APPLYING THE PUBLIC TRUST DOCTRINE TO LOCAL GOVERNMENTS

by
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Under the public trust doctrine, the government holds public lands in trust for the public and cannot unreasonably restrict citizens from accessing them or otherwise breach its duties as a trustee. The public trust doctrine is often thought of as a state law doctrine. However, local governments own a significant portion of public land. Some local governments argue that the public trust doctrine does not apply to them because the state is the proper trustee under the public trust doctrine. This Comment argues that the public trust doctrine applies to local governments. State law preempts local government law on matters of statewide concern, and because the public trust doctrine is a matter of statewide concern, the public trust doctrine preempts local government action that contravenes the public trust doctrine. Similarly, as agents of the state, local governments may not take action that the public trust doctrine prohibits the state from taking. This Comment starts by discussing those principles of local government law, and then examines Kramer v. City of Lake Oswego, *a recent case in Oregon that demonstrates how one state supreme court overturned the appellate court decision that declined to apply the public trust doctrine to local governments. This Comment also surveys six jurisdictions that expressly apply the public trust doctrine to local governments. Litigants can use the courts' reasoning in these cases to expand the application of the public trust doctrine to local governments in other jurisdictions that have not yet decided the issue.*

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INTRODUCTION

Throughout history, civilizations worldwide have recognized the right of the public to fish and enjoy the sea, regardless of who owned the adjacent land.[1] Although colonial Britain favored private ownership in most contexts, it considered navigable waterways public.[2] The United States Supreme Court adopted this concept in *Martin v. Lessee of Waddell*, when it decided that the government held navigable waters, and the submerged land underneath, in trust for the public.[3]

The government's trust title to submerged land under navigable waters, for the benefit of the public to navigate, swim, and fish without obstruction from private parties, is known as the public trust doctrine.[4] Although the early applications of the public trust doctrine involved navigable waters, in some states the courts have interpreted the public trust doctrine to extend to other resources.[5] For example, in 1896, the Supreme Court upheld a Connecticut statute regulating wild game, thus applying the public trust doctrine to wildlife by deciding that states may regulate

[1] *See* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV'T L. 425, 428–30 (1989).

[2] *Id.* at 430; *see also* Matthew Hale, *De Jure Maris et Brachiorum Ejusdem*, *in* 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND FROM MANUSCRIPTS (Francis Hargrave ed., 1787).

[3] Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 414–18 (1842).

[4] *See, e.g.*, State Dep't of Nat. Res. v. Alaska Riverways, Inc., 232 P.3d 1203, 1211 (Alaska 2010).

[5] *See generally* Michael C. Blumm et al., The Public Trust Doctrine in Forty-Five States (March 18, 2014), https://ssrn.com/abstract=2235329.

the hunting and transportation of wild animals for the benefit of the public.[6] Litigants have used the public trust doctrine with varying degrees of success in attempts to preserve other natural resources, including parks, archeological sites, and recreational areas.[7] In the United States, the source of the public trust doctrine varies by state and can come from state constitutions, state statutes, or the common law.[8]

Many courts have characterized the public trust doctrine as a state law doctrine.[9] That recognition does not mean that local governments lack trust responsibilities, however. Local governments have significant land use regulatory authority.[10] For example, waste disposal is a local government function.[11] In some states, local governments can regulate air pollution using zoning ordinances.[12] Many cities have climate initiatives and sustainable development goals.[13] But local governments may be overly influenced by property owners and avoid regulating the local environment in ways that could negatively affect property values. Homeowners are more active in local politics than non-homeowners through participation in local city council meetings and donation to local politicians' campaigns.[14] The public trust doctrine would be a mechanism by which citizens could counteract pressure from local property owners and hold local governments accountable for maintaining local lands for public use.

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[6] Geer v. Connecticut, 161 U.S. 519, 529 (1896); *see also* Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal.Rptr.3d 588, 595–600 (2008) (holding that under the public trust doctrine, public agencies in California must consider the protection of wildlife when taking actions).

[7] William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 401–02 (1997).

[8] *See* BLUMM ET AL., *supra* note 5.

[9] *See, e.g.*, Appleby v. City of New York, 271 U.S. 364, 395 (1926) (referring to the conclusion of *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892) as "necessarily a statement of Illinois law"); Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974, at *7 (R.I. Super. Ct. July 5, 2005) (claiming "Public Trust Doctrine . . . is to be applied based upon *state* law"); *In re* Water Use Permit Applications, 93 P.3d 643, 650 (Haw. 2004) ("[T]he public trust is a state constitutional doctrine . . . .").

[10] OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 395 (5th ed. 2019).

[11] United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 344 (2007) (quoting United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245, 264 (2d Cir. 2001) (Calabresi, J., concurring)) (upholding county corporation ordinance requiring all waste to be sent to county corporation processing facilities).

[12] Vill. of Carpentersville v. Pollution Control Bd., 553 N.E.2d 362 (Ill. 1990) (holding that state law did not preempt local ordinance regulating air pollution through building height restrictions).

[13] Thomas M. Gremillion, *Setting the Foundation: Climate Change Adaptation at the Local Level*, 41 ENV'T L. 1221, 1244 (2011).

[14] Jesse Yoder, *Does Property Ownership Lead to Participation in Local Politics? Evidence from Property Records and Meeting Minutes*, 114 AM. POL. SCI. REV. 1213, 1215 (2020).

There is significant caselaw supporting the premise that the public trust doctrine applies to local governments. For example, the recent case of *Kramer v. City of Lake Oswego* involved a city's public access restriction to Oswego Lake in Lake Oswego, Oregon.[15] The Oregon Court of Appeals upheld the city's access restriction, which only allowed lake-front property owners to access the lake.[16] The Oregon Supreme Court reversed that decision in part, holding that the city could not unreasonably restrict the public from accessing the lake from city-owned public land under Oregon's public trust doctrine.[17] The Oregon Supreme Court stated that the city could restrict access to waters of the state if the restrictions were "objectively reasonable in light of the purpose of the trust and the circumstances of the case."[18] The Court remanded the case to determine whether the access restrictions were objectively reasonable.[19] The litigation is ongoing.[20]

The *Kramer* decision demonstrates how local governments and some courts might argue that local governments do not share the public trust responsibility of the state.[21] The result of the *Kramer* decision, however, appears universally applicable: a local government cannot take actions that the state government could not lawfully take.[22] The decision also highlights the concept adopted by some jurisdictions that restrictions on public trust resources are permissible only if objectively reasonable.[23]

Many other jurisdictions have applied the public trust doctrine to local governments for various reasons. This Comment focuses on six states that have applied the public trust doctrine to local governments: New Jersey, Wisconsin, California, Rhode Island, New York, and Pennsylvania. This is not the first paper to consider the application of the public trust doctrine to local governments. For example, one

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[15] Kramer v. City of Lake Oswego, 446 P.3d 1 (Or. 2019).

[16] Kramer v. City of Lake Oswego, 395 P.3d 592, 612 (Or. Ct. App. 2017).

[17] *Kramer*, 446 P.3d at 18–19.

[18] *Id.* at 19.

[19] *Id.* at 19, 26.

[20] *See* Kramer v. City of Lake Oswego, No. CV12100913 (Clackamas Cnty. Cir. Ct. remanded Feb. 28, 2020); Savannah Eadens, *Oregon Judge Affirms Oswego Lake Public-Access Ruling, Moves for Trial Phase 2 to Begin*, OREGONIAN (Feb. 21, 2023, 3:04 PM), https://www.oregonlive.com/pacific-northwest-news/2023/02/oregon-judge-affirms-oswego-lake-public-access-ruling-moves-for-trial-phase-2-to-begin.html.

[21] *See, e.g.*, *Kramer*, 395 P.3d at 608.

[22] *Kramer*, 446 P.3d at 18–19.

[23] *Id.* at 19; *see also* Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 56 (N.J. 1972) (holding that municipalities can charge reasonable fees for access to its beaches); Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty., 658 P.2d 709, 728 (Cal. 1983) (holding a city agency can use water from a navigable lake if, on balance, the benefit to citizens outweighs the environmental impact on the lake).

commentator has argued that local governments play a necessary role in implementing the public trust doctrine because of their roles as landowners, regulators, and enforcers.[24] Conversely, another commentator reasoned that the public trust doctrine should not apply to local governments because it would promote abuse of local government authority as local governments would have the ability to decide what actions are consistent with the public trust doctrine.[25] This Comment argues that the public trust doctrine applies to all local governments in all states.

This Comment explains the *Kramer* court's decision to include local governments as trustees under the public trust doctrine and surveys other cases that apply the public trust doctrine to local governments to show why the public trust doctrine universally applies to local governments. Part I provides background on sources of local government authority, when local government law is preempted by state law, and why local governments are "creatures" of the state. Part II explores *Kramer v. City of Lake Oswego*, which includes many of the arguments for and against the application of the public trust doctrine to local governments. Part III explains how six jurisdictions have applied the public trust doctrine to local governments. Although most courts to consider the question applied the public trust doctrine to local governments, only a handful of states have done so.[26] The Comment concludes by arguing in support of the universal application of the public trust doctrine to local governments for two reasons. First, state law preempts local government action involving statewide public trust resources, which in effect applies the public trust doctrine to local governments because they cannot take actions that violate the public trust doctrine. Similarly, as political subdivisions, or "creatures" of the state, local governments must manage their trust resources under the same standards as the state. This means that local governments must, in effect, act as trustees of local trust resources.

I. BACKGROUND PRINCIPLES OF LOCAL GOVERNMENT LAW

The public trust doctrine applies to local governments under two main principles of local government law: state preemption and the "creature" theory of local

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[24] Sean Lyness, *The Local Public Trust Doctrine*, 34 GEO. ENV'T L. REV. 1, 4 (2021).

[25] Susan H. Bingham, Note, *The Public Trust Doctrine: A Tool for Abuse in the Hands of Local Governments?*, 20 STETSON L. REV. 929, 965 (1991). Nearly all the cases discussed *infra* Part III that apply the public trust doctrine to local governments in fact *limit* local government authority by prohibiting local government action that would violate the public trust doctrine.

[26] Of the cases examined in this Comment, the only court to decide that the public trust doctrine did not apply to a local government action was the Oregon Court of Appeals in *Kramer*, 395 P.3d at 608. The Oregon Supreme Court subsequently reversed that portion of the decision. *Kramer*, 446 P.3d at 26.

government. Local governments, which include counties and municipalities,[27] are constrained by state law, regardless of the source or scope of their authority. The following Sections explain the source of local government authority, how local government action is preempted by state law, and relevant principles of local land use law.

A. Sources of Local Government Authority

States differ as to how they grant authority to local governments. Local governments can receive authority from the state, either through state constitutions, statutes, or a combination of both.[28] Some states grant local governments specific authorities through statutes, such as the authority to establish fire stations or name city streets.[29] Other states grant municipalities more general authority, such as the authority to create laws "necessary and proper for the health, safety, and welfare of their inhabitants."[30] Nearly every state gives local governments "home rule" authority that allows them to govern freely within their jurisdictions.[31] Like other forms of authority, states can grant home rule authority through statutes, the constitution, or a combination of both.[32] Home rule authority gives local governments the ability to decide on the form of government they want and the scope of powers they hold.[33]

Local governments are often referred to as "creatures of the state" because their authority exists only to the extent that the state legislature grants it to them.[34] The United States Constitution does not mention local governments or contemplate the amount of authority that local governments would hold.[35] American law has no explicit concept of local government sovereignty, like it does for state sovereignty.[36]

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[27] Municipalities are also referred to as "townships, villages, boroughs, cities, or towns." *State and Local Government*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government (last visited Apr. 19, 2024).

[28] National League of Cities, *Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1329, 1330 (2022).

[29] DAVID J. MCCARTHY, JR. & LAURIE REYNOLDS, LOCAL GOVERNMENT LAW IN A NUTSHELL 20 (5th ed. 2003).

[30] *Id.* at 21–22.

[31] National League of Cities, *supra* note 28, at 1330.

[32] *Id.*

[33] REYNOLDS, *supra* note 10, at 101.

[34] Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO STATE L.J. 423, 427 (2016).

[35] Jesse J. Richardson, Jr., *Dillon's Rule Is from Mars, Home Rule Is from Venus: Local Government Autonomy and the Rules of Statutory Construction*, 41 PUBLIUS 662, 662 (2011).

[36] Erin Adele Scharff, *Hyper Preemption: A Reordering of the State–Local Relationship?*, 106 GEO. L.J. 1469, 1475 (2018).

The Supreme Court has held that local governments are "the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers."[37] Local governments cannot take actions that are unconstitutional for state governments to take.[38] Therefore, if the purpose of local government is to exercise a part of the state's powers, arguably local governments must act as the trustees of local public lands, just as states act as the trustees of state-owned public lands.

B. State Preemption of Local Government Law

State law can preempt local law in two ways. First, the state may occupy "a particular field of activity," in which case it supersedes local government law through field preemption.[39] Whether the municipality is home-rule or non-home-rule, the municipality cannot enact legislation in that field.[40] Sometimes state legislation expressly occupies a field. For example, the Georgia Court of Appeals found that state legislation "for a uniform state-wide livestock law embracing all public roads in the state and all other property," expressly occupied the regulatory field of livestock on public roadways.[41] More often courts find evidence of implied field preemption.[42] When determining if state law preempts local government law impliedly, courts consider the comprehensiveness of the state law and the importance of uniform treatment on the matter throughout the state.[43] State law occupies the field of public trust resource management because of the importance for uniform treatment of public trust resources throughout the state.[44] Fundamental rights to access and enjoy public trust resources do not vary from municipality to municipality.[45]

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[37] Atkin v. Kansas, 191 U.S. 207, 220 (1903).

[38] United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 215 (1984) (holding that the Privileges and Immunities Clause of the United States Constitution applies to local governments).

[39] REYNOLDS, *supra* note 10, at 124.

[40] *Id.* New York allows local governments to act in that field if they receive explicit state legislative authority to do so. *See, e.g.*, DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 189–90 (N.Y. 2001).

[41] Faulkner v. Crumbley, 851 S.E.2d 164, 169 (Ga. Ct. App. 2020) (quoting GA. CODE ANN. § 4-3-1 (2020)).

[42] REYNOLDS, *supra* note 10, at 124; *see also* East Star, LLC v. Cnty. Comm'rs of Queen Anne's Cnty., 38 A.3d 524, 533 (Md. Ct. Spec. App. 2012) (finding implied preemption of local surface mining regulations); Aakjer v. City of Myrtle Beach, 694 S.E.2d 213, 215–16 (S.C. 2010) (finding implied preemption of local motorcycle helmet regulations).

[43] REYNOLDS, *supra* note 10, at 124–25.

[44] William C. Mumby, Note, *Trust in Local Government: How States' Legal Obligations to Protect Water Resources Can Support Local Efforts to Restrict Fracking*, 44 ECOLOGY L.Q. 195, 209 (2017).

[45] *See id.*

Second, even when state law does not field-preempt local government law, state law can preempt local government law when it conflicts with state law on matters of statewide concern.[46] A conflict exists "where a local ordinance prohibits an act that a state statute permits, or permits an act that a state statute prohibits."[47] For example, if a state statute said that all lakes belonged to the public, a local government ordinance purporting to grant title to a lake to a private party would conflict with state law. It is not always clear when local government law conflicts with state law. Where local action less obviously conflicts with state law, courts can weigh several factors to determine if it involves a matter of statewide concern. Those factors include: the extent to which uniform regulation throughout the state is necessary or desirable; the historical roles of state and local governments; the effect of the matter on those outside the municipality; and the importance of cooperation between the locality and the state on the matter.[48] Courts commonly decide that matters of public safety and public health are matters of statewide concern, whereas decisions on finances and local government structure are matters of local concern.[49]

The public trust doctrine is a matter of statewide concern because the failure to maintain public trust resources can affect resources throughout the state. Destruction of resources in one ecosystem can lead to a domino effect of destruction elsewhere.[50] If one jurisdiction converts a park to an industrial site, for example, it will likely have effects on other parts of the state. Additionally, access restrictions on local public trust resources often adversely affect citizens from other jurisdictions because local governments are incentivized to monopolize their trust resources.[51] "[L]ocal

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[46] REYNOLDS, *supra* note 10, at 106. Some states allow local government law to preempt conflicting state law if the local law governs matters of purely local concern. *See, e.g.*, COLO. CONST. art. XX, § 6 ("[O]rdinances made pursuant thereto in such [purely local] matters shall supersede . . . any law of the state in conflict therewith."); Madison Tchrs., Inc. v. Walker, 851 N.W.2d 337, 369 (Wis. 2014) ("[I]f the legislative enactment concerns a matter of purely local affairs, home rule municipalities may regulate those local matters and, under the home rule amendment, state legislation that would preempt or make that municipal regulation unlawful, unless uniformly applied statewide, is prohibited.").

[47] REYNOLDS, *supra* note 10, at 120.

[48] *Id.* at 119.

[49] Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 URB. LAW. 179, 189–90 (2020). *But see* State *ex rel.* Town of Westerly v. Bradley, 877 A.2d 601, 607 (R.I. 2005) ("Cities and towns with home rule charters . . . are vested with the authority to legislate matters of public health and safety . . . .").

[50] *Impact of Ecosystem Destruction*, WORLD COUNTS, https://www.theworldcounts.com/stories/impact-of-ecosystem-destruction (last visited Apr. 19, 2024).

[51] *See, e.g.*, Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 48–49 (N.J. 1972) (describing one municipality challenging another municipality's ordinance that charged non-residents a higher fee to access public beaches).

governments have traditionally exercised the lion's share of land-use authority . . . ."[52] However, since uniformity is desirable when it comes to the management of public trust resources, and because of the potentially large effect on citizens from outside of the municipality, state law preempts local government actions that violate the public trust doctrine.

Preemption does not make the local government a trustee. It does, however, prevent local governments from taking actions that violate the public trust doctrine. This in effect applies the public trust doctrine to local governments because it holds local governments to the same standard as the state.

C. Limitations on the Use of Local Government Property

There are some specific restrictions on local governments' land use. Local governments cannot allow permanent private uses of public property that would contravene public rights to access, enjoy, or use the land.[53] Some courts narrowly construe the language in land grants to local governments.[54] Other courts decide that property deeds can create public trust responsibilities.[55] These restrictions on local governments' use of public land are compatible with the application of the public trust doctrine to local governments because the public trust doctrine ensures that public land largely remains under public control, and by implication, that public lands are not used to benefit private individuals.

D. Summary of Local Government Law Principles

The public trust doctrine applies to local governments under principles of local government law. Local governments are creatures of the state, and therefore cannot take action that the state cannot legally take. Further, the purpose of local government is to exercise the state's power at a local level. This includes acting as the trustee

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[52] Stahl, *supra* note 49, at 196.

[53] McCarthy & Reynolds, *supra* note 29, at 323 ("Such private uses are frequently termed 'purprestures,' a form of common law nuisance constituting an encroachment upon lands or rights and easements incident thereto, belonging to the public or to which the public has a right of access or enjoyment.").

[54] *See, e.g.*, Bernstein v. City of Pittsburgh, 77 A.2d 452, 455 (Pa. 1951) ("[W]here land is conveyed by the owner to a municipality . . . as distinguished from a situation in which the municipality itself purchases or condemns land . . . the terms of the grant must be narrowly construed and the uses to which the land may be put correspondingly restricted.").

[55] *See, e.g.*, Save the Welwood Murray Mem'l Libr. Comm. v. City Council of Palm Springs, 215 Cal. App. 3d 1003, 1017 (1989) (holding that deed language requiring a municipality to maintain land as a public library created public trust responsibilities); Hoffman v. City of Pittsburgh, 75 A.2d 649, 650, 654–55 (Pa. 1950) (holding that contemporaneous deeds that referred to a municipal property as a "public square" showed that the town dedicated the square to the public).

of local public trust resources. Additionally, the public trust doctrine is a matter of statewide concern that preempts local government action that violates the public trust. If local governments must manage public trust resources following the same standards that the state must follow when managing its public trust resources, the local government is, in effect, the trustee of local public trust resources.

Kramer v. City of Lake Oswego, described in Part II, and the cases outlined in Part III of this Comment demonstrate various reasons that courts have applied the public trust doctrine to local governments. Litigants can use these cases to understand the status of the local public trust doctrine in six jurisdictions and can use the courts' reasoning to support the application of the public trust doctrine to local governments in jurisdictions that have not yet addressed the question.

II. *KRAMER V. CITY OF LAKE OSWEGO*

Kramer v. City of Lake Oswego is representative of many aspects of the public trust doctrine as it applies to local government. The case demonstrates one of many ways that local governments could violate the public trust and includes many arguments that those who oppose the application of the public trust doctrine to local governments might make. The Oregon Supreme Court, however, rejected the city's arguments and applied the public trust doctrine to the city of Lake Oswego.[56]

A. *Factual Background*

The dispute in *Kramer v. City of Lake Oswego* centers around the city of Lake Oswego's access restriction to Oswego Lake.[57] Lake Oswego is a wealthy suburb of Portland, Oregon.[58] White settlement around Oswego Lake began in 1850, when "two early settlers staked . . . Donation Land Claim[s] to land abutting what was then called Sucker Lake."[59] In the early 1900s, Oregon Iron & Steel granted the city of Lake Oswego two parcels of land on the lake "with a covenant [stating] that the land was for use 'by the resident children of Lake Oswego' for [recreational] purposes."[60] Since then, the city acquired land for three waterfront parks.[61] Although the parks are open to the public, in 2012 the city passed a resolution that prohibited

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[56] Kramer v. City of Lake Oswego, 446 P.3d 1, 19 (Or. 2019).

[57] *Id.* at 5.

[58] The median household income in Lake Oswego is $127,252. *QuickFacts: Lake Oswego City, Oregon*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/lakeoswegocityoregon/INC110221 (last visited Apr. 19, 2024). This is over 160% of Oregon's median income of $76,632. *QuickFacts: Oregon*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/OR/INC110221 (last visited Apr. 19, 2024).

[59] *Kramer*, 446 P.3d at 6.

[60] *Id.*

[61] *Id.*

the public from entering Oswego Lake from any of the three parks.[62] Under the city ordinance, only owners of waterfront property could access the lake. In 2012, two people, Mark Kramer, a kayaker, and Todd Prager, a swimmer, challenged the city's ordinance.[63] The following Sections detail the parties' arguments and the decisions of the Oregon Court of Appeals and Oregon Supreme Court.

B. The Parties' Arguments

The plaintiffs, Kramer and Prager, argued that the public trust doctrine required the city to grant public access to the lake from adjacent public land, subject only to reasonable use restrictions.[64] Kramer and Prager stated that Oregon courts have found state law to preempt local law that addressed "social, economic, or other regulatory objectives of the state."[65] Additionally, they argued that, as subdivisions of the state, local governments cannot take actions that conflict with the public trust doctrine.[66] These two arguments, state-law preemption and the creature theory of local government, are the most common reasons rooted in local government law that courts give to explain why the public trust doctrine applies to local governments.[67]

Kramer and Prager also argued that although the city could place reasonable restrictions on the use of the lake, it "must consider the Public Trust Doctrine when taking actions that could impact the public's rights."[68] They asserted that there was no indication that the city considered the public trust doctrine in its lake access prohibition, and an outright ban on public use of the lake was not a reasonable restriction.[69] Therefore, Kramer and Prager contended that the city violated the public trust doctrine through its lake access prohibition, and the court must declare the ordinance void and enjoin its enforcement.[70]

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[62] Kramer v. City of Lake Oswego, 395 P.3d 592, 595 (Or. Ct. App. 2017) (citing Lake Oswego, Or., Resolution 12-12 (Apr. 3, 2012)).

[63] Conrad Wilson, *Judge Removed from Oswego Lake Access Case*, OR. PUB. BROAD. (July 21, 2022, 6:18 AM), https://www.opb.org/article/2022/07/21/judge-removed-oswego-lake-case.

[64] *Kramer*, 395 P.3d at 602; Appellants' Reply Brief at 6, Kramer v. City of Lake Oswego, 395 P.3d 592 (Or. Ct. App. 2017) (No. A156284).

[65] *See* Appellants' Opening Brief and Excerpt of Rec. at 23, Kramer v. City of Lake Oswego, 395 P.3d 592 (Or. Ct. App. 2017) (No. A156284) [hereinafter Appellants' Opening Brief].

[66] *Id.* at 23–24.

[67] Many of the cases in Part III cite to one or both of these principles when applying the public trust doctrine to local governments, although most of the courts applied the public trust doctrine to local governments without citing to principles of local government law.

[68] Appellants' Opening Brief, *supra* note 65, at 26–27.

[69] *Id.*

[70] *Id.* at 27.

The city argued that the state's public trust duties derive from "the state's sovereign interest in the submerged . . . land underlying [navigable] waterway[s]," and thus the trust duties are restricted to the water-related public rights of commerce, navigation, and fishing.[71] Further, the city argued that the public trust doctrine does not give the state an affirmative duty to ensure that the public has access to those waterways.[72] Finally, the city argued that "even if the state ha[d] some obligation under the public-trust doctrine to ensure" access to waterways, "that obligation would not extend to the city" because the city did not act as a subdivision of the state in the management of local parks.[73]

C. *The Oregon Courts' Decisions*

The Oregon Court of Appeals held that the public trust doctrine did not require the state to ensure upland access to Oswego Lake, regardless of whether the land was publicly or privately owned, and that the city did not share the state's trust duties.[74] The court stated that, even if a right to pass over public lands bordering a navigable waterway existed, it would only apply to state-owned public land because the state is the trustee under the public trust doctrine.[75] The court decided that the city is not an instrumentality of the state for public trust doctrine purposes.[76] To that end, the court refuted the plaintiffs' interpretation of cases from other jurisdictions that extended public trust doctrine duties to municipalities, and stated that they were of limited relevance because the public trust doctrine varies from state to state.[77] Therefore, the Oregon Court of Appeals decided that the public trust doctrine did not apply to local governments.[78]

The Oregon Supreme Court reversed the part of the lower court decision that held the public trust doctrine did not apply to the city.[79] The Oregon Supreme Court did not decide the extent to which the city shared the state's public trust duties but determined that the city could not take action that the state was precluded from taking under the public trust doctrine because local governments are "agencies" of the state.[80] The Court held that because the public trust doctrine precluded

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[71] Respondents' Answering Brief at 17, Kramer v. City of Lake Oswego, 395 P.3d 592 (Or. Ct. App. 2017) (No. A156284).

[72] Kramer v. City of Lake Oswego, 395 P.3d 592, 604 (Or. Ct. App. 2017).

[73] *Id.* at 603.

[74] *Id.* at 607–08.

[75] *Id.* at 608.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] Kramer v. City of Lake Oswego, 446 P.3d 1, 26 (Or. 2019).

[80] *Id.* at 18.

the state from unreasonably interfering with public access to Oswego Lake, the public trust doctrine also precluded the city from unreasonably preventing public access to Oswego Lake from its waterfront parks.[81] The Court stated that, although the public right to use navigable waterways included a right to access those waterways, trustees *can* make reasonable restrictions on access to public waterways from public lands.[82] The Court remanded the case to determine whether the access restrictions were reasonable.[83] Importantly, the Oregon Supreme Court's decision in *Kramer* signifies that the public trust doctrine applies to local governments in Oregon.

III. APPLYING THE PUBLIC TRUST DOCTRINE TO LOCAL GOVERNMENTS IN SIX JURISDICTIONS

This Part focuses on twelve cases from six jurisdictions that all applied the public trust doctrine to local governments. Although the public trust doctrine varies from state to state, litigants can use the reasoning in these cases to argue in support of applying the public trust doctrine to local governments in other states.

A. *New Jersey*

In New Jersey, the public trust doctrine applies to local-government-owned beaches.[84] In New Jersey, because local governments are creatures of the state, they must abide by the public trust doctrine and grant public access to their beaches, regardless of whether the local governments ever dedicated the beaches to the public.[85]

In 1972, the New Jersey Supreme Court applied the public trust doctrine to a municipal ordinance that charged nonresidents higher fees than residents to use its public beach area in *Borough of Neptune City v. Borough of Avon-By-The-Sea*.[86] The borough of Avon-By-The-Sea owned the beach above the high water mark, which it dedicated to the public for recreation, and New Jersey owned the tideland.[87] The superior court upheld the ordinance, without mentioning the public trust doctrine, because it determined that the higher fees that Avon-By-The-Sea charged nonresidents were reasonable.[88] The New Jersey Supreme Court reversed the lower court decision and held that where municipalities, as creatures of the state, dedicate an

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[81] *Id.* at 18–19.

[82] *Id.* at 17–19.

[83] *Id.* at 26.

[84] *See* Van Ness v. Borough of Deal, 393 A.2d 571, 574 (N.J. 1978).

[85] Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972).

[86] *Id.* at 48–49.

[87] *Id.* at 49.

[88] Borough of Neptune City v. Borough of Avon-By-The-Sea, 274 A.2d 860, 865 (N.J. Super. Ct. Law Div. 1971).

upland sand area to public beach purposes, the public trust doctrine requires that the beach and the ocean remain open to all on equal terms.[89] The Court announced that even if the state had granted the tideland to the Avon-By-The-Sea, it could not exclude nonresidents because New Jersey law requires tidelands to remain in use for the public.[90] Therefore, local governments in New Jersey, as creatures of the state, must comply with the public trust doctrine and cannot unreasonably discriminate in granting access to public trust lands.[91]

The New Jersey Supreme Court reaffirmed that the public trust doctrine applied to local governments six years later in *Van Ness v. Borough of Deal* when it struck down a municipal restriction limiting membership to a beach and casino to local residents.[92] Aside from a 50-foot wide stretch of beach along the high water line that the public could use, the Borough of Deal restricted access to its casino and the beach in front of the casino to Deal residents.[93] The Superior Court of New Jersey, Appellate Division held that the beach area was not subject to the Court's holding in *Borough of Neptune City* because Deal never dedicated the beach to the general public and the public could still access the beach area along the high water line and on either side of the casino.[94] The New Jersey Supreme Court reversed the Appellate Division and held that because Deal opened the beach for recreational use, the public had the right to use it under the public trust doctrine, regardless of whether Deal previously dedicated the beach to the general public.[95] The court specified that the public trust doctrine applied to municipally-owned beaches.[96] This went further than the New Jersey Supreme Court's decision in *Borough of Neptune City* by applying the public trust doctrine to all municipally-owned beaches, regardless of whether the local government previously dedicated the land to the public.

Under New Jersey law, the public trust doctrine applies to local governments under the creature theory of local government. This is true regardless of whether local governments formally dedicated the land to the general public.

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[89] *Neptune City*, 294 A.2d at 54.

[90] *Id.* at 49 (citing N.J. STAT. ANN. § 12:3-34 (West 2022)).

[91] *Id.* at 54.

[92] Van Ness v. Borough of Deal, 393 A.2d 571, 574 (N.J. 1978). The same day, the New Jersey Supreme Court held, without reaching the public trust doctrine issue, that a municipality abused its power by barring the public from toilet facilities on a municipally-owned beach. Hyland v. Borough of Allenhurst, 393 A.2d 579, 582 (N.J. 1978).

[93] *Van Ness*, 393 A.2d at 572.

[94] Van Ness v. Borough of Deal, 367 A.2d 1191, 1192–93, 1197 (N.J. Super. Ct. App. Div. 1976).

[95] *Van Ness*, 393 A.2d at 573–74.

[96] *Id.* at 573.

B. Wisconsin

In Wisconsin, the Wisconsin Supreme Court initially determined that state law preempted local government law on public trust doctrine matters, which meant, in effect, that the public trust doctrine applied to local governments.[97] More recently, the Wisconsin Court of Appeals decided that the state could delegate management of public trust doctrine matters to local governments, so long as the local government regulated the matter in furtherance of the public trust.[98] Therefore, local governments must abide by the public trust doctrine in Wisconsin.

First, in *City of Madison v. Tolzmann*, the Wisconsin Supreme Court decided that the city of Madison could not restrict public use of navigable waters because it did not have authority to legislate matters of statewide concern.[99] In *Tolzmann*, a boat owner challenged a boat license fee charged by Madison for the use of boats in water bodies within the city.[100] The Wisconsin Supreme Court reversed the lower court decision and held that, although Wisconsin municipalities have home-rule authority to govern local affairs, the use of navigable waters is a matter of statewide concern, and therefore Madison lacked authority to enact the licensing fee law.[101] Therefore, although the Wisconsin Supreme Court did not directly apply the public trust doctrine to Madison's actions, it stated that the city could not take actions involving navigable waterways, which are subject to the public trust doctrine. This meant that, in practice, local governments must comply with the public trust doctrine.

The Wisconsin Court of Appeals later applied the public trust doctrine directly to a local government in *State v. Village of Lake Delton*.[102] In *Lake Delton*, the village of Lake Delton passed an ordinance that created a requirement for a license to use part of a lake, which could only be used for waterskiing shows.[103] The state challenged the ordinance, alleging that the regulation went beyond the authority of the municipality and violated the public trust doctrine because it destroyed the public's right to use that part of the lake.[104] The Wisconsin Court of Appeals affirmed the decision of the circuit court that decided that the ordinance was within Lake Delton's authority.[105] The court stated that the legislature may delegate authority to local governments to regulate matters involving public trust resources so long as "the

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[97] *See* City of Madison v. Tolzmann, 97 N.W.2d 513, 517 (Wis. 1959).

[98] State v. Vill. of Lake Delton, 286 N.W.2d 622, 629 (Wis. Ct. App. 1979).

[99] *Tolzmann*, 97 N.W.2d at 517.

[100] *Id.* at 515.

[101] *Id.* at 517.

[102] *Lake Delton*, 286 N.W.2d at 629.

[103] *Id.* at 624–25.

[104] *Id.* at 625.

[105] *Id.* at 642.

delegation is in furtherance of the trust and will not block the advancement of paramount interests."[106] Unlike in *Tolzmann*, where the public trust doctrine preempted local government law, here Lake Delton had to act as the trustee of the lake when regulating matters involving trust resources. However, the court stated that the ordinance restricting access to the lake benefitted the local economy by promoting tourism and did not destroy public rights but merely shifted the areas of the lake that the public could use at certain limited times.[107] Therefore, the ordinance did not violate the public trust doctrine.[108]

After *Lake Delton*, local governments in Wisconsin must comply with the public trust doctrine when regulating matters involving trust resources. However, local governments can impose restrictions on the public trust, so long as those restrictions do not destroy public rights.

C. California

In California, local governments must abide by the public trust doctrine when they are granted land for public purposes.[109] The following two California Court of Appeal cases illustrate California's local public trust doctrine.

First, the California Court of Appeal held that property deed language created a public trust that constrained the action of the city of Palm Springs in *Save the Welwood Murray Memorial Library Committee v. City Council of Palm Springs*.[110] Palm Springs contracted with a developer to use part of a city-owned public library to improve access to a commercial area and to provide patio seating for a restaurant.[111] The city owned the library pursuant to a grant that it must "forever maintain the Palm Springs Free Public Library."[112] The court affirmed the superior court's holding that the land grant deed limited the use of the land to public library purposes and created a public trust.[113] This public trust prohibited Palm Springs from converting the land to a non-library use, especially to enhance private commercial property.[114]

Nearly 20 years later, the California Court of Appeal reaffirmed that deed language can create a public trust that applies to local government action in *County of*

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[106] *Id.* at 638 (quoting Wisconsin's Env't Decade v. Dep't of Nat. Res., 271 N.W.2d 69, 76 (Wis. 1978)).

[107] *Id.* at 630.

[108] *Id.* at 636.

[109] *See* Save the Welwood Murray Mem'l Libr. Comm. v. City Council of Palm Springs, 215 Cal. App. 3d 1003, 1017 (1989).

[110] *Id.*

[111] *Id.* at 1007.

[112] *Id.* at 1006.

[113] *Id.* at 1012–17.

[114] *Id.* at 1015–17.

Solano v. Handlery.[115] In *Handlery*, Solano County sought a determination that land it received in a grant dedication in 1946 no longer restricted the county's use of the property.[116] The grantors conveyed the land to Solano County under the condition that the county use the land for "a County Fair or exposition and purposes incident thereto, which may include but not necessarily be limited to a public park, playground and/or recreational area."[117] The trial court granted summary judgment in the county's favor.[118] The California Court of Appeal reversed and decided that when grantors convey property for public use, local governments hold the land in a public trust, and cannot use the property in an inconsistent manner.[119]

Under California law, the public trust doctrine applies to local governments when grantors convey the land to local governments for public purposes. Further, the dicta in *Handlery* suggests that the public trust doctrine is narrower than any use that would benefit the public.[120] Instead, the *Handlery* court stated that local governments must use the land for the purpose specified in the deed.

D. Rhode Island

The Rhode Island Supreme Court initially determined that state law preempted local government action involving the public trust, which in effect meant that local governments must abide by the public trust doctrine.[121] More recently the Rhode Island Supreme Court directly applied the public trust doctrine to local governments when they regulate matters of local public health and safety.[122]

The Rhode Island Supreme Court held that the public trust doctrine preempted the town of New Shoreham's cease-and-desist order that prohibited two commercial ships from docking at a town pond in violation of a local zoning ordinance in *Champlin's Realty Associates, L.P. v. Tillson*.[123] The Supreme Court affirmed the superior court decision that declared that state law preempted New Shoreham from prohibiting the ships to dock at Great Salt Pond because the state Coastal Resources Management Council (CRMC) had exclusive jurisdiction over commercial ferry operations.[124] The Court held that, although the 1887 Rhode Island legislature granted title to the pond to the town, nothing in the act indicated that the legislature intended to delegate its public trust responsibilities over the

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[115] Cnty. of Solano v. Handlery, 155 Cal. App. 4th 566, 580 (2007).

[116] *Id.* at 569.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 576.

[120] *See id.* at 575–76, 580.

[121] Champlin's Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1169–70 (R.I. 2003).

[122] State *ex rel.* Town of Westerly v. Bradley, 877 A.2d 601, 606–07 (R.I. 2005).

[123] *Tillson*, 823 A.2d at 1167.

[124] *Id.* at 1164.

pond.[125] The Court stated that while it was apparent that the state granted its *jus privatum* ownership interest, it retained its responsibility over the public trust, the *jus publicum*, which included the right to regulate and control development and operations on the pond.[126] Therefore, the Rhode Island Supreme Court determined that the public trust doctrine preempted New Shoreham's actions.[127] Although this did not directly create a trustee role for the town, in effect it meant that the town must comply with the public trust doctrine.

The Rhode Island Supreme Court applied the public trust doctrine to the town of Westerly in *State ex rel. Town of Westerly v. Bradley* when Westerly regulated a matter of local public safety.[128] Westerly had an ordinance that prohibited swimming in the Weekapaug Breachway.[129] A local resident who violated the ordinance argued that the ordinance did not comply with the public trust doctrine.[130] The Rhode Island Supreme Court affirmed the superior court and held that the ordinance did not violate the public trust doctrine because it did not infringe upon the right to access the shore or fish in the sea.[131] The Court said that "towns with home rule charters, such as Westerly, are vested with the authority to [regulate] matters of [local] public health and safety," so long as the regulations are consistent with the state constitution, statutes, and the CRMC's regulatory prerogatives.[132] This added to the Rhode Island Supreme Court's decision in *Champlin's Realty Associates* by specifying that the public trust doctrine applied to local governments when they acted within the scope of their authority. Here, Westerly determined it was dangerous to swim in the Weekapaug Breachway, and because the ordinance regulated a matter of local safety and the public still had access to the shore and could swim in other areas of the sea, the ordinance did not violate the public trust doctrine.[133]

In Rhode Island, state law generally preempts local government law involving public trust resources. When local governments are acting within their scope of legislative authority, however, the public trust doctrine requires that they act as trustees of the public resources.

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[125] *Id.* at 1167.

[126] *Id.*

[127] *Id.*

[128] State *ex rel.* Town of Westerly v. Bradley, 877 A.2d 601, 606–07 (R.I. 2005).

[129] *Id.* at 603.

[130] *Id.* at 603, 606.

[131] *Id.* at 607.

[132] *Id.* at 607–08.

[133] *Id.*

E. New York

In New York, the public trust doctrine applies to local government-owned parkland.[134] Local governments cannot convert parks to non-park uses without legislative approval because local governments hold parks in trust for the public.[135]

The New York Supreme Court's Appellate Division applied the public trust doctrine to the town of Huntington in *Grayson v. Town of Huntington*.[136] In *Grayson*, Huntington sought to create low-income housing on a town-owned parcel that the town used primarily for drainage purposes, although it was designated as a "park-site."[137] A neighboring landowner challenged the conversion, arguing that the parcel was parkland and therefore Huntington could not convert it to low-income housing without violating the public trust doctrine.[138] The court recognized that dedicated parkland in New York is automatically impressed with a public trust and local governments cannot convert parks to other uses, either temporarily or permanently, without the approval of the state legislature.[139] However, the court affirmed the judgment below and held that the New York public housing law that encouraged the creation of "adequate, safe, and sanitary low rent housing accommodations," constituted legislative approval of Huntington's authority to create low-income housing.[140] Therefore, although the court applied the public trust doctrine to local government-owned parkland, it upheld Huntington's conversion of the "park" parcel to low-income housing because it had legislative approval to do so.

The New York Supreme Court of Kings County held that the public trust doctrine prevented New York City from converting a portion of a municipal park to a solid waste management facility in *In re Raritan Baykeeper, Inc. v. City of New York*.[141] In *Raritan Baykeeper*, New York City planned to convert 20 acres of Spring Creek Park to a solid waste management facility, which would make it inaccessible to the public.[142] An environmental group challenged the plan, arguing that the conversion of the parkland violated the public trust doctrine.[143] The court held that the conversion of the park to a solid waste management facility violated the public trust

[134] *See* Grayson v. Town of Huntington, 160 A.D.2d 835 (N.Y. App. Div. 1990).

[135] *Id.* at 837.

[136] *Id.*

[137] *Id.* at 836.

[138] *Id.*

[139] *Id.* at 837.

[140] *Id.*

[141] *In re* Raritan Baykeeper, Inc. v. City of New York, No. 31145/06, 2013 WL 6916531, at *6–7 (N.Y. Sup. Ct. 2013). *In re Raritan Baykeeper*, though not authoritative, provides one example of a violation of the public trust doctrine in New York.

[142] *Id.* at *6.

[143] *Id.*

doctrine.[144] The court stated that the recycling and composting at the proposed facility would not be an acceptable park use because it had no recreational or aesthetic value for the public.[145] Unlike in *Grayson*, where the court found implied legislative approval for the conversion because of the New York public housing law, the *Raritan Baykeeper* court did not find any indication that the legislature approved the conversion of part of the park to a solid waste management facility.[146] Even though a recycling and composting center would arguably provide benefits for the public, the trust purposes under the public trust doctrine are narrower than any use that conceivably serves a public purpose.

Under the public trust doctrine, local governments in New York cannot convert parks to other uses without legislative authorization. The public trust doctrine may even prevent conversions to other uses that benefit the public unless they further the recreational and aesthetic value of the park.[147]

F. Pennsylvania

In Pennsylvania, the public trust doctrine initially applied to local government-owned land if the court found indications that the local government dedicated the land to the public, such as expenditures of funds by the local government towards public purposes, or actual public use of the land.[148] Later, the Pennsylvania Supreme Court clarified that plaintiffs needed to show much less to prove that the local government dedicated the land to the public, such as mere references to the land as "public" by contemporaneous deeds.[149]

The Pennsylvania Supreme Court applied the public trust doctrine to the city of Philadelphia when it held that the city could not convey its parklands to a private university.[150] Philadelphia passed ordinances creating parks, gardens, and museum buildings on local public land that included a requirement that they always remain open for the public.[151] The board of trustees of the Philadelphia museums sought to prevent Philadelphia from conveying some of the museum buildings to the University of Pennsylvania.[152] The Court decided that if the city dedicated the land for public use, it lacked the authority to convey the land for private purposes.[153] The

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[144] *Id.* at *8.

[145] *Id.* at *7.

[146] *Id.* at *8.

[147] *See id.* at *7–8.

[148] Bd. of Trs. of Phila. Museums v. Trs. of Univ. of Pa., 96 A. 123, 125 (Pa. 1915).

[149] Hoffman v. City of Pittsburgh, 75 A.2d 649, 650 (Pa. 1950).

[150] *Bd. of Trs. of Phila. Museums*, 96 A. at 126.

[151] *Id.* at 123–24.

[152] *Id.* at 124.

[153] *Id.* at 125.

Court held that because Philadelphia set aside the parkland for public use in previous ordinances, expended funds for the public use and enjoyment of the land, and the public used the parklands, Philadelphia effectively dedicated the land to the public and that dedication could not be revoked.[154] Therefore, because Philadelphia dedicated the parkland to the public, it had to act as a trustee of the parkland under the public trust doctrine.

The Pennsylvania Supreme Court again applied the public trust doctrine to a city in *Hoffman v. City of Pittsburgh* but did not require extensive evidence of dedication of the land to the public.[155] The Court affirmed the lower court decision that determined that Pittsburgh did not have authority to sell a public square because it held the public square in trust for the public.[156] Unlike the Court in *Board of Trustees of Philadelphia Museums*, the *Hoffman* Court did not require the city to demonstrate a dedication of Diamond Square to the public through an ordinance or the expenditure of funds.[157] Instead, the Court decided that contemporaneous deeds referring to Diamond Square as a public square created a legal presumption that Pittsburgh dedicated the square for public use.[158] The Court rejected the city's argument that it could sell the square while still benefiting the public because the proceeds of the sale would benefit the public generally.[159] The Court stated that Pittsburgh dedicated the property itself to public use, so allocating the proceeds of the sale towards public purposes would not prevent a violation of the public trust doctrine.[160] Therefore, in Pennsylvania, permissible public trust doctrine uses are not all publicly beneficial uses but rather the specific use for which the local government dedicated the land.

In Pennsylvania, the public trust doctrine constrains local governments' use of local public land if there is evidence that the local government dedicated the land to the public. Local governments cannot sell land dedicated to the public, even if the proceeds would go towards a public purpose, because the local government must use the land for its dedicated purpose.

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[154] *Id.*

[155] Hoffman v. City of Pittsburgh, 75 A.2d 649 (Pa. 1950).

[156] *Id.* at 654–55.

[157] *Id.* at 655.

[158] *Id.* at 650.

[159] *Id.* at 653–54.

[160] *Id.*

G. *Discussion*

All six of these jurisdictions applied the public trust doctrine to local governments. Oregon and New Jersey applied the public trust doctrine to local governments under the creature theory of local government law.[161] In Rhode Island, state law preempted local government law on public trust matters of statewide concern, but local governments had to act as trustees of public trust resources when they acted within the scope of their legislative authority.[162] In California, local governments had to abide by the public trust doctrine when grantors conveyed the land to the local government for a public purpose.[163] In other states, like Wisconsin, New York, and Pennsylvania, the courts applied the public trust doctrine to local government action without explanation as to why it applied.[164]

The reasons that courts give when applying the public trust doctrine to local governments are important because they determine who the trustee is. If state law preempts local government law on public trust matters, local governments cannot violate the public trust doctrine, but presumably the state retains the role of trustee.[165] Alternatively, if courts directly apply the public trust doctrine to local government actions, the local governments are the trustees of local public trust resources.[166] This is important because the trustee has some affirmative duties under the public trust doctrine, such as the duty to consider the public trust when planning and allocating resources.[167] Future litigants may want to specify that local governments are the trustees of local public land and therefore must not only comply with

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[161] *See* Kramer v. City of Lake Oswego, 446 P.3d 1, 18 (Or. 2019); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972).

[162] *See* Champlin's Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1167 (R.I. 2003); State *ex rel.* Town of Westerly v. Bradley, 877 A.2d 601, 607 (R.I. 2005).

[163] *See* Save the Welwood Murray Mem'l Libr. Comm. v. City Council of Palm Springs, 215 Cal. App. 3d 1003, 1017 (1989); Cnty. of Solano v. Handlery, 155 Cal. App. 4th 566, 580 (2007).

[164] *See* State v. Vill. of Lake Delton, 286 N.W.2d 622 (Wis. Ct. App. 1979); *In re* Raritan Baykeeper, Inc. v. City of New York, No. 31145/06, 2013 WL 6916531 (N.Y. Sup. Ct. 2013); *Hoffman*, 75 A.2d at 649.

[165] *See, e.g.*, Robinson Twp. v. Commonwealth, 83 A.3d 901, 936, 956–57 (Pa. 2013) (stating that the General Assembly possessed authority to preempt local municipal laws).

[166] *See, e.g.*, *Kramer*, 446 P.3d at 19 (explaining that same regulatory restrictions that apply to the state also apply to the city when the city is assigned the authority to regulate public trust resources).

[167] *See, e.g.*, Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty., 658 P.2d 709, 728 (Cal. 1983) ("The state [as trustee] has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."); *In re* Maui Elec. Co., 506 P.3d 192, 200–01 (Haw. 2022) (holding that, as a trustee under the public trust doctrine, a public utility company must consider public trust resources when it reviews a power purchase agreement).

the public trust doctrine but must also affirmatively consider the public trust when taking actions that implicate public trust resources.

The reasons courts give for applying the public trust doctrine to local governments are also important because they could affect who can enforce the public trust doctrine. Under the traditional public trust doctrine, the public at large can enforce violations.[168] When a deed creates a public trust responsibility, it is unclear whether non-parties to the deed contract can enforce violations.[169] Arguably, if the deed describes the public as a beneficiary, the public will obtain third-party beneficiary status to challenge the deed restrictions.[170] Additionally, in *Save the Welwood Murray Memorial Library Committee*, a citizen group had standing to challenge the deed violation.[171] Still, the parties that can enforce deed violations could vary in other jurisdictions, which litigants may want to consider when bringing claims.

The local public trust doctrine cases explained in this Comment demonstrate important distinctions between different jurisdictions on how local governments can restrict public trust resources. Some jurisdictions, like New Jersey and Oregon, allow local governments to restrict public trust resources if the restrictions are reasonable.[172] The Pennsylvania Supreme Court stated that public use under the public trust doctrine is narrower than anything that would conceivably benefit the public.[173] The Wisconsin Court of Appeals held that the city of Lake Delton could restrict access to part of a lake for waterski shows because the shows benefitted the local economy, even though it restricted the public's ability to swim and fish in the lake in those areas.[174] New York takes the unique approach of looking for state legislative approval for local governments to convert public trust resources.[175] These differences show that different courts have different perspectives on the permissibility of local governments' restrictions on public trust resources. Future local public

[168] Paepcke v. Pub. Bldg. Comm'n of Chicago, 263 N.E.2d 11, 18 (Ill. 1970) ("If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it.").

[169] *Compare* Save the Welwood Murray Mem'l Libr. Comm. v. City Council of Palm Springs, 215 Cal. App. 3d 1003, 1006–07, 1016–17 (1989), *with* Ours v. City of Rolla, 965 S.W.2d 343, 344 (Mo. Ct. App. 1998).

[170] *See, e.g.*, Schauer v. Mandarin Gems of Cal., Inc., 125 Cal. App. 4th 949, 957–58 (2005) (holding that third parties can enforce contracts under California law if the parties to the contract intended to benefit that third party).

[171] *See Save the Welwood Murray Mem'l Libr.*, 215 Cal. App. 3d at 1007 (finding the committee was "a nonprofit unincorporated association" formed with the express purpose of saving the library and was thus able to bring suit to enforce the terms of the trust).

[172] *See* Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 55 (N.J. 1972); Kramer v. City of Lake Oswego, 446 P.3d 1, 19 (Or. 2019).

[173] *See* Hoffman v. City of Pittsburgh, 75 A.2d 649, 655 (Pa. 1950).

[174] State v. Vill. of Lake Delton, 286 N.W.2d 622, 630, 636 (Wis. Ct. App. 1979).

[175] *See, e.g.*, Grayson v. Town of Huntington, 160 A.D.2d 835, 836 (N.Y. App. Div. 1990).

trust doctrine litigation will demonstrate how courts in different jurisdictions apply the doctrine.

CONCLUSION

Most of the courts that have considered the issue applied the public trust doctrine to local governments. The Oregon Supreme Court recently reversed in part a lower court decision and decided that local governments are agencies of the state and must therefore abide by the public trust doctrine, just like the state.[176] Although the public trust doctrine varies in its application state to state,[177] all local governments are creatures of the state and are constrained by state law. Local governments have significant land use authority[178] and may face pressure to use this authority to retain their public lands for local residents or convey their lands to private parties. For these reasons, it is important that local governments are held responsible as trustees to retain and manage their public lands for the use of the public under the public trust doctrine.

[176] *Kramer*, 446 P.3d at 18.

[177] *See generally* Blumm et al., *supra* note 5 (discussing application of the public trust doctrine in various states).

[178] REYNOLDS, *supra* note 10, at 395.