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PUBLIC ACCESS TO THE COAST FOR RECREATION

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MASTERS THESIS PROJECT

PUBLIC ACCESS TO THE COAST

FOR RECREATION

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May 15, 1978

MASTERS THESIS PROJECT

INTRODUCTION

and

SECTION I

IDENTIFICATION OF SPECIFIC ISSUES AND PROBLEMS
RELATED TO RECREATIONAL ACCESS TO THE SHORE

Wesley J. Ewell
March 29, 1978

Dr. Richard O. Brooks

INTRODUCTION

The shores of our oceans and Great Lakes have always carried an appeal to persons seeking escape from the pressures of work and routine. The shore is different and unique. It offers unlimited open space, tempering weather, and a refreshing feeling of freedom that makes its use for recreation a natural occurrence. But persons who want to use the shore for recreation often cannot. They may find that suitable space is too far away, too crowded, or simply not open to them. This is the issue of coastal recreation access.

Access, for the purposes of this paper, can be defined as the ability to use the shore for recreation. Coastal access can be as simple as a visual openness to the water from public roads, unimpeded^{by} structures, vegetation or topography. More often it is a complex mixture of legal restrictions, discriminatory attitudes, and physical barriers that keep large segments of our populace from enjoying the freedom of beach use.

This paper will attempt to analyze the complex components of the recreational access issue. It will emphasize access to beaches--sandy shorefronts and related immediate uplands and dunes--because most coastal recreation takes place in these areas. Swimming, bathing, surfing, beachwalking, sunning, skindiving, jogging, picnicking, fishing, and many other recreational pursuits are best suited to beach areas. Boating, shellfishing, water-skiing, camping and sightseeing are among the coastal recreational activities that do not require sandy beach. These activities are included in this study to the extent that they are affected by restricted shore access. Problems of boat mooring space, benthic pollution, and competition among recreational

uses of the shore are treated only superficially here, however, as these issues are complex in themselves and beyond the scope of this study.

The nature and intensity of the problems comprising the access issue vary widely from state to state and between different regions within states. Reasons for this variation include physical area of beach, ownership patterns, geologic conditions, population density, and differences in laws and their interpretation by the courts. The access issue in some form is universal; it is most severe in the Northeast.

The issue of public access to the shore has been studied before by others. Dennis Ducsik's 1974 treatise, Shoreline For The Public is probably the most definitive and comprehensive work to date. Ducsik's investigation, and the works of others, have defined the extent of demand for shoreline recreation, documented legal precedents, and suggested governmental action to alleviate the problem. This paper will not duplicate their work, but will build upon it and apply the knowledge of studies produced under the Coastal Zone Management Act of 1972, and of emerging trends in land use management.

In four sections, this paper will show that (I) recreational access to the shore is not a single issue, but a multiplicity of issues that vary from place to place and that often compound each other, (II) that a corresponding multiplicity of solutions is available to, and must be used by, states and localities in addressing the access issue, (III) that evolving and adopted policies of coastal states are, with rare exception, too narrow and simplistic to effectively address the problems, and (IV) that innovative techniques being

developed in land use management and open space preservation can be applied to the problems of coastal recreation access.

Section I will identify specific issues and problems related to recreational access. This section will define six major components of the access issue and list the problems and sub-issues that constitute the major components. It will also relate the issues to the states where they are a concern, identify influences that exacerbate or alleviate the problems, and indicate how these influences are likely to change over the next 20 years.

In Section II the various methods available for application to coastal access problems will be discussed. This compilation will include legislative, judicial, administrative, regulatory, market and incentive methods used in the past, as well as new techniques suggested in the Coastal Zone Management plans and other policy statements published by the coastal states.

Section III will review and evaluate state responses to the coastal recreation access issue, documenting how states have responded, and relating similarities in response to similarities in the nature and extent of the problem.

Finally, Section IV will suggest how responses might be improved by the application of innovative land use controls. The Coastal Zone Management Act requires the use of new approaches to coastal protection based upon the concepts of the American Law Institute's Model Land Development Code. How these approaches will help the access issue will be discussed. Other innovative land use controls such as density bonus and transfer of use rights will also be investigated. Emphasis will be placed on multi-

faceted solutions and policies that attack each aspect of the access issue in the most appropriate manner.

The coastline access issue is complex and certainly not limited to recreation; access for commerce, energy facilities, and resource conservation are often more pressing and difficult. The purpose of this paper is to analyze the recreation issue so that the public need for this use of the shore can be better served by government policy leaders who must balance conflicting demands for limited waterfront space.

SECTION I: IDENTIFICATION OF SPECIFIC ISSUES AND PROBLEMS RELATED
TO RECREATIONAL ACCESS TO THE SHORE

The problem of recreational access has been recognized for many years, particularly in the heavily developed urban areas of the Northeast. State and Federal courts have been challenged with the question since early in the nineteenth century, and are not likely to resolve the issue soon. More than 55 significant decisions have been handed down since 1832 when the federal courts were asked to decide whether a strip of land adjacent to the Monongahela River in Pittsburgh had been dedicated to public use.¹

State legislatures began to react to the access issue only recently, however. Wisconsin adopted a mandatory shoreline zone act in 1966, Minnesota followed in 1969, and Michigan in 1970.² Similar legislation was passed at about the same time in North Carolina, Maine, California, Oregon, and Washington.³ The federal government reacted to the problem in 1972 with passage of the Coastal Zone Management Act initiated, in part, by the "Stratton Commission Report" sent to President Nixon in January, 1969.⁴ The specific question of recreational access was not incorporated into this act until 1976.⁵

A review of coastal state responses to recreational access in general and the CZM Act requirements in particular was conducted in preparation of this paper. Results of this review showed a wide disparity between states, both in perception of the problem and formulation of policy toward solution of the problem. The three West Coast states have adopted coastal access policies and passed legislation to assure that the policies are carried out.

The Gulf Coast states of Louisiana, Mississippi, and Alabama, on the other hand, deny the existence of an access problem.⁶ Most of the other coastal states have drafted policy statements in response to the 1976 CZM Act amendment, but until these policies are accepted and endorsed, they cannot be considered for comparison. Of the Northeast states, only Rhode Island and New Jersey have adopted policies and legislation that substantially affect the supply of shorefront available to the public.

In review of the coastal states' policies, management plans, and laws, the dimensions and complexity of the recreational access issue became apparent. While the nature and intensity of the problems are not uniform along the coast, the basic access issues are comparable, and fall into six general categories:

- (1) physical limitations
- (2) pre-emptive and conflicting uses
- (3) economic constraints
- (4) legal restrictions
- (5) discriminatory actions
- (6) transportation impediments

While most of the specific problems of coastal recreation access fall under one of these categorical issues, there is considerable overlap among them. A strong correlation can be found, for instance, between economic constraints and discriminatory actions. Most conflicting use problems could also be considered economic restraints, and many legal restrictions appear to be discriminatory in fact if not in intent.

Physical Limitations

Physical scarcity of waterfront sites for recreational use is a severe

limitation in the New England states (except Rhode Island and Cape Cod) and on the Great Lakes. Geological formations such as rocky headlands and salt marshes limit recreational use of much of the shore. The Connecticut Coastal Area Management office estimates that as much as 82 percent of that state's coastline is so limited.⁷ Note that this definition of physical limitation ignores all other constraints; in other words, given a totally undeveloped shore in full public ownership, physical limitations are considered to be conditions that make use of the shore for recreation physically impossible. Other apparently physical limits are actually due to pre-emptive uses, ownership patterns and transportation problems.

Every coastal state suffers some form of physical limit on recreational use. The high bluffs, rocky headlands and steep wooded slopes characteristic of much of the West Coast leave miles of shoreline with very narrow, if any, foreshore suitable for use. The Great Lakes shorelines are geologically similar, but even more limited by severe erosion and the absence of intertidal shoreline. Texas and North Carolina have many miles of barrier beaches, but physical access to the mainland is widely spaced. Much of the Gulf Coast and Atlantic shore is characterized by broad reaches of salt marsh that is suitable only for very limited and non-intensive recreational activities.

Physical limitations need not be geological or even naturally occurring, however. Sites that are used to their capacity, or that suffer environmental damage to dunes, vegetation, and wildlife habitat because of excessive recreational use can be considered to be physically limited. The effects

of normal wave action, storms, and other meteorological conditions, especially when they are aggravated by the location of bulkheads, jetties and similar "protective" works, are physical limitations.⁸ North of Cape Cod, where coastal waters are not warmed by Gulf Stream currents, water temperature is a physical limitation.

The problem of physical limitation tends to be a relative one. New Jersey's ocean shore has virtually no naturally occurring physical limitations on recreational use, but suffers from overuse and environmental destruction because of the high population concentrations served by the Jersey shore and past efforts to control natural littoral movement of sand by jetties and bulkheads.⁹ Neighboring Delaware, however, with far less usable shore, experiences little pressure from physical limitations because it is further removed from population centers and suffers fewer non-physical constraints upon public access.¹⁰

The physical aspect of the coastal access issue is worsened by the presence of other restraints, particularly by discriminatory actions and laws, and conflicting uses of coastal land. The presence of transportation barriers, however, tends to have the opposite effect. As coastal population increases, with a corresponding increase in shore use, available sites will reach or exceed their physical capacity. The removal of transportation barriers, to be discussed later in this section, can aggravate problems of physical limitation by increasing use of the shore by persons whose access was previously limited by distance.

Conversely, alleviation of access problems created by physical limitations depends primarily on making all suitable land available for recreation by the removal of other limitations. Shore access becomes an issue when

it is denied to certain persons, but not to others. If the shore were equally inaccessible because of natural limitations, then access would no longer be a political or sociological issue, but simply a fact of life beyond anyone's control. Therefore, if all available sites could be fully developed for recreation, fully accessible to everyone, and properly managed for maximum use, limited access would not be an issue even though there may not be enough sandy beach for everyone who wants to use it.

In summary, the problem of physical limits to coastal recreation may be the least difficult to solve because it is a natural limitation, not a political or legal one. When demand exceeds supply for clearly insurmountable reasons, substitution of other, non-coastal, recreation activities will occur. Unfortunately, this highly idealized situation will never exist. It is suggested here only to illustrate the relative position of physical limits among the components of the access issue.

Pre-emptive and Conflicting Uses

The use of coastal land for purposes that are not essential to a waterfront location, and that preclude the use of the coast for recreation or other essential waterfront use, is classified as a pre-emptive or conflicting use. Certain coastal uses are more important to society than recreation, of course. Shipping, fisheries, military defense, production and processing industries that rely on waterborne transport, and some energy-related facilities must have coastal sites. Wildlife preserves, shellfish beds, and intensive aquaculture demand exclusive use of coastal lands and cannot be

displaced or share use of their territory.¹¹ But these uses take up only a small percentage of the coast and are often located on land that is not physically suitable for recreation.

Nearly all pre-emptive use of the shore is by private development that does not necessarily require a waterfront location. The Council on Environmental Quality estimated in 1970 that more than 68 percent of total recreational property values along ocean and Great Lakes coasts was accounted for by shorefront homes.¹² In New York and Connecticut, access to much of the shore is impeded by railroad tracks that follow the shoreline. Limited-access highways similarly block the shore in many coastal states. Along New York's Lake Erie shore, strip residential development blankets nearly all potential access to the water.¹³

Perpendicular access between public roads and the shore is one of the most commonly cited problems of public access throughout the country. While restriction of perpendicular access may be due to physical limitation, especially along bluff shores such as the Great Lakes and much of the West Coast, most such restriction results from pre-emptive uses. Development along the shore also blocks visual access, and often impairs the scenic quality of the coastline. Competition for coastal land by developers, utilities, government, and private individuals is seemingly boundless. Ducsik notes that ". . . as long as (shore property) is available there will be people to buy it, regardless of cost."¹⁴ Public recreation simply cannot compete with the private market economy for coastal land.

Not all conflicting uses are man-made. Nesting areas for shore birds and wildlife are an important pre-emptive use that cannot tolerate close proximity to heavily-used recreation sites.¹⁵ Such uses of the natural shore are more threatened by building than by recreation, however.

Other conflicting uses are not as obvious. Sewage disposal outfalls cross coastal wetlands and beaches, destroying or severely disrupting natural conditions along a path as much as 250 feet wide.¹⁶ Once buried, they do not block visual access, but may permanently impair visual quality as well as water quality, thereby limiting the use of nearby shore for recreation.

And finally, coastal recreation uses compete with each other. In Texas, Florida, North Carolina, and Cape Cod, where driving of beach buggies and four-wheel-drive vehicles along the beach is a popular form of recreation, serious conflicts have developed with more traditional uses of the beach.¹⁷ Surf fishing is incompatible with swimming or surfing; driving is dangerous to sunbathers and beachwalkers; and resort hotels can bring urban pressures to the water's edge.¹⁸

Like the problem of physical limitations, the problem of pre-emptive and conflicting uses is universal; affecting every coastal state to some degree. It is most severe along the Great Lakes and in the Northeast, but also an important concern along the Chesapeake Bay shore, in Florida, most of the Gulf Coast, Southern California, and Puget Sound.¹⁹

Unlike physical limits, however, pre-emptive use is a difficult problem to deal with. It involves vested interests in buildings and land that often date back to Colonial days. While the spread of inappropriate uses may be

slowed by zoning and other coastal zone management regulations, the removal of existing uses may be virtually impossible. This component of the coastal access issue is closely related to economic constraints, legal restrictions, discriminatory actions, and transportation problems, and cannot be addressed as an independent problem.

Economic Constraints

This component of the access issue is a mixed grouping of several distinct problem areas. It includes the cost to government of acquiring, developing and maintaining coastal recreation facilities, the cost to users of getting to, and using, coastal recreation, and the displacement of lower income persons by new coastal development.²⁰

Market scarcity of suitable waterfront land for recreation is the single greatest economic constraint to beach access. Nearly all waterfront property is privately owned, and either not available for sale or priced extraordinarily high.²¹ Only when the intangible value of coastal recreation is correspondingly high to the public, is beach frontage purchased. In recent years, the acquisition in fee of extensive areas of shore has been limited almost entirely to federal government establishment of National Seashore and National Lakeshore parks. Where states or municipalities have purchased waterfront, the federal government has also participated in the funding, contributing up to 50 per cent of the cost through the Bureau of Outdoor Recreation's Land and Water Conservation Fund established in 1965.²²

Beyond the cost of acquiring land, the capital costs of developing and preparing the land for recreational use are also a consideration. Bath houses, boat launching ramps, parking lots, picnic and camping grounds, and access roads can exceed the costs of land acquisition. And once the facilities are developed, the government is further burdened with labor and materials costs for operation and maintenance. Security and maintenance personnel, life guards, and beach cleaning costs become permanent budget items.

Pollution of water, making it unsuitable for recreation use, could be considered an economic constraint, although this might also be classed as a physical limitation or pre-emptive use. Water quality is an especially troublesome constraint on recreational use of the shore because it is most severe in urban areas where demand for waterfront recreation is highest. Connecticut's Coastal Area Management office has recognized this limitation, "...particularly on the western end of the Sound and in the urban areas."²³ This is also a problem in Boston Harbor, Northern New Jersey, and on the Great Lakes.

There is another side to the economic issue that is not often recognized as a problem of coastal access: the cost to individuals of owning or using waterfront recreation land and facilities. Ownership of waterfront property is fast becoming a privilege of only the very wealthy. Others, who may have held waterfront land or houses in their families for generations, are being displaced to inland sites by new coastal development, no longer able to resist the economic incentive of selling out.²⁴ Such displacement not only deprives the owners of their access to the shore, but also closes a means of

access to their friends and relatives who otherwise might not afford the use of coastal facilities.

Use of the waterfront, for many people, requires paying for hotels, restaurants and other expensive tourists' accommodations. This economic constraint further limits access available to those persons who are most likely to be barred by other access restrictions. In addition, water-oriented recreational opportunities often require equipment that must be purchased or rented, such as boats, waterskis, surfboards, sand vehicles, fishing gear, campsites, etcetera. The costs of such equipment and its maintenance, further restrains access to those least able to pay.

The economic issue, then, may also be a problem of discrimination. Market competition for increasingly scarce waterfront land forces ever larger numbers of people out of private ownership, while at the same time making public acquisition and development of shorefront recreation prohibitively expensive. This too is a universal problem common to all coastal states, but most critical in the urbanized northeast, the industrialized Gulf and Great Lakes areas, and the wealthy retirement and vacation communities in Florida, Cape Cod, and Long Island.

Solution of the economic component of the coastal access issue may be more difficult than the other components because it is so much a part of the free market economic system and attitude dominant in this country. Government intervention, either through the market mechanism or in regulation of it, is becoming increasingly necessary to assure some measure of public allocation of shore resources. Duesik addresses this idea in detail, noting

that "...governments in general are increasingly being called upon to take a more direct role in providing for and protecting qualitative, intangible values left unattended by the market..."²⁵

Legal Restrictions

Economic constraints and discriminatory actions barring public access to the coast often take the form of statutes, ordinances and by-laws, deed restrictions and other covenants, regulations and other legal mechanisms. Legal restrictions vary widely between states, but are present to some degree along every coast; they are, in a sense, artificial limitations in that they impose a social perspective on use of the shore that is not necessarily related to physiographic conditions.²⁶

Private ownership of waterfront land, conferring exclusive use and control of the property upon the owners to the exclusion of all others, is the most common and troublesome legal restriction on public use of the shore. Private ownership by groups or associations allows broader access, but usually only to selected individuals, creating problems of discrimination with legal protection. Nor does public ownership always remove this constraint on use. Municipally owned beaches are often restricted to residents of the municipality, a privilege closely guarded by most coastal communities, especially on Long Island Sound.²⁷ The rights to use beach property will be discussed more fully under the discriminatory action component of the access issue.

In most coastal states, lateral access along the foreshore is allowed by customary use, statute, or other authority. Fewer than half of the states

assure this right by law, however. It is presently being litigated in Connecticut, although a 1969 decision recognized the high tide line as the boundary between public and private ownership in that state.²⁸

Definition of the foreshore is not uniform between states, although it is normally considered to be the wet sand area between high and low water. Where tides are absent or intertidal distances are small, the foreshore is virtually non-existent. On the West Coast, where there are two widely differing high ^{and low} tides in each tidal cycle, the higher high tide and lower low tide are normally used. Definition of high or low tide may be an average, or mean, of all tides, or it may be a Spring tide or Moon tide. Since no two tides are normally the same more than once every 18.6 years, delimitation of foreshore by high and low water marks is a problem.²⁹

Municipal zoning ordinances and by-laws are yet another restriction on public access, although they also hold the potential for facilitating access. Urban areas typically zone their waterfronts for industrial use or marine commerce, pre-empting any reasonable use for recreation. Non-urban waterfronts are most commonly zoned for low-density residential use except where the promise of increased property tax base encourages zoning for hotels, marinas, and similar waterfront commercial activities. While these uses provide recreational opportunities, they suffer the economic restraints discussed earlier, and often lead to discriminatory access in fact.

Local regulations may also restrict access to beaches and other coastal recreation that is otherwise open to the public. It is common practice to close beaches during stormy or cold weather, and during the winter in northern latitudes. Yet many recreational activities are well-suited to the off-

season when sun-bathing and swimming is not practical. Beachcombing, surfing, jogging, surf-casting, and nature-study are too often banned by regulations that limit opening hours at coastal parks and beaches. Two reasons given for closing are that lifeguards are not available or that maintenance and security personnel cannot be justified for the limited use that recreation areas would receive off-season.

The legal system provides a framework for social order. But that framework is not always equitable and can be used by some persons or groups to the disadvantage of others. Changes are slow to evolve and are often initiated only by a crisis that affects many people. Recent trends of change in legal restriction, coming both through the state and federal legislatures and from the courts, have moved toward increasing public rights to the water's edge.³⁰ The legal component of the coastal access issue may be the slowest to change, but once a change is made, it can have far-reaching effects on public rights. Efforts by various states and the federal government to effect legal changes will be described in Section III of this paper.

Discriminatory Actions

The most pervasive group of limitations on coastal recreation access is discrimination against persons who do not own or cannot afford to buy property rights to the shore. Discriminatory actions often appear as legal restrictions, economic constraints, or transportation problems, but whatever their form they represent a lack of motivation to increase beach access. Discriminatory restrictions are most often related to place of residence, a

technique that effectively acts against persons of social status, income level, or ethnic background that is different from those of the property owners.

Property owners associations and private beach clubs are common in New England and Long Island, and other areas where good beachfront is scarce. Connecticut alone has more than 240 beach clubs, waterfront property owners associations, and yacht clubs.³¹ The beaches, docks, and other recreational facilities controlled by these associations are, with rare exception, closely limited to intrusion by non-members. And membership is often limited by peer acceptance, property ownership, high fees, or a combination of these requirements. Economic discrimination is compounded in many of these organizations by charter requirements for ownership of houses or yachts.

Nor are such restrictions absent from "public" beaches and boat facilities owned by municipalities. Town beaches in New England, Long Island and along the Great Lakes are normally restricted to residents only. The justification for such restriction is that the taxpayers who paid for the beach and its maintenance have purchased the right to use it. Where state or federal funds are used, however, the facilities must be open to all.³²

Parking fees or permits, and user fees, are often used to discriminate against non-residents. Municipal beaches often have deliberately undersized parking lots with parking bans along nearby streets to limit access by automobile--often the only means of transport to the shore.³³ This problem will be discussed further under transportation impediments, but it is also a form of discrimination. Beach fees can be charged to users provided they are uniform for all persons, but even a moderate beach fee can be an economic

impediment to some persons. The New Jersey courts have held that the public trust doctrine prevents discrimination in fees by place of residence.³⁴ New Jersey beachfront communities still discriminate, however, by offering very low price season permits to anyone who buys one in person before the summer season, and charging higher rates for daily or weekly permits.³⁵

As coastal property becomes increasingly expensive to acquire and develop, municipalities and private associations find it more difficult to justify the use of local tax revenues to this purpose. New facilities, therefore, will require state and federal funding more often than in the past. Since most suitable beachfront in heavily populated areas is already privately or municipally held, however, discriminatory practices are likely to continue until removed by legislation or judicial action.

Transportation Impediments

More than half of the nation's population resides in coastal counties.³⁶ For many of these persons, however, access to the shore is blocked by an inability to get to suitable sites for coastal recreation. The best beaches are far removed from population centers, and urban coastal areas are largely pre-empted by conflicting land uses, pollution, or private development. Rhode Island, for instance, has excellent beaches with nearly double the capacity needed by the state's residents, but there are no suitable beaches near the Providence metropolitan area where 75 percent of the residents live.³⁷

Public transportation is rarely provided to beaches or other shore areas for several reasons. Passenger rail service is rarely available except in

metropolitan Boston and New York. Bus service to shore areas, especially in northern climates, is difficult because of the heavy dependence of beach use on weather conditions. Charter buses run successfully from New York and Philadelphia to the New Jersey shore, and from Washington, D.C. to the Delaware shore, but attempts at regular service often fail because of long travel distances and erratic ridership.³⁸

Travel to beaches or other coastal recreation sites must be by private automobile, with rare exception, because the transportation system is designed to preclude the use of alternative modes of transport, and because waterfront recreation is normally a group or family activity that involves carrying recreation equipment, food, clothing, and other personal belongings. It is difficult to carry such baggage by public transport even when it is available. Distances between housing and beaches usually require the use of private cars even for local residents.

The seasonal nature of beach use in most of the country, and the necessity for use of private cars to reach the shore, combine to create other transportation impediments to coastal access. Roads designed for normal year-round use become grossly overburdened with traffic on summer weekends; bridges to barrier beaches and islands become severe bottlenecks, often backing traffic to a crawl for five miles or more at peak periods; and the locations of roads, originally laid out for other purposes, often do not efficiently serve the sites where people want to go. Finally, direction signs to coastal areas may be inadequate, either as a deliberate means of discouraging non-local traffic or because of damage during the off-season.³⁹

Once the traffic reaches the shore, other transportation impediments arise. Parking may not be available, may be limited to residents only, or may be located an unreasonable distance from the water.⁴⁰ Parking may be deliberately limited in a form of discrimination to keep down the number of persons using a beach, or for economic reasons because of the cost of buying land, clearing it, and paving or preparing the lot. Parking may also be prohibited along public roads within walking distance of a beach, boat launching ramp, or other coastal recreation facility. The stated reason may be public safety, but the underlying reason is more likely to prevent non-residents, who do not have parking permits, from gaining access to the shore.⁴¹

Transportation problems are common to all coastal states, but for different reasons and in different forms. Parking limitations are most common in urbanized areas while public transit is a greater limitation in areas of sparse population. The mid-Atlantic and Texas Gulf coasts have plenty of public beachfront, but it is often far removed from population centers and difficult to reach because of natural physical barriers.⁴²

Changes in transportation impediments to public access are not likely to occur except as a result of other forces. This component of the access issue is mentioned in several Coastal Zone Management Programs, but only New Jersey has taken a positive, if token, step to address the problem with a demonstration shuttle bus service to Island Beach State Park.⁴³ Transportation changes are more likely to be made as a result of changes

in energy cost and supply, and a general shift in all transportation patterns resulting from the energy issue.⁴⁴

Summary

Of the six major components of the coastal access issue, only the problem of physical limitation is governed by forces beyond the power of society to control. Physical access is the least of the six problems, however, and would not by itself be an issue if not compounded by other problems. The other five components, pre-emptive and conflicting uses, economic constraints, legal restrictions, discriminatory actions and transportation impediments can all be removed given the will to do so.

The real problem is attitude. Recreational access does not yet have a relative value to society high enough to justify the economic and social costs of providing such access to all who desire it. The value of coastal recreation is rising, however, and efforts to increase access have risen proportionately.⁴⁵ With the completion of Coastal Management Programs in all 30 coastal states, policies to improve access will at least have been declared, if not adopted. The problem now is not whether to improve public access, but rather how to do it. Some of the tools available for this purpose will be analyzed in Section II.

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MASTERS THESIS PROJECT

SECTION II

METHODS AVAILABLE FOR APPLICATION
TO COASTAL ACCESS PROBLEMS

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SECTION II: METHODS AVAILABLE FOR APPLICATION TO COASTAL ACCESS PROBLEMS

The diversity of problems comprising the issue of coastal recreation access, analyzed in Section I, requires a similarly diverse approach to resolution of the issue. No single statute, decision, or policy can be adopted to assure public rights, and the ability to use those rights, in the coastline for recreation.

This section describes the activities, policies, and methods available to various agencies of government at all levels to resolve the issue of coastal recreation access. It is, in effect, a catalog of tools. Like any set of tools, some of these are generally applicable to the whole issue, while others can be used only for limited application to specific problems.

Analysis of available methods results in six categories of activities:

- a) Legislative - enactment of laws authorizing or prohibiting activities and practices that affect public access to the shore.
- b) Judicial - affirmation and interpretation of legislative acts to improve access.
- c) Administrative - policies and procedures for government agencies to use in administering and enforcing legislation applicable within the coastal zone.
- d) Regulatory - local government ordinances and by-laws, and regulations of state, regional and local agencies with jurisdiction in the coastal zone.
- e) Market - government activities within the free market system of land development and use other than administrative or regulatory.
- f) Incentive - actions of government agencies that tend to induce voluntary improvements in public recreational access by private individuals and businesses.

The following paragraphs catalog common methods and techniques available under each of these categories.

Legislative Actions

The initiative for improved coastal access rests ultimately in the state legislatures and the United States Congress. Without laws authorizing, enabling, and restricting activities in the coastal zone, there would be no basis for the regulatory and administrative procedures that deal with the access issue directly. Unfortunately, philosophical differences between levels of government, and political procedures common to them all, have resulted in few substantial acts that address this issue.¹

One difficulty with legislative solutions is that they tend to follow a "shot-gun approach" of simple solutions to complex problems. A prime example is the National Open Beaches Bill introduced in the House of Representatives by Rep. Robert Eckhardt on September 19, 1973.² This bill would have guaranteed public access along the foreshore by declaring and affirming "that the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution."³

Rep. Eckhardt's bill raised a great deal of interest in the access issue, but would have had little real effect if it had been adopted.⁴ It ignored physiographic differences in the coast, did not deal with the problems of preemptive uses, and grossly underestimated the nature and extent of the economic component of the coastal access. Furthermore, it attacked a problem that does not exist in half of the coastal states, but is severe in the Northeast.⁵ While apparently intended to overcome discriminatory exclusion,

it would not have stopped any of the practices identified with the discrimination component in Section I of this report.

Similar legislation was introduced in Massachusetts the same year.⁶ This bill, however, addressed a specific problem in a specific manner. It would have allowed lateral access along the intertidal zone to pedestrians only during daylight hours.⁷ In Massachusetts, the Colonial Ordinance granted shoreline owners the land between mean high and low water. The state's Supreme Court ruled, however, in response to a legislative request relative to this bill, that granting walking rights across private land in this manner would amount to an unconstitutional taking of property without compensation.⁸ Beach access bills have been adopted in other coastal states, however, and this form of legislative action remains a practical option for improving coastal recreation access.

Access protection can also be legislated via shorefront protection acts, as Oregon's Ocean Shores Act.⁹ This act confirms public rights in coastal lands acquired through "dedication, prescription, grant or otherwise."¹⁰ It also protects the natural resources of the shoreline from destruction by man-caused activities, thereby retaining suitable beachfront for recreational use. Tidal and freshwater wetlands protection acts, which exert authority over designated environments may serve as access ways to adjacent shorelines.¹¹

Enabling legislation can be adopted increasing the ability of local governments to improve access, or giving access authority to regulatory agencies as a condition for granting permits for development in the coastal zone.¹²

Duesik recommends shifting authority over land use from local governments to regional, federal, and state levels, where access policies are likely to be less discriminatory.¹³ Special legislation creating regional land use authorities also shows great promise as a tool for improving public access to the shore. Probably the best example of such legislation is ^{Massachusetts'} Chapter 637 of the Acts of 1974, which created the Martha's Vineyard Commission, a regional planning agency with land use regulatory powers that supersede those of its constituent municipalities.¹⁴

Authorization and appropriation acts can address many of the specific access problems outlined in Section I of this paper. Most common is funding for public acquisition through open space preservation programs such as New Jersey's "Green Acres" acts or New York's Land and Water Conservation Fund.¹⁵ Funding can also be supplied to municipalities for acquisition of public access, with the condition that access not be limited to local residents. Many transportation improvements, from public transit to parking lots, can be authorized to improve access. States might also demand the right of first refusal for purchase on the open market of appropriate coastal land that is offered for sale.¹⁶

New York's state legislature has authorized coastal trail systems and urban cultural parks.¹⁷ Both could be effective, if sufficiently funded, in providing new recreational access close to urban centers where it is most needed. These models could readily be adopted by any coastal state.

Legislative actions to improve access are clearly state responsibilities, although the federal government has addressed the issue through the 1976

Many recent beach access disputes adjudicated involve the doctrines of prescription and dedication. The dedication doctrine was first applied to beaches by a Texas court in 1964.²² It was strongly reinforced by the California supreme court in Dietz v. King, and Gion v. City of Santa Cruz,²⁴ which recognized implied intent to dedicate after only five years of public use. While prescriptive use normally requires much longer periods of unimpeded public use, this doctrine is most useful in determining beach access rights. The California Court of Appeals recently applied the doctrines of prescription and dedication in City of Long Beach v. Daugherty,²⁵ where privately owned beachfront property that had been in continuous public use since 1922, and maintained by the city since 1924, had been dedicated as a permanent recreation easement.

The public trust doctrine also holds promise for greater judicial interpretation of public trusteeship to include recreational rights. Dating back to Roman law, this doctrine provides the basis for open beach laws now in effect in many coastal states. While the public trust doctrine has good historical and case law support, it also has two basic limitations: its protection may extend only to in-state residents, and it has traditionally been applied only to the wet-sand area of beaches.²⁶

The courts are being increasingly challenged to resolve the demarcation issue by defining the line between public and private ownership. Again, this issue must be adjudicated on a state-by-state basis, and often decisions apply only to the specific case at hand. In many states this line was established by charter or colonial ordinance, precluding a uniform national standard.

amendments to the Coastal Zone Management Act of 1972.¹⁸ Regulations applicable to this Section (proposed 15 CFR 923.23) set out specific requirements for a process to identify shorefront areas that are suitable for access and protection. This federal incentive may at least lead to some consistency in state policies toward coastal access, although it does not, by itself, guarantee additional public access.

Judicial Actions

Whatever legislative action is taken to increase public access to the shore must eventually be affirmed by the courts--a continuing and slow process that often leaves much uncertainty because of the often limited jurisdiction of each case. Ducsik points out that state court decisions apply only in the respective states where the cases were tried "...and even then the scope of some rulings has not always been clear."¹⁹ Most shore access decisions have relied on three common law doctrines, however: customary use, prescription, and dedication.

The ancient doctrine of custom was applied by the Oregon supreme court, in State ex rel. Thornton v.Hay.²⁰ This case found that the public had enjoyed recreational use of dry-sand areas of Oregon's beaches since the beginning of the state's history, and that this usage established recreational rights regardless of ownership in record.²¹ The customary usage doctrine had not been used in modern times in this country until the Oregon case because the country's history was not considered ancient enough to establish custom. With this barrier now broken, this doctrine may be applied more frequently in establishing public access rights.

A related issue appearing more often recently is whether coastal management acts constitute a taking or damaging of private property without just compensation. The Supreme Court of Washington (State), in State Department of Ecology v. Pacesetter Construction Company, Inc.,²⁷ decided in November 1977 that the proper test to be applied was the balancing of private loss against public gain. The court upheld a trial court decision that the construction of two waterfront houses would cause a greater loss to the neighborhood than the loss to one owner in restricting the use of his property.

Protection of established parklands and other access rights is a further function of the judicial system. This can also be done legislatively. In Massachusetts, for instance, land once designated for parkland cannot have a building of more than 500 square feet erected upon it without a special act of the state legislature.²⁸

Increasing judicial findings of public rights in private property has actually caused some loss of public access. Owners who had previously tolerated or allowed public use of their beaches now are asserting their property rights by blocking public access, thereby avoiding the risk of loss of their exclusive right by implied dedication.²⁹ On balance, the loss of access in this manner may be insignificant in light of gains in affirmed public rights, but this reaction to recent cases (particularly Gion) should be considered.

Administrative Actions

The most direct and observable effects on public recreational access to the shore come not from the legislatures or the courts, but from the many

government administrative agencies with jurisdiction in the coastal zone. The activities of these agencies, particularly at state and county levels, are bread-and-butter routine that lack the political impact of gubernatorial policy statements or landmark court decisions, but that directly and often significantly improve actual public access. These are the little decisions that, taken together, can amount to big improvements.

Administrative activities can be further classified into four categories: policy-setting, management, transportation and permitting. Policy-setting by administrative agencies over coastal land use has been primarily in response to requirements of the Coastal Zone Management Act. The 1972 act required designation of Areas of Particular Concern (APC) in the pattern of the American Law Institute's Model Land Development Code. The 1976 amendments address the access issue directly, requiring states to define the word "beach," identify suitable sites for public access, and set up a management program to carry out state access policies.³⁰

Management agencies are well-established in state governments, and many states have applied a "networking" procedure in fulfillment of the CZM Act requirements.³¹ Networking establishes procedures for the coordination of existing management agencies and programs to achieve the objectives and carry out the policies of the Coastal Zone Management Program. Public access can also be improved within the existing structure of agencies having jurisdiction over coastal recreation facilities. The key is to manage existing facilities for maximum use. This could include increasing the carrying capacities of existing sites by making them more efficient or more accessi-

ble during off-peak hours. Many public beaches are closed off-season although they are still suitable for some recreational activities such as surfing, fishing, or beachcombing.

Existing management can improve access in the design and construction of new coastal recreation facilities by being more sensitive to natural coastal processes. Too often beaches are enclosed by jetties, bulkheads, and other "protective" works that prohibit the natural seasonal shifting of sand, sediment and dunes. The beachfront then erodes, but does not accrete, and the resulting loss of area reduces capacity for public use.³² The development or renewal of underutilized or decayed waterfront areas is suggested by Connecticut's Coastal Area Management program and Virginia's Coastal Management Plan. In Connecticut, many urban waterfronts have fallen into disrepair and could be rejuvenated for recreational use close to population centers.³³ Virginia has many abandoned or underutilized military sites along its shore that could serve to dramatically increase public access if developed for recreational use.³⁴

Transportation decisions are regularly made on an administrative level that impede public access to the shore. Coordination of state transportation departments with coastal management agencies could reverse past practices and result in increased recreational access with no diminution of traffic efficiency. The most effective improvement might result from locating new highways shoreward of the coastal zone instead of along the immediate waterfront as commonly practiced. Shore access roads could be relocated to better serve recreation sites and widened to increase capacity. Direction signs to public recreation areas could be improved; parking areas could be

increased, possibly using turf instead of asphalt for peak period parking; and access points for boat launching or lateral access could be provided at bridges crossing coastal inlets.³⁵

Alternative transportation modes can be encouraged administratively to increase the availability of coastal recreation facilities to persons without automobiles. Shuttle bus service, bicycle and pedestrian trails, and ferry runs to islands and remote beaches are being considered in New Jersey, New York and Massachusetts. Only when the trip becomes part of the recreational experience, however, and not a drudgery to be endured, will alternatives to the automobile become common.

The most rapidly evolving administrative technique for coastal area management is review or issuance of development permits by state or regional authorities. This technique holds great promise for improving public recreational access to the shore, and is being used as such in the states that have adopted coastal permit regulations. State or regional review of all coastal development for access potential can also serve to reinforce local zoning, wetlands protection, or other codes that have the authority to control inappropriate uses of the shore. New Jersey's Department of Environmental Protection has suggested that coastal permitting authorities favor private recreational development over other private development along the coast.³⁶

Regulatory Actions

While the administrative activities described above are primarily functions of state and regional government agencies, regulatory activities affecting coastal recreation access are primarily local government functions.

Municipal governments, with rare exceptions, have the sole authority to regulate the use and development of land, and as a result have greater legal power to improve public access than do the states. Local regulations generally fall under the headings of zoning ordinances, subdivision and design regulations, environmental protection laws, and other codes. Land use zoning, by governing the nature and density of development along the coast, can be used to improve public access to the shore. Through zoning, inappropriate uses can be prohibited, as can the displacement of public uses. The extent to which zoning can limit coastal development to public uses has not been widely tested, but one classic case, McCarthy v. City of Manhattan Beach, upheld a city ordinance that zoned property solely for beach recreation.³⁷ The history and implications of this case are well-reported by Ducsik.³⁸

Overlying zoning districts to protect significant natural features regardless of the nature of the underlying use district have become common during the last decade.³⁹ Overlying zones are especially well-suited to flood plain or wetland protection, and other environmentally sensitive areas such as steep slopes, tidal flats, and barrier beaches. This type of zoning can improve public access by prohibiting the construction of buildings, fences, or other unsuitable structures⁴⁰ within the designated zones.

Dimensional requirements under zoning ordinances can also influence access to the shore, especially visual access, by prohibiting the blocking of sight lines from public highways.⁴¹ Careful application of cluster development and planned unit development provisions can result in permanently

protected view corridors while allowing reasonable development of water-front land. Where the purpose of zoning is to prevent development that precludes future public use of the land, setback regulations that require minimum distances between the high water line and any permanent structures can be used.⁴² Such requirements are essentially the same as highway setbacks, which are universally accepted.

Local planning boards, operating under typical state enabling legislation, may require the reservation (and in some states, dedication) of land for public use, including recreation, as a condition of approval of subdivision plats. The general rationale for such an exaction is that the public lands needed by the population of the proposed development should be provided by the developer. While this method is used by several coastal states to acquire access rights of way and view easements, it may not be reasonable to require dedication of the shoreline itself.⁴³ The greatest advantage to acquiring beach access through subdivision exaction is that it is easy and inexpensive; the major disadvantage is that it can be applied only to land about to be developed.⁴⁴

Other design standards may be adopted by municipalities to promote visual access to the shore through the prevention of screening by intensive shoreline development. Such standards must be reasonable and should require open areas proportional to width and depth of lots.⁴⁵

Environmental protection regulations serve three purposes for coastal recreational access. They can preserve sensitive environmental areas from development encroachment that interferes with natural processes and

thereby destroys or impairs the resource. They can limit use of coastal resources to non-intensive recreation. And they can keep potential recreation areas open until such areas can be acquired for public use. Conservation restrictions can help to maintain visual access to the shore by limiting development in environmentally sensitive areas. Since these areas are often the most scenic also, this form of regulation is particularly appropriate.

Unlike most regulatory mechanisms, environmental controls are often best applied statewide, avoiding the tendency of erratic enforcement at local levels. Direct controls include regulation of the use of beach buggies and other vehicles that can destroy a beach's self-protective capacity by increasing erosion of dunes and injuring protective vegetation. Experiments conducted at the Cape Cod National Seashore show that the intertidal salt marshes and sand flats are the most severely affected by vehicles because these areas harbor the most complex ecosystems.⁴⁶ Use of beaches by vehicles actually decreases the physical supply of recreation area available by increasing erosion. Such use also poses a safety hazard to persons using the foreshore for other recreational purposes; this problem was noted at several public meetings conducted by the Texas coastal management office.⁴⁷

Other environmental regulations that can influence the availability of waterfront land for recreation include pollution control to assure safe water quality, wetlands protection and other preservation acts, and regulations on the use and modification of beaches.

Market Actions

The most direct and effective way for government to increase the supply of coastal recreation to those persons who do not have access to the shore is to buy additional public lands. Acquisition is costly, however, and coastal access traditionally is not valued high enough among government spending priorities to compete with other demands on the budget.⁴⁸ Two options are open to state and local governments for increasing coastal access through the market mechanism: appropriate sufficient funds to take or purchase necessary waterfront land, or acquire an interest in coastal land through other market means.

Given the desire and the financial ability to acquire shorefront property, state and local governments hold a definite advantage over the private market in their ability to acquire property for public use through eminent domain condemnation. While forced taking is rarely less expensive than open market purchase, it allows acquisition of the most suitable sites for the intended purpose. Recent judicial decisions, furthermore, have softened the traditional standard of public necessity to allow condemnation of land prior to actual need. Florida's District Court of Appeals, for example, recently held that the city of St. Petersburg need only show a "reasonable necessity" for waterfront property the city condemned for future public use.⁴⁹

Other means of land acquisition are available, although not often used by general purpose governments. These include installment purchase, purchase-leaseback or purchase-resale, and life tenancy agreements.

Installment purchase is useful to landowners who may wish to spread the proceeds of sale over a period of years for tax purposes. If the government agency purchasing the land is prohibited from entering into an installment agreement, the land could be sold to a land-trust until fully transferred in fee title, then resold to the government in a single transaction.

Purchase-leaseback is an appropriate tool for acquiring land in advance of actual need. Under this system, the government becomes owner of the land, but the seller retains use of it through a low-cost or no-cost lease agreement until the land is needed by the public. Purchase-leaseback assures the availability of the land when it is needed and lowers the cost of acquisition. Purchase-resale is similar, but gains the government only certain restrictions that may be included in the resale agreement. Direct purchase of partial rights, to be discussed in Section IV, is probably more desirable.

Life-tenancy is also similar to purchase-leaseback, but guarantees use of all or part of the land to the seller for his lifetime. As with installment purchase agreements, this method offers tax advantages to the seller. It also allows the landholder to cash in his capital interest in the property, avoid most property tax, and still retain the enjoyment of his land. Funding for acquisition and development of coastal recreation land is available, in part, from the federal government. The Bureau of Outdoor Recreation's Land and Water Conservation Fund will reimburse up to 50% of cost to state and local governments.⁵⁰ Limitations on this program are few: it is a reimbursement program, so the initial cost must be borne entirely by the

acquiring agency; all land acquired or developed under the program must be open to all persons; and the acquisition and development must be in accordance with a comprehensive recreation and open space plan. Priority is given to projects in urban areas.

Similar programs have been enacted in several states, for use either in conjunction with the federal program, such as in Massachusetts,⁵¹ or as New Jersey's Green Acres plan. Few states have been aggressive in acquiring beachfront land, however, an indication that cost is not the primary deterrent to expanding the public supply of waterfront recreation. The federal government, on the other hand, has acquired many miles of shoreline for public use and preservation through the Interior Department's National Seashore and National Lakeshore programs. Market acquisition of coastal land may eventually become solely the duty of the federal government if present trends continue.

Incentive Programs

Governmental incentives for private landowners, developers, and lower levels of government to increase the availability of public access to coastal recreation are suggested in several coastal management plans. Incentives to private developers include tax reductions or deferments, zoning concessions, or technical assistance in return for increased public access. Incentives to local government include funding and technical assistance.

Reduced assessments or direct abatements of property taxes are commonly granted to farmers, foresters, and other agricultural land users in exchange for development restrictions that keep land open and available for

agriculture. Similar tax incentives could be offered to coastal land owners in exchange for public access over their property. Such an incentive might not be as readily accepted by the waterfront property owner as by the farmer, however, because of the disparate economic status of the two groups. Waterfront owners traditionally have paid premium prices for the privilege of living on the shore: a property tax reduction would not outweigh that premium for most private owners. This incentive may be effective with beach clubs and other private associations that have been increasingly burdened by property taxes as waterfront land values have risen faster than land values generally.

Duscik reports on a plan for the Lake Tahoe region that would involve government purchase of private land for public use through the application of a four percent annual income tax credit over a 25 year period. During the tax credit period, the land would be privately held, but open to the public; at the end of the period, ownership would transfer to the government.⁵² Duscik also warns that the use of the tax power as a social policy tool detracts from its effectiveness as a revenue source.⁵³

The Virginia Coastal Zone Management Program recommends, in addition to tax incentives, that municipalities offer contractual agreements to developers for zoning concessions in return for public access.⁵⁴ While contract zoning per se has not been favored by the courts, a point system written into a zoning ordinance as part of a special permit provision might effectively produce the same result. The Virginia plan also ^{refers} to "other measures attached to the issuance of building permits,"⁵⁵ but does not elaborate on what form those measures should take.

One incentive that is recommended by several CZM programs is technical assistance to municipalities and private developers in return for public access. No details are presented in the plans as to the extent of assistance or its form, and no estimate is made of the potential effectiveness of this idea. Engineering and design costs are reimbursed under the BOR program, but the access requirement remains a major deterrent to use of this program by local governments.

The record of incentive programs to acquire public access is thin, being limited almost entirely to permits granted by state agencies for coastal development. Whether access exactions for development approvals should be called incentives is questionable. Incentives may have limited use in certain special applications, but they are not likely to be as useful to increasing public access as are the disincentives to not providing access that can be carried by law or condemnation.

Summary

It is evident that state and local governments have the authority and the ability to increase coastal recreation access. No single policy, program, or activity will substantially improve the access problem, however. What is needed is a carefully orchestrated coordination of programs, administrative agencies, and policies to attack each component problem of the access issue with the appropriate tool or means to solve that problem.

NOTES TO SECTION II

1. Ducsik, Dennis W., Shoreline for the Public, The MIT Press, 1974, p. 211.
2. ibid, Appendix B.
3. H.R. 10394, Sec. 202, (93rd Cong. 1st Session, 1973).
4. op. cit., Ducsik, P. 133.
5. Seventeen of 28 coastal states responding to a questionnaire reported in Section III of this report indicated that lateral access along the foreshore is guaranteed by law.
6. S.B. No. 1924 (August, 1973) Commonwealth of Massachusetts.
7. New England Law Institute, Battle for Land, Boston, 1974, p. 18.
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9. ORS 390.605 (1967)
10. Oregon Coastal Management Program. p. 256.
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16. ibid., p. 10.
17. ibid., pp. 6,7,10,11.
18. Section 305 (b) (7) as amended.
19. op. cit. Ducsik, p. 122.
20. 462 P. 2d 671 (1969).
21. McKeon, Steve A., "Public Access to Beaches," Stanford Law Review, Vol. 22, February 1970, p. 583.
22. Seaway Co. v. Attorney General. 375 S.W. 2d 923.
23. 465 P. 2d 50.
24. 294 A. 2d 49.
25. 142 Cal. Rptr. 593.
26. "Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach," 7 Suffolk U.L. Rev. 936 (1973).
27. 571 P. 2d 196.
28. Massachusetts General Laws, Chapter 45, Section 7.
29. "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 N.Y.U.L. Rev. 369 (1973). p. 374.
30. op. cit., Sec 305 (b) (7).
31. Massachusetts and Texas have established the most comprehensive and detailed networking systems.
32. This phenomenon is probably most apparent in Cape May, New Jersey, where the beach was once up to $\frac{1}{2}$ -mile wide, but has completely eroded since the construction of the Cold Spring Inlet jetties in 1908.
33. Connecticut Coastal Area Management Program, Discussion Papers: Options and Recommendations, Planning Report No. 20, March 10, 1977, p. 3-3.
34. Virginia Department of Commerce and Resources, Proposals for Coastal Resources Management in Virginia, Draft, September 1977, p. 82.
35. ibid.

36. New Jersey Department of Environmental Protection, Alternatives for the Coast 1976, p. 46.
37. 264 P. 2d 932 (1953).
38. op. cit., Ducsik, p. 175.
39. American Society of Planning Officials, Performance Controls for Sensitive Lands. Planning Advisory Service.
40. Walkways, piers, and boathouses or bathhouses are commonly allowed within flood plain or coastal wetlands districts.
41. Crandall, Tom, "Shoreline Development Controls and Public Access to the Ocean's Edge," Coastal Zone Management Journal, Vol. 1, No. 4, 1974. p. 451.
42. op. cit. Ducsik, p. 185.
43. op. cit., Ducsik, p. 190.
44. op. cit., McKeon, p. 572.
45. op. cit., Crandall. See also Connecticut Report No. 20, p. 3-3.
46. Gadfrey, Paul J., "Recreational Impact on Shorelines Research and Management," Coastal Recreation Resources in an Urbanizing Environment, Cooperative Extension Service, Amherst, Mass., 1977. p. 114.
47. Summary, Beach Access Meetings, Texas General Land Office, October 1977.
48. op. cit., Ducsik, Chapter 4.
49. City of St. Petersburg v. Vinoy Park Hotel Company, 352 So. 2d 149 (1977).
50. Public Law 88-578.
51. Massachusetts General Laws, Chapter 132A, Section 11.
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MASTERS THESIS PROJECT

SECTION III

REVIEW AND EVALUATION OF STATE RESPONSES TO
THE COASTAL RECREATION ACCESS ISSUE

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May 3, 1978

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SECTION III: REVIEW AND EVALUATION OF STATE RESPONSES TO THE
COASTAL RECREATION ACCESS ISSUE

Response to the issue of coastal recreation access by state and local governments has been mixed, ranging from outright denials of the issue's existence to detailed programs for its resolution. With rare exception, however, state policies toward coastal access lack the innovation and complexity of approach that will be required to redirect differences in supply of and demand for waterfront recreational resources.

Section 305 (b) (7) of the Coastal Zone Management Act of 1972, as amended in 1976, requires that state management programs include policies, "...and a planning process, for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value." Regulations applicable to this Section (proposed 15 CFR 923.25) set out specific requirements for a process to identify shorefront areas that are suitable for access and protection. The process must include, among other requirements, the following:¹

- a. A procedure for assessing public areas requiring access or protection.
- b. A definition of the term "beach" and an identification of public areas meeting the definition.
- c. Articulation of state policies pertaining to shorefront access or protection.
- d. A method for designating shorefront areas, either as a class or site--specifically, as Areas of Particular Concern (APC)

or as Areas for Preservation or Restoration (APR), if it is appropriate to do so.

- e. A mechanism for continuing refinement and implementation of necessary management techniques, if appropriate.
- f. Identification of funding programs and other techniques that can be used to meet management needs.

These regulations have forced the thirty coastal states to amend their coastal management programs. How the states have responded to the challenge is the subject of this section of this paper. In reviewing CZM programs, policy statements, and other publications related to the access issue, several common thoughts were evident: First, recreational access is a universal problem in all coastal states, although the nature and extent of the problem differs from state to state. Differences result from the physical properties of the shoreline, location and density of population, legal and political constraints, and ownership patterns, among other reasons. There also appears to be a problem with official perceptions of the issue, its extent and relative seriousness.

Second, attempts by the states to address the access issue fall into a handful of general categories that can be readily identified. Techniques range from open market purchase to local zoning regulation, with most emphasis placed on state issuance or review of coastal development permits. And finally, it is evident that most coastal access policies have evolved from initiatives within the states, and have not been generated as a response to the requirement of the CZM Act.

Study Methodology

To determine how the states have responded to the charge of the CZM Act, the Coastal Zone Management Program directors in 28 of the 30 coastal states were asked for copies of their state's Coastal Zone Management Plan and any other material pertinent to the issue of access to the shore. No request was made of Alaska or Hawaii because the access problems and issues in these states are unique and not comparable to the problems faced by the other coastal states.²

The material received, while voluminous, was not satisfactory for several reasons: First, only five states had completed their Coastal Zone Management Plans. Several other states sent nearly final, but not approved, drafts; many states sent only draft policy statements, preliminary study papers or related reports that were not part of the CZM program. Comparison of such incomparable material was clearly impossible. Second, it became apparent that some states were deliberately withholding material because of the "sensitive nature" or "political volatility" of the access issue.³ And finally, with two exceptions, the responses only reported what the states intended to do or proposed to do, and not what had been or was being done to correct inequities in coastal recreation access.

To supplement the CZM reports, a questionnaire was drafted and sent to the state CZM offices. All states responded except Michigan and Minnesota. Massachusetts, Rhode Island, and Connecticut were surveyed by telephone. The questionnaire was kept brief, simple and straightforward to encourage replies, but it asked six questions that had not been answered

by the earlier research, and that were essential to completion of the study. The first question asked if permits for coastal development are issued or reviewed by a state agency, and if yes, what agency is responsible. Not asked was whether the permitting system included provisions for increasing public access to the shore. This question would likely have generated the same incomparability that arose in the earlier data gathering.

Question two asked if public access along the shoreline, below high water, is guaranteed by law, and if yes by what statute or authority. Several states offered additional comments and supporting material with their answers to this one. The third question asked if the state has a statewide program for acquisition of coastal recreation land, and if yes what the ^{problem} ~~problem~~ is. The results of these three questions will be reported in more detail in the next sub-section.

On the question of access as an issue of concern, replies were more subjective and reflected differences in perception of the access issue. Delaware and the four Gulf Coast states replied that public access to beaches and other coastal recreation facilities is not an issue of concern. Obviously it is not an issue to state policy-makers, but it may be an issue to those persons who cannot travel to a suitable beach or who cannot gain admission to the beach once arrived. Six states, Connecticut, New York, Pennsylvania, Indiana, North Carolina and South Carolina, replied that coastal recreation access is a severe problem. It is difficult to see objectively how North Carolina, with its relatively low population density and extensive barrier beaches can have a more severe coastal access problem than Illinois, with its intensive developed shoreline on Lake Michigan.

COASTAL ACCESS QUESTIONNAIRE

1. Are permits for coastal development issued or reviewed by a state agency?

No _____ Yes, issued _____ Yes, reviewed _____

If yes, what agency is responsible for permits? _____

2. Is public access to the shoreline, below the high water line, guaranteed by law?

No _____ Yes _____ To other line (specify) _____

If yes, please cite statute or other authority: _____

3. Is there a statewide program for acquisition of coastal recreation land?

No _____ Yes, SCORP _____ Yes, other _____

4. Is public access to beaches and other coastal recreation facilities an issue of concern?

No _____ Only near metropolitan areas _____

Generally a problem, though minor _____ Severe problem _____

5. What is the total length of coastline in your state?

Saltwater _____ miles Great Lakes _____ miles

6. Who may I call for more information?

Name _____ Number _____ ext. _____

Comments:

The definition of coastline was also a problem. Question five asked for total length of coastline in miles. Louisiana reported 12,000 miles, while Mississippi admitted to only 69. New York was very precise at 2059.61 miles, but did not mention if this was at high or low tide. Maine was most honest, with an estimate of 2500 to 4000 miles.

Open Beach Laws

Only seven of the 28 coastal states surveyed guarantee by law that the public has a right of access along the foreshore between high and low water. Ten more have a reasonable assurance of lateral access under common law, and four states have no rights or extremely limited rights, in privately owned wet sand areas. The Great Lakes states cannot reasonably be considered in this evaluation because of the absence of tidal shore. This does not mean that conflicts do not arise from seasonal variations in water level. In Michigan, for instance, riparian rights normally extend to the water's edge, but the public trust is considered to extend from the high water mark.⁴ In *Collins v. Gerhardt*, a 1927 Michigan state court decision, the public right of fishing was recognized in wet sands and navigable waters, based upon the public trust doctrine.⁵

Alabama, Georgia, Virginia and Massachusetts do not guarantee public rights along the foreshore except where riparian or littoral rights are publicly owned. Common law rights to the normal high water line are generally recognized in Washington, North Carolina, Maryland, Delaware, New Jersey, Maine, Connecticut, Rhode Island, Mississippi and New Hampshire. Exceptions exist in all of these states where riparian or littoral rights were sold to private interests by the state.

States with legislated open beach laws include California, Oregon, Texas, Louisiana, Florida, South Carolina, and (once again, with exceptions) New York. The California Coastal Act of 1976 affirmed public rights to the foreshore, but these rights had already been well established by several court cases. In *Borax Consolidated, Ltd. v. City of Los Angeles*, the federal court concluded that determination of rights and interests in the wet-sand area is a matter of state law.⁶ The state court, in *Marks v. Whitney*, held that the plaintiff's wet-sand ownership is subject to a reserved public trust easement;⁷ and in *People v. William Kent Estate*, adopted the mean high tide line as the boundary between public and private ownership.⁸

Oregon's famous "Beach Bill," the Oregon Ocean Shores Act of 1967, specifies that the entire ocean shore, from low water to the line of vegetation, be for public use, recreation, and enjoyment.⁹ Texas has the Texas Open Beaches Act,¹⁰ although the Texas Court of Appeals declared in 1917 that the public has a coequal right (with the upland owner) to use the wet-sand area for reasonable purposes.¹¹ Louisiana foreshore is open by Article 450-452, Louisiana Revised Statutes.

Chapter 253, Florida statutes guarantees public access below the high water line. This law was upheld by the state court, in *Adams v. Elliott*, which limited use of wet-sand areas in a manner which does not obstruct reasonable public use, in this case, as a public highway.¹² Two years later, when a car struck a bather on the beach, the court held that bathing and recreation were the primary uses of Florida's wet-sand area,

and that these uses have the "right-of-way" over use of the shore as a highway.¹³

South Carolina assures lateral access through Sections 1-11-10 through 160 of the 1976 Code of Laws. New York State claims ownership under Section 7-A of State Law, to most of the state's foreshore except where ownership has been legally conveyed by colonial grants or other means. The towns of Southampton, Southold, Easthampton, Huntington and Brookhaven, and one individual, a Colonel Richard Smith, received colonial grants to underwater property, but interpretation of these grants has been extensively litigated.¹⁴

The courts have also been called on to interpret the public trust and common law doctrine in other states. Washington's State Supreme Court ruled, in *Hughs v. State*, that the dividing line between public and private land is the vegetation line as it stood at the time of statehood.¹⁵ The federal court reversed this decision, in *Hughs v. Washington*,¹⁶ ruling that the mean high tide line determines the exact boundary, and that natural accretion of the shore accrues to the private owner.¹⁷

In *Martin v. Waddell*, the federal court upheld public trust doctrine in New Jersey Tidal flats, ruling that it will not be presumed that any part of the public domain passes to private ownership unless "clear and especial words" are used to denote such an intention.¹⁸ Two federal cases, in 1845 and 1894, established the rights to wet-sand areas in new states and territories. In *Pollard's Lessee v. Hagan*¹⁹ the court

held that when new states are admitted to the Union, the title to the wet-sands therein becomes vested in the state. In *Shively v. Bowlby*²⁰ the court ruled that the ownership of wet-sand areas in newly acquired territories remained in the United States until states were formed in those territories.

The high tide line was established as the public/private boundary line in Mississippi by a state court in 1928 (*Money v. Wood*),²¹ and in Maryland by *Van Ruymbeke v. Patapsco Industrial Park*,²² in 1971. The same line was established in North Carolina by *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*.²³ Much earlier (in 1903) the North Carolina Supreme Court, in *Shepard's Point Land Co. v. Atlantic Hotel*,²⁴ adopted the public trust doctrine for the wet-sand area, declaring that the state holds title to this area. In Connecticut, the high tide line was recognized in *Bloom v. State Water Resources Comm'n*,²⁵ but the issue in Connecticut is extremely complex and still in litigation.²⁶

Rhode Island guarantees public access in Article 17 of the State Constitution.²⁷ There are exceptions, however, where public rights have been specifically conveyed. Washington State also has a constitutional guarantee, but as noted above, the courts have not left a clear interpretation of public rights under that constitutional provision.

Mandatory Coastal Land Use Control

In the late 1960's and early 1970's, shortly before the federal Coastal Zone Management Act was passed, several states took the initiative to

at least oversee development within their coastal zones. The thrust of these initiatives was more toward planning than toward control. Wisconsin's Water Resources Act, passed in 1966, established a Coastal Coordinating and Advisory Council of 25 members, appointed by the Governor, with additional representatives of state and local agencies. Under this law the state mandated specific local controls over a narrow band of shoreline, and set up a procedure for state review of local plans and ordinances affecting the coastal zone.²⁸

Minnesota established a similar program in 1969 for unincorporated areas, and expanded it in 1973 to cover all of the state's shoreline. In 1970 Michigan enacted its Shorelands Protection and Management Act. This law established ten regional planning agencies to prepare a plan for Michigan's shorelands, but local ordinances did not have to be based on the plan.²⁹

The State of Maine enacted the Mandatory Shoreline Zoning Act in 1971. By the time the federal CZM Act was passed 88 coastal Maine townships had zoning, and 50 more were added by 1975. A 10-member state Board of Environmental Protection was established to set up guidelines for local coastal plans.³⁰

The California Coastal Act of 1976 created the California Coastal Commission and drastically revised the coastal zone management program in that state. The 1976 Act shifted planning and permit authority back to local government, but requires that each local government within the coastal

zone prepare a Local Coastal Program under guidelines promulgated by the state. Development of any kind within the coastal zone may be permitted only if it is in accordance with the local plan.³¹

A model format for Local Coastal Programs suggests how issues should be identified and addressed. Highest of 14 policy groups is shoreline access; recreation and visitor-serving facilities is second. Under the shoreline access policy, development is not to interfere with public rights of access, and is, wherever possible, to provide for dedication of accessways.

Washington State also requires local control of coastal development under the Shoreline Management Act of 1971. The state sets standards and criteria for local regulations, and requires that each of the local communities with shorelines prepare a master shoreline program. Among the seven elements that must be included in every program is a recreation element and a public access element. Washington's program is enforced through a permitting procedure (to be described later in this Section) and administered by the state Department of Ecology.³²

The Washington plan has been incorporated into the state's Coastal Zone Management Program, the first such program approved by the federal government. It retains the tradition of local authority over land use, yet offers the benefits of statewide uniformity and efficiency. But the Washington plan, and the other mandatory coastal zoning plans may not carry the clout needed to broaden the availability of coastal recreation access. Local governments, normally reluctant to change their traditional

ways of doing business, often oppose mandated changes only because they are required by the state. Three years after Maine's Shoreland Zoning Act was adopted, the state had imposed shoreland zoning on about half of the coastal communities; the great majority of local governments chose to ignore the first deadline.³³

State Advisory Boards

At least ten coastal states have advisory boards or committees to set policy for management of the coastal zone. Membership typically includes local government elected officials or staff members in addition to representatives of various citizen interests. Wisconsin has its Coastal Coordinating and Advisory Council. North Carolina has a 15-member Coastal Resources Council; twelve members must be selected from a list of nominees submitted by coastal cities and counties, and each must represent a specific interest or have a special knowledge of coastal affairs.³⁴ Maine has a Governor's Advisory Committee on Coastal Development and Conservation; Indiana has a Technical Advisory Committee and an Elected Officials Committee; and Massachusetts has a Governor's Task Force on Coastal Resources. The Massachusetts Task Force, an ad hoc committee to set policy for development of the CZM plan, is being replaced by a permanent advisory committee similar to North Carolina's.³⁵

Three states, in addition to Indiana, have advisory committees comprised entirely of local government officials. Illinois has the Lake Michigan Shoreline Advisory Committee; Oregon has a local officials advisory committee; and Pennsylvania has a central steering committee.

Illinois' committee is comprised of representatives from each of 14 shoreline municipalities and Lake County. Ex Officio members represent special districts, military bases, and the Illinois Department of Conservation. Coordination and staff services are provided by the Northwest Illinois Planning Commission.³⁶

State Permitting

All of the saltwater coast states except Alabama and Virginia either issue permits or review locally issued permits for certain types of coastal development. Through this permitting procedure many of the states either informally request or formally require the provision of public access whenever it is appropriate.

The earliest types of permits required by states for coastal development were usually for dredge and fill. The most common types of permits are those covering alteration of coastal wetlands, specifically barrier beaches, tidal flats, sand dunes, salt marsh, and freshwater wetlands within the coastal zone. More recently, states have begun to require permits for structures within the coastal zone.

Administration of state permits is not at all uniform. In Oregon, coastal development permits are issued by the Highway Division of the Department of Transportation; in Mississippi by the Department of Marine Resources, and in New Hampshire by a State Special Board. In Florida, Georgia, Maryland, Delaware, and Wisconsin, the Department of Natural Resources issues permits. It is not uncommon for multiple

permits to be required from many state agencies before work can be started along the coast. To coordinate multiple-permit requirements under their Coastal Zone Management programs, several states, including Texas, North Carolina, Massachusetts, Maine, and Washington have established "networking" procedures whereby the various permitting authorities agree to incorporate CZM policies in their review requirements.³⁷

Connecticut has a relatively efficient system for coastal permitting within the traditional structure of state government. Permits for coastal alterations or development are required by many agencies, but all are administered by the Department of Environmental Protection. Permits for work within tidal wetlands and inland wetlands that are in the coastal zone may be issued by local governments if the local authorities choose to accept that authority, otherwise they are issued by the state. Permits for coastal structures have been required in Connecticut since 1939, under legislation enacted in response to the 1938 hurricane, which extensively damaged the state's shoreline development.

Although Connecticut's permitting procedure does not formally require public access, the present Director of Water Resources has established informal policy to request access where suitable.³⁸

New Jersey adopted a Coastal Area Facilities Review Act (CAFRA) in 1973 to control coastal development that would have a significant impact on the shore. The impetus for this legislation arose from problems the state had experienced with a nuclear power plant built in a sensitive environment near Toms River on the Atlantic coast, and proposals to

build offshore nuclear power plants in the Atlantic ocean. CAFRA requires that the Department of Environmental Protection take planning and regulating actions that would preserve the coastal environment without banning needed development.³⁹

The Act covers all industrial, transportation, utilities, and energy facilities, and includes residential projects of 25 units or more. After a project has met all local zoning, subdivision and other requirements, it is reviewed by DEP. The Department may approve, disapprove, or apply conditions to a project approved by local authorities, but may not approve any project that has been disapproved locally.

Although recreational access is not specifically noted in the CAFRA regulations, it clearly fits within one of the four basic policies governing the administration of the ACT: "Protect the health, safety and welfare of the people who reside, work and visit in the coastal zone."⁴⁰ Access policy is further defined in the draft CZM program: "DEP-OCZM will continue to support and, where feasible, initiate efforts to promote access to beaches and other waterfront areas."⁴¹ Note that New Jersey also has a legislative Beach Access Study Commission that has instituted experimental beach shuttle service to Island Beach State Park.

Special Coastal Authority

The coastal management procedure with the most authority and most potential for efficiency is establishment of a special agency for administration of all coastal development. Only two states, South Carolina and

Rhode Island, now have such agencies. Organization, authority, and impact differ between them, however.

The South Carolina Coastal Council is similar to the California Coastal Commission, but has extensive permitting power over coastal development. Unlike the California commission, which relies on local government for adoption and enforcement of development standards, the South Carolina council has authority at the state level to permit coastal development. Beach access is included in the Council's Interim Rules and Regulations. Section 15 specifies general considerations to be followed in determining whether a permit application should be approved or denied. Among these are "the extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources."⁴²

Rhode Island, the only northeastern state with abundant beach capacity for its population,⁴³ has one of the most authoritative programs for coastal management. Despite the apparent lack of an access problem, Rhode Island has identified impediments to access and recommended policies and activities to solve them. In 1971, the state legislature created a Coastal Resources Management Council, charged with full authority for management of the state's coastal resources. The Council consists of 17 members appointed by the Governor, the Lieutenant Governor and the Speaker of the House, and must include at least four local officials representing communities of various sizes.⁴⁴

Among the goals the Council pursues in managing the coastal region, one is to "protect and promote public access to the shore and provide high quality recreational opportunities to all who come to the Rhode Island Shore."⁴⁵ In reviewing permit applications, the Council is to give high priority to public recreational use of and access to the shore and low priority to activities detrimental to such use. If the Council finds that there will be "significant interference with or damage to recreation use or value (it) shall prohibit or require appropriate modification of the proposal in question."⁴⁶

Acquisition Programs

It is universally agreed that the most effective way to improve coastal recreation access is to increase the supply of suitable coastline by acquiring waterfront property. The federal government has provided an incentive to this end by allocating funds to states and their municipalities for acquisition of land and construction of facilities under the Bureau of Outdoor Recreation's (BOR) Land and Water Conservation Fund.⁴⁷ Despite this incentive, only 16 of the 28 coastal states surveyed for this project report that they have prepared Statewide Comprehensive Outdoor Recreation Programs (SCORP) and participate in the BOR program. Seven states, Louisiana, Mississippi, Alabama, North Carolina, Pennsylvania, Indiana and Illinois, reported no acquisition program for coastal recreation. California, Washington, Florida, New Jersey, New York, Rhode Island, Massachusetts, Ohio and Michigan have other programs for land acquisition in lieu of or in addition to the BOR program.

Acquisition of coastal land continues to be an expensive and difficult process. Few states have active programs for acquisition although most recommend public acquisition in their CZM programs and draft policies. The State of Washington has one of the most active and well-funded acquisition programs. It is administered by an Interagency Committee for Outdoor Recreation (IAC) created in 1964 by the Marine Recreation Land Act (RCW Chapter 43.99). The IAC places special emphasis on the acquisition of shorelands in urbanized areas, and has "given an extremely high priority to the acquisition of saltwater shoreland, particularly emphasizing access to public beaches."⁴⁸

Innovative Responses

Although, as we have seen, several states have set up strong coastal management programs, the primary emphasis of these programs has been environmental protection or development regulation, or a combination of both. New York and Connecticut, which have severe access problems, have not yet established policies or implementation programs for improving public access to the shore. Washington, South Carolina, New Jersey and Rhode Island have good access policies and strong programs to back them, but these states also have abundant sandy beach areas for their populations. Massachusetts has a very weak coastal zone management program based on "networking" existing agencies, but the Massachusetts program is the only one yet adopted to consider the access issue as a multi-faceted problem and to specifically address each aspect of the issue with a realistic policy recommendation.

The Massachusetts Coastal Zone Management Program clearly has the most aggressive set of policies on recreational access of all the coastal states. Primary emphasis of the recreation section is on supply and demand by region, with specific quantification of projected needs. The program recommends acquisition of land as the best solution to the access problem, but recognizes the problem of cost. Further complicating the access issue, most of the state's coastal recreation areas are far removed from urban centers. While the shoreline as a whole is deficient in recreation facilities, the greatest deficiency, according to the CZM plan, is in transportation to the shore.⁴⁹

Overall policy is stated concisely:

"Coastal Zone Management's primary concern is to increase and enhance public use of the Massachusetts shoreline while improving existing facilities and minimizing future conflicts, over-utilization and environmental impacts. Our plan is to improve transportation and access; to acquire new sites in recreation poor areas; to expand suitable existing sites through small acquisitions or encouraging multiple uses; and to improve maintenance."⁵⁰

Seven specific policies elaborate this statement. Each of the seven includes actions to be taken by CZM to assure that policy is carried out, and a list of agencies with their authority and roles in policy implementation.

The seven policies (numbered 21 through 27 in the plan) are as follows:

Policy (21) "Improve public access to coastal recreation facilities, and alleviate auto traffic and parking problems through improvements in public transportation."⁵¹

Policy (22) "Link existing coastal recreation sites to each other or to nearby coastal inland facilities via trails for bicyclists, hikers, and equestrians, and via rivers for boaters."⁵²

- Policy (23) "Increase capacity of existing recreation areas by facilitating the multiple use of the site and by improving management, maintenance and public support facilities. Resolve conflicting uses whenever possible through improved management rather than through exclusion of uses."⁵³
- Policy (24) "Provide technical assistance to developers of private recreational facilities and sites that increase public access to the shoreline."⁵⁴
- Policy (25) "Expand the physical size of existing state or local recreation facilities in regions with a high need."⁵⁵
- Policy (26) "Acquire and develop new sites in conjunction with transportation improvements and at a scale compatible with the social and environmental characteristics of the surrounding community (ies). Give highest priority to areas with a high need and few remaining opportunities."⁵⁶
- Policy (27) "Review developments proposed near existing public recreation sites in order to encourage minimization of their potential adverse impacts."⁵⁷

Summary

Nearly all of the coastal states have responded in some manner to the need for statewide regulation of land use and development within the coastal zone. Responses generally fall into seven categories reviewed above:

1. Open beach laws and litigation to assure customary rights.
2. Mandatory coastal planning and land use control.
3. Statewide or regional policy advisory boards or committees.
4. Issuance or review of coastal development permits by one or more state agencies.
5. Specially legislated authorities to govern or review coastal land use and development.

6. Land acquisition and improvement programs.
7. Other responses, including subdivision exaction, transportation improvements, design review, etc.

Of the seven, only the legal approach (Number 1), acquisition program (Number 6) and certain other methods (Number 7) directly act on the issue of public recreational access, and these approaches have severe limitations on their use. The legal approach is politically difficult and often takes many years to develop; acquisition is expensive and often involves years of litigation also. Other responses tend to have minor, though cumulative, effects on the supply of accessible shoreline.

The remaining approaches, permitting, mandatory zoning, policy boards, and special commissions, must consider all facets of coastal land use, and set priorities that often place recreational access below more economically productive or politically popular uses of the shore. They are positive responses, however, in that they indicate a will toward coastal management with excellent potential to increase public access. Some such programs, notably California, Washington, Rhode Island, and Massachusetts, actively use this potential.

But generally the states have responded very narrowly to the access issue. Few states use more than three of the approaches available to them. If public access to the shore is to be significantly improved, all available methods must be used, including some of the more innovative developments in land use regulation that have been instituted in the last

decade as a response to overdevelopment and too-rapid community growth. Most needed of all, however, is a strong public motivation and dedication to increase access to a wider segment of the population. The methods are available, but they must be aggressively employed.

(Section IV of this paper will examine some of the more innovative trends that could be applied to resolution of the coastal recreation access issue.)

Notes to Section III

1. This synopsis of the regulations paraphrased from a preliminary report by Jim Coon of the New York Department of State legal staff, entitled Analysis of Authorities/Organization: Shorefront Access . unpub.
2. For similar reasons, recreational access to inland lakes and rivers, other than the Great Lakes, was not included in this study.
3. This contention was confirmed by telephone conversations with staff members in Connecticut and South Carolina.
4. Riparian Rights and the Public Trust in Michigan Public Lakes and Streams, Michigan Dept. of Natural Resources, p. 3.
5. 237 Mich 38, 211 N.W. 115.
6. 296 U.S. 10 (1935).
7. 6 Cal. ed 251, 491 P. 2d 374 (1971).
8. 242 Cal. App. 2d 156 (1966).
9. ORS 390.600, et seq.
10. Texas Natural Resources Code, Sec. 61.001 et seq.
11. Dincans v. Keeran, 192 S.W. 603.
12. 128 Fla. 79, 174 So. 731 (1937).
13. White v. Huhes, 139 Fla. 54, 190 So. 446 (1939).
14. Letter from Kathleen B. Cramer, Senior Natural Resources Planner, New York State Parks & Recreation, March 20, 1978. See also Coxe v. State, 144 N.Y. 396 (1895).
15. 67 Was. 2d 799, 410 P. 2d 20 (1966).
16. 389 U.S. 290 (1967).
17. See also Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935).
18. 41 U.S. 367 (1842).
19. 44 U.S. 212 (1845).
20. 152 U.S. 1 (1894).
21. 152 Miss. 17, 188 So. 357.
22. 261 MD. 470, 276 A. 2d 61.
23. 277 N.C. 297, 177 S.E. 2d 513 (1970).
24. 132 N.C. 336, 44 S.E. 39.
25. 157 Conn. 528, 254 A. 2d 884 (1969).
26. Stratford Land & Improvement Co. is currently arguing their right to a wet-sand area in Stratford.
27. State of Rhode Island Coastal Management Program and Draft Environmental Impact Statement , December, 1977, p. 146.
28. International City Managers Association, "Coastal Zone Management," Management Information Service , Report Number 12, Volume 9, December, 1977. p. 1
29. ibid.
30. ibid., p. 2.
31. ibid., p. 10.
32. ibid., p. 7.
33. Lewis, Sylvia, "Coastal Plan Runs Aground," Planning, Vol. 41, No. 10, November, 1975, The American Society of Planning Officials. p. 13.
34. op. cit., ICMA. p. 4.

35. Memo from Marc Kaufman to Citizen Advisory Committee Members, March 31, 1978.
36. op.cit., ICMA. p. 4.
37. Note that this procedure could be a forerunner of a true single-permit system.
38. Telephone conversation with Mary Ann Dickinson, April 24, 1978.
39. op.cit. ICMA. p. 7.
40. New Jersey Department of Environmental Protection, A Coastal Management Strategy for New Jersey - CAFRA Area, October, 1977.
41. ibid.
42. South Carolina Coastal Council, Interim Rules and Regulations, August 24, 1977. p. 15.
43. State of Rhode Island Coastal Management Program and Draft Environmental Impact Statement, December, 1977, p. 152.
44. ibid., p. i.
45. ibid., p. xx.
46. ibid., p. 153.
47. Public Law 88-578 (1965).
48. Washington State Coastal Zone Management Program, June 1976, p. 85.
49. Massachusetts Coastal Zone Management Program, Executive Office of Environmental Affairs, March 18, 1977. p. 192.
50. ibid., pp. 192-193.
51. ibid., p. 204.
52. ibid., p. 207.
53. ibid., p. 209.
54. ibid., p. 211.
55. ibid., p. 212.
56. ibid., p. 213.
57. ibid., p. 215.

DRAFT

MASTERS THESIS PROJECT

SECTION IV

THE APPLICATION OF INNOVATIVE LAND USE
CONTROLS TO THE COASTAL ACCESS ISSUE

Wesley J. Ewell
May 10, 1978

Dr. Richard O. Brooks

SECTION IV: THE APPLICATION OF INNOVATIVE LAND USE CONTROLS TO THE COASTAL ACCESS ISSUE

A Workshop on Critical Problems of the Coastal Zone was held in 1972 at the Woods Hole Oceanographic Institution on Cape Cod. Supported by the National Science Foundation and the Rockefeller Foundation, the workshop brought together approximately 60 specialists from many disciplines with interests in coastal affairs. Recommendations that evolved from the week-long workshop were published by the MIT Press as The Water's Edge: Critical Problems of the Coastal Zone, edited by Bostwick H. Ketchum, who also served as chairman of the workshop.

Among the workshop's many recommendations were several that support the theme that coastal recreation access is a complex issue that must be addressed with a corresponding complexity of solutions. The Woods Hole group also recommended that innovative management systems be instituted at all levels of government to deal with coastal issues and problems. Specifically, the workshop recommended the following:

- a) Development of innovative approaches through new coastal land and water use accommodations;
- b) Alternative means for the regulation of coastal development besides the taking of private property;
- c) Improvement of statutes and administrative regulations for land, water, and submerged land activities;
- d) Increased access of individuals, groups, and governmental units to administrative and judicial proceedings;

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- c) Improvement of statutes and administrative regulations for land, water, and submerged land activities;
- d) Increased access of individuals, groups, and governmental units to administrative and judicial proceedings;

- e) Establishment by state legislatures of Environmental Review Boards for appeals of local administrative decisions concerning activities that have coastal and environmental impact;
- f) Establishment by Congress of an expert federal Environmental Court with broad jurisdiction over private persons, state and local government agencies, and federal agencies in controversies involving coastal and environmental impact.¹

While the workshop's recommendations apply to all aspects of coastal management, they are especially appropriate to the issue of recreational access. Additional legal and administrative tools are needed before substantial advances can be made in the redistribution of coastal recreation. Sections II and III of this paper document that traditional techniques of land management and established legal and administrative authorities have the ability to improve public access, but have not done so. Ducsik reached a similar conclusion, but also proceeded to suggest additional land use tools that could be applied to coastal access.² The question then is why should additional controls and techniques succeed when traditional methods that appear to be adequate have failed?

The answer lies in the degree to which traditional regulatory and management techniques adversely affect private landowners for the public benefit. The application of police power controls is often considered to be a public taking of property rights without compensation because such regu-

lation diminishes to some extent the "bundle of rights" held by the private landowner.³ Condemnation with compensation, however, is even less popular, as it deprives the private landowner of all rights through involuntary sale of his property. If new techniques can be developed or applied in such a way as to improve access to a greater proportion of the population, while benefitting, or at least not severely damaging, the private landowner, and minimizing public costs, then these techniques may well succeed where more traditional methods have failed.

Needed is a new land use system, to supplement but not necessarily replace the present system. The new system should accomplish the following:

- a) Recognize that the public value of certain sites, because of unique natural conditions, is paramount over private rights to destruction of the natural conditions for personal gain;
- b) Develop innovative regulatory methods for land use and development that offer non-monetary compensation for loss of certain rights to the public;
- c) Establish a workable system of monetary compensation for partial loss of private property rights through regulation;
- d) Institute a closed market for development rights separate from the market for physical real estate;
- e) Allow government to participate directly in the private marketplace of land speculation and development.

The following paragraphs define emerging trends in land use and development that might meet these requirements.

Special Land Identification

One of the requirements of the Coastal Zone Management Act of 1972 is that states inventory critical areas within the coastal zone and identify Areas of Particular Concern (APC) for special treatment under the coastal zone management program.⁴ Such areas may be of economic importance as well as of environmental importance.⁵ They must, however, possess unique or important characteristics that demand special attention or protection.

Three basic criteria for identifying APC's are suggested in the (Section 305) regulations: (1) areas with significant natural values--among these physical or scenic; (2) transitional areas where either restoration or further development is called for, or intensely developed areas where other modifications may be necessary; and (3) areas which are threatened for various reasons or are already scarce.⁶ The CZM regulations further suggest criteria for identifying eight categories of areas, one of them being "areas of substantial recreational value."⁷

Michael McCloskey, Executive Director of the Sierra Club, suggested additional criteria for evaluating coastal sites for recreational use. In an address before the Second Annual Coastal Zone Management Conference, held in Charleston, South Carolina, in March 1974, McCloskey said, "One can also look at purely recreational values such as the width and length of sand beaches, the fineness of the sand, the warmth of the waters, the clemency of the weather, the degree of wave action, usefulness for surfing,

usefulness of the waters and winds for sailing, and for swimming, the amount of undertow, and the presence of conditions discouraging to swimming, such as sharks and so forth."⁸

Several states have taken early initiatives to inventory potential coastal recreation land, and all of the coastal states will eventually do so to meet the requirements of the 1976 amendment to the Coastal Zone Management Act.⁹ The designation of Areas of Particular Concern, required by the CZM Act, is a method suggested by the American Law Institute in their Model Land Development Code.¹⁰

One of the earliest successful uses of this concept as a regulatory mechanism for coastal land development was in Florida. The Florida Environmental Land and Water Management Act of 1972¹¹ authorizes a state land planning agency to recommend, and another state administrative commission to designate Areas of Critical State Concern. Local governments are then authorized to adopt principles for guiding development in designated areas, following state planning recommendations. If the local government fails to perform, the state may adopt and administer such regulations.¹²

Other states have adopted critical area legislation applicable only to specified regions. New Jersey designated 18,000 acres of the Hackensack Meadows as an Area of Critical Concern, and created a special commission to administer the area; New York took similar action in its six million acre Adirondack Park. Nevada and California, by a congressionally approved compact, designated the Tahoe Basin as a critical area, and created the Tahoe Regional Planning Agency to control development in the basin.¹³

In Massachusetts, the Martha's Vineyard Commission uses the APC or Critical Area concept as a regulatory tool to control growth and development on the island of Martha's Vineyard. The MVC is a regional planning agency with land regulation authority established by a special act of the state legislature in 1974.¹⁴ While the MVC has not attempted to use its authority to increase public access to the shore, the designation of APC's has served to identify sites with recreational potential as required by the CZM Act.

Innovative Zoning Regulations

In the past 10 to 15 years traditional zoning regulations have been maturing into flexible and innovative land use controls that allow more freedom of design to the developer while better protecting the public interest. The familiar "as of right" form of Euclidian zoning is being replaced by a system whereby development issues are resolved on a case by case basis as they arise.¹⁵ Several of these flexible zoning techniques have excellent potential for increasing public access to the shore without unreasonably restricting private development of coastal land.

Cluster Zoning - Residential land is typically zoned for individual houses on lots ranging in size from $\frac{1}{4}$ -acre to three acres. This zoning classification does not fit recent trends in housing styles, however, which are increasingly favoring attached buildings with minimum yards and low maintenance. Cluster zoning allows the grouping of housing units closer together than would normally be allowed, primarily to create common open

space instead of large individual yards.¹⁶ Three characteristics are common to most cluster developments: the overall density of dwelling units per acre is the same as allowed in the underlying zone; compact development allows less road and utility installation, saving money on construction and maintenance; and large areas of common open space are preserved for public use and enjoyment. Although the common open space may be reserved for residents of the development, cluster zoning ordinances in most states may require public dedication without compensation.¹⁷

Applicability of Cluster Zoning to the waterfront access problem is excellent. Coastal land is rarely uniform in quality, with some areas more suitable for building than others. Through the cluster technique, development can be limited to the most suitable land, lowering costs and increasing profits to the developer, while reserving the more scenic and environmentally sensitive lands in permanent open space for public use.¹⁸

Planned Unit Development - Designed for flexible development of large tracts of land, planned unit development combines the functions of zoning control and subdivision approval into one procedure. PUD ordinances usually allow a mixture of land uses or a variety of housing types from detached single family units to apartments. PUDs often include social and recreation facilities giving them the atmosphere of a small town in themselves.¹⁹ Rigid standards are replaced by broad general standards with detailed administrative review.²⁰

Applicability of Planned Unit Development to coastal access is similar to that of cluster zoning. Much depends upon the wording of enabling legis-

lation, however. One good example is the Vermont law allowing planned residential development which states:

"If the application of this procedure results in lands available for park, recreation, open space or other municipal purposes, the planning commission as a condition of its approval may establish such conditions on the ownership, use and maintenance of such lands as it deems necessary to assure the preservation of such lands for their intended purposes;"²¹

Special Permits - Where cluster zoning and planned unit development have not been accepted, special permit requirements are almost universally used. A special permit use, or conditional use, is a use that is permitted by ordinance within a zone, subject to prior review so that proper conditions may be attached or the permit denied for cause.²² Recent amendments to the Massachusetts zoning law require local ordinances to adopt special permit provisions.²³ This procedure may be a gentle transition to full permit review of all development in lieu of typical "as of right" zoning.

Coastal development is well suited to the application of special permits for reasons stated above. The provision of public access to the shore where practicable should be incorporated into the ordinance as a condition for permit issuance. Although state courts have shown mixed reaction to the use of special permits to exact public amenities, the trend in recent decisions is favorable, and reasonable standards have been consistently upheld.²⁴

Contract Zoning - Also known as conditional zoning, although there is a fine distinction between the two, contract zoning involves an agreement

between a municipality and a developer to rezone a particular parcel of land subject to certain restrictions, conditions or exactions agreed to in advance.²⁵ Meshenberg states, "While legally more questionable than special permits, contract zoning offers potentially greater legislative leeway through reconciling the various interests affected by the reclassification."²⁶ The legal question is an important one. Contract zoning is clearly illegal in New Jersey, Florida, Maryland, North Carolina and Rhode Island; it has been upheld, however, in New York, Washington, California, Wisconsin, Massachusetts, Connecticut, and several non-coastal states.²⁷

Although certainly of more limited application than other zoning techniques, contract zoning remains a device with potential for obtaining public access in return for private benefits in coastal states where it is not illegal.

Site Plan Review - Site plan review is contained in many modern zoning ordinances to provide administrative review of the layout of buildings and open space, including parking and other ordinance requirements.²⁸ Plans are reviewed by the planning board to assure compliance with zoning in much the same way that subdivision plans are reviewed. This is a less powerful tool than special permitting because it is done administratively by a board that has no authority to impose requirements beyond those in the ordinance.

Density Bonus - The number of dwelling units or the square feet of commercial floor space that a developer can fit on a parcel of land substantially affects his return on investment in site preparation, utilities, roads, and

other more-or-less fixed costs. It also affects the total value of his project and therefore his amount of profit. Maximum site density is nearly always controlled by zoning, either as a direct ratio of dwelling units or floor area per acre (or other measure) of land. The zoning standard, in turn, is often an arbitrary figure applied throughout the zone regardless of the characteristics of a particular site.

There are situations, however, where density of development can be substantially increased with no detriment to the common good. Where public water supply and sewage disposal obviate the need for wells and septic systems; where the development is large enough to justify a central sewage treatment plant of its own; or where the site is adjacent to guaranteed open space so that increased density can be balanced by open area, thereby minimizing visual and environmental impact. Since the ocean provides the ultimate guaranteed open space, waterfront property can often sustain increased density of development without impairing the intent of the zoning standard.

To take advantage of this natural benefit, zoning ordinances should include density bonus provisions that allow additional units or floor space in coastal development projects in return for public access to and use of the waterfront.

Density bonus zoning was originally conceived as a device to improve inner-city development. A density provision applicable to medium-to high-density residential districts in New York City was adopted in 1961. Similar provisions have since been adopted in Philadelphia, Baltimore, Denver,

Washington (D. C.) and Seattle.²⁹ New Castle, Delaware, and other suburban communities have adopted density bonuses to encourage increased development of low- and moderate - cost housing.³⁰ Use of density bonus in rural areas is not common, because land values are relatively low.³¹ Coastal land, however, is typically valued above the regional market and bonuses should therefore be well accepted.

Bonuses essentially become a form of contract zoning with the community's terms spelled out in the ordinance. The developer has the option of accepting the bonus and giving the amenity only if it is in his best interest. Several Cape Cod communities have found density bonuses to be a successful means of securing open spaces; the system has also been suggested for use at Lake Tahoe.³² Of all the evolving forms of flexible zoning, bonuses appear to hold the most promise for inclusionary standards.

Compensable Regulations

Stepping beyond zoning incentives, which grant compensation to a developer by allowing him to recover a greater return on his investment from the private market, several commentators have suggested that a system of direct monetary compensation for confiscatory regulations be built into the regulations themselves. Ducsik comments that "Under such a scheme, the full market value of land prior to the imposition of regulations is guaranteed to the landowner if the regulation is held to be invalid as a taking. To the extent that the restrictions impair the value of the land for present use, compensation is due immediately."³³

Fred Bosselman, David Callies and John Banta, in their classic report for the Council of Environmental Quality, The Taking Issue, suggest that "state and local governments should undertake experiments with new methods to provide compensation to landowners."³⁴ One of their major recommendations is that "More thorough consideration should be given to the possibility of statutory standards to determine when compensation must be paid."³⁵ Williams states the issue concisely: "The time is thus ripe for serious work on new techniques, to combine the use of the police power with various possible methods for partial compensation."³⁶

Williams further suggests that the traditional practice of taking all rights by condemnation is "hardly a sensible arrangement."³⁷ He recommends a system of partial compensation based upon the degree of impairment suffered to the private property rights. Bosselman and Callies addressed this problem in their earlier work of the CEQ, The Quiet Revolution in Land Use Control. Their opinion was that "The government should not be forced to purchase the entire land if some lesser remedy provides equitable compensation."³⁸

The concept of compensation for partial taking of property rights by police power regulations should be especially useful along the shore. Coastal recreation use does not necessarily require full control, use or ownership of coastal land. It often involves only limited use during limited time periods. If methods of compensation, financial or otherwise, can be devised to acquire those limited rights for the public, while leaving the waterfront

landowner with much of his "bundle of rights" intact, the public costs might be substantially lowered.

Ducsik notes a number of advantages to this idea. Since damages need not be paid until determined by the court, but based on value at the time of taking, the interim increase in value accrues to the public while the actual payment is delayed.³⁹ In addition, the inclusion of a mechanism for compensation into the regulations may allow the adoption of regulations that would not otherwise stand the constitutional challenge of taking.⁴⁰

There are many potentially significant problems inherent in a compensable regulatory scheme, however. "For, as soon as the possibility of compensation is raised in the context of land use controls, every developer will feel free to demand compensation for any restriction which affects even his wildest dreams; some may even be reinspired to think big."⁴¹ Hagman suggests several formulae for assessing damages for partial taking, but notes that before/after market value formulae do not always work because many circumstances that actually depress values "are not considered damages in the law of eminent domain and therefore no compensation is paid for them."⁴²

Other disadvantages include the administrative problems that would certainly exceed those of traditional acquisition; the typical speculative rise in value of property once a taking has been made; and the threat of challenge on the basis that such regulations "are designed to depress land values to lower future condemnation costs, a practice of which the courts are very wary."⁴³

Williams suggests six techniques for compensable regulatory systems:

- 1) Zoning incentives;
- 2) Splitting the fee between public and private ownership;
- 3) Adjusting tax assessments upon open land;
- 4) Authorizing the transfer of development rights;
- 5) Taxation of capital gains from land; and
- 6) Inverse condemnation.⁴⁴

Zoning incentives are reviewed above; taxation schemes and inverse condemnation are included in Section II; and transfer of development rights is evaluated below. Williams provides an excellent, in-depth discussion of fee-splitting regulations, including two examples in Vermont and the Brandywine (Pennsylvania) Valley.⁴⁵

Another method of lowering the public cost of acquiring recreational rights in private shorefront property, that is not strictly a compensable regulation, is the requirement of "in-lieu fees" to be paid by developers of coastal property that is not suitable for access as their share of the public cost of acquiring, developing, and maintaining public shorefront elsewhere.⁴⁶ The obvious problem here is that waterfront land varies widely in quality and value, and it would be difficult to assess proportionate costs.

In-lieu fees for off-site park development have been upheld in New York State,⁴⁷ but not in New Jersey.⁴⁸ The problem in New Jersey, however, was one of lack of statutory authority. It appears that if the authority is granted municipal governments by the state, then they may enact such a

requirement. While this system has merit for sharing the burden of increasing public recreational access to the shore, the legal and administrative problems to be overcome may delay its widespread use until other methods are exhausted.

In summary, compensatory regulations are rarely used, but hold significant promise for future use. They are an important component of the American Law Institute's Model Land Development Code, and they are frequently suggested in legal commentary as a solution to the dilemma of regulation versus taking. As a means of increasing public shoreline access, they are worth considering.

Development Rights Transfer

Perhaps the ultimate compensatory system short of outright purchase of fee, is the transfer of development rights from one (or more) site to another. This concept of development rights transfer has received a lot of study in the past decade, much of the study coming from Rutgers Universities Center for Urban Policy Research.⁴⁹ Although relatively new to this country, DRT has been used in Britain for three decades.⁵⁰ It has been applied in this country to eminent domain acquisition of less than full fee in open space, preservation of historic landmarks in urban areas, and incentive zoning bonuses.⁵¹ There is no reason why it could not also be applied to coastal access.

DRT relies on the fact that not all ownership rights are physically reliant on the land, and that certain rights are more valuable in one parcel

of land than in another. Under the DRT concept, these separable rights can be transferred from one owner to another either within a free marketplace or under government regulation.⁵² By this process, property owners whose rights have been severely limited by government regulations can recover their losses by selling their rights to another landowner who may in turn increase the intensity of his development by the amount of rights purchased.

Worth Bateman has compiled a concise list of advantages of development rights transfer:

1. Reduction of arbitrary and inequitable "windfalls and wipeouts" which frequently accompany government use of the police power to regulate land use;
2. More effective preservation of environmentally sensitive areas, open space, and agricultural lands; and more efficient use of land earmarked for development;
3. Unification of plans and programs for development and environmental protection;
4. A shift of the larger share of the total cost of new development to the developer and ultimate consumer; and
5. Recoupment of a portion of private gains created by public investment.⁵³

Disadvantages of the DRT system are more difficult to quantify because of its varied application and limited use in this country. Certainly it requires more difficult and complex administration than other government controls, and state enabling legislation is needed where it does not already exist. But these problems are surmountable. David Heeter has compiled a list of six basic requirements for a DRT system that imply some of the problems that might be encountered:

1. The system must be legally defensible.
2. The formula for issuing development rights must (a) fully reflect the loss in land values of those who are denied the right to develop their lands and (b) be easily administrable.
3. The supply of development rights and the demand for them must be such that (a) their value does not fall below their value when issued, and (b) developers will be encouraged to or can be required to make use of them because they can make a reasonable profit in doing so.
4. A TDR system must have safeguards against fraudulent issues and transfers, hoarding, dumping, etc.
5. The establishment of a TDR system must not result in an overall loss in tax revenues.
6. The TDR system must be politically acceptable.⁵⁴

Development rights transfer would be applied to waterfront land as a form of compensable regulation. Beachfront suitable for recreational use would be zoned exclusively for such use, but valued for its full developed potential. A market mechanism would then be established to allow more intensive development on other land, coastal or inland, that has little or no recreational value and can support higher density development, upon the purchase of development rights from land in the restricted category. This method is essentially the same as that attempted in urban areas to preserve open space, and in rural areas to protect prime agricultural land.⁵⁵

An alternative would be for the state or its political subdivisions to purchase rights as has been recently legislated in Massachusetts.⁵⁶ Government purchase simplifies the system by eliminating the need for a private market and subsequent regulation by a government agency, and does not require increasing density on other sites.

Land Banking

An even more advanced concept of land use control would involve the

government directly in the real estate market, buying, developing and selling land for public purposes. Known as land banking, this concept forms an important part of the ALI Model Land Development Code. As defined in the Model Code, land banking is:

A system in which a government entity acquires a substantial fraction of the land in a region that is available for future development for the purpose of controlling the future growth of this region.⁵⁷

Although relatively untried by state and local governments in this country, land banking has been used successfully in Canada, Sweden, Switzerland and other European countries. Most of this country was, in a sense, land banked by the federal government, but to encourage growth, not to control it. There are two major arguments in favor of land banking, and two against it. Proponents argue that it will have an anti-inflationary effect on land prices, and that it will permit more rational patterns of development rather than urban sprawl.⁵⁸ Opponents counter that land banking requires substantial capital investment⁵⁹ and that government control of development may favor special interest groups.⁶⁰

Legal authority for local governments to acquire land in advance of actual need, or to acquire land for the expressed intent of later selling for private development is not uniform. While this practice has been used in urban renewal and community development programs, long-term holdings have not been common. Advance acquisition has been struck down by courts in Michigan⁶¹ and Washington,⁶² but upheld in Hawaii⁶³ and Florida.⁶⁴ Florida's District Court of Appeals recently held that the city of St. Petersburg

need only show a "reasonable necessity" for waterfront property the city condemned for future public use.⁶⁵

One way around the problem of legal authority is for land banking to be carried on by a non-profit public trust. This has been done in Lincoln, Massachusetts, where a non-profit land holding and development trust, the Rural Land Foundation, purchased a 109-acre tract to keep it from being speculatively developed. About one-half of the property was deeded to another local group, the Lincoln Land Conservation Trust, as permanent open space; the remainder was subdivided into ten large house lots that were sold to pay for the original purchase as well as design and legal costs.⁶⁶ A private trust does not have eminent domain power, of course, but it does have the advantage of being able to act quickly and efficiently.

Applied to the problem of coastal access, land banking has some promise, despite its limitations. A community or trust could acquire waterfront property, retain the shorefront and access to it, and sell or develop and sell the remaining land to recover a bulk of its costs.

Summary

Evolving trends in land use management reflect a significant philosophical departure from historic attitudes upon which traditional land use controls have been based. The attitude of maximizing the value of land as a commodity, predominant until recently in both the public and private sectors, is giving way to the concept of land as a resource for the public good.⁶⁷ Bosselman and Callied describe this phenomenon well in

The Quiet Revolution in Land Use Control:

If one were to pinpoint any single predominant cause of the quiet revolution it is a subtle but significant change in our very concept of the term 'land,' a concept that underlies our whole philosophy of land use regulation. 'Land' means something quite different to us now than it meant to our grandfather's generation.⁶⁸

The innovative techniques described in this Section reflect this new attitude. They also respect the importance of traditional values and the constitutional right to buy, own and sell land freely. Compensable regulations, development rights transfer, and land banking are designed to fit the free market system. Their use should be allowed and encouraged.

These techniques are all meant to be adopted and administered by local government units: cities, towns and counties. Yet, the initiative for social changes in the allocation of land uses, especially the allocation of recreational access and rights in the shoreline, obviously must come from the federal and state governments. There are three ways this problem can be overcome. First, enabling legislation must be adopted to allow and encourage local government to use innovative methods; second, funding must be provided to remove the burden of land acquisition from local property tax sources; and third, incentives to local government to use the new techniques must be sufficient to overcome traditional reluctance and outright hostility common at the local level against intervention of any kind from higher government levels.

But the biggest problem to overcome in providing public access to poor persons and members of minority groups that cannot afford to buy their share of the shore, or who are deliberately excluded for reasons other

than economic, remains in allocation of values. The Woods Hole workshop recognized this problem and stated it well:

There is no well-established agreement on methods for measuring and reflecting social values, such as equity, in policies concerning the coastal zone. Apart from measurement difficulties, which are formidable, there has been little serious inclination to identify the potential social costs of particular allocative policies.

Failure to deal with these issues now may have important social and political consequences in the future. . . . Given the present policy patterns, deep social stresses could arise if black and chicano citizens become a major political influence but are largely excluded from access to coastal resources because of pricing or a set of public facilities designed to meet the values of middle- and upper-class whites.⁶⁹

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