Access to the Nation's Beaches: Legal and Planning Perspectives

by David Brower
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ACCESS TO THE NATION'S BEACHES:
LEGAL AND PLANNING PERSPECTIVES

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Principal Investigator

with

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Nancy Stroud
and
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Drawings by Don Meserve

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Chapter One. Introduction

The problem of insufficient public access to the nation's coastal beaches has been recognized nationally for at least forty years. As early as 1935 the U.S. Department of the Interior recommended that the federal government buy undeveloped lands along the Atlantic seacoast for public recreation. A series of subsequent reports by the federal government reiterate a concern about dwindling shoreline resources and rising recreational needs. In 1954 the National Park Service considered the Atlantic and Gulf coast shoreline and recommended that 15 percent of the shore be acquired for public recreational purposes, including outstanding sites such as Smith Island and Bogue Banks in North Carolina. The study also called for prompt action "before the best of the remaining areas are acquired for private or commercial development." A Congressionally commissioned study prepared in 1962, "Shoreline Recreational Resources of the United States," remains one of the most comprehensive and well documented of the shoreline studies. The study recognized the shoreline, especially the sandy beaches, as a unique national resource with unusually high recreational qualities:

Here, land and water are easily accessible; the violence of breaking surf and the warm safety of relaxing sands are but a step apart; the stimulation of the foreign environment of the water and the relaxation of sunbathing are nowhere else so easy of choice. Physical sport and mental relaxation are equally available.

One of the major difficulties in the use of the shore was found to be its availability:

In general, the only beaches widely available to the public are public beaches, and even some of these are restricted. For example, some municipal beaches admit only bona fide citizens of the
municipality. Others practice some form of segregation or other restriction. The use of private beaches is normally under the control of owners, although in some States access may be gained to the foreshore—the area below high tide—through public thoroughfares. Because of time and fund limitations, it was impossible to make an inventory of restrictive policies of either private or public beaches. The authors have assumed that public beaches are usually available to anyone. However, it may be that the extent of adjacent parking areas is the greatest single factor restricting the availability of accessible public beaches.

In 1966 the Department of the Interior inventoried American islands and found that they were a major untapped national recreational, environmental and historic resource that were nevertheless "threatened with development that would destroy their recreation potential." The study recommended a National System of Island Trusts. 4

The President's Council on Recreation and Natural Beauty in 1968 declared that:

Unfortunately, opportunities to know and enjoy shorelines and islands are steadily diminishing. Natural shorelines increasingly are being fenced, bulldozed, paved, and built upon. Increasingly, scenic stretches of tidelands, beaches, dunes, and seaciffs are covered with shacks and chalets, hamburger emporiums and parking lots, highways and billboards, power plants and even oil derricks.

It is time to proclaim the principle that all Americans—of present and future generations—have a right to enjoy the shoreline experience, and that ocean and lake shoreline with high-quality scenic and recreation values are natural resources to be conserved and not destroyed. 5
Later, in 1970, the Commission on Marine Science, Engineering and Resources noted:

A decent concern for preserving life's amenities as well as economic considerations demands that more adequate provisions be made for recreational use along the Nation's crowded shoreline.

Access to the shoreline for the populations that increasingly are concentrated in urban areas along the coasts and the Great Lakes will present a major coastal zone problem. Of all the uses of the coastal zone, recreation uses are the most diversified and pose some of the greatest challenges to any coastal management systems.

These and other studies show a continued awareness on the national level of the value and threatened loss of shoreline resources.

Rough indications of supply and demand factors associated with beach use demonstrate that the demand for public access remains high relative to available land. One of the earliest national shoreline studies recommended that 15 percent of the shore be set aside for public use. This study, appropriately titled "Our Vanishing Shoreline", reported that in 1954 only 6.5 percent of the Gulf and Atlantic coasts was in state or federal ownership, with much of it not suitable for recreational development. Eight years later, only 2 percent of the national shoreline was in public ownership and potentially available for recreation, although nearly one-third of the shoreline in the 28 contiguous states was suitable for recreation. Although federal and state governments have moved forward in acquiring more public recreational lands along the coast since 1952, the most recent national survey reports that 5 percent of suitable national recreational shoreline is in public ownership. Regionally, areas with the highest population concentrations show the lowest percentages of publicly available lands, as indicated in the following table.
<table>
<thead>
<tr>
<th>State</th>
<th>Total (miles)</th>
<th>Beach (miles)</th>
<th>Bluff (miles)</th>
<th>Marsh (miles)</th>
<th>Public Recreation areas (miles)</th>
<th>Restricted areas (miles)</th>
<th>Privately owned (miles)</th>
<th>Development status</th>
</tr>
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<tbody>
<tr>
<td>Alabama</td>
<td>204</td>
<td>115</td>
<td>...</td>
<td>89</td>
<td>3</td>
<td>1</td>
<td>200</td>
<td>Low</td>
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<td>1,272</td>
<td>283</td>
<td>883</td>
<td>106</td>
<td>149</td>
<td>100</td>
<td>1,023</td>
<td>Moderate</td>
</tr>
<tr>
<td>Connecticut</td>
<td>162</td>
<td>72</td>
<td>61</td>
<td>29</td>
<td>9</td>
<td>...</td>
<td>753</td>
<td>High</td>
</tr>
<tr>
<td>Delaware</td>
<td>97</td>
<td>41</td>
<td>41</td>
<td>56</td>
<td>4</td>
<td>9</td>
<td>79</td>
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<tr>
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<td>1,078</td>
<td>406</td>
<td>1,171</td>
<td>161</td>
<td>122</td>
<td>2,372</td>
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<td>385</td>
<td>92</td>
<td>...</td>
<td>293</td>
<td>5</td>
<td>...</td>
<td>380</td>
<td>Moderate</td>
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<tr>
<td>Illinois</td>
<td>45</td>
<td>13</td>
<td>32</td>
<td>...</td>
<td>24</td>
<td>4</td>
<td>17</td>
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<tr>
<td>Indiana</td>
<td>33</td>
<td>33</td>
<td>...</td>
<td>...</td>
<td>3</td>
<td>...</td>
<td>30</td>
<td>Do.</td>
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<tr>
<td>Louisiana</td>
<td>1,076</td>
<td>257</td>
<td>...</td>
<td>819</td>
<td>2</td>
<td>...</td>
<td>...</td>
<td>Low</td>
</tr>
<tr>
<td>Maine</td>
<td>2,612</td>
<td>23</td>
<td>2,520</td>
<td>69</td>
<td>34</td>
<td>...</td>
<td>2,578</td>
<td>Do.</td>
</tr>
<tr>
<td>Maryland</td>
<td>1,368</td>
<td>40</td>
<td>912</td>
<td>416</td>
<td>113</td>
<td>3</td>
<td>1,252</td>
<td>Do.</td>
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<tr>
<td>Massachusetts</td>
<td>649</td>
<td>240</td>
<td>288</td>
<td>121</td>
<td>12</td>
<td>6</td>
<td>631</td>
<td>High</td>
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<tr>
<td>Michigan</td>
<td>2,469</td>
<td>292</td>
<td>1,959</td>
<td>218</td>
<td>357</td>
<td>...</td>
<td>2,112</td>
<td>Low</td>
</tr>
<tr>
<td>Minnesota</td>
<td>264</td>
<td>22</td>
<td>175</td>
<td>67</td>
<td>19</td>
<td>...</td>
<td>245</td>
<td>Do.</td>
</tr>
<tr>
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<td>203</td>
<td>134</td>
<td>...</td>
<td>69</td>
<td>...</td>
<td>25</td>
<td>178</td>
<td>High</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>25</td>
<td>7</td>
<td>9</td>
<td>9</td>
<td>3</td>
<td>...</td>
<td>22</td>
<td>Very high</td>
</tr>
<tr>
<td>New Jersey</td>
<td>366</td>
<td>101</td>
<td>33</td>
<td>232</td>
<td>18</td>
<td>15</td>
<td>333</td>
<td>Do.</td>
</tr>
<tr>
<td>New York</td>
<td>1,071</td>
<td>231</td>
<td>590</td>
<td>250</td>
<td>47</td>
<td>...</td>
<td>1,024</td>
<td>Moderate</td>
</tr>
<tr>
<td>North Carolina</td>
<td>1,326</td>
<td>285</td>
<td>260</td>
<td>781</td>
<td>139</td>
<td>42</td>
<td>1,145</td>
<td>Low</td>
</tr>
<tr>
<td>Ohio</td>
<td>275</td>
<td>20</td>
<td>195</td>
<td>60</td>
<td>9</td>
<td>5</td>
<td>261</td>
<td>High</td>
</tr>
<tr>
<td>Oregon</td>
<td>332</td>
<td>133</td>
<td>181</td>
<td>18</td>
<td>101</td>
<td>...</td>
<td>231</td>
<td>Moderate</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>57</td>
<td>9</td>
<td>44</td>
<td>4</td>
<td>4</td>
<td>...</td>
<td>38</td>
<td>Do.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>188</td>
<td>38</td>
<td>145</td>
<td>4</td>
<td>8</td>
<td>10</td>
<td>170</td>
<td>High</td>
</tr>
<tr>
<td>South Carolina</td>
<td>522</td>
<td>162</td>
<td>...</td>
<td>360</td>
<td>9</td>
<td>10</td>
<td>503</td>
<td>Moderate</td>
</tr>
<tr>
<td>Texas</td>
<td>1,081</td>
<td>301</td>
<td>421</td>
<td>359</td>
<td>5</td>
<td>18</td>
<td>1,058</td>
<td>Very low</td>
</tr>
<tr>
<td>Virginia</td>
<td>692</td>
<td>160</td>
<td>118</td>
<td>414</td>
<td>2</td>
<td>26</td>
<td>664</td>
<td>Low</td>
</tr>
<tr>
<td>Washington</td>
<td>1,571</td>
<td>121</td>
<td>1,294</td>
<td>156</td>
<td>46</td>
<td>27</td>
<td>1,498</td>
<td>Moderate</td>
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<tr>
<td>Wisconsin</td>
<td>724</td>
<td>46</td>
<td>634</td>
<td>44</td>
<td>13</td>
<td>46*</td>
<td>663</td>
<td>Do.</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>21,724</strong></td>
<td><strong>4,350</strong></td>
<td><strong>11,160</strong></td>
<td><strong>6,214</strong></td>
<td><strong>1,209</strong></td>
<td><strong>581</strong></td>
<td><strong>19,934</strong></td>
<td></td>
</tr>
</tbody>
</table>

*Includes some Indian lands held in trust.*
The demand for coastal land is reflected in the rising costs of that land. For example, scattered beach areas along the Atlantic seaboard investigated by the Department of the Interior in 1935 as possible recreational areas could have been acquired at an average cost of $9000 per mile. The same lands in 1955 were reported by the Department to cost an average of $110,000 per mile, and in 1975 the cost per mile was 1.5 million dollars.

Though recreational use of the land is just one of many possible uses of these lands, the recreational market is one of the fastest growing markets in the United States. The leisure industry in 1970 was estimated to reach $290 billion or 28 percent of total outdoor recreation, a 58 percent increase over 1968. In 1973 the United States Bureau of Outdoor Recreation reported that swimming was by far the nation's number one outdoor recreational activity, having grown rapidly from fourth place in favorite outdoor recreational pursuits in 1962. Boating and water-skiing ranked third and fifth respectively in the 1973 survey. The report summed up the attraction of water-oriented sports:

Most people seeking outdoor recreation want water to sit by, to swim and fish in, to ski across, to dive under and to run their boats over. Swimming is now one of the most popular outdoor activities and is likely to be the most popular of all by the turn of the century. Boating and fishing are among the top 10 activities. Camping, picnicking, and hiking also high on the list, are most attractive near water sites.

With these statistics in mind, the recent census data indicating that more than half of the nation's population is within 50 miles, or one hour's drive, from the beach takes on added significance. Three-fourths of the nation's residents, and nine out of ten of its largest cities are in the thirty states bordering the sea and the Great Lakes. Pressure on available lands is responsible for the various restrictive practices by landowners near the shore. Private owners, for example, have commonly erected "No Trespassing" signs and have fenced in part of the shore. Municipalities have restricted the use of beaches to residents or charged high fees for parking near the beach. As a result, only those persons who own or rent their
own private access to the beach, or who live near one of the relatively few publicly owned beaches can make use of the increasingly popular seashore.

There are two fundamental aspects of the problem of making beaches available for public use. The first is that a public right to use the beach, or at least a portion of it, must be established. Many states have already established that certain portions of their beaches are owned by the public and thus open to public use. North Carolina courts, for example, have ruled that the part of the beach seaward of the mean high tide line is owned by the state. However, most of the North Carolina shoreline landward of the mean high tide line has been held to be in private ownership. Thus, to reach the public portion of the beach, the general recreational user is faced with the task of passing over private land without trespassing, and this is the second aspect of the problem. The simple provision of a public walkway leading from a street or road to the public shoreline can greatly expand the use of the public beach, as do other such public accessways. Another method is to place portions of the shore in public ownership. The federal and state governments have acquired a number of seashore sites for public parks and recreation areas. Parks in public ownership can provide large stretches of beachland and inland areas on which a variety of activities such as hiking, swimming, boating and camping may be enjoyed.

Several states have responded to both ownership and access problems by beginning to open up beach areas. Some states have acted to clarify which portions of their shorelines are in the public domain. Two states have clarified this by statute. The most far-reaching "Open Beaches" statute is that of Oregon, which was passed in 1972 and declares that all beach area to the vegetation line is in the public domain. Texas legislation passed in 1959 creates a presumption that all beach area to the vegetation line if one exists or two hundred feet above the mean low tide line belongs to the public. Court decisions in these and other states act to clarify which part of the beach is in public domain. The Hawaii Supreme Court held in 1968 that all
beaches up to the vegetation line are owned by the state.\textsuperscript{12} California\textsuperscript{13} and Florida\textsuperscript{14} decisions hold that the public right to use the beach may extend to the vegetation line.

Of course, while these kinds of state legal actions have helped define the public area of the beach, the more difficult problem of gaining actual egress from and ingress to the area remains. Oregon has supplemented its statutory declaration with an extensive park development program, so that in 1973 the state operated 76 parks, constituting 30,847 acres, along the coast.\textsuperscript{15} In addition, the Oregon State Highway Commission began a program in 1967 to provide access roads and parking facilities at three mile intervals along the coast.\textsuperscript{16} Although few states have shown the high commitment to beach access that Oregon has shown, many states have acquired public parkland along their shores with state and federal funds. South Carolina has recently used state and federal funds to complete a beach access plan envisioning both park purchase and provision of public accessways.\textsuperscript{17} Municipalities have also participated in shoreline acquisition under state and federal encouragement. Acquisition has not been limited to coastal municipalities; some inland cities in Florida have bought lands on the Florida shore for municipal recreation. The purchase of municipal parks have sometimes given rise to general public rights to use the shoreline in municipal ownership, as was decided recently in New York\textsuperscript{18} and New Jersey\textsuperscript{19} state courts.

Federal interest in the provision of publicly owned beach lands has accelerated in the past twenty years and has been the impetus for state shoreline acquisition. The first national park bordering the shore was established in 1919 at Acadia, Maine, and in 1954 the U.S. Department of the Interior began acquiring a series of national seashores. As of 1970\textsuperscript{20} the federal government managed forty National Parks and ninety-one areas under the National Wildlife Refuge System, including lands on the ocean and the Great Lake shores. Nine national seashores on the Ocean and Gulf Coasts now exist.\textsuperscript{21} These federal lands make up a substantial part of the nation's publicly owned beaches. The federal government in the last decade has provided significant grants-in-aid to states for park acquisition and has been perhaps the greatest stimulus to date for state planning and
acquisition of recreational shoreline. The major grant-in-aid program has been that established through the Land and Water Conservation Fund Act of 1967, which provides minimum funding of at least 300 million dollars annually through 1989. Urban areas on the shoreline have also made use of the Open Space program administered by the Department of Housing and Urban Development. Federal surplus property is also available to localities for free or at low cost under the Department of the Interior Surplus Property Program.

Federal attention was shifted from simple land acquisition to the wider problem of beach access through private lands, when Open Beaches bills were introduced in the U.S. Congress in 1973. Senator Henry Jackson and Representative Robert Eckhardt, author of the Texas open beaches legislation, proposed the bills which would provide federal aid to states to determine and secure public rights to the coast under state law. Although the bills were unsuccessful, hearings brought additional national attention to the beach access problem. The bills are expected to be introduced again.

The Coastal Zone Management Act of 1972 addressed the national interest in the effective management of the coast, was strengthened in 1976 pursuant to Congressional recognition that "access to public beaches...has come to be identified as one of the critical problems facing state and local governments." Section 305(b) of the Act as amended in 1976, provides that "the management program for each coastal state shall include...a planning process for the protection of, and access to, public beaches and other coastal areas..." The Act, in Section 315(2) which was also added in 1976, authorizes grants to states for up to 50 percent of the costs of acquiring access to beaches. These monies, while not yet appropriated, would be an effective complement to state acquisition programs under the Land and Water Conservation Fund and other federal programs. See Appendix.
Footnotes

1 Bonenti, Maybe You Can't Get Near the Water, Boston Sunday Globe, July 18, 1976 (magazine).


5 The U.S. President's Council on Recreation and Natural Beauty, From Sea to Shining Sea, at 175 (1968).


ORE. REV. STAT. §§ 390.610-.690 (1968).


Id. at 62.

South Carolina Department of Parks, Recreation and Tourism, Public Access and Recreation in South Carolina (1976).


Chapter Two. North Carolina's Vanishing Shoreline

North Carolina boasts a shoreline of 308 miles of gently sloping, sandy beach on the Atlantic Ocean. This valuable natural asset acts as a magnet to a recreation population drawn from all over the state and nation. Because of its relatively long distance from any major population center, the North Carolina coast has fortunately not yet experienced the great development pressures common in other Atlantic states. Some of the shore remains undeveloped, and all of it is suitable for recreation. However, access to the shore has been and remains limited. Coupled with the pattern of private ownership that restricts general public access to the beach is the slowness of the state to acquire public recreational lands on the beach or to otherwise make the beach available. The state recognized the problem of limited beach access in 1972 in the Statewide Comprehensive Outdoor Recreation Plan:

The pattern of private ownership is reducing the accessibility of the shoreline to the general public...with increased recreation demand in the future, this problem will become critical.\(^1\)

This was reiterated in the North Carolina Governor's Policy Guidelines of 1974:

North Carolina has almost unlimited natural resources with great potential for recreational uses. Presently, too many of these resources are not widely or effectively utilized. One major reason for this underuse is that the state has not implemented a concerted effort to provide the public with access...\(^2\)

Beach access may be provided by various levels of government, as well as by private individuals and institutions. Public and private institutions have different capabilities and interests in providing beach access, however, depending on
their constituents. The huge financial resources of the federal government, for example, are expended to serve what is perceived to be the national interest. The state interest must be defined in terms of the state constituency. The resources and administrative machinery of the state are particularly appropriate for the development and implementation of a state beach access policy. Municipal governments may have fewer resources, but they do have economic and welfare interests in providing beach access. It is important that the different levels of government work together to combine resources and interests. The federal government, for example, has contributed directly to state governments to help provide recreational planning and land acquisition. Programs such as the Land and Water Conservation Fund Act, the Coastal Zone Management Act, or indirect benefits obtained, for example, through highway monies can be effectively utilized in a state beach access plan. States can provide technical, administrative, as well as financial aid to localities in their efforts to provide access. Private individuals and institutions can also make substantial contributions of land, labor or capital in their own governmental programs.

The largest provider of public access to the beach in North Carolina is the federal government, which owns more than one third of the shore, at Cape Hatteras and Cape Lookout and Shackleford Banks. Cape Hatteras' excellent recreational capabilities were recognized as a national resource in 1954, when the islands were established as the nation's first National Seashore. It is the most recreationally developed of the Seashores and is accessible by ferry and two bridges that connect with the mainland. Cape Hatteras alone draws more than 1,300,000 people to its shores each year. Many of these people are from out of state, drawn from nearby population centers in Virginia, Maryland, and the District of Columbia. In fact, the location of these National Seashores make their beaches the most distant of all North Carolina beaches from major centers of North Carolina population. The travelling distance from Raleigh to Cape Hatteras, for example, is about 250 miles, while the trip from Raleigh to Morehead City, at the center of the coast, is 147 miles. A family in North Carolina, therefore, travels further than many out-of-state residents to the federal beaches. Cape
Lookout National Seashore does extend as far south as Morehead City but the islands are accessible only by private boat, and are totally undeveloped, making them unsuitable for general public use. The same is true of Shackleford Banks.

In contrast to the extensive federal ownership of beach land in the northern half of the North Carolina coast, the state owns only three small recreational areas on the remaining shore. Even these areas are further away from many North Carolina cities than are the South Carolina Beach areas at Myrtle Beach. For example, the distance from Charlotte to Fort Fisher Historic Site near Wilmington is about 210 miles, while the trip from Charlotte to Myrtle Beach is 175 miles. Most of the state population, if they prefer to visit a state beach site, must drive at least three hours from their homes inland. These distances are responsible for the state recreational pattern of spending at least a weekend at the shore.

It is worth repeating that the State of North Carolina holds title to all oceanfront beaches up to the mean high tide line. Thus, the public has a legal right to use a narrow strip of shore running parallel and immediately adjacent to the ocean for their recreational purposes. However, except for the provision of public accessways to this strip from other inland areas such as roads, or for the ownership of larger parcels such as park lands, the public is effectively precluded from using the public beach simply because they cannot legally get to it. The benefit of the shoreline accrues rather to the individuals who own the land that is immediately inland from the mean high tide line. The value of the publicly owned strip along the shore can be realized by the public, therefore, only if they can get to it.

There are just three state-owned recreational sites along the southern half of the coast. Fort Fisher State Historic Site is located within easy access of Wilmington, North Carolina's largest coastal city. The site is also the state beach most easily accessible from the state's major population centers, being about 140 miles from Raleigh and 220 miles from Charlotte. Fort Fisher is primarily an historic interpretation site, but has an excellent beach area that is presently undeveloped but
heavily used for recreation. Fort Macon State Park is about ten miles from Morehead City, and easily accessible from the mainland by bridge. Fort Macon is utilized by over half a million people each year. In the areas around Wilmington and Morehead City development pressure is great, and the recreation areas serve an ever increasing need for public access, both for the local population and for state and out-of-state visitors. A second state park is at Hammocks Beach, an island about thirty miles from Morehead City. The beach extends over three miles along the ocean, but is quite undeveloped and accessible only by boat. The state operates two ferries between the mainland and the park in the summer season. The state has no beaches accessible to the public in Pender or Brunswick Counties, nor does the federal government. The improvement of U.S. Highway 71 in 1981 is certain to encourage use of the beach along the entire southern half of the North Carolina shore, both creating a demand for access and making private development that restricts access more likely. The state role in providing access should grow concomitantly.

Information on lands in public ownership at the local level is sparse, as the state has yet to make an inventory of such lands. The very lack of information perhaps indicates the nature of beach access on the local level. The small amount of public access is not known to the general public, and therefore serves only the people "in the know", or the local population. Counties and municipalities in North Carolina traditionally provide parks and recreational facilities to local residents, but an examination of the 1972 Statewide Comprehensive Outdoor Recreation Plan reveals no local parks located on the beach. It is generally known that many beach towns maintain beaches and also maintain public streets or walkways that lead to them. However, there is no state policy requiring or even suggesting that municipalities provide accessways and thus distribution is uneven and widely scattered. Municipalities that participate in dune building projects with the U.S. Army Corps of Engineers are required to provide public access within the area; Wrightsville Beach and Carolina Beach have both participated in this program. A documented case study of Bogue Banks, in Carteret County, is perhaps representative of beach access when viewed from the local level. The study lists a few publicly owned
beaches, including Fort Macon State Park, a municipal beach at Atlantic Beach, and a small beach formerly used by the U.S. Coast Guard which is now accessible from a state access road. Customarily used footpaths, subdivision streets that have been reserved for the use of landowners in the subdivision, and commercial access points are described. Also described are numerous restricted areas marked by "No Trespassing" or "For Hotel Guests Only" signs. The study relates the refusal of state and local governments to accept the offer of a gift or sale of privately owned beach land because of the worry of maintenance costs. Both the provision and restriction of access are not uncommon. Elsewhere, private owners who originally dedicated easements through their property to the beach have attempted to reclaim those accessways. Currituck County and the Nature Conservancy's efforts to acquire land on Monkey Island for public use has recently received attention. It is clear that actual access on the local level varies widely, according to perceived local interests. What efforts there are to provide access would be greatly strengthened by a coordinated state policy and plan.
Footnotes

1

2

3

4
Turner, Bogue Banks Beach Access, Carteret County, Center for Urban and Regional Studies, University of North Carolina, Chapel Hill, 1975.

5
Id. at 38.

6
North Carolina General Statutes § 136-96 creates a conclusive presumption of abandonment if (1) a municipality for a period of fifteen years or more fails to improve and open to the public a dedicated street or alley, and (2) the dedicant or his successor files a declaration withdrawing the street or alley from dedication. The statute exempts from its coverage cases "where the continued use of any strip of land...shall be necessary to afford convenient ingress or egress to any lot or parcel of land sold and conveyed by the dedicant..."

As of March 17, 1975, fifty-one streets and alleys had been withdrawn from dedication by landowners in Holden Beach, North Carolina. This prompted the town commissioners to take steps to prevent future withdrawals, including marking the remaining accessways. The town also requested a ruling from the State Attorney General, seeking a determination of which accessways are legally available to beach users, and claiming that
the withdrawals are invalid because the streets and alleys fall within the N.C.G.S. § 136-96 exemption, and because the public had, in fact, been using them.

Chapter Three. The Law of Ownership and Use of Coastal Beaches

I. Introduction

Can coastal motels fence off their beach area for the exclusive use of motel guests? Can members of the public fish from the surf anywhere they want? Or use any beach for swimming, sunbathing, or picnicking? To what extent can owners of beach cottages prohibit anyone else from sitting on "their" beach or walking across their property to get to the beach?

These questions raise the issue of who owns the beach, and to what extent the public has a legal right to use the beach, and to gain access to it. The answers to the questions are based on sometimes complex legal issues and doctrines. This chapter examines these issues and how they have been treated by courts in several coastal states.

Before examining these cases it is important to clarify terminology on two points—what is "ownership" and what is the "beach". Ownership may be complete as to all the rights associated with that parcel of land, such as when the public owns a park. However, sometimes a number of different people may own separate rights associated with the same parcel of land; for example, A may own title to the land, B may own an easement that gives him the right to cross the land, and C may be in actual possession of the land by virtue of a long-term lease. All three "own" a part of that land. On the second point, what is the "beach", for the purposes of this discussion the "beach" is divided into four parts: the sea, the wet-sand, the dry-sand, and the upland.

First, that area seaward of the mean low tide line is termed the sea, or sea bed (lake or lake bed in non-oceanic situations). Second, the area between the mean low tide and mean high tide lines, which is covered by the usual flow of tides, is termed the wet-sand. "Foreshore" and "tideland" are
generally synonymous with this term. Third, the area between the mean high tide line and the line of vegetation, or dune line, an area inundated only during severe storms, is termed the dry-sand. Fourth, that area landward of the vegetation line is termed the upland. The following diagram illustrates this division.

<table>
<thead>
<tr>
<th>UPLAND</th>
<th>DRY-SAND</th>
<th>WET-SAND</th>
<th>SEA</th>
</tr>
</thead>
<tbody>
<tr>
<td>vegetation line</td>
<td>mean high tide line</td>
<td>mean low tide line</td>
<td></td>
</tr>
</tbody>
</table>

II. Public Ownership and Use Rights

A. Overview

The issue of to what extent the general public has the right to use coastal beaches has come before the courts in several states. Major cases have been decided in New Jersey, California, New York, Oregon, and Florida. Each of these cases involved different fact situations and different aspects of the beach access and use issue. Each decision was also based on different legal theories. In the following sections these cases are examined in terms of the facts involved, the requirements for the application of the particular legal concept involved, and the case's implications in terms of the public's right to use coastal beaches.

B. The Public Trust Doctrine

1. Development of the Public Trust Doctrine in the United States

There are certain lands that are owned by the government in a special fashion. These lands are different from, for example, a parcel owned for a fire station site that is purchased when the fire station is needed and freely disposed of if that
fire station site becomes unnecessary. These "special" lands are those lands held in trust for the people and are called public trust lands. Although the government holds complete legal title, it is not free to act in any way it wishes regarding these public trust lands because their title is subject to the interests of the public, who are the beneficiaries of the trust.

The public trust doctrine has a long legal history. Roman law held the seashores to be publicly owned, open to the common use of all citizens with the government being the supervisor or trustee for these public rights. Much the same concept was adopted by the English courts well prior to the American Revolution.¹

American courts very early on adopted this doctrine and applied it to navigable waters and associated tidelands.² In the leading case on this point, the U.S. Supreme Court in 1892 said that these lands are held in trust for the people so that public rights of navigation, fishing and commerce could be preserved. The court further said that the state could not abdicate its control over these areas in any fashion that would diminish the public's rights in the trust lands.³

2. General applicability of the doctrine to the wet-sand area

As the following chart indicates, approximately three-fourths of the oceanic states have held that wet-sand beaches are publicly owned:⁴

<table>
<thead>
<tr>
<th>Publicly owned</th>
<th>Privately owned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>New Jersey</td>
</tr>
<tr>
<td>Alaska</td>
<td>New York</td>
</tr>
<tr>
<td>California</td>
<td>North Carolina</td>
</tr>
<tr>
<td>Florida</td>
<td>Oregon</td>
</tr>
<tr>
<td>Georgia</td>
<td>Rhode Island</td>
</tr>
<tr>
<td>Hawaii</td>
<td>South Carolina</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Texas</td>
</tr>
<tr>
<td>Maryland</td>
<td>Washington</td>
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<tr>
<td>Mississippi</td>
<td>Delaware</td>
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<td></td>
<td>Maine</td>
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<td>Massachusetts</td>
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<td>New Hampshire</td>
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<tr>
<td></td>
<td>Pennsylvania</td>
</tr>
<tr>
<td></td>
<td>Virginia</td>
</tr>
</tbody>
</table>

21
In most of these states, including North Carolina, the public ownership of the wet-sand beaches has been held to be of the "public trust" nature. Whether the private ownership of wet-sand beaches is also subject to the public trust is a good question, and one which illustrates a possible limitation on the scope of the public trust doctrine. This issue arises in those states which have opened some of their trust lands to entry-and-grant or conveyance to private individuals, for it is conceivable that public trust rights have thereby been extinguished. Fortunately, the general rule applied under these circumstances, and likely to be followed in North Carolina, is that the grantee cannot obtain better title than that of his grantor; thus, private parties hold their lands subject to the public trust.


Avon is a small resort community in New Jersey bordering the Atlantic. The city owned a dry-sand beach that for many years was free to all comers. In the 1950's the New Jersey legislature allowed cities to start collecting user fees for the beaches to defray maintenance costs. Avon established such a fee, which was the same for residents and nonresidents. In 1970, Avon changed their beach fee ordinance so that it would charge nonresidents about twice as much as residents to use the beach. Neptune City, a neighboring inland city, brought suit to challenge this change in the ordinance.

The court invalidated the ordinance. They said that where a municipality owns a dry-sand beach and dedicates it to public beach purposes, the public trust doctrine requires the beach to be open to all on equal terms. So while New Jersey cities could charge reasonable user fees, they may not discriminate between residents and nonresidents.

4. Implications of a public trust finding

The first question relative to the public trust doctrine is just what public rights it protects. Traditionally, the doctrine only protected rights of navigation and fishing. Some
states, such as New York, have added a recreational access dimension, saying the public has a right to cross these lands to reach publicly owned areas.8 Others, such as Wisconsin9 and California,10 have held the doctrine to include public rights of bathing, swimming, skating, recreation, preservation, and the enjoyment of scenic beauty.

A second question relates to determining what lands the public trust applies to. While traditionally restricted to navigable waters and tidelands (the wet-sand area), many observers feel courts will increasingly expand coverage to include publicly used dry-sand areas, as was done in the New Jersey area.

C. Implied Dedication

1. Introduction

A 1970 California Supreme Court case confirmed the public's right to use two privately owned beaches. In doing so, the court used a legal concept that could, if followed in other states, have great implications for the public's right to use beaches.11

The court said that when the public has used a beach for a long time, paying no attention to the fact that the beach is privately owned, the public acquires a legal right to use that beach. The legal concept used to reach this result was the concept of "implied dedication." Unlike the commonly used "express dedication," where the private owner signs a deed granting the land to the public and some public body formally agrees to accept the dedication,12 there are no formalities required for "implied dedications." The owner's intent to give the land to the public may be implied from his conduct of not preventing public use of the beach. And the public's acceptance of the dedication may be implied from public use of the beach. Nothing need be written by either side—the dedication and acceptance is implied by their conduct.
2. The California cases—Gion-Dietz

The decision that used this principle to confirm the public's right to use the beaches was actually two different cases, involving different areas and different owners, but consolidated because the legal issues were the same.13

The first case involved three lots between a public road and the ocean. The lots were 70 to 160 feet deep, each having some area level with the road, with a sharp cliff-like drop of 30 to 40 feet to a second area level with the ocean. It was shown that at least 1900 members of the public freely used both areas—the upper level for parking and the lower level for fishing, picnicking and the like. In more recent years the city had paved the upper level and regularly cleaned up trash from both areas. The owners occasionally posted signs that the area was private, but the signs quickly blew down and were generally ignored by the public.

The second case involved a small privately owned peninsula jutting into the ocean, with the beach on the peninsula being reachable only along a 3,000 foot long dirt road connecting the beach to a public road. The public had freely used both the road and beach for at least 100 years. The owner involved in this court action bought the property in 1960 and placed a large timber across the road. It was removed within two hours. Although the owner occasionally put up "No Trespassing" signs, the public ignored them and continued to use the road and beach. In 1966, six years after purchasing the property, a second large log was placed on the road by the owner and promptly moved by the public. The owner then sent out an earth moving crew to permanently close the road. Before the crew could act, the owner was sued and the case eventually wound up in the California Supreme Court.

In both these cases, the court upheld the public's right to continue using the beaches and accessways. The key fact leading to this decision was that the general public used the beaches for a long time (over five years) just as if they were public recreation areas. The court refused to presume the owners had given the public permission to use the beaches. Further, the
court noted that even if the present owners wanted to keep the public out, the conduct of previous owners in not keeping the public out constituted the "implied dedication," and once the dedication to the public has been made, it cannot be taken back.

3. The requirements for finding an "implied dedication"

There are two basic requirements for finding an "implied dedication" of a beach or accessway to the public: (1) The owner's intent to dedicate the area; and (2) the public's acceptance of the dedication. As both of these acts are "implied," it is the conduct of the parties that determines whether the acts have taken place.

On the first point--the owner's intent to dedicate the land to the public--it is often said that the courts are using a "legal fiction." This is because in many of these "implied dedication" cases the owner had absolutely no intent to give his land away. But the court says since we are confronted with widespread public use of your land and since you did not keep the public off the beach, we will assume you wanted to give it away, even if you really did not want to do so. Further, the court says minimal, ineffective attempts to exclude the public, such as occasionally posting a no trespassing sign, are not enough to show the owner really did not want to give away his land. To do that, he must effectively keep the public off the beach. This has led some observers of the California decision to fear that more beaches may now be shut off to the public as owners attempt to preserve their exclusive private rights. Finally, the court noted that an "implied dedication" is irrevocable--once it has happened, it cannot be taken back.

The second point--public acceptance of the dedication--may also be implied. The public use of the beach is the acceptance. Active governmental maintenance of the beach helps in this regard but, as the second case indicated, it is not necessary. All that is required is public use over an extended period of time.
4. Impacts of an "implied dedication" finding

Once a court finds a beach has been impliedly dedicated to the public, the public has a legal right to continue using that beach forever. The owner can not take the beach back without public permission.14

5. "Express dedication"

A recent New York case establishing a public right to use a beach also used the dedication concept—but in this case the court found an "express" rather than "implied" dedication. The case, Gewirtz v. City of Long Beach15, is particularly interesting because the owner of the beach was not a private citizen. The owner was the City of Long Beach.

The beach land in question was obtained by the city between 1935 and 1937. Following improvements made with the state and federal funds, the area was opened to the general public as a park in 1936. In 1970, the city passed an ordinance that would have restricted the use of this beach to residents of the City of Long Beach and their guests. Nonresidents would have been excluded.

The New York court refused to let the ordinance take effect, saying that by opening the beach to all comers in 1936, the city had intended to dedicate it to the general public. The actions of the city in maintaining and operating the park, as well as use by the general public, were said to constitute acceptance of the dedication.

Thus, once the park had been dedicated to general public use, the city (like the private landowners in the "implied dedication" cases) had no power to take the dedication back and exclude nonresidents. For this reason, the New York court held the city's ordinance invalid.
D. Customary Rights

1. The Oregon case—Thornton v. Hay

In 1969, the Oregon Supreme Court announced a decision that some observers feel could eventually turn out to be the most significant beach access case in recent years. In this case, Thornton v. Hay, the court employed the legal doctrine of "customary rights" to confirm the right of the public to use Oregon's dry-sand beach area.

The facts of this case are similar to situations ever more frequently arising across the country—relatively undeveloped beach areas start growing, resorts are built, and conflicts arise between resort owners and members of the public accustomed to freely using the beach area.

This case involved the efforts of Hay, a motel owner, to fence in a portion of the dry-sand beach adjacent to his motel for the exclusive use of motel guests. The publicity generated by this act in 1966 helped trigger, among other things, legislation recognizing the public's right to use dry-sand beaches. However, since legislation of this sort cannot change or determine property rights, the matter of Hay's fence was sure to wind up in court.

It did wind up in court when, after a 1967 winter storm destroyed his fence, Hays replaced it without obtaining a permit required by the legislation. The state went to court seeking an order to force Hay to remove the fence.

In reviewing Hay's claim of a right to exclude the public from this dry-sand area, the Oregon court noted that ever since recorded history began the public had been freely using the state's dry-sand beaches as if they belonged to the public. Public use of this specific beach for over 60 years was shown at the trial. At no time had anyone sought or obtained the upland owner's permission to use the dry-sand area—everyone, including the upland owners, had always assumed the public had a right to use the area. For these reasons, the court held the public, by "customary right," had obtained the right to continue
using the dry-sand beach.

2. Requirements for finding "customary rights"

"Customary rights" is a legal doctrine developed in England long before the American revolution. This doctrine says where there has been very long and common use of a defined area, that use becomes legally established for that area.

There are seven requirements that traditionally have to be met before it can be said that the public has a "customary right" to use a beach area:17

(1) The use must be "ancient," so long that nobody remembers otherwise;
(2) The use must have been without interruption, which is to say the public must not have been excluded by the upland owners during this period;
(3) The use must have been peaceable and free from dispute, the public entering and using the area without resort to force;
(4) The use must have been reasonable and in keeping with the character of the land;
(5) There must be certainty as to just what land was being used;
(6) The use must have been obligatory for the upland landowners, that is, the public's use not being subject to the option of each individual upland owner; and
(7) The use must not be repugnant or inconsistent with public policy and other laws.

3. The impact of a finding of "customary rights"

If the court finds the public has a "customary right" to use a dry-sand beach, upland owners may not exclude members of the public from that area.

One very important difference in this doctrine and the "implied dedication" doctrine used in California is that a finding of customary rights may well eventually apply to very large areas of coastline, not just to the specific parcel of
land involved in the case before the court (as in the case with "implied dedication"). This was clearly an intention of the Oregon court. They specifically said one of the reasons for choosing this legal doctrine was to avoid a long series of litigation going down the coast parcel-by-parcel to determine public versus private rights. Of course, individual owners might still bring actions alleging that their land had not been customarily used by the public, but in a sense the burden is on the landowner to show this and defeat a presumed public right to use the beach.

So, where there is a defined "beach" area (here below the vegetation line) that the public has freely used as long as anyone can remember, the old doctrine of "customary rights" might be used to confirm the public's right to continue that use.18

E. Prescriptive Easements

A recent Florida case raised the issue of whether the public, by using a beach area for a set period of time in a fashion that conflicts with the owner's property rights, can obtain an easement to continue using the beach. The legal concept at issue here was "prescriptive easements," a legal concept very similar to that of "adverse possession."

This case, City of Daytona Beach v. Tona - Rama,19 involved a pier owner's attempt to construct an observation tower in the dry-sand area next to the pier. The city granted the permit, but before construction began, the owner of another nearby observation tower sued to prevent construction. The basis of the suit was that construction of the tower would interfere with the public's "prescriptive easement" to use the dry-sand beach area.

The area in question had been used by the public as a public recreation area for well over twenty years. The public had freely engaged in sunbathing, picnicking, and parking in the area. The city had installed public showers, cleaned up trash, and enforced traffic regulations in the area. The proposed
tower would carry 25 passengers 176 feet above the ocean and would be a part of the owner's pier-recreation center complex. The tower was actually constructed before the case was tried.

While both the trial court and the court of appeals ruled the tower would have to be removed, the Florida Supreme Court said in a 4-3 decision that the tower could stay. There seemed to be three reasons for this decision: (1) the court felt that the long public use of the dry-sand beside the pier was not adverse to, but in furtherance of, the pier owner's property rights; (2) the tower was consistent with public recreational use of the beach; and (3) the tower cost $125,000 to construct and an order to tear it down seemed rather drastic.

2. Requirements for "prescriptive easements"

There are five requirements for establishing a public "prescriptive easement" to use beach areas:

(1) There must be actual use of the property by the general public;
(2) The use must be continuous (not occasional) and uninterrupted for a set period;
(3) The use must be open and fully visible to the owner;
(4) The user must be claiming a right to use the property; and
(5) The use must be adverse to the property interests of the owner.

The Florida decision really turned on this last point—the court's majority felt public use of the dry-sand beach was not adverse to the interests of the owner (in doing this the court, to a certain extent, seemed to confuse adversity to the owner's economic interests with adversity to the owner's property interests).

3. Impact of a finding of "prescriptive easements"

If it is found that the public has acquired a prescriptive
 easement for the use of a specific beach area, then the public has a right to continue to use the area in the same fashion as before. What had started out as a trespass becomes, when enough time passes without the owner evicting the trespassers, a legal right to use the beach. The owner still "owns" the property, but can not do anything on it that would reduce the public's established rights to use it.

For example, if the public regularly used a dry-sand area for sunbathing over the prescribed period and a prescriptive easement were established, the public would have the right to continue sunbathing there. The owner could not evict sunbathers or do anything such as constructing a building on the site, that would interfere with the public's sunbathing. The public's rights, though, are confined to sunbathing--the area could not, for example, be converted to a public parking lot. Thus, to a large degree, the use of the property is effectively frozen.

III. North Carolina

Broadly speaking, the state owns the beach seaward of the mean high tide line (wet-sand), but the beach above the mean high tide line (dry-sand and upland) is in private ownership. The North Carolina Supreme Court has specifically held that the state owns the wet-sand, defined as "the strip of land that lies between the high and low water marks and that is alternately wet and dry according to the flow of the tide." [Capune v. Robbins, 273 N.C. 581 (1968)] This definition was borrowed from the New York courts. That the "high water mark" used in the definition is construed to be the mean high tide line was made clear in Carolina Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297 (1970), where the court, relying on California cases, stated that "The high-water mark is generally computed as a mean or average high-tide, and not as the extreme height of the water." Land ownership can thus be depicted as follows:

<table>
<thead>
<tr>
<th>Water</th>
<th>Mean High Tide Line</th>
<th>Dunes</th>
</tr>
</thead>
<tbody>
<tr>
<td>State owned (foreshore)</td>
<td>Privately owned</td>
<td></td>
</tr>
</tbody>
</table>
No North Carolina case has dealt specifically with access by the public over unencumbered privately owned land to get to the wet-sand; existing case law has involved only the rights of littoral owners to use it. The clearest example is the Capune case, in which the court recognized the littoral owner's right of access to the water, and established standards for the height of a pier that crossed the foreshore between the littoral owner's property and the water. However, in Capune, the court at 590 did concede (in dicta) that the littoral owner has the right to prohibit use of the dry-sand and upland by other people, indicating that the court may hold that private owners have the right to prevent public access across their property should this issue be litigated.

It would thus seem that while the use of the dry-sand question has never been decided in a North Carolina court, there is some existing precedent indicating that a littoral landowner has the right to prevent use of the dry-sand by the public as well as access across his property to the foreshore. However, this conclusion should apply only to unencumbered land, meaning that in many areas there may be a public right of access or use via prescriptive easement, implied dedication, or similar encumbrance on fee simple ownership. Although these mechanisms for achieving access have already been discussed, they are mentioned again to make the point that the public may already have a right of access across and/or the right to use what is generally considered privately owned land, meaning that private ownership may already be limited by existing public rights in the land.

Specifically, under a long line of recent cases, including Janicki v. Lorek, 255 N.C. 53 (1961), and Andrews v. Country Club Hills, Inc., 18 N.C. App. 6 (1973), the public has a right to use access routes recorded on subdivision plats, within the meaning of N.C.G.S. 136-96, so long as these have not been withdrawn. Accordingly, in many beachfront subdivisions, there currently exists a right of access across what may appear to be privately owned land.

Land which has traditionally been used by the public may be subject to a prescriptive easement running with the land, under the criteria set forth in Dickinson v. Pake, 204 N.C. 276 (1973).
Conclusion

It seems clear that in North Carolina, the state owns the wet-sand, subject to a public trust, but that everything above it is privately owned. However, there are a number of mechanisms under traditional property law in North Carolina by which the public can acquire, and may have already acquired, rights of access across the upland and use of the dry-sand. Accordingly, in some areas, private ownership of upland and dry-sand areas is, or may be held to be, limited by public rights of access and use.
Footnotes

1 For a more detailed history of the early development of the public trust doctrine, see D. Owens and D. Brower, Public Use of Coastal Beaches, 15-26, and the references cited therein.


4 See D. Owens and D. Brower, supra note 1 at 15.

5 The North Carolina situation has been described in Schoenbaum, Public Rights and Coastal Zone Management, 51 N.C. L. Rev. 1, 7-16 (1972).

6 Shephard's Point Land Co. v. Atlantic Hotel, 132 N.C. 366, 373, 44 S.E. 39, 42 (1903) (citing with approval a statement from Illinois Central R.R. v. Illinois, supra note 3: "The trust devolving upon the State for the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and water remaining.").


See, e.g., City of Madison v. Tolzmann, 7 Wis. 2d 570, 97 N.W.2d 513 (1959).


The importance of this case is reflected in the great number of articles written about it. For a collection of citations to the articles on the case in legal periodicals, see D. Owens and D. Brower, Public Use of Coastal Beaches, 101-102 (1976).

Such as with dedications for highways or subdivision exactments requiring dedications of park, open space or school site lands.


The private owner may retain ownership of the beach on record, and can sell his interest in the property, as he retains ownership of the underlying fee interest. However, the new owner takes subject to the public's use rights in effect a use easement in the public.


While the Oregon court is the only modern state court to apply the doctrine of customary rights in a beach context, the concept is receiving increasing serious legal consideration. See, for example, Justice Ervin's dissent in the Florida beach case, City of Daytona Beach v. Toma-Rama, 294 So.2d 73 (1974).

294 So.2d 73 (1974).

271 So.2d 765 (1972).

The length of this period varies from state-to-state. In Florida it was twenty years.
Chapter Four. Planning for Beach Access

I. Policy Overview

The public which makes use of the beaches is far greater in number than the indigenous local population, and in many ways has different needs than does the resident. Parking is much more of a problem, since the resident user can often walk to the beach. Similarly, the non-resident user requires more public and private support activities, such as camping and picnic areas, bath houses, as well as restaurants, motels and other commercial activity. The non-resident is also different in that he pays no local taxes and contributes to the local economy only through money spent while visiting the beach. It is often argued that the day-user, the non-resident who commutes to the beach, in fact is a negative influence in that he spends little while imposing economic burdens on the locality.

This difference in the needs of different user groups is especially evident in an effort to provide sufficient public access to the beaches to meet public demand. Meeting local beach use needs will normally be relatively simple and inexpensive. However, the additional recreational demands made by non-residents will increase the amount of beach to which the public needs access, and as a result will require increased effort and expenditure on behalf of government. The problem is: which government?

At the local government level, the usual emphasis in facility planning involves meeting local needs. While this may include planning to support anticipated levels of beach use with accommodations, restaurants, pavilions, and sufficient parking to prevent the local roads from becoming clogged, local governments may be reticent to expend large amounts of money to acquire increased access areas for non-residents. In fact, doing so may go against the economic interests of the community, by dispersing the recreating public to which local restaurants, pavilions and motels cater.
On the other hand, the state has, or should have, an interest in seeing that its residents who do not live on the coast have sufficient beach and ocean recreational resources available to them on a day visit basis. To meet this interest, the state may look to such measures as the provision of parks, camping facilities, and other facilities within short driving distances to concentrations of population. The state perspective will thus tend to emphasize the acquisition of large tracts of land, or relatively high density recreation areas. In contrast, the local governmental interest may be more likely to concentrate on those acquisition tools, such as acquiring rights-of-way to the beach, which serve the needs of local residents but which may not necessarily meet the recreational needs of the non-resident beach user.

In short, the public needs for beach recreation will vary among the user groups involved. As a result, the responses which can be anticipated from different levels of government will also vary. While the interests of state and local governments will not necessarily conflict, neither will they necessarily agree or coordinate with each other, unless there is effective and coordinated planning at both the state and local levels. Access acquisition can proceed at the local level independent of the broad purchase programs that may be necessary to provide recreational opportunities specifically for non-local residents. However, any broad program for access acquisition must involve coordinated planning efforts and implementation by state and local governments. Local governments will want to insure that the location and types of recreational facilities provided by the state will not disrupt local land use patterns and activities. State governments will want to insure that any state or federal money spent is used for expanding the recreational opportunities available to non-local as well as local users. A coordinated approach to beach access and the provision of public beach recreational facilities is accordingly desirable in order to maximize the benefits to the public of governmental activities to secure access.

Moreover, beach access planning must be coordinated with existing programs affecting coastal land use. Access planning
must take into account the environmental impacts of concentrating large numbers of people in small geographic areas, and should coordinate with programs involving the preservation of wetlands and other areas of environmental concern. Public and private uses of the beach can co-exist. Access and acquisition planning should take cognizance of these factors, but should also emphasize the public's right to beach recreation, and the public's interest in being able to use the public beach.

II. State Planning for Beach Access

A. State Patterns

A state planning process for beach access may take different forms, depending on the role that the state wishes local government to play, and the extent of the state commitment. For example, the state may wish to focus on the provision and upgrading of highways along the coast, or alternatively, to invest in new or expanded state parks on the shore. The planning process will be more or less confined to certain administrative agencies and sets of goals according to the state commitment. In determining respective roles, the state may wish to involve local governments only minimally, and thus to centralize decision-making, administrative processes, and to take advantage of certain economies of scale. On the other hand, access planning may be left to local government with a minimum of state involvement. In the same manner, the state may wish to make more or less use of federal programs.

As indicated previously, the state is obligated by its participating in the Federal Coastal Zone Management program to develop a planning process for beach access by October 1978. Within various federal requirements, state alternatives are somewhat a matter of choice. Rather than choose a particular pattern for the state, this section will outline a general planning process that may apply to any one of the possible patterns that the state might choose. At the same time, by following this general process, federal requirements may reasonably be expected to be met.
B. Planning Process

The basic planning process can be very simple and straightforward, involving five steps: problem identification, policy making, plan making, implementation and evaluation. The first steps, however, are critical in guiding the later steps in the process. The determinations of beach access needs and state policies will define appropriate methods to plan for and implement an access program.

1. Problem Identification

The planning process begins with the identification of the nature of the access problem. Existing data should be analyzed to determine the character and extent of the access problem. Such data might include the State Comprehensive Outdoor Recreation Program. The analysis should consider such questions as: is there a perceived public need for more beach access? What kind of access is needed? Who needs beach access? What economic and social reasons are there to justify the provision of more beach access? What environmental reasons are there to limit access? The basic outlines of the problem need to be understood and discussed by all those planning for the problem. Public discussion of beach access should be particularly encouraged through legislative discussion, public hearings, media events and the like.

2. Policy Making

The second step in the planning process and the most critical step in guiding the later planning process is to determine state policy for beach access. Among the policy questions that should be considered are: (1) how much of its own resources is the state willing to commit to beach access, and how much use will the state make of federal funds? (2) Where will the initiative for using state and/or federal resources remain? Will the initiative be with local or state government? (3) Will statewide or local needs take precedence? The state should
consider which user groups, referred to earlier, it wishes to serve. (4) What means of acquisition should be used? For example, how much litigation is the state willing to support, as opposed to a purchase program?

3. The Plan

The third step in the process is to develop a plan for the provision of beach access. Generally, a complete plan will contain the elements described below. The first element is a precise definition of the beach. For the purposes of state law, the public beach begins at the mean high tide mark and continues to the ocean. For planning purposes, the state may wish to include in its definition other parts of the shore on which public recreation takes place, including the dry-sand area and area of vegetation. A broad definition of the beach will place the planning process in broader perspective, so that planning is concerned with a wider geographic area than simply the area seaward of the mean high tide.

A second element of the plan is an inventory of existing resources. The inventory should detail the location of all publicly owned lands and all lands that are presently used by the public for access and for recreation. The location of these lands, their present and possible uses for public access, and any problems in ownership would summarize useful information about land resources. The inventory might also include other areas with potential for public use, including both physical and visual access. A proposed land inventory is presented further on in this chapter. Institutional and financial resources of the state and local government should also be inventoried. State or local programs that impinge on or that may support access include programs such as highways, marine fisheries, dune protection, and beach erosion. The use of state and federal programs should also be investigated. (See Appendix)

A third element of the plan is a precise statement of beach access needs, that expands on the original problem definition. In determining need, the anticipated demand for existing facilities should be considered, along with the capability of those
facilities to support the demand. Needs assessment should not be limited to that of existing facilities, however. Areas where access is not yet available may have the most pressing access needs. Priorities among needs such as publicly owned parklands, parking facilities for day visitors, or ferries or bridges to the barrier islands must be established. Priorities will help direct the most effective use of state resources.

A fourth element is an analysis of feasibility of meeting different needs. In this analysis, the relative benefits and costs of obtaining access in its various forms and in different locations is considered. Also considered are implementation problems, such as institutional arrangements that might become necessary, or political constraints involved with certain means and locations.

The fifth and final element of the plan is the construction of alternative access strategies, based on priority needs, state resources, and feasibility. Alternative access strategies will consider each access need and different means to meet those needs. Examples of access strategies on the local level can be found in the Scenarios section. Alternative access strategies should present discrete choices to decision makers of effective ways to provide beach access.

Again, the elements of the plan outlined above are generalized, and must be refined according to the role chosen by the state. If the state is to play the predominant role in the overall provision of beach access, a state planning body based, for example, in the state department of parks could construct a plan based on the four planning elements outlined above. However, if state policy determines that both state planning and local planning should be involved in the planning process, an integrating element is also necessary. A familiar and workable method of planning on both state and local levels is to have the state set guidelines for local planning. In order that local needs are consistent with state needs each local plan can be required to meet certain state criteria. Such criteria would be, for example, that the planning process itself is thorough, and that the local plan assist the state in its own priority needs
as well as the local priority needs. Local plans can then be evaluated by the state according to how the plan meets state criteria, and may either become part of a state alternative access strategy, or be funded on their own merits according to a predetermined state allocation formula. On the local level, state criteria are important constraints to be considered at the time of the local feasibility analysis. (See Local Planning for Beach Access, below.)

4. Implementation

The fourth step in the planning process is that of implementation. Implementation begins with a decision of the best strategy from among alternative access strategies. Thereafter, implementation is essentially a managerial process, in which agencies must be assigned tasks to put the plan into effect. Financial arrangements, legal arrangements and other institutional support which are a part of the chosen strategy must be initiated. Intergovernmental coordination remains important throughout the entire implementation process and indeed, throughout the entire planning process.

5. Evaluation

The final step in the planning process is that of evaluation. This step is particularly important if implementation is a long-term process. Such a process affords an opportunity to modify the plan according to experience with the plan and according to changing conditions. With proper use of the evaluation step, the planning process can be self-correcting and a more effective access plan can be assured. Modification requires a reiteration of the planning process, and essentially brings the process full cycle.
State Planning Process

I. Problem Identification

A. Public discussion of perceived problem
B. Collect data base
C. Analyze data
D. Inventory existing resources
   1. Public lands, existing access--site specific
   2. Institutional resources (including financial)
E. Statement of needs, in priority

II. Policy-Making

A. How much is the state willing to commit
B. Role of state v. local governments
C. What are favored means to access

III. The Plan

A. Alternative access strategies
B. Feasibility of meeting needs
   1. Cost-benefits of obtaining needs
   2. Implementation possibilities and problems
      a. Institutional arrangements
      b. Political constraints
C. State-local plans

IV. Implementation

A. Decision as to best strategy
   1. Public discussion
   2. Administrative/legislative decision
B. Administration
   1. Legal arrangements
III. Local Planning for Beach Access

Local planning for beach access can be viewed from two perspectives: (1) whatever local planning activities are required by the state as a prerequisite to obtaining coastal zone management act (i.e., federal) money; or (2) the procedures local governments would use, independent of the actions of other governments, in attempting to plan for and provide increased public access to beaches. These two approaches do not embody mutually exclusive planning processes. The former, however, is dependent upon decisions made at the state level, and is not likely to entail a full planning process at the local level. Because the second approach does involve such a total planning process, this second approach is the one outlined below. Most, if not all, of the planning components utilized in the first approach will be found within this total planning process.

It should be noted that there are a variety of components which are relatively interchangeable within a rational planning model rubric. What follows below is a recommended planning process which the authors feel will best effectuate the acquisition of beach access at the local level. Broadly, this process consists of the following components: inventory, public hearings, determination of priorities, development of acquisition strategies, and implementation.

Inventory. A method for conducting an inventory of existing and potential accessways may be found in the section below entitled Inventory. These mechanics need not be elaborated upon here, except to emphasize that especially at the local level, consultation with the public can provide a facile method of ascertaining which areas are currently being used and have in the past been used for access purposes.

The important point to be made concerning the inventory in the local planning process is that inventorizing is the method by which access problems and potentials will be identified. This is particularly true in a legal context. That is, public hearings may afford an indication of perceived problems in access at the local level. However, many existing accessways may be over
private property, or over land with questionable public title, with the result that access is currently available (and hence perceived not to be a problem) but may be withdrawn in the future. Proper inventorying will identify those areas in which the public has a right of access to the beach. The location of these accessways, as well as public demand, will determine what current and future problems are likely to be, and will provide the perspective within which local governmental efforts to obtain access will occur.

Public hearings. Public hearings may be necessary at several different times in the local planning process. They should occur initially at the very beginning of this process, either concomitantly with or immediately subsequent to the completion of inventorying. The usefulness of public hearings at this stage in the local planning process involves both issue identification and political feasibility. In terms of issue identification, public hearings give members of the public the opportunity to tell local planners what they perceive to be problems in securing beach access. Perceived problems may not be actual ones—for example, if there is sufficient legal access but insufficient public knowledge that it exists, a local beach access "problem" might be solved simply by erecting signs indicating the locations of existing accessways. Public hearings can also indicate the various user groups that local plans must address—that is, public hearings can help to identify access problems of the day visitor as opposed to the visitor who rents a cottage for a week, or stays in a motel.

From a political viewpoint, public hearings can also serve to indicate the level of public support for beach access programs involving expenditure of local funds and can help eliminate reticence by local officials vis-a-vis any such plan. What this means exactly will vary according to local circumstances. For example, early public hearings may indicate a widespread antipathy to the use of eminent domain for acquiring access easements across private property. If use of this strategy is not politically viable in a particular county, the county planners need to know this as early as possible in order to avoid developing an unimplementable plan. Similarly, if there is great public and/or political pressure for the provision of parking to
support beach use, or to develop a municipal beach, the discovery of these desires early in the planning process can enable local planners to develop a more effective plan.

Establishing priorities. Once access problems have been identified and potential new access areas have been investigated, priorities must be established among access sites and strategies. Although this procedure essentially involves an allocation of scarce resources, the priorities selected will in part be a product of the amount of money and manpower available. For example, if there is virtually no money available for beach access, the highest priorities might well go to strategies that preserve existing areas of access and increase public awareness of these areas (e.g., by signs). Similarly, if considerable state and/or local monies are available, the evaluation of priorities might go into detailed analysis of alternative strategies (e.g., purchase as opposed to condemnation of easements), and might assign priorities among specific sites utilizing a cost/benefit type of approach. The more specific the priorities are, the easier the final plan probably will be to implement. It should be noted that this approach is analogous to that used by local governments in setting priorities among projects to be incorporated into the state thoroughfare system. Accordingly, local governments will have some experience in ranking projects along these lines. Public hearings may also be appropriate at this stage of the planning process, either to help establish the priorities or to obtain feedback once the planning staff has done this.

Acquisition strategy. Once priorities have been established, it is then necessary to determine how specific parcels can be acquired and to determine the mechanics of utilizing specific tools. This essentially amounts to planning for implementation. The planning staff should investigate alternative money sources as well as alternative modes of implementation. For example, if little or no state money is available, it might nevertheless be possible to substantially implement a beach access plan by including the substantive provisions of such a plan in a county recreation plan for which state and federal funding is available. Detail is preferable here. For example, if the mechanics for
acquiring portions of Old MacDonald's farm can be planned—e.g., what tool to use, evaluating the possibility of litigation and attendant costs and time constraints—then acquisition of this property is both more likely and easier than it would be without this information. Implementation planning should discuss alternative time frames as well as alternative access strategies, and should bear in mind the political efficacy of the acquisition strategies considered.

IV. Federal Beach Access Requirements

Section 305(b)(7) of the federal Coastal Zone Management Act, as amended in 1976, requires that

The management program for each coastal state shall include...(a) definition of the term 'beach' 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.

State management programs will be expected to meet this requirement by October 1, 1978. Final regulations for the beach access requirement have been published, and may be found at 42 Fed. Reg. 22044-22045 (1977). The regulations are summarized below to more clearly define federal expectations for beach access programs.

A management program must define the term "beach" and identify public areas that meet the state definition. The definition of "beach" should, at a minimum, be as broad as that allowed by state law. The regulations leave open the option of using a broader definition for program purposes. The definition may be made in terms of component parts of the beach (the dry sand, wet sand, etc.), and where there are questions of ownership or use of the foreshore or dry-sand areas states are encouraged to define this way. The beach may also be defined in terms of physical characteristics, or in terms of various public interests in the beach area. In defining "beach", the state is to provide a rationale explaining the relationship between the definition and beach access and protection needs.
Federal regulations also require that states set up a procedure for assessing public areas requiring access or protection. Comments elaborate a great deal on this requirement. Specific procedures are outlined. The states are to identify: (1) existing facilities and area, (2) anticipated demand for those facilities, and (3) the capability of those areas to support increased access. The state program should also identify specific areas where access through land acquisition would be appropriate, and determine available state, local and federal funding sources for this purpose. The comments also specify the kinds of access to be considered: while the emphasis is to be on physical access, visual access should also be considered. Lateral access is recommended where the portion of beach land that is "public" by state law is not sufficient to provide meaningful access opportunity. The recreational needs of urban citizens also are to be considered.

Further requirements include an articulation of state access policies and a comprehensive consideration of different techniques, including funding programs, that can be used to meet management needs. If appropriate, the state may designate shorefront areas as areas of particular concern, either by class or by specific sites, using the methods and considerations of other areas of particular concern. The access program may also find it appropriate to include a method for continuing refinement and implementation of management techniques. (See Appendix)

V. Inventory

An inventory of existing beaches and their potential for public use is a necessary preliminary step to planning for better access. The inventory can determine (1) who owns the land, (2) what access rights exist or may be shown to exist, and (3) how suitable the beach is for recreational use. This section proposes an inventory methodology to make these determinations.

The proposed method involves two steps: (1) reference to county records for ownership and land use data, and (2) on-site surveys to confirm and expand recorded information and to assess recreational suitability and public use potential. Inventory
information is to be recorded on an Inventory-Assessment Form included at the end of the section.

County records to be used in the inventory include tax maps, land deeds, subdivision plats, and land use maps. Tax maps give general ownership and locational information about lands, and are a useful first step in the research. The maps show the location of any land parcels that might give access to the beach or be used for public recreation. Each parcel of land delineated on the tax map is identified by its owner. The map will also give clues as to existing or possible future uses of the land. For example, large land holdings have a potential for future subdivision and subsequent potential subdivision regulations requiring accessway dedication. The map may indicate public lands that are not specifically used for recreation, but for which access rights are possible to obtain. Lands in unknown ownership may have possibilities of becoming public lands through legal proceedings, or possibilities of present prescriptive use of the land. Lands within flood zones or near inlets or washovers have potential for public use even if they are in private ownership.

Ownership information indicated by tax maps must be confirmed by deeds or maps located in the County Registry of Deeds. Deeds are indexed according to the owner’s name. Deed descriptions give locational information as well as information about use. The researcher can review a deed description to determine the exact boundaries of the land parcel, and particularly to see how far the land extends to the ocean. The deeds should also be read for any description of a public right in the property, such as the public dedication of an alleyway, or the purchase of an easement by the public. The Registry will also have recorded subdivision maps. These can be very helpful for clarifying deed descriptions of lot boundaries, and should also mark subdivision lands such as roads and alleyways that have been dedicated.

Land use information may be available at the county or municipal planning office. Information on public lands may be available in the form of maps of existing public parks, and highway and street maps. Existing facilities such as boat ramps, public beaches and marinas are sometimes mapped.
Additionally, information on neighboring uses to an existing or potential public beach area will be helpful in assessing recreational suitability.

At the conclusion of the first step, a great deal of information about ownership and access rights should be recorded. Some suitability information should also be recorded. The second step is an on-site survey to assess suitability for recreational use. The survey should also provide clues to possible legal actions to secure access.

Recreational suitability is in some measure a subjective assessment as well as an objective one. For this reason, a standard set of criteria to judge suitability is needed. The criteria must be consistent with the objectives of the beach access program. For example, if the objective is to provide more areas for boating activities, the assessment may include a great number of criteria to determine suitability for boating, and fewer criteria for scenic qualities or surfing potential. The assessment form included at the end of this section lists a number of factors that cover a representative range of criteria. Some criteria, such as tenure, will have been determined from the first step in the inventory methodology. Others, such as shoreline vegetation, beach material and geomorphic characteristics may be determined from the on-site survey. The survey may also indicate adjacent land uses, for which private commercial recreational facilities might particularly be noted. Such facilities include, for example, piers, motels, or marinas. Environmental damage potential and potential maintenance problems may also be assessed on site.

Access information included in the on-site survey is distance from parking facilities and the nature of the parking facilities (off-the-road parking, parking lots- fees, size). Apparent uses of land such as pathways extending from streets to the beach should be noted as indicating possible implied dedications or permissive easements. "No trespassing" signs, gates, and fences restricting access should also be included.
The methodology proposed herein may be expanded or simplified according to the needs of the beach access program. The framework provides a way to assess ownership, access rights, and recreational suitability.

**Inventory Assessment Form**

<table>
<thead>
<tr>
<th>Inventory Factor</th>
<th>Ranking/Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Beach Material</strong></td>
<td>Sand (Coral, Algal) Gravel, Cobble, Rock, Pebble</td>
</tr>
<tr>
<td><strong>Beach Texture</strong></td>
<td>Fine Granular Sandy</td>
</tr>
<tr>
<td><strong>Length</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Width</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Recreational Use</strong></td>
<td>Swimming, Snorkeling, Scuba, Picnicking, Fishing, Boating</td>
</tr>
<tr>
<td><strong>Shoreline Vegetation</strong></td>
<td>Embayed, Peninsular, Ridge</td>
</tr>
<tr>
<td><strong>Geomorph Char.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Seasonality/Stability</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Tenure</strong></td>
<td>Private/Public/Disputed</td>
</tr>
<tr>
<td><strong>Access Tenure</strong></td>
<td>Public/Private/Open/Private-Restricted</td>
</tr>
<tr>
<td><strong>Adjacent Land Use</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Parking Availability</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Development Intensity</strong></td>
<td>High-Medium-Light-Natural</td>
</tr>
<tr>
<td><strong>Development Type</strong></td>
<td>Hotel-Condominium-Single-Industrial</td>
</tr>
<tr>
<td><strong>Boat Ramp Potential</strong></td>
<td>Yes No</td>
</tr>
<tr>
<td><strong>Public Facilities</strong></td>
<td>Toilets, Showers, Food, Recreational Rentals (Skindiving, Sailboats)</td>
</tr>
<tr>
<td><strong>Waves/Currents</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Anchorage Potential</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Traditional Land Use</strong></td>
<td></td>
</tr>
</tbody>
</table>

**Comments**

**Other**

VI. Critical Issues

This report focuses upon the perfection, preservation, and acquisition of access from public roads to the publicly owned wet-sand area of the beach. However, beach access planning must also address a number of closely related issues: Once access has been obtained, what steps must be taken to maintain the accessways and the beach? What environmental impacts will result from increased beach use and what restrictions should be placed upon that use? Should highways or other means of transportation be provided or improved to encourage a larger portion of the public to use the beaches? How will parking requirements be satisfied? Should attempts be made to provide beach recreation to groups which have traditionally failed or been unable to utilize beach resources?

A. Maintenance

After public rights in beach resources, including rights of access, have been established, it is necessary to maintain the resources in a usable and attractive condition. Maintenance includes the provision of litter containers and "No Littering" signs, notification of beach use restrictions, enforcement and supervisory personnel, grounds crews, lifeguards, first-aid attendants, and so on. Thus, a crucial question arises: Where does the responsibility for maintenance lie? Local governments are reluctant to accept an additional burden, especially when it produces little or no revenue, yet they are often expected to handle beach maintenance. It is important not to overlook alternatives such as agencies of the federal, state or county governments, regional governing bodies, and private park or recreation associations (to whom the responsibility might be contracted). For example, accessway maintenance might be allocated to agencies according to the type of intended users, e.g., a pathway designed for use by community residents would be maintained by a local agency. Actual enforcement of the rules and regulations passed by the appropriate governmental unit might become a serious issue, particularly if the local or state police forces are not held responsible. For example, could federal forest rangers or special officers hired by a regional governing council legally
and effectively discharge their duties?

Beach access planning is primarily concerned with the access rights of the general public. However, the rights of private property owners, especially the rights of owners of land adjacent to public beaches and accessways, must be recognized and respected. The ideal, but unrealistic, guarantee against clashes between public and private rights would be the containment of all public uses and their incidental effects within the legal boundaries of accessways. Examples of measures which might be taken toward containment are: the posting of signs delineating the physical extent of public access rights, or the establishment of rules (or customs) setting limits on the use of public access paths; the provision of flexible wooden walkways over which the public is required to cross; the use of fences or vegetation to mark the boundaries of public access; etc.

B. Environmental Considerations

Beach access presupposes the existence of a beach. However, because the beach is inherently unstable, careless coastal management practices can destroy a beach and wreak havoc on inland areas. Responsibility for coastal management quite naturally lies with the government in which the public trust rests, and this responsibility mandates wise management and environmental sensitivity on the part of that government. Environmental measures which might be utilized include: the prohibition or close regulation of the use of off-road vehicles on the beach; the proscription of groins, jetties, and other beach "stabilization" techniques; the adoption of rules permitting no structures on the beach except for portable accessories to recreation; the monitoring of the number of beach users to ensure that beach "carrying capacities" (i.e., environmental, safety, and other limitations) are not exceeded.

The beach is surprisingly tolerant of picnickers, sunbathers, and fishermen, but the primary dune system (the first line of dunes along the coastline) cannot tolerate such users. When people walk on the dunes, they disturb the sea oats and
other grasses and thereby destroy the plants which trapped the sand and created the dunes in the first place. The resultant dune destruction eliminates a natural barrier against the ocean and opens a pathway through which the waves of the next storm will crash. The sensitivity of the dunes is of particular importance to beach access planning because access to the beach cannot be obtained without crossing the primary dune (unless the dune has already been destroyed). Plans must include: measures forbidding the disturbance of dune grasses and requiring that persons crossing the dune do so only at designated points where flexible walkways or other dune preservation walks have been laid (the goal being zero alteration of the natural dune surface); monitoring of water usage to ensure the health of the dune vegetation; careful design and construction of roads and public service lines to follow natural contours.

C. Transportation and Parking

A very important policy decision which must be made by beach access planners is whether or not more people should be encouraged to use the beaches. If encouragement is selected as an objective, then states and localities should not automatically consider building additional highways and improving existing roads. For several reasons, road expansion may not be the best solution. These reasons include parking limitations, air quality and noise implications, and the fact that new highways inevitably bring new development and may merely complicate existing problems.

One alternative is public transportation between beach areas and the origins of beach user trips. Responsibility for the funding of public transit might be placed upon the major traffic generators (tourist attractions, hotels, etc.). Park and recreation agencies could share costs, and subsidies might be provided through gas taxes, license fees, and parking charges.

In the absence of public transportation, beach users are forced to compete for parking spaces. In some places parking space has become the limiting factor with respect to beach
capacity; once a parking lot has been filled, the beach is designated as "closed". Even where parking has not yet become a problem, the provision of additional parking facilities to meet anticipated growth may not be a satisfactory solution. Parking facilities, like highways, encourage automobile traffic and the associated losses in environmental and social amenities. A second alternative to highway improvement is the use of shuttles or jitneys in conjunction with parking reservoirs built several miles inland adjacent to highway interchanges. Of course, this alternative commands careful consideration of the potential adverse environmental effects of the remote parking lots.

D. Equity

When we talk about providing more beach access along our coastlines, we are speaking implicitly about changing the equity of ownership patterns. Coastal zone management programs are often criticized as being designed for the economically privileged -- those who can afford to live or vacation on the coast. A beach access program, however, can be a method of distributing what has become a scarce resource to a greater portion and a greater diversity of the population.

The majority of our coastal areas are presently the domain of the upper and middle classes. Rising property values along the shore, plus the high costs of construction, exclude most low and moderate income families from residence at the beach. Rising costs are also reflected in the price of a vacation at the beach. Unless a family can drive from their home to the coast and return in one day, it must stay overnight in a motel, cottage or camp. In most cases, motels and cottages on the shore are too expensive for low and moderate income families, especially those with several children. Camping also involves initial costs for equipment such as tents, cooking gear, and sleeping bags, that can total hundreds of dollars. Camping fees must be included in the costs, although fees are lower than motel costs, and are significantly lower in public parks. Even a day's journey assumes the availability of private transportation and the ability to pay for the transportation costs.
There are at least three ways to help resolve the inequities of coastal usage: providing alternative modes of transportation, providing alternative accommodations, and opening the beaches for public use. Each of these benefits all sectors of the population, but has its primary impact on low and moderate income people.

The most obvious method of opening up transportation to the shore is to provide public transport systems and eliminate the necessity for a private automobile. This would enable a single-car family to travel to the beach while the car is used by those remaining behind in employment or otherwise. It would also reach those people who do not own cars and must rely on public transport, usually being lower income persons. Public transport has secondary beneficial effects for beach areas. It decreases the necessity to use valuable land at the beach for parking, opening up the land for uses such as parks, commercial areas or open space. It also decreases the amount of pollution attributed to cars, a benefit to all residents and vacationers.

A number of experiments in public transportation at the beach indicate its potential value. One can take a bus in San Francisco to Point Reyes National Seashore for a nominal fare. At least one New Jersey community operates a bus shuttle to the beach from a municipal parking lot, thereby reducing the costs of parking to the visitors and preventing problems of congestion and safety. The Department of Transportation has shown interest in sponsoring research in this area.

The second way to open up the beach to a more diverse population is to provide less expensive accommodations. Expanded camping areas might serve at least part of the lower-income population. Public parks might try some of the more imaginative solutions offered elsewhere to further accommodate those unable to afford a cottage or motel. In the Virgin Islands, for example, a "rent-a-tent" system has been so popular that reservations are necessary months beforehand. It might be expected that some families may not be able to plan such a vacation months ahead of time. The solution may be to make more tents available so that waiting periods are not as long. Some state parks offer
inexpensive accommodations. A major difficulty in providing low cost accommodations is ensuring that they are used by those who need them most. There seems to be no nondiscriminatory manner in which this could be assured, although simply providing the opportunity for their use eases the situation a bit.

Perhaps the most inequitable situation exists where the beach is nearby those of low and moderate income, but is inaccessible because it is in private hands or is adjacent to private property which effectively fences it from use. Opening up the beaches where persons live and work will ameliorate this situation. Beachfront parks in urban areas can provide the opportunity for a seaside experience for great numbers and classes of persons. Providing public walkways to the beach or other public accessways will permit others to enjoy the beach, as well. A properly designed access program, planned with all income groups in mind, can be perhaps the most effective way to redistribute the benefits of the beach.
Footnotes

1 For additional information on environmentally sensitive use of beach resources, read:

D. Brower, et al., Ecological Determinants of Coastal Area Management, Volumes I and II (UNC-Sea Grant publication, 1976).


2 Considerations of transportation and parking are discussed in:

California Coastal Zone Conservation Commissions, California Coastal Plan, pp. 139-51 (December 1975).

Public Beach Access and Resources in South Carolina: Executive Summary, pp. 16-17 (no date).

3 The California Coastal Plan squarely confronts the issue of equity. See California Coastal Zone Conservation Commissions, California Coastal Plan, pp. 152-57 (December, 1975).
Chapter Five. Legal Tools for Preserving, Perfecting and Acquiring Beach Access

I. Introduction

A. Overview of Legal Constraints

The prevalent pattern of beach ownership involves public ownership of the wet-sand or foreshore and private ownership of the dry sand and uplands. The access problem can be defined by reference to this ownership pattern, using the example of a public highway running parallel to the ocean. The road itself is publicly owned. Accordingly, the public has the right to use the road, though such use does not necessarily include the right to park along it. The land on the ocean side of the road, the upland area, is privately owned, and may or may not be developed. The land to the ocean side of the uplands is the dry-sand, again in private ownership and usually belonging to the owners of the adjoining upland. Seaward of both the upland and the dry-sand is the wet-sand or foreshore, which the public owns and has the right to use. Thus the public has the right to use the road and the wet-sand. However, the public has no right, either of ownership or use, in the lands in between—the upland and the dry-sand. The access problem by and large concerns the way in which the public obtains the right to proceed from the road down to the foreshore.

Access accordingly involves the availability to the public of beach and ocean recreational resources. This definition of the access problem leads to three important points. The first is that the public currently does have the right of access to many beaches and other ocean areas. Examples of such areas include municipal beaches, state parks, and national seashores as well as beaches already served by accessways. It should be remembered that the access with which we are concerned involves the public's right of access to the beach. This should be distinguished from permissive use of private property by the public as an accessway. For instance, a beachfront property owner who sets up a
Typical Pattern of Beach Ownership
pavillion and encourages members of the public to park, use his facilities, and walk over his property to get to the beach does not give the public a right to use his property, and may withdraw his permission at any time. There are, nevertheless, a substantial number of beach and ocean recreational areas to which the public currently does have the right of access. The problem is that there not enough, and that existing accessways are not always located where they are easily accessible to the public.

The second point is that while more beach access is needed, this does not necessarily mean that all of the upland should be declared open for public access to the rest of the beach. Littoral owners have proprietary rights that must be protected. Increased public access can and should be coordinated with the use of private land, and public utilization of the beach need not interfere with littoral owners' enjoyment of their land. Local governments should be selective in choosing accessways for acquisition that are compatible with both public and private use. Moreover, once public accessways have been acquired, public management and maintenance of beaches and accessways is essential to continued use and enjoyment of the beach by both littoral owners and the public. With regard to the protection of private rights and uses, a beach access program accordingly involves maintenance and management as well as the initial acquisition effort.

The third point is that there may currently exist a large number of potential accessways in which the public currently has or can easily acquire proprietary rights. Examples of such areas include rights-of-way leading down to the foreshore, which have been offered to the public but not yet accepted by the appropriate local government body. A check of the titles of beachfront property may reveal similar instances in which the public can perfect title to accessways. Similarly, there may exist areas currently dedicated to the public which are neither used nor maintained by the governmental body to which the land was dedicated, and hence are subject to having dedication withdrawn. The public rights in this type of property can be preserved through adequate maintenance and management of the
accessway and beach resource to which the accessway leads. In many communities, access problems can be substantially alleviated by perfection and preservation measures which involve discovering who currently has rights of access and use, and then acting accordingly. These generally will be less costly than outright acquisition measures, easier to implement, and quicker to bring about.

The basic problem remains: more access is needed in appropriate locations to increase the amount of beach available to the public. Means of obtaining access can be classified within three general approaches: (1) legislation, (2) perfection and protection of existing access, and (3) acquisition of new accessways. Legislation, as exemplified by the Texas Open Beaches Act, can simplify the task of access acquisition, but should not be considered essential to any beach access program—adequate legislative authority already exists in most jurisdictions to facilitate the use of at least some acquisition strategies. Perfection and preservation measures, as discussed above, should provide the groundwork for any beach access program. This simply means that any program should begin with full knowledge of the existing situation and a solid legal base. To increase the amount of beach access available to the public, acquisition strategies will generally be required. Many of the tools for acquiring access involve the application of general property law concepts to a beach access context. Many can and should be used in concert to most effectively acquire increased public access. It is anticipated that use of acquisition tools will form the core of most access programs. The selection of tools will depend upon a variety of factors, including local circumstances and access needs, existing legal authority, and available resources.

Efforts to acquire public access to beaches may generate litigation particularly by owners of beachfront properties. As a preliminary matter therefore, the acquiring entity should anticipate legal challenges which emanate from the Federal and state constitutions. (Godschalk, Brower, McBennett and Vestal, Constitutional Issues of Growth Management, ASPO Press, 1977; Godschalk, Brower, Herr and Vestal, Responsible Growth Management;
Cases and Materials, in press) Two major challenges should be anticipated.

The first challenge is based on the constitutional doctrine that states retain all power not expressly or implicitly given to the federal government by the United States Constitution or preempted by federal legislation. Under this doctrine the states have created local governments and have given them the power to engage in certain activities. Unless state enabling legislation authorizes local government to perform a given function (i.e., the acquisition of land and the regulation of its use), they may not do it. North Carolina authorizes its governmental units to acquire fee or lesser interests in property and to regulate land use and development within their jurisdictions, typically requiring that in doing so, these actions must in some way benefit the public. The specific enabling language of these powers should be reviewed before local governments adopt acquisition strategies to avoid challenges based on lack of authorization.

The acquisition tools most likely to raise constitutional challenges are those which require a private owner of beachfront property to provide the public access across his land to the beach without compensating him. (Banta and Callies, The Taking Issue). The Fifth Amendment provides that private property is not to be taken for a public use without just compensation. The Fourteenth Amendment due process clause extends this restriction to the states. Thus, since local governments derive their power from the states, this extends to them as well. The landowner burdened by beach access obligations imposed by the local government may object that his property has been taken for a public use for which he should be compensated. The courts in North Carolina require that compensation be paid if the owner's property has been rendered valueless for normal uses (State v. Joyner, 23 N.C. App. 27) or for practical purposes (Roberson's Beverages, Inc. v. New Bern, 6 N.C. App. 632; Heims v. Charlotte, 255 N.C. 647, cited in Strong's North Carolina Index 2d, section 30, Municipal Corporations) by the local action. Local governments must be sure that their actions do not exceed the limits of the police power or else compensation
to the burdened landowners will be required, making acquisition an expensive proposition.

The following sections outline the tools that can be used to increase public access within each of the three approaches outlined above, with greatest emphasis given to acquisition strategies. Each tool is described generally, and then discussed in detail concerning its potential application to beach access problems in North Carolina.

B. Legislation

1. Description

The legislative approach to access acquisition involves the statutory establishment of public rights to beach utilization and access, or evidentiary presumptions which favor public rather than private use.

The legislative approach to the acquisition of beach access is exemplified by the Texas Open Beaches Act [TEX. STAT. ANN. Sec. 5415(d) (Vernon Supp. 1972)] which has been in effect since 1959. The statute is predicated upon the right of the public to free and unrestricted use and enjoyment of the beach.

The Act creates several presumptions and instructs the state attorney general to enforce them. It creates a presumption that the public enjoys a prescriptive easement to use the area between the mean low tide and the line of oceanfront vegetation, or if there is none, the line two hundred feet landward of the mean low tide. It also creates the presumption that title to littoral land does not entitle its owner to exclude the public from using this part of the beach or the part below. Both of these can be overcome on a sufficient showing of facts by the landowner that no prescriptive right exists. The Act also creates a presumption that the public has a prescriptive easement for purposes of ingress and egress to beaches owned by the state and to beaches over which the prescriptive easement extends. However it does not create a right or presumption for the public to cross the uplands landward of the vegetation.
to reach the beach (Eckhardt, "The Texas Open Beaches Bill," in Texas Law Institute of Coastal and Marine Resources, The Beaches: Public Rights and Private Use, Conference Proceedings, Jan. 15, 1972). This seemingly results in the anomaly that in exercising its presumptive rights to use the beach, the public cannot get to the beach when this requires crossing the uplands except over existing public access routes. Whether this approach works depends on the amount of access currently available to the public. Accordingly, other states considering legislative solutions to the access problem might consider incorporating presumptions as to the public's right to use the uplands, as well as the dry-sand, for access purposes.

A federal Open Beaches Bill [H.B. 1676, 94th Cong., 1st Session, 1974; the bill is discussed in Black, "Constitutionality of the Eckhardt Open Beaches Bill," 74 Col. L.R. 439 (1974)] has been proposed in the last several years by Congressman Bob Eckhardt of Texas, and will probably be proposed again in the present session of Congress. This bill is a variant of the Texas Open Beaches Bill, but would probably be less effective in securing public access because of its deference to state property law. As currently proposed, this bill would make federal money available to state governments involved in acquisition of beach access, and would create federal policies supporting the public's rights to use the beaches. However, inasmuch as similar provisions have already been passed as part of the Coastal Zone Management Act, it is questionable whether an Open Beaches Bill would in fact change existing federal policy. To facilitate increased public access, the bill would authorize the federal courts to make declaratory judgments as to the respective rights of the public and littoral owners, meaning that federal courts would determine title under state law. Whether or not the bill can effectively increase public access is conjectural, especially inasmuch as federal courts will be constrained by existing state law and will be unable to initiate new approaches to property rights as has been done in some state courts [e.g., State ex rel. Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969); Gion v. City of Santa Cruz, 2 C.3d 29, 465 P.2d 50 (1970)].
2. North Carolina Application

As discussed in the section dealing with ownership of the beach, public rights of use and access in North Carolina have been established only in the foreshore. Accordingly, legislation establishing a presumption of public rights of access over or use of the dry-sand and uplands would be useful in North Carolina to help effectuate more public access. However, as the analysis of acquisition tools indicates, legal authority for a wide variety of acquisition tools currently exists in North Carolina. Accordingly, while legislation directed expressly to the beach access problem would be desirable, it is by no means a prerequisite to an effective beach access program in North Carolina.

C. Perfection and Protection of Existing Title and Access

1. Description

In many coastal communities, there exists a large number of accessways which the public would have a legal right to use given requisite prior action by city and county governments. Some of these accessways are currently in use by the public for purposes of beach access. Others are not. In either case, the types of accessways under discussion involve those in which the public has title or can acquire title with relatively minimal effort. The emphasis is twofold: (1) to take effort to preserve the public's right to use, where that right currently exists, so that public access cannot in the future be withdrawn; and (2) to perfect public title where local governmental action is required to establish the public's right to use land for access purposes. In many situations, both perfection and preservation techniques will be required--first to establish the public's right to use, and thereafter to maintain that right. In many situations, the same techniques will be required for both perfection and preservation.

In a beach access context, perhaps the two most useful perfection and preservation tools are the erection of signs identifying public accessways and public maintenance of access areas.
Such actions can serve a variety of purposes. For example, the dedication of subdivision streets is contingent upon acceptance by the appropriate city or county government. Such acceptance is also required for dedicated alleyways, which may be platted or otherwise offered to local government. Although express acceptance is one method to ensure that a legal dedication has in fact occurred, withdrawal of the dedicated streets and alleyways is still possible if the local government fails to use the dedicated property in some active manner. Maintenance has been held not only to constitute an acceptance of an offer to dedicate by implication, but is also sufficient to defeat any efforts to withdraw dedicated land. Accordingly, where dedicated roads, rights-of-way, or alleyways can be used to afford public access to the beach, local governmental maintenance of these areas, such as marking these areas with signs and providing waste receptacles and similar litter clean-up services, will both perfect and preserve the public's right to use these areas for beach access purposes.

This makes apparent the need for detailed and accurate title searches, involved in an inventory of existing and potential access areas. The emphasis should be on discovering those areas in which the public has or may easily establish a legal right to use accessways and those in which a legal right to use either has not been established or can be abrogated by the acts of others. The specific tools employed to preserve and protect access will of necessity depend upon the particular defects in title. However, most defects can probably be solved by such relatively simple measures as posting signs, doing some minimal amount of maintenance, or similar action evidencing the public's commitment to the land in question as a recreational resource. In some instances, litigation may be required to establish public rights or enjoin private attempts to abridge these rights. All of these activities will of course involve some expenditure on the part of local government. These expenditures should be relatively low where the public either has title or can easily perfect title. In any event, these expenditures should be less than those incurred by application of virtually all of the acquisition tools which follow.
2. North Carolina Application

The drawback to preservation and perfection is that it alerts landowners to the option of withdrawing public access by withdrawing dedications. The recent controversy over acquiring access at Holden Beach resulted in a net loss of public beach access.

Perhaps the most visible current application of preservation and perfection techniques can be seen at Carolina Beach, where public accessways are marked and maintained by the municipality. Such actions by local government can both preserve/perfect public rights of access and inform the public as to the location of public accessways and maintained beaches.

II. Acquisition of Access

Access to beaches can be acquired in a number of ways, including purchase, donation, establishment via litigation, and application of land use control mechanisms. The various tools and techniques for acquiring access are presented in the following section, with each analyzed in terms of advantages and limitations, innovative applications, use in combination with other techniques, and legal status in North Carolina.

There are a number of characteristics that inhere to all acquisition activities:

- Access acquisition is generally expensive. As a result, governments should seek to acquire only the degree of ownership necessary for the type and quality of access desired. In many cases, this will mean acquiring less than fee simple ownership.

- Acquisition of property is often a slow process for governmental agencies; and conversely, property suitable for access may be on the market for only a short period of time. Historically, private sector organizations (e.g., The Nature Conservancy) have assisted governments in making land acquisitions. These organizations can
and should be used to help facilitate beach access acquisition.

- Governmental access acquisition programs will be most effective if they are based upon clearly established objectives. These objectives should specify the types of access having highest priority in the acquisition program. Moreover, the available resources and access tools should be used to carry out these objectives.

A. Acquisition of Fee Simple

1. Purchase of Fee Simple

   a. Description

      Purchase of fee simple title is the most direct means of acquiring access and beachfront recreation areas for the public. All that is involved is the purchase of property by state or local government. Unless combined with other tools such as eminent domain, the governmental purchaser is limited to property available in the market. In addition, the governmental purchaser must compete with other potential buyers, which may have the effect of inflating market prices. As a result, purchase of fee simple title is likely to be the most expensive acquisition tool.

   b. Beach Access Application

      Effective use of this tool in a beach access context is dependent upon the location of land purchased. For example, purchase of a narrow strip from a roadway to the foreshore would be much less expensive than purchase of a wide strip of beachfront property. Purchase of such narrow strips would of course be dependent upon the availability of a seller. However, given availability, purchase of narrow accessways combined with acquisition of nearby land for parking would probably be a feasible tool in most developed beachfront areas.

      Purchase of fee simple title is also applicable to the acquisition of beachfront parks. Land purchased for parks could
include entire islands or portions thereof, beachfront property, or land contiguous to beachfront property, with strips of land purchased to afford access from the park to the beach.

c. Experience in Other States

The state of Oregon is currently conducting a purchase program to provide public areas for beach recreation. The Oregon program divides the coastline into discrete sections. The goal is to provide a public recreation area within each of these sections. In most instances, the recreation areas consist of a small amount of parking, scattered picnic tables, overlooks from cliffs, and access to coves and similar scenic portions of the beach. The emphasis of the Oregon program is to purchase as much land as rapidly as possible but to limit improvements placed upon the land, as opposed to a strategy of purchasing only a few selected parcels of land and intensively developing these for public use.

The state of South Carolina has over the years purchased oceanfront islands or parts of islands for preservation and public recreation purposes. As a result, there currently exists a series of state parks along the coast which afford the public access to the beach and support facilities such as picnic areas and improved campsites. The 1976 report Public Beach Access and Recreation in South Carolina (by Hartzog, Lader and Richards, funded by B.O.R.) cites the need for even more publicly owned parks along the coast to meet increasing public demand. The South Carolina acquisition approach involves geographically large areas and considerable recreation improvements, in contrast to the Oregon strategy of acquiring numerous small parcels and making only minimal improvements. Such large parcel acquisitions seem particularly appropriate to a coastline like South Carolina's which consists of numerous small islands.

Several highly developed communities in Florida, such as Boca Raton, have financed beach and uplands acquisitions by means of public bond issues. This has been positively received on the ground that if beach recreation areas are not acquired now, they will be the site of commercial development, leaving the local residents without access to and use of the beach.
d. North Carolina Application

(1) Legal Aspects

The general authority to acquire interest in real property is granted to North Carolina counties and municipalities in N.C.G.S. 153A-158 and 160A-11. More specifically, N.C.G.S. 15A-444 and 160A-353 authorize local governments to purchase property for parks or recreational purposes. In addition, the state government is authorized to purchase property under N.C.G.S. 146-22.1. Especially inasmuch as purchase of property for purposes of providing public access to the beaches would undoubtedly constitute a public purpose as construed by the courts, there should be no legal impediments to the use of this tool for purposes of acquiring access.

(2) Methods of Application

(a) Neighborhood Scale

On a neighborhood scale, acquisition of fee simple title would most likely be used to provide narrow accessways from public roadways to the beach. Acquisition of land would also be an appropriate tool for providing parking areas contiguous to such accessways. Small beachfront lots might also be purchased to provide for both access and public parking. At the neighborhood level, purchase might be combined with other tools such as condemnation and prescriptive easement to provide public pedestrian access between privately owned tracts of land, especially in locations where such accessways are platted.

(b) Municipal Scale

At the municipal level, fee simple purchase is most appropriate for the establishment of municipal beaches. Such beaches would presumably require some degree of intensive development and periodic maintenance by municipal government. Important variables would be public demand and the expected degree of use of the facility, the resulting size requirement for the facility, and the cost of the facility, which would involve location.
Municipal beaches can be used as a planning device to concentrate commercial beachfront development. Especially if beachfront property has not yet been intensively developed, combinations of public acquisition and land use management techniques such as zoning can be used to plan beachfront land use, and thus help manage such common beachfront problems as dune protection, sewerage, adequacy of road and parking facilities, etc.

(c) Regional/State Scale

At this scale, purchase of fee simple title is perhaps the most appropriate means for acquiring land for use of state parks. Examples of land to be purchased for this purpose would include islands or portions of islands, or any large acreage in coastal areas which includes some beachfront property. Although use of this tool might be expensive, arguably fee simple acquisition is the only tool for acquiring sufficient acreage for state parks.

2. Acquisition in Fee by Gift

a. Outright Donation

Outright donations of land for public purposes have long played an important role in public resource development. As of 1960, for example, over 30 percent of the Federal, State and county parkland in the State of New York had been acquired through donations. Outright donation is still a highly desirable method of conveying property because of its relative simplicity and because it gives the organization entrusted with the land the freedom, within reasonable limitation, to vary uses of the property to meet needs and conditions in the future. The tax savings realized from a donation of land are great. Aside from avoiding any further real estate taxes or estate taxes on the land value, maximum savings are obtained from Federal and State income and capital gains taxes.

The major conservation organizations--both national and regional--have historically given assistance to governments involved in acquiring land donations. Almost all local governments are permitted to receive charitable donations of land from public-
spirited citizens. Possibly the main reason charitable donations of land are not more common across the nation is that it does not occur to public officials to ask.

When a landowner decides to donate his property to an organization or governmental agency, it is the landowner's prerogative to include restrictions in the deed of transfer. Such restrictions can ensure that the land will be managed and used according to the donor's wishes. However, the government must accept the conditions attached to the grant.

Donors who place restrictive language in the deed should be aware that the restrictions will most likely have an effect on the fair market value of the property. Through restrictions, the donor is effectively retaining some rights, and these rights have value; thus, the value of the restrictions will be considered in any appraisal of the land.

One such restriction is commonly referred to as a "reverter" clause. By including a reverter clause in the deed, will, or other instrument of transfer, the donor can specify that title to the land or interest in land conveyed will revert to its former owner or to a third party if it ceases to be used for the purposes defined in the instrument.

When a landowner gives his land to a government entity, he is generally permitted to deduct from his federal income tax the fair market value of the property (or a lesser amount if a lesser estate is given).

b. Bargain Sale

In many cases, a landowner cannot, for some reason, simply give his land to an organization or government agency for protection, and the alternative of purchasing the property at a bargain sale price should be explored. A bargain sale is a purchase price at less than the appraised estimate of fair market value.

If the owner of a piece of property feels that he has to
receive some actual cash for his land, a bargain sale is often a very attractive alternative to the owner, especially if he has a low cost basis on the property and a big income. The long term capital gains tax which results from the sale of appreciated property can have an adverse effect on an individual's adjusted gross income. The long term capital gains tax allows the seller to put all of his original cost of the property and one-half of the profit from the sale into his pocket, without any taxes. The other half of the profit is added to the seller's adjusted gross income before deductions, and unless there are some sizeable deductions to shield this additional income, the increased taxes can have an adverse effect on the seller's ordinary income. By adding one-half of the profit to his ordinary income, the seller will probably be pushed into a higher tax bracket, which adversely affects not only his profits from the sale, but also the net after tax return on his ordinary income.

A bargain sale to a governmental body at less than appraised fair market value not only gives the donor a deduction with which he can shield his adjusted gross income, but it also may provide a simple way for the owner to realize fair market value without actually placing the property on the open market.

B. Acquisition of Less Than Fee Interest

In order to understand the concept of less-than-fee, it is useful to think of the rights associated with a property as a bundle of sticks. Each of these sticks can be thought of as representing some particular property right. For instance, one stick might represent the right to exclusive possession of the land. Another might be the right to develop the land. In theory, the owner of property in fee simple holds the entire bundle of sticks, except those retained by government through police power, taxation, eminent domain, and escheat. The property owner, therefore, is free to use his property in any manner he wishes as long as it does not conflict with existing governmental rights and laws.

When property is acquired in fee simple, all of the rights
associated with the property are transferred from the original owner to the acquiring party. The acquiring party thus becomes the new property title holder and is free to use the land as desired within the scope of his rights. Less-than-fee acquisition, on the other hand, involves the granting by the property owner of a limited right or set of rights to a second party. The rights granted are always less than the total bundle of rights possessed by the property owner. As a result, the property owner continues to hold the title to the land and is free to use the land in any manner which is consistent with the rights conveyed to the acquiring party.

1. Purchase of Easements

   a. Description

   An easement is the right to use someone else's land in some specifically designated manner. In most cases, easements involve a specific right to travel over a landowner's property. The most common situation involves a landlocked person who must travel across his neighbor's land in order to reach a road. In general, an easement is limited to a specific use by a particular person(s). Easements may be granted to a person (which includes a unit of government) (called an easement in gross), or to an adjoining landowner (easement appurtenant). Easements are also categorized as affirmative or negative. An affirmative easement is a right to use land, as in the right of access over land described above. Negative easement precludes some use of land, as in a scenic easement, which might prohibit a neighboring landowner from erecting a building which would block a view.

   Easements may be acquired by deed, in which case the right to use another's property is generally purchased, or by prescription, where if certain legal requisites have been satisfied, continued and prolonged use has given the user the right to use someone else's land. Purchase and prescription will be discussed as separate tools. Purchase of easements is described below.

   Easements are generally purchased in circumstances in which it is unnecessary or infeasible to purchase the land itself--i.e.
only some rights to use the land, such as the right to pass over it, are needed. There is no requirement for a landowner to sell an easement, in the absence of the use of such tools as eminent domain. Accordingly, easements are likely to be expensive, particularly when the user desires an easement on a particular piece of property. However, landowners may be persuaded to grant easements because of the tax consequences involved, including a decrease in the valuation of their property for property tax purposes and their potential ability to avoid paying capital gains tax on the income derived from the sale of the easement. Generally speaking, the viability of purchase of easements as a tool for acquiring access is conditioned upon most of the variables discussed in the section regarding purchase of fee simple title.

b. Beach Access Application

Easements are most appropriate as walkways from a public road, across a landowner's property, to the beach--i.e., down to the foreshore, which is owned by the state. In many instances, this will accordingly mean a right to travel from the state-owned road to the state-owned beach. Easements are particularly useful where (private) walkways from a road to the beach have already been designated on recorded plats, and along the lot lines of property being used for purposes not inconsistent with a public walkway to the beach. Easements may also be procured across residential beachfront property, particularly where the landowner needs the money.

The major caveat involved in acquiring access easements is that the accessway must lead from the beach to an area which is accessible to the public. This means that road capacity and probably parking facilities of some sort must be available if an access easement is to be useful to the public. In addition, as with purchase of fee simple title, purchase of access easements requires a willing seller. In the case of access easements, owners of beachfront property may be induced to sell easements if their property can be revalued for taxation purposes.
(1) Methods of Application

(a) Neighborhood Scale

On the neighborhood scale, acquisition of access easement would seem to be most useful for providing local residents access to the beach. Where beachfront subdivisions were sold with reference to a plat on which accessways were delimited, or with covenants assuring lot owners access to the beach, landowners may already have legal access. In addition, subdivision residents may have acquired the right of access to the beach via prescription. Accordingly, easement acquisition is probably not necessary in most beachfront subdivisions as a means of providing subdivision residents with access to the beach.

Using a slightly more expansive definition of neighborhood, there may be many residents of beachfront communities who lack access to the beach other than by trespass (i.e., those living in near-beach but not beachfront lots). Easement acquisition can be used to provide access for these people. Particularly if the route selected for easement acquisition is one already in use as an accessway—such as a route reserved for use by subdivision residents—and sufficient parking is available, or is an undedicated right-of-way, this tool can effectively procure public access at a fairly insubstantial cost.

(b) Municipal Scale

At the municipal scale, the local government involved must decide between acquiring neighborhood access easements, as discussed above, and using easements to provide access to high-use beach facilities, such as municipal beaches, or combining the two. In the context of high-use facilities, easements could be used to provide access between parking facilities and the beach, to provide access to the public along the commercial strip, or similarly to enable the public to reach the beach without disrupting existing beachfront land use.

(c) Regional/State Scale

At this scale, easement acquisition is perhaps most
effectively used in combination with other access acquisition techniques. For example, scenic easements might be acquired over marshland property contiguous to state parks, or access easements to the marsh provided to enable the public to use these areas for fishing, boating, etc. Depending on the area involved, easements could also be used to afford access to the beach in situations in which the landowner might not be willing to sell for simple title.

c. Experience in Other States

Broward County, Florida, has purchased three easements, ten feet wide and six hundred feet long, from the coastal highway to the beach, over currently undeveloped land just north of Pompano Beach. While there is no provision for parking, these easements do provide access to the residential communities on the landward side of the coastal highway.

Another frequent use of easements has involved scenic easements, easements which are designed to preserve the aesthetic attractiveness of an area by prohibiting unattractive land uses. In the 1930s, the National Park Service began to acquire scenic easements along the Blue Ridge and Natchez Trace Parkways. Scenic easements have also been used to preserve the shoreline along Oregon's Willamette River and to protect the views along Wisconsin's Great River Road.

A different kind of easement has been used by the Fish and Wildlife Service in the "pothole" country of Minnesota and the Dakotas, where easements were purchased to protect the natural breeding habitat of ducks and other wild fowl. These easements stipulate that farmers will not burn, fill, or drain the wetlands located on their property.

Within the beach access context, easements have been acquired through the development permit process. Although this does not involve outright purchase, the governments have exchanged something just as valuable as money (the right to develop) for the easements. (See the following sections dealing with trades and with required dedication of roads and alleyways.) An example of this sort of transaction occurred in Malibu, California, where
the builder was required to open a five-foot easement over his property so that the public could get from a nearby highway to the beach. Many other states use this technique.

d. North Carolina Application

Assuming that unity of title can be proved, an easement running from a state-owned road across a landowner's property to the state-owned beach will be construed to be an easement appurtenant, meaning that it will run with the land. As discussed in *Ecological Determinants of Coastal Area Management* (UNC-SG-76-05, 1976), the distinction between easement in gross and easement appurtenant is probably inconsequential in this instance, inasmuch as the North Carolina Supreme Court has held that easements in gross are interests which are personal to the grantee and terminate at the death of the grantee. If the state or local government is the grantee, arguably an easement in gross has the effect of running with the land. See generally William A. Campbell, "Conservation Easements: An Effective Tool in the Environmental Kit," *Popular Government*, Chapel Hill, Institute of Government, April 1973. The practical result accordingly should be state ownership of the easement essentially in perpetuity.

North Carolina counties and municipalities are authorized to acquire easements "in order to preserve, through limitation of their future use, open spaces in areas for public use and enjoyment" under N.C.G.S. 160A-401 et seq. (see also, statutes discussed in *Purchase of Fee Simple Title*). Arguably, N.C.G.S. 19B-317(A)(1) allows for a revaluation of property for taxation purposes by the landowner who grants an easement in his property. The law in North Carolina accordingly seems to facilitate public acquisition of the type of easement described.

2. Prescriptive Easement

a. Description

Generally speaking, prescription refers to the process by which one person obtains the right to use another's land in some
specified manner. Title remains with the original landholder. However, because of continued use of the landowner's land by some other party, the law recognizes that party's right to continue that use. The landowner's land is accordingly encumbered by the easement holder's right of use.

The requirements for establishing a prescriptive easement vary from state to state. Generally speaking, the requirements include the continued use of someone else's land for a considerable number of years, such as ten or twenty. Such use must be adverse, meaning that the landowner must not give permission for the use, and usually must be notorious in the sense that the landowner could have discovered the use and taken steps to prevent it had he cared to do so. Once the requirements for prescription have been met, the user has acquired a right to continue his use. In other words, this use cannot be interfered with by the landowner or his successors. If the legal requirements are met, prescription approximates the common notion of squatters' rights—that is, if one squats for long enough, he gets to keep what he has squat.

b. Beach Access Application

Prescription in a beach access context can refer to two distinct phenomena—(1) acquisition of the right to pass over privately held land in order to reach the beach, and (2) acquisition of the right to use the dry-sand and uplands for recreational purposes. Arguably, public rights in the foreshore will have as their practical consequence public ability to use the dry-sand but not necessarily the uplands for recreational purposes. Accordingly, the principal uses of prescription in a beach access context will be found in obtaining access to the beach and use of the uplands. Prescription may be used effectively to obtain or perfect the right to use the beach as well.

In many, perhaps most, beachfront communities, the public has regularly used certain paths to reach the beach. If such public use satisfies the requirements for prescription, primarily as to duration of the use and adverseness, then the public has acquired a right to use that particular accessway and dry-
sand/uplands irrespective of the desires of the title holder of the land. It must be noted that continued or habitual use of an accessway may not necessarily result in a public easement by prescription. The public acquires an easement only when it can be shown that the use has been made by the public at large. For example, if only the residents of a particular subdivision used a particular path to the beach, and met the requirements for prescription, those subdivision residents but not the public would acquire the easement. Similarly, if a Girl Scout troop for the requisite number of years used a pathway without permission of the owner, the troop in question, or perhaps the Girl Scouts as a whole, would have acquired an easement of passage or access by prescription, but the public would acquire no such rights.

While there may currently be accessways that are legally obtainable for use by the public by means of prescription, most such routes have not been legally established. Easement by prescription, to be legally recognized, must generally be established through litigation, followed by the recordation of the encumbrance upon recorded title. Local government may wish to so establish easements by prescription as a method of obtaining access. However, documentation and litigation do involve some cost, and de facto access may be preferable to the expense of securing legally recognized access.

c. Experience in Other States

Prescription is a traditional property law concept. It can be applied to beach access contexts in the same manner that it is applied in regard to any other property. For example, the Florida Supreme Court in City of Daytona Beach v. Tona-Rama, 294 So.2d 73 (1974), applied traditional concepts of adverseness to overrule a lower court decision which had upheld the public's prescriptive acquisition of access to and use of the beach. Other courts, such as the Texas Appellate Court in Seaway Co. v. Attorney General, 375 S.W. 2d 923 (Tex. Civ. App. 1964), arguably display a willingness to find that the public has prescriptively acquired access to the beach, and accordingly construe both facts and the law in the manner more likely to result in prescription
than would traditional modes of analysis.

d. North Carolina Application

(1) Legal Aspects

The requirements for establishing a prescriptive easement in North Carolina were set forth by the North Carolina Supreme Court in 1973 in Dickinson v. Pake, 284 N.C. 576 (1973). To establish a prescriptive easement, the Court must find:

(a) That the party claiming the easement has met the requisite burden of proof. The Court noted that early North Carolina law presumed that a use by the claimant was adverse, subject to rebuttal by the owner of the servient estate. This presumption has shifted in favor of the owner of the servient estate, and the claimant must now prove that he is entitled to an easement.

(b) That the way over the land of the servient estate is not permissive or with consent of the owner. There is a presumption of permissive use unless otherwise shown.

(c) That the use is adverse, hostile, or under a claim of right. Quoting from Dulin v. Faires, 266 N.C. 257 (1966), the Court defined a "hostile" use as "simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." The Court further notes that a permissive use cannot ripen into an easement by prescription, regardless of the duration of the use.

(d) That the use has been open and notorious.

(e) That the use has been continuous and uninterrupted for twenty years. The test for continuous use seems to be whether the user was able to use and
did in fact use the way when he wanted to do so.

(f) That there has been a substantial identity of the way used for twenty years--i.e., that the same path has been used.

The major stumbling block to establishment of a prescriptive easement in North Carolina seems to be the requirement of adverseness. Most of the cases have involved use of a driveway or similar access road by a landlocked property owner across his neighbor's property to a road. In these cases, adverseness has generally been shown by the lack of overt permission given by the servient owner. In other words, the use need not be hostile, in the conventional sense, in order to be adverse. On the other extreme, permission given by the servient owner will preclude establishment of an easement by prescription under Dickinson v. Pake. Use of vacant land is presumed to be with the permission of the owner.

(2) Methods of Application

(a) Neighborhood Scale

Most prescriptive easements of access to the beach will be on the neighborhood scale—that is, prescriptive easements will be the ways that local people use to get to the beach. Locally used accessways will also be the easiest to prove in litigation, so long as there are local people who have used or know of others using the accessway in question for the requisite number of years.

(b) Municipal Scale

Prescriptive easements for access can also be established at the municipal scale where there are beaches that local residents customarily use and have used for the requisite number of years. If such beach areas exist, the public may also be able to acquire via prescription the right to use the dry-sand and uplands area for recreational purposes. The public may also be able to acquire by prescription the right to park vehicles in specified areas adjacent to paths leading to the beach.
(c) Regional/State Scale

Prescription is probably not a viable tool at this scale. However, if the public has continuously used land the state wishes to acquire for recreational purposes in a manner that satisfies the requirements for prescription, the state might be able to use this tool in conjunction with other tools to acquire the property more easily, and at a lower price.

3. Conservation Easements

a. Description

A conservation easement is a method by which a landowner can secure both present enjoyment of his land and future limitations on the land's use. Pursuant to authorizing statute, the landowner conveys the easement to a governmental entity or authorized private organization. The terms of the easement preclude certain uses of the land. The owner retains title. The effect is to encumber future uses of the land, in that future owners must take title subject to the terms of the easement. Depending upon the terms of the easement, the effect of a conservation easement may accordingly be a substantial reduction in the market value of the land. To facilitate use of this technique, tax benefits in the form of reduced property taxation valuation may accrue to the landowner so encumbering his land.

A conservation easement is thus essentially a preservation technique. It involves taxation mechanisms, such as reduction in property valuation for tax purposes, as an inducement for landowners to use this technique. In theory, conservation easements constitute the donation of proprietary rights to the public, and accordingly could constitute an important acquisition tool in any beach access strategy. However, as illustrated in the discussion below concerning beach access application, use of this tool without substantial controls can lead to increased restriction rather than increased public access.
b. Beach Access Application

In a beach access context, the most likely application for conservation easements will involve large tracts of property which have not yet been developed. The effect of conservation easements in these tracts will vary depending upon the terms of the easements. The stringent easement, such as one precluding the removal of all trees, shrubs, and other vegetation, may have the practical effect of limiting future land use to open space. If these terms are so written as to preclude roadways or pedestrian paths through the property, the use of conservation easements may effectively preclude future development, keep the beachfront property in large tract private ownership, and preclude public access over this property to the beach. In such a situation, the landowner would be reducing the market value of his land, but his efforts would also have helped insure his continued ownership and enjoyment of the land, at a lesser rate of taxation. In return, the public would have received a guarantee of future open space, but not of the ability to use this open space.

A further effect of such conservation easements involves the valuation of other property along the beach. Beachfront property not so encumbered would greatly appreciate in value due to what amounts to market manipulation by taking large tracts off the market, via the conservation easement mechanism. The consequence in terms of public access is that the public may be shut off from most beach areas and unable to pay the price for the land that is available.

The above description applies to the forms of conservation easements that have been used to date. Arguably, a variant form of conservation easement could be used to obtain public access via this mechanism.

In many situations, a landowner will contract to donate his land via a conservation easement on the condition that his property is revalued for taxation purposes. Similarly, the governmental or private entity receiving the easement could condition that receipt upon provision for public access. This essentially
involves negotiation, and a willingness on the part of the governmental or private entity involved not to take everything offered at first blush.

Statutes authorizing the use of conservation easements and the ability of governmental and private entities to accept them can be amended to require the management of the proprietary rights so acquired to be consistent with certain public purposes or general welfare provisions. Such provisions can include the provision of public access to recreational facilities. Other similar purposes could be environmental preservation, habitat management, and so forth. Similarly, tax statutes can be written specifically for revaluations concerning conservation easements, with revaluation allowed only on the condition that such public access be provided.

c. Experience in Other States

The most prevalent use of conservation easement has been in Maine. Under Maine statutes 33-667 and 33-668, "conservation restrictions" are defined and authorized for acquisition by any governmental body having power to acquire interest in land. Section 33-668 distinguishes this mechanism from any other governmental powers to acquire property, including by gift. The Maine program is administered through the Maine Coastal Heritage Trust. This organization promotes the use of conservation easements as a preservation technique, and is the principal entity in Maine acting as recipient of the rights donated in conservation easements. While this program seems to have been successful in acquiring for preservation many ecologically important areas of the Maine coast, it has been criticized on the ground that use of the conservation easement technique has not increased public utilization or access to open space and recreation areas.

d. North Carolina Application

(1) Legal Aspects

There should be no legal impediment to utilizing the
conservation easement tool in North Carolina. The Land Conservancy Corporation was explicitly established under N.C.G.S. §113A-135 to acquire this type of proprietary interest. In addition, local governmental entities should have the power to accept offers of proprietary rights under the same statutes establishing their ability to acquire land generally. Arguably, the conservation easement is really nothing more than an offer by a landowner to dedicate to a governmental or other authorized entity certain proprietary rights. For conservation easements, these rights generally will be negative easements. Under a dedication concept, dedication is not complete until the governmental entity accepts the offer to dedicate. Once this has been done, the entity in question has acquired those specific rights offered.

Presumably, the landowner granting the conservation easement will want to have his property revalued for taxation purposes. He may do this by petitioning for a revaluation pursuant to N.C.G.S. § 195-317(A)(1) and in fact may want to have the timing of such a revaluation coincide with the offer and acceptance of the easement.

It might be noted that acceptance by the governmental entity or the Land Conservancy Corporation is required. Accordingly, such entities may wish to negotiate with the would-be donor of the conservation easement. Public access to recreational facilities, such as the beach, can accordingly be made one of the conditions exacted from the donor in exchange for accepting the easement and allowing a reduction in taxation.

(2) Methods of Application

Use of this tool is limited to areas where beachfront properties still exist in large tract ownership. So long as the governmental entities involved can exact public access to the beaches from the grantor as a condition for accepting the conservation easement, this appears to be a viable tool for acquiring recreation as well as access rights on either the municipal or regional/state level.
4. Leaseholds

a. Description

Leaseholds are a second commonly used less-than-fee technique. Under a leasehold agreement, the owner of a parcel of land (lessor) grants an interested party (lessee) the right to use the land in a specified manner for a limited period of time. The leasehold thus creates and transfers to the lessee restricted rights, generally referred to as the leasehold estate, and reserves to the lessor all remaining property rights, known as the fee estate. At the time of lease expiration, the restricted rights revert to the lessor. Usually the lessor and lessee have contractually decided what the state of this reversion should be before the rights are initially granted.

While leases are most frequently utilized as a legal instrument for the renting of buildings and structures (e.g. apartments, stores, offices, etc.), they can be applied to any number of other uses including the provision of farming rights, public fishing and hunting rights on private lands, and public access rights across someone's property.

Two basic variations of the standard lease are commonly used. The first involves the inclusion of a renewal clause within the contract. This simply permits the renewal of the lease at the time it expires, provided the lessor and lessee desire to use this option. The second variation, known as the option to purchase clause, allows the lessee to buy the fee outright prior to the expiration of the lease. Often this clause is inserted when the lessee is uncertain about the relative value or utility of a particular parcel of land. By acquiring certain affirmative rights, and then exercising them for a period of time, the lessee can determine whether or not fee simple investment is desirable.

Aside from these basic characteristics, leases have a number of other traits which must be considered before determining whether they may be particularly suitable for access purposes. These traits are presented below.
Advantages

- Flexible relative to possible length of contract term and types of affirmative interests which can be included.
- Usually less expensive than purchase of fee interest.
- Basic ownership remains with property owner.
- In some states lessor may be exculpated from personal and property losses to those using the land for recreation.
- Lease is generally accepted and understood by the public and the courts.
- Rights granted do not take away future rights to full use of property by lessor.
- Public entry and use can be limited to specified months and purposes--permits some continued use by lessor during other times.
- Contractual nature of agreement helps to identify more clearly the maintenance/enforcement roles.
- Might be a partial solution where no other solution is possible.

Disadvantages

- Lessor and lessee may not always be able to agree on term of lease or interests to be included therein.
- Leasing rates are adversely affected by development pressures.
- Lease may not necessarily reduce the owner's tax liability.
- Responsibility for personal and property damage liability may be unclear.
- May not solve problem (need for access) in the long run.
b. Beach Access Application

In the beach access context, leases can be used to serve a variety of needs and factual circumstances. Immediate needs for access can be served by leasing access across developed or undeveloped land while long-term needs are being analyzed and long-term plans drafted. Leases can also be used to demonstrate to a landowner who is suspicious of the harm that might be done by the public travel across his land that the harm is minimal and fully compensated by the cash payments provided by the lessee for the lease or by reduced property taxes. If the local government or other lessee has a duty to maintain the accessway and responsibly carries out that duty, this would contribute to the creation of a positive perception by the suspicious landowner. Having made this demonstration, the lessee could urge the landowner to dedicate the accessway to the public or could negotiate lease extensions at a reduced rate of compensation. If the landowner is unfavorably impressed, the local government still has the option of eminent domain available to acquire access over the property.

c. North Carolina Application

There should be no impediments to utilizing leases to provide beach access in North Carolina. Local governments and the Land Conservancy Corporation are expressly authorized to enter into contracts including leases [N.C. GEN. STAT. §§ 153A-158 (counties); 160A-11 (municipalities); 113A-135 (Land Conservancy Corporation)].

C. Other Means of Acquisition

1. Eminent Domain

a. Description

Eminent domain is the process by which governmental entities can acquire proprietary interests in privately held land in exchange for compensation, regardless of the owner's willingness to sell. Generally speaking, the governmental entity may
condemn whatever land it chooses so long as its actions are consistent with a public use or benefit involving the land in question. Compensation is usually fixed at fair market price, though there may be evidentiary problems in establishing exactly what this is.

b. Beach Access Application

In a beach access context, eminent domain has a variety of applications. One is to condemn property in fee, and thus to acquire land for access-related purposes, such as parks, parking lots, and so forth. While eminent domain may be used effectively in some circumstances, it has the drawback of being expensive. A second and less expensive application of eminent domain in a beach access context is to condemn easements, that is, public rights-of-way, over privately held property; title would remain in private ownership, but would be encumbered by the public easement for purposes of access.

This second application—using eminent domain to acquire access easements—can be used in a variety of contexts. In many coastal subdivisions, accessways (usually paths through the dunes) exist for use by landowners in the subdivisions. Many of these are retained in ownership by the subdivider, who simply does not sell strips between platted lots. Other such accessways may be held by littoral owners subject to a private easement in favor of the subdivision landowners, or subject to prescriptive easement. Where such accessways are recorded on plats, condemnation appears to be a particularly useful and inexpensive method of acquiring public access: the right-of-way is set out in metes and bounds; the land is already subject to use for purposes of access, so that additional use will only marginally affect property values, and in fact may already have a limited access easement recorded against it. Easements recorded in littoral land deeds but not showing on plats may be more difficult to fix by metes and bounds, but still present the advantages of similar existing use. In these situations, it would seem that the governmental entity could condemn an access easement across the existing accessway and pay only a minimal sum because the property is already encumbered by existing easements or covenants.
In many coastal areas, there are a large number of platted accessways and possible road extensions down to the beach. Eminent domain exercised in these contexts for purposes of acquiring access easements appears to offer an inexpensive and readily available means of public access in these areas. Although some litigation may be expected contesting both valuation and the location of accessway chosen, it would seem that this use of eminent domain presents a comparatively facile method for acquiring access.

C. Experience in Other States

In the beach access context, eminent domain powers have been used almost exclusively for fee simple acquisition. As has been mentioned, the principal difficulty with fee simple acquisition is not so much a legal as a practical problem: the costs of condemning substantial areas of beachfront property are higher than most states and municipalities can afford. The problem is illustrated by three recent examples.

In the early 1970s, the County of Hawaii condemned a park site at Kalapana Black Sand Beach. In doing so, it had to confront: (1) the difficulty of surveying a piece of ocean-front property, a task complicated by special laws relating to shifting boundary lines; (2) the problems inherent in appraising unique and commercially valuable land, the value of which may be greatly inflated because of speculation; (3) the possibility of litigation with the landowner; and (4) the realities of obtaining dollars for compensating the landowner. [County of Hawaii v. Sotomura, 55 Hawaii 176, 517 P.2d 57 (1973), cert. denied, 419 F.Supp. 95 (D. Hawaii, 1975)].

Since 1970 the State of Florida has been using eminent domain to acquire beachfront property. Between 1970 and 1973, it acquired ten miles of beach lands at a cost of one million dollars per mile. (Miami Herald, April 22, 1973) California, on the other hand, recently exercised eminent domain over a one-mile stretch of beach at a cost of six million dollars. (Los Angeles Times, January 31, 1971, §B, p. 1, col. 6).
d. North Carolina Application

North Carolina General Statutes (N.C.G.S.) 40-2 authorizes the exercise of eminent domain for "works which are authorized by law and which include a public use or benefit, by the bodies politic...." The idea of public use has been held subject to accommodation to changing circumstances, State Hwy. Comm'n v. Batts, 265 N.C. 346 (1965), and it should be noted that public benefit as well as public use is sufficient justification for use of eminent domain under the statute. Use of eminent domain to secure public access to the beaches appears to be consistent with the North Carolina statute.

Route selection has been held to be discretionary with the condemnor, and judicial interference with route selection has been limited to instances of abuse or discretion. [Duke Power Co. v. Ribet, 25 N.C. App. 87 (1975)]. It would accordingly appear that if a governmental entity concentrated its condemnation activities on accessways that were least expensive and most accessible to the public, route selection could not be successfully challenged in the North Carolina courts.

The measure of compensation in North Carolina has been defined to be the difference between fair market value of the land immediately preceding condemnation and fair market value immediately following the taking of an easement. (Duke Power Co. v. Ribet, supra.) While such valuations will obviously involve evidentiary disputes in litigation, the point should be made that landowners may in a practical sense be stuck with what the governmental entity wants to pay for an easement.

N.C.G.S. 40-10 limits the condemnation of dwelling houses to express authorizations. The important point in this regard is that condemning houses usually is expensive, and unwarranted in the context of securing numbers of accessways for public use.

Both cities (N.C.G.S. 160A-241) and counties (N.C.G.S. 153A-159) are authorized to exercise powers of eminent domain, and may acquire fee or lesser interests in property. Recreational easements are specifically provided for in N.C.G.S. 153A-159(2) and 160A-241(3). In addition, cities are granted the
authority to exercise eminent domain for purposes of opening, extending, and improving streets, alleys, sidewalks and public wharves under N.C.G.S. 160A-241(1).


2. Implied Dedication

   a. Description

   If a residential lot is sold with reference to a recorded plat on which roads or rights-of-way are designated, the purchaser has a right to use those roads and rights-of-way as an incident to title. Often such roads and rights-of-way will be expressly dedicated to the general public as well (required dedication is dealt with separately later in this chapter). In other cases, the doctrine of implied dedication enables a court to find that recordation of streets, alleyways, etc., or other acts constitute a dedication of those features to the public. An implied dedication may be found to exist whenever there is a transfer of title. It may be shown by some act or course of conduct on the part of the owner from which a reasonable inference can be drawn or which is inconsistent with any other theory than that he intended to dedicate. Therefore it can arise from activity other than recordation. For example, if a purchaser buys land that has been used for an extended period of time by the public for access purposes, and he does not subsequently seek to prevent such use, it may be argued that the purchaser intended to donate to the public an access easement over his land. This concept has obvious ties to prescription and adverse possession, but with the concept of adversity removed. The landowner is construed to have a donative intent—that is, he intended to give to the public the property rights in question. However, the evidence used to prove an implied dedication may be substantially similar to that used to prove prescription—i.e., continuous and uninterrupted use with the knowledge of the landowner. Implied dedication can accordingly
be seen as an alternative to prescription in those circumstances in which adverse use cannot be established.

Express dedication poses no such proof problems—the dedication itself establishes public rights of use, consistent with applicable statutes and ordinances. Accordingly, where a road or right-of-way has been expressly dedicated in a beach access context, the public has acquired access.

b. Beach Access Application

In the context of residential subdivisions, implied dedication can be used to argue that subdivision roadways and alleyways have been dedicated to the public. This is especially important in those subdivisions in which alleys between beach-front lots can provide accessways from a roadway to the beach. In such circumstances, successful invocation of implied dedication will have the effect of securing a public accessway from a public road within the subdivision to the beach. In addition, in those subdivisions in which existing roads can be extended down to the beach, use of implied dedication will have the effect of securing a public accessway from a public road within the subdivision to the beach. In addition, in those subdivisions in which existing roads can be extended down to the beach, use of implied dedication to establish rights in the right-of-way can afford not only pedestrian access to the beach but also vehicular access to the beach. In either situation, the establishment of public rights in the subdivision streets should have the effect of allowing public parking along these streets, with the caveat that some improvements might have to be made if the streets are not paved or are too narrow to allow both parking and through traffic.

The non-subdivision application of implied dedication involves the establishment of public rights in existing ways that are permissively used for access purposes. Whether or not this application of dedication can be used to supplement prescription depends on the interpretation of state law, and may well not be available.
Express dedication is applicable to those beachfront roads and rights-of-way that have been expressly dedicated. Such roadways already afford the public legal right of access—accordingly, the emphasis in express dedication is to discover (e.g. by title search) and utilize existing dedicated roads and rights-of-way, and to encourage the express dedication of new streets and rights-of-way.

c. Experience in Other States

The doctrine of implied dedication has been used in both the Texas and California courts. In Seaway Co. v. Attorney General, 375 S.W. 2d 923 (Tex. Civ. App.), the Texas Appellate Court found that an easement for purposes of access had been impliedly dedicated to the public as a result of over a century's use of the beach by the general public for recreational purposes. There had been no interference with public enjoyment of the area, and the public had never sought permission from anyone to use the beach. The court applied roadway precedents to the beach context, without discussing their suitability or referring to earlier beach access decisions in other states.

In Gion v. City of Santa Cruz and Dietz v. King, 2 C.3d 29, 465 P.2d 50 (1970), the California court set forth guidelines indicating when public use of the beach and adjacent parking facilities would ripen into an implied dedication of the property in question. However, as noted in 22 Stanford Law Review 564 (1970), the criteria set forth by the court amount to use of prescription under the name of implied dedication.

d. North Carolina Application

(1) Legal Aspects

In North Carolina, dedication consists of two distinct acts: (1) an offer to dedicate, express or constructive, by the landowner, and (2) acceptance of this offer by an appropriate governmental entity. The North Carolina courts construe recor-
dation of streets and alleys on a plat to be an offer to dedicate for public use. Wofford v. North Carolina State Highway Commis-
sion, 263 N.C. 677 (1965); but cf. Spooner's Creek Land Corp.
v. Styron, 7 N.C. App. 25 (1967), reversed on other grounds. Designation of streets as public roads is construed as such an offer. Questions about whether or not an offer has been made will in part be eased by N.C.G.S. §136-102.6 (Acts 1975), which requires most residential roads to be designated on plats as either public or private, in the context of lots sold after 1975.

An actual or constructive offer to dedicate a road for public use does not constitute a dedication in the absence of an acceptance. Oliver v. Ernul, 277 N.C. 591 (1970). Acceptance must be made by proper governmental authorities—e.g., the governing board of a municipality or the State Highway Commission. Owens v. Elliott, 258 N.C. 314 (1962). Acceptance must be express—i.e., permissive use in the absence of an express acceptance does not constitute a dedication for public use. Oliver, supra. While there is no definitive statement on what constitutes an express acceptance, it has been held that municipal authorities are "conclusively presumed" to have accepted a dedication if they improve the streets and open them to public use. Osborne v. Town of North Wilkesboro, 280 N.C. 696 (1972). The key test regarding acceptance seems to be whether the local government (or the State Highway Commission) accepts the responsibility for maintenance and operation of the road. Owens, supra.

If there has been no public acceptance of an offer of dedication within fifteen years from the time of the offer, the owner may withdraw the offer under N.C.G.S. §136-96. Abandonment by the public is not presumed—a withdrawal must be recorded in the county of dedication. Janicki v. Lorek, 255 N.C. 53 (1961). Withdrawal does not obviate the rights of landowners who purchased land with reference to a plat on which the roads were recorded from use of the roads; these grantees acquire at purchase an irrevocable right to use the roads, which can be extinguished only voluntarily. Oliver, supra. However, the court, in Janicki, indicated that where sale is not made pursuant to a plat, landowners who used the roads being withdrawn have no special legal rights to use the roads (in the absence of easement by necessity, etc.).

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(2) Methods of Application

(a) Neighborhood Scale

Implied dedication would seem most applicable in North Carolina in the context of particular roads and accessways. These of necessity will be at the neighborhood scale, although litigation to establish public rights in these areas might be limited to locations which would afford public access to highly used (e.g. municipal) beaches. Especially within subdivisions, parking is likely to be a problem. Accordingly, planning is necessary to insure that the municipality seeks to establish access easements by implied dedication only in those areas where it is unnecessary to expend large amounts of money to improve roadway and parking facilities.

(b) Municipal Scale

The advantage of using implied dedication as a means of establishing the right of access in areas currently used by the public for access purposes lies in the ability to establish what amounts to a public beach, and access thereto, without the expenditure of public funds (except for litigation). This may be possible in many areas traditionally used by the public for access purposes with permission of the landowners (accordingly making prescription unavailable under North Carolina law).

(c) Regional/State Scale

It seems unlikely that this tool will have significant application at the regional or state scale. However, its use depends upon the factual circumstances in each case, which may make application of this tool desirable.

3. Trades

a. Description

There are two principal means by which trading can be used as a tool to acquire access. The first involves the exchange
of access rights for development or use modifications or for commitments to assume maintenance responsibilities. This was the approach adopted by the City of Greensboro. That city amended its zoning ordinance [§23-33.5 (1975)] exempting residential lots abutting open space dedications from the minimum lot size otherwise required by the ordinance. This was done in an effort to obtain open space dedications on flood plains. It is apparent that such an approach could be used in the beach access context as well. However, unless the specifics of such an approach are fully reported in advance of their implementation, there is a serious problem of abuse by the body evaluating the benefit received. This could lead to contract or spot zoning which would be overturned by the courts, to political kick-backs, and to instability in local development patterns.

The other principal use of trading involves the exchange of land. If a local government or the state owns non-beachfront property for which it has no immediate or foreseeable need, such property could be exchanged for beachfront property having similar value. Here the dangers of abuse are less, because the exchange would follow objective appraisal of both parcels.

b. Beach Access Application

Trading is most appropriate for new development proposals. When land which is desirable for access purposes is the subject of private development planning, the local or state government which owns non-beachfront, trade-able land should alert the private developer of the availability of that land which it owns. For example, if beachfront property has been platted in fifty foot wide lots as it frequently is in residential zones, and the developer proposes to develop commercial uses, the fifty foot wide lot is not as valuable to him as a larger, non-beachfront lot would be. Therefore, if the local or state government owns non-beachfront land which has a two hundred foot frontage on the coastal highway, the private developer, in keeping with good economic sense, should be willing to trade his fifty foot wide lot for the larger parcel. Any difference in land values can be compensated for in money or in additional land or in development rights modifications.
The federal government has often traded land in order to obtain a larger, unified parcel where it had previously held title to scattered pieces of land. This has enabled the government to establish parks and parkways which it could not otherwise have done as effectively or efficiently.

c. North Carolina Application

There appear to be no legal barriers to the use of trades in North Carolina. The trading of land for other land is authorized implicitly by the statute creating the Land Conservancy Corporation (N.C.G.S. §113A-135). The powers given to this nonprofit corporation include the power to make contracts and other agreements useful for acquisition of land in its natural and unaltered condition, and the power to convey and assign any interests in real estate. These powers can be used in conjunction with other powers to affect trades. More general powers are given to the Department of Administration by N.C.G.S. 146022.1, which authorizes acquisition "by gift, condemnation, or otherwise."

4. Implied Reservation

a. Description

Where the state has previously owned a parcel of land used by the public, it is possible to argue that the grant from the state to private parties was not unencumbered, but instead reserved for the public's use an easement allowing passage over or use of the land. The rationale underlying this tool is that the state did not intend to relinquish well-established public rights of use or access, and accordingly impliedly reserved such rights for the public. This essentially involves a policy determination, inasmuch as there is likely to be no hard evidence indicating intent.

b. Beach Access Application

In a beach access context, the argument in favor of implied reservation is predicated upon state ownership of the foreshore
and public use of the beaches. The argument is that the state, in selling or granting the upland and dry-sand, could not reasonably have intended to deprive the public of access to the state-owned foreshore. A right of public access to the foreshore, via reasonable ways of access, was retained. This argument could apply only in those situations where the state at one time did own the beachfront property, and subsequently transferred title to private ownership.

c. Experience in Other States

As illustrated by the Texas court’s rejection of the doctrine of implied reservation in Seaway Co. v. Attorney General, 375 S.W. 2d 923 (Tex. Civ. App. 1964), the problem with this tool involves proof of an intent to retain rights in land granted away. The Hawaii courts have been willing to use this doctrine given sufficient evidentiary substantiation. See, e.g., Town and Yuen, “Public Access to Beaches in Hawaii: A Social Necessity,” 10 Hawaii B. J. 3 (1973).

d. North Carolina Application

In Dorman v. Wayah Valley Ranch, Inc., 6 N.C. App. 497 (1969), the North Carolina Court of Appeals sets forth three requisites to create an easement by implication upon severance of title:

(1) Separation of title.

(2) Before separation, the use occurred for so long and so obviously or manifestly as to show that it was intended to be permanent.

(3) The easement is necessary to the beneficial enjoyment of the land either granted or retained, such necessity to be determined by a standard of reasonable, not absolute, necessity.

Using these criteria, it might be possible to argue that grants of property to private individuals from the state did not include
the grant of a right to exclude the public from access to beach areas.

There are two problems in trying to effectuate this means of obtaining access. The first is the traditional property orientation of the North Carolina courts. Given such holdings as Capune v. Robbins, 273 N.C. 581 (1968) (re: private rights in dry-sand areas), it would seem unlikely that the North Carolina courts would construe grants in fee to retain a public right of access in the absence of express provisions to this effect, particularly with regard to pre-twentieth century grants. The second problem stems from Wilson v. Smith, 18 N.C. 415 (1973), which suggests that this type of easement is available only to the grantee over land retained by the grantor—not to the grantor over land granted to the grantee, as suggested in the Dorman decision.

Implied reservation will be a viable doctrine in North Carolina, but only in those cases in which sufficient proof of intent to retain a public right of access can be shown. This will be difficult, if not impossible, to obtain in most situations, but is still worth considering.

5. Post Flood Damage Acquisition

a. Description

Many North Carolina communities are currently participating in the National Flood Insurance Program administered by the U.S. Department of Housing and Urban Development.

The Flood Insurance Program itself is not directly applicable to the acquisition of beach access. The program does require local governments to institute some type of subdivision controls in order to qualify for the program (Section 1910.3 of the new regulations, 41 F.R. 46976), but there is no requirement that any such regulation deal with beach access problems. Although provisions relating to beach access could certainly be made part of any such subdivision regulations, as discussed in
other sections of this chapter, any such effort would be tangential to the Flood Insurance Program itself.

b. Beach Access Application

The importance of the Flood Insurance Program to beach access falls not within the implementation of the insurance program itself, but rather with the mechanics of the program once loss has been incurred. Under the National Flood Insurance Act (42 USC 4102), the federal government is authorized to purchase properties "damaged substantially beyond repair" rather than pay the insured to reconstruct whatever was on the property before the damage occurred. In practice, this may allow for purchase whenever there is greater than 50 percent damage. The provisions of this section allow the federal government to sell, lease, donate, or otherwise transfer the property thus acquired to any state or local agency which agrees to use the property for a minimum of forty years for whatever "sound land management" practices HUD has determined applicable. This statute and the regulations promulgated pursuant to it provide both state and local governments with an opportunity to negotiate with the federal government for the transfer of lands which have sustained substantial flood damage. Although apparently this approach has never been tried, it could provide accessways for the public and at the same time prevent the recurrence of damage in hazardous areas. For example, when a structure built in a washover is "damaged substantially beyond repair," it could be acquired, the land cleared and used for access. Whether a state or local agency could encourage HUD to make use of this opportunity by offering to pay the difference between that which HUD would normally pay to compensate for the damage sustained and outright purchase ought to be explored.

III. Regulation - Land Use Controls

A variety of land use control techniques can be used to provide public access to beaches whenever beachfront property is being subdivided or developed. Some of these techniques involve direct requirements for the provision of access. Others may be
employed to enable local governmental bodies to encourage the provision of access by developers of oceanfront property during the design of the development. Many of these tools must be used in conjunction with other tools in order to acquire access.

The techniques discussed have all been used in North Carolina. Many of them have been used in ocean-side communities and have been applied in oceanfront contexts. It should be noted that all of these techniques involve use of the police power, and hence are dependent upon the existence of adequate enabling legislation.

A. Required Pedestrian Access

1. Description

This tool simply requires that as a matter of public policy public pedestrian access to the beach be provided as part of any beachfront development. Provision may be made for the design and construction of the accessway, whether the requirement is applicable to both subdivision and commercial development, whether the requirement is applicable only to certain classes of development, and so forth.

The easiest method of requiring pedestrian access is through a city or county zoning ordinance. Beachfront property can be zoned as recreational/residential, with the access provision being one of the requirements of the zone. Such designation could apply to all beachfront property, commercial as well as residential uses.

2. North Carolina Application

Currituck County. Section 96 of the Currituck County Zoning Ordinance, adopted in October, 1971, creates a Recreation Residential Zone, as one of a number of zones established by the ordinance. One requirement of the Recreation Residential Zone involves the provision of public accessways of not less than ten feet in width, from a public roadway to a recreation area (defined to include rivers, sounds, and beaches), for each development involving more than 600 feet of recreation resource
frontage. It should be noted that development may be either commercial or residential, and that the developer is allowed to locate access anywhere on the property. The ordinance requires that the accessway connect the public recreation area—in this case, the beach, meaning the foreshore—to a public roadway. This requirement may effectively make the dedication of subdivision roads to the public a necessary condition to meeting the zoning requirements; arguably, it may also require the appropriate local governmental body to accept the offer of dedication made by the subdivision developer.

3. Authority

Authority for requiring public pedestrian access would appear to exist under the zoning enabling provisions of N.C.G.S. 153A-340 (counties) and N.C.G.S. 160A-381 (cities). The former states: "Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational facilities be provided." The latter similarly provides: "Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that provision be made of recreational space and facilities." The question thus seems to be whether or not the provision of beach access is an "appropriate" situation for the imposition of requirements relating to recreational space and facilities. As discussed elsewhere in this report, a substantial case can be made that the provision of public access to beaches does constitute such an appropriate situation. It is accordingly possible to conclude that the North Carolina statutes authorizing cities and counties to engage in zoning are sufficiently broad to encompass a requirement that an easement for pedestrian access be given to the public in the context of beachfront development. Currituck County's limitation of such requirement to developments having greater than 600 feet of recreational facility frontage would seem to take into account the appropriateness of the statute's language, and would seem to serve as a guide to future application of such a requirement so as not to burden the small business developer or individual residential developer.
B. Required Dedication of Roads to Provide Access

1. Description

This tool affords public access to beaches by requiring the extension of roads or rights-of-way to the foreshore and dedication of these roads to the public. Application of the tool will normally involve three distinct requirements:

(a) The extension of all roads and rights-of-way not parallel to the beach down to the foreshore.

(b) Public dedication of all such roads and rights-of-way not parallel to the beach.

(c) Required public dedication of all other roadways in beachfront subdivisions.

The purpose of this tool is to provide vehicular and/or pedestrian access either to the foreshore itself or to a point very near the foreshore, with pedestrian access on a dedicated right-of-way down to the foreshore. Although only the first two elements listed above are required in order to provide this type of access, in most situations practical considerations will mandate the third element of requiring dedication of all subdivision roads.

Although this tool is most applicable to new subdivisions, it might also be appropriate in those commercial development situations in which an existing road (perpendicular to the beach) dead-ends at the property being developed, or fails to continue across the developed property. In these situations, a requirement that the right-of-way be extended across the developed property down to the foreshore would work in a similar manner to the required dedication of subdivision roads.

2. North Carolina Application

Currituck County. The recreational/residential zone established in the Currituck County Zoning Ordinance (October, 1971)
requires the extension of all roads and rights-of-way not parallel to the ocean down to the foreshore in all developments having a minimum of 600 foot beachfront frontage. This requirement extends to all developments—meaning both residential and commercial. It might be noted that while streets running parallel to the ocean are not covered by the dedication requirement, the further provisions of this zone requiring pedestrian access from a public roadway effectively requires dedication of parallel roads in most circumstances. The total impact of the Currituck ordinance is to require dedication of all roads and rights-of-way for those developments having sufficient beach frontage (i.e., 600 feet).

Town of Nags Head. Article VI, Section 111B of the May 1, 1972 Land Subdivision Regulations for the Town of Nags Head requires public dedication of all roads in subdivisions developed within the municipality. This requirement applies to beachfront as well as non-beachfront property.

3. Authority

Authority for requiring public dedication of roads is contained in North Carolina's zoning enabling statutes, as discussed in the section on Required Pedestrian Access. Further authority is found in the subdivision control ordinance statutes, N.C.G.S. 153A-331 (counties) and N.C.G.S. 160A-372 (cities) which state, "A subdivision control ordinance may provide for . . . the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision and of rights-of-way or easements for street and utility purposes." It should be noted that the subdivision control ordinance statutes limit the dedication of recreation areas to use by residents of the immediate community, not the public at large, and mentions rights-of-way and easements only in the context of street and utility purposes. Thus a developer could apparently be required to dedicate the dry-sand to the use of the residents of the immediate community and streets across the upland and dry-sand as accessways for the general public to the wet-sand.
C. Water Access Lots in New Subdivisions

1. Description

As a general rule, a governmental body cannot require the dedication of a subdivision lot to public use without first paying for it. However, in beachfront subdivisions, it may be possible to effectuate this same result and provide public access to the beaches with either nominal or no cost to the governmental body involved. This result can be achieved either through use of what has been termed water access lots alone, or by a combination of using water access lots in conjunction with eminent domain.

Water access lots, as used in North Carolina, refer to strips of property fronting a public street and having beach frontage as well. Such lots are usually narrow and on the ground probably indistinguishable from accessways. However, water access lots are platted as lots, and accordingly are not construed to be part of any roadway system.

The method of providing public access by use of water access lots involves two steps. The first is to require, by subdivision control ordinance, that in any beachfront subdivision development containing interior lots (i.e., without beach frontage), water access lot(s) be provided for the benefit of the interior lot owners. In other words, the requirement provides for access for the entire subdivision, but not the public. The ordinance can require that each water access lot either be dedicated to the public or transferred in fee to the interior lot owners.

If dedication is made to the public, and accepted by the appropriate governmental authority, then the public has acquired the right of access across the water access lot to the beach. However, if the subdivision owner chooses to transfer title to the water access lot(s) to the interior property owners, the public at large still has no right to use that (those) lot(s) unless the land is either purchased or taken by eminent domain.
Eminent domain is well suited to use in situations where title has been transferred to the interior property owners. Because there are so many owners, the lots would be effectively inalienable; condemnation would be the only way to acquire the lots. The cost of the land taken would be the difference between the market value immediately before condemnation and the market value immediately thereafter. In the case of a water access lot which is platted as such and can be used only for that purpose and is owned and used by a large number of people already, it is arguable that allowing more people to use the lot for access decreases the market value of the property little if at all. Accordingly, acquisition of an access easement by means of condemnation would cost little if anything. Arguably, the price of eminent domain should be the taxes which the interior lot owners must pay on the water access lot, presumably capitalized over a reasonable number of years.

Summarizing, water access lots can be used in two ways to afford public access to the beach:

(1) by dedication of water access lots to the public, or

(2) by using eminent domain to acquire an access easement in favor of the public over the water access lots held in fee by interior lot owners.

2. North Carolina Application

Carolina Beach. Section 4.9 of the Subdivision Regulations adopted by the town of Carolina Beach on May 3, 1973, require the provision of water access lots for any subdivision adjoining the sound, the Cape Fear River, the intracoastal waterway, or the Atlantic Ocean which contains interior lots. Water access lots must be no less than ten feet in width, and must be provided in the ratio of one lot for each 600 feet of shoreline frontage. Water access lots must adjoin a public street, which means that at least some if not all subdivision streets must be dedicated to the public. The Carolina Beach regulations provide that water access lots must either be dedicated to the public or transferred in fee to the common ownership of the interior lot
owners. The town must agree to accept such dedication.

3. Authority

N.C.G.S. 153A-331 (counties) and N.C.G.S. 160A-372 (cities) state: "A subdivision control ordinance may provide for . . . the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision and of rights-of-way or easements for street and utility purposes." These statutes accordingly provide direct authority for requiring the provision of water access lots for use by subdivision residents. It should be noted that this authority is granted in subdivision control statutes rather than the zoning enabling statutes, meaning that the lack of zoning in any particular coastal community is not a bar to use of this tool.
Chapter Six. Seaside: A Scenario

Seaside is a community located on a barrier island off the coast of North Carolina. The island is about thirty-five miles long and varies in width from one-half to three-quarters of a mile. A bridge connects the island to the mainland one mile north of town. The community stretches for three miles along the island, encompassing about 2.5 square miles. On one side of the island is the Atlantic Ocean and on the other side is the Lost Sands Sound. (Refer to the Seaside Context Map.)

Seaside has a permanent population of about three hundred people. At the height of the summer season, the transient-tourist population reaches three thousand people. About 700 of the seasonal population are day visitors, while 500 people make use of the motels and 1500 people reside in their own or rented houses. State Highway 100, a two-lane macadam road built in the 1940's, opened the island for settlement. Parallel to Highway 100, and one-quarter mile to the west is U.S. Highway 1, a concrete, divided, two-lane road built in 1960. The bridge was built in 1960 as an extension of U.S. Highway 1. The tourist industry at Seaside experienced rapid growth in the 1960's because of the construction of the highway and the bridge. Before this time, access to the island was possible only via a bridge 30 miles south of town, or by boat or plane.

The beach at Seaside is fairly uniform, composed of small grain, golden sand. It is this beach that has attracted tourists to the area. The beach has been relatively stable for forty years, surviving the impact of two major hurricanes. A hurricane in 1965 destroyed a part of the dunes, creating a small washover at the edge of the commercial area. Generally, the distance between the mean low and mean high tide lines (wet-sand) is about one hundred feet. From the high tide line to the dune or vegetation line (dry-sand) is about forty feet. From the dune line to the right-of-way of State Highway 100 is about five hundred feet. The right-of-way extends twelve feet beyond
the edge of the paved surface.

As is the rule throughout North Carolina, the wet-sand portion of the beach is publicly owned. To date, no one in Seaside has questioned the right of the public to use the dry-sand area as well, but motels have recently begun to rent umbrellas and chairs for use in the dry-sand areas adjacent to their establishments. The Town Board anticipates that these businesses may try to bar the public from the dry-sand area in the near future, as has happened in nearby coastal cities. The Board is not planning to make any waves unless a challenge to the public right to use the dry-sand is raised by a coastal landowner, but it is accumulating data and legal opinions regarding the status of the dry-sand area. Should the issue be raised, the town expects to make two arguments:

(1) The dry sand area within the city limits of Seaside has been acquired by the public by implied dedication (see Chapter Three, Section II, C).

(2) The public trust doctrine should be extended in North Carolina to cover the dry-sand as well as the wet-sand beaches (see Chapter Three, Section II, B).

The Town Board has made a finding that the lack of public access to its beaches is frustrating to many permanent residents, and to the tourist industry. Therefore, the Board has resolved that public access to the beach should be provided to the greatest extent possible. With this general policy guidance from the Board, the town planning staff has initiated a beach access planning process. As a first stage in the process, an inventory of existing and potential access areas has been started. The planning staff inventoried the town by dividing it into three study areas:

(1) The northern section of Seaside includes a municipal park, four small subdivisions, and other miscellaneous developments.

(2) The central section includes a commercial area with
motels, restaurants, tourist cottages, and shops. The washover abuts the commercial area to the south.

(3) The southern section includes an undeveloped area, a subdivision platted in 1940, and a condominium located on the sound side of Highway 100.

The inventory includes a description of the development in each study area, and a set of possible access strategies for each area. The staff has made a preliminary selection of alternatives that seem the most suitable within each study area. The planning process will continue with an analysis of institutional resources, a refined analysis of needs and policies, and a feasibility analysis. (See Chapter Three, above.) Following is a summary of the inventory, by study area.

I. Northern Study Area

Many of Seaside's day visitors come to the Northern Study area to utilize the Seaside Community Park, an eight acre municipally-owned facility containing the only publicly owned beach within a half hour's drive. In the past, the park has had no difficulty accommodating all those who have sought to use it, but because a great deal of growth has been occurring in the surrounding region, it is expected that park capacity will soon be reached, particularly with respect to available parking facilities.

Two combination restroom-change houses, a picnic shelter, and a concession stand were recently added to the park. These improvements have increased the already expanding demand on the park facilities, and a number of management problems have resulted:

(1) The increasingly intensive use of the park has made it more and more (and almost prohibitively) expensive for the town to provide the required lifeguard and maintenance personnel;
(2) As has already been suggested, parking facilities are rapidly becoming inadequate; and

(3) It used to be a relatively simple task to ensure that park users crossed the primary dune system only at appropriately designated points. That is no longer the case, and the dunes are beginning to disappear.

The Seaside Community Park Board of Commissioners has been carefully reviewing a number of options which have been proposed to deal with the park management difficulties. The alternatives are as follows:

(1) Close the park and offer it for sale.

(2) Close the park to nonresidents.

(3) Set user fees and establish a capacity limit.

(4) Expand the parking facilities off site, introducing a jitney service and charging user fees.

(5) Give the entire park to a state agency.

(6) Leave everything as is, or simply set user fees.

Because the park has long served as a focal point for the community's summer activities and as a gathering place for the Town's young people, the Board would like to keep at least a portion of the park open for community use. Nevertheless, sale of the park grounds could be attractive, particularly if the buyer were a private association dedicated to the continued provision of Seaside community services.

Closing the park to nonresidents would solve all the perceived problems, except that dune restoration would still have to be undertaken. But a major new problem could arise. Interested nonresidents might validly claim that the park has been dedicated (probably expressly, at least impliedly) to public use
and that the Town cannot withdraw that dedication while continuing to make the park available for use by Seaside residents. Should the nonresidents take their claim to court, their argument would likely prevail.

If the Town chooses to set fees and establish a limit on the number of park users, it may face the prospect of turning away its own taxpayers. This result might be avoided by the careful use of differential fees (one fee for residents, another higher fee for nonresidents). For such fees to pass judicial muster, the differing rates must bear a reasonable relationship to the legitimate purpose for which they are imposed. Here they would be imposed to generate revenues sufficient to sustain a valuable public resource (the park) and, if used, they should be set to reflect the existing disparity between tax support by residents and nonresidents as well as the operating cost differential between the two classes (e.g., the nonresidents require more parking space per visitor than do the residents). As long as the fees approximately reflect the differences in cost, they would probably be upheld if challenged.

The fourth option is parking facility expansion. The addition of acreage adjacent to the park is not feasible, since all the surrounding land has been developed and would therefore be prohibitively expensive to purchase. It would be possible, however, to acquire remote parking reservoirs from which shuttle bus service could carry nonresident visitors to the park. Unfortunately, this alternative is expensive, addresses only one of the three management problems, and is likely to aggravate the remaining two.

Turning the entire park over to a state agency would certainly eliminate the Park Commissioners' management difficulties and might be viewed as a solution which places responsibility where it belongs. Oceanfront communities often argue that it is unfair to place the burden of providing beach recreation to the rest of the world on them. The state not only has a broader and more stable financial base, it has the ability to distribute the burdens more widely and less onerously. This alternative
would, however, remove (at least theoretically) local control over the park. If a cap were subsequently placed upon the number of park users by the new ownership, use by local residents would not retain any priority. Moreover, the new management would be unlikely to impose differential fees (except perhaps between automobile visitors and pedestrian visitors).

From the limited perspective of the Park Board, the most desirable alternative would result from the opening of a state-owned park in the Southern Study Area. If a state park were established there or at any nearby location, it would be likely to remove much of the currently existing pressure on the Community Park. This would almost certainly be the case if the Board were to impose differential fees: nonresidents would obviously prefer the free state park. This solution would reduce and possibly eliminate the problems presently confronting the Park Commissioners.

In addition to the Park, the Northern Study Area contains four subdivisions, all of which began to be developed during the mid-1960s. Strangely enough, each subdivision differs from the remaining three in the way its developer laid out the central street, although all the central streets run perpendicular to the oceanfront. This fact was noticed recently by an alert member of the Seaside Planning Department as she examined records in the county's Registry of Deeds.

Atlantic Drive (in Shore Acres) was platted on a subdivision map and ends at the dunes. Eight Arms Boulevard (in Octopus Sands), on the other hand, was platted through the dunes to the mean high tide line, but the street has been cut and surfaced only to the dunes. The deeds for lots in Octopus Sands contain a number of covenants and restrictions, one of which gives the owners the right to a pathway extending along the extension of Eight Arms Boulevard through the dune to the beach. The owners have been exercising this right since the 1960s. The developers of Shrimp Heights and Bluefish Resort both dedicated their central streets to the town of Seaside: Shrimp Street extends to the mean high tide line; Gill Road ends at the dunes. (See the map of the Northern Study Area).
All of the streets have been used to some extent by the general public in its quest for access to the beach, but Seaside has as yet manifested no intention to accept responsibility for maintaining the areas through or east of the dunes. The Town is currently re-evaluating this policy of non-action, and is soliciting recommendations for beach access provision through the subdivision areas.

Because Shrimp Street and Gill Road have been dedicated as public streets, the general public has the right to use them. With respect to Gill Road, this right ends at the dunes, unless the public has crossed from this street to the beach for a period of twenty years and in a manner sufficient to establish a prescriptive easement. (See Chapter Five, Section II.B.2.) Since Shrimp Street has been dedicated to the mean high tide line, Seaside can use it for public access to the beach merely by insuring that the dedication is not withdrawn. Providing litter receptacles and maintaining the area would probably accomplish this. The Town should, however, do this promptly because there is a North Carolina statute (Chapter Two, footnote 6) which permits developers to withdraw previously dedicated streets or portions of streets if the public has failed to improve and maintain them during the fifteen years immediately following dedication.

Atlantic Drive and Eight Arms Boulevard were platted on subdivision maps, which means that they are private streets unless the public has somehow acquired the right to use them since they were laid out. Although the twenty years requirement for establishing a prescriptive easement has not yet been met, it is possible that an implied dedication of the streets has occurred (See Chapter Five, Section II.C.2.). Assuming, however, that the streets are still private, the Town will have to acquire easements by purchase or condemnation if it wishes to provide the public with the right to use Atlantic Drive and Eight Arms Boulevard. The price of these easements will necessarily reflect the decrease in value caused by the general public's added use. However, because the public has apparently been using these streets without objection from the subdivision residents, Seaside should argue that if there has been a decrease in value
it is very slight.

Once the public's right to use Atlantic Drive and Eight Arms Boulevard has been established, access from the streets to the beach can be examined. Because Eight Arms Boulevard was platted to the mean high tide line and is already being used for beach access by the subdivision residents, any right acquired by the public to use the Boulevard would include the right to use all of it. However, access from Atlantic Drive to the beach could cost a substantial amount since a totally new accessway would have to be acquired.

Recommendation: The Town should promptly accept the dedication of Shrimp Street and frustrate any effort to withdraw the dedication by setting out litter receptacles and maintaining the accessway. It should also investigate the existence of prescriptive easements from the other three streets because it is possible that the public had obtained prescriptive rights prior to subdivision development in the 1960s. Finally, if purchase is deemed appropriate, Seaside should pursue its "as much as possible" beach access policy first by purchasing the least expensive accessway (Eight Arms Boulevard) and then, and only if necessary, the remaining two.

II. The Central Study Area

The central study area stretches for one mile (see context map). It can be divided into three sub-areas: (1) the beachfront properties east of State Highway 100, (2) a broad, level sand and grass covered area between State Highway 100 and U.S. Highway 1, and (3) the more heavily vegetated marshlands which begin to the west of U.S. Highway 100. There is no development in the marshland, that area having been acquired by a conservation group in the late 1960s. Over twenty detached homes and several service stations have been built in the area between the highways since 1965. The central study area is split by Connector Road, which joins the two highways. At the southwest intersection of State Highway 100 and Connector Road, the Town of Seaside owns a one-half acre parcel of land. At the northeast
intersection of U.S. Highway 1 and Connector Road, the Town owns an eleven acre parcel of land. Neither of these parcels has been developed. It is the beachfront area that has been most developed.

The beachfront properties (see central study area map) are zoned for commercial-residential development, which permits owners to build a mix of single and multiple family dwellings and motels and the shops to provide services for them. This zoning, which the Town of Seaside first adopted in 1968, appeared flexible enough to landowners in the area and it was well received. In essence the zoning provides for the uses to which the oceanfront properties are being used. It does establish that development on each parcel should not extend onto or over or in any way alter the primary dunes and that building should not occur within ten feet of the northern or southern boundaries of the properties (sideyards) nor within fifty feet of the State Highway 100 right-of-way (frontyards). However, all existing development of the beachfront properties was completed before the adoption of the Town zoning ordinance; therefore, where that development violates the zoning ordinance, it must be excused as a prior nonconforming use. Buildings on several properties in the beachfront area do violate the sideyard and frontyard requirements contained in the zoning ordinance. If those buildings are substantially altered or if storm damage or some other contingency causes them to be damaged or destroyed, the Town can enforce the ordinance as to those alterations and buildings. This has not happened to date. The zoning ordinance will have its greatest impact on new development. Only one proposal for new development on a beachfront parcel in the central study area is expected in the foreseeable future. That proposal is discussed below in the context of the existing development on that parcel.

Existing development on the central study area beachfront properties is catalogued in Table 1. Included in this catalogue are the owner's name and the year the property was acquired by that owner, the use to which the parcel is put and the number of people using it as developed, the size and shoreline length of each parcel, any legal encumbrances on each parcel, an account
CENTRAL STUDY AREA
NOT TO SCALE
of existing pedestrian use of the parcel as a path to the beach,
and a specification of the number of cars that the development
on the parcel was designed to accommodate.

The southernmost parcel is a washover fan. A washover is
a low, broad pass which is created when wave action erodes an
existing line of dunes to the point at which the water can ex-
ceed its height. The wave energy is dissipated as the water
flows over the broad plain, called a washover fan, landward of
the dunes. A washover fan can extend from the ocean to the
sound, although the washover in Seaside is not that large, ex-
tending only one-quarter mile from the mean high tide line. A
washover fan is inundated intermittently when the level of wave
energy is high, such as during seaward storms. The washover
fan in Seaside was formed during a major hurricane in 1965
when a breach in the dunes occurred and resulted in the creation
of a washover fan of just less than two acres. In 1966, Bart
Franks, who owns the 2 1/2 acre parcel on which the washover
fan is located, built his family a vacation home at the north-
west edge of the fan. Since that time, the fan has been inun-
dated at least once each year, but because the Franks' home is
located on the edge of the fan, it has not suffered serious
damage from flooding. Mr. Franks admits however that a major
hurricane would likely result in substantial damage to his home.

On the beachfront north of the washover fan are six parcels
under separate ownership. Parcel 1 is the largest oceanfront
tract in the central study area (3.6 acres). It is currently
the site of seven tourist cottages. John Smith, owner of the
parcel, operates those cottages in the summer season, but is
dissatisfied with the return on his investment. To increase
the earning power of his land, Mr. Smith proposes building a
condominium on the parcel in place of the cottages. To do so
he must first obtain the approval of his plans by the Town
Board pursuant to the zoning ordinance. This means he must meet
sideyard and frontyard requirements under the ordinance. While
the ordinance currently does not require beachfront developers
to provide beach access to the public, Mr. Smith is aware of
the Town's desire to provide access and has made an ingenious
offer to the Town. He will convey a ten foot strip of land
along the northern boundary of his parcel, consisting of the required ten foot sideyard, from the right-of-way of State Highway 100 to the mean high tide line. In exchange, the Town Board would approve his application and would pay him $10,000. The Town Board has not yet formally considered his application or his offer. Some of the Board members have expressed the desire to pursue other courses of action before accepting his offer, particularly since there is substantial evidence that the public may have a prescriptive easement over the parcel from long-standing public use for access to the beach.

Parcels 2, 3, and 4, rectangular parcels of 1.4, 1, and 1.2 acres respectively, are currently occupied by three motels, each of which stretches practically from property line to property line. Each motel has a gift shop and a small restaurant. During the tourist season, each motel is fully booked, and the beach in front of each motel is packed with people. The public has little opportunity to gain access to these beaches across any of these parcels except through the motels. The motels discourage the public from doing so except for motel guests.

Parcel 5 is an L-shaped lot of 1.5 acres with a relatively long shoreline of .22 miles. It is currently the site of seven recently rebuilt tourist cottages. A private road provides the residents of those cottages with access to State Highway 100. This road extends from the highway to the western side of the dunes on the parcel. Since the road was built in 1948, some members of the general public have used it as a path to the dunes and hence to the beach. Larry Blum, who owns the parcel, has discouraged this practise by posting numerous signs that the road is private and not for public pedestrian or automobile use. This has been effective to keep the public off the road for the most part.

Parcel 6 is the smallest of the central study area oceanfront parcels (.8 acres) and has the shortest shoreline (.08 miles). It is currently the site of a motel. The Town owns an easement over the parcel along the northern boundary of the property for a public sewer discharge line. The line was built in 1950, but has not been used since 1960. The easement
<table>
<thead>
<tr>
<th>PARCEL</th>
<th>Washover fan</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
</tr>
</thead>
<tbody>
<tr>
<td>USE &amp; POPULATION</td>
<td>single family home (50)</td>
<td>seven tourist cottages (50)</td>
<td>motel &amp; shops (200)</td>
<td>motel &amp; shops (150)</td>
<td>motel &amp; shops (200)</td>
<td>seven tourist cottages (50)</td>
<td>motel &amp; shops (50)</td>
<td>store &amp; single family house (10)</td>
</tr>
<tr>
<td>ACREAGE</td>
<td>2.0</td>
<td>3.6</td>
<td>1.4</td>
<td>1.0</td>
<td>1.2</td>
<td>1.5</td>
<td>.8</td>
<td>1.0</td>
</tr>
<tr>
<td>SHOREFRONT (MILES)</td>
<td>.18</td>
<td>.3</td>
<td>.15</td>
<td>.1</td>
<td>.12</td>
<td>.22</td>
<td>.08</td>
<td>0</td>
</tr>
<tr>
<td>ENCUMBRANCES OF RECORD</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>access easement to parcel 7</td>
<td></td>
<td></td>
<td>public sewer easement</td>
</tr>
<tr>
<td>EXISTING PEDESTRIAN ACCESS</td>
<td>since 1965, when isewager area was formed, it was settled, the public has repeatedly enjoyed the original boardwalk for access.</td>
<td>since the isewager area was formed, it was settled, the public has repeatedly enjoyed the original boardwalk for access.</td>
<td>only thru motel</td>
<td>only thru or around the motel</td>
<td>only thru or around the motel</td>
<td>the road to the dune has been used by the public to reach the dunes.</td>
<td>since it was built, the public has not often used it for access.</td>
<td>N/A</td>
</tr>
<tr>
<td>EXISTING VEHICULAR STORAGE</td>
<td>4 cars</td>
<td>14 cars</td>
<td>75 cars</td>
<td>100 cars</td>
<td>100 cars</td>
<td>7 cars</td>
<td>30 cars</td>
<td>10 cars</td>
</tr>
</tbody>
</table>
has not been built upon and could be used by the public for access to the beach, but no indications exist that it has been so used by any appreciable number of people.

Based on this inventory, a list of means to provide public beach access should be drafted corresponding to the individual parcels, discussing the functional advantages and disadvantages associated with each. Two of the options in the central study area are analyzed below to demonstrate what problems might arise in implementing them and what solutions to them are most evident.

Discussion of the Best Two Options

I. The Washover Fan

The washover fan is an eminently suitable location for the establishment of a public beach and of access to the shoreline. If, as we assume, a structure currently exists on the parcel, the Town has two options: (1) it can wait for a storm to damage the structure or (2) it can acquire the parcel by voluntary sale or by application of eminent domain.

If the Town is willing to wait for a storm, this would provide it with an inexpensive option. If the structure is insured under the federal program and is made functionally uninhabitable and economically irreparable, the federal government is authorized to contribute 60 percent of the purchase price for the acquisition of the property (42 U.S.C. § 4102) when the storm damage to the structure reduces the value of the property at least 50 percent. The state or local government would pay the remaining 40 percent of the purchase price. Before the federal government will make its contribution, it must determine that the subject land is covered by a subdivision control ordinance and that the land will be responsibly managed for a period of at least forty years. Seaside should begin drafting such a subdivision control ordinance as soon as possible. This will result in costs to the Town for developing the ordinance and to subdividers and their clients for conforming to it. If storm damage does not exceed 50 percent
of the property value of the subject parcel, the federal government will supply insurance benefits to an eligible owner. These benefits are meant to enable reconstruction, but it would be within the broad purposes of the flood insurance program to permit the money paid in benefits to be put to another use—reducing the amount of compensation the locality would have to provide to satisfy the owner in the alternative for abandoning his land in favor of conveying the land to the Town.

If the Town is unwilling to wait for a storm, or the conditions for flood insurance are not met, it can condemn the property and pay the landowner just compensation. It need not condemn the whole property. In any case the purchase price of all or part of this property is going to be lower than that of other oceanfront properties in Seaside because of its greater propensity to flood. However, the market is not always cognizant of such defects in the land, and the Town may be forced to demonstrate in court that what it pays for the property is just. It can do so by pointing out the existence of the washover and by recounting how many more times this property has been flooded than have other oceanfront properties. Appraisal of flood-prone property should reasonably yield a lower figure than for non-flood-prone property under otherwise similar circumstances.

II. Parcel 1

The other prime candidate for providing public beach access in the central study area is parcel 1. As has been discussed above, this parcel is the site of seven tourist cottages built in 1941. There are no warnings against physical trespass displayed anywhere on the property. Neither are there physical impediments to access. A significant natural feature on this property is a breach in the dunes, a drop in the height of the dunes from their average sixteen feet to about four feet, at about the midpoint of the parcel’s eastern boundary. This breach has not enabled flooding to occur on the property (absent hurricanes of major dimension) because on the eastern side of the breach the beach slopes sharply in descent to the ocean. The breach is visible from State Highway 100. Its presence attracts
many tourists to seek access through it to the beach. The lay-
out of the property makes this commonplace. A common driveway
connects each of the tourist cottages to State Highway 100. This
driveway is wider than necessary simply for ingress and egress,
but cottage residents seldom use it for anything else because
each has an individual concrete pad near his or her cottage on
which to park two cars. Therefore up to twenty cars per day
park on the common driveway, though they do not belong to resi-
dents of the cottages. Other members of the public frequently
park on the twelve foot right-of-way along State Highway 100,
walk across the parcel, and pass through the breach. The owner
of the parcel has protested to individual members of the public
that they should neither park on nor cross over his property.
However, he has not had cars towed away, so the practice con-
tinues.

The Town could acquire beach access across this parcel by in-
stituting court action to declare a prescriptive public easement
over the parcel from the highway through the existing breach
in the dunes to the beach. To prove a prescriptive easement in
North Carolina, the Town would have to meet several evidentiary
burdens. It must show (1) that the use is not with the owner's
consent (i.e., that it is adverse), (2) that the use has been
open and notorious, (3) that, for a minimum of twenty years, the
public has used the land when and as it wanted, and (4) that the
same general path on which the easement is sought has been used
for the period. The Town should be able to meet these eviden-
tiary burdens. It can show (1) that at no time did the owner
expressly approve of the use of his parcel for access to the
beach by anyone other than the residents of his tourist cottages,
(2) that the public use is clearly open every time the property
is so used and adverse to the owner's expressed policy of ex-
cluding access except to those in his cottages, and (3) that
the same path has been used repeatedly, that path being the
shortest route from the highway to the breach in the dunes. It
may have difficulty showing to what extent the parcel has been
used for access by the general public. The testimony or deposi-
tions of a collection of non-resident users of the path taken
near its terminal points to the effect that they use the path
although they have not been invited to do so and have no colorable
claim of right will make a prima facie showing of public use. Barring such a showing, a more limited prescriptive easement could be granted as to users who habitually frequent the path, such as residents of the cottages across State Highway 100 from parcel 1. The declaration of such a limited prescriptive easement will have the advantage of reducing the value of the parcel for purposes of condemnation. After all, if a limited group of 100 is allowed to use the land, how much greater is the loss of privacy or accumulation of damage when two or three times that number do so? The existence of the limited prescriptive easement will give the Town leverage with which to bargain at a later condemnation proceeding.

Assume that a prescriptive public easement is not granted but that a limited prescriptive easement for a smaller, defined group living across Highway 100 is granted. The route of the limited prescriptive easement bisects the parcel from Highway to breach. However, this is inadequate to provide the necessary public beach access, because the right to use it is restricted --not public. The Town could acquire a strip of land for public beach access purposes by means of purchase or by means of eminent domain if it is willing to assume the cost of doing so. Assuming that unencumbered land on the oceanfront sells for $2,000 per front foot, the cost of acquiring an unencumbered, ten foot strip from the highway to the high tide line would be $20,000. But the cost of condemning the land coincidental with the existing limited prescriptive easement would be much less because it is already encumbered. The route of the easement has a substantial impact on the developability of the parcel; any development on the whole parcel would have to be separated by the route, because Mr. Smith would be prevented by law from obstructing it. This is the reason Mr. Smith has offered an alternative location for public beach access adjacent to his northern property line. The alternative would preserve the integrity of the parcel from the impact of the condemned public easement. To remove the burden of the limited prescriptive easement, the easement must be extinguished by those who hold it. By offering the alternative location, Mr. Smith removes the incentive for the holders of the limited prescriptive easement to enforce the existence of the easement in court. They may therefore
agree to relinquish their right to cross the parcel on the route of the easement in writing in exchange for the right shared with the general public to cross the property along the alternative route.

It would be advisable for the Town and Mr. Smith to go further than the creation of a public right to cross the parcel at its northern boundary. To make this right available to the public, parking will have to be provided. The route of the easement will have to be improved and maintained. At its eastern terminal should be a walkway or bridge over the dunes to eliminate foot travel across them. The existing breach in the dunes on this parcel should be filled in to reduce the incidence of trespass across the parcel at the western foot of the dunes to reach it and to reduce the danger of flood damage. These actions all have at least two consequences. They have a cost to the improver, and they have an impact on the form and style of the condominium to be built on the rest of the parcel. If the developer, Mr. Smith, makes the improvements, they can be made to conform to his plans for the condominium and complement them. If the improvements are made up to standards set by the Town, it should be willing to accept dedication of the easement and to provide for its future maintenance.

Mr. Smith has requested $10,000 for his offer in addition to approval of his plans. This amount will be subject to adjustments such as those suggested above concerning the completion of improvements. In any case, the Town need not only compensate Mr. Smith in direct cash payments. It could offer to trade Mr. Smith title to land for the path and for parking in exchange for title to all or part of the Town-owned parcels. A trade will be more attractive to the owner if his plans do not require that future development be physically proximate to the planned condominium. Also the Town may offer long-term tax abatements or reduced rates of taxation on the improved remainder of the parcel to make up for the shortage of cash-on-hand. Tax breaks would have to be complemented by some cash payments to make the offer attractive. They would not amount to the value of the land taken for an easement for a long period of time.
SOUTHERN STUDY AREA

NOT TO SCALE
III. Southern Study Area

A. Undeveloped Area

South of the washover at Seaside is an area of undeveloped land located between the beach and State Highway 100. The land encompasses about fifty acres between the high tide line and the highway right-of-way. About thirty acres, from the back of the first dune to the highway right-of-way can be developed, where the land is sandy and covered with brush. The area includes about three-quarters of a mile of highway frontage.

The land presently has a small cottage and a dilapidated pier on it. It has been fenced along its boundaries at the highway and the lot lines running from the highway to the beach. The fence has been broken in a number of places, where there are apparent trails running to the beach. These trails have been used by townspeople for many years, and at least since the cottage was built in the 1940s.

The land is owned by a family which is now considering a sale to an interested developer. The developer has offered to buy the land for $700,000. The land is presently zoned residential for single family units (two dwelling units per acre). The developer would like to construct condominiums, which would include shops and tennis courts, but a rezoning would be necessary. If he cannot obtain a rezoning, he will construct a subdivision or expensive second homes.

Alternatives

1. Purchase for Public Park/Condemnation

Advantages - The municipality could provide for diverse recreational needs with this large, undeveloped area. It could attract more tourists by developing recreational facilities such as campgrounds, piers, and marinas. The pressure on the municipal park could be diverted to this area, particularly the pressure from use by out-of-towners. It may be possible to acquire the land with state funds provided from the Land and Water...
Conservation Fund. An advantage of full ownership is the ability to control environmental consequences as well as the economic use of the land. Condemnation powers can be used if the owner is unwilling to sell.

Disadvantages - The main disadvantage is the high cost of the land; even a small parcel is quite expensive. If the seller is not willing to sell, condemnation would be necessary, a choice that might be politically unfavorable. Placing the land in public ownership will mean foregoing tax revenue associated with development, and will require maintenance expenditures.

2. Purchase of Easements/Condemnation

Advantages - The purchase of easements is cheaper than full fee acquisition and will insure at least some access. Condemnation powers may be used. The existence of public accessway may raise the value of property for commercial development, and thus the value for tax purposes.

Disadvantages - This alternative is also fairly costly. It may devalue the adjoining property for residential development. Further investment for adjacent parking places may be necessary to get the full value of the easements. Condemnation may be politically unacceptable.

3. Prescriptive Easement

Advantages - The elements necessary for prescriptive easement appear to exist: adverseness, continuous use for twenty years, the existence of specific ways across the land. The prescriptive use, if established, may include broad rights, such as use of a substantial area of the dry-sand, as well as trails. Townspeople may provide an abundance of evidence to establish use.

Disadvantages - Litigation to establish prescriptive use is necessary, involving economic costs and probably political costs. The presumption of permissive use by the landowner may not easily be overcome. Controversy surrounding litigation may discourage development, and thus tax revenues may be lost.
4. Trading of municipally-owned parcels for undeveloped land

Advantages - If the municipality has property of similar value, it can effect a trade of that property for this undeveloped area. This has an advantage of not requiring cash. The city can thus acquire the use of the beach, a high priority, for land that may be just as suitable to the present owner or potential developer.

Disadvantages - The trade depends on equal values of the land exchanged. It is unlikely that such lands can be found, especially because the beach is an important amenity to the developer.

5. Zoning Amendment

Changes in the zoning ordinance may be made to require dedication or other access provisions, to allow trade-offs of zoning density or other restrictions for public accessways and parks, and to allow Planned Unit Development (PUD) zones.

Advantages - Such use of the police power is expensive to the municipality. By incorporating trade-offs in zoning, advantages can accrue to the developer, such as flexibility of site design, at the same time that public needs are satisfied. Certain amendments, such as PUD's, allow closer control by the planning staff, of the total development, so that environmental, recreational, and other objectives may be met by the development.

Disadvantages - Many of the zoning tools, such as required dedication, have not been tested in court, though they have statutory authority. The tools must be applied carefully to avoid challenges based on taking, due process, or being outside zoning enabling legislation. Administrative costs increase under more flexible zoning provisions.

6. Subdivision Controls

Advantages - Similar to zoning amendments. Subdivision controls provide further opportunity to oversee development.
Disadvantages - Administrative costs may increase.

Preferred Techniques

Zoning and subdivision controls are preferred in this situation to other alternatives because (1) they are cheaper, despite administrative costs; (2) they can be advantageous to the developer, and (3) they can be simultaneously advantageous to the municipal tax base. In particular, the city should consider rezoning this property to a classification that requires the dedication of beachfront for public use and access to the beach. The city might alternatively establish a PUD zone and subdivision ordinance with incentives for the developer to exchange his higher density and mixed use needs for public access rights.

Rezoning the area to require dedication may be accomplished first by establishing a Recreation Residential Zone in the city zoning ordinance, wherein public roadways from the highway to the beach are required for each 600 feet of residential property located along the beach. The undeveloped property would then be rezoned to the Residential-Recreational classification. In conjunction with newly dedicated accessways, the city should provide parking along the side of Highway 100.

Alternatively, the city should establish a PUD zone within its zoning ordinance, and allow for rezoning to PUD's when PUD requirements can be met by the developer. A PUD zone would permit the developer to build the condominium development that he desires, in return for public use of roads to the beach and perhaps preservation of certain beach land for public use. The zone, coupled with subdivision regulations, can offer the developer higher densities, mixed uses, and flexible site design. In addition to public access rights, the municipality may gain in the exchange the protection of environmentally fragile lands such as the area between the primary dune and the water. An example of the kinds of development possible through a PUD is shown on the following page.
(Reprinted from Interdisciplinary Team Design and Planning for Coastal Development, May/June 1973.)
In case the developer should choose not to use a PUD, or the city chooses not to rezone the property as Recreational-Residential, subdivision controls should be adopted. These controls would be applicable to any future subdivision in the municipality. Subdivision controls should include required dedication of streets, alleyways, and pedestrian access to the beach. Dedication of water access lots should also be required. These controls will assure that at least the residents of the new subdivision will have access to the beach and recreational areas.

B. Ocean Heights

The southernmost development at Seaside is an old residential subdivision extending one mile south along Highway 100 from the edge of the undeveloped land described above. This subdivision, Ocean Heights, was developed in the 1920's, when upper
middle class families from the state capital built summer homes in the area. Lot sizes in the subdivision range from five to seven acres, and front directly on the highway and the beach. Each lot contains a house and garage, with a driveway extending from the garage to the road. There are no access roads from the highway to the ocean. However, a few apparent footpaths lead directly from the highway to the shore in some areas between large lots.

The subdivision remains quite exclusive, with few lots being sold out of the families of the original owners. In the last five years, however, taxes on the lots have been rising considerably, to the point that some lot owners have begun to rent the houses for part of the summer to help meet the tax burden.

Across the state highway from Ocean Heights about three-quarters of a mile south from the northern boundary of the subdivision is a recently constructed condominium. The condominium has thirty units, which have been sold to out-of-towners primarily for summer use. Condominium owners assumed when they bought their apartments that they would be able to walk across the highway and through the subdivision to the beach, but at the beginning of the summer a number of homeowners in Ocean Heights evidenced their hostility to this idea by placing "No Trespassing" signs in their yards.

The condominium is built on land formerly owned by an old North Carolina family whose descendants moved to California after selling the estate to the developer. The family and its guests had always used the footpaths across Ocean Heights to get to the beach. Adjacent to the north of the condominium lot is a city-owned lot fronting on State Highway 100.

Alternatives

1. Subdivision covenants or dedicated accessways

It is possible that the condominium property is part of the original Ocean Heights Ocean Heights subdivision. This should be
investigated by checking subdivision plats and deeds to the subdivision and condominium lands at the county Registry of Deeds. If so, there may be existing covenants between the owners giving access over the Ocean Heights properties, or there may be dedicated pedestrian accessways. The condominium owners as subdivision members would inherit the access rights.

Advantages - If these rights are recorded, condominium owners would have their access needs met immediately without expense or need for litigation. This would be the ideal situation for the condominium.

Disadvantages - The alternative is a possibility for which there is little outside evidence, except proximity of the lands. Even if rights exist for condominium owners, the general public would not necessarily acquire access rights unless specifically designated.

2. Existing Easements

The previous owner of the condominium land may have acquired an easement over Ocean Heights by prior purchase. This easement will be recorded on the deed of the condominium land. The deeds should be checked for any such easement. The easement must be "appurtenant" for it to survive the change of ownership.

Advantages - Same as #1 above. The easement rights might be expanded to the general public through acquisition by the municipality.

Disadvantages - Same as #1 above. The subdivision owners will probably not be willing to sell public access rights.

3. Prescriptive Easement

If no easements are recorded, the prior owner might have established a prescriptive easement. Such use must have been continuous for twenty years, adverse, notorious, and the same path must have been used.
Advantages - This could be more inexpensive than purchase of easement, though establishing the use involves litigation costs. If a general public prescriptive easement is to be proved, numerous witnesses in town can be obtained.

Disadvantages - Proof of the use by previous owners of the condominium land may be difficult, because previous users are in California and may not wish to involve themselves, and because of the court's presumption that such use is permissive. The prescriptive use, even if established for previous owners, may not include the new owners, because of exchange in character of the users. Litigation costs in terms of public relations will probably be high, because Ocean Heights residents are hostile to the idea of condominium use, and would probably be even more hostile to the general public. Simple economic litigation costs may be high.

4. Eminent Domain

The municipality may choose to condemn an easement or a parcel of land so that the general public has access over the land.

Advantages - Access would be open to more people. Land values across the highway from the subdivision would rise to reflect the value of the easement.

Disadvantages - This may be costly, both in immediate economic costs, and in possible devaluation of the subdivision property. The area may not be suitable for general public use because of lack of parking and maintenance facilities. The alternative may be politically infeasible.

5. Conservation Easement

Ocean Heights owners may be induced to give conservation easements to the city or the North Carolina Land Conservancy Corporation in exchange for revaluation of their property for taxation purposes. The easement would include lands suitable for preservation and over which a public pathway could be constructed.
Advantages - Property owners would receive a benefit in the form of reduced property taxes and an income tax deduction; the municipality would receive, in effect, a dedicated accessway. Property tax may be a significant enough burden for some owners that they would be willing to sell an easement. This involves no cash transfer from the municipality, though it does involve long-range tax loss.

Disadvantages - The technique depends on a willing property owner. The tax relief may not be enough of an incentive to overcome lot owners' wishes for privacy from the general public.

6. Purchase of Easement

If owners are willing to sell an easement, it could be bought by either the town or the condominium owners.

Advantages - Property owners would receive cash value for the easement, which they might prefer. If sold solely for the condominium owners' use, environmental impacts and impacts on Ocean Heights privacy would be minimized. Condominium owners as a group probably have considerable purchasing power and so would be willing to pay for the easement. An easement purchased by the municipality would benefit the public generally.

Disadvantages - The easement is likely to be fairly costly. A willing seller must be found.

Preferred Techniques

The preferred alternatives would be for the city to offer a conservation easement to Ocean Heights property owners in exchange for tax revaluation. A second preferred alternative is the purchase of an easement by the condominium owners. In both cases, a willing seller may be available if the seller owns a large area upon which an easement would not interfere greatly with privacy, and upon which existing taxes may be a considerable burden.
The conservation easement is sufficiently flexible a technique that terms could be negotiated that would be suitable to the landowner and the city. A large portion of the property, possibly several acres, could be set aside for the easement, with only a narrow strip reserved for pedestrian access. The city should acquire the ecologically most valuable acreage for the conservation easement, thereby achieving both access and environmental objectives. The area encompassing the primary dune, maritime forests or other such crucial areas are suitable candidates for conservation acreage. At the same time, accessways should be placed so as not to disturb these fragile areas. To be able to offer a property revaluation, the cooperation of the county taxing authority is required; so that close municipal-county coordination is prerequisite. The property owners should also be made aware of their right to a charitable deduction on Federal income tax. If the local government prefers to avoid administrative burdens, the easement may be arranged through the North Carolina Land Conservancy Corporation, which is specifically authorized by statute to accept these easements. If this option is pursued, Seaside should ensure that suitable access to the beach is a precondition to acceptance.

The second preferred alternative is outright easement purchase by the condominium owners. The condominium owners are the user group with the greatest need for access, assuming that other access is provided elsewhere within Seaside. Encouraging private action by these owners would save the municipality expense, serve a real need, and probably be more palatable to Ocean Heights residents than city action for the benefit of the general public. It would also eliminate the necessity for Seaside to provide other access support, such as parking or maintenance. However, the municipality should consider providing a crosswalk, traffic light, or other safety features at the point of access, to protect what would be mainly pedestrian traffic. The most suitable location for the easement is across from the condominium itself, where a large lot faces the condominium (see map). A representative from the condominium should approach the owner of this lot first.
Appendix One. Beach Access Provisions of the Coastal Zone Management Act

1. Congressional findings and general policy declarations of the Coastal Zone Management Act of 1972.

2. Section 305(a)(1) of the Act which authorizes the Secretary of Commerce to make grants to states to develop coastal zone management programs.

3. Section 305(b)(7) of the Act which requires that beach access be a part of each coastal management program funded under the Act.

4. Regulations issued to explain to the states what they must do to comply with the beach access provisions of the Act.

5. Section 315(2) of the Act which authorizes the Secretary of Commerce to make grants to states to acquire land for beach access. (Congress has yet to appropriate funds to carry out this section.)

6. Concept paper issued by the Office of Coastal Zone Management in preparation for the issuance of regulations which will explain how Section 315(2) will be administered. (Regulations have not yet been issued.)
To establish a national policy and develop a national program for the management, beneficial use, protection, and development of the land and water resources of the Nation's coastal zones, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to provide for a comprehensive, long-range, and coordinated national program in marine science, to establish a National Council on Marine Resources and Engineering Development, and a Commission on Marine Science, Engineering and Resources, and for other purposes", approved June 17, 1966 (80 Stat. 203), as amended (33 U.S.C. 1101-1124), is further amended by adding at the end thereof the following new title:

TITLE III---MANAGEMENT OF THE COASTAL ZONE

SHORT TITLE

Sec. 301. This title may be cited as the "Coastal Zone Management Act of 1972:"

CONGRESSIONAL FINDINGS

Sec. 302. The Congress finds that--

(a) There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.

(b) The coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation.

(c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.

(d) The coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irrevocably damaged or lost.
(f) Special natural and scenic characteristics are being damaged by ill-planned
development that threatens these values.

(g) In light of competing demands and the urgent need to protect and to give
high priority to natural systems in the coastal zone, present state and local
institutional arrangements for planning and regulating land and water uses in such
areas are inadequate.

(h) The key to more effective protection and use of the land and water
resources of the coastal zone is to encourage the states to exercise their full
authority over the lands and waters in the coastal zone by assisting the states, in
cooperation with Federal and local governments and other vitally affected interests,
in developing land and water use programs for the coastal zone, including unified
policies, criteria, standards, methods, and processes for dealing with land and
water use decisions of more than local significance.

(i) The national objective of attaining a greater degree of energy self-
sufficiency would be advanced by providing Federal financial assistance to meet
state and local needs resulting from new or expanded energy activity in or affecting
the coastal zone.

DECLARATION OF POLICY

Sec. 303. The Congress finds and declares that it is the national policy (a) to
preserve, protect, develop, and where possible, to restore or enhance, the resources
of the Nation's coastal zone for this and succeeding generations, (b) to encourage
and assist the states to exercise effectively their responsibilities in the coastal
zone through the development and implementation of management programs to achieve
wise use of the land and water resources of the coastal zone giving full considera-
tion to ecological, cultural, historic, and esthetic values as well as to needs for
economic development, (c) for all Federal agencies engaged in programs affecting
the coastal zone to cooperate and participate with state and local governments and
regional agencies in effectuating the purposes of this title, and (d) to encourage
the participation of the public, of Federal, state, and local governments and of
regional agencies in the development of coastal zone management programs. With
respect to implementation of such management programs, it is the national policy to
encourage cooperation among the various state and regional agencies, including
establishment of interstate and regional agreements, cooperative procedures,
and joint action particularly regarding environmental programs.
MANAGEMENT PROGRAM DEVELOPMENT GRANTS

Sec. 305. (a) The Secretary may make grants to any coastal state—

(1) under subsection (c) for the purpose of assisting such state in the development of a management program for the land and water resources of its coastal zone; and

* * * * *

(b) The management program for each coastal state shall include each of the following requirements:

* * * * *

(7) A definition of the term "beach" 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.

* * * * *

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This 15—Commerce and Foreign Trade
CHAPTER IX—NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
PART 920—COASTAL ZONE MANAGEMENT PROGRAM DEVELOPMENT GRANTS
Revised Regulations
AGENCY: National Oceanic and Atmospheric Administration, Commerce.
ACTION: Final Rule.
SUMMARY: These final regulations amend existing program development grant regulations to define procedures by which Coastal States can meet the new planning requirements and the requirements for preliminary approval contained in the 1978 amendments to the Coastal Zone Management Act of 1972.
FOR FURTHER INFORMATION CONTACT:
Carol Sondheimer, Chief Program Planning Office, Coastal Zone Management, 205-843-1972.
SUPPLEMENTARY INFORMATION:
Pub. L. 94-278, signed on July 28, 1976, amended the Coastal Zone Management Act of 1972, as amended, 114 C. O.C. 1431, et seq., hereinafter referred to as the "Act." As a result of amendments made to section 307 of the Act, it is necessary to issue these regulations on the new requirements for development of coastal zone management programs, pursuant to section 305 of the Act. The proposed amendments contained guidance to Coastal States as to the requirements for meeting a new planning element on shorefront access and protection (subsection 305(b)(7) of the Act), new planning element on energy facility subsection 305(b)(8), and a new planning element on shoreline erosion and protection subsection 305(b)(9). The proposed regulations also detailed the requirements for preliminary approval subsection 305(d). Written comments were requested by February 1, 1977.

Discussion of Major Comments and NOAA Responses
SHOREFRONT ACCESS PLANNING
(a) Definition of "Beach": Two commentators felt that the term "beach" was not defined sufficiently. One of those commentators felt that the term should be included in the discussion. The other felt that the regulations should define "beach." Conversely, one commentator felt that defining "beach" in terms of physical and public characteristics was too complex and that the regulations should clarify the process of defining the term.
NOAA Response: NOAA feels that a general definition of "beach" contained in the appropriate emphasis for the subsection 305(b)(7) planning process is on shorefront public coastal areas. Other public areas included from the shoreline but in the coastal zone can be addressed under other aspects of the basic program development. In particular, the requirements have to do with geographic areas of particular concern. The danger of providing a definition is in overlooking certain types of areas, or of limiting a "beach's" ability to be more comprehensive or creative than that provided for in the regulations. NOAA has revised § 920.17(b)(8) to permit States to define beach in terms of either physical or public characteristics. NOAA has added the word 'dunes' to § 920.17(b)(8) as a physical characteristic to be considered in defining beaches. It is not the intent of these regulations to emphasize the process of defining the term "beach" at the expense of developing a process for identifying and responding to shorefront access and protection needs. Accordingly, the discussion of defining the term "beach" has been de-emphasized by shifting that discussion to § 920.17(b)(8) as it appeared in the proposed regulations.

(b) Definition of "Public": Three commentators expressed approval of the concept of "public" as contained in the proposed regulations. One of those commentators was concerned, however, that "public" not be defined to include construction of highways or parking facilities. A fourth commentator suggested that recognition be given to the need for access by public transportation, especially for urban areas. This same reviewer felt the term "facial access" was sufficiently defined. Another reviewer questioned whether a broader interpretation was intended for "access" under subsection 305(b)(1) of the Act that might be extended for subsection 351(b) of the Act.

NOAA Response: NOAA does not feel that the discussion of "public" as contained in the proposed regulations encourages construction of highways or parking facilities. It may be possible to discuss the need for access by public transportation, especially for urban areas. This same reviewer felt the term "facial access" was sufficiently defined. Another reviewer questioned whether a broader interpretation was intended for "access" under subsection 305(b)(1) of the Act that might be extended for subsection 351(b) of the Act.

(c) Definition of "other public coastal areas": One commentator asked whether the planning process for other public coastal areas could extend inland from the shoreline but in the coastal zone. Another commentator requested discussion of what constitutes other public coastal areas and recommended including all areas. Other public areas below the shoreline but in the coastal zone can be addressed under other aspects of the basic program development. In particular, the requirements have to do with geographic areas of particular concern. The danger of providing a definition is in overlooking certain types of areas, or of limiting a "beach's" ability to be more comprehensive or creative than that provided for in the regulations. NOAA has revised § 920.17(b)(8) to permit States to include areas of special concern. Other public areas below the shoreline but in the coastal zone can be addressed under other aspects of the basic program development. In particular, the requirements have to do with geographic areas of particular concern. The danger of providing a definition is in overlooking certain types of areas, or of limiting a "beach's" ability to be more comprehensive or creative than that provided for in the regulations. NOAA has revised § 920.17(b)(8) to permit States to include areas of special concern.

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access to the shorefront only where a State does not have a reasonable amount of public shorefront area above mean high tide or the ordinary high water mark. Finally, NOAA believes the term “access” was intended to be interpreted more broadly for parking purposes under subsection 305(17) of the Act than for acquisition purposes under subsection 315B. NOAA believes that a coastal management program, which is developed pursuant to section 305 of the Act, may contain the necessary elements which are specifically fundable pursuant to other sections of the Act.

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Comments beyond the Scope: A number of comments were received which are beyond the scope of this specific planning requirement. These include:

(1) Comments addressed primarily to requirements of subsection 315B of the Act. These comments will be addressed at the time regulations for subsection 315B are promulgated.

(2) Comments suggesting any major Federal actions resulting from this planning process would be subject to the National Environmental Policy Act of 1969 (NEPA, Pub. L. 91-190, as amended).

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General Background of Part 920

The guidelines contained in this Part 920 are grants made pursuant to section 408 to develop a coastal zone management program. As such, this element is subject to all the requirements for program approval as part of the overall program. Finally, one commentator was concerned that an Act requirement for providing access not be read to apply to private individuals. There is nothing in these regulations that requires NOPOA to provide access to private individuals providing access. However, the manner of how best to provide additional shorefront access, if there is a need for such access, is a matter that will be determined by the Secretary in the development of the management program. Thus, there is nothing in these regulations to require States to provide shorefront access to private individuals providing access. However, the Act requires that such access be provided for the purposes of the Act. The Act itself defines “State coastal zone management program” as a program of planned, comprehensive, coordinated, and continuing efforts to achieve management of the environmental, economic, social, or cultural values associated with State coastal zones for the benefit of the people of the State. This definition includes measures for ensuring the participation of the public in the development of the State coastal zone management program, and specifies that the program shall be developed and implemented in consultation with the public.

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Rules in this whole process are an effort to provide a program that is comprehensive, coordinated, and continuing efforts to achieve management of the environmental, economic, social, or cultural values associated with State coastal zones for the benefit of the people of the State. This definition includes measures for ensuring the participation of the public in the development of the State coastal zone management program, and specifies that the program shall be developed and implemented in consultation with the public. The rules are intended to provide a program that is comprehensive, coordinated, and continuing efforts to achieve management of the environmental, economic, social, or cultural values associated with State coastal zones for the benefit of the people of the State. This definition includes measures for ensuring the participation of the public in the development of the State coastal zone management program, and specifies that the program shall be developed and implemented in consultation with the public.


T. P. Quade,
Asst. Administrator for Administration
RULES AND REGULATIONS

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For the sake of clarity and ease of reference, the entire 15 CFR Part 920
is reprinted below. New additions made final as a result of issuance of these
regulations are §§ 920.17, 920.18, 920.19, Subject B, and §§ 920.60 and 920.61.
Accordingly, 15 CFR Part 920 is revised as follows:

Subpart A—General

§ 920.1 Policy and objectives.
(a) This part establishes guidelines on the procedures to be utilized by coastal
States in planning program development
(grant program) pursuant to section 306 of the
Act. See § 200.40 for specific criteria for
final approval of State management
programs.
(b) Coastal management programs
developed by participating States shall
comply with the policy of the Act which
requires States to give full consideration
to ecological, cultural, historic, and
esthetic values as well as to economic
development. As a result of consideration
of these values and needs, States will identify issues and problems
that confront or will confront coastal zones and, relatively, will articulate specific goals, objectives, policies, standards, guidelines, and regulations to
address these issues within the context
provided by these regulations.

Comment. Statutory Citation, section
306.

The Congress finds and declares that it is in the public interest to
encourage and assist the States to exercise effectively their responsibilities in the coastal management
through the development and implementation
of management programs to achieve the
wise use of land and water resources of the
coastal zone giving due consideration to
ecological, cultural, historic, and aesthetic values as well as to needs for
economic development.

Subpart A—General

§ 920.1 Policy and objectives.
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States in planning program development
(grant program) pursuant to section 306 of the
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final approval of State management
programs.
(b) Coastal management programs
developed by participating States shall
comply with the policy of the Act which
requires States to give full consideration
to ecological, cultural, historic, and
esthetic values as well as to needs for
economic development. As a result of consideration
of these values and needs, States will identify issues and problems
that confront or will confront coastal zones and, relatively, will articulate specific goals, objectives, policies, standards, guidelines, and regulations to
address these issues within the context
provided by these regulations.

Comment. Statutory Citation, section
306.

The Congress finds and declares that it is in the public interest to
encourage and assist the States to exercise effectively their responsibilities in the coastal management
through the development and implementation
of management programs to achieve the
wise use of land and water resources of the
coastal zone giving due consideration to
ecological, cultural, historic, and aesthetic values as well as to needs for
economic development.

Subpart B—Content of Management
Programs

§ 920.10 General
(a) These guidelines for section 306 of
the Act have been structured to parallel
language and sequence of require-
ments of the Act. This has been done
to facilitate reference to the Act. It is not
required that this sequence be followed
in developing the management program
and in carrying out the specific tasks
contained therein. It is anticipated and
acceptable that the approach taken for
development of programs will vary.

These guidelines should not be inter-
preted as limiting States approaches or
the content of their program development
grant applications.
(b) Subsection 200.4(b) requires the in-
clusion of nine elements in the develop-
ment of State coastal zone management
programs. These minimum requirements
are included below with accompanying
comments that are designed to guide
State response to these key provisions of
the program development effort. Prior to
October 1, 1979, States may seek ap-
proval for their management programs
pursuant to section 306, even if three of
these elements—those relating to the
planning process for shorefront access,
entitlements, and shoreline stability
mitigation—have not yet been completed; how-
ever, such States must be able to fulfill
these requirements by October 1, 1979
and submit these requirements by that date for review
and approval, as amendments to their
management programs submitted after Oc-
tober 1, 1979 must include all nine ele-
ments in order to be approved pursuant
to section 306.
(c) It is anticipated that an environ-
mental impact statement will be pre-
pared and circulated on a State's man-
agement program prior to its approval
by the Associate Administrator. In ac-

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§ 202.7 Shorefront access planning.

(a) Requirement. In order to fulfill the requirements of subsection 105(c)(4) of the Act, the management program must include a planning process that can identify public shorefront areas appropriate for increased access and protection. This process must include:

(1) a procedure for assessing public areas requiring access or protection;
(2) a definition of the term "beach" and an identification of public areas that meet that definition;
(3) articulation of State policies pertaining to shorefront access and/or protection;
(4) a method for designation of shorefront areas as areas of particular concern (either as a class or as specific sites) for protection and/or access purposes, if appropriate;
(5) a mechanism for continuing refinement and implementation of necessary management techniques, if appropriate; and
(6) an identification of funding programs and other techniques that can be used to meet management requirements.

(b) Comment. Statutory Citation. Subsection 105(b)(4).

The management program for each coastal State shall include (a) a definition of the term "beach" and a planning process for the protection of and access to, public beaches and other public coastal areas of environmental, recreational, historical, aesthetic, ecological, or cultural value. The emphasis, however, should be on the provision of increased physical access. Special attention should be given to recreational needs of urban residents for increased shorefront access. Special attention should be given to areas identified in the State's plan for recreation, tourism, and other public use. The extent to which the provision of periodic access to public shorefront areas is necessary to meet the public's needs is determined by the State's plan. It is appropriate to provide access to free public beaches. What this means is that where a State does not have a reasonable amount of public shorefront area above mean high tide or above the ordinary high water mark in the Great Lakes, then provision of periodic access may not serve a sufficient range of purposes in terms of contributing to the public's ability to get to and enjoy shorefront amenities. In such cases, consideration of the need for access above mean high tide or the ordinary high water mark in the Great Lakes is appropriate. Visual access may involve, but need not be limited to, viewpoints, setback lines, building height restrictions, and light requirements.

(4) As part of this general planning process, States should develop a procedure which will allow for the eventual identification of specific areas for which provision of access through acquisition will be appropriate during program implementation. In conjunction with developing this procedure, States shall identify local, State or Federal sources for accomplishing particular access proposals. Particular attention should be given to coordination of management objectives with funding programs pursuant to subsection 318(l) of the Act, and pursuant to the Land and Water Conservation Fund (16 U.S.C. 400 et seq.) and other State, local or appropriate.

(f) Building. In determining the needs for protection of coastal areas, States should consider such factors as (a) environmental, ecological, aesthetic, cultural, and/or cultural values of existing public shorefront areas; (b) economic values of existing public shorefront areas; (c) the importance of existing public shorefront areas to the State's economy; (d) the importance of existing public shorefront areas to the State's population; (e) the importance of existing public shorefront areas to the State's environment; (f) the importance of existing public shorefront areas to the State's culture; and (g) the importance of existing public shorefront areas to the State's history.
ESTUARINE SANCTUARIES AND BEACH ACCESS

Sec. 315. The Secretary may, in accordance with this section and in accordance with such rules and regulations as the Secretary shall promulgate, make grants to any coastal state for the purpose of --

* * * * *

(2) acquiring lands to provide for access to public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value, and for the preservation of islands. The amount of any such grant shall not exceed 50 per centum of the cost of the project involved; except that, in the case of acquisition of any estuarine sanctuary, the Federal share of the cost thereof shall not exceed $2,000,000.

* * * * *
Section 315(2)

Shorefront Access/Island Preservation

I. Introduction

The purpose of this paper is to present the preliminary recommendations of the Office of Coastal Zone Management on the content of regulations implementing subsection 315(2). These regulations are necessary because of the addition of this new authority in the amendments to the Coastal Zone Management Act approved in 1976. Implementation of the program is subject to appropriations.

The recommendations contained here are preliminary and subject to change based on the comments received. These preliminary recommendations are based on an initial set of questions and issues identified by the Office of Coastal Zone Management as requiring resolution in the regulations and circulated for comment.

Proposed Regulations will be published in the Federal Register on or about September 30. Reviewers are encouraged to comment on both this preliminary paper and the Proposed Regulations. Interim Regulations are scheduled to be published in December 1977. The regulations implementing section 315(2) should be read in the context of the planning requirements mandated in section 305(b)(7). States are required by that subsection to develop a planning process for the protection of and provision of access to public shorefront attractions. Under section 315(2), funds are available:

(1) to acquire access to public shorefront attractions and

(2) to preserve islands.

II. Language of the Act

Section 315 of the Coastal Zone Management Act provides that:

"The Secretary may, in accordance with this section and in accordance with such rules and regulations as the Secretary shall promulgate, make grants to any coastal state for the purpose of...acquiring lands to provide for access to public beaches and other public coastal areas of environmental, recreational, historic, esthetic, ecological, or cultural value, and for the preservation of islands. The amount of any such grant shall not exceed 50 percentum of the cost of the project involved; except that, in the case of acquisition of any estuarine sanctuary, the Federal share of the cost thereof shall not exceed $2 million." (Section 315(2)).

Funding is provided in subsection 318(a)(7) which provides for sums, "not to exceed $25 million for each of the fiscal years ending
September 30, 1977; September 30, 1978; September 30, 1979; and September 30, 1980, respectively, as may be necessary for grants under section 315(2), to remain available until expended." As of July 1, 1977, no funds had been appropriated for the program.

III. Intent

The intent of Congress in adding subsection 315(2) is plainly stated in the legislative history. The House Committee Report accompanying the 1976 amendments discussed the shoreline access acquisition provision as follows:

"This authorization complements the new requirement the Committee has added to section 305 for a beach protection and access planning process. Because time is of the essence in acquiring access, particularly in or near urban coastal areas, it was felt advisable to accompany the planning requirements with funds to carry out the plans.

"The Committee does not intend to authorize the purchase of lands for beaches or other public uses. The concern is that there are areas already in public ownership on the shore which, for one reason or another, are not readily accessible to the public.

"The Committee's further concern is that in providing the means of opening up this access, we do not overburden the resources. That is why this authorization is tied to the planning requirement of section 305 - the intent is to see to it that this expanded means of access fits into an overall recreational plan and that due care is given to protect areas susceptible of damage from excess use."

The inclusion of the island preservation provision is clearly for a different purpose. The major aim here, legislative history makes clear, is to put into public ownership those coastal islands now relatively unspoiled before they are developed intensively. In introducing the original legislation in 1975, Senator Ernest F. Hollings stated:

"This bill recognizes the importance of ...the protection of islands, areas which have been experiencing ever-increasing developmental and recreational pressures in recent years."

From the legislative history, the Office of Coastal Zone Management has concluded that section 315(2) is intended to provide ways of getting to areas presently in public ownership and is not for adding to those areas. Congress did not intend that funds from this section be used to add to beach areas, such as the dry sand area above the mean high tide line (or the ordinary high watermark in the Great Lakes) delineating where public ownership ends in certain states.

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Also, the word "public" appears before "beaches" and the listing of the other shorefront areas to which access might be provided. Thus, it is clear that Congress did not intend for access to be provided to privately held property. However, it would seem appropriate to provide right of access through private property to public areas.

Access must be provided according to the criteria established pursuant to the section 305(b)(7) planning process and must be sensitive to the areas involved. Thus, access to ecologically valuable areas will be markedly different from access to a public beach, for example.

The island funding provision is to preserve islands which are largely undeveloped and to keep them in that condition. Some limited public access to islands purchased under this provision may be provided.

IV. Policy and Objectives

The legislative history of this section of the Act makes it clear that its framers perceived the lack of access to public shorefront attractions, particularly beaches, as a major national problem which the Federal government must address through the vehicle of state coastal zone management programs. Congress has authorized a program which would make funds available to states for the purpose of increasing the ability of the public to gain access to coastal lands and waters which it already owns. Thus, Congress has implied a broad program objective and has indicated that section 315(2) funds are to be used to acquire lands or interest in lands as one means of achieving this objective.

Congress also recognized the intense developmental pressures on coastal islands and authorized funds to acquire these islands for the purpose of preserving their natural integrity.

V. Key Terms

Cost of Project: If one assumes that the intent of section 315(2) is to increase the ability of the public to use those shorefront attractions which it already owns, much more than simple land acquisition is involved. Although it is clear that Federal funds must be used for acquiring interests in land only, a project designed to increase shorefront access might well include capital expenditures (e.g., pavement of parking areas), transportation costs (e.g., shuttle buses) or maintenance (e.g., litter pickup, protection against vandalism, liability insurance). Thus, the non-Federal matching share may come from a variety of sources and need not be only for land acquisition purposes. The "cost of project" will apply to the overall effort designed to increase shorefront access, so long as the Federal share is for land acquisition. The same rationale will be applied to island preservation projects: those costs should be associated with a "project" designed to preserve the environmental, recreational, historical, esthetic, ecological and/or cultural value...
value of islands.

Access to: The term "access" as used in this section can include both physical and visual access. In providing for physical access, this may include but need not be limited to land for walkways, roads, boardwalks, bikeways, boat-launching areas for island access, parking facilities, for example. Visual access could include but not be limited to viewpoints, scenic easements and overlooks.

Public Beach: The term "public beach" carries over directly from the shorefront planning provision in which the states are required to define the term "beach" and as stated in the 305(b)(7) Regulations:

"The purpose of defining the term "beach" is to aid in the identification of those existing public beach areas requiring further access and/or protection as a part of the State’s management program. States should define "beach" in terms of characteristic physical elements (e.g., submerged lands, tidelands, foreshore, dry sand area, line of vegetation, dunes) or in terms of public characteristics (e.g., local, State or Federal ownership, or other demonstrated public interest such as easements, leases, licenses, or traditional and habitual usage). At a minimum, the definition of what constitutes a public beach shall be as broad as that allowed under existing state law or Constitutional provisions. States should take into account special features such as composition (e.g., non-sand beaches), location (e.g., urban or riverine beaches), origin (e.g., mangrove beaches) and fragility (e.g., areas of shifting dunes). Where access may be complicated by questions of ownership and use of the foreshore or dry sand beach, states are encouraged to define beach in terms of its component parts, especially at the mean high tide line, or the ordinary high water mark in the Great Lakes. Finally, in defining the term "beach", states shall provide a rationale explaining the relationship between the definition developed and access and protection needs."

Other public coastal areas of environmental, recreational, historical, ecological or cultural value. These public shorefront attractions, as stated in the 305(b)(7) Regulations. . ." may be broadly construed to include, but need not be limited to: public recreation areas, scenic natural areas, threatened or endangered floral or faunal habitats, wetlands, bluffs, historic, cultural or archaeological artifacts, and urban waterfronts" and applies to this subsection of the Act as well.

Preservation of Islands: This phrase means protecting the environmental, recreational, esthetic, ecological, cultural and/or historic values of islands, or parts thereof.

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VI. Eligibility Requirements

The legislative history states "Although not stipulated in H.R. 3981, it is understood that states must have substantially completed the public area protection and access planning process required under Section 305(b)(7) before being eligible to receive grants under Section 315(2)."* OCZM proposes the following two alternatives in order to be eligible for planning process.

1. Completion of the 305(b)(7) planning requirement in the event funding becomes available in FY 78.

2. Program approval under Section 306 if funding becomes available in FY 79. In the event funding becomes available in FY 78, OCZM must be in position to move quickly and allocate the funds during that year. Completion of the 305(b)(7) planning process, but not program approval under Section 306, will allow more states access to grant monies. The question becomes moot if funding becomes available in FY 79, since the great majority of states are scheduled to have their programs approved under Section 306 by then.

VII. Allocation of Funds

In order to make the Section 315(2) Program viable, and to insure continued funding in subsequent fiscal years, OCZM favors an allocation methodology that at least in the initial years of funding will ensure that all appropriated acquisition funds are spent, preferably on innovative projects having a relatively high degree of visibility. There, OCZM proposes that all funds allocated under Section 315(2) not be arbitrarily proportioned between shorefront access or island preservation projects. Within this initial framework OCZM has considered a number of different methods for allocating funds among proposed projects. In evaluating the respective merits of these alternative methods, OCZM suggests that reviewers consider the following factors:

A. The procedure for project funding should not be so burdensome or time-consuming as to foreclose acquisition opportunities that become available to the states.

B. Administrative delay should be minimized.

C. Acquisition should be well underway shortly after obligation by OCZM of funds for a given project, hence time is a critical factor.

D. Funding available for 315(2) acquisitions will be quite limited, especially given the total number of potential projects that will be eligible for funding within all 34 coastal states and territories.

E. Funding alternatives that stress geographical equity will eliminate certain types of land acquisitions. For example, if $10 million were appropriated, and each region were to be allocated $2 million the purchase of an island costing $3 million would not be possible.

F. Some projects may take longer to plan than others. It is possible that allocation methods heavily stressing geographical equity may inadvertently favor mediocre projects which can be proposed more quickly than complex but more innovative ones.

OCZM is considering four alternate methods for allocating 315(2) funds. The following alternatives are proposed in the context of one method of funding for shorefront access and island projects. However, if desired, one alternative might apply to shorefront access and another to island preservation (e.g., Alternative #3 apply to allocation of funds for beach access, and Alternative #6 for island's).

Alternative #1

Funds will be allocated directly to the coastal states and territories using the 305 grants allocation formula. Under this formula, 1% of the appropriated funds will be given to each eligible state. Of the remaining funds, 40% will be allocated on the basis of coastal population; 40% will be allocated on the basis of miles of shoreline; and 20% will be allocated for projects having national significance, at OCZM's discretion. No state will be allowed to receive more than 10% of the total amount appropriated in any fiscal year.

Considerations

A. States would select projects based upon state, rather than national, criteria. Except for the 20% discretionary funds, there would be little reflection of national needs and priorities.

B. Funds would potentially be available to all eligible states in each fiscal year. States unable to provide matching money to develop projects would have their funds reallocated to other states.

C. Most states would receive relatively small amounts of money — perhaps too small for the acquisition of islands or substantial access projects.
Alternative #2

Funds will be allocated equally to all five OCZM coastal zone management regions. State proposals will be judged on the basis of criteria to be set forth in regulations, and funded from the money available in the applicable state's region. In the event that projects funded within any region in the first nine months of the fiscal year do not exhaust the available funds, the unused funds can be transferred to projects in other regions, at OCZM's discretion.

Considerations

A. This method would roughly balance only the geographical distribution of projects funded each fiscal year and not consider other factors.

B. Each individual state is not assured of having projects funded.

C. If all or most of a region's allocation had already been committed, unexpected acquisition opportunities could not be acted upon.

Alternative #3

Using the §305 grant allocation formula, the funds for each state will be aggregated by region. Once aggregated at the regional level funds would be allocated to the states based not on any allocating formula, but instead on criteria which are discussed in this paper. This alternative method would be similar to Alternative #2, with the exception that the funds for each region would not be uniform.

Considerations

A. Instead of geographical balance, this method would emphasize distribution based upon population and amount of coastline.

B. The constraints on project funding discussed for Alternative #2 above would also apply.

Alternative #4

States will submit project proposals, and funds will be allocated among these proposals on the basis of criteria to be contained in regulations and discussed in this paper. There will be only one national pool of funds, from which all projects will be funded.
Considerations

A. This method provides maximum flexibility to fund those projects nation-wide which OCZM believes will meet the most critical shorefront access and island preservation needs.

B. This method would allow OCZM to take advantage of unexpected, innovative, or highly visible acquisition opportunities, especially island purchases which in some instance might require larger amounts of money.

C. In any given year, funds might be concentrated in some areas, to the exclusion of others. Selection criteria might accordingly need to ensure that over a number of fiscal years, projects funded under §315(2) approximate some geographical or other distributional standards.

VIII. Criteria for Selection

Under allocation Alternative #1, only very broad criteria would be needed for individual projects. The assumption here is that the states will set priorities among projects in the 305(b)(7) planning process. Under the other three alternatives OCZM would be in the position of allocating limited funds among competing project proposals. Selection criteria would emphasize equitable distribution of funds to the extent practicable with minimal administrative delay.

To the extent that OCZM is involved in project selection (Alternatives #2, 3, and 4, and the discretionary portion of Alternative #1), grant proposals will be reviewed and judged on the basis of criteria to be contained in regulations. OCZM proposes to use the set of criteria set forth below. Although some criteria will differ depending upon whether a project is classified under shorefront access or island preservation, there are a number of common factors that can be considered by OCZM in reviewing all project proposals. OCZM proposes that these general criteria include:

1. A showing that the proposed project is consistent with the goals and priorities established by the §305(b)(7) planning process. This would consist of coordination with existing/proposed state and local land use and recreation plans, and transportation plans and systems.

2. A showing of the need for the particular project.
3. An evaluation of the environmental impact of the project. Environmental assessments will accompany all project proposals, and environmental impact statements will subsequently be required if warranted.

4. A demonstration that state and local agencies have sufficient legal authorities to acquire and manage the property for which funding is sought.

Additional proposed criteria for evaluating proposed shoreline access projects would include:

1. Proximity to population centers.

2. Use of innovative acquisition techniques - e.g., less than fee simple purchase.

3. Local support for the project.

Additional proposed criteria for evaluating the proposed acquisition of islands or portions of islands would include:

1. Assessment of the ecological role of the island.

2. Evaluation of the social benefits (e.g., wildlife refuge, storm barrier, visual amenity, etc.) that would result from acquisition.

3. The threat of impending development or alteration of the island's ecosystem.

While the states must submit sufficiently detailed information to enable OCZM to meaningfully evaluate the relative benefits of proposed projects, OCZM is concerned that the application process for individual projects be relatively simple. It is anticipated that most of the detailed information required in the g315(2) regulations can be generated in the g305(b)(7) planning process, and that time delays will be minimal in those states which have addressed acquisition issues in their g305(b)(7) plans.
Appendix Two. Other Federal Programs Related to Beach Access

In this Appendix federal programs that may have some relevance to a beach access program are described. The beach access provisions of the Coastal Zone Management Act have been described in Appendix One and are not repeated here.

There is a wide variety of programs described. Some are acquisition programs, many are not. Some will have immediate application, others will be useful only under peculiar circumstances, some, perhaps, never. They are all listed, however, because it was felt that each one might be of help.

In some instances the programs are cross-referenced by means of code number taken from the Catalog of Federal Domestic Assistance which is an excellent point for further information on specific programs. Other sources are the BNA Environment Reporter and Housing and Development Register, which usually contain the relevant statutes and regulations.

The descriptions incorporated here draw heavily on work done by Jeffrey Trepel, a fourth year student in the Joint Degree Program in Law and Planning at the University of North Carolina at Chapel Hill, while he was an intern in the Office of Coastal Zone Management, Washington, D.C. during the summer of 1977.
1. Department of the Interior
   Bureau of Outdoor Recreation
   Land and Water Conservation Fund
   Outdoor Recreation Technical Assistance
   Outdoor Recreation Resource Area Studies
   Outdoor Recreation Water Resources Planning Program
   Surplus Property for Parks Program

   Bureau of Land Management
   Public Land for Recreation, Public Purposes, and Historic Monuments

   National Park Service
   Park and Recreational Technical Assistance

   Fish and Wildlife Service
   Surplus Property for Wildlife Conservation

2. Department of Agriculture
   Watershed and Flood Prevention Operations Program

3. Department of Housing and Urban Development
   Open Space Program
   Federal Flood Insurance Program

4. Department of Defense
   Small Beach Erosion Control Projects

5. Department of Transportation
   Federal Highway Administration
   Highway Research, Planning and Construction

   Federal Aviation Administration
   Airport Planning and Development
Department of the Interior
Bureau of Outdoor Recreation
Land and Water Conservation Fund

Probably the most significant support for coastal recreation comes through the Land and Water Conservation Fund Act of 1965 (LAWCON). BOR administers LAWCON as a program of financial assistance grants to states for facilitating outdoor recreation planning, acquisition and development activities, and the fund also provides for the acquisition of national recreation lands by the federal government. Since 1965, federal grants of over $1 billion have been made to the states, territories, and the District of Columbia under LAWCON. Well over half of these funds have benefitted water-oriented recreation projects (including but not limited to access projects). A major portion of the water-oriented projects have been in the four coastal areas, but the fund encompasses all water areas.

Authorization


Coastal/Recreational Responsibilities and Uses

Tools and Techniques

LAWCON provides for:

(1) acquisition of lands for federally administered parks, wildlife refuges and recreation areas; and
(2) matching Project Grants for state recreation planning, and state and local land acquisition and development.

Under the "federal side" (not less than 40 percent of the total fund), money is provided only for the acquisition of national recreation and conservation lands. (See Acquisition Authority below.) Under the "state side" (about 60 percent of
the total fund) grants are provided to states and their political subdivisions for acquisition and development of public outdoor recreation areas and facilities. These project grants must be matched by not less than an equal amount of non-federal funds.

Acquisition Authority, Purposes

On the "federal side" acquisition programs must be approved by Congress. Recreation resources which may be acquired by the Federal government include national parks, seashores, lakeshores, forests, wild and scenic rivers, trails, national recreation areas, historic areas, wildlife refuges, and natural and wilderness areas.

On the "state side" acquisition and development grants may be used for projects such as picnic areas, inner city parks, campgrounds, tennis courts, boat launching ramps, bike trails, outdoor swimming pools, and support and access facilities such as roads, water supply, etc. There are several restrictions on the types of projects that may be funded:

1. Facilities must be open to the general public and not limited to special groups. (Assistance is available only for public projects.)
2. Development of basic rather than elaborate facilities is favored.
3. Priority consideration generally is given to projects serving urban populations.

Organizational Structure
Operations and Management

On the "federal side", it is important to note that BOR does not manage any lands. Under LAWCON management of the national recreation lands is divided between the National Park Service, the Fish and Wildlife Service, and the Bureau of Land Management, all in the Department of Interior, and the Department of Agriculture's Forest Service.
On the "state side", fund monies are not available for the operation and maintenance of facilities. The sponsoring agency must permanently dedicate the project to outdoor recreation and assume responsibility for operation and maintenance.

Funding and Assistance

Sources of revenue

(1) Sale of Federal surplus real property;
(2) Federal motorboat fuels tax;
(3) Outer Continental Shelf mineral receipts.

Obligations (project grants)

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<td>75</td>
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<td>76</td>
<td>175,840,000</td>
</tr>
<tr>
<td>77 est.</td>
<td>175,516,000</td>
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</table>

Range and Average of Financial Assistance (project grants)

$150 to $5,450,000; $68,178

At the beginning of FY 1976, nearly 14,500 state and local projects had been approved for funding. Approximately 40 percent of the money obligated was for use by state agencies, 13 percent for counties, and 41 percent for cities. (Remember, this is all included in the 60 percent of the Fund appropriation that is for assistance to states; the remaining 40 percent is for federal land acquisition.)

Under certain conditions, all or part of the project sponsor's matching share may be from certain other federal assistance programs, such as Title I Community Development Funds. Funds are available for obligation during the fiscal year in which appropriated and for the two following fiscal years. Complex projects may be broken down into stages.
Coordination

related programs (numbers are code numbers found in the "Catalog of Federal Domestic Assistance.")

- Public Land for Recreation, Public Purposes
  and Historic Monuments  15.202
- Outdoor Recreation Technical Assistance  15.402
- Disposal of Federal Surplus Real Property  39.002

As noted above, lands acquired by BOR under LAWCON are administered by the National Park Service, Fish and Wildlife Service Bureau of Land Management, and the Forest Service.

Eligibility

Only the state agency formally designated as responsible for the preparation and maintenance of the Statewide Comprehensive Outdoor Recreation Plan (SCORP) is eligible to apply for planning grants. For a state or its political subdivisions to receive grants, it must develop a SCORP and update and refine it on a continuing basis. The Fund provides matching planning grants and technical assistance to states for such purposes.

The state-designated agency may apply for assistance for itself, or on behalf of other state agencies, or political subdivisions such as cities, counties, and park districts. Treated as states are the District of Columbia, Puerto Rico, The Virgin Islands, American Samoa and Guam. Indian tribes which are organized to govern themselves and perform as municipal governments also qualify for assistance. Individuals and private organizations are not eligible.

Application Procedures and Requirements

Project proposals are submitted to BOR through the state liaison officer designated by the Governor. The SLO has the
initial prerogative of determining acquisition and development project eligibility, priority need, and order of fund assistance within the state. He must furnish assurance that each project meets high priority recreation needs shown in the action program portion of the plan.

Applications are to undergo A95 review. The applicant is to furnish basic environmental information or evaluation, and BUR will determine if an environmental impact statement must be prepared.

BUR estimates, rather optimistically, it would seem, approval/disapproval time to be approximately 20 days for acquisition and development projects, and approximately 60 days for planning projects.

References


Department of the Interior
Bureau of Outdoor Recreation
Outdoor Recreation Technical Assistance

A. Informational Aspect

One focus of BOR's Technical Assistance Program is to provide advisory services and counseling and dissemination of technical information to other federal agencies, governmental units and private interests in order to increase the number and quality of public recreation areas, facilities and opportunities.

Authorization


Coastal/Recreational Responsibilities and Uses Tools and Techniques

The informational source of the Technical Assistance Program is BOR's Outdoor Recreation Information Clearinghouse which contains over 8,500 references. BOR applies technical information useful in planning, developing, financing, and managing outdoor recreation programs and related research and educational activities. Technical assistance is also given to state and local governments relating to applications for federal surplus property for public parks and recreation, and Historic Monument purposes in cooperation with GSA's Disposal of Federal Surplus Real Property program.

Acquisition Authority

This segment of the Technical Assistance Program is not an acquisition program.

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Operations and Management

Technical assistance is available under this program with regard to the operations and management of outdoor recreation areas.

Funding Assistance

No funds are provided to any public or private entities under this program.

Coordination

Consultation is available to other federal agencies assisting states or localities or private entities in providing outdoor recreation opportunities. As noted above, assistance is also given to states and localities relating to applications for GSA's Dispersal of Federal Surplus Real Property Program.

Eligibility

Anyone engaging in conducting outdoor recreation programs may receive assistance or information.

Application Procedures and Requirements

Informal request addressed to the Bureau of Outdoor Recreation's regional offices.

Related Programs

- Land and Water Conservation Fund 15.400
- Outdoor Recreation Technical Assistance 15.906
- GSA Surplus Property Program
Information Contacts

James W. Cook (202) 343-7962
Division of Cooperative Services
Bureau of Outdoor Recreation
Department of the Interior
Washington, D.C. 20240

References

1. Executive Office of the President; Office of Management and
   Budget, Catalog of Federal Domestic Assistance, Government

2. U.S. Department of Commerce, Bureau of Outdoor Recreation,
   A Technical Assistance Program (pamphlet).

B. Public-Private Partnership

The second focus of the Technical Assistance Program is
working with state and local governments and private interests
in order to obtain private contributions, of land or money,
and support for public outdoor recreation areas, facilities and
programs.

Authorization

Bureau of Outdoor Recreation Organic Act; P.L. 88-29; 77

Coastal/Recreational Responsibilities and Uses
Tools and Techniques

The program employs two approaches. One is locating a land
resource in any region with outstanding public recreation
potential and, in cooperation with local officials, developing an acquisition program which is suitable for private contributors. Contributions may include donations of cash, land, facilities, leases, and easements, or bargain sales.

The second approach is to identify private interests with potential recreation resources and then to develop programs to make their resources available to the public in a variety of ways ranging from outright donation of the resources to a public agency, to opening the area for public use under a lease, easement, or management agreement with a public agency. Below are three brief examples of cooperative efforts by federal, state, and local governments and the private sector to meet the recreation needs of urban areas.

The Dolese Company/Kerr Foundation

In 1976, the Dolese Company decided to make available to Oklahoma City a 157-acre tract of land (formerly used as a sand-pit mine) for a city park to be known as the Oklahoma City Youth Park. The Company donated 89 acres and the city purchased 69 acres. The value of the 89-acre donation was estimated at $1,400,000.

This project received a broad-base support from several philanthropic and civic organizations. The Kerr Foundation pledged $1,000,000 and other civic organizations pledged an additional $1,500,000 for the development of the park complex which will include bike, hiking, and jogging trails, picnic and day camping accommodations, a small lake, playgrounds, sports fields, and support facilities. BOR provided an initial $700,000 for the acquisition of the 69 acres.

Wisconsin Electric Power Co. R.O.W.

The Bureau assisted Wisconsin Electric Power Company by assessing the recreation potential of its rights-of-way, informing local recreation departments of its availability and providing technical assistance for trail development on the rights-of-way.
Wisconsin Electric owns over 100 miles of electric utility R.O.W. radiating from Milwaukee and has a policy to encourage the use of these lands for public recreation. Four county recreation departments have developed and presently administer approximately 20 miles of bicycle-hiking trails on these R.O.W. and many more miles are planned for development as local funds permit.

St. Joe Minerals Corporation

In 1975, the St. Joe Minerals Corporation donated an 8,500 acre tract of land, located 60 miles south of St. Louis, near Farmington, to the State of Missouri for development as a State park. The 8,500 acre tract, valued at over $2,000,000, was no longer needed for mining purposes by the corporation.

Acquisition Authority

Under this program the state or local government is the recipient of the land. BOR has no acquisition authority. If BOR considers it to be desirable for land to be held in escrow, so to speak, for a donee, an arrangement with the Nature Conservancy is often worked out.

Operations and Management

The recipient of the land is responsible for its operation and management. In some cases ownership of the land is retained by the donor, and it is operated by the donee under a management agreement.

Funding and Assistance

Since the Legacy of Parks Program was initiated land valued at $213 million has been transferred to state and local governments for park and recreation purposes. During Fiscal Year 1976
137,077 acres and 75 miles of trail, valued at over $25 million, were added to the public outdoor recreation estate. Of this, 62,483 acres and all of the trails, valued at over $13.5 million, were acquired at little or no cost to the recipient public agency. The Technical Assistance Program is designed to add to the public outdoor recreation estate with a minimum of Federal expenditures. At the current level of effort over $20 worth of public recreation property is obtained for every federal dollar expended on this program.

Coordination

Many of the private interest actions under the Technical Assistance Program interface with the Land and Water Conservation Fund and further its objectives. Private donations are frequently utilized for matching fund grants to help state and local agencies take full advantage of available recreation resources.

Eligibility Requirements

There are no specific eligibility requirements for potential state and local government donees unless federal funds are used in the project. Thus, a project does not necessarily have to conform to a state's SCORP.

Application Procedure

A state or local government with particular recreational needs may contact the Bureau in order to locate a donor, but frequently a project is initiated by the donor.

Information Contacts

James W. Cook (202) 343-7962  
Division of Cooperative Services  
Bureau of Outdoor Recreation
References


Department of the Interior
Bureau of Outdoor Recreation
Outdoor Recreation Resource Area Studies

BOR undertakes studies of the suitability of areas for designation as national parks or recreation areas, and wild and scenic rivers or trails. Designation of wild and scenic rivers has been a major effort of this program under recent years. The major importance of this program to beach access is its study of coastal barrier islands. President Carter directed the Secretary of the Interior and the Secretary of Commerce to study these islands, and this office represents the central thrust of Interior's efforts.

Information Contact

Department of the Interior  (202) 343-4793
Bureau of Outdoor Recreation  Robert Eastman
Office of Resource Area Studies  William Rennebohm
Washington, D.C.  20402
The Outdoor Recreation Water Resources Planning Program has two major purposes: first, to protect outdoor recreational resources from the ravages of development, and, second, to ascertain the outdoor recreational resource development potential of a particular water resource development according to each state's SCORP. The Bureau accomplishes these purposes through participation in the formulation of comprehensive basin studies and proposals for water (and related land) resources under the aegis of the Water Resources Council, and study of proposed water resource developments and reports by various Federal agencies (Bureau of Land Management, Soil Conservation Service, Army Corps of Engineers). The Bureau also reviews Federal Power Commission license applications and environmental impact statements with regard to outdoor recreation resources in power projects. Technical assistance is provided to private utility companies for planning recreational development at hydroelectric and nuclear power projects.

Information Contact

William Lawson
Outdoor Recreation Water Resources Planning Program
Bureau of Outdoor Recreation
Department of the Interior
Washington, D.C. 20240

(202) 343-7688

Related Program

Water Resources Council Planning Program 65.001
The Secretary of the Interior may transfer to eligible applicants, including states and their political subdivisions, land surplus to the needs of the federal government for public park and recreation purposes. The responsibility for administering the program has been delegated to BOR.

**Authorization**

The disposal of surplus federal real property is authorized by Section 203 of the Federal Property and Administrative Services Act of 1949. 63 Stat. 385, as amended, 40 U.S.C. 484, and is administered by the General Services Administration (GSA). Surplus real property may be conveyed for purposes other than recreation. The conveyance for public park and recreation purposes specifically is authorized by Section 203 (K) (2) of the Act (40 U.S.C. 484 (K) (2)).

**Tools and Techniques**

Surplus property may be conveyed for public park and recreational use, at discounts up to 100 percent. The law requires that deeds of conveyance to state or local governments of surplus property provide that the property transferred be used and maintained for public park and/or recreation uses in perpetuity, and that if the property ceases to be so used, it shall revert to the United States. Specific deed restrictions to protect the interest of the federal government are placed on the property.

**Acquisition Authority**

Normally BOR merely assists GSA in the transfer of the surplus property to the buyer. BOR has no acquisition or management
authority for itself.

Organizational Structure

When any federal agency determines that real property under its control is not required by that agency, it is reported to the GSA, which notifies other executive agencies of the availability of the property. If within 30 days no agencies have notified GSA of their interest, the property becomes "surplus." Notices of Availability are transmitted to appropriate state and local governments by BOR and GSA. Upon receipt of an acceptable application, BOR may request assignment of the surplus property from GSA. When the property is so assigned BOR initiates actions for property conveyance. Surplus property which is not deeded to public bodies may be offered for sale to the public on a competitive bid basis by GSA.

Operations and Management

The acquiring agency is responsible for the operation and management of the property conveyed to it.

Funding and Assistance

As of July 13, 1977, over 683 properties, comprising 84,594 acres and valued at over $265 million, have been added to the Nation's recreation estate by the Surplus Property for Parks Program.

Coordination

BOR and GSA cooperate in the implementing of the Surplus Property for Parks Program.
Related Programs

- Public Land for Recreation, Public Purposes and Historic Monuments
  Bureau of Land Management

- Surplus Property for Wildlife Conservation
  U.S. Fish and Wildlife Service

- Surplus Property for Historic Monument Purposes
  BOR and GSA

Eligibility

Any state, county, city, town, municipality, or instrumentality is eligible to apply. The prospective applicant must be able to attest that the property is suitable for public park and recreation purposes; and that, when developed, it will meet recreation needs identified in the State Comprehensive Outdoor Recreation Plan (SCORP). The applicant must also set forth a schedule of development and a financial plan which will result in orderly, early development of the property for public use. The approved plan is referenced in the deed of conveyance, and any amendments must be submitted for secretarial approval.

Application Procedure

Assistance in applying for surplus property may be obtained at any of BOR's regional offices. Range of approval/disapproval time is 3 to 6 months.

Information Contacts

Charles I. Montgomery
BOR Surplus Property Program
Bureau of Outdoor Recreation
Department of the Interior
Washington, D.C. 20240

(202) 343-7962

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References


3. General Services Administration, Disposal of Surplus Real Property (pamphlet).
Almost one-third of the nation's land is owned by the federal government. BLM manages about 60 percent of the federal land estate, and thus, a staggering 20 percent of the land in the United States. In some western states, about 90 percent of the land is federally owned. BLM supports recreation that is compatible with its view of its land stewardship objective, and has recently taken a more active role in meeting outdoor recreational needs.

Under the Recreation and Public Purposes Act of June 14, 1926, as amended; 43 U.S.C. 869, 869-4; qualified Federal, state and local government agencies, and also nonprofit associations and corporations may lease or purchase available BLM land for recreation, historical monuments and "public purposes". (Assistance is not available in the original thirteen states, Hawaii, Kentucky, Tennessee, Texas or West Virginia.) The significance of BLM's recreational activities is limited by the distribution of its holdings. BLM lands are located almost entirely in the western states, and a great preponderance of the lands are inland. So, while BLM occasionally engages in coastal recreational activities (most notably in King Range National Conservation Area in California), the availability of coastal lands to states and their subdivisions is very limited. This limitation, however, should make it easy for OCZM to monitor BLM's coastal activities.

References

The National Park Service is an important land management agency throughout the country, including the coastal zone. Its domain consists of about 300 units located in 47 states, the District of Columbia, Puerto Rico and the Virgin Islands, comprised of national parks, monuments, historic sites, recreation areas, lakeshores, seashores, preserves, natural landmarks, battlefields, and military parks.

Ditton and Stephens have described some of the responsibilities of the National Park Service (Ditton, Robert B. and Stephens, Mark, Coastal Recreation: A Handbook for Planners and Managers, OCZM/NOAA, U.S. Department of Commerce, January, 1976):

The Park Service is charged with a dual, at times conflicting, mission of: (1) preserving the nation's natural, cultural and scenic wonders, while simultaneously (2) providing for public enjoyment derived through recreational use of these resources. NPS administered areas are generally established only where resources meet stringent requirements for uniqueness and national significance, and as a consequence, are seldom located where public needs are most intense. In addition, NPS policies deemphasizing facility development in many types of park system units, and focusing greater attention upon preservation efforts have evolved in response to increasing use pressures and resultant resource degradation at heavily visited sites.

NPS has, however, undertaken projects in recent years that are distinctly oriented toward satisfying urban recreational needs. The Gateway and Golden Gate National Recreation Areas established in the New York and San Francisco metropolitan regions during 1972 represent the foremost examples of National Park
Service units established for urban recreational users in a coastal setting.

A 1935 National Park Service survey of undeveloped seashore areas recommended that 12 major sites, with a combined shoreline frontage of 439 miles, be preserved as national seashores. This investigation led to the creation of Cape Hatteras National Seashore in 1937. NPS conducted another survey in 1954 to determine the remaining opportunities to preserve outstanding stretches of the Atlantic and Gulf Coasts. Subsequently, nine national seashores and four national lakeshores distributed throughout the country's ocean and Great Lakes coastline have been established. These units have been complemented by the designation of several national parks, monuments, and other units with coastal frontages...

The establishment of national parks, seashores and lakeshores requires special legislation to provide for purchasing privately held lands. This requirement complicates planning for the creation of new areas due to the uncertainties inherent in dependence upon enabling legislation from the Congress...

The Natural Landmarks Program, also administered by NPS, was created to facilitate identification and registration of national landmarks, and to encourage the preservation of nationally significant properties, regardless of ownership. NPS has conducted an inventory of the country's natural areas in conjunction with this program. The system of natural landmarks is designed to illustrate the diversity of the nation's natural environment.

Following NPS evaluation, sites which appear to qualify for inclusion are submitted to the Advisory Board on National Parks, Historic Sites, Buildings and Monuments for its recommendations to the Secretary of the Interior concerning their eligibility for registration.
In requesting registration, property owners agree to comply with basic management and protection practices prescribed by the program. (pp. 2-11 to 2-14; footnotes omitted)

National seashores are natural coastal areas set aside for the preservation and public recreation use of their naturally significant scenic, scientific, historic, or recreational values, or a combination of those values. They usually contain fairly extensive acreage.

National Recreation Areas, such as the Gateway and Golden Gate areas mentioned above, are of special interest because of the criteria NPS uses to evaluate the suitability of sites to be National Recreation Areas. These are reproduced below.

National Recreation Areas: The following criteria are established for the evaluation and selection of areas proposed for Congressional designation as National Recreation areas in the national Park System. These criteria modify those issued in the Recreation Advisory Council's Policy Circular No. 1 of March 26, 1963.

The following criteria are to be applied to all proposals:

-National Recreation Areas should be spacious areas containing outstanding natural and/or historic features and providing significant recreation opportunities.

-National Recreation Areas should be located and designed to achieve comparatively heavy recreation use and should usually be located where they can contribute significantly to the recreation needs of urban populations.

-National Recreation Areas should provide recreation opportunities, significant enough to assure national, as well as regional, visitation.
-The scale of investment, development, and operational responsibility should be sufficiently high to require either direct federal involvement or substantial federal participation to assure optimum public benefit.

-Within the National Recreation Area, outdoor recreation shall be recognized as a primary management purpose; however, such management shall be compatible with the protection of the natural and historic resources.

Information Contact

Raymond S. Freeman
Planning and Development Division
National Park Service
Department of the Interior
Washington, D.C. 20402

References


Department of the Interior
National Park Service
Park and Recreation Technical Assistance

The National Park Service provides technical assistance to state and local agencies in planning, developing, and managing their park and recreation areas.

Authorization


Tools and Techniques

Assistance consists of technical and advisory services on such matters as agency organization, operation and maintenance of park systems, personnel training, historical and archaeological programs, and general development planning. Reimbursement is usually required if planning is accomplished by the National Park Service.

Acquisition Authority

This program has no acquisition authority.

Operations and Management

As stated above, technical assistance is available under this program with regard to the operations and maintenance of park systems.

Funding Assistance

No funds are provided to public agencies under this program.
During 1975, about 6,000 inquiries for technical information were answered and 350 state and local agencies and Indian tribes were provided with technical assistance.

**Coordination - Related Programs**

- Outdoor Recreation Technical Assistance 15.402
- Park Practice Program 15.907
- Training Institute for Park and Recreation Management 15.911

**Eligibility and Application Procedure**

States and local units of government and Indian tribes may apply for assistance under this program. A letter to the appropriate regional director explaining the need for assistance is required.

**Information Contact**

Chief, Division of Federal, State and Private Liaison National Park Service U.S. Department of the Interior Washington, D.C. 20240

**Reference**

Department of the Interior   General Services Administration
U.S. Fish and Wildlife Service
Surplus Property for Wildlife Conservation

The Secretary of the Interior may transfer to states land surplus to the needs of the federal government for wildlife conservation purposes. Hence, this program may be related to coastal access and island preservation efforts. The responsibility for administering the program has been delegated to USFWS.

Authorization

The overall disposal surplus of federal real property is operated by the General Services Administration (GSA) under the authority of Section 203 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 385, as amended, 40 U.S.C. 484. Surplus real property for wildlife conservation is specifically covered by P.L. 537; 16 U.S.C. 667b-d.

Tools and Techniques

Surplus property for wildlife conservation is conveyed to states for wildlife conservation purposes at no cost to the states. The law requires that deeds of conveyance to states provide that the property transferred be used and maintained for wildlife conservation purposes in perpetuity, and that if the property ceases to be so used, it shall revert to the United States.

Acquisition Authority

Under this particular act the U.S. Fish and Wildlife Service has no acquisition authority. Normally BOR assists GSA in the transfer of the surplus property to the state.
Organizational Structure

When any federal agency determines that real property under its control is not required by that agency, it is reported to the GSA, which notifies other executive agencies of the availability of the property. (When the land is available to federal agencies as "excess", USFWS may acquire it under the Migratory Bird Conservation Act.) If within 30 days no agencies have notified GSA of their interest, the property becomes "surplus." "Notices of availability" are transmitted to appropriate state and local governments by USFWS and GSA. Upon receipt of an acceptable application, USFWS may request assignment of the surplus property from GSA. When the property is so assigned, USFWS initiates actions for property conveyance. Surplus property which is not deeded to public bodies is generally offered for sale to the public on a competitive bid basis.

Operations and Management

The acquiring agency is responsible for the operation and management of the property conveyed to it.

Funding and Assistance

Examples of properties recently transferred under this program include Fishermen's Island, Plum Tree Island, and Wallops Island (a former NASA installation), all in Virginia, and Amagansett Light Station in New York.

Coordination

BOR and GSA cooperate in the operation of the Surplus Property for Parks Program.
Related Programs

- National Migratory Bird Program

- Surplus Property for Parks
  Bureau of Outdoor Recreation

Eligibility

Only states are eligible to receive surplus property for wildlife conservation purposes.

Information Contact

Richard E. Corthell  (202) 343-6649
U.S. Fish and Wildlife Service
Department of the Interior
1717 H Street - Matomic Building
Washington, D.C.
Department of Agriculture
Watershed Protection and Flood Prevention Loans
Farmers Home Administration
and
Watershed Protection and Flood Prevention
(Small Watershed Program)
Soil Conservation Service

The Watershed and Flood Prevention Operations Program in the Department of Agriculture includes three basic activities:

Watershed Operations - Cooperation in establishing works of improvement to reduce erosion, flood water and sediment damage. The development of recreational facilities may be a by-product of these operations.

Flood Prevention Operations - Establishment of works of improvement for flood prevention may also include the development of recreational facilities.

Loans - Loans are made to help finance the local share of the cost of implementing watershed and flood prevention works of improvement.

Authorization

The Watershed Protection and Flood Prevention Act, P.L. 83-566, 85 Stat. 666, 16 U.S.C. 1001 et seq., as amended, provides for cooperation between the federal government and the states and their political subdivisions in a program to prevent erosion, floodwater and sediment damages in the watersheds of rivers and streams; to further the conservation, development, utilization and disposal of water; and to further the conservation and proper utilization of land.

Coastal Recreational Responsibilities and Uses
Tools and Techniques

The Act provides for technical and financial assistance for the installation of works of improvement, usually either land
treatment measures or structural measures. Structural measures such as floodwater retarding structures, stream channel improvements, stabilizing and sediment control structures, water storage structures, and others may enhance or encourage recreational development. The federal government will provide a share of the cost of installing improvements for agricultural water management, fish and wildlife, and recreational development. (The latter includes the cost of minimum basic facilities for public health and safety and access to recreational areas.) Local organizations must pay all costs of improvements for other purposes.

Watershed Protection and Flood Prevention Loans are available to local organizations to finance the local share of costs of installing planned works of improvement. Loans are administered by the Farmers Home Administration.

**Acquisition Authority**

This is not an acquisition program. Local organizations must acquire water rights and furnish land, easements and rights-of-way for all structural measures. However, up to one-half the cost of land, easements, and rights-of-way allocated to public fish and wildlife and recreational developments may be paid with federal funds.

**Organizational Structure**

The Farmers Home Administration is responsible for making loans to sponsors of projects. No loan may be made until the Soil Conservation Service and the local organization have agreed on a plan for works of improvement and the project is approved for operations.

**Operations and Management**

Local sponsoring organizations are responsible for operating
- Soil and Water Conservation 10.902
- River Basin Surveys and Investigations 10.906
- Flood Plain Management 12.104

Eligibility

Any state agency, county or groups of counties, municipality, town or township, soil and water conservation district, flood prevention or flood control district, or any other nonprofit agency with authority under state law to carry out, maintain and operate watershed works of improvement may apply for assistance from SCS. To qualify for the FmHA loan the agency must also have authority under state law to obtain, give security for and raise revenues to repay the loan and to operate and maintain the facilities to be financed with the loan.

Application Procedure

Application to SCS may be made through the state field offices of SCS. An environmental impact statement for a project is frequently, but not always, required. An environmental impact statement is required for the loan program. Loan applications are filed with county FmHA offices. After an application has been reviewed by the County Supervisor and the County committee, it is referred to the State Director who has approval authority.

These Agricultural programs are not exclusively coastal or recreational, but it is interesting to note that federal money can be used to provide a share of the cost of recreational development and access to that development. In the context of watershed development it would generally be more appropriate to use this program to provide access, because we usually will not be talking about beaches, but about reservoirs. Occasionally, however, it is possible that beach access will be part of watershed development.
and maintaining completed works of improvement on non-federal 
lands and reservoirs and recreation areas.

Funding

Range and average of financial assistance (SCS)

$20,000 to $14,000,000; $2,000,000

In FY 1975 a total of 473 projects were in some stage in 
construction and 396 had been completed. At this time we are 
unable to determine what proportion of these include recreational 
uses.

Range and average of financial assistance (FMHA; loans)

$7,230 to $5,000,000; $300,000

Loans Made

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
<th>Loans</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 1975</td>
<td>$20,175,000</td>
<td>25</td>
</tr>
<tr>
<td>FY 1976</td>
<td>23,400,000 est.</td>
<td>29 est.</td>
</tr>
<tr>
<td>FY 1977</td>
<td>23,400,000 est.</td>
<td>27 est.</td>
</tr>
</tbody>
</table>

Coordination

All projects must undergo A95 review. (See also Organization Structure)

Related Programs

- Irrigation, Drainage, and Other Soil and Water Conservation Loans
  10.409

- Soil and Water Loans
  10.416

- Resource Conservation and Development
  10.901
References


Department of Housing and Urban Development
Open Space Land Program

This program must be spoken about in the past tense, because HUD's categorical grant programs, such as open space and urban beautification, have been replaced by community development block grants. It might be informative, however, to summarize what the Open Space Program, established in 1961, did do. It authorized matching grants of up to 50 percent to states and local agencies for acquisition and limited development of, among other things, open space for park and recreational purposes. Proposed projects had to be in areas of "urban character" (which included suburbs). High priority was not given to the preservation of scenic or ecologically significant areas, which would seem to afford a low priority to beach acquisition. However, one commentator noted that "the most pressing needs for water-oriented recreation opportunities are in urban areas where they can be made available to less mobile, lower income groups." (Ducsik, see below, p. 143)

In its prime, the Open Space Program served many non-recreational objectives. Now, under community development block grants, localities have much greater discretion over how grant funds are to be spent. Although open space remains a valid purpose for community development funds, it appears that most recipient communities have what they consider to be more critical needs for the funds.

References


The Flood Insurance Program itself is not directly applicable to the acquisition of beach access. Regulations do require local governments to institute some type of subdivision controls in order to qualify for the program, but there is no requirement that any such controls pertain to beach access. Provisions relating to beach access could be developed, but any such effort would be tangential to the Flood Insurance Program itself.

The importance of the Flood Insurance Program to beach access falls with the mechanics of compensation once loss has been incurred. Once a flood disaster, probably a hurricane, has occurred, Section 1362 of the Act (42 U.S.C. 4103) authorizes the federal government to purchase insured properties "damaged substantially beyond repair" rather than pay the insured to reconstruct whatever was on the property before the disaster occurred. Section 1362 then allows the federal government to sell, lease, donate, or otherwise transfer the property to any state or local agency which agrees to use the property for purposes "consistent with sound land management and use" for at least forty years. Thus, state and local governments are provided with the opportunity to acquire lands which have sustained substantial hurricane damage.

The major difficulty with Section 1362 is that as of June 1977 funds have never been appropriated to implement it. However, administrators are studying the feasibility of implementing this section as both a valuable floodplain management tool and as a means of insurance recovery. A policy on Section 1362 may emerge in 1978.

Another possible access-related use of the National Flood Insurance Act arises from regulations which will require local governments in identified erosion-prone areas (yet to be determined) to establish a setback for all new development from
the ocean, lake, bay, river front or other body of water in order to create a safety buffer of natural vegetation which will be appropriate for wildlife habitats and open space purposes such as recreation. Program administrators are presently developing prototype base maps to delineate erosion-prone areas along the barrier islands, beaches, and the Great Lakes. Hence this aspect of the Act could prove beneficial to both beach access and island preservation.

References


Department of Defense
Department of the Army,
Office of the Chief of Engineers
(Army Corps of Engineers)
Small Beach Erosion Control Projects

Section 102 of the 1962 River and Harbors Act, as amended; P.L. 87-874, 33 U.S.C. 426g; authorizes the Corps of Engineers to aid state and local agencies in controlling beach and shore erosion of public shores. The Corps designs and constructs each project. This is not a large program; for instance, in 1974 only three projects were under construction, and the federal cost limit per project is $1,000,000 or 70 percent of the cost of the project, whichever is lower.

Under this program the non-federal sponsoring agency must agree to "provide and maintain" necessary access roads, parking areas and other public use facilities. This includes the possibility that beach access facilities be provided.

Reference

A portion of the enormous Federal-Aid Highway Program may be directed to roadside beautification, recreation (including access roads to recreation areas), bikeways, pedestrian walkways, fringe and corridor parking areas and rest areas. Since grants to state and local agencies under this program are estimated at over $6 billion for FY 1977, even a very small fraction of this can be significant to a particular project. DOT funds, it would seem, can be used for coastal highways and parkways, rest areas including water access, and bicycle trails. It might be appropriate for this liaison to take place on the state level.

References


Department of Transportation
Federal Aviation Administration
Airport Planning and Development

The FAA provides technical and financial assistance to public agencies for the planning and development of airports under its Airport Development Aid Program (ADAP) and Airport Planning Grant Program (PGP). The FAA also coordinates its airport planning with the Department of Housing and Urban Development and with local planning departments so that consideration is given to the use of land surrounding airports for park and recreation facilities. The FAA encourages such consideration because recreational uses are among the few uses compatible with airport operations.

References

   -Airport Development Aid Program (ADAP) 20.102, p. 560
   -Airport Planning Grant Program (PGP) 20.103. p. 561

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