

**Legal Tools to Enhance Public Coastal Access
While Protecting Private Property Rights**

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March 2008

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Executive Summary

People desire access to the beach, shore and water for different reasons. Sometimes they wish to relax or walk on the beach or perhaps go fishing from a pier. Sometimes they simply want to be able to see the ocean from their own home, or a public road or park. For others, simply knowing the ocean is there is enough.

In Maine, landowners own the shore out to the “mean low tide line,” but they must allow people to use the water at high tide or the sand and mud at low tide for fishing, fowling and navigation. Landowners are not required by law, however, to grant others the right to cross their land—or gain “perpendicular access”—just to get to the beach or shore.

Those who own the shore and the land adjacent to it sometimes wish to grant others access to their beach or the ability to make use of the water. They have several legal tools at their disposal to allow such access voluntarily, depending on the type of access desired, the people requesting it, and the role of the government in encouraging such access.

Sometimes the government, representing the public at large, has such a strong interest in securing shoreline and ocean access for its citizens that it will “take” the access right by eminent domain. This requires certain important circumstances and fair compensation to the landowner. Still, the possibility that the government could force a landowner to give access privileges to others is one reason why landowners sometimes agree to do it under their own terms and conditions.

Usually these interests are identified as part of a broader coastal management plan undertaken by a municipality, region or state. This document describes the key legal tools available to address these access issues and to highlight the circumstances in which each might serve as the appropriate tool.

I. Introduction

Access to the shore becomes increasingly important as more and more people seek to use this resource. Landowners have many tools at their disposal for granting the public at large, specific interest groups or particular individuals access to their privately-owned coastal properties. Access may involve crossing the land perpendicularly to reach the shore, after which the user may engage in legally protected activities such as fishing, fowling or navigation. It may involve crossing the shoreland horizontally as well, such as strolling along a beach or scrambling across rocks for recreation. On occasion, the state has a strong interest in ensuring that certain lands are available to the public at large or to support economically significant activities.

This document attempts to look at the following legal tools related to access to the shoreline: (1) acquisition/conveyance of a property interest and the associated tax and other incentives; (2) private agreements that convey a legal use right other than an actual property interest; (3) environmental and land use regulation; and (4) taxation tools other than incentives to convey a property interest. This document describes which tools are most appropriate for providing different types of access. In addition to defining tools for state and municipal officials, this document highlights the perspective of the landowner, and shows why providing access may be in a landowner's interest.

II. Types of access and their effects on private property rights and user rights.

The public can access the coast physically, visually or psychologically, and these types of access are treated differently under the law. The Maine State Planning Office defines "public access" as people reaching the shoreline either physically (actively being there), visually (seeing the shore from a distant location) or psychologically (knowing the shore is available even if physical access is not achieved).¹ These different types of access affect property rights in different ways. They each require different legal tools should landowners desire to grant some form of access across their land. The law treats visual and psychological access very differently from physical access. For example, local zoning authorities can legally put in place regulations that require a landowner to mitigate a loss of public physical access by providing such access elsewhere, but the same authorities cannot require the landowner who reduces visual access to mitigate that loss through physical access.

For the purpose of describing access to the shore, it is helpful to break access issues into the following general categories: *remote access*, such as visual or psychological access;² *physical access*, getting from the road to the beach, shore or water; and *physical use access*, what the public can do once at the shore. Physical use access issues generally arise between the mean low and mean high tide lines, where the land is privately owned in Maine, but the public has broad use rights associated with fishing, fowling and navigation.³ In some states, the public owns all the so-called "wet sand" (up to the mean high-tide line); in Maine (and three other coastal states, Delaware, Massachusetts and Virginia), such lands can be privately owned. Activities below the mean-low tide line are ocean uses, and are not within the scope of this document.

¹ "Maine Shore Access Public Access Series, Planning & Implementing Public Shoreline Access," published by DECD Office of Comprehensive Planning and available at the State Planning Office (hereafter "SPO Doc.").

² This term is used liberally in shoreline access materials but we have not yet found a formal legal definition.

³ For a comprehensive description of these foreshore use access issues, see *Public Shoreline Access in Maine*. We have not reproduced that information here.

Perpendicular vs. horizontal access

Perpendicular access means getting to the shore from a road or path. Horizontal access means moving along the shore parallel to the water line.

Perpendicular access is the greatest concern for uses related to fishing, fowling and navigation, as those users have the right to horizontally traverse the intertidal zone. For uses other than fishing, fowling and navigation, however, both perpendicular and horizontal access are important. For example, if a person arrives at one publicly owned beach in Maine and wants to stroll along it, she would not legally be entitled to continue her stroll across any privately-owned beach adjacent to it, even to cross to another public one, unless she had permission from the private landowner.

Both horizontal and perpendicular access require the user to physically occupy the land during the period of use (as opposed to visual access which can be achieved from across the land without actually occupying it). The right to exclude people from physically occupying one's land is a highly protected property right under the laws of trespass. Therefore providing users with beach/shore access is often best achieved by using tools, such acquisition and contracts, that compensate the landowner in exchange for providing access. These tools are often better suited and more adaptable than broad governmental regulatory schemes which might be considered "takings" when they do not compensate the landowner. For example, a regulation that required landowners who owned land between two publicly accessible beaches to allow the public to walk across their land could be challenged in court as a "takings."

However, a coherent regulatory scheme can help identify and establish which land parcels are appropriate for conveyance/acquisition and contract tools. For example, a local comprehensive plan or statewide audit that tracks the number of users who want access to the shore and the location of existing access points for each type of user could highlight areas where the public or specific user groups might want to focus on acquiring access. In addition, a coherent regulatory scheme can keep the issue of public access in the minds of landowners and developers, and create incentives for landowner cooperation. For example, a landowner who owns property in an identified area of sparse access may choose to provide access through contract or acquisition tools while refraining from allowing uses that would further exacerbate access conflicts.

Are different coastal uses treated differently by the law?

In Maine, working waterfront uses have much broader rights under the law than recreational uses. Many working waterfront uses—those that depend upon water access for resource extraction or transportation as a form of commercial livelihood—fall under the traditional interpretation of fishing, fowling and navigation, and thus perpendicular access is a greater concern than horizontal access. Perpendicular access can be maintained or created through acquisition, contractual arrangements or tax tools that make it economical for commercial providers to continue to provide access (such as Maine's current use tax status for working waterfronts). For clammers, wormers or seaweed harvesters, a place to park and a path to the shore (even just a contractual agreement that doesn't transfer a property interest) may be enough. For others, working waterfront access may include public piers and docks which may require public acquisition (or incentives to increase commercial infrastructure). The purview of navigation has not been fully defined by the courts, but it has sometimes been restrictively described as "passing of the land on the water," so some commercial uses may not fall under the traditional interpretation of fishing, fowling and navigation. For example, a kayak guide and a group of kayakers needing a place to stop for lunch will not necessarily be able to stop on private land. These users, although they are commercial, face the same access issues as recreational water users.

Recreational water uses such as boating or kayaking may also have a stronger need for perpendicular access than for horizontal access. The courts have not explicitly outlined how much of the associated foreshore use will likely be considered within the traditional purview of fishing, fowling and navigation. The courts have been conservative in their interpretation of these concepts, and both recreational users and coastal landowners should be cognizant that this issue is not clear and be respectful of others' needs and concerns.

Recreational uses of the shore itself, such as beach strolling, bathing or sporting activities, have a strong need for both perpendicular and horizontal access. These needs will be most acute in areas with sandy beaches that are more popular for this kind of recreation. Because these recreational activities typically involve pedestrian access, they may also require more frequent perpendicular access routes than activities which make use of the water for transportation. In these sandy beach areas, the public's desire for use of the beach, and the landowner's property interest and desire to control that use, have the potential to come into conflict. Because Maine has comparatively few sandy beaches and these beaches represent the greatest need for horizontal and perpendicular access, sandy beaches present a good target for public investment.

III. Legal Tools for Addressing Coastal Access Needs

A. Conveying or Acquiring Property Rights

Summary

- People desiring access to a beach or shore across privately held land can purchase the right either by buying/acquiring the land outright or by buying a limited right just to cross it. Similarly, a landowner can convey her land or a limited path across it to anyone she wishes. In this circumstance, a landowner may control how the land is used and even give herself the right to get the land back if terms or conditions aren't met.
- Acquisition or conveyance of land is typically achieved through a contract, although it could also be done through a will or some other legal instrument.

Conveyance or acquisition is a means through which an entire property, or a partial property interest, is conveyed by the original landowner to an acquiring group (for example, the government, a land trust or another organization) that will formally provide access to certain (or all) user groups. A landowner voluntarily conveys property interest to another entity, permanently transferring specific rights and duties to that other entity. A private land trust or the state (through the market voluntarily or by forcing a sale in eminent domain) may purchase from a landowner full fee interest or partial interest in land.

Once the ownership interest (either the complete title, or a subgroup of rights) is transferred, the original landowner no longer has that interest to transfer in the future. Thus, once the ownership interest has been transferred, the original landowner can no longer revoke that interest. However, the landowner could have initially structured the conveyance so that it reverts back to the him or her if certain conditions cease to be met in the future. For example, a landowner might convey a property interest in a strip of land to the public so long as it is used and maintained by the public for access to the beach. If the public ever ceased to use it in that manner, the ownership interest would revert back to the original landowner or his or her heirs.

When is the conveyance/acquisition tool best used?

Summary

- The government may want to purchase land, sometimes against the wishes of a landowner, for a particular public purpose which may include access rights to the beach or shore. If the current government can afford to do so outright, then use of eminent domain to acquire the land is an option. Because coastal land is very expensive, however, the government may be forced into acquiring the land through longer-term purchase agreements, such as paying installments over time, binding future governments that may lack the resources to make regular payments.
- Private land trusts often have even greater or more flexible resources than the government, and are not obliged to demonstrate a "public purpose" for acquiring land.
- Often a landowner wishes to help people gain access to the shore by providing a right to cross the land, or perhaps even to convey the land outright to a person or group that wishes to gain access to the shore or preserve the land for conservation reasons. These motivations, coupled with the government's potential to exercise eminent domain, encourage landowners to convey their land to others voluntarily.

- Land conveyance can include assigning title to the entire parcel of land and retaining none; or granting a lesser property interest that allows only partial use of the land. This latter approach (potentially an easement or a lease) can give the landowner control over the use of her land.
- Governments often enact tax incentives to encourage landowners voluntarily to grant access to their private beaches and shores through conveyance of the full title to the land or by granting easements permitting access to the shore.

Acquisition is used by government or private organizations such as land trusts, although the two differ in how they can use it. The state has the power of eminent domain (which private organizations do not), but the state may lack the power to commit future governments to certain long-term payment arrangements (which may be used by private organizations). Using its power of eminent domain, the state can acquire land against a private property owner's wishes as long as the acquisition is for a public purpose (the term 'public purpose' is interpreted broadly and almost any access to the shore would likely be considered a public purpose). This power allows the state to avoid some of the holdout problems (situations in which some, but not all of the landowners wish to convey their property) that may plague the acquisition goals of private organizations. Because coastal land is very expensive, however, the government may be forced into acquiring the land through longer-term purchase agreements, such as paying installments over time, binding future governments that may lack the resources to make regular payments. A private organization such as a land trust is likely not so limited.

For this reason, state agencies and private organizations can complement each other, providing a comprehensive approach to securing public access in a way that meets the needs of the diverse parties involved. The acquiring party (state or land trust) will want to make sure land is acquired as part of a comprehensive plan to provide access. This will ensure a public perception that the acquisition is in the best interest of the public, and that the state or town is not playing favorites with certain landowners or certain shore users.⁴

Why might a landowner voluntarily convey interest in his or her land for public use?

A landowner might convey an interest because he can receive direct compensation or possible tax benefits, help alleviate current access conflicts, or provide access for future generations. For a more detailed description of the tax incentives available for landowners wishing to participate in acquisition, see the next section, as well as the Land Trust Alliance's document on "Options for Landowners," cited in the bibliography.

By donating or selling easements or other partial interests in property, a landowner can continue to use the land and pass it on to his or her heirs while still providing public use rights. Also, donating or selling land with attached conditions can ensure that the land be used in accordance with the donor's wishes. For instance, one could transfer title to the state effective as long as the property was maintained as a recreational beach; if the site ceased to be maintained as a public beach the land would revert back to the original owner. Further flexibility is available through the use of leases or private agreements that can specify use during certain hours only, or that can require the state or private groups to provide police supervision or to clean up trash, etc.

⁴ See the State Planning Office Document: Maine Shore Access Public Access Series *Planning and Implementing Public Shoreline Access* for a broader discussion of this issue.

How are conveyance and acquisition implemented?

Parties can acquire full fee interest (all rights) in the land, or on a lesser property interest (some rights) such as an easement, conservation easement, development rights, or leases. These interests can be purchased at or below market value, or can be donated depending on the wishes of and related tax benefits to the private property holder. The interests can be conveyed unconditionally or with conditions attached.⁵

If the goal is to increase public access to a broad area owned by many different landowners, then full fee acquisition, perhaps is a tool that can be used by the state.⁶ This approach has been suggested as a means of acquiring the sand beaches throughout Maine.⁷

What are some tax incentives related to conveyance and acquisition?

Summary

- Tax incentives include tax deductions, lowered property taxes, lowered estate taxes, avoidance of capital gains taxes, and gained investment interest.
- A landowner can enjoy property tax savings by selling, donating or conveying a portion of her land for conservation purposes, including recreational uses.
- A creative way for a landowner to enjoy her land during her lifetime and still give something valuable to others is to convey a “remainder interest” in the land while reserving a life estate that allows her to remain on the land for her lifetime. The landowner may be able to take an income tax deduction on the donation, and the value of the landowner’s estate subject to estate tax will be decreased.
- For highly appreciated land that will likely incur significant capital gains taxes upon sale, landowners may consider transferring the property to a charity that makes payments to third party beneficiaries or that puts proceeds from selling the land into a trust for beneficiaries. The landowner enjoys the tax benefits of the gift.
- Landowners should consult a tax attorney about these possibilities.

A landowner can sell or donate a conservation easement. If the donation benefits the public by permanently protecting important conservation resources (which can include public access for recreation) and meets other federal tax code requirements, it can qualify as a tax-deductible charitable donation. The amount of the donation for an interest less than the full fee (such as a conservation easement) is the difference between the land's value with the easement and its value without the easement.

Transferring full or partial public access rights for recreation will likely qualify the landowner for these incentives. If the property interest is transferred in a manner that doesn’t provide access to the general public, the landowner may still qualify for the incentives depending on other purposes for the conveyance. Because of the complexity of these tax incentives, a landowner should consult with an attorney in this matter. The value of the incentive is almost always calculated as the difference between the value of the property owner’s holdings before and after the conveyance, as determined by a certified

⁵ For a more detailed description see the State Planning Office Document: Maine Shore Access Public Access Series *Planning and Implementing Public Shoreline Access*.

⁶ For more information on this approach see the Marine Law Institute’s publication “Managing the Shoreline for Water Dependent Uses: A Handbook of Legal Tools” (MLI Handbook of Legal Tools).

⁷ See Orlando Delogu’s article “Buy the Foreshore Now” (45 Maine Law Review 243).

appraiser. The type of interest conveyed (whether partial or full) will affect the value of the incentive. In addition, some partial interest such as conservation easements may have other caps on the value of the tax incentives that are tied to the percentage of the landowner's income.

As a means of providing visual access, the easement may simply restrict development. By removing the land's development potential, the easement lowers its market value, which in turn lowers estate tax on the property. Whether the easement is donated during life or by will, it can enhance the heirs' ability to keep the land intact.

Donating or selling land releases the landowner from the responsibility of managing the land and can provide substantial income tax deductions and estate tax benefits (while avoiding any capital gains taxes that would have resulted from selling the property). By donating a remainder interest and retaining a reserved life estate, a private landowner can continue to live on the land. When the life estate expires (at the death of the holder) the donee (such as the state or a land trust) gains full title and control over the property. By donating a remainder interest, the landowner can continue to use the land and may be eligible for an income tax deduction when the gift is made. The deduction is based on the fair market value of the donated property less the expected value of the reserved life estate.

A landowner can turn a gift of land into a continuous income by donating it using a charitable gift annuity or a charitable remainder unitrust. In a charitable gift annuity, property is transferred to a charity (which could be a land trust), and the charity makes regular annuity payments to one or two beneficiaries for life. In a charitable remainder unitrust, the land is put in a trust (this can be done with an easement attached to it). The trustee sells the land and invests the net proceeds from the sale. One or more beneficiaries receive payments each year for a fixed term or for life, and the remaining funds in the trust are turned over to the land trust. Charitable gift annuities and charitable remainder unitrusts are most useful for highly appreciated land, the sale of which would incur high capital gains tax. Also useful for this type of land is the Bargain Sale, where an owner sells the land to a trust at less than the full market value and takes a deduction on the difference between the sale price and the market value.

Examples of successful use of conveyance and acquisition

Scarborough Beach

For many years, access to Scarborough Beach was tenuous. Parking, for which the private landowner charged a fee, was inadequate, and the beach entrance depended on a public right-of-way over private land. In 1999, the parking area and access land came up for sale and were purchased by the state as part of a land deal to acquire 62 acres between the shore and Route 207, including the entirety of Massacre Pond. Support for the purchase came through the Land for Maine's Future Program and the Trust for Public Land (which purchased the site for subsequent transfer to the state). The property is now owned and managed by the Bureau of Parks and Lands.

Sewall Bridge Dock

The Sewall Bridge Dock is an example of private parties joining with a land trust to purchase a piece of property on the market in order to maintain access, in this case for commercial fishermen. Under the terms of the agreement, fishermen Mark Sewall and Jeff Donnell put up \$300,000 to help meet the \$710,000 sale price of the rebuilt, 2,290-square-foot dock and about a sixth of an acre of land. The York Land Trust raised the remaining \$410,000 with which they purchased a conservation easement from Sewall and Donnell that protected the land from development. The conservation easement required that the property be used only as working waterfront, provided for public access to a portion of the property, and protected its scenic beauty. The parties heavily negotiated the terms of the easement to meet the needs of both the fishermen and the conservation community.

Working Waterfront Access Pilot Program

The Working Waterfront Access Pilot Program (WWAPP) provides public funds to help acquire land that will preserve access for working waterfront uses. Financial awards may be used for projects that include land used for walk-in and small boat access for worming, clamming and similar harvesting activities; property dedicated in entirety to commercial fisheries use; or mixed use properties where the portion used to support commercial fishing business can be clearly delineated and secured. There is a strong program preference for projects that protect and secure use of existing, established fishing access sites and facilities over projects that might involve development of new access sites and facilities. These funds are available to private businesses, cooperatives, municipalities, or other qualified organizations for projects that will provide permanent waterfront access to commercial fisheries businesses. As a condition of any acquisition or grant made under the program, the property may not be used, altered or developed in a manner that precludes its use by commercial fisheries businesses. This protection is to be assured through a working waterfront covenant or other appropriate legally binding deed restriction. As an additional condition, the state retains a permanent right of first refusal on any property receiving grant allocations. More information is available at www.wwapp.org.

B. Private Agreements

Summary

- Private agreements do not transfer ownership of the land, but permit certain access to identified users in exchange for some benefit to the land owner.
- Landowners are free to allow others to cross their land for shoreline and beach access without selling them the land or even granting them a formal interest in it (like an easement). This can be done through a private agreement or contract between the parties.
- A landowner may informally agree (verbally or in a non-binding statement) to allow certain people the privilege of gaining access to the shore across his or her property. Usually these agreements can be revoked at any time by the landowner because they lack “consideration,” a legal concept that requires both parties to give up something in exchange for receiving something. These agreements are inexpensive to create and do not bind the landowner or subsequent purchasers of the land, but they are risky for those acquiring access through informal agreement, as the access privilege could be revoked at any time.
- Landowners can also enter into more formal and binding contracts with those they wish to grant shore or beach access. These agreements allow the landowner to specify how the land is to be used and to create conditions that, if not met, would allow revocation of the access rights. They can be useful to avoid more onerous access rights compelled by the government.

Private agreements provide a means to enforce promises between two or more parties, typically formalized in a written contract. In the case of a landowner granting others access to the shore, the contract need not transfer an ownership interest in the land although it may convey a use right. In most private agreements, this right of use given to the public will not be exclusive, so the landowner continues to have all of the same property rights that were present before the agreement was made. For a general description of the “private agreements” tool see the SPO document under the heading for Leases.

For a contract to be legally enforceable, it needs to include benefits for both parties. The scope of this tool is limited mostly by the imagination of the parties involved. As long as the parties are negotiating on equal footing, and as long as each party is conveying a benefit to the other, almost any type of private agreement can be entered and enforced. It is important to note that a private agreement that only conveys a benefit to one party (such as a landowner promising to provide access rights with nothing in return) may not be an enforceable agreement. It could lack “consideration,” a necessary element for a valid contract. For this reason, once the parties have come to an agreement, it is important that a lawyer be consulted to draft the agreement in a manner that will be enforceable in court.

If the landowner breaches the contract, the other party may need to be compensated, but it's unlikely that access will be enforced. Private agreements differ from conveyance/acquisition in that the landowner is agreeing to permit a use of her land, but is not actually transferring the property interest in that land. For this reason, if the landowner breaches the contract she becomes liable to the other party only for the value of the allowed use she subsequently refused to permit. She may need to compensate the other party by monetary means, but the court will not likely force the landowner to grant the other party the promised access. This is particularly true if the other party could acquire similar access elsewhere. An exception might exist if the access point is unique to the area. The specifics of the agreement will determine the likelihood that monetary compensation (as opposed to continued performance) will be required in the case of a breach of the contract. This is another reason to consult an attorney over the specifics of any agreement.

For least risk to the landowner, a non-legally enforceable contract can be used. This tool can also be used in a non-legally enforceable manner. If a landowner gives permission for his land to be used for public access but does not receive anything in return, that agreement will not be enforceable if the landowner changes his mind. While not legally enforceable, such an arrangement provides public access with minimum risk to the landowner. The landowner would have the ability to unilaterally revoke the access for any reason. This type of arrangement relies solely on the good will of the landowner, and provides a strong incentive for the other party to the agreement to ensure that such good will is maintained. The other party might set up a means to ensure stewardship of the access point. The landowner likely would not incur increased risk of liability from such an arrangement because Maine statute provides for limited liability for landowners allowing recreational use.⁸ Landowners have a strong incentive to offer access in this manner because they remain in ultimate control of the arrangement. Further, by alleviating some of the demand for access, the landowner helps reduce the likelihood that the tool of eminent domain will be used to force a non-voluntary conveyance of some permanent interest. This type of non-binding agreement might be used as a first step to test whether certain conditions of use will be satisfactory to a landowner. The parties could then enter into a binding agreement for a period of time, or use the tool of a formal conveyance/acquisition of a property interest.

Why would coastal property owners benefit from the use of a private contract?

Private contracts offer landowners continued flexibility and control of uses on their property. Private agreements are ideal for landowners who are willing to consider certain types of coastal uses on their properties, but are not willing to transfer ownership, at least initially. In this same way, contracts allow landowners to test their comfort with particular uses before entering into a more binding long-term agreement such as an easement. Landowners may also have a strong incentive to enter into such agreements because they could forestall the need for more severe regulatory or non-voluntary acquisition approaches. Incentives such as use fees and property maintenance may also be negotiated with users to the benefit of the landowner. The ability of a landowner to change his mind is more present in private agreements than in a transfer of a property interest.

Why would potential users benefit from the use of a private contract?

Private contracts may offer users the only possibility of access to some sites. Because private contracts impose minimum risk on the landowner, owners may be more inclined to try this tool than others that are more binding. Therefore the use of a private contract may provide users with access locations and uses, even if temporarily, that might otherwise have been impossible.

⁸ See 14 MRSA 159A (“An owner, lessee, manager, holder of an easement or occupant of premises does not have a duty of care to keep the premises safe for entry or use by others for recreational or harvesting activities or to give warning of any hazardous condition, use, structure or activity on these premises to persons entering for those purposes. This subsection applies regardless of whether the owner, lessee, manager, holder of an easement or occupant has given permission to another to pursue recreational or harvesting activities on the premises.”) For a more detailed description of liability issues see the State Planning Office document on “Liability” in the public access series.

When is the Private Agreement tool best used?

Summary

- Private agreements can be more flexible and cost effective than an outright conveyance or acquisition of land. They are best used when:
 - *The landowner does not want to part with all or part of the land long-term;
 - *The landowner wants to allow access but control how or when it takes place and be in a position to revoke that privilege;
 - *The landowner wishes to dissuade a government entity from enforcing a more permanent and/or less favorable access obligation.
- Contracts are *not* ideal when landowners wish to convey or others wish to acquire permanent, predictable and/or long-term rights of access that bind future as well as existing landowners.
- Private agreements should specify the obligations and responsibilities of each party.

The private agreement is a cost effective short-term tool, best used when acquisition is too expensive or too permanent. Private contracts are extremely flexible, but their continued viability is vulnerable to changes in the will of the parties. This tool might be used by a landowner to contract with a specific user group on behalf of its members, even if the group wouldn't be able to hold a property interest.

Private agreements might also be structured as a "try before you buy" arrangement. The contracts can be entered into for a period of time providing an option to purchase at the end of that period if the arrangement is agreeable to both parties. The parties could agree that the rental payments served as credits toward a purchase. This would allow a landowner to determine if users of the parcel would be agreeable. It would also allow users to gain access when sufficient funds for purchase might not be immediately available. The option to purchase might take the form of a right of first refusal if the landowner ever decided to sell.

If a private agreement is going to be used for more than just a short term solution or a set period of time, the agreement should include a description of each party's right of renewal. The right to renew the agreement could be conditioned on one party performing specific obligations such as adequate policing or maintenance of the property. This provides a longer term solution to access, although it is still not as permanent as outright purchase. Such an arrangement allows the landowner to exercise continued control over the property.

The parties may wish to agree on specific use restrictions. The agreement might limit public use to certain seasons of the year or hours of the day. The agreement might be limited to a specific user groups such as clambers, surfers, or a kayak tour company. An agreement with such use restrictions could be entered into directly between those user groups, or with the public at large. If a public entity or government enters into agreements with landowners that establish use restrictions for specific user groups, the entity will want to do so based on a comprehensive access plan to ensure that the needs of all groups are being met adequately somewhere within the region.

Parties entering into an agreement will want to specify each party's liabilities and duties to maintain the property. This will help eliminate confusion, enhance public safety, and ensure that the needs and expectations of each party are being met. A town may wish to indemnify a landowner in exchange for a contract more favorable to the town.⁹

⁹ The State Planning Office's publication on Liability more fully addresses this issue.

This tool's availability is limited to a landowner's willingness to enter into an agreement. Participation by landowners and rental fees may be subject to unpredictable market conditions. Thus this tool may be very flexible and cost effective for targeted access needs, however it is tailored toward shorter term solutions or more limited use access restrictions and should not replace the conveyance/acquisition tool as a means of ensuring long term access.

Examples of successful private agreements

Maine Island Trail System

The Maine Island Trail System is a 350-mile-long waterway that consists of islands and mainland sites available for day visits or overnight camping. The Maine Island Trail Association (MITA) ensures access to these sites through partnerships with the State of Maine, as well as land trusts and private property owners; in return, MITA commits to protect and care for the properties in a way that balances recreational access and conservation. Some of the MITA sites are publicly owned or owned by land trusts that would otherwise permit public access. Many of the sites, however, are privately owned and made available to MITA for use of its members in exchange for the organization's stewardship. MITA does not receive a legally enforceable right to access, but rather relies on the landowner's good will. MITA in turn makes these private sites available only to its members. In all cases, property owners set the rules and can revoke access at any time. Landowners annually review conditions such as which sites may be accessed, what months members are welcome, and whether fires and pets are allowed. Because MITA members do not become invitees or licensees of the landowner, the landowner is effectively shielded from liability by Maine's recreational use statute.¹⁰

Parson's Beach

Landowners permit access to privately owned Parson's Beach, but provide limited parking and no facilities. The landowners retain the right to terminate access at any time. There is no agreement of any kind between the owners of Parson's beach and the town of Kennebunk. This is an example of landowners deciding on their own initiative to make their land available for public use. The landowners have the ability to set any terms of use that they choose.

Boothbay Region Land Trust License Agreement

The Boothbay Region Land Trust owns a waterfront parcel and contracts with specific fishermen. In exchange for a yearly license fee, fishermen can use the dock facilities for loading and unloading, storing gear and parking. The license holders cannot interfere with the public who are also granted free access to the property. The license operates for one year and then must be renewed.

¹⁰ For more information on the liability issue see the State Planning Office Document on Liability in the Public Access series.

C. Environmental and Land Use Regulation (at state and municipal levels)

Land use regulation is a tool unique to the government, which can limit the types of development that may be incompatible with access or may displace the types of uses that have historically provided access. The tool may take the form of zoning, harbor management, or environmental regulation that protects commercial ocean resources. Governments have authority from several fundamental legal doctrines to use their regulatory power on behalf of the public, with restrictions. The legal doctrines involved include police power, the common law public trust doctrine, and the protection of private property provided by the "takings" clause of the U.S. Constitution. For a more in-depth description, see *Managing the Shoreline for Water Dependent Uses: A Handbook of Legal Tools* cited in the bibliography.

Underlying legal authority

Summary

- The government has authority under its police powers to make laws protecting the welfare of its citizens, including regulating lands next to beaches and shores.
- Under the public trust doctrine, the government is obliged to act on behalf of the public to protect publicly-owned submerged lands below the mean low tide line, and publicly-owned natural resources such as fish, shellfish and seaweed that might be extracted from the intertidal zone.
- The U.S. Constitution and many state constitutions also give the government the right to take private property but only if the landowner receives appropriate compensation. Sometimes the government's attempts merely to regulate behavior on or use of land goes so far as to amount to a "taking," requiring the government to pay the landowner for the lost value of the land.

Police power is the legal authority given to all states to make laws to protect the health, safety and general welfare of its citizens. This power is broadly defined and requires only that a governmental action be reasonably related to the protection of public health, safety and welfare. This general power allows governments to zone land for particular uses.

The public trust doctrine is a source of governmental power specific to the shoreline, and one that sometimes requires the government to act on behalf of the public. This doctrine (as it applies to coastal access issues) defines the public and private interests in land beneath "navigable waters," including those subject to tides. The doctrine has two principal functions. First, it sets the boundary between publicly-owned submerged lands and private uplands. In Maine, this boundary is the mean low tide line, with the area between low and high tide *not* subject to the public trust. Second, the public trust doctrine defines the nature of the state's ownership interest. The state holds the public land (in Maine this means the submerged land below the low tide line) in "trust" for the benefit and use of the people. The state generally cannot sell or give away these submerged lands unless it does so in the interest of promoting public uses of the adjacent waters. If this happens, a citizen could bring a lawsuit under the public trust doctrine and ask the court to compel the state to reclaim the land. The public trust doctrine provides a framework for citizens to challenge government use of submerged land in the courts.

The public trust doctrine may also require the state to protect the public's interest in the land, which means that if private landowners are impeding the rights the state holds in trust for the general public, the state can't look the other way, and may be compelled to prevent them from continuing to impede on the public rights.

In Maine, where the public trust doctrine only applies to land below the mean low tide line, it is less useful for ensuring access to the intertidal region. The land between the mean low and mean high tide lines is subject to a public easement for fishing, fowling and navigation. Maine courts have defined fishing to include most types of resource extraction; navigation generally means traveling over the water; fowling has not been well defined by the courts. For more detail on the public trust doctrine in Maine, see *Public Shoreline Access in Maine*.

Natural resources such as fish, shellfish and seaweed are also owned by the state in trust for the public. The state can allow their extraction and conversion to private property through harvesting, but it must also ensure their continued protection for future generations. If harms are identified to these resources, and the legislature refuses to address them through regulation, it may be possible to bring a case in court under the public trust doctrine to compel the state or municipality to address the identified harm.

A *taking* occurs when a state passes regulation that reduces the value of an individual's property beyond the amount permitted by state and federal constitutions. Governments need to consider whether their regulatory actions (or interpretation of the public trust doctrine) will constitute a taking under the law. The U.S. Constitution provides the minimum protections that must be given to private property, but the degree to which property is protected by the Constitution is a complicated topic. Regulations that reduce property values a certain amount are not considered a taking, but if a regulation goes "too far" as defined by the courts, then the government is required to pay the individual for the loss in property value.

Takings and the public trust doctrine are continually evolving areas of the law that are not exhaustively definable. The following general rules apply.

First, if a court finds that a government regulation constrains a landowner's ability to make use of the property, the regulation amounts to a taking and the landowner is entitled to just compensation from the government. Simply removing the regulation is not a sufficient remedy.

Second, certain police power regulations are insulated from a takings challenge in court because they are safety regulations designed to protect the public from harmful uses on private land, such as the emission of toxic pollutants or the creation of some other public nuisance.

Third, a valid police power regulation that involves a reduction in a property owner's use of property must "substantially advance a legitimate purpose," or it will be deemed a taking. In other words, the regulation must actually serve the purpose it claims to serve.

Forms of environmental and land use tools

Summary

- Governments should adopt comprehensive shoreline access plans that take into account regional or statewide coastal management practices and laws.
- Zoning can be used to encourage visual access through height or density restrictions in coastal development. Waterfront areas can be zoned exclusively for water-dependent uses, thereby guaranteeing access. Zoning laws can also require special permits for waterfront development, perhaps obliging the permit holder to allow physical access or use rights to a group or the public.
- "Exactions" allow governments to require shoreline developers to mitigate any reduction in the public's access to the shore through an equivalent access at another location or in some other manner.
- Developers and landowners can also enter into contracts with a governing body that allow for access or use rights through voluntary agreement.

The environmental and land use tool takes the form of regulations that protect natural resources and water quality of the shore; these can have the effect of reducing the type of development that is incompatible with access, and can ensure that shore and associate resources remain healthy. The tool also takes the form of land use controls, usually in the form zoning, that reduce developments that are incompatible with access, and provide incentives for developers to provide access to the public.

When is zoning most effective to provide access?

Zoning and other land use regulations are most effective when a community is able to take a comprehensive approach to its access needs. A comprehensive shoreline access plan is specific to a community, depending on local access needs. A comprehensive shoreline access plan might be part of a larger water-dependent use zoning scheme for a region. Maine has several laws that provide frameworks that allow and in some cases require towns to take access needs into account in the zoning and subdivision review processes. The Coastal Management Policies Act requires that agencies with responsibility for regulating, planning, developing or managing coastal resources conduct their activities in the coastal area consistent with, among other things, shoreline management and access, so as to “support shoreline management that gives preference to water-dependent uses over other uses, that promotes public access to the shoreline and that considers the cumulative effects of development on coastal resources.” Maine’s Mandatory Shoreline Zoning Act requires that municipalities protect shoreland areas by adopting zoning maps and ordinances. Maine’s Subdivision Review Act permits town officials to take access issues into account during a subdivision approval process.

As part of this comprehensive approach, each community should select goals for its waterfront and then adopt policies and regulations to reach those goals. A comprehensive regulatory program could also integrate the other legal tools of taxation and acquisition to help achieve the desired goals.

How can zoning affect coastal access?

Zoning ordinances outline the types of development and the density of the development within different shoreline areas (zones). By preventing certain uses, zoning can ensure that some land remains open for the possibility of being acquired for access. The ordinances might lay out minimum setback requires, building size requirements, etc. Sometimes a zoning ordinance can be written to allow a certain amount of flexibility, for example allowing a slightly higher density of houses in an area where the developer sets aside land for conservation and perhaps for a path to the ocean.

Regulatory zoning ordinances can directly foster visual access by restricting building height or density along the waterfront. Environmental regulations might achieve a similar density effect through different means. The public benefit of such visual access should be weighed against other potentially conflicting public benefits, such as a viable working waterfront. Zoning can also help prevent land from becoming used in ways that tend to restrict access, and instead ensure that the land will be used in a way that is compatible with access. By setting up restrictive zoning (that is supported by valid police power concerns over health safety and general welfare of the people), a community can negotiate exceptions to these restrictions in a manner that is consistent with the comprehensive plan, and in exchange a developer may be willing to dedicate a portion of the land for public access. For example, a town might have some of its shorefront zoned residential and some zoned for commercial waterfront use. A developer might want to create a multiuse development in a zone with both residential and water-dependent uses. The town might agree to rezone a portion of one of the existing zones to permit this, and perhaps to permit an increased density of buildings, in exchange for the developer agreeing to transfer some of the land, or an easement across it for public access to the shore.

Marine use zones can limit uses that are incompatible with access. If an area is zoned only for marine use, this helps keep the value of the land in a range that is economically viable for marine uses, thus making it more affordable for individual users, user groups, or the public to purchase the land in order to gain access. It also prevents the purchase and development of the area into private residences or other land use types that are then difficult to convert back to marine uses in the future.

What types of zoning can be used for coastal access?

Zoning ordinances can be very flexible, as long as they address legitimate health, safety and general welfare concerns. They must not be designed solely to prevent development or keep people out of an entire town, and zoning must not decrease land values to the point of becoming a "taking." For a longer list of zoning strategies to increase water-dependent uses and public access, and a more detailed description of each, see *Managing the Shoreline for Water Dependent Uses: A Handbook of Legal Tools*. A brief discussion of the different types of zoning follows.

Special permit zoning (also called incentive zoning, bonus zoning, conditional use, special use, special exception) allows certain uses, prohibits others, and allows a third group of uses only by special permit. For instance, an area could be zoned for water-dependent uses only, with special permits for water-enhanced uses such as restaurants. The special permit uses could be allowed only if they preserved or enhanced the water-dependent uses, for example by providing physical access. Special permit zoning ordinances apply to all land parcels in the zone. A community using this type of zoning must create explicit ordinance standards establishing when incentives will be available in order to avoid the appearance of political favoritism (as each decision will necessarily be made on a case-by-case basis). A community must also consider the downside of the "incentive," which is a relaxation of a restriction that had its own public benefit. If a zoning law requires that a developer donate an interest in real property in order to get a permit, this required concession is known as an exaction. Exactions must be logically connected with a harm that the new development will have (such as providing an area from which to view the shore because of a loss of public view of the ocean when a new two story building is constructed), and the required concession must also be roughly proportional to the harm the new development will have. The concept of exactions is discussed more fully below.

Contract zoning (also called a development agreement) is a bilateral agreement authorized by Maine law in which a landowner contracts with local government to apply deed restrictions to a property in exchange for a desired zone change. Contract zoning differs from special permit zoning in that contract zoning can be applied to individual parcels within a zone, and thus is more flexible. Contract zoning is usually used for the development of complex, multi-phase projects. Developers are permitted to develop a project under existing regulations, with the knowledge that future zoning changes or development regulations will not apply to their project. Developers may concede more more in exchange for the security this provides. These agreements are not considered exactions because they are voluntary; the developer agrees to concessions in order to rezone a particular area (not simply get a permit under existing zoning laws).

Transfer of Development Rights (TDRs) is a system designed to compensate a developer restricted by a particular zoning regulation. Land is protected by transferring the "rights to develop" from one area and giving them to another. What is actually occurring is placement of conservation easements on property in certain coastal areas while allowing for an increase in development densities or "bonuses" in other areas that are being developed. The costs of purchasing the easements are recovered from the developers who receive the building bonus elsewhere. TDRs tend to be successful only where there is a strong market for the traded development rights.

When might zoning be unconstitutional?

Zoning laws will be presumed to be constitutional as long as they are rationally related to a legitimate government purpose. Excluding new people (preventing growth) is not a legitimate government purpose. Therefore, any ordinance that restricts growth in some way should be justified with actual information on how it affects health, safety and general welfare, such as environmental impacts, traffic impacts, burden on infrastructure (e.g., sewers or septic fields), erosion, etc.

A town cannot require a developer to give a real property interest that the town would otherwise have to buy as a condition for getting a permit under zoning law. To do so is an exaction. Exactions are unconstitutional unless they have a very close connection to the public benefit the developer is reducing, and are roughly proportional in nature to the degree that benefit will be reduced. For example, in a case where a permit to build a bigger house results in reduced visibility of the coast, the government can not require the landowner to provide lateral access to his privately owned beach, because there is no inherent connection between the adverse impact (reduced visual access) and the permit condition (lateral access).¹¹ However, such an exchange would likely be upheld if the developer agreed to provide physical access as opposed to visual access and the town was amenable..

In another example, a town cannot condition a permit to expand a business's parking lot on the business agreeing to dedicate an adjacent 15-foot strip for a bike path, because the permit condition (a bike path) is inadequately proportional to the adverse impact (increased automobile traffic) created by the parking lot expansion.¹²

When coastal development occurs, government agencies may require property owners to convey a public access easement as a condition of the development, but only to mitigate the development's adverse impacts on public access to the coast. Also, there must be a rough proportionality between the value of the easement that is donated and the adverse impacts the development will create. Finally, a government restriction may significantly diminish the value of a piece of property, but it cannot deprive the owner of all economically viable uses of the land. For a more detailed description of takings analysis, see *Managing the Shoreline for Water Dependent Uses: A Handbook of Legal Tools* cited in the bibliography.

What are other regulations that might affect access?

Environmental regulations, habitat protection and sound and lighting ordinances can prevent development that might be adverse to access, but these regulations can make access an incompatible use. Harbor plans that control the number of boat moorings, and the manner in which boats can safely navigate, also affect access. Where submerged land is subject to the public trust doctrine, that doctrine might provide a means to challenge inadequate harbor plans in court, or compel a municipality to adopt a harbor plan if they are unwilling to do so.

Other ordinances such as light pollution ordinances (restricting the amount of night lighting on the shoreline), sound control ordinances, or environmental ordinances such as those controlling the amount of surface water runoff that is permitted to enter the ocean from the shore, can make it more difficult to develop land in a way that is incompatible with access. Many of these regulations could be crafted to include access as a compatible use, but exclude other uses that might restrict access, such as residential use. For example, certain bird habitat may be compatible with a path to the shore or a boat ramp (used when the species of concern was not present), but not a year-round residence. This could also be the case if the access was shut down during the period in which a particular species was present.

¹¹ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)

¹² *Dolan v. City of Tigard, Oregon*, 512 U.S. 687 (1994)

Discussion of these types of regulation is beyond the scope of this document, but it is important to be aware of them and their potential effects on access.

Note about Maine’s Coastal Towns and Zoning

According to a 2007 survey by the Island Institute, within the 142 coastal towns and 5,300 miles that make up the coast of Maine, 1,555 points provide saltwater access. This access includes everything from public boat landings and municipal rights-of-way, to boatyards, marinas and private fishing docks. It includes both ocean and estuarine access. Of the 1,555 saltwater access points, 888 (57%) support commercial fishing activities. Of these 888 access points, 66% are privately owned and thus vulnerable to conversion to other, incompatible uses. Only 81 access points qualify as "prime working waterfront," and only 62 of these currently support commercial fishing. Only 446 (29%) of the 1,555 saltwater access points in 45 of Maine's 142 coastal towns are currently protected under some type of water-dependent use zoning.¹³

When is the Land Use Regulation tool best used?

Land use regulation is best used in any area where there are development pressures on the coast. The tool is flexible enough that it allows communities to outline a vision for their coastlines, and set the legal framework necessary to ensure that coastal development remains within their vision. They can do this through zoning or other regulations as described above. This tool can therefore help maintain visual access to the shore, help create incentives for developers to donate access, and help preserve areas that might be acquired for physical access through the voluntary conveyance/public acquisition tool. Regulators should take care not to overstep the bounds of police power and create a takings. Also, if regulators are not protecting areas that the state holds in trust for the public (such as submerged lands, and possibly wildlife), citizens can use the public trust doctrine to have the courts force the regulators to do so.

Examples of successful land use regulations

Massachusetts Intertidal Development Regulations

In Massachusetts, as in Maine, private ownership includes the intertidal region, subject to a public easement right for fishing, fowling or navigation. A Massachusetts statute provides for regulation of private development in intertidal areas, similar to Maine's Natural Resources Protection Act and submerged lands leasing program. The Massachusetts regulations provide that development, such as a marina or pier, “shall not significantly interfere with” public rights of fishing, fowling and navigation. In addition, the rules require that “any water-dependent use project which includes fill or structures for private use of Commonwealth tidelands [state-owned submerged lands] . . . shall provide compensation to the public for interfering with its broad rights to use such lands for any lawful purpose.” Massachusetts uses this regulatory provision to secure public “strolling rights”—lateral access along privately owned intertidal and dry sand areas—in connection with projects on state-owned submerged lands.¹⁴

¹³ Mapping Maine’s Working Waterfront A Statewide Inventory by the Island Institute. Published in 2007 by the Island Institute. Available electronically at: www.islandinstitute.org/pdf/WWF_AccessReport_053107.pdf

¹⁴ Title 310 Mass. Code of Reg. §9.53

Texas Open Beaches Act

The Texas Legislature enacted the Open Beaches Act as a means of codifying the strong common law principles in Texas that already established public ownership of beaches. The act states: "It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches. . . ." Another provision of the act states that a private coastal landowner's title does not include the right to prevent the public from using the area below the vegetation line for access to the sea. Therefore, while a private landowner may prosecute beach users for trespassing if they cross upland private property to reach a beach covered by the act, once a user obtains lawful access to the open beach area he or she has continuous access to the beach. The act makes it a crime to restrict this access or to erect a sign representing that a beach is privately owned. The Texas law further explicitly sets up a means of enforcement, providing that "[t]he attorney general shall strictly and vigorously enforce the prohibition against encroachments on and interferences with the public beach easement."¹⁵ The Texas Act has been challenged, but was upheld as recently as May 2007 by a federal district court in Texas.

Because the Texas Open Beaches Act codified common law rather than creating a new law, it did not constitute a taking of private property. In Maine, the common law provides rights for continuous use for the purpose of fishing, fowling or navigation. Maine could therefore, in theory, pass a similar act that codified these rights and empowered the attorney general to prosecute landowners who violated this policy. While this would not serve to increase public rights on the beach, it could provide a mechanism for enforcement of existing use privileges.

Special Permits: Norwalk, Connecticut

Norwalk, Connecticut has a Marine Commercial Zone designed to promote water dependent uses. Norwalk grants special permits for specific, non-water-dependent uses within this zone as long as the landowner or developer provides public access along the shoreline. Providing public access to the waterfront does not, by itself, convert an otherwise non-water-dependent use into a water-dependent use. The zoning laws, which have been upheld by the Connecticut Supreme Court, state:

"New developments and additions to structures on lots adjacent to the water shall provide public access along the waterfront which is a minimum of twenty-five (25) feet wide. Such public accessways shall be in the form of landscaped walks, esplanades, boardwalks or piers, of suitable design to encourage active use by the public, and shall be dedicated as such in the deed to the property. Access from the street to the water shall be provided, subject to Commission approval. Where access along the waterfront would, in the determination of the Commission, expose the public to hazardous conditions, the Commission may consider alternative forms of access to be provided. Reasonable time-of-day restrictions may be established regarding such public accessways where justified for reasons of security or public safety."¹⁶

¹⁵ Title 31 Tex. Admin. Code §15

¹⁶ Norwalk, CT City Zoning Regulations Article 50 §118-505.

D. Taxation tools

Summary

- Taxes on the sale of land, or on certain activities at places where the public enjoys the beach or shore, can raise money for the acquisition of additional access rights.
- Tax incentives are also appropriate tools for public access. They can encourage particular uses deemed socially or economically important, or discourage uses that would inhibit coastal access.

Taxation can be used in two major ways. Taxes can be used to raise money from activities that use public access points, and also from uses that compete with public access. Money to be publicly invested through the conveyance/acquisition tool can come from any number of sources. Taxes related to land transfers or impacts of land uses may be especially appropriate means of raising money for such public investment.

The second way taxation can be used as a tool is through a reduction in taxes for certain uses that help encourage providing public access, or help discourage uses that would further inhibit public access. This could come in the form of local tax abatements for access purposes, or a current use taxation structure for working waterfronts that provide access to the working waterfront community. Tax benefits for landowners participating in the conveyance/acquisition tool, such as tax deductions, lowered property taxes, lowered estate taxes, avoidance of capital gains taxes and gained investment interest, are discussed in that section.

When is taxation best used?

Taxation abatements are best used in conjunction with a regulatory program when existing tax burdens are causing people to convert the use of their property to a use inconsistent with providing shoreline access.

Summary

- A land gains tax, which applies to property sold after only a short ownership period, shares with society some of the appreciation that high-value land like waterfront property enjoys just because of its location.
- Real estate transfer taxes that are applied to all land sales can raise money for the purchase of land for public recreation or conservation.
- When a new coastal development affects the public, the government may use its police power to charge an “impact fee,” the funds from which may be used to finance a public facility or service.
- Tax increment financing (TIF) allows governments to pay for current public investments, including land acquisitions and developments by relying on the increased tax revenue from neighboring properties whose values are enhanced by the public investments.
- In Maine, a coastal landowner may enjoy a reduction in property taxes by granting access to the shore for or in support of commercial fishing.

Tax programs and investment through the conveyance/acquisition tool is the most secure and long-term method to establish public access, because ownership of the property right or use right ensures that the public can maintain access without worrying about future changes in shore ownership. Some taxation options have the advantage of distributing the cost of public shoreline access among those who benefit from shore use and values, or among those that pursue uses adverse to public access.

What types of taxes can be used to raise money for conveyance/acquisition?

A *land gains tax* is a capital gains tax (a tax on the difference between the sale price and the original cost, plus improvements, of the property) applied to sales of land that the seller owned for a short period of time. A land gains tax on waterfront property makes speculation less attractive. It distributes to the general public a portion of the property value's increase that is attributable to the land's scarcity or rarity, rather than some improvement the landowner has made to the land. Vermont has had a land gains tax in place since 1973. There is some possibility that because a land gains tax applies only to certain land transfers (those owned by the seller for a short period), it could violate the uniformity clause of the Maine constitution, which may require that if such a tax is applied to any land transfers, it be applied to all land transfers.¹⁷

A *real estate transfer tax*, on the other hand, applies to all real estate transfers. A real estate transfer tax is usually a fixed percentage of the sale price placed in an account used for land acquisition. This funding mechanism is often used to provide a steady source of funds for a public land bank for such purposes as heritage or natural resource preservation or recreation.

Impact fees are charges imposed on new development, based on the development's impact on public facilities. Impact fees are actually a use of the government's police power rather than its taxation power, so impact fee programs can be more flexible than taxation-based programs. Once established, impact fees apply uniformly to all development. Impact fees can be used to finance any type of public facility or service, such as a public park, which will benefit the new development. Such fees can be imposed at any stage in the development approval process.¹⁸

Tax Increment Financing (TIF) is a method of using future tax revenue to fund current public investment. Maine has explicit legislation authorizing TIF, which can be used to fund public investment in land acquisition and parks. The underlying theory of TIF is that such public investment will increase surrounding property values, and the resulting increase in tax revenue can be used to repay the original public investment. A publicly accessible beach or waterfront park would likely increase the property value of nearby land parcels that otherwise would not have access to such recreational opportunities. TIF could be used for infrastructure that would increase working waterfront access.

Can tax relief increase shoreline access?

Preferential tax programs such as tax abatement or current use valuation tax create incentive for a private individual to act in a specific way. Tax abatement for providing permanent access in the form of a conservation easement or a land donation already exists in Maine (see conveyance/acquisition tool). Such tax abatement could be extended to less permanent access arrangements, as described under private agreements, to encourage landowners to provide access,

A *use-value assessment* program taxes land at the value for which it is currently being used, rather than the "highest and best use" of the land. The lower property tax is designed to alleviate pressure to develop land for a more profitable use. Maine has recently extended current use taxation to working waterfront land.

Examples of taxation's successful use

¹⁷ Article IX, Section 8, of the Maine Constitution provides: "Section 8. Taxation. All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof."

¹⁸ For more information on impact fee see the state planning office document Financing Infrastructure Improvements through Impact Fees, published in 1990.

The Nantucket Islands Land Bank

The Nantucket Islands Land Bank was created to acquire, hold and manage important open space resources and endangered landscapes of Nantucket Island for the use and enjoyment of the public. The program was adopted by the voters of Nantucket and established by a special act of the Massachusetts Legislature in 1983. Land Bank revenue is derived from a two percent real estate transfer fee which is levied against most real estate transfers on the island. The Land Bank competes in the open market to acquire land which provides the public a wide range of opportunities. The Land Bank currently holds beaches, wetlands, aquifer recharge areas, moorlands, heathlands, rare species habitat, ocean, pond and harbor frontage, and properties for passive and active recreation.

Bay County Impact Fees Program

Bay County, Florida, charges several different types of impact fees on new development projects. One of the impact fees charged to new residential development is the Park and Recreational Facilities Impact Fee, which is based on the assumption that new residential development will increase the need for park facilities, including beach access sites. Revenue from the fees is then used to help purchase land and create new parks, in proportion to the increased use projected by the development.¹⁹

Working Waterfront Current Use Taxation

Traditionally, lands are taxed at the value of their highest and best use. Exceptions include open space and tree growth tax assessments based on current use. Maine voters by referendum approved taxation of working waterfront parcels based on current use value, as of April 2007.

¹⁹ For a more detailed description of this program see www.co.bay.fl.us/bcds/Final-Parks-and-Recreational-Impact-Fee.pdf

IV. Conclusion

Landowners have many tools at their disposal for granting the public, specific interest groups or particular individuals access to their privately-owned coastal properties. Access may involve crossing the land perpendicularly to reach the shore, after which the user may engage in legally protected activities such as fishing, fowling or navigation. It may involve crossing the shoreland horizontally, such as strolling along a beach or scrambling across rocks for recreation. On occasion, the state has a strong interest in ensuring that certain lands are available to the public at large or to support economically significant activities. Usually these interests are identified as part of a broader coastal management plan undertaken by a municipality, region or state. In those circumstances, the government may exercise its powers to acquire the land without the landowner's voluntary consent, supplying the landowner with just compensation for the taking. Such circumstances are rare, however, and it is often in the government's and landowner's best interests to cooperate on such matters. The government may wait for certain properties to come on the market and purchase them at a fair price. The landowner may wish to sell the lands to the government or some charitable organization for less than a private purchaser may pay in order to take advantage of one or more tax incentives designed to encourage voluntary conveyance of publicly-valued coastal lands. Sometimes the sale is motivated by the landowner's conservation interests or general good will. Alternatively, a landowner may convey rights to use her land short of selling all title and interest outright. Easements and leases allow physical access across the land without transferring the land itself. A less formal arrangement is a private contract whereby a landowner agrees to allow certain people to use the land for coastal access in exchange for the users' promise to treat the land and its occupants with courtesy and respect. These voluntary and sometimes unwritten agreements allow the landowner to maintain a great deal of control over the use of her land.

Each circumstance must be evaluated on its own merits, and the tool chosen carefully to fit the parties' needs and interests. When easements or covenants are conveyed, or land is transferred in fee, it is ideal for landowners to work with a seasoned real estate attorney to assist with terms and with understanding taxation consequences and incentives. Attorneys may be useful as well to draft contracts permitting limited access and use rights to a group or certain individuals, although often such agreements are informal.

Maine has several highly qualified real estate attorneys who work with coastal landowners. For more information and a referral, it might be helpful to check with the current chair of the Real Estate Law section of the Maine State Bar Association:

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V. Bibliography

Marine Law Institute. 1988. North Atlantic Water Dependent Use Study, Volume 1: Managing the Shoreline for Water Dependent Uses: A Handbook of Legal Tools. Portland, ME: University of Southern Maine.

Marine Law Institute. 1988. North Atlantic Water Dependent Use Study, Volume 2: Guidebook to the Economics of Waterfront Planning and Water Dependent Uses. Portland, ME: University of Southern Maine.

Maine State Planning Office. 1990. *Planning and Implementing Public Shoreline Access*. Maine Shore Access Public Access Series. Augusta, ME.

Maine State Planning Office. 1990. *Liability*. Maine Shore Access Public Access Series, Augusta, ME.

Springuel, N. 2007. *Access to the Waterfront: Issues and Solutions Across the Nation*. Orono, ME: Maine Sea Grant College Program.

<www.seagrant.umaine.edu/documents/pdf/07access.pdf>

Island Institute. 2007. *Mapping Maine's Working Waterfront: A Statewide Inventory*. Rockland, ME. <www.islandinstitute.org/pdf/WWF_AccessReport_053107.pdf>

Duff, J. 2004. *Public Shoreline Access in Maine: A Citizen's Guide to Ocean and Coastal Law* (revised). Orono and Portland, ME: Maine Sea Grant and the Marine Law Institute.

<www.seagrant.umaine.edu/documents/pdf/pubacc04.pdf>

Land Trust Alliance. Conservation Options for Landowners.

<www.lta.org/conserves/options.htm>

VI. Glossary

acquisition: the act of obtaining a property interest from another person.

appreciated land: land that is increased substantially in value from the purchase price.

assessor: a certified official who appraises property for tax purposes by determining the assessed value, not the tax rate.

bargain sale: sale of land at less than full market value. When this sale takes place to a charitable organization or land trust, the difference between the sale price and market value may be used as a charitable deduction from income tax.

beach: the part of a coast that is washed by waves or tides.

beneficiary: (noun) a broad definition for any person or entity (like a charity) who is to receive assets or profits from an estate, a trust, an insurance policy or any instrument in which there is distribution. There is also an *incidental beneficiary* or a *third party beneficiary* who gets a benefit although not specifically named, such as someone who will make a profit if a piece of property is distributed to another.

capital gains tax: a tax on the gains of an investment, payable only when the investment is sold or disposed of in some other way.

capital gains: (noun) the difference between the sales price and the original cost (plus improvements) of property. Capital gains taxes can be a financial shock to individuals who bought a house or business many years ago for the going price and now find it is highly valued, greatly due to inflation. For example: a couple buys an oceanfront house in 1950 for \$20,000 (then a high price) and upon retirement wants to sell it for \$400,000. There is a potential of tax on a \$380,000 gain. There are some statutory cushions to ease this blow. Donating or selling the land to a land trust that will provide public access could reduce the capital gain tax owed.

charitable gift annuity: a contract between a donor and a charitable organization to pay an income stream, expressed as a percentage of the original principal amount, to not more than two people for life in exchange for a gift of cash or other asset(s).

charitable remainder trust (charitable remainder irrevocable unitrust): (noun) a form of trust in which the donor (trustor or settlor) places substantial funds or assets into an *irrevocable trust* (a trust in which the basic terms cannot be changed or the gift withdrawn) with an independent trustee, in which the assets are to go to charity on the death of the donor, but the donor (or specific beneficiaries) will receive regular profits from the trust during the donor's lifetime. The IRS will allow a large deduction in the year the funds or assets are donated to the trust, and the tax savings can be used to buy an insurance policy on the life of the donor which will pay his/her children the proceeds upon the donor's death. So, for example, the donor (trustor) can make the gift of land to a land trust that will provide public access, the donor can receive a return on his/her money and still arrange to make a monetary gift at death to his/her heirs.

charitable remainder unitrust: in a charitable remainder unitrust, the land is put in a trust. The trustee sells the land to a land trust and invests the net proceeds from the sale. One or more

beneficiaries receive payments each year for a fixed term or for life, then the remaining funds in the trust are turned over to the land trust.

common law: a body of laws based on custom, usage and rulings by courts, not on government legislation.

compensation: something (such as money) given or received as payment.

comprehensive plan: an all-inclusive, long-range plan for the future growth of a community. The plan is designed to reflect community values and goals, and is built into local law once it is completed to guide policymakers regarding decisions about the physical development of the community. The plan describes land use patterns according to whether a given district or parcel will be devoted to residential, commercial, water-dependent use, etc. Such a plan may also include transportation, public facilities, existing and desired public shorefront access.

concession: something granted or conceded during a negotiation

conservation easement: an agreement between a landowner and a private land trust or government. The agreement limits certain uses on all or a portion of a property for conservation purposes while keeping the property in the landowner's ownership and control. The agreement is usually tailored to the particular property and to the goals of the owner and conservation organization. It applies to present and future owners of the land.

consideration: 1) payment or money. 2) a vital element in the law of contracts, consideration is a benefit which must be bargained for between the parties, and is the essential reason for a party entering into a contract. Consideration must be of value (at least to the parties), and is exchanged for the performance or promise of performance by the other party (such performance itself is consideration). In a contract, one consideration (thing given) is exchanged for another consideration. Not doing an act (forbearance) can be consideration, such as "I will pay you \$1,000 not to build a fence that will block my view of the ocean." Sometimes consideration is "nominal," meaning it is stated for form only, such as "\$10 as consideration for conveyance of title," which is used to hide the true amount being paid. Contracts may become unenforceable or rescindable (undone by rescission) for "failure of consideration" when the intended consideration is found to be worth less than expected, is damaged or destroyed, or performance is not made properly (as when the marine mechanic does not make the outboard motor run properly). 3) something of value given by each side in the making of a contract to make the contract binding. For example, when John promises to let Amy use a path across John's land to the ocean for one year in exchange for \$100, the consideration is the \$100 and the right to use the path. If John promises to let Amy the path for free, then Amy has provided no consideration and the promises is not enforceable as a contract.

contract: 1) (noun) an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration. Since the law of contracts is at the heart of most business dealings, it is one of the three or four most significant areas of legal concern and can involve variations on circumstances and complexities. The existence of a contract requires finding the following factual elements: a) an offer; b) an acceptance of that offer which results in a meeting of the minds; c) a valuable consideration (which can be a promise or payment in some form); Contracts can be either *written* or *oral*, but oral contracts are more difficult to prove and in most jurisdictions the time to sue on the contract is shorter (such as two years for oral compared to four years for written). In some

cases a contract can consist of several documents, such as a series of letters, orders, offers and counteroffers. The variations are almost limitless. For example, I promise to pay you \$100 for the right to cross your land to reach the clam flats for the period of one year. 2) (verb) to enter into an agreement.

contractual agreement: see contract.

convey: (verb) to transfer title (official ownership) to real property (or an interest in real property) from one (grantor) to another (grantee) by a written deed (or an equivalent document such as a judgment of distribution which conveys real property from an estate). This is completed by recording the document with the County Recorder or Recorder of Deeds. It only applies to real property. Conveyance can include granting title to the entire parcel of land and retaining none; or it can include granting a lesser property interest that allows only partial use of the land

conveyance: the act of transferring a property interest from one person to another.

covenant: 1) (noun) a promise in a written contract or a deed of real property. The term is used only for certain types of promises such as a *covenant of warranty*, which is a promise to guarantee the title (clear ownership) to property, a promise agreeing to joint use of an easement for access to real property, or a covenant not to compete, which is commonly included in promises made by a seller of a business for a certain period of time. *Mutual covenants* among members of a homeowners association are promises to respect the rules of conduct or restrictions on use of property to insure peaceful use, limitations on intrusive construction, etc., which are usually part of the recorded covenants, conditions and restrictions which govern a development or condominium project. For example, mutual covenants between waterside condo owners may dictate rules about how residents or the public can use the condo wharf. Covenants which run with the land, such as permanent easement of access or restrictions on use, are binding on future title holders of the property. Covenants can be concurrent (mutual promises to be performed at the same time), dependent (one promise need be performed if the other party performs his/hers), or independent (a promise to be honored without reference to any other promise). 2) (verb) to promise.

current use taxation: a method of taxation where the value at which the land is taxed is based on its value as it is currently being used, rather than based on the value that it would have if it were divided up and developed for maximum profit.

dedicated interest: a property interest that has been transferred from private to public ownership.

deed: a written document that transfers title to real property from one owner to another.

development agreements: a form of contract zoning (a zoning amendment) that is negotiated between the zoning body and the developer that rezones the land in way to facilitate the developer in achieving his goals, but that is still consistent with the town's comprehensive plan. The developer may provide the town with land for access to the water in exchange for such a rezoning. This differs from exactions because the developer is not required to do so and conversely is not entitled to develop without the rezoning.

development right: the legally allowed potential for improvement or construction on a parcel of real property. The development right can be separated from the underlying fee, such that one

person owns the property while another (such as a land trust) owns the right to development (usually for the purpose of preventing the exercise of that right).

duty: a legal obligation to do or refrain from doing something.

easement: the right to use the real property of another for a specific purpose. The easement is itself a real property interest, but legal title to the underlying land is retained by the original owner for all other purposes. Typical easements are for access to shoreline held by the public, for use of a path to clam flats by clambers, for use of private shorelands or islands by the public for recreational purposes. Easements can be created in a number of ways: by a deed to be recorded just like any real property interest; by continuous and open use by the non-owner against the rights of the property owner for a statutory number of years, typically five (*prescriptive easement*); or by a court due to equity (fairness), including the ability to get to a "land-locked" piece of property (sometimes called an *easement of necessity*). Easements may be specifically described by boundaries ("24 feet wide along the northern line for a distance of 180 feet"), somewhat indefinite ("along the trail to the northern boundary") or just for a purpose ("to provide access to the Jones property" or "access to the saltwater") sometimes called a *floating easement*. There is also a *negative easement* such as a prohibition against building a structure which blocks a view. Title reports and title abstracts will usually describe all existing easements upon a parcel of real property. Issues of maintenance, joint use, locking gates, damage to easement and other conflicts clog the judicial system, mostly due to misunderstandings at the time of creation.

egress: the right to leave a tract of land, often used in connection with access.

eminent domain: the power of a government to take private real estate for public use, with or without the permission of the owner. The Fifth Amendment to the Constitution provides that "private property [may not] be taken for public use without just compensation." The Fourteenth Amendment added the requirement of just compensation to state and local government takings. The usual process includes passage of a resolution by the acquiring agency to take the property (*condemnation*), including a declaration of public need, followed by an appraisal, an offer, and then negotiation. If the owner is not satisfied, he/she may sue the governmental agency for a court's determination of just compensation. The government, however, becomes owner while a trial is pending if the amount of the offer is deposited in a trust account. Eminent domain may be used for public uses such as waterfront land for a parking lot, access ramp, pier and wharves, etc.

estate tax: generally a federal tax on the transfer of a dead person's assets to his heirs and beneficiaries. Although a *transfer tax*, it is based on the amount in the decedent's estate (including distribution from a trust at the death) and can include insurance proceeds. Currently such federal taxation applies to the amount of an estate above \$600,000, or as much as double that amount if the estate is distributed to a spouse. Some states have an estate tax, more commonly called an *inheritance tax*.

exaction: an interest in land required to be transferred to the public as a condition for a permit to develop the land, as a means to offset the negative impact of that development, usually as a result of a permit process under zoning ordinances. For an exaction to be imposed it must be logically connected, and roughly proportional to the negative impact that it is being required to offset.

express enabling authority: authority given to municipalities by the state through explicit language passed by the state legislature that allows the municipality to enact certain types of

regulations (such as contract zoning) that the municipality would not otherwise have the authority to engage in.

failure of consideration: not delivering goods or services when promised in a contract. When goods a party had bargained for have become damaged or worthless, failure of consideration (to deliver promised goods) makes the expectant recipient justified to withhold payment, demand performance or take legal action.

federal tax code: the collection of rules promulgated by the Internal Revenue Service that detail the circumstances in which taxes are required to be paid.

fee acquisition: the act of acquiring the fee interest in a piece of real property.

fee holder: the owner of the underlying interest in real property, who owns all aspects of that property not conveyed to other partial interest holders in the form of easements, covenants, etc.

fee simple: absolute title to land, free of any other claims against the title, which one can sell or pass to another by will or inheritance. This is a redundant form of "fee," but is used to show the fee (absolute title) is not a "conditional fee," or "determinable fee," or "fee tail." Like "fee" it is often used in deeds transferring title, as in "Harry Hadit grants to Robert Gotit title in fee simple..." or similar words.

fee: 1) absolute title in land, from old French, fief, for "payment," since lands were originally given by lords to those who served them. It often appears in deeds which transfer title as "Mary Jo Rock grants to Howard Takitall in fee..." or similar phrasing. The word "fee" can be modified to show that the title was "conditional" on some occurrence or could be terminated ("determinable") upon a future event. Ownership in fee may still be subject to easements, the term *fee simple absolute* is used to designate a fee not subject to any easements.

fishing, fowling and navigation: public easement rights over the privately owned land between high and low tide. This public easement was created by a centuries old colonial ordinance applicable only to Maine and Massachusetts that granted this land to private ownership subject to the public easement for "fishing, fowling and navigation." In most other coastal states this intertidal land is owned by the state in trust for the public under the public trust doctrine.

foreshore: the part of the shore or beach lying between mean high tide and mean low tide.

full fee interest: An entire ownership share in real property that is not subject to any easement, covenant, etc.

holdout: a negotiator who hopes to gain concessions or prevent a deal by refusing to come to terms. For example, a land trust may wish to purchase some land for a waterfront park that spans four parcels, each individually owned. Three of the owners may willingly sell, but the deal may be prevented if the fourth landowner becomes a holdout. The government would not have a problem with holdouts because it has the ability to compel the fourth owner to sell through eminent domain.

horizontal access: reaching a publicly accessible beach or shore by traversing along the beach or shore.

impact fees: charges imposed on new development for the impact of the development on the public facilities that benefit them. Impact fees can be used to finance any type of public facility or service, such as a public oceanfront park, which will benefit the new development. However,

impact fees can only be used to cover the percentage of the cost that is attributable to the new development.

incentive or bonus zoning: a system by which zoning incentives are provided to developers on the condition that specific physical, social, or cultural benefits are provided to the community. Incentives include increases in the permissible number of residential units or gross square footage of development, or waivers of the height, setback, use or area provisions of the zoning ordinance. The benefits to be provided in exchange may include waterfront access, waterfront recreational facilities, open space, infrastructures, or cash in lieu thereof.

income tax: a tax on an individual's net income, after deductions for various expenses and payments such as charitable gifts, calculated on a formula which takes into consideration whether it is paid jointly by a married couple, the number of dependents of the taxpayers, special breaks for ages over 65, disabilities and other factors. Federal income taxes have been collected since 1913 when they were authorized by the Sixteenth Amendment to the Constitution. Most states also assess income taxes, but at a substantially lower rate than that of the federal government.

indemnify: to guarantee against any loss which another might suffer. Example: two parties settle a dispute over a contract, and one of them may agree to pay any claims which may arise from the contract, holding the other harmless.

installment contract: an agreement in which payments of money, delivery of goods or performance of services are to be made in a series of payments, deliveries or performances, usually on specific dates or upon certain happenings. One significance is that failure to pay an installment when due is a breach in which damages can be assessed based on the portion which has not been paid, and is an excuse for the other party not to perform further. In many installment contracts, failure to make a payment gives the seller of an article the right to repossess (take it back).

installment sale: a real estate transaction in which the sales price is paid in installments. This type of transaction may permit capital gains to be reported by installments for successive tax years in order to minimize the impact of capital gains tax in the year of the sale.

interest: see property interest.

jurisprudence: the entire subject of law, the study of law and legal questions.

liability: one of the most significant words in the field of law, liability means legal responsibility for one's acts or omissions. Failure of a person or entity to meet that responsibility leaves him/her/it open to a lawsuit for any resulting damages or a court order to perform (as in a breach of contract or violation of statute). In order to win a lawsuit the suing party (plaintiff) must prove the legal liability of the defendant if the plaintiff's allegations are shown to be true. This requires evidence of the duty to act, the failure to fulfill that duty and the connection (proximate cause) of that failure to some injury or harm to the plaintiff.

just compensation: in *takings*, the amount paid to the property owner. Just is defined as making the owner no richer or poorer than before the *taking*.

land bank: a land conservation program created to acquire, hold and manage important open space resources and endangered landscapes for the use and enjoyment of the general public. The land bank competes in the open market to acquire land which provides the public a wide range of

opportunities. It can hold beaches, wetlands, ocean and harbor frontage, and properties for passive and active recreation.

land gains tax: a capital gains tax (a tax on the difference between the sale price and the original cost, plus improvements, of the property) on land sales from land that the seller owned for a short period of time.

land speculation: the purchase of land for the sole purpose of selling it again for a large profit when it appreciates in value. Land speculation causes those who wish to use the land for their livelihood to compete for ownership with those using the land as an investment mechanism.

land transfer: the conveyance of land from one owner to another.

land trust: a nonprofit organization that assists landowners who wish to voluntarily conserve their properties. Land trusts are usually organized as charitable corporations, not as trusts.

lease: (noun) a written agreement in which the owner of property (either real estate or some object like a boat) allows use of the property for a specified period of time (term) for specific periodic payments (rent), and other terms and conditions. Leases of real property describe the premises (often by address); penalties for late payments, termination upon default of payment or breach of any significant conditions; increases in rent based on cost of living or some other standard; inclusion or exclusion of property taxes and insurance in rent; limitations on use (example: for a lobster pound only), charges for staying on beyond the term (holding over); any right to renew the lease for another period; and/or a requirement for payment of attorneys' fees and costs in case of the need to enforce the lease (including eviction).

legal authority: the source of the power under which a regulation is created. The legal authority of the federal government is limited to those powers enumerated in the constitution. The legal authority of state governments come from a general power to regulate for the public welfare, subject to the restrictions outline in the state constitution.

legal doctrine: a framework, set of rules, procedural steps or test, established in law, through which judgments can be determined in a given legal case. A doctrine comes about when enough judges make a ruling where a process is outlined and applied that can be equally applied to similar cases.

liability: responsibility or fault for an incident resulting in injuries and damages to person and/or property.

life estate: the right to use or occupy real property for one's life. Often this is given to a person (such as a family member) by deed or as a gift under a will with the idea that a younger person would then take the property upon the death of the one who receives the life estate. Title may also return to the person giving or deeding the property or to his/her surviving children or descendants upon the death of the life tenant; this is called *reversion*. Example of creation of a life estate: "I grant to my mother, Molly McCree, the right to use and/or receive rents from the boat house on said real property, until her death," or "I give my daughter, Sadie Hawkins, said real property, subject to a life estate to my mother, Molly McCree." This means a woman's mother, Molly, gets to use the property until she dies, then the woman's daughter, Sadie, will own the property.

mean high tide: the line on the shore made by the average of all the high tides as calculated over a long period of time.

mean low tide: the line on the shore made by the average of all the low tides as calculated over a long period of time.

navigable waters: waters sufficiently deep and wide for navigation by all, or specified vessels.

option/right of first refusal: a right to purchase property or require another to perform upon agreed-upon terms. An option is paid for as part of a contract, but must be *exercised* in order for the property to be purchased or the performance of the other party to be required. Exercise of an option normally requires notice and payment of the contract price. Thus, a potential buyer of a tract of ocean front land might pay \$5,000 for the option which gives him/her a period of time to decide if he/she wishes to purchase, tying up the property for that period, and then pay \$500,000 for the property. If the time to exercise the option expires then the option terminates. The amount paid for the option itself is not refundable since the funds bought the option whether exercised or not. Often an option is the right to renew a contract such as a lease. A *lease-option contract* provides for a lease of property with the right to purchase the property during or upon expiration of the lease.

partial interest: an interest to a share of real property that is less than the entire ownership of that property.

perpendicular access: reaching the beach or shore from a road or otherwise publicly accessible location across the upland area.

physical access: the ability to actually reach the beach or shore.

police powers: from the Tenth Amendment to the Constitution, which reserves to the states the rights and powers "not delegated to the United States," which include protection of the welfare, safety, health and even morals of the public. Police powers include licensing, inspection, zoning, safety regulations (which cover a lot of territory), quarantines, and working conditions as well as law enforcement. In short, police powers are the basis of a host of state regulatory statutes.

preferential tax program: a tax program that reduces the tax burden based on the use of the property. This can take the form of tax abatements or current use taxation.

prescriptive easement: an easement upon another's real property acquired by continued use without permission of the owner for a period provided by state law to establish the easement. The problems with prescriptive easements are that they do not show up on deeds or title reports, and the exact location and/or use of the easement is not always clear and occasionally moves by practice or erosion.

private agreement: a mutual exchange of promises that may or may not rise to the level of a legally enforceable contract.

property interest: legal ownership share (either partial or entire) of a piece of real property.

property tax: an annual governmental tax on real property or personal property based on a tax rate (so many dollars or cents per \$100 value of the property). The value is usually established by an *assessor*, a municipal official.

property: anything that is owned by a person or entity. Property is divided into two types: *real property*, which is any ownership interest in land, real estate, growing plants or the improvements on it, and *personal property*" which is everything else. *Public property* refers to ownership by a governmental body such as the federal, state, county or city governments or their

agencies (e.g., waterfront parks). The government and the courts are obligated to protect property rights and to help clarify ownership.

protracted purchase agreement: a contract to purchase real property where payment is drawn out of a long period of time. For example, an installment sale. Structuring payment over a long period may have tax benefits, but a government may be forbidden to enter into such contracts because current legislators may not have the ability to contractually bind future legislators to allocate money to pay for the installments.

psychological access: knowledge that the shore is available and unspoiled, even if physical access does not occur.

public access: defined by the Maine State Planning Office as people reaching the shoreline either physically (actively being there), visually (seeing the shore from a distant location) or psychologically (knowing the shore is available even if physical access is not achieved).

public easement: the right of the general public to use certain streets, highways, paths or airspace. In most cases the easement came about through reservation of the right when land was deeded to individuals or by dedication of the land to the government. In some cases public easements come by prescription (use for many years) such as a pathway across private property down to the ocean. Beach access has been the source of controversy between government and private owners in many seaboard states.

public investment: the use of public funds to fund infrastructure that will benefit the public over the long term.

public trust doctrine: the principle that the government holds title to submerged land under navigable waters in trust for the benefit of the public. Thus, any use or sale of the land under water must be in the public interest.

real estate transfer tax: a sales tax on land imposed on the transfer in ownership from one owner to another. The tax is usually based on the value of the land.

real property: land, buildings and whatever is attached or affixed to the land. This is in contrast to personal property which are movable things such as boats, lobster traps, etc.

remainder interest: the residual ownership of property left in trust or in a life estate after the interest of a previous beneficiary or the life tenant has terminated. If John grants his lobster pound to his mother to own while she is alive, then John's mother owns a life estate in the lobster pound, and John owns the remainder interest. When John's mother dies, John will again own the lobster pound.

remainder: in real property law, the interest in *real property* that is left after another interest in the property ends, such as full title after a life estate (the right to use the property until one dies). A remainder must be created by a deed or will. Example: "Patricia Parent deeds Happy Shores Ranch to her sister Sally for life and upon Sally's death to Charla Childers, Sally's daughter, or Charla's children if she does not survive." Charla has a remainder, and her children have a "contingent remainder," which they will receive if Charla dies before title passes. A remainder is distinguished from a "reversion," which gives title back to the grantor of the property (upon Sally's death, in the example) or to the grantor's descendants; a reversion need not be spelled out in a deed or will, but can occur automatically by "operation of law."

remote access: access, such as visual or psychological access, that can be achieved from a location that can be physically accessed, but does not necessarily need to be at the beach or shore.

renewal: keeping an existing arrangement in force for an additional period of time, such as a lease, a promissory note, insurance policy or any other contract. Renewal usually requires a writing or some action which evidences the new term.

reserved life estate: When a remainder interest is granted to another party, the grantor retains the right of ownership of the land for the rest of his life. This interest is known as a reserved life estate.

restrictive covenant: 1) an agreement included in a deed to real property that the buyer (grantee) will be limited as to the future use of the property. Example: no fence may be built on the property when it abuts the shore. Commonly these covenants are written so that they can be enforced by the grantor and other owners in the subdivision, so that future owners will be bound by the covenant (called "covenant running with the land" if enforceable against future owners).

right of first refusal: a provision in an agreement that requires the owner of a property to give another person the first opportunity to purchase or lease the property before he or she offers it for sale or lease to others.

right of renewal: a clause within a lease giving the holder of the lease the right to renew the existing lease for a specified term on specified conditions.

right: a legal entitlement to do or refrain from doing something.

shore: a shore or shoreline is the land at the edge of the ocean.

special permit: a permit for a use or structure that is not permitted as a matter of right in a land-use zone, but is permitted under the provisions of the zoning ordinance if certain special conditions defined in the ordinance are met. Special permits are sometimes also referred to as conditional uses, special uses, special exceptions, or secondary uses.

subdivision review process: the process a developer goes through to obtain approval from a planning board for a proposed subdivision.

submerged lands: land lying below tidal waters, seaward of the ordinary low water mark, including bays, inlets, and other arms of the sea, out to the seaward boundary of the state.

takings clause: clause of the U.S. Constitution that limits the scope of governmental action by safeguarding private property and preventing governmental action that effectively deprives an owner of all economically viable uses of the land without payment of just compensation.

takings: a shorthand way to refer to government regulations which the courts decide are unconstitutional because they violate the *takings clause* of the Constitution which states that the government will not take private property without *just compensation*.

tax abatement: a reduction of taxes or an exemption from taxes granted by a local government on a piece of real property for a specified length of time.

tax incentive: a tax reduction afforded to people for particular purposes, for example, donating coastal land to a land trust for use as a waterfront park

tax increment financing: a financing method which uses the additional taxes generated by a completed development to pay for development costs such as land acquisition and site improvements.

taxation: a compulsory charge against a citizen's person or property or activity for the support of government.

title: ownership of real property or personal property, which stands against the right of anyone else to claim the property. In real property, title is shown by an appropriate document recorded in the public records of the county such as a *deed*.

transfer of development rights: a technique for guiding growth away from sensitive resources and toward controlled development centers through the transfer of development rights from one area to another. Development rights in coastal areas would be restricted by the town (and the landowner compensated for that restriction). The town would then recover the cost of the restriction by selling the development rights to developers in other specially designated areas, allowing them to develop more densely than they otherwise would be permitted.

transfer: (noun) 1) the movement of property from one person or entity to another. 2) passage of title to property from the owner to another person. 3) a piece of paper given to allow a person or shipment to continue travel.

trust: an entity created to hold assets for the benefit of certain persons or entities, with a trustee managing the trust (and often holding title on behalf of the trust) for the benefit those certain persons or entities. A *charitable remainder unitrust* provides for eventual guaranteed distribution of the trust assets to charity, thus gaining a substantial tax benefit. For example, a person wishing to donate their land to a land trust to provide public access, but still live on the land can achieve this arrangement by putting the land in a trust, with the land eventually (after their death) going to the land trust. There can be tax benefits, and possible income to the trust beneficiary during the period the land is held in trust.

uniformity clause: a section of the Maine Constitution that requires that taxes apply uniformly throughout the state. Article IX, Section 8, of the Maine Constitution provides: "All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof."

uplands: lands lying above the reaches of the highest high tides.

use right: a legally recognized entitlement to possess (use) something that is owned by someone else.

use-value assessment: see current use taxation.

visual access: the ability to view the beach or shore from a location that can be physically accessed.

water-dependent use zoning: a type of zoning ordinances for functionally water-dependent uses. Municipalities may establish districts within these zones to give preference to commercial fishing and other maritime activities. The ordinance defines what constitutes a permitted water-dependent use, and what other uses might be permitted by special permit. The zone must be consistent with the municipality's comprehensive plan.

working waterfront: a term that applies to shoreline and coastal uses that depend upon water to function, such as fishing, boat-building and all related industries (as opposed to restaurants, housing and other non-water-dependent uses). For current-use taxation purposes, "working waterfront land" means a parcel or portion of a parcel of land abutting tidal waters or located in the intertidal zone (located between the high and low water mark) the use of which is more than 50% related to providing access to or in support of the conduct of commercial fishing activities.

zone: 1) (verb) the act of creating zoning regulations; 2) (noun) an area designated by zoning regulations for a specific use. For example, a water-dependent use only zone.

zoning amendment: the addition of new ordinances or the modification of existing ordinances in a town's zoning regulation. Typically a zoning amendment must be enacted through the same process required to pass the original zoning ordinance.

zoning body: the entity that has the power to pass zoning ordinances, usually the town council or selectmen, or sometimes the state.

zoning: (noun) a system of developing a city or county plan in which various geographic areas (zones) are restricted to certain uses and development, such as industrial, light industrial, commercial, light-commercial, marine use, agricultural, single-family residential, multi-unit residential, parks, schools and other purposes. Zoning is the chief planning tool of local government to guide the future development of a community, protect neighborhoods, concentrate retail business and industry, channel traffic and play a major role in the enhancement of urban as well as small-town life.

Published by
Maine Sea Grant College Program, 5784 York Complex, Orono, ME 04469

with support from
National Sea Grant Law Center and University of Maine Cooperative Extension



www.seagrants.umaine.edu



MSG-TR-08-02 NA06OAR4170108