

# COASTAL ISSUES IN NEW ENGLAND

## Opportunities for Enhancing Public Access to the New England Shore

Based on a R.I. Sea Grant Coastal Issues in New England Lecture

by

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*Access to the shore in New England is complicated by the region's history. Over 300 years of privatization and development along the coast creates a special challenge for those seeking to enhance the public's access to navigable waters. Unlike the open beaches of Oregon, stone walls frequently run to the water's edge. The region's legal history is rich with struggles over the right to control access to the shore.*

*Why the concern over coastal access? Particularly in the densely populated states of Connecticut, Rhode Island, and Massachusetts, an access point is like the narrow center of an hourglass, with the inland public struggling to reach state and federal waters. This is very much a populist issue—historically, only adjacent private property owners object when a new right-of-way to the shore is proposed.*

*This white paper will first review legal techniques to preserve and enhance access, and second, consider how each of the six New England states have used them.*

### Techniques to Enhance Access

All three branches of government have a role to play in preserving and enhancing access. The legislative branch, for example, has the power of the purse. Property can be acquired by direct appropriation or through the passage of a bond issue. But full ownership of the property, called "fee simple title," is not always necessary—in many cases, a public passage easement may be

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enough to serve the public's needs. Another tool the legislature has available is the creation of a public lands user fee trust fund. Although not yet used in New England, other

states have begun to charge rent for the occupation of state-owned submerged lands by marinas, piers, etc. Those rental fees can then be used to fund an acquisition program. Finally, the legislature can address a concern of landowners who are asked to provide access on a voluntary basis: liability. Faced with the risk of being sued for simple negligence, many otherwise sympathetic landowners have kept their properties fenced from public use. A limited liability statute would free the owner from that concern—the owner would only face liability for gross negligence or willful misconduct.

The judicial branch has used a variety of common law methods to maintain and enhance access to the shore. Certainly the most important concept that has been utilized is the public trust doctrine. This ancient doctrine holds that the state may not sever its interest in submerged lands unless it performs a careful analysis that indicates that the public interest is served by the proposed private

use. It is a strict standard, used increasingly both nationally and in New England, which has led to the reaffirmation of public rights in key urban waterfronts like Boston and Burlington, Vt. It can be seen as the philosophical basis for the contemporary Coastal Zone Management Act. In addition, the common law doctrines of implied dedication and easement by prescription have proven to be very useful in contested right-of-way cases. Each requires a heavy burden of proof, however, and their successful use is often bogged down by a long legal struggle.

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Unlike the judicial branch, which must wait for cases to be brought before it, the executive branch can be pro-active. Under the constitutional "police power" to regulate for the common good, state agencies can take affirmative steps to promote and preserve public access. Certainly the most remarkable example is the state of Connecticut, which has added some 8.2 miles of shore for public access through the administration of its coastal area management program. In critical areas, the power of condemnation can be used to obtain access, but obviously only when the state has

funds to compensate the property owner.

### State Public Access Programs

#### VERMONT

Although Vermont is not a coastal state, much of New England's "freshwater" shore is found along Vermont's Lake Champlain. Since there is little legal distinction between navigable fresh and salt waters, a recent decision of the Vermont Supreme Court has relevance for the remaining states along the coast. In *Vermont v. Vermont Central Railroad*, the railroad attempted to sell a former railroad yard in Burlington—built on filled submerged lands—to a developer. Title to the land had been granted to the railroad for the explicit purpose of enhancing the railroad's operations. The Vermont Supreme Court held that the original statute conveying the submerged lands to the railroad was a grant of public trust lands on the condition subsequent that they be used for the public purposes for which they were granted—and those uses alone. The court found that fee simple title was not transferred, and the proposed sale was blocked.

#### NEW HAMPSHIRE

While New Hampshire cannot claim an extensive saltwater coast, it does have significant lakes, ponds, and rivers that are desirable public recreation resources. In 1991, the state published a major public access plan to guide future acquisition efforts. Some of the plan's major conclusions were: (1) access has been a major problem for over 30 years; (2) only *half* of the state's 780 publicly owned great ponds are actually accessible to the public; (3) no unified public access program links disparate agency efforts; (4) there was a demonstrated need for 350 access points to great ponds and

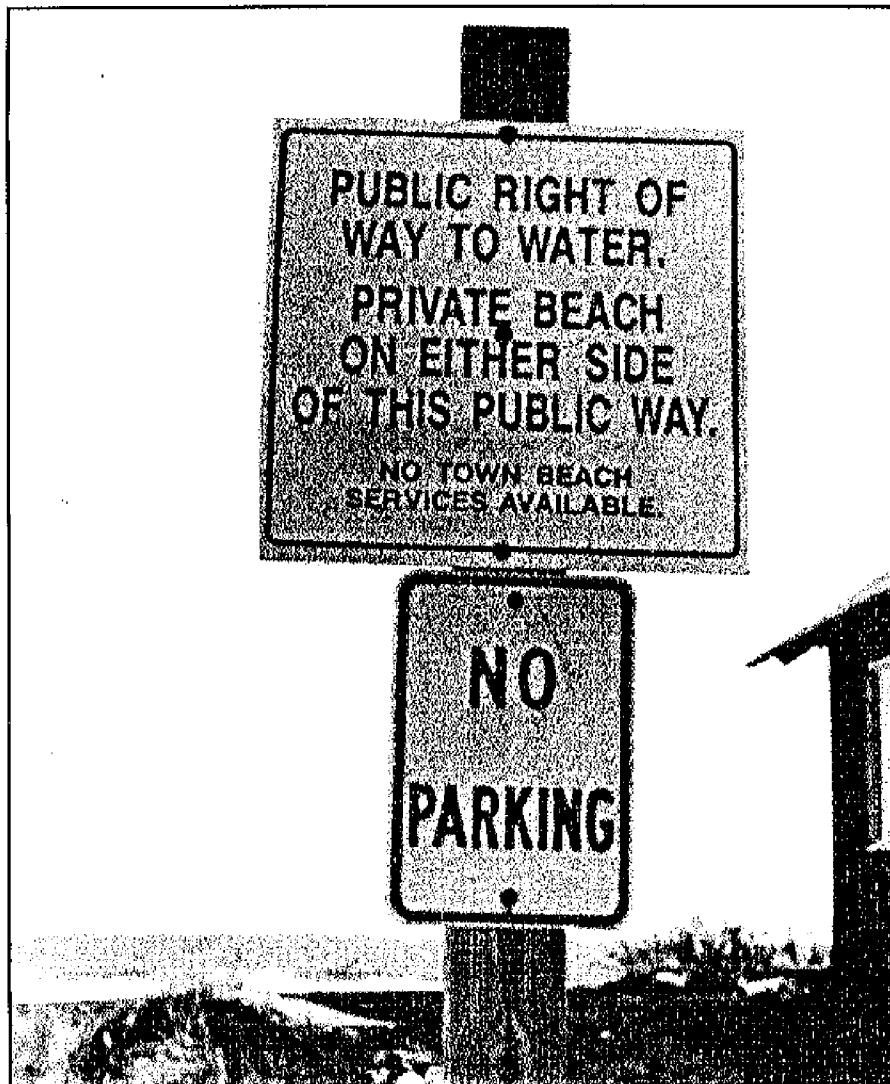
between 150 and 190 on navigable rivers; and (5) a \$10 million bond issue was suggested to begin to implement the estimated \$36 million plan.

#### CONNECTICUT

Connecticut's coastal management program strongly supports the preservation of water-dependent uses along the shore. Since public access is defined as a water-dependent activity, any change of use in a coastal property can be made "water-dependent" by incorporating an access element into the design. As stated earlier, by using this method, more than 8.2 miles of new public access has been made available. This has occurred through the review of more than 100 major waterfront development proposals, leading to the construction of walkways, waterfront parks, easements, or other agreements. This is particularly significant in that as much as 80 percent of the coast is steep, rocky shorefront or bulkheaded urban waterfront. It is one of the most progressive uses of the concept of "mitigation" in New England, in which otherwise private uses are encouraged to have a public component. The developer gets the permit, and the public gains access.

#### MAINE

Access to the shore in Maine is a highly controversial issue. Why? Along a coast of several thousand miles, only 45 miles is sandy beach, and only 27 of that is publicly owned. The period of 1984–90 could be characterized as "The Battle for Moody Beach" as the state struggled with intense pressure focused on such a small, but important, part of its shore. Maine is a "low-water" state; that is, property can be privately owned to mean low water—or a maximum of 100 rods (1 rod equals 16.5 feet or 5.029 meters) sea-



Signs such as this one, posted at Wells Beach, Maine, are often the only demarcation of a public access site to the shore. From a photo by Dennis Nixon, University of Rhode Island.

ward from mean high water. Ownership of the intertidal zone, according to the Colonial Ordinances of 1641 and 1647, is subject to the public easements of fishing, fowling, and navigation. In the case of *Bell v. Town of Wells*, the owners of Moody Beach filed suit to prevent the public from using the intertidal zone for anything other than historic easement activities. The state argued that the public trust doctrine was flexible, and new uses, such as sunbathing and bird-watching, should be allowed. However, in a close four-three decision, the Maine Supreme Court upheld the right of the property owners to keep the public off the

beach. They also struck down an attempt by the legislature to broaden the permitted uses of the intertidal zone as a taking. Following the decision, the *National Law Journal* reported a remarkable coincidence—the four justices who voted to restrict public access were all coastal property owners; the three dissenting justices were not.

Trying another approach, in 1989 the Town of Wells had 10 of the 126 lots along Moody Beach appraised to assess the possibility of acquiring the intertidal portion of Moody Beach through the use of eminent domain (the power of the state to take, with compensation,

property for the public good). That appraisal valued the intertidal area of the 10 lots at \$516,000. Projected to the other lots, it would have cost \$6.5 million to acquire the rest of the beach. A license for local residents only to use the beach was negotiated by the town, but it was rejected by voters at their town meeting in March 1990.

While all this was going on, Maine voters approved a 1987 referendum to create a \$35 million fund to purchase recreational lands. In addition, the Maine Coastal Management Program used some of their funds, combined with the Land for Maine's Future Fund, to acquire over 2,000 acres of land with more than 10,000 feet of coastal frontage. They also funded 18 projects to enhance access and funded a right-of-way discovery program that added 37 legally designated rights-of-way.

#### MASSACHUSETTS

The Bay State presents a real legal dichotomy. Like Maine, it is a low-water state, controlled by the 1641 and 1647 Colonial Ordinances, but a more activist Supreme Judicial Court in the *Boston Waterfront Development* case gave the region one of its most important cases involving the public trust doctrine.

In the Maine example, the state supreme court invalidated a statutory effort to redefine and expand the range of activities permitted in the intertidal zone. In Massachusetts, despite the repeated efforts of powerful State Senate President Billy Bulger, a bill to do the same thing never garnered enough support to be enacted. But in 1991, Bulger was successful in pushing through a bill that authorized the purchase of easements in the intertidal zone. The Massachusetts Department of Environmental Management has begun

soliciting the services of consultants to develop an appraisal methodology prior to the selection of an actual beach, which ideally would connect two public beaches.

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The *Boston Waterfront Development* case, decided in 1974, was one of the first "modern" public trust doctrine cases and has been relied upon by several other New England states as precedent. The issue in that case was whether permission to fill submerged lands for the purpose of promoting commerce during Colonial times was sufficient to grant clear title to modern owners seeking to convert historic piers and warehouses to boutiques and condominiums. The court held that there was a "continuing public interest" in filled tidelands, but left it to the legislative branch to revise the state's waterways regulations, and to the executive branch to implement that policy. Although those revisions have only recently been fully implemented, today's open, accessible, Boston waterfront is a direct result of the earlier Supreme Court case and the determination of state coastal managers to keep at least the first level of waterfront structures

"facilities of public accommodation." Like Connecticut, Massachusetts emphasizes access as a water-dependent use when it examines all development proposals.

#### RHODE ISLAND


The Ocean State has seen substantial public access activities from all three branches of government. As early as 1957, the General Assembly established and funded a Right-of-Way Commission, whose task it was to discover, through title searches, historic access sites and record them for posterity. More recently, that authority passed to the Coastal Resources Management Council (CRMC), which has authority to mark, but not maintain, access points. A related issue that the legislature studied in 1992 was the proposed development of a submerged lands leasing program with revenues accruing to a public access trust fund. Because of strong disagreements between real estate and public interest groups, a bill was never reported out of committee. The issue remains as important unfinished business for the state.

♦ The executive branch, largely through the efforts of the Environmental Advocate in the Department of the Attorney General, has been actively litigating a key series of cases related to shore access. Use of the doctrine of implied dedication in the *Black Point* case led to a partial finding in favor of public rights. The public outcry caused by the case ultimately led to a taking of the entire 42-acre parcel for public recreation. The *Hall v. Nascimento* decision in 1990 held that filled lands would remain the property of the state unless there was a specific grant by the General Assembly and that the public's rights could not be lost through adverse possession. The

*Newport Realty* case, now pending in Superior Court, will determine ownership of lands filled out to a harbor line and whether a harbor-line statute can be interpreted as a "blanket" legislative grant.

In addition, the state Department of Environmental Management seems to be taking a stronger interest in posting signs and maintaining rights-of-way "discovered" through the CRMC process. This seems altogether appropriate in a state where "shore rights" were prominently mentioned in the colonial King Charles II Charter and subsequently in the state constitution.

The six New England states have remarkably different legal histories with regard to shore rights, yet similar themes emerge in each state's effort to preserve and enhance public access. The public must learn to work with each branch of government in an integrated approach. With a governmental "full court press," the future of public access in New England may evolve into a lasting contribution to our region's future.

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