

University of Massachusetts Boston

ScholarWorks at UMass Boston

Urban Harbors Institute Publications

Urban Harbors Institute

1-2003

Public Trust Doctrine and Public Access in New Jersey

Urban Harbors Institute, University of Massachusetts Boston

Follow this and additional works at: https://scholarworks.umb.edu/uhi_pubs



Part of the [Land Use Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Recommended Citation

Urban Harbors Institute, University of Massachusetts Boston, "Public Trust Doctrine and Public Access in New Jersey" (2003). *Urban Harbors Institute Publications*. 27.

https://scholarworks.umb.edu/uhi_pubs/27

This Occasional Paper is brought to you for free and open access by the Urban Harbors Institute at ScholarWorks at UMass Boston. It has been accepted for inclusion in Urban Harbors Institute Publications by an authorized administrator of ScholarWorks at UMass Boston. For more information, please contact scholarworks@umb.edu.

Public Trust Doctrine and Public Access in New Jersey

scheduled for January 2003

Prepared by the Urban Harbors Institute
of the University of Massachusetts Boston
under contract with the New Jersey Coastal Zone Management Program

Public access is specifically identified as one of the key priorities of the Coastal Zone Management Act (CZMA) of 1972. In its Declaration of Policy, it states:

“The Congress finds and declares that it is the national policy...to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, which programs should at least provide for -- **public access to the coasts for recreation purposes**” (§1452. Section 303(2)(E)).

More importantly, the Act enables states to develop their own coastal zone management programs and to receive federal funding with which to implement them. There are a number of criteria that such plans must include before they can receive federal approval. One of these is:

“The management program includes each of the following required program elements: A definition of the term “beach” and a planning process for the protection of, and **access to, public beaches and other public coastal areas** of environmental, recreational, historical, esthetic, ecological, or cultural value” (§1455. Section 306 (d)(2)(G)).

To comply with this, the New Jersey Coastal Zone Management Program (1980) has as one of its “Basic Coastal Policies” the requirement that it should:

“Promote public access to the waterfront through linear walkways and at least one waterfront park in each waterfront municipality”.

The Origins of the Public Trust Doctrine

The right of the public to access the coast or waterfront is largely based on the principle of the public trust doctrine. This first appeared in Roman civil law around 550 AD, when it was decreed that “by the law of nature these things are common to all mankind; the air, running water, the sea, and consequently the shores of the sea”. Medieval English common law incorporated the same idea when, while recognizing that most lands were owned by a person or entity, it was also recognized that the ownership of “tidelands” (i.e. those lands that lie below the mean high tide line) resided with the King. In this way, under common law the rights of the public were inalienable and could not be transferred from the crown to private ownership. This is the basis of the public trust doctrine.

This same concept was incorporated into the American legal system so that the tidelands were held in public trust for “fishing, fowling and navigation”. Traditionally, the physical jurisdiction of public trust lands includes all lands below the **mean high tide line** and out to 3 nautical miles offshore. These are sometimes referred to as “flowed” lands. These lands are held in trust by the state and it is therefore the state’s duty to protect the public’s right to use these lands. Over time, the doctrine has evolved through US case law and at present, the physical jurisdictional boundaries to which it can be applied vary from state to state. In some states, the landward boundary is the traditional mean high tide line, while others only recognize lands below the mean low tide line. Particularly where the coast is beach lined, other states have extended the boundaries to include the area landward of the mean high tide line up to the vegetation line. This is sometimes called the “dry-sand” beach. The extension of the boundaries to include the dry-sand areas is clearly of benefit to the public as it increases the beach area to which it has access. In New Jersey, the courts have ruled that “where use of dry sand is essential or reasonably

necessary for the enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner" (*Matthews v. Bay Head Improvement Association*, 95 N.J.306, 312, 471 A.2d 355 [1984]). However, it is difficult to determine what is "reasonably necessary". Further confusion arises from the fact that, due to the tidal cycle, the waterline cannot easily be used to determine where a boundary lies. In May 2001, the New Jersey Attorney General warned five homeowner associations with private beaches that they had to allow public access to 10 feet of dry sand. This may represent a practical solution; the public has the right of access to 10 feet of sand above where the sea is wetting the sand, regardless of where the tide is in its cycle.

When the coast is mentioned in New Jersey, what most readily comes to mind is the Atlantic coastline from Monmouth County south to Cape May. However, the public trust doctrine specifically addresses lands that are, or historically have been, below the mean high tide line and these extend much further than this and include the back bays, Delaware Bay and the urban northeast coast. Furthermore, as tides can reach far up rivers and streams, these areas are also covered by the public trust doctrine and include the Delaware, Passaic, Raritan and Hackensack rivers up to the head of the tide, as well as all more minor rivers that are affected by the tides. Therefore the physical boundaries of the public trust doctrine extend far beyond what might be traditionally thought of as the New Jersey coast. Basically, wherever land is, or has been below the mean high tide line, it is public trust land and as such, the public's right to use these resources is protected by the doctrine.

In much the same way as the physical boundaries vary, so too do the definitions of the activities that the public have the right to engage in. What was originally the right simply to "fish, fowl or navigate" has successfully been interpreted to mean more general uses of the natural resources held in trust. For example, in 1821 the New Jersey Supreme Court ruled that the doctrine ensured the public's right to use the tidelands "for the purposes of passing and repassing, navigation, fishing, fowling, sustenance and all **other uses of the water and its products**" (*Arnold v Mundy*. 6 N.J.L. 1, 12 [1821]). The use of the public trust lands also includes less direct uses, such as right to enjoy the aesthetic beauty of the waterfront and bird watching.

Public Access and the Public Trust Doctrine in New Jersey

Physical Access

The public trust doctrine protects the rights of the people to engage in certain activities on the waterfront. In 1984, it was ruled that "[t]he public's right to use the tidal lands and water encompasses navigation, fishing and **other recreational uses, including bathing, swimming and other shore activities**" (*Matthews v. Bay Head Improvement Association*, 95 N.J.306, 312, 471 A.2d 355 [1984]). In order to do so, they must clearly be able to access these areas. As the waterfront is held in trust by the state, it can be argued that the state must therefore also ensure that there are sufficient public access points so that the people can enjoy their rights.

The demand for waterfront property is high and much of this land is under private ownership. This can lead to conflict between property owners and the general public. When purchasing a waterfront parcel of land, the owner will have property rights that extend, most commonly, to the mean high tide line. The public trust doctrine ensures that the land seaward of this line remains the property of the public but is held in trust by the state. Therefore, the public has right of access along the waterfront below the mean high tide line. This is often called "linear" or "horizontal" access. However, property owners frequently do not want the public to use what they see as their private waterfront. If the property lies on filled land that has previously been below the historic mean high tide line, then the public may be entitled access to all of the property. The situation can be further exacerbated by the fact that, it can be argued, the state should also ensure sufficient access points between nearby public right-of-ways and the waterfront. This is often termed "perpendicular" or "vertical" access.

Conflicts often occur when it comes to the public accessing property that is under private ownership, especially when such access is enforced by the state. Some property owners feel that a state rule that forces them to allow the public access across their property is unconstitutional as it contravenes the Fifth Amendment. The final phrase of which states:

".....nor shall private property be taken for public use, without just compensation".

Therefore, if private owners are forced to grant access to the public, then they should receive compensation from the government. If they receive no compensation than this represents what is called a “taking”, as defined by the Constitution.

However, proponents of the public trust doctrine argue that those lands that lie below the historic high tide line are owned by the public but held in trust by the state for the benefit of the people. Therefore the waterfront property owner has no rights to such tidelands. This interpretation has been upheld by New Jersey courts, an example of which occurred regarding the Hudson River waterfront. Due to state rules, all developers who received permits to develop the waterfront along the Hudson River were required to construct and maintain a 30-foot wide, public waterfront walkway. The National Association of Home Builders and its New Jersey Association claimed that the requirement, without due compensation, amounted to a “taking”. In August 1999, Federal District Judge Garrett E. Brown Jr. ruled that almost 90 percent of the land on which the walkway was to be constructed was filled land and had previously been below the mean high tide line of the Hudson River. Therefore, the land was public trust land and the state was within its police powers to require the walkway construction and maintenance (*National Association of Home Builders of the United States and New Jersey Builders Association v. State of New Jersey Department of Environmental Protection and Robert C. Shinn, Jr., Commissioner of the Department of Environmental Protection*. No. CIV.A.98 2514 (GEB). [1999]).

Another court decision that had major ramifications on public access to the waterfront in New Jersey was *Matthews v. Bay Head Improvement Association* (*Matthews v. Bay Head Improvement Association*, 95 N.J. 306 [1984]). Prior to this ruling, in New Jersey the landward physical boundary of public trust lands was understood to be the mean high tide line. This was similar to the situation in many other states. However in February 1984, in a dispute about public access to a beach, the Supreme Court of New Jersey ruled that the landward boundary of public trust lands included the “dry-sand” beach. The court stated that the decision was not based on jurisdiction theories, such as prescriptive easements or customary law, but rather on the fact that in reality, the public must be able to use the dry-sand area of a beach in order to enjoy the wet-sand area. In the ruling, the court stated:

"[A]rchaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit”.

This and subsequent rulings have concluded that the public has the right of access not only to the wet-beach, but also to the dry-beach areas, even if they are privately owned. However, this raises a further public access issue, that of perpendicular access. If public access points, running between nearby public right-of-ways and the waterfront are too widely spaced, then the intervening stretches of coastline become *de facto* private beaches, due to public access being generally impractical. Such areas become the private domain of the nearby waterfront property owners. To prevent this, it would be necessary for the state to establish a greater number of perpendicular access points so that the public can reach the more isolated public trust lands. The New Jersey Coastal Zone Management Rules state that access must be designed to **encourage** the public to take advantage of the waterfront.

Although minimizing the physical distance between perpendicular access points can go a long way to ensuring that stretches of the waterfront are not inaccessible to the public, there are a number of other ways that access can be restricted. A report entitled “The State of the Coast” by the American Littoral Society, Clean Ocean Action and Save Barnegat Bay provides a good example. Along a 1.3-mile stretch of beach in Sea Bright in Monmouth County there are three ladders that lead over the seawall and onto the beach. These provide ample perpendicular access to the waterfront, so that no areas of the beach are so isolated from an access point that the public will not generally reach them. However, the public’s access to the beach is limited in another way; there are only parking spaces for approximately six cars and there is no parking available on the side streets. In this case, while the physical access to the waterfront is provided, the lack of other facilities means that this access is of little use to the general public and clearly does not encourage the public to use the waterfront. The New Jersey Coastal Zone Management Rules state:

“Public access must be clearly marked, provide parking where appropriate, be designed to encourage the public to take advantage of the waterfront setting and must be barrier free where practicable” (7:7E-8.11(b)(3)); and,

“Public access, including parking where appropriate, shall be provided to publicly funded shore protection structures and to waterfronts created by public projects unless such access would create a safety hazard to the user” (7:7E-8.11(b)(6)).

A lack of support infrastructure such as parking spaces, restrooms, concession stands etc. means that those members of the public who do not live or rent property in the vicinity are at a disadvantage when it comes to enjoying their right to access those stretches of the waterfront. At present, there is limited information available to the public regarding public access points, parking availability, facilities and any fees that might be required. This lack of information can make planning a trip to the beach more difficult and therefore discourage such behavior.

Waterfront Access Fees

The public trust doctrine can also be applied to prohibit discrimination against particular segments of the public from accessing the shoreline. As discussed above, such discrimination can manifest itself simply as a lack of facilities. Especially at beach locations, a lack of parking spaces can mean that only those who can walk to the beach have real access, and those who do not live in the vicinity are effectively excluded.

Another form of discrimination that has emerged in New Jersey courts is the charging of fees to access beaches. It is common practice for local municipalities along the New Jersey coast to charge access fees for use of their beaches. These are justified to cover the costs of supplying lifeguards, trash collection etc.. However, in the past it was common that non-residents were charged significantly more than residents. An article in the Philadelphia Inquirer in June 2002 addresses this issue. It states that while some towns “put out a giant welcome mat to the world” by providing ample parking and restrooms etc. while charging minimal access fees, other towns provide almost no infrastructure yet charge high daily fees. The higher fees not only discriminate against non-residents who might only be using the beach for a few days but it also discriminates against lower income people. The use of the beach becomes a luxury that can only be enjoyed by the wealthy. This hardly lives up to the philosophy that is expounded by the public trust doctrine.

At present, regulation allows municipalities to charge non-residents a higher fee for access **to marinas** and other **facilities from which the public can launch a boat**, as stated in the Coastal Zone Management Rules:

“A fee for access, including parking where appropriate, to or use of publicly owned waterfront facilities shall be no greater than that which is required to operate and maintain the facility and must not discriminate between residents and non-residents except that municipalities may set a fee schedule that charges up to twice as much to non-residents for use of marinas and boat launching facilities for which local funding provided 50 percent or more of the costs” (7:7E-8.11(b)(4)).

However, this does not support differential fees that specifically target non-residents for higher fees to access a beach. The New Jersey Supreme Court has ruled that it is unconstitutional for municipalities to charge non-residents a higher beach access fee than residents (*Hyland v Borough of Allenhurst*, 78 N.J. 190 [1978]). Access to the shoreline was deemed to be a right that was equally held by everyone and not preferentially by residents. However, discrimination against non-residents can be achieved in practice by charging a high cost for a daily pass relative to a seasonal pass. For many people, high access fees or limited facilities are as much of a hindrance to public access as the lack of a physical access points.

Visual Access

As previously discussed, the public trust doctrine has been legally interpreted to support many, less tangible forms of public access, such as the right to enjoy the aesthetic beauty of the waterfront. The popularity of waterfronts as residential areas and vacation spots attests to the fact that, in general, the public finds such areas to be aesthetically pleasing. There are probably many reasons why we have such an affinity for such areas, but waterfronts provide the public with a place where there is a largely unrestricted view and where they feel that they can relax. Physical access to the waterfront is the ideal situation, but for many, visual access is the next best thing. While visual access to the water is not

necessarily high on the agenda of all state governments, such access is as important as the physical access to these areas. And to those who, for whatever reasons, cannot physically access the waterfront, the ability to enjoy the view of the water is of prime importance.

Another aspect of visual access is the view of the waterfront **from** the water. For those who use the water, the view of the shoreline is an important aspect of their enjoyment. Especially in urban areas, the waterfront can often represent a cultural resource that provides a snapshot of how the waterfront used to be. These cultural landscapes are a valuable resource and maintaining them for the public's visual enjoyment is as much a part of the public trust doctrine as their right to physical access such areas.

The importance of visual access is illustrated by the fact that the first of the New Jersey Coastal Zone Management Rules that addresses public access states:

“Public access to the waterfront is the ability of all members of the community at large to pass physically **and visually** to, from and along the ocean shore and other waterfronts” (7:7E-8.11(a)).

Environmental Protection

The public trust doctrine and its applicability to public access is increasingly being used as a tool to address coastal pollution. Traditionally, the public trust doctrine means that the state holds in trust the right for the public to “fish, fowl and navigate” in the flowed lands. More recently, this has been interpreted to mean the trust is, “to preserve and continually assure the public’s ability to fully use and enjoy public trust lands, waters and resources for certain public uses” (*Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District*, 733 P.2d 733, Idaho 512 [1987]). Therefore, if these resources are damaged through the actions of another “party”, then this is a breach of the doctrine. Furthermore, if the state, as the trustee, does not ensure that the other “party” implement remediation measures then the state itself has failed in its duties as a trustee. The ramifications of this use of the public trust doctrine are enormous. For example the Hudson-Raritan estuary is considered to be public trust lands and, as such, the governments of New York and New Jersey hold them in trust for the public and are therefore liable for the state of this estuary. It is argued that it is their duty to ensure that pollution from the numerous industries on this water body is cleaned up so that it does not impinge upon the public’s right to access and enjoy the resources. If either state fails to fulfil its duty then it is legally liable. Largely, such arguments have yet to be supported by case law. However, there is potential for these arguments to be upheld and, as such, the public trust doctrine may prove to be an extremely powerful tool for environmental advocacy groups and the general public.

The requirement that property owners provide a linear open space along the waterfront in the form of a walkway can also help to reduce the amount of pollution entering a waterway. Such a walkway acts as a buffer between the source of pollution and the water and can therefore reduce the amount of non-point source pollution. This may help to preserve the natural resources that the public trust doctrine protects. Similarly, the trees that are planted on such walkways provide shade and a valuable habitat for animals and plants. Therefore the public trust doctrine may be used as a tool to ensure that remediation efforts can be enforced and can also, through public access requirement, reduce the amount of non-point source pollution entering waterways.

Public Access in Federal and State Programs

As discussed above, the issue of public access is a fundamental priority of the Federal Coastal Zone Management Act (CZMA) that states:

“The Congress finds and declares that it is the national policy...to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, which programs should at least provide for -- **public access to the coasts for recreation purposes**” (§1452. Section 303(2)(E));

The CZMA enabled states to develop their own coastal zone management programs and to receive federal funding with which to implement them. There are a number of criteria that such plans have to include before they can receive federal approval. One of these is:

“The management program includes each of the following required program elements: A definition of the term "beach" and a planning process for the protection of, and **access to, public beaches and other public coastal areas** of environmental, recreational, historical, esthetic, ecological, or cultural value” (§1455. Section 306 (d)(2)(G)).

When it was approved in 1980, the New Jersey Coastal Zone Management Program stated that a “Basic Coastal Policy” was to:

“Promote public access to the waterfront through linear walkways and at least one waterfront park in each waterfront municipality.”

Over time, changes in the Coastal Zone Management Rules have led to changes in the “Basic Coastal Policies” so that the one pertaining to public access now reads (changes are in bold):

“Promote public access to the waterfront through **protection and creation of meaningful access points and** linear walkways and at least one waterfront park in each waterfront municipality.”

And that this should be achieved by enhancing the value of the waterfront to the surrounding communities by:

- discouraging new highways and high-rise buildings adjacent to the waterfront;
- providing pedestrian bridges over existing highways;
- publicly purchasing waterfront properties; and,
- obtaining easements for public access over other properties.

Section 309 Assessments and Strategies

Section 309 of the CZMA is the Coastal Zone Enhancement Program. It is intended to encourage each state to make improvements to their state coastal zone management program. These improvements must focus on one of nine key issues that are regarded as being of national significance -- aquaculture, coastal hazards, coastal wetlands, cumulative and secondary impacts, energy and government facility siting, marine debris, ocean resources, special area management planning, **and public access**. As part of this grant program, each coastal state must carry out a periodic assessment (309 Assessment). These provide a comprehensive review of a state coastal zone management program and help to identify specific needs or problems, and assess the general effectiveness of the program. This occurs with public involvement and comment, which means that it can be a contentious process. It is then possible to identify methods to improve the program and implement specific activities. These activities may include: developing or revising state or local statutes, regulations or ordinances that relate to public access; developing or improving state processes related to accessing funding sources and acquisition and maintenance programs; improving coordination between agencies and other stakeholder groups; and developing studies, inventories and outreach material. Periodically, each state is required to develop a 5-year strategy (309 Strategy) that identifies the priority issues and plans to improve the way that the program addresses the nine key issues.

The most recent review of the New Jersey Coastal Zone Management Plan was completed in July 2001. Prior to this, assessments had occurred in 1992 and 1997. In both of the previous assessments, the need to address public access issues was judged as being of “medium” importance. In the latest assessment it has been elevated to “high”.

Section 309 assessments identify four programmatic objectives relating to public access:

- improve public access through regulatory, statutory, and legal systems;
- acquire, improve, and maintain public access sites to meet current and future demand through the use of innovative funding and acquisition techniques;
- develop or enhance a Coastal Public Access Management Plan, which takes into account the provision of public access to all users of coastal areas of recreational, historical, aesthetic, ecological, and cultural value; and,

- minimize potential adverse impacts of public access on coastal resources and private property rights through appropriate protection measures.

In the 2001 assessment and strategy, it is clear that due to limited staff and resources, the Coastal Zone Management Program (CZMP) has had limited success in addressing the issue of public access. After the 1997 assessment, it was noted that while much of New Jersey's ocean frontage is open to the public, there exists a very incomplete understanding of the access resources. In 2001, the CZMP acknowledged that this was still the case. This knowledge gap makes it difficult to assess the current state of public access, or the location or type of access problems that exist. The CZMP also acknowledges that past coastal permits will have to be reviewed in order to ensure that any public access enhancements that might have been required were actually implemented. In order to address these problems a database is being compiled, a new method for tracking public access stipulations in permits is being developed and the Department is considering developing outreach materials to disseminate the information. Furthermore, in order to enhance inter-agency cooperation, new Memoranda of Understanding (MOUs) will have to be drawn up.

Once these efforts have been successful, it is felt that, as the CZMP often relies on permit conditions to address compliance with public access rules, long-term inspections and enforcement of these conditions is critical if the state is to meet its programmatic objectives.

In the meantime, without a database it is difficult to assess where the most serious public access issues exist and, therefore how to address them. In such a situation, the stakeholders who are either directly or indirectly affected by these issues provide an equally valuable source of information. The current assessment focuses on what can be done in the future to better deal with these issues and this will require meaningful participation of all stakeholders and for government to work closely with local communities.

What are the Issues that need to be Addressed?

The series of focus groups that are scheduled for January are aimed at initiating the process of stakeholder participation. In this way, they should establish meaningful dialog and help the CZMP focus on what are generally felt to be the most pressing public access issues while the aforementioned database, MOUs and permit tracking systems are developed.

The 309 assessment and public comment associated with it, as well as a series of interviews conducted by the Urban Harbors Institute, have identified a number of public access issues and problems that exist in New Jersey. However, this list is unlikely to be exhaustive and these issues may not be relevant in certain areas or as significant in one area as compared with another. Which issues should or should not be prioritized is one of the outcomes for which this series of focus groups have been planned. When the priority issues are identified, then it will be possible to identify the methods for addressing them.

Generally, the public access issues that arise in urban waterfront areas and those that occur on coastline that have beaches differ to some degree. Generally, issues that have been raised include:

General Issues

- *Coastal Zone Management Program and its role in public access* – Should the CZMP take a more active / public role in promoting public access? And if so, how?
- *Stakeholder participation* – Does the CZMP involve stakeholders sufficiently in the decision making process? If not, how could things be improved?
- *Building on success* – The Hudson River Walkway is often cited as an example of where public access in an urban waterfront has been successfully achieved through enforcement of the Coastal Zone Management Rules. If this is so, could similar rules be developed for other areas such as the Raritan, Delaware, and Hackensack Rivers? Would the public support such an approach?
- *Using public access as a tool* – Would there be support for using public access as a tool to achieve other goals, such as the use of open space set backs to increase value of properties along waterfront? Or for public access requirements to result in non-point source pollution abatement? How effective is the provision of walkways etc. at reducing non-point source pollution?

- *Lack of information and outreach material* – The CZMP acknowledges that it is lacking information on public access resources. This makes it difficult to pinpoint where there may be problems. They are implementing a program to rectify this situation, however this will take time. Therefore, what is the best way to identify and address public access issues while the information is being gathered?
- *Inability to track permit requirements* – The CZMP acknowledges that it has had little success in tracking and enforcing the public access requirements that have been part of the CAFRA permitting process. The ability to do so is being developed and CZMP sees its role as largely enforcing such requirements in the future. Will this approach be successful in increasing public access to the waterfront?
- *Boat launch facilities* – Are there sufficient boat ramp and boat launch facilities that are open to the public? The latest 309 assessment lists 58 public boat ramps and another 111 that, although private, are accessible to the public. Some of the public feedback on the 309 Assessment seems to suggest that boat launch facilities are sufficient. However, this may not hold true for all areas of the state or in the future.
- *Problems with land acquisition programs* – Limited coordination between land acquisition programs means that opportunities to acquire some properties are likely to be missed. How can the system be improved?
- *Conflicting use of the waterfront* – As use of the waterfront is increasing, so too are the conflicts between different users. What is the best way to address this problem and have approaches such as the establishment of Personal Watercraft exclusion zones been successful in preventing conflict between user groups? The subject of conflicting use of the waterfront is a difficult issue as some people may feel that, for example, ports and waterfront industrial uses conflict with the public's right to use the waterfront. However, other sections of the population clearly enjoy the industrial activity and derive pleasure from simply watching what is going on. What is important is that there are multiple uses of the resources and that where one activity predominates, efforts are made to ensure that others can also enjoy the resources. For example, while an area may be largely involved in port activities, the provision of viewing points would allow the public to watch the activities while keeping them safe from potential hazards. Zoning and the promotion of water-dependent uses of the waterfront can also achieve the multiple use of resources.

Issues Specific to Beach Coastlines

- *Beach nourishment without sufficient access* – While the Coastal Zone Management rules stipulate that where shore protection is publicly funded or where waterfronts are created using public funds then, as long as it is safe, the public access should be made available to these areas. This is often felt not to be the case. It has been suggested that when tax dollar funded beach nourishment is implemented as a storm damage prevention measure, public access requirements are often overlooked. Is there a conflict between those that view beach nourishment simply as a storm protection practice and those that view it as a means to increase coastal recreational resources?
- *Beach nourishment programs and increased access* – It has been suggested that a number of municipalities have refused to participate in the beach nourishment program due to fear that this would lead to greater public use of the municipal beaches due to the requirements to enhance public access. Is this an issue?
- *Storm protection measures and visual access* – Some storm damage protection measures decrease the visual access or aesthetic beauty of the waterfront and this can cause conflict. For example, the creation of dunes can be an effective shoreline protection method. However, for those who own property behind where the dunes are being created, this will impair their visual access to the tidelands. Is this a common issue and how could it be addressed?
- *Levying beach access fees* – The levying of beach access fees may discourage lower income people from enjoying the beach. Municipalities need to be able to raise funds to provide the services associated with a beach. However, as access fees increase, the use of the beach becomes more and more of a luxury that many people may not be able to afford. How should this be addressed?
- *Daily beach access fees* – It is claimed that high rates for daily beach access passes, as opposed to seasonal passes, discourage non-residents from utilizing beaches. For example, in Spring Lake it is

reported that a weekday pass costs \$8 per person while a season pass that entitles the buyer to unlimited beach visits between Memorial Day and Labor Day costs only \$45. While beach access is to be encouraged, how are municipalities to ensure that their beaches do not become so crowded that it drives out the local users?

- *Lack of support infrastructure* – The lack of parking spaces or other support facilities puts non-residents at a disadvantage when it comes to accessing the beach. Is this common and how should be addressed?

Issues Specific to Urban Waterfronts

- *Development and visual access to the waterfront* – For some areas, strict permit requirements exist that regulate the type and height of waterfront development and therefore can be used to ensure visual access. However, it is reported that in other areas, such rules do not exist, are not enforced or are simply flouted. How can visual access be protected or enhanced without stifling development?

Tools Used to Address Public Access Issues

A number of key cases have already been through the New Jersey courts and these provide important case law that can be used in addressing public access issues. However, which of the suite of tools available to address public access issues would be most successful remains a matter of debate.

Regulatory Programs

Regulatory Programs, such as CAFRA, the Waterfront Development Act, and the Coastal Zone Management Rules, can provide powerful tools for ensuring that public access and open space are incorporated in waterfront development plans. These rules can be very specific in the details that are stipulated. This can be seen with the rules that determine the development and public access to two waterfront areas of New Jersey that are specifically addressed in the state's Coastal Zone Management Rules.

The Hudson River Waterfront Area is regulated by rule 7:7E-3.48. This rule clearly lays out the type of development that is acceptable and ensures that public access and open spaces are not only incorporated into the development plan, but that they are also implemented and maintained. The maximum heights of buildings, and the type and length of public access to piers etc. are all regulated through this rule. One specific stipulation of the rule relates to the Hudson Waterfront Walkway:

“All waterfront development along the Hudson River shall develop, maintain and manage a section of the Hudson Waterfront Walkway coincident with the shoreline of the development property. The developer shall, by appropriate instrument of conveyance, create a conservation restriction in favor of the Department. The conservation restriction shall define the physical parameters of the walkway and the allowable uses, address the maintenance and management duties and identify the responsible party“ (7:7E-3.48(e)).

This rule was challenged in the courts by the National Association of Home Builders of the United States and the New Jersey Builders Association who claimed that the walkway requirement amounted to a taking of their property. In a very significant ruling, the Federal District Judge rejected their claim. He ruled that 90 percent of the land on which the walkway had been, or was to be, built was public trust land, as it was formally flowed tidelands. The remaining 10 percent were lands where it was deemed necessary for the public to have access in order to enjoy the tidelands.

Waterfront development is also tightly regulated through the Coastal Zone Management Rules in Atlantic City. Along the Hudson River the issue relates more to ensuring public access to public trust lands through waterfront walkways. However, in Atlantic City it is more to do with ensuring and encouraging free and easy public access to the Boardwalk, piers and the dry-beach areas below the piers.

Throughout the world, the development of waterfront casinos and hotels etc. has led to waterfront and beach access being limited to the patrons of such establishments. In order to prevent such a situation, rule 7:7E-3.49(c)(8)(iv) states:

“The public open space shall have unrestricted access, at no cost, and shall not be limited to the patrons of the commercial or hotel facilities”.

The Atlantic City Coastal Zone Management Rule is particularly detailed with regards to beach access, the location of facilities such as restrooms and the size and design of public open spaces that are incorporated into development plans;

“The development shall provide a means for pedestrians to walk along the dry beach under the pier from one side to the other, except where the beach is so narrow as to preclude such passage” (7:7E-3.49(c)(8)(i)); and,

“Public restroom, showers and changing areas shall be provided on the pier, immediately adjacent to the Boardwalk and the stairs from the beach on either side of the pier. Alternatively, the public restroom, showers and changing areas may be located immediately adjacent to the Boardwalk provided these facilities are: (1) owned and maintained by the pier owner and, (2) located no further than 200 linear feet from the pier” (7:7E-3.49(c)(8)(vii)); and,

“Publicly accessible open space, including lighted public seating and viewing and, where appropriate, fishing areas, shall be provided at the seaward end of the pier at the level of the deck surface of the Boardwalk. The publicly accessible open space shall occupy the entire width of the pier (parallel to the ocean shoreline in a northeast-southwest direction) for a distance of 50 feet landward from the end of the pier. The area between 30 and 50 feet inland from the end of the pier may be occupied by outdoor dining and food concessions and be partially enclosed, through the use of awnings, canopies, and windbreaks. No other structures shall be placed in this area” (7:7E-3.49(c)(8)(iii)).

The use of the Coastal Zone Management Rules have proven to be a powerful tool to ensuring public access within certain areas of the New Jersey waterfront. Therefore it would be possible to add to the rules so that detailed development criteria, such as those that exist for the Hudson River and Atlantic City could be extended to cover the rest of the New Jersey coastal zone. However, the present rules apply specifically for developed urban waterfronts and the issues that exist in other areas may be less easy to quantify or qualify. There is also a suite of other tools that have been used to alleviate coastal access problems without resorting to re-writing the state regulations.

Zoning and other municipal land use controls

Municipal governments have a variety of authorities to control the way land is used and developed. Zoning is the exercise of the government’s police power to protect the health, safety, and general welfare of the public. With zoning ordinances, municipalities control the uses made of private property and the density and dimensions of development. Municipalities have increasingly used these review and approval authorities over proposed development to incorporate public access or open space into the final project. The ability to do so is in some ways limited by statute and by constitutional protections such as those pertaining to private landowners’ property rights.

Acquisition Programs

Public acquisition of coastal property for parks and open space is the most direct way to increase the amount of coastal property accessible to the public. Coastal property may be acquired through outright purchase, gift, eminent domain, or purchase or gift of an access easement (or other less-than-fee interests) on private property. The principal barrier to public acquisition of coastal property is its often prohibitively high cost due to intense market demand. Funds for acquisition of parkland and open space are available through the federal, state, and municipal governments as well as a host of nonprofit land conservation organizations. While coastal property may be rated highly desirable in state and local open space acquisition plans, its high cost relative to other properties often influences funding decisions.

There are funds available for acquisition programs. For example, in June 1999 Governor Christie Whitman signed the Garden State Preservation Trust Act. This dedicates \$98 million per year for 10 years for preservation efforts. The funding can be used for acquiring and preserving open space and sites of historic interest. However, it is important to identify what monies are specifically available to address public access issues and how much is earmarked for the coastline. In New Jersey, the answer is “not much”. Therefore it is necessary to look to other sources. One possible source is municipal funds. If local governments could be required to allocate some of their funding to providing public access resources, this

could provide a valuable tool for addressing such issues. The Coastal Zone Management Rules already state that where municipal funds are used for storm damage prevention programs, then public access must be provided:

“Public access, including parking where appropriate, shall be provided to publicly funded shore protection structures and to waterfronts created by public projects unless such access would create a safety hazard to the user. Physical barriers or local regulations which unreasonably interfere with access to, along or across a structure are prohibited” (7:7E-8.11(b)(6)).

In order to make more municipal funds available, the state could require that when municipal funds are used for any habitat restoration program or for a beach nourishment program that aims to increase recreational resources, then public access should also have to be provided. However, municipalities may resist such a move and it has already been reported that some municipalities are reticent to spend funds on shore protection structures as they feel that the public access requirements would lead to over crowding on the municipal beaches.

An alternative to outright acquisition of property is acquisition of a public access easement on private property. An easement or conservation restriction is a partial interest in real property and therefore less expensive to acquire than the full title.

The New Jersey Coastal Zone Management rules define a “conservation restriction” as:

“[A] restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural state, scenic or open or wooded condition, or for conservation of soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife, ...” (7:7E-1.3 (c)).

As is encompassed in the above definition, an easement can be either an affirmative easement which gives the owner of the easement certain defined rights on another’s property, such as the right to pass over the property, or a negative easement which allows the owner of the easement to prohibit certain activities on another’s property, such as alteration of the land or vegetation.

Water Dependent Uses

The Coastal Zone Management Rules define “water dependent” as:

“[D]evelopment that cannot physically function without direct access to the body of water along which it is proposed. Uses, or portions of uses, that can function on sites not adjacent to the water are not considered water dependent regardless of the economic advantages that may be gained from a waterfront location. Maritime activity, commercial fishing, public waterfront recreation and marinas are examples of water dependent uses, but only the portion of the development requiring direct access to the water is water dependent. The test for water dependency shall assess both the need of the proposed use for access to the water and the capacity of the proposed water body to satisfy the requirements and absorb the impacts of the proposed use” (7:7E-1.3(c)).

The definition of water dependent use includes docks, piers, marina activities, boat repairs, industries such as fish processing plants and other commercial fishing operations, port activities, and water-oriented recreation. They do **not** include housing, hotels, restaurants, warehouses, most manufacturing facilities, boat sales, automobile junk yards, and non-water oriented recreation such as roller rinks and racquetball courts.

Various states have regulations that encourage that waterfronts are only developed for water dependent uses, however the aims of such regulations vary. They may be to ensure that the areas available for waterfront industries remain available and are not developed as condominiums. However, another goal is often to maintain or enhance public access resources. If this is the goal of such rules, then they can stipulate that new waterfront developments provide amenities such as walkways, parks, fishing piers and viewing points. Government agencies may require property owners to convey a public access easement as a condition of development, but only to mitigate the development’s adverse impacts on public access, either alone or in conjunction with the cumulative effect of other development in the same area (Marine Law Institute’s “Managing the Shoreline for Water Dependent Uses”).

The New Jersey Coastal Zone Management Program Goals for Public Access

The recent Section 309 Assessment identifies four programmatic objectives relating to public access:

- improve public access through regulatory, statutory, and legal systems;
- acquire, improve, and maintain public access sites to meet current and future demand through the use of innovative funding and acquisition techniques;
- develop or enhance a Coastal Public Access Management Plan, which takes into account the provision of public access to all users of coastal areas of recreational, historical, aesthetic, ecological, and cultural value; and,
- minimize potential adverse impacts of public access on coastal resources and private property rights through appropriate protection measures.

However, it is important that, like the “basic coastal policies”, these can be expanded and rewritten. A report called the State of the Coast, written by the American Littoral Society, Clean Ocean Action and Save Barnegat Bay recommends that the way in which New Jersey addresses coastal issues should be changed to include the following:

- strengthen the requirements for municipalities to protect the coast;
- identify priority conservation areas and coordinate the state’s open space program with local efforts;
- coordinate regulatory decisions to address cumulative impacts;
- strengthen enforcement of coastal regulations; and,
- in general, consider the coast as a resource to be protected rather than exploited.

Conclusion

It is essential that sufficient information be known about the state of the public access resources. This will greatly facilitate any management decision-making. This information must then be made freely available to the public so that they can enjoy the waterfront. Furthermore, the goals of a coastal zone management program must be developed with significant stakeholder involvement. The state is the trustee of coastal lands, but their ownership remains with the public. Therefore, what occurs in these areas must be, to the greatest extent possible, the decision of the people.

Public access is of key importance to the general public. For most people, their concerns for the coast are limited to being able simply to enjoy the waterfront. They want to be able to get to the waterfront easily and cheaply and, once there, be able to enjoy a clean, pleasant and peaceful time. Therefore the right to enjoy that waterfront may be as much as many of the public will ever come to knowing about the state’s coastal zone management policies.