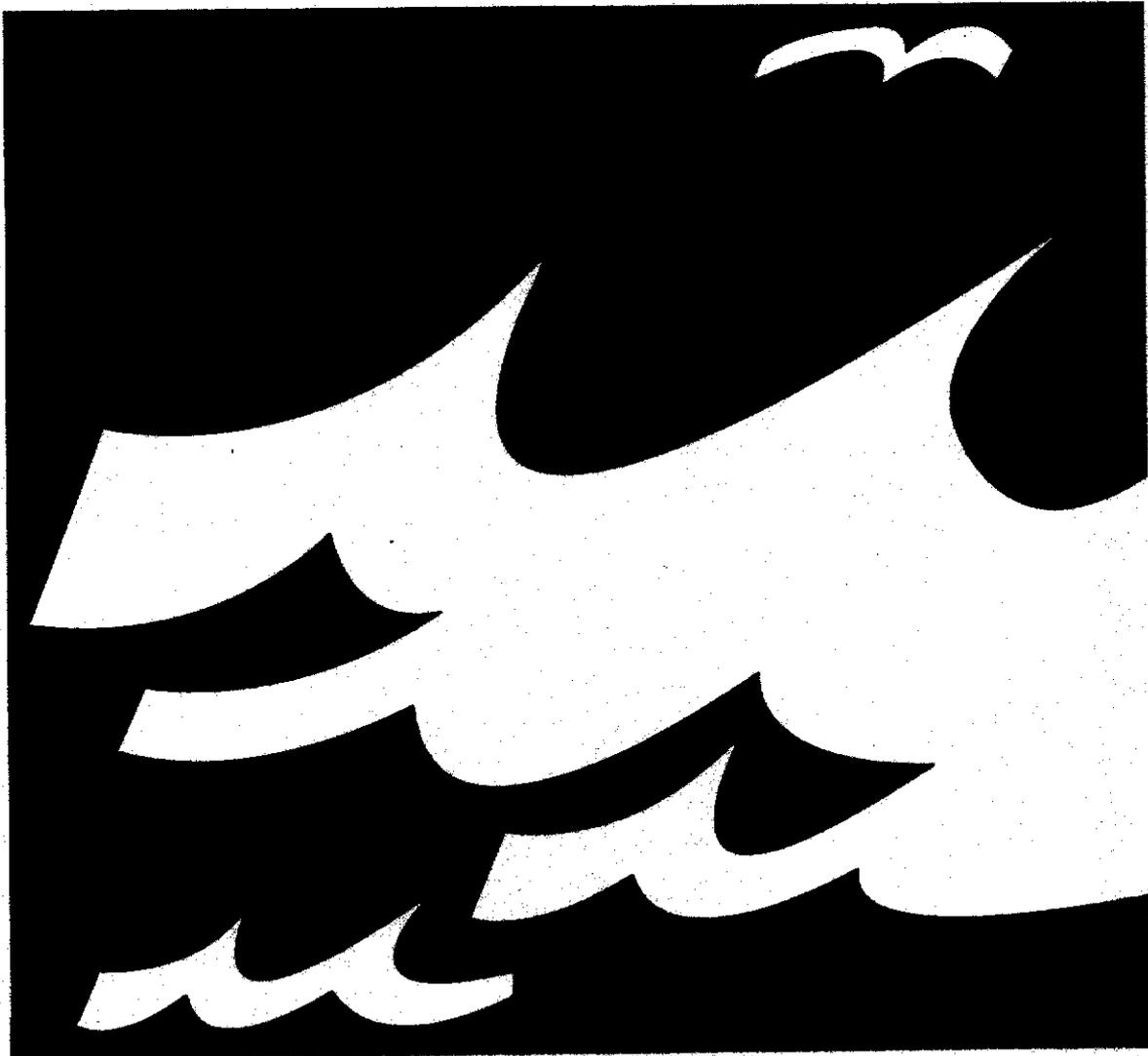


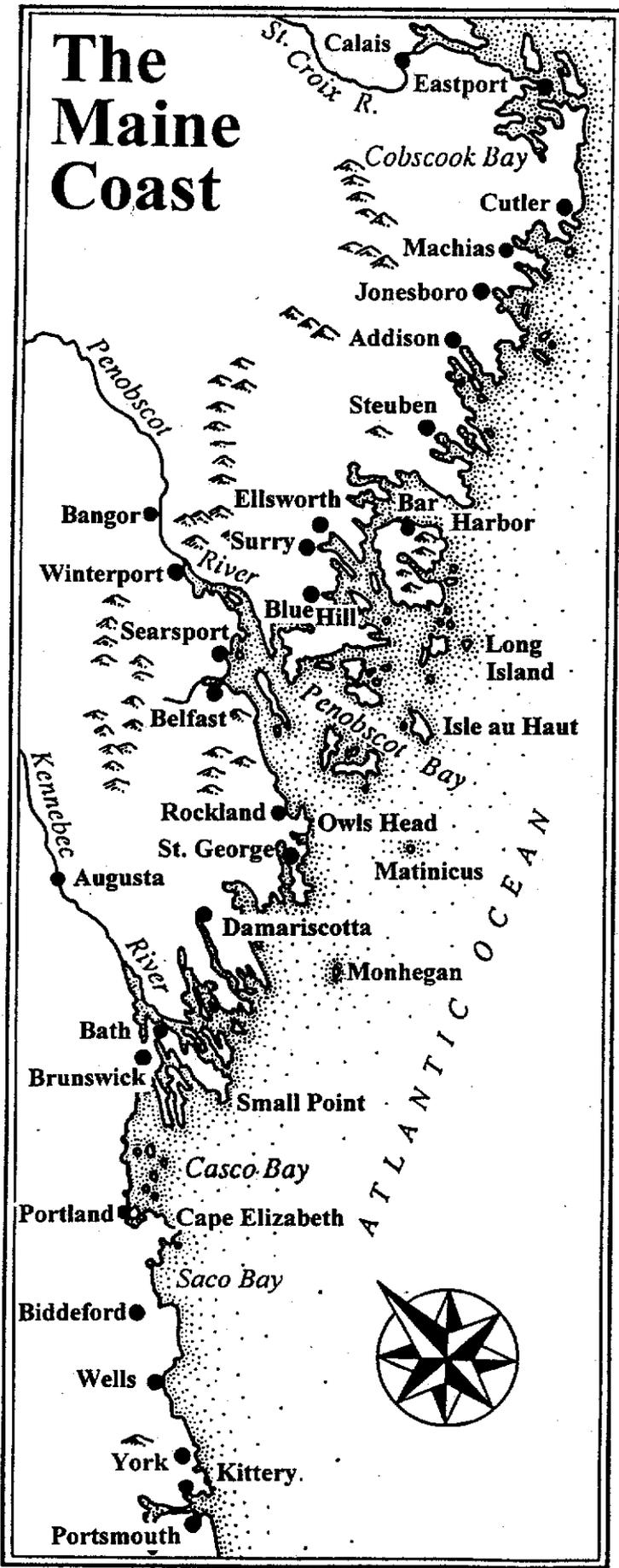
Maine's Shore Access Public Access Series

**Planning and Implementing
Public Shoreline Access**



**Maine State Planning Office
Maine Coastal Program**

The Maine Coast



Planning and Implementing Public Shoreline Access

A Handbook for Local Officials

**Maine State Planning Office
Maine Coastal Program**

June 1990

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Publications in the Public Access Series:

How to Conduct an Inventory of Scenic Areas -- a guide for those who wish to conduct a visual resources inventory for your community or local land trust, and to prepare a simple map of scenic views.

Liability of Maine Landowners Who Provide Public Access -- a guide to legal issues related to the liability of Maine municipalities and landowners who provide public access ways for recreational uses.

Planning and Implementing Public Shoreline Access -- a guide to the steps involved in preparing a public access plan with regulatory and non-regulatory techniques for securing public access sites.

Coastal Right-of-Way Rediscovery Programs -- a guide to the rediscovery of rights-of-way that may already exist within a community but may have been forgotten with the passage of time.

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I. INTRODUCTION

A. Scope and Purpose

Many coastal communities in Maine realize the need to improve public access to the shoreline for commercial as well as recreational purposes. This effort involves preserving and formalizing existing public accessways in addition to the creation of new opportunities.

This guide is intended to assist local officials, such as planning board members and selectmen, in their efforts to preserve their citizens' access to the shore.* The guide offers a practically-oriented analysis of the legal and policy issues which arise in planning for public access. The guide includes discussion of several approaches and specific techniques towns may use, singly or in combination, in creating a comprehensive, public access plan. The guide also lists resources local officials may consult for more detailed information on a particular issue or planning technique.

This guide is divided into three major sections. The introduction discusses specific problems with public access, the general need and legal requirement for public access planning, and some advantages of such planning. Part II details specific components of a complete shoreline access plan. The third major section provides a detailed reference of specific market-based and regulatory techniques towns may find useful in implementing their plans and promoting public access. The appendix includes information about the statutory framework that supports access to coastal areas, and about legal doctrines for securing access rights. Examples of plans developed by other communities and other useful references, are listed in the bibliography.

* This guide deals with public access in coastal areas. The planning process and many techniques described here may also be useful to improve access to Maine's lakes and rivers. However, differences in the public's legal rights in these various areas prevent this guide's analysis from being uniformly applicable.

B. Problems with Shoreline Access

A recent study by Maine's State Planning Office (SPO),¹ which conducted interviews with over two thousand Maine residents, pinpoints some of the factors underlying communities' access problems. An understanding of the causes of their access problems will help towns generate locally effective solutions. The SPO study made the following findings regarding access issues in Maine:

- The demand for access exceeds the present supply of access opportunities.

Burgeoning year-round and summertime populations have markedly increased use of existing accessways. State and local efforts to enhance public access have not kept pace with the rapidly growing demand.

- Efforts to improve public access have focused on major, concentrated public uses such as public beaches or boat launches.

More attention needs to be given to the access needs of "dispersed" uses, including those of clammers, wormers, and bird hunters.

- Changes in land ownership patterns are making access problems worse.

The influx of new landowners to Maine has carried with it new attitudes; shore harvesters who have reached flats through private land (with tacit acquiescence from the landowner) are increasingly finding "keep out" signs obstructing their paths.

- The public believes that government should act to enhance access opportunities.

If this viewpoint is at all representative of the general voting public, state and local lawmakers may find that prompt and decisive responses are not only politically feasible, but popular.

- Access problems vary from community to community.

This fact most vividly demonstrates the need for local planning based on the particular needs and conditions of a given community.

C. The Requirement and Need for Shoreline Access Planning

Public access along the coast takes many forms. It includes, for example, boat launching, clamming, recreational use, and visual access. Needs and opportunities for such access vary among communities. Consequently, access plans must be town-specific. The purpose of the shoreline access plan is to identify access needs and develop goals and strategies to guide future actions to meet those needs. The plan allows a town to address problems of decreasing availability of shoreline access for the general public, shore harvesters, and commercial fishermen due to changing land ownership patterns.

Shoreline access planning is an element of comprehensive planning. Maine's Comprehensive Planning and Land Use Regulation Act of 1988 requires towns to address public access to the shoreline in local comprehensive plans. Comprehensive planning produces a document to guide community growth and development, to protect natural resources and critical or sensitive wildlife habitat areas, and to plan for expenditure of municipal fiscal resources. The comprehensive plan serves as a basis for enactment of zoning regulations and other actions to achieve the plan's goals.

Developing a shoreline access plan as a component of the comprehensive plan insures that municipal access goals are coordinated with the town's overall blueprint for its future. Moreover, this approach encourages more thorough analysis of a town's shoreline access goals, which must be reconciled with other planning objectives such as promoting economic development.

As well as requiring towns to plan for public access through the Comprehensive Planning Act, Maine law provides communities with the authority and opportunity to act to meet the public access needs of their citizens. Relevant laws include:

- Coastal Management Policies Act of 1986 -- Provides specific authority for towns to develop and implement shoreline access plans, and requires towns to promote state coastal access goals.
- Mandatory Shoreland Zoning Act -- Authorizes zoning standards to implement access goals of a comprehensive plan.
- Subdivision Review Act -- Allows shoreline access to be used as a valid criterion in a town's subdivision review process.

These four laws are discussed in greater detail in Appendix A.

D. The Advantages of Preparing a Shoreline Access Plan

Developing an effective shoreline access plan calls for hard decisions and hard work. However, these efforts promise substantial advantages to towns and their residents that should compensate them for the time, labor, and money spent in laying the groundwork. Many advantages are inherent in the planning process itself. Several benefits towns can expect to stem from the planning process, in addition to improved access opportunities, are:

- Creation of a Prospective Basis for Action

Access planning will help foster a general public perception that municipal public access objectives and future actions furthering them are "fair". The town will be acting on the basis of a publicly-scrutinized, comprehensive strategy, and not merely reacting case-by-case. In short, the development of a shoreline access plan will allow towns to address, in a reasoned, systematic and foresightful fashion, those access problems described in the SPO's 1986 report that are applicable to their own community.

- Effective Citizen Involvement

By encouraging maximum public participation, towns can learn about the current and foreseeable future access needs of the community. In addition, realistic priorities for improving of existing access routes and facilities, as well as additional ones, can be established in light of other public concerns and budgetary constraints. Full public participation will also help assess available access routes.

- Encouragement of Voluntary Conveyances

The plan can serve as a basis for seeking voluntary conveyances, such as conservation easements, from landowners. The plan should contain a strategy and plans for financing acquisition of such conveyances. Landowners may be more likely to give when they realize the gift forms a crucial element of a larger, long-term access strategy.

- Promotion of State and Federal Consistency with Local Access Objectives.

Once developed, the plan will help realize public access objectives in various regulatory programs that

use the impact on public access as a criteria for approving development proposals. A number of Maine laws require consideration of impacts on public access.² Towns can use the plan in commenting on state and federal development proposals. The plan will provide a frame of reference for judging a given development's relationship to existing and potential public access routes, as well as a reasonable and defensible basis for making this judgment. One option towns should explore with the State Planning Office is incorporation of towns' access plans, and other coastal management ordinances, as amendments to Maine's Coastal Program (a process which requires federal review and approval). Federal agencies then would be required to conduct their activities consistently with town access plans. Army Corps of Engineers dredge and fill permits, for example, would have to be consistent with the access plan and implementing ordinance.

In short, communities across Maine are experiencing increasing problems providing adequate shore access, but public and legislative support exists to remedy the situation. Communities are not only required, but also have been given the legal authority and opportunity to plan and implement actions that protect and improve access to their town shores. By doing so, they will realize benefits that extend beyond improved access to more rational planning and growth, greater citizen involvement, easier land acquisition, and better intergovernmental coordination regarding access opportunities.

II. THE STEPS TO A SHORELINE ACCESS PLAN: PREPARATION AND IMPLEMENTATION

The following steps, described more fully below, are vital to an effective access plan:

- A. Form a committee representing a broad range of interests;
- B. Inventory existing and potential public access sites;
- C. Assess the community's current and foreseeable public access needs and desires;
- D. Develop clear goals and objectives regarding public access; and
- E. Develop a list of strategies and actions to implement the goals and objectives, with a reasonable timetable.

A. Forming a Committee: Getting Started

Extensive public involvement in developing an access plan is essential to an acceptable and workable plan. However, to set the basic agenda at the outset, it is necessary to form a committee of members of the planning board, comprehensive planning committee, conservation commission and other interested residents. Wider public involvement should then be sought, through questionnaires, meetings, and newspaper articles to gain information about points of access, and public perceptions of access needs and goals. A preliminary draft plan may then be prepared and submitted for review by the community in a series of special meetings, and for discussion in local newspapers. The plan should be revised to reflect public input, where appropriate. Comments should also be sought from the local regional planning council, which will very likely prove an invaluable resource in developing an effective shoreline access plan.

B. Inventorying Points of Access: Locating Public Access Ways

This step involves preparing of an inventory of access ways within the town (including "town ways" or "public roads", or other areas or strips of land owned by the town or designated and held by the town for the passage of the general public). Such an inventory should include identifying and evaluating existing coastal access facilities in the town (and perhaps in the surrounding area, if there are state parks or other public facilities used by town residents.) Factors to consider in evaluating access opportunities include:

- Availability and adequacy of parking at or near the access site;
- Type of access made available (Is it a footpath or boat ramp?)
- Current users of the site or access way (Is it accessible to the handicapped? Is it used by local residents only? Is it a regional resource for tourism?).

The inventory should not be limited to those points of access for which legal recognition of public rights has already been secured. "Traditional" public access ways over private property should also be recognized during the inventory phase. [For a more detailed discussion of this issue, refer to the Public Access Series publication "Coastal Right-of-Way Rediscovery Programs"].

In some instances, legal and historical research will be necessary to determine ownership or current legal status of the public's right to use a given point of access or right-of-way. Towns should establish research priorities and concentrate on areas where preserving or enhancing access opportunities is particularly important to the community. This research is a critical step towns should take early in the planning process.

Some of the expense and labor of preparing an access plan can be avoided if towns look to outside sources for inventories that are already prepared. The local regional planning commission may have prepared a regional or county-level accessway inventory.³ The State Planning Office and the Department of Economic and Community Development may also be able to tell towns about completed research that covers their area.

Towns should develop, and update as necessary, a list of public rights-of-way (ROWS), access easements, town landings, and beaches. This "bookkeeping" will prevent towns from losing track of access opportunities over time. Public rights can be lost (as a practical if not legal matter) if abutting landowners deliberately or inadvertently conceal access ways with vegetation or structure. Towns should maintain these access ways and prevent landowners from using them for purely private ends. Obviously, awareness of the location of access routes must precede efforts to prevent their obstruction. Once a list of routes is generated, towns may wish to publish it, or simply make it available upon request. The public importance of the access way and the attitudes of abutters (who may object to increased public usage) may shape how the town chooses to handle this information.

In many coastal communities, there are likely one or more public ways or easements which have been long neglected. Towns need to locate these access opportunities before asserting the public's legal rights to them. Towns may take the following steps in conducting a thorough search:

- Consult the town clerk's records, maps, road indices, and assessor's maps.

In this way town officials may locate old town ways and public easements that have been neglected.

- Search tax records at the town hall.

Such a search may reveal areas for which abutters have not been paying property taxes; it is highly possible these lands weren't assessed property taxes because the town owns them.

- Examine deeds to coastal properties.

Town ways may have been incorporated when the land was first platted. Time and changes in ownership may have resulted in neglect but not abandonment of these legal rights. In some cases, title searches will be necessary to determine the location of public ways. While this is often a lengthy and sometimes costly process its importance cannot be overestimated. The granting language in the deed should be carefully considered. Although in Maine a coastal landowner is presumed to hold title down to the mean low water mark, a deed may expressly only grant rights down to the mean high tide line. (If, for example, a deed conveys ownership "to the water or sea," the upland owner's title includes the intertidal zone.) In the absence of a conveyance extending to mean low water, the intertidal zone may be retained in State (or even municipal) ownership or may have been separately conveyed to another private landowner. Careful research at the registry of deeds is necessary.

- Distribute questionnaires and hold public meetings.

Through these devices, towns can effectively consult with long-time residents who can point out traditionally used ways or paths. Also, extensive public participation will help establish research priorities and evaluate the sufficiency of existing access opportunities. Towns should also actively solicit the views of local societies, whose records and expertise can be extremely helpful.

Once public rights of access have been identified, litigation in some cases may be necessary to secure legal recognition and/or to clarify ownership. This is especially so where rights to the path or way have been informal, i.e., not expressed in a deed. There are several legal doctrines for preserving existing public access ways that have been neglected or are not clearly traceable to a deed. These doctrines include easements by prescription, custom, and dedication. For details of these legal approaches, please see Appendix B.

C. Identifying Community Access Needs

By determining the community's needs for access, a town can begin to develop an action plan to meet those needs. Also, the town will have established a reasoned, principled, and fair basis for future actions to facilitate public access.

This part of the plan should include:

- Description of current uses of the town's shoreline

These uses include activities such as walking, shore harvesting, fishing, boating, and various forms of recreation. This description should be as complete and detailed as possible, and should categorize uses as commercial and recreational.

- Prediction of future, foreseeable uses of the shoreline

Examples include expanded recreational activities as well as aquaculture and related industries. Environmental improvements may make these and other public uses feasible in additional areas.

- Projection of trends in demand

Based on current and foreseeable shoreline uses, towns should project changes in uses of the shoreline over a 5- to 10-year period. The appropriate regional planning commission may have useful data projecting regional growth and demand for access facilities. By looking forward, towns can better devise an action plan, and justify steps taken to address or avoid anticipated problems.

D. Stating Goals and Objectives

Once existing access opportunities and both present and projected demand for access facilities are identified, towns should specify their goals and objectives for protecting and improving public access (their "wish list"). These goals should be based on problems identified in planning phases A and B --

discrepancies between the demand for access and the supply of access opportunities. This section should include both general and specific statements regarding public use of the shoreline.

Public access goals and objectives should be geared to each town's unique circumstances. However, access plans developed by other communities can help show how to structure this section and what types of concerns to address. For example, the City of South Portland's Greenbelt Plan provides a useful model. Its goals indicate that in designing an effective access strategy it is essential to:

- identify and clarify the implications of legal issues that may affect plan implementation;
- develop a strategy for funding implementation of access goals, which may include land acquisition; and
- design a public education program to inform residents of existing access opportunities and efforts to expand them.

While other goals and objectives will be unique to each town, all should be as specific as possible, to provide maximum guidance and legal support for ordinances enacted to carry out the plan.

E. Developing the Action Plan: Implementation Strategies to Achieve Town Goals and Objectives

Once a town has determined what it has and what it wants in the way of public access, the question arises "How do we get there from here?" Effective strategies and actions to achieve public access goals depend on each town's unique circumstances and the imagination of local officials and interested citizens. Towns should attempt to develop an agenda and timetable to meet existing and future access needs, as well as a strategy for implementing the plan. Ideally, such a strategy will blend regulatory (e.g., ordinances) and non-regulatory (e.g., acquisition, donation, and capital improvements) measures. Specific tools and techniques available to towns for plan implementation are discussed in detail next in Section III.

The plan should include explicit land use standards for evaluating development proposals' effects on public access. If, for example, preservation of shore harvesters' access is an important local goal, the plan should indicate this and specify how impacts upon this form of access will be assessed. Without such standards, towns will be at a substantial disadvantage in efforts to control impacts of development on public access.

Towns may be able to obtain financial assistance for comprehensive shoreland and harbor planning through the Office of Comprehensive Planning, Department of Economic and Community Development (DECD). The Local Coastal Planning Grant Program is funded by grants from the federal Office of Ocean and Coastal Resource Management.⁴

III. Methods for Providing Public Shoreline Access: A Review of Market-Based and Regulatory Techniques

This section describes a variety of regulatory and market-based tools and techniques Maine towns can use to preserve and expand public access opportunities. Reference is also made to the vital role private conservation organizations can play in promoting public access.

In devising its action plan, a town will need to evaluate the regulatory and market-based tools described in this section to determine which are most appropriate to it. The acquisition and zoning strategies, described and illustrated by examples, are not offered for adoption by towns in full. One or more of these policy tools may suit the needs and tastes of a given community. It is hoped that understanding of the techniques described will stimulate discussion and the creativity of local communities, in addition to offering tangible options to improve public access. Ideally, the planning process itself will, by heightening awareness of local needs and resources, suggest other options compatible with local circumstances. All of these policy tools will need to be tailored to respond to local conditions prior to adoption.

Options for improving public access opportunities fall into two broad categories: acquisition and regulation. The former involves strategies for various legal interests and agencies to purchase or receive a donation of property rights that advance public access. Regulation involves the use of zoning ordinances and other land use requirements to control or direct development to enhance or preserve public access opportunities. Each of the tools and techniques described has pros and cons which affect its utility in a given situation. Most communities will wish to combine zoning measures with an acquisition strategy in designing their action plan.

A. ACQUISITION

Towns wishing to acquire greater shoreline access can do so through direct purchase, receiving gifts of land, land trades, or through some combination of these.

1. Purchasing Rights of Access

Towns can utilize several related methods to acquire land: purchase of the full fee interest or lesser property interests, purchase at less than full market value, eminent domain, and land banking.

a. Buying Full Fee Interest

Fee simple title to a piece of property gives the holder of the fee, the landowner, the right to exclusive use and possession of the land, subject only to the restriction that it not be used in a way that is inconsistent with zoning regulations and other applicable law. The major advantage of a town acquiring fee ownership of access areas is this broad right to use the land however it desires to carry out the goals of the access plan.

There are, however, several disadvantages to purchase of the fee. First, towns may be required to buy more land than is actually necessary to improve access at a given site. Purchase of a lesser property interest such as an easement at a lower cost will be a preferable option in cases where acquisition funds are limited and ownership of an entire parcel unnecessary.

Second, municipal ownership will remove land from the property tax base. Highly valued coastal property can be expected to generate sizeable revenues. Thus towns may wish to own as little as possible.

Third, by increasing their land holdings, towns will increase their risk of liability. Although the risk of being held liable for injuries at a municipally-owned recreational area are slim, towns should consider the increased risk they do face in making the decision to buy land to improve access. (Liability of municipalities and landowners who make their property available to the public for recreational access is discussed in a separate guide in the Public Access Series).

Fourth, purchase of the full fee title is perhaps the most expensive option for providing public access, whether towns purchase land on the market or exercise their power of eminent domain. Coastal property in Maine fetches a high price on the market. In addition, coastal properties are desirable and as a rule sell quickly, especially in areas such as southern Maine where access problems are most acute. Government agencies may not be able to act quickly enough to take advantage of market opportunities. Given this fact, the role of land trusts and conservation organizations in providing and managing access opportunities takes on added importance (see Section C below).

In short, while purchase of the fee title is an effective way to guarantee public access, it may be of limited use in many cases, primarily due to cost considerations. However, towns should include an acquisition strategy in their access action plan. Funds should be earmarked for purchase of access sites of particular importance when planning for capital improvements. The limited money towns have for such purchases dictates that these funds should be spent only on the highest priority sites. Towns should explore purchase of lesser interests in land, such

as easements, where acquisition of more limited public rights will adequately serve access goals.

**b. Buying Lesser Interests in Property:
Easements, Conservation Easements, and Leases**

i. Easements and Conservation Easements

Public access rights can be acquired without purchase of a fee interest in a parcel of land. Rights of use can be bought separately from ownership of the land itself. In many instances, acquiring the right to use land will be sufficient to fulfill access objectives. An easement entitles the holder(s) of the right to use another's land for the purposes specified in the deed granting the easement. The owner granting the easement retains fee ownership of the land, subject to the rights of use conveyed to the holder of the easement. For example, a waterfront landowner may sell the town an easement allowing pedestrian passage across a particular part of the land from a public road to the water. The landowner would retain full ownership of the property, and would be free to use it in any way that did not interfere with the rights granted in the easement.

A conservation easement is a particular type of statutorily created easement or contractual promise in which a landowner voluntarily limits the purposes for which the property may be used to one or more "conservation purposes." These purposes include, but are not limited to, preserving land areas for public recreation and open space for the public's scenic enjoyment. The explicit restrictions on use and related public rights of access or enjoyment are spelled out in a conservation easement of indenture, which is recorded in the county registry of deeds. The easement becomes part of the title so that future owners must abide by it. A conservation easement may be held by a governmental body, or by a non-profit corporation or charitable trust with conservation purposes or powers.

Employing this approach, a landowner could grant an easement for access to the water to be used by members of the public, but explicitly limit the times, volumes, and manner of public use by express conditions in the easement. For example, an upland owner could grant an easement but limit the hours of use, restrict it to pedestrian use only, and limit activities to walking from one public area to another. This type of easement of lateral access along the dry sand area of a beach could greatly expand the area along which the public has lawful access for recreational activities.

The following language is excerpted from a conservation easement granted by a private landowner to a state agency to allow access for clammers and wormers over an unpaved road and specified footpaths to reach the intertidal zone of the shore.

Note how the drafters carefully specify the legal rights ceded and reserved and the responsibilities of the parties to the agreement. While this example grants access rights to a limited group, the language could easily be modified to grant access to the general public if that is the intent of the parties. If the holder of the easement is to be a town rather than a state agency, conservation group or local land trust, the drafters might opt to have the landowner grant affirmative rights for access rather than agreeing not to prohibit or charge for access.⁵

Public Access Easement

A. Grantor agrees to take no action to prohibit nor to exact a fee for pedestrian public access over the Protected Property to the intertidal zone of the shore _____ Bay, provided that:

(1) such use is for the harvesting of marine worms and shellfish, by persons licensed to do so, and is conducted in a manner that does not unreasonably disturb plant or wildlife habitat or the quiet use and enjoyment of private property by the owners, residents, guests and invitees of the Protected Property and neighboring lands, and

(2) access is limited to the two areas described below:

- * over an unpaved woods road off the east side of _____ Road, and thence along a footpath to the shore of _____ Bay; and
- * over a footpath off the west side of _____ Road to the shore of _____ Bay.

B. Notwithstanding any public use of the Protected Property and any insurance coverage therefor, neither the Grantor nor the Holder assumes any obligation to maintain the Protected Property or any part thereof for public use. This Public Access Easement, or any actual or implied permission to enter thereon should not be construed an invitation or license, and neither the Grantor nor the Holder assumes any liability to the general

public for accidents, injuries, acts, or omissions, and they claim all rights under Title 14 M.R.S.A. Section 159-A, or successor provisions thereof, and under the Maine Tort Claims Act at Title 14 M.R.S.A. Section 8101 et seq, or successor provisions.

C. Nothing herein should be construed as a grant of access over the Protected Property to the general public, nor a grant of access to any other portion of the Protected Property without the express permission of Grantor. Grantor retains the right to permit additional public access to the Protected Property, provided that such permission is limited to uses that do not result in degradation of the Protected Property and/or disturbance of plant or wildlife habitat.

Several considerations should be borne in mind by towns considering purchase of easement to facilitate access. First, for the easement to be useful it must connect to another area open to public use, most commonly a roadway. Adequate parking near the access point may also be needed.

Second, a landowner must be willing to tolerate public use of the property. Creating of an easement across the land will likely lower its market value. Tax incentives and other financial considerations (discussed below) may serve as inducements to create access easements despite these factors. If the town pays for the easement, the price will probably compensate the landowner fully for decrease in property value, at least in combination with tax benefits.

Third, there is a slight risk of exposure to additional liabilities. Although Maine law contains provisions that protect both the landowner and municipality that own and maintain the access way, the parties may wish to expressly provide for duties of maintenance and financial responsibilities in the event of injury to a member of the public using the easement.

ii. Leases

A lease is a familiar device for obtaining non-ownership interests in property. The rights of the lessee (the one who receives the right to use the property) are spelled out in a contract (the lease) together with stipulations of the time and manner in which these rights may be enjoyed. At the end of the lease's term (or upon earlier termination for breach by the lessee), all rights revert back to the lessor (the landowner). Because it involves merely a temporary compromise of the landowner's rights, acquiring a lease of property desirable for

public access will in many cases be considerably less expensive than acquiring of the full fee or an easement.

Because a lease is a contract, it is a very flexible device for creating access opportunities. Including the following terms in the lease agreement may be particularly beneficial in promoting public access:

- **Option to purchase:**

This contract term allows the town the option to buy the leased property, and perhaps credits rental payments toward the purchase. Such a provision may be advantageous where sufficient funds to buy the land or a suitable easement are lacking. Similarly, towns may wish to seek options or rights of first refusal on other parcels well-suited to achieving of access objectives.

- **Right of renewal:**

This provision allows renewal of a lease of fixed duration for one or more successive terms of a particular duration. The right to renew could be conditional, only being exercisable if the lessee has complied with negotiated obligations, such as adequate policing and maintenance of the property. This provision would allow for longer-term answers to access problems without the large expenditures associated with outright purchase.

- **Use restrictions:**

The decision to seek to improve access at a given site should be based on the access plan. Ordinarily towns will be seeking to allow a discrete number of uses, such as access for commercial clambers and wormers. Clarification that the land is being leased to serve limited types of users consistently with the access plan may assist the town in managing the area. Likewise, the lease can limit public use to certain seasons of the year. Generally, the more time and use limits the town is willing to accept, the lower the rent charged by the landowner.

- **Liability and duty to maintain:**

Including terms that specify responsibilities of the parties to keep the leased area safe will help eliminate confusion and enhance public safety. Likewise, towns may wish to agree to indemnify the landowner/lessor in exchange for other contract terms

favorable to the town. The risk of liability in regard to municipally-maintained access ways is minimal; therefore assuming this risk may be an acceptable way to advance access objectives. [Refer to 14 MRSA § 8103 sub §F, as well as the Public Access Series publication "Liability" for a further discussion of this issue.]

In sum, leasing lands desirable for public access is a cost-effective, short-term solution to access problems, if the right land is available. The ability to carefully tailor the lease to the objectives of the access plan make it an even more useful tool. However, since it is a market-based rather than regulatory technique of securing access, its utility is limited by an owner's willingness to lease. Participation by landowners and rental fees will both be subject to unpredictable market conditions. Towns may wish to direct their limited funds toward longer-term solutions.

c. Alternatives to Purchase for Full Market Value

Coastal property suitable for public access is likely to be expensive if purchased for full market value. However, if landowners can be convinced to sell the property for less than full market value or allow payment in installments, landowners may be able to reap tax benefits and help municipalities stretch their acquisition budgets.

i. Bargain Sale

A "bargain sale" simply involves sale of property for less than market value. The parties' agreement should specify their intent to enter into a bargain sale. By selling at less than market value, the landowner may enjoy two tax benefits: the difference between the sale price and the market value can be claimed as an income tax deduction; and, assuming the sale is at a profit, the landowner will receive a lesser capital gain than by selling at full market value, thereby limiting taxable income. Landowners considering entering into such an agreement should consult with an accountant or tax attorney to determine what, if any, tax breaks they would realize.

ii. Installment Sale

An "installment sale" may also offer financial advantages to both parties. This type of agreement involves payment over a number of years for a single parcel, or purchase of discrete parts of the land in series. The agreement should provide for management and maintenance responsibilities during the pendency of the sale, as well as any desired arrangements concerning use restrictions or liability.

The advantage to the purchaser is that only a portion of the price need be available as installments come due. However, government entities may be prevented from entering into such an arrangement due to limits on their authority to make prospective, binding financial commitments. Private landholding agencies are ordinarily not similarly restricted.

There are possible tax advantages for a seller entering into an installment agreement. By spreading payment of the sale price over several years, the seller realizes only a portion of the total gain each year. This may ultimately result in less tax imposed on the full amount realized.⁶ As in all real estate transactions, landowners should consult with an attorney to determine the financial arrangement best suited to their needs and conditions.

d. Eminent Domain

The power of eminent domain allows municipalities to force the sale of property. The major limitation on this power is the requirement that the land be for public use and benefit. Maine has granted this power to its municipalities. Developing of an access plan as part of a local comprehensive plan will lay the groundwork for demonstrating that using eminent domain authority to acquire access sites furthers a public purpose.

Although eminent domain permits acquisition of land not otherwise for sale, towns can expect no break on the price. The property's owner must be paid fair market value, otherwise a "taking" may occur. Also, townspeople may view exercising the power of eminent domain as coercive and heavy-handed.

e. Land Banking

Land banking involves public acquisition of land for public use or for later resale: a stock of properties is obtained and essentially "banked" by holding them in municipal ownership. These lands can be managed either by the town, a public corporation created specifically for that purpose, or by contract with conservation organization.

Land banking can be an effective growth management tool. Using its power of eminent domain, a town may purchase land to fund the bank despite resistance by real estate developers or owners. By taking full advantage of increases in the property's worth, a land bank can acquire capital for purchase of other lands and access rights. In addition, conservation easements or use restrictions could be added to the deed when the town sells land containing important access points.

Using a land bank to further public access objectives has several important drawbacks, however. First, Maine communities as yet lack the legislative authority to establish municipal or regional land banks. Second, acquiring enough land for the system to work could be cost-prohibitive for smaller communities. Third, a land banking system requires a level of financial and real estate development marketing skills that may be lacking among small town, volunteer planning boards, and town councils. Fourth, there is a legal argument that use of eminent domain to fund a land bank may not constitute land acquisition for public use, a constitutional requirement, thus embroiling the community in a costly legal battle over whether the acquisition is constitutional.

2. Voluntary Conveyances: Gifts That Improve Public Access

Much of the previous discussion about purchased access rights also applies to voluntary conveyance, or gifts of land. A land donor can impose the same limits, reservations, and conditions as when selling land, and may be entitled to additional tax breaks.

a. Unconditional Gifts

This type of grant involves an outright, no-strings-attached transfer of title. No complex negotiations are necessary, since neither price nor use restrictions need be discussed. This type of gift leaves future management responsibilities to the town or other organization that accepts the donation.

Towns obviously cannot wholly rely on largess in setting up an access strategy. However, a well-publicized access plan that demonstrates public need and community vision may encourage donations. The donors' sense of civic responsibility and desire to leave a lasting legacy to the community are strong incentives to give land needed for public access.

Persons who donate land to a municipality or qualified non-profit organization may also enjoy a tax break. A landowner voluntarily transferring land to such an entity has made a charitable gift and can claim a tax deduction equal to the fair market value of the property.

Landowners can also donate property for public access through their wills. These gifts "by devise", by the terms of a will, allow the landowner to retain full enjoyment of the property until death. In addition, by removing the property from the estate taxable at death, a landowner may be able to reduce federal estate and gift tax liability.

b. "Conditional" Gifts: Partial Interests in Land, Use Restrictions, and Retained Rights

A landowner need not give up all rights in land or allow unqualified use to facilitate public access. A landowner can condition a gift to tailor it to present needs and future wishes.

i. Gifts of Partial Interests in Land

Just as landowners can sell an easement to create an access site, they can donate an easement and either retain or otherwise dispose of remaining rights in the land. Likewise, landowners can provide for heirs and, at some future date, facilitate public access by granting a "remainder interest" to a community or conservation organization. An example would be to grant use of the property to certain named individuals for life (e.g., one's children) with the "remainder" (the fee interest) going to a designated organization upon the death of the last life tenant. Or a landowner may simply wish to retain a life estate and devise the remainder to a municipality or qualified conservation organization.

In general, a donor cannot claim an income tax deduction when giving up less than total interest in land. However, several exceptions may help make this form of gift financially feasible by allowing tax benefits that partially offset the value of the land donated. A landowner can claim a deduction for:

(1) Gifts of undivided fee interests

(e.g., the landowner and a conservation organization are made "tenants in common" - each has an equal and inalienable right to use the property; the landowner may pass this right to heirs at death.)

(2) Gifts of remainder interests in farms or residences

(see example above);

(3) Certain gifts in trust

(e.g., a landowner in a will funds a trust with a parcel of coastal property, to be managed by a conservation organization, with a designated class of beneficiaries, such as area shore harvesters); and

(4) Certain conservation contributions,

such as a conservation easement (see example on page -).

ii. Conditioning Use of the Land

A landowner can use several ways to place conditions on the use of land given to promote public access. Awareness of the ability to control how donated land may be used in the future could encourage landowners to consider providing public access compatible with other interests. Two methods are by conditional transfers and deed restrictions.

a) Conditional Transfers

In essence, this type of transfer deeds the land to a grantee on the condition that the land be used only in a specified manner or by specified persons. A landowner has two basic options in making a conditional transfer. First, the deed can provide that the property will revert back to the grantor (or successors or assigns) if the grantee (a town or conservation organization) fails to honor the conditions of the grant. The deed can be written in such a way that this reversion occurs automatically or takes effect only by an act of the grantor. Second, the deed can provide that if stipulated conditions of use, such as a requirement that the land remain open to all on an equal basis for outdoor recreation, are violated, title shifts to a third party. Under this scenario, the party holding the "springing use", as it is called, is relied upon to enforce the conditions of the gift.

Depending on how the deed is worded, if its conditions are violated, the landowner (or successor) will have a right to reenter the property or will obtain title to the property automatically. Maine law limits the term of these prospective rights, i.e., the effective period of the conditions of use, to thirty years, unless they were established for public, religious, or charitable ends, or a government entity is the grantee. Thus, grants conditioned on use for public access would likely endure beyond thirty years.

Creating these property interests as a way to ensure access has other drawbacks beyond the potential thirty-year limit. First, a measure of diligence is required of the owner or whoever holds the reserved rights: the land must be watched to see that the conditions are honored over time. Second, if named individuals or descendants are to hold these rights, use of this device assumes their values will be compatible with the grantor's desire to do public service by promoting access. Third, a conditional transfer of this type will make the property less marketable and reduce its value. In addition, because the right retained by the grantor has some value, the grantor is probably entitled to a smaller tax deduction than if donating the property free and clear.

The technique does have corresponding advantages. It is simple to create, requiring only addition of the proper words to a deed. Also, the landowner has an obvious incentive to comply with the access conditions; if these conditions are not respected, title to the property may be lost.

b) Deed restrictions

This technique has similarities to both conservation easements and conditional transfers. However, the differences are critical. Deed restrictions, often referred to as "covenants," are limitations on the use of property that are included in a deed at the time of transfer. Violation of these conditions gives a legal right to one or more persons or entities to enforce the conditions. Title to the property is not at risk as a result of breaching the conditions. Courts tend to view these types of deed restrictions with a jaundiced eye. Contemporary circumstances are considered when the court decides whether the conditions will be enforced. Thus, future changes in land use surrounding an access site created via deed restrictions could alter its fate.

Major drawbacks of this technique are the uncertainty of effective enforcement and tax considerations. A landowner who has burdened land with deed restrictions can't claim the resulting diminution in value as a charitable gift. The right to enforce the restrictive conditions will be held only by the original landowner (the creator of the conditions) and the successors in title, if the landowner conveyed away the property to which the conditions apply. Ordinarily, only those whose land benefits by the conditions may enforce them.

3. Trading Land

Towns may be able to enhance access opportunities by trading parcels of town-owned land for desirable access sites. Ideally, in such a transaction no cash need be exchanged and the private landowner and town will each receive sites better suited to their needs. Towns would probably incur the appraisal expenses for each property and, depending upon local ordinances and/or applicable statutes, secure formal approval as might be required to trade municipal property. Federal tax laws contain rules on "like-kind exchanges," which may allow certain landowners to defer payment of federal income tax by trading for municipally-owned land, or purchasing it with the proceeds from another land sale.

Local access plans should identify lands, if any, available to trade for shoreland or access rights, and specify that land exchange is part of its action strategy. This advance notice will help eliminate charges of favoritism if trades are later negotiated with private landowners.

A recent land exchange between the Town of Stonington and area developers illustrates how this technique may be used to promote public access. In 1974, the Town acquired rights of way to several lots in the Cat Cove subdivision for its nonpayment of taxes. In May 1988, the Town traded certain rights of way for conservation easements to the shore, for the exclusive use of licensed clambers and wormers. As a result of the trade, shore harvesters have legal access to the sea, and there is no need to press claims of customary or prescriptive rights.

B. LAND USE REGULATION

Towns can utilize their powers of land use regulation to improve access to shorelines. Techniques include incentive or bonus zoning, transfer of development rights, exactions, impact fees, and residency restrictions.

1. Incentive or Bonus Zoning

This zoning technique allows developers to exceed the limitations of otherwise applicable zoning regulations in exchange for providing specific amenities or environmental protections desired by the community. Most commonly, this technique may be used to promote public access by allowing a developer to exceed density restrictions (i.e., number of housing units per acre or minimum lot size), in exchange for providing access at or near the development site. This type of trade-off must be explicitly provided for in the zoning ordinance; it should specify that if applicants provide a certain amount of access, they would be allowed to increase density over the base amount by a certain percent or according to a specified formula.⁷

The Town of Boothbay Harbor, Maine uses the following density bonus program:

Density: In sewered areas where they are permitted, the lot size requirement of 10,000 square feet may be reduced to 6 units per acre as a density bonus with the approval of the Planning Board. Planning Board approval shall be based upon a determination that the development meets all other requirements of the ordinance and that it will result in a benefit to the public, such as public waterfront access, a public boat ramp, or additional public parking.

Building Size Limitations: There shall be no more than 4 units per building. This limitation may be increased to 6 units per building by approval of the Planning Board in accordance with the requirements of [the] paragraph 2 above.⁸

An ordinance of the Town of Orleans, Massachusetts, illustrates a variant of this technique that employs a special permit procedure.

3:9 Shoreline District(s)

To protect use of shoreline areas, a Shoreline District is hereby created covering areas so designated on the Zoning Map by Town Meeting vote. Such Shoreline Districts shall be considered to be superimposed over any other districts established in this Bylaw. Land in the Shoreline District shall be subject to the requirements of this section in addition to those applicable to the underlying zoning districts.

3:9-1 Use Regulations

Uses shall be authorized only if they are allowed in the underlying district and they also meet the following:

3:9-1-1 To be allowed without necessity of a special permit a use must meet all of the following:

- a. Be functionally dependent upon waterbody access, for example a marina or aquaculture; or be unequivocally oriented to and substantially benefitting from waterbody access or visibility, such as a motel or restaurant designed to take advantage of waterfront views; and also
- b. Provide opportunity for pedestrian access to the water side of any buildings; and also
- c. Cover less than ten per cent (10%) of lot area with buildings; and also
- d. Place no building, parking area, or disposal facility within one hundred (100) feet of mean high water unless functionally dependent upon closer proximity.

3:9-1-2 All other uses require a special permit from the Board of Appeals. Such permit shall be granted only if the Board of Appeals makes the following determinations:

- a. The proposal takes good advantage of the unique qualities of that location, including proximity to a waterbody; and also
- b. Pedestrian access to the water and water visibility are reasonably provided for, unless

precluded by safety or similar concerns arising from the nature of the use; and also

- c. Shoreline ecology is carefully protected through location of proposed alterations, and any compensatory or mitigating measures proposed; and also
- d. Every reasonable effort has been made to provide for visibility of the shoreline and water from public ways and nearby developed properties, and to avoid visual dominance by manmade features as viewed from the waterbody or opposite shorelines.⁹

The advantages and disadvantages of incentive zoning techniques make it a tool more suited to some communities' needs than others. A principal disadvantage of these techniques lies in the "incentive" (e.g., higher density) given for providing access. Towns could end up sacrificing other community amenities in the process. For example, dense residential developments, even with public access on-site, could undesirably alter the character of a community. Similarly, dense waterside development may reduce environmental quality to the point where the uses for which access was sought are no longer possible. (For example, additional housing commonly increases the amount of sewage discharged, to the detriment of coastal fisheries and recreation.) Another disadvantage is that this technique is essentially reactive: a private land owner's decision to develop a piece of property is necessary to trigger the process. Finally, incentive zoning may create the perception of political favoritism, since decisions to allow developers to take advantage of incentives will be made case-by-case. However, creating explicit ordinance standards and restricting situations where incentives are available to instances where a public goal will be served in a manner specified in the local comprehensive plan should prevent abuse and the appearance of abuse of this access strategy.

The primary advantage of this zoning technique lies in its flexibility and ease of application. Areas in which the incentive system should be used, i.e., where public access goals can be advanced by influencing land use decisions, will be identified in the access planning process. Criteria spelled out in ordinances establishing the zoning system can be applied by existing planning boards or similar decision-making bodies.

2. Transfer Of Development Rights (TDRs)

Transfer of Development Rights (TDR) is a system which builds on the fact that certain legal rights inherent in land ownership may be separated from the rest and transferred to another owner. For example, the owner can sell the entire

property or parts of it, encumber it with easements, lease it, develop and use it within the bounds of applicable law, or sell the future right to develop the property, while retaining all of the other rights. A TDR system creates a market for the future right to develop property for a particular use.

The purpose of a TDR system is to shift development away from certain areas to areas where higher density development is acceptable, while compensating the owner whose land becomes restricted. Towns can designate areas they hope to use for public access as "preservation areas," and thus restrict development that would curtail public use.

Unlike zoning, TDR systems have a built-in mechanism for compensating landowners for restricting future use of their land. In theory, a TDR system generally includes these elements:

- Preservation and receiving zones in the community are designated.
- Development is forbidden (or restricted on the bases of environmental or use impact criteria) in preservation zones.
- Landowners in preservation zones are given development rights certificates (DRC's) in compensation for their loss of development rights (i.e., loss of "highest and best use" for the property).
- Landowners in receiving areas may purchase these development rights which allow them to develop at a higher density than otherwise permitted under applicable zoning regulations.

A TDR system can be modified to meet the needs of a given community, but three main issues need to be addressed in setting up any TDR scheme¹⁰: (1) Will participation be voluntary or mandatory? A mandatory system is reliable: development in critical or desirable access areas will assuredly be restricted. A voluntary system relies upon whether the DRC's will be accepted. However, mandatory TDR schemes are more vulnerable legally.¹¹ (2) Will DRC's be allocated according to the property's assessed value or acreage. (3) How will receiving zones be designated? Designated receiving zones will bear the brunt of increased development pressures-especially if the TDR plan allows exceptionally high density development.

Creation of TDR's can also shift tax burdens and further widen the gulf between rich and poor. Landowners in the preservation zone will receive the economic benefit of selling development rights, and perhaps receive a tax break since their

land will have a lower use assessment value. This could place a greater tax burden on those living in the more developable portion of town. For these reasons, instituting a TDR system could be politically difficult.

In addition, towns should take care to locate receiving zones in areas able to handle higher density development. The adequacy of the infrastructure as well as a host of other environmental and social considerations should be aired during the planning process.

Narrow easement corridors and small parcels of land very often serve public access objectives. TDR's, on the other hand, appear most suitable for preserving larger areas of land for particular uses, such as open space or farmland, thus raising the question of whether the system is a truly useful tool for promoting public access.

3. Exactions

This technique, which must be established by ordinance implementing the access plan, requires land developers to dedicate an interest in land for public access, typically an easement to or along the shoreline. This opportunity arises when developers seek subdivision or site plan approval. Towns have ample legal authority to condition land development approval on the provision of public access.¹²

The major problem with exactions is the compulsory nature of the dedication required; resistant landowners may challenge the exaction as a taking of private property without just compensation. The U.S. Supreme Court recently ruled that there must be a close relationship between the exaction and the regulatory goal the exaction is intended to further.¹³ This means that, in the case of a subdivision, exactions for public access or other amenities must be substantially related to impacts associated with the development. If the development will have no adverse impact on physical access to the shore, for example, either directly or cumulatively, exactions to require such access would be legally vulnerable. Likewise, the access exacted must be in proportion to the development's impacts and relate to the kind of access that is adversely affected. A project that adversely affects visual access, for example, cannot be used by a town as an opportunity to exact interests in land to meet physical access objectives.

The Town of Narragansett, Rhode Island, has adopted zoning provisions that, in general, require developers to dedicate land for public open space and, where applicable, for access to the seashore. (It should be noted that the Town was one of 21 Rhode Island coastal communities expressly granted authority to adopt an exaction ordinance.) The following is an excerpt from the

original proposal, which the Town adopted in slightly modified form. The proposal was developed from North Carolina's public access policy.¹⁴

Article 2. Public Access Dedication

Section 1. Purpose. This Ordinance is enacted to insure that future land development within the Town provides for public access to the Atlantic Ocean. This Ordinance may be cited as the "Public Access Ordinance" of the Town of Narragansett, Rhode Island.

Section 2. Definitions. For the purpose of this section:

- a) "Developer" shall mean any person undertaking any development as defined in this section.
- b) "Development" shall mean any subdivision, whether or not the recording of a plat is required; any horizontal condominium; and any multiple dwelling unit residential building, including, but not limited to, apartments, condominiums, hotels, motels, special planned developments, planned unit development, and group development projects. Development shall also mean any commercial or industrial building or structure. The term shall, when appropriate to the context, include the act of establishing or creating any of the foregoing or the result of such activity.
- c) "Public Accessway" shall mean a piece of land transferred to public use for access to the Narragansett Bay and to the Atlantic Ocean. Public accessways may be dedicated by right-of-way, perpetual easement, or fee simple title transfer.

Section 3. Requirements. As a condition of development, the developer shall dedicate land, pay a fee in lieu thereof, or combination of both, at the option of the Town Council upon recommendations made by the Zoning Board, for public access at the time and according to the standards in this section.

Section 4. Formula for Fees in Lieu of Public Accessway Dedication. If it is determined that no public accessway is to be located in whole or part within the proposed development to serve immediate or future needs of the

residents, the developer shall, in lieu of dedication, pay a fee. This fee shall be equal to the value of the land acreage and required improvements as determined herein for dedication.¹⁵

4. Impact Fees

Impact fees, established by ordinance, are charged to land developers based on the development's costs to the public, e.g., demand on city sewer system. Charges are usually based on a predetermined fee schedule and/or formula set by the ordinance, not decided case-by-case. Ordinances should include impact criteria that specify how a town planning board will determine whether a given development proposal unduly impacts access opportunities or fails to agree with comprehensive plan provisions. Impact fees, based on a professional assessment of the monetary diminution of public access and other rights due to the development, may then be charged. Funds acquired in this manner can then be used to purchase access rights.¹⁶

The Integrated Subdivision and Site Review Ordinance of the Town of Islesboro establishes a system for assessment and payment of impact fees. The following is excerpted from that ordinance:

A. General Provisions

The developer shall provide the Board with an assessment of the financial impacts of the proposed development on public services and facilities.

When the net public costs, attributable to the proposed development, for the public facilities and services are greater than the existing public costs the developer shall make provisions acceptable to the Board for compensating the Town for such additional net public costs.

B. Public Costs, Defined

Public cost is capital outlay (and resulting debt service charges) attributable to the development under consideration. The term capital outlay shall consist of the capital cost to the Town to provide the necessary public facilities and services to the proposed project and/or to the new residents and their children calculated to result from the project if the development under consideration is approved by the Board. Public cost must be a positive integer...

D. Public Facilities and Services to be Considered

In determining the impacts attributable to developments being reviewed under this Ordinance, the Board shall consider impacts on the following public facilities and services: ...

E. Determination of Public Cost and Net Public Costs

Determination of public costs and net public costs shall be made by the Board, using the Proportional Valuation Method for non-residential projects and the Per Capita Multiplier Method for residential projects, or upon its own motion or at the request of the developer, by three qualified experts.

If qualified experts are used to determine the impact of the project, two shall be appointed by the Town and one shall be appointed by the developer. Expenses involved in making such determinations as may be required shall be paid by the developer.¹⁷

Martin County, Florida has a similar program to promote recreational beach access. This program is a negotiating tool in planned unit development (PUD) review. Developers pay the impact fee in exchange for more flexible development restrictions under the PUD review process.

The fee is determined by detailed formula. The program makes assumptions about the demand of new residents for recreational beach lands. The demand is translated into linear foot demand levels, applying Florida Recreational Planning Standards. A per capita fee is then computed, based upon the cost of beach property. This figure is translated into a fee per dwelling unit for various types of housing. The proceeds from the fee are used to acquire and maintain beachfront property, and to service bond issues. PUD projects that provide their own beach property receive a credit for the fee.

The creative Martin County program demonstrates how a municipality can tailor an impact fee program to fund specific public needs. Impact fees can augment public funds for acquiring public access to the waterfront, funding public boat slips, and developing or maintaining public dock facilities. Additionally, an impact fee program could charge developers for the cost of replacing displaced commercial fishing berths or marina services.

5. Residency restrictions

Perhaps the central goal of access planning is to meet the needs of area residents. Towns may wish to establish a system whereby residents' rights of access receive preferential treatment. Although the goal may be laudable, discrimination of this type can raise a number of legal issues and complicate implementation of the access plan.

Several years ago, a New Jersey town, Avon-by-the-Sea, enacted an ordinance that in effect allowed town residents preferential access to the community's beach. The ordinance favored local users by charging the same for a monthly beach pass as for a full season pass, and by restricting sale of season passes to town residents, taxpayers, and their immediate families. The New Jersey Supreme Court invalidated the ordinance on the grounds that the State Legislature had not given the town the authority to discriminate against non-residents, and that the public trust doctrine allowed all persons access to the shoreline on equal terms.¹⁸

There are also potential constitutional problems with discriminating against non-residents in providing access to municipally-controlled sites. Any such restriction must bear a rational relationship to a non-discriminatory public objective to avoid charges that the ordinance is a denial of equal protection under the law. In other words, residency restrictions are apt to provoke legal challenges, especially where demand on access facilities is acute. Towns should evaluate the need for residency restrictions and, if found necessary, seek legal counsel to aid in drafting a defensible ordinance.

In Maine no state law expressly allows towns to discriminate against non-residents in controlling beach access. In addition, non-residents denied access to this state's shore could claim an infringement of constitutional rights - a denial of equal protection under the law. This argument appears to have some merit, although the Maine Supreme Court has ruled in an analogous context (access to harvestable clams) that distinctions can be made between residents and non-residents in allocating a resource, to the extent that the residency restriction bears a reasonable relation to conservation or some other legitimate legislative objective.¹⁹ A similar preference for residents is evident in a recent amendment to the law governing assignment of mooring privileges by Maine's municipalities and their harbor masters.²⁰

C. THE ROLE OF CONSERVATION ORGANIZATIONS AND LOCAL LAND TRUSTS

Members of the public need not rely completely on the government to solve local access problems. Donations to or

acquisitions by conservation organizations such as the Nature Conservancy and the Maine Coast Heritage Trust may preserve open space valuable for public access. In addition, local people can take matters into their own hands and form a local land trust to acquire and/or receive donations of property rights guaranteeing access.

A land trust is a not-for-profit corporation organized to acquire land for conservation purposes. A trust can be established explicitly to acquire shorelands integral to a community's access strategy. Often a trust is organized and run by members of a town or adjacent towns to acquire interest in lands within that area.

Its local bias is a land trust's major strength. Larger conservation organizations, concerned with a larger territory and answering to a larger constituency, tend to prioritize their acquisitions on the basis of a site's regional or national significance in ecological terms, rather than its local value and utility for public access. Local land trusts can focus their efforts and funds on areas of local significance. The relative informality and small size of the trust may help it act quickly and efficiently where the bureaucratic machinery of governments and larger conservation groups would bog down. Once its priorities are set and money raised, the trust may be able to respond with the speed required by an active real estate market.

Not only can conservation organizations complement public acquisition efforts, these groups can also accept donations of property rights. Land trusts should seek tax-exempt status under section 501(c)(3) of the Internal Revenue Code so that landowners can receive tax breaks if they grant land to the trust. Those wishing to organize a land trust should seek assistance from one of the larger land protection organizations, such as the Maine Coast Heritage Trust, when forming a non-profit corporation and drafting documents necessary to secure tax-exempt status. Ultimately, the conservation organization will probably need the services of a lawyer to finalize its status.

The River Green acquisition of the Kennebunkport Conservation Trust illustrates the ability of a land trust to preserve access points. The area purchased, although small (about 3/4 of an acre) and of modest ecological value, is an important point of visual access and a destination of some who chose to enjoy the river's edge. The Trust was formed to preserve this locally important open space. With the necessary money raised through private donations, the Trust agreed to purchase the site, with payment to be made in three annual installments.

In sum, local citizens should look to their own resources, as well as government expenditures, to resolve access problems. In drafting access plans, towns should encourage formation of land trusts and educate their residents about how these organizations are created and operated. Likewise, towns should be sure to inform larger conservation groups of their access plans and, working cooperatively with these organizations, encourage provision for public access on lands owned or managed by them whenever possible.

IV. SUMMARY AND CONCLUSIONS

Recognizing the urgent need for all towns to plan for Maine's future, the Legislature enacted the Comprehensive Planning and Land Use Regulation Act which requires towns to undertake comprehensive planning and to enact zoning ordinances or other measures to carry out the plan. The new law, reinforcing requirements and authorities in existing state laws such as the Coastal Management Policies Act, requires comprehensive planning to include consideration of public access needs and opportunities. The State will provide some funding and technical assistance to towns for planning and implementation.

Preparation of a public access plan will serve the community in several ways. Towns will learn, through public participation, where existing and desirable access sites are located. Moreover, an open planning process will ensure greater public acceptance: the plan will be a "fair" basis for towns' later actions to promote or protect access routes.

Towns need not start from scratch in developing a public access plan. Other communities have developed plans that may serve as models. Several components are vital to an effective plan:

- an inventory of existing and desirable access ways;
- a description of the town's access needs (such as those of shore harvesters and recreational users);
- a statement of the town's goals and objectives in terms of public access; and
- an action plan for realizing those goals.

This last element could include zoning changes, acquisition strategies, and/or improvement of existing access ways. The access plan should be unique to each town and reflect the community's particular goals and circumstances. In certain instances, towns may need to resort to the courts for clarification of their rights to access easements. In other cases, latent rights of public access may be useful negotiating tools in securing suitable public access opportunities.

In short, prompt, proactive action is needed to maintain customs and usages many Mainers have long taken for granted. Public access planning will best ensure that those ways to the sea that have been so vital in the past remain open to the public today and in the future.

NOTES

1. Maine State Planning Office, Public Access to the Maine Coast (August 1986).
2. See, e.g., Great Ponds Act, 38 MRSA § 393(1); Coastal Wetlands Act, 38 MRSA § 474; Site Location Act, 38 MRSA §§ 482(3), 484(3); and Subdivision Review Act, 30-a MRSA § 4404(8)(F).
3. See, e.g., Southern Maine RPC (1983); Penobscot Valley COG (1987); Greater Portland COG (1986, 1987), in bibliography.
4. For more information on the Grant Program, contact Fran Rudoff at the Office of Comprehensive Planning, Department of Economic and Community Development.
5. Excerpt from conservation easement provided courtesy of Maine Coast Heritage Trust. For additional examples of easement provisions for different purposes, contact Maine Coast Heritage Trust or your local land trust.
6. Changes to federal tax law in 1986 removed some of the advantages of installment sales for professional real estate investors.
7. Sources of authority for using these zoning techniques are the Comprehensive Planning and Land Use Regulation Act of 1988 and town' "home rule" powers (see Appendix A). Preparation of an access plan which these zoning tools are intended to implement will greatly add to town ordinances' defensibility in addition to determining the areas in which these techniques should be used. The plan should demonstrate that there is a rational relationship between its objective, improved public access, and the means chosen to that end. By clearly establishing this relationship, towns can forestall complaints from landowners that regulatory actions geared to improve access to the shore are "takings" of private property.
8. Revised Zoning Ordinance, Town of Boothbay Harbor, Maine (March 2, 1987).
9. Zoning By-Law, section 3:9 - Shoreline District, Orleans, Massachusetts (1987).
10. See generally McGilvery, et al., 25, 28 (1985)
11. Several potentially troublesome legal issues are associated with mandatory TDR systems. In general, legal difficulties center on whether or not establishing of a TDR system violates "takings" provisions of the federal and state constitutions.

Because DRC's only have value if market conditions create a demand for them, landowners may argue that requiring them to accept DRC's in compensation for the loss of valuable development rights is an unconstitutional taking. Courts have decided both ways on this issue. See, e.g., Fred F. French Investing Co., Inc. v. City of New York, 350 N.E. 2d 381 (1976) (uncertainty in value of DRC's resulted in unconstitutional taking); Penn Central Transportation Co. v. City of New York, 366 N.E. #2d (1977), aff'd on other grounds 438 U.S. 104 (1978). Apparently, where the TDR system is more stable and there is a market for the DRC's, a court will be less likely to find a taking.

Second, landowners may claim that DRC's are not the "just compensation" required by the Constitution when private property is taken for a public use. Compensation in the form of certificates of uncertain and conditional value rather than money may be problematic. Third, a landowner could maintain that imposing a TDR system is not in fact a legitimate exercise of police power, but is rather eminent domain under another guise. If one accepts the notion that the right to develop is a valuable "stick" in a landowner's bundle, a TDR system is not simply regulating but exacting private property for public uses.

Finally, state law and local ordinances must empower enactment of a TDR system. In Maine, the home rule statute, (38 MRSA sec. 1917), and the Comprehensive Planning and Land Use Regulation Act together empower towns to plan and regulate for improved public access through appropriate ordinances (see Appendix A).]

12. In the Subdivision Review Act, 30-A MRSA sec. 4404 requires that towns may only approve subdivisions that do not have an "undue adverse effect" on "any public rights for physical or visual access to the shoreline." More to the point, 30-A MRSA § 4403(5) allows a town to approve subdivisions upon any terms and conditions that it considers advisable to satisfy the criteria listed in section 4404 and to satisfy any other regulations adopted by the authority, and to protect and preserve the public's health, safety, and general welfare. The Comprehensive Planning and Land Use Regulation Act and the Coastal Management Policies Act also provide relevant legal powers (see Appendix A).

13. Nollan v. California Coastal Commission, 483 US 825 , 97 L. Ed. 2d 677 (1987).

14. Although requiring exactions is a delicate business after the U.S. Supreme Court's Nollan decision, this model carefully lays out the rationale and public purposes behind the exactions. These steps are essential to demonstrating the connection between the required exaction and the problem to be remedied.

15. Draft Proposed Shoreline Access Regulations, Narragansett, Rhode Island (August 13, 1987).
16. The Comprehensive Planning and Land Use Regulation Act, supra, allows towns to assess impact fees when specified conditions are met, such as reasonably relating fees to infrastructure improvements (e.g., sewer extension) necessitated by the development and spending fees only for purposes for which they were collected. These purposes expressly include provision for open space and recreational opportunities. The law requires that an impact fee ordinance be adopted as part of a certified growth management program.
17. Development Review Ordinance: Islesboro, Me., An Integrated Subdivision and Site Plan Review. Prepared by Jim Haskell & Associates (no date).
18. See Neptune City v. Avon-by-the-Sea, 294 A.2d 47 (1972).
19. See State v. Norton, 335 A.2d 607, 616-617 (Me. 1975). Cf. County Bd. of Arlington Cty. v. Richards, 434 U.S. 5 (1977) (restricting use of municipal parking facility on basis of residency is not denial of equal protection where it furthers a legitimate public purpose).
20. See Harbor Masters Act 38 M.R.S.A. § 3 and § 7-A.

**APPENDIX A. THE LEGAL FRAMEWORK: AUTHORITIES AND OPPORTUNITIES
FOR LOCAL GOVERNMENTAL ACTION**

Four state laws provide towns with the legal authority to meet the public access needs of their citizens. Those laws are:

- (1) The Comprehensive Planning and Land Use Regulation Act of 1988 (30-A M.R.S.A. 4311 et seq.);
- (2) The Coastal Management Policies Act of 1986 (38 M.R.S.A. 1801 et seq.);
- (3) The Mandatory Shoreland Zoning Act (38 M.R.S.A. 435 et seq.); and
- (4) The Subdivision Review Act (30-A M.R.S.A. 4401 et seq.).

A basic understanding of these laws will help local officials recognize when and how towns may act to meet the access needs of their residents.

1. The Comprehensive Planning and Land Use Regulation Act of 1988

This Act requires that a town's local growth management program and comprehensive plan address the public access needs and opportunities of the community. One of the ten State goals identified in the Act is to "protect the State's marine resources industry, ports and harbors, from incompatible development and to promote public access to the shore for commercial fishermen and the public." (emphasis added) To meet these goals, the Act specifies that comprehensive plans "shall include inventory and analysis" of "...[e]xisting recreation, park and open space areas and significant points of public access to shorelands within a municipality." (emphasis added) A strategy to implement the plan, including a timetable and land use ordinances to be adopted, must meet certain guidelines, including ones to "ensure the preservation of access to coastal waters" for commercial activities and to encourage the availability and protection of undeveloped shorelands for outdoor recreation.¹ In short, local planning for public access and implementation of such plans, are now expressly required by state law.

2. The Coastal Management Policies Act of 1986

In 1986, the Maine Legislature enacted this law as "a statement of legislative policy and intent with respect to state and local actions affecting the Maine coast."² The Act requires state, local, and federal agencies "to conduct their activities affecting the coastal area consistent[ly] with" nine coastal

management policies.³ Under the terms of the statute, consistency with these goals is not optional; coastal towns must use their authority, and make land use and other resource decisions, to further these legislative policy goals. In addition, the Act provides express legislative authority for municipalities to develop and implement shoreline access plans.

Policy #3 in the Act requires towns to "[s]upport 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."⁴ (emphasis added) The Coastal Advisory Committee, a standing committee of the Maine Land & Water Resources Council, has issued guidelines to assist municipal efforts to implement the Act's goals. Concerning Policy #3, the Committee directed government agencies to "increase opportunities for public shoreline access through decisions affecting the use of the shoreline" and to consider "the compatibility of the proposed land use activity with public access, and the extent and quality of the access opportunities offered."⁵ In short, the Act requires that preservation and expansion of public access be influential factors in making land use decisions. Developing a shoreline access plan will greatly facilitate fair, consistent, and efficient attention to public access in carrying out this legislative policy.

3. The Mandatory Shoreland Zoning Act

This statute is a vital source of local authority to preserve and enhance public access. The Act lists protection of public access as one of its primary goals:

The purposes of [controls in shoreland areas] are to...conserve...visual as well as actual points of access to inland and coastal waters....⁶ (emphasis added).

In this context, the term "actual points of access" refers not only to existing accessways (those to which municipalities have asserted public rights) but also to other physically existing accessways. In other words, towns should act to ensure the public's right to continue using customary accessways, even if legal rights to do so have not yet been formalized.

The Act authorizes, but does not require, enactment of zoning standards designed to protect public access opportunities.⁷ Any such zoning laws must, however, be based on a comprehensive plan.⁸ This requirement is particularly significant since the model Minimum Shoreland Zoning Ordinance developed by the Maine Department of Environmental Protection (DEP) does not specify standards or criteria for the conservation of public access (visual or actual). Thus, towns that have simply adopted this model ordinance, or a slightly modified

version, have no legal framework for implementing their public access plan once it is developed. However, like the Comprehensive Planning Act, the Mandatory Shoreland Zoning Act empowers towns with comprehensive plans to adopt ordinances to address public access needs. Towns should be aware that these ordinances must be carefully drafted to specify the types of permissible actions its planning board or similar entity may take regarding public access.⁹

4. The Subdivision Review Act

This statute¹⁰ allows towns that have subdivision authority to consider a development proposal's impacts on public access to the shoreline as a review criterion. The subdivision law forbids granting approval to a development proposal which would have "an undue adverse effect on ... public rights for physical or visual access to the shoreline."¹¹ The intent of the statute appears to be to authorize local protection of public interests in physical and visual access as well as existing public rights of way. Having a planning document that identifies these interests and rights of way is essential to effective use of this review authority.

The law also requires that town officials "must determine that the proposed subdivision is in conformance with a duly adopted comprehensive plan, development plan, or land use plan, if any¹² In other words, if a project would eliminate or unreasonably restrict points of access identified in the access plan, a town could deny subdivision approval. However, the Act allows a town to approve a subdivision "upon such terms and conditions as it may deem advisable to [comply with the town's comprehensive plan]...."¹³ Thus, for example, a town might permit a coastal development project, which restricts or eliminates public access opportunities, on the condition that the developer enhance access at another location. Towns may be able to sacrifice less desirable access rights on the development site in exchange for enhanced access at sites more valuable to their residents. Ordinances implementing the access plan should specify the actions town officials take when developers' plans conflict with the access plan.

The home-rule authority of towns also provides ample authority to promote public access consistent with state legislative directives;¹⁴ the Legislature has in fact has directed towns to use their authority to conserve and promote public access, through the Coastal Management Policies Act.¹⁵

APPENDIX B. Legal Doctrines for Securing Public Access Rights

1. Easement by Prescription

To establish an easement in favor of the public under this legal doctrine, one must prove that:

- members of the public have continuously and openly used the land claimed,
- for 20 or more years,
- under a claim adverse to the owner (i.e., the claimed interest is inconsistent with the owner's legal interest),
- with the owner's knowledge and acquiescence or used the land claimed so openly that the owner's knowledge and acquiescence will be presumed.¹⁶

Maine law makes proof of "acquiescence" difficult. Acquiescence means "consent by silence," as distinguished from express permission.¹⁷ Thus, if the public is using land with the owner's permission, an easement by prescription can't be established. In the case of "wild and uncultivated land," a term which apparently includes widely used recreational beaches, a court will presume that the owner granted permission; those seeking to establish public rights must present evidence of use adverse to the owner's interest to overcome that presumption.¹⁸

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There is another legal difficulty in using this doctrine. Whereas it is clear that a town or city can bring a lawsuit to establish public rights, the Law Court has not determined whether an individual member of the public has standing to do so.¹⁹ In short, the nature and duration of the public use to be proven, the presumption of permission by the owner, and questions about legal standing make easement by prescription a difficult vehicle for establishing public rights in coastal areas. However, where the necessary facts can be demonstrated, this doctrine firmly establishes public easement rights of use and access over the land in question. Title to the land remains with the landowner.

2. Custom

The doctrine of custom is another legal theory for securing recognition of public rights.

Under this theory, one must prove that:

- Customary usage has been in effect "so long as the memory of man runneth not to the contrary";
- the right has been uninterruptedly exercised;
- the use has been peaceable and free from dispute;
- the use is reasonable;
- the land impressed with the customary right has discrete boundaries;
- the custom is obligatory (i.e., not at the landowner's discretion); and
- the custom does not violate other law or customs.²⁰

Although Maine's Law Court has not formerly recognized the doctrine of custom as part of Maine law,²¹ its existence as a common law doctrine was recently acknowledged by a Maine Superior Court.²² The Law Court's resolution of the Moody Beach case may determine the legal status of the doctrine and whether it will be an effective tool for securing public access rights.

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3. Dedication

Dedication occurs when a landowner grants land or an interest in land, such as an easement, for public use and enjoyment and that land is "accepted" by the public. In Maine dedication may occur in two ways: expressly, through compliance with the procedures specified in the statute 23 MRSA § 3021 et seq.); and by implied dedication, through the actions and intentions of the landowner and the public.

a. Statutory Dedication

Town officers can lay out town ways²³ and public easements²⁴. When a landowner or subdivider dedicates land for a town way or public easement, the town must "accept" the land on the public's behalf in order for the public's rights to come into existence. An affirmative vote of a town's legislative body or affirmative action on an appropriate article placed in a warrant for a town meeting constitute "acceptance" of dedicated land.²⁵ The Law Court has suggested that public use of dedicated land, for such a length of time that public and private rights would be substantially affected if the status quo were changed, can constitute "acceptance."²⁶

A recent change in Maine law gives towns a limited time in which to accept dedicated land. Public rights are lost if no act of acceptance occurs within the time periods specified. Basically, a town has 20 years to accept ways laid out in a subdivision created after September 20, 1987.²⁷ Town ways in subdivisions created before this date must be accepted, constructed, or used no later than either: (1) 15 years after the subdivision was platted, or (2) 10 years after September 20, 1987.²⁸ Thus, title and deed searches for old town ways as well as public easements may be necessary to preserve valuable public rights that will otherwise be lost.

Finally, towns should be aware that, unless otherwise specified, a public easement remains on land when a town votes to discontinue a town way.²⁹ Thus, towns may wish to determine the location of discontinued town ways that may remain as valuable public access ways to the shoreline.

b. Implied Dedication

Land can be dedicated without following the formal procedures outlined above. A town or individual asserting that an "implied" dedication has occurred must prove two things: (1) the landowner "intended" to establish public rights of use on the property; and (2) the public, by its use of the area consistently with that intent, accepted the dedication. In contrast to easement by prescription, permission by the landowner to use an

area is some evidence of intent to dedicate land for public use. For a more complete discussion of this issue, refer to Public Access Series publication "Coastal Right-of-Way Rediscovery Programs", pgs. 20-1, and Appendix H.

Appendix Notes

1. 38 M.R.S.A. § 4960-A(3)(G); § 4960-C(4)(A)(6); § 4960-C(4)(C)(9).
2. 38 MRSA § 1801.
3. Id.
4. Id. (Emphasis added.)
5. Coastal Management Policy Guidelines, (December 1986).
6. 38 MRSA § 435.
7. See 38 MRSA § 440-A.
8. But cf. Kunzel v. Town of Swan's Island, Docket No. CV-84-98 (Hancock Cty. Superior Ct.) (decided 5/17/85). A comprehensive plan and zoning ordinance need not be distinct documents.
9. See Kittery Water District v. Town of York, 489 A.2d 1091, 1093 (Me. 1985). The Law Court ruled that an ordinance provision that directed the Town's planning board to consider whether a project proposal "will conserve" visual and actual access points did not allow the planning board to require the developer to allow public recreational access in order to encourage or improve access.
10. 30 MRSA § 4956, recodified as 30-A MRSA § 4401
11. 30 MRSA § 4956(3)(I), recodified as 30-A MRSA § 4404 (8)
12. 30 MRSA § 4956(3)(J), recodified as 30-A MRSA § 4404 (9)
13. See 30 MRSA § 4956(2), recodified as 30-A MRSA § 4403 (5)
14. See 30 MRSA § 1917.
15. See Coastal Management Policies Act, 38 MRSA § 1801 (Policy #3), discussed above.
16. Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1130 (Me. 1984).
17. Dartnell v. Bidwell, 115 Me. 227, 230 (Me. 1986).
18. See Town of Manchester, supra at 1130.
19. Town of Manchester, supra at 1129 n.6.
20. State ex rel. Thorton v. Hay, 462 P.2d 677 (Or. 1969).

21. See Piper v. Vorhees, 130 Me. 305 (1931).
22. Bell v. Town of Wells, Docket No. CV-84-125 Decision at 28-29 (September 14, 1987) (York County Superior Court).
23. A "town way" is an area of land designated and held by a municipality for motor vehicle use, i.e., a roadway. 23 MRSA § 3021(3).
24. A "public easement" is a municipally-held easement for public access to land or water by foot or motor vehicle. 23 MRSA §§ 3021(3), 3022.
25. See 23 MRSA § 3025; Vachon v. Town of Lisbon, 295 A.2d 255 (Me. 1972).
26. See Town of Manchester, supra.
27. 23 MRSA § 3031(1) effective April 15, 1982.
28. 23 MRSA § 3032(1).
29. 23 MRSA § 3026(1), effective April 15, 1982.

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