

PROVIDING PUBLIC ACCESS IN COASTAL AREAS: OPTIONS FOR LANDOWNERS

A fact sheet produced by the Great Lakes Sea Grant Network, Coastal Land Use Committee

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INTRODUCTION

The United States boasts more than 7.2 million acres of national rivers, lakeshores, seashores, and recreation areas, not including state- and municipally-owned properties (Cordell, et al., 1990). While this might seem like a large supply of publicly-owned shoreline, trends indicate that participation in coastal activities such as boating, swimming, and fishing will increase into the next century (Cordell, et al., 1990). Increasing participation in water-related activities is expected to increase the demand for coastal access.

Government agencies and private landowners need to examine possibilities for expanding coastal access to the public. Landowners considering making their property accessible to the public have many options available to them, including arranging an easement with a land trust or donating land to a not-for-profit organization or government agency. Government agencies, by organizing agreements with private developers and/or directly purchasing coastal property, can also increase public coastal access.

The purpose of this fact sheet is to provide case studies from the Great Lakes states of some of these options. Each case study includes information about how and why the option was used. The glossary at the end of the fact sheet defines each option presented as well as others that exist. Use of these options may differ according to state policies and laws and the specific situation of the landowner. In all cases, it is recommended that landowners seek competent legal guidance when choosing alternatives.

Liability issues need to be considered when making property accessible to the public. Since landowner liability differs between states and depends on the public access option chosen, it is not discussed in this fact sheet. Property owners should discuss their liability concerns with an attorney prior to establishing any contracts regarding the use of their land.

LAND TRUSTS

Case study: Western New York Land Conservancy

The Western New York Land Conservancy (WNYLC) is one of approximately 1,200 land trusts nationwide that assists landowners with the preservation of their property. Covering eight counties in western New York, the WNYLC has worked to protect land on both Lakes Erie and Ontario.

One of the most valuable tools used by this land trust is the conservation easement (CE). A CE is a legal agreement between a landowner and a qualified conservation organization or government agency that permanently limits use of the property for conservation purposes. CEs allow the property to remain under the ownership of the landowner, who may continue to live on it, sell it, or pass it on to heirs. CEs are flexible, designed to meet the particular needs of the landowner, and permanent, remaining in force even after the land changes hands. They can result in certain tax advantages.

The purpose of the CE often dictates whether public access to the property is permitted. If the easement is given for recreation or education purposes, public access is usually provided for. For scenic easements, much of the property must be visible to the public, but physical access is not necessary. For historic preservation easements, either visual or physical access may be appropriate, depending on the nature of the property or building to be preserved. When public access is not a specific provision of a CE, the landowner may reserve the right to grant access at his/her discretion.

Each CE is tailored to fit the individual landowner's needs and visions. Some factors that landowners need to consider when establishing a CE through a land trust are:

1. Who specifically, if anyone, should be allowed access to the property? Examples: the public in general, supervised groups only, or local residents only.
2. What activities will be permitted on the property? Example: hiking may be permitted, but not hunting or fishing.
3. To what specific portions of the property will access be permitted? Example: visitors may be permitted to use a shoreline area, but not inland areas.
4. What responsibilities, if any, will the landowner have for maintaining public access to the property? Example: the landowner may agree to maintain an access trail.
5. Is there a potential situation in which further public access to the property would be disallowed? Example: visitor use is causing the deterioration of wildlife habitat, so access to the property is

disallowed.

Once these questions are answered, the easement is drawn up and donated, typically to a land trust. Both the holder of the CE (the land trust) and the landowner are responsible for enforcing the agreement. Additionally, many states, including New York, give the state attorney general enforcement powers. If the landowner sells or leaves the property to his/her heirs, the next owner is obligated to abide by the terms of the CE and the public access clause.

FEE SIMPLE PURCHASE

Case study: Sandy Pond Beach Natural Area, New York

Along the eastern shore of Lake Ontario in New York is a 17-mile stretch of sand dunes, wetlands, and woodlands known as the Eastern Lake Ontario Dune and Wetland Area. This area comprises private property, four state-owned properties, and two nature preserves owned by The Nature Conservancy (TNC). Sandy Pond Beach Natural Area is one of the latter (Figure 1).

Located on a narrow peninsula of land that separates Lake Ontario from a large pond called Sandy Pond, the 77-acre natural area provides important breeding ground for many species of birds. Even though access to the site is mainly by boat, visitor use is extremely high and has caused sand dune erosion.

Using private donations, TNC acquired this property through a fee simple or direct purchase from two separate landowners in 1994. Both previous owners were concerned about preservation of the land. One family contacted the New York State Department of Environmental Conservation (NYSDEC) to see if the state could purchase the property for public use. When the NYSDEC was not able to locate funds for the purchase, the property owners began negotiations with TNC.

Because of the high visitor use of the site, TNC decided that the area needed to be properly managed to provide both public access and habitat protection. TNC and the NYSDEC came to an agreement that while the Conservancy would continue to own the property, the NYSDEC would manage it.

Several public meetings were organized by TNC and NYSDEC to obtain public input concerning the management of the area. A 10-year management plan was developed and presented for public review and approval. The plan was written to transcend TNC ownership, should the NYSDEC eventually purchase the property from them. The plan provides for maintaining optimum public access while managing visitor use and traffic, and protecting bird habitat.

With assistance from New York Sea Grant and a state grant, interpretive signs were produced to educate visitors about the fragile dune environment. With a grant from the U. S. Environmental Protection Agency, a wooden walk-over structure was constructed by TNC to enable visitors to cross the dunes

from one side of the spit to the other without causing dune erosion. TNC also plans on installing two interpretive kiosks regarding the dune environment in the area.

Figure 1. Sandy Pond Beach Natural Area is comprised of three separate properties on a spit of land that separates Lake Ontario from North Sandy Pond. While most of the area is protected dune and bird habitat, access for visitors has been established along the beach and on two designated walkways.

FEE SIMPLE PURCHASE AND EMINENT DOMAIN

Case study: Mentor Lagoons, Mentor, Ohio

Mentor Lagoons is a 500-acre tract of coastal property within the city of Mentor, Ohio. It is one of few remaining large, undeveloped tracts of coastal land in Lake County. Thirty miles east of Cleveland, the area has the potential to be one of the finest recreational parks and harbors on the Ohio shoreline. It also has potential for upscale housing, marina, or dockominium development on a shoreline dominated by 30- to 60-foot-high bluffs.

The majority of Mentor Lagoons property was placed into receivership by the courts (i.e., held in trust by a court-appointed person) after a family dispute over distribution of profits and a failure to comply with a court-ordered cleanup of the lagoon. The local Sea Grant Extension Agent, with the support of his advisory committee, explored opportunities to increase public access to Lake Erie. A Mentor Lagoons Task Force was organized by the Sea Grant Extension Agent, the city of Mentor, and interested stakeholders to explore public acquisition of the property and ensure public access to the area.

The Lagoons contains three distinct parts: (1) an 150-acre lagoon created in the early 1900s by dredging and filling the estuary of a relic channel of the Grand River (originally intended as a "Venice of the North," a private club, it was partially developed into private docks, a restaurant, and service facilities); (2) an 80-acre marshland, directly influenced by the changing water levels of Lake Erie, that is part of the much larger Mentor Marsh; and (3) about 220 acres of uplands coastal forest between the marshland/lagoons and the lake, high and dry with some vernal pools and a 3,000-foot shoreline. The 80 acres of marsh area is protected by a conservation easement held by the Ohio Department of Natural Resources.

With the assistance of the local Sea Grant Extension Agent, the Mentor Lagoons Task Force explored ways of raising funds to directly purchase the lagoons. Attempts to obtain financial assistance from the state of Ohio failed. In the end, the city placed a bid on the property at its appraised value of \$5.4 million, to be financed through municipal bonds. More than one dozen alternative bids were received. In early February 1996 the court endorsed the consent decree and closed the sale to a developer for \$7.7 million.

With the court accepting a private developer's bid, the city of Mentor passed a resolution of intent to purchase the Lagoons property through eminent domain. However, the price could be steep since the

courts will determine fair-market value if an agreeable price cannot be negotiated with the developer. Once the property is in public ownership, there are several potential sources of public funds, including the Land and Water Conservation Fund, the Waterways Safety Fund, the Lake Erie Access Program, and Intermodal Surface Transportation Efficiency Act (ISTEA) grants.

With a clear "owner" of Mentor Lagoons, there are now options under which the city of Mentor may be able to achieve its objectives without actually "owning" the property.

It is critical that the city agree on and prioritize its objectives for the property before beginning discussions with the developer. Some of the developer's goals may be consistent with city objectives. A public marina with boat ramp and adequate parking (97% of Ohio boaters trailer their boats) and an increase in the number of boat docks, which guarantees access to the lake by boaters, may be a mutual goal. The "feared" condominiums may be compatible with a public beach if the developer and city agree, voluntarily or under the threat of eminent domain, that the beach area is always to be open to the public. This type of access is common in many coastal areas of the U.S., but not in Ohio. On the other hand, wildlife habitat preservation and park development would be seriously impeded, if not prevented, by housing.

Three lessons concerning coastal redevelopment emerge from Mentor Lagoons. First, redevelopment actions are likely to take many years. Although the initial court suit by the city of Mentor occurred in 1987, the courts only endorsed ownership in early 1996. Second, each step in the process requires a reassessment of the public goals for the project. When the property was in receivership, purchasing it was the priority goal. However, the effort devoted to purchasing it detracted from prioritizing public use goals such as beach and lake access, habitat preservation, and park development. With a private owner, prioritizing these and other goals is critical. Finally, alternative means of achieving each priority goal must be assessed. Publicownership may not be the only way to achieve priority goals, since some may be achieved more effectively and efficiently under private development (e.g., operating the marina).

The city of Mentor has a wide array of tools at its disposal in addition to eminent domain. These tools include a voluntary negotiated plan or public-private partnership, zoning, Ohio's tax-deferral programs, purchase of part of the property (possibly using eminent domain), and easements.

PUBLIC-PRIVATE DEVELOPMENT AGREEMENT

Case study: Whiskey Island Marina, Cleveland, Ohio

The development of Whiskey Island Marina is a model of how coastal access for the public can be achieved through public and private sector development agreements. Located on Cleveland's downtown lakefront, this marina was designed by a developer with a vision for creating public access in combination with the operation of a privately-owned and operated marina.

In 1992 Whiskey Island Partners, the owners of the marina, purchased a former railroad property on the Cleveland waterfront. The former leaseholder agreed to remove three barge loads of contaminated soil and debris prior to the redevelopment of the site. A full-service marina is now being developed in stages by Whiskey Island Partners and, when completed, will include 1,000 floating docks, an indoor dry-stack storage facility, restaurants, a marine-related retail facility, and year-round security. The marina property is open to the public with the exception of the private club, docks, and boat hoist. Visitors pay to park their cars at the public-access area and then are free to use the picnic facilities, beaches, waterside walk, laundry room, and showers.

The marina consists of 35 acres of dry land and 25 acres of submerged land (land below the average high-water mark of Lake Erie). Because the state of Ohio acts as trustee for the public in matters related to the use and development of submerged lands of Lake Erie that border the state, developers building on these lands are required to secure a lease from the Ohio Department of Natural Resources Coastal Management Program.

Whiskey Island Partners entered into an agreement with the state of Ohio to develop 10 acres for public access within eight years. This agreement became part of the lease agreement between the state of Ohio and Whiskey Island Partners. In addition, the city of Cleveland agreed to contribute to the project by financing improvements to the marina's main access road.

This project meets a significant public need since Cleveland's lakefront lacks varied opportunities for public access. An additional benefit has been the revitalization of an obsolete industrial site into a new enterprise with positive economic impact. Any coastal community interested in increasing its public access, but with limited financial resources to acquire, develop, operate, and maintain a public access area, could consider a similar arrangement with a private developer. Urban waterfront communities, in particular, may find this project of interest.

REGIONAL COMPREHENSIVE PLAN

Case study: Lake Superior's North Shore Harbors Plan, Minnesota

A number of studies by Minnesota Sea Grant, the Minnesota Department of Natural Resources (DNR), and others pointed to an unsatisfied recreational boating demand on Lake Superior for boat launching facilities, protected harbors, and, to a lesser extent, marina slips. Boaters perceive that Lake Superior has inadequate safe harbor facilities on Minnesota's coastline (known locally as the North Shore). A 1988 DNR boater survey indicated that the greatest barrier to more frequent use of Lake Superior was a lack of protected harbors. An evaluation by an engineering firm, taking Lake Superior conditions into account, recommended an ideal spacing between harbors of 8 to 10 miles. Currently, the distance between existing recreational boating facilities on the North Shore is up to 90 miles.

A North Shore Management Board (NSMB) was established in 1987 to develop a North Shore Management Plan for environmental protection and orderly growth. A state-funded, multi-jurisdictional planning agency, the board is responsible for developing comprehensive solutions to Lake Superior coastal resource and development issues. The NSMB includes representatives of local government units and is guided by citizen and technical advisory committees. The board monitors how effectively local government units apply and enforce the North Shore Management Plan. With increasing demand for harbors, the NSMB initiated comprehensive planning to guide the location and development of harbor facilities, to protect the resource values of the North Shore, and to assure the public's involvement in and support of the process. After a two-year planning process, the North Shore Harbors Plan was completed in 1991 (Figure 2).

The Trails and Waterways Section of the Minnesota Department of Natural Resources (DNR) assists the NSMB in its planning efforts. Under the plan guidelines, it is local government's role to initiate activities to develop a harbor. The DNR cooperates with local government in siting, designing, and finding funds for construction. Actual construction and operation of any facility is the responsibility of individual local governments (village, city, township, or county) and/or the DNR. The NSMB does not construct or operate facilities, but does monitor activities to keep local development in line with the Harbors Plan. Implementation is slow because the cost of building a harbor breakwater is well beyond the resources of local North Shore governments.

Based upon boating characteristics, surveys, existing use, boating registration growth, community interest (expressed in questionnaires and public meetings), and active projects along the North Shore, the NSMB believed there was sufficient justification for a network of harbor facilities designed for multiple use, provided that the specific design and implementation were sensitive to environmental and aesthetic resource values. The North Shore Management Plan recommends that commercial developments should occur only in already developed locations such as cities and villages. This philosophy of controlling development was followed in the creation of the Harbors Plan. In undeveloped or natural resource areas, the plan recommends that harbor development be limited to the construction of low-impact harbors of refuge.

The Comprehensive Harbors Plan recognized that a network of harbors would have certain effects that communities needed to be aware of as they proceeded with implementation. These include:

1. A network of safe harbors will increase boating use of Lake Superior, based on a comparative analysis with Wisconsin and Michigan.
2. Increased boating use of Lake Superior may provide a positive economic impact through increased tourism dollars for the North Shore.
3. Additional harbor facilities may increase the financial burden on local communities. This will be partially offset by revenues generated by the harbor facilities.

4. Development of additional harbor facilities and increased boating use will create environmental concerns that should be carefully monitored and considered in planning and design.

5. Increased boating use of Lake Superior will increase the probability of boating-related accidents or safety incidents on the North Shore, requiring boater safety training to accompany harbor establishment.

Available funds for harbor development are limited and require cooperative efforts between many sources including local communities and potential users. The plan has been used to guide DNR project support and the allocation of funding assistance from state resources. Any proposal not contained in the plan will not receive NSMB or DNR support. Based on the 1988 DNR survey, boaters see Lake Superior as a statewide resource and support this state funding.

Implementation will require a multi-year time frame. Priorities will be set but will not prohibit the concurrent progress of other harbor projects. The NSMB, with its shore-wide perspective and voice, is in an excellent position to continue to provide a coordinating and review role, as well as participating in the identification and preparation of funding requests for harbor facilities during the implementation process.

Planning for several harbor sites is currently underway. Actual construction of the first harbor is expected to begin in 1996 in Silver Bay, Minnesota. Planning for two other sites (Two Harbors and Grand Marais, Minnesota) is underway, but less advanced. Initial planning for some of the other harbor locations is underway. One site, Sugar Loaf Cove, has been removed from the plan because of citizen concern. It has been reclassified as a protected resource through the Scientific and Natural Areas Program of the DNR, due to its unique geological features. Alternate sites are being examined to replace this site.

Developing a regional comprehensive plan would be useful for other regions in dealing with issues that cannot be managed solely by local government, supporting the need for financial resources beyond the capacity of local governments, guiding the development of facilities of regional or statewide importance, minimizing the impact of development on natural resources, and avoiding the duplication of expensive facilities.

Figure 2. The location of recommended harbors according to the North Shore Harbors Plan.

FEE SIMPLE PURCHASE AND CONDEMNATION

Case study: Sleeping Bear Dunes National Lakeshore, Michigan, and Indiana Dunes National Lakeshore, Indiana

Sleeping Bear Dunes in Michigan and Indiana Dunes in Indiana allow public access to the only Great Lake that lies completely within the United States < Lake Michigan (Figure 3). Creation of the two National Lakeshores shared many historical similarities, including strong supporters in Congress. Land for both Lakeshores was acquired primarily through fee simple purchase.

Sleeping Bear Dunes encompasses approximately 71,000 acres including 19,000 acres of islands and 10,000 acres of submerged land. Discussions about acquiring lakeshore land for public use began in 1955, with strong support in Congress from U. S. Senator Phillip Hart of Michigan. Legislation was proposed in 1959 and signed into law in 1970. To date some \$58 million has been expended to purchase land.

Property owners were given two options. Residential property built before 1964 was immune to condemnation, and post-1964 property had to be sold via purchase agreement or by way of condemnation. Some of the post-1964 owners negotiated 25-year leasebacks (i.e., the owner maintains use of the property after selling it to the government by leasing it back from the government), and a few obtained life estates (i.e., the owner maintains use of the property for life) for their properties. More than 150 private tracts remain inside the boundaries, and 92 are immune to condemnation. Controversies were open and bitter, and in late 1994 a group of leaseholders petitioned Congress for new leases.

Concerns expressed included: large amounts of northern Michigan land was already in public ownership, and tax losses occurred as more land left the tax roll; property right infringement; potential tourism effects on local economies; potential degradation of natural resources; and a fight over "state vs. federal" control.

The creation of Indiana Dunes National Lakeshore occurred in a similar way. Indiana and its neighboring state Illinois share many things including Lake Michigan. Although Indiana Dunes National Lakeshore lies entirely on Indiana shores, the realization of the Lakeshore came about to a significant degree through supportive efforts of U.S. Senator Paul Douglas of Illinois.

Even before World War I, efforts were begun to preserve the dunes in Indiana. Delayed by priorities that included three more wars and economic ups and downs, federal action was slow to come. As concerned citizens remained steadfast in working to establish a nationally preserved dunes area, Senator Douglas lent support, and the Indiana Dunes National Lakeshore was approved by Congress along with the Port of Indiana as a package deal in 1966. Established in 1972, Indiana Dunes included 8,330 acres. The last amendment to the 1966 act was passed by Congress in 1992 and sets the Lakeshore's boundaries to include approximately 15,000 acres of land and water, the majority fronting Lake Michigan in Lake, Porter, and LaPorte Counties.

Landowners¹ reservations of use and occupancy retention rights apply only to single family, noncommercial residential use. The original legislation included a fixed term of up to 25 years, with exemption from condemnation if property conformed to zoning ordinances approved by the Secretary of the Interior. Subsequent legislation included fixed terms of 20 years. A 1976 amendment repealed the

exemption from condemnation. Legislation of 1980 and 1986 included extensions of the 20-year reservation and the option for a life estate.

Priority has been given to the acquisition of beaches and lakefront land adjoining beaches. Currently, the United States holds fee title or a lesser interest in 10,253 acres within the boundaries that have been obtained by purchase, exchange, transfer, and condemnation. An additional 3,200 acres of non-federal public lands, principally the Indiana Dunes State Park and other state and municipal lands, are also within the national lakeshore's boundary.

Remaining private holdings are in four major groupings: developed land of industry and railroads; undeveloped lands in industrial or utility ownership; undeveloped lands in other private ownership; and developed residential properties. Generally, lands developed for railroad, utility, or industrial purposes cannot be acquired as long as they are necessary for continuing operations.

Problems associated with land acquisition for public use are occurring in varying degrees throughout the country. Communities must find a balance between private rights and public good, and no easy answers exist. As local, state, and federal control of these decisions remains in limbo, a clear understanding of all the issues involved must continually be made available to all.

Figure 3. Sleeping Bear and Indiana Dunes National Lakeshores.

PURCHASE OF DEVELOPMENT RIGHTS

Case study: Peninsula Township, Grand Traverse County, Michigan

In late 1994, the citizens of Peninsula Township, Grand Traverse County, Michigan, adopted a purchase of development rights (PDR) program to protect a selection of the township's most scenic farmland. Peninsula Township's PDR program is the first of its kind in the Midwest and is viewed as a model by adjacent townships and counties. The new program helps ensure visual access to the Lake Michigan coast.

Peninsula Township occupies Old Mission Peninsula, a 17-mile-long strip of land reaching into a narrow bay in northern Lake Michigan (Figure 4). It averages just three miles across and has only one arterial roadway. The scenic peninsula has more than 50 miles of shoreline and thousands of acres of hills overlooking Lake Michigan. Uninterrupted vistas and rural character are recognized as important public assets in this coastal community, and so is a healthy farm economy. The township, which borders the region's largest city, is regarded by many as the tart-cherry capital of the world. The settlement pattern is rural agricultural with a current population of 6,000. Present zoning allows for a population of 30,000 at "buildout." Buildout (a hypothetical condition used by planning and zoning officials) is derived from the legally allowed density of people per acre per zone and the total number of acres found in the township.

Participation in the Peninsula Township PDR program is strictly voluntary. Landowners who participate are compensated for part of the fair-market value of their land. The amount of compensation is based on the difference between what the property could be sold for on the open market with no restrictions and what it can be sold for once development is restricted to open space or agricultural use. Independent professional appraisers determine these values, and the agreement is negotiated with the farmer in a willing seller-willing buyer atmosphere. A permanent conservation easement held by the township is placed on the land, but the farmer otherwise retains full ownership and control.

Township residents voted to levy a millage (a levy of one dollar per thousand dollars of property value), which provides a pool of funds for the purchase of development rights. The 1.25 mill levy is expected to raise \$2.6 million to purchase the development rights to about 20% (2,000 of 9,000 acres) of the peninsula's prime agricultural land with scenic views. The millage will cost approximately \$62.00 a year over a 15-year period for a property valued at \$100,000. State Trust Fund monies are being sought to complement the millage, and volunteer contributions are accepted in a matching program as well. The township received technical and legal support from Michigan State University, the American Farmland Trust, The Nature Conservancy, and Grand Traverse Rotary Charities.

Figure 4. Old Mission Peninsula in Lake Michigan's Grand Traverse Bay.