

2004

# Public Shoreline Access in Maine: A Citizen's Guide to Ocean and Coastal Law

John Duff

Cheryl Daigle

Follow this and additional works at: [https://digitalcommons.library.umaine.edu/seagrant\\_pub](https://digitalcommons.library.umaine.edu/seagrant_pub)



Part of the [Property Law and Real Estate Commons](#)

---

## Repository Citation

Duff, John and Daigle, Cheryl, "Public Shoreline Access in Maine: A Citizen's Guide to Ocean and Coastal Law" (2004). *Maine Sea Grant Publications*. 24.

[https://digitalcommons.library.umaine.edu/seagrant\\_pub/24](https://digitalcommons.library.umaine.edu/seagrant_pub/24)

This Article is brought to you for free and open access by DigitalCommons@UMaine. It has been accepted for inclusion in Maine Sea Grant Publications by an authorized administrator of DigitalCommons@UMaine. For more information, please contact [um.library.technical.services@maine.edu](mailto:um.library.technical.services@maine.edu).

# Public Shoreline Access in Maine

## A Citizen's Guide to Ocean and Coastal Law



Produced by the Marine Law Institute, University of Maine School of Law;  
Maine Sea Grant College Program; and University of Maine Cooperative Extension

Revised Edition: September, 2004

*Public Shoreline Access in Maine* is a revision of an original citizen's guide, *Public Shoreline Access and the Moody Beach Case*, published in August, 1990, by Maine/New Hampshire Sea Grant College Program and Marine Law Institute.

Funding for this publication is provided in part by the University of Maine Cooperative Extension.  
Revised by John Duff, Marine Law Institute, University of Maine School of Law  
Edited by Catherine Schmitt, Maine Sea Grant College Program  
Layout and design by Cheryl Daigle, Maine Sea Grant College Program

Additional copies of this guide are available from:

Maine Sea Grant College Program  
5715 Coburn Hall  
University of Maine  
Orono, ME 04469-5715  
Tel 207-581-1435  
Fax 207-581-1426  
[www.seagrants.umaine.edu](http://www.seagrants.umaine.edu)

Marine Law Institute  
University of Maine School of Law  
246 Deering Avenue  
Portland, ME 04102  
[www.mainerlaw.maine.edu/mli/](http://www.mainerlaw.maine.edu/mli/)

## Public Shoreline Access in Maine

Ask a Mainer who lives on or near the coast about the “right to access” the shoreline, and you’re likely to get a response that includes the phrase “fishing, fowling, and navigation.” Often as not, however, the person will have a rather fuzzy notion as to where that qualification comes from and what it really means. While the state of Maine boasts thousands of miles of coastline, getting to the ocean can sometimes prove challenging.

That’s because most of Maine’s coastal property is privately owned. Yet the public does have longstanding “public trust” rights to support traditional coastal uses. Additionally, other legal rights to reach certain stretches of Maine’s ocean edge augment those important, but limited, public trust rights of fishing, fowling, and navigating. In an era of increasing desire to reach and use the state’s coastal resources, it is important to understand the range of access rights that accommodate the public’s interest. At the same time, it is helpful to understand the legal balance that protects private property.

### Who owns the beach?

In Maine, the answer to the question, “Who owns the beach?” is usually some combination of the following:

- Private property holders may own the beach;
- The town or state may own the beach;
- The general public has certain legal interests in the beach even where a private owner holds legal title.

### How can this be? Isn’t property ownership an all-or-nothing system?

The answer lies in how the Public Trust Doctrine and other legal principles apply in the state of Maine.

Simply stated, the Public Trust Doctrine is a common-law principle that supports the general public’s right of coastal access for certain coast-dependent activities. While the Public Trust Doctrine has certain elements that apply to all states (i.e., the state holds certain legal interests in the coastal area for the benefit of its citizens), each state applies the Public Trust Doctrine in accordance with its property law and historical background. At the same time, the public may acquire coastal access rights in a variety of other forms: customary use rights, prescriptive easements, legal dedications, and/or fee simple title held by some public entity. While these concepts and terms may seem like legal technicalities and jargon (they are), their impact on public access is something every Mainer who has an interest in the coast can understand when the issues are illustrated by some recent legal cases.

The background and history of the Public Trust Doctrine in Maine is extensively set out in the 1989 Moody Beach case familiar to many people in Maine. The legal rights that might arise from the other means of public access are illustrated in the 2000 Eaton v. Wells case and accompanying material.



## The Moody Beach case

In March, 1989, the Maine Supreme Judicial Court issued its decision in *Bell v. Town of Wells*, also known as the Moody Beach case.<sup>1</sup> The case has come to symbolize the conflict between public versus private rights to the shore in Maine, and it has been cited as authority for the proposition that the public has only very limited rights in the intertidal zone (the area between high and low tide). Since that case was handed down, access to Maine's coastline has become even more contentious. The population shift in the state to coastal areas, along with the influx of out-of-staters moving in or buying vacation homes, has increased concerns that non-property owners will lose even more access to the coast.

Public access to and along the shore is a sensitive issue in Maine which, despite its magnificent 3,500-mile ocean coastline, has less than 40 miles of publicly owned sandy beaches.<sup>2</sup> A centuries-old Colonial Ordinance, applicable only in Maine and Massachusetts, extends private property rights to the low water mark, subject to a public easement for fishing, fowling, and navigation.<sup>3</sup> The extent of permitted public uses of private tidelands is therefore an extremely important issue and is directly affected by the Moody Beach case.

Moody Beach is a mile-long sandy beach in the Town of Wells, just north of the Ogunquit town line. About 100 private homes adjoin the beach. In 1984, twenty-eight of these homeowners filed a "quiet title action" in Superior Court against the Town of Wells, the State Bureau of Public Lands, and various individuals. The owners sought a court declaration to prevent the public from walking, swimming, sunbathing, or using the beach in front of their homes for general recreational purposes. The owners were concerned about the increase in the public's use of Moody Beach and the town was perceived as unwilling to treat members of the public as trespassers. In 1986, the Supreme Court ruled in *Bell I*,<sup>4</sup> that the Colonial Ordinance, enacted by the Massachusetts Bay Colonies between 1641-1647, influenced Maine's common law (recalling that Maine was a district of Massachusetts until the early nineteenth century) by extending private ownership of the beach to the low water mark, extinguishing all public rights in privately owned tidelands, except for fishing, fowling, and navigation.

*Bell I* had two effects. First, before the case was decided, the Maine legislature enacted The Public Trust in Intertidal Land Act<sup>5</sup> in 1986. The Act declared that "the intertidal lands of the State are impressed with a public trust," and therefore the public has the "right to use intertidal land for recreation." Second, the ruling in *Bell I* permitted the case to proceed to trial in Superior Court on the issue of whether the extensive public use of Moody Beach had created a public recreational easement by prescription, implied dedication, or local custom.<sup>6</sup> After a four-week trial in 1987, the Superior Court decided that the public had acquired no easement over Moody Beach by custom or any other common law doctrine, and that the 1986 Public Trust in Intertidal Land Act, guaranteeing public recreational use of intertidal lands, was unconstitutional. This decision was appealed to the Maine Supreme Judicial Court.

In 1989, the Maine Supreme Court upheld the lower court ruling and found that:

In Maine, public rights in privately owned tidelands are limited only to those specifically enumerated in the 1647 Colonial Ordinance; that is, fishing, fowling, and navigation. The Court held that although the Colonial Ordinance was never expressly adopted by the State Legislature, it has become part of Maine's common law by custom and usage.

Since the Colonial Ordinance extends adjoining private property rights down to the low water mark, Maine's Public Trust in Intertidal Land Act amounted to a physical intrusion to private property by permitting public recreational use of private tidelands. Therefore, the Act was an unconstitutional "taking" of property for public purposes without just compensation, forbidden by the 5th and 14th amendments to the United States Constitution and Maine's State Constitution.

No public rights beyond fishing, fowling, and navigation were acquired at Moody Beach by custom, prescription, or implied dedication. If the State or the Town of Wells wishes to extend public uses beyond those prescribed by the Colonial Ordinance, it must purchase the beach or exercise its powers of eminent domain and pay just compensation.<sup>7</sup>

## After Moody Beach: The Public's Rights along the Shore in Maine

The public still has the right, by virtue of an easement created by the Colonial Ordinance, to use privately owned intertidal land, but only if it is engaged in fishing, fowling, or navigation.

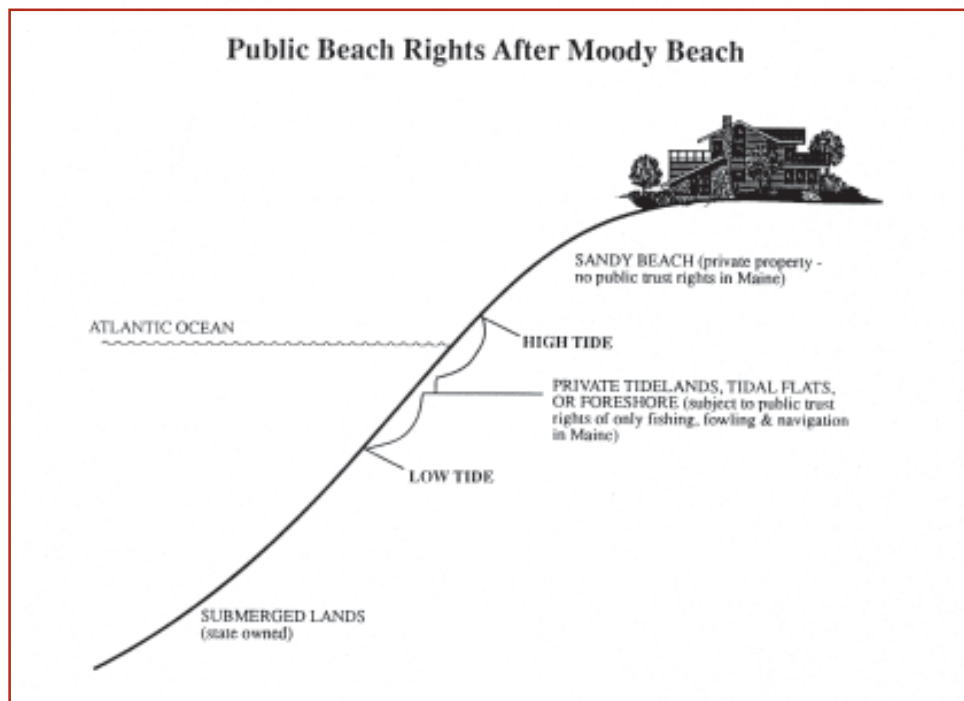
The land to which this easement applies is the area between mean high water and mean low water (or to 1,650 feet seaward from the high water, if the mean low watermark is even farther seaward). If the shoreline is beach, this is the wet sand area. If the shoreline is marsh, mudflat, or ledge, the intertidal area will commonly consist of gravel beaches or mud flats. (See the diagram below for further illustration.)

The lands seaward of mean low water (or 1,650 feet from high water) are called submerged lands. They are owned by the state. Public use is not restricted to fishing, fowling, or navigation. The public generally has unrestricted use of the water and sea bottom, subject to state regulations. However, public rights to use certain submerged lands may be restricted by leases between the state and private individuals in which the lessee is granted exclusive use of particular submerged lands such as for aquaculture or marinas.

The dry sand area or rocky shore area above mean high water and adjacent uplands are generally privately owned. (Only about 7% of the coastline is under public ownership.) The public has no absolute right to make any use of that privately owned land for recreation, fishing, fowling, navigation or any other purpose. Neither does the public have a right to pass

over privately owned upland to obtain access to the intertidal area to engage in fishing, fowling, or navigation. In Maine, there has been a custom of "permissive access" or "permissive trespass," which the public has relied on to cross privately owned, unimproved, unposted land with the assumption that they had informal permission of the owner. However, this customary use rarely achieves the status of a legally enforceable right and depends on continued landowner acquiescence. Further, landowners generally do not have any special duty of care to protect users from injury under this type of access.

Clearly, the public has rights to use the upland if it is publicly owned, subject to any governmental regulations. The public also has a right to use the upland if the public has been granted an easement over private land, such as with a public road or public path. The public may also have a legally enforceable right of use if the upland owner has granted the public the right to use it by license, lease, or otherwise. Finally, as discussed above, even though not a legally enforceable right, the public may be able to cross private, unimproved, unposted land through the tradition of permissive access, but only with the actual or implied permission of the property owner.



Anne Bernard

## What is meant by the term “fishing, fowling, and navigation”?

The Maine Court has been addressing this question on a case-by-case basis since the early 19th century. There is, however, no comprehensive statement of appropriate public uses in the intertidal zone under the Colonial Ordinance. The court has held that the easement includes uses reasonably incidental or related to fishing, fowling, and navigation.<sup>8</sup> The public easement applies equally to protect those individuals involved in fishing, fowling, or navigation for sustenance, business, or pleasure.<sup>9</sup> The court has held that the easement does not extend to other recreational uses.

Since many of the cases date from the mid-19th century, the case law is sometimes of limited help in defining the modern parameters of these terms. The cases have held that the term “fishing” includes digging for worms and clams, and the taking of shellfish; a person has a right to be on the privately owned intertidal area as long as he or she is engaged in those activities. However, there are some apparent restrictions on removing items located in the intertidal area; while taking fish, shellfish, “sea manure,” and floating seaweed from the intertidal zone is allowed, cases have held that the public may not harvest “mussel bed manure” or seaweed cast upon the beach from within that zone.<sup>10</sup> The cases also suggest that the public may not remove sand or empty shells from the intertidal area. The court has previously found that the public’s right to fish does not include the right to erect fish weirs or fasten seine or fishing equipment to private tidelands.<sup>11</sup>

The term “fowling” has not received nearly the same judicial scrutiny. It is generally interpreted to mean bird hunting. Some commentators have suggested that the meaning should be widened to include bird watching, but there is no indication that the court would be willing to extend the ordinance beyond the obvious meaning of the word.

The term “navigation” has been construed to mean that the public can sail over the intertidal lands, can moor craft upon them, and can allow vessels to rest upon the intertidal land when the tide is out. These activities may be conducted for profit, such as ferry services in which the boat operator picks up and discharges passengers on intertidal land.

As an incidental use, if a person reaches the intertidal land by means of navigation, the person can walk on the intertidal lands for purposes related to navigation or to reach lands (not necessarily lands of the upland owner) which are accessible by traveling along the intertidal zone.<sup>12</sup> This right to travel through the intertidal lands does not, however, include the right to remain on the intertidal lands for bathing, sunbathing or recreational walking.

A boat operator can also moor the vessel to discharge and take on cargo in the intertidal zone, provided that the cargo does not spill over onto the uplands and provided that the flats are unoccupied.<sup>13</sup> In keeping with the importance of the intertidal area for travel, it has also been held that the public can ride or skate over the intertidal area when it is covered with ice.<sup>14</sup>

It has now been determined by the Maine Supreme Court that this term does not include the right to use private tidelands for general recreational uses such as strolling along the beach (except if incidental to fishing, fowling, or navigation), sunbathing, picnicking, bathing, or Frisbee-throwing.<sup>15</sup>



## Private property rights in the intertidal zone

The Moody Beach case affirms that, in Maine, owners of beachfront property or property adjoining tidelands (also called littoral or riparian owners) have private property rights to the low water mark or low tide area subject only to a public easement for fishing, fowling, and navigation as defined above. Thus the public should be aware that littoral or riparian owners may

bring an action for trespass against members of the public who enter upon private tidelands without permission except for the purposes of fishing, fowling, and navigation as defined above.<sup>16</sup>

Although in some cases the public easement for fishing, fowling, and navigation may be cut off by selling, filling, or developing private tidelands, public navigational rights may not be unreasonably impeded.<sup>17</sup> Riparian owners have the exclusive right to moor their boats on their privately owned tidelands as long as it does not interfere with the public's reasonable use of the area for shellfish harvesting or

other public trust uses (fishing, fowling, or navigation).<sup>18</sup>

Finally, owners of private tidelands must still obtain all necessary local, state, and federal permits prior to any tideland development. Environmental laws prevent most construction activities in tidelands except for wharves, piers, and in exceptional circumstances, fill for residential, commercial, or industrial development.

---

## Ways to Address Public Shoreline Access Needs in Maine after Moody Beach

Even before the Moody Beach case, the problem of securing access to Maine's coastal shoreline was growing increasingly critical as traditional access points were built upon, fenced off, posted, or purchased by new owners who were unwilling to allow old patterns of usage to continue. Conflicts were increasing as more people tried to use the fewer remaining access points. With the decision in the Moody Beach case, the problems were compounded by the determination that even if a person is able to reach the shoreline, there is no broad right to use the intertidal area for recreational pursuits. The use has to be limited to fishing, fowling, or navigation.

While the Moody Beach case remains the law of the state regarding the limitation of public access to the shore, signals from the court suggest that the case could be overturned by today's Maine Supreme Court. The Moody Beach case was decided in favor of private ownership by a slim 4-3 decision by the seven justices on the state Supreme Court. When the decision was issued, a dissenting opinion suggested that the majority opinion was not well supported and that the public access rights to the coast ought to evolve as human society evolves. Simply stated, the dissenting opinion suggested that the 18th century public access rights of fishing, fowling, and navigation were meant to characterize the then current prevailing public uses of the intertidal area. As such, modern prevailing public uses of the shoreline ought to be read reasonably into the public trust/public easement activities that support public access interests. Nonetheless, a dissenting opinion, regardless

of how well-stated is merely that, an opinion in opposition to the majority opinion that constitutes the rule of law.

### Eaton v. Wells and the prospect of overruling the Moody Beach case

In 2000, another beach case made its way to the Maine Supreme Court that illustrated alternative legal means for the public to acquire coastal access rights. The case also suggested that the state Supreme Court (constituted with a very different group of justices than those who heard the Moody Beach case) might be amenable to overturning the 1989 Moody Beach case and employing the rule advocated in the Moody Beach dissenting opinion.

In the 1990s the Town of Wells maintained a stretch of beach for the benefit of the public. The trouble was,



the town did not own the beach. A private property owner sued the town, arguing that the town's actions and the public use of the beach constituted trespass over private property. The town responded and defended its actions and the rights of the public by claiming that the public had acquired legal rights to the beach by their longstanding use of the property.

### Can trespass ripen into a legal interest in property?

The court addressed one aspect of the case in the context of prescriptive easement law. Simply stated, a non-property owner may acquire a legal interest (an easement) in or over certain private property if the non-owner's use of the property is longstanding (20 years or more); continuous; under a claim adverse to the owner; and where the owner either knows or should know of the non-owners use. The property owner argued that the public's use had not ripened into a prescriptive easement. In *Eaton v. Town of Wells*,<sup>19</sup> the Maine Supreme Court affirmed a Superior Court decision granting an easement by prescription to the town (and effectively to the public) for general recreational purposes and maintenance.

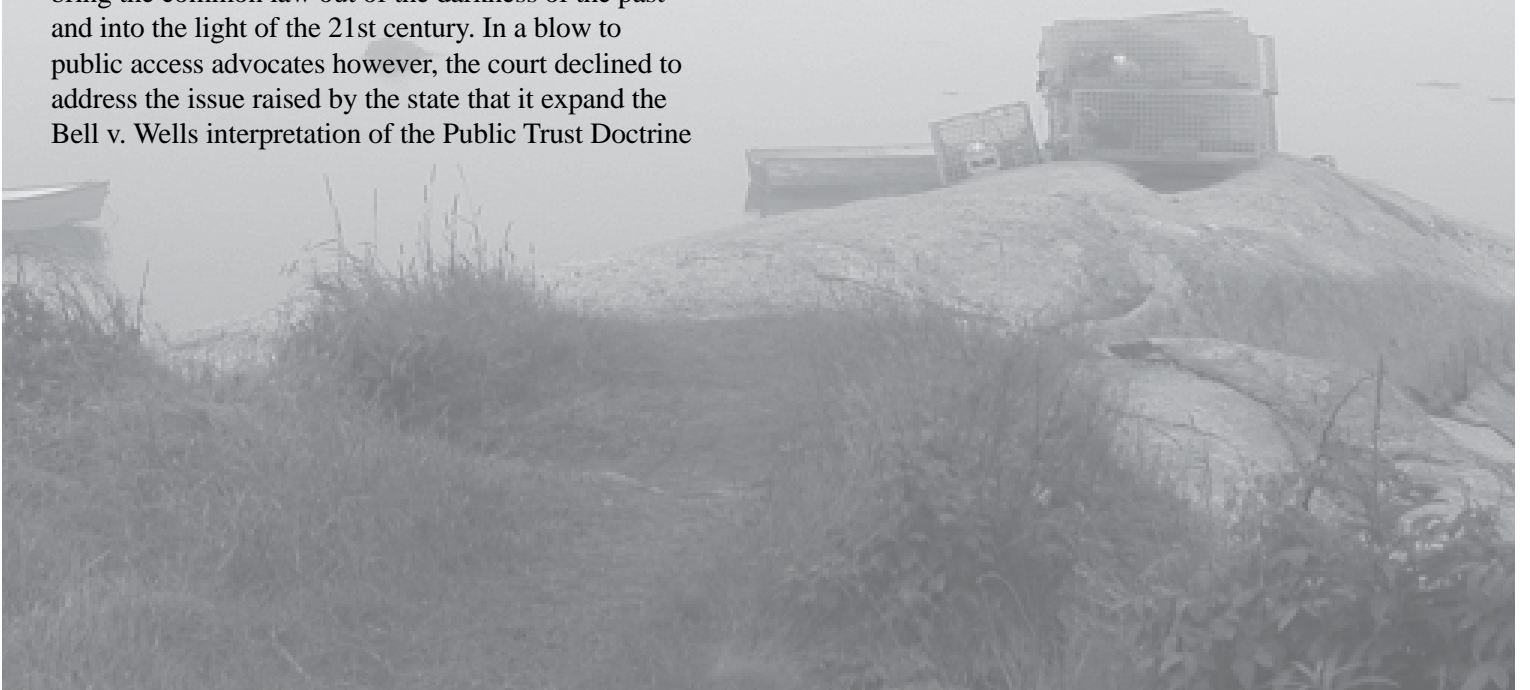
Sensing that the difference in the make-up of the court in 2000 (compared to the make-up of the court in 1989) might mean that the current justices might be willing to overturn the *Moody Beach* case, the office of the attorney general joined the case to argue that it was time to "fix" the public trust/public easement rights along the coastline of the entire state. The 2000 court, argued the state, ought to overturn *Moody Beach* and bring the common law out of the darkness of the past and into the light of the 21st century. In a blow to public access advocates however, the court declined to address the issue raised by the state that it expand the *Bell v. Wells* interpretation of the Public Trust Doctrine

to include recreational activities. The court explained that it could resolve the case at hand without having to revisit the issue of public trust interests in general.

### Another signal from the court?

While the court, in *Eaton v. Wells*, indicated that it need not consider the Public Trust Doctrine at that very moment, one justice suggested that the court might be willing to overturn the 1989 decision if the right case was brought before it. In a concurring opinion in the 2000 case, Associate Justice Saufley (now Chief Justice Saufley) noted that the 1989 rationale for interpreting the Public Trust Doctrine is unascertainable and inefficient, and that the court should take the opportunity here to correct that problem. Given the willingness of the attorney general's office to argue on behalf of the citizens of Maine that the Public Trust Doctrine ought to be interpreted as something greater than mere fishing, fowling, and navigation rights and the inclination of the court to address such an argument in the proper context, it seems as though private property owners might be in a precarious situation.

If a private property owner brings a trespass action against non-owners for activities in the intertidal zone other than fishing, fowling, and navigation, the case might ultimately serve as the vehicle for overturning the *Moody Beach* case and expanding the Public Trust Doctrine in Maine. Alternatively, if a landowner, aware of the court's recent signals, refrains from bringing a trespass claim, he may be facilitating the type of continuous and open adverse use of his/her property that might ultimately ripen into a prescriptive easement claim.



## Other Options for Securing Public Rights

While the cases and circumstances outlined here indicate some of the history and methods of securing public access to the coast, keep in mind that there are other means for securing and maintaining coastal access. Land use regulations, purchasing rights of access, trading town lands, negotiating a lease of license, conducting a right-of-way rediscovery project, or receiving gifts which improve public access also constitute valuable tools in the public's effort to reach the beach. Regardless of how the public acquires access to the coast, it is always important to determine the relative rights and responsibilities of the landowner and the user. In most instances, a landowner will be relieved of liability for injuries sustained by a user unless the owner has some duty to the user pursuant to a lease or license.

### Land Use Regulation

There are several land use regulatory techniques that may be used to encourage (or require) new real estate developments to make provisions for public access to, and use of, the shoreline where such development burdens public access. These methods, however, have no impact in areas such as Moody Beach where the shoreline is already fully developed. The techniques include incentive zoning, bonus zoning, transfer of development rights systems, exactions, and impact fees.<sup>20</sup> The use of any of these techniques should be supported by a shoreway access or open space component of a comprehensive plan. If the provisions are mandatory, extreme care needs to be taken in drafting the implementing ordinance. For instance, a city or town might condition a development permit upon a certain level and type of public access (e.g., environmental monitoring, limited recreational activity, limited right of way, etc.).

### Purchasing Rights of Access

One way to secure general recreational shoreline access is for the town (or state) to acquire the land, either by purchasing it from a willing seller or by using eminent domain to take it from an unwilling seller in exchange for the payment of just compensation. Another variation is for the town to purchase only an easement over the land for recreational uses, not the land itself. The purchase of land (or an easement) is an effective way to guarantee public access. The obvious drawback is the cost. However, for key parcels where a permanent solution is desired, the public may determine that the benefits justify the investment.

### Trading Town Lands

One variation on the purchase of land with money is to trade parcels of town-owned land (or public rights to use land) for desirable access sites or access rights. Some of the land available for trade may be identified in advance in a shoreway access plan and in comprehensive plans, but other opportunities will present themselves as more research is done on land in anticipation of development. For example, the trade may involve the town releasing its unclear rights to certain land in a proposed subdivision (e.g., an old street that may or may not have been properly dedicated to the public) in exchange for the developer clearly conveying an easement granting shoreway access and shoreline use to a particular group (e.g., licensed clambers and worms). Other transactions may be a more straightforward swap of one piece of town land for another which is more favorable for shoreway recreational use. In either case, the town will need to work with appraisers and attorneys to evaluate the advisability of a trade.

### Lease or License

Instead of actually acquiring an ownership interest in property, a community may be able to negotiate an agreement which allows the public (or some portion of the public) to use land for shoreline access and recreational use. If an agreement can be reached, this option is often less expensive than acquisition. The document spelling out the rights and responsibilities can be extremely flexible in addressing unique issues, including factors that would trigger a termination of the agreement, specific restrictions on public use, protection from liability, and maintenance responsibilities. However, this may be a relatively short-term solution and is dependent upon the owner's willingness to enter into an agreement.

## Right-of-Way Rediscovery Projects

In addition to seeking new points of access, it is important for towns to inventory and safeguard already existing public access rights. Right-of-Way “Rediscovery” is a systematic community effort to research and reassert existing legal rights of access which have been neglected or are uncertain. Public rights to roads which run to the shore and shoreline parcels may have been acquired through the years by the town laying out and voting to establish a road, by the town accepting a road which was dedicated (offered) by a private owner or developer, by town purchase of a parcel, through gift, by prescriptive use, or through acquisition by lien for nonpayment of real estate taxes. Sometimes the town loses track of those rights, especially as use patterns change. For example, a public road to an old ferry landing may have fallen into disuse when a bridge was built. But public rights might remain. Careful research in public records may allow the town to document continuing public rights and to reclaim a site for public use.

## Receiving Gifts Which Improve Public Access

Clearly, a community cannot rely on voluntary gifts to meet its shoreline access needs. But a community can take steps to encourage strategic gifts of land. A shoreline access plan which illustrates a long-term vision for a coordinated access system may encourage donations from individuals with a strong sense of civic responsibility or a strong desire to preserve their land in its natural condition. There are many ways to structure these gifts to produce some offsetting benefits for the donor, including: income tax benefits, reductions in estate tax liability, donor retention of rights until the happening of a specified event, and/or conditions on future use of the land to carry out the donor’s wishes. The community will need to consider issues such as appropriateness of the land in relation to its shoreline access plan, ability to provide proper policing and maintenance, real estate tax implications, and acceptability of any conditions imposed by the potential donor in deciding whether to accept voluntary conveyances. Local towns are not the only entities that can receive voluntary gifts of property interests which might help solve local access problems. Donations may also be made to conservation organizations such as The Nature Conservancy, Maine Coast Heritage Trust, and local land trusts.

---

### *Additional information on this subject:*

Coastlines article	<a href="http://www.epa.gov/owow/estuaries/coastlines/fall97/publictr.html">http://www.epa.gov/owow/estuaries/coastlines/fall97/publictr.html</a>
John Duff’s Beach Law 101	<a href="http://www.mli.usm.maine.edu/Beachlaw101/sld001.htm">http://www.mli.usm.maine.edu/Beachlaw101/sld001.htm</a>
Maine Coastal Program	<a href="http://www.state.me.us/mcp/">http://www.state.me.us/mcp/</a>
Maine Coast Heritage Trust	<a href="http://www.mcht.org/">http://www.mcht.org/</a>
Bureau of Parks & Lands Boating Facilities Program	<a href="http://www.state.me.us/doc/parks/programs/boating/grants.html">http://www.state.me.us/doc/parks/programs/boating/grants.html</a>
Preserving Commercial Fishing Access	<a href="http://www.ceimaine.org/fisheries/WaterfrontStudy.pdf">http://www.ceimaine.org/fisheries/WaterfrontStudy.pdf</a>
Maine Shore Access: Public Access Series	<a href="http://mainelaw.maine.edu/mli/access.htm">http://mainelaw.maine.edu/mli/access.htm</a>

## Endnotes

1. Those wishing to read the full text of the Court's opinion may find the case in any law library, cited as 557 A.2d 168 (Me. 1989).
2. Maine Department of Conservation, Bureau of Parks and Recreation, Coastal Beach Inventory, May 1989. Maine's coastline, which includes over 3,000 islands, consists mainly of rocky shores, headlands, and tidal flats. It has only 50 miles of sandy beach, about half of which are privately owned. See also "Coastal Choices: Deciding Our Future," The Maine Coastal Program, State Planning Office, State of Maine.
3. In all other states, private property rights end at the high water mark and the public or the state owns the intertidal zone and submerged lands out to three miles offshore.
4. 510 A.2d 509 (Me. 1986).
5. 12 M.R.S.A. 571-573
6. Similar to the principle of adverse possession (also known as "squatter's rights"); that is, open, continuous, notorious, and uninterrupted use of private property for a certain period of time (20 years in Maine), a claim of right adverse to the owner, will create a "prescriptive easement" to continue such use. Such an easement for public use may also be created by "implied dedication" where the owner clearly acquiesces to public use and the public's enjoyment has lasted for such a length of time that the public would be affected materially by a denial or interruption of the enjoyment. *Town of Manchester v. Augusta Country Club*, 477 A.2d 1124 (Me. 1984).
7. In fact, in 1989, the Town of Wells had 10 of the 126 lots along Moody Beach appraised to assess the possibility of acquiring the intertidal portion of Moody Beach through the use of eminent domain. That appraisal valued the intertidal area of the 10 lots of \$516,000. If representative of values for the other lots, it was projected that it would cost approximately \$6.5 million to acquire the entire intertidal portion of the beach. In lieu of proceeding with acquisition of the land, the town and beachfront property owners negotiated a revocable license that would allow residents and homeowners of Wells, their accompanied guests and specified seasonal residents to make daytime use of the area of Moody Beach below the high tide line for quiet recreational pursuits. This negotiated license was rejected by voters at the town meeting in March, 1990.
8. *Bell v. Town of Wells*, 557 A.2d 168, 169 (Me. 1989).
9. *Barrows v. McDermott*, 73 Me. 441, 449 (1882).
10. *Moore v. Griffin*, 22 Me. 350, 356 (1843); *Hill v. Lord*, 48 Me. 83, 86 (1861), *Marshall v. Walker*, 93 Me. 532, 536-37. The terms "sea manure" and "mussel bed manure" generally refer to the organic detritus and waste of marine organisms.
11. *Mathews v. Treat*, 75 Me. 594 (1884).
12. *Andrews v. King*, 124 Me. 361 (1925).
13. *Id.* At 364.
14. *French v. Camp*, 18 Me. 433 (1841).
15. *Bell v. Town of Wells*, 557 A.2d 168, 175-176.
16. *Storrer v. Freeman*, 6 Mass. 435 (1810).
17. *Marshall v. Walker*, 93 Me. 532, 45 A.497 (1900).
18. *Wellfleet v. Glaze*, 403 Mass. 79 (July 20, 1988).
19. 760 A.2d 232 (Me. 2000).
20. Simply stated, these techniques are "carrots and sticks" that can be used to induce the protection and/or acquisition of public use rights within the context of coastal and ocean zoning and planning efforts. For example, a certain type of coastal development might be allowed if the developer guaranteed that impacts on public use at the development site would be offset by augmenting public access elsewhere along the coast.

# Public and Private Rights to the Maine Coast

Access to the shore is a sensitive issue in Maine. While the state boasts thousands of miles of coastline, only a small portion of the state's beaches are publicly owned. Even where coastal property is privately owned, the public still has legal rights to intertidal land for certain traditional uses. This document outlines the history of several key lawsuits highlighting rights to shoreline access in Maine, and also discusses options for securing public access to the Maine coast. It is always important to determine the relative rights and responsibilities of both private landowners and the public when accessing the Maine shoreline.

## In summary:

- § In general, private ownership of shoreline property in Maine extends to the mean low water mark.
- § The dry sand area or rocky shore area above mean high water and adjacent uplands are generally privately owned. The public has a right to use privately owned upland only if an easement has been granted, such as with a public road or public path.
- § Between the mean high water mark and the mean low water mark (intertidal lands), public access is allowed for activities related to "fishing, fowling, and navigation." This does *not* include the right to use private intertidal lands for general recreational uses such as strolling along the beach, sunbathing, picnicking, swimming, etc.
- § The lands seaward of mean low water (submerged lands) are owned by the state. Generally, public use is not restricted on submerged lands, except in cases where a private individual has a lease for an aquaculture facility, marina, or other use.
- § The public has a right to use state waters and submerged lands subject to state regulations.
- § A non-property owner may acquire an easement over private, unimproved, unposted tideland under certain circumstances, for example if the non-owner's use of the property is long standing (20 years or more) or continuous with the actual or implied permission of the property owner. This may become a legally enforceable right if sufficient time and conditions support the non-owner user's claim.



*A member of the University of Maine System*