

# **Property Rights and Planning for Public Access in the English Coastal Zone**

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## **SUMMARY**

While the nature of property rights varies dramatically across the land- sea interface, the need to manage the Coastal Zone in an integrated way has never been greater. It is proposed that an essential component for policy is to understand the influence of property rights and restrictions. With increasing pressures not only from climate change raising the levels of the sea, but also economic changes, the impact on coastal access for the next generations will be influenced by the legal basis of how society might need to organise and policy frameworks they may need to adopt.

This paper aims to address the rights, responsibilities and restrictions in the coastal area, focusing on the coastline of England. Placed in the spatial context of the coastal zone, the paper seeks to articulate the division of property roles and explains the difference in property rights between terra firma and marine. Next it reviews the English responsibilities outlined in the current legislative status of the coastline and the extent to which the situation may, and can change. The emerging National Integrated Maritime policy being developed by England, notably the Marine Bill is explored with observations of the effect on coastal access given the property rights in existence. Finally the paper concludes with observations on why policy development should recognise the institutional activities of land tenure and the potential to accommodate changing patterns in physical, economic and social indicators, yet maintaining access rights for coastal communities.

# **Property Rights and Planning for Public Access in the English Coastal Zone**

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## **1. INTRODUCTION**

While the nature of property rights varies dramatically across the land- sea interface, the need to manage the Coastal Zone in an integrated way has never been greater. It is proposed that an essential component for an integrated marine policy is to understand the influence of property rights and restrictions.

This paper is drawn from the RICS information documents series (RICS 1.), but specifically here overviews the property rights, and responsibilities in the context of emerging English national policy, with a focus on public access to the coastline of England.

This is explained first, by the spatial context of the coastal zone, the paper seeks to articulate the division of property roles and explains the difference in property rights between terra firma and marine. Second, it reviews the responsibilities outlined in the emerging English national integrated maritime approach, notably the Marine Bill, highlighting the inclusion of coastal access.

Next, observations on why it is helpful, when planning for public access, to be guided by and work with existing property rights is outlined. Finally the paper concludes that coastal policy for the next generations will be influenced by the legal basis of how society might need to organise and policy frameworks that they may need to adopt.

## **2. THE CONTEXT**

The coastal zone (CZ) is a narrow band of land and sea around the coastline; it is a linear strip of land with adjacent open space (sea and submerged land) that are mutually interdependent. But in the context of public access, the inland boundary is unlikely to extend further than 1km above High Water Mark.

The CZ is a dynamic system of great economic, social and environmental significance. This significance is evident in the variety and types of demands made on the CZ and its resources. It is also an area where overcrowding, overdevelopment and the destruction of valuable resources through misuse underscores that it is a finite resource and in urgent need for the improved and integrated management of human activity.

It is proposed that understanding property rights and working with landowners will help facilitate public access to the CZ.

In England and Wales there is no legal recognition of the concept of a unified coastal zone. The nature of coastal zone property rights is based on dividing the coastal zone into: terra firma, foreshore, sea bed, and internal waters, where the:

- **The foreshore**, under common law, lies between high-water mark and low-water mark, with terra firma (dry land) above it and sea bed below.
- Internal waters are those waters falling on the landward side of the territorial sea baseline.

Applicable definitions are:

- **The high-water** mark boundary is more precisely defined as the "line of the medium high tide between the springs and neaps ascertained by taking the average of these medium tides during the year" .
- **The low-water** mark boundary is defined similarly, but relates to the Medium low tide.

The division of the coastal zone into four property categories presents a complex scenario, especially given the ambiguities in the boundaries between these categories and the plethora of public and private interests. This is further complicated by the uncertainty, which surrounds the terminology and precise character of many marine property rights.

The academic and legal interpretation of those rights are in themselves far from definitive, but in practice interpretation needs to understand ambiguities and anomalies found in the underlying boundaries of high and low water marks. Importantly, the legal definition of foreshore does not necessarily correspond with the natural feature. The foreshore, as a moveable freehold, follows the tides, as long as the changes are slow and gradual.

The significance of these definitions as it relates to public access is outlined below.

### **3. PROPERTY RIGHTS**

#### **Terra Firma - Above MHWM**

Salient issues relating to land above high water mark under modern law (post 1925) relates to freehold and a bundle of subservient occupation rights (e.g. leasehold, licences etc)'. The explanation of these rights has been substantially documented, and thus not duplicated; but the relevance here relates to restrictions on the right to occupy, and the presence of easements on title deeds.

In terms of statute law, the primary restrictions on the exercise of property rights, on these interests, come from town and country planning law and that of public health.

Broadly, these statutes and policy documents impact on the landowner, or through the demise of land to the occupier. In the Town and Country Planning Acts, to develop his land, and in Public Health Acts cannot be a nuisance or be prejudicial to health (including the disposal of

waste without licences). In addition owners have their rights restricted by the designation of their land as of coastal conservation interest (see box).

- National Parks, Areas of Outstanding Natural Beauty,
- Sites of Special Scientific Interest,
- Heritage Coasts and Special Protection Areas.
- National Nature Reserves and Local Nature Reserves.
- Environmentally Sensitive Areas

### *Easements*

In addition to restrictive covenants and the provisions of statutes, leases and freehold interests are subject to a number of further qualifications, through the existence of easements. Easements are is important, as they are particularly relevant to public access in England and Wales.

Easements constitute a right in respect of another's land, either a 'positive easement', such as a right of way over another's land, or a 'negative easement', such as a right to stop a neighbour doing certain things on his land. The existence of an easement is dependent on the existence of dominant land, which enjoys the right and subservient land, which is subject to the right. But, this is not required in respect of any public right of way.

A right of way across another's property can exist as a licence as well as an easement. The rights are defined, with broadly three forms of public right of way or "highway", each conferring differing rights on the public:

- Footpaths,
- Bridleways and
- Carriage ways,

Notably, these rights are purely a right to "pass and re-pass" for legitimate travel, not a right to be on a highway, although a number of ancillary rights may exits, for example, a right to pause and admire the view, often with a caveat of reasonableness. Any acts by the public beyond these rights constitute trespass.

Certain interests in land are further qualified by customary rights, i.e. those afforded to local inhabitants, such as such as the right of fishermen of a particular parish to dry their nets on private land. There is no necessity to be granted, they must, however, be ancient, continuous, certain and reasonable.

### *Foreshore – between MHWM and MLWM*

At common law, the foreshore is generally believed to be vested in the Crown, unless title has been gained by grant or prescription. The Crown now retains about half of the foreshore of the United Kingdom.

Private foreshore holdings do exist e.g. the Beaulieu Estate, Hampshire. Private rights of ownership over the foreshore are subject to a number of conditions, including: the rights and duties of the Crown, Coast Protection Authorities, and Ministry of Defence. In addition, owners have also to recognise the public rights of fishery and navigation and the law of public nuisance. Where a conveyance is made of foreshore and seabed, Crown ownership is retained in respect of all mines, and mineral substances within the land.

The Crown's interest in the foreshore along with responsibilities for management and improvement is vested in the Crown Estates Commissioners. The Commissioners may, grant leases for periods of up to 150 years or issue licences for parcels of land selected at their discretion and subject to any consideration, covenants, conditions or restrictions they think fit.

The use of licences by the Crown extends to the placing of cables over or under the foreshore or on, over, or under the sea or river bed, the placing of commercial moorings, the conduct of dredging operations both commercial and for navigation purposes and coast protection or land drainage works.

Given that the Crown cannot demise an interest in land greater than it possesses, the licensee is covenanted not to do anything that may prejudice or obstruct navigation or fishing beyond, the proper maintenance and use of the works, or otherwise constitute a nuisance.

In respect of the duties of the Crown, the defence of the realm is an historic duty under common law, this duty is not transferred or diminished with the transfer of any property rights. Further, the Secretary of State for Defence has byelaw making powers, to any area of sea, tidal water, or shore used for defence purposes, lying at least partly within the area of the territorial sea. The purpose of such byelaws is to regulate the use made of land and to secure civilians from danger in areas affected by weapons testing or training. Where private rights are adversely affected by such byelaws, there exists an entitlement to compensation.

Importantly, property rights are subject to a range of the public rights including fishery and navigation....

### *Fishing*

A public right to cross the foreshore to fish or navigate in the sea or in tidal waters In relation to the right of fishery, access may, however, only be in places which through necessity or usage are statutorily appropriated for the purpose or where the right is acquired by custom. The right to fish does not extend to the collection of seaweed, nor does it allow for the use of all fishing gears. It does, extend to the taking of bait for one's own use.

## *Navigation*

In respect of navigation, the rights of the Crown and of any person holding a grant in the soil of the foreshore, are subject to the right of owners of the adjoining land to have access to the sea at all times for purposes of the public right of navigation.

*"By the common law, all the King's subjects have in general a right of passage over the sea with their ships, boats and other vessels, for the purposes of navigation, commerce, trade and intercourse" (Blundell et al)*

The public right of navigation is a "right to wander" which supersedes the property rights of the Crown and their grantees and also the public and private rights of fishery, although unnecessary obstruction of fishing should be avoided. It is accompanied by incidental rights of anchoring and mooring, beaching and grounding, for which the riparian owner can extract no charge unless additional benefits are provided or it occurs within a harbour.

A right of access to the foreshore does not necessarily extend to a right to bathe or of recreation on the foreshore. Although the Crown holds the foreshore for the benefit of the public, these activities are not considered to fall under this definition. It is possible for a right to bathe to be formally acquired by agreement, statute, or order of the Secretary of State for the benefit of the public in general and the inhabitants of a particular district, or by prescription.

These rights can, be restricted where the ownership of the foreshore lies in the Crown, the Crown Estate Commissioners having the power to make regulations to be observed by persons using the foreshore, even to the point of restricting the common law rights of navigation and fishery. Local authorities also have byelaw making powers in respect of public bathing and pleasure boating on or from the foreshore.

Briefly, interfering with a scheduled ancient monument on, under, or in the foreshore and seabed is illegal and so the presence of one will impact on foreshore property rights. (Similarly, any wreck is protected by the designation of a restricted zone of a radius of 50-300m). Foreshore activities restricted by such designations are those, which would potentially tamper with or damage the designated site, but depositing material on the bed. Boating and baiting, for example, are not necessarily prohibited. Where an undesignated wreck exists on the foreshore then the permission of the owner needs to be obtained before interference of the wreck can take place.

### ***Seabed- below MLWM***

In respect of the seabed, the area beneath the territorial sea has been claimed as the property of the Crown. The position is a moot one, although the present balance of argument supports the Crown's claim to proprietary rights. This debate is a clear example that historically it was not possible to comprehend that the seabed would be capable of, and actively utilised, and of value.

Public access to the seabed may appear inconsequential to public access, but by virtue of users (particularly recreation) and the need to gain a footing in shallow waters (moorings) brief mention is made of occupation, conservation, safety and harbours.

### *Occupation*

As with the foreshore, leases of up to 150 years and licences are the typical. Alienation is further qualified by the existence of public rights of navigation and fishery. The rights of ownership, including that of alienation, are generally accepted not to extend to interfering with, or requiring the payment of tolls for, the execution of the right of navigation or any other right of the public.

### *Conservation*

Marine Nature Reserves is the conservation designation which affects property rights below Low water mark,. These are defined as areas of 'land covered (continuously or intermittently) by tidal waters or parts of the sea in or adjacent to Great Britain up to the seaward limits of territorial waters' for their nature conservation interest. While there are byelaw making powers in relation to these reserves, few have been designated and the byelaws cannot interfere with the rights and functions of any person and authority. This includes private rights and public rights of fishery and navigation.

### *Safety*

Further restrictions on the execution of property rights are generally based on the grounds of safety, such as protection afforded to wrecks and the restrictions imposed on activities in the general position of submarine cables and pipelines. Also, the powers of local authorities to make byelaws which can restrict property rights through the regulation of recreational activities out to 1,000m seawards of the low water mark also fall into this category, as do the powers of the Minister of Defence to provide for public safety in military exercise areas.

### *Harbours*

Because these areas are often popular recreation areas it is appropriate to highlight the position of harbours and their authorities within coastal zone property rights.

The nature, spatial extent and functions of harbour authorities vary, but the vast majority have their foundations in Acts of Parliament. The powers generally include the regulation of the movement and mooring of vessels, the licensing of works and the deposit and removal of objects by others within the harbour and the making of byelaws.

#### 4. EMERGING POLICY FRAMEWORK

Addressing the key questions: Is the coast is different form sea or land? And does it need a special focus? The answer is Yes. The facts are:

- It is dynamic, which fundamentally creates difficulties for planning in the area over overlap, the foreshore.
- It requires a strategic management system, to contribute toward sustainable and resilient development objectives in the marine environment.
- Unique factors such as common law rights to access to the foreshore and navigation, as described above and
- Far more institutions of governments and user groups are involved than will be found inland or at sea.

Thus the scene is set for the need for an overarching strategic approach. This is recognised at supra and national levels, both are intent on progressing with an integrated approach to the marine environment. Some relevant emerging Policy at EU and National level is overviewed:

##### *Europe:*

- In Oct 2007 the EU published its vision for an **integrated maritime policy together with a detailed action plan**. These actions cover a wide spectrum of issues ranging from maritime transport to the competitiveness of maritime business, employment, scientific research, fisheries and the protection of the marine environment.
- The EU **Marine strategy directive**, has now reached the final stages of Member agreement. The aim is to fit into the overarching policy of the EU to integrate an ecosystem based approach to management of human activities whilst enabling sustainable use of goods and services provided by the marine environment. The final text is expected to require member states to take measures to achieve and maintain Good Environmental Status (GES) in Europe's marine environment by 2020.
- A key thrust of this directive includes a 'roadmap towards maritime spatial planning by member states', which parallels the English current activity, explained next.

##### *England:*

- The Government's white paper on a **Marine Bill** was published in June 2006. Setting out its plans with 5 key proposals. Including, strengthening environmental management arrangements, setting up a marine management organisation, establishment of a strategic marine panning system, changes to marine licensing system, and new tools for conservation of marine wildlife.
- The Marine Bill was published in April 2008, and is entering its parliamentary process; so the earliest it could be passed into law is early 2009.



## *Impetus fro Change*

Property rights in the coastal zone have developed in parallel with man's exploration of space, in, on, and adjacent to sea, and investigations into science and technology. With each new step perceptions of value changed as with perceptions of what is possible or desirable, generating new issues and questions as to the nature and extent of the rights over the new discoveries. With such a discovery approach, the marine management framework has also evolved, but with the result that it is uncoordinated and ad hoc.

There are many social impetuses for change in the coastal zone; but Public access is at the forefront in England. The desire for leisure and recreation activities typifies the changing emphases along the coast.

DEFRA identified that improving coastal access is a priority issue, and should be is a flagship initiative for Natural England (NE) to 'demonstrate how access, landscape and wildlife benefits can be integrated in a positive way.

Consequently, in February 2007 NE published its advice to government, analysing the strengths and weakness of three existing legal mechanism for public access to the CZ:

1. New rights of way, or
2. New 'open' access using powers in the countryside and Rights of Way Act 2000, or
3. Voluntary measures that relies upon landowners.

NE concluded that none of the above would adequately meet the government's vision and so proposed new legislation, albeit it is assured that opportunities will be given to influence detail later. The linch pin to NE proposal is to make it possible to walk along the entire length of the English coast. Further, their desire is to progress swiftly; consequently, it is likely that their proposals will be incorporated into the emerging Marine Bill.

## *Responsibilities*

An integrated marine policy has responsibilities to serve all section of the community. It may be argued that NE is rushing their policy ideas, and not taking adequate steps for a due consultative process.

The challenge is to consider and promote an inclusive approach, which requires understanding existing property frameworks, and includes community individuals, business and landowners. As the RICS (2) has already commented, "what about":

- Clear and equitable methodology is needed for determination of a route and Mapping to provide clarity for the public users.
- The impact on business and property values should be investigated where NE desire
  - to prevent farmers planting their crops close to the coastal edge; on the basis that NE want to increase biodiversity in Rural areas, and
  - the ability for people to meander through a single route in urban areas.

- Introducing but also enforcing a coastal access code for users of the rights of way
- Access to beaches should be decided upon a case by case basis and decided at a local level

## 5. PLANNING FOR PUBLIC ACCESS

Traditional uses of land values attributed to coastal resources differ somewhat from the uses and values generated over the last century. This is consistent with the difference between the management framework, the legal provisions of yesteryear and arising circumstances of today, such as recreation, and public access.

It is observed that on land - Any human lifestyle on land, with the possible exception of low level hunting and gathering, involves deliberate alienation and fundamental alteration of areas of originally pristine environment. Typically human activities are regulated on the basis that subdividing an area or a resources and allocating subunits for different purposes with, generally, little interaction between the subdivided sites can accommodate a range of users.

It is observed that on sea-the majority of uses are still at the level of hunting and gathering. Alienation and fundamental alteration of the environment of areas of the seabed or volumes of the water column has not been a substantial issue until very recently. Now Mari culture, seabed mining, reclamation, tourism and some form of trawl or dredge fishing can and areas of seabed, pollution can modify the water column.

The combination of these observations, places the concept of alienation in a pivotal position, understanding the practicality of this is important reflected in the need for policy makers to appropriately draft legislation to facilitate subsequent implementation.

Further, the tradition and sense of public right to coastal use is extremely strong; thus public rights to use marine waters are generally accepted, but property rights on adjacent land often above high water mark, are highly institutionalised and the right to prevent access over land above MHWL will effectively negate the rights on land below MHWL. Access can be agreed with co-operation.

It appears that the government intention is to put in place an ecosystem based approach to management that will deliver good environmental status (GES). With added responsibilities to create Marine protected areas (MPA), does this mean restricting public access to all categories of coastal land?

Landowners are critical players in the delivery of economic, social and environmental objectives in the coastal zone. In terms of nature conservation interests major landowners are responsible for the preservation of adjacent coastal areas, including MOD, National Trusts and Private land Estates (Dumashie).

Often the conservation of rural and semi rural landscapes at the coastal interface are as a result of Private landowners undertaking appropriate good estate management activities.

Sometimes funded through countryside initiatives, e.g. Coastal Landowners, Hampshire, and/or in tandem with providing conservation led tourism, e.g. Dorset coastal Landowners.

Similarly along Urban coastlines, Business (public and private) is at the forefront of managing dynamic coastal communities, with access to marine business activity, which in turn promotes public recreation access and leisure through regeneration projects (e.g. Portsmouth, Hampshire).

Granted, landowners are not, in isolation, the panacea to solving all public access objectives, but they are an important part. It is not suggested that a “do nothing” option be adopted but acknowledged that a balance is required between competing interests. Indeed the conflicting demands for space should be assessed on the basis of public rights as they currently stand although care must be taken to ensure that companies and individuals with private property rights in the marine area are not overlooked. Transparency, inclusiveness, individual rights and an adequate scrutiny processes are expected in modern democratic systems.

Marine spatial planning frameworks should be drawn up to co ordinate related plans and decision making processes being mindful of business investment decision making, on both land and sea. This relates to security to make investment, and the current property regime in place. Similarly, in marine areas, any attempts to improve marine nature conservation should take into account the property rights of those abutting these areas. Notwithstanding that freedom of access is important, the consideration of a balanced approach in MPAs must be the subject of rigorous debate

As with statutory provisions, property rights are simpler in category below the low water mark than on terra firma, but in interpretation the reverse. Lying in between these two areas and physically changing in status between the two with the tide, the foreshore suffers from an uncomfortable combination of the two very different property rights frameworks. Fortunately, the ownership structure on which this combination sits is uncomplicated and relatively controllable, although the allocation of power and authority in this instance is frequently under debate.

## **6. CONCLUSIONS**

With increasing pressures not only from climate change raising the levels of the sea, but also economic changes, the impact on coastal access for the next generations will be influenced by the legal basis of how society might need to organise and policy frameworks they may need to adopt.

The significance of the coastal zone in terms of its resources and pressures has grown enormously, it is now time to fully understand and comprehend the rights and responsibilities in the coastal zone.

Coastal Area Management is inevitably a complex process. The focus should be integration covering: sectoral, spatial, and across government, science and management. The territorial

imperative of 'property rights' is a fundamental of the policy framework, and consequently, also a controlling factor on management, in this instance, public access to land.

Land law moves very slowly, but the balance between individual freedom and community responsibility, the tension between legal rules and local practice on the ground, the mechanics of control over land use and development is a strategic responsibility. But a significant change in attitudes toward land, with the rise of human rights law introducing procedural and compensation complexities, (Home) creates a need for alternative collaborative approaches.

It is proposed that working within the paradigm of land administration is possible based on a collaborative approach.

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