



Sustained Shoreline Access and Rising Seas: Rhode Island's Coast in a Changing Climate

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Rhode Island is increasingly vulnerable to climate hazards such as sea level rise, coastal erosion, flooding, and storm surges.¹ Consequently, Rhode Island's coastal areas are ever-changing,² which raises questions about the future of public shoreline access. The purpose of this report is to examine the laws and regulations that govern public shoreline access for developed coastlines. Part 1 explains the public trust doctrine, an important legal principle for this topic, and its implementation in Rhode Island. Part 2 and its subparts describe common regulatory mechanisms aimed at preserving public shoreline access. Part 3 discusses some additional regulatory strategies and considerations.

1 The Public Trust Doctrine & Rhode Island's Shoreline Access Law

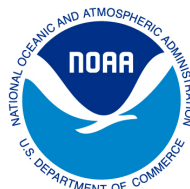
To understand the legal mechanisms of public shoreline access, it is useful to have foundational knowledge of the public trust doctrine. The public trust doctrine “is the fiduciary obligation of the state to hold state sovereign resources for the benefit of the general public.”³ In other words, the government's use of the public trust doctrine limits the privatization of access to certain natural resources.⁴

¹ *Introduction to Climate Change*, STATE OF R.I.: CLIMATE CHANGE (July 3, 2024), <https://climatechange.ri.gov/climate-science>.

² See STATE OF R.I., RESILIENT RHODY 13-15 (2018).

³ 2 WATERS AND WATER RIGHTS § 30.02(c) (Amy K. Kelley & Jesse J. Richardson, Jr., eds., 3rd ed. 2024); see also *public trust doctrine*, LEGAL INFO. INST. (May 2022), https://www.law.cornell.edu/wex/public_trust_doctrine (“Public trust doctrine is a legal principle establishing that certain natural and cultural resources are preserved for public use. Natural resources held in trust can include navigable waters, wildlife, or land. The public is considered the owner of the resources, and the government protects and maintains these resources for the public's use.”).

⁴ See Serena L. Liss, *Shoreline Armoring and the Public Trust Doctrine: Balancing Public and Private Interests as Seas Rise*, 46 ENV'L L. REP. NEWS & ANALYSIS 10033, 10034 (2016) (“In practice, the public trust doctrine serves to allow property owners to freely exercise most property rights, including ‘the rights to possession, use, and alienation,’ while limiting the property owner's rights to exclude and develop where exclusion or development would interfere with the public's right to use trust resources.”) (citation omitted).



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Traditionally, states have used the public trust doctrine to protect rights to fishing, commerce, and navigation,⁵ but the doctrine has evolved in some states, including Rhode Island, to encompass more resources and activities.⁶ Notably, Rhode Island incorporated the public trust doctrine into Article I, Section 17 of its constitution.⁷ That section states:

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.⁸

Conventionally, the public trust doctrine enabled the State of Rhode Island to “hold[] title to all land below the high-water mark in a proprietary capacity for the benefit of the public.”⁹ In 2023, however, Rhode Island enacted a law that specifies the public’s right to shoreline access “on wet sand or dry sand or rocky beach[] up to ten feet (10”) landward of the recognizable high tide line[,]” except where there is no passable shore and “on land above the vegetation line, or on lawns, rocky cliffs, sea walls, or other legally constructed shoreline infrastructure.”¹⁰ The recognizable high tide line can be identified by seaweed lines, relatively continuous shell or debris deposits, or other indicators left by the changing tides.¹¹ The 2023 law’s clarification of the public trust area is likely to affect property owners and the public because it changes where individuals may legally traverse.¹² Municipalities should understand where the public trust land begins and ends to better coordinate public access strategies.

⁵ Richard C. Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses*, U. ILL. L. REV. 407, 408 (1986) (discussing the expansion of the public trust doctrine).

⁶ See Sean Lyness, *The Local Public Trust Doctrine*, 34 GEO. ENV’T. L. REV. 2, 9-18 (2021) (explaining the public trust doctrine and its susceptibility to municipal government influence). See generally Liss, *supra* note 4, at 10034-35 (arguing that state governments can and should use the public trust doctrine to enhance shoreline protection).

⁷ See R.I. CONST. art. I, § 17.

⁸ *Id.*

⁹ Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1041 (R.I. 1995).

¹⁰ 46 R.I. GEN. LAWS § 46-23-26(c); see also R.I. HOUSE OF REPRESENTATIVES, SPECIAL LEGISLATIVE COMMISSION TO STUDY AND PROVIDE RECOMMENDATIONS ON THE ISSUES RELATING TO LATERAL ACCESS ALONG THE RHODE ISLAND SHORELINE: FINAL REPORT 11 (2022).

¹¹ 46 R.I. GEN. LAWS § 46-23-26(b).

¹² See Rob Smith, *Walk This Way: Shoreline Tour Explains Public Access Rights*, ECO RI NEWS (Sept. 25, 2023), <https://ecori.org/walk-this-way-shoreline-tour-explains-public-access-rights/>.

2 Popular Land Use Controls that may Help Ensure Public Access to the Shore: Setbacks, Easements, and Buyouts

The State of Rhode Island and its municipalities have various tools to maintain public shoreline access. Rhode Island's Coastal Resources Management Council (CRMC), the state's agency tasked with implementing Rhode Island's coastal management policies and managing coastal zone permit issuance,¹³ can and does utilize its regulations to protect public access to and along the coastline. Municipal governments can use local land use tools, like planning and zoning, to also maintain public shoreline access.¹⁴

Broadly, public shoreline access has two forms: lateral and perpendicular access.¹⁵ Lateral access refers to the public's ability to walk parallel to the shoreline¹⁶ whereas perpendicular access refers to the public's ability to reach the shore from the street or upland features adjacent to the shoreline.¹⁷ Rhode Island's shoreline access law is largely geared towards lateral access rights, and there are various obstacles to shoreline access that have the same effect as restrictions on perpendicular access.¹⁸ For instance, restrictive parking or lack of public transit routes can discourage individuals from trying to access the shore and therefore create a chilling effect on public access.¹⁹ Among the tools municipal governments can use to increase lateral and perpendicular shoreline access are setbacks, easements, and property buyouts.

2.1 Setbacks

Local governments incorporate setbacks in zoning codes for erosion and sea level rise concerns, but setbacks can also preserve public shoreline access. Generally, setbacks are the minimum distance that development must be set away from some boundary²⁰ and dictate how structures are sited in a coastal area.²¹

¹³ *What is the CRMC?*, RI COASTAL RES. MGMT. COUNCIL, [http://www.crmc.ri.gov/aboutcrmc.html#:~:text=The%20Coastal%20Resources%20Management%20Council%20\(CRMC\)%20is%20an%20independent%20state.%2046%2D23%2D22](http://www.crmc.ri.gov/aboutcrmc.html#:~:text=The%20Coastal%20Resources%20Management%20Council%20(CRMC)%20is%20an%20independent%20state.%2046%2D23%2D22) (last visited Nov. 18, 2024).

¹⁴ See 45 R.I. GEN. LAWS §§ 45-22.2-1 to -14.

¹⁵ *A Practical Guide to Beach Access and the Public Trust Doctrine in New Jersey*, URB. COAST INST. 2 (2017), <https://www.monmouth.edu/uci/documents/2018/10/beach-access-report.pdf/>.

¹⁶ Kristin A. Scaduto, *The Erosion of Private Property Rights After Raleigh Avenue Beach Association v. Atlantis Beach Club*, 51 VILL. L. REV. 459, 464 (2006) (discussing tensions between public and private property rights pertaining to beach access).

¹⁷ Todd McLeish, *Whose Right? Coastal Access is Constitutional but Controversial*, 41°N (March 2, 2022), <https://41nmagazine.org/2022/03/02/whose-right/>.

¹⁸ *Id.*; Rob Smith, *As Beach Days Come, So Does The Annual Ocean State Battle: Access and Parking*, ECO RI NEWS (May 16, 2022), <https://ecori.org/as-beach-days-come-so-does-the-annual-ocean-state-battle-access-and-parking/>.

¹⁹ See Alex Nunes, *Westerly beach parking bans are being called forms of 'bigotry'*, PUB.'S RADIO, (Mar. 12, 2024), <https://thepublicradio.org/shoreline-access/westerly-beach-parking-bans-are-being-called-forms-of-bigotry/>.

²⁰ *WATERFRONT SETBACKS*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (Mar. 24, 2024), https://coastalsmartgrowth.noaa.gov/gettingstarted/waterfront_setbacks.html.

²¹ Anne Siders, *Managed Coastal Retreat: A Legal Handbook on Shifting Development Away from Vulnerable Areas*, SABIN CTR. FOR CLIMATE CHANGE L. 41 (2013), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1146&context=sabin_climate_change.

In the context of public shoreline access, setback ordinances mandating minimum distances between development and the water can indirectly protect lateral access along the shore.²² Many coastal setbacks require that activities and alterations go through an administrative review before a permit is approved,²³ which allows for some oversight of development happening on private property in the coastal zone that may affect public shoreline access.²⁴ Therefore, while setbacks “convey[] no rights to the public[,]”²⁵ they can enable some regulation of public shoreline access.

For example, North Carolina has setback laws with co-benefits that prioritize lateral access to the shore. North Carolina’s Coastal Management Program has designated “ocean hazard areas” that include beaches and barrier islands.²⁶ These ocean hazard areas are subject to an “ocean hazard setback”²⁷ that, among other priorities, looks to “prevent encroachment of permanent structures on public beach areas” and “protect . . . public rights of [shoreline] access.”²⁸ The setback is determined by the size of the development and the shoreline erosion rate.²⁹ If an individual seeks a permit to build, they must measure from the “vegetation line,” which is “the first line of stable and natural vegetation” moving landward.³⁰ Development is generally not allowed past the setback moving towards the ocean,³¹ with some exceptions.³² The setbacks’ dependence on erosion rates and development sizes can enable a dynamic preservation of public shoreline access.

Rhode Island also has coastal setback rules through CRMC’s regulations.³³ CRMC defines a setback as, “the minimum distance from the inland boundary of a coastal feature or buffer zone at which construction or an approved activity or alteration may take place.”³⁴ CRMC also established coastal buffer zones, which are distances that “establish a natural area adjacent to a shoreline feature that must be retained in, or restored to, a natural vegetative condition.”³⁵ Under CRMC’s regulations, setbacks and coastal buffer zones often work in tandem, and, “[a]t a minimum . . . , setbacks shall extend either fifty (50) feet from the inland boundary of the coastal feature or twenty-five (25) feet inland of the edge of a Coastal Buffer Zone, whichever is further landward.”³⁶ Rhode Island’s

²² *Id.* at ii (describing how a private property owner may construct a seawall that limits lateral public access).

²³ *See* 650 R.I. CODE R. § 20-00-1.4; MARK RANDALL & HENDRIK DEBOER, CONNECTICUT GENERAL ASSEMBLY, COASTLINE CONSTRUCTION RESTRICTIONS (2012), <https://www.cga.ct.gov/2012/rpt/2012-R-0046.htm>.

²⁴ *See* 650 R.I. CODE R. § 20-00-1.1.3(E)(3).

²⁵ Siders, *supra* note 21.

²⁶ 15A N.C. ADMIN. CODE 07H.0301.

²⁷ *Id.* 07H.0306(a)(1).

²⁸ *Id.* 07H.0303(b).

²⁹ *Id.* 07H.0306(a)(2).

³⁰ *Id.* 07H.0305(5).

³¹ *Id.* 07H.0306(a)(3).

³² *Id.* 07H.0309(a).

³³ 650 R.I. CODE R. § 20-00-1.1.2(A)(141); 650 R.I. CODE R. § 20-00-1.1.2(A)(26).

³⁴ 650 R.I. CODE R. § 20-00-1.1.2(A)(141).

³⁵ *Id.* § 20-00-1.1.2(A)(26); *see also* *Coastal Classifications & Regulations*, RI COASTAL RES. MGMT. COUNCIL, http://www.crmc.ri.gov/samp_beach/cpg_classregs.html#:~:text=Coastal%20or%20shoreline%20features%20such,renovating%20or%20remodeling%20older%20structures (last visited July 1, 2024) (providing “coastal barriers, dunes, and wetlands” as examples of shoreline features); *see also* 650 R.I. CODE R. § 20-00-1.2.2 (categorizing shoreline features under coastal beaches, barrier islands and spits, coastal wetlands, coastal headlands, bluffs, and cliffs, rocky shores, manmade shorelines, and dunes).

³⁶ 650 R.I. CODE R. § 20-00-1.1.9(C).

setback rules are more definitive than North Carolina's, but they still help preserve public shoreline access.

Importantly, applications for development and alteration activities must demonstrate that the proposed actions will not impact existing public access areas.³⁷ Also, the coastal buffer zones help prevent the shoreline pinning problem that certain structures pose.³⁸ Further, permitted actions for commercial and industrial development that impact public access must include a "public access plan."³⁹ These plans should provide the same level of access that is being impacted by a project.⁴⁰ Lastly, municipalities can use their zoning authority to develop and enforce their own development standards on coastal properties. For example, Bristol, Rhode Island prohibits dune alteration and requires new construction to be "located landward of the reach of mean high tide."⁴¹ These state- and local-level requirements may be relatively subtle reinforcements of public shoreline access.

Although both the North Carolina and Rhode Island setback laws have the co-benefit of keeping lateral access clear for public use, setbacks are not without potential legal challenges. The Fifth Amendment prohibits the "taking" of private property for public use without just compensation.⁴² The United States Supreme Court has ruled on the use of regulations that constitute a "total taking"⁴³ A total taking violates the Fifth Amendment and therefore requires just compensation when a regulation deprives an owner of "all economically beneficial uses" of their land.⁴⁴ Notably, there has been debate that "climate change adaptations could present the type of emergency situation that American courts have frequently held exempts the government from takings liability,"⁴⁵ but this argument is untested in the courts so far.

Further, a couple recently sued the North Carolina Resources Commission after they were denied a permit to rebuild their beach vacation home after a fire destroyed the entire structure.⁴⁶ The permit was denied because the property did not "satisfy the 60 feet set-back limit"⁴⁷ as the property was only "set back 12 feet from the vegetation line" when measured.⁴⁸ The plaintiffs sued North Carolina under a Fifth Amendment takings claim.⁴⁹ While the court did not rule on the merits of the ocean hazard setback requirement and the Fifth Amendment challenge,⁵⁰ the lawsuit is

³⁷ *Id.* § 20-00-1.3.1(A)(1)(f).

³⁸ *See generally id.* § 20-00-1.1.11.

³⁹ *Id.* § 20-00-1.3.6(A)(4).

⁴⁰ *Id.* § 20-00-1.3.6(C)(2).

⁴¹ BRISTOL, R.I., ZONING ORDINANCE § 28-307(14).

⁴² U.S. CONST. amend. V.

⁴³ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

⁴⁴ *Id.* at 1018.

⁴⁵ Katherine C. Skinner, *Confronting Coastal Flooding Risks Due to Climate Change in Portland, Maine*, 26 OCEAN & COASTAL L. J. 155, 183 (2021) (discussing land use strategies to manage flood risks in Portland, Maine).

⁴⁶ *Zito v. N.C. Coastal Res. Comm'n*, 8 F.4th 281, 284 (4th Cir. 2021).

⁴⁷ *Id.* at 283.

⁴⁸ *Id.*

⁴⁹ *Id.* at 284.

⁵⁰ *Id.* at 289.

indicative of the types of claims that may be brought against a state that is enforcing setback requirements.⁵¹

2.2 Easements

Another mechanism for protecting public access rights are easements. Easements can help preserve coastal access because they can grant nonpossessory interests to the public on private property.⁵²

An easement is defined as “an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.”⁵³ In this context, an easement would provide public access to the shoreline by allowing the public to walk over existing private property.⁵⁴ Common easement types used to preserve public access to coastlines include conservation easements, rights-of-way, and rolling easements.

2.2.1 Conservation Easements

Conservation easements can help preserve public access while respecting private property rights.⁵⁵

A conservation easement is “a recorded, [permanent], individually tailored agreement creating a nonpossessory interest in real property” that often restricts a property owner from doing something on the land.⁵⁶ This may look like restricting development or armoring of the shore.⁵⁷

Conservation easements do not require public access, meaning public access on private land is subject to the assent of the property owner.⁵⁸ This type of easement can be an effective way to voluntarily restrict private property for a certain purpose, including perpendicular public access.⁵⁹

States can accept “non-state-owned [coastal] land” as a natural area preserve and open that land to the public by recording a conservation easement.⁶⁰ In Rhode Island, landowners have the ability to willingly restrict their land and “provide the public the benefit of the unique features of the land or water area” while retaining ownership of the land.⁶¹ Also, land trusts or government agencies offer a

⁵¹ See also *Stilts, LLC v. State of Rhode Island*, No. WC-2023-0481, 2024 WL 3488823 (R.I.Super. July 12, 2024) (deciding a motion regarding a constitutional takings challenge against Rhode Island’s new public shoreline access law); *Roth v. State of Rhode Island*, No. WC-2023-0440, 2024 WL 3488820 (R.I.Super. July 12, 2024) (deciding a motion regarding constitutional takings and other challenges against Rhode Island’s new public shoreline access law). See generally Nancy Lavin, *R.I. Superior Court judge sides with property owners in shoreline access law dispute*, R.I. CURRENT (July 15, 2024), <https://rhodeislandcurrent.com/2024/07/15/r-i-superior-court-judge-sides-with-property-owners-in-shoreline-access-law-dispute/>.

⁵² JAMES TITUS, ROLLING EASEMENTS 19 (2011).

⁵³ *Easements*, BLACK’S LAW DICTIONARY (12th ed. 2024).

⁵⁴ *McElroy v. Stephens*, 226 A.3d 1288, 1292 (R.I. 2020).

⁵⁵ *Conservation Easements*, SCITUATE CONSERVATION COMM’N, https://www.scituateriltcc.org/uploads/1/3/6/0/13607660/fact_sheet_-_conservation_easement.pdf (last visited Nov. 22, 2024).

⁵⁶ *Conservation Easement*, BLACK’S LAW DICTIONARY (12th ed. 2024).

⁵⁷ See TITUS, *supra* note 52, at 50.

⁵⁸ *Conservation Easements*, AQUIDNECK LAND TR., <https://aitl.org/protect-your-land/conservation-easements/#:~:text=While%20these%20arrangements%20typically%20restrict,may%20have%20outzones%20for%20structures> (last visited Aug. 29, 2024).

⁵⁹ *Questions and Answers on Conservation Easements*, RENSSLAER LAND TR., <https://www.renstrust.org/protect/14-protect/38-questions-and-answers-on-conservation-easements> (last visited Aug. 29, 2024).

⁶⁰ 42 R.I. GEN. LAWS § 42-122-5.

⁶¹ 34 R.I. GEN. LAWS § 34-39-2(a).

collaborative solution where landowners can grant conservation easements and enjoy modest financial considerations.⁶²

Conservation easements can be costly. For example, the Coastal Land Trust (“CLT”) in North Carolina is in the process of conserving “The Point,” a privately-owned, undeveloped stretch of barrier island in Topsail Beach.⁶³ In 2023, the beach was at risk for rezoning and development.⁶⁴ In March of 2024, the CLT signed a contract with the intent of purchasing the property from the private owners.⁶⁵ The agreed price for the property is approximately \$8 million.⁶⁶ The CLT has described raising that amount of money as a “daunting challenge.”⁶⁷ If the agreement were to go through, Topsail Beach would be transferred to the North Carolina Division of Coastal Management to ensure public access and ecological management.⁶⁸ Conservation of something like “The Point” is unlikely to happen often, but it does show how cost-prohibitive private land acquisition could be.

In Rhode Island, a conservation easement is a voluntary mechanism where private coastal property owners can encumber their land by prohibiting further development and providing public access without surrendering private ownership.⁶⁹ A conservation easement can be an agreement between a landowner and a land trust or government agency, such as CRMC.⁷⁰ The easement's terms can vary depending on the specific agreement but often include provisions that maintain or enhance coastal vegetation, protect wildlife habitats, and ensure public access to the shoreline.⁷¹ Private property owners who encumber their land may receive financial incentives such as lower property taxes, reduction in taxable probate assets, and one-time income tax breaks.⁷²

⁶² *A Guide to Land Protection with the South Kingstown Land Trust*, S. KINGSTOWN LAND TR. 10 (Oct. 2021), <https://sklt.org/wp-content/uploads/2021/10/Landowner-Guide-rev-Oct-21.pdf>.

⁶³ Press Release, Coastal Land Tr., Preserving Paradise: Coastal Land Trust Launches Campaign to Protect South Topsail Beach (Mar. 26, 2024), <https://coastallandtrust.org/wp-content/uploads/2024/03/South-Topsail-Beach-press-release.pdf>.

⁶⁴ Trista Talton, *Olsons Scrap Plans to Buy, Develop Topsail Beach Property*, COASTAL REV. (Nov. 30, 2023), <https://coastalreview.org/2023/11/olsons-scrap-plans-to-buy-develop-topsail-beach-property/>.

⁶⁵ *Campaign Launches to Save The South End*, COASTAL LAND TR. (Mar. 23, 2024), <https://coastallandtrust.org/campaign-launches-to-save-the-south-end/>.

⁶⁶ Gareth McGrath, *Conservation Group Wants to Buy “The Point” in Topsail Beach. Now it Just Needs \$ 8 Million*, STAR NEWS (Mar. 26, 2024), <https://www.starnewsonline.com/story/news/local/2024/03/26/nc-coastal-land-trust-plans-to-buy-the-point-on-topsail-beach-nc/73104791007/>.

⁶⁷ *Id.*

⁶⁸ COASTAL LAND TR., *supra* note 65.

⁶⁹ 34 R.I. GEN. LAWS § 34-39-2(a); *see also* 45 R.I. GEN. LAWS § 45-36-2.

⁷⁰ *Resources*, NAT’L CONSERVATION EASEMENT DATABASE, <https://www.conservationeasement.us/resources/> (last visited Nov. 22, 2024); *see, e.g., Application Forms and Fees*, RI COASTAL RES. MGMT. COUNCIL, <http://www.crmc.ri.gov/applicationforms.html> (last visited Nov. 22, 2024) (providing an application for a conservation easement).

⁷¹ S. KINGSTOWN LAND TR., *supra* note 62, at 8.

⁷² *Id.* at 10.

2.2.2 Rights-of-Way

Similar to a conservation easement, a public right-of-way (ROW) can secure perpendicular access to the shoreline.⁷³ ROWs are specific ways in which the state can designate public access points.⁷⁴ There are six ways in which ROWs can be established and then designed through CRMC,⁷⁵ including: (1) roadways which have been laid out, recorded, opened, and maintained; (2) highways by grant or use; (3) recording of a subdivision plat; (4) implied dedication; (5) highways used by the public “since time immemorial;” and (6) adverse possession.⁷⁶

CRMC has a legislative mandate and authority to establish a public ROW to the shore for public access to tidal waters, allowing passage on foot or by vehicle, depending on the site's condition; it can be used for fishing, scenic overlooks, or boat launching.⁷⁷ CRMC investigates potential public ROWs town by town, starting with fact-finding of common public access points to the shoreline, often at a town's request.⁷⁸ Evidence is reviewed by a CRMC subcommittee and presented at a public hearing; if a ROW is favorable, a recommendation is made to the full council for designation.⁷⁹ Once a public ROW is established, it cannot be abandoned or blocked unless there is concurrence between the local municipality and CRMC.⁸⁰ Municipalities in Rhode Island can use CRMC's designation process to establish ROWs to maintain public access to the coastline in perpetuity.⁸¹

2.2.3 Rolling Easements

Rolling easements can also help protect public access to coastlines on private property as the sea level rises and the coast erodes.⁸² A rolling easement is “either (a) a regulation that prohibits shore protection or (b) a property right to ensure that wetlands, beaches, barrier islands, or access along the shore moves inland with the natural retreat of the shore.”⁸³

Generally, access provided through the public trust doctrine moves inland with natural shoreline migration.⁸⁴ However, when access is created through other means, it often does not migrate inland with the shoreline.⁸⁵ When public access is created through certain kinds of easements, it is unlikely

⁷³ *Public Right of Ways: CRMC's Designation Process*, COASTAL RES. MGMT. COUNCIL 1, <http://www.crmc.ri.gov/publicaccess/ROWCoastalBriefing.pdf> (last visited Nov. 22, 2024); Matthew Ranelli, *Public Right of Access to Beaches*, OLR RSCH. REP. (Dec. 3, 1999), <https://www.cga.ct.gov/PS99/rpt/%5Colr/%5Chtm/99-R-1150.htm>.

⁷⁴ See 46 R.I. GEN. LAWS § 46-23-6(5).

⁷⁵ See COASTAL RES. MGMT. COUNCIL, *supra* note 73.

⁷⁶ *Id.*

⁷⁷ See *id.*; see also *CRMC-Designated Rights-Of-Way to the Shore*, CRMCGIS, <https://crmcgis.maps.arcgis.com/apps/instant/attachmentviewer/index.html?appid=7f8f263ce81c4e269c4b87a35371f86f> (last visited Nov. 22, 2024).

⁷⁸ COASTAL RES. MGMT. COUNCIL, *supra* note 73, at 2.

⁷⁹ *Id.*

⁸⁰ 46 R.I. GEN. LAWS § 46-23-6(5)(viii).

⁸¹ M. Allard Cox, *Public Access to the Rhode Island Coast*, R.I. SEA GRANT 81 (2004), http://www.crmc.ri.gov/publicaccess/ri_access_guide.pdf.

⁸² Siders, *supra* note 21, at 54.

⁸³ TITUS, *supra* note 52, at 6.

⁸⁴ *Id.* at 21.

⁸⁵ *Id.*

those easements would continue to exist as the shorelines change through erosion events or other climate-related changes.⁸⁶ Contrarily, rolling easements may be a tool coastal states can use to adjust public access boundaries as the coastline erodes, ensuring continued access to the shore.

Texas tried to codify rolling easements in the Open Beaches Act.⁸⁷ The Act allows the creation of a rolling easement through a public easement or public use that was “continuous.”⁸⁸ More importantly, the Act defines “public beach” to include dry beach on privately-owned property “[in] which a public easement has been established.”⁸⁹ Therefore, the Act seemed to allow the dry beach with a public easement to roll landward as the sea eroded the wet beach.⁹⁰ However, in 2010, the Texas Supreme Court concluded that the Act did not recognize a “rolling” public beachfront access easement on private dry beach property.⁹¹ The court noted that “[t]he [Open Beaches Act] does not necessarily create a rolling easement along the dry beach . . . or any other places where the access has been obtained by means other than the public trust doctrine.”⁹² The court added that when the public has an easement for beach use, the precise location of the easement will likely not move in conjunction with gradual changes to the boundaries of the easement.⁹³ Thus, in Texas, easements may allow the public to use the existing beaches subject to the easement, but “the wet beach is owned by the State as part of the public trust, and the dry beach is not part of the public trust and may be privately owned.”⁹⁴ This type of easement is untested in Rhode Island courts.

Rhode Island’s new shoreline access law has a similar outcome to a rolling easement: both the law and rolling easements address boundaries that are subject to change.⁹⁵ The law protects public access ten feet landward of a “recognizable high tide line,” which can fluctuate due to typical tidal ranges.⁹⁶ A rolling easement adjusts its boundary inland as the shoreline recedes due to erosion.⁹⁷ The primary objective of the new Rhode Island law emphasizes state access rights and serves as a broader approach to addressing the challenges of erosion and sea-level rise than coastal rolling easements.⁹⁸ Municipalities can use rolling easements to address the long-term effects of erosion and sea level rise and use the statute to mark the boundary between private property and the land held in public trust.

⁸⁶ *Id.*

⁸⁷ See TEX. NAT. RES. CODE §§ 61.001-.254.

⁸⁸ *Id.* § 61.011(a).

⁸⁹ *Id.* § 61.001(8).

⁹⁰ TITUS, *supra* note 52, at 48.

⁹¹ *Severance v. Patterson*, 370 S.W.3d 705, 718 (Tex. 2011).

⁹² TITUS, *supra* note 52, at 48.

⁹³ See *Patterson*, 370 S.W.3d at 722.

⁹⁴ *Id.* at 718.

⁹⁵ See 46 R.I. GEN. LAWS § 46-23-26(c).

⁹⁶ *Id.*

⁹⁷ Jessica Grannis et al., *Coastal Management in the Face of Rising Seas: Legal Strategies for Connecticut*, 5 SEA GRANT L. AND POL’Y J. 59, 82 (2012).

⁹⁸ See H.R. 5174 Sub A, Gen. Assemb., Reg. Sess. (R.I. 2023).

2.3 Property Buyouts

Municipalities can also address flooding risks and protect public access to coastlines by acquiring coastal properties through buyout programs.⁹⁹ Buyouts avoid the takings issues associated with the expanding public trust areas by offering landowners compensation in exchange for their property.¹⁰⁰ Property buyouts are typically voluntary but can be involuntary through the doctrine of eminent domain, where the government can compel the sale of private property for the public good but offers just compensation to the private property owner.¹⁰¹ Often, governments acquire at-risk coastal properties and hold the land in public trust.¹⁰² Like coastal setbacks, buyout programs can help create and enforce natural buffer zones that can dampen the harmful effects of storm surges and protect infrastructure further inland.¹⁰³ Some property buyout programs open after a declared disaster and are typically funded through the federal government.¹⁰⁴

Oakwood Beach, New York, like many other neighborhoods across coastal America, experienced increasing levels of flooding dating back to the 1990s; authorities approved the property buyout process after the 16-foot storm surge from Hurricane Sandy inundated the community and destroyed their homes.¹⁰⁵ The Oakwood Beach community buyout committee urged the state to buy out the entire neighborhood rather than individual homes that were destroyed or at risk of future flooding.¹⁰⁶ Three months after Sandy struck the community, Governor Andrew Cuomo introduced a \$200 million state-funded buyout program to relocate families in flood-prone areas like Oakwood Beach to elsewhere in the state.¹⁰⁷ A year later, 184 out of 185 homeowners applied to this program, and by 2015, 180 applications were accepted; their properties were bought out and the state committed to maintain the properties as open space.¹⁰⁸ This community-led initiative demonstrates a successful model for voluntary buyouts that could be replicated in other vulnerable coastal areas with support from state and local governments.

A similar buyout program could be successful in Rhode Island at the local level if municipal leaders involve residents by assigning them various roles or tasks, promoting community cohesion, deepening relationships, and increasing buy-in for the process.¹⁰⁹ Rhode Island municipalities, can

⁹⁹ See, e.g., *Blue Acres*, N.J. DEPT. OF ENV'T PROT. (Nov. 20, 2024), <https://dep.nj.gov/blueacres/>.

¹⁰⁰ Katie Spidaleri and Annie Bennett, *Managed Retreat Toolkit: Introduction to Voluntary Buyouts*, GEORGETOWN CLIMATE CTR., <https://www.georgetownclimate.org/adaptation/toolkits/managed-retreat-toolkit/voluntary-buyouts.html> (last visited Aug. 29, 2024).

¹⁰¹ Siders, *supra* note 21, at 109.

¹⁰² *Id.*

¹⁰³ *Id.* at 110.

¹⁰⁴ See *Hazard Mitigation Assistance Grants*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/grants/mitigation> (last visited Nov. 22, 2024); see also Press Release, Jack Reed, Reed Announces Over \$12 Million Buyout Lifeline for Flood-Prone Properties in East Providence, Middletown and Narragansett (July 7, 2022), <https://www.reed.senate.gov/news/releases/reed-announces-over-12-million-buyout-lifeline-for-flood-prone-properties-in-east-providence-middletown-and-narragansett-federal-funds-will-help-homeowners-and-offer-natural-storm-protection-to-vulnerable-neighborhoods>.

¹⁰⁵ Kate Spidaleri et al., *Managing the Retreat from Rising Seas: Staten Island, New York: Oakwood Beach Buyout Committee and Program*, GEORGETOWN CLIMATE CTR. 2 (2012), https://www.georgetownclimate.org/files/MRT/GCC_20_Oakwood-4web.pdf.

¹⁰⁶ *Id.* at 3.

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.* at 1.

¹⁰⁹ See *id.* at 4.

improve on the Oakwood buyout program by being proactive with their legislation and community engagement. Proactive legislation can expedite the buyout process after a storm, and it can also work preventatively to reduce the environmental impacts of storms by removing at-risk properties in favor of open space before a storm strikes. This approach could also help correct public misperceptions, reduce stress, and expand the buyout program's reach to other Rhode Island communities.

3. Other Regulatory Tools

There are several additional mechanisms under CRMC's authority that may be utilized to establish and preserve public shoreline access. For one, CRMC has special authority under the federal Coastal Zone Management Act¹¹⁰ and Rhode Island's statutes¹¹¹ to develop Special Area Management Plans (SAMPs), or "ecosystem-based management strategies."¹¹² SAMPs provide specific regulations to preserve, protect, and manage coastal resources.¹¹³ SAMPs can identify public access areas and establish guidelines for development that prioritize access in the face of coastal hazards.¹¹⁴ For example, the Greenwich Bay SAMP states, "It is CRMC policy to . . . continue to protect and provide for new public access sites as part of the ongoing permit process."¹¹⁵ CRMC must ensure that new, allowable activities preserve public access at CRMC-designated ROWs to Greenwich Bay.¹¹⁶ The regulation also requires that applicants for proposed activities that will impact public access must then provide access of a similar type and level.¹¹⁷

Additionally, CRMC can utilize its permitting authority to address some barriers to public shoreline access, such as private shoreline armoring. Private property owners seeking to prevent erosion and mitigate the effects of sea level rise sometimes use hard structures (such as sea walls) to armor their private property.¹¹⁸ Those hard structures, however, may limit public shoreline access by pinning the private property in place while the coast around the armoring erodes.¹¹⁹

¹¹⁰ 16 U.S.C. § 1452(3).

¹¹¹ 46 R.I. GEN. LAWS § 46-23-6(1)(v).

¹¹² *Special Area Management Plans*, RI COASTAL RES. MGMT. COUNCIL, <http://www.crmc.ri.gov/samps.html> (last visited April 19, 2024).

¹¹³ 16 U.S.C. § 1452(3).

¹¹⁴ *Shoreline Change SAMP*, RI COASTAL RES. MGMT. COUNCIL 4-72 to -73 (June 2018), http://www.crmc.ri.gov/samp_beach/SAMP_Beach.pdf.

¹¹⁵ 650 R.I. CODE R. § 20-00-6.4.5(A)(1).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Siders, *supra* note 21, at 63.

¹¹⁹ Badreya Almarshed et al., *Innovative Coastal Risk Reduction through Hybrid Design Combining Sand Cover and Structural Defenses*, 1 J. OF COASTAL RSCH. 174, 175 (2020) (exploring the effectiveness of hard and soft shoreline defense structures and strategies).



Figure 1. 2 Green Hill Ave, South Kingstown, R.I.¹²⁰

Currently, CRMC regulations require applicants seeking permits for shoreline armoring to maintain public access as a condition of approval.¹²¹ In the event public access is impacted at any time, a lateral public access plan that details alternate public paths around the structure shall be provided for CRMC review and approval.¹²² Additionally, shoreline armoring is generally prohibited in Type 1 (Conservation Areas)¹²³ and Type 2 (Low Intensity Use)¹²⁴ waters (which comprise 70 percent the state's shoreline¹²⁵). With assent, the only permissible shoreline protection is vegetation or biodegradable materials used to reduce the erosion in the area.¹²⁶ If a previously approved shoreline armor structure was damaged by more than half, rebuilding it requires a new permit from CRMC and the new permit shall be reviewed in accordance with the most current guidelines.¹²⁷ CRMC has the authority to restrict new structural shoreline protection in Rhode Island in favor of public coastal access.¹²⁸

To ensure sufficient lateral public access while balancing property owner rights and environmental concerns, CRMC could regularly review and update the regulations and management plans to ensure they reflect current best practices and consider all stakeholder interests. CRMC could also implement effective enforcement mechanisms and monitoring programs to ensure compliance with regulations and assess their effectiveness in maintaining public access. By addressing these areas, the

¹²⁰ 2 Green Hill Avenue, South Kingstown, R.I., GOOGLE MAPS, https://www.google.com/maps/place/2+Green+Hill+Ave,+South+Kingstown,+RI+02879/@41.3657046,-71.5975879,826m/data=!3m2!1e3!4b1!4m6!3m5!1s0x89e5caa03bcc20c3:0x855bf5a18a3e75f6!8m2!3d41.3657006!4d-71.5950076!16s%2Fg%2F11c3716js7?entry=ttu&g_ep=EgoyMDI0MTAwNS4yIKXMDSoASAFQAw%3D%3D.

¹²¹ 650 R.I. CODE R. § 20-00-1.3.1(G)(4)(b)(8).

¹²² *Id.*

¹²³ *Id.* § 20-00-1.2(B).

¹²⁴ *Id.* § 20-00-1.2(C).

¹²⁵ *Id.* § 20-00-1.2.1(A).

¹²⁶ *Id.* § 20-00-1.1.2(A)(97).

¹²⁷ *Id.* § 20-00-1.3.1(N)(1)(d).

¹²⁸ *Id.* § 20-00-1.3.6(A).

regulations could be strengthened to better protect both shoreline properties and public access, ensuring a balanced and sustainable approach to shoreline management.

Conclusion

Coastal development and public access are not mutually exclusive. Through careful policy design, a balance can be achieved. Rolling easements offer a dynamic solution, while property buyouts can be beneficial to municipalities and homeowners in specific situations. Voluntary land grants and well-defined setbacks promote collaboration and responsible development for the community. By understanding the benefits and drawbacks of each approach, coastal communities can craft tailored shoreline access approaches that meet that community's unique needs.