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Land Acquisition and Coastal Resource Management: A Pragmatic Perspective

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LAND ACQUISITION AND COASTAL RESOURCE MANAGEMENT· A PRAGMATIC PERSPECTIVE

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There is a growing recognition in the United States that coastal resources are important and that properly managing their use and development is crucial. For example, barrier islands and wetlands historically were considered to be worthless wasteland. Over the past twenty years, however, the public has come to understand and appreciate these areas as economically and ecologically important.[1] Coastal wetlands are vital to sport and commercial fishing because they provide critical spawning and nursery areas and support the base of the aquatic food chain. Coastal wetlands also protect water quality by filtering out harmful pesticides and sediments from water running off upland areas that otherwise would flow into coastal waters. Some wetlands are vital to water supply, serving as important ground water recharge areas.[2] Wetlands also protect coastal developments from natural hazards by acting as buffers to erosion and as natural storage areas for flood waters.

Although ocean beaches traditionally have been popular recreational attractions, affluence and improved public transportation in the twentieth century have transformed many beaches into heavily developed resorts.[3] Bustling beach towns filled with new condo-

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1. The law has long recognized the importance of protecting key public rights and interests in critical areas such as navigable waters. *See* Butler, *The Commons Concept: An Historical Concept With Modern Relevance*, 23 WM. & MARY L. REV. 835 (1982); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571 (1971); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

2. *See generally* J. CLARK, COASTAL ECOSYSTEM MANAGEMENT (1977); POCOSIN WETLANDS (C. Richardson ed. 1981); WETLAND FUNCTIONS AND VALUES: THE STATE OF OUR UNDERSTANDING (P Greeson, J. Clark & J. Clark eds. 1979).

3. Recent studies show that of the 1,631.3 miles of barrier island ocean frontage on the Atlantic and Gulf coasts, 34% of this already is developed and another 8% already has developmental infrastructure such as roads, water, and sewer. OFFICE OF COASTAL ZONE

minium projects, high-rise motels, and fast-food restaurants have displaced many isolated fishing villages and desolate stretches of barren beaches. Although such development permits more visitors and provides jobs and increased tax revenues for residents, development also brings peculiar problems. Foremost among these problems is the tremendous damage that occurs when developed areas fall victim to hazardous natural forces.[4] A single storm can move the shoreline hundreds of feet landward, thus destroying improperly located or constructed buildings or shelters.[5] Long-term erosion, frequently averaging several feet per year, occurs in many coastal areas.[6] Without proper coastal management practices, these natural forces can lead to loss of life and property, and require tremendous public expenditures for disaster relief, reconstruction after storms, and erosion control projects.

Until recently, government efforts to manage coastal development and to protect sensitive coastal resources proceeded on an issue by issue basis with little coordination between the different programs. For example, the federal government long has accepted a role in protecting key wetland areas. The two primary vehicles

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MANAGEMENT, NATIONAL OCEANIC AND ATOMOSPHERIC ADMINISTRATION, DEP'T OF COMMERCE, BIENNIAL REPORT TO THE CONGRESS ON COASTAL ZONE MANAGEMENT 26 (1982) [hereinafter cited as BIENNIAL REPORT].

4. *See generally* J. CLARK, J. BANTA & J. ZINN, COASTAL ENVIRONMENTAL MANAGEMENT: GUIDELINES FOR CONSERVATION OF RESOURCES & PROTECTION AGAINST STORM HAZARDS (1980); W. KAUFMAN & O. PILKEY, THE BEACHES ARE MOVING (1979); Hildreth, *Coastal Natural Hazards Management*, 59 OR. L. REV. 201 (1980); Kuehn, *The Shifting Sands of Federal Barrier Island Policy*, 5 HARV. ENVTL. L. REV. 217, 218-22 (1981); Maloney & O'Donnell, *Drawing the Line at the Oceanfront: The Role of Coastal Construction Setback Lines in Regulating Development of the Coastal Zone*, 30 U. FLA. L. REV. 383 (1978); Shows, *Florida's Coastal Setback Line—An Effort to Regulate Beachfront Development*, 4 COASTAL ZONE MGMT. J. 151 (1978).

5. The cost in terms of life and property resulting from coastal storms is high. Improved forecasting, warning, and evacuation plans may prevent future large-scale loss of life such as occurred during the hurricane in 1900 which killed 6,000 people in Galveston, Texas. Nevertheless, increasing populations in flood-prone areas and areas that are difficult to evacuate make another such disaster possible. In any event, tremendous property losses are inevitable. Hurricane Fredrick, which struck the Mississippi and Alabama Gulf coast in 1979, caused an estimated two billion dollars in property damage. BIENNIAL REPORT, *supra* note 3, at 22. For a summary of the physical effects of a large storm in an ocean beach area, see Schramm, Penland, Gerdes & Nummedal, *Effects of Hurricane Fredrick on Dauphin Island, Alabama*, 48 SHORE & BEACH 20 (1980).

6. *See, e.g.*, Dolan, Hayden, Rea & Heywood, *Shoreline Erosion Rates Along the Middle Atlantic Coast of the United States*, 7 GEOLOGY 602 (1979).

for achieving federal wetland protection objectives have been a regulatory program administered by the United States Army Corps of Engineers[7] and wildlife refuge acquisition programs administered by the Department of the Interior.[8] These two programs have the same general purposes,[9] but generally have not been coordinated.[10] Lack of coordination characterizes other federal coastal management programs, including programs to acquire coastal recreational areas for parks.[11] Additionally, executive orders limit fed-

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7. The principal federal regulation for wetland protection is § 404 of the Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344 (1976 & Supp. V 1981), which requires a permit from the Corps of Engineers for discharging dredged or fill material in any wetland. A closely related federal regulatory program, also administered by the Corps of Engineers, requires permits for any obstruction or alteration of navigable waters. *See* Rivers & Harbors Appropriation Act of 1899, § 10, 33 U.S.C. § 403 (1976). Federal protection of navigation interests, however, predates even the 1899 statute. *See, e.g.*, Pennsylvania v. Wheeling and Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851). For a critical assessment of the implementation of wetland regulation see Parish & Morgan, *History, Practice and Emerging Problems of Wetland Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 LAND AND WATER L. REV. 43 (1982).

8. Federal legislation for acquiring critical wetland areas as wildlife refuges dates to 1929. *See* Migratory Bird Conservation Act, 16 U.S.C. §§ 715-715s (1976 & Supp. V 1981). Later legislation expanded the federal government's ability to acquire land. *See* Migratory Bird Hunting Stamp Act of 1934, 16 U.S.C. §§ 718-718i (1976 & Supp. V 1981); Wetlands Loan Act, 16 U.S.C. §§ 715k-3 to -5 (1976). In addition to this general legislation, a number of specific acts have provided for individual refuges to be established. *See* Holmes, *Federal Participation in Land Use Decision Making at the Water's Edge—Floodplains and Wetlands*, 13 NAT. RES. LAW. 351, 383 (1980). As of 1979, the U.S. Fish and Wildlife Service owned 31 refuges on Atlantic and Gulf Coast barrier islands, encompassing 388,582 acres and nearly 180 miles of beach frontage. HERITAGE CONSERVATION AND RECREATION SERVICE, DEP'T OF THE INTERIOR, ALTERNATIVE POLICIES FOR PROTECTING BARRIER ISLANDS ALONG THE ATLANTIC AND GULF COASTS OF THE UNITED STATES AND DRAFT ENVIRONMENTAL IMPACT STATEMENT 9 (1979) [hereinafter cited as ALTERNATIVE POLICIES].

9. Both are designed to protect the natural values of important undisturbed wetlands. The Corps of Engineers' regulations on discharges of dredged or fill material specifically recognize the values of wetlands for nesting and breeding by migratory waterfowl, 33 C.F.R. § 320.4(b)(2) (1982), and limit discharges into such areas; *id.* § 323.4(b)(7).

10. One recent study of federal wetland management programs concluded, "The two sets of issues—federal wetland acquisition for waterfowl breeding and wintering, and dredge and fill permitting under Section 404 [of the Water Pollution Control Act]—have rarely, if ever, been joined for broad consideration of national wetland policy." ENVIRONMENTAL AND NATURAL RESOURCES POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, WETLAND MANAGEMENT 97th Cong., 2d Sess. 139 (1982) [hereinafter cited as WETLAND MANAGEMENT].

11. As of 1979, the federal government had acquired nine national seashores, one national recreation area, and part of a national park on the country's coastline. ALTERNATIVE POLICIES, *supra* note 8, at 6. These holdings amounted to 222,000 acres. *Id.* at 8. Separate Acts of

eral agency activities in wetland and floodplain areas.[12] State programs for managing coastal resources did not begin in most parts of the country until the 1960's, and then they focused almost exclusively on coastal wetland management.[13] Virtually all of the state and federal programs concentrated on a single resource or addressed a specific problem, because no program for comprehensive management of coastal resources existed.

In the 1970's several states recognized the importance of proper coastal management and, significantly aided by financial incentives from the federal government,[14] implemented comprehensive coastal management programs.[15] As of June 1982, twenty-six states

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Congress have provided for acquisition of most of these areas.

12. Exec. Order No. 11,988, 3 C.F.R. 117-20 (1978) (wetlands); Exec. Order No. 11,990, 3 C.F.R. 121-23 (1978) (floodplains).

13. *See generally* Dawson, *Protecting Massachusetts Wetlands*, 12 SUFFOLK U. L. REV. 755 (1978); Heath, *Estuarine Conservation Legislation in the States*, 5 LAND & WATER L. REV. 351 (1970); McGregor & Dawson, *Wetlands and Floodplain Protection*, 64 MASS. L. REV. 73 (1979); Note, *Coastal Wetlands in New England*, 52 B.U.L. REV. 724 (1972); Note, *Regulations and Ownership of the Marshlands: The Georgia Marshlands Act*, 5 GA. L. REV. 563 (1971); Note, *Maryland's Wetlands: The Legal Quagmire*, 30 MD. L. REV. 240 (1970).

14. The Federal Coastal Zone Management Act provided financial incentives. 16 U.S.C. §§ 1451-1464 (1976 & Supp. 1980). The principal grants to the states were to develop and implement programs. *Id.* §§ 1454-1455 (1976 & Supp. V 1981). In the 1981 fiscal year, the federal government granted $35,534,000 to the states to implement their management programs. BIENNIAL REPORT, *supra* note 3, at 51. Additional state funds also were expended for these programs because federal grants are limited to 80% of program costs.

To be approved under the Federal Coastal Zone Management Act of 1972, state programs must include the following: (1) an identification of the boundary of the state's coastal zone; (2) a definition of those permissible land and water uses within the coastal zone that have a direct and significant impact on coastal waters; (3) an explanation of how these uses will be managed; (4) an inventory and designation of areas of particular concern and the ability to designate areas for preservation and restoration; (5) general priorities of uses in these areas; (6) a description of the program's organization; (7) a planning program for access to beaches and other important public coastal areas; (8) a planning program for siting energy facilities in the coastal area; (9) a planning program for addressing shoreline erosion; (10) a program for coordinating program development and implementation with all affected public and private parties; (11) a demonstration that the program provides for adequate consideration of the national interest in planning and siting facilities, other than local needs; and (12) a method for assuring that local regulations do not unreasonably restrict or exclude land and water uses of regional benefit. 16 U.S.C. §§ 1454(b), 1455(c), (e) (1976 & Supp. 1981).

15. *See generally* Davidson, *Coastal Zone Management and Planning in California: Strategies for Balancing Conservation and Development*, 15 URB. L. ANN. 253 (1978); Douglas & Petrillo, *California's Coast: The Struggle Today—A Plan for Tomorrow*, 4 FLA. ST. U.L. REV. 177 (1976); Finnell, *Coastal Land Management in Florida*, 1980 AM. B. FOUND. RESEARCH J. 303; Finnell, *Coastal Land Management in California*, 1979 AM. B.

and territories, possessing nearly eighty-seven percent of the nation's coastline, had comprehensive coastal management programs that met standards necessary for federal financial assistance.[16] The primary focus of these programs is wetland protection, beach and dune protection, and management of floodplain areas.[17] Although the states conducted some studies on land acquisition and compiled several land ownership inventories, most states determined that regulating development of coastal regions required immediate implementation of coastal management programs.[18] The management tools used to implement these programs were almost uniformly land use planning and environmental regulation.[19]

Planning and regulation have limited utility, however, because

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FOUND. RESEARCH J. 647; Forman, *Louisiana Coastal Resources Management Act of 1978*, 28 LA. B.J. 91 (1980); Goodman, *The Delaware Coastal Zone Experience*, 5 ENVTL. L. 727 (1975); Schoenbaum, *The Management of Land and Water Use in the Coastal Zone: A New Law is Enacted in North Carolina*, 53 N.C.L. REV. 275 (1974); Note, *The South Carolina Coastal Zone Management Act of 1977*, 29 S.C.L. REV. 666 (1978).

16. These states and territories include Alabama, Alaska, American Samoa, California, Connecticut, Delaware, Florida, Guam, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, North Carolina, New Hampshire, New York, Northern Marianas, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Virgin Islands, Washington, and Wisconsin. BIENNIAL REPORT, *supra* note 3, at 1, 50.

17. *See* OFFICE OF COASTAL ZONE MANAGEMENT, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEP'T OF COMMERCE, THE FIRST FIVE YEARS OF COASTAL ZONE MANAGEMENT (1979).

18. *Id.*

19. For example, the discussion of management techniques in a guide used by a number of states in program development focuses almost exclusively on planning and regulatory approaches as a management technique. J. ARMSTRONG, H. BISSELL, R. DAVENPORT, J. GOODMAN, M. HERSHMAN & J. SORENSEN, COASTAL ZONE MANAGEMENT: THE PROCESS OF PROGRAM DEVELOPMENT 85-123 (1974). Section 306(d) of the Federal Coastal Zone Management Act of 1972 requires states to consider the full range of legal authority necessary to implement comprehensive management programs, including acquisition of interests in land. 16 U.S.C. § 1455(d) (1976). The original federal regulation on program approval explicitly noted, however, that "[i]n most cases, it will not be necessary to acquire fee simple ownership. Normally, appropriate use restrictions will be adequate to achieve conformance with the program." 40 Fed. Reg. 1690 (1975) (codified as amended at 15 C.F.R. § 923.41 (1982)) (language appears only in comment to original rule).

From the outset, the federal program has encouraged a broad perspective of coastal management. For example, § 306(c)(9) of the Federal Coastal Zone Management Act of 1972 requires that management programs include provisions for designating areas that should be preserved or restored. 16 U.S.C. § 1455(c)(9) (1976). Attention to such topics by the states was modest during the initial program development and implementation states, however, and these topics generally were addressed either superficially or through incorporation by reference of preexisting park, refuge, and similar programs.

alone they will not achieve certain objectives of a comprehensive coastal management program. Completely preserving an area in its natural state and setting aside an area for public recreation are goals that land acquisition can most effectively and fairly accomplish; however, because public land acquisition is expensive, involves time-consuming and complicated procedures, and often raises political opposition, land acquisition should be employed only in limited circumstances.

This Article, in describing the practical elements of a land acquisition program, will consider the extent of the interest acquired, methods of acquisition, and sources of funding. The Article then will examine land acquisition in the context of North Carolina's coastal management program. First, recent legislation providing for the acquisition of land to increase public beach access will be examined. Then, by focusing on the development of management plans for the Currituck Outer Banks, the Article will illustrate the practical problems with developing a comprehensive coastal management program of which land acquisition is a key element. The Article concludes that because land acquisition is an essential tool for effective management of coastal areas, private and public agencies should be encouraged to coordinate their efforts to accommodate diverse interests and incorporate land acquisition into integrated coastal management systems.

Land Acquisition as a Resource Management Tool

Constitutional Limitations on Regulation

An important factor making land acquisition a key coastal management tool is the constitutional limitation on regulation. The United States Constitution prohibits appropriating private property for public use without compensating the owner.[20] When the

20. The fifth amendment to the United States Constitution provides that "property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V The fourteenth amendment makes this provision applicable to the states. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 235-41 (1897). *See also* United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 279 (1943). Similar limitations are included in most state constitutions. For a general review and analysis of the "takings" claim, see F Bosselman, D. Callies & J. Banta, The Taking Issue (1973); Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Sup. Ct. Rev. 63; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*,

government seizes private property for public use, such as for a military base or reservoir,[21] or invades property in a traditional trespass sense[22] to an extent that materially frustrates normal use and enjoyment of the property, a property right has been taken and the owner is entitled to relief.[23] Thus, if a coastal community were to construct a protective sand dune on private property to minimize future storm losses, and if it did so without compensating the owner or securing his consent, the community has unconstitutionally taken that property.[24]

When a land owner alleges that government regulations so restrict his property use as to be a constructive taking of the property for public use a more difficult situation arises. Until the 1900's, the United States Supreme Court was not sympathetic to constructive taking claims. For example, the Court ruled in 1887 that a Kansas law prohibiting the manufacture of intoxicants did not constitute a constructive taking of a brewery even though the law rendered the facility useless.[25] The Court stated that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[26]

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80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

21. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (owner is entitled to compensation where state agency authorizes dam and floods private property). A taking may not be found, however, even where property is physically destroyed by the government. *See, e.g.*, United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952) (destruction of private oil-storage facilities in Philippines during war not a taking). *Cf.* United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (War Production Board's closing of private gold mines not a taking).

22. *See, e.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

23. One important issue is whether the owner of property which has been "taken" by regulatory action is entitled to monetary compensation or only invalidation of the regulation as applied. *See infra* notes 24-34 and accompanying text. *See also* Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L.Q. 517 (1981); Johnson, *Compensation for Invalid Land Use Regulations*, 15 GA. L. REV. 559 (1981); Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981).

24. Lorio v. Sea Isle City, 88 N.J. Super. 506, 212 A.2d 802 (1965).

25. Mugler v. Kansas, 123 U.S. 623 (1887).

26. *Id.* at 668-69.

In 1922, however, the Court invalidated a Pennsylvania law prohibiting coal mining that might cause harmful land subsidence.[27] Justice Holmes noted that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[28] Subsequent attempts to articulate a standard to define how far is "too far" have been futile.[29] Recently, in an extensive review of taking cases, Justice Brennan noted that they are "essentially ad hoc, factual inquiries . "[30] The basic question underlying the taking issue is "determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."[31]

Taking challenges in the context of coastal management are most likely to arise when regulations greatly restrict the alteration or use of wetlands, floodplains, and other natural hazard areas. Additionally, landowners are likely to assert a taking claim when regulations require dedication of areas for public use.[32] Although

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27. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

28. *Id.* at 415.

29. As Professor Dunham noted 20 years ago, "[w]hen a problem that the Constitution itself states in ethical terms must be answered by courts with few, if any, guides, it is not surprising that there are floundering and differences among judges and among generations of judges." Dunham, *supra* note 20, at 105. Considerable litigation since that time confirms the wisdom of this observation. For the Supreme Court's recent attempts to more precisely define this point, see San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (challenge to open space zoning dismissed for lack of jurisdiction); Agins v. City of Tiburon, 447 U.S. 255 (1980) (upholding low density zoning); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (upholding the constitutionality of New York City's landmark preservation program as applied to the Grand Central Terminal).

30. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

31. *Id. See* Armstrong v. United States, 364 U.S. 40, 49 (1960). In these regulatory takings cases, the analysis essentially is a substantive due process review addressing the fundamental fairness of the application of the regulation, although the Court does not explicitly address it as such. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 646-53 (1980) (Brennan, J., dissenting).

32. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979). This case involved a 523-acre pond that was being dredged from a two-foot to a six-foot depth, with sluice gates connecting the pond to navigable waters being removed. The project was part of a large subdivision and marina complex. The Court ruled that requiring this pond to be open to public access would constitute a taking. Justice Rehnquist concluded "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Id.* at 179-80.

A strong dissent in *Kaiser Aetna* noted that "this question requires a balancing of private

courts rarely invalidate regulations on a taking challenge,[33] the belief of coastal managers that invalidation may result if they regulate too restrictively may influence their management decisions.[34]

To obviate the effect of this belief on coastal managers' decisionmaking and to avoid unconstitutional takings, land acquisition must be integrated into state coastal resource efforts. Acquisition

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and public interests." *Id.* at 188 (Blackmun, Brennan, and Marshall, JJ., dissenting). The dissent would find no taking had occurred because the pond's owner would suffer little damage if public access were allowed, and because the Government's interest in securing public access was substantial: "Such appropriation of navigable waters for private use directly injures the freedom of commerce that the navigational servitude is intended to safeguard." *Id.* at 191 (Blackmun, Brennan, and Marshall, JJ., dissenting).

In another "right to exclude" case, the Court did not find a taking. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (statute forbidding a shopping center from excluding pamphleteers held not to be a taking). *See also* Georgia-Pacific Corp. v. California Coastal Comm'n, 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982) (required dedication of beach access not a taking); Brady, *The Navigation Easement and Unjust Compensation*, 15 J. MAR. L. REV. 357 (1982); Note, *Assault on the Beaches: "Taking" Public Recreational Rights to Private Property*, 60 B.U.L. REV. 933 (1980); Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 U.C.L.A. L. REV. 1049 (1981).

33. The vast majority of recent challenges to environmental regulations on takings grounds have not been successful. *See, e.g.*, Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970) (denial of fill permit not a taking); Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (wetlands regulation upheld); Brecciaroli v. Connecticut Comm'r of Envtl. Protection, 168 Conn. 349, 362 A.2d 948 (1975) (wetlands regulation upheld); Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981) (wetlands regulation upheld); Iowa Natural Resources Council v. Van Zee, 261 Iowa 1287, 158 N.W.2d 111 (1968) (floodplain regulation upheld); Town of Boothbay Harbor v. Russell, 410 A.2d 554 (Me. 1980); Potomac Sand and Gravel Co. v. Governor of Md., 266 Md. 358, 293 A.2d 241, *cert. denied*, 409 U.S. 1040 (1972) (wetlands fill prohibition upheld); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973) (floodplain ordinance upheld); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975) (wetlands regulations upheld); Usdin v. State, 173 N.J. Super. 311, 414 A.2d 280 (1980) (floodplain regulation upheld); Spears v. Berle, 48 N.Y.2d 254, 397 N.E.2d 1304, 422 N.Y.S.2d 636 (1979) (wetlands regulation upheld); State v. Capuano Bros., Inc., 384 A.2d 610 (R.I. 1978) (wetlands regulation upheld); Maple Leaf Investors, Inc. v. State, 88 Wash. 2d 726, 565 P.2d 1162 (1977) (floodplain legislation upheld); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (shoreline/wetlands legislation upheld). *But see* Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963) (wetlands regulation held a taking).

34. One comprehensive survey of the takings issue concluded that "the fear of the takings issue is stronger than the takings clause itself." F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 20, at 318. In such instances, the political constraints imposed by the regulators' perceptions of what is publicly acceptable, coupled with their own beliefs about what is appropriate, may well be more of a limiting factor than the possibility of judicial invalidation on a takings challenge.

is not a substitute for planning and regulation, but is a tool supplementing the traditional management tools.[35] Where planning and regulation can meet resource management objectives adequately, as in restricting the type and design of development, they should be used. In special cases where planning and regulation are inadequate, however, land acquisition may be the most effective and equitable way to reconcile public needs with private property interests. To be most effective, however, land acquisition must be a well considered component of a comprehensive management program.

The Viability of Land Acquisition

Historically, the government has limited land acquisition to acquiring space for providing governmental services, such as roads, water and sewer lines, and government offices. Although land acquisition long has been recognized as an effective management tool to implement land use and environmental policies,[36] large-scale land acquisition as an urban growth management tool often has been rejected as too costly and politically infeasible.[37] Nevertheless, governments frequently acquire land for specific purposes. For example, governments at all levels regularly acquire land for parks and for wildlife and waterfowl preserves.[38] Although less common, governments recently have acquired land to promote urban renewal,[39] to prevent development in hazard areas,[40] and to preserve

35. The question of compensable regulations is beyond the scope of this Article.

36. *See, e.g.*, Comment, *Public Land Ownership*, 52 YALE L.J. 634 (1943). Citing problems of land speculation, urban sprawl, blight, inefficient provision of utilities, and loss of esthetic and recreation resources, the author concluded that "[e]xtensive public ownership of land appears to be the most effective technique of countering this unplanned chaos." *Id.* at 636.

37. Kamm, *The Realities of Large-Scale Public Land Banking*, in 3 MANAGEMENT AND CONTROL OF GROWTH 86, 87 (R. Scott ed. 1975). The concept, nevertheless, remains popular with American commentators. *See, e.g.*, MODEL LAND DEVELOPMENT CODE art. 6 (1976). Public acquisition of large areas of land, particularly in areas where urban growth is anticipated, frequently is suggested as a growth management tool. *See, e.g.*, Note, *Public Land Banking: A New Praxis for Urban Growth*, 23 CASE W. RES. L. REV. 897 (1972). At the appropriate time for development, the government would resell the acquired land with appropriate use restrictions to manage the character and intensity of the development. The technique has been used with some success in Sweden, Finland, Israel, and the Netherlands. *Id.* at 908-12.

38. For a discussion of such efforts by the federal government, see *supra* notes 8 & 10.

39. One important limitation on governmental acquisition authority, particularly under eminent domain powers, is the requirement that the property be put to public use. The United States Supreme Court, in upholding an urban renewal acquisition, has ruled that

open space.[41]

While the total amount of land acquired for public use is relatively modest, individual acquisition proposals often generate extreme controversy and strong political opposition. Citing that the federal government owns approximately one third of the nation's land,[42] critics decry the socialization of one of our most highly treasured private resources—private property. Although more than ninety percent of federally owned land is western land that never has been owned privately,[43] the federal government recently indicated concern over any extension of land ownership by the federal government.[44] At the state and local levels, opposition to land acquisition proposals generally centers on the cost of acquisition and the loss of tax revenues.[45] A philosophical uneasiness with government having anything other than a very limited role in land owner-

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acquisition to secure a better balanced and more attractive community served a legitimate public purpose and, therefore, met the public use requirement. Berman v. Parker, 348 U.S. 26 (1954).

40. Examples of hazard areas include areas subject to natural hazards, such as steep slope and floodway areas, and areas subject to man-made hazards, such as safety zones near airports. *See* 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 157.10 (1975).

41. *See, e.g.*, C. LITTLE, CHALLENGE OF THE LAND 25-33 (1968); Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274 (1966).

42. The federal government owns a little more than 33% of the land in the United States. State and local governments own 6%, and 2% is held in trust for Indians. Total public ownership is 42%. U.S. GENERAL ACCOUNTING OFFICE, THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED (1979) [hereinafter cited as FEDERAL DRIVE TO ACQUIRE].

43. Of the 760 million acres in federal ownership, 700 million acres are unappropriated lands that have always been in the public domain. Ninety percent of this federal land is located in 13 western states. *Id.*

44. Upon taking office in 1981, Secretary of the Interior James Watt imposed an 18-month moratorium on all land acquisitions by his Department. The rationale for the moratorium was a belief that federal funds would be better spent in maintaining existing property than in acquiring new properties. *See* SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, 97TH CONG., 1ST SESS., WORKSHOP ON PUBLIC LAND ACQUISITION AND ALTERNATIVES 7-18 (Comm. Print 1981) (statement of Secretary Watt).

45. Local and state governments with limited budgets and a reluctance to raise taxes understandably prefer to resolve natural resource management issues through planning and regulation rather than capital intensive land acquisition projects. The problem of high costs of public land acquisition is exacerbated by the lengthy time period required for acquisition. Rapid escalation of land values between the time a public land acquisition is authorized and the time acquisition actually takes place is not uncommon. W. WHYTE, THE LAST LANDSCAPE 57-58 (1968). The local concern regarding tax base loss stems from both the immediate loss of property tax revenues when the property is transferred from private ownership to tax exempt public ownership as well as the loss of future enhanced property tax revenues from more valuable developed property.

ship undoubtedly is also a potent underlying factor causing opposition to many state and local acquisition proposals.

In coastal areas, land acquisition can be a tremendously valuable resource management tool. Wetlands critical to fisheries and wildlife have been developed at an alarming rate.[46] Draining, filling, or developing wetlands diminishes their value as fisheries and waterfowl habitat, destroys spawning and food supply areas, and renders them ineffective for flood control and water quality protection. Development of adjacent lands can be almost as disruptive because of the harmful effects of storm water run-off. Preserving these areas through acquisition is often more equitable and effective, legally and politically, than attempting to curtail development through regulation. Additionally, strong demand for recreational use of coastal waters and beaches requires that this land not be left entirely in private hands.[47] Further, in some coastal areas, the public costs resulting from development, in the form of subsidies for water, sewer, and transportation services, as well as flood insurance and disaster relief, are potentially so high that land acquisition is less costly to taxpayers over the long term.[48] Finally, ownership of

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46. The U.S. Fish and Wildlife Service estimates that of the country's original 127 million acres of wetlands located in the lower 48 states, 45 million acres had been lost by 1956. WETLAND MANAGEMENT, *supra* note 10, at 65.

47. As with most aspects of public land ownership, disagreement exists even on whether acquisition of public parks is a proper function of government. *See, e.g.*, M. FRIEDMAN, CAPITALISM AND FREEDOM 31 (1962).

48. *See, e.g.*, Kuehn, *The Shifting Sands of Federal Barrier Islands Policy*, 5 HARV. ENVTL. L. REV. 217 (1981). The author concludes that proposals for public purchase of privately owned undeveloped barrier islands may "present the best means to ensure environmental protection, save lives, and compensate present owners. Though the initial cost seems high, government subsidy of development for only one-half of the undeveloped, unprotected area over the next twenty years would be five times [as expensive] " *Id.* at 255 (footnotes omitted). *See also* Note, *Barrier Islands: The Conflict Between Federal Programs that Promote Preservation and Those That Promote Development*, 33 S.C.L. REV. 373 (1981).

Legislation calling for barrier island acquisition has been introduced in Congress on several occasions. *See, e.g.*, H.R. 857, 97th Cong., 1st Sess. (1981). Recent legislation restricting federal investments on undeveloped barrier islands may reduce the public costs resulting from future development. Coastal Barrier Resources Act, Pub. L. No. 97-348, 96 Stat. 1653 (1982) (to be codified at 16 U.S.C. §§ 3501-3510).

An instance of the federal government determining that land acquisition would be less expensive than a flood control project is the Army Corps of Engineers' decision to acquire 8,000 acres of wetlands along the Charles River rather than create a channel in 10 miles of the river at a cost of $30 million. WETLAND MANAGEMENT, *supra* note 10, at 48.

key land areas can influence development patterns for an entire coastal area and affect the type, timing, and intensity of development of nearby lands.[49]

Extent of Interest Acquired

Public land acquisition generally requires the government to acquire the full fee simple interest.[50] The reasons are clear: a need to acquire all property rights to adequately protect the property; the lack of any significant cost savings with alternatives; simplicity for both the private landowners and the government; and a lack of familiarity with less than fee acquisition.[51] In most instances, then, acquiring the full fee simple interest is justified and reasonable.

In some situations, however, an alternative to fee acquisition can be used more effectively to benefit all parties involved. The most frequently used alternative is acquiring an easement.[52] Easements fall between uncompensated regulation and full fee acquisition and are particularly advantageous when the government is attempting to accomplish a specific objective, such as preventing future development while preserving the landowner's limited use of the property.

Public easements can be either negative or positive. Negative easements prevent the landowner from taking certain actions deemed adverse to the public interest. For example, when the government acquires an easement to preserve a scenic view, the owner sells the government his right to develop the property in ways that obstruct the view.[53] Landowners also may sell to the government

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49. *See infra* notes 139-79 and accompanying text. The presence of large land holdings, initially by the hunt clubs and subsequently by The Nature Conservancy and the Audubon Society, has had a major impact on development patterns on the Currituck Outer Banks.

50. Of 2.2 million acres acquired by the three federal agencies most involved in land acquisition—the National Park Service, the Fish and Wildlife Service, and the Forest Service—88% was fee acquisition and 12% was acquisition of partial rights. FEDERAL DRIVE TO ACQUIRE, *supra* note 42, at 4-6.

51. *See, e.g.*, W. WHYTE, *supra* note 45, at 54-65.

52. Most of the more than 18,000 partial rights acquired by the federal government have been easements to prevent drainage or filling of seasonal wetlands in the upper Midwest, affecting more than one million acres acquired by the Fish and Wildlife Service. FEDERAL DRIVE TO ACQUIRE, *supra* note 42, at 25.

53. The purchase of scenic easements on 1,200 acres along the Blue Ridge Parkway by the federal government in the 1930's was one of the earliest and largest scenic easement acquisitions. *Id.* at 23-24. Wisconsin pioneered use of scenic easements at the state level when it

their right to develop wetland areas. Such a sale prevents any alteration of the area, but the owner retains exclusive hunting and fishing rights. This arrangement often meets the principal objective of both the government, which is interested in habitat preservation and water quality protection, and wetland owners, particularly those who originally purchased extensive wetland areas for waterfowl hunting.

In contrast, positive easements give the public limited use rights. Examples of positive easements include public hunting or fishing rights and public use of a strip of upland property as a walkway to the beach. Whether the public easement is negative or positive, the underlying fee simple interest remains in private hands, and the owner retains the right to make economically productive use of the property.[54]

Easements have advantages and disadvantages as compared to fee acquisition. The principal advantage is that an easement is a carefully tailored agreement between the government and a landowner, thereby allowing the government to obtain only those property interests it actually needs, and leaves in private hands those property interests that a landowner may deem essential.[55] Addi-

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undertook one of the country's most extensive efforts in the 1960's to protect and preserve views along the Great River Road and other scenic state highways. The Wisconsin Department of Transportation acquired easements on 15,000 acres along more than 290 miles of highway in this effort. OFFICE OF STATE PLANNING AND ENERGY, WISCONSIN DEP'T OF ADMIN., NONREGULATORY TECHNIQUES FOR URBAN GROWTH MANAGEMENT IN WISCONSIN 58 (1978) (D. Owens, S. Schaeffer & G. Kalson). The Wisconsin Supreme Court upheld use of condemnation to acquire scenic easements for the road in Kamrowski v. Wisconsin, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

For a discussion of easements as a government alternative to fee acquisition, see generally P HOOSE, BUILDING AN ARK: TOOLS FOR THE PRESERVATION OF NATURAL DIVERSITY THROUGH LAND PROTECTION 115-35 (1981); Campbell, *Conservation Easements: An Effective Tool in the Environmental Kit*, 39 POPULAR GOV'T 36 (1973); Coughlin & Plaut, *Less-than-Fee Acquisition for the Preservation of Open Space: Does It Work?*, 44 J. AM. INST. OF PLANNERS 452 (1978); Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENVER L.J. 167 (1968); Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECON. 343 (1963); Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*, 1965 WIS. L. REV. 352; Comment, *Easements to Preserve Open Space*, 1 ECOLOGY L.Q. 728 (1971).

54. The nature and extent of the fee owners' use rights, and therefore their economic value, are determined by the terms of the easement and vary significantly. *See infra* notes 57-58.

55. Such flexibility allows the negotiation necessary for the successful execution of some public land acquisitions. For example, the retention of hunting rights by existing fee owners

tionally, easements may provide amicable accommodations where fee acquisition would lead to bitter conflict.[56] Easement acquisition also can be less costly for government, although the cost of acquiring extensive development rights frequently approaches the cost of acquiring the fee interest.[57] Finally, some local governments favor easement acquisition because it does not completely remove the land from the property tax base, though it does reduce the assessed value of the property.[58]

A disadvantage of easement acquisition is that some easements, particularly negative easements, can have significant long-term administrative and enforcement costs not incurred with fee acquisitions.[59] Other disadvantages include the difficulties of drafting the easement precisely and accurately appraising the value of the easement.[60]

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of marshlands along the Currituck Outer Banks was an essential element of state and county support of the Fish and Wildlife Service's refuge acquisition proposal. *See infra* note 161 and accompanying text.

56. *Id. See also* W. WHYTE, *supra* note 45, at 80-82.

57. The cost of easement acquisition can vary significantly depending primarily upon the character of land involved and the type of easement interest being obtained. Where the development rights being acquired constitute a relatively small portion of the property's value, such as the right to develop a marsh being held primarily for its waterfowl hunting rights, the easement's cost relative to fee acquisition is low. Conversely, the cost of acquisition of all development rights in highly marketable property that is suited for development, such as certain upland oceanfront properties, will approach the cost of fee acquisition. As one commentator succinctly concluded, "Easements are worth what the landowner is giving up." W. WHYTE, *supra* note 45, at 87.

58. The classic example is the acquisition of scenic or open space easements on rural lands where existing uses such as farming may be continued. The present use value of the property is not diminished, though that portion of the existing fair market value based on future development expectations is lost. In such situations there is little or no immediate reduction in assessed values for property tax purposes, but potential future increments in value as development possibilities become more concrete, with concomitant increases in property tax revenues, are lost.

59. *See* FEDERAL DRIVE TO ACQUIRE, *supra* note 42, at 27; Lambert, *Private Landholdings in the National Parks: Examples from Yosemite National Park and Indiana Dunes National Lakeshore*, 6 HARV. ENVTL L. REV. 35, 39 (1982). *See generally* HERITAGE CONSERVATION AND RECREATION SERVICE, DEP'T OF THE INTERIOR, LAND CONSERVATION AND PRESERVATION TECHNIQUES 10-28 (1979).

60. *See, e.g,* SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, 97th CONG., 1ST SESS., WORKSHOP ON PUBLIC LAND ACQUISITION AND ALTERNATIVES 452-55 (Comm. Print 1981) (statement of Michael Priesnitz); Roush, *What's Wrong with Easements?*, in PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION, 71 (B. Rushmore, A. Swaney & A. Spader eds. 1982). Other acquisitions of less-than-fee interest also are used in special situations. For example, the government may want to acquire an area for future preservation

Methods of Acquisition

Various methods exist for acquiring public interests in land, including purchases, donations, and dedications. The most direct method of public acquisition of any interest in land is by purchase, using eminent domain powers when the owner does not want to sell. Purchases raise few legal issues other than assuring that the acquisition is for a public use or purpose,[61] assuring that statutory authority for the acquisition involved will be sufficient to avoid ultra vires problems,[62] and assuring that proper procedures are followed.[63]

The expense of property and the scarcity of funds frequently prevent governments from purchasing land. Donations of land and bargain sales[64] occasionally are available to government agencies with the expertise and interest necessary to consummate such transactions.[65] Although the parks programs of some state and local governments are based primarily on donated lands, most public agencies[66] have not used donations extensively as an acquisition

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without displacing current residents. Rather than leaving private enclaves within a large public park or wildlife refuge, the public can acquire the property and allow the owner to retain either a life estate or a long-term lease. Public agencies have used other techniques successfully, such as purchases and sellbacks with restrictions. FEDERAL DRIVE TO ACQUIRE, *supra* note 42, at 121-23. *See also* Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709, 732-36. This technique has been used widely and successfully for urban renewal. Tax foreclosures, adverse possession, land exchanges, and other devices also are useful techniques.

61. *See supra* note 39.

62. Exercising eminent domain powers requires specific statutory authorization. Courts generally will not imply the authority to condemn property. *See, e.g.*, Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540, 569 (1904); Dillon v. Davis, 201 Va. 514, 519, 112 S.E.2d 137, 141 (1960).

63. Detailed statutory provisions regarding appraisals, offers, values, closing procedures, and relocation of landowners are common. Although these provisions add some protection to individual property owners from governmental overreaching, procedures frequently make government acquisition more cumbersome, time-consuming, and expensive than similar private transactions.

64. A bargain sale is the sale of property to a government agency (or other qualifying nonprofit organization) for less than the fair market value. The seller generally is then eligible to claim a charitable contribution for income tax purposes for the donation of the difference between the market value and the sales price. *See* HERITAGE CONSERVATION AND RECREATION SERV., DEP'T OF THE INTERIOR, LAND CONSERVATION AND PRESERVATION TECHNIQUES 25-26, 54-56 (1979).

65. *See* C. LITTLE, *supra* note 41, at 57-66.

66. Some public agencies facing a chronic shortage of maintenance and improvement

technique.

Substantial income tax advantages accrue to donors who make charitable contributions of land interests to public agencies. Donated land is particularly valuable to many government donees because its value frequently can be used to meet matching requirements for additional grants. Making land donations a successful component of an effective public land acquisition program is possible, but demands extreme flexibility, patience, diplomacy, initiative, and persistence by the acquiring agency

A final acquisition method used on a widespread basis is requiring mandatory dedication of land as a condition of zoning or subdivision approval of new development.[67] For example, developers may be required to dedicate land for roads, schools, and parks before receiving approval for their subdivision. Coastal management programs can use this method to require dedication of beach accessways for oceanfront property developments.

The dedication requirement, however, is triggered only by requests for approval of development proposals, and its use generally is limited to instances of active property development. Because the dedication requirement generally must relate back to public service needs or costs being generated by the development, this method has only limited usefulness. It will not address needs in previously developed areas, and is of little use when the purpose of acquiring the land is to prevent development.

Sources of Funding

Funding land acquisition programs represents one of the major obstacles to implementing land acquisition as a coastal management tool. A wide variety of public acquisition programs operate at the federal, state, and local levels. At the federal level, over a hundred different statutes authorize land acquisition.[68] The most sig-

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funds may refuse to accept donations of land.

67. *See generally* R. Ducker, Dedicating and Reserving Land to Provide Access to North Carolina Beaches (1982) (report by the Institute of Government, University of North Carolina, Chapel Hill); Jacobsen & McHenry, *Exactions on Development Permission*, in WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 342 (D. Hagman & D. Misczynski eds. 1978); Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L. REV. 871 (1967).

68. FEDERAL DRIVE TO ACQUIRE, *supra* note 42, at 3. Although several of these are compre-

nificant federal funding source for land acquisition in the past fifteen years has been the Land and Water Conservation Fund.[69] Established in 1965, the Fund receives revenues from the sale of federally owned surplus realty, motorboat fuel taxes, recreation fee receipts, and outer continental shelf mineral leasing receipts.[70] At least forty percent of the fund must be used for federal purposes.[71] Only a modest portion of these funds, however, has been used to acquire key coastal lands.[72]

Several other federal programs provide funds for land acquisition, although at lower funding levels than the Land and Water Conservation Fund. The refuge acquisition program of the Department of the Interior is a widely used source of funding.[73] The national estuarine sanctuary program, funded through the Federal Coastal Zone Management Act,[74] provides funds for acquiring

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hensive acts, many are project specific. Individual acts authorize most national parks and many national wildlife refuges.

69. 16 U.S.C. §§ 460*l*-4 to -11 (1976 & Supp. 1980).

70. *Id.* §§ 460*l*-5 to -5a (1976 & Supp. V 1981).

71. *Id.* § 460*l*-7 (1976 & Supp. 1981). Through 1978, federal agencies had received $1.6 billion from the Fund and states had received $1.9 billion. By September 30, 1977, of the $1.2 billion obligated by federal agencies for land acquisition using Fund monies, the National Park Service spent $815 million, the Forest Service spent $284 million, the Fish and Wildlife Service spent $54 million, and the Bureau of Land Management spent $8 million. At that time, the federal government had used the Fund to acquire two million acres of land, and the states had acquired lands at a rate of approximately one million acres a year. FEDERAL DRIVE TO ACQUIRE, *supra* note 42, at 3-4. The Reagan Administration has proposed eliminating funding for this program for the 1984 federal fiscal year.

72. Of the $3.5 billion available through the Fund, *see supra* note 69, only $128 million was spent to acquire barrier island acreage. ALTERNATIVE POLICIES, *supra* note 8, at 4. As of late 1979, approximately $37 million had been spent to acquire floodplain areas. Holmes, *supra* note 8, at 380.

73. *See supra* note 8. Preserving migratory waterfowl habitat and breeding areas, funded primarily through the sale of duck stamps to hunters, involved acquiring 2.2 million acres of land between 1935 and 1976. In 1977, revenues available for this program were $12 million. WETLAND MANAGEMENT, *supra* note 10, at 97.

74. 16 U.S.C. § 1461 (1976 & Supp. 1980). In fiscal years 1980 and 1981, the federal government provided $5.174 million to the states to acquire estuarine sanctuary sites. BIENNIAL REPORT, *supra* note 3, at 51. One of the unique aspects of this statute is that it makes acquisition funds available to the state agencies responsible for overall coastal resource management. *See generally* Dennis, Browning & Bissell, *Elkhorn Slough: The Making of an Estuarine Sanctuary*, in 3 COASTAL ZONE '80, at 1939 (B. Edge ed. 1980); Hanselmann & Vogel, *Old Woman Creek, Ohio: The Designation of a Freshwater Estuarine Sanctuary*, 4 COASTAL ZONE MGMT. J. 329 (1978); Ross & Hepp, *Estuarine Sanctuaries—The Oregon Experience*, 1 COASTAL ZONE MGMT. J. 433 (1974); Young, *Duplin River Estuarine Sanctuary—A Description*, 4 COASTAL ZONE MGMT. J. 213 (1978).

coastal areas that are to be preserved in a natural state for research and education. Provisions of the federal flood insurance program allow the government to acquire floodprone areas,[75] but little funding has been appropriated to implement the provision.[76] Federal community development block grants to local governments are another important source of funding for land acquisition in some communities.[77]

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75. National Flood Insurance Act of 1968, § 1362, 42 U.S.C. § 4103 (Supp. 1980). This provision, funded for the first time in 1980, allows the government to acquire properties suffering 25% damage three times in a five-year period, and damaged properties for which restoration either is not permitted or permitted only at significantly increased reconstruction costs. Congress authorized $5.4 million for this program in 1982. Holmes, *supra* note 8, at 360-61. *See also* NAT'L OCEANIC AND ATMOSPHERIC ADMIN., DEP'T OF COMMERCE, THE FEDERAL COASTAL PROGRAMS REVIEW: A REPORT TO THE PRESIDENT 24-25 (1981).

The Federal Emergency Management Agency has also employed a "constructive total loss" concept to fund limited relocation projects. In these situations, damaged but not destroyed structures which cannot be rebuilt under local regulations were declared total losses and the full amount of the policy paid to fund relocation even though actual damages were less than this amount. U.S. WATER RESOURCES COUNCIL, STATE AND LOCAL ACQUISITION OF FLOODPLAIN AND WETLANDS 75 (1981) (Ralph M. Fields Assoc., Inc.).

76. An example of inflexibility in governmental programs which has caused higher costs and less successful results was the inability of the federal government to implement this provision of the flood insurance program in North Carolina in the fall of 1982. A small winter storm destroyed one beach cottage in Kitty Hawk and left 10 to 15 others so close to the ocean that another small storm probably would destroy them. Despite requests from the state, the federal flood insurance program was unable to employ § 1362 to pay for the relocation of the structures and acquire the hazardous lots. When a second storm hit the area several weeks later, it washed 10 cottages into the sea. The insured property owners recovered the full value of their structures (an amount much higher than the cost of relocation and lot acquisitions) under the flood insurance program, and the vacant, hazardous lots remained in private ownership.

This, as well as the clear probability of similar occurrences in many other beach communities, led the state's Coastal Resources Commission to unanimously urge the Federal Emergency Management Agency to make flood insurance funds available for the relocation of imminently endangered structures, with the properties on which the structures are located being placed in public ownership. Minutes, N.C. Coastal Resources Commission, at 9 (Mar. 18, 1983). Noting that an aggressive relocation program would save tax funds, reduce private losses, reduce premium levels, and promote sound land use practices, Governor Hunt joined in calling for its immediate use in coastal North Carolina. Letter from Governor James B. Hunt, Jr., to General Louis O. Guiffrida, Director, Federal Emergency Management Agency (Mar. 28, 1983). Congressman Walter B. Jones (D., N.C.), Chairman of the House Merchant Marine and Fisheries Committee, has also joined in this request, noting his interest in securing any statutory amendments or budget authorizations necessary for implementation. Letter from Congressman Walter B. Jones to General Louis O. Guiffrida, Director, Federal Emergency Management Agency (Apr. 11, 1983).

77. In a 1977 survey of public land acquisition in hazardous floodplain areas, Community Development Block Grant funds (or funds from similar previous sources) were used to

State and local acquisition programs for land use and environmental management purposes vary considerably Although funding always has been limited,[78] several state and local governments have established substantial acquisition programs using specially appropriated funds, special bond issues, donations, and federal grants.[79]

In addition to direct public acquisitions, several private organizations acquire land for land use and environmental management purposes. These private agencies often work cooperatively with public agencies.[80] Because private agencies often can acquire land more quickly and simply than public agencies,[81] their participation is critical to some land acquisition projects. Moreover, private organizations provide funding essential to land acquisition.[82]

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finance half of the 36 acquisitions for which a source of funding could be identified. OFFICE OF MITIGATION AND RESEARCH, FEDERAL EMERGENCY MANAGEMENT AGENCY, EVALUATION OF ALTERNATIVE MEANS OF IMPLEMENTING SECTION 1362 OF THE NATIONAL FLOOD INSURANCE ACT OF 1968, at 18 (1981) (Abeles, Schwartz, Haeckel & Silverblatt, Inc. and Ralph M. Fields Assoc., Inc.). This survey also found that most successful acquisition programs were directed towards multiple objectives. *Id.* at 19.

78. In the fiscal year ending June 30, 1981, the 13 states in the southeastern United States acquired 12,602 acres of land for park and recreation purposes at a cost of $24,008,449. ASSOCIATION OF SOUTHEASTERN STATE PARK DIRECTORS, ANNUAL INFORMATION EXCHANGE, FINAL REPORT FOR THE YEAR ENDING JUNE 30, 1981, at 7 (1981). Of this acreage, 9,922 acres were purchased and 2,738 acres were acquired by other means. *Id.* at 23. In 1980, those states acquired 17,701 acres at a cost of $12,466,430. *Id.* at 7.

79. *See, e.g.*, Heath, *Estuarine Conservation Legislation in the States*, 5 LAND & WATER L. REV. 351, 357-58 (1970). Recently, efforts undertaken by programs such as the California State Coastal Conservancy have expanded state acquisitions. CAL. PUB. RES. CODE §§ 31000-31406 (West 1977 & Supp. 1983). New Jersey and Florida have similar programs, Florida's being funded by bonds. *See* Fla. Stat. Ann. §§ 375.041-.065 (West 1974 & Supp. 1983); N.J. Stat. Ann. §§ 13:8A-1 to -55 (West 1979).

80. Private agencies that acquire land for these purposes include agencies that acquire land for conservation or similar purposes, such as The Nature Conservancy and the Trust for Public Lands. Broader organizations which have an acquisition or land management component, such as the Audubon Society, also are active.

81. *See, e.g.*, Wallin & Kuperberg, *Public Land Trusts: Role of the Nonprofit Land-Buyer*, 50 FLA. B.J. 175 (1976).

82. The Nature Conservancy, a private non-profit environmental organization, has been particularly successful both in acquiring land for later transfer to public agencies and in acquiring land for its own long-term management. As of March 1982, The Nature Conservancy had sponsored 2,909 projects involving 1,857,650 acres located in all 50 states, Latin America, and the Caribbean. The Conservancy owns and manages 672 preserves and frequently works as an informal advance acquisition agent for projects later acquired by public agencies. The Conservancy uses a $28 million revolving Land Preservation Fund to acquire interests in land. It raises separate funds for special projects. Nature Conservancy News Release No. 2-82 (Spring, 1982).

Public land acquisition thus is an essential tool for an effective coastal management program where the goal is to preserve an area in its natural state or to provide land for active public use. Many factors, however, operate to make land acquisition a difficult tool to implement in a resource management program. To examine the effectiveness and illustrate the problems attending the institution of land acquisition, this Article now will examine two efforts to implement this tool as part of North Carolina's coastal management program: the beach access program, which is directed at all coastal areas in the state, and proposals to control the development of the Currituck Outer Banks.

Acquisition as an Active Component of a Coastal Management System: The North Carolina Experience

The Legislative Context

North Carolina's coastal resources are among the most spectacular in the country The state has 320 miles of ocean beaches on twenty-three separate barrier islands and a 2.2 million acre estuarine complex that is the largest on the east coast. In the 1960's, North Carolina, like many coastal states, recognized a serious need for careful management of its valuable coastal resources.[83] Increasing residential, industrial, agricultural, and tourist developments in the coastal area began to compete and conflict with one another and to threaten the health and integrity of the natural system of rivers, sounds, wetlands, and beaches that are the cultural, eco-

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The Conservancy has played a particularly important coastal management role in Virginia. In the late 1960's and early 1970's, the Conservancy acquired most of the 13-island, 45-mile-long section of barrier islands along the border between Virginia and Maryland in the Chesapeake Bay. It acquired this area, the Virginia Coastal Reserve, over an eight-year period at a cost of $4.7 million. The area will be kept in a natural state and used for research, education, and as a model preserve. Byers, *Saving the Islands,* Law. Title News 2 (July-Aug. 1978). *See also* Annand, *North Carolina Nature Conservancy, Conservation Through Private Action,* 6 Carolina Planning 7 (1980).

83. *See, e.g.,* Morgan, *On the Legal Aspects of North Carolina Coastal Problems,* 49 N.C.L. Rev. 857 (1971); Rice, *Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control,* 46 N.C.L. Rev. 779 (1968); Schoenbaum, *Public Rights and Coastal Zone Management,* 51 N.C.L. Rev. 1 (1972); Comment, *Coastal Land Use Development: A Proposal for Cumulative Area-Wide Zoning,* 49 N.C.L. Rev. 866 (1971); *Estuarine Pollution: The Deterioration of the Oyster Industry in North Carolina,* 49 N.C.L. Rev. 921 (1971).

nomic, and ecological base of eastern North Carolina.[84] In response to concern about environmental protection and a need to assure orderly and balanced use of coastal resources, the North Carolina Legislature adopted a series of coastal resource management laws. The most significant of those laws is the Coastal Area Management Act of 1974 (CAMA).[85] The federal government approved in 1978 the state's comprehensive coastal management program, based primarily on CAMA, as meeting the standards of the Federal Coastal Zone Management Act.[86] This approval made the state eligible for continued federal funding.[87] Thereafter, federal agencies were required to cooperate to the maximum extent practicable with the approved state program.[88]

The resource management goals set by the legislature in CAMA are broad.[89] The goals include protecting the natural biologic, economic, and esthetic values of the coastal area, assuring development compatible with the natural resource base, managing development in areas well-suited for intensive use, and establishing general policies for economic development, for recreation and transportation facilities, and for historic and cultural features.[90] CAMA applies in the twenty coastal counties that border either the Atlantic Ocean or one of the state's seven brackish sounds, including their tributaries to the point of saltwater intrusion.[91]

The resource management program established by CAMA has two principal parts—mandatory local land use planning,[92] and reg-

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84. *See generally* T. SCHOENBAUM, ISLANDS, CAPES, AND SOUNDS (1982).

85. N.C. GEN. STAT. § 113A-100 to -128 (1978 & Supp. 1981). For detailed reviews of this law, see Cooper & George, *Coastal Area Management Act: Regional Planning for the State's Coastal Area*, 1 CAROLINA PLANNING 33 (1975); Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. REV. 303 (1974); Heath, *A Legislative History of the Coastal Area Management Act*, 53 N.C.L. REV. 345 (1974); Schoenbaum, *The Management of Land and Water Use in the Coastal Zone: A New Law is Enacted in North Carolina*, 53 N.C.L. REV. 275 (1974); Schoenbaum & Rosenberg, *The Legal Implementation of Coastal Zone Management: The North Carolina Model*, 1976 DUKE L.J. 1; Comment, *Public Participation in Local Land-Use Planning: Concepts, Mechanisms, State Guidelines and the Coastal Area Management Act*, 53 N.C.L. REV. 975 (1975).

86. *See supra* note 14.

87. *See* 16 U.S.C. § 1455 (1976 & Supp. V 1981).

88. *Id.* § 1456(c)(1) (1976).

89. N.C. GEN. STAT. § 113A-102 (1978).

90. *Id.* § 113A-102(b).

91. N.C. GEN. STAT. § 113A-103 (1978 & Supp. 1981).

92. *Id.* §§ 113A-106 to -112 (1978).

ulation of development in critical environmental areas.[93] The Coastal Resources Commission (CRC), a fifteen-member citizen body appointed by the governor from a list of nominations made by local governments,[94] provides policy direction for implementing CAMA. CAMA requires that each of the twenty coastal counties adopt and maintain a comprehensive land use plan consistent with state guidelines.[95] Municipalities have the option of preparing their own plan, but if they do not prepare their own, their territory is included in a county plan.[96] The CRC sets the guidelines for local land use plans, and has review and approval authority over them. If any county refuses to adopt a plan, the CRC may adopt a plan for that county.[97] The adopted plans guide local, state, and federal decisions[98] and provide a valuable catalyst for public debate re-

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93. *Id.* § 113A-113 to -124 (1978 & Supp. 1981).

94. *Id.* § 113A-104 (1978). The statute requires at least one member to have experience in a wide variety of fields, including commercial fishing, wildlife or sport fishing, marine ecology, agriculture, forestry, land development, engineering, conservation, banking, and local government. No more than two of the 15 members may reside outside of the coastal area. Once thought by environmentalists to be the weak point in the CAMA, this locally nominated and coastal-based commission has evolved into perhaps the coastal program's greatest strength.

A Coastal Resources Advisory Council advises the CRC. This group includes 28 members representing local governments, nine members representing state agencies, four members representing regional planning commissions, three marine scientists, and a local health director. *Id.* § 113A-105.

95. The state guidelines for local land use plans establish the procedures that must be followed in adopting, updating, and amending plans. They contain a minimum list of issues that each plan must address and the type of analysis that must be conducted for each issue. Substantive policy choices for each issue generally are left to the discretion of the local governments. 15 N.C. ADMIN. CODE 7B.

96. N.C. GEN. STAT. § 113A-110(c) (1978).

97. *Id.* § 113A-109. Nineteen of the 20 counties covered by CAMA adopted their own plans by the original statutory deadline in 1975. Only Carteret County refused to adopt a land use plan, and the Coastal Resources Commission adopted a plan for that county in 1978. Carteret County adopted its own plan, which was substantially the same plan originally prepared by the state, in 1982. The county is preparing a comprehensive update of its plan, scheduled for completion in 1983.

The state paid most of the costs of preparing the land use plans in 1974-1975 and completing the required five-year comprehensive updates, using grant money received through the Federal Coastal Zone Management Act. Grants to local governments for the land use plan preparation and updates, which covered approximately 90% of the cost of the work, totalled $1,270,930.

98. All permit decisions under CAMA are required to be consistent with the land use plans. N.C. GEN. STAT. § 113A-111 (1978). Also, by executive order, all state agencies have been directed to carry out their activities consistently with the plans. Exec. Order No. 15

garding future development of coastal areas. By late 1982, all twenty counties and fifty municipalities had adopted land use plans.

CAMA also established a regulatory program for environmental areas, called "areas of environmental concern."[99] The state, by administrative rule, designates the geographic boundaries of these areas. After designation, these areas may not be developed without a permit; moreover, any development must conform to standards set by the CRC.[100] The public may nominate for designation additional areas that sustain remnant species, complex natural areas, unique geologic formations, historic architectural resources, and archaeological resources. No publicly nominated areas, however, have been designated as critical environmental areas.[101]

Areas currently designated by the state as "areas of environmental concern" include ocean erodible areas,[102] oceanfront high hazard flood areas,[103] inlet hazard areas,[104] estuarine and public

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(Oct. 27, 1977). As a part of the state's federally approved coastal management program, federal agencies' activities are required to be consistent with the plans. Federal Coastal Zone Management Act, § 307, 16 U.S.C. § 1456(c) (1976 & Supp. 1980).

99. N.C. GEN. STAT. § 113A-113 (1978).

100. The CRC also hears permit appeals and variance requests. "Development" is defined very broadly by the statute and includes most land alteration and construction. *Id.* § 113A-103(5) (1978 & Supp. 1981). The state administers permits for large-scale developments, including any activity below the mean high water line; local governments may administer smaller project applications. *Id.* § 113A-118(d) (1978). The state and local governments process approximately 1,000 permits annually. Appeals of state or local permit decisions may be made to the Coastal Resources Commission. *Id.* § 113A-121.1 (Supp. 1981). Detailed standards have been adopted as binding rules for development in areas of environmental concern. 15 N.C. ADMIN. CODE 7H.

101. *See* 15 N.C. ADMIN. CODE 7H.0500.

102. An ocean erodible area is an area extending inland from the Atlantic Ocean a distance equal to 30 times the long-term annual erosion rate plus the shoreline recession projected for a 100-year storm. 15 N.C. ADMIN. CODE 7H.0304(1). For example, in an area with a 10-foot per year erosion rate and a 150-foot projected shoreline recession in a 100-year storm, the ocean erodible area would be 450 feet deep (10 x 30 + 150). The distance is measured inland from the first line of stable natural vegetation. The width of this area for most of the coast is between 200 and 400 feet, but it varies from a low of 103 feet to a high of 600 feet.

103. An ocean high hazard flood area is any open coast area subject to both flooding and wave action in a 100-year storm. *Id.* at 7H.0304(2). These areas generally are shown as velocity zones (V zones) on federal flood insurance rate maps.

104. Inlet hazard areas are based on statistical analysis of past inlet migration (using a 99.9% confidence interval for a 10-year period) and factors such as man-made alterations or unusual hydrologic features. *Id.* at 7H.0304(3). The width of these areas varies from 250 to

trust waters,[105] coastal wetlands,[106] a seventy-five foot wide strip around estuarine waters,[107] a few surface water supply watersheds,[108] and public water supply well fields.[109] These designated areas include virtually all of the water area in the twenty coastal counties and approximately three percent of the land area in those counties.[110]

North Carolina has a long history of public land acquisition in coastal areas. The Cape Hatteras area contains the country's first national seashore, authorized in 1937.[111] Large areas of Hatteras Island, including the Cape itself, were donated to the state in the late 1930's,[112] although land acquisition for the seashore was not complete until the 1950's.[113] A second national seashore located in North Carolina, the Cape Lookout National Seashore, currently is being acquired.[114] In addition to these two major holdings, several

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4,000 feet, depending on inlet stability.

105. *Id.* at 7H.0206, .0207. This category includes virtually all navigable waters within the coastal areas.

106. *Id.* at 7H.0206. Coastal wetlands include both regularly and irregularly flooded marshes. Freshwater swamps are not included.

107. *Id.* at 7H.0209.

108. *Id.* at 7H.1001.

109. *Id.* at 7H.1002.

110. The North Carolina Supreme Court upheld the constitutionality of CAMA in Adams v. Department of Natural and Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978). In *Adams*, plaintiffs alleged CAMA was unconstitutional because it amounted to local legislation by the state legislature, and because it delegated legislative power without providing adequate standards. The court ruled that the 20 coastal counties affected by CAMA constituted a valid legislative class so that the statute did not single out a locality for invidious treatment; additionally, the state had provided standards in delegating adjudicative and rulemaking power to the CRC.

Other states have upheld similar legislation. *See* CEEED v. Coastal Zone Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974); Toms River Affiliates v. Department of Envtl. Protection, 140 N.J. Super. 135, 355 A.2d 679, *cert. denied*, 71 N.J. 345, 364 A.2d 1077 (1976). *But see* Askew v. Cross Keys Waterways, 372 So. 2d 913 (Fla. 1978).

111. 16 U.S.C. §§ 459-459a-9 (1976).

112. A special state commission was created to acquire the land for the national seashore. 1939 N.C. SESS. LAWS 257.

113. D. STICK, THE OUTER BANKS OF NORTH CAROLINA: 1584-1958, at 150-52 (1958). Land acquisition lagged during World War II and during oil exploration thereafter. In 1952, the Mellon Fund contributed $618,000 to be matched equally by state funds. In 1958, the land acquisition was completed and the property transferred from the state to the federal government. *Id.* The Pea Island National Wildlife Refuge is located within the Cape Hatteras seashore area.

114. 16 U.S.C. §§ 459g to 459g-7 (1976). This second National Seashore in North Carolina was authorized by Congress in 1966. As with Cape Hatteras, initial land acquisition was

military properties and state parks are located on the oceanfront. Altogether, approximately forty-eight percent of North Carolina's oceanfront is currently in state or federal ownership.[115] Other significant non-oceanfront public holdings[116] also exist, but these public land holdings all were acquired as parts of single-purpose programs rather than as part of a comprehensive coastal management program, and all are managed individually

To promote further the policies underlying CAMA,[117] North Carolina is attempting to integrate land acquisition as an active component of the state's coastal management program. The two vehicles by which this is being accomplished are the national estuarine sanctuary program[118] and a new state beach access program.[119] The CRC, which implements North Carolina's coastal management program, generally oversees administration of both of these programs.[120] The sanctuaries program is one of the acquisition programs proposed to implement a management plan for the Currituck Outer Banks, and the beach access program is an example of using land acquisitions to meet multiple coastal resource management objectives.

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carried out by the state. 1969 N.C. Sess. Laws ch. 904.

115. The major public oceanfront holdings include Cape Hatteras National Seashore (62 miles), Pea Island National Wildlife Refuge (13 miles), Cape Lookout National Seashore (55 miles), Fort Macon State Park (1 mile), Hammocks Beach State Park (3.5 miles), Camp Lejuene Military Reservation (15 miles), Fort Fisher State Park and Historic Area (3.5 miles), and Baldhead Island (state) (3.25 miles).

116. The major federal non-oceanfront holdings include those at Mackay Island, Pungo, Mattamuskeet, Swan Quarter and Cedar Island National Wildlife Refuges, Croatan National Forest, as well as military facilities at Elizabeth City, Camp Lejuene, Cherry Point, Sunny Point, and a number of small Coast Guard facilities. The federal government also holds several historic and memorial facilities such as Fort Raleigh (Manteo) and the Wright Brothers Memorial (Kill Devil Hills). State non-oceanfront holdings include Jockey's Ridge State Park (Nags Head), Great Dismal Swamp State Park (Camden Co.), Merchant's Mill Pond State Park (Gates Co.), Pettigrew State Park (Washington Co.), Goose Creek State Park (Beaufort Co.), T. Roosevelt National Area (Carteret Co.), and Carolina Beach State Park (New Hanover Co.).

117. *See supra* notes 89 & 90 and accompanying text.

118. *See supra* note 61.

119. N.C. GEN. STAT. §§ 113A-134.1 to -134.3 (Supp. 1981).

120. The Office of Coastal Management in the Department of Natural Resources and Community Development has this responsibility. The office provides staff support for the Coastal Resources Commission and Coastal Resources Advisory Council as well.

Beach Access Program

The public demand for access to and use of ocean beaches grew dramatically in the 1960's and 1970's. At the same time, the amount of private development along the oceanfront also increased significantly This concurrent growth led to conflict, litigation, and legislation in many coastal states.[121] One key legal issue has been defining the scope and character of existing public rights for beach access and use. Using a variety of legal doctrines, including prescriptive easements, implied dedication, customary rights, and the public trust doctrine, several state courts have held that sustained public use of beaches, upland parking areas, and pathways to the beach, can ripen into a legal right to continued use.[122]

Although no litigation in North Carolina has addressed this question directly, the public long has enjoyed unobstructed use of ocean beaches seaward of the vegetation line,[123] and few landowners have attempted to exclude the public from this beach area. In the 1970's, however, increasing private development of the upland

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121. *See* cases cited *infra* note 122. *See also* Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription*, 24 SYRACUSE L. REV. 935 (1973); Eckhardt, *A Rational Policy on Public Use of Beaches*, 24 SYRACUSE L. REV. 967 (1973); Lafargue, *Practical Legal Remedies to the Public Beach Shortage*, 5 ENVIR. AFF. 447 (1976); Maloney, Fernandez, Parrish & Reinders, *Public Beach Access: A Guaranteed Place to Spread Your Towel*, 29 U. FLA. L. REV. 853 (1977); Note, *Public Access to Beaches: Common Law Doctrines and Constitutional Challenges*, 48 N.Y.U. L. REV. 369 (1973); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970); Note, *Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach*, 7 SUFFOLK U.L. REV. 936 (1973).

122. *See* Gion v. City of Santa Cruz, 2 Cal. 3d 29, 84 Cal. Rptr. 162, 465 P.2d 50 (1970) (public rights to beach and access areas held established by implied dedication); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974) (observation tower held not inconsistent with public's prescriptive beach use rights); Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 294 A.2d 47 (1972) (public trust doctrine requires municipal beach to be open to general public); Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct. 1972), *aff'd mem.*, 358 N.Y.S.2d 957 (App. Div. 1974) (municipality held to have expressly dedicated beach area to use by the general public); State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969) (public use rights in beach area held established by customary rights); Seaway Co. v. Attorney General, 375 S.W.2d 924 (Tex. Civ. App. 1964) (public use rights by prescription upheld). *Contra* Department of Natural Resources v. Ocean City, 274 Md. 1, 332 A.2d 630 (1975); *In re* Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974).

123. Private property boundaries in North Carolina extend to the mean high water line. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970). This leaves unresolved, however, the precise nature of use rights in the area between the vegetation line and the mean high water line.

areas contiguous to the beach began to reduce the public's ability to get to the beaches. Consequently, the beach access issue began demanding increased political and legal attention.[124]

Concern with beach access arose concurrently with the state's efforts to manage oceanfront development more adequately.[125] One aspect of the management effort to prevent property loss or damage was to impose minimum oceanfront setback regulations in 1979 that, when combined with local highway setbacks and septic tank restrictions, rendered many small oceanfront lots unsuitable to build upon.[126] The oceanfront setback regulations fueled controversy over the state's coastal management program, and generated support for providing financial relief to owners of strictly regulated lands, particularly those who acquired property prior to the effective date of the setbacks.

The North Carolina General Assembly in 1981 considered several bills to address these issues. The first bill, aimed primarily at the compensation question, would have established a Coastal Land Acquisition Fund to acquire for public use, principally as beach access, lots for which building permits had been denied because of setback regulations.[127] A second bill focused more directly on the beach access issue and established a permanent program for acquiring, improving, and maintaining beach accessways.[128] This latter bill, which was enacted into law,[129] directs the state to give pri-

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124. *See, e.g.*, D. Brower, W Dreyfoos, L. Epstein, J. Pannabaecker, N. Stroud & D. Owens, Access to the Nation's Beaches: Legal and Planning Perspectives (1978) (UNC Sea Grant Report No. UNC-SG-77-18); D. Owens & D. Brower, Public Use of Ocean Beaches (1976) (UNC Sea Grant Report No. UNC-SG-76-08).

125. *See generally* Owens, *The Management of Oceanfront Development in North Carolina*, in ACHIEVEMENTS OF THE '70S AND PROSPECTS FOR THE '80S 17 (J. Sorensen ed. 1981) (Proceedings, Seventh Annual Conference, The Coastal Society).

126. *Id.* at 19-20. When the regulations originally were adopted in 1979, estimates were that as many as 800 pre-existing lots could not meet the minimum setback requirements. The rule was relaxed to grandfather some of these lots in 1981, but an estimated 500 lots still did not meet the requirements. Many of these lots also fail to meet local septic tank, zoning, and highway setback requirements. *Id. See also* C. Liner, An Analysis of the Coastal Area Management Act Erosion-Rate Setback Regulation (1982) (report of the Institute of Government, University of North Carolina, Chapel Hill); C. Liner, The Impact of State Regulation of Coastal Land in North Carolina (1980) (report of the Institute of Government, University of North Carolina, Chapel Hill).

127. S.B. 232, General Assembly of North Carolina (1981 session).

128. H.B. 1173, General Assembly of North Carolina (1981 session).

129. N.C. GEN. STAT. §§ 113A-134.1 to -134.3 (Supp. 1981); 1981 N.C. Sess. Laws ch. 925.

ority in purchasing land for beach access to lots that cannot be developed.

The new beach access program established by this law is significant in several respects. First, the legislative findings recognize that placing permanent structures on hazardous oceanfront lots "will lead to increased risks of loss of life and property, increased public costs, and potential eventual encroachment of structures onto the beach."[130] This legislative recognition comports with the Coastal Resources Commission's findings regarding the need for a minimum oceanfront setback.[131] Additionally, the law explicitly recognizes long-standing public use of beaches, finding that the state's beaches "have been customarily freely used and enjoyed by [the] people. [and that the] public has traditionally fully enjoyed the State's ocean beaches and public access to and use of the beaches."[132] Similar legislative findings have been important in beach access and use litigation in several states, particularly where courts have upheld public use claims.[133] Furthermore, the law establishes an affirmative role for the state government in identifying, acquiring, improving, and maintaining public access to the beach.[134] Previously, this role had been reserved primarily to local governments. Finally, the access program is to be coordinated with the state's coastal management program. The CRC will adopt program standards and give priority "to acquisition of lands which, due to adverse effects of coastal natural hazards, such as past and potential erosion, flooding and storm damage, are unsuitable for the placement of permanent structures . . "[135] The 1981 General Assembly appropriated $1,000,000 for implementation of the program during 1981 through 1983 and land acquisition began imme-

130. N.C. GEN. STAT. § 113A-134.1 (Supp. 1981).

131. 15 N.C. ADMIN. CODE 7H.0303(b).

132. N.C. GEN. STAT. § 113A-134.1. *See also infra* note 144.

133. As yet, no litigation has occurred on this point in North Carolina either as to beach use in general or this statute specifically. Of course, such a finding only reflects the legislature's judgment; the courts, when and if called upon to resolve a particular dispute, will reach their own independent judgment.

134. N.C. GEN. STAT. § 113A-134.1 (Supp. 1981).

135. *Id.* § 113A-134.3. Prior to enactment of this law, the CRC generally had considered access provision primarily a local responsibility. *See* 15 N.C. ADMIN. CODE 7M.0303(b). Specific regulations under this new law have not been adopted by the CRC.

diately [136] Thus, the program will test the efficacy of meeting the multiple objectives of securing beach access and limiting future development on small lots with a land acquisition program.

Experience with the beach access program in its first year of existence leads to several conclusions concerning land acquisition as a coastal resource management tool. First, the political acceptability of strict regulations improved significantly when land acquisition was implemented. Although enacting oceanfront setback rules was one of the most controversial actions ever taken in conjunction with the state's coastal management program, the beach access program has been one of the most popular programs.[137] Because these two programs were closely related, public acceptance of the regulatory program increased. The availability of funds to purchase lots affected adversely by the setback regulations also reduces the hardship of the regulation on individual property owners.

Early experience also suggests that acquisition programs can and should be designed to meet multiple public objectives whenever possible. In this instance, additional beach access is the primary objective, but acquisitions also will reduce public costs of improper development and the private costs from losses of life and property [138] Additionally, land acquisition and setback rules preserve public beach areas by precluding the possibility of private struc-

136. Capital Improvement Appropriations Act of 1981, 1981 N.C. Sess. Laws 860. As of January 1983, $744,175 of these funds had been committed to access projects in 11 communities. Additionally, 580 beach access site identification signs have been distributed as part of the program. Approximately $2.8 million in grant applications have not been funded. The 1983-1985 budget submitted by the Advisory Budget Commission to the General Assembly contained a proposed appropriation of $100,000 per year to continue this program.

137. At the three hearings conducted by a special legislative study committee in the fall of 1982 on the Coastal Area Management Act, the aspect of the coastal program most frequently praised was the beach access program. The study committee concluded that the program should be continued and expanded beyond oceanfront to estuarine beach areas. *See* LEGISLATIVE RESEARCH COMM'N, COASTAL AREA MANAGEMENT, REPORT TO THE 1983 GENERAL ASSEMBLY OF NORTH CAROLINA 8-10 (Jan. 6, 1983).

138. The public costs that are reduced include the costs of disaster relief, erosion control, and the maintenance of public facilities that serve development in hazard areas such as roads and water and sewer lines. Most successful acquisition programs are designed to promote multiple objectives, such as reduction of flood and storm damage, provision of open space and recreation opportunities, and protection of wildlife and fisheries resources. *See* U.S. WATER RESOURCES COUNCIL, INNOVATION IN LOCAL FLOODPLAIN MANAGEMENT: A SUMMARY OF COMMUNITY EXPERIENCE (1982) (J. Kusler).

tures eventually encroaching on beaches. In addition to providing more effective management and more efficient use of funds, an acquisition program with multiple objectives also has a better chance of securing political approval. Although the 1981 General Assembly probably would not have passed either a compensation bill or a beach access bill individually, it did enact a law when supporters of the two forces combined.

Nonetheless, early experience demonstrates the practical difficulty of meeting multiple objectives. Local governments want choice lots for beach access areas, not marginally suitable, eroded lots. The entity implementing a program tends to maximize one objective, such as improving beach access, at the expense of secondary objectives, such as shifting lots that may not be built upon from private to public ownership. The complex procedures that must be followed with public land acquisitions, the details of individual project design, and the controversial nature of access location decisions all exert pressure and time demands on the entity implementing the program and further accentuate the tendency to direct attention toward maximizing a single objective. Thus, as evidenced by the North Carolina experience, land acquisition is an essential resource management tool, albeit unwieldy at times. North Carolina's efforts to implement a comprehensive coastal management plan for the Currituck Outer Banks provides further important lessons for states that may wish to incorporate a land acquisition program into their coastal management plans.

The Currituck Outer Banks

The Currituck Outer Banks constitute one of the largest privately owned barrier island segments that may be developed that is left in the United States. This twenty-three mile long beach, stretching south from North Carolina's boundary with Virginia to the developed Dare County beaches,[139] is the subject of one of North Carolina's most controversial and most important coastal management efforts. For the past ten years, the federal, state, and local governments, major developers and landowners, national con-

139. The northern Dare County beach area is already heavily developed, primarily with single family resort homes. This area includes the popular resort towns of Kitty Hawk, Kill Devil Hills, and Nags Head.

servation groups, and long-term residents have struggled to develop and implement a reasonable plan for balancing preservation with development of this unique area. Despite a number of proposals, all having public land acquisition as a major element, no public acquisition has been undertaken and all of the proposals remain only partially implemented.[140] The coastal management plans for the Currituck Outer Banks are an excellent example of the strong, but as yet unrealized, potential of land acquisition as a coastal resource management tool.

The Currituck Outer Banks is a sparsely populated area with an environment typical of East Coast barrier islands.[141] It has diverse vegetation, is the habitat for several threatened and endangered species,[142] and is a particularly important wintering site for large numbers of migratory waterfowl. Although the area contained sev-

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140. For reviews of the various planning efforts for the Currituck Outer Banks, see Batchelor, *Interdisciplinary Team Design and Planning for Coastal Management*, 20 N.C. ARCHITECT 7 (1973); Owens, *The Future of the Currituck Outer Banks*, 6 CAROLINA PLANNING 44 (1980); Soucie, *Fare-thee-well, Currituck Banks*, 78 AUDUBON MAGAZINE 22 (1976).

The exact delineation of existing public and private rights to the waters and marshes of Currituck Sound has been at issue many years. In Tatum v. Sawyer, 9 N.C. 127 (2 Hawks 226) (1823), which involved a title dispute regarding a marsh area, the court held that lands under navigable waters could not be granted in fee to private parties. In Hatfield v. Grimsted, 29 N.C. 103 (7 Ired. 139) (1846), the court effectively upheld private use of a shoal area, ruling that because the area no longer was tidal (the last inlet had closed in 1828), the plaintiff could establish private rights. Later cases involving the Currituck marshes clearly established the principle that navigable creeks and streams within the marsh areas must be left open to public use. *See* State v. Twiford, 136 N.C. 603, 48 S.E. 586 (1904); State v. Baum, 128 N.C. 600, 38 S.E. 900 (1901); State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888). A subsequent case held that the public retained navigation, fishing, and hunting rights to shallow shoals even if the bottom is privately owned. Swan Island Club, Inc. v. White, 114 F Supp. 95 (E.D.N.C. 1953), *aff'd sub nom.* Swan Island Club, Inc. v. Yarbrough, 209 F.2d 698 (4th Cir. 1954).

141. Although the area has a typical barrier island environment, it has unusually diverse vegetation because it is located at the transition point between northern and southern vegetation groups. The area also is a key wintering site for migratory waterfowl and is a habitat for several endangered and threatened species. The area is critically important in protecting the water quality in the adjacent Currituck Sound. *See* FISH AND WILDLIFE SERVICE, DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED NATIONAL WILDLIFE REFUGE ON THE CURRITUCK OUTER BANKS (1980) [hereinafter cited as REFUGE IMPACT STATEMENT]; NATURAL HERITAGE PROGRAM, N.C. DEP'T OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, AN ANALYSIS OF SELECTED SITES ON CURRITUCK SPIT, N.C. (1979) (P Hosier & W Cleary).

142. REFUGE IMPACT STATEMENT, *supra* note 141, at 93, 107-08.

eral small fishing and farming villages in the 1800's,[143] the population of these villages has gradually declined until only approximately fifty permanent residents remained on the Banks in the late 1970's. Beginning in the mid-1800's, hunting clubs acquired a number of large tracts on the Banks. These tracts generally were several miles long and stretched from ocean to sound. The existence of these large private landholdings, which remained intact until the late 1960's, was a principal reason the area remained undeveloped. Another important reason is that the area, although connected by land[144] to Virginia Beach to the north and to Kitty Hawk and Nags Head to the south, has no improved public roads. The undeveloped Back Bay National Wildlife Refuge just beyond the state line in Virginia has blocked a road from the north.[145] Similarly, North Carolina has never built a public road coming from the south. Only a private road, with a gatehouse at the county line, now extends northward along the Currituck Outer Banks.[146]

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143. D. STICK, *supra* note 113, at 255-60.

144. At various times the Currituck Outer Banks has been a true island. In 1663, Currituck Inlet was used to set the boundary between North Carolina and Virginia; however, the last inlet connecting Currituck Sound to the Atlantic Ocean closed in 1828. *Id.* at 1-10.

145. The refuge is located six miles north of the state boundary. It contains 4,600 acres of land and 4,500 acres of water. When the federal government acquired the refuge in 1938, it acquired property to mean low water, thereby controlling driving along the beach. In 1970, when abuse and overuse by off-road vehicles began to cause problems, the Fish and Wildlife Service instituted a permit system for vehicular access through the refuge. A federal court upheld these access restrictions in Coupland v. Morton, No. 145-73-N (E.D. Va., Feb. 26, 1975). Since 1980, only permanent residents have been allowed access through the refuge. The federal government currently is considering proposals to expand access to seasonal residents. *See* 46 Fed. Reg. 46258 (1981). Land exchanges with Virginia are also being considered to provide access to Virginia's False Cape State Park, which occupies the land between the refuge and the state boundary. FISH AND WILDLIFE SERV., DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED STATE-FEDERAL LAND EXCHANGE INVOLVING PORTIONS OF FALSE CAPE STATE PARK AND BACK BAY NAT'L WILDLIFE REFUGE (Jan. 1983).

For a review of the various development plans for the 4,160-acre False Cape State Park, see Drake, *Controversy over the Use of a Coastal State Park*, 10 COASTAL ZONE MGMT. J. 97 (1982). The park was acquired in the late 1960's at a cost of $8.5 million. *Id.*

146. North Carolina actively considered building a toll road through the Currituck Outer Banks to connect Virginia Beach to Nags Head. An early takings challenge to this proposal failed. Penn v. Carolina-Virginia Highway Corp., 231 N.C. 481, 57 S.E.2d 817 (1950). In 1953, however, the North Carolina Supreme Court ruled the legislation establishing the turnpike authority to build this road to be an invalid delegation of legislative authority. Carolina-Virginia Coastal Highway v. Coastal Turnpike Auth., 237 N.C. 52, 74 S.E.2d 310 (1953). North Carolina enacted curative legislation which the court upheld as having suffi-

The major controversy over the future of the Currituck Outer Banks began in the late 1960's.[147] Developers acquired several of the hunt club properties and subdivided them into thousands of lots. Recognizing that unmanaged development of the Banks could cause environmental problems and public services provision problems, Currituck County in 1972 imposed a moratorium on subdivision approvals and undertook a major land use planning effort for the Banks.

The resulting plan adopted in 1973 had several key provisions. The plan allowed no through access to the area from either the north or south; access from mainland Currituck County would be by ferry. The underlying goals of the limited access provision were to prevent strip development, allow a reasonable period for gradual building, and link the Banks more closely to Currituck County culturally and financially. Additionally, the plan envisioned that development would take place in high density clusters because cluster development facilitated centralized water and sewer services,

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cient guidance to be a valid delegation of legislative authority. North Carolina Turnpike Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

An "informal" road has existed for some time between the county line at the southern end of the Currituck Outer Banks and the village of Corolla, located approximately midway between the county line and state border. This road was officially part of the state highway system from 1939 to 1974. When private developers fenced off this road in 1975, other landowners in the area instituted a suit to declare the road a public road and to remove the gate. The court ruled for the developers, holding the roadway could not be precisely located. West v. Slick, 60 N.C. App. 345 (1983). Developers also have challenged the county's right to require dedication of the right-of-way to the public as part of subdivision approvals. Pine Island Dev. Venture v. Currituck County, No. 75 CVS 19 (Currituck County, April 15, 1975). Furthermore, the conditions of use of the private easement for the road have been a source of major controversy between rival developers on the Currituck Outer Banks. *See* Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980). North Carolina currently is considering proposals to take over the existing private road and make it a state road. *See* N.C. DEP'T OF TRANSPORTATION, FINAL ENVIRONMENTAL IMPACT STATEMENT, CURRITUCK COUNTY, N.C., OUTER BANKS ACCESS (Oct. 1981) [hereinafter cited as TRANSPORTATION IMPACT STATEMENT]. Legislation also has been proposed that would declare this road to be a neighborhood public road open to the general public. S.B. 113, General Assembly of North Carolina (1983 Sess.).

147. Controversy, however, is not new to the Currituck Outer Banks. *See supra* note 140. The county's efforts to secure a transportation link to the area date back over 50 years.

A similar land acquisition controversy occurred 20 years ago. In the early 1960's, Secretary of the Interior Stewart Udall, after flying over the Currituck Banks, suggested that the area be made a national seashore like the one at Cape Hatteras. The proposal, however, met strong local opposition and never received serious consideration.

and left extensive common open space in its natural state. Finally, the plan provided for the acquisition of a large area as a state park, thus allowing active public use and further inhibiting strip development.[148]

Although approved by the county and state, this plan was never implemented.[149] Funds were not available for either the ferry or the park.[150] Some of the subdivisions were replatted into a cluster layout,[151] but others retained the traditional grid design and had individual wells and septic tanks.[152] The plan was abandoned in the mid-1970's because it had proved too controversial, too costly, and too difficult to implement.

Subsequently, several private groups acquired land to assure preservation of some areas of the Currituck Outer Banks. In 1977, The Nature Conservancy acquired two hunt clubs in the northern and central parts of the Banks.[153] In 1978, the Audubon Society accepted the donation of a large tract at the extreme southern end of the Banks for use as a sanctuary.[154] Although the Audubon Society intended to retain the property for long-term management, the Conservancy intended to hold its acquisition only long enough for a public agency to acquire approval and funding necessary to assume ownership.[155]

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148. *See* EXECUTIVE COMM. FOR PROGRAMMING AND FUNDING, CURRITUCK COUNTY, THE CURRITUCK PLAN—OUTER BANKS: DEVELOPMENT POTENTIAL 7-10 (1972).

149. *See* Owens, *supra* note 140, at 46.

150. Studies and surveys were prepared for the ferry and park, but the large sums of money required for actual implementation were never secured. At the time, land acquisition costs alone for the park were estimated to be $1.5 to $2 million.

151. This fact generated a lawsuit between the developer who replatted and the developers who did not. Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980).

152. A "grid" subdivision design is one in which the streets are straight and intersect at right angles, thereby forming a rectangular grid. A "clustered" subdivision design generally groups smaller lots close together, often using cul-de-sacs, and preserves extensive common open space between the development clusters.

153. The Conservancy acquired the Monkey Island Club (approximately 775 acres) and the Swan Island Club (approximately 812 acres) tracts with a four million dollar grant from the Mellon Foundation. In addition to acquiring the fee interest, the Swan Island purchase also included conservation easements on approximately 5,095 additional acres of shoal and marshland.

154. This tract was part of the Pine Island Club property. It includes approximately 1,084 acres.

155. While the Conservancy does retain some properties as nature preserves, most of its

In the late 1970's, public controversy over the Currituck Outer Banks arose again when, almost concurrently, Currituck County asked the state for a public road on the Banks and the United States Department of the Interior announced a proposal to acquire land for a new wildlife refuge on the Banks.[156] Conservation groups and several landowners and developers vigorously opposed improved access, while the county, the state, and many small landowners opposed the refuge proposal.

In 1979, North Carolina, in close cooperation with Currituck County and other interested parties, began to review the alternatives for the future use of the Currituck Outer Banks. The goal was to resolve equitably the complex, interrelated issues regarding this valuable area.[157] Task forces were formed to assist in coordinating the work of several state and federal agencies, the county, and Virginia. The parties conducted detailed studies on several key topics. The United States Department of the Interior studied wildlife resources and alternatives for protection and preservation.[158] The county authorized a study of the fiscal impact of various development alternatives.[159] The state studied alternatives for providing access to the area.[160] The county initiated a comprehensive update of its local land use plan and development ordinances. All of the key parties—governmental agencies, landowners, and conservation

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acquisitions are only held until a preservation-oriented permanent owner can be found. *See supra* note 82.

156. Efforts by Virginia to secure access to False Cape State Park sparked the Department of the Interior's interest, causing the Department to look comprehensively at recreation demand and wildlife protection needs from the Chesapeake Bay to Dare County. The Nature Conservancy's continuing interest in a Currituck refuge also played a part in Interior's interest.

157. *See* Owens, *supra* note 140, at 46-51. *See also* T. SCHOENBAUM, *supra* note 84, at 90-102. One indicator of the initial strong negative reaction to the refuge acquisition proposal was a resolution adopted by the North Carolina General Assembly urging the Department of the Interior to hold a referendum in Currituck County prior to any land acquisition for a refuge. 1979 N.C. Sess. Laws, Res. 58.

158. REFUGE IMPACT STATEMENT, *supra* note 141.

159. CURRITUCK COUNTY BOARD OF COMMISSIONERS, A FISCAL IMPACT ASSESSMENT OF DEVELOPMENT ON THE CURRITUCK OUTER BANKS (1979) (Roberts & Eichler Associates, Inc.).

160. *See* TRANSPORTATION IMPACT STATEMENT, *supra* note 146. The question of how to provide access to False Cape State Park also has been studied carefully by the State of Virginia. *See* DIVISION OF PARKS, VIRGINIA DEP'T OF CONSERVATION AND ECONOMIC DEVELOPMENT, FALSE CAPE PARK TRANSPORTATION ACCESS STUDY (1975) (Howard, Needles, Tammen and Bergendoff, Inc.). *See also supra* note 101.

groups—held numerous meetings to facilitate coordination.

After almost two years of intense work, the parties reached a broad consensus as to the most appropriate development pattern for the Currituck Outer Banks. The public would acquire the northern half of the Banks and the wetlands to the south to assure preservation of these areas in a natural state. This publicly owned area would be used principally as a wildlife refuge, but the public also would be allowed to use some of the area for recreation. The southern half of the Banks would accommodate reasonable development, subject to state and local regulation. The development would be either on large lots or clustered with central public services. Access would be by road from the south, though eventually this access would be replaced with access from the west in Currituck County. No through access connecting Virginia and North Carolina, however, would be built.[161]

Reaching this compromise was difficult. Initially, distrust among the parties had to be overcome by regular and reliable communication. Key facts and analysis necessary for informed decisionmaking had to be compiled. A frank recognition of the different values and interests of the many parties affected by these decisions was necessary. Ultimately these obstacles were overcome, and in 1980 the federal, state, and county governments agreed to basic elements of the comprehensive resolution.[162]

The land acquisition portion of the proposal proved to be much more difficult and time-consuming than reaching the agreement initially. One important reason was high cost. In 1980, the Department of the Interior estimated the value of the lands to be acquired to be in excess of $63 million.[163] Although the General

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161. The general terms of this broad consensus are set out in comments by the state and county on the Department of the Interior's wildlife refuge proposal and the Department's responses thereto. *See* REFUGE IMPACT STATEMENT, *supra* note 141, at 169-72, 176-77.

162. Owens, *supra* note 140, at 51. Secretary of the Interior Cecil Andrus, in one of his last official acts before leaving office, approved the establishment of the new Currituck Banks National Wildlife Refuge. He decided, however, to leave the formal task of presenting legislation to Congress for this purpose to his successor, James Watt.

163. REFUGE IMPACT STATEMENT, *supra* note 141, at 12. If spread over five years as recommended, inflation would push the total acquisition cost to just over $94 million. The land area involved consisted of 15,880 acres in over 3,200 separate parcels. The Department estimated that if less than fee acquisition was used wherever feasible, generally on wetlands, the $63 million present value acquisition costs would be reduced by $6.5 million to $56.5 mil-

Accounting Office subsequently concluded that the land could be acquired for $20 million less,[164] the project nevertheless would be one of the most expensive wetland and waterfowl protection projects ever undertaken by the federal government.

Because approval for such acquisition must be obtained from powerful groups not involved in developing the proposal, such as federal budget officials and congressional committees responsible for appropriations, securing the necessary funds requires a great deal of time. The time factor makes implementing such a large public acquisition proposal even more difficult. During delays, changes can occur in the technical and administrative staff necessary to keep a complicated proposal progressing through all levels of government bureaucracy. More importantly, changes occur in the political leadership of the governments involved. At a minimum, these changes bring new people into key decisionmaking posts who have not participated in the lengthy process of deliberation that led to the decision to acquire the land. A significant shift in prevailing political philosophy, as occurred when the Reagan Administration replaced the Carter Administration in 1981, also complicates matters.[165] This particular shift had a significant impact on the Currituck refuge proposal because Secretary of the Interior Watt postponed Secretary Andrus' decision to proceed with acquisition pending a review of the proposal that was still under-

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lion. *Id.*

164. At the request of Senator Jesse Helms (N.C.) and Congressman William Whitehurst (Va.), the General Accounting Office conducted a review of the refuge acquisition proposal while it was being developed by the Department of the Interior. The GAO report concluded that the Department had adhered to proper procedures in developing the refuge proposal but had overstated its costs. It concluded that the $63 million acquisition cost could be reduced by $20 million, primarily through accepting a bargain sale of The Nature Conservancy property ($9.5 million savings), regulating rather than acquiring wetlands ($4.7 million savings), and using conservation easements ($4.6 million savings). U.S. GENERAL ACCOUNTING OFFICE, COST ESTIMATE FOR THE CURRITUCK OUTER BANKS NATIONAL WILDLIFE REFUGE NEEDS REVISION (1981).

165. At the local level, such shifts can be caused directly by decisions on controversial land acquisition decisions. Members of a city council commonly fail in reelection bids largely because they support or oppose controversial individual acquisition proposals. In Currituck County, the Board of Commissioners' decision to support the refuge acquisition was a major issue in the 1980 local elections. The refuge supporters won reelection. In 1982, when the refuge question was not being debated actively, several of the refuge supporters lost reelection bids.

way two years later.[166]

To help resolve the impasse caused by this delay, The Nature Conservancy in 1982 proposed an alternative refuge acquisition plan.[167] The Conservancy's proposal, a variation of an alternative discussed earlier by the Department of the Interior,[168] contemplates the federal government acquiring the Conservancy's holdings at cost[169] for use as a wildlife refuge and the State of North Carolina managing the acquired area, and Currituck County strictly enforcing septic tank and other building regulations in the areas not acquired. Although the county[170] and state[171] have endorsed the alternative, the federal government has not yet acted. The acquisition proposed by the Conservancy is significantly less expensive than the previously approved acquisition proposal, because the Conservancy's proposal involves acquiring less land. Additionally, the Conservancy proposal differs from the approved refuge acquisition proposal because it does not involve acquiring any subdivided properties and does not require use of any eminent domain powers.[172]

In a separate acquisition alternative being developed in close coordination with the refuge proposals, North Carolina is contem-

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166. Secretary Watt's decision in early 1981 to place an 18-month moratorium on all new land acquisition projects of the Department of the Interior caused the initial delay. In March 1982, the Department began to reevaluate the Currituck acquisition proposal, focusing on less expensive alternatives to secure the same general goals. Letter from Mr. Howard Larsen, Regional Director, U.S. Fish and Wildlife Service, to Governor James B. Hunt, Jr. (Mar. 23, 1982). Initially the Department staff concluded that a $13 million acquisition project was feasible, but Secretary Watt has not acted on the report.

167. Letter from Mr. Gregory Low, Executive Vice President, The Nature Conservancy, to Mr. Baxter Williams, Chairman, Currituck County Board of Commissioners (July 29, 1982).

168. *See* REFUGE IMPACT STATEMENT, *supra* note 141, at 22-27.

169. The Conservancy offered to sell their properties to the federal government for $5 million, considerably below the estimated market value of over $13 million.

170. Minutes, Board of Commissioners, Currituck County, N.C., at 357 (August 16, 1982).

171. Letter from Governor James B. Hunt, Jr., to Secretary James Watt, (Aug. 24, 1982). The Conservancy's Board of Governors also endorsed the proposal. Letter from Mr. Mason Walsh, Jr., Chairman, Board of Governors, The Nature Conservancy, to Secretary James Watt, (Oct. 2, 1982). The state remained a strong and active supporter of the original larger refuge proposal, but nevertheless endorsed the less inclusive Conservancy proposal as more immediately feasible.

172. The only lands involved in the proposal are the Monkey Island and Swan Island tracts owned by The Nature Conservancy. *See supra* note 153. The lands are not subdivided, and the Conservancy would be a willing seller.

plating establishing a national estuarine sanctuary on the Currituck Outer Banks.[173] This program involves acquiring lands to be preserved in their natural state, and used primarily for research and education.[174] In the past, North Carolina has received land acquisition grants for establishing sanctuaries in other parts of the state;[175] therefore, North Carolina is considering requesting a grant for the Currituck Banks sanctuary.

This ongoing effort to develop and implement a comprehensive management plan for the Currituck Outer Banks provides several important lessons regarding large-scale public land acquisition projects. First, it demonstrates that land acquisition can be critical to an overall management plan. In Currituck, preserving large areas of wetlands and undeveloped barrier islands necessitates acquiring land in a natural state. Although regulating development in such areas will reduce environmental harm, any development disturbs the natural balance in an undeveloped area. A recreation area has been important to all the plans for the Banks, from the state park proposed in the 1973 plan to the day-use recreation area proposed in the 1980 plan.[176] Acquisition is necessary if an active public recreation area is to exist on the Banks.

The Currituck experience also demonstrates the difficulty of implementing a large-scale public land acquisition program. The large sums of money required for purchase are difficult to secure because many excellent projects compete for limited public funds.[177] The procedures involved are complex and time-consum-

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173. *See supra* note 74.

174. The state allows other uses, such as recreation, in sanctuaries provided these uses do not disrupt natural systems and do not interfere with the primary research and education objectives.

175. The two initial estuarine sanctuary sites in North Carolina are at Zeke's Island (New Hanover and Brunswick Counties) and Carrot Island (Carteret County). Two general sites—one on the Currituck Banks and one at Masonboro Island in New Hanover County—have been proposed for future acquisition as additional funds become available. North Carolina received the initial acquisition grant of $454,100 in September of 1982.

176. BOARD OF COUNTY COMM'RS, CURRITUCK COUNTY, 1980-1990 LAND USE PLAN 77-93 (1980); BOARD OF COUNTY COMM'RS, CURRITUCK COUNTY, LAND USE PLAN 45 (1976).

177. Lack of funds often means the public is unable to take advantage of very attractive bargain sales. In Currituck, the properties eventually purchased by The Nature Conservancy were offered first to the state at attractive prices, but no funds were available. Baldhead Island, at the mouth of the Cape Fear River, also was offered at an attractive price. In fact, this unique semi-tropical island was available to the state at a reasonable price as early as

ing. Consequently, only the most critical areas warrant an acquisition project of this magnitude.[178] Success demands not only the cooperation of public agencies, public interest groups, and private parties who may be willing to donate their land or maintain it in a natural state, but perhaps most importantly, success demands a high level of political consensus. The cooperating parties must make many formal and informal commitments, and adhere to those commitment decisions for such a project to move forward. The size and controversial nature of a project directly relates to the number and the political and economic power of different interests that must be accommodated in the acquisition decision. Several interests effectively could veto a land acquisition proposal such as that made for the Currituck Outer Banks. Additionally, the longer the acquisition process takes, the more likely that the consensus to acquire land will dissipate and some party will invoke its veto power. To mitigate the danger of losing consensus, as many interests as possible should be involved and accomodated in the design phase of any large-scale proposals. Additionally, by involving competing interests in the process early, the parties can actively work to maintain consensus, and move as quickly as possible to implement the acquisition decision.

Finally, the Currituck proposal demonstrates the importance of persistence and flexibility in developing a comprehensive coastal management program. Given the time and difficulty involved in project design and implementation, only in rare circumstances will acquisition efforts succeed without someone committing leadership and staff resources.[179] Additionally, some flexibility is necessary, particularly in the choice of means to arrive at agreed-upon ends. When funds fail to materialize from one source, others must be pursued. When new decisionmakers enter the process, their inter-

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the 1930's, but no funds were available for purchase. SMITH ISLAND AND THE CAPE FEAR PENINSULA: A COMPREHENSIVE REPORT ON AN OUTSTANDING NATURAL AREA (A. Cooper & S. Satterthwaite eds. 1964). Efforts to secure acquisition funds in the 1960's and 1970's also were unsuccessful. Baldhead Island now is a large resort complex that includes a marina and golf course. *See generally* T. SCHOENBAUM, *supra* note 84, at 240-41, 256-59.

178. Only a few projects of this scope are implemented nationally each year.

179. As one commentator noted, acquisition projects must be sufficiently exciting to arouse civic support and must be a cause that political leadership can rally round. C. LITTLE, *supra* note 41, at 33.

ests must be incorporated. Without persistence and flexibility, promising and worthwhile projects may fail.

Conclusion

Acquisition of land interests is an important and powerful tool that should be used more actively in coastal resource management programs. Without the ability to acquire lands, coastal management programs must restrict their goals unreasonably[180] and will be unable to implement fully important public objectives.

Traditional coastal management agencies will not implement most of the public land acquisition that will occur in coastal areas. Traditional agencies will continue to acquire land for a single purpose such as establishing a park, refuge, or sanctuary Coastal management programs, therefore, must incorporate these acquisitions into overall resource management programs. Coastal managers must become fully aware of existing public and private acquisition programs and integrate them into a comprehensive coastal management program. Maximizing the benefit of each program requires active consultation and coordination among program directors. Despite the inherent difficulties and limitations involved, one of the major contributions of coastal management programs can be creative coordination of programs so that the end result has greater benefits than could be achieved by separate implementation of individual programs.

Beyond more active coordination with public and private land acquisition programs, coastal management programs must have at least modest land acquisition programs of their own. Despite strong efforts, good intentions, and good will, what can be accomplished through governmental coordination is limited. Ultimately, single purpose agencies are just that, and they understandably give first priority to their own particular mission. Similarly, because of the difficult and controversial nature of coastal resource management, active and detailed coordination with other programs is one of the first tasks abandoned by coastal management agencies that face political and budgetary crises almost daily

Having a direct land acquisition role may encourage coastal

180. Examples of objectives that generally require land acquisition include completely preserving natural areas and providing areas for active public use.

management programs to consult with other agencies and to use land acquisition in implementing their own programs. Most coastal management agencies have little expertise in land acquisitions and, given their other problems, many no doubt are not interested in incorporating land acquisition into their program. The success of North Carolina's beach access program and the possible acquisition on the Currituck Outer Banks, however, illustrate that acquisition is a viable tool. Further, the potential of land acquisition as a positive and effective supplement to more traditional management tools is far greater than has yet been realized. Securing the authority and at least modest funding for land acquisition should be a priority for governments interested in effective coastal resource management.[181]

181. A 1980 amendment to section 306A of the Federal Coastal Zone Management Act provides a possible source of funding. 16 U.S.C. § 1456 (Supp. 1980). The amendment allows the federal government to make land acquisition grants to state management programs to preserve and restore key coastal areas, to redevelop deteriorating urban waterfronts, and to provide beach access. Unfortunately, no funds have yet been appropriated to implement this important amendment.

Legislation being considered by the Congress would make a portion of federal revenues from off-shore oil and gas lease sales and royalties available to coastal states for a variety of coastal resource management purposes, including land acquisition. *See* S. 800, 98th Cong., 1st Sess. (1983); H.R. 5, 98th Cong., 1st Sess. (1983).