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Title: Whose Beach is it Anyway?

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Abstract

The public right to access the beaches in many places is frustrated by those who have no interest in sharing the benefits of *their* beach with others.

Beach precincts around the world are the setting for a protracted conflict between public and private control of access to the natural environment of the beach. This conflict sees private individuals and corporate interests that own foreshore properties seeking to extend that ownership to deny or restrict access to the beach. Foreshore property owners have, in many places, used various urban design and development devices to effectively control the conditions for beach access and use. Their intent is to enjoy as exclusive a right to the benefits of the beach as is possible.

Governments have sought to regulate public access to beaches through various iterations of Coastal Zone Management by regulation, law, policies and planning controls around the world. Private interests, however, have proven adept at circumventing the intent of these plans and policies. They are assisted in subverting plans and policies by conflict between the different levels of governments. Local politicians and government officials often undermine the political positions of higher level policies that assert the right of the public to enjoy the beach from the land or the water.

This research used a Google™ alert for 'public access to beaches' to analyse the discourse over the issues surrounding beach access. It reveals that although the narrative varies in each country, the central issues remain the same. The strategies, positions and myths of the active players reveal a story that is fluid and changing, motivated by self-interest, aversion, greed and profit and sometimes by altruism and the notion of the public good.

Keywords: Public access, public open space, public good, public funding, private property, coastal zone management, beach management, beach neighbourhoods and precincts.

Introduction

This paper arises from a doctoral research interest in the urban design and planning of beach precincts. Urban beach precincts are a unique place where nature meets the built environment, where the sea meets the land and where the public domain of the beach meets the subdivision of land ownership (Cartlidge, 2011).

The urban design and planning of the beach precincts of the Gold Coast is a particular research interest. Initial research indicates that there has been a longstanding conflict over the construction of a pedestrian and cycle path known as the Oceanway along the beachfront of the Gold Coast (Bedo, 2010a; Willoughby, 2011a; Willoughby, 2011b). This has highlighted the problems produced by subdividing and building on the foreshore dunes adjacent to the beach. Nearly half of the Gold Coast beachfront has development on the beachfront (Wake, Stuart, Hunt, & McGrath, p 31 2008) described as private properties adjacent to dunes. It is in these locations that the conflict over the completion of the Oceanway exists.

This research aims to build a picture of the jurisdictions and governance of this unique case of development. Does the same problem of private property rights cause conflict in other places around the world, or is the situation unique to the Oceanway on the Gold Coast? What are the arguments used in support of private property or public use of beaches? Is conflict inevitable or can it be eliminated, alleviated or managed?

Research Methodology

This research used a Google™ alert for ‘public access to beaches’ to collect relevant blogs, editorials, news articles, reports, organizational and government web pages in a six month period from October 2010 to March 2011. The authors of these sources are referred to as “writers” in the text, as distinct from the “commentators” who may have posted comments to the website. Zotero™ was used to create a searchable archive for the researcher. The web pages were converted to text files and stored as sources in Nvivo™ for coding and analysis.

Using Nvivo the text was then subject to a content analysis to understand the arguments, beliefs, and claims etc. presented by the writers and commentators. The meanings and positions taken by the contributors were then examined to establish the degree of conflict over public access and private property rights. The implications for the urban design and planning of beach precincts were considered and initial findings presented.

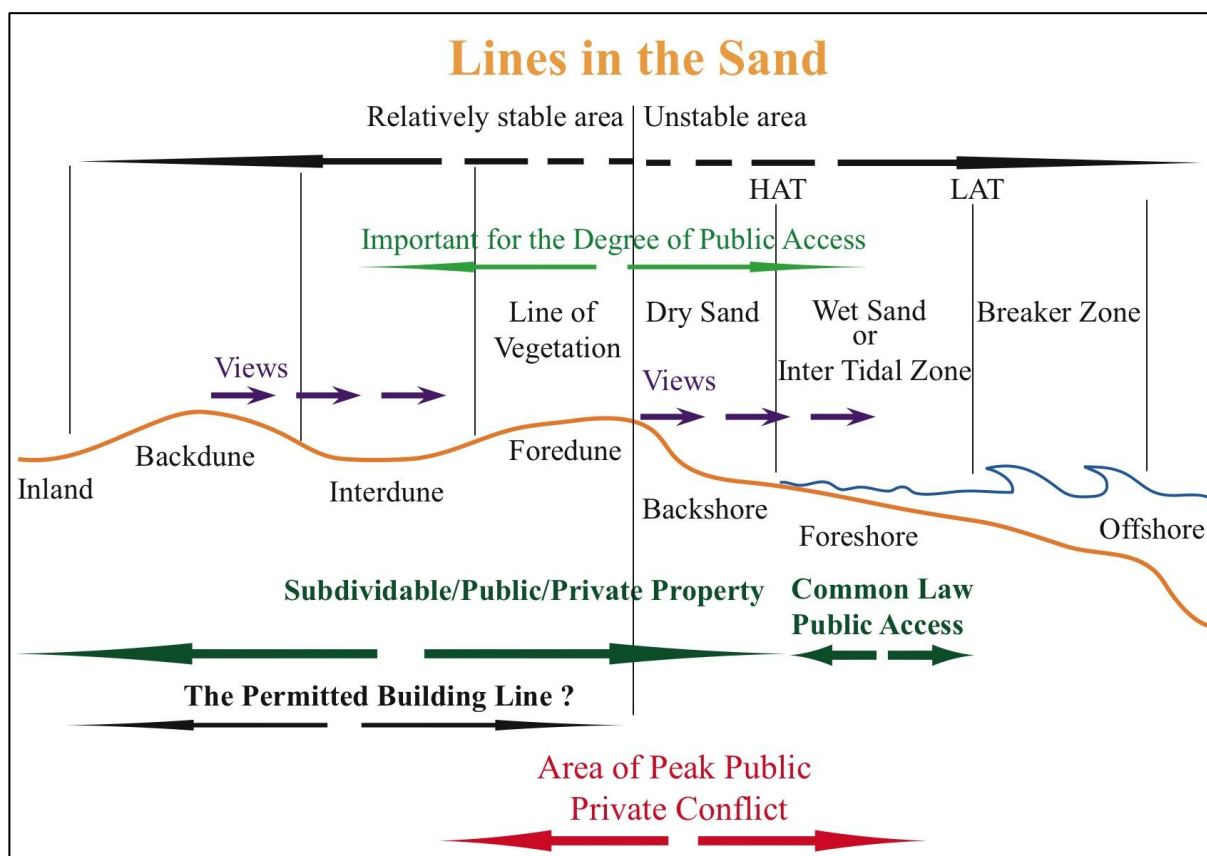
The Legal Framework of Public Access to Beaches

The public right to access of the beaches is generally said to originate in Roman law, and the laws and customs of England. In the United States this has created a principle of the Public Trust. This principle holds that *certain resources belong to all and cannot be privately owned or controlled because of their inherent importance to each individual and society as a whole* (Klass & Huang, 2009).

In Queensland the right to beach access is mentioned in the Coastal Protection and Management Act 1995 s 50 c and the South East Queensland Regional Plan 2009 – 2031 policy 2.4.4. The policy aims to *Maintain and enhance safe public access to the foreshore and coastal waters and ensure public access is designed and maintained*

to conserve coastal resources. Public Access is also considered in development applications under the State Coastal Management Plan. This plan is not prescriptive, and there are no particular public access requirements for developments to meet. In the opinion of the Environmental Defenders Office, development interests usually win out in development applications (Environmental Defenders Office (Qld) Inc, 2008).

Private and public land is usually defined by survey showing private and public land and easements. Defining the beach boundaries is much more difficult. The following diagram aims to highlight these difficulties. Generally, the laws in all the jurisdictions examined see the beach between the highest astronomical tide (HAT) and lowest astronomical tide (LAT) marks as a public domain. Above the HAT to the line of vegetation, (sometimes known as dry sand), is usually public, but in some places and jurisdictions given over to private space. Conflicts arise beyond the HAT and the nature of access to the inter-tidal zone, also known as tidelands or wet beach. The boundaries inland from the wet beach are also affected by natural factors like erosion, extreme weather events and sea level rises (Lopez, 2011). These geographic, legal, planning and public access uncertainties are presented in the diagram. These 'lines in the sand' illustrate the changing, confusing, indeterminate and unstable nature of private property and public access in beach precincts.



The lines in the sand between private property and public access (source: Author)

In Queensland the right to access the beach appears to be one of access from the sea. This infers that it is actually a resource based access, not a recreational, social or cultural public access. There does not appear to be a definitive right for the public to access the foreshore from the land. This situation would appear to be at odds with

the perception that there are no private beaches in Queensland (Willoughby, 2011a). The right to use the foreshore is negated by the inaccessibility of that foreshore. This situation effectively privatises the beach and sets up conflict between private property owners and the public who wish to gain access to the foreshore. The planning processes in Queensland have seen building on the beachfront becoming a common practice in the past fifty years. These practices have tended to restrict or prevent public access to beachfronts in highly urban areas such as the Gold Coast. This practice continues with current development applications for beachfront property development (Potts, 2011)

Permitting private development in coastal areas on the beachfront has effectively privatised beaches on the Gold Coast and in all the jurisdictions examined. This creates public liabilities to protect and preserve private property that has been permitted in vulnerable and unstable coastlines. Considering population growth in coastal zones, limited recreational space, erosion, adverse weather events, sea level rise and the costs to the public of permitting beachfront development, there has been some movement to limiting the public liability and increasing the public benefits of the beaches by restricting building on the beachfront.

One such attempt occurred in the United States. The Coastal Barrier Resources Act (CBRA, Public Law 97-348) attempted to restrict building on barrier islands. Although primarily intended to limit the exposure of the Federal disaster relief budget to coastal development, this act has often failed to prevent beachfront development on the fragile Barrier Islands. This has usually resulted in exclusive gated communities that exclude public access. Development is achieved by coalitions of developers, local and state governments who then pass on the risk of infrastructure replacement and protection to the U.S. Federal Government (Salvesen, 2005). Salvesen explains the approaches used to circumvent the intent of the law by developers, local and state governments. The significance of the circumvention of law shown in the development of fragile barrier islands for the Gold Coast is that developers are a global community and the techniques used to leverage development are quickly adopted, adapted and utilised elsewhere. The connection between the development of the Gold Coast and developments in Florida and California (Burchill, 2005) appears to have had negative effects on public access to the beaches in the Gold Coast.

The Arguments

The arguments found in the texts can be seen as bi-polar, with writers and commentators in favour of either public access to the beach or the rights of private ownership of the adjacent land. All the cases of conflict examined were located where beachfronts were developed by private property owners. The weight of argument presented by writers and commentators was found to be in support of maintaining the right of reasonable public access to the beach.

The sources contained a large number of assertions of rights and claims to the facts and values of those rights. The concepts put forward to support the arguments presented are generally propositional and conditional on the preferred interpretation of those rights through policy and law.

The claims made in the sources often put forward claims of fact as to the different rights of the parties to public access or private property enjoyment. These are

usually accompanied with claims to the value of those rights and interpretation of laws and policies to support claims to value or fact. Many of these claims can also be seen as claims of concept as the wording of the claim mixes value with fact. For instance, public access to the wet beach may be a legal fact, but the access to the beach is sometimes controlled by those who own the adjacent properties. Two concepts arise out of this situation, either extended property rights or the creation of public access. This situation is seen as the main source of conflict between private rights and public access proponents (Grove, 2010).

Public access to beaches is an *a priori* conflict in many jurisdictions. McKeon writing in the Stanford Law Review in 1970 defined the conflict as between two kinds of recreation, the public and the private uses of the beach. He saw the origins of the conflict in terms of private interests confining the public to the wet sands through the control of access from the dry sands, creating a de facto private beach that rendered the public's right to the tidelands valueless. McKeon proposed two solutions to this problem, the creation of beach parks or easement acquisition (McKeon, 1970).

The Power of Belief

Belief is an important factor in the narrative of beach access; the motivation generated by belief has been involved in driving changes to law and policy. The facts of law are subject to beliefs and connected to the sense of entitlement by right. The beliefs of those who support the privatization of the public commons of the beach are seen as a right. If the law does not agree, they often seek to change the law (Associated Press, 2010), ignore, reinvent or subvert it (Bedo, 2010b; McCracken, 2011; Ruengwutchanapuech, 2010). Writers and commentators in favour of private property rights often invoke the illegal activities of others as reasons to prevent improved access to beaches they border. Drug use, illegal and sexual activity, loss of privacy and trespass are often reasons given to restrict or prevent the public access (Fleisher, 2010; Lovett, 2010; Moore, 2011)

Public access writers and commentators often tie their arguments to emotive life experiences especially with regard to childhood. Clare Wright laments the loss of public access to her childhood beach. She saw this beach as a sacred space linked to her journey to adulthood. She perceived a loss of democracy and an attack on cultural values of Australia by the forces of elitism (Wright, 2007). This theme is repeated frequently by writers and commentators in the sources. Powerful personal narratives support and inform the positions people take to the issue of public access to beaches. They often appear to motivate emotional responses to actions taken to privatise beaches (Tatman, 2011).

Prominent Participants

Two important non-government actors in private property versus public access rights in the United States are the Pacific Legal Foundation and the Surfrider Foundation. The Pacific Legal Foundation was incorporated in Sacramento, California and is particularly active in contesting public access rights. It appears to be opposing the California Coastal Commission and the State of Texas (Pacific Legal Foundation, 2011) in a targeted campaign. It is a libertarian law firm which has been active in many of the conflicts in the United States over public access to beaches. It recently

supported the case by Californian lawyer and property owner Carol Severance that undermined the Texas Constitution and Open Beaches Act 1957. This has occurred within a year of voters in that state extending and including the rights contained in the Open Beaches Act into the State Constitution (Editorial Board, 2010) (House Research Organisation, 2009).

The Surfrider Foundation is an organization founded in 1984 in Malibu, California with the declared aim: *our mission is the protection and enjoyment of oceans, waves and beaches through a powerful activist network*. It currently has chapters across the United States and in fifteen other countries including Australia. It is particularly active in the states of California, Oregon and Florida (Surfrider Foundation, 2011). The textual analysis tended to suggest that the Surfrider Foundation is focused on government policies and local planning decisions. In contrast, the Pacific Legal Foundation appears to seek legal judgments which alter the interpretation of state and federal law.

Jurisdictions in Conflict

The most active jurisdictions during the period of study were in the United States particularly California, Florida, New Jersey and Texas, followed by New Zealand and Australia. New Jersey, New Zealand and Texas are seen as special cases due to recent legal and political activity in either the law or policies governing public access to beaches. Australia for its population size is well represented. This may be due to the length of coastline or its adoption of American development paradigms since the 1950s (Burton, 2009). However, there were no unequivocal conclusions to be inferred from the data examined.

The absence of some jurisdictions may be as significant as their presence. Articles and blogs tend to concentrate on current newsworthy stories. These stories involve conflict, if there is no conflict there is probably little news or opinion generated. There are few articles from the UK, with its high population density and coastal settlement patterns. This may be due to public access being more assured there or a less permissive planning process to the privatization of beach frontage.

Two jurisdictions with major reported conflicts were in the states of New Jersey and Texas. In New Jersey the 2010 election of a Republican Governor prompted a review of the pro access policies of the previous Democratic Governor's administration (Hess, 2011; Hester, 2010; Moriarty, 2011). In Texas the Open Beaches Act 1959 states that the public shall *have the free and unrestricted act of ingress and egress to and from state owned beaches, extending from the line of mean high tide to the line of vegetation* (McLaughlin, 2010).

In Florida, the conflict is often between the state, inland counties and small beachfront cities over the public access to beaches in exchange for State and Federal funding of beach renourishment projects (Kelly, 2011a; Reid, 2011; Smart, 2010). In California the conflict is usually between the California Coastal Commission and Coastal Cities, organisations and individuals (Echavaria, 2011; Lovett, 2010). A few jurisdictions are actively purchasing beachfront property to create public open space. This includes Hawaii County (Corrigan, 2011).

The conflict between private property rights and beach access took an interesting turn in New Zealand with allegations of racist motivations for the introduction of a

Marine and Coastal Area Bill which aimed to restore customary title to the foreshore and seabed for the Maori (Saunders, 2011; Tahana, 2010; Tahana, 2011). New Zealand law had established the right of public access to all sea, lake and river waterfronts by what was commonly known as *The Queen's Chain* (Mason, 1990). Claims were made that the proposed law would change this and favour one side or the other unfairly (Voxy News Engine, 2010) (Voxy.co.nz).

In Thailand, beach access has also been tied to land takeovers and garbage collection. Protestors are claiming that public land had been seized whilst matters were still before the courts. The protestors also claimed that the local Mayor was only collecting the garbage of his supporters (Sidasathian, 2011).

In the Dominican Republic, the press reported a claim that drug traffickers and 'land grabbers' were using threats of violence to force a home and business owner off their property to make way for traffickers. The drug traffickers were said to be looking to develop their business at one of the Republic's best wind and surf beaches at Playa Encuentro (Manon, 2011).

In Malta a high wall was erected across a beachfront public footpath by the Exiles Water Polo Club. This wall forces the public onto a rocky foreshore which can be slippery or wet from sea spray. The consequence of this is that the elderly or people with disabilities are unable to reach a popular destination, Exiles Point. The article also makes references to Roman law and irregularities in processing of planning applications by local authorities (Zammit, 2011).

Themes of Conflict

A prominent theme in the sources examined revealed the prevalence of 'name calling' by the commentators to the online articles, whereas writers generally avoided this tactic. Conflict is expressed by the rejection of the opposing viewpoints either beach visitors or beachfront residents by the expedient use of abuse (Tatman, 2011). One example posted by 'joey' is: *I think it's a great idea. It will keep the rednecks and trashy people off the beach. Too cheap to spend \$10...go hunt or hang out in the trailer park.* (King, 2011). In the same article 'boxer' posts: *I live on E.I. and these yankees make me sick. They so think they are better than everyone else. I hope every single one of their precious beach front homes goes in the water.*

Parking is a major cause of conflict. In some ways it is the single most important theme found in the conflict over beach access, especially in locations not served by regular public transport. In the USA parking spaces are explicitly linked to State and Federal funding of beach renourishment and defence works. It also appears to be used as a method in some jurisdictions to exclude 'undesirables'. The issue of paid parking is seen as a permissible imposition on outsiders, and is often accompanied by residents' parking permits and illegally erected no beach access signs. This form of restriction is often found in high-density urban centres and appears inequitable in some of the beach settings to which it is applied (Kelly, 2011a; Kelly, 2011b; Kelly, 2011c; King, 2011).

Climate change does not figure strongly in the articles, blogs or comments, but erosion and weather events do. A blog by an attorney, used to alert clients to development issues, draws attention to a reduction of public access to eroded intertidal zones, and the increased likelihood of future storm damage (Silverberg,

2011). The threat of reduced public access is repeated in an editorial attacking the Republican Senate Bill 110 in North Carolina that seeks to build hard coastal defences. Another writer asserts that beach towns in the pursuit of revenue have ignored warnings from scientists to increase building setbacks. This has resulted in an estimate of USD 7.7 billion of property being put at risk in North Carolina (Tomlin, 2011). The Australian government has recently identified AUD 226 billion of infrastructure at risk to a sea level rise of 1.1 meters by 2100 (Tuttiert, 2011).

One example was found of an altruistic private landowner voluntarily offering public access to the beach in return for maintaining a road to that beach in Kerikeri, New Zealand. This offer was lost on his death and the property passing to new owners (Molloy, 2011).

An exceptional case was reported in the United Kingdom. Newhaven Town Council applied for and received Village Green status for the town's West Beach. This was in response to the beach being arbitrarily closed and fenced by Newhaven Port and Properties (Newhaven Town Council, 2010).

The narrative surrounding beaches and public access also illustrates unintended consequences. One example concerns the tourist taxes raised in the City of Naples. The tax was intended to maintain beaches and finance beach facilities but became an advertising subsidy for the city's hotels (Smart, 2010). In Texas, a high court ruling in favour of private land rights led to the withdrawal of State beach re-nourishment project funds (Rice, 2010).

Incremental Erosion of Public Rights of Access

The incremental erosion of the public right to use beaches is an ongoing process that is both historical and contemporary (Wright, 2007). The quantum of suitable beachfronts within a driving distance of urban conurbations is effectively finite. Every new beachfront development that occurs reduces the accessible beach frontage for the rapidly growing coastal populations (Australian Bureau of Statistics, 2004; Gurrán, Squires, & Blakely, 2006). In the Gold Coast nearly a half of the beachfront is developed, with suburbs such as Mermaid Beach effectively privatised. This results in public users being concentrated on only the more accessible beaches of the 35 kilometers of beach frontage (Wake et al., 2008).

Initial Findings and Implications for the Urban Design and Planning of Beach Precincts

Conflict over beachfront development is not just a Gold Coast phenomenon. Beach precincts around the world are the setting for a protracted conflict between public and private control of access to the natural environment of the beach. This conflict sees private individuals and corporate interests that own foreshore properties seeking to extend that ownership by denying or restricting access to the beach. Foreshore property owners have in many places used various urban design and development devices to effectively control the conditions for beach access and use. Their intent is to enjoy as exclusive a right to the benefits of the beach as is possible.

On the Gold Coast, they have successfully fought off attempts by the council to provide walking and cycling access. This has been in part because of organized beach residents' pressure on local government representatives and the reluctance of

the council to pursue the matter through the courts (Killoran, 2011). The existence of buildings along the foreshore also has the effect of walling off views to the beach. This blocking of access is also combined with parking restrictions and traffic engineering to further reduce public accessibility to the beach for non-residents of the beach precinct(O'Hare, Bajracharya, & Cartlidge, 2010).

There is a fixed quantum of available beach frontage. Every decision taken that favours private ownership on beach frontages therefore reduces access to public beaches. The privatised beachfronts created also become an economic and social liability for future generations. Once private subdivision has occurred, it is normally local government that must deal with any conflict over public access issues. However, local governments often have limited financial resources to enter into protracted legal battles with private property owners or to purchase those properties. The potential for conflict over access to beaches is exacerbated if those beaches are urban beaches.

Some Governments have sought to regulate public access to beaches through various iterations of Coastal Zone Management by regulation, law, policies and planning controls. Private interests however have proven adept at circumventing the intent of these plans and policies. They are assisted in subverting plans and policies by conflict between the different levels of governments. Local politicians and government officials often undermine the political positions of higher level policies that assert the right of the public to enjoy the beach from the land or the water.

Private owners are also more motivated to engage in a struggle to win their cases as they perceive they are defending their homes and property. Public authorities are apparently less committed to engage in conflict with an active and powerful section of their electorate. This favours the continuation of strategies of conflict by owners of beachfront land for the benefits of the beach (West, 2011).

An incremental loss of public access by a gradual case by case concession is a very possible outcome in some jurisdictions, as private owners relentlessly pursue their own interests. This may be more likely in small population beachside local authorities. Small local authorities do not have the financial or human resources and expertise to oppose appropriation of public access (Grove, 2010). Private property owners are also aided by politicians who may rely on the support of wealthy and influential beachside property owners for their votes and financial support (Willoughby, 2011a).

Developers are motivated to restrict public access as they are more able to market an exclusive product to their customers. They are usually short term in their approach to the subdivision of land and then move on to the next development. To maximise sales in the shortest possible time, they understandably seek to subdivide the beach frontage as this is their most valuable land. They have little interest in what happens after they have developed the land and moved on to the next project. They have little financial incentive to preserve the beachfront for public use, as it imposes development costs on the project that cannot be easily recouped for amenities and infrastructure that will be publicly owned.

If local authorities permit beachfront subdivision they are committing their jurisdiction, the state, visitors and residents to a long term conflict over public access to the beaches. Residents and visitors unfortunate enough not to own beachfront property

will be motivated to seek greater access. They will also be under pressure to provide beach cleaning and lifeguard services, renourish the beaches and build coastal defences against likely erosion and sea level rises to protect the beachfront properties. They will either have to raise special levies on beachfront owners or use public funds. This is a conflicted response as the main beneficiaries will be the private property owners. This in effect means that public funds are used to increase the value of private property and support that valuation.

The implications for the urban design of beach precincts suggest that the proposed solutions for the problem of public access to the beach made by McKeon in 1970 are flawed. He suggested that the solution was either the creation of a beach park or easement acquisition. This research suggests that conflict between private property owners and the public is inevitable if easements are the chosen option. When beachfronts are developed the public loses access and gains liability to repair and defend private property. This situation exclusively benefits the property owner. McKeon's opinion does not take into account the creation of perpetual conflict created when the public resource of the intertidal zone is effectively privatised to create a private benefit to adjacent land owners. This public resource, according to the public trust doctrine, is more important to each individual and society as a whole than privately owned property.

The research also suggests that there are important design elements in the design of beach precinct. In order of importance they are: accessibility: the provision of parking; the nature of the beach access points; management of the beach park; amenities that support visitation; active and passive activities; and public infrastructure.

In summary, the research demonstrates that the conflict over public access to beachfronts is not unique to the Gold Coast or Australia. Allowing private beachfront development which restricts public access guarantees ongoing social conflict which cannot be eliminated, alleviated or managed. It also commits government to economic liabilities that will prove unpopular with the general public.

The research also indicates that the ancient rights and common law foundations of the public access to the beaches is unable to meet the needs of society. Beaches have developed as cultural, recreational, restorative and social spaces in recent history. They require easy and unrestricted public access from the land. Ancient customs, laws and rights intended to allow the exploitation of the coastal resources do not meet the needs of modern societies, especially in urban areas.

Further Research

This paper is an ongoing research project, with much more detail to be extracted from the analysis of the online narrative surrounding public access to beaches. Only the major points have been reported from the research. The detailed analysis will inform the ongoing research into the urban design of beach precincts.

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