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Urban Waterfront Development Symposium - Selected Topics on Land Use Law.

Douglas M. Wrenn

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URBAN WATERFRONT DEVELOPMENT

DOUGLAS M. WRENN*

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I. INTRODUCTION

By tracing the historical role of urban waterfronts in the development of cities, it is apparent that waterfronts change in response to demands for new uses.¹ The adaptations to new functional requirements over time have resulted in a recurring cycle of waterfront development. The current rediscovery of waterfront sites as potential opportunities for economic development and public enjoyment represents the continuation of this pattern of reuse.

Although current redevelopment activities in a few cities date back to the late 1950s, this latest cycle of reuse is in its infancy. Throughout North America, public and private development inter-

* B.S., Honors, 1974, North Carolina State University; M.L.A. 1976, North Carolina State University. Associate, The Urban Land Institute, Washington, D.C. Author of several articles and books including *URBAN WATERFRONT DEVELOPMENT*.

1. See Darlin, *Troubled City*, Wall St. J., Jan. 26, 1984, at 1, col. 6. In 1801, for example, entrepreneurs constructed a whiskey still along the Cuyahoga river in Cleveland. Later in the 19th century, John D. Rockefeller built an oil refinery along the river, and after World War II, steel companies prospered in the same location. The area, which is known as the Flats, is now enjoying development of residential, recreational, and entertainment projects. *See id.*

ests are investigating waterfront development opportunities,² and the level of development activity should continue to rise through the 1980s. The purpose of this article is to address the benefits and problems associated with urban waterfront development and to suggest ways in which waterfronts might be better utilized.

II. DEVELOPMENT OPPORTUNITIES

Waterfront development projects are complex and challenging but also very rewarding when successfully completed. Determining whether an opportunity exists to develop a waterfront area depends upon the incentives and constraints that distinguish a site. Appreciating the value of various development initiatives requires understanding the factors that stimulate and hinder development.

A. Incentives

Incentives for developing waterfronts are both directly and indirectly related to waterfront conditions. One of the more significant factors stimulating development is the dramatic improvement in environmental quality.³ The nation's effort to clean up its waterways, begun in earnest in the mid 1970s,⁴ is beginning to produce the desired results.⁵ In addition, many waterfront industries have either relocated outside urban areas or discontinued operation and the air and water pollution generated by remaining waterfront uses has been reduced by the implementation of point-source controls. Consequently, urban waterfronts are becoming cleaner and land along the water's edge is suitable for uses that were unthinkable a decade ago.

Another factor, and one which does directly relate to waterfront conditions, is the change in the functional role of urban waterfronts. At one time the commercial life of cities depended almost exclusively on the activities of their ports. This is no longer the case; the

2. See Guenther, *Many Pitfalls Await Planners of Waterfront Developments*, Wall St. J., June 29, 1983, at 37, col. 1.

3. See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL TRENDS 237, 242-47 (1981). But see Belmont, *Public Interest Access to Agencies: The Environmental Problem for the 1980's*, 11 STETSON L. REV. 454, 455 (1982).

4. See Gold, *Clean Water, Federalism and the Res Judicata Impact on State Judgments in Federal Environmental Litigation*, 16 U.C.D.L. REV. 1, 2 (1982).

5. See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL TRENDS 237, 242-47 (1981).

shift in importance along with recent revolutionary changes in cargo handling and steadily decreasing waterborne passenger travel has left large sections of urban waterfront land unused or underused.⁶

Moreover, the general renewed interest in the inner city is stimulating development,⁷ and waterfront locations are prime attractions for new or converted residences, offices, or shops near city or neighborhood centers. Coinciding with this preference for urban places is the attractiveness of adaptive use or preservation of older structures.⁸ Tax benefits for structures placed on the National Register of Historic Places have helped encourage creative reuse of old buildings.⁹ Furthermore, the rising costs of new construction make conversion of existing structures economically attractive.¹⁰ Waterfronts often possess exciting opportunities to reuse older structures. These opportunities are enhanced by the positive historical image urban waterfronts hold in North America.¹¹

In addition, the steady rise in travel costs coupled with the increase in leisure time has produced a growing demand for recreational opportunities in urban areas.¹² Because many residents feel that cities have neglected their waterfront resources, providing opportunities for the public to use and enjoy waterfront sites is a major

6. See COMMITTEE ON URBAN WATERFRONT LANDS, URBAN WATERFRONT LANDS 3 (1980).

7. See Guenther, *Many Pitfalls Await Planners of Waterfront Developments*, Wall St. J., June 29, 1983, at 37, col. 1. *But see* Murphy, *Alliance for Growth: Stimulating Urban Revitalization Through Corporate, Governmental and Community Cooperation*, 9 FORDHAM URB. L. J. 835, 836 (1980-81).

8. See Beckwith, *Preservation Law 1976-1980: Faction, Property Rights, and Ideology*, 11 N.C. CENT. L. REV. 276, 276 (1980); Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 473 (1981).

9. See, e.g., Anthony, *1982 Legislative Changes in the Federal Tax Incentives for Historic Preservation*, 1 PRESERVATION L. REP. 2087, 2087 (1982) (historic preservation tax benefits); Anthony, *Summary of Preservation Tax Incentives in the Economic Recovery Tax Act of 1981*, 1 PRESERVATION L. REV. 2001, 2001 (1981) (tax incentives increased for historic rehabilitation); Note, *Federal Tax Incentives for Historic Preservation: A Strategy for Conservation and Investment*, 10 HOFSTRA L. REV. 887, 887 (1982) (tax incentives through 1981 traced). See generally *Federal Tax Incentives for Historic Preservation*, PRESERVATION L. REP. 11,003-705 (1982) (detailed analysis of federal tax plans dealing with historic preservation).

10. See Ziegler, *Large-Scale Commercial Adaptive Use: Preservation Revitalizes Old Buildings--And New Ones Too!*, 11 N.C. CENT. L.J. 234, 241 (1980) (tax benefits and favorable financing favor historic preservation).

11. See *id.* at 236-39.

12. See U.S. DEPARTMENT OF INTERIOR, NATIONAL URBAN RECREATION STUDY, EXECUTIVE REPORT 4 (1978).

concern in many cities.¹³ The recreation potential of waterfronts goes beyond the traditional water-based sports and programs; it also covers a broad range of activities related more to urban living.

B. *Constraints*

Successful waterfront projects throughout North America attest to the strength of the development incentives. Moreover, many recent projects have a mix of recreational, residential, and commercial uses that clearly demonstrate the tremendous development potential of urban waterfronts.¹⁴ Nevertheless, there should be no illusion about the ease of waterfront development. Beyond the inherent difficulties of any substantial urban development project, waterfronts present several special problems. The constraints discouraging development come from two sources: the characteristics of waterfront sites and the institutional framework guiding the development process.

The use and condition of urban waterfronts impose many impediments to nonindustrial development. All too often the potential reuse of a waterfront site is constrained by neighboring shoreline uses. Many types of development are not compatible with the large commercial airports, waste treatment facilities, power generating plants, and industrial operations that occupy waterfront sites in several cities. Furthermore, waterfronts currently serve many cities as convenient locations for lumber yards, tank farms, and vehicle storage areas. As a result, waterfront development may entail finding new locations for these necessary uses.

There are other serious problems involved with the purchase of urban land for waterfront redevelopment. These include fragmented ownerships of properties,¹⁵ restricted property rights,¹⁶ such as easements and deed restrictions, and problems identifying and

13. See Guenther, *Many Pitfalls Await Planners of Waterfront Developments*, Wall St. J., June 29, 1983, at 37, col. 1; cf. Comment, *Urban Revitalization: Planning for the Future in Our Cities*, 21 WASHBURN L.J. 116, 117 (1981) (urban revitalization is general concern of many cities).

14. See Darlin, *Troubled City*, Wall St. J., Jan. 26, 1984, at 1, col. 6; see also The Dallas Morning News, March 11, 1984, at A52, col. 1 (development along Concho river in San Angelo, Texas similar to Riverwalk in San Antonio with hotels, restaurants and condos).

15. See *Leabo v. Leninski*, 438 A.2d 1153, 1155 (Conn. 1981).

16. See Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees*, 27 TEXAS L. REV. 158, 159-60 (1949); Comment, *Right of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248, 251 (1940).

locating the actual owners.¹⁷ Moreover, waterfront locations have traditionally been used heavily for railroad, utility, and highway right-of-ways which severely complicate attempts to assemble land.¹⁸ In addition, special waterfront features such as eroding shorelines and legal questions regarding ownership of submerged lands and riparian water rights may present additional obstacles.¹⁹

Development is also difficult because of the unusual physical problems urban waterfront sites tend to have.²⁰ The severity of the problems vary widely depending on a city's size, age, and history of waterfront uses.²¹ Although most of these problems can be overcome, to do so requires a significant investment in time and capital.

One characteristic problem is the inaccessibility of waterfronts. This is due primarily to the lack of attention given to shoreline access by neighboring developments and the use of adjacent lands for industrial, military, or transportation purposes that restrict access. Consequently, many waterfront sites are unusually difficult to reach by vehicle or by foot. For example, railroads historically have been built along urban shorelines and even if the trains are no longer in use, the tracks, switching yards, and related facilities restrict access and limit development opportunities.

In addition to these constraints, waterfront sites commonly have very poor soil conditions for typical construction methods.²² Frequently building foundations and rubble remain from previous uses. Furthermore, waterfront soils are usually unconsolidated and have a very limited load-bearing capacity. This is due in part to the fact that in many cities waterfront land was created over the years with fill material. Compounding the poor soil conditions is the potential

17. See Wunderlich, *Landownership: A Status of Facts*, 19 NAT. RESOURCES J. 97, 105, 110-11 (1979).

18. See Guenther, *Many Pitfalls Await Planners of Waterfront Developments*, Wall St. J., June 29, 1983, at 37, col. 1. Boston's Central Artery, for example, and Toronto's Gardiner Expressway isolate the city from the waterfront in both cities. See *id.* at 37.

19. See *United States v. California*, 381 U.S. 139, 142 (1965) (resolution of twenty-year dispute concerning submerged lands); *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (1976) (stating general rules concerning riparian owners).

20. See Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 692 (1983).

21. See *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 358-61 (Mass. 1979).

22. See generally Massey & Silver, *Property Tax Incentives for Implementing Soil Conservation Programs Under Constitutional Taxing Limitations*, 59 DENVER L. J. 485, 486 (1982) (topsoil erosion in excess of five billion tons a year across country).

for shoreline erosion and periodic flooding.²³ These factors can make waterfront development extremely difficult.

The deteriorated condition of waterfront structures and facilities in older cities creates additional problems.²⁴ In some cases bulkheads, piers, and pilings have decayed to the point where they are unreliable and not suitable for new uses. Moreover, the development of some water-dependent uses, such as marinas or ferry terminals, may be infeasible because of excessive sedimentation, periodic flooding, deteriorated structures, or barriers (such as fixed-span low-level bridges) restricting water uses.

The important point is that limitations posed by the use and condition of urban waterfronts significantly increase development costs, particularly site engineering and construction costs.²⁵ In addition, site investigations and infrastructure repairs dramatically add to the up-front costs of a project. Consequently, these constraints make waterfront development difficult if not necessarily impossible.

Many of the more formidable constraints to waterfront development exist within the institutional framework guiding the management of urban shorelines. Waterfronts generally have a fragmented and complex structure of jurisdictional involvement.²⁶ This is because the presence of the water resource introduces additional and overlapping agencies at each level of government.²⁷ Moreover, numerous special purpose government groups have authority over specific shoreline resources and activities. As a result, waterfront development is subject to a multitude of governmental regulations and permit requirements.²⁸ A typical waterfront project does not get off the drawing board until the developer has obtained all of the necessary approvals and permits. While most waterfront regula-

23. See Holmes, *Federal Participation in Land Use Decisionmaking at the Water's Edge—Floodplains and Wetlands*, 13 NAT. RESOURCES LAW. 351, 360 (1980).

24. See Darlin, *Troubled City*, Wall St. J., Jan. 26, 1984, at 1, col. 6.

25. Cf. McClendon, *Simplifying and Streamlining Zoning*, INST. ON PLAN., ZONING, & EMINENT DOMAIN 45, 46-47 (1982) (many zoning ordinances result in increased development costs).

26. See THE CENTER FOR ENERGY AND ENVIRONMENTAL STUDIES, DEVELOPMENT AND REGULATION OF THE URBAN WATERFRONT: BOSTON, SAN FRANCISCO, AND SEATTLE 4 (1980).

27. See *Marina Plaza v. California Coastal Zone Conservation Comm'n*, 139 Cal. Rptr. 249, 252 (Ct. App. 1977).

28. See Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 30 U. PA. L. REV. 28, 38 n.39 (1981).

tions and permits are designed to protect the shoreline from misuse, they tend to restrict options and impede the development process.²⁹

Another regulatory burden on waterfront development is the requirement for public access.³⁰ In this respect, California, Washington, and Massachusetts have strict public access requirements within their state coastal management programs.³¹ In other states, public access to waterfronts is regulated on a local level by each city.

In many cities waterfront development is further constrained by regulations governing the aesthetics of a proposed project. For example, while the Coastal Zone Management Act calls for the protection of aesthetic values, it offers little in the way of specific guidelines.³² Generally, state and local regulations deal with the height, bulk, and site coverage of the project with restrictions imposed to preserve visual access to the water's edge from inland sites.³³

The development process can also be hindered by the involvement of numerous citizen groups, each having a special interest in the condition and use of a city's waterfront.³⁴ In addition to groups typically associated with urban development, such as neighborhood associations, preservation organizations, and school districts, many other groups such as fishing organizations, recreational boating clubs, tugboat operators, and conservation groups are interested in

29. See *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 553 P.2d 546, 549, 132 Cal. Rptr. 386, 389 (1976) (en banc) (multitude of permit requirements and delays resulted in two million dollar loss to developer). The most stringent regulations pertain to waterfront use. In many jurisdictions, uses that are neither water-dependent nor water-related are prohibited completely or allowed only if specific conditions are met.

30. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489-91 (1970). Moreover, when public access or rights are not reasonably limited, waterfront areas may be harmed. See Tarlock, *Introduction*, 24 WM. & MARY L. REV. 535, 543 (1983).

31. See HERSHMAN, GOODWIN, RUOTSALA, MCCREA & HAYUTH, *UNDER NEW MANAGEMENT--PORT GROWTH AND EMERGING COASTAL MANAGEMENT PROGRAMS* 67 (1978).

32. See 16 U.S.C. § 1452(2) (1982). See generally Owens, *Land Acquisition and Coastal Resource Management: A Pragmatic Perspective*, 24 WM. & MARY L. REV. 625, 628 n.14 (1983) (brief discussion of the Coastal Zone Management Act).

33. See HERSHMAN, GOODWIN, RUOTSALA, MCCREA & HAYUTH, *UNDER NEW MANAGEMENT--PORT GROWTH AND EMERGING COASTAL MANAGEMENT PROGRAMS* 68 (1978).

34. Cf. *City of Alexandria v. County of Fairfax*, 184 S.E.2d 758, 759-60 (Va. 1971) (5000 residents opposed annexation of waterfront area which would have resulted in \$139 million development project). See generally Hicks, *New and Significant Decisions: The Interest Groups Involved in the Planning and Zoning Process*, INST. ON PLAN., ZONING, & EMINENT DOMAIN 1, 13, 24, 30-31 (1978) (discussion of various special interest groups).

waterfront projects. While citizen participation is a necessary ingredient of any good urban development,³⁵ waterfront projects often become caught in a web of conflicting demands voiced by single-interest groups.³⁶ This can produce costly delays and result in compromises that create inoffensive but mediocre results.

The additional development constraints imposed by shoreline management agencies increase the risk taken by a developer attempting to build a waterfront project.³⁷ The potential magnitude of risk far exceeds what is typically associated with conventional land development projects. Often market studies and financial feasibility statements lead a waterfront developer to conclusions that collide head-on with regulatory guidelines and time delays.

Few cities, however, can afford to ignore the wealth of benefits offered by the full and productive utilization of their waterfront. By providing unique development opportunities, urban waterfronts are regaining a significant role in supporting the viability of North American cities.³⁸ In the process, some important issues concerning waterfront development have emerged. These issues will greatly influence future opportunities for development.

III. DEVELOPMENT ISSUES

While the incentives and constraints to development vary widely depending on a city's size, age, and history of shoreline use, there are three common development issues which stem from judgments made during the development process and which generate controversy for waterfront projects. These issues are regulations and permits, appropriate use of waterfronts, and public access.

A. *Regulations and Permits*

One of the most controversial aspects of waterfront development is the regulatory requirements imposed on waterfront lands. As al-

35. See Murphy, *Alliance for Growth: Stimulating Urban Revitalization Through Corporate, Governmental and Community Cooperation*, 9 FORDHAM URB. L.J. 835, 851 (1980-81).

36. Cf. *Bradford v. Nature Conservancy*, 294 S.E.2d 866, 870 (Va. 1982) (eight years of litigation between ecological group and sportsmen's club concerning access to shores and marshlands).

37. See *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 553 P.2d 546, 550, 132 Cal. Rptr. 386, 389-90 (1976) (en banc).

38. See Guenther, *Many Pitfalls Await Planners of Waterfront Developments*, Wall St. J., June 29, 1983, at 37, col. 1.

ready mentioned, urban waterfronts generally have a jurisdictional structure that far exceeds the typical urban governmental framework in both size and complexity.³⁹ As a result, waterfront development is subject to a multitude of governmental regulations and permit requirements.⁴⁰

From the viewpoint of the private developer, the jurisdictional framework guiding the development process is difficult and counter-productive.⁴¹ The multijurisdictional structure produces redundancy and inefficiency.⁴² The fundamental problem is that the permitting process is not always compatible with the development process.⁴³

The developer is caught in a web of waterfront regulations that is discouraging for two reasons. First, the range of development opportunities is limited by restrictions pertaining to use, density, design, and access.⁴⁴ Secondly, the review and approval process is time consuming and laborious.⁴⁵ Under these circumstances, the developer is faced with an elongated if not indefinite development time frame that is stretched to the point of undermining the project's

39. See *Deltona Corp. v. United States*, 657 F.2d 1884, 1187 (Ct. Cl. 1981).

40. See Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 30 U. PA. L. REV. 28, 38 n.39 (1981).

41. See Lloyd, *A Developer Looks at Planned Unit Development*, 114 U. PA. L. REV. 3, 4, 8-10 (1965). See generally Delaney & Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U.L.J. 219, 236, 246 (1979) (discussion of plight of developers). The State of Missouri, however, has created a system whereby the private sector and public sector work together in redeveloping urban areas. The plan safeguards against abuses of redevelopment without stifling the creativity and progress of new development. See MO. ANN. STAT. §§ 99.420 - 99.430 (Vernon Supp. 1984). The combined public and private effort has resulted in the development of eighteen bars and restaurants, fifty-two apartments, and 700,000 square feet of office space in Laclede's Landing along the St. Louis riverfront. See Guenther, *Many Pitfalls Await Planners of Waterfront Developments*, Wall St. J., June 29, 1983, at 37, col. 1.

42. See Bartke & Patton, *Water Based Recreational Developments in Michigan—Problems of Developers*, 25 WAYNE L. REV. 1005, 1061-62 (1979). See generally Comment, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668, 673-76 (1969) (brief discussion of administrative process behind development).

43. See *Marina Plaza v. California Coastal Zone Conservation Comm'n*, 139 Cal. Rptr. 249, 252-53 (Ct. App. 1977); *Hawkinson v. County of Itasca*, 231 N.W.2d 279, 281-83 (Minn. 1975).

44. See ADVISORY COMM'N ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT §§ 1-3 (1926), reprinted in 4 R. ANDERSON, AMERICAN LAW OF ZONING § 30.01, at 399 (2d ed. 1977).

45. See Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 30 U. PA. L. REV. 28, 48 (1981).

feasibility.⁴⁶

The impact of the regulatory process is manifested in several ways. Regulations add to development costs and basically the risk of the project increases with the rise in development costs.⁴⁷ This worries investors and lenders, and the developer responds to the risk by either abandoning the project or changing certain aspects of the project to increase the expected return on investment.⁴⁸ Sometimes this translates into focusing on a higher income market, and other times it means increasing the intensity of development. When regulations are oppressively complex and stringent, developers are overly cautious and deliberate.⁴⁹ There is concern among developers that an innovative, imaginative proposal would be swallowed up by the regulatory beast and never successfully digested. This undercurrent of concern stifles creativity, and projects can be predictably bland.

The developer has a vested interest in the immediate and long-term success of a project and given the chance would only develop an economically sensible project without serious environmental degradation.⁵⁰ Thus, the developer argues that many regulations are not necessary and the process is unresponsive to waterfront development efforts.

On the other hand, many lawmakers, regulators, and citizens embrace a different viewpoint. From their perspective, regulations were enacted for environmental protection and pollution control basically because private industry, including the development industry, was not doing the job.⁵¹ Regulations are more complex and abundant for waterfront land because shorelines are limited, fragile

46. See *id.* at 60, 63.

47. See Delaney & Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U.L.J. 219, 224 (1979).

48. See Hagman, *The Vesting Issue: The Rights of Fetal Development Vis a Vis the Abortions of Public Whimsy*, 7 ENVTL. L. 519, 534 (1977).

49. See McClendon, *Simplifying and Streamlining Zoning*, INST. ON PLAN. ZONING & EMINENT DOMAIN 45, 46-47 (1982).

50. Cf. *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 553 P.2d 546, 550, 132 Cal. Rptr. 386, 389-90 (1976) (en banc) (after completing substantial work and incurring substantial liability following good faith reliance on construction permit, property owner has vested right to complete work).

51. See Stein, *Problems and Programs in Water Pollution*, 2 NAT. RESOURCES J. 388, 402, 409-10 (1962). See generally Belmont, *Public Interest Access to Agencies: The Environmental Problem for the 1980's*, 11 STETSON L. REV. 454, 455-57 (1982) (discussion of environmental trends).

resources of tremendous public value.⁵² It is in the public interest to control and manage this resource, and the permitting process serves as a mechanism to accomplish this.⁵³ This view contends that if a development proposal is truly meritorious it will sail through the regulatory process without a scratch.

The argument is also based on the premise that regulations help to coordinate the disjointed and incremental decisions affecting urban waterfronts. Although the process creates delays and expense, it also safeguards against pursuing immediate financial rewards at the expense of long-term environmental or community degradation.⁵⁴ The conclusion is then reached that regulations are necessary and exist primarily because of problems created by the policies or practices of developers in the past.⁵⁵

Government agencies on all levels have a mandated responsibility to protect waterfront resources; such is clearly in the public interest.⁵⁶ This purpose must be satisfied, however, in a way that does not inadvertently penalize the development industry. That is to say, the regulatory process needs to be restructured to be more responsive to both development opportunities and problems.⁵⁷ Just as it is in the public interest to manage shorelines for future productivity and enjoyment, it is also in the public interest for cities to realize economic development opportunities.⁵⁸

While regulatory changes are certainly in order, private developers must also take steps to improve existing circumstances. Developers should acknowledge that waterfronts are unique urban resources that require special treatment. It is the responsibility of private developers to take advantage of information sources and

52. See *Deltona Corp. v. United States*, 657 F.2d 1184, 1186-87 (Ct. Cl. 1981).

53. See 33 U.S.C. § § 1341-1344 (Supp. V 1981).

54. Cf. *Dalton v. City & County of Honolulu*, 462 P.2d 199, 208-09 (Hawaii 1969) (land use regulations prevent environmental deterioration). *But cf.* Comment, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335, 335 (1972) (land use control achieves economic segregation and inefficiency).

55. Cf. Comment, *Land Use Control In Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335, 353 (1972) (lack of zoning ordinances in Houston allow private self-interest to cause loss to society).

56. See 16 U.S.C. § 1425(2) (1982).

57. See Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 30 U. PA. L. REV. 28, 66 (1981).

58. See Murphy, *Alliance for Growth: Stimulating Urban Revitalization Through Corporate, Governmental and Community Cooperation*, 9 FORDHAM URB. L.J. 835, 847-48 (1980-81).

study jurisdictional policies and regulations pertaining to shoreline development.⁵⁹ The wheels of the regulatory process should be lubricated with cooperation and good faith. In San Diego, the Unified Port District Commission has proven that shoreline regulation and management can be tailored to accommodate private development without sacrificing public interests.⁶⁰

B. *Deciding Appropriate Use*

The appropriate use of waterfront land is an issue that commonly paralyzes the redevelopment of urban shorelines. The controversy centers on distinguishing among water-dependent uses, water-related uses, and uses that are not dependent on or have any relationship to the water.⁶¹ In some cities, policy makers contend that urban shorelines should be preserved exclusively for uses which could not exist in any other locations but on the water. A more common policy is to allow also uses which may be helped by locating along the shoreline, but could function elsewhere (water-related uses). In contrast, some jurisdictions place no special restrictions on the use of waterfront lands.⁶² This approach is supported by most private developers. They contend that shoreline uses should be determined by site suitability factors and market conditions.

The argument made in support of a very restrictive policy is that given a finite amount of waterfront land, it is in the public interest to reserve it for uses that need a shoreline site to exist. Uses such as cargo shipping terminals, ferry and passenger terminals, marine construction and repair facilities, marinas and moorage facilities, and tug and barge companies should not have to compete with residential, retail, and office uses for waterfront sites. Conservationists point out that water-dependent uses have no choice but to locate along the water's edge, and competition from other urban uses can drive up land values to the point of making the water-dependent uses obsolete. Therefore, these uses should be given preferential

59. See Bartke & Patton, *Water Based Recreational Developments in Michigan--Problems of Developers*, 25 WAYNE L. REV. 1005, 1055 (1979).

60. See SAN DIEGO UNIFIED PORT DISTRICT, PORT OF SAN DIEGO, HISTORY AND DEVELOPMENT 2 (1976).

61. See HERSHMAN, GOODWIN, RUOTSALA, MCCREA' & HAYUTH, UNDER NEW MANAGEMENT--PORT GROWTH AND EMERGING COASTAL MANAGEMENT PROGRAMS 77 (1978).

62. See SAN DIEGO UNIFIED PORT DISTRICT, PORT OF SAN DIEGO, HISTORY AND DEVELOPMENT 2 (1976).

treatment in order to capitalize on the full potential of the water resource. Furthermore, by allowing a non-water-related use on the waterfront, a city loses the opportunity to develop a water-dependent use on the site in the future.

A less restrictive policy is to allow water-related uses in addition to uses absolutely dependent on a shoreline location. Under this policy a use is considered to be water-related if real cost savings or revenue advantages can be attributed to a waterfront location.⁶³ Thus, single-user terminals, seafood plants, petroleum processing plants, waterfront parks, public resorts, aquariums, and restaurants are permitted uses. This approach offers more flexibility;⁶⁴ it encourages traditional waterfront uses while allowing functional changes to occur.⁶⁵ Conservationists feel that this policy provides for the full use of waterfront lands and strengthens the functional attachment of the city to the water resource.

Most private developers do not see the need for excluding primary urban uses from city waterfronts. From their perspective the highest and best use of waterfront land should be determined by site characteristics and market forces.⁶⁶ Developers point out that because of technological innovations many water-dependent uses are no longer economically viable in central city locations. Consequently, use restrictions perpetuate the underutilization and deterioration of urban waterfronts. In effect, land is reserved for uses that it cannot support.

The desire to preserve waterfront lands for water-related uses should not overshadow important citywide objectives to stimulate economic development and make physical improvements. In support of this belief, developers point to such a city as San Diego where the lack of restrictions did not produce exclusively non-

63. See HERSHMAN, GOODWIN, RUOTSALA, MCCREA & HAYUTH, *UNDER NEW MANAGEMENT--PORT GROWTH AND EMERGING COASTAL MANAGEMENT PROGRAMS* 78 (1978).

64. *Cf.* *Teer v. Duddlesten*, 26 Tex. Sup. Ct. J. 544, 547 (July 20, 1983) (planned unit developments offer great creativity and flexibility in use and design of land).

65. *Cf.* Bartke & Patton, *Water Based Recreational Developments in Michigan--Problems of Developers*, 25 WAYNE L. REV. 1005, 1059 (1979) (planned unit developments offer flexibility to land developments).

66. See *Deltona Corp. v. United States*, 657 F.2d 1184, 1193-94 (Ct. Cl. 1981); *cf.* Pope, *The Decisionmaking Process by the City and the Courts*, INST. ON PLAN. ZONING & EMINENT DOMAIN 163, 179-80 (1982) (city plan should address physical characteristics of city as well as social and economic forces).

water-related development.⁶⁷ In some cases, office, retail, and residential uses generate secondary water-related uses that otherwise would not be feasible.

It is difficult to make blanket statements regarding the appropriate use of urban waterfronts because each city has a unique set of conditions and circumstances that must be taken into account. In general terms, a use is only appropriate if it reflects the special characteristics of a waterfront site and responds adequately to community needs.⁶⁸ This criteria rewards both water dependency and economic viability; it is a balanced approach that injects flexibility into a waterfront management program.

Certainly in cities where competition for waterfront sites threaten the continued existence of valuable water-dependent uses, intervention is justifiable. While use limitations may discourage real estate speculation and land development,⁶⁹ these restrictions will not guarantee the continued viability of the allowable water-related uses. There are other public sector initiatives such as tax incentives and public improvements that work better than land use restrictions in preserving maritime uses along urban shorelines.⁷⁰

Another drawback to allowing only water-related uses along urban shorelines is the exclusion of mixed-use development projects. This is particularly unfortunate when waterfront areas are in need of full-scale revitalization because water-related uses that would otherwise not be feasible can be developed within a mixed-use concept. A mixed-use project can produce the critical mass of development necessary to attract people to the water's edge and provide the full range of services and facilities necessary to support a variety of maritime uses.⁷¹

Perhaps the best strategy is one that acknowledges both water dependency and economic viability as desirable features of water-

67. See SAN DIEGO UNIFIED PORT DISTRICT, PORT OF SAN DIEGO, HISTORY AND DEVELOPMENT 2 (1976). Boston and Baltimore have experienced similar success because of a lack of use restrictions.

68. Cf. *McGlashan v. Spade Rockledge Terrace Condo Dev. Corp.*, 402 N.E.2d 1196, 1199 (Ohio 1980) (property owner should be allowed to reasonably develop).

69. See Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 14 U. PA. L. REV. 47, 47-49 (1965).

70. See COMMITTEE ON URBAN WATERFRONT LANDS, URBAN WATERFRONT LANDS 10 (1980).

71. See D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT 9 (2d ed. 1980).

front development. This policy would reflect the city's view of the waterfront as not just an industrial area supporting maritime uses, but also as a catalyst for urban redevelopment, economic growth, and community enhancement. It is this type of approach that cities might find beneficial.

C. *Providing Public Access*

The issue of the public's right to have direct access to the water's edge is another controversial aspect of waterfront development.⁷² In recent years there has been a great deal of debate over the allocation of public and private uses along urban shorelines.⁷³ Improvements in water quality due to public investments in pollution control facilities have significantly enhanced the potential of waterfront lands for both private development and public use.⁷⁴ While many local governments support the widespread public use of the water's edge, few can afford to finance it since public holdings of waterfront lands are limited. At the same time, there has been public opposition to private development projects that would restrict either physical or visual access to the shoreline.⁷⁵ In response to citizen demands, many communities are using their zoning or project permitting authority to win concessions from developers of waterfront lands to allow public access.⁷⁶

Complicated legal questions, however, are involved in the decision on providing access.⁷⁷ The shore may be in public ownership

72. See Comment, *The Public Trust After "Lyon" and "Fogerty": Private Interests and Public Expectations—a New Balance*, 16 U.C.D.L. REV. 631, 631-34 (1983).

73. See *City of Berkley v. Superior Court*, 606 P.2d 362, 363-65, 162 Cal. Rptr. 327, 328-31 (1980); *Seaway Co. v. Attorney General*, 375 S.W.2d 923, 929-30 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.) See generally Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 679-86 (1983) (general discussion of public and private rights to shores).

74. See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL TRENDS 237, 242-47 (1981).

75. See *City of St. Paul v. Chicago, St. P., M. & O. Ry. Corp.*, 413 F.2d 762, 763-65 (8th Cir.), cert. denied, 396 U.S. 985 (1969).

76. See COWEY & BREEN, IMPROVING YOUR WATERFRONT: A PRACTICAL GUIDE 12 (1980).

77. See Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of the Implied Dedications and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 679-83 (1983).

but only to a certain point, such as the normal high tide mark.⁷⁸ States have different laws defining the line near the water's edge where private ownership stops and public ownership begins.⁷⁹ Private investors, property owners, and developers naturally want to maximize the return on their investment in waterfront sites. This objective may not always be compatible with public sector demands for shoreline access.

The prevailing opinion among city officials, government agency representatives, and urban residents is that public access to the water's edge should not be limited by the private development of waterfront lands.⁸⁰ This viewpoint is based on the premise that an urban shoreline is a public resource and should be managed to benefit the greatest number of people in the best way possible.⁸¹ Under this policy, private developers are encouraged to enhance the public use and enjoyment of urban shorelines by providing access to the water's edge.

There are a few basic reasons why public sector representatives feel that provisions for access should be imposed on private property owners and developers. One reason is that waterways are publicly owned and maintained.⁸² Therefore, the public costs of water quality and navigational improvements should be balanced by public benefits of an equal magnitude. This can be achieved in part by improving the accessibility of the water resource.

Another reason cited in support of public access requirements is the tremendous recreational potential of urban waterfronts.⁸³ Many water-related recreational opportunities can be realized simply by

78. See *Department of Natural Resources v. Mayor and Council of Ocean City*, 332 A.2d 630, 633 (Md. 1975).

79. Compare *City of Berkeley v. Superior Court*, 606 P.2d 362, 363-65, 162 Cal. Rptr. 327, 328-31 (1980) (public trust doctrine allows public access to all navigable waterways) and *Thornton v. Hay*, 462 P.2d 671, 676-77 (Or. 1969) (public right to use private beaches based on custom) with *Seaway Co. v. Attorney General*, 375 S.W.2d 923, 930-33 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.) (public use of beach established by implied dedication). See generally Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of the Implied Dedications and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 679-87 (1983) (discussion of various theories and laws balancing private and public ownership).

80. See *Leabo v. Leninski*, 438 A.2d 1153, 1156 (Conn. 1981).

81. See *Payne v. Kassab*, 312 A.2d 86, 93-94 (Pa. Commw. Ct. 1973).

82. See Frank, *Forever Free: Navigability, Inland Waterways and the Expanding Public Interest*, 16 U.C.D.L. REV. 579, 580-83 (1983).

83. Cf. *Moody v. White*, 593 S.W.2d 373, 378 (Tex. Civ. App.—Corpus Christi 1979, no

allowing public access to the shoreline.⁸⁴ It is unfortunate that in some jurisdictions public waterfront areas are burdened with overcrowding because access is restricted to a few locations.⁸⁵ Furthermore, without mandatory requirements to provide public access the shoreline is chopped into segments corresponding to the pattern of property ownership. This condition effectively eliminates recreational uses dependent upon movement along the shoreline as well as the ability to interconnect dispersed waterfront facilities with a walkway or trail system.

Visual access to the water's edge is just as important as physical access.⁸⁶ Waterways are special visual amenities with the potential to greatly enhance the appearance of urban environments. It is in the public interest to make sure that views to and from the shoreline are not blocked by unbroken masses of large structures.⁸⁷ With the above stated reasons in mind, city officials and regulatory agencies feel justified in demanding that private property owners and developers provide public access to the shoreline in order to gain approval of proposed development projects.

Although most private developers agree that public access to the water's edge is a worthwhile objective, they take issue with having mandatory requirements for the provision of access incorporated into the development approval process. Developers point out that rigid demands for access do not take into consideration either existing environmental variations or differences in the type of pro-

writ) (public's access to beach justified by recreational activities such as fishing, sunning, boating, and swimming).

84. *See id.* at 378.

85. *But cf.* Beckwith, *Preservation Law 1976-1980: Faction, Property Rights, and Ideology*, 11 N.C. CENT. L.J. 276, 305 (1980) (lack of private property rights results in overcrowded parks).

86. *See* *City of St. Paul v. Chicago, St. P. M. & O. Ry. Corp.*, 413 F.2d 762, 763-65 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969); *cf.* *United Advertising Corp. v. Metchen*, 198 A.2d 447, 448-49 (N.J. 1964) (upheld billboard restriction against blocking scenic residential area); *People v. Stoner*, 191 N.E.2d 272, 274, 240 N.Y.S.2d 734, 737 (1963) (upheld clothesline ordinance against blocking visibility at street corners).

87. *See, e.g.*, *Welch v. Swasey*, 214 U.S. 91, 106 (1909) (height regulation valid if for benefit of people); *City of St. Paul v. Chicago, St. P., M. & O. Ry. Corp.*, 413 F.2d 762, 770 (8th Cir.) (building height regulation upheld since protected public welfare), *cert. denied*, 396 U.S. 985 (1969); *Sisters of Bon Secours Hosp. v. City of Gross Pointe*, 154 N.W.2d 644, 653 (Mich. Ct. App. 1967) (concept of height regulation universally accepted); *cf.* *Baysinger v. City of Northglenn*, 575 P.2d 425, 427 (Colo. 1978) (city may regulate tower and antennae height).

posed project uses. The uniform application of a public access requirement essentially penalizes some developers more than others, depending on shoreline characteristics and market demands.

If, for example, public access provisions require buildings to be set back from the shoreline to allow for uninterrupted movement along the water's edge, or place limitations on building heights to permit visual access to the water, the size of the development envelope for a particular site can be significantly reduced. With the inherent high costs of waterfront development, these limitations affect project feasibility. When a portion of a waterfront site is allocated to a non-revenue producing use, a developer tries to compensate by either building a product that can be sold or leased at a higher price or increasing the intensity of development on the remainder of the site. Developers see the irony of this situation: government efforts to ensure public access to urban shorelines indirectly encourage private developers to be more exclusive and focus on the high end of the market for each use.

Developers maintain that the need for providing public access should not overshadow the rights of private property owners. Local governments have to reconcile the need for access with the need for personal security and property protection.⁸⁸ Obviously, public access is less compatible with some urban uses than with others, and developers feel this factor should be given more consideration.

Another concern for private developers is the maintenance and management of public access areas within a waterfront development project. For shoreline projects that combine various uses within public and private areas, formal written agreements should clearly define which party will be responsible for management and maintenance of each portion of the project, who will pay the costs, and on what basis these will be assessed.⁸⁹ Jurisdictions that impose access provisions on private development projects should be prepared to provide support for maintenance and management functions. In this regard, developers are not only concerned about costs but also

88. See Jampol, *The Questionable Renaissance of the Tidelands Trust Doctrine in California*, 13 SW. U.L. REV. 1, 82-85 (1982); Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of the Implied Dedication and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 675, 688-91 (1983).

89. See generally Holliman, *Development Agreements and Vested Rights in California*, 13 URB. LAW. 44, 44-46 (1981) (general discussion of development agreements).

about quality standards and the ability of the public sector to fulfill its commitments.

The conclusion reached by most private developers is that public access to the water's edge can be provided in many different ways depending on factors such as the site characteristics, type of uses, and public funding. Therefore, regulations should be flexible enough to accommodate a broad range of waterfront development opportunities and to balance the public's need for access with the property rights of private landowners.⁹⁰

The controversy over requiring private developers to provide public access to urban shoreline centers not so much on the public's right to be able to get to the water's edge as it does on the approach used to accomplish this objective.⁹¹ Certainly waterfront developers have an obligation to meet the public's need for increased recreational opportunities in urban areas, but not at the risk of undermining the financial feasibility of a project. In this respect, mandatory requirements for public access can, in fact, be a self-defeating obstacle in achieving other important public objectives such as economic revitalization and community development. Instead of incorporating mandatory public access provisions into the development approval process, a better approach might be to impose access requirements that vary in relationship to existing conditions, proposed uses, and public sector goals. One criterion that should be used to determine the requirement is the existing public accessibility of the shoreline. In this regard, it seems reasonable to maintain the level of public access that exists prior to site development and to offer incentives to encourage developers to provide public access in locations where it does not exist.

Attention should also be given to the quality of public access provided by developers. Depending on the circumstances, it may be better for a city to have a limited number of shoreline access points that are nicely landscaped and complete with boat docks, parking areas, and observation decks than to have continuous access to the shoreline in the form of a pathway that lacks other basic attributes.

90. *But cf.* Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 30 U. PA. L. REV. 28, 52-53 (1981) (current zoning and planning practices inflexible and inefficient).

91. *See* *Liberty v. California Coastal Comm'n*, 170 Cal. Rptr. 247, 254-55 (Ct. App. 1980).

The public sector's desire for unobstructed access to the shoreline and the private sector's desire to develop waterfront projects are not mutually exclusive. As new projects are developed, access can be built into the design and public ownership of shoreside territory can be clarified. In return for public investment in support of development projects, parks, public piers, or marina facilities can be incorporated into approved private ventures.

IV. CONCLUSION

Despite the controversy generated by these three basic issues one thing is certain: urban waterfronts will be the focus of development activity in cities throughout North America in the years ahead.⁹² Public and private sector leaders will concentrate on creative solutions to the problems associated with waterfront development and work together to recapture these valuable urban resources.

Given the strong appeal of the water's edge, local government and private development interests should be very careful not to be blinded by the reflection of the water. That is, the amenity of the water's edge will not compensate for poor judgment and bad management in developing urban waterfront sites. In fact, the difficulties of shoreline development will only be exacerbated by incompetent development efforts. Waterfront development opportunities require more than just water and land; there must be sharp entrepreneurial skill, public leadership, and market demand to produce successful projects.

92. See Guenther, *Many Pitfalls Await Planners of Waterfront Developments*, Wall St. J., June 29, 1983, at 37, col. 1.