ROLLING EASEMENTS: A FLEXIBLE SOLUTION*

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Abstract

Innovative planning mechanisms are required to ensure that the protection of beach access and amenity is appropriately prioritised and balanced against private property rights interests. Where combined pressures of increasing development, existing use rights and sea level rise are intensifying, the competition for coastal resources and property and development rights in coastal areas should no longer be indefinitely weighted in favour of private property rights. The implementation of a system such as rolling easements provides a useful mechanism to achieve the appropriate public/private balance for the coast.

Introduction

Rolling easements offer an innovative legal mechanism that can provide options for a balanced approach to the many diverse interests in the Australian coastline. The use of rolling easements can ensure that the protection of beach access and amenity is given the proper weight and consideration as ought to be required for public policy. This is especially important in the context of expected future sea level rise risks. The use of rolling easements can also offer private property rights holders some flexibility in their enforcement of those rights. Finally, rolling easements provide a longer term platform for the importance of the coast as a culturally iconic place in Australia.

What is a rolling easement?

Responding to sea level rise along the coastline can be achieved by adopting a number of approaches, which can include protect, defend or retreat. Shoreline protection is often via the elevation of the land (beachfront nourishment) or other softer engineering structures; defending the shoreline is often by harder engineering design and implementation such as sea walls and raising floor levels; and retreat which involved the eventual abandonment of the land as it becomes uninhabitable.

Touted as an alternative to attempting to completely prohibit shoreline development, a rolling easement is a legal tool that can provide a platform for public recognition that the land being developed is at risk of change due to sea level rise (Titus, 2011), or by some other predetermined trigger point (O'Donnell and Gates, 2013). Once this pre-determined trigger point is reached, the use of the land reverts to the use in the easement. I suggest that this could be, in a coastal context, to make allowance for the natural shoreline to encroach landward in all areas that are currently undeveloped. This is more challenging in areas that have existing development in place.

Whilst more popular in the United States (Titus, 2011; McLaughlin, 2010) and despite tensions existing in Australian law (see, for example, Verschuuren and McDonald, 2012), rolling easements are worth consideration because their usefulness and practicality allows for valuable coastal land to be used at its highest value at a

particular point in time, but with the risks associated with development on the coast to be borne by the future landowner. Easements in New South Wales have the added benefit of registration under the *Conveyancing Act 1919* (NSW), particularly if initially provided over Crown land and land dedicated for a public purpose (such as public access to the coast, see further s59 *Crown Lands Act 1989* NSW). A rolling easement can be an effective mechanism to balance the competing needs and desires of the New South Wales coastline for the benefit of both current and future generations.

The function of a rolling easement

Rolling easements have the ability to be put in place now, but 'triggered' later by reaching a predetermined threshold. These can be time based trigger points or events based trigger points, or a combination of both. An example of this could be a specific mean rise in sea level each year for x number of years. Using this framework rolling easements provide advance notices of where potential land or property damage and losses will lie. This, in turn, provides both private owners and would be developers with ample time to factor in future planning scenarios on climate risk but to still maximise land use potential. A trigger system could work whereby planning approvals would still be given in the ordinary way they are now but would also incorporate a lapsing mechanism which would be triggered when a certain threshold of risk to coastal access, ecosystem function or other predetermined public interest is reached.

Alternatively, it could operate that a condition of approval of development be that once the trigger point is reached, the use of the property is required to change. Conditions attaching to development approvals could, for instance, incorporate triggers for the cessation of the approval after a specified time or, perhaps more appropriately, once a certain mean sea level rise is reached. Alternatively, such a condition could require that a property be converted to rental use only once the sea reached a pre-specified distance from the property and, when the sea encroaches further, that the property be sold, acquired, or abandoned, providing a long term and strategic climate adaptation response. Abel (2011) argues that property rights rules triggered by biophysical thresholds, such as mean sea levels, are more suited to addressing the uncertainties associated with predictions of sea level rise than those that are time based (page 284).

Such examples are of the application of a rolling easement in the form of a future interest in land. In this example it operates as a ribbon of land along the coastline of predetermined size that remains in public ownership, continuing to 'roll over' as the sea slowly encroaches over land. This mechanism, as Titus (1998) explains:

> *Do[es] not render property economically useless, they merely warn the owner that someday, environmental conditions will render the property useless, and that if this occurs, that state will not allow the owner to protect his or her investment at the expense of the public.*

In addition, a scheme could be adopted whereby the government compulsorily acquires coastal land as an option for easement. The purchase of a rolling easement would be less costly than the acquisition of land, whilst striking an effective balance between compensating the private land owner and still ensuring the providing access to public space. More recently the New South Wales Land and Environment Court found that open space land does not have the same value as residential land in the acquisition process (*Willoughby City Council v Roads and Maritime Services* [2014] NSWLEC 6

per Biscoe J). This has implications for how the current public land is valued for acquisition purposes which may have implications for easement mechanisms.

Rolling easements are flexible mechanisms that may be enforced in a number of ways. While rolling easements have the potential to provide flexible solutions that achieve a balance between coastal stakeholders, their implementation and success is highly dependent upon clear legislative intent and action.

How to implement?

Enacting a statutory amendment to modify the common law doctrine of erosion may provide a simple means to introduce a rolling easement mechanism, and the doctrine already operates to transfer land falling below the mean high water mark to Crown ownership. The amendment would require that the width of the foreshore strip converting to Crown ownership extend inland to an appropriate distance to ensure public access to the coast. A similar scheme has been implemented in New Zealand (Ministerial Reference Group, 2003). There, the transfer of title is triggered on the subdivision of land.

In situations that require short or medium term protective works (such as a storm event), mandatory conditions attaching to the development consent can ensure continuing public access to the foreshore by specifying that an easement be reserved along the landward edge of the works. Such conditions are common in the United Kingdom under the *Marine and Coastal Access Act* 2009 (UK) which places a duty on the decision maker to secure a long distance walking trail along the open coast of England ("the Coast Path") together with public rights access to a wider area of land along the path for amenity and enjoyment purposes. This is known as "spreading room" and parts of the England Coast Path are open for enjoyment, underway, or have an estimated start date of 2015/16. This process took over a decade to implement, and there are many learnings from this for State and Federal Government here in Australia.

Thom (2012) offers six potential options to implement a regulatory system that protects the public amenity of the beach. Private property rights, specifically existing use rights, are a central barrier to achieving a suitable long-term balance for the wider benefit of the community. However, I argue that Thom's third point offer's a mechanism to best achieve the appropriate public/private balance for the coastline in situations where there are existing use rights in issue:

> "*Following the model suggested in the House of Representatives Standing Committee report (2009), it may be possible to achieve an intergovernmental beaches agreement between the States and Commonwealth governments which would achieve a similar objective to amending federal legislation without the federal government assuming any further responsibility. The PTD as defined in the agreement could be built into enabling State legislation along the lines of that in Florida or the Beaches Act in Oregon with explicit recognition of the obligation in law to maintain beach amenity and access as mandatory requirements in the national interest*." (p39).

A contractual agreement along the lines of what is outlined above, containing trigger points similar to that of a rolling easement, would strike a balance between the deeply entrenched and cultural attachment to the public beach in the Australian psyche whilst providing a secondary benefit - private property protection. For all other coastal land, a

rolling easement mechanism could be put in place now, before any potential future development occurs.

Conserving the social and ecological values of the foreshore

Access to and the public use of beaches and foreshore areas is an intrinsic part of the Australian culture (Booth, 2001), and the concept of rolling easements as prevalent in Australian discourse as a potential tool for effective coastal management is well documented (Fletcher et al, 2013). The important long term benefits to be had include, as priority, maintaining public beaches and the coastline for the public good (Thom, 2012).

Despite the cultural truth that access to coastal areas is part and parcel of being Australian; a predilection for the coast does not necessarily translate into any specific legal rights of access or use of the coastline or beaches at law. In New South Wales, there is no comprehensive legislative scheme governing public access to or the public use of coastal land. As sea levels rise, it is conceivable that rising seas will reach private property boundaries and result in pockets of privatised shoreline, an issue well canvassed by Lipman and Stokes (2003), Thom (2012) and O'Donnell and Gates (2013). A redeliniation of private ownership rights will be required in response to the increasing scarcity of coastal land if the social and ecological values of the foreshore are to be conserved.

The tension between the consideration of the public interest in protecting private property rights *contra* the natural ecosystem and public access to the coast is not one that is easily resolved. The ideas of private property rights are so deeply entrenched that people will go to great lengths to protect those rights (Rose, 2007). This is particularly prevalent in properties that enjoy existing property rights or uses. But there are ways to effectively balance these competing interests. The question is when is the right time to effectively plan for the long term future of our coastline? I argue that the right time is right now, with the New South Wales Stage 2 coastal reforms announced on November 14, 2014.

Conclusory comments

The utilisation of rolling easements is a potential solution in addressing the competing demands the Australian coastline faces. By properly balancing current competing interests in the coast, for the benefit of both current and future generations, rolling easements offer a more cost effective option for managing coastal development in the long term. Given the potential risks of costly litigation in the future, weighted with the significant costs of future relocation and associated compensatory issues and costs associated with the more short term engineering costs, rolling easements ought be viewed as striking the correct cost/benefit balance, and the correct private/public balance.

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