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Private Property and The Coastal Zones

by T. D. Barrow
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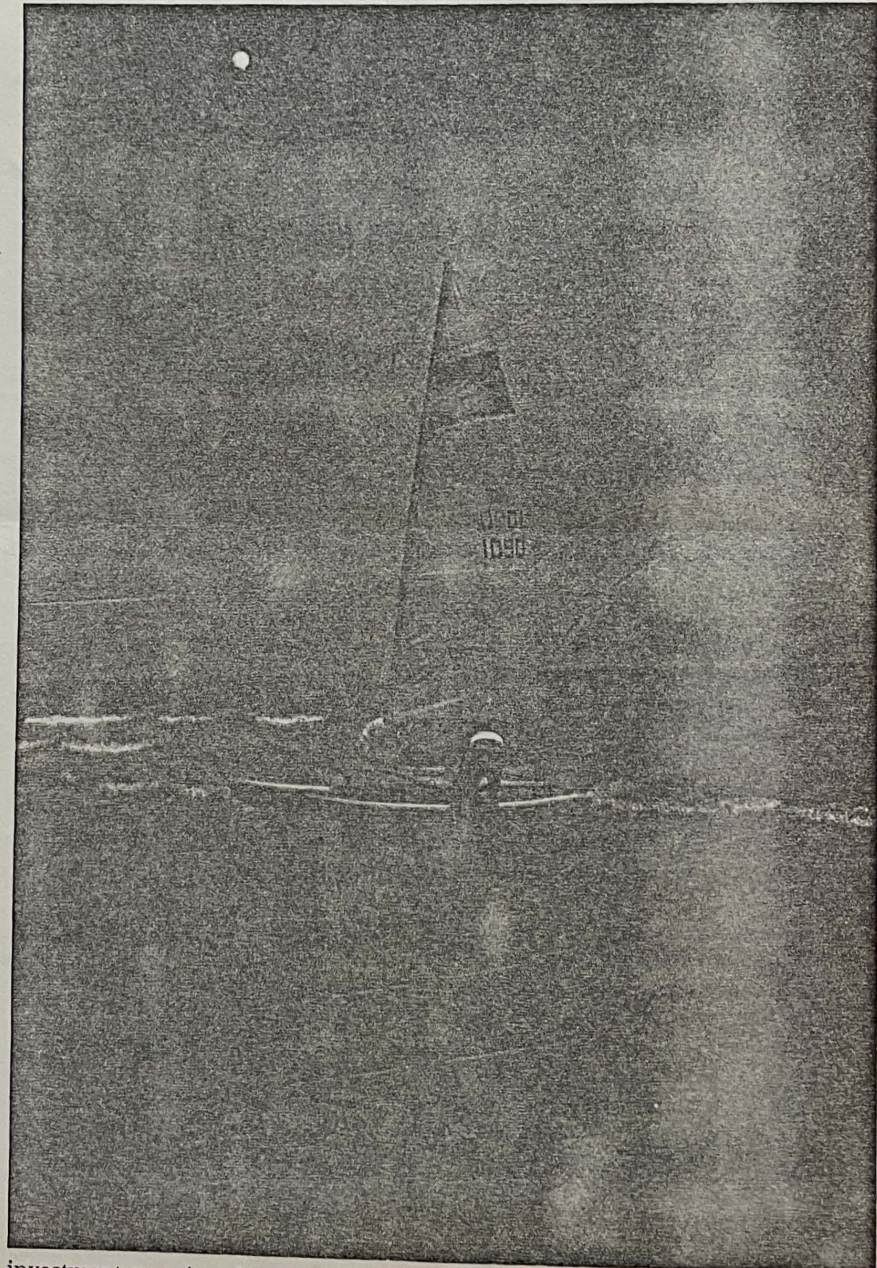
"IT IS AT THE JUNCTURE of the land and sea that the greater part of this nation's trade and industry takes place," wrote the Stratton Commission on Marine Science, Engineering and Resources. "The waters off the shore are among the most biologically productive regions of the nation."

With these few words, the Commission explains a number of recent trends:

- The nation's new awareness of the value of our coastal zones.
- The consciousness that these highly productive areas are being endangered by the increasing pressures of man's activities.
- The recognition that improved methods of governing and managing the coastal zones are needed.

The highly concentrated economic and biological productivity of coastal zones is becoming more widely recognized. What is less known is that most activities which make these areas so valuable economically are carried out by the private sector on private property. Coastal waters and the submerged lands beneath them are virtually all publicly owned, of course—but private development has enhanced their economic value. And the major proportion of our coastal lands has become productive through the efforts and investment of private land owners.

The extent to which coastal zone lands are privately owned may not be generally recognized because ownership varies so widely between states. For example, most of Oregon's coast is publicly owned. On the other hand, some 65 percent of the California coast is privately owned, with a large part of the remaining publicly owned lands reserved for the Department of Defense. About one-third of the approximately 59,000 statute miles of shoreline in the lower 48 states is considered recreational shoreline. And of this, more than 90 percent is privately owned. So when we speak of coastal zone management we are talking primarily about public management of private activities and



investment on privately owned land.

Any system of coastal zone management that is proposed will inevitably raise questions about impairment of property rights. And these questions go right to the heart of the legal system under which we all live.

Property rights are human rights. In the English legal heritage, the right to acquire and own property, and to use it as the owner sees fit—so long as he does not harm others—is a natural right with the weight of many centuries of tradition behind it. It does not owe its origin

to constitutions; it existed before them. From ancient times, property rights have been considered part of a person's fundamental liberty.

Our legal tradition recognizes, of course, that obligations go together with rights. All property is subject to reasonable regulation by government where this can be shown to be clearly necessary to preserve the health, safety, morals, or general welfare of the people. Our law also recognizes the right of government to take an owner's land for a public use, if it can be shown that the public interest requires it, and if the owner is justly compensated.

Within this legal framework, the right of a private land owner to decide the use of his private property is a mainstay of our economic system. Basically, the rule of property use is permissive and restrictions are recognized only for truly compelling reasons.

This system has produced outstanding results. By this process of making many millions of independent, individual decisions about land use, our economy has progressed to great heights. The property owner has the opportunity to succeed—or to fail—on the exercise of his own judgment. The competitive process tends to perpetuate the good decisions and allows the bad ones to disappear. In this way, national productivity and resource utilization are improved. No planning body, no matter how wise, could duplicate the success of this "natural selection" process of property use. The system of free choice has worked well, and should be perpetuated.

However, growing population density, mounting demand on limited coastal resources, and changing social values have caused this system of individual free choice to be questioned as a means of using the coastal zones. Some maintain that economic values alone should not always dictate land use decisions. They also say that the competitive free enterprise system does not always respond adequately to non-

economic values. And some claim that an even more fundamental law than that of property rights exists—the "law of the environment." Unquestionably, we might have utilized our coastal zone resources in a more selective and careful manner than we have. But it is both a wise and fair question to ask by what method government can institute a different system that will protect the natural environment without unfairly infringing on our centuries-old liberties of private property rights.

Our experience up to now with efforts to impose new governmental arrangements in the coastal zones has been rather mixed. There has been a strong tendency to view the situation in an "either-or" context between nature and progress. Some government actions seem to reflect a feeling that if we want to safeguard the environment, we have to abandon economic development—and vice versa. Laws creating moratoriums or sanctuaries which deny portions of the coastal zone to certain types—or even *all* types—of new development for unspecified periods of time have been passed.

These actual or contemplated actions raise serious questions about the broad and fundamental rights of every property owner—large or small—versus the opposing right of a governmental body to restrict those rights. If carried to extremes, such actions could lead to governmental regulation of the coastal zones that would be tantamount to partial "taking" of private property without just compensation to the owner. As Justice Holmes put it years ago in a case before the U. S. Supreme Court: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Coastal zone management should be based on a positive rather than a negative approach. Up to date, most government emphasis has been directed

toward imposing restrictions rather than creating opportunities. The emphasis has been on telling the property owner what he cannot do rather than protecting what he can do. I am convinced that the broadest range of public and private benefits can be obtained through a regulatory philosophy which encourages creativity and innovation in the use of their lands by individual property owners.

Much will depend on the roles played by the various levels of government. I believe those roles should be defined in these ways:

The federal government should discharge its responsibilities for managing the national interests in the coastal zones. And there are *many* national interests to consider.

To protect the natural environment and to maintain the biological productivity of the coastal areas is certainly in the national interest. But it is also in the national interest to have adequate domestic supplies of energy to fuel our economy. And it is in the national interest that regulation not be so onerous as to impede economic development by creating bottlenecks in transportation, commerce, and over-all productivity. There should be a *balance* of the national interests in managing coastal zones.

Specifically, the federal government could review state plans for managing coastal zones to assure that these plans are consistent with the national interests. Implementation of the plans should be left to state and local governments and private interests. Financial assistance could be provided to the states from the federal level. The federal government would also, obviously, operate within the coastal zones in matters such as coastal defense, immigration, and customs.

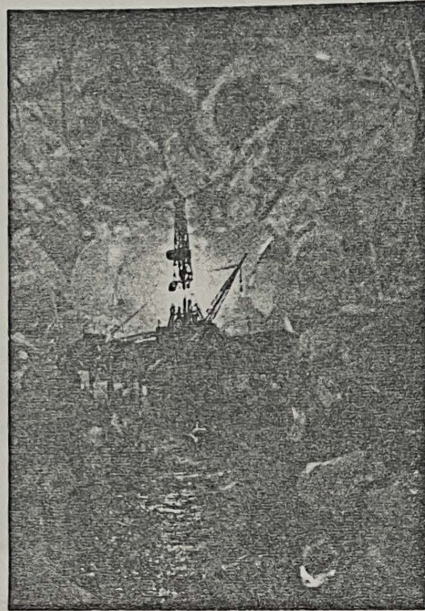
But the real focal points for coastal zone management should be at the state level. The individuality of the coasts and the estimated 900 estuaries, and the varying purposes for which these

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zones are used, would seem to dictate the wisdom of a regional or "watershed" approach rather than a national master plan. In the event that the political boundaries of a single state pose obstacles to the handling of a coastal zone, multi-state action such as interstate compacts may be appropriate.

This presupposes that the states will create effective machinery for managing their coastal zones. States should study their present management systems and examine the various alternatives for improving them. The degree of concentration of administrative power in a coastal zone authority is a matter of state concern and will vary with the type and nature of state government involved. The important thing is to have some state government body capable of doing the job. At present the coastal zone is also the "twilight zone" where government is concerned. In some cases there is no authority existing to set the ground rules; in other cases, the authority is too narrow and limited to do the job, or it overlaps with the jurisdictions of other federal, state, or local governmental bodies. The states can make a significant contribution if they will create a clear and authoritative channel for relations between government agencies at all levels and coastal zones users, property owners, and the public at large.

State and local planning activity should be based on the fundamental principle of compatible use. By "compatible use," I mean a flexible framework of use priority for coastal lands and waters. This should be a dynamic rather than a static concept. It should recognize the unique characteristics of each area of coastal lands or waters—whether these characteristics be esthetic, biological, or economic. It should recognize the possible preminent uses of these lands or waters, based on their characteristics. And it should not predetermine that one land or water use will always be desirable—nor another use always undesirable.



I believe that the best approach to determining use priorities under a compatible use concept is through institution of a set of "performance standards." These standards would be oriented toward the continued development and utilization of coastal zones; they would allow for innovation in using lands and waters; and they would contain safeguards to protect or improve the natural environment to any degree we wish or can afford. All activities within the given area—whether conducted by public or private parties—would have to meet these performance standards. No use would be prejudicially excluded—or, for that matter, included; each case would stand or fall on its own merits. For example, if draining of an area covered by shallow water to create farmland may be deemed undesirable for reasons of ecological conservation, the same area might still be available for, say, shrimping, oyster farming, selective shell dredging, oilwell drilling, transportation channels and outdoor sports. Always provided, of course, that these latter uses meet the performance standards designed to protect environ-

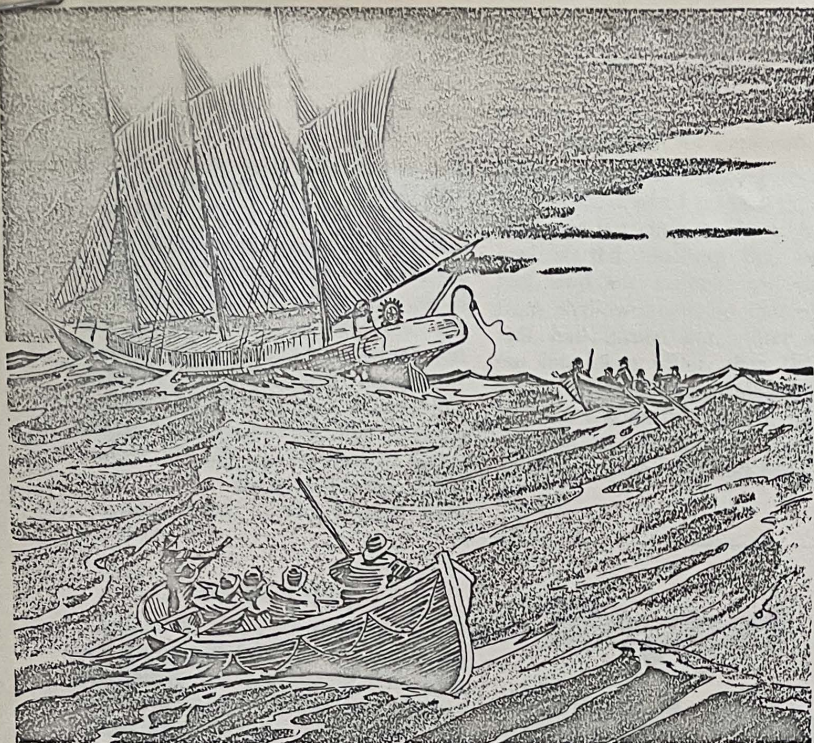
mental quality. This approach, I believe, would incorporate new technology and science more readily than any other method.

If there is one keystone to coastal zones management, that keystone is "flexibility." Stated conversely, it is the need to avoid inflexibility of land use. This concept has a distinguished legal tradition going back to the English common law. The English learned centuries ago the undesirability of taking land out of commerce and thus interfering with the free use of lands and transfer of ownership. The principle is known as "mortmain," taken from the Latin expression meaning "dead hand." As early as the 13th century, the English passed the Statute of Mortmain to prevent such a result. There are examples in this country of the same principle—in laws, for example, which prohibit corporations from owning and retaining title to lands not reasonably useful in the corporate business purpose, and in rules prohibiting restrictions upon the free transfer, sale, or disposition of land.

The lessons of history show us today the undesirability of "freezing" lands to one use, or to their existing uses, for indefinite periods of time. This lays the heavy weight of history's "dead hand" on the future of these lands. For to preempt the future use of lands is to preclude alternative or innovative uses, and consequently to stifle progress. For example, while a specific activity or industry may not be able to meet the desired performance standards today, it may be able to do so in the future. Technological advances—or other developments we cannot foresee—may render it acceptable or even desirable in future years. If so, it should be allowed. We need a flexible set of ground rules in the coastal zones—not a cast-in-concrete, unchangeable plan.

Flexibility—in law, in administration, in philosophy—will bring great dividends to the nation in the management of its coastal zones.

By SALLY G. MOORE



Surprising Antics of The Hanted Schooner

**“... the three-masted schooner
headed right for us, and there
wasn't a living soul aboard.”**

My old fisherman friend always told the following story with such enthusiasm and flavor. His blue eyes would twinkle and his toothless grin was infectious. He delighted in an audience and could keep you entertained by the hour. It is hard to do justice to his account, but here goes:

Until the 1930's, whenever the weather worsened, and especially if the wind jumped into the nor'east, all those sailing vessels headed north would have a pretty hard time from here at Cape Lookout until thee rounded Hatteras, so whenever this would happen most of the captains had sense enough to pull in here and ride out the storm.

Back then, the hills were much higher and the Hook of the Bight was one of the best harbors. We would come out to fish and stay, sometimes two or three weeks. Our boats were always

safe and those sail boat captains knew it was a good harbor too.

We were always glad to see them because thee were going north from the West Indies, and most all would have some rum or whiskey aboard and that sure did taste better than the corn we were used to. We could always swap them some fish or clams.

Hanted Ships

Many times we would have twenty or more schooners at anchor out in the Hook, and the sailors would come ashore in small boats and we would all sot around and listen to the tales thee had to tell about far-off places and bad storms the ships had weathered. Thee would talk about them schooners just like thee were people, and believed thee had souls just like we folks. It would scare the daylight out of a body to hear them talk, as them

schooners would do the dangest things. Thee always said it were the spirit of a woman guiding the boat and didn't want her to get mad. At times thee would tell about ships that were jinxed and all of the bad things that would happen to them, and talked like all ships were hanted. It would give you the shivers to hear them.

There was one time we had been out at the Cape for about a week and a hard, screaming sou'wester blowed up. The wind sounded like a thousand souls were in all kinds of pain, and we didn't have much to do except sot around and tell yarns, lies and visit, so a couple of us decided to go up to the Lifesaving Station and visit with the crew. Wanted to make certain we knowed everything that was going on. We were about to leave when the lookout in the tower spotted a 3 masted schooner, headed right for the Shoals. Sure enough, she grounded about half way out.

Cape Lookout Shoals go out about nine miles, and we all see'd that there were no chance for that schooner. The tide was going out, and it was bad out where thee were; the waves looked 70 feet high and the spray looked like it was going 200 feet in the air.

Rescue

In a little while we see'd them put up the distress signal, so Capt. Fred and the lifesaving crew lunched the surf dory. Thee would go plumb out of sight in those waves, and it sure was a struggle all the way out but thee managed to get to the lee of that ship, took the crew off and headed for shore. The crew must have been real scart, because thee abandoned ship leaving all sails up. During the trip back, when one of those waves would get up under the stern of that dory, we would think for sure that we had lost them, but thee were what you call real surfmen, and all got ashore safe and sound.

The Schooner Acts Up

Early the next morning we were up and headed over to the eastern side of the beach to see what kind of wrack had come ashore. We all just knowed that schooner was beat to pieces, but when we got to the beach, there came that 3 masted schooner headed right for us and there wasn't a living soul aboard. I felt a tingle along my spine, and after hearing those sailors talk

about these ships having souls, me thinks to meself, "Thee left her out there by herself and she didn't like it. Now she is a mad ship and is going to wreck herself just like she wants to and just where she wants to, and here she comes, sailing herself right straight for shore and destruction."

We all stood watching and she was almost to the breakers, when suddenly our mouths fell wide open, because as she got closer to the breakers, she started turning — and as if guided, she gradually turned herself completely around and headed out to sea. She kicked up a wake just like a fancy woman kicking up her heels, and I would almost swear I heered a triumphant laugh as she headed back out to sea.

Salvage in Mind

In a short while the shock wore off, and I realized that the wind and sea had cam'd down; the tide had ris' during the night and she had beat her way across the shoals unharmed. We thought of salvage, and quick as we could, we lunched our boat and started after her, but the life-saving crew had been watching too and thee got ahead of us.

That schooner sure acted up. She made a complete circle as if she were waiting for them, and as thee got close to her she straightened up and headed out to sea. After a short distance she turned again and headed straight for the lifesaving boat, veering just before she got to them. She managed to stay just out of reach as if mocking them, sassy as could be. Finally she started making another big circle and thee were able to catch up with her. Standing in our boat watching that schooner act as she did, I felt my knees get wobbly and I thought I was going to weak - away at any moment, and I couldn't help but believe every word those sailors had told about sailing vessels. We were almost glad thee had

beat us to her, because if we had gotten there first, I don't know who would have boarded her. Don't think I would have.

Hopefully, An Explanation

Later, I got to thinking about what we had see'd, and I realized that as that schooner got close to shore, her deep keel started touching that off-shore reef, and any sailboat will shy-away from shallow water, so that off-shore reef had turned her. After she got out into deep water, then the waves rolling the boat kept turning the wheel, at least, I hope that was it, because I can still feel those cold chills going down my spine. If I had been one of

those sailors I don't think I would have sailed aboard that ship; after getting them back aboard she just may have had other plans for them.

Thee were great days back then. The engine boat is nice now days, but to set on shore and see twenty or thirty schooners at anchor out in the Hook is a pretty sight, and when the wind is blowing hard, you can just imagine all them hants out there in them ships getting together, having their own witches meeting, and planning what thee are going to do next, and you just can't imagine such about an engine boat — kinda makes you sad, wondering what happened to all them hants.

Report on a Recent Wild Flower Meeting

"We went ten miles and then stopped by the Freshes of Enoe-River, which had raised it so high that we could not pass over till it was fallen. . . . This River is near as large as Reatkin, the South-side having curious Tracts of good Land, the Banks high, and Stone-Quarries."

Thus spoke John Lawson near 270 years ago about this site which was the meeting place of the North Carolina Wild Flower Preservation Society on Sunday, April 19, 1970. Here on the banks of the river, as guests of Dr. and Mrs. Holger Nygard out Cole Mill Road from Durham, was assembled one of the largest gatherings of the society's members since it was founded in 1951 largely through the efforts and inspiration of its first president, Mrs. Herbert Smith, of Smithwin Farm near Liberty, N. C. Those of us unfamiliar with this area were surprised to find so nearly unspoiled, literally under the shadow of a city, this wild river flowing through the land where Lawson found the Tuscarora and the Enoe Indians, and not so far from here, the strange Indian town of one-eyed inhabitants. The Nygards were not the only ones interested in protecting this river from the ravages of civilization. The society upon the suggestion of its retiring president, Dr. Herbert Hechenbleikner, voted, unanimously, funds

from its meager treasury to carry on the efforts of those already involved in its preservation.

The more rugged members descended the laurel shaded rocks to the alluvial floor below where a wonderland of wild flowers awaited us. The Pinxter Flower was not quite in bloom but thousands of Toothworts, Rue-Anemones, Violets, Giant Chickweeds and other wildings were at their peak in a setting that hasn't changed appreciably since the Red Man hunted here. Even that member of the violet family most unlike its relatives, the Green Violet, was evident everywhere, more so than at any place that I have ever seen it. All things were as a generous God placed them in that long ago before any man followed this stream to the sea.

Wild places with their wild creatures and wild plants should be protected, not only for ecological reasons, but for spiritual reasons. It is in this setting, and only in such a setting, that man can find himself in the divine order of things, for as that grand old man of botany, Dr. B. W. Wells, reminded us near the close of the meeting: all flowers were wild at one time and so was man; that the thousands of visitors to the Duke Gardens on that day were the descendents of wild men seeing only the descendents of wild flowers.

— LIONEL MELVIN

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