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Contextualizing Public Coastal Access Challenges in South Africa, a Review of Best Practices in Selected Countries

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Abstract

Coastal regions and populations worldwide experience the challenge of coastal access constraints. Owing to South Africa's socio-economic background of apartheid, equitable access to coastal resources remains a challenge. Integrated coastal management has been the subject of numerous research in South Africa, nevertheless, the issues surrounding coastal access and global best practices received little attention. This study was conducted due to insufficient documentation of global practices for addressing coastal access challenges relevant to South Africa. The objective of this paper was to contextualize challenges of coastal access in South Africa and assess the best practices in selected countries to address them. This study was contextualized in terms of the established literature and previous studies. In examining the key public coastal access challenges, thematic literature review was used to systematically identify themes and gaps. The best practices for public coastal access are examined in this research using global examples. The following challenges were identified, that is, influence by private properties, apartheid spatial legacy, influence of new developments, lack of institutional capacity, policy gaps and funding constraints. The study concludes that lessons learnt from different case studies should be integrated into policy framework of South African integrated coastal management to improve public coastal access.

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1. Introduction

International human rights rules, agreements, and related obligations apply in the oceans as well as on land since they are universal¹. Consequently, a fundamental component of integrated coastal zone management, the right to enter and enjoy the coastal zone, particularly the beach, has been recognized as a legal right for centuries in many nations². The

right of the public to access the coast or waterfront is largely based on the principle of the public trust doctrine³. According to the public trust doctrine, natural resources are regarded as public goods and people's common heritage⁴. In South Africa, public trust doctrine has been incorporated in an environmental right in section 24 of the Constitution which laid the foundation for several statutes to incorporate a public trust doctrine in South African environmental and natural resources law⁵. The National Environmental Management: Integrated Coastal Management Act 24 of 2008⁶ integrated the principle of public trust doctrine. This Act stipulates that the Republic's citizens are the rightful owners of coastal public property, with the state serving as its public trustee. Coastal resources including fish, minerals, and energy are critical to people, nature and the economy, and are a focus for the emerging sustainable blue economy agenda⁷. Public beach access is everyone's right for a better quality of life⁸. At a minimum the public trust doctrine protects the public interest in the beds of navigable waters, up to mean high tide on the ocean, and mean high water mark on fresh waters. Lack of access to marine resources disrupts local coastal communities who rely on the ocean and coasts for their livelihoods, cultural practices, and well-being, resulting in dispossession and increased marginalization⁹.

Coastal management and planning in South Africa have been impacted by the historical spatial-political planning of apartheid, resulting in present access and development being unevenly dispersed along the coast¹⁰. Racial inequality influenced South African policy and development during most of the 20th century, drastically limiting access to and use of coastline resources¹¹. Integrated coastal management (ICM) is still relatively new in Sub-Saharan Africa, compared with other regions of the world¹², therefore there is a need to draw lessons to tackle ICM challenges from other successful regions. Best practice concept relates to solutions, policies, interventions, actions, or procedures that are deemed successful and may assist other entities grappling with similar challenges¹³. At a policy level best practice is as an attractive option to save reinvention of the wheel¹⁴ by building on previous success elsewhere and applying it appropriately. Though ICM in South Africa has advanced significantly in terms of policy development since 1994, like with ICM programs worldwide, moving beyond the establishment of a policy and legal framework is a difficult task¹⁵. The challenges of public coastal access in South Africa are discussed in this paper. There is more to coastal access than the accessway, providing meaningful public access requires understanding the hurdles that prevent various segments of the population from utilizing and enjoying the coast¹⁶. These challenges are comparable on a global scale, but there are implementation inconsistencies. Recommendations were drawn from the international best practices which were assessed with the aim of addressing the challenges of coastal access in South Africa.

2. Methodology

To investigate the guiding question – what are best practices that can be extrapolated to address public coastal access challenges in South Africa? Thematic literature review was used to contextualized public coastal access challenges in South Africa. Thematic literature review is “a method for identifying, analyzing, and reporting patterns (themes) in a specific body of literature¹⁷. Google Scholar and Academia were used as search engines to review existing literature and the recurring themes were categorized into relevant clusters, each dealing with a specific issue. Themes were generated from both the data and from the investigator's prior theoretical understanding of the phenomenon under study¹⁸. Themes

regarding coastal access challenges were generated from various government reports as well as published reports. Case study approach was used to select countries who have coastal access laws to solicit best practices for South Africa. Benchmarking was used as the most appropriate way of best practice. Experts in many fields, such as medicine, management, computer science and law, commonly focus on how to improve performance by identifying and compiling best practices¹⁹. The selection of best practices was predicated on problem statements derived from the themes of South Africa's challenges pertaining to public coastal access. Data were analyzed using content analysis.

3. Problems of public coastal access in context, a South African perspective

Most of the challenges of public coastal access in South Africa originates from the historical spatial-political planning of apartheid. South Africa's apartheid regime perpetuated spatial inequality of coastal resources, similar to how American States (US) employed racial restrictions in the past to prevent people of color from accessing the coast. Both countries discriminated against citizens who were not white during the 20th century. "Jim Crow" laws were passed in the America, limiting the rights of the oppressed to enter particular areas. In South Africa, black people were marginalized through the enforcement of petty apartheid, a discrimination in public and private facilities²⁰. Under the Apartheid government, access rights to coastal and marine resources were largely denied to black South Africans⁴. Black people were prohibited from settling near the high watermark of the coast and from using the marine resources to which they have the historical access right²¹. Apartheid system ensured that land was dispossessed from black people and allocated to white people through privatization. According to literature review (^{22, 23, 24}), factors which influence public coastal access in South Africa are; conflict between public and private property owners, apartheid spatial legacy, new coastal development, lack of institutional capacity, lack of human and financial resources.

3.1. Addressing private ownership of the coastline

In South Africa, most of the coastline is privately owned with only a small percentage belonging to the State; roughly 70% of coastal land is private and barely 30% is public²⁵. Consequently, private property owners install barriers that restrict public access to coastal public property. To address the imbalances of the past South African government passed the National Environmental Management: Integrated Coastal Management Act 24 of 2008⁶. Ensuring equitable access to the opportunities and benefits of coastal public spaces is one of the primary goals of this Act. Section 9 of the ICM Acts states that the Minister may acquire private land by way of purchase, exchange, or expropriation. However, there is no dedicated fund to address the acquisition of private land to improve public coastal access in South Africa. In Maine, the Land and Water Conservation Fund under the administration of the Department of Economic and Community Development/Office of Comprehensive Planning, has played a major role in funding acquisition for public access along the state's coast²⁶. The federal government receives fees from offshore oil well leases that go toward supporting the fund²⁷. In United State of America, the land for improving coastal access is also secured through private/public alliances²⁶. Private funding is often provided as a match for state and federal grants to acquire coastal land, however, public access must be a condition of purchase. An easement is a legal right granted to a person or entity that allows them to use, access, or cross someone

else's property for a particular purpose²⁸. Rather than providing a designated coastline access road, the Land Reform Act of 2003 of Scotland also grants the public a right of access across private land including the seashore, for recreational reasons²⁹. Although the ICM Act does not have the concept of easement, section 18⁶ mentions coastal access servitude which a municipality must secure in terms of which members of the public may use to gain access to coastal public property. Given that most coastal land in South Africa is privately owned, the question that arises relates to the public's legal right of access to the sea-shore over private property³⁰. Due to the requirements of the general limitation clause³¹, the municipality may experience challenges in imposing coastal access servitude without triggering uncompensated expropriation. Furthermore, the ICM Act, makes no provisions for the payment of compensation for coastal access servitudes. Both public and private rights are enshrined in the Constitution of South Africa. The need to balance the imperatives of securing the public's inalienable right to coastal access vs the need to protect private interests remains a challenge to many authorities worldwide.

3.2. Apartheid spatial legacy

The degree of fit between the user and the service determines access; the better the fit, the better the access³². Access can be divided into two categories, namely, resource access and spatial access³³. In South Africa, citizens' right to coastal public property is guaranteed, but access to the coast is nevertheless constrained by another significant obstacle: the distance factor. Despite the abolishment of apartheid laws by the democratic government which came into power in 1994, South Africa's black communities are still marginalized due to numerous socio-economic challenges which undermine redress and equity. Apartheid spatial planning remains a factor that undermines equitable access to the coast and the majority of South Africans are still located away from coastal resources and services⁴. Despite the scrapping of petty apartheid laws in the 1990s, most black people still flock to the beaches assigned to them during the apartheid government³⁴ due to a lack of meaningful spatial transformation. The majority of Black people continue to be beach sojourners, visiting the coast just occasionally a year due to their distance from coastal attractions. Social equity is a stated goal of recent international agreements for sustainable ocean governance^{35,36}. In America the California Coastal Commission has a consistent record of supporting multi-family, affordable and workforce housing in the coastal zone. The Coastal Commission supports housing by approving proposed projects and has used the Coastal Act to require equitable and safe housing³⁷. For example, in 2020 the Commission approved a 48-parcel subdivision (DCM Properties) in the City of Encinitas with 4 lots dedicated to affordable housing³⁸. California Coastal Act Section 30604(f) requires the Commission to encourage housing opportunities for persons of low and moderate income. Post-apartheid South Africa continues to use apartheid planning approaches³⁹, new housing schemes such as RDP are implemented in the same apartheid spaces such as townships and rural areas. Turok⁴⁰ criticizes both housing schemes and planning approaches for sustaining and reproducing spatial inequity. The public housing provision in South Africa is criticized by Buckley⁴¹ for neglecting "the question of land," which has a significant impact on how projects are distributed spatially. Pursuing spatial transformation is challenging because most of the land parcels around South Africa's coast are privately owned. In Cuba, state ownership prevails over coastal land, sometimes generating better conditions for the benefit of the population, in negotiations, and in conflict resolution⁴². Cuba has a total area of 10,988.4 Mha, of which 86.2% is state-owned⁴³.

Although South Africa is not a communist country, however, government need to secure land from private ownership through legal processes to promote equitable access to the coastline.

3.3. Addressing new coastal developments

In South Africa, development is managed through environmental impact assessment (EIA) regulations. However, Kirby⁴⁴ observed that the issue of coastal access was one of the social issues that was not properly addressed in the environmental impact assessment (EIA) processes. Even though section 63 of the integrated coastal management Act addresses environmental authorization for coastal activities, however the emphasis in the EIA regulations is more on the construction of structures in the coastal public property⁴⁵. Even though certain activities, including golf courses, may not be located in the coastal public property, their cumulative effect may impede access to the coastline. Furthermore, various studies highlight the weakness of the EIA processes in relation to the assessments of social impacts of certain projects^{46,47,48,49,50}. In America, the California Coastal Act (CCA) of 1976⁵¹, prioritizes the public's access to the shoreline by requiring that coastal development does not impede existing rights of access, including on private property, and encourages the creation of new public access areas. Section 30212 of the California Coastal Act (CCA) of 1976 requires new development projects to provide public access from the nearest public roadway to the shoreline and along the coast. Furthermore, the California State Constitution protects Californians' rights to public coastal access in Article X, Section 4 (Constitution of the State of California, 1976). In Texas, the Open Beaches Act (TOBA) also protects public beaches by prohibiting any development that interferes with public access⁵². Therefore, it is necessary to stipulate in the ICM Act that development cannot impede on the public's right of access to the coast, particularly rights pertaining to historical access. Jaumain (2009), found that communities of Sokhulu and Mbonambi in KwaZulu Natal lost their historic access rights due to mining development along the coast of Richards Bay which was approved through EIA processes. In South Africa, environmental impact assessment (EIA) is required as part of the mining rights application process⁵³. This shows the weaknesses of the EIA processes regarding the assessment of social impact associated with coastal development.

3.4. Lack of institutional capacity

Facilitation of public coastal access in South Africa is assigned by section 18 of the integrated coastal management Act of 2008⁶ to municipalities. However, the national government is notorious for assigning additional responsibilities to local government without providing needed human and financial support. Consequently, environmental responsibilities assigned to local government are regarded as the unfunded mandates by several Councils⁵⁴. Although the development of policy instruments in South African integrated zone coastal management (ICZM) has been slowly progressing, at the local level, coastal management is still disjointed, inefficient, and under-prioritized⁵⁵. The lack of capacity of local administration, particularly small coastal municipalities, can therefore compromise the implementation of coastal access. The question then becomes whether local governments have the financial and human resources to promote public coastal access. Given the overwhelming demands on municipalities to provide basic services, it may be necessary to establish a specialized agent to implement the provisions of the ICM Act. Regarding funding, the American government enacted the

Unfunded Mandates Reform Act (UMRA)⁵⁶ to avoid imposing unfunded federal mandates on state, local, and tribal governments (SLTG), or the private sector. Section 203 of UMRA applies to all regulatory requirements that might significantly or uniquely affect small governments⁵⁷. Regarding the alternative body, in Narragansett (United States), the Coastal Access Improvement Committee is established as an advisory body to the Town Council on matters concerning both preservation of existing shoreline access and the expansion of physical access by the public⁵⁸. The committee focuses on the identification of public rights of way to the water and works to improve accessibility, create maintenance plans, and upgrade public infrastructure around coastal access sites. Similarly, in New England, section 296 of the Marine and Coastal Access Act 2009 (“the 2009 Act”)⁵⁹ places a duty to facilitate coastal access on Natural England and the Secretary of State through legal binding duty called the Coastal Access Duty. Section 298 of the 2009 Act requires Secretary of State to approve a Scheme which sets out the approach to be followed to discharging the Coastal Access Duty. Natural England receives an establishment grant funding for the facilitation of access to nature including coast and it is funded by the Department for Environment, Food and Rural Affairs⁶⁰. Likewise, the California Coastal Act of 1976 established the California Coastal Commission as the state agency to maximize public access to and along the coast.

3.5. Gaps in the integrated coastal management Act

The ambiguity in the policy can lead to uncertainty and lack of consensus amongst implementers, hindering effective implementation⁶¹.

Definitions: Although Coastal access is addressed under Section 13 of the Integrated Coastal Management Act of 2008, the definition is inadequate because the Act does not define 'coastal access'. The following definition can be adapted from Ordinance 1519-E of the State of Florida to define coastal access in the ICM Act (2008).

“Beach access” means any public beach access points identified by the City Parks and Recreation Department, including associated boardwalks, walkways, and dedicated parking areas, and the area on the beach beginning at the entrance of the beach access point perpendicular with the applicable road right of way to the water's edge⁶². Burbidge et al⁶³ also defines coastal access as the ability of the public to reach, use, or view the shoreline of coastal waters or nearby inland areas adjacent to the ocean.

Maning of a municipality: The following definition (part b) of the municipality in the amended ICM Act (2014) creates confusion.

municipality’—

- a. means a metropolitan [,] or district [or local] municipality established in terms of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);
- b. or (b) in relation to the implementation of a provision of this Act in an area which falls within both a local municipality and a district municipality, means— (i) the district municipality; or (ii) the local municipality, if the district municipality, by written agreement with the local municipality, has assigned the implementation of that provision in that area to the local municipality;”.

This definition does not consider the powers and functions set out in schedule 4b and 5b of the Constitution. According to the Constitution, the local municipality does not need a written consent to perform specific duties which may include ICM Act related responsibilities from the district municipality. Furthermore, this definition creates confusion regarding the implementation of section 42 (2) of the ICM Act which reads as follow:

“Any local municipality that has jurisdiction over any part of the coastal zone may establish a coastal committee for the municipality and, subject to subsection (4), determine its powers, which may include the power to establish local subcommittees of the municipal coastal committee.

Reporting: Coastal access is not specifically mentioned in Section 93 of the integrated coastal management Act 24 of 2008 which deals with reporting on coastal issues. Section 55A of the National Parks and Access to the Countryside Act 1949 (the "1949 Act") allows Natural England to create coastal access reports for different stretches of the English coast and recommend route alignment to the Secretary of State.

Representativity: Even though the role of tribal authorities and civic organizations is vital in ensuring community buy-in regarding coastal issues, the integrated coastal management Act (2008) does not really specify their responsibilities, especially on facilitating coastal access.

3.6. Funding constraints

Even though, the integrated coastal management Act 24 of 2008, is a progressive legislation for addressing coastal issues in South Africa, it is silent about funding issues. Among the several reasons why coastal regulation fails, Neal et al⁶⁴. cite a lack of funding for implementation and enforcement. The lack of a dedicated fund or funding mechanisms to implement provisions in the ICM Act is considered one of the greatest weaknesses of the South African coastal policies¹⁹. The "Working for the Coast" initiative is only mentioned in the National Coastal Access Strategy⁶⁵ as the available funding opportunity, however, it is more concerned with poverty reduction than infrastructure development. Furthermore, while municipalities are supposed to design coastal management plans, however, the national government does not give financial means to implement them. In America the states governments develop coastal zone management program under the authority of the U.S. Coastal Zone Management Act of 1972⁶⁶. Section 306 funds support administration and implementation of a state's approved coastal management plan; Section 306a funds support specific projects to meet the objectives of the state's coastal management program. The state funds coastal land acquisition plans that are consistent with an approved coastal zone management program. American government funds a National Oceanic and Atmospheric Administration (NOAA) -approved coastal management program that includes specific statutorily required elements, especial provisions of public coastal access⁶⁷. The U.S. Army Corps of Engineers (USACE) and several states already require coastal public access as a condition to receive public funds⁸. Similarly, chapter 13 of the Marine and Coastal Policy of the State of Victoria, addresses funding mechanisms for the implementation of coastal management programs⁶⁸. The Coastal Zone Management Act (CZMA) of 1972 created among major programs, the Coastal and Estuarine Land Conservation Program (CELCP)⁶⁹. State governments can purchase threatened coastal and estuary areas of ecological significance or other conservation value by using matching funds provided by the CELCP program⁷⁰. The program gives

priority to lands that can be effectively managed and protected, provide public access to coastal and estuarine resources, and have significant ecological value⁷¹. The State of Victoria also avail the Coastal Public Access and Risk (CPAR) Grants to coastal Crown land managers to reduce coastal risk and improve public access⁷². In United Kingdom the Coastal Communities Fund (CCF) was introduced with the aim of encouraging the economic development of UK coastal communities by awarding funding to create sustainable economic growth and jobs⁷³. This fund is expected to be used by local authorities for coastal benefit such as support for local projects or initiatives. Projects may also include infrastructure development to improve public coastal access.

4. Conclusion

In many coastal governments around the world, coastal management authorities see coastal access as a critical issue. Coastal authorities worldwide struggle with the problem of loss of beachfront access. Protecting coastal access while encouraging development through private investors is a challenge that South Africa faces as a developing economy. Unique to South Africa, apartheid geography also affects the coastal policy's aspiration of attaining equitable access to the coast. This study succeeded in providing critical analysis of the public coastal access challenges in South Africa as well as drawing lessons from various countries. The challenges of public coastal access in South Africa are contextualized as follow; i) The private nature of the coast is a persistent hindrance to the goal of equitable coastal access. The notion of balancing common good and individual liberties in the context of coastal access needs careful consideration. Lessons are derived from America, Scotland, and Cuba such as using private/public alliances, land reforms and increasing state land ownership; ii) Apartheid geography and inequality continue to pose a threat to the concept of fair access to coastal resources. Central to this problem is government's inability to decisively address land ownership in South Africa. Spatial justice and equitable land distribution is central to South Africa's constitutional project. To pursue spatial transformation, the Minister of Environmental Affairs must implement section 18 of the integrated coastal management Act (2008) which deals with acquisition of private land by the State to achieve equality pertaining to coastal access. Furthermore, this study provides practical lessons from the Coastal Commission of California regarding using housing schemes to address coastal access inequalities. Additionally, the Case of Cuba also provide lessons regarding the State securing land ownership to achieve desired outcome for the public good; iii) Although new coastal development is vital to improve the economy, it has the potential to limit citizens' access to the seashore. The study provides lessons from the State of California and Texas regarding the new development along the coast. Furthermore, the ability of both the EIA practitioners and competent authorities to assess social impact of the coastal project need careful consideration since they are not social impact specialists; iv) facilitation of public coastal access can be undermined by the lack of institutional capacity. The study provides lessons from America and New England such as enacting policy to address unfunded mandates as well as establishing a specific body to implement certain provisions of the coastal management Act; v) Inadequacies in coastal management policies may jeopardize coastal access. This study makes specific suggestions to address gaps within the integrated coastal management Act 92008), vi) lack of adequate funding remains a major challenge in the implementation of the coastal management policy. Regarding lack of funding, lessons are drawn from the implementation of US coastal Zone Management Act (1972), especially section 306. Without funding constraints, more empirical evidence would be

presented to substantiate the document analysis approach utilized in this study. Therefore, there is an opportunity for considerably more comparison analysis using empirical approaches such as field visits and experiential studies.

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Data Sharing Statement

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