

A Citizen's Guide to Assisting in the

**RIGHT-OF-WAY
DESIGNATION PROCESS**



**Rhode Island
Coastal Resources Management Council**

INTRODUCTION

A public right-of-way (ROW) to the shore is a parcel of land over which the public has the right to pass on foot or, if appropriate, by vehicle, in order to access the tidal waters of Rhode Island. Accordingly public ROWs can be used for a variety of activities. In some cases, public ROWs provide access for fishing and scenic overlooks while in other cases, public ROWs can be used to launch a boat.

In Rhode Island, the Coastal Resources Management Council (CRMC) is vested with the authority and responsibility to designate all public ROWs to the shore. The CRMC's enabling legislation (R.I.G.L. 46-23) requires that the CRMC carry on a continuing process of discovery and designation of ROWs to the tidal water of the state and contains specific penalties associated with the illegal blocking or posting of a designated public ROW.

In a period of seemingly endless development, it has become increasingly important to identify and protect existing public ROWs to the shore. A powerful mechanism to accomplish this is the CRMC's ROW designation process. A CRMC public ROW designation clarifies the status of a public ROW and provides shore goers with clear and legally defined pathways to the shore; it does not determine or establish ownership of the site. Once a site has been designated by the CRMC as a public ROW, the public's right to pass over that site to access tidal waters of the State is protected in perpetuity. The CRMC prohibits any activities that would obstruct the public's use of the site and pursues legal actions against individuals that block or impede public access at designated ROWs.

Designation of a public ROW requires thorough and careful research. While the CRMC carries out the continuous process of discovery and designation of ROWs using a standing ROW subcommittee, the steps leading up to a subcommittee hearing can be very time-consuming and therefore limit the CRMC's ability to aggressively investigate every possible ROW in the state. Prior to reaching the public hearing phase of the designation process, a detailed review of town records and historical documents must be conducted and current conditions at a proposed site assessed. In some cases, ROWs have not been designated *not* because they do not exist, but rather, because adequate evidence has not been gathered or the CRMC has not yet investigated the site. In these times of limited resources, local participation in the discovery and designation of public ROWs in Rhode Island is critical to the preservation of access to one of Rhode Island's greatest natural resources, its coast.

Cities and towns can assist in the ROW designation process by identifying potential public ROWs, conducting background research, and gathering evidence which CRMC legal staff can then verify and use during the hearing process. In many respects, town or city employees and residents may be better-suited to conducting preliminary research due to their knowledge of the community, its history and its administration. Nonetheless, it must be understood that the ROW designation process is a legal process which requires the expertise of attorneys, title searchers, and/or professional surveyors. Communities can, however, assist in this process in a meaningful way that can facilitate and streamline the CRMC's ROW designation process.

This handbook has been prepared to provide guidance to city and town officials as well as interested residents who wish to participate in the CRMC's ROW designation process. Such efforts are critical to protecting and preserving access to the shore in Rhode Island and are always appreciated by the Council. In addition, information gathered through the ROW research process may be very useful to communities when developing and revising Comprehensive Land Use Plans and Harbor Management Plans. Whether or not a proposed ROW is found to be public and designated as such by the CRMC thorough and well-documented research will remain valuable to the community.

The first section of this handbook describes what a public ROW is and how one is established. The second part of this handbook explains steps municipal officials and interested citizens can take to assist in the CRMC's ROW designation process. Much of this handbook has been adapted from *Coastal Right-of-Way Rediscovery Programs: A Handbook for Local Researchers* (December, 1989) published by the Maine Department of Economic and Community Development.

Identifying and Establishing a Public Right-of-Way in Rhode Island

Over the history of a community, public rights of access to the shore are likely to have been established in a number of ways. In Rhode Island, there are six legal methods of establishing a public ROW to the shore:

1. ***City or town accepted streets:*** A public ROW maybe established through the creation of a public road. In this case, the municipality lays out boundaries, records a description in the land evidence records, opens and maintains the road. Many of the public ROWs in Rhode Island's coastal communities fall into this category.
2. ***Highways by grant or use:*** In accordance with Rhode Island General Laws (Chapter 24-2), all lands that have been quietly, peaceably, and actually used, improved, and considered as public highways for 20 years by a city or town council shall be taken and considered to be public highways. In order for this statute to apply, a city or town must give notice of its intention to declare the land as public highway and must prepare and record a plat of the highway in the land evidence records of the city and town in which the land lies.
3. ***Roads approved by the recordation of a subdivision:*** As land is subdivided for development, roads, some of which may lead to the tidal waters of the state, are necessarily created. In the approval and acceptance of a subdivision plat, roads created as a result of the subdivision and recorded in the land evidence records of the municipality become available for public use.
4. ***Roads offered to the public through dedication or implied dedication:*** This is a common law method of establishing public ROWs. In order for there to be a common law dedication there must be a clear intent by the owner to donate the land and clear acceptance by the public or municipality. Such intent can be evidenced by the recordation of a plat map showing the R"OW as public or by language contained in a deed(s).

5. ***Highways that have been used by the public for time immemorial:*** Also a common law method of establishing a public ROW, evidence must show that historical use has been general, uninterrupted, continuous and adverse.
6. ***Ways that have been obtained by the public's adverse use:*** Privately owned paths to the shore, that have been used for a period of ten consecutive years by the public, may become public ROWs if the requirements of Chapter 34-7 of the Rhode Island General Laws are met. This method is commonly referred to as an *easement by prescription*. In order to create a public ROW by this method, the public has the burden of establishing actual, open, notorious, hostile and continuous use of a way under a claim of right for 10 years. In addition, the law specifically does not allow a public ROW to be established by footpaths; the pathways must have been used by carriages or vehicles.

The CRMC's Right-of-Way designation process

In accordance with the enabling legislation, the CRMC has the authority and responsibility to designate public ROWs to the tidal waters of the state (R.I.G.L. 46-23-6). This designation process begins with a fact-finding investigation and title search conducted by the CRMC's legal counsel. In general, this process is conducted using a town-by-town approach.

Fact-Finding

During the fact-finding stage, evidence supporting the existence of a ROW is gathered from any number of available sources. In addition, a visual inspection of the sight is made to gather evidence pertaining to the exercise of dominion (i.e., maintenance, repair and upkeep) over a potential ROW.

Substantial evidence must support the existence of a ROW as established by one of the six methods outlined above. In accordance with R.I.G.L. 46-23(e), the Council must consider the following sources of evidence in making its designation:

1. Land evidence records;
2. The exercise of domain over a parcel such as maintenance, construction, or upkeep;
3. The payment of taxes
4. The creation of a dedication;
5. Public use; and
6. Any other public record or historical evidence such as maps and street indexes.

The Council may also consider any other evidence found to be relevant.

Subcommittee Review

Following the fact-finding stage of the designation process, the CRMC's ROW subcommittee reviews all evidence. A public hearing in the municipality involved is then held in order to gather

any additional evidence and receive public testimony. If, based on the evidence gathered and the public testimony received, the subcommittee determines with reasonable probability that a public ROW exists, a recommendation to designate a site is made to the full Council.

Full Council Hearing

The recommendation of the ROW subcommittee is presented to the full Council at one of its bi-monthly meetings. If, upon review of the evidence presented, the Council approves the subcommittee's recommendation for designation of a public ROW, a final written decision, containing factual findings and conclusions of law, is rendered. Provided there is no appeal, or after an appeal has been resolved in favor of the CRMC, the decision is recorded in the community's land evidence records and filed with the Secretary of State's office. At this point the way becomes officially designated by the CRMC and is legally protected in perpetuity.

It should be noted that the CRMC designation process does not determine ownership of a public ROW, nor does it create "new" public ROWs. Rather, a CRMC designation clearly identifies pre-existing ways over which the public has the right to pass and ensures the preservation and protection of these sites for current and future generations.

Assisting in the CRMC's ROW designation process

Prior to initiating any efforts aimed at assisting in the CRMC ROW designation process, it is important to consult with Council staff to ensure that these efforts and those of the Council are complementary and not duplicative. In addition, it must be remembered that the ROW designation process is a legal process which, at times, may move slowly. Nonetheless, the Council remains committed to its mandate to protect and preserve access to the Rhode Island coast through its ROW discovery and designation process and is appreciative of all efforts made to support this important responsibility.

As noted, the CRMC's ROW designation process can be extremely time-consuming and require significant research. To assist in and expedite the process, municipal officials and interested citizens can undertake some of the preliminary research required by the ROW designation process. The following describes a step-by-step approach to the research and evidence gathering process that can be taken by those who wish to take an active role in the protection and preservation of access to the shore for all Rhode Islanders. These steps focus primarily on conducting preliminary research gathering evidence, since it is in these areas that the public can best contribute to and assist in the designation process.

Step 1: Eliminate sites where the status has been resolved

An investigation of potential ROWs should begin with a review of existing information. As a starting point, the CRMC produces an annual ROW inventory. Additionally, community Comprehensive Land Use Plans and Harbor Management Plans often contain pertinent information and access inventories. Another potentially useful source is *Public Access to the Rhode Island Coast* published by the University of Rhode Island Coastal Resources Center. These documents can be

used to eliminate previously investigated sites where a public ROW already has been designated or found to not exist. These documents may also be useful for identifying sites where there may be a public ROW, but more research is needed.

Step 2: Develop a list of potential sites

The next step is to develop a preliminary list of potential access sites. These may be sites whose legal status is unclear in spite of public use, or sites where there is reason to suspect a public ROW existed at one time but is no longer used by the public due to blockage or an illegal extension of property lines. In addition to roads and ways, other possible public access sites, such as tax acquired properties, unbuildable lots deeded to the city or town, and easements should be considered.

During this preliminary phase of the investigation, a number of general sources can be consulted in order to generate a list of potential ROWs. The tax assessor will have records and maps which may indicate a site(s) worth researching further. Your city or town's harbormaster may also be a valuable source of information. Other municipal officials, such as planning board, harbor commission and conservation commission members may have suggestions for further investigation. Knowledgeable citizens including fishermen and local historians can also be a resource when identifying potential sites. And, a drive or walk by a suspected ROW to make a cursory inspection just may prove to be worth the trip.

Once a list of potential public ROWs has been developed, these sites should be prioritized in accordance with the importance of the site to the municipality and the likelihood of finding adequate evidence to document the existence of a public ROW. Traditional and threatened access points should also be given a high priority.

Step 3: Determine what information is available

Prior to researching a specific site, an inventory of information sources should be made. The primary sources of information will generally be tax records, the registry of deeds (land evidence records), and records of town or city council actions taken with regard to the acceptance of streets. Additional sources of information, such as street indexes, published and unpublished historical information, annual reports, maps, town year books, town atlases, and promotional and tourist information may also prove valuable during the research process. Occasionally, land evidence records or Town Council records refer to litigation involving a potential ROW. In these cases, a search of court records is helpful. This information, however, may be difficult to uncover unless the name of the plaintiff or defendant and/or case number is available. It also may be useful to talk with the town or city clerk, historical society members and others in the community who may be knowledgeable about the existence and location of old maps and documents.

Step 4: Gather Evidence

Once a list of potential sites has been developed, priorities for investigation established and information sources determined, evidence as to the existence of a public ROW must be carefully gathered and thoroughly documented. As previously stated, the primary sources of information used when researching a specific site will be tax records, the registry of deeds, and records of municipal actions.

* **The Tax Assessor's Office**

As a starting point, tax records on the site in question need to be researched. At the Tax Assessor's office, chain of title cards for a potential ROW may be obtained. A chain of title card is the recorded history of documents which affect the title to a parcel of land and provides the ownership history for lots abutting a potential ROW. Depending on the particular site, numerous chain of title cards may have to be obtained for lots abutting the site under investigation.

The Tax Assessor's office will also have records on the tax status of the particular site; that is whether the site is taxed to an individual or not. While at the Tax Assessor's office, plat and lot numbers for properties abutting the potential ROW and the name of the person(s) most recently taxed for the abutting property(ies) should be obtained. In some cases, the Tax Assessor's records will contain information on the year the current or most recent owner was first taxed on the property and references to the book and page number where deed was recorded at the registry of deeds.

* **The Registry of Deeds**

From the Tax Assessor's office, the next step in the research process is the Registry of Deeds. Here, the chain of title for each lot abutting the potential ROW must be reconstructed back in time to the original platting of the potential ROW. When a tow has good chain of title cards, this is easily accomplished.

If a particular city or town does not have chain of title cards, the chain of title must be reconstructed using grantor (person transferring title or interest) and grantee (person receiving property or interest) indexes. A grantor/grantee index is a set of record books which lists all recorded instruments (i.e. mortgages, liens, etc.) Affecting title to a parcel and provides book and page numbers where they have been recorded in the registry of deeds. In some cases, the grantor/grantee index will be combined while in other cases the indexes for grantors and grantees will be separate. Generally, the grantor and grantee indexes cover a specified time period and list the deeds alphabetically by grantor and/or grantee.

At the registry of deeds, refer to the book and page number determined either at the Tax Assessor's office or through the grantor/grantee index to find the deed on the parcel of land being researched. Review the deed carefully to ensure that the deed is to the parcel being researched and not to a different parcel owned by the same individual. It is extremely important to thoroughly document findings while conducting this research so as to facilitate legal review. The researcher should provide, at a minimum, the name of the grantor, the name of the grantee, the book and page number where the instrument is recorded at the registry of deeds, dates the instrument was signed and recorded, and a description of the property. The description of the property need not go into great detail, but particular attention should be paid to references to roads easements or other passageways on or adjacent to the property. This process should be repeated for each prior owner as far back as is possible or necessary to demonstrate the existence of a public ROW. If possible, copies should be made deeds to abutting properties which reflect the chain of title.

Providing a *thorough* and *well-documented* reconstruction of the chain of title, including copies of deeds, for lots abutting a potential ROW is one of the most important contributions citizens and municipal officials can make to the CRMC ROW designation process. When reconstructing the chain of title it is important to carefully review the description of the parcel provided in the deed(s). These descriptions often contain important evidence such as the precise bounds of the parcel affected by the deed, whether the parcel abuts a public road, and whether the parcel is subject to an easement for public passage. In addition, any changes over time to the original deed which may be relevant can be identified when researching the chain of title.

* **Additional Municipal Departments**

Additional official sources of information should also be investigated at other town or city departments. For example, some cities and towns have street indexes in the land evidence records or at their Public Works, Planning or Engineering Departments. Street indexes are usually field cards with the name of the street, its dimensions and its characteristics (i.e. paved/unpaved, gravel, utilities, etc.) Some street index cards may also provide information on the municipal history of potential ROWs, such as references to town council resolutions and record books. If the city or town does not have formal street indexes, surveys of municipal streets and ways may be available through one of the aforementioned offices. Town officials should also be queried about other similar sources of information which may be useful in the designation process.

* **Records of Town or City Council Meetings and Resolutions**

After the chain of title for a lot(s) abutting a potential ROW has been reconstructed, town records should be researched to confirm that municipal officials took appropriate action to accept the site. Acceptance of the road or way is the final step in the process by which a city or town establishes public rights and responsibilities in roads. Whether the potential ROW was actually laid out by the municipality or was dedicated by a landowner to the municipality, the town must take steps to accept the road or way in order to formally establish the public's rights. It should be noted that only roads that have been laid out by the municipality or dedicated to the municipality are likely to have been appropriately accepted by the municipality. Such acceptance may be in the form of a town council resolution or some other act(s) indicative of acceptance, such as maintenance and upkeep or public use for a period of at least twenty years. Highways used by the public since time immemorial and ways obtained by the public's adverse use are less likely to have been accepted by the municipality through a town or city council resolution. However, informal acceptance demonstrated by municipal maintenance and upkeep may be adequate as evidence of municipal acceptance.

In some cases, as previously noted, the municipal history of a particular road or way may be provided in town or city street indexes. In the remaining cases, records of town or city council meetings, resolutions or ordinances dating around the time of the laying out or onset of municipal responsibility for the road or way should be investigated to determine whether or not the municipality ever took any official steps to accept as public the road or way. The clearest indication of acceptance is a formal vote by the town or city council. Lacking that, acceptance

may be found if significant levels of public use and/or public maintenance can be demonstrated.

Step 5: Evaluate the physical condition of the site

It is particularly helpful to provide an accurate physical description of the potential ROW. After compiling evidence from the Tax Assessor's office, the Land Evidence Records, Town or City Council records, official street indexes, and any other available sources, a visit to the site should be made. An assessment of field conditions at the site is crucial because it provides information on the status of a potential ROW as far as maintenance, construction, or upkeep is concerned. It is important to ascertain whether the potential ROW has been maintained and, if so, by whom. At times, the physical layout of a ROW does not correspond with the documentary evidence. When possible, a metes and bounds description prepared by a surveyor should be provided.

Step 6: Organize and submit the evidence gathered

At this point in the research process, all relevant documentary evidence as well as an accurate physical description of the site should be reviewed and organized. At a minimum this package should include the following:

- * a written description of the potential ROW;
- * a copy of the Tax Assessor's plat map;
- * a copy of the chain of title card (or a copy of the reconstructed chain of title);
- * a copy of relevant deeds; and,
- * supplementary evidence of public and historical use

Any additional evidence, such as street indexes, historical records, and town or city council resolutions should be included. Sources, page numbers, dates, etc., should be noted on any documents provided. If available, photographs, surveys and access site development plans should also be included. In general, the more evidence put into the administrative records, the better the Council's position is with regard to any legal challenges to a public ROW designation.

Once the evidence has been compiled and organized, a request for legal review should be submitted by either the Harbor Commission or the Town or City Council to the CRMC's Executive Director. Again, it is neither necessary, nor advisable, to wait until the research process is complete before contacting the CRMC. On the contrary, consultation with the CRMC prior to and during the research process is recommended.

After all available evidence has been reviewed by the CRMC legal counsel, a written report is submitted to the CRMC's ROW subcommittee. This report will contain the documentary evidence described above, and evaluation of the physical condition of the site, and a conclusion as to the legal status of the potential ROW based on the evidence gathered during the research process and the legal theories available. If the CRMC's TOW subcommittee determines that there is adequate evidence to support the existence of a public ROW at the site, a public hearing before the subcommittee is scheduled.

Step 7: Provide testimony at the public hearing

At the subcommittee hearing, it is particularly helpful to have a town-appointed spokesperson

(preferably, but not necessarily, the Town or City Solicitor) present to provide information on a particular site. Such information could include a municipality's exercise of dominion and control over the site; municipal maintenance, construction and upkeep of the site; historical uses of the site; tax status of the site; and, the community's position with respect to the site's designation as a public ROW.

Clearly the ROW designation process is one that requires significant time and effort. However, once the process is complete, and a ROW has been formally designated as public by the Council, it becomes subject to a level of protection which ensures the preservation of access to Rhode Island's shore for this and future generations. In a time where traditional access ways seem to be disappearing, it is important that the public help protect the right of access to the shore guaranteed by the Constitution and exercised for centuries. The assistance of municipal officials and interested citizens in this designation process allows the Council to more efficiently fulfill its mandate to carry on a continuing process of discovery and designation of ROWs to the shore for the benefit of all Rhode Islanders.