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After the Storm: Determining Title To Changing Shoreline Property

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As the flood waters left by Hurricane Sandy recede and leave behind an altered landscape, we are reminded of the age-old difficulties occasioned by human efforts to draw permanent boundaries on an earth that is forever changing. Where water meets land, traditional notions of private property collide with the sea, which has historically been property common to all.

What has resulted is an uncertain legal doctrine derived in part from a vexing set of common-law rules centuries in the making. These rules—which attempt to reconcile the myriad, competing interests in this unique sliver of real estate with the ephemerality of its borders—have been further complicated by recent Fifth Amendment takings jurisprudence.[1] Accordingly, this article discusses the effects of Sandy on title to shoreline property, the government's ability to regulate such property, and issues related to the government's condemnation or taking of private property in its efforts to restore the coastline in the wake of Sandy's devastation.

Common Law Littoral Rights

The water shapes the shoreline in various ways, and centuries of common law development have resulted in no shortage of means to characterize these changes. Accretion, reliction, avulsion, and erosion are the four phenomena most typically cited in the legal literature and, together, describe all manner of shoreline evolution. As discussed below, the distinctions between these phenomena may blur at times but are nonetheless essential from a legal perspective.

Accretion and reliction describe instances in which an area of dry land is gradually increased—by additional deposits of sand and sediment in the case of accretion or, in the case of reliction, by a receding water line that slowly uncovers once submerged land. Erosion is the counter-phenomenon of accretion and reliction; it describes a situation in which dry land is slowly covered by a body of water.

From a legal standpoint, accretion, reliction, and erosion operate similarly. As shorelines change and new dry land is exposed, title to the once submerged property shifts from the state, which is the holder of sovereign title to land below the high-water mark in navigable bodies of water, to the adjacent littoral or riparian owner.[2] The terms "littoral" and "riparian" refer to land that is adjacent to navigable bodies waters. "Riparian" refers specifically to moving bodies of water—rivers or streams, for example—and "littoral" to bodies such as lakes and oceans.[3] While accretions and relictions serve to enlarge a landowner's estate, erosion operates as a threat to title: As waters rise and dry land slowly gives way to the sea, title to the once dry land shifts from the landowner to the sovereign.[4]

The fourth phenomenon cited above is that of avulsion. In contrast with the three doctrines discussed above, avulsion denotes a sudden, as opposed to gradual, change in which once dry land becomes submerged or once submerged land becomes dry. From a legal standpoint, avulsion does not give rise to a change in title. Where nature operates to shift rapidly the location of a body of water such that submerged land becomes dry, the state retains title to the newly created dry land. Where, on the other hand, a landowner's property becomes submerged, the landowner retains title to the submerged land.[5]

Accordingly, the fate of the littoral owner with respect to his property holdings is at the mercy of the sea. The risk of loss by erosion and avulsion is, to some extent, offset by the chance of accretion. Notably, the right to accretions is among the rights historically afforded littoral owners. Other of the rights include the right of access to the water and an unobstructed view.[6]

Given that the doctrines discussed above originated centuries ago under Roman law, it's no wonder that courts today struggle to adapt these concepts to contemporary disputes concerning

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shoreline revitalization, environmental regulation, and flood-control efforts. Over the past few decades, nowhere has this struggle been more apparent than in challenges brought by landowners under the Fifth Amendment's Takings Clause.

Takings and Coastal Property

The boundary between land and sea also typically serves as the boundary between state and private property. As noted above, the state is the holder of title to land below the high-water mark in most navigable bodies of water; so it's no surprise that individual property interests might clash with those of the public along this border.

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Takings Doctrine. The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[7] As the Supreme Court has reasoned, the goal underlying the Fifth Amendment is to prevent both the federal and state governments "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[8] As originally conceived, the Takings Clause implicated only direct appropriations of private property by governmental entities. Thus, under the power of eminent domain, the government may acquire private property for a public purpose if the owner is adequately compensated.

The interpretation of the Takings Clause has developed, however, such that a taking need not involve the government's actual taking of title to private property. Rather, in the present context, takings claims are often a question of the degree to which government regulation affects private property rights. *Lucas v. South Carolina Coastal Council*[9] and *Loretto v. Teleprompter Manhattan CATV Corp.*[10] provide two instructive examples wherein the court held that regulation of private property resulted in a per se taking.

In *Loretto*, the court found unconstitutional a New York statute requiring a landlord to permit a cable television company to install cable equipment on the landlord's property. Such a regulation, the court reasoned, constituted a mandate by the government that a property owner submit to a physical occupation by a third party.[11] The regulation at issue in *Lucas* was South Carolina's 1988 Beachfront Management Act (BMA), which effected a permanent ban on construction in an area that included two vacant lots owned by the petitioner. At the time of purchase, petitioner's lots had been zoned for residential use. After enactment of the BMA, residential use was no longer permitted, and the properties were left valueless. The court held that the BMA effected a taking, concluding that "confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land" cannot be newly legislated without just compensation.[12]

Lucas and *Loretto* are both instructive in the context of coastal regulation. *Lucas* is relevant because the facts of the case relate to governmental efforts to regulate coastal development. Clear from *Lucas*, a state may not regulate the use of property so severely as to rob it of all economic value. Under *Loretto*, a state is barred from subjecting landowners to physical takings without just compensation. In dicta, the Loretto court quoted from an 1872 case: "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."[13] As such, a government seeking to erect flood-control structures along the coast may then be required to pay just compensation to affected landowners.

Notably, the per se takings tests outlined in *Lucas* and *Loretto* are stringent ones. Only the strictest regulations or actual physical occupations will give rise to per se takings. Regulations that fall short of these standards are often construed as administrative action and thus upheld so long as they are not judged arbitrary, capricious, or unreasonable.[14] In waterfront residential communities, this test will often apply to the myriad zoning restrictions that limit landowners' rights to develop.

While the controversy in *Lucas* centered on restrictions that limited the landowner's right to develop vacant lots, litigation in New York has concerned the limitations placed on existing homeowners and their attempts to protect their property by erecting flood-control structures. At issue in *Allen v. Strough*[15] and its companion case, *Poster v. Strough*[16] was the decision of the Town of Southampton to reject the applications of beachfront residents to install concrete revetments within a certain distance from the beach.

The Appellate Division, Second Department, reasoned that the town's decision to deny the application for installation of the revetment was not arbitrary and capricious, as there was "legitimate debate over the extent to which hard structures erected to protect one particular beachfront property might exacerbate erosion-related perils posed to other properties."[17] While municipalities' restricting landowners in their attempts to protect their shores may seem counterintuitive, according to many commentators, the protection afforded by hard structures, such as jetties and revetments, sacrifices beaches downdrift of such structures.[18] The protection of the individual's property, therefore, may operate to rob the public of recreational beaches.

'Stop the Beach Renourishment.' In addition to the *Loretto–Lucas* line of per se takings cases, there exists another genre of takings litigation wherein a landowner challenges the state's use of state-owned property. Where a state's use of its own property destroys private property, the Supreme Court has held that a taking has occurred.[19]

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[20] littoral owners, living adjacent to the ocean, argued that the state's use of submerged land effected a

taking of individual landowners' littoral rights. Under the authority of Florida's Beach and Shore Preservation Act, the state's Department of Environmental Protection undertook beach restoration programs in various locations along the coast.[21] The goal of the programs was to rebuild beaches by filling submerged land with additional sand. This practice made for a wider beach but gave rise to questions of title: Who owns the newly created property?

Where state actors seek to fill this submerged land in an effort to restore the beach, a taking will have occurred, and just compensation will be due. In such a situation, however, what compensation will be deemed "just" remains to be seen.

Florida maintains the common-law scheme of littoral rights outlined in Part 2 above, so the question the court faced was twofold: (i) whether the filling operated as an avulsion, thus vesting title to the newly formed beach in the state, and (ii) if so, whether the state's ownership of the newly created beach unconstitutionally interfered with landowners' littoral rights, particularly the right to accretion.[22]

The court held that the filling of submerged land constituted an avulsion. Accordingly, the state retained title to the newly created beach, and the landowners' contact with the water was thus severed.[23] As a result of this severance, the littoral owners lost their common law right to accretion. The landowners argued that this loss of rights resulted in a taking. Still, the court held otherwise. On this point, the court relied on *Martin v. Busch*, a 1927 case in which the Supreme Court of Florida held that the state retained title to a lakebed after the state had caused the lake in question to be drained.[24] The landowners argued that because their contact with the water had been lost, their right to accretion had been taken. Relying still on *Martin*, the court reasoned that the littoral owner's right to accretion must be subordinate to state's right to fill.[25]

While *Stop the Beach* has not been without criticism,[26] the question is at base one of state law; and notably, other states have wrestled with the question and arrived at the same answer as *Stop the Beach*. For instance, the Supreme Court of New Jersey confronted the issue in *City of Long Branch v. Jui Yung Liu*. The littoral owners in *Liu* claimed title to approximately two acres of additional beachfront land that had been deposited upon their shores as a result of the efforts of a beach redevelopment program. The court concluded that the expansion of the Lius' shoreline by so great an amount over a two-week period constituted an avulsion and that, consistent with common-law doctrine, the state retained title to the subject land.[27]

After 'Stop the Beach.' In the aftermath of Hurricane Sandy, *Stop the Beach* is instructive. States and municipalities may undertake beach redevelopment efforts in an attempt to restore the waterfront to pre-Sandy conditions. To the extent that courts are willing to characterize the shoreline destruction caused by Sandy as avulsion, title will have not changed hands; that is, title to land submerged by Sandy will remain vested in the individual littoral owners. For instance, upon filling of the channel cut by Sandy across Fire island the land would be owned by the littoral owner rather than the state because the littoral owner would never have lost its claim to the property.

Accordingly where state actors seek to fill this submerged land in an effort to restore the beach, a taking will have occurred, and just compensation will be due.[28] In such a situation, however, what compensation will be deemed "just" remains to be seen. Where a littoral owner's property has been submerged, its value may be negligible, and little compensation would therefore be due. Moreover, in light of the value enhancement provided by the state's reclamation efforts, property owners in most instances only stand to benefit from beach redevelopment.

Conclusion

The distinctions between the various forms of governmental takings can be as blurry as those between accretion and avulsion. The myriad parties with interests in the shoreline have not a small task before them in trying to negotiate the legal pitfalls present in the Supreme Court's takings jurisprudence. Even so, in the wake of *Stop the Beach*, it seems clear that states may endeavor to protect their coastlines through beach replenishment, the results of which have on the whole proven mutually beneficial to landowners and the public alike.

1. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env. Protection*, 130 S. Ct. 2592 (2010).
2. Id. at 2598.
3. Today, there is no distinction between the rights of littoral and riparian owners. Given the focus of this article and for the sake of simplicity, I will refer only to littoral owners and rights.
4. *Stop the Beach*, 130 S. Ct. at 2598.
5. Id. at 2598–2599.
6. Id. at 2598; *Town of Oyster Bay v. Commander Oil Corp.*, 759 N.Y.2d 566, 571 (2001).
7. U.S. CONST. amend. V.
8. *Elias v. Town of Brookhaven*, 783 F.Supp. 758, 760 (1992).
9. 505 U.S. 1003 (1992).
10. 458 U.S. 419 (1982).
11. 458 U.S. at 426.
12. 505 U.S. at 1029.
13. 458 U.S. at 427 (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1872)).
14. See, e.g., *Poster v. Strough*, 299 A.D.2d 127, 128 (2d Dept. 2002).
15. 301 A.D.2d 11 (2d Dept. 2002).
16. 299 A.D.2d. 127 (2002).
17. Id. at 20.
18. *Poster*, 299 A.D.2d at 132.
19. *United States v. Causby*, 328 U.S. 256, 261–262 (1946).
20. 130 S.Ct. 2592, 2601 (2010).
21 Id. at 2599.
22. See id. at 2611–12.
23. Id. at 2611.
24. Id. at 2611 (citing 93 Fla. 535, 574 (1927)).
25. Id.
26. Commentators have pointed out that the doctrines of accretion and avulsion have historically applied only to natural events. See, e.g., Richard A. Epstein, "Littoral Rights Under the Takings Doctrine: The Clash Between the 'Ius Naturale' and 'Stop the Beach Renourishment,'" 6 Duke J. Const. L. & Pub. Pol'y 37, 56 (2011).
27 203 N.J. 464, 484–85 (2010); see also *Arkansas v. Tennessee*, 246 U.S. 158, 173 (1918) ("[I]f the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one…, the resulting change of channel works no change of boundary."); *J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Company*, 423 N.W.2d 130, 134 (N.D. 1988) ("Apparently, no court has refused to apply the common-law avulsion rule to artificial or man-made avulsion.").
28 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) ("[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.") (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1872)).