



The
University of Mississippi

Oxford • Jackson • Tupelo • Southaven

National Sea Grant Law Center

Kinard Hall, Wing E - Room 262

Post Office Box 1848

University, MS 38677-1848

Office Phone: (662) 915-7775

Fax: (662) 915-5267

E-mail: sealaw@olemiss.edu

April 1, 2013

Randall Schneider

Atlantic Coastal Management Programs & Planning/Budgeting

NOAA's Office of Ocean & Coastal Resource Management

Re: Effect of Hurricane Sandy on coastal property lines in New Jersey (NSGLC-13-04-01)

This product was prepared by the National Sea Grant Law Center under award number NA09OAR4170200 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the authors and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

Dear Randy,

Please find below our examination of the effect of Hurricane Sandy on coastal property lines in New Jersey as requested in December 2012. Hurricanes often result in avulsion, which is a sudden, apparent addition to or loss of land to shorelines due to water action. In contrast to the doctrines of accretion, erosion and reliction, shoreline changes due to avulsion generally do not change the boundary between private and public property, as the boundary between state and private land will remain at the mean high water mark as it existed before the avulsive event.¹

In New Jersey, the state owns all the land up to the mean high water mark (the location where, on average, the ocean ends and dry sands begin at high tide), while oceanfront

¹ The U.S. Supreme Court has "long recognized that a sudden shoreline change known as avulsion (as distinct from accretion, or gradual change in configuration) 'has no effect on boundary,'" N.J. v. N.Y., 523 U.S. 767, 784

property owners hold title to the dry sand upland from the high water mark. However, due to New Jersey's broad interpretation of the public trust doctrine, privately held upland dry sand may be subject to some public use. The New Jersey Supreme Court has applied the public trust doctrine to navigation, fishing and recreational uses, such as swimming and bathing. In addition, the court has also held that dry sand held by upland property owners is subject to limited uses that are "essential or reasonably necessary for enjoyment of the ocean" since "[t]he complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge."²

New Jersey, like other states, has recognized that the high water mark remains in flux due to accretion, reliction, erosion and avulsion, and applies common law rules to these changes to the property line. Accretion is the gradual, imperceptible addition of sand to a beach, while reliction occurs when water withdraws from a shoreline and uncovers new dry sand. Similarly, erosion occurs when sand gradually withdraws from the beach. When accretion, reliction or erosion changes the high water mark, the property line between state and private property will change. The oceanfront landowner will obtain title to any dry land added by accretion or reliction, but will lose title to eroded land to the State.³

The common law treats avulsion differently. New Jersey courts have characterized avulsion as a dramatic, significant and swift change in the shoreline, and an avulsive event can result in either an addition or loss of land. Avulsion can happen as the result of natural causes, including storms and hurricanes, and manmade causes like beach replenishment projects. Unlike accretion, reliction and erosion, avulsive events do not change the property line, as the prior mean high water mark remains the dividing line between state and private property.⁴ Therefore, as the result of an avulsive event, an oceanfront property owner does not lose property that is covered by water to the state, nor does the landowner take title to any additions of dry sand. Thus, "if a hurricane washes away one hundred feet of beach and is followed by a hurricane adding one hundred feet of beach, there is neither a gain nor a loss to the upland owner or the State."⁵

Whether any particular event is avulsive depends on the length of time over which the change in oceanfront property occurs. For example, the New Jersey Supreme Court has found that the dumping of sand over a two-week period for a beach replenishment project was avulsion⁶. In regards to Hurricane Sandy, the New Jersey Department of Environmental Protection (NJ DEP) has determined that the storm was an avulsive event, and thus, did not affect the property line between state and private property.⁷ However, in the past, courts in New Jersey have placed the burden of showing whether the shoreline changed due to accretion, reliction, erosion or avulsion on the property owner since he or

² *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 325 (N.J. 1984).

³ *Long Branch*, 203 N.J. at 476-77.

⁴ *Long Branch*, 203 N.J. at 477-78.

⁵ *Long Branch*, 203 N.J. at 479.

⁶ *Long Branch*, 203 N.J. at 484-85.

⁷ *Frequently Asked Land Use Permitting Questions Post Superstorm Sandy Updated February 12, 2013*, available at <http://www.nj.gov/dep/landuse/SandyFAQ.html#a7>.

she is “in the best position to know when and how the shoreline to their property changed.”⁸

In the event that land is lost during an avulsive event, a landowner traditionally has had the right to restore or reclaim the lost land. According to NJ DEP, if one’s property has increased due to Hurricane Sandy, the state will still claim these lands based on the high water mark before the storm. If a property owner’s land decreased due to the storm, NJ DEP has claimed that property owners have the right to restore their property to its condition before the storm, and a landowner can place clean fill where Hurricane Sandy eroded his or her property.⁹ However, if the property owner wants to dredge eroded material from a waterbody, the property owner will need to obtain a permit, and NJ DEP recommends that the property owner apply for an emergency permit. If the landowner wishes to put in new shoreline stabilization structures, the property owner needs to apply for a permit under the normal permitting process, as an emergency permit is not available for these structures.¹⁰

NJ DEP will issue an emergency permit when work has to begin immediately to protect the environment and the public health, safety and welfare. NJ DEP states that they often issue these permits orally and send a follow-up letter describing what the property owner is authorized to do and how the work must be completed.¹¹ After completing the work, the landowner still needs to get a conventional permit from NJ DEP to prove he or she completed the work as authorized.

In conclusion, generally speaking, if land is added to or lost from the shore by an avulsive event, shoreline boundaries will remain at the high water mark as it existed before the storm. Generally, a landowner who loses land due to the storm has the right restore his or her land to its pre-storm condition, but may need to obtain a permit from NJ DEP depending on how the landowner plans on restoring his or her land. If you would like additional information, please let us know.

Sincerely,



Catherine Janasie

Ocean and Coastal Law Fellow

⁸ Long Branch, 203 N.J. at 484.

⁹ Tidelands FAQs as Related to Superstorm Sandy and Related Storm Events, *available at* <http://www.nj.gov/dep/landuse/SandyFAQ.html#a7>.

¹⁰ Land Replacement FAQs as Related to Superstorm Sandy and Related Storm Events, *available at* <http://www.nj.gov/dep/landuse/SandyFAQ.html#a7>.

¹¹ Emergency Permits FAQs as Related to Superstorm Sandy and Related Storm Events, *available at* <http://www.nj.gov/dep/landuse/SandyFAQ.html#a7>.