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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

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Steve Stewart
Michigan Sea Grant Extension
21885 Dunham Road, Suite 12
Clinton Township, MI 48036

RE: Lexington Harbor Accretion (MASGP 09-008-02)

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Dear Steve,

Below is the summary of research regarding the question you posed to the National Sea Grant Law Center about the rights of property owners on either side of Lexington Harbor. As we understand it, there is some concern that property owners may assert ownership of land that has accumulated on the updrift side of the harbor due to the Lexington Harbor structure, thereby limiting restoration and remedial options. The following information is intended as advisory research only and does not constitute legal representation of Michigan Sea Grant or its constituents. It represents our interpretations of the relevant laws.

Common Law of Accretion and Erosion

Given the inherent shifting nature of bodies of water, the boundaries of waterfront property are considered ambulatory and can change through natural processes and water level fluctuations.¹ Sediment or sand may build up over an extended period of time through accretion. On the other hand, erosion may cause land to disappear. As a result of these natural processes, littoral property owners may gain or lose land over time.² "The title of the riparian owner [in Michigan] follows the shore line under what has been graphically called 'a movable freehold.'"³

¹ *In re City of Buffalo*, 206 N.Y. 319, 325 (1912).

² Littoral refers to property abutting lakes and oceans. Courts often use this term interchangeably with "riparian," which more properly refers to property abutting rivers.

³ *Hilt v. Weber*, 233 N.W. 159, 166 (Mich. 1930).

For instance, "Where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land."⁴ The historical arguments in favor of this rule are as follows. If the boundaries of waterfront property were fixed and the law ignored these natural processes, accretion would result in the state owning a strip of land between the property and the water. The property owner would no longer be a waterfront owner, which could result in a decrease in property value and possibly even a loss of access to the water.⁵

There is an exception to this general rule. Sudden or perceptible changes in the shoreline, such as those caused by hurricanes and floods, do not affect boundaries. The first issue to be addressed, then, is whether the shoreline changes caused by the Lexington Harbor project were "sudden or perceptible." According to the U.S. Supreme Court, a change is gradual and imperceptible if "though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."⁶ The changes that resulted from the construction of Lexington Harbor probably would not qualify as "sudden or perceptible" because the accretion to the north and the erosion to the south occurred slowly over the course of thirty years and not immediately upon the construction of the harbor.

Updrift Property Owners

The Lexington Harbor structure, by blocking the natural movement of sand, has resulted in accumulations of beach and nearshore materials on the updrift (north) side. Under the traditional law of accretion, the property owners to the north of the Harbor would own the accreted land. Property owners generally may not claim title to intentional artificial additions to their shorelines. When accretions are caused by the actions of a third party, however, the riparian owner remains the beneficiary of those accretions "unless, perhaps, structures are erected for the specific purpose of causing the accretion."⁷ Stated another way, the landowner is entitled to the additional land, provided he did not participate or consent to the disruption of natural events.⁸

Lexington Harbor was built by the U.S. Army Corps of Engineers, but the project's website does not indicate who requested it.⁹ As the project was not intended to cause the accretion or benefit adjacent properties, the updrift property owners probably did not participate or consent to the interference with the natural drift of sand.¹⁰ As a result, they likely have a strong claim of title to the accreted land, although individual claims would have to be analyzed on a case-by-case basis.

⁴ *Shively v. Bowlby*, 152 U.S. 1, 35 (1894).

⁵ However, there are special benefits afforded to the property owner from a larger beach, such as additional shore protection, that can offset any loss in value associated with a property that no longer "touches" the water. Further, if the state owns the strip of land between the property and the water, the property owner landward of the strip will not necessarily lose access, but only the right of exclusivity. The Florida Supreme Court recently held that littoral owners have only a right of access to water and "there is no right to maintain a constant boundary with the water's edge." *Walton County v. Stop the Beach Renourishment, Inc.*, No. SC06-1449 at 34 (Fla. S.Ct. Sept. 29, 2008).

⁶ *St. Clair County v. Lovington*, 90 U.S. 46, 69 (1874).

⁷ A. Dan Tarlock, *Law of Water Rights and Resources* § 3:43.

⁸ *Board of Trustees of the Internal Imp. Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934 (Fla. 1987). See also, *St. Clair County v. Lovington*, 90 U.S. 46, 61 (1874) ("Upon no principle of reason or justice should [the riparian owner] be deprived of accretions forced upon him by the labor of another, without his consent or connivance, and thus cut off from the benefits of his original proprietorship.")

⁹ http://www.lre.usace.army.mil/who/operationsofficehomepage/project_overview/lexington/.

¹⁰ If they had consented or participated, the accreted land would belong to the State of Michigan. That scenario is more likely in situations where jetties or seawalls are built primarily to combat erosion.

Your report suggests "the massive accumulation of beach sand that has built up on the north and east sides of the Lexington Harbor needs to be transported to the south to continue its natural journey to the southerly beaches." This option may only be feasible if the updrift property owners consent to the removal of the sand, or they are provided just compensation for the removal.¹¹

That being said, the updrift owners do not have a claim against future erosion. If, instead of moving the sand all at once, the harbor is removed or improved to restore the natural drift, any loss of sand from the updrift property would be natural, provided it happened "gradually and imperceptibly." The property lines would shift accordingly.

Downdrift Property Owners

According to your report, beaches south of Lexington Harbor "are being starved of the natural southward movement of beach sands resulting in severe and continual erosion of private property." Michigan common law states that if the erosion is gradual, the property owner loses title. But, littoral property owners also have a proprietary interest in "the uninterrupted flow of sand carried to [their] land by the . . . 'current in [its]' natural state. . ."¹² If that flow is interrupted by a third party, as opposed to natural forces, littoral owners may be entitled to compensation for the loss of their land.

The Fifth Amendment of the U.S. Constitution prohibits the government from taking private property for public use without just compensation. Michigan courts have recognized that a taking can occur when the government eliminates access to property,¹³ maintains a nuisance that causes damage to property,¹⁴ or deprives the owner of the ordinary use of the property.¹⁵ The Corps of Engineers, the State of Michigan, and the local government have potentially taken the property of the downdrift owners because the owners no longer have access to or use of their property since it is no longer there.

An exception to the takings doctrine may impede this claim. "Damage to riparian properties arising from navigational improvements are often not compensable takings," because the owner's title is subservient to the right of the federal and state governments to improve navigation.¹⁶ This is referred to as the navigational servitude. The Federal Circuit Court of Appeals, however, has been willing to entertain takings claims against federal navigation improvements which interrupt natural sand drift currents.¹⁷ Michigan has also required compensation when navigation projects result in the loss of a beach.¹⁸

¹¹ Whether the property owners would be entitled to compensation would depend on whether the removal resulted in a taking, discussed in more detail in the next section. An important factor of any regulatory takings analysis is the extent to which the government action interferes with reasonable investment-backed expectations, so the date the updrift owners purchased their property may be relevant.

¹² *Peterman v. State Dept. of Natural Resources*, 521 N.W.2d 499, 509 (Mich. 1994) (citing *Miramar Co. v. Santa Barbara*, 23 Cal.2d 170, 173 (1943)).

¹³ *Ranson v. City of Sault Ste. Marie*, 107 N.W. 439 (Mich. 1906).

¹⁴ *Buckeye Union Fire Ins. Co. v. Michigan*, 178 N.W.2d 476 (1970).

¹⁵ *Peterman* 521 N.W.2d at 507.

¹⁶ *Peterman*, 521 N.W.2d at 508.

¹⁷ Tarlock, *supra* note 5.

¹⁸ *Peterman*, 521 N.W.2d 499.

The question before the Michigan Supreme Court in *Peterman v. State Dept. of Natural Resources* was “whether the Department of Natural Resources must compensate property owners for the destruction of beachfront property caused by the filtration of sand from the water because of the construction of a boat launch.”¹⁹ The boat launch and accompanying jetties built by the Michigan Department of Natural Resources (DNR) had an effect upon an owner of waterfront property similar to those to the south of Lexington Harbor. The jetties impeded the littoral flow of sand from north to south; subsequently, the shoreline gradually moved inland as the beach eroded. Peterman, the property owner, lost sand below the high water mark as well as a portion of his land above the high water mark.

The federal and state navigational servitude only extends inland to the high water mark. When a navigation project results in the loss of land above the high water mark (fastlands), the owner is entitled to compensation.²⁰ Because the boat launch resulted in the loss of fastlands, Peterman was entitled to compensation.

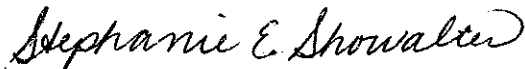
The Michigan Supreme Court, however, went a step further and awarded Peterman compensation for the loss of the land below the high water mark despite the navigational servitude. Peterman argued that compensation was required because the loss of the beach was unnecessary. The trial court had determined that the DNR’s “unscientific construction and design of the jetties proximately caused the destruction of [Peterman’s] beach.”²¹ The Supreme Court held that because the boat launch could have been constructed in such a way to prevent the erosion of the beach, the project served no public interest and Peterman was entitled to compensation under the takings clause.²²

Whether the property owners downdrift from Lexington Harbor would be entitled to compensation would depend on a number of factors, which could include the extent of erosion and the design of the harbor. If the erosion has not caused the loss of fastlands, the navigational servitude could bar any claims for compensation.

Conclusion

The restoration and remedial options for Lexington Harbor may be limited by the rights of the updrift and downdrift property owners. I hope you find this information helpful. If you would like additional information or have follow-up questions, please let us know.

Sincerely,



Stephanie Showalter
Director, National Sea Grant Law Center

Jonathan Proctor
Research Associate

¹⁹ *Id.* at 502.

²⁰ *Id.* at 510.

²¹ *Id.* at 511.

²² *Id.* at 512.