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RE: State Policies for Removal of Structures from Active Beach (MASGP 07-007-05)

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Dear Betsy,

Recently you requested assistance investigating state regulations and policies addressing structures on the active beach due to erosion. You also indicated that it would be helpful to know the outcomes of any legal challenges. This letter contains the results of our research into the applicable law. Please be aware that the National Sea Grant Law Center does not offer formal legal advice, and that this letter is intended for informational purposes only.

As we understand it, you are specifically seeking information on state mechanisms for the removal of structures. While many states have erosion management programs, we have limited our analysis below to removal authorities. Please be advised that, due to the short turnaround time, we have also limited our research to statutory and regulatory authorities. Additional research may be needed to determine how these policies and programs work in practice.

Before discussing the individual state programs, it is important to note that most challenges to permit conditions and erosion controls will be based on takings claims. The Fifth Amendment of the U.S. Constitution prohibits the government from taking private property for public use without compensation. Regulations can exact a taking if the government action deprives the landowner of all economically viable use of the land.¹ If a regulation, however, only prevents a landowner from conducting certain activities without removing all viable use, courts will examine the purpose and the effect of the regulation. Using the "Penn Central Analysis," named for the case that established it, the court weighs the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the

¹ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

government action.² As will be detailed below, states that allow temporary structures or variances for small lots can often avoid compensating landowners.

Delaware

The Beach Preservation Act (BPA) prohibits the construction, modification, or reconstruction of any structure or facility on any beach seaward of the building line without a permit from the Department of Natural Resources and Environmental Control (DNREC).³ The "building line" is a line generally paralleling the coast set forth on maps prepared by the DNREC.

In general, structures are prohibited seaward of the building line unless the DNREC determines that the size of the area of the parcel of real property located landward of the building line is inadequate for construction of the proposed structure.⁴ If a structure located seaward of the building line is completely destroyed, a permit or letter of approval must be obtained from the DNREC prior to reconstruction.⁵ If a new or reconstructed structure does not have to be located seaward of the building line to achieve its intended purpose, then such structure must be located entirely landward of the line.⁶ If there is inadequate space available, the structure shall be located as far landward as possible.⁷

Structures erected in violation of the BPA are considered public nuisances and must be removed upon notification by the DNREC.⁸ In *Lynch v. State*,⁹ John Lynch was sentenced to 180 days in jail and a \$1,800 fine for erecting a fence that extended into the beach past the building line without obtaining the proper permits and for failing to remove the fence once notified by the DNREC. The Secretary of the DNREC has the power to issue cease and desist orders to any person violating any provision of the BPA and its regulations.¹⁰

Florida

Shoreline construction in Florida is primarily governed by the Beach and Shore Preservation Act (BSPA). The BSPA prohibits construction within 50 feet of the mean high water line.¹¹ The BSPA also provides that Coastal Construction Lines be established by the Department of Environmental Protection (DEP) on a county-by-county basis. The BSPA bans most coastal construction and other activities seaward of the established control line. Any unauthorized construction or excavation seaward of the line violates the statutory provisions and is declared to be a public nuisance. Structures that existed or are under construction before the control line is established are exempt from these requirements.¹²

The BSPA further authorizes DEP to require a person performing unauthorized construction or excavation to remove the structure or refill the excavation. If the offender does not comply within a reasonable time, the department may then perform the work itself and assess its costs as a lien on that property.¹³ Violation of the control line restrictions constitutes a first degree misdemeanor and is considered a separate offense, punishable

² See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

³ 7 DEL. CODE ANN. § 6805(a)(1).

⁴ 7-5000-5102 DEL. CODE REGS. § 3.1.1.1.

⁵ *Id.* § 2.7.

⁶ *Id.* § 2.8.

⁷ *Id.*

⁸ 7 DEL. CODE ANN. § 6807(b).

⁹ 1994 Del. Super LEXIS 654 (Del. Super. Ct. 1994).

¹⁰ 7-5000-5102 DEL. CODE REGS. § 8.1.

¹¹ FLA. STAT. § 161.052.

¹² *Id.* § 161.053.

¹³ *Id.*

by fines of up to \$10,000 for each day of the violation.¹⁴ DEP also has the authority to suspend or revoke an existing permit if the activity or permit holder is found to violate BSPA rules, regulations, or other laws.¹⁵

A structure located below the mean high water line that serves no public purpose, which is dangerous to or in any way endangers human life, health, or welfare, or which proves to be undesirable or becomes unnecessary, as determined by the DEP, must be adjusted, altered, or removed by the property owner.¹⁶ This provision applies regardless of date of construction or whether a permit has been issued. If the property owner does not adjust, alter, or remove the structure, the DEP may alter, adjust, or remove such coastal construction or structures at its own expense and place a lien on the property. State attorneys and sheriffs and their deputies assist the DEP with enforcement. Upon the request from the DEP, state attorneys "shall institute and maintain such legal proceedings as may be necessary to carry out the enforcement of the provisions of this part."¹⁷

Maine

Maine's coastal wetlands sand dunes are resources of state significance.¹⁸ To protect these fragile resources, the Maine Department of Environmental Protection (DEP) promulgated rules for coastal sand dunes¹⁹ to provide guidance to applicants seeking permits under the Maine Natural Resources Protection Act (NRPA) for certain activities in a coastal sand dune system. The DEP evaluates proposed developments in light of the projected impacts of future sea level rise and may impose restrictions on the density and location of development and on the size of structures. For example, the DEP will not permit a project if, within 100 years, the property may reasonably be expected to erode as a result of changes in the shoreline such that the project is likely to be severely damaged by a two foot rise in sea level.

Normally a permit is not required for maintenance and repair if there is no additional intrusion into the protected resource. However, the maintenance and repair permit exception does not apply if the repair is to more than 50 percent of a structure located in a coastal sand dune system.²⁰ This provision allows the DEP to evaluate whether a damaged structure should be rebuilt or relocated after a storm or event. Although it is always challenging to enforce such rules (there are numerous methods to determine property values and structural damage), this could facilitate removal in some cases.

Removal, however, is explicitly addressed in the DEP's standard permit conditions. One of the standard conditions applicable to all permits granted under the Coastal Sand Dune rules address shoreline recession and states:

If the shoreline recedes such that a coastal wetland, as defined under 38 M.R.S.A. § 480-B(2), extends to any part of the structure, including support posts, but excluding seawalls, for a period of six months or more, then the approved structure along with appurtenant facilities must be removed and the site must be restored to natural conditions within one year.²¹

The NRPA has been challenged in the Maine courts. In *Hall v. Board of Environmental Protection*,²² the Maine Supreme Court upheld the state's denial of a permit to rebuild a cottage lost to coastal erosion. After losing their

¹⁴ *Id.* § 161.054(1)

¹⁵ FLA. ADMIN. CODE ANN. r. 16B-33.019(1)-(3) (1985).

¹⁶ FLA. STAT. § 161.061.

¹⁷ *Id.* § 161.071.

¹⁸ 38 ME. REV. STAT. § 480-A.

¹⁹ 06-096 ME. CODE R. Chapt. 355 available at <http://www.maine.gov/sos/cec/rules/06/096/096c355.doc>.

²⁰ 38 ME. REV. STAT. § 480-Q(2).

²¹ 06-096 ME. CODE R. Chapt. 355, § 10(A).

²² 528 A.2d 453 (Me. 1987).

summer cottage to beach erosion, the Halls acquired local building permits and began constructing a permanent residence on their property. When the Board of Environmental Protection (BEP) denied the Halls' after-the-fact application for a coastal sand dune permit, the Halls sought judicial review claiming the permit denial exacted a taking of their property without compensation. The Supreme Court disagreed. In takings cases, the burden is on the landowner to prove, among other things, that government regulation has rendered the property useless. Although the Halls were not permitted to build a permanent structure, they were not prohibited from using temporary structures, such as campers, to live on the parcel in the summer months. Since "beneficial and valuable uses of their property remain available to the Halls despite the denial of a building permit by the BEP," no taking had occurred.

Several enforcement mechanisms are available to the DEP. First, DEP staff, inland fisheries and wildlife game wardens, Department of Marine Resources marine patrol officers, and all other law enforcement officers are authorized to enforce the NRPA and associated permits.²³ In addition, violations of the coastal sand dune rules, including permit conditions, may be enforced by the Attorney General who is authorized to "institute injunction proceedings to enjoin any further violation thereof, a civil or criminal action or any appropriate combination thereof."²⁴ The courts are further authorized to "order restoration of any area affected by any action or inaction" found to be in violation of an law administered by the DEP or permit issued by the Board "to its condition prior to the violation or as near thereto as may be possible."²⁵

Michigan

Part 323 (Shorelands Protection and Management) of the Natural Resources and Environmental Protection Act governs activities occurring in high risk erosion areas of the Great Lakes shoreline. The Act requires the Michigan Department of Environmental Quality (MDEQ) to identify high-risk areas and "determine if the use of a high-risk area shall be regulated to prevent property loss or if suitable methods of protection shall be installed to prevent property loss."²⁶ A setback, based upon a projected rate of erosion over a period of 30 years, is used to prevent property loss. Local units of government may adopt a zoning ordinance to regulate high risk erosion areas. In the absence of a local ordinance, a permit application must be submitted to the MDEQ to erect, install, move, or enlarge a permanent structure.²⁷

A permit for a permanent structure will be approved if the structure is landward of the setback line and, if small, readily moveable.²⁸ If a nonconforming structure deteriorates or becomes damaged, it may be restored if the repair costs do not total more than 60 percent of the replacement value of the structure.²⁹ If the cost is more than 60 percent, but less than 100 percent, the structure may be restored if it was damaged by a force other than erosion, would be at least 20 feet landward of the erosion hazard line, and the reconstructed building would be a readily moveable structure.³⁰ If the building has been totally destroyed, the permit requirements for new permanent structures apply.

Circuit courts in Michigan, upon a showing by the MDEQ that a rule violation has occurred, are authorized to issue any necessary order to correct the violation or restrain the landowner from further violation.³¹

²³ 38 MICH. REV. STAT. § 480-R(2).

²⁴ *Id.* § 348(1).

²⁵ *Id.* § 348(2).

²⁶ MICH. COMP. LAWS § 324.32305.

²⁷ MICH. ADMIN. CODE r. 281.22(7).

²⁸ *Id.* § 281.22(8).

²⁹ *Id.* § 281.22(15).

³⁰ *Id.*

³¹ MICH. COMP. LAWS § 324.32312.

New York

The Coastal Erosion Hazard Areas Act authorizes the Department of Conservation (DEC) to map coastal erosion hazard areas and adopt regulations for certain activities in these areas. A "coastal erosion hazard area" is defined as an area of the coastline which is "likely to be subject to erosion within a forty-year period" or "constitute natural protective features."³² Permits, which may be issued by the DEC or certified local governments, are required for the construction or placement of a structure, or any action or use of land which materially alters the condition of land.

"The construction or placement of a nonmovable structure, or nonmovable major addition to an existing structure, is prohibited within structural hazard areas."³³ Movable structures may be permitted within a hazard area only if no permanent foundation is attached, the structure is placed no closer than 25 feet to the landward limit of a bluff, and "a plan for the landward relocation of a movable structure, when threatened by shoreline recession" is included with each coastal erosion management permit application.³⁴ Movable structures located within an erosion hazard area pursuant to a permit, "must be removed before the receding edge recedes to within 10 feet of the most seaward point of the movable structure."³⁵

The Coastal Erosion Hazard Act and permits issued pursuant to it may be enforced by every police officer and designated DEC employees.³⁶

North Carolina

The Coastal Area Management Act of 1974 (CAMA) requires permits for development in areas of environmental concern, which include beaches and coastal wetlands. The Coastal Resource Commission's rules establish the building setback lines for development in the Ocean Hazard Area of Environmental Concern. The setback line is determined by multiplying the erosion rate by 60, with a minimum setback being 120 feet. A greater setback line is required for large structures (over 5,000 sq. feet). Most development is required to be located landward of the erosion setback line. The regulations for ocean hazard areas require the following condition be added to all oceanfront development permits:

any structure shall be relocated or dismantled when it becomes imminently threatened by changes in shoreline configuration as defined in 7H .0308(a)(2)(B). The structure(s) shall be relocated or dismantled within two years of the time when it becomes imminently threatened, and in any case upon its collapse or subsidence. However, if natural shoreline recovery or beach renourishment takes place within two years of the time the structure becomes imminently threatened, so that the structure is no longer imminently threatened, then it need not be relocated or dismantled at that time.³⁷

Local governments and the Secretary of the N.C. Department of Environment and Natural Resources (DENR) may initiate proceedings against violators in state court to obtain injunctive relief "to restrain the violation and for a preliminary and permanent mandatory injunction to restore the resources."³⁸ The state Attorney General shall act as the attorney for the Commission and shall initiate actions at the request of the DENR to enforce CAMA.

³² N.Y. ENVTL. CONSERV. LAW § 34 – 0103.

³³ N.Y. COMP. CODES R. & REGS. tit. 505 § 7(b).

³⁴ *Id.* tit. 505, § 7(a).

³⁵ *Id.*

³⁶ N.Y. ENVTL. CONSERV. LAW § 71-0201.

³⁷ 15A N.C. ADMIN. CODE § 7H.0306(k).

³⁸ N.C. GEN. STAT. § 113A-126.

South Carolina

The Coastal Tidelands and Wetlands and Beachfront Management Act (BMA) regulates beachfront development in South Carolina.³⁹ The BMA directs the South Carolina Department of Health and Environmental Control (Department) to administer the BMA and to promulgate regulations pursuant to it. The Office of Coastal Resources Management (OCRM), a division within the Department, is responsible for permitting. The Department has the authority to remove all erosion control structures which have an adverse effect on public interest.⁴⁰

Setback lines are established at a distance of forty times the average annual erosion rate, determined by historical and other scientific means and adopted by the Department in the State Comprehensive Beach Management Plan. All setback lines must be established no less than twenty feet landward of the baseline, even in cases where the shoreline has been stable or has experienced net accretion over the past forty years.⁴¹ New construction seaward of the setback line is prohibited, with exceptions.⁴² Construction between the baseline and the setback line may be permitted if certain requirements are met.⁴³ In some circumstances, the OCRM may grant special permits to allow development seaward of the baseline. To qualify, the structure must be built as far landward as possible and have no impact on the primary sand dune or active beach area. An active beach is defined as "that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean."⁴⁴ In addition, with respect to erosion,

A structure cannot be constructed or reconstructed on a primary oceanfront dune or on the active beach, and in the event that the beach erodes so that in the future the permitted habitable structure is located on the active beach, the property owner agrees to remove the structure at his own expense.⁴⁵

The BMA has been challenged in court, most notably in *Lucas v. South Carolina Coastal Council*.⁴⁶ Lucas had purchased his property before the passage of the BMA. The Council subsequently established a setback line landward of Lucas' lots, leaving him unable to develop his property. Lucas claimed that the regulations resulted in an unconstitutional taking. The Supreme Court held that a regulatory taking had occurred because the government had deprived Lucas of all economically beneficial uses of his property.⁴⁷

The enforcement officers of the Natural Resources Enforcement Division of the South Carolina Department of Natural Resources may serve warrants to enforce the provisions of the BMA.⁴⁸ The South Carolina circuit courts have the jurisdiction to restrain violators upon a lawsuit by the OCRM, the state Attorney General, or any person adversely affected by the violation.⁴⁹

Texas

The Texas Open Beaches Act (TOBA) was passed in 1959 to provide that the public has the "free and unrestricted right of ingress and egress to and from" public beaches, defined as the area between the line of vegetation and the mean low tide line. The TOBA further prohibits the construction of an "obstruction, barrier,

³⁹ S.C. CODE ANN. § 48-39-10.

⁴⁰ *Id.* § 48-39-120 (C).

⁴¹ S.C. REG. ANN. § 30-15.

⁴² S.C. CODE ANN. § 48-39-290.

⁴³ *Id.*

⁴⁴ *Id.* § 48-39-270.

⁴⁵ S.C. CODE ANN. REGS. § 30-15 (F).

⁴⁶ 505 U.S. 1003 (1992).

⁴⁷ *Id.*

⁴⁸ S.C. CODE ANN. § 48-39-170.

⁴⁹ *Id.* § 48-39-160.

or restraint of any nature which would interfere with the free and unrestricted right of the public” to access the beach.⁵⁰ Holding back the sea, either through bulkheading or seawalls is, therefore, not permitted along public beaches. Buildings located seaward of the vegetation line must be removed if those buildings serve as an impediment to public access to the beach. Any county attorney, district attorney, or the state attorney general can sue to obtain a court order or injunction “to remove or prevent any improvement, maintenance, obstruction, barrier, or other encroachment on a public beach, or to prohibit any unlawful restraint on the public’s right of access to and use of a public beach or other activity that violates” the TOBA.⁵¹

Because the vegetation and low tide line shift due to natural coastal processes, the demarcation lines for public beaches are not static. The public’s right of access, or easement, moves as well. Before the TOBA may be enforced, the public must acquire an easement to the property.⁵² In some cases, owners dispute the fact that an easement exists. The government must prove that an easement exists by virtue of prescription, dedication, or custom.⁵³ Even if an easement exists, some landowners dispute the “rolling easement” element of TOBA. For example, in *Arrington v. Texas General Land Office*, after a storm damaged Arrington’s property and moved the vegetation line under his home, the Land Office denied his permit to rebuild.⁵⁴ Although Arrington acknowledged that a public easement existed, he argued that the easement had not moved with the new vegetation line.⁵⁵ The court disagreed, stating that “once a public beach easement is established, it is implied that the easement moves up or back to each new vegetation line, and the State is not required to repeatedly re-establish that an easement exists up to that new vegetation line.”⁵⁶

Some landowners affected by TOBA have argued that the removal of their structures constitutes a taking in violation of the Fifth Amendment. In *Lucas v. South Carolina Coastal Council*, the U.S. Supreme Court established that a regulatory taking occurs when the government deprives the owner of “all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”⁵⁷ However, the Supreme Court noted two exceptions: 1) if the principles of nuisance and property law prohibit the owner’s use of the land, then the state is not “taking” anything by regulating the landowner’s use of the land; and, 2) a taking may not occur when the regulation restricts a use that the property owner does not have in his title.⁵⁸

Although some Texas landowners may claim an unconstitutional taking, others may fall under one of the exceptions in *Lucas*. For instance, Texas law requires those selling their houses after October 1, 1986 to include a clause in the deed notifying the new owners that structures seaward of the vegetation line are subject to a lawsuit by the state to remove the structures. Since the right to build seaward of the vegetation line is not part of those titles, owners who purchase beachfront property purchased after 1986 may not claim a taking.⁵⁹ In a recent case, *Severance v. Patterson*, the court held “the public’s rolling beach easement was established long before Severance [the landowner] ever purchased her rental properties, and the easement is one of the ‘background principles’ of Texas littoral property law. She has not suffered a taking because her right to exclude the public never extended seaward of the dynamic, natural boundary of the beach.”⁶⁰

⁵⁰ TEX. NAT. RES. CODE § 61.013(a).

⁵¹ *Id.* § 61.018(a).

⁵² *Id.* § 61.011(a).

⁵³ *Id.*

⁵⁴ 38 S.W.3d 764 (Tex. App. 2001).

⁵⁵ *Id.*

⁵⁶ *Id.* at 766.

⁵⁷ 505 U.S. 1003 (1992).

⁵⁸ *Id.* at 1029-1032.

⁵⁹ Holmes, Mark D. “What about My Beach House? A Look at the Takings Issue as Applied to the Texas Open Beaches Act” 40 HOUS. L. REV. 119, 146 (2003).

⁶⁰ 485 F. Supp. 2d 793, 804 (S.D. Tex. 2007).

In *Arrington v. Mattox*, a hurricane moved the vegetation line landward and the property owner built a retaining wall seaward of the vegetation line. The state filed suit and the trial court ordered the structure removed. The property owner argued that that was an unconstitutional taking. The court disagreed, holding that TOBA did not create the government's power to take land, but only furnished a means to enforce the public's existing rights of acquiring its easements through prescription, dedication, and custom.⁶¹ The court cited a case in which a storm destroyed a home on Galveston Island and left the remains of the home seaward of the vegetation line.⁶² In that instance, the attorney general sought to enjoin homeowners from rebuilding their house. The Texas Court of Appeals held that the public had acquired a right of use or an easement in the vicinity of appellants' property by custom. The court further held that the landowner's complaint of an unconstitutional taking was without merit, reasoning that the easement on his property was acquired through custom, not through the TOBA.⁶³

Tropical Storm Frances left several homes seaward of the vegetation line. In that instance, the state attorney general concluded that the homes did not require removal.⁶⁴ However, the city denied the homeowners' petitions to reconnect utility services, citing public access reasons. The homeowners brought suit. The Fifth Circuit held that enforcement activities must be rationally related to the goal of protecting beach access and that all similarly situated properties must generally be treated the same way.⁶⁵ In this instance, the court held that the city had provided no rational reason why refusing to reconnect the utilities related to protecting public access.

TOBA is also protected from takings claims under the second Lucas exception – if the principles of nuisance and property law prohibit the owner's use of the land, then the state is not "taking" anything by regulating the landowner's use of the land because the owner would not be able to use the property due to nuisance laws. Essentially, if the use of the property would be considered a nuisance under Texas common law, then there would be no takings claim.

Virginia

The Virginia Primary Sand Dune Protection Act requires permits for most construction activities that have the potential for encroaching or damaging coastal primary sand dunes and state-owned beaches.⁶⁶ Permits may be issued by local governments with approved primary sand dune zoning ordinances or the Marine Resources Commission. The Commission has issued a specific policy applicable to the barrier island systems on the seaside of the Virginia portion of the southern Delmarva peninsula.⁶⁷

The policy warns property owners that if a structure is destroyed or damaged by natural events, reconstruction in the original location may not be authorized. The owner's permit application will be evaluated as if no structure was present on the property. Furthermore, if a structure is damaged beyond repair and not restored to a usable state within one year, the owner "shall be responsible for the complete removal of all vestiges of the structure and materials resulting from them, including the septic tank, distribution box, and drainfields in their entirety."⁶⁸ For undamaged structures, relocation plans must be submitted "once local mean high water approaches a structure to within 10 times the average recession rate."⁶⁹ Any movement or relocation must be approved by the Commission.

⁶¹ 767 S.W.2d 957 (Tex. App. 1989).

⁶² *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. App. 1986).

⁶³ *Id.*

⁶⁴ *Mikeska v. City of Galveston*, 451 F.3d 376 (5th Cir. 2006).

⁶⁵ *Id.* at 381-82.

⁶⁶ VA. CODE ANN. § 28.2-1406.

⁶⁷ Barrier Island Policy, 4 VA. ADMIN. CODE § 20-440-10.

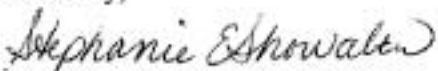
⁶⁸ *Id.* § 20-440-10(B)(2).

⁶⁹ *Id.* § 20-440-10(E)(c).

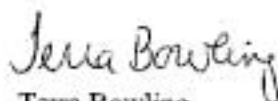
The Commission is authorized to investigate any project which alters dunes or beaches and prosecute all violations of any provision of the Act. Upon the petition of the Commission or a wetlands board, a circuit court may enjoin the unlawful act and order the violator "to take any steps necessary to restore, protect, and preserve the dunes and beaches involved."⁷⁰

I hope you find this letter helpful. Please let me know if you or any state coastal managers have further questions. Thank you for bringing you questions to the National Sea Grant Law Center.

Sincerely,



Stephanie Showalter
Director



Terra Bowling
Research Counsel

⁷⁰ *Id.* § 28.2-1419.