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Re: Effect of Hurricane Sandy on coastal property lines in New York (NSGLC-12-04-10)

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Dear Jay,

Please find below our examination of the effect of Hurricane Sandy on coastal property lines in New York. Hurricanes often result in the sudden and perceptible loss of or addition to land by the action of the water, or "avulsion." Generally, with shoreline changes resulting from avulsion, the boundary between private and public property does not change. In contrast to the doctrines of erosion, reliction, and accretion, the doctrine of avulsion operates to maintain

the boundary between public and private land at the Mean High Water Line as it existed before the avulsive event.¹

In *Schwarzstein v. B.B. Bathing*, a New York court noted the characteristics of avulsion: “The change ... was not a gradual or imperceptible encroachment on the land, but occurred by reason of avulsion, sudden or violent action of the elements perceptible while in progress ... Such loss of the land was not erosion or the gradual eating away of the soil, and did not change the boundaries nor did the owner lose his title where the extent and quantity of his land was apparent, the owner endeavoring as best he might to protect and reclaim his property.”²

Whether any particular event is avulsive is a fact-intensive determination that depends on the length of time over which the land loss occurs. In one instance, the New York State Supreme Court held that the loss of land over a three-year period was an avulsive event due to several heavy storms.³ In making its decision, the court reasoned that “much of the loss took place upon particular occasions during heavy storms ... These losses were not gradual and imperceptible [but] ... caused by what might well be described as a cataclysm or catastrophe.”⁴

In the event that land is lost during an avulsive event, a landowner traditionally has had the right to restore or reclaim lost land. In New York, a property owner seeking to restore land must apply to the Commissioner of General Services. “

The commissioner may, in his discretion and upon such terms and conditions, including consideration, as to him shall seem just and proper, authorize the taking of soil from state land under water where such soil is to be taken by an upland owner bordering on state land under water for the improvement or the protection of his upland from the action of the water, or for the restoration, in whole or in part, of his upland where there has been sudden washing away and loss of soil thereof by violent storm and consequent avulsion, but where the title to his land has not been lost, the boundary line remaining the same.⁵

In other words, landowners can apply for permission to use state land to restore their property. There are exclusions to the Commissioner’s authority. For example, the Commissioner is not authorized to allow removal of material from under the waters of Lake Erie in certain places and the Commissioner must consult with the United States Army Corps of Engineers when licensing the taking of materials from lands bordering Long Island.⁶

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. New York*, 523 U.S. 767, 784 (U.S. 1998).

² 203 A.D. 700, 703 (N.Y. App. Div. 1922).

³ *In re Town of Hempstead*, 144 NYS.2d 440, 444 (N.Y. Sup. Ct. 1954).

⁴ *Id.*

⁵ NY CLS Pub L § 22.

⁶ *Id.*

In conclusion, generally speaking, if land is added to the shore by an avulsive event, shoreline boundaries will remain at the high water mark as it existed before the storm. A landowner who loses land (if the hurricane caused sudden erosion) could seek permission from the state to restore his land to the pre-event boundary line. If you would like additional information, please let us know.

Sincerely,

/s/ Terra Bowling
Research Counsel, National Sea Grant Law Center