

Food for Thought

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1) Concept of Post Storm “High Water Avulsion Line”

- Traditional Littoral Privilege of Upland owner after Avulsion Event
- When an sudden erosion event (avulsion) leads to the loss of land, the traditional common law doctrine of avulsion recognizes the affected property owner’s right to reclaim the lost land within a reasonable time.
- But wait!

Severance v. Patterson (Texas Supreme Ct. 2012)

- Carol Severance's Home Pre and Post Hurricane Ike





Post Hurricane Ike



Severance Case and Doctrine of Avulsion

- “Property along Gulf subject to hurricane and tropical storms... (t)his is an ordinary hazard of owning littoral property...”
- While mainly addressing Rolling Public Easement impacts of severe and sudden storm caused erosion (avulsion) and the resulting shifting of public rights, the Court stated that the upland owners rights are indeed impacted by such sudden change: “... The division between public and private ownership remains at the mean high tide line in the wake of naturally occurring changes, and even when boundaries seem to to change suddenly” (emphasis added) Severance 370 S.W. 3rd 705



Pre Ike



6 days later

- Reasoning shows an intent to divest the owner of the land that lies seaward of the new High Water Avulsion Line, contrary to what is custom in most other states.
- Justice Madina's dissent in Severance seems to support this idea "... on one hand a property owner loses title to land if, after a hurricane or tropical storm, such land falls seaward of the (MHTL). Severance at 373

Application to RI Property Law

- Use of the concept of High Water Avulsion Line in the Regulatory Process in RI
- Our Courts have not directly addressed the common law Doctrine of Avulsion nor has the Legislature
- Opportunity for well crafted argument based upon highly migratory nature of RI Coast, Sea Level Rise and higher intensity coastal erosional events due to Climate Change to support Severance approach to use regulatory setbacks from a High Water Avulsion Line

- Possible regulatory scheme requiring all post storm rebuilds to be based upon a minimum set back from new (post storm) High Water Avulsion Line
- Not to be confused with well established Public Trust Doctrine concept of State v. Private **ownership** at MHL
- Merely a regulatory setback for rebuilding in recognized Highly Prone Erosion Zone

2) Passive Takings

St Bernard Parish Government v. US (2015)



- Post Katrina complaint filed in Fed Court by Parish against US (ACOE)
- Alleges ACOE “constructed, expanded, operated and failed to maintain the Miss. River- Gulf Outlet...” which “...significantly increased storm and surge flooding” throughout many private properties in violation of 5th Amendment” (Parish v. US at 619).

Lower Court used Supreme Court guidance for 5th Amendment temporary takings analysis

- Arkansas Game and Fish Commission v. US 133 S. Ct. 511 (2012):
 - Plaintiffs held protectable property interest
 - Plaintiffs had investment backed expectations
 - Foreseeable to Gov. that its actions would substantially increase storm surge during hurricanes

- Arkansas (cont.)

- There was causal link between Gov. action and flooding of plaintiff's prop.

- The injury from flooding was substantial and severe. (St. Bernard Parish at 693)

- Parish Court Held plaintiffs has successfully established all five factors and therefore there was a temporary takings

Why is this case important?

- First impression where 5th Amendment claim used against Gov to establish a constitutional duty to design, construct and maintain flood control structures
- Eliminates sovereign immunity and Public Duty doctrines and other common law tort burdens of proof

- Prof Chris Serkin: A passive taking is essentially the idea that a Gov. is liable if its inaction deprives a person of property without just compensation. (for an in-depth discussion see: *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 Mich L. Rev. 345 (2014))
- Effectively inflicts upon Gov. an affirmative duty to account for changing environmental conditions or be constitutionally liable.

Questions?

Thank You!