

# Regulatory Takings & Planning for Dynamic Coasts

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Recent Developments in Takings Law: A Workshop for Planners  
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Why manage the shoreline?

# Why manage the shoreline?

- Public services such as navigation, recreation, fishing
- Valuable protections against storm surge, erosion, and other coastal hazards
- Economic revenue from tourism and marine resource based industries like commercial fishing and aquaculture
- Unique habitats and wildlife such as sea turtle nesting on beaches and juvenile shrimp development in marsh environments

# Ways we regulate shores:

Beach Nourishment

Wetland Protections

Rolling Easements

Bulkheading Restrictions/Living Shorelines

Construction Limitations



# Why is regulating the shore unique?

Shifting Property Lines -  
Avulsion, accretion, erosion

Public Trust Doctrine

State-owned Submerged Lands

Littoral/Riparian Property Rights



# Avulsion, Accretion & Erosion

- **Avulsion** – sudden or perceptible change in the shoreline that either submerges new land or exposes new land
  - General Rule: Property lines do not change
  
- **Accretion** – gradual gaining of land along shoreline
  - General Rule: Property lines change with the shoreline
  - Exception: Artificially caused accretions
  
- **Erosion** – gradual loss of land along shoreline
  - General Rule: Property lines change with the shoreline
  - Exception: Artificially caused erosion

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# Public Trust Doctrine & State-owned Submerged Lands

- Recognizes navigable waterways as a public resource
- Public rights to use waterways for navigation, fishing, recreation, commerce
  - Rights vary by state
- State holds title to submerged lands underlying the navigable waterways for the benefit of the “public good”

# Public Trust Doctrine in Alabama

- “All navigable waters shall remain forever public highways, free to the citizens of the state and the United States.”
  - Alabama Constitution
- Also recognize fishing and submerged lands
- Applies to all navigable-in-fact waters and all tidal waters
- For tidal waters, mean high tide line marks property line between upland owner and public trust land

# Public Trust Doctrine in Mississippi

- Public Trust Tidelands Act – state policy to favor preservation of natural tidelands and their ecosystems and prevent destruction or despoliation
  - All tidelands and all submerged lands
- Coastal Wetlands Protection Act – policy of preservation for coastal wetlands
- Public rights to transportation, fishing, swimming and recreation, development of mineral resources, and environmental preservation
- Mean high tide line marks boundary between tidal property owner and state submerged lands

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# Public Trust in Louisiana

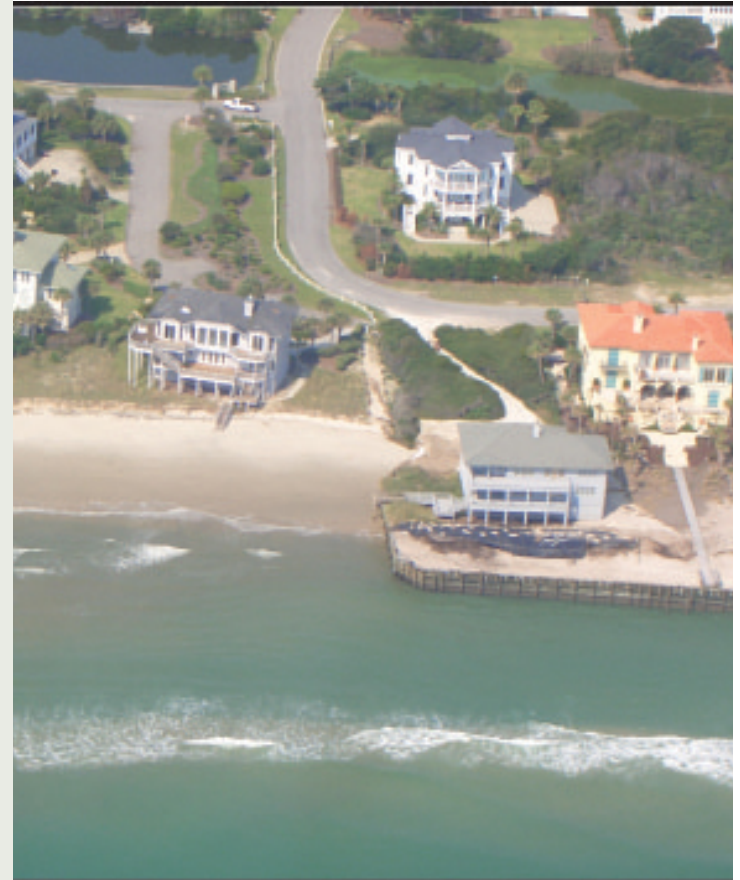
- Natural resources of the state, including air, water, and the quality of the environment, shall be protected for the benefit of the people.
  - LA constitution
- Public trust rights of navigation, fishery, recreation, and other interests
- Mean high tide line but highest winter tide along seashore

# Littoral/Riparian Rights

- Unique rights of the waterfront property owner
- Gives them special rights within a “riparian zone” (nearshore) to certain activities
- Can include: right to access water, right to harvest oysters, right to erect pier or boathouse, right to view of water
  - Varies by state
- Still subject to all other permitting conditions and generally cannot supersede the public rights
  - like fishing, navigation, or recreation

# Why this leads to challenges:

Two competing  
property interests:  
Waterfront Property Owner  
versus  
State-Owned Public Trust Lands





## Takings Challenges to Shoreline Regulation

# What are Regulatory Takings?

- U.S. Supreme Court held “that while property may be regulated to a certain extent, ***if regulation goes too far it will be recognized as a taking.***”
  - *Pennsylvania Coal Co v. Mahon* (1922)
- When has it gone too far?
- How is it different for coasts? How do takings claims interact with the public trust doctrine?

# Lucas v. South Carolina Coastal Council

- Regulation designed to prevent beach erosion prohibited all development with a setback line
  - No variance provision
  - Required “land be left substantially in its natural state”
- Destroyed “all economically beneficial or productive use” of the lots
- U.S. Supreme Court: is a taking **unless** the state could show that **background principles of nuisance and property law** already prohibit the same uses



## Homes on Lucas Properties Today

# Stop the Beach Renourishment v. FL DEP

- Beach nourishment & littoral property rights
- Waterfront property owners sued Florida claiming the beach nourishment project would be a taking of their property rights without compensation
- “Taking” claims were their property right to touch the water and right to future accretions
- Project was permitted under FL’s Beach and Shore Preservation Act

# The Renourishment Project

Destin & Walton County sought to restore beach eroded by hurricanes

Would add 75 feet of dry sand seaward of mean high-water mark

Sets fixed “erosion control line” replacing mean high-water line as property boundary

Property line becomes fixed instead of moving with the shoreline



# U.S. Supreme Court Ruling

- Focused on state property rights vs littoral property rights under Florida law
- State rights – owned the submerged lands it was filling (through FL public trust doctrine)
- Littoral rights – include right of access to water, right to view, right to receive accretions and relictions to the littoral property
- Whose rights are superior?

# U.S. Supreme Court Ruling

- State action characterized as an “avulsion” irrespective of who caused the avulsion (based on FL law)
  - Distinguishes between avulsion and accretion property rights
- Future accretions: Because state would own land exposed by an avulsion no taking of littoral property rights to future accretion occurred
- Contact with water: Relying on FL Supreme Court decision that held “there is no independent right of contact with the water” but it “exists to preserve the upland owner’s core littoral right of access to the water”

# Severance v. Patterson

- Texas rolling easements and avulsive events
- Property owner challenged Texas General Lands Office (GLO) efforts to remove rental house on Galveston Island from the public beach following Hurricane Rita
- GLO offered Severance \$40,000 to relocate or remove house
- Taking alleged was physical taking of property

# Texas Rolling Easement Doctrine

**Texas Open Beaches Act:** “the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.”

**Prohibits:** creating, erecting, or constructing any obstruction, barrier, or restraint that interferes with the public easement



# Texas Supreme Court Opinion

- Distinguished between avulsive events and gradual erosion
- Found easement did not necessarily move with vegetation line after avulsive event like hurricane
- Avulsions: State must prove that easement existed over newly exposed beach. If so, easement rolls with vegetation line.
- Erosion: easement continues to roll with vegetation line

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# Current Case Status

- Immediate fallout of ruling: Galveston Island beach nourishment project halted
- Court granted rehearing of case and heard oral arguments.
  - This opinion not officially released as precedent.
- Severance sold property at issue, Texas moved to dismiss case as moot.
- Currently waiting on ruling as to mootness.

# Implications of these Cases

- Whether or not there will be a taking turns on the “background principles” of property law
- Shoreline Background Principles include:
  - Public trust rights of access and use
  - Accretion, avulsion & erosion
  - State ownership of submerged lands
- Shoreline regulations grounded in background principles will not be a taking
- Background principles of property law determined based on state law (state specific determination)

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# Comments or Questions?

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