

Climate Change Ate My Property

September 29, 2019

As the state with the second longest coastline (8,436 miles) and the second largest number of islands (about 4,500 that are 10 acres or larger), Florida is certain to experience significant impacts from rising sea levels due to climate change. The Fourth National Climate Assessment, issued by the U.S. Global Change Research Program in November 2018, estimates that the United States will likely experience a sea level rise of between 1 foot and 4.3 feet by 2100. While the encroachment of the ocean and inundation of dry land is at a minimum an inconvenience, rising sea levels can also result in a permanent loss of ownership of a portion of the impacted property. How this can happen and what can be done to prevent such loss are important considerations for any oceanfront landowner in Florida.

Under Florida law, the state owns, in trust for the public, land that is permanently submerged that exists beneath navigable waters and the shoreline. The boundary between private beachfront land and state-owned land is the mean high-water line (the average height of the high tide line over the preceding 19 years). Fla. Const. art. X, § 11; *Broward v. Mabry*, 58 Fla. 398, 407-09, 50 So. 826, 829-30 (Fla. 1909). Unfortunately, given that shorelines are dynamic features subject to natural forces that can change the location of the mean high-water line, the boundaries of oceanfront property are not as permanent as those of landlocked property.

In addressing natural changes to the shoreline of oceanfront property, Florida law makes a distinction between sudden changes and gradual changes. “Accretion” (or erosion) means the gradual and imperceptible accumulation (or diminution) of land along the shoreline. “Avulsion” is the sudden or perceptible loss of or addition to the shoreline by the action of the water or weather. *Bd. of Trs. of the Internal Improvement Tr. Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987). It is the ability to actually perceive the change occurring over time that distinguishes the two principles. “[For the change to be perceptible, it] is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. ‘The test as to what is gradual and imperceptible ... is, that 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.’” *Id.* (quoting *Philadelphia Co. v. Stimson*, 223 U.S. 605, 32 S. Ct. 340 (1912)). Given the recent rate of sea level rise

measured at one-eighth of an inch per year, sea level rise due to climate change, barring a catastrophic event, will be regarded as a gradual and imperceptible change.

While avulsion events adding to or subtracting from an existing tract will not impact the tract's boundaries (i.e., additional dry land continues to be owned by the state, and land now submerged still belongs to the original owner), accretion (or erosion) will increase (or decrease) the size of the tract being impacted. Thus, where the shoreline of oceanfront property has been subjected to gradual erosion over time (whether due to rising sea levels or another imperceptible change), the title to land below the high-water line permanently reverts to the state of Florida (unless, of course, the natural forces reverse themselves and accretion occurs). Moreover, there is a presumption of accretion or erosion as against avulsion and a party contending avulsion has the burden of proof. *Mun. Liquidators, Inc. v. Tench*, 153 So. 2d 728, 731 (Fla. 2d DCA 1963).

To further complicate matters, oceanfront property owners also have to concern themselves with the actions of nearby property owners potentially taking action to prevent the erosion of their shorelines by erecting artificial structures (for example, seawalls or other structures intended to prevent the loss of sand/soil). Such action may exacerbate the effects of natural erosive forces on adjoining properties. While such actions may subject those property owners to liability, the fact that erosion was "initiated, accelerated, or otherwise influenced by artificial, manmade structures has no effect on the general rule of accretion. ..." *Sand Key Assocs., Ltd.*, 512 So. 2d at 937. Thus, while a property owner may be entitled to legal relief against an adjoining property owner whose actions were negligent and exacerbated erosion of the owner's shoreline, the submerged property is lost to the ownership of the state of Florida.

Given the provisions of Florida law, how do oceanfront property owners protect themselves against climate change slowly eating away at their properties? The primary option is the present construction of a bulkhead/seawall structure at or near the property's current mean high-water line. Such an option poses significant legal, permitting, environmental, and monetary considerations that will vary with the particular property at issue. In addition, as referenced above, such improvements require careful consideration of the impact on nearby property owners who could be adversely impacted. Other options include the intercession of local government through beach/shoreline replenishment projects, the construction of artificial structures restricting water flow or local erosive forces, and the construction of a public bulkhead/seawall. In certain metropolitan areas, public action may be the only available option due to the engineering challenges and ownership of the property needed to construct the necessary improvements — not to mention the potential significant costs that may be involved.

The impacts from climate change will present numerous challenges in the years ahead. The gradual loss of property of an oceanfront owner's lot is not as immediate or apocalyptic as many of the expected impacts that the media and public currently focus upon. Regardless, the rising tides are

coming. Whether the potential risks are mitigated by private or public action, Florida property owners need to be cognizant of the danger that no action presents to their vested property interests and prepare now for the mean high-water line of tomorrow.

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