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ZONING AND LAND USE PLANNING

State and Local Laws Address Coastal Erosion Management

The barrier beaches on the Eastern End of Long Island's south shore are among the area's most prized natural resources. They protect the island from the rough ocean waters, serve important recreational purposes, and are crucial to the local economies. Unfortunately, by their very nature, barrier beaches are subject to change. For example, over the past decades, the shoreline in the Southampton area has, according to one report, moved landward at an average rate of one foot to seven feet per year.¹

New York State's Coastal Erosion Hazard Areas Act, a part of the Environmental Conservation Law (ECL), recognizes that certain sections of the state's coastline, including the Long Island barrier beaches, are prone to erosion from action of the waves, currents running along the shore, tides, wind-driven water, and ice.² Storms such as nor'easters and hurricanes can cause immense damage in a short period of time. Ironically, another cause of erosion appears to be human activities such as construction of erosion protection structures.³ Indeed, there is a significant body of scientific opinion that holds, essentially, that the use of hard structures to retard the process of erosion in one coastal location will merely exacerbate the process elsewhere.⁴

The owners of beachfront homes along the East End barrier beaches thus are faced with a serious problem. They can see their structures washed into the ocean. In responding to this



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problem, owners can "retreat," that is, relocate their homes landward. They may also renourish the surrounding beach and replenish the dunes in a process known as "soft stabilization," or they may engage in "hard stabilization," which involves the "armoring" of beaches with "hard structures" such as rock jetties, rock and timber groins, seawalls, steel and timber bulkheads, and rock revetments that are designed to dissipate wave energy or to trap sand and widen beaches. In many instances, property owners see the last option as being the only one that is economically feasible and effective, at least in the short term. However, the possibility that the hard stabilization approach, while temporarily allaying the concerns of particular homeowners, might simultaneously accelerate the natural long-term process by which Long Island's south shore beaches are being narrowed has created a dilemma for government agencies seeking to satisfy both homeowners and recreational beach users.

State Law

The New York erosion act sets forth

a variety of policies regarding coastline areas most prone to erosion.⁵ For example, the act states that development in those areas should be restricted or prohibited if necessary to protect natural protective features or to prevent or reduce erosion impacts. Additionally, the act declares that public actions, such as the provision of additional municipal services that are likely to encourage new permanent activities or development within coastal erosion hazard areas, should "not occur" unless such hazard areas have been protected by erosion protection structures or non-structural measures that are most likely to prevent damages from effects of erosion during the anticipated life of the proposed activities or development.

Under the act, publicly financed structures to minimize erosion damage should be utilized only where necessary to protect human life, existing investment in development or new development that requires a location within the erosion hazard area or adjacent coastal waters to be able to function. Both publicly and privately financed erosion protective structures should be designed to minimize damage to other man-made property or to natural protective features or to other natural resources; moreover, long-term costs of such structures should be carefully weighed against public benefits before construction is undertaken.

Importantly, the state law also encourages local governments to use "all authorities that can be applied within the identified erosion hazard areas" to achieve the statute's objectives. Pursuant to this grant of authority, a number of East End municipalities, including the Towns

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of Southampton⁶ and Riverhead,⁷ and the Village of East Hampton,⁸ already have adopted, or are in the process of adopting, coastal erosion hazard area laws of their own.

Town of Southampton

The Town of Southampton adopted a coastal erosion hazard area law about 15 years ago, and amended it in its entirety last year. As currently in effect, the statute first recognizes a "coastal erosion hazard area" and a "coastal erosion hazard adjacent area" in the town, the boundaries of which are set forth on a map prepared by the New York Department of Environmental Conservation under the New York erosion act.

Southampton then bars any person from engaging in a "regulated activity" in either of those areas without first obtaining a coastal erosion management permit. A regulated activity is defined to include the construction, reconstruction, modification, restoration, or placement of a structure or addition to a structure or any action or use of land that materially alters the condition of land, including grading, excavating, artificial beach nourishment, dumping, dredging, and filling or other disturbance of soil.

Southampton will issue a coastal erosion management permit under its law only if it finds that the proposed regulated activity:

- Is reasonable and necessary, considering reasonable alternatives to the proposed activity and the extent to which the proposed activity requires a shoreline location;
- Is not likely to cause a measurable increase in erosion at the proposed site and at other locations; and
- Prevents, if possible, or minimizes adverse effects on natural protective features, their functions and protective values, and existing erosion protection structures and natural resources, including, but not limited to, significant fish and wildlife habitats.

The Southampton law also restricts regulated activities in: "structural hazard areas" (defined as "shorelands located landward of natural protective features and having

shorelines receding at a long-term average recession rate of one foot or more per year"); "nearshore areas" (which are lands under water beginning at the mean low-water line and extending waterward for a defined distance); and beach, dune, bluff and adjacent areas.

Construction Barred

A separate section of the Southampton law provides that, except in certain emergency situations immediately necessary to protect the public health, safety or welfare, neither construction of new erosion protection structures (such as a groin, jetty, revetment or breakwater) nor reconstruction or modification of lawfully preexisting erosion protection structures is allowed in any erosion hazard area or adjacent area.

The town acknowledges in the law that its limitations could cause difficulty or hardship. Accordingly, it provides for the granting of a variance in the event an applicant is able to demonstrate, among other things, that the proposed work and location will have a less adverse environmental impact than any available practical alternative. However, because the law prohibits all use of erosion protection structures except in emergencies, to obtain a variance from that prohibition, an applicant must establish "exceptional hardship." That requires, among other things, that the applicant demonstrate:

- It cannot realize a reasonable return from any use of the property without an erosion protection structure;
- The alleged exceptional hardship relating to the applicant's property is unique, and does not apply to a substantial portion of the coastline;
- The erosion protection structure and its construction, if allowed, will not alter the essential character of the neighborhood;
- The erosion protection structure is the only measure available to overcome the alleged hardship; and
- The alleged hardship was not self-created.

Village of East Hampton

The Village of East Hampton takes a different approach to the regulation of erosion protection structures. In appropriate circumstances, the village's Coastal Erosion Hazard Area Law permits the construction of erosion protection structures provided that they are not likely to cause a measurable increase in erosion at other locations and that such structures minimize the adverse effects upon natural protective features and existing erosion protection structures. In addition, such structures must be designed and constructed so as to have a reasonable probability of controlling erosion for at least 30 years.

To increase the likelihood of achieving long-term erosion control, all approved erosion protection structures in the village must be constructed of materials capable of withstanding inundation, wave impacts, weathering and other effects of storm conditions for a minimum of 30 years. The structures must be regularly maintained pursuant to a long-term maintenance program.⁹

For waterfront property owners, beachgoers and East End towns and villages, the balance between coastal development and coastal protection remains as malleable as the coastline itself. When one adds to the mix the potential for takings claims filed by property owners who may be barred from taking steps to protect their homes, it seems clear that the political and legal issues associated with erosion are likely to be around for quite some time.



1. See *Poster v. Strough*, 299 A.D.2d 127 (2d Dept. 2002).

2. ECL §34-0101.

3. *Id.*

4. See *Allen v. Strough*, 301 A.D.2d 11 (2d Dept. 2002).

5. ECL §34-0102.

6. Code of the Town of Southampton, Chapter 138.

7. Code of the Town of Riverhead, Chapter 12.

8. Code of the Village of East Hampton, Chapter 10.

9. Code of the Village of East Hampton, §10-14.