Coastal Law Series

# OCEAN COASTAL EROSION PROTECTION: JUDICIAL ALLOCATION OF SHOREOWNERS' RIGHTS AND RESPONSIBILITIES

Milton Kaplan
December 1984

New York Sea Grant Institute
State University of New York and Cornell University
37 Elk Street
Albany, New York 12246



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Sea Grant Law Program, Jaeckle Center for State and Local Government Law
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# OCEAN COASTAL EROSION PROTECTION: JUDICIAL ALLOCATION OF SHOREOWNERS' RIGHTS AND RESPONSIBILITIES

Milton Kaplan[1]

## I. Introduction

Ocean coastal lands are dynamic geomorphic structures. The ocean shoreline is constantly changing as a result of a number of natural processes. One such process is coastal erosion, defined as "the gradual eating away of the soil by the operation of currents or tides."[2] Responses to the resulting loss of land and improvements raise complex legal issues.

(1) The owner of beachfront land constructs a seawall or other structure to deflect the ocean waves and prevent further erosion of his property. The deflected waves may damage the beachfront property of his neighbor. Will the courts order the owner to compensate the neighbor for the damage?

(2) If the structure has been authorized by a law or regulation, or under a permit granted by an administrative agency, would this constitute an absolute defense to the neighbor's action for damages? Or, if not conclusive as a matter of law, would the authorization otherwise influence the result?

We acknowledge the limited significance of these issues when viewed in the larger context of public intervention to prevent or minimize coastal erosion damage. Important questions, not within the scope of this paper, remain to be addressed. They include questions regarding the potential liability of public entities for works or regulatory action in connection with erosion control, such as: (1) Is the permit granting agency liable to B for allowing the offending structure to be built? (2) If legislation prevents A from building the seawall should the enacting government unit be liable to A for losses the seawall might have prevented? (3) If a public agency builds a seawall protecting A (and others) from the ravages of the ocean, but causing damage to B's beachfront land, may B have recourse

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1. Professor of Law, State University of New York at Buffalo, Faculty of Law and Jurisprudence. Barbara S. Schifeling and David Eagan, former Sea Grant Scholars, contributed to the research.

2. Mulry v Norton, 100 NY 424, 433, 3 NE 581, 584 (1885). For a technical definition and explanation of coastal erosion, see Bascom, Waves and Beaches: The Dynamics of the Ocean Surface (rev ed 1980) (cited hereafter as Bascom.)

against the public agency? (4) If government regulation restricts private development near the shore to reduce potential damage from erosion, must the government pay compensation for the owner's loss? (5) How can existing laws governing intergovernmental relationships be applied to avoid conflicts of federal, state and local jurisdictions over regulatory policies? (6) To what extent and with what consequences does admiralty law assign responsibilities for collisions of vessels with erosion control structures?

The issues dealt with here are discussed with particular reference to coastal erosion of the shores of Long Island, New York. Similar problems afflict shoreowners in other American oceanfront settings and an analysis of New York law applicable to Long Island may contribute to an understanding of their legal implications. It would be pretentious to claim more from a study of Long Island's coastal erosion problems or of similar problems of any other single locale, given the differences both in physical environments and in the separate developments of relevant policies and legal doctrines in the several states.[3]

The critical coastal erosion problems of New York are not confined to Long Island. They occur along the New York shores of the Great Lakes, namely Lakes Erie and Ontario and the tributary Niagara River.[4] Approximately 60 of the 70.9 miles of New York shorelands of Lake Erie and the Niagara River consist of erodible bluffs and low plains.[5] The makeup of about 137 of the 289.6 miles of the southern or New York shores of Lake Ontario is similar.[6] Although the shores of the Great Lakes are immune from the ravages of the waters of the Atlantic, to some extent the causes and consequences of erosion are similar.[7] Yet, the erosion problems of the

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3. For these reasons a national scale analysis of the legal problems would entail studies of a magnitude beyond our immediate reach. Others might be encouraged to pursue similar studies focusing on particular locations or states.

4. "Shore erosion is one of the major problems along the Great Lakes shoreland." Great Lakes Basin Commission, Great Lakes Basin Framework Study, Appendix 12: Shore Use and Erosion vi (1975).

5. Id 75.

6. Id 77.

7. "While its major causes on the five Great Lakes include underground water seepage, frost and ice action, surface water runoff, and wave action, wind generated wave action causes the greatest erosion damage. Wave action works directly on the beach or at the toe of the bluffs eroding away clay, silt, sand, and gravel." Id vi. Existing and potential shoreland damages, projected to the year 2020, are estimated at about $25.1 million for Lake Erie and $88.5 million for Lake Ontario. Id 76, 78.

Great Lakes arise under circumstances somewhat different from those of Long Island and merit special, separate treatment at another time.[8]

## II. The Mechanics, Nature and Magnitude of Coastal Erosion

### A. Shoreline Dynamics and the Coastal Erosion Process

The principal natural causes of eroding bluffs and beaches are wave or tidal action (particularly storm tides), surface water runoff, and the seepage of ground water.[9] The activities of man, including the building of erosion protection devices, may hasten and intensify the erosion.[10]

#### 1. The Basic Processes Altering Shorelines

Erosion is but one of a related series of natural phenomena constantly altering ocean shorelines. The natural counterpart to erosion is accretion -- the gradual and imperceptible increase of land caused by the deposit of earth, sand or sediment by contiguous waters.[11] In addition, the shoreline is subjected to periodic storms which cause avulsion -- the sudden or violent removal of soil by action of the elements, the effect and extent of which is perceptible while in progress.[12] Avulsion often causes the loss of

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8. Erosion caused by ice formation or movement, in particular, has legal implications special to the Great Lakes and its tributary rivers, or similar water bodies. See, e.g., United States Corps of Engineers, 8th United States Army Engineer District, Detroit, Final Survey Study for the Great Lakes and St. Lawrence Seaway Navigation Season Extension, Appendix L (Report of the Legal Committee to the Winter Navigation Board) at L-8 (August 1979).

9. J. M. Heikoff, Marine and Shoreland Resources Management 42 (1980) (cited hereafter as Heikoff, Marine and Shoreland); Bascom (at 3) explains: "While any kind of disturbance in the water is likely to generate waves, there are three prime natural causes: wind, earthquakes, and the gravitational pull of the moon and the sun." And see United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of Coastal Zone Management, Natural Hazard Management in Coastal Areas II-25 (1976) (cited hereafter as Natural Hazard Management); and L. A. Ehrlich and F. M. Kulhawy, Coastal Structures Handbook Series, Breakwaters, Jetties and Groins 1 (New York Sea Grant Institute 1982) (cited hereafter as Ehrlich and Kulhawy).

10. Burke, Shore Erosion: Implications for Public Rights and Private Ownership, 1 Coastal Zone Management J 175, 180 (1974) (cited hereafter as Burke); Natural Hazard Management II-25.

11. In Re Broadway in Borough of the Bronx, 137 AD 852, 854, 122 NYS 281, 283 (1st Dep't 1910). For a technical definition and explanation of the process of accretion, see, 1 United States Department of the Army, Corps of Engineers, Coastal Engineering Research Center, Shore Protection Manual 4-80 - 4-83 (1984) (cited hereafter as the Shore Protection Manual).

12. In re City of Buffalo, 206 NY 319, 325, 99 NE 850, 852 (1912), remittitur denied, 208 NY 731, 100 NE 1126 (1912).

large sections of coastal land. The action of waves and tides combine to modify the coastline still further by the processes of submergence and reliction. Submergence results in the loss of land by its disappearance underwater and the formation of a more or less navigable body of water over it.[13] Reliction, the opposite of avulsion, is the process by which land is increased by the withdrawal of the water by which it was previously covered.[14] The modification of the shoreline by these processes is a function of both the character and the interaction of beach material, waves, winds and tides.[15]

### 2. The Dynamics of Wave and Wind Action and Shore Changes

The most important active agent in the buildup and erosion of a shoreline is wave motion, particularly the motion of breaking waves. Waves are created by wind blowing across a water surface.[16] The characteristics of waves are determined by wind speed and duration and the unobstructed water distance, or "fetch," over which the wind blows. As waves break, run up the shore, and return, they carry sedimentary material onshore and offshore.[17]

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13. Nicholsen v Leskowicz, 55 NYS2d 831, 838 [Sup Ct, Suffolk Co 1945] [not officially reported].

14. Jefferis v East Omaha Land Co., 134 US 178 [1890]. See Bottar, Coastal Processes and Changes: Legal Implications, 1 Sea Grant LJ 139, 141-43 [1976] [cited hereafter as Bottar], for an account of the legal implications of these processes.

15. Bottar 141.

16. In its manual, Low Cost Shore Protection [1981] [cited hereafter as Low Cost Shore Protection], the United States Army Corps of Engineers explains [at 4]:

> The energy to power the movement of air and water comes partly from the heat of the sun and partly from the gravitational forces of the sun, moon, and earth. Winds — currents in the air — are caused by uneven solar heating, as warm air rises and cooler air rushes in to take its place. Uneven heating also causes currents in the water. Other causes of water currents include streams or rivers entering larger bodies of water, the action of winds moving the water as they might move a raft, and the tides. The range of the tides and the strength of tidal currents are determined by the combined gravitational effects of the sun, moon, and earth.

17. Low Cost Shore Protection 7. The term "fetch" is defined as the "unobstructed distance over water in which waves are generated by wind of relatively constant direction and speed." Id 35.

Waves formed during calm weather constitute long, low swells and cause little turbulence when they break.[18] Upon breaking at the shore line, the swells run up over the foreshore of the beach until their energy is used up, then drop back under the force of gravity. Material is deposited on the beach up to the normal high water line, where it forms a low ridge or "berm."[19] Onshore winds pick up sand from the berm and carry it landward until they meet an obstruction, where a secondary ridge, called a dune, is formed on the backshore parallel to the shoreline.[20]

Seasonal changes caused by this cycle of shoreline destruction and recovery are comparatively small.[21] But strong surges[22] occasionally flood and destroy beaches and dunes, and though wave action during relatively calm periods may repair most damage to the beach by bringing sand from other areas, and the wind will rebuild the dunes, over the long run the movement landward causes part of the beach to disappear into the ocean.[23]

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18. Low Cost Shore Protection 5. Waves generated by local storms, called "seas," hit the "beach in nearly the form in which they are generated," thus are steep, the wave length being "10 to 20 times the wave height." Shore Protection Manual 1-7. Waves generated by distant storms "decay" after traveling "hundreds or even thousands of miles of calm areas before reaching the shore," hence "have lengths from 30 to more than 500 times the wave height," and are called "swells." Id.

19. Id.

20. Id. And see J. M. Heikoff, Politics of Shore Erosion: Westhampton Beach 10 (1976) (cited hereafter as Heikoff, Westhampton Beach).

21. Heikoff, Westhampton Beach 11. "Winter waves and storm surges wash sand from the beach into deeper water, and may even attack the face of the dune, forming a winter bar parallel to the shore. The moderate waves and swells of summer reverse this process. Summer waves are lower and have longer wave length. They pick up sand from the winter bar and return it to the beach face." Id.

22. The Shore Protection Manual notes, at 1-6 – 1-7:

> Wind creates currents as it blows over the water surface, producing a stress on surface water particles and starting the movement of the particles in the direction in which the wind is blowing. Thus, a surface current is created. When the surface current reaches a barrier, such as the coast, water tends to pile up against the land. Strong winds create wind setup or storm surges in this way. . . . In violent storms, storm surge may raise the water level at the shore as much as 5 meters [20 feet].

23. Id 11. Burke notes (at 180): "Beach stability is analagous [sic] to the household budget: if more goes out than comes in, there is a net loss." Since the process of accretion, like the process of erosion, is continuous, "if the sand lost through wave action exceeds the sand supplied through swells and littoral drift," the beach will "suffer net erosion."

Most waves arrive at the shore at an angle. This sets up what is known as a longshore current, which moves sedimentary material called littoral drift in a series of zigzagging directions as successive wave fronts advance and retreat.[24] Because the prevailing wind direction on the south shore of Long Island is from the east, the sand on that shore is transported in a westerly direction.[25] Along the north shore of the Island, the longshore currents usually flow east on the eastern side of headlands and west on the western side. Along relatively straight stretches of shore line, such as the shore of the eastern half of Suffolk County, the net flow is eastward.[26] If the supply of littoral drift to a particular section of beach ceases or is obstructed in some manner, the turbulent waves and the longshore current will pick up sand already there and carry it forward, causing erosion of the beach segment.[27]

## B. The Nature and Magnitude of the Coastal Erosion Problem

### 1. Magnitude on a National Scale

Coastal erosion is a national problem. It is estimated that about 20,500 or one quarter of the 84,240 miles of the nation's shorefront are subject to significant coastal erosion, and that erosion is a critical problem along 2,700 of those miles.[28] A substantial segment of the population of the United States is directly or indirectly affected by beach erosion; 50 percent of the population resides in coastal counties.[29] Moreover, the growth rate of the population within one mile of the coast is three to four times faster than the national average.[30]

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24. Shore Protection Manual 7. "The predominant direction of longshore transport is referred to as 'downdrift'; the opposite direction is called 'updrift'." Id. The movement of the current along the shore is sometimes called "littoral transport." "Longshore transport" and "longshore drift" are variant terms referring, respectively, to this movement and the material it carries.

25. Heikoff, Marine and Shoreland 44; Heikoff, Westhampton Beach 10.

26. Heikoff, Marine and Shoreland 44.

27. Heikoff, Westhampton Beach 10. And see Shore Protection Manual 1-9 - 1-12; Beacom 213-15; Burke 179-81.

28. Natural Hazard Management II-25, II-27.

29. Id II-25.

30. Id.

In 1973 it was conservatively estimated that annual losses from erosion amounted to $300 million.[31] Today the amount would surely be greater, owing to increased development in coastal areas, premium prices of coastal lands, and inflationary conditions generally. Most of the losses reflect damage to private homes, beaches and shoreline protection structures.[32] Erosion-prone areas are typically found in small cities, villages, and unincorporated areas which depend on recreation and tourism for economic survival and growth.[33] Hence these places suffer disproportionately severe economic losses from beach erosion.

### 2. Magnitude of the Long Island Erosion Problem

The Nassau-Suffolk counties area of Long Island has the unwanted distinction of leading the nation in the magnitude of its coastal stabilization and protection problems. This stems from a substantial rate of erosion, combined with very high real estate values associated with the shoreline in this densely populated, highly developed area.[34] The cost of protective measures for 279 miles of Nassau-Suffolk shoreline has been estimated at $320 million.[35] Annual damages from coastal erosion on the south shore, including the loss of land and damages to structures, have been estimated at $85,000 per mile of shore.[36] The United States Army Corps of Engineers (the Corps of Engineers) has estimated that recurrences of the tidal floods of record (the 1938 hurricane for most of Long Island and the storm of September 12, 1960 for western Long Island and the bay areas) would inflict in the bi-county area an estimated $170 million in damages on the south shore and $2 million on the north shore and the eastern coast (in 1970 dollars).[37]

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31. Id II-28.

32. Id II-25.

33. Id.

34. The Center for the Environment and Man, Inc., Coast Stabilization and Protection on Long Island 2 (prepared for the Regional Marine Resources Council, a Committee of the Nassau-Suffolk County Regional Planning Board, February 1972) (cited hereafter as Coast Stabilization and Protection).

35. Id 24.

36. Office of the County Executive, Annual Environmental Report to the Suffolk County Legislature 27-28 (June 1981) (cited hereafter as the Annual Environmental Report).

37. Coast Stabilization and Protection 28. And see the Annual Environmental Report at 27: "It is estimated that occurrence of the standard project hurricane, with tides of 15 ft. above sea level along the ocean shoreline, and over 11 ft. in the bays at high tide, would result in over $700 million in damages (1976 price level) along the south shore from Fire Island Inlet to Montauk Point."

## C. Physical Characteristics and Nature of the Erosion Problem along the Long Island Coastline

The Long Island coastline, currently the center of controversy over the private construction of erosion control devices, is varied in its physical composition and uses.[38] As Long Island is adjacent to New York City, it is under great pressure for housing and recreation uses.[39] Part of its coastline, as a result, is occupied by highly-developed, year-round residential communities.[40] Other sections of it, although still rural, contain substantial numbers of seasonal residences.[41] The remaining frontage is divided among several uses: recreational, agricultural, commercial fisheries, shipping, mining, power plants and natural preserve areas. Although most of the frontage is divided into individual and privately-owned parcels,[42] there are also significant public holdings.[43]

An understanding of Long Island's coastal erosion problems requires comprehension of important distinctions between the northern coast, which bounds Long Island Sound, and the southern, which fronts the Atlantic Ocean. The bodies of water they border, the physical materials of which the coastlines are composed, and the uses to which they are put are different.

### 1. The North Shore

The Sound itself is a partially isolated ocean area with strong tidal

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38. J. D. Warbach and D. B. Harper, A Fresh Look at the New York Coastline 75-76 [School of Landscape Architecture, State University of New York, College of Environmental Science and Forestry, Syracuse, NY, 1980] [Character Map: New York City Area, and Long Island].

39. Koppelman, Weyl, Gross, Davies, The Urban Sea: Long Island Sound 10 [1976] [cited hereafter as The Urban Sea].

40. Howell, The Delicate Business of Protecting Our Coasts, The Conservationist 6, 9 [May-June 1981] [cited hereafter as Howell].

41. Id.

42. Shorefront land in private ownership constitutes 58 of the 108 miles of southshore oceanfront; 80 of the 172 miles of south shore embayments; 124 of the 168 miles of east shore; 71 of the 87 miles of Suffolk county north shore; and 12 of the 16 miles of Nassau county north shore. Coast Stabilization and Protection 23.

43. Id. These include the Fire Island National Seashore on the southern coast, six natural wildlife refuges on Long Island itself, intensively used state parks, and two Indian reservations. Howell 10.

currents at both ends.[44] It has many features of an estuary,[45] and contains an eastward littoral drift. The north shore west of Port Jefferson is highly irregular, with deep harbors and bays, narrow beaches, and bluffs. The shore east of Port Jefferson, on the other hand, consists of gradually curving expenses, separated by slightly projecting headlands with high bluffs which contain clay or till layers more resistant to erosion than the sand or gravel of adjacent bluffs.[46]

The north shore, with its narrow beaches and high bluffs, has less of a problem with beach movement and erosion than with the crumbling and recession of the bluffs above those beaches. Bluff erosion rates at various locations along the north shore range from 0.8 to 5.2 feet a year, depending on the period of record studied.[47] With some exceptions (where rates have been up to 3.5 feet per year), as measured over the last 100 years the north shore of Suffolk county has been receding at an average rate of from 1 to 2 feet per year.[48] The Corps of Engineers has designated 96 miles of the north shore as subject to critical erosion.[49] The estimated first cost for shore protection in critical areas was $138 million (1971 dollars) and did not include the cost of annual beach nourishment.[50] Planning authorities consider that 85% of the erosion damage is not susceptible to practical remedies that are environmentally, economically, and socially acceptable.[51]

Typically suburban, the north shore contains relatively even, low-density residential and commercial development.[52] Howell explains the

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44. The Urban Sea 5.

45. Id. An estuary is "[t]hat part of the mouth or lower course of a river flowing into the sea which is subject to tide; especially, an enlargement of a river channel toward its mouth in which the movement of the tide is very prominent." Black's Law Dictionary 486 (5th ed 1979).

46. The Urban Sea 36-38.

47. Id 50.

48. Coast Stabilization and Protection 37.

49. The Urban Sea 50.

50. Id.

51. 1 New England River Basins Commission, People and the Sound: A Plan for Long Island Sound 48 (1975) [cited hereafter as People and the Sound].

52. People and the Sound 8; see also map entitled "Land Use and Critical Natural Resources."

dilemma created by efforts to protect structures in the north shore from erosion damage:

> On much of the Long Island north shore, beach movement is far less a problem to residents than the failure of the bluff edge above the beaches. Such bluffs range up to 150 feet in height and are receding at up to three feet a year in some places. Generally the north shore beaches are narrow and subject to an eastward littoral drift. While such drift provides some beach deposition, much of the beach material, which is composed of small stones and gravel as well as sand, comes from the erosion of the bluffs above.
>
> In many places on the North Shore it has been necessary to slow down or try to halt this bluff recession when it threatens structures. This is done by constructing bulkheads or revetments to reduce wave impact at the base of the bluff. Planting or vegetation on bluff slopes also helps. However, this retarding or recession also reduces the amount of material available to maintain the beach at the base of the bluff. This in turn reduces the amount of down drift material available to maintain adjacent shore sections. Consequently, each individual shoreline erosion protection proposal should be looked at on its own merits in order to determine the extent of possible negative impacts nearby.[53]

The critical issues in this study stem from those or similar "possible negative impacts."

### 2. The South Shore

The physiography of the south shore includes two distinct features, an eastern headlands portion on the Island's south fork and an off-shore barrier island complex.[54]

Characteristic of the eastern headlands section, extending from Montauk Point 33 miles west to Southampton, are truncated hills of varying heights and steepness, fronted by narrow beaches of gravel and coarse sand.[55] This headlands section has suffered severely from erosion.[56]

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53. Howell 7-8.

54. United States Department of Commerce and New York Department of State, Final Environmental Impact Statement and the New York Coastal Management Program II-2-2 (1982) [cited hereafter as New York Coastal Management Program].

55. Id.

56. Heikoff, Westhampton Beach 12-14.

West of Southampton and extending parallel to the Island 73 miles to the Nassau County–New York City boundary lies a series of barrier islands,[57] varying in width from several hundred feet to two miles.[58] The barrier beaches have attracted intense recreational use and development, including public facilities such as state parks on Jones Island and Fire Island, and the development of privately owned structures for seasonal use, notably on Fire Island and Westhampton Beach.

These barrier islands are narrow, consisting of ocean beach, irregular sand dunes and bayside tidal lagoons. They are continually subject to the action of waves, wind and westward longshore currents.[59] Separated from the irregular mainland shore by Great South Bay and other wide, shallow bays,[60] the barrier beaches bear the brunt of severe storms and protect the bays and mainland shore from storm damage.[61]

In the Montauk area at the eastern end of Long Island are cliffs up to 60 feet high. Erosion of these cliffs is a primary source of the sand of the south shore barrier beaches. The sand is carried to the beaches by the prevailing westerly littoral transport. A secondary source is probably the larger material on the narrow beaches fronting the Montauk Cliffs, consisting of well-rounded cobbles and boulders whose grinding action appears to produce the finer particles in the surf zone nourishing beaches to the west.[62]

### 3. The Erosion Problem; the Controversy

Inlets between the different barrier beaches, which permit the flow of water between the landward bays and the Atlantic Ocean, have an important effect on the beaches of the barrier islands.[63] Inlets caused by storms tend to be closed by the natural processes of the westward littoral transport, but some have been kept open by the construction of stone

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57. New York Coastal Management Program II-2-2.

58. Buttner, New York's Barrier Island System, The Conservationist 28 (May-June 1981) (cited hereafter as Buttner).

59. New York Coastal Management Program II-2-2.

60. Heikoff, Westhampton Beach 11.

61. New York Coastal Management Program II-2-2.

62. Heikoff, Westhampton Beach 12.

63. Id.

jetties.[64] Rapid erosion of Westhampton Beach[65] since 1933 is presumed to be caused by the action of the new, artificially maintained inlets,[66] through the following process:

> As the sand carried by the shore currents, usually westward but sometimes in the opposite direction, passes the inlets, some of it is picked up by the tides. The flood tide carries the sand through the inlets into the bay and deposits it in the form of a delta on the bay side of the barrier island. The ebb tide forms a similar, but smaller, delta on the ocean side of the inlet. The sediment trapped by this process and deposited in the flood tidal delta probably explains the accelerated erosion rates at Westhampton Beach since the Shinnecock Inlet was opened.[67]

A barrier beach has been likened to a "loose bag of sand; it absorbs wave energy by the movement of individual grains and transforms itself into a new shape."[68] Barrier beaches are constantly changing character. Waves may scoop up sand and deposit it farther up a beach, forming dunes. During an intense storm, the waves may break higher on the beach, washing part of the dunes away or completely overwashing the entire beach. Later waves may reconstruct the dunes.[69]

Rapid and systematic change in the south shore barrier system accounts for some long term trends, including a rising sea level and migration of the shoreline slowly toward the mainland.[70] This migration is accomplished by relocation of vast amounts of sand. Sand from in front of the barrier beach is carried up on the beach by waves, moved further inland in the form of dunes and overwash fans, and then moved by wind and water into the bay

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64. Id 14. E.g., Moriches Inlet, opened in 1931, which would have probably closed were it not for such construction in 1938 and 1952; and Shinnecock Inlet, opened by the hurricane of 1938 and stabilized in 1952 by the construction of stone jetties.

65. Westhampton Beach is a narrow barrier beach east of Fire Island, between Moriches and Shinnecock Inlets. Id 2.

66. E.g., from 1933 to 1956 the Shinnecock to Moriches portion of the Westhampton beach produced an erosion rate of 6.8 feet per year, compared with a rate of 1.8 to 0.7 feet per year during the period from 1838 to 1933. Heikoff, Westhampton Beach 14.

67. Id 15.

68. Buttner 28.

69. Id. And see Heikoff, Westhampton Beach 9-14.

70. Buttner 30.

behind the barrier. In effect, the barrier beach is walking landward over itself like the moving belt of a tank track.[71]

In sum, the erosion problems and controversies differ on the Long Island coastline. The north shore is marked by crumbling bluffs and the need for revetments and bulkheads, which concomitantly effect the width of the already narrow beaches. The south shore, faced with the Atlantic storms, consists of wide, sandy barrier beaches. The efforts at preventing erosion there center more often around devices built to trap the particles within the littoral drift, and keep or build beaches in that way.

**D. The Effects of Human Activities**

The littoral landowner[72] who builds up to the seaward limit of his property to maximize returns on his investment may interfere with natural processes of erosion protection. A first line of natural defense is provided by the sloping nearshore bottom and beach berm that absorb most of the wave energy.[73] The last zone of defense is the dunes, which absorb the energy of storm waves that overtop the berm.[74] The leveling of beach areas, particularly dunes, to make way for coastal structures, improve views of the sea, or provide easy access to the water weakens these natural defenses,[75] resulting in heavy economic losses from storm waves. Dredging operations in the construction of marinas remove natural protection against wind and waves. Pedestrian and vehicular traffic also contribute to the destruction of natural shoreline defenses by destroying vegetation, degrading dunes, and weakening banks and bluffs.[76]

To protect their investments from these losses, shoreowners and developers construct, or look to government entities to provide, beach stabilizing devices such as jetties, groins, or bulkheads, or seawalls, revetments, or breakwaters. Although they may protect the beaches and shore properties of the party installing them, they may at the same time disrupt

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71. Id.

72. The term "littoral landowner" denotes one whose premises are located on the shores of a lake or sea and is used to distinguish a riparian owner, whose lands are located on the banks of a river or stream. Allen v Potter, 64 Misc2d 938, 316 NYS2d 790 (Sup Ct, Yates Co 1970), aff'd, 37 AD2d 691, 323 NYS2d 409 (4th Dep't 1971).

73. Shore Protection Manual 1-10.

74. Id.

75. Low Cost Shore Protection 8.

76. Id.

the natural movement of water and redirect forces in unexpected and undesirable directions.[77]

There are two basic categories of protective structures, those for trapping littoral transport of sand, such as groins and jetties, and those intended to prevent erosion of the shoreline, such as seawalls.[78] A groin is a small fingerlike structure built perpendicularly to the shoreline (usually with other groins) to trap littoral drift or retard erosion of the shore.[79] Jetties are one or two groins built at the sides of an inlet to protect and maintain navigable inlets.[80]

By interrupting the flow of littoral drift, a groin or jetty causes sand to be deposited against the structure's updrift side, resulting in beach accretion there. But as the quantity of sand transported downdrift of the barrier is reduced, the beaches of neighbors on the downdrift side will be deprived of sand and consequently erode.[81] The apparent solution to the problem is to build a series of groins along an extended shoreline,[82] but this can carry heavy economic costs.[83]

77. Id.

78. S. P. Leatherman, Barrier Island Handbook 90 (National Park Service, Cooperative Research Unit, The Environmental Institute, University of Massachusetts at Amherst, 1979) (cited hereafter as Leatherman).

79. Low Cost Shore Protection 35.

80. Leatherman 91. Groins are constructed generally of stone, steel sheetpile, timber or other materials. Id 90. The Shore Protection Manual elaborates further (at 1-17):

> When sand being transported along the coast by waves and currents arrives at an inlet, it flows inward on the flood tide to form an inner bar, and outward on the ebb tide to form an outer bar. Both formations are harmful to navigation through the inlet, and must be controlled to maintain an adequate navigation channel. The jetty is similar to the groin in that it traps sand moving along the beach. Jetties are usually constructed of steel, concrete, or rock. . . . Jetties are much larger than groins, since jetties sometimes extend from the shoreline seaward to a depth equivalent to the channel depth desired for navigation purposes.

And see R. S. K. Barnes (ed), The Coastline 17 (John Wiley and Sons, London, 1977).

81. Leatherman 90-91.

82. Id 90.

83. The Corps of Engineers' plan for constructing a series of groins on the Long Island south shore from Fire Island Inlet to Montauk Point carried a price tag of $18.7 million (in 1980 dollars) as a first cost to the United States, and $15,800 annually for a period of 10

A bulkhead is a retaining structure placed on a bank or bluff to prevent sliding of the land and protect the inland area against damage from waves.[84] Bulkheads are constructed of steel, timber, or concrete piling. Though sometimes used interchangeably with "bulkhead," the term "seawall" normally denotes a massive structure resembling an enlarged bulkhead.[85] A revetment is a facing, usually of masonry or stone, erected to protect a slope, embankment or shore structure against erosion by wave action or currents.[86] The distinctions between seawalls, bulkheads and revetments are based on their differing functions. Generally, seawalls are the largest of the three because they are used to withstand the onslaught of storm waves. The primary function of bulkheads, the next in size, is to retain fill. They generally are not exposed to severe wave action. Revetments are the lightest because they are designed to protect against erosion by light wave action or currents.[87]

Seawalls, and possibly bulkheads in lesser degree, though effective in protecting backbarrier areas, actually can have a harmful effect on beaches because they prevent the natural exchange of sand between dune and beach during storms.[88] Moreover, since a significant portion of wave energy is reflected off the face of a seawall (and by the same token, a bulkhead), increasing the strength of the longshore current and accelerating the rate

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years. Heikoff, Westhampton Beach 41; and see Heikoff, Marine and Shoreland 53-55. The project was not sufficiently funded. Only 15 of 21 groins called for by the first phase of the project were built. Failure to complete the groin field and alleged engineering errors resulted in extensive damage to properties west of the groins on Westhampton Beach, leading to litigation against the Federal Government and Suffolk County. This litigation presently is before the United States District Court. Howell 7; Dallas Gatewood and Laura Durkin, Dune Road Storm Suit Cites County, Newsday, April 10, 1984; Heikoff, Westhampton Beach 43 et seq.

84. Low Cost Shore Protection 35.

85. Shore Protection Manual 1-20.

86. Low Cost Shore Protection 22-25, 36. "A revetment armors the existing slope face of a dune or embankment. . . . [Revetments] are usually only a protective armor and not a retaining structure. Because the sloping face of the [masonry or stone] revetment is a good energy dissipator, revetments have a less adverse effect on the beach in front of them than a smooth-faced vertical bulkhead." Shore Protection Manual 1-21.

87. Shore Protection Manual 6-1.

88. Leatherman 91.

of beach erosion,[89] the beaches of neighboring shoreowners are also vulnerable to damage.[90]

A breakwater is a fixed or floating barrier that protects a shore area, harbor, anchorage, or basin by intercepting and breaking the force of waves.[91] Though they can be built on the shore, they are usually located offshore. More generally built for navigational purposes, typically to provide a sheltered area for boats between the breakwater structure and the shore, they also may be used for shore protection.[92] Because all breakwaters reduce or eliminate wave action, they protect the shore immediately behind them, but the interference with natural wave action reduces longshore transport, obstructs the movement of sand along the shore and starves the downdrift beaches.[93]

## III. Some Underlying Policy Issues; the Shoreowner's Protection Act

### A. Policy Issues

Three basic approaches are taken to cope with coastal erosion problems: (1) the use of engineering structures (e.g., groins, bulkheads); (2) the use of nonstructural methods for enhancing natural processes leading to beach stabilization, such as the artificial addition of beach material; and (3) resort to public management techniques, such as government regulation of shorefront construction, or flood insurance programs. Each approach carries different economic and social costs.[94] But underlying the question whether generally or in specific situations any of the approaches should be tried are the central issues: (1) whether men should intervene at all in the natural dynamics of beach formation and reformation; (2) if so, to what extent; and (3) how the costs and benefits should be allocated among different interest groups.

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89. Id.

90. Id.

91. Low Cost Shore Protection 35.

92. Shore Protection Manual 1-22; Ehrlich and Kulhawy 28. Floating tire breakwaters are an increasingly popular type in the floating category. Id 48 et seq.

93. Shore Protection Manual 1-23.

94. E.g. the cost of a large beach nourishment project "often exceeds a million dollars per mile of shoreline." Leatherman 97. The results might be questionable, for stabilization of a barrier beach through the building of synthetic dunes "might work for some number of years and then the entire system might 'snap the strap that holds it' with disastrous results to cultural features on both the barrier and the mainland." Buttner 30.

Those who advocate a policy of minimal or no interference with the natural processes start with the premises that over the long run coastal erosion is inevitable and man's efforts to influence the processes are futile, partly because, "[i]n the absence of proven theories of beach dynamics, engineers are not able to predict to their own complete satisfaction the effect of engineering works on the future structure and stability of beaches where they have been installed"[95]; and that, in any event, the harm resulting from remedial measures may outweigh the benefits.

The policy implications are different for different interests, and the differences may produce intergroup conflicts.

Where the emplacement of protective structures is perceived to be essential to economic development of coastal areas, at the cost of beach conservation, different levels of government with overlapping jurisdictions over the areas may differ in the weighting of these contrary goals. Thus the policy of the state may be to preserve beaches in their natural condition, while that of the local government in a particular location may be to encourage development to enhance the community tax base. Or different decision-making authorities within a particular government may advocate conflicting policies.[96]

Facing a potential loss of the benefits of the natural processes to their beaches caused by a government-built jetty or groin, neighboring private shoreowners would favor a policy of letting nature take its course, creating a public-private conflict.

The same policy biases would underlie the conflict of the neighboring shoreowners with the private builder of a jetty or groin. A policy of discouraging human interference with natural beach dynamics may be a significant factor in the resolution of a conflict between private owners. The subsidiary considerations of the extent of that interference and choice of circumstances under which one of the parties might be made to suffer a disparate burden of its consequences may also be weighed in the balance. This paper is confined to the issues arising between private shoreowners, but the resolution of the issues may be influenced by a public position on whether, to what extent, and under what circumstances human activities should be allowed to alter the natural processes. That, too, will be

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95. Heikoff, Westhampton Beach 12.

96. For example, Heikoff recounts the disagreement of John Klein, Suffolk County Executive, with the county legislature over county funding of part of the project for building groins at Westhampton Beach. Id 93-97; and see Heikoff, Marine and Shoreland 55. Klein argued: "The results of man's past efforts to stabilize the primary interfaces of beaches and coasts have been mostly negative, resulting in more serious management problems than existed with the natural state. . . . Management strategies based on the concept of stable features are in conflict with nature." Id 95. [His veto of a county appropriation prevailed. Heikoff, Marine and Shoreland 55.]

explored later. At this point we take a preliminary look at the position taken by the New York legislature.

## B. The Shoreowner's Protection Act

Consistent with and supportive of New York's Coastal Management Program, in 1981 the New York legislature enacted the Shoreowner's Protection Act.[97] In furtherance of these policies the Shoreowner's

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97. Environmental Conservation Law art 34 [McKinney 1984]. The Coastal Management Program Policies include the following:

> Policy 12. Activities or development in the coastal area will be undertaken so as to minimize damage to natural resources and property from flooding and erosion by protecting natural protective features including beaches, dunes, barrier islands and bluffs.
>
> . . . .
>
> Policy 13. The construction or reconstruction of erosion protection structures shall be undertaken only if they have a reasonable probability of controlling erosion for at least thirty years as demonstrated in design and construction standards and/or assured maintenance or replacement programs.
>
> . . . .
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> Policy 14. Activities and development including the construction or reconstruction of erosion protection structures, shall be undertaken so that there will be no measurable increase in erosion or flooding at the site of such activities or development, or at other locations.
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> . . . .
>
> Policy 15. Mining, excavation or dredging in coastal waters shall not significantly interfere with the natural coastal processes which supply beach materials to land adjacent to such waters and shall be undertaken in a manner which will not cause an increase in erosion of such land.
>
> . . . .
>
> Policy 16. Public funds shall only be used for erosion protective structures where necessary to protect human life, and new development which requires a location within or adjacent to an erosion hazard area to be able to function, or existing development; and only where the public benefits outweigh the long term monetary and other costs including the potential for increasing erosion and adverse effects on natural protective features.
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> . . . .

Protection Act initially mandated the identification by the Commissioner of Environmental Conservation of coastal erosion hazard areas.[98] Within six months from the date of filing of a final identification of an erosion control area, the city, town or village having jurisdiction over the area "shall submit to the commissioner," for his approval, "an erosion hazard area ordinance or local law" regulating development within the area.[99] If a town or village, or a city other than New York City fails to submit an ordinance or local law within the prescribed time, the county is directed to submit similar legislation for review by the commissioner.[100] If a county under those circumstances, or New York City, fails to submit the proposed local legislation or its submission has been disapproved by the commissioner, the commissioner himself is required to issue and enforce his own regulations within the affected erosion hazard area.[101]

The Commissioner of Environmental Conservation must adopt rules and regulations, including minimum standards, to be followed by the local governments in framing and implementing their hazard area control laws or ordinances, and by himself in regulating such areas directly in default situations.[102]

The Waterfront Revitalization and Coastal Resources Act, enacted at the same time the New York Legislature enacted the Shoreowner's Protection Act, prescribes as a condition of state funding of municipal waterfront revitalization programs, compliance with the state coastal erosion policies enunciated in the Shoreowner's Protection Act.[103] Before approving a municipal program for funding the Secretary of State must find that the program will be consistent with the policies of the Act, including the policy "[t]o minimize damage to natural resources and property from flooding and erosion, including proper location of new land development, protection of beaches, dunes, barrier islands, bluffs and other critical coastal

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Policy 17. Non-structural measures to minimize damage to natural resources and property from flooding and erosion shall be used whenever possible. New York Coastal Management Program II-6-58 - II-6-75

98. Environmental Conservation Law sec 34-0104 (McKinney 1984).

99. Id sec 34-0105 (McKinney 1984).

100. Id sec 34-0106 (McKinney 1984).

101. Id sec 34-0107 (McKinney 1984).

102. Id secs 34-0105 - 34-0108 (McKinney 1984). The regulations are found in 6 NYCRR Part 505 (1983).

103. Executive Law art 42, enacted by 1981 NY Laws ch 840 (McKinney 1982).

features and use of non-structural meesures, whenever possible";[104] and the policy of preservation of "the protective capability of coastal land features."[105]

## IV. Liability to Adjacent Coastal Landowners for Damages from Privately Constructed Erosion Control Devices: Common Law Doctrine

The issue addressed here is whether the private landowner who erects such a structure to protect his own shores from erosion must compensate his neighbor for the neighbor's consequent erosion losses. The neighbor's claim falls within that part of the common law universe called "tort" law. "Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages,"[106] or in the form of an equitable remedy such as an injunction to prevent threatened or continuing injury.[107] Generally, the acts constituting torts are classified in terms of fault, including intentional interferences with persons or property (such as assault on persons or trespass on land), negligent actions, and actions resulting in strict liability regardless of fault (such as abnormally dangerous activities). Within and sometimes cutting across these major categories are particular fields of torts classified according to the nature of the wrongdoer's acts or their legal consequences. A major field of particular concern here is "nuisance" law.[108]

In operating within these fault-no-fault categories or fields the courts, absent statutory direction, follow the common law system of formulating and applying doctrines to fit particular factual patterns. An example is the adoption by some courts of the "common enemy" doctrine as a basis for holding that a landowner who builds a structure to fend off the

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104. Id sec 912[5].

105. Id sec 915[5]g.

106. Prosser, Handbook of the Law of Torts 2 (4th ed 1971).

107. Id. The choice of remedy itself may cause the court to invoke particular doctrines affecting the outcome of the case (e.g., if the equities rule out the granting of an injunction, the complaining landowner may lose even if other applicable substantive law doctrines are on his side). See McCann v Chasm Power Co., 211 NY 301, 308, 105 NE 416, 418 (1914), in which the court refused to enjoin the maintenance of defendant's dam causing a flooding of plaintiff's land, where the injunction would "produce great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right" (plaintiff having suffered insignificant damage).

108. See infra note 168 and text accompanying notes 358-374.

"common enemy" of floodwaters is not liable for damages to neighboring property. The court may apply or consider the doctrine in deciding a claim based on alleged nuisance arising from the erection of the erosion protection structure, and the nuisance claim may be based on alleged negligent, or non-negligent yet intentional, conduct of the party who built or is about to build the structure.[109]

We will first review the few reported ocean coastline cases, demonstrating the uncertainty of American law on the utility of the "common enemy" doctrine, with particular reference to the law of New York. We will then investigate the policy underpinnings of the "common enemy" or other doctrines applied in inland water cases.

**A. Early English Doctrine; Rex v Commissioners of Sewers**

A "common enemy of the sea" concept of immunity of the owner of seacoast land from liability to his neighbor for damages from an erosion control structure was first enunciated in England in 1828 in Rex v The Commissioners of Sewers for the Levels of Pagham, and Other Certain Places (referred to hereafter as Pagham).[110] The commissioners had erected a large groin on the Sussex coast to protect a number of coastal landowners from inroads of the sea. Cosens, the owner of a mill on adjacent land lying east of the groin, complained to the court that "the effect of this groyne was to cause the sea to flow with increased force against his land; and that in consequence thereof his land had been gradually washed away until high water mark was within fifteen yards of his mill."[111] Cosens sought compensation for the loss in value of his land, or an order directing the commissioners to erect new works for the protection of his land.

The issue came down to the question, "[W]ho is to bear the expense of erecting the works necessary to protect Cosens's land?"[112] Cosens argued that because they had caused the injury, the commissioners should pay for correcting it. Lord Tenterden, in explaining the court's dismissal of Cosens' claim, observed that if the commissioners were required to erect a groin on Cosens' land, it would probably injure land adjacent to it. That adjacent owner could call upon the commissioners to protect him similarly, "and the commissioners might be compelled to erect defences against the sea along the whole line of coast" to protect successive proprietors of eastward

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109. Id.

110. 108 Eng Rep 1075, 8 B & C 356 (KB 1828).

111. Id.

112. Id at 1076, 3 B & C at 359.

land.[113] Lord Tenterden was "therefore, of opinion that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several land-owners, may erect such defences for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy."[114]

Although Lord Tenterden acknowledged that the commissioners were discharging a public duty, he could not see that in "acting for the common interest of several land owners," the commissioners were "in a different situation from any individual proprietor."[115] At least by way of dictum, then, he was assuming the existence of a rule giving a private landowner the right to protect himself by erecting a groin or other erosion control structure, "although it may render it necessary for the owner of the adjoining land to do the like."[116]

**B. Limitations of the Pagham Doctrine**

**1. Bad Faith**

By definition, the Pagham Doctrine is limited to the erection of structures for the sole purpose of protection from the ravages of the sea. Another purpose, say to spite one's neighbor, won't do. Bayley, J., in his concurring opinion in Pagham, so reasoned:

> If, indeed, [the commissioners] made unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention, to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment, for an abuse of the powers vested in them. But if they act bona fide, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves.[117]

**2. Necessary Protection vs Desired Improvement**

Yet other limits on the doctrine are implied in that statement of Justice Bayley's, as well as in Lord Tenterden's caveat that the right is

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113. Id at 1076-1077, 3 B & C at 360-361.

114. Id at 1077, 3 B & C at 361.

115. Id at 1076, 3 B & C at 360.

116. Id.

117. Id at 1077, 3 B & C at 361.

confined to the erection of "such defences . . . as the necessity of the case requires."[118] The necessity requirement might be violated in at least two types of situations. In one, the structure may be built to serve some purpose other than erosion prevention; it could not then be deemed "necessary" for such protection. In the other, the purpose of erosion control may be conceded, but it might be shown that the landowner built more structures or larger ones than were necessary to achieve that purpose, or with other features not essential to attain that end.

In his treatise on nuisance law, Wood cites Pagham in referring to a likely motive for building at a greater scale than necessary for erosion protection: "But a man has no right to do more than is necessary for his defense, and to make improvements at the expense of his neighbor."[119] The word "improvements" in this context is elusive. Surely, a structure built to prevent erosion improves the protected land in the sense of preserving the land's utility or value. And the improvement might be achieved at the neighbor's expense, in the form of noncompensable damage to the neighbor's land. A more general and less ambiguous formulation of this qualification of the common enemy of the sea doctrine might ask: Did the coastal landowner build the structure merely to gain the benefits of erosion prevention, or to obtain some other benefits?

The problem of proving the intent of the landowner remains. Justice Bayley's dictum that the common enemy of the sea doctrine may be invoked by those acting "bona fide, doing no more than they honestly think necessary for the protection of the level," suggests a subjective standard. Even if the dictum be taken at face value, an objective judicial examination of the facts is invited by the modifier "honestly."[120]

### 3. "Improper Works"; Negligence

Justice Bayley said in his Pagham opinion that if the landowner had been guilty of "improper works," the common enemy of the sea doctrine would not save him from liability for damage to neighboring property.[121] This was another way of declaring that liability might be based on negligence in the placement, design or construction of the erosion control structures.

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118. Id.

119. Wood, A Practical Treatise on the Law of Nuisances 575 (2d ed 1883) [cited hereafter as Wood].

120. We will observe later that in at least one American case the court treated the issue as one of fact, and looked for the landowner's intent in all the circumstances surrounding the construction of the erosion prevention device. See discussion of Rhoads v Virginia-Florida Corporation, text accompanying notes 145-158 infra.

121. 108 Eng Rep at 1077, 8 B & C at 361.

Generally, whenever the law countenances construction by a landowner inflicting damage on his neighbor's land, it will not excuse him from his careless or otherwise improper performance of the construction work. The law governing the erection of erosion control structures on seacoasts is no exception.

### C. The Pagham Doctrine in the American Courts

With age, the Pagham dictum that any landowner (not just a public agency) may protect himself against the inroads of the sea without liability for injury to his neighbor's land acquired the status of an English common law rule.[122] The English doctrine was accepted as American law by early commentators.[123] We turn now to the treatment of the doctrine by the American judges.

#### 1. Massachusetts

Two reported Massachusetts cases litigated the claims of ocean beachfront owners for damages caused by structures built by neighbors. In neither case did the court mention the common enemy of the sea doctrine of Pagham, but the decisions and reasoning of the courts are nonetheless an important part of the American experience with the underlying issues.

The locale of the first case, Jubilee Yacht Club v Gulf Refining Co.,[124] was a sea harbor. The Yacht Club complained about a high concrete and stone wall erected by the Refining Company, an adjacent shoreowner, along or near the boundary line between the lands of the two parties. The Yacht Club alleged that the wall altered tidal action causing "a large amount of sand and soil from other beaches and flats . . . to be deposited on the land and beach of the" Yacht Club, and raising the Yacht Club's land level "many feet higher," making it necessary for the Yacht Club "to extend

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122. "At common law a subject might erect groynes or such other defences as were necessary for the protection of his lands on the sea coast, though such erections must have the effect of rendering it necessary for his neighbour to do the same . . . ." 39 Halsbury's Laws of England 574 (3d ed 1962). The English doctrine does not apply to rivers. It is conceivable that the doctrine relating to structures on the sea coasts has been modified by application of the English Coast Protection Act, 1949 (12, 13 and 14 Geo. 6c. 74).

123. 3 H. P. Farnham, The Law of Waters and Water Rights 2706 (1904); J. M. Gould, A Treatise on the Law of Waters 321 (2d ed 1891), citing Pagham and Gerrish v Clough, 48 NH 9 (1871) (the latter case noted infra in text accompanying notes 219-221, 229); Wood 575; A. S. Wilson, The Law of Rivers and Watercourses 31 (1962).

124. 245 Mass 80, 140 NE 280 (1923).

its wharf, or pier, and to change its runway end floats," and otherwise interfering with the use of its property.[125]

The case was decided at a procedural stage. It did not go to trial. The Yacht Club sought an injunction requiring the Refining Company to abate a nuisance, and damages. There is no indication in the opinion that the Yacht Club charged the Refining Company with negligence, or that there was something unreasonable in the manner or location of the construction. The court noted that the Yacht Club did not allege that the Refining Company was acting malevolently or out of spite in putting up the wall.[126] Rather, the Yacht Club's cause of action had the earmarks of a claim of nuisance per se, that is, a claim that as a matter of law the mere fact the wall was built and resulted in the injury to its property entitled it to relief on nuisance grounds.[127]

Possibly anticipating a common enemy of the sea defense, the Yacht Club averred that the Refining Company "does not use its property bounded by that portion of its wall causing damage to the plaintiff, and could advantageously use its property without that portion of its wall"[128] -- the lack-of-necessity exception to the Pagham doctrine. The court, however, did not place the issues in that context. Influenced by the enjoyment of proprietary rights by shoreowners under provisions of a colonial ordinance dating back to 1647, the court looked to analogous law governing the rights of adjoining proprietors of uplands:

> Plainly, if these acts had been committed by the owner of adjoining property away from the seashore, no right of action would arise. The building of fences, walls or other structures, or making excavations on his own land ordinarily is within the absolute right of the owner of a fee without reference to the incidental injury which may thereby be caused to his neighbor.[129]

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125. Id at 61, 140 NE at 281.

126. "There is no averment of malignity and spite on the part of the defendant in building the wall, so that factor, if indeed ever entitled to weight, may be laid on one side." 245 Mass at 62, 140 NE at 281. The court's "if" was based on Mr. Justice Holmes' statement in Rideout v Knox, 148 Mass 368, 372, 19 NE 390, 392 (1889) that "to a large extent the power to use one's property malevolently in any way which would be lawful for other ends, is an incident of property which cannot be taken away even by legislation."

127. "The single question is whether the defendant has violated any legal right of the plaintiff by thus building a wall on its own property which by its effect on the tide and currents of the sea flowing over its own land has injured the adjacent property of the plaintiff." Id at 62, 140 NE at 281.

128. Jubilee Yacht Club, 245 Mass at 61, 140 NE at 281.

129. Id at 62, 140 NE at 281.

More significant, the court relied on specific development rights conferred on shoreowners by the colonial ordinance. Not only did the ordinance establish "the ownership of proprietors of upland to the adjacent strip of land not exceeding one hundred rods in width between high and low water mark";[130] it also secured to these upland owners "not merely an easement, but a property in the land in fee, with full power to reclaim the flats by building wharves, or inclosing them, so as to exclude navigation, provided he did not cut off his neighbor's access to their houses or lands. He could erect wharves or other structures thereon, could fill up the same, and plant stakes thereon, even to the obstruction of the public right of fishing."[131]

In addition to the blessing of the colonial ordinance, the Refining Company had the advantage of presumptions that it had obtained "whatever license from public authorities was necessary to validate" its construction of the wall, "and that no public right is being violated."[132] The court thus dealt with the issue whether compliance with statutory or administrative approvals provides a defense to a complaint in nuisance, a subject discussed in chapter 7 infra.

The question whether Jubilee was a precedent for accepting or rejecting the common enemy of the sea doctrine in Massachusetts was resolved by the Supreme Judicial Court of Massachusetts in Lummis v Lilly.[133] In or about 1966, Josiah K. Lilly constructed a stone groin extending 105 feet from the mean high water line into tidewater on land he owned on a bay in Cape Cod. It was built with the permission of the Massachusetts Department of Public Works and the "United States Army Engineer Division" [sic].[134] Lummis'

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130. Id, not referring explicitly to the ordinance at that point, but citing Davidson v Boston & Maine Railroad, 57 Mass (3 Cush) 91, 105, 108, which identified "the colony ordinance in regard to flats" as one source of authority for this proposition. The pertinent provisions of the colonial ordinance, as set out in Commonwealth v Alger, 61 Mass (7 Cush) 53, 67-68 (1851), read: "It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more whersoever it ebbs further: provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands."

131. 245 Mass at 84, 148 NE at 282, quoting from Henry v Newburyport, 148 Mass 582, 585, 22 NE 75, 76 (1889).

132. 245 Mass at 82, 140 NE at 281.

133. 385 Mass 41, 429 NE2d 1148 (1982).

134. Id, 429 NE2d at 1148.

beachfront property, purchased in 1975, was almost contiguous to the Lilly property. The record showed that the "function of a groin is to interrupt the littoral drifting of sand along the shore, thereby producing deposition of sand on the updrift side of the structure and widening the beach"; and, as a result, the littoral "drifting continues on the downdrift side of the structure and since the sand which is transported away is not replaced by sand from the updrift side, the beach narrows on the downdrift side of the groin."[135] That was precisely the damage complained of by Lummis, whose property was on the downdrift side of the littoral flow.

The opinion of the court does not reveal the purpose of the groin. It does not refer to the common enemy of the sea doctrine derived from Pagham, indicating, perhaps, that Lilly's motive was to build up his beach rather than protect it from ravages of the sea. The court's analysis rested, instead, on doctrines applied to problems involving the flow of surface or river waters. It framed the "narrow but important issue" as "whether we should apply the rule of 'reasonable use' as most recently enunciated by [the] court in Tucker v Badoian [a surface water case] to the rights of owners of oceanfront property."[136] In Tucker the Massachusetts court had rejected the earlier "common enemy rule" acknowledging a right of a landowner to build on or otherwise improve his land without liability for the consequent excessive flow of surface waters onto adjoining lands. The Massachusetts court in Tucker followed the courts of several other states in abandoning the "rigid" common enemy approach "in favor of a more flexible 'reasonable use' doctrine."[137]

The Lummis court explained that a similar reasonable use doctrine, rather than the common enemy doctrine, had from the earliest times been invoked in Massachusetts where the acts of riparian owners altering the flow of streams or rivers damaged adjoining lands.[138]

Responding to Lilly's heavy reliance on Jubilee Yacht Club, the court declared:

> To the extent that the Jubilee decision approved of a rule applicable to littoral owners other than that of reasonable use we choose not to follow it. There is no sound reason for imposing the obligation of reasonable use on riparian owners,

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135. Id.

136. Id, 429 NE2d at 1148, citing Tucker v Badoian, 376 Mass 907, 394 NE2d 1195 (1978).

137. 376 Mass at 914, 394 NE2d at 1199.

138. 385 Mass 41, 429 NE2d at 1148.

while permitting littoral owners to use their property without any limitations.[139]

The court also drew support from statements in Commonwealth v Alger that the "sic utere" rule applied to both rivers and tidal waters, and that rights granted by the colonial ordinances to shore owners to build embankments and other structures were "subordinate only to a reasonable use of the same, by other individual riparian proprietors and the public, for the purposes of navigation, through any sea, creeks or coves, with their boats and vessels."[140]

## 2. California

Over 40 years ago the California courts in Katenkamp v Union Realty Co.[141] indicated approval of the Pagham doctrine as a general principle, in deciding the case on the basis of an exception to the doctrine. Katenkamp and other owners of land on the shore of an inlet of the Pacific Ocean claimed that their properties were damaged as a result of two groins built by the Realty Company, an adjacent shoreowner. Katenkamp and the other plaintiffs claimed that the groins were built solely to cause the currents to carry away sands from plaintiffs' beaches to the Realty Company's rocky, barren land; and that, as a result, a gradual accretion of sand created a sandy beach on the Realty Company's land and both removed the sand cover from, and otherwise caused erosion damage to, plaintiffs' properties.

The California appellate courts in Katenkamp acknowledged that earlier California cases had confirmed the Pagham "holding . . . that the sea is a common enemy and whenever it attacks littoral property the owner thereof may protect his property from its ravages and use every reasonable means so to do without liability."[142] However, applying the property improvement

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139. Id, 429 NE2d at 1148. In support of this statement the court cited Moore v Dole, 135 Mass 508 (1883). Moore was awarded damages for the undermining of his land on a bay in Boston Harbor caused by Dole's excavation of his adjoining shorefront land. Dole argued "that the sea is regarded as a common enemy, and that it is a rule that each man may defend himself against its encroachments as best he can, even if thereby it washes against his neighbor's land." 135 Mass at 510. The court responded: "This may be so, but the rule has no application to the case at bar. The defendant was not protecting himself against the common enemy; he voluntarily introduced the enemy upon his land, and allowed it to escape from there to the injury of the plaintiff." Id.

140. 385 Mass 41, 429 NE2d at 1148, citing Commonwealth v Alger, 61 Mass 53 (7 Cush.) 89 (1851).

141. Katenkamp v Union Realty Co, 6 Cal2d 78, 53 P2d 367 (1935); rev'd, 11 Cal2d 63, 58 P2d 473, 477 (1936); following remand, 36 Cal App2d 602, 93 P2d 1035 (Dist Ct 1939), and 36 Cal App2d 602, 98 P2d 239 (Dist Ct of App 1940).

142. 98 P2d at 242-43.

exception to the Pagham doctrine, the Katenkamp courts had to determine "whether there existed a reasonable need for the construction of the groins in order to protect [the Realty Company's] property from the ravages of the sea, and also as to whether [the Realty Company] did in fact erect the groins for the purpose of protecting its property from encroachment by the sea and to prevent erosion or for the purpose of transforming into an artificial sandy beach to be utilized in connection with bathhouses, boardwalk and other improvements incidental to a beach club, what had formerly been a rocky shore in front of its property."[143] The trial courts held for Katenkamp on those issues and the holdings were sustained on appeal.[144]

### 3. Florida

The Katenkamp test — inquiring whether the purpose was to improve the property or protect it against the common enemy of the sea — was examined over 30 years later by federal courts sitting in Florida, in Rhoads v Virginia-Florida Corporation.[145] The issue there was whether erosion damage to the residential beach front property owned by Mr. and Mrs. Rhoads was caused or substantially contributed to by the defendants' construction of a seawall for a beach front high-rise apartment complex. The trial court held that the defendants were not liable to the Rhoads if they built the wall properly.[146] The Circuit Court of Appeals reversed the trial court decision on the basis of a deficiency of evidence that defendants had built the seawall on their own property.[147] Anticipating the possibility that on a further trial the location issue might be resolved in favor of defendants, the Court of Appeals explained that the trial court should then consider "the question of whether under Florida law a littoral landowner has an unqualified right to construct a seawall on his property . . . , and if there are qualifications, what they are."[148] Though the Court of Appeals said that in view of a lack of Florida cases on the matter, it was leaving it to the trial judge to decide it "in the first instance."[149] However, the

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143. Id at 246.

144. Id.

145. 476 F2d 82 (5th Cir 1973); following remand, 548 F2d 985 (5th Cir 1977).

146. 476 F2d at 84.

147. Id. At issue was the question whether defendants had built landward of the high water mark, on property owned by them, or seaward of high water mark on property retained in state sovereign ownership.

148. Id at 89.

149. Id.

Court of Appeals provided a strong hint on where it stood on the Pagham doctrine, in stating:

> In this instance the purpose of the wall was to improve defendants' property, not to protect it from the "common enemy," the sea. Katenkamp v Union Realty . . . holds that if a littoral landowner constructs a wall on his property to save his property from destruction by the sea, such use of his property is as a matter of law a reasonable use, and therefore, is not actionable even if an adjoining landowner's property is damaged by the use; but if he builds the wall, though on his own land, to improve the property, then the use is not as a matter of law reasonable, and the court must analyze the facts to reach a conclusion on the issue of reasonableness.[150]

On the second trial the defendants again prevailed, but again the Court of Appeals reversed the decision, both on the evidence and the lower court's treatment of the liability issue.[151] On the liability issue the Court of Appeals noted that the trial court had "made a finding that it was 'necessary' for defendants to build the wall to prevent erosion of their property, that is, the beach was eroding and a wall was requisite to halt the erosion process"; but had not made an independent "finding that halting erosion was the defendants' purpose in erecting the wall."[152] In directing the trial court to decide on the matter, the Court of Appeals said:

> With the issue of purpose decided, the case — as we see it — will present these issues under Floride law: A littoral landowner erects a seawall on the [mean high water mark] or landward thereof but in close proximity to it. Is he liable to nearby property owners whose beachfront property is damaged by erosion caused or contributed to by the seawall, if a seawall was necessary to protect his own property against beach erosion? If not otherwise liable, is he liable if his

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150. Id. The court then noted that the "rule in Massachusetts appears to be contrary," citing Jubilee Yacht Club as holding that "a littoral owner can construct seawalls on his property without limitation." Id.

151. 548 F2d 995 [5th Cir 1977].

152. Id at 998. Apparently the trial court had assumed that the earlier Court of Appeals reference to the "purpose" of the seawall made it unnecessary for the trial court to make findings on the "common enemy" theory. Id. Accordingly, to clarify the situation, the Court of Appeals on the second appeal vacated its earlier statement on the "purpose" issue and directed the trial court to decide the issue. Id.

purpose was entirely or partly to improve his own property (if the court finds there was such purpose)?[153]

As of July 15, 1982, no order had been entered to implement the decision of the Court of Appeals calling for a new trial,[154] hence Rhoads still does not reveal the Florida position on the "common enemy" theory. If the issues posed by the Court of Appeals were to be resolved in the Rhoads or some other similar case we surmise that the trial court would read into the Court of Appeals remarks strong hints that the "common enemy" theory would not provide immunity from liability for damage to neighboring property if the purpose of the erosion control structure were to "improve" the shoreowner's property. We are less certain of the outcome if the purposes were found to be both property improvement and beach erosion prevention.

On facts similar to those in Rhoads, where the seawall was erected to protect a beach fronting an apartment complex, it would be difficult for a court to determine whether the purpose was in whole or in part to improve the property for the construction and maintenance of the building. By preventing erosion of the beach the developer would necessarily enhance its value to the apartment project, and in that sense improve his property. Under some circumstances, by preventing erosion of the beach the developer might at the same time reduce the risk of erosion damage to his beachfront building, implicating an "improvement" purpose in that sense. The issue was clearer in Katenkamp, where it was alleged and found that the purpose of the groins was to bring sand to the developer's barren beach; erosion was not its problem.[155]

The Court of Appeals' first statement regarding the common enemy doctrine may create further uncertainty if given credence at all.[156] In paraphrasing the Katenkamp holding as an invitation "to analyze the facts to reach a conclusion on the issue of reasonableness,"[157] the Court of Appeals may have been suggesting that factors other than those eliciting the purpose of the erosion control device could influence the decision. This would bring the judicial inquiry closer to the approach adopted by the Massachusetts court in Lummis.

In the second Rhoads opinion, the court noted: "Subsequent to the actions of defendants upon which this suit was brought Florida enacted Fla.

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153. Id at 988-89.

154. Telephone interview with Richard Ralph, Esq., attorney for the Rhoads plaintiffs, July 15, 1982.

155. See supra text accompanying notes 141-144.

156. See text accompanying note 150.

157. Id.

Stat. Ann. sec 161.052 requiring a 50 foot minimum setback for all beachfront construction."[158] An additional subject of speculation is the weight, if any, this Florida legislation might be given in judicial treatment of cases in which the owner of a structure built within the 50 foot setback line before and presumably not subject to the statutory requirement erects an erosion protection device detrimental to adjacent shoreland.

**4. New York**

The issue of liability for damages caused by a privately constructed erosion control device recently arose on Long Island in Maitrejean v Levon Properties Corporation.[159] In the early 1960s Levon Properties Corporation (Levon) purchased 525 acres of waterfront land on Long Island in the Town of Riverhead, and in 1965 obtained a grant of underwater land from the State of New York and permission from the Corps of Engineers to enable it to excavate a channel and build two stone jetties extending 500 feet into Long Island Sound, ostensibly for the purpose of building a deep water port and industrial park.[160] The Town of Riverhead had granted Levon an industrial zoning classification for the site. The jetties were necessary to prevent the littoral flow of sand from the west to fill the channel. The jetties were partially built in 1967 and completed in 1969. When constructed they caused an accretion of Levon's land to the west of the jetties and the erosion of waterfront bluffs of Maitrejean and 10 other property owners lying immediately to the east of the jetties in the Town of Southold. Seven of these neighbors had acquired their properties before 1965, three of them after the construction of the jetties had begun but before they were completed, and one of them after their completion and after the erosion process had begun.

In response to a 1971 order of the Corps of Engineers and a court order obtained by the New York State Attorney General, by 1972 Levon had removed the jetties and constructed a sand by-pass facility to restore the eroded sand.[161] However, because of conditions created when the jetties were in

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158. 549 F2d at 986, note 5.

159. 87 AD2d 605, 449 NYS2d 46 (2d Dep't 1982), aff'd, 57 NY2d 902, 456 NYS2d 763, 442 NE2d 1274 (1982). The facts recited here are taken from the briefs to the Appellate Division, the trial court Memorandum of Mr. Justice Baisley (the Supreme Court, Suffolk County, December 22, 1980) (the Trial Court Memorandum), and the pleadings.

160. Plaintiffs argued that in view of the limited depth of the channel, 12 feet, "no deep water harbor for ocean going ships was ever contemplated," and the "entire plan was to be nothing more than a cover for a sand mining operation." Plaintiffs' Appellate Division Brief 7.

161. Id 14-15.

place, the erosion continued and caused the bluffs to collapse.[162]

Maitrejean and the ten other owners sued Levon. The Maitrejean complaint alleged the commission of a "public nuisance," but in briefing his case the Maitrejean attorney invoked "private nuisance" theory.[163] In constructing his case on those features of nuisance law, Maitrejean's attorney argued that the interference with plaintiffs' use of their lands

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162. Trial Court Memorandum 2.

163. Plaintiffs' Appellate Division Brief, Point II. Nuisance law covers two different sub-fields of tort liability, (1) "public nuisance," an "unreasonable interference with a right common to the general public," and vindicated through action taken by a public official or under some circumstances by a specially aggrieved private party; and (2) "private nuisance," a "nontrespassory invasion of another's interest in the private use and enjoyment of land." 4 Restatement (Second) of Torts secs 821B, 821C (1979). "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession. . . . In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability." Id, comment 101-102 (emphasis added). "Despite early private nuisance cases, which apparently assumed that the defendant was strictly liable, today it is recognized that one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities . . . ." Copart Industries, Inc. v Consolidated Edison Company of New York, Inc., 41 NY2d 564, 569, 394 NYS2d 169, 172 (1977) (emphasis added); and see 4 Restatement (Second) of Torts sec 822 (1979). The invasion is intentional if it is a result of "acts for the purpose of causing it," or the actor "knows that it is resulting or is substantially certain to result from his conduct." Id sec 825. The intentional invasion is "unreasonable" if "(a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." Id sec 826. To be actionable the harm suffered by the aggrieved landowner must be "significant," meaning something "more than slight inconvenience or petty annoyance." Id sec 821F, and comment. Factors to be considered in determining the gravity of the harm include the extent and character of the harm involved; "the social value that the law attaches to the type of use or enjoyment invaded"; the "suitability of the particular use or enjoyment invaded to the character of the locality"; and "the burden on the person harmed of avoiding harm." Id sec 827. Factors involved in determining the utility of the conduct include "(a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the invasion." Id sec 828. Other considerations entering into the weighing of gravity and utility are the motive of the actor (did he mean to harm the other, or did he act "contrary to common standards of decency") (id sec 829); whether the harm is "severe and greater than the other should be required to bear without compensation" (id sec 829A); whether the invasion could have been avoided by the actor without undue hardship (id sec 830); and the relative suitability of the actor's conduct and invaded interest to the character of the locality (id sec 831).

was significant (including the destruction of substantial uplands and the cost of moving dwellings farther from the shores); intent was demonstrated by the fact that in arresting the movement of sand Levon was bound to know that the beaches to the east would be starved and would recede; and the record sustained the unreasonableness of Levon's conduct, including the facts that Levon did nothing to replenish the starved east beach, and that its real objective was to mine and sell the sand accumulated on the updrift side of the west jetty.[164]

The action was tried before a jury on counts of nuisance and negligence, and the court awarded compensatory and punitive damages[165] to Maitrejean and the ten other owners of eroded property.[166] There is no way of telling which of the factors weighed most significantly in the determination of unreasonableness, because that general issue was decided by the jury with no specification of findings on which the decision was based.

Levon appealed. The principal issues on appeal were whether the jetties had in fact caused the erosion, and whether it was error for the trial court to allow punitive damages. The Appellate Division upheld the causes of action for nuisance and negligence and the award of compensatory damages, but dismissed the claim for punitive damages. The Court of Appeals affirmed.[167]

As in Jubilee Yacht Club, the court did not mention the "common enemy" theory. The defendants in Levon did not plead or argue the point.

### 5. Summary of the Cases

The few cases we have found and reported on the subject suggest that there is not much left of the Pagham doctrine allowing the owner of ocean

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164. Plaintiffs' Appellate Division Brief 28-31.

165. Compensatory damages are those awarded to a plaintiff for due compensation for injury. Punitive damages are those awarded to a plaintiff in excess of due compensation to punish the defendant.

166. The damages were in fact payable by the Curtiss-Wright Corporation, which acquired an 80% interest in and later merged with Levon, and was named as a co-defendant in the action. The jury was able to "consider Levon and Curtiss-Wright as one and the same." Plaintiffs Appellate Division Brief 7.

167. Supra note 158. The jury had awarded $164,000 in compensatory damages to be shared by the 11 plaintiffs, and punitive damages of $5 million. One plaintiff claimed that his share of the damages would not pay for the cost of removing his house, which was left in a precarious position above the eroded bluffs. See Paul Sallot, My $307,000 Misunderstanding, Newsday, January 22, 1984.

coastal land to protect his property against the common enemy of the sea without responsibility for damage to his neighbors.

Massachusetts has repudiated the doctrine altogether, preferring the less rigid "reasonable use" approach applied in deciding analogous situations involving owners of river shorelands.[168] This allows the court to consider a large variety of circumstances of the parties, similar to those commonly considered in deciding causes of action based on nuisance law.

In the California Katenkamp case the courts resorted to the rhetoric, if not the substance, of common enemy theory, but the circumstances permitted the courts to resolve the case on the basis of the Pagham doctrine exception exposing a shoreowner to liability to his neighbors if his purpose is improvement of his property rather than erosion protection.[169] The difficulty of separating out the two purposes indicates that the occasions for granting immunity under the Pagham doctrine are bound to be rare.

The federal courts have had an opportunity to declare Florida law on questions of applicability of the Pagham doctrine but have not done so, other than to suggest subtly that they might follow the lead of the California courts.[170]

In the one New York case uncovered, the courts did not bring the Pagham doctrine into their discussion.[171] The fact that the courts appeared to be pursuing reasonable use inquiries in deciding a cause of action for nuisance may be evidence that had the defendants asserted the Pagham defense, the courts might have rejected it just as the Massachusetts court did.

Thus we can only speculate on the extent, if any, to which modern American courts will embrace the reasoning of Pagham in ocean shore erosion protection situations. In doing so, we must look more closely at policy considerations that may influence the direction the courts may take.

## V. The "Common Enemy" Factor in the Development of Doctrines Governing Other Fields of Water Law

The essence of nuisance law based on intentional acts, as revealed by Maitrejean, is a rule of reason. We now seek enlightenment from other

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168. See discussion of Lummis v Lilly, supra text accompanying notes 133-140.

169. See discussion of Katenkamp v Union Realty Co., supra text accompanying notes 141-144.

170. See the discussion of Rhoads v Virginia-Florida Corporation, supra text accompanying notes 145-158.

171. See the discussion of Maitrejean v Levon Properties Corporation, supra text accompanying notes 159-167.

branches of water law applied in litigations over similar uses of erosion prevention devices, where the decisions are based either on a rule of a reason or on some less flexible doctrine. The purpose of the search is to look for policy underpinnings that might be relevant here. The utility of the analogies is suggested by the easy transferability of doctrine from one setting to another. This is illustrated by the liberal borrowing of the Massachusetts court in Lummis of rules pertaining to surface waters and watercourses,[172] and, in reverse, by the extension in some states of the Pagham common enemy doctrine to surface water and watercourse problems.[173]

The nuisance chapter of the Restatement (Second) of Torts includes invasions of interests in the use and enjoyment of land resulting from water pollution or interference with the flow of surface waters.[174] In addition, the Restatement contains a special chapter on tort liability arising from interference with the use of water.[175] It deals with the common law rules governing the beneficial use of streams, lakes, ground water and surface water,[176] but not the use of lands on the shores of seas and oceans. Justification for the separate treatment of the inland situations is found in the fact that "[c]ertain principles applicable to controversies involving the use of water and the determination of the persons entitled to its use and enjoyment are peculiar to those controversies," especially factors arising from "interdependent, simultaneous and successive uses of water" by different persons.[177]

In its treatment of water rights in inland locations, the Restatement (Second) of Torts divides waters into three categories based on their source: surface water, watercourses and lakes, and ground water. The Restatement acknowledges, but does not deal with, a fourth category, "flood water."[178]

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172. 385 Mass 41, 429 NE2d at 1148.

173. See supra text accompanying notes 179-221 infra. In perhaps the only law review article discussing the issue of liability to a neighbor for damage caused by privately constructed coastal erosion protection devices, the author appeared to assume that the "common enemy doctrine," where it is favored, applies alike to ocean and river shorelines and surface waters. Hildreth, Coastal Natural Hazards Management, 59 Or L Rev 201, 210 (1980).

174. 4 Restatement (Second) of Torts secs 832-33 (1979).

175. Id, chapter 41.

176. Id, Introductory Note and Scope Note to Chapter 41, at 181.

177. Id 182-83.

178. 4 Restatement (Second) of Torts sec 841 comment k (1979); and see sec 846, the definition of "surface water," infra note 181.

## A. Surface Waters

The Restatement (Second) of Torts defines "surface water" as "water from rain, melting snow, springs or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake."[179] But the Restatement definition has been criticized for basing the classification on the origin of the surface water:

> [I]n the final analysis the courts treat as surface water those waters which do not fit within any other legal classification of water. . . . [A] better understanding of the nature of surface water may be had . . . by discussing what it is not.[180]

The Massachusetts court in Lummis took the lead from surface water[181] diversion cases in establishing a rule of reasonableness for determining whether a landowner is liable for damages to a neighbor from the building of a groin on oceanfront property.[182]

Three different approaches have been adopted by American courts in deciding controversies over damage inflicted on adjoining land by acts affecting the flow of surface waters, applying (1) the civil law or natural flow theory, (2) the common enemy rule, or (3) the reasonable use rule.[183]

The civil law rule is that a landowner has a duty to receive surface flows from above his land, and a corresponding right to have the water flow

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179. 4 Restatement (Second) of Torts sec 846 (1979).

180. Maloney and Plager, Diffused Surface Water: Scourge or Bounty? 8 Nat Resources J 72, 73 (1968). These commentators favor a considerably broader definition of "surface water," including not only waters in a diffused state (comporting with the Restatement [Second] of Torts definition), but also puddles and ponds with no outlet, a "marsh or swamp which is not physically connected to a lake or stream by even occasional overflows," and "flood waters which entirely lose their connection with a lake or stream . . . and settle in low places." Id at 74-75. And see 5 Waters and Water Rights 486 (R. E. Clark, ed, 1972) (each of various volumes cited hereafter as Waters and Water Rights).

181. We refer here to surface waters, sometimes described as "diffused surface waters," as defined in section 846 of the Restatement (Second) of Torts noted earlier ("water from rain, melting snow, springs or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake.)"

182. 365 Mass 41, 422 NE2d at 1148.

183. Reviewed in 6 Powell on Real Property, para 728 et seq (Rohan rev ed 1981); Annotation, Modern Status of Rules Governing Interference with Drainage of Surface Waters, 92

from his land to land below it. This gives him a right of action if another party alters natural conditions and causes water to be discharged upon his land in a different manner or greater quantity than would happen under the natural conditions.[184] The courts in a number of states have modified their application of the civil law rule in particular types of situations. Some substitute the common enemy rule in urban areas where intensive use of the land creates conditions in which it is virtually impossible not to interfere with natural drainage. Others propound a "good husbandry" rule, permitting the owner of upper land to accelerate the natural drainage by such system as might be justified by good husbandry, so long as the flow of water is not diverted from its natural path.[185]

The New York courts have rejected the civil law rule.[186]

In perhaps its earliest American formulation, the common enemy rule was expressed over a century ago by the Massachusetts court in Gannon v Hargadon, as follows:

> The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow.[187]

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ALR3d 1192 (1979); 3 Tiffany, The Law of Real Property secs 740 et seq (3d ed 1939); Kinyon and McClure, Interference with Surface Waters, 24 Minn L Rev 891 (1940) (cited hereafter as Kinyon and McClure); 1 Waters and Water Rights 300 et seq, and 5 Id, chapter 28; Comment, The Application of Surface Water Rules in Urban Areas, 42 Mo L Rev 76 (1977); Maloney and Plager, Diffused Surface Water: Scourge or Bounty? 18 Nat Resources J 72 (1968).

184. 1 Waters and Water Rights 305.

185. Annotation, Modern Status of Rules Governing Interference with Drainage of Surface Waters, 93 ALR3d 1193, 1211-12, 1215 (1979).

186. Berkley v Wilcox, 86 NY 140 (1881).

187. 92 Mass (10 Allen) 106, 109 (1865), quoted in Lunde, 385 Mass 41, 429 NE2d at 1148.

The courts adopting this rule appear to have regarded it as a logical extension of the Pagham doctrine "to the waters of large navigable American rivers subject to extensive overflows."[188]

In the first test of the issue before it, the New York Court of Appeals in Barkley v Wilcox followed Massachusetts in embracing the common enemy doctrine in preference to the civil law doctrine.[189] Except for modifications in particular situations, the New York courts have not wavered from that position. The Court of Appeals endorsed the Barkley position in 1959 in Kossoff v Rathgeb-Walsh, Inc.,[190] and in 1967 in Buffalo Sewer Authority v Town of Cheektowaga.[191]

One of the modifications, recognized in Barkley, withholds the immunity of the common enemy rule from a landowner who collects then casts surface water onto his neighbor's land by means of drains, ditches or other artificial means, for there "is a manifest distinction between casting water upon another's land, and preventing the flow of surface water upon your own."[192] The Appellate Division in Musemeci v State of New York[193] read the collect and discharge exception as being part of a broader exception incorporating the maxim "sic utere" and its corollary concept of negligence or lack of due care into the common enemy doctrine.[194] By inference, it is arguable that whether or not the defendant's improvement uses artificial means to cast the surface waters onto his neighbor's land, he may be liable to the neighbor if the improvement is carried out negligently.[195] A

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188. Lamb v Reclamation District No. 108, 73 Cal 125, 14 P 625, 628 (1887).

189. 88 NY 140 (1881).

190. 3 NY2d 583, 170 NYS2d 789, 148 NE2d 132. In Kossoff, Judge Van Voorhis referred to the common enemy doctrine of Barkley as "the common law adopted in this State." Id at 588, 170 NYS2d at 793, 148 NE2d at 134. Some "writers assert that the rule is not supported by English authority, and have therefore concluded that calling the 'common enemy' rule the 'common law' rule is misleading and erroneous." Kinyon and McClure 898.

191. 20 NY2d 47, 281 NYS2d 328, 228 NE2d 386 (1967).

192. Barkley v Wilcox, 86 NY at 148; and see Buffalo Sewer Authority v Town of Cheektowaga, 20 NY2d 47, 51, 281 NYS2d 328, 330, 228 NE2d 386, 389 (1967); and Kossoff v Rathgeb-Walsh, Inc., 3 NY2d 583, 588-90, 170 NYS2d 789, 793-95, 148 NE2d 132, 135-36 (1959).

193. 43 AD2d 288, 291, 351 NYS2d 211, 214 (4th Dep't 1974).

194. Cf Tremblay v Harmony Mills, 171 NY 598, 64 NE 501 (1902), where the defendant was held liable for negligently maintaining a roof leader causing ice to form on a sidewalk; and see cases in several other states suggesting that the owner must exercise "due care" in making the improvement, cited in 5 Waters and Water Rights 483.

195. Kossoff v Rathgeb-Walsh, Inc., 3 NY2d 583, 588-90, 170 NYS2d 789, 794, 148 NE2d 132, 135-36 (1959).

related, if not the same, limiting rule stipulates that the improvement must be "made in good faith to fit the property to some rational use to which it is adapted."[196] These qualifications of the common enemy doctrine are simply adaptations of the "improper works" and "bad faith" caveats expressed in Pagham.

The New York Court of Appeals, like others subscribing to the common enemy doctrine, found justification both in (1) a traditional conception of the nature of land ownership, noting that although the result is to interfere with natural laws, the interference "is justified, because the general law of society is, that the owner of land has full dominion over what is above, upon or below the surface, and the owner . . . is exercising merely a legal right";[197] and (2) a public policy favoring land development.[198]

Courts preferring the reasonable use rule look at all the circumstances to determine whether the action of a landowner who interferes with the natural flow of surface water is reasonable. As summarized in a leading New Hampshire case, the circumstances to be considered would include "the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other landowners as compared with the value of such improvements."[199]

In Massachusetts, the creation of exceptions to avoid the rigidity of the common enemy and civil law rules paved the way for the announcement by six concurring justices in Tucker v Badoian that from that time on they would abandon the common enemy doctrine and adopt the reasonable use approach. Mr. Justice Kaplan, writing for the group, explained:

> In practice and application, then, if not in terms, both rules tended in some degree to reach a plane of reason. Still the formulary statements on either side confused the issues and impaired the results. Therefore, with encouragement from competent scholars, a respectable number of courts over the past thirty years and more have abandoned the poler positions and adopted, instead, a "reasonable use" standard which introduces, in the resolution of quarrels between landowners

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196. Mussacf, supra note 193, 43 AD2d at 291, 351 NYS2d at 215.

197. Berkley v Wilcox, 88 NY 140, 147 (1881). "Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built." 88 NY at 148. And see Kinyon and McClure 888-889.

198. Kinyon and McClure 888-89.

199. Swett v Cutts, 50 NH 439, 445 (1870).

about surface waters, the considerations typical of the law of private nuisance. On such lines the question was treated in the Restatement of Torts as promulgated in 1939.[200]

A New York trial court judge argued for a similar switch in this state to the concept of reasonable use in upholding the sufficiency of a complaint alleging damages from surface water runoff, after observing that the "growth of urban areas, as well as other ecological and socio-economic factors affecting water rights, have riddled the common enemy and the civil law approaches with numerous exceptions, . . . [which] have all but obliterated the main principles."[201] Though affirming the holding, the Appellate Division observed that the matter was governed by the rationale set forth in Kossoff v Rathgeb-Walsh, suggesting that it was not advocating the abandonment of the common enemy doctrine in New York.[202]

## B. Liability for Interference with the Reasonable Use of Watercourses

The Restatement (Second) of Torts defines a "watercourse" as a "stream of water of natural origin, flowing constantly or recurrently on the surface of the earth in a reasonably definite natural channel," and including "springs, lakes or marshes in which a stream originates or through which it flows."[203] The Restatement regards "flood channels" as part of a watercourse, explaining:

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200. 376 Mass 907, 917-18, 384 NE2d 1195, 1201 (1978). The successor section 833 of the Restatement of Torts states that an "invasion of one's interest in the use and enjoyment of land resulting from another's interference with the flow of surface water may constitute a nuisance," under standard "reasonable use" or negligence rules in nuisance law. 4 Restatement (Second) of Torts (1979). Cf section 864 of the Restatement (Second) of Torts: "The possessor of land is not subject to liability for a use of surface water on his land that interferes with another person's use of the water, unless the use is made for the primary purpose of causing the harm." The Restatement's reporters claim that this rule "is a crystallization of the principle of reasonable use generally applicable to the use of land." Although the Restatement's definition of the term "use of water" for the purposes of section 864 includes "impoundment," which would appear to embrace diversion or capture by dams or similar structures interfering with the flow of surface water resulting in the invasion of a neighbor's land, section 864 relates to the "beneficial" use of surface waters, say for commercial purposes, rather than to the repelling of surface waters to the detriment of others. Sec 847 comment a; sec 864 comments b and c.

201. Bohemian Brethren Presbyterian Church v Greek Archdiocesan Cathedral of the Holy Trinity, 94 Misc2d 841, 845, 405 NYS2d 928, 928 (Sup Ct, NY Co, 1978).

202. 70 AD2d 568, 416 NYS2d 751 (1st Dep't 1979).

203. 4 Restatement (Second) of Torts sec 841.

> Some streams have overflow or flood channels that carry the excess water of the stream during high water or flood periods. When flood channels are reasonably definite and water flows in them in times of ordinary floods, they are part of the watercourse and are subject to the rules governing watercourses even though they are of little use other than to carry flood water and there are considerable periods of time between floods when the channels are dry.[204]

This is an appropriate place to introduce a term of art usually associated with the law of watercourses, the term "riparian." The Restatement (Second) of Torts uses the term "riparian" in a broad sense in referring to lands or owners of lands on the shores of lakes, as well as of rivers and streams (watercourses).[205] The Restatement prefers to employ the term "littoral" in referring "to lands adjacent to seas and oceans."[206] Generally, however, the term "littoral" is used to describe the shores or shoreowners on lakes as well as on seas.[207]

The principles of the law of watercourses are shaped by nature and man. Their variations are based on the locations and characteristics of particular types of watercourses, and by the functions of the channeled water in serving mankind, reflecting in turn the social and economic conditions in which the functionaries operate.

From Roman times to the present, under the civil law and then the common law:

> [R]unning water, unrestrained in its natural course, belongs to the negative community and is nobody's property; its particles or aggregate drops, in specie or as a substance, being outside the domain of what can constitute property; just as no one can be said to own the air, the sea water, the rain or the clouds or the moon or stars, or the pearl at the bottom of the sea, the wild animals in the forest, or the very fish swimming at large in the running stream itself. [And though the] corpus of naturally running water is . . . not the subject of private ownership, the law recognizes nevertheless

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204. Id, comment f.

205. Vol 4 secs 842-843.

206. Id sec 843 comment a.

207. Allen v Potter, 64 Misc2d 938, 939 (Sup Ct, Yates Co, 1970), aff'd, 37 AD2d 691, 323 NYS2d 409 (4th Dep't 1971): "A riparian proprietor is one who owns land on the bank of a river. . . . Corresponding to riparian proprietors on a stream or a small pond are littoral proprietors on a sea or lake. But riparian is also used coextensively with littoral."

> a very substantial right in its use and flow, -- the right to have the liquid flow and to use it, which the law calls the "usufructuary right," or the "water right." The law of watercourses consists of the rules governing this right of flow and use.[208]

Defined as a right of flow and use rather than as a right of ownership of the water itself, the nature of the legal interests of the riparian landowners in the water has been subject to change over time as social and economic conditions alter the nature and extent of the need for that flow and use.[209] These changes, in turn, have influenced the development of rules governing the interference by one riparian owner with the use of water by others. In the early, predominantly agriculture society of England, waters were used mainly for domestic purposes and for running small mills. Litigations over conflicts among riparian owners were relatively few. The decisions in some early cases turned on whether a particular owner's rights had evolved from ancient usage, giving him a prescriptive right. Others seemed to be based on a rule of first user, while still other decisions invoked the "sic utere" principle that one may not so use his property as to injure others. Litigation over water use increased with the advent of the Industrial Revolution because industrialization required greater use of water for powering machinery and resulted in increased pollution problems. Thus it led to the development by the English courts of the "natural flow theory," under which:

> [T]he primary or fundamental right of each riparian proprietor of a watercourse is to have the body of water flow as it was wont to flow in nature, qualified only by the privilege of each to make limited uses of the water. . . . In the early days of the Industrial Revolution when many mills and factories were powered by water, the doctrine served a very utilitarian purpose as it passed the water down from one mill dam to the next. In today's economy it is not utilitarian and prohibits many beneficial uses of water although those uses may be causing no one any harm and although the water would run to waste if not so used.[210]

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208. Wiel, Running Water, 22 Harv L Rev 190, 199-200 (1908).

209. These references to early English and American history are taken from 4 Restatement (Second) of Torts, Introductory Note Preceding sec 850 (1979); and 5 Powell on Real Property, para 711-712 (rev Rohan ed 1981).

210. 4 Restatement (Second) of Torts, Introductory Note and Scope Note to Chapter 41, at 209-10 (1979). See Lux v Haggin, 69 Cal 255, 10 P 674 (1886), for an early statement of the doctrine.

Emphasis on a policy of promoting the beneficial use of water resources has led to the adoption of the reasonable use rule by most American courts, though some natural flow language may be found in the opinions. As expressed in the Restatement (Second) of Torts, the reasonable use rule declares that a "riparian proprietor is subject to liability for making an unreasonable use of the water of a watercourse or lake that causes harm to another riparian proprietor's reasonable use of water or his land."[211]

The New York courts have adopted that approach,[212] and the New York legislature has codified it. Section 15-0701(1) of the Environmental Conservation Law provides in part:

> An alteration (whether or not it causes water to cover or permeate land previously dry) in the natural flow, quantity, quality or condition of a natural watercourse or lake situated in this state and either on or below the surface of the earth, effected by the use either on or off riparian land, withdrawal, impoundment, or obstruction of the water in such watercourse or lake, or by the addition of water thereto, or by changes in the banks, bed, course or other physical characteristics of such watercourse or lake, is reasonable and lawful as against any person . . . having an interest in such watercourse or lake, unless such alteration is causing harm to him or it, or would cause him or it immediate harm if and when begun.[213]

The statute defines "harm" in this context to mean interference with the complaining party's use of water or enjoyment of riparian land, whether or not resulting in measurable financial loss; and, whether or not such interference is found, a "decrease in the market value of the complaining party's interest in riparian land."[214]

The Massachusetts court in Lummis could find "no sound reason for imposing the obligation of reasonable use on riparian owners, while permitting littoral owners to use their property without any limitations,"

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211. Vol 4 sec 850. And see section 850A, listing factors determining the reasonableness of use. The courts of some western states, responding to particular water conditions and uses of that region, have developed yet another theory, the theory of "prior appropriation" resting on the principles "that beneficial use of water is the basis of the right to use water, and that priority of use is the basis of the division of water between appropriators when there is not enough for all." Id, Introductory Note and Scope Note to Chapter 41, at 213.

212. Strobel v Kerr Salt Co, 164 NY 303, 58 NE 142 (1900) (temporary detention of waters by dams to run machinery and provide irrigation, allegedly polluting water used by lower riparian owners).

213. McKinney 1984.

214. Id sec 15-0701(2)a, b.

and, accordingly, proceeded to apply the reasonable use rule to the oceanfront situation before it.[215] The court cited section 850 of the Restatement (Second) of Torts subjecting a riparian owner to liability for his own use of water of a watercourse to the detriment of another riparian owner.[216] The court seemed to overlook the distinction between the defendant's use of stream waters for his own benefit and his act of turning the water away to prevent damage to his land — a non-use rather than a use of the water. For the purposes of section 850, the Restatement defines the term "use of water" as including "both a direct utilization of the water itself by withdrawal or impoundment and the use and enjoyment of the water in place."[217] In commenting on the provisions of section 850A, listing factors for determining the reasonableness of the use of water, the Restatement states that a "reasonable use must be one that is beneficial and that fulfills some significant or worthwhile human need or desire"[218] — hardly a description of the action taken by a shoreowner to prevent the water from harming his property.

The distinction was made in Gerrish v Clough, an early New Hampshire case,[219] where the issue was whether the owner of land along a stream who built a breakwater ("in the nature of a dam"[220]) to prevent erosion of his land would be liable for injury to a neighbor's land. Rejecting the argument that the doctrine of reasonable use of stream waters applied and that the defendant's "use of measures for self-protection" were reasonable, the court observed:

> This doctrine of reasonable use as applied to watercourses, is applied so far as we know, only to a use of the water in some ordinary and common sense. But in this case, defendant made no use of the water on his land, but was simply trying to prevent the water from destroying his land.[221]

If the analogy to the watercourse reasonable use doctrine is not apt, our attention should be directed to cases dealing not with the reasonable

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215. 385 Mass 41, 429 NE2d at 1149.

216. Id.

217. Vol 4 sec 847.

218. Id sec 850A comment b.

219. 48 NH 9 (1871).

220. Id at 12.

221. Id, emphasis in original.

use of friendly waters, but with measures taken by shoreowners for protection against hostile waters.

### C. Protection Against Flooding from Overflowing Streams

Following the development of different doctrines applicable to the interference with the flow of watercourses and surface waters, the courts were confronted with the question whether flood waters overflowing the natural banks of streams should be classified as watercourses or surface waters.[222] The problem is complicated by the differing characteristics of such flood waters. We have noted one category recognized by the Restatement (Second) of Torts, waters from ordinary floods contained within reasonably definite overflow or flood channels of a watercourse and deemed to be part of it. Another category of flood waters from streams regarded by the Restatement as constituting watercourses includes new channels cut in time of flood or through other forces of nature, that have been allowed to exist for some time, and where persons effected by the changed conditions would be harmed by a restoration of former conditions.[223] We are left with the problem of classifying stream overflows from ordinary floods that do not produce new channels. They are described by Maloney and Plager as "flood waters which entirely lose their connection with a lake or stream and spread out over the adjoining country and settle in low places and become stagnant,"[224] and are classified by the authors as "surface waters."[225]

The reference in the Restatement (Second) of Torts to overflow waters in times of ordinary flood, contained within the flood channels of a watercourse, raises the questions whether overflows reaching beyond such channels are necessarily deemed to be extraordinary, and if so whether extraordinary floods warrant special legal analysis and treatment. "An extraordinary flood is one which is not foreshadowed by the usual course of nature, and is of such magnitude and destructiveness as could not have been

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222. "The almost incredible conflict of authorities as to when and under what circumstances flood waters become surface waters, so as to be governed by rules relating to the latter rather than by the rules of riparian rights, is set out in III Farnham [The Law of Waters and Water Rights, 1904], 2558-2569, secs 879-880b." Sund v Keating, 43 Wash2d 38, 259 P2d 1113, 1116 [1953].

223. Vol 4 sec 841 comment g. Similarly, Maloney and Plager apply the law of watercourses to water "which overflows the banks of a natural watercourse and which follows the course of the stream to its outlet or which on subsidence returns to the stream." Supra note 180, at 74. And see 3 R. P. Farnham, The Law of Waters and Water Rights 2559 (1904).

224. Supra note 180, at 75.

225. Id.

anticipated or provided against by the exercise of ordinary foresight."[226] An extraordinary flood has also been seen to be tantamount to an "act of God," which, "in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them."[227] At least one court has reasoned that "[i]mplicit in the definition of flood waters is the element of abnormality; they are flood waters because of their escape from the usual channels under conditions which do not ordinarily occur."[228]

The Pegham dictum left its mark on American law governing the rights and liabilities of neighboring owners of land along the shores of inland rivers, though not without varying degrees of modification in the various states.

The majority rule in America, following the lead of the English courts,[229] limits the operation of the Pegham doctrine in its application to floodwaters of rivers. Reviewing both civil and common law precedents, Chief Justice White stated, in Cubbins v Mississippi River Commission, that although the right of riparian owners to uninterrupted flow of waters is universally accepted,

> a limitation to the rule was also universally recognized by which individuals in case of accidental or extraordinary floods were entitled to erect such works as would protect them from the consequences of the flood by restraining the same, and that no other riparian owner was entitled to complain of such action upon the ground of injury inflicted thereby because all, as the result of the accidental and extraordinary condition, were entitled to the enjoyment of the common right to construct works for their own protection.[230]

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226. McKell v Spanish Fork City, 6 Utah2d 93, 305 P2d 1097, 1099 (1957). See also Cubbins v Mississippi River Commission, 241 US 351, 363 (1916).

227. 2 H. A. Farnham, The Law of Waters and Water Rights 1840 (1904).

228. Everett v Davis, 18 Cal2d 389, 393, 115 P2d 821, 823 (1941).

229. Marriage v East Norfolk Rivers Catchment Board, [1949] 2 KB 458; Garrard v Crowe, [1921] 1 AC 395, 16 ALR 825; Farquharson v Farquharson, [Scotland 1741] Morison's Dict 12778. And see the discussion of the English law in Garrish v Clough, 48 NH 9, 13 (1868), indicating that the English departure from the "common enemy" doctrine was based on the assumption that flooding from inroads of the sea is normally extraordinary, while occasional flooding by river overflow may fall within the "ordinary" category.

230. 241 US 351, 363-64 (1916).

Chief Justice White's statement suggests that a riparian owner may be relieved of liability for damages from extraordinary flood waters caused by the protective structure, whether or not the structure obstructs or diverts the natural flow of the stream. However, elsewhere in his opinion he notes a limitation on the limitation in stating that the structures may "not encroach upon the natural bed of the water courses."[231]

The questions whether and to what extent the common enemy doctrine should be applied in river situations has been the subject of considerable litigation in California. In one of the earliest California cases on the point, in an action against a public reclamation district for damages resulting from the building of flood control levees along the Sacramento River, the court resorted to the analogy of sea waters.[232] Based on its reading of Pagham and previous application of the Pagham dictum to controversies over the building of levees to contain the Mississippi River, the court concluded: "Logically, this principle would seem to be applicable to the waters of large navigable American rivers subject to extensive overflows."[233] In its broadest formulation, expressed by the same court more recently in Clement v State Reclamation Board, Sacramento San Joaquin Drainage District, the rule is said to hold:

> [T]he flood waters of a natural watercourse are a common enemy against which the owner of land subject to overflow by those waters may protect his land by the erection of defensive barriers, and . . . he is not liable for damage caused to lower and adjoining lands by the exclusion of the flood waters from his own property, even though the damage to other lands is increased thereby.[234]

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231. Id at 385, quoting from Demolombe, L 1 Code de Alluvionibus.

232. Lamb v Reclamation District No. 108, 73 Cal 125, 14 P 625 (1887). The year before, the same court, while holding that the "defendant had a right to protect his land from the threatened change of the river's channel by building a bulk-head as high as was his original bank before it washed off," stated that the defendant would be liable if he interfered "with the ancient channel of the stream." Barnes v Marshall, 68 Cal 569, 10 P 115, 116 (1886). The qualification suggests acceptance, at least in part, of the majority rule, discussed infra.

233. Id, 14 P at 628. The court did not need to rely on this position in holding for the reclamation district, because plaintiff's counsel "argued the case almost entirely upon the theory that [the district] is a municipal corporation acting under the authority of the state; and that, therefore, although exercising the power of the state, it is bound, like the state, by the constitutional limitation that private property cannot be taken for public use without compensation." The court rejected that argument. Id. The earlier cases cited by the court were decided in Iowa, Indiana and Louisiana.

234. 35 Cal2d 628, 635-36, 220 P2 897, 901-02 (1950).

Subsequently, the court in Beckley v Reclamation Board of the State of California[235] took note of criticism of the Pagham doctrine as applied to flood protection activities of the state, signaling a potential relaxation of the doctrine in California and movement toward a more flexible rule of reason. As in earlier cases, Beckley sought damages from a reclamation board for flood injury to his land caused by a levee built by the board. The board had taken and paid for a flowage easement over Beckley's land, preventing him from erecting his own protective structures. Addressing the board's assertion of the Pagham doctrine as a defense, the court pointed to "one significant circumstance" found in the earlier cases applying the common enemy doctrine, namely, that "the plaintiff, after the defendant's damaging acts, will have the right to protect his own lands from floods and will be left to that remedy."[236] Since Beckley was deprived of that right, his claim could not be barred by the common enemy defense.

Further doubts as to the California position have been reflected in other opinions of the California courts. Subsequent to Beckley, the court in Tahan v Thomas, in holding that plaintiff might have a good cause of action for inundation by flood waters of the Fresno River resulting from defendant's building of a dike across a county road, said:

> While the decisional law of this state embraces the "common enemy" doctrine first articulated in the early English case of Rex v Commissioners, etc., . . . , a landowner's right to protect his land from flood waters, to the detriment of adjoining landowners, is not without limitation; the governing principle is whether the steps taken are reasonable under all of the circumstances (Jones v California Development Company, 173 Cal 585, 160 P 823).[237]

In Jones v California Development Company, from which the Tahan passage was taken, the court deemed inappropriate California's civil law rule governing protection against surface waters, or rules governing the responsibilities of riparian owners embanking rivers against ordinary floods. The court stressed the extraordinary nature of the conditions confronting the Development Company — the conversion of California's Imperial Valley into a vast lake from floodwaters of the Colorado River — and quoted from Chief Justice White's Cubbins opinion reciting the common enemy exception to standard watercourse law in the case of "accidental or extraordinary floods."[238] Yet the court engrafted on that exception a reasonableness rule, stating:

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235. 205 Cal App2d 734, 23 Cal Rptr 428 [Dist Ct App, 3d Dist, 1962].

236. Id at 745, 23 Cal Rptr at 435, emphasis in original.

237. 7 Cal App3d 78, 81, 86 Cal Rptr 440, 441-42 [Ct App, 5th Dist 1970].

238. See supra text accompanying note 230.

> The underlying principle governing the decision of all these cases which deal with extraordinary water conditions, whether created by the ocean or by unexpected and unprecedented floods, is that in such stress the landowner may use every reasonable precaution to avert injury from his land, and whether or not his conduct be reasonable will be determined by existing conditions and not by after consequences; so that if the acts of the landowner be, in the light of the existing circumstances, not unreasonable, he will not be held liable for consequent damage which by these reasonable acts may be inflicted upon another landowner.[239]

The conduct of the Development Company in dynamiting to hasten the draining of the lake created by the flooding, though it increased the extent of erosion of plaintiffs' lands, was deemed reasonable under the circumstances of the case.

These authorities provide limited analysis of the general viability of existing rules and distinctions; they are preoccupied more with attempts to choose among and fit existing rules and distinctions to the situations at bar.

In an attempt to clarify the law on the point, Judge Cardozo, writing the opinion in New York's leading case on the subject, Howard v City of Buffalo, explained:

> We may . . . assume, . . . that a clearly defined flood channel may not be needlessly obstructed by [an] embankment. Cases superficially in conflict will be harmonized if we separate them into two classes: in the one class, the embankment has cut off the spread of surface waters, which formerly descended in an undefined mass and settled promiscuously over irregular depressions in adjacent lands; in the second class, it has intercepted flood waters which formerly maintained their own channel and their own identity. In the one class, the obstruction is lawful . . . ; in the other, there are decisions which hold it to be unlawful. . . .

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239. 173 Cal 585, 160 P 823, 827 (1916). The circumstances included the assumption that "in common with the owner of every other acre of submerged land [plaintiffs] would have welcomed the assurance that the flood waters would be drained from their soil and the land once more made to appear," indicating that the Development Company's actions had contributed to improving and making "productive" lands that had been inundated a whole year. Id, 160 P at 826. For discussions of the question whether a similar reasonableness modification in the law of surface water drainage differs from the "reasonable use" rule see 5 Waters and Water Rights 518; Comment, The Application of Surface Water Rules in Urban Areas, 42 Mo L Rev 78, 80-81 (1977); and see Keys v Romley, 58 Cal Rptr 273, 412 P2d 529 (1966).

> It is the continuity of the river's life, as a river and not as a dispersed body of water, that supplies the touchstone by which to test the right of interference.[240]

Other New York courts, in cases decided before and after Howard, have made liability depend on whether the protective structure caused ordinary as distinguished from extraordinary flood waters to overflow and injure the complainant's land (whether or not the structure encroached on the bed of the stream), and not on whether the runaway waters escaped from the watercourse and took on the character of surface waters before inflicting the damage. The court in Allen v State, treating the state as it would a private riparian owner in upholding a claim against the state for damage caused by a dike rebuilt to prevent flooding in the City of Corning, explained:

> The State cites the leading English case of Rex v Commissioners . . . to the effect that a riparian owner may without liability erect a dike to protect his lands even though he thereby causes the water to flow with greater force upon another, the injured party's remedy being to construct his own dike . . . , and there is a line of cases in California, Indiana and Missouri to the same effect. We are satisfied, however, that this is not the majority American rule and is not the rule in New York. The prevailing rule is that a riparian owner may not construct a dike if such dike in times of ordinary floods . . . will cause the waters to damage the lands of another . . . .[241]

The courts throw little light on the policy basis for the distinction between ordinary and extraordinary flooding or between waters that remain river waters and those that escape and become classified as surface waters. Judge Cardozo's reference to "the continuity of the river's life, as a river

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240. 211 NY 241, 259, 260, 105 NE 426, 431 (1914).

241. 208 Misc 385, 388, 143 NYS2d 867, 871 (Ct Claims 1955), aff'd, 2 AD2d 844, 151 NYS2d 821 (4th Dep't 1956). The "dike tended to impound the back water and to increase its depth," but there is no indication that it was built within the stream or flood channel. Id at 387, 143 NYS2d at 871. In support of its statement the court cited three New York cases in each of which the piling or other materials obstructing the flow of the watercourse were placed in the bed of the stream. Hartshorn v Chaddock, 135 NY 116, 31 NE 997 (1892); Ordway v Village of Canisteo, 66 Hun 569 (5th Dep't 1893); Zidel v State of New York, 198 Misc 91, 96 NYS2d 330 (Ct Claims 1949). Cf the dictum in People v Amerada Hess Corporation, 84 Misc2d 1036, 1039, 375 NYS2d 1001, 1004 (Crim Ct of the City of NY, Bronx Co 1975): "But while a riparian owner who seeks to improve his property must do so without obstructing the navigability of a waterway or without destroying the property of another riparian owner . . . he is, nevertheless, entitled to build some form of protection to establish his boundary or to prevent the loss of soil by the process of erosion . . . ."

and not as a dispersed body of water" as the "touchstone" does provide a hint. A policy favoring the productive use of watercourses permits a reasonable beneficial use of the passing waters by each riparian owner. The use and benefits are reciprocal. No riparian owner could obtain the benefits for himself if he were not required to tolerate another's reaping of like benefits. The expectation of benefits is based on the watercourse remaining pretty much as nature leaves it; and the meanderings caused by frequent, ordinary, anticipated flooding is part of the natural condition. One who frustrates those expectations by changing the natural condition — particularly by obstruction or diversion turning the flow onto the lands of others — must compensate the others for the resulting injury to their property. Otherwise, the several shoreowners might kill the goose that lays the golden egg — reducing if not eliminating the beneficence of the stream to the detriment of the entire riparian community. No one riparian owner may be allowed to speculate without risk whether, in changing the flow of the stream, he is depriving others of benefits of ordinary flood waters, or giving them a bonus in the form of added flood protection. Extraordinary floods, on the other hand, are less apt to be regarded as a source of commonly shared benefits deserving of the same degree of protection against tampering by individual beneficiaries.

**D. Overflow of Sea Waters**

The classification of waters in most texts and for most purposes omits sea and ocean waters.[242] The closest the Restatement (Second) of Torts definitions come to the sea is in its definition of "lake," if taken literally. Ordinarily, and as probably intended in the Restatement, "lake" denotes an inland body of water.[243] The Restatement defines a lake as "a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, if both depression and body of water are of natural origin or a part of a watercourse."[244] No distinction is made on the basis of the size of the body of water; accordingly, the Restatement includes a "pond" in the term "lake."[245]

The North Carolina Supreme Court, after "an exhaustive search," could find no cases "involving overflow waters from an ocean, sea or gulf."[246] In

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242. "Sea" and "ocean" are often deemed to be synonymous and are used interchangeably, as they will be here from time to time.

243. See definitions of "lake" in Black's Law Dictionary 788 (5th ed 1979).

244. Vol 4 sec 842 (1979).

245. Id sec 842, comment a.

246. Midgett v North Carolina State Highway Commission, 260 NC 241, 132 SE2d 599, 605 (1963).

view of the lack of recorded judicial pronouncements on the subject, we treat overflow sea waters as a separate category in the ensuing analysis.

Similar to our inquiry whether all floods from stream waters extending beyond a watercourse or its channels are deemed to be extraordinary floods, or whether they might be divided into ordinary and extraordinary subcategories, we may ask whether, for the purposes of our study, a distinction should be drawn between the overflow of sea waters from ordinary and extraordinary conditions. The court in Midgett v North Carolina State Highway Commission[247] was faced with a similar question, though the problem there did not arise from damages to the property of one private shoreowner from an erosion prevention structure built by a neighboring proprietor. Midgett, the plaintiff, sought to recover for damages to buildings near a new highway being constructed by the state. Because of its elevation, the highway prevented ocean waters from taking their normal course over dunes back to the ocean, and caused them to inundate Midgett's land. The court adopted the same concept of an extraordinary flood noted above in relation to overflows of stream waters, namely, that it is an act of God "the coming of which is not to be anticipated from the natural course of nature," as distinguished from an "ordinary flood . . . , the repetition of which, although at uncertain intervals, can be anticipated."[248]

## E. Ground Water

Ground or subterranean waters are defined by the Restatement (Second) of Torts as "water that naturally lies or flows under the surface of the earth."[249] These waters are usually divided into two principal classes, namely, "(1) underground bodies or streams of water flowing in known and defined or ascertainable channels or courses, and (2) waters which ooze, seep, or percolate through the earth, or which flow in unknown or undefined channels, generally referred to as 'percolating waters'."[250]

The rights and responsibilities of landowners relating to the use, diversion, waste or destruction of subterranean streams are generally

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247. Id.

248. 260 NC 241, 132 NE2d at 608. The court held that the facts alleged in the complaint constituted a "sufficient pleading of a flood which might have been anticipated," hence might lead to a recovery against the state. Id. The court cited cases in which a dam or other obstruction of a stream was alleged to have caused the flooding of a riparian owner's land, and the party maintaining the dam or obstruction asserted as a defense the extraordinary or unprecedented volume of rainfall or storms: Bruton v Carolina Power & Light Co., 217 NC 1, 6 SE2D 822 (1940); Law v Gulf States Steel Co., 228 Ala 305, 156 So 835 (1934); and Taylor v Chesapeake & Co., 84 W Va 442, 100 SE 218 (1919). Id.

249. Vol 4 sec 845 (1979).

250. 78 Am Jur2d, Waters sec 148 (1975).

governed by rules applying to surface watercourses.[251] Accordingly, in New York, the liability of one landowner for damages to another's property or water supply from a use of or interference with an underground stream would probably be tested by a standard of reasonableness.[252]

The evolution in America of doctrines relating to percolating waters involved the shift from an English inflexible, laissez faire approach to a more flexible American rule of reason, similar to the course of development of the law of watercourses and surface waters. Following the English rule, the earlier decisions in New York and other states "laid down the general rule that a landowner might not be enjoined from doing an act on his own premises which resulted in diverting or even wholly destroying the flow of percolating waters from or upon his neighbor's lands."[253] The rationale of the English rule was explained in terms of standard property law doctrine: Percolating water is the same as and cannot be distinguished in law from land, hence "the owner of the land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil," and he can "consume or cut it off, with impunity."[254]

At about the turn of the century, the New York courts broke from the English tradition. Reasoning from the logic of the English reliance on property law concepts, they refused to grant immunity to a landowner who withdrew water for some purpose not incidental to the use or enjoyment of his own land.[255] In carving out exceptions to the English absolute

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251. Id sec 152. And see Powell, supra note 209, par 724; and Annotation, Liability for Obstruction or Diversion of Subterranean Waters in Use of Land, 29 ALR2d 1354, 1373 et seq (1953).

252. Bloodgood v Ayers, 108 NY 400, 405, 15 NE 433, 434-35 (1888) (dictum); and Flanigan v State, 113 Misc 81, 183 NYS 834 (Ct Claims 1920) (dictum). Cf O'Dell v Hyack Waterworks Co., 81 AD (Hun) 283, 35 NYS 208 (2d Dep't 1895).

253. Hathorn v Natural Carbonic Gas Co., 184 NY 328, 335, 87 NE 504, 507 (1906). See also Trustees of Delhi v Youmans, 45 NY 362, 363 (1871); and Johnstown Cheese Manufacturing Co. v Veghte, 68 NY 18, 22 (1877).

254. Pixley v Clark, 35 NY 520, 526 (1866).

255. Smith v City of Brooklyn, 18 AD 340, 46 NYS 141 (2d Dep't 1897), on remand, 32 AD 257, 52 NYS 983 (2d Dep't 1898), aff'd, 160 NY 357, 54 NE 787 (1899): "[N]o case will be found in . . . this country, where the right has been upheld in the owner of land to destroy a stream, a spring or well upon his neighbor's land, by cutting off the source of its supply, except it was done in the exercise of a legal right to improve the land or make some use of the same in connection with the enjoyment of the land itself, for purposes of domestic use, agriculture or mining or by structures for business carried on upon the premises." 18 AD at 342, 343, 46 NYS at 143. The waters pumped by the defendant city in Smith were not used on or for the city's land on which the wells were located, but were used to furnish water to residents of the city. For a similar holding and facts see also Forbell v City of New York, 47

ownership, no liability rule, the New York courts developed and acknowledged the adoption of a general "rule of the reasonable use of percolating waters."[256]

The New York position is shared generally by other American states.[257]

## VI. Summary of Major Policy Issues

For the most part policy shifts in the evolution of doctrines in the law of watercourses, surface waters (including flood waters) and ground waters have been influenced by societal attitudes, adopted as judicial attitudes, favoring or opposing urban development in coastal locations. To some extent these issues overlap those questioning man's interference with natural ocean shore dynamics.

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AD 371, 61 NYS 1005 (2d Dep't 1900), aff'd, 164 NY 522, 59 NE 644 (1900). See also Dunbar v Sweeney, 260 NY 609, 610-11, 130 NE 913, 914 (1921), affirming the right of defendants to withdraw and use subterranean waters for refrigerating purposes in their storage and ice manufacturing plant, but not "for the purpose of manufacturing ice for sale."

256. People v Carbonic Acid Gas Co., 196 NY 421, 431, 90 NE 441, 444 (1909). See also Forbell v City of New York, 164 NY 522, 528, 58 NE 644, 645-46 (1900); and Stevens v Spring Valley Water Works and Supply Company, 42 Misc2d 98, 247 NYS2d 503 (2d Dep't 1964), aff'd, 22 AD2d 930, 255 NYS2d 486 (2d Dep't 1964). Cf Bondy v Utah Construction Co., 28 NYS2d 125 (Sup Ct, Westchester Co, 1940, not officially reported), where the court appeared to follow the English rule in denying liability of the defendant company for tunnel blasting allegedly causing the drying up of plaintiff's wells (a result possibly influenced by the city's grant of the right to construct the tunnel); and see Powell's suggestion that the Bondy and Flanigan decisions point to New York's endorsement of the English no-liability rule in excavation cases like these. Powell, supra note 209, par 728 at 422.

257. Powell, supra note 209, par 728. Section 858 of the Restatement (Second) of Torts states that a landowner "who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless . . . the withdrawal . . . unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure, . . . exceeds the proprietor's reasonable share of the annual supply or total store of ground water, or . . . has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water" (subjecting the determination of reasonableness or unreasonableness to the same Restatement's tests governing riparian conflicts). See Annotation, Liability for Obstruction or Diversion of Subterranean Waters in the Use of Land, 28 ALR2d 1354 (1953); and Annotation, Liability of Landowner Withdrawing Ground Water from Own Land for Subsidence of Adjoining Owner's Land, 5 ALR4th 614 (1981), indicating that in some cases the results may be influenced by doctrines governing the right of subjacent support.

## A. Pro-Development Policies

### 1. In General

In states adopting the civil law rule in drainage law, a landowner who interferes with the natural flow of surface waters is liable for injury to other landowners. That normal urban development often alters the natural drainage system means that improving landowners are burdened with additional costs under that rule. This has influenced the courts of some states to modify the rule or abandon it in favor of the common enemy rule, allowing the urban builder to construct drainage works with impunity[258] (unless otherwise caught by the collect and discharge or other exceptions[259]). Thus, in an early case, decided when the New York courts embraced the civil law rule, the Court of Appeals explained: "It is undoubtedly true that the rule which would be applicable to surface water in agricultural districts must be somewhat modified in its application to city lots. Such lots are useful only for building, and the owners must be permitted to improve them for building purposes."[260]

The Supreme Court of California questioned the premise that a departure from the civil law natural flow theory would hamper urban development and refused to endorse the modification:

> Admittedly the rule was adopted when California was primarily a rural society, and apparently it has never been strictly applied in a case involving urban land. On the other hand, no documentation has been produced to establish that the rule has in fact impeded urban development in the state. A number of highly urbanized states follow the rule, and California's phenomenal growth rate, to which no one can be oblivious and of which this court may take judicial notice, appears unstunted by the existance and application of the civil law rule since 1873.[261]

Elaborating on this theme, the author of one comment pointed out that certainly the civil law rule does not prohibit a landowner from constructing

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258. Comment, The Application of Surface Water Rules in Urban Areas, 42 Mo L Rev 76, 79 (1977). And see Annotation, 93 ALR3d 1193, supra note 183, at 1197, 1214; and Kinyon and McClure 907, 931-32.

259. See supra text accompanying note 192.

260. Vanderwiele v Taylor, 65 NY 341, 346 (1875).

261. Keys v Romley, 50 Cal Rptr 273, 279, 412 P2d 529, 535 (1966). The court favored a rule of reasonableness. One law review writer could find "no mention of empirical data which would support the assumption" that the "decisions of land developers are influenced by rules of law regarding surface water disposal." Hanks, Law of Waters in New Jersey, 22 Rutgers L Rev 621, 691 (1968).

surface drainage facilities. He may so improve his land, but in such a way as to avoid injuring his neighbor, and he must be willing to pay the cost if he cannot avoid the injury.[262] The author also cautions us to look at the effect on the injured neighbor's land when applying a pro-development policy.[263] Even if it be granted that a landowner might be encouraged to develop his land if he does not face the prospect of liability to his neighbor from drainage improvements, the neighbor may or may not be encouraged to improve his own land. If, as in a rural area, the neighbor never intended to build on his flooded premises, there would be a net gain of improvement. If the result were to destroy improvements already made by the neighbor, or make it impossible for the neighbor to undertake future improvements, the result might be a net loss [if, of course, it were possible to quantify and compare the gains and losses of the respective landowners].

The objective of promoting the improvement of land has also been cited as a justification for allowing a landowner to tap or otherwise affect another's source of ground water supply, though qualified by a reasonable use limitation.[264] By parity of reasoning, the reasonable use rule accords weight to a policy of permitting, if not encouraging, riparian owners to use river waters productively, though subject again to counterbalancing, unreasonable injury to the neighbor.

### 2. Pro-Development; the Fairness Issue

Where the extraordinary nature of the flooding of urban areas from overflowing streams influences a court to invoke the common enemy doctrine, the urban setting may be significant, though not necessarily because application of the doctrine may be seen to facilitate urban development. If a stream courses through a built-up city, and embankments or other flood prevention structures already in place have contributed to the need for the defending owner to take protective measures himself, he would be subject to unjust discrimination if he were made to compensate the adjoining owners for the resulting injury to their properties. Judge Cardozo made the point in Howard v City of Buffalo:

> The rules applicable to the obstruction of streams in an unsettled or rural region cannot be rigidly applied where an urban population has planted its factories and homes. The law of water rights is not an inflexible body of precedent. It takes heed of the varying wants of varying localities. . . .

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262. 42 Mo L Rev 76, supra note 239, at 82.

263. Id at 82-83.

264. Forbell v City of New York, 164 NY 522, 525, 58 NE 644, 645 (1900). And see Smith v City of Brooklyn, supra note 255.

> No court would presume by mandatory injunction to compel the destruction of a great section of a city because in building it the limits of some ancient flood channel were obstructed. We cannot order these homes and factories to be removed . . . , yet if the defendants' structures have helped to swell the stream, these also have contributed to that result. To bid the defendants take down their embankments while leaving their neighbors all about them untouched, would be an unjust discrimination.[265]

The United States Supreme Court in Jackson v United States[266] has recognized an element of unfairness in the situation of the shoreowner who has built his own protective structure and seeks to recover damages from exacerbated flooding conditions caused by structures built by others. In absolving the United States from liability for damages from increased overflow from the Mississippi River caused by levees built by federal and state authorities, the Court pointed out:

> When accurately fixed, the complaint is but this, that because the claimants had built a levee for the purpose of protecting their lands and which answered that purpose if levees were not built by others to protect their lands, actionable injury would be occasioned claimants when anybody else sought to protect his land from overflow, since to so do would increase the volume of water in the river and raise the flood level to the detriment of claimants. In its essence, however, this but amounts to saying that because the claimants have built a levee along their property for the purpose of protecting it from overflow in times of high water, they have acquired the right to stereotype the conditions existing at the time they built their levee even to the extent of preventing any one from subsequently exerting his right to build a levee to protect his land.[267]

By the same logic, reverse discrimination could favor a holdout who does not want to build his own protective structure. Thus, in Lamb v Reclamation District No. 8, the early California opinion declaring the aptness of the Pagham common enemy principle to inland rivers, the court said:

> If the works of [the Reclamation District] can be declared a nuisance, then the levees [built by municipalities and by

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265. 211 NY 241, 283, 105 NE 426, 432 (1914).

266. 230 US 1, [1913].

267. Id at 20-21.

> private riparian owners] in front of the cities of Colusa and Sacramento, which preserve millions worth of property . . . can be removed at the suit of any owner who will not protect himself, and who can show that the swell of the river is increased in times of flood by levees either above or below him, and the whole system of reclamation can be defeated.[268]

Lord Tenterden, in his Pagham opinion, denied special, favored status to a shoreowner seeking a judicial mandate to the defendant to build a structure for his land, rather than an order for demolition of structures built by others. In demonstrating the consequences of a recovery by an unprotected adjoining owner (Cosens) for damage caused by groins built by the defendant Commissioners of Sewers, Lord Tenterden said:

> If we were in this instance to say that the commissioners for the level in question were bound to erect a groyne for Mr. Cosens, it might, and probably would, cause injury to the land lying to the eastward in the same manner as that erected for the protection of the level has caused injury to Mr. Cosens; and the owner of the land lying eastward of Mr. Cosens would have a right to call upon the commissioners to protect him also. In like manner each successive proprietor of land lying to the eastward would be entitled to claim protection, and the commissioners might be compelled to erect defences against the sea along the whole line of coast from the level of Pagham to the North Foreland; for so far, I believe, the sea is making inroads upon the land.[269]

The common enemy approach, requiring each owner to assume the burdens of protecting his own land, thus provides an incentive (or at least an invitation) to the owner to improve his land in that particular way, or a disincentive to leave his shore property unprotected.[270] In that sense the approach could be said to foster a pro-development policy, as well as resolving a problem of unfairness.

### B. Anti-Development Policies

The argument that a common enemy approach encourages land improvement rests on the premise that the particular community, at a particular time,

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268. 73 Cal 125, 14 P 825, 829 (1887).

269. 109 Eng Rep at 1076-77, 8 B & C at 360-61.

270. It is assumed that each owner has a legal right to construct his own protective works. If not, the Pagham principle is inapplicable. See Beckley v Reclamation Board of the State of California, 205 Cal App2d 734, 23 Cal Rptr 426 (Dist Ct, 3d Dist 1962), noted supra, text accompanying note 235.

favors further land development. Even if the community has a pro-development bias generally, it may be neutralized by countervailing policies relevant to the particular area. In the evolution of surface water law it has been recognized that a policy favoring the developer may be appropriate at some times in some communities, but at other times a policy favoring retention of natural areas is preferable. The needs of communities involve more than the need to improve and develop, and may compel the reservation of land for parks and other natural areas.[271] More generally, it has been observed that "[w]hile in the early days of the development of this country, a presumption in favor of drainage may have been proper, the policy today probably should favor retention of as many natural areas as possible." A preservation policy rejects the common enemy rule -- allowing a landowner to use drainage methods without regard to injury to his neighbor -- and most supports the natural flow rule -- burdening the improver with damages for turning back waters onto his neighbor's land if the result is to disturb the natural flow of water on the neighbor's land.[272]

### C. Non-Interference with Natural Coastal Processes

Generally, the issue confronting public authorities concerned with Long Island erosion problems is framed in terms of whether or not new shoreline development or the protection of existing coastal structures should be restricted.[273] Underlying the issue is the more basic question whether the ultimate societal good can best be achieved by letting natural coastal processes operate without human intervention. It assumes the ultimate futility of man's efforts to turn back or redirect ocean waves to reduce erosion, conceding that the "common enemy" will win the war, if not particular skirmishes. It acknowledges that particular shoreowners may achieve short-term benefits from building a groin, bulkhead or jetty, but at the potential cost of short-term injury to other shoreowners or long-term detriment to a larger community, or both. The issue is similar to the general one whether development should be restrained to preserve environmental quality, but with the additional twist that even if the choice is development, nature may win in the long run.

Where government intervenes to establish preservationist policies, as in statutes for protecting tidal wetlands[274] or requiring the preparation of environmental impact statements,[275] courts are given statutory or

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271. 42 Mo L Rev 76, supra note 238, at 93.

272. 5 Waters and Water Rights 578.

273. See supra, text accompanying notes 97-105, for discussion of positions taken by the New York Legislature and other authorities in relation to this and ensuing statements here.

274. Eg., Tidal Wetlands Act, Environmental Conservation Law art 25 (McKinney 1984).

275. Eg., State Environmental Quality Review Act, Environmental Conservation Law art 8 (McKinney 1984).

administrative guidelines to follow in resolving disputes between the private builder of an erosion protection structure and the regulating government. If the contest over the building of an erosion protection device is between private shoreowners, and the application of a statute is not in question, evidence of environmental concerns may nevertheless be weighed by a court in deciding a pro-anti-development policy debate. Whether in the case between private shoreowners a court would entertain evidence of and consider testimony or findings of scientists or engineers regarding the effect of natural coastal processes remains to be seen. We anticipate no jurisdictional or doctrinal constraint on judicial invention going that far. Thus it is conceivable to us that a court might reverse the traditional "common enemy" concept, and find in the natural operations of ocean waves a "common friend" of coastal shores and their human users.

In taking a position on the let-nature-take-its-course issue, the courts would tend to look for a policy foundation for a "common friend" concept in statements or actions representing a consensus in the affected community. We surmise that in New York the search would focus on pertinent state policies expressed in the state's Coastal Management Program.[276] As applied to any given dispute over claims for damages from a privately built groin, bulkhead or jetty, these policies would not be definitive or self-executing. They represent, rather, a basic anti-development bias, tempered with a regard for factors measuring the potential effectiveness of the structure to curb erosion, the degree of harm to natural beach conditions, and a weighing of public and private costs and benefits.[277] The multi-factor approach suggests that, if adopted by a court, it would lead to an examination of the particular facts of each case and the form of remedy sought by aggrieved parties in contested matters. The incorporation of these policies into the court's decision-making would tend to give the injured neighbor a considerable advantage in pursuing his claim against the party about to build or owning the groin, bulkhead or jetty.

## VII. Consideration of Compliance with Statutory Standards in Common Law Adjudications

### A. Introduction

Normally, erosion prevention structures may not be placed in or along navigable waters without the permission of authorities at various

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276. See supra text accompanying note 97.

277. E.g., Policy 12, stressing the protection of natural protective features of beaches; Policy 13, requiring proof of a "reasonable probability of controlling erosion for at least thirty years"; Policy 14, establishing as a standard "no measurable increase in erosion or flooding at the site . . . or at other locations"; and Policy 17, favoring the use of non-structural measures whenever possible.

governmental levels. Local governments may require a permit under general building codes or other ordinances. If the site is subject to zoning restrictions barring the proposed structure, the landowner may seek an amendment to the zoning ordinance. Under some circumstances he may request a variance from the restrictions, rather than an amendment. If the zoning ordinance allows the structure subject to obtaining a special permit, the landowner must apply and satisfy the requirements for obtaining the permit.

The state may intervene through laws designed to protect the quality or regulate the use of the waters or foreshore.[278] At the federal level, the shoreowner must also secure permission of the Corps of Engineers, under the Rivers and Harbors Act.[279] If all or part of the site of the proposed structure is in public ownership, the shoreowner must obtain title or some type of user right from the owner-government.[280] In doing so he may be called upon to comply with certain conditions similar to those imposed by regulatory laws.

The question considered here is whether a landowner, after demonstrating compliance with statutes, regulations, or conditions of ownership in constructing an erosion control device may nevertheless be liable for damages to adjoining land. In legal terms, the issue is whether such compliance constitutes a complete defense to a common law action for such damages. Generally, the courts refuse to bar liability as a matter of law, but do give some weight to the compliance in deciding the common law case. However, there are exceptions, and some differences in approach depending on the nature of the common law cause of action asserted by the plaintiff. The ensuing discussion summarizes the sources of governmental regulatory standards in New York; reviews past judicial treatment of the general rule, exceptions and differences; and considers their applicability where aggrieved neighbors seek damages for property injuries resulting from the building of erosion control structures.

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278. E.g., in New York, the Tidal Wetlands Act, Environmental Conservation Law art 25, and the Shoreowners' Protection Act, Environmental Conservation Law art 34 [see text accompanying notes 97-105 supra, and 305-315 infra]; and Navigation Law sec 32 [McKinney Supp 1984). See discussion in N. Kaplan, State and Local Restrictions on Siting Coastal Aquaculture in New York 21 et seq [New York Sea Grant Institute, May 1984].

279. 33 USC sec 403 (1976].

280. E.g., in New York, the Public Lands Law secs 3, 75 [McKinney 1951, and 1983 Supp]. See discussion relating to state and town lands, in N. Kaplan, Access to Waters and Underwater Lands for Aquaculture in New York 20-38, 41 et seq [New York Sea Grant Institute, April 1984].

## B. Sources of Governmental Regulatory Standards: New York State and Local Laws

### 1. The Shoreowner's Protection Act

Landowners seeking approval of erosion protection structures lying within coastal erosion hazard areas designated under the Shoreowner's Protection Act will have to comply with minimum standards set by the Commissioner of Environmental Conservation, whether the permitting authority is a local government or the state Department of Environmental Conservation itself.[281] A city, town or village exercising the authority is not given increased regulatory powers by the Shoreowner's Protection Act, but would implement the Act through the use of its existing powers in the form of "zoning regulations, subdivision regulations, site plan approval regulations or any other applications of the police power."[282] A county administering the Act in default of legislation by a city (other than New York City), town or village is vested with the same police powers enjoyed by the defaulting unit.[283] The Act does not bar the local government from exacting more restrictive standards than the minimum ones prescribed by the state.[284]

Examples of erosion hazard area restrictions imposed by local governments through zoning ordinances are found in the codes of the towns of East Hampton and Southampton, and the Village of Southampton. East Hampton created a Coastal Erosion Overlay District in which the ordinance prohibits the "[c]onstruction of a bulkhead, revetment, jetty, etc.," and any "alteration of the natural topography of beach, dunes, bluffs or escarpments with exception of the stabilization by planting vegetation on the face or crest of a bluff."[285] The Town of Southampton and Village of Southampton

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281. See text supra accompanying notes 98-102.

282. Environmental Conservation Law sec 34-0105(1) (McKinney 1984).

283. Id sec 34-0106(1) (McKinney 1984).

284. The Coastal Erosion Management Regulations state that these regulations do "not prohibit any local government from adopting and enforcing a local program that regulates actions or uses of land more stringently" than the state minimums. 6 NYCRR sec 505.17(a) (1983). We note that a model local law for Great Lakes shoreline coastal erosion hazard area management, prepared by the St. Lawrence-Eastern Ontario Commission, does not appear to be more restrictive than the state regulations.

285. Code of the Town of East Hampton sec 153-33.3 (1980). The Zoning Board of Appeals is authorized to grant variances, but only upon the applicant's meeting the strict standard of use variances, showing that he cannot obtain any reasonable economic return from the property; and the stricter standard, in the case of bulkheads, jetties, revetments and groins, requiring a showing that the benefits from the proposed structure clearly outweigh any possible detriment to adjoining properties. Id.

have each formed a Tidal Wetlands and Ocean Beach Overlay District, in which private shoreland owners are prohibited from constructing any building or structure on the ocean beach, other than an access walkway meeting certain specifications; or from constructing bulkheads in tidal wetlands, "except those in a Resort Waterfront Business District or when found necessary to protect the natural environment from excessive erosion, silting or an imbalance in the ecological system of the tidal wetlands."[286]

The subdivision regulations of the Town of Brookhaven, Town of Southampton and Village of Southampton require bulkheading where specified municipal authorities deem it necessary for erosion protection.[287] The codes of the Southamptons also authorize the Planning Board to "require such erosion and sedimentation control methods as are needed to protect terrain features."[288]

Municipal police power measures enacted independently of particular state enabling laws are illustrated in the codes of the Village of Southampton, Town of Southampton and Town of Southold. Section 37-3A of the Code of the Village of Southampton, in the article entitled "Beach Erosion and Protection," prohibits the changing or impairing of any "structure, location or any condition pertaining to the dunes, beach barrier, revetment or any structure or installation of any kind designed or erected as a barrier to water, wind or to the elements or against erosion or other similar action." The same section bars any person, "whether he be the owner of the property or not," from excavating, removing or cutting down any such dune or structure unless certain setback or height restrictions are met. In the article on beach protection the Town of Southampton code prohibits the erection or placement of "any building, structure or tent between the north face" of any brush-filled "revetment, fence, work or installation, and the

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286. Code of the Town of Southampton sec 69-9A[2][e] (1984); Code of the Village of Southampton sec 116-76[5] (1983).

287. Code of the Town of Brookhaven, Appendix, Part I, Subdivision Regulations sec 21 (1984): "Bulkheading will be required along all water-front property where, in the opinion of the Planning Board, the land is subject to erosion and other protective measures are not considered adequate." Similar subdivision requirements in the codes of the Town and Village of Southampton provide that "where bulkheading is deemed necessary by the Planning Board and the Town Engineer and the Town [or Village] Trustees to protect the coastal areas from erosion caused by storm and tidal action, it shall be placed in such fashion as not to destroy or alter significant ecological values of the natural marine edge which are considered to extend up to and above the mean high water level and to include all tidal wetlands." Code of the Town of Southampton sec 80-41A (1979); Code of the Village of Southampton sec 97-41A (1982).

288. Code of the Town of Southampton sec 80-39D (1979); Code of the Village of Southampton sec 97-39D (1982).

present crest of the dunes on the south beach in this town, not excepting the owners of said area," unless the area is filled to the higher of the height of such facility or of the dune crest.[289] The Town of Southold requires a permit for the placement of any "piles, stakes, buoys, piers, docks, bulkheads or other objects in or on any town waters or public lands under or adjacent to town waters" without a permit from the Board of Trustees.[290]

The Coastal Erosion Management Regulations promulgated under the Shoreowner's Protection Act by the Commissioner of Environmental Conservation require erosion area permits for specified activities in "natural protective feature areas," including nearshore areas, beaches, bluffs, primary dunes, and secondary dunes.[291] For example, an "erosion area permit" is required for "new construction, modification, or restoration of docks, piers, wharves, groins, jetties, seawalls, bulkheads, breakwaters, revetments, and artificial beach nourishment" in nearshore and beach areas, with specified exceptions.[292]

A separate, overlapping section of the state regulations relates specifically to "erosion protection structures." It requires an "erosion area permit . . . for construction, modification, or restoration of erosion protection structures including the modification or restoration of erosion protection structures that were constructed without an erosion area permit."[293]

The state restrictions on construction, including the construction of erosion control facilities, are quite comprehensive. Some are specific. For example, the "ramp slope" of permitted "bluff cuts must not be steeper than 1:6 and the side slopes must not be steeper than 1:3, if not terraced

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289. Code of the Town of Southampton sec 20-47 [1983].

290. Code of the Town of Southold sec 32-10 [1959] [emphasis added].

291. 6 NYCRR sec 505.8 [1983].

292. Id sec 505.8[e][3],[b][5]. The exceptions include "structures built on floats, columns, open timber, piles, or similar open-work supports having a top surface area of 200 square feet or less," and those "built on floats and which are removed in the fall of each year." Permits may also be granted for the "deposition of clean sand or gravel on beaches, only for expansion or stabilization of beaches" [id sec 505.8[b][3]]; and for dredging "for only for expansion or stabilization of beaches" [id sec 505.8[b][3]]; and for dredging "for constructing or maintaining navigation channels, bypassing sand around natural and man-made obstructions, or artificial beach nourishment" [id sec 505.8[e][1]]. With exceptions, an "erosion area permit is required for new construction, modification, or restoration of erosion protection structures, walkways, or stairways." Id sec 505.8[c][4].

293. Id sec 505.9[a].

or otherwise structurally stabilized."[294] Others are closer to general performance standards (e.g., erosion "protection measures must have a reasonable probability of controlling erosion on the immediate site for at least 30 years," and "[a]ll materials used in such structures must be durable and capable of withstanding inundation, wave impacts, weathering, and other effects of storm conditions").[295]

Of particular significance here are state regulations obedient to the mandate of the Shoreowner's Protection Act that the state minimum standards "shall include . . . regulation of activities or development, including placement of erosion protection structures or use of non-structural measures so that there will be no measurable increase in erosion to the development site or at other locations."[296] Section 505.9 of the state regulations elaborates, in noting that the construction of erosion protection structures is "often only partially effective over time, and may even be harmful to adjacent or nearby properties"; and that even though "major erosion protection structures of great length would be required to effectively reduce future damages due to erosion," in some coastline areas, "in those instances where properly designed and constructed erosion protection structures will be likely to minimize or prevent damage or destruction to man-made property, private and public property, natural protective features, and other natural resources, construction of erosion protection structures may be allowed," subject to prescribed requirements.[297] These include the requirement, for the most part in the words of the statute, that the structure must "not be likely to cause any measurable increase in erosion at the development site or other locations."[298]

In weighing the factor of compliance with statutory or regulatory standards by a landowner defending himself in a neighbor's common law action for damages, a court is likely to consider not only the substance of the

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294. Id sec 505.9(c)(1)(ii), following the requirement in the Shoreowner's Protection Act that the state "standards and criteria shall provide that erosion protection structures . . . shall have a reasonable probability of controlling long-term erosion on the immediate site for a period of at least thirty years and that a long-term maintenance program is provided for such structures; however such standards and criteria may allow for such protection structures to be constructed of materials which by themselves have a working life of less than thirty years, when the maintenance program assures that they will be regularly maintained and replaced as necessary to attain the required thirty years of erosion protection." Environmental Conservation Law sec 34-0108(3)(d) (McKinney 1984).

295. Id sec 505.9(b), (d).

296. Environmental Conservation Law sec 34-0108(3)(b) (McKinney 1984).

297. 6 NYCRR sec 505.9 (1983).

298. Id sec 505.9(e)(1).

standards, but also the thoroughness and integrity of the record of the permitting proceeding in which the standards were applied, as well as the status or other indicia of the credibility of the administrative decision-makers in the proceeding. We surmise, then, that compliance with the standards might be accorded relatively more weight in favor of the defending landowner if confirmed following some kind of administrative, quasi-judicial, or judicial review proceeding. An example of a quasi-judicial proceeding is found in the provisions of the Shoreowner's Protection Act authorizing the applicant for an erosion area permit to obtain a variance or modification of a particular restriction or requirement when he can demonstrate that the strict application of the restriction or requirement will cause "practical difficulty or unnecessary hardship," and meets various specified criteria.[299]

The listed criteria include a specific reference to mitigation of "adverse impacts on natural systems," but not impacts on "other locations."[300] In one respect they do not follow the analogy of variance criteria in the New York zoning enabling acts and most municipal zoning ordinances, which invite an examination of the impact of the proposed variance on the neighborhood.[301] As a practical matter, however, owners of adjacent shorelands perceiving adverse effects from a proposed erosion protection structure would make their voices heard before the agency passing on the variance, and these would be given weight by the agency. In any case, if the restriction from which a variance were sought were embodied in a zoning ordinance, we expect that the variance criteria prescribed under or for the zoning ordinance would be applied.[302] It is also possible, if not

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299. Environmental Conservation Law sec 34-0108[4] (McKinney 1984). The Act says that the variance procedure is to be provided by the state regulations. It is found in 6 NYCRR sec 505.13 (1983).

300. Id. The statute requires a showing that "all responsible means and measures to mitigate adverse impacts on natural systems in the area have been incorporated into the project design." Environmental Conservation Law sec 34-0108[4][c] (McKinney 1984) (emphasis supplied). The corresponding regulations do not contain the words "in the area," but do add a specific reference to adverse effects on the "functions and protective values described in section 505.3," a section describing the dynamics of wave action on beaches, bluffs, dunes and nearshore areas.

301. Invited by the common statutory criterion stipulating that "the spirit of the [zoning] ordinance be observed." E.g. in Town Law sec 267[5] (McKinney Supp 1984).

302. Cf section 58-13A of the Code of the Town of Shelter Island (1983), providing that variances from flood hazard area restrictions "shall only be issued by the . . . Zoning Board of Appeals upon a showing of good and sufficient cause, a determination that failure to grant the variance would result in exceptional hardship to the applicant and a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public or conflict with existing local laws or ordinances." (Emphasis added.)

likely, that adverse effects on a neighbor's foreshore would stem from adverse effects on natural processes.

The administrative type of proceeding in which the circumstances surrounding the proposed construction of an erosion protection device might be examined is exemplified by proceedings before municipal planning boards on applications by developers for subdivision approval or site plan approval.[303] An example of a judicial proceeding, the results of which might enhance the case of the defendant permittee, would be court review of a decision of the quasi-judicial body that granted or denied a variance from a restriction on constructing the erosion protection facility.[304]

### 2. The Tidal Wetlands Act

If the site of the proposed construction is within an area designated as tidal wetlands under the Tidal Wetlands Act,[305] the landowner is required to obtain a permit from the Commissioner of Environmental Conservation.[306] In passing on the application for a permit "the commissioner shall consider the compatibility of the proposed activity with reference to the public health and welfare, marine fisheries, shellfisheries, wildlife, flood and hurricane and storm dangers, and the land-use regulations promulgated" by the commissioner under the Act.[307] The statutory guidelines for the land

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303. See, e.g., Town Law sec 274-a [site plans], and sec 281 [subdivision plats] (McKinney Supp 1984).

304. In New York, a review normally conducted through resort to Article 78 of the Civil Practice Law and Rules [McKinney 1981], as stipulated by the zoning enabling act (e.g., section 267[7] of the Town Law [McKinney 1965]). The enabling laws similarly prescribe article 78 proceedings as the mode of judicial review of site plan and subdivision approval decisions [e.g., Town Law secs 274-a, 282 [McKinney 1965 and 1984 Supp]].

305. Environmental Conservation Law art 25, enacted in 1973 to further "the public policy of this state to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the state." Sec 25-0102 (McKinney 1984). Tidal wetlands include "[a] those areas which border on or lie beneath tidal waters, such as, but not limited to, banks, bogs, salt marsh, swamps, meadows, flats or other low lands subject to tidal action, including those areas now or formerly connected to tidal waters; [b] all banks, bogs, meadows, flats and tidal marsh subject to such tides," and the "intertidal zone" upon which specified types of aquatic plants grow or may grow. Id sec 25-0103[1].

306. Id sec 25-0402. The "erection of any structures" is included in the list of activities regulated by the Act and subject to the permitting requirement. Id sec 25-0401[2].

307. Id sec 25-0403[1].

use regulations of tidal wetlands focus on wetlands preservation, not on adverse effects on adjacent lands, except to the extent they regard wetlands "as an element of flood and storm control."[308]

The regulations set forth general standards for the issuance of permits (e.g., the proposed activity must be shown to be "compatible with the public health and welfare," and "reasonable and necessary, taking into account such factors as reasonable alternatives to the proposed regulated activity and the degree to which the activity requires water access or is water dependent").[309] They also condition permits on compliance with specific standards (e.g., 75 foot minimum setbacks for structures larger than 100 square feet, except bulkheads, piers, docks and other such structures).[310]

The regulations authorize the Department of Environmental Conservation, in connection with its review of applications for permits, to "vary or modify the application of any provisions [in the regulations imposing development restrictions] in such a manner that the spirit and intent of the pertinent provisions shall be observed, that public safety and welfare are secured and substantial justice done and that action pursuant to the variance will not have an undue adverse impact on the present or potential value of any tidal wetland for" specified purposes, including "flood and hurricane and storm control."[311] Judicial review of the decisions of the Commissioner of Environmental Conservation under the Act is provided by section 25-0404 of the Act.[312] In addition to the procedural requirements for hearing applications for permits,[313] these proceedings are apt to produce a relatively complete record on issues involving claims of neighboring landowners for damages from construction allowed in tidal wetlands.

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308. Id sec 25-0302[1], stating that in framing the regulations the commissioner is to be guided by "the public policy set forth in this act as well as the present and potential value of the particular wetland for marine food production, as a wildlife habitat, as an element of flood and storm control, and as a source of recreation, education and research." The regulations reflect the same values, and in the statement of findings on which they are based note that coastal shoals, bars, and flats and littoral zones of tidal wetlands "play an important role in flood and hurricane and storm control." 6 NYCRR secs 661, 661.2[e] (1977).

309. Id sec 661.10[b][ii], [b][iii].

310. Id sec 661.6[a][1].

311. Id sec 661.13[a].

312. McKinney 1984. And see section 661.36 of the regulations.

313. See Environmental Conservation Law sec 25-0402 (McKinney 1984) and other provisions there cited.

Although the Tidal Wetlands Act is silent on the point, the regulations promulgated under the Act make it clear that the state law does not bar municipal regulation of the use of tidal wetlands, in providing: "[N]o provision of [the regulations] shall relieve any person from his obligation to comply in all respects with the provisions of any other Federal, State or local law or regulation, including but not limited to acquisition of any other required permit or approval."[314] However, in the event of a direct conflict between the state and local regulations, a court might decide that the state provisions prevail.[315]

### 3. The Freshwater Wetlands Act

Permits are required for "erecting any structures" within freshwater wetlands located and classified as such under the Freshwater Wetlands Act.[316] The Freshwater Wetlands Act was enacted two years after the Tidal Wetlands Act and follows it in most respects, including its focus on preservation of mapped wetlands, the promulgation of land use regulations by the Commissioner of Environmental Conservation, and permitting and review procedures. In one major departure from the earlier Act, the state defers to local regulatory jurisdiction in granting to each city, town, village or county the option to adopt and implement a "freshwater wetlands protection law or ordinance in accordance with" the Act.[317] In default of such action by a city, town or village, the county may act, and if it fails to do so the function devolves upon the Department of Environmental Conservation.[318] The local legislation must meet standards set out in regulations of the Commissioner of Environmental Conservation.[319]

The Town of Brookhaven Wetlands Law is an example of a local law enacted in response to the Freshwater Wetlands Act.[320] It purports to cover

314. 6 NYCRR sec 661.31 (1977). See references to wetlands provisions in the codes of the towns of Brookhaven, Shelter Island, Southampton and Smithtown, infra notes 320, 324, 344, 350.

315. See discussion of analogous preemption issues in M. Kaplan, State and Local Restrictions on Siting Coastal Aquaculture in New York 66 et seq (New York Sea Grant Institute, May 1984).

316. Environmental Conservation Law sec24-0701 (McKinney 1984). Specifically, the regulations under the act require permits for the construction of "groins, bulkheads and other shoreline stabilization structures." 6 NYCRR sec 663.4(d), item 32 (1980).

317. Environmental Conservation Law sec 24-0501 (McKinney 1984).

318. Id and sec 24-0503.

319. Implied from Environmental Conservation Law secs 24-0501 and 24-1301[3] (McKinney 1984).

320. Code of the Town of Brookhaven, chapter 81 (1979) (adopted in 1976).

both freshwater wetlands mapped under the state Freshwater Wetlands Act and tidal wetlands, in requiring any "person proposing to conduct or cause to be conducted a regulated activity upon any tidal or freshwater wetland [to] file an application for a permit with the Town Clerk."[321] For the purposes of the Brookhaven Wetlands Law, the definition of the term "freshwater wetlands" includes, but is not limited to, lands and waters shown on the state Freshwater Wetlands Map;[322] and the term "tidal wetlands" is defined to include, but is not limited to, lands and waters in the town covered by the "inventory of tidal wetlands prepared by or for the State of New York."[323] Regulated activities for which permits are required include the "erecting of any structures," and "any other activity which substantially impairs any of the several functions served by tidal or freshwater wetlands or the benefits derived therefrom."[324] The Code of the Town of Shelter Island similarly includes both freshwater and tidal wetlands in its wetlands chapter.[325]

In addition to provisions for judicial review of orders or decisions of a local government or the Commissioner of Environmental Conservation,[326] the Freshwater Wetlands Act created a Freshwater Wetlands Appeals Board to hear appeals from such orders and decisions.[327]

### 4. Flood Plain Management Regulations

In 1974 the state legislature enacted article 36 of the Environmental Conservation Law[328] to facilitate municipal qualification and participation

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321. Id sec 81-5A. Regulations issued under the Tidal Wetlands Act provide that if any area regulated under that Act "is also subject to regulation pursuant to the Freshwater Wetlands Act . . . such area shall be subject to the provisions of [the Tidal Wetlands Act] and of the Freshwater Wetlands Act and rules and regulations and local ordinances and laws adopted pursuant thereto." 6 NYCRR sec 661.20(b) (1980).

322. Id sec 81-3.

323. Id.

324. Section 81.4B, referring to functions and benefits described in sec 81.1 of the Brookhaven law, including "erosion control."

325. Chapter 129, sec 129-c (1980).

326. Environmental Conservation Law sec 24-1105 (McKinney 1984).

327. Id secs 24-1101, 24-1103.

328. McKinney 1984.

in the National Flood Insurance Program.[329] Under the federal program the United States Department of Housing and Urban Department notifies cities, towns and villages that they have been formally identified as flood prone communities. If within a specified period the Commissioner of Environmental Conservation "judges that such local government may fail to qualify, the [Department of Environmental Conservation] shall develop flood hazard regulations for such local government which meet minimum federal requirements for participation in such program."[330] The Commissioner of Environmental Conservation is authorized to promulgate and administer flood hazard regulations in and for local governments that fail to qualify for participation in the program or when the qualification has been revoked by the federal government.[331]

The floodplain management regulations of the Commissioner of Environmental Conservation provide that, with some exceptions, no person may "commence a project within an area of special flood hazards of a community unless such person has submitted an application for and obtained a development permit for such project from the" Department of Environmental Conservation.[332] The term "development" is defined as "any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations."[333] A "project" for which a development permit is required means "any development," as thus defined, and is said to include not only various specified activities connected with the "construction of a new structure" -- a term defined narrowly as meaning a "walled or roofed building"[334] -- but also such activities as "land preparation," "dredging," "filling or depositing," excavation for "footings, piers or a foundation," and "installation of pilings under proposed subsurface footings."[335]

The regulations do not specifically require development permits for constructing erosion protection structures, like bulkheads or jetties. However, it would seem that a case for bringing erosion protection

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329. Authorized under the Federal National Flood Insurance Act of 1968 [42 USC secs 4001-128 [1982]].

330. Environmental Conservation Law sec 36-0107[3] [McKinney 1984].

331. Id sec 36-0109.

332. 6 NYCRR sec 500.2 [1978].

333. Id sec 500.1[p].

334. Id sec 500.1[aaa].

335. Id sec 500.1[uu].

structures within the regulations could be made if the construction were to require dredging, filling, the depositing of materials, excavation or the sinking of pilings. And the general reference in the definition of "development" to man-made improvements to real property, the definition of "flood or flooding,"[336] and various direct or indirect references to coastal area erosion[337] would tend to demonstrate an intent to regulate the construction of erosion protection facilities. Yet the regulations' narrow definition of "structures" and absence of express reference to groins, bulkheads, jetties and the like could be cited for the contrary proposition. In addition, the prescribed standards for the issuance of a development permit appear to relate solely to the construction of residential or similar buildings or the preparation of subdivision plats for such construction.[338]

The regulations expressly provide that the holder of a development permit for a site within a coastal hazard area may not alter "sand dunes which would increase potential flood damage,"[339] but the prohibition does

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336. Section 500.1(u) of the regulations provides:

> Flood or flooding shall mean:
>
> (1) a general and temporary condition of partial or complete inundation of normally dry land areas from: (i) the overflow of inland or tidal waters; (ii) the unusual and rapid accumulation or runoff of surface waters from any source; (iii) mudslides (i.e., mudflows) which are proximately caused or precipitated by accumulations of water on or under the ground; or
>
> (2) the collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in subparagraph (1)(i) of this subdivision.

337. See, e.g., references to "flood-related erosion," defined largely in the words of the foregoing section 500.1[u][2] [id par [bb]]; "flood-related erosion area or flood-related [sic] erosion-prone area," defined to include the shores of lakes or other bodies of waters [id par [cc]]; "flood-related erosion control works," found in the definition of "flood-related erosion area management" [id par [dd]]; "sand dunes" [defined in par [xx]]; and "coastal high hazard area" [referred to in sec 500.10[a,b]].

338. The standards apply to various features of a "proposed subdivision or other major new development project," "mobile home parks," "substantial improvements of residential structures," and other "buildings" and "structures" (structures defined, as noted above, to mean "walled and roofed" buildings). Id sec 500.10.

339. Id sec 500.10[d][6]. Note, however, that the New York Coastal Management Program,

not appear to stand alone to bar erosion protection works constructed independently of the construction of a building or structure (as narrowly defined) for which the permits are required.

If a development permit were required for the construction of a groin, jetty or bulkhead the administrators of the floodplain management regulations would probably apply performance standards which would directly concern adjacent property owners -- particularly, the criteria that the proposed "project is consistent with the need to minimize flood damage," and that the proposed "construction methods and practices will minimize flood damage."[340]

As in other similar permitting statutes noted above, the statute and regulations relating to floodplain management provide for the granting of variances and for judicial review of administrative decisions or orders.[341]

The state regulations apply within any community brought within the federal program "until such time as the Federal Insurance administrator approves the community's locally adopted and administered floodplain management regulations."[342] The local regulations may include "zoning ordinances, subdivision regulations, building codes, health regulations, special purpose ordinances or local laws such as a floodplain ordinance, grading ordinance and erosion control ordinance, and other applications and extensions of the normal police power," which, individually or in combination, "provide standards for the control of the use and occupancy of flood-prone, mudslide (i.e., mudflow)-prone and/or flood-related erosion-prone areas."[343]

The available local floodplain laws and ordinances reviewed by us generally track the definitions and standards of the state floodplain

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in summarizing the state scene for implementing the policy of minimizing damage from flooding and erosion by protecting natural protective features such as dunes, says: "Regulations promulgated under this law include a prohibition on the alteration of sand dunes in coastal high hazard areas so as to prevent an increase in potential flood damage to lands and property." [II-6-58]

340. Id sec 500.10[e][1][ii], [5][ii], governing applications for development permits for proposed subdivisions or other major new development projects.

341. Environmental Conservation Law sec 38-0115 (McKinney 1984); 6 NYCRR sec 500.13 (1988).

342. 6 NYCRR sec 500.3[s] (1978).

343. Id sec 500.1[z].

management statute and regulations, raising similar questions of interpretation.[344]

### 5. The State Environmental Quality Review Act

This law does not itself restrict or require public permits for development. Rather, its central objective is to ensure "that all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage."[345] The environmental quality review process, being an integral part of state and local permitting procedures governing the construction of erosion protection structures, is pertinent to this inquiry regarding the potential significance of such procedures in the resolution of common law conflicts.

The State Environmental Quality Review Act (SEQRA) requires all agencies, defined as including state and local government agencies[346] and various other types of public agencies, to prepare or have prepared "an environmental impact statement on any action they propose or approve which may have a significant effect on the environment."[347] Rules and regulations adopted by the Commissioner of Environmental Conservation under SEQRA establish the criteria for determining whether various types of proposed actions may have such an impact, and thus require the preparation of the statements.[348] The statutory definition of governmental "actions" covered by SEQRA is comprehensive, covering generally fiscal and policy considerations, and, particularly, decisions and "projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies."[349]

The SEQRA regulations classify "listed" actions that may or may not have a significant effect on the environment, hence may or may not require

344. Code of the Town of Brookhaven chap 33 (1978); Code of the Town of Shelter Island chap 68 (1983); Code of the Town of Smithtown sec 54-17.1 (1981) ("Coastal floodplain zoning and management regulations," in the chapter on zoning); Code of the Town Southampton sec 99-98 (1984) ("Tidal Floodplain Overlay District," in the chapter on zoning).

345. Environmental Conservation Law sec 8-0103(8) (McKinney 1984).

346. Id sec 8-0105(1-3).

347. Id sec 8-0109(2).

348. Id sec 8-0113(2). The rules and regulations are found in 6 NYCRR secs 617.1 et seq (1982).

349. Environmental Conservation Law sec 8-0105(4)(1) (McKinney 1984).

the preparation of an environmental impact statement. There are two types of listed actions. Type I actions are those "that are more likely to require the preparation of [environmental impact statements] than those not so listed [i.e., unlisted actions]," though the "Type I list is not exhaustive of those actions that an agency may determine have a significant effect on the environment."[350] Type II actions are those "which have been determined not to have a significant effect on the environment," so "do not require environmental impact statements or any other determination or procedure under" the regulations.[351] "Each agency may adopt its own Type II list, provided it finds that each of the actions contained on it: (1) is no less protective of the environment than the" items in the Type II list; and "(2) will in no case have a significant effect on the environment based on the criteria" established in or under regulations.[352]

The regulations do not mention explicitly the construction of erosion protection structures in the Type I or Type II lists. These structures might nevertheless be part of a larger Type I project, such as a marina located in a residential district, likely to require an environmental impact statement.[353] Or a municipality subject to SEQRA may have added the construction of erosion protection structures to its Type I list.

The stated criteria for determining whether a proposed action may have a significant effect on the environment include "a substantial increase in potential for erosion, flooding or drainage problems," the "impairment of the character or quality of . . . existing neighborhood character," the "creation of a hazard to human health or safety," and a "substantial change" in the capacity of land or other natural resources "to support existing uses."[354] These criteria are specially pertinent to the subject of this report.

### C. Variables Influencing Judicially Developed Doctrines in the Application of the Government Authorization Defense

Despite significant similarities, and although the courts seldom expressly acknowledge the differences, they have developed separate, and to

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350. 6 NYCRR sec 617.12 (1978-82). The Code of the Town of Smithtown, for example, has its own list of specific actions or uses likely to have a significant effect on the environment, including any "facility, development or project located in tidal or freshwater wetlands, floodplains or scenic riverine areas." Local Law No. 1, sec 15a-46 (1983). Most of the local floodplain management laws examined by us simply incorporate the state Type I list by reference.

351. Id sec 617.13 (1982).

352. Id.

353. See, e.g., id sec 617.12(b).

354. Id sec 617.11(1,5,7,8).

some extent different, doctrinal approaches to the question whether compliance with government authorization may defeat a claim of property damages from a neighbor's activities. The following variables, among others, have influenced the shaping of the doctrines: (1) whether the complaint asserts a cause of action in nuisance or negligence;[355] (2) whether the authorization (a) is derived directly from federal, state or municipal legislation or regulations relating to a particular act or general class of actions, or (b) is given by an administrative officer or agency exercising delegated discretionary power;[356] (3) whether the approval of the action given by such officer or agency is (a) in the form of a permit (such as a building permit) or license, or (b) is based on the actor's compliance with a zoning ordinance; and (4) whether the complainant seeks damages or some other form of relief. Because these variables appear in different combinations, it is not feasible to organize an analysis of the cases in the order in which the examples of variables are recited above, but some will be discussed separately in the ensuing discussion of the cases.

A related issue, whether federal statutes such as those restricting water pollution may preempt additional liability under federal or state common law, is beyond the scope of this paper.[357]

## D. Direct Authorizations; Nuisance and Negligence Actions

### 1. Public Nuisance

Although it is said that a legislature "may authorize that which would otherwise be a nuisance,"[358] the statement requires explanation and

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355. See supra, text accompanying notes 124 et seq, for examples of resort to nuisance or negligence theory: Lumais v Lilly, supra notes 133-140 (nuisance, the principal cause of action); Jubilee Yacht Club v Gulf Refining Co., supra notes 124-132 (action to abate a nuisance); Maitrejean v Levon Properties, supra notes 159-167 (action for damages for nuisance); Rhoads v Virginia-Florida Corp., supra notes 145-158 (causes of action in nuisance and negligence).

356. Common law nuisances may be sanctioned "by license, charter or other forms of legislative authorization." Comment, Nuisance and Legislative Authorization, 52 Colum L Rev 781 (1952) (cited hereafter as 52 Colum L Rev).

357. "This is different from the question of compliance as a defense, because the defendant in preemption cases generally denies the applicability of the common law standard to his conduct," though the effect of barring relief may be the same. Trauberman, Common Law Nuisance in Hazardous Waste Litigation: Has It Survived Milwaukee II? 113 ELR 10048, 10044 (1983). See this article for an analysis of federal cases on the issue.

358. W. L. Prosser, Handbook of the Law of Torts 606 (4th ed 1971). The Restatement (Second) of Torts comment on the section defining a public nuisance says, in part: "Although

qualification. A significant qualification stems from the distinction between two related but different sub-fields of tort liability, public nuisance [an "unreasonable interference with a right common to the general public"] and private nuisance.[359] The general proposition of legislative authorization is usually confined to a defense in a public action alleging a public nuisance. For example, it has been held that a government grant of a franchise to operate a railroad constitutes a good defense against a criminal prosecution of the railroad company for maintaining a public nuisance in operating its cars in a residential neighborhood in the early morning hours.[360] One commentator offered as a rationale for the defense the argument that it would be "unreasonable to permit the executive branch of the government to prosecute or enjoin an activity sanctioned by the legislature."[361] This reasoning is reinforced by the recognition that the official is performing a "public duty."[362]

For the purpose of applying the authorization defense an important distinction is made between public nuisance actions initiated by public representatives to exact criminal penalties or enjoin the offending

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it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability." Sec 821B comment f.

359. Supra note 163. And see 3 Restatement [Second] of Torts sec 821B(1) (1979). The "general public" test is satisfied if the act "has caused annoyance or injury to a 'considerable number of persons.'" People v Brooklyn & Queens Transit Corp., 283 NY 484, 490, 28 NE2d 925, 927 (1940).

360. People v Brooklyn & Queens Transit Corp., supra note 359. "[N]o unlawful injury to the public results from an act of the railroad company in the performance of its public function with the sanction of the State and in manner and at a place not prohibited by any regulatory body." Id at 490, 28 NE2d at 930. However, the court noted that were private parties suing for damages under the circumstances of the case, they might recover.

361. 52 Colum L Rev at 782. The author cites as further policy grounds for the legislative authorization doctrine applied to public nuisances the relative respect the judiciary would pay to acts of a state legislature, compared with its treatment of administrative authorizations; judicial favoring of progressive industrial developments compared with "more prosaic" activities; and a tendency to honor the defense if the public is attempting to demolish an existing structure, as distinguished from seeking to correct its nuisance features. Id at 783.

362. Horton v The Mayor, Aldermen and Commonalty of the City of New York, 140 NY 207, 212, 35 NE 490, 491 (1893): "[L]egal liability in damages cannot result from acts done by a corporation in the performance of a public duty by express legislative authority, resulting in consequential injury to others, and which, as between individuals would be regarded as a nuisance."

activities, and those initiated by private parties seeking redress for the public nuisance. Private persons may sue for damages for special injuries to their property caused by a public nuisance.[363] When they do, the courts are reluctant to accept the legislative authorization defense.[364] The distinction is based on application of a rule of construction applied by the courts, that the legislative grant of authority to engage in the nuisance activity must be express or clearly implied to sustain the defense to the private party's action.[365] Accordingly, the courts often refuse to read into the authorization to perform the act permission to perform it in any location of the actor's choice, or in any manner he sees fit, regardless of the impact on property of others.[366]

A dictum in a Florida case stemming from damages to a shoreowner from the construction of a groin illustrates the reluctance of the courts to find statutory authorization to act in a manner detrimental to others.[367] The City of Palm Beach had been authorized to construct seawalls, bulkheads and

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363. "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement [Second] of Torts sec 821C [1979].

364. "The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." Baltimore & Potomac R. R. v Fifth Baptist Church, 108 US 317, 332 [1883], confirming a recovery by a private property owner of damages from passing trains operated under authority of Congress.

365. The "authority which will . . . shelter an actual nuisance must be express, or a clear and unquestionable implication from powers conferred, should be certain and unambiguous, and such as to show that the legislature must have intended and contemplated the doing of the very act in question." Hill v The Mayor, Aldermen and Commonalty of the City of New York, 139 NY 495, 502, 34 NE 1090, 1092 [1893], sustaining an injunction sought by plaintiff for damages to his pier [damages special to him] from the city's use of a structure on its part of the pier for rubbish disposal. The court could not find in a statute authorizing the rubbish disposal operation either express or implied authority to block the use of the pier by plaintiff or other members of the public.

366. See, e.g., as to location, Baltimore & Potomac R. R. v Fifth Baptist Church, 108 US 317, 331 [1883]: The "authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others."

367. Paty v Town of Palm Beach, 29 So2d 383 [Fla 1947].

groins to protect a boulevard. A groin built under this authority allegedly changed the natural action of the Atlantic Ocean currents so as to "whip around . . . and to beat against and to excessively wash away plaintiff's land." The court acknowledged that although, generally, one is not entitled to damages for an injury caused by an act authorized by law, he might nevertheless recover damages where it is done in a "manner, or under circumstances, which render the actor chargeable with want of proper regard for the rights of others."[368]

In applying a rule of construction requiring a close look at the reach of legislative authorization, the courts tend to give weight to the extent of its comprehensiveness. In discussing the effect of compliance with law in actions for public nuisance the Restatement (Second) of Torts observes that "if there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations."[369]

Even if a statute or regulations support the defendant's activity, in applying a strict standard of review the courts may reject the defense on the vaguely described ground that the activity was "unreasonable." Analogizing to negligence theory, the Restatement (Second) of Torts explains that although violation of a statutory speed limit may constitute negligence as a matter of law, it is usually no more than a minimum standard applicable to ordinary situations, and one may nevertheless be deemed negligent while driving at a lawful speed but in an unreasonable manner. "The same general principle applies to public nuisance."[370] The courts apply this principle in two ways. They may acknowledge that the law expressly permits the activity, but condemn the law itself as being unreasonable, and as such unconstitutional.[371] Or in construing the authorization law they reason

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368. Id, quoting from 1 Am Jur, Actions sec 33. The court nevertheless sustained a demurrer to the complaint. The opinion suggests that the plaintiff failed to allege that the groin had been built in an improper manner. The court suggested that the "common enemy" doctrine also supported the city's defense, in stating: "The rights of private owners as well as the rights of the public depend somewhat on the character of the water on which the land borders and the nature of the proprietary interest in the land both below and above the surface of the water. The waters of the sea are usually considered a common enemy." 28 So2d at 363.

369. Sec 821B comment f. And see Trauberman, Common Law Nuisance in Hazardous Waste Litigation: Has It Survived Milwaukee II? 13 ELR 10043, 10044 (1983), where the author concludes that in view of the comprehensiveness of federal regulatory programs for preventing water pollution, the defendants might legitimately invoke them as a defense to common law nuisance actions.

370. Sec 821B comment f.

371. "It is a principle of long standing in the law of the Commonwealth that 'when the Legislature directs or allows that to be done which would otherwise be a nuisance, it will be

that it does not condone the "unreasonable" act of the defendant.[372]

Even if the defense of legislative immunity from liability for a public nuisance passes the strict construction test, the defense may be vulnerable on a constitutional ground. Legislative authority to destroy another's property without paying for it may violate constitutional prohibitions against public taking of private property without just compensation. Thus, in holding that the owner of property near the portal of a railroad tunnel constructed under authority of Congress might be entitled to compensation for damages specially affecting his property, the Supreme Court said:

> We deem the true rule, under the Fifth Amendment [of the United States Constitution], as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.[373]

### 2. Private Nuisance

Where the injured property owner's complaint asserts a cause of action for private nuisance, the judicial approach is similar to that taken where damages are sought for special damages arising from a public nuisance. The constitutional prohibition against uncompensated taking of private property is read together with a rule of strict construction. Typically, in a leading New York case, the court explained:

> [T]he statutory sanction which will justify an injury to private property, must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the

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valid, upon the ground that the Legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law." Hub Theatres, Inc. v Massachusetts Port Authority, 370 Mass 153, 155, 346 NE2d 371, 373 (1976), appeal dismissed, 429 US 891 (1976), dismissing a claim in nuisance for damages from overflights at the Port Authority's airport on the ground that the airport operation was authorized by statute (quoting from a dictum in Sawyer v Davis, 136 Mass 239, 241-42 [1884]).

372. See, e.g., Levine v New York Railways Co., 182 AD 486, 490, 169 NYS 1032, 1035 (1st Dep't 1918): "And if, in a situation claimed to constitute a nuisance, the danger or inconvenience or injury caused is so needless as to be unreasonable, or is due to negligence, the authority granted unless express, is no answer to the claim of nuisance."

373. Richards v Washington Terminal Company, 233 US 546, 553 (1914).

injury. This is but an application of the reasonable rule that statutes in derogation of private rights, or which may result in imposing burdens upon private property, must be strictly construed. For it cannot be presumed, from a general grant of authority, that the legislature intended to authorize acts to the injury of third persons, where no compensation is provided, except upon condition of obtaining their consent.[374]

### 3. Actions for Negligence; Unreasonable Behavior

The asserted negligence of the shoreowner in constructing an erosion prevention device may form the basis for a cause of action in nuisance based on allegedly negligent acts,[375] or for a cause of action in negligence without reference to nuisance law doctrines. In either case, generally, "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."[376] At times the courts, in reaching the same result, vaguely refer to the defendant's "unreasonable" behavior in creating a dangerous condition, without a clear indication that the behavior constitutes negligence.[377] The test of reasonableness in this context appears to be nothing more than a part of the process of statutory

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374. Cogswell v The New York, New Haven and Hartford R. R., 103 NY 10, 21, 8 NE 537, 541 (1886), holding that the statute authorizing the railroad operation conferred no authority on the railroad company to erect its engine house in such manner and so near plaintiff's house as to emit smoke and soot making the house untenantable. And see Crittenden v Wilson, 5 Cowen 165 (1825), holding that a statute authorizing the building of a dam on defendant's land along a public creek protected defendant from an indictment for a public nuisance, but not from liability for damages from overflowing of the lands of others.

375. See supra note 163.

376. Restatement (Second) of Torts sec 288C (1979).

377. Thus, in Baltimore & Potomac R. R. v Fifth Baptist Church, 108 US 317, 331 (1883), the Court stated that as a general rule legislative authority to operate a railway over city streets, "when used with reasonable care" and producing incidental inconvenience to others, would support a defense to a nuisance action for damages to a property owner [there a church] from the operation of an engine house — implying a duty of due care, the foundation of negligence theory. Yet, in stating that the railroad company before it could not avail itself of the defense, the Court said that its operation "in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship" indicated that even if the company acted with due care, meaning without negligence, it might still be liable for damages. Id. And see Stern v International Ry. Co, infra note 378.

construction, the court preferring to find that the legislative authorization did not go so far as to condone unreasonable behavior.[378]

## E. Delegated Authorizations

If a state or municipal legislative body may itself legalize an act that would otherwise constitute a nuisance, it follows that it may delegate the same power to an administrative agency (e.g., an individual officer or board) with like effect. If the legislative authorization were to set out precise standards to be followed by the administrative agency, licenses or permits granted under such authority should carry the same weight the legislative authorization would if granted directly. If the administrative agency is empowered to exercise some measure of discretion -- as, for example, it might in determining whether the applicant's situation satisfied some general performance standard — one could reason that the authorization defense should be stronger. The administrative agency may consider the manner in which the activity is to be undertaken, in view of the possible consequences to neighbors, and condition the granting of the permit or license accordingly. At the same time, the grantee would be able to rely on the expertise of the administrative agency in meeting a claim that the location, manner or other aspects of the approved activity unreasonably affected the complainant's property.[379] Some courts, apparently following this reasoning, exculpate defendant from charges of maintaining a nuisance if he complied with all the conditions of a permit.[380]

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378. See, e.g., Baltimore & Potomac R. R., supra note 377, where the court followed up its statement regarding the unreasonable operation of the engine house with the statement: "It admits of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances." 106 US at 331-32. And see Stern v International Ry. Co., 220 NY 264, 291, 115 NE 758, 781 (1917), affirming a judgment for plaintiff injured as a result of the placement of the railway's poles: "The implied condition is, therefore, attached that they must be so located as to avoid unreasonable and unnecessary danger to travelers upon the highway. . . . The railway company was . . . free to make its own choice [of location of the poles] if the choice was not unreasonable. . . . The question is whether the place chosen is so dangerous and the danger so needless that the choice becomes unreasonable."

379. See Toledo Disposal Co. v State, 89 Ohio St 230, 237-38, 106 NE 6, 8 (1913): Although a "general law will not justify the doing of the thing in such a way as to produce a nuisance or cause injury," if a special law or contract defines the "particular thing done and the manner of doing it," the courts hold that "the governmental authority had in view the consequences which were to follow," and that "the state cannot sustain a criminal proceeding for the doing of the thing specifically authorized."

380. See, e.g., Union Institution for Savings v City of Boston, 224 Mass 288, 112 NE 837 (1916) (license to place an obstruction in a public street "which would otherwise constitute a

However, other courts place limited weight on the fact that the defendant in a nuisance or negligence action obtained a license or permit from a public monitoring agency. In Lummis, Jr. v Lilly, the case discussed earlier on the subject of liability of the defendant builder of a groin for damage to a neighbor shoreowner,[381] the court noted that the defendant had been granted a license from the Massachusetts Department of Public Works, under specified terms and conditions, and had also received a permit from the Corps of Engineers.[382] In holding that the reasonable use rather than the common enemy doctrine applied, and in referring to the factors to be considered in the determination of reasonable use, the court said:

> Among those factors are the license which the defendant secured and whether the conditions of the license have been met. Neither the license from the Department of Public Works nor the permit from the United States Army Engineer Division is conclusive on the issue of reasonable use. It is settled that a license does not immunize the licensee from liability for negligence or nuisance which flows from the licensed activities.[383]

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nuisance"); and Commonwealth v Packard, 185 Mass 64, 69 NE 1067 (1904) [charge of maintaining a nuisance dismissed, where city officials, "after giving due consideration to those who might be inconvenienced and annoyed," granted a license to defendant to store petroleum products]; doctrine endorsed more recently in a dictum in Flannery v State Mutual Life Assurance Co., 339 Mass 699, 162 NE2d 29 (1959) [permit to place a ventilator pipe on a public street]. See also Levine v New York Railways Co., where the complaint alleged that the Railways' cars were negligently operated and constituted a public nuisance because passing cars were too wide to allow pedestrians to walk safely between them. 182 AD 486, 169 NYS 1032 (1st Dep't 1918). In dismissing the nuisance claim, the court stressed the fact that an engineer of the Public Service Commission, which had been authorized by law to determine whether street railroad equipment is unsafe and proper, had participated in supervising the construction of the type of car used by defendant. Id at 489, 169 NYS at 1036.

381. See supra text accompanying notes 133-140.

382. 365 Mass 41, 429 NE2d at 1147-48. The Department's conditions were specific, including such details as distances of the groin extending from the mean high water line into the tidewater and from the licensee's property, the top width of the groin, side and end slope dimensions, and top and slope elevations. The court noted that the Corps' permit also carried conditions, but the court did not recite them.

383. 365 Mass 41, 429 NE2d at 1150, citing Ferriter v Herlihy, 287 Mass 138, 143, 191 NE 382 (1934) [milk dealer's license not a defense where it did not specifically authorize the acts complained of], and Hub Theatres, Inc. v Massachusetts Port Authority, 370 Mass 153, 156, 346 NE2d 371, appeal dismissed, 429 US 991 (1976).

## F. Compliance with Zoning Ordinances

Generally the courts will not enjoin a use as a nuisance per se, that is, a nuisance arising from an activity so obnoxious as to warrant a declaration of nuisance regardless of the particular circumstances, if the use is permitted by a zoning ordinance.[384] However, despite the location of the site in a zone where the use is permitted, if the acts complained of give rise to a nuisance per accidens, or nuisance in fact — that is, only where based on the particular circumstances in issue — in appropriate cases the complainant may be entitled to an injunction to prevent or abate the acts or to damages.[385] Justification for accepting the conclusiveness of the zoning ordinance is found in a dictum in Bove v Donner-Hanna Coke Corporation, in which the plaintiff, alleging a private nuisance, unsuccessfully asked for an injunction and damages for injury to her home and health from emissions from the defendant's coke ovens.[386] Although the court was satisfied that the defendant's plant was neither a nuisance per se, nor one in fact by reason of the manner it was operated, it emphasized the fact that the city had seen fit to zone the site of the plant for industry, and was reluctant to substitute the court's judgment for that of the city on the matter.[387]

One commentator regarded a line of funeral home cases as carving out an exception in New York to the general rule that a nuisance per se cannot be found if the use is permitted in the zoning district.[388] In the leading case in this category, Sweet v Campbell, the Court of Appeals held that even though defendants held a building permit to construct a funeral home in compliance with the zoning ordinance, the plaintiff neighbors could

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384. Matter of Goelet v Moss, 248 AD 499, 290 NYS 573 (1st Dep't 1936), aff'd, 273 NY 609, 6 NE2d 425 (1973); Kay v Pearlirie Realty Corp., 106 NYS2d 449 (Sup Ct, Kings Co, 1951, not officially reported); 2 R. M. Anderson, New York Zoning Law and Practice sec 27.03 (3d ed 1984); 4 R. M. Anderson, American Law of Zoning sec 27.07 (2d ed 1977).

385. Elger v S. H. Kress & Co., 309 NY 533, 127 NE2d 325 (1955); 2 R. M. Anderson, New York Zoning Law and Practice sec 27.03 (3d ed 1984).

386. 236 AD 37, 258 NYS 229 (4th Dep't 1932).

387. "After due consideration the common council of Buffalo decreed that an enterprise similar to that carried on by the defendant might properly be located at the site of this particular coke oven. It is not for the court to step in and override such decision, and condemn as a nuisance a business which is being conducted in an approved and expert manner, at the very spot where the council said that it might be located. A court of equity will not ordinarily assume to set itself above officials to whom the law commits a decision, and reverse their discretion and judgment, unless bad faith is involved." Id at 43, 258 NYS at 236.

388. Comment, Zoning Ordinances and Common-Law Nuisance, 18 Syracuse L Rev at 885: "Apparently in New York, mental annoyance and reduction of real estate values are sufficient grounds for enjoining funeral homes."

challenge the use as a nuisance.[389] A recent dictum of the Court of Appeals indicates that it would regard both Bove and Sweet as falling within the nuisance in fact category, hence would have no reason to treat Sweet as an exception to the general nuisance per se rule.[390] More recently the Appellate Division, Fourth Department, seems to have taken the same tack in citing Sweet for the statement that even if the "operation of a veal production business is a permissible use, plaintiff is not precluded from bringing this action."[391]

### G. Authorization Defenses Applied to Actions Involving Erosion Control Structures

We have mentioned the fact that permits obtained by the defendants in the Massachusetts case of Lummis, Jr. v Lilly[392] and the Florida case of Paty v Town of Palm Beach[393] were not a complete defense to an action for private nuisance from an erosion control structure.[394]

Generalizing from judicial treatment of analogous situations in the above discussion of the authorization defense, we surmise that the New York

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389. 282 NY 146, 25 NE2d 963 (1940); followed in Jones v Chapel Hill, Inc., 273 AD 510, 77 NYS2d 887 (1st Dep't 1948).

390. "The law of nuisance and that of zoning both relate to the use of property, but they each protect a different interest. So a use which fully complies with a zoning ordinance may still be enjoined as a nuisance . . . , albeit 'the plaintiff assumes a heavy burden of proof.'" Little Joseph Realty, Inc. v Town of Babylon, 41 NY2d 738, 744, 395 NYS2d 428, 433, 363 NE2d 1163, 1166 (1977) (citing Sweet v Campbell and Bove v Donner-Hanna Coke Corp., and quoting from 2 R. M. Anderson, New York Zoning Law and Practice sec 23.03 [2d ed 1973]).

391. Murray v Young, 97 AD2d 958, 468 NYS2d 759 (4th Dep't 1983). The record revealed "conflicting testimony as to the reasonableness of the defendants' activities," on the basis of which defendants' motion for summary judgment was denied, setting up for trial a nuisance in fact issue.

392. See supra text accompanying notes 133-140.

393. See supra text accompanying note 387.

394. The defense was also raised in New York in Maltrajean v Levon, where the construction of jetties had been approved by the Corps of Engineers, the State of New York and the Town of Riverhead. 87 AD2d 805, 448 NYS2d 46 (2d Dep't 1982), aff'd, 57 NY2d 902, 456 NYS2d 783, 442 NE2d 1274 (1982), defendant Levon's brief before the Appellate Division, at 40, citing Kay v Peerless Realty Corp., 108 NYS2d 443 (Sup Ct, Kings Co, 1951, not officially reported), (supra note 384). The Trial Term in its unreported opinion having noted that one of the disputed issues was whether the construction of the jetties was completed in compliance with the permits issued, the authorization defense may not have been regarded by the Appellate Court as a serious issue.

courts will give considerable weight to the degree of explicitness and comprehensiveness of detail regarding potential impacts on nearby properties in statutory or administrative authorizations of erosion control construction or maintenance.

Regulations of the New York Department of Environmental Conservation under the Shoreowner's Protection Act are calculated to guard against erosion damage from an erosion protection structure to properties of nearby shoreowners as well as properties of the present or future owners of the site itself.[395] They do so by exacting performance standards requiring a high degree of administrative oversight. This would necessarily lend considerable weight to the granting of necessary permits by the state under the Act, and by local authorities required to follow the state standards in framing their own erosion protection laws. Examples of local regulations implementing the Shoreowner's Protection Act indicate that in many cases they may be more specific and restrictive in looking to the protection of neighbors.[396]

The potential impact on neighboring wetlands determines whether one may obtain a permit under the Tidal Wetlands Act or Freshwater Wetlands Act to build an erosion protection structure.[397] It is conceivable that if a permit were given, a private owner of the wetlands involved might have occasion to sue the owner of the structure for alteration of the natural condition of the wetlands. Although the wetlands themselves might not have a substantial monetary value, their destruction might lead to injury to other property of their owner dependent on preservation of the wetlands. The Town of Brookhaven Freshwater Wetlands Law, noted above, indicates that erosion control is one of several functions of wetlands.[398] If that were the focus of a particular proceeding in which a developer were seeking a permit under a state or local wetlands law to build an erosion protection structure, the granting of the permit should give the developer a powerful weapon with which to defend himself from liability to the neighbor.

Similar reasoning should produce a similar conclusion in the case of a permit obtained under state or municipal floodplain management regulations.[399] An application by a shoreowner in a regulated area for a permit to build a structure to prevent erosion of his own land would necessarily be examined for its potential for flooding neighboring lands.

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395. See supra text accompanying notes 281-304.

396. See supra text accompanying notes 285-280.

397. See supra text accompanying notes 305-327.

398. See supra text accompanying note 320.

399. See supra text accompanying notes 328-344.

Under the circumstances, a go-ahead signal should weigh in the defendant's favor in a nuisance action brought by the neighbor.

## Summary

(1)

The legal issues addressed are (1) whether the owner of ocean beachfront land who builds an erosion prevention structure is liable for damage to neighboring property resulting from disturbance in the natural wave action at the site; and (2) whether, if the structure has been authorized by a law, regulation, or permit granted by an administrative agency, the owner is immune from liability as a matter of law, or if, in any case, the authorization strengthens the owner's defense. The issues are not unique to Long Island, but are explored with particular reference to erosion control on Long Island shores.

On Long Island, erosion is part of a natural process by which waves build up and alternately carry back to sea (thus erode) beaches and bluffs. Man-made coastal structures interfering with the process may exacerbate erosion damage. This frequently occurs when a shorefront owner builds a jetty, groin or other erosion prevention structure to protect his own property. The effect may be to disrupt the drift of sand along the shore (called littoral drift) caused by wave action, and either deposit excess land on one neighbor's beach, or deprive another's of sand so as to hasten its erosion.

On the issue whether, as a matter of policy, a shoreowner should be permitted to build structures to protect his land at the expense of a neighbor's property or to the detriment of the larger community concerned with beach stability generally, the New York legislature has taken the position that the harm outweighs the benefit of such structures. Accordingly, in the Shoreowner's Protection Act, the state and cooperating local governments restrict the building of individual erosion prevention devices.

The attitudes of the American courts on the issue are mixed. There are very few recorded decisions involving interference with the natural flow of ocean waters by erosion protection structures. Possibly for the historical reason that judge-made law on the subject was first developed in early England, a country completely surrounded by hostile seas, some of these decisions have applied a "common enemy of the sea" doctrine, or have seemingly endorsed the concept without basing their decision squarely on it. That doctrine holds that each landowner is entitled to erect his own defenses against the ravages of the sea, without liability for damage to adjoining shore property, leaving it to the other shoreowners to protect themselves against the "common enemy," the sea. Even in the original formulation of the doctrine the courts recognized exceptions where the structure injuring adjoining property was built in bad faith; or built to improve the owner's land for some purpose other than erosion prevention; or constructed improperly or negligently.

The propensity of the courts in dealing with ocean coastal erosion situations is to look to doctrines applied in analogous cases of interference by landowners with the flow of surface waters, watercourses (rivers and streams) and lakes, and ground waters.

There are signs of a tendency of the courts, suggested by decisions in Massachusetts and New York, to move away from the common enemy doctrine that grants absolute immunity from liability for injury to adjoining property. The preference is for a more flexible test of reasonableness, by analogy to the rule applying to similar situations along rivers or involving the diversion of surface waters. Using that test the courts look closely at the facts of each case, and reach a decision by balancing the interests of the respective parties and the community.

The majority of the courts dealing with claims for damages from the diversion of surface waters use a reasonableness approach, inquiring whether the defendant was making a reasonable use of the water or managing its flow in a reasonable way. The New York courts, in the minority, favor an adapted "common enemy" concept allowing one landowner to repel surface water to protect his own property without being subject to liability for damages to the property of others.

However, the New York courts join the majority in applying a reasonable use rule where a riparian owner — the owner of land on the shore of a river — builds an embankment or dike causing damage to lands of others, at least from ordinary floods. Some authorities, including New York courts, distinguish cases of damage from extraordinary and ordinary floods, finding greater justification for absolving the builder of the protective facility from liability for damages from extraordinary ones. There is some indication that the distinction would be applied to complaints of damage from overflowing sea waters.

The reasonableness rules applied in surface water cases are generally applied to actions for damages from the diversion of ground or subterranean waters. New York follows the general pattern.

Some courts have favored the common enemy concept on the ground that if the courts were to impose liability on a landowner for protecting his property against erosion or flooding they would discourage urban development. Courts have also reached the same result where the locale is a built up urban area by reasoning that since existing embankments or similar protective facilities have contributed to a landowner's flooding or erosion problems, it would be unfair to make him compensate others for injuries caused by his own protective measures.

Other courts have questioned the premise that the threat of a lawsuit by neighbors is, in fact, a deterrant to development. In recent years increasing recognition of the importance of natural resource conservation, including the preservation of coastal lands, has influenced the courts to adopt an anti-development stance making them more receptive to finding

liability to injured neighbors. Conservation is also fostered by a recognition that the ultimate societal good might best be achieved by letting natural coastal processes operate without human intervention. The underlying assumption is that man's efforts to turn back or redirect ocean waves to reduce erosion must ultimately be futile. These judicial attitudes are reinforced by the position of the New York legislature taken in the Shoreowner's Protection Act.

(2)

If the placement and building of a shoreland owner's erosion protection structure has been directly authorized by a law or regulation, or has been built under a permit granted under the Shoreowner's Protection Act or some other law, does that relieve the landowner from liability for injury to his neighbor's property? Generally, the courts refuse to bar liability as a matter of law, but do give weight to compliance with such authorization or permit in deciding the case. The significance of the compliance factor depends on the extent to which the authorities, in approving the structure, have already given consideration to the potential of injury to others. If, for example, the authorities have passed on the precise location of the structure in relation to nearby properties, and have been satisfied that prescribed safety standards have been met, a court would be inclined to absolve the owner of liability unless he were found to be negligent in carrying out the work.

A similar issue asks whether the owner may escape liability if the structure conforms with a zoning ordinance. Ordinarily the courts do not so hold as a matter of law, but may give some weight to the conclusion of the zoning authorities that the structure is in an appropriate use district.

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