

Legal Issues in the Age of Climate Adaptation

The Public Trust Doctrine

November 6, 2015

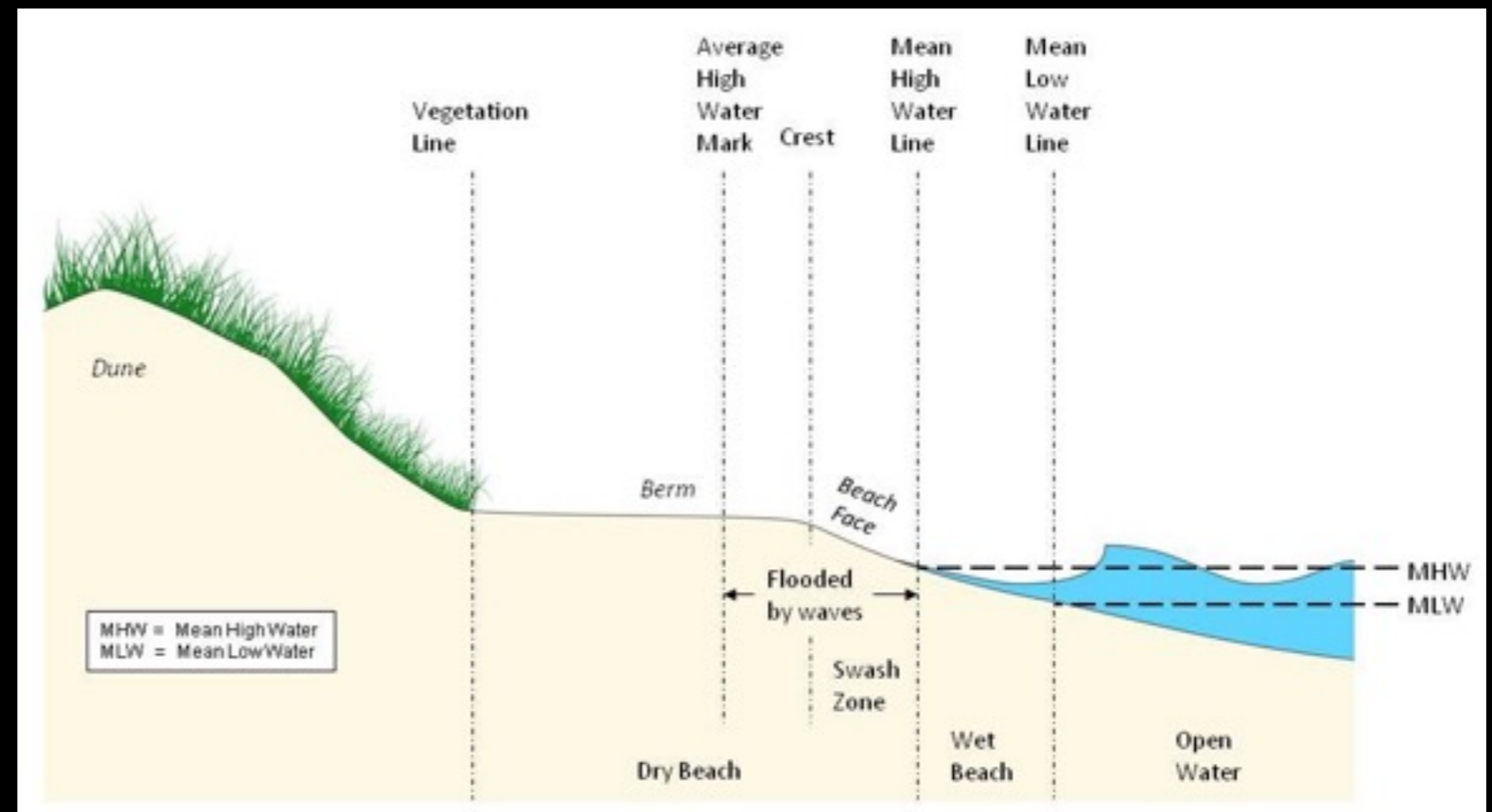
Attorney Marjorie Shansky
61 East Grand Avenue
New Haven, Connecticut 06513

marjorie.f.shansky@snet.net

Legal Issues in the Age of Climate Adaptation

The Public Trust Doctrine

- Brief History
- Definitions
- Illustrative cases



The Public Trust Doctrine

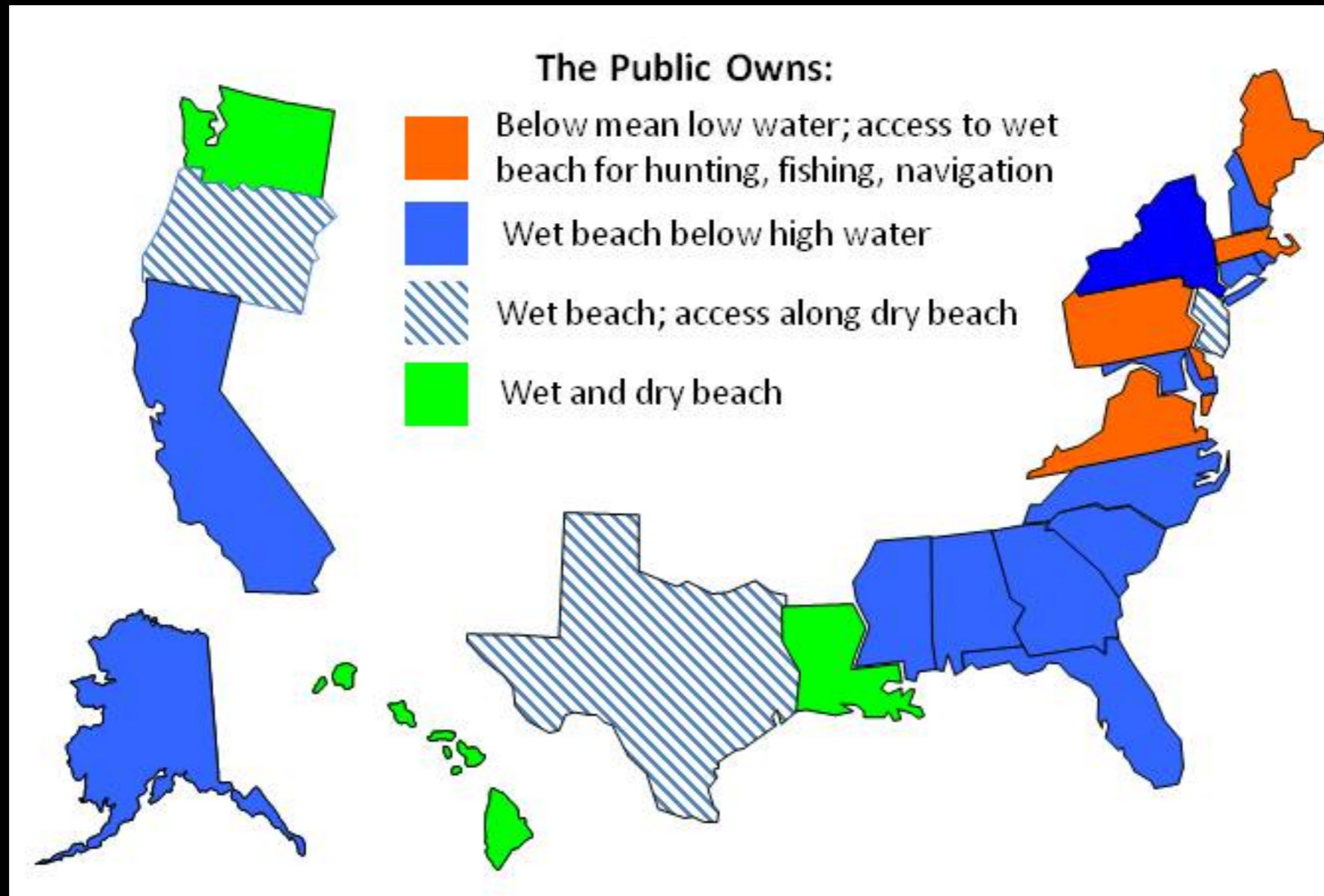
A common law doctrine inherited from England and dating back to Roman law

All submerged lands are property of the state and held in trust for the people

The Public Trust Doctrine

- Consists of Federal Navigational Servitude and State Level doctrines
- Equal Footing, Submerged Lands Act (1953) - Q: If state owns the land under navigable waters, how is navigability determined?
- Not limited to commercial navigation but also includes recreational boating, bathing, sunbathing and other beach and water activities as well as access

The Public Trust Doctrine



The Public Trust Doctrine

A special kind of title that may not freely be given away

The state may not abdicate its interest in the public trust
Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892)

The conundrum: To what extent does permitting private property owners to hold back the advance of the dynamic property line unlawfully abdicate the state's interest in protecting the public trust?

The Public Trust Doctrine

Amount of inundation associated with sea level rise is unprecedented - unlike anything seen at common law

Increases in public trust land represent a “future interest” of the state

How can background principles of law, including the public trust doctrine, be used to define defensible coastal adaptation laws and regulations without running afoul of takings jurisprudence?

Accretion

Gradual increase or acquisition of land by the action of natural forces washing up sand, soil or silt from the water course or seashore



“Accretion” occurs gradually and imperceptibly;
“Relictions” are lands once covered by water
that become dry once the water recedes



Erosion

Gradual washing away of land along the shoreline



Avulsion

Sudden and often very perceptible change to the shoreline by natural forces [or by the state or federal government]



Avulsion may result in the addition or removal of land



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Hurricane Sandy and Fire Island



U.S. Geological Survey

Hurricane Sandy winds and storm surge carved a path through Fire Island in four places

Stop the Beach Renourishment v. Florida DEP
130 S. Ct. 2592 (2010)



When a beach is made wider, who owns the new land?

Severance v. Patterson
2010 WL 8366839
Texas Supreme Court

When the beach is eroded by avulsion, do the public access easements “roll” landward?



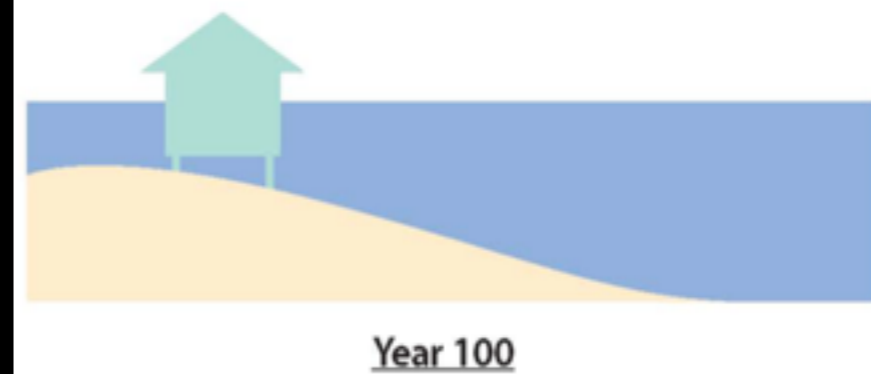
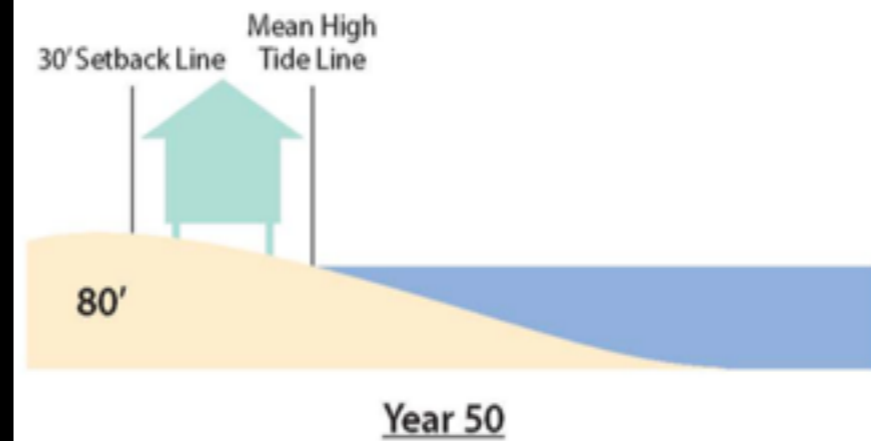
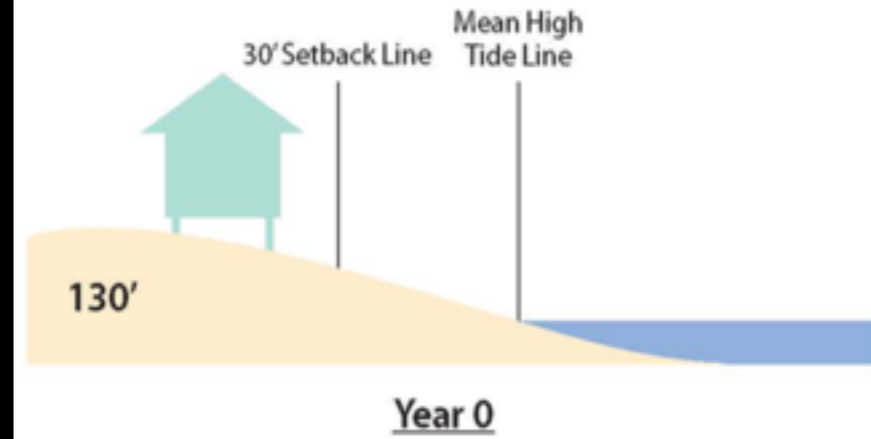
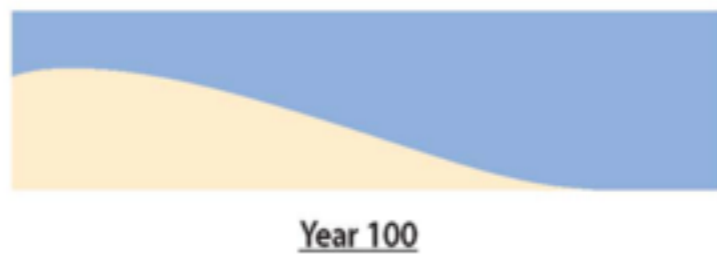
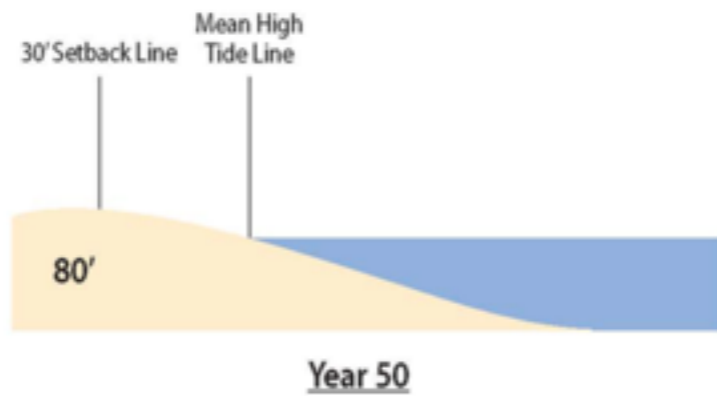
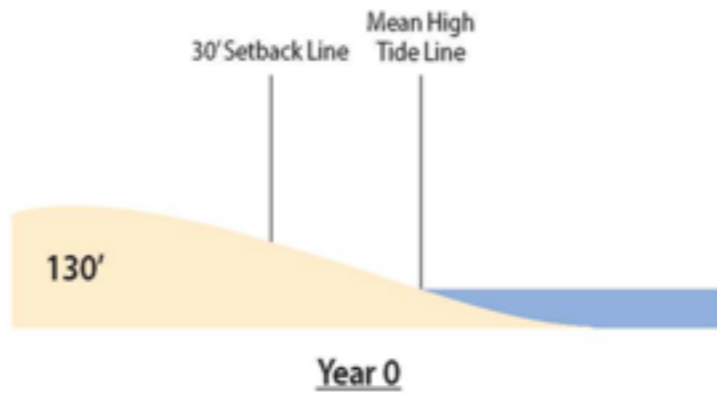
Borough of Harvey Cedars v. Karan
New Jersey Supreme Court, 2013



When a property is taken to enlarge a protective dune that shelters an entire town, does that benefit offset the owner's loss of value?

Given all of that, then what?

Figure 1



The Public Trust Doctrine

Preliminary Toolbox re: Sea Level Rise

- Thorough analysis of common law - “background principles”
- Thorough analysis of decisional takings jurisprudence, esp. *Lucas* and *Penn Central*
- Consider/emphasize no-build zones, transfer of development rights, land acquisition, building/reconstruction restrictions, promulgation of mapping of impact areas, incorporation into statute, POCD, regulation

No conclusion today but background principles of common law, like the Public Trust Doctrine, will inform the discussion and the regulatory future