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## Matunuck Beach: Bringing Coastal Erosion into Focus

John Maxwell Greene\*

Just about everyone agrees that climate change is causing sea level rise.<sup>1</sup> There is a similar consensus that sea level rise is causing beach erosion.<sup>2</sup> And, for its part, beach erosion presents a host of issues including the physical loss of private property (as land disappears into the ocean), the legal loss of private property rights (as the public trust comes to encompass once privately-owned land), and the physical loss of public trust lands (as shorelines give way to walls with no tidal lines).<sup>3</sup> To address these problems as they relate to new coastal development, many states are enacting legislation, creating agencies, and developing

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1. See Peter C. Frumhoff et al., *Confronting Climate Change in the U.S. Northeast: Science, Impacts, and Solutions*, at 12 (July 2007), available at <http://www.climatechoices.org/assets/documents/climatechoices/confronting-climate-change-in-the-u-s-northeast.pdf>; For more on how climate change will affect Rhode Island's coasts, see generally Leanne Heffernan et al. *Climate Change & Rhode Island's Coasts: Past, Present, and Future*, (2012), available at [http://seagrant.gso.uri.edu/z\\_downloads/coast/climate\\_change\\_summ\\_web.pdf](http://seagrant.gso.uri.edu/z_downloads/coast/climate_change_summ_web.pdf).

2. Frumhoff, *Climate Change in the U.S. Northeast*, *supra* note 1, at 25; see also Michael P. Dixon, *Drawing Lines in the Disappearing Sand: A Re-evaluation of Shoreline Rights and Regimes a Quarter Century after Bell v. Town of Wells*, 16 OCEAN & COASTAL L. J. 481, 521-22 (2011).

3. For more on these doctrines, see *infra* Part 2.

comprehensive plans.<sup>4</sup> But how to deal with changes to and loss of existing property is a sticky problem that states have struggled to address through either new or existing law.<sup>5</sup>

This issue has recently surfaced in Rhode Island, as groups and individuals with conflicting interests – the Town of South Kingstown, local property owners on both sides of the debate, and environmental groups – have fought over the fate of Matunuck Beach and Matunuck Beach Road.<sup>6</sup> Matunuck, it is said, comes from a Narragansett word meaning “land’s end.”<sup>7</sup> Perhaps it is unsurprising, then, that at Matunuck, the ocean surf has been eroding the beach and presenting an imminent threat not only to structures like the beloved Ocean Mist (a beachfront bar), but also to infrastructure like Matunuck Beach Road, which provides the only access to and from a small, densely populated strip of land between the Atlantic Ocean and an inland salt marsh.<sup>8</sup> After twice refusing to allow the town of South Kingstown to protect the road against the encroaching ocean, the Rhode Island Coastal Resources Management Council (CRMC) recently reversed course and allowed armoring.<sup>9</sup> Matunuck Beach presents an excellent backdrop for understanding, (1) the concrete realities of coastal erosion; (2) the legal regime governing our receding coasts; (3) the policies at play in coastal law and management; (4) the conflicts that can arise from different coastal interests; and (5) the ways we should consider revising and resolving issues of coastal erosion. This brief article – which is intended to provide only food for thought, not a thorough dissection of coastal erosion – will discuss those issues in that order.

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4. See Megan Higgins, *Legal and Policy Impacts of Sea Level Rise to Beaches and Coastal Property*, 1 SEA GRANT L. & POL. J. 43, 50-57 (June 2008).

5. See generally E. Britt Bailey, *From Sea to Rising Sea: How Climate Change Challenges Coastal Land Use Laws*, 33 U. HAW. L. REV. 289, 294-306 (2010).

6. See *infra* Part 4.

7. Gail C. Conley, *Save my Beachfront Home*, PROV. J., Apr. 22, 2011, at 7 (letter to the editor).

8. Dave Fisher, *CRMC Nixes Wall Exemption for Matunuck Beach*, ECORI NEWS, (Apr. 11, 2012), <http://www.ecori.org/statehouse/2012/4/11/crmc-nixes-wall-exemption-for-matunuck-beach.html>.

9. See Minutes of CRMC Meeting, May 8, 2012, *available at* <http://sos.ri.gov/documents/publicinfo/omdocs/minutes/92/2012/26519.pdf>.

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## I. HISTORY OF MATUNUCK EROSION

*“People say the beach is going away. The beach is not going away . . . it’s just going under your house.”*<sup>10</sup>

Matunuck has always been a risky place to buy property. Its sands have been receding gradually for decades, ebbing and flowing with various natural events and human interventions.<sup>11</sup>

A reasonable place to begin is the famed hurricane of 1938, which not only flooded the City of Providence and killed hundreds of Rhode Islanders,<sup>12</sup> but also significantly eroded Matunuck, carrying the beach’s sands inland to Succotash Marsh.<sup>13</sup> Hurricane Carol, another infamous storm, did the same in 1954.<sup>14</sup> As destructive as these hurricanes were, they were just the beginning for Matunuck. In the 1970s beach erosion began increasing exponentially: “Shoreline changes accelerated during the nineteen year period of 1978 to 1997” and “[t]he eight year span between 1998 and 2006 saw an even greater increase in coastal erosion.”<sup>15</sup>

In 1982, Senator John Chafee proposed a policy response to coastal erosion: denying federal flood insurance and other aid to the owners of homes on barrier beaches.<sup>16</sup> This approach reflected a policy that recognized the inevitability of coastal erosion and therefore discouraged beach development; indeed, the wealthy

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10. *Slipsliding Away - Coastal Erosion Redefining South County Beaches*, PROV. J., May 12, 2005 (quoting University of Rhode Island professor of geology Jon Boothroyd).

11. Jess Bidgood, *In Rhode Island, Protecting a Shoreline and a Lifeline*, N.Y. TIMES, May 13, 2012, at A16.

12. Jeffrey P. Donnelly, et al., *700 yr sedimentary record of intense hurricane landfalls in southern New England*, Geological Soc. Am. Bull. (June 2001), available at <http://faculty.gg.uwyo.edu/bshuman/Pubs/Donnelly-GSABull.pdf>.

13. *Id.*

14. *Id.* For a dramatic recounting of when Hurricane Carol hit Matunuck, see Gerald M. Carbone, *The last big one*, PROV. J., Aug. 29, 2004, at E1.

15. SOUTH KINGSTOWN PLANNING DEP’T, MATUNUCK COASTAL AREA REPORT: STORM RELATED SHORELINE IMPACTS (1939 – PRESENT) 5 (Apr. 2010), available at [http://clerkshq.com/content/Attachments/southkingstown-ri/tm100506\\_H2.pdf?clientSite=southkingstown-ri](http://clerkshq.com/content/Attachments/southkingstown-ri/tm100506_H2.pdf?clientSite=southkingstown-ri).

16. Randal Edgar, *Chafees Tear Down Matunuck Beach House*, PROV. J., Jun. 10, 2004, at B-01.

Chafee family would eventually tear down their Matunuck beach house and let the ocean claim the shore.<sup>17</sup> But most coastal property owners have not been either willing or financially able to be so proactive with their own property; instead, they have tried to combat coastal erosion.

In 1998, following “[b]ack-to-back winter storms” that “swept away big chunks of the village shoreline . . . workers . . . dumped more than 4 tons of sand along the disappearing shoreline.”<sup>18</sup> As of 2001, it seemed that this renourishment effort has “stopped the steady erosion along the shore,”<sup>19</sup> but this turned out to be wrong – by 2002 people were nevertheless looking to renourishment again.<sup>20</sup> The Army Corps of Engineers planned to dredge Ninigret, Quonochontaug, and Winnapaug Ponds, to restore eelgrass beds in those ponds, and to use the dredged material to restore Matunuck and Charlestown Beaches.<sup>21</sup>

In 2006, they tried renourishment yet again. The Army Corps of Engineers dredged about 90,000 cubic yards of sand from Point Judith Harbor, and “agreed to dispose the dredged material off Matunuck in hopes it would replenish eroding beaches.”<sup>22</sup> Whatever short-term benefit the beach might have received in sand was counteracted by “reams of fishing gear, thousands of multicolored lobster bands and pull-tab beer cans” and other trash that had been dredged from the harbor only to wash up along five miles of coast.<sup>23</sup> Despite these many renourishment efforts, erosion has continued to the point that Matunuck Beach Road is in danger of being washed away in the next big storm.<sup>24</sup>

Clearly, nothing thus far has worked.

## II. WHAT TO DO? EXISTING LEGAL FRAMEWORK

As various stakeholders – chiefly policymakers and property

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17. *Id.*

18. Andrew Goldsmith, *All in All Storm More of a Nuisance Than a Knockout*, PROV. J., Mar. 7, 2001, at 1C.

19. *Id.*

20. See Katie Mulvaney, *Study Completed to Restore Eelgrass in 3 Salt Ponds*, PROV. J., Aug. 15, 2002, at C-01.

21. *Id.*

22. Katie Mulvaney, *Trash on Beaches Prompts Look at Dredging Practices*, PROV. J., Feb. 20, 2007, at D-01.

23. *Id.*

24. See Bidgood, *supra* note 11.

holders – have tried to address the problem of Matunuck’s erosion, they have had to confront a legal regime that has not kept up with the reality of New England’s changing coastline.

Coastal land ownership is governed by several ancient common law doctrines. The starting point is the well-established principle that the state owns coastal property under the public trust doctrine.<sup>25</sup> This principle is broadly enshrined in the Rhode Island Constitution:

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state. . . .<sup>26</sup>

The public trust doctrine is a practical means of ensuring that the shoreline rights of the people of Rhode Island are not infringed by private ownership. The Rhode Island Supreme Court explained, “the state holds title to all land below the high-water mark in a proprietary capacity for the benefit of the public.”<sup>27</sup>

Several common-law doctrines describe who owns land when coastal property increases either through the creation of new land or the recession of the water. In a case involving Florida common law, the United States Supreme Court recently (and relatively succinctly) defined the important terms accretion, reliction, and avulsion:

Accretions are additions of alluvion (sand, sediment, or other deposits) to waterfront land; relictions are lands once covered by water that become dry when the water recedes. . . . In order for an addition to dry land to qualify as an accretion, it must have occurred gradually and imperceptibly — that is, so slowly that one could not see

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25. See, e.g., *Champlin’s Realty Assoc. v. Tillson*, 823 A.2d 1162, 1165 (R.I. 2003).

26. R.I. Const. art. I, § 17.

27. *Champlin’s Realty Assoc.*, 823 A.2d at 1165 (quoting *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041 (R.I. 1995)).

the change occurring, though over time the difference became apparent. When, on the other hand, there is a sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream, the change is called an avulsion.<sup>28</sup>

Under common law, accretions and relictions belong to the adjacent property owner, while avulsions belong to the coastal property owner<sup>29</sup> – hence the recent arguments that public beach renourishment constitutes a taking.<sup>30</sup> Renourishment creates an avulsion, and the coastal property, in public-trust states, is public. Therefore, by creating an avulsion, the state could theoretically claim more coastal property away from individual owners.<sup>31</sup> The Supreme Court, however, rejected the notion that state-created avulsions constitute a taking.<sup>32</sup>

But what happens when, instead of water giving way to land, land gives way to water? The general rule is that the public trust doctrine trumps private ownership.<sup>33</sup> This means that if the mean high-water mark encroaches on private property, formerly private land gradually becomes public.<sup>34</sup>

As distressing as this can be for private coastal property owners, perhaps even thornier is the issue of how to deal with improvements to eroding coastal property. As with Matunuck Beach Road, public property exposed to coastal erosion can present public health and safety hazards; the same is no less true

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28. *Stop the Beach Renourishment, Inc. v. Florida Dep't. of Environmental Protection*, 130 S. Ct. 2592, 2598 (2010) (internal quotation marks and citations omitted).

29. *Id.*

30. *See id.* at 2598-99.

31. *See id.* at 2612.

32. *Id.* at 2613.

33. *Allen v. Allen*, 32 A.2d 166, 166 (R.I. 1895) (per curiam) (“A riparian proprietor whose land borders upon tidewater has, by the common law, certain private rights to the shore between high and low water mark. These do not amount to seisin in fee. . . . The state holds the legal fee of all lands below high-water mark, as at common law, as has been uniformly and repeatedly decided by this court.”).

34. The transition will be gradual indeed. In *State v. Ibbison*, the Rhode Island Supreme Court set the mean high tide line as the line between private ownership and public trust, holding that the mean should be determined by averaging 18.6 years of tidal data. 448 A.2d 728, 732 (R.I. 1982).

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for private property. If erosion cannot be stopped, who is responsible for mitigating these hazards? In Matunuck, the consequences of erosion on private property have been borne by the affected landowners. Mary Carpenter, for example, whose family name has been synonymous with a stretch of Matunuck Beach for decades, was forced in 2008 to tear down the Seaview, a building her father had constructed in 1920.<sup>35</sup> Erosion had progressed to the point that waves were “undercutting the foundation” of the Seaview, and if Ms. Carpenter had not taken the building down then, “it would [have been] in the ocean by the end of winter.”<sup>36</sup>

As private property owners, the Chafees could make the decision to move their Matunuck home and Mary Carpenter could make the decision to demolish the Seaview. Public property, however, is subject to governance by many stakeholders with different interests and goals. For this reason, erosion on public property – like Matunuck Beach Road – can be trickier.

To understand fully how local governments have attempted to address the issue of coastal erosion, one must understand how coastal waters are governed. Such an understanding requires us first to zoom out to international law: specifically, the United Nations Convention on the Law of the Sea (“UNCLOS”).<sup>37</sup> UNCLOS declares that the “high seas,” more than two hundred nautical miles from shore, are not subject to the laws of any nations.<sup>38</sup> However, each coastal nation has limited sovereignty over an “Exclusive Economic Zone” (EEZ) extending two hundred nautical miles from its coastline<sup>39</sup> and has full sovereignty over its “territorial sea” – coastal waters within twelve nautical miles of the shore.<sup>40</sup> The waters within the United States’s territorial sea

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35. Peter B. Lord, *Beach, Memories Eroding*, *PROV. J.*, Dec. 16, 2008, at 1.

36. *Id.*

37. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

38. *Id.* arts. 86-89.

39. *Id.* arts. 56 & 57. One can imagine how this provision leads countries to claim the tiniest bits of floating debris as islands subject to their national sovereignty. For a sampling of some early small-island disputes, see *A Review of Developments in U.S. Ocean and Coastal Law 1994-1996*, 2 *OCEAN & COASTAL L.J.* 457, 461 (1997).

40. UNCLOS, *supra* note 37, arts. 2 & 3.

(defined as all “submerged lands seaward of the low-water line” and the waters above these submerged lands) are subject to the “paramount sovereign rights” of the federal government.<sup>41</sup>

Some of these rights have been delegated to the states. To address governance of its territorial waters, the United States passed the Coastal Zone Management Act.<sup>42</sup> This Act essentially provided funding to coastal states, allowing states to develop their own coastal management programs in accordance with a designated federal policy which, in part, seeks “to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations. . .”<sup>43</sup> Perhaps not surprisingly, Rhode Island (whose official nickname is “The Ocean State”) has one of the most developed systems of coastal government under the CZMA. Rhode Island’s coastal governance begins with the Coastal Resources Management Act (“CRMA”).<sup>44</sup> The CRMA created the Coastal Resources Management Council, a quasi-governmental agency that regulates uses of coastal lands and waters.<sup>45</sup> As part of its regulatory authority, CRMC may hold hearings and issue orders stemming from contested cases.<sup>46</sup> Aggrieved parties may appeal CRMC orders to the Rhode Island Superior Court under the State’s Administrative Procedures Act.<sup>47</sup> It is also worth noting that CRMC has its own detailed set of regulations governing private use of the coast, called the Coastal Resources Management Program (“CRMP”).<sup>48</sup> The CRMP regulations are lengthy and detailed, effectively a zoning ordinance for the coast.

Finally, Rhode Island has also developed “Special Area Management Plans” (“SAMPs”). To pick a couple of examples

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41. United States v. Alaska, 521 U.S. 1, 5 (1997).

42. 16 U.S.C. §§ 1452-66 (2006).

43. *Id.* §1452(1).

44. R.I. GEN. LAWS §§ 46-23-1-25 (2007).

45. *Id.* at § 46-23-2. Climate Adaptation Knowledge Exchange, *Rhode Island Coastal Resources Management Council*, available at <http://www.cakex.org/directory/organizations/rhode-island-coastal-resources-management-council>.

46. R.I. GEN. LAWS § 46-23-20.4 (2007).

47. R.I. GEN. LAW § 42-35-15 (2007).

48. Rhode Island Coastal Resources Management Program (Dec. 2012) available at <http://www.crmc.ri.gov/regulations/RICRMP.pdf> [hereinafter CRMP].

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relevant here, there is a very local “Salt Pond Area” SAMP (a stretch of Matunuck Beach lies between the ocean and a series of salt ponds),<sup>49</sup> as well as the groundbreaking Ocean SAMP – a collaboration between CRMC, National Oceanic and Atmospheric Administration (“NOAA”), and many other stakeholders that sets forth a detailed plan for resolving conflicts regarding use of the Narragansett Bay and the adjacent portions of the Atlantic Ocean.<sup>50</sup> If the CRMP is a zoning ordinance, a SAMP is the comprehensive plan that provides broader guidance to coastal planning officials.

Unsurprisingly, given that Matunuck erosion is essentially a local problem (albeit with broader implications), the highly detailed CRMP speaks most specifically to how the problem should be resolved. The starting point is CRMP section 300.7, which governs “Construction of Shoreline Protection Facilities.”<sup>51</sup> Section 300.7(B) presents policies which “favor non-structural methods for controlling erosion such as stabilization with vegetation and beach nourishment.”<sup>52</sup> Furthermore “[r]iprap revetments are preferred to vertical steel, timber, or concrete seawalls or bulkheads” and any armoring will be considered “permanent, not temporary structures” (subject to stricter regulation).<sup>53</sup> Approval of such shoreline armoring “require[s] that the owner exhaust all reasonable and practical alternatives including, but not limited to, the relocation of the structure and any nonstructural shoreline protection methods.”<sup>54</sup> In addition to these general provisions, the CRMP specifically requires applicants requesting armoring to demonstrate several prerequisites; most notable here is the requirement that “the proposed structure is not likely to increase erosion in adjacent areas.”<sup>55</sup>

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49. Rhode Island’s Salt Pond Region: A Special Area Management Plan (Maschaug to Point Judith Ponds) Apr. 12, 1999, *available at* [http://www.crmc.ri.gov/regulations/SAMP\\_SaltPond.pdf](http://www.crmc.ri.gov/regulations/SAMP_SaltPond.pdf).

50. Rhode Island Ocean Special Area Management Plan (Oct. 19, 2010), *available at* [http://www.crmc.ri.gov/samp\\_ocean/finalapproved/RI\\_Ocean\\_SAMP.pdf](http://www.crmc.ri.gov/samp_ocean/finalapproved/RI_Ocean_SAMP.pdf).

51. CRMP, *supra* note 48, §300.7(B).

52. *Id.* § 300.7(B)(1).

53. *Id.* § 300.7(B)(2).

54. *Id.* § 300.7(B)(3).

55. *Id.* § 300.7(E)(1)(d).

Surprisingly, we shall see that the actual resolution in the Matunuck Beach Road saga is contrary to what the CRMP regulations require. Before finishing that story, though, we must consider some of the policy implications presented by the erosion of Matunuck Beach and the legal regime that currently governs the problem.

### III. POLICY CONSIDERATIONS

As they confront the problem of addressing existing coastal property faced with impending erosion, local policymakers and stakeholders must understand the various policy implications that follow the shoreline's inevitable retreat.<sup>56</sup> Different responses to coastal erosion have varying effects on the parties involved. Some responses are expensive while some are cheap; costs may be borne by coastal landowners or by the public; some responses cause net environmental benefits while others cause net environmental costs. Furthermore, some responses are long term, while others are short term; some responses are difficult to implement, while others are easy; some responses are difficult to administer, while others have no discernible administrative costs. Given these basic, broad policy considerations, let us look at some possible responses to coastal erosion.

At first glance, the cheapest response might appear to be no response at all. Of course, doing nothing has no up-front costs and does not need to be implemented or administered. But failing to prepare for a problem causes significant back-end costs: coastal improvements will inevitably be lost or destroyed (creating debris), costs to the owners of lost property, potential private liability for harm caused by negligently secured property, and potential public liability for any public infrastructure injured by storm surges or debris.<sup>57</sup> Sorting out the inevitable mess – assessing claims, allocating costs, and housing refugees – is an administrative nightmare.<sup>58</sup> And if public infrastructure is

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56. This article discusses only policies affecting existing structures on coastal property, not new construction, about which much has been written elsewhere.

57. See generally The Heinz Center, "Evaluation of Erosion Hazards" (Apr. 2000), available at <http://www.fema.gov/pdf/library/erosion.pdf>.

58. See generally Mitchell F. Crusto, *The Katrina Fund: Repairing Breaches in Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. 329 (2006)

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neglected, lives could be lost – a washed-away Matunuck Beach Road, for example, could leave some residents without access not only to basic utilities but also to emergency care.<sup>59</sup> Doing nothing is no solution to coastal erosion.

Renourishment, on the other hand, is expensive, short-term, and uncertain.<sup>60</sup> It can bring significant environmental costs, as renourishment often disrupts ecosystems<sup>61</sup> and can even distribute trash on the beach along with sand.<sup>62</sup> The main benefit of renourishment is that it is the response that best protects the status quo (if only temporarily): it allows coastal property owners and decision makers to procrastinate on real ways to address coastal erosion while rendering coastal property temporarily safe and allowing coastal economies to thrive in the short term (thereby offsetting some of the up-front costs of renourishment).<sup>63</sup> Renourishment is a mixed and, ultimately, temporary response to coastal erosion, like taking a really expensive ibuprofen to manage the pain of an infected limb that instead needs antibiotics – or amputation.

Armoring is another common response that makes some sense at first glance: it is expensive but relatively long-term<sup>64</sup>; it preserves property interests in land that is protected from pounding waves; and it is easily accomplished. However, armoring has been shown to exacerbate coastal erosion on adjacent properties, damaging both property rights and local ecology.<sup>65</sup> Indeed, armoring destroys beaches not only on adjacent property but even immediately seaward of the armored shoreline,

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(proposing a system for administering claims stemming from damage caused by Hurricane Katrina).

59. See Fisher, *supra* note 8.

60. See Dixon, *supra* note 2, at 527.

61. *Id.* at 527-28.

62. See Mulvaney, *supra* note 22.

63. Dixon, *supra* note 2, at 526-27.

64. It was estimated that the Matunuck sheet-pile wall would cost \$1.6 million and last twenty to forty years. Erin Tiernan, *CRMC to Reconsider Matunuck Decision on Tuesday*, NARRAGANSETT-SOUTH KINGSTOWN PATCH, Apr. 24, 2012, available at <http://narragansett.patch.com/articles/crmc-to-reconsider-matunuck-decision-on-tuesday>.

65. Madeline Reed, *Seawalls and the Public Trust: Navigating the Tension Between Private Property and Public Beach Use in the Face of Shoreline Erosion*, 20 *FORDHAM ENVTL. L. REV.* 305, 307-09 (2009).

eliminating public trust lands and leading to walled coasts.<sup>66</sup> The loss of beaches has negative downstream effects as tourism dollars and property values decline.<sup>67</sup> Armoring, therefore, is not a strong solution to coastal erosion.

Taking all policy considerations into effect, proactive solutions to incentivize retreat tend to be favored by experts.<sup>68</sup> For example, accepting the ocean's inevitable advancement and intentionally demolishing or moving coastal improvements brings with it relatively minor up-front costs – especially if there is some public or private insurance program to distribute costs among groups of potentially affected people and to cover individual costs – and mitigates long-term costs.<sup>69</sup> A well-designed and well-run insurance program can ensure that costs are borne equitably.<sup>70</sup> Proactive responses to erosion have no environmental costs other than waste byproducts of either demolishing or moving the property. These solutions are long-term, easy to implement, and environmentally friendly. To the extent any response relies on insurance, it does bring some administrative costs, but these are likely less than the significant costs of other methods involving engineering. Probably the most difficult costs of this method are emotional: it is hard to abandon a beautiful and beloved property to the advancing ocean. But the ocean's advancement is inevitable, so a proactive response at least mitigates emotional costs somewhat by paying for some portion of an affected individual's loss; no matter what we do or do not do, coastal property will be lost and individuals will suffer.

With those basic balancing principles in mind, let us now turn to the CRMC proceedings on armoring Matunuck Beach Road.

#### IV. CRMC PROCEEDINGS

In 2011, the Town of South Kingstown worked with CRMC to discuss the Town's options for dealing with the severe coastal

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66. *Id.*

67. *Id.* at 322-24.

68. See generally Hyo Kim and Caroline A. Karp, *When Retreat is the Better Part of Valor: A Legal Analysis of Strategies to Motivate Retreat from the Shore*, 5 SEA GRANT L. & POL'Y J. 169 (2012).

69. See Dixon, *supra* note 2, at 533-36 (discussing the consensus view that planned retreat is the only viable response to coastal erosion).

70. See Kim, *supra* note 68, at 207-08.

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erosion at Matunuck Beach, especially the clearly endangered Matunuck Beach Road. The Town elected to pursue a hard seawall to armor the road, and on September 1, 2011 it filed an application with CRMC for just that purpose.<sup>71</sup> Specifically, South Kingstown sought “[t]o construct and maintain a sheet pile wall along Matunuck Beach road within the Town-controlled right of way to protect the road against future undermining from ongoing coastal erosion.”<sup>72</sup> CRMC opened the application to public comment on October 4 and received several responses.<sup>73</sup> Among these were comments from Save the Bay, Surfrider Foundation, the owners of the Ocean Mist Restaurant and Tara’s Pub, and many individuals.<sup>74</sup>

Per a memorandum prepared by CRMC staff, Save the Bay argued that the proposed seawall would result in “the loss of beaches and marine habitat, loss of public access, loss of recreational opportunities and tourism, increased erosion on adjacent properties, increased exposure of the population and property to risks from storms and hazards, and the long-term decrease in non-waterfront property values for owners in communities in which beach access is significantly reduced.”<sup>75</sup> Surfrider agreed and “advocate[d] relocation of the road . . . rather than armoring.”<sup>76</sup> Additionally, Surfrider noted that allowing a seawall in Matunuck would set bad precedent for other communities affected by coastal erosion, significantly weakening the CRMP.<sup>77</sup>

The owners of the Ocean Mist and Tara’s reported (again, as represented in the CRMC staff memo) that the seawall would “essentially seal off the properties from the street,” resulting in “devastating impacts on the business[es].”<sup>78</sup> They further noted that the seawall would “exacerbate the erosion problem on the seaward side,” potentially damaging the properties themselves.<sup>79</sup>

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71. See Kenneth Anderson et al., Coastal Resources Management Council: Inter-Office Memorandum, April 20, 2011, at p. 23.

72. *Id.* at 1.

73. *Id.* at 2.

74. *Id.* at 5-6.

75. *Id.* at 6.

76. *Id.*

77. *Id.*

78. *Id.* at 7.

79. *Id.*

A separate group of nearby homeowners echoed this argument, “explaining that the proposal by the Town will increase and amplify the forces of wave action placing these properties in great danger.”<sup>80</sup>

CRMC staff members considered all these comments and agreed that a structure to armor Matunuck Beach Road would “redirect and amplify wave energy along the shore resulting in greater erosion.”<sup>81</sup> The staff members further agreed that such a structure would “exacerbate erosion problems and ultimately destabilize” nearby buildings.<sup>82</sup> Indeed, the staff reported, “the structure will not only increase erosion on adjoining properties but will result in the loss of the beach, associated marine habitat and the recreational opportunities provided by the beach including public shoreline access.”<sup>83</sup> The staff report accordingly concluded that armoring Matunuck Beach Road would be contrary to CRMC Regulations and the SAMP.<sup>84</sup> To approve the petition would “set a precedent for other areas of the State that are also suffering from shoreline erosion.”<sup>85</sup> The clear implication is that this would set a negative CRMC precedent.

On April 10, 2012, CRMC held a hearing on South Kingstown’s request for a special exemption from the CRMP to allow the town to armor Matunuck Beach Road.<sup>86</sup> Town Manager Steven Alfred testified that the road was necessary: “Matunuck Beach Road serves 240 homes. A breach of this road would leave 660 people without water and fire safety services and also prevent the evacuation of those homes in an emergency.”<sup>87</sup> He further testified that alternative options like demolishing or moving homes were neither practical nor economically viable.<sup>88</sup> Accordingly, South Kingstown requested a special exception from the CRMP anti-armoring provisions “through the CRMC’s public infrastructure exception rule.”<sup>89</sup>

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80. *Id.*

81. *Id.* at 2.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 3.

86. *See* Fisher, *supra* note 8.

87. *Id.*

88. *Id.*

89. Coastal Resources Management Program § 130(A)(1)(a) (1983)

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Several objectors appeared at this first hearing. An attorney representing the owners of the Ocean Mist again protested that the wall would likely exacerbate erosion beneath the Ocean Mist.<sup>90</sup> A representative of the Surfrider Foundation testified that “[b]each armoring has been refuted as effective beach management at every turn,” and argued that the town had not adequately considered alternatives to armoring.<sup>91</sup> A representative of Save the Bay testified succinctly in opposition to armoring: “[h]ardening shoreline encroaches on the public trust, decreases property values, and increases erosion on adjacent beaches.”<sup>92</sup> On the other hand, an attorney representing the MC Homeowners’ Association – “288 homeowners in the Mary Carpenter’s Beach neighborhood” – not only supported the town’s requested special exception but actually went a step further. He argued that the Matunuck shoreline should be reclassified as “manmade”<sup>93</sup>; if CRMC were to classify the shore as manmade then CRMC policy would “encourage[] proper maintenance of existing shoreline protection structures.”<sup>94</sup>

At the conclusion of the first hearing, CRMC voted to deny the special exception.<sup>95</sup> The council did, however, set a date for a second hearing to consider whether to reclassify Matunuck’s shoreline as “manmade.”<sup>96</sup>

The second hearing occurred on April 24, 2012.<sup>97</sup> South Kingstown Manager Steven Alfred again kicked off the hearing, this time arguing that because “1,000 of the 1,400 feet in question have already been armored by property owners,” the beach was in

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(technical revision Dec. 2012). This statute allows CRMC to approve “special exceptions” for “alterations and activities . . . which would otherwise be prohibited” so long as “the proposed activity serves a compelling public purpose” including “an activity associated with public infrastructure.” *Id.* Special exceptions require an applicant to take “all reasonable steps . . . to minimize environmental impacts” and to demonstrate that “there is no reasonable alternative” to the proposed activity. *Id.* at §§(A)(2)-(3).

90. See Fisher, *supra* note 8.

91. *Id.*

92. *Id.*

93. *Id.*

94. CRMP § 210.6(C)(2).

95. Fisher, *supra* note 8.

96. *Id.*

97. Dave Fisher, *CRMC Denied Petition for Manmade Matunuck*, ECORI NEWS, Apr. 25, 2012.

fact manmade.<sup>98</sup> He argued that much of this armoring predated CRMC, and suggested that CRMC had overlooked this existing armor and incorrectly classified Matunuck from the outset.<sup>99</sup> Attorneys for Save the Bay, Conservation Law Foundation, and the Surfriider Foundation separately argued against Matunuck's reclassification, suggesting that CRMC might not have authority to reclassify the beach and that, in any event, to do so would be to undermine what authority CRMC does possess – it would be “an end-run around CRMC regulations.”<sup>100</sup> Local property owners, however – even those that had previously argued against the town's requested special exception – tended to support the reclassification, seeing it as a route to more flexibility in addressing the erosion problem.<sup>101</sup> A representative of the Rhode Island Shoreline Access Coalition raised a new concern: “The erection of a seawall, or other hard solutions to the erosion problem, will inevitably restrict Rhode Islanders' constitutional right to lateral access to the beach – when the ocean laps against a wall or other hard structure, how does a citizen exercise that right?”<sup>102</sup> In the end, CRMC again rejected the town's request.<sup>103</sup>

On May 8, 2012, however, CRMC held a third hearing, this time to reconsider the town's original request for a special exception.<sup>104</sup> This hearing came just days after CRMC Director Grover Fugate had issued a memorandum recommending that the council members consider a four-pronged approach to Matunuck Beach: (1) allow sheet-pile armoring of about 200 feet of the road; (2) designate some Matunuck shoreline “manmade” and allow experimental erosion control; (3) research and prepare a shoreline SAMP; (4) enforce regulations governing experimental erosion control.<sup>105</sup> In light of this memo, Save the Bay changed its position and supported the proposed experimental zone; all other

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Dave Fisher and Tim Faulkner, *Barriers Fall for Matunuck Beach Armoring*, ECORI NEWS, May 9, 2012.

105. Grover Fugate, *Matunuck Erosion Solution Recommendations*, May 4, 2012, <http://www.ecori.org/storage/documents/Matunuck%20Rept%20and%20Budget%20Proposal5812.pdf>.

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interested parties maintained their earlier positions.<sup>106</sup> CRMC followed Save the Bay's lead, changed its collective mind, and granted South Kingstown's requested special exception.<sup>107</sup>

The owners of the Ocean Mist have appealed CRMC's decision to the Washington County Superior Court, likely arguing that CRMC erred in applying the test for a special exception given that there are alternatives to armoring that would not cause environmental harm.<sup>108</sup> There has been little news of the appeal, but it is unlikely to produce tangible results – construction of the Matunuck Beach Road armoring is underway.<sup>109</sup>

## V. LESSONS LEARNED

Surely there are myriad lessons that might be drawn from CRMC's difficulties applying coastal law to a sensitive situation, but this article is only intended to take a brief and broad look at how to deal with coastal erosion from a legal perspective. Keeping with this broad view, Matunuck suggests several lessons to the detached observer.

Perhaps the most significant lesson from Matunuck is the importance of crafting a policy that recognizes the inevitability of coastline change and fairly balances the loss of public beach against the loss of private property. Difficult as it may be given how closely many people's lives are tied to the coast, we must remember that coastal land will necessarily be lost in the coming years. Official policy should encourage individuals and local governments to relinquish rights in shoreline property now rather than waiting for nature to extinguish those rights in the near future.

Of course, one possible policy is to do nothing. Everyone knows that ownership of coastal property carries significant risks – on top of erosion, wet and salty sea air degrades coastal structures, and hurricanes can damage or destroy improvements on coastal property. Coastal property owners assume these risks,

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106. Fisher & Faulkner, *supra* note 104.

107. *Id.*

108. Maria Shanahan, *Ocean Mist appeals CRMC decision on wall*, THE NARRAGANSETT TIMES, Aug. 3, 2012.

109. See TOWN OF SOUTH KINGSTOWN 2011-2012 ANNUAL REPORT OF MUNICIPAL SERVICES, at 16, available at <http://www.southkingstownri.com/files/2011-2012%20FINAL%20annual%20report%20for%20WEB1.pdf>.

and perhaps they should be left to bear them – or buy insurance. That said, rates for covering loss of coastal property in erosion-prone areas are reportedly astronomical, if insurance is available at all.<sup>110</sup> So another possible approach is for Rhode Island's coastal communities to recognize that “there but for the grace of God go I” and pool their resources so they can collectively help those whose property is lost.

Alternatively, the entire state could recognize the beach as a public good and create a statewide insurance program into which all people pay to compensate those whose land is taken by the sea – something along the lines of FEMA. As attractive as this no doubt would be to coastal property owners, it is perhaps unfair to landlocked Rhode Islanders who, after all, gain nothing tangible from protecting coastal property owners against erosion. Erosion is not zero-sum: private property owners lose, but the amount of public-trust land does not change. Then again, the public may gain in less tangible ways: avoiding debris from destroyed coastal homes, for example; ensuring better access to public-trust shorelands; and preventing the loss of the beach due to armoring.<sup>111</sup> However, if the state were to develop such a program, it should take care to avoid perversely creating incentives for new coastal building – payouts must be limited, and they should only apply to preexisting structures.<sup>112</sup> Indeed, the FEMA structure could be inverted and payouts could be limited to offset the costs of moving or demolishing shoreline structures rather than paying for damage to properties whose owners took no action. Recall Senator John Chafee's plan to limit federal flood insurance: the idea should be to encourage residents to abandon portions of the shore that will soon be lost anyway, not to create new shoreline structures.

Modifying incentives to manipulate the coastal-property market is one approach; hard-and-fast regulation is another.

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110. See Frumhoff et al., *supra* note 2, at 26.

111. Then again, access to public-trust shore lands is a right protected under Rhode Island's constitution, so it is still difficult to identify even an intangible gain to the public from a statewide public insurance program – perhaps neighborliness?

112. For an example, see Reed, *supra* note 65, at 336 (describing a Texas program offering reimbursement of up to \$40,000 for shoreline landowners to move or demolish structures).

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Rhode Island has its CRMP, which already takes into account many of the policy considerations discussed above. It is wise for the CRMP to allow some flexibility in coastal regulation, as is the case in land-use codes (which allow for code-sanctioned special-use permits and more difficult-to-achieve variances from code provisions). But some policies simply bring too many costs to bear, and in the context of Matunuck, armoring would seem to be one of these. Armoring the road will likely mean the end of the beach and the elimination of public-trust lands. The CRMP should not allow for exemptions in such damaging situations.

Another lesson is that CRMC (which has already been depoliticized in the last five years<sup>113</sup>) should be further insulated from political pressure. Through two hearings, CRMC stuck to its objectively passed coastal plan and denied the petition for armoring. But, following a third hearing, CRMC reversed course, abandoned its plan, and granted an exemption. Nothing in the public record had changed in the interim, which leads one to wonder whether CRMC responded to some unseen pressure. Apolitical, policy-based advocacy is all well and good. But when it appears that something opaque is happening outside the context of hearings and public advocacy, there is cause for concern.

That said, the Matunuck armoring scenario might teach some positive lessons, too: CRMC is taking another, creative approach to addressing Matunuck erosion. As CRMC Director Fugate mentioned in his recommendations to the Council, a draft modification to the SAMP would authorize CRMC to approve “experimental erosion control” methods on application by coastal property owners.<sup>114</sup> The draft rule specifically excludes “revetments, bulkheads, seawalls, groins, breakwaters or jetties” and also provides for immediate suspension of any permitted activity that ends up causing environmental or economic harm or

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113. In re Request for Advisory Opinion from House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 940 (R.I. 2008) (holding that “(1) no member of the General Assembly nor an appointee of that body may sit on the CRMC; and (2) appointments to the CRMC are to be made exclusively by the Governor . . . with the advice and consent of the Senate”).

114. Coastal Resources Management Council, *DRAFT – Proposed new section for CRMC Salt Pond Region Special Area Management Plan*, Oct. 26, 2012, available at [http://www.crmc.ri.gov/news/pdf/SaltPondSAMP-Section980\\_draft\\_102612.pdf](http://www.crmc.ri.gov/news/pdf/SaltPondSAMP-Section980_draft_102612.pdf).

that exacerbates erosion on adjacent properties.<sup>115</sup>

#### VI. EPILOGUE

On October 29, 2012, while I was writing this article, Hurricane Sandy struck Rhode Island. Sandy caused significant further erosion of beaches throughout southern Rhode Island, including Matunuck. Some Matunuck cottages were swept to sea; others were severely damaged.<sup>116</sup> But Matunuck Beach Road and the Ocean Mist, perhaps miraculously, survived the storm.<sup>117</sup> In Sandy's aftermath, CRMC has loosened its permitting requirements for properties damaged by the storm.<sup>118</sup> At the same time, CRMC Director Fugate says, the storm highlights the need for robust coastal planning: "[a]ny time we have an event like this people need to take pause. . . . It certainly is a warning bell. We need to start looking at the long term."<sup>119</sup> Fugate has proposed developing a "Shoreline Special Area Management Plan" to strengthen long term coastal planning – a good idea, to be sure.<sup>120</sup> But, as the difference between the CRMP and CRMC's approval of armoring for Matunuck Beach Road shows, the idea will only be as good as its implementation.

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115. *Id.* at § 980(C)(7), (C)(8) & (E)(2).

116. G. Wayne Miller, *A 'warning bell' on erosion*, PROVIDENCE J., Nov. 4, 2012, at A1.

117. See Richard Salit, *Storm underscores need for planning*, PROVIDENCE J., Nov. 4, 2012 at A1.

118. *Id.* ("The CRMC is issuing expedited permits for emergency repairs from Sandy, but if a property is more than 50 percent damaged, it will have to comply with current coastal building standards.")

119. *Id.*

120. *Id.*