

## Lingering Groin Pain: The Grapes of *Rapf*

By Lance Pomerantz

Superstorm Sandy dramatically altered substantial portions of the Long Island coastline. Some localities are already restoring the beachfront using artificial means, while others are still assessing the most prudent course of action.

Here is a look at the reaction to the damage done by Long Island's 20th Century "superstorm," the Hurricane of 1938, as well as its echoing after-effects.

### Background

From Long Beach on the west to Sagaponack on the east, most of Long Island's south shore is separated from the Atlantic Ocean by a "barrier beach." Readers may be most familiar with the longest stretch of this beach, which is known as Fire Island.

The Hurricane of 1938 caused severe damage to several areas along the barrier beach, opening four inlets that allowed the Atlantic to ebb and flow into the various bays on the north side of the beach. All but one of these inlets eventually closed up due to natural tidal action. The largest one, Shinnecock Inlet, was actually bulkheaded, dredged and widened by the County of Suffolk. It has been continuously improved and maintained down to the present day.

Pursuant to the federal River and Harbor Act of 1960, Pub. L. No. 86-645, 74 Stat. 480 (1960), the County of Suffolk, the State of New York and the Army Corps of Engineers embarked on a series of projects designed to protect the barrier beach from future hurricane damage. Between 1964 and 1970, these efforts resulted in the erection of a series of "groins," stone jetties that extend from the shore into the water in a direction perpendicular to the beach.

Unfortunately, the Inlet improvements and the groins had the unintended effect of hastening erosion along the ocean beaches to the west thereof (*i.e.*, Westhampton Beach and points further west). In 1984, a class action was filed in the U.S. District Court for the Eastern District of New York, on behalf of approximately 200 beachfront landowners who claimed that they were directly harmed as a result of the groin projects. *Rapf, et al. v. County of Suffolk, et al.*, #84 CV 1478 (E.D.N.Y. 1984). The original defendant was only the County of Suffolk, but eventually came to include the State of New York, the

United States of America, the then Governor of New York, the DEC and several DEC officials (collectively "the Government"). *Rapf, et al. v. County of Suffolk*, 755 F.2d 282 (2nd Cir.1985).

Following protracted litigation in the Federal Courts, the parties entered into a "Stipulation of Settlement and Consent Judgment" (the "consent judgment"). In October, 1994, the consent judgment was recorded in the Suffolk County Clerk's Office. In December, 1994, the U.S. District Court entered a final judgment in the case, amending the stipulation, approving the settlement and dismissing the class action. The Final Judgment was recorded in the Suffolk County Clerk's Office soon thereafter.

### The mechanics of the Consent Judgment

In the *Rapf* consent judgment the government committed to implement an "Interim Plan for Storm Damage Protection." Pursuant to the Interim Plan, the government would first construct (or modify), then subsequently operate and maintain, various erosion control structures in order to alleviate the erosion problems that led to the lawsuit. The operation and maintenance phase was to continue for only 30 years following the completion of the construction phase. However, the plaintiffs permanently gave up valuable rights in return for the government correcting the problems it caused in the first place!

The consent judgment required the implementation of a "Public Access Plan" and the execution of several different agreements between some or all of the parties: the "Boundary Line Agreement," the "Dune Protection and Conservation Easement," the "Access Grant" and the "Right-of-Entry Agreement" (the "Agreements"). These agreements were intended to implement environmental and beach access policies unconnected to the original avulsion problems caused by the hurricane.

The Public Access Plan is the "blueprint" for the entire scheme. The agreements are the vehicles by which the portions of the Public Access Plan that require apportionment of rights and obligations among the parties are accomplished.

The Public Access Plan requires that the



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plaintiffs execute the Boundary Line Agreement relinquishing to the State of New York title to that portion of their properties lying between the seaward toe of the dune and mean high water. In addition, particular plaintiffs must convey to the County of Suffolk certain strips of land extending from Dune Road to the beach in order to provide public access, via the Access Grant.

The Dune Protection and Conservation Easement, while recognizing the private ownership of the dune and a protected area 25 feet to the north of the seaward toe, prohibits any use of that area by the private landowner except 1) the construction of a "dune walkover structure" to afford access to the beach and 2) the repair, maintenance and improvement of the dune itself.

Finally, the Right-of-Entry Agreement required of each plaintiff permits government employees or contractors to enter the protected area to construct, inspect and maintain any improvements made pursuant to the Interim Plan or the Public Access Plan. The Right-of-Entry Agreement terminates at the end of the operation and maintenance phase of the Interim Plan, *i.e.*, 30 years from the completion of construction.

### Later cases

There were two subsequent attempts by owners of eroded properties to collect damages in Federal Court based on groin construction. *Devito, et al. v. United States of America*, 12 F.Supp.2d 269 (E.D.N.Y. 1998) involved several property owners who claimed that the USA was liable under the Federal Tort Claims Act for erosion damage precipitated by groin construction. The court held that the construction of the groins was a discretionary function of the Corps of Engineers and, therefore, the USA was entitled to full immunity from FTCA liability. In *Ireland v. Suffolk County of New York, et al.*, #00 CV 2412 (E.D.N.Y. 2000), the plaintiff failed to prove that the groins were the cause of the erosion. Following a bench trial, judgment was entered for the defendant.

In a recent Suffolk County Supreme Court case one party tried to use the *Rapf* consent judgment to vitiate the burden of a privately created beach access easement over his prop-

erty. In *Djoganopoulos v. Polkes*, 2011 NY Slip Op 31444(U) (Suffolk County Sup. Ct., 2011), the burdened land owner correctly pointed out that the *Rapf* judgment (and the Public Access Plan implemented thereafter) prohibit more than one dune walkover structure on each private parcel. Since the burdened owner had already erected such a structure in a location removed from that of the easement, he argued that the easement holder could not build an additional walkover, thereby eliminating the easement.

The court found that:

“[t]his argument is without merit. While the *Rapf* consent decree [*sic*] may bind the

parties, it does not in any way eliminate the deeded easement in favor of the petitioners and does not create any legal impediment which would prevent the respondents from reconfiguring or removing their walkways as necessary to allow the construction of a walkway on the easement area so that all structures are in compliance with the *Rapf* consent decree.”

#### **What’s next?**

As of this writing, it is unknown whether government agencies will try to exact far-reaching concessions in exchange for rebuilding or reclamation assistance following Sandy, as they did in *Rapf*. In addition, the *Devito* and

*Ireland* cases signal difficulty in recovering for damages inflicted by poorly conceived or shoddily implemented government intervention.

When faced with devastation, it’s tempting to take any assistance offered. However, counsel should advise their oceanfront clients of the potential ramifications of hastily made, emotional decisions.

*Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely read land title newsletter Constructive Notice. For more information visit [www.LandTitleLaw.com](http://www.LandTitleLaw.com).*