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June 2010

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CLIMATE ADAPTATION AND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION: HOW DO ADAPTATION STRATEGIES IMPACT REGULATORY TAKINGS CLAIMS?

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Abstract

As the impacts and potential of climate change are realized at the governance level, states are moving towards adaptation strategies that include greater regulatory restrictions on development within coastal zones. The purpose of this paper is to outline the impacts of existing and planned regulatory mechanisms on the Fifth Amendment to the United States Constitution, which prevents the government taking of private property for public use without just compensation. A short history of regulatory takings is explained, and the potential legal issues surrounding mitigation and adaptation measures for coastal communities are discussed. The goal is to gain an understanding of the legal issues that must be resolved by governments to effectively deal with regulatory takings claims as coastal mitigation and adaptation plans are implemented.

A Short History of Regulatory Takings

"…[N]or shall private property be taken for public use, without just compensation." (U.S. Const. amend. V). The Fifth Amendment to the United States Constitution protects citizens from government acts that directly interfere with private rights attached to real property. If a taking is proven, the government action is valid only when two criteria are met. First, the government must prove the taking of private property was done for a public purpose. Second, in addition to showing a public purpose, the government must also provide just compensation to the private landowner. Just compensation is generally based on the fair market value of the property at the time the government takes the property.

Now that we have a basic summary of the Fifth Amendment conditions to a government taking of private property, it is important to quickly summarize the competing dynamics involved in the government regulation of land. These competing interests derive mainly from government's power to regulate for the health, safety, and welfare of its' citizens (found primarily under the 10th Amendment to the United States Constitution); and the limits to this government power as it related to real property based on the Fifth Amendment conditions of public use and just compensation mentioned above.

The U.S. Supreme Court has aided our understanding of when a taking of private real property occurs. Some instances are obvious, such as where the government intentionally takes private property pursuant to its eminent domain power. In other instances, the potential taking is less obvious because the government is not overtly acting pursuant to its eminent domain power, but rather restraining the use of private land through a regulation. A main inquiry in these so-called regulatory types of takings is whether the government regulation has gone so far as to result in a per se, or categorical taking of the property.

There are two major categories of per se regulatory takings. The first category is when a government regulation results in a permanent physical occupation of the private land (Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)), such as a government regulation that allows for a private cable box to be permanently attached to private real property. The second category, based in the Lucas decision, occurs when the government regulation removes all viable economic use of the private land. For example, a government regulation permanently preventing development on land previously capable of being developed may result in the removal of all viable economic use of the property.

A number of factors are balanced in determining when all viable economic use of the land has been removed, some of which focus on the reasonable investment-backed expectations of the landowner prior to the regulation (Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978)). The Lucas per se regulatory takings analysis may be viewed as a balance between the government's Tenth Amendment rights to protect its citizenry, and the private citizen's Fifth Amendment right to be secure from unreasonable government intrusion.

Categorizing the individual property right at stake becomes important when looking at regulatory takings from the point of view of balancing the Tenth and Fifth Amendments. For instance, a close examination of the individual property right being burdened can aid in identifying the obligations, if any, which may be owed by the government. Critical questions for examination include: whether the private landowner actually owns the property right at stake; whether the alleged property right can be categorized as a public nuisance; and, whether there are background principles of law that preclude a takings claim. The purpose of these inquires is to ensure the government regulation actually interferes with a discernable property right. If it does not, then there can be no regulatory taking. The reminder of this article focuses on this background principle inquiry, and then explores how such an analysis is a necessary first step when determining the effect of government mitigation and adaptation efforts within coastal areas.

Existing and Planned Regulatory Mechanisms

It should come as no surprise that governments at the federal, state, and local levels are actively pursuing climate mitigation and adaptation strategies that potentially limit land use. As governments pursue these policies, their impact on the Fifth Amendment must be considered. It seems governments have two choices when planning for complete prohibitions on the development of land: they can either purchase littoral landowner rights through a direct eminent domain proceeding, as there can be little argument climate adaptation and mitigation strategies are in the public interest; or they can regulate land within coastal regions. The term regulation is assumed to include long-term prohibitions on the development of property in coastal regions, rather than conditions to development, such as rolling easements. If governments choose to regulate coastal activities, by far the cheaper and politically prudent alternative,- then regulatory takings claims will likely follow.

To aid in properly analyzing the extent of government liability for climate adaptation and mitigation strategies in coastal regions, governments should engage in a preliminary analysis of the nature of the regulation itself, and then compare this analysis with the actual property rights and expectations of existing landowners. For example, where the government regulation is intended to protect against a traditional public nuisance, then it is far less likely that a regulatory takings claim will prevail because the landowner never had the right to engage in such an activity in the first place. However, as Professor Huffman points out, the claim of public nuisance cannot be a judicial construct; it must be based in the common law traditional itself. Fundamentally, this means the government regulation must do no more than formalize a pre-existing nuisance, which the landowner was always barred from engaging in.

In the context of climate change, it remains to be seen how regulations supporting mitigation and adaptation strategies might be protected from background principles analysis. For instance, in the Lucas case, Justice Scalia identified a number of principles in which states can avoid a takings claim. In doing so, he offered examples where background principles of law, or an otherwise close analysis of the state power, would prevent a regulatory takings claim. In one principle, Scalia notes a state can prevent harmful or noxious uses of property without requiring compensation. The key is that such a regulation by the state must provide a significant and well-established public benefit, while being generally applicable to all similarly situated properties.

The second principle identified in the Lucas decision is a qualifier of the first. It suggests a regulation avoids a takings claim only where it is shown that the property rights being denied by the regulation were never part of the landowner's title to begin with. For climate regulation purposes, this qualifier suggests that while states can purport to justify a regulation based on background principles, they cannot do so where the regulation takes away a right of ownership that was part of the landowner's estate when they received title to the property. For example, if a landowner bought a property that included a general right to use the property for X number of uses, but the government regulation changes the use to X minus 2, then the regulation has taken away a right of ownership that existed when the landowner purchased the property. It seems any climate-related restrictions must sufficiently link historical principles of police powers (via public nuisance) as the basis from which the regulation is being implemented.

The third principle identified in the Lucas decision highlights pre-existing property rights, such as the navigation servitude, which are superior to the property rights of an individual landowner. For instance, the rights of a riparian landowner are subject to the navigation rights of the government. A private landowner takes ownership subject to this superior right. Another example is the Public Trust Doctrine, which subjects the rights of littoral or riparian

landowners to certain rights of the public in navigable waters. The key element is a pre-existing government right established in property law, which limits the extent of property rights obtainable by the private landowner.

Discussion

It is not immediately clear how to ensure climate change regulations steer clear of regulatory takings claims, especially where those regulations entirely prohibit development. Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) provides an example of how a temporary moratorium on development may survive a regulatory takings claim, but its application to climate change regulation is suspect because sea-level rise is not generally seen as a temporary condition in human timeframes. However, there are a few lessons that can be learned from the Lucas decision, and specifically the background principles discussion. First, to avoid a regulatory taking claim, climate change regulations should focus their purpose on preventing private land activities that were always prohibited, simply making the implicit prohibition explicit through the regulation. To do this, some care should be taken at the outset to properly identify the exact purpose of the regulation, including specifically identifying the types of land uses being proscribed. This will help policymakers understand the actual purpose of the regulation, and also assess the potential impacts on private citizens and constitutionally protected property rights.

Second, it is critical to identify how climate change necessitates the explicit regulation of private property in new ways. Attention should be placed on how climate change evokes a change in circumstances, or the way in which we have traditionally approached coastal development. For instance, we have always known the coast to be a dynamic place, but climate change fundamentally alters our traditional understanding of limits on the intensity and frequency of the assumed dynamic nature of coastal areas. As a result, new regulations reflect the new dangers posed to the community, and these new dangers are similar in kind to those that have traditionally been regulated by government as public nuisances. For example, in Lucas, Scalia notes how changed information – a nuclear power plant is found to exist on land with an active fault line – can alter the expectations of what activities are allowed on certain property.

Finally, there should be a clear indication that the climate change regulation has spawned from fundamental changes in community values. As Professor Huffman rightly identifies, common law is not a judicial construct, but rather a reflection of the rules a community chooses regarding social existence. Since common law tradition supports a background principles claim, climate change regulations that impact local land use should ensure the basis for the regulation is supported by community choice. This way, the connection between the climate regulation and common law principles is clearly established.

Conclusion

If predictions of climate change impacts – such as sea-level rise – come to pass, public policy will demand more proactive regulations, including limiting the development of land in coastal regions. These regulations will undoubtedly be challenged as regulatory takings. Lessons from the Lucas case can aid in avoiding such claims. Specifically, regulations that are developed in-line with background principles of law will more readily avoid regulatory takings claims. However, to do this, there are a number of principles that should be employed by policy drafters. The key to successful regulations lie in the nexus developed between climate change policy and traditional public safety measures, especially where regulations employ complete prohibitions on coastal development. Because this nexus must be proven on a regulation-by-regulation basis, the ultimate effectiveness of climate change regulations removing all viable economic use of land remains to be seen.

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