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Regulatory Takings Claims and Coastal Management of Sea Level Rise: Remembering Governments are More Than Regulators

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Introduction

Scientific consensus has been expanding on both the existence of climate change, and the role climate change is having on sea-level rise (*see* Intergovernmental Panel on Climate Change, Climate Change 2007: Synthesis Report (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf). For example, global average sea-level rise over the past 100 years has been calculated at approximately eight inches, with the observed *rate* of sea-level rise doubling within the last fifteen years (*see* U.S. Global Change Research Program, Global Climate Change Impacts in the United States 18 (2009), *available at* http://www.globalchange.gov/what-we-do/assessment/previous-assessments/global-climate-change-impacts-in-the-us-2009).

The existence of climate change and, most notably, the impacts that such change is having on coastal land use planning is something of particular concern for coastal land use planners, As local planners work to develop coastal land use policies that proactively deal with the impacts of climate change, the question of *impacts* these regulations might have on existing land use expectations is a prime consideration. At the center of such impacts is how potentially proscriptive regulations to limit development in coastal zones might trigger regulatory takings claims (U.S. Const. amend. V; *see generally Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

The purpose of this article is to highlight some of the roles government can take on that exist *outside* the traditional regulatory powers of government. Two such nonregulatory roles include the rights of government as the property owner of submerged lands, and the rights/obligations of government as trustee of the public trust under the public trust doctrine that exists at common law and also statutorily in many coastal states. The reasons these nonregulatory roles are important considerations is because of the reasonable argument that a government that is not acting in a regulatory capacity cannot be said to be "regulating," and therefore cannot be subject to a regulatory takings claim. As such, it may be helpful to practitioners working with public coastal planning authorities to consider the importance of thinking about government's nonregulatory rights in the coastal zone as a means of developing policy responses to sea-level rise that impact private property right expectations.

Issues Related to Land Use Planning in the Coastal Zone: Accounting for Sea-Level Rise

State and local governments are adapting their land use planning strategies in coastal regions to deal with sea-level rise brought on by climate change (*see* James G. Titus et al., *State and Local Governments Plan for Development of Most Land Vulnerable to Rising Sea Level Along the U.S. Atlantic Coast*, 4(4) Envtl. Res. Letters 1–7 (2009), *available at* http://iopscience.iop.org/1748-9326/4/4/044008/pdf/1748-9326_4_4_044008.pdf). As government creates plans for dealing with sea-level rise, the options for planning tend to fall into one of two categories: stay at the coast, or retreat from the coast. A variety of methods have been suggested to deal with each category; some dealing with holding the sea back (armoring through sea walls as a prime example), while others focus on allowing the natural progression of the sea to maintain the traditional coastal landscape (rolling easements have been highlighted as a prime example here). For an excellent discussion of these options and implications, *see* James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 Md. L. Rev. 1279 (1998).

The option(s) chosen by land use planners have a variety of implications. For example, choosing to stay and armor the coastline against rising seas—say, by creating seawalls—commits public resources and reinforces expectations about the way in which land can be used in the coastal zone. At the same time,

there are ecological impacts to such choices, including the erosion that accompanies most armoring techniques, resulting in a loss of sandy beach and associated wetland resources. Alternatively, choosing to retreat can have its own set of consequences. For example, while retreat may minimize the commitment of public resources at the coast (say, through minimizing infrastructure development ahead of sea-level rise), and while it may also ensure ecological values of a natural coastal landscape are better maintained (in comparison to armoring techniques), the change from a development mind-set to a nondevelopment mind-set will impact the value of privately held coastal properties, likely leading to regulatory takings challenges.

Land use planners often see the two options, stay or retreat, either of which creates difficult policy choices. Stay and wait for sea-level rise to force reactionary policies and the costs can be substantial. Retreat and the political/legal consequences can be just as substantial, especially when regulatory takings challenges are considered. Even though it has been almost 20 years since the *Lucas* decision, the idea that public proscriptions on private coastal land can lead to a takings finding, thus requiring the government to pay for the protection, sits at the forefront of the minds of many planners. However, there are options for government. Rather than seeing policy options solely through a "regulatory lens," governments can look to their nonregulatory rights in coastal zones, specifically their rights as a property owner and their corresponding obligations to the public as trustee of coastal public resources.

Nonregulatory Tools Government May Consider in Planning for Sea-Level Rise: Property Rights and Trustee Obligations

Beyond the role of regulator stemming from government's traditional police power to regulate land use for the health, safety, and welfare of the public (*see* U.S. CONST. amend. X; *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926)), government also has specific rights in the coastal zone related to its ownership of submerged lands (43 U.S.C. §1301, Submerged Lands Act of 1953). The government is the owner of submerged land seaward of a defined boundary (usually the *mean high water mark* but the *mean low water mark* in certain states), while the private landowner claims ownership landward of this boundary. In this way the government and private landowners abut one another. When thinking of the government in this role, we can see how the rights of abutting landowners become the primary consideration, rather than the impact of government proscribing what a private landowner may do on its real property.

Taken a step further, we can also consider how disputes between abutting landowners (private and public landowners in this instance) might be viewed in legal terms, and how these kinds of disputes are usually resolved. For example, courts have tended to move toward abandoning older principles of property law between adjoining landowners such as the "common enemy doctrine" or the "natural law doctrine" to a more tort-based consideration using the rule of reasonableness in resolving property disputes. Certainly, government does have property interests at stake when, for example, a private landowner chooses to build a sea wall and armor against the rising sea. An argument can be made that such a practice artificially prevents the accretion of submerged land toward the upland, thus depriving the government of incremental increases in its property interest. Such an argument can help form the basis of negotiating the means by which a private landowner deals with sea-level rise, while also providing courts with a strong argument that the government has property interests at stake when such actions are taken by adjacent private landowners. This suggests that government, advancing its interests as a property owner, may be in a superior position to work with private landowners to implement solutions to sea-level rise without having to resort to proscriptive regulatory mechanisms.

The ownership rights that government has in submerged lands also create obligations for government to protect the public interests in these lands. As trustee of the public interests in submerged lands (sometimes referred to as the *jus publicum* and thus differentiated from the *jus privitum*, or private interests as property owner), the government is

responsible for enforcing the rights of the public in the coastal zone (*see* Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Taking Liability for Sea-Level Rise Responses on the Gulf Coast*, 26 J. Land Use & Envtl. L. 395, 399–407 (2011)). Through enforcing these rights, the government can act as a third party between the private landowner and the public at-large, stepping in as trustee to defend the rights of the public in the coastal zone. To use the same example provided earlier, a private landowner who wishes to armor against the rising tide may frustrate public rights in the surrounding area, including erosion of the sandy beach that may or may not be part of the established public right in the coastal zone. (For examples of how certain Atlantic ocean states have developed their public trust doctrine rights, *see* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classification of States, Property Rights, and State Summaries*, 16 (1) Penn State Envtl. L. Rev. 1 (Fall 2007).) Where public trust rights are implicated, government can claim a defense against regulatory takings based on "background principle of property law." In essence, the actions of the private landowner of armoring can erode public trust rights, a category of rights that have been held to be background principles of property law. By defending these rights, the government action is outside a traditional 'regulatory' stance and thus avoids the kind of actions that traditionally come within the influence of a regulatory takings claim.

Conclusion

The purpose of this article is to highlight examples where the government can choose to enforce its rights and obligations in the coastal zone to help it achieve land use planning objectives that take account of sea-level rise. This can be especially helpful where local governments are fearful about the impacts regulation of private property might have both politically and legally through private reactions that result in regulatory takings claims. Of course, none of the options identified here are holistic panaceas for solving all local land use decisions in coastal zones.

This is especially true in states where public trust rights are limited. Still, looking outside the traditional regulatory lens of government control of land use provides some additional tools to planners as they move forward in dealing with the reality that is sea-level rise brought on by climactic changes.

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