Strategies for Making Sea-Level-Rise Adaptation Strategies “Takings-Proof”

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What Exactly Is a Taking?

- A government-compelled, permanent, physical occupation (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)) **PO**
- A total deprivation of use and/or value (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992))) **TD**
- An exaction of a real property interest (for example, fee or easement) even if the value of the property is enhanced by the conditional permitting (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)) **EX**
- If “a court declares that what was once an established right of private property no longer exists” (plurality opinion in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl Prot.* (2010)) **JT**
Why do we recognize non-eminent domain takings

“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”

Pennsylvania Coal Co. v. Mahon (1922)

“The Fifth Amendment’s guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Armstrong v. U.S. (1960)
SLR Adaptation Strategies
Level 1
No takings implications

- Notice to landowners of impending SLR
- Comprehensive plan SLR element
- Building code changes to accommodate SLR
- Government purchase of fee in properties vulnerable to SLR
- Government purchase of (or truly voluntary donation of) conservation easements on properties vulnerable to SLR
SLR Adaptation Strategies
Level 2

Minimal takings implications

- SLR overlay zoning and downzoning (affecting height, area, and use of undeveloped or underdeveloped parcels) (PT)
- Restrictions on existing, nonconforming buildings/uses in SLR overlay zone (PT)
- Enhanced floodplain restrictions in SLR areas (PT)
- Permits for soft-armoring in SLR areas (e.g., beach nourishment) (PT)
- Requiring living shorelines in front of hard-armoring structures (PT, EX)
- Transferable development rights exchange with owners in SLR zone (ED)
SLR Adaptation Strategies
Level 3
Moderate takings implications

• Increased buffers and setbacks for landowners directly affected by SLR (PT, PO)
• Prohibition of hard-engineered structures (armoring) in designated SLR zones (PT)
• Special assessments for beach nourishment and other soft-armoring in SLR zones (PT, EX)
• New rolling easement statutes/judicial decisions (PT, JT)
SLR Adaptation Strategies
Level 3
Moderate takings implications

• Land banking in upland areas for future private use (ED)
• Exaction of coastal impact fees on all permitted development in the state (EX)
• Massive public land acquisition in SLR areas and areas nearby financed by new taxes and bond issues followed by resale with restrictions to private owners (ED)
SLR Adaptation Strategies

Level 4

Serious takings implications

• Development exactions of conservation easements *(EX)*

• Judicial decisions redefining public ownership in the coastal zone *(JT)*

• Ban on soft-armoring financed by landowners *(PT, TD)*

• Prohibition of new, permanent structures in designated SLR zones, declaring them to be public nuisances *(PT, TD)*
SLR Adaptation Strategies
Level 4
Addressing serious takings implications

• Development exactions of conservation easements (EX):
  *Articulating essential nexus + rough proportionality*

• Judicial decisions redefining public ownership in the coastal zone (JT):
  *Marshalling relevant precedent(s)*

• Ban on soft-armoring financed by landowners (PT, TD):
  *Using public nuisance language in statutes/ordinances*

• Prohibition of new, permanent structures in designated SLR zones, declaring them to be public nuisances (PT, TD):
  *Identifying allowable uses*