Takings Liability and Coastal Management in Rhode Island

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The "takings" clauses of the federal and state constitutions provide an important basis for municipal liability in Rhode Island. The takings clauses require "just compensation" to any person whose property is "taken" for public use.[1] The Rhode Island constitution limits state takings liability related to the state's power to "regulate and control the use of land and waters,"[2] but the more restrictive language of the state constitution cannot "defeat the mandates of the Federal Constitution."[3] As a result, takings cases in Rhode Island related to coastal management will generally allege violations of the federal Constitution.

Takings can occur through direct condemnation through eminent domain or by "inverse condemnation" or "regulatory takings" in which government regulations or actions result in physical occupation of property or unconstitutional limits on the use of property.[4] Where a taking occurs by inverse condemnation, the responsible government must compensate the property owner.[5] This fact sheet reviews the standards under which courts decide regulatory takings cases arising in Rhode Island.

Regulatory takings

State, and local governments are empowered to issue regulations that promote the public health, safety, and welfare. Many of these regulations inevitably limit land use in some way, but are not takings provided they "are reasonably necessary to protect the public health and safety" and do not become "arbitrary, destructive, or confiscatory."[6] However, when these regulations place sufficient limits on land use to rise to the level of a regulatory taking,[7] property owners may file "inverse condemnation" claims against the government to recover compensation for their losses.[8] Regulatory takings may result from actions depriving a property owner of property value or compelling a property owner to suffer a physical invasion of her property.[9]

Deprivation of use

Under both federal and state law, a regulation that deprives a property owner of all economic or productive use of their property is a taking requiring payment of just compensation. In *Lucas v. South Carolina Coastal Council,* the U.S. Supreme Court held such "total" takings compensable in part due to a concern that "regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here,

by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[10] This holding was in accord with prior Rhode Island precedent indicating that deprivation of all beneficial use of property is a taking that requires compensation.[11]

Diminution of the value of property that does not rise to a *per se* taking may also require compensation. Diminution in property value alone is not sufficient to prevail on a claim for a regulatory taking.[12] Instead, courts determine whether a taking has occurred in such cases under the federal and Rhode Island constitutions by applying a three-factor balancing test laid out by the U.S. Supreme Court in *Penn Central Transportation Co. v. City of New York*.[13] Courts applying the test focus on three factors, which include: (1) the character of the government regulation; (2) the reasonable expectation of the property owner; and (3) the economic impact of the regulation.[14]

Plaintiffs in Rhode Island and elsewhere have asserted a variety of takings claims related to zoning and land use decisions restricting development. While zoning and land use restrictions do not constitute takings in many cases,[15] they may be sufficiently burdensome in some cases so as to rise to the level of a taking.[16] A number of cases related to denial of permission to develop coastal and wetlands areas have been reviewed by Rhode Island courts, however, and these have rarely risen to the level of a taking.[17]

Physical occupation of property

Physical occupation of property as a result of regulation may also result in a taking requiring compensation. Takings cases "establish that even a minimal 'permanent physical occupation of real property' requires compensation under the [Takings] Clause."[18] Temporary occupation of property, like permanent occupation, may constitute a taking, including "when government action occurring outside the property [gives] rise to 'a direct and immediate interference with the enjoyment and use of the land.'"[19]

Repeated or temporary flooding is considered a physical occupation and therefore may constitute a taking when induced or affected by the government.[20] The Supreme Court identified factors for courts to consider in determining whether a temporary occupation is a taking, including: the duration of the occupation; the "character of the land at issue" and the owners' "reasonable-investment backed expectations" regarding its use; whether the harm was a foreseeable or intended result of the government action; and the severity of the interference with use of the land.[21] In 2015, the Court of Federal Claims applied these factors in *St. Bernard Parish Government v. U.S.* to determine that failure by the U.S. Army Corps of Engineers to properly construct, operate, and maintain the Mississippi River-Gulf Outlet caused a taking by substantially contributing to the flooding of parts of New Orleans during Hurricane Katrina and subsequent storms.[22]

Rhode Island regulatory takings liability related to coastal management

Coastal management decisions may give rise to takings claims under a variety of circumstances, notably including limitations on or requirements for development of coastal properties and causing or substantially contributing to inundation during storm events or high tide events. These types of claims may become more common in the future as a result of harm to private property owners related to sea level rise, increased storm frequency and severity, and associated coastal flooding and erosion.

Consideration of potential takings liability associated with adaptation efforts may reduce potential exposure to future takings liability. Municipalities and other governmental entities may take a range of actions to increase coastal resiliency, including development of plans and policies; engaging in permitting activity, and constructing or maintaining coastal infrastructure.

Planning, policymaking, and permitting

Municipal planning may give rise to takings claims if plan causes a reduction in property values. For example, a coastal resilience or hazard mitigation plan could indicate that a property is at a high risk of inundation, which could reduce the fair market value of that property. Similarly, zoning regulations prohibiting or tightly restricting development in an area previously developable could result in a takings claim, either through the plan or policy itself or as a result of permitting decisions based on that plan.[23]

Takings cases are fact-intensive and highly dependent on the context and details of particular properties and plans. However, courts have previously held that a reduction in property value, alone, is insufficient to prevail on a takings claim. As a result, to prevail in such cases, a property owner must show that the plan or policy works a total taking of her beneficial use of the land or must show other elements sufficient to enable a court to determine, based on the *Penn Central* factors, that a taking has occurred. Local and state governments must either plan for payment of compensation when enacting laws and regulations that will result in takings or tailor their efforts to avoid causing a taking.

Infrastructure

Governmental actions related to coastal infrastructure may have long-term liability consequences to the extent that they may result in takings. Takings claims may arise in this context if infrastructure causes or contributes to harm, such as by removal of access to private property (e.g., through abandonment of roadways) or by creation of infrastructure that adversely affects property either by poor design, downstream effects, or other cases (e.g., dredging that increases storm surge or groins or other hard stabilization structures that cause erosion by stopping lateral movement of sediment along the shoreline). Recent cases have indicated that government infrastructure actions may result in permanent or

temporary takings of private property.[24] Governments seeking to avoid this liability may benefit from a forward-looking consideration of the potential consequences of their infrastructure decisions over their complete lifespan and maintain their infrastructure to ensure that it continues to operate as designed.

Conclusion

Emerging challenges such as sea level rise and increased storm frequency and severity pose challenges for municipal and state governments throughout Rhode Island. Efforts to increase coastal resiliency and proactively adapt to changing conditions may result in a proliferation of legal claims seeking compensation for losses of property value and other losses based on the takings clauses of the federal and state constitutions.

The courts will likely be sympathetic to the challenges facing shoreline managers and to the need for policies and practices to evolve to meet this new challenge. As the Rhode Island Supreme Court explained:

> The power of the state to regulate for the protection of public health, safety, and morals, also known as the police power, is not a static concept. As advances in scientific knowledge have increased public awareness of certain harms, the power of society to guard against these newly perceived dangers must adjust accordingly. Activities that have previously been considered harmless may come to be recognized as serious threats to the public well-being. Concomitantly, new technologies may render harmless conduct that previously put public health at great risk.[25]

While efforts to avoid takings liability may not be completely successful, governments can mitigate their exposure to liability related to their adaptation efforts by considering potential liability in advance and designing their activities to tread the narrow path between causing undue harm to property owners on the one hand and protecting the interests of all on the other.

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[1] U.S. CONST. Amend. 5 (". . . nor shall private property be taken for public use, without just compensation."); R.I. CONST., art. I § 16 ("Private property shall not be taken for public uses, without just compensation.").
[2] Alegria v. Keeney, 687 A.2d 1249, 1252 (R.I. 1997) (state takings clause "evinces a strong Rhode Island policy favoring the preservation and the welfare of the environment"), citing R.I. CONST., art. I § 16 ("The powers of the state and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.").
[3] Alegria v. Keeney, 687 A.2d at 1252.

[4] E & J, Inc. v. Redevelopment Agency of Woonsocket, 405 A.2d 1187, 1189 n.1 (R.I. 1979) ("'Inverse condemnation' is a term used to describe a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.").
[5] Neither the state nor any municipality is immune from takings claims, nor is its liability limited by statutory liability caps. L.A. Ray Realty v. Town Council of Town of Cumberland, 698 A.2d 202, 218-19 (R.I. 1997) (Flanders, J. concurring in part and dissenting in part) ("any [] state constitutional damage remedies would not be subject to the statutory cap on tort claims against state and municipal entities.").
[6] Annicelli v. Town of S. Kingstown, 463 A.2d 133, 139 (R.I. 1983).
[7] Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
[8] Annicelli, 463 A.2d at 139.
[9] Palazzolo v. State ex rel. Tavares, 746 A.2d 707 (R.I. 2000), *cert. granted* 531 U.S. 923 (2000), *aff'd in part, rev'd in part*, 533 U.S. 606 (2001), *on remand* 785 A.2d 561 (2001).
[10] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992).
[11] Annicelli, 463 A.2d at 139 ("When all beneficial use of property is deprived by governmental restrictions, there is no question that an unconstitutional taking can occur even in the absence of a physical entry . . . . Whether a taking has occurred depends upon whether 'the restriction practically or substantially renders the land useless for all reasonable purposes.'").
[12] E & J Inc. v. Redevelopment Agency of Woonsocket, 405 A.2d 1187, 1191 (R.I. 1979) ("Depreciation of property values alone by the act of an entity vested with the power of eminent domain is not a taking of property within the meaning of section 16.").
[13] Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978); Alegria v. Keeney, 687 A.2d 1249, 1252 (R.I. 1997).
[14] Penn Central Transp. Co, 438 U.S. at 124.
[15] Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) ("The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.").
[16] *See, e.g.,* Annicelli, 463 A.2d 133.
[17] *See, e.g.,* Alegria v. Keeney, 687 A.2d 1249 (R.I. 1997); Palazzolo v. State of R.I., No. WM 88-0297, 2005 WL 1645974 (R.I. Super. Ct. July 5, 2005).
[18] Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982)).
[19] Ark. Game & Fish Com'n v. U.S., 133 S.Ct. 511, 519 (2012) (quoting United States v. Causby, 328 U.S. 256, 266 (1946)); *see also id.* at 515 ("Ordinarily, this Court's decisions confirm, if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking.").
[20] *Id.* at 518-19 (holding that repeated temporary releases of flood waters by the U.S. Army Corps of Engineers may constitute a taking and reviewing cases holding prior government-related flooding to be takings).
[21] *Id.* at 522-23 (noting considerations for case-specific factual analysis of temporary takings cases); *see also* St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 719 (Fed. Cl. 2015).
[22] St. Bernard Par. Gov't, 121 Fed. Cl. at 719 (requiring plaintiffs to establish five factors in reliance on *Arkansas Game and Fish*: "(1) a protectable property interest under state law; (2) the character of the property and the owners' "reasonable-investment backed expectations"; (3) foreseeability; (4) causation; and (5) substantiality.").
[23] While in most such cases courts have required appeal from a permit decision, a challenge may, in some cases, precede such a final determination as to a particular parcel. Palazzolo v. State of Rhode Island, 533 U.S. 606 (2001) (finding case ripe for determination without permit decision).

[24] *See, e.g.,* St. Bernard Parish Gov't, 121 Fed. Cl. 687; Banks v. United States, 78 Fed. Cl. 603 (Fed. Cl. 2008) (holding the U.S. Army Corps of Engineers liable in takings claim arising from shoreline erosion caused in part by construction and maintenance of harbor jetties).

[25] Milardo v. Coastal Res. Mgmt. Council of Rhode Island, 434 A.2d 266, 269 (R.I. 1981) (internal citation omitted).