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Coastal Adaptation and Takings Law

Introduction

Local governments can proactively plan for sea level rise by amending their local coastal programs and other local planning documents and ordinances to better address the expected effects of rising seas and eroding coastlines. However, there is no one-size-fits-all approach for all coastal communities. Furthermore, private property disputes in the coastal zone will likely increase as coastal squeeze threatens both private property and public resources, including beaches and other public trust lands. As local communities navigate these challenges, understanding the Fifth Amendment's Takings Clause and its implications for local governments will aid their efforts. Understanding this complex area of the law can help decisionmakers steer clear of avoidable takings claims and better deal with inevitable ones. Ideally, local governments will be able to choose policies that financially burden their constituents the least while still achieving their long-term planning and coastal adaptation objectives.¹ With this aim in mind, this document provides a brief overview of federal and California-specific takings law.

General Takings Law

The Takings Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from taking private property for "public use, without just compensation."² The Fourteenth Amendment extends this prohibition to state and local governments through the Due Process Clause.³ A government taking can occur in two ways: when the government acquires title to private property for a public use through eminent domain, or when the government has regulated a private property to such a degree that it has lost all of its economic value. Deciding when a government entity has "taken" private property,

and therefore must provide just compensation to a private property owner, is at the core of takings law jurisprudence.

The first category of takings is eminent domain—when the government literally takes private property for some public purpose.⁴ Case law limits the exercise of eminent domain to circumstances where property is taken for "public use."⁵ In *Kelo v. City of New London* the Court found that even a community's economic development can be a public use.⁶ Many state legislatures responded to this decision by enacting statutes defining when and how the government can condemn properties for public use.⁷

A second category of takings is when a government regulation limits or affects the use of private property past a legally-defined threshold. Importantly, the Takings Clause does not diminish the government's ability to regulate property. Instead, it requires the government to compensate private property owners when a regulation goes "too far."⁸ Determining whether a regulation goes "too far" so as to effectuate a taking is a legal question that encompasses at least four categories.⁹ Each of these categories "aims to identify regulatory actions that are functionally equivalent to the classic taking . . . in which government directly appropriates private property."¹⁰

4 Wolf, *supra* note 1, at 159.

5 *Kelo v. City of New London*, 545 U.S. 469 (2005).

6 *Id.* at 485.

7 Wolf *supra* note 1, at 164; CAL. CONST. art. 1, §19; CAL. PUB. RES. CODE § 30010.

8 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Block v. Hirsh*, 256 U.S. 135, 156 (1921).

9 CECILY TALBERT BARCLAY & MATHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 299 (35th ed. 2016)

10 *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 548 (2005).

1 Michael Allan Wolf, *Strategies for Making Sea-Level Rise Adaptation Tools 'Takings-Proof'*, 28 J. LAND USE & ENVT'L. L. 157, 164 (2013), available at <http://scholarship.law.ufl.edu/facultypub/404>.

2 U.S. CONST. amend. V.

3 U.S. CONST. amend. XIV, § 1.

Legal precedent has established at least one exception to regulatory takings. Where a regulation forbids a use of a property that would have already been prohibited by “background principles of the state’s law of property and nuisance” the government is not required to compensate a private property owner based on the effects of that regulation on the property.¹¹ Practically, this means that government regulations do not effect a taking when they prohibit an action that the property owner never had the right to do, such as creating or sustaining a nuisance or occupying another’s land.¹² This allows governments to limit development that would infringe on publicly-owned tidelands for some portion of the year. This also allows governments to limit the use of shoreline armoring if that armoring is found to create a nuisance.¹³ Governments may successfully defend many other regulatory, planning, or decisionmaking actions from a takings challenge by arguing that the government action is consistent with background principles of California property law.¹⁴

Categories of Regulatory Takings

One type of regulatory takings occurs when a regulation effects a permanent physical invasion of one’s property, no matter how slight the intrusion.¹⁵ In *Loretto*, the Supreme Court ruled that a regulation requiring landlords to allow cable companies to enter and install cable lines on their private property was a physical taking.¹⁶ The court concluded that “a permanent physical occupation authorized by government is a taking, without regard to the public interests that it may serve.”¹⁷

A government regulation that denies a property owner of “all economically beneficial use”—also known as a *Lucas* taking—of their property is another kind of regulatory taking.¹⁸ Proving this kind of taking is rare, as subsequent court cases have highlighted the need for all economic value to be eliminated for this categorical

taking to apply.¹⁹ For instance, local land use development moratoriums²⁰ and regulations drastically limiting developmental opportunities²¹ have not been found to be takings under this rule. Instead, courts have generally found in these cases that where some economically permissible use is still allowed on the property despite the government regulation, then all economic value has not been eliminated.²² Accordingly, the threshold question for whether a regulation causes a *Lucas* taking is the extent of economic impact to the property.

A third kind of regulatory takings occurs when a government regulation goes “too far” in placing a public burden on particular private property owners.²³ Courts use the ad hoc, factually-intensive *Penn Central* factors test to determine when a regulation goes “too far.”²⁴ The three *Penn Central* factors are: (1) the economic impact of the regulation on the affected landowner; (2) the extent to which that landowner has reasonably distinct investment-backed expectations for their property; and (3) the nature of the governmental action (whether the property regulation has occurred in order to confer a public benefit or to prevent a public harm).²⁵ This test has largely resulted in courts holding that a government regulation which partially impacts the economic value of a property is not a takings for two reasons.²⁶ First, governments have broad leeway under the first and third factors to balance the benefits of the common good against the burdens of economic changes.²⁷ Second, courts have held that property owners “with knowledge of pre-existing government regulations or even of reasonably foreseeable extensions of existing law” should temper the reasonability of their investment-backed expectations.²⁸ The idea that government regulations are capable of changing and, therefore, property owners should soften their economic expectations in light of variable regulatory landscapes, pervades *Penn Central* case law.²⁹

19 BARCLAY & GRAY, *supra* note 9, at 300.

20 See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002).

21 *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117, 1119 (9th Cir. 1979).

22 For a discussion of *Lucas* takings and its limitations see *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 616 (9th Cir. 1993); BARCLAY & GRAY, *supra* note 9, at 300-1.

23 BARCLAY & GRAY, *supra* note 9, at 302.

24 *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).

25 *Id.* at 124.

26 Wolf, *supra* note 1, at 168.

27 *Id. citing Penn Central*, 438 U.S. at 124.

28 *Id. citing Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1357 (Fed. Cir. 2001).

29 See generally BARCLAY & GRAY, *supra* note 9, at 303-305.

The final category of regulatory takings addresses exactions—i.e. government-imposed conditions on a development permit intended to mitigate the environmental or public impacts of the development.³⁰ Courts apply the *Nollan*³¹ and *Dolan*³² tests to dispose of these takings claims. *Nollan* requires a legitimate “nexus”—a direct, logical relationship—between the exaction and the purpose of the restriction.³³ *Dolan* additionally requires that the benefit of the exaction be “roughly proportional” to the projected harm of the permitted activity.³⁴ These tests have since been applied to monetary exactions intended to fund similarly-related yet off-site mitigation projects through the 2013 *Koontz* decision.³⁵

Regulatory Takings Jurisprudence in California

California’s Constitution includes its own takings provision.³⁶ Thus, all takings analyses for actions undertaken by the State of California must be consistent with both federal and state takings requirements.³⁷ For its part, the State of California has taken the frameworks derived from Supreme Court cases (above) and, in some instances, expanded upon them to include other factors or procedures.³⁸

For regulations that effect a physical taking, California courts utilize the *Loretto* framework as described above. California also has several eminent domain laws codified as statutes.³⁹ For instance, one of these laws delineates the process by which California state actors may be given entry to a property and provide just compensation to the property owner.⁴⁰ Overall, the statutes require that a public entity either obtain a court order prior to entering a property

for a land condemnation action or obtain permission from said property owner prior to the anticipated activity.⁴¹ As *Loretto* prescribes, the prevailing question for a physical takings analysis under this law depends on the permanency of the intrusion, and state actions are therefore scrutinized under both the constitutional and statutory tests.⁴²

Like federal *Lucas* claims, California cases where regulations have been found to deny all economic use of a property are rare.⁴³ This is largely because California courts follow the “valuation rule,” which evaluates whether there is any economic value left in the property that remains, instead of evaluating the decrease in the value of the property after the regulation.⁴⁴ Using this formula, California cases have held that downzoning, modified motel ordinances which effect 30%–65% of motel’s business, and the planting of public trees which obstructed the views of billboard advertisements did not constitute a *per se Lucas* taking.⁴⁵ This jurisprudence conforms with the principle that “denial of the highest and best use [of property] does not constitute a taking of the property.”⁴⁶

Regarding *Penn Central* takings analyses, California has adopted the *Penn Central* test in these scenarios and extended its considerations by including ten more factors that courts can consider.⁴⁷ Broadly, these additional factors take into account the traditional uses of the property affected, the state’s interest in the regulation, whether the regulation mitigates the financial burdens placed on the property owner, and any fundamental changes to property ownership effectuated by the regulation.⁴⁸ With these additional factors in place, California courts are wary to “articulate a standard test for determining when circumstances comprise an acceptable diminution in value as compared to a regulation that ‘goes too far.’”⁴⁹

³⁰ *Id.* at 307.

³¹ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

³² *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

³³ *Nollan*, 483 U.S. at 837.

³⁴ *Dolan*, 512 U.S. at 375.

³⁵ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013).

³⁶ CAL. CONST. art. I, § 19 (“Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.”) California’s Takings Article goes beyond the U.S. Constitution by additionally providing citizens with the right to have just compensation determined by a jury, as opposed to a presiding judge, unless waived.

³⁷ See generally *Prop. Reserve, Inc. v. Super. Ct.*, 375 P.3d 887 (Cal. 2016).

³⁸ Broadly-sweeping laws, such as the California Coastal Act, also generally include a provision which ensures that any action authorized by such a statute does not “decrease the rights of any owner of property under the Constitution of the State of California or the United States.” CAL. PUB. RES. CODE § 30010.

³⁹ CAL. PUB. RES. CODE §§ 1230.010 *et seq.*

⁴⁰ CAL. PUB. RES. CODE §§ 1245.010-060.

⁴¹ CAL. CODE CIV. PROC. §§ 1245.020-030.

⁴² *Prop. Reserve, Inc. v. Super. Ct.*, 375 P.3d 887, 915 (Cal. 2016).

⁴³ BARCLAY & GRAY, *supra* note 9, at 301.

⁴⁴ *Id.*

⁴⁵ *Id. citing* *Terminals Equip. Co. v. City and County of San Francisco*, 221 Cal. App. 3d 234 (1990); *Buena Park Motel Ass’n. v. City of Buena Park*, 109 Cal. App. 4th 302, 311 (2003); *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 39 Cal. 4th 507, 513 (2006).

⁴⁶ BARCLAY & GRAY, *supra* note 9, at 302 *citing* *Long Beach Equities, Inc. v. Superior Court of Ventura County*, 231 Cal. App. 3d 1016, 1036 (1991); *MacLeod v. County of Santa Clara*, 749 F.2d 541, 548 (9th Cir. 1984).

⁴⁷ *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 776 (1997) (“This list is not a comprehensive enumeration of all the factors that might be relevant to a takings claim, and we do not propose a single analytical method for these claims. Rather, we simply note factors the high court has found relevant in particular cases. Thus, instead of applying these factors mechanically, checking them off as it proceeds, a court should apply them as appropriate to the facts of the case it is considering.”).

⁴⁸ BARCLAY & GRAY, *supra* note 9, at 303-4.

⁴⁹ *Id. citing* *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Unfortunately, for local governments and regulated property owners alike, this framework has caused a vastly uncertain legal landscape in this complex area of law.

California law establishes certain procedures for land and monetary exactions, beyond the constitutional limits under *Nollan* and *Dolan*. For instance, the California Mitigation Fee Act of 1987 requires government actions that establish, increase, or impose a fee as a condition of a development permit to identify the purpose of the fee, declare how it is related to the impacts on the project, and determine how the fee uses will contribute to the needs of public facilities in the area.⁵⁰ This law, along with the California Supreme Court's *Ehrlich* decision, require

cities to document the need and decisionmaking criteria for proposed exactions, and provide private landowners a process to challenge those decisions.⁵¹ California cases challenging exactions look both to the constitutionality of the exaction under the *Nollan* and *Dolan* decisions, as well as the government's compliance the Mitigation Fee Act.⁵²

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⁵¹ *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996) (“[T]he best reading of this statute is that the Act imposes additional requirements on a local government in assessing an ad hoc fee, and is not intended to supplant *Nollan* and *Dolan* review for ad hoc fees.”); BARCLAY & GRAY, *supra* note 9, at 346.

⁵² BARCLAY & GRAY, *supra* note 9, at 346; *San Remo Hotel L.P. v. City & Cty. of San Francisco*, 41 P.3d 87, 100 (Cal. 2002); *Barratt American Inc. v. City of Rancho Cucamonga*, 37 Cal. 4th 685 (2005); *Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore*, 185 Cal. App. 4th 554 (2010).



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