

Rebuilding and Redevelopment Restrictions

Introduction

Property owners whose homes and other structures are damaged or destroyed by coastal hazards typically want to rebuild on their properties. Similarly, coastal landowners, responding to rising seas or merely wanting modernized, larger homes, sometimes redevelop them into more permanent, fortified structures.¹ As rising seas increasingly make these locations dangerous to inhabit, local governments can respond by amending their laws and ordinances to regulate the rebuilding and redevelopment of structures on these increasingly vulnerable coastal properties.²

Rebuilding and redevelopment restrictions encompass a broad range of regulatory tools local governments can use to place progressive restrictions on structures when they are rebuilt and renovated. They might allow rebuilding the destroyed structures where they were, but with certain additional conditions or safety mandates.³ Similarly, they might allow rebuilding, but only on a portion of a property.⁴ Where rebuilding concerns are the most acute, regulations can completely prohibit rebuilding in an area.⁵ Likewise, redevelopment restrictions can regulate the expansion and fortification of existing structures in perilous coastal locations. Rebuilding restrictions can also take the form of downzoning—i.e. rezoning an area to allow lower densities or less intensive uses.⁶

These tools are useful where redevelopment is undesirable, such as areas currently in floodzones or predicted to be impacted by future sea level rise. Rebuilding and redevelopment restrictions can be particularly useful in locations with many “grandfathered” structures that are not meeting current zoning regulations, and perhaps where there is a danger of repetitive loss.⁷ Because redevelopment restrictions affect projects that are rebuilt or modified in some way only after adoption of the restriction, their effectiveness requires early adoption.⁸

Rebuilding and redevelopment restrictions can be implemented in areas looking to accommodate sea level rise in the short to mid term and areas looking to move out of harm’s way in the long term. Specifically, these restrictions can prompt planned retreat from a coastal region by incrementally restricting new and modified structures in an area that is currently hazardous or is expected to become hazardous in the near future. These strategies could also accommodate sea level rise by requiring that redeveloped or rebuilt buildings be elevated to a certain height or incorporate other resilient engineering approaches.

1 Trends in redevelopment in the California coastal zone have generally shown that “aging structures do not really die so much as metamorphose into ‘new and improved’ structures in the same place.” Charles Lester, *An Overview of California’s Coastal Hazards Policy*, in *LIVING WITH THE CHANGING CALIFORNIA COAST* 138, 148 (Gary Griggs et al. eds., 2005).

2 *Id.* at 160.

3 JESSICA GRANNIS, *ADAPTATION TOOL KIT: SEA-LEVEL RISE AND COASTAL LAND USE* 32 (2011).

4 *Id.* This option might be achieved through setbacks.

5 *Id.*

6 *Id.* Under this scenario, existing nonconforming uses in an area will typically be allowed to continue, but will be required to be brought into compliance if they need to be rebuilt or redeveloped.

7 See 42 U.S.C. § 4121(a)(7) (defining repetitive loss structures). California’s Sonoma County is home to the most repetitive loss properties west of the Rockies. See SONOMA CNTY. PERMIT AND RES. MGMT. DEP’T., SONOMA COUNTY LOCAL COASTAL PLAN: SONOMA COUNTY HAZARD MITIGATION PLAN 109 (2011), available at http://www.sonoma-county.org/prmd/docs/hmp_2011/chapters/full_chapters.pdf.

8 ANNE R. SIDERS, *MANAGED COASTAL RETREAT: A LEGAL HANDBOOK ON SHIFTING DEVELOPMENT AWAY FROM VULNERABLE AREAS* 89 (2013), available at https://web.law.columbia.edu/sites/default/files/microsites/climatechange/files/Publications/Fellows/ManagedCoastalRetreat_FINAL_Oct%2030.pdf.

Tradeoffs

One advantage of redevelopment and rebuilding restrictions is that they can help a community combat nonconforming uses.⁹ Specifically, they can require that redevelopment or large-scale modification of a property brings all current uses and building designs into compliance with updated zoning and building regulations. Another advantage is their compatibility with other adaptation strategies. For instance, restrictions can apply specifically to overlay zones based on sea level rise projections or they can also work to downzone an area to less intensive uses.

Current redevelopment policies have allowed property owners to fortify their coastal homes indefinitely.¹⁰ Engineering advances have contributed to these issues, persistently extending the economic life of buildings and homes, while the ground beneath them erodes.¹¹ Rebuilding and redevelopment policies can be updated to reduce this phenomenon, prompting thoughtful long-term coastal land uses and even eventual retreat from rising seas and flood areas.

These strategies also feature certain economic advantages and disadvantages. Redevelopment restrictions work to internalize the costs associated with rebuilding by placing the financial burden on a property owner who wishes to remain in an area that is or will soon be subject to sea level rise hazards. For instance, a homeowner who wants to remain in a location might be required to pay to elevate the buildings on its property. Conforming to these ordinances can prove extremely costly. Alternatively, implementing a rebuilding or redevelopment restriction can reduce tax revenues from coastal property for a local community, thus externalizing the financial loss.¹²

Legal Considerations

Rebuilding and redevelopment policies can take several forms, but they are all premised on a local jurisdiction's power to promote public safety and welfare by reducing individual property risk.¹³ Implementing redevelopment restrictions will generally require changes to existing local ordinances or the creation of guidance which more accurately delineates when a property is legally redeveloped.¹⁴

As discussed, a major advantage of these strategies is their ability to phase out nonconforming uses. But there are certain legal considerations for achieving this outcome. Generally, nonconforming uses are permitted to continue because it would be unconstitutional to immediately disallow a lawfully established business or use.¹⁵ However, general California land use policy promotes the elimination of nonconforming uses by requiring that grandfathered-in structures come into compliance with all regulations upon being rebuilt or substantially modified.¹⁶

Furthermore, redevelopment restrictions designed to bring nonconforming properties into legal conformance generally only apply once some type of regulatory threshold has been met. These thresholds often vary from jurisdiction to jurisdiction and can comprise square footage additions, property value changes, or the number of previous rebuilds as the defining requirement for what constitutes redevelopment. Private landowners and government regulators often differ over their appraisal of whether major repairs cross these thresholds. Accordingly, thresholds should be clearly defined to avoid legal arguments and misunderstandings over what does and does not constitute "rebuilt" or "substantially modified" and similar terms.

Another issue that these restrictions can help address are existing legal loopholes. For instance, the California Coastal Act currently incentivizes rebuilding destroyed buildings in their previous footprint. The Coastal Act's "repair and maintenance" exception to its coastal development permit (CDP) requirements allows certain rebuilding and redevelopment to proceed without a CDP.¹⁷ Another section allows a structure destroyed by

9 A building or property use which was appropriately established at the time of construction yet has since fallen out of legal compliance is said to be "nonconforming." CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 60 (35th ed. 2016).

10 MOLLY LOUGHNEY MELIUS & MARGARET R. CALDWELL, CALIFORNIA COASTAL ARMORING REPORT: MANAGING COASTAL ARMORING AND CLIMATE CHANGE ADAPTATION IN THE 21ST CENTURY 24 (2015).

11 *Id.*

12 GRANNIS, *supra* note 3, at 33.

13 *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

14 MELIUS & CALDWELL, *supra* note 10, at 24.

15 *Id.*

16 *Id.*; see also B.E. Witkin, WITKIN SUMMARY OF CALIFORNIA LAW § 1040 (2005).

17 CAL. PUB. RES. CODE § 30610(d).

a disaster to be rebuilt in the same location without a permit—even if it would be safer to rebuild further upland on the same property.¹⁸ Local Coastal Programs under the Coastal Act might also allow renovations beyond the permissible legal threshold (usually 50%) if completed in stages, thus allowing them to avoid certain added permit requirements.¹⁹ Redevelopment and rebuilding restrictions can be implemented to address these and other loopholes and exceptions.

Examples

Several California communities feature redevelopment restrictions with varying requirements. Sonoma County redevelopment restriction ordinance requires that all commercial and industrial rebuilt structures must comply with current regulations if the rebuild exceeds “more than fifty percent (50%) of the replacement value of the structure.”²⁰ This means that a property owner interested in rebuilding that requires over 50% of the property value to do so will need to conform with current basefloor

elevations and other requirements. Monterey County features a very similar requirement,²¹ and Marin County has proffered amendments to its local coastal program to make its redevelopment policies more stringent by defining and measuring “redevelopment” cumulatively since 1977, when the Coastal Act went into effect.²²

State and federal sources have begun recommending rebuilding and redevelopment restrictions for dealing with sea level rise. California recommends instituting them when structures are damaged by sea level rise or coastal storms.²³ Florida highlighted this issue in its climate action plan as well.²⁴ The U.S. Environmental Protection Agency has also recommended progressive updates to redevelopment policies.²⁵

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18 CAL. PUB. RES. CODE § 30610(g).

19 See generally Jesse Reiblich & Eric H. Hartge, *The Forty-Year-Old Statute: Unintended Consequences of the Coastal Act and How They Might Be Redressed*, 36 STAN. ENVTL. L.J. 63, 75-81 (2016).

20 SONOMA CNTY., CAL., CODE OF ORDINANCES § 26C-351 (2017), available at https://www.municode.com/library/ca/sonoma_county/codes/code_of_ordinances?nodeId=CH26CCOZOREDI_ARTXXXVNOUS_S26C-351RE.

21 MONTEREY CNTY., CAL. CODE OF ORDINANCES § 18.01.020 (2017), available at https://library.municode.com/ca/monterey_county/codes/code_of_ordinances?nodeId=TIT18BUCO_CH18.01BUSTADCO_18.01.020AP.

22 MARIN COUNTY LCP IP AMENDMENTS 2015-#3 AND 2016 #5, #6, #7 COMPILED IMPLEMENTING PROGRAM (2016), available at https://www.marincounty.org/~media/files/departments/cd/planning/local-coastal/newdocs/161102_ccc_approved_ipa_web.pdf?la=en.

23 CALIFORNIA NATURAL RESOURCES AGENCY, 2009 CALIFORNIA CLIMATE ADAPTATION STRATEGY 77 (2009).

24 GOVERNOR'S ACTION TEAM ON ENERGY & CLIMATE CHANGE, FLORIDA'S ENERGY & CLIMATE CHANGE ACTION PLAN F-9 (2008).

25 EPA, ANTICIPATORY PLANNING FOR SEA-LEVEL RISE ALONG THE COAST OF MAINE Summary-9 (1995).



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