

# Property Rights and Planning for Natural Hazards

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# Increasing natural hazards

- Wildfire risk
- Sea level rise
- River flooding
- Etc.

# In addition to ...

- Hardening structures
- Defensible space, etc.
- Better evacuation plans
- Better communication

# Can, should we ...

- Shape development patterns?
- Limit development?
- Avoid development in some areas?

# Regulation: the “police power”

- Government authority to regulate private activity to promote public *health, safety, welfare*
- Reserved to states by 10<sup>th</sup> Am, US Constitution
- Delegated to cities and counties – broad delegation in California

# An elastic power

... for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions that are constantly coming within the field of their operation. *In a changing world, it is impossible that it should be otherwise.*

*Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926)

# However ...

- Local exercise of police power may not conflict with state or federal law

# The takings clause

“... nor shall private property be *taken* for public use without just compensation”

5th Amendment, U.S. Constitution



# Takings clause is

“... 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. United States* (1960)

# Types of government actions that may be “takings”

- Eminent domain
- “Regulatory taking” – based on regulation that restricts use of property

# Eminent domain

- Government can take private property, even from an unwilling property owner
- Must be for a public purpose
- Must pay just compensation

## Use eminent domain to prohibit certain development in hazardous areas?

- Use with or without voluntary agreement in high risk areas?
- New York state used voluntary purchase program with coastal properties post-Sandy
- What policy and political implications?

# Regulatory taking

The result of a regulation that imposes such a severe restriction on the owner's use of her property that it produces nearly the same result as a direct appropriation

*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002)*

# When is a regulation a taking?

Not every regulation that reduces property value:

”Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”

*Pennsylvania Coal Co. v. Mahon* (1922)

But,

“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)

# 2 tests for regulatory taking

- Denies all economically beneficial use?
- What if loss of something less than 100%?

Then subject to a 3-part fact-based test



# Denial of all economically beneficial use

- *Lucas v. So. Carolina Coastal Council* (1992)
- Beachfront Management Act prohibited all permanent structures in critical coastal area
- State conceded this eliminated all economically beneficial use
- Thus, categorically a regulatory taking

# In context of development restrictions based on fire risk

- Would restrictions deny “all economically beneficial use?”
- Depends on the regulation – might economically beneficial uses remain?

# If loss is less than 100%, consider

- 1) economic impact of the regulation on the claimant;
  - 2) extent to which the regulation has interfered with distinct investment-backed expectations;  
and
  - 3) character of the governmental action
- Penn Central v. New York City* (1978)

# Utility of the *Penn Central* test

- Historically, for land use, not a lot
- “Walking, talking, screaming disaster of a standard”

# *Smyth v Conservation Commission of Falmouth*

- Approval for single family home denied because of wetlands issues
- Massachusetts appeals court found no taking, using *Penn Central* test

# *Smyth v Falmouth* (continued)

- Hearing sought before U.S. Supreme Court
- Plaintiffs wanted Court to reconsider the *Penn Central* test
- But hearing denied

In wildfire context: “Economic impact of the regulation on the claimant”

Depends on uses remaining after regulation

Extent to which regulation has interfered  
with “distinct investment-backed  
expectations”

In wildfire context, to what degree should  
property owners be “on notice” that their  
ability to develop may be restricted?



# Character of the governmental action

- In *Smyth*, Mass appeals court said regulation was
- “... designed to protect coastal and wetlands resources generally”

# Character of the governmental action (continued)

- How should the purpose of the regulation matter?
- For wildfire, preserving
  - lives of residents and firefighters
  - communities
  - air and water quality
  - etc.

# What for the future?

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