

**LEGAL AND POLICY IMPLICATIONS OF INNOVATIVE PLANNING FOR SEA-LEVEL
RISE IN THE GULF OF MEXICO**

FINAL REPORT AND RESEARCH SUMMARY

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In February 2010, the Mississippi-Alabama Sea Grant Legal Program and project partners Florida Sea Grant, Louisiana Sea Grant Law and Policy Program, Harte Research Institute for Gulf of Mexico Studies, and Texas Wesleyan School of Law launched a new legal research and outreach program on the impact of the “regulatory takings” doctrine on the ability of local governments to implement sea level rise adaptation policies. This work was funded by the Gulf of Mexico Sea Grant Programs, the EPA Gulf of Mexico Office, the Northern Gulf Institute, and the U.S. Geological Survey.

The Project Team focused on five primary research areas:

- The impact of notice provisions on the “reasonable investment-backed expectations” of coastal property owners;
- Conditional approvals of development proposals or “proposed exactions”;
- Continued feasibility of “rolling easements” as an adaptation response;
- Shoreline regulation; and
- Liability of local governments for failing to act.

The Project Team made preliminary presentations regarding their research at the *International Conference on Sea-level Rise in the Gulf of Mexico: Impact, Adaptations, and Management* in Corpus Christi, Texas on March 1-3, 2010. The Project Team’s research findings were shared at Florida State University College of Law’s *Journal of Land Use & Environmental Law* Symposium on Sea Level Rise and Property Rights on April 23, 2010. The proceedings from the Symposium were published in the Spring 2011 issue of the *Journal of Land Use & Environmental Law*. Copies of the symposium articles are available for download at http://www.law.fsu.edu/journals/landuse/vol26_2.html.

In addition, the Project Team organized continuing education workshops for attorneys, land use planners, and local government officials. On August 19, 2011, the Mississippi-Alabama Sea Grant Legal Program organized *Recent Developments in Takings Law: A Workshop for Planners*. State and national experts on sea level rise, law, planning, and policy presented at the workshops organized by Florida Sea Grant on January 18, 2012 (Lee County), January 19, 2012 (Pinellas County), and August 9, 2012 (Tallahassee). On January 23, the Harte Research Institute for Gulf of Mexico Studies and the Mississippi-Alabama Sea Grant Legal Program hosted a workshop entitled *Adaptive Planning for Sea-Level Rise: Legal Issues for Local Government*. Finally, on July 18, 2012, the Project Team conducted a 3-hour professional development session, *Takings 101*, for Sea Grant extension agents in the Gulf of Mexico.

The project team’s research and outreach materials also formed the foundation for the StormSmart Legal website (<http://legal.stormsmart.org/>). Local government officials and planners are the primary audience for the StormSmart Legal site, which provides an overview of local government land use authority in coastal areas, the takings doctrine, and allowable restrictions on coastal development.

Please visit the Project Team’s website for more information at
<http://masglp.olemiss.edu/GOM/GOMProject.html>

REASONABLE INVESTMENT-BACKED EXPECTATIONS

Lead Researcher - Thomas Ruppert, Coastal Community Outreach Coordinator, Florida Sea Grant College Program

A key component of a takings claim analysis is consideration of the property owner's "reasonable investment-backed expectations." In 1978, the U.S. Supreme Court in *Penn Central Transportation Co. v. City of New York* set forth a three-pronged inquiry to determine when a taking has occurred as the result of government regulation. Courts look to (1) the character of the government action, (2) the economic impact on the property owner, and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." The Supreme Court, in *Kaiser Aetna v. U.S.*, changed the terminology from "distinct" to "reasonable." Property associated with a reasonable-investment-backed expectation is protected from takings (i.e., compensation is required if government action "takes" property in which an owner has a reasonable investment-backed expectation.)

A property owner's reasonable investment-backed expectations can be influenced by any number of factors, including the current use of the property, purchase price, geographic location, and existing regulations. This research examined on how increasing awareness of sea level rise and its impacts should inform a court's analysis of coastal property owners' reasonable investment-backed expectations when they claim government regulation or action has taken their property. Regardless of whether or not notice requirements impact a takings analysis, they also serve the interests of fairness and efficiency in land markets by ensuring that potential purchasers have fuller understanding of the unique challenges, hazards, and legal regimes affecting coastal property

The research then focused on how to best draft a notice statute or ordinance by analyzing dozens of statutes from around the country. The most detailed and explicit notice statute for coastal property occurs in Texas. Texas requires that the sales contract for certain property near its coasts include a disclosure which states, in part, "if you own a structure located on coastal real property near a Gulf coast beach, it may come to be located on the public beach because of coastal erosion and storm events." A properly designed notice statute should address four key components: (1) what property is affected, (2) timing and process related to the notice, (3) the content and form of the notice, and (4) results of compliance or noncompliance with the notice requirements.

While no one part of the *Penn Central* analysis necessarily trumps the others, ensuring that coastal property owners have full understanding of the nature of the hazards, the dynamic coastal environment, and existing and potential regulatory limitations should demonstrate that owners' expectations which are drastically out of line with these realities and information are not reasonable. Incorporating some level of notice as an element of the "reasonable investment-backed expectations" analysis supports the notion that has motivated protection of property for centuries: Property shall not be taken arbitrarily.

PROPOSED EXACTIONS

Lead Researcher – Timothy M. Mulvaney, Associate Professor of Law, Texas Wesleyan University School of Law

Local governments generally have the discretion to issue conditional approvals of development proposals by requiring the permit applicant to offset the impacts of the project by dedicating a portion of the land to be developed to public use or completing other remedial actions. However, these conditions, also known as exactions, may constitute a taking of property. In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Supreme Court outlined two tests relevant to identifying whether a dedicatory exaction (and possibly other types of exactions, as well) has risen to the level of a compensable taking: (1) the condition imposed must bear an essential nexus to the impacts that would justify denying the permit altogether, and (2) the burdens imposed on the applicant must be roughly proportional to the benefits that the public will receive from the permit's approval.

With the exception of very few lower court opinions, this exactions takings construct is typically applied only when an exaction is actually imposed on a development permit applicant. This article suggests that, when a permit applicant refuses a proposed condition, no taking of property has actually occurred.

Exactions are commonly used to counter the public safety and environmental risks linked to sea level rise, including beach erosion and the inundation of low-lying lands; however, if governmental regulators would face takings claims each time they proposed that a development permit be conditionally approved, their ability to employ exactions as part of their land use controls would diminish considerably. Accordingly, additional guidance from the judiciary is needed to outline whether proposed exactions could result in the same takings liability for government entities as conditions that are actually imposed on the application's approval. As this summary went to print, the U.S. Supreme Court recently granted certiorari in the matter of *Koontz v. St. Johns River Water Management Agency*, whereby the nation's highest court is expected to address this very issue. Oral argument is scheduled for January 15, 2013.

ROLLING EASEMENTS AS A RESPONSE TO SEA LEVEL RISE IN COASTAL TEXAS

Lead Researcher – Richard J. McLaughlin, Endowed Chair, Harte Research Institute for Gulf of Mexico Studies

Rolling easements have been identified as a potential means of addressing the impacts of sea level rise along the Gulf Coast. Through its Open Beach Act, the state of Texas has attempted to mitigate the adverse effects of sea level rise by permitting public easements that move along with the vegetation lines, thereby allowing the public to access and use the beach while simultaneously precluding man-made structures from invading the public's easement across the beach. The state's rolling easement doctrine, once the cornerstone of Texas's open beaches scheme, has suffered a recent setback by the state's Supreme Court.

In *Severance v. Patterson*, the court held that rolling easements exist under state law only if created by the slow process of erosion; conversely, rolling easements created when the vegetation line shifts due to sudden avulsive processes cannot be recognized under Texas law. Where the vegetation line has been altered by avulsion, the state bears the heavy burden of showing that a prescriptive easement has been established on the beach to give the public access up to the new vegetation line.

The *Severance* case illustrates the conflict between coastal property owners seeking to protect their property from rising sea levels and the government attempting protect the public's historic use of the wet and dry sand beach areas. For instance, while homeowners may seek to erect hard structures to protect their own property from the adverse effects of erosion and sea level rise, the government endeavors to restrict the use of such structures to protect the public's right to access the beach, which can be washed away due to the presence of the armoring devices. This tension often triggers regulatory takings claims against the government by the property owners, who claim that the government-imposed restrictions on armoring subjects their property to erosion and other effects of sea level rise.

As a result of *Severance*, waterfront property owners may exclude the public from portions of the state's beaches and erect structures that stand in the way of the public's traditional easement granting them beach access. Until further guidance is provided by the courts to clarify the reach of the *Severance* decision, additional litigation is likely between landowners seeking to redefine whether and how their property is subject to public easements and the government attempting to manage the state of the shoreline. The use of shoreline management practices offering an adaptive strategy of contending with sea level rise may better serve coastal communities than the difficult rule outlined by the *Severance* court.

SHORELINE REGULATION

Lead Researcher – Niki L. Pace, Sr. Research Counsel, Mississippi-Alabama Sea Grant Legal Program

Accelerating sea level rise and intensifying coastal storms have bolstered property owners' efforts to guard their waterfront properties against the harmful effects of erosion. One such effort commonly used by waterfront homeowners and developers to combat the effects of sea level rise involves erecting hard structures and armoring devices along the coastline. As these property owners petition state and local officials for permission to install these structures, local and state governments must balance the need to protect private property with the importance of guarding coastal ecosystems and access to public beaches, which can be lost as the armoring structures cause the wet beach to wash away. The adverse impacts of armoring on coastal areas have contributed to the need for a new approach for shoreline regulation highlighting the use of lower-energy shores, which slow the impact of erosion through the use of, for instance, native vegetation and natural materials.

State and local governments typically employ various forms of shoreline regulation to combat the risks associated with sea level rise; however, the traditional shoreline protections – including armoring – does not typically consider the benefits provided by wetlands and estuarine habitats that could be lost as the result of excessive placement of shoreline structures. For instance, wetlands offer significant protection from storm surges and provide crucial habitats for various species of birds and fish that are central to the Gulf Coast's economy; consequently, local governments often attempt to shield wetland areas from destruction. As sea level rise accelerates, government efforts to protect the shoreline by limiting waterfront property owners' right to armor their property subject state and local officials to regulatory takings challenges. Because of the potential for takings lawsuits, state and local governments have become less willing to enact legislation limiting the use of armoring along the shoreline. Consequently, an ideal solution for shoreline preservation combines the restriction of shoreline armoring with promoting living shorelines.

THE FORESEEABILITY OF SEA LEVEL RISE

Lead Researcher – James Wilkins, Director, Louisiana Sea Grant Law and Policy Program

The present rate of sea level rise has been calculated at three millimeters per year, a rate at which devastating damage to coastal properties is likely to occur, particularly in Gulf Coast states where the average elevation does not exceed two and a half feet above sea level. In many coastal jurisdictions, local governments are hesitant to implement land use controls to reduce the risks to coastal properties from sea level rise, in part due to the government's concern for potential takings claims stemming from the interference with private property. Many local governments are not in a financial position to compensate property owners and, consequently, rarely attempt to interfere with the use of private property by restricting commercial development in coastal areas, implementing setbacks, or denying waterfront residential construction permits.

However, local governments may also be at risk for liability due to their hesitation to enact coastal land use controls or issue warnings concerning the risks associated with developing in hazardous areas. Where municipalities are authorized to implement community planning and zoning laws and understand the risks of developing along the coastline, the government's decision to allow development that ultimately results in injury or property damage to that development due to natural hazards could result in the government's liability for these damages. Whether a local government will actually be held liable under such circumstances depend on various factors, including the government's knowledge regarding the risks associated with the development and the defenses available to such allegations, including sovereign immunity and discretionary function immunity.

The ultimate inquiry that will determine whether the government will be liable for its failure to implement adequate coastal land use measures will ask if such inaction was reasonable under the circumstances. Only in one instance in the U.S. have plaintiffs been successful with such a claim; however, with sea level rise posing an accelerating threat to coastal communities and the flood of information becoming available to decision makers, local governments in the future may face an increased risk of liability for failing to properly regulate coastal development.