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Responding to Climate Change: Is the Takings Clause an Obstacle?

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Responding to Climate Change: Is the Takings Clause an Obstacle?

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Welcome to Climate Change



What I'm Talking About

Adaptation ✓



Mitigation ✗



Adaptation Strategies

■ Structural/Physical

- Elevation
- Armoring
- Restoration/Buffering



Adaptation Strategies

- Legal/Legislative

- Public Trust/Easements -- Mandated Retreat
- Moratoria -- Eliminate “Risk” Subsidies



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

- *Koontz v. St. Johns River Water Management District* - 2013
- ***Arkansas Game & Fish Commission v. U.S.* - 2013**
- ***Stop the Beach Renourishment, Inc. v. Florida Dept. of Env. Protection* - 2010**
- *Palazollo v. Rhode Island* - 2001
- *Dolan v. City of Tigard* - 1994
- ***Lucas v. South Carolina Coastal Council* - 1992**
- *Nollan v. California Coastal Commission* - 1987
- *First English Evangelical Lutheran Church v. County of Los Angeles* - 1987
- *Loretto v. Teleprompter Manhattan CATV Corp.* – 1982
- *Penn Central Transportation Co. v. City of New York* - 1978

Lucas v. South Carolina Coastal Council – 1992

- Mandated Retreat Strategy
 - new state law authorized administrative definition of mean high water mark



Lucas v. South Carolina Coastal Council – 1992

- Regulation that denies all economically valuable use of property cannot be “**newly-legislated**” unless ...
- same result would “inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance **already** place upon land ownership.”

Stop the Beach Renourishment, Inc. v. Florida Dept. of Env. Protection - 2010

- Beach-front owners challenge beach restoration because “new” dry sand becomes public
- Avulsion vs. erosion/accretion



Stop the Beach Renourishment, Inc. v. Florida Dept. of Env. Protection - 2010

- Owners lose their challenge 8-0
 - avulsion vs. erosion/accretion ... BUT
- 4 Justices show sympathy for concept of a “**judicial taking**”
- *Lucas*: “ ... **background principles** of the State’s law of property and nuisance **already** place upon land ownership.”

Arkansas Game & Fish Commission v. U.S. - 2013

- Army Corps of Engineers released water from dam in manner that **benefitted** farmers but **harmed** woodlands owned by Commission
- 8-0 for Commission on the facts in this case.
- What's important?
 - duration and severity of flooding
 - was flooding intentional or foreseeable?
 - character of land at issue and owner's "reasonable investment-backed expectations"

What's Happening in the Courts?

- Dune restoration
- Retreat
- Flooding due to inaction

Dune Restoration

- *Borough of Harvey Cedars v. Karan* (N.J. Sup. Ct. 2013)

- Adjacent property owners entitled to “just compensation” for dune construction program that takes part of beachfront property and obstructs view . . .

BUT

- “Just compensation” includes **both** loss and benefits to the property owner (offset)
- Court rejected “special benefits” vs. “general benefits” distinction

Retreat

- *Jordan v. St. Johns County* (Fla. App.Ct. 2011, review denied)
 - County has obligation to maintain public road unless abandoned
 - County has discretion on level of maintenance, if access is provided
 - County failure to maintain road access can give rise to takings claim
 - Ditto for abandonment

Flooding Due to Inaction

Farmers Insurance v. Chicago

