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

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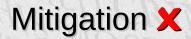


Welcome to Climate Change



What I'm Talking About

Adaptation 🗸











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 "newlylegislated" 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





