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Takings Liability and Coastal Management in Massachusetts

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Some scholars fear that governments "are failing to take aggressive steps to address the risks of sea-level rise" out of fear of prompting "takings" litigation.[1] Takings liability is among the most commonly asserted claims against municipalities, particularly where land use decisions limit the development of valuable land in coastal areas. This document explains what takings are and how takings lawsuits may apply to coastal management decisions. After introducing the fundamental concepts of takings law, it specifically addresses potential takings claims associated with coastal permitting decisions and the construction and management of coastal infrastructure. This fact sheet is provided solely for educational purposes and does not provide legal advice.

1 What is a taking?

The takings clause requires the government to provide "just compensation" to any person whose property is "taken" for a public use.[2] Both the U.S. and the Massachusetts constitutions include a takings clause. While plaintiffs can sue under either constitution, there is "no substantial difference in [their] interpretation."[3] Thus, takings cases apply in Massachusetts even if they involve actions in other states.

For a taking to occur, the plaintiff must satisfy two prerequisites. First, the plaintiff must have lost a *property interest* recognized under state law.[4] For example, Massachusetts law does not recognize a property right to a view, so loss of view cannot be a taking in that state.[5] Second, the loss must result from *governmental action for the benefit of the public*.[6] Thus, damage caused solely by natural forces or by a private party do not result in takings,[7] and *in*action, such as failure to maintain infrastructure, is not a taking (though it may be a tort).[8] For example, failure to inform the public about flood risk is unlikely to be a taking. In addition, not every affirmative government action that interferes in property is a taking—the action must be for public benefit.[9] If the prerequisites are met in a

particular case, the court will engage in a fact-specific inquiry to determine whether a taking has occurred.[10]

If a court determines that a taking has occurred, the plaintiff will receive compensation. The amount of compensation is the fair market value of the property interest that was taken.[11] If part of a property is taken, the plaintiff will receive the value only of that part; for example, the value of an easement is calculated as the difference in the value of the property before and after the easement was taken.[12] The compensation may also be reduced or eliminated where the government action directly benefits the property owner.[13]

2 Types of takings

Courts consider the *means, duration, and impact* of government action to determine what law to apply to the facts of each case.[14]

- The means of a taking can include a *physical taking* or a *regulatory taking*.[15]
- The duration of a taking may be *temporary* or *permanent*.[16]
- The impact of a taking may be *categorical* (also known as *per se* or *practical confiscation*) or *partial*.[17]

In the coastal context, takings cases can arise from any combination of these categories. Physical takings may result from a variety of government actions, such as infrastructure development, shoreline protection structures (by erosion of neighboring land), or flood management decisions.[18] Regulatory takings often arise from land use restrictions, such as setbacks or denial of building permits, which can categorically or partially restrict the use of private land. Government action may cause temporary takings, such as flooding, or permanently occupy land or restrict its use. By understanding how courts decide takings cases, coastal municipalities can identify when their actions may result in a taking and help them decide whether and how to proceed with a planned action.

2.1 Physical Takings

Physical takings involve occupation of private property and may result from intentional occupation of private land or from government actions that foreseeably result in occupation of private property. Even a temporary physical invasion, such as by floodwater after a storm, may constitute a taking.[19] And any physical occupation, no matter how small, is categorically considered a taking.[20]

Eminent domain and condemnation are well-recognized forms of physical takings that occupy private property and can arise in coastal protection projects. For example, government construction of a dune system on private property was a taking, although damages were minimal because of the benefits provided to the landowners.[21] Coastal infrastructure projects that require the occupation of any private land in the form of an easement or complete property transfer will require compensation as a result of either a voluntary agreement or takings litigation.

Government actions that indirectly occupy private lands are also regarded as physical takings. For example, a regulation requiring landlords to allow installation of a cable box on their property was a taking, despite the cable box occupying only a small area.[22] For a government action to cause a physical taking, the harm must be a predictable result of the action and have a sufficiently substantial impact on the plaintiffs.[23] These conditions can be met for coastal projects and infrastructure management decisions—especially those that cause flooding or erosion, as discussed in more detail below.

2.2 Regulatory Takings

Massachusetts and its municipalities can implement regulations to promote the public health, safety, and welfare. Zoning and land use regulations limit how property owners can use their land and not infrequently give rise to takings claims. Most of these regulatory takings claims are reviewed as partial takings.

Regulations rarely result in categorical takings because this category of claims requires the plaintiff to have suffered a complete deprivation of all economically viable use of their property.[24] In *Lucas v. South Carolina Coastal Council*, the parties stipulated that a regulation requiring land on a barrier island "to be left substantially in its natural state" rendered the property valueless, and the Supreme Court found that this deprivation required the government to compensate its owner.[25] However, a regulation leaving *any* residual value—even 5% of the property's pre-regulation value—is not a categorical taking.[26] Thus, a 32-month moratorium on development around Lake Tahoe was not a categorical taking because the property subject to the moratorium retained residual value.[27] Similarly, in *James v. Zoning Board of Appeals of Pembroke*, the Massachusetts Court of Appeals found no categorical taking of a subdivided parcel where town zoning regulations prohibited development, because the property could be used for "woodland, wetland, or recreational use, or as additional acreage for residential abutters."[28] Thus, a regulatory taking claim will likely be categorized as a partial taking unless the plaintiff can prove that a regulation has left a property valueless.

Most regulatory takings cases are reviewed as partial takings because they diminish, but do not extinguish, property value. These cases are founded on the recognition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[29] There is "no set formula" for deciding these cases;[30] rather, cases are decided based on a highly fact-specific inquiry. The Supreme Court has identified three factors that courts must consider when evaluating regulatory partial takings cases:

- "the character of the governmental action;"
- "[t]he economic impact" on the property owner; and
- "the extent to which the regulation has interfered with distinct investment-backed expectations."[31]

Massachusetts courts have upheld a range pf coastal land use regulations against partial takings challenges.[32] For example, in *Gove v. Zoning Board of Appeals of Chatham*, the plaintiff owned property

in a coastal conservancy overlay district where development was limited to specific, non-residential uses.[33] The owner sued the town for a taking after a prospective buyer was denied a building permit.[34] The Massachusetts Supreme Judicial Court analyzed the takings claim under the three-factor test.[35] It found that the "character" of the conservation district ordinance was the "the type of limited protection against harmful private land use that routinely has withstood allegations of regulatory takings"[36] – a conclusion supported by the factual record, which showed that the conservancy district was intended for "the protection of rescue workers and residents, the effectiveness of the town's resources to respond to natural disasters, and the preservation of neighboring property."[37] The plaintiff had also failed to prove that the regulation caused a decline in the value of the property or interfered with her investment-backed expectations because she failed to provide a property assessment and because natural hazards—notably, a breach in the barrier island leading to increased erosion—had already reduced the property value before the regulation was adopted.[38] As a result, the plaintiff failed to show that "she ever had any *reasonable* expectation of selling that particular lot for residential development, or that she has suffered any substantial loss as a result of the regulations."[39] As a result, the court found in Chatham's favor.

The *Gove* case illustrates several important considerations for municipal land use officials. First, while zoning regulations are often challenged, their character is not problematic in most cases. Rather, plaintiffs must prove that they have suffered a substantial economic deprivation causally tied to the regulation they are challenging. As the court noted in *Gove*, the value of coastal properties that are "exposed to the ravages of nature" can decline for a number of reasons, including not only regulations but also environmental conditions and speculation.[40] The facts in the record in each particular case are likely to be determinative of the outcome of partial regulatory takings litigation. Municipalities therefore can prepare for takings challenges by documenting the reasons supporting their land use ordinances.

3 Takings in the Coastal Context

Coastal hazards, such as sea level rise and storm surge, create special risks for coastal properties. Municipal responses to these risks can and do result in takings litigation. This section reviews the potential for takings liability based on permitting decisions and infrastructure construction and management.

3.1 Land Use Permitting

Massachusetts municipalities may be exposed to takings litigation in the coastal context for several reasons. Lawsuits may result from denial of permit applications, (allegedly) improvident issuance of permits, and issuance of permits for activities that impact neighboring properties. This section briefly reviews each category of claim.

First, applicants frequently allege takings for denial of permits, including building permit denial due to coastal hazards. As in the *Gove* case, Massachusetts courts have typically declined to find takings for building permit denial because the need to protect the public against coastal hazards is sufficient to justify reasonable restrictions on private development rights.[41] However, the facts of specific

cases, and particularly the economic impacts and investment-backed expectations of plaintiffs, will determine the outcome of particular lawsuits.

Second, permit-holders may seek to recover if a permit improvidently authorizes activity without accounting for coastal hazards, such as for structures destroyed in a hurricane. No cases were identified in the research for this fact sheet claiming that issuance of a permit was a taking of property because the government should have known that the permitted activity was unsafe or unsustainable.[42] Instead, most cases arising from issued permits address the legality of permit conditions. These cases require that permit conditions requiring "exactions" of easements or funding, such as public easements for access to the shore or in-lieu fees for wetlands mitigation, are takings unless they "have an essential nexus and rough proportionality to the impacts of a proposed development."[43] Thus, while permit conditions may result in takings litigation, it is unlikely that landowners will successfully sue municipalities for failing to prevent them from undertaking hazardous activities.

Finally, landowners may sue municipalities for issuing permits to their neighbors for activities which damage their properties. In contrast to a few decisions in other jurisdictions,[44] Massachusetts courts have declined to find takings liability when the government permits an action that subsequently harms a neighbor's property. For example, in *Woods v. Massachusetts Department of Environmental Protection*, the Woods' claimed that the Department committed a taking by authorizing a neighbor to construct revetments that caused erosion on the Woods' property and failing to enforce conditions in those permits requiring beach nourishment.[45] The court found "no compelling reason to extend Massachusetts takings law to encompass a situation" where the government had not built or required private owners to build shoreline protection structures.[46] However, in rare cases, coastal protection by non-governmental entities has been a taking. In *Banks v. U.S.*, the government was liable for erosion caused by privately-constructed jetties because those jetties were themselves constructed to address erosion caused by the government's own jetties.[47] Thus, while the government usually is not liable for damages caused by private actors, this rules may not apply when the government motivates the private action.

3.2 Municipal Infrastructure

Coastal municipalities often have a substantial amount of infrastructure along the coast, such as sewage treatment systems, roadways, jetties or groins, and dams or water retention facilities. Coastal infrastructure construction and management can lead to takings liability when it causes or contributes to flooding, coastal erosion, or loss of access to private property.[48]

In recent years, extreme storm events have resulted in numerous takings lawsuits stemming from flood management decisions. The Supreme Court held in 2012 that flooding, including temporary flooding, is a physical occupation of property and can be a taking.[49] Thus, a change in management of a federal dam that flooded and destroyed timber in bottomland hardwood forests was a taking.[50] Similarly, the federal government was liable for flooding "upstream" plaintiffs who owned property above a federal dam following Hurricane Harvey because the dam owner, the U.S. Army Corps of

Engineers, knew that flooding of those properties was likely when it constructed the dams.[51] The Court therefore found that the Corps had taken a "flowage easement" on the affected properties. When government flood management foreseeably will cause flooding of private property, the courts have not hesitated to find that a taking has occurred.

While the courts have clarified that government-caused flooding is a taking, these holdings are limited by issues of causation and relative harm. The Corps prevailed in its defense against "downstream" plaintiffs flooded during Hurricane Harvey because Texas law did not require the dam owner to guarantee perfect flood control: the downstream properties would have been flooded whether or not the dam was present.[52] Similarly, the government did not take property when it raised lake levels behind a dam to prevent a levee breach.[53] Applying the "relative benefits doctrine," the court determined that a breach of the levee would have caused worse damage to the plaintiffs' properties than they suffered in reality, so they had no claim for compensation.[54] Municipalities should be aware that temporary, storm-induced flooding caused by municipal-owned infrastructure can be a taking, but that causation, foreseeability, and other issues will affect liability.

Several notable decisions have found governments liable for takings associated with groins, jetties, and other coastal and navigation infrastructure. This infrastructure can interrupt sediment transport along the coast, resulting in increased erosion of down-drift properties. While it can be difficult for property owners to prove that government infrastructure caused the erosion,[55] especially given confounding factors such as storms and sea level rise, courts have consistently found the government liable when plaintiffs prove causation. For example, in *Banks v. U.S.*, property owners recovered for erosion caused by a Corps-owned jetty protecting a navigable channel for harbor access.[56] Thus, government-owned shoreline protection or harbor management structures that increase erosion on nearby properties are likely to require compensation.

Coastal roadways are a third potential source of takings liability for municipalities. Coastal roadways in Massachusetts are flooding at increasing rates and may be damaged due to sea level rise and erosion, leading municipalities to consider discontinuance of affected roadways.[57] Courts in several states have found that loss of access to the public road system is a compensable property right that can support a takings claim.[58] Takings claims arising from discontinuance in Massachusetts would be difficult, as state courts have limited damages from discontinuance to instances where a parcel is rendered entirely landlocked and no longer has any access to a public road.[59] Thus, while coastal highway management decisions could result in a takings claim under limited circumstances, these cases are limited in scope.

4 Conclusion

Massachusetts municipalities face several forms of potential takings claims when managing coastal property. Because takings law is rooted in the state and federal constitutions, state and local legislation cannot limit liability risk. Therefore, governments should consider potential claims when making coastal management decisions. If a government is willing to pay fair compensation for lost property rights, then it has broad authority to regulate or physically appropriate land for a public

purpose. However, if a government wishes to regulate private property without incurring the costs of takings claims, then it will need to (1) avoid physical appropriation of property; (2) avoid eliminating the entire economic use of the property through regulation; and (3) ensure that the benefits of the regulation are well-documented and outweigh harms to individual private property owners. Because regulatory takings cases are decided on the basis of a fact-specific analysis, it may be difficult for a government to predict whether a given regulation, permit decision, or infrastructure decision will result in a taking. Governments can prepare for possible claims by considering the effects of their decisions on private parties and documenting the reasons and evidence supporting their decisions.

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[1] Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 348 (2014).

[2] *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation"); MASS. CONST. pt. I, art. X ("[N]o part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people…. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.").

[3] Woods v. Mass. Dep't of Envtl. Prot., No. BACV200700099A, 2011 WL 7788022, at *4 (Mass. Super. Ct. Jan. 7, 2011).

[4] Members of Peanut Quota Holders Ass'n v. U.S., 421 F.3d 1323, 1330 (Fed. Cir. 2005).

[5] Fazio v. Trustees of River House Condominium Trust, No. 10 MISC. 437493 AHS, 2011 WL 3672047, at *6 (Mass. Land Ct. 2011).

[6] Members of Peanut Quota Holders Ass'n v. U.S., 421 F.3d 1323, 1330 (Fed. Cir. 2005).

[7] St. Bernard Parish Gov't v. U.S., 887 F.3d 1354, 1359-6060 (Fed. Cir. 2018) ("Proof of [] a [takings] claim requires the plaintiffs to establish that government action caused the injury to their properties—that the invasion was the 'direct, natural, or probable result of an authorized activity.'") (quoting Ridge Line, Inc. v. U.S., 346 F.3d 1346, 1355 (Fed. Cir. 2003)).

[8] St. Bernard Parish Gov't v. U.S., 887 F.3d 1354, 1362 (Fed. Cir. 2018) ("Takings liability must be premised on affirmative government acts. The failure of the government to properly maintain the MRGO channel or to modify the channel cannot be the basis of takings liability. Plaintiffs' sole remedy for these inactions, if any, lies in tort.").

[9] Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) ("[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking.").

[10] *Id.*

[11] Horne v. U.S. Dep't Agric., 576 U.S. 350, 368-69 (2015) ("[O]ur cases have set forth a clear and administrable rule for just compensation: 'The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of the taking.'"'), quoting United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984), Olson v. U.S., 292 U.S. 246, 255 (1934).

[12] Rasmuson v. U.S., 807 F.3d 1343, 1345 (Fed. Cir. 2015).

[13] Alford v. U.S., -- F.3d --, No. 2019-1678, 2020 WL 3393533 (Fed. Cir. 2020) (denying claim based on "relative benefit" doctrine because flooding of property prevented worse damage that would have resulted from levee breach); Borough of Harvey Cedars v. Karan, 70 A.3d 524 (N.J. 2013) (finding damages of $1 where plaintiffs benefited from storm protection as a result of placement of dune on their property).

[14] Caquelin v. U.S., 140 Fed. Cl. 564, 573 (Fed. Cl. 2018), aff'd 959 F.3d 1360.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Ark. Game & Fish Comm'n v. U.S., 568 U.S. 23 (2012) (flooding is a physical invasion of property); Woods v. Mass. Dep't Envtl. Prot., No. BACV200700099A, 2011 WL 7788022, at *5-6 (Mass. Super. Ct. Jan. 7, 2011) (reviewing takings cases related to shoreline protection).

[19] Ark. Game & Fish Comm'n v. U.S., 568 U.S. 23, 27 (2012) (holding that "recurrent [invasions], even if of finite duration, are not categorically exempt from Takings Clause liability").
[20] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[21] *See* Lorio v. Sea Isle City, 212 A.2d 802, 804 (N.J. Super. Ct. 1965); JON KUSLER, GOVERNMENT LIABILITY AND CLIMATE CHANGE: SELECTED ISSUES FOR WETLAND AND FLOODPLAIN MANAGERS 15 (2016), *available at* https://www.aswm.org/pdf_lib/government_liability_and_climate_cahnge_kusler_0416.pdf.
[22] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).
[23] Banks v. U.S., 721 Fed. Appx. 928 (Fed. Cir. 2017).
[24] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)) (holding that a regulation is a categorical taking if it "leave[s] the owner of land without economically beneficial or productive options for [the land's] use.").
[25] 505 U.S. at 1015, 1018.
[26] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) (citing Lucas, 505 U.S. at 1019 n.8) ("The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%."); Palazzolo v. Rhode Island, 533 U.S. 606, 630-31 (2001) (holding reduction in value from $3,150,000 to $200,000 was insufficient to show a categorical taking).
[27] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331-32 (2002) (finding no per se taking when defendant-agency instituted a thirty-two month development moratorium around an ecologically sensitive lake while the agency developed a comprehensive land use plan).
[28] No. 02-P-714, 2004 WL 384801, at *4 (Mass. App. Ct. Mar. 2, 2004).
[29] Penn. Coal v. Mahon, 260 U.S. 393, 414-15 (1922).
[30] Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590, 594 (1962).
[31] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
[32] *See*, *e.g.*, Giovanella v. Conservation Comm'n of Ashland, 857 N.E.2d 451, 455 (Mass. 2006) (upholding denial of a building permit based on regulation prohibiting development in a wetland buffer zone); Leonard v. Town of Brimfield, 666 N.E.2d 1300, 1302 (Mass. 1996) (finding no taking where properties were not buildable based on regulation prohibiting construction in the floodplain because the plaintiff was still able to build her home on other portions of her property, other permissible uses remained for portions within the floodplain, and the plaintiff had notice of restrictions when she purchased the property).
[33] 831 N.E.2d 865, 869 (Mass. 2005).
[34] *Id.* at 872.
[35] *Id.* at 873.
[36] Id. at 875.
[37] Id. at 871.
[38] *Id.* at 873-74. The court also observed that the character of the government action "is the type of limited protection against harmful private land use that routinely has withstood allegations of regulatory takings." *Id.* at 875.
[39] *Id.* at 875 (emphasis in original).
[40] *Id.* at 874.
[41] *See, e.g., Gove*, 831 N.E.2d at 875; James v. Zoning Bd. of Appeals of Pembroke, No. 02-P-714, 2004 WL 384801, at *6 (Mass. App. Ct. Mar. 2, 2004); Blair v. Dep't Conservation & Rec., 932 A.2d 267 (Mass. 2010) (holding denial of variance for construction on property abutting public drinking water system not a taking); Smyth v. Conservation Comm'n of Falmouth, 119 N.E.3d 1188 (Mass. App. Ct. 2019) (holding denial of variance to build in wetland buffer not a taking).
[42] Some lawsuits alleging similar harm have been decided under tort law. *See, e.g.,* Quality Court Condominium Ass'n v. Quality Hill Dev. Corp., 641 A.2d 746 (R.I. 1994) (holding city could be liable for negligent building code enforcement).
[43] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) ("the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (rebuilding permit condition requiring lateral beach

access was a taking); Dolan v. City of Tigard, 512 U.S. 374 (1994) (requirement to set aside part of property in flood plain for storm drainage and bicycle and foot path was a taking).

[44] *See*, *e.g.*, Sheffet v. County of Los Angeles, 3 Cal.App.3d 720, 735, 736 (Cal. Ct. App. 1970) (finding a taking when county approved development of upland area that resulted in increased flooding of plaintiff's property); Kite v. City of Westworth Village, 853 S.W.2d 200, 202 (Tex. Ct. App. 1993) (reversing a directed verdict for city and remanding for trial on plaintiffs' claim that permitting of a subdivision had caused increased flooding on plaintiffs' property).

[45] *See* Woods v. Mass. Dep't of Envtl. Prot., No. BACV200700099A, 2011 WL 7788022, at *1 (Mass. Super. Ct. Jan. 7, 2011).

[46] *Id.* at *3.

[47]

[48] Ingram v. City of Redondo Beach, 45 Cal.App.3d 628, 632 (Cal. Ct. App. 1975) (remanding an inverse condemnation claim when a city-constructed retaining wall collapsed, causing plaintiffs' properties to flood, and requiring for the standard on remand that a taking will have occurred if the property damage was "proximately caused by the improvement as deliberately designed and constructed"); KUSLER, *supra* note 21, at 14.

[49] Ark. Game & Fish Comm'n v. U.S., 568 U.S. 23, 27 (2012).

[50] *Id.*

[51] In re Upstream Addicks And Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219 (Fed. Cl. 2020).

[52] In re Downstream Addicks and Barker (Texas) Flood-Control Reservoirs, 147 Fed. Cl. 566 (Fed. Cl. 2020).

[53] Alford v. U.S., -- F.3d --, No. 2019-1678, 2020 WL 3393533 (Fed. Cir. 2020).

[54] *Id.* at *3 ("The government's uncontested evidence showed that, in the event of a breach of the levee, the water level of Eagle Lake would have far exceeded that caused by the Corps' intentional flooding. Each of the plaintiffs suffered considerably less damage due to the government's planned flooding of Eagle Lake than if the levee had breached.").

[55] Applegate v. U.S., 35 Fed. Cl. 406, 414 (Fed. Cl. 1996) (noting settled law that erosion is a taking, but noting issues of fact precluded judgment in case alleging erosion caused by federal harbor project).

[56] Banks v. U.S., 721 Fed. Appx. 928 (Fed. Cir. 2017).

[57] *See* MARINE AFFAIRS INSTITUTE, RESPONDING TO NUISANCE FLOODING OF COASTAL HIGHWAYS: OPTIONS FOR MASSACHUSETTS MUNICIPALITIES (2020).

[58] *See, e.g.,* Jordan v. St. John's Cy., 63 So.3d 835, 830 (Fla. Dist. Ct. App. 2011) (failure to maintain coastal highway that substantially impairs access to private property could be a taking under Florida law); Aust v. Marcello, 310 A.2d 758, 760 (R.I. 1973) (impairment of the "right of access to land abutting upon a highway" is a "confiscatory taking" when it is "so substantial as to leave the property owner without reasonable access to his property").

[59] Nylander v. Potter, 667 N.E.2d 244, 247 n.10 (Mass. 1996) (denying claim for lost access to a discontinued road when plaintiff retained access to public road on the far side of her property and noting that a "claim for monetary damages is only available if a parcel is rendered landlocked by the discontinuance of a public way").