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Takings and Coastal Management (Legal Fact Sheet: CTSG-17-02)

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The "takings" clauses of the federal[1] and state[2] constitutions provide an independent basis for municipal liability in Connecticut. These clauses require compensation to property owners when governmental actions result in a "taking" of property either through physical occupation of property (e.g., through the exercise of eminent domain powers) or as a result of regulations that unconstitutionally limit the use of property. As takings claims arise from the constitution, governments are not protected from takings liability by sovereign or statutory immunity.[3]

This fact sheet reviews the standards under which courts will decide regulatory takings cases under both the federal and Connecticut constitutions, as well as whether governments can be held liable for inaction as well as action.

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Regulatory Takings

Federal, state, and local governments create regulations to promote the public health, safety, and welfare. When these regulations place sufficient limits on land use to rise to the level of a "regulatory taking,"[4] property owners may file "inverse condemnation" claims against the government to recover compensation for their losses.[5] Regulatory takings may result from actions creating a *per se*, or total, taking of property value or from a lesser diminution in the value or use of property.

Takings cases are fact-specific and may require courts to consider precedents from both federal and state law. While takings cases based on the federal constitution must be consistent with decisions by the U.S. Supreme Court, state courts alone determine the meaning of state constitutions. "Historically, Connecticut courts have been more protective of private property rights [than federal courts]; however, these old state law cases pre-date and may be superseded by more recent U.S. Supreme Court cases that have clarified federal takings analysis."[6] Therefore, until Connecticut courts clarifies state law by issuing additional decisions, distinctions between federal and Connecticut takings law will be necessarily uncertain in some respects.

Under *Lucas v. South Carolina Coastal Council,* any regulation that deprives a property owner of complete beneficial or economic use of her property is a *per se* taking under the federal constitution.[7] Prior to *Lucas*, Connecticut courts adopted a similar "practical confiscation" test that "sits at the intersection of . . . land use regulation and constitutional takings jurisprudence."[8] Under this test, a regulation may constitute a taking if it deprives a property owner of a complete loss[9] of any "economically viable use of his land other than exploiting its natural state"[10] that is not remedied by the grant of a variance. The courts have determined that a practical confiscation has occurred when a regulation removed less than 100% of the value of property and has "struck down regulations even where they were designed to prevent

significant injuries to the community."[11] However, such cases are the exception and are likely to be limited to instances where no permitted use of a property is allowed and no variance or other relief is granted.[12]

Diminution of the value of property that does not rise to a *per se* taking or practical confiscation may also require compensation. Courts determine whether a taking has occurred in such cases under the federal constitution by applying a three-factor balancing test laid out in *Penn Central Transportation Co. v. City of New York*.[13] Connecticut courts apply an analogous three-factor balancing test under the state constitution to determine whether an action has created a "significant restriction" on land use that must be compensated. The three factors considered to determine whether a regulatory taking has occurred in Connecticut are: (1) the degree of diminution of the value of the land; (2) the nature and degree of public harm to be prevented; and (3) the alternatives available to the property owner.[14]

Recent federal takings decisions have shed new light on takings related to flood control infrastructure. In *Arkansas Game & Fish Commission v. U.S.*, the Supreme Court held that the U.S. Army Corps of Engineers could be held liable under takings for harm to state forest areas caused by deviations from the Corps' normal water diversion operations spelled out in its Water Control Manual.[15] In *St. Bernard Parish v. U.S.*,[16] the Court of Federal Claims similarly determined that the Corps could be liable for failure to properly maintain the Mississippi River Gulf Outlet, resulting in increased storm surge and flooding in New Orleans during Hurricanes, including Katrina and Rita. These holdings are relevant to creation of shoreline protection infrastructure and suggest that creation and maintenance of such infrastructure may both result in takings liability for responsible governments if they enhance coastal flooding in other areas or fail due to improper maintenance.

Many cases raise takings claims along with statutory claims challenging the case-by-case municipal implementation of land use laws. These cases may be resolved on statutory rather than constitutional grounds, such that municipal decisions that could theoretically be takings are instead overturned as invalid exercises of municipal authority. While this fact sheet focuses on takings law, such statutory issues should also be considered.

Taking Through Inaction

Regulatory takings generally arise from action by the government, such as a decision to issue or deny a permit.[17] Two Connecticut courts have considered claims for compensation due to government inaction. In *Citino v. Redevelopment Agency of the City of Hartford*, the city was held liable to a neighboring landowner who materially and detrimentally relied on a promised redevelopment project that did not occur.[18] This holding was subsequently reviewed in *Dibble Edge Partners v. Town of Wallingford*, where the court found that a municipality will be liable for condemnation by inaction where "the inaction claimed is based upon a provision that is mandatory and so long as it has been sufficiently relied upon by the inversely condemned property owner."[19]

The impact of these two cases may be limited in the future, as the Connecticut Supreme Court has yet to consider whether and when a municipality may be liable for failure to act. However, these findings are consistent with one recent holdings in Maryland, where courts have found takings "where a plaintiff alleges a taking caused by a governmental entity's . . . failure to act, in the face of an affirmative duty to act."[20] Other states have adopted different standards, however.[21]

Based on existing law, local governments in Connecticut will not be liable for inaction related to shoreline erosion or protection unless they are under an affirmative legal duty to protect the shoreline. Conversely, once a municipality builds shoreline protection infrastructure, it may be subject to takings liability if the infrastructure is ineffective or is not adequately maintained.[22] For example, a town that erects a seawall system to protect a neighborhood from flooding and erosion could be liable in the future to shoreline property owners if the system is overcome or breached. On the other hand, the town does not appear to be liable if it does not erect such a system in the first place, as it is not under any legal obligation to do so.

Changing Takings Law

Takings law cannot be changed through legislation alone because it is grounded in the federal and state constitutions.[23] As a result, local and state governments must either plan for payment of compensation when enacting laws and regulations that will result in takings or tailor their efforts to avoid causing a taking. Governments can avoid causing regulatory takings by ensuring that regulations do not rise to the level of a *per se* taking and, secondarily, by considering the factors courts will use to determine if a regulation caused a significant restriction on land use. In addition, governments may wish to avoid passive takings liability by considering the full life-cycle costs of building or accepting responsibility for maintaining coastal infrastructure, such as roads and seawalls.

Questions Answered

In November 2015, Connecticut Sea Grant and CLEAR held a workshop on the legal aspects of climate adaptation. Participants were asked to write down questions or issues they had about the topic. Over fifty questions were asked and a complete list can be found on the Adapt CT website at http://climate.uconn.edu/caa/. **This Fact Sheet answers the following questions from the workshop:**

Government Action (zoning/plans/regulations)

17. How does local/State government start to enact meaningful statutes and regulations that address climate change, knowing that this will affect property rights? How do we start changing the laws involved with "takings"?

Property Rights/Permitting

11. Can inaction by a government entity be a taking? i.e. If continual erosion is known and expected and makes private property undevelopable must the government take action (build a F&ECS) to mitigate the erosion and keep the property(ies) whole?

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U.S. Const. Amend. 5 ("No person shall be…deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

[2] Conn. Const. Art. I., Sec. 11 ("The property of no person shall be taken for public use, without just compensation therefor.").

[3] Laurel, Inc. v. State of Conn., 362 A.2d 1383, 1387 (Conn. 1975).

[4] *See* Penn. Coal Co. v. Mahon, 260 US 393, 415 (1922).

[5] Cumberland Farms, Inc. v. Groton, 808 A.2d 1107, 1125 (Conn. 2002), *quoting* U.S. v. Clarke, 445 U.S. 253, 257 (1980) ("Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."); Cumberland Farms, Inc., 808 A.2d at 1126 n.30 (reviewing evolution of Connecticut regulatory takings and compensation).

[6] Jessica Grannis et al., *Coastal Management in the Face of Rising Seas: Legal Strategies for Connecticut,* 5 SEA GRANT LAW & POL'Y J. 59, 70 (2012).

[7] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1024, 1027 (1992).

[8] Verrillo v. Zoning Board of Appeals, 111 A.3d 473, 503 (Conn. 2015).

[9] Green Falls Assoc. v. Zoning Bd. App. of Town of Montville, 53 A.3d 273, 282 n.9 (Conn. App. 2012). "Evidence that a property is not 'practically worthless' but 'still possesses value' precludes a finding of practical confiscation." Verrillo v. Zoning Board of Appeals, 111 A.3d at 504.

[10] Bauer v. Waste Mgmt. of Conn., Inc., 662 A.2d 1179, 1197 (Conn. 1995), *quoting* Gil v. Inland Wetlands & Watercourses Agency, 219 Conn. 404, 413 (Conn 1991).

[11] Grannis et al., *supra* note 6, at 71.

[12] See Caruso v. Zoning Bd. App. Of City of Meriden, 130 A.3d 241 (Conn. 1026) (reviewing practical confiscation jurisprudence). For example, the Connecticut Appellate Court declined to find a taking upon denial of a variance for a property purchased for $45,000 when the property was assessed at $6750 and there was an offer to purchase for $1500, and where a smaller house could be constructed on the lot. Green Falls Assoc. v. Zoning Bd. App. of Town of Montville, 53 A.3d 273 (Conn. App. 2012).

[13] 438 U.S. 104, 124 (1978).

[14] Chevron Oil Co. v. Zoning Bd. of App. of Town of Shelton, 365 A.2d 387, 390 (Conn. 1976).

[15] 133 S.Ct. 511 (2012).

[16] 121 Fed. Cl. 687 (2015).

[17] A few courts and commentators have begun to consider whether inaction by a government may result in a taking requiring payment of compensation. Such "passive takings" would impose a duty on the government to intervene or pay compensation to a property owner. Such a duty could theoretically exist where "the government is so entangled in the substantive content of property that the line between acts and omissions becomes especially blurry—for example, in cases where the government has acted to disable property owners' self-help. For more on passive takings, please refer to: Christopher Serkin, Passive Takings: The State's Affirmative Duty to Protect Property, 113 MICH. L. REV. 345, 346 (2014).
[18] 721 A.2d 1197 (Conn. App. Ct. 1998), *overruled in part on other grounds by* Kaczynski v. Kaczynski, 981 A.2d 1068 (Conn. 2009).
[19] No. CV064006084S, 46 Conn. L. Rptr. 250, 2008 WL 4038946, at *16 (Conn. Super. Ct. Aug. 6, 2008).
[20] Litz v. Md. Dept. of Env't, 131 A.3d 923 (Md. 2016).
[21] *Id.* (reviewing cases); *see also* 11A McQuillin The Law of Municipal Corps. § 32:158.50 (3d. Ed. July 2016) (noting a variety of approaches adopted by states, including liability for inaction generally; liability for inaction in the face of an affirmative duty to act; or a prohibition on liability for inaction).
[22] Jordan v. St. Johns Cy., 63 So.3d 835 (Fla. Dist. Ct. App. 2011) (holding county liable in takings for abandoning road).
[23] Boulanger v. Town of Old Lyme, 16 A.3d 889, 911 (Conn. Super. Ct. 2010).

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