

***Respecting, Regulating, or Rejecting the
Right to Rebuild Post
Sandy: What Does the Takings Clause
Teach Us?***

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What Exactly *Is* a Taking?

- The affirmative exercise of eminent domain (*Kelo v. City of New London*, 545 U.S. 469 (2005)) **ED**
- A government-required, permanent, physical occupation (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)) **PO**
- A total deprivation of use and/or value (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)) **TD**
- A partial taking that falls short of total (*Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)) **PT**
- An exaction of a property interest (real or personal), even if the value of the subject property would be enhanced by the grant of the conditional permit (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Management Dist.*, 133 S.Ct. 2596 (2013)) **EX**
- Judicial taking, which might occur if “a court declares that what was once an established right of private property no longer exists” (plurality opinion in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.* (2010)) **JT**

Why do we recognize non-eminent domain takings

“The general rule at least is, that while property may be regulated to a certain extent, **if regulation goes too far** it will be recognized as a taking.”

Pennsylvania Coal Co. v. Mahon (1922)

“The Fifth Amendment’s guarantee . . . was designed to bar **Government from forcing** some people alone to bear public burdens which, **in all fairness and justice, should be borne by the public as a whole.**” *Armstrong v. U.S.* (1960)

Adaptation Strategies

Level 1

No takings risk

- Notice to landowners of impending risk
- Comprehensive plan SLR/flooding element
- Building code changes to accommodate SLR/flooding
- Government purchase of fee in vulnerable properties
- Government purchase of (or truly voluntary donation of) conservation easements on vulnerable properties

Adaptation Strategies

Level 2

Minimal takings risk

- Overlay zoning and downzoning (affecting height, area, and use of undeveloped or underdeveloped parcels) **(PT)**
- Restrictions on existing, nonconforming buildings/uses in overlay zone **(PT)**
- Enhanced floodplain restrictions in vulnerable areas **(PT)**
- Permits for soft-armoring in SLR areas (e.g., beach nourishment) **(PT)**
- Requiring living shorelines in front of hard-armoring structures **(PT, EX)**
- Transferable development rights exchange with owners in vulnerable zones **(ED)**

Adaptation Strategies

Level 3

Moderate takings risk

- Special assessments for beach nourishment and other soft-armoring in SLR zones (**PT, EX**)
- Increased buffers and setbacks for landowners directly affected by SLR/flooding (**PT, PO**)
- Prohibition of government-financed hard-engineered structures (armoring) in designated SLR zones (**PT**)
- Massive public land acquisition in vulnerable areas and areas nearby financed by new taxes and bond issues followed by resale with restrictions to private owners (**ED**)
- Land banking in upland areas for future private use (**ED**)

Adaptation Strategies

Level 4

Serious takings risk

- Development exactions of conservation easements or of fee title interests, and imposition of impact fees on all permitted development in vulnerable areas (**EX**)
- Prohibition of new, permanent structures in designated zones, declaring them to be public nuisances (**PT, TD**)
- Ban on hard- and soft-armoring financed by owners of developed parcels (**PT, TD**)
- New judicial decisions that impose rolling easement ambulatory boundaries and expand public property interests in the coastal zone (**PT, PO, JT**)

Adaptation Strategies

Level 4

Addressing serious takings implications

- Development exactions of conservation easements or of fee title interests, and imposition of impact fees on all permitted development in vulnerable areas (EX)

Articulating essential nexus + rough proportionality

- Prohibition of new, permanent structures in designated SLR zones, declaring them to be public nuisances (PT, TD)

Identifying allowable uses or identifying background principles attributes of new regulation

- Ban on hard- and soft-armoring financed by owners of developed parcels (PT, TD)

Clarifying that the Fifth Amendment applies to government takings not to takings by the forces of nature; identifying allowable uses or establishing background principles attributes of new regulation

- New judicial decisions that impose rolling easement ambulatory boundaries or that expand public property interests in the coastal zone (PT, PO, JT)

Marshaling relevant precedent(s)

A satellite image of Earth showing a large, swirling hurricane over the ocean. The hurricane is a prominent white and grey feature in the center-right of the frame, with a clear eye. The surrounding ocean is dark blue, and the landmasses are visible in shades of green and brown. The text is overlaid on the image.

For more details: Michael Allan Wolf, *Strategies for Making Sea-level Rise Adaptation Tools “Takings Proof,”* 28 J. LAND USE & ENVTL. L. 157 (2013).