TAKINGS LAW UNDER THE U.S. AND CONNECTICUT CONSTITUTIONS

2015 CLIMATE ADAPTATION ACADEMY

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Coastal Development & Regulation Implicates Many Legal Issues

- Private Rights
- Public Rights
- Multiple Layers of Regulation
  - Federal
  - State
  - Local
Constitutional Protection of Private Rights

- Federal Constitution
  - Fifth Amendment
    “nor shall private property be taken for public use, without just compensation”
Connecticut State Constitution

• Article I, Section 11

“The property of no person shall be taken for public use, without just compensation therefor.”
Types of Takings to Be Discussed

- Physical Takings
- Regulatory Takings
- Exactions
Physical Takings

  - Direct appropriations and permanent physical occupations = per se taking
Regulatory Takings / Inverse Condemnation

• *Lucas v. South Carolina Coastal Council* (1992)
  o Categorical taking that result in the total denial of all value = *Lucas* per se taking

• *Penn Central Transportation Co. v. New York City* (1978)
  o Lesser but still substantial restrictions on property use = potential *Penn Central* taking
Exactions / Unconstitutional Conditions Doctrine

- An exaction of a property interest in the context of a permitting process is not a taking, provided the exaction meets the “essential nexus” and “rough proportionality” standards.
  - Does the permit condition serve the same legitimate police power purpose as a refusal to issue the permit?
  - Has there been an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development?
Exactions / Unconstitutional Conditions Doctrine

  - The *Nollan* and *Dolan* tests extend to a permit denial and to unconstitutional requests for the payment of money, where no land dedication or real property taking is involved
  - *IF* the demand occurs in the land use permitting context and is tied to a specific parcel of real estate
Connecticut Takings Jurisprudence

- **Practical Confiscation Test**
  - Where a regulation eliminates all reasonable uses of the land
  - Limited to undeveloped properties only
- **Balancing Test**
  - Attempts to balance public’s interests in regulations against private property rights
  - Three-pronged test:
    - Degree of diminution of value
    - Nature and degree of public harm to be prevented
    - Alternatives available to landowner
Strategies to Avoid *Lucas* Claims

- Regulation of property alone is not a taking
- Don’t enact ordinances that prohibit all development
- Understand the “background principles of state law”
  - Nuisance law
  - Property rights v. public trust
- Be reasonable in consideration of variances
Strategies to Avoid *Penn Central* Claims

- **Consider:**
  - The extent to which the regulation interferes with investment-backed expectations
  - The economic impact of the regulation on the property owner
  - The character of the government interest, or the social goals being promoted by the government
Strategies to Avoid Exaction Claims

- **Essential Nexus**
  - Does the permit condition serve the same legitimate police power purpose as a refusal to issue the permit?

- **Rough Proportionality**
  - Has there been an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development?

- **Demanding an easement or future development rights is a taking**
Gove v. Zoning Board of Appeals, Massachusetts Supreme Judicial Court (2005)
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- Local government can bar residential construction in flood-prone area
- “Reasonable relationship” between regulation prohibiting development in flood hazard zone and the town’s legitimate interests
- No taking because there were other viable development options
Thank You!

QUESTIONS?