Climate Change Adaptation Law in Hawaii: Regulatory Takings and Sea-Level Rise Policy Tools

State of Hawaii Office of Planning
Coastal Data Exchange
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Douglas A. Codiga, Esq.
Climate Change and Regulatory Takings in Coastal Hawai‘i

Center for Island Climate Adaptation and Policy (2011)

Douglas Codiga, Dennis Hwang and Chris Delauney
Takings Paper

- Climate Change Impacts in Hawai`i
- Regulatory Takings Law
- Takings Analyses
  - Hazard-Based Planning and Regulating
  - Shoreline Setbacks
  - Shoreline Hardening
  - Flood Control, Rolling Easements and Managed Retreat
Takings Clause

Property “shall not be taken for public use without just compensation”

- Fifth Amendment to U.S. Constitution
- Hawaii Constitution Article I, section 20
- Does not prohibit taking by government but requires compensation
- Eminent domain and physical invasions
Lucas Total Loss Test

- Must take all economic use of property
- Does not apply if property use is regulated by "background principles"
  - Nuclear plant on fault line
  - Grading causes flooding on neighbor’s property
- Regulatory action seldom takes all economic use of property
Penn Central 3-Part Test for Regulatory Takings

- Taking if regulation goes “too far” *Pennsylvania Coal v. Mahon* (1922)
- *Penn Central* three-part test
  - Economic impact of regulation
  - Character of government action
  - Reasonable investment-backed expectations
- Role of Public Trust Doctrine
- Importance of hazard-based planning and regulation
Koontz and Regulatory Takings

- Two regulatory takings tests
  - *Nollan* – Nexus with gov’t demand
  - *Dolan* – Proportionality requirement
- *Nollan* and *Dolan* now apply to exactions
  - Restoration of non-adjacent wetlands
- Denial of permit may give rise to takings claim
- Dissent – no permit denial because no specifics
- Application of *Koontz* in Hawaii
Policy Tool Kit
Sea-Level Rise and Coastal Land Use in Hawai‘i: A Policy Tool Kit for State and Local Governments

Center for Island Climate Adaptation and Policy (2011)
Douglas Codiga and Kylie Wager
Sea-Level Rise Impacts

- Increased vulnerability to coastal hazards
- High water events, wave inundation, hurricanes, tsunamis
- Increased flooding and drainage problems
- Increased coastal erosion
- Inundation of low-lying areas
Policy Tool Kit

Major Recommendations for Government Action
SLR Benchmark

- Executive order directing state agencies to utilize sea-level rise benchmark of 1-foot-by-2050 and 3-feet-by-2100
- Build on existing agency use of similar benchmarks (e.g., USACE)
- Use for planning, permitting, decision-making
- Mandate government agency consideration of SLR
Sea-Level Rise in Hawaiʻi

1 foot by 2050

3 feet by 2100
Expanded SLR Research

- Scientific research provides critical foundation for law and policy implementation
- Maps and models for site-specific impacts
- Funding for research
  - SLR variability
  - Risk and vulnerability assessments
  - Federal funding and partnerships
  - Outreach program
SLR Adaptation Lead Agency

- Increase interagency coordination and collaboration
- Increase access to scientific resources and information
- Create statewide vision, planning and research goals, data and information gaps, update SLR benchmark
House Bill No. 1714

- “Hawaii Climate Adaptation Initiative Act”
- Climate change is “paramount challenge of this century”
- Interagency Climate Adaptation Committee
  - SLR vulnerability and adaptation report
  - Due in 2017 and covers through 2050
  - SLR major areas, impacts, economics, law
  - Recommendations for “planning, management and adaptation” for SLR hazards
- Statewide Climate Adaptation Plan (HRS 225M)
  - Developed by Office of Planning, due in 2017
  - Act 286 Climate Change Priority Guidelines
Policy Tool Kit

- Planning Tools
- Regulatory Tools
- Spending Tools
- Market-Based Tools
Planning Tools

- Hawaii Coastal Zone Management Act
- Comprehensive Plans
- Pre-Disaster Mitigation Plans
Act 286 (2012)
CCA Priority Guidelines

- Climate change adaptation Priority Guidelines under State Plan
- To “encourage collaboration and cooperation between county, state, and federal agencies”
- Promote education and awareness
- Increase scientific monitoring
- Explore adaptation strategies, promote sector resilience, identify threats, evaluate responses
- Native Hawaiian traditional knowledge
Regulatory Tools

- Zoning and Overlay Zones
- Floodplain Regulations
- Shoreline Construction Setbacks
- Coastal Construction Control Lines
- Hard Armoring
- Rebuilding Restrictions
- Building Codes and Resilient Design
Regulatory Tools (con’t)

- Subdivision Approvals
- Cluster Development
- Land Development Conditions
- Environmental Review
- Rolling Easement Statutes
- Non-Structural Armoring
- Buffer Zones
Regulatory Tool: Subdivision Approval

- Hawaii County Planning Department and Kapoho subdivision
- Subdivision must be above water in 100 years after 2 feet of sea-level rise (plus 3-4 feet continuous subsidence and 2 feet catastrophic subsidence)
- City of Malibu subdivision ordinance requires consideration of sea-level rise
Regulatory Tool: Cluster Development

- Consider amending applicable ordinances to allow cluster development for inundation from sea-level rise
- California Climate Adaptation Strategy (2009) encourages cluster development to reduce vulnerability to sea-level rise
Spending Tools

- Capital Improvement Programs
- Land Acquisitions
- Conservation Easements
- Rolling Conservation Easements
Market-Based Tools

- Mandatory Real Estate Disclosures
- Tax Incentives
- Transfer of Development Rights Programs
Mahalo