

Local Climate Adaptation Planning: Trends and Legal Issues

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Presentation Outline

- **State framework and local trends**
 - State framework
 - Local trends
- **Legal and policy issues**
 - Types of local adaptation actions
 - Legal constraints
 - Sea level rise as case study
 - Possible solutions to “takings” challenges
 - Mitigating climate risks through CEQA?
- **Role of climate science**

State Framework for Local Action

- **California Adaptation Planning Guide (2012)**
prepared by Cal-EMA, CNRA, and FEMA
 - Step-by-step approach to adaptation planning
- **Coastal Commission Draft Sea-Level Rise Policy Guidance (2013)**
 - How to address sea level rise in local coastal plans and coastal development permits
- **Safeguarding California (2014)**
 - Update to 2009 California Climate Adaptation Strategy

State Framework, cont'd

- **Draft Environmental Goals and Policy Report (2013) prepared by OPR**
 - **Goal: build climate resilience and preparedness into all plans and policies**
- **Cal-Adapt: web-based climate adaptation planning tool**
 - **Temperature, precipitation, wildfires, snowpack**

Local Climate Adaptation Planning Trends

- **OPR 2012 Planning Survey**
 - **80% of local governments have prepared or are preparing climate policies or programs**
 - **Most take the form of General Plan policies or Climate Action Plans**
 - **Most address GHGs only; about 20% address adaptation (2010)**
Adaptation also addressed in local hazard mitigation plans

Types of Local Adaptation Actions

- **Land use strategies: focus of presentation**
 - **Community level planning**
 - **Site development standards or mitigation**
 - **Land use strategies must**
 - **Be a valid exercise of the “police power”**
 - **Not cause a “taking” of private property**
- **Shoreline protection and management**
- **Habitat protection and enhancement**
- **Water quality/water supply management**
- **Land acquisition/buyout**

Police Power

- Legal basis for local agencies to regulate land use within their boundaries to protect the public health, safety and welfare
- Test: land use regulation lies within police power if it is “reasonably related” to public welfare
 - *Very deferential to local governments*
- Adaptation issue: is evidence of future climate change risks strong enough to justify land use regulation?

Regulatory “Takings”

- **Overly restrictive land use regulations may be challenged as “taking” of property without just compensation**
- **Prohibited by Fifth Amendment: “nor shall private property be taken for public use without just compensation”**

Regulatory Takings, cont'd

- **Supreme Court tests (fuzzy, constantly evolving):**
 - Does a land use regulation (e.g., zoning) deprive owner of all economic use of property?
 - If not, how great is the economic impact, and does it interfere with “investment-backed expectations”
 - Does an exaction (e.g., dedication requirement) have a “nexus” to the project’s impacts, and is it “roughly proportional” to those impacts?

Sea Level Rise Impacts as Case Study

- So when do restrictions on private property to prevent or mitigate climate change impacts result in a taking?
- Sea level rise perhaps the impact with highest economic stakes. Impacts include:
 - Inundation
 - Greater vulnerability to storm surge
 - Erosion, e.g., coastal bluffs

Sea Level Rise Adaptation Strategies Subject to Takings Challenges

- **Basic planning strategy= managed retreat**
 - **Move development back from the shoreline, often with corresponding restoration of coastal area**
- **Zoning regulations prohibiting or limiting development in areas vulnerable to sea level rise**
- **Development project conditions: setbacks, buffer zones, and easements as condition of project approval in these areas**

Sea Level Rise Strategies, cont'd

- Prohibitions on coastal armoring
- Requirements to remove “nonconforming uses” when land use regulations change
- Rebuilding restrictions (politically unpopular)

Possible Solutions to Takings Challenges

- “Rolling” development restrictions: imposed now but only come into play “as needed” based on advance of sea-level rise
- Transfer of development rights
- Public trust doctrine: as mean high tide line moves inland, public ownership of affected property is increased
- If government only had enough money
 - Purchase of conservation easements
 - Land acquisition and buyout

CEQA for Private Projects

- **Controversial case law: EIR need not evaluate or mitigate impacts of sea level rise on coastal development**
 - **Why: because CEQA requires disclosure of the impacts of the project on the environment, not the impacts of the environment on the project**
 - *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 CA4th 455
 - **May be overturned by future legislation or Supreme Court**

CEQA for Public Projects

- **Public lead agencies can still voluntarily evaluate and mitigate climate change impacts**
 - “Future baseline” must be based on substantial evidence and not hypothetical
 - **Example: BDCP EIR/EIS uses two future baselines, with and without climate change**

How Climate Science Can Help

- **Forecasting the extent of local climate vulnerabilities, impacts, and risks**
- **Justifying climate-driven land use regulations as valid exercise of police power**
- **Developing “rolling” land use restrictions**
- **Developing monitoring and adaptive management programs that trigger further action**

Some Web Resources

- http://resources.ca.gov/climate_adaptation/docs/01APG_Planning_for_Adaptive_Communities.pdf
- http://resources.ca.gov/climate_adaptation/
- <http://cal-adapt.org/>