Public Health, the Police Power, and Constitutional Takings: Using Public Health Connections to Promote Coastal Adaptation to Climate Change

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Overview of the Talk

- Constitutional takings litigation—or fear of takings litigation and liability—impedes innovation in coastal adaptation to climate change by increasing the uncertainty and potential expense of implementing such measures.
- Both sea-level rise and coastal storms have public health implications, many of which derive from land use decisions.
- Refiguring certain kinds of land use regulations as public health measures could help to insulate innovative coastal regulatory strategies, including planned retreat, from constitutional takings challenges, especially *Penn Central* regulatory takings challenges.
Sea Level Rise Possibilities

- Greenland ice sheet melts: sea level rises ~6 meters (~18-19 feet)
- West Antarctic ice sheet melts: sea level rises up to 8 meters (~17-20 feet)
- Both melt: sea level rises 10 or more meters (33 feet or more)
- All of Antarctica melts: sea level rises about 60 meters (~200 feet)
- EVERYTHING MELTS: Sea level rises at least 65 meters = about 215 feet
Health Effect #1: Contaminated Drinking Water
Health Effect #2: Increased Disease

Potential Malaria Vectors in the United States

- Anopheles quadrimaculatus
- Anopheles freeborni
- Anopheles albimanus & A. quadrimaculatus

Source: www.cdc.gov/malaria
Spread of Dengue Fever

World Distribution of Dengue - 2005

Areas infested with Aedes aegypti
Areas with Aedes aegypti and dengue epidemic activity
U.S. Vulnerability to Dengue Fever

Map care of Natural Resources Defense Council
Cholera and Other Vibrio Species
Waterborne Diseases (E. coli, Cryptosporidium)
Health Effect #3: WHAT'S COMING WITH THE SEA WATER?
Think About What’s in the Coastal Zone . . .

Hazardous Waste Site Installations (1997)

Gas Stations

Superfund Sites

NATIONAL NUCLEAR POWER REACTORS (COMMERCIAL)

Legend
- Operational between 10-19 years
- Operational between 20-29 years
- Operational between 30-39 years

Source: U.S. Nuclear Regulatory Commission
Lessons from Hurricane Katrina

“Put a tick under ‘very toxic’.”
Lessons from Hurricane Katrina, continued

The Dallas Morning News’ Arsenic Contamination Map
Lessons from Hurricane Sandy

Power Outages Have Significant Public Health Impacts

10 BILLION Gallons of Raw Sewage Were Released into Streets, Waterways, and Drinking Water
Lessons from Hurricane Sandy, con’t

Superstorm Sandy hit Superfund sites - spread toxic pollution

Toxic Mold Is a Continuing Public Health Problem More Than One Year Later
Adapting to Coastal Inundation: Some Potential Public Health-Based Measures

- Ensure adequate and protected drinking water supplies.
- Ensure adequate medical treatment for likely increases in disease and toxic exposure.
- Finish cleaning up existing Superfund & other contaminated sites along the coast ASAP and impose new cleanup responsibilities.
- Change building codes, design reqs, maintenance reqs and siting requirements for new potentially contaminating facilities.
The Police Power

- Sovereign authority to protect the “health, safety, and welfare” of the public.
- Allows government to respond to a threat of harm, rather than waiting for the harm to manifest.
- Exercises of the police power expanded in the 19th and early 20th centuries to produce a “well-ordered civil society” (Shaw).
- At heart, exercises of the police power privilege the rights and needs of the community over the rights and needs of the individual (Dubber).
- At the extremes, the police power reflects the community’s right of self-preservation (preserved in the doctrine of public necessity).
Village of Euclid, OH v. Ambler Realty:

“Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.

“The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.
Lucas v. South Carolina Coastal Council:

It is correct that many of our prior opinions have suggested that ‘harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The ‘harmful or noxious uses’ principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power.”

“When it is understood that ‘prevention of harmful use’ was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that ‘prevents harmful use’ and that which ‘confers benefits’ is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory ‘takings’—which require compensation—from regulatory deprivations that do not require compensation. A fortiori the legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court’s approach would essentially nullify Mahon’s affirmation of limits to the noncompensable exercise of the police power.”
Jacobson v. Commonwealth of Massachusetts:

“The authority of the state to enact this statute is to be referred to what is commonly called the police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and ‘health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”

“The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.”
City of Erie v. Pap’s A.M.:

“Erie's efforts to protect public health and safety are clearly within the city's police powers. . . . The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important.”

“The preamble to the ordinance states that ‘the Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity.’ The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects.”
Advantages of Connecting Public Health and Land Use for Coastal Inundation

- Public health threats motivate action in ways that climate change does not.
- Public health rationales connect both private use of land and coastal inundation to immediate community concerns, like scary diseases and contamination of water supply, potentially re-invigorating a more communitarian perspective on real property use in the coastal zone.
- Public health efforts still promote “community mindedness” more strongly than land use planning.
- Public health-based restrictions on land use are more likely to survive regulatory “takings” claims than measures framed as traditional coastal land use planning measures, especially regarding the Penn Central look at the “character of the government action.”