

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

**State of Hawaii Office of Planning
Coastal Data Exchange**

May 30, 2014

Douglas A. Codiga, Esq.



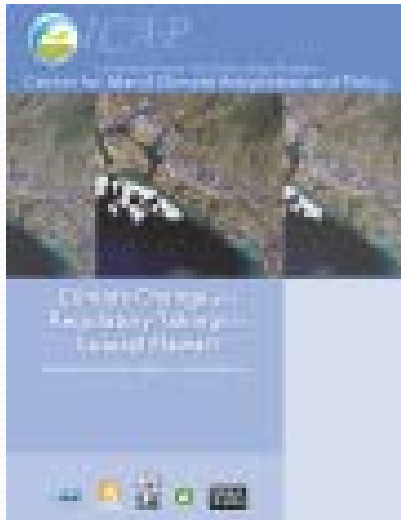
SCHLACK ITO
A LIMITED LIABILITY LAW COMPANY

Sea Grant (ICAP) Publications

Regulatory Takings Paper

Sea-Level Rise Policy Tool Kit

*DISCLAIMER: THIS IS FOR INFORMATIONAL AND EDUCATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL ADVICE. FOR LEGAL ADVICE, CONSULT AN ATTORNEY



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

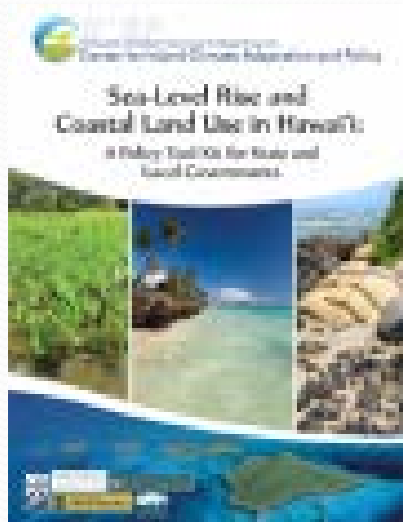
Penn Central 3-Part Test for Regulatory Takings

- 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

- *Koontz v. St. Johns River Water Mgmt. Dist.*
U.S. Supreme Court (2013)
- 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 Hawai'i

A tropical beach scene with palm trees and a stone wall. The background shows a clear blue sky, a turquoise ocean, and a distant island. In the foreground, there is a sandy beach and a low stone wall made of dark rocks. Several tall palm trees are scattered along the wall, some leaning slightly. The water is clear and shallow, with gentle waves lapping at the shore.

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

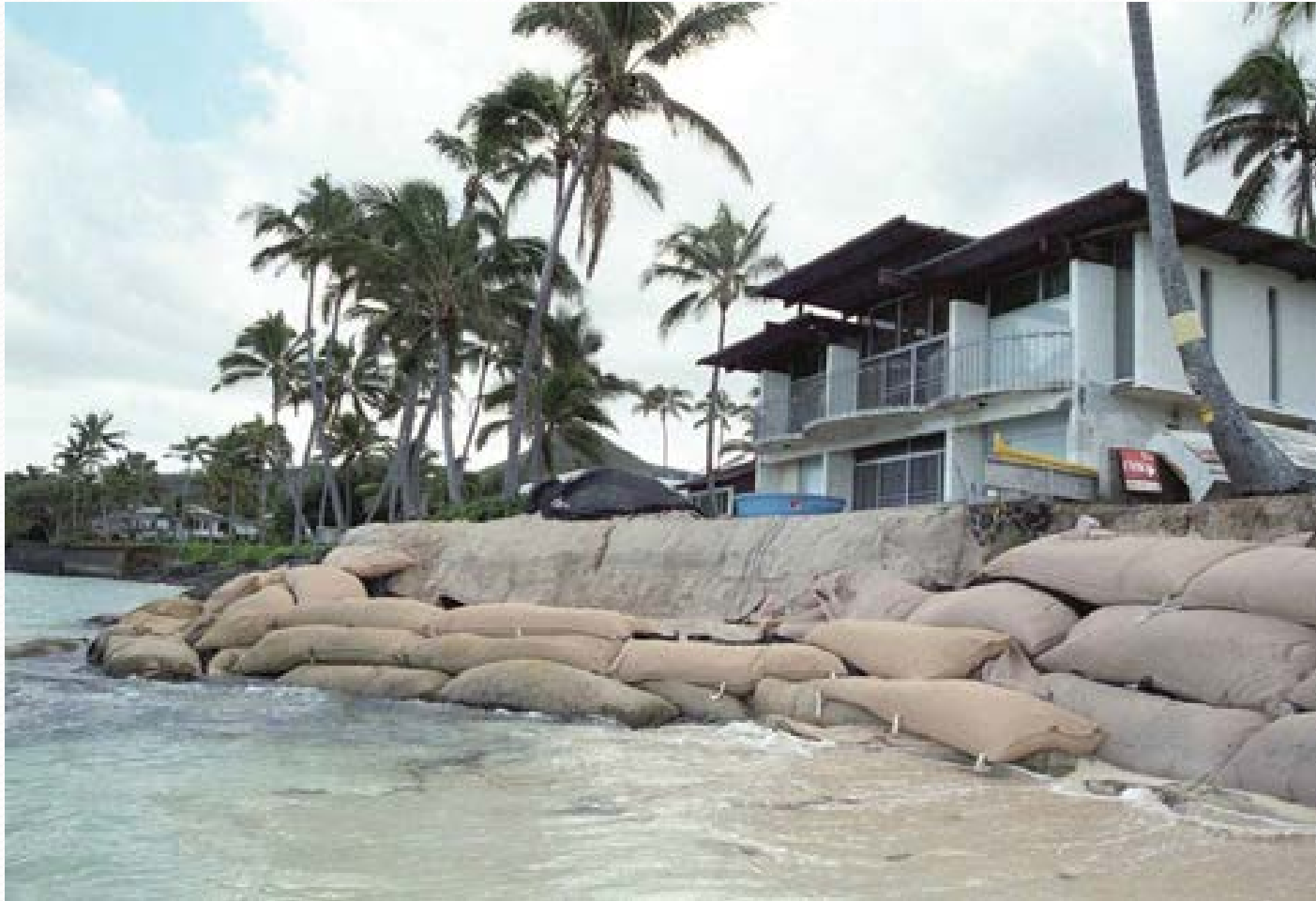


Spending Tools

- 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

