Public Trust and Public Necessity Defenses to Takings on the Gulf Coast

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The Lucas Hook: Background Principles

If coastal regulations “prohibit all economically beneficial use of land,” compensation must be paid unless the limitations “inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.”

So, What Background Principles Did Lucas Note?

- Federal Navigation Servitude
- Private Nuisance
- Public Nuisance
- Limitations on private property that arise “otherwise” through state law
Lucas’s “Principal ‘Otherwise’”

Lucas footnote 16: “The principal ‘otherwise’ that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of ‘real and personal property, in cases of actual necessity, to prevent the spreading of a fire’ or to forestall other grave threats to the lives and property of others.”

= Public Necessity Doctrine
In times of true emergency or public necessity, private rights fall to public need.

Defense to takings or damages liability.

ELEMENTS:

- Public necessity or emergency exists
- The destruction or limitation of private property is reasonably necessary.
Scott v. City of Del Mar
(Cal. App. 1997)

Lois built seawalls, rip rap, & patios that encroached on a public beach; city removed.

No compensation because nuisance \textit{per se}.

BUT nuisance and public necessity are related:

Public necessity is for emergencies.

Nuisance is for the rest of the time.
But see Carolina Beach Fishing Pier (NC 1968)

- Town of Carolina Beach erected a seawall in response to long-term beach erosion, claiming an emergency public necessity that eliminated the need for compensation.

- N.C. Supreme Court remanded on the takings issue, finding the takings claim was not automatically barred.

- NOTE: On remand, plaintiff’s lots were deemed taken by sea & hence state property. No taking because City was building on state property.
Public Necessity and the Gulf of Mexico

- All Gulf of Mexico states have recognized the public necessity doctrine for true emergencies.
- Louisiana and Florida have best developed doctrines.
- Easy cases related to sea-level rise for applying the doctrine:
  - Increased damage or damage further inland during hurricanes
  - Worsening effects of non-hurricane storm surge
  - I.e., normal storm-related public necessity powers will migrate inland
Harder Cases for Gulf
Public Necessity

Using public necessity for slower-building problems--like basic sea-level rise--will be difficult in most Gulf states.

HOWEVER, this is common law, and there are a couple of openings for evolution:

TEXAS: Public necessity requires (only?) that the problem property be a nuisance at the moment of destruction or regulation.

MISSISSIPPI: Courts have said (albeit in 1859) that public necessity is allowed for “self-preservation” of the community.

ALABAMA: Very little precedent to contradict.
An Unnamed Background

Principle: Public Trust Doctrine

Basic Argument: Government action to advance or protect the public trust in coastal or other navigable waters in the face of sea-level rise cannot constitute a taking.

HOOK: State public trust doctrines vary considerably in what public interests they protect.
Alabama’s PTD & Takings

- No case law on point. However, older cases indicated that riparian/littoral rights are absolute and can only be taken with compensation.
- Limited development of the state PTD generally.
- Protected public uses are commerce, navigation, and fishing.
- The state owns the oysters.
“[T]he public trust doctrine does not preclude a party from asserting that state regulation has resulted in a compensable taking of an interest in property obtained from the state . . . .” 


HOWEVER, many coastal “property” interests are too speculative or intangible to be protected.
Louisiana’s PTD & Takings

- Under its PTD, Louisiana can protect its coastline from erosion without effecting a taking, even when coastal protection destroys oyster leases. *Avenal v. State* (La. 2004).

- Moreover, despite the fact that fishing is a protected public use, the state can restrict fishing without violating the PTD. *Louisiana Seafood Management Council v. Louisiana Wildlife & Fisheries Comm’n* (La. App. 1998).

- BROAD dispensation to deal with sea-level rise and its impacts (?).
No cases directly on point. BUT:

Public Trust Tidelands Act states a public policy “to favor the preservation of the natural state of the public trust tidelands and their ecosystems . . . .”

Common-law public trust doctrine evolves “with the needs and sensitivities of the people” and includes:

- Environmental protection & preservation
- Enhancement of aquatic, avian, and marine life
- Recreation
- Aquaculture

So, as tidelands move inward, so logically do these public trust interests. Good enough to force coastal retreat?
Texas’s PTD & Takings

- Coastal Public Lands Management Act of 1973: Uses benefiting the public at large take priority over uses benefiting individuals. Public uses include aesthetics and preservation of areas in their natural state.

- Cummins v. Travis County Water Control & Improve. Dist. No. 17 (Tex. App. 2005): Denial of license to build a dock was not a taking b/c there is no right to build on public trust lands, esp. when the state is using the waters for drinking water supply.

- Thus, a gradual conversion to state lands could be important.
Conclusions on PTD

- Despite limitations in Alabama and Florida, Gulf states have untapped authorities through their PTDs to address the problems associated with sea-level rise:
  - Loss of coastal habitat & ecosystems
  - Loss of public recreation
  - Coastal erosion
- The role of state PTDs beyond immediate coast is untested: Could a state, for example, act to protect deeper water fisheries from contamination caused by sea-level rise?
- Watch Mississippi!