Chapter 8. Legal Context of Adaptation Planning

Land use law is dynamic and must be interpreted and applied based on case-specific factors at the time of decision. Nonetheless, sea level rise and adaptation planning raise a number of important legal issues that coastal managers should consider as they develop and apply adaptation strategies.

This section includes discussion of the legal contexts for addressing:

- Seawalls and other shoreline protective devices
- The public trust boundary
- Potential private property takings issues

SEAWALLS AND OTHER SHORELINE PROTECTIVE DEVICES

Section 30235 of the Coastal Act provides that seawalls and other forms of construction that alter natural shoreline processes "shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply." Despite other Coastal Act provisions that could often serve as the basis for denial of shoreline protective devices (for example, new development requiring shoreline protection can also conflict with Coastal Act policies requiring protection of public access and recreation, coastal waters and marine resources, natural landforms, and visual resources), the Coastal Commission has interpreted Section 30235 as a more specific overriding policy that requires the approval of Coastal Development Permits (CDPs) for construction intended to protect coastal-dependent uses[66] or existing structures if the other requirements of Section 30235 are also satisfied.[67] The Commission thus will generally permit a shoreline protective device if (1) there is an existing structure, public beach, or coastal-dependent use that is (2) in danger from erosion; and (3) the shoreline protection is both required to address the danger (the least environmentally-damaging, feasible alternative) and (4) designed to eliminate or mitigate impacts on sand supply.

In contrast to Section 30235, Coastal Act Section 30253 requires that "new development… assure stability and structural integrity, and neither create nor contribute significantly to erosion… or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs." The Commission has long applied this policy to implement appropriate bluff-top and shoreline setbacks for new development. Such setbacks are based on an assessment of projected erosion and related hazards at the site for the life of the proposed development and help ensure that

[66] Coastal-dependent uses are those that require a site on, or adjacent to, the sea to be able to function at all. (Public Resources Code, § 30101.)

[67] Some commenters argue that because shoreline armoring often conflicts with Coastal Act policies other than Section 30235, the Commission should evaluate proposed armoring under the conflict resolution provisions of the Act. (See Public Resources Code, § 30007.5, 30200(b).) Because the conflict resolution provisions require the Commission to resolve the conflict in a manner which on balance is the most protective of significant coastal resources, this approach could result in the more frequent denial of shoreline armoring, especially when it is intended to protect residential development or other uses that the Coastal Act does not identify as priority uses.

seawalls and other protective devices that could lead to adverse impacts would not be necessary in the future.

Additionally, from its earliest days, the Commission has also required that landowners "assume the risks" of developing along shoreline and coastal bluffs where risks of coastal hazards are present. Since at least the late 1990s, the Commission has approved many new developments with required deed restrictions that specifically prohibit any future construction of shoreline protection for these developments. These deed restrictions require that property owners waive any rights that may exist for a shoreline structure under Section 30235 and thus internalize the risks of building in an inherently hazardous location. This, in turn, will protect shoreline areas with natural resources or other access, recreational, or scenic value, including as required by Section 30253. If and when the approved development is threatened by erosion and becomes uninhabitable, these deed restrictions prevent the construction of a shoreline protective device and require property owners to remove the development, as well as clean up any debris that may result from erosion undermining the development.[68]

Read together, the most reasonable and straight-forward interpretation of Coastal Act Sections 30235 and 30253 is that they evince a broad legislative intent to allow shoreline protection for development that was in existence when the Coastal Act was passed, but avoid such protective structures for new development now subject to the Act. In this way, the Coastal Act's broad purpose to protect natural shoreline resources and public access and recreation would be implemented to the maximum extent when new, yet-to-be-entitled development was being considered, while shoreline development that was already entitled in 1976 would be "grandfathered" and allowed to protect itself from shoreline hazards if it otherwise met Coastal Act tests even if this resulted in adverse resource impacts. Such grandfathering of existing conditions is common when new land use and resource protection policies are put in place, and the existing development becomes "non-conforming."

Even still, in the case of Coastal Act Section 30235, existing development is only entitled to shoreline protection if it is in fact in danger, and the proposed shoreline protection is the least environmentally-damaging alternative to abate such danger. It may be that in certain circumstances existing development can be modified or feasibly relocated, or that other non-structural alternatives such as reducing blufftop irrigation or pursuing beach replenishment, may effectively address the risk to the development without the need for a shoreline protective device.

In practice, implementing Sections 30235 and 30253 has been challenging because many urban areas are made up of both developed and undeveloped lots. In addition, many developments in existence in 1976 have since been "redeveloped" through renovations, remodeling, additions, and complete demolition and rebuild. The reality of effective shoreline management is that the

[68] This legal instrument is not an easement but it does provide for "planned retreat" into the future as a site erodes. Once a development is removed, a site may have potential for new development if it is once again set back and restricted against future shoreline protection device construction.

Coastal Act and LCPs must address and be applied to a wide variety of physical and legal circumstances that may not be addressed by a simple application of the clean Coastal Act distinction between existing development that may be entitled to shoreline protection and new development that is not. In some urban areas, for example, one may find intermingled shoreline developments that pre-date the Coastal Act, both with and without shoreline protection, post-Coastal Act developments approved by the Coastal Commission or local governments pursuant to an LCP that theoretically won't need shoreline protection (though some may have it), and developments that may have pre-dated the Coastal Act but that were redeveloped pursuant to a coastal development permit. Moreover, some of the post-Coastal Act developments may have conditions that prohibit shoreline protection while adjacent properties may be eligible for or have a protective device because they pre-date the Act.

For purposes of implementing this Guidance, it is important that local governments, property owners, development applicants, and others take full advantage of available legal tools to mitigate hazards and protect resources, but to do so in way that considers the specific legal context and circumstances of LCP updates and individual development decisions in context and on a case-by-case basis. For example, although the Coastal Act does not explicitly define what qualifies as an "existing structure" for the purposes of Section 30235, how this term is interpreted in specific cases and through LCPs may be critical to the success of an adaptation strategy over the long-run.

The Commission has relatively infrequently evaluated whether structures built after 1976 should be treated as "existing" and thus entitled to shoreline protection pursuant to Section 30235. When it has, the shoreline protection being proposed to protect the structure has often also been identified as necessary to protect adjacent pre-Coastal Act structures.[69] In a few instances, however, the Commission has treated structures built after 1976 as existing structures entitled to shoreline protection even if no adjacent pre-Coastal Act structure also needed protection. Nonetheless, going forward, the Commission recommends the rebuttable presumption that structures built after 1976 pursuant to a coastal development permit are not "existing" as that term was originally intended relative to applications for shoreline protective devices, and that the details of any prior coastal development approvals should be fully understood before concluding that a development is entitled to shoreline protection under Section 30235.

As mentioned, in order to find new development consistent with Section 30253 or related LCP requirements and to limit the potential proliferation of armoring to protect newly approved structures, the Commission has long used setbacks, assumption of risk conditions and, over the last couple of decades, generally required that applicants proposing new development in hazardous shoreline locations waive any rights under Section 30235 (or related LCP policies) to

[69] For example, CDP A-3-CAP-99-023-A1, *Swan and Green Valley Corporation Seawall*. In this situation, repairs to maintain a seawall fronting the pre-coastal Swan Residence could only be undertaken by encroachment onto the adjacent property, Green Valley Corporation; however, the Green Valley Corporation development had been approved with a condition to prohibit any future shore protection.

build shoreline protection for the proposed new development. Notably, no appellate decision addresses whether the term "existing structures" in this context includes only structures built prior to the Coastal Act or instead includes structures in existence at the time the Commission acts on an application for shoreline protection, or otherwise addresses the interplay between 30235 and 30253.

LCP updates are an opportunity to clarify how the distinction between existing and new development will be applied in specific areas, and some LCPs have already done so. For example, local governments have sometimes specified a date by which a structure must have been constructed in order to qualify as an "existing structure" for the purpose of evaluating whether it may be eligible for shoreline protection. In Morro Bay, the Local Coastal Program policy that implements Section 30235 states that new shoreline protective devices "shall only be allowed where required to serve a coastal-dependent use or to protect existing structures (i.e., structures legally constructed prior to January 1, 1977, that have not been redeveloped since then) …." Similarly, the City of Long Beach's Local Coastal Program (SEASP) states: "'existing structure' means a principal structure (e.g., residential dwelling or accessory dwelling unit) that was legally permitted and in existence prior to the effective date of the Coastal Act (January 1, 1977) and that has not subsequently undergone redevelopment." In Marin County, the Local Coastal Program policy that implements Section 30235 specifies that existing structures are those that existed on the date the LCP was originally adopted (May 13, 1982). LCPs can also codify the prohibition on shoreline protective devices for new development, such as the following provision from the San Luis Obispo County North Coast Area Plan standard:

> ***Seawall Prohibition****. Shoreline and bluff protection structures shall not be permitted to protect new development. All permits for development on blufftop or shoreline lots that do not have a legally established shoreline protection structure shall be conditioned to require that prior to issuance of any grading or construction permits, the property owner record a deed restriction against the property that ensures that no shoreline protection structure shall be proposed or constructed to protect the development, and which expressly waives any future right to construct such devices that may exist pursuant to Public Resources Code Section 30235 and the San Luis Obispo County certified LCP.*[70]

The distinction between existing and new development inherent in the Coastal Act is often directly raised by proposals for redevelopment as well. This Guidance thus deals directly with potential approaches for managing shoreline hazards and protecting coastal resources as shorelines are redeveloped (see Chapter 7, Strategy A.13). As an example, in 2012, the Commission approved a Land Use Plan for the City of Solana Beach that includes many policies designed to address the existing residential development pattern along the high, eroding bluffs of the City. Although further elaboration is yet to come through the City's work on the Implementation Plan, the Solana Beach LUP is a good example of an effort to pragmatically address the need to mitigate the risks to residential development, provide for some redevelopment potential while moving the line of new development inland, avoid and minimize new bluff protection and seawalls, and perhaps remove protective devices in the future to

[70] Community-wide standard 15C.

minimize impacts to natural landforms and to protect the beach for long-term public use. In the case of the Morro Bay LCP (updated in 2021), policies prohibit both new development and redevelopment in areas other than along the Embarcadero waterfront from using or requiring shoreline protective devices at any point during the development's life, unless it is required to serve a coastal-dependent use. Further, as a condition of approval for any such development or redevelopment, any existing shoreline protective devices shall be removed and the underlying area restored.

Local governments and other shoreline managers should also take into account that although a public agency may not deny a CDP for a shoreline protective device that meets all of the tests under Section 30235 and equivalent LCP policies, this does not limit the authority of public agencies to refuse to allow construction of shoreline protective devices pursuant to some authority other than the Coastal Act. For example, if a private property owner requests permission from a public agency to build a structure on that agency's property (such as a local or State park or public beach) to protect adjacent private property, the public agency would generally have the authority as the landowner not to agree to the encroachment. Similarly, agencies that are trustees of public trust lands (such as the State Lands Commission and Port Districts) have the authority to prohibit structures that are not consistent with public trust uses and prioritized public trust needs, values, and principles. Public trust uses include maritime commerce, navigation, fishing, boating, water-oriented recreation, and environmental preservation and restoration, but do not typically include non-water dependent uses such as residential or general commercial and office uses. Thus, trustee agencies have the authority to refuse to allow, or to require removal of, shoreline armoring located on public trust lands, including if that armoring unreasonably interferes with public trust uses.

Approval of a CDP for shoreline armoring under Section 30235 may be unavoidable in certain circumstances. Nonetheless, the construction of shoreline armoring will often cause impacts inconsistent with other Coastal Act requirements, including Section 30235's requirement that a shoreline protective device be the least-environmentally damaging, feasible alternative for addressing shoreline hazards. For example, as discussed above, Section 30253(b) prohibits *new development* from in any way requiring the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. Shoreline protective devices can also adversely affect a wide range of other coastal resources and uses that the Coastal Act protects. They often impede or degrade public access and recreation along the shoreline by occupying beach area or tidelands, by reducing shoreline sand supply, and by fixing the back of the beach, ultimately leading to the loss of the beach. Shoreline protection structures thus raise serious concerns regarding consistency with the public access and recreation policies of the Coastal Act. Such structures can fill coastal waters or tidelands and harm marine resources and biological productivity in conflict with Sections 30230, 30231, and 30233. They often degrade the scenic qualities of coastal areas and alter natural landforms in conflict with Section 30251. Finally, by halting shoreline erosion, they can prevent the inland migration of intertidal habitat, salt marshes, beaches, and other low-lying habitats that rising sea levels will inundate.

Even when an agency approves a CDP for shoreline armoring, the agency has the authority to impose conditions to mitigate impacts on shoreline sand supply and to minimize adverse impacts on other coastal resources. (See *Ocean Harbor House Homeowners Assn. v. California Coastal Comm.* (2008) 163 Cal.App.4th 215, 242; Public Resources Code, §30607.)[71] Any approved shoreline structure, therefore, must avoid or mitigate impacts that are inconsistent with Coastal Act policies.

Because of the wide range of adverse effects that shoreline protective devices typically have on coastal resources, this Guidance recommends avoidance of hard shoreline armoring whenever possible. This can entail denying development in hazardous locations, allowing only development that is easily removable as the shoreline erodes, or requiring new development to be set back far enough from wave runup zones or eroding bluff edges so that the development will not need shoreline armoring during its anticipated lifetime. The Commission's practice when reviewing proposed development in shoreline locations that are potentially vulnerable to shoreline erosion, wave runup, or inundation has been to require applicants to waive rights to shoreline protective devices in the future, and, more recently, to require relocation and/or removal should such development become endangered in the future. See Chapter 7: Adaptation Strategies for further details regarding alternatives to the use of hard armoring structures.

PUBLIC TRUST BOUNDARY

The State of California acquired sovereign ownership most tidelands and submerged lands and beds of navigable waterways upon its admission to the United States in 1850. The State holds and manages these lands for the benefit of all people of the State for statewide purposes consistent with the common law Public Trust Doctrine ("public trust"). The public trust ensures that title to sovereign land is held by the State in trust for the people of the State. Public trust uses include maritime commerce, navigation, fishing, boating, water-oriented recreation, visitor-serving facilities and environmental preservation and restoration. Non-water dependent uses such as residential and general office or commercial uses are generally inconsistent with public trust protections and do not qualify as public trust uses.

In coastal areas, the landward location and extent of the State's sovereign fee ownership of these public trust lands are generally defined by reference to the ordinary high water mark (Civil Code §670), as measured by the mean high tide line (*Borax Consolidated v. City of Los Angeles* (1935) 210 U.S. 10); these boundaries remain ambulatory, except where there has been fill or artificial accretion. More specifically, in areas unaffected by fill or artificial accretion, the ordinary high water mark and the mean high tide line will generally be the same. In areas where there has been fill or artificial accretion, the ordinary high water mark (and the state's public trust ownership) is generally defined as the location of the mean high tide line just prior to the fill or artificial influence. It is important to note that such boundaries may not be readily

[71] Indeed, as noted above, 30235 itself clarifies that even when approvable, such structures should be designed to eliminate or mitigate any adverse impacts on local shoreline sand supply.

apparent from present day site inspections (*Carpenter v. City of Santa Monica* (1944) 63 C. A. 2nd 772, 787).

The mean high tide line is the intersection of the shoreline with the elevation of the average of all high tides calculated over an 18.6-year tidal epoch. This property line is referred to as "ambulatory" for two reasons: first, gradual changes to the shoreline due to factors such as variations in the height and width of sandy beaches, shoreline erosion or accretion, and uplift or subsidence of land can change the location of where the mean high tide line meets the shoreline. Second, the elevation of the mean high tide line itself changes over time and is likely to increase at an accelerating rate in the future due to sea level rise. Over time, sea level rise will continue to gradually cause the public trust boundary to move inland. Boundaries between publicly-owned waterways and adjoining private properties (referred to as *littoral* along lakes and seas and *riparian* along rivers and streams) have always been subject to the forces of nature and property boundary law reflects these realities.

Accelerating sea level rise will likely lead to more disputes regarding the location of property boundaries along the shoreline, since lands that were previously landward of the mean high tide line have become subject to the State's ownership and protections of the public trust. These disputes, in turn, will affect determinations regarding what kinds of structures and uses may be allowed or maintained in areas that, because of sea level rise, either are already seaward of the mean high tide line, are likely to become seaward of the mean high tide line in the future, or would be seaward of the mean high tide line if it were not for artificial alterations to the shoreline. This subject is discussed in the Coastal Commission Public Trust Guiding Principles and Action Plan.

California case law does not explicitly address how shoreline structures such as seawalls that artificially fix the shoreline temporarily and prevent inland movement of the mean high tide line affect property boundaries, if at all. The Ninth Circuit Court of Appeals, however, has interpreted federal common law as allowing the owner of tidelands to bring a trespass action against a neighboring upland property owner who built a revetment that prevented the natural inland movement of the mean high tide line. The court ruled that the actual property boundary was where the mean high tide line would have been if the revetment were not there and that the owner of the tidelands could require the upland owners to remove the portions of the revetment that were no longer located on the upland owners' properties. (*United States v. Milner* (9th Cir. 2009) 583 F.3d 1174, 1189-1190.)

POTENTIAL PRIVATE PROPERTY TAKINGS ISSUES

The United States and California constitutions prohibit public agencies from taking private property for public use without just compensation. Section 30010 of the Coastal Act similarly prohibits public agencies implementing the Coastal Act from granting or denying a permit in a manner that takes or damages private property for public use without payment of just compensation. The classic "takings" scenario arises when a public agency acquires title to private property in order to build a public facility or otherwise devote the property to public

use. In 1922, however, the United States Supreme Court ruled that regulation of private property can constitute a taking even if the regulation does not involve acquisition of title to the property. As Justice Oliver Wendell Holmes stated, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.)

Courts have struggled in the 90 years since then to give agencies and property owners a more definite sense of exactly when a regulation "goes too far." The Supreme Court has identified three basic categories of takings that can occur in the context of land use regulation. Different legal standards apply depending on what kind of taking is at issue. (See, generally, *Lingle v. Chevron USA, Inc.* (2005) 544 U.S. 528).

The most straightforward test applies to what is variously called a categorical, total, *per se,* or *"Lucas"* takings, which occurs when a regulation deprives an owner of all economically beneficial use of the property. (See *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003). An agency that completely deprives a property owner of all economically beneficial use of the property will likely be found liable for a taking unless background principles of nuisance or property law independently restrict the owner's intended use of the property. Courts have generally been very strict about when they apply this test. If any economically beneficial use remains after application of the regulation, even if the value of that use is a very small percentage of the value of the property absent the regulatory restriction, a *Lucas* taking has not occurred.

Where a regulation significantly reduces the value of private property but does not completely deprive the owner of all economically beneficial use, the multi-factor "*Penn-Central"* test applies (*Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104). This test has no set formula, but the primary factors include the economic impact of the regulation, the extent to which the regulation interferes with distinct, reasonable investment-backed expectations, and the character of the governmental action. When evaluating the character of the governmental action, courts consider whether the regulation amounts to a physical invasion or instead more generally affects property interests through a program that adjusts the burdens and benefits of economic life for the common good. Whether a regulation was in effect at the time an owner acquired title is also a relevant factor, but is not by itself dispositive. (See *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 632-633 (O'Connor, J., concurring)). Because this test takes such a wide range of factors into account, caselaw does not provide clear guidance about the situations in which a regulation is likely to qualify as a "*Penn-Central"* taking. A *Penn-Central* claim is unlikely to succeed, however, unless the plaintiff can establish that the regulation very substantially reduces the value of the property.

The third category of takings claims applies to "exactions," that is, government permitting decisions that require a property owner either to convey a property interest or to pay a mitigation fee as a condition of approval. (See *Nollan v. California Coastal Comm.* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374; *Koontz v. St. Johns River Water Management Dist.* (2013) 133 S.Ct. 2586). Under the *Nollan/Dolan* line of cases, the agency

must establish a "nexus" between the condition requiring a property interest or payment and the effects of the project that that property interest or payment is mitigating. That property interest or payment must also be roughly proportional to the impact that it is intended to mitigate. In California, the *Ocean Harbor House* case is a good example of a shoreline structure impact mitigation requirement that was found by the courts to meet the relevant standards of nexus and proportionality.

Various recommendations of this Guidance may potentially give rise to takings concerns. Because the determination of whether a particular regulation may in some circumstances be applied in a way that constitutes a taking is so fact-intensive and context-specific, this Guidance cannot provide a simple set of parameters for when agencies should either allow exceptions to a land use regulation or consider purchasing a property interest. That said, land use restrictions that prevent all economically beneficial use of the entirety of a property[72] are vulnerable to *Lucas* takings claims unless those uses would qualify as a nuisance or are prohibited by property law principles such as the public trust doctrine. Agencies can minimize the risk of these claims by allowing economically beneficial uses on some of the property and by exploring whether legal doctrines regarding nuisance, changing shoreline property lines, or the public trust independently allow for significant limitations on the use of the property. Establishing a transferrable development rights program for properties that are subject to significant development restrictions may also minimize potential exposure to takings claims.

Where a proposed development would be safe from hazards related to sea level rise in the near future but cannot be sited so as to avoid those risks for the expected life of the structure, agencies may consider allowing the structure, but requiring removal once it is threatened. Property owners may argue that they have a right to protect threatened structures even if they have waived rights to shoreline protection under the Coastal Act, but a recent federal court of appeal ruling casts significant doubt on the existence of any common law right to attempt to fix an ambulatory shoreline boundary through artificial structures such as seawalls (see *United States v. Milner* (9th Cir. 2009) 583 F.3d 1174, 1189-1190).

If an agency is contemplating requiring property owners to dedicate open space easements or other property interests or requiring the payment of fees to mitigate project impacts, the agency should be careful to adopt findings explaining how requiring the property interest or payment is both logically related to mitigating an adverse impact of the project and roughly proportional to that impact. With respect to mitigation fees, California cities and counties should also comply with applicable requirements of the Mitigation Fee Act (Government Code, §66000 *et seq.*).

[72] What qualifies as the entirety of a property can also be the subject of dispute. The property will normally include all legal lots on which the proposed development would be located but can also include other lots that are in common ownership and adjacent to, or in close proximity with, the lots that would be developed. (See *Murr v. Wisconsin* (2017) 582 U.S. 383).