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ENVIRONMENT

Mass. coastal property owners beware

Climate change efforts may diminish value of waterfront land



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HOW FAR CAN GOVERNMENT go in regulating private property when protecting us from common threats? Since a seminal 1922 US Supreme Court opinion, *Pennsylvania Coal Company v. Mahon*, a debate has raged about when government regulation crosses a line too far into private property rights, and thereby constitutes a taking of that property requiring just compensation under the Fifth Amendment to the US Constitution.

In December the US Supreme Court denied a petition for review by Janice Smyth of Falmouth on the question of whether the Falmouth Conservation Commission, when denying a permit to develop her coastal property in Falmouth, exacted a de facto “taking” (often referred to as a regulatory taking, or inverse condemnation). Smyth inherited the coastal property from her parents but, by the time she took action to exercise her right to develop that land in 2012, she ran afoul of the no-development zone enacted locally to mitigate erosion and coastal land loss experienced over recent decades.

Smyth argued this was a government taking and sued. In 2014 a jury found for Smyth and valued the loss of her development rights at \$640,000. Falmouth appealed the case to the Massachusetts Appeals Court. Earlier this year, the appeals court reversed the trial court award. Smyth appealed that ruling to the Massachusetts Supreme Judicial Court, which denied review. She then appealed to the US Supreme Court, which also denied review, making the appeals court ruling “the law of the land” in Massachusetts on these facts. This is important, because the details of that ruling have a lot to say about how Massachusetts might position itself to deal with an emerging conflict between rising sea levels and vulnerable coastal communities and landowners.

Most of the Massachusetts coastline is very low-lying; indeed, areas like Cape Cod are effectively glacial till, the remnant “dust” left over after the glaciers retreated north during the current interglacial period. There is an enormous amount of economic value wrapped up in coastal living. Consider that Smyth’s quarter-acre lot, with its development rights, had a market value that is almost three times the current median home value in the US – and that is without a house on the land. These high property values reflect continuing high demand for coastal property, even in the face of increasing risk.

The Massachusetts Appeals Court relied heavily on a balancing test when deciding if a regulatory taking happened to Smyth. That test was derived from a 1978 US Supreme Court Case, *Penn Central Transportation Company v. City of New York*. Three main considerations dominate the balancing analysis: the economic impact of the regulation, the investment-backed expectations of the landowner, and the nature of the government interest.

The appeals court, in quoting a 2005 Massachusetts Supreme Judicial Court case, *Gove v. Zoning Board of Appeals of Chatham*, noted, “Reasonable government action mitigating such harm, at the very least when it does not involve a ‘total’ regulatory taking or a physical invasion, typically does not require compensation.” It was noting the government interest here, protecting coastal and wetland resources, was sufficient to overcome the economic impact (significant but not total loss of value) and diminished investment expectations.

In using the *Penn Central* balancing test as the basis of examining the government action, the current law in Massachusetts provides a strong precedent for state and local regulation over coastal development and restrictions that are based on legitimate concerns over the increasing risks associated with climate change. While those restrictions will inevitably impact coastal land values, the Smyth case makes it clear that this fact alone will not suffice to require financial compensation for any loss in development rights.

This creates an urgent need for more active professional land use planning along coastlines in Massachusetts in response to the already observed and forecasted effects of climate change. It will also require new policy strategies to manage the consequences for coastal land values, local real estate markets, and the tax base of our coastal municipalities.

The stakes, like the tides, are high and rising. Our policymakers and coastal landowners should take notice.

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