

Property Rights and Climate Change

Anthony Flint

As coastal cities continue to face the potentially expensive threat of increasingly volatile weather, storm surge, and sea level rise associated with climate change, building resilience has become a top planning priority. But resilience has multiple dimensions. It means not only building things, like flood gates and hardened infrastructure, but also keeping natural systems such as wetlands free of development—and, in many cases, deciding not to rebuild in the most vulnerable places. Therein lies an evolving and complex issue affecting private property rights.

From at least the turn of the 20th century, the Supreme Court has wrestled with a basic question: When does land use regulation constitute a taking, requiring compensation for property owners under the 5th amendment of the U.S. Constitution (“... nor shall private property be taken for public use without just compensation.”)? Since *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) and *Euclid v. Amber Realty*, 272 U.S. 365 (1926), the essence of the rulings has been that government has considerable leeway in its power to regulate land use. In *Kelo v. City of New London*, 545 U.S. 469 (2005), the high court affirmed the state’s power to use eminent domain for economic development in the 21st century.

In June 2013, however, a decision on a Florida development project seemed to indicate a subtle shift in another direction. In *Koontz v. St. Johns River Water Management District*, the justices ruled 5 to 4 that government was overzealous in imposing mitigation requirements on developers as conditions for building permits. Coy Koontz, Sr., who had wanted to build a small shopping center on his property,



A few years after enacting tougher development standards on the coast, Long Branch, NJ, withstood Hurricane Sandy far better than neighboring towns.

objected to a Florida water management district’s demands that he pay for off-site wetlands restoration to offset environmental damage caused by the construction. Citing two cases, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), Koontz claimed that the requirements constituted a taking for exceeding a “rough proportionality” between the requirements and the scope of damages caused by the development. In 2011, the Florida Supreme Court rejected Koontz’s argument, but in June the high court ruled that the mitigation requirements on the builder went too far.

The ruling alarmed some environmentalists and groups such as the American Planning Association, who feared new limits on the government’s ability to control development and impose require-

ments to restore and conserve natural areas. The concern extended to coastal metropolitan regions preparing for the impacts of climate change, such as New York City, which in May proposed a model \$20 billion plan that is a mix of strategies for living with water and keeping it out. Property rights experts speculated that developers could cite the Koontz case as justification to refuse to pay into a fund for such initiatives.

At a broader level, the question remains: After an event like Hurricane Sandy, is government within its rights to forbid rebuilding or to modify regulations in order to prevent new building? The legal answer is essentially yes, according to Jerold Kayden, an attorney and professor at Harvard University’s Graduate School of Design, who was part of the Lincoln Institute’s Journalists

Journalists Forum on Land and the Built Environment: The Resilient City

Thirty-five leading writers and editors who cover urban issues attended the 6th Journalists Forum on Land and the Built Environment on April 20, 2013, at Lincoln House. The theme was The Resilient City, from coastal municipalities preparing for sea level rise and storm surge to legacy cities trying to evolve despite diminished populations and business activity.

Kai-Uwe Bergmann, principal at Bjarke Ingels Group, opened the forum with a look at urban design innovations that maximize efficiency in land, housing, and major infrastructure projects. Johanna Greenbaum from Kushner Companies, who helped run New York City Mayor Michael Bloomberg's microhousing initiative, detailed that project as well as other similar efforts around the country to accommodate singles and couples who can live in just 300 square feet.

Alan Mallach, co-author of the Lincoln Institute's policy focus report *Regenerating America's Legacy Cities*, noted signs of resurgence in places such as the Central West End in St. Louis or Over-the-Rhine neighborhood in Cincinnati, while acknowledging the challenges facing Camden, New Jersey; Flint and Detroit, Michigan; and Youngstown, Ohio. Antoine Belaieff, Innovation Director at MetroLinx, detailed the use of social media to gain citizen input on a \$16 billion investment in resilient transportation infrastructure in the Toronto area.

John Macomber, from Harvard Business School, led a session on the global city by recognizing the hundreds of millions of people who continue to migrate from rural to urban areas, requiring large-scale planning for infrastructure. Martim Smolka, director of the Lincoln Institute's Program on Latin America and the Caribbean, lamented widespread dislocations caused by preparations for the World Cup and the Olympics in Rio de Janeiro. Bing Wang, from Harvard University's Graduate School of Design, noted that 11 cities in China have populations over 10 million—and yet the rapidly growing nation is only halfway to its expected urbanization.

John Werner, chief mobilizing officer at Citizens Schools, spelled out how urban school systems can ignite passion in students by bringing in outside professionals as teachers and mentors. Gordon Feller of Cisco Systems envisioned a completely connected world and an Internet of everything, joined by *Washington Post* investigative reporter Dan Keating, who shared his experiences extracting data from various levels of government.

The forum had to be shortened because of the manhunt for the Boston Marathon bombers in the Cambridge-Watertown area—but that event prompted dialogue about the “shelter in place” request by Massachusetts Governor Deval Patrick, security and public space, and another kind of resilience in the Boston area. Several participants wrote about the events, including Emily Badger at *The Atlantic Cities*, Donald Luzzatto at the *Virginian Pilot*, and Inga Saffron at *The Philadelphia Inquirer*.

The springtime gathering is a partnership of the Lincoln Institute, Harvard's Graduate School of Design, and the Nieman Foundation for Journalism at Harvard University. The mission is to bring journalists together to share ideas and learn about cutting-edge trends in the coverage of cities, architecture, and urban planning. — AF

Forum on Land and the Built Environment, held in April.

Particularly as more data become available on sea level rise and storm surge, government has the legal right to restrict owners from building on a vacant lot that is subject to flooding and sea level rise, or from rebuilding a home that has been destroyed. But, Kayden said, “politically, it's another story.”

New York and New Jersey represented two different approaches to post-Sandy reconstruction. New York Governor Andrew Cuomo and New York City Mayor Michael Bloomberg called for a mix of rebuilding and “strategic retreat,” while New Jersey Governor Chris Christie focused on allocating money to residents so they could rebuild on parcels battered by the storm—even when the property remained in harm's way.

The City of Boston, meanwhile, has begun to require waterfront developers to prepare for rising seas and storm surge by relocating mechanicals from basements to higher floors, among other measures. As the Koontz case opens the door for heightened scrutiny of various measures imposed by local government as a condition for building, developers might sue over these expensive, climate-related requirements, arguing that they are too burdensome and may constitute a regulatory taking.

While property rights lawsuits over reconstruction and restrictions on new building in coastal areas will no doubt continue to proliferate, Pratap Talwar, principal at the Thompson Design Group, presented an alternative in long-range planning that could help prevent such conflicts from arising. He detailed for the journalists the case study of Long Branch, New Jersey, which overhauled its planning process several years ago to include tougher standards but also a fast-track process for development that satisfied the guidelines. Long Branch was the one mile of New Jersey shore that weathered Sandy relatively intact, Talwar said. ■