Hazard Ahead: The Risk of Seizing the Shoreline for Public Access

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INTRODUCTION

House Bill No. 8055 proposes to redefine public access to Rhode Island's shoreline. The proposed statute declares that a fundamental right of property ownership—the right to exclude others from private land—no longer exists below the "recognizable high tide line." The proposal changes state law and appropriates a physical interest in private property for the public at large.

Under settled state and federal law, the proposed legislation will affect a *per se* taking without just compensation and subject the State to immense legal and financial liabilities. Simply put, when the government gives with one hand, it may also take with the other, and the law compels it to pay for what it takes.

BACKGROUND

The Rhode Island Supreme Court has consistently affirmed at least three core principles defining the scope of citizens' rights in Rhode Island's shoreline:

(1) Under the public trust doctrine, the State holds title to all land "below the high-water

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mark in a proprietary capacity for the benefit of the public,"[2]

(2) The "public rights" secured in trust by the state, including the rights of "passage, navigation, and fishery," extend to "all lands below the high-water mark,"[3] and

(3) The landward boundary of the "shore" for the public's exercise of its rights and the "privileges of the shore" under Article I, § 17 of the state constitution is the "mean high tide line," which is the average height of all the high waters over the astronomical cycle of 18.6 years.[4]

The Rhode Island Supreme Court established the mean high tide line boundary in *State v. Ibbison*.[5] Four years later, Rhode Island held a constitutional convention, and the delegates considered a proposal to redefine the shore to include—among other things—land "one rod above the daily high water mark made by the flux of the sea at high tide . . . ."[6] This proposal (echoes of which can been heard in House Bill No. 8055) was rejected based on concern that it would constitute a taking without just

[2] *See, e.g.*, *Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1165 (R.I. 2003); *Greater Providence Chamber of Com. v. State*, 657 A.2d 1038, 1041 (R.I. 1995)

[3] *Allen v. Allen*, 19 R.I. 114, 32 A. 166, 166 (1895)

[4] *State v. Ibbison*, 448 A.2d 728, 732 (R.I. 1982).

[5] *Ibbison*, 448 A.2d at 732.

[6] Resolution 88-00217, A Resolution Relating to Shore Access and Preservation.

compensation.[7] Instead, the delegates made a conscious decision to leave further refinements for "judicial determination."[8]

ANALYSIS

I. The Proposed Legislation Changes Settled State Law and Permits the Public to Invade Private Property.

House Bill No. 8055 ("Proposed Legislation") takes aim at the boundary established by *Ibbison* and its progeny. The bill proposes to amend the General Laws to extend the area wherein the public may exercise the "rights and privileges of the shore" from the mean high tide line up to the "recognizable high tide line." The "recognizable high tide line" is defined as "a boundary which is ten feet (10') landward from the line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface level at the maximum height reached by a rising tide." The bill then lists a set of non-exclusive indicia of the rising tide mark, including "a lien of seaweed, oil or scum" or "a more or less continues deposit[] of fine shell or debris . . . ."

The public is entitled to exercise the "rights and privileges of the shore" under Article I, Sections 16 and 17 of the state constitution anywhere this zone. Although the statute suggests that title to the land remains in the littoral landowner, there is no other limitation on permissible public activities. The public-at-large would thus be entitled to enter, occupy, and use private property on any day, at any time, for uncertain purposes.[9]

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[7] Patrick T. Conley & Robert G. Flanders, Jr., The Rhode Island State Constitution: A Reference Guide 103 (1999) (hereinafter "Conley & Flanders"). Notably, as described in *Cavanaugh v. Town of Narragansett*, No. WC 91-0496, 1997 WL 1098081, at *5 (R.I. Super. Ct. Oct. 10, 1997), there was an abundance of testimony at the convention that the amendments to Section 16 were not intended to encompass trespass on the land of others.

[8] *Id.*

[9] Article I, Section 17 is not exhaustive, although the four classic privileges of the shore are fishing, gathering seaweed, swimming, and passage along the shore.

II. The Proposed Legislation Will Cause a Physical Taking of Private Property Without Just Compensation.

The Takings Clause of the Fifth Amendment to the United States Constitution states: "[N]or shall private property be taken for public use, without just compensation." This necessary condition of property acquisition applies not only to the federal government, but also to the states through the Fourteenth Amendment.[10] The Takings Clause is one of only two provisions "that dictate a particular remedy,"[11] and the failure to pay what is owed at the time of the taking violates a landowner's constitutional rights.[12] The Rhode Island Supreme Court has consistently looked to federal precedents to interpret state constitution's takings clause in Article I, Section 16.[13]

Takings fall into two broad classes of appropriations: physical and regulatory. Physical takings are "as old as the Republic"[14] and occur when the government physically acquires real or personal property for itself or a third party.[15] The taking can occur in a multitude of ways. The state may directly condemn land; take physical possession of property, but not acquire legal title; or it could simply occupy property.[16] The "essential question" is "whether the government has physically taken property for itself or

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[10] *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897). It is similarly beyond question that state laws—and even state constitutional provisions—cannot prevail if they conflict with the federal constitution. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 584 (1964).

[11] *Allen v. Cooper*, No. 5:15-CV-627-BO, 2021 WL 3682415, at *8 (E.D.N.C. Aug. 18, 2021) (citing Richard H. Fallon et al., *Hart & Wechsler's Federal Courts and the Federal System* 849 (4th ed. 1996)).

[12] *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17 BK 3283-LTS, 2022 WL 504226, at *43 (D.P.R. Jan. 18, 2022).

[13] *See, e.g.*, *Andrews v. Lombardi*, 231 A.3d 1108, 1128 (R.I. 2020); *Alegria v. Keeney*, 687 A.2d 1249, 1252 (R.I. 1997).

[14] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency,* 535 U.S. 302, 322 (2002).

[15] *See Cedar Point Nursery*, 141 S. Ct. at 2072

[16] *Id.* (citing cases).

someone else—by whatever means—or has instead restricted a property owner's ability to use his own property."[17] Any physical acquisition of property—including an appropriation of the "right to invade"—is a *per se* taking that triggers a state's constitutional obligation of just compensation.[18]

How the government takes private property is largely irrelevant. A legislature can take land by statute as easily as an executive agency may do so by rule or a court by judicial decision. "[T]he particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[19] The size or duration bears only on the amount of compensation, not whether compensation is due.[20]

A "regulatory taking" occurs "when some significant restriction is placed upon an owner's use of his property for which justice and fairness require that compensation be given."[21] To assess whether a regulatory restriction constitutes a taking, courts typically look to the three factors articulated in *Penn Central Transp. Co. v. New York City*: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[22]

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[17] *Id.*

[18] *Id.* at 2071-72.

[19] *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010).

[20] *See, e.g.*, *Cedar Point Nursery*, 141 S. Ct. at 2074; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (appropriating part of a rooftop in order to provide cable TV access for apartment tenants is a taking); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (compensation required even when government appropriation is temporary).

[21] *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 (1st Cir. 2002) (quotation marks omitted).

[22] *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978)).

The Rhode Island Supreme Court has consistently applied these federal precedents when interpreting the state constitution's takings clause. As is the case under federal law, a categorical right to compensation exists under the state constitution "when the government physically takes possession of an interest in property for some public purpose."[23] A potential regulatory taking is likewise analyzed under the *Penn Central* balancing test.[24]

There is a high likelihood that a court would find that Proposed Legislation is a categorical, physical taking. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the U.S. Supreme Court considered whether conditioning a land-use permit on an uncompensated conveyance of a public easement constituted an unconstitutional exaction. In that case, the California Coastal Commission required a landowner, as a condition of approval for a building permit, to convey to the state an easement allowing the public to traverse across a strip of their beachfront property.[25] The Court found that the Commission's condition was a taking and that there was no "essential nexus" to a legitimate state interest. Accordingly, if the commission wanted a public easement, it had to pay for it.[26] As Justice Scalia explained:

> A "permanent physical occupation" has occurred, for purposes of [the Takings Clause], where individuals are given *a permanent and continuous right to pass to and fro*, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[27]

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[23] *See Andrews v. Lombardi*, 231 A.3d 1108, 1128 (R.I. 2020); *Cranston Police Retirees Action Comm. v. City of Cranston by & through Strom*, 208 A.3d 557, 581 (R.I. 2019).

[24] *Cranston Police Retirees Action Comm.*, 208 A.3d at 582.

[25] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987).

[26] *Id.* at 841-42.

[27] *Id.* at 832 (emphasis added).

The Court moreover observed "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, *we have no doubt there would have been a taking*."[28] Such intrusions impose a categorical duty to provide just compensation "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[29]

The Court reached a similar conclusion in *Dolan v. City of Tigard*.[30] In that case, the government conditioned a permit to expand a store and parking lot on the dedication of a portion of the property to the public for recreation.[31] As in *Nollan*, the Court concluded "[w]ithout question, had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."[32] Compelling public access would "deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[33]

Cedar Point Nursery eliminates any lingering uncertainty. The law before the Court was a California regulation granting union organizers access to agricultural employers' properties for three hours per day, 120 days per year to solicit support for unionization.[34] The fundamental question was whether the regulation was a *per se* physical acquisition of the right to enter

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[28] *Id.* at 831 (emphasis added).
[29] *Id.* at 831-32.
[30] *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).
[31] *Id.* at 379-80.
[32] *Id.* at 384.
[33] *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))
[34] *Cedar Point Nursery*, 141 S. Ct. at 2069-70.

property, or a permissible exercise of regulatory authority that did not rise to the level of a taking under *Penn Central*.[35]

The Court's ruling was decisive. "[G]overnment-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation."[36] The "right to exclude" is not just one of the "bundle of rights" associated with property ownership—it is "universally held to be *a fundamental element* of the property right."[37] It is an essential condition of ownership that is absolutely necessary for it to exist at all.[38] Accordingly, a law that "appropriates a right to physically invade [a landowner's] property" and grants it to others as an entitlement is a *per se* taking.[39] The state's failure to provide compensation violated the Takings Clause.

Under *Ibbison*, a person's right to exercise the "privileges of the shore" ends at the mean high tide line. This has been the law of the state of Rhode Island since 1982. The 1986 constitutional convention declined to change it, and it has been enforced to the present day.[40] Consistent with *Cedar Point Nursery*, eliminating a shoreline property owner's right to exclude "beachcombers" eliminates a fundamental right of ownership and conveys an entitlement to the public at large. It is not merely a regulation aimed a "reasonable use of the shore"—it is a *per se* taking and the State will be obliged to pay for it.

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[35] *Id.*

[36] *Id.* at 2074.

[37] *Id.* at 2072.

[38] *Id.*; *see also Opinion of the Justices*, 365 Mass. 681, 689 (1974) ("The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others.")

[39] *Id.* (emphasis added).

[40] *See, e.g., Ne. Corp. v. Zoning Bd. of Rev. of Town of New Shoreham*, 534 A.2d 603, 606 (R.I. 1987) ("[I]n this jurisdiction the line of demarcation that separates the property interests of the waterfront owners from the remaining populace of this state is the mean high-tide line.")

Ibbison was not, as some have suggested, a de facto taking from the public.[41] The Rhode Island Constitution does not define "the shore" for the purposes of Article I, Sections 16 and 17. The delegates to the 1986 constitutional convention expressly declined to define the boundaries of the shore in the constitution itself. In the absence of guidance from the Constitution or the General Assembly, the Supreme Court exercised its authority to interpret "the shore" as the land below the mean high tide line. If the intention behind the Proposed Legislation is to expand the Court's definition, it is—without question—a taking.[42]

The Proposed Legislation arguably tries to pass as an access regulation by, for instance, acknowledging that landowners "may" still hold title to the shore above the mean high tide line. But this is exactly the chicanery the Supreme Court rejected in *Cedar Point Nursery*. If the Proposed Legislation is enacted, the State will acquire a fundamental, physical interest in property for the benefit of the public even if the legal boundary of the "shore" remains fixed at the mean high tide line. Cloaking the statute in the trappings of the State's "police power" does not change this reality.[43] Thus, upon

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[41] This argument is based on the assertion that the mean high tide line is often under water, thus the public cannot exercise its privileges of the shore unimpeded.

[42] *See Purdie v. Att'y Gen.*, 732 A.2d 442 (N.H. 1999) (holding state statute the expanded public right in the shore beyond common law limits was an unconstitutional taking) ("Although the legislature has the power to change or redefine the common law to conform to current standards and public needs, . . . property rights created by the common law may not be taken away legislatively without due process of law[.]"); *see also Opinion of the Justices to the House of Representatives*, 313 N.E.2d 561 (Mass. 1974) (advisory opinion rejecting proposed bill creating a public "on-foot free right-of-passage" along the shore of the Massachusetts coastline between the mean high water line and the extreme water line as private property extends to the low-water line, thus the legislation would constitute a taking).

[43] In *Alegria v. Keeney*, 687 A.2d 1249, 1252 (R.I. 1997), the Rhode Island Supreme Court held that Section 16 "evinces a strong Rhode Island policy favoring the preservation and the welfare of the environment," but that those terms "cannot be interpreted . . . to defeat the mandates of the Federal Constitution." *See also* Annotated Const. of the State of Rhode Island 8 (1988) ("The Committee intended that the powers of the state in such regulation shall be 'liberally construed' *to the limits allowed by the federal constitution* when constitutional challenges are posited.")

enactment, shoreline property owners will be entitled to the fair market value of their land.

Property owners may have additional grounds to seek declaratory and injunctive relief in federal court.[44] Furthermore, the Supreme Court's ruling in *Knick v. Township of Scott* casts serious doubt on any defense that the State is immune from suit for an uncompensated taking under the Fifth Amendment in federal court. Indeed, at least two federal courts have recently found that, in the wake of *Knick*, the federal constitution furnishes a remedy for money damages against a state such as Rhode Island, which is not insulated by immunity.[45]

Conclusion

House Bill No. 8055 redraws the line between private and public property established by the Rhode Island Supreme Court in 1982. While the bill may be motivated by salutary goals, licensing the public-at-large to use private lands appropriates a fundamental right of ownership and takes private property for public use. Consequently, if the legislation is enacted, the State of Rhode Island will be exposed to a clear risk of substantial legal and financial liability.

(emphasis added); *Opinion of the Justices*, 365 Mass. 681, 689 (1974) (rejecting argument that state's "police power" could justify an uncompensated taking).

[44] The statute appears to envision an enforcement scheme carried out by the Coastal Resources Management Council, the Department of Environmental Management, and the Rhode Island Attorney General. The Supreme Court's opinion in *Ex Parte Young*, 209 U.S. 123 (1908), allows suits in federal court for declaratory and prospective injunctive relief against state officials when the state acts contrary to any federal law or the constitution. Damages and attorneys' fees may also be available under 42 U.S.C. § 1983.

[45] *Allen v. Cooper*, No. 5:15-CV-627-BO, 2021 WL 3682415 (E.D.N.C. Aug. 18, 2021); *Devillier v. Texas*, No. 3:20-cv-00223, 2021 WL 3889487 (S.D. Tex. July 30, 2021).