

Overlay Zones

Introduction

An overlay zone is a land use planning area where additional zoning requirements “overlay” the original requirements of the underlying district. Property owners within an overlay zone must conform to the provisions of both sets of development restrictions.¹ Traditionally, these zones have been used to create preservation areas, buffer airports and military institutions, demarcate building preservation districts in historic spaces, or require additional safety provisions in steep, erosion, or flood-prone areas.² “Recovery” overlay zones have also been used post-disaster to install temporary regulations which prevent redevelopment as damage assessment takes place.³ Municipalities aiming to preserve or shape an array of areas of special concern have also employed overlay zones to this end.

Advances in Geographic Information System (GIS) software, improved sea level rise projections, and more detailed coastal hazard mapping might make overlay zones a useful coastal adaptation zoning tool in the future. Specifically, detailed coastal hazard mapping may now make it possible for coastal planners to determine the expected extent of sea level rise inundation and combined storm surge risks. Sea level rise and flooding overlay zones might then be implemented according to these projected sea level rise rates, time horizons, and locations.

A sea level rise overlay zone designation would notify landowners of potential danger to their properties and then include specified “triggers” based on observable hazard events requiring some change or assessment in

light of the prevalent danger.⁴ Over the shorter term, this notice provides landowners with the warning that they are currently, or will soon be, in the crosshairs of rising seas or flooding waters. Over the longer term, the added conditions of an overlay zone can reduce or stop rebuilding in hazardous areas through rebuilding restrictions. In the meantime, an overlay zone remains “transparent” and does not affect the property until the triggering event requires the prescribed land use change.⁵

Tradeoffs

A primary advantage of an overlay zone is its flexibility in implementing multiple sea level rise adaptation efforts.⁶ Overlay zones can be used to prompt retreat via redevelopment restrictions or buyout programs, or strengthen accommodation efforts by incentivizing smart, proactive planning. Moreover, a community can tailor them to its specific needs to ensure political feasibility and land use equity.⁷ In highly developed areas subject to intense development and redevelopment, overlay zones may include building design considerations, increased flood elevation requirements, or required mitigation for project development. In more rural areas, they may require the use of natural “green infrastructure” such as dune and wetland habitats, or permanently ban the use of seawalls for new development. This flexibility allows communities to implement overlay zones based on their unique needs, allowing them to delineate areas prioritized for protection, accommodation, and retreat.⁸

1 CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 586 (35th ed. 2016) (defining “overlay zone”).

2 INSTITUTE FOR LOCAL GOVERNMENT, UNDERSTANDING THE BASICS OF LAND USE AND PLANNING: GUIDE TO LOCAL PLANNING 29 (2010), available at http://www.ca-ilg.org/sites/main/files/file-attachments/2010_-_landuseplanning.pdf.

3 ANNA SCHWAB, DYLAN SANDLER & DAVID BROWER, HAZARD MITIGATION AND PREPAREDNESS: AN INTRODUCTORY TEXT FOR EMERGENCY 8.5.1.4 (CRC Press, 2nd ed. 2016).

4 CITY OF GOLETA, CA, DRAFT COASTAL HAZARDS VULNERABILITY ASSESSMENT AND FISCAL IMPACT REPORT ES-6 (2015), available at <https://www.conservationgateway.org/ConservationPractices/Marine/crr/library/Documents/GoletaCoastalVulnerability.pdf>. This draft report was officially adopted through Resolution No. 15-55 of the City Council of the City of Goleta.

5 SCHWAB, SANDLER & BROWER, *supra* note 3.

6 FLORIDA CLIMATE INSTITUTE, PLANNING FOR SEA LEVEL RISE IN THE MATANZAS BASIN: OPPORTUNITIES FOR ADAPTATION, APPENDIX H1, Section V.a.i. (June 2015).

7 *Property Topics and Concepts*, AMERICAN PLANNING ASSOCIATION, <https://www.planning.org/divisions/planningandlaw/propertytopics.htm> (last visited Aug. 15, 2017).

8 FLORIDA CLIMATE INSTITUTE, *supra* note 6, at Section VII.

Overlay zones will likely face opposition, as well as several policy hurdles. Demarcating certain areas will inherently create inequities by applying restrictive regulations to some properties and not others.⁹ This approach is often a challenge for land use planners, and any overlay zone should be scrutinized for how it will affect the appraisal of individual private properties and the municipality's tax base as a whole. Additionally, new restrictions affecting the value or allowed use of private properties may spur challenges from homeowners. These challenges will be discussed in the next section.

Legal Considerations

Developing overlay zones will require adopting new land use regulations that must be consistent with the applicable General Plan and relevant Local Coastal Programs. Local governments instituting overlay zones are most likely to be challenged by private property owners as potential regulatory takings. Like traditional zoning, overlay zone regulations based on improving the health, safety, and welfare of the population are generally allowed.¹⁰

However, the Fifth Amendment of the United States Constitution provides a check to these broad land use powers. Specifically, its Takings Clause requires that the government pay just compensation when a regulation becomes so onerous that it has the practical effect of a direct physical appropriation of that property.¹¹ Overlay zone changes that go so far as to deprive a parcel of nearly

all economic value will likely be challenged as a taking by its owner, while regulations under this threshold will be considered according to certain judicially mandated factors.¹²

Local governments that adopt overlay zones should also be cognizant of the procedural due process rights of affected property owners. Because overlay zone changes may alter the allowed uses of a land parcel, local governments may incur liability for failing to apprise a homeowner of an ordinance which affects a protected property interest (i.e. an affirmative development right).¹³

Examples

Sea level rise overlay zones are suitable in areas where coastal erosion, storm surge, sea water inundation, and/or coastal squeeze events are expected to challenge land use planning and development. Cities along the California coast are considering or have already utilized overlay zones for flood-prone and environmentally sensitive areas.¹⁴ For example, the City of Goleta is evaluating overlay zones as part of their suite of future coastal adaptation strategies.¹⁵

Researchers

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⁹ *Property Topics and Concepts*, *supra* note 7.

¹⁰ "The legal basis for all land use [and building code] regulations is the police power of the city to protect the public health, safety, and welfare of its residents." *See* BARCLAY & GRAY, *supra* note 1, at 1, *citing* Berman v. Parker, 348 U.S. 26, 32-33 (1954).

¹¹ INSTITUTE FOR LOCAL GOVERNMENT, REGULATORY TAKINGS AND LAND USE REGULATION: A PRIMER FOR PUBLIC AGENCY STAFF 6 (2006).

¹² *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.")

¹³ *See* Moreland Properties v. City of Thornton, 559 F.Supp.2d 1133 (D. Colo. 2008).

¹⁴ SANTA BARBARA CTY., CAL. CODE, §§ 35.28.090-120, *available at* <http://sbcountyplanning.org/pdf/forms/LUDC/LUDC.pdf>; CARLSBAD, CAL. MUN. CODE § 21.82.010-070, *available at* <http://www.qcode.us/codes/carlsbad/?view=desktop&topic=21>; SANTA CRUZ, CAL. MUN. CODE §§ 24.10.625.0-7, *available at* <http://www.codepublishing.com/CA/SantaCruz/html/SantaCruz24/SantaCruz2410.html#24.10.625.0>.

¹⁵ CITY OF GOLETA, *supra* note 4, at ES-6.



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