

Norfolk's Flooding Adaptation Measures: Taking Lawful Precautions or 'Takings' Lawsuits?

Emilie Whitehurst, J.D.
Law School Graduate
Virginia Coastal Policy Clinic
at William & Mary Law School



VIMS | WILLIAM & MARY
VIRGINIA INSTITUTE OF MARINE SCIENCE



WILLIAM & MARY
Law School

Sea Grant
Virginia

SPRING 2013

Contact Us

Please contact Shana Jones at scjones@wm.edu if you have comments, questions, or suggestions.



Emilie Alexandra Whitehurst, J.D., is a graduate of William & Mary Law School, where she served as Notes Editor on the William & Mary Bill of Rights Journal. Ms. Whitehurst has experience in land use and plans to continue her professional pursuits in that area. She will be joining the Maryland Department of Planning as a post-graduate fellow this fall. Prior to receiving her J.D., Ms. Whitehurst worked for a U.S. corporation where she negotiated business contracts with Chinese and Taiwanese companies. She graduated from The College of William and Mary in 2007 with a Bachelor of Business Administration in Marketing.

About the Virginia Coastal Policy Clinic

The Virginia Coastal Policy Clinic (VCPC) at William & Mary Law School provides science-based legal and policy analysis of environmental and land use issues affecting the state's coastal resources and educates the Virginia policy making, non-profit, legal and business communities about these subjects.

Working in partnership with Virginia scientists, law students in the clinic integrate the latest science with legal and policy analysis to solve coastal resource management issues. Examining issues ranging from property rights to federalism, the clinic's activities are inherently interdisciplinary, drawing on scientific, economic, and policy expertise from across the university. VCPC has a strong partnership with the Virginia Institute of Marine Science (VIMS) and Virginia Sea Grant.

VCPC is especially grateful to the Virginia Environmental Endowment for providing generous funding to establish the clinic in fall 2012.

A Note from the VCPC Director

VCPC received funding from the Virginia Environmental Endowment to produce a series of white papers analyzing legal issues Virginia localities may face as they respond and adapt to increased flooding caused by sea level rise. To focus the students' analysis, we selected two Virginia jurisdictions—Norfolk and Poquoson—to analyze. The students utilized facts from published reports and press accounts to inform their work. **Although we focused on these two jurisdictions, the issues raised are broadly applicable to similarly situated cities in Virginia.** The reader should be aware, however, that the legal issues that county governments may face might be different from those in the city government context.

Future work is likely to involve interviews, additional analysis, and engagement with the broader policy community about some of the issues raised. Adapting to flooding and sea level rise is a complex area. We have not identified all of the possible legal issues that may arise. Nor have we necessarily answered every possible legal question as part of the analysis that was conducted. We hope, however, that our white papers begin to answer some of the threshold questions facing Virginia localities at this time. We also anticipate that they lay the groundwork for in-depth work and identify areas of needed discussion and additional research. We therefore welcome any feedback on our work.

Finally, a special thanks goes to Chris Olcott, a rising third-year law student and Virginia Sea Grant Summer Fellow, for source-checking and editing this white paper. VCPC is also grateful to Virginia Sea Grant for funding the VCPC Summer Fellow

program at William & Mary Law School.

Introduction

In response to a rising sea levels, Norfolk is contemplating and has already undertaken several measures designed to effectively combat the growing threats posed by significant flooding and storm surge. One of the many questions facing the city is whether these measures would open it up to “takings” claims brought by private citizens. There are three adaptation measures that are particularly feasible for the city and therefore constitute the focus of the following analysis: condemning private property, building physical structures on privately owned property, and building physical structures on public property which affect the views of neighboring waterfront property owners. Each measure is constitutionally sound from the perspective of the Takings doctrine as long as Norfolk follows certain statutorily prescribed guidelines and procedures.

Key Points

Norfolk Adaptation Measure	Norfolk’s Risk of Being Sued Under Takings Doctrine
Condemnation of Private Property	• Little to no risk as long as Norfolk pays just compensation and follows specific guidelines, which are discussed in the full analysis below.
Physical Construction (e.g., sea walls, culverts, pumps) on Privately Owned Property	• Little to no risk as long as Norfolk pays just compensation and satisfies certain criteria, which are discussed in the full analysis below.
Physical Construction on Public Property Which Affects Private Property Owners’ Waterfront Views	• Little to no risk as there is no present right to an unobstructed view in Virginia, and Norfolk would not have to pay just compensation.

If Norfolk and similarly situated localities want to avoid takings and the payment of just compensation altogether, incentivizing private landowners with waterfront properties to build adaptation structures such as walls and living shorelines is an option. In return, the landowner would receive a plot of land that would otherwise be part of the public shore.

The Government, Including the City of Norfolk, Can Take Private Property

The United States Constitution empowers the government to transfer private property to itself.¹ This is referred to as the power of “eminent domain.”² The government is restricted in its exercise of this power. First, the transfer, otherwise known as a taking, must be for a public purpose.³ Second, the government must pay the property owner an appropriate amount of compensation.⁴

State, county, town, and city governments, including the City of Norfolk, are also authorized to exercise the power of eminent domain, but it is similarly restricted.⁵ According to the Virginia Constitution, a government like the City of Norfolk can take privately owned property if it will further the public’s interest, or use.⁶ There is a wide range of objectives that may fall within the purview of “public use.”⁷ Put simply, a

Key Point

Who Can Take Private Property?

- 1) Federal government
- 2) State government
- 3) Local government

What is Required for a Taking?

- 1) Public Use
- 2) Just Compensation

“public use” is an action that is reasonably related to a plausible public purpose.⁸ Even the “elimination of a public nuisance existing on [a] property,”⁹ the establishment of storm water management facilities,¹⁰ and the condemnation of “oyster beds and grounds” can constitute a public use under Virginia law.¹¹ While the thrust of the taking must be guided by public considerations, courts have recently clarified that in the context of a taking, a taking may benefit a private landowner as long as the benefit is incidental to achieving the intended public purpose.¹² When taking private property for public use, the government may only take that amount of private property which is “necessary to achieve the stated public use.”¹³

State, county, city, or town government must also pay “just compensation” to a landowner in exchange for taking land.¹⁴ According to the Virginia Constitution, the compensation must amount to at least “the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking.”¹⁵ Therefore, the City of Norfolk would be required to pay just compensation if it “takes” a property.

These limitations on the government’s ability to take private property—the public use, amount, and compensation requirements—are designed to protect private property rights and to ensure that private citizens are not forced to pay the toll for a benefit that accrues to the general public.¹⁶

There are two ways by which the government, including the City of Norfolk, can take private property for public use:

- A **physical taking** occurs when the government appropriates the property or physically intrudes, such as by building a structure.¹⁷
- A **regulatory taking** occurs when the government adopts a regulation that strips the landowner of all or substantially all “economically viable use” of the property.¹⁸

If a private citizen brings a takings claim against the government for either a physical or regulatory action, a court will consider four elements in determining whether the taking was constitutional and therefore permitted. First, the private citizen must demonstrate that he has a valid property interest in the property he claims is being taken.¹⁹ State law will define whether a specific interest is a valid property interest for the sake of a takings claim.²⁰ Second, there must be some government action that chips away at that interest.²¹ This is accomplished through either a physical or regulatory action, as defined above. Third, the court will evaluate whether the government took the private property for public use; if the purpose of the taking does not fall within the purview of “public use,” then the court will find that the government is acting outside the scope of its constitutionally authorized power and the taking will be deemed unconstitutional.²² Fourth, the court will consider whether the private citizen received just compensation in exchange for the government encroaching on his property interest; if the compensation was inadequate, then the taking will be considered unconstitutional.²³

Norfolk’s Susceptibility to Takings Claims

Norfolk is unlikely to be sued by a private citizen under the takings doctrine for adopting

Key Point

Criteria for a Constitutionally Acceptable Taking:

- 1) Privately held property interest
- 2) Government reduces that interest
- 3) Taking is for public use
- 4) Government pays just compensation

certain adaptation measures designed to counteract the dangers posed by flooding and storm surge. However, there are guidelines and procedures that the city must follow in order for its actions to remain protected under federal and state law. The following three adaptation measures—condemnation of private property, building structures on privately owned property, and building structures that affect a private property owner’s waterfront view—are all viable options for Norfolk as it develops strategies and formulates plans for protecting its citizens and properties against the effects of sea level rise.

Adaptation Measure 1: Condemnation of Private Property

Overview

The City of Norfolk can acquire any private property through a voluntary contractual sale. If the owner refuses to sell, then the city has the ability to condemn private property in order to achieve a public purpose—such as flood protection. As long as the city follows certain steps and has a valid public purpose for condemning the property, it is unlikely to be sued under the takings doctrine. The most notable steps include first making an offer to purchase the targeted land from the landowners, and, if such a contractual sale is not possible, then the city must provide the landowners with just compensation in exchange for condemning the land pursuant to its statutorily authorized power of eminent domain.²⁴ If condemnation occurs, then the city must adopt measures that will assist the displaced residents in finding alternative accommodations.

Discussion

Norfolk may desire to condemn private property within its city limits in order to halt rebuilding in areas particularly susceptible to consistent flooding or to use the land in the course of operating services that protect other life and property. Norfolk’s condemnation of private property is permissible because it is in keeping with its constitutionally authorized powers of eminent domain,²⁵ but the city must meet certain criteria.

First, under Virginia law, Norfolk must initially attempt to purchase the property from the private landowners.²⁶ If a contractual sale is not feasible, then Norfolk may begin the taking process.²⁷

Second, then, the taking must be for a public use. Protecting against flooding and the damages thereof is an action reasonably related to public safety and welfare.²⁸ Therefore, it constitutes a “public use.”²⁹

Third, the city must pay compensation. The compensation may be two-fold. First, the city must justly compensate the private landowners for the land taken.³⁰ The amount of compensation is the “sum as the governing body estimates to be the fair value of the property taken and damage, if any, done to the residue.”³¹ In addition, Norfolk must pay compensation to any residents—whether homeowners or tenants—that are displaced as a result of the condemnation. Under Virginia law, when a locality or other state agency takes real estate and consequently displaces a person, the locality must pay to the “displaced” person “fair and reasonable relocation payments.”³² Therefore, if Norfolk condemns a residence or residential area, for example Spartan Village, then the city must pay

Key Point

Criteria for a Constitutionally Acceptable Condemnation of Private Property:

- 1) Pre-condemnation attempt to purchase
- 2) Public use
- 3) Compensation to landowners and displaced residents
- 4) Adherence to specific procedures (e.g., public hearings and displacement control plans)

compensation to the displaced residents as well as the landowners.

Fourth, Norfolk must effectuate its condemnation through specific procedures. The condemnation must be carried out in accordance with a process—which includes public hearings—as outlined in the Virginia Code.³³ One of the more notable aspects of this process is that if the condemnation results in the displacement of residents or tenants,³⁴ then the city is required to specifically plan for that displacement.³⁵ The plan must reflect Norfolk’s cognizance of the fact that the condemnation will cause a forced removal of residents and that this diaspora may cause problems.³⁶ The plan must also contemplate how those problems will be mitigated.³⁷

Adaptation Measure 2: Building Structures on Privately Owned Property

Overview

If the City of Norfolk constructs sea walls, culverts, drains, pumps, or other structures to protect property from flooding and those structures are placed on private property, then the city is likely to withstand a challenge that the taking is unconstitutional if it meets certain criteria. First, the taking of the privately owned property must be primarily for the benefit of the public. This will not be difficult for the city to demonstrate in the context of sea level rise and storm surge control. Second, the amount of land that is taken must not exceed the amount that is necessary to accomplish the public good. Third, the city must pay just compensation to the landowner. If these elements are satisfied, then the city should be able to withstand a claim brought by a private landowner that the taking is unconstitutional.

Discussion

If the City of Norfolk erects a structure on privately owned property, then this action would constitute a physical taking. The property owner’s right to exclusive use of the property and his right to exclude others from his property are negatively affected when the city comes onto his property and physically occupies a portion of it by building a structure for the benefit of the public. The size of the structure is irrelevant, as any physical invasion constitutes a taking.³⁸ The U.S. Supreme Court has been exceedingly clear on this point in the past: “any . . . addition of . . . material, or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as, by the constitutional provisions, demands compensation.”³⁹

Therefore, there must be compensation for the physical intrusion, even though the structure being built is an adaptation measure intended to mitigate the harmful effects of sea level rise and storm surge and consequently furthers the public good. Unfortunately, there is unlikely to be any exception to this compensation requirement.

The United States Supreme Court has held in the past that in wartime emergency situations, compensation for a physical destruction of private property in battle is not necessary.⁴⁰ But, this exception does not extend to a seizure of domestic property during a war.⁴¹ Storm surge and recurrent flooding do not constitute such an emergency situation.

Various state Supreme Courts, including Virginia’s, have allowed an exception to

Key Point

If Norfolk builds a structure on private property in order to mitigate the hazards of sea level rise and recurrent flooding, then Norfolk will be required to pay the private property owner just compensation.

It should be noted that this discussion will not analyze the permit process associated with building structures. That is outside the scope of this Paper.

the payment of just compensation when private property needed to be destroyed out of public necessity.⁴² The public necessity doctrine has been invoked where governments acted to stop a fire from spreading or a pestilence from multiplying.⁴³ The City of Norfolk would be unable to successfully argue that constructing a permanent object on privately owned land for the purpose of mitigating the hazards of sea level rise is a necessary response to an emergency situation. While sea level rise and storm surge certainly pose foreseeable danger, they do not pose immediate harms that require intervention: as would an outbreak of fire or disease.⁴⁴ This exception only allows governments to resist compensation where the use or destruction of property prevents imminent harm.

In the absence of an exception, the City of Norfolk will be required to pay the landowner just compensation for the structure it builds on the landowner's property as the action constitutes a physical taking. While the city's power of eminent domain would allow it to build flood mitigation structures on private property in exchange for just compensation, it is a course of action that the city has not readily engaged in, at least in the last decade.⁴⁵ Federal funding could make this more desirable.

If the City of Norfolk wants to avoid takings and the payment of just compensation altogether, perhaps it could follow other states and incentivize private landowners with waterfront properties to build the adaptation structures—e.g., walls and living shorelines—along the perimeter of their property and the public shoreline (especially if it is the shoreline of a tidal land).⁴⁶ In return for undertaking the construction, the landowner would receive a plot of land that would otherwise be part of the public shore.⁴⁷ With this property right, the landowner could prevent the general public from openly accessing the “area inland from the wall.”⁴⁸ Maryland has been particularly active in adopting this strategy.⁴⁹ One long term benefit of this alternative approach is that it may reduce the flooding risk to certain residential areas. However, this piecemeal approach may not provide the optimal public benefit for the benefits granted to the private owner: an owner is granted more property for placing a structure along one piece of property, which may provide no appreciable flood reduction to the broader area.⁵⁰ The potential reduced risk may alleviate any future need of the City of Norfolk to condemn the property and displace the residents in order to protect life and property. Currently, however, this is not an option under consideration.⁵¹

Adaptation Measure 3: Building Structures that Affect a Private Property Owner's Waterfront View

Overview

If the City of Norfolk erects structures on public property, for instance a sea wall, and those structures obstruct a neighboring landowner's view of the water, then the city is likely acting within the scope of its authority and not at risk of a taking. Government actions that result in a partial diminution of the value of private property are only compensable where they interfere with a property right held by the property owner.⁵² Thus, if a sea wall or other adaptation structure built on neighboring land reduces the value of a property, but fails to interfere with a recognized property right, there will be no compensation.⁵³

Key Point

Rights to Views

1) Not a protected property right in Virginia

2) Norfolk may build a structure that impedes a landowner's view of the water with minimal risk of a Takings claim

Virginia recognizes and protects specific property rights for coastal property owners, called riparian rights, but unlike some other states such as Florida, **there is no jurisprudence or statute that suggests that Virginia considers the right to an unobstructed view a protected property right. Because a Virginia court is unlikely to find a coastal landowner has a protected property right** in maintaining a scenic view, any takings claim brought by a riparian landowner in Norfolk on this basis will probably fail.

Discussion

Norfolk may build sea walls and other flood and storm surge mitigating structures that affect the interests of landowners owning adjacent property. While these structures may not be on the landowner's private property, they may negatively impact the neighboring landowner's interest in an unobstructed view of the water and may diminish the value of his or her property. Florida treats the right to an unobstructed view as a protected "riparian right" and any government interference with that view is a taking.⁵⁴ However, an interest in an unobstructed view presently is not treated as a valid property right in Virginia: placing a sea wall upon public property that limits this view and diminishes the value of the private property is not a compensable taking.

In Virginia, a riparian right is defined as "a qualified property right[s] incident to the ownership of the soil through or by which the waters of a stream flow."⁵⁵ Virginia landowners are given "exclusive rights and privileges to and along the shores of the waters bordering their land down to ordinary low water mark."⁵⁶ The Virginia Supreme Court has recognized five types of riparian rights for Virginia landowners:

- The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.
- The right of access to the water, including a right of way to and from the navigable part.
- The right to build a pier or wharf out to navigable water, subject to any regulations of the State.
- The right to accretions or alluvium.
- The right to make a reasonable use of the water as it flows past or laves the land.⁵⁷

These riparian rights are subject to the government's eminent domain power, which means that they may be "taken" by the government as long as the government satisfies the taking criteria (e.g., public use, just compensation).⁵⁸ However, the focus of this discussion is on the right to an unobstructed view of the water. This is not explicitly recognized as a riparian right in Virginia. It could be construed as a reasonable interpretation of one of Virginia's recognized riparian rights: "Right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water."⁵⁹ However, while Florida recognizes an unobstructed view as a legally protected riparian right, Virginia's neighbor, West Virginia, does not: "A riparian owner has no proprietary right in a beautiful scene presented by a river any more than any other owner of land could claim to a beautiful landscape."⁶⁰ In fact, Florida is the only state that recognizes a riparian right to an

unobstructed view.⁶¹ Because of this, it is likely that the city can build a structure that obstructs a landowner's view, so long as the structure does not interfere with any other riparian rights.

However, there is no precedent rejecting a riparian right to an unobstructed view, so a Virginia court could create such a right if it deems it appropriate under the circumstances.⁶² This is most likely to happen if an adaptation a structure severely or completely eliminates a property owner's water view, causing a total, or near-total, destruction of the value of the property. Although there is no present riparian right to an unobstructed view, the city should be mindful when designing and placing structures that a court may create such a right to protect a sympathetic landowner. Still, the Virginia Supreme Court has recently held that a plaintiff cannot "state a cause of action for declaratory relief for inverse condemnation when the sole damage alleged was a diminution in value arising from the public use of proximately located property."⁶³ After that decision—where the Court refused to allow compensation for diminution of value in a landlocked property—it is less likely that the Court will manufacture a riparian right to permit such compensation in cases involving coastal property. Thus, it is unlikely that the city will have to provide compensation where a seawall obstructs a landowners view of the water.

Conclusion

The City of Norfolk has the power of eminent domain, meaning that it can lawfully "take" privately owned property for public use as long as it pays the landowner just compensation. It may effectuate this Taking by adopting a measure that prohibits the property from being used in such a way as to create economic value. Alternatively, the Taking may occur if the City physically occupies any portion of the privately held land.

Norfolk may use this power to condemn private property in order to protect the property and any people living on the property from the harmful effects of storm surge and recurrent flooding. In order to remain within the bounds of its authority, Norfolk must first offer to purchase this property through a contractual sale, but if such a sale is not possible, then Norfolk must pay the landowners just compensation. The City must be particularly careful if the condemned land is also residential. If residents are consequently displaced, then the City must plan for their displacement and assist them in finding alternative accommodations. As long as Norfolk follows this statutorily prescribed process, then Norfolk is unlikely to be subject to a Takings claim.

In addition to private property condemnation, Norfolk may use its power of eminent domain to construct sea walls, bulkheads, and other flood mitigating structures on privately owned property. While the City has yet to embrace this course of action, such a plan is legally permissible. Because the City would be physically occupying a portion of privately owned land, the City would have to pay the landowner just compensation, take no more land than what is required for the construction, and demonstrate that the purpose of the construction was to primarily benefit the public. Given the increasing intensity and frequency of flooding in Norfolk, it will not be difficult for the City to demonstrate how a flood mitigation structure (such as a sea wall) will further the public's safety and welfare, and thus advance the public good. In summation, if the City decides to adopt this type of measure, then it would be acting within the scope of its authority.

Acknowledgement

Funding for this project came from the Virginia Environmental Endowment

The City of Norfolk may also build structures on public property and consequently impede a neighboring property owner's view of the water without opening itself up to a Takings claim. While Virginia does recognize riparian rights, it is distinct from some other states in that Virginia is unlikely to treat the right to an unobstructed view as a legally protected property right. A valid Takings claim requires the plaintiff landowner to demonstrate that he has a legally protected property right that is being infringed upon by the government. In the context of scenery, while a Norfolk riparian landowner's view may be infringed upon by the government if the government erects a flood mitigating structure, such a view is unlikely protected in the first place, and therefore cannot form the basis of a valid Takings claim. If Norfolk builds a structure on public land that obstructs a private property owner's view, then a Takings claim brought by the landowner on this basis will likely fail.

In conclusion, it is evident that Norfolk has little susceptibility to a Takings claim if it adopts any or all of the above adaptation measures. When planning these efforts, the City must be sure to satisfy the constitutional and statutory requirements. As long as the condemnation process and the construction of sea walls, pumps, and other flood mitigating structures are carried out in accordance with these requirements, the City may move towards creating a safer, drier community without running the risk of liability under the Takings doctrine.

Notes

- 1 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 639 (Vicki Been et al. eds., 3d ed. 2006).
- 2 *Id.*
- 3 U.S. CONST. amend. V.
- 4 U.S. CONST. amend. V.
- 5 VA. CODE ANN. § 15.2-1901 (2013); CHEMERINSKY, *supra* note 1 at 640.
- 6 VA. CONST. art. I, § 11.
- 7 CHEMERINSKY, *supra* note 1 at 640.
- 8 *Id.*; see, e.g., *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (defining public use as a use that is "rationally related to a conceivable public purpose").
- 9 VA. CONST. art. I, § 11.
- 10 VA. CODE ANN. § 15.2-2109 (2013).
- 11 VA. CODE ANN. § 15.2-1904 (A) (2013).
- 12 *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).
- 13 VA. CONST. art. I, § 11.
- 14 VA. CONST. art. I, § 11.
- 15 VA. CONST. art. I, § 11.
- 16 See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
- 17 CHEMERINSKY, *supra* note 1 at 641; see generally, e.g., *Loretto v. Teleprompter Manhattan Corp.*, 458 U.S. 419, 426 (1982).
- 18 See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1054 (1992) (holding that a regulation that results in a 100 percent diminution in property value constitutes a regulatory taking); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137-38 (1978) (holding that a regulation will constitute a regulatory taking when the regulation interferes with the property owner's reasonable investment-backed expectations and substantially reduces the property value so as to leave him with no reasonable beneficial use of the property).
- 19 See CHEMERINSKY, *supra* note 1 at 640.
- 20 *Id.*
- 21 *Id.*
- 22 *Id.*; see also, e.g., *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (defining public use).
- 23 CHEMERINSKY, *supra* note 1 at 640.
- 24 Determining "just compensation" is not a simple or easy process. Property owners will often dispute the government's determination and can benefit from litigating the amount they are to be paid. See, e.g., Andy Fox & Mila Mimica, Local Business Gets Nearly \$4 Million, WAVY.COM, Dec. 2, 2012, available at http://www.wavy.com/dpp/news/local_news/norfolk/norva-plastics-wins-big-in-eminant-domain (discussing

a recent case where a condemned landowner sued over the compensation amount and the jury increased the compensation amount from \$2.4 million to \$3,756,250.

25 See VA. CODE ANN. § 15.2-1901.1 (2013).

26 See VA. CODE ANN. § 15.2-1903 (2013).

27 *Id.*

28 See, e.g., *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring) (defining public use as a use that is “rationally related to a conceivable public purpose”).

29 See *supra* notes 6-8 and accompanying text.

30 VA. CONST. art. I, § 11.

31 VA. CODE ANN. § 15.2-1904 (C) (2013).

32 VA. CODE ANN. § 25.1-406 (2013).

33 VA. CODE ANN. § 15.2-1903 (2013).

34 See VA. CODE ANN. § 25.1-416 (2013).

35 VA. CODE ANN. § 25.1-411 (A).

36 *Id.*

37 *Id.*

38 See *Loretto v. Teleprompter Manhattan Corp.*, 458 U.S. 419, 430, 441 (1982).

39 *Pumpelly v. Green Bay Corp.*, 80 U.S. 166 (1872).

40 *United States v. Caltex, Inc.*, 344 U.S. 49, 53-54 (1952).

41 See, e.g., *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951).

42 See Robin Kundis Craig, Public Trust And Public Necessity Defenses to Takings Liability For Sea Level Rise Responses On The Gulf Coast, 26 J. LAND USE & ENVTL. L. 395, 419-31 (2011).

43 *Id.*

44 See, *id.* at 430-31 (“[T]he public necessity doctrine may be of more limited assistance in avoiding takings claims when the Gulf states and local governments deal with the longer-term and gradual process of sea level rise.”).

45 As of March 2013, the Norfolk City Attorney’s office was unaware of any effort by the City over the past twelve years to use its power of eminent domain and effect a Taking of private property by building a hard engineered structure on the privately owned property. Relatedly, the City has not been asked by any private landowners to adopt this course of action.

46 See James G. Titus, Rising Seas, Coastal Erosion, And The Takings Clause: How To Save Wetlands And Beaches Without Hurting Property Owners, 57 MD. L. REV. 1279, 1281-82 (1998).

47 See *id.*

48 *Id.* at 1281.

49 *Id.* at 1281-82.

50 See Living Shorelines Policy: The Integration of Shoreline Management and Planning, 7 Rivers & Coast 1, 4 (2012).

51 As of March 2013, the Norfolk City Attorney’s office was unaware of any effort by the City to incentivize private landowners to absorb the cost of building adaptation structures on public property in exchange for an ownership interest in part of that public property.

52 *Byler v. Va. Elec. & Power Co.*, 284 Va. 501, 509, 731 S.E.2d 916, 921 (2012).

53 See *id.*

54 See, e.g., *Stop The Beach Renourishment, Inc. v. Fla. Dep’ of Envtl. Prot.*, 30 S.Ct. 2592, 2598 (2010). Note that in order to have a protected riparian right in Florida, “an individual must own property down to the ordinary high water mark.” *Teat v. City of Apalachicola*, 738 So. 2d 413, 413 1999 Fla. App. LEXIS 8646 (Fla. 1st D.C.A. 1999).

55 *Thurston v. Portsmouth*, 205 Va. 909, 912, 140 S.E.2d 678, 680 (1965) (quoting *Hite v. Town of Luray*, 175 Va. 218, 226, 8 S.E.2d 369 (1940)).

56 *Id.* at 911 (internal quotations omitted).

57 *Scott v. Burwell’s Bay Improvement Ass’n*, 281 Va. 704, 710, 708 S.E.2d 858, 862 (2011) (citing *Taylor v. Commonwealth*, 102 Va. 759, 773, 47 S.E. 875, 880-81 (1904)) (internal quotation marks omitted).

58 *Thurston*, 205 Va. at 912, 140 S.E.2d at 680.

59 *Scott*, 281 Va. at 710, 708 S.E.2d at 862 (citing *Taylor v. Commonwealth*, 102 Va. 759, 773, 47 S.E. 875, 880-81 (1904)) (internal quotation marks omitted).

60 *International Shoe v. Heatwole*, 126 W. Va. 888, 892-93 (1944).

61 RIPARIAN AND TITORAL OWNER’S RIGHT TO VIEW OVER NAVIGABLE WATER, 32 A.L.R. 186 (2013). Additionally, New York and West Virginia have explicitly rejected a right to an unobstructed view. *Id.*

62 See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”)

63 *Byler v. Va. Elec. & Power Co.*, 284 Va. 501, 509, 731 S.E.2d 916, 921 (2012).

64 See *supra* notes 6-8 and accompanying text.

65 VA. CONST. art. I, § 11.

66 VA. CODE ANN. § 15.2-1904 (C) (2013).

67 VA. CODE ANN. § 25.1-406 (2013).

68 VA. CODE ANN. § 15.2-1903 (2013).

- 69 See VA.CODE ANN. §25.1-416(2013).
- 70 VA.CODE ANN. §25.1-411(A).
- 71 Id.
- 72 Id.
- 73 See *Loretto v. Teleprompter Manhattan Corp.*, 458 U.S. 419, 430, 441 (1982).
- 74 *Pumpbelly v. Green Bay Corp.*, 80 U.S. 166 (1872).
- 75 *United States v. Caltex, Inc.*, 344 U.S. 149 (1952).
- 76 See, e.g., *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).
- 77 See Robin Kundis Craig, Public Trust and Public Necessity Defense to Takings Liability For Sea Level Rise Responses On The Gulf Coast, 26 J. LAND USE & ENVTL. L. 395, 419-31 (2011).
- 78 See, id. at 430-31 (“[T]he public necessity doctrine may be of more limited assistance in avoiding takings claims when the Gulf states and local governments deal with the longer-term and gradual process of sea level rise.”).
- 79 As of March 2013, the Norfolk City Attorney’s office was unaware of any effort by the City over the past twelve years to use its power of eminent domain and defect a taking of private property by building a hard engineered structure on the privately owned property. Relatedly, the City has not been asked by any private landowner to adopt this course of action.
- 80 See James G. Titus, Rising Seas, Coastal Erosion, and The Takings Clause: How To Save Wetlands and Beaches Without Hurting Property Owners, 57 MD. L. REV. 1279, 1281-82 (1998).
- 81 See id.
- 82 Id. at 1281.
- 83 Id. at 1281-82.
- 84 As of March 2013, the Norfolk City Attorney’s office was unaware of any effort by the City to incentivize private landowners to absorb the cost of building adaptation structures on public property in exchange for an ownership interest in part of that public property.
- 85 See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 130 S.Ct. 2592 (2010). Note that in order to have a protected riparian right in Florida, “an individual must own property down to the ordinary high water mark.” *Teat v. City of Apalachicola*, 738 So. 2d 413, 1999 Fla. App. LEXIS 8646 (Fla. 1st D.C.A. 1999).
- 86 *Thurston v. Portsmouth*, 205 Va. 909, 912 (1965) (quoting *Hite v. Town of Luray*, 175 Va. 218, 226, 8 S.E. 2d 369 (1940)).
- 87 Id. at 911 (internal quotations omitted).
- 88 *Scott v. Burwell’s Bay Improvement Ass’n*, 708 S.E. 2d 858 (Va. 2011) (citing *Taylor v. Commonwealth*, 102 Va. 759, 773, 47 S.E. 875, 880-81 (1904)) (internal quotation marks omitted).
- 89 *Thurston*, 205 Va. at 912.
- 90 *Scott*, 708 S.E. 2d at 862 (citing *Taylor v. Commonwealth*, 102 Va. 759, 773, 47 S.E. 875, 880-81 (1904)) (internal quotation marks omitted).
- 91 *International Shoe v. Heatwole*, 126 W. Va. 888, 892-93 (1944).
- 92 *Pruneyard Shopping Ctr. v. Robins*, 44 U.S. 74, 84 (1980) (emphasis added).

Cover Image: Flooding in the Hague neighborhood of Norfolk. ©Skip Stiles/Wetlands Watch