



MEMORANDUM OF LAW

To: Jessica Kuonen
Hudson River Estuary Specialist, New York Sea Grant

From: Zachary Klein, Ocean and Coastal Law Fellow, National Sea Grant Law Center

Re: Sea Level Rise in Ossining – Consequences of Rezoning and Obligation to Maintain Westerly Road (NSGLC-20-04-04)

Date: May 27, 2020

Advisory Request Summary

On March 23, 2020, you contacted the National Sea Grant Law Center (NSGLC) with questions posed to you by the Mayor of the Village of Ossining, New York regarding her community's adaption to sea level rise. More specifically, you made two inquiries:

- 1) What would happen if Ossining were to rezone areas of the waterfront so these areas could not be developed for certain uses, particularly with respect to lower property values?
- 2) What are the legal grounds for having to maintain Westerly Road?

I. Rezoning Vulnerable Waterfront Areas

The legal consequences of local government rezoning have a long and somewhat tumultuous history dating back to the beginning of zoning in the early 20th century.¹ Property owners can challenge municipal zoning changes that negatively affect the value of private property through the Fifth Amendment's Taking Clause, which applies to states through the Fourteenth Amendment. The Fifth Amendment provides, "private property [shall not] be taken for public use[] without just compensation."² In practice, this allows the government to exercise the power of eminent domain to condemn property, but only if the government has a legitimate interest in using the property for a public purpose (which is interpreted broadly)³ and the condemnation is accompanied by payment of the property's fair market value to its owner.

Municipal zoning is, in practice, land use regulation that is carried out through a local government's exercise of its police power. When exercising the police power, a government typically does not need to compensate private property owners when a regulation or ordinance

¹ See *Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

² U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation.").

³ See *Kelo v. City of New London*, 545 U.S. 469 (2005) (finding that condemning private property so it can be included in an economic development plan by a private developer qualifies as "public use" for purposes of eminent domain).

negatively affects the value of property as long as that regulation or ordinance substantially relates to the general health, safety, or welfare of the community. However, a government may be required to compensate affected property owners when a valid exercise of the police power through a regulation or ordinance totally deprives the property of all economically beneficial use or otherwise “goes too far.”⁴

A. Total Takings

For total takings, the most relevant federal case on the issue is *Lucas v. South Carolina Coastal Council*.⁵ In *Lucas*, the petitioner had bought two residential lots on a South Carolina barrier island in 1986 with the intention of building single-family homes.⁶ In 1998, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels.⁷ He then filed suit contending that, even though the Act may have been a lawful exercise of the state’s police power, the ban on construction deprived him of all “economically viable use” of his property and therefore constituted a “taking” that required the payment of just compensation.⁸

The Supreme Court agreed with Lucas and decided that: (1) title to real estate is not held subject to a state’s subsequent decision to eliminate all economically beneficial use, so a regulation to this effect requires payment of just compensation to affected property owners; but also (2) no compensation is owed when the state’s action is consistent with restrictions already placed upon land ownership by the state’s law of property and nuisance. As discussed more below, a property owner is not entitled to compensation if the contested use was not allowed when the property owner purchased the property due to relevant property law and nuisance principles.⁹

B. Partial Takings - When Government Action “Goes Too Far”

Even if a regulation or ordinance does not totally deprive a property of all economically beneficial use, compensation may still be required if the regulation or ordinance “goes too far.” When considering whether rezoning property has gone so far as to constitute a taking requiring compensation, courts use a three-part balancing test known as the “Penn Central test,” named after the case which created it. The test considers three factors, but does not require all three of them to be present: (1) “[t]he 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.”¹⁰

As to the first factor, New York courts have determined that a property owner must demonstrate that a regulation has destroyed the entire economic value or “all but a bare residue of the economic value” of a specific property in order to receive compensation for a regulatory

⁴ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁵ 505 U.S. 1003.

⁶ *Id.* at 1006-07.

⁷ *Id.*

⁸ *Id.* at 1009.

⁹ *Id.* at 1029-30.

¹⁰ *In re New Creek Bluebelt, Phase 4*, 997 N.Y.S.2d 447, 450 (App. Div. 2d Dept. 2014), citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

taking.¹¹ Accordingly, a significant diminution of property value alone is typically insufficient to constitute a regulatory taking in New York.¹² In the case of *In re New Creek Bluebelt*, for example, the Appellate Division found that a Staten Island property losing 82% of its value due to a New York City wetlands regulation was insufficient to constitute a regulatory taking in and of itself.¹³ Conversely, the court in *Matter of Friedenborg v. New York State Dept. of Env'tl. Conservation* held that a 95% reduction in property value under similar circumstances met this threshold and required compensation.¹⁴ Considering these precedents, zoning in response to sea level rise (SLR) would be unlikely to trigger a compensable regulatory taking unless it truly deprives that property of all but the “bare residue” of its pre-zoning value.

Under the third factor (“the character of the governmental action”), a property owner generally “must establish that the regulation attacked so restricts his [or her] property that he [or she] is precluded from using it for any purpose for which it is reasonably adapted.”¹⁵ While the court in *In re New Creek Bluebelt* found that a 82% reduction in value alone was insufficient to require compensation, it ultimately recognized the fact that the Department of Environmental Conservation was highly unlikely to issue a permit to develop the property effectively deprived the property of all value and, thus, rewarded compensation to the property owner.¹⁶

The second factor (“the extent to which the regulation has interfered with distinct investment-backed expectations”) is not well developed at the federal or state level, likely due to its subjectivity¹⁷ and redundancy.¹⁸ In fact, the court in *In re New Creek Bluebelt* awarded compensation to the affected property owners despite their failure to introduce any evidence concerning this factor, finding that “such an omission [was] not fatal to their claim” in light of the persuasive evidence that the property owners had introduced with respect to the third factor in particular.¹⁹

¹¹ See *id.* at 450, citing *de St. Aubin v. Flacke*, 505 N.Y.S.2d 859 (1986); see *Spears v. Berle*, 422 N.Y.S.2d 636 (1979); *Chase Manhattan Bank v. State of New York*, 103 479 N.Y.S.2d 983 (1984).

¹² *In re New Creek Bluebelt* at 450-51; see *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 645; *Noghrey v. Town of Brookhaven*, 938 N.Y.S.2d 613; *Noghrey v. Town of Brookhaven*, 852 N.Y.S.2d 220).

¹³ *In re New Creek Bluebelt* at 450-51.

¹⁴ See 767 N.Y.S.2d 451 (Div. App. 2d Dept. 2003).

¹⁵ *Id.*, citing *de St. Aubin* at 859.

¹⁶ *In re New Creek Bluebelt* at 451.

¹⁷ *Petition for Writ of Certiorari: Smyth v. Falmouth*, Case No. 17-P-1189 (Mass. App. Ct. 2019) at 21. Available at https://www.supremecourt.gov/DocketPDF/19/19-223/112575/20190816110233981_CERT%20PETITION.pdf. (“The vague and multi-faceted terms in the phrase ‘distinct investment-backed expectations’ invite shifting and subjective interpretations of the concept. As a result, the inquiry regresses to a ‘lot-by-lot, fact-by-fact method of adjudication . . . so fraught with uncertainty that landowners must often litigate to the highest court that will hear them out to determine whether they have even properly stated a claim.” citing Michael M. Berger, *Tahoe Sierra: Much Ado About—What?*, 25 U. Haw. L. Rev. 295, 314 (2003)).

¹⁸ Sean B. Hecht, *Taking Background Principles Seriously in the Context of Sea-Level Rise*, 39 VT. L. REV. 781, 793 (2015). (“It is worth noting that the end result of [*Lucas*’ and *Penn Central*’s] modes of analysis, if fully litigated to conclusion, may be the same in every or virtually every case where a background principle applies. Under a proper *Penn Central* analysis, if a court finds that a state law embodying a background principle prevents a taking, that court would likewise have to hold that the property owner could not have a reasonable expectation to develop the property contrary to that state law requirement.”)

¹⁹ *In re New Creek Bluebelt* at 451.

In light of this information, New York municipalities have the authority to rezone areas vulnerable to SLR but may be required to compensate property owners if the rezoning's impact on affected properties "goes too far." More specifically, NY state courts have interpreted the U.S. Supreme Court decisions on the matter as requiring compensation under the Fifth and Fourteenth Amendments only if the rezoning deprives a property of all but the "bare residue" of its pre-zoning value or the rezoning effectively prevents the property's owner from securing the permits necessary to realize any economically beneficial use of the property. Nevertheless, the U.S. Supreme Court's decision in *Lucas* makes clear that a local government will not be liable for a regulatory taking if the stated use of the property would not be allowed under state law.²⁰

C. Affirmative Defenses: Background Principles of New York State and Common Law

Even if a New York municipality were to rezone properties at risk of sea level rise to the extent that they lose all value, it may be able to escape the need to compensate affected property owners. Although heralded by private property advocates, the Supreme Court's decision in *Lucas* makes clear that background principles of property and nuisance law serve as an affirmative defense to takings liability.²¹ An affirmative defense is a fact or set of facts which, if proven by the defendant, defeats or mitigates the legal consequences of the defendant's otherwise unlawful conduct.²²

The *Lucas* "background principles" refer to laws restricting the use of property that were already in place at the time of purchase. For example, property owners generally cannot use their property in such a way that creates a nuisance to neighboring property owners, such as by playing extremely loud music. An excessive noise ordinance is simply a local enactment of a restriction already present in state law. When applicable, these background principles are an absolute defense to any takings claim, meaning property owners are not entitled to compensation even if properties are rendered totally worthless by regulation.²³ Under *Lucas*'s test for regulatory takings, the primary inquiry is whether the claimant had a protected property interest. If the claimant lacked a property interest because of "background principles" inherent in her title, the challenged regulation is not a compensable taking.²⁴

Although the precise contours of these background principles have remained murky in the post-*Lucas* era, the *Lucas* majority explicitly clarified three of the principles which belong in this

²⁰ Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARVARD ENVTL. L. REV. 321, 326 (2005).

²¹ Blumm & Ritchie, *supra* n.14 at 326. The *Lucas* Court determined that for South Carolina to avoid compensation on remand, the state "must identify background principles of nuisance and property law that prohibit the [contested] uses." 505 U.S. at 1031.

²² See Legal Information Institute, *Affirmative Defense*, CORNELL UNIV. retrieved May 21, 2020). Available at https://www.law.cornell.edu/wex/affirmative_defense.

²³ See, e.g., Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVTL. L.J. 439, 458 (1993) (arguing that "the only categorical rule in the *Lucas* majority opinion is a negative one: If a property restriction repeats limitations inherent in the title to property, as defined by property and nuisance law ...the restriction never effects a taking") (emphasis in original); David Coursen, *Lucas v. South Carolina Coastal Council: Indirection in the Evolution of Takings Law*, 22 ENVTL. L. RPT. (ENVTL. L. INST.) 10,778, 10,784 (1992).

²⁴ 505 U.S. at 1029.

metaphorical basket: nuisance, necessity, and federal navigational servitude.²⁵ The federal navigational servitude is irrelevant in this context, but the doctrines of public nuisance and public necessity theoretically remain available as affirmative defenses to local governments that rezone due to SLR, at least under certain circumstances.

i. Public nuisance

The New York Court of Appeals has indicated that public nuisance “consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.”²⁶ Although no New York case was found in which a municipality raised public nuisance as an affirmative defense, this characterization contains two key provisions that suggest public nuisance may be available if property is rezoned due to SLR. First, public nuisance may arise not only from an action, but also from an omission. Second, public nuisance may be invoked to protect the property and safety of a considerable number of persons.

As sea levels rise and waterfront properties become inundated, structures on those properties may begin to interfere with the public’s ability to access beaches or threaten public health. It’s possible that the continued presence of such structures could be deemed a public nuisance by future courts. In such case, a local government ordinance requiring the removal of such structures might be protected from takings claims by the “background principle” defense.

ii. Public necessity

The doctrine of public necessity has long operated as a defense to taking claims because courts recognize that private rights fall to public need in times of genuine emergency.²⁷ However, two aspects of the public necessity doctrine limit its potential usefulness as a defense to regulatory taking claims in the context of SLR-related regulations. First, most states require an existing or imminent emergency before the defense applies. This requirement is easily met in the classic applications of the public necessity doctrine, which are government actions responding to a fire²⁸ or flood.²⁹ Second, governments may assert the public necessity defense only if the destruction or limitation of private property is reasonably necessary to address the threat in question.³⁰ In practice, this second limitation imposes few restrictions on local governments because it merely requires that their responses to emergencies be reasonable.³¹ Therefore, the critical question

²⁵ *Lucas*, 505 U.S. at 1028-29.

²⁶ *Copart Indus., Inc. v. Consol. Edison Co. of New York*, 41 N.Y.2d 564, 568 (1977).

²⁷ See *United States v. Caltex, Inc.*, 344 U.S. 149, 154 (1952), rehearing denied, 344 U.S. 919 (1953); *Surocco v. Geary*, 3 Cal. 69, 73 (1853).

²⁸ See generally, e.g., *Bowditch v. Boston*, 101 U.S. 16 (1879); *Field v. City of Des Moines*, 39 Iowa 575 (1874); *American Print Works v. Lawrence*, 23 N.J.L. 9 (1850).

²⁹ See generally, e.g., *Dudley v. Orange County*, 137 So. 2d 859 (Fla. App. 1962); *Short v. Pierce County*, 78 P.2d 610 (Wash. 1938); *Aiken v. Village of Wells River*, 40 A. 829 (Vt. 1898).

³⁰ See *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 585 F. Supp. 1062, 1067 (D. Or. 1984)(“[t]he defense applies only when the emergency justifies the action and when the defendant acts reasonably under the circumstances.”).

³¹ *Craig*, *supra* n.29 at 30.

regarding the availability of the public necessity defense to local governments for rezoning SLR-vulnerable areas is how the State of New York views the “actual necessity” requirement.

Unfortunately, New York case law with respect to “actual necessity” is scant and broad. In *Matter of Cheesebrough*, the Court of Appeals held that New York City could not build drains through plaintiff’s land for the purpose of draining water from his neighbors’ lands into the Harlem River without compensating him for the intrusion upon his land.³² There, the court observed:

*In cases of actual necessity, as that of preventing the spread of fire, the ravages of a pestilence, the advance of a hostile army, or any other great calamity, the private property of any individual may be lawfully taken, used or destroyed for the general good, without subjecting the actors to personal responsibility. In such cases, the rights of private property must be made subservient to the public welfare; and it is the imminent danger and the actual necessity which furnish the justification.*³³

More recently, the Supreme Court of New York County favorably endorsed this language when reviewing how 9/11 responders should be treated under the State Defense Emergency Act.³⁴ Neither court decision, however, clarifies the contours of “actual necessity” beyond “imminent danger” and, axiomatically, actual necessity. Legal scholarship acknowledges that it is unclear whether SLR currently qualifies as a sufficiently imminent danger to trigger public necessity but also posits that the danger posed by SLR to waterfront properties and public health will become increasingly imminent as sea levels continue to rise.³⁵ In the absence of clearly developed “actual necessity” jurisprudence, the scholarship notes, courts may be able to evolve this common-law doctrine beyond the “strict emergency” requirement or, alternatively, distinguish public necessity in the context of coastal and riverfront development from public necessity elsewhere.³⁶

In light of this uncertainty, a decision from New York’s now-defunct Court of Correction of Errors offers insight into how municipalities in New York may be able to successfully invoke the public necessity doctrine to avoid compensating property owners who bring a takings claim arising from SLR-related rezoning:

*Where the same extent of loss or injury would have been sustained by the individual, as the necessary consequence of the fire or other public calamity, if his property had not been thus taken and destroyed for the protection of others, it may be considered as at the least doubtful whether he has any equitable claim to compensation, either from the public in general, or from that portion of the community for whose particular benefit or protection his private property was taken or sacrificed; for in such a case, although others have been benefited, he has in fact sustained no damage thereby.*³⁷

³² 78 N.Y. 232 (1879).

³³ *In re Cheesebrough*, 78 N.Y. 232, 36-37 (Ct. App. 1879).

³⁴ See *Daly v. Port Authority of New York and New Jersey*, 793 N.Y.S.2d 712, 717-18 (Sup. Ct., N.Y. County 2005).

³⁵ Craig, *supra* n.29 at 44.

³⁶ See *id.* at 32, 40 (“[T]here is some suggestion [...] that “emergencies” justifying the public necessity doctrine can be of some duration. In 1942, for example, the Alabama Supreme Court announced that war—in this case, World War II—was an emergency justifying the taking of private property without compensation.”).

³⁷ *Mayor of New York v. Lord*, 18 Wend. 126, 129-30 (1837).

This passage suggests that a municipality would have a much stronger claim to the public necessity defense if it can demonstrate that SLR will eventually overcome downzoned properties or, at the very least, inhibit their economically beneficial use to a similar degree as the attempted rezoning.

D. Zoning Mechanisms that Could Avoid Compensation

There are a few zoning options that can effectively address SLR's impact on waterfront properties while posing a minimal threat of triggering compensation to affected property owners.³⁸ Thus, the consequences of re-zoning vulnerable waterfront areas (VWAs) largely depend on how such re-zoning occurs.

i. Overlay zoning

First, local governments in New York are able to implement overlay zoning. Overlay zones allow local governments to superimpose additional regulatory requirements on an existing zone with special characteristics. A major benefit of overlay zones is that they do not require disruption of existing zoning classifications. In order to create an overlay zone, a local government would need to (1) establish the purposes for creating the district, (2) map the district, and (3) establish the regulations to achieve the purposes for creating the district.³⁹

More specifically, SLR-sensitive municipalities may want to consider creating a type of overlay zone known as an "accommodation zone" for its high-risk waterfront areas. Accommodation zones generally allow new development but limit its intensity and density, and may also require that structures be designed or retrofitted to be more resilient to flood impacts.⁴⁰ Two kinds of accommodation zones that are particularly relevant to SLR are preservation zones and retreat zones. Creating a preservation zone allows municipalities to preserve and enhance natural flood buffers.⁴¹ More aggressively, local governments can designate a retreat zone, which allows them to restrict the rebuilding of damaged structures and/or require the removal or relocation of structures that become inundated.⁴² In the retreat zone, municipalities can combine regulations with incentives and encourage landowners to relocate structures upland through tax benefits, acquisitions, or conservation easement programs.

³⁸ Michael Allan Wolf, *Strategies for Making Sea-Level Rise Adaptation Tools 'Takings-Proof'*, 28 J. LAND USE & ENVTL. L. 157, 175 (2013), available at <http://scholarship.law.ufl.edu/facultypub/404>.

³⁹ Center for Land Use Education, *Planning Implementation Tools – Overlay Zones*, COLLEGE OF NATURAL RESOURCES AT THE UNIV. OF WISCONSIN STEVENS POINT (Nov. 2005), available at <ftp://ftp.wi.gov/DOA/public/comprehensiveplans/ImplementationToolkit/Documents/OverlayZoning.pdf>.

⁴⁰ Jessica Granis, *Adaptation Tool Kit: Sea-Level Rise and Coastal Land Use*, Georgetown Climate Center (Oct. 2011) at 19-20, available at https://www.georgetownclimate.org/files/report/Adaptation_Tool_Kit_SLR.pdf.

⁴¹ See generally Thomas T. Ankersen et al., presentation to the Charlotte Harbor National Estuary Program, *Comprehensive Plan Policies, Land Development Regulations, and a Parcel-Specific Implementation Strategy to Address Sea-Level Rise Impacts in Florida* (May 27, 2010), available at <http://www.law.ufl.edu/conservation/projects/coastal.shtml>.

⁴² Granis, *supra* n.16 at 20.

ii. *Prior nonconforming uses and variances*

If rezoning might prevent all economically beneficial use of a property, local governments can ensure the availability of mechanisms to preserve reasonable use of the property. By awarding an exemption that allows some reasonable use of the property, local governments can foreclose a property owner's claim that the regulatory regime destroys all but a bare residue of value. There are two zoning mechanisms available to municipalities tackling SLR that can be deployed to ensure that compensation to the owners of rezoned properties is not necessary: prior nonconforming uses and variances.

A prior nonconforming use (PNCU) refers to an activity that existed prior to the enactment of a zoning restrictions that would otherwise prohibit such use.⁴³ PNCUs are also known as “grandfather” protections in local zoning bylaws.⁴⁴ New York courts and municipal legislators have shown a “grudging tolerance” towards PNCUs but disfavor their broad application, as “[t]he law ... generally views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination.”⁴⁵ As a result, a party looking to rely on a PNCU to continue a now forbidden use must establish specific actions showing its explicit intent to use the property for its dedicated purpose at the time the zoning ordinance became effective; a mere contemplation of purpose, lacking supportive evidence of undertakings to effectuate such intentions, will not suffice.⁴⁶

Conversely, a variance is granted by a municipality's zoning board of appeals (ZBA) to allow use of property in a manner not permitted by the applicable zoning regulations.⁴⁷ The variance procedure is designed to grant administrative relief from hardship unique to an individual property owner arising from the literal application of zoning requirements.⁴⁸ New York's zoning-enabling acts authorize a ZBA, on appeal from the decision of the local official charged with the enforcement of zoning regulations, to grant both use variances and area variances.⁴⁹

If the applicant for a use variance proves the requisite unnecessary hardship, the ZBA must grant the minimum variance that it deems necessary and adequate to address such hardship, while simultaneously preserving and protecting the character of the neighborhood and the health, safety, and welfare of the community.⁵⁰ Additionally, ZBAs in New York may impose reasonable conditions and restrictions that are directly related or incidental to the proposed use of

⁴³ See Mark S. Dennison, 44 AM. JUR. PROOF OF FACTS 3d 531 (1997).

⁴⁴ Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, N.Y.U. L. Rev. 1222, 1224 n. 4 (2009), citing *Rourke v. Rothman*, 859 N.E.2d 821, 822 n.5 (Mass. 2007).

⁴⁵ *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*, 885 N.Y.S.2d 8, 14 (2009); see *Matter of Toys “R” Us v. Silva*, 654 N.Y.S.2d 100 (1996).

⁴⁶ *Id.* at 14; see *Syracuse Aggregate Corps. v. Weise*, 434 N.Y.S.2d 150, citing *Matter of Harbison v. City of Buffalo*, 176 N.Y.S.2d 598 (1958).

⁴⁷ See Division of Local Government Services, *Zoning Board of Appeals*, N.Y. DEPT. OF STATE (2015) at 10. Available at https://www.dos.ny.gov/lg/publications/Zoning_Board_of_Appeals.pdf.

⁴⁸ *Paplow v. Minsker*, 350 N.Y.S.2d 238 (1973).

⁴⁹ Gen. City Law § 81-b(3)(a); Town Law § 267-b(2)(a); Village Law § 7-712-b(2)(a).

⁵⁰ Gen. City Law § 81-b(3)(c); Town Law § 267-b(2)(c); Village Law § 7-712-b(2)(c).

the property. These must be consistent with the spirit and intent of the zoning law in order to minimize any adverse impact the variance may have on the neighborhood or community.⁵¹

NY law gives ZBAs similar discretion to grant area variances, which involve matters like setback lines, frontage requirements, lot size restrictions, density regulations, and height limitations.⁵² By carefully administering use and areas variances as necessary for properties that are rezoned due to SLR, New York municipalities may be able to preserve those properties' economically beneficial use and avoid the need to compensate their respective owners.

II. Legal Obligation of New York Municipalities to Maintain Roads

Various sections of New York law make reference to the different standards that apply to the discontinuation of public maintenance of streets in counties, towns, and cities. For villages such as Ossining, the authority for discontinuing streets is found in Village Law §§6-612 and 6-614. Village Law §6-612 provides, "The board of trustees may by resolution provide for laying out, altering, widening, narrowing, discontinuing or accepting the dedication of a street in the village." Village Law §6-614 requires notice to the public of any resolution under consideration for discontinuing, or "demapping," a street. Nevertheless, Village Law §§6-612 and 6-614 set forth no legal standard for determining whether a village may discontinue a street.

A. *The "Useless" Test*

Although villages have the authority to discontinue streets, New York courts have held that the discontinuance of a village street requires a finding that the street has become "useless as a right-of-way to the general public."⁵³ In one case, Bass Building Corp. owned a tract of land that was under development in the Village of Wesley Hills, contiguous to the Village of Pomona. A single road, Hidden Valley Drive, extended from within the Village of Pomona ("Pomona") into the Village of Wesley Hills, where it intersected Bass Building's land at the border. Pomona's Board of Trustees passed a resolution that the roadway on its side of the border be discontinued, as it was useless to the village. Bass Building brought suit, alleging that the Pomona resolution was designed to prevent the development by leaving it with only one means of ingress and egress.⁵⁴

In its decision, the Appellate Division explained that municipalities hold fee title to streets in trust for the general public.⁵⁵ Here, the Second Department observed, Bass Building's interest as a member of the public in the continued existence of Hidden Valley Drive was within the zone of interests to be protected. It was in this context that the court held that the "useless" test governed the discontinuance of village streets under Village Law §§6-612 and 6-614, adding that Pomona had never attempted to establish that the discontinued portion of Hidden Valley Drive had become useless as a right-of-way to the general public.⁵⁶

⁵¹ Gen. City Law § 81-b(5); Town Law § 267-b(4); Village Law § 7-712-b(4).

⁵² Beth Bates Holliday, et al, 12A N.Y. JUR. 2d Buildings § 380 (2020).

⁵³ *Bass Bldg. Corp. v. Village of Pomona*, 530 N.Y.S.2d 595 (2d Dep't 1988).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

Additionally, a village in New York that is interested in demapping a street must also consider the implications of the state’s environmental laws—specifically, the State Environmental Quality Review Act (“SEQRA”). The case of *Matter of Baker v. Village of Elmsford*⁵⁷ arose after the Village of Elmsford (“Elmsford”) agreed to purchase property located on Vreeland Avenue for \$1,550,000. A rider to the contract conditioned the sale upon the village demapping portions of Vreeland Avenue and River Street and transferring title to the demapped property to the seller in exchange for a credit to the village of \$200,000 against the contract price at closing. Elmsford prepared short Environmental Assessment Forms (“EAFs”) for each road pursuant to the State Environmental Quality Review Act (“SEQRA”), and these alleged that the proposed demapping of Vreeland Avenue and River Street would not affect the area’s air quality, surface and ground water, traffic patterns, erosion, drainage, or flooding problems.⁵⁸

After Elmsford’s Board of Trustees adopted two resolutions that discontinued portions of Vreeland Avenue and River Street, two nearby property owners challenged the resolutions on the basis that the streets were not useless because they were used for vehicular access and parking by the property owners’ tenants and employees. They also argued that the demapped roads were used during flooding, which occurred at least six times per year, as the sole means of ingress to and egress from the area when an alternate route was flooded. Moreover, the plaintiffs contended that the village had failed to take the requisite “hard look” at the environmental impact of the discontinuances as required by SEQRA.

In its decision, the Appellate Division observed that once a street is established, its continued existence is presumed, and municipalities may close a street only if acting under proper statutory authority. The court noted that under the “useless” test, a street is not useless if it affords a means of ingress or egress and is used to any degree more than mere token use. As a result, the court held that the Elmsford’s determination that portions of Vreeland Avenue and River Street had become useless was arbitrary and irrational given that the streets had undergone improvements at the insistence of the village government and were repeatedly used for vehicular travel during times of periodic floods. More importantly, the court also found that Elmsford had not complied with SEQRA. Even though Elmsford’s EAFs stated that road discontinuances would not cause any adverse effects associated with existing traffic patterns or flooding, the court observed that the EAFs’ “Reasons Supporting This Determination” sections “merely restated that there would be no adverse effects related to traffic or flooding” and were “merely conclusory.” Under these circumstances, the court held, the Elmsford’s analysis of the potential adverse effects of discontinuances on local traffic and safety did not represent the “hard look” with “reasoned elaboration” mandated by SEQRA. Accordingly, the court annulled Elmsford’s resolutions.

In brief, local governments in New York may not close a SLR-vulnerable road by merely passing a resolution to this effect. Before such a resolution can be entertained, the road in question can no longer be used as means of ingress or egress to any degree more than mere token use. Additionally, even when local government believes that a road may meet the “useless” test, SEQRA still requires the preparation of an EAF that reasonably elaborates a “hard look” at the proposed demapping’s effect on traffic patterns and flooding. If this “hard look” identifies any adverse consequences on traffic patterns or flooding that would arise from demapping the road,

⁵⁷ 2009 N.Y. Slip op. 9220 (2d Dep’t 2009).

⁵⁸ Anthony Guardino, *Numerous Statutes Outline Street Demapping Standards*, 243 NEW YORK L. J. 17 (2010).

then the road presumably does not meet the “useless” test and cannot be demapped by the local government.

B. Obligation to Maintain a Road Until It Is “Useless”

Nevertheless, local governments should take into account the legal grounds for having to maintain a road that will succumb to SLR until it is actually “useless” and can be demapped. When a municipality fails to maintain or design roads adequately, it may face tort liability if harm to human life or property results. This liability is often brought as a negligence claim. Negligence is “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”⁵⁹ Four elements must be satisfied to prove negligence: duty, breach, causation, and damages. The following analysis concerns only the duty of local governments to maintain roads in light of the threat posed thereto by SLR.

In New York, municipal governments are under a continuing, nondelegable duty to maintain the roads in a reasonably safe condition.⁶⁰ This duty extends not only to the physical surface of the thoroughfare, but also to traffic control devices, barriers, abutting curbs, roadway shoulders on which it is reasonably anticipated that some traffic will travel, and to the removal of ice, snow, debris or other dangerous elements from the road surface.⁶¹ Additionally, the government must assure adequate visibility on its thoroughfares and eliminate dangerous obstructions.⁶² Municipalities must also warn the users of public roads about existing hazards and dangerous conditions.⁶³

Even when a government entity is negligent in performing a duty, sovereign immunity may bar claims against that entity arising from such negligence. This defense provides immunity to the government for its discretionary actions,⁶⁴ but not its proprietary ones.⁶⁵ While quintessential governmental functions include police and fire protection,⁶⁶ proprietary functions also include “the maintenance of roads and highways in a reasonably safe condition.”⁶⁷ As a result, sovereign immunity is not available to municipalities as a defense to liability for tort claims arising from failing to fulfill its duty to maintain streets, roads, and highways until they are actually “useless.”

⁵⁹ Restatement (Second) of Torts, § 282.

⁶⁰ See *Friedman v. State*, 67 N.Y.2d 271, 283 (Ct. App. 1986); *Weiss v. Fote*, 7 N.Y.2d 579, 584 (Ct. App. 1960) quoting *Annino v. City of Utica*, 276 N.Y. 192, 196 (Ct. App. 1937); see also *Lopes v. Rostad*, 45 N.Y.2d 617, 623 (Ct. App. 1978).

⁶¹ Lee S. Kreindler, et al., 15 N.Y.Prac., New York Law of Torts § 17.61 at 1 (2019).

⁶² *Parada v. City of New York*, 613 N.Y.S.2d 630 (1st Dep't 1994); *Sanchez v. Lippincott*, 455 N.Y.S.2d 457 (4th Dep't 1982); *Wilkinson v. State*, 178 N.Y.S.2d 55 (Ct.Cl.1958) mod. on oth. grds., 200 N.Y.S.2d 99 (1960); *Karrat Bros. & Co. v. State*, 156 N.Y.S.2d 924 (4th Dep't 1956), aff'd and revsd. in pt. on oth. grds., 169 N.Y.S.2d 909, (1957); *Battistoni v. State*, 149 N.Y.S.2d 614 (3d Dep't 1956); but see *Duger v. Estate of Carey*, 744 N.Y.S.2d 262 (3d Dep't 2002).

⁶³ *Martin v. Reedy*, 606 N.Y.S.2d 455 (3d Dep't 1994); *Fisher v. State*, 433 N.Y.S.2d 280 (3d Dep't 1980); *Coco v. State*, 474 N.Y.S.2d 397 (Ct.Cl.1984); *Rivero v. City of New York*, 290 N.Y. 204 (1943) (duty to warn of unsafe path); *Marcario v. City of New York*, 103 N.Y.S.2d 205 (2d Dep't 1951) (duty to warn of ditch).

⁶⁴ *Turturro v. City of New York*, 28 N.Y.3d 469, 479 (2016).

⁶⁵ *Heeran v. Long Is. Power Auth.*, 36 N.Y.S.3d 165 (2016), aff'd 30 N.Y.3d 719 (2018).

⁶⁶ See *id.*

⁶⁷ *Id.*

III. Conclusion

The implications of sea level rise raise important legal questions for municipalities to consider, particularly with respect to the rezoning and maintenance of areas susceptible to inundation. The legal consequences that follow from rezoning vulnerable waterfront areas will depend on how such rezoning occurs and whether mechanisms are in place, such as variances, to prevent properties from being rendered completely worthless by the regulation.

Separately, a New York municipality cannot abandon a road until it is no longer used; until then, the municipality has a duty to maintain that road in reasonably safe condition, and the municipality will be unable to invoke sovereign immunity as a defense to liability for harm arising from the road's condition.

Thank you for bringing your question to the National Sea Grant Law Center. I hope you find the above information useful, and please contact us at your convenience with any follow-up questions.