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stormsmart coasts

Case Study - A Cape Cod Community Prevents New Residences in Floodplains

Lessons learned from Chatham's legally successful conservancy districts

In a landmark 2005 ruling, the highest court in Massachusetts decisively affirmed the authority of municipalities to regulate or even prevent residential or other high-risk development in flood-prone areas without financial compensation to the property owners, so long as the regulation does not render the land entirely valueless.

The case arose from the town of Chatham's refusal to permit the construction of a new home in a flood zone because the local zoning bylaw prohibited new residential units in the town's mapped floodplains. After multiple appeals by the landowner, the Massachusetts Supreme Judicial Court ruled on July 26, 2005, that the zoning bylaw was based on reasonable public interest, and did not render the lot economically worthless. Therefore, no compensation was due. The decision was not appealed.

THE ZONING BYLAW

Chatham's zoning bylaw designates "conservancy districts" encompassing all land in the town's 100-year floodplain as mapped in its most recent town-approved Flood Insurance Rate Maps. The goal of the bylaw is to protect people, property, and resources (see "Chatham Conservancy District Purposes" sidebar). The bylaw clearly delineates three types of activities in designated conservancy districts—permitted uses, special permit uses, and prohibited uses—examples are shown in the table below.

Examples from Chatham's Zoning Bylaw

Permitted uses	Special permit uses	Prohibited uses
Fishing, cultivation, and harvesting of shellfish (including excavation of areas for cultivation and harvesting of marine foods); various horticulture activities	Construction of certain structures, including catwalks, piers, ramps, stairs, boat shelters, tennis courts	Filling of land
Outdoor recreation activities, provided that related structures do not destroy beneficial character of district	Construction of structures or buildings used in conjunction with a marina or boatyard	Draining of land
Floats	Construction and maintenance of driveways or roadways of minimum legal length and width	Discharging of hazardous substances, treated sewage, or thermal effluent
Maintenance of existing raised roadways	Construction and maintenance of private boat launches and beaches	Construction of residential units or use of houseboats or barges as dwellings
Installation of utilities	Installation of submerged pipes or cables used for swimming pools or commercial fishing operations	Building of any structure in V and V1-30 Zones
Agriculture		Construction of pipelines to carry crude oil or unprocessed natural gas
Government dredging of navigation channels		Actions that destroy natural vegetation, alter existing tidal flow, or otherwise alter the character of the land
Construction and maintenance of town landings and public boat launching ramps; nourishment of town beaches		Destruction of natural growth that prevents erosion or storm damage
Mosquito control by Cape Cod Mosquito Control Project		Draining, damming, or relocating water courses except for aquaculture, agriculture, or flood or mosquito control
Maintenance of existing channels and marine facilities		

"The takings clause was never intended to compensate property owners for property rights they never had." – *Massachusetts Supreme Judicial Court*

THE CASE

The lawsuit concerned a 1.8-acre parcel located in Chatham's mapped floodplain (and therefore, in a conservancy district). In 1998, the owner of the lot received an offer of $192,000 for the parcel, contingent upon the ability of the purchaser to obtain the permits necessary to build a home. The proposed home was to be elevated on open piles above the mapped 100-year flood elevation.

Because the lot is located within a conservancy district, the town's Zoning Board (the district permitting authority) denied the building permit application. The owner of the lot responded by filing one suit against the Selectmen and Zoning Board and another against the town's Conservation Commission (the construction would have also violated a local wetlands bylaw), each suit alleging that the bylaws violated the owner's constitutional property rights, and that the town had thereby effectively "taken" her property (for more on constitutional takings, see StormSmart Coasts Fact Sheet 2, *No Adverse Impact and the Legal Framework of Coastal Management*). A Superior Court judge combined the two suits. After a two-day trial, which included testimony on the flood history of the property, the risks and impacts of its potential development, and the difficulty in safely evacuating the area, the Superior Court found insufficient evidence to support the plaintiff's claims that the bylaws had resulted in a regulatory land taking, and upheld the town's decision.

When the plaintiff appealed the decision, the Massachusetts Appeals Court affirmed the Superior Court's decision. While acknowledging that the bylaw did severely constrict the possible uses of the lot, the Appeals Court noted that "a land-use regulation may deprive an owner of a beneficial property use—even the most beneficial such use—without rendering the regulation an unconstitutional taking." The Appeals Court further noted that:

> "As a matter of Massachusetts law, restricting residential development within the path of floodwater, the flood plain, is a direct, logical, and reasonable means of safeguarding persons and property from those hazards occasioned by a flood and advances a substantial State interest, that is, the health, safety, and welfare of the general public as well as that of its individual members."

Photo: Google Earth

The arrow indicates the approximate location of the proposed home site. This satellite photograph also shows the breach in the barrier beach from 1987. The breach greatly increased the exposure of the lot and surrounding properties to wave and storm surge.

The plaintiff then appealed to the Massachusetts Supreme Judicial Court, which, after reviewing the case, upheld the lower courts' rulings, citing a recent U.S. Supreme Court decision that had rendered zoning bylaws and ordinances valid under the U.S. Constitution so long as their application bears a "reasonable relation to the State's legitimate purpose" (such as protecting people and property).

The decision also noted that while the regulation may have indeed reduced the market value of the property, the prevention of one potential use for a piece of property did not constitute a total taking. A witness for the plaintiff estimated that with the bylaw, the lot was worth at least $23,000—a substantial reduction but still more than a "token" interest, according to the decision which cited a (2001) case where the U.S. Supreme Court ruled that no compensation was due when a regulation reduced the appraised value of a parcel from $3,150,000 to $200,000.

Finally, the decision noted that there was ample evidence showing that the construction of a home on the lot could have severe adverse impacts on the surrounding community. The plaintiff's expert testified that the proposed house could be

A Nauset Beach home destroyed by a 2007 storm. As was noted in the Massachusetts Supreme Judicial Court's ruling, damaged structures like the one in this photo can create debris that may threaten other structures.

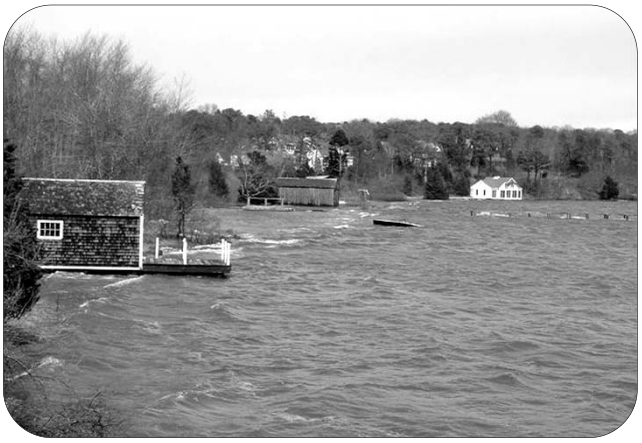
picked up off its foundation and floated away by a severe storm, potentially damaging neighboring homes. The defendant offered testimony that efforts to evacuate the home during a flood would pose risks to rescue workers, as well as the home's occupants.

The Massachusetts Supreme Judicial Court concluded that no compensation was due to the property owner, because: "The taking clause was never intended to compensate property owners for property rights they never had."

The decision was not appealed.

WHY CHATHAM WON THE CASE

1. The zoning bylaw had the clear goals of protecting people and property.
2. While the bylaw prevents construction of new homes, it leaves property owners with many alternative uses. The land retains more than a "token" value.
3. The law was fair, and applied to identifiable, mapped areas (i.e., wasn't "spot zoning," which unfairly prevents one individual property owner from using property in a certain way).
4. The town's emergency management experts testified that evacuation of the areas would put rescue workers at risk.
5. The town was willing to legally defend its position.



Top: The erosional beach near the proposed home site is prone to flooding and storm damage.

Bottom: An area of Chatham in the floodplain where flooding can make evacuation difficult.

As coastal areas of Massachusetts continue to change in response to erosion and storms, the relative risks to properties do too. While the risk to these homes near a new breach is obvious, homes on the mainland that were once protected by the shifting barrier island also face increased exposure. (Photo: Nauset Beach, Chatham.)

FOR MORE INFORMATION . . .

- For an overview of the legal framework of coastal management in Massachusetts, see the StormSmart Coasts Fact Sheet 2, *No Adverse Impact and the Legal Framework of Coastal Management*.
- For the text of the decision, see www.socialaw.com/slip.htm?cid=15382.
- For a copy of the bylaw see www.chatham-ma.gov/Public_documents/chathamma_CommDev/Zbylaw2005.pdf.
- For a more detailed look at the legal theory behind this and similar cases involving management of land in hazardous areas, see the Association of State Floodplain Managers' *No Adverse Impact Floodplain Management and the Courts*, by attorneys Jon Kusler and Ed Thomas at www.floods.org.
- The Massachusetts StormSmart Coasts webpage: www.mass.gov/czm/stormsmart.

CHATHAM CONSERVANCY DISTRICT PURPOSES

a. Preserve and maintain the groundwater supply on which the inhabitants depend.

b. Protect the purity of coastal and inland waters for the propagation of fish and shellfish and for recreational purposes.

c. Protect public health and safety.

d. Protect persons and property from the hazards of flood and tidal waters that may result from unsuitable development in or near swamps, ponds, bogs, and marshes; along water courses; or in areas subject to flooding, extreme high tides, and the rising sea level.

e. Preserve the amenities of the town and conserve natural conditions, wildlife, and open space for the education and general welfare of the public.

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For further information on StormSmart Coasts, visit www.mass.gov/czm/stormsmart.

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This is not and cannot be legal advice. For legal advice, see an attorney licensed in your jurisdiction.

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