



THE IMPLICATIONS OF ROLLING EASEMENTS AND TRANSFERRED DEVELOPMENT RIGHTS IN  
MAINE, CONNECTICUT, AND MASSACHUSETTS

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## I. INTRODUCTION

As the consequences of climate change begin to take effect with impacts such as rising sea levels, increased erosion, and increased storm frequency and intensity, coastlines will shift, causing a variety of issues for municipalities. These issues include the conflict between the public's right to access the water and public beaches, and private property owner's rights to land, potentially upsetting the balance of public and private rights. One possible tool to cope with this problem is the implementation by states and municipalities of rolling easements, which are either:

1.[a] [r]egulation or an interest in land in which a property owner's interest in preventing real estate from eroding or being submerged yields to the public or environmental interest in allowing wetlands, beaches, or access along the shore to migrate inland[; or] 2. An interest in land along the shore whose inland boundary migrates inland as the shore erodes.<sup>1</sup>

The theory of rolling easements posits that the best way to combat rising seas is not to combat them at all, but, instead, allow them to move inland and adjust structures, property interests, etc., accordingly.<sup>2</sup> This memorandum will explore whether rolling easements are a viable solution for Massachusetts, Connecticut, and Maine in managing the impending consequences of climate change. First, this memo will discuss the public trust doctrine and each state's duty to protect its citizens' right to access the water. Second, this memo will explore what rolling easements are and how they can be implemented. Third, this memo will discuss Maine, Massachusetts, and Connecticut's interpretation of how the public trust doctrine and rolling easements relate. Fourth, this memo will explore whether or not rolling easements rise to the level of a government

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<sup>1</sup> James Titus, Rolling Easements 8 (Climate Ready Estuaries EPA Program ed., 2011).

<sup>2</sup> *Id.* at 10.

taking. Lastly, this memo will examine a specific court case from Texas, *Severance v. Patterson*, and what its decision means for the future of rolling easements.

## **II. DISCUSSION**

### **A. THE PUBLIC TRUST DOCTRINE**

The public trust doctrine establishes a fiduciary duty of the state, or government, as trustee, to the public regarding the public right to access water resources and preserve tidelands in their natural state.<sup>3</sup> As sea levels rise, the public's access rights, protected by the public trust, may conflict with those of private property owners, and states will be in danger of breaching their fiduciary duties to the public.

Consequences of climate change have already begun to take effect; one example is increased erosion, causing shoreline armoring in some places, and the resulting the loss of public beaches.<sup>4</sup> When formerly public beaches are submerged and the only access points left are on private land, a conflict can arise regarding private and public property rights and the state's fiduciary duty to the public.<sup>5</sup> The private land owners risk losing, at worst, their land to the sea, and at best their right to develop a portion of their land and exclude others from it. The public risks losing its right to access the water (e.g. for recreational activities, for employment purposes, etc.) and the state risks liability for breaching its fiduciary duty to its citizens.

James Titus, a recognized scholar on the public trust doctrine, posits three ways to limit the issue of too much, and unnecessary, shore protection:

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<sup>3</sup> Kate Kramer, *Coastal Preservation and Transferred Development Rights*, 1-2, (December 17, 2010) available at <http://law.rwu.edu/sites/law/files/rwu/MarineAffairs/pdf/Kramer-MACZM%20TDR%20Memo%20Final%2001%2011.pdf> .

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.*

1. Setbacks. Prevent development of some lands vulnerable to sea level rise, either through regulation or by purchasing land (or development rights) from the current owners.
2. Rolling easements. Make no effort to restrict land use but prevent shore protection of some coastal lands either through regulation or by transferring any right to hold back the sea from owners inclined to do so to organizations that would not.
3. Laissez-faire. Make no effort to prevent either development or shore protection, but curtail government subsidies for both, and hope that eventually the forces of nature and economics will lead owners to allow their lands to be submerged.<sup>6</sup>

The theory of rolling easements combines setbacks with Laissez Faire, enabling the property owner to maximize the value of the property through development, while knowing that when sea levels rise the land will convert into a wetland or beach as if it had never been developed.<sup>7</sup>

## **B. ROLLING EASEMENTS**

### **I. WHAT ROLLING EASEMENTS CAN ACCOMPLISH**

Some of the objectives that rolling easements address include the preservation of beaches and the waterfront, the preservation of public access along the shore, the facilitation of landward relocation of roads and other structures, and enabling wetlands to migrate inland.<sup>8</sup> There are occurrences of shoreline armoring and protection resulting in beaches being entirely eliminated, even at low tide; in some instances public access points have been eradicated as well.<sup>9</sup> To prevent these impacts from continuing to occur, rolling easements may call for:

No shoreline armoring; A rolling design boundary (e.g. dune vegetation line), seaward of which the owner's property rights are reduced; No new structures seaward of the rolling design boundary; Encouragement or requirement to remove preexisting structures when erosion leaves them seaward of the rolling design boundary; Warnings about the policy to prospective buyers of

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<sup>6</sup> Titus, *supra* note 1 at 4.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Id.*

coastal property; Provisions for public access []; and Indication whether beach nourishment and adding sand to dunes are allowed.<sup>10</sup>

The requirements of rolling easements can be as static or flexible as a state or municipality determines best for its jurisdiction. However, a key feature of rolling easements is the prohibition of shoreline armoring, preserving public access to the shore.<sup>11</sup>

Preserving public access is only necessary if there is something for the public left to access. Assuming shoreline armoring has been prohibited and there is still a beach, although further inland than it originally was, the public trust doctrine will kick in and, depending on the state, the public will have a right to access the beach from the mean high water line or the mean low water line seaward.<sup>12</sup> This means that if private land borders the public beach, as the shoreline moves inland, what was once private property will become the public's right to access. This is the greatest point of contention with the theory of rolling easements, in part due to the law of avulsion.<sup>13</sup> Some courts have determined that littoral owners possess the same rights to lands they had a right to prior to the sudden loss of land, but this can be resolved through agreements with and cooperation of the private property owners, possibly through the Transfer of Development Rights (TDRs) or compensation (which will be addressed later in this memo).<sup>14</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 3, 14 (Shoreline Armoring: “protect[s] development with structures such as dikes, seawalls, and bulkheads. This approach maintains existing land use, but can increase the loss of wetlands and beaches. It can also eliminate public access along the shore”).

<sup>12</sup> Titus, *supra*, note 1 at 19.

<sup>13</sup> *See id.* at 20 (Avulsion is a sudden detachment or separation. “When the shoreline migrates suddenly, by contrast, the property line does not move, under the ‘law of avulsion.’ Although somewhat counterintuitive, courts treat avulsion and accretion differently for several reasons. Originally all lands had fixed boundaries, so when large areas of land suddenly appeared over what had been water, early courts had little reason to change the rule that what had been the King’s water was now the King’s land. When the state fills a body of water to create land, the state owns that land under the law of avulsion, although there may be provisions to ensure that the littoral landowner continues to have access to the water. The courts in some states, however, view the new land as an artificial accretion and award it to the waterfront landowner. Another example of avulsion would be a river changing course or the sudden creation of an inlet through a barrier island.”).

<sup>14</sup> *Id.*

## II. HOW ROLLING EASEMENTS CAN BE IMPLEMENTED

Rolling easements can be implemented in a variety of ways, including: regulation, interests in land, combinations of rolling easements, and through combinations with other coastal policies.<sup>15</sup>

One way a municipality can achieve rolling easements through regulation is by amending zoning ordinances.<sup>16</sup> This can be accomplished in a variety of ways. Amendments may include the following: splitting the rural estate zone into two zones, rural estate protect (REP) and rural estate retreat (RER); splitting the residential single family zone into two zones, residential single-family protection (RSP) and residential single-family accommodation (RSA); amending the zoning ordinance to add “shore protection structures” and “increases in land elevation grades” to the list of prohibited activities for zones agricultural, open space/ conservation, and rural estate retreat (for further detail on this see *Rolling Easements* by James Titus).<sup>17</sup>

Additionally, interests in land can be employed in a variety of ways to realize rolling easements, including covenants, defeasible estates and future interests, conservation easements, and ambulatory boundaries.<sup>18</sup> Covenants, defeasible estates, and future interests are useful devices that local governments could require developers to include in deeds as they sell property to private individuals. For example, “[c]onsider a deed that says that the developer is granting the land to the buyer ‘for as long as it takes sea level to rise 4 feet above the level that prevailed in the 1980–2001 tidal epoch.’”<sup>19</sup> Furthermore, rolling easements can be established via

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<sup>15</sup> *Id.* at iv.

<sup>16</sup> *Id.* at 88 (Where, for example, in VA a “statute authorizes zoning ordinances ‘to provide for... safety from flood...for the preservation of agricultural and forest lands and other lands of significance for the protection of the natural environment.’ Any locality can create zones and regulate ‘the use of land, buildings, structures, and other premises for agricultural, business, industrial, residential, flood plain and other specific uses.’ Zoning ordinances must include ‘adequate provisions for drainage and flood control.’”).

<sup>17</sup> Titus, *supra* note 1 at 42.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 55.

ambulatory boundaries, where private property owners voluntarily agree to recognize that boundaries will migrate with the shifting shore.<sup>20</sup>

There are five combinations of rolling easements that are theorized by Titus:

rolling easement zoning of land that is already subject to recorded rolling easements; rolling easement zoning of land subject to federal or state regulations that discourage shore protection; recorded rolling easements on land already subject to restrictive zoning; covenants on subdivided parcels of land where a developer has already conveyed a rolling easement on the entire development; and a combination of a conservation easement with a possibility of reverter.

Each is described in-depth in *Rolling Easements*.<sup>21</sup>

### C. THE STATE'S DUTY AND ROLLING EASEMENTS

#### I. MAINE

Massachusetts and Maine's public trust grew out of the same common law heritage, as Maine was once a part of the Massachusetts Bay Colony.<sup>22</sup> Together their doctrines are among the most restrictive of public rights, granting ownership, subject to conditions, to the intertidal lands to the private property owner.<sup>23</sup>

During the mid-19th Century the Supreme Judicial Court of Maine held that the upland owner's "title to the shore [is] as ample as to the upland" and again reiterated, with conditions, at the turn of the 20th Century in *Marshall v. Walker*, where the court held that "the proprietor of the main holds the shore ... in fee, like other lands, subject, however, to the jus publicum, the right of the public to use it for the purposes of navigation and of fishery."<sup>24</sup> Thus in the state of Maine, the upland property owner owns the intertidal land in fee simple subject to conditions, as distinguished from the majority of states where the upland property owner owns from the mean

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<sup>20</sup> *Id.* at 58.

<sup>21</sup> *Id.* at 62.

<sup>22</sup> See [http://www.mass.gov/czm/oceanmanagement/waves\\_of\\_change/pdf/trpt.pdf](http://www.mass.gov/czm/oceanmanagement/waves_of_change/pdf/trpt.pdf) (last visited Nov. 14, 2012).

<sup>23</sup> *Id.*

<sup>24</sup> *State v. Wilson*, 42 Me. 9, 28 (1856); *Marshall v. Walker*, 93 Me. 532, 45 A. 498 (1900).



high water line upland in fee simple.<sup>25</sup> Regarding intertidal land and more specifically flats, it has been established, through case law, that the public has “the right of navigation” which includes the mooring of vessels, and the discharging and taking in of cargoes, provided the flats are unoccupied.<sup>26</sup> In addition, members of the public are permitted to make such uses of the privately owned flats “[i]n the pursuit of [their] private affairs, of business as well as pleasure.”<sup>27</sup> However, the court held that the “removal of six gondola loads of mussel-bed manure,” the taking of seaweed, or the deposit of ice by the public is not permissible or protected by the public trust.<sup>28</sup> The two most recent cases to explore Maine’s Public Trust are *Bell v. Town of Wells* and *McGarvey v. Whittredge*. In *Bell*, the court held that there was a “legally sufficient basis for recognizing limited public recreational rights in the Maine seashore” and in *McGarvey* it was established that “The public may engage in activities in intertidal lands that are not directly related to fishing, fowling, or navigation,” specifically, scuba diving.<sup>29</sup> Although, in recent years the court has recognized the public’s right to activities other than fishing, fowling, and navigation in intertidal lands, Maine’s public trust doctrine is still much narrower than the overwhelming majority of states and tends to favor the rights of private property owners over the public’s right of access.

#### A. TDRS IN MAINE

In preparation of rising tides, Maine “sharply restricts new hard shore protection structures along the ocean shores and within the dunes, but allow them along estuaries” and “explicitly

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<sup>25</sup> *Wilson* at 28; *Walker* at 498.

<sup>26</sup> *Andrews v. King*, 124 Me. 361, 129 A. 298, 299 (1925).

<sup>27</sup> *Id.*

<sup>28</sup> *See, Moore v. Griffin*, 22 Me. 350, 352 (1843)(where the court held, “[n]either the ordinance nor the common law would authorize the taking of ‘muscle-bed (sic) manure’ from the land of another person”); *Hill v. Lord*, 48 Me. 83, 92 (1861); *McFadden v. Haynes and DeWitt Ice Co.*, 86 Me. 319, 29 A. 1068 (1894) (where the court held, the defendant ice company, a member of the public, had no right to deposit snow upon the plaintiff’s flats between high and low watermark).

<sup>29</sup> *McGarvey v. Whittredge*, 28 A.3d 620 (Me. 2011); *Bell v. Town of Wells*, 557 A.2d 168, 192 (Me. 1989) .

contemplates ecosystem migration in [its] regulations for some areas where structural shore protection is prohibited.”<sup>30</sup> Additionally, Maine has adopted TDRs by statute under § 4328

Transfer of Development Rights, which reads:

In order to comply with the requirement in section 4326 for each municipality to adopt land use policies and ordinances to discourage incompatible development, a municipality may adopt a transfer of development rights program for the transfer of development rights within its boundaries. Two or more municipalities may adopt a program that provides for the transfer of development rights between the municipalities if the municipalities have entered into an interlocal agreement pursuant to chapter 115 for this purpose.<sup>31</sup>

Although TDRs are part of Maine’s statutory scheme they have not been widely successful. Brunswick adopted a TDR program in 1986 in hopes of preserving “land for recreation, conservation and protection of water quality, natural features and historical resources,” however the program was never used and the town eliminated the provisions in 1997 when it adopted a new zoning ordinance.<sup>32</sup> Like Brunswick, the TDR program in Cape Elizabeth, Maine was a complete failed attempt, and no transaction occurred in either municipality.<sup>33</sup> It is likely that both program failed due to the following,

Brunswick designated a single, undeveloped property as a receiving area that *lacked sewer and water, and failed to specify on a map a designated sending area*. Cape Elizabeth *did not provide adequate incentives or compensation* to induce landowners to sell development rights, compared to the profit that could otherwise be gained through subdivision and build out.<sup>34</sup>

There are still currently two towns in Maine that have TDR programs, New Gloucester (TDR Program only became official in February 2005), and Scarborough.<sup>35</sup> Due to the short period of

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<sup>30</sup> Titus, *supra* note 1 at 46.

<sup>31</sup> Me. Rev. Stat. tit. 30-A, § 4328.

<sup>32</sup> *Smart Preservation: Brunswick, ME* available at <http://smartpreservation.net/brunswick-maine>.

<sup>33</sup> *Transferable Development Right*, 3, available at <http://www.maine.gov/doc/commissioner/landuse/docs/techassist/transferofdevelopmentrightsintro.pdf> (last visited Dec. 17, 2012).

<sup>34</sup> *Id.* at 3 (emphasis added).

time that these programs have been in place there is little information available regarding their success or lack thereof. However, Maine's Department of Conservation has compiled a list of necessary factors for viable and successful TDR programs, which include, development pressure and market demand, adequate incentives, market acumen and periodic program review, a well-conceived preservation plan at the sending end, a well-conceived plan to guide development at the receiving end, highly-qualified consultants, extensive record-keeping capabilities, political leadership, public education and community support, and a mix of complementary tools and land use planning techniques.<sup>36</sup> It is likely that the reason why the Brunswick TDR program was unsuccessful was due to the fact that several, if not all of the "success and viability" factors listed above, were not adequately met.

Considering Maine's restrictive interpretation of the public trust doctrine and its current lack of success, in practice, with TDR programs, it would appear that the implementation of rolling easements might fail as well. However, the adoption of TDRs by statute and the sharp restrictions on new hard shore protections are strong indicators that addressing the consequences of climate change and developing viable solutions to them are a priority of citizens and government actors alike. Taking into account the failures of various regulatory programs that were put in place throughout the country, it is likely that Maine will have to gain the cooperation of its private waterfront property owners, if it wants to guarantee successful rolling easement programs, for example, through a combination of rolling easements and TDRs, so that property owners will not completely lose out on the exchange.

## II. MASSACHUSETTS

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<sup>35</sup> *Smart Preservation: Cape Elizabeth, ME*, <http://smartpreservation.net/cape-elizabeth-maine> (last visited Dec. 17, 2012).

<sup>36</sup> *Transferable Development Right*, *supra* note 33, at 3-4.

Massachusetts, like Maine, is in the minority of states that give expanded rights to the private property owner and limit the public's use of intertidal lands.<sup>37</sup> The upland property owner has fee simple interest in the intertidal land, subject to certain limitations, including the public's right to navigate, swim, fish, fowl, however, the public does not have the right to bathe in intertidal waters.<sup>38</sup> Massachusetts joins DE, ME, NH, PA, VA, in the minority that vest from the mean low tide line upland in fee simple to the private property owner, this means the intertidal lands are deemed private property, subject to the limitations mentioned above.<sup>39</sup> Because this intertidal land is not held in trust for the public by the state of Massachusetts and the upland owner has a fee simple interest in it, gaining the private property owner's cooperation in order to preserve the public's access to the ocean is very important. There have been numerous court decisions that have struck down regulatory implementation of rolling easements without gaining cooperation of or giving compensation to the private property owners.

#### A. TDRS IN MASSACHUSETTS

Like Maine, Massachusetts already has a plan for TDRs under its Smart Growth Alliance Program, and several towns have wetland protection rules that "prohibit both shore protection structures and grade elevation within 50 feet of the shore, with the explicit purpose of ensuring that wetlands and beaches migrate inland as sea levels rise."<sup>40</sup>

Smart growth's vision, "promotes healthy and diverse communities, protects critical environmental resources and working landscapes, advocates for housing and transportation choices, and supports equitable community development and urban reinvestment."<sup>41</sup> As the first

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<sup>37</sup> *Id.*

<sup>38</sup> *McGarvey* at 620; *Butler v. Attorney Gen.*, 195 Mass. 79, 80 N.E. 688 (1907).

<sup>39</sup> See [http://www.accessingthemaineoast.com/common\\_law\\_and\\_statutes/common\\_law\\_and\\_statutes.shtml#A1](http://www.accessingthemaineoast.com/common_law_and_statutes/common_law_and_statutes.shtml#A1) (last visited Dec. 17, 2012).

<sup>40</sup> Titus, *supra* note 1 at 50.

<sup>41</sup> Smart Growth, [http://www.mass.gov/envir/smart\\_growth\\_toolkit/pages/intro-to-SG.html](http://www.mass.gov/envir/smart_growth_toolkit/pages/intro-to-SG.html) (last visited Dec. 17, 2012).

municipality in Massachusetts to promulgate a TDR program, Falmouth, distinguished itself from its counterpart in Brunswick, Maine by utilizing TDRs, successfully, three times preserving 15 to 20 acres in the process.<sup>42</sup> It is likely that Falmouth's success is due to the fact that its receiving districts were properly equipped to handle development (e.g. the property owners who were forfeiting development rights could actually develop the land they were transferred, unlike the failed TDR attempts in Maine) and the sending districts were suitably fitted with a covenant once the TDR was set in motion.<sup>43</sup> Although this particular case study dealt with the preservation of water resources and not the public's right to access water or property rights, the fact that the program has been successfully used bodes well for a potential pairing with rolling easements in an effort to preserve the public trust doctrine. In addition to Falmouth, the following Massachusetts municipalities have proposed TDR programs: Acton, Cambridge, Carver, Easthampton, Groton, Hadley, Hatfield, Northampton, Palmer, Plymouth, Sunderland, Townsend, Westborough, and Westfield.<sup>44</sup> These programs have been proposed or implemented quite recently and therefore, there is little to no information regarding their progress and their success cannot be gauged as of yet.

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<sup>42</sup> *Smart Preservation: Falmouth, MA*, available at <http://smartpreservation.net/falmouth-massachusetts> (last visited Dec. 17, 2012).

<sup>43</sup> *See id.* (where "Sending areas in the Falmouth program... known as donor districts. Eligible donor sites include land within Water Resource Protection and Coastal Pond Overlay Districts... Donor lots... compl[ied] with the minimum requirements for a building permit or be determined potentially sub-dividable by the Planning Board given minimum zoning requirements, subdivision regulations and other pertinent code provisions Receiving districts consist of land currently zoned B3, B2, LIA, RC, RB, AGB, RA, AGA, RAA and AGAA. However, receiving sites cannot be located within a mapped Water Resource Protection District, a mapped coastal pond recharge area or an area that qualifies as a TDR donor district. Receiving sites must be at least five acres in size if located within the RA, RB, RC, AGA or AGB zones. Receiving areas in the AGAA or RAA zones must be at least 10 acres in size and receiving areas in the Business or LLA zones must be at least two acres in size. Town-owned land can serve as either donor or receiving sites if approved for that purpose by a two-thirds vote of the Town Meeting. The Planning Board approves TDR transfers in conjunction with receiving subdivision and special permit applications. The density bonus allowed on receiving sites varies depending on the zoning of the donor site. For example, a receiving site zoned RB could receive 1.4 credits from a donor site zoned RC but 1.3 credits from a donor site zoned AGB. In approving a transfer, the Planning Board may also allow minimum frontage, lot width and area standards to be reduced.").

<sup>44</sup> *See Smart Preservation*, available at <http://smartpreservation.net/tdr-updates>.

Although TDRs have only been successfully applied in Falmouth and the current program does not provide for rolling easements, in *Rolling Easements*, Titus posits a plan where the two can be used in conjunction with each other. This pairing may help to insure that the preservation efforts of public rights are not challenged as takings.<sup>45</sup> Although Massachusetts has a fairly restrictive interpretation of the public trust doctrine, the fact that it has TDR programs already in place makes the implementation and success of rolling easements that much more likely.

### III. CONNECTICUT

Connecticut follows the majority view of the public trust doctrine and its interpretation is much more expansive than Massachusetts and Maine. The coastal property owner has fee simple interest from the mean high waterline upland, while the state retains interest in the intertidal land, which it holds in trust for the public where the state, as representative of the public, is owner of soil between high and low watermark on navigable water where the tide “ebbs and flows.”<sup>46</sup> Furthermore, the court in *Bloom v. Water Res. Comm'n* went on to say that common-law riparian rights are subject to reasonable police regulation in the interest of the public welfare and have been held subject to such regulation for many years.<sup>47</sup> Although it may seem obvious that riparian rights would be subject to police regulation, it is important that the court specifically made note of this in its decision as it is a further recognition of the public’s rights pertaining to access of the waterfront and Connecticut’s expansive view of the public trust doctrine.

#### A. CONNECTICUT AND TDRS

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<sup>45</sup> Titus, *supra*, note 1 at 62.

<sup>46</sup> See *Bloom v. Water Res. Comm'n*, 157 Conn. 528, 254 A.2d 884 (1969).

<sup>47</sup> *Id.* at 888.

Like Massachusetts, Connecticut has TDR programs in place that could be complimented by rolling easements. Connecticut's TDR program, the oldest discussed in this memo, was first implemented by the town of Windsor:

In 1976, Windsor adopted a transfer of residential density program which allows flexibility in residential density in order to ensure that residential development is appropriately located in relation to transportation, community facilities and other services. In 1993, the Town also created a separate non-residential TDR program in an effort to preserve land with historic, ecologic, aesthetic, agricultural or recreational resources.<sup>48</sup>

Since its promulgation, Windsor has only received one application for TDR, and it was denied, in large part because of the town's Economic Development Commission's recommendation to do so "because the proposed receiving area was in an industrial zone...[and] the proposal would be a detrimental reduction in the Township's inventory of industrial land."<sup>49</sup> However, after the decision, Town Planner Mario Zavarella, stated that the Town has since acknowledged there is actually too much land zoned for industrial purposes.<sup>50</sup> After the denial of the first application, there were no further applications, causing some to speculate that the denial had a chilling effect on future proposals, and the possibility that the one-to-one transfer ratio was inadequate compensation.<sup>51</sup> Despite the issues Windsor has experienced with residential TDRs, in 2001 the town planner, Mario Zavarella, reported that the town had been more successful with the non-residential TDR program, receiving almost 13 acres of open space land in critical locations.<sup>52</sup> Additionally, the town of Hebron, Connecticut has implemented a TDR program with a one to

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<sup>48</sup> *Smart Preservation: Windsor, CT* available at <http://smartpreservation.net/windsor-connecticut>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

one transfer ratio, but there is no information regarding its status as of yet, likely due to the short period of time it has been in place.<sup>53</sup>

#### **D. THE ROLE OF TAKINGS IN ROLLING EASEMENTS AND TDRS**

A significant issue surrounding rolling easements and TDRs is whether or not they rise to the level of a government taking. The Fifth Amendment of the United States Constitution, states that a taking occurs if the government's actual or effective acquisition of private property occurs without just compensation to the landowner.<sup>54</sup> TDRs do not rise to the level of a taking because the owners of the private land are compensated for their property right, however the concept of rolling easements is not as cut and dry. The major issue that needs to be resolved is whether or not the property owner has the right to hold back the sea. Only a few states have specifically explored this question, and although one of the cases took place in Massachusetts, the court "fail[ed] to rule on the underlying takings claim when homes in Chatham were lost due to government delays in [a] decision on permit for revetment."<sup>55</sup> If the property owner does have the right to hold back the sea, then rolling easements constitute a taking *per se*, due to the presence of a permanent physical invasion, and if the owner does not have that right, then a rolling easement would not constitute a taking *per se*, but an ad hoc test would still have to be explored.<sup>56</sup> In the seminal case *Penn Central Transportation Co. v. NYC*, the court established

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<sup>53</sup> *Id.*

<sup>54</sup> U.S. Const. amend. V.

<sup>55</sup> *Wilson v. Commonwealth*, 597 N.E. 2d 43 (Mass. App. 1992).

<sup>56</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) (Held, "(1) physical occupation of plaintiff's rental property which occurred in connection with cable television company's installation of 'crossover' and 'noncrossover' cables on plaintiff's five-story apartment building constituted a 'taking' notwithstanding that statute might be within state's police power as authorizing rapid development and maximum penetration by means of communication having important educational and community aspects; (2) allegedly minimal size of the physical installation was not determinative; (3) fact that statute applied only to rental



the ad hoc test that is used in current takings analyses.<sup>57</sup> The ad hoc test requires that any economic impacts, investment backed expectations, and the character of the government action be taken into account and balanced in determining if a taking has occurred.<sup>58</sup> The ad hoc test requires an analysis of the factors specific to each, individualized case. This is so because property value and the ability to develop varies greatly from parcel to parcel, and each property owner is likely to have differing investment backed expectations, if any; however, the character of the government activity will likely always be the same, or at least similar, to preserve ecological interests, and the public's right to access the water. If rolling easements are paired with TDRs it is unlikely that a court will find a taking has occurred because the private land owner will be compensated for giving up his or her development rights of the easement area.

In *Lucas v. South Carolina Coastal Council*, the court held that the rolling easement provision of the South Carolina Beach Front Management Act of 1988 amounted to a government taking. Prior to the passage of the Act, Lucas owned a parcel of ocean front land that he planned to develop, the Act was then passed making Lucas' land undevelopable, and thus, according to the majority, depriving him of one hundred percent of his property value which was tantamount to a regulatory taking.<sup>59</sup> Here, the majority's decision clearly favors the rights of the private property owner and is exceedingly wary of government overreaching via regulation. However, it is also important to note the dissent, where Stevens contemplates whether or not there has been a complete deprivation of property, "because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice."<sup>60</sup> If the government

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property did not make it simply a regulation of use of real property; and (4) statute could not be construed as merely granting a tenant a property right as an appurtenance to his leasehold").

<sup>57</sup> *Penn. Central Transp. v. New York City*, 438 U.S. 104, 137 (1978).

<sup>58</sup> *Id.*

<sup>59</sup> *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1065, 112 S. Ct. 2886, 2919, 120 L. Ed. 2d 798 (U.S.S.C. 1992).

<sup>60</sup> *Id.*

had compensated Lucas in some way for his property, for example, by exchanging development rights in another portion of the municipality for the “easement” it is unlikely a taking would have been found.

**E. SEVERANCE V. PATTERSON AND ITS LIKELY EFFECT ON ROLLING EASEMENTS AND TDRS**

Prior to the decision in *Severance v. Patterson*, most of the sources on rolling easements pointed to Texas common law as recognizing rolling easements, however, since the decision in June of 2012 that is no longer entirely true. The central debate in the *Severance* case was a challenge to the Texas Open Beaches Act, which imposed a public beach access easement on all property up to the natural vegetation line, regardless of whether or not the public had ever used the property.<sup>61</sup> In the wake of Hurricane Rita the beaches in Galveston Texas experienced severe erosion pushing back the vegetation line in certain areas. This was the case with Carol Severance’s property, and in 2006, she received letters informing her that because her homes were now seaward of the vegetation line they were now on the public beach and in violation of the Open Beaches Act, therefore she could not exclude the public and she was prohibited from developing the land any further. The Supreme Court of Texas decided this issue very narrowly holding that, “[a]lthough existing public easements in the dry beach of Galveston’s West Beach are dynamic, as natural forces cause the vegetation and the mean high tide lines to move gradually and imperceptibly, these easements do not spring or roll landward to encumber other parts of the parcel or new parcels as a result of avulsive events.”<sup>62</sup> Due to the narrow holding in

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<sup>61</sup> *Severance v. Patterson*, 370 S.W.3d 705, 713 (Tex. 2012).

<sup>62</sup> *Id.* at 45.

this case, rolling easements may still be recognized in other parts of Texas, just not along Galveston's West Beach.

### **III. CONCLUSION**

Regardless of what approach is taken, it is undeniable that both states and municipalities need to create plans to combat the effects of climate change and rising sea levels that will be effective in practice. Although there are a variety of ways to minimize the effects of rising sea levels, it seems that if a state wishes to use rolling easements and/ or transferred development rights programs successfully it is important to have the cooperation of the private property owner, or at the very least to provide compensation for the lost rights of exclusion and development.