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LITIGATION PREVIEW

by Jessica B. Goldstein*

In June 2009, the Supreme Court granted *certiorari* to *Stop the Beach Renourishment v. Florida Department of Environmental Protection*,¹ a case concerning the rights of states to maintain and restore coastal areas. The case has created a great deal of interest, with a majority of U.S. state attorneys general, as well as a number of public interest groups, filing amicus briefs in support of Florida and multiple private property rights groups filing in support of the land owners.² The case will be heard in December and the Supreme Court may use it to answer the question of whether a judicial decision can create a constitutional taking.

Judicial taking occurs when a statute is challenged for “taking” private property and the court rules that the property right in dispute never existed.³ In this case, the question is whether the Florida Supreme Court was correct in ruling that landowners did not have rights over increased future beach property resulting from natural deposition and, therefore, a Florida law did not violate the Constitutional regulatory takings clause.⁴ The U.S. Supreme Court has previously declined to intervene in similar cases because they are deeply rooted in state property law.⁵

Although the challenge that led to the present case was filed in 2004 by landowners in Florida attempting to stop a planned beachfront restoration,⁶ the Florida Beach and Shore Preservation Act was enacted in 1961 by the Florida Legislature. The purpose of the Act is to address beach erosion, which the legislature found to be a problem affecting the local economy and general welfare of society.⁷ The state has a duty under the State Constitution to protect and conserve Florida’s beaches as they are important natural resources and held in trust for public use.⁸ The Act charged the Florida Department of Environmental Protection with the determination of which beaches are in need of restoration and authorized spending for up to seventy-five percent of the actual costs of restoration.⁹

Under the Florida Beach and Shore Preservation Act, the Board of Trustees of the Internal Improvement Trust Fund establishes a fixed erosion control line (“ECL”) to replace the mean high water line (“MHWL”), which fluctuates with the rise

and fall of the water level.¹⁰ In establishing the ECL, the Board considers the MHWL, the extent of erosion, and landowners’ rights.¹¹ As a result, the ECL becomes the new fixed property line, dividing public lands and upland property.¹² When cities and towns restore beaches eroded by hurricanes, the increased beach area below the ECL becomes public beach because the restoration is done using public funds.¹³ The ECL allows upland owners to continue to exercise littoral rights,¹⁴ such as boating, fishing, and swimming.¹⁵ The Act states that “there is no intention on the part of the state to extend its claims to lands not

already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property.”¹⁶

At issue in *Stop the Beach Renourishment* is the plan to “renourish” beaches critically eroded by a hurricane in 1995 through the addition of sand, and the establishment of an ECL in conjunction with the project.¹⁷ In 2006, a Florida District Court held that the state’s restoration effort was an unconstitutional property taking that denied

property owners their right to water contact and accretion, which is the increase of shoreline gradually added by a body of water.¹⁸ Under Florida case law, landowners were allowed to use the doctrine of accretion to own land.¹⁹ However, upon appeal, the Florida Supreme Court ruled that the Florida Beach and Shore Preservation Act does not deprive owners of their littoral rights and reversed the district court’s ruling.²⁰

While the Florida Supreme Court acknowledged landowners’ littoral rights, it drew a distinction between the present rights of use and access and the future rights of accretion and reliction,²¹ unrelated to the present use of the shore and water. Landowners claim these littoral rights are private property rights and, therefore, that the state’s action constitutes a taking, which requires just compensation.²² The Florida Supreme Court held, however, that the right does not exist unless land is added

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through accretion or reliction.²³ Because the state adds the sand for restoration, landowners do not have a property right to the increased beachfront.²⁴ Furthermore, the court adds that there is no right of contact with water under Florida common law.²⁵

The Supreme Court of Florida stated the Florida Beach and Shore Preservation Act carefully balances private property and public interests because it not only prevents future erosion but also restores presently damaged beaches.²⁶ The court also noted that, in the interest of upland owners, the Act restores their beaches and protects their property from future damage and erosion.²⁷ Beach restoration costs between three and five million dollars per mile and Florida officials believe restoring the beach is enough to compensate landowners.²⁸ The Surfrider Foundation, a non-profit environmental organization, filed an amicus brief arguing that (1) the Florida beach access provisions are consistent with the Florida Constitution; (2) that private property owners' rights are not violated by the Act; and (3) judicial takings do not apply under the Fifth and Fourteenth Amendments.²⁹

However, the upland owners argue that the Act converts private waterfront property into merely water view property without compensation, as required under the Constitution.³⁰ The

Coalition of Property Rights, which includes Florida coastal property owners,³¹ claims that the Act lowers property values by allowing the general public to use the beach.³² They argue that in order to implement this Act, the government abandoned the decades-old right of accretion, and landowners claim that this constitutes an uncompensated taking of private property, violating the Fifth and Fourteenth Amendments.³³

There is much speculation over whether the Supreme Court will address the issue of judicial takings and use this case to establish precedent, since it has avoided the issue in the past. The Florida Supreme Court reasonably determined that accretion rights are future property rights and if the state did not preserve the beaches, accretion would not occur due to the erosion problem. In fact, landowners could lose more of

their beach than what the Act makes public. The Court should take into consideration the benefit that landowners derive from the Florida Beach and Shore Preservation Act. Not only is the state restoring their beachfront property but also continuing to preserve it and, therefore, beachfront property values. Is it too great a price to pay that the public has access to that beach? The Supreme Court will have to decide.



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Endnotes: LITIGATION PREVIEW

¹ *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008) *cert. granted sub nom.*, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 129 S.Ct. 2792 (U.S. June 15, 2009) (No. 08-1151).

² Jennifer Koons, *Supreme Court's Regulatory Takings Case Draws Wide-spread Interest*, N.Y. TIMES, Oct. 6, 2009, available at <http://www.nytimes.com/gwire/2009/10/06/06greenwire-supreme-courts-regulatory-takings-case-draws-w-78107.html>.

³ Reed Watson, *A chance to close the judicial takings loophole* 27 PERC REPORTS, Fall/Winter 2009 at 37, available at http://www.perc.org/pdf/PRfall_winter09.pdf.

⁴ Koons, *supra* note 2.

⁵ Watson, *supra* note 3.

⁶ Koons, *supra* note 2.

⁷ Beach and Shore Preservation Act, FLA. STAT. §§ 161.011-45 (2003).

⁸ *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1110-11, 1114-15 (Fla. 2008); FLA. CONST. art. X, § 11.

⁹ § 161.101.

¹⁰ *Id.*

¹¹ *Id.*

¹² § 161.191.

¹³ Koons, *supra* note 2.

¹⁴ "Littoral rights" refer to the property right to the shore between the high and low tide waterlines.

¹⁵ Beach and Shore Preservation Act, FLA. STAT. § 161.201 (2003).

¹⁶ *Id.* § 161.141.

¹⁷ *Save Our Beaches, Inc. v. Fla. Dep't of Env't Prot.*, 31 Fla. L. Weekly D1173, 1 (Dist. Ct. App. 2006).

¹⁸ *Id.*

¹⁹ *Walton County*, 998 So. 2d at 1111; *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919).

²⁰ *Walton County*, 998 So. 2d at 1105.

²¹ "Reliction" (also known as "dereliction") is the gradual increase of land as a water body recedes to leave permanently dry land.

²² *Watson*, *supra* note 3.

²³ *Walton County*, 998 So. 2d at 1112.

²⁴ Koons, *supra* note 2.

²⁵ *Walton County*, 998 So. 2d at 1115.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Steve Patterson, *Florida's beach restoration program threatened by suit*, JACKSONVILLE NEWS, Oct. 8, 2009, available at http://jacksonville.com/news/metro/2009-10-07/story/florida%E2%80%99s_beach_restoration_program_threatened_by_suit.

²⁹ *Surfrider Foundation Argues for Public Access in Brief*, ENVTL PROTECTION, Oct. 13, 2009, available at <http://eponline.com/articles/2009/10/13/surfrider-foundation-argues-for-public-access-in-brief.aspx> (last visited Oct. 17, 2009).

³⁰ Warren Richey, *Supreme Court takes up property-rights case*, CHRISTIAN SCI. MONITOR, June 15, 2009, at 2.

³¹ Koons, *supra* note 2.

³² Coalition for Property Rights, *CPR takes fight to US Supreme Court*, Aug. 24, 2009, available at http://www.proprights.com/newsviews/display_newsletter.cfm?ID=827 (last visited Oct. 17, 2009).

³³ *Id.*