

**VERMONT LAW SCHOOL
GEORGETOWN UNIVERSITY LAW CENTER
BERKELEY LAW**

**THE 13TH ANNUAL CONFERENCE ON LITIGATING
TAKINGS AND OTHER LEGAL CHALLENGES TO LAND
USE AND ENVIRONMENTAL REGULATION**

**NOVEMBER 5, 2010
BERKELEY, CALIFORNIA**

***Stop the Beach Renourishment v. Florida Department of
Environmental Protection***

by Thomas W. Merrill
Columbia Law School

*A slightly edited version of this article appeared in the Trends newsletter published by the ABA Environment and Energy Section.

Stop the Beach Renourishment v. Florida Department of Environmental Protection

Thomas W. Merrill

The Supreme Court in *Stop the Beach Renourishment v. Florida DEP* took on a novel and quite difficult question: can a court re-interpret state property law in such a way as to violate the federal constitution? The short answer, which was unanimously agreed upon by the eight participating Justices (Justice Stevens was recused), was that no such violation had occurred in the case before the Court. All agreed that the Florida Supreme Court decision under review was consistent with Florida common law, so the predicate for advancing any federal claim based on judicial revisionism was not established. Justice Scalia, who received the assignment to write for the Court, sought to go further, and to lay down some general principles about when a decision about state property rights might give rise to a judicial takings claim. His efforts in this regard garnered only four votes. The Scalia opinion on the conditions for establishing a judicial taking was joined in full only by Chief Justice Roberts and Justices Thomas and Alito. The other four participating Justices either disagreed about the applicable clause of the Constitution for assessing a claim of judicial revisionism – Justice Kennedy, joined by Justice Sotomayor, argued that the Due Process Clause was the proper vehicle, not the Takings Clause -- or thought it was unwise to try to specify either which Clause applies or the applicable test for a violation – this was Justice Breyer, joined by Justice Ginsburg.

The net effect of *Stop the Beach Renourishment* was therefore negligible. The U.S. Supreme Court decided that a Florida Supreme Court decision applying Florida law was consistent with prior Florida law, which is hardly news. Otherwise, the Court split 4-

4 on the proper analysis going forward for assessing federal constitutional challenges to judicial revisionism regarding property rights. This aspect of the decision will undoubtedly stimulate further litigation raising judicial takings claims. But for now, it is hard to predict how these cases will be resolved.

Let me start with what the Court decided unanimously, in part because it may be influential in resolving other issues about beach management programs. In any event, this discussion is necessary in order to assess the bigger questions about judicial takings left unresolved.

The decision of the Florida Supreme Court at issue in *Stop the Beach* involved a Florida statute, the Beach and Shore Preservation Act, which authorizes local governments to re-build storm damaged beaches. Traditionally, the boundary in Florida between private upland property and state owned public trust property is the mean high water line. This line shifts over time, due to accretion, erosion, and changes in ocean levels. Under the act, a reconstruction project creates a fixed property line, which is located by survey as close as possible to the pre-storm mean high water line. Because the property line is fixed, the act expressly abrogates future rights to accretion as well as future liability to erosion. But the act preserves all other common law riparian rights, including rights to access, use, and a view of the water.

The project in question restored a 6.9 mile stretch of beach in the City of Destin and Walton County, on the Florida Panhandle. A key fact about the project, which was barely alluded to in the state courts but loomed large in the U.S. Supreme Court, is that the reconstruction over-built the beach. The new beach extended some 75 feet further into the water relative to the pre-storm beach. There was an interesting side-bar debate in

the briefs and oral argument about the reason for this. The government entities said the breach was overbuilt in anticipation of future storms and erosion. The petitioner, whose members owned beach front property along the Destin-Walton beach, intimated that the objective was to construct a new public beach between the members' property and the open water, in order to promote tourism. Neither the Florida courts nor the U.S. Supreme Court made any attempt to resolve this question of motivation.

Petitioner claimed that the Act and the project had eliminated two rights recognized in prior state law that its members had enjoyed as riparian landowners, and that this was a taking under state constitutional law: the right to future accretion and the right to maintain contact with the water. Citing only Florida authorities, the Florida Supreme Court rejected both claims. It said that future accretion is a "contingent" right the state legislature was warranted in eliminating, because the Act also eliminated liability to future erosion and provided other offsetting benefits to riparian owners. It said that there was no right to maintain contact with the water under Florida law; a statement to this effect in a prior decision was merely describing the right of access to the water, which the Act did not disturb.

Petitioner filed a petition for rehearing which argued that the Florida court had rendered an unforeseeable change in state property law that constituted a judicial taking under the federal constitution. When this was denied without opinion, petitioner filed a petition for certiorari, which was granted.

Given this context, it is more than a little surprising to read Justice Scalia's analysis of why the Florida Supreme Court did not impermissibly change state property law. According to Justice Scalia, the Florida court's decision was consistent with earlier

Florida authorities on avulsions – sudden and perceptible changes in the boundary of riparian lands. Avulsions, under Florida law and the common law, do not change a property boundary, but have the effect of locking in the boundary as it existed before the avulsive change occurred. Moreover, Justice Scalia cited Florida decisions and treatises indicating that state-sponsored construction projects on state submerged lands are regarded as “artificial” avulsions. Since such a project would insert a new strip of solid land between upland owners and the water, it would necessarily eliminate future accretions and future contact with the water. Given that this was permitted at common law, the Florida court’s decision did not eliminate any established property right.

The Court’s rationale for why the Florida Supreme Court did not disturb previous property rights was strikingly different from the rationale offered by the Florida court. The Florida court had discussed avulsions, but only to make the point that hurricanes are avulsive events. If the hurricanes were the relevant avulsion, however, they would justify only restoring the beach as it had existed before the hurricanes occurred. They would not justify over-building the beach. In contrast, if the project itself is regarded as the avulsive event, then the state would be justified in overbuilding the beach and cutting off future accretions and contact with the water. Justice Scalia’s change in focus showed him to be a better common-law lawyer.

What is the relevance of this for future disputes about beach management? One possible effect is that it offers a powerful argument in support of beach preservation projects based not on a police power rationale, but rather on the state’s authority over its own property. What the Court held, in effect, is that the common law can be interpreted as allowing the state to build new beaches on its own submerged land, even if this

diminishes the value of abutting private property by inserting new solid land between the private owner's land and the water's edge. The Court suggested that this result may seem "counterintuitive" or even "odd," because private property "has been deprived on its character (and value) as oceanfront property by the State's artificial creation of an avulsion." But the unanimous judgment that this is consistent with the common law will surely embolden other legislatures to undertake such projects, and courts to approve them, in the future.