

A New Kind of Taking: The Impact of *Stop the Beach Renourishment*

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The Fifth Amendment is the constitutional cornerstone for private property protection. The *Takings Clause* (“nor shall private property be taken for public use, without just compensation”¹) protects private property from government seizure and invasion, but some takings are more subtle and difficult to pinpoint, especially if government regulations deprive property owners of some, but not all, of their property rights. In the aftermath of a recent Supreme Court decision, courts may find themselves dealing with an even trickier kind of takings; one affected by the judiciary itself.

Beach Nourishment and the Common Law

Beach nourishment programs have become a hot topic in the realm of regulatory takings. These projects are meant to restore eroded beaches by filling the state-owned public trust submerged lands adjacent to existing beaches with sand from offshore sources.² Private beachfront, known as littoral property, is directly impacted by renourishment projects since the newly created beach would belong to the State, not the private landowner, and be open to public use.³

Traditional common law generally provides littoral property owners with special rights such as direct access to the water body, the right to accretions, and the right to an

¹ U.S. CONST. amend. V.

² Joseph Kalo, *Do Publicly Funded Beach Nourishment Projects Deprive Oceanfront Property Owners of Private Property Rights Without Just Compensation?*, LEGAL TIDES (Nov. 20, 2010, 5:48 PM), <http://blogs.ncseagrant.org/legaltides/>.

³ *Id.*

unobstructed view of the water.⁴ Accretions are additions of deposits such as sand and sediment to waterfront land that occur naturally and gradually over time.⁵ Under common law principles, littoral landowners are entitled to additional land gained through accretions.⁶ However they are not entitled to avulsions, which are sudden additions to the shoreline.⁷

Since new beaches created by nourishment projects are considered avulsions rather than accretions, the state gains title to the new land.⁸ Though the littoral owners do not own these new beaches, their right to direct access to the water is preserved.⁹ Littoral right to access is not eradicated when a landowner's property no longer directly abuts the waterfront; he/she simply has to cross state-owned beach in order to get to the water.¹⁰

When the State undertakes a beach nourishment project, it does not seriously infringe upon private landowners' littoral rights; instead, it adds new state-owned avulsions by filling in its submerged lands.¹¹ The only right the landowner loses is the right to accretions.¹² However, Professor Kalo of the University of North Carolina Law School notes that "current predictions about the impact of climate change strongly suggest that erosion, and not accretion, is the more likely future of ocean beaches... The reality is that any loss associated with the claim to accretions is more theoretical than real."¹³

⁴ *Id.*

⁵ *See Bd. of Trs. v. Sand Key Assocs.*, 512 So. 2d 934, 936 (Fla. 1987).

⁶ *Id.*

⁷ *Id.*

⁸ Kalo, *supra* note 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

The Latest *Stop the Beach Renourishment* Case

Just this year, the Supreme Court handed down an opinion that reaffirmed the balance in favor of state government when it comes to disputes arising out of beach nourishment programs.¹⁴ However, the Court also hinted at what may be a powerful new weapon in the arsenal of property owners: judicial takings.¹⁵ The Supreme Court recently “opened the door” to judicial takings by suggesting that a judicial decision in and of itself could be considered a taking of property rights without just compensation.¹⁶

Background and Florida Law

Under Florida law, the state owns in trust for the public the land submerged beneath navigable waters and beaches seaward of mean high water lines.¹⁷ The mean high water line is considered the boundary between the state-owned lands and the privately owned beachfront property.¹⁸ Florida’s Beach and Shore Preservation Act (“the Act”) uses the mean high water line as a reference for determining an “erosion control line,” which replaces the mean high water line as the boundary between the private property and the state property once a beach nourishment project is undertaken.¹⁹ The Act explicitly states that owners of property upland of the erosion control line are still

¹⁴ See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 130 S. Ct. 2592, 2594-2598 (2010).

¹⁵ *Id.*

¹⁶ Michael Allan Wolf, *Michael Allan Wolf on Stop the Beach Renourishment, Inc. v. Florida DEP*, 2010 Emerging Issues 5148 (June 17, 2010).

¹⁷ FLA. CONST. art. X, § 11.

¹⁸ FLA. STAT. § 177.28 (2010).

¹⁹ *Id.* at § 161.191(1).

entitled to all other common-law riparian rights.²⁰ Therefore, the only right significantly affected by the Act is the right to accretions.²¹

In 2003, Walton County and the city of Destin applied for permits to restore 6.9 miles of beach that were eroded by hurricanes.²² The project planned to add 75 feet of sand seaward of the mean high water line.²³ Stop the Beach Renourishment, Inc., a nonprofit comprised of beachfront property owners, challenged the project. The Florida trial court ruled that the project would be an unconstitutional taking of riparian rights.²⁴ The Florida Supreme Court held that the Beach and Shore Preservation Act did not violate the Florida Constitution and that the doctrine of avulsion allowed the State to claim title to the newly restored beach.²⁵ Furthermore, it held that there was no littoral right to contact with the water, just a right to direct access to the water, on which the Act did not infringe.²⁶

The Supreme Court Weighs In

On appeal to the United States Supreme Court, the petitioner claimed the Florida Supreme Court decision deprived owners of their littoral rights without just compensation in violation of the *Takings Clause* of the Fifth Amendment, as applied to the States through the Fourteenth Amendment.²⁷ The petitioner argued that, by declaring that the

²⁰ *Id.* at § 161.201.

²¹ *See* Kalo, *supra* note 2.

²² *See* Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1106 (Fla., 2008).

²³ *Id.*

²⁴ *Save our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot.*, 27 So. 3d 48 (Fla. Dist. Ct. App. 1st Dist., 2006).

²⁵ *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1116-1118 (Fla., 2008).

²⁶ *Id.* at 1119-1120.

²⁷ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2597 (2010).

right to accretions and the right to have littoral property touch the water did not exist, the Florida Supreme Court took these rights.²⁸

The beach takings issue proved to be a straightforward one: all eight Justices (Stevens took no part in the case) agreed that the Florida decision had not affected a taking.²⁹ According to the Court, the petitioner failed to show that, prior to the Florida Supreme Court's decision, littoral property owners in Florida had rights to future accretions and rights to contact with the water superior to the State's right to fill its submerged land.³⁰ Furthermore, the Justices held that the Florida Supreme Court did not abolish the right to accretions but declared instead that the right did not apply to beach restoration because of the doctrine of avulsions.³¹ Also, they agreed with the Florida Supreme Court that there was no right to direct contact with the water independent of the right of access.³²

The real issue the Justices found themselves grappling with was whether a judicial decision could be considered a taking in and of itself.³³ Justice Scalia delivered the opinion of the court, which only addressed the Florida Supreme Court's decision.³⁴ However, Scalia went on to propose a broader theory of judicial takings in part II A of the opinion.³⁵ Scalia asserts that "if a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken the property no less than if the State had physically appropriated it or destroyed its value by regulation."³⁶

²⁸ *Id.* at 2610-2611.

²⁹ *Id.* at 2613.

³⁰ *Id.* at 2611.

³¹ *Id.* at 2612.

³² *Id.* at 2612-2613.

³³ See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2596-2597 (2010).

³⁴ *Id.*

³⁵ *Id.* at 2601-2603.

³⁶ *Id.* at 2602.

Scalia notes that the *Takings Clause* prohibits the State from taking private property without just compensation, regardless of which branch of the government is the “instrument of the taking.”³⁷ Therefore, the executive, legislative, and judicial branches are all capable of affecting a takings depending upon the nature of the respective order, statute, or decision.³⁸ Scalia emphasizes that the state *actor* is irrelevant; the state *action* is what matters in takings claims.³⁹

While Justices Thomas, Alito, and Chief Justice Roberts joined Scalia in his discussion of judicial takings, Justices Kennedy, Sotomayor, Breyer, and Ginsburg were not willing to acknowledge any such doctrine, either because they argued substantive due process was adequate protection against takings, or because they felt there was no immediate need for the Court to address the issue.⁴⁰

However startling some Justices found the notion of judicial takings, the test that Scalia puts forward is actually fairly limited. In order for a court decision to go too far, it would have to declare that a well-established property right suddenly did not exist anymore.⁴¹ If the Florida Beach and Shore Preservation Act did not constitute a taking when it interfered with landowners’ rights to accretion and solidified the nonexistence of a littoral right to contact the water, then how far would a judicial decision have to go before it amounted to a taking?⁴² It seems likely that judicial takings would only be declared in instances where the courts’ decisions startlingly deviated from landowners’

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2613-2619 (2010).

⁴¹ See *id.* at 2602.

⁴² See Donna R. Christie, *Of Beaches, Boundaries and Sobs*, 25 FSU J. Land Use & Env’tl. Law 19, 68-69 (2009).

expectations of their property rights under previous law.⁴³ Only a judiciary's reconstruction of the state's pre-existing property laws would warrant an inquiry into judicial takings.⁴⁴

Judicial Takings: Beaches and Beyond

Even if the Supreme Court had declared the Florida Supreme Court's decision a taking, the ruling probably would not have had a significant impact on beach restoration in Florida.⁴⁵ Under the Beach and Shore Preservation Act, the compensation for a taking includes the consideration of the enhanced value of the property resulting from the addition of the new beach.⁴⁶ In general, any value lost for the right to accretions for property on an eroding beach will be offset by the added value of the new state beach protecting against such erosion.⁴⁷

While the *Stop the Beach* decision was a victory for states' rights to control and manage their beachfront, the fact that the Supreme Court may be willing to hear lawsuits arising out of judicial takings claims means property owners may have found a new avenue into court.⁴⁸ The doctrine has the potential to provide a new litigation strategy for landowners who believe that a state court has violated their rights by changing the existing law within the state.⁴⁹ Michael Wolf points out that two things must be shown in order to prove a judicial takings: (1) a shift in the law, and (2) a confiscation or taking of

⁴³ *Id.* at 68.

⁴⁴ *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010).

⁴⁵ Christie, *supra* note 42, at 71.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See* Wolf, *supra* note 16.

⁴⁹ *Id.*

an established private property right by the shift.⁵⁰ If landowners can prove both of these factors, then they just might succeed in showing their rights were unconstitutionally taken by the judiciary.⁵¹

Judicial takings claims are not restricted to issues of beach takings. It is quite possible that these takings will be alleged in a broad array of property areas, including land use planning, real estate, and environmental law.⁵² Importing judicial takings into other aspects of environmental law could increase the litigation over certain regulatory schemes limiting landowners' uses of their property, such as the Endangered Species Act.⁵³

No stranger to regulatory takings jurisprudence, the ESA can prevent private landowners from using their property in any way they please.⁵⁴ However, the authority of the ESA is well established, property owners generally know what to expect if their land hosts endangered species, and there is strong judicial precedent defending the act based on its advancement of a public purpose.⁵⁵ As a result, it may be difficult to prove that a court's decision to uphold regulations arising from the ESA "shifts the law" in such a way as to deprive a landowner of an existing property right.⁵⁶ Either way, the mere prospect of judicial takings claims means local and state governments should be aware: their actions could be scrutinized in a new light.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.*

⁵⁴ Darren Botello-Samson, *The History and Potential of Regulatory Takings Challenges to the Endangered Species Act*, 16 Duke Envtl. L. & Pol'y F. 293, 319-320 (2006).

⁵⁵ *Id.* at 333.

⁵⁶ *See* Wolf, *supra* note 16.

A state's ability to modify private property rights is crucial if it is to respond effectively to new environmental challenges.⁵⁷ States need some degree of flexibility in order to react to new threats, such as beach erosion, global climate change, or even the recent Gulf oil spill.⁵⁸ If judicial takings claims clog the courts and constrain state government by rigidifying existing property rights, states will not be able to adjust property rights for fear of having to compensate landowners for court decisions that sustain state environmental regulations. Whether judicial takings will become a problematic new obstacle to state government hinges upon just how far states are allowed to "shift" existing property rights before a right is unconstitutionally taken.⁵⁹

⁵⁷ See Christie, *supra* note 42, at 71.

⁵⁸ See Wolf, *supra* note 16.

⁵⁹ See *id.*