



*Sea Level Rise, Beach Restoration
and Judicial Takings*

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SYMPOSIUM ON SEA LEVEL RISE AND PROPERTY RIGHTS
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STBR v. Florida DEP

- ❑ Stop the Beach Renourishment (representing 6 landowners) challenged the issuance by DEP of a permit to Destin and Walton County for a 6.9 mile beach restoration project.
- ❑ After an administrative hearing, DEP issued a final order supporting the issuance of the permit.
- ❑ On appeal to the First District Court of Appeal, held:
DEP's order effected a taking of the upland owners' "constitutionally protected riparian rights" to "receive accretions and relictions to the property, and...[to] have the property's contact with the water remain intact."
- ❑ The case was certified to the Florida Supreme Court.



1986 Beach and Shore Preservation Act (BSPA)

- The State has a “necessary governmental responsibility to properly manage and protect Florida beaches ... from erosion and [directed] that the Legislature make provision for beach restoration and nourishment projects [for critically eroding beaches].”
- Requires DEP to identify those beaches of the state which are critically eroding and to develop and maintain a comprehensive long-term management plan for their restoration.



BSPA Provisions for a Beach Restoration Project

- **The erosion control line (ECL)**
 - Establish the line of mean high water for the area to be restored.
 - The MHWL is the primary reference for the erosion control line (ECL) for the project.
 - ECL may also take into account
 - the requirements of proper engineering in the beach restoration project,
 - the extent to which erosion or avulsion has occurred, and
 - the need to protect existing ownership of as much upland as is reasonably possible.



BSPA Procedures for a Beach Renourishment Project

- If the ECL must be located landward of the MHWL in order to accomplish the project, BSPA provides eminent domain authority to acquire such lands.
- After ECL recorded, title to all land seaward of the ECL is “deemed to be *vested in the state by right of its sovereignty . . .*”



Florida's Common Law Littoral Rights

- The Florida Sup. Ct has stated that riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights:
 - (1) the right of access to the water, including the right to have the property's contact with the water remain intact ;
 - (2) the right to use the water for navigational purposes;
 - (3) the right to an unobstructed view of the water; and
 - (4) the right to receive accretions and relictions to the property.

Board of Trustees v. Sand Key Associates, Ltd., 512 So. 2d 934(1987).

The effect of beach restoration projects on riparian & littoral rights

- The BSPA goes on to provide statutory protection for most of the rights that characterize riparian ownership, including but not limited to:
 - rights of ingress, egress, view, boating, bathing, and fishing.
 - state shall not allow any structure to be erected upon - lands created, either naturally or artificially, seaward of any erosion control . . . , except such structures required for the prevention or erosion.
 - [no] use [shall] be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee;
 - municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.
- “The common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of [ECL], either by accretion or erosion or by any other natural or artificial process”



In the Florida Supreme Court – The Certified Question

- As reframed by the Florida Supreme Court as a facial challenge to the BSPA:

On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?



Facially constitutional

- ❑ Avulsive event
- ❑ ECL set at the pre-avulsion MHWL
- ❑ State fills in lost in “shoreline”
- ❑ Basically returns situation to pre-avulsive *status quo*
- ❑ Does no more than allowed by the common law, therefore—facially constitutional!



Second part of case

- Whether the BSPA “takes” without compensation
 - the right to accretion and
 - The right to contact with the water.
 - Littoral rights “*are such as are necessary for the use and enjoyment*” of the upland property, but “*these rights may not be so exercised as to injure others in their lawful rights.*”



Nature of Littoral Rights

- Littoral rights “*are such as are necessary for the use and enjoyment*” of the upland property, but “*these rights may not be so exercised as to injure others in their lawful rights.*”
- rights to access and use are affirmative easements”
- “rights to access, use, and view are rights relating to the present use of the foreshore and water.”
- “[T]he littoral right to accretion and reliction is distinct from the rights to access, use, and view.
- ***The right. to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction.***”



“[T]he common law rule of accretion . . . is not implicated in the context of this Act.”

□ Rationale for common law right to accretions

- (1) [D]e minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.



“[T]he common law rule of accretion . . . is not implicated in the context of this Act.”

- ❑ None of the policy reasons that apply to the common law accretions doctrine apply to the BSPA.
- ❑ No currently accreted property concerned
- ❑ No “property” implicated, so there can’t be a taking.
- ❑ Therefore, BSPA is not unconstitutional because it does not constitute a taking of the right to accretions.



Contact is Ancillary to the Littoral Right of Access

- “[U]nder Florida common law, there is no independent right of contact with the water. Instead, contact is ancillary to the littoral right of access to the water.”
- “The ancillary right to contact with the water exists to preserve the upland owner’s core littoral right of access to the water. . . [T]he Act expressly protects the right of access to the water, which is the sole justification for the subsidiary right of contact.”



Cert. granted by US Supreme Court

- Three questions presented, but most of focus is on the first question:

*[Whether the] Florida Supreme Court invoked ‘nonexistent rules of state substantive law’ to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a **‘judicial taking’** proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?*



Taking of Property requires just compensation under Fifth Amendment

- Applicable to legislative & executive branches
- Does it apply to the courts?
 - *Chicago, Burlington & Quincy Railroad v. Chicago (1897)*
 - *Hughes v. Washington (1967)(Stewart dissenting)*
 - No deference to state courts to the extent that decision constitutes *a sudden change in state law, unpredictable in terms of the relevant precedents*
 - *Stevens v. City of Cannon Beach (1994) (Scalia dissenting to denial of cert)*
 - A State may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law
 - Courts shouldn't be able to invoke "new found" and "fictional" background property principles to redefine property and avoid takings



Commentators

- Seminal article: Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990)
 - “[J]udicial changes in property law raise the same concerns as legislative and executive takings,” so courts should be subject to the same constitutional restrictions as other branches of government.
- Only a handful of articles on the issue, but until recently almost all argued against finding a concept of judicial taking.



Caselaw

- ❑ Only one modern era case in 1985 – and it was vacated by the Supreme Court on other grounds.
- ❑ 15 cases arguing for “judicial taking” denied cert.
- ❑ Justice Brandeis: “the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decision on which a party relied, does not give rise to a [takings] claim under the [Fifth and] Fourteenth Amendment” *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673,(1930).



TAKING?

- Not as good a candidate for establishing principle as *Hughes* or *Cannon Beach*
- Did the Florida Supreme Court *startlingly* reinterpret riparian rights or simply recognize that the circumstances of beach restoration are *sui generis*?
- What reliance is impaired even if the case did change the law?
- Even if some riparian rights are no longer applicable in this context, is the upland property or even the bundle of riparian rights substantially impaired?
- Would the Supreme Court have to come up with a new way to assess a taking to find a taking?

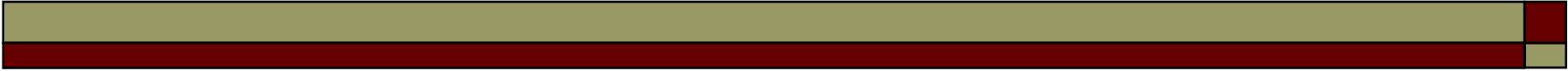


Even if a judicial taking found- How does it affect beach restoration in FL?

In any action alleging a taking of all or part of a property or property right as a result of a beach restoration project . . . [i]f a taking is judicially determined to have occurred as a result of a beach restoration project, *the enhancement in value to the owner's remaining adjoining property by reason of the beach restoration project shall be offset against the value of the property or property right alleged to have been taken*. If the enhancement in value shall exceed the value of the damage, if any, to the remaining adjoining property, there shall be no recovery over against the property owner for such excess.

2007 amendment to s.161.141







Effects on other Gulf States

- Texas
- Mississippi



Effects of a judicial taking doctrine

- ❑ Public trust doctrine is largely court-made law – how can it evolve?
- ❑ Other doctrines affecting access to beaches, like custom
- ❑ Chilling effect on state courts in responding to changes in society, gaps in the law ...
- ❑ Will it make the federal courts the ultimate determiners of what constitutes property – an area traditionally within the scope of state law?