



STOP THE BEACH RENOURISHMENT: PROPERTY RIGHTS BACK ON THE SUPREME COURT'S DOCKET

by

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The Supreme Court's infamous decision in *Kelo v. City of New London*, 545 U.S. 469 (2005) energized property rights advocates. In *Kelo*, the Court examined whether a city's taking of a home and selling it to commercial developers constitutes a "public use". The Court ruled that the municipality did not violate the Fifth Amendment's Takings Clause, which prohibits the government from taking private property for public use without just compensation. *Kelo* set off alarm bells across America, leading to fears that the wrecking ball might soon level more homes to make way for shopping malls or office buildings. Unfortunately, these predictions that government would further trample property rights have proven eerily prophetic. The Supreme Court recently granted certiorari in a takings case from the Supreme Court of Florida and will hear oral arguments in the October 2009 term. See *Walton Cty v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008). Will the Court return some teeth to the Takings Clause, or hammer another nail into property rights' coffin?

Background. After the Gulf Coast hurricanes of the previous decade, the Florida Department of Environmental Protection (FDEP) moved to restore eroded beaches. First, a coastal survey established the restoration area's mean high water line (MHWL). This became the erosion control line (ECL), a boundary between the publicly owned land and privately owned upland. When FDEP applied for a permit to begin the beach restoration, six owners of beachfront property formed the non-profit Stop the Beach Renourishment (STBR). STBR filed two petitions for formal administrative hearings; one challenged the issuance of the permit, and the second raised constitutional issues. The administrative judge approved the project without addressing the constitutional issues. The First District Court of Appeals addressed the constitutional issues, and reversed in favor of STBR, but the Supreme Court of Florida reversed the First District in a 5-2 vote.

This year, the U.S. Supreme Court will determine whether the State's temporary occupation of the petitioner's land for the purpose of beach renourishment, without just compensation or an eminent domain proceeding, constitutes the taking of private land for public use. The lengthy renourishment process involved dredging sand from neighboring counties to repair the hurricane-damaged beaches. The government essentially expropriates the prime beachfront real estate for as long as it takes to repair the beach, indefinitely impeding owners' view of and access to the water. Florida law requires that an eminent domain proceeding precede any beach renourishment involving the taking of private property. Beach and Shore Renourishment

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Act (the Act), § 161.141, Fla. Stat. (2005). Additionally, section 161.201 expressly preserves the upland owners' littoral rights to both view and use the water, and the State may only build beach structures seaward of the ECL to prevent erosion. 'Littoral' refers to beachfront property.

Florida Supreme Court Ruling. The Florida high court first examined the relationship between the public land and private uplands and concluded that the State holds the lands seaward of the MHWL in public trust for fishing, bathing, and navigation. The English introduced this common law doctrine of public trust to the thirteen colonies, and Florida adopted it upon joining the Union. *Brickell v. Trammel*, 82 So. 221, 226 (Fla. 1919). Furthermore, under Art. II, § 7(a) of the Florida Constitution, the State is constitutionally obligated to conserve and protect Florida's beaches and other natural resources.

As noted in *Brickell*, private upland owners hold these rights in common with the public. However, private owners also have the exclusive right to: (1) access the water; (2) reasonably use the water; (3) accretion and reliction; and (4) view the water without obstruction. *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987). These special littoral rights "are such as necessary for the use and enjoyment" of the upland property, but "may not be so exercised as to injure others in their lawful rights." *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 645 (Fla. 1909). Littoral rights are private property rights that cannot be taken without just compensation. *Brickell*, 82 So. at 227. The nature of upland owners' rights is a matter of state law. Under Florida common law, the littoral rights to access, use, and view are easements.

A brief review of property terms is helpful for fully understanding the issues in *STBR*. Erosion is the gradual wearing away of land from the shore. Accretion is the gradual accumulation of land along the shore of a body of water. Reliction is the increase of the land by a gradual withdrawal of the body of water. Avulsion is the sudden and perceptible loss of or addition to land by the action of water. BLACK'S LAW DICTIONARY (8th ed. 2004). The legal effect of changes to the shoreline on the boundary between public lands and uplands varies depending on the rate of change. William Blackstone, 2 COMMENTARIES ON THE LAWS OF ENGLAND, 261-62. The MHWL represents an average over nineteen years. § 177.27(15) Fla. Stat. (2007). Accordingly, under the doctrines of erosion, reliction, and accretion, the boundary between public and private land changes to reflect gradual changes to the shoreline. See *Sand Key*, 512 So. 2d at 934. Under the doctrine of avulsion on the other hand, the boundary between public and private land remains the MHWL as it existed before the sudden changes to the shoreline.

The First District failed to discuss the doctrine of avulsion because neither party raised it. Florida common law treats hurricanes as avulsive events. See *Bryant v. Peppe*, 238 So. 2d 836, 838 (Fla. 1970) (applying the doctrine of avulsion and concluding that a small strip of land that a hurricane brought to the surface belonged to the State, not neighboring owners). Another case arising from a hurricane further reinforces this point. *State v. Fla. Nat'l Properties, Inc.*, 338 So. 2d 13 (Fla. 1976). In *Florida Nat'l Properties*, the littoral owners dynamited obstacles from a drainage canal to return a lake to pre-hurricane levels. *Id.* at 16. The Court held that the self-help merely returned the water to normal levels and the owners retained title to the present MHWL as well as the land reclaimed through drainage. *Id.* at 18. Reasoning that the public has the right to restore a shoreline to its original MHWL after hurricane damage, the Court found the Renourishment Act constitutional because the State has the same power under the Act as it does under Florida common law.

In *Stop the Beach Renourishment, Inc.*, the Court took issue with the First District's determination that the Act results in a facially unconstitutional taking of the littoral right of accretion. Under Florida common law, the right to accretion is a contingent right that grants small portions of gradually accreted land to the upland owner. *Bd. of Trustees of the Int'l Improvement Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 212-13 (Fla. 2d DCA 1973): "There are four reasons for the doctrine of accretion: (1) de minimis non curat lex; (2) he who sustains the burden of losses and 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 (4) the necessity of preserving the riparian right of access to the water.” *STBR*, 998 So. 2d at 1114. The Court found that none of these four reasons applied in the case before them. First, the land gained or lost through avulsion is inherently more than a trifling sum. Second, the State sustains the burden of repairing the beach under the Act, and therefore it is the State, and not the upland owners, that ought to receive the benefit. Third, all land has an owner under the Act because the boundary between public land and private uplands is fixed at the ECL. Finally, the upland owner’s littoral right of access is preserved by the Act.

The Justices felt the lower court had erred in ruling that the owners had an independent right to contact with the water. Under Florida common law, contact is ancillary to the littoral right of access to the water. Section 161.201 of the Act expressly protects the right to access the water, upon which the right to contact is based. Since the Act safeguards the right to access, the Court reasoned, the Act does not unconstitutionally eliminate the ancillary right to contact.

In concluding its opinion, the majority expounded upon why one case the First District relied upon to discount the Act’s preservation of littoral rights in section 161.201 was neither controlling nor relevant. In that case, the Court held that “littoral rights cannot be severed by condemnation proceedings without the consent of the upland owner.” *Belvedere Dev. Corp. v. Dep’t of Transp.*, 476 So. 2d 649, 652-53 (Fla. 1985) (emphasizing that the decision is limited to the context of condemnation of upland property). The Court found *Belvedere* inapplicable because *STBR* did not argue that the Act mandates the condemnation of the uplands.

In a strongly worded dissent joined by Justice Wells, Justice Lewis argued that the majority “butchered Florida law...and create[s] dangerous precedent...based upon infirm, tortured logic.” *Stop the Beach Renourishment, Inc.*, 998 So. 2d at 1121. Lewis argues that the majority opinion rests on the misguided premise that contact with the “water has absolutely no protection and is just some ancillary concept that tags along with access to the water and seemingly possesses little or no independent significance.” *Id.* at 1122. Furthermore, Justice Wells argued that the majority ignored its own holding in *Belvedere* – which established clear principles of littoral property rights – dismissing the binding law as an annoying footnote in Florida jurisprudence.

Far from being “ancillary to” or “independent of” littoral property rights, contact with the water is what distinguishes littoral and non-littoral property. *See Medeira Beach*, 272 So. 2d at 213. The majority carelessly glossed over the obvious point that severing property from its contact with the water diminishes the value of the property. In this regard, an identically sized property located further inland is not equivalent to property with water access. The Court ignored the plain language of the statute 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.” § 161.141, Fla. Stat. (2005). Under this dangerous misapplication, the government can deprive waterfront property owners of thousands of yards of prime real estate, thereby destroying the essential nature of littoral property. According to the Florida Constitution and state statutes, the Sovereign owns the land between the MHWL and the low-water mark, and the private upland owner owns the land up to and including the MHWL. Art. X § 11, Fla. Const.; § 253.141, Fla. Stat. (2005). The Act is constitutional in certain circumstances, but its application in this case constitutes takings without compensation.

The dissent makes the more compelling argument. A key point that the majority overlooks is the constitutionality not of the Act itself, but of its application in this case. The Court seems content merely restating the language of the Act, as if this is a valid substitute for proper legal analysis. Though long on discussion of esoteric geographic concepts such as accretion and reliction, the opinion is short on application of basic constitutional law principles. While both sides are mindful of the importance of repairing hurricane-

damaged beaches in Florida, five of the seven justices seem to value this over properly compensating land owners.

STBR Before the U.S. Supreme Court. Although both *Kelo* and *Stop the Beach Renourishment, Inc.* involve eminent domain, there are some key distinctions. First, unlike Mrs. Kelo, the Florida property owners never received any compensation. This is significant because *Kelo* determined what constitutes a public use, whereas *STBR* does not question the public interest in repairing hurricane-damaged beaches. Rather, *STBR* addresses whether Florida's taking of the beachfront property without any compensation is constitutional. Second, state law expressly permits the Florida takings. Even the dissent acknowledges Florida's compelling state interest in preserving her natural beauty. No such state law existed in Connecticut, where Kelo and her neighbors lost their homes to commercial developers so that the cash-strapped city could use the higher property taxes to address purported neighborhood blight. In other words, New London circumvented property rights in the interest of gentrification, while Florida merely enforced its interpretation of state law. Third, and perhaps most important, *STBR* will be decided in a much different political and legal climate than *Kelo*. Polls reveal that *Kelo* remains a deeply unpopular decision among most members of the public, many of whom probably do not otherwise follow the Supreme Court. Many states responded to *Kelo* by passing laws strengthening property rights.

The turnover in the Court's lineup since *Kelo* further complicates prognostication on how it will decide *STBR*. Since the 2005 decision, Justice Alito has replaced Justice O'Connor, who wrote the dissenting opinion shortly before her retirement in 2006. Chief Justice Roberts has replaced the late Chief Justice Rehnquist, who joined O'Connor's dissent. With Judge Sotomayor poised to replace the retiring Justice Souter, the Court may have a different perspective than that which decided *Kelo*. Nevertheless, a seismic ideological shift occurring in just four years remains a dubious proposition at best. If the fallout from *Kelo* is any indication, *Stop the Beach Renourishment v. Florida* is sure to capture the public's attention.