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## CAN A COURT CAUSE A JUDICIAL TAKING OF PRIVATE PROPERTY?

By Ronald A. Zumbrun\*

The United States Supreme Court has taken jurisdiction of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*. At issue is whether a court's ruling that changes a state's property law can cause a judicial taking of private property.

Legislative or executive action that deprives a person of his property can result in a violation of the Fifth Amendment requiring just compensation. However, the United States Supreme Court has never addressed the question of whether a judicial change to state property law can become a Fifth Amendment taking. In fact, since 1994, 15 petitions for Writ of Certiorari raising this issue were denied a hearing by the United States Supreme Court.

The pending case, *Stop the Beach Renourishment*, involves Florida law that for 100 years has provided waterfront (littoral) property owners with constitutionally protected property rights of direct access to the ocean and the right to accretion (accumulating sand and soil). Landowners must own to the mean high tide water line in order to possess such rights.

The case began in 2003 when the City of Dustin and the County of Walton sought approval to restore 6.9 miles of beach and dunes after several hurricanes eroded the beaches in

the city and county. They applied for a Joint Coastal Permit and Authorization to use Sovereign Submerged Lands from the Florida Department of Environmental Protection to place sand landward and seaward of the mean high tide water line as authorized by the 2003 Beach and Shore Preservation Act. Under the Act, in order to restore continually eroding beaches, the legislative and executive branches of the State of Florida decided to sever an oceanfront property owner's contact with the ocean by unilaterally altering and replacing the mean high tide water line with a fixed erosion control line as the property boundary for the 6.9 mile stretch of beach. This resulted in a complete elimination of the 100-year-old littoral property rights without any judicial proceeding or compensation.

The Florida Supreme Court has blessed this scheme by simply announcing in effect that the ancient littoral rights never existed so the state does not have to pay compensation. It held that the state common law right to accretion and property beyond the fixed erosion control line does not supercede Florida's subsequently adopted act.

The Beach and Shore Preservation Act expressly provides that "title to all lands seaward of the Erosion Control Line shall be deemed to be vested in the State by right of its

sovereignty, and all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the Erosion Control Line or would have abutted the line if it had been located directly in the line of mean high water on the date the Board of Trustees' survey was recorded."

United States Supreme Court Justice Stewart in his 1967 concurring opinion in *Hughes v. Washington* stated that "[a] judicial taking may occur when a court, through sudden departure from established legal principles, has essentially changed long-standing property rights via judicial fiat so as to effect the 'retroactive transformation of private into public property.'"

A unanimous panel of the Florida Court of Appeal had found the case relatively simple—given well-established Florida law—and held that the adoption of the Erosion Control Line resulted in an uncompensated taking of littoral rights and invalidated the Erosion Control Line. The Florida Supreme Court obviously disagreed and held that the Act was a "reasonable solution to a public policy problem."

In 1994, United States Supreme Court Justice Scalia in *Stevens v. City of Cannon Beach* dissented from the denial of a Petition for Writ of Certiorari in a similar case, stating "just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate 'background law' – regardless of whether it is really such – could eliminate property rights . . . . Since opening private property to public use constitutes a taking, if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking."

The *Stop the Beach Renourishment* case can have a major impact on future cases. States would no longer be able to limit their liability for certain takings by convincing state courts to narrow their laws of property to avoid governmental takings.

To fully comprehend the significance of this case and its application, two cases from the Third District Court of Appeal here in Sacramento provide guidance. The first case is *State of California v. Superior Court (Fogerty)*. *Fogerty* dealt with the "Public Trust Doctrine" which goes back to the Roman days and eventually became part of the English common law. This doctrine provides that the public may use tidal waters for fishing, navigation and commerce. The United States Supreme Court in 1873 limited the public trust to land under the tidewater and to the right of navigation over the water.

In *Fogerty*, which dealt with Lake Tahoe, the California Supreme Court, under Chief Justice Rose Bird, expanded the public trust to include recreation, picnicking, birdwatching and preservation of the land in its natural state. The court also expanded the public trust concept to include the area between the low and high water mark on both nontidal and tidal waters whether or not water was present.

The defeated property owners petitioned the United States Supreme Court, contending that there had been a judicial taking of private property that required the payment of just compensation. The California Supreme Court had changed long-standing private property ownership rules so as to pass an ownership interest from a private individual to a public agency. Judicial takings are subject to the just compensation requirement of the Fifth Amendment just as if the public agency had brought an eminent domain proceeding.

In response to petitions to the United States Supreme Court in *Fogerty*, the State of California balked. Rather than risk a Supreme Court ruling that would require the payment of just compensation, the State argued that it had

never exercised jurisdiction below the high water mark and this issue was therefore not ripe for judicial review. Consequently, the United States Supreme Court denied review and the issue of just compensation as a prerequisite to the State placing the public on private beaches between the high and low water marks was not resolved.

The second example is the *Marine Forests Society v. California Coastal Commission* lawsuit brought initially in Sacramento County Superior Court. The nonprofit Marine Forests Society is an environmental organization dedicated to creating and restoring marine habitat. With the permission and approval of the owner, the City of Newport Beach, and funding by the State Department of Fish and Game and the Waste Management Board, Marine Forests volunteers established an experimental reef on the sandy ocean bottom about 300 yards beyond the Newport pier. As a result, they received the 2004 Governor's Environmental Leadership Award "in recognition of meritorious contributions to environmental protection and resource conservation in the State of California." However, along the way Marine Forests crossed the California Coastal Commission, which had an unsuccessful reef. The Commission eventually brought a Cease and Desist Order against Marine Forests to shut down their program that was aimed to provide a habitat where plankton, shellfish and fish could breed.

Marine Forests brought suit alleging that the Coastal Commission was unconstitutionally structured. The California Legislature appoints two-thirds of the commissioners who serve at the will of the Legislature in violation of California's separation of powers clause which prohibits each of the three branches of government from materially interfering with the core functions of the other branches. Therefore, the Coastal Commission was a legislative body without authority to issue cease and desist orders which is a core

function of the executive branch. It could retain its rule-making function, since that was a legislative function. However, it could not enforce its coastal rules, as that was an executive and judicial function.

Marine Forests prevailed in the superior court and the court of appeal and a Special Session of the State Legislature eliminated the "at will" provision and set fixed four-year terms for commissioners. The Coastal Commission sought review before the California Supreme Court. It took the court more than two years to craft its opinion. The court appeared to be concerned with retroactivity and the possibility of undoing 28 years of coastal decisions. However, statutes of limitations would prevent most of these concerns.

The rationale of the Supreme Court's decision supporting the Coastal Commission's efforts to deprive Marine Forests of its property interests was quite unique. Even though Marine Forests agreed that all California Coastal commissioners lawfully held office, the court went ahead to say that "under the '*de facto officer*' doctrine prior actions of the Commission cannot be set aside on the ground that the appointment of the commissioners who participated in the decision may be vulnerable to constitutional challenge.

... The lawful acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it."

It is important to note that Marine Forests had merely challenged the Commission's jurisdiction to perform executive and judicial functions inasmuch as the Legislature appoints two-thirds of the commissioners. This was a separation of powers challenge, not a challenge of the Legislature's ability to establish the appointment process.

If the California Supreme Court's decision were left to stand, that court would have allowed a state agency to take Marine Forests' property without just compensation or due process. The court had suddenly and arbitrarily changed state law. The action was totally unpredictable in terms of relevant precedents.

Marine Forests filed a Petition for Writ of Certiorari seeking a hearing before the United States Supreme Court on the basis that the California Supreme Court had committed a judicial taking as a result of its decision. Unfortunately, the petition was denied.

The above two cases illustrate two independent approaches to judicial takings. In *Fogerty* the lower court abruptly changed land use rules thus causing a taking. In *Marine Forests* the court abruptly changed a non-land use rule, the "de facto" officer doctrine, thus allowing a taking to occur.

If Stop the Beach Renourishment, Inc. prevails by establishing the judicial takings doctrine before the United States Supreme Court, it will set precedent for the state and federal courts to follow. It also will provide major protection of private property rights in the future.

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