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A MAJOR PROPERTY RIGHTS ADVANCE PLUS AN ASTONISHING EXCHANGE BY THE FIFTH CIRCUIT COURT OF APPEALS

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Ever since 2005 when the United States Supreme Court ruled in *Kelo v. Town of New London, Connecticut*, there has been heightened attention paid to the Constitution's protection of private property rights. The *Kelo* Court held that the government's power of eminent domain was so great that it could take one person's private property for another's private economic gain. The Court chose to rewrite our nation's Constitution by substituting public "purpose" for public "use." The purpose here was to improve the tax base.

The most important outcome of *Kelo* is the realization that major groups from across the political spectrum have criticized this decision. It has affected property owners from all walks of life throughout the country, each of them outraged at this ruling. The most common criticism is that the costs of unlimited powers of condemnation fall mainly on the poor. In fact, the property owners in *Kelo* were joined by friends of the court, including Pacific Legal Foundation, Mountain States Legal Foundation, the Claremont Institute for Constitutional Jurisprudence, as well as the National Association for the Advancement of Colored People (NAACP), the American Association of Retired Persons (AARP), the Hispanic Alliance

of Atlantic County, Inc., and the Southern Christian Leadership Conference among others.

With this background, it is surprising to see the proponents of property rights described as right-wing extremists and worse by a member of a United States Circuit Court of Appeals.

Two and one-half weeks ago, on April 23, 2009, the United States Court of Appeals for the Fifth Circuit, in an appeal from the United States District Court of the Southern District of Texas, ruled in *Severance v. Patterson, et al.* (No. 07-20409). The case involves a public easement under the 1959 Texas Open Beach Act (OBA) which provides that beachfront properties are subject to an easement for the public to have free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering the Gulf of Mexico (i.e., between the wet beach and the dry sandy beach to the line of vegetation). To enforce the OBA, various state and local officials may seek declaratory or injunctive relief, including orders to remove "any improvement, maintenance, obstruction, barrier, or other encroachments on a public beach." A landowner may not exclude the public from a beach covered by the OBA. The easement boundaries shift with the

vegetation line and the line of mean low tide.

Carol Severance, a California resident, purchased two beachfront properties above the vegetation line in 2005. Each parcel was improved with a single-family home to be used as a rental property. No easement has ever been established on either parcel by prescription, implied dedication, or continuous right.

After the purchase, erosion caused by Hurricane Rita shifted the vegetation line farther landward, causing both of Severance's properties to be located on the dry beach. Subsequently the Commissioner of the Texas General Land Office (Patterson) informed Severance that her houses were subject to a removal order at any time.

Severance promptly filed suit for declaratory and injunctive relief, alleging that the rolling easement pursuant to the OBA would effect an illegal seizure under our Constitution's Fourth Amendment and a taking without just compensation under the Fifth Amendment. She was represented by David Breemer of the Pacific Legal Foundation.

The trial court ruled that both issues were unripe because Severance had not exhausted her state court remedies. The Circuit Court reversed the ruling on the illegal seizure under the Fourth Amendment. This reveals an approach to the challenge of land use restrictions which has been lying dormant for two centuries.

The Fourth Amendment, made applicable to the states by the Fourteenth Amendment, provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property."

Despite the long dormant period, it should come as no surprise that the Fourth Amendment has finally been recognized as one of the shields available to defend our individual property rights against government encroachment. After

all, the amendments known to protect our property rights – until now, primarily the Fifth and Fourteenth Amendments – are the very same amendments which protect our rights against unfair criminal prosecution. The Fifth Circuit now recognizes that "the Fourth Amendment applies to civil as well as criminal seizures."

Over the government's objection, the Circuit Court indicated that substantive due process, procedural due process, equal protection and takings claims may be implicated simultaneously in various types of government actions that interfere with individual property rights. The same would apply to seizures under the Fourth Amendment.

The Court pointed out that "the elements of a violation of the Fourth and Fifth Amendments differ, with the touchstone of a takings claim being lack of just compensation and that of a seizure claim being its unreasonableness. Further, § 1983 [of the Federal Civil Rights Act] authorizes different damage measures for each of the claims."

The Court held that "Severance sufficiently asserts the elements of a Fourth Amendment claim, *i.e.*, (a) a meaningful interference with her possessory interests in her property, which is (b) unreasonable because the interference is unjustified by state law or, if justified, then uncompensated. The State asserts the appropriation of an easement over beachfront land not previously so encumbered, and the consequence of the easement, according to the State, is that Severance may neither repair her damaged houses nor rebuild on that segment of her property nor exclude the public from using the new dry beach even though they were previously excluded. Not only has the State thus appropriated an easement over her property, but it denies owing any compensation. These facts state a potential claim under the Fourth as well as Fifth Amendments."

The Court went further and concluded that whether a "reasonable" seizure had been accomplished depends on a definitive

construction of Texas law as to which there was no State Supreme Court precedent. Consequently, the Court certified the question of Texas law to the Texas Supreme Court for response. The Circuit Court will then revisit this issue.

The opinion was authored by Chief Judge Edith Jones and joined by Circuit Judge Edith B. Clement. Circuit Judge Jacques L. Wiener, Jr., dissented. And what a dissent it was.

The first paragraph of the dissent follows. I will leave it to the reader to form his or her own opinion:

"I. CONTEXT

Although undoubtedly unintentionally, the panel majority today aids and abets the quixotic adventure of a California resident who is here represented by counsel furnished *gratis* by the Pacific Legal Foundation. (That non-profit's published mission statement declares that its *raison d'être* includes "defend[ing] the fundamental human right of private property," noting that such defense is part of each generation's obligation to guard "against government encroachment.") The real *alignment* between Severance and the Pacific Legal Foundation is not discernable from the record on appeal, but the real *object* of these Californians' Cervantian tilting at Texas's Open Beaches Act ("OBA") is clearly not to obtain reasonable compensation for a taking of properties either actually or nominally purchased by Severance, but is to eviscerate the OBA, precisely the kind of legislation that, by its own declaration, the Foundation targets. And it matters not whether Ms. Severance's role in this litigation is genuinely that of the fair Dulcinea whose distress the Foundation *cum* knight errant would alleviate or, instead, is truly that of squire Sancho Panza assisting the Foundation *cum* Don Quixote to achieve its goal: Either way, the panel majority's reversal of the district court (whose rulings against Severance I would affirm) has the unintentional effect of enlisting the federal courts and, via

certification, the Supreme Court of Texas, as unwitting foot-soldiers in this thinly veiled Libertarian crusade."

In response, the majority inserted a footnote at the beginning of its opinion that reads as follows: "Notwithstanding the hyperbolic and unsupported assertions in Part I of the dissent ("Context"), the judges of the court endeavor not to decide appeals based on who the litigants are, who their lawyers are, or what we may believe their motives to be. Whether that rule is observed in light of Part I of the dissent, however, the reader must determine."

The dissent concludes that "the State's action was unquestionably reasonable, leaving Severance uncompensated under the Fourth Amendment for the chimeric [illusory or unachievable] loss she now claims I am convinced that today's holding spuriously opens the Fourth Amendment as an avenue for property-rights activists to attack the exercise of constitutionally permissible powers of eminent domain—a classic example of using a shield as a sword."

Judge Wiener's ad hominem attack on the lawyers representing Severance, and the constitutional rights which they pledge to uphold, may be the best illustration of the importance of the Fourth Amendment to private property advocates, be they liberal, libertarian or conservative. The Fourth Amendment actually is being used as a shield to restrain overreaching government—not as a sword. Cases should be analyzed by judges on their merit, not on the basis of personal predilections and animus. It is hoped that adherence to this basic principle will advance the liberty of citizens as well as the public's confidence in the neutrality of the judiciary.

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