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DID JOHN GARAMENDI REALLY WANT TO RISK PURCHASING EVERY PRIVATE BEACH AT LAKE TAHOE?

By Ronald A. Zumbrun*

Before being elected to Congress last month, John Garamendi was Lt. Governor of the State of California. He also was Chairman of the State Lands Commission, which is the Trustee of California lands that are subject to the Public Trust Doctrine. At its October 22, 2009 meeting, led by its chairman, the State Lands Commission voted to exercise an expanded interpretation of the Public Trust which would require every Tahoe lakefront owner to allow the public onto his or her private property below the high water mark. Turning private beaches into public beaches at Lake Tahoe could be very costly, especially for cash-strapped California and its weary taxpayers.

The Public Trust Doctrine goes back to ancient Roman laws and eventually also 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 1981 the Lake Tahoe case of *State of California v. Superior Court (Fogerty)* was decided by the California Supreme Court

under Chief Justice Rose Bird. The court expanded the public trust to include recreation, picnicking, bird watching 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. They argued that the California Supreme Court had changed long-standing private property ownership rules so as to pass an ownership interest from private individuals 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 the *Fogerty* petition to the United States Supreme Court, 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 prerequisite to the State placing the public on private beaches between the high and low water marks was not resolved. It would continue to remain undecided until such time as the State or other government agency decided to exercise jurisdiction in the shorezone between the high and low water marks.

The State Attorney General had represented to the United States Supreme Court that: "All the California Supreme Court has done is tentatively recognize that lands below the current high water mark in Lake Tahoe are *potentially* subject to judicially-fashioned trust interests, all of which may be curtailed or adapted to dovetail with private needs (and even wants). Unless this Court is ready to abandon its well-entrenched rules against consideration of broad facial challenges under the Takings Clause . . . there is no proper federal question on the record." (Emphasis in original)

At the October 22, 2009 hearing, the State Lands Commission ignored the Attorney General's representation to the United States Supreme Court and proceeded while claiming that the California Supreme Court's *Fogerty* decision expanding the public trust was binding and that all Tahoe lakefront owners are banned from claiming otherwise. However, the Commission's staff report for their October 22, 2009 hearing admits that taking jurisdiction at Lake Tahoe "is the first formal trust exercise by the Commission involving the public trust easement on nontidal shorezone areas."

The Commission, led by John Garamendi, ignored the argument that the first formal exercise of the expanded public trust may result in a finding that the jurisdiction deprives California lakefront

owners of their property without just compensation. Chairman Garamendi went on to declare that this jurisdiction would now "be imposed on all lakefront property at Lake Tahoe." At the end of the hearing, John Garamendi indicated his position on the expansion of the Public Trust Doctrine by stating: "We have to be very, very clear here. This is not just about Lake Tahoe. This is about the entire state of California. We have thousands of miles of coastlands . . . we have thousands of miles of rivers. We need to be very, very clear about the public trust. . . . This is in fact the right of the public, and it will be enforced."

Meanwhile, the United States Supreme Court has recently taken jurisdiction of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*. Of significance is the issue of whether a court's ruling that changes a state's property law can cause a judicial taking of private property. Oral argument was heard on December 2, 2009.

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 High 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 inland waterways 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, in order to restore continually eroding beaches caused by several hurricanes, the State of Florida placed a sand barrier landward and seaward, thus severing the property owners

on 6.9 miles of beaches. This resulted in the complete elimination of the 100-year-old littoral property rights without any judicial proceedings or compensation.

The Florida trial court found this action to be a taking without just compensation. The Florida Supreme Court disagreed and held that the state's action was a "reasonable solution to a public policy problem".

The December 2, 2009 oral argument before the United States Supreme Court was quite lively. Surprisingly, none of the nine Justices challenged the petitioner's premise that a court, just like a legislative or executive body, "which suddenly and dramatically redefined property rights" could be found to have violated our Constitution's Fifth Amendment and caused a taking of private property without compensation. Here it was the "conversion of oceanfront property into ocean view property."

The oral argument instead centered around the factual issues related to the nature of the restoration project and its impact on the affected property owners. The court seemed split on the factual issues. However, Chief Justice Roberts was the most outspoken on the side of the property owners and appeared to have the votes. The concept of a judicial taking remained intact.

Tahoe lakefront owners have an even stronger case, as there are no necessity factors or factual issues present at Lake Tahoe. As of 2005, 47% of the Tahoe Lake shore was already public beaches (up from 17% in 1971). Due to fiscal problems the state is already closing many of its Tahoe beaches. Why require private lakefront owners to pick up this financial burden?

The public trust issue at Lake Tahoe is enormous because it changes private property into public beaches without provisions concerning garbage cleanup, toilets, dogs, etc. and without security, rules, public facilities or protection for the property owners and their families. Most important – there has been no compensation and all costs and expenses have been left to the private property homeowner to pay. The State Lands Commission also has failed to comply with the applicable rulemaking statutes and failed to provide an environmental assessment.

All lakefront owners at Lake Tahoe, as well as those who own property on other lakes and rivers in California, have a major stake in this issue and need to be involved.

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