

**THOMPSON
HINE**

December 2009

**LAND USE AND REAL ESTATE
LITIGATION ALERT**

U.S. Supreme Court Considers New Eminent Domain Issue: “Judicial Taking” of Private Beach Property

The U.S. Supreme Court on December 2 heard oral arguments in a case that may have far-reaching consequences for eminent domain law as it applies to states’ efforts to restore eroding beaches. Thompson Hine partner and chair of the firm’s Land Use subgroup, Steve Kaufman, attended the oral arguments. The issue presented is whether Florida’s highest court effected a judicial taking by impermissibly approving the taking of property from beachfront property owners in the name of the public good but without just compensation and due process of law. The case, *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, et al*, provides the Court with the opportunity to address for the first time the long unanswered question of whether a judicial decision can constitute a “judicial taking” of private property in violation of the Fifth Amendment’s Just Compensation Clause.

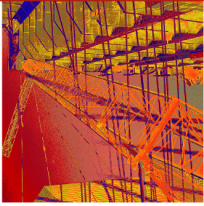
COURT TO RULE ON CONSTITUTIONALITY OF STATE COURT TAKING PROPERTY

The U.S. Constitution expressly guarantees the protection of free speech, equal protection and property and protects against uncompensated takings of property. While the U.S. Supreme Court defines the scope of free speech and equal protection, state courts define property. Once property is defined under state law, it is protected by the Fifth and Fourteenth Amendments of the U.S. Constitution.

The U.S. Supreme Court will decide whether Florida’s highest court made a precipitous judicial decision that impermissibly and fundamentally changed Florida’s property law when it redefined “littoral property” thereby effectively taking property from beachfront property owners in the name of the public good but without just compensation and due process of law. Littoral rights of an owner of upland property respect ownership (reflected in a deed) to land above the high water line so the property will “touch” the water line and thus benefit from accretion to the beach. Florida ceased to recognize this historical view of these rights and thus they were “extinguished” and not compensated.

FLORIDA’S STATE JUDICIAL ACTION AT ISSUE

The petitioner, an association of beachfront property owners in Destin and Walton County, Florida, claims that the Florida Supreme Court decision “suddenly and dramatically changed 100 years of background property law in Florida, thereby effecting a judicial taking.” A judicial taking occurs when a decision of the state court effects a “sudden change in state law, unpredictable in terms of the relevant precedents” so as to be a sudden departure from established legal principles. *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring). The decision will have essentially



changed longstanding property rights via judicial fiat so as to effect “the retroactive transformation of private into public property.” See, *Hughes v. Washington*, 389 U.S. at 298.

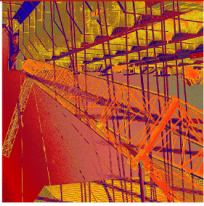
The Florida Supreme Court reversed a Florida appeals court that found that Florida’s Beach and Shore Preservation Act (“Act”) contains provisions that divest upland owners of their littoral right to receive accretions and eliminate the right to maintain direct contact with the water. The First District thus held that allowing a new erosion control line (ECL) to replace the mean high water line (MHWL) in front of the petitioner’s beachfront properties resulted in an unconstitutional taking without an eminent domain proceeding as required by § 161.141 of the Florida statutes.

The Florida Supreme Court in reversing the First District also stated that the public interest is served because the addition of sand to eroded sovereignty lands prevents a further loss of public beaches, protects existing structures and repairs prior damage. The court further stated that the Act benefits private upland owners by restoring beach already lost and by protecting their properties from future storm damage and erosion, while expressly preserving the upland owners’ rights to access, use and view, including the rights in ingress and egress, and the rights to boating, bathing and fishing. It further protects them by prohibiting the state from erecting structures on the new beach except those necessary to prevent erosion.

CHALLENGE TO FLORIDA COURT’S RADICAL CHANGE OF PROPERTY RIGHTS LAW

Most states have grappled for years with what the dividing line is between state and private ownership of beachfront property. In coastal states, the dividing line usually has been defined as the MHWL, a fluctuating boundary that moves as the beach grows or erodes. Traditionally, the state owns everything seaward of the MHWL and the private owner owns everything on the landward side of the MHWL. Florida’s common law recognized the principle of the MHWL, but in an effort to rebuild eroding and hurricane- and storm-damaged beaches, the Florida state legislature enacted the Act more than 30 years ago. The new law fixes a new dividing line, the ECL, which becomes a new, fixed boundary between state- and private-owned land and replaces the MHWL. The Act allows Florida to restore critically eroded beaches and storm-ravaged shorelines by placing sand on sovereign submerged lands. Sand placed landward of the ECL becomes the property of the upland owner. Sand placed seaward of the ECL becomes the property of the state of Florida in trust for its citizens.

The property owners’ association now claims that in order to avoid paying compensation for taking private property, the Florida Supreme Court redefined well-established littoral property rights by declaring that they never existed, so that nothing was taken. The association claims that in effecting an unconstitutional judicial taking, the Florida Supreme Court ignored 100 years of Florida law that requires a property to contact the MHWL to possess littoral rights and instead concluded that “under Florida common law there is no independent [littoral] right of contact with the [MHWL].”



PROPERTY AT ISSUE

The property involved includes 6.9 miles of beach in the city of Destin and Walton County, purportedly badly eroded after several hurricanes washed sand away from the beaches affecting up to 453 individual properties, five of which belong to members of the property owners' association. The association contends that its members' properties, prior to the renourishment, sat on an accreting beach (i.e., a beach increasing in size as ocean deposits occur) more than 200 feet of dry sand and dunes from the MHWL. Over objections by the association, the state pumped sand onto the property in front of members' homes, creating an additional 75-foot wide "public beach" seaward of the MHWL.

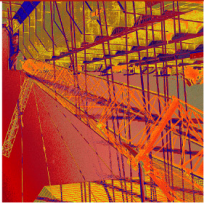
ORAL ARGUMENT EXPOSED A DEEPLY DIVIDED COURT

At center stage are the "littoral rights" including the right to exclude others from the littoral property. The property owners' association contends that the state of Florida by this ruling will use the Act as the cheapest method by which to commandeer a private beach and convert it to a public beach; to in essence take a property owner's oceanfront property and turn it into an ocean view—thereby causing a devaluation of the owner's property interest.

The state contends that the decision can hardly qualify as a judicial taking, as it involved the facial constitutionality of a state statute, not judge-made law that departs from established legal norms. According to the state, the Act's challenged provisions address only the narrow context of property rights along critically eroded beaches, and it retains every littoral right other than potential future accretion.

The oral arguments disclosed a highly divided court, suggesting a possible 4-4 decision (Justice Stevens owns Florida property and is not participating). All of the members of the bench were active in questioning counsel for both sides and often engaged in very lively and sharp exchanges with counsel. There was tension between the private beachfront owners' benefit from state conservation and the threat of the state's public beach uses for spring break vacationers and hot dog vendors that may be injurious to the private owners.

A number of the justices centered questions on the actual property rights in dispute and whether the law was altered by the Florida Supreme Court. Justice Breyer suggested the need for state courts to be able to apply common-law principles flexibly to new situations; Justices Scalia and Kennedy pointed to the significant benefits to the property owners and enhanced value that was received as a result of the legislation and beach restoration and questioned whether the benefits were sufficient compensation to the property owners for any property owner rights that were affected. Counsel for the property owners' association responded that the question of enhanced value was one that a property owner was entitled to have heard by a jury setting compensation for a taking. Justice Breyer pointed to the owners obtaining more value than they had before.



Justices Scalia, Kennedy and Roberts were all concerned about the nature of the state's uses of property it had and might have obtained through the state court's ruling, i.e., the band of land (often submerged) between the new "property line" and the previous high water line that defined the place the private owners' property reached and touched. They mused about hypothetical state uses of the new "public lands" as a place for spring break vacationers, amusement parks and hot dog vendors in two feet of water. These questions suggested a concern over state misuse of rights it may obtain from an activist state court departing from previous definitions of private owners' property rights.

Justice Kennedy honed in on what constitutional standard the court could set for when there is a judicial taking by a state court in order to justify the federal court "intervening and disagreeing with the state court's interpretation of state law." Justice Kennedy suggested adjectives for "a state pronouncement of property law that was 'unexpected' or 'sudden' or 'unfounded.'" Counsel for the property owners' association urged the court to set the standard as one where the state court made a "sudden and dramatic change" that "broke with all precedents" and "effected a change in the direction of state law." Justice Kennedy interjected that if the state court had a "close" case that could go either way, then "should not the state win such a case?" The court then probed the distinction between a sudden and dramatic change in the law, as opposed to gradual changes in the law. Justice Alito suggested the notion of a "fundamental change" in state law. Justice Breyer also questioned the disposition by a state court of a case where the law was not clear and in such a case, the parties would have to accept the result the court ordered because it was "reasonable" in the context of the precedents.

FOR MORE INFORMATION

We will issue another bulletin on this topic as soon as the decision is announced next spring. In the meantime, if you have questions, please contact:

Steven S. Kaufman	216.566.5528	Steve.Kaufman@ThompsonHine.com
Robin M. Wilson	216.566.5572	Robin.Wilson@ThompsonHine.com

If you do not wish to receive future communications by e-mail, please send an e-mail with the word "unsubscribe" as the subject line to Georgene.Davison@ThompsonHine.com.

This advisory may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions. Some of the design images and photographs in this document may be of actors depicting fictional scenes.

© 2009 THOMPSON HINE LLP. ALL RIGHTS RESERVED.