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**LAND USE AND REAL ESTATE  
LITIGATION ALERT**

**Supreme Court Rules in Florida Zoning Case**

The U.S. Supreme Court yesterday ruled against a group of property owners in Florida in deciding that Florida's beach restoration program does not violate their property rights. We first told you about the case last December when the U.S. Supreme Court heard oral argument on the issue of whether the Florida Supreme Court's decision (finding that the restoration program did not unconstitutionally deprive the owners of their property without just compensation) constituted a judicial taking. Yesterday's 8-0 decision held in favor of the state of Florida concluding that the state's beach restoration program only filled in submerged land on the beach that clearly belonged to the state under Florida law, and that the private property owners thus had not suffered a loss.

The case, *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, et al.*, provided the Court with the opportunity to make new law and to answer the long unanswered question of whether a judicial decision can ever constitute a government taking of private property in violation of the Fifth Amendment's Just Compensation Clause. The justices split evenly 4-4 on that broader issue. (Justice Stevens had recused himself because he owns a condominium in South Florida, thus precluding a majority.) Thus, there is no majority decision setting this standard.

However, Chief Justice John Roberts Jr. and Justices Antonin Scalia, Clarence Thomas and Samuel Alito joined in an opinion, which stated that yes, there can be a case that can constitute a judicial taking, with Justice Scalia writing that "it would be absurd to allow a state to do by judicial decree what the takings clause forbids it to do by the legislative fiat." Justice Scalia further provided a standard for what would constitute a taking, stating, "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property."

Justices Anthony Kennedy, Stephen Breyer, Sonia Sotomayor and Ruth Bader Ginsberg refused to join in that opinion, saying instead that there was no reason to make such a finding in order to decide the Florida case. Kennedy and Sotomayor, however, appeared sympathetic to property owners, stating that a "judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the due process clause." They further stated that "If and when future cases show that the usual principles, including constitutional ones that constrain the judiciary like due process, are inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented."

The property at issue included 6.9 miles of beach in the city of Destin and Walton County, Florida, purportedly badly eroded after several hurricanes washed sand away from the beaches, affecting up to 453 individual properties. The owners of five of the properties filed suit, claiming that under the state's restoration project, the new sand pumped in to alleviate the erosion became public land,

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which caused them to fear losing their private property rights to the water. In its ruling yesterday, the U.S. Supreme Court agreed with the Florida Supreme Court, which had found that the state restoration law at issue had not robbed the beachfront owners of their property rights because they still had the same access to the beach and to the water as they once did.

#### **FOR MORE INFORMATION**

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