

The Supreme Court's environmental case this term: Will it be a "takings" away of beach restoration?

By NORMAN A. DUPONT

So far, the U. S. Supreme Court has accepted only one environmental case for review this term. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, No. 08-1151, the Court will consider a Fifth Amendment "takings" claim brought by six beachfront property owners whose littoral (or riparian) property rights were allegedly extinguished by the state's restoration of sand to hurricane-racked beaches in the Florida panhandle. The State of Florida, the County of Walton, and the City of Destin prevailed in a decision by the Florida Supreme Court that held that the littoral property right at issue (avulsion) was in fact not actual property entitled to protection under Florida law. Therefore, the government's restoration of beachfront sands did not constitute a taking of "property." *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. Sup. Ct. 2008). The U.S. Supreme Court granted certiorari this June, and has scheduled oral argument on Dec. 2, 2009.

Stop the Beach poses a series of potentially interesting questions for the Court. Is this, as the beachfront owners maintain, a physical taking, which falls into a per se category of almost automatic condemnation, or is it a regulatory taking, which invokes something close to a rule of reason and often results in a finding that there was no constitutional taking? If so, who did the taking? Petitioners point the finger at the Florida state court and urge the Court to adopt a new category of "judicial takings." Traditionally, a takings claim is founded upon a legislative act of a state, county, or city that allegedly deprives someone of his property rights. For this novel judicial takings argument, petitioners cite a concurring opinion by Justice Potter Stewart in *Hughes v. Washington*, 389 U.S. 290, 296 (1967). Justice Stewart suggested that a judicial taking could occur when a state court suddenly and unpredictably departed from past precedent in such a manner as to take a private party's property. Respondents retort that the Supreme Court has never before recognized such a judicial taking and should not now recognize such a claim based upon both practical and jurisprudential reasons.

In addition, *Stop the Beach* raises complex federalism issues. Can the Supreme Court, through the Fifth Amendment Takings Clause, review a multitude of state property law decisions and overrule them based upon a judicial takings doctrine? Does the Supreme Court really wish to put itself into reviewing the

nuances of littoral property rights under Florida (or other state) law in order to evaluate whether a particular state highest court's decision was such an extreme departure from previously settled state law to constitute a judicial takings? Is Supreme Court review necessary to "curb state courts from redefining property out of existence," as the petitioners argue? Or, is the naturally dynamic boundary point of sandy beachfront property a matter as to which state courts are entitled to the "greatest deference"?

The amicus brief of the conservative Cato Institute and the Pacific Legal Foundation argues for Supreme Court intervention in state court decisions: "The [state] government should not be encouraged, or permitted, to avoid paying just compensation by way of formalistic trickery." The trickery, according to these amici, allows the state legislature to avoid an outright declaration of a taking by enacting a law that effectively deprives an individual of property, secure in the knowledge that the state high court will conveniently declare that no such property right in fact existed.

Respondents rejoin that the Florida Supreme Court's decision on the common law issue of whether an upland property owner's right to an avulsion of suddenly increased amounts of beach sand had fair support in existing Florida law and should be upheld. Florida's brief highlights the economic and geographic importance of its sandy beaches and urges that beach restoration enhances both the environment and protects property owners. Respondents note the difficulty of the Supreme Court directly reviewing state high court property decisions. The United States filed an amicus brief in support of Respondents, arguing that a judicial takings claim was both inconsistent with the text of the Fifth Amendment and that recognition of this novel judicial takings claim would intrude on the "core functions" of state courts—to regulate their own property law.

The Section's Constitutional Law Committee will present a panel discussion at the 39th Annual Conference on Environmental Law in Salt Lake City, Utah, on Fifth Amendment Takings cases and environmental law, including *Stop the Beach*. We invite all Section members to attend and find out which of these constitutional questions the Supreme Court will answer.

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