Is it a taking of private property without just compensation in violation of the Fifth Amendment of the U.S. Constitution for the State of Florida to claim ownership under the public trust of any new beach area formed after the state restores and stabilizes the beach?

A Hard Line in the Sand: *Stop the Beach Renourishment v. Florida*

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The takings case recently argued in the U.S Supreme Court could turn out to about the same as a blind date — really fun and exciting, or a miserable waste of time. I'm betting on the former.

The case is simple; the underpinnings exceedingly complex. Here's the sound bite version: Is it a taking of private property without just compensation in violation of the Fifth Amendment of the U.S. Constitution for the State of Florida to claim ownership under the public trust of any new beach area formed after the state restores and stabilizes the beach?

Knowing about this case is important for all planners, not just those on the coast, because it goes to the issue of how far the government can regulate in the public interest.

Florida loves its beaches, and its tourist economy is utterly dependent on them. Impress your friends with these dandy facts: Florida has 1,197 miles of shoreline and 825 miles of sandy beaches. (By way of sad comparison, Connecticut has a little less than 100 miles of shoreline.)

Florida loves its beaches, and its tourist economy is utterly dependent on them. Impress your friends with these dandy facts: Florida has 1,197 miles of shoreline and 825 miles of sandy beaches. (By way of sad comparison, Connecticut has a little less than 100 miles of shoreline.) Of 62.3 million visitors in 2001, 22.4 million — over a third — said going to the beach was their principal activity during their stay. Those beach tourists pour sand out of their shoes and pour $24 billion into the state's economy each year. So it is not surprising that over four decades ago Florida enacted legislation giving the state the authority to protect and enhance beaches. The beaches are endangered. In 2008 there were 400 miles of critically eroding beach and almost 100 more miles of non-critically eroding beach. Sea level rise promises to worsen the loss.

Now, you must suffer through a short law school lecture on the common law — law made by the courts — of land titles as they relate to shorelines. If you have a waterfront lot and the deed says "bounded by the waters of Long Island Sound" then you need to go find the ordinary high water mark or mean high tide line. That's the extent of your land. Beyond that you have riparian or — more correctly because we are on the ocean, not a lake or river — littoral rights. I looked it up in my *Merriam-Webster's* (where else?) and the first choice pronunciation for littoral is \li-tə-rl\. Compare that with the word "literal": \li-t(-)rl\. They are pronounced almost alike. Or you can put the emphasis on the last syllable. You say tomato, I say tomato.

If your land slowly erodes, you lose your land, physically and legally, as the mean high water moves inland. You don't have the right to rebuild that beach, as a general rule. I say "as a general rule," because there are circumstances with altered shorelines and structures where you do have the right to maintain, repair and rebuild.

On the other had, should the sand gods look favorably on you and that beach in front of your coastal McMansion grows slowly through accretion, you won the coastal Lotto — you have more land and you can exercise dominion over it.

Now, for a different rule, if a hurricane wipes out your beach — this is called "avulsion" — you can renourish the beach right back to where it was. You

(continued next page)

A Hard Line in the Sand, cont'd

don't lose your title to that land. You get to pile the sand back on until you get back to the where the mean high tide was the day before the storm.

Property owners challenged the Florida law which permanently fixed the historic high tide line (they call it the "Erosion Control Line" under the law). The state set that line because they are spending great sums renourishing eroded the beaches and don't want that dynamic line moving in and out with erosion and accretion. The property owners say the ECL takes away their right to gain new land through accretion and their littoral right of direct, physical access to the water, which would be interrupted by the state's new strip of land if there is accretion. The Florida Supreme Court held for the state. No taking.

Justice Stevens, who owns a waterfront home in a Florida beach renourishment area, didn't show up, so it was eight justices. The argument seemed to go for the state. '"You didn't lose one inch,'" Justice Breyer said to the property owners' lawyer. '"All you lost was the right to touch the water. But the court here says you in effect have that right because you can walk right over it and get to the water." Even conservative Justice Scalia, assessing the value of the government beach renourishment program, said: "I'm not sure it's a bad deal."

If there is a 4-4 tie, the Florida Supreme Court decision stands and the state wins, but there is no written decision and no precedent created. The pundits predict a clean win for the state, not a tie.

I encourage you to read both Florida District Court of Appeals and Florida Supreme Court decisions, and the transcript of the U.S Supreme Court argument. Go to www.inversecondemnation.com and click on "beach takings case." You'll learn plenty about accretion and avulsion…and takings law.

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Above: Miramar Beach. Background photo: Topsail Road Beach. Photos courtesy of The Beaches of South Walton County Tourist Development Council.