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Rising Tides-Changing Title:
Court to Mull Takings Issue

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Abstract: The United States Supreme Court has granted certiorari in *Walton County v. Stop the Beach Renourishment, Inc.,* where novel questions arose concerning sea level rise and constitutional property rights of beachfront landowners. In Florida, the state government owns in trust, all beach property below the mean high tide water line, while beachfront landowners own the rights to any land above the mean high tide water line. The line shifts along with beachfront as the beach expands and contracts. In this Florida case, landowners challenge a state statute, which precludes the ocean property line from shifting in favor of the private landowner, even in situations where the state rebuilds an eroded beach. Private owners claim that refusal to shift the mean high tide water line effectively takes away their private ownership rights. This article discusses the constitutional takings issues presented by *Walton County*, including past Supreme Court takings decisions, and a discussion of pertinent Florida law. Finally, the article concludes with an overview of the legal issues raised by this case.

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The U.S. Supreme Court has granted certiorari in *Walton County v. Stop the Beach Renourishment, Inc.* This Florida case raises novel questions about coastal erosion due to storm events, the prospect of sea level rise, and the definition of constitutionally protected property rights of beachfront property owners. Lawyers who represent riparian land owners, title agencies, mortgage companies, equity investors, and land use regulators should pay close attention to the arguments before the Court in this case and the eventual decision. So should planners, citizens, and owners interested in the impacts of climate change which include storm surges, hurricanes, and the gradual landward movement of the tide.

The setting for the *Walton County* case is a five mile stretch of beach along the Florida panhandle in *Walton County* that was critically eroded by several hurricanes. Much of the land adjacent to the beach is zoned for a variety of "pro-tourist" uses and is developed as high rise hotels, mid-rise condominiums and commercial properties, and a variety of lower density retail, tourist, and

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residential uses. Beach related tourism in Walton County accounts for over $250,000,000 in annual revenue and is a major reason for the government's commitment to rebuilding beaches when storm surges and hurricanes severely erode them. Some parts of the beach nearly disappeared after hurricane Opal; others were significantly narrowed, affecting the access that the public, including tourists, have to walk up and down the beach, sun bathe, and swim.

A variety of state grants, tax surpluses, bonds supported by future tax revenue, and other funds were accumulated by the Walton County Tourist Development Council. Altogether $16 million was raised to cover the cost of beach renourishment. The funds paid the costs of the beach rebuilding project, which was conducted under a Florida statute that requires two permits, detailed property surveys, and the protection of property rights as renourishment progresses. The plaintiffs objected to the prospect of rebuilding, argued against the issuance of the required permits at administrative hearings conducted by the Florida Department of Environmental Protection, and then challenged the statute in court as a regulatory taking. They won at the District Court level in Florida, but lost when the Florida Supreme Court reversed. They then successfully appealed for a Writ of Certiorari from the U.S. Supreme Court.

At first blush, it is hard to understand why property owners would object to having their beaches improved, widened, and protected by the State of Florida at the expense of the tourism industry and the taxpayer. The effect of the renourishment project, however, greatly expanded public access near their private lands. The project substantially widens the beach, expanding public access by adding, on average, 100 feet of beach seaward of the pre-project mean high water line. Constitutional arguments aside, these private owners object to the increased intensity of use by the public of the land in front of their properties. Demonstrating that opposition to the renourishment project was not limited to the six plaintiffs involved, an association with 150 members sought, but was denied, standing to sue.

The Legal Impact of the Statute

The Beach and Shore Preservation Act was adopted by the state legislature in 1961[2] to discharge the state's duty under the Florida Constitution to protect natural resources,[3] including coastal beaches. Under the public trust doctrine, [4] the state owns legal title of the beach seaward of the mean high water line, which it holds on behalf of the public. Nearly 400 miles of Florida's 1,200 miles of shoreline in Florida is listed as "critically eroded" and in need of restoration under the Act, including the five miles in question in Walton County.

[2] FLA. STAT. §§ 161.011-161.45 (2005).
[3] FLA. CONST. Art. II, §7(a).
[4] *Id*. art. X, § 11.

The Act authorizes state-sponsored renourishment projects and commits the state to maintain beaches restored and expanded by such projects. But for such projects, property owners gamble on the wiles of nature, accepting the risk of losing title to their land through erosion and gaining it through accretion: the gradual building up of the beach seaward of their property lines. Erosion and accretion occur gradually and unpredictably. As they transpire over the years, common law holds that the mean high water line is moved landward or seaward, and the boundary between public and private ownership shifts. When storm events occur and the land is suddenly altered, the law provides that the boundary between state and upland ownership is not changed. This is called avulsion. The doctrine allows both the state and the private owners affected by sudden shifts in land formation to take action to reclaim the land moved by avulsion. Case law in Florida clearly defines hurricanes as avulsive events.

Once a renourishment project is completed under the Beach and Shore Preservation Act, the statute provides that the property line is fixed at the pre-avulsion mean high water line. It denominates this surveyed line the Erosion Control Line (ECL) and requires it to be recorded on the land records. This statutory fixing of the property line takes away the risk of future erosion and the right to accretion. The statute provides, however, that if the state fails to maintain and protect the restored beach, the property line reverts to the common law mean high water line.

The plaintiff's primary claim is that fixing—rendering immoveable—the property line constitutes a regulatory taking of a recognized common law property right: the right to accretion. Normally, if the beach expanded through accretion, that new land would belong to the upland owner. The statute takes that right away, raising the issue of whether there exists a common law right to accretion under Florida law that is affected by the statute, and, if so, whether that amounts to a taking under the Constitution.

The Regulatory Taking Issue: What is a Judicial Taking?

The plaintiffs' petition for certiorari claims that the Florida Supreme Court "invoked non-existent rules of state substantive law to reverse 100 years of uniform holdings that littoral rights are constitutionally protected." They call this a "judicial taking" and ask the U.S. Supreme Court to recognize this judicial redefinition of extant rights, combined with the working of the statute to fix their property line, as a compensable taking under the Fifth and Fourteenth Amendments.

Over 15 years ago, the Court denied certiorari in a similar case where beachfront owners argued that an Oregon statute constituted a taking where it prevented building sea walls on the "dry sand area" of their beaches. They lost when the Oregon Supreme Court held that the public had right to the dry sand area under

the "doctrine of custom."[5] Justice Scalia dissented from the denial of certiorari, writing that "the petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual."[6] Among other statements, Scalia indicated that the Oregon Supreme Court "appears to have misread Blackstone in applying the law of custom."[7]

Is this the role of the U.S. Supreme Court: to decide the wisdom or accuracy of a state court's determination of preexisting state law? Perhaps one of the more interesting and important issues the *Walton County* case raises is whether matters of state common law, as determined by the highest state court, are reversible by the Court. Scalia thinks so. "Our opinion in Lucas…would be a nullity if anything that a State court chooses to denominate 'background law' -- regardless of whether it is really such -- could eliminate property rights."[8] The Court's *Lucas* case held that a regulation that takes all economic use of a petitioner's property is a taking unless, under the "background principles of the State's law,"[9] the use that the regulation prohibits is "not part of his title to begin with."[10]

In *Lucas*, Scalia, writing for the majority, referred to "our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments."[11] In *Lucas*, the Court stated, "Although it seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on Lucas's land, this state-law question must be dealt with on remand."[12] The Lucas decision also accommodates the notion that change in common law principles happens. "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition though changed circumstances or new knowledge may make what was previously permissible no longer so."[13] In *Phillips Petroleum*, the Court held that "[s]tates have the authority to define the limits of lands held in public trust and to recognize private rights in such lands as they see fit."[14]

For devotees of regulatory takings doctrine, the *Walton County* case is not a *Lucas* type of case. There is no regulation at issue that takes the economic value of the parcel owned by the petitioners. *Walton County* is best described as a

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[5] Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993).
[6] Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 n.5 (1994).
[7] *Id.*
[8] *Id*. at 1212.
[9] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).
[10] *Id*. at 1027.
[11] *See* Lucas, 505 U.S. at 1030 (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)).
[12] Lucas, 505 U.S. at 1031.
[13] *Id*. (citing Restatement (Second) of Torts § 827 (1965).
[14] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479 (1988).

Loretto-style case, different a per se category of takings.[15] The Walton County case raises the somewhat novel issue of whether the "appropriation" of a common law property right, such as the right to accretion, constitutes a compensable taking. The typical *Loretto* case involves a challenge to a governmental action that imposes an affirmative easement on private property where there is no application by the affected owner for a governmental permit.

Mrs. Loretto was simply told that she had to grant an easement to the cable company to allow them to install and maintain cables for the convenience of her tenants. Even though the intrusion was *de minimis*, the Court held that a taking of her fundamental right of exclusion occurred. Similarly, the beachfront owners in *Walton County* are told that their property lines will be fixed by the statute even though they are not before a public body for a building or development permit.

The Florida Supreme Court recognizes that a "governmental appropriation" of a discrete property right, one stick in the bundle of rights, can constitute a compensable taking. In *Walton County*, it refers to *Lee County v. Kiesel*, which held that riparian owners own a right to an unobstructed view of the water and that this right was violated by the construction of a bridge on government lands built at an angle to the water line that obstructed their view.[16] The court, in *Lee*, held this to be a compensable taking. The *Lee* court cites two prior Florida cases for the proposition. It then held that the right to a view is not absolute, recognizing the government's right to obstruct it to a degree, but notes that the government action must not "substantially and materially obstruct the land owner's view of the channel."

The *Lee* court calls this a case by case analysis--a process of making an "equitable distribution" regarding the submerged lands between the upland and the Channel. This would seem to call for similar flexibility with regard to renourishment, rendering the other common law rights of the littoral owners less than absolute. In this sense, it differs from the absolutist view of imposing an affirmative easement as in *Loretto* under which even the slightest invasion is compensible.

Did the Florida Court Make Up New Rules as a Pretext for Validating the Act?

Under Florida common law, the defendants own title landward of the mean high water line, while the state owns, in public trust, the land seaward of that line. The line is adjusted automatically every 19 years as tides change following historically predictable cycles that influence the tides. Littoral owners also own corollary rights including the rights of accretion, access to the water, use of the water, and an unobstructed view of the water. These are private property rights that cannot be taken from upland owners without just compensation.

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[15] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[16] Lee County v. Kiesel, 705 So.2d 1013 (1998).

The Supreme Court of Florida begins its opinion noting that prior court decisions have not dealt with many of the common law property right issues raised by beach renourishment. Curiously, this seems to be the situation in other prominent coastal states, including California and New York: the common law of littoral rights is poorly developed, despite the increasingly critical importance of coastal protection and property rights. The court also notes that it reviews matters of law of this type *de novo* and must be the arbiter of property law, giving deference to the legislature and presuming the constitutionality of its actions where possible. This is particularly so here, since the court treats the plaintiffs' challenge as a facial attack on the statute where it has to be shown that there exists no set of circumstances under which the statute would be valid.

The court notes that the statute preserves several of the corollary littoral rights: the right of access, use, and view, including the right of ingress and egress, after a renourishment project is completed. The lower court held that the common law rights of accretion and of contact with the water are taken by the statute. The Florida Supreme Court disagreed. It asserts that the lower court misunderstands the law of avulsion. Florida common law holds that when sudden loss or addition of land occurs—an avulsion-- the property line does not move as it does with accretion; it remains fixed at the former mean high water line. Following such an event, both the state and the upland owner have a reasonable time to reclaim their lost lands. Prior case law establishes that hurricanes are avulsive events and that the loss of the sovereign's interest in the beach may be recovered by self help on the part of the state. The court argues that the statute simply codifies the state's common law right to reclaim storm-ravaged lands by fixing the boundary line at the pre-event mean high water line.

Although the court recognizes the existence of a common law right of accretion, it notes that it is a contingent right, arising out of a rule of convenience and that the reasons for establishing the common law right of accretion do not apply to the statute. Florida common law established four reasons for recognizing the right of accretion; the court looks at each one and determines that none of them is implicated in the context of renourishment by the state of beaches seriously eroded by avulsive events. It goes through each of four underlying reasons for the doctrine and demonstrates why each does not apply.

It disagrees with the district court regarding the upland owner's right to contact with the water. It explains that this right is ancillary to the owner's right of access, which is preserved by the statute, quoting its prior decision in *Board of Trustees v. Sand Key Associates*.[17] "We have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water."[18] Citing the statute's preservation of the right of access,

[17] Board of Trustees of the International Improvement Trust Fund v. Sand Key Associates, 512 So.2d 934 (Fla. 1987).
[18] *Id*. at 936.

the court concludes “at least facially, these provisions ensure that the upland owner’s access to the water remains intact. Therefore, the rationale for the ancillary right to contact is satisfied.”

Questions Raised

So many constitutional and practical issues are raised by the *Walton County* case. Will the Court use the *Lucas* concept of a total taking and apply it to the taking of a discrete stick from the bundle of property rights, or will it see *Walton County* as a *Loretto*-style case, but refine *Loretto* to include and explain how it should be used in a government appropriation case rather than its traditional use in invasion cases?

Did the Florida Supreme Court reinterpret common law as a pretext for validating the Beach and Shore Preservation Act? Is there any clear holding of a previous Florida Supreme Court decision in the context of beachfront erosion that was confused, reversed, or misinterpreted by the decision? If common law shifts gradually, like the mean high water line, should a “judicial taking” be found when a state court applies previous common law principles to emerging circumstances like coastal erosion in a time of climate change? What would the U.S. Supreme Court have to find wrong with the state court’s analysis to justify reversal on the basis of state common law? By what powers of divination does the Court determine that a state court decision is motivated by a pretext?

This is clearly a case to watch.