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Zoning and Land Use Planning

John R. Nolon and Kristen M. Grzan[*]

Rising Tides-Changing Title:

Walton County v. Stop the Beach Renourishment

Introduction—The *Walton County* Case

The U.S. Supreme Court has granted certiorari in the case of *Walton County v. Stop the Beach Renourishment, Inc.*[1] In *Walton County*, the Florida Supreme Court interpreted a state statute and Florida common law so that the boundary of some coastal parcels is changed. The statute affects lots that front on seriously eroded beaches when the state undertakes a project to restore damaged beach through renourishment. The effect of the statute is to fix the seaward boundaries of these parcels at a recorded Erosion Control Line, rather that to allow them to move over time to accommodate gradual accretion and erosion.

Some of the affected parcel owners in Walton County, where a beach renourishment project took place under the statute, challenged this holding as a regulatory taking and as a "judicial taking." They claim that the decision of the Florida Supreme Court, which held that, on its face, the statute did not constitute a regulatory taking, reinterpreted Florida common law simply as a pretext for upholding the statute. The case raises both novel legal and environmental issues and illustrates the importance of understanding property rights and land titles in reading regulatory takings cases. It also presents interesting questions of deed drafting and title insurance.

This article first discusses the facts of the Walton County case and how the statute affects title to coastal parcels and then turns to an analysis of the fee simple absolute title to coastal properties in Florida, how deeds are drawn, and how

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title is insured under title company practices. This is followed by a further exploration of the regulatory taking issue and then the judicial taking claim. We then explore the tension that the judicial takings issue raises regarding the jurisdiction of federal and state courts. The article then takes a look at the property interests—the sticks in the bundle of rights that constitute fee simple title—that are implicated in regulatory takings cases, followed by a conclusion.

U.S. Supreme Court Grants Certiorari in *Walton*: The Facts and the Affect on Title

The setting for the *Walton County* case is a five mile stretch of beach along the Florida panhandle 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 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 lands owned by private owners as well as 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 under Florida law requires two permits, detailed property surveys, and guarantees 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 taking under the Florida Constitution. They won at the District Court level in Florida, but lost when the Florida Supreme Court reversed.

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 (MHWL), which it holds on behalf of the public. Nearly 400 miles of Florida's 1,200 miles of shoreline in Florida are listed as "critically eroded" and in need of restoration under the Act, including the five miles in question in *Walton County*.

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 MHWL 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 coastal land formation to take action to reclaim the land moved by avulsion. Case law in Florida clearly defines hurricanes as avulsive events.

The Supreme Court of Florida begins its opinion in *Walton County* by 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, sometimes called riparian, rights is poorly developed, despite the 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.

Fixing the Boundary of the Riparian Parcel: The Legal Impact of the Florida Statute

Under Florida common law, the defendants own title landward of the MHWL, while the state owns, in public trust, the land seaward of that line. The line between the two ownership interests is adjusted automatically every 19 years as tides change following historically predictable cycles

that influence the tides.[5] 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.

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 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.

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.

Title Issues and the Walton Case

In Florida, as elsewhere, land parcel owners rely on title companies and title insurance to determine and insure what they own. Title is established through an examination of the public records and thorough inspection of the site. The burden of conducting a diligent search of all public records, all applicable laws and regulations, and all physical conditions on the land lies on the buyer in a fee transaction and the lender in a mortgage transaction. The examiner of the

title assists in this process by searching the chain of title: prior deeds, mortgages, leases, grants, deed restrictions and covenants, judgments, liens, Uniform Commercial Code filings, and any other relevant documents relating to the premises. Title Insurance is indemnity insurance necessary to ensure that the title is marketable, meaning it is free from encumbrances and liens that may have occurred in the chain of title and there is no other party that can claim ownership of the premises.

Lands bounded by a watercourse give rise to numerous title examination considerations. Water is not only subject to environmental factors such as the ebb and flow of the tide, which result in ever changing title boundaries, but also unique issues of land ownership. Title to land under water is "burdened by federal and state navigational servitudes, the application of doctrines of public trust, public policy, and various riparian rights . . . ."[6]

To understand the complexities involved with examining title to land under water it is important to review the historical background. All lands under tidal and navigable water once originated from the Crown of England; title to those lands were transferred to the new sovereign states for the use of the public on July 4, 1776. This underwater land was subject to the U.S. Constitution, which afforded the United States the right to "regulate and improve navigation, fisheries, etc."[7] In New York, transfer to private individuals and entities of title to lands under water from the sovereign state is permitted by N.Y. Public Lands Law § 75 and the use, occupation, and state jurisdiction of the land are prescribed. Those who own land adjacent to both surface and coastal waters in New York are denominated riparian land owners. The state can convey under water lands to riparian owners through a Patent or Grant, subject to certain conditions that protect the state's interest in commercial, recreational, or conservation uses of the property.

Absent transfer of title by the state to lands under water, "the owner of the adjacent upland owns only to the mean-high water mark. This is so even where the deed to the upland owner bounds his land by tidal navigable waters limited to 'where the tide ebbs and flows.' "[8] So long as the change in the geographic location of a boundary line along the water is "gradual and imperceptible", the property boundary continues to move, as it does in Florida, so that the riparian owner gains and loses title as the ambulatory boundary moves.[9]

Schedule A of the Title Policy contains the legal description of the premises most often described by metes and bounds; metes are specific distance measurements and bounds are definite boundary markers. A parcel of land is described by referencing the abutting lands and describing each course of a boundary as "running along" the line. In the case where the boundary line is a body of water, the line runs along the mean high tide line of the water. Consider, for example, the following Schedule A description:

> All that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Town of X, County of X and State of New York, bounded and described as follows:
>
> > BEGINNING on the corner formed by the intersection of the southeasterly side of Red Road with the northeasterly side of Blue Avenue;
> >
> > RUNNING THENCE North 40 degrees 58 minutes 50 seconds East along the southeasterly side of Red Road 524.62 feet South to the southwesterly side of Green Avenue;
> >
> > THENCE RUNNING South 51 degrees 33 minutes 30 seconds East along the southwesterly side of Green Avenue 350.00 feet to land formerly of Smith and now or formerly of Jones;
> >
> > THENCE RUNNING along said land now or formerly of Jones, the following three (3) courses and distances:
> >
> > > South 38 degrees 26 minutes 30 seconds West 30,00 feet;
> > >
> > > South 14 degrees 35 minutes 10 seconds East 154.43 feet;
> > >
> > > South 38 degrees 26 minutes 50 seconds West 24.91 feet to a point;
> >
> > THENCE still along said lands of Jones and continuing along lands now or formerly of Doe and part of the way along a wall, South 51 degrees 35 minutes 00 seconds East 397.34 feet;
> >
> > THENCE along the southeasterly and southwesterly faces of the sea wall the following five (5) courses and distances:
> >
> > > South 40 degrees 25 minutes 00 seconds West 48.51 feet;
> > >
> > > South 37 degrees 54 minutes 00 seconds West 43.49 feet;
> > >
> > > North 51 degrees 26 minutes 00 seconds West 19.00 feet;
> > >
> > > North 34 degrees 29 minutes 00 seconds East 2.17 feet; and
> > >
> > > North 50 degrees 31 minutes 00 seconds West 43.01 feet

> *to the line of mean high tide as it existed September 30, 1970;*
>
> *THENCE along said line of mean high tide as it existed on September 30, 1970 the following six (6) courses and distances:*
>
> South 34 degrees 46 minutes 00 seconds West 74.06 feet;
>
> South 22 degrees 58 minutes 00 seconds West 49.25 feet;
>
> South 13 degrees 00 minutes 00 seconds West 53.37 feet;
>
> South 28 degrees 18 minutes 00 seconds East 29.53 feet;
>
> South 24 degrees 59 minutes 00 seconds West 97.08 feet; and
>
> South 16 degrees 54 minutes 00 seconds West 31.02 feet to a point;
>
> THENCE RUNNING North 50 degrees 30 minutes 00 seconds West, for most of the way along the northeasterly side of Blue Avenue, 931.77 feet to the point or place of BEGINNING.

A grant of land by Patent will include language of this sort:

> TOGETHER with all the right, title and interest of the party of the first part in the land below the mean high tide as it existed on September 30, 1970 and the land under water laying in front of and adjoining the above described premises as conveyed by The People of the State of New York to Mr. John Doe by Letters Patent dated May 23, 1889 and recorded in the Office of the Secretary of State in Book 22 of Patents at page 171 and also recorded in the Office of the Clerk of the County of X on June 13, 1889 in Liber Y cp. 100.

If a body of water can be used for trade and commerce, it is considered to be navigable. "In New York, waters deemed navigable include the arms of the Atlantic Ocean affected by the tide, the great rivers such as the St. Lawrence and Hudson and the larger lakes such as Erie, Ontario, George, Champlain and the Finger Lakes . . . ."[10] Regardless of whether the state has conveyed title to lands under a navigable body of water to the riparian owner or has kept the land in trust for the public use, "the federal government, under the powers granted to Congress to regulate commerce, may regulate and improve navigation and navigable water," often referred to as a federal navigational servitude.[11] It is under this power that the federal government may "require that the lands be restored to usability for commerce and navigation without any obligation to pay compensation to

the owner."[12] Under the regulatory power of the federal government afforded by the Constitution, regardless of whom title may vest in, state or upland owner, the rights of said owners are subordinate to the interest of the people under the public trust. An exercise of this power by Congress may be to establish bulkhead lines, pierhead lines, or other improvement in service of the public. "The authority of the state to authorize or permit obstructions is subordinate to the federal power."[13] The Army Corps of Engineers maintains control of the navigation over all United States waters. It has the authority to "sanction excavations and filling of lands under water, remove obstructions to navigation and establish pierhead and bulkhead lines."[14] There is no obligation by the federal government to compensate the owner, whether it is the state or private ownership, for such activities on or adjacent to their land.

In New York, when insuring property that adjoins such navigable waters, title companies use four basic "water exceptions" to their insurance of title:

1. No title is insured to any land lying below the present or any former high water line of (insert name of body of water). Under the public trust doctrine, lands under navigable waters are considered public highways, title to which vests in the state in trust for the people and therefore, title should not be insured to any land that is below the current or former high water line.[15]

2. Title coverage excepts riparian rights and easements of others over (insert name of body of water), but policy does not insure any riparian rights in favor of the owner of the premises described herein.[16]

Riparian owners have a right to reasonable use of the water abutting their property; these rights, however, are not insured in the title policy "due to the litigious nature of riparian use." Title insurance does not cover use of the water and, therefore, loss of the usage of the water cannot be brought as a title claim against the insurer.[17]

3. Title coverage also excepts the right of the United States Government to change and alter the harbor, bulkhead or pierhead lines adjacent to said premises, to establish harbor, bulkhead or pierhead lines different from the present lines, and to take land now or formerly underwater without compensation. Under the federal navigational servitude, the federal government possesses "the power to regulate commerce, regulate and improve navigation and navigable waters."[18] This power exists regardless of whether

the title to the land now or formerly under the water is held by the state or the individual owners.

4. Finally, title insurance policies except from coverage the rights of the United States Government, the State of New York and local municipalities or any of their departments or agencies to regulate and control the use of the piers, bulkheads, land under water and land adjacent thereto. The federal, state and local governments possess authority to regulate the use of land under federal and state constitutions and laws adopted under those constitutional provisions. The risk of limitations on the use of the lands due to such regulations are on the private parties, not the title company.[19]

Two of these four exceptions reference that title coverage excludes any effect on title due to improvements placed on under water lands under state or federal authority. It is possible that the increased need for beach restoration and renourishment activities promulgated by the government will create the necessity to amend these exceptions to include explicit mention of them, in addition to physical improvements such as piers and bulkheads.

The State of Florida's land title history is similar to that of New York. On February 19, 1821, the United States acquired Florida from Spain including title to all lands lying under the waters of the Atlantic Ocean and Gulf of Mexico, except for those previously conveyed to private parties under Spanish grants. Title to all submerged sovereignty lands lying below the MHWL of the Atlantic Ocean and the Gulf of Mexico is vested presently in the Board of Trustees of the Internal Improvement Trust Fund, consisting of the Governor and Cabinet.[20]

When examining title to waterfront properties along the ocean or gulf coasts in Florida, the determination of what should be covered and excepted from the policy is dependant on the legal description of the water boundary line. A standard water exception reflecting the right of sovereignty and riparian rights is found in nearly every title insurance policy in Florida. Policies explicitly except "any claim that any part of said land is owned by the State of Florida by right of sovereignty, and riparian rights, if any."[21]

Where the property description references the meandering MHWL this standard exception may be omitted. However, if the water boundary references any fixed monument or fixed line, other than the Erosion Control Line, there may be an overlap with the MHWL and this standard exception must be included in the policy.[22]

Because of accretion and erosion, the boundary line of some coastal properties may now lie landward of the Mean High Water Line (MHWL), without any overlap or contact with the water. Based on the decision of the Florida Supreme Court in, *City of Daytona Beach v. Tona-Rama, Inc.*, "the public has acquired a prescriptive right to the use of the beachfront areas lying above the MHWL that are customarily private."[23] Accordingly, the following exception must be included in all policies insuring property fronting on the Atlantic Ocean or Gulf of Mexico:

> "The right, title, or interest, if any, of the public to use any part of the land seaward and/or lakeward of the most inland of any of the following: a) the natural line of vegetation; b) the most extreme highwater line; c) the bulkhead line; and d) any other line which has been legally established as relating to such public use."[24]

Florida has adopted an Erosion Control Line (ECL) in some counties where beach restoration and renourishment activities have been performed. In these cases, the ECL becomes the boundary between state owned and private lands. So long as the water boundary line of the insured land coincides with the ECL, the standard exception may be omitted. Should there by an overlap between the ECL and the water boundary line, the standard exception will be replaced with the following exception from title coverage:

> "Any claim by the State of Florida to any portion of the insured land lying seaward of the Erosion Control Line established in (insert name of the county) records."[25]

In all instances where the insured land abuts or is wholly or partially submerged and it is deemed appropriate to omit or to replace the standard water exception in the policy, title policies include the following riparian rights exception:

> "The nature, extent and existence of riparian rights are not insured."[26]

In all title policies insuring lands affected by the navigational servitude the following exception is contained in title policies issued in Florida:

> "Any and all rights of the United States of America over any lands now or formerly lying under navigable waters, arising by reason of the authority of the United States of America to control navigable waters in the interest of navigation and commerce, and any conditions contained in any permit authorizing the filling in of such areas."[27]

The Army Corps of Engineers is granted permits for various beach revitalization and renourishment activities by the

federal government. The permit is not a transfer of any property rights, merely an allowance to conduct specific activities upon the sovereignty and littoral lands. When issuing a policy insuring property that may be affected by a navigational servitude there will be an exception in the policy for these rights. It is possible, however, to purchase affirmative coverage for any loss experienced as a result of the existence of the servitude. "The Navigational Servitude Endorsement, provides affirmative coverage against losses sustained by reason of the U.S. Government requiring the removal of improvements on land which formerly constituted navigable waters because the improvements constitute an obstruction of the navigable waterway. This endorsement only applies to the federal servitude and not other forms of regulatory control."[28]

Of relevance to the effects of the Beach and Shore Preservation Act in Florida and the title issues it raises, the following exceptions are commonly used in title policies insuring the acquisition or financing of beachfront lands in Florida.

1. "Notwithstanding the legal description in Schedule A, this policy does not insure against rights of the State of Florida based on the doctrine of the state's sovereign ownership of lands lying below the mean high water line of any navigable or tidally influenced waters."[29]

2. "Rights, if any, of the public to use as a public beach or recreation area any part of the land lying between the body of water abutting the subject property and the natural line of vegetation, bluff, extreme high water line, or other apparent boundary line separating the publicly used area from the upland private area."[30]

3. "Notwithstanding the legal description in Schedule A, this commitment/policy does not insure any portion of the land lying waterward of the Erosion Control Line."[31]

These title policy exceptions and title company policies make it clear that the risks of fixing a new property boundary under the Beach and Shore Preservation Act are squarely on the private owners and that they are subject to the rights of the sovereign state of Florida to effect improvements in the interest of beach restoration and to the rights of the public to use the improved beach.

The Takings Issues in Walton County:

Does the Statute Affect a Regulatory Taking?

The Florida Supreme Court in *Walton County* notes that the Beach and Shore Preservation Act 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.[32] The lower court held that the common law rights of accretion and of contact with the water are taken by the statute.[33] The state high 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.[34] 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.[35] 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.[36]

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.[37]

The Florida Supreme Court further 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*: "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."[38] Citing the statute's preservation of the right of access, 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."[39]

For devotees of regulatory takings doctrine, the *Walton County* case is not a *Lucas* type of case.[40] *Lucas* involves regulations that leave no economic value to the regulated properties, so-called "total takings." In *Walton County*, 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 *Loretto*-style case, a different per se category of takings.[41] The 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 it 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. *Walton County* refers to *Lee County v. Kiesel*, a Florida case that 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.[42] 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."[43]

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.[44] This would seem to call for similar flexibility with regard to beach 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 in *Loretto* under which even the slightest invasion is compensable.

Does the Florida Supreme Court's Decision Constitute a "Judicial Taking?"

The plaintiffs' petition for certiorari claims that the Flor-

ida Supreme Court "invoked non-existent rules of state substantive law to reverse 100 years of uniform holdings that littoral rights are constitutionally protected."[45] 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."[46] 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."[47] Among other statements, Scalia indicated that the Oregon Supreme Court "appears to have misread Blackstone in applying the law of custom."[48]

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."[49] 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,"[50] the use that the regulation prohibits is "not part of his title to begin with."[51]

In *Lucas*, Scalia, writing for the majority, also 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."[52] 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."[53] 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."[54]

This view, by Scalia, in writing the majority decision in *Lucas* is supported by a long line of cases. "A State's highest court is unquestionably 'the ultimate expositor of state law,' " and "the prerogative of (the state court) to say what (the state's) law is merits respect in federal forums."[55] The Fifth Amendment of the U.S. Constitution defines what a taking is, but does not define what property rights are. The U.S. Supreme Court has resorted to "existing rules or understandings that stem from an independent source such as state law" in order to define what constitutes property under the Fifth Amendment."[56] "[T]he Constitution protects rather than creates property interests."[57] "Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance."[58] 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."[59] The principle that state substantive property law applies to questions involving sovereignty lands was affirmed by the U.S. Supreme Court in *Oregon v. Corvallis*.[60]

Conclusion

Takings cases draw upon the expertise of real estate attorneys and their practices in a variety of ways. The challenge of drafting exceptions to title insurance policies is clear following this review of title practices in Florida. The importance of reading and understanding these exceptions on the part of future purchasers and lenders is equally obvious. To follow takings cases, one must be conversant with a wide variety of property rights including, in the *Walton County* case alone, affirmative easements running to the public, navigational servitudes held by the state and federal governments, rights to a view, rights of access to the water, rights to fish and boat, the risk of erosion, the right to reclaim land after an avulsive event, and the future contingent rights of accretion and contact to the water.

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?

To underline the seriousness of the issues involved, we end with a quote from a governmental report from Miami-Dade County in Florida, which contains the following prognosis: "Developed Miami-Dade County as we know it will significantly change with a 3–4 foot sea level rise. Spring high tides would be at about +7 to 8 feet; freshwater resources would be gone; the Everglades would be inundated on the west side of Miami-Dade County; the barrier islands would be largely inundated; storm surges would be devastating; landfill sites would be exposed to erosion contaminating marine and coastal environments."[61]

The *Walton County* case implicates the role of state courts in defining the common law of their unique coastlines and the state legislature in adjusting to unprecedented changes in the environment and the effect of those changes on property ownership. Who decides these matters and what degree of latitude they have in making those decisions is clearly a matter of great importance.

NOTES:

[1]Walton County v. Stop the Beach Renourishment, Inc., 129 S. Ct. 2792 (2009).

[2]FLA. STAT. §§ 161.011 to 161.45 (2005).

[3]FLA. CONST. art. II, § 7(a).

[4]*Id*. art. X, § 11.

[5]BRUCE S. FLUSHMAN, WATER BOUNDARIES: DEMYSTIFYING LAND

BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS § 4.9 (2002).

[6]JAMES M. PEDOWITZ, REAL ESTATE TITLES § 18.0 (3d ed. 2007).

[7]*Id*. at § 18.1 (quoting Lewis Blue Point Oyster Cultivation Co. v. Briggs, 198 N.Y. 287 (1910)).

[8]*Id*. at § 18.9 (quoting Hunter v. Van Keuren, 224 N.Y.S. 153 (Sup. Ct., Steuben Co. 1927) and Granger v. City of Canandaigua, 257 N.Y. 126 (1931)).

[9]Flushman, *supra* note 5 at § 3.12.3.

[10]Pedowitz, *supra* note 6 at § 18.9.

[11]*Id*. at § 8.12.

[12]*Id*. at § 18.12.

[13]*Id*. at § 18.13.

[14]*Id*.

[15]Memorandum from Chicago Title Insurance Company on Underwriting Procedures and Practices to New York Area Agents (Oct. 31, 2006) (on file with author).

[16]*Id*.

[17]*Id*.

[18]*Id*.

[19]*Id*.

[20]LandAmerica SingleSource, *Florida Uniform Requirements and Exceptions Manual*, available at https://www.agentxtra.net/Extranet/singlesource/NavMaster.asp?LinkID=5182717 (last visited October 14, 2009).

[21]*Id*.

[22]*Id*.

[23]LandAmerica SingleSource, *Florida Manual: Waterfront Property Rights*, available at https://www.agentxtra.net/extranet/SingleSource/NavMaster.asp?DocID=1043005 (last visited Oct. 14, 2009) (quoting City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73 (Fla. 1974).

[24]*Id*.

[25]*Id*.

[26]*Id*.

[27]*Id*.

[28]LandAmerica SingleSource, Florida Manual: Endorsements, available at https://www.agentxtra.net/extranet/SingleSource/NavMaster.asp?DocID=1042978 (last visited Oct. 14, 2009).

[29]*Id*.

[30]*Id*.

[31]*Id*.

[32]Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (citing Board of Trustees of the International Improvement Trust Fund v. Sand Key Associates, 512 So.2d 934, 936 (Fla. 1987)).

[33]Save Our Beaches, Inc. v. Fla. Dep't of Envtl. Prot., 31 Fla. L Weekly D1173 (Fla. 1st DCA 2006).

[34]Walton County, 998 So. 2d at 1112–1114.

[35]*See* State v. Florida National Properties, Inc., 338 So. 2d 13 (Fla. 1976).

[36]Walton County, 998 So. 2d at 1114.

[37]*Id*. at 1118.

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

[39]Walton County, 998 So. 2d at 1119.

[40]*See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[41]*See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[42]Lee County v. Kiesel, 705 So.2d 1013 (1998).

[43]*Id*. at 1016.

[44]*Id*. at 1015.

[45]Petition for Writ of Certiorari at 15, Stop the Beach Renourishment, Inc., v. Fla. Dep't of Envtl. Prot., The Board of Trustees of the Internal Improvement Trust Fund, Walton County, and City of Destin, No. 081151 (U.S. Mar. 13, 2009).

[46]Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993).

[47]Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 n.5 (1994).

[48]*Id.*

[49]*Id*. at 1212.

[50]Lucas, 505 U.S. at 1029.

[51]*Id*. at 1027.

[52]*Id. at* 1030 (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)).

[53]*Id.* at 1031.

[54]*Id.* (citing Restatement (Second) of Torts § 827 (1965).

[55]Riley v. Kennedy, 128 S.Ct. 1970, 1985 (2008) (referencing Mullany v. Wilbur, 421 U.S. 684, 691 (1975)).

[56]Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[57]Phillips v Washington Legal Found., 524 U.S. 156, 164 (1998).

[58]Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980).

[59]Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479 (1988).

[60]Oregon v. Corvallis, 429 U.S. 363 (1977).

[61]Science and Technology Committee, *Statement on Sea Level in the Coming Century*, in SECOND REPORT AND INITIAL RECOMMENDATIONS MIAMI-DADE COUNTY CLIMATE CHANGE TASK FORCE, Presented to the Miami-Dade Board of County Commissioners (Apr. 2008), *available at* http://www.miamidade.gov/derm/library/08-10-04__CCATF__BCC__Package.pdf.