



Stop the Beach Renourishment
& the Public Trust Doctrine

Donna R. Christie
Elizabeth C. and Clyde W. Atkinson
Professor of Law
Florida State University
College of Law

Critically eroding beaches in Destin and Walton County





1986 Beach and Shore Preservation Act (BSPA)

- The State has a “necessary governmental responsibility to properly manage and protect Florida beaches ... from erosion and [directed] that the Legislature make provision for beach restoration and nourishment projects [for critically eroding beaches].”
- Requires DEP to identify those beaches of the state which are critically eroding and to develop and maintain a comprehensive long-term management plan for their restoration.



Status of Florida Beaches

- Of the 825 miles of sandy beach in the State,
 - over 485 miles, about 59%, is eroding,
 - 387 miles of beach, about 47%, are “critically eroded.”



Beach Restoration and Management

- The State has spent at least \$600 million on beach erosion control and beach restoration, and the Florida Department of Environmental Protection (DEP) now manages about 200 miles of restored beaches.



BSPA Provisions for a Beach Renourishment Project

- **The erosion control line (ECL)**
 - Establish the line of mean high water for the area to be restored.
 - The MHWL is the primary reference for the erosion control line (ECL) for the project.
 - ECL may also take into account
 - the requirements of proper engineering in the beach restoration project,
 - the extent to which erosion or avulsion has occurred, and
 - the need to protect existing ownership of as much upland as is reasonably possible.



BSPA Procedures for a Beach Renourishment Project

- If the ECL must be located landward of the MHWL in order to accomplish the project, BSPA provides eminent domain authority to acquire such lands.
- After ECL recorded, title to all land seaward of the ECL is “deemed to be *vested in the state by right of its sovereignty . . .*”



The effect of beach restoration projects on riparian & littoral rights

“The common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of [ECL], either by accretion or erosion or by any other natural or artificial process”

- The BSPA goes on to provide statutory protection for most of the rights that characterize riparian ownership, including but not limited to:
 - rights of ingress, egress, view, boating, bathing, and fishing.
 - state shall not allow any structure to be erected upon - lands created, either naturally or artificially, seaward of any erosion control . . . , except such structures required for the prevention or erosion.
 - [no] use [shall] be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee;
 - municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.



Background Legal Principles

- The mean high water line (MHWL)
 - Art. X, § 11, Fla. Const.: the boundary between upland private ownership and sovereignty lands along the state’s beaches is the mean high water line (MHWL).
 - Fla. Stat. § 117.27(15): “mean high water” is the average of the high tide heights over a 19-year period. “MHWL” means the intersection of the tidal plane of mean high water with the shore.



Background Legal Principles

- In Florida riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights:
 - (1) the right of access to the water, including the right to have the property's contact with the water remain intact ;
 - (2) the right to use the water for navigational purposes;
 - (3) the right to an unobstructed view of the water; and
 - (4) the right to receive accretions and relictions to the property.

Board of Trustees v. Sand Key Associates, Ltd., 512 So. 2d 934(1987).



Background Legal Principles

- **Common law riparian rights**
 - ‘**Accretion**’ means the gradual and imperceptible accumulation of land along the shore or bank of a body of water,” while erosion involves the gradual and imperceptible removal of land.
- Exceptions to accretions rule:
 - if an owner causes the artificial accretions, the “accreted land remains with the sovereign.”
 - if the addition to the shore is not a “gradual and imperceptible accumulation of land along the shore,” the change is considered **avulsion**, rather than accretion, and does not change the property boundary.



Background Legal Principles

- The Fl. S.Ct. has defined avulsion as “the sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream.”
- Florida Supreme Court has never addressed whether beach restoration by the methods in the previous slides is accretion or avulsion or *something else*.



In the Florida Supreme Court – The Certified Question

- As reframed by the Florida Supreme Court as a facial challenge to the BSPA:

On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?



Doctrine of Avulsion

- “[W]hen an avulsion event leads to the loss of land, the doctrine of avulsion recognizes the affected property owner’s right to reclaim the lost land within a reasonable time.”
- “[I]f the shoreline is lost due to an avulsive event, the public has the right to restore its shoreline up to that MHWL.”



Facially constitutional

- Avulsive event
- ECL set at the pre-avulsion MHWL
- State fills in lost in “shoreline”
- Basically returns situation to pre-avulsive *status quo*
- Does no more than allowed by the common law, therefore—facially constitutional!



Second part of case

- Whether the BSPA “takes” without compensation
 - the right to accretion and
 - The right to contact with the water.



The Nature of Common Law Rights of Littoral Owners

- The Upland Owners and Florida's Beaches
 - “[S]pecial or exclusive common law littoral rights:
 - (1) the right to have access to the water;
 - (2) the right to reasonably use the water;
 - (3) the right to accretion and reliction; and
 - (4) the right to the unobstructed view of the water..
 - These special littoral rights “are such as are necessary for the use and enjoyment” of the upland property, but “these rights may not be so exercised as to injure others in their lawful rights.”



Nature of Littoral Rights

- Though subject to regulation, these littoral rights are private property rights that cannot be taken from upland owners without just compensation.
- Littoral rights are not subordinate to public rights and can not be eliminated without compensation.
- These special rights are easements incident to the [littoral] holdings and are property rights The common-law [littoral] rights that arise by implication of law give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights.



Nature of Littoral Rights

- “rights to access and use are affirmative easements”
- “rights to access, use, and view are rights relating to the present use of the foreshore and water.”
- “[T]he littoral right to accretion and reliction is distinct from the rights to access, use, and view.
- *The right. to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction.*”

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“[T]he common law rule of accretion . . . is not implicated in the context of this Act.”

□ Rationale for common law right to accretions

- (1) [D]e minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.



“[T]he common law rule of accretion . . . is not implicated in the context of this Act.”

- None of the policy reasons that apply to the common law accretions doctrine apply to the BSPA.
- No currently accreted property concerned
- No “property” implicated, so there can’t be a taking.
- Therefore, BSPA is not unconstitutional because it does not constitute a taking of the right to accretions.



Contact is Ancillary to the Littoral Right of Access

- 1. “[U]nder Florida common law, there is no independent right of contact with the water. Instead, contact is ancillary to the littoral right of access to the water.”

- 2. “The ancillary right to contact with the water exists to preserve the upland owner’s core littoral right of access to the water. . . [T]he Act expressly protects the right of access to the water, which is the sole justification for the subsidiary right of contact.”



Court's Findings

1. The Beach and Shore Preservation Act effectuates the State's constitutional duty to protect Florida's beaches.
2. The Act facially achieves a reasonable balance between public and private interests in the shore.
 - a. The Act benefits upland owners by restoring lost beach, by protecting their property from future storm damage and erosion, and by preserving their littoral rights to use and view.
 - b. The Act also benefits upland owners by protecting their littoral right of access to the water, which is the sole justification for the ancillary right of contact.



Court's Findings

3. Additionally, the Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event.
4. The littoral right to accretion is not implicated by the Act because the reasons underlying this common law rule are not present in this context.

Holding: The Act, on its face, does not unconstitutionally deprive upland owners of littoral rights without just compensation. [Decision “is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act.”]



Cert. granted by US Supreme Court

- Three questions presented, but most of focus is on the first question:

*[Whether the] Florida Supreme Court invoked ‘nonexistent rules of state substantive law’ to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a ‘**judicial taking**’ proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?*

Taking of Property requires just compensation under Fifth Amendment

- Applicable to legislative & executive branches
- Does it apply to the courts?
 - *Chicago, Burlington & Quincy Railroad v. Chicago (1897)*
 - *Hughes v. Washington (1967)(Stevens dissenting)*
 - No deference to state courts to the extent that decision constitutes *a sudden change in state law, unpredictable in terms of the relevant precedents*
 - *Stevens v. City of Cannon Beach (1994) (Scalia dissenting to denial of cert)*
 - A State may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law
 - Courts shouldn't be able to invoke "new found" and "fictional" background property principles to redefine property and avoid takings



Commentators

- Seminal article: Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990)
 - “[J]udicial changes in property law raise the same concerns as legislative and executive takings,” so courts should be subject to the same constitutional restrictions as other branches of government.
- Only a handful of articles on the issue, but until recently almost all argued against finding a concept of judicial taking.



Caselaw

- ❑ Only one modern era case in 1985 – and it was vacated by the Supreme Court on other grounds.
- ❑ 15 cases arguing for “judicial taking” denied cert.
- ❑ Justice Brandeis: “the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decision on which a party relied, does not give rise to a [takings] claim under the [Fifth and] Fourteenth Amendment” *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673,(1930).



TAKING?

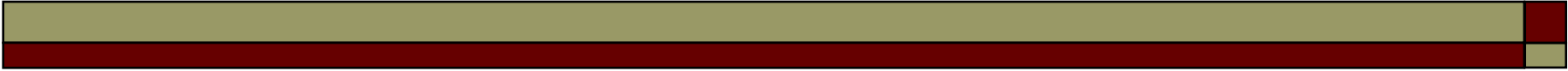
- ❑ Not as good a candidate for establishing principle as *Hughes* or *Cannon Beach*
- ❑ Did the Florida Supreme Court *startlingly* reinterpret riparian rights or simply recognize that the circumstances of beach restoration are *sui generis*?
- ❑ What reliance is impaired even if the case did change the law?
- ❑ Even if some riparian rights are no longer applicable in this context, is the upland property or even the bundle of riparian rights substantially impaired?
- ❑ Would the Supreme Court have to come up with a new way to assess a taking to find a taking?



Even if a judicial taking found- How does it affect beach restoration in FL?

In any action alleging a taking of all or part of a property or property right as a result of a beach restoration project . . . [i]f a taking is judicially determined to have occurred as a result of a beach restoration project, *the enhancement in value to the owner's remaining adjoining property by reason of the beach restoration project shall be offset against the value of the property or property right alleged to have been taken*. If the enhancement in value shall exceed the value of the damage, if any, to the remaining adjoining property, there shall be no recovery over against the property owner for such excess.

2007 amendment to s.161.141







Effect on the Public Trust Doctrine

- ❑ Public trust doctrine is largely court-made law – how can it evolve?
- ❑ Other doctrines affecting access to beaches, like custom
- ❑ Chilling effect on state courts in responding to changes in society, gaps in the law ...
- ❑ Will it make the federal courts the ultimate determiners of what constitutes property – an area traditionally within the scope of state law?