



# **TAKINGS LAW:**

**BEFORE & AFTER**

**Stop the Beach Renourishment, Inc. v.**  
**FDEP**

**Presented by:**

**Stephen A. Walker, Esq.**

**Daniel D. Richardson, Esq.**

**Andrew J. Baumann, Esq.**



**LEWIS  
LONGMAN &  
WALKER | P.A.**

**A T T O R N E Y S   A T   L A W**

## Inverse Condemnation

Inverse condemnation or “reverse condemnation” is a legal action filed by a citizen against a governmental defendant to recover the value of property that has been taken in fact, even though no formal exercise of the power of eminent domain has been attempted by the taking agency

# Basic Elements of an Inverse Condemnation Claim

property  
that has been taken  
for a public purpose  
without full (or just) compensation



# PROPERTY

Definitions of “property” recognize a broad variety of individual protected property interests, including access, water, timber and mineral rights, drainage rights/flooding, air rights, or even exactions or forced public dedications of property or property rights

# Definition of “Taking”

- Nearly ninety years ago, then-Justice Oliver Wendell Holmes, Jr. announced a deceptively simple definition of taking:

“While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

- Since Justice Holmes’ opinion, the courts have been consumed with trying to answer that devilishly simple question – “how far is too far?”

# No Litmus Test for Takings

Since Pennsylvania Coal, a one-size-fits-all litmus test has eluded the courts. Instead, several different tests have emerged to determine when a regulation “goes too far.”

# Categorical Takings

The Supreme Court has recognized two classifications of government action that will be treated as a taking under any circumstance:

## Categorical Takings (con't)

### 1. Physical Invasion

Where a government action requires a property owner to suffer a permanent physical invasion of their property – no matter how minor – a taking has occurred. Loretto Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking).



## Categorical Takings (con't)

### 2. Total Deprivation of Beneficial Use

A taking will be found *per se* in cases where government regulation completely deprive a landowner of all economically beneficial use of their property. Lucas v. south Carolina Coastal Council, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

# Unlawful Exactions (Nollan and Dolan)



A taking will also be found in cases of an unconstitutionally onerous dedication of private property to a public benefit required in return for a discretionary government approval such a development permit. Public dedications will be held to be takings if either:

- The public benefit of the dedication bears little or no relationship back to the benefit of granting the development permit. Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)(permit to build a larger residence on beachfront property conditioned on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the high tide line).
- The requirement of the dedication has no reasonable relationship or "rough proportionality" to the nature or impact of the proposed development. Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)(permit to expand a store and parking lot conditioned on the dedication of a portion of the property for a greenway and bike/pedestrian path)

# The Penn Central Test

- All other takings claims arising from regulation of property are evaluated under test pronounced in Penn Central Transportation Co. v. New York City, 438 U.S. 104 S.Ct. 2446, 57 L.Ed.2d 631 (1978). In Penn Central, the Supreme Court admitted defeat, conceding that no set test is possible to determine when a regulation has gone too far.

# The Penn Central Test (cont.)



Given the fact intensive nature of the inquiry to determine “how far is too far”, Penn Central Court applied ad hoc investigation tailored to each particular case. Three considerations were found to be most relevant by the Court:

- the economic impact of the regulation on the subject property
- the extent to which the regulation interferes with the owner’s distinct investment-backed expectations
- the character of the regulation – does it bestow some benefit upon the public at the owner’s expense, or does it prevent some harm to the public.



## Penn Central Test (con't)

### **Economic Impact**

- A survey of state and federal cases show that the impact on a property must be severe (generally in excess of 60%-70% diminution or loss in value) to have a chance to succeed in a taking under the Penn Central test.

# Penn Central Test (con't)



## Investment-Backed Expectations

- A property owner's distinct investment-backed expectations are defined at the time the property is purchased, and his reasonable expectations are shaped by the regulatory regime in place at that time. Appolo Fuels, Inc. v. United States, 381 F.3d, 1338, 1349 (Fed.Cir. 2004).
- Where an owner has purchased in the face of an existing regulatory prohibition, it is assumed that the market has already discounted for the restraint, such that the purchaser will have difficulty showing a loss in his investment attributable to the pre-existing regulation. Good v. United States, 198 F.3d 1355 (Fed.Cir. 1999); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177-79(Fed.Cir. 1994).
- However, a regulation's existence prior to purchase, is not fatal *per se* to establishing a reasonable investment-backed expectation but may be very difficult to prove. See Palazzolo v. Rhode Island, 533 U.S. 606, 629-30, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

## Penn Central Test (con't)

### Character of the Regulation

- A key distinction is made between regulations designed to confer a public benefit as opposed to those aimed at preventing a public harm. Accordingly, the owner's liberty interest must be balanced against the government's need to protect the public interest through the imposition of a restraint. Cienega Gardens v. United States, 331 F.3d 1319, 1346 (Fed.Cir. 2003).

# Takings Remedies

- Success in proving a taking results in a court order forcing the taking agency to formally exercise the power of eminent domain and properly take and compensate for that which has already been de facto taken.
- Valuation is accomplished in the manner of a traditional eminent domain valuation trial and the specific property right which has been taken must be valued and paid for along with any severance damage to the remaining estate of land.



# Definitions



- Littoral Property – private beachfront
- Riparian – of, on, or relating to the bank or shore of a natural course of water
- Accretion – a gradual and imperceptible addition to littoral property
- Avulsion – a sudden change adding to littoral property
- Mean High Waterline – the original boundary between private beachfront and state-owned land

# Background State Statute



- Beach and Shore Preservation Act
  - Authorizes local government to rebuild storm changed beaches. Reconstruction creates a fixed property line located by survey as close as possible to the pre-storm mean high water line. Act expressly abrogates common law doctrine of accretion but preserves other common law riparian rights.

# Rights of Littoral Owners



- Right to access water
- Right to use water for certain purposes
- Right to an unobstructed view of the water
- Right to receive accretions and relictions to the littoral property

# Florida Common Law



- The littoral owner automatically takes title to dry land added to his property by accretion, but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed.



# Florida Common Law



- Regardless of whether an avulsive event exposes land previously submerged or submerges land previously exposed, under Florida law the boundary between littoral property and sovereign land does not change, but remains (ordinarily) what was the mean high-water line before the event.

# Florida Common Law

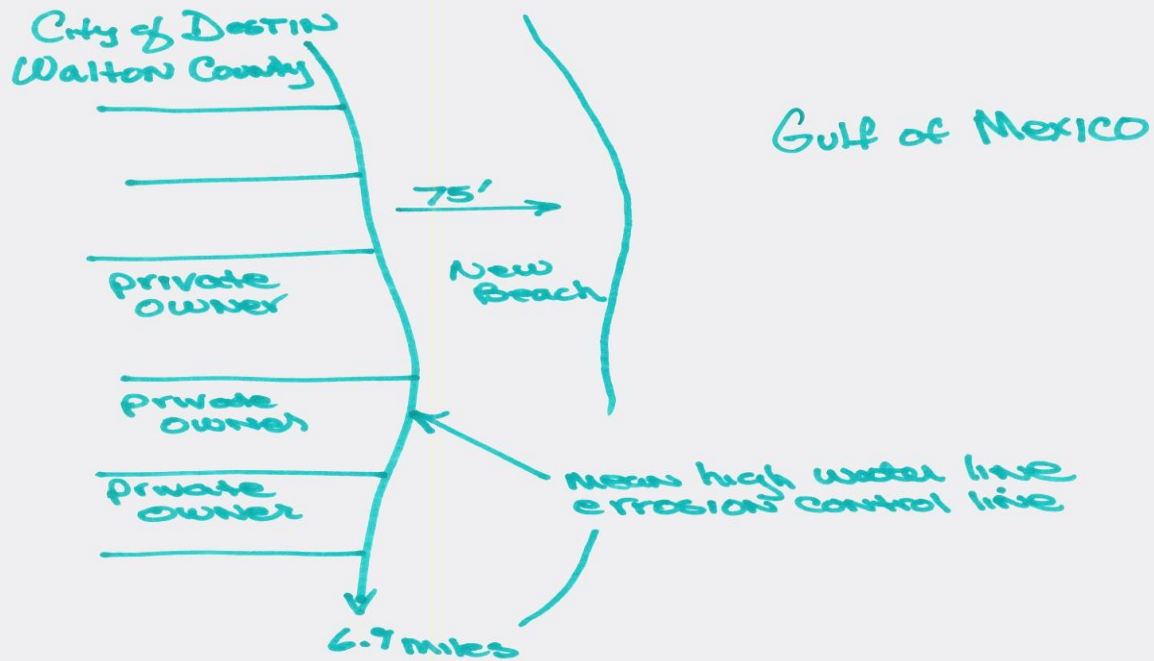


- When a new strip of land has been added to the shore by avulsion, the littoral owner has no right to subsequent accretions.
- The State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral landowners.

# Florida Common Law



- If an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water.





# Factual Background



- City of Destin and Walton County sought to restore 6.9 miles of beach eroded by hurricanes. They petitioned to add 75 feet of beach seaward of the mean high-water line (also the erosion control line).
- Petitioners, a group of beach front property owners, protested.

# Case History



- Petitioners (“members”) filed administrative challenge to permit granted by Florida DEP.
- Appellate court found that the DEP’s order had eliminated littoral rights:
  - To receive accretions to their property
  - To have their property’s contact with the water remain intact

# Case History



- Florida Supreme Court found that members did not own property rights supposedly taken
- United States Supreme Court reviewed the Florida Supreme Court's decision in light of the U.S. Constitution to determine if the judicial action of the Florida Supreme Court constituted a taking.

## Question before the Fla. Supreme Court

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



## Holding of the Fla. Supreme Court

- The Florida Supreme Court answered the certified question in the negative, and faulted the Court of Appeal for not considering the doctrine of avulsion, which, it concluded, permitted the State to reclaim the restored beach on behalf of the public. It described the right to accretions as a future contingent interest, not a vested property right, and held that there is no littoral right to contact with the water independent of the littoral right of access, which the Act does not infringe.

## Question before the U.S. Supreme Court

- Whether the Florida Supreme Court took property without just compensation in violation of the Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth.

## **Holding of the U.S. Supreme Court**

- The Supreme Court held that the Florida Supreme Court did not engage in an unconstitutional taking of littoral property owners' rights to future accretions, and to contact with the water, by upholding State's decision to restore eroded beach by filling in submerged land.

# U.S. Supreme Court on Judicial Takings

- The Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth Amendment, applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land.



# U.S. Supreme Court on Judicial Takings

- Classic “taking,” is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing; thus, when the government uses its own property in such a way that it destroys private property, it has taken that property.

## **U.S. Supreme Court on Judicial Takings**

- Under the Fifth Amendment, as applied against the States through the Fourteenth Amendment, it is a taking when a state regulation forces a property owner to submit to a permanent physical occupation or deprives him of all economically beneficial use of his property.

# U.S. Supreme Court on Judicial Takings

- The Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth Amendment, bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking.

# Under the Federal Constitution

- Issues raised regarding judicial takings:
  - What is the correct clause of the Constitution to use in assessing claims of impermissible judicial revision of property rights?
  - If the court rendering the challenged decision maintains it was only clarifying the law what is the standard of review for determining whether or not the court was in fact changing the law?
  - Assuming the rendering court has revised property law in a way that eliminates previous advantages of ownership, what is the standard for determining whether this has resulted in a taking?



# Under the Federal Constitution

- Issues raised regarding judicial takings:
  - Assuming the rendering court has revised property law in a way that eliminates previous advantages of ownership, what is the standard for determining whether this has resulted in a taking?
  - What procedure should be followed in adjudicating claims of judicial takings?
    - These issues were identified by Thomas W. Merrill, Columbia Law School Professor and counsel of record for the City of Destin and Walton County, in his article, Supreme Court Considers the Judicial Takings Doctrine in Beach Restoration Case. 42 No. 1 ABA Trends 12.

# Questions?



Stephen A. Walker, Esq.  
Andrew J. Baumann, Esq.  
515 N. Flagler Drive, Suite 1500  
West Palm Beach, FL 33401  
Phone: (561) 640-0820  
Fax: (561) 640-8202  
[swalker@llw-law.com](mailto:swalker@llw-law.com)  
[abaumann@llw-law.com](mailto:abaumann@llw-law.com)

Daniel D. Richardson, Esq.  
245 Riverside Avenue, Suite 150  
Jacksonville, FL 32202  
Phone: (904) 353-6410  
Fax: (904) 353-7619  
[drichardson@llw-law.com](mailto:drichardson@llw-law.com)