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How Scary Is *Stop the Beach Renourishment*?

Roger Bernhardt

Introduction

As a matter of strict water law, the United States Supreme Court's decision in *Stop the Beach Renourishment, Inc. v Florida Dep't of Env't'l Protection* (2010) ___ US ___, 177 L Ed 2d 184, 130 S Ct 2592 (reported at p 142), is not exceptionally interesting, because the general rules have been that the states hold in trust all of the submerged land below navigable waters, and that the doctrine of avulsion (sudden boundary changes from water actions) does not have the same impact on property boundaries that the slower boundary changes resulting from accretion or reliction do. See *City of Long Beach v Mansell* (1970) 3 C3d 462, 476 P2d 423. Consequently, as a substantive takings law issue, loss of what had never been held to be an established property right (direct contact of littoral land with the water) simply meant that no constitutional deprivation had occurred, in Florida or, likely, in California.

Analysis

But the notion that a judicial decision could, under the right circumstances, by itself constitute a taking of a litigant's property can be unsettling. Just as city planners some years ago had to learn to consider the impact of their decisions on local budgets in light of judicial development of the doctrine of regulatory takings, so now perhaps local judges may also have to check with their municipal treasurers before they too readily decide to alter settled property rights. Four members of the United States Supreme Court have now held that this could happen. Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, has announced: "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." 177 L Ed 2d at 197; emphasis in original.

That means that a judicial rule change that eliminates what had previously been regarded as a property right of one of the parties could constitute a taking. The growth of the common law by the technique of changing the rules could be costly. "It is no more essential that judges be free to overrule prior cases that establish property entitlements than that state legislators be free to revise pre-existing statutes that confer property entitlements, or agency-heads pre-existing regulations that do so." 177 L Ed 2d at 204. Precedent may have some kind of economic value. "What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established." 177 L Ed 2d at 201. The risk exists, even when the old precedent was in known jeopardy. A "judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking." 177 L Ed 2d at 205.

The fact that these quoted parts of the opinion had only four signatures is not that soothing, since none of the other four Justices held positions that were truly contradictory. Justices Kennedy and Sotomayor simply thought that due process analysis was preferable to takings

analysis (*i.e.*, asking whether the ruling was arbitrary or irrational), which could still leave compensation as a possible remedy for a violation. They said (177 L Ed 2d at 212):

And if the litigation were a class action to decide, for instance, whether there are public rights of access that diminish the rights of private ownership, a State might find itself obligated to pay a substantial judgment for the judicial ruling. Even if the legislature were to subsequently rescind the judicial decision by statute, the State would still have to pay just compensation for the temporary taking that occurred from the time of the judicial decision to the time of the statutory fix.

Justices Breyer and Ginsburg, on the other hand, merely believed that “the questions were better left for another day,” which does not say that much about the possible outcome when that day arrives. With Justice Kagan now replacing absent Justice Stevens, the future of this doctrine is even more unpredictable.

In light of the fact that judicial decisions might someday be regarded as compensable takings, and since there was nothing in the opinion about retroactivity, I have indulged my imagination, and offer the following existing decisions of the California Supreme Court as candidates under such a new doctrine. The first three more or less frankly acknowledged that the rules were being changed. The last two retitled the playing field no less dramatically, although they were not quite as explicit about admitting it (which perhaps may become important if the *Stop the Beach* doctrine truly starts inhibiting rule remaking).

Slumlords and the Implied Warranty

In *Green v Superior Court* (1974) 10 C3d 616, 111 CR 704, Justice Tobriner began (10 C3d at 619):

Under traditional common law doctrine, long followed in California, a landlord was under no duty to maintain leased dwellings in habitable condition during the term of the lease. In the past several years, however, the highest courts of a rapidly growing number of states ... have reexamined the bases of the old common law rule and have uniformly determined that it no longer corresponds to the realities of the modern urban landlord-tenant relationship. Accordingly, each of these jurisdictions has discarded the old common law rule and has adopted an implied warranty of habitability for residential leases.... [W]e have determined that [there is] a common law implied warranty of habitability in residential leases in California, and we conclude that the breach of such warranty may be raised as a defense in an unlawful detainer action.

The court forthrightly admitted that it was putting a new rule into place; but it was time to do so (10 C3d at 622):

The transformation of the landlord-tenant relationship and developments in analogous areas of law compel the recognition of a common law implied warranty of habitability in residential leases in California.... Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease.... [W]e do not exercise a novel prerogative, but merely follow the well-established duty of common law courts to reflect contemporary social values and ethics.

But because this decision dramatically removed the former freedom that some landlords had of not spending money on the upkeep of their rental units, was that a taking of their properties? Did the fact that courts in other jurisdictions were reaching the same result make our court's decision less of a taking? Or did the fact that rent control ordinances more or less simultaneously

survived takings attacks (see *Pennel v City of San Jose* (1988) 485 US 1, 99 L Ed 2d 1, 108 S Ct 849) mean that implied warranty decisions were equally immune? Should this sudden wealth transfer from landlords to tenants have been treated as a compensable taking?

Impenetrable Running Covenants and Incomprehensible Servitudes

Students dread the topic of covenants running with the land because of its complexity. Apparently, our supreme court believed that to be a sufficient reason for eliminating one of its more arcane rules. With regard to these interests, the supreme court noted, in *Citizens for Covenant Compliance v Anderson* (1995) 12 C4th 345, 47 CR2d 898, that “the Court of Appeal held they are not enforceable because they were not also mentioned in a deed or other document when the property was sold.” But then it said (12 C4th at 349):

We disagree, and adopt the following rule: If a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions upon the use of the property as part of the common plan, is recorded before the execution of the contract of sale, describes the property it is to govern, and states that it is to bind all purchasers and their successors, subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan; the restrictions, therefore, are not unenforceable merely because they are not *additionally* cited in a deed or other document at the time of the sale. [Emphasis in original.]

That was not what the court had said earlier. In *Werner v Graham* (1919) 181 C 174, 182, 183 P 945, it had held:

Servitudes running with the land in favor of one parcel and against another cannot be created in any such uncertain and indefinite fashion.... The grantee’s intent in this respect is necessary, as well as the grantor’s, and the deed, which constitutes the final and exclusive memorial of their joint intent, has not a word to that effect, nor anything whatever which can be seized upon and given construction as an expression of such intent ... as of the time it is given.... Nor does it make any difference that ... [the developer] gave each grantee to understand, and each grantee did understand, that the restrictions were exacted as part of a general scheme. Any understanding not incorporated in them is wholly immaterial in the absence of a reformation.

This was reaffirmed in *Riley v Bear Creek Planning Comm.* (1976) 17 C3d 500, 131 CR 381, which, as the *Citizens for Covenant Compliance* court observed (12 C4th at 348):

rejected the claim that parol evidence may be admitted to show that the parties in fact intended the property to be subject to restrictions like those later recorded, finding that the covenants must be in writing to be effective. The rule of the *Werner* case is supported by every consideration of sound public policy which has led to the enactment and enforcement of statutes of frauds in every English-speaking commonwealth.

That rule may not have made great policy sense, but it was surely the rule; as the *Citizens for Covenant Compliance* court acknowledged (12 C4th at 360): “[T]o date, the Court of Appeal decisions have required some reference in the deed, however vague, to the recorded restrictions.”

The impact of this change—abandoning the requirement of having at least one deed in the development refer to the recorded CC&Rs—was dramatically noted by dissenting Justice Kennard in *Citizens for Covenant Compliance* (12 C4th at 369):

By adopting this rule, the majority blasts a gaping hole through the structure of real property law that has been painstakingly erected by the Legislature and by the courts over the past century.... [T]he majority has now transformed grant deeds that on their face are unrestricted conveyances of the landowner's entire interest into deeds conveying only a portion of the landowner's interest.... Because Californians have been creating subdivisions for at least 130 years, the majority's decision to make its new rule retroactive will revive land use restrictions that, like the restrictions in this case, were unenforceable under the law as it existed before today, while at the same time erasing other land use restrictions on which landowners may have relied for generations.

If your client was a landowner/developer whose prospective title, in your opinion, had been clean despite old CC&Rs in the chain of title because no deed had ever incorporated them, would you now recommend that your client consider suing the judge if she declared that the title was restricted anyway, because she had taken one of his property rights away?

Natural Servitudes and Common Enemies

California follows the civil law (known as the natural servitude doctrine) regarding the disposition of surface waters, a rule that restricts the ability of an upper landowner to use artificial means to dispose of unwanted surface waters over her downhill neighbor's property. But then, as stated in *Ektelon v City of San Diego* (1988) 200 CA3d 804, 808, 246 CR 483:

Keys v. Romley [(1966) 64 C2d 396, 409, 50 CR 273], modified the rule, however, by inserting a requirement of reasonableness, holding that: "No party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability.... It is therefore incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner. It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury. If the actions of both the upper and lower landowners are reasonable, necessary, and generally in accord with the foregoing, then the injury must necessarily be borne by the upper landowner who changes a natural system of drainage, in accordance with our traditional civil law rule.

That means that the old rights a downhill property owner had to arbitrarily demand that his uphill neighbor not use artificial techniques to divert her unwanted surface waters over his property vanished in 1966, when *Keys* was decided. The downhill owner's claim was lost unless he could also show that he himself had taken reasonable precautions to reduce his injuries.

If a court told a property owner that his former absolute right to tell trespassers to keep off his property was being replaced with a limitation of reasonableness, *i.e.*, that he now had to show that he was unreasonably bothered or harmed by their trespasses, would that amount to a taking of one of his property rights? Will the Fifth Amendment stop courts from displacing the principles of absolutism now in property law with principles of reasonableness derived from modern tort law?

Beach Access by the Public and Good Samaritan Owners

These next two decisions wrought comparably large changes in California law, but because our supreme court appeared less willing to acknowledge what it had done, I have put them at the bottom of the list.

Before 1970, owners of unenclosed land could act more or less charitably towards the public, allowing them to wander and play there, comforted under their belief that the rule was

where land is unenclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate.... It will not be presumed, from mere failure to object, that the owner of such land so used intends to create in the public a right which would practically destroy his own right to use any part of the property.

F. A. Hihn Co. v City of Santa Cruz (1915) 170 C 436, 150 P 62. See also *City of Manhattan Beach v Cortelyou* (1938) 10 C2d 653, 76 P2d 483.

But then came *Gion v City of Santa Cruz* (1970) 2 C3d 29, 84 CR 162, in which the supreme court held that failing to put a timely stop to that public activity meant that the owners had impliedly dedicated their land to the public. Their resistance had to be effective, more than just enough to rebut the inference of a license (2 C3d at 41):

Although “No Trespassing” signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide whether the owner’s activities have been adequate. If the owner has not attempted to halt public use in any significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication.

In retrospect, could it be said that owners of open land had their right to keep the public out taken away by the courts because of a rule change regarding licenses? Because of that decision, local governments did not have to pay compensation for the new public parks and public beaches that had suddenly been impliedly dedicated to them.

Deeds of Trust and the One-Action Rule

Here is what the supreme court said in *Bank of Italy Nat’l Trust & Sav. Ass’n v Bentley* (1932) 14 P2d 85, about a deed of trust being subject to the one-action rule of CCP §726:

The question presented by these facts is, therefore, whether it is possible to sue on a promissory note secured by a deed of trust without first exhausting the security or showing that it is valueless.... An examination of section 726 and of the cases which have construed it leaves no doubt as to its meaning in this connection.... There is no general reference to “security” as such. The statute deals with mortgages, and with no other type of security.... It must be considered as thoroughly settled in California that a deed of trust is not a mortgage. Substantial differences between the two types of security have been recognized, and statutes applicable to mortgages have generally been held inapplicable to deeds of trust.... It necessarily follows that the deed of trust does not come within the terms of section 726, Code of Civil Procedure. Nor do any of the California cases support a contrary conclusion.... [T]he distinction and its incidents have survived for so long a period as to render them safe from judicial attack. The remedy for the evils attending the use of deeds of trust, if there are such, must be legislative.

How, then, should we react to the reasoning of that court when, seven months later, on rehearing, it opined instead:

It is our opinion that, in the absence of some unusual circumstance not present in this case, an independent action on a note secured by a deed of trust may *not* be brought by the holder of the note unless and until the security is exhausted.... Assuming that a trust deed is not within [CCP §726] ... we do not feel justified in holding, merely because “title” passes by a deed of trust, while only a “lien” is created by a mortgage, that, in reference to the necessity of exhausting the security before enforcing the obligation secured, deeds of trust and mortgages are so different that in one case security must be exhausted before suit on the personal obligation, while, in the other, no such necessity exists. Fundamentally, it cannot be doubted that in both situations the security for an indebtedness is the important and essential thing in the whole transaction. The economic function of the two instruments would seem to be identical. Where there is one and the same object to be accomplished, important rights and duties of the parties should not be made to depend on the more or less accidental form of the security.

Bank of Italy Nat'l Trust & Sav. Ass'n v Bentley (1933) 217 C 644, 648, 20 P2d 940.

For over 75 years, California creditors had demanded deeds of trust, rather than mortgages, as security for their loans because they believed those instruments to be immune from the hazards of CCP §726. Now, those instruments no longer were safe. (That might sound like a mere contract rule change, except that the court thought it was more dignified than that; in the first *Bank of Italy* opinion, it said (14 P2d at 87): “Any disturbance by this court of these *settled rules of property* would cause endless confusion and great hardship.” (Emphasis added.))

Because a secured creditor is allowed to ride through bankruptcy because its security interest is treated as property that may not be taken from it, did the rule change about the nature of deeds of trust violating lenders' Fifth Amendment rights?

Dangers Ahead

If the four-member wing of the United States Supreme Court ever becomes five, we can certainly look forward to lively times in state court judicial chambers as new rules are debated. The judges should hope that their malpractice coverage is current and applicable.

Because Florida beachfront property owners could not show an established property right to littoral property, no unconstitutional taking of property occurred under state and federal law when local agencies restored eroded beaches for public use.

Stop the Beach Renourishment, Inc. v Florida Dep't of Env'tl Protection (2010) _ US_, 177 L Ed 2d 184, 130 S Ct 2592

Under Florida law, the state owns land permanently submerged below navigable waters and the foreshore, which is “the land between the low-tide line and the mean high-water line.” The mean-high water line is a line established over the preceding 19 years and varies accordingly. Private property owners own the beachfront property or littoral property above the mean high-water line. Beachfront property owners are entitled to any addition of property due to gradual, imperceptible accretions and relictions. “Accretions are additions of alluvion (sand, sediment, or other deposits) to waterfront land; relictions are lands once covered by water that become dry when the water recedes.” 177 L Ed 2d at 192. But in the event that land is added by avulsion, which is a sudden and immediately perceptible change in the coastline, under common law and Florida state law, that land is owned by the seabed owner (typically the state). Florida has passed legislation to allow local governments “to deposit sand on eroded beaches (restoration) and to

maintain the deposited sand (nourishment).” At issue in this case was the attempt by a local city and county to replenish Florida beaches eroded by several hurricanes.

Plaintiffs and appellants are private beachfront owners who formed a nonprofit corporation to challenge the permit granted to the local city and county to restore and nourish the eroded beach and to allege an unconstitutional taking of private property without just compensation. Beachfront owners first filed an unsuccessful administrative challenge to the permit and then appealed to the court. The Florida District Court of Appeal reversed the agency’s grant of a permit, remanding the case back to the agency and certifying to the Florida Supreme Court the question of whether there had been an unconstitutional taking of beachfront owners’ littoral rights. The Florida Supreme Court held that no unconstitutional taking had occurred, quashed the remand, and denied rehearing. The United States Supreme Court granted certiorari.

Beachfront owners alleged an unconstitutional taking without just compensation under the Fifth Amendment, applicable to the states through the Fourteenth Amendment. They alleged that their right to future accretions and their right to have their beachfront property directly abut the ocean had been taken from them in violation of the takings clause of the Fifth Amendment.

A unanimous U.S. Supreme Court (Justice Stevens not participating) held that, under federal and state law, no unconstitutional taking without just compensation had occurred. By restoring and nourishing the eroded beach, the city and county essentially created an avulsion, which then established a new and permanent “erosion control line” that replaced the fluctuating mean high-water line for purposes of demarcation between littoral and state property. The Court entertained and dismissed under Florida state law the beachfront owners’ argument that an owner of property should not be able to create an avulsion, which would benefit its own property interests. Once the permanent erosion control line is recorded, beachfront owners no longer become entitled to added land created by accretion or reliction because their land no longer comes in contact with the water. The right to future accretions and relictions is “subordinate to the State’s right to fill.” 177 L Ed 2d at 207.

As to the owners’ argument that the state took away their rights to have their beachfront property permanently abut the water, the Court approvingly quoted Florida case law, noting that “there is no independent right of contact with the water” as long as access to the water is maintained for the beachfront owners and the public. 177 L Ed 2d at 208. Further, preserving this right would essentially void the erosion control line and create a permanent, inviolate mean high-water line in contradiction of Florida law.

The Court found that two arguments presented by the city and county were waived because they were absent from the briefs:

- While beachfront owners owned private property, the nonprofit corporation pursuing relief did not.
- The beachfront owners’ claim was not ripe for decision because they had not made a claim for just compensation.

Four Justices held that the takings clause applies to judicial action. The takings clause is silent as to the government actor and respective governmental branches. “It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.” 177 L Ed 2d at 196. Thus, if “a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property” in violation of the takings clause.

177 L Ed 2d at 197 (emphasis in original). The Court rejected a proposed test that future takings analyses include an additional requirement that the judicial action had no “fair and substantial basis.” The Court rejected another proposed test that future takings analyses include an “unpredictability test,” requiring reversal of a judicial taking only if the decision reflects “a sudden change in state law, unpredictable in terms of relevant precedents.” 177 L Ed 2d at 205.

Two Justices suggested the viability of a due process clause analysis under the Fourteenth Amendment—obviating the need for and essentially duplicating the likely results of a judicial takings analysis. Six Justices declined to address the due process argument because beachfront owners “did not raise this challenge before the Florida Supreme Court, and only obliquely raised it in the petition for certiorari.” 177 L Ed 2d at 206 n 11. Nevertheless, two Justices argued that a due process clause analysis would honor the separation of powers doctrine, keeping the power of eminent domain safely within the purview of legislative branch.