

## Commentary

# Stop the Beach Renourishment— Six Perspectives

“No foul,” the Justices unanimously declared on June 17 when the U.S. Supreme Court ruled that Florida does not owe six Panhandle beachfront property owners monetary compensation from the state’s beach renourishment program (*Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 130 S.Ct. 2592, June 17, 2010; see 62 PEL 334 in this issue). The 8–0 decision (retiring Justice Stevens did not participate presumably because he owns beach property in Florida) affirmed the ruling of the state’s highest court.

This case left many scratching their heads. Instead of acknowledging that the state was protecting their properties at the public’s expense, petitioners argued that the state’s efforts to rebuild the eroded beach in front of their homes took away valuable property rights without paying them compensation, such as their exclusive right to access the beach, their unobstructed views of the beach, and their right to future accretion of new sand. The property owners prevailed in April 2006 when the district court ruled that the beach-

front reconstruction project was an unconstitutional taking of their riparian rights (*Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, 27 So.3d 48 (Fla. App.1 Dist. April 28, 2006) (NO. 1D05-4086), *rehearing denied* (July 3, 2006)).

Florida’s highest court accepted the case, with the question framed as follows: “On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?” In September 2008, the Florida Supreme Court held that provisions of the Beach and Shore Preservation Act that fix shoreline boundaries and that suspend operation of common-law rule of accretion—but preserve littoral rights of access, view, and use after the erosion control line is recorded—do not, on their face, unconstitutionally deprive upland owners of littoral rights without just compensation (*Walton County v. Stop Beach Renourishment, Inc.*, 998 So.2d 1102, (Fla. Sept. 29, 2008), *rehearing denied* (Dec. 18, 2008)).

Then the excitement began. The petitioners sought review in the U.S.

Supreme Court but added a new twist. They believed the Florida Supreme Court’s ruling constituted a “judicial taking” because the court had invoked “nonexistent rules of state substantive law” to reverse 100 years of uniform holdings that littoral rights are constitutionally protected (2009 WL 698518). This issue raised eyebrows and, after the U.S. Supreme Court accepted review, more than 20 amicus briefs were filed.

Justice Scalia authored the majority’s decision that trounced the petitioner’s claim. The Florida Supreme Court did not engage in an unconstitutional taking. Scalia, however, failed to convince a majority of his brethren to embrace the judicial takings doctrine. Chief Justice Roberts, along with Justices Thomas and Alito, agreed with Scalia, but a fifth member would not take the bait.

The case of the year for planners and land use practitioners has generated great interest in the popular media and the bar. Six constitutional law scholars and litigators, each having followed this case closely, share their opinions in their mini-commentaries below.

—Lora A. Lucero, AICP, Editor

---

## Is an Answer Blowin’ in the Wind?<sup>20</sup>

Harvey M. Jacobs

The decision in *Stop the Beach Renourishment* was anxiously awaited among the property rights and land use communities. This term it was the Court’s major statement on property rights and takings. With its decision, the Court continues its dance with property rights. In so doing, the Court both intrigues and confounds. As a result, there are things we know, things that we might know, and things we do not know.

### Things We Know

The plaintiffs believed they were bringing a case about the substantive matter of property rights. First and foremost, who owned what, and why?

The Court quickly and unanimously addressed these matters. The actions of the state of Florida were reasonable both vis-a-vis common law and Florida statutory law. The state was acting within its rights when it brought sand in and created and extended the

beachfront, and in so doing modified the access and property right composition of those private property owners adjoining the sea. The Court found nothing controversial in the facts of the case. Reading this early part of the decision, one can wonder why the Court even took the case. Their assessment is, in essence, “this is clear, there is no controversy, the state was acting within its rights, and the state did nothing untoward.”

The question of the existence and extent of judicial takings is one of the major unresolved questions about takings.

As a result of their reasoning, we know that states may take beach enrichment actions like Florida took, and that in so doing they are fully within their common law (and hopefully statutorily reinforced) rights.

Something else we know. In the matter of land use and property rights, the Court is inclined to defer to states and their legislative processes. In the very first sentence of the full opinion, Justice Scalia, speaking for all eight justices, notes that “[g]enerally speaking, state law defines property interests. . .” (130 S.Ct. 2592 at 2597). In this way, this decision can be viewed as in line with the Court’s more narrowly decided decision in *Kelo v. City of New London* (545 U.S. 469 (2005)). For those in the majority in *Kelo*, the fact that the City of New London was acting under the specific authorization of a state statute legitimated the process, even if some in the majority may have had doubts about the city’s action.

So the Court does not use *Stop the Beach Renourishment* to add anything to its existing jurisprudence on whether and how states and local governments can affect private property rights. Common law and states are the starting points for governmental actions that affect private property owners. Actions supported by common law and specifically enabled and authorized by state law are likely legitimate and it will be difficult for private property owners to contest them.

#### Things We Might Know

One thing we might learn from the decision is that the Court is not particularly interested in property or property rights *per se*. That is, in deferring to state law, thus acknowledging the limited role for the federal government in state actions, the Court largely brushes aside the substantive question of what is and should be in the bundle of rights.

What is the Court interested in, then? Simply, they want to answer the question: When does government take property and, specifically, is there such an action as judicial takings? This focus of the Court on judicial takings was both a morphing of the original *Stop*

*the Beach Renourishment* action, and a search for an opportunity, by Justice Scalia in particular, to engage the matter of judicial takings, a subject he has long been interested in.<sup>21</sup> So in terms of the Court’s present (and future) focus, it is not the matter of what is and is not a property right. It is a matter of what the government may and may not do in taking a property right. The Court has already established that the administrative and legislative branches of government can constitute legitimate actions that impinge on individual private property rights (like regulation), especially when these actions come out of common law and are buttressed by specific state legislation. But the Court also acknowledges that occasionally these actions will overreach, and that the Court has authority to admonish such overreaching. The question before the Court in this case is, does this same line of reasoning apply to the actions of state judges?

Justice Scalia makes a compelling plain-English argument for recognizing the existence of judicial takings: “The Takings Clause is not addressed to the action of a specific branch or branches. It is concerned simply with the act, not with the governmental actor . . .” He goes on to say: “There is no textual justification for saying that the existence or the scope of a State’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation” (130 S.Ct. 2592 at 2601).

Is he right? Three of his colleagues agree with him, two might or might not agree with him, and two appear skeptical. So does one view the Court as 4-4 on this issue (which is how they officially ruled in this part of the case) or 6-2 (which is how several conservative commentators want to describe what they believe may be a leaning that emerges out of the case?)<sup>22</sup>

#### Things We Do Not Know

The question of the existence and extent of judicial takings is one of the major unresolved questions about takings.<sup>23</sup> Whether such a thing even exists, or should exist, and what would be

the consequences if it did, is of great debate.<sup>24</sup> As a result of *Stop the Beach Renourishment*, we do not know if there is an action such as judicial takings. We know that plurality of the Court strongly and unambiguously believes there is. Whether and how these members will convince one or more other Justices to join them in their opinion is unknown. Placing a wager, I will bet that the answer is no; they will not convince one or more Justices to join them. As a result, the existence and scope of judicial taking will remain a divided issue, debated in academic journals, referenced in lower court cases, but not clarified in the immediate future by the Court, and therefore not a substantive matter for planners and planning practice.

#### What Does It All Mean for Planning Practice?

As planners learn, law matters. It matters both symbolically and literally. Symbolically, Americans and their elected officials hold beliefs about what the Declaration of Independence, the Constitution and its Bill of Rights, and the U.S. Supreme Court say about the rights of individuals, the limitations on the powers of government, and the relationships among levels of governments. It is very often the emotionality of these beliefs that structure the electoral, legislative, and policy processes. For example, public debate will often begin with lead-ins such as: “As an American I am entitled to . . .”; “Government doesn’t have the right to . . .”; “America was founded to . . .”; “The Constitution says . . .” Whether or not the statement that follows the lead-in is historically or legally correct, it is almost always difficult to refute it and redirect the conversation. So law matters because we use it, and what we believe to be true about it to direct our public conversations about property rights, land, natural resources, communities, the individual, and the state.<sup>25</sup>

Literally law matters because decisions establish guideposts for how planners think about what is appropriate policy action. If, for example, a regulation were proposed that would take all economic value from a set of properties and there

From a literal point of view, government is empowered to do much more (to act more assertively) than most governments are willing to do.

was no background principle of nuisance to justify it, then existing jurisprudence makes clear that such regulation would be viewed as a taking, and the government would need to be prepared to offer compensation for its actions.<sup>26</sup>

If I weigh the literal versus the symbolic—which is more important—from my perspective, it is the symbolic value of law.

From a literal point of view, government is empowered to do much more (to act more assertively) than most governments are willing to do. What holds government back from the literal limit of its authority? The symbolic value of law. Government does much less than it could, in theory, do on behalf of the public interest, because of how groups of citizens, elected officials, and administrative personnel (mis)understand what the law actually says and what it allows or prohibits in terms of public action. It is the symbolic nature of law that, more than anything else, structures our interactions around land use, natural

resources and environmental issues vis-a-vis the rights of the individual and the power of the state.

How does *Stop the Beach Renourishment* add to this dialogue? Not in any significant way. The case is, in some real ways, a dud (not that that is bad). It was argued with great anticipation and animation,<sup>27</sup> and yet the results say very little that is new. I'm not sure it will enter the symbolic narrative in any significant way or even matter much to property and land use scholars.

The major exception is, of course, the matter of judicial takings. The unknown is to what extent the Court will continue to seek out cases which allow it to opine on this subject, and whether, in so doing, it will change the opinions of any present or future judges.

But even if the Court were to define the existence and scope of judicial takings, I doubt whether it would have much impact on most land use decision making. Why? Because most policy is local, most policy decisions

are uncontested, and the decisions that are contested don't go very far. Think about zoning permits, appeals to a zoning board, and appeals beyond a zoning board. And for the overwhelming majority of local processes, it is the symbolic nature of law, not its literalness, which structures the terms of debate and dispute (what a landowner and a government can and cannot do), though it is the literalness of law that often settles a specific disputed question.

There are many important questions to address with regard to property rights, individual rights, government authority, and the role of the branches of government. But at least for now, from the perspective of the U.S. Supreme Court, many of the answers are blowing in the wind.

**Harvey M. Jacobs is a professor in the Department of Urban and Regional Planning and Gaylord Nelson Institute for Environmental Studies at the University of Wisconsin–Madison. Jacobs is the editor of *Who Owns America?* (University of Wisconsin Press, 1998) and *Private Property in the 21st Century* (Edward Elgar, 2004). He can be reached at hmjacobs@wisc.edu.**

#### ENDNOTES

20. With acknowledgments and apologies to Bob Dylan, "Blowin' in the Wind," on *The Freewheelin' Bob Dylan*, Columbia Records, 1963.

21. See Justice Scalia's dissent in the denial of cert in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994).

22. Ben Barros, *What's at Stake in Stop the Beach Renourishment?* (2009), PROPERTY PROF BLOG, available at: <http://lawprofessors.typepad.com/property/2009/07/whats-at-stake-in-stop-the-beach-renourishment.html>; Timothy Sandefur, *Judicial Takings in Stop the Beach Renourishment* (2010), available at Pacific Legal Foundation website, <http://plf.typepad.com/plf/2010/06/judicial-takings-in-stop-the-beach-renourishment.html>; and Ilya Shapiro, *Mixed Result in Complicated Property Rights Case* (2010), available at Cato Institute website: <http://www.cato-at-liberty.org/2010/06/17/mixed-result-in-complicated-property-rights-case>.

23. See Ben Barros, *Supreme Court Rules in Stop the Beach* (2010), PROPERTY PROF BLOG, available at <http://lawprofessors.typepad.com/property/2010/06/supreme-court-rules-in-stop-the-beach.html#tp> (conservative comment).

24. See John Echeverria, *In Stop the Beach Renourishment Ruling, Conservatives Come up One Vote Short in Quest to Remake Property Rights Law* (2010), CENTER FOR PROGRESSIVE REFORM BLOG, available at <http://www.progressivereform.org/CPRBlog.cfm?idBlog=480598E4-9B74-D4DC-69FCF9E648F55238> (contrasting comment).

25. See Harvey M. Jacobs, *Fighting Over Land: America's Legacy . . . America's Future?* J. AM. PLAN. ASS'N 65, 2: 141–149 (1999); Harvey M. Jacobs, *Planning is Un-American! (or, what to say when you are accused of being a communist)*, SMALL TOWN & RURAL PLAN. (June): 1, 6–7, 9 (2009); and Harvey M. Jacobs, *Social Conflict Over Property Rights: The End, A New Beginning or a Continuing Conversation?* HOUSING POL'Y DEBATE 20, 3: 329–349 (2010).

26. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992).

27. See Adam Liptak, *Homeowner Rights and Hot Dog Sellers Are Talk of Court*, THE N.Y. TIMES (December 3, 2009), available at <http://www.nytimes.com/2009/12/03/us/03scotus.html?ref=politics>.