

LEGAL TIDES

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Do Publicly Funded Beach Nourishment Projects Deprive Oceanfront Property Owners of Private Property Rights Without Just Compensation?

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In 2009, the Supreme Court of the United States granted certiorari to review¹ *Walton County v. Stop The Beach Nourishment, Inc.*,² a Florida beach nourishment case in which the plaintiffs claim that their private property rights are being taken without just compensation in violation of the Fifth Amendment to the United States Constitution. The outcome of this case could have important financial implications for beach nourishment projects around the country, including those in North Carolina.

Facts of the Florida Case

The essential facts of the case are these: A series of hurricanes — Opal (1995), Georges (1998), Isadora (2002) and Ivan (2004) — severely eroded beaches in the Florida Panhandle region. As a remedy, a beach



Eroding shorelines threaten beachfront properties, such as this home in North Topsail Beach. Photo: Spencer Rogers

nourishment project was initiated by Walton County and the City of Destin. As is typical in such projects, sand from offshore sources would be used to fill state-owned public trust submerged lands adjacent to the existing dry sand beach. Upon completion of the project, title to that part of the beach created by fill-

ing those submerged lands would be vested to the State of Florida, and those newly created beach lands would be open to public use. The dividing line between privately owned oceanfront property and this newly created beach would be the mean high water line (sometimes referred to as the mean high tide line), as it existed before the project began. To determine the location of that line, at the beginning of the project the existing mean high water line is identified and delineated by a survey. In Florida, this line is referred to as the erosion control line, or ECL.³

In the Florida case, the plaintiffs argue that the legal impact of the beach nourishment project upon the oceanfront property owners is that they are no longer common law littoral owners and no longer possess common law littoral rights. They further contend that the statutory rights provided are an inadequate

3. The ECL is formally established by the Florida Trustees of the Internal Improvement Trust Fund (IITF). The IITF, comprised of the governor and cabinet, is vested and charged with the acquisition, administration, management, control, supervision, conservation, and disposition of state lands.

Center Developments

2009 *Shape of the Coast* program scheduled for Oct. 23 in New Bern, N.C. To learn more, visit: www.nccoastallaw.org and click on "News and Events."

1. Docket number 08-1151. See Supreme Court of the United States Docket, at <http://origin.www.supremecourtus.gov/docket/08-1151.htm> (last accessed Sept. 4, 2009).
2. 998 So 2nd 1102 (Sept. 29, 2008).

substitute for their common law rights. More specifically, the plaintiffs claim that their common law littoral rights of direct contact to the water and to accretions have been taken without payment of just compensation, as required by the Fifth Amendment to the U.S. Constitution. What they are not claiming, however, is that their right of access to the water is being taken because the applicable Florida statutes expressly preserve that right of access. In light of this case, the question is: what are the legal consequences of a beach nourishment project establishing a fixed land property line for adjacent private oceanfront lands?

Traditional Common Law

Understanding both the plaintiffs' claims and their flaws requires an appreciation of applicable traditional common law principles. Under these principles, normally littoral rights attach only to land that directly abuts the water. In the case of oceanfront property it means that one of the seaward property lines must be the existing mean high water line. However, after a publicly funded beach nourishment project, privately owned oceanfront property no longer abuts the ocean. It abuts the new beach created by the nourishment project, and the seaward line of the oceanfront property is no longer the existing mean high water line. Instead, it will be a fixed line landward of the existing mean high water line — a fixed line determined by where the mean high water line was before the project was undertaken. Therefore, one might reasonably conclude that the establishment of the fixed line and the separation of the privately owned oceanfront land from the water eliminate both the land's status as littoral property and associated common law littoral rights. However, there is some case law that would suggest otherwise.

Direct Contact With The Water Is Not Always Essential To The Right Of Direct Access

Perhaps one of the most instructive is *Tiffany v. Town of Oyster Bay*,⁴ a 1922 New York case. In the case the court uses the term "riparian rights"; however, there is no substantive difference between riparian rights

4. 234 N.Y. 15, 136 N.E. 224 (1922)

and littoral rights. Frequently, the generic term "riparian" is used for both.

In *Tiffany*, a waterfront property owner mistakenly believed he owned the adjacent submerged lands and filled them. Unfortunately for him, the court ruled that the town held title to the submerged lands both before and after that land was raised. Having title to the raised land, the town decided to make full use of the filled land and built 33 public bath houses on it. The waterfront property owner sued to enjoin the town's plan on the ground that it would interfere with his right of access. Although the town was not precluded from using the filled land as a public beach, it was prohibited from erecting structures which would interfere with the waterfront owner's direct access to the water "along the whole frontage" of his property. The court also stated that the waterfront owner's "rights as a riparian owner continue[d]." The conclusion to be drawn is that, if the filling of submerged lands through a mistake of fact by the adjacent waterfront owner or by a third person physically separates the property from the water, the property owner still retains her or his common law right of direct access to the water across the full frontage of his land. Although the property owner may no longer abut the water and be in direct contact and no longer have ownership of any future accretions to the filled lands, the right of direct access to the water continues to exist.⁵

When beach nourishment projects result in a similar separation of privately owned oceanfront property from the water, this general principle is acknowledged by statute, the project agreement or general understanding.

In the Florida case, the state's Beach and Shore Preservation Act incorporates this principle. By the terms of that Act, the oceanfront property owners' littoral access rights are expressly preserved. However, the

5. Another example would be the situation in which public trust submerged lands are illegally filled by a third party and removal of the fill would be not be possible because of possible ecological or other harms. Title to the uplands created by the illegally filling would be in the state because the submerged lands filled were state-owned submerged lands. As in *Tiffany*, an unauthorized filling does not shift title to the filled area from the state to the adjacent waterfront property owner. However, at the same time, the unauthorized cutting off of the waterfront property from the water should not destroy the waterfront property owner's right of access to the water.

Act does state that the oceanfront property owners have no right to any future accretions to the newly created beach lying seaward of the fixed line established by the project. This means that they would no longer have direct contact with the water. There is nothing novel about this provision in the Act. In fact, when the first beach nourishment project took place in North Carolina at Wrightsville Beach in 1933, the North Carolina General Assembly passed a similar statute expressly preserving the right of access of oceanfront property owners being cut off from direct contact with the ocean. In essence, what such statutes do is to substitute statutory littoral rights for the common law ones.

The Common Law Right Is Direct Access, Not Necessarily Direct Contact Or A Right To Accretions

Under some circumstances, the elimination of direct contact with the water and any claim to accretions is consistent with the common law of littoral rights. Under common law principles, the relevant common law right is the right of access to the waterbody. According to a 19th century authority,⁶ the components of that right were:

- (a) The right to maintain contact with the body of water
- (b) The right to accretions
- (c) The first right to purchase adjacent submerged lands if it is sold by the state
- (d) If filling of submerged land is permitted by the state, the preferential right to fill adjacent submerged lands.

However, to focus upon these individual components is to lose sight of the forest for the trees. The justification for the components is to assure that the waterfront property owner does not lose the most valuable feature of her or his property — the right of direct access to the waterbody. Just as the cutting down of one or two trees does not eliminate the forest, in the context of a beach nourishment project the absence of a right to accretions or direct contact with the water does not eliminate the littoral right of continued direct access to the water. At the conclusion of the beach nourishment project, the oceanfront

6. I. Farnham, *Water and Water Rights* §62 (1904).

property owners continue to have direct access both legally and practically to the water. Legally, a private, constitutionally protected right to cross the nourished beach to reach the water exists as a matter of common law and is recognized by the Florida Act. As a practical matter, no physical barriers or hindrances prevent the oceanfront property owners from walking out the door, crossing the nourished beach and reaching the water's edge.

It is also important to note that littoral rights are not absolute and may be lost through natural events, such as hurricanes. Another common law principle is that, if there is a sudden addition to the shoreline as the result of an event such as a hurricane, a so-called change by avulsion, the physical location of the legal line dividing privately owned oceanfront property from state-owned public trust lands does not move as it would with gradual accretions to the shoreline. Instead, a quirk in the common law is that the pre-storm mean high water line would remain as the physical location of the seaward limit of privately owned oceanfront property. For example, if a storm left an addition of 50 feet of sand to the beach, those 50 feet would be state-owned public trust lands. This means that privately owned oceanfront lands would no longer abut the water, and the oceanfront property owner would no longer have any common law littoral right of access or any of the component littoral rights. If the state decided to put up fences or other barriers seaward of the pre-storm mean high water line, the oceanfront property owner would have no claim that the fences or barriers infringed her or his rights as a littoral owner. Therefore, the Florida Act actually provides the oceanfront property owner with a higher level of access than the common law would. Under the Act, if additions to the shoreline take place, the property owner retains access to the water regardless of whether additions are the result of accretions, avulsion or artificially created.

The permanent loss of all littoral rights, and to all legal title to any oceanfront lands, also may take place if erosion is so severe



Beach nourishment projects, as seen here in Emerald Isle, can raise complex legal questions. Photo: Spencer Rogers

that the entire area comprising a particular oceanfront parcel becomes submerged land. In that situation, once the mean high water line moves across all the boundary lines of an oceanfront tract, private title to that area is gone, lost forever. Under the common law rule of promotion, the property behind the original oceanfront tract would be promoted to littoral status, its seaward boundary would become the ambulatory mean high water line, and all traditional common law littoral rights would attach to that tract of land. Any later resurrection of the submerged area would not revive the title of the original oceanfront property owner. Of course, a beach nourishment project protects oceanfront property owners from just such a loss of title to valuable oceanfront property.

Assuming Loss of the Right to Direct Contact and Accretions: So What?

If the plaintiffs lose ancillary rights to direct water contact and to accretions, then such a loss may be only temporary. The Florida Act itself provides that, if the restored beach is not maintained, then the ECL is cancelled and common law littoral owners are re-established. Even in the absence of the statute, if the restored beach was not maintained and the shoreline eroded past the pre-project mean high water line, then under the common law the littoral rights of the oceanfront property owners would be resurrected. Once the shoreline crossed the pre-project mean high water line, under the common law the oceanfront property owners would once again become littoral property owners, the fixed boundary line would be eliminated, and the

mean high water line would once again become the seaward boundary of the privately owned oceanfront property. Therefore, there is no assurance that the oceanfront property owners' loss of direct contact or to accretions is a permanent loss of those ancillary rights. The duration of the loss depends upon public funding and maintenance of the restored beach.

Secondly, current predictions about the impact of climate change strongly suggest that erosion, and not accretion, is the more likely future of ocean beaches. Absent beach nourishment projects, the combination of predicted sea level

rise and increased storm events are likely to eat away at ocean beaches. The reality is that any loss associated with the claim to accretions is more theoretical than real. Under the common law, the impact of the erosion rule is the flipside of the coin. If erosion gradually eats away at the shoreline and the mean high water line moves landward, the oceanfront property owner will lose title to any lands seaward of that moving mean high water line. Therefore, as a practical matter, the protection against loss of shoreline through erosion afforded by a beach nourishment project probably more than offsets any "loss" of the right to accretions.

In addition, if the rights to direct contact and to accretions are being "taken," what exactly is the value of those rights? These rights are just two related sticks in a traditional bundle of littoral rights. As such, the value of the rights should be determined by the value of the property with the rights versus the value after the rights can no longer be exercised. In the setting of a beach nourishment project, the shoreline being nourished is already seriously eroding, perhaps with ocean waters even lapping at or near the foundations of oceanfront houses. If one takes the value of those houses prior to the project and the value after the project, the likelihood of any adverse financial impact is probably non-existent or minimal. More likely, the oceanfront property is worth more with a nourished beach lying in front of it — a beach that likely will continue to be nourished in the future — compared to a seriously eroded beach that may disappear all together and destroy the oceanfront property.

Finally, as a policy matter, why should the public pay oceanfront property owners for the loss of, at best, marginal rights when the public is already footing, through federal and state taxes, the lion's share of any beach nourishment project? An acceptance of the idea that, as part of a beach nourishment project, the government must pay oceanfront property owners for the "loss of the right to accretions," should stiffen already growing societal resistance to the public funding of such projects.⁷

Recognition of the claims of the Stop The Beach Nourishment plaintiffs would exhibit blindness to the fundamental purpose for the creation and acceptance of what

7. If the costs of acquiring affected littoral rights of direct contact and to accretions are added to beach nourishment projects, one solution would be to assess the oceanfront property for those additional costs of such projects. The outcome would be a wash transaction.

we refer to as "littoral rights." Hopefully, the Supreme Court of the United States will approach this case with an understanding that the basic littoral right at issue here is the right of direct access, a right that the public, at its great expense, preserves and protects in beach nourishment projects.

Upcoming Events

The Coastal Society's 2010 Conference

The Coastal Society invites submissions for papers, panels and posters for its 22nd International Conference, "Shifting Shorelines: Adapting to the Future," to be held at the Wilmington Riverside Hilton, Wilmington, N.C., from June 13-16, 2010.

To view the full Call for Papers, please visit: www.thecoastalsociety.org/conference/tcs22/call.html.

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