The New York Times

August 26, 2009

Property Rights Groups Assemble Support in Regulatory Takings Case

By JENNIFER KOONS of Greenwire

Correction appended

Property rights groups are lining up in support of private waterfront landowners in Florida at the center of a case that the Supreme Court will hear later this year.

Twelve groups, including the National Association of Home Builders and the Cato Institute, have filed friend-of-the-court briefs in *Stop the Beach Renourishment v. Florida*, which turns on whether Florida's Supreme Court violated the Constitution's regulatory takings clause when it upheld a plan to create a state-owned public beach between private waterfront land and the Gulf of Mexico.

"The Florida Supreme Court departed from long-established state law protecting the property rights of beachfront landowners," noted a brief filed on behalf of Cato, the NFIB Legal Center and the Pacific Legal Foundation. "So drastic was the court's departure from settled precedent that it functionally eliminated fundamental constitutional protections that owners of beach property had relied on for almost 100 years."

The case arose in 2004, when property owners filed a lawsuit to halt the planned restoration of beaches in Walton County along the northwest Florida panhandle.

Under the state's Beach and Shore Preservation Act, counties and cities can restore beaches eroded by hurricanes and storms by adding sand beyond a state-designated erosion control line -- separating private property from the state's property. After doing so, the new sand becomes public beach because the projects are funded with state and federal dollars.

A Florida district court ruled in 2006 that the state's restoration effort constituted an uncompensated taking, depriving property owners of their right to maintain contact with the water and their "right to accretion," which is the gradual accumulation of land by natural forces.

Last September, the Florida Supreme Court reversed the lower court order.

"Without the beach renourishment provided for under the act, the public would lose vital economic and natural resources," the court held. "As for the upland owners, the beach renourishment protects their property from future storm damage and erosion while preserving their littoral rights to access, use, and view. Consequently, just as with the common law, the act facially achieves a reasonable balance of interests and rights to uniquely valuable and volatile property interests."

In June, the U.S. Supreme Court agreed to hear the case. Arguments are expected to be held this winter.

A majority finding that the Florida Supreme Court violated the takings clause could have broad implications.

"The big issue before the court is whether judicial actions can ever violate the takings clause," said Benjamin Barros, an associate professor of law at Widener University School of Law. "There has been some dicta in some prior cases on this subject, but most observers treat it as an open issue."

As the respondents in the case, the state of Florida and local governments' briefs are not due until the end of September, and groups supporting respondents don't have to file their arguments until Oct. 5.

"Environmental interests will be heard from," said Richard Frank, executive director of the Center for Law, Energy & the Environment at the University of California, Berkeley, School of Law.

Meanwhile, the American Shore and Beach Preservation Association announced last week that it would join the Florida Shore and Beach Preservation Association, the Florida Association of Counties and the Florida League of Cities in filing an amicus brief in support of the state.

"While the case before the court is technically a Florida matter, the results of the case could have implications for coastal communities nationwide," said ASBPA President Harry Simmons. "ASBPA is dedicated to the efforts of our members in Florida and elsewhere who are working hard to maintain, protect and enhance the coasts of America."

Stop the Beach Renourishment will be the first taking case to come before Chief Justice John Roberts and Associate Justices Samuel Alito and Sonia Sotomayor -- a fact not lost on either side.

"It will be really interesting to see how this plays out as the first important takings case before the Roberts court," Barros said. "We can guess which way they might vote, but we don't have that much to go on. My guess is that we won't see much of a shift in the court's approach to takings cases, because the new justices are relatively close ideologically to those they replaced."

During her nomination hearings before the Senate Judiciary Committee in July, Sotomayor fielded numerous questions on regulatory takings.

Discussing the issue of precedent, Sen. Herb Kohl (D-Wis.) asked Sotomayor for her opinion on the controversial 2005 decision in *Kelo v. City of New London*, which affirmed the right of local and state governments to take private property for economic development purposes.

"*Kelo* is now a precedent of the court," Sotomayor said. As a justice on the Supreme Court, "I must give it the deference that the doctrine of *stare decisis* would suggest."

However, the nominee added, "I understand the concern that many citizens have expressed about whether *Kelo* did or did not honor the importance of property rights, but the question in Kelo was a complicated one about what constituted public use. And there, the court held that a taking to develop an economically blighted area was appropriate."

Correction

This article was revised to note that the American Shore and Beach Preservation Association, Florida Shore and Beach Preservation Association, the Florida Association of Counties and the Florida League of Cities plan to file an amicus brief in support of the state.

For more news on energy and the environment, visit www.greenwire.com.