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Supreme Court Justices Hear Arguments in High-Stakes Takings Case

By JENNIFER KOONS of Greenwire

The Supreme Court heard oral arguments today on whether Florida's Supreme Court violated the U.S. Constitution's regulatory takings clause when it upheld a plan to create a state-owned public beach between private waterfront property and the Gulf of Mexico.

The case, *Stop the Beach Renourishment v. Florida*, arose in 2004, when a group of property owners filed a lawsuit to halt the planned restoration of beaches in Walton County along the Florida Panhandle.

Under the state's Beach and Shore Preservation Act, counties and cities can restore eroded beaches by adding sand beyond a state-designated erosion-control line, which separates private property from state property. Sand placed beyond the line 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.

"If this court were to recognize a judicial takings claim, it should only be when a state court radically and unexpectedly deviated from settled state property law, and the decision's impact is so substantial as to constitute a taking under conventional analysis," U.S. Solicitor General Elena Kagan wrote in a friend-of-the-court brief. "The decision of the Florida Supreme Court is not in that category, because it applied settled common-law principles to the particular situation of a beach restoration project."

During today's arguments, Justices Ruth Bader Ginsburg, Stephen Breyer and Antonin Scalia pressed Kent Safriet, a Tallahassee lawyer representing the property owners.

"I'm not so sure this is a bad deal," Scalia said. "It seems to guarantee against a future loss of property."

But Chief Justice John Roberts and Justice Samuel Alito appeared skeptical. Both, along with frequent swing voter Anthony Kennedy, presented Florida Solicitor General Scott Makar with a number of hypotheticals to determine when exactly the state would consider an action a "judicial takings."

Kennedy had tough questions for attorneys on both sides, wondering what standard the court would have to apply if it found in favor of the petitioners.

"I thought Kennedy seemed troubled by some aspects of the case, although I think he will vote to affirm,"

said John Echeverria, an environmental law professor at Vermont Law School who filed a friend-of-the-court brief on behalf of the American Planning Association and the Florida Chapter of the American Planning Association.

"I predict a solid win for the State of Florida in this case. What is more uncertain is whether the court will breathe some life into the judicial takings doctrine for application in some future case."

This is the first taking case to come before Roberts and Alito and Justice Sonia Sotomayor.

Justice John Paul Stevens, who owns property in Florida, did not participate in today's oral arguments.

Widespread interest

Kagan, attorneys general from 26 states, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors and others filed friend-of-the-court briefs supporting the state of Florida in the case.

A majority finding that the Florida Supreme Court violated the takings clause "would undermine the states' well established and traditional authority to determine the scope of their own property laws," the attorneys general warned in their combined friend-of-the-court brief.

"It would do this by expanding takings law to subject state court property law determinations to federal review," they wrote. "Specifically, petitioner would encourage dissatisfied litigants to argue that a state court has taken property without payment of just compensation because it has issued a decision that purportedly departs from prior holdings. This would subject state court property laws to unwarranted and unprecedented review by the federal judiciary."

Meanwhile, more than a dozen other organizations, including the National Association of Home Builders, the Cato Institute and the Pacific Legal Foundation filed similar briefs backing the private waterfront landowners who filed the lawsuit.

"In attempting to 'balance' the landowners' littoral rights against other countervailing interests (mainly the newly created governmental duty to 'preserve' the beach), the Florida Supreme Court erroneously applied a multi-factor test in this physical takings case," the Florida-based Coalition for Property Rights argued in its amicus brief.

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