

Ocean-front Property Rights Disputed in U.S., State Supreme Courts

Property rights involving beachfront properties are being disputed at the federal and state level as two separate rulings provide conflicting views.

In Florida, the U.S. Supreme Court ruled last year in a unanimous decision against ocean-front owners who argued beach replenishment projects unconstitutionally separated their property from the sea.

The land owners wanted compensation because they claim beach replenishment projects have lowered the price of their property by reducing their access to the ocean. The debate started about seven years ago when owners from Destin in the Panhandle claimed a beach replenishment project created a 75-foot wide barrier between their homes and the ocean. They claimed this lowered property values because the properties were farther from the water.

Under Florida law, before work begins on any public beach nourishment project, the state sets an Erosion Control Line (ECL), a

static property line set at the mean high water mark prior to the project.

A group of property owners along the beach where the project took place sued in state court, arguing that the ECL took away their right to benefit from natural build-up of sand on the beach (accretion) and gradual recession of ocean waters (reliction), as well as a right to remain in contact with the ocean, which the property owners argued was independent of the right of access. After the Florida Supreme Court ruled that the ECL statute was not a taking, the owners



appealed to the U.S. Supreme Court, arguing that the Florida Supreme Court's decision was itself a taking of their littoral property rights.

In 2008, the Florida Supreme Court disagreed and ruled that the project balanced public and private interests and that the property owners didn't need to be compensated. Although there is a new public beach, the court ruled, the property owners haven't lost most of their key rights to view and use the ocean. In his dissent, Justice R. Fred Lewis wrote that the decision "butchered Florida law" in depriving waterfront property owners of their connection to the sea.

In court papers, 27 other states, from California and Washington

to Mississippi and Maine, sided with Florida's state and local governments. Officials in those states said the suit filed by the residents is "ill conceived" and would "undermine the states' well-established and traditional authority to determine the scope of their own property laws.

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, et al*, the U.S. Supreme Court essentially gave the state of Florida free reign to alter the property boundary lines of ocean-front property owners and to turn all private ocean-front land into ocean-view property.

The Supreme Court turned to two provisions of Florida law in its decision. First, Florida common

law gives the state, as the owner of submerged land, a right to fill that land and thus raise it above the water level. Next, as in a number of coastal states, Florida's common law establishes that sudden changes in the shoreline (avulsion) have the effect of fixing the property line between the state and the private landowner at the high water line prior to the sudden change. The U.S. Supreme Court agreed with the Florida Supreme Court that since a landowner's right to remain in contact with the sea can be interrupted by natural acts of avulsion, man-made avulsion (i.e., a beach nourishment project) should have the same effect. Because Florida law did not provide an explicit carve-out from the

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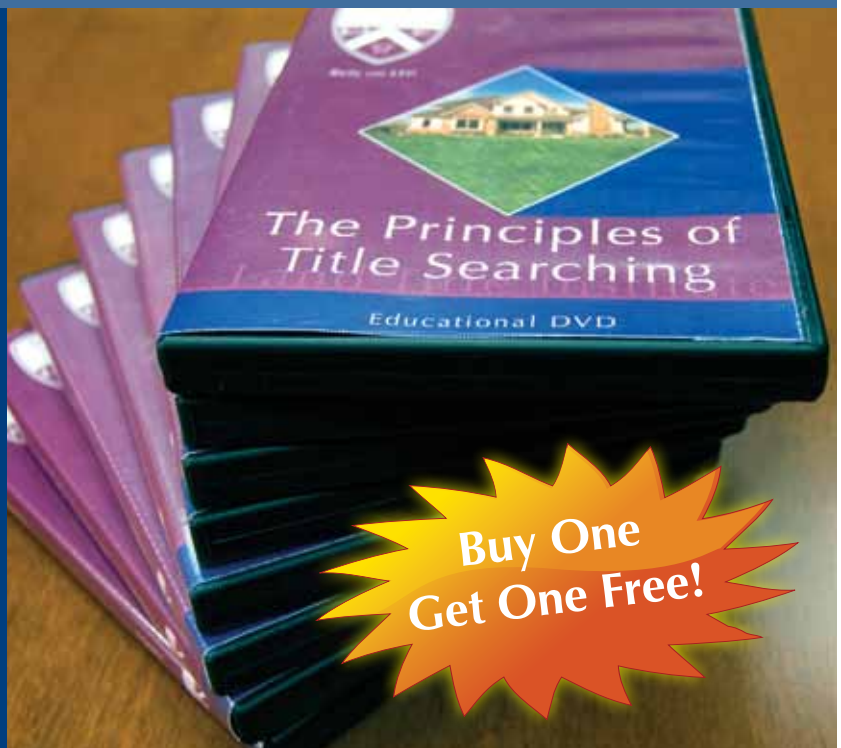
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avulsion rule for events caused by the state, the court ruled that the private landowners' right to gains from accretion and reliction was subordinate to the state's right to fill submerged land, and thus there was no taking. With respect to the right of contact with the water, the court ruled that no such right had been explicitly granted by Florida law, nor could it exist as an independent right without contradicting the avulsion rule.

Title insurance underwriters following the case said the ruling does not change interpretation of existing Florida law relating to accretion, avulsion, erosion and reliction.

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Based upon the methodology for insuring titles in Florida, the case should not cause new title issues or claims for title insurers. Florida statute requires the establishment of an ECL that is located at the existing mean high water line when tidally influenced land is filled by the state for beach restoration. The location of this line is recorded in the public records. The ECL becomes the boundary between the state and the upland owner, and does not move once the land is filled unless the land later erodes landward of the erosion control line. In light of the statute, underwriters do not insure filled land seaward of the

ECL as being owned by the upland owner. Underwriters have said they would not insure upland title to the erosion control line if the survey shows the erosion control line to be in the water.

Rolling Easements in Texas

Meanwhile in Texas, the Supreme Court recently heard a case brought by a California woman who owns beachfront rental houses in West Galveston, Texas. The Court ruled 6-2 protecting the property rights of beachfront property owners.

The Texas land commissioner wanted to remove the houses because he said they now encroach on the public beach. J. David

Breemer, an attorney representing the homeowner told the court the state's policy of rolling easements had no basis in the Texas Open Beaches Act (Act) or any other state law. He said storms can't change property lines.

Assistant Solicitor General Daniel Geyser argued that the rolling easement is common law and is acknowledged by every Texas court that has addressed the issue.

Geyser claimed the homeowner knew the risks of the shifting lines when the property was purchased in 2005, six years after the land commissioner had placed them on a list of 107 houses that were seaward

of the vegetation line and thus subject to removal. He claimed the property was already burdened.

The homeowner contended she wasn't told the houses were on the public beach until after Hurricane Rita pushed the vegetation line farther landward in 2005.

Justice Eva Guzman asked whether it was reasonable for the homeowner to expect the beach easement to change because of a storm.

“You don’t expect the state to go outside common law to grant an easement where the public has never walked before,” Breemer said. “If the grass moves, then you should just get sandy property.”

Beyond the question of the rolling easement, the justices considered whether property owners would be entitled to compensation from the state beyond the amount offered to remove the houses from the beach.

Justice Dale Wainwright seemed to reject the idea, saying that while the state claimed an easement, it didn't seize the title on the homeowner's property. In theory, she could benefit if the vegetation line later moved seaward.

The Court held (6-2) that the Act does not establish a rolling easement, at least to the extent that the state asserted – essentially siding with the plaintiff. The case was sent back to the Fifth Circuit.

The Texas law on beaches is one of the nation's strongest. Maine and Massachusetts allow landowners to close beaches for their exclusive enjoyment, while New Jersey defines state property as anything seaward of the mean high-tide line. ■