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When and Who?: New Jersey, U.S. Supreme Courts Grapple with Beachfront "Takings" Issues

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Recent court decisions explore when beachfront owners can allege that a project has actually taken their property, triggering the requirement of "just compensation."

"Beach nourishment" and "beach restoration" projects, where sand from other locations (often the ocean bottom) is dumped on a beach to retard erosion or to repair its effects, are expensive. They also raise complex issues of fairness and equity about who should pay for the projects and who should be compensated for their negative effects. In two decisions handed down in June, the New Jersey and United States Supreme Courts grappled with another often controversial aspect of these projects: when can beachfront owners allege that the project has actually taken their property, triggering the requirement of "just compensation" found in the New Jersey constitution and the Fifth Amendment to the federal constitution?

The classic "taking," of course, is when the government exercises its sovereign right of eminent domain, a process that, in New Jersey, is controlled by the Eminent Domain Act and which was the subject of Supreme Court's recent opinion in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*.[1] Even without the exercise of eminent domain, the government is deemed to have taken private property whenever the landowner is required to suffer a permanent physical occupation, no matter how minimal.[2] At least in the development context, however, most takings cases concern "regulatory takings," which occur when a regulation has such a significant effect on the landowner's ability to use the property — when, in the words of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*,[3] the regulation has gone "too far" — that the landowner must be compensated. A landowner who asserts that a government action has effected a taking that requires compensation files what is known as an inverse condemnation action, so called because unlike a normal condemnation case, where the government is the plaintiff, the government is the defendant, and the plaintiff-landowner seeks a declaration that a taking has occurred.

The New Jersey and U.S. Supreme Court decisions handed down in June do not deal with familiar regulatory takings but rather involve, respectively, novel issues of timing and institutional power. In *Klumpp v. Borough of Avalon*,[4] the New Jersey Supreme Court

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decided on the applicable statute of limitations for takings claims of any sort. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[5] a plurality of the U.S. Supreme Court concluded that a judicial decision that fundamentally changes property rights under state law can effect a "judicial taking" that triggers the constitutional requirement of just compensation. While *Klumpp* seeks to clarify the law governing takings claims in New Jersey, *Stop the Beach Renourishment* is likely to cause significant uncertainty in the years ahead.

A Question of Timing: The New Jersey Supreme Court Decision in *Klumpp*

The story of *Klumpp* begins in 1962, when a massive storm destroyed Edward and Nancy Klumpp's Avalon beach house. As part of a state-authorized shore restoration project, Avalon constructed a dune on the Klumpps' property and constructed fences that limited access to the property. Over the next four decades, the borough maintained that, and acted as if, the Klumpps still owned the parcel.

That changed after the Klumpps sued the borough in 2004. During the course of the litigation, the borough claimed that it had gained title to the property, either through adverse possession, via a taking in 1962, or via a taking resulting from its adoption of development restrictions in the ensuing years. The borough also asserted that due to the Klumpps' failure to take any legal action for so long, their claims were time-barred. The trial court found that the borough had indeed taken the property, both in 1962 and later via a re-zoning ordinance, but because the Klumpps had never sought compensation, it did not have to determine what limitations period would apply to such a claim. The Appellate Division affirmed.

The New Jersey Supreme Court held that the applicable time frame for commencing an inverse condemnation claim is the six-year period set forth in N.J.S.A. 2A:14-1. While some states use the limitations period for adverse possession claims, the court concluded that such a limitations period, which in New Jersey is generally 30 years, is inappropriate for claims of government takings, where public uses are implicated, because it would allow an excessively long period of uncertainty regarding property ownership. The holding, however, is limited to those cases where the government "provides adequate notice through physical or regulatory action" that it is taking the property. In the Klumpps' case, that clearly did not happen; while a physical taking certainly occurred no later than 1965 (there was thus no need for the court to consider whether a regulatory taking had taken place later), the borough's behavior following the taking made it unjust to apply the six-year limitations period to bar the Klumpps' claim here. "Although a physical invasion and physical taking of real property by a governmental entity ought to be notice sufficient to awaken property owners to act to protect their interest in receiving compensation for the taking," said the court, "government also should provide some other form of notice to affected property owners before, and surely after, a physical taking." At a minimum, the government cannot deny that it has taken the property, and then turn around years later and assert that the statute of limitations has run.

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Can a Court Decision "Take" Property?: The U.S. Supreme Court's Decision(s) in *Stop the Beach Renourishment*

Stop the Beach Renourishment is notable not for what it holds — that a taking did not occur when the Florida Supreme Court held that a state statute did not deprive beachfront landowners of littoral rights — but for what a four-Justice plurality recognized for the first time in the court's history: the possibility of a "judicial taking." Writing for the plurality (which included Chief Justice Roberts and Justices Alito and Thomas), Justice Scalia declared that for purposes of the Takings Clause, what matters is that the state is taking property, regardless of which branch is doing the taking: "[T]he particular state actor is irrelevant." Thus, he wrote, "[i]f a legislature *or a court* declares that what was once an established right of property no longer exists, it has taken that property," no less than if the state "had physically appropriated it or destroyed its value by regulation." (emphasis in original)

The case arose in 2003, when a Florida city and county sought permits to restore an eroded beach by adding sand seaward of the mean high water line. Under Florida law, the mean high water line separates land owned by the beachfront owner from land owned by the state. Beachfront owners have certain rights, including the right to receive automatic title to gradual accretions to their property. When new land appears suddenly, however, in a process called avulsion, the boundary between privately owned and state-owned land does not shift, and the state, rather than the beachfront owner, receives any future accretions on the seaward side of the new land.

Under the governing Florida statute, when sand is added to a beach, a new and permanent "erosion control line" is established and takes the place of the mean high water line as the private/state land boundary. After the new boundary line is recorded, the common law accretion rule no longer applies, and when new land is added by accretion seaward of the new line, it belongs to the state, not the beachfront owner.

A group of beachfront owners challenged the proposed beach restoration project. An intermediate state appellate court held that the project would eliminate important littoral rights held by the owners, including the right to receive accretions to their property, and thus constitute a taking unless the governmental permit applicants could show that they owned or had a property interest in the upland property. It remanded to the state agency for such a showing, and also asked the Florida Supreme Court (via a certified question) to rule whether, on its face, the state statute unconstitutionally deprived beachfront owners of littoral rights without just compensation. The Florida Supreme Court answered that the statute did not effect a taking, and quashed the remand. The U.S. Supreme Court granted certiorari last year.

All eight Justices who considered the case (Justice Stevens did not participate) agreed that no taking had occurred as a result of the Florida Supreme Court's decision. On the important legal question, however, no position could command a majority. Justice Breyer (joined by Justice Ginsburg) expressed concerns over opening the federal courts to many cases that would require federal judges to decide thorny questions of state law. Justice Kennedy (joined by Justice Sotomayor) wrote that it was not necessary to decide whether a "judicial taking" was

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possible, and pointed to the Due Process Clause as the appropriate constitutional source of limitations on a state court's ability to redefine property rights. In his plurality opinion, Justice Scalia swept aside both sets of concerns, criticizing Justice Breyer for claiming to decide that a taking had not occurred while declining to formulate a standard to guide that decision, and criticizing Justice Kennedy for offering a novel interpretation of the Due Process Clause to limit state courts when the Takings Clause explicitly and directly addresses the problem at hand.

In offering a judgment but no holding, *Stop the Beach Renourishment* raises many questions without clearly answering any. What is clear is that four Justices are willing to entertain claims of "judicial takings" and would be willing to find such a taking — and reverse the holding of the state supreme court whose decision caused the taking — in the appropriate case. The precise contours of the appropriate case, and the factual and legal circumstances that might attract a fifth vote, are still a mystery.

Looking Ahead: Be Alert!

Landowners in New Jersey have another reason to stay informed about government actions that may affect their property. The six-year statute of limitations for takings claims established by *Klumpp* will act to bar the claim of an insufficiently vigilant landowner. Nor should landowners take too much solace in the result in *Klumpp*, which depended upon the unusually misleading actions of the borough government. Notice of the government's action sufficient to start the six-year clock running will vary with the circumstances, and may not come in the form of a personal letter.

Stop the Beach Renourishment puts another potential tool in the hands of landowners — and their attorneys — when they suspect that government action has caused a decrease in the value of their property. Land use attorneys, in particular, should be on the lookout for that set of circumstances that might give rise to a "judicial taking."

NOTES:

[1] *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 191 N.J. 344 (2007).

[2] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[3] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[4] *Klumpp v. Borough of Avalon*, ___ N.J. ___, No. A-49-09 (N.J. June 22, 2010).

[5] *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. ___, No. 08-1151 (U.S. June 17, 2010).

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