U.S. Supreme Court Building

As fellow Legal Plant contributor, Sean Hecht, reported earlier today, the U.S. Supreme Court decided the most important environmental law case on its current docket: *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, No. 08-1151. The Court’s opinion can be found here.

The issue in the *Stop the Beach Renourishment* case is whether a publicly-funded and implemented public works project to restore Florida beaches heavily damaged by a series of tropical hurricanes violates the private property rights of coastal homeowners. Those homeowners argued that state regulators’ fixing of a permanent coastal boundary line between their upland properties and publicly-owned tide and submerged lands, preparatory to the beach restoration project, deprived them of their littoral rights of access to and use of the shoreline. When the Florida Supreme Court rejected that legal claim, the homeowners sought review from the U.S. Supreme Court, claiming that the adverse state court decision had “taken” their property in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution.

In today’s decision, the Supreme Court rejected the takings claim. The justices unanimously ruled that long-established principles of Florida boundary law permitted both the fixing of a previously-ambulatory coastal boundary and the beach restoration project itself. To that extent, today’s decision is a significant win, both for Florida’s Beach and Shore Preservation Act and for government regulators who regularly confront the environmental consequences of coastal storms, climate change-generated impacts such as sea level rise and–in the very region from which this litigation emanates–human-caused ecological disasters such as the Deepwater Horizon oil spill.

Digging more deeply into today’s decision, however, reveals some cause for concern. In a plurality opinion representing the views of the Court’s four most conservative justices, Justice Scalia squarely embraces the principle of “judicial takings”–the notion that courts, just like regulators and legislators, can through their decisions take private property in violation of the Fifth Amendment.

Justices Kennedy and Breyer wrote concurring opinions (in which they were joined by Justices Sotomayor and Ginsberg, respectively) arguing that it was premature and therefore unnecessary to address the issue of judicial takings at all in this case.

At the same time, their opinions reflect significant misgivings about such a doctrine, presaging these justices’ likely rejection of the theory if and when the issue again finds its way to the Supreme Court. (Justice Stevens recused himself and therefore did not participate in the case.)

In the meantime, three observations can be confidently offered: first, the issue of judicial takings–whether courts through their decisions can “take” property” in violation of the Fifth Amendment–remains very much in play. Property rights advocates can be expected to press that theory aggressively in state and federal court litigation around the country.

Second, it will be both interesting and important to see how presumptive Supreme Court Justice Elena Kagen views the issue of property rights in general and judicial takings in particular. (During her tenure as Solicitor General, the U.S. did submit an amicus brief supporting the state and local government respondents in the *Stop the Beach Renourishment* case.)

Finally, today’s decision demonstrates–yet again–Justice Kennedy’s overarching influence on this constitutional issue, as with so many others. While the Supreme Court will remain closely divided on property rights issues arising under the Takings Clause, Justice Kennedy’s views are likely to wind up being dispositive in the foreseeable future. It is for that reason that his important, concurring opinion in today’s case should hearten government regulators, and give private property advocates pause.

(Full disclosure notice: this writer served as counsel of record for the Coastal States Organization, which filed an amicus brief in the *Stop the Beach Renourishment* case supporting the state and local governments that prevailed today before the Supreme Court.)