Supreme Court Issues Much Anticipated Takings Decision – But What Was It?

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It was a hectic week in takings jurisprudence. On June 11, the *City of San Jose v. Union Pacific Railroad* court decided to publish an earlier decision involving valuation for easements across rail lines. On June 15, the *County of Los Angeles v. Glendora Redevelopment Project* court struck down Glendora's redevelopment plan, holding that it had failed to make proper blight findings. And finally, on June 17, the US Supreme Court issued its long-anticipated decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (No. 08–1151).

The "Florida beach case" has received considerable attention, especially following the colorful oral argument before the Court last December. At issue was whether Florida's efforts to restore its beaches by depositing new sand seaward of the high-tide line rose to the level of a taking because it resulted in former beach-front owners' property lines being "moved" away from the water. In a unanimous decision, the Court held that no taking had occurred, but the actual holding is only the tip of the iceberg in what will undoubtedly be a much-analyzed decision.

Any time a takings case makes it to the US Supreme Court, it generates a buzz. But this case possessed extra intrigue. By the time it got to the Supreme Court, the issue was framed as whether the Florida Supreme Court's decision in favor of the state constituted a "judicial taking" of property -- a concept first recognized in a 1967 concurring opinion by former Justice Potter Stewart in *Hughes v. Washington*. There, Justice Stewart explained that "a sudden change in state law, unpredictable in terms of the relevant precedents" could qualify as a taking. In the nearly half-century since Justice Stewart posited the concept of a "judicial taking," no court has upheld such a claim.

The tone at oral argument suggested that the Court might be fractured on the issue, and the lengthy decision evidences that. The opinions are almost as complicated as the archaic law of littoral rights, accretion, and avulsion that underlies it, with four different groupings of Justices signing on to various

portions of three different opinions.

Let's start with the simple part: **despite the contentious tone at oral argument, on the merits of the dispute, the Court held unanimously that the Florida Supreme Court's decision did not constitute a taking**. The Court upheld the ruling in favor of the state, meaning the beach-front property owners no longer own to the tide line; rather, they now have about 75 feet of new, public beach between their property and the water. The decision is grounded in the long-standing rule that an avulsive event (i.e., a sudden change in the tide line) does not result in a change in the property line.

From there, things get a bit murky. Four Justices signed portions of the opinion authored by Justice Scalia, recognizing the validity of judicial takings claims. Specifically, the Justices concluded that **if a court declares that what was once a recognized private property right no longer exists, such a decision qualifies as a taking**.

However, those four Justices concluded that the Florida Supreme Court made no such announcement; rather, they concluded that the Florida court based its decision on existing legal principles. (Note that the other Justices did not reject the idea of a judicial takings claim; instead, they concluded that the Court did not need to reach the issue at all.)

The real debate over the opinion will revolve around what that 4-person opinion means. Notably, in this case, four Justices did not constitute a minority of the panel. In one of the case's odd twists, Justice Stevens recused himself as a result of his personal ownership of some Florida beach-front property. Thus, this part of the opinion represents half the Court. Still, under long-standing Supreme Court precedent, in the case of a 4-4 tie, the opinion of the equally divided Court does not constitute binding precedent.

Still, getting half the voting Justices to endorse the idea of a judicial takings claim is not insignificant, and property-rights advocates are already trumpeting the decision as a "victory" for property owners. Assuming they are correct, and the decision does (at least unofficially) validate the concept of a "judicial taking," what would a successful claim look like?

Shifting the facts (and law) of this case, one can see how a judicial takings claim could succeed. The key legal principle involved changes in the high-tide line resulting from an avulsive event. Under preexisting law of littoral rights, beach front property lines do not move to coincide with the new tide line when the change results from avulsion, though property lines do move with the tide line when the change results from accretion (a slow, imperceptible change). Thus, when Florida "suddenly" deposited 75 feet of new sand, the Court concluded that the Florida Supreme Court's holding that the new beach belonged to the state was – at least according to the Court -- grounded in long-standing common law.

Imagine, however, that the preexisting law held that regardless of whether the tide line moved through accretion or avulsion, the property line moved with it. If that had been the established law and the Florida court nonetheless held that the new beach belonged to the state, such a decision might qualify as "a sudden change in state law, unpredictable in terms of the relevant precedents." and, therefore trigger a successful "judicial taking" claim.

It remains to be seen whether this decision will open a new floodgate of litigation against judges and, in particular, whether unsuccessful state-court plaintiffs will seek to use the decision to gain access to federal courts for another "bite at the apple." When and if a court finally upholds a "judicial takings" claim, one final

interesting issue remains: who pays the judgment?