

FEATURE CASE

Victory for Texas Beaches and Background Principles

In May, a federal district court in Texas rejected a takings challenge to the Texas Open Beaches Act, which provides that the public has a “free and unrestricted right of ingress and egress” to state-owned beaches on the Gulf of Mexico. Nobody is allowed to hinder access. The law was enacted after a developer in Galveston tried to fence off a beach to render it private. The ruling in *Severance v. Patterson*, 2007 U.S. Dist. Lexis 32291 (S. D. Tex. May 2, 2007), is a perfect illustration of how to use background principles of state law to defend modern statutory protections.

Under the Texas law, the public has an easement over most of the dry beach, defined as the sandy portion between the mean high tide mark and the vegetation line. Structures that become seaward of the vegetation line due to natural movement of the line are subject to removal by the state.

Carol Severance is a California resident who bought three beachfront houses on Galveston Island in 2005. In 1999, two of the houses had been listed for possible removal because the vegetation line had moved landward. Severance’s sales contract made clear that structures seaward of the vegetation line are subject to removal. In 2006, the state told Severance that it could file a removal action at any time, and it offered financial assistance for removing the homes and relocating. Severance responded by filing a lawsuit seeking injunctive relief to prevent the threatened removal.

After concluding that some of the claims were unripe, the court in *Severance* turned to the merits of the remaining claims and rejected Severance’s challenge to the easement provisions of the Open Beaches Act. The court concluded that the rolling beach easement derives from Texas common law, which “exists separate and apart from the statute or its interpretation.” To enforce the easement under the terms of the Act, the state must prove that the easement was established by the common law doctrines of prescription, dedication, or continuous right. The Texas judiciary, the court noted, repeatedly has held that the common law beach easement expands and contracts as the vegetation line moves through natural processes.

Accordingly, the claimant could not show interference with a protected property interest: “Severance’s allegedly-invaded interests in her rental properties are (and always have been) subject to the public’s superior interest in its pre-existing easement.” Moreover, according to the court, while the forces of nature might expand the scope of the easement, “this natural movement does not work a constitutional wrong.”

The court stressed that its ruling is fully consistent with *Lucas v. South Carolina Coastal Comm’n* (U.S. 1992) because the *Lucas* court recognized that no taking occurs where government action simply gives effect to background principles of state law. “Here,” the district court ruled, “the public’s rolling beach easement was established long before Severance ever purchased her rental properties, and the easement is one of the ‘background principles’ of Texas littoral property law. She has not suffered a taking because her right to exclude the public never extended seaward of the dynamic, natural boundary of the beach.” Furthermore, the federal Constitution “does not guarantee or require static real property boundaries.”

The *Severance* decision follows similar rulings in Oregon and elsewhere holding that state common law preserves public access to beaches. We hope other states will examine their own common law traditions carefully to ensure that longstanding, but sometimes neglected, doctrines regarding public rights in coastal lands are fully preserved.

EYE ON WASHINGTON

Don’t Panic

If you hear through the grapevine that the U.S. Supreme Court has granted cert. in a takings case, calm down. It’s true, but review is limited to the question of whether a statute-of-limitations defense is jurisdictional and thus can be raised by the court at any time, even when the government fails to assert it. See *John R. Sand & Gravel Co. v. United States*, S. Ct. No. 06-1164 (cert. granted May 29, 2007). That issue may be of interest to litigators and civil procedure gurus, but it appears highly unlikely that the court will address the substantive law of regulatory takings.

OUTRAGE OF THE MONTH

Makers of Lottery Gaming Machines Try to Skirt License Terms

When the Iowa General Assembly restricted lottery gaming machines to protect gambling addicts and minors, you could have bet the farm that the lawsuit-happy property rights movement would file a takings challenge.

In *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 2007 U.S. App. Lexis 9283, No. 06-2406 (8th Cir. 2007), two leading lights of the movement, Roger and Nancie Marzulla, filed suit to invalidate the state's 2006 ban on "TouchPlay" machines, which are pull-tab vending machines that dispense lottery tickets, using flashing lights and mesmerizing sounds to resemble slot machines. Unlike slot machines, a TouchPlay machine is not random, but instead is loaded with tickets predetermined to be losers and winners.

By April 2006, more than 6,400 machines operated at 3,800 businesses across Iowa, including grocery stores, restaurants, gas stations, truck stops, convenience stores, bowling alleys, and laundromats. As TouchPlay expanded, the public became concerned about protecting minors and compulsive gamblers. The legislature responded with the ban.

The Marzullas filed claims on behalf of the maker of the TouchPlay machines under the Takings Clause and other constitutional provisions. In a carefully reasoned opinion, the U.S. Court of Appeals for the Eighth Circuit unanimously affirmed the district court's rejection of these claims.

What makes the takings claim here especially outrageous is that the claimant's Licensing Terms and Conditions make clear that if any provision "conflicts with an applicable statutory or regulatory provision, the statutory or regulatory provision preempts the conflicting provision." The appeals court had little difficulty in concluding that the claimant's expectation that its contracts would not be modified or nullified by the state was undermined by the very terms of its licensing agreement. Moreover, the claimant's expectations were undercut by its participation in a heavily regulated industry (gambling), and by the experience of its owners with South Carolina's video-poker ban, which was upheld against a takings challenge by a South Carolina appeals court.

Although the court concluded that the claimant had a cognizable property interest in its machines and in its business, it ruled that the *Lucas per se* rule applies only to land, not personal property, and even if it applied to personal property, neither property interest was deprived of all beneficial use. The claim also failed under *Penn Central*, mainly due to the claimant's diminished expectations: "No doubt Hawkeye hoped that the Legislature would not stringently regulate or abolish TouchPlay before calendar year 2009 when it would have recouped its investment. However, a 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" (citing *Ruckelshaus v. Monsanto* (U.S. 1984)).

Update -- More on the First Circuit's Troubling Williamson County Ruling

Last month, we reported on a bizarre March 1 decision from the U.S. Court of Appeals for the First Circuit ruling that a takings claimant need not pursue a takings claim under the state constitution to fulfill the requirement under *Williamson County* to seek compensation first in state court before filing in federal court. In *Asociación De Suscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 2007 U.S. App. LEXIS 4660 (1st Cir. Mar. 1, 2007), the court tried to distinguish regulatory takings claims under the state constitution from inverse condemnation claims (a false distinction that has no basis in the case law) and held that a claimant need pursue only the latter, but not the former, under *Williamson County*.

On April 18, the court issued an order denying rehearing and rehearing en banc, but it was accompanied by a "statement" by three judges (Chief Judge Boudin, Judge Lynch, and Judge Howard) indicating that the panel opinion's analysis of *Williamson County* "likely conflicts directly with binding Supreme Court authority and prior decisions in this court, as well as the law in other circuits." The three judges, however, were not inclined to vote for rehearing because the appeal was interlocutory and it therefore is uncertain whether the panel ripeness ruling would affect the ultimate outcome. They expressly left open the option of having the court revisit the ripeness issue en banc if the panel's decision on ripeness is relevant to any victory by the claimant in later proceedings.

This strange disposition is far from ideal, given how baseless the panel's analysis is, but at least it shows that most of the judges on the First Circuit (which currently has only five judges) seem to recognize that the panel badly strayed off course.

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