Damon Key Attorneys Advocate in U.S. Supreme Court Takings Case

Do judges "make" law, and do courts "take" property when they change it? These questions, and others, are now before the U.S. Supreme Court in a Florida case to be argued in December. In *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, the Court is considering whether state supreme courts may suddenly and radically alter long-established property law, or whether the U.S. Constitution insulates property owners from these changes.

Continuing the firm's long tradition of Supreme Court advocacy started by Charlie Bocken and Diane Hastert when they overturned one hundred years of precedent in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) – the case keeping Hawaii Kai Marina private – Damon Key attorneys Robert Thomas, Mark Murakami and Tred Eyerly recently filed a friend-of-the-court brief in the *Beach Renourishment* case.

After a hurricane washed away portions of a beach on Florida's Gulf coast, the government dumped thousands of tons of sand to "renourish" it. Under Florida's Beach and Shore Preservation Act, the renourished beach became public property. However, under over a century of Florida decisional law, a beachfront owner had the right to gain ownership of new beach created by accretion; under traditional common law, the property boundary would shift seaward when a beach grew. In other words, a littoral property owner had the right to have her property contact the ocean.

Several beachfront owners challenged the Act, asserting that government ownership of the renourished beach deprived them of that right. They claimed that public ownership of the new beach – which created an additional public beach seaward of their properties – wiped out their right to have their land touch the sea, and effectively put a government-owned 75-foot wide barrier between them and the water.

In deciding the case in favor of the government, the Florida Supreme Court reexamined its earlier decisions regarding ownership of accretion, and concluded that for over a century, these cases had been misconstrued: beachfront property owners, the court said, never had those rights. Thus, the court concluded, by declaring the public owns the renourished beach, the Act did not affect the rights of beachfront property owners.

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Thus the stroke of a pen, the court eliminated the dominant feature of littoral property – continuous contact with the water, wherever the water naturally flows.

Last June, the U.S. Supreme Court agreed to hear the property owners' case. The U.S. Constitution's Takings and Due Process clauses prohibit the government from confiscating property without fair procedures and without exercising eminent domain and paying just compensation. At issue is the question of "judicial takings" –

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whether a state court "takes" property when its decision "constitutes a sudden change in state law, unpredictable in terms of relevant precedents."

The Damon Key team filed a brief supporting the beachfront owners on behalf of Owners' Counsel of America, a network of the most experienced eminent domain and property rights lawyers in the country. The brief argued the Florida Supreme Court's decision took the beachfront owners' rights when it simply defined long-established rights out of existence by declaring they never existed at all.

The Florida situation should be very familiar to Hawaii land owners. Several well-known decisions by our state court suddenly and unpredictably altered long-standing and established property rights. These decisions effectively transformed private property into public property. For example:

In a dispute between two Kauai landowners over prescriptive water rights, the Hawaii Supreme Court – without any notice to the parties – overruled all contrary precedent and adopted the riparian rights doctrine. It also held the state owned and had the exclusive right to control a stream's flow, and thus no prescriptive rights could be established. In other words, in a dispute between "*A*" and "*B*" over which of them possessed water rights, the court simply declared "neither does, the State owns it."

In a case from the Big Island, the court (also without notice to the parties) redefined the seaward boundary of a Land Court-titled littoral parcel from the high water mark to the "upper reaches of the wash of the waves," holding the county owed no compensation for the land seaward of the new boundary line because it was (and had always been) owned by the state.

In another Big Island case, the court relied on the public trust doctrine to overturn its own prior precedent regarding construction of property descriptions on the shoreline, which held that private property extended to the "high water mark." Instead, the court held the description was merely a "natural monument" and not an "azimuth and distances" description, and determined that new land formed when fresh lava met the ocean was public and not private property.

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The *Beach Renourishment* case presents the U.S. Supreme Court with the opportunity to provide definitive guidance that "property" is not a completely malleable term, but rather embodies a core set of timeless principles immunized from state court redefinition. If the court rules in favor of the Florida owners, it would represent a significant victory for property owners nationwide, because it would keep state courts from summarily rearranging rights and changing established law on which property owners have relied, often for centuries.

The case has generated massive nationwide interest, and a total of 21 outside parties have filed briefs, including the Obama Administration and the governments of 26 states. Damon Key was the only Hawaii firm to file a brief.

This case is one to watch. Additional information, including the briefs, can be found on Robert's land use and property law blog, **www.inversecondemnation.com**.

For more information or questions regarding this article, please call Robert at 531-8031 ext 627 or email him at rht@hawaiilawyer.com

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