

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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TO: Commissioners and Alternates

FROM: Will Travis, Executive Director (415/352-3653 travis@bcdc.ca.gov)
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**SUBJECT: Staff Report and Recommendation to Join the Supreme Court
Amicus Curiae Brief of the Coastal States Organization (CSO)**
(For Commission consideration on September 3, 2009)

Summary and Recommendations

The staff recommends that the Commission join the Coastal States Organization amicus brief before the United States Supreme Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* involving Florida's beach renourishment program.

Staff Report

Background. An approximately seven-mile long stretch of Florida beach in the City of Destin and Walton County was repeatedly damaged by devastating tropical storms and hurricanes between 1995 and 2004. The beaches were placed on a list of critically eroded beaches, and the city and county applied for renourishment permits from the Florida Department of Environmental Protection (DEP) under the Florida Beach and Shoreline Preservation Act.

The Beach and Shoreline Preservation Act states that it is "a necessary governmental responsibility to properly manage and protect beaches that area critically eroded." The Act authorizes the DEP to conduct a coastline survey to determine the current mean high water line (MHWL), and then fix that line when it replenishes beach sand as the boundary between publically-owned and privately-owned beaches. After this fixed boundary line—called the erosion control line (ECL)—is established, sand can be added to repair eroded beaches without altering ownership rights which otherwise could expand (through accretion) or contract (through erosion or reliction) with the movement of the MHWL. The Act provides that beachfront owners maintain littoral rights of ingress, egress, view, boating, bathing and fishing, but fixing the public-private boundary at the ECL can prevent private beachfront property from expanding through accretion.

An organization called Stop the Beach Renourishment, representing the beachfront property owners, contested the establishment of the ECL in formal administrative hearings, and filed suit in state court. The Florida Court of Appeal found that the ECL deprived private landowners of their littoral (shoreline) property rights because their property no longer



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“touched” the water, and they no longer would be able to gain property from accretion. The Court of Appeal found that the loss of these property rights was contrary to the takings clause of 5th Amendment of the U.S. Constitution, which provides that private property cannot be taken for public use without just compensation.

The Florida Supreme Court reversed, holding that the provisions of the Beach and Shore Preservation Act fixing the shoreline boundary suspend operation of the common law doctrine of accretion, and represent a reasonable balance between the private and public rights in the coast. Moreover, because the Act preserves shoreline rights of access, view, and use of the beach, it does not unconstitutionally deprive upland beach owners of littoral rights without just compensation.

Stop the Beach Renourishment petitioned the U.S. Supreme Court for a Writ of Certiorari on the grounds that the Florida Supreme Court’s decision constituted a “judicial taking” because it altered existing Florida common law principles governing private property ownership. The U.S. Supreme Court accepted the case on June 15, 2009, and CSO was asked to prepare an amicus brief by the State of Florida to explain how an adverse ruling would affect other coastal states. The Florida Supreme Court’s decision and other relevant briefs and documents can be found

at:
http://www.scotuswiki.com/index.php?title=Stop_the_Beach_Renourishment%2C_Inc._v._Florida_Department_of_Environmental_Protection%2C_et_al.

Issues Before the U.S. Supreme Court Relevant to BCDC. A Supreme Court ruling reversing the Florida Supreme Court could undermine the ability of state courts and legislatures to make decisions that affect shoreline property rights. It could also hinder the efforts of state coastal management programs to maintain and preserve public trust beaches and protect state lands and waters from the impacts of climate change-associated sea level rise and intensified storm activity. Faced with the prospect of compensating beachfront property owners for the asserted loss of or damage to property rights when conducting beach nourishment and other public works projects, states may decline to undertake restoration efforts necessary to protect some of our most valuable natural resources.

A decision by the U.S. Supreme Court holding that beach renourishment takes littoral property rights also could upset the long established role of states in defining coastal property rights. For example, the public trust doctrine in California provides that artificial accretion (the gradual accumulation of land) does not belong to littoral property owners. A contrary ruling could impede BCDC’s ability to implement measures to manage the Bay and shoreline and to seek legislative solutions to address changing conditions resulting from the effects of climate change and sea level rise.

Conclusion. Because it is important for the Court to understand the consequences of an adverse ruling to California and other coastal states, the staff recommends that the Commission support the State of Florida and authorize the staff to assist CSO, and sign on to CSO’s amicus brief before the U.S. Supreme Court, in the case of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.