

IMLA in the Courts

by Chuck Thompson,
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One of our most important activities involves participation as an *amicus* in cases of significance for local governments. Last year, our efforts in the Supreme Court were rewarded in the case of *Pleasant Grove City v. Summum*. To support our brief, IMLA had conducted a member survey to categorize the methods by which monuments were erected on government property in cities and counties. In its unanimous opinion, the Supreme Court adopted, for the first time, a clear expression of the government speech doctrine, and referred to the IMLA brief and to our survey several times.

We were there in other cases, as well. More and more frequently, IMLA is being asked to participate as an *amicus* in cases around the country. We try to respond in as many cases as possible when issues affect local governments. To respond, however, requires resources and volunteers. Generally, when the issues in a case are directly related to IMLA's mission, IMLA seeks a pro bono brief writer, or signs on to an *amicus* brief prepared by others with similar interests. For IMLA to continue this successful program, we need more volunteers and more members.

Although IMLA tries to ensure that its *amicus* participation follows the goals of our members, there will be cases where some members would prefer that IMLA take a different position. Often, that preference is based in a conflict with the municipal policy that the case supports. We try to disregard the underlying policy at stake in favor of supporting the authority of local government to act, or against mandates imposed on local governments. The issue of what's best for a local community ought to be a local decision, and it is that concept we seek to protect. The *Pleasant Grove City* case is a good example. Many can argue about whether a local government should place a specific monument on its property, but IMLA believes that the locality, having legally chosen to display one monument, should not then be required to include monuments to opposing viewpoints.

In the coming months, the U.S. Supreme Court will decide several cases that are important to local government (and some that will have a more tangential effect). Many cases in which IMLA is an *amicus* involve important issues like takings, liability under the False Claims Act, bankruptcy proceedings, and the Establishment Clause.

The takings case, *Stop the Beach Renourishment v. FDEP*, puts before the Court the interesting concept that a court's decision can constitute a "taking." The case began with a legislative program designed to protect Florida beaches, one of that state's most important assets, from the ravages of hurricanes and the effects of weather. After hurricanes eroded beaches in many areas, the state adopted a plan to preserve them. This basically involved taking sand from the bottom of the sea and placing it in beach areas that had been eroded (or which might be subject to future erosion) and managing the restored property to better protect the



beachfront from the action of nature in the future. The state recognized that any program that restored eroded beaches would necessarily implicate Florida common law "littoral" rights, a stick in the bundle of rights held by an owner of real property. According to the Supreme Court of Florida in *Walton County, et al v. Stop the Beach Renourishment*, slip opinion p. 14, these rights include:

> … several special or exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to the unobstructed view of the water. *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987).

Under the common law, an upland property owner that holds the littoral property rights along the beachfront owns the fee title to property to the Mean High Water Line (MHWL), or the average level of the high tide over the past 20 years – a constantly moving mark. The Florida court also recognized the common law distinction between accretion and avulsion: the former is a gradual process that adds to the shoreline; the latter is a sudden change to the shoreline. This distinction forms the basis for the argument before the Supreme Court.

When Florida adopted its beach restoration law, it recognized that there could be disputes over title to the restored portions of beach land and it determined that, for the program to be effective, it needed to address the MHWL (and its transiency) as a property boundary line. To reform the border between private and public land into a more permanent boundary, the state imposed a distinct line, one that followed the existing MHWL, to be known as the erosion control line (ECL). As of the time of a restoration project, the boundary between the upland owner's property and the State's no longer changed with the tides, but would remain as the ECL. If property accreted to the shoreline, it belonged to the state, but if property eroded from the shoreline, the upland owner's title continued to the ECL, even though it could be between the MHWL and a Mean Low Water Line, or under water.

The property owners who challenged the law claimed that the effect of the law was to "take" their property interest in the right to accretion and the right for their property to "touch the water." The Florida Supreme Court concluded that these rights were more like a contingent than a vested right (specifically, that the potential for an avulsion to naturally change the property line created a contingent right for the upland owner to touch the water), and that no taking occurred, as no vested right was affected by the state's regulation. The property owners sought review in the Supreme Court, not under the theory that the state's regulatory program was confiscatory, but arguing that the Florida court's decision effected a "judicial taking" by changing what the plaintiffs claimed was a long history of Florida law on upland property owners' rights.

The concept that a court can effect a taking through one of its decisions portends some troubling times ahead. Can any decision support a taking or must the decision have adjectives attached to it that make it unique? Would the concept extend to the United States Supreme Court and, if so, how would that takings case be adjudicated? What about cases in lower federal courts that are not appealed? Hopefully, the Court will recognize the impracticality of this theory.

Every so often, the Supreme Court is unable to resolve a case before it when its members cannot achieve a majority. Because only eight justices heard oral argument in this case, a tie vote is possible.

IMLA will continue to bring you updates on Supreme Court rulings in this magazine and in our Newsletters. As always, I am interested to hear your comments and suggestions. Let me know how IMLA can serve you better. **ML**

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