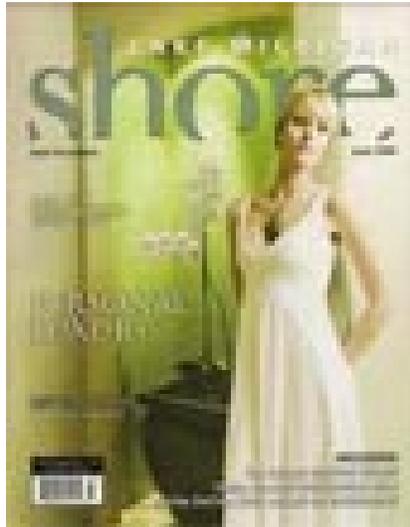


# Shore Magazine



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## Honey, They Shrank the Beach!

By Peter J. Birnbaum

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Last year, I wrote an article for *Shore* entitled “Who Owns the Beach?” In it, I discussed the legal battles in Illinois and Michigan involving the competing interests of private beach owners’ rights versus the public’s right to traverse the shoreline under the Public Trust Doctrine.

A new summer is here and the battles continue. Walk the shores in Northwest Indiana/Southwest Michigan for a day and the tensions between the beachfront property owners and the public are evident. Most recently, we have been hearing about rumblings in Long Beach, Ind., between property owners and the city council over the right to access the beaches.



## **SUPREME COURT ALTERS BEACH LANDSCAPE**

In June of this year, the U.S. Supreme Court rendered a decision that may muddy the waters even further.

In *Stop the Beach Renourishment Inc. vs. Florida Department of Environmental Protection* (decided by the Court on June 17, 2010), the U.S. Supreme Court dealt with an issue one could easily envision occurring down the road in Illinois, Indiana, or Michigan.

The law in Florida is that the state owns (for the benefit of the public) the land permanently submerged between the navigable waters and the foreshore (the land between the water's edge and the mean high-water line). This high-water line of the foreshore is the boundary between what is legally referred to as littoral property (private beachfront) and state-owned land. This is the so-called Public Trust Doctrine.

Two types of ownership changes can occur with the dry land on beach property. In most states (including, Illinois, Indiana and Michigan) the littoral owner automatically takes title to the dry land of sand added to his property through accretion (that which occurs gradually over time). But a sudden change, called an avulsion, is different. Property added through avulsion belongs to the state and to the public.

### **HOW IT BEGAN**

In 1961, the Florida legislature passed a beach and shore preservation statute implementing procedures to restore and maintain beach property.

This process involved the depositing of sand on eroded beaches and maintaining the deposited sand through nourishment procedures. The battle began when the state started asserting its right to the artificially expanded beaches. The state asserted that these new beaches were created through avulsion, not accretion. As such, they argued that the landowners could not claim that their beachfront extended to these newly created beaches. The state argued that the expanded sections of those beaches belonged to the public.

The parties litigated in the state courts all the way to the Florida Supreme Court. The Florida Supreme Court concluded that the homeowners did not own the portion of the beaches created by the state. The landowners appealed to the U.S. Supreme Court. In its decision, the Supreme Court agreed with the decision of the Florida Court. It held that in Florida, littoral owners have "special rights" associated with the water and foreshore. But the Court found these to be easement property rights; i.e., right of access to the property, right to use the water for certain purposes and the right to an unobstructed view of the water. But the Court held avulsion occurred on the beach properties at issue because the state manufactured the erosion control line. Because of this, the Court found that the landowners lost their right to subsequent accretions. The Court reasoned that these accretions no longer added to the littoral property because the base line of sand was created by the state. In its simplest terms, the Court found that when the state has re-nourished a beach, the public owns the portion of the beach up to the erosion control line created through these efforts.

But the Court left open an interesting issue. Four of the Justices (including Long Beach native Chief Justice Roberts) supported the idea that when a Court declares that what was once an established right of private property no longer exists, the state has “taken” the property no less than if the state has physically appropriated or destroyed its value through regulation. Thus, the Court left open for another day whether landowners, at least under certain fact patterns, can sue the state or other unit of government to compensate them for the taking of this land. Given that property values continue to remain strong in Chicago’s North Shore, Southwest Michigan, and Northwest Indiana, these claims could be considerable.

It is evident that federal, state, and even local governments across the U.S. have continued interest in protecting the great shorelines of this country.

### **A PARTNERSHIP WITH A PRICE**

In recent years, many states have submitted themselves to the jurisdiction of the Federal Coastal Zone Management Program. That program provides economic assistance to the states to address issues like beach erosion and water levels. The stakes of the game got much higher with the BP oil spill in the Gulf of Mexico. The rehabilitation of the beaches in the South and Southeast coastlines will conservatively run into the tens of billions of dollars.

But as we learned in the *Stop the Beach Renourishment* case, help from the government often comes at a very high price. Owners of lakefront property are well advised to be proactive in their dealings with the government on this issue. They may find the price of poker far too high. Interestingly, in the 1970s, a group of lakefront owners from the tiny suburbs along Chicago’s North Shore convinced the Illinois legislature to reject participation in the Coastal Zone Program. In today’s political climate, one could certainly envision a similar scenario unfolding in Michigan and Indiana.

### **About Peter Birnbaum**

*Peter Birnbaum has served as president and chief executive officer of Attorneys’ Title Guaranty Fund, Inc. (ATG) since 1991. ATG is the leading lawyer-service company in the United States. Peter oversees a staff of 165 people and annual revenues in excess of \$30 million.*

*With more than 26 years of experience as a real estate attorney, Peter is a highly sought after resource for real estate professionals and bar associations across the country. He has written many papers and is a frequent speaker on a wide variety of subjects of interest to the public and legal profession.*

*Peter lives in Chicago with his wife and their three children . . . and in Michiana, Michigan, every weekend they can steal away.*

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