By Wendy Lathrop, LS, CFM

Wendy Lathrop is licensed as a Professional Land Surveyor in NJ, PA, DE, and MD, and has been involved since 1974 in surveying projects ranging from construction to boundary to environmental land use disputes. She is a Professional Planner in NJ, and a Certified Floodplain Manager through ASFPM.

On the Waterfront–or Not

Those who have deeds citing frontage on a body of water are very protective of that frontage. When natural phenomena such as avulsion, alluvium, or erosion change the physical proximity of a land parcel to water, we are generally familiar with the effect on boundaries. Of course rights along water boundaries are subject to variables such as navigability, regulation for commercial use, and tidal influence. There are also considerations relating to natural versus human-caused alterations. But for the most part, a slow and imperceptible change mean that a boundary line deed to a body of water moves along with that change, while a sudden change freezes the boundary in its pre-change location.

The U.S. Supreme Court recently decided to hear a case about water boundary changes during its next term. This will be the first "takings" case heard under Chief Justice John Roberts (and probably also for new Justice Sonia Sotomayor), so it is worth watching for its outcome.

It all began after Hurricane Opal destroyed miles of Florida's coastline in two separate landfalls, September and October 1995, first arriving as a tropical depression along the Atlantic and then as a Category 4 storm along the Gulf of Mexico. Pensacola was particularly devastated, with 15-foot storm surges and 115-mph winds.

Storm-caused erosion in City of Destin and Walton County meant that Florida's Department of Environmental Protection (DEP) placed them on its list of critically-eroded beaches. The city and county then initiated a beach

continued on page 50

FEMA photo by Leif Skoogfors

Pensacola Beach, Florida, July 19, 2005. Hurricane Dennis (July 2005) rearranged the sand on Pensacola Beach that was put back in place after Ivan (September 2004). This time, an 8 ft. high, 15 ft. deep protective sand berm was washed away.

Lathrop, *continued from page 46*
restoration process through "renourishment", or bringing in new material to replace lost sands.

There are loud voices on various sides of beach nourishment. One side says that the expense of restoring beaches is balanced by the protection of private property and the dollars brought in by tourism. A wider beach provides greater protection from storm damages, dissipating the wave energy over the wider beach and weakening surge to lessen damage to structures on land. Another side (as voiced in this series of suits by Save Our Beaches, Inc. and Stop the Beach Renourishment, Inc. [STBR]) expresses the outrage of all private landowners whose rights are infringed upon for whatever reason–presumably "taken" from upland owners by the government in this instance. Adding "land" (or sand) between their properties and the water is a taking of waterfront rights for which compensation must be paid.

Save Our Beaches was dismissed for lack of standing, but STBR's members were all property owners in the affected area. In 2006 the Florida appeals court (*31 Fla. L. Weekly D 1173*) found that DEP's application of the state's Beach and Shore Preservation Act eliminated these landowners' rights to natural accretions and relictions and their properties' contact with the water. STBR now had the basis for a constitutional challenge, one that would require that they be paid for private property rights lost as a result of the beach restoration.

The court cited several Florida statutes, including one requiring establishment of the new line of mean high water resulting from beach restoration but not intending "to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property." Such deprivation requires eminent domain proceedings. But a later statute, addressing the filing of plans for beach restoration and the location of the new "erosion control line" (essentially the new Mean High Water Line), states very specifically that the erosion control line (ECL) becomes the new property boundary, vesting title in lands seaward of the ECL in the State (as sovereign) and denying upland landowners any property that would otherwise be gained by accretion.

No one disputes that STBR members' property boundaries extend to the high water mark. But the statutes lock their boundaries in place as beach nourishment moves the high watermark seaward. The result: STBR loses direct contact with the water. STBR asserts that changing boundaries to the new ECL and loss of upland owners' rights to accretion or relicted lands are unconstitutional takings, and that the littoral rights expressly preserved by statute (ingress, egress, view, boating, bathing, and fishing) are not adequate substitutes for the common law littoral rights taken away. The right to cross over the State's land is not adequate compensation for losing rights of direct contact with water.

Fast forward to 2008; the case moves from Florida's appellate First District Court to the Florida Supreme Court (*998 So. 2d 1102*). After carefully noting that its decision is strictly limited to critically eroded beaches under Florida's

Beach and Shore Preservation Act, it overturns the appellate court and finds that the act does not unconstitutionally deprive upland owners of littoral (along the ocean, sea, or lake), rather than riparian rights (along riverine water bodies), without just compensation.

The Supreme Court of Florida expends considerable effort to describe the unique nature of volatile water boundaries, distinctions between "gradual and imperceptible" changes and "sudden or perceptible" ones, and the variations between states in treatment of upland owners' littoral rights. This in itself makes the case worth reading, as it is an interesting historical and legal treatise that includes examples from the British roots of our own legal system.

In the end, the higher court found that the State has a "constitutional duty to protect Florida's beaches in a way that reasonably balances public and private interests," and that without the Beach and Shore Preservation Act "the public would lose vital economic and natural resources." Repeatedly noting that its decision on the Act's constitutionality is based "on its face", the court states that its finding of constitutionality "is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act."

The two dissenting judges disagree that right to contact with water is merely a nicety; it is instead "the upland owner's core littoral right of access", and "contact [with the water] is inherent in, and essential to, the very heart of the property we discuss." Assessing the majority's opinion as a mere skimming of riparian and littoral property rights, the dissenting opinion states: "Although the Sovereign may have the right to *reclaim* land lost through an avulsive event, the littoral-upland property owner also maintains property rights to land submerged through avulsion."

How will the U.S. Supreme Court balance the public and private interests involved in beach nourishment? Watch for the answer as Walton County and the Florida Department of Environmental Protection continue to battle Stop the Beach Renourishment, Inc.