Washington Supreme Court: Pre-1969 Shoreline Fill is Safe from the Public Trust Doctrine

Legal Alert
March 22, 2018

In an extraordinary reversal of its own decision, the Washington Supreme Court ruled that pre-1969 shoreline fills in Washington state waters can stay, although the fate of post-1969 fills remains less clear. The decision has significant property rights and permitting ramifications for any filled shoreline in the State.

Chelan Basin Conservancy v. GBI Holding Co. addressed the legality of three "fingers" of fill material in Lake Chelan that had been in place since 1961 on a property owned by GBI. In 2010, GBI submitted a permit application to the City of Chelan to develop the Three Fingers. While GBI was going through the permitting process, the Chelan Basin Conservancy sued for removal of the fill. As explained in more detail below, the case defined the interplay of the public trust doctrine and the Shoreline Management Act, in particular the Act's "Saving Clause," RCW 90.58.270.

On March 15, 2018, after withdrawing a prior opinion filed in July 2017, the Washington Supreme Court filed a new opinion finding that "the legislature expressly consented to the placement of pre-1969 fills, which includes the Three Fingers fill, when it enacted the Savings Clause and that consent does not violate the public trust doctrine." Thus, the Savings Clause continues to protect property owners from having to abate pre-1969 shoreline fills. This should come as a relief to property owners across the State whose shorelands were improved prior to 1969, as thousands of acres of Washington's tidelands and shorelands were, such as Harbor Island and large parts of downtown Seattle.

For developments involving filled shorelines, it will be important in the permitting process to document that fills occurring before 1969 fall under the protections of the Savings Clause. For fills that occurred after 1969 without a permit it remains a risk that, under the public trust doctrine, abatement of the fill may be

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required.

Below is additional background on the public trust doctrine, the Savings Clause and the decision in the *Chelan Basin Conservancy* case.

1. WHAT IS THE PUBLIC TRUST DOCTRINE?

The public trust doctrine is a common law doctrine that recognizes the public right to use navigable waters in place for navigation and fishing, and other incidental activities. Under Article 17, section 1 of the Washington State Constitution, the State "has the power to dispose of, and invest persons with, ownership of tidelands and shorelands subject only to the paramount right of navigation and the fishery." Thus, the State can convey rights in tidelands and shorelands, but any right conveyed remains subservient to the public right to use the water in place for navigation.

The legislature can dispose of the public right to use navigable waters in place only to promote the interests protected by the public trust doctrine or to further some other interest if doing so does not substantially impair the public trust resource.

2. WHAT IS THE SAVINGS CLAUSE?

In 1971, the legislature enacted the Savings Clause, RCW 90.58.270, as part of the Shoreline Management Act (SMA). It was intended to legislatively resolve the Washington Supreme Court's 1969 decision in *Wilbour v. Gallagher*, which held that an area of filled land in Lake Chelan violated the public trust doctrine and had to be reduced. The Savings Clause gave after-the-fact consent to pre-*Wilbour* improvements to protect them from a public trust challenge.

In 1972, the legislature referred the SMA to the people for ratification and presented it along with an alternative measure, Initiative 43. Both established guidelines for development of Washington's waterways and shorelines, but the SMA provided legislative consent to pre-*Wilbour* fills whereas Initiative 43 did not. The people ratified the SMA, with its Savings Clause, and rejected Initiative 43.

3. WHAT HAPPENED IN *CHELAN BASIN CONSERVANCY V. GBI HOLDING CO.*?

In its natural state, the land under the Three Fingers of fill material owned by GBI stood above Lake Chelan's peak water levels and was continuously dry throughout the year. In 1927, a power company completed a dam that artificially raised the water level of the lake. GBI's property was then seasonally submerged by the lake's artificially elevated waters.

In 1961, fill material was added to GBI's property to permanently elevate six acres of land above the seasonal water level fluctuations. In 2010, GBI submitted a permit application to the City of Chelan to develop the Three Fingers with a mixed use development. While GBI was going through the permitting process, the Conservancy filed a lawsuit against GBI, seeking the removal of the Three Fingers fill pursuant to the public trust doctrine and *Wilbour*. On cross-motions for summary judgment, the trial court ruled that the Savings Clause did not apply and ordered the Three Fingers to be removed.

GBI appealed to the Court of Appeals, Division III, that the Savings Clause applied and its bar on public trust claims was enforceable because the Conservancy failed to prove that the Savings Clause violated the public trust doctrine. *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn. App. 478, 378 P.3d 222 (2016).

In an opinion decided on July 6, 2017 and later withdrawn, the Court ruled that although the Savings Clause purports to authorize the Three Fingers fill, the Savings Clause *itself* may violate the Public Trust doctrine. The court remanded to the Chelan County Superior Court to make a factual determination of whether the Savings Clause violates the public trust doctrine based on a test set forth in *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989, 994–95 (1987). The July 2017 opinion left open whether *any* pre-1969 fill could continue to exist, an issue that carried tremendous implications for owners of Washington state shorelines, particularly port districts.

Both the State of Washington and GBI filed motions for reconsideration with the Washington Supreme Court and, in November 2017, the court unanimously withdrew the July 2017 opinion.

On March 15, 2018, the court filed a new opinion affirming the Court of Appeals. In particular, the new decision unanimously confirmed that the Savings Clause did not violate the public trust doctrine. The majority, authored by Justice Steven C. Gonzalez and signed by five Justices, declined to apply the *Caminiti* test for evaluating whether the Savings Clause violates the public trust doctrine, finding that it does not adequately account for the special circumstances leading to the development of pre-1969 fills in Washington. The concurrence, authored by Justice Barbara A. Madsen and signed by four Justices, would have applied the *Caminiti* test to reach the same conclusion.

4. WHAT IS THE SIGNIFICANCE OF *CHELAN BASIN CONSERVANCY V. GBI HOLDING CO.* TO SHORELINE PROPERTIES?

Under the March 15, 2018 opinion in *Chelan Basin Conservancy v. GBI Holding Co.*, the Savings Clause remains effective and pre-1969 shoreline fills are not subject to abatement under the public trust doctrine. But unpermitted post-1969 shoreline fills do not benefit from the protections of the Savings Clause, and the court's opinion in *Chelan Basin Conservancy* does not resolve how post-1969 shoreline modifications will be addressed under the public trust doctrine.

Purchasing and developing properties along Washington's shorelines can offer great opportunities but continues to require careful planning to navigate the sometimes complex issues raised by shoreline development.

This decision is another example demonstrating that shoreline development or modifications require a strategic entitlement strategy. For more information about the public trust doctrine and shoreline development, please contact Jacquie Quarré at jacquie.quarre@foster.com or 206.447.6206. For a copy of the *Chelan Basin Conservancy v. GBI Holding Co.* case, please click here.