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Opinion

My Turn: John M. Boehnert: Brewing assault against private property owners

By John M. Boehnert

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There is an assault brewing against private property owners in Rhode Island, and it has its roots at the Rhode Island State House.

Bipartisan legislation has been introduced in the House and Senate to allow trespass on private waterfront property throughout the state.

The legislation would prevent criminal trespass charges from being prosecuted against anyone pursing access along the shore "within ten feet (10') of the most recent high tide line."

Our Rhode Island Supreme Court established the boundary between public and private property at the shore as the mean high tide, which is capable of precise measurement by a surveyor.

Critics of this decision claim that the mean high tide line is not readily visible, which impedes public access along the shore, while the highest tide, measured by the throw of seaweed on the beach, is visible.

However, our court selected the mean high tide as the boundary because it is measurable with precision, because to use the highest tide would unfairly take property from private property owners and because to use the lowest tide would unfairly impinge on public rights to the shore.

Supporters of the legislation say it avoids the issue of changing the boundary between public and private property.

Veteran Rhode Island land use litigator William Landry had this to say:

"This bill, if enacted, is most likely dead on arrival as an unconstitutional taking of private property ... It would effectively wrest 10 feet of dry sand beach area above the mean high water line from private ownership and place it in the public domain without compensation."

Mr. Landry is exactly correct.

One of the most important values of private property ownership is the right to exclude others. You do not have to allow strangers or neighbors to use your property.

Here, the state would be prohibiting authorities from enforcing criminal trespass on certain private property. Such failure to enforce is as much a deprivation of a right as active trespassing on someone's private property.

As the U.S. Supreme Court said in 1979: "We hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category ... that the government cannot take without just compensation."

Three years later the same court said that even government-authorized placement of cable television cables and a small box on the rooftop of a building violated the right to exclude and required compensation because "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property."

In the Lucas case, the Supreme Court found that regulations which compel a property owner to suffer an invasion "no matter how minute the intrusion and no matter how weighty the public purpose behind it" requires compensation.

Our Rhode Island Supreme Court has also recognized infringement of the right to exclude to be a compensable taking.

In the U.S. Supreme Court's Nollan decision, a permitting requirement that a property owner give the public access across his waterfront property was found to be a taking.

Closer to home, Massachusetts' high court concluded that giving the public "on-foot-right-of-passage" across private land to further public trust purposes would constitute a compensable taking. The Maine Supreme Court took a similar

position regarding granting the public a recreational easement over private waterfront property. New Hampshire's high court reached the same conclusion as to the grant of a public easement in all dry sand areas along New Hampshire's coast.

This legislation would unquestionably be seen as a taking that could cost Rhode Island taxpayers hundreds of millions of dollars.

If the General Assembly passes this legislation, which it should not do, the governor should promptly veto it.

This would be perhaps the costliest, and least advised, taking in the history of the state.

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