IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

WALTON COUNTY et al.,

Appellants,

CASE NO.: SC06-1447

v.

SAVE OUR BEACHES, INC. et al.,

Appellees.
_____/

AMENDED AMICUS BRIEF OF FLORIDA ASSOCIATION OF COUNTIES and FLORIDA LEAGUE OF CITIES

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STATEMENT OF INTEREST AS AMICUS

The Florida Association of Counties, Inc. was formed in 1929 to assist counties and represent the interests and concerns of Florida county governments. Every county in the state is a member of the Association. The Florida League of Cities, Inc. was formed in 1922 to assist cities and represent the interests and concerns of Florida cities. Ninety-nine percent of Florida's 411 municipalities are members of the League, as are five charter counties.

The Association and the League seek to appear as amicus curiae in a case only when the case involves issues of substantial interest and concern to cities or counties throughout the state. This case is critically important to the cities and counties in this state, and in particular, to the coastal cities and counties in this state, because many of them have conducted beach restoration activities, or contemplate taking them in the future.

SUMMARY OF THE ARGUMENT

There is no compensable taking by the government in the instant case because the government's actions involve restoration of a critically eroded public beach and preservation of public rights. Due to the severity of the erosion, the government's actions are akin to the abatement of a public nuisance. The common law provides that littoral rights are subordinate to the public's rights and government interests in public projects associated with the shoreline.

The First District erred in holding that the government has taken the right of access, because the government may move the point at which access takes place. Further, the First District erred in holding that the government has taken the right to accretion, because the statute limits government restoration activities to critically eroded beaches where there is no expectation of receiving future alluvion.

ARGUMENT

I. WHEN THE GOVERNMENT FILLS SOVEREIGN SUBMERGED LANDS TO RESTORE A CRITICALLY ERODED PUBLIC BEACH AND PRESERVE PUBLIC RIGHTS ASSOCIATED WITH THAT BEACH, THEN IT OWES NO COMPENSATION FOR ANY ALLEGED LOSS OF LITTORAL RIGHTS.

A. The character of the government action involves restoration of a critically eroded public beach as a principled response to a public nuisance.

This case involves an analysis of competing interests: littoral property rights versus a legitimate government interest in restoring a critically eroded public beach to preserve rights guaranteed under the public trust and customary use doctrines. In a regulatory takings case, courts must look at the *character* of the government action, that is, whether a regulatory action amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" to determine whether a taking of property has taken place through inverse condemnation. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124

(1978). In the case at bar, the government action does not involve a physical taking of any land owned by Respondents. Rather, it involves application of a law which allows public projects for the restoration of critically eroded public beaches and the abatement of a public nuisance, while at the same time preserving littoral right of access.

Severe erosion along a public beach endangered public and private interests during storms. The government's action to stem severe erosion which endangers public and private interests is akin to the abatement of a public nuisance, for which the government should owe no compensation. *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880) (finding no compensable taking where necessary to prevent spreading of fire or forestall other grave threats to lives and property of others).

B. Littoral rights are subordinate to the government's interest in public projects associated with the shoreline, because the public trust and customary use doctrines impose limitations on the exercise of those littoral rights which inhere in the title to property.

In its determination whether the government's action in the instant case results in a taking, the Court will undoubtedly consider the common law of England and the American states. *See* § 2.01, Fla. Stat. (2006); *Coleman v. Davis*, 120 So. 2d 56, 57 (Fla. 1st DCA 1960) (noting that American courts do not solely look to English courts to determine the common law, but rather also look to all the courts of the American states) *but see Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d at 941-42 (Fla.

1987)(Erlich, J. dissenting) (noting that great caution necessary when applying common law precedent from other states concerning questions involving sovereignty lands).

By finding that the government's actions unconstitutionally took Respondents' littoral rights, the First District either failed to afford due respect to the public trust doctrine under the common law, or at best misapprehended the doctrine and its significant import. The First District and Respondents erroneously perceived the Erosion Control Line as a firm dividing line of ownership, where inviolate private property rights begin, and where inferior public rights must end. As articulated below, littoral rights are not inviolate. Rather, they are subject to the public trust doctrine, which is not bounded by the mean high water line.

In Florida, the public trust doctrine is stated in Article X, Section 11, of the Florida Constitution. *Id.* Florida courts and other American courts have expansively interpreted the public trust doctrine to safeguard the public's use of navigable waters and the shoreline for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty. *See State, Dept. of Natural Resources v. Contemporary Land Sales, Inc.*, 400 So. 2d 488, 491 (Fla. 1981); *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640 (1893); *U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 14 (Fla.1974) (Ervin, J., dissenting); *Brannon v. Boldt*, 31 Fla. L. Weekly D1260 (Fla. 2d DCA May 5,

2006) (Kelly, J., *concurring in part, dissenting in part*); *Glass v. Goeckel*, 703 N.W.2d 58, 73, 78 (Mich. 2005) (holding that public has right to walk along beach, for which no compensation is owed to littoral owners); *R.W. Docks & Slips v. Wisconsin Dept. of Natural Resources*, 628 N.W.2d 781, 787-88 (Wis. 2001).

This Court has also recognized the rights of the public to access Florida's beaches under the customary use doctrine. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) ("If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner.") The customary use of the beach by the public is subject to reasonable regulation by the state. *Id*. Here, through implementation of its statutes and rules associated with beach restoration projects, the Department merely seeks to regulate that area of the beach customarily used by the public.

Many courts reason that there is no compensable taking where the government fills sovereign submerged lands as part of a public beach restoration project because the public trust and customary use doctrines impose limitations on the use of properties which inhere in their title and preclude any such claims. The relevant property interests owned by a purchaser may be confined by limitations on the use of land which inhere in the title itself. *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001). The first inquiry into the nature of the owner's estate begins with

a determination of whether the proscribed use interests were part of the landowner's title to begin with. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). Property rights are defined by state law, and here they are limited by Florida's traditional nuisance and property principles. *See Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382-83 (Fla. 1981) (rejecting argument that landowner had an unqualified right to fill wetlands). Thus, Respondents' rights to use of their property extend only so far as to use the property such that they do not conflict with traditional property principles, including those found in the public trust and customary use doctrines. *See id.*

Under English common law, courts defined the public trust doctrine based on logic and experience, not scientific units of measurements like the tidal cycle over an 18.6 year time frame. According to Justinian's Institutes "by the law of nature the air, running water, the sea, and consequently the shores of the sea" were "common to mankind." JUSTINIAN, INSTITUTES II:I:1. The shores of the sea "extends as far as the greatest winter flood runs up." JUSTINIAN, INSTITUTES, II:I:3. Justinian observed that under Roman law "[t]he public use of the seashore… is part of the law of nations, as is that of the sea itself; and, therefore, any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man, but are subject to the same law as the sea itself, and the sand

or ground beneath it." JUSTINIAN, INSTITUTES, II:I:5.

Neither Justinian, nor Blackstone, or the common law ever spoke of the public trust doctrine high water mark as a function of a tidal cycle. *See also,* 2 *Bracton On the Laws and Customs of England* 39-40 (1968). Instead, the public trust doctrine was expressed as based on Natural Law, and all three spoke of the high water mark as equating to the line of vegetation, since the greatest winter flood would invariably denude the area of all vegetation. This boundary is eminently logical, whereas a boundary line based on a tidal cycle is not.

Courts carefully considering the public trust doctrine in the context of common law jurisprudence have found that the public trust doctrine encompasses both the wet sand beach and the dry sand beach. *Tona-Rama, Inc.*, 294 So. 2d at 78; *Matthews v. Bay Head Improvement Assoc.*, 471 A.2d 355, 363 (N.J. 1984); *Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969); *United States v. St. Thomas Beach Resorts, Inc.*, 386 F.Supp. 769, 772 (D.C. V.I. 1974). In *Matthews*, the New Jersey Supreme court aptly observed:

> Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless.

Matthews, 471 A.2d at 364.

States have the authority to define the parameters of the public trust doctrine and to protect the public's rights in those lands as they see fit. *Phillips Petroleum*

Co. v. Mississippi, 484 U.S. 469, 484 (1988). Florida's public trust doctrine has probably not been completely articulated by the courts, and this Court should take the opportunity to clarify the matter. However, the Florida Legislature has legislated on the topic of public trust property, and in so doing, has articulated the historical parameters of the doctrine. In connection with restoration projects, in section 161.041, Florida Statutes (2006), the public trust doctrine is expressed, and the rights of the public and beach front property owners are reflected:

> … prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property.

Id. The history of legislative enactments by the Florida Legislature is further evidence that the conventional thinking on the public trust doctrine has long been that the dry sand beach was public domain. For instance, in 1925, the Florida Legislature simply designated all of Atlantic Beach and Jacksonville Beach public highways for automobiles. Ch. 10486, Special Acts of 1925, Laws of Florida. The

courts at the time noted, nevertheless, that pedestrians still had the right-of-way. *Town of Atlantic Beach v. Oosterhoudt*, 127 Fla. 159, 166; 172 So. 687, 690 (1937). In making this observation, the courts took it as apodictic that the public had rights in the dry sand. The special acts did not create public use rights that had heretofore never existed. On the contrary, they merely supplemented the public's rights as pedestrians, bathers, and takers of "siestas in the sand" *Id.* at 167, 690, that had been recognized all along.

Prior to the nineteenth century, the common law held that riparian owners possessed no rights to the use of a waterbody that are different from, or superior to, those of the general public. Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. Rev. 1427, 1434 (Sept. 2005). Rather, riparian ownership merely involved abutment to the water, which made it easier for the riparian owner to gain access and exercise their public rights of use. *Id.* However, the riparian owner's access to the water was permissive, and the State could cut off access at any time, without compensation. *Id.*

In the twentieth century, many American courts held that riparian owners possessed rights appurtenant to their property, and that the government could not deprive them of these rights without compensation. *Id.* However, these same American courts correctly continued to view riparian rights as subordinate to the

state's paramount rights in navigable waters, and the federal government's navigation servitude, when a government project associated with the shoreline affects those rights. *Id.*; *see e.g., Duval Engineering & Contracting Co. v. Sales*, 77 So. 2d 431 (Fla. 1955); *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927); *Home for Aged Women v. Commonwealth*, 89 N.E. 124 (Mass. 1909); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) (acknowledging the superiority of the federal navigation servitude). In the instant case, the First District correctly noted that Respondents possess littoral rights associated with their properties, but erred when it did not view those littoral rights as subordinate to the state's interest in public projects associated with the shoreline. The common law recognizes this important exception to the rule requiring compensation for taking of riparian or littoral rights.

C. The government owes no compensation for actions associated with restoration of a critically eroded public beach.

Neither the Department nor the local governments owe any compensation to Respondents in the instant case, because they have a legitimate government interest associated with restoring and preserving the shoreline. *See Mississippi State Highway Comm'n v. Gilich*, 609 So. 2d 367, 375 (Miss. 1992); *Slavin v. Town of Oak Island*, 584 S.E.2d 100, 102 (N.C. App. 2003); *Home for Aged Women*, 89 N.E. at 126. Without restoration of this beach, the people will invariably lose those rights guaranteed under the public trust and customary use

doctrines as the beach continues to erode until hardened structures obstruct public access along the shoreline. Those public rights include the ability to walk up and down the beach, fishing, bathing, and for other recreation.

Under the common law, Respondents would not have an interest in any submerged lands reclaimed by the State along the current shoreline. Because the doctrines of reliction and accretion do not apply where land is reclaimed by government agencies, the Respondents' properties lose their littoral status under application of the common law. This black letter rule was recognized in *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927), in which this Court addressed a title dispute involving a dry land created when a public project lowered lake levels in Lake Okeechobee. *Id*. at 546, 278. This Court held that "if to serve a public purpose, the state, with consent of the federal authority, lowers the level of navigable waters so as to make the water recede and uncover lands below such high-water mark, the lands so uncovered below such high-water mark, continue to belong to the state." *Id*. at 574, 287. This Court reasoned that the doctrine of reliction does not apply where land is reclaimed by governmental agencies as by drainage operations. *Id.* In a concurring opinion, Justice Brown pointed out that the riparian rights doctrines of accretion and reliction did not apply to lands reclaimed by the state, and that therefore "there was no question of riparian rights involved in the case." *Id*. at 578, 288 (Brown, J., concurring). Rather, because the

plaintiff's property boundary did not extend to the ordinary high-water mark, they were no longer riparian owners who had riparian rights. *Id.*

Applying the holding and reasoning in *Martin* to the instant case, under the common law Respondents' properties would lose their littoral status as a result of the reclamation activities that fill sovereign submerged lands, for which the government owes no compensation. In *Martin*, the government lowered the lake levels of Lake Okeechobee to create dry land. Here, the government seeks to create additional dry beach by pumping sand in from offshore areas. Because both situations involve public projects which artificially change the shoreline, the doctrines of reliction and accretion do not apply to change the boundary between sovereign lands and private lands. As articulated by Justice Brown in *Martin*, the question of whether riparian rights might be affected is not material in cases of government reclamation projects. Thus, the statutes challenged by Respondents in this case actually provide greater rights to littoral property owners than they would receive under the common law.

This Court later gave the same deference to the State regarding the construction of public projects in its decision in *Duval Engineering & Contracting Co. v. Sales*, 77 So. 2d 431 (Fla. 1955). *Id.* at 434. In *Duval Engineering*, riparian property owners sued the State and its contractor for an alleged appropriation of riparian rights associated with the construction of the Gilmore Street Bridge across

the St. Johns River in Jacksonville. *Id.* at 432-33. The riparian property owners alleged that the filling of submerged lands along the river bank across the road from their property resulted in a taking of their riparian rights. *Id.* The Court rejected this argument, reasoning that such riparian rights must give way where the lands had previously been dedicated for highway purposes. *Id.* at 434. The Court also reasoned that in spite of the fill that was placed alongside the shoreline, the riparian owners' rights to an unobstructed view, ingress and egress, bathe, fish and otherwise make use of the St. Johns River were not materially affected. *Id.* Thus, the property owners were owed no compensation. *Id.*

Comparing *Duval Engineering* with the instant case reveals several similarities. Just as in *Duval Engineering*, the government seeks to fill submerged lands along the shoreline. In both cases, there is not a material impact on the rights of the upland property owners. In *Duval* Engineering, the riparian owners could still access the river across the newly filled land. Here, likewise, the statutory scheme outlined in sections 161.141 – 161.211, Florida Statutes (2006), ensures that Respondents will still be able to access the ocean for purposes of bathing, fishing, swimming, etc. Thus, this Court should follow the holding and reasoning of the *Duval Engineering* case, and find no compensable taking for any alleged interference with littoral/riparian rights.

Other state courts have similarly found no compensable taking where a

government project associated with the shoreline affects littoral rights. In *Mississippi State Highway Comm'n v. Gilich*, 609 So. 2d 367 (Miss. 1992), the Mississippi Supreme Court resolved ownership interests associated with construction of a man-made beach to support a highway project. *Id.* at 368-69. A property owner filed an inverse condemnation suit against the state claiming that the construction of the beach and highway resulted in a wrongful taking of their littoral rights. *Id.* The state took the position that the beach in question was land held in the public trust, and that the taking of riparian rights was non-compensable. *Id.* at 370. The Mississippi Supreme Court ruled against the property owner, finding that "where the State has exercised its power to impose an additional public use on property already set aside for public purpose, the injury to riparian or littoral licenses is not a taking of private property for which compensation must be made." *Id.* at 375.

Like the *Gilich* decision, the project in the instant case involves the construction of a man-made beach. In both cases, the littoral property owners claim that the government has taken littoral rights without compensation. This Court should follow the decision made by the Mississippi Supreme Court, which found no compensable taking where the State has engaged in a beach nourishment project.

The common law decisions amongst the various states apparently all come

to the same conclusion: there is no compensable taking associated with government projects and regulations associated with beach nourishment and restoration. In *Slavin v. Town of Oak Island*, 584 S.E.2d 100 (N.C. App. 2003), a North Carolina appellate court resolved a dispute between beachfront property owners and a town that had adopted a beach access plan and constructed a fence to protect a newly restored beach. *Id.* at 101. The littoral property owners claimed that the town had taken their riparian rights of access, because the owners could no longer directly walk down to the ocean, but now could only get to the ocean by traversing one of several designated public access points. *Id.* The North Carolina appellate court rejected the property owners' claims that they had a vested littoral right to direct access to the ocean, for which the government owed them compensation. *Id.* at 102. While the court agreed that the law recognizes the riparian right of access to the water, the property owners had misinterpreted that right. *Id.* The court held that a littoral property owner's right of access to the ocean is a qualified one, and is subject to reasonable regulation by the state. *Id.* Thus, the court found that the property owners were not entitled to compensation from the state. *Id.*

Like in *Slavin*, the Respondents access to the water is a qualified one, subject to regulation by the state. In *Slavin*, the town created an access plan and public access points which limited access along the newly restored beach, which

meant that some property owners might have to walk some distance prior to accessing the beach. Here, after the beach restoration project is complete, Respondents will likewise still be able to access the water, if only after traveling the breadth of the new wider sandy beach to reach the water. This Court should also find that the Respondents are not entitled to compensation for any purported taking of their riparian right of access as a result of the beach restoration project.

D. The government owes no compensation for any purported taking of the right of access.

The First District erred when it held that the application of the statute would deprive Respondents of their riparian right of access. The common law provides that a littoral or riparian property owner's riparian right to access is qualified, and subject to the public trust doctrine or reasonable regulation by the state. *Krieter v. Chiles*, 595 So. 2d 111, 112 (Fla. 3d DCA 1992); *Slavin*, 584 S.E.2d at 102. In *Krieter*, the Board of Trustees denied a riparian owner the use of sovereign submerged lands for a single-family dock on Key Largo, reasoning that the proposed dock would be contrary to the public interest. *Krieter*, 595 So. 2d at 112. Krieter sued the Board, claiming that her riparian right to wharf out had been taken without compensation. *Id.* The Third District affirmed the trial court's decision dismissing the inverse condemnation claim, holding that Krieter's riparian right of ingress and egress, to be exercised by building a dock, was a qualified right inferior to the rights of the public. *Id.* The Third District reasoned that no right of

access had been taken, because the property owner still could get to the property via an abutting road. *Id.*

Just as in *Krieter*, the Respondents' riparian rights of ingress and egress, and right to wharf out, are qualified ones which are limited by public trust doctrine. Following the reasoning of the *Krieter* court, this Court should conclude that Respondents' claims that "direct" access to the Gulf have been taken from them to be without merit.

The beach restoration project in the case at bar seeks to preserve this public right of lateral access along the beach, and therefore Respondents' riparian rights must yield. Accordingly, this Court should reverse the First District's decision, and find that there is no compensable taking where the government acts to restore and preserve a public beach.

E. The government owes no compensation for any alleged taking of the right to accretion.

Neither the Department nor the local governments in this case owe compensation to Respondents for any alleged taking of the right to accretion. The First District erred in holding that the government has taken the right to receive accretions, because the statute in question limits government action to restoration of critically eroded beaches, where there is no expectation of receiving future alluvion. Further, it defies logic that the government would owe compensation for acts which curb a littoral property owner's risk of loss associated with erosion. In

Banks v. Ogden, 69 U.S. 57 (1864), the United States Supreme Court explained the origin of the right to accretion as the counterpart to the risk of loss sustained by the owner of land bounded by the sea. *Id.* at 67. That is, the owner of littoral property should receive the benefits of accretion, if they must also suffer the burden and risk associated with possible erosion of their property. Here, the Department and local governments have removed that risk of loss. This Court should thus find that there is no compensable taking for loss of any alleged riparian right to accretion where the government acts to preserve and restore a critically eroded public beach.

Additionally, the government owes no compensation in the instant case because Respondents and the First District have misconstrued the right to accretion. The right to receive accretion does not equate to a property interest to drifting sand which has not yet attached itself to upland property. *See* Jeremy N. Jungreis, *Drawing Lines in the Shifting Sands of Cape Canaveral: Why Common Beach Erosion Should Not Yield a Compensable Taking Under the Fifth Amendment*, 11 J. Land Use & Envtl. L. 375, 396-400 (Spring 1996). As noted in this law review article, this Court's decision in *Sand Key Associates* "indicates that drifting sand is strictly a public good to be maintained in the public trust." Jungreis at 399-400. Further, the article notes that if there was a property right in drift sand, then the holding in *Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209 (Fla. 2d DCA 1973), which

found no liability in the government for construction of a project which obstructed drifting sand to create accretion on one side, and erosion on the other, could not be possible. Jungreis at 400. Accordingly, there is no property right to drifting sand in Florida, and neither the Department nor the local governments owe compensation to Respondents as a result of the beach restoration project.

CONCLUSION

For the reasons set forth, the Florida Association of Counties and Florida League of Cities respectfully requests that this Court reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing has been furnished this _____ day of November 2006 via hand delivery to Richard S. Brightman, Esq., Kenneth J. Plante, Esq., Thomas E. Pelham, Esq., Charles T. Miller, Esq., and Teresa L. Mussetto, Esq.

_____

Gary K. Oldehoff, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), I certify that I have used 14-point Times New Roman font throughout this amicus brief.

_____

Gary K. Oldehoff, Esq.