IN THE SUPREME COURT
STATE OF FLORIDA

Case Number: **SC06-1447**
Lower Tribunal Case No: 1D05-4086

WALTON COUNTY AND THE CITY OF DESTIN,

Petitioners,

v.

SAVE OUR BEACHES, INC. and STOP THE BEACH RENOURISHMENT, INC., FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Respondents.

PETITIONERS' JOINT BRIEF ON JURISDICTION

ON MANDATORY AND DISCRETIONARY REVIEW FROM A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

This case arises from an appeal to the First District Court of Appeal ("District Court") of the Department of Environmental Protection's ("Department") Final Order granting a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands Permit ("Permit"), pursuant to Section 161.041, Florida Statutes, to Walton County and the City of Destin ("Petitioners"), to conduct a beach restoration project on certain critically eroded beaches.

Stop the Beach Renourishment, Inc. ("STBR"), and Save Our Beaches, Inc. (collectively the "Respondents"), separately filed Petitions for Administrative Hearing which were consolidated, and subsequently jointly amended. At the final evidentiary hearing before the Administrative Law Judge ("ALJ"), there were three remaining issues,[1] to-wit: whether the Petitioners gave reasonable assurances that applicable water quality standards will not be violated; whether the Petitioners were required to provide "satisfactory evidence of sufficient upland interest" under Rule 18-21.003, Florida Administrative Code (F.A.C.), and, if so, did they provide it; and whether Respondents had standing.

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1 Although STBR initially challenged the Board of Trustees of the Internal Improvement Trust Fund's ("BOT") independent action in establishing and recording an Erosion Control Line ("ECL") in Walton County pursuant to Section 161.191, Florida Statutes, the location or recording of the Walton County ECL was not an issue before the ALJ. The ALJ specifically stated: "[t]his is not being converted into a challenge of the ECL."

The ALJ's Recommended Order recommended issuance of the Permit and found: 1) Respondents' interest, i.e., their use of the Gulf of Mexico within the project area would not be substantially affected; 2) Petitioners provided reasonable assurances that water quality standard would not be violated by the permitted activities; and 3) Petitioners were exempt from the requirement to provide "satisfactory evidence of sufficient upland interest" pursuant to Rule 18-21.003, F.A.C. The Department's Final Order adopted the ALJ's Recommended Order in its entirety.

Respondents appealed the Final Order to the District Court, which reversed and remanded the Final Order holding, in pertinent part, that STBR had standing to bring an as-applied constitutional challenge on behalf of its members; that Sections 161.191(1) and (2), Florida Statutes, are invalid; invalidating the Walton County ECL as to STBR members; and remanding the Permit to the Department to show "satisfactory evidence of sufficient upland interest" pursuant to Rule 18-21.003, F.A.C. The Petitioners and the Department moved for rehearing, rehearing en banc and/or certification of a question of great public importance. The motions for rehearing and rehearing en banc were denied, but the District Court certified the following question as being a question of great public importance:

> Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken,

so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply?

Petitioners timely filed a Notice of Appeal to invoke the Court's mandatory and discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

The District Court declared Sections 161.191(1) and (2), and 161.201, Florida Statutes, invalid as an unconstitutional taking of private property, thereby invoking the mandatory jurisdiction of this Court. Discretionary jurisdiction of this Court is appropriate by virtue of: 1) the District Court's holding that the Beach and Shore Preservation Act constitutes a per se physical taking of property under the Fifth Amendment of the United States Constitution and Section 6(a), Article X of the Florida Constitution; and 2) the decision is in direct conflict with this Court's opinions governing associational standing.

JURISDICTIONAL STATEMENT

This Court has mandatory jurisdiction to review the District Court's opinion which declares Sections 161.191(1), 161.191(2) and 161.201, Florida Statutes, invalid. See Art. V § 3(b)(1), Fla. Const.; Fla. R. App. P. 9.030(a)(1)(A)(ii).

This Court also has discretionary jurisdiction to review the District Court's decision because the District Court certified a question of great public importance; the decision expressly construes provisions of both the state and federal

constitutions; and the decision expressly and directly conflicts with decisions of this Court on the same point of law. See Art. V §§ 3(b)(3) and 3(b)(4), Fla. Const.; Rules 9.030(a)(2)(A)(ii), (iv), and (v), Fla. R. App. P.

ARGUMENT

POINT I: THE DISTRICT COURT OPINION DECLARES SECTIONS 161.191(1), 161.191(2) and 161.201, FLA. STAT., INVALID.

The District Court opinion declares Section 161.191(1), Florida Statutes, invalid, as an unconstitutional taking of certain riparian rights because it establishes a fixed boundary. The District Court also declared Section 161.191(2), Florida Statutes, invalid, because that section states "that common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion." The District Court held:

> The erosion control line was established by the Board of Trustees on the high water mark. That became the fixed new boundary of the property. See §161.191(1), Fla. Stat. (2005)(stating in relevant part that "[u]pon the filing of a copy of the board of trustees' resolution and recording of the survey showing the location of the erosion control line. . . title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners"). As in *Madeira Beach*, the freezing of the erosion control line renders the ordinary high water mark useless as a boundary line, which is contrary to the property owners' boundaries. Although STBR's members deeds are not in the record, there is unrebutted testimony that their property boundaries extend to the high water mark.
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> * * *
>
> The parties agree that this project will cause the high water mark to move seaward and ordinarily this would result in the upland

> landowners gaining property by accretion. However, section 161.191(2) states that "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion. . . ." Therefore, the Department's final order, approving the permits and authorization for the project, will deprive STBR's members of their riparian accretion rights. [Emphasis added.]

See Save Our Beaches, Inc., et al. v. Florida Department of Environmental Protection, et al., ___ So. 2d ___ 2006, WL 1112700 (Fla. 1st DCA), 31 Fla. Law Weekly D1173 at WL 9 and 10. Although the District Court held that the Department's Final Order deprives upland property owners of their riparian right to future accretion, the Court admitted that it is Section 161.191, Florida Statutes, which operates to eliminate such right.

The District Court also expressly declared Section 161.201, Florida Statutes, invalid to preserve riparian rights which the Court deems unconstitutionally taken by Sections 161.191(1) and 161.191(2), Florida Statutes. The District Court held:

> Moreover, because the boundary will now remain fixed, as the high water mark moves seaward, the landowners will also lose the right to have the property's contact with the water remain intact. It is not enough to provide, as in section 161.201, rights of ingress and egress to the water over the state's land.
>
> These deprivations of riparian rights are an unconstitutional taking of STBR's members' riparian rights. The Department relied on section 161.201 to rule that the landowners' riparian rights are not affected by its final order. Although section 161.201 has language describing a preservation of common law riparian rights, it does not actually operate to preserve the rights at issue in this case. Florida's law is clear that riparian rights cannot be severed from riparian uplands absent an agreement with the riparian owner, not even by the power of

eminent domain. [Citation omitted.]

> . . . [T]he statutory "reservation" of STBR's members' riparian rights is legally invalid with the effect that as applied in this case, the Beach and Shore preservation Act deprives the members of their constitutionally protected riparian rights without just compensation for the property taken. . . .

See Id. at 10 and 11. Although the District Court's decision is couched in terms of "as applied" to STBR's members, there is no explanation as to how Sections 161.191 and 161.201, Florida Statutes, are applied to STBR's members any differently than to any other upland property owner where an ECL has been established by Section 161.191, Florida Statutes. The District Court acknowledged that Sections 161.191(1), 161.191(2), and 161.201, Florida Statutes, operate the same for all property owners with respect to the right to future accretion, and that STBR's members' deeds are not in the record. Therefore, the true application of the statutes to STBR's members' property is unknown. Thus, the District Court's decision effectively declares Sections 161.191(1), 161.191(2), and 161.201, Florida Statutes, both facially invalid and invalid as applied, both of which invoke mandatory jurisdiction of this Court pursuant to Section 3(b)(1), Article 5, Florida Constitution. See L.M. Duncan & Sons, Inc. v. City of Clearwater, 478 So. 2d 816 (Fla. 1985) ("We have before us *City of Clearwater v. L.M. Duncan & Sons, Inc.*, 466 So. 2d 1116 (Fla. 2d DCA 1985), holding section 440.11(1), Florida Statutes (1982), unconstitutional as applied to the City of Clearwater (the City) in this case.

We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution . . . ."); State v. Stepansky, 761 So. 2d 1027 (Fla. 2000).

POINT II: THE DISTRICT COURT OPINION EXPRESSLY CONSTRUES A PROVISION OF BOTH THE STATE AND FEDERAL CONSTITUTIONS.

The District Court's opinion expressly determines that the Beach and Shore Preservation Act statutorily eliminates from the upland property the riparian right to future accretion and is, therefore, invalid as an unconstitutional physical taking. Save Our Beaches at 7; Point I above. In so holding, the District Court concluded that the statutory elimination of a riparian right, even through a valid exercise of the State's police power, constitutes a per se physical taking under the Fifth Amendment of the United States Constitution and Section 6(a), Article X of the Florida Constitution. Thus, the opinion expressly construes a provision of both the state and federal constitutions. See, e.g., Melbourne v. State, 679 So. 2d 759 (Fla. 2005), *rev'g* Melbourne v. State, 655 So. 2d 126 (Fla. 5th DCA 1995).

POINT III: THE DISTRICT COURT OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FLORIDA SUPREME COURT.

The District Court's decision expressly and directly conflicts with this Court's decisions in LEAF v. Clark, 668 So. 2d 982 (Fla. 1996), and Fla. Home Builders Ass'n v. Dep't of Labor & Employment Sec., 412 So. 2d 351 (Fla. 1982), on the issue of associational standing. There are two different standing issues

addressed by the District Court: 1) associational standing under Section 120.68, Florida Statutes; and 2) associational standing to bring as-applied constitutional challenges regarding the taking of private property rights.

The District Court's holding that STBR has standing to challenge the Final Order expressly and directly conflicts with the holding in LEAF, supra, regarding standing to appeal agency action outlined in Section 120.68(1), Florida Statutes. In LEAF, this Court stated, quoting, in part, Daniels v. Florida Parole & Probation Comm'n, 402 So. 2d 1351 (Fla. 1st DCA 1981):

> The APA's definition of party recognizes the need for a much broader zone of party representation at the administrative level than at the appellate level. For example, in rulemaking, a large number of persons may be invited or permitted by the agency to participate as parties in the proceeding, so as to provide information to the agency concerning a broad spectrum of policy considerations affecting proposed rules. [Citations omitted] Yet, a person who participates in such a proceeding by authorization of a statute or rule, or by permission of an agency, may not necessarily possess any interests which are adversely, or even substantially, affected by the proposed action. . . . LEAF must therefore still demonstrate that it will be adversely affected by the Commission's decision.

LEAF at 988. The District Court made no findings that STBR is "adversely affected" by the Final Order, and acknowledged that STBR did not appeal the findings in the Final Order on the merits. See Save Our Beaches at 6 ("Appellants bring only an as-applied constitutional challenge on appeal and do not seek reversal on the Department's standing rulings or any of the other rulings on the merits from the administrative proceeding."). The District Court merely found that

STBR's members would be "affected" for the reasons enumerated by the ALJ. See Save Our Beaches at 6. Thus, the District Court's decision that STBR has standing to appeal expressly and directly conflicts with this Court's decision in LEAF, supra.

Further, the District Court's holding that STBR can bring an as-applied constitutional challenge on behalf of its members directly conflicts with this Court's decision in Fla. Home Builders, supra. See Save Our Beaches, at 6-8. This Court has adopted the federal test for association standing, which provides:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Fla. Home Builders, at 353. On appeal, STBR sought to quash the Final Order with instructions that the Department require Petitioners to acquire "the necessary riparian rights," eliminated by Section 161.191, Florida Statutes, and to invalidate the ECL as applied to STBR's members. The District Court accepted that STBR's challenge was whether the Beach and Shore Preservation Act was unconstitutionally applied to STBR's members to take the members' private property rights without just compensation. See Save Our Beaches at 7.

The District Court cites two cases to support the Court's opinion that an association can bring as-applied constitutional challenges, to-wit: Pennell v. City

of San Jose, 485 U.S. 1 (1988) and Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342-45 (1977). However, Pennell and Hunt, both involve ***facial*** constitutional challenges, not as-applied challenges. In Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 365 F.Supp.2d 1146, 1164 (D. Nev. 2005), the Court expressly held that "*Pennell and Hunt* are likewise distinguishable because they both involved facial challenges and not as-applied claims" and that "[t]he Committee does not have associational standing to assert an as-applied takings claim on behalf of its members under the ad hoc, fact-based *Penn Central* test. For prudential reasons, this type of taking claim must be raised by an individual homeowner under the facts of this case." See also Ga. Cemetery Ass'n, Inc. v. Cox, 353 F. 3d 1319, 1322-23 (11th Cir. 2003) ("The Association must show that neither the claim asserted nor the relief requested requires the participation of the individual members [of the association] in the lawsuit."). Thus, the District Court's opinion that STBR may bring as-applied constitutional challenges on behalf of its members disregards the Fla. Home Builders test for standing in direct and express conflict with such decision.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that this Court accept both mandatory and discretionary jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U.S. Mail this 28th day of July, 2006, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Joint Jurisdictional Brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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