**IN THE SUPREME COURT OF FLORIDA**

---

**SC-06-1447**
First DCA Case No.: 1D05-4086

---

CITY OF DESTIN and WALTON COUNTY,
Petitioners,

vs.

STOP THE BEACH RENOURISHMENT, INC.,
Respondent.

---

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, FLORIDA

---

# RESPONDENT'S AMENDED ANSWER BRIEF

---

DAN R. STENGLE
Florida Bar No. 352411
RICHARD S. BRIGHTMAN
Florida Bar No. 347231
D. KENT SAFRIET
Florida Bar No. 174939
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, FL 32314
(850) 222-7500

Attorneys for Respondent
STOP THE BEACH RENOURISHMENT, INC.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Judicial Decisions

**Florida Statutes**

**Florida Administrative Code**



**Other Authorities**

## PRELIMINARY STATEMENT AND GLOSSARY

This Court has acknowledged that the instant case (Case No. SC06-1447) is related to and will be considered along with a companion case (Case No. SC06-1449). While these two cases have not been consolidated, this Amended Answer Brief is identical in all respects with the Amended Answer Brief filed in companion Case No. SC06-1449 (with the exception of Issue II – which discusses new issues raised only by Florida Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund).

The Index to the Record on Appeal includes three volumes of pleadings that are consecutively numbered as 1-472. The Index then identifies the Transcript and Exhibits admitted at the administrative hearing by party and number without any consecutive page numbers. For citations to the Transcript, Respondent will reference the page number of the Transcript (e.g., [T. p.__]). For its citations to exhibits, Respondent will reference the exhibit by party, number, and page number, if applicable. (e.g., [R., Pet. Ex. __, p.__]). Respondent will use the following abbreviations throughout its Answer Brief:

| | |
|---|---|
| Act | Beach and Shore Preservation Act, Part I of Chapter 161, Florida Statutes |
| Agency Petitioners | Florida Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund |
| Applicant Petitioners | City of Destin and Walton County |

| | |
|---|---|
| DEP | Florida Department of Environmental Protection in its own right, and as staff to the Board of Trustees of the Internal Improvement Trust Fund, as the context allows |
| ECL | Erosion Control Line |
| JCP | Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands |
| MHWL | Mean High Water Line |
| Petitioners | Florida Department of Environmental Protection, Board of Trustees of the Internal Improvement Trust Fund, City of Destin, and Walton County |
| STBR | Stop the Beach Renourishment, Inc. |
| Trustees | Board of Trustees of the Internal Improvement Trust Fund |

## INTRODUCTION

*The preservation of the rights of private property was the very keystone of the arch upon which all civilized governments rest.*[1]

Petitioners are asking this Court to disregard its 97-year history of holdings that littoral or riparian rights[2] are constitutionally protected property. Petitioners do so by asking this Court to approve their unilateral conversion of oceanfront property into oceanview property without a court order authorizing a boundary change and without paying any compensation. Petitioners attempt to camouflage this unconstitutional taking of property rights by labelling it a "regulatory" taking, in an attempt to cast the analysis in the only mold which can achieve the result they seek.

Petitioners' initial briefs ignore the administrative context in which this case has arisen and omit several levels of necessary analyses, including answering the certified question. Instead, Petitioners' briefs focus on whether the taking is regulatory or physical, a largely irrelevant issue which the District Court did not reach. In response, STBR addresses the relevant issues omitted by the Petitioners

---

[1] Joseph H. Choate, Peter's Quotations, 2003.

[2] The term "riparian" technically refers to property adjacent to a river or stream, and the term "littoral" refers to property adjacent to an ocean, sea, or lake. However, the term "riparian" is generally used to describe all uplands adjacent to any navigable water. See Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd., 512 So.2d 934, 936 (Fla. 1987) ("Sand Key"). While this case involves "littoral" rights rather than "riparian" rights, STBR will use the common term riparian for consistency purposes.

and also responds to the new issues improperly raised by DEP for the first time to this Court.

## STATEMENT OF THE CASE AND OF THE FACTS

The District Court's opinion under review accurately states the facts and case.[3] To the extent Respondent disagrees with any factual assertion made by the Petitioners, its disagreement will be noted within the argument. Additionally, Respondent refers the Court to its Initial Brief filed in the District Court below for an accurate statement of the facts and case.

## SUMMARY OF ARGUMENT

Riparian rights are common law property rights that are inherent in the ownership of uplands adjoining navigable water.[4] Riparian rights include the vested rights to access and use the water, receive accretions, and to have the property's contact with the water remain intact.[5] In Florida, riparian rights are constitutionally protected property rights that can neither be severed from the upland property nor taken without just and full compensation.[6]

---

[3] Save Our Beaches, Inc. v. Florida Dep't of Envt'l Protection, 31 Fla. L. Weekly D1173 (Fla. 1st DCA 2006).

[4] Belvedere Dev. Corp. v. Department of Transp., 476 So.2d 649, 651 (Fla. 1985) ("Belvedere"); § 253.141, Fla. Stat.

[5] Id.; Sand Key, 512 So.2d at 936.

[6] Belvedere, 476 So.2d at 653; § 253.141, Fla. Stat.

In a beach nourishment project, the Act requires the adoption and recordation of an ECL, a surveyed line which upon recordation becomes a fixed and permanent property boundary between upland property and state-owned lands. The Act declares the State to be the owner of any newly-created dry sand area seaward of the ECL. DEP's Final Order recognized that Section 161.191, Fla. Stat., expressly eliminates constitutionally protected common law riparian property rights, but found that such elimination did not infringe on riparian rights.

Whether such elimination (or taking) of riparian rights is physical or regulatory is of little consequence because any severance of riparian rights from riparian uplands is unconstitutional absent an agreement with the riparian owner.[7] The Act's statutory scheme, as applied by the Final Order, severs **all** riparian rights from the former oceanfront – now ocean view – upland property by creating a new state-owned sand beach between the uplands and the water. The Act's attempt to statutorily "reserve" rights similar to constitutional riparian rights to the owner of the formerly oceanfront property is legally ineffective as a cure for the unconstitutional taking of riparian rights.

The statutory privileges that mimic constitutionally protected riparian rights found in Section 161.201, Fla. Stat., are revocable at the will of the State and are thus no substitute for the constitutionally protected common law riparian rights currently

[7] Belvedere, 476 So.2d at 653.

enjoyed by STBR's members. As recognized by the District Court, the application of the Act in this way is unconstitutional because it severs and takes riparian rights and fails to afford riparian owners just and full compensation for the property taken.

If the resulting taking must be classified as either physical or regulatory, it is a physical taking for which the Petitioners have a constitutional and categorical duty to compensate the former owner. The Act recognizes the potential for a taking and includes a savings provision that requires any taking of private property be accomplished through eminent domain proceedings.[8] DEP, however, has chosen not to follow the Act's mandate in this regard, apparently because it would be too cumbersome and expensive.

The Petitioner Applicants did not present "satisfactory evidence of sufficient upland interest" as required by Rule 18-21.004(3)(b), F.A.C. Nor do the Petitioner Applicants qualify for the exception from having to produce evidence of sufficient upland interest because their beach nourishment project "unreasonably infringes" upon the riparian rights of STBR's members by completely taking those rights. Accordingly, DEP's action in issuing the JCP without first requiring the Petitioner

[8] Section 161.141, Fla. Stat., provides in part: "If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."

Applicants to acquire the necessary property interests, as required by Section 161.141, Fla. Stat., was improper and unconstitutional.

STBR has standing to maintain this challenge under the associational standing test of Florida Home Builders.[9] Associational standing is appropriate where, as here, the relief sought is of an appropriate character for an association to seek on behalf of its members and no claim for monetary damages is made.

## ARGUMENT

This Court is being asked to review the District Court's determination that Part I of Chapter 161, Fla. Stat., was unconstitutionally applied by DEP in this case. Petitioners attempt to justify their actions by improperly framing the issue in terms of a "regulatory" taking. They then attempt to lure this Court's focus to a single riparian right, namely that of accretion, which they then claim is "speculative" so it is sure to fail their inapposite "regulatory takings" analysis.[10] Not only is accretion not

[9] Florida Home Builders Ass'n v. Dept. of Labor, 412 So.2d 351 (Fla. 1982).

[10] The Petitioners' repeated claims that accretion is "speculative" is factually false. Contrary to Petitioners' argument that there is "no evidence to show accretion has ever occurred, or might in the future" (DEP Initial Br., p. 9) the record includes the following statement from the City and County's own coastal engineers:

> Littoral transport analyses indicate primarily westerly net longshore transport along the project area. Net longshore transport rates, ranging from 47,000 cy/yr near R-23 in Walton County to approximately 30,000 cy/yr near R-39 in Destin, **reveal an accretive trend. Taylor Engineering, Inc. (2003) concludes that the project area beaches possess the natural ability, as indicated by the**

speculative, Petitioners' strategy ignores **ALL** other constitutional riparian rights that have been eliminated by DEP's application of the Act in this case, with inferior statutory rights being illegally substituted for constitutionally protected riparian rights.

## STANDARD OF REVIEW

The standard of review applicable to the legal issues raised in this appeal is de novo,[11] while questions of fact are reviewed under the competent substantial evidence standard.[12] Review of mixed questions of law and fact require that "the trial court's ultimate ruling must be subjected to de novo review, but the court's factual findings must be sustained if supported by legally sufficient evidence."[13]

---

> **accretive longshore sediment transport trend, to recover absent storms** . . . . (emphasis added).

See, ROA Joint Exhibit 1, Environmental Assessment, Walton County/Destin Beach Restoration Project, 2003, p. 12-13 (see Exhibit 3 in Appendix).

[11] "Constitutional interpretation, like statutory interpretation, is performed *de novo.*" Zingale v. Powell, 885 So.2d 277, 280 (Fla. 2004).

[12] See Bruner v. GC-GW, Inc., 880 So.2d 1244, 1246 (Fla. 1st DCA 2004).

[13] Osterback v. Agwunobi, 873 So.2d 437, 439 (Fla. 1st DCA 2004) quoting N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So.2d 612 (Fla. 2003).

## I. THE ACT, AS APPLIED BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION IN ISSUING THE JOINT COASTAL PERMIT AND ESTABLISHING THE EROSION CONTROL LINE, EFFECTS AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY BECAUSE ALL CONSTITUTIONALLY PROTECTED RIPARIAN RIGHTS ARE ELIMINATED

### A. Riparian Rights Are, in and of Themselves, Constitutionally Protected Property Rights

"Although riparian rights are property, they are unique in character. The source of those rights is not found within the interest itself, but rather they are found in, and are defined in terms of the riparian upland."[14] Riparian rights are common law rights that are inherent in the ownership of uplands adjoining navigable water.[15] "Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) the right of access to the water, including the right to have the property's contact with the water remain intact; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property."[16]

The legislature has recognized riparian property rights and has attempted to statutorily define these rights. Section 253.141, Fla. Stat., provides in pertinent part:

---

[14] Belvedere, 476 So.2d at 652.

[15] Id.; §253.141, Fla. Stat.

[16] Sand Key, 512 So.2d at 936.

> Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. **They are appurtenant to and are inseparable from the riparian land**.[17]

In 1909, this Court announced that "[t]hese special [riparian] rights are easements incident to the riparian holdings, and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law."[18] Since then, this Court has steadfastly adhered to and reaffirmed this holding. In 1917, this Court reiterated that riparian rights "are property, and, being so, the right to take it for public use without compensation does not exist."[19] In 1919, in Brickell v. Trammell,[20] this Court again stated "riparian or littoral rights are property rights that may be regulated by law, but may not be taken without just compensation and due process of law." In 1976, this Court spoke specifically to the riparian right of accretion stating:

---

[17] (Emphasis added). As the District Court notes, the differences between the statute and common law, if any, have not been addressed and do not affect the issues in the instant case. Save Our Beaches, 31 Fla. L. Weekly at D1176.

[18] Broward v. Mabry, 50 So. 826, 830 (Fla. 1909).

[19] Thiesen v. Gulf, Florida and Alabama Railway, 78 So. 491, 507 (Fla. 1917).

[20] 82 So. 221, 227 (Fla. 1919).

> Both Federal and Florida courts have held that an owner of land bounded by the ordinary high water mark of navigable water is vested with certain riparian rights, including the right to title to such additional abutting soil or land which may be gradually formed or uncovered by the processes of accretion or reliction, which right cannot be taken by the State without payment of just compensation."[21]

In 1985, this Court considered an attempt by the Florida Department of Transportation ("DOT") to condemn riparian property, excluding and reserving the riparian rights to the condemnee and thus not paying compensation for those riparian rights. DOT's actions were held to be "an unconstitutional taking."[22] The basis for the Court's holding was that riparian rights could not be severed from the riparian uplands (even in a condemnation action).[23] The Court remanded the case for the trial court to determine the "just compensation due" for the riparian rights.[24]

Two years later in 1987, this Court decided Sand Key, again reaffirming "that riparian or littoral rights are legal rights and, for constitutional purposes, the common

---

[21] State of Florida v. Florida Nat'l Properties, Inc., 338 So.2d 13, 17 (Fla. 1976).

[22] Belvedere, 476 So.2d at 652.

[23] Id. at 653.

[24] Id.

law rights of riparian and littoral owners constitute property" which "may not be taken without just compensation."[25]

After 97 years of consistent jurisprudence, it is the well-established law in Florida that riparian rights are constitutionally protected property rights that cannot be taken without just and full compensation. Stated succinctly, "The distinction between riparian and non-riparian rights is a clear one. Lost riparian rights always entitle the owner to relief . . . ."[26]

The importance and need for strict protection of riparian rights was stressed in Thiesen, where this Court stated:

> The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability, whether for residence or business purposes. The right of access to the property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase by one and the reason for the price charged by the seller.[27]

---

[25] 512 So.2d at 936. The Court further stated:

> In *Brickell,* we said these riparian or littoral rights are 'property rights that may be regulated by law, but may not be taken without just compensation and due process of law, *Brickell,* 77 Fla. [544] at 561, 82 So. [221] at 227, and we recently reaffirmed that principle in *Florida National Properties, Inc.*

[26] Florida Dep't of Transp. v. Suit City of Aventura, 774 So.2d 9, 13 (Fla. 3d DCA 2001).

[27] Thiesen, 78 So. at 507.

The fact that riparian rights are, in and of themselves, "property" protected by the Constitution cannot now be seriously contested.

### B. The Act, as Applied by the Department of Environmental Protection, Takes All Constitutionally Protected Riparian Rights

Under the Act, DEP is required to develop and maintain a long-term beach management plan for critically eroded beaches.[28] Once DEP approves a beach management plan, it is submitted to the legislature for funding of beach nourishment projects.[29] If an applicant decides to implement a project contemplated by DEP's plan, such applicant must obtain a Joint Coastal Permit ("JCP"). The JCP, which authorizes construction on coastal uplands, is an exercise of DEP's regulatory authority under the Act and Chapter 62B-49, F.A.C. In addition to the JCP, a beach nourishment applicant must also obtain proprietary authorization for use of sovereign submerged land from the Trustees under Chapter 253, Fla. Stat., and Chapter 18-21, F.A.C. These two authorizations are processed together.[30]

As part of a nourishment project, the Act requires the Trustees to conduct or approve a survey of the beach in order to locate the "Erosion Control Line" (ECL) for

---

[28] See § 161.161(1), Fla. Stat.

[29] See § 161.161(2), Fla. Stat.

[30] See Rule 62B-49.003(2), F.A.C.

the project.[31] Thereafter, the Trustees are required to provide notice of the ECL survey to, inter alia, all riparian land owners and hold a public hearing regarding the establishment and approval of the ECL.[32] The Trustees are ultimately required to approve the ECL for a project.[33]

The Act further contemplates recordation of the surveyed ECL in the official records of the appropriate county.[34] Importantly, the Act provides that upon recording of the surveyed ECL:

> **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 whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded. [35]

The recording of the ECL thus permanently fixes the boundary line between upland property and state-owned lands seaward of the ECL. This is evident from the Act, which states:

---

[31] See § 161.161(3), Fla. Stat.; The ECL may or may not be located on the mean high water line.

[32] See § 161.161(4), Fla. Stat.

[33] See § 161.161(5), Fla. Stat.

[34] See § 161.181, Fla. Stat.

[35] See § 161.191(1), Fla. Stat. (emphasis added).

> The Legislature declares that it is the public policy of the state to cause to be fixed and determined, pursuant to beach restoration, beach nourishment, and erosion control projects, the boundary line between sovereignty lands of the state bordering on the . . . Gulf of Mexico . . . and the upland properties adjacent thereto . . . .[36]

Even though the Act expressly eliminates only the riparian right to accretion,[37] the legal effect of the establishment of the ECL and the creation of dry land seaward of the ECL is to divest the upland riparian property owner of **all** common law riparian rights.[38] As described above, riparian rights only attach to upland properties that border on navigable waters.[39] When the beach is nourished, the MHWL is moved seaward, creating new dry land between the ECL and the MHWL.[40]

The result of the private upland owner's boundary being fixed at the ECL is that the upland owner's property no longer borders a navigable water body. Consequently, the upland owner no longer owns ANY riparian rights because riparian

---

[36] See § 161.141, Fla. Stat.

[37] See § 161.191(2), Fla. Stat.

[38] The Court below focused on two specific riparian rights that are expressly eliminated by operation of the Act ("the right to future accretion and the right of riparian land to touch the water." [R. 397]). Petitioners' attempt to focus on and defeat only these two rights – via tenuous and irrelevant arguments – ignores all of the other riparian rights which the Act illegally severs from lands owned by STBR's members.

[39] Sand Key, 512 So.2d at 936.

[40] Save Our Beaches, at D1177. The Mean High Water Line (MHWL) is the natural interface between riparian uplands and navigable waters.

rights inure only to the owner of land bordering on a navigable water body. The riparian rights which formerly attached to the upland owner's property now attach to the new dry land created by the nourishment project because it now borders the navigable water body.

Pursuant to the statutory process outlined above, DEP issued a "Consolidated Notice of Intent to Issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands" authorizing the nourishment project on July 15, 2004.[41] Also pursuant to the statutory process outlined above (specifically Section 161.161(5), Fla. Stat.) the Trustees adopted resolutions establishing the "Western Walton County Erosion Control Line" on June 25, 2004, and the "City of Destin Erosion Control Line" on December 30, 2004.[42] By fixing the boundary of riparian property at the ECL and authorizing the creation of new dry land between the ECL and the navigable water body, DEP has authorized the taking of all riparian rights previously owned by STBR's members.[43]

---

[41] [R. 339-340].

[42] [R. 349-350]. These two ECL surveys have been recorded in the official records of the appropriate counties. See also Walton County OR Book 2686, Page 2233 and Plat Book 17, Page 1 and Okaloosa County OR Book 2658, page 4124 and Plat Book 22, Page 53.

[43] To directly address the certified question, there can be no greater infringement on riparian rights than their complete elimination. Such an infringement is unreasonable where, as here, no compensation is paid because it violates the constitutional protections for private property. Because there is an unreasonable

### C. The Act Is Unconstitutional As Applied in this Case Because it Eliminates STBR's Members' Property Without Due Process and Just Compensation

Apparently aware that establishing an ECL in connection with a beach nourishment project can result in a taking of constitutionally protected riparian property rights, the Act expressly provides that "[i]f an authorized . . . beach nourishment . . . project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."[44] DEP's Final Order issuing the JCP expressly acknowledges that the Act eliminates riparian rights. The Final Order concludes, however, that the JCP issued in accordance with the Act does not infringe on any riparian rights because the riparian rights arguably infringed upon are eliminated by the Act.[45] The pertinent question, though, is not whether riparian rights are eliminated, but whether that elimination passes constitutional muster.

The Act, which DEP claims does the taking, directs DEP and the Applicants to institute eminent domain proceedings for any taking occasioned by a beach

---

infringement on riparian rights, the Applicants do not qualify for the exception in Rule 18-21.004(3), F.A.C., to the requirement to provide satisfactory evidence of sufficient upland interest.

[44] ' 161.141, Fla. Stat.

[45] See, Final Order, ("The issuance of the Joint Coastal Permit in accordance with the applicable statutes and implementing rules will not infringe on these riparian rights."). [R. 397].

nourishment project under the Act.[46] If properly applied, this provision could save the Act from constitutional infirmity as the District Court recognized. In this case, however, DEP has failed to properly interpret and apply the Act, resulting in an as-applied unconstitutional taking.

The Final Order glosses over this fundamental constitutional infirmity by asserting that DEP is without authority to decide whether a statute is constitutional. While true, this assertion does not alter the fact that DEP, in its Final Order, could have required the City and County to institute eminent domain proceedings to acquire the necessary riparian property rights for the nourishment project as contemplated by Section 161.141, Fla. Stat. STBR contends, and the District Court agreed that, as a result of DEP's failure to do so, the Final Order has applied the Act in an unconstitutional manner.

### D. Riparian Rights Have Been Physically Taken: This Is Not a Regulatory Takings Case

Petitioners argue at length that there is no taking in this case because the "regulatory taking" test under Penn Central[47] should control. In response to similar arguments below, the District Court declined to engage in a regulatory versus physical taking analysis, recognizing that Belvedere and Section 253.141, Fla. Stat., expressly

[46] ' 161.141, Fla. Stat.

[47] Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

prohibit the severance of riparian rights from riparian lands.[48] Because Petitioners are unable to overcome the hurdles of Belvedere or Section 253.141, Fla. Stat. – as noted infra – there is no need for the Court to reach the question of whether the taking is physical or regulatory. If this Court finds it is appropriate to engage in such an analysis, however, the taking in this case – if it must be categorized – is a physical taking because STBR's members' property rights have been eliminated, not regulated.

In Lee County v. Keisel,[49] the County built a bridge over the Caloosahatchee River which extended from the shoreline at an angle reaching across the water view of the Keisel's riparian property.[50] Because the bridge substantially and materially interfered with the Keisel's riparian right to an unobstructed view over the water to the channel, the Keisel's filed an inverse condemnation claim against the County.[51]

The County argued that "there was no physical taking" since the bridge did not physically rest on any of the Keisel's property nor was any of the Keisel's

---

[48] See Belvedere, 476 So.2d at 651.

[49] 705 So.2d 1013 (Fla. 2d DCA 1998).

[50] Id. at 1014.

[51] Id.

property condemned for the project.[52] The Second District rejected the County's regulatory taking argument and found a physical taking occurred stating:

> We reject the county's argument that there was no physical taking here; that, since the bridge did not physically rest upon any of the Kiesel property itself, the Kiesels were entitled to compensation only if the bridge construction substantially ousted them from or deprived them of substantially all beneficial use of their property. That test would apply if this case involved a 'regulatory taking', in which a land owner's use of his property had been restricted by government regulation. . . . But this was not a regulatory taking. **Rather, this case involved an actual physical intrusion to an appurtenant right of the Kiesels' property ownership.**[53]

In the instant case, as in Keisel, Petitioners are physically intruding on an appurtenant right of the property ownership of STBR's members. While quick to chastise the District Court for relying upon riparian rights cases "that did not involve regulatory takings,"[54] Petitioners failed to cite a single case that applies the regulatory takings test in the context of riparian rights. Naturally, the Petitioners avoid discussing Keisel and its application to the instant case.

As noted by the Second District, regulatory takings occur only when a "landowner's use of his property has been restricted by a governmental regulation." Here, neither the Act, nor DEP, are "restricting" STBR members' use

---

[52] Id. at 1015.

[53] Id. (Emphasis added).

[54] See, County's Initial Br., p. 23.

of their property or riparian rights, such as limiting the type, size, or location of structures to be built on accreted lands. Rather, the Act, as applied by DEP, transfers the riparian rights from the upland property owners to the State.

In Kendry v. State Road Dep't,[55] the plaintiffs owned riparian property which was bounded on the east by the navigable Indian River. The State Road Department decided to widen U.S. Highway 1 and in so doing "filled submerged lands in the Indian River a distance of 60 feet east of and adjacent to the plaintiffs' east boundary lines."[56] After the State claimed title to the newly-filled lands, the Plaintiffs filed suit seeking a mandatory injunction to require the Road Department to institute eminent domain proceedings for the taking of plaintiffs' property.[57] On appeal from a dismissal for failure to state a cause of action, the Fourth District Court of Appeal addressed the following question of law:

> where the state, in the course of highway construction, fills bottom land in a navigable stream adjacent to riparian property of a private citizen **and claims title to the fill**, does a taking occur with respect to the riparian rights of the upland owner.[58]

The Fourth District held that the "allegations in the complaint are sufficient to show a **complete appropriation** of the plaintiffs' riparian rights and thus a

[55] 213 So.2d 23 (Fla. 4th DCA 1968).

[56] Id. at 25.

[57] Id.

[58] Id. (Emphasis added).

taking without just compensation."[59] In the instant case, like Kendry, DEP is authorizing the filling of submerged lands[60] adjacent to the private riparian uplands and is claiming title to those lands.[61] Because DEP has claimed ownership to the new lands and will physically occupy the interface between privately owned uplands and the MHWL with sand (creating new dry land), it has completely appropriated STBR's members' riparian rights. Such a complete appropriation is a physical taking that must be accomplished, if at all, through eminent domain proceedings.

Even the cases quoted by the Petitioners command a finding that compensation is due. As noted by Petitioners, the Court in Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,[62] stated:

---

[59] Id. at 28. (Emphasis added).

[60] While submerged, STBR is not admitting that the lands to be filled for this project are owned by the State in its sovereign capacity. Infra, STBR discusses the legal effect of the doctrine of avulsion – raised by DEP – relating to the ownership of the submerged lands proposed for filling in this project.

[61] DEP previously represented to the District Court that if the project was ultimately found unconstitutional "all members of the Appellants' organizations who actually own property in this area, would have a new beach free of any statutory constraints." See Response to Motion for Stay, ¶ 33 (filed Oct. 13, 2005) (see Exhibit 4 in Appendix). DEP is judicially estopped from now maintaining that it owns the nourished beach. Chase & Co. v. Little, 156 So. 609 (Fla. 1934); McCurdy v. Collis, 508 So.2d 380 (Fla. 1st DCA 1987).

[62] 535 U.S. 302 (2002) (Emphasis added).

> When the government **physically takes possession of an interest in property for some public purpose**, it has a categorical duty to compensate the former owner, (citation omitted) regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.

In this case, DEP is physically taking possession of the interface between the upland and the navigable water and with that it will physically possess the riparian rights once held by STBR's members. Thus, even under Tahoe-Sierra, Petitioners have a "categorical duty to compensate the former owner."

### E. As Applied in this Case, the Act Is Unconstitutional Because it Severs Riparian Rights from Riparian Uplands

The District Court properly held below that Belvedere[63] is controlling because "Florida's law is clear that riparian rights cannot be severed from riparian uplands absent an agreement with the landowner, not even by eminent domain."[64] Petitioners' attempt to brush off this crucial holding, summarily stating it does not apply (as they must because ignoring the entire severance issue is necessary to their inapposite "regulatory takings" argument).

In Belvedere, this Court addressed the following certified question: "DOES FLORIDA LAW PERMIT RIPARIAN (OR LITTORAL) RIGHTS TO BE SEPARATED FROM RIPARIAN LANDS?" This Court held that riparian rights

[63] 476 So.2d 649 (Fla. 1985).

[64] Save Our Beaches, 31 Fla. L. Weekly at D1177.

cannot be severed from riparian uplands absent an agreement with the riparian owner.[65]

In Belvedere, the DOT sought through eminent domain proceedings to acquire a parcel of riparian property in fee simple absolute from Belvedere.[66] DOT did not condemn the riparian rights to the property, however, expressly "reserving" those riparian rights to Belvedere.[67] Belvedere challenged the taking, alleging that DOT was taking only a portion of its lands and was required to take all of it or pay severance damages.[68]

On appeal, the district court upheld the reservation of riparian rights but certified the question of their severability to this Court, which quashed the district court decision, agreeing with Belvedere that the attempted reservation of riparian

---

[65] Belvedere, 476 So.2d at 653.

[66] Id. at 650.

[67] The reservation language provides:

> Reserving unto the Defendant the rights to use and enjoy the riparian rights of and pertaining to said lands, including the rights to bulkhead and fill, said lands as provided by law, which are not in conflict with the interests of the Florida Department of Transportation in the construction and maintenance of said public highway.

Belvedere, 476 So.2d at 650.

[68] Id. at 650.

rights is ineffective because "riparian rights are appurtenant to and inseparable from the riparian land."[69]

In deciding against DOT's position, the Supreme Court rejected a general rule that riparian rights are severable recognizing the inherent and absurd results thus achieved, which were eloquently stated by Judge Hersey in the case below:

> [Riparian] rights basically include (1) general use of the water adjacent to the property, (2) to wharf out to navigability, (3) to have access to navigable waters and (4) the right to accretions.
>
> How could it seriously be contended that appellants in this case retain any of those rights despite the language in the Order of Taking (the functional equivalent of a deed)? They have no easement or other retained rights to enter upon appellee's land. If a dock is built by appellants it will have to be free-standing, without contact with appellee's land. And how are they to "use" the water, say for swimming, when they have no access to it other than by boat? And consider the horrendous problem of accretions!
>
> To speak of riparian or littoral rights unconnected with ownership of the shore is to speak a *non sequitur*.[70]

In light of these concerns, this Court expressly held that "[r]iparian rights cannot be severed by condemnation proceedings without the consent of the upland owner,"[71] noting that the "condemnation context is distinguishable from the situation where two parties to a real estate transaction might choose to sever the riparian rights

---

[69] Belvedere Dev. Corp. v. Department of Transp., 413 So.2d 847 (Fla. 4th DCA 1982).

[70] Belvedere, 413 So.2d at 851 (Hersey, J., concurring).

[71] Belvedere, 476 So.2d at 653.

from the riparian lands and also provide those necessary additional rights which would enable the riparian right holder to actually benefit from those rights – i.e., an easement or right to enter the riparian lands."[72] Therefore, the Court concluded that riparian rights can only be severed when there is a "bilateral agreement to do so" with the riparian owner.[73] The Court further held that "the act of condemning petitioners' lands without compensating them for their riparian property rights under these facts was an unconstitutional taking."[74]

In the instant case, the Act and Final Order purport to do exactly what this Court found to be unconstitutional in Belvedere: sever riparian rights from riparian lands. The statutory scheme, as applied by the Final Order, attempts to separate riparian rights from the newly-created State-owned strip of riparian land to be created by the nourishment project.[75] Then, the scheme attempts to statutorily "reserve"

---

[72] Id. at 652. A governmental entity would not have to condemn the entire beachfront parcel, as argued by Petitioners and amici, to acquire the riparian rights. Rather, the entity could condemn (through eminent domain as required by the Act) a small strip of uplands along the beach that borders the navigable water, which would then make the governmental entity the riparian owner.

[73] Id. at 652-653.

[74] Id. at 652.

[75] This effect is illustrated by the survey of the Walton County ECL which is a part of the record below. [R. 1-5]. The survey shows the ECL located at the current Mean High Water Line ("MHWL"). [R. Pet. Ex. 4]; see also Recommended Order [R. 349]. It further depicts the "predicted upland limits of construction," "predicted seaward limits of construction," and the "predicted post-construction

those riparian rights (except, of course, for the right to accretion) for the owners of the property which is currently riparian, but which is to be rendered no longer riparian because of the nourishment project. Belvedere prohibits such a severance of riparian rights, absent a bilateral agreement which is in keeping with Section 253.141, Fla. Stat., which provides that riparian rights "are **inseparable from the riparian land**."[76]

Relying on Belvedere's holding – which is controlling – there is no need for this Court to decide whether the elimination of a riparian right is a physical or regulatory taking. Any action that separates the boundary of STBR's members' properties from the navigable water is a severance of riparian rights and prohibited by Belvedere and Section 253.141(1), Fla. Stat. Consequently, this Court should affirm the District Court's opinion as it properly applied controlling precedent.

### F. The Act's "Reservation" of Riparian Rights Is Invalid and Does Not Cure the Unconstitutional Severance of Riparian Rights

The District Court found, consistent with Belvedere, that the Act's attempt in Section 161.201, Fla. Stat., to "reserve" to prior riparian owners statutory rights similar to the common law rights that are eliminated by operation of the Act was

---

mean high water line." Id. The ECL survey clearly shows – as found by the ALJ – that construction (i.e., placement of sand) will occur both landward and seaward of the ECL. Id. Additionally, and most importantly, the ECL survey shows that the predicted post-construction MHWL is significantly (between 60' and 135', and on average approximately 100') seaward of the ECL. Id.

[76] ' 253.141, Fla. Stat. (Emphasis added).

invalid.[77] While Section 161.201, Fla. Stat., may be well intentioned, as applied to STBR's members this Section is ineffective as a cure, and is illegal and unconstitutional for two reasons.

First, Section 161.201, Fla. Stat., is nothing more than an illegal statutory "reservation" of riparian rights similar in legal effect to that in Belvedere. As held by the District Court and explained supra, the "reservation" of riparian rights in Belvedere was ineffective because it illegally severed riparian rights from the riparian uplands. In Belvedere, DOT included a riparian rights "reservation" in the order of taking in an attempt to reserve **all** riparian rights to Belvedere, the former riparian owner. In this case, Section 161.201, Fla. Stat., attempts to reserve all riparian rights **(except the right to accretion)** to the former riparian owner. There is no legal difference between the two "reservations." For the same reasons that the attempted "reservation" in Belvedere was unconstitutional, the attempted "reservation" in Section 161.201, Fla. Stat., as applied by the Final Order, fails.

Secondly, assuming *arguendo* that riparian rights could legally be severed or "reserved," Section 161.201, Fla. Stat., attempts to replace constitutionally protected rights with inferior statutory rights. Unlike constitutionally protected common law

[77] See § 161.201, Fla. Stat., which provides in part, "Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing."

riparian property rights, these statutory rights are a mere privilege that can be revoked at any time.[78] Constitutionally protected rights, on the other hand, cannot be infringed or modified by the legislature, nor can the legislature authorize such an infringement.[79] No one could credibly argue that any statutory rights guaranteeing free speech for example, are the legal equivalent of constitutional rights to free speech.

For these reasons, the revocable statutory privileges mimicking riparian rights in Section 161.201, Fla. Stat., hardly compare to – and do not replace – the riparian rights granted and afforded by common law and the Florida Constitution. Consequently, Section 161.201, Fla. Stat., does not cure the constitutional infirmity of the Act, as applied in this case.

### G. The Department of Environmental Protection Failed to Construe the Act in a Constitutional Manner

As noted above, in an apparent attempt to avoid an unconstitutional taking Section 161.141, Fla. Stat., includes a savings provision that requires any taking of private property to be accomplished through eminent domain proceedings.[80]

---

[78] See Packard v. Banton, 264 U.S. 140, 145 (1924).

[79] See Cawthon v. Town of DeFuniak Springs, 102 So. 250, 251 (Fla. 1924).

[80] Section 161.141, Fla. Stat., provides in part: "If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."

As a result, DEP had the authority and ability to require the City and County to first institute eminent domain proceedings to lawfully acquire the necessary property rights before issuing the JCP.

In the Final Order, DEP has interpreted this section to apply only when some ownership interest in the upland real property is taken, and does not apply to the "mere" elimination of riparian rights. However, as seen above, riparian rights cannot constitutionally be severed from the riparian property even through eminent domain proceedings.[81] Thus, in light of Belvedere and Section 253.141, Fla. Stat., DEP's interpretation of Section 161.141, Fla. Stat., results in an unconstitutional taking of riparian rights. If, however, Section 161.141, Fla. Stat., is properly construed to require the City and County to first become the owner of all requisite property rights – including riparian rights – then the Act could be applied in a constitutional manner.[82]

[81] See Belvedere, supra; § 253.141, Fla. Stat. As noted by Amicus Beach and Shore Preservation Association, this does not mean that the entire waterfront parcel must be acquired. Belvedere prohibits the severance of riparian rights from riparian property, it does not prohibit a beach nourishment applicant from acquiring (by eminent domain, if necessary) a narrow strip of riparian property, including the riparian rights attaching thereto.

[82] "When an interpretation upholding the constitutionality of a statute is available" the court must adopt that construction. Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So.2d 815, 820 (Fla. 1983).

Because the District Court properly held that DEP applied the Act in an unconstitutional manner (i.e., by issuing a JCP in a manner that takes private property) the Opinion below must be affirmed.

## II. NEW LEGAL THEORIES RAISED BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION FOR THE FIRST TIME IN THIS COURT

*[As noted in the Preliminary Statement, STBR is omitting the argument under this issue because it relates to new arguments raised by Petitioners, Florida Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund, in companion Case No. SC06-1449. In all other respects, this brief is identical to the Amended Answer Brief filed in Case No. SC06-1449.]*

## III. STOP THE BEACH RENOURISHMENT, INC. HAS STANDING TO MAINTAIN THIS APPEAL

The District Court properly held that associations can bring the type of as-applied constitutional challenges involved in this case.[83] Petitioners' attempt to argue their entire case in the vacuum of "regulatory takings" jurisprudence is fatal to their standing argument. Because this is not a regulatory takings case, Petitioners' microscopic focus on limited associational standing to bring a "regulatory taking" is inapposite. As explained above, this case challenges DEP's administrative actions – where the administrative action is claimed to physically

[83] Save Our Beaches, 31 Fla. L. Weekly at D1175.

invade, expropriate, and extinguish constitutionally protected property rights. This is not a regulatory takings case.

The cases cited by Petitioners in support of their argument demonstrate their fundamental misunderstanding of the issue raised by STBR. Commission for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency, 365 F. Supp. 2d 1146 (D. Nev. 2005); Greater Atlanta Home Builders Ass'n v. City of Atlanta, 149 Fed. Appx. 846 (11th Cir. 2005); Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591 (2d Cir. 1993), are all **regulatory** taking cases involving various claims that local government acts (i.e., comprehensive plans or local development regulations) deprived certain landowners of all economically viable uses of their property. This case, to the contrary, claims an **actual expropriation** of STBR's members' property by the Act as applied by the Final Order.[84] In the face of clear law that mandates such a challenge be taken on appeal of an administrative final order,[85] Petitioners' citation of cases where local land development regulations are applied to a specific property on an ad hoc basis is inapt.

In the instant case, the Final Order unconstitutionally applies the Act (specifically §§ 161.141-.211, Fla. Stat.) to all property owners within the entire

[84] See Keisel, 705 So.2d 1013.

[85] See Lee County v. Zemel, 675 So.2d 1378, 1381 (Fla. 2d DCA 1996); Chrysler Corp. v. Florida Dep't of Highways and Motor Vehicles, 720 So.2d 563, 567-568 (Fla. 1st DCA 1998), and other cases cited by STBR in the Initial Brief below.

6.9-mile beach nourishment project in a uniform manner. This appeal does not seek to determine how much compensation is due to each landowner (which likely would vary among the different parcels). Rather, it seeks only to determine whether it is constitutionally permissible for the statute to be applied in a manner which, as candidly admitted by the Final Order, will result in the severance (i.e., expropriation) of riparian rights from the upland property without requiring acquisition of those property rights.

Citing only a contract case as support,[86] DEP also suggests that STBR cannot challenge the unconstitutional application of the Act on behalf of their members because the relief requested is not of the type appropriate for an association to seek on behalf of its members, as required by this Court's test in

[86] DEP cites to Palm Point Property Owners' Ass'n of Charlotte County, Inc. v. Pisarski, 626 So.2d 195 (Fla. 1993), where a property owners' association attempted to enforce restrictive covenants (contractual in nature) when it was not a party to the contract or in privity with a party to the contracts. Not surprisingly, this Court held associational standing did not exist not only because the Association was not a party to the contract but because of well-established law that restrictive covenants are strictly construed against the limitation of property uses. Id. at 197. Unlike Pisarski, the instant case involves constitutionally protected property rights as they are eliminated by an illegal *administrative* permit and does not involve restrictive covenants. Accordingly, Pisarski is inapposite.

As a threshold matter, it should be noted that DEP did not contest STBR's standing below (much less argue Pisarki to the District Court) and is now precluded from doing so here. Metropolitan Dade County v. Chase Fed. Housing Corp., 737 So.2d 494, n. 7 (Fla. 1999).

Florida Home Builders.[87] If STBR were seeking monetary damages for deprivation of its members' property rights, that might be true. The non-monetary relief requested by STBR, however, is an appropriate type of relief for an organization to request on behalf of its members.[88]

Petitioners have not described how the effects of DEP's actions in issuing the JCP and establishing the ECL are different for each STBR member such that the relief requested is inappropriate or that individual participation is required.[89] To the contrary, the effects of DEP's actions on each member of STBR is exactly the same, to wit, by changing the ownership of the property between the navigable water body and the ECL, thereby severing (and taking) all riparian rights from the upland properties. Because the effect on all STBR members is the same, and the

---

[87] The test for associational standing enunciated therein was that an "association must demonstrate that a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and **the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.**" Florida Home Builders, 412 So.2d at, 353-354 (emphasis added).

[88] See Florida Home Builders, where the court specifically, in discussing the type of appropriate relief, noted that the association was seeking invalidation of an agency action and not a claim for money damages on behalf of its members, which would require individual participation. Florida Home Builders, 412 So.2d at 354.

[89] The evidence is undisputed that each STBR member owns upland property to the MHWL of the Gulf of Mexico within the project area. Save Our Beaches, 31 Fla. L. Weekly at D1177; [R. 350, 369].

relief requested simply seeks reversal of the unconstitutional actions of DEP, there is no requirement for individual participation by STBR members in this case.

The District Court correctly noted that in Pennell v. City of San Jose,[90] and Hunt v. Washington State Apple Adver. Comm'n,[91] associations were allowed to bring constitutional challenges. Further, the cases are legion where the courts have allowed constitutional challenges by organizations where they found the "relief requested" was the type appropriate for the association to receive on behalf of its members.

In Florida Ass'n of Counties, Inc. v. Department of Admin.,[92] the court found that the Florida League of Cities and Florida Association of Counties (Amici here) had standing to challenge the constitutionality of Chapter 88-238, Laws of Florida, which increased the retirement benefits to special risk members (police and firefighters) and increased the retirement contributions required by the cities and counties. Relying on City of Lynn Haven v. Bay County Council of Registered Architects, Inc.,[93] the court held:

---

[90] 485 U.S. 1 (1988).

[91] 432 U.S. 333 (1977).

[92] 580 So.2d 641 (Fla. 1st DCA 1991), approved 595 So.2d 42 (Fla. 1992).

[93] 528 So.2d 1244, 1246 (Fla. 1st DCA 1988) (holding that a nonprofit corporation of architects had standing to assert that City's actions invaded a statutorily-created

> Here, a substantial number of the constituents comprising the Association and League have been substantially and adversely affected by Chapter 88-238, in that they have increased their FRS contributions. There is no **requirement that those entities themselves must sustain special injury.**[94]

In Hillsborough County v. Florida Restaurant Ass'n, Inc.,[95] the Florida Restaurant Association sued the county in a declaratory judgment action challenging the constitutionality of a county ordinance "requiring that a health warning sign be posted in certain establishments that serve alcohol." On the issue of standing, the court held:

> We agree with the trial court on this threshold issue and find that the Association has standing to contest the validity of the ordinance. That is so because the Association has met the three-prong test which confers standing to an association to sue for the benefit of its members who are more directly affected by the governmental action than the association itself.[96]

As explained above, STBR is like the Florida Restaurant Association, Florida Association of Counties, Florida League of Cities, and Bay County Council of Registered Architects, Inc., in that they meet the Florida Home Builders three-

---

interest in competitive negotiations, common to its members, but not shared by taxpayers generally).

[94] Florida Ass'n of Counties, Inc., 580 So.2d at 646 (Emphasis added).

[95] 603 So.2d 587 (Fla. 2d DCA 1992).

[96] Id. at 589.

prong test for standing to challenge the constitutionality of the Act, as applied by DEP.

## CONCLUSION

DEP's action in issuing the JCP without requiring that the Applicants first acquire the necessary riparian property through eminent domain proceedings (if necessary) is unconstitutional because it attempts to illegally sever riparian rights from riparian lands. Even analyzing the case under the physical versus regulatory takings dichotomy, the complete elimination of riparian rights is a physical taking that must be compensated. As evidenced by prior cases of this Court, STBR has standing to bring this case. Accordingly, this Court should affirm the District Court Opinion by invalidating the JCP and the ECL.

Respectfully submitted,

HOPPING GREEN & SAMS, P.A.

_____

Dan R. Stengle
Florida Bar No. 352411
Richard S. Brightman
Florida Bar No. 0347231
D. Kent Safriet
Florida Bar No. 0174939
P.O. Box 6526
Tallahassee, FL 32314
Phone: (850) 222-7500
Fax: (850) 224-8551

Attorneys for Respondent

## CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2006, a true and correct copy of the foregoing document was provided by **Hand-Delivery to**:

Gregory M. Munson, Esq.
Teresa L. Mussetto
L. Kathryn Funchess
Department of Envt'l Protection
3900 Commonwealth Blvd. MS-35
Tallahassee, FL 32399-3000
*for DEP and Board of Trustees of the Internal Improvement Trust Fund*

Thomas G. Pelham
Fowler White Boggs Banker P.A.
101 North Monroe Street, Suite 1090
Tallahassee, FL 32301
*for Walton County and City of Destin*

Linda Loomis Shelley
Fowler White Boggs Banker, P.A.
Post Office Box 11240
Tallahassee, FL 32301
*for the Florida Shore & Beach Preservation Association*

Kenneth J. Plante
Wilbur E. Brewton
Kelly B. Plante
Tana D. Storey
Roetzel & Andress, L.P.A.
225 South Adams Street, Suite 250
Tallahassee, FL 32301
*for Florida Association of Convention & Visitors Bureaus, Inc.*

and by **U.S. Mail** on this 29th day of November, 2006 to:

Stephen A. DeMarsh
Gary K Oldehoff
David M. Pearce
Office of the County Attorney
1660 Ringling Blvd., Second Floor
Sarasota, FL 34236
*for Florida Association of Counties and Florida League of Cities*

_____
Attorney

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
Attorney