IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
SC06-1447

WALTON COUNTY and THE CITY OF DESTIN,

Petitioners/Appellants,

vs.

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

Respondents/Appellees.
_____/

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

PETITIONERS/APPELLANTS' INITIAL BRIEF ON THE MERITS

Kenneth J. Plante
Florida Bar Number 444790
ROETZEL & ANDRESS, LPA
225 S. Adams St., Suite 250
Tallahassee, FL 32301
Telephone: 850/222-7718
Fax: 850/222-8222

Thomas G. Pelham
Florida Bar Number 138570
FOWLER WHITE BOGGS BANKER P.A.
P.O. Box 11240
Tallahassee, FL 32302
Telephone: 850/681-0411
Fax: 850/681-6036

Hala Sandridge
Florida Bar Number 0454362
FOWLER WHITE BOGGS BANKER P.A.
P.O. Box 1438
Tampa, FL 33601
Telephone: 813/228-7411
Fax: 813/229-8313

ATTORNEYS FOR PETITIONERS
WALTON COUNTY AND CITY OF DESTIN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Decisional Authority

Statutes and Other Authority

PRELIMINARY STATEMENT

Appellants, Walton County and the City of Destin, will be individually referred to as the "County" and "City" or collectively as "Appellants." Appellee, Save Our Beaches, Inc., will be referred to as "SOB." Appellee, Stop the Beach Renourishment, Inc., will be referred to as "STBR." Appellee, Department of Environmental Protection will be referred to as the "Department." Appellee, Board of Trustees of the Internal Improvement Trust Fund, will be referred to as the "Trustees."

The Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands will be referred to as the "Permit." The Beach and Shore Preservation Act, Sections 161.141-161.211, Florida Statutes, will be referred to as the "Act."

References to the record on appeal will cite to "R," followed by the appropriate volume, then appropriate page number. References to the DOAH final hearing transcript will cite to "T," then appropriate page number. References to the First District briefs will cite to "A" for the Initial Brief, "B" for the City/County Answer Brief, "C" for the Department Answer Brief, and "D" for the Reply Brief, then the appropriate page number. References to the First District opinion contained in the required attached appendix will cite to "Op" then the appropriate tab and page number.

STATEMENT OF THE CASE AND FACTS

The City of Destin and Walton County's beaches were critically eroded by Hurricane Opal in 1995 and also by subsequent hurricanes. (R:7; T:23). The 2004 Hurricane Ivan further eroded these beaches. (T:141). The Florida Legislature has declared that beach erosion is a "menace to the economy and general welfare of the people of this state." § 161.088, Fla. Stat. (B:43). The Beach and Shore Preservation Act provides the mechanism for local government to restore and nourish Florida beaches. §§ 161.011, et seq., Fla. Stat.

The Department of Environmental Protection declared the City and County's beaches critically eroded. (T:23; Op1:2). Pursuant to the Act, the City and County sought a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands from the Department of Environmental Protection to restore through nourishment 6.9 miles of their beaches declared to be critically eroded. (R1:7; T:23). The beach restoration would add sand to the seaward side of the beach. (R1:6-14). The project would widen the beach 210 feet and increase its elevation. (R1:6-14). The project would also restore dunes. (R1:7).

The mean high water line ("MHWL") is the boundary between submerged land owned by the State and those upland landowners

who border the MHWL.[1] §177.27(14), Fla. Stat. (C:2). In designated critically eroded shoreline areas, the Act requires the Board of Trustees of the Internal Improvement Fund to establish an erosion control line ("ECL"), which becomes the boundary for those landowners whose property borders the MHWL. §§ 161.141-161.211, Fla. Stat. (C:2).

The MHWL guides the Trustees in setting the ECL. (C:2-3). If setting the ECL requires an actual taking of a landowner's property, however, the Act requires that it be done by eminent domain. § 161.141, Fla. Stat. (C:3). Moreover, if the beach erodes landward of the ECL, the Act provides a mechanism to cancel the ECL if the agency responsible for the beach fails to restore the area. § 161.211(3), Fla. Stat. (C:3).

The Act only affects riparian rights in designated critically eroded shoreline areas. (Op1:7). Even in these areas, the Act only eliminates a landowner's common law rights to accretion and reliction, contact of the upland with the water, and risk of erosion. §§ 161.191(2) and 211(3), Fla. Stat. (B:24). All other common law riparian rights are reserved to the landowner, including the right of ingress, egress, view, boating, bathing, and fishing. § 161.201, Fla. Stat. (B:24).

[1] The MHWL is an average height of the high water over 19 years. The MHWL is the intersection of the tidal plane of mean high water with the shore. §§ 177.27(14)-(15). (C:2).

The State is prohibited from erecting any structures seaward of the ECL except those necessary to prevent erosion. (B:24).

Administrative rules were promulgated to assist the Trustees and Department in implementing their responsibilities regarding sovereign submerged lands. 18-21.002 (1), F.A.C. Rule 18-21.004, Florida Administrative Code, provides the criteria for the Department to determine whether to approve the requests for activities on sovereignty submerged land. Subsection (3) provides that none of the provisions of the rule "shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights. . ." Paragraph (3)(b) further provides:

> Satisfactory evidence of sufficient upland interest is not required. . . when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.

(Op1:5-6).

Based upon the authority vested in it by the Act, the Department issued a Notice of Intent to Issue the challenged Permit on July 15, 2004. (R:6). In conjunction with the proposed beach nourishment project, the Trustees adopted resolutions approving surveys of the ECL for the County and City. (R3:406).

Save Our Beaches, Inc. and Stop The Beach Renourishment, Inc. were formed in 2004 to, among other things, protect and defend private property rights. (R3:415). Both associations purported to represent landowners who claimed to be affected by the permit. (R3:415). They petitioned for formal administrative hearing, challenging issuance of the draft permit. (R3:406). STBR also petitioned for formal administrative hearing challenging the ECL. (R1:119). Because the ECL was already the subject of a circuit court lawsuit, STBR deferred the issues surrounding the constitutionality of the ECL. (T:98; R3:417).

In the Amended Petition, SOB and STBR claimed that the Permit and ECL resulted in an unconstitutional takings. (R1:123). After SOB and STBR conceded DOAH was without jurisdiction to entertain the constitutional issues, the administrative law judge ("ALJ") dropped the constitutional challenge from the administrative proceeding. (1:140, 143). Prior to the administrative hearing, SOB and STBR filed a separate action in circuit court in Leon County, Florida, challenging the facial constitutionality of the Act. (B:29).

The non-constitutional issues proceeded to administrative hearing. (T:1). SOB and STBR challenged whether: (1) the City and the County gave reasonable assurance that applicable water quality standards would not be violated; and (2) whether the

City and County had obtained, or were able to obtain, all requisite private property rights necessary to implement the proposed project. (R3:417). At the hearing, neither SOB nor STBR presented evidence of the Act's economic impact on its members' properties or of its members' investment-backed expectations. (T:147-187).

In the recommended order, the ALJ found that the City and County gave reasonable assurances that the applicable water quality standard would not be violated. (R3:422). The ALJ also held that the City and County had obtained the private property rights needed to implement the project. (R3:428). The ALJ recognized that, under Rule 18-21.004(3)(b), the City and County need not provide evidence of an upland interest if the beach nourishment activities did not unreasonably infringe on the landowners' riparian rights. (R3:425). The ALJ noted that SOB and STBR alleged the infringement of only two riparian rights: the right to accretion and the right to have the property contact the water. (R3:428). Because the Act eliminated these common law riparian rights, the ALJ reasoned that the City and County were not infringing on them, assuming the constitutionality of the Act. (R3:428). The ALJ recommended that the Department enter a final order issuing the permit. (R3:431).

The Department determined that the permit was properly issued pursuant to existing statutes and rules, including the Act; adopted the recommended order in its entirety; and entered its final order issuing the permit. (R3:398, 402).

SOB and STBR appealed to the First District Court of Appeal. (R3:436). They did not challenge the water quality finding adopted by the Department in its final order. (Op1:12). Rather, they argued that the Act was unconstitutional, as-applied, because it eliminated their riparian rights to accretion and reliction and to have their property contact the water. (Opl:12, 18).

In defense of this appeal, the City and County argued that neither SOB nor STBR had associational standing. (B:7). The First District agreed that SOB was without standing to bring associational claims. (Op1:13). However, the court found that STBR's members had sufficient adverse interests to justify associational standing. (Op1:13-15). The court rejected the City and County's argument that associational standing was unavailable when an association made an as-applied constitutional challenge. (Op1:14-15).

The City and County also maintained that the Act was not unconstitutional, on its face or as-applied. (B:30-40). The City and County clarified that despite SOB and STBR's as-applied constitutional challenge to the Act, their challenge was facial.

(B:25). The City and County explained that the Act did not take SOB or STBR's members' property because it did not physically invade or occupy the property, did not deprive the owners of all beneficial use of the entire parcels of property, and did not constitute a taking under the *Penn Central ad hoc* takings test. (B:49-46).

The First District found the Act unconstitutional as-applied. (Op1:2). The court agreed with STBR that its members' riparian rights to: (1) receive accretions and relictions to the property; and (2) have the property's contact with the water remain intact, were eliminated by the Department's final order, which applied the Act. (Op1:18). Thus, the court held that the Act as-applied resulted in a taking of STBR members' property without an eminent domain proceeding as required by Section 161.141, Florida Statues, and was therefore unconstitutional. (Op1:18).

The State, City, and County moved for rehearing and certification. (Op2:1). The First District granted the certification motion to the extent that it certified the following question to be 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?

(Op2:2).

This timely appeal followed.

STANDARD OF REVIEW

The determination of a statute's constitutionality is a question of law reviewed *de novo* by this Court. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). "While we review decisions striking state statutes *de novo*, we are obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." *Dept. of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005).

SUMMARY OF ARGUMENT

The First District held that the Beach and Shore Preservation Act, as applied to STBR members, unconstitutionally deprived them of two riparian rights without compensation. In reaching this conclusion, the First District incorrectly segmented the two riparian rights from each of the STBR members' individual properties as a whole. In turn, the First District employed the wrong takings analysis. These errors led the First District to find a taking where none had occurred.

As regulatory takings law evolved under Florida and federal law, courts do not sever some property rights from the entire parcel and determine whether that segment was taken. Courts analyze the impact of a regulation on the parcel as a whole. The First District failed to apply this non-segmentation rule.

Under modern regulatory takings jurisprudence, courts created two categorical or *per se* takings test. A regulation that causes physical occupation or invasion is automatically a taking no matter how small the invasion. Likewise, a regulation that deprives a landowner of all beneficial use is a *per se* taking. The First District did not apply these tests or find a physical invasion or deprivation of all economically beneficial use. No categorical regulatory takings of their property occurred without a physical invasion or deprivation of all use of STBR members' property.

Where there is no categorical regulatory taking, courts apply the *Penn Central ad hoc* multi-factor balancing test. This test requires proof of: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government invasion.

The First District should have but did not apply the *Penn Central ad hoc* test. If it had, the court could only have concluded that the Act did not unconstitutionally take STBR members' property rights. The STBR members did not prove either the Act's economic impact on their properties or how the Act deprived them of their investment-backed expectations. Nor should the court have found STBR had standing to bring this claim. Associations are without standing to bring as-applied takings claims on behalf of their members.

The Act is a valid exercise of the police power to restore and nourish beaches in critically eroded areas of the State with only minimal impact on property owners. For all practical purposes, the STBR members retain the same use and enjoyment of their entire property as they had prior to the Act. Nothing in this record suggests that prevention of erosion will do anything other than enhance the value of their property. Under the applicable as-applied *Penn Central ad hoc* analysis, the Act is clearly constitutional.

ARGUMENT

I. THE FIRST DISTRICT IMPROPERLY HELD THAT STBR MEMBERS' COMMON LAW RIPARIAN RIGHTS WERE UNCONSTITUTIONALLY TAKEN BY THE ACT WITHOUT CONDUCTING ANY ANALYSIS UNDER APPLICABLE REGULATORY TAKINGS TESTS.

The First District did not attempt to construe the Act in a manner that would render it constitutional. Instead, it failed to apply well-established regulatory takings tests and created a new *per se* takings rule for riparian rights. The result is a decision that deviates greatly from modern takings jurisprudence in order to invalidate legislation that is of critical importance to the entire state.

A. The Legislature's Partial Elimination of Common Law Riparian Rights in Critically Eroded Beach Areas

The Legislature adopted the Act to establish a comprehensive regulatory program for beach restoration and nourishment in critically eroded shoreline areas. § 161.088, Fla. Stat. Finding that "beach erosion is a serious menace to the economy and general welfare of the people of this state" which has reached "emergency proportions,"[2] the Legislature directed the Department to designate critically eroded beaches, and develop "a comprehensive long-term management plan for the

[2] The Legislature also found that beach erosion is "detrimental to tourism, the state's major industry, further exposes the state's highly developed coastline to severe storm damage, and threatens beach related jobs," § 161.091(3), Fla. Stat.

restoration and maintenance of" those beaches. § 161.101(1) and 161(1).

Implementation of the plan requires the location of an erosion control line by the Trustees at the existing MHWL. After the ECL is located, the Trustees are required to record a survey of the line in the public records of the local government. §§ 161.161(3)-.181, Fla. Stat. Upon recording of the survey, the common law of riparian rights is modified as provided in Sections 161.191 and 161.201, Florida Statutes.

By virtue of legislative enactment, the common law of England applies in Florida. § 2.01, Fla. Stat. Accordingly, the common law may be repealed or modified by state statute so long as it does not violate the Constitution. *State v. Egan*, 287 So. 2d 1, 5 (Fla. 1973); *see also Board of Trustees of the Internal Improvement Trust Fund v. Sand Key*, 512 So. 2d 934, 937 (Fla. 1987) (noting legislative modifications to the common law of riparian rights). However, to change the common law, a statute "must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard." *Carlile v. Game and Fresh Water Fish Commission*, 354 So. 2d 362, 364 (Fla. 1977); *Saunders v. Saunders*, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001) ("The common law is changed where a statute clearly, unequivocally, and

specifically prescribes a different rule of law from a common law rule.").

The Act clearly and unequivocally changes the common law of riparian rights in critically eroded areas in Florida. Under the common law, riparian rights included the right to receive future accretions and relictions and the right to have the riparian property's contact with the water remain intact. *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934, 936 (Fla. 1987). The Legislature's intent to change the common law with regard to these riparian rights in critically eroded areas is manifest in the express language of the Act.

Section 161.191(2), Florida Statutes, states in part:

> (2) Once the erosion control line along any segment of the shore line has been established in accordance with the provision of §§ 161.141-161.211, **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 or by any other natural or artificial process**, except as provided in sections 161.211(2) and (3).[3]

(emphasis added). Section 161.201, Florida Statutes, then provides in part:

> Any upland owner or lessee who by operation of §§ 161.141-161.211 ceases to be holder of

[3] Sections 161.211(2) and (3), Florida Statutes, provide for cancellation of the erosion control line and the changes in the common law under certain conditions.

> 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). . . .**

(emphasis added). Thus, as both the Department and the First District concluded, the Act "clearly, unequivocably, and specifically" changes the common law of riparian rights by eliminating the riparian rights referenced above in critically eroded areas.

If the Act's regulatory scheme results in a taking of common law riparian property rights, the taking is regulatory in nature. Therefore, the regulatory takings tests formulated by the United States Supreme Court and this Court must be applied.

B. The Florida and Federal Tests For Determining Regulatory Takings

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V. Florida's Constitution includes a similar limitation: "No private property shall be taken except for a public purpose and with full compensation."[4] Art. X, § 6(a), Fla. Const. The Takings Clause "is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn*

[4] The federal Takings Clause is applicable to the States through the Fourteenth Amendment. *Dolan v. City of Tigar*, 512 U.S. 374, 383 (1994).

Central Transp. Co. v. City of N.Y., 438 U.S. 104 (1978). As evidenced by numerous Florida takings cases, Florida courts generally interpret the State's Takings Clause in a manner consistent with the United States Supreme Court's interpretation of the counterpart federal Takings Clause.

Under both Takings Clauses, a regulation may go so far as to constitute an unlawful taking of private property. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922); *Graham v. Estuary Properties*, 399 So. 2d 1374, 1380-81 (1981). The courts have devised various tests for determining when a regulation goes too far. These tests include the non-segmentation rule, two categorical tests, and one *ad hoc* balancing test.

1. The Non-Segmentation Or Parcel As A Whole Rule

Unless a regulation causes a physical invasion or occupation, a regulatory takings analysis always focuses on "the interference with rights in the parcel as a whole. . . " *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978). Under this rule, also known as the non-segmentation rule, the property is not divided into "discrete segments," but rather it is examined as a whole. *Id*. The United States Supreme Court recently reaffirmed this rule:

> Takings' jurisprudence ***does not divide a single parcel into discrete segments*** and attempt to determine whether rights in a particular segment have been entirely

> abrogated. In deciding whether a particular governmental action has effected a takings, ***this Court focuses rather*** both on the character of the action and on the nature and extent of the interference with rights ***in the parcel as a whole…***

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002)(emphasis added) (quoting *Penn Central*, 438 U.S. at 130-31).

Florida courts have consistently recognized and applied the non-segmentation rule. *See, e.g., Palm Beach County v. Wright*, 641 So. 2d 50, 54 (Fla. 1994) (quoting *Penn Central's* statement of the non-segmentation rule.); *State Department of Environmental Regulation v. MacKay*, 544 So. 2d 1065, 1066 (Fla. 3d DCA 1989) (citing *Penn Central*); *State Department of Environmental Regulation v. Schindler*, 604 So. 2d 565, 568 (Fla. 2d DCA 1992) (citing the non-segmentation rule); *Florida Game and Fresh Water Fish Commission v. Flotilla, Inc.*, 636 So. 2d 761, 765 (Fla. 2d DCA 1994) (citing *Penn Central*).

Further, under this rule, the nature of the segmentation is immaterial. In regulatory takings analyses, property will not be conceptually severed, physically, temporally, or functionally. *Tahoe-Sierra*, 535 U.S. at 318. For example, physically, neither the air space, *Penn Central*, 438 U.S. at 130-31, nor subsurface rights, *Keystone Bituminous Coal*, 480 U.S. 470, 498-99 (1987), nor a portion of the land surface,

Graham v. Estuary Properties, 399 So. 2d at 1382, will be severed from the remainder of the parcel. Functionally, a particular use of property that has been prohibited will not be severed from other permitted uses, *Andrus v. Allard*, 444 U.S. 51 (1979). Temporally, a segment of time, such as a three-year moratorium, will not be conceptually severed from the remainder of a fee simple estate, *Tahoe-Sierra*, 535 U.S. at 331.

To illustrate, in *Florida Game and Fresh Water Fish Commission v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. 2d DCA 1994), a landowner owned 173 acres of undeveloped property. As a condition of development approval, the landowner was required to set aside approximately 43 acres as habitat preserves to protect endangered eagles. In the landowner's inverse condemnation claim, the trial court segmented the 48 acres and determined that they had been unlawfully taken. The Second District ruled that the trial court committed error: "Prohibition of development on certain portions of a tract does not, however, amount to an unconstitutional takings." *Id.* at 765. Citing *Penn Central*, the court concluded that "[b]ecause the property as a whole retained an economic life, we cannot agree that the land use restrictions are compensable." *Id.*

2. Categorical or *Per Se* Takings Tests

The Supreme Court has recognized "at least two discrete categories of regulatory action as compensable without case-

specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. The first includes actions that result in a physical "invasion" of private property. *Id.* The second includes regulatory actions that deny "all economically beneficial or productive use of land." *Id*. Regulations which violate these tests result in *per se* takings.

a) The *Loretto* physical occupation test

The Supreme Court established this categorical or *per se* test in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982). There, a New York regulation required a landlord to permit a cable television company to install its cable facilities upon appellant's roof and the side of her building. The Court concluded "that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve" and no matter how small the invasion. *Id*. at 426.

The Supreme Court has continued to adhere to this principle. In *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), the court stated:

> 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, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.

Id. at 322 (citations omitted)(emphasis added).

This Court and other Florida courts have followed the *Loretto* physical invasion test to determine if there is a categorical or *per se* taking. *Storer Cable T.V., Inc. v. Summerwinds Apartments Associates, Ltd.*, 493 So. 2d 417, 419 (Fla. 1986); *Certain Interested Underwriters at Lloyd's London v. City of St. Petersburg*, 864 So. 2d 1145, 1148 (Fla. 2d DCA 2003).

b) The *Lucas* deprivation of all economically beneficial use test

The second categorical or *per se* takings test was adopted by the Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The South Carolina legislature enacted a statute which prohibited the petitioner from building any permanent habitable structures on his two barrier island lots. 505 U.S. at 1003. Lucas brought suit in state court claiming that the legislation effected a taking requiring compensation. *Id*. at 1009. The trial court agreed, finding that Lucas's two beachfront lots were rendered valueless by the legislation's ban on construction.

The Supreme Court in *Lucas* found the state statute unconstitutional on its face. It acknowledged the recognition in its takings jurisprudence of at least two forms of regulatory action which require compensation without a usual case-specific

inquiry into the public interest advanced in support of the restraint: (1) where the regulation compels the property owner to suffer a physical invasion, or (2) where the regulation "denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. The Court explained that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is to leave his property economically idle, he has suffered a taking." *Id.* at 1019.

3. The *Penn Central Ad Hoc* Takings Test

In cases where there is no categorical or *per se* taking, the courts apply the *Penn Central ad hoc* multi-factor balancing test. *Lucas*, 505 U.S. at 1019-20, n. 8. In *Penn Central*, the Supreme Court described this test as an essentially *ad hoc*, factual inquiry which evaluates several factors. The court identified three factors of particular significance: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government invasion. *Penn Central*, 438 U.S. at 124.

The Supreme Court in *Tahoe-Sierra* reaffirmed that the *Penn Central* test provides the proper analytical framework for a takings claim when a land use regulation does not result in a categorical or *per se* taking. *Tahoe-Sierra*, 505 U.S. at 1019-

20, n. 8. *See also Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 871, n. 12 (Fla. 2001). This Court has recognized and applied the *Penn Central ad hoc* test. *See Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1380 (Fla. 1981) (identifying factors to be considered); *Palm Beach County v. Wright*, 641 So. 2d at 54.

C. The First District's Failure to Discuss or Apply Established Regulatory Takings Tests

The First District held "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." (Op:23). More specifically, the Court held that elimination of only two of the bundle of riparian rights without compensation was an unconstitutional taking. (Op:18, 22).

In reaching this conclusion, the First District did not discuss or apply any of the established regulatory takings test. The Court did not consider or determine whether the Act resulted in a physical occupation or invasion of STBR members' property, *Loretto*, *supra*; it did not consider or determine whether the Act deprived the members of all economically beneficial use of their property, *Lucas*, *supra*; and it did apply or analyze the Act's impact under the *Penn Central ad hoc* multi-factor balancing

test. Not surprisingly, therefore, the First District cited no regulatory takings cases in its decision.

Instead, the court's holding is based on the following flawed reasoning:

(1) Riparian rights are property rights that cannot be taken without just compensation (Op:15);

(2) Common law riparian rights include the right to receive future accretions and relictions to the property and to have the property's contact with the water remain intact (Op:18);

(3) As applied, the Act eliminates these two common law riparian rights (Op:18);

(4) The Act's attempted "reservation" of riparian rights is legally invalid (Op:23); and

(5) These riparian rights were eliminated "without an eminent domain proceeding as required by Section 161.141." (Op:18).

Although decisions from this Court and the district courts of appeal refer to riparian rights as property rights which may not be taken without just compensation, these cases are factually distinguishable and did not involve regulatory takings. These decisions were either rendered, or relied on cases decided, long before the development of modern regulatory takings jurisprudence. With one exception, these cases do not

discuss the tests courts should employ to determine whether a regulatory taking of property occurred without just compensation.

The First District cited four of these cases. *Thiesen v. Gulf, F. & A. Ry. Co.*, 78 So. 491 (Fla. 1918), involved an act which authorized the City of Pensacola to convey the submerged land between the high and low water marks to a private railroad company which then filled in the submerged lands and constructed railroad tracks across the filled in land, thereby depriving the riparian landowner of his common law right of access to the water. *Id*. at 491, 505, 507. In holding that the railroad company had deprived the riparian landowner of his right of access to the water, the court observed that a riparian owner's common law riparian rights "constituted property of which he cannot be deprived without just compensation." *Id*. at 506. This case did not involve a regulatory taking nor did the court discuss the test to be applied to an alleged regulatory taking of riparian rights.

Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates-Ltd., 512 So. 2d 934 (Fla. 1987), also did not involve a regulatory takings claim. It decided a dispute between the Trustees and the riparian landowner over title to **existing, already accreted lands**. The Trustees claimed that the accreted lands were created by the State's public beach

renourishment program, and that title to these lands remained in the State under both common law and Section 161.051, Florida Statutes, because they had been created by the State. *Id*. at 934. In rejecting both the common law and statutory claims made by the Trustees, the Court, *in dicta*, noted that riparian rights are property rights which may not be taken without just compensation. *Id*. at 936.

Lee County v. Kiesel, 705 So. 2d 1013 (Fla. 2d DCA 1998), involved a physical taking. The court held that the construction of a bridge on adjacent property physically and substantially obstructed the Kiesel's riparian right of view. *Id*. at 1014. Significantly, while rejecting the County's argument that Kiesel was entitled to compensation only if the bridge "deprived them of substantially all beneficial use of their property," the *Kiesel* court noted that this takings test "would apply if this case involved a 'regulatory taking.'" *Id*. at 1015.

Kendry v. State Road Dep't, 213 So. 2d 23 (Fla. 4th DCA 1968), also did not involve a regulatory taking, and it does not discuss the analytical framework to be used in a regulatory takings claim. Rather, it involved the issue of whether a complaint should have been dismissed for failure to state a cause of action. The court held that the complaint should not have been dismissed because its allegations that the state road

department filled submerged lands in the Indian River adjacent to plaintiff's land were sufficient "to show a complete appropriation of the plaintiff's riparian rights and thus a taking without just compensation." *Id*. at 28.

The First District also held that the preservation of common law rights in Section 161.201, Florida Statutes, cannot save the Act. Citing *Belvedere Dev. Corp. v. Department of Transportation*, 476 So. 2d 649 (Fla. 1985), the court ruled "that the riparian rights cannot be constitutionally reserved to the landowners." (Op1:23). Thus, according to the First District, because the statutory reservation is legally invalid, the Act, as applied, deprives the STBR members of riparian rights.

The First District's reliance on *Belvedere* is misplaced. *Belvedere* involved a condemnation action in which the Department of Transportation took upland property by eminent domain, but attempted to "reserve" the riparian rights to the landowner in order to avoid paying full compensation to the landowner. This Court expressly declined to hold "that riparian rights are never severable from the riparian lands," but did hold, "in the context of condemnation of property . . . that the act of condemning a landowner's uplands without compensating the owner for riparian property rights was an unconstitutional taking." *Id*. at 652. Obviously, the instant case does not involve an

effort by the State to condemn the uplands of STBR members without paying them for their riparian rights. Indeed, the very purpose of Section 161.201 is to preserve not only all of an owner's upland property but also all of the upland owner's riparian rights, except the right to future accretions or relictions.

The First District's misapplication of *Belvedere*, when combined with its misinterpretation of Section 161.141, Florida Statutes, levels a potentially fatal blow to the Act. Based on its interpretation of Section 161.141,[5] the court concludes that the riparian rights must be taken through eminent domain proceedings. (Op:18). Based on its misreading of *Belvedere*, moreover, the Court ruled that riparian rights cannot be severed from the uplands absent the upland owner's agreement. (Op:22). Thus, the Court has held in effect that the only way for the State to extinguish lawfully the riparian rights of accretion and reliction in critically eroded shoreline areas is to condemn all of the riparian upland properties in their entirety. The cost of such an endeavor is likely to be financially prohibitive. This dire result will be avoided if the appropriate regulatory takings analysis is applied in this case.

[5] Section 161.141, Florida Statute, as properly interpreted in the context of the entire Act, is intended to require eminent domain if the state actually physically appropriates upland property. There has been no such physical appropriation in this case.

The First District should have analyzed STBR's takings claim as a regulatory taking. *See Lee County v. Kiesel*, 705 So. 2d at 1015. *See also R. W. Docks & Slips v. State of Wisconsin*, 628 N.W. 2d 781, 789-90 (Wis. 2001) (holding that a takings claim based on interference with the riparian right of access is subject to the *Penn Central ad hoc* test). As demonstrated below, if the First District had conducted the appropriate analysis, it would have concluded that there was no unconstitutional taking in this case.

II. THE ACT DOES NOT UNCONSTITUTIONALLY TAKE THE PROPERTY RIGHTS OF STBR MEMBERS.

Applying the legal principles discussed above, the First District legally erred when it held the Act unconstitutional. The Court erroneously concluded that two riparian rights can be segmented from the "parcel as a whole" to determine whether a taking occurred. The Court failed to recognize that there has been no physical invasion, *a la Loretto*, or deprivation of all economically beneficial use, *a la Lucas*, and that the *Penn Central ad hoc* test must be applied. If the First District had applied the appropriate regulatory takings tests, it could have only determined that the Act is a reasonable regulation of property rights that does not result in a taking of the STBR members' property rights.

A. No Physical Invasion or Occupation of Property

The Act as applied has not caused a physical invasion or occupation of the property of STBR members, and the First District made no such finding. Although the Act eliminates the landowner's right to any additional upland property that may arise from future accretion or reliction, this involves property that has not yet come into existence, and its future existence is hugely speculative. Thus, the State cannot physically invade or occupy something that does not exist. The idea that the Act physically invades property that does not yet exist and may never exist, *i.e.*, land created by future accretion or reliction, cannot seriously be entertained. No taking has occurred under the *Loretta per se* test.

B. The Subject Riparian Rights Cannot Be Separated From the Parcel As A Whole To Determine Whether There Has Been A Taking

As discussed above, in determining whether there has been a taking of the STBR members' property, each parcel of property must be considered as a whole where there has been no physical occupation or invasion of the property. "Petitioners' 'conceptual severance' argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'" *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. at 331. Thus, the property of each of the STBR members must be evaluated as a

whole, including the riparian rights, which are only one of several sticks in the entire bundle of property rights.

The First District violated the non-segmentation rule and focused solely on two riparian rights, failing to view the parcel as a whole. Moreover, assuming the riparian rights could be severed and treated as the denominator for the takings analysis, the First District conceptually severed only two of those rights instead of considering the entire bundle of riparian rights. In addition to the right of accretion and reliction, common law riparian rights include the right to general use of the water adjacent to the property; to wharf out to navigability; access to navigable waters; the right to an unobstructed view of the water; and rights of ingress, egress, boating, bathing, and fishing.

Ironically, the First District's severance of the two riparian rights for its takings analysis is inconsistent with its reliance on *Belvedere Dev. Corp. v. Department of Transp., Div. of Admin.*, 476 So. 2d 649, 652 (Fla. 1985), to justify its conclusion that riparian rights cannot be severed and reserved to the landowner to avoid a taking. Like STBR in the court below, the First District contends that the riparian rights can be severed for one purpose but not for another.

The result of the First District's departure from established takings jurisprudence is the creation of new *per se*

takings rule for riparian rights. There is no compelling reason why these rights should be treated any differently than any other stick in the bundle of property rights.

C. No Deprivation of All Economically Beneficial Use

The *Lucas per se* takings test is obviously not satisfied in this case. STBR members have not been deprived of all economically beneficial use of their property; the First District made no such finding. They retain not only economically beneficial uses of their upland property but also all riparian rights except the two eliminated by the Act. Thus, because neither the *Loretta* or *Lucas per se* takings tests apply, the *Penn Central ad hoc* test is the proper framework for the takings analysis. *Tahoe-Sierra*, 535 U.S. at 331.

D. No Facial Taking

As earlier discussed, a regulation may be challenged as a facial or an as-applied taking. A facial challenge contends that the regulation on its face, as enacted, constitutes a taking. *Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990); *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. at 493. The test in a facial takings claim is whether the regulation, as enacted, "denies an owner economically viable use of his land." *Id*. at 495. An as-applied challenge, on the other hand, evaluates the impacts of the application of a regulation on a particular parcel of land. *Glisson v. Alachua*

County, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990); *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. at 493.

The First District accepted STBR's contention that it was asserting an as-applied claim and treated it as such. Thus, if the court's characterization of the claim is correct, the facial takings test is not applicable.

Arguably, however, STBR's claim is a facial challenge. In its Initial Brief in the First District, STBR argued:

> The unconstitutional application of the Act by the Final Order should not be allowed to hide behind the unconstitutional Act. If the Act is unconstitutional because it takes riparian rights, then it must follow that a permit issued pursuant to that Act results in an unconstitutional taking.
>
> and
>
> If the statute is unconstitutional, the [Permit] is as well.

(A:12, 23). Indeed, in the very brief DOAH hearing, STBR presented its case as if it were a facial challenge. For example, no evidence was presented to establish the reasonable investment expectations of the STBR members or the economic impact of the Act on their individual properties. (T:147-187).

Nevertheless, STBR has postured its claim as an as-applied challenge. No doubt this is because it could not possibly satisfy the facial takings test. The STBR members have clearly not been deprived of all economically beneficial use of their

properties because they have the use of their upland property and retain most of their common law riparian rights.

E. No As-Applied Taking Under Penn Central

The *Penn Central ad hoc* test focuses on three factors of particular significance: (1) the economic impact of the regulation on the property owner, (2) the extent to which the regulation has interfered with distinct investment backed expectations, and (3) the character of the government invasion. *Penn Central*, 438 U.S. at 124; *see also Graham v. Estuary Properties*, 399 So. 2d at 1380.

Regarding the economic impact factor, the STBR members must establish "a serious financial loss from the regulatory imposition." *Leon County v. Gluesenkamp*, 873 So. 2d 460, 467 (Fla. 1st DCA 2004). The focus is on the change in fair market value of the property. In other words, the court must compare the value that has been taken from the property with the value that remains in the property. *Id*. at 467; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497. There is not one shred of evidence in this record to establish any change in the market value of STBR members' property or, for that matter, any other economic impact on their property.

Moreover, the right to future accretion and reliction is purely speculative. No record evidence shows that accretion or reliction will or is even likely to occur. The record evidence

proves only that the property has severely eroded. In the absence of a beach nourishment project, erosion is likely to continue. The right to future accretions and relictions is so speculative that their loss is unlikely to have any significant impact on STBR members' property. See *Coastal Petroleum v. Chiles*, 701 So. 2d 619, 625 (Fla. 1st DCA 1997) (holding that right to royalties to oil and gas in offshore areas if the State leased such areas to parties who might drill for oil and gas was too speculative to be protected by inverse condemnation action.)

As the party bearing the burden of showing the Act was unconstitutional as applied, the STBR members should have rendered evidence of the economic impact of the Act on their property. They failed to carry this burden.

Similarly, regarding the second *Penn Central* factor, the STBR members failed to sustain their burden of proving the extent to which the regulation has interfered with their distinct investment-backed expectations. The record is devoid of evidence on this important factor.

Finally, the *Penn Central ad hoc* test requires the court to review the character of the governmental action which "is critical in takings analysis." *Keystone*, 480 U.S. at 488. With respect to this factor, "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by government. . . than when interference

arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124.

The governmental action in this case does not physically invade private property and is clearly an exercise of the police power to prevent public harm and promote the common good. In the exercise of its constitutional duty and power to conserve and protect the state's natural resources and scenic beauty,[6] the Legislature adopted the Act to abate beach erosion, "a menace to the economy and general welfare of the people" which is of "emergency proportions." Fla. Stat. § 161.088. Abating this critical problem is undeniably a legitimate public purpose, and the Act's comprehensive plan to achieve that purpose in critically eroded areas is rationally related to that purpose. *See Haire v. Florida Dep't of Agriculture and Consumer Serv.*, 870 So. 2d 774, 782 (Fla. 2004). Thus, the Act is a valid exercise of the police power and is not a taking because STBR members still have reasonable uses of their property. *Glisson v. Alachua County*, 558 So. 2d 1030, 1035 (Fla. 1st DCA 1990).

---

[6] Article II, Section 7 of the Florida Constitution provides, in pertinent part:
(a) It should be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provisions shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

Additionally, the Act is designed to have minimal impact on affected private landowners. It applies only in designated critically eroded areas. The landowners in these areas retain all of their riparian rights except the highly speculative rights of accretion and reliction. They will be primary beneficiaries of the Act because beach erosion will be abated on their properties and their beaches will be restored and maintained. This enhancement in value is likely to more than offset any decrease caused by the loss of only two of their riparian rights. *See Palm Beach County v. Wright*, 641 So. 2d at 51-52 (in rejecting a regulatory takings challenge to designation of public transportation corridors over private property, this Court noted that those landowners closest to the corridors were likely to benefit the most). Because the Act does not interfere with landowners' property in a substantial way, it does not amount to a taking and is a lawful exercise of the police power. *Anhoco Corp. v. Dade County*, 144 So. 2d 793, 798 (Fla. 1962).

Finally, the Act itself reflects that it is not intended to authorize either physical or regulatory takings without compensation. If implementation of the Act requires actual physical appropriation of private property, Section 161.141, Florida Statutes, provides that the taking must be accomplished by eminent domain proceedings. If there is an alleged

regulatory taking, Section 161.212, Florida Statutes, provides landowners with a statutory action for compensation in circuit court in addition to their constitutional right to file an inverse condemnation action. STBR and its members have not pursued these remedies and, therefore, have not been denied compensation.[7]

Accordingly, when the character of the governmental action is this case is considered along with the lack of any evidence of economic impact or interference with reasonable investment-backed expectations, it is clear that under the applicable *Penn Central ad hoc* test no regulatory taking has occurred.

F. Because the Act Is Constitutional, The City and County Need Not Provide Evidence Of Sufficient Upland Interest

The First District concluded that Section 161.191(2), Florida Statutes, deprives STBR's members of certain constitutionally protected riparian rights without just compensation. Based on that finding, the First District held that: "because those riparian rights have been infringed, contrary to the Department's ruling, satisfactory evidence of sufficient upland interest required by rule 18-21.004(3) must be provided." (Op1:18). The First District Court remanded the

[7] *See Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (No constitutional violation occurs under Fifth Amendment "until just compensation has been denied.")

case to the Department to provide satisfactory evidence of sufficient upland interest pursuant to Rule 18-21.004(3)(b), Florida Administrative Code.

Subsequently, the First District certified the following question of great public importance to this Court:

> Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applies 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 unreasonable infringe on riparian rights, does not apply?

Because the Act is constitutional, the Act does not infringe, unreasonably or otherwise, on riparian rights. STBR presented no evidence in the administrative hearing to demonstrate any other basis for a determination that riparian rights are unreasonably infringed upon. Therefore, the City and County are exempt pursuant to Rule 18-21.004(3)[8], Florida Administrative Code, from the requirement to provide satisfactory evidence of sufficient upland interest.

[8] Arguably, the City and County are also exempt from providing evidence of sufficient upland interest under Rule 18-21.004(3), Florida Administrative Code, since that rule only applies to the acts of the permittees. The riparian rights affected by Section 161.191, Florida Statutes, are not affected by any actions of the City or County, but rather by the recordation of the ECL which is an act of the Trustees.

III. THE FIRST DISTRICT INCORRECTLY HELD THAT STBR HAS ASSOCIATIONAL STANDING TO BRING AN AS-APPLIED TAKINGS CHALLENGE TO THE ACT.

Assuming STBR has brought an as-applied takings challenge, the First District incorrectly held that STBR had associational standing to do so. As this Court held in *Florida Home Builders Ass'n v. Dept. of Labor and Employment Sec.*, 412 So. 2d 351, 353 (Fla. 1982), an association has standing to bring suit on behalf of its members only 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.**

In the First District, the City and County argued that STBR could not meet the third prong of the *Florida Home Builders'* associational standing test in an as-applied takings claim that is subject to the *Penn Central ad hoc* takings test. (B:9-10). The analysis under this test is not conducive to generalizations, but must focus on the specifics of each parcel of land. "[T]he takings analysis will depend on the facts of each individual parcel of land, including the length of time that the homeowner has owned the land, the investment-backed expectations of the homeowner, and the use that the homeowner

desires for her property." *Id.* at 353 citing *Penn Central*, 438 U.S. at 124.

The First District, in peremptorily rejecting the City's and County's standing argument, relied solely on two federal cases: *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). Neither case supports the proposition that STBR has associational standing to bring an as-applied takings claim. *Pennell* involved a ***facial*** takings claim which the Court expressly stated "does not require the participation of individual [members]" of the association. *Pennell*, 485 U.S. at 7 n. 3. In *Hunt*, which involved a constitutional challenge to a statute but not a takings claim, the Court held that the relief sought in that case did not require participation by individual members. *Hunt*, 432 U.S. at 344.

Further, while apparently no Florida court has addressed this precise issue, federal courts routinely deny associational standing in as-applied takings challenges.[9] *See, e.g., Greater Atlanta Home Builders Ass'n v. City of Atlanta*, 149 Fed. Appx. 846 (11th Cir. 2005)(associations lacked standing to bring their

[9] These federal decisions are persuasive authority because this Court based its associational standing rule in *Florida Home Builders*, 412 So. 2d 353 (1982), on the federal associational standing rule enunciated in *Warth v. Seldin*, 422 So. 2d 490, 511 (1975) and *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

takings claims challenging a city's expenditure of development impact fees imposed on new development projects because the economic impact varied depending upon the economic circumstances of each of the associations' members, requiring the participation of those members); *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591 (2d Cir. 1993)(association lacked standing to bring suit to obtain declaratory and injunctive relief from rent stabilization scheme where the individual participation of landlords was required to determine when a taking occurred).

In *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 365 F. Supp. 2d 1146, 1165 (D. Nev. 2005), the court acknowledged the general judicial consensus that an association lacks standing to assert an as-applied takings challenge under *Penn Central.* The court explained the reasoning behind this rule:

> Facial challenges by their very nature focus on the mere enactment of the statute or ordinance. This is distinct from an as applied challenge that will differ in application and analysis depending on the specifics of the person challenging the government action.

Id. at 1164.

The fact that STBR did not seek money damages does not alter this analysis. The *Comm. for Reasonable Regulation* court recognized that seeking equitable relief does not *per se* overcome the third prong of associational standing. *Id*. at 1163

citing *Hunt*, 432 U.S. at 343 (stating that associational standing is only proper "if neither **the claim asserted** nor the relief requested requires the participation of individual members in the lawsuit")(emphasis added).

Accordingly, the First District's holding that STBR had standing to bring an as-applied takings challenge to the Department Permit and/or the Act is erroneous and should be reversed.

CONCLUSION

For all the foregoing reasons, this Court should answer the certified question in the negative. The Act is constitutional, facially and as-applied. The First District failed to apply the proper regulatory takings analysis. The district court should have applied the *Penn Central ad hoc* takings test to the STBR members' property as a whole. Instead, the First District improperly severed the two riparian rights from the parcels as a whole and categorically held that these rights were unconstitutionally taken. If the court had applied the appropriate tests, it could have only correctly concluded that no unconstitutional taking has occurred.

Respectfully submitted,

Kenneth J. Plante
Florida Bar Number 444790
ROETZEL & ANDRESS, LPA
225 S. Adams St., Suite 250
Tallahassee, Florida 32301
Telephone: (850) 222-7718
Facsimile: (850) 222-8222
kplante@ralaw.com

_____

Thomas G. Pelham
Florida Bar Number 138570
FOWLER WHITE BOGGS BANKER P.A.
Post Office Box 11240
Tallahassee, Florida 32302
Telephone: (850) 681-0411
Facsimile: (850) 681-6036
tpelham@fowlerwhite.com

Hala Sandridge
Florida Bar Number 0454362
FOWLER WHITE BOGGS BANKER P.A.
Post Office Box 1438
Tampa, Florida 33601
Telephone: (813) 228-7411
Facsimile: (813) 229-8313
hsandrid@fowlerwhite.com

Co-Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U.S. Mail on October 20, 2006 to:

Richard S. Brightman, Esq.
Dan R. Stengle, Esq.
D. Kent Safriet, Esq.
HOPPING GREEN & SAMS, P.A.
Post Office Box 6526
Tallahassee, Florida 32314
Counsel for Respondents

Gregory M. Munson, General Counsel
Kathy Funchess, Esq.
Florida Dept. of Environmental Protection
3900 Commonwealth Blvd., MS #35
Tallahassee, Florida 32399
Counsel for Dept. of Environmental Protection

_____
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is printed in Courier New 12.

_____
Attorney