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' REPLY BRIEF ON THE MERITS

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INTRODUCTION

Respondent Stop the Beach Renourishment, Inc. ("STBR"), asks this Court to uphold the First District's unnecessary invalidation of police power legislation that is critically important to Florida's economy, environment, and public welfare. The First District, at STBR's urging, held that the Act unconstitutionally deprives STBR members of their riparian rights based on this Court's decision in Belvedere Dev. Corp. v Department of Transportation, 476 So. 2d 649 (Fla. 1985). Rarely has a case been so abused and misused. Belvedere, which rejected DOT's outrageous scheme to physically take private riparian property without paying for the riparian rights, is clearly distinguishable from the state legislature's abatement of the public nuisance of critically eroded beaches. This Court should reject the inappropriate extension of its Belvedere decision to the substantially different facts of this case.

The First District and STBR have ignored that in the Act the Legislature has changed the common law of riparian rights. Instead, they rigidly adhere to earlier judicial pronouncements regarding riparian rights that addressed different times and different circumstances. However, this Court has observed that the Legislature has the power to modify the common law, State v. Eagan, 287 So. 2d 1, 6-7 (Fla. 1973), and also that courts, in applying the common law, may "develop and announce new

principles made necessary by changes wrought by time and circumstance" because:

> The common law has not become petrified; it does not stand still. It continues in a state of flux. And, **its ever present fluidity enables it to meet and adjust itself to shifting conditions and new demands**. It has been described as a leisurely stream that has not ceased to flow gently and continuously in its proper channel, at times gradually and imperceptibly eroding a bit of the soil from one of its banks and at other times getting rid of and depositing a bit of silt. In view of our English heritage, it is unthinkable that judicial limbo should be its destiny.

Id. at 7 (emphasis added).

All property is subject to the police power and "may be regulated and restricted for the public welfare and without compensation when not done arbitrarily, needlessly or oppressively." Hav-A-Tampa Cigar Co. v. Johnson, 5 So. 2d 433, 437 (Fla. 1942). The Act is a reasonable exercise of the police power which only minimally affects riparian rights in critically eroded beach areas. In determining whether the Act effectuates an unlawful taking, this Court should apply established regulatory takings tests and reject STBR's invitation to create a new categorical takings rule for riparian rights.

ARGUMENT

I. BELVEDERE IS CLEARLY DISTINGUISHABLE AND SHOULD NOT BE EXTENDED AND APPLIED TO THIS CASE

As in the lower court,[1] the foundation of STBR's takings claim is Belvedere. STBR argues that the Act has severed all common law riparian rights from the upland property and that this "complete appropriation" of all riparian rights constitutes an unlawful taking because Belvedere holds that riparian rights can never be severed without the upland owner's consent. (Answer Brief, at 15-16, 21-25). Further, STBR argues that because of the Belvedere rule, this Court need not decide whether the taking is physical or regulatory. (Answer Brief, at 19). When the Belvedere prop is removed, as it must be, STBR's fallacious taking argument collapses.[2]

As explained in Petitioner's Initial Brief, at 26-27, Belvedere does not support, much less command, the position

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[1] [R: D, Reply Brief, at 23] In its Reply Brief in the First District, STBR contended that Belvedere "controls this case." The First District echoed this contention in its decision: "Belvedere controls . . . ." [Opl. 23]

[2] As did the First District, STBR attempts to bolster its Belvedere-based arguments by citation to § 253.141(1), Fla. Stat., (Answer Brief, at 7-8, 25) which states generally that riparian rights "are inseparable from the riparian land." However, this statute, enacted with the above-quoted provision in 1953 (ch. 28262, Laws of Florida), has been superseded by §§ 161.191 and 161.201, enacted in 1970 (ch. 70-276, § 7, Laws of Florida, as amended) which specifically addresses the separability of riparian rights in critically eroded beaches. V.K.E. v. State, 934 So. 2d 1276, 1293 (Fla. 2006); McKendry v. State, 641 So. 2d 45, 46-47 (Fla. 1994).

taken by STBR and the First District. Despite STBR's suggestion to the contrary, this Court did not hold in Belvedere that riparian rights can never be severed from upland property without the owner's consent. Indeed, this Court expressly declared that "we will not hold that riparian rights are never severable from the riparian lands." Belvedere, 476 So. 2d at 652. Further, in discussing its prior cases, this Court stated:

> "Implicit in the foregoing cases is the principle that riparian rights may sometimes be severed from the ownership of the land to which they attach. If this were not so, decisions which resolve how and to whom to allocate riparian rights would not ever arise. There is nothing novel about the notion of finding a legal separateness of an incorporeal interest such as a riparian right. **The law has long recognized the separateness of nonpossessory property interests, including incorporeal hereditaments and future interests."**

Id. at 651. Although noting that "following this **general rule** in all situations" could lead to absurd results, Id. at 651, this Court in Belvedere clearly recognized that riparian rights may be legally severed from uplands depending on the circumstances.

The circumstances in Belvedere involved the Department of Transportation's ("DOT") eminent domain action to take the waterfront portion of riparian uplands in fee simple absolute, except for the riparian rights which DOT expressly reserved to the upland owners. Because of this reservation, DOT contended

and the trial court agreed that the landowners were not entitled to any compensation for the severance damages to landowners' remaining upland property. Id. at 649. In other words, through its attempted reservation of riparian rights without the landowners' consent, DOT sought to avoid paying full just compensation for the physical taking of riparian property as is required by the Constitution.

This Court held in Belvedere that "**in the context of condemnation of property**," Id. at 552, the physical taking of landowners' riparian lands "without compensating them for their riparian rights **under these facts** was an unconstitutional taking." Id. In reaching this conclusion, this Court expressed concern that the upland landowners in Belvedere would have "no easement or other retained right" to cross DOT's newly acquired riparian lands to get access to the water or to build a dock to the water. Id. at 651.

The circumstances in the instant case are easily distinguishable from Belvedere. This case does not involve a condemnation proceeding to physically take STBR members' lands without paying any compensation for the riparian rights. The STBR landowners will retain title to and possession of all of their upland land. Also, unlike the Belvedere situation, in this case the Act by statutory grant guarantees the private landowners that they will continue to have full rights of access

to the water, "including but not limited to rights of ingress, egress, view, boating, bathing, and fishing." Fla. Stat. § 161.201.

Further, the Department of Environmental Protection ("DEP"), unlike DOT in Belvedere, is not attempting to take private land for public use. Rather, pursuant to the Act, DEP is seeking to abate a menace to the entire state by restoring and renourishing critically eroded beaches. This action will also benefit the private upland owners who will retain virtually all riparian rights.

Clearly, the attempted severance and reservation of riparian rights by DOT in Belvedere to avoid payment of full just compensation in an eminent domain action bears no resemblance to the **state legislature's** limited modification of the common law to protect both public and private interests in critically eroded beach areas. Unlike DOT, the Legislature has the power to modify the common law,[3] an important point which STBR studiously and completely ignores.

Accordingly, this Court need not and should not apply Belvedere to the substantially different circumstances of this case.

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[3] See Bd. of Trustees of the Internal Improvement Trust Fund v. Mederia Beach Nominee, Inc., 272 So. 2d 209, 212 (Fla. 2d DCA 1973) (noting the power of "the Legislature to make sweeping changes in property rights assuming constitutional problems are properly avoided.").

II. THERE HAS BEEN NO COMPLETE APPROPRIATION OF STBR MEMBERS' RIPARIAN RIGHTS

The core of STBR's categorical takings claim is the fiction that the Act "completely appropriates," and therefore takes, all riparian rights of STBR members. (Answer Brief, at 22). This argument is based on STBR's misinterpretation of Belvedere[4] as holding that any severance of riparian rights constitutes a "complete appropriation" of such rights and is *per se* a taking. It also ignores the Act's express provision that the upland owner continues to have all common law riparian rights except the speculative rights of accretion and reliction. Fla. Stat. §§ 161.191(2) and 161.201. This provision hardly constitutes a "complete appropriation" of such rights.

Regarding the loss of the speculative right to accretion, STBR asserts that "The Petitioners' repeated claims that accretion is 'speculative' is factually false." (Answer Brief, at 8n. 10). To support this statement, STBR cites only the following: "Taylor Engineering, Inc. concludes that the project area beaches possess the natural ability, as indicated by the accretive alongshore sediment transport trend, to recover absent

[4] STBR also vainly tries to derive some support from Kendry v. State Road Dept., 213 So. 2d 23 (Fla. 4th DCA 1968). (Answer Brief, at 21). This case does not involve a state legislative act which modifies common law riparian rights as part of a program to restore critically eroded beaches.

storms. . . ."[5] However, the fact that beaches within the project area have the "natural ability" to recover, does not mean that the beaches will recover in the foreseeable future or that the storm cycle in the area will be such as to allow natural recovery. Further, nothing in the cited Taylor Engineering, Inc., report or elsewhere in the record suggests that there is either an on-going natural recovery of the beaches or that recovery will occur within the foreseeable future. Natural recovery of the beaches through accretion is, therefore, speculative at best.

III. THERE HAS BEEN NO PHYSICAL TAKING OF STBR MEMBERS' PROPERTY

Realizing that application of regulatory takings tests will be fatal to its case, STBR first urges this Court not to decide whether the alleged taking is physical or regulatory. Then, implicitly recognizing that the taking must be one or the other, STBR asserts for the first time in this appeal that it is a physical taking. (Answer Brief, at 18-19). STBR did not make this argument in either its Initial Brief or its Reply Brief (A: 1-35; D: 1-15) in the First District. Also, the First District did not find or hold that there was a physical taking of STBR members' lands. Obviously, STBR is belatedly making this

[5] By the ellipsis, STBR omitted the following caveat from the statement: "however, insufficient recovery times between storms have caused the present unhealthy beach conditions." R., Joint Exhibit 1, Environmental Assessment, pp. 12-13).

argument in a desperate attempt to avoid application of regulatory takings test.

Further, STBR's belated physical taking argument is without merit. First, it is based on the mistaken proposition that Belvedere holds that riparian rights are "completely eliminated or appropriated" when severed from the upland property. (Answer Brief, at 18-19, 22). However, as noted above, Belvedere itself recognizes that riparian rights can be severed and exist separate and apart from riparian rights in some circumstances. Belvedere, 476 So. 2d at 651.

Also, Belvedere describes a riparian right as an incorporeal, nonpossessory interest. Id. In other words, a riparian right is an intangible or nonphysical interest. See Blacks Law Dictionary (5th Ed.), at 1192.[6] As such, riparian rights cannot be physically taken or possessed. Therefore, STBR's contention that riparian rights have been physically taken is nonsensical and its reliance on Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) is misplaced. (Answer Brief, at 20-21).

[6] "Incorporeal" means "without a body, not of a material nature." Blacks, at 690. "Incorporeal things" mean "[t]hings which can neither be seen nor touched." Id. "Incorporeal hereditaments" means that "which is inheritable and not tangible or visible." Id. at 653.

Furthermore, there has been no physical invasion or occupation of the **land** now owned by STBR members.[7] A physical taking "occurs only when the government 'requires the landowner to submit to the **physical occupation of his land.**'" Florida Game and Fresh Water Fish Com'n v. Flotilla, Inc., 636 So. 2d 761, 764 (Fla. 2d DCA 1994) (quoting Yee v. City of Escondido, Cal., 503 U.S. 519 (1992). Hence, in this case there has been no physical taking as that term is used in takings jurisprudence.

In support of its untimely physical takings argument, STBR now mistakenly relies on Lee County v. Kiesel, 705 So. 2d 1013 (Fla. 2d DCA 1998), a case it did not argue or even cite in the lower court. (See Answer Brief, at 17-18). Kiesel involved the construction of a bridge which substantially interfered with the adjacent upland landowner's riparian right to an unobstructed view of the water. Stating that the bridge created "an actual physical intrusion" into the riparian right of view, the Fourth District held that it was an unlawful physical taking of the

[7] Therefore, §163.141, Fla. Stat. does not apply. As the language of the statute in its entirety indicates and as DEP reasonably interpreted it, §161.141's requirement of eminent domain is directed to the physical taking of private uplands. This interpretation is reinforced by §161.212, providing for a regulatory takings claim if an agency's **permitting** decision allegedly constitutes a taking as in this case. DEP's interpretation is not clearly erroneous and should be upheld. Wallace Corp. v. City of Miami Beach, 793 So. 2d 1134 (Fla. 1st DCA 2001); Island Harbor Beach Club,Ltd. v. Department of Natural Res., 495 So. 2d 209, 214 (Fla. 1st DCA 1986).

right to a view. Id. at 1015. Assuming Kiesel was correctly decided, it has no application to this case which does not involve any physical intrusion into the riparian right of view.

If a taking occurred in this case, it resulted from DEP's regulatory action in issuing a Joint Coastal Permit. Even STBR admits that issuance of the permit was "an exercise of DEP's **regulatory** authority under the Act and Chapter 62B-49, F.A.C." (Answer Brief, at 11). Thus, the alleged taking is regulatory in nature.

IV. THIS COURT SHOULD NOT CREATE A NEW CATEGORICAL TAKINGS RULE FOR RIPARIAN RIGHTS

STBR's incantation of "constitutionally protected riparian rights" is intended to divert judicial attention from the real issue: What protection does the Constitution afford? Similarly, its repetitive conclusory assertion that riparian rights have been "taken" is designed to avoid the fundamental question: How does the court determine whether a "taking" has occurred? Knowing that established takings tests will not produce the result it seeks, STBR urges this Court to create a new categorical or *per se* takings test for riparian rights: Any non-consensual severance of riparian rights from the host property is a categorical taking. The Court should resist this invitation.

There is no compelling or justifiable reason for affording more constitutional protection to riparian rights than is given to other property rights. The Florida Constitution does not even mention riparian rights. The Taking Clause's protection against the taking of private property without just compensation speaks to all property rights and makes no special provision for riparian rights. Indeed, riparian rights are a creature of the common law,[8] not the Constitution, and it is beyond dispute that the Legislature may change the common law so long as it does not violate the Constitution.

STBR has not explained why riparian rights should be subject to different takings tests than are other property interests. Why should this Court adopt a rule that riparian rights may be segmented from the remainder of the property for purposes of a takings analysis while all other property rights cannot be severed under established law? Why should the law provide that requiring preservation of 43 acres of a 173-acre tract of land, see Florida Game & Fresh Water Fish Com'n v. Flotilla, Inc., supra, or 1,800 acres out of 6,500 acres, see Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981), is not a taking of the 43 or 1,800 acres, whereas elimination of only the right to future accretions or relictions from the

[8] Haynes v. Carbonell, 532 So. 2d 746, 748 (Fla. 3d DCA 1988) ("riparian rights . . . are derived from the common law as modified by statute.").

entire bundle of property rights is a *per se* taking? To ask the question is to answer it: There is no logical or prudential justification for such a distinction.

Although STBR asserts that 97 years of case law support their takings claim, (Answer Brief, at 12), close scrutiny of the cited cases reveal a less certain picture. Numerous cases, particularly those decided before the advent of modern takings jurisprudence, proclaim that riparian rights are property that cannot be taken without just compensation. However, many of these statements are dicta in cases involving boundary disputes, title to already accreted lands, or actions by private entities. None involve legislative police power enactments like the Act which expressly change the common law by providing for severance of common law riparian rights in order to abate a serious public nuisance.

The new categorical rule advocated by STBR will not well-serve present day society, especially with regard to the state's precious beach resources in critically eroded coastal areas. Florida courts have indicated that in fashioning rules regarding riparian rights it considers public policy and the needs of society. See, e.g., Bd. of Trustees of Internal Improvement Trust Fund v. Mederia Beach Nominee, 272 So. 2d 209, 213 (Fla. 2d DCA 1973) ("Public policy weighs heavily in this decision as

well.").[9] At a time when Florida is faced with complex environmental, economic, and safety issues relating to the state's hurricane-beleaguered coast, this Court should not adopt a categorical riparian rights takings rule that will unnecessarily complicate the Legislature's reasonable efforts to solve these critical problems.

V. STBR HAS NOT ESTABLISHED ASSOCIATIONAL STANDING TO BRING AN AS-APPLIED TAKINGS CLAIM

STBR contends that participation of each of its members is not required because the effect of the Act on each STBR members "is exactly the same," i.e., all riparian rights are severed and, under Belvedere, taken without compensation. (Answer Brief, at 34). This argument again erroneously assumes, based on Belvedere, that a categorical, non-regulatory taking has occurred. (Answer Brief, at 31-32). However, because Belvedere is inapplicable and the taking, if any, is regulatory, participation of individual STBR members is essential under the Penn Central *ad hoc* takings test. (See Initial Brief, at 33-34; 39-42).

Amicus FHBA's concern that Petitioners' standing argument will hinder the Association's ability to represent its members

[9] See, also, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 at 331, in which the Supreme Court discussed various public policy considerations in determining not to create a new categorical takings rule for temporary land development moratoria.

in future administrative proceedings is unwarranted. Petitioners seek only to enforce, not modify, the Florida Home Builders' associational standing rule.

Finally, the three Florida cases cited by STBR and the Amicus do not support their standing argument. These cases involve **facial** constitutional challenges whereas STBR maintains that its claim is an as-applied challenge.

CONCLUSION

The Court should reverse the First District's decision and affirm DEP's Final Order issuing the Joint Coastal Permit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to **Richard S. Brightman, Esq., and Victoria L. Weber, Esquire**, HOPPING GREEN & SAMS, P.A., Post Office Box 6526, Tallahassee, Florida 32314, Counsel for Respondent, and Amicus FHBA; to **Gregory M. Munson,**

Esquire, 3900 Commonwealth Blvd., MS #35, Tallahassee, Florida 32399, Counsel for Department of Environmental Protection; and, to **Gary K. Oldehoff, Esquire**, Office of the County Attorney, 1660 Ringling Blvd., Second Floor, Sarasota, Florida 34236, Counsel for Amicus, Florida Association of Counties and Florida League of Cities, this _____ day of December, 2006.

_____
Attorney

CERTIFICATE OF COMPLIANCE

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

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