IN THE SUPREME COURT OF FLORIDA

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SC-06-1449

First DCA Case No.: 1D05-4086

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FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND
Petitioners,

vs.

STOP THE BEACH RENOURISHMENT, INC.,
Respondent.

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

AMICUS BRIEF OF FLORIDA HOME BUILDERS ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amicus Curiae, Florida Home Builders Association (FHBA), is a nonprofit association composed of individuals and companies who own property and/or are engaged in construction and property sales throughout Florida. As a party to the seminal case of *Florida Home Builders Ass'n v. Department of Labor*, 412 So.2d 351 (Fla. 1982), FHBA is vitally interested in the requirements for an association to have standing to participate in government decision-making that impacts its more than 20,000 members. FHBA has been granted leave to submit amicus curiae briefs in numerous other appeals before this Court involving property issues. *See e.g., Sunset Harbour North Condo. Ass'n v. Robbins*, 914 So.2d 925 (Fla. 2005).

FHBA members have a special interest in this Court's review of the decision below. If the decision below is reversed, FHBA could lose the expanded "public access to the activities of governmental agencies" for which the associational standing test was created. *Florida Home Builders*, 412 So.2d at 352-353. FHBA routinely serves as the vehicle through which its members exercise their public access rights to challenge allegedly impermissible governmental actions. It does so in circuit courts, appellate courts and more frequently before the Division of Administrative Hearings where it has participated in over 25 cases since 1986.

FHBA members also regularly own, develop, and sell waterfront (*i.e.*, riparian) property throughout the State. The outcome in this case could create title problems or render title to these riparian properties unmarketable. Accordingly, FHBA will offer a unique perspective on the implications of the lower court's holding for associations that rely upon associational standing, and for landowners throughout Florida who engage in the development and sale of waterfront property like that involved in this appeal.

SUMMARY OF ARGUMENT

The *Florida Home Builders* associational standing test is one that a court must apply on a case-by-case basis irrespective of the characterization of a challenge to governmental decision-making. Whether the challenge could be labeled as constitutional, statutory, facial, as-applied, etc. is irrelevant. If the challenge brought by an association meets the three-prong test of *Florida Home Builders*, which was adopted in recognition of the legislature's intent to expand public access to the activities of agencies, then the association has standing.

Here, the Board of Trustees of the Internal Improvement Trust Fund (Trustees), through the recording of two Erosion Control Line (ECL) surveys in Walton and Okaloosa County, unilaterally changed the property boundaries of 453 riparian properties. This impermissible change of property boundaries jeopardizes the marketability of numerous titles because the ECL surveys are recorded outside of

the chain of title of the 453 properties. Ignoring the fact that the establishment of the ECLs results in a taking of riparian rights, an issue addressed by the parties and other amici, the Trustees have further jeopardized the marketability of these titles by asserting ownership to any newly-created beach seaward of the ECLs.

ARGUMENT

I. An Association Has Standing To Bring Any Action That Meets the Three-Prong Test of This Court's *Florida Home Builders* Test

The Petitioners in this case attempt to artificially limit the doctrine of associational standing as announced by this Court in *Florida Home Builders.* FHBA, a party to this seminal case, urges the Court to reject any argument that would so limit the holding of *Florida Home Builders*.

This Court, in initially establishing the associational standing test in *Florida Home Builders*, was cognizant of the legislature's intent to "broaden public access to the . . . activities of agencies." *Florida Home Builders*, 412 So.2d at 353 n. 2. As this Court recognized: "[e]xpansion of public access to the activities of governmental agencies was one of the major legislative purposes of the new Administrative Procedure Act." *Id.* at 352-353.

With this broadening of access to agencies' activities in mind, the three-prong associational standing test of *Florida Home Builders* was formulated. To show standing, an association:

> "[1] must demonstrate that a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged rule. Further, [2] the subject matter of the rule must be within the association's general scope of interest and activity, and [3] **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).

The dispute over standing in the instant case involves the third prong of this test: the appropriateness of the relief requested. Thus, any analysis of standing must begin with a review of the relief sought by Respondent, Stop the Beach Renourishment, Inc. (STBR). STBR argued that the Petitioners' actions in issuing the Joint Coastal Permit (JCP) and establishing the ECL did not comply with Part I of the Beach and Shore Preservation Act, Chapter 161, Fla. Stat., (Act) and should be invalidated. The First District Court of Appeal agreed and invalidated the entire JCP and the ECL with respect to the property of STBR's members. *Save Our Beaches, Inc. v. Florida Dep't of Envt'l Protection*, 31 Fla. L. Weekly D1173, D1177 (Fla. 1st DCA 2006). This type of relief is exactly the kind of relief contemplated by *Florida Home Builders* because it applies broadly and identically to all affected persons.

Petitioners ignore the type of relief STBR seeks and choose to focus instead on labeling STBR's challenge as an "as-applied regulatory taking" that cannot be

brought by an association.[1] However, any artificial label or categorization of any claim is irrelevant when determining whether an association has standing to challenge unlawful governmental action. That determination can and must be made instead by looking at the specific challenge to assess whether it meets the three-prong test of *Florida Home Builders*.

In discussing the propriety of the relief requested in *Florida Home Builders*, this Court specifically noted that the issue in that case was the validity of agency action and not "association or individual claims for money damages." *Florida Home Builders*, 412 So.2d at 354. In the instant case, STBR is seeking to invalidate the Petitioners' agency action asserting that the JCP and ECL were issued and recorded, respectively, in violation of the Act. This relief is clearly the appropriate type of relief an association may obtain on behalf of its members. Conversely, the participation of individual members of STBR would be required if it were seeking money damages for itself or its members, as in the "takings" cases cited by the Petitioners.

It also should be noted that this Court has expressly approved constitutional challenges brought by associations on behalf of their members. In *Florida Ass'n of Counties, Inc. v. Department of Admin.*, 595 So.2d 42 (Fla. 1992), this Court

[1] It should be noted that STBR has not brought an as-applied regulatory taking claim. Rather, STBR has challenged the Petitioners' agency action, which does not comply with the Act's requirements resulting in unconstitutional agency action.

expressly adopted the opinion of the Fourth District Court of Appeal which found two associations (both amici in this case) had standing to challenge the constitutionality of Chapter 88-238, Laws of Florida. The district court held:

> Here, a substantial number of the constituents comprising the [Florida] Association [of Counties] and [Florida] League [of Cities] 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.**

Florida Ass'n of Counties, Inc. v. Department of Admin., 580 So.2d 641, 646 (Fla. 1st DCA 1991) (emphasis added); *accord City of Lynn Haven v. Bay County Council of Registered Architects, Inc.* 528 So.2d 1244, 1246 (Fla. 1st DCA 1988).

The court in *Hillsborough County v. Florida Restaurant Ass'n, Inc.*, 603 So.2d 587 (Fla. 2d DCA 1992) relying on *Florida Ass'n of Counties, Inc.*, reiterated that associational standing was proper to challenge an unconstitutional act of a governmental entity:

> 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.

Id. at 589 (citing the *Florida Home Builders* three-prong test for standing).

In *Hillsborough County*, as in the instant case, all members of the restaurant association were affected in the exact same manner (*i.e.*, each one of them was required by county ordinance to post a health warning sign). The association members did not seek money damages but, as STBR here, sought invalidation of the allegedly illegal and unconstitutional government action.

As this Court recognized in *Florida Home Builders*, there are cases where the costs of instituting and maintaining a challenge to a governmental action may be prohibitive for individual association members, and needlessly tax the resources of the tribunal to dispose of multiple challenges based upon identical or similar allegations of unlawful agency action. *Florida Home Builders* at 353. Certainly, agency action which does not comply with a statute's requirements, resulting in an unconstitutional agency action, and which stands not only to broadly affect an association's individual members but also to establish broadly applicable agency policy, is agency action that an association has standing to challenge on behalf of its members. Thus, FHBA urges this Court to affirm the holding of the District Court as it properly determined that STBR had associational standing.

II. The Trustees' Attempt to Claim Title to any Newly-Created Beach Based on an Illegal ECL Will Jeopardize the Marketability of Riparian Property Titles Statewide.

In the case of this nourishment project, the Trustees, through application of the Act, attempt to modify 453 deeds by the simple recording of two ECL surveys in

Walton and Okaloosa Counties. [T. 133, 142]. It is noteworthy that the Trustees have not recorded any document within the chain of title to each of these properties to put the owner or any subsequent purchaser on notice of the modification to the deed by the ECL survey. Numerous property owners believe that the Mean High Water Line (MHWL) is their property boundary as indicated by their deeds and any future conveyance of that property likely would include the current legal description in the future deed. A subsequent purchaser's title search would not reveal the ECL survey as the Trustees do not place any notice in the chain of title.[2]

In this case, the Trustees – for the first time on appeal – have asserted that they own title to any newly-created beach seaward of the ECL through the common law doctrine of avulsion in addition to provisions of the Act. FHBA agrees with STBR that any ownership issues are premature since no factual record was created (or could have been created)[3] relating to ownership. To the extent the Court considers such

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[2] Other Amici point out that the Act requires the Trustees to inform riparian property owners (and hold a public hearing) prior to the setting of the ECL. ' 161.161, Fla. Stat. These Amici, however, fail to note that a riparian owner cannot opt out of a nourishment project. In practice, the Trustees force all riparian property owners to submit to having an ECL change their property line. Because riparian property owners cannot opt out of a project, any public hearing is meaningless.

[3] Section 26.012(2)(g), Fla. Stat., provides that the circuit courts have "exclusive original jurisdiction . . . in all actions involving the title and boundaries of real property."

arguments, it should be aware of the impacts that any decision on this issue could have on the marketability of titles.

The Trustees' assertions of ownership will subject numerous riparian titles around the state to uncertainty. This situation could have easily been avoided had the Trustees merely complied with Section 161.141, Fla. Stat., which requires the applicant for a beach nourishment project to use eminent domain to condemn the property rights needed for the nourishment project (*i.e.*, a strip of riparian land).

Such a haphazard change of property boundaries jeopardizes the marketability of numerous titles around the state where ECLs have been recorded (or may be in the future) outside the chain of title. It further subjects each property owner to a suit with the Trustees to quiet title. The Second District Court of Appeal has expressed the same concerns in a case where the Trustees attempted to strip a riparian owner of its right to accreted lands where the riparian owner did not cause the accretions. *Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So.2d 209 (Fla. 2d DCA 1973). Therein, the court stated: "Were the state to gain title to this accreted land we believe that riparian titles around the state would be in jeopardy of unmarketability." *Id*. at 213.

The State's passage and implementation of the Act is no doubt well-intentioned. These intentions, no matter how honorable, however, do not justify the creation of a situation that will render hundreds of property titles unmarketable, and

simultaneously create a precedent for repeating this unlawful action throughout the State, simply because the Trustees failed to comply with the requirements of the Act.

CONCLUSION

FHBA requests this Court to expressly uphold the decision below finding that STBR has associational standing under the *Florida Home Builders* associational standing test to raise claims on behalf of its members seeking to invalidate an agency action. FHBA further urges this Court to affirm the decision below because doing otherwise would impair the marketability to riparian titles statewide.

Respectfully submitted,

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

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