IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellants,

vs.

CASE NUMBER: SC06-1449

SAVE OUR BEACHES, INC., et al.,

Appellees.

_____/

AMICUS CURIAE BRIEF OF FLORIDA SHORE & BEACH PRESERVATION ASSOCIATION IN SUPPORT OF APPELLANTS WALTON COUNTY AND THE CITY OF DESTIN

LINDA LOOMIS SHELLEY
Florida Bar I.D. 0240621
FOWLER WHITE BOGGS BANKER P.A.
101 North Monroe Street, Suite 1090
P.O. Box 11240
Tallahassee, FL 32301
Telephone: (850) 681-0411
Facsimile: (850) 681-6036

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADMINISTRATIVE ORDERS

STATUTES

CONSTITUTIONAL PROVISIONS

RULES

OTHER AUTHORITIES

STATEMENT OF INTEREST

Members of the Florida Shore & Beach Preservation Association ("FSBPA") have been active participants, either as local government sponsors of a project or financial contributors, in virtually every beach nourishment project undertaken in Florida. Its members advocate for substantive and financial program enhancements before the Florida Legislature and Congress. FSBPA members participate in and fund research regarding beach management options and the economic, environmental and storm protection benefits of beach nourishment. They also conduct state and national conferences, technical workshops and public meetings to exchange information about innovations in beach management technology and other issues of concern to coastal communities and residents relating to the beach environment.

FSBPA members, particularly its 74 coastal cities and counties, are concerned that if the decision of the First District Court of Appeals is not reversed the beach nourishment program in Florida will be eliminated. The District Court's determination that *Belvedere Dev. Corp. v. Dept. of Transp.*, 476 So. 2d 649, 652 (Fla. 1985) is controlling such that "riparian rights cannot be constitutionally reserved to the landowners as described in section 161.201, F.S. . . .," when combined with its holding that riparian rights are "inseparable from the riparian land," creates an untenable situation for local governments interested in restoring

their beaches. There is no possible way in which the government can afford to condemn the entirety of upland beachfront property in order to carry out a beach nourishment project. Even assuming the Supreme Court clarifies the First District's opinion to allow a partial taking of the littoral rights of beachfront property owners, there will be a reduction in the number of new beach nourishment projects and in the frequency of periodic renourishment of existing projects, adding time and expense to an already costly and time-consuming process.

If the beach program is eliminated or reduced, many of FSBPA's members – Florida's coastal communities – and our state as a whole will suffer significant economic losses and the potential for devastating building and infrastructure losses because of the lack of beaches as a tourist destination and the lack of storm protection provided by beach nourishment projects.

In addition, FSBPA is concerned that due to the many Erosion Control Lines (ECLs) that already exist in the state, a decision upholding the First District's ruling that an ECL constitutes a taking of the entire beachfront property or even a portion of the littoral rights of abutting upland property owners, numerous takings claims would be lodged against the State and local governments on completed or ongoing projects. This would cause significant fiscal impacts and unanticipated cost overruns, thus impacting local government budgets for their share of the project costs. Future projects would be prohibitively expensive if governments

were required to acquire all the upland property ownership in order to place sand on sovereign lands. Even if the Supreme Court clarifies that a taking can have only occurred as to a portion of the littoral rights, not the entire parcel, the beach nourishment program would be threatened because the governmental entities that undertake these projects would be reluctant to add what could be significant additional time and the cost of condemnation litigation to already expensive and time-consuming projects. Moreover, the general public would question its support of a program in which abutting property owners file actions for monetary damages even though they most directly benefit from the expenditure of taxpayer dollars for beach nourishment projects.

SUMMARY OF THE ARGUMENT

The decision of the First District Court of Appeals, if upheld in its entirety, will lead to the elimination of the beach nourishment program in Florida because the opinion incorrectly holds that the state must condemn all of an abutting landowner's property, both the upland and littoral rights, if it undertakes a beach nourishment project without the property owner's consent. No government can or will condemn beachfront properties under these circumstances because to do so would be prohibitively expensive. The practical effect of a decision by this Court that a taking has occurred of even a portion of the littoral rights of an abutting property owner upon the establishment of an ECL will be to reduce or eliminate beach nourishment projects. Elimination of the beach nourishment program will cause substantial economic losses to the state, beachfront communities, homeowners and businesses as a result of the loss of tourism and tax dollars. In addition, the loss or reduction of beach nourishment projects will cause an increase in the exposure of upland buildings and infrastructure to the risk of catastrophic losses in the event of hurricanes and other storm events, and the public will lose valuable recreational opportunities.

Further, upholding the First District Court of Appeals decision will predictably lead to countless takings claims within existing project areas with established ECLs, thus immeasurably adding to the cost of completed projects at

great unanticipated cost to the local government sponsors, and ultimately, to the taxpayers. It may also considerably undermine the government's willingness to undertake the projects because of the added time and expense of takings claims, and erode public confidence in the program as the very property owners who are most benefited by beach nourishment would also be suing to recover damages at public expense.

ARGUMENT

Background

More than 435 miles of Florida's 825 miles of sandy beaches have experienced erosion and over 328 miles are designated critically eroded. *Introduction to State of Florida, Strategic Beach Management Plan*, p. 1 (http://www.dep.state.fl.us/beaches/publications/pdf/int-sbmp.pdf). According to the Florida Department of Environmental Protection, Bureau of Beaches and Coastal Systems, a beach is "critically eroded" if a segment of the shoreline has, through natural processes or human activity, eroded to such a degree that upland development, recreational interests, wildlife habitat, or important cultural resources are threatened or lost. *Critically Eroded Beaches in Florida*, p. 3, updated April 2006, (http://bcs.dep.state.fl.us/reports/crit_ero.pdf).

Over the past forty years, Florida has nourished over 180 miles of critically eroding beaches as part of 45 separate projects. *Introduction to State of Florida, Strategic Beach Management Plan*, at pp. 2-4. Each of these projects was preceded by the establishment of an ECL at the mean high water line by the Board of Trustees of the Internal Improvement Trust Fund ("Trustees") established at the mean high water line. *See* Section 161.141, Fla. Stat. The mean high water line is determined by averaging the height of the high-waters over a 19-year period. *See* Section 177.27(14), Fla. Stat; *see also* Fla. Admin. Code R. 62B-41.002(24). The

ECL, by definition, demarks the landward extent of the claims of the state as sovereign titleholder of the submerged bottoms and shores of the beaches as of the date of the recording of the survey. Section 161.151(3), Fla. Stat. The land seaward of the ECL is sovereign land and the sand placed seaward of the line, which is paid for in most cases by federal, state and local governments, is located on and becomes sovereign land. *See* Article X, section 11, Fla. Const.; Section 161.191, Fla. Stat.

The setting of an ECL is an open, participatory process and specific notice is given to each owner of abutting upland property. Section 161.161(4), Fla. Stat. There can be no "unsuspecting waterfront owners," as was the case in the *Sand Key Associate*s decision of this Court. *See Board of Trustees v. Sand Key Associates, Ltd,* 512 So.2d 934, 939 (Fla. 1987). The Trustees are guided by the existing line of mean high water, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible. Section 161.161(5), Fla. Stat. Once set, the upland owner's boundary is set, unless the agency charged with maintaining the protected beach fails to do so or a substantial portion of the affected shoreline recedes to a point landward of the ECL, in which case the ECL ceases to be operative as to the affected upland. *See* Sections 161.191(2) and 161.211, Fla. Stat.

Economic Benefit

The State's declared purpose in undertaking beach nourishment projects is clear and unequivocal:

> 161.088 Declaration of public policy respecting beach erosion control and beach restoration and nourishment projects.—
>
> **Because beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions**, it is hereby declared to be a necessary governmental responsibility to properly manage and protect Florida beaches fronting on the Atlantic Ocean, Gulf of Mexico, and Straits of Florida from erosion and that the Legislature make provision for beach restoration and nourishment projects, including inlet management projects that cost-effectively provide beach-quality material for adjacent critically eroded beaches. **The Legislature declares that such beach restoration and nourishment projects, as approved pursuant to s. 161.161, are in the public interest; must be in an area designated as critically eroded shoreline**, or benefit an adjacent critically eroded shoreline; must have a clearly identifiable beach management benefit consistent with the state's beach management plan; and must be designed to reduce potential upland damage or mitigate adverse impacts caused by improved, modified, or altered inlets, coastal armoring, or existing upland development. . . .

Section 161.088, Fla. Stat. (Emphasis added)

> 161.091 Beach management; funding; repair and maintenance strategy. –
>
> (3) In accordance with the intent expressed in s. 161.088 and **the legislative finding that erosion of the beaches of this state 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, which, if not stopped, could significantly reduce state sales tax revenues**, funds deposited into the State Treasury to the credit of the Ecosystem Management and Restoration Trust Fund, in the annual amounts provided in s. 201.15(11), shall be used, for a period of not less than 15 years, to fund the development, implementation, and administration of the state's beach management plan, as provided in ss. 161.091-161.212, prior to the use of such funds deposited pursuant to s. 201.15(11) in that trust fund for any other purpose.

Section 161.091(3), Fla. Stat. (Emphasis added)

Beach nourishment as a management tool to reduce storm damage to upland properties has been used throughout Florida. The Legislature directs funds to the state's most severely eroded beaches annually pursuant to law, with an unusually large appropriation for Fiscal Year 2006-2007 in the amount of $65 million, General Appropriations Act, Ch. 2006-25, Section 5, Line Item 1796, and Section 30, Laws of Florida, in response to the 2004 and 2005 hurricane seasons.

Because the recognized economic benefits of beach nourishment accrue most directly to coastal communities, Chapter 161 requires dollar for dollar cost-sharing for beach nourishment projects from local government sponsors. *See* Sections 161.101(1), (11) and (15), Fla. Stat. Congress also authorizes federal financial participation for beach erosion control, and in these instances, the state and local sponsor provide an equitable share of needed funds for the specified project. *See* Sections 161.101(3)–(7), Fla. Stat. The participation of the federal

government in beach nourishment projects in Florida is important to the state, especially since in the vast majority of cases the federal government is the largest funding partner. The availability of federal matching dollars is a factor considered by the Department of Environmental Protection in determining annual project funding priorities. Section 161.101(14)(b), Fla. Stat.

The leveraging of federal and local government funds is an important feature of the state beach nourishment program. It is estimated that for every $1 the State of Florida spends on beach management, that money is matched with $1 to $5 from local and federal sources, depending on the level of federal participation, and that each state dollar spent protecting beaches prevents the loss of $8 in state taxes paid by out of state tourists and resident users of Florida's beaches. James F. Murley, et al, *Economics of Florida's Beaches: The Impact of Beach Restoration*, Center for Urban & Environmental Solutions, Florida Atlantic University, June 2003, p 1, (http://www.flseagrant.org/program_areas/coastal_hazards/publications/economics_beaches_restoration.pdf).

The value of Florida's beaches to the state's tourism industry is difficult to overstate. In 2003, Florida hosted more than 74 million visitors, 27 million of which indicated that going to the beach was a primary activity during their stay in Florida. *2004 Florida Statistical Abstract*, pp. 571-572. Economic models indicate that beaches also provide other direct and indirect benefits including, but

not limited to, job creation, increased government tax revenues, improved storm protection, and recreational benefits. *Economics of Florida's Beaches: The Impact of Beach Restoration, supra*.

According to the Center for Urban & Environmental Solutions at Florida Atlantic University, a study of the changes in property values since the 2004 hurricanes reveals that single family properties upland of nourished beaches increased more than thirty (30) percent between 2004 and 2005, twice the increase in properties upland of beaches that had not been nourished. The estimated statewide benefit to property values in the four study areas was $45 million in storm protection for single family homes, and more than $105 million for condominiums. James F. Murley, et al. *The Protection of Property Values by Restored Beaches: The 2004 Hurricane Season*, Center for Urban & Environmental Solutions, Florida Atlantic University, June 2006, pp. 9-10.

Dr. William B. Stronge has conducted numerous economic studies on beach nourishment projects and has established that benefits accrue to a wide range of entities. For example, the Captiva Island beach nourishment project increased property values 20.6 percent and resulted in an increase in property value of $20 million, with a corresponding increase in property taxes of $1 million. Since schools are funded primarily by ad valorem tax in Florida, the greatest single beneficiary of the additional taxes resulting from beach nourishment projects are

the school districts. W.B. Stronge, *The Economic Impact of the Marco Island Beach Restoration: A Preliminary Analysis.* New Directions in Beach Management: Proceedings of the 5th Annual National Conference on Beach Preservation Technology, Tallahassee, Florida 1992, at page 111.

Benefit to Upland Owners

In order to rule in favor of Appellees, the Court must overturn fundamental legal precedent regarding takings and overlook the direct benefit accruing to abutting property owners as a result of a beach nourishment project. Instead of a critically-eroded beach in front of their property, it is now protected – at the expense of the public – from potential storm damage and resulting economic losses. In fact, the value of their property is enhanced substantially as a result of the public's investment. The alleged taking about which Appellee property owners complain is actually a windfall to them.

What are the interests that must be weighed against the public's interest in placing additional sand on its own property in order to restore or enhance the beach system and thereby protect its economic, storm protection and recreational interests? According to the First District's opinion, the interest being protected is the upland owner's right to future accretion and his right for the abutting upland property to touch the water, even though it is recognized that these "rights" are only a portion of the bundle of riparian rights. *Save Our Beaches, Inc. v. Florida*

Dept. of Envtl. Protection, 31 Fla. L. Weekly D1173 --- So. 2d ---, 2006 WL 112700, (Fla. 1st DCA April 28, 2006).

The right to future accretion under the circumstances surrounding a beach nourishment project is entirely speculative. A beach nourishment project cannot commence without an ECL and an ECL cannot be set if the beach is not critically eroding. *See* Sections 161.088 and 161.161, Fla. Stat. A critically eroding beach is unlikely to accrete, if at all, in a predictable manner, therefore it is impossible to tell whether erosion will claim upland structures before accretion begins to take place. From a more global perspective, sea level rise makes assumptions regarding future accretion on a critically eroded beach appear to be an even more remote possibility.

As a matter of public policy, the Legislature has decided not to take the long shot gamble that, over time, Florida's critically eroded beaches will accrete before upland structures are destroyed by storms. Instead, it has determined in Chapter 161 that it is in the public interest to move forward with beach nourishment in order to protect the economic interests of the state and its beach communities, nesting habitat for threatened or endangered marine turtles and shorebirds, as well as the safety of the structures and infrastructure located along its shores. A critically eroding beach creates an imminent threat of catastrophic loss of shoreline

structures, such as those owned by Appellees, and the state should not be punished for deciding to protect those properties.

The right of an upland owner to have his property touch the water is nothing more than the right to accretions (and relictions), *Save Our Beaches, Inc. v. Dep't of Envtl. Protection*, 2005 WL 1543209, 11 (DOAH Recommended Order entered June 30, 2005), and when a beach is "critically eroded," that "right" is far too speculative to be legally protected. A beach nourishment project provides artificial accretion, bought and paid for by the public, and therefore owned by the public. Even though the newly constructed beach is public land, no structure can interfere with an abutting property owner's access to the water unless it is determined that interference is unavoidable for purposes of protecting the beach or any endangered upland structure, and even then, alternative access is granted. Section 161.041, Fla. Stat. Even the abutting owner's view of the water is protected unless the state has first obtained his consent to alter or impair it. Section 161.191(2), Fla. Stat. Since the onset of the statewide beach management program in the late 1950's, projects have proceeded on the premise that owners of property upland of beach nourishment projects are entitled to all riparian rights reserved to them under section 161.201, Florida Statutes, and the program has been successful in meeting the needs of the public as well as the direct interests of the abutting property owners.

Potential Adverse Consequences to Existing and Future ECLs

By operation of law, the boundary between the upland property and sovereign lands has been established through the setting of an ECL prior to each beach nourishment project. Numerous beach nourishment projects and subsequent renourishment projects have been built in front of thousands of abutting upland properties since the beach program began in the early 1970s. It is conceivable that a ruling by this Court upholding the decision of the First District Court of Appeals that setting an ECL and nourishing a beach without the permission of an abutting upland owner is a compensable taking of either all or a portion of an abutting upland property owner's rights will result in hundreds of claims against the State and local governments. Even if this Court limited the holding and found that only a portion of the littoral rights of an abutting property owner were taken, and regardless of the speculative nature of the damages, litigation will be expensive and time consuming and will have a chilling effect on the willingness of the federal government and state and local governments to fund beach nourishment projects. The resulting flood of litigation will divert scarce public resources and undermine the beach nourishment program.

Moreover, the prohibitive expense of condemning entire beachfront parcels in order to nourish a beach will end the program in Florida. Even the added expense of condemnation for the speculative value of the rights to accretion and to

have the upland property boundary touch the water may seriously undermine the state's willingness to undertake beach nourishment projects. Assuming, but not agreeing, that the portion of the littoral rights allegedly taken has a value, the expense to the state and local governments for beach nourishment would escalate in the amount necessary to cover that value. In short, the state and local governments likely will be reluctant to expend millions of dollars for beach nourishment each year when they may be sued by the very property owners who are most directly benefited by the public expenditure of funds. Government does not conduct the program for the benefit of a handful of individual private property owners, even though they might have the most to gain, but instead seeks to benefit the state and its coastal communities as a whole. The fact that the individual property owners most directly benefited from a beach nourishment project would then seek additional compensation for the speculative "rights" they have allegedly lost would have a chilling effect on the program as a whole. The Legislature will be reluctant to appropriate funds knowing that the beach projects it is funding will engender litigation.

CONCLUSION

Based upon the above-mentioned significant negative economic, public safety and practical impacts as well as the inherent inequities in claiming damages for a taking in the context of the expenditure of public funds which directly benefit the Appellees, the FSBPA urges the Supreme Court to reverse the decision of the First District Court of Appeals.

RESPECTFULLY SUBMITTED this 25th day of October, 2006.

LINDA LOOMIS SHELLEY
Florida Bar I.D. 0240621
FOWLER WHITE BOGGS BANKER P.A.
101 North Monroe Street, Suite 1090
P.O. Box 11240
Tallahassee, FL 32301
Telephone: (850) 681-0411
Facsimile: (850) 681-6036

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been provided via hand delivery upon the following persons this 25h day of October, 2006.

Richard S. Brightman, Esq.
Dan R. Stengle, Esq.
D. Kent Safriet, Esq.
Hopping, Green & Sams, P. A.
P. O. Box 6526
Tallahassee, FL 32314

Kenneth J. Plante, Esq.
Kelly B. Plante, Esq.
Roetzel & Andress, L.P.A.
225 S. Adams St.
Suite 250
Tallahassee, FL 32301

Gregory M. Munson, Esq.
Teresa L. Mussetto, Esq.
L. Kathryn Funchess, Esq.
Department of Environmental Protection
3900 Commonwealth Blvd., MS-35
Tallahassee, FL 32399-3000

Thomas G. Pelham, Esq.
Fowler White Boggs Banker P.A.
101 N. Monroe St., Ste. 1090
P.O. Box 11240
Tallahassee, FL 32301

Stephen A. DeMarsh, County Attorney
Gary K. Oldehoff, Asst. County Attorney
David M. Pearce, Asst. County Attorney
Office of the County Attorney
1660 Ringling Blvd., Second Floor
Sarasota, FL 34236

_____

CERTIFICATION PURSUANT TO RULE 9.210(A)(2)

I HEREBY CERTIFY that this Amicus Brief is submitted in Times New Roman 14-point font, which complies with the requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

_____