IN THE SUPREME COURT OF FLORIDA

SC-06-1449
First DCA Case No.: 1D05-4086

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

RESPONDENT'S AMENDED ANSWER BRIEF

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

Attorneys for Respondent
STOP THE BEACH RENOURISHMENT, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Decisions

Florida Statutes

Florida Administrative Code

Florida Constitution

Other Authorities

PRELIMINARY STATEMENT AND GLOSSARY

This Court has acknowledged that the instant case (Case No. SC06-1449) is related to and will be considered along with a companion case (Case No. SC06-1447). Because the two cases have not been consolidated, Respondent is filing identical Answer Briefs with respect to Issues I and III under each docket number.

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

Act	Beach and Shore Preservation Act, Part I of Chapter 161, Florida Statutes
Agency Petitioners	Florida Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund
Applicant Petitioners	City of Destin and Walton County
DEP	Florida Department of Environmental Protection in its own right, and as staff to the Board of Trustees of the Internal Improvement Trust Fund, as the context allows
ECL	Erosion Control Line

JCP	Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands
MHWL	Mean High Water Line
Petitioners	Florida Department of Environmental Protection, Board of Trustees of the Internal Improvement Trust Fund, City of Destin, and Walton County
STBR	Stop the Beach Renourishment, Inc.
Trustees	Board of Trustees of the Internal Improvement Trust Fund

INTRODUCTION

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

Petitioners are asking this Court to disregard its 97-year history of holdings that littoral or riparian rights[2] are constitutionally protected property. Petitioners do so by asking this Court to approve their unilateral conversion of oceanfront property into oceanview property without a court order authorizing a boundary change and without paying any compensation. Petitioners attempt to camouflage

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

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

this unconstitutional taking of property rights by labelling it a "regulatory" taking, in an attempt to cast the analysis in the only mold which can achieve the result they seek.

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

STATEMENT OF THE CASE AND OF THE FACTS

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

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

SUMMARY OF ARGUMENT

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

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

Whether such elimination (or taking) of riparian rights is physical or regulatory is of little consequence because any severance of riparian rights from riparian uplands

---

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

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

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

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

The statutory privileges that mimic constitutionally protected riparian rights found in Section 161.201, Fla. Stat., are revocable at the will of the State and are thus no substitute for the constitutionally protected common law riparian rights currently enjoyed by STBR's members. As recognized by the District Court, the application of the Act in this way is unconstitutional because it severs and takes riparian rights and fails to afford riparian owners just and full compensation for the property taken.

If the resulting taking must be classified as either physical or regulatory, it is a physical taking for which the Petitioners have a constitutional and categorical duty to compensate the former owner. The Act recognizes the potential for a taking and includes a savings provision that requires any taking of private property be

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

accomplished through eminent domain proceedings.[8] DEP, however, has chosen not to follow the Act's mandate in this regard, apparently because it would be too cumbersome and expensive.

The Petitioner Applicants did not present "satisfactory evidence of sufficient upland interest" as required by Rule 18-21.004(3)(b), F.A.C. Nor do the Petitioner Applicants qualify for the exception from having to produce evidence of sufficient upland interest because their beach nourishment project "unreasonably infringes" upon the riparian rights of STBR's members by completely taking those rights. Accordingly, DEP's action in issuing the JCP without first requiring the Petitioner Applicants to acquire the necessary property interests, as required by Section 161.141, Fla. Stat., was improper and unconstitutional.

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

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

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

ARGUMENT

This Court is being asked to review the District Court's determination that Part I of Chapter 161, Fla. Stat., was unconstitutionally applied by DEP in this case. Petitioners attempt to justify their actions by improperly framing the issue in terms of a "regulatory" taking. They then attempt to lure this Court's focus to a single riparian right, namely that of accretion, which they then claim is "speculative" so it is sure to fail their inapposite "regulatory takings" analysis.[10] Not only is accretion not speculative, Petitioners' strategy ignores **ALL** other constitutional riparian rights that have been eliminated by DEP's application of the Act in this case, with inferior statutory rights being illegally substituted for constitutionally protected riparian rights.

---

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

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

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

STANDARD OF REVIEW

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

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

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

"Although riparian rights are property, they are unique in character. The source of those rights is not found within the interest itself, but rather they are found in, and are defined in terms of the riparian upland."[14] Riparian rights are common law

---

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

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

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

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

rights that are inherent in the ownership of uplands adjoining navigable water.[15] "Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) the right of access to the water, including the right to have the property's contact with the water remain intact; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property."[16]

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

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

In 1909, this Court announced that "[t]hese special [riparian] rights are easements incident to the riparian holdings, and are property rights that may be regulated by law, but may not be taken without just compensation and due process of

---

[15] Id.; §253.141, Fla. Stat.

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

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

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

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

In 1985, this Court considered an attempt by the Florida Department of Transportation ("DOT") to condemn riparian property, excluding and reserving the riparian rights to the condemnee and thus not paying compensation for those riparian rights. DOT's actions were held to be "an unconstitutional taking."[22] The basis for the Court's holding was that riparian rights could not be severed from the riparian

---

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

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

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

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

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

uplands (even in a condemnation action).[23] The Court remanded the case for the trial court to determine the "just compensation due" for the riparian rights.[24]

Two years later in 1987, this Court decided Sand Key, again reaffirming "that riparian or littoral rights are legal rights and, for constitutional purposes, the common law rights of riparian and littoral owners constitute property" which "may not be taken without just compensation."[25]

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

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

---

[23] Id. at 653.

[24] Id.

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

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

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

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

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

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

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

---

[27] Thiesen, 78 So. at 507.

[28] See § 161.161(1), Fla. Stat.

[29] See § 161.161(2), Fla. Stat.

submerged land from the Trustees under Chapter 253, Fla. Stat., and Chapter 18-21, F.A.C. These two authorizations are processed together.[30]

As part of a nourishment project, the Act requires the Trustees to conduct or approve a survey of the beach in order to locate the "Erosion Control Line" (ECL) for the project.[31] Thereafter, the Trustees are required to provide notice of the ECL survey to, inter alia, all riparian land owners and hold a public hearing regarding the establishment and approval of the ECL.[32] The Trustees are ultimately required to approve the ECL for a project.[33]

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

> **title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty**, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded. [35]

---

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

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

[32] See § 161.161(4), Fla. Stat.

[33] See § 161.161(5), Fla. Stat.

[34] See § 161.181, Fla. Stat.

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

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

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

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

---

[36] See § 161.141, Fla. Stat.

[37] See § 161.191(2), Fla. Stat.

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

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

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

The result of the private upland owner's boundary being fixed at the ECL is that the upland owner's property no longer borders a navigable water body. Consequently, the upland owner no longer owns ANY riparian rights because riparian rights inure only to the owner of land bordering on a navigable water body. The riparian rights which formerly attached to the upland owner's property now attach to the new dry land created by the nourishment project because it now borders the navigable water body.

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

[41] [R. 339-340].

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

water body, DEP has authorized the taking of all riparian rights previously owned by STBR's members.[43]

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

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

---

[43] To directly address the certified question, there can be no greater infringement on riparian rights than their complete elimination. Such an infringement is unreasonable where, as here, no compensation is paid because it violates the constitutional protections for private property. Because there is an unreasonable infringement on riparian rights, the Applicants do not qualify for the exception in Rule 18-21.004(3), F.A.C., to the requirement to provide satisfactory evidence of sufficient upland interest.

[44] ' 161.141, Fla. Stat.

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

question, though, is not whether riparian rights are eliminated, but whether that elimination passes constitutional muster.

The Act, which DEP claims does the taking, directs DEP and the Applicants to institute eminent domain proceedings for any taking occasioned by a beach nourishment project under the Act.[46] If properly applied, this provision could save the Act from constitutional infirmity as the District Court recognized. In this case, however, DEP has failed to properly interpret and apply the Act, resulting in an as-applied unconstitutional taking.

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

[46] ' 161.141, Fla. Stat.

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

Petitioners argue at length that there is no taking in this case because the "regulatory taking" test under Penn Central[47] should control. In response to similar arguments below, the District Court declined to engage in a regulatory versus physical taking analysis, recognizing that Belvedere and Section 253.141, Fla. Stat., expressly prohibit the severance of riparian rights from riparian lands.[48] Because Petitioners are unable to overcome the hurdles of Belvedere or Section 253.141, Fla. Stat. – as noted infra – there is no need for the Court to reach the question of whether the taking is physical or regulatory. If this Court finds it is appropriate to engage in such an analysis, however, the taking in this case – if it must be categorized – is a physical taking because STBR's members' property rights have been eliminated, not regulated.

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

---

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

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

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

[50] Id. at 1014.

the water to the channel, the Keisel's filed an inverse condemnation claim against the County.[51]

The County argued that "there was no physical taking" since the bridge did not physically rest on any of the Keisel's property nor was any of the Keisel's property condemned for the project.[52] The Second District rejected the County's regulatory taking argument and found a physical taking occurred stating:

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

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

---

[51] Id.

[52] Id. at 1015.

[53] Id. (Emphasis added).

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

regulatory takings test in the context of riparian rights. Naturally, the Petitioners avoid discussing Keisel and its application to the instant case.

As noted by the Second District, regulatory takings occur only when a "landowner's use of his property has been restricted by a governmental regulation." Here, neither the Act, nor DEP, are "restricting" STBR members' use of their property or riparian rights, such as limiting the type, size, or location of structures to be built on accreted lands. Rather, the Act, as applied by DEP, transfers the riparian rights from the upland property owners to the State.

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

---

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

[56] Id. at 25.

[57] Id.

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

The Fourth District held that the "allegations in the complaint are sufficient to show a **complete appropriation** of the plaintiffs' riparian rights and thus a taking without just compensation."[59] In the instant case, like Kendry, DEP is authorizing the filling of submerged lands[60] adjacent to the private riparian uplands and is claiming title to those lands.[61] Because DEP has claimed ownership to the new lands and will physically occupy the interface between privately owned uplands and the MHWL with sand (creating new dry land), it has completely appropriated STBR's members' riparian rights. Such a complete appropriation is a

---

[58] Id. (Emphasis added).

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

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

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

physical taking that must be accomplished, if at all, through eminent domain proceedings.

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

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

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

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

The District Court properly held below that Belvedere[63] is controlling because "Florida's law is clear that riparian rights cannot be severed from riparian uplands absent an agreement with the landowner, not even by eminent domain."[64] Petitioners'

---

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

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

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

attempt to brush off this crucial holding, summarily stating it does not apply (as they must because ignoring the entire severance issue is necessary to their inapposite "regulatory takings" argument).

In Belvedere, this Court addressed the following certified question: "DOES FLORIDA LAW PERMIT RIPARIAN (OR LITTORAL) RIGHTS TO BE SEPARATED FROM RIPARIAN LANDS?" This Court held that riparian rights cannot be severed from riparian uplands absent an agreement with the riparian owner.[65]

In Belvedere, the DOT sought through eminent domain proceedings to acquire a parcel of riparian property in fee simple absolute from Belvedere.[66] DOT did not condemn the riparian rights to the property, however, expressly "reserving" those riparian rights to Belvedere.[67] Belvedere challenged the taking, alleging that DOT

---

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

[66] Id. at 650.

[67] The reservation language provides:

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

Belvedere, 476 So.2d at 650.

was taking only a portion of its lands and was required to take all of it or pay severance damages.[68]

On appeal, the district court upheld the reservation of riparian rights but certified the question of their severability to this Court, which quashed the district court decision, agreeing with Belvedere that the attempted reservation of riparian rights is ineffective because "riparian rights are appurtenant to and inseparable from the riparian land."[69]

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

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

---

[68] Id. at 650.

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

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

In light of these concerns, this Court expressly held that "[r]iparian rights cannot be severed by condemnation proceedings without the consent of the upland owner,"[71] noting that the "condemnation context is distinguishable from the situation where two parties to a real estate transaction might choose to sever the riparian rights from the riparian lands and also provide those necessary additional rights which would enable the riparian right holder to actually benefit from those rights – i.e., an easement or right to enter the riparian lands."[72] Therefore, the Court concluded that riparian rights can only be severed when there is a "bilateral agreement to do so" with the riparian owner.[73] The Court further held that "the act of condemning petitioners' lands without compensating them for their riparian property rights under these facts was an unconstitutional taking."[74]

In the instant case, the Act and Final Order purport to do exactly what this Court found to be unconstitutional in Belvedere: sever riparian rights from riparian lands. The statutory scheme, as applied by the Final Order, attempts to separate

---

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

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

[73] Id. at 652-653.

[74] Id. at 652.

riparian rights from the newly-created State-owned strip of riparian land to be created by the nourishment project.[75] Then, the scheme attempts to statutorily "reserve" those riparian rights (except, of course, for the right to accretion) for the owners of the property which is currently riparian, but which is to be rendered no longer riparian because of the nourishment project. Belvedere prohibits such a severance of riparian rights, absent a bilateral agreement which is in keeping with Section 253.141, Fla. Stat., which provides that riparian rights "are **inseparable from the riparian land**."[76]

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

---

[75] This effect is illustrated by the survey of the Walton County ECL which is a part of the record below. [R. 1-5]. The survey shows the ECL located at the current Mean High Water Line ("MHWL"). [R. Pet. Ex. 4]; see also Recommended Order [R. 349]. It further depicts the "predicted upland limits of construction," "predicted seaward limits of construction," and the "predicted post-construction mean high water line." Id. The ECL survey clearly shows – as found by the ALJ – that construction (i.e., placement of sand) will occur both landward and seaward of the ECL. Id. Additionally, and most importantly, the ECL survey shows that the predicted post-construction MHWL is significantly (between 60' and 135', and on average approximately 100') seaward of the ECL. Id.

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

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

The District Court found, consistent with Belvedere, that the Act's attempt in Section 161.201, Fla. Stat., to "reserve" to prior riparian owners statutory rights similar to the common law rights that are eliminated by operation of the Act was invalid.[77] While Section 161.201, Fla. Stat., may be well intentioned, as applied to STBR's members this Section is ineffective as a cure, and is illegal and unconstitutional for two reasons.

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

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

"reservation" in Belvedere was unconstitutional, the attempted "reservation" in Section 161.201, Fla. Stat., as applied by the Final Order, fails.

Secondly, assuming *arguendo* that riparian rights could legally be severed or "reserved," Section 161.201, Fla. Stat., attempts to replace constitutionally protected rights with inferior statutory rights. Unlike constitutionally protected common law riparian property rights, these statutory rights are a mere privilege that can be revoked at any time.[78] Constitutionally protected rights, on the other hand, cannot be infringed or modified by the legislature, nor can the legislature authorize such an infringement.[79] No one could credibly argue that any statutory rights guaranteeing free speech for example, are the legal equivalent of constitutional rights to free speech.

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

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

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

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

As noted above, in an apparent attempt to avoid an unconstitutional taking Section 161.141, Fla. Stat., includes a savings provision that requires any taking of private property to be accomplished through eminent domain proceedings.[80] As a result, DEP had the authority and ability to require the City and County to first institute eminent domain proceedings to lawfully acquire the necessary property rights before issuing the JCP.

In the Final Order, DEP has interpreted this section to apply only when some ownership interest in the upland real property is taken, and does not apply to the "mere" elimination of riparian rights. However, as seen above, riparian rights cannot constitutionally be severed from the riparian property even through eminent domain proceedings.[81] Thus, in light of Belvedere and Section 253.141, Fla. Stat., DEP's interpretation of Section 161.141, Fla. Stat., results in an unconstitutional taking of riparian rights. If, however, Section 161.141, Fla. Stat., is properly construed to

---

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

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

require the City and County to first become the owner of all requisite property rights – including riparian rights – then the Act could be applied in a constitutional manner.[82]

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

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

In addition to rearguing their regulatory takings argument, which was properly rejected below, DEP has developed two new legal theories to justify its expropriation of STBR's members' riparian rights. It is not appropriate, however, for DEP to make new arguments on this appeal as they were not presented to the District Court.[83] This Court should reject DEP's new arguments for this reason alone, in addition to the following substantive reasons.

---

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

[83] Metropolitan Dade County v. Chase Fed. Housing Corp., 737 So.2d 494, 499 n. 7 (Fla. 1999) (holding that argument raised for the first time in the Supreme Court and was not "raised in the trial court nor addressed by the Third District" was not preserved for appellate review.); Cole Taylor Bank v. Shannon, 772 So.2d 546, 552 n. 2 (Fla. 2000) (refusing to consider new theory of claim for first time on appeal).

A. Common Law Changes to Property Boundaries of Riparian Lands

After failing to argue – or even cite – Martin v. Busch[84] below, DEP now scolds the District Court for "fail[ing] to recognize that Martin applies to the present facts."[85] DEP was right the first time, as Martin is wholly inapplicable to this case because this case does not involve "a boundary dispute [where] the parties [are] arguing over which survey should be used to identify the ordinary high water mark."[86]

DEP has attempted to transform this case from one that adjudges whether its action in issuing the JCP was constitutional into one which determines the proper owner of any newly-formed beach. While such an issue will likely need to be decided eventually, the record before this Court was not created to determine title issues. This case is an administrative appeal from issuance of a JCP permit where neither DEP nor the ALJ had jurisdiction to decide title issues.[87] The record in this case was created well before any new beach was created, and ownership of the newly created beach has not been litigated, briefed, or argued below.

---

[84] 112 So. 274 (Fla. 1927).

[85] See DEP Initial Br., p. 27.

[86] Sand Key, 512 So.2d at 939 (stating this to be the "sole issue" in Martin).

[87] 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."

Not only is DEP's claim of title by avulsion premature and outside of the record, it is legally wrong. Nevertheless, DEP's argues that, based on Martin, Florida law provides that the addition or loss of waterfront land from "avulsive" events do not change the property boundary. The effect of which in this case, DEP claims, would be that the newly-created beach would not change the boundary line of STBR's members' property and the ECL is merely the codification of this common law concept.

DEP's new argument fails for three reasons. First, the beach nourishment project is not "avulsion." Secondly, if applying DEP's avulsion theory, the submerged lands upon which the new sand is being placed is likely not owned by the State but by STBR's members because of the hurricanes that caused the retreat of the shoreline were also avulsive events. Thirdly, DEP's reliance upon dicta in Martin theory has been recently rejected by this Court in Sand Key.

1. A Beach Nourishment Project Is Not "Avulsion"

DEP's avulsion argument implodes because a beach nourishment project is not "avulsion." DEP asks the Court to decide that the newly-placed sand be classified as avulsion, instead of accretion. The Court need not make such a decision without a proper record, and because a beach nourishment project is not neatly categorized as either.

Avulsion is defined as the "sudden or perceptible loss or addition to land **by action of the water**. . . ."[88] Stated another way, "avulsion" is caused by "the sudden or violent **action of the elements** . . . ." [89] DEP glosses over the requirement that avulsion occurs by the action of the water or elements and chooses to focus on whether the action is "sudden or violent" as compared to "gradual."

It should be beyond debate and common sense that a huge ship physically sucking tons of sand from the ocean floor and pumping that sand through pipes to the shoreline where it is distributed by bulldozers is not "an action of the water" or "elements." Perhaps this explains DEP's failure to cite a case so holding, as the two cases cited by DEP involve hurricanes as the avulsive event.[90] Notably, the opinion in Martin does not even use the term avulsion.

Accretion is defined as the "gradual and imperceptible accumulation of land along the shore or bank of a body of water."[91] Even assuming the Court could reach the "sudden or violent" versus "gradual" issue, a beach nourishment is not "sudden"

---

[88] Sand Key, 512 So.2d at 936 (Emphasis added).

[89] Siesta Properties, Inc. v. Hart, 122 So.2d 218, 224 (Fla. 2d DCA 1960) (Emphasis added).

[90] See Siesta Properties, 122 So.2d at 219-20 (involving a property dispute resulting from a "heavy gale in 1918," "heaving washing of sand and soil by gale winds . . . in 1921" and a "severe hurricane [that] struck the area . . . on September 18, 1926."); Bryant v. Peppe, 238 So.2d 836, 837 (Fla. 1970) (involving changes to properties as a result of the same 1926 hurricane).

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

enough to be classified as avulsion. In the instant case, the nourishment project will proceed at a rate of 300-500 feet per day taking anywhere from 73 days to 122 days (assuming no delays).[92] It may be perceptible to a degree, but it is certainly not suddenly like a hurricane or storm. Thus, a beach nourishment project is not "sudden" enough to be avulsive, in addition to the fact the action is not natural.

2. The Submerged Land upon Which the New Sand is Being Placed is Not Sovereign Because it Was Likely Submerged by "Avulsion"

In raising its new avulsion argument – which is completely outside the record – DEP has overlooked the complexity as well as the impropriety of the issue. The doctrine of avulsion is a two-way street which fatally undermines DEP's position and perhaps its entire case.

If avulsion causes a retreat of the beach, the upland owner does not lose title to the land submerged by avulsion.[93] Instead, the upland owner continues to own to the location of the MHWL prior to the avulsive event (i.e., hurricane), including land that is submerged as a result of the hurricane. In the instant case, the land which DEP has claimed as sovereign (and is allowing to be filled) is most likely privately-owned land that became submerged as a result of several avulsive events. DEP admits that

---

[92] Save Our Beaches, 31 Fla. L. Weekly at D1173. The record also demonstrates that the County has nourished the beach in front of some STBR members' properties and not others. See, Response In Opposition to Petitioners Motions for Stay of Mandate, Exhibit 3, Affidavit of Tammy Alford.

[93] Siesta Properties, 122 So.2d at 224.

avulsive events caused the retreat of the beaches involved in this case, acknowledging that Hurricanes Erin and Opal in 1995, Georges in 1998, and Tropical Storm Isidore in 2002 "decimated" the shoreline within the project causing the beaches to become "critically eroded."[94]

The record does not contain any findings with respect to the ownership of any specific area of land with respect to any avulsive events because that issue was never raised below, nor could it have been, because circuit courts have exclusive jurisdiction to consider title disputes, and this appeal is from an administrative proceeding.[95] To the extent DEP wishes to determine if the lands which it claims and proposes to fill are truly sovereign and not owned by the upland owner because of avulsion, it should file an appropriate action in circuit court claiming ownership with respect to each riparian property. The entire ownership issue is premature as the issue has never been raised nor a proper trial court record prepared.

3. Martin v. Busch Does Not Extinguish Common Law Riparian Rights

There is little need for STBR to distinguish Martin because the Trustees raised the identical argument in Sand Key, and the argument was soundly rejected. As noted by the Sand Key Court, "*Martin's* sole issue was a boundary dispute, and the parties were arguing over which survey should be used to identify the ordinary high water

---

[94] See DEP Initial Br., p. 1.

[95] See ' 26.012(2)(g), Fla. Stat.

mark."[96] In addressing the Trustees' argument that Martin extinguished riparian rights, Justice Overton stated:

> We reject the Trustees' contention that the dicta in *Martin* means that riparian owners are divested, **not only of their riparian or littoral right to accretions, but also of their property's waterfront characteristics.** This Court expresses no such intent in *Martin v. Busch*, and, in fact, the concurring opinion of Justice Brown states that *Martin* does not involve the rights to accretion and reliction. . . . Our subsequent decisions show there was no intent to change common law principles regarding the right to accretions and relictions.[97]

Like Sand Key, STBR's members cannot be "divested . . . of their riparian or littoral right to accretions, [or] . . . their property's waterfront characteristics" and Martin expresses no such intent.

In stark contrast to Martin and DEP's reliance thereon, this Court has specifically held that the "freezing" of the property boundary between riparian lands and sovereign submerged lands (eliminating riparian rights) is invalid. The ECL fixes a permanent boundary line between the state-owned submerged lands and STBR's members' riparian lands, and in so doing, unconstitutionally deprives STBR's members of constitutionally protected riparian rights without due process and just and full compensation under the United States[98] and Florida Constitutions. In State of

---

[96] Sand Key, 512 So.2d at 939.

[97] Sand Key, 512 So.2d at 940-941 (Emphasis added) (Citation omitted).

[98] In addition to the Petitioners' actions being a taking under state law, STBR notes that Petitioners' actions also constitute a taking under the federal constitution. See

Florida v. Florida Nat'l Properties, Inc.,[99] this Court addressed a statutory scheme almost identical to the Act and declared like behavior unconstitutional.[100] In that case, Florida National Properties filed suit against the Trustees to resolve a dispute over the property boundary between its riparian uplands and the Trustees= bottom lands of Lake Istokpoga. The Trustees argued that the property boundary should be located at a contour of 41.6 feet above sea level pursuant to Section 253.151, Fla. Stat. (1973).[101] Florida National Properties challenged the constitutionality of Section 253.151, Fla. Stat., which the trial court and this Court declared unconstitutional.

Section 253.151, Fla. Stat., was strikingly similar to the provisions of the Act. Section 253.151, Fla. Stat., attempted to establish a Aboundary line@ between the

---

Bonelli Cattle Co. v. State of Arizona, 414 U.S. 313 (1973). As such, STBR expressly makes the following reservation to the disposition of this case by the state courts of Florida: Prior to bringing a claim for an unconstitutional taking under the Fifth and Fourteenth Amendments of the United States Constitution and any related federal statute, a plaintiff is required to first exhaust state judicial remedies which may be available for redress. STBR therefore exposes such federal takings claims to this Court, but expressly reserves them for adjudication in federal court in the event no state judicial remedy is obtained. Accordingly, the only takings claims presented to this Court for adjudication is one under the Laws and Constitution of the State of Florida.

[99] 338 So.2d 13 (Fla. 1976).

[100] Florida Nat'l Properties, 338 So.2d 13.

[101] All citations to § 253.151, Fla. Stat., in this portion of the Brief are to the 1973 version, unless otherwise noted.

sovereign bottom lands of freshwater lakes and the upland property.[102] The statute provided for several methods for establishing the location of the boundary line.[103] The statute then provided that the Aboundary line@ became effective and recorded in the County in which the land was located once the location was approved by the Trustees and public notice given for three weeks.[104] Thereafter, the Aboundary line@ marked the permanent boundary between privately-owned uplands and state-owned sovereign lands. By establishing the boundary line in such a manner as to result in a dry strip of land between the actual water's edge and the upland property, the statute was similar to the Act. It even provided the upland owner with usufructuary rights much like the Act's attempt to sever riparian rights and reserve them (per Section 161.201, Fla. Stat.) to the owner of the land abutting the ECL.[105]

This Court affirmed the trial court=s judgment declaring Section 253.151, Fla. Stat., unconstitutional because it attempted to fix a permanent boundary line between

---

[102] See ' 253.151(2)(b), Fla. Stat. ABoundary line@ is defined as Athe line which separates the sovereignty lands of the state from those of a riparian upland owner. Such boundary line shall be described in terms of elevation above mean sea level of the state as indicated on the bench mark of the United States Coast and Geodetic Survey nearest the respective navigable meandered fresh water lake.@

[103] Id. at (3)(a-d).

[104] Id. at (4).

[105] See ' 253.151(5), Fla. Stat. ("The riparian owner shall have the usufructuary right over lands lakeward of the boundary line down to the existing waterline. . . . A riparian owner shall have the right of ingress and egress to and from the water for purposes of boating, swimming, fishing, skiing, and similar activities . . . .").

riparian uplands and sovereign lands.[106] In holding that the statute deprived private property owners of their constitutional right to compensation, the trial court stated:

> By relying upon ' 253.151, the State . . . claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction. Both Federal and **Florida courts have held that an owner of land bounded by the ordinary high water mark of navigable water is vested with certain riparian rights, including the right to title to such additional abutting soil or land which may be gradually formed or uncovered by the processes of accretion or reliction, which right cannot be taken by the State without payment of just compensation**. [citations omitted]
>
> By requiring the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands, Fla. Stat. ' 253.151 . . . constitutes a taking of Plaintiff's property, including its riparian rights to future alluvion or accretion, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of Art. I, Sec. 9, of the Florida Constitution.[107]

This Court, in affirming the trial judge=s reasoning and opinion and quoting the same extensively, stated, A[W]e sustain the learned trial court in holding Section 253.151, Florida Statutes, unconstitutional in its entirety. An inflexible meander

---

[106] Interestingly, in Florida Nat'l Properties, the "State concede[d] the invalidity of the boundary-setting" scheme. Florida Nat'l Properties, 338 So.2d at 19 (England, J. concurring). The Agency Petitioners have yet to experience the same epiphany in this case.

[107] Florida Nat'l Properties, Inc., 338 So.2d at 17 (Emphasis added).

demarcation line would not comply with the spirit or letter of our Federal or State Constitutions nor meet present requirements of society.@[108]

The creation, establishment, and effect of the ECL under the Act is directly analogous to the illegal Aboundary line@ under Section 253.151, Fla. Stat. Like that illegal Aboundary line,@ the ECL establishes an inflexible demarcation line between riparian property and sovereign submerged lands that divests riparian property owners of certain vested riparian rights, including the Aright to title to such additional abutting soil or land which may be gradually formed or uncovered by the processes of accretion or reliction.@[109] The attempted "reservation" of riparian rights as a usufructuary right in Section 253.151(5), Fla. Stat., did not cure the unconstitutional infirmity in the 1973 statute, and the "reservation" of severed riparian rights to STBR's members in Section 161.201, Fla. Stat., is equally ineffective.

Petitioners understandably do not cite or distinguish Florida Nat'l Properties, considering that the legal effect of the ECL is no different than the illegal Aboundary line@ in Florida Nat'l Properties.[110] For the same reasons that the "boundary line" was

---

[108] Id. at 19. The Court further stated: AUpon careful consideration of both the record and arguments of counsel, we conclude that the trial court correctly held the efforts of the State to fix specific and permanent boundaries were improper, and we hold that Section 253.151, Florida Statutes, is unconstitutional.@ Id. at 18.

[109] Id. at 17.

[110] See also Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So.2d 209, 213 (Fla. 2d DCA 1973) ("Freezing the

unconstitutional in Florida Nat'l Properties (and the reservation of riparian rights ineffective), the Act and ECL as applied by DEP in this case are unconstitutional.[111]

B. Riparian Owners May Defend Their Property Notwithstanding That an Interference with or Elimination of Their Riparian Rights Is for an Alleged "Public Good"

DEP's second new argument asserts that "the public good" trumps the constitutional protections afforded to, and justifies the elimination of, STBR members' riparian rights.[112] DEP even goes so far as to state that STBR members' assertion "of their riparian right to accretion is "dubious" and . . . "is hostile to important public purpose activities . . . ." DEP then characterizes STBR members' defense of their property rights as antagonistic and "harming to the state's property rights and rises to the level of a 'nuisance.'"[113]

---

boundary at a point in time, such as was done in Martin or as is suggested here by the state, not only does damage to all the considerations above but renders the ordinary high water mark useless as a boundary line clearly marking the riparian's rights and the sovereign's rights.").

[111] In Florida Nat'l Properties, the Court held all of Section 253.151, Fla. Stat., unconstitutional (facially and as-applied) because there was no savings clause similar to that contained in Section 161.141, Fla. Stat. In this case, DEP failed to follow Section 161.141, Fla. Stat., which contains a savings clause requiring all property rights be acquired by eminent domain. That is why this case is an as-applied challenge.

[112] See DEP Initial Br., p. 31.

[113] Id. at 31, 42-43.

DEP's casting of aspersions on STBR members for defending themselves and protecting their property rights is illustrative of DEP's arrogance. This arrogant posture may explain DEP's actions in this case, as they choose to ignore the plain language of Section 161.141, Fla. Stat., requiring eminent domain proceedings.

DEP proceeds to put the cart before the horse by citing to the common law maxim "*sic utere tuo ut alienum non laedas*," which is the principle that an owner cannot exercise its property rights in a manner that harms the property rights of others. Logically, this principle actually cuts against DEP, for it is DEP and the Applicants that seek to change the status quo and seek a permit that unilaterally alters STBR members' property boundaries and divest them of all riparian rights.[114] Because the DEP/Applicants are the first to exercise their property rights in this case – as the alleged owner/authorized user of sovereign submerged lands – they must do so in a manner which does not injure the property rights of others, including STBR's members.

DEP lastly misrepresents the holding in Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n.[115] This Court in Ferry Pass stated:

---

[114] STBR members' exercise of their constitutional right of access to the courts to defend themselves from DEP's taking of property rights is hardly injurious to the State's property rights.

[115] 48 So. 643 (Fla. 1909).

> A riparian owner has a right to enjoin in a proper proceeding the unlawful use of the public waters or the land thereunder including the shore which is a part of the bed, when such unlawful use operates as a special injury to such riparian owner in the use and enjoyment of his riparian lands. (citations omitted) . . . . the injury must relate to riparian lands . . . .[116]

As riparian owners, STBR's members, whose rights are being eliminated, easily meet the "special injury" test of Ferry Pass. For DEP to argue that STBR members have no right to defend themselves in this proceeding simply because DEP is the government and administers public trust lands is nothing short of high-handed and undemocratic.

C. Whether a Taking Has Occurred is Unrelated to How Much the Taking Would Cost the Government

The protestations of Petitioners (and their supporting Amici) that the ruling below would impose "unprecedented financial burdens on local governments" and devastate coastal restoration activities is emotional rhetoric and ignores that the legislature has already imposed that "financial burden" on the local governments, as it had to in order for the Act to pass constitutional muster. As noted by the District Court, the Act itself, in Section 161.141, Fla. Stat., requires property rights to be taken through eminent domain proceedings which require compensation to be paid, only if the state desires to carry out the project.[117]

---

[116] Ferry Pass, 48 So. at 645.

[117] Save Our Beaches, 31 Fla. L. Weekly at D1176-1177.

As this Court has aptly noted:

> [T]he constitutional guarantee of compensation does not extend only to cases where the taking is cheap or easy. Indeed, the need for compensation is greatest where the loss is greatest. **If one must make a choice between the government's convenience and the citizen's constitutional rights, the conclusion should not be much in doubt.**[118]

Petitioners, after ignoring the legislature's mandate, now want this Court to ignore the constitution and rewrite the Act to eliminate any obligation for the State to acquire property rights by eminent domain. Their reasoning is simple: it is cheaper and more convenient for the State to refuse to pay for the riparian rights taken in this case. The Court cannot and should not embrace this terribly flawed reasoning.

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

The District Court properly held that associations can bring the type of as-applied constitutional challenges involved in this case.[119] Petitioners' attempt to argue their entire case in the vacuum of "regulatory takings" jurisprudence is fatal to their standing argument. Because this is not a regulatory takings case, Petitioners' microscopic focus on limited associational standing to bring a "regulatory taking" is inapposite. As explained above, this case challenges DEP's

---

[118] Palm Beach County v. Cove Club Investors Ltd., 734 So.2d 379, 389 (Fla. 1999) (emphasis added) quoting William B. Stoebuck, Nontrespassory Takings in Eminent Domain, 134, 135 (1977).

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

administrative actions – where the administrative action is claimed to physically invade, expropriate, and extinguish constitutionally protected property rights. This is not a regulatory takings case.

The cases cited by Petitioners in support of their argument demonstrate their fundamental misunderstanding of the issue raised by STBR. Commission for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency, 365 F. Supp. 2d 1146 (D. Nev. 2005); Greater Atlanta Home Builders Ass'n v. City of Atlanta, 149 Fed. Appx. 846 (11th Cir. 2005); Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591 (2d Cir. 1993), are all **regulatory** taking cases involving various claims that local government acts (i.e., comprehensive plans or local development regulations) deprived certain landowners of all economically viable uses of their property. This case, to the contrary, claims an **actual expropriation** of STBR's members' property by the Act as applied by the Final Order.[120] In the face of clear law that mandates such a challenge be taken on appeal of an administrative final order,[121] Petitioners' citation of cases where local land development regulations are applied to a specific property on an ad hoc basis is inapt.

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

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

In the instant case, the Final Order unconstitutionally applies the Act (specifically §§ 161.141-.211, Fla. Stat.) to all property owners within the entire 6.9-mile beach nourishment project in a uniform manner. This appeal does not seek to determine how much compensation is due to each landowner (which likely would vary among the different parcels). Rather, it seeks only to determine whether it is constitutionally permissible for the statute to be applied in a manner which, as candidly admitted by the Final Order, will result in the severance (i.e., expropriation) of riparian rights from the upland property without requiring acquisition of those property rights.

Citing only a contract case as support,[122] DEP also suggests that STBR cannot challenge the unconstitutional application of the Act on behalf of their members because the relief requested is not of the type appropriate for an association to seek on behalf of its members, as required by this Court's test in

---

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

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

Florida Home Builders.[123] If STBR were seeking monetary damages for deprivation of its members' property rights, that might be true. The non-monetary relief requested by STBR, however, is an appropriate type of relief for an organization to request on behalf of its members.[124]

Petitioners have not described how the effects of DEP's actions in issuing the JCP and establishing the ECL are different for each STBR member such that the relief requested is inappropriate or that individual participation is required.[125] To the contrary, the effects of DEP's actions on each member of STBR is exactly the same, to wit, by changing the ownership of the property between the navigable water body and the ECL, thereby severing (and taking) all riparian rights from the upland properties. Because the effect on all STBR members is the same, and the

---

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

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

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

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

The District Court correctly noted that in Pennell v. City of San Jose,[126] and Hunt v. Washington State Apple Adver. Comm'n,[127] associations were allowed to bring constitutional challenges. Further, the cases are legion where the courts have allowed constitutional challenges by organizations where they found the "relief requested" was the type appropriate for the association to receive on behalf of its members.

In Florida Ass'n of Counties, Inc. v. Department of Admin.,[128] the court found that the Florida League of Cities and Florida Association of Counties (Amici here) had standing to challenge the constitutionality of Chapter 88-238, Laws of Florida, which increased the retirement benefits to special risk members (police and firefighters) and increased the retirement contributions required by the cities and counties. Relying on City of Lynn Haven v. Bay County Council of Registered Architects, Inc.,[129] the court held:

---

[126] 485 U.S. 1 (1988).

[127] 432 U.S. 333 (1977).

[128] 580 So.2d 641 (Fla. 1st DCA 1991), approved 595 So.2d 42 (Fla. 1992).

[129] 528 So.2d 1244, 1246 (Fla. 1st DCA 1988) (holding that a nonprofit corporation of architects had standing to assert that City's actions invaded a statutorily-created

> Here, a substantial number of the constituents comprising the Association and League have been substantially and adversely affected by Chapter 88-238, in that they have increased their FRS contributions. There is no **requirement that those entities themselves must sustain special injury.**[130]

In Hillsborough County v. Florida Restaurant Ass'n, Inc.,[131] the Florida Restaurant Association sued the county in a declaratory judgment action challenging the constitutionality of a county ordinance "requiring that a health warning sign be posted in certain establishments that serve alcohol." On the issue of standing, the court held:

> We agree with the trial court on this threshold issue and find that the Association has standing to contest the validity of the ordinance. That is so because the Association has met the three-prong test which confers standing to an association to sue for the benefit of its members who are more directly affected by the governmental action than the association itself.[132]

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

---

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

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

[131] 603 So.2d 587 (Fla. 2d DCA 1992).

[132] Id. at 589.

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

CONCLUSION

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

Respectfully submitted,

HOPPING GREEN & SAMS, P.A.

_____

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

Attorneys for Respondent

CERTIFICATE OF SERVICE

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

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

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

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

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

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

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

_____
Attorney

CERTIFICATE OF COMPLIANCE

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

_____
Attorney