IN THE SUPREME COURT OF FLORIDA

Case No. SC06-1449
Lower Tribunal Case No. 1D05-4086

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, CITY OF DESTIN and WALTON COUNTY,
Petitioners,

vs.

SAVE OUR BEACHES, INC. and
STOP THE BEACH RENOURISHMENT, INC.,

Respondents.

AMENDED INITIAL BRIEF OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND

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The following references will be used in this Brief on Jurisdiction:

REFERENCE	DESCRIPTION OF REFERENCE
Act	Part I, Chapter 161, Florida Statutes (2005) (the "Beach and Shore Preservation Act")
ALJ	Administrative Law Judge
Board	Petitioner, Board of Trustees of the Internal Improvement Trust Fund
Co-Petitioners	Petitioners City of Destin & Walton County
DEP	Petitioners, Department of Environmental Protection and (as applicable) Board of Trustees of the Internal Improvement Trust Fund
Department	Petitioner, Department of Environmental Protection
Joint Permit	Consolidated Notice of Intent to Issue a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands
R#	Record on Appeal
Respondent, or STBR	Respondent, Stop the Beach Renourishment, Inc.
SOB	Appellant Association below, Save Our Beaches
Tr.	Transcript of Administrative Hearing Below

STATEMENT OF FACTS AND OF THE CASE

The beaches of Destin and Walton County have experienced such severe erosion that the Department designated this shoreline as "critically eroded"--that is, the beach and dune system have been eroded (either from natural or man-induced causes) to such a point that upland properties and recreational amenities are threatened by further erosion. (Tr. 10.) This particular shoreline was decimated by Hurricanes Erin and Opal (1995), Georges (1998) and Tropical Storm Isidore (2002). (R1: 7.) As a result of the critical condition of these beaches, the City of Destin and Walton County filed a joint application with DEP in 2003 to conduct a beach nourishment project which would involve dredging from an ebb shoal located south of East Pass in the Gulf of Mexico off the shore of eastern Okaloosa County, and the placement of sand along approximately 6.9 miles of shoreline. (R1: 7, R3: 409, Tr. 74-75.) The project would encompass 275 parcels in the County, and 178 in the City. (Tr. 133, 142.)

Like the beaches of Destin and Walton County, other Florida beaches have experienced erosion so severe as to require restoration. (Tr. 20.) Florida's coastline consists of approximately 825 miles of sandy beaches fronting the Gulf of Mexico and the Atlantic Ocean. (Id.) Of that number, approximately 175 miles of beaches have been restored and are currently actively managed through a maintenance nourishment program, pursuant to the provisions of the Beach and

Shore Protection Act (the "Act") challenged in this case. (Id.) There are a total of forty-five (45) separate beach projects throughout Florida, on both the Gulf and Atlantic coasts, which have restored these beaches. (Id.)

In 1986, the Legislature, recognizing the "extent of the problem of critically eroded beaches," enacted section 161.088, Florida Statutes, in which it declared the public policy regarding beach erosion control and beach 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…from erosion and that the Legislature make provision for beach restoration and nourishment projects….The Legislature declares that such beach restoration and nourishment projects, as approved pursuant to § 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.

To further this governmental responsibility to manage and protect Florida beaches, the Legislature appropriates thirty million dollars annually to DEP to assist local governments in restoring "critically eroded" beaches. (Tr. 13.) Walton County has spent millions of county dollars on beach management projects. (Tr. 129.)

The process for obtaining a permit to conduct beach restoration is detailed, requiring engineering analyses, environmental assessments, technical sand search investigations, and feasibility studies, generally requiring a year or more to

complete. (Tr. 14, 18.) On July 30, 2003, at the culmination of this process, Walton County and the City of Destin filed their permit application. (R1:7)

Because the proposed activities will be located on sovereign submerged lands, a beach nourishment permit--issued pursuant to the Act--requires both regulatory authorization from the Department, and proprietary authorization from the Board of Trustees of the Internal Improvement Trust Fund. (R1: 7; Tr. 41.) Beach restoration consists primarily of placing high-quality sand from a "borrow" source on the beach, thereby increasing its width, or berm. (R:1 6-14; R3: 410, Tr. 75.) This restoration project will widen the beach berm to 210 feet, with an elevation of +8 feet, North American Vertical Datum, ("NAVD"). The project will also include dune restoration, resulting in a crest elevation of +12 feet, NAVD. (R1: 7.) The primary purpose of this restoration is protection of threatened upland residences, accomplished by moving the waterline further away from them. (Tr. 14.) In fact, the project design includes "sacrificial sand," which--during its "life expectancy" of six to eight years--is anticipated to erode back to the protective berm. (Tr. 19.) Once this sand erodes, the berm's protective value against storms will be lost unless maintenance nourishment is provided. (Tr. 19-20.)

Even though the upland properties adjacent to any beach nourishment project are thus greatly, and most directly, benefited by beach nourishment (both by the storm protection and aesthetic enhancement aspects of the project), there are

also significant public benefits.[1] Billions of dollars of taxable properties are located landward of the beach and dune system, providing millions of dollars in property tax revenue to local communities (Tr. 11.) Moreover, Florida's coastal beach areas--which "represent one of the most valuable natural resources of the state," § 161.053(1)(a), Fla. Stat. (2004)--both form the "first line of defense for the mainland against both winter storms and hurricanes," § 161.053(2), Fla. Stat. (2004), and are the cornerstone of the state's tourism industry. (Tr. 11.)

On beaches that have not been restored, the mean high water line ("MHWL") along the shores of land immediately bordering on navigable water is the boundary line between private ownership of upland property and the sovereign lands associated with navigable water. See § 177.28(1), Fla. Stat. (2004). "Mean high water" means the average height of the high waters over a 19-year period. See § 177.27(14), Fla. Stat. (2004). "MHWL" means the intersection of the tidal plane of mean high water with the shore. See § 177.27(15), Fla. Stat. (2004).

When beaches are restored, the Board is required to establish an "Erosion Control Line" ("ECL"). See § 161.141, Fla. Stat. (2004). Prior to initiating any beach nourishment project--including this one--a survey of all or part of the shoreline must be conducted to establish the area of beach to be protected by the project and to locate the MHWL, to determine placement of the ECL.

[1] Here, the Legislature has set forth the important public policies furthered by the Act, see § 161.088, Fla. Stat. (2004), which Respondent does not dispute.

§ 161.161(3), Fla. Stat. (2004); (see also Tr. 26). The ECL then represents the landward extent of the state's claims as sovereign title-holder of the submerged bottoms and shores of the Gulf of Mexico. Id. In this case, the City and the County had the MHWL surveyed in the proposed project area prior to commencing the beach nourishment project. The MHWL as of the survey date was used to establish, and coincides with, the ECL for the project. (R3: 414.)

The ECL also represents the seaward extent of claims of upland owners whose properties border the MHWL. See § 161.191, Fla. Stat. (2004). Thus, these owners will no longer suffer loss of property as a result of erosion. Id. If the ECL cannot be located on the MHWL, and must include some upland property--resulting in a "taking" of such property upon setting of the ECL--the Act provides authorization for the exercise of eminent domain. See § 161.141, Fla. Stat. (2004). If the beach ever erodes landward of the ECL, and the agency responsible for beach management fails to restore the area, the Act also provides a mechanism to vacate the earlier survey, and void the ECL. See § 161.211(3), Fla. Stat. (2004).

In this case, upon completion of the application process, DEP issued a Consolidated Notice of Intent to Issue a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (the "Joint Permit"), authorizing restoration of 6.9 miles of critically eroded beaches in Destin and Walton County. (R1: 6-7.) The Joint Permit includes two separate permits and an authorization. (R3: 422.)

The two permits are a coastal construction permit (governed by Chapter 161, Florida Statutes, and Chapter 62B-41, Florida Administrative Code) and a wetland environmental resource permit (governed by Chapter 373, Florida Statutes, and Chapter 62-312, Florida Administrative Code). (R3: 422.) The Joint Permit also includes a proprietary authorization to use sovereign submerged lands, which is governed by Chapter 253, Florida Statutes, and Chapter 18-21, Florida Administrative Code (Id.) Section 253.77, Florida Statutes, provides:

> A person may not commence any excavation, construction or other activity involving the use of sovereign or other lands of the state, the title to which is vested in the board of trustees of the Internal Improvement Trust Fund under this chapter, until the person has received the required lease, license, easement, or other form of consent authorizing the proposed use.

Rule 18-21.004(3), Florida Administrative Code ("Riparian Rights"), promulgated under section 253.03(7), Florida Statutes, provides, in pertinent part:

> (a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights, as defined in Section 253.141, F.S., of upland property owners adjacent to sovereignty submerged lands.
>
> (b) Satisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands, unless otherwise specified in this chapter. Public utilities and state and other governmental agencies proposing activities such as utility lines, roads or bridges must obtain satisfactory evidence of sufficient upland interest prior to beginning construction, but need not provide such evidence as part of any required application. Satisfactory evidence of sufficient upland interest is not required for activities on sovereignty submerged lands that are not riparian to uplands, or when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.

Upon DEP's issuance of the Joint Permit, Save Our Beaches, Inc., ("SOB") and Stop the Beach Renourishment, Inc. ("STBR") timely filed petitions for administrative hearing, challenging DEP's issuance of the Joint Permit, and requesting an administrative hearing. (R1: 16.) According to the allegations of the petition, SOB and STBR are both not-for-profit organizations incorporated in Florida. (Tr. 149-50, R3: 415.) Their purpose, among others, is to seek redress for past, present and future unauthorized or inappropriate restoration activities. (Id.) STBR has six members, all alleged to be owners of beachfront property in the area of the project. (R3: 415.) SOB has about 150 members, alleged to own approximately 112 properties in Destin, 62 of which are claimed to be beachfront. (Id.) No deeds or other documentation regarding the associations' members' ownership of property were proffered, nor any evidence that SOB or STBR themselves own property, or would otherwise be affected by the project. (Id.)

The initial petition asserted that there were thirty-eight disputed issues of fact, including whether the location of the MHWL had been properly identified. (R1: 19-23) On August 30, 2004, STBR filed a second petition, in which it challenged (inter alia) both the location of the ECL and whether the shoreline where the ECL would be established was "critically eroded." (R1: 84-85.) Shortly thereafter, both SOB and STBR--recognizing that shoreline impacts of hurricanes had further damaged project areas during 2004--sought and were granted leave to

amend the petitions to abandon challenges to "technical aspects" of the Joint Permit and location of the (pre-hurricane set) ECL. (R1: 116.)

In their First Amended Petition, SOB and STBR disputed only whether water quality standards would be met; whether the project would deny upland owners' use and enjoyment of their properties; whether the project would result in a "taking;" and whether the local sponsors had obtained requisite property rights to implement the project. (R1: 123-24) Both associations asserted that the project would "significantly impair" their members' riparian rights--particularly, the right to accretion--and that, therefore, the city and county were required, under rule 18-21.004(3) of the Florida Administrative Code, to provide satisfactory evidence of sufficient upland interest. (R3: 424-5, R2: 332.) The constitutional "taking" issue was dismissed prior to hearing, for later resolution by the appropriate court. (R1: 143; R3: 417.) Accordingly, DEP did not address this issue, as not before it.

At the formal administrative hearing, the associations called as witnesses only Slade Lindsey and Linda Cherry, as the representative of STBR and SOB, respectively. (Tr. 147, 165, 190.) While the witnesses testified that the project would impact the use and enjoyment of their properties "by having their riparian rights adversely impacted and taken away," no further evidence was presented to address whether these claimed losses would result in an "unreasonable infringement" of riparian rights. (Tr. 151-52, 155, 168.) The witnesses each

submitted affidavits from other members, but these affidavits, all similar, addressed only impacts which might arise from violations of the water quality standard for turbidity. (Record Exhibits 3, 6, 7.) No evidence was presented regarding the nature of the property interests held by these members, when their properties were acquired, or how the project would impact their property interests.

In addition, no record evidence was presented to support a claim that the project would deprive association members of any uses of their beachfront property. Rather, the two property owners who did testify indicated that they would continue to use and enjoy their beachfront property. (See generally testimony of Slade Lindsey, Tr. 148-65; testimony of Linda Cherry, Tr. 166-89.) Indeed, Mr. Slade's complaint was simply that the project would add "50 to 80 feet" of "dry sandy beach" between his property line and the water. (Tr. 163-64.) Ms. Cherry testified that she wades in the water at the beach; that she is at her property "once every two or three weeks;" and that she would probably be there "the whole time" the project is "being done." (Tr. 180-81.) The associations also presented no evidence to show that accretion has ever occurred, or might in future occur, at the subject properties. Rather, the record establishes the opposite--that the project area is critically eroded and "significantly eroding." (Tr. 23; 106-7.)

Lastly, STBR asserted that its members' "right" to have their properties "touch the water" would be infringed by the project. (Tr. 152.) However, STBR

presented no evidence to establish that its members' properties presently maintained continual contact with the water. Rather, Slade Lindsey testified that his own property extended to the MHWL (Tr. 148); thus, by definition, indicating that it does not maintain constant contact with the water. In contrast, the testimony of Martin Seeling reflects that the concept of "touching the water" is commonly associated with freshwater (non-tidal) lakes or rivers, where water levels are likely to remain the same. (Tr. 105.) His unrefuted testimony reflects that riparian properties do not always "touch" the water. (Tr. 105.)

Thereafter, upon consideration of exceptions to the Recommended Order, DEP issued its Final Order, supporting permit issuance. (R3: 393-435.) With respect to any "unreasonable infringement" of riparian rights, DEP stated:

> The ALJ specifically found that there would be no infringement of riparian rights resulting from the draft permit, but that even if any infringement did result from the issuance of the permit, such infringement was 'not unreasonable'. [SOB and STBR] have failed to show that this critical finding of the ALJ is flawed or not based on competent substantial evidence.

(R3: 398.) DEP concluded by adopting the Recommended Order in its entirety. (R3: 402.) Among the legal determinations thus adopted was the ALJ's conclusion that SOB lacked administrative standing, since it has presented no evidence that it owned property in the project area, or that more than one of its members owned such property, or would be affected by the project if it reduced water quality. DEP questioned, but did determine, whether STBR had standing. (R3: 419-20.) DEP

also found that reasonable assurance had been given that no water quality violations would occur, and that the application fell squarely within the exception in rule 18-21.004(3)(b), obviating the need for evidence of upland interest where project activities "do not unreasonably infringe on riparian rights.'" (R3: 425)

SOB and STBR timely appealed from the Final Order. (R3: 436-48.) Upon review, the First District reversed, holding that DEP's order effected a "taking" of the unconsenting upland owners' "constitutionally protected riparian rights" to "receive accretions and relictions to the property, and…[to] have the property's contact with the water remain intact." Save Our Beaches, Inc. v. Dep't of Envtl. Prot., 31 Fla. L. Weekly D1173, --- So. 2d ---, 2006 WL 1112700, *8 (Fla. 1st DCA Apr 28, 2006). In so doing, the First District concluded that the eminent domain case of Belvedere Dev. Corp. v. Dep't. of Transp., 476 So. 2d 649 (Fla. 1985) (addressing DOT's improper attempt to condemn upland property "in fee simple absolute without an award for severance damages" by purporting to reserve wholly-severed riparian rights to the owners) controlled. 2006 WL 1112700 at *10 ("Belvedere controls by explicitly holding that the riparian rights cannot be constitutionally reserved to the landowners as described in Section 161.201.").

Based on its interpretation and application of Belvedere, the First District further determined that, "[b]ecause [the] riparian rights [of unconsenting upland owners represented by STBR] were unconstitutionally taken without an eminent

domain proceeding as required by section 161.141, those rights have been infringed upon." Id. at *8 (emphasis added). It remanded the case, directing DEP --not the permit applicants--to provide satisfactory evidence of sufficient upland interest pursuant to administrative rule 18-21.004(3)(b). Id. at *11.

Thereafter, DEP, Walton County, and the City filed timely motions for rehearing, rehearing en banc and certification of questions. In its motion (among other points), DEP asserted that it had never conceded, as the First District's opinion reflected, id. at *10, that "the MHWL would move seaward as a result of the beach nourishment project, and ordinarily this would result in the upland landowners gaining property by accretion."[2] DEP noted the Court's clear misapprehension both by reference to DEP's brief (in which it had argued vigorously that accretion had neither occurred, nor was even remotely likely to occur, at the subject properties) and to the relevant exchange which had occurred on oral argument.[3] DEP further observed that the court had overlooked that application of a constitutional "takings" analysis to the record facts would compel a result contrary to the court's determination; and that the court, in reversing the

[2] DEP also asserted that such concession, even if made, "cannot affect the legal status of the sovereignty lands." Martin v. Busch, 112 So. 274, 287 (Fla. 1927).

[3] As reflected in this exchange, counsel for DEP was asked, at oral argument, if the MHWL would move seaward, but was not asked what effect that would have:

> Q: Is there any dispute that when the beach restoration project takes place that the MHWL will move seaward?
>
> A: No, no dispute.

order, had relied on a legal basis (that the Act effected an "unreasonable infringement" of riparian rights) which SOB and STBR had not argued on appeal. DEP also urged the exceptional importance of this case.

The District Court denied the motions for rehearing and rehearing en banc, but certified the following question as one of great public importance:

> Has [the Act] been unconstitutionally applied so as to deprive the members of [STBR] of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply?

Save Our Beaches, 2006 WL 1112700 at *11 (Fla. 1st DCA July 3, 2006). DEP timely requested the Court's discretionary review, which was granted.

STANDARD OF REVIEW

All issues addressed in this Initial Brief involve questions of law, to which the de novo standard of appellate review applies. See D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003) (reflecting that the de novo standard of review applies to questions of law).

SUMMARY OF THE ARGUMENT

Contrary to the First District's determination, STBR--which asserted no property rights of its own--does not have standing to assert an as-applied "taking" on behalf of its individual members. To the extent that a regulatory "takings" analysis is implicated, such claims as to each member's specific parcel are subject

to an ad hoc factual inquiry into the reasonable investment-backed expectations of the individual owner and the particular defenses which might be raised as to each. Just as this Court has held that an association with no legal interest in a particular property cannot enforce a covenant to which that property is subject, see Palm Point Property Owners' Ass'n of Charlotte County, Inc. v. Pisarski, 626 So. 2d 195 (Fla. 1993), so, too, an association with no legal interest in its members' properties cannot pursue an as-applied, constitutional "taking" claim as to such individual properties. Therefore, consistent with the principle that courts should "endeavor to implement the legislative intent of statutes and avoid constitutional issues," this Court should quash the Save Our Beaches decision on the basis that STBR lacks associational standing to pursue its individual members' as-applied taking claims.

However, assuming arguendo that the Court were to reach the as-applied constitutional question, the Act effects no compensable taking. Rather, it merely codifies effects to property boundaries and the right to receive accretion which are consistent with Florida's Constitution and established common law. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). At common law, property boundaries remain unchanged where, as here, sovereign submerged lands are reclaimed through an authorized public purpose project on such lands. Martin v. Busch, 112 So. 274 (1927). Moreover, when the right to receive accretion is highly speculative and is claimed against sovereign submerged lands, such right is

conditioned on the constitutional constraint that such lands may not be used in a manner contrary to the public interest. Art. X, § 11, Fla. Const. Lastly, at common law (and contrary to the First District's opinion), there is no recognized common law right for coastal properties to "touch the water" independent of the right to access, which, in this case, has been preserved. Because implementation of the Act has no consequence to upland property different from that effected by Florida's Constitution and common law, no compensable "taking" occurs.

If a "takings" analysis is implicated, however, the balancing factors of Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), adopted in this Court's opinion in Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (1981), must be applied. This is so because the Act plainly effects neither a physical "taking" (by permanent governmental occupation) nor a per se regulatory "taking" (by deprivation of "all economically beneficial use") of the property. Applying a Penn Central / Graham analysis here would compel the conclusion that no "taking" of upland properties results from the public purpose beach nourishment activities authorized to occur on sovereign submerged lands adjacent to such uplands.

Lastly--but importantly--the First District, in its opinion, has both expansively misread the holding of Belvedere, and erroneously relied upon that misconstrued holding (applied to materially different facts) in concluding that, absent payment of compensation, an unconstitutional "taking" of property occurs

where a beach nourishment project is located on sovereign submerged lands abutting an upland owner's critically eroded property. This incorrect result disregards, and is inconsistent with, the proper application of constitutional "takings" standards. For these reasons, should the Court determine that STBR has standing, the Court is requested to quash the Save Our Beaches decision on the basis that application of the Act has no significant adverse effect on any member's riparian rights, and does not result in a compensable "taking" of property.

ARGUMENT

I. THIS COURT SHOULD QUASH THE DISTRICT COURT'S DECISION ON THE BASIS THAT RESPONDENT LACKS ASSOCIATIONAL STANDING TO PURSUE ITS INDIVIDUAL MEMBERS' AS-APPLIED "TAKING" CLAIMS

Although the district court rejected SOB's claim of standing below, see Save Our Beaches, 2006 WL 1112700 at *6, it determined that STBR had established associational standing. See id. at **6-7. However, there is no allegation or record evidence that STBR possesses any rights in the beachfront properties of its members.[4] While STBR originally challenged the permit approval in an administrative forum, only the judicial forum has jurisdiction to consider any constitutional, as-applied challenge. See generally Key Haven Associated

[4] See uncontested finding of fact, Recommended Order, ¶ 29 ("There was no evidence that SOB or STBR themselves own property or otherwise would be affected by the proposed Project.") (R3: 419); see also Petitioners' Motion to Amend Petition for Administrative Hearing [with attached First Amended Petition for Formal Administrative Proceedings (exhibit A)], ¶¶ 4(h), (i) (R. 122-23.)

Enterprises, Inc. v. Bd. of Trustees of Internal Improvement Trust Fund, 427 So. 2d 153, 156 (Fla. 1982) ("[O]nce an applicant has appealed the denial of a permit through all review procedures available in the executive branch…[it] may choose either to contest the validity of the agency action by petitioning for review in a district court, or, by accepting the agency action as completely correct, to seek a circuit court determination of whether that correct agency action constituted a total taking of a person's property without just compensation.").

Thus, to assert as-applied constitutional claims in a judicial forum, the respondent must meet applicable standing requirements for asserting a constitutional claim before the court. Cf. LEAF v. Clark, 668 So. 2d 982, 987 (Fla. 1996) (recognizing that a person who participates in an administrative proceeding by authorization of statute or rule, or by permission of the agency, may not necessarily possess any interests which are substantially affected by the proposed action, as required for appellate standing) (approving Daniels v. Fla. Parole & Prob. Comm'n, 401 So. 2d 1351, 1354 (Fla. 1st DCA 1981) (same)). The fact that such claims were originally raised in an administrative proceeding does not obviate the need to meet the judicial standing requirement. Id. Here, because the claimed deprivation of property is a personal one whose resolution depends upon assessment of particular facts and defenses inuring to each piece of property and its individual owner, STBR lacks standing to assert its members' claims.

A similar conclusion was reached by this Court under analogous circumstances in Pisarski, 626 So. 2d 195. There, certain homeowners' associations asserted standing, as representatives of their members, to enforce restrictive covenants applicable to members' properties, in which they held no interest. Id. at 197 ("Palm Point has not shown that it is the assignee of the developer's right of enforcement or that the covenants were created for its benefit…."). The Court rejected the associations' request that it "expand the doctrine of associational standing announced in Hunt v. Washington State Apple Advertising Comm'n, [432 U.S. 333 (1977)], to encompass cases such as this."[5] Pisarski, 626 So. 2d at 196 (footnote omitted). In so doing, this Court emphasized that its recognition of a "modified version of associational standing for trade and professional associations seeking to institute rule challenges under section 120.56(1), Florida Statutes (1979)" in Florida Home Builders Ass'n v. Dep't of Labor and Employment Sec., 412 So. 2d 351 (Fla. 1982), "was not a blanket adoption of the doctrine." Pisarski, 626 So. 2d at 197. The Court stated that its decision Florida Home Builders to grant trade and professional associations

[5] Under Hunt, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Pisarski, 626 So. 2d at 197. However, even under the Hunt standard, here--because both the "claim asserted" and the relief provided require members' participation--STBR cannot achieve such standing.

standing in to represent their members was necessary "to further the legislative purpose of expanding the public's ability to contest the validity of agency rules." Id. (citing Florida Home Builders, 412 So. 2d at 352-53). In contrast, it determined that "[t]here is no similar policy for expanding the class of those who may enforce restrictive covenants." Id. at 197. Significantly, the Court stated that its "refusal to grant homeowners' associations standing to enforce restrictive covenants as representatives of their members also avoids various problems we foresee, such as the possible preclusion of certain defenses that otherwise might be available against individual property owners." Id.

The same constraint does not apply where--unlike here--an association seeks to enforce is own property interests. Cf. Hernandez v. Trout Creek Dev. Corp., 779 So. 2d 360, 362 (Fla. 2d DCA 2000) (finding that the association had standing to enforce restrictions in a recorded declaration where "[t]he association's authority to enforce the restrictions is based--not on the fact that it is a homeowners' association--but rather on the right…which Trout Creek…assigned to the association."); Cudjoe Gardens Property Owners Ass'n, Inc. v. Payne, 770 So. 2d 190 (Fla. 3d DCA 2000) ("[I]n the present case, unlike the Association in the Palm Point case, the Cudjoe Gardens Association owned a platted lot within the subdivision."). In such case, the entity needed to engage in the ad hoc factual inquiry is before the court. Compare Pennell v. City of San Jose, 485 U.S. 1, 7

(1988) (finding that an association representing interests of lessors of real property had standing to assert a facial challenge to a San Jose ordinance which did "not require the participation of individual landlords") with Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency, 365 F.Supp.2d 1146, 1163 (D.Nev. 2005) (finding that the homeowners' group did not have standing to assert an as-applied "taking" challenge to a local ordinance, because a fact-specific analysis of each members' property would be required, and "the investment-backed expectations and the economic impact [to each homeowner] will differ").

In this case, in contrast, it is undisputed that STBR does not itself own any property which would be affected by the project (R3: 419), nor has it alleged any assignment of legal rights in its members' properties.[6] Since judicial assessment of the individual members' as-applied constitutional claims may require inquiry into both the fact-specific effect of the Act alleged with respect to each property, and potential defenses applicable to each, it is inappropriate, as in Pisarski, to extend the concept of associational standing to encompass such challenges. Because "courts should endeavor to implement the legislative intent of statutes and avoid

[6] Rather, STBR merely asserted that it was "formed expressly for the purpose of, and [is] authorized to protect, the private property and natural resources associated therewith, owned by [its] members." (R1: 122-23.)

constitutional issues," State v. Mozo, 655 So. 2d 1115, 1117 (Fla. 1995), the Court need not reach the "taking" issue raised by STBR, which lacks standing.[7]

II. UNDER THE APPROPRIATE CONSTITUTIONAL "TAKINGS" ANALYSIS, THIS COURT SHOULD QUASH THE DISTRICT COURT'S DECISION THAT APPLICATION OF THE BEACH AND SHORE PRESERVATION ACT (THE "ACT") EFFECTED AN AS-APPLIED "TAKING" OF PROPERTY OF RESPONDENT'S MEMBERS

A. BECAUSE THE ACT MIRRORS PROPERTY RIGHTS UNDER THE FLORIDA CONSTITUTION AND EXISTING COMMON LAW, IT DOES NOT RESULT IN A COMPENSABLE "TAKING"

The rights and expectations that create property are, in general, a matter of state law. See generally Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); see also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011-1012 (1984); Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring). Common law principles defining effects on upland coastal boundaries by accretion, erosion and avulsion are among the background property rules of the state.

These are significant to the Court's "taking" analysis because--even where a regulation prohibits *all* beneficial use or removes *all* economic value of property (clearly not the case here)--no compensable taking of property occurs if the

[7] Moreover, by asserting no rights of its own, STBR has also failed (1) to meet the requirements of jus tertii standing, see generally Alterra Healthcare Corp. v. Estate of Shelley, 827 So. 2d 936 (Fla. 2002) ("Under traditional jus tertii jurisprudence, 'In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'") (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)), or (2) to establish that it was "adversely affected," see § 120.68(1), Fla. Stat. (2004), as required to demonstrate appellate standing below. See generally LEAF, 668 So. 2d at 987.

regulation reflects limitations that "inhere in the title itself, in the restrictions that background principles of the state's law of property and nuisance already place upon land ownership." Lucas, 505 U.S. at 1029. Moreover, as the Lucas Court explained, id. at 1030, the state may make explicit, at any time, "the implication of those background principles of nuisance and property law":

> In light of our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments, this recognition that the Takings Clause does not require compensation when . . . [an owner's property rights are] proscribed by those 'existing rules or understandings' is surely unexceptional.

(1) *Under the Act, as at Common Law, Legal Property Boundaries Are Not Changed by Authorized Public Projects On Sovereign Submerged Lands, Which Are Avulsive Events*

The boundary between upland private ownership and sovereign lands along the state's beaches is the mean high water line (MHWL). See Art. X, § 11, Fla. Const.; see also § 177.27(15), Fla. Stat. (2004) "Mean high water" is the average of the high tide heights over a 19-year period. Fla. Stat. § 177.27(14). Although the average of the height of the tides only changes over a very long period, the point where the tidal plane intersects with the shore--the MHWL--is more dynamic, and subject to change as sand is deposited or (as here) washed away. Indeed, the Legislature--recognizing two decades ago this "dynamic" character of Florida's coastal shoreline--deemed it necessary to require sellers to provide to "purchasers of interests in real property located in coastal areas partially or totally

seaward of the coastal construction control line as defined in § 161.053" a "coastal properties disclosure statement," so that such purchasers "are fully apprised of the character of the regulation of the real property in such coastal areas and…that such lands are subject to frequent and severe fluctuations." § 161.57, Fla. Stat. (2004).

Florida common law similarly takes into account the variable nature of the physical boundaries of ocean coastal properties.[8] Its rules recognize that, in determining the legal effect of shifting sands, the boundary of upland property (on the one hand) remains static where sudden (avulsive) actions or events abruptly change the physical contours of the shoreline, and (on the other) follows the MHWL where the shore is gradually changed by accretion or erosion.

"'Accretion' means the gradual and imperceptible accumulation of land along the shore…," Bd. of Trustees of the Internal Improv. Trust Fund v. Sand Key Assocs. Ltd., 512 So. 2d 934, 936 (Fla. 1987), while erosion involves its gradual and imperceptible removal. Id. "Gradual and imperceptible" means that, "although witnesses may periodically perceive changes in the waterfront, they could not observe them occurring." Id.

The Court has identified three situations in which land is physically added to the shoreline, but the legal boundary of the upland property does not change. First,

[8] For a scholarly overview of ocean boundary law, see Donna R. Christie, OCEAN AND COASTAL LAW AND POLICY: A UNITED STATES AND FLORIDA PERSPECTIVE 45-101 (1992).

the Sand Key Court stated that an upland owner is not entitled to new lands formed by accretion if that accretion directly resulted from public improvements benefiting the upland property. Id. Similarly, an upland owner is not entitled to new lands formed by accretion if the owner himself causes artificial accretions to his property. In such case, the "accreted land remains with the sovereign." Id. at 938. Third, an upland owner is not entitled to any addition which is not a "gradual and imperceptible accumulation of land along the shore." Id. at 936; see 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 262 (1769) ("the quantity of ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property"). Because such change is considered avulsion, rather than accretion, the upland boundary in such case remains unchanged. Id.; see Bryant v. Peppe, 238 So. 2d 836 (Fla. 1970); Siesta Properties, Inc. v. Hart, 122 So. 2d 218 (Fla. 1960).

The Court has defined avulsion as "the sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream." Sand Key, 512 So. 2d at 936. For a change to be "perceptible," it is "not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. 'The test as to what is gradual and imperceptible…is, that though the witnesses may see from

time to time that progress has been made, they could not perceive it while the process was going on.'" Id. at 936 (citations omitted).

This distinction between accretion and avulsion was also at the heart of the Court's decision in Peppe, 238 So. 2d at 836. There, private landowners sought to quiet title to a narrow strip of land created as the result of a 1926 hurricane. The Peppe Court recognized that the sovereign retained any newly-emergent land:

> [T]he title to the water bottom, prior to its sudden emergence as dry land following the hurricane, was in the State of Florida by virtue of its sovereignty; that changes resulting from avulsion--a sudden change in the land formation resulting usually from the elements--do not effect a change in the boundaries and ownership of the land as it existed prior to the avulsion, so that…title was, in fact, still in the State of Florida….

Peppe, 238 So. 2d at 837. The Court held that the "particular parcel here in question was originally sovereignty land; and it did not lose that character merely because, by avulsion, it became dry land." Id. at 838.

The Court's analyses have emphasized that the difference in accretion and avulsion is not whether additions to the shoreline are created naturally or artificially, but whether the change in the shoreline is gradual and imperceptible, or sudden and perceptible. See Sand Key, 512 So. 2d at 937-39. Although the boundary change in Peppe was caused by a natural event, rather than man-made additions to the shoreline, the Court did not find the distinction either significant or relevant. See id. at 838-39. Rather, the fact that the change was not gradual and imperceptible was the decisive factor. Id. Thus, the Peppe Court, in its analysis,

favorably cited Martin--which involved the artificial lowering of a lake by a state drainage project--finding its factual circumstances to be "somewhat similar" to the avulsive change which had occurred in Peppe:

> [In Martin], the avulsion[9] resulting in the water bottom becoming dry was artificially rather than naturally created, resulting from a drainage project undertaken by the state. The court noted that, when the water receded suddenly, the "title to such lands, which remained in the state just as it was when covered by the lake. The riparian rights doctrine of accretion and reliction does not apply to such lands."

Id. at 838-39 (quoting Martin, 112 So. 2d at 285) (footnote added).

In Martin, the state had lowered the level of Lake Okeechobee as part of a drainage project. This Court distinguished the legal concept of reliction from the circumstances before it, stating that it did not apply to the avulsive change effected where "land is reclaimed by governmental agencies" through an authorized public purpose project, "as by drainage operations." Martin, 112 So. at 287. The Court held that, "[i]f to serve a public purpose the State, with the consent of the Federal authority, lowers the level of navigable waters so as to make the water recede and uncover lands below the original high water mark, the lands so uncovered below such high water mark, continue to belong to the State." Id. As the Sand Key Court observed, that portion of the Martin opinion "explains that the state, for a public purpose, may lower the

[9] While Justice Ehrlich, dissenting in Sand Key, disputed that the public project in Martin was avulsive, see 512 So. 2d at 946 n.6, the Peppe Court directly characterized it as such. See Peppe, 238 So. 2d at 838-39.

level of navigable waters by drainage without losing title to the uncovered sovereignty lands." The circumstances in Martin are clearly analogous to reclamation of sovereign submerged land through beach nourishment. Thus--even absent the Act's codification of common law principles recognized in Martin--the particular circumstances here would result in the state's continued ownership of emergent sovereign submerged lands, and confirm the unchanged extent of the upland owner's legal property boundary.

In Save Our Beaches, the First District failed to recognize that Martin applies to the present facts. In citing Bd. of Trustees v. Medeira Beach Nominee, Inc., 272 So. 2d 209 (Fla. 2d DCA 1973) for the principle that "freezing the erosion control line renders the ordinary high water mark useless as a boundary line," the court apparently overlooked that, in Martin, a similar "freezing of the boundary"[10] had been specifically recognized as authorized by this Court. Indeed, the Medeira Beach court distinguished Martin by stating, "[F]or the instant case to be analogous [to Martin], the groin project of the City of Medeira Beach would have had to be intended to produce the accretion which occurred and…would have to be in fact the cause of the accretion." 272 So. 2d at 212 (emphasis added).

[10] Legally, the ECL remains in effect only so long as the beach is maintained by the governmental entity responsible for the project. Should the beach erode to a point landward of the established ECL, the provisions of section 161.191(2) cease to operate as to the affected upland. See § 161.211(2), Fla. Stat. (2004).

In contrast, the present case is analogous to Martin. Here, when critically eroding beaches are directly restored through an authorized public purpose project located on sovereign submerged lands, the resulting avulsive shoreline additions are purposefully caused. Thus, application of preexisting background principles of law (from Martin, Peppe and Sand Key) effects an outcome no different from that achieved under the Act, which has essentially codified the common law principles.

Indeed, in areas of critically eroding beachfront property, implementation of the Act effects an outcome which is better for the upland owner than that which would otherwise occur to property boundaries at common law under the "status quo." The buffer which beach nourishment creates provides additional protection and aesthetic enhancement to the owner's property, which would necessarily tend to preserve or increase its value. Until the beach again erodes landward of the MHWL that existed at the time the avulsive change occurred, the boundary of the upland owner remains fixed (both under the Act, and at common law) at that historic MHWL, to the owner's substantial advantage, in this situation.

Under these circumstances, there is no justification in law or policy to depart from the principle that, because the addition of sand to the shore seaward of the MHWL pursuant to an authorized beach nourishment project is a sudden and perceptible addition of materials to the shoreline, such restoration is an avulsive change which does not change the boundary between privately-owned upland and

state sovereign lands. See generally Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 336 (2002) ("The concepts of 'fairness and justice'... underlie the Takings Clause"). Therefore, with respect to any claimed adverse effect on STBR's members' legal property boundaries, because the Act achieves the same effect on the legal boundary of the upland property as would otherwise result through application of the state's background common law principles, see Peppe, 238 So. 2d at 836; Martin, 112 So. at 274, the approval of the Joint Permit does not cause a taking of property requiring exercise of eminent domain. Lucas, 505 U.S. at 1019 (1992). Further, the very same principles and result apply when assessing the asserted impairment of members' riparian rights.

(2) Under the Act, as at Common Law and Pursuant to Florida's Constitution, Upland Owners May Not Assert a Highly Speculative "Right to Receive Accretion" from Sovereign Submerged Lands In a Manner Contrary to the Public Good

The state holds the sovereign submerged lands seaward of the MHWL in trust for the public for purposes of navigation (boating), fishing, and bathing. See State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893); Broward v. Mabry, 50 So. 826 (1909); Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957). These public trust rights are not merely created by common law, but are constitutionally protected. Art. X, § 11, Fla. Const. ("The title to lands under navigable waters, within the boundaries of the state…including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people.").

The rights of the public extend from the water through the foreshore (the area between the low tide line and MHWL) and above to the dry sand area, where the public has established additional rights by custom, prescription, or dedication. See City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974) (additional citations omitted). The state is charged with preserving these interests, and statutory provisions affecting public trust lands "must be read in conjunction with the public trust doctrine…as well as the general police powers of the state…." Coastal Petroleum v. Chiles, 701 So. 2d 619, 625 (Fla. 1st DCA 1997).

In critically eroding beach areas, it is not only upland properties which are endangered; the concurrent[11] and paramount[12] public trust uses of sovereign land and the foreshore are also destroyed, as erosion relentlessly eliminates the foreshore and beach until they disappear. The state has authority to implement beach nourishment projects to protect both upland structures and public trust lands.

While a riparian owner enjoys both private and commonly-held (public) riparian rights, see Thiesen v. Gulf, F. & A. Ry. Co., 78 So. 501 (Fla. 1917), such owner "has no title, of any nature, to the sovereign lands…held in trust by the Trustees for the people of Florida." Krieter v. Chiles, 595 So. 2d 111, 112 (Fla. 3d

[11] Including bathing, boating, fishing, and like uses. Bowman, 91 So. 2d at 799.

[12] Including the sovereign's right to authorize public projects on sovereign submerged lands, see Sand Key, 512 So. 2d at 940; and the public's rights to commerce and navigation. See generally Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643, 645 (Fla. 1909).

DCA 1992); see also Brickell v. Trammell, 82 So. 221, 226 (1919) (observing that, "[f]or the purpose of enhancing the rights and interests of the whole people, the states may…grant to individuals limited privileges in the lands under navigable waters" but may not "divert them or the waters thereon from their proper uses for the public welfare"). Here, the assertion of a dubious right "to receive accretion" in critically eroding sovereign submerged lands is hostile to important public purpose activities on the state's trust property.

The common law is clear that, absent sufficient proof of special injury, an upland owner cannot preempt authorized activities on trust lands by claiming a speculative "taking" of private property rights. See generally Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643, 645 (Fla. 1909) ("Among the common-law rights of those who own land bordering on navigable waters… are the right to prevent…an unlawful use of the water or of the shore or bed that specially injures the riparian owner in the use of his property") (emphasis added); see also Coastal Petroleum, 701 So. 2d at 625 (recognizing that, although "the public trust doctrine does not preclude a party from asserting that state regulation has resulted in a compensable taking of an interest in property obtained from the state, not all interests obtained from the state are entitled to the same constitutional protections"); see generally F. Maloney, S. Plager & F. Baldwin, Jr., WATER LAW AND ADMINISTRATION, THE FLORIDA

EXPERIENCE 104 (1968) (observing that the interest asserted by the plaintiff in Moore v. State Road Dep't, 171 So. 2d 25 (Fla. 1st DCA 1965)--who claimed that DOT's bridge obstructed potential use of his riparian property to service large ships, but "apparently was not actually servicing the large ships"--was "too remote to establish the special injury required for [injunctive] relief," and any injury to navigation was "damnum absque injuria"). The state's use of the police power to protect sovereign lands held in public trust cannot be limited by an asserted private interest that, in this case, creates no more than an unreasonable hope of future accretions on sovereign land. See Coastal Petroleum, 701 So. 2d at 625, n.2 (holding that appellants' asserted interest in royalties from lease of sovereign submerged lands to recover oil did not constitute a "protectable property interest" where it was "purely speculative as to whether any oil existed in this area").

Nor have the members demonstrated that, under the Act, their inchoate right "to receive accretion" could not be vindicated, should it ever to come to fruition in the form of actually accreted land. To the contrary, in the highly unlikely event that accretion on such critically eroded beaches were to occur, the Act provides an avenue to determine entitlement to such accretion (through an asserted "taking" of actual, disputed property). See § 161.141, Fla. Stat. (2004). By allowing mere speculative interests asserted now to interfere with restoration of critically eroded sovereign land, the decision below ignores devastating impacts to the public trust.

(3) Under the Act, as at Common Law, there is no "Right to Touch the Water" Independent of the Right of Access

In Save Our Beaches, the First District states that, "as the high water mark moves seaward, the landowners will also lose the right to have the property's contact with the water remain intact." 2006 WL 1112700 at *10 (emphasis added). While the decision reflects that the ALJ had acknowledged this, id. at *5, it fails to observe that the ALJ also characterized the "so-called 'right to have the property's contact with the water remain intact" as "no different than the riparian right to accretions (and relictions)," and thus not a separate and distinct riparian right. Save Our Beaches, Inc. v. Dep't of Envtl. Regulation, 2005 WL 1543209, * 11 & n.12 (Fla. Div. Admin. Hrgs. June 30, 2005). Indeed, no Florida court has heretofore ever recognized an independent "right" to have tidal upland property physically "touch" the water. As reflected in the statute setting the MHWL as a 19-year average, tidal waters are generally subject to fluctuation; and these properties, in particular, do not always touch the water. (Tr. 105.) Rather:

> [R]iparian 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[13] 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.

[13] Containing "as a part of something." BLACK'S LAW DICTIONARY (8th Ed. 2004).

Sand Key, 512 So. 2d at 936 (emphasis and footnote added); cf. also Thiesen, 78 So. at 501 (recognizing riparian rights of "ingress and egress to and from the lot over the waters of the bay,…[an] unobstructed view over the waters, and in common with the public the right of navigating, bathing, and fishing…."). The Sand Key Court, in turn, cites to five decisions as authority for its list of "riparian and littoral property rights." 512 So. 2d at 941 (citing Hughes, 389 U.S. 290; St. Clair County, 90 U.S. (23 Wall.) 46, 68; Hayes, 91 So. 2d 795; Brickell, 82 So. 221; Thiesen, 78 So. 501). None of these decisions mention any "right to have the property's contact with the water remain intact": Hughes and St. Clair County address accretion; Hayes and Thiesen, ingress and egress; and Brickell, access. Sand Key, itself, involved only accretion. 512 So. 2d at 941. Sand Key addressed no separate "right" to maintain contact with the water. Not until the First District's decision below has such a separate "right" been deemed "taken." Thus, because, at common law, there is no right (separate from access) to have one's property "remain in contact with the water," the Act effects no "taking" of such "right."

B. Assuming Arguendo That A Beach Nourishment Project May Affect Upland Property Rights And Values, The District Court Did Not Apply A Proper Constitutional Analysis To Determine Whether A Taking Of Property Had Occurred

The Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, and article X, section 6, of the Florida Constitution require just compensation if property is "taken" by the state for a

public use.[14] These constitutional provisions do not bar government interference with property rights, but rather require compensation "in the event an otherwise proper interference amount[s] to a taking." First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 315 (1987). The most common example of a "taking" that requires just compensation is a direct government appropriation or physical invasion of private property. See United States v. Pewee Coal Co., 341 U.S. 114 (1951). Beginning with Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the Supreme Court deviated from the principle in American and English law that compensation is required only when a government takes possession of property, and recognized that regulation of private property may be so onerous ("goes too far") as to be tantamount to a direct appropriation or ouster.

The ensuing law of regulatory "takings" has turned on an "essentially ad hoc, factual [inquiry]," with the Supreme Court eschewing any "set formula" for determining when a regulation requires compensation. Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). Two factual situations have been identified, however, where a regulation of property will be deemed a per se "taking": (1) where government requires an owner to suffer a permanent physical invasion of his property, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982),

[14] For an overview of takings jurisprudence in the context of coastal regulation, see J. Kalo, R. Hildreth, A. Rieser & D. Christie, COASTAL AND OCEAN LAW 347-67 (West 3rd ed. 2006).

or (2) where regulations completely deprive an owner of "all economically beneficial use" of his property. Lucas, 505 U.S. at 1019. Even in a "total taking," however, compensation is not due if "background principles of nuisance and property law" similarly restrict the claimed property rights. Id. at 1026-32.

Lingle v. Chevron, 544 U.S. 528 (2005), cogently explains this framework:

> Outside these two relatively narrow categories…regulatory takings challenges are governed by the standards set forth in [Penn Central]. The Court in Penn Central…identified "several factors that have particular significance."…Primary among those factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"…and the "character of the governmental action…." The Penn Central factors…have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or Lucas rules.

Id. at 538-39 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 617-618 (2001). In Lingle, a unanimous Court indicated that a regulatory taking analysis focuses on the "magnitude or character of the burden [imposed] upon private property rights" and how any such burden "is distributed among property owners." Id. at 542.

(1) Because This Case Does Not Involve a Direct Physical Appropriation of Property, It Must Be Assessed Under a Regulatory "Takings" Analysis

"For over 130 years, most people thought that the Takings Clause 'reached only a "direct appropriation" of property, or the functional equivalent of a practical ouster of the owner's possession.'" John C. Keene, WHEN DOES A REGULATION "GO TOO FAR?"--THE SUPREME COURT'S ANALYTICAL FRAMEWORK FOR DRAWING

THE LINE BETWEEN AN EXERCISE OF THE POLICE POWER AND AN EXERCISE OF THE POWER OF EMINENT DOMAIN, 14 Penn St. Envtl. L. Rev. 397, 398 (2006) ("TOO FAR?") (quoting from Lingle, 544 U.S. at 537). Recent United States Supreme Court decisions have retreated from historical attempts to categorize takings, preferring to employ an adaptive analysis which allows a "careful examination and weighing of all the relevant circumstances [and resists] the temptation to adopt what amount to per se rules in either direction." Tahoe-Sierra, 535 U.S. at 322, citing Palazzolo, 533 U.S. at 636 (O'Connor, J., concurring).

Under this precedent, only an actual occupation of property warrants the "straightforward application of per se rules." Id. Unlike the complex situation in which an owner contends that a regulation has resulted in a "taking," "[w]hen the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed." Id. Only in these cases of actual ouster or occupation does a categorical physical taking of property occur. See Yee v. City of Escondido, 503 U.S. 519, 527 (1992); Loretto, 458 U.S. at 435; Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Assocs., 493 So. 2d 417 (Fla. 1986). Such "physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights." Tahoe-Sierra, 535 U.S. at 324. In a physical taking, the government's occupation of the property "does not

simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." Loretto, 458 U.S. at 435.

In this case (in contrast), far from cutting through every strand, the Act's alleged impairment of riparian rights does not affect the owner's use and enjoyment of the upland property in any way, except insofar as it preserves and protects such property for its continued use and enjoyment. Because STBR's members continue to enjoy the exclusive use of their land above the ECL (which would coincide with the physical extent at common law of their ownership boundary), these rights to use and enjoy the upland property remain undisturbed.

In direct contrast to the "physical takings" described above are cases involving asserted "regulatory takings," where "an [alleged] interference with property rights…'arises from some public program adjusting the benefits and burdens of economic life to promote the common good….' [In such cases,] the Court will engage in the type of factual inquiries mandated by the 1978 Penn Central decision that are designed to allow careful examination and weighing of all the relevant circumstances." TOO FAR?, 14 Penn St. Envtl. L. Rev. at 419-20. Arguably, however, this case does not even conform to the typical case involving regulation of an owner's use of land, because the Act prescribes how sovereign lands will be used, and upland property and riparian rights preserved and protected.

While any adverse regulatory effect is thus not apparent, it is clear that, here, the state has neither physically occupied nor appropriated any STBR member's upland property.[15] Moreover, the members' claim that state authorized beach nourishment activities on sovereign submerged lands may constitute a "taking" of their right to "receive accretion" is both legally unfounded, and too speculative to be vindicated through eminent domain. Without this predicate finding of physical appropriation, it was inappropriate for the district court to rely on physical takings cases involving accretions which had already attached to upland property[16] in reaching its decision. As the United States Supreme Court has stated, "[t]his longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." Tahoe-Sierra, 535 U.S. at 323 (2002). Therefore, here, a proper "takings" analysis must involve an "'ad hoc, factual [inquiry],' designed to allow 'careful examination and weighing of all the relevant circumstances.'" Tahoe-Sierra, 535 U.S. at 324 (citing Palazzolo, 533 U.S. at 636) (O'Connor, J., concurring)).

[15] By withdrawing its challenge to location of the ECL (R1: 116), STBR waived any claim such location would put the project on members' upland property.

[16] See Sand Key, 512 So. 2d 934 (involving dispute regarding ownership of existing land built up by accretion following construction of a jetty on sovereign submerged lands); Medeira Beach, 272 So. 2d at 211-12 ("The fact that the strip of land involved was true accretion is not in dispute.") (Emphasis added).

(2) *Because the Regulatory Action In Setting the ECL and Implementing the Beach Restoration Cannot Be Categorized as a Per Se "Taking," This Case Must Be Analyzed Under Factors Set Out In Penn Central and Graham*

"Takings" law recognizes that a per se regulatory taking occurs only where a regulation either authorizes a permanent physical occupation of the owner's property, or eliminates all of its value or beneficial use. This case involves neither. A permanent physical invasion denies the owner's right to exclude others from entering and using his property, and is thus equivalent to an ouster of the owner from his property. Here, however, there is no permanent intrusion on the upland owner's land above the established ECL. If sand or materials are added to upland property, these additions become part of the upland. § 161.141, Fla. Stat. (2004). The state neither makes claim to those additions, nor permanently occupies any area landward of the ECL. There is thus no basis to claim a permanent physical invasion of the upland property, as needed to justify a per se taking under Loretto.

Lucas also recognizes that a per se taking occurs if a statute eliminates all economically beneficial or productive use of land. 505 U.S. at 1019. The United States Supreme Court recently reemphasized that the categorical, total taking analysis applied in Lucas establishes an extremely narrow category, stating:

> The categorical rule that we applied in Lucas states that compensation is required when a regulation deprives an owner of "all economically beneficial uses" of his land. Id. at 1019. Under that rule, a statute that "wholly eliminated the value" of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to "the

> extraordinary circumstance when no productive or economically beneficial use of land is permitted." [505 U.S.] at 1017. The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. [505 U.S.] at 1019, n.8. Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in Penn Central. Lucas, 505 U.S. at 1019-1020, n. 8.

Tahoe-Sierra, 535 U.S. at 327 (footnotes omitted).

Moreover, an owner's "land," for purposes of this "taking" analysis, is his entire property; thus, even a complete loss of one "stick" in his bundle of property rights would not constitute a loss of all economically beneficial or productive use of land, resulting in a "taking." As stated in Penn Central, 438 U.S. at 130-31, "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether… governmental action has effected a taking, [the Supreme Court has focused] rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole…."

Thus, in Penn Central, the United States Supreme Court found that the property owner could not consider the loss of "air rights" independent of the impact of the regulation on the value of the entire property. Similarly, in Tahoe-Sierra, the Supreme Court would not divide a property into "temporal segments" to find that a moratorium on development for a number of years constituted a per se temporary taking of all value. As the Tahoe-Sierra Court explained:

> This requirement that "the aggregate must be viewed in its entirety" explains why…a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. Andrus v. Allard, [444 U.S. 51, 66] (1979). It also clarifies why restrictions on the use of only limited portions of the parcel, such as set-back ordinances, Gorieb v. Fox, [274 U.S. 603] (1927), or a requirement that coal pillars be left in place to prevent mine subsidence, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 498, were not considered regulatory takings. In each of these cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." Andrus, 444 U.S. at 65-66.

535 U.S. at 397. Consistent with that principle, this Court, in reviewing a permit denial in Graham, 399 So. 2d at 1380, considered the regulation's effect on the whole property, not just the wetlands segment that could not be developed.

However, even assuming (contrary to this precedent) that impairment of the right to receive accretion, alone, could somehow effect a per se taking, this Court's analysis would still be incomplete. The Lucas Court found that, even in the case of a loss of all economically beneficial use of property, no compensation was due if the regulation merely embodied "background principles of nuisance and property law." 505 U.S. 1030. Here, applying the public trust doctrine and Florida law related to avulsive changes, the rights claimed to be impaired were always subject to the challenged limitations, which inhered in the owners' title. 505 U.S. at 1029.

Further, the common-law maxim "sic utere tuo ut alienum non laedas" embodies the principle that an owner cannot exercise property rights in a manner

that harms property rights of others. In this case, highly speculative private riparian rights are being invoked by members of Stop the Beach Renourishment with the clear goal of "stopping" the authorized public project designed to protect upland properties, public lands, and nearby property owners through rebuilding of critically eroding beaches. Under the compelling and specific circumstances here of critical erosion legislatively determined to pose a present hazard of emergency proportions, this antagonistic assertion of theoretical property interests rises to the nuisance level. A nuisance analysis--similar to a Penn Central analysis--requires a balancing of all circumstances. See Lucas, 505 U.S. 1030-31. Under that analysis, the harm to public lands and other property outweighs any nominal impact to the interests claimed to be lost; thus, no "taking" by application of the Act results.

(3) *An Analysis of this Case Under the Penn Central and Graham Standards Compels a Finding that the Act Does Not Unconstitutionally Deprive Respondent's Members of Property Without Just Compensation*

Outside the "two relatively narrow categories" (described above), into which this case does not fall, "regulatory takings challenges are governed by the standards set forth in [Penn Central]." Lingle, 544 U.S. at 548. In Penn Central, 438 U.S. at 124, the owner of Grand Central Station, which had been declared a landmark, claimed the complete taking of the "air rights" in the property above the station when a permit to build a 55-story tower over the building was denied under

New York City's Landmarks Preservation Law (the "Landmarks Law"). The Penn Central Court found that this law did not effect a "taking" of property. Id. at 138.

In so doing, the Court emphasized the ad hoc, fact-dependent nature of the taking analysis and the lack of any set formula for determining when "justice and fairness" required compensation for the effects of regulation on property values. It did, however, set out a balancing test with certain factors that would generally be considered in a regulatory takings analysis. These include (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with distinct, reasonable investment-backed expectations; and (3) the character of the governmental action. Id. at 124-25. Although the economic impact on the owner's proposed project under the law was substantial, the Court soundly rejected the proposition that diminution in property value, alone, can establish a taking when the regulation is reasonably related to promotion of the general welfare. Id. at 131. It was also significant that the owner could continue its present use, and make reasonable, beneficial use of its property in future. Id. at 138.

In this case, STBR's members have not established any loss in the value of their upland property, or in the beneficial use of that property. Their common law rights (including "ingress, egress, view, boating, bathing, and fishing") are preserved. See § 161.201, Fla. Stat. (2004). Additionally, access to, and use of, the enhanced, dry sandy beach provided by the project are valuable to the upland

property owner. Finally, the record reflects that the project does not interfere with the ability of the members to continue the current reasonable beneficial use of their upland properties; to the contrary, the continued existence of the upland property is dependent on the beach erosion control project, to stem the critical erosion that has already led to substantial loss of upland. Under these circumstances, STBR has failed to establish any significant diminution in the value or use of its members' upland property due to the establishment of the ECL or the erosion control project.

This case also presents a clear "reciprocity of advantage," Mahon, 260 U.S. at 415, because the erosion control project affects riparian interests of all adjacent owners, protecting upland properties and preserving access to state sovereign lands. Even assuming arguendo that owners are "burdened somewhat by such restrictions, [they], in turn, benefit greatly from the restrictions that are placed on others." Keystone, 480 U.S. at 491. As in Tahoe-Sierra, "there is [in fact] reason to believe property values often will continue to increase…." 535 U.S. at 341.

There is no evidence, in contrast, that the project will interfere with any member's distinct, reasonable investment-backed expectations. Rather, the record reflects that representative owners continue the use that constitutes their "primary expectation concerning the use of the parcel." Penn Central, 438 U.S. at 136. Also, the Act ensures that rights dependent on access to the water are preserved.

The common law principles applicable to water boundaries are deemed part

of the reasonable, investment-backed expectations of an upland owner; thus, in Peppe, this Court held that "plaintiff-respondents were charged with notice that the sudden avulsion of the parcel in controversy gave them no more title to it than they had to the water bottom before its emergence as dry land." 238 So. 2d at 839. Coastal upland owners are charged with the knowledge that avulsive changes can fix their boundaries, so that their land is no longer bounded by the MHWL.

Lastly, in this case, the final prong of Penn Central's balancing test--the "character of the government action"--tips the scale decisively in favor of the constitutionality of the Act, as applied. Beach nourishment projects on critically eroding beaches fall squarely within the category of government action that the Penn Central Court described as a " public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. "The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis." Palazzolo, 533 U.S. at 634 (O'Connor, concurring).

Erosion control projects address a serious menace to the safety and stability of coastal property, and to the economy of the state "[G]overnment regulation--by definition--involves the adjustment of rights for the public good," Lingle, 544 U.S. at 538. But far from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," Armstrong v.

United States, 364 U.S. 40, 49, (1960), here, the state has accepted responsibility to manage the beaches of Florida and make provision for beach nourishment.

The Act also advances the public interest by maintaining and protecting the public's rights in sovereign lands seaward of the MHWL. Under the public trust doctrine, "[p]rivate use of portions of [sovereign submerged] lands may be authorized by law, but only when not contrary to the public interest." Art. X, § 11, Fla. Const. The Legislature's authorization, in the Act, of governmental beach nourishment projects on sovereign submerged lands "designed to reduce potential upland damage or mitigate adverse impacts caused by…existing upland development" (§ 161.088)--and concurrent preservation of common law riparian rights associated with access to waters of the state (§ 161.201)--is clearly in the public interest. In stark contrast, the First District's interpretation that the Legislature, in the Act, has required the government (to avoid forfeiture of its sovereign use of trust lands for authorized beach nourishment projects) both to provide financing for such projects, and to obtain a "sufficient upland interest"--in the very "existing upland development" which contributed to the critical erosion, and is directly improved by the projects remedying it--would be contrary to such public interest. See generally Brickell, 82 So. at 226; cf. also Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 344 (recognizing the "epochal nature" of any enactment changing the common law to divest the state of

"irreplaceable public assets"). For these reasons, applying Penn Central factors[17] leads to the conclusion that implementation of the Act results in no "taking."

Ultimately, the resolution of whether a given law or regulation effects a compensable talking of property depends upon whether the concepts of "fairness and justice" that underlie the Takings Clause will be served. See Tahoe-Sierra, 535 U.S. at 334. The Act creates a program, based on common law principles, which carefully balances the interests of state and the public with private property interests. The program preserves the public's rights and interest in sovereign lands, contributes to the state economy, mitigates storm damage to public and private property and disaster response costs, enhances and protects upland property, and preserves riparian rights that depend on access to the water. Fairness and justice require that the Act be found not to be a taking of private property.

III. THE FIRST DISTRICT INCORRECTLY APPLIED THE EMINENT DOMAIN HOLDING OF BELVEDERE AS "CONTROLLING" WHEN THAT OPINION IS BASED ON MATERIALLY DIFFERENT FACTS, AND IS INAPPOSITE TO THE CONSTITIONAL "TAKINGS" ANALYSIS HERE

[17] Similar factors are articulated in Graham: "(1) Whether there is a physical invasion of the property; (2) the degree to which there is a diminution in value of the property [or] stated another way, whether the regulation precludes all economically reasonable use of the property; (3) Whether the regulation confers a public benefit or prevents a public harm; (4) Whether the regulation promotes the health, safety, welfare, or morals of the public; (5) Whether the regulation is arbitrarily and capriciously applied; and (6) the extent to which the regulation curtails investment-backed expectations." 399 So. 2d at 138.

The lynchpin of the Save Our Beaches decision was the district court's determination that "Belvedere controls." Because both the facts and holding of Belvedere are wholly inapposite and contrary to the constitutional "taking" analysis which the First District should have employed, the decision below should be quashed, and this Court's original intent in Belvedere confirmed.

The facts of Belvedere are indeed extraordinary. Over twenty years ago, the Department of Transportation ("DOT") planned a road to physically occupy land immediately adjacent to Lake Worth and owned by Belvedere Development Corporation and Colonnades, Inc. ("Belvedere"). Belvedere, 476 So. 2d at 649-50. Having conceded a partial "taking" through this physical appropriation, DOT sought to acquire the property in fee simple by filing an eminent domain action. Id. Without providing Belvedere access over the appropriated property, DOT nonetheless purported to reserve riparian rights to Belvedere, which--because Belvedere had no right of access with which to exercise them--were illusory. Id.

Not surprisingly, DOT's plan failed. Id. at 651. This Court clarified that--absent the upland owner's consent--a condemning authority may not avoid the payment of severance damages by purporting to "reserve" in the former owner the appurtenant riparian rights which it can no longer exercise. Id. "The act of condemning petitioners' lands without compensating them for their riparian rights under these facts was an unconstitutional taking." Id. at 652 (emphasis added).

Belvedere in no way addresses the issue here: whether asserted interference with a highly theoretical right to accretion will result in a compensable "taking" where (1) the claimants retain ownership and all use of the upland property; (2) the upland owner retains all riparian rights dependent on access to the water, which is preserved; (3) the project will not be located on upland property, but on abutting sovereign submerged lands, and (4) the project, designed to protect the public and upland owners against erosion, directly benefits the upland property. Here, there is no physical appropriation, nor deprivation of all (or even substantial) beneficial use of the members' property. Under a proper analysis, no "taking" results.

CONCLUSION

DEP respectfully requests that the Court quash the opinion under review, and remand with directions to dismiss the appeal. Alternatively, should the Court reach the constitutional question posed, DEP requests that the opinion below be quashed because Belvedere is inapposite and no "taking" of property has occurred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief on Merits is typed in Times New Roman, 14-point and complies in all respects with requirements of Fla. R. App. P. 9.210(a)(2).

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