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.

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

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GLOSSARY OF BRIEF REFERENCES

REFERENCE	DESCRIPTION OF REFERENCE
Act	Part I, Chapter 161, Florida Statutes (2005) ("Beach and Shore Preservation Act")
Amended Answer Brief	Amended Answer Brief of Respondent, STBR
Amicus	Amicus, Florida Home Builders Association
Appendix "[letter]"	Document in Appendix to DEP's Reply Brief
DEP	Petitioners, Department of Environmental Protection and (as applicable) Board of Trustees of the Internal Improvement Trust Fund
Department	Petitioner, Department of Environmental Protection
Environmental Assessment, or E.A.	Environmental Assessment, Walton County/Destin Beach Restoration Project
ECL	Erosion Control Line
FHBA Amicus Brief	Brief filed by the Amicus, Florida Home Builders Association, in support of STBR's position
FSCR	Florida Supreme Court Record
Joint Permit	Consolidated Notice of Intent to Issue a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands
MHWL	Mean High Water Line
Motion for Rehearing	Department's Motion For Rehearing, Rehearing En Banc, and Certification of Questions below
PLF Amicus Brief	Brief filed by the Amicus, Pacific Legal Foundation, in support of STBR's position
R#	Record on Appeal
RO	Recommended Order of Administrative Law Judge
STBR	Respondent, Stop the Beach Renourishment, Inc.
Tr	Transcript of Administrative Hearing Below

I. Applying Background Principles of Property Law and Established Rules of Statutory Construction, STBR's Members' Riparian Rights (Which Are Not "Constitutional," but Derive from the Common Law, as Modified by Specific Statute) are Not Wholly, or Even Significantly, Impaired by Implementation of the Act

DEP agrees that the riparian rights of STBR's members are constitutionally protected rights. But the members' rights are not now--nor have they ever been--"constitutional riparian rights," but are defined by principles of state property law, as embodied in the common law and statutes. Game and Fresh Water Fish Comm'n v. Lake Islands, Ltd., 407 So. 2d 189, 191 (Fla. 1981). The only property rights at issue which are embodied in the State constitution are the sovereign's rights and responsibilities with respect to public trust lands. See Art. X, § 11, Fla. Const. Further, while § 161.201 affects erosion and accretion, all other common law riparian rights (reserved in the statute) are no less constitutionally protected.

In Save Our Beaches, Inc. v. Dep't of Envtl. Prot., 2006 WL 1112700, *10 (Fla. 1st DCA Apr. 28, 2006), the First District accepted STBR's argument that the general riparian rights statute (§ 253.141), coupled with the "controlling" after-decided holding of Belvedere Dev. Corp. v. Dep't of Transp., 476 So. 2d 649 (Fla. 1985), compelled the conclusion that the reservation of rights of owners of critically-eroded coastal property in the Act is legally ineffectual. On this basis, STBR argues that its members are entitled to compensation for loss of all riparian rights, which--being inseparable from the upland property--requires condemnation

of the entire upland parcel.[1] That analysis overlooks the fact that this case involves our state constitution and two statutes defining riparian rights--a specific one, section 161.201, which expressly affects existing common law, and a general one, section 253.141, which does not.[2] It also involves two Court decisions, from 1927 (Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927)), and 1985 (Belvedere).

A statute which does not refer to the common law should not be construed to derogate it; thus, section 253.141 did not affect Martin's principles, established a quarter century before. Dudley v. Harrison, McCready & Co., 127 Fla. 687, 694, 173 So. 820, 823 (1937). In contrast, to the extent section 161.201 might be deemed "inconsistent" with after-determined common law principles set forth in Belvedere--which DEP disputes[3]--the Legislature has made clear its intent that any such "contrary" provisions of the Act supercede such principles. Belvedere cannot be construed to have "overruled" the Legislature's prior determination (in § 161.201) that the right to accretion in critically eroded areas can be severed, in critically eroded areas, from the upland property. Nor could the 1970 Act impair any rights alleged to arise as a result of the after-decided Belvedere opinion.

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[1] See Amended Answer Brief at 30-31. Although STBR now argues that a strip of land can be condemned with its appurtenant riparian rights, see id. at n.81, it does not reconcile this result with something less than facial invalidation of the Act.

[2] Section 177.28, Florida Statutes, cited sua sponte by the district court, similarly applies to all coastal properties, and expressly does not abrogate common law.

[3] DEP relies on its analysis regarding Belvedere in Amended Initial Brief at 48-50.

Further, the Coastal Mapping Act of 1974, § 177.28, Fla. Stat. (2004) (cited by the court in identifying the MHWL as the boundary between state sovereignty land and privately-owned uplands),[4] rather than abrogating Martin's established common law principles, expressly requires their application:

> **177.28 Legal significance of the mean high-water line.--**
> (1) Mean high-water line along the shores of land immediately bordering on navigable waters is recognized and declared to be the boundary between the foreshore owned by the state in its sovereign capacity and upland subject to private ownership. However, no provision of this part shall be deemed to constitute a waiver of state ownership of sovereignty submerged lands….
>
> (2) No provision of this part shall …modify the common law of this state with respect to the legal effects of accretion, reliction, erosion, or avulsion.

(Emphasis added). Thus, the First District's opinion fails to give effect both to the plain language of the statutes it applies, and to rules of interpretation. If general language in Chapters 253 and 177 is contrary to specific language in Chapter 161, or to property rights of the sovereign provided for by the constitution (and recognized in Martin), then the constitution and specific law take precedence.[5]

Moreover, if the Act, which expressly states its effect on existing common law, is viewed as inconsistent with Belvedere, then it is the principles of Belvedere--and not those embodied in the Act--which must yield. Here, the Act

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[4] Save Our Beaches, 2006 WL 1112700 at *9.

[5] See M.W. v. Davis, 756 So. 2d 90, 106 n.31 (Fla. 2000) ("[A] specific statute… takes precedence over a conflicting more general statute."); Lane v. Chiles, 698 So. 2d 260, 262 (Fla. 1997) (the constitution takes "precedence over any contrary provisions of the common law or statutes," and is entitled to greater deference).

provides, in §§ 161.191(2) and 161.201 that, after the ECL is set at the current MHWL, "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process…[but the upland owners] shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in § 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing." (Emphasis added). Properly viewed, Belvedere's precepts are not inconsistent with section 161.201. However, even assuming they were, applying governing rules of statutory construction, the district court--rather than declaring the Legislature's explicit directive that "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line" to be "legally invalid" (as contrary to § 253.141(1) and Belvedere)--should, rather, have given legal effect to such intent.

II. The First District's Analysis Regarding Real Property Title Issues (Not Raised by STBR Below) Is Contrary to Precedent

In its second point, STBR argues that, on this record, any title questions as between its members and the State are not ripe for determination; and that DEP has either waived, or is estopped from making, such arguments.[6] Indeed, in STBR's

[6] See Amended Answer Brief at 30-31. STBR concedes that title was not [and could not be] framed as an issue in the administrative hearing. However, it argues that DEP is "estopped" from asserting State ownership of emergent submerged lands resulting from public beach nourishment projects because, in a Joint

second petition, it had challenged the location of the ECL (R1: 84); but, shortly thereafter, STBR had sought, and was granted, leave to amend the petition to abandon challenges to "technical aspects" of the Joint Permit, including the location of the ECL.[7] (R1: 115-18; 126-27.) Yet, STBR fails to reconcile these facts with its linchpin arguments that DEP was authorized and required to determine that the proposed project would effect a physical "taking" of as-yet-

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Response to Appellants' Motion for Stay pending appeal to the district court, the Appellees stated: "If, ultimately, the project proceeds, but this Court or another court subsequently finds the applicable statutes unconstitutional, then, at such time, the statute would not longer be operative, and those property owners…would have a new beach free of any statutory constraints." Amended Answer Brief at 21, note 61. Based solely on this language, STBR asserted in its initial brief below that, "as noted by the Appellees in their [Joint Response]," should the ECL be found unconstitutional, this would have "the effect that any new sand placed on the beach becomes the property of the current riparian owner not the state." (TAB A: 35.)

The legal import of the phrase "[to] have…free of statutory constraints" is not "[to become] the property of the riparian owner, not the state," nor would such phrase fairly preclude common law arguments regarding ownership. However, even assuming arguendo that the phrase, despite its context, could be construed that way, the State could not, by such statement, effect a legal abdication of its ownership of emergent sovereign submerged lands. Martin, 93 Fla. at 576, 112 So. at 287.

[7] Among the 38 disputed issues of fact alleged in ¶ 4 of the original petition, and not in the four contained in the amended petition, were: (f) "whether [DEP] properly considered the erosion conditions on the Destin/Walton County Beach;" (g) "whether [DEP] properly identified the location of the mean high water line on the Destin/Walton County Beach;" (aa) "whether the Destin/Walton County Beach was properly designated a 'critically eroded area';" (bb) "whether the project will be constructed in a 'critically eroded area' or benefit an adjacent critically eroded shoreline." (R1: 19-22; 123.) While STBR challenged the public's easement to use the beach (which use, under the Act, is no greater after than before a project is built, see § 161.141), this was alleged to "ultimately deprive" the members of their "rights to use and enjoy their private land." Amended Petition, ¶ 4 (i) (R1: 123.) STBR asserted no claim of impaired title or marketability of members' properties.

unaccreted land (a matter beyond its substantive jurisdiction), and, on that basis, to require the local sponsor to condemn the upland property as a permit condition.

Indeed, the boundary as a separate real property issue[8] (and not solely alleged to support standing and provide a rationale for an asserted total "taking" of the upland owners' property by alleged deprivation of all riparian rights[9]) was raised for the first time, sua sponte, by the Court on oral argument,[10] and later appeared in the First District's opinion, in its analytical section "A," devoted to "The Boundary." Save Our Beaches, 2006 WL 1112700 at *8-9. There, the court referenced § 177.28--not cited by either party--as establishing the MHWL "as the

[8] Here, despite the County's request to produce members' deeds (Tr: 185), STBR participated at hearing without them. Thus, the record reflects that STBR's six members own beachfront property somewhere in the project area (Tr: 145), but key data relevant to any as-applied "taking" claim--such as, for how long each member has owned the property, and exactly where such properties are located--is not disclosed. (See RO, Note 5: "The City and County argued…that it was necessary for…STBR to introduce…[members'] deeds…to prove ownership to the MHWL in the area of the proposed … project. This argument is rejected. The testimony and evidence in the record was sufficient to support this finding.") (R3: 433.)

[9] Thus, the only reference to the boundary in the First Amended Petition for Formal Administrative Proceedings is in ¶ 4(i), which reflects, in pertinent part, that "[t]he Petitioners' substantial interests are or will be affected by the agency determination in the following ways:…(i) Petitioners' substantial interests are affected because the Project would alter the boundaries of Petitioners' members' private upland properties…." Subsequent paragraphs, including those which identify specific disputed issues of fact, do not refer to the members' property boundaries, nor did STBR raise the boundary issue in subsequent filings, including its Proposed Recommended Order and Exceptions to the Recommended Order.

[10] The court asked DEP counsel questions about the Act's potential impact on members' title boundaries, as reflected in their extra-record deeds. See http://www.1dca.org/video/2006.htm (19:54 minutes) (last visited Dec. 8, 2006).

boundary between state sovereignty land and [privately-owned] uplands…." Id. at *9. [11] The court also erroneously stated: "The parties agree that this project will cause the high water mark to move seaward and ordinarily this would result in the upland landowners gaining property by accretion." Id. at *10.

Surprised with this reverse "tipsy coachman" analysis,[12] DEP properly raised arguments regarding division of property between the upland owner and the state, and based on Martin,[13] in its motion for rehearing (FSCR: 68.)[14] Moreover, DEP had raised the police power and public trust doctrines--repeated in its rehearing motion--in its answer brief. [15] Thus, STBR's assertions[16] that such legal theories are "new issues improperly raised by DEP for the first time to this Court" and that DEP "fail[ed] to argue--or even cite--Martin" are contrary to the record.

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[11] Nor had STBR argued in its brief that riparian rights were "significantly impaired," so that the County was required to obtain a "sufficient upland interest."

[12] It has been questioned if a court may reverse an order on an unasserted basis. See State v. Baez, 894 So. 2d 115, 121 (Fla. 2004) (Pariente, J., dissenting). Here, the reverse "tipsy coachman" analysis presented extraordinary circumstances impacting "fundamental principles governing the administration of justice." Such circumstances allow a court to consider even untimely argument. Regan v. ITT Indus. Credit Co., 469 So. 2d 1387, 1390 & n. 3 (Fla. 1st DCA 1984).

[13] Martin was mentioned in the court's opinion. See 2006 WL 1112700 at *9.

[14] Attached as Appendix "C."

[15] DEP argued: "In Coastal Petroleum v. Chiles, 701 So. 2d 619 (Fla. 1st DCA 1997), [the court]…held that the interest was too speculative to be protected through inverse condemnation, in light of state constitutional public trust doctrine, state police power, and the owner's lack of a reasonable expectation that the state would lease the properties." (TAB C: 15; see also R1: 93-96.)

[16] Amended Answer Brief at 3, 30-31.

A. The Common Law Principles Established in Martin Apply in this Case

In response to STBR's Martin arguments, two factual issues must initially be addressed. The first involves STBR's quote from the Environmental Assessment ("E.A."),[17] used to attempt to refute DEP's assertion that, on this record, no likelihood of future accretion is shown. In the Amended Answer Brief at 7, n.10, STBR quotes: "[T]he project area beaches possess the natural ability, as indicated by the accretive longshore sediment transport trend, to recover absent storms…." The part omitted is: "however, insufficient recovery times between storms have caused the present unhealthy beach conditions." This is key, since (as the E.A. reflects)[18] longshore transport effects, alone, do not result in net accretion over time. "Winds provide the primary wave-generating mechanism and directly transport sand on and off the dry beach," and "[a]eolian transport can remove and redistribute sand within the littoral zone." (E.A. at 13, ¶¶ 3.1.4., 3.1.5.)

"Aeolian transport rates range from 0.1 – 2.2 cubic yards per year per linear

[17] Attached as Appendix "D."

[18] See, e.g., E.A. ¶¶ 2.1.1 ("The No Action alternative allows nature to take its course, i.e., storms will continue to erode the beach and further threaten upland development"); 4.2.1("Continued erosion of the beach would result in a continued loss of vegetated dune areas"); 4.3.1.1 ("By allowing the continued loss of the beach and dune system, the No Action alternative would result in less…[turtle] habitat"); 4.3.1.2 ("By allowing the continued reduction of the beach width (inter-tidal beach), the No Action alternative would result in less… [bird] habitat"); 4.3.2 ("Continued erosion of the beaches and shorelines along the study area threatens coastal habitat important to many species."); 4.5.1 ("The No Action alternative… [allows] the continued loss of [fish and wildlife] beach habitat"); 4.9.1 ("The beaches would continue to erode and provide less width for recreation").

foot of [project area] beach. These rates translate into approximately 6,300 cy/yr of sand lost from the littoral sediment via Aeolian transport over the project area." (Id. at 3.1.5.) (Emphasis added). Due to net sand loss (as the E.A. reflects), if the "No Action" alternative (failing to build the project) is adopted, the beach "would continue to erode." Net accretion is not anticipated to occur; net erosion is.

Second, STBR states in the Amended Answer Brief at 34 (without record citation) that, "[i]n 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." Citing the Initial Brief at 1, it states that DEP "acknowledg[ed] that Hurricanes Erin and Opal in 1995, George in 1998, and Tropical Storm Isidore in 2002 'decimated' the shoreline within the project causing the beaches to become 'critically eroded.'" Id. at 35 (Emphasis added). However, the facts recited in DEP's Amended Initial Brief (unchanged from the Initial Brief) do not reflect that the hurricanes "caus[ed] the beaches to become 'critically eroded.'"[19] Additionally, STBR had abandoned any challenge to the location of the ECL, as set at the pre-hurricane MHWL. (R1: 20; 123; see also n.7, supra.) Therefore, this argument should be disregarded.

Turning to STBR's substantive arguments, then, it is clear that--although Martin is mentioned in Save Our Beaches, 2006 WL 1112700 at *9--the First

[19] See Amended Initial Brief at 1.

District, in its discussion of "the Boundary," failed to recognize the applicability of that case, basing its decision, instead, on a misreading of this Court's findings in Bd. of Trustees v. Sand Key Assoc., 512 So. 2d 934 (Fla. 1987). In its argument addressing this issue, STBR wholly fails to explain why the common law rule stated in Martin does not directly apply here. Amended Answer Brief at 35-36. In Sand Key, on which STBR relies, this Court had found only that the Trustees had "misconstrue[d] section 161.051" as changing the common law regarding accretions, and had "misinterpret[ed] Martin" in applying its principles to "accretions" which--in that case--had occurred in an area remote from the State project.[20] 512 So. 2d at 935-36. The Sand Key Court neither overruled Martin, nor limited the principle that the "doctrine of reliction[21]…does not apply where land is reclaimed by government agencies" (as in Martin) to protect upland property owners from storm damage and flooding. 973 Fla. at 574, 112 So. at 287.

Similarly, the doctrine of accretion does not apply in this case, where a beach nourishment project will be built on tidelands to protect upland life and property from storm damage and critical erosion. Thus, the outcome of Sand Key is both factually and legally inapposite. The Sand Key Court characterized the

[20] As STBR acknowledges, Sand Key reflects that Martin did not change the law regarding rights to accretion and reliction. Amended Answer Brief at 36.

[21] Reliction and accretion involve a slow and imperceptible movement of the land/water interface, with the legal result that the ownership boundary follows the MHWL. Martin, 973 Fla. at 574, 112 So. at 287; Sand Key, 512 So. 2d at 936.

"sole issue" in Martin (a quiet title action) as a boundary dispute, involving land which had accreted on property unimproved by, and remotely located from, the public beach project. 512 So. 2d at 939. Unlike the First District below, the Sand Key Court recognized the need to examine the water law principles established in Martin, and ultimately determined, on the facts before it, that those principles did not apply. Id. at 935-36. Here, in contrast--because the emergent lands resulting from the project will not be caused by reliction or accretion--Martin's principles are applicable, and it is the doctrine of accretion (which operated to move the boundary with the water line in Sand Key) that is inapplicable. The doctrine of accretion applies only where property is created by a gradual and imperceptible accumulation of sand. The pumping of new sand onto State tidelands, at a rate of 300-500 linear feet per day,[22] is more than "perceptible to a degree," Amended Answer Brief at 34, and not "gradual and imperceptible." It is not accretion.

B. The Record Facts Do Not Support a Physical "Taking" Claim

In its amicus brief, the Pacific Legal Foundation ("Pacific"), argues that the ECL, set "to track the then-current mean high water line, becomes the permanent boundary of demarcation between private properties and the beach land that will be restored and, ultimately, will become the property of the state."[23] PLF Amicus

[22] Save Our Beaches, 2006 WL 1112700 at *1.

[23] See discussion at 21 and n.32, infra, regarding whether the ECL is "permanent."

Brief at 5. (Emphasis added). Citing Save Our Beaches, 2006 WL 111270 at *3, Pacific asserts the First District held that establishment of the ECL "thus results in…the deprivation of property rights, and of physical property itself, by virtual fiat." Id.[24] While the court had cited physical "taking" cases in its background discussion of riparian rights, see 2006 WL 111270 at *6-7, it never used the word "physical" in its opinion, nor did it "hold" that the sovereign submerged lands on which the public project would be placed were not already owned by the State. Rather, it stated that the upland owners would be denied "any property gained by accretion." Id. at *4. It also referred to the members' "riparian rights"--which it

[24] While Pacific argues that, "under the Act[,] the state assumes legal, record title to the property," PLF Amicus Brief at 5, Florida Home Builders, in contrast, argues that, because the ECL is not included in the chain of title, a title insurer of coastal property in a project area will be unable to discern, through due diligence, that a property abuts a nourishment project, thus "jeopardiz[ing] the marketability of these titles...." FHBA Amicus Brief at 3. However, neither of these conflicting assertions is correct. Whether under the Act or at common law, the State has been, and remains, the owner of sovereign submerged lands on which the project will be built. The "right of control over sovereignty lands is so inherent in the State that [the Court feels] such control can be exercised with or without specific statutory provisions." State v. Florida Nat'l Properties, 338 So. 2d 13, 18 (Fla. 1976).

Further, as conceded in STBR's Amended Answer Brief at 13, "[s]ection 161.181 provides that…the Board shall file its resolution …in the public records and record the survey showing the area of beach to be protected and the erosion control line in the book of plats of the county or counties where the erosion control line lies." Save Our Beaches 2006 WL 1112700, *3; (see also Tr: 26). Since 1970, through diligent search of county public records, title insurers doubtless have been, and will be, able to ascertain the extent of upland property to which their binders extend. And, even absent receipt of the express notice to purchasers required by § 161.57, owners are charged with constructive notice of statutory (and common law) constraints. Bryant v. Peppe, 238 So. 2d 836, 839 (Fla. 1970).

deemed "invalid[ly]" reserved by the Act, id. at *10--as "property," reasoning:

> Belvedere controls by explicitly holding that the riparian rights cannot be constitutionally reserved to the landowners as described in section 161.201. Id. at 652 (ruling that "in the context of condemnation of property, we think the condemnor should be unable to reserve the riparian rights to the condemnee in the absence of an express bilateral agreement to do so with the condemnee;" and concluding that "the act of condemning petitioners' lands without compensating them for their riparian property rights under these facts was an unconstitutional taking"). See also § 253.141(1), Fla. Stat. (2005) (stating that riparian rights "are inseparable from the riparian land"). Therefore, the statutory "reservation" of STBR's members' riparian rights is legally invalid with the effect that as applied in this case, the Beach and Shore Preservation Act deprives the members of their constitutionally protected riparian rights without just compensation for the property taken. Because those riparian rights have been infringed…satisfactory evidence of sufficient upland interest required by rule 18- 21.004(3) must be provided.

Id. at *10. Thus, the "property" STBR and Pacific now assert to be physically taken[25] is not, and cannot be, the already State-owned sovereign submerged lands. When Pacific argues that the beach nourishment project will result in the "placement of sand…on the property that is the subject of this vested right [to future accretions]," PLF Amicus Brief at 10 (emphasis added), it is flatly wrong.

Rather, it is the current of sand potentially drifting above those State-owned, sovereign submerged lands--which no other Florida court has ever held to be "taken" by a public project--that the upland owner hopes (absent anticipated, continued adverse effects of storms and critical erosion) will become future

[25] See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

accreted land.[26] If the public beach nourishment project results in loss of this hope for future land formed by favorably drifting sea sand, such loss is not actionable, because--as this Court has held--no such suit can "be maintained for damages resulting to individuals from acts done by persons in the execution of a public trust and for the public benefit, acting with due skill and caution and within the scope of their authority." Paty v. Town of Palm Beach, 29 So. 2d 363 (1947).

In Paty, the Court addressed whether "a trespass or wrong [is] made to appear when a municipal corporation builds a groin from the shore of the Atlantic Ocean out into the waters of the ocean, and the groin changes the natural action and the currents of the ocean so as to cause them to whip around to the south of the groin and to beat against and to excessively wash away plaintiff's land?" Id. at 373. Thus, in Paty, an actual--and not just (as here) hypothetical--lessoning of the plaintiff's upland property was alleged to result from construction of the groin, which the city had built "to protect its Ocean Boulevard and the lands lying westerly thereof against danger of destruction because of action of the sea…." Id. This Court found that the erosive effects allegedly caused by the groin were "damnum absque injuria." Id. In so holding, the Court observed:

> The rights of private owners …[and] of the public depend somewhat on the character of the water on which the land borders and the nature of the proprietary interest in the land both below and above the surface of the water. The waters of the sea are usually considered a common enemy.

[26] See n.18, supra (reflecting that the record does not support anticipated accretion).

Id. Here, the sponsors propose to construct an urgently needed beach nourishment project on sovereign submerged lands, to protect upland life and property--including the members' own property--from critical erosion and storm effects. In this joint fight against critical encroachment of the "waters of the sea," it would be inequitable to require the government to shoulder the burden not only of building and maintaining the protective beach nourishment project, but also of paying for loss of accretion caused, in record fact, not by the project or the Act, but by natural forces of the "common enemy." Thus, STBR's members' claim is not a physical "taking" of existing property, and as in Paty, no viable claim of wrong results.

Moreover, while it is true that, under Florida law, a property owner benefits when the MHWL moves seaward due to gradual and imperceptible accretion not caused by improvements to his property, it is not--contrary to Pacific's suggestion --only accretion which results in seaward movement of the MHWL. PLF Amicus Brief at 6. Pacific attempts to bolster this erroneous implication by citing out-of-state cases, which--being based on the controlling property law of those states--are inapplicable here. Id. However, the analysis in one of them is still noteworthy.

In State by Kobayashi v. Simring, 566 P.2d 725 (Haw. 1977), the court addressed an action brought by Hawaii seeking to quiet title to approximately 7.9 acres of land formed in 1955 by volcanic eruption. In deciding the title issue, the court--after analyzing Hawaiian law--ultimately quieted title in the State, holding

that the volcano-formed land was held in public trust. Id. at 735-36. In so doing, it analogized volcanic additions to accretion, but rejected the abutting landowners' argument that the lava extensions should increase their property, reasoning:

> [T]he preservation of littoral access is not sacrosanct and must sometimes defer to other interests and considerations. For example, it is well established in California "that accretions formed gradually and imperceptibly, but caused entirely by artificial means…belong to the state or its grantee, and do not belong to the upland owner"…[and] that being cut off from contact with the sea is not basis for proper complaint.…[As a California appellate court] noted: "It is well settled that the littoral rights of an upland owner who owns no title to tidelands adjoining his property are subject to termination by whatever disposition of tidelands the state, or its grantees, in the exercise of their trust, choose to make."

Id. at 734 (citations omitted). Similar principles (as reflected in Martin, Paty, and Peppe[27]) inform this Court's assessment of the members' as-applied claims here.

Further, this Court, in Florida Nat'l Properties, did not determine (as suggested by the elliptic quote used by Pacific, see PLF Amicus Brief at 7) that any establishment of a fixed boundary line constitutes a taking of the upland owner's property. Rather, as the omitted language reflects, it was the setting of a line pursuant to § 253.151--at the historical, rather than current, MHWL [thereby depriving the owner of half its property, purchased from the Trustees]--which would have effected an as-applied taking in that case. Here, in contrast, the ECL's correct location is undisputed, and does not encroach on existing upland property.

Pacific also argues that the members' upland properties will no longer be

[27] Bryant v. Peppe, 238 So. 2d 836, 839 (Fla. 1970).

oceanfront properties, but "something less," because its riparian rights are "eliminated by virtue of having the property removed from contact with the water." PLF Amicus Brief at 8. This ignores the plain language of § 161.201, which preserves to upland owners all common law riparian rights other than accretion. Similarly (unless Pacific intends to acknowledge the public's prescriptive use of dry sandy portions of the beach--a matter beyond this record), Pacific ignores the provisions of § 161.141 when it states: "Petitioners' restoration projects result in the…traversing of the public" on the project area. Id. at 10. Section 161.141 provides, in contrast, that "resulting additions to upland property are…subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to" the beach project. Pacific next argues that "tons of sand are located permanently upon property upon which…[absent the project] the upland owners would have a 'vested property interest in, and right to, future accretions." Id. at 12. This contradicts record evidence reflecting that the average "life" of the public project's protective value is only 6-8 years. (Tr: 19.)

Lastly, Pacific characterizes the government-sponsored beach nourishment project--which provides structural protection, and aesthetic amenities, to the very upland owners who challenge it--as "arbitrary and oppressive government action," likening it to warrantless searches, "hous[ing] peacetime soldiers in private homes," or failing to desegregate public parks. PLF Amicus Brief at 17-19. In the

joint war against the "common enemy" of critical erosion, however, the local government's placement of sand on sovereign property does not constitute such "oppressive action." Accordingly, Pacific's physical "taking" argument fails.

C. The Unique Kiesel Opinion Is Factually and Legally Distinguishable

STBR's reliance on Lee County v. Kiesel, 705 So. 2d 1013 (2d DCA 1998)--a physical "taking" case--is, for similar reasons, misplaced. In Kiesel, the Second District found that obstruction of the view to the channel by construction of a bridge extending from the shoreline constituted a compensable taking. Finding that the intrusion on the view was a physical taking, the Court found a per se taking. Assuming arguendo that the case was correctly decided,[28] Kiesel--like Sand Key and Florida Nat'l Properties--involved the government's appropriation of existing property, not the right to future property (which may or may not accrue). In Sand Key and Florida Nat'l Properties, there was a physical appropriation of the accreted land by the government, and in Kiesel, the existing view to the channel was deemed appropriated when substantially eliminated by the bridge. Notably, STBR has shown no physical intrusion on, nor impairment in the use and enjoyment of, any members' existing property.[29]

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[28] Cf. Paty; Martin (no "taking" by public projects on sovereign submerged lands).

[29] Moreover, this Court has accorded the right of access a special stature at common law. See Game and Fresh Water Fish Comm'n v. Lake Islands, Ltd., 407 So. 2d 189, 193 (Fla. 1981) ("Reasonable access must, of course, be balanced with the public good, but a substantial diminution or total denial of reasonable

As discussed in DEP's Amended Initial Brief at 36-39, the United States Supreme Court has retreated from application of per se rules, and applies a per se physical "taking" analysis only in rare situations. In Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 324 (2002), the United States Supreme Court noted that "physical appropriations are relatively rare [and] easily identified." The Court observed that the existence in fact of a physical taking "is typically obvious and undisputed." While a "taking" of accreted land or an existing view may fit this description, a claimed "taking" of "future land" does not.

D. The Problems Addressed in Florida Nat'l Properties Do Not Apply Here

On that same basis, this case differs significantly from State v. Florida Nat'l Properties, Inc., 338 So. 2d 13 (Fla. 1976). There, the Court addressed a dispute which had arisen four years previously regarding location of the boundary line between the sovereignty bottom lands of the Lake and the subject upland property, which the parties were unable to resolve. Thus, as in Sand Key, the dispute concerned a strip of existing land, lying between the boundary line the Trustees

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access…is a compensable deprivation of a property interest."). As clarified in Hayes v. Bowman, the right to an unobstructed view of the navigable channel is directly related to the right of ingress and egress; thus, loss of a particular aesthetic view which does not obstruct the view to the channel is not compensable. 91 So. 2d 795, 801-02 (Fla. 1957) ("An upland owner must in all cases be permitted a direct, unobstructed view of the Channel and as well a direct, unobstructed means of ingress and egress over the foreshore and tidal waters to the Channel. If the exercise of these rights is prevented, the upland owner is entitled to relief."). This record reflects no legal or policy justification to accord the right to receive future accretion on critically eroded beaches a specially protected status (like access).

claimed and the one which the upland owner asserted.

The challenged statute (§ 253.151) purported to set a boundary between sovereign submerged lands and all privately owned riparian lands adjacent to all navigable meandered fresh water lakes in the state (not privately owned). Additionally, it purported to do so at an historical MHWL, and not--as under the Act--at the current MHWL. Id. at 15. The owner in Florida Nat'l Properties --who had purchased its property from the Trustees themselves--asserted that the boundary line the Trustees claimed (established at a contour of 41.6 feet above mean sea level--reflecting the line as it existed in 1926, rather than at the current ordinary high-water line of 38.5 feet) was "unacceptable…since this proposal laid claim to approximately half of [the owner's] purchased property." Id. at 16.

Survey notes indicated that the [improper] "draining by the landowners" approximately equaled the amount the Lake had been [avulsively] "raised by the hurricane, thereby balancing out." Id. Therefore, while (as part of its analysis) the Court acknowledged that the "ancient common law relating to accretion and reliction prevails in Florida," id. at 18, on those facts, the doctrines did not apply:

> [T]he doctrine of reliction is applicable in situations where water recedes by imperceptible degrees from natural causes and…does not apply where land is reclaimed by deliberate drainage. This is not the situation in the instant case.…Therefore while the [upland owner] is entitled to the land down to the present ordinary high-water line…it is not because of…reliction but because of the location of the actual, present high-water mark.

Id. (Emphasis added) (citing Martin, 93 Fla. at 76, 112 So. 2d at 287). Because,

applying common law principles, the current MHWL was accurate, the only basis for setting the line at the historic high-water mark was operation of the statute. Id. at 16-17. Also, while the challenged statute allowed the upland owner to obtain a permit to "fill to combat erosion," it did not view such erosion as a critical threat, cut off the legal effects of erosion, or authorize public projects to forestall it. Id.

Here, in contrast, the Act has been passed specifically to address critical erosion of emergency proportions. § 161.088, Fla. Stat. (2004). This record reflects that, consistent with the Act, the ECL is set at the recently-surveyed MHWL. (R3: 414.) Unlike the owner in Florida Nat'l Properties, who contested the specific location of the boundary line asserted by the Trustees, STBR dropped its members' challenge to the location of the ECL,[30] and does not assert any "taking" claim on the basis that--applying "ancient common law" principles[31]--the ECL encroaches on existing upland which is already part of the members' property. Also, the Act does not apply to all coastal properties, but only to "critically eroded" ones. Nor is the ECL in all cases permanent.[32] If the project does not proceed within two years, or the sponsor fails to maintain the beach, or it erodes seaward of the ECL, the Act provides a means to vacate the ECL.

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[30] See n. 7, supra.

[31] If--unlike STBR--an owner were to allege that the specific location of the ECL encroached upon existing upland property above the current MHWL, the Act provides appropriate remedies. See § 161.141; Fla. Stat. (2004).

[32] See §161.211, Fla. Stat. (2004).

Just as deliberate drainage does not--as the Florida Nat'l Properties Court recognized--constitute reliction, the proposed beach project in this case will not constitute accretion. With respect to any future accretion, this record supports no reasonable expectation of such accretion, but only that--absent the proposed public project--the beach will continue to erode.[33] Thus, by authorizing adjacent beach projects on sovereign submerged lands in critically eroded areas, the Act (which cuts off adverse legal effects of erosion and provides substantial structural protection to upland properties)[34]--rather than diminishing such properties (as in Florida Nat'l Properties)--will only enhance them.[35] The specially-tailored safeguards and advantages the Act provides thus pass constitutional muster and are urgently needed to "meet with present requirements of society." 338 So. 2d at 19.

In this case, the Act has long provided for beach restoration in a manner whereby upland property is not physically occupied or obscured (although its structural integrity is significantly enhanced by adjacent public works on sovereign lands); the upland owner's access to the water is not curtailed; and all common law riparian rights other than the right to accretion are preserved. DEP has urged this

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[33] See discussion, supra, at 8-9 & n.18.

[34] See §161.088, Fla. Stat. (2004); see also n.36, infra.

[35] The proposed "Grant Agreement DEP Contract No: 04WL1," at 2 (Joint Exhibit 1, Part 6) reflects that the project life expectancy is 10 years, and the estimated agreed costs are "State $4,173,661---Local $11,187,624---Total $15,361,285." These expenditures provide specific upland benefits. See n.18, supra & n.36, infra.

Court--cognizant of applicable background property principles (including longstanding statutory provisions and common law principles, traditional "takings" jurisprudence, and the police power, nuisance, and public trust doctrines[36])--to confirm that Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1380 (Fla. 1981), and Martin apply, and to make clear the intended import of Belvedere, in this beach nourishment context. While STBR variously labels certain of these arguments as "arrogan[t]," "high-handed," and "undemocratic,"[37] to the contrary, as stated by Justice Kogan (in a different context), "[f]ar from being undemocratic, the judicial refinement of the law is one part of democracy's genius." State v. Stalder, 630 So. 2d 1072, 1079 (Fla. 1994) (Kogan, J., concurring). Because, in Save Our Beaches, the district court has both misapplied and failed to apply this Court's precedent and specific, applicable statutory law with grave statewide implications, the Court's "judicial refinement of the law" is urgently needed here.

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[36] STBR argues that--in asserting that the upland property must be condemned (in whole or part) to allow the proposed government-funded beach nourishment project (urgently needed to protect the structural integrity of that same property) to proceed--its members, rather than exercising their alleged property rights in a manner contrary to the public good, are "defending themselves" and "protecting their property rights." (Amended Answer Brief at 42.) Since part of protecting one's property includes the obligation to prevent avoidable consequences where such damage can be "avoided without undue risk, burden, or humiliation," Restatement (Second) of Contracts § 350(1) (1981), the characterization of such action as "protective" is subject to legal debate. See E.A. ¶ 4.16.1 ("The No Action alternative would continue to leave structures susceptible to storm damage.").

[37] Amended Answer Brief at 42-43.

III. Standing Arguments Regarding Facial Challenges Do Not Apply

Lastly, STBR argues that DEP did not contest its standing below, and is "precluded from doing so here."[38] While Pisarski[39] was not cited, DEP did challenge both STBR's standing to pursue its members' as-applied "taking" claims in the judicial forum, and its appellate standing to contest the permit, urging the same rationale.[40] Further, if standing under § 120.68(1) is jurisdictional, cf. Sullivan v. Div. of Elections, 413 So. 2d 109, 109 (Fla. 1st DCA 1982) (examining the court's "jurisdictional grant" under the constitution and § 120.68), it cannot be waived. Cf. Grand Dunes, Ltd. v. Walton County, 714 So. 2d 473, 475 (Fla. 1st DCA 1998) ("In the administrative context, '[s]tanding has been equated with [subject matter] jurisdiction…and has been held subject to the same rules....'").

This case does not present the question of whether an association can bring a facial constitutional challenge to a statute potentially affecting its members. As STBR explains repeatedly, this case involves an "as-applied," rather than a facial, "taking" claim. Moreover, it is not correct that the only remedy sought by STBR

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[38] Amended Answer Brief at 46, n.122.

[39] Palm Point Property Owners' Ass'n of Charlotte County, Inc. v. Pisarski, 626 So. 2d 195 (Fla. 1993).

[40] (See TAB C: 11-12) ("[T]he record…is devoid of evidence that the associations possess any property right whatsoever in the subject beachfront properties of their members… [T]he associations have failed to demonstrate any "injury in fact" to themselves to establish "the kind of special relationship necessary for third-party standing," or to show that the individual property owners involved are not capable of raising their own personal constitutional claims.") (Internal citations omitted).

was invalidation of the ECL; rather, it sought remand to DEP "with instructions to require the Applicants to acquire the necessary riparian property with its appurtenant riparian rights before the [Permit] can be issued." (TAB A: 34.) (Emphasis added). Yet, Florida Home Builders insists that this is not an "as-applied regulatory taking claim,"[41] citing only cases involving facial constitutional challenges,[42] whose rationale is inapplicable. Indeed, in one of these--Hillsborough County v. Florida Restaurant Ass'n, Inc., 603 So. 2d 587, 589 n. 1 (Fla. 2d DCA 1992), the district court--in referencing the Florida Home Builders three-part test--also cited Warth v. Seldin, 422 U.S. 490 (1975), noting its requirement that an association allege "that the nature of the issue does not make the individual participation of each association member indispensable to a proper resolution of the case"--an element not met in asserting the members' as-applied "taking" claims here. Thus, STBR lacks standing to raise its members' claims.

Based on the foregoing, the opinion under review should be quashed, either because STBR lacks standing to raise its members' as-applied "taking" claims, or because no compensable "taking" has occurred here by implementation of the Act.

[41] FHBA Amicus Brief at 5, n.1.

[42] See FHBA Amicus Brief at 3-6 (citing Florida Home Builders Ass'n v. Dep't of Labor & Employment Security, 412 So. 2d 351 (Fla. 1982) (facial challenge to agency rule); Hillsborough County v. Florida Restaurant Ass'n, Inc., 603 So. 2d 587 (Fla. 2d DCA 1992) (facial challenge to ordinance); Florida Ass'n of Counties, Inc. v. Dep't of Admin., 580 So. 2d 641 (Fla. 1st DCA 1991) (facial challenge to statute); City of Lynn Haven v. Bay County Council of Registered Architects, Inc., 528 So. 2d 1244 (Fla. 1st DCA 1988) (facial challenge to city bidding procedure).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply 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).

Chief Appellate Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Reply Brief of the Department of the Environmental Protection and Board of Trustees of the Internal Improvement Trust Fund has been filed with the Clerk of the Supreme Court of Florida this 18th day of December, 2006, and furnished by U.S. Mail to:

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