No. 08-1151

In the
SUPREME COURT OF THE UNITED STATES

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, et al.

Respondent.

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN SUPPORT OF RESPONDENT

Amicus Curiae, Brevard County, Florida, respectfully files it Brief in Support of Respondent, Florida Department of Environmental Protection, in this case as follows:

STATEMENT OF IDENTITY OF *AMICUS CURIAE* AND INTEREST IN THE CASE

Brevard County presents this statement of identity and interest in support of its contention, as *amicus curiae* to this Honorable Court.

Brevard County is a political subdivision of the State of Florida located on the Atlantic coast in the state's central region. Brevard has the state's longest beach at 71.6 miles, nearly 9 percent of all the beaches in Florida.[1] This shoreline is marked by dune bluffs, in

[1] 71.6 miles/825 miles = 8.7%. *See* Ralph R. Clark, "Beaches Conditions in Florida: a Statewide Inventory and Identification of the Beach Erosion Problem Areas in Florida", Division of Beaches and Shores Technical and Design

some places rising nine feet or more above the toe of the dune about 50 to 100 yards from the water's edge. In many areas of the County, beachfront lots are sandwiched within a 150 to 200 foot area between the dune line on the beach and U.S. Highway A1A. In many cases, privately owned houses, condominiums and other structures have been built upon narrow, shallow beachfront lots and, due to beach erosion, the foundations of some of those privately owned structures have been compromised or threatened after an avulsive storm event leaving the upland edge of the dune line within feet of the eroded sheer faces of sandy cliffs located within yards of the churning ocean.

Brevard County's highly sloped beach and dune system offer the only buffers between improved private property and the ocean's persistent, grinding erosion,

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Memorandum 89-1, Fla. Dept. of Envtl. Prot., 5th ed. 1993, http://www.dep.state.fl.us/beaches/publications/tech-rpt.htm#Length_of_Shoreline

which threatens, and in some cases has caused, the destruction of private beachfront structures. Unlike Walton County and other areas along Florida's panhandle region, Brevard County's private beachfront structures are built on elevated land at the ocean's edge as compared to panhandle structures which are typically built on stilts driven into the much wider and flatter expanses of beach on Florida's Gulf of Mexico coast.

In Brevard, in many instances, beachfront structures lie precariously close to the rims of cliffs formed by erosion that, year after year, pose a constant threat to private property—homes, condominiums and other structures—having a total value in the billions of dollars. Beach renourishment has worked to ward off the threat to these privately owned structures posed by

the frequent avulsive erosion generated by the Atlantic Ocean.

In Brevard, about two-thirds of the County's beaches have suffered erosion and over half are critically eroded according to state environmental officials.[2] In fact, nearly 10 percent of Florida's 491.9 miles of eroded coastline lies in Brevard County.[3] Presently, the State of Florida, its subdivisions, and the federal government spend millions of dollars each year to renourish eroded shorelines, with hundreds of millions more projected over the next decade.[4] The

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[2] 65.4 percent of Brevard's shoreline is eroded; 51 percent is classified as critically eroded. "Critically Eroded Beaches in Florida", Bureau of Beaches and Coastal Systems, Fla. Dept. of Envtl. Prot., 2009 at 6, http://www.dep.state.fl.us/beaches/publications/pdf/CritEroRpt09.pdf

[3] 9.5 percent of all the eroded shoreline in Florida and 9.2 percent of all *critically* eroded shoreline in Florida is in Brevard County. *supra* at n.2 at 3, 6.

[4] *See e.g.*, "Florida Beach Management Program: Long Range Budget Plan", Bureau of Beaches and Coastal Systems, Fla. Dept. of Envtl. Prot., 2009, http://www.dep.state.fl.us/beaches/programs/pdf/fy-09-19.pdf

sand used to renourish eroded beaches is akin to an energy absorbing sponge that mitigates erosion impacts from the storm driven pounding of waves on the beach and dune system, as well as the impacts from a persistently rising sea. Left unchecked, the seas would march forward, gradually swallowing protective dunes and encroaching on the upland closer and closer to the thresholds of private beach front homes until the scouring wave action undermines foundations and structures collapse.

Not only do renourishment efforts protect private property, those efforts maintain beaches for public enjoyment, support Brevard's tourism industry, and protect natural wildlife habitats.

The renourishment process is incredibly expensive and hard costs will continue to grow with the future depletion of sand that is both practically

available and suitable as material for renourishment sand.[5] The looming economic reality of a ruling in favor of the Petitioner from this Court is predictable. Government leaders faced with the prospect of paying out substantial sums in takings compensation while facing the correspondingly substantial costs of beach renourishment in times of diminishing revenues may be forced to opt out of renourishment projects. To opt out means to let nature take its course, and along with it the inevitable, catastrophic results for owners of private property abutting the shoreline in Brevard County who stand to lose their homes, which for many represents all of their economic security.

The economic and environmental disaster that is sure to accompany an unmitigated, relentless march

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[5] *See* § 161.144, Fla. Stat. (2009). "The Legislature recognizes that beach-quality sand for the nourishment of the state's critically eroded beaches is an exhaustible resource, in ever-decreasing supply . . . ." *Id.*

of the sea would be unprecedented. Not only would private property owners see their homes and, in some cases, businesses destroyed, but the public would lose a classic venue for recreation that annually attracts hundreds of thousands of users who are vital to the economic well-being of Brevard County's hotels, restaurants, and beachside businesses. Millions of dollars spent each year by tourists and beach goers from near and far could be swept away with the unchecked erosion of the County's shoreline. Likewise, loss of the beach would result in destruction of wildlife habitat for species such as sea turtles, which, for hundreds of thousands of years, have trekked in droves to Brevard's beaches to dig nests for their hatchlings.

Brevard County may find itself in an untenable situation should it be faced with unworkable renourishment economics. Brevard is party to a long-

term renourishment funding agreement with the United States Army Corps of Engineers, which itself is obligated to maintain the condition of certain Brevard County beaches by virtue of a settlement agreement with a group of beachfront property owners along the beaches in specific sections in the County. If substantial takings compensation is to be added to the enormous cost of renourishment, then Brevard, as a provider of local matching funds faced with additional looming budget shortfalls, may be unable to extend its nourishment project. The same may be true for the County's renourishment partners, the State of Florida and the U.S. Army Corps of Engineers.

Thus, pursuant to Supreme Court Rule 37.4, Brevard County, Florida submits this brief in support of the Respondents in this case in order to allow the

County to present its arguments on the issues presented in the Petitioner's Brief.

SUMMARY OF THE ARGUMENT

A conflict exists between section 161.141, Florida Statutes, and section 161.191(1), Florida Statutes, relating to ownership of beach restoration sand deposited by the state landward of the mean high water line (MHWL), which occurred in this case. Section 161.141, Florida Statutes, vests ownership of such "additions to the upland property" in the upland owner, which has the legal effect of establishing the MHWL as the boundary between sovereign and private ownership once beach restoration sand is deposited by the government on private riparian property. Therefore, this statute could be construed as leaving the Petitioner's asserted "right of contact" with the MHWL and derivative littoral rights intact.

In contrast, section 161.191(1), Florida Statutes, vests title to all lands landward of the erosion control line (ECL) in the upland owner, which, depending upon the location of the ECL—seaward from, landward from or coextensive with the MHWL—may either enhance upland ownership rights, reduce those rights or leave those rights intact, with the exception of the common law right of accretion and the common law burden of erosion which are supplanted by the "statutory accretion" rights provided for in section 161.141, Florida Statutes. Under section 161.191(1), therefore, the Petitioner's asserted "right of contact" and derivative littoral rights may or may not be left intact, depending on the location of the MHWL.

Since the Florida Supreme Court decision in *Walton County v. Stop the Beach Renourishment, Inc.* below, determined that record did not establish the

location of the ECL relative to the MHWL, the conflict between the above-referenced provisions in the Beach and Shore Preservation Act (the Act) was not considered or resolved by the Florida Supreme Court. The resolution of that statutory conflict is required before a determination can be made as to whether the Petitioner's asserted right of contact with the MHWL has been taken by operation of the statute. That determination, involving a construction of a state statute, is reserved to the Florida courts under the Tenth Amendment and no judicial taking can be claimed until that issue has been decided.

Moreover, for three reasons, the common law right of accretion has not been eliminated by section 161.191(2) of the Act, as claimed by the Petitioner. First, the common law right of imperceptible accretion has been supplanted by a superior, noticeable and

immediate right of "statutory accretion" as long as the government fulfills its statutory duty to construct, complete and maintain a beach restoration project. Second, if the government fails in that duty, the Act contains a statutory reverter which reinstates the common law right of accretion, as well as the common law burden of erosion.

Finally, the common law burden of erosion borne by the upland owner was the historical policy reason for vesting the upland owner with the common law right of accretion. Under the Act, the burden of erosion is also suspended for the upland owner since the government is under a statutory duty to maintain the beach restoration project designed to prevent erosion. Therefore, the policy reason for the common law right of accretion does not exist as long as the government fulfills its statutory duty. As a result, the statutes

suspending the common law do not affect a taking and the Florida Supreme Court's failure to require the initiation of eminent domain proceedings, as provided for in the Act, is not a judicial taking.

ARGUMENT

I. Conflicting provisions in the Florida Beach and Shore Preservation Act, as applied to the evidence of record in this case, create an unresolved issue of state law as to whether the mean high water line has been supplanted by the erosion control line as the boundary between sovereign lands and private riparian uplands. Under the Tenth Amendment, that statutory conflict must be resolved by the Florida judiciary before a judicial takings claim based upon loss of contact with the mean high water line can be asserted.

A. Background

Petitioner glosses over the portion of Justice Stewart's concurring opinion in *Hughes v. State of Washington*, 389 U.S. 290 (1967), conceding "as a general proposition that the law of real property is,

under our Constitution, left to the individual States to develop and administer" and that the state "is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners." *Hughes*, 389 U.S. at 295. Of course, the constitutional provision alluded to by Justice Stewart is the Tenth Amendment, which reserves to the states the powers not delegated to the United States nor prohibited to the states by the Constitution. U.S. Const., amend. X; *see Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Absent a taking, the state's enactment and interpretation of laws regulating beach erosion is a matter of state law reserved to the states by the Tenth Amendment.

The Petitioner has also conveniently ignored 190 years of background principles in substantive Florida

law which has continuously subordinated the common law to the acts of the Legislature.[6] Likewise, the Petitioner has also ignored 100 years of background principles of substantive property law making the littoral rights of riparian upland owners subject to regulation by Florida's Legislature. *Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909).

One law falling within both of the above-stated background principles is Florida's Beach and Shore Preservation Act, Chapter 161, part I, Florida Statutes,[7] (the Act) which, at its core, is a

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[6] Section 2.01, Florida Statutes, was first enacted in 1829 when Florida was still a territory and the provision has continuously been a part of Florida statutory law since that time. The statute reads as follows:

2.01 Common law and certain statutes declared in force.—The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

[7] §§ 161.011-242, Fla. Stat.

comprehensive law establishing a regulatory framework designed to preserve the Florida beach and dune systems that protect private upland properties, as well as public beaches from the economic menace posed by severe erosion generated by the avulsive hurricanes, tropical storms and nor'easters that frequently plague Florida's peninsular coastline bounded by the Atlantic Ocean, Gulf of Mexico and Straits of Florida.[8] The comprehensive regulatory scheme set up under Chapter 161, part I, Florida Statutes, includes the establishment of coastal construction control lines,[9] coastal construction setbacks,[10] rigid coastal armoring regulations,[11] erosion control and beach restoration and

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[8] §§ 161.088 and 161.141, Fla .Stat.

[9] § 161.053, Fla. Stat.

[10] § 161.052, Fla. Stat.

[11] § 161.085, Fla. Stat.

nourishment,[12] though only the beach restoration and nourishment provisions are relevant in this case.

The Act was adopted forty-four years ago and substantially revised thirty-nine years ago, as Chapter 65-408, Laws of Florida and Chapter 70-276, Laws of Florida, respectively. The Legislature's stated purposes for the adopting the Act were as follows.

> The Legislature finds and declares that the beaches in this state and the coastal barrier dunes adjacent to such beaches, by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable natural resources of Florida and that it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access.

§ 161.053, Fla. Stat.

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[12] § 161.141, Fla. Stat.

> Because beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions, it is hereby declared to be a necessary governmental responsibility to properly manage and protect Florida beaches fronting on the Atlantic Ocean, Gulf of Mexico, and Straits of Florida from erosion and that the Legislature make provision for beach restoration and nourishment projects, including inlet management projects that cost-effectively provide beach-quality material for adjacent critically eroded beaches.

§ 161.088, Fla. Stat.

The beach restoration and nourishment component of the Act is designed to implement these legislative policies. Section 161.141 of the Act clearly contemplates government renourishment of the state's beaches at government expense to either restore beaches after or protect beaches from the avulsive erosion caused by hurricanes, tropical storms and other weather related events frequently experienced in

Florida. Specifically, section 161.141 pertains to the state restoration of eroded beach landward of the mean high water line in the interest of preserving the beach for the protection of the state's economy, the general public welfare, private upland structures and private property adjacent to the state's beaches. In effect, the Act allows the expenditure of public funds for mixed public and private purposes associated with the state's beaches, supplanting the need for riparian upland owners to incur the expense of restoring their private beach up to the mean high water line after an avulsive event, as they are entitled to do under Florida common law. *Walton County v. Stop the Renourishment, Inc.*, 998 So. 2d 1102 (Fla 2008)

B. The Dispute

In this case, Petitioner asserts that, notwithstanding the lack of permission from the

landowners, the Walton County Commission demanded that its beach restoration contractor enter upon the Petitioner's members' private properties to place the sand required by engineering specifications for a county beach restoration project performed in accordance with the Act.[13] Petitioner further asserts that the county's restoration contractor trespassed upon the property of at least two of the Petitioner's members, dumping tons of sand on their property thereby changing its character.[14] Since the Petitioner's members are riparian owners[15] who presumably claim title to the mean high water line (MHWL), the sand had to be dumped landward of the MHWL on the property of at least two members to result in a trespass, although it is unclear whether any sand was

[13] Pet. Brief, 11-12

[14] Pet. Brief, 11-12

[15] Pet. Brief, 13, n.12

placed landward of the MHWL touching the properties owned by the remaining three members. Pet. Brief, 11-12.

The Petitioner in this case asserts it is beyond argument that Florida law has always required a property to touch or border the MHWL in order to be a littoral property with attendant littoral rights. Pet. Brief, 24. The Petitioner also asserts that "[i]f the upland property is separated from the MHWL, then the entire property is no longer littoral in character, and all littoral rights are lost." Pet. Brief, 26. It follows that Petitioner claims that Florida's Beach and Shore Preservation Act has the effect of separating its members' properties from direct contact with the MHWL.

Unfortunately for the Petitioner, the Act does contain a provision under which "additions to the

upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner,"[16] which has the effect of granting ownership of restoration sand placed landward of the MHWL to the upland owner, thus preserving the asserted property right of contact between upland riparian property and the MHWL in the context of a beach restoration project. The statute is section 161.141, Florida Statutes, and the provision clearly applies to the two Petitioner's members owning property where renourishment sand was deposited landward of the MHWL. It is likely, although unclear, that the statute also applies to the remaining three members since it would be highly unusual if sand was not placed landward of the MHWL within the boundaries of a

[16] § 161.141, Fla. Stat.

beach restoration project where the government must "establish the line of mean high water for the area to be restored." . Section 161.141, Florida Statutes. The statute is discussed at page 1108 in the *Walton County* opinion rendered by the Florida Supreme Court and reads, in relevant part, as follows:

> **161.141 Property rights of state and private upland owners in beach restoration project areas.—**
>
> [P]rior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and *any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner* subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the

> need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. (Emphasis supplied)

Although, under section 161.141, the sand placed landward of the MHWL on the Petitioner's members' property would be owned by those upland owners, as will be explained in detail below, the statute appears to potentially conflict with section 161.191(1), Florida Statutes, which states that title to land lying seaward of the erosion control line (ECL) is vested in the state. The conflict between these two statutes means that neither the Act itself, nor the Florida Supreme Court decision upholding the Act, can be deemed to be a taking because no Florida court of last resort has yet resolved or reconciled the effect of two distinct, apparently contradictory provisions in the

Act addressing the issue of post-beach restoration ownership—and attendant littoral rights—resulting from "additions" to upland property landward of the MHWL caused by the deposit of sand in a nourishment and restoration project such as the one under discussion in this case. Such statutes, and their interpretation, are matters reserved to the state under the Tenth Amendment and until this statutory conflict is resolved by Florida courts, no judicial taking can be claimed for the reasons that follow.

C. Harmonizing Conflicting Statutes to Eliminate a Taking of MHWL Contact

Section 161.141, Florida Statutes, preserves the MHWL as the basis for determining ownership of restoration-related additions to riparian upland on the restored beach. Though the effects of this "statutory accretion" resulting from beach restoration can be

noticeable and immediate (as in this case),[17] as opposed to imperceptible as required for common law accretion, under section 161.141 the property of the upland owner remains in contact with the MHWL as a result of the statutory accretion inuring to the benefit of the riparian upland owner. *Walton County,* 998 So. 2d at 1113. Under this statute, these statutory accretions are also subject to the same regulation and public easement for customary and traditional public use of sandy beaches that are embedded as background principles of Florida law. *City of Daytona Beach v. Tona-Rama,* 294 So. 2d 73 (Fla. 1974).

In contrast, and apparent contradiction, section 161.191(1) of the Act bases title to post-restoration

[17] It is worthy of note that such "additions" resulting from the restoration project are particularly noticeable on portions of Atlantic beaches where the riparian upland owner has refused permission to restore a private beach leaving a private hole surrounded on both sides by newly deposited, elevated sand once the restoration project is finished.

riparian upland on the location of the erosion control line (ECL) under which the state claims ownership to lands seaward of the ECL while vesting ownership to lands landward of the ECL in the riparian upland owner. That section reads as follows:

> **161.191 Vesting of title to lands.—**
>
> (1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.

But, according to section 161.161(5), Florida Statutes,[18] the ECL is supposed to be set using the

[18] Section 161.161(5), Florida Statutes reads as follows:

existing MHWL as a guide, which means there are three potential locations for the ECL: (1) the ECL and the MHWL can be the same line, (2) the ECL can be set seaward of the MHWL or (3) the ECL can be set landward of the MHWL.

Significantly, in this case, the Florida Supreme Court found that the record did not establish whether or not the ECL was the same as the existing MHWL.[19] As described below, in this case, the effect of the Act on littoral rights attached to the riparian upland would be uncertain because of the apparent conflict between sections 161.141 and 161.191(1), Florida Statutes. The

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161.161 Procedure for approval of projects.—
(5) The board of trustees shall approve or disapprove the erosion control line for a beach restoration project. *In locating said line, the board of trustees shall be guided by the existing line of mean high water,* bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible. (Emphasis supplied).

[19] *Walton County,* 998 So. 2d at 1117, n.15

interplay of those statutes and their effect on littoral rights is still a matter of undecided Florida law Tenth Amendment. The Petitioner's claim of a judicial taking is therefore defeated for the following reasons.

Under the title provisions of section 161.191, if the ECL is the same as the MHWL, there is no separation of littoral rights from the upland since the riparian upland owner gains all "statutory accretions" from the project landward of the MHWL and the Act preserves all other common law littoral rights[20] except accretion,[21] which is supplanted by the superior, immediate right of "statutory accretion" under section 161.141 as long as the beach restoration project is constructed and maintained—failing which, the Act provides for a statutory reverter to the common law of

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[20] § 161.201, Fla. Stat.

[21] § 161.191(2), Fla. Stat.

accretion.[22] If the ECL is located seaward of the MHWL, under section 161.191(1), the riparian owner gains title to what would have been sovereign lands located between the ECL and MHWL[23] and there is no taking since the MHWL lies within the riparian upland ownership and all common law littoral rights but common law accretion are statutorily preserved.[24]

The "taking" problem arises if the ECL is established landward of the MHWL. "But for" the operation of section 161.141, if the ECL is located landward of the MHWL, section 161.191(1) would

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[22] § 161.211, Fla. Stat.

[23] Such an alienation of sovereign lands is authorized under Art. X, section 11 of the Florida Constitution(1968):

ART. X, SECTION 11. Sovereignty lands.—The title to lands under navigable waters, within the boundaries of the state, ***which have not been alienated,*** including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest. (Emphasis supplied).

[24] § 161.201, Fla. Stat.

appear to vest in the state those "statutory accretions" deposited landward of the MHWL but seaward of the ECL. If the effect of section 161.141, vesting ownership of the statutory accretions between the MHWL and the landward located ECL, is not taken into account, the application of section 161.191(1) in this ECL scenario would have the apparent effect of severing the MHWL from the formerly riparian upland property. However, since section 161.141 clearly identifies the MHWL–not the ECL–as the boundary between state and private upland ownership to the extent statutory accretions result from the beach restoration project, even in this ECL scenario the upland property remains in contact with the MHWL under section 161.141–whether or not the upland owner consented to the placement of sand on the upland property. Therefore, under this ECL scenario,

the result under section 161.141 is in direct conflict with the result under section 161.191(1).

If the state's judiciary ultimately determines that section 161.141 prevails in the last mentioned ECL scenario, the upland owner's lack of consent might give rise to an action for trespass damages and/or removal of the sand, but no taking occurs since the additional sand landward of the MHWL is still owned by the riparian upland owner under section 161.141 and the upland owner's property remains in contact with the MHWL.

The problem with Petitioner's claim to a judicial taking in this case is that the Florida Supreme Court, not being able to determine from the record where the ECL was located relative to the MHWL, could not address the issue as to how Petitioner's upland title and littoral rights were statutorily impacted by the

restoration project, although the Florida Supreme Court clearly stated that "fact" based, as-applied takings claims could be raised under the Act and Florida law.[25] Because of the inadequate record, it was impossible for the Florida Supreme Court to reconcile or harmonize the conflicting MHWL-based title to the additional sand deposited on the Petitioner's members' land under 161.141 with the potentially conflicting section 161.191(1) that could arguably sever contact of the upland with the MHWL by vesting the state with title to property landward of the ECL <u>if the ECL was located landward of the MHWL</u>—the only ECL scenario under section 161.191(1) that could give rise to a "takings" claim.

However, the issue as to whether, in any of these scenarios, the claimed right of contact with the MHWL

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[25] *Walton County,* 998 So. 2 at 1117, n.15

remains intact under section 161.141 or whether the claimed right of contact with the MHWL disappears under section 161.191(1) where the ECL is located landward of the MHWL is a matter that is still undecided under Florida law and a matter falling squarely within the interpretive powers of Florida's judiciary under theTenth Amendment. Unless and until a state court of last resort has a sufficient record to reconcile the conflict as to whether section 161.141 preserves the right of contact with the MHWL or section 161.191(1) affects a "taking" of the asserted right to contact with the MHWL in any specific ECL scenario described above, the Petitioner cannot establish a claim for the loss of littoral rights attached to the asserted right of contact with the MHWL.

Because, based upon the facts of record in this case, the Petitioner cannot establish a statutory taking

founded upon loss of contact with the MHWL, the judicial failure to force the eminent domain proceedings provided for in the Act does not give rise to a judicial taking.

II. The grant of a superior right of "statutory accretion" combined with the removal of the common law burden of erosion during the construction and maintenance of a beach restoration project does not give rise to a facial statutory taking requiring eminent domain proceedings enforceable by the judiciary. Therefore, there is no judicial taking.

Petitioner's claim that the Florida Supreme Court has changed state law by making accretion a future contingent interest in place of a vested right to future accretions amounts to an exercise in legal semantics because Petitioner ignores the substantive effect of the Act, which effectively suspends the common law littoral right of imperceptible accretion and substitutes a superior, immediate right to

"additions" of upland property landward of the MHWL so long as a beach restoration project is constructed and maintained. The reason for that substitution is evident. As long as the responsible government is pouring sand out upon renourished beaches to fulfill its statutory duty to maintain a restoration project, imperceptible common law accretion is literally and physically displaced by obvious and immediate sand deposits which attach to the upland ownership when located either landward of the MHWL, in accordance with section 161.141, Florida Statutes, or landward of the ECL, in accordance with section 161.191(1), Florida Statutes.

In relevant part, section 161.191(2)–the portion of the Act suspending the common law littoral right of accretion as a complement to the statutory accretion rights granted under sections 161.141–reads as follows:

> 161.191 Vesting of title to lands.—
>
> (2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, the common law shall no longer operate to increase...the proportions of any upland property lying landward of such line...by accretion...*except as provided in s. 161.211(2) and (3).* (Emphasis supplied).

Contrary to Petitioner's assertion, the net effect of the above-cited statute, read together with sections 161.211(2) and (3), Florida Statutes, is to suspend, not eliminate, the common law littoral right of accretion during an ongoing beach restoration project. The common law littoral right of accretion is held in abeyance as long as the project is completed and maintained. However, the statute provides what might be labeled a "statutory reverter" of the common law of accretion if the project is not maintained—a provision discussed next.

Section 161.211, Florida Statutes, imposes upon the state or other governmental entity with responsibility a duty to complete and maintain any approved beach restoration project. Under section 161.211(2), if the shoreline recedes landward of the erosion control line as a result of the failure to maintain the completed restoration project, the suspension of the common law of accretion provided for in section 161.191(2), Florida Statutes, ceases to be operative as to the affected upland. If the state does not respond to requests from riparian upland owners to restore the beach under such circumstances, the common law littoral right of accretion is reinstated by operation of section 161.211(3), Florida Statutes, and the ECL becomes void. Together, these statutes work to suspend the littoral right of accretion without the elimination of that right asserted by the Petitioner at

page 30 of Petitioner's brief, for suspension lasts only as long as the state or local governments charged with maintaining the restoration project diligently perform that duty.

Petitioner also conveniently ignores the other effect of these same two statutes—the suspension of the common law burden of erosion on riparian upland owners which, as the Florida Supreme Court aptly pointed out, quoting from Blackstone, *2 Commentaries on the Laws of England,* "is that the owner of the [upland] loses title to land that is lost by erosion." One of the policy reasons traditionally cited as a basis for the common law rule establishing the littoral right of accretion is the countervailing burden of erosion. As the Florida Supreme Court recognized in *Thiesen v. Gulf F. & A. Ry. Co.,* 75 Fla. 28, 78 So. 491 (1917)

> By some, the rule has been vindicated on the principle of natural justice, that he

> who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion . . .

Thiesen 75 Fla. at 46.

The reason for the common law rule of accretion—the burden of erosion upon the upland owner—is therefore eliminated by the above-cited provisions of the Act. At the same time, sections 161.141 and 161.191(2) operate to grant superior rights of "statutory accretion", especially where the ECL is located seaward of the MHWL. In addition, section 161.201 preserves all other common law littoral rights in the riparian upland owner. Again, there is not a taking of the common law right of accretion but a grant of enhanced statutory property rights which supplant common law accretion, subject to a statutory reverter to common law accretion and erosion if the government fails to complete or maintain a beach restoration

project. Consequently, there is no requirement for the institution of eminent domain proceedings and no judicial taking for failing to require such proceedings.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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161.141 Property rights of state and private upland owners in beach restoration project areas.—The Legislature declares that it is the public policy of the state to cause to be fixed and determined, pursuant to beach restoration, beach nourishment, and erosion control projects, the boundary line between sovereignty lands of the state bordering on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida, and the bays, lagoons, and other tidal reaches thereof, and the upland properties adjacent thereto; except that such boundary line shall not be fixed for beach restoration projects that result from inlet or navigation channel maintenance dredging projects unless such projects involve the construction of authorized beach restoration projects. However, prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. If an authorized beach restoration, beach

nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings. In any action alleging a taking of all or part of a property or property right as a result of a beach restoration project, in determining whether such taking has occurred or the value of any damage alleged with respect to the owner's remaining upland property adjoining the beach restoration project, the enhancement, if any, in value of the owner's remaining adjoining property of the upland property owner by reason of the beach restoration project shall be considered. If a taking is judicially determined to have occurred as a result of a beach restoration project, the enhancement in value to the owner's remaining adjoining property by reason of the beach restoration project shall be offset against the value of the damage, if any, resulting to such remaining adjoining property of the upland property owner by reason of the beach restoration project, but such enhancement in the value shall not be offset against the value of the property or property right alleged to have been taken. If the enhancement in value shall exceed the value of the damage, if any, to the remaining adjoining property, there shall be no recovery over against the property owner for such excess.

161.161 Procedure for approval of projects.—
(5) The board of trustees shall approve or disapprove the erosion control line for a beach restoration project. In locating said line, the board of trustees shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible.

161.191 Vesting of title to lands.—
(1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.
(2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, 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, except as provided in s. 161.211(2) and (3). However, the state shall not extend, or permit to be extended through artificial means, that

portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the board of trustees unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.

161.201 Preservation of common-law rights.—Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing. In addition the state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line fixed in accordance with the provisions of ss. 161.141-161.211, except such structures required for the prevention of erosion. Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.

161.211 Cancellation of resolution for nonperformance by board of trustees.—
(1) If for any reason construction of the beach erosion control project authorized by the board of trustees is not commenced within 2 years from the date of the recording of the board of trustees' survey, as provided in s. 161.181, or in the event construction is

commenced but halted for a period exceeding 6 months from commencement, then, upon receipt of a written petition signed by those owners or lessees of a majority of the lineal feet of riparian property which either abuts or would have abutted the erosion control line if the same had been located at the line of mean high water on the date the board of trustees' survey was recorded, the board of trustees shall forthwith cause to be canceled and vacated of record the resolution authorizing the beach erosion control project and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

(2) If the state, county, municipality, erosion control district, or other governmental agency charged with the responsibility of maintaining the protected beach fails to maintain the same and as a result thereof the shoreline gradually recedes to a point or points landward of the erosion control line as established herein, the provisions of s. 161.191(2) shall cease to be operative as to the affected upland.

(3) In the event a substantial portion of the shoreline encompassed within the erosion control project recedes landward of the erosion control line, the board of trustees, on its own initiative, may direct or request, or, upon receipt of a written petition signed by the owners or lessees of a majority of the lineal feet of riparian property lying within the erosion control project, shall direct or request, the agency charged with the responsibility of maintaining the beach to restore the same to the extent provided for in the board of trustees' recorded survey. If the beach is not restored as directed or requested by the board of trustees within a period of 1 year from the date of the directive or

request, the board of trustees shall forthwith cause to be canceled and vacated of record the resolution authorizing the beach erosion control project and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.