IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 66,385

TORTOISE ISLAND COMMUNITIES, INC. and TORTOISE ISLAND GROUP, LTD.,

Defendants/Petitioners,

v

THE MOORINGS ASSOCIATION, INC., Individually and THE MOORINGS ASSOCIATION, INC., a Class Representation,

Plaintiffs/Respondents.
_____/

RESPONDENTS' REPLY BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondents, THE MOORINGS ASSOCIATION, INC., individually, and THE MOORINGS ASSOCIATION, INC., a class representation, filed a Second Amended Complaint which was dismissed with prejudice by the Trial Court [SA #1, 2]*. An appeal was taken which reversed the lower court. Petitioners seek to appeal that decision.

The facts are all contained in Footnote #1 to the dissenting opinion - the Second Amended Complaint.

*Supplemental Appendix #1 and #2

ARGUMENT I

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF ANY OTHER DISTRICT COURT OF APPEAL.

On April 1, 1980 Article V, Section 3 of the Florida Constitution pertaining to jurisdiction of the Supreme Court was substantially revised. Section 3(b)(3) relating to review of conflicting decisions states:

> "May review any decision of a district court of appeal . . . That expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law."

Prior to the constitutional amendment which became effective April 1, 1980 a dissenting opinion could provide the basis for conflict jurisdiction. Commerce National Bank in Lake Worth v Safeco Insurance Company, 284 So.2d 205 (Fla. 1973). But see Golden Loaf Bakery, Inc. v Charles W. Rex Const. Co., 334 So.2d 585 (Fla. 1976)(concurring opinion).

Subsequent to the April, 1980 amendment this Court held that a "Per Curiam Affirmed" accompanied by a dissenting opinion was an insufficient basis to provide this Court with jurisdiction. Jenkins v State, 385 So.2d 1356 (Fla. 1980). In Jenkins, supra, this Court reviewed the language "expressly" in the amendment to determine that a decisional conflict must be expressed in words.

The decision in the instant case does not expressly and directly conflict with the decision of any decision of any other district court of appeal. The conflict which the Petitioners seek to create stems from the dissent. Since

the dissent is not the decision, no conflict exists. Jenkins, supra.

A.
THE DECISION OF THE 5th DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH CANELL v ARCOLA HOUSING CORP. OR JONITA, INC. v LEWIS.

There are two basic forms of decisional conflict which may allow this Court to exercise jurisdiction. They are: (1) where an announced rule of law conflicts with other appellate expressions of law, or (2) where a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case". City of Jacksonville v Fla. First Nat. Bank of Jacksonville, 339 So.2d 632 (Fla. 1976)(concurring opinion). Neither of the two situations arises herein. In Canell v Arcola Housing Corp., 65 So.2d 849 (Fla. 1953) and Jonita, Inc. v Lewis, 368 So.2d 114 (Fla. 1st DCA 1979) it was held that an easement could not be created by an oral promise to do something in the future. The case herein represents a promise, fulfillment of the promise then the subsequent removal by the defendants. The majority opinion follows Canell, supra, expressly in which Canell recognizes that easements may be created by implication. It is apparent that there is no conflict in a rule of law nor a conflict in the application of law to similar facts. The reference in the decision to Williams Island Country Club, Inc. v San Simeon at the California Club, Ltd., 454 So.2d 23 (Fla. 3rd DCA 1984) appears to harmonize rather than conflict as Petitioners suggest. This being so, then

no conflict arises to vest this Court with jurisdiction.

B.
THERE WAS NO CONFLICT IN THE DECISION OF THE 5th DISTRICT COURT OF APPEAL IN FINDING "NECESSITY" AND THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL IN CONSTRUING STATUTORY "NECESSITY".

Petitioners seek to create conflict between the decision herein which construed the term "necessity" as it relates to one of the elements necessary to find an easement by implication. Kirma v Norton, 102 So.2d 653 (Fla. 2nd DCA 1958). The court in Roy v Vastgoed, 404 So.2d 410 (Fla. 4th DCA 1981) construed "necessity" as that term was found in F.S. 704.01. The facts of this case and Roy, supra, are distinguishable. Thus, this Court does not have jurisdiction. Department of Revenue v Johnston, 442 So.2d 950 (Fla. 1983).

Respondent has been unable to find any reference in either the majority opinion or dissent to Roy, supra. Thus, there is no direct and express conflict in decisions.

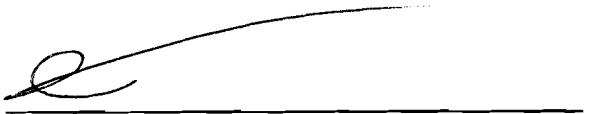
C.
THERE WAS NO DECISIONAL CONFLICT CONCERNING AN ISSUE NEVER PRESENTED TO THE TRIAL OR APPELLATE COURT.

Petitioners seek to vest this Court with conflict jurisdiction on the basis of an issue never raised at the trial court or appellate court level. SA #1, #2. Since the majority was never presented with the issue of class representation, no decision on that basis was rendered. Without a decision there can be no express and direct conflict decision with any other district court of appeal.

CONCLUSION

For the reasons stated herein there is no express and direct conflict with the decision of any other district court of appeal. Thus, this Court cannot exercise jurisdiction.

Respectfully submitted,



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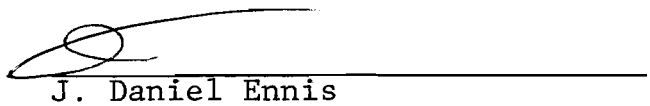
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail this 6th day of February, 1985 to Kerry I. Evander, Esquire, Post Office Drawer 639, Melbourne, FL 32901, Attorney for Petitioners.



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