

**IN THE SUPREME COURT OF FLORIDA**

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CASE NO. SC20-1284

L.T. CASE NOS.

4D19-1537

15<sup>TH</sup> Jud. Cir. 502018CA015447XXXXMB

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CITY OF WEST PALM BEACH,

Petitioner,

v.

Peter and Galina Haver,

Respondents.

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**RESPONDENTS' BRIEF ON JURISDICTION**

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Peter M. Haver  
Florida Bar No. 0022604  
329 Alhambra Place  
West Palm Beach, FL 33405  
Telephone: 561 540-5368  
E-mail: [p.haver@dmh-law.com](mailto:p.haver@dmh-law.com)

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## STATEMENT OF THE CASE AND FACTS

1. In reliance on *Boucher v. Novotny*, 102 So.2d 132 (Fla. 1958) (“*Boucher*”), Respondents on December 9, 2018, filed a complaint against Petitioner (“WPB”) asserting in counts I, II and III equitable claims to compel WPB to enforce a single-family, low density residential zoning classification with respect to one of Respondent’s neighbor’s operation of an Adult Family-Care Home.<sup>1</sup> (Record 8) By a final and binding Order dated June 10, 2019, the trial court dismissed with prejudice Respondent’s counts I, II and III on the basis of the Third District Court of Appeal’s decision in *Detournay v. City of Coral Gables*, 127 So.3. 869 (Fla. 2013) (“*Detournay*”). (Record 197) Respondents appealed the trial court’s dismissal of Respondents’ counts I, II and III.

2. In a unanimous-panel opinion dated June 10, 2020, the Fourth District Court of Appeal (the “Fourth District”) reversed the trial court’s order dismissing Counts I, II and III of Respondents’ complaint (the “Decision at Issue” – *Haver v. City of West Palm Beach, Inc.*, 298 So.3d 647 (Fla 4<sup>th</sup> DCA 2020). In the Decision at Issue the Fourth District certified conflict with *Detourney* and *Chapman v. Town of Reddington Beach*, 282 So.3d 979 (Fla. 1958) (“*Chapman*”).

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<sup>1</sup> Respondents agreed to dismiss without prejudice the violator-neighbor in the view that civil litigation lacks the “teeth” to address directly zoning violations, the enforcement of which requires the extensive police-powers available only to municipalities.

3. WPB has petitioned the Court to review the Decision at Issue pursuant to Article V, section 3(b)(4) of the Florida Constitution (“Art. V. section 3(b)(4)”).

### SUMMARY OF ARGUMENT

The Decision at Issue does not directly conflict with either *Detournay* or *Chapman* insofar as the latter two decisions fail to comply with Florida Supreme Court precedent established in *Boucher*.

### ARGUMENT

#### I. Parameters of Art. V, section 3(b)(4) Certified-Conflict Jurisdiction

##### A. Discretionary Nature of Certified-Conflict Jurisdiction

The 1980 constitutional reforms granted the Court by way of Art. V, section 3(b)(4) discretionary-review jurisdiction in the event a district court certifies that its decision conflicts directly with a decision of another district court of appeal as to an identical issue of law (“certified conflict”).<sup>2</sup> Initially, the Court interpreted Art. V, section 3(b)(4) more or less to oblige the Court to exercise jurisdiction in the event of a certified conflict.<sup>3</sup> With time, however, the Court began increasingly to refuse to exercise automatically jurisdiction in the event of a certified conflict. *Blevins v.*

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<sup>2</sup> Arthur J. England, *et al.*, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 Fla. L. Rev. 147 (1980).

<sup>3</sup> Pursuant to this quasi obligatory path to jurisdiction an earlier version of Rule 9.120(d) of the Florida Rules of Appellate Procedure expressly prohibited the filing of briefs on jurisdiction where the petitioning party invoked jurisdiction pursuant to a certified conflict. Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L.Rev. 431, 529-30 (2005) (“*Constitutional Jurisdiction*”).

*State*, 829 Do.2d 872 (Fla. 2002); *Vega v. Indep. Fire Ins. Co.*, 666 So.2d 897 (Fla. 1996).<sup>4</sup>

#### B. Two-Step Application

As presently interpreted by the Court, Art. V, section 3(b)(4) takes on a hybrid character, whereby a certified conflict accords the Court *per se* jurisdiction,<sup>5</sup> but simultaneously authorizes the Court, at its sole discretion, to refuse to exercise such jurisdiction. *State v. Frierson*, 926 So.2d 1139, 1142 (Fla. 2006) (“Although we clearly have jurisdiction based upon the Fourth District’s certification, ... we also have the discretion to determine that we should not exercise our jurisdiction in this case.”) This hybrid character gives rise to a two-step review, whereby the Court first determines whether the respective district court of appeal properly certified a conflict<sup>6</sup> and, secondly, evaluates whether the circumstances warrant the Court’s agreeing, at its sole discretion, to review the respective appellate decision. *State v.*

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<sup>4</sup> This subsequent emphasis on the “discretionary” nature of Art. V, section 3(b)(4)’s path to jurisdiction required an amendment of Fla. R. App. P. Rule 9.120(d), so as to oblige parties to submit jurisdictional briefs in the event of a party’s invocation of jurisdiction pursuant to a certified conflict. *Constitutional Jurisdiction* at 530.

<sup>5</sup> *State v. Vickery*, 961 So.2d 309, 312 (Fla. 2007) (“The difference is that a certification of conflict provides us with jurisdiction *per se*.”).

<sup>6</sup> The conflict certification language in the Decision at Issue satisfies the prerequisites for establishing *per se* jurisdiction pursuant to Art. V, section 3(b)(4); namely, the Decision at Issue “certifies” a conflict rather than merely acknowledging one and identifies the other District Court of Appeal decisions which supposedly conflict with the Decision at Issue. Furthermore, the Decision at Issue qualifies as an elaborated decision rather than *per curiam*. *State v. Vickery*, 961 So.2d 309, 312 (Fla. 2007).

*Frierson*, 926 So.2d 1139, 1142 (Fla. 2006). In deciding whether to grant a petition to review an appellate decision, the Court reviews whether the decision contemplated for review directly conflicts with the decision of another district court of appeal as to an identical point of law and, if it does, whether such point of law has the requisite importance in terms of social and economic consequences to warrant the Court's expenditure of limited resources to resolve such conflicting jurisprudence.<sup>7</sup> *The Florida Star v. B.J.F.*, 530 So.2d 286, 288-89 (Fla. 1988) (“While this Court has subject-matter jurisdiction ..., we have operated within the intent of the constitution’s framers, as we perceive it, in refusing to exercise our discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court.”).

### C. Direct Conflict

Unlike Fla. Const. article V, section 3(b)(3), which requires both an express and direct conflict in order to bestow discretionary jurisdiction on the Court, merely a direct conflict satisfies for article V, section 3(b)(4) conflict-jurisdiction. *State v. Vickery*, 961 So.2d 309, 312 (Fla. 2007). The caselaw provides little guidance as to the prerequisites for a direct conflict, other than one decision’s employing the

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<sup>7</sup> This Court’s permitting the *Boucher* precedent to stand will, in WPB’s view, open the floodgates to specious litigation seeking to enforce zoning laws (Jurisdictional Brief at 8-10). But the *Boucher* precedent has survived over sixty years of application, without causing much catastrophic flooding.

equally ambiguous term “irreconcilable” to describe simultaneously both “express” and “direct” conflict. *Aravena v. Miami-Dade County*, 928 So.2d 1163, 1166 (Fla. 2006). The decisions do suggest that a conflict requires that the “conflicting” decisions (i) involve very similar facts, (ii) address an identical legal question and (iii) reach an opposite result. *Miles v. Weingrad*, 164 S.3d 1208, 1210 (Fla. 2015) (“Because the Third and Fourth Districts have reached different conclusions on the same question of law, this Court has jurisdiction...”); *Crossley v. State*, 596 So.2d 447, 449 (Fla. 1992) (“Because the court below in the instant case reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated a severance, we concluded that a conflict of decisions existed that warranted accepting jurisdiction.”). However, the interjection of the “direct” requirement suggests the “conflicting” cases must also employ the same legal analysis or applicable law in reaching the opposite result. *State v. Frierson*, 926 So.2d 1139, 1142 (Fla. 2006).

- II. The Decision at Issue Fails to Conflict Directly with Either *Detournay* or *Chapman*
  - A. *Detournay*
    - 1. Different Facts than those in the Decision at Issue

Although *Detournay* and the Decision at Issue both involve the violation of zoning laws, the latter decision focuses uniquely on the single-family zoning classification, the most fundamental element of the zoning regulatory system, to which this Court has attached both great importance and accorded a significant

degree of protection. *Watson v. Mayflower Property, Inc.*, 223 So.2d 368, 373 (Fla. 1969); *Hillsborough County v. Westshore Realty, Inc.*, 444 So.2d 25, 26 (Fla. 1983). Conceivably, the implementation of technical and accessory zoning regulations could possibly fall within the discretion of municipal governments, whereas the enforcement of the pivotal single-family zoning classification clearly does not.<sup>8</sup>

2. Different Legal Question than that in the Decision at Issue  
*Detournay* addressed solely the issue of whether the separation of powers doctrine bars courts from exercising jurisdiction over an equitable action to compel municipalities to enforce zoning laws. *Id.* at 873-73. The Fourth District in the Decision at Issue expressly refused to entertain the separation-of-powers question as framed by *Detournay* and, instead, analyzed exclusively whether the zoning-law-enforcement cause of action set out in *Boucher* and its progeny applies to the facts of this case, a question which it answered in the affirmative. *Id.* at 8.

If the Florida Supreme Court determines it best to overrule *Boucher* or any other case, or that it should otherwise extend *Trianon* to claims for declaratory and injunctive relief, the court can do so. We cannot. *Id.* at 8.

### 3. Absence of Opposing Results

The Third District Court of Appeal (the “Third District”) in *Detournay* opines that the separation-of-powers doctrine bars courts from exercising jurisdiction over an equitable cause of action brought to compel a municipality to enforce its zoning

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<sup>8</sup> *Board of County Com’rs of Brevard County v. Snyder*, 627 So.2d 469 474 (Fla. 1993).

laws, a legal conclusion which the Third District derives from disputed *dicta*<sup>9</sup> contained in the thirty-five year old *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah* decision, 468 So.2d 912 (Fla. 1985) (“*Trianon*”) involving sovereign tort immunity, precedent in which this Court found that under the particular circumstances the respective municipality did not owe a duty of care to the plaintiff under tort law. Far from rejecting the Third District’s “separation-of-powers” analysis, the Decision at Issue describes the respective analysis as “compelling,” but finds that long-standing Florida Supreme Court precedent (the *Boucher* line of cases) expressly affords individuals an equitable cause of action to compel municipalities to enforce their applicable zoning laws.

We are free to treat *Detournay* as persuasive authority, or not, and reach our own conclusion [citations omitted]. But even though we are not bound by *Detournay*, we are still bound by existing supreme court precedent [*Boucher*]... [S]upreme court precedent holds that if an individual can show some special damage from an alleged zoning violation, he or she then has standing to maintain an action to enforce the zoning ordinance in equity against both a municipality and a private party. [Citing Dissent in *Detournay*] Decision at Issue at 6-7.

Rather than conflicting directly with *Detournay*, the Decision at Issue recognizes a conflict between *Detournay*’s separation-of-powers analysis and the well-established Florida Supreme Court precedent set out in *Boucher*.<sup>10</sup> WPB

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<sup>9</sup> This Court has limited the applicability of such *dicta* (quoted on pages 5 and 6 of WPB’s Jurisdictional Brief) to the issue of when a municipality owes a duty of care under principles of tort law. *Wallace v. Dean*, 3 So.3d 1035, 1047 (Fla. 2009).

<sup>10</sup> *Miles v. Weingrad*, 164 So.3d 1208, 1213 (Fla. 2015) (“There is no dispute that our precedent establishes a requirement that the conflict must ‘appear within the four

implicitly concedes the absence of a conflict between the holdings in the Decision at Issue and *Detournay*, since WPB insists in its Motion for Rehearing and Jurisdictional Brief (pages 7-8) that the Decision at Issue misapplied the *Boucher* line of cases, so as to expand the scope of the respective equitable cause of action for the enforcement of zoning laws beyond that supposedly fixed by *Boucher* and its progeny. Such argumentation, if valid, does not confirm a conflict between the Decision at Issue and *Detournay*, but rather rests on a supposed conflict between the Decision at Issue and the *Boucher* precedent.

#### 4. Reliance on Different Applicable Law

*Detournay* contends that *Trianon dicta* overturns silently all previous Florida Supreme Court precedent which arguably infringes the separation-of-powers doctrine as articulated in such *Trianon dicta* (*Detournay* at 873-74), whereas in the Decision at Issue the Fourth District declares itself bound to follow all Florida Supreme Court precedent which the Court has not expressly overturned in conformance with self-imposed restrictions embodied in the principle of *stare*

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corners of the majority decision.”); *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (“[T]he issue to be decided from a petition for conflict review is whether there is ... direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion....”). WPB’s Jurisdictional Brief (pages 5 and 6) focuses on the conflict between *Detournay* and *Boucher*.

*decisis*.<sup>11</sup> These fundamentally different approaches resulted in the Third and Fourth Districts, respectively, in *Detournay* and the Decision at Issue applying different bodies of law to equitable claims to enforce zoning laws.

*B. Chapman*

*Chapman* constitutes essentially a *per curiam* dismissal of the equitable cause of action asserted against the Town of Reddington Beach and, therefore, cannot give rise to a conflict for purposes of Art. V, section 3(b)(4).<sup>12</sup> Even in the event the Court considers that *Chapman* qualifies as an elaborated decision for purposes of a certified conflict, the respective holding conflicts with Florida Supreme Court precedent established in *Boucher* rather than with the Decision at Issue.

III. The Detrimental Consequences of Using Discretionary Certified-Conflict Jurisdiction to Enforce Florida Supreme Court Precedent

By erroneously certifying a conflict with *Detournay* the Fourth District burdens this Court with the task of obliging district courts to comply with the long-standing precedent established in the *Boucher* line of cases, when, in fact, the job of implementing Florida Supreme Court precedent belongs to the circuit and district

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<sup>11</sup> The Decision at Issue points out this Court’s long-standing refusal to “silently overrule” pre-existing precedent, citing *Arsali v. Chase Home Fin., LLC*, 121 So.3d 511 (Fla. 2013). *Id.* at Pg. 8.

<sup>12</sup> *Wells v. State*, 132 So.3d 1110, 1114 (Fla. 2014) (“[W]e hold that this Court lacks discretionary review jurisdiction to review an unelaborated *per curiam* dismissal from a district of appeal....”).

courts. *Pardo v. State*, 596 So2d 665, 666-67 (Fla. 1992).<sup>13</sup> Certified-conflict jurisdiction facilitates uniformity of law among the District Courts of Appeal. However, the Florida Constitution's drafters made such certified-conflict jurisdiction discretionary in order, in part, to avoid saddling the Florida Supreme Court with the review of rogue appellate-court decisions which inappropriately deviate from settled Florida Supreme Court precedent. By qualifying as discretionary certified-conflict review, the drafters of the Florida Constitution clearly envisioned situations in which the Court would choose not to address certified conflicts. The Court's refusal to exercise discretionary review does not constitute an affirmation of the respective appellate caselaw. *Constitutional Jurisdiction* at 484-85. Otherwise, the Florida Supreme Court's refusal to review *Detournay* (153 So.3d 903 (Fla. 2014)) would constitute the Court's implicit adoption of the *Detournay* holding, a result which would have compelled the Fourth District to follow *Detournay*.<sup>14</sup>

CONCLUSION: This Court should refuse to accept discretionary jurisdiction.

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<sup>13</sup> Instead of certifying a conflict between the Decision at Issue and *Detournay*, the 4<sup>th</sup> DCA might have pursuant to Article V, section 3(b)(4) certified as a question of great public importance the issue of whether the separation-of-powers doctrine bars the equitable action established in *Boucher* to compel municipalities to enforce their zoning laws.

<sup>14</sup> *Detournay*'s failure to mention the *Boucher* line of cases most likely barred review pursuant to Fla. Const. article V, section 3(b)(3), since the latter provision requires both an express and direct conflict. 153 So.3d 903 (2014).

## CERTIFICATE OF SERVICE

RESPONDENTS HEREBY CERTIFY that a true and correct copy of the foregoing was served on September 20, 2020, by e-mail (via the Court's e-filing portal) upon Petitioner's counsel of record, City Attorney, Ms. Kimberly L. Rothenburg, Office of the City Attorney, City of West Palm Beach, 401 Clematis Street, 5<sup>th</sup> Floor, West Palm Beach, FL, 33401 and Assistant City Attorney, Ms. K. Denise Haire, Office of the City Attorney, City of West Palm Beach, 401 Clematis Street, 5<sup>th</sup> Floor, West Palm Beach, FL, 33401.

## CERTIFICATE OF COMPLIANCE

RESPONDENTS HEREBY CERTIFY that the foregoing complies with the requirements set out in Florida Rules of Appellate Procedure 9-210(a)(2) and 9-210(a)(5)(A).

By: s/Peter M. Haver

Peter M. Haver  
Florida Bar No. 0022604  
Attorney for Co-Respondent  
Galina Haver and Representing  
Himself as Co-Respondent  
329 Alhambra Place  
West Palm Beach, FL 33405  
Telephone: 561 540-5368  
E-mail: [p.haver@dmh-law.com](mailto:p.haver@dmh-law.com)