IN THE SUPREME COURT OF FLORIDA

CITY OF DESTIN and WALTON COUNTY,

Petitioners,

vs.

STOP THE BEACH RENOURISHMENT, INC.,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

Case No. SC-06-1447

DCA Case No.: 1D05-4086

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STATEMENT OF THE CASE AND OF THE FACTS

This case arises from the District Court's reversal of a Department of Environmental Protection ("DEP") Final Order issuing a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (collectively "JCP") (DEP File No. 0218419-001-JC). R. 393-402. The District Court expressly found that DEP failed to properly follow statutory requirements and its own rules in issuing the JCP. *Save Our Beaches, Inc. v. Florida Dep't of Envtl. Protection*, 31 Fla. L. Weekly D1173, D1176 (Fla. 1st DCA 2006). Therefore, the District Court held the JCP was issued illegally. *Id.* at D1177.

In 2003, the City of Destin and Walton County applied for a JCP to authorize the nourishment of 6.9 miles of beaches within the City and County. R. 339. Pursuant to Chapter 161, Fla. Stat., the Beach and Shore Preservation Act ("Act"), the Board of Trustees of the Internal Improvement Trust Fund ("Trustees") adopted resolutions establishing Erosion Control Lines ("ECL") for Walton County and the City of Destin. R. 349-50.

Respondent, Stop the Beach Renourishment, Inc., ("STBR") filed an administrative petition challenging the JCP and filed a separate petition challenging the adoption of the Walton County ECL. R. 16, 18. The Amended Petition challenged whether the JCP and ECL would: 1) deny upland owners their legitimate

and constitutional use and enjoyment of their properties; and 2) result in a taking.[1] R. 121, 123. Respondent also challenged whether the Applicants were required to provide "satisfactory evidence of sufficient upland interest" as required by Rule 18-21.004(3)(b), F.A.C., because the JCP would "unreasonably infringe on [the] riparian rights" of Respondent's members. R. 395, 397. The Recommended Order expressly recognized the elimination of at least two riparian rights (*i.e.*, the right to have the property's contact with the water remain intact and the right to receive accretions and relictions to the property) but found no "infringement" of the riparian rights. R. 396-97. DEP's Final Order did not disturb these findings.

The District Court held that the wholesale elimination of at least two constitutionally protected riparian rights was an unconstitutional taking because DEP did not institute or require the Applicants to institute eminent domain proceedings as required by the Act in Section 161.141, Fla. Stat. *Id*. at D1176. The District Court also held that the elimination of two riparian rights was an unreasonable "infringement" on those riparian rights. *Id*. at D1177. Having found an unreasonable infringement, the District Court went on to find that the JCP was improperly issued because the Applicants and DEP had not demonstrated "satisfactory evidence of sufficient upland interest required by Rule 18-21.004(3)." *Id.* Consequently, the

[1] These two issues were not (nor could) be decided by the ALJ or DEP.

District Court reversed the Final Order granting the JCP and invalidated the ECL that had been recorded in the official records of Walton County as it applied to the properties of Respondent's members. *Id*. at D1177. The District Court denied Petitioners' Motion for Rehearing and Rehearing en banc, but certified a question of public importance.

Petitioners seek mandatory review of the District Court Opinion under Fla. R. App. P. 9.030(a)(1)(A)(ii) claiming it declared a state statute to be invalid; discretionary review under Fla. R. App. P. 9.030(a)(2)(A)(ii) claiming it expressly construed a constitutional provision; and discretionary review under Fla. R. App. P. 9.030(a)(2)(A)(iv) claiming conflict with *LEAF v. Clark*, 668 So.2d 982 (Fla. 1996) or *Florida Home Builders Ass'n v. Dep't of Labor & Employment Sec.*, 412 So.2d 351 (Fla. 1982). These claims of mandatory and discretionary jurisdiction are in addition to this Court's proper discretionary jurisdiction to review the case as a question of great public importance under Fla. R. App. P. 9.030(a)(2)(A)(v).

SUMMARY OF ARGUMENT

The District Court did not hold any Florida Statute invalid. Petitioners admit as much by claiming that the holding "effectively" invalidated a state statute. The proper standard for mandatory review under Fla. R. App. P. 9.030(a)(1)(A)(ii) requires a "clear holding" invalidating a statute. DEP applied Section 161.191, Fla. Stat., while ignoring Section 161.141, Fla. Stat., and the District Court held such a selective

application resulted in an unconstitutional taking. The District Court also found that Section 161.201, Fla. Stat., does not "cure" this unconstitutional taking, as suggested below by the Petitioners. The District Court's mere application of all statutory provisions is not the "clear holding" that a statute is invalid necessary to confer mandatory review jurisdiction under Fla. R. App. P. 9.030(a)(1)(A)(ii).

To invoke this Court's discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(ii), a court must expressly construe, rather than simply apply, a constitutional provision. The District Court below did not expressly construe any constitutional provision; it simply applied settled constitutional law to the facts of the case. This is insufficient to confer jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(ii).

Discretionary jurisdiction based on conflict under Fla. R. App. P. 9.030(a)(2)(A)(iv) only exists where the opinion in question establishes a point of law contrary to another case. Under this standard, the District Court's Opinion does not conflict with *LEAF* or *Florida Home Builders* because the District Court correctly recognized the statements of law as determined therein and then applied that law to the case below. Thus, the District Court created no conflict on which to base jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

This Court decides to review this case, it can clearly do so under Fla. R. App. P. 9.030(a)(2)(A)(v) because the District Court certified a question of great public importance. If such review occurs, Respondent is confident that the well-reasoned opinion of the District Court will be upheld. Because the certified question provides a basis for jurisdiction if the Supreme Court desires to exercise the same, there is no need to invoke jurisdiction on any of the other jurisdictional bases argued by the Petitioners.

I. The District Court Opinion Does Not Declare Any Florida Statute Invalid.

The plain language of Art. V. §3(b)(1), Fla. Const., requires that the District Court decision actually *hold* a statutory or constitutional provision invalid before the Supreme Court's mandatory jurisdiction is invoked. Harry Lee Anstead, et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 499 (2005). It is insufficient to infer that the opinion *effectively* reached that result.

The Petitioners, therefore, are wrong when they assert that this Court has mandatory jurisdiction in this case because the District Court expressly declared a state statute invalid. As explained below, the Petitioners point to two sentences of the opinion and then attempt to extrapolate a holding that two statutes were invalidated. The Petitioners cite to no direct invalidation of any statute, and essentially admit that

their arguments are an extrapolation by stating that the District Court's decision "effectively declares" Sections 161.191 and 161.201, Fla. Stat., invalid.

First, the Petitioners argue that the District Court "declared" Section 161.191(1-2), Fla. Stat., unconstitutional by focusing on the following statement as the basis for their argument:

> As in Medeira Beach, the freezing of the erosion control line renders the ordinary high water mark useless as a boundary line, which is contrary to the property owners' boundaries.

Save Our Beaches at D1177. This statement does not "declare" Section 161.191, Fla. Stat., (which expressly provides that once an ECL is established the riparian right to accretion is eliminated) unconstitutional or invalid. It merely reflects the impact of the project on STBR members' property. In fact, the District Court clearly notes that the Legislature included a mechanism in the Act whereby Section 161.191, Fla. Stat., could be applied in a constitutional manner:

> As provided by Section 161.141, Florida Statutes (2005), if the project "cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."

Save Our Beaches at D1177.

Contrary to Petitioners' assertions, the District Court's finding that an unconstitutional taking has occurred does not mean that Section 161.191, Fla. Stat., is unconstitutional. The unconstitutional taking did not occur because Section 161.191,

Fla. Stat., exists; rather, it occurred because the Petitioners chose to apply Section 161.191, Fla. Stat., without simultaneously applying Section 161.141, Fla. Stat., (acquiring the right they are taking through Section. 161.191, Fla. Stat., by eminent domain). The two sections must be applied together to avoid an unconstitutional taking. The District Court did not invalidated any statute. It merely mandated that if the benefits of Section 161.191, Fla. Stat., are invoked, Section 161.141, Fla. Stat., must be followed to avoid an unconstitutional taking.

Second, the Petitioners contend that Section 161.201, Fla. Stat., was found to be unconstitutional by the following section of the opinion:

> These deprivations of riparian rights are an unconstitutional taking of STBR's members' riparian rights. The Department relied on section 161.201 to rule that the landowners' riparian rights are not affected by its final order. Although section 161.201 has language describing a preservation of common law riparian rights, it does not actually operate to preserve the rights at issue in this case. Florida's law is clear that riparian rights cannot be severed from riparian uplands absent an agreement with the riparian owner, not even by the power of eminent domain.

Id.

This statement is not a holding that Section 161.201, Fla. Stat., is invalid. Rather, the District Court made this finding in response to the Petitioners' arguments that if any taking of riparian rights has occurred by issuance of the JCP, Section 161.201, Fla. Stat., "cured" the unconstitutional taking by replacing constitutional riparian rights with similar statutory rights. As the Court noted, a statutory right

cannot and does not replace or in any way "cure," the elimination of a constitutional riparian right. *See id*. ("It is not enough to provide, as in section 161.201, rights of ingress and egress"). The Court did not invalidate Section 161.201, Fla. Stat. It merely concluded that it does not "cure" the unconstitutional taking effected by the Final Order. Accordingly, no mandatory jurisdiction exists under Fla. R. App. P. 9.030(a)(1)(A)(ii) because the District Court did not hold any portion of the Act invalid.

II. The District Court Opinion Does Not Expressly Construe A Provision Of The State Or Federal Constitution.

The Supreme Court's jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(ii) is "properly invoked as to construction of a constitutional provision only where the [district] court has expressly construed the constitutional provision involved." *Dykman v. State*, 294 So.2d 633, 634 (Fla. 1973). Mere application of a provision is not sufficient to invoke jurisdiction. *Id*. The Supreme Court has defined "construing a constitutional provision" as undertaking to "explain, define or otherwise eliminate doubts arising from the language or terms of the constitutional provision." *Ogle v. Pepin*, 273 So.2d 391, 392 (Fla. 1973).

The District Court did not explain any provision of the State or Federal constitution. The Court simply held that the JCP issued by DEP without first requiring the Petitioners to comply with Section 161.141, Fla. Stat., would result in an

uncompensated taking of property rights. Thus, the District Court, at most, merely "applied" the well recognized constitutional law that private property cannot be expropriated without compensation after expressly construing statutory provisions of the Act. As such, this Court does not have jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(ii) based on the express construction of a constitutional provision.

III. The District Court Opinion Does Not "Expressly And Directly" Conflict With *LEAF* or *Florida Home Builders*.

Under Art. V, §3(b)(3), Fla. Const., the Supreme Court has jurisdiction to review a district court opinion that "establishes [a] point of law contrary to a decision of this Court or another district court." *Florida Star v. B.J.F.*, 530 So. 2d 286, 289 (Fla. 1988). While claiming "direct and express" conflict, the Petitioners fail to identify the "point of law" expounded by the District Court that is contrary to a Supreme Court decision. Petitioners attempt to parlay their disagreement with District Court's application of the facts to the points of law established in *LEAF* and *Florida Home Builders* into a "direct and express" conflict.

In *LEAF*, the court stated the requirements for standing to seek judicial review of administrative action as: "(1) the action is final; (2) the agency is subject to provisions of the act; (3) the person seeking review was a party to the action; and (4) the party was adversely affected by the action." *LEAF* at 986. The District Court's holding below does not conflict with *LEAF* as the Court found that all of STBR's

members own property in the affected area and are adversely affected –unlike in *LEAF*. *Save Our Beaches* at D1175.

Petitioners also argue that the District Court's holding that STBR can bring an as-applied constitutional challenge conflicts with *Florida Home Builders.* However, *Florida Home Builders* involved only a rule challenge and not a constitutional challenge. As such, the district court's holding cannot "directly or expressly" conflict with *Florida Home Builders* because that issue was not addressed in that case. In any event, constitutional challenges by associations have long been allowed and approved. *See Florida Ass'n of Counties, Inc. v. Department of Admin*., 580 So.2d 641, 646 (Fla. 1st DCA 1991), *approved* 595 So.2d 42 (Fla. 1992).

Because the District Court Opinion does not expressly and directly conflict with either *LEAF* and *Florida Home Builders*, there is no discretionary review jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iv) in this case.

CONCLUSION

As stated above, this Court has clear discretionary jurisdiction to review this case, if it so desires, under Fla. R. App. P. 9.030(a)(2)(A)(v) based on the question certified by the District Court of Appeal as one of great public importance. Based on the foregoing, however, Respondent respectfully requests this Court deny the Petitioners' requests for review on other grounds.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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