IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Petitioners,

vs.

STOP THE BEACH RENOURISHMENT, INC.,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

Case No. SC-06-1449

DCA Case No.: 1D05-4086

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

Judicial Decisions

Florida Constitution

Florida Statutes

Florida Rules of Court

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 discretionary review under Fla. R. App. P. 9.030(a)(2)(A)(iv) based on alleged conflict with *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So.2d 649 (Fla. 1985). Petitioners claim of conflict jurisdiction is in addition to the admittedly proper discretionary jurisdiction this Court has under Fla. R. App. P. 9.030(a)(2)(A)(v), to review a question certified by the District Court as one of great public importance.

SUMMARY OF ARGUMENT

The District Court's holding does not expressly and directly conflict with *Belvedere Dev. Corp.*, 476 So.2d 649 (Fla. 1985). To be a proper basis upon which to invoke jurisdiction discretionary conflict jurisdiction, a court opinion must establish a contrary point of law. In *Belvedere*, (which itself was decided in response to a certified question) this Court held riparian rights are constitutionally protected property rights and cannot be involuntarily severed from riparian land without the owner's consent. In the present case, the District Court held the Petitioners attempt to

sever riparian rights from uplands without the upland owners' permission was improper. The District Court's holding in *Save Our Beaches* merely applies the legal principle recognized in *Belvedere* and it does not "expressly and directly" conflict with *Belvedere.* Discretionary conflict jurisdiction is not properly based on the fact that a case may have "compelling public policy considerations" and "statewide implications" as claimed by Petitioners in this case. Petitioners cite no law to support this claim.

ARGUMENT

If the 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. There are no grounds, however, for the exercise of discretionary conflict jurisdiction. 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 other basis.

I. The District Court Opinion Does Not "Expressly And Directly" Conflict With *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So.2d 649 (Fla. 1985).

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). The Petitioners request this Court to exercise "misapplication" conflict jurisdiction claiming that *Belvedere* was misapplied. While "misapplication" conflict jurisdiction has been used as a basis for jurisdiction, it is not universally recognized as a proper jurisdictional basis. *See Knowles v. State*, 848 So.2d 1055, 1059 (Fla. 2003) (Wells, J., dissenting) ("I have considerable doubt as to the constitutional underpinning of this Court's 'misapplication jurisdiction'"). Without debating the propriety of "misapplication" conflict, there is no "misapplication" of *Belvedere* in this case.

Misapplication conflict exists only when the controlling facts "are materially at a variance." *See McBurnette v. Playground Equip. Corp*., 137 So.2d 563, 565 (Fla. 1962). Despite the Petitioners' lengthy attempt to create a conflict, the controlling facts in this case do not materially vary from those in *Belvedere*. Nor does any variance in the facts matter because *Belvedere* was before the Supreme Court on the following certified question:

> "DOES FLORIDA LAW PERMIT RIPARIAN (OR LITTORAL) RIGHTS TO BE SEPARATED FROM RIPARIAN LANDS?"

Belvedere, 476 So. 2d at 650. In answering the certified question this Court stated:

> In summary we hold: (1) Riparian rights are property rights, incorporeal interests in real estate; (2) They may be separated from the upland by bilateral agreement to reserve them in a deed of conveyance or all or any interest in

> riparian rights may be transferred by voluntary act of the upland owner; … (4) Riparian rights cannot be severed by condemnation proceedings without the consent of the upland owner.

Id. at 653.

The certified question and the answer thereto establish a point of law not constrained to any particular set of facts. That point of law is that riparian rights cannot be severed from the upland property absent an agreement with the upland owner. Thus, there can be no severance of riparian rights unless there is a bilateral agreement, regardless of any purported "reservation" of those severed riparian rights to the former riparian owner.

In *Belvedere,* the Department of Transportation attempted to condemn certain riparian uplands. Not wanting to compensate the landowner for the full value of the property, however, the Department of Transportation attempted to reserve the riparian rights for the benefit of the upland owners. *Belvedere* at 650. The landowners responded that the attempted reservation of riparian rights was ineffective and that "riparian rights are appurtenant to and are inseparable from the riparian land." *Id*. at 651. The Court recognized Florida case law allows riparian rights to be severed from riparian land in certain instances, but realized this general rule has the potential to lead to absurd results. *Id.*

While condemnation proceedings have not been instituted in the present case, the ECL for the project has been recorded and resulted in the severance of riparian rights from riparian lands. Both *Belvedere* and the present case involve a government attempt to separate riparian rights from riparian upland without the consent of the landowners. It makes no difference whether the severance of riparian rights occurs when a road is built using the power of eminent domain to condemn only a portion of the upland property as in *Belvedere*, or – as in this case – when the state authorizes the "creation" of new upland property that severs riparian rights. The result is the same: the state will own a strip of upland property between the former riparian owner's land and the navigable water, thereby impermissibly severing riparian rights from riparian land.[2]

The facts in the instant case have no effect on *Belvedere's* holding that riparian rights cannot be severed from the upland property absent an agreement with the upland owner. Accordingly, there can be no severance of riparian rights unless there is a bilateral agreement, regardless of any purported "reservation" of those severed riparian rights to the former riparian owner.

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[2] In effect, the Petitioners' nourishment project -- which will fill current submerged lands exposing new dry land -- will make the Petitioners the new oceanfront property owner and relegate the former oceanfront property owner to a first-tier ocean-view property owner. Petitioners attempt to do this without compensating the property owner or obtaining a court order altering the boundaries of the property.

The District Court properly applied the holding of *Belvedere* in the case below. *See Save Our Beaches, Inc. v. Dep't of Envt'l Protection*, 31 Fla. L. Weekly D1173, 1177 (Fla. 1st DCA 2006). The District Court looked to the precedent of *Belvedere,* which held riparian rights are property rights that cannot be severed from the uplands without an agreement from the landowner. Because the Respondent's members did not agree to the severance of riparian rights from their land, the District Court held Petitioner's actions were improper. The holding flows directly from *Belvedere* and there is no misapplication thereof. Therefore, "misapplication" conflict with *Belvedere* is not a valid basis for jurisdiction.

II. Potential Grave Results Do Not Create a Basis for "Misapplication" Conflict Jurisdiction

Petitioners attempt an emotional appeal by claiming that the District Court's legally sound holding will undermines the state's ability to address beach erosion. Petitioners selectively cite provisions of the Act that state beach erosion is a "serious menace" that has advanced to "emergency proportions." While the Legislature certainly expressed those concerns in the Act, the Legislature did not (nor could it have) eliminate property rights by providing the Petitioners with unfettered power or authority to address beach erosion. To the contrary, the Legislature specifically recognized that private property rights were not to be constitutionally infringed by the

Petitioners in abating beach erosion: "if an authorized . . . beach nourishment . . . project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings." ' 161.141, Fla. Stat.

The Petitioners go so far as to state that the lower court's decision is inconsistent with the "stated intent" of the Act. Such an argument ignores that the intent of the Act as stated by the Legislature is to not take private property unless such is done through eminent domain proceedings. Therefore, the lower court's decision will actually require compliance with the Act. In addition, despite Petitioners' dire predictions, the decision below will not prevent any future beach nourishment project from occurring. Rather, agencies and applicants seeking to nourish a beach under the Act will simply have to comply with the existing statutory requirement to pay compensation for any property rights that they take in furtherance of their beach nourishment project. As this is an existing statutory requirement, the "devastating statewide results" recited by Petitioners is already imposed by the Act.

This Court's decision to exercise jurisdiction should not be influenced by the fact that the lower court's holding has invalidated an Agency's longstanding illegal application of a statute that may have implications beyond 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 the Court deny the Petitioners' requests for review.

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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