O/a 5-3-83

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SID J. WHITE
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IN THE SUPREME COURT
STATE OF FLORIDA

GEORGE ALBRECHT and C. G. SCHINDLER, JR.,

Petitioners,

v.

THE STATE OF FLORIDA, et al.,

Respondents.

CASE NO. 61,600

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

This case involves the attempt of the landowners, George R. Albrecht and C. G. Schindler, Jr., to fill and bulkhead approximately 2.3 acres of submerged land in Indian Shores, Pinellas County, Florida. R1-2; R90.

From 1944 until the present date, some 300 feet of land on the water side of the platted land was eroded and the title to that portion of land which became submerged through erosion revested in the State of Florida. In recognition of this legal principle, predecessors in title purchased this submerged land from the Trustees of the Internal Improvement Fund of the State of Florida, and reacquired title to the submerged lands. R90.

In April of 1974, Albrecht and Schindler applied to the Board of County Commissioners of Pinellas County, Florida, then sitting as the Pinellas County Water and Navigation Control Authority, to fill and bulkhead the 2.3 acres of land in question. R2.

By Resolution 25-74, dated December 10, 1974, the Town Council of Indian Shores, Florida, urged the Pinellas County Water and Navigation Control Authority to grant Petitioners' application for permit as being in the best interest of that town in that the proposed bulkhead and fill would eliminate a health and welfare menace to the town citizens. R2.

On December 17, 1974, the Board of County Commissioners of Pinellas County, Florida, sitting as the Pinellas County Water and Navigation Control Authority, approved Petitioners' application for bulkhead and fill, subject to the approval of the Defendant

Board of Trustees of the Internal Improvement Fund of the State of Florida. R2-3.

Petitioners applied to the Department of Pollution Control for water quality certification under Chapter 17-3, Florida Administrative Code, and on April 1, 1975 were informed by that Department that their application was denied. R3.

Petitioners thereupon filed a Petition for review of the denial of April, 8, 1975. Pursuant to reorganization of the Stste environmental agencies in 1975, the pending application of Petitioners was transferred to the Defendant Department of Environmental Regulation for further action. R3.

A Hearing Officer was appointed pursuant to the provisions of the Administrative Procedure Act, who reviewed the denial of Petitioners' application to bulkhead and to fill and recommended Petitioners' application for permit be denied. R3-4.

The Secretary of the Department of Environmental Regulation, acting on behalf of the Defendant, Department of Environmental Regulation, adopted the Recommended Order in toto on June 22, 1976. R4.

Pursuant to the provisions of Section 253.76, Florida Statutes, Petitioners applied to the Defendant, Board of Trustees of the Internal Improvement Trust Fund, for review of the decision of the Department of Environmental Regulation. R4.

On November 10, 1976, the Defendant Board of Trustees of the Internal Improvement Trust Fund approved the Order of the Department of Environmental Regulation. R4.

On December 3, 1976, pursuant to Section 120.68, Florida Statutes, the Administrative Procedure Act, the Petitioners filed a Petition with the District Court of Appeal for the First District challenging, inter alia, the facial constitutionality of Section 253.124, Florida Statutes, (1975). The First District denied the Petition for Review and this Court denied certiorari. Albrecht v. Dept. of Environ. Regulation, 353 So.2d 883 (1st D.C.A. 1977), cert. denied 359 So.2d 210 (Fla. 1978).

Following the denial of their Petition for Writ of Certiorari to the Supreme Court, the Petitioners filed an action in the Circuit Court of Pinellas County against the State of Florida and civil state agencies, alleging that by virtue of the administrative action denying their permit to bulkhead and fill, they have been unable to put their property to any use and that its full market value had been greatly diminished. R1-21.

The Complaint requests that the Court declare the property to have been the subject of inverse condemnation and fix an amount of compensation to be paid to Petitioners as a result of the taking. R5-7.

The Circuit Court entered judgment on the pleadings against Petitioners citing Coulter v. Davin, 373 So.2d 423 (Fla. 2d D.C.A. 1979). R210-211.

The District Court of Appeals for the Second District affirmed the judgment on the pleadings on March 25, 1981. Albrecht v. State, 407 So.2d 210 (Fla. 2d D.C.A. 1981).

The Petitioners then sought review in this Court.

POINTS ON APPEAL

1. Following full administrative review of the propriety of agency action implementing a statute which properly allows a total taking of private property, and following an unsuccessful challenge to the facial constitutionality of the aforesaid statute upon direct review, may a party properly bring an action in the Circuit Court asserting that the agency action constituted unconstitutional taking of private property without just compensation?

2. May the doctrine of res judicata be invoked when it would work an injustice?

ARGUMENT ONE

FOLLOWING FULL ADMINISTRATIVE REVIEW OF THE PROPRIETY OF AGENCY ACTION IMPLEMENTING A STATUTE WHICH PROPERLY ALLOWS A TOTAL TAKING OF PRIVATE PROPERTY, AND FOLLOWING AN UNSUCCESSFUL CHALLENGE TO THE FACIAL CONSTITUTIONALITY OF THE AFORESAID STATUTE UPON DIRECT REVIEW, A PARTY MAY PROPERLY BRING AN ACTION IN CIRCUIT COURT ASSERTING THAT THE AGENCY ACTION CONSTITUTED UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION

A. FACTUAL BACKGROUND

This is an appeal from a Final Judgment on the pleadings which dismissed Petitioners' Complaint for inverse condemnation on the grounds of res judicata. The Second District affirmed. Albrecht v. State, 407 So.2d 210 (Fla. 2d D.C.A. 1981).

Petitioners originally sought to bulkhead and fill approximately 2.3 acres of submerged land in Pinellas County, which had been lost by erosion between 1944 and 1974. R90. Title to that portion of land which became submerged through erosion revested in the State of Florida. R1-2; R90. Municipal Liquidators, Inc. v. Tench, 153 So.2d 728 (Fla. 2d D.C.A. 1963). In recognition of this legal principle, a predecessor in title purchased these submerged lands from the Trustees of the Internal Improvement Fund of the State of Florida, and reacquired title. R90.

In April of 1974, Petitioners applied to the Board of County Commissioners of Pinellas County, Florida (sitting as the Pinellas County and Navigation Control Authority) for permission to fill

and bulkhead their land to its original size. The Board approved the application subject to the approval of the Board of Trustees of the Internal Improvement Fund.

Petitioners then applied to the Department of Pollution Control for water quality certification. Their application was denied. They filed a Petition for Review, which was ultimately transferred to the Department of Environmental Regulation. Following a hearing, the Hearing Officer issued a recommended order affirming the denial. The Secretary of the Department of Environmental Regulation adopted the recommended order.

Petitioners exhausted their administrative remedies by appealing the permit denial to the Board of Trustees of the Internal Improvement Fund, who affirmed the order of the Department of Environmental Regulation.

Petitioners then sought judicial review pursuant to Section 120.68, Florida Statutes, (1975). The First District affirmed and this Court denied certiorari. Albrecht v. Department of Environmental Regulation, 353 So.2d 883 (Fla. 1st D.C.A. 1978), cert. denied 359 So.2d 1210 (Fla. 1978).

The Petitioners, having unsuccessfully challenged the propriety of the permit denial through all administrative and judicial remedies, then filed suit for inverse condemnation in the Circuit Court of Pinellas County, Florida.

The Petitioners' Complaint alleged that Respondents' conduct in denying Petitioners' application to bulkhead and fill constituted the taking of private property for public purposes

without the payment of full compensation, contrary to the Fifth and Fourteenth Amendment of the United States Constitution, as well as Article X, Section 6, Article I, Section 9, and Article I, Section 21 of the Florida Constitution.

The trial court held that Petitioners' inverse condemnation claim was barred by res judicata.

The Second District, citing Coulter v. Davin, 373 So.2d 423 (Fla. 2nd D.C.A. 1979), perceived Petitioners' inverse condemnation claim as a collateral attack of the earlier permit denial. Albrecht v. State, supra, at page 211.

The Second District ruled that, in their previous appeal to the First District, the Petitioners could have simultaneously challenged the denial of their permit to bulkhead and fill and raised, de novo, the question of whether the permit denial constituted a taking of their property. Since Petitioners could have raised this issue in the First District, and did not do so, Petitioners' later Circuit Court action was barred by res judicata. Id.

B. FOLLOWING ADMINISTRATIVE REVIEW OF THE PROPRIETY OF AGENCY ACTION IMPLEMENTING A STATUTE WHICH PROPERLY ALLOWS A TOTAL TAKING OF PRIVATE PROPERTY, AND FOLLOWING AN UNSUCCESSFUL CHALLENGE TO THE FACIAL CONSTITUTIONALITY OF THE AFORESAID STATUTE UPON DIRECT REVIEW, A PARTY MAY PROPERLY BRING AN ACTION IN CIRCUIT COURT ASSERTING THAT THE AGENCY ACTION CONSTITUTED AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION.

In the instant case, Petitioners unsuccessfully challenged both the propriety of agency action and the facial constitutionality of the statute which authorized the agency to deny Petitioners' permit to bulkhead and fill.

In ruling that Petitioners' action for inverse condemnation was barred by res judicata, the Second District held that: (1) Petitioners' claim was a collateral attack upon prior agency action, and (2) That following the administrative action denying the bulkhead and fill permit, it was mandatory that Petitioners raise the issue of taking in their appeal to the District Court. Albrecht v. State, supra, at page 211.

The rationale of the Second District's ruling in Albrecht v. State, supra, has been undermined by this Court's ruling in Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Fund. Supreme Court of Florida Case No. 61,027. Opinion filed December 16, 1982. 7 F.L.W. 537. In Key Haven, this Court held at page 539:

> A petition to the district court for review of agency action is necessarily taken when an aggrieved party wishes to assert that the agency action was improper. The district court considered Key Haven's assertion that its property had been taken without just compensation to be, in essence, a collateral attack on the propriety of the permit denial. The district court stated: 'The constitutional question is not independent of the agency's action on the merits, but is inseparable from it, and the constitutional question is necessarily phrased, ingeniously or ingenuously, as a variation of the affected party's original position on the non-constitutional question.' Key Haven, 400 So.2d at 71. The district court observed that the property was taken was a 'constitutionally rephrased question that Key Haven might have presented as a permit issue through Chapter 120 processes.' Id. We must disagree. In the particular circumstances of this case, where the agency is implementing a statute which, by its terms, properly allows a total taking of private property, direct review of the district court of the agency action may be eliminated and proceedings properly commenced in circuit court, if the aggrieved party is willing to accept all

> actions by the executive branch as correct both as to the constitutionality of the statute implemented and as to the propriety of the agency proceedings. We disagree with the holdings in Albrecht v. State, 407 So.2d 210 (Fla. 2d DCA 1981), and in Coulter insofar as they conflict with our conclusions in this case. We hold that Key Haven may file suit for inverse condemnation in the circuit court, after exhausting all executive branch appeals, because we find that Key Haven's claim in the circuit court is not a viable attempt to collaterally attack the propriety of agency action.
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> [Emphasis supplied.]

This case presents a corollary to the above-cited rule that, after full executive branch review, a party may forego judicial review, voluntarily accept all actions by the executive branch as correct, and allege that the agency ruling provides the predicate for an action for inverse condemnation brought in Circuit Court.

What happens, when, as here, a party does not voluntarily accept the agency action as valid following executive branch review, but, rather, challeges both the propriety of agency action and, upon direct review, challenges the facial constitutionality of the statute that the agency is attempting to implement?

It makes no difference.

This Court has ruled, in Key Haven, that it is not mandatory that the taking issue be asserted before the District Court:

> We do not agree, however, with the district court's holding that, had Key Haven appealed to the trustees without success, the claim that the agency action amounted to a taking of its property could be presented only to the district court on direct review of agency action.
>
> Key Haven, supra, at pg. 539.

There is no appreciable difference between the party voluntarily accepting the propriety of agency action following executive branch review, and a party being required to accept the propriety of agency action after an unsuccessful review by the District Court. In both cases, it is the agency action, whether confirmed by executive review or judicial review, which provides the predicate to a subsequent action for inverse condemnation. Key Haven, supra, page 539.

In the instant case, Petitioners' bulkhead and fill permit was denied by the Department of Environmental Regulation. The agency was acting pursuant to a statute which, by its terms, properly allowed a total taking of private property. Section 253.124, Florida Statutes, (1975); Albrecht v. Dept. of Environ. Regulation, supra. The Petitioners challenged the propriety of the agency action before the Trustees of the Internal Improvement Fund. Then, upon direct review to the First District, the Petitioners challenged the facial constitutionality of Section 253.124 on the grounds that it, by its terms, constituted an unlawful delegation of legislative authority. Id.

The First District affirmed the Order of the Trustees of the Internal Improvement Fund and this Court denied certiorari. The propriety of the permit denial has now been fully adjudicated.

The propriety of the permit denial now being established, Petitioners should be permitted to bring an action in inverse condemnation alleging that the permit denial constituted a taking of their private property without just compensation.

ARGUMENT TWO

UNDER THE CIRCUMSTANCES OF THE PRESENT CASE, RES JUDICATA SHOULD NOT BE INVOKED FOR IT WOULD WORK AN INJUSTICE

Res judicata should not lie and the doctrine will not be invoked where it will work an injustice. deCancino v. Eastern Air Lines, Inc., 283 So.2d 97, 98 (Fla. 1973); Universal Construction Company v. City of Fort Lauderdale, 68 So.2d 366 (Fla. 1953).

In Universal Construction the contractor brought an action in quantum meruit against the City of Fort Lauderdale for materials and labor furnished in making "additional improvements" in connection with a contract to construct a yacht basin. The contract provided that Universal would construct $212,500 worth of buildings other than those set out in the original plans and specifications at no cost to the City.

During the course of construction, Universal, in addition to performing its contractual obligations, constructed "additional improvements" the alleged value of which in labor and material was in the area of $372,000.

Both the City and Universal assumed that these "additional improvements" were in full performance of the contractual obligation to build $212,500 worth of "additional buildings."

A suit was brought against Universal demanding that it construct the "additional buildings." The trial court determined that the City and Universal were mistaken in their understanding and agreement that the $372,000 of "additional improvements"

constituted a tender and performance of the obligation to build $212,500 worth of "additional buildings." A judgment was entered against Universal in the amount of $196,888 for its failure to construct the aforesaid "additional buildings." The Supreme Court affirmed.

Universal subsequently brought an action for quantum meruit for the materials and labor expended in constructing the "additional improvements." This Court determined that the cause of action in the second case was the same as that which was asserted by way of setoff or counterclaim in the original lawsuit, but refused to apply the doctrine of res judicata, and held at page 369:

> The basic principle upon which the doctrine of res judicata rests is that there should be an end to litigation and that 'in the interest of the State every justiciable controversy should be settled in one action in order that the parties will not be pothered [sic] for the same cause by interminable litigation.' [Gordon v. Gordon] 59 So.2d at page 44; italics supplied. Nevertheless, when a choice must be made we apprehend that the State, as well as the courts, is more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation.

The Court noted that it was not fair or just that the city should be unjustly enriched at the expense of Universal, and held that the doctrine of res judicata "should not be so rigidly applied as to defeat the ends of justice."

A regulatory action which deprives the landowner of the right to make "any economically beneficial use of his property" is a taking for which he must be compensated. Graham v. Estuary

Properties, Inc., 399 So.2d 1374 (Fla. 1981); Zabel v. Pinellas County Water and Navigational Control Authority, 171 So.2d 376 (Fla. 1965).

In the present case, as in Universal Construction Company v. City of Fort Lauderdale, supra, the application of the doctrine of res judicata will result in a governmental entity being unjustly enriched. If Albrecht and Schindler are denied compensation they will bear the cost of conferring a benefit to the general public, i.e., shoreline and estuarial preservation. An inflexible application of the doctrine of res judicata is clearly not appropriate under the facts herein.

CONCLUSION

The Department of Environmental Regulation, in implementing a statute, which by its terms, properly allows the total taking of private property, denied Petitioners a permit to bulkhead and fill the submerged property in question.

The Petitioners then fully exhausted all executive branch and judicial review and the propriety of the permit denial has now been established.

Under the authority of Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, Supreme Court. Case No. 61,027. Opinion filed December 16, 1982. 7 F.L.W. 537, the Petitioners may properly bring an independent action in the Circuit Court asserting that the permit denial acted as a taking of their private property without just compensation.

The ruling of the Second District Court of Appeals in Albrecht v. State, 407 So.2d 210 (Fla. 2d D.C.A. 1981) should be quashed and this cause remanded to the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, for a determination, after hearing, of whether or not the permit denial acted as an uncompensated taking of Petitioners' private property.

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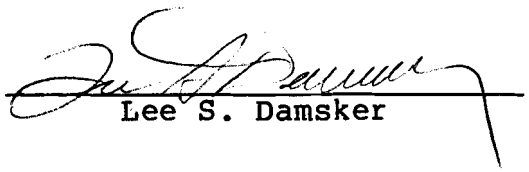
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Jurisdictional Brief of Petitioners has been furnished by U.S. Mail, postage prepaid, this 17th day of February, 1983, to ALFRED W. CLARK, ESQUIRE, Deputy General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32301; PETER J. WINDERS, ESQUIRE, Post Office Box 3239, Tampa, Florida 33601; and, HENRY DEAN, ESQUIRE, Dept. of Natural Resources, Suite 1003, Commonwealth Building, 3900 Commonwealth Boulevard, Tallahassee, Florida 32303.



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