

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

Petitioners,

vs.

THE STATE OF FLORIDA,  
et al.,

Respondents.

Case No. 61,600

**FILED**

FEB 22 1982

SID J. WHITE  
CLERK SUPREME COURT

*[Signature]*  
Chief Deputy Clerk

JURISDICTIONAL BRIEF OF RESPONDENT,  
STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL REGULATION

*Mary J. Smallwood*  
~~ALFRED W. CLARK~~  
Deputy General Counsel

State of Florida, Department  
of Environmental Regulation  
2600 Blair Stone Road  
Twin Towers Office Building  
Tallahassee, Florida 32301  
Telephone: 904/488-9730

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## ARGUMENT

THE ALBRECHT DECISION DOES NOT  
ANNOUNCE A RULE OF LAW WHICH  
EXPRESSLY AND DIRECTLY CONFLICTS  
WITH THAT ANNOUNCED BY ANOTHER  
APPELLATE COURT.

This Court's discretionary conflict jurisdiction has been established in order to harmonize a district court decision that "expressly and directly conflicts" with the decision of another appellate court "on the same question of law." Article V, Section 3(b)3, Fla. Const. A review of the decisions cited by Petitioners in their Jurisdictional Brief reveals that the rule of law announced by the Second District Court of Appeal in Albrecht v. State, et al., Second District Court of Appeal, Case No. 79-2234, Opinion filed March 25, 1981, reh. den., December 11, 1981 (Ott Dissenting), is entirely consistent with precedent, and there is no disharmony in case law which justifies this Court's intervention.

### I.

Petitioners seem to rely for conflict primarily on zoning decisions by the Third District Court of Appeal in Dade County v. Yumbo, S.A., 348 So.2d 392 (Fla.3d DCA 1977) and Bama Investors, Inc. v. Metropolitan Dade County, 349 So.2d 207 (Fla.3d DCA 1977). In perceiving conflict between the decisions in Yumbo and Bama Investors and the decision here, Petitioners fail to distinguish between the remedies available to seek relief from confiscatory zoning ordinances (legislative enactments) and those available for relief from confiscatory zoning resolutions (administrative actions).

In Yumbo, Dade County passed a resolution denying a request for rezoning and the property owner sought review of the resolution by means of a petition for writ of certiorari to circuit court.<sup>1</sup> The circuit court granted the petition and held, inter alia, that the ordinance which had established the zoning for the property was confiscatory. Upon review, the Third District reversed and recognized that requests for rezoning (and their denial by resolution) are "universally known primarily as administrative action." Citing Kasser v. Dade County, 344 So.2d 928 (Fla.3d DCA 1977), the Third District also recognized that the property owner could still attack the constitutionality of Dade County's zoning ordinance ("zoning practice") by original action for inverse condemnation.

Petitioners are obviously misled by the use of the phrase "zoning practice" in the Yumbo decision. However, the court's citation to Kasser clearly reveals that the court was referring to zoning ordinances when it used the phrase "zoning practice." In Kasser, a property owner whose request for rezoning had been denied by Dade County sought relief by way of suit for inverse condemnation rather than petition for writ of certiorari. Both the circuit court and the Third District properly perceived the suit to be a challenge to a "zoning resolution ... rather than a general challenge to the validity of any zoning ordinances" (emphasis supplied). Both the circuit court and the Third

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<sup>1</sup>Section 33-316, Code of Metropolitan Dade County, provides for judicial review of zoning actions by petition for writ of certiorari to the circuit court.

District ruled that since Mr. Kasser was not challenging the "constitutional validity of the underlying zoning ordinance", but rather was challenging the "confiscatory nature of the resolution denying his application for a zoning change", his remedy was available through the process established by law. Kasser, 344 So.2d at 929.

Implicit in both Kasser and Yumbo is the rule of law that original action in circuit court for inverse condemnation is available when the constitutionality of an ordinance (statute) is alleged, but the constitutionality of administrative action (resolution or final order) should be challenged through the review process established by law.<sup>2</sup>

Petitioners' confusion should have been eliminated by Bama Investors, a decision announced shortly after Yumbo. There, after the property owners' request for rezoning was denied by Dade County resolution, the property owners filed suit in circuit court alleging that the Dade County zoning ordinance was confiscatory. Reversing the circuit court's dismissal of the complaint, the Third District recognized the distinction between challenges to resolutions (agency action) and challenges to ordinances (statutes), stating:

... [T]his court construed the respective complaints [in cited cases] as direct attacks on a resolution of the county commission rather than a challenge to the validity of a zoning ordinance as per-

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<sup>2</sup>Id. Of course, for Albrecht, the analogous judicial review process is established by Section 120.68, Florida Statutes.

tained to the owner's property, and therefore, such a challenge was required to be brought by petition for certiorari from the resolution of the county commission and not by an equitable proceeding. However, implicit in these holdings is that where, as in the case sub judice, the complaint is a challenge to the validity of a zoning ordinance as it pertains to complainant's property, then an equitable proceeding is proper.

\* \* \* \* \*

... Further, the holding that Section 33-316, Code of Metropolitan Dade County, prescribes the sole or exclusive method (certiorari) whereby a person who has been aggrieved by a decision of the county commission in actions taken by the commission relating to zoning matters may take an appeal is referring, in essence, to the passage of zoning resolutions by the commission which an adversely affected property owner is seeking to challenge. This holding, however, was never intended to include actions which challenge the constitutional validity of a zoning ordinance as applied to one's property on the grounds that the ordinance ... amounts to a taking without compensation.

Bama Investors, 349 So.2d at 209.

A comparison of the following language in Albrecht with that found in Kasser, Yumbo and Bama Investors reveals total harmony on the same question of law:

... Perceiving appellants' complaint as one attacking the constitutionality of the agency action rather than one attacking the constitutionality of the law under which the agency acted, the lower court held that once the decision in Albrecht became final, the doctrine of res judicata barred appellants' action.

The rule of law expressed in Albrecht is that attack upon the constitutionality of agency action is available through the



judicial review process provided by law, Section 120.68(12)(c), Florida Statutes.<sup>3</sup> This same rule of law is expressed in Kasser, Yumbo, and Bama Investors.

## II.

Petitioners also assert conflict between Albrecht and a wide variety of unrelated cases.

A. The Albrecht decision does no harm to either State, ex rel. Watkins v. Fernandez, 106 Fla. 779, 143 So. 638 (Fla. 1932) or State, ex rel. Renaldi v. Sandstrom, 276 So.2d 109 (Fla.3d DCA 1973). These cases are starkly different from Albrecht, the most significant differences being that Watkins and Renaldi were original proceedings (quo warranto and habeas corpus, respectively) initiated in an appellate court concerning matters over which the appellate and circuit court had concurrent jurisdiction. The Watkins and Renaldi courts held that the aggrieved party had "brought the proper action", but, in effect, relinquished jurisdiction to circuit court because of the necessity of taking testimony to resolve the cases.

The Albrecht decision is consistent with the distinction between nisi prius and appellate jurisdiction expressed in Watkins and Renaldi. Nothing in Albrecht requires an appellate court to take testimony or to perform other judicial labors unique to the trial level. Albrecht simply encourages all cognizable issues, including constitutional issues, to be reviewed in one appeal from agency action (where trial-type

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<sup>3</sup>That Petitioners are attacking agency action is clear from their Jurisdictional Brief at page 2: "... by virtue of the administrative action (Petitioners) have been unable to put their property to any use ...."

functions have been performed). Neither Watkins nor Renaldi even remotely address the issue of res judicata and that doctrine's relationship to assault on administrative action.

B. Petitioners appear to assert conflict between the Albrecht decision and the decisions in Central & Southern Florida Flood Control District v. YWE River Farms, Inc., 297 So.2d 323 (Fla.4th DCA 1974) and Behm v. Div. of Admin., Dept. of Transportation, 383 So.2d 216 (Fla.1980), which Petitioners cite for the proposition that the issue of whether there is a taking without due compensation is a judicial question which an administrative agency has no jurisdiction to determine. The Albrecht decision is consistent with this rule of law, in that Albrecht states that the taking question can be presented upon judicial review of agency action pursuant to law. Petitioners fail to reveal how Albrecht can be read to express or imply a rule of law that an administrative agency has authority to determine full compensation for the taking of property.

C. Similarly, Petitioners assert that Albrecht conflicts with the decision in Bryant v. Small, 258 So.2d 459 (Fla.3d DCA 1972), which Petitioners cite for the rule of law that res judicata is inapplicable where the judgment plead was beyond the jurisdiction of the court. Albrecht does not rule that an administrative agency has authority to determine whether such a taking has occurred. What Albrecht does decide is that Petitioners had an opportunity to litigate the taking without due compensation issue before the First District Court of Appeal in an earlier appeal, and because the First District Court of Appeal

had jurisdiction to determine such a taking question, a subsequent attempt to raise the issue in circuit court is barred by the doctrine of res judicata.

### III.

Petitioners urge this Court to accept jurisdiction here because jurisdiction has been accepted in Key Haven Associated v. Board of Trustees, 400 So.2d 66 (Fla.1st DCA 1981).<sup>4</sup>

For the purpose of determining express and direct conflict, the similarities between the Albrecht and Key Haven decisions are purely superficial. Although the cases are factually similar, they express opinions on different rules of law and are therefore legally distinct. Albrecht is a res judicata case, pure and simple; Key Haven is just as clearly a case which turns on the doctrines of exhaustion of administrative remedies and primary administrative jurisdiction. Key Haven, 400 So.2d at page 71.

Related to this legal distinction is a significant difference in the history of the two cases. The property owner in Albrecht did exhaust all administrative and judicial remedies, but the property owner in Key Haven went directly to circuit court following agency action, foregoing its opportunities for administrative and judicial review. In this regard, Albrecht decides that because Petitioners availed themselves of judicial

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<sup>4</sup>The Department has objected to Petitioners' tactic of adopting the Key Haven arguments by reference. See Motion to Dismiss or in the Alternative Motion to Strike filed February 15, 1982. Curiously, Petitioners' Key Haven arguments are not labeled "Argument".

review and because this judicial review could have determined whether the agency action had the effect of depriving Petitioners of property without full compensation<sup>5</sup>, res judicata bars a second round of judicial review of this action. Whether the Key Haven action was, or could have been, barred by res judicata is not an issue addressed by the Key Haven court.

Contrary to Petitioners' argument, agency action which deprives a person of property without full compensation does violate both state and federal constitutions. In Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1380 (Fla.1981), this Court recognized that "Section 120.68(12)(c) ... [provides relief] if the reviewing court finds that the agency's exercise of discretion violated a constitutional or statutory provision", and went on to discuss the taking issue at length, in spite of the fact that the hearing officer refused to rule on the issue. The decision in Albrecht is in total harmony with Estuary Properties. In fact, Estuary Properties underscores the propriety of the application of res judicata by the Albrecht court.

Obviously, Albrecht is correct in deciding that taking without due compensation is one of the constitutional issues available for review under Section 120.68(12)(c). More importantly, for purposes of determining conflict jurisdiction, Petitioners can point to no case which decides that relief under

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<sup>5</sup>Petitioners took advantage of the first Albrecht appeal to raise constitutional issues for the first time. Albrecht v. Dept. of Environmental Regulation, 353 So.2d 883 (Fla.1st DCA 1978), cert. den. 359 So.2d 1210 (Fla.1978). There is nothing which prevented Petitioners from raising the taking issue. Compare Farrugia v. Frederick, 344 So.2d 920 (Fla.1st DCA 1977).

Section 120.68(12)(c) is not available to remedy a taking without due compensation. Therefore, Petitioners can point to no case which decides that there is an exception to the res judicata doctrine when taking without due compensation is alleged.

In connection with their arguments comparing Key Haven to Albrecht, Petitioners contend that Albrecht conflicts with Askew v. Gables-by-the-Sea, Inc., 333 So.2d 56 (Fla.1st DCA 1976) and Zabel v. Pinellas Co. etc., 171 So.2d 376 (Fla.1st DCA 1965). Not only do Petitioners completely obscure the rules of law stated by those cases, but Petitioners fail to point to any language in Albrecht which remotely conflicts with or even addresses the issues or holdings in Zabel and Gables-by-the-Sea. Only if Albrecht had reached the merits of Petitioners' Complaint could Albrecht have even considered a ruling which would conflict with these rather unique cases.

Petitioners have given notice of reliance upon Griffin v. St. Johns River Water Management District, \_\_So.2d\_\_ (Fla.5th DCA 1981), 1982 FLW 354. Petitioners' reliance is misplaced, for Griffin is expressly limited to the effects which Section 373.617, Florida Statutes, has upon the forum for resolution of the taking question. For Albrecht, the analogous statutory provision is Section 253.763, Florida Statutes, which the parties have agreed is inapplicable to this case. (A.3). In fact, Petitioners voluntarily dismissed the count in their complaint which sought relief pursuant to Section 253.763. (R.55-57).

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Because of its unique facts, Gables-by-the-Sea may be one of those rare cases in which circuit court intervention in the administrative process would be justified. Gulf Pines Mem. Park, Inc. v. Oaklawn Mem. Park, Inc., 361 So.2d 695 (Fla.1978).

CONCLUSION


The rules of law stated by Albrecht are that (1) the constitutional issue of whether agency action amounts to a taking without just compensation may be raised on judicial review pursuant to Section 120.68, Florida Statutes, and (2) the doctrine of res judicata bars a second attack on agency action in circuit court when review of that action pursuant to Section 120.68 was available and pursued.

Petitioners can point to no decision which expressly and directly conflicts with the rules of law stated by Albrecht. In fact, Albrecht is in total harmony with all cases which address these issues. There is no need here for Supreme Court resolution of discordant rules of law. Jenkins v. State, 385 So.2d 1356 (Fla.1980); Sanchez v. Wimpey, \_\_ So.2d \_\_ (Fla.1981), 1982 FLW 21.

Accordingly, Respondent Department of Environmental Regulation requests that this Court deny jurisdiction of this case.

Respectfully submitted,

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL REGULATION

  
\_\_\_\_\_  
ALFRED W. CLARK  
Deputy General Counsel

2600 Blair Stone Road  
Tallahassee, Florida 32301  
Telephone: (904) 488-9730


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to the persons listed below on this 22nd day of February 1982:

LEE S. DAMSKER, ESQUIRE  
Gordon and Maney, P.A.  
2919 First Florida Tower  
Tampa, Florida 33602

HENRY DEAN, ESQUIRE  
Department of Natural  
Resources, Suite 1003  
Commonwealth Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32303

PETER J. WINDERS, ESQUIRE  
Post Office Box 3239  
Tampa, Florida 33601

  
ALFRED W. CLARK  
Deputy General Counsel