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

JURISDICTIONAL BRIEF OF PETITIONERS

Lee S. Damsker, Esquire
GORDON & MANEY
2919 First Florida Tower
Tampa, Florida, 33602
(813) 228-7371

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF CITATIONS

I

STATEMENT OF THE FACTS

Petitioners, George R. Albrecht and C. G. Schindler, Jr., were owners of coastal property in Pinellas County, Florida, 300 feet of which had been lost by erosion between 1943 and 1974.

As the title to that portion of the land which had become submerged through erosion revested in the State of Florida, petitioners' predecessors in title bought the submerged portion of their land from the Trustees of the Internal Improvement Fund of the State of Florida for $925.00.

In 1974, they applied to the Board of County Commissioners of Pinellas County, sitting as the Pinellas County Water 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 Trust Fund.

Petitioners then applied to the Department of Pollution Control for water quality certification. However, that department denied their application. As a result, they filed a petition for review, and pursuant to a reorganization of the state environmental agencies, their application was 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, and the Board of Trustees of the Internal Improvement Trust Fund affirmed it.

Petitioners sought judicial review of that Order in the First District Court of Appeal pursuant to Section 120.68, Florida Statutes (1975). The Court denied their petition in an opinion issued on January 30, 1978. Albrecht v. Department of Environmental Regulation, 353 So.2d 883 (Fla. 1st DCA 1978), cert. den. 359 So.2d 1210 (Fla. 1978).

Petitioners then filed the instant suit in the Circuit Court of Pinellas County against the State of Florida and several state agencies alleging that by virtue of the administrative action recited above they had been unable to put their property to any use and that its fair market value had been greatly diminished. The Complaint requested that the court declare the property to have been the subject of inverse condemnation and fix an amount of compensation to be paid appellants as a result of the taking. The trial court entered judgment on the pleadings against the Petitioners.

The Second District Court of Appeals affirmed the judgment of the trial court holding that Petitioners' inverse condemnation action was barred by res judicata. Albrecht v. State, ____ So.2d ____, 2nd Dist Case No. 79-2234. Opinion filed March 25, 1981, rehearing denied Dec. 11, 1981 (Ott. Dissenting).

II

THE SUPREME COURT OF FLORIDA HAS ACCEPTED JURISDICTION IN A CASE FACTUALLY SIMILAR TO THE PRESENT CASE

At least two of the same points of law involved in the instant case were involved in Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 400 So.2d 66 (Fla. 1st DCA 1981), Petition for Review granted January 13, 1982, Case No. 61,027.

A majority of the First District noted that the instant case was "remarkably like this one, ending in the same result." Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, supra at page 70. The First District in Key Haven quoted Albrecht v. State, ____ So.2d ____ (Fla. 2nd DCA 1981) and Coulter v. Davin, 373 So.2d 423 (Fla. 2nd DCA 1979), with approval. A copy of the Jurisdictional Brief of the Petitioner filed in Key Haven is contained in the Appendix and is incorporated herein by reference.

In Key Haven, between 1961 and 1968, the Trustees of the Internal Improvement Trust Fund sold Key Haven's president and predecessor in title 185 acres of submerged shallow flat lands in the Keys of Monroe County for a price of $300.00 per acre. In 1972, Key Haven applied to the trustees for a permit to dredge and fill. In April of 1976, the Department of Environmental Regulation notified Key Haven of its intent to deny the permit.

After a formal hearing, the administrative hearing officer entered an order recommending denial of the permit.

The Department of Environmental Regulation adopted the recommended order with little change. Key Haven did not appeal this order within the administrative process.

Rather, Key Haven filed an action for inverse condemnation in the circuit court alleging that the Trustees of the Internal Improvement Fund sold Key Haven's predecessor the submerged flat lands knowing and intending that he would dredge and fill to create canal front lots, and the Department of Environmental Regulation's denial of the permit unconstitutionally prevented all use of the property and constituted a taking for which compensation was payable.

The circuit court dismissed Key Haven's complaint for failure to exhaust its administrative remedies.

One issue in Key Haven, as in the present case, is whether or not the raising of constitutional issues in administrative proceedings is a mandatory substitute for the right to file an inverse condemnation action in the circuit court.

Another issue central to both Key Haven and the instant case is whether the State of Florida, by denial of the petitions to bulkhead and fill submerged lands, has denied the petitioners the right to use those lands in the only way in which private ownership could be of any value, thereby rendering these lands totally useless. This ruling directly and expressly conflicts with Askew v. Gables-By-The-Sea, Inc., 333 So.2d 56, 61 (Fla. 1st DCA 1976) and Zabel v. Pinellas County Water and Navigation Control Authority, 171 So.2d 376 (Fla. 1965).

Petitioners' case is even more compelling than Key Haven, for Petitioners fully exhausted their administrative and judicial remedies within Chapter 120. Albrecht v. Department of Environmental Regulation, supra.

In the instant case, the Second District, following Coulter v Davin, supra, held that petitioners could have argued the question of whether the order of the Department of Environmental Regulation constituted a taking of their property in the proceedings before the First District Court of Appeals. Albrecht v. State, ____ So.2d ____ (Fla. 2nd DCA 1981). The Court ruled that the doctrine of res judicata barred the petitioners from bringing an action in inverse condemnation in the circuit court.

The Second District ruled that in their previous appeal to the First District, the petitioners should have simultaneously challenged the denial of their permit to fill and bulkhead their land and should have brought an action for inverse condemnation in the First District, de novo.

Implicit in this holding is the assumption that a taking is per se unconstitutional. The holding of the Second District conflicts with this Court's recent ruling in Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1381 (Fla. 1981). As Judge Ott opined in his opinion dissenting from the majority in the instant case:

> "My brethren, both in this court and in first district, evidently conclude that proof that the denial of a fill permit would effect a taking would compel granting of the permit. To the contrary. Proof that denial of a permit effected a taking would compel an award of compensation, and failure to do so would be reversible error under the fifth amendment of the Federal Constitution and article X, section 6, of the Florida Constitution. This case merely calls for a determination of where and when the demand for compensation can be entertained. Article IV, section 6, of the Florida Constitution supplies the answer to the first question: the circuit court."

III

ARGUMENT

THE PRESENT DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THOSE CASES HOLDING THAT ADMINISTRATIVE PROCEEDINGS WHICH DEPRIVE A PARTY OF ANY REASONABLE USE OF HIS PROPERTY DO NOT ACT TO DENY THE OPPORTUNITY TO LATER LITIGATE THE ISSUE OF INVERSE CONDEMNATION.

The instant case directly and expressly conflicts with Dade County v. Yumbo, S.A., 348 So.2d 392, 395 (Fla. 3rd DCA 1977), and Bama Investors, Inc. v. Metropolitan Dade County, 349 So.2d 207, 209 (Fla. 3rd DCA 1977).

Yumbo, S.A. petitioned Dade County Commission for rezoning to build a new type of habitat, including townhouses, apartments and businesses. The County Commission denied the application for rezoning and Yumbo filed a petition for writ of certiorari to the Circuit Court of the Eleventh Judicial Circuit.

The Circuit Court granted the petition for certiorari and directed the county to grant the rezoning. The trial court also ruled that the zoning resolution created an avigational easement and a taking of real property.

The Third District reversed, holding that the trial court's finding that the ordinance in question created an avigational easement and taking of real property was erroneous. However, the court held at page 395:

> "Our holding herein is limited only to the decision of the County to deny the appellee's request for residential zoning. It should not be construed to deny the appellee relief by way of inverse condemnation or otherwise, if the County (by its zoning practice) deprives the appellee of any reasonable use of his property. Compare Kasser v. Dade County, 344 So.2d 928 (Fla. 4th DCA 1977)."

The Third District clearly indicated in Yumbo that while the trial court's grant of the rezoning and finding that there had been a taking of real property was erroneous, the decision applied only to Yumbo's request for rezoning. The Third District explicitly held that the decision was not to be construed to bar a subsequent inverse condemnation action by Yumbo if the county zoning practice deprived Yumbo of any reasonable use of its property.

Bama Investors, Inc. v. Metropolitan Dade County, supra, was another zoning case. Bama Investors' application for a more liberal zoning classification was denied by the Dade County Commission. After exhausting their administrative remedy, Bama Investors filed a complaint for injunctive relief seeking to enjoin the county from enforcing the rezoning ordinance which restricted the use of their property. The complaint further provided that the present zoning ordinance was confiscatory and constituted a taking of their property without due process of law.

Dade County filed a motion to dismiss the complaint on the ground that certiorari was the only proper remedy for review of the County Commission's resolution denying the requested zoning change. The trial court dismissed the complaint with prejudice for lack of jurisdiction of the subject matter.

The Third District reversed, holding at page 209:

> "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 totally denies to an owner any reasonable use of his (or her) property in that it is confiscatory and amounts to a taking without compensation. For the right to make a reasonable use of property is fundamental and constitutionally protected under the Fifth Amendment to the United States Constitution and Article I, Section 9, of the Florida Constitution. When this constitutional right is interfered with through a zoning ordinance which deprives an individual of any reasonable use of his (or her) property to the extent that the ordinance becomes confiscatory in nature and amounts to a taking without compensation, that individual, after exhausting administrative remedies, cannot be precluded from instituting an equitable suit seeking to enjoin the enforcement of the zoning ordinance as applies to his (or her) property and the local governmental authority from infringing upon his constitutionally protected property rights."

The majority's holding herein -- that Petitioners could have brought an action for inverse condemnation in the district court of appeal and that the district court could have determined de novo whether or not there had been a taking without just compensation undermines the distinction between nisi prius and appellate jurisdiction and conflicts with State Ex. Rel. Watkins v. Fernandez, 106 Fla. 779, 143 So. 638 (Fla. 1932).

As the Third District held in State Ex. Rel. Renaldi v. Sandstrom, 276 So.2d 109, 111 (Fla. 3rd DCA 1973), citing Watkins with approval:

"'While we hold that the relator brought the proper action ... we think that there are patent reasons why we should not retain jurisdiction of the cause. In the first place, the circuit court has coordinate jurisdiction with this court to grant the writ, the issues are such that testimony will have to be taken ... and ... [T]his court ... has no facilities for taking testimony. It was never intended that it perform the function of a nisi prius court; this being peculiarly within the province of the circuit court. If we take original jurisdiction in this contest, other matters of similar character will press us for attention to such an extent that the appellate work will be very much delayed.'

> Moreover, our taking of jurisdiction might well result in the need for the court to appoint a fact finding commissioner, since this court is not equipped to hear such testimony."

In the present case, the administrative hearing officer did not have jurisdiction to determine whether or not a taking had occurred. The issue of whether there has been a taking is a judicial one. Central and Southern Florida Flood Control District v. YWE River Farms, Inc., 297 So.2d 323, 330 (Fla. 4th DCA 1974). See also, Behm v. Division of Administration, Dept. of Transportation, 383 So.2d 216, 218 (Fla. 1980).

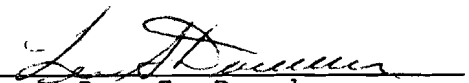
The instant case directly conflicts with Bryant v. Small, 258 So.2d 459 (Fla. 3rd DCA 1972), in that the doctrine of res judicata is not applicable where the judgment pled was beyond the jurisdiction of the trial court.

CONCLUSION

The decision of the District Court of Appeal, Second District, that the Petitioners, George A. Albrecht and C. G. Schindler, Jr., seek to have reviewed is in direct and express conflict with the decisions of the District Court of Appeal, Third District, in the cases of Dade County v. Yumbo, supra, Bama Investors, Inc. v. Metropolitan Dade County, supra, and Bryant v. Small, supra, the decision of the District Court of Appeal, First District, in Askew v. Gables-By-The-Sea, Inc., supra, and this Court's ruling in Zabel v. Pinellas County Water and Navigation Control Authority, supra. Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is erroneous.

The Petitioners, therefor, request this Court to accept jurisdiction of this cause and to enter an order quashing the decision of the District Court of Appeals, Second District.

GORDON & MANEY
2919 First Florida Tower
Tampa, Florida, 33602
(813) 228-7371
ATTORNEYS FOR PETITIONERS

By: 
Lee S. Damsker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Jurisdictional Brief of George R. Albrecht and C. G. Schindler, Jr. has been furnished by regular U. S. Mail, postage prepaid, this 25th day of January, 1982, to Alfred W. Clark, Esquire, Department of Environmental Regulation, General Counsel's Office, Twin Towers Office Building, 2600 Blair Stone Road, Tallahassee, Florida, 32301, and to Jack W. Pierce, Esquire, 634 Crown Building, 202 Blount Street, Tallahassee, Florida, 32301.

Lee S. Damsker