IN THE SUPREME COURT
STATE OF FLORIDA

GEORGE ALBRECHT and C.G. SCHINDLER, JR.,	*	
Petitioners,	*	CASE NO. 61,600
v.	*	
THE STATE OF FLORIDA, et al.,	*	
Respondents.	*	

PETITIONERS' REPLY BRIEF

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REPLY

In its Response To Point 1 On Appeal, the State has made two arguments:

1. After exhausting all executive branch appeals an applicant must choose either to contest the validity of agency action in the district court, or, by accepting the propriety of agency action, to seek a circuit court determination of whether the agency action constituted a taking. The State argues that these remedies are mutually exclusive and if an applicant pursues judicial review of the permit denial, he foregoes his opportunity to use the permit denial as a predicate for an action for inverse condemnation filed in the circuit court. Respondent's Brief, page 5.

2. Since the issue of taking can be raised on direct review to the circuit court, failure to do so bars a subsequent proceeding in the circuit court on the ground of res judicata. It is mandatory that an applicant raise the issue of inverse condemnation in an appeal from a permit denial by the Trustees of the Internal Improvement Trust Fund. Respondent's Brief, pages 6-7.

In fact, this Court's recent ruling in Key Haven Associated Enterprises v. Trustees of the Internal Improvement Trust Fund. Sup.Ct. Case No. 61,027. Opinion filed December 16, 1982. 7 FLW 537, holds to the contrary on both issues.

I.

The State's Brief has quoted this Court's opinion in Key Haven out of context. The State, at pages 4 and 5 of its Brief, has interpreted paragraph 2 of the sub-heading "Facial Unconstitutionality of a Statute" as providing that once an aggrieved party has completed the administrative process and challenged a statute's facial constitutionality in the district court on direct review, this party is foreclosed from proceeding with an action in the circuit court for inverse condemnation.

The State's error is in failing to read both paragraphs of the sub-heading in pari materia.

In Key Haven, this Court ruled that when the facial constitutionality of a statute was challenged, the circuit court could entertain a declaratory action on the statute's validity. Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund, supra, at page 538.

Recourse to the circuit court was especially appropriate when the administrative proceedings could have no effect on the constitutional issue to be presented to the circuit court, but it was not mandatory:

> Since the facial constitutionality of a statute may not be decided in an administrative proceeding . . . this type of constitutionality could not, absent recourse to the circuit courts, be addressed until the administrative process and the claim is before a district court of appeal on direct review of the agency action. We agree with the district court's position in the instant case that the aggrieved party could complete the administative process and then challenge the statute's facial constitutionality in a district court on direct review to which party is entitled

> under Section 120.68 . . . We note, however, that once a party chooses one or the other alternative, he is foreclosed from proceeding with the alternative remedy.
>
> Key Haven, supra, at page 538. [Emphasis supplied.]

A proper interpretation of this ruling is that one cannot challenge the facial constitutionality of a statute in the circuit court, and, if unsuccessful, renew the challenge (after full administrative proceedings have occurred) in the district court of appeals.

Conversely, one cannot challenge the statute's facial constitutionality in the district court on direct review and then file a declaratory action in the circuit court seeking to collaterally attack the facial constitutionality of the statute.

In the present case Petitioners completed the administrative process and then unsuccessfully challenged the statute's facial constitutionality in the district court on direct review, asserting that the statute being implemented by the agency constituted an invalid delegation of a legislative authority. Albrecht v. Department of Environmental Regulation, 353 So.2d 883 (Fla. 1st DCA 1978), cert. denied, 359 So.2d 1210 (Fla. 1978). Petitioners clearly would be barred from raising the facial constitutionality of the aforesaid statute in an independent action in the circuit court.

Petitioners' later circuit court action for inverse condemnation is not barred.

An action for the inverse condemnation of property taken pursuant to regulation authorized by constitutionally valid

statutes does not represent a collateral attack. Key Haven, supra, at page 540.

This Court has recognized that a permit denial can be both proper and confiscatory. The Legislature has adopted statutes which, by their terms, properly allow a total taking of private property. Cf. Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund, supra., pages 539, 540; see Graham v. Estuary Properties, 399 So.2d 1374, 1381 (Fla. 1980).[1]

The State cites no authority to support its position that one who unsuccessfully challenges the facial constitutionality of a statute that authorizes a total taking of private property is precluded from later bringing a circuit court action for inverse condemnation.

Indeed, this Court has long held that it is a denial of due process if review of the legality of a statute may be had only at the risk of penalties so great that it is better to yield to

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[1]Indeed, it is the permit denial which forms the predicate for Petitioners' complaint for inverse condemnation--a claim which this Court recognized need not be presented only to the district court on direct review of agency action:

> "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 page 539.

the orders of uncertain legality. Florida East Coast Railway Co. v. State, 79 Fla. 66, 83 So. 708, 715 (Fla. 1920).

In Florida East Coast Railway, this Court held at pages 715-716:

> Rules and orders of the Railroad Commission are administrative, not judicial, and are not conclusive. They are subject to review by the courts in any appropriate proceeding; and if the defendant reasonably and in good faith regarded the rule, for the violation of which the fines here sought to be enforced were imposed, as an unconstitutional violation of its property rights, it had the privilege of testing the validity of the rule in the courts. And, if the defendant proceeded in good faith and with due diligence to make the test in actions brought by the Railroad Commissioners for the enforcement of such contested rule, heavy fines cannot lawfully be imposed for violations pending such test, where the fines are so onerous as to intimidate the defendant in exercising its right to contest the validity of the administrative rule not having the characteristics of a final judgment, since such action would be a denial to the defendant of the equal protection of the laws, in violation of the federal Constitution, if not also a deprivation of property without due process of law in violation of the state and United States Constitutions.
>
> Accord, Atlantic Coastline Railway Co. v. Wilson and Toomer Fertilizer Co., 89 Fla. 224, 104 So. 593, 594 (Fla. 1925).

Therefore, applicant's right to contest the validity of the permit denial is not "mutually exclusive" to his right, after unsuccessfully challenging the permit denial, to file an action in inverse condemnation.

II.

The State has argued since the issue of taking can be raised on direct review to the district court, failure to do so bars a subsequent proceeding in the circuit court on the ground of res judicata. In other words, it is mandatory that an applicant raise the issue of inverse condemnation in an appeal from a permit denial by the Trustees of the Internal Improvement Trust Fund.

Key Haven holds precisely the opposite.

In the circuit court, Key Haven alleged that, although the Department of Environmental Regulation's action denying the permit was both proper and in accordance with the requirements of a constitutionally valid statute, the permit denial nevertheless resulted in an unconstitutional taking. Key Haven, supra, at page 539.

This Court first noted that Key Haven could not pursue the inverse condemnation action in circuit court and without first having exhausted its administrative remedies by taking an appeal of the permit denial to the Trustees of the Internal Improvement Trust Fund.

This Court then held at page 539:

> 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's direct review of agency action.
>
> * * *
>
> We disagree with the holdings in Albrecht v. State, 407 So.2d 210 (Fla. 2nd DCA 1981), and in

Coulter insofar as they conflict with our conclusions in this case.
[Emphasis supplied.]

This Court has recognized that although the taking issue may be addressed by the district court upon review of the permit denial, such review is not mandatory. The applicant may, as in the present case, exhaust its executive branch review, then contest the validity of agency action upon direct review to the district court, and, if such review be unsuccessful, file an action in the circuit court alleging that the permit denial, though adjudged proper, was confiscatory and constituted a taking of private property without just compensation.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioners' Reply Brief has been furnished by U.S. Mail, postage prepaid, this 29th day of March, 1983, to the following:

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