IN THE SUPREME COURT OF THE STATE OF FLORIDA

ATLANTIC INTERNATIONAL INVESTMENT CORPORATION,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondents.

CASE NO. 64,551

MAX SIMON, individually and as class representative,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondents.

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JOINT JURISDICTIONAL BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

The following abbreviations or reference symbols are used in this brief:

"Atlantic" -- refers to petitioner Atlantic International Investment Corp.

"CAE" -- refers to Cape Atlantic Estates.

"DER" -- refers to the State of Florida Department of Environmental Regulation.

"St. Johns" -- refers to the St. Johns River Water Management District.

"State" -- refers to the State of Florida.

"(A-) -- refers to the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Atlantic's brief omits mention of all facts that show this case ended in 1977 when the First District Court of Appeal approved a settlement agreement between Atlantic and DER. These facts, essential to understanding the First District's opinion, are set forth below.

Atlantic's plan for Cape Atlantic Estates ("CAE") called for construction of some 400 miles of drainage canals to drain CAE's 14,000 acres. It applied to DER for a permit to discharge the drainage water into off-site waters of the state. DER issued an intent to deny the permit in November, 1974. In February, 1975, Atlantic sought relief in circuit court against DER, the Department of Business Regulation and Volusia County contending, inter alia, that the permit denial would effect a "taking".[1]

The trial court directed Atlantic to pursue its administrative remedies before DER and purported to retain jurisdiction of the "taking" claim based on the denial. After an administrative hearing, DER entered a final order denying the permit, and Atlantic appealed to the First District challenging

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[1]Atlantic later joined the State of Florida and the St. Johns River Water Management District as defendants. The trial court entered orders granting motions to dismiss by Volusia and St. Johns, and also ordered a directed verdict in favor of Business Regulation. Atlantic did not timely appeal those orders. Hence, because those rulings stand (A-5, 6), this brief will focus on matters relating to DER.

the propriety of the permit denial. As the First District recounted in its opinion (A-4):

> Prior to a decision by this court on the petition for certiorari, but subsequent to oral arguments, Atlantic and DER entered into a stipulation and consent agreement which provided, inter alia, the following: (1) a 13-month baseline study would be conducted to establish water quality standards for discharges from the project; (2) that after construction of modified drainage facility DER would issue a 3-year temporary operation permit if the facility complied with the plans attached to the agreement; (3) that the facility would be monitored; and (4) if, upon expiration of the temporary permit no water quality violations remained uncured, DER would issue the operation permit. The parties' joint motion for this court's approval of this agreement stated that it 'resolve[d] or rendere[d] moot all issues formerly in dispute before this Court.' On June 29, 1977, this court approved the stipulation and consent agreement, vacated the DER order sought to be reviewed, remanded to DER for proceedings consistent with the terms and conditions of the stipulation and consent agreement, and dismissed the petition for writ of certiorari.

Atlantic's jurisdictional brief is patently misleading when it blandly states, in referring to the above sequence, that DER "granted a permit." (Atlantic's Brief pps. 1, 5, 7). The appeal was settled by the court approved consent agreement, not the administrative grant of a permit, and the agreement "resolved or rendered moot all issues . . . before the Court." As the opinion notes, the DER final order was vacated. Atlantic never undertook construction pursuant to the agreement and thus never received a DER permit.

Notwithstanding the settlement agreement, Atlantic returned to the circuit court where it amended its previously filed complaint in the same case and attempted to pursue its so called "constitutional taking claim" on two theories: 1) DER's final order (which the First District had vacated) wrongly denied the permit Atlantic sought in 1975, and thus wrongly delayed the project; 2) DER, in the consent agreement, imposed $11 million in additional construction costs for "road stabilization" which Atlantic could not afford. Without the improvements, according to Atlantic, the property could not be used and, hence, had been "taken" by DER and the State. The trial court, per Judge John A. Rudd, found a taking on this basis.[2]

Atlantic's plea for review is grounded in two fundamental misrepresentations to this Court: 1) that the consent agreement approved by order of the First District (which Atlantic's brief refers to as DER's "grant of a permit") was administrative agency action that it could attack in circuit court; 2) that under the guise of a "constitutional claim" over which the circuit court

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[2]The trial court reviewed the merits of the vacated denial and purported to find that the permit had not been denied on statutory grounds or to prevent environmental harm; that DER did not establish that granting the permit would adversely affect the public health and safety, etc.; and that DER ignored competent, substantial evidence in favor of the permit. (Final Judgment ¶s 50, 74, 75) (A-50, 61). It also found that the settlement agreement, approved by the First District at Atlantic's request, caused an increase in construction costs of at least $11 million and said DER "imposed" this cost. (Final Judgment ¶s 58, 63) (A-54, 56).

purportedly retained jurisdiction, it could relitigate the merits of the very permit issues it had represented to the First District were "resolved or rendered moot" by the settlement. In essence, its argument is that the First District misconstrued Key Haven v. Bd. of Trustees, 427 So.2d 153 (Fla. 1982), in ruling against such tactics.

Atlantic states that it could not present to the First District events occurring after the permit hearing in 1975, and that the trial court found a taking date of September 1, 1977. The record is clear that the settlement agreement (A-15) was approved on June 29, 1977; the only relevant event after that was that St. Johns informed Atlantic of a permitting requirement. (A-5) The trial court found Atlantic had no cause of action against St. Johns and that order was never appealed.

I. THE DECISION BELOW DOES NOT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE SAME QUESTION OF LAW.

Introduction

Not suprisingly, Atlantic's brief does not even attempt to point to whatever language or ruling in the opinion below allegedly conflicts with the language or ruling in any of the cases cited. The brief completely fails to show a basis for conflict review -- that is to show how the First District's opinion "on its face collides with a prior decision of [the Supreme] Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents." Kincaid v. World Ins. Company, 157 So.2d 517 (Fla. 1963). See also, Florida Power & Light v. Bell, 113 So.2d 697 (Fla. 1959); Kyle v.Kyle, 139 So.2d 885 (Fla. 1962). Instead of precise analysis, Atlantic offers a shotgun list of some seventeen or more "conflicting" cases none of which announce antagonistic principles on essentially the same facts. Trustees etc. v. Lobean, 127 So.2d 98, 100 (Fla. 1961). Argument that does no more than disagree with the "justice of the case" provides no basis for conflict review. Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

A. There is no conflict with Key Haven v. Bd. of Trustees, 427 So.2d 153 (Fla. 1982).

In Key Haven, supra, the Supreme Court only disapproved of that part of the First District's Key Haven decision (400 So.2d 66) that sought to preclude a taking claim in circuit court which conceded the correctness of agency action under pertinent statutes and regulations. The Supreme Court agreed with the First District, however, in holding that a mere "constitutionally rephrased" attack on the propriety of a permit denial in circuit court is barred:

> . . . direct review in 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. 427 So.2d at 159
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> * * *
>
> We agree with the district court, and wish to emphasize, that if a party in Key Haven's position has appealed to the trustees and received an adverse ruling, the only way it can challenge the propriety of the permit denial, based on asserted error in the administrative decision-making process or on asserted constitutional infirmities in the administrative action, is on direct review of the agency action in the district court. Id.
>
> * * *
>
> We emphasize that, by electing the circuit court as the judicial forum, a party foregoes any opportunity to challenge the permit denial as improper and may not challenge the agency action

> as arbitrary or capricious or as failing to comply with the intent and purposes of the statute. Id. at 160.

As shown in the statement of facts, ante, p. 2, Atlantic initially and properly attacked DER final action in the First District in 1976. Atlantic's so-called constitutional claim, renewed in the circuit court after the settlement, was simply a collateral attack on the merits of the vacated DER administrative order and the settlement agreement the First District approved in 1977. (See Final Judgment ¶s 50, 58, 63, 74, 75 at A-50 et seq.). The opinion below does not and cannot conflict with Key Haven in prohibiting such action in the circuit court, especially after a representation to the First District that the permitting issues were "resolved or rendered moot." As the opinion stated

> By proceeding in circuit court on a taking claim, after Atlantic had sought review of DER's denial of the permit in this court and after it had entered into a stipulation and consent agreement with DER, which was approved by this court, Atlantic effectively sought to do that which is impermissible under Key Haven. (A-7)

Atlantic argues the First District followed Coulter v. Davin, 373 So.2d 423 (Fla. 2nd DCA 1979), and Albrecht v. State, 407 So.2d 210 (Fla. 2nd DCA 1981), which the Supreme Court disapproved in part in Key Haven. These cases were disapproved only to the extent they would prohibit any taking claim in circuit court based on agency action. It is clear, however, that the First District did not rely on Coulter or Albrecht - cases it

did not even cite. Rather, it relied on Key Haven which clearly forbids an attack on the merits of agency action in circuit court.

B. There is no jurisdiction on the basis of Albrecht v. State, 407 So.2d 210 (Fla. 2nd DCA 1979).

Atlantic argues that Albrecht, supra, conflicts with Key Haven and that the decision below does also because the First District "adopts the same rule of law" as Albrecht. (Atlantic Brief, p.7). In Key Haven, at p. 159, Albrecht may have been read to preclude taking actions in circuit court that conceded the propriety of agency action. The First District's opinion below, however, ruled against a taking claim attacking the propriety of agency action in circuit court after the claimant sought appellate review and entered a settlement agreement. The Atlantic opinion does not rule on the same issue that Albrecht did, it does not follow that case and in no way conflicts with Key Haven. Hence, there is no jurisdiction on the same basis as Albrecht.

C. There is no conflict as to the Simon class on the basis of res judicata.

Atlantic urges the opinion below "expressly and directly" conflicts with some six cases that discuss generally the principles of res judicata.

It is first to be noted that the opinion does not anywhere discuss the applicability of res judicata to the Simon class; thus, it does not on its face conflict with, nor anywhere announce a controlling principle contrary to, the cases Atlantic cites under Point C of its brief. See Introduction and cases cited, ante, p. 5.

The Simon class is a class of intervenors who did not even attempt to enter this litigation until 1980, some six years after the permit application was filed with DER and over three years after settlement. (A-6) If Atlantic's statement is true, that in fact "all members had acquired their contract rights in the property before the permitting action was filed" [Brief, p. 8.], their intervention and challenge to the permit denial should have been undertaken in 1975, not 1980 and later.

As intervenors, the Simon class took the case as it found it in 1980 -- subject to the consent agreement which had "resolved or rendered moot" all permitting issues. Coast Cities Coaches, Inc. v. Dade County, 178 So.2d 703 (Fla. 1965). Res judicata aside, there is no law which entitles the class to relitigate permitting issues years after termination of the Chapter 120 proceedings. Nor does the class cite any such authority. As to res judicata, there is no reliance on or elucidation of that principle in the opinion, its application was not essential to the First District's decision, and hence there can be no conflict.

D. There is no conflict with "election of remedies" cases.

The gist of Atlantic's argument here is that it is not inconsistent or impermissible for it to attack the propriety of the denial first in the District Court of Appeal as it did, and, subsequently, after settlement, attack the agency's action as proper and confiscatory in circuit court. Atlantic argues the opinion below forbade that and thus conflicts with Key Haven, supra, and Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), which say administrative action may be statutorily proper and constitutionally confiscatory.

This argument again distorts the case and opinion below because Atlantic never conceded any DER action was proper. Insofar as Atlantic refers to its post settlement collateral attack on the vacated DER order, it did not concede the order's correctness in circuit court, and hence the opinion below does not conflict with but follows Key Haven. Moreover, insofar as the collateral action focused on the alleged costs of the settlement agreement, it attacked not agency action but a settlement for which it had solicited and obtained District Court approval. (A-8) This being so, there is no possible conflict with Key Haven or Estuary.

E. There is no conflict with "law of the case" cases.

There is no discussion or application of the "law of the case" doctrine in the First District's opinion so there can be no facial conflict with the cases Atlantic cites. Moreover, the First District enunciated no "guiding principle" or "law of the case" in Volusia County v. Dept. of Business Regulation, 325 So.2d 454 (Fla. 1st DCA 1976). The circuit court had directed Atlantic to contest the permit denial in the Chapter 120 administrative process, and the First District declined to disturb that order. Whatever "jurisdiction" the circuit court purported to retain, it could not have been to review the merits of the permit denial which Atlantic subsequently took to the First District or the costs and propriety of the settlement to which Atlantic agreed and the First District gave approval. That would be a highly strained interpretation of an order which in its entirety reads:

> Upon considering the briefs, the record, and oral argument, we find no reversible error.
>
> Accordingly, the interlocutory appeal is dismissed. (325 So.2d at 455.)

F. There was no "retroactive application of procedural rules to affect substantive rights" and hence no conflict.

The holding of the First District was simply that issues going to the merits of a permit denial cannot be reviewed in circuit court. This has long been the law in Florida, and

Atlantic recognized that in taking its appeal of the denial to the First District in 1976. In the opinion below, the First District simply and correctly applied what the Supreme Court referred to in Key Haven as the "accepted rule" -- constitutional issues going to the merits of agency action must be resolved by direct review in the district court, not a collateral attack in circuit court. (See Key Haven, 427 So.2d at 156). That agency action subject to appellate review may not be collaterally attacked in circuit court has been the law for decades. See DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957). This point was underscored by the Second District in Coulter v. Davin, 373 So.2d 423, 427 (Fla. 2nd DCA 1979).

Whether Atlantic could have or should have raised the taking question in its appeal, and whether it was retroactively deprived of its right to assert a taking claim, are irrelevant and even spurious issues and certainly no basis for any conflict argument. Atlantic chose to settle the case, and the court approved consent agreement gave it permission to construct the drainage system. The order Atlantic later attacked in circuit court had been vacated. The propriety of that order was, according to Atlantic's own representation to the First District, resolved by the settlement agreement.

There can be no conflict with Florida Forest etc. v. Strickland, 18 So.2d 251 (1944), and Aronson v. Cong. Temple De Hirsch, 123 So.2d 408 (Fla. 3d D.C.A. 1960), as Atlantic argues, because those cases concern rights acquired pursuant to statute or appellate rule and have nothing to do with administrative action and judicial review thereof.

G. The First District did not reweigh evidence.

According to the cases Atlantic cites, "reweighing" evidence essentially involves reconsideration of the credibility of live testimony. This did not occur. The trial court stated in its final judgment that the court approved settlement required Atlantic to stabilize roads at a cost of $11 million. It is submitted the trial court had absolutely no authority to second guess the First District and decide this settlement was a "taking", but the First District at p. 8 of the opinion (A-8) said the agreement did not require road stabilization. An examination of that document (A-15 et seq.) proves the First District absolutely correct. The cases Atlantic cites state that inherently incredible testimony or evidence may be rejected on appeal; here, the very document Atlantic relied on belied its claim.

H. There is no conflict with Estuary Properties.

The opinion below recognizes that Atlantic settled its claim on the permit denial in 1977, obtaining a court approved settlement. The opinion therefore cannot possibly conflict with the analysis of a continuing permit denial the Supreme Court undertook in Estuary.

Moreover, comparison of the two cases reveals a total dissimilarity of facts. A different conclusion on the "taking" question, which was not even necessary for the decision, cannot possibly constitute a conflict.

II. THE DECISION DOES NOT CONSTRUE A PROVISION OF THE FLORIDA CONSTITUTION.

Atlantic argues the Supreme Court has jurisdiction on the same basis it did in Key Haven, supra.

In Key Haven, the Supreme Court, with two pointed dissents, determined that the First District's opinion (400 So.2d 66) construed article X, section 6, Florida Constitution. In fact, the First District did fleetingly advert to that provision in a footnote at 400 So.2d 68. The opinion below, however, neither cited nor construed a provision of the Florida Constitution; it decided a procedural point -- that the "taking" question culminated in 1977 with the settlement and no collateral attack could be brought thereafter in circuit court. It did not in any

manner construe a constitutional provision as "construe" has been heretofore interpreted. Armstrong v. City of Tampa, 106 So.2d 407, 409, 410 (Fla. 1958); Rojas v. State, 288 So.2d 234 (Fla. 1973). This court has not decided that every purported "taking" claim involves express construction of article X, section 6. See, Smith v. City of Clearwater, 383 So.2d 681 (Fla. 2nd DCA 1980), app. dism. 403 So.2d 407 (Fla. 1981).

III. THE COURT SHOULD NOT EXERCISE ITS JURISDICTION.

Atlantic argues the court should exercise its jurisdiction because the "effect" of agency permitting actions, if not the merits, should be reviewable in circuit court. This plea is false because the circuit court did not review the DER order for its effect (since it had been vacated) but for its merits. It also found the District Court approved settlement, which was not "agency action", and which it had no right to review, contributed to the "taking".

Atlantic's contention that the old APA (§120.31, F.S., 1973) was inadequate is likewise false because it was entirely sufficient to allow the District Court to remand for any purpose or to reverse a denial not based on competent, substantial evidence and to direct issuance of the permit as originally applied for - in which case there could have been no taking claim. Atlantic is, if anything, the victim of its own tactics.

This case is now well into the seventh year following settlement. It has caused the state great expense. It should not be further prolonged. The fact that the petitioners are seeking nearly $150 million from the state treasury in this case may explain their persistence but it does not lend merit to the many distortions thrown at this Court.[3]

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[3]Atlantic claims the value of the 14,000 CAE acres is nearly $80 million. It also claims interest on that amount at the statutory rate since 1977 (the alleged taking date).

CONCLUSION

The Court should deny jurisdiction because no basis for it has been shown.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Cynthia S. Tunnicliff, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Drawer 190, Tallahassee, Florida 32302; Peter J. Winders Carlton, Fields, Ward, Emmanuel, Smith, Cutler, P.A., Post Office Box 3239, Tampa, Florida 33601; John C. Briggs, Esquire, 35 West Church Street, Orlando, Florida 32801; Daniel D. Eckert, Esquire, Post Office Box 429, Deland, Florida 32720; David Maloney, Esquire, Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32301; and Richard P. Lee, Esquire, Department of Environmental Regulation, 2600 Blairstone Road, Tallahassee, Florida 32301, this 20th day of December, 1983.

Louis F. Hubener

LOUIS F. HUBENER