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.	)	Case No. 64,552

JOINT JURISDICTIONAL BRIEF OF PETITIONERS

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INTRODUCTION

After trial, the Circuit Court entered a 50-page "Findings of Fact, Conclusions of Law and Final Judgment," finding that the cumulative acts of a number of state agencies (including among other things a delay of more than 6 years in granting a permit by DER) constituted a "taking" as of September, 1977 of the property of Atlantic International Investment Corporation ("Atlantic") and the 4,000 members of the class of purchasers of lots in Cape Atlantic Estates (the "Simon class"). The trial judge analyzed the facts both on an overall basis and under each of the six approaches to "taking" questions approved by this Court in Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla.), cert. denied, 454 U.S. 1083 (1981), found a taking under each of the approaches, and ordered the State to commence condemnation proceedings. The Final Judgment (F.J.) appears at the Appendix A 1-50.

The First District Court of Appeals reversed, holding that the trial court erred in reaching the merits at all because any "taking" claim should have been raised in an appeallate review of an earlier permit denial. (A 51 et. seq). This ruling was made despite the facts that:

(1) The First District had previously approved on interlocutory appeal the procedure of trying the "taking" case in circuit court after the permitting process was concluded.

(2) The factual and legal issues were not tried in the lower tribunal in the permitting case. The permitting record closed as of 1974 (compare the 1977 taking found by the trial court) and the parties had stipulated and the hearing officer had ruled that no constitutional "taking" issues were to be tried in the permitting case.

(3) None of the 4,000 members of the Simon class in the "taking" case were parties to the administrative permitting process or the "permitting appeal."

(4) The "permitting appeal" had been dismissed as moot by stipulation after the Department of Environmental Regulation (DER) decided to grant the permit while the permitting appeal was pending.

As an alternative holding, the district court quarreled with two of the findings of fact of the trial court, reweighing the evidence despite substantial evidence supporting the trial court's factual findings.

Atlantic and the Simon class assert conflict jurisdiction in this court on the basis of an express and direct conflict with:

(a) Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982).

(b) Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla.), cert. denied, 454 U.S. 1083 (1981).

(c) Election of remedies cases including Key Haven, supra; Estuary Properties, supra; State v. Panama City, 171 So. 760 (Fla. 1937).

(d) "Law of the case" cases including Greene v. Massey, 384 So.2d 24 (Fla. 1980); Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 467 (Fla. 1976); Strazzula v. Hendrick, 177 So.2d 1 (Fla. 1965).

(e) Retroactive application of procedural rules and "access to the courts" cases including Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977); Florida Forest and Park Service v. Strickland 154 Fla. 472, 18 So.2d 251 (1944); GBB Investments, Inc. v. Hinterkopf, 343 So.2d 899 (Fla. 3d DCA 1977); Aronson v. Congregation Temple De Hirsch, 123 So.2d 408 (Fla. 3d DCA 1960).

(f) Cases prohibiting appelate court's reweighing of facts including Marshall v. Johnson, 392 So.2d 249 (Fla. 1980); Delgado v. Strong, 360 So.2d 73 (Fla. 1978); Shaw v. Shaw, 334 So.2d 13 (Fla. 1976); Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972).

(g) Cases prohibiting res judicata application to a non-party and other res judicata decisions including McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 323 (1935); Coral Realty Co. v. Peacock Holding Co., 119 Fla. 916, 138 So. 622 (1931); Hay v. Salisbury, 92 Fla. 446, 109 So. 617 (1926).

In addition, this Court has jurisdiction because the First District has expressly construed a provision of the State Constitution, Article X Section 6.

STATEMENT OF THE CASE AND FACTS

The facts are contained in the trial court's Final Judgment A 1-50, and those findings must be read to fully understand how the actions of the State of Florida, the abolishment of the South County Drainage District, the inherent delay in resolving with Volusia County the problems created by that state action, the arbitrary and unreasonable actions of the Department of Pollution Control, and the improper assertion of jurisdiction by St. John's Water Management District, among other things, coincided to result in the situation that the trial court found to be a "taking." For purposes of understanding the District Court's opinion, however, the facts are that at the time Atlantic began selling lots in Cape Atlantic Estates subdivision in 1967, the only State requirements were those of the Florida Division of Land Sales that the promised improvements of graded dirt access roads and surface water drainage be installed. The installation of these improvements was stipulated to be a requirement of the State upon the registrations with the Land Sales Division beginning in 1967. (F.J. ¶28-30, A-18). By the time the State-created delays began in 1970, a 12-mile main canal had been constructed and the improvements were on time and within budget. (F.J. ¶22, A 15). By the time the Department of Pollution Control first asserted jurisdiction in 1971, most of the land had already been sold (under agreements for deed) to the members of the Simon

class of purchasers in Cape Atlantic Estates who are parties to this case. (F.J. ¶31, A 19).

One of the things that had happened during the course of the delays and events (beginning in 1970 and ending in reality well after the date of "taking" in 1977) was the arbitrary denial by the Department of Pollution Control's administrative staff of a permit in 1974. (F.J. ¶44-53 (particularly ¶50), A 23 et. seq.). When that happened, Atlantic filed (a) a request for an administrative hearing on the permit denial and (b) in early 1975, this suit in Leon County Circuit Court for inverse condemnation, asking that the court determine that its property had been "taken" without compensation. On motion to dismiss the circuit court complaint for failure to exhaust administrative remedies, Judge Cawthon, recognizing the tension between the constitutional claims triable in circuit court and the administrative permitting process, ruled that he would not dismiss for failure to exhaust administrative remedies, but that he would postpone trial of the "taking" claim until the administrative proceedings were exhausted. On interlocutory appeal of that order, the First District Court of Appeal affirmed, finding no reversible error. Volusia County v. Department of Business Regulation, 325 So.2d 454 (Fla. 1st DCA 1976). Thus, the prosecution of this circuit court action was held in abeyance while the administrative permitting process ran its course, and any constitutional "taking" issues were eliminated from the permitting case by stipulation. (Plaintiff's Exhibit 35,38).

The hearing officer recommended that the permit be issued, (Plaintiff's Exhibit 38) but the agency head denied the permit.

Review of the denial was sought in the First District Court of Appeal by writ of certiorari under F.S. § 120.31. After argument, but prior to decision, DER agreed to grant a permit and the parties stipulated that the proceedings in the district court were moot and should be dismissed. Thereafter, after certain other events had occurred, Atlantic supplemented its complaint in the circuit court case, the Simon class members intervened as additional plaintiffs, and Atlantic and the Simon class successfully prosecuted the "taking" claims. The trial court found as a matter of fact that the cumulative effects of the years of state action and state caused delays was to deprive Atlantic and the class of all reasonable use of their lots in Cape Atlantic Estates, constituting a "taking" of the property. The final judgment ordered the state to begin condemnation proceedings. (F.J. ¶83, A41, A49).

In the decision sought to be reviewed, the First District Court of Appeal reversed, holding that the circuit court erred in reaching the merits of the case at all! Contrary to the First District's previous opinion in the interlocutory appeal in this case, approving the procedure of holding the circuit court case in abeyance while the administrative process was completed, the district court held on appeal from the Final Judgment that Atlantic was foreclosed from prosecuting its constitutional claim in circuit court. This opinion held that when Atlantic had contested the permit denial, it should have had its inverse condemnation claim determined in the district court during the permit denial review which the parties had dismissed as moot when DER granted the permit. Although the members of the Simon class had not been parties to the permitting proceedings, the district court reversed as to them as well.

POINT I. THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THE SUPREME COURT ON THE SAME QUESTIONS OF LAW

A. Direct Conflict with Key Haven (Fla. 1982). The district court's opinion, holding that Atlantic's petition for writ of certiorari to review the permit denial foreclosed it from prosecuting its inverse condemnation claim in circuit court, expressly and directly conflicts with this Court's decision in Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982) [hereinafter cited Key Haven (Fla. 1982)]. In Key Haven (Fla. 1982), the Florida Supreme Court disapproved of the First District's holding that a "taking" claim following a permit denial could only be presented to the district court of appeal on direct review of agency action. The district court had purported to follow a doctrine announced in Coulter v. Davin, 373 So.2d 423 (Fla. 2d DCA 1979), that those constitutional issues which could have been raised by the party in a petition to the district court for review of agency action are foreclosed and may not be subsequently asserted in a suit in circuit court. By the time this court announced its decision in Key Haven (Fla. 1982) the Second District Court of Appeal had held in Albrecht v. State, 407 So.2d 210 (Fla. 2d DCA 1981), that if a party appeals a permit denial, a subsequent circuit court "taking" claim is barred. Thus, the First District in Key Haven had held a taking claim barred for failure to exhaust administrative remedies through appeal to the district court level, and Albrecht had held that an appeal from a permit denial must raise all inverse condemnation issues or they would be barred.

The Florida Supreme Court in Key Haven (Fla. 1982) reversed the First District and expressly disapproved of the holdings in Albrecht and Coulter and further held that a party can accept top level administrative action as final (without district court review) and use that as the factual basis of a circuit court "taking" case. That is what Atlantic did with respect to the DER action granting the permit and stipulating that the permitting appeal was moot. Thus, Key Haven (Fla. 1982) holds both (1) administrative remedies need be exhausted only through the top executive branch level before proceeding in circuit court for inverse condemnation (reversing the district court in Key Haven) and (2) the fact that an appeal is taken does not mean that all inverse condemnation claims must be made in the district court (disapproving Albrecht). The First District Court of Appeal in the present case held that Atlantic, by filing a 1976 petition of writ of certiorari in the permitting case was foreclosed from later proceeding with the inverse condemnation case in circuit court. Thus, the district court here adopted the very Albrecht rule that the Supreme Court disagreed with in Key Haven (Fla. 1982). Not only did this Court announce in Key Haven (Fla. 1982) that it disagreed with Albrecht, but it has accepted jurisdiction over Albrecht, which was argued before the Supreme Court on May 3, 1983. Consequently, this court has conflict jurisdiction over the First District Court's decision in the present case because of the conflict with Key Haven (Fla. 1982).

B. Jurisdiction on same basis as Albrecht. The First District's decision here adopts the same rule of law adopted by Albrecht, supra. This Court has determined it has jurisdiction in

Albrecht (Case No. 61,600, Order dated January 19, 1983). Therefore, the Court has jurisdiction in this case.

C. As to Simon Class, conflict with McGregor v. Provident Trust, Coral Realty v. Peacock Holding, and other res judicata cases.

The First District in the present case held that the failure to determine the "taking" claim on appeal from the earlier permitting denial barred even the Simon class from prosecuting its constitutional claim in circuit court. This ruling was made despite the fact that none of the members of the Simon Class in the "taking" case were parties to the administrative permitting process or the permitting appeal. All members had acquired their contract rights in the property before the permitting application was filed. Atlantic was contractually obligated to accomplish the improvements and Atlantic and Volusia County were the permit applicants. Under no circumstances then, could the district court's decision, even if correct, that Atlantic's inverse condmenation claim should have somehow been raised in the district court permitting review, have any effect on the constitutional rights of the non-party lot owners. This application of res judicata to the Simon class expressly and directly conflicts with such cases as McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 323 (1935) and Coral Realty Co. v. Peacock Holding Co., 103 Fla. 916, 138 So. 622 (1931) which establish that the rights of persons who have an interest in the subject matter of litigation cannot be adjudicated or affected by a judgment rendered in a suit to which they were not made parties.

Other elements of res judicata and estoppel by judgment are also missing and create conflict as to both the Simon class and Atlantic Res judicata cannot apply to questions which could not be adjudicated in the prior action, and in view of the limited certiorari standard of review

under the applicable old APA, § 120.31 (1973), no inverse condemnation claims could properly have been decided. Further, the doctrine of estoppel by judgment is inapplicable because that doctrine only precludes (a) identical parties from relitigating matters (b) actually litigated and determined by the court. No inverse condemnation issues were decided by the court in the permit review because it was dismissed as moot when the permit was granted on different terms. The First District's decision conflicts with Gordon v. Gordon, 59 So.2d 40 (Fla.) cert. denied, 344 U.S. 878 (1952); Hughes v. Town of Davenport, 141 Fla. 382, 193 So. 291 (1940); Mabson v. Christ, 104 Fla. 606, 140 So. 671 (1932); Hay v. Salisbury, 92 Fla. 446, 109 So. 617 (1926).

D. Conflict with State v. Panama City, Estuary Properties and Key Haven and other "Election of Remedies" cases.

The Florida Supreme Court held in State v. Panama City, 171 So. 760, 762 (Fla. 1937) that "election [of remedies] implies a choice between alternative and inconsistent rights or remedies . . . It has no application to existing or consistent remedies." The Supreme Court held in Key Haven (Fla. 1982) and in Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla.), cert. denied, 454 U.S. 1083 (1981), that an administrative body's actions can be both proper and confiscatory, that an administrative order, although proper, may nevertheless result in a compensable taking and that permitting remedies and taking claims are therefore not inconsistent.[1/]

1/ As the Supreme Court said in Key Haven (Fla. 1982) at page 159 "we reject the assertion that this permit denial cannot be both proper and confiscatory . . . As we stated in Graham v. Estuary Properties, 'it may be . . . that a regulation complies with standards required for the police power, but still results in a taking.'"

To the contrary of all those decisions, however, the First District held in this case that Atlantic had, by filing its 1976 petition to review the permit denial, elected its remedy and was thereby foreclosed from pursuing its pending inverse condemnation claim, and further described the review of the permit denial as "an alternative remedy" to inverse condemnation. The opinion thus applies election of remedies principles to consistent remedies and conflicts with Panama City, Key Haven, and Estuary Properties.

E. Conflict with Greene v. Massey and other "law of the case" cases. The district court's previous opinion on interlocutory appeal in this case, Volusia County v. Department of Business Regulation, 325 So.2d 454 (Fla. 1st DCA 1976), found no reversible error in Judge Cawthon's 1975 ruling that he would not dismiss the inverse condemnation complaint for failure to exhaust administrative remedies, but would postpone trial until the administrative process was completed and then try the taking claim. The assignments of error in that appeal appear in the record at R. 90 and again at R. 335. (A. 60). The assignments assert that the refusal to dismiss the complaint was error on the grounds that the circuit court lacked jurisdiction of the inverse condemnation claim because jurisdiction would properly be in the district court of appeal on review of the permit denial. The opinion in the interlocutory appeal rejected that contention and affirmed, thus establishing as "the law of the case" Judge Cawthon's ruling that the circuit court properly retained

jurisdiction to try the constitutional issues after the administrative permitting process was completed. The decision presently before the Court held exactly the opposite.

The subsequent change of position in the present decision holding, after trial and final judgment, that the circuit court erred in reaching the merits of the inverse condemnation action, expressly and directly conflicts with the following decisions: Greene v. Massey, 384 So.2d 24 (Fla. 1980);[2/] Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 467 (Fla. 1976);[3/] Strazzula v. Hendrick, 177 So.2d 1 (Fla. 1965).[4/]

F. Conflict with Florida Forest And Park Service v. Strickland and other cases prohibiting retroactive application of procedural rules to affect substantive rights. The holding that the filing of the petition for certiorari following the permit denial foreclosed Atlantic from proceeding with its "taking" claim in circuit court, in view of the

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2/ "All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case."

3/ "Enunciations in a prior appellate decision upon the same case becomes the law governing that case, and the court upon a second appeal must take judicial notice and knowledge of the opinion and the judgment rendered in the first appeal, as well as the facts presented by the transcript of record in the original case."

4/ "An exception to the general rule binding the parties to 'a law of the case' at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons -- and always, of course, only where 'manifest injustice' will result from a strict and rigid adherence to the rule."

previous interlocutory ruling to the contrary, effectively abolished Atlantic's remedy. This "catch 22" result expressly and directly conflicts with such cases as Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944) and Aronson v. Congregation Temple De Hirsch, 123 So.2d 408 (Fla. 3d DCA 1960), cert. denied, 128 So.2d 585 (1961) which establish that where a statute or rule has received a given construction and parties have relied on such construction, such rights should not be destroyed by retroactive application of a subsequent overruling decision.

Petitioners clearly had every right to rely upon the procedure established on interlocutory appeal whereby it could have its constitutional dispute heard in circuit court. The district court's denial of that right is the result of the district court erroneously giving retrospective effect to its interpretation of Key Haven (Fla. 1982), and expressly and directly conflicts with the Florida Supreme Court's opinion in Florida Forest & Parks Service, supra and the cases following it.

G. Conflict with Marshall v. Johnson and other cases prohibiting appellate courts reweighing facts. As an alternative ground for its decision, the district court disagreed with specific facts found by the trial court despite substantial supporting evidence. Although it plainly appears from the face of the opinion that the district court simply reweighed the evidence, a partial list of the evidence supporting the trial court's view of the facts appears at A. 62 et seq. The decision thus conflicts with the substantial body of case

law holding that a district court of appeal may not substitute its judgment for that of the fact finder by reevaluating the evidence. That this creates conflict jurisdiction is established by Marshall v. Johnson, 392 So.2d 249 (Fla. 1980), holding that where the district court does substitute its judgment for that of the fact finder by reevaluating the evidence, a jurisdictional conflict is created with the Supreme Court's decisions in Delgado v. Strong, 360 So.2d 73 (Fla. 1978); Shaw v. Shaw, 334 So.2d 13 (Fla. 1976); Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972).

H. Direct Conflict with Estuary Properties. The trial court found a "taking" under each of the six alternative approaches mentioned by the Supreme Court in Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla.) cert. denied, 454 U.S. 1083 (1981). Estuary Properties holds that "taking" questions are questions of fact, and lists six methods of analyzing the facts to determine if a "taking" has occurred. Even if the appellate court could disagree with some of the specific fact findings of the trial court, that does not mean that there has been no "taking" here, because the facts have been analyzed and a "taking" found under each alternative factual analysis. Accordingly, the judgment should have been affirmed under the alternative approaches and the district court's opinion expressly and directly conflicts with Estuary Properties.

POINT II. THE PRESENT DECISION EXPRESSLY CONSTRUES A PROVISION OF THE FLORIDA CONSTITUTION

This Court determined in Key Haven (Fla. 1982) that it had jurisdiction because the First District had necessarily construed

Article X Section VI of the Florida Constitution in analyzing the appropriate forum for determining an inverse condemnation action. The First District's analysis in this case is identical, and accordingly Key Haven (Fla. 1982)'s jurisdictional determination establishes that this Court has jurisdiction here.

POINT III. THE COURT SHOULD EXERCISE ITS JURISDICTION

The Florida Supreme Court clearly held in Key Haven (Fla. 1982) that the circuit court does have jurisdiction to hear inverse condemnation cases and that any question of exhaustion of remedies is not a matter of the circuit court's jurisdiction, but a matter of judicial policy. 427 So.2d at 156-57. Thus, any procedural method which results in the circuit court's deciding only the constitutional effects of government action and not permitting questions per se, is permissible under Key Haven (Fla. 1982) and should be approved, particularly when it has become "the law of the case" and particularly when it is a matter of Florida's constitutional policy to decide cases on the merits. Because of the tension between the constitutional claims triable in circuit court and the administrative permitting process, this court should exercise its authority and accept jurisdiction over the present case to further clarify the status of Florida law under Key Haven (Fla. 1982). This is especially true in light of the First District Court of Appeal's insistence upon applying a rule of law which this Court so firmly disagreed with in Key Haven (Fla. 1982).

There are also practical reasons why the court should exercise its authority to take jurisdiction in the case. The district court's opinion, as a practical matter, conflicts with Key Haven's plainly implied position that a claim of "taking" may be raised in a direct review proceeding only if an adequate record is available. It is very clear that the permitting record was not and could not have been sufficient to assert the "taking" issue in view of the fact that: (1) by rule and enforcement of the rule by the hearing officer, the record evidence in the 1976 certiorari proceeding included only facts up through 1974; (2) the trial court here found a 1977 date of taking; (3) the record here shows that the parties stipulated and the hearing officer held the constitutional issues were eliminated from the permitting case; (4) all the parties stipulated in the district court that the granting of the permit rendered moot all issues before the district court in the permitting review; and (5) no taking issues were before the permitting agency or the permitting court.

Furthermore, the permitting review involved in the present case was governed by the "old" administrative procedures act, which governed cases begun before 1975 and which specifically confined the district court's review to a certiorari standard. See Fla. Stat. 120.31 (1973). Under the district court's certiorari jurisdiction, review is limited to a review (1) of the record and (2) to determine failure of the hearing process to comply with the essential requirements of law. In contrast, the "new APA" grants judicial review as of right - a full appeal standard of review. Thus, although

Key Haven (Fla. 1982) indicates that there is a possibility in a 120.68 review that, if the record is adequate, the state may be ordered to commence condemnation proceeding in quite a different statute applied to the 1976 review. Thus, even without "the law of the case" announced in the previous interlocutory appeal, Key Haven (Fla. 1982) cannot apply to a 120.31 certiorari proceeding.

CONCLUSION

Because of the continuing tension between constitutional claims triable in circuit court and the administrative permitting process, and to resolve the other conflicts and the constitutional issues, the Court should accept jurisdiction.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Joint Jurisdictional Brief of Petitioners and Appendix has been furnished by mail, this 28th day of November, 1983, to the following:

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