O/a 3-5-85

IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION,

Petitioner,

v.

MARTIN BOWEN SR. and MARTIN BOWEN JR.,

Respondents.

Case No. 65,264

Review of the Decision of the
District Court of Appeal of Florida,
Second District

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RESPONDENTS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA STATUTES

FLORIDA LAWS

FLORIDA ADMINISTRATIVE CODE

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner, Florida Department of Environmental Regulation, defendant/appellee below, will be referred to as "DER" or "the agency."

Respondents Martin Bowen, Sr., and Martin Bowen, Jr., plaintiff/appellants below, will be referred to as the Bowens.

References to the record will be cited as "R.___."

Pages in the Appendix accompanying this Brief will be referred to as "Bowen App. ___."

References to Petitioner's Brief on the Merits will be cited as "DER Brief at ___," and Petitioner's Appendix to its Brief on the Merits will be cited as "DER App. ___."

STATEMENT OF THE CASE

This is a case of first impression involving an inverse condemnation action arising under and controlled by the legislative provisions of Chapter 78-85, Florida Laws, the "Property Rights Act of 1978." This case arises on review of the decision of the Second District Court of Appeal in Bowen v. Florida Department of Environmental Regulation, 448 So. 2d 566 (Fla. 2d DCA 1984), in which the Second District applied the Property Rights Act to reverse a circuit court order dismissing the action for failure to exhaust administrative remedies. This Court should affirm the decision of the Second District in order to effectuate the purposes of the Property Rights Act.

STATEMENT OF THE FACTS

The following statement of the facts is submitted to address areas of disagreement with the statement of the facts in the Department of Environmental Regulation's brief on the merits.

This action involves the Bowens' several attempts, over a period of three-and-one-half years, to design a plan of development for their property that would be acceptable to DER. The Bowens own approximately four (4) acres of land in Everglades City, Florida. (R. 5) In order to develop that property, they were required to obtain a dredge and fill permit from DER pursuant to Chapters 403 and 253, Florida Statutes.

Beginning with the filing of their first permit application on October 11, 1978,[1] the Bowens made repeated attempts and spent substantial monies to formulate a development plan for the use of their land that would comply with DER's controlling environmental statutes and regulations. (R. 6) A different development plan was submitted on August 8, 1980; yet another plan was submitted on December 1, 1980; and a final development plan was submitted on October 8, 1981.[2] In all, four different development plans were submitted to DER. Under DER's statutory requirements, none was found acceptable.

During DER's three-and-one-half year review of the Bowens' development plans, it conducted at least two thorough site inspections of the property and prepared two separate environmental reports concerning the site.[3] Contrary to the suggestion of DER (Brief at 2-3), however, the Bowens provided sufficient information concerning the mean high water (MHW) line for the agency to process the application on the merits. After reviewing the Bowens' last development plan, the agency requested a survey to determine the mean high water (MHW) line on the property. (DER App. 2) The Bowens asked for an explanation of

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1/ As alleged on Page 2 of the Complaint (R.6), the first application was filed on October 11, 1978, not in October of 1981 as incorrectly suggested by DER. (See DER Brief at 2)

2/ Bowen App. B. and C; see R. 6. See also DER App. 1 and 6.

3/ Bowen App. H; see Bowen App. C. See also R. 10; DER App. 6 and 9.

the sudden need for the mean high water survey, and requested that DER use an existing survey of "spot elevations" of the property in lieu of the mean high water survey.[4] In response, DER agreed, stating it would process the application based upon the information submitted to date and would assume, in the absence of the MHW survey, "that the provided spot elevations document at least a portion of the site as waterward of MHW."[5] Based on this and other information, DER made express findings that the Bowen project proposed to place fill material both "waterward and landward of MHW."[6]

On April 5, 1982, DER issued a notice of intent to deny the permit for failure to meet the requirements of Chapters 253 and 403, Florida Statutes, describing in great detail the expected adverse impacts to water quality, habitat, fish and wildlife, and the public interest. (R. 17-19, Bowen App. F) The Bowens did not request an administrative hearing under Chapter 120, Florida Statutes, to challenge DER's action as an invalid exercise of the police power. (R. 10) On June 18, 1982, DER took final agency action by issuing a Final Order denying the Bowens' permit

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4/ Bowen App. D; see DER App. 7.

5/ Bowen App. E; see DER App. 8.

6/ Bowen App. F and G. DER's Statement of the Facts curiously fails to mention that DER agreed to process the application on the merits based on the spot elevations, or that DER made findings that the project would be located both "waterward and landward of MHW."

application on the merits. (R. 6, 10; Bowen App. G; Slip Op. at 2, Bowen App. A)

DER's final decision to deny the Bowens' development permit, following its failure to approve three earlier plans, left the Bowens with no reasonable, economically viable use of their property. (R. 8) The Bowens, therefore, filed this action in circuit court on September 15, 1982, for inverse condemnation seeking payment of just compensation for DER's taking of their private property and requested a jury trial of all issues so triable of right. (R. 9)[7]

7/ Counts II-IV of the Complaint seek just compensation for a taking of private property. Count I, on the other hand, requested a declaration that DER was without jurisdiction over the property or activities. As previously stated (R. 37, n. 1), plaintiff/respondents will voluntarily dismiss Count I from the action. See generally State Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787 (Fla. 1st DCA 1982).

ARGUMENT

I.

THE LEGISLATURE HAS ALLOWED TAKING ACTIONS TO BE BROUGHT DIRECTLY IN CIRCUIT COURT FOLLOWING FINAL AGENCY ACTION

The Bowens seek payment of just compensation for an alleged "taking" of real property caused by DER's denial of a dredge and fill permit in accordance with Chapters 403 and 253, Florida Statutes. A new mechanism for bringing inverse condemnation (i.e., "taking") actions was established by the Legislature in 1978 with the enactment of the "Property Rights Act of 1978," Chapter 78-85, Florida Laws.[8] This Act, codified in several sections of the Florida Statutes (i.e., Fla. Stat. §§161.212, 253.763, 373.617, 380.085, and 403.90), allows aggrieved parties to go directly to circuit court after "final agency action" to seek judicial relief for a taking. Sections 253.763(2) and 403.90(2), Florida Statutes, provide:

> Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located . . . .

These statutes, therefore, alter prior case law by authorizing

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8/ See Griffin v. St. Johns River Water Management District, 409 So. 2d 208, 210 (Fla. 5th DCA 1982).

direct circuit court review of taking actions following final agency action.[9]

Circuit court review, however, is limited to determining whether the final agency action constituted a taking without just compensation. Review of the agency action to determine whether the action was in accordance with existing statutes and based on competent substantial evidence -- that is, whether it was a valid exercise of the police power -- must still proceed in accordance with Chapter 120. Id. This requirement is consistent with the settled principle that agency action can be a valid exercise of the police power, yet nevertheless result in a taking of property.[10] The Property Rights Act, therefore, prescribes what the Fifth District Court of Appeal called a "bifurcated appeal process," with two alternatives available to a property owner aggrieved by final agency action:

9/ See Slip Op. at 4; Griffin, 409 So. 2d at 210:

> Some case law apparently indicates that pursuit of Chapter 120 review . . . is a prerequisite to being able to raise the "inverse condemnation" or "taking" issue in the circuit court. Some courts have also held that an issue, like "unjust taking" of property, must be raised in the Chapter 120 appeal before it can be raised in the cirucit court. However, none of these cases consider the later applicable statutes, section 253.763 or section 373.617. (Citations omitted)

10/ Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922); Albrecht v. State, 444 So. 2d 8 (Fla. 1984); see Dade County v. National Bulk Carriers, Inc., 450 So. 2d 213, 215 (Fla. 1984).

> If the aggrieved party wants to appeal issues dealing with whether the agency followed the statutes or rules or acted on competent substantial evidence, it must perfect its appeal in accordance with section 120.68. If it claims the agency action constitutes an "unconstitutional taking" of property, it must file an action in the circuit court, pursuant to section 373.617(2). There the circuit court can fully litigate de novo this issue and prepare a complete record.

Griffin v. St. Johns River Water Management District, 409 So. 2d 208, 210 (Fla. 5th DCA 1982).

A. The Bowens Obtained Valid, Final Agency Action as Required by Statute.

The statutory procedures for proceeding to circuit court for a taking action are straightforward. A property owner first obtains final agency action, and the agency's final action must be on the merits. (Slip Op. at 5) Within 90 days of the agency's final action on the merits, the property owner may file a taking action in circuit court. Once this is done, he is foreclosed from challenging the agency's action as an invalid exercise of the police power.

The Bowens followed the procedures prescribed by the Legislature. After submitting four separate development plans to DER over three-and-one-half years, the Bowens obtained final agency action on June 18, 1982, when DER issued its Final Order, in writing, containing findings of fact and conclusions of law,

which was filed with the agency clerk. (R. 10, Bowen App. G) Thus, DER's Final Order unquestionably constituted final agency action under Sections 120.52 and .59, Florida Statutes. Moreover, DER's final action was on the merits. (Slip Op. at 2) The Bowens, therefore, fully complied with the unequivocal requirements of Sections 253.763 and 403.90, Florida Statutes.

B. The Property Rights Act Does Not Require the Pursuit of Agency Appeals Following Final Agency Action

On its face, the Property Rights Act requires only that the property owner obtain "final agency action" before proceeding to circuit court for a taking action. A plain reading of this straightforward Act demonstrates that the Legislature did not require an appeal of final agency action in order to pursue a taking action. Thus, an appeal of DER's final agency action to the Trustees of the Internal Improvement Trust Fund under Section 253.76, was not required by Section 253.763, Florida Statutes.

Through its enactment of the Property Rights Act, therefore, the Legislature altered prior case law established by Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982). Although Key Haven was an inverse condemnation action, it was decided under Florida law as it existed prior to enactment of the Property Rights Act. Under Key Haven, a property owner was required to pursue all potential administrative appeals before instituting a

taking action. The unambiguous terms of the Act have changed that requirement. This Court, in Albrecht v. State, 444 So.2d 8 (Fla. 1984), refined the prior case law by explaining that the propriety of the agency action was the key factor to be considered, and that once propriety had been determined, irrespective of the manner in which it was determined, the taking action would then be ripe:

> The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists. . . . Whether the party agrees to the propriety or it is judicially determined is irrelevant. In either case the matter is closed and a claim of inverse condemnation comes into being. [Id. at 12-13]

Therefore, the property owner's acceptance of the agency action as a valid exercise of the police power concludes the administrative process for purposes of pursuing a taking action in circuit court.

C. The Bowens Accepted DER's Final Action as a Valid Exercise of the Police Power

In this case, following DER's long and involved review of the Bowens' development plans and applications under the substantive requirements of Chapters 253 and 403, Florida Statutes, the Bowens accepted DER's final agency action as a valid exercise of the police power. In other words, after submitting four

different development plans to DER, it now appears to the Bowens that their property cannot be developed in compliance with the requirements of governing environmental statutes and rules. Accordingly, the Bowens asserted in the complaint that DER's final action denying a permit left them with no reasonable, economically viable use of their property and no reasonable return on their investment -- that is, DER's final action constituted a taking of property requiring payment of just compensation. Having accepted DER's final action as a valid exercise of the police power, they were authorized by Sections 253.763 and 403.90 to file an inverse condemnation action in circuit court.

The Bowens spent more than three years trying to obtain development approval from DER. They now seek a trial in circuit court to prove DER has left them with no economically viable use of their property. Because the Bowens fully complied with the requirements of the Property Rights Act, this Court should affirm the decision of the Second District Court of Appeal.

II.

AN ADMINISTRATIVE HEARING WOULD HAVE BEEN POINTLESS BECAUSE AGENCIES CANNOT ADJUDICATE TAKING ACTIONS

The Department of Environmental Regulation contends this action should be dismissed for failure to exhaust administrative

remedies because the Bowens did not pursue an expensive administrative hearing challenging the validity of DER's decision. No such hearing is required, however, under any applicable statute as a prerequisite to final agency action. Moreover, an agency hearing on the only contested issue -- whether DER's decision resulted in a taking -- would have been pointless because agencies cannot adjudicate taking cases. The doctrine of exhaustion of administrative remedies, therefore, cannot fairly or reasonably be applied in this action.

A. An Administrative Hearing Is Not Required for Final Agency Action under Chapters 120, 253, or 403, Florida Statutes

There is no requirement in Sections 403.90 or 253.763, Florida Statutes, for an administrative hearing prior to final agency action. There must be final agency action before an aggrieved party may proceed to circuit court, but that final action is not conditioned on a prior administrative hearing.

Furthermore, Chapter 120 in no way mandates a Section 120.57 hearing before final agency action. In fact, Chapter 120 expressly recognizes that final agency action may occur in the absence of a prior administrative hearing: Section 120.59(1)(c), for example, contains express requirements for rendering a final order where there has been no prior administrative hearing. In addition, Section 120.68, which authorizes judicial review by the district courts of appeal following final agency action,

expressly recognizes that such judicial review may occur "when there has been no hearing prior to agency action." Fla. Stat. §120.68(6).[11] Finally, DER's own rules specifically acknowledge that an administrative hearing is unnecessary for there to be final agency action. See Rule 17-103.155(3),(4), Fla. Admin. Code.

Nevertheless, DER essentially argues that its decisions cannot constitute "final agency action" until the Division of Administrative Hearings has conducted Section 120.57 proceedings;

11/ It is not uncommon for the Legislature to provide for judicial review of agency proceedings without intervening administrative processes. See England and Levinson, Florida Administrative Practice Manual, § 15.07(b). See, e.g., Fla. Stat. §§ 120.54(4)(d), .56(4) ("Failure to proceed under [these sections] shall not constitute failure to exhaust administrative remedies"). In addition, Fla. Stat. § 120.73 preserved then-existing circuit court proceedings in lieu of administrative hearings, allowing citizens the right to seek injunctive relief in circuit court -- without first pursuing an administrative hearing -- to prevent agency violations of the Public Records Law, Fla. Stat. Ch. 119, and the Sunshine Law, Fla. Stat. Ch. 286.

See also Cherry v. Bronson, 384 So. 2d 169 (Fla. 5th DCA 1980) (declaratory suit by discharged employee was authorized despite pending administrative hearing regarding the discharge); Jones v. Braxton, 379 So. 2d 115 (Fla. 1st DCA 1979) (injunctive relief allowed to prevent school board from breaching its own contract without requiring plaintiffs to exhaust administrative remedies); Times Publishing Co. v. Florida Department of Corrections, 375 So. 2d 304 (Fla. 2d DCA 1979) (judicial review of orders adopting emergency rules need not await administrative measures pursuant to Fla. Stat. §120.54(9); Postal Colony Company v. Askew, 348 So. 2d 338 (Fla. 1st DCA 1977), aff'd sub nom Askew v. Cross Keys Waterways, 372 So. 2d 913 (Fla. 1978) (judicial review of a rule was not barred by exhaustion where the rule challenge had not been first brought under Fla. Stat. §120.565).

that it should be presumed that the agency cannot properly protect the public without an administrative hearing; that even when a property owner accepts the agency's decision as correct, he must, in all cases, challenge that decision in an agency hearing in an attempt to prove the agency acted improperly under the police power.

DER's argument is unsupportable. The entire administrative scheme of Chapter 120 envisions that the vast majority of agency decisions will occur without a hearing. Agency action taken pursuant to lawful authority is presumed to be valid and correct. State ex rel. Siegendorf v. Stone, 266 So. 2d 345 (Fla. 1972); Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957); Varholy v. Sweat, 15 So. 2d 267 (Fla. 1943).[12] Administrative agencies and their officers are presumed to perform their duty and to exercise their power in good faith. Glendinning v. Curry, 14 So. 2d 794 (Fla. 1943). The same presumption of correctness also applies where there has been no administrative hearing underlying the agency action. See, e.g., Flake v. State Department of Agriculture, 383 So. 2d 285, 287-88 (Fla. 5th DCA 1980) (failure to seek a Section 120.57 hearing to challenge the validity of final agency action did not bar a taking action in circuit court; although no agency hearing had been held, the court would presume correctness absent a showing of fraud or abuse).

12/ See also Levinson, A Comparison of Florida Administrative Practice Under the Old and the New Administrative Procedure Acts, 3 Fla. St. U.L. Rev. 72, 81 (1975).

That presumption of correctness applies equally to DER in this case. Relying on its expertise and experience in dealing with environmental matters under Chapters 403 and 253, Florida Statutes, and on environmental investigations and appraisals, DER issued a notice of intent to deny the permit containing a thorough, substantive discussion of why the Bowens' project would not comply with governing environmental statutes and rules. (R. 17-19, Bowen App. F; see Bowen App. H) The Final Order specifically incorporated those findings and denied the permit application on the merits. In accordance with sections 403.90 and 253.763, the Bowens accepted DER's decision as a valid exercise of the police power and sought just compensation for a taking.

B. An Administrative Hearing Would Have Been Pointless

The doctrine of exhaustion of administrative remedies requires that an aggrieved party exhaust remedies that are both available and adequate -- a party need not pursue administrative procedures that are useless, pointless, or in vain. Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695 (Fla. 1978); Southern Bell Telephone and Telegraph Company v. Mobile America Corporation, 291 So. 2d 199 (Fla. 1974) (exhaustion not required when a plaintiff seeks money damages that an agency has no authority to award).

As shown below, when a property owner concedes the validity of agency action and chooses to pursue a taking action in circuit court, there is no point in requesting an administrative hearing because agencies lack authority to adjudicate constitutional issues. Moreover, assuming arguendo they had such power, compelling a property owner to forego statutorily authorized circuit court review in favor of agency review would vitiate the entire purpose of the Property Rights Act.

1. Administrative agencies lack power to adjudicate taking actions

The Bowens seek just compensation for a taking of private property pursuant to the United States and Florida constitutions. Under the Separation of Powers doctrine, expressed in Article II, Section 3 of the Florida Constitution, persons belonging to one branch of government are prohibited from exercising powers granted to the other two branches. Under Article V, Section 1 of the constitution, the judicial power is vested in the courts.

Administrative agencies cannot decide constitutional issues. Gulf Pines, 361 So. 2d at 699; Canney v. Board of Public Instruction, 278 So. 2d 260 (Fla. 1973); Pickerill v. Schott, 55 So. 2d 716 (Fla. 1951). Because taking actions by their very nature present issues of constitutional rights and protections, agencies have no power to adjudicate them. See Slip Op. at 4; Griffin v. St. Johns River Water Management District, 409 So. 2d

208, 210 n.3 (Fla. 5th DCA 1982); Albrecht v. State, 407 So. 2d 210, 214 (Fla. 2d DCA 1981) (Ott, J., dissenting), quashed 444 So. 2d 8 (Fla. 1984). See also Estuary Properties, Inc. v. Askew, 381 So. 2d 1126, 1131 (Fla. 1st DCA 1979), rev'd on other grounds sub nom Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981) (hearing officer refused to address the taking issue in agency proceedings because it was a "judicial issue" that was "beyond the purview of the administrative hearing").

Because administrative agencies have no power to consider constitutional issues, the administrative hearing that DER contends should have been exhausted as an "adequate remedy," could not have had any relevance whatsoever to the Bowens' taking claim.[13] In Albrecht, 444 So. 2d at 12, this Court stated that an agency's primary responsibility is to protect the public by assuring compliance with applicable statutes, whether or not that would result in a taking:

> Under a constitutionally valid statute providing for protection of the public welfare, those facts [necessary to maintain a taking action] are irrelevant to the determination of propriety of the agency action. The first duty of the agency is to protect the public in compliance with the law, whether or not that results in inability to use the property.

13/ Petitioner, referring to some of the allegations in Count I of the Complaint, erroneously contends that "virtually all of the issues raised in the Bowen complaint could have been addressed in the administrative proceeding . . . ." DER Brief at 9. That misleading assertion ignores that the Bowens have already agreed to dismiss the jurisdictional challenge in Count I, as previously noted, and that three Counts of the Complaint present pure and simple taking claims.

Therefore, the taking facts underlying the Bowens' inverse condemnation claims would have been irrelevant in the administrative hearing.[14] In the absence of a challenge to the propriety of the agency action, there is no useful purpose served by requesting a hearing before the agency because it cannot decide a taking case.

2. Assuming, arguendo, agencies had power to consider the taking issue, the purpose of the Property Rights Act would be frustrated if property owners were compelled to forego direct circuit court review

Even assuming, arguendo, the agency did have the power to adjudicate the taking claim, or to make factual findings concerning the taking issue, forcing the property owner to forego a circuit court trial and present his taking case before the agency would deprive him of his right to have a jury participate in the trial. Further, it would render the Property Rights Act

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14/ The futility of administrative hearings prior to taking actions was also explained by Judge Ott in his dissent in Albrecht, 407 So. 2d at 214:

> It is simply immaterial, and the agency not only has no jurisdiction to adjudicate that issue, there is no reason for it to do so, because even if a taking were concededly the inevitable result, that would not and should not dissuade the agency from whatever action is necessary to protect the public. That is the duty -- the sole duty -- of the agency, and its very reason for being. If a taking results, the land owner must pursue his remedies elsewhere. That is the procedure now expressly recognized by section 253.763, Florida Statutes . . . .

meaningless by preventing the very purpose of the Act -- direct circuit court review of taking actions.

Statutes must not be construed to become meaningless or to defeat legislative purposes. The Legislature enacted the Property Rights Act to afford property owners a right to present taking claims directly in circuit court. The goal of this Act would be entirely frustrated if property owners were compelled to present their taking claims to hearing officers and then to the district courts of appeal:

> We reject the concept that the "taking" issue should first be raised and determined in the District Courts of Appeal under this statute. If that was done, at worst it would bar consideration of this issue by the circuit court on principles of res judicata thereby defeating the bifurcated appeal provisions of [the Act] . . . , and at best it would result in an "administrative morass" of undue proportions.

Griffin, 409 So. 2d at 210.

Compelling property owners to endure pointless and expensive administrative hearings in cases falling under the Property Rights Act would not serve to exhaust adequate administrative remedies; it would serve to exhaust property owners seeking to avail themselves of the remedies afforded by the Act. This Court should not allow the Property Rights Act to become meaningless by requiring pointless, expensive agency hearings unrelated to the relief afforded property owners by the Act. The decision of the Second District Court of Appeal should be affirmed.

CONCLUSION

The Property Rights Act was enacted to provide the citizens of this State with direct circuit court review of taking actions following final agency action. The Second District Court of Appeal correctly held that an administrative hearing is not a prerequisite to seeking circuit court review under the Act, and that such a hearing would be pointless because agencies lack power to adjudicate taking actions. Any other interpretation of the Act would defeat the Legislature's purpose in enacting it.

Therefore, Respondents Martin Bowen, Sr., and Martin Bowen, Jr., respectfully request the Court to affirm the decision of the Second District Court of Appeal and remand the action for trial to determine whether there has been a taking without payment of just compensation.

Respectfully submitted,

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