5,264

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT
OR ENVIRONMENTAL REGULATION,

Appellant,

vs. Case No. 83-1265

MARTIN BOWEN, SR. and MARTIN
BOWEN, JR.,

Appellees.

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION
OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

FILED
SID J. WHITE
MAY 14 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

APPELLANT'S BRIEF ON JURISDICTION

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PREFACE

For purposes of clarity, Appellant State of Florida Department of Environmental Regulation will be referred to alternatively as "the Department" or as "DER". Appellees Martin Bowen, Sr. and Martin Bowen, Jr. will be referred to as "the Bowens". References to the "District Court," unless otherwise specified, shall mean the District Court of Appeal, Second District of Florida. References to "the Circuit Court" shall mean the Circuit Court of the Twentieth Judicial Circuit, in and for Collier County, Florida.

STATEMENT OF THE CASE

A brief summary of the procedural history of this case, relying principally on the opinion of the District Court (copy attached), may assist the Court in discerning the issues of law for which discretionary review is sought. A fuller treatment of the case and of the facts will be provided should the Court accept jurisdiction in this cause and allow argument on the merits.

The Bowens applied to the Department for a dredge and fill permit under Chapters 253 and 403, Florida Statutes, to undertake certain activities on lands adjacent to the Barron River, in Collier County, Florida. In April, 1982, the Department issued a Notice of Intent to Deny Permit, advising the applicants of their right to a 120.57 hearing. The Bowens,

through counsel, requested an extension of time for filing a petition for administrative hearing, which was granted by the Department, but Bowen subsequently advised the Department that no administrative hearing would be requested. In June, 1982, therefore, the Department entered a final order denying the permit, as required by section 120.60, F.S.

The Bowens then filed suit in the Circuit Court on several inverse condemnation grounds, including those contemplated by sections 253.763 and 403.90, Florida Statutes. The Department moved to dismiss the action for failure to exhaust administrative remedies, under the authority of Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982). That motion was granted by the Circuit Court, and the Order of Dismissal was appealed by the Bowens to the District Court of Appeal, Second District of Florida.

In its opinion filed on April 4, 1984, the District Court reversed the Circuit Court Order of Dismissal and remanded for further proceedings, concluding that no requirement to exhaust administrative remedies applied to an inverse condemnation action brought in Circuit Court under the provisions of Section 253.763, Florida Statutes, and that an administrative hearing under Chapter 120, Florida Statutes, was not an essential element of "final agency action" for purposes of bringing suit under that statutory provision.

The Department thus seeks discretionary review of that decision of the District Court, pursuant to Rule 9.030(2)(A)(iv), Florida Rules of Appellate Procedure.

ISSUE

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL OR OF THE FLORIDA SUPREME COURT ON THE SAME QUESTION OF LAW.

The decision of the District Court in Bowen, holding that an applicant whose permit is denied by the DER under the authority of Chapters 253 and 403, Florida Statutes, need not exhaust administrative remedies in the executive branch and, further, need not request a 120.57 hearing, prior to commencing an inverse condemnation action in Circuit Court, conflicts with the decisions of this Court in Key Haven v. Board of Trustees, 427 So.2d 153 (Fla. 1982) and subsequently approved in Albrecht v. State, 444 So.2d 8 (Fla. 1984).

In Key Haven, this Court held that:

> . . . once an applicant has appealed the denial of a permit through all review procedures available in the executive branch, the applicant may choose either to contest the validity of the agency action by petitioning for review in a district court, or, by accepting the agency action as completely correct, to seek a circuit court determination of whether that correct agency action constituted a total taking of a person's property, without, just compensation. (emphasis supplied) Key Haven, 427 So.2d 153, .

That conclusion is reiterated throughout the Key Haven opinion:

> We hold that Key Haven could have filed suit for inverse condemnation in the Circuit Court, <u>after exhausting all executive branch appeals</u>, because we find that Key Haven's claim in the Circuit Court is not a veiled attempt to collaterally attack the propriety of agency action. (emphasis supplied) <u>Key Haven</u>, supra, at 159.

And:

> We conclude by holding that an aggrieved party must complete the administrative process through the executive branch, which in this instance requires an appeal to the IIF trustees. <u>Id.</u>, at 160.

Finally:

> We approve the District Court's holding in the instant case that the trial court properly dismissed Key Haven's suit in inverse condemnation because Key Haven had failed to exhaust its administrative remedies by appealing DER's order denying the dredge-and-fill permit to the IFF trustees, pursuant to Section 253.76. <u>Id.</u>, at 160.

The reasoning of this Court with regard to exhaustion of executive branch remedies has been recently re-emphasized in <u>Albrecht vs. State</u>. There this Court, concluded that the doctrine of res judicata would not preclude a subsequent action in circuit court for inverse condemnation.

The District Court in the instant case has interpreted <u>Albrecht</u> as an apparent abandonment of the doctrine of exhaustion of administrative remedies in all circumstances where the applicant fails or declines to pursue administrative remedies. That decision, which addresses whether the applicant must exhaust <u>further</u> remedies pursuant to Section 120.68, F.S., is scarcely authority for the proposition that no administrative hearing must

be conducted at all.

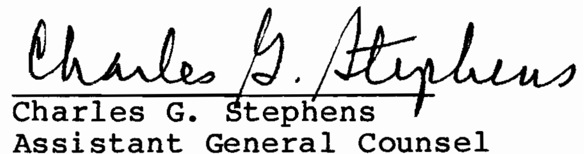
Further, the District Court decision in Bowen flies in the face of a long line of cases, many emanating from the First District, developing and affirming the administrative process under Chapter 120 as a prerequisite to the litigation of constitutional issues arising from agency action: Willis v. Department of General Services, 344 So.2d 580 (Fla. 1st DCA 1977), School Board of Leon County v. Mitchell, 346 So.2d 562 (Fla. 1st DCA 1977), cert. den., 358 So.2d 132 (Fla. 1978), Jefferson National Bank of Miami Beach v. Lewis, 348 So.2d 348 (Fla. 1st DCA 1977). See also, Rice v. Department of H.R.S., 386 So.2d 844 (Fla. 1st DCA 1980), Department of H.R.S. v. Lewis, 367 So.2d 1042 (Fla. 4th DCA 1979).

The abundant remedies afforded by the Administrative Procedure Act have become an indispensable component of the evolving relationship between the executive and judicial branches of government. The opinion of this Court in Key Haven stands as the definitive statement to date, with regard to inverse condemnation claims arising from permit denials under Chapter 253, requiring the exhaustion of administrative remedies in the executive branch. The opinion of the District Court of Appeal, Second District, in Bowen v. DER directly conflicts with this Court's Key Haven opinion by holding that an applicant whose permit is denied by DER pursuant to Chapters 253 and 403 need not pursue the most elemental administrative remedy of requesting a

120.57 hearing. The enormity of a judicial policy allowing immediate access to the circuit court to litigate either a real or spurious "taking" issue without first testing the agency decision and building an appropriate 120.57 record warrants the considered review of this Court.

WHEREFORE, Appellant State of Florida Department of Environmental Regulation petitions this court to accept discretionary jurisidiction over this cause and to entertain argument thereon.

Respectfully submitted



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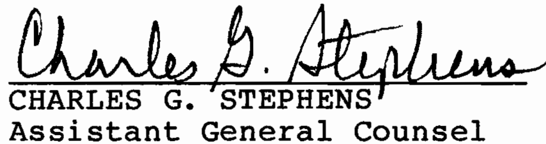
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five true copies of the foregoing APPELLANT'S BRIEF ON JURISDICTION have been hand delivered on this date to the Clerk of the Supreme Court and a true and correct copy of the same by United States Mail to William F. Tarr, Esquire, PEEPLES, EARL, REYNOLDS & BLANK, One Biscayne Tower, Suite 3636, Two South Biscayne Boulevard, Miami, Florida, 33131, on this 14th day of May, 1984.



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