D/a 3-5-85

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL
REGULATION,

Petitioner,

vs. Case No.: 65,264

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

Respondents.
_____/

PETITIONER'S BRIEF
ON THE MERITS

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PREFACE

The State of Florida Department of Environmental Regulation shall be referred to herein as "Petitioner" or as "the Department." Martin Bowen, Sr. and Martin Bowen, Jr., plaintiffs in the original circuit court proceeding, appellants in the district court and respondents herein, are referred to as "Bowen" or "the Bowens", "the applicant" or as "Respondent." Unless otherwise specified, references to the circuit court or the trial court shall mean the Circuit Court of the Twentieth Judicial Circuit in and for Collier County. Likewise, references to the district court mean the District Court of Appeal, Second District of Florida. Items contained in Petitioner's Appendix to Brief on the Merits shall be referred to as (A-__).

STATEMENT OF THE CASE AND OF THE FACTS

This case arises on petition for discretionary review of a decision of the District Court of Appeal, Second District, in Bowen v. DER, 448 So.2d 566 (Fla 2nd DCA 1984) wherein that court concluded that a permit applicant who does not wish to contest a permit denial may bring suit directly in circuit court on a theory of inverse condemnation. Petitioner Florida Department of Environmental Regulation urges this honorable court to reverse that decision.

In October, 1981, Martin Bowen, Sr. applied to the Department of Environmental Regulation for a permit to place nearly 10,000 cubic yards of fill into a mangrove swamp near the Barron River, for the construction of a mobile home park in Collier County, Florida. (A-1). During the permit review process, as contemplated by Section 120.60, Florida Statutes, the Department made repeated requests to the applicant for a mean high water survey to clarify the relation between the applicants' property and the sovereign lands underlying the contiguous navigable waters. (A-2, A-5, A-8). The need for such a survey, authorized by Florida Administrative Code Rules 17-4.05 and 17-4.28(11), was confirmed by onsite inspection revealing a low lying mangrove swamp interlaced with small tidal creeks. A mean high water determination under such circumstances was

particularly significant in determining the applicability of permit requirements under Chapter 253, in addition to those contained in Chapter 403. Nonetheless, the applicant declined to provide such information to the Department and asked the Department to rely on whatever information was already on file. (A-6, A-7).

On April 5, 1982, the Department advised the applicant of its intent to deny the application (A-10). The Department's letter of intent to deny addressed deficiencies in the application on both procedural and substantive grounds. It referred specifically to the applicant's failure to supply information requested previously, as well as to the biological and water quality impacts which could be assessed by field inspection and other information supplied. The letter concluded by advising the applicant of his right to a hearing under Section 120.57, Florida Statutes. On April 23, 1982, counsel for Bowen requested an extension of time for filing a petition for administrative hearing (A-11). By order dated April 30, 1982, Bowen's request for extension was granted until June 10, 1982 (A-12). On June 10, 1982, the Department received a letter from Bowen's counsel (A-13) advising that a petition for hearing would not be filed by Mr. Bowen, and requesting that the Department's final order be directed to counsel's office. On June 18, 1982, the Department, entered a Final Order Denying Application for Permit (A-14), adopting by reference the grounds for denial set

out in the April 5 letter (A-10) and reciting the procedural events by which the applicant waived his right to an administrative hearing. That final order was forwarded to Bowen's counsel as requested.

On or about September 15, 1982, Martin Bowen, Sr., and Martin Bowen, Jr., filed suit against the Department in the circuit court in a four-count complaint seeking declaratory and injunctive relief and damages resulting from the permit denial. (A-15). The Department moved to dismiss the complaint for failure to exhaust administrative remedies. Following the submission of memoranda and oral argument on the motion, the circuit judge dismissed the complaint for failure to exhaust administrative remedies, relying upon the then-recent decision of this court in Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund 427 So.2d 153 (Fla. 1982). The circuit judge concluded from Key Haven, supra, that a permit applicant who fails to pursue administrative remedies prior to final agency action cannot subsequently maintain an action in the circuit court on an inverse condemnation theory. (A-16)

That order of dismissal was appealed by the Bowens to the District Court of Appeal, Second District. The District Court concluded that the trial judge had misapplied Key Haven to an action brought under the "Private Property Rights Act", (Chapter 78-85, Laws of Florida, Sections 253.763, 373.617 and 403.90,

Florida Statutes.) Based upon its reading of Key Haven supported by Albrecht v. State, 444 So.2d 8 (Fla. 1984), and the opinion of a sister court in Griffin vs. St. Johns River Water Management District, 409 So.2d 208 (Fla. 5th DCA 1982), the district court held that an action under Section 257.763, Florida Statutes, was not governed by this Court's construction of the "exhaustion" doctrine enunciated in Key Haven and that nothing in Section 253.763 required an administrative hearing prior to seeking relief in the circuit court. Bowen v. DER, 448 So.2d 566 (Fla. 2nd DCA 1984). (See A-17) Thus finding error in the circuit court's earlier order dismissing the complaint, the district court reversed and remanded the case to the trial court for further proceedings.

On May 2, 1984, the Department of Environmental Regulation petitioned this honorable Court to review the foregoing decision pursuant to its discretionary jurisdiction under Rule 9.030(2)(A)(iv), Florida Rules of Appellate Procedure. By order dated November 20, 1984, this honorable Court accepted jurisdiction herein and ordered the parties hereto to file briefs on the merits and to present oral argument.

I. ISSUE:

WHETHER A PERMIT APPLICANT MAY ELUDE THE EXHAUSTION DOCTRINE BY IGNORING PROCEDURAL AND SUBSTANTIVE ISSUES INHERENT IN THE PERMIT DENIAL

A. Key Haven required exhaustion of all administrative remedies in the executive branch.

The decision of this Court in Key Haven Associated Enterprises v. Board of Trustees, et al., 427 So.2d 153 (Fla. 1982) was rendered on December 16, 1982, after the filing of the Bowen complaint in circuit court but prior to a hearing on the Department's motion to dismiss. In that opinion, this Court held that Key Haven could not pursue a "taking" claim in the circuit court without exhausting its administrative remedies within the executive branch, i.e., an appeal to the Board of Trustees pursuant to Section 253.76, Florida Statutes, even though a formal 120.57 hearing had already been conducted. In ruling on the Department's motion to dismiss in the instant case, the trial judge simply concluded that if administrative remedies had to be exhausted throughout the executive branch, they must certainly be initiated by requesting a 120.57 hearing. Thus he dismissed the Bowen complaint for failure to exhaust administrative remedies. In so doing, the trial judge affirmed the judicial policy which has evolved over the last decade under the Florida Administrative Procedure Act, namely, that one must pursue available

administrative remedies prior to going to court, and secondly, that the executive branch must be given an ample opportunity to make a mature and informed decision. State ex rel. Dept of General Services v. Willis, 344 So.2d 580 (Fla. 1st DCA 1977), Rice v. Dept. of HRS, 386 So.2d 844 (Fla. 1st DCA 1980), and Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695 (Fla. 1978); See also Judge Smith's discussion in Key Haven, 400 So.2d at 69-72, cited with approval in Key Haven, 427 So.2d at 156.

B. Numerous disputed issues of law and fact were explicitly identified in the circuit court complaint.

On or about September 15, 1982, Martin Bowen, Sr. and Martin Bowen, Jr. filed suit against the Department of Environmental Regulation in the Circuit Court for Collier County seeking declaratory and injunctive relief and damages arising from a permit denial by the Department under Chapters 253 and 403, Florida Statutes. (A-15) In its STATEMENT OF FACTS, the Complaint alleged that the proposed fill material was clean and sanitary and was not harmful or injurious, and that while certain portions of the property were tidally inundated, the remainder of the property was not connected with navigable or other waters. Count I of the Complaint challenged the Department's regulatory jurisdiction over portions of the site and over the proposed

activity. Plaintiffs (Respondents herein) argued that since, in their view, placing clean fill could not possibly constitute pollution, the Department had no jurisdiction over the plaintiffs' proposed activities.

Count II claimed that DER's exercise of regulatory jurisdiction over Plaintiffs' property was "so extensive, harsh, restrictive and burdensome" as to constitute a taking within the purview of the Fifth Amendment to the Constitution of the United States, while in Count III of the Complaint, Plaintiffs allege that the Department's exercise of its regulatory powers, in particular its interpretation of Chapter [sic] 17-3.021(17), Florida Administrative Code, was so arbitrary and capricious as to violate Plaintiffs' rights protected under Article 10, Section 6 of the Florida Constitution. Finally, realleging paragraphs 1-19, Count IV of the Complaint claims the permit denial to be an unreasonable exercise of the police power, thus constituting a taking without just compensation, and entitling Plaintiffs to those remedies set forth in Sections 253.763 and 403.90, Florida Statutes.

Despite identifying the DER's Final Order Denying Permit, dated June 18, 1982, as the source of the alleged injuries, (Paragraphs 5 and 6), Plaintiffs did not refer to their earlier point of entry to request an administrative hearing on the Department's proposed agency action, nor to the extension of time granted for doing so nor to the notice by counsel that no such

petition would be filed. Nonetheless, the Complaint seeks relief from the Department's ill-founded regulatory jurisdiction, its misguided evaluation of environmental impact, and its arbitrary definition of pollution.

By allowing an aggrieved party such as Bowen to abandon so readily his challenge to the "propriety" of the permit denial, the District Court has converted the exhaustion of administrative remedies doctrine, designed to encourage the maturation of co-equal branches of government, into a simple exercise in forum-shopping. In so doing, the Court has overlooked one of the principal objectives of the administrative process - to foster wise agency decisions based upon an appropriate record. For this reason the Bowen "fiction" (that it accepts the agency action as "proper") should not be indulged. Virtually all of the issues raised in the Bowen complaint could have been addressed in the administrative proceeding which Bowen declined to request some three months earlier. Thus not even Bowen qualifies under the jurisdictional test set out by the Bowen Court.

II. ISSUE:

WHETHER THE ENACTMENT OF THE PRIVATE PROPERTY RIGHTS ACT (CHAPTER 78-85, LAWS OF FLORIDA) SIGNIFICANTLY ALTERS THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE ON A CLAIM OF "TAKING" ARISING FROM A PERMIT DENIAL

A. The district court misunderstood this Court's decision in Key Haven.

In its opinion of April 4, 1984, in Martin Bowen, Sr. and Martin Bowen, Jr. vs. Florida Department of Environmental Regulation, 448 So.2d 566 (Fla. 2d DCA 1984) the District Court of Appeal, Second District, interpreted Section 253.763, Florida Statutes, and construed this court's decision in Key Haven in a manner which is both unreasonable and unworkable. In so doing, the district court retreated hastily from the principles of primary jurisdiction and exhaustion of administrative remedies into a posture authorizing forum selection which is neither required by statute nor supported by judicial policy.

In an effort to understand the district court's misperception, it is helpful to note that the Key Haven decision emerged from a series of district court cases based on the doctrines of exhaustion, res judicata and collateral estoppel which this Court found to be misguided. Foremost among the cases to be clarified were Coulter v. Davin, 373 So.2d 423 (Fla. 2nd DCA 1979) and Kasser v. Dade County, 344 So.2d 928 (Fla 3rd DCA 1977). Both cases focused upon the role of the district court,

under Section 120.68, in considering constitutional and quasi-constitutional issues arising from disputed agency action, while characterizing the "taking" issues as impermissible collateral attacks upon agency action. See, Key Haven, at 155-156.

Under Key Haven, a party aggrieved by a permit denial must exhaust all executive branch remedies. Upon conclusion of that process, the party may elect to seek review in the district court under 120.68, Florida Statutes, or to bring an action in the circuit court challenging the effect, but not the propriety, of the permit denial. As underscored in its subsequent Albrecht opinion, this court summarized its Key Haven decision as providing "alternative methods of bringing a claim of inverse condemnation once all executive branch review of the action has been completed." Albrecht 444 So.2d at 12. (emphasis supplied)

By eliminating the requirement that a "taking" issue be brought only in the district court, this Court has modified the judicial rationale for determining when the propriety of the permit denial may be severed from its consequences, not whether one can forego administrative remedies altogether. "The point is that the propriety of the agency action must be finally determined before a claim of inverse condemnation exists." Id. at 12.

In Bowen, however, the district court, because it found no clear contrary signal from Section 253.763, Florida Statutes,

concluded that neither an executive branch appeal nor a 120.57 hearing was necessary for final agency action to become the subject of a "taking" case in the circuit court. Bowen vs. DER, 448 So.2d at 568.

Noting that Key Haven did not address the issue of whether an injured party has failed to exhaust administrative remedies where final agency action resulted without a request for an administrative hearing, the district court concluded that no such requirement was present in, nor should be inferred from, a plain reading of Section 253.763 nor of Chapter 120:

> "Section 120.59(1)(c) specifically provides for final agency action in the form of an order issued as a result of presentations submitted without hearings. Therefore, we reverse the order of dismissal by the circuit court and remand for further proceedings." Id. at 569-70.

Such an interpretation fails to ask the (still) most important question: should any of these factual or policy issues have been taken up with the agency prior to commencing this litigation? Did the agency have a chance to render a proper decision?

B. The jurisdictional approach proposed by the Bowen court is unworkable.

The district court did articulate one caveat to its "final agency action" doctrine which requires that the permit denial be

based on the merits of the application. This simple but elusive concept is intended to be contrasted with permitting decisions which are not "on the merits:"

> Where procedural or substantive errors in the application or administrative hearing thereon result in a permit denial, administrative and judicial appeal through the applicable substantive statutes and Chapter 120 is still the proper remedy. Id. at 569

This reading of Key Haven affords some prospect of reconciliation with a similar caveat in Section 253.763:

> Review of final agency action for the proposes of determining whether the action is in accordance with existing statutes or rules and based upon competent substantial evidence shall proceed in accordance with Chapter 120.

Both the Key Haven and Albrecht opinions make reference to this provision of the Private Property Rights Act, Chapter 78-85, Laws of Florida, though neither purports to view it as a panacea. What was referred to as the "propriety" of the agency action (Albrecht), or the "validity" of the agency action (Key Haven), or the "intrinsic correctness" of the agency action (Key Haven) is now cast as a determination of "whether the action is in accordance with existing statutes or rules and based upon competent substantial evidence . . ." Section 253.763(2), Florida Statutes. (See also, Sections 403.90, 373.617, Florida Statutes.

The difficulty in making this threshold jurisdictional determination is apparent from the case at bar. Portions of the Bowen property are covered by mangrove swamp and interlaced with tidal creeks. The Bowens' proposal to cover the mangroves with fill material is subject to the permitting requirements of Chapter 403. If fill is to be placed waterward of the line of mean high water, then the permitting and related requirements of Chapter 253 are triggered. These include local approval (253.125), a public interest determination (253.124), and the consent of use by the Board of Trustees (253.77, Florida Statutes). The Department has the authority to request any additional information reasonably necessary to evaluate the application (120.60, 403.087, Florida Statutes, 17-4.05(1), 17-4.28(11), Florida Administrative Code). The Department requested a mean high water survey undertaken by approved methods (A-2, A-5, A-8). The applicant declined to do so on economic grounds. The Department evaluated the application as best it could, finding sufficient grounds for denial "on the merits" but unable to address a fundamental factual and legal consideration, i.e., its relation to Mean High Water. Is this case ready for the circuit court on a theory of inverse condemnation? Has Bowen allowed the Department to act upon his permit application based upon an adequate and competent record? If the Department says "no" to the project at this point, will it constitute a "taking"?

These questions underscore the awkwardness of the jurisdictional scheme proposed by the district court in Bowen. Under Sections 120.60 and 403.0876, Florida Statutes, the Department must take agency action on the permit application within ninety days. The applicant has the burden of demonstrating entitlement to the requested license. Distinctions between procedural and substantive issues are not easily made, particularly where decisions "on the merits" rely heavily on information which the applicant has, or should have, supplied.

A more useful and practical reading of Key Haven is available to avoid this confusion. That reading is simply that the propriety of an agency decision on a permit application cannot be determined unless and until that permitting decision has been tested in a Section 120.57 hearing. Only when the record is prepared, the documents reviewed, the witnesses proffered and the issue plainly articulated in a final order which is not merely ministerial can it be said that final agency action has occurred for purposes of determining the propriety of an agency decision.

CONCLUSION

The District Court of Appeal, Second District, has authorized one who is aggrieved by a DER permit denial to seek relief in the circuit court despite a deliberate waiver of his rights to request an administrative hearing.

Such a decision relies upon a superficial interpretation of "final agency action" under Section 253.763, Florida Statutes, and appears to impose upon the applicant no duty whatsoever to test in an administrative forum the accuracy of the agency's facts nor the wisdom of its policies.

WHEREFORE, it is urged that this honorable Court reverse the decision herein appealed from on the grounds that the Respondent failed to request a 120.57 hearing, which is the only meaningful way he could have determined the propriety of the agency action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits and Appendix was served by U.S. Mail to William Tarr, Esquire, PEEPLES, EARL, REYNOLDS & BLANK, P.A., Suite 3636, One Biscayne Boulevard, Miami, Florida 33131, on this 14th day of December, 1984.

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