O/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 REPLY BRIEF

ON DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT IN BOWEN v. DEPARTMENT OF ENVIRONMENTAL REGULATION, 448 So.2d 566 (Fla. 2d DCA) 1984

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PRELIMINARY STATEMENT

Petitioner State of Florida Department of Environmental Regulation files this reply brief in response to arguments contained in Respondent's Brief on the Merits before this Court. The State of Florida Department of Environmental Regulation will be referred to as "DER" or as "the department." Respondents Martin Bowen, Sr. and Martin Bowen, Jr. will be referred to as "the Bowens" or as "the applicant."

References to the briefs on the merits and appendices previously filed in this case will be designated as "DER Brief at ___"; "DER App. ___"; "Bowen Brief at ___"; and "Bowen App. ___".

ARGUMENT

I. THE PROPRIETY OF THE DEPARTMENT'S DENIAL OF THE BOWEN PERMIT APPLICATION HAS NEVER BEEN FINALLY DETERMINED.

Respondents emphasize the time and expense which they have devoted in formulating a development plan acceptable to the DER (Bowen Brief at 1, 2, 4, 7, 9, 10) as supporting the proposition that they should now be allowed to bring suit directly in circuit court rather than pursuing administrative remedies available under Chapter 120, Florida Statutes.

The pertinent fact, however, is that none of these development proposals[1/] has been followed through to completion nor been the subject of a fact-finding hearing in accordance with Section 120.57, Florida Statutes. As noted in the permit application (Bowen App. B, ¶ 15), the Bowens had discussed several proposals with District staff, including a marina and a mobile home park, none of which was embraced with enthusiasm by DER field inspectors. One previous request for hearing was withdrawn in order to submit the modified permit application which is the subject of the present dispute. It is ironic, therefore, that a permit applicant who has frequently disagreed with, but never tested the grounds for, DER evaluations of his dredge and fill proposals should now acknowledge so readily the correctness of the Department's permitting decisions (See Bowen Brief at 9-10).

1/ References by the Bowens to "development plans" are assumed to mean "dredge and fill permit applications" under Chapters 253 and 403 and are not to be confused with "development orders" or "development permits" as those terms are utilized in Chapter 163 and 380, Florida Statutes.

The final order denying permit application, which Respondents eagerly embrace for its correctness and finality, is essentially a default final order, the necessary result, pursuant to Sections 120.60 and 403.0876, Florida Statutes, of Respondents' failure to petition for administrative hearing. The question before this Court is whether such an order, clearly final agency action for the purpose of complying with Section 120.60, Florida Statutes, satisfies the requirement of exhausting administrative remedies within the executive branch. Petitioner urges that it does not.

In Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982), 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. Key Haven at 156.

Appealing the permit denial through all review procedures within the executive branch would require for the Bowens, as it did for Key Haven, an appeal to the Board of Trustees pursuant to Section 253.76, Florida Statutes.

How the availability of this administrative appeal, as distinct from an appeal to the district court under Section 120.68, Florida Statutes, should be construed for purposes of identifying "final agency action" was addressed in Griffin v. St. Johns Water

Management District, 409 So.2d 208 (Fla. 5th DCA 1982). There the district court sought to untangle a barrage of appeals launched by Griffin (following an administrative hearing) before the Governor and Cabinet, the district court and the circuit court, the latter action based upon Section 373.617, Florida Statutes, identical to Sections 253.763 and 403.90 in the instant case. Griffin at 209. In evaluating the pending administrative appeal, the court noted that "[s]ince the Commission may modify or rescind the action of the Water Management District, it cannot be considered (as yet) 'final' agency action." Id. at 210. See also School Board v. Noble, 372 So.2d 1111 (Fla. 1979).

This recognition of the incomplete status of a permitting decision for which a second level of administrative review is provided having the authority to rescind or modify the lower agency's action is likewise applicable in the case at bar. Thus the propriety of the agency action cannot be determined until it has been reviewed and acted upon, based upon an appropriate record, first by the agency, and, secondly, by the Governor and Cabinet where such a review mechanism exists.[2/] This construction of the "final agency action" requirement contained in the Property Rights Act is consistent with, and allows harmony between, objectives set forth in the Property Rights Act (that access to the circuit court be allowed following final agency action), the Administrative Procedure Act (that final agency action be based upon

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2/ A permitting decision based solely upon Chapter 403 would be appealable directly to the district court. Sec. 120.68, Fla. Stat.

competent substantial evidence and a reasoned application of law and policy), and this Court's construction of the exhaustion doctrine (that administrative remedies in the executive branch must be exhausted) in Key Haven.

II. THE DEVELOPMENT OF A COMPLETE RECORD IN AN ADMINISTRATIVE PROCEEDING IS AN ESSENTIAL PREREQUISITE TO THE LITIGATION OF A "TAKING" CLAIM.

Despite compelling arguments that all administrative remedies in the executive branch must be exhausted, Key Haven, supra; see also Albrecht v. State, 444 So.2d 8 (Fla. 1983), Respondents urge, with the concurrence of the District Court of Appeal, Second District in Bowen v. Department of Environmental Regulation, 448 So.2d 566 (Fla. 2d DCA 1984), that the mere silence of the Property Rights Act, (Chapter 78-85, Laws of Florida) on the "exhaustion" question obviates the need to determine the propriety of the agency action, even initially, in a Section 120.57 proceeding. Bowen Brief at 8-9.

The Property Rights Act, however, is not silent with respect to proceedings under Chapter 120:

> Review of final agency action for the purpose 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. Sec. 403.90(2), F.S. See also, Sec. 253.763.

It is clearly contemplated that a determination of the propriety, or the correctness, of the agency action shall be achieved in accordance with Chapter 120. The Property Rights Act is merely silent on whether that determination must be made prior to litigation in the circuit court on a claim of constitutional proportions, or whether one may immediately forego any testing of the agency's determination through available administrative processes. That decision, which has been addressed squarely in Key Haven and Albrecht, is essentially one of judicial policy

rather than statutory interpretation, given no statutory mandate to the contrary.

The doctrine of exhaustion of administrative remedies has become a mainstay of judicial policy in the State of Florida since the adoption of major amendments to the Administrative Procedure Act (Chapter 74-310, Laws of Florida) more than a decade ago. See State ex rel. Department of General Services v. Willis, 344 So.2d 580 (Fla. 1st DCA 1977); McDonald vs. Department of Banking & Finance, 346 So.2d 569 (Fla. 1st DCA 1977); Capeletti Brothers Inc. v. Department of Transportation, 362 So.2d 346 (Fla. 1st DCA 1978), cert. den., 368 So.2d 1374 (Fla. 1979).

Respondents insist that the remedies available to them under Chapter 120 were pointless because the administrative agency lacks the authority to adjudicate taking actions. Bowen Brief at 10, 14. That argument ignores the broad purposes served by requiring the exhaustion of adequate administrative remedies prior to collateral litigation. As stated by Chief Justice Robert P. Smith of the District Court of Appeal, First District, in a dissenting opinion:

> The supreme goal of the Administrative Procedure Act of 1974 is increased initiative and self-discipline within the executive branch. All its remedies press toward that goal, as McDonald and its progeny make clear. When as here those remedies are preempted that goal is the first and most important casualty.
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> * * * * *
>
> . . . For litigation to justify itself on the dour assumption, expressed or implied, that the agency "will not change its mind" in APA proceedings, describes the inevitable condi-

> tion of litigants, not the experience of agencies under Chapter 120. For collateral litigation to justify itself on the pretense of saving time and money, when litigation gulps both more time and more money, to vastly more uncertain ends, is judicial deception. State v. Falls Chase Special Taxing District, 424 So.2d 787, 818-819 (Fla. 1st DCA 1982) reh. den. (dissenting opinion)

An administrative hearing in the instant case would have afforded the agency the opportunity to make a mature and informed decision based on a record appropriate to the issues. It would have resulted in a refined composite of relevant facts and a reasoned assessment of applicable law. It would have exposed errors, identified omissions and weighed alternatives. It would have prepared a foundation for review by the Board of Trustees vested with the authority to modify, reverse or remand the agency decision. And, without prejudice to the applicants, it would have shed substantial light on the question for consideration by the circuit court as to whether the final agency action was "an unreasonable exercise of the police power constituting a taking without just compensation."

CONCLUSION

Respondents' failure to request an administrative hearing cannot provide a basis for bringing an action for taking in the circuit court based upon the Department's Final Order Denying Permit. To do so would strip the executive branch of the opportunity to render a mature and informed decision on a proper record and seriously erode the doctrine of exhaustion of administrative remedies enunciated by this Court in Key Haven. By affirming the vitality of the exhaustion doctrine, however, this Court may safeguard the objectives of the Property Rights Act within an orderly administrative and judicial process. For the foregoing reasons, Petitioner urges this Honorable Court to reverse the decision of the District Court of Appeal, Second District, and to reinstate the order of the circuit court dismissing the complaint for failure to exhaust administrative remedies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Petitioner's Reply Brief were served by hand-delivery to the Supreme Court of Florida, and a true copy of same by U.S. Mail to William F. Tarr, Esquire, PEEPLES, EARL, REYNOLDS & BLANK, P.A., One Biscayne Tower, Suite 3636, Two South Biscayne Boulevard, Miami, Florida 33131, this 11th day of February, 1985.

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