OA 6-30-87

IN THE SUPREME COURT
STATE OF FLORIDA

PAUL and ELLEN THOMSON,	:	
	:	
Petitioners,	:	
	:	
v.	:	CASE NO. 69,483
	:	
STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL REGULATION,	:	FIRST DISTRICT COURT OF APPEAL
	:	
Respondent.	:	NO. AZ-337/BD-330
	:	

BRIEF OF PETITIONERS

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NOTE: Citations to the record designated by "R" refer to the record for Case BD-330.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioners, PAUL AND ELLEN THOMSON, applied to Respondent, the DEPARTMENT OF ENVIRONMENTAL REGULATION, to construct a 36 foot wide covered dock connected to the uplands by a 92 foot long by 8 foot wide walkway in Jupiter Island Cove, Jupiter, Palm Beach County, Florida. Respondent provided a notice of an intent to deny on October 14, 1983. Representatives of an engineering firm, acting as agent for Petitioners, contacted a representative of the Respondent and received agreement from Respondent to hold the permit application in abeyance until more detailed information, leading to subsequent design modifications, was provided. Nevertheless, the Respondent entered a final order of denial on November 10, 1983.

Petitioners then filed a new application for permission to construct a covered dock in a different configuration from that requested in the earlier application. On March 9, 1984 Respondent provided an intent to deny the project based upon the alleged application of administrative res judicata. On March 12, 1984 Petitioners requested a formal administrative hearing due to the existence of disputed issues of material fact concerning the permit application. By Procedural Order dated March 27, 1984 Victoria J. Tschinkel, Secretary of the Department of Environmental Regulation, denied the petition for a formal hearing pursuant to Section 120.57(1), Florida Statutes, and granted an informal Section 120.57(2), Florida Statutes, hearing in this case. The Secretary also allowed Petitioners ten days from the entry of the Procedural Order to file a Memorandum of Law in opposition to the application

of res judicata. Petitioners filed a Motion for Reconsideration and a Memorandum of Law in opposition to the application of res judicata. Respondent entered a Final Order of Denial on May 18, 1984 and on May 30, 1984 Petitioners filed Notice of Appeal to the Board of Trustees of the Internal Improvement Trust Fund. Under the provisions of the Rule 17-103.330(3), Florida Administrative Code, Petitioners requested development of a record through a formal proceeding pursuant to Section 120.57(1), Florida Statutes. On September 5, 1984 Respondent adopted an order "granting" development of a record but ignored Petitioner's request for a formal proceeding and simply designated certain documents already on file as the record. Petitioners appealed this refusal to grant an administrative hearing at any point in the proceeding to the Board of Trustees of the Internal Improvement Trust Fund and to the First District Court of Appeal. A dual appeal was taken since the Respondent's final order cited for jurisdiction both Chapters 253 and 403, Florida Statutes. The First District Court of Appeal granted an extension of time pending consideration of the matter by the Board of Trustees of the Internal Improvement Trust Fund. On November 27, 1984 the Board of Trustees dismissed the appeal for lack of subject matter jurisdiction as a result of a statutory change, and the consolidated appeal was heard by the First District Court of Appeal. On February 15, 1985, the First District Court of Appeal directed an Order to Show Cause to Respondent, regarding the preparation of the record. On June 19, 1985, the First District Court of Appeal dispensed with oral argument, but during consideration of the matter changed its decision, and oral

arguments were heard September 10, 1985. The opinion of the First District Court of Appeal was filed May 1, 1986. Petitioners filed Motion for Rehearing on May 9, 1986, and on October 6, 1986, the Motion for Rehearing was denied, presenting the opportunity for Petitioners to bring their case before this Court. A precise and detailed statement of the facts regarding this case can be found in the dissent to the opinion of the Court below (Appendix Tab "A").

SUMMARY OF THE ARGUMENT

Paul and Ellen Thomson present to this Court their plight in finding that, contrary to the circumstances in all of the cases cited by Respondent in earlier pleadings, no hearing for either their first or second application was ever held, and they were denied a fair opportunity to be heard. After expending a substantial sum of money for expert consultants to modify their proposal, to save the seagrasses that were of concern to the department, no chance was provided for them to present evidence regarding their second application. The only evidence of departmental review, is a summary intent to deny containing standard-form language. The rigid application of the doctrine of res judicata must be tempered to prevent injustice. The failure of the First District Court of Appeal to evaluate these factors places the opinion in direct conflict with decisions of the Second and Third District Court of Appeal, and with three decisions of the Supreme Court of Florida.

ARGUMENT ONE

THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA CANNOT BE USED TO DENY A NEW AND REVISED PERMIT APPLICATION WHEN AN AGENCY HAS FAILED TO PROVIDE THE APPLICANT WITH

PROCEDURAL SAFEGUARDS IN THE INITIAL PERMITTING PROCEEDING. BY DOING SO THE AGENCY HAS DENIED TO THE APPLICANTS THE DUE PROCESS AND EQUAL PROTECTION OF LAW.

The majority opinion in the Court below, together with the actions of the Department of Environmental Regulation's secretary, underscore an increasingly widespread presumption of correctness for agency action in Florida relating to environmental permitting. The relatively recent and well taken concern by the people of Florida for environmental protection is exemplified by Article II, Section 7, of the Florida Constitution, mandating protection of natural resources and scenic beauty and dictating: "adequate provision shall be made by law for the abatement of air and water pollution...". Water pollution is a complex subject, and one need only gauge the thickness of Rules 17-3 and 17-4, Florida Administrative Code, to note the specialized knowledge and experience that is inherent in environmental permitting decisions. It is understandable then that a presumption of correctness for DER action has arisen, but at some point there must be safeguards built into practice and procedure to insure that other equally valid constitutional rights are not lost in the process.

In the complex procedural record below, no cognizance is given to more fundamental sections earlier enacted, and it is worth taking a few lines to quote from Article I, Section 2, Fla. Const., that "all natural persons are equal before the law, and have inalienable rights...to be rewarded for industry and to acquire, posess, and protect property". Continuing on, Section 9, provides: "no person shall be deprived of life, liberty, or property without due process of law...". Art. I, S.9, Fla. Const.

Petitioners hold in fee simple the submerged lands upon which they asked for a permit to construct a dock. To comply with the complexities of Rule and Statute concerning environmental protection, detailed engineering and scientific studies were obtained at significant cost. The present case well illustrates that safeguards are not in place within the administrative process to protect Applicants' real property and personalty; both often in this age being of great value.

In the opinion below we find "a fair opportunity to be heard is generally an element of the procedural due process necessary for the applicability of the doctrine of administrative res judicata..., but it is the opportunity to be heard, rather than an actual hearing, which is critical...", Thomson v. Department of Environmental Regulation, 493 So.2d 1032, (Fla. 1st DCA 1986). The omission of the word "fair" in the second sentence points to the direction taken by the majority.

But is there a requirement for fair and impartial opportunity or hearing? Such a requirement is not found in the Rules of the Department of Environmental Regulation, nor is it found in Chapter 120.57, Florida Statutes, 1985. A review of cases decided under Chapter 403, Florida Statutes, does not reveal such a mandate. Petitioners, both on their own behalf and with their thoughts being directed towards many others who apply for DER permits, respectfully request this Court to examine the circumstances of this case and to call to the attention of DER both constitutional requirements and traditional judicial notions for fair play and justice.

The Thomsons were not afforded a fair opportunity to be heard, when an employee of the Department of Environmental Regulation assured them that their first application would be held in abeyance; pending submittal of additional information (R-94). The Thomsons were not afforded a fair opportunity to be heard, when the letter of transmittal for the final order of denial of the first application, invited the Thomson's to reapply (R-96). The majority below, and Respondent, continue to point backward to the intent to deny for the first application. This provided Petitioners' with 14 days to request an administrative hearing, and Respondent states that its employee did not have the authority to grant an extension of time. Presumably then someone on the department's staff had the authority to grant such an extension, but how could the Applicant's engineer not know that the employee had no such authority when he had been directed by communication from the department to deal with that particular employee. The department was on notice by both oral and written communication that a continuance or tolling of the 14 day time period was being requested, and also the request was being made by a non-lawyer (R-95).

The Respondent's rules contemplate participation by non-lawyers, and pursuant to Rule 17-103.020, Florida Administrative Code, the department should have made "diligent inquiry of the representative under oath, to assure that the representative was qualified to appear in the agency proceeding, and capable of preserving the rights of the party". The actions of the DER in issuing the first final order without honoring its commitment for an extension of time, and by inviting reapplication, clearly

violate the requirement in Coral Reef Nurseries, Inc. v. The Babcock Company, 410 So.2d 648, (Fla. 3rd DCA 1982), that a fair opportunity to be heard be provided.

ARGUMENT TWO

THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA IS INAPPLICABLE IN THIS PROCEEDING BECAUSE PETITIONERS' SECOND PERMIT APPLICATION IS SUBSTANTIALLY DIFFERENT FROM THE PREVIOUS APPLICATION, AND IS SUFFICIENT TO PROMPT A DIFFERENT RESULT.

If Paul and Ellen Thomson's second application was such a mirror image of the first as to prompt an identical result, then why did Respondent's factual allegations in the intent to deny shift from impact on seagrasses to impact on marine soils? Only a very brief factual determination is contained in each document, and a reference back to the then-existing portion of Chapter 253, Florida Statutes, regarding the evaluation of permit applications, will indicate that the Respondent's determination was based on mere boilerplate, and not factual evidence. Section 253.123, Florida Statutes, 1981, recites:

> "The removal of sand, rock or earth from the navigable waters of the state...and the submerged bottoms thereof by dredging...shall not be permitted except in the following instances:
>
> For other purposes when, but only when, the board of trustees has determined, after consideration of a biological survey and an ecological study...that such removal will not interfere with the conservation of fish, marine and wildlife or other natural resources, to such an extent to be contrary to the public interest, and will not result in the destruction of oyster beds, clam beds, or marine productivity, including, but not limited to, destruction of natural marine

habitats, grass flats suitable as nursery or feeding grounds for marine life, and established marine soils suitable for producing plant growth of a type useful as nursery or feeding grounds for marine life...".

The two intents to deny from Respondent are virtually identical, except for one factual paragraph that in the first intent recited:

> "The proposed roofed platform and walkway will be located over seagrasses. The resultant shading is expected to destroy those seagrasses which, as a base of a detrital food web, contribute to the commercial and recreational shellfish and fishing industry. Seagrasses also provide habitat and nursery grounds for many marine organisms, consolidate sediments and can improve water quality by removing nutrients from the water and reducing turbidity." (R-40)

The second intent to deny reflected a shift in emphasis as follows:

> "The proposed roofed platform and walkway will be located over and near marine bottom capable of supporting seagrasses. The resultant shading by the structure is expected to destroy existing seagrasses and eliminate the potential for seagrasses to grow in the area. Seagrasses are the base of a detrital food web, contributing to the commercial and recreational shellfish and fishing industry. Seagrasses also provide habitat and nursery grounds for many marine organisms, consolidate sediments and can improve water quality by removing nutrients from the water and reducing turbidity." (R-50)

The subsequent portion of both intents to deny contain direct quotations from the department's water quality standards, and paraphrasing of the above noted Chapter 253, Florida Statutes, requirements. The concerns voiced by the department in the first

application were for seagrasses, so the Thomsons mapped the seagrasses and submitted a revision that placed the structures over unvegetated submerged lands. Marine bottoms and soils are ubiquitous, yet marine bottoms and soils capable of supporting seagrass growth are a matter for scientific determination and evaluation. Nowhere in the record is there any evidence that the department conducted any soil analysis, and certainly the Applicant was precluded from presenting any evidence concerning whether or not the soils were suitable for seagrass growth.

Only a cursory review of the application sketches incorporated into the opinion below reflect the significant changes in configuration. The Respondent's reliance on Doheny v. Grove Isle Limited, 442 So.2d 966 (Fla. 1st DCA 1983), is certainly misplaced, since in that case formal administrative proceedings were held for the prior application which was a mirror image of the second proposal, and during which hearing full scientific evidence covering all issues was presented, and the rights of all parties preserved. Indeed most cases cited by either party in this proceeding have involved situations where an evidentiary hearing was held in the initial proceeding, and it was the avoidance of a second evidentiary hearing that was at issue. An exception is the case of Clean Water Inc. v. Department of Environmental Regulation, 402 So.2d 456 (Fla. 1st DCA 1983), in which a first petition for formal hearing was dismissed because it was based only upon a preliminary agreement; and upon finalization of the agreement into agency action, a second identical petition was found not barred by res judicata as a result of changed circumstances.

Administrative res judicata has been analyzed most often in zoning cases, and in the Case of Gunn v. Board of County Commissioners Dade County, 481 So.2d 95 (Fla. 3rd DCA 1986), a second application for only a rearrangement of the same softball field was determined not to be barred by res judicata. While this opinion also related that determination of whether a change in circumstances has occurred lies primarily within the discretion of the zoning authority itself, it refers to City of Miami Beach v. Prevatt, 97 So.2d 473 (Fla. 1957), for the proposition that res judicata should be applied in zoning cases with great caution.

ARGUMENT THREE

IN ITS ORDER ON REQUEST FOR DEVELOPMENT OF A RECORD, RESPONDENT IGNORED ITS OWN RULES IN DENYING PETITIONERS AN OPPORTUNITY TO PRESENT EVIDENCE ENTITLING THEM TO THE REQUESTED PERMIT, OPPOSING RESPONDENT'S ASSERTION OF RES JUDICATA AND IN SUPPORT OF THEIR TAKING CLAIM.

The provisions Rule 17-103.330(3), Florida Administrative Code, provide as follows:

> "If no record was developed pursuant to Section 120.57, Florida Statutes, prior to the final agency action, then a request for the development of a record shall accompany the notice of appeal. Such a request should state which method of developing a record pursuant to Section 120.57, Florida Statutes, is desired. Either a formal or informal proceeding or informal disposition by stipulation, agreed settlement or consent order. Thereupon the times for further prosecution of the appeal shall be tolled until the requested record has been completely developed. Until such record has been completely developed the appeal shall not be deemed received by the board."

Petitioners filed a request for development of a record through a formal proceeding (R-83). Respondent's attempt at humor

through its "granting" of Petitioners' request is not well received (R-84). Respondent failed to include within its final order or initial record (for case AZ-337) the affidavit attached to and incorporated into Petitioners' petition for an administrative hearing (R-94). In its initial intent to deny, Respondent stated that the project was in an aquatic preserve, while the second intent deleted that allegation. The Petitioners are entitled to a fair, accurate, and complete record. The provisions of Chapter 120, Florida Statutes, are intended to prevent just such abuse of discretion as has occurred in this case, and to allow development of an impartial record.

ARGUMENT FOUR

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH A DECISION OF THE THIRD DISTRICT COURT OF APPEAL, REGARDING FAIR OPPORTUNITY TO BE HEARD.

In the case of Coral Reef Nurseries, Inc. v. The Babcock Company, 410 So.2d 648, (Fla. 3d DCA 1982), the Court determined that the doctrine of res judicata was properly found not to be applicable in the particular circumstances of that case, and noted that the doctrine should be applied with great caution. In determining whether or not the doctrine of res judicata was applicable in the particular zoning matter at issue, the Court stressed that one of the requirements for the application of the doctrine was a fair opportunity to be heard.

The majority opinion in the Court below dismissed the fairness issue in a footnote, stating that any issue with regard to fairness should have been pursued by direct challenge to the final

order, which was entered upon Petitioner's initial permit application.

Fundamental fairness falls by the wayside in the majority opinion, at this point, because Respondent's rules allow representation by non-attorney personnel, and the final order was forwarded to the non-attorney with a letter inviting reapplication. It was not until after the 30-day period in which appeal could be taken had elapsed, that the problems began to surface regarding res judicata.

The lack of analysis concerning the fair opportunity to be heard, and the complete lack of determination regarding whether caution was applied by Respondent in its review of the second application to prevent manifest injustice, places the opinion of the District Court below in direct conflict with the Third District decision in the Coral Reef Nurseries case.

ARGUMENT FIVE

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH TWO DECISIONS OF THIS COURT REGARDING CHANGED CIRCUMSTANCES FOR THE SECOND APPLICATION.

In Matthews v. State ex. Rel. St. Andrews Bay Transportation Company, 11 Fla. 587, 149 So. 648 (Fla. 1933), this Court held that an amended application showing a substantial change was not barred by statutes preventing the Railroad Commission from entertaining a once denied application until the expiration of six months from the date of such denial. The key to the holding was the substantial changes inherent in the second application.

This Court looked at its own prior decisions concerning zoning of a parcel of land, and determined that even if the land and the

parties involved had been the same, the passage of time resulted in changed circumstances, defeating the application of the doctrine of res judicata. City of Miami Beach v. Prevatt, 97 So.2d 473 (Fla. 1957).

In the Thomson case, after difficulties were encountered with the first application, Petitioners retained environmental experts to review the site, to map the seagrasses, and to propose a modification that would prevent damage to the seagrasses (R-86). The DER did not analyze the new report: both Intents to Deny simply contain boilerplate language from statutes or rules.

Once the shading of seagrasses was eliminated, the DER's emphasis shifted to marine soils capable of supporting vegetation, but the evidence was still only paraphrased quotations from prior Chapter 253, Florida Statutes, listing areas of concern. No opportunity was provided for the Thomsons to respond to the shift in emphasis, and no bilateral conference, informal hearings, or formal hearings, were held concerning either application. The drawings included in the dissent to the majority opinion below, clearly evidence the significantly changed circumstances. The failure to acknowledge the changed circumstances, places the majority opinion in direct conflict with this Court.

ARGUMENT SIX

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH A DECISION OF THIS COURT AND A DECISION OF THE SECOND DISTRICT COURT OF APPEAL CONCERNING RIGID APPLICATION OF RES JUDICATA.

Lastly, but certainly most importantly, this Court announced that the doctrine of res judicata should not be so rigidly applied

as to defeat the ends of justice. Universal Construction Company v. City of Fort Lauderdale, 68 So.2d 366 (Fla. 1953). The second district Court of appeal in State Department of Health and Reabilitative Services v. Laplante, 470 So.2d 832 (Fla. 2nd DCA 1985) cited the Universal Construction Company case when vacating an order of the Department of Health and Rehabilitative Services. In that case a hearing had been held in the first proceeding, but was not satisfactorily recorded, and while the trial judge in the second proceeding determined from testimony of the judge in the first case that the matter had been ajudicated, and thus was res judicata to the second proceeding, the District Court of Appeal determined that since there was no clear-cut former adjudication that res judicata did not apply.

The ends of justice concerning Paul and Ellen Thomson relate to whether administrative agencies should provide open access to administrative forums for hotly contested cases. Certainly something here went amiss in the administrative process. Both Respondent, and the First District Court of Appeal, provide administrative hearings to third party intervenors at the drop of a hat, see Booker Creek Preservation v. Mobil Chemical Company, 481 So.2d 10, (Fla. 1st DCA 1985), yet here the land owners of not only the uplands, but the underlying submerged lands, are denied an administrative hearing. The decision in the Court below provides carte blanche authority to the DER to invite reapplication for once denied applications and then simply raise the doctrine of res judicata to forever bar judicial enforcement of land owners rights. A presumption of correctness has arisen regarding administrative

action, which sweeps the rights of applicants under the rug. The Thomsons came to DER seeking a fair deal, what they received was an administrative fast shuffle. The complete lack of inquiry into the fundamental fairness issue, or whether the application of res judicata would work an injustice, places the opinion below in direct conflict with this Court's prior opinion, and that of the Second District Court of Appeal.

CONCLUSION

A direct conflict between the opinion of the Court below and opinions of the Second and Third District Court of Appeal is clear, as is the conflict with the three cases decided by this Court. In this regard there is no doubt but that the undersigned cannot match the precision or depth of argument contained in the dissent to the majority opinion below.

This Court will find from a review of the record that no opportunity was provided for a determination of the changed circumstances inherent in the second application. The record also reveals that DER failed to provide the Applicant with procedural safeguards in the initial permit proceeding, and by so doing the agency denied to the Applicants the due process and equal protection of the law. The agency also had a rule that was clear on its face affording Petitioners to the Board of Trustees a formal proceeding in which to develop a record. Lastly, the Court will find, that Paul and Ellen Thomson were sold the lands under which their dock was to be constructed by the State of Florida, and that the denial without benefits of the due process safeguards inherent in the administrative hearing process, of the qualified riparian

right to build a dock, clearly is contrary to the provisions of the Constitution of the State of Florida. Paul and Ellen Thomson have been to the Department of Environmental Regulation, to the Board of Trustees of the Internal Improvement Trust Fund, and to the First District Court of Appeal, seeking a fair disposition of their case. They find encouragement in the dissent below, and now look to the Justices of this Court, for recognition of the fact that they as Applicants have some small rights to challenge the massive bureaucracy seeking to prevent them from making the only reasonable use of the lands, sold by the State to private individuals, for some reason other than the opportunity to pay taxes.

Respectfully Submitted,

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ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven true copies of the Brief of Petitioners 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 E. Gary Early, Esquire, Assistant General Counsel, Department of Environmental Regulation, 2600 Blair Stone Road, Tallahassee, Florida 32301, this 18th day of March, 1987.

ATTORNEY