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COMMENTS

PROCEDURAL ISSUES IN RAISING A CONSTITUTIONAL TAKING CLAIM: TRENDS IN FLORIDA LAW

ROBERT P. BANKS

I. INTRODUCTION

The criteria by which a development regulation can be analyzed to determine if the regulation as applied to a particular property results in a taking in violation of the United States Constitution¹ and Florida Constitution² were set out in *Graham v. Estuary Properties, Inc.*³ However, *Estuary Properties* did not definitively settle the procedural issues concerning when and in what forum a constitutional taking claim may be raised.

Subsequent to *Estuary Properties* the Florida courts have dealt with these procedural issues in a series of cases.⁴ In 1978, the Florida legislature created a circuit court cause of action for property owners seeking to raise a taking claim following final action by the appropriate state agency with regard to the issuance of permits.⁵ This comment will compare the procedural standards established by the Florida Supreme Court in cases where the taking claim occurred prior to the creation of the 1978 statutory taking remedy⁶ with case law which has interpreted the 1978 statute.⁷ This com-

1. "No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. "[N]or shall any state deprive any person of life, liberty or property without due process of law" *Id.* amend. XIV, § 2.

2. "No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner." FLA. CONST. art. X, § 6(a).

3. 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981).

4. *Dade County v. National Bulk Carriers, Inc.*, 450 So. 2d 213 (Fla. 1984); *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984); *Key Haven Assoc'd Enters., Inc. v. Board of Trustees*, 427 So. 2d 153 (Fla. 1982); *Bowen v. Department of Env'tl. Reg.*, 448 So. 2d 566 (Fla. 2d DCA), *cert. granted*, Fla. S. Ct. No. 65,264 (1984); *State v. Atlantic Int'l Inv. Corp.*, 438 So. 2d 868 (Fla. 1st DCA 1983), *cert. granted*, Fla. S. Ct. No. 64,551 (1984); *Griffin v. St. Johns Water Mgmt. Dist.*, 409 So. 2d 208 (Fla. 5th DCA 1982).

5. Ch. 78-85, 1978 Fla. Laws 124 (currently codified at FLA. STAT. §§ 161.212, 253.763, 373.617, 380.085, and 403.90 (1983)).

6. *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984); *Key Haven Assoc'd Enters., Inc. v. Board of Trustees*, 427 So. 2d 153 (Fla. 1982).

7. *Dade County v. National Bulk Carriers, Inc.*, 450 So. 2d 213 (Fla. 1984); *Bowen v. Department of Env'tl. Reg.*, 448 So. 2d 566 (Fla. 2d DCA), *cert. granted*, Fla. S. Ct. No. 65,264 (1984); *Griffin v. St. Johns Water Mgmt. Dist.*, 409 So. 2d 208 (Fla. 5th DCA 1982).

ment will then endeavor to assess the status of taking law in Florida and will highlight areas of conflict in the case law.

II. *Graham v. Estuary Properties, Inc.*: THE ESTABLISHMENT OF SUBSTANTIVE TAKING CRITERIA

In *Graham v. Estuary Properties, Inc.*, the Florida Supreme Court listed the criteria to be used in determining "when the valid exercise of the police power stops and an impermissible encroachment on private property rights begins."⁸ The criteria are:

1. Whether there is a physical invasion of the property.
2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
3. Whether the regulation confers a public benefit or prevents a public harm.
4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
5. Whether the regulation is arbitrarily and capriciously applied.
6. The extent to which the regulation curtails investment-backed expectations.⁹

The court used a two-step analysis in *Estuary Properties* to determine whether a taking had occurred.¹⁰ First, the court determined if the regulation as implemented was a valid exercise of police power.¹¹ Second, the court considered whether the valid exercise of the police power had placed so great a burden on the property as to require the exercise of eminent domain.¹²

8. *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1380-81 (Fla.), cert. denied, 454 U.S. 1083 (1981).

9. *Id.* For an analysis of *Estuary Properties* see Note, *Environmental Law: Doing the Two-Step Through the Mangroves To Preserve the Status Quo*, 11 STETSON L. REV. 348 (1982). See also Comment, *Environmental Law: Wetlands Regulation Prevents Harm*, 33 U. FLA. L. REV. 615 (1981).

10. Note, *supra* note 9, at 355. The author classifies the two-step analysis as follows: Step one is a police power analysis, which includes criteria three, four, and five; step two is an eminent domain analysis, which considers criteria two and six. The two-step analysis does not include criterion one, "whether there is a physical taking of the property." The United States Supreme Court recently held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), that permanent physical occupation always results in a taking. Because physical invasion or occupation always results in a taking, if criterion one is satisfied there is no need to go through the two-step analysis.

11. Note, *supra* note 9, at 355.

12. *Id.*

Florida courts have followed the *Estuary Properties* court's approach to taking analysis in subsequent cases.¹³ In contrast, the procedural sequence followed in *Estuary Properties* to raise the taking claim has not been uniformly adopted.

While the Florida Supreme Court in *Key Haven Associated Enterprises v. Board of Trustees* ratified the process followed in *Estuary Properties* as a proper method to raise a constitutional taking claim,¹⁴ it outlined alternative procedures to raise taking claims based on the actions of state agencies in the permitting process. These alternative procedures have been interpreted by the Florida courts in several subsequent taking cases.¹⁵

The constitutional taking claim in *Estuary Properties* was raised in a district court review of a State Land and Water Adjudicatory Commission denial of an application for development approval.¹⁶ In 1975, Estuary applied to the Board of Commissioners of Lee County for approval of a development of regional impact pursuant to section 380.06, Florida Statutes.¹⁷ After a public hearing and a recommendation for denial of the project by the Southwest Florida Regional Planning Council, the Lee County Commission held public hearings and denied the request to build a 26,500 unit development which would destroy 1,800 acres of mangroves.¹⁸ The board then denied the application for development approval, citing the findings of the Southwest Florida Regional Planning Council that the project would result in severe environmental impacts.¹⁹ Included in the denial was a list of recommended changes which would be necessary to gain approval of the project, including a reduction in the size of the project from 26,500 to 12,968 units and the elimination of the destruction of such large acreages of mangroves.²⁰

Estuary appealed the denial of the development order to the Florida Land and Water Adjudicatory Commission.²¹ After a five day de novo hearing, a hearing officer recommended that the ap-

13. *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984); *Key Haven Assoc'd Enters., Inc. v. Board of Trustees*, 427 So. 2d 153 (Fla. 1982); *Fox v. Treasure Coast Regional Planning Council*, 442 So. 2d 221 (Fla. 1st DCA 1983).

14. *Key Haven*, 427 So. 2d at 159.

15. *Bowen*, 448 So. 2d at 568-69; *Albrecht*, 444 So. 2d at 12.

16. *Estuary Properties*, 399 So. 2d at 1376.

17. (Supp. 1974).

18. *Estuary Properties*, 399 So. 2d at 1376.

19. *Id.* at 1376-77.

20. *Id.* at 1377.

21. *Id.*

peal be denied, citing adverse environmental impacts and declining to consider the taking issue "because that issue was determined to be a judicial question beyond the purview of the administrative hearing."²²

The Land and Water Adjudicatory Commission adopted the hearing officer's recommendation and entered a final order of denial.²³ Estuary sought judicial review of the commission's denial of the project.²⁴ The First District Court of Appeal found that the denial of the application for development approval resulted in a taking and remanded the case to the commission for approval unless Lee County commenced condemnation proceedings for all salt-water mangroves.²⁵ Subsequently, the supreme court reversed the finding of a taking without questioning the jurisdiction of the district court of appeal to consider the constitutional question.²⁶

The *Estuary Properties* procedural process of raising a taking claim against the state can be summarized as follows: after a denial of a state permit and an exhaustion of administrative remedies, the constitutional taking claim may be raised along with other issues in a district court proceeding.

III. THE PROCEDURAL TAKING CLAIM PROCESS REFINED: *Key Haven*, *Albrecht* AND *Atlantic International*

A. Key Haven

In *Key Haven Associated Enterprises v. Board of Trustees*,²⁷ the Florida Supreme Court was provided the opportunity to clarify the procedural requirements for raising a taking claim based on state action resulting in a permit denial. The issues which the court dealt with in *Key Haven* were the choice of court forums and the question of exhaustion of administrative remedies, both of which are issues evolving out of provisions in the Florida Administrative Procedure Act.²⁸ The Act provides for all final agency action of state agencies to be subject to review in district courts of

22. *Estuary Properties, Inc. v. Askew*, 381 So. 2d 1126, 1131 (Fla. 1st DCA 1979). For a contrary view held by another hearing officer, see *Peterson v. Department of Envtl. Reg.*, 35 FDOAH 77 (1977).

23. *Estuary Properties*, 399 So. 2d at 1377.

24. *Id.*

25. *Id.*

26. *Id.* at 1377-83.

27. 427 So. 2d 153 (Fla. 1982).

28. FLA. STAT. ch. 120 (1983).

appeal.²⁹ The issues to be considered in district court review of agency action include constitutional issues.³⁰ The Act also provides for the continuing ability of circuit courts to issue declaratory judgments.³¹

Between 1964 and 1968, Key Haven purchased 185 acres of submerged land in the Florida Keys from the Trustees of the Internal Improvement Fund.³² In 1972, Key Haven sought a permit to dredge and fill a portion of the submerged land.³³ In 1976, the Department of Environmental Regulation (DER) notified Key Haven of its intention to deny the permit.³⁴ Key Haven requested and received a formal hearing on the permit application as authorized by section 120.57(1), Florida Statutes.³⁵ After public hearings, a hearing officer recommended denial of the permit, finding Key Haven did not meet the requirements of chapters 253 and 403, Florida Statutes.³⁶ DER proceeded to deny the permit.³⁷

Key Haven chose not to pursue an administrative appeal of DER's action to the Trustees of the Internal Improvement Trust Fund as provided in section 253.76, Florida Statutes.³⁸ Instead, Key Haven chose to raise a constitutional taking claim in circuit court.³⁹ The trial court dismissed the action based on *Coulter v. Davin*⁴⁰ and *Kasser v. Dade County*.⁴¹

In *Coulter*, the Second District Court of Appeal held that a party seeking to overturn an agency action based on the unconstitutionality of that *action* is barred from raising constitutional challenges in circuit court that could have been raised in a district court action pursuant to section 120.68 of the Florida Administrative Procedure Act.⁴² *Coulter* held, however, that a party is not foreclosed from challenging the underlying constitutionality of a

29. *Id.* § 120.68(2).

30. *Id.* § 120.68(12)(c).

31. *Id.* § 120.73.

32. *Key Haven*, 427 So. 2d at 155.

33. *Id.*

34. *Id.*

35. (1975).

36. (1975).

37. *Key Haven*, 427 So. 2d at 155.

38. (1975). The statute provided that the governor and cabinet sitting as the Board of Trustees of the Internal Improvement Trust Fund shall hear and decide appeals made from department decisions. FLA. STAT. ch. 253 (1975); *Key Haven*, 427 So. 2d at 155.

39. *Key Haven*, 427 So. 2d at 155.

40. 373 So. 2d 423 (Fla. 2d DCA 1979).

41. 344 So. 2d 928 (Fla. 3d DCA 1977).

42. *Coulter*, 373 So. 2d at 425-28.

statute in circuit court.⁴³

In *Kasser*, the Third District Court of Appeal held that a plaintiff could not simultaneously assert that a rezoning was a valid exercise of the police powers while at the same time claiming that it constituted an illegal taking.⁴⁴

The district court in *Key Haven* agreed with the trial court's finding that both *Key Haven* and *Coulter* "were attempts to collaterally attack the particular agency's denial of a permit."⁴⁵ It also agreed with the trial court's comparison of *Key Haven* to *Kasser*, finding that in both cases the party claimed an agency action was valid while simultaneously alleging that the action was unconstitutional.⁴⁶

The district court provided a discussion of the judicial policy of exhaustion of remedies and gleaned the following principles from Florida case law:

1. All review processes available under chapter 120 must be exhausted before the judicial branch will consider intervention.⁴⁷
2. Circuit courts should only overrule agency action in extraordinary situations, such as "when the constitutional legitimacy of the entire administrative inquiry is questioned."⁴⁸

The Florida Supreme Court affirmed that portion of the district court opinion holding that the failure to exhaust administrative remedies precluded a circuit court challenge.⁴⁹ However, the supreme court reversed that part of the opinion which held that *Key Haven* was required to raise its constitutional claim in district court.⁵⁰

The supreme court held that after administrative remedies in the executive branch are exhausted, an applicant is free to: (1) contest the agency action in district court, raising all issues (including constitutional issues); or (2) accept the agency action as completely correct and file an action in circuit court alleging an illegal taking.⁵¹ The court analyzed the types of constitutional challenges

43. *Id.* at 428.

44. *Kasser*, 344 So. 2d at 929.

45. *Key Haven Assoc'd Enters., Inc. v. Board of Trustees*, 400 So. 2d 66, 68 (Fla. 1st DCA 1981).

46. *Id.* at 69.

47. *Id.*

48. *Id.*

49. *Key Haven*, 427 So. 2d at 160.

50. *Id.*

51. *Id.*

that can be raised in the administrative process and the role of the district and circuit courts in considering the challenges. The court found three categories of constitutional challenges:

1. Challenges to the facial constitutionality of a statute;
2. Facial challenges to an agency rule adopted pursuant to a constitutional provision or statute; or
3. The unconstitutionality of an agency's action in implementing an otherwise constitutional rule.⁵²

The court found that a facial challenge to the constitutionality of a statute can be raised in circuit court without the prior exhaustion of administrative remedies.⁵³ The facial constitutionality of a statute can also be raised on direct appeal in the district court.⁵⁴ The raising of the constitutionality of a statute on direct review was described by the court as "a process that would allow all issues to be decided in the least expensive and time-consuming manner."⁵⁵ The court further held that facial constitutionality of an agency rule should always be raised on direct appeal pursuant to the Administrative Procedure Act.⁵⁶ The district court can remand the rule back to the agency, and if the agency refuses to modify the rule the district court can declare the rule unconstitutional.

Challenges to the constitutionality of ordinances as applied should not be permitted, the court held, until administrative remedies are exhausted.⁵⁷ The court stated that district courts are the appropriate forum for such challenges "because those courts have the power to declare the agency action improper and to require any modifications in the administrative decision-making process necessary to render the final agency order constitutional."⁵⁸ The court found, however, that:

[D]irect review in the district court of the agency action may be

52. *Id.* at 157. *But see* State Comm'n on Ethics v. Sullivan, 430 So. 2d 928, 941-45 (Fla. 1st DCA 1983) (Shaw, J., concurring).

53. *Key Haven*, 427 So. 2d at 156-57 (citing *Gulf Pines Memorial Park, Inc. v. Oakland Memorial Park, Inc.*, 361 So. 2d 695 (Fla. 1978)).

54. *Key Haven*, 427 So. 2d at 157.

55. *Id.*

56. *Id.* at 158 (citing *Rice v. Department of Health & Rehabilitative Servs.*, 386 So. 2d 844 (Fla. 1st DCA 1980)). In *Rice*, the district court remand of an appeal of an agency decision back to the agency resulted in modification of the rule without the need for the court to find the rule unconstitutional.

57. *Key Haven*, 427 So. 2d at 158.

58. *Id.*

eliminated and proceedings properly commenced in circuit court, if the aggrieved party is willing to accept all actions by the executive branch as correct both as to the constitutionality of the statute implemented and as to the propriety of the agency proceedings.⁵⁹

The court then rejected the district court's application of zoning law to the state permitting process:

A zoning ordinance is, by definition, *invalid if it is confiscatory*. . . . We agree with the court in *Kasser*, which correctly held that an assertion that a denial of rezoning is confiscatory constitutes a direct attack on the validity of a zoning ordinance. This is not the case when a statute authorizes a permit denial which is confiscatory. As we stated in *Graham v. Estuary Properties*, "it may be . . . that a regulation complies with standards required for the police power but still results in a taking."⁶⁰

Examining the instant case, the court found that Key Haven's failure to exhaust administrative remedies by appealing the permit denial to the Trustees of the Internal Improvement Trust Fund precluded any constitutional challenge to the agency action.⁶¹ If the administrative remedies had been exhausted, Key Haven could have chosen to pursue an *Estuary Properties* style challenge in the district court or a circuit court challenge to the constitutionality, but not the propriety, of the agency action.

There is a suggestion in *Key Haven* that a circuit court challenge to the constitutionality of an agency action may not utilize all six taking criteria as established in *Estuary Properties*.⁶² *Key Haven's* establishment of different taking criteria at the circuit and district courts emphasizes the nature of the *Estuary Properties* taking analysis as a two step process involving analysis of (1) the validity of the exercise of police power; and (2) eminent domain.⁶³ After *Key Haven*, if there were a challenge in district court, the court could consider a taking claim using both police powers and emi-

59. *Id.* at 159.

60. *Id.* (quoting *Estuary Properties*, 399 So. 2d at 1381) (citations omitted) (emphasis in original).

61. *Id.*

62. *Id.* at 160.

63. *Id.*; see also Fernandez & Bryant, *Key Haven and Its Progeny: Uncertain Choices for Constitutional Challenges to Administrative Action*, 58 FLA. B.J. 381 (1984) (suggesting that *Key Haven* eliminates criteria four and five of the *Estuary Properties* analysis in circuit court taking actions).

ment domain analysis, while a taking action in circuit court would be limited to eminent domain analysis.

B. Albrecht

In *Albrecht v. State*⁶⁴ the Florida Supreme Court was faced with the question of whether a party raising a district court challenge to final agency action must raise a taking claim, or whether the constitutional claims can be held in abeyance and raised in circuit court if the district court upholds the administrative action. The Second District Court of Appeal, which had found that *res judicata* prevented the raising of constitutional claims in circuit court after a district court had upheld the administrative action, was reversed by the supreme court.⁶⁵ It held that a party challenging an administrative action can choose to raise constitutional claims along with administrative claims in a section 120.68 appeal or can choose to raise a circuit court taking challenge after the disposition of the district court administrative challenge.⁶⁶

The applicants in *Albrecht* were the owners of coastal property who had purchased 300 feet of submerged land from the State of Florida.⁶⁷ They applied for and received a permit to fill the land from Pinellas County, subject to approval by the State of Florida. When the permit was denied by DER, the applicants unsuccessfully appealed to the Trustees of the Internal Improvement Trust Fund.⁶⁸

The applicants pursued judicial review of the permit denial pursuant to section 120.68, Florida Statutes,⁶⁹ by challenging the constitutionality of section 253.124, Florida Statutes⁷⁰ and the authority of DER to review county findings.⁷¹ The First District Court of Appeal upheld the permit denial, finding that DER had authority to review county commission findings, and upheld the constitutionality of the standards provided in chapter 253.⁷²

The applicants subsequently filed suit in Pinellas County Circuit Court seeking compensation for the taking of their property.⁷³ The

64. 444 So. 2d 8 (Fla. 1984).

65. *Albrecht v. State*, 407 So. 2d 210 (Fla. 2d DCA 1981).

66. *Albrecht*, 444 So. 2d at 12-13.

67. *Id.* at 10.

68. *Id.*

69. (1975).

70. (1973).

71. *Albrecht v. Department of Env'tl. Reg.*, 353 So. 2d 883 (Fla. 1st DCA 1977).

72. *Id.* at 885-86.

73. *Albrecht*, 444 So. 2d at 10.

circuit court dismissed the action based on the holding in *Coulter* that when an administrative action has become final, with or without district court review, a party is precluded from making a constitutional attack on the proceeding in circuit court.⁷⁴

The Second District Court of Appeal affirmed the dismissal based on *Coulter* and principles of res judicata.⁷⁵ The court noted that the appellants had the opportunity to raise the taking claim in their earlier district court appeal and stated that "[t]he fact that they did not raise [the taking claim] is irrelevant to the application of res judicata."⁷⁶

The supreme court, however, rejected the application of *Coulter* and res judicata to *Albrecht* and held that res judicata did not prevent raising a taking claim in circuit court subsequent to district court disposition of the action.⁷⁷ The supreme court expressly rejected the holding in *Coulter* that the doctrine of res judicata forecloses circuit court review of constitutional issues which could have been raised in the district court review of an action.⁷⁸

The court then found that the legislature, in providing a means to raise constitutional claims in section 120.68(12), Florida Statutes,⁷⁹ did not mandate that such claims be brought there:

We do not believe that was the legislature's intention. It is too broad a leap to take the words of a statute which provide for remand *if* the action is found to be in violation of the constitution and interpret them to mean that any constitutional issue *must* be raised there or be forever barred.⁸⁰

Citing several previous Florida res judicata cases,⁸¹ the court concluded:

It is . . . a settled rule that when the second suit is between the same parties, but based upon a different cause of action from the first, the prior judgment will not serve as an estoppel except as to those issues actually litigated and determined in it. . . . The de-

74. *Albrecht*, 407 So. 2d at 211 (citing *Coulter v. Davin*, 373 So. 2d 423 (Fla. 2d DCA 1979)).

75. *Albrecht*, 407 So. 2d at 211.

76. *Id.*

77. *Albrecht*, 444 So. 2d at 11.

78. *Id.*

79. (1981).

80. *Albrecht*, 444 So. 2d at 11 (emphasis in original).

81. *Donahue v. Davis*, 68 So. 2d 163 (Fla. 1953); *Gordon v. Gordon*, 59 So. 2d 40 (Fla. 1952); *Prall v. Prall*, 50 So. 867 (Fla. 1909); *Lake v. Hancock*, 20 So. 811 (Fla. 1896).

termining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions.⁸²

The court then found that the cause of action in the First District Court action differed from the cause of action in the subsequent circuit court taking claim.⁸³ The court also noted that facts necessary to challenge the propriety of the agency action differed from the facts necessary to demonstrate a taking.⁸⁴

While the Florida Supreme Court's application of res judicata principles is consistent with Florida precedent, it is an anachronistic approach, reflecting law that predates modern rules of civil procedure and pleadings. The current Florida approach to res judicata allows parties challenging administrative challenges to forum shop, challenging the action in the district court where the state agency is located⁸⁵ and, if unsuccessful there, to challenge the constitutionality of the action in the circuit where the property subject to the permit application is located.⁸⁶ As Judge Robert Smith of the First District Court of Appeal stated in *Rice v. Department of Health & Rehabilitative Services*: "[W]e think there is precious little sound policy to justify dividing an administrative controversy into nonconstitutional issues and . . . constitutional issues and parceling them out to separate agency and circuit court litigations which may eventually merge again in the same district court of appeal or, worse, in different district courts."⁸⁷

The precise problems which Judge Smith wrote about in *Rice* occurred in *Albrecht*, where the district court appeal challenging the agency action was heard in the First District Court of Appeal,⁸⁸ while the subsequent appeal of the circuit court taking challenge occurred in the Second District Court of Appeal.⁸⁹

A more efficient approach to res judicata is provided in section 24, *Restatement (Second) of Judgments*, which provides:

82. *Albrecht*, 444 So. 2d at 12.

83. *Id.*

84. *Id.*

85. Proceedings in district court challenging the actions of an agency are instituted in the district court "where the agency maintains its headquarters or where a party resides." FLA. STAT. § 120.68(2) (1983).

86. *Id.* § 253.763(2) provides that circuit court action shall be filed "in the circuit court in the judicial circuit in which the affected property is located"

87. *Rice v. Department of Health & Rehabilitative Servs.*, 386 So. 2d 844, 848 (Fla. 1st DCA 1980).

88. *Albrecht v. Department of Env'tl. Reg.*, 353 So. 2d 883 (Fla. 1st DCA 1977).

89. *Albrecht*, 407 So. 2d 210 (Fla. 2d DCA 1981).

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the transaction arose.

(2) What factual grouping constitutes a "transaction," and what grouping constitutes a "series" are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit⁹⁰

The *Restatement's* approach to res judicata is based on the modern system of pleadings as evidenced by the Federal Rules of Civil Procedure. While Florida has had a system of pleading based on the federal rules since 1950 and eliminated all distinctions between common law and equity pleadings in 1967,⁹¹ the principles of res judicata used by the Florida Supreme Court are gleaned from relatively archaic law.⁹²

If the res judicata analysis of *Albrecht* is performed using the transactional approach of the *Restatement*, it becomes clear that the various causes of action raised in the district court and the circuit court evolved out of the same "transaction." As all rights evolving out of a transaction are extinguished pursuant to the rules of bar or merger, the 1977 district court ruling upholding agency action⁹³ would have barred subsequent circuit court action.

The process laid out by the supreme court in *Albrecht* and *Key Haven* to raise the constitutional taking issue when challenging state action can be summarized as follows:

1. Exhaust administrative remedies available in the executive branch and appeal the agency decision in district court, including the constitutional claim;⁹⁴ or
2. Accept the agency action as correct and institute immediate circuit court action raising the taking claim;⁹⁵ or
3. Raise the taking claim in circuit court after the propriety of

90. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1980); see also *Nevada v. United States*, 103 S. Ct. 2906, 2918-20 (1983).

91. H. TRAWICK, *FLORIDA PRACTICE AND PROCEDURE* v-vii (1981).

92. See *supra* note 81 and accompanying text.

93. *Albrecht v. Department of Env'tl. Reg.*, 353 So. 2d 883 (Fla. 1st DCA 1977).

94. *Key Haven*, 427 So. 2d at 60.

95. *Id.*

the agency action has been determined in district court.⁹⁶

C. Atlantic International

The First District Court of Appeal applied *Key Haven* principles in *State v. Atlantic International Development Corp.*,⁹⁷ reversing a circuit court decision which had found a taking.

In *Atlantic International*, the developer of a speculative subdivision filed a circuit court taking claim after entering a consent agreement and settlement stipulation which "‘resolve[d] or rendere[d] moot all issues’" raised in the district court action filed after permit denial by DER.⁹⁸ The circuit court found that the cumulative effects of the actions of various state agencies resulted in a taking and ordered the state to commence eminent domain proceedings.⁹⁹ The state appealed the circuit court ruling.¹⁰⁰ In this second appeal, the district court held Atlantic was precluded by *Key Haven* from proceeding with an alternate remedy in circuit court: "By contesting the validity of DER's denial of the permit in a petition for writ of certiorari Atlantic elected the district court as the judicial forum and was thereby foreclosed from proceeding with an alternate remedy in circuit court."¹⁰¹

The *Atlantic* decision was written prior to publication of the supreme court's decision in *Albrecht*, which allowed a taking claim to be raised in circuit court after the propriety of an action is determined in district court.¹⁰² *Albrecht* does not, however, allow an agency action to be relitigated in circuit court after a district court has ratified the action: "[O]nce a party agrees to the propriety of the action and chooses the circuit court forum, it is estopped from any further denial that the action itself was proper."¹⁰³ If the district court in *Atlantic International* interpreted *Key Haven* as foreclosing circuit court taking actions, its interpretation has

96. *Albrecht*, 444 So. 2d at 12.

97. 438 So. 2d 868 (Fla. 1st DCA 1983), *cert. granted*, Fla. S. Ct. No. 64,551 (1984).

98. *Id.* at 870 (quoting the parties' joint motion for the court's approval of a stipulation and consent agreement).

99. Findings of Fact, Conclusions of Law and Final Judgment on "Taking" Issues, *Atlantic Int'l Inv. Corp. v. Department of Business Reg.*, No. 75,295 (Fla. 2d Cir. Ct. June 2, 1982).

100. *Atlantic Int'l*, 438 So. 2d at 868.

101. *Id.* at 871.

102. *Albrecht*, 444 So. 2d at 12-13.

103. *Id.* at 13.

clearly been overturned by *Albrecht*.¹⁰⁴ However, if the court is referring to a prohibition against attacks on the propriety of agency action in circuit court, its holding is consistent with *Key Haven* and *Albrecht*.¹⁰⁵

The taking analysis performed by the circuit court in *Atlantic International* was not limited to eminent domain analysis, but involved all six of the *Estuary Properties* taking criteria.¹⁰⁶ The Florida Supreme Court has the opportunity in its review of *Atlantic International* to clarify the criteria by which a taking action can be judged in circuit court. In addition, the court is faced with its first review of circuit and district court opinions applying an *Estuary Properties* taking analysis.

IV. A STATUTORY TAKING REMEDY: CHAPTER 78-85, LAWS OF FLORIDA

In 1978 the legislature created a statutory taking remedy in circuit court when it adopted chapter 78-85, Laws of Florida.¹⁰⁷ The Act can be traced to proposals of the Governor's Property Rights Study Commission of 1975,¹⁰⁸ which proposed the creation of a system whereby compensation would be paid for a regulation that "unduly diminishes the value of property even though it does not constitute an unconstitutional taking without compensation."¹⁰⁹

Taking remedies fall into two general classifications: (1) compen-

104. Petitioners' Initial Brief on the Merits at 36-39, *Atlantic Int'l Inv. Corp. v. State*, Fla. S. Ct. No. 64,551. Petitioner argues in its brief that the district court opinion clearly conflicts with the supreme court finding in *Albrecht*.

105. Answer Brief of Respondent at 2-11, *Atlantic Int'l Inv. Corp. v. Florida*, Fla. S. Ct. No. 64,551. The respondent in *Atlantic Int'l* argues that *Atlantic International* never accepted the propriety of state permitting actions, as required in *Albrecht*, prior to proceeding with the circuit court taking action. "Atlantic ventured where *Key Haven* explicitly held an aggrieved party in circuit court could not go: a claim of taking based on a challenge to the propriety of the state's actions." *Id.* at 7.

106. Findings of Fact, Conclusions of Law and Final Judgment on "Taking" Issues at 33-41, *Atlantic Int'l Inv. Corp. v. Department of Business Reg.*, No. 75,295 (Fla. 2d Cir. Ct. June 2, 1982).

107. Ch. 78-85, 1978 Fla. Laws 124 (currently codified at FLA. STAT. §§ 161.212, 253.763, 373.617, 380.085, and 403.90 (1983)). For an analysis and description of ch. 78-85, see Rhodes, *Compensating Police Power Takings: Chapter 78-85, Laws of Florida*, 52 FLA. B.J. 741 (1978). See also Cookston & Bruton, *Zoning Law*, 35 U. MIAMI L. REV. 581, 633-37 (1981).

108. Rhodes, *supra* note 107, at 742.

109. Final Report of the Governor's Property Rights Study Commission (Mar. 17, 1975) (available at Florida Legislative Library, The Capitol, Tallahassee, Fla.). For a discussion of the proposals of the Property Rights Study Commission, see Haigler, McInerney & Rhodes, *The Legislature's Role in the Taking Issue*, 4 FLA. ST. U.L. REV. 1 (1976); see also Note, *Updating Eminent Domain for Environmental Control*, 4 FLA. ST. U.L. REV. 24 (1976).

sable regulations which, like the proposal of the Governor's Property Rights Commission of 1975, require compensation for nontakings that result in a substantial diminution of property value;¹¹⁰ and (2) the American Law Institute (ALI) approach allowing governments to modify, invalidate, or pay compensation if a court determines that a regulation is an unconstitutional taking.¹¹¹ The Florida approach adopted in chapter 78-85 is based on the ALI approach, but differs in that the ALI approach applies to all development regulations while the Florida approach applies to the state permitting process but excludes local zoning.¹¹²

Chapter 78-85 allows persons affected by the state permitting process involving chapters 161, 253, 373, 380, and 403 to raise a constitutional taking claim within ninety days of final agency action regarding the permit.¹¹³ The state programs affected by this cause of action include the coastal construction program of the Department of Natural Resources, the state lands program of the Trustees of the Internal Improvement Fund, Land and Water Adjudicatory Commission decisions regarding developments of regional impact and critical areas, Land and Water Adjudicatory Commission and Regional Water Management districts' actions involving water permits, and Department of Environmental Regulation permits regarding pollution control.¹¹⁴ The adoption of the Warren S. Henderson Wetlands Protection Act of 1984 as an addition to chapter 403 added wetlands permitting to the program areas subject to taking actions under chapter 78-85.¹¹⁵

The circuit court cause of action is "confined solely to determining whether final agency action is an unreasonable exercise of the state police power constituting a taking without just compensa-

110. See D. HAGMAN & D. MISCZYNSKI, *WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION* 256-307 (1978) for a spirited argument in favor of compensable regulations for nontakings.

111. MODEL LAND DEV. CODE § 9-112(3) (1975).

112. Rhodes, *supra* note 107, at 743; Cookston & Bruton, *supra* note 107, at 635. The Florida Supreme Court in *Dade County v. National Bulk Carriers, Inc.*, 450 So. 2d 213, 216 (Fla. 1984), cited Rhodes when it interpreted ch. 78-85 as excluding local zoning regulations.

113. Chapter 78-85, § 2, 1978 Fla. Laws 124, 124 (currently codified at FLA. STAT. §§ 161.212(2), 253.763(2), 373.617(2), 380.085(2), and 403.90(2) (1983)).

114. Rhodes, *supra* note 107, at 743.

115. Warren S. Henderson Wetlands Protection Act of 1984, ch. 84-79, 1984 Fla. Laws 202 (currently codified at FLA. STAT. §§ 403.901-.915 (Supp. 1984)). The Act contains no reference to FLA. STAT. § 403.90 (1983) and provides in § 403.909 that final agency action shall be reviewed pursuant to ch. 120. The inclusion of the Wetlands Act within ch. 403 brings it under the requirements of the statutory taking remedy contained in § 403.90.

tion."¹¹⁶ The statute does not modify the jurisdiction of chapter 120 to provide review of the propriety of final agency action.¹¹⁷

If a circuit court finds a state agency action constitutes a taking without just compensation, the statute provides for remand to the agency, which shall agree within a reasonable time to do one of the following:

- (1) issue the permit;
- (2) agree to pay monetary damages; or
- (3) modify the agency action to eliminate the taking.¹¹⁸

The agency shall submit an agreed upon action to the circuit court within ninety days of the circuit court ruling.¹¹⁹ If the agency fails to submit a proposed order or if the court finds the order unreasonable, the court may order the agency to perform any of the three alternatives listed in the Act.¹²⁰

Chapter 78-85 muddles the procedural taking requirements set out by the supreme court in *Albrecht* and *Key Haven*. While both *Albrecht* and *Key Haven* acknowledge the statute as codified, the court did not base its rulings on the statute because that legislation was codified subsequent to the permit denials challenged in the cases.¹²¹

The Florida courts have interpreted the statute in several decisions after the enactment of chapter 78-85.¹²² In *Dade County v. National Bulk Carriers, Inc.*, the Florida Supreme Court held that a local zoning decision was not subject to the procedural process created in the statute.¹²³ In *Griffin v. St. Johns Water Manage-*

116. Chapter 78-85, § 2, 1978 Fla. Laws 124, 124 (currently codified at FLA. STAT. §§ 161.212(2), 253.763(2), 373.617(2), 380.085(2), and 403.90(2) (1983)).

117. *Id.*

118. Chapter 78-85, § 3, 1978 Fla. Laws 124, 124 (currently codified at FLA. STAT. §§ 161.212(3)(a)-(c), 253.763(3)(a)-(c), 373.617(3)(a)-(c), 380.085(3)(a)-(c), and 403.90(3)(a)-(c) (1983)).

119. Chapter 78-85, § 4, 1978 Fla. Laws 124, 124-25 (currently codified at FLA. STAT. §§ 161.212(4), 253.763(4), 373.617(4), 380.085(4), and 403.90(4) (1983)).

120. *Id.*

121. *Key Haven*, 427 So. 2d at 160: "We find that this procedure exists independent of the specific statutory authority now found in section 253.763(2), Florida Statutes, (1979), which became effective . . . after *Key Haven* filed suit in the circuit court in this case." The *Albrecht* court noted "the subsequent enactment of section 253.763, Florida Statutes (Supp.1978)." *Albrecht*, 444 So. 2d at 11.

122. *Dade County v. National Bulk Carriers, Inc.*, 450 So. 2d 213 (Fla. 1984); *Bowen v. Department of Envtl. Reg.*, 448 So. 2d 566 (Fla. 2d DCA), cert. granted, Fla. S. Ct. No. 65,264 (1984); *Griffin v. St. John's Water Mgmt. Dist.*, 409 So. 2d 208 (Fla. 5th DCA 1982).

123. *National Bulk Carriers*, 450 So. 2d at 216.

ment District, the Fifth District Court of Appeal held that appeal of a final agency action to the State Land and Water Adjudicatory Commission delayed the final agency action required for a circuit court taking action.¹²⁴ In *Bowen v. Department of Environmental Regulation*, the Second District Court of Appeal held that the exhaustion requirement established by the supreme court in *Key Haven* does not apply in circuit court taking actions which are based on the statutory remedy provided in chapter 78-85.¹²⁵ After *Bowen*, it becomes unclear what, if anything, is left of the supreme court's holdings in *Key Haven* and *Albrecht*.

V. JUDICIAL INTERPRETATION OF CHAPTER 78-85, LAWS OF FLORIDA

A. National Bulk Carriers

The Florida Supreme Court held that zoning cannot simultaneously be both valid and confiscatory in *Dade County v. National Bulk Carriers, Inc.*¹²⁶ The only remedy for invalid zoning is to repeal the invalid ordinance.¹²⁷ In addition, the court held that section 373.617, Florida Statutes, does not apply to the local zoning process.¹²⁸

In 1975 Dade County designated 1,850 acres of industrially zoned land owned by National Bulk Carriers as "environmentally sensitive" in the County Comprehensive Master Plan.¹²⁹ The county subsequently rezoned the property from "industrial" to "interim use," while denying a request from the landowners to approve an unusual use application to dredge and fill a portion of the property to make it suitable for farming.¹³⁰ National Bulk Carriers challenged the denial and the rezoning in circuit court, claiming a taking without compensation.¹³¹ The circuit court upheld the county's action, but indicated that National Bulk Carriers had the right to raise a separate circuit court taking action.¹³² The district court of appeal remanded the case to circuit court, finding that the circuit court must determine the taking issue pursuant to section

124. *Griffin*, 409 So. 2d at 210.

125. *Bowen*, 448 So. 2d at 568-69.

126. 450 So. 2d 213 (Fla. 1984).

127. *Id.* at 216.

128. *Id.*

129. *Id.* at 214.

130. *Id.* at 214-15.

131. *Id.* at 215.

132. *Id.* at 216.

373.617, Florida Statutes.¹³³ The Florida Supreme Court, citing the limited scope of chapter 78-85, remanded the case to the circuit court for a determination of whether the zoning resulted in a taking and therefore should be invalidated.¹³⁴

In holding that the proper remedy for invalid zoning is repeal of the invalid ordinance, the court reiterated the distinction between confiscatory zoning and confiscatory state permitting:

[I]f the "statute authorizes a permit denial which is confiscatory," . . . a separate condemnation proceeding is an appropriate remedy. Under the type of statutory permitting-scheme involved in *Key Haven, Albrecht and Graham v. Estuary*, it was contemplated that its application may result in a taking. Such is not the case in the application of a zoning ordinance. To be valid, it must be reasonable. If a zoning ordinance is confiscatory, the relief available is a judicial determination that the ordinance is unenforceable and must be stricken.¹³⁵

Why did the supreme court make a distinction in the remedies available to challenge the exercise of police powers by the state in the permitting process as compared to their exercise by local governments in the zoning process? Ironically, Robert Rhodes, in an article cited by the court to interpret section 373.617, had questioned the validity of such a distinction.¹³⁶ The string of cites the supreme court provided in *National Bulk Carriers* in support of the proposition that the only remedy for confiscatory zoning is invalidation, offered little more than a mere restatement of the rule.¹³⁷

The easiest way to distinguish the difference in remedies between local zoning and state permitting is to note, as the supreme

133. (1981).

134. *National Bulk Carriers*, 450 So. 2d at 216.

135. *Id.* (quoting *Key Haven*, 427 So. 2d at 159).

136. Rhodes, *supra* note 107, at 741. Rhodes questioned the "clear distinction" described by the Fourth District Court of Appeal in *Mailman Dev. Corp. v. City of Hollywood*, 286 So. 2d 614, 615 (Fla. 4th DCA 1974), *cert. denied*, 293 So. 2d 917 (Fla.), *cert. denied*, 419 U.S. 844 (1975).

137. *National Bulk Carriers*, 450 So. 2d at 216; *Key Haven*, 427 So. 2d at 159 ("[A]n assertion that a denial of rezoning is confiscatory constitutes a direct attack on the validity of a zoning ordinance. This is not the case when a statute authorizes a permit denial which is confiscatory."). See also *Kasser v. Dade County*, 344 So. 2d 928, 929 (Fla. 3d DCA 1977) ("We cannot allow the appellant to assert that the denial of rezoning was reasonable while simultaneously alleging that it was confiscatory."); *Mailman Dev. Corp.*, 286 So. 2d at 615 ("We hold that enactment of a zoning ordinance . . . does not entitle the property owner to seek compensation for the taking of the property . . .").

court did in *National Bulk Carriers*, that the legislature chose not to provide a taking remedy for zoning when adopting chapter 78-85.¹³⁸ However, in *Key Haven* the court found that the taking cause of action exists "independent of the specific statutory authority now found in section 253.763(2), Florida Statutes."¹³⁹ Given the court's apparent steadfast devotion to the invalidation rule, it is unclear if the court will abandon the rule absent specific statutory direction.

One rationale to distinguish remedies available in zoning from those available in the state permitting process is to label zoning a "first generation" regulation which applies "comprehensively to all owners, who ultimately share the burden as well as the benefit of regulation."¹⁴⁰ In contrast, "second generation" land use restrictions focus on natural resource protection and are not aimed at providing a minimum reasonable use of property.¹⁴¹ One commentator has questioned the distinction between compensation under the new comprehensive land use regulations and no compensation under old regulations, noting that "[i]maginatively used, the old powers could be stretched to do almost everything that is possible under the new powers."¹⁴²

The most influential argument in favor of a taking remedy in rezoning cases was presented by Justice Brennan in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*, where he stated that once a taking is established "the Constitution demands that the government entity pay just compensation for the period commencing on the date the government entity chooses to rescind or otherwise amend the regulation."¹⁴³ If the United States Supreme Court chooses to adopt the position of Justice Brennan in the future, the Florida Supreme Court would be forced to rethink

138. *National Bulk Carriers*, 450 So. 2d at 216.

139. *Key Haven*, 427 So. 2d at 160.

140. Rhodes, *supra* note 107, at 741.

141. *Id.*

142. D. HAGMAN & D. MISZYNSKI, *supra* note 110, at 298. See Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. REV. 711, 732-40 (1982), for an argument that the invalidation remedy is inadequate and subject to abuse, placing landowners on a "merry-go-round" of endless invalidation and litigation.

143. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting). See Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 URB. LAW. 447 (1983), for a critique of Justice Brennan's dissent. See also *Pinellas County v. Brown*, 420 So. 2d 308 (Fla. 2d DCA 1982) (rejecting an assertion that the temporary denial of a building permit resulted in a taking).

its position regarding taking and zoning.¹⁴⁴

The distinction that best explains the difference in remedies available for the local zoning and state permitting process is the classification of local zoning as a legislative process and of the state permitting process as an administrative process which is subject to the Administrative Procedure Act.¹⁴⁵ As the state permit process merges with the local zoning process, the distinctions between legislative and administrative acts fade, as does the rationale for providing different remedies for state and local actions.

In *Manatee County v. Estech General Chemical Corp.*,¹⁴⁶ the Second District Court of Appeal held that local zoning decisions that are part of an order of a development of regional impact (DRI) are subject to review by the Florida Land and Water Adjudicatory Commission. Under *Estech*, whether a local rezoning decision is subject to state review is determined by whether the rezoning is large enough to meet the threshold of a DRI.¹⁴⁷ Thus if the National Bulk Carriers' unusual use application had triggered a DRI, the local zoning denial would have been subject to Florida Land and Water Adjudicatory Commission review. Commission action upholding the zoning denial would have permitted a circuit court taking action pursuant to section 380.085, Florida Statutes.¹⁴⁸

B. Griffin

A Florida district court was provided with the first opportunity to interpret chapter 78-85, Laws of Florida in *Griffin v. St. Johns River Water Management District*.¹⁴⁹ After denial of an application for a permit by the St. Johns River Water Management Dis-

144. In *Hamilton Bank v. Williamson County Planning Comm'n*, 729 F.2d 402 (6th Cir.), cert. granted, 105 S. Ct. 80 (1984), the Sixth Circuit Court of Appeals cited Justice Brennan's dissent in *San Diego Gas & Elec. Co.* as the majority view of the Supreme Court on taking in local land use regulation cases and awarded temporary damages of \$350,000 for the improper denial of a subdivision plat. The Supreme Court in *Hamilton Bank* has the opportunity to revisit *San Diego Gas* and end the uncertainty left after that 4-1-4 decision.

145. See 1 L. DAVIDSON & M. MACCONNELL, FLORIDA ZONING LAW § 5.03 (1983).

146. 402 So. 2d 1251, 1253-56 (Fla. 2d DCA 1981). But see *Friends of the Everglades, Inc. v. Board of County Comm'rs*, 9 Fla. L.W. 1636, 1638 (1st DCA July 25, 1984), where Chief Judge Ervin criticized the *Estech* court's finding that the Florida Land and Water Adjudicatory Commission can review zoning decisions involved in a DRI. This criticism was omitted from the official opinion published at 456 So. 2d 904 (Fla. 1st DCA 1984).

147. FLA. ADMIN. CODE ch. 27F-2 (1982) provides threshold levels of developments presumed to be DRI's.

148. FLA. STAT. § 380.085 (1983).

149. 409 So. 2d 208 (Fla. 5th DCA 1982).

trict, Griffin filed the following appeals:

- (1) a district court action challenging the permit denial pursuant to chapter 120, Florida Statutes;
- (2) review of the action by the Florida Land and Water Adjudicatory Commission pursuant to section 373.114, Florida Statutes; and
- (3) a circuit court taking action pursuant to section 373.617, Florida Statutes.¹⁵⁰

One month after filing his notice of appeal, Griffin sought to abate the district court appeal pending the outcome of the circuit court taking action.¹⁵¹ Ruling on the abatement motion, the district court dismissed the chapter 120 appeal, found that the appeal of the permit denial to the Land and Water Adjudicatory Commission delayed the final agency action required for a district court appeal, and stated: "Since the Commission may modify or rescind the action of the Water Management District, it cannot be considered (as yet) 'final' agency action."¹⁵²

In dicta, the court approved of the simultaneous appeal process followed by Griffin, interpreting section 373.617(2) as setting up "a bifurcated appeal procedure, both avenues of which must be pursued simultaneously because of the time deadlines."¹⁵³

Because an appeal of final agency action to a district court may result in a rescission or modification of the agency action, a circuit court taking proceeding undertaken prior to the conclusion of appellate proceedings would probably be meaningless and at best would be a highly speculative undertaking. A better method of interpreting what constitutes final agency action under section 373.617 would be to adopt the position of the Florida Supreme Court set forth in *Albrecht* and *Key Haven*, that "the propriety of an agency action must be finally determined before a claim for inverse condemnation exists."¹⁵⁴ It should be noted that the *Griffin* court's interpretation of section 373.617 was made without the

150. *Id.* at 209.

151. *Id.*

152. *Id.* at 210.

153. *Id.* The interpretation that FLA. STAT. § 373.617(2) (1983) requires simultaneous district court appeal and circuit court appeal is based on: (1) the 90-day deadline to seek circuit court review of a final agency action established in the statute, and (2) the 30-day deadline established in FLA. R. APP. P. 9.110(b) to seek district court review of final agency action.

154. *Albrecht*, 444 So. 2d at 12.

benefit of the supreme court's opinions in *Key Haven* and *Albrecht*.¹⁵⁵

C. Bowen

In *Bowen v. Department of Environmental Regulation*, the Second District Court of Appeal interpreted sections 253.763(2) and 403.90(2), Florida Statutes, as allowing a circuit court taking action without exhaustion of administrative remedies.¹⁵⁶ The court found that section 253.763(2) had altered the case law established by *Key Haven* which required the exhaustion of administrative remedies.¹⁵⁷

Bowen applied for a dredge and fill permit pursuant to chapters 403 and 253.¹⁵⁸ Bowen did not request an administrative hearing under section 120.57, and DER issued a final order denying the permit.¹⁵⁹ Bowen subsequently filed a taking action in circuit court.¹⁶⁰ The trial court, applying *Key Haven* principles, found that failure to request an administrative hearing pursuant to section 120.57 prior to the final agency action denying the permit constituted a failure to exhaust administrative remedies and barred the circuit court taking action.¹⁶¹

The Second District Court of Appeal reversed the circuit court and remanded the case to allow the taking claim to be tried.¹⁶² The court based its decision on two grounds: (1) an interpretation of the meaning of sections 253.763 and 403.90; and (2) a conclusion that the procedure established by section 253.763 "is in accord with the general policy against requiring exhaustion of administrative remedies where administrative proceedings would be useless, and where parties are willing to accept the final agency administrative action as procedurally and substantively correct."¹⁶³

The court's interpretation of section 253.763 was based on the plain meaning of the statute: "Section 253.763 now only requires,

155. *Griffin* was issued by the Fifth District on February 3, 1982; the supreme court decision in *Key Haven* was issued December 16, 1982; and the supreme court decision in *Albrecht* was released on January 12, 1984.

156. *Bowen v. Department of Env'tl. Reg.*, 448 So. 2d 566, 568-69 (Fla. 2d DCA), *cert. granted*, Fla. S. Ct. No. 65,264 (1984).

157. *Id.* at 568.

158. (1981).

159. *Bowen*, 448 So. 2d at 568.

160. *Id.*

161. *Id.* at 567-68.

162. *Id.* at 570.

163. *Id.* at 569.

before resort to the circuit court, 'final action of any agency' and not an *appeal from* 'final action of any agency.'"¹⁶⁴ The court concluded that if the legislature had wanted to require appeal from final agency action, it could have provided language to that effect.¹⁶⁵

The *Bowen* court's interpretation that section 253.763 does not require exhaustion of administrative remedies is consistent with commentaries which have discussed the statute.¹⁶⁶ The court, however, ignored the fact that Florida courts consider the exhaustion question a matter of policy rather than statutory authority.¹⁶⁷ The court found its interpretation of section 253.763 to be consistent with the exception to the general policy of exhaustion of administrative remedies outlined in *Gulf Pines*.¹⁶⁸ In *Gulf Pines*, the Florida Supreme Court upheld circuit court intervention in the administrative process when a party challenged the constitutionality and retroactive application of a statute.¹⁶⁹ The supreme court concluded that there was no adequate remedy in the administrative process, and thus additional administrative review would be "pointless."¹⁷⁰

The *Gulf Pines* exception to the exhaustion doctrine does not apply to *Bowen*, because administrative appeal of a permit denial is not "pointless." In *Key Haven* the supreme court discussed the possible outcome that could have resulted from exhaustion of administrative remedies: "[T]he trustees could have offered Key Haven several possible remedies as a result of the appeal. The trustees could have found the permit denial improper or found a basis for allowing less extensive development of the land."¹⁷¹ The precise remedies which the court outlined as available upon administrative appeal in *Key Haven* would have been available in *Bowen*.¹⁷²

164. *Id.* (emphasis in original).

165. *Id.*

166. Rhodes, *supra* note 107, at 745 n.30 ("An aggrieved party . . . may wish to forego an administrative appeal and take an agency's final action directly into the circuit court alleging a taking."); see also 1 J. JURGENSMEYER & J. WADLEY, *FLORIDA LAND USE RESTRICTIONS* § 2.17 (1984).

167. See, e.g., *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978).

168. *Bowen*, 448 So. 2d at 569.

169. *Gulf Pines*, 361 So. 2d at 695.

170. *Id.* at 699.

171. *Key Haven*, 427 So. 2d at 158-59.

172. Indeed, the opportunities for review and modification of the agency action were greater in *Bowen* than in *Key Haven*. In *Key Haven*, the property owner participated in an agency hearing with DER but declined to request a hearing before the Governor and the

The *Bowen* court cited *Key Haven* for the proposition that administrative remedies need not be exhausted when a party is willing to accept an agency action as correct.¹⁷³ *Key Haven* provides no such exception. *Key Haven* allows the foregoing of district court appeal and institution of circuit court action if the party is willing to accept the action as correct, but only after the party has completed the administrative process.¹⁷⁴ The only exception to the exhaustion rule discussed in *Key Haven* is a *Gulf Pines* style challenge to the constitutionality of a statute.¹⁷⁵

The Florida courts have refined the exhaustion of administrative remedies doctrine in cases considering the power of circuit courts to issue declaratory judgments provided in chapter 86 of the Florida Statutes and the role of circuit court declaratory actions in the context of the Florida Administrative Procedure Act.¹⁷⁶ In *State ex rel. Department of General Services v. Willis*¹⁷⁷ the First District Court of Appeal held that a circuit court injunctive action would not be heard when the party seeking the injunction had adequate administrative remedies available under the Administrative Procedure Act. The court in *Willis* described the exhaustion of administrative remedies doctrine as a "judicial" rather than a "statutory" device,¹⁷⁸ and cited the value of administrative hearings under the Act as "serv[ing] the public interest by providing a forum to expose, inform and challenge agency policy and discretion."¹⁷⁹

The Florida Supreme Court in *Gulf Pines* and *Key Haven* restated the position that judicial "policy" requires circuit court restraint in interfering with administrative action.¹⁸⁰ In *Key Haven*, the court stated that "the determination of whether a particular controversy may be taken out of the administrative process and into a circuit court is a question of judicial policy and not a matter of judicial jurisdiction."¹⁸¹

Cabinet acting as Trustees of the Internal Improvement Trust Fund. *Key Haven*, 427 So. 2d at 155. In *Bowen*, the appellant declined to request a hearing with DER, foreclosing two levels of review: (1) the agency hearing at DER, and (2) an appeal to the Trustees of the Internal Improvement Trust Fund. *Bowen*, 448 So. 2d at 568.

173. *Bowen*, 448 So. 2d at 569.

174. *Key Haven*, 427 So. 2d at 159.

175. *Id.*; see also *Smith v. Willis*, 415 So. 2d 1331 (Fla. 1st DCA 1982).

176. *State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d 580, 586-93 (Fla. 1st DCA 1977); see also *School Bd. v. Mitchell*, 346 So. 2d 562 (Fla. 1st DCA 1977).

177. 344 So. 2d 580 (Fla. 1st DCA 1977).

178. *Id.* at 589.

179. *Id.* at 591.

180. *Key Haven*, 427 So. 2d at 157; *Gulf Pines*, 361 So. 2d at 699.

181. *Key Haven*, 427 So. 2d at 157.

This policy of judicial restraint in what otherwise appears to be a legislatively created cause of action was criticized by Judge (now Justice) Shaw of the Second District Court of Appeal in his concurring opinion in *State Commission on Ethics v. Sullivan*:

[I]t is well established that the wisdom of legislation does not furnish grounds for judicial challenge of the legislation, and there is no question that the legislature has the constitutional power to grant such remedies and to assign the concomitant jurisdictional power to the circuit courts. . . . I have misgivings about the power of the judiciary to limit statutorily-granted remedies, or the wisdom of doing so, assuming we have the power.¹⁸²

While Justice Shaw questioned the propriety of the doctrine of exhaustion of administrative remedies, he acknowledged that "it is [the] body of controlling case law."¹⁸³ Florida appellate courts have limited the ability of circuit courts to entertain declaratory actions, despite broadly worded statutory and constitutional grants of authority.¹⁸⁴ Similarly, in *Key Haven*, the Florida Supreme Court adopted a doctrine restricting the actions that a circuit court may take by requiring the exhaustion of administrative remedies. The *Bowen* court based its interpretation of section 253.763 on the meaning of "final action of an agency," a term left undefined in section 253.763, Florida Statutes.¹⁸⁵ The court chose to define "final agency action" as synonymous with "final order" in section 120.59(1)(c).¹⁸⁶ Because a "final order" may be issued by an agency pursuant to section 120.59(1)(c) without a hearing, the court concluded that "Chapter 120 does not require a 120.57 hearing before final agency action."¹⁸⁷ Given the policy regarding exhaustion of remedies as enunciated in *Key Haven*, a final agency action could have been defined by the *Bowen* court as a section 120.59(1) final order issued after the exercise of all available administrative appeals. However, the *Bowen* court held instead that the "final agency action" of section 253.763 is not synonymous with the "exhaustion of administrative remedies" set forth in *Key Haven*.¹⁸⁸

182. *State Comm'n on Ethics v. Sullivan*, 430 So. 2d 928, 940 (Fla. 1st DCA 1983) (Shaw, J., concurring).

183. *Id.*

184. FLA. STAT. § 86.011 (1983); FLA. CONST. art. V, § 5(b).

185. *Bowen*, 448 So. 2d at 569.

186. *Id.*

187. *Id.*

188. *Id.*

The Florida Supreme Court in its review of *Bowen* is faced with the choice of restating exhaustion doctrine as established in *Key Haven* or abandoning the exhaustion requirement in light of the wording of section 253.763. Since chapter 78-85 provides a statutory taking remedy that encompasses Florida's major environmental permitting programs, the court in *Bowen* may settle the exhaustion question as it relates to taking claims based on the permitting actions of state agencies.

VI. CONCLUSION

The Florida Supreme Court in *National Bulk Carriers* rejected a taking claim based on local zoning action. The court stated a clear rule that the only remedy for impermissible zoning is invalidation. In contrast, the judicial response to the procedural issues arising out of state permit denial can best be described as muddled.

The supreme court in *Key Haven* urged a policy of judicial restraint and the promotion of judicial and administrative efficiency in requiring the exhaustion of administrative remedies prior to raising a taking claim. In contrast, the same court in *Albrecht* promoted an archaic res judicata formula which results in judicial inefficiency by allowing a property owner to challenge the propriety of an agency action in district court and subsequently raise a taking claim in circuit court.

The legislative taking remedy for state permitting action, chapter 78-85, Laws of Florida, does not contain specific requirements for the exhaustion of administrative remedies prior to raising a circuit court taking claim. The Second District Court of Appeal in *Bowen* ignored the exhaustion policy established by the supreme court in *Key Haven* and interpreted chapter 78-85 as allowing a circuit court taking action without the exhaustion of administrative remedies. The Florida Supreme Court in *Bowen* has the opportunity to clarify the *Key Haven* exhaustion rule in light of chapter 78-85 and establish a predictable process by which to raise a taking claim.