

65,264

=====  
IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF )  
ENVIRONMENTAL REGULATION, )  
  
Petitioner, )  
  
v. )  
  
MARTIN BOWEN SR. and )  
MARTIN BOWEN JR., )  
  
Respondents. )  
\_\_\_\_\_ )

**FILED**  
SID J. WHITE  
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Chief Deputy Clerk

Review of the Decision of the  
District Court of Appeal of Florida,  
Second District  
Case No. 83-1265

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RESPONDENTS' BRIEF ON JURISDICTION

\* \* \*

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ABBREVIATIONS

The parties to this proceeding are referred to as follows:  
The Petitioner, Florida Department of Environmental Regulation,  
which was the Defendant/Appellee below, is referred to as "DER."  
Respondents Martin Bowen Sr. and Martin Bowen Jr., who were the  
Plaintiffs/Appellants below, are referred to as the Bowens.

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STATEMENT OF THE FACTS AND THE CASE

Respondents Martin Bowen Sr. and Martin Bowen Jr. adopt the statement of the facts and of the case as recited by the District Court of Appeal, Second District, in the decision under review. See Slip op. at 1-2.

ARGUMENT

THE DECISION UNDER REVIEW DOES NOT EXPRESSLY OR  
DIRECTLY CONFLICT WITH ANY DECISION OF THE  
SUPREME COURT OR ANOTHER DISTRICT COURT OF APPEAL  
ON THE SAME QUESTION OF LAW

Petitioner, Florida Department of Environmental Regulation ("DER"), seeks to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3), Florida Constitution, based on an alleged conflict between the decision under review and two decisions of this Court. Completely ignoring the statutory provisions controlling the decision under review, DER asserts a direct and express conflict with Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund, 417 So.2d 153 (Fla. 1982), and Albrecht v. State, 444 So.2d 8 (Fla. 1984). As shown below, however, DER has failed to show any conflict that would properly invoke this Court's discretionary jurisdiction in accordance with applicable constitutional limitations.

In order to harmonize conflicting decisions among the courts of this state, the Florida Supreme Court may exercise jurisdic-

tion over decisions that "expressly and directly conflict" with a decision of the Supreme Court or of another district court "on the same question of law." Fla. Const. art. V, § 3(b)(3). The Supreme Court has stated that its power to review decisions of the district courts of appeal is "limited and strictly prescribed," and that district courts should, to the extent possible, be final appellate courts whose review of lower court decisions is "in most instances final and absolute." Sanchez v. Wimpey, 409 So.2d 20, 21 (Fla. 1982), quoting with approval Ansin v. Thurston, 101 So.2d 808 (Fla. 1958); see In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So.2d 1127, 1128 (Fla. 1982).

This Court has identified the two principal situations in which conflict jurisdiction may properly arise: (1) Where the announcement of a rule of law conflicts with a rule previously announced by this Court or another district court of appeal, or (2) Where the application of a rule of law produces a different result in a case involving substantially the same controlling facts as a prior case. Neilsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960). There must be a conflict that is "real and embarrassing," see Ansin v. Thurston, 101 So.2d at 811, and the conflict must be of such magnitude that if the two decisions had been rendered by the same court, the latest decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962).

Under these strict limitations for discretionary review, there is no question that the decision under review does not in any way expressly or directly conflict with decisions of this or any court on the same question of law. As shown by the Second District Court of Appeal below, the question of law in this action involves the relationship of administrative hearings and appeals to inverse condemnation actions brought specifically pursuant to Sections 253.763 and 403.90, Florida Statutes. (Slip op. at 3.) Sections 253.763(2) and 403.90(2) provide:

Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation. Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120.

Relying on the express, unequivocal language of these statutes, the Second DCA held in favor of the Bowens.

Although Key Haven and Albrecht were inverse condemnation actions, both were decided under Florida law as it existed prior to the enactment of Sections 253.763 and 403.90, Florida Statutes, which controlled the decision under review. Under

prior law as enunciated by Key Haven and approved by Albrecht, a property owner was required to exhaust all available executive appeals before bringing an inverse condemnation action. See Key Haven, 427 So.2d at 153, 159-60; Albrecht, 444 So.2d at 12. As stated by the district court below (Slip op. at 4), the enactment of Sections 253.763 and 403.90 altered the case law established in Key Haven and Albrecht by expressly authorizing direct access to circuit court following final agency action. Thus, the decision under review simply does not involve the same question of law as Key Haven and Albrecht.

Petitioner DER, however, ignores the controlling status of Sections 253.763 and 403.90 in the decision under review, and instead erroneously argues that the district court below relied on Albrecht to establish a "judicial policy allowing immediate access to the circuit court." (Petitioner's Jurisdictional Brief at 4 and 6, emphasis supplied.) As clearly demonstrated by the decision under review, DER's argument is incorrect. Access to the circuit courts following final agency action was provided by explicit legislative enactment, not by judicial policy, and the district court below relied not on Albrecht or Key Haven for its decision but on express statutory provisions that were not involved in either Albrecht or Key Haven. Thus, there clearly is no express or direct conflict on the same question of law. This Court must, therefore, refuse to exercise discretionary jurisdiction.

CONCLUSION

Petitioner DER requests that this Court review the decision below based on discretionary conflict jurisdiction. Because the decision below was controlled by statutory provisions that were not involved in either Key Haven or Albrecht, there is no "real and embarrassing conflict" and the instant decision can not be considered to have overruled Key Haven or Albrecht. Sections 253.763 and 403.90, Florida Statutes, are unequivocal, and the Second District Court of Appeal reasonably applied those statutes to the case at bar. In the absence of an express and direct conflict of decisions, the proper forum to challenge the wisdom of those statutes is the legislature, not this Court. This Court must deny Petitioner's request to invoke discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8<sup>th</sup> day of June, 1984, the original and five copies of the foregoing Respondents' Brief on Jurisdiction were provided by U.S. Mail to the Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, FL 32301; and that one copy was provided by U.S. Mail to Charles G. Stevens, Assistant General Counsel, Florida Department of Environmental Regulation, 2600 Blair Stone Road, Tallahassee, FL 32301.

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