Section 6. THE TAKING ISSUE

The Fifth Amendment of the United States Constitution provides that private property "shall [not] be taken for public use without just compensation." When there has been a physical invasion of a person's property by a government, it is generally incontrovertible that there has been a taking of property requiring compensation. However, when the value or utility of land has been impaired or limited through a government's exercise of the police power, has the property been "taken"? This has been one of the most complicated and pervasive questions in land use and environmental law.

One of the leading cases on the taking issue is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which Justice Holmes stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." Id. at 413. The court found in that case that the public interest was not sufficient to justify the extensive impairment of property rights:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits.... One fact for consideration in determining such limits is the extent of the diminution of value. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. Id. at 413. (Emphasis added).

The influence of the Holmes opinion is indisputable, but the dissent in the case written by Justice Brandeis is quoted nearly as frequently in taking litigation. Brandeis would have decided the question of legitimate police power versus compensable taking on whether the exercise of police power prevented a public harm or provided a public benefit. When the government exercises the police power to create benefits for a neighborhood, there must be a "reciprocity of advantage." "[W]here the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is ... no room for considering reciprocity of advantage."

Pennsylvania Coal did not, however, settle the confusion about regulatory taking or state an exclusive test for taking. In Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), the Supreme Court stated: "There is no set formula to determine where regulation ends and taking begins."

169
State courts have applied a variety of tests since no single rationale exists for determining a taking. In *Maine v. Johnson*, 265 A.2d 711 (Me. 1970), the Maine Supreme Court applied a diminution of value test to find that the denial of a permit under the Wetlands Act constituted a taking. In a zoning case, however, the same court affirmed the police power to set standards for development where "the use is actually and substantially an injury or impairment of the public interest," in *Re Spring Valley Development*, 300 A.2d 736, 748 (Me. 1973).

In *Turnpike Realty v. Town of Dedham*, 286 N.E.2d 891 (Mass. 1972), the Massachusetts Supreme Judicial Court based the taking test on the distinction between creating public benefit and prevention of public harm. The denial of a permit to fill a New Hampshire saltmarsh was held to be a valid regulation because it would prevent future harm to the public, *Sibson v. State*, 336 A.2d 239 (N.H. 1975).

*Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972), was the first to apply the "natural use" rule in calculating diminution of value for purposes of determining whether a taking had occurred. The court relied heavily on the fact that the regulation was intended to prevent a public harm rather than provide a benefit. The court also stated:

The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based on changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.

One commentator on the Just decision argued that "[i]n addition to modifying the concept of taking, the court redefines property." *Large, This Land Is Whose Land? Changing Concepts of Land as Property*, 1973 Wis. L. Rev. 1039, 1078. The U.S. Supreme Court held in *Goldblatt, supra*, that an owner is not entitled to the "highest and best" use of his land if it causes a public harm. The Court did not, however, limit value to "natural use" and stated that reasonable investment-backed expectations have traditionally been a criterion in estimating the diminution of value of the owner's property.

The following cases set out the Florida Supreme Court's test for regulatory taking and the procedures for asserting a claim that property has been unconstitutionally taken.
This case is before the Court for review of a district court decision reported at 381 So.2d 1126 (Fla. 1st DCA 1979). We affirm in part and reverse in part.

Estuary Properties, Inc., owns almost 6,500 acres of land in Lee County on the southwest coast of Florida near Fort Myers. The site includes substantial wetlands along Estero, San Carlos, Hurricane, and Hell-Peckish Bays and is a sensitive ecological environment. Tidal waters flush daily through about 2,800 acres of predominantly red mangroves on the edge of the bays. Some 220 days a year these tidal waters move through the red mangroves into the predominantly black mangrove forest which covers approximately 1,800 acres that Estuary wants to dredge or fill. The remaining 1,800 acres begin at the salina and range from two to five feet above mean sea level. Only 526 acres of the total area have been identified as dry enough to be classified as nonwetlands.

On June 18, 1975, Estuary applied to the board of county commissioners of Lee County for approval of a development of regional impact (DRI) pursuant to section 380.06, Florida Statutes (Supp.1974).1/ Estuary’s plan provided for no construction on the 2,800 acres of red mangroves but contemplated destroying the 1,800 acres of predominantly black mangroves. In their place a 7.5 mile “interceptor waterway” would be constructed, and the fill from the waterway (and from twenty-seven lakes to be dredged) would be used to raise the elevation of the remaining land for construction. Estuary contended that the waterway and the lakes would replace the functions of the black mangroves in the ecosystem. Estuary’s plan called for the eventual construction of 26,500 dwelling units with an estimated eventual population of 73,500, eleven commercial centers, four marinas, five boat basins, three golf courses, and twenty-eight acres of tennis facilities.

The development proposal was submitted to the Southwest Florida Regional Planning Council (SWRPC), which prepared a report pursuant to section 380.06(8). Based on this report SWRPC recommended that the board of county commissioners deny the application.

After public hearings, the board adopted the SWRPC findings and recommendations and concluded, inter alia, that the proposed


171
development would cause the degradation of the waters of Estero and San Carlos Bays. This degradation would adversely affect both the commercial fishing and shellfishing industries, as well as the sport fishing industry, resulting in an adverse economic impact on Lee County and the region. The board denied both the increase in zoning density and the application for development approval. The commissioners listed twelve conditions which would have to be met before they would approve a development order. The first condition was that Estuary submit an amended DRI application for development approval for a maximum density of two units per acre. Such density would allow Estuary to construct 12,968 residential units as well as commercial facilities. Other conditions included eliminating the destruction of such large acreages of mangroves and giving consideration to a system of collector swales to deliver the drainage overflow over the marshland borders of the development in a manner that would not violate applicable state water quality standards for the receiving bodies of water.

Estuary appealed this order to the Florida Land and Water Adjudicatory Commission pursuant to section 380.07, Florida Statutes (1973). After a five-day hearing de novo requested by the developer, the hearing officer found that destruction of the black mangroves would have an adverse impact on the environment and natural resources of the region. He concluded that the interceptor waterway would not adequately replace the functions of the mangroves and that removing them would greatly increase the risk of pollution to the surrounding bays, thus adversely affecting the area’s economy. The hearing officer found that requiring the landowner to refrain from degrading state-owned waters was a reasonable restriction on this land required by chapter 380; consequently, he recommended denial of the appeal. The Land and Water Adjudicatory Commission adopted his recommendation and entered a final order denying the appeal. Estuary sought judicial review in the First District Court of Appeal. That court granted relief and remanded the case to the adjudicatory commission with instructions to enter an order granting Estuary permission to develop its property, including the mangrove acreage, unless Lee County commenced condemnation.

2. (2) Under the board’s suggested rezoning, Estuary would be allowed 2 units per acre to be built on an upland site, leaving the submerged mangrove forests undeveloped.

3. (3) Additional conditions were aimed at alleviating the serious impact of a development of this size on local water supplies, schools, roads, sewage treatment facilities, and other government services.
proceedings on the mangrove acreage lying below the salina. The adjudicatory commission and Lee County have sought review by this court.

The decision of the district court is divided into two points. Simply stated they are:


II. Denial of Estuary's application constitutes a taking of private property for public use without compensation in violation of the United States and Florida Constitutions.

A.

The district court found that chapter 380 requires a balancing of the interests of the state in protecting the health, safety, and welfare of the public against the constitutionally protected private property interests of the landowner. In this respect we agree with the district court. Although the act does not expressly mandate balancing, such legislative intent is clear from the stated purpose of the act and the factors enumerated in section 380.06(8), 4/ which the regional planning agency must consider in making a DRI recommendation. The act specifically states that private property rights are to be preserved. Section 380.021, Fla. Stat. (1973). Therefore, the only way to logically and feasibly apply the act is by balancing the often conflicting interests according to the considerations listed in section 380.06(8).

4. (6) (a) The development will have a favorable or unfavorable impact on the environment and natural resources of the region; (b) The development will have a favorable or unfavorable impact on the economy of the region; (c) The development will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities; (d) The development will efficiently use or unduly burden public transportation facilities; (e) The development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment; and (f) The development complies or does not comply with such other criteria for determining regional impact as the regional planning agency shall deem appropriate.
The district court found that the adjudicatory commission had not balanced the considerations in section 380.06(8) noting that the commission found favorably on four of the considerations and unfavorably on only two. According to the district court, the adjudicatory commission ruled against the development only because the commission found an adverse environmental impact would result and because the proposed development deviated from the policies of the planning agency.

There is no evidence, however, that the commission did not balance the factors. Balancing in an adjudicatory process does not always mean that four favorable considerations outweigh two unfavorable considerations. The legislature did not place specific values on each consideration listed in section 380.06(8). Thus, it would have been permissible for the hearing officer to determine that the adverse environmental impact and deviation from the policies of the planning council outweighed the other more favorable findings.

In Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978), we stated that "[f]lexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society." Id. at 924. Section 380.06(8) sets out guidelines for implementing the policies of the act. The guidelines may permit discretion on the part of the agency when balancing applicable considerations.

B.

The thrust of the district court's holding that denial of the DRI permit was improper is that the planning council and hearing officer applied an incorrect burden of proof. The court found that "the position of the Planning Council is that a private landowner has no private right to use his property unless he can prove that such will not impair a public benefit." 391 So.2d 1136. In determining that this position placed an unconstitutional burden of proof on the landowner, the court relied on Zabel v. Pinellas County Water and Navigation Control Authority, 171 So.2d 376 (Fla. 1965).

In Zabel this Court held that the statute in question would be unconstitutional as applied if it required the appellants to prove the proposed landfill would not materially and adversely affect any of the eight specified public interests. Zabel is of limited value in the instant case because the facts differ significantly. In Zabel the property in question had been transferred from the state to the landowners by a conveyance which carried with it a statutory right to bulkhead and fill the property purchased. The state’s subsequent denial of the fill permit amounted to the state’s reneging on its agreement. This court found that the rights to dredge, fill, and bulkhead the land were the appellants’ only present rights attributable to
ownership of the submerged land itself." Id. at 381. Denying those rights would have deprived the owners of the only beneficial use of their property. To then place the burden of proof on the owners to show that the dredging and filling would have no adverse impact on public interest would have been unconstitutional. When Estuary bought the property in question in this case, however, it did so with no reason to believe that the conveyance carried with it a guarantee from the state that dredging and filling the property would be permitted.

There is also a significant difference between the initial findings in Zabel and the initial findings of the planning council in this case. In Zabel the Court did not find that any material, adverse effect on the public interest had been demonstrated. 171 So.2d at 379. In the instant case there is no question but that the proposed development would have an adverse environmental impact. The issue in the present case, then, is not whether an adverse impact exists, but whether the curative measures are adequate. Zabel stands for the proposition that the burden is on the state to show that an adverse impact will result if a permit is granted. Here the state clearly met that burden. The burden of proof then shifted to Estuary to prove that the curative measures are adequate. Once there is sufficient evidence of an adverse impact, it is neither unconstitutional nor unreasonable to require the developer to prove that the proposed curative measures will be adequate.

In holding that the state has the initial burden of showing that a proposed DRI will have an adverse impact in light of section 380.06(8), we do not ignore or alter the established rule of administrative law that one seeking relief carries the burden of proof. We simply reaffirm the rule that exercise of the state's police power must relate to the health, safety, and welfare of the public and may not be arbitrarily and capriciously applied. If the state denied a permit without showing the existence of an adverse or unfavorable impact, there would be no showing that the regulation protected the health, safety, or welfare of the public; without such a showing the denial would be arbitrary and capricious. * * *
The second point upon which the district court based its decision was that denial of the permit constituted a taking of Estuary's property for a public purpose without compensation, in violation of the Florida and United States Constitutions.

Section 120.68(12)(c), Florida Statutes (1977), calls for the remand of a case to the agency if the reviewing court finds that the agency's exercise of discretion violated a constitutional or statutory provision. We disagree with the district court's conclusion that the facts as found by the agency constituted a taking and therefore violated the constitution or section 380.08, Florida Statutes.

There is no settled formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins. Whether a regulation is a valid exercise of the police power or a taking depends on the circumstances of each case. Some of the factors which have been considered 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.

If the regulation does not promote the health, safety, welfare, or morals of the public, it is not a valid exercise of the police power. Likewise, if the regulation is arbitrarily and capriciously applied it is an invalid exercise of the police power. If the regulation creates a public benefit it is more likely an exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power. It would seem, therefore, that if the regulation preventing the destruction of the mangrove forest was necessary to avoid unreasonable pollution of the waters thereby causing attendant harm to the public, the exercise of police power would be reasonable. On the other hand, if the retention of the forest simply created a public benefit by providing a source of
recreational fishing for the public, the regulation might be a taking.

Protection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power. In the instant case, the adjudicatory commission found that the proposed development would cause pollution in the surrounding bays. Such pollution would affect the economy of Lee County. Therefore, the regulation at issue here promotes the welfare of the public, prevents a public harm, and has not been arbitrarily applied.

It may be, however, that a regulation complies with standards required for the police power but still results in a taking. This occurred in Pennsylvania Coal Co., upon which Estuary and the district court relied. In Pennsylvania Coal Co. the court considered a Pennsylvania statute, passed to protect the public safety, which prohibited subsurface mining of coal if such mining would cause subsidence of the surface. The Court held that enforcement of the statute amounted to a taking which required compensation. In holding that the mining prohibition was unconstitutional as applied, the Court emphasized that the statute rendered the coal company's rights to subsurface minerals virtually worthless. 260 U.S. at 414, 43 S.Ct. at 159.

The district court apparently determined that prohibiting the destruction of the mangroves rendered Estuary's property "virtually worthless." In support of this determination, the court relied on three cases: Zabel v. Pinellas County Water and Navigation Control Authority, 171 So.2d 376 (Fla. 1965); Alford v. Pinch, 155 So.2d 790 (Fla. 1963); and Askew v. Gables-By-The-Sea, Inc., 333 So.2d 56 (Fla.1st DCA 1976), cert. denied, 345 So.2d 420 (Fla. 1977). Zabel has already been distinguished from the case at bar and Gables-By-The-Sea, Inc., can be distinguished on similar grounds. In both cases the landowners had bought submerged bottom lands from the state. In both cases denying the right to fill the land deprived the landowners of all reasonable use of their property. In both cases all of the owners' lands were submerged and were totally useless without the right to fill them.

The property owned by Estuary, on the other hand, is not entirely submerged although part of it is covered part of the time by tidal flows. Furthermore, Estuary did not purchase its property from the state. Estuary purchased the property in question from a private individual with full knowledge that part of it was totally unsuitable for development.

Estuary argues that without the interceptor waterway it can make no beneficial use of its property. This argument is supported mainly by the self-serving testimony of the president of Estuary, who stated that he did not "believe that we can economically survive" by building approximately one-half the number of units originally proposed and giving up the interceptor waterway. Estuary offered no independent evidence to support this contention.

Simply because the interceptor waterway would increase the value of the property does not mean that disallowing it constitutes a taking. Nor is a taking established merely because Estuary may be allowed to build a development only half the size
of its original proposal. We agree with the Wisconsin Supreme Court's observations in Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972), where that court pointed out the involvement of exceptional circumstances because of the interrelationship of the wetlands, swamps, and natural environment to the purity of the water and natural resources such as fishing. The court also noted the close proximity of the land in question to navigable waters which the state holds in trust for the public. Similar factors are present in the case at bar. We agree with the Wisconsin court that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." 56 Wis.2d at 17, 201 N.W.2d at 768.

We do not hold that any time the state requires a proposed development to be reduced by half it may do so without compensation to the owner. We do hold that, under the facts as found by the commission, the instant reduction is a valid exercise of the police power. As we have already pointed out, there was ample evidence for the commission to find that destruction of the mangroves and creation of the waterway would result in an adverse impact on the surrounding area. The owner of private property is not entitled to the highest and best use of his property if that use will create a public harm.

As previously stated, the line between the prevention of a public harm and the creation of a public benefit is not often clear. It is a necessary result that the public benefits whenever a harm is prevented. However, it does not necessarily follow that the public is safe from harm when a benefit is created. In this case, the permit was denied because of the determination that the proposed development would pollute the surrounding bays, i.e., cause a public harm. It is true that the public benefits in that the bays will remain clean, but that is a benefit in the form of maintaining the status quo. Eustasy is not being required to change its development plan so that public waterways will be improved. That would be the creation of a public benefit beyond the scope of the state's police power.

The district court also relied on Alford v. Finch, 155 So.2d 790 (Fla. 1963). In Alford the state attempted to incorporate the landowners' property into a game preserve without compensation to or consent of the owners. As in Zabel and Gables-By-The-Sea, Inc., the basis for finding that a taking occurred was that the state action rendered the property virtually valueless. For the reasons stated above, that determination is not present in this case.

Underlying all of the cases involving the police power to regulate private property is the reasonableness of the regulation. In Alford, for example, the plaintiff's land was required to be a game preserve while the lands of adjacent property owners were not. This requirement implicitly supports the unreasonableness of the regulation in that case. The landowners in Alford did not seek to alter their land so as to adversely affect their neighbors. They simply wanted to hunt on their land in the same manner as their neighbors. In those circumstances it was unreasonable to subject those landowners to
such a total restriction on the use of their property. In distinguishing Alford from the instant case, we again stress the magnitude of Estuary’s proposed development and the sensitive nature of the surrounding lands and water to be affected by it. In this situation it is not unreasonable to place some restrictions on the owner’s use of the property.

Another factor which may be considered in determining the reasonableness of an exercise of the police power involves the investment-backed expectation of the use of the property. In Zabel and Gables-By-The-Sea, Inc., the property owners’ investment was backed by the expectation that they would be permitted to fill the lands in question. This expectation was further supported in Zabel by a statutory right to fill which existed when the property was purchased. Estuary, on the other hand, had only its own subjective expectation that the land could be developed in the manner it now proposes. Estuary diligently and at considerable expense prepared development plans in an attempt to assure that its development would not adversely affect the environment. It recognized that it should not materially alter the property in a way that would have serious adverse impact on the surrounding area. The fact finder concluded that Estuary’s plans do not accomplish this goal, and that the development would in fact be detrimental to the surrounding area.

This case is remanded to the district court of appeal with instructions to remand it to the Florida Land and Water Adjudicatory Commission with instructions to that commission to comply with section 380.08(3), Florida Statutes (1973), as set forth in this opinion.

It is so ordered.

---------------------

KEY HAVEN ASSOCIATED ENTERPRISES, INC.
v.
BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT TRUST FUND
427 So.2d 153 (FLA. 1982)

OVERTON, Justice.

This is a petition to review the decision of the First District Court of Appeal in Key Haven Associated Enterprises v. Board of Trustees, 400 So.2d 66 (Fla. 1st DCA 1981). The district court held that an action for inverse condemnation, based on the denial of a dredge-and-fill permit by the Department of Environmental Regulation (DER), may not be taken in a circuit court until all remedies provided in chapter 120, Florida Statutes (1975), including an appeal to the appropriate district court of appeal, have been exhausted. The district court, in this holding, expressly construed article V, section 6, Florida Constitution. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We approve in part and disapprove in part the decision of the district court and hold that, under the facts of this case, Key Haven was required to exhaust all executive branch
administrative remedies before instituting the circuit court action, but, under the specific circumstances in this case, would not have been required to seek direct review of the final executive branch action in the district court of appeal. Resolution of the issue in this case requires us to determine the appropriate forum in which to raise constitutional questions arising from administrative action or implementation of statutory provisions.

The present dispute evolves from the conflict between the implementation of legislation which has as its purpose the protection of our natural resources and the right to the beneficial use of private property. The facts as summarized are undisputed. Between 1964 and 1968, petitioner Key Haven, a land developer, purchased 185 acres of submerged shallow flatlands located in the Florida Keys from the governor and cabinet sitting as the Trustees of the Internal Improvement Fund (IIF), paying three hundred dollars per acre for the land. In 1972, four years after the last land purchase, Key Haven applied to the state, pursuant to the regulatory statutes, for a permit to dredge 679,000 cubic yards of limestone from a portion of its submerged lands and to use this material to fill the remaining land to create canal-front lots. In 1976, DER notified Key Haven of its intention to deny the application for the dredge-and-fill permit.

Key Haven sought and received a formal hearing under section 120.57(1), Florida Statutes (1975), in which it argued that the permit should be granted because the dredge-and-fill proposal conformed to the standards for preserving natural resources and water quality set out in chapters 253 and 403, Florida Statutes (1975). The Department of Administrative Hearings officer found, however, that Key Haven's proposed project would obliterate all aquatic life in the area so that the project did not meet the requirements of chapters 253 and 403. The hearing officer also found that, because the IIF trustees had not promised a permit to or misled Key Haven in any way, the state was not estopped from denying the permit even though the IIF trustees sold the submerged land to Key Haven with implied knowledge that the purchaser desired to improve the submerged land for beneficial use. DER issued a final order denying the dredge-and-fill permit.

At this state of the proceedings, Key Haven decided not seek review of DER's order by appealing to the IIF trustees pursuant to section 253.76, Florida Statutes (1975), and by thereafter appealing to the district court of appeal pursuant to section 120.68, Florida Statutes (1975). Instead, Key Haven filed suit in the circuit court, alleging that the denial of the dredge-and-fill permit, although proper under the requirements of chapters 253 and 403, constituted a taking of its property by inverse condemnation because the action totally denied its use of its property for any beneficial purpose and because the IIF trustees sold the submerged lands to Key Haven's predecessor knowing of the intent to dredge and fill the land. Key Haven asserted that it was entitled to just compensation under article X, section 6, Florida Constitution.

DER filed a motion to dismiss, alleging that the circuit court lacked subject matter jurisdiction in the case. The trial
court granted the motion to dismiss based on Coulter v. Davin, 373 So.2d 423 (Fla. 2d DCA 1979), and Kasser v. Dade County, 344 So.2d 928 (Fla. 3d DCA 1977). The trial court found that Key Haven was essentially alleging that the "agency action constituted an unconstitutional taking of land," and determined that Key Haven was in the same posture as the petitioners in Coulter in that "both actions were attempts to collaterally attack the particular agency’s denial of a permit." The trial judge relied on the holding in Coulter that "those constitutional issues which could have been raised by the party in a petition to the district court of appeal for review of the agency action are foreclosed and may not be subsequently asserted in a suit for relief brought in circuit court," 373 So.2d at 525, in dismissing the suit for inverse condemnation, finding that "the plaintiff has not exhausted his administrative remedies." The trial judge also found that "Key Haven’s assertions of satisfaction with the denial of the permit are inconsistent with its position that the same action constitutes and unconstitutional taking of property," citing Kasser v. Dade County.

Key Haven appealed to the First District Court of Appeal, which affirmed the trial court’s order.

***

We agree in part and disagree in part. We agree that, before Key Haven could use the permit denial as a basis for an inverse condemnation claim, it was required to pursue a section 253.76 appeal to the IIF trustees. [This section was repealed in 1984.] We disagree with the district court’s conclusion that, upon an adverse ruling by the trustees, Key Haven’s only option would be to exhaust the administrative process delineated in chapter 120 by seeking judicial review of the agency action in a district court of appeal under the provisions of section 120.68.

We hold that, once an applicant has appealed the denial of a permit through all review procedures available in the executive branch, the applicant may choose either to contest the validity of the agency action by petitioning for review in a district court, or, by accepting the agency action as completely correct, to seek a circuit court determination of whether that correct agency action constituted a total taking of a person's property without just compensation. We disagree, however, with Key Haven’s contention that a party aggrieved by agency action is not in any way restricted in choosing a judicial forum in which to raise constitutional claims.

Constitutional Challenges to Administrative Action

***

Three types of constitutional challenges may be raised in the context of the administrative decision-making process of an executive agency. An affected party may seek to challenge: (1) the facial constitutionality of a statute authorizing an agency action; (2) the facial constitutionality of an agency rule adopted to implement a constitutional provision or a statute, or (3) the unconstitutionality of the agency’s action in implementing a constitutional statute or rule.

***

181
Constitutional Application of a Statute or Agency Rule

The final category of constitutional challenge is the claim that an agency has applied a facially constitutional statute or rule in such a way that the aggrieved party’s constitutional rights have been violated. This type of challenge would involve the assertion that an agency’s implementing action was improper because, for example, the agency denied the party the rights to due process or equal protection. A suit in the circuit court requesting that court to declare an agency’s action improper because of such a constitutional deficiency in the administrative process should not be allowed. As well articulated by Judge Smith in the instant case, administrative remedies must be exhausted to assure that the responsible agency “has had a full opportunity to reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue.” Key Haven, 400 So.2d at 69. We also agree with the instant district court decision that, sitting in their review capacity, the district courts provide a proper forum to resolve this type of constitutional challenge 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. A party may, however, seek circuit court relief for injuries arising from an agency decision which the party accepts as intrinsically correct, as illustrated in this case.

Key Haven’s Claim

In the instant case, Key Haven did not allege in the circuit court that any statute relied upon by DER in denying its dredge-and-fill permit was facially unconstitutional, nor did Key Haven assert that the agency action was improper because of a constitutional violation inherent in the agency’s decision-making process. Rather, Key Haven asserted in its circuit court complaint that, although DER’s action in denying the permit was proper and taken in accordance with the requirements of a constitutionally valid statute, the denial nevertheless resulted in an unconstitutional taking of Key Haven’s private property without just compensation. We note that the statutes in this instance, chapters 253 and 403, allow such a taking to occur. We hold that Key Haven could not pursue the inverse condemnation action in circuit court without first having taken an appeal of the permit denial to the IIF trustees, consisting of the governor and cabinet, as provided in section 253.76. The district court correctly observed that the 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. We do not agree, however, with the district court’s holding that, had Key Haven appealed to the trustees without success, the claim that the agency action amounted to a taking of its property could be presented only to the district court on direct review of agency action.
A petition to the district court for review of agency action is necessarily taken when an aggrieved party wishes to assert that the agency action was improper. The district court considered Key Haven’s assertion that its property had been taken without just compensation to be, in essence, a collateral attack on the propriety of the permit denial. The district court stated: “The constitutional question is not independent of the agency’s action on the merits, but is inseparable from it, and the constitutional question is necessarily phrased, ingeniously or ingenuously, as a variation of the affected party’s original position on the nonconstitutional question.” Key Haven, 400 So.2d at 71. The district court observed that the claim that the property was taken was a “constitutionally rephrased question that Key Haven might have presented as a permit issue through Chapter 120 processes.” Id. We must disagree. In the particular circumstances of this case, where the agency is implementing a statute which, by its terms, properly allows a total taking of private property, direct review in the district court of the agency action may be 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. We disagree with the holdings in Albrecht v. State, 407 So.2d 210 (Fla. 2d DCA 1981), and in Coulter Insofar as they conflict with our conclusions in this case.

We hold that Key Haven could have filed suit for inverse condemnation in the circuit court, after exhausting all executive branch appeals, because we find that Key Haven’s claim in the circuit court is not a veiled attempt to collaterally attack the propriety of agency action. When an aggrieved party has no grounds for contesting the propriety of agency action, a remedy is available, but not mandatory, in the circuit court for inverse condemnation. We agree with the district court, and wish to emphasize, that if a party in Key Haven’s position has appealed to the trustees and received an adverse ruling, the only way it can challenge the propriety of the permit denial, based on asserted error in the administrative decision-making process or on asserted constitutional infirmities in the administrative action, is on direct review of the agency action in the district court. The claim of the taking of property can be raised in this direct review proceeding, and, if an adequate record is available, the district court could require the state to institute condemnation proceedings.

We reject the assertion that this permit denial cannot be both proper and confiscatory. This case presents a much different situation than that presented in Kasser v. Dade County, 344 So.2d 928 (Fla.3d DCA 1977), where the court refused to allow the contradictory claim that a denial of rezoning was both reasonable and confiscatory. 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.” 399 So.2d at 1381.

We note that one of the factors that must be considered by the circuit court in determining if a taking of property has actually occurred is whether "the regulation precludes all economically reasonable use of the property." Id. at 1380. We point this out because the district court found that "Key Haven seeks in consequence of DER’s lawful action ... full compensation for the lost ‘Manhattan’ Key Haven might have raised from the ocean floor by dredge and fill." Key Haven, 400 So.2d at 69 (footnote omitted). We emphasize that taking will not be established simply because DER denies a permit for the particular type of use that a property owner considers to be the most desirable or profitable use of the property.

We conclude by holding that an aggrieved party must complete the administrative process through the executive branch, which in this instance requires an appeal to the IIF trustees. Having completed review in the executive branch, if an aggrieved party does not wish to further contest the validity of the permit denial by seeking district court review, the party may accept the agency action under the statute being implemented in this case and file suit in circuit court on the basis that denial was improper but resulted in an unconstitutional taking of the party’s property. 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 on May 29, 1978, after Key Haven filed suit in the circuit court in this case.*

We emphasize that, by electing the circuit court as the judicial forum, a party foregoes any opportunity to challenge the permit denial as improper and may not challenge the agency action as arbitrary or capricious or as failing to comply with the intent and purposes of the statute. Further, if an aggrieved party intends to assert that the agency should have, or could have, allowed at least a modified use of the property, this issue may not be presented to the circuit court in an inverse condemnation.

*Section 253.763(2) provides:

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 from 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 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.
proceeding; this assertion presents an issue that must be addressed in the administrative proceeding and before the district court.

We approve the district court's holding in the instant case that the trial court properly dismissed Key Haven's suit in inverse condemnation because Key Haven had failed to exhaust its administrative remedies by appealing DER's order denying the dredge-and-fill permit to the IIF trustees, pursuant to section 253.76. We disapprove that part of the district court's holding that would require Key Haven to seek direct review of the trustees' action in the district court, as the only available avenue to obtain judicial consideration of its claim that its property was taken. Our holding does not mean that Key Haven cannot submit another proposed plan for the use of the subject property and proceed according to the procedures delineated in this opinion; the proceedings on this present application are, however, concluded.

For the reasons expressed, the opinion of the district court in the instant case is approved in part and disapproved in part.

It is so ordered.

-----------------

NOTES


2. A major issue that remains to be resolved is whether compensation is the appropriate remedy for a regulatory taking. Arguably the courts, rather than the appropriate decision-making bodies, are carrying out eminent domain proceedings if compensation is the remedy. Others argue that the police power is broad enough to allow complete taking of property which must be compensated. Still others argue that a regulatory taking is by definition a taking without due process, and the regulation must be invalidated, rather than compensating the landowner. For further discussion of these issues, see: Paster, Money Damages for Regulatory "Takings", 22 Nat. Resources J. 711 (1983); Gordon, Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road, 12 Real Est. L.J. 211 (1984); Kelso, Substantive Due Process as a Limit on Police Power Regulatory Takings, 20 Willamette L.J. 1 (1984); Siemon, Of Regulatory Takings and Other Myths, 1 P.S.U. J. Land Use & Envtl. L. 103 (1983).