0 A 12-7-84

IN THE

SUPREME COURT OF FLORIDA

Case No. 65,191

STATE OF FLORIDA, by and through the State Attorney for the Twelfth Judicial Circuit,

Appellant,

vs.

GENERAL DEVELOPMENT CORPORATION, a Delaware corporation, authorized to do business in Florida,

Appellee.

* *

Appeal from the District Court of Appeal of Florida, Second District

* *

ANSWER BRIEF ON THE MERITS OF APPELLEE GENERAL DEVELOPMENT CORPORATION

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I. STATEMENT OF THE CASE AND OF THE FACTS

The Point on Appeal and Statement of the Case submitted by Appellant, State of Florida, by and through the State Attorney for the Twelfth Judicial Circuit ("State Attorney"), is not correct; for this reason Appellee, General Development Corporation ("GDC"), has set forth below the Point presented and its Statement of the Case.

A. STATEMENT OF THE CASE

The Point presented to the Court by this appeal is whether the State Attorney can, in violation of constitutional and legal requirements, usurp responsibilities of the Florida Department of Environmental Regulation ("DER").

Circuit Court Judge Paul E. Logan denied the State Attorney standing, because:

(i) As conceded by the State Attorney, his claimed authority to abrogate DER's power to proceed with this litigation was based on either the provisions of Florida Statutes Section 120.69(1) (a), which requires that the State Attorney be an "agency" under the Administrative Procedure Act, which he is not; or, in the alternative,

(ii) The State Attorney relied on Section 27.02 -- enabling legislation for Article V, Section 17 of the Constitution -- creating State Attorneys as part of the Judicial Branch, but not providing them with special authority necessary to initiate the litigation filed here. See Order dated December 15, 1982 (Record 814-815).[1]

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[1]The Record is cited hereafter as "(R. ____)".

The State Attorney filed an appeal to the District Court of Appeal, Second District on January 5, 1983. After briefs and oral argument, the Second District affirmed the Circuit Court, concluding that:

(i) the State Attorney lacked broad independent authority to proceed on behalf of all State agencies based solely on Section 27.02; and, in the alternative, that

(ii) the State Attorney's claim of discretionary authority to act as a State agency under the Administrative Procedure Act, and to enjoy agency standing, without being limited by the statutory and constitutional obligations applicable to all other state agencies, was also incorrect.

The State Attorney filed a Notice to Invoke Discretionary Jurisdiction on April 9, 1984. After briefs submitted on the jurisdictional points, this Court concluded that the decision of the Second District affected the State Attorney, a constitutional or State officer and, therefore, that there is jurisdiction to hear this case on the merits.

B. STATEMENT OF THE FACTS

GDC submits that the State Attorney's Statement of the Facts is incorrect and misleading. Accordingly, GDC has set forth the facts based on the record before this Court.

1. Notwithstanding the effort of the State Attorney to pretend that no other agency of the State of Florida filed, or was diligent in prosecuting, a petition for enforcement, the DER had issued warning notices to GDC. DER was actively proceeding in connection with this matter, which fact was known by the State Attorney, long before he initiated his litigation in the Circuit Court. The State Attorney effectively confirmed this in proceedings before

the Second District, when he attached to his Brief DER warning notices issued pursuant to the DER's enforcement procedures promulgated under Chapter 17-FAC. See Appendix to the Brief of the State Attorney filed with the Second District at pages 17-20; See also the Appendix to this Brief, at page A-1 (cited as "App. _____").

2. The pleadings, motions and affidavits filed in the Circuit Court demonstrate the following:

a. The State Attorney filed a Complaint for Damages and Civil Penalties or Alternatively Petition for Enforcement ("Complaint or Petition") seeking to proceed as a State agency under Sections 120.69(2) and 403.141(1) of the Florida Statutes, in order to complain of alleged violations of Chapter 403 of the Florida Statutes (R. 1-13). The State Attorney alleged that:

(1) The State Attorney was generally authorized to proceed to enforce all state law by Section 27.02 of the Florida Statutes, or in the alternative as a "State agency" pursuant to Section 120.52(1) (R. 1);

(2) The State Attorney desired to complain of alleged violations involving work by GDC in an area known as North Port, which involved numerous excavations that the State Attorney asserted were performed in violation of Chapter 403 of the Florida Statutes (R. 1-13; 34-40); and

(3) "No other agency of the State of Florida has filed or is diligently prosecuting a Petition for Enforcement in this matter."[2] See Petition, paragraph 11 (R. 2).

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[2]This, however, is refuted by the DER Warning Notices (App. A-2 - A-5) issued pursuant to the Department's enforcement procedures promulgated in Chapter 17-F.A.C. As noted, these warning notices were in the Appendix to the Brief of the State Attorney submitted to the Second District (at pages 17-20), although not part of the record.

b. GDC filed a Motion to Dismiss and a Motion for Summary Judgment with a supporting Affidavit (R. 25-31; 36-38; 39-708). These Motions stated that GDC had not engaged in any incorrect activities, and all work had in fact been permitted (R. 41-48). However, GDC noted, assuming arguendo that there were questions under Chapter 403, the DER was the agency already involved in proceedings in order to resolve those questions (R. 48), and the State Attorney lacked standing to institute the Complaint or Petition (R. 25-31) since:

(1) The State Attorney could not be an agency under Chapter 120 of the Florida Statutes as a matter of law. To make him an agency would require rewriting Article V of the Constitution of the State of Florida -- which is in fact the law applicable to the Judicial Branch of government and does not confer legislative powers on the State Attorney;

(2) If the State Attorney were an agency, he still could not proceed, because he would be usurping the legislative delegation specifically granted to an agency (DER) by the Florida Legislature;

(3) The State Attorney is not charged with enforcing violations of Chapter 403 and lacks power to initiate independent enforcement actions, particularly when the DER is already proceeding under its own adopted rules. If he were an agency he would have to comply with Chapter 120 as to promulgation of rules;

(4) The State Attorney's claims were not only prohibited by the separation of powers concept in the Florida Constitution, but the following provisions of the Florida and United States Constitutions:

(a) The due process guarantee;

(b) The equal protection guarantee; and

(c) The guarantee against improper ex post facto laws;[3]

(5) The State Attorney failed to meet prerequisites for an enforcement petition under Chapter 120, because he is not a state "agency", and is also precluded from filing as a "person" under Section 120.69(1)(b)(2) since:

(a) such a petition requires 60 days notice to the designated statutory agency prior to usurping its jurisdiction; and

(b) such a petition must allege substantial interest.

The foregoing requirements were not met by the State Attorney under Section 120.69 nor under Section 403.412 (also providing for citizen's suits under prerequisites not satisfied here).

(6) The State Attorney also failed to join DER, an indispensable party. He certified that he had mailed to DER's counsel a copy of his Complaint or Petition. This demonstrated that he was aware of, but had not met, the standing requirements for a person's, or citizen's, suit and that he was aware that DER had to be joined as a party.

c. GDC filed an Affidavit in support of its Motion for Summary Judgment, which showed its conduct was proper.[4] (R. 41-48). The Affidavit, uncontested as a matter of record, confirmed among other points that:

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[3]This precludes the State Attorney from repudiating legislative authority that could otherwise be relied upon, by determining, any time he wanted to file a suit similar to the one here, that he could usurp functions delegated to a specific administrative agency.

[4]The Motion to Dismiss, while assuming arguendo the truth of the allegations in the Complaint or Petition, was supplemented by a Motion for Summary Judgment and an Affidavit. The State Attorney never filed any affidavits in opposition. The Circuit Court hearing was duly noticed, and proceeded in accordance with the provisions of the Florida Rules of Civil Procedure that allow for a hearing on a summary judgment motion (R. 739-804).

(1) GDC had proceeded to obtain the necessary permits required at the time of the initiation of the work under Chapter 298. This included among other things proceeding to a Circuit Court after serving notification on not only all landowners and local and regional governmental entities in the area, but on Sarasota County and on the DER;

(2) Sarasota County (although not the Sarasota State Attorney) opted to participate through its County Attorney. Sarasota County intervened and objected to the Chapter 298 plan of reclamation. In addition to Sarasota County, the Southwest Florida Water Management District also intervened. Thereafter these parties participated in settlement negotiations which, after a Court hearing, resulted in a final judicial order, authorizing the work complained of herein under Chapter 298 of the Florida Statutes; and

(3) DER, as noted above, nevertheless subsequently issued warning notices after most of the permitted work was completed. As a result, GDC entered into discussions with DER in order to resolve not only the jurisdictional and legal questions but, also, to determine whether there could be an amicable resolution of this matter.

3. At the Circuit Court hearing on the Motions to Dismiss and Motions for Summary Judgment on December 1, 1982, the following occurred (R. 739-804):

a. In response to the State Attorney's assertion that he could proceed as a State "agency", it was noted that this would dilute and destroy the ability of any State agency to enforce State law delegated to it for implementation:

> THE COURT: What about Mr. Fleming's hypothetical that the Department of Banking could bring an action? I mean that --
>
> MR. LEVIN: If the Department of Banking has the authority to initiate civil suits, for instance --
>
> THE COURT: I think they do, don't they?

MR. LEVIN: Well then perhaps there is nothing wrong, and that would certainly be within the scope of the intent of the Legislature.

If the DER was negligent in its pursuit of the enforcement of the laws, and the only other agency to come along to enforce the laws, was the Department of Banking, I think that the Legislature would command that (See pages 38 and 39 of the Transcript of the Hearing on December 1, 1982, hereafter "Tr." (R. 842-843)).

The State Attorney claimed that Chapter 120 allows citizens suits by any person. It was noted that such a citizens suit can only occur after the authorized statutory agency has been given the opportunity to review a verified complaint, and no such opportunity occurs if the State Attorney has the independent ability to claim that he is a State agency and at his sole discretion can initiate action to enforce all laws independent of the authorized agency's procedures or action. The State Attorney then conceded that he was not bringing any such citizen's suit (R. 41).

b. The State Attorney, alternatively, argued that if he lacked jurisdiction under Chapter 120 to enforce all Florida agencies' rules and statutes, he could proceed to do so under Chapter 27. It was noted that:

(1) Chapter 27 merely gives a State Attorney the opportunity to appear in the Circuit and County Courts to prosecute and defend on behalf of the State all suits, applications, or motions in which the State is a party; and that,

(2) Chapter 27 is not tied to any other provisions of law and it does not give independent authority to the State Attorney to initiate law-suits at will if any provision of Florida Statutes is allegedly involved.

The State Attorney responded that he either wanted to proceed under Chapter 120.69 as a State agency, or in the alternative under Chapter 27:

MR. LEVIN: Your Honor, it is never the intention of a State Attorney to hide its Chapter 27 jurisdiction under 120.69. It was always the intent, and that is why it is indicated in the alternative, that there were two causes of action, two points of entry which will be alleged (Tr. 60-61; R. 829-830).

When the Court noted that a State Attorney is given authority in criminal cases in Section 17 of Article V of the Constitution, the State Attorney said that "the authority under Chapter 27, to enforce the laws of 403 is what we are attempting to do here" (Tr. 62; R. 798).

The Court, after review of the constitutional provisions relating to the State Attorney's position and Chapter 27, questioned the State Attorney as to whether there is a need for another statute to authorize standing:

THE COURT: Now the question is after that, what can you do? You, your position is that's broad enough in and of itself to allow you to do what you are doing. The more restrictive view of that is no, that just says that's implementing what's in Section 17 of Article V; and then beyond that you look to the other statutes (Tr. 63; R. 802).

In response the State Attorney said that Chapter 27 alone was sufficient to justify initiation of civil litigation, without any independent statutory grounds:

MR. LEVIN: Certainly, the way that Chapter 27 has been applied is that the State Attorney can act by virtue of that, by virtue of that Act to initiate civil or criminal actions, and that it does not need any independent statutory grounds to do so. And that is the general law, which has been, which is referred to in the Constitution (Tr. 63; R. 802) (our emphasis).

It was also noted during the hearing that the Florida Legislature had enacted specific laws (not including Chapter 403) which related to environmental land use regulatory schemes, and had therein specifically authorized the State Attorney's ability to act under such law, not herein involved (Tr. 63-64; R. 802-803).

4. The Court, after the hearing, ruled that:

a. Section 27.02 is enabling legislation: "This Section authorizes a State Attorney to bring criminal and civil actions, but does not give special authority to bring an action of this type, so authority if any must be elsewhere" (R. 814).

b. Section 120.69(1)(a), which authorized an agency to seek action, did not include in the definition of "agency" a State Attorney; but, rather,

> limits agencies to a narrow class as set forth in Florida Statutes Section 20.04 (Executive Branch Departments) and Chapters 160, 163, 298, 373, 380 and 582. None of which sections or chapters include State Attorneys (Judical Branch). Thus "any agency" in Florida Statutes Section 120.69(1)(a) does not include State Attorneys (R. 814-815).

Shortly thereafter the State Attorney appealed to the Second District. The Second District affirmed the decision of the Circuit Court, concluding not only that the State Attorney could not proceed under Section 27.02, but also that the State Attorney could not proceed under Section 120.69(1)(A) as "an agency."

The Second District, with regard to the issue of the authority to proceed under Section 27.02 -- the only point now appealed[5] -- ruled:

(1) While the State Attorney could criminally prosecute Section 403.161(1), violations he could not bring a civil action as he had attempted.

(2) Section 27.02 was merely enabling legislation which did not in any way justify the type of action proposed by the State Attorney here,

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[5]This was the only point raised on appeal. The other point has been dropped by the State Attorney, as he concedes in his Brief at pages 1 and 6.

and not a general law prescribing other duties pursuant to Article V, Section 17 of the Florida Constitution.

Since the State Attorney's Brief in the Second District included the DER warning notices, this Court can take judicial notice of the fact that there ultimately was a resolution of the DER proceedings. DER, in accordance with Chapter 120, issued notice to interested parties in a Consent Order (App. A-5 - A-23) dated November 18, 1983 containing a "Notice of Agency Action" so that "a person whose substantial interests are affected" could petition for an administrative proceeding in accordance with Section 120.57, Florida Statutes" and challenge the settlement and Consent Order (App. A-21). The DER served a copy of its Consent Order, including notice upon the State Attorney among others specifically served (App. A-23). There was in fact an objection, but not from the State Attorney. The objector settled (App. A-24 - A-33) its concern and a Final Order was thereafter entered on February 21, 1984 (App. A-24 - A-25) by the DER Secretary. See DER OGC File No. 82-0128 and DOAH Case No. 83-4021 (App. A-6 - A-33).

While the State Attorney did not object to the DER Consent Order, now final, he appealed the decision of the Second District. GDC submits that the appeal lacks any merit and, therefore, that the decision of the Second District below should be affirmed.

II. ISSUE ON APPEAL

WHETHER THE STATE ATTORNEY LACKS GENERAL AUTHORITY TO PROSECUTE A CIVIL ACTION IN THIS CASE UNDER THE CONSTITUTION, THE STATUTES OR THE CASE LAW.

III. ARGUMENT

THE STATE ATTORNEY LACKS GENERAL AUTHORITY TO PROSECUTE A CIVIL ACTION IN THIS CASE UNDER THE CONSTITUTION, THE STATUTES OR THE CASE LAW.

A. The State Attorney's claims of general civil jurisdiction under Chapter 403 of the Florida Statutes are not supported by any statutory provision.

Chapter 403 is a legislative mandate for a uniform enforcement of environmental laws under DER's jurisdiction. The only reference in Chapter 403 to civil litigation such as that desired by the State Attorney, by parties other than the DER, is in Section 403.412. It allows a suit by a citizen (and others, excluding the State Attorney) but only after DER has reviewed the Verified Complaint and determined whether it wishes to proceed. This is calculated to maintain DER's exclusive agency enforcement power. See Section 403.412(2)(c).[6]

The State Attorney admitted in the Circuit Court proceedings that he had not filed a verified complaint with the DER, to allow DER to determine whether it would proceed to Court. He also admitted that in fact and law he was not proceeding under Section 403.412 (Tr. 41; R. 780).

The State Attorney, however, asserts that he can proceed generally under Chapter 403 independent of DER, without specific statutory authority and despite the language of Chapter 403 delegating enforcement authority only to DER. He claims his authority derives from Article V, Section 17 of the Florida Constitution, providing that a State Attorney is to be elected in each

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[6]This section sets forth prerequisites of notice which protect DER jurisdiction and which were not satisfied by the State Attorney here.

judicial circuit as the prosecuting officer of trial courts in that circuit, since the State Attorney is to "perform other duties as prescribed by general law."

The State Attorney then relies on Section 27.02 as the "general law." However, Section 27.02 only restates the duties of the State Attorney to "prosecute and defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party" (our emphasis) as prescribed by the general law. It does not authorize the State Attorney to usurp unlawfully the DER's statutory powers.

Despite numerous citations in the State Attorney's Brief, not a single authority cited supports the proposition that Section 27.02 enables the State Attorney to independently enforce State laws (which are to be enforced by specific State agencies). No case cited in the State Attorney's Brief even suggests that the State Attorney can assume general duties of administrative agencies to bring civil enforcement actions under State-wide laws, especially where, as here, such private civil enforcement requires that the agency have the first opportunity (by review of a verified complaint or petition) to determine whether it desires to proceed to Court, or pursue other available remedies under its authorizing statute.

Furthermore, the DER prosecuted this matter in proceedings in which the State Attorney had specific notice of (and failed to object to, or intervene in) and reached, after conclusion of such proceeding, final, non-appealable, agency action.

B. The State Attorney's broad claims of prosecutorial power in civil actions, and assertions of "civil tradition," are also refuted by cases and authorities cited in his Brief.

The State Attorney incorrectly asserts that Article V, Section 17, which creates the office of the State Attorney, provides that he is the "prosecuting

officer" of trial courts and that the Second District was incorrect in concluding that the:

> plain meaning of the emphasized sentence directly empowers the state attorney to independently bring appropriate criminal proceedings ... However, the provision does not give the state attorney the authority to initiate a cause of action created by statute in favor of the state to recover civil damages and penalties for violations of section 403.161(3). Rather, only a specific general law can grant him the power to file such a suit.

The State Attorney's arguments confirm that the Second District was correct since:

1. The term "prosecuting officer" relates to the State Attorney's role in criminal proceedings. The cases cited in the State Attorney's Brief at page 9, for his argument that "the term prosecuting and related terms such as 'prosecute' and 'prosecution', while admittedly having a criminal connotation, are equally applicable to civil actions" involve decisions in other States under different laws. Even such cases cited confirm that these terms are used in the context of other State laws involving criminal procedure, and further in cases which have indicated that the term "prosecution" may mean civil prosecution it is clear that Courts have looked to the total context of the laws involved. Thus in Sigmon v. Commonweath, 105 S.E.2d 171 (Va. 1958), relied upon by the State Attorney in his Brief at page 9, the Court noted that:

> It is manifest that Code, § 19-232 contained in the Chapter entitled "Criminal Procedure," relates especially to criminal prosecutions or proceedings.

Here, it should be noted that the Florida Constitution refers not to prosecuting cases but, rather, defines the State Attorney as "the prosecuting officer," further substantiating the position of the Second District.

The State Attorney himself concedes in his Brief at page 9 that the term "prosecuting" is one "admittedly having a criminal connotation." The cases

he cites show this too. See, e.g., State v. Dickens, 183 P.2d 148 (Ariz. 1947), noting at 151:

> It is true that the words "to prosecute" and "prosecution" usually have reference to criminal proceedings.

As a practial matter, if the term "prosecuting officer" were as broad as the State Attorney asserts, then the Constitution would not have stated that the State Attorney shall be the "prosecuting officer of the trial court in that circuit and shall perform other duties prescribed by the general law," because the first term (prosecuting officer of the trial court) under the State Attorney's asserted approach would have been broad enough to include the second term, making it not only repetitious but unnecessary.

In addition, if applying the general term "prosecuting" the way the State Attorney interprets it -- so that it does not have a meaning of criminal prosecution -- means that the term "prosecuting" means to follow-up, or carry forward, then the term then becomes an absurdity. It suggests that, as a matter of constitutional law, the State Attorney is to be active and to proceed, which seems to be an unnecessary redundancy to place in the Constitution since most attorneys have to proceed with their actions -- regardless of whether they are initiating them or defending them. Alternatively, it means, under the State Attorney's interpretation, that the State Attorney would be the sole attorney able to proceed. This would obviously create some constitutional problems, since the result of such a meaning would preclude an attorney opposing the "prosecuting attorney" from being able to follow-up, or carry forward, a judicial action.

2. The State Attorney cannot pretend to be the Attorney General in order to derive his powers from the Attorney General, since they are different officers of the law and function under different provisions and laws. The State Attorney's Brief at pages 8 and 10 through 18 asserts that the

Second District improperly concluded that the State Attorney was trying to proceed in a manner not consistent with the scope of authority "traditionally granted to and exercised by a state prosecuting attorney." The State Attorney's argument is also refuted by authorities in his Brief since:

a. As noted above, the very definitions and cases relied upon in other locations cited by the State Attorney in his Brief show that, traditionally, as the Second District noted, the term "prosecuting" attorney relates to conducting suits "generally criminally on behalf of the State in his jurisdiction." See Balentine's Law Dictionary, 3rd ed., relied upon in the State Attorney's Brief at page 10. See also the State Attorney's Brief at page 10 for the concession that he is searching for "exceptions to the usually criminal duties of the prosecuting officer."

b. The State Attorney's Brief at page 10 asserts: "An analysis of the tradition of the office of state attorney begins in England with the origin of the office of Attorney General." This is incorrect as shown by his own authorities.[7] The Common Law Powers of the Attorney General of North Carolina, 9 N.C. Cent. L.J. 1, 3-5 (hereafter "9 N.C. Cent. L. J.") only discussed the Attorney General as an officer of the Crown, the Sovereign, and not the State Attorney. Contrary to the attempt at linkage by the State Attorney to the Attorney General, 7 Am.Jur.2d § 13 Attorney General, "Relationship Between Attorney General and Prosecuting Attorneys" at page 15, states, that in most States there has been created at a county or similar level the office of "prosecuting attorney" or "as it is termed in some jurisdictions, the office of district attorney, county attorney, state attorney,

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[7]The citation referred to at page 10 of the State Attorney's Brief does not state that "the tradition of the office of state attorney begins in England with the origin of the office of Attorney General." See 9 N.C. Cent. L.J.

public prosecutor or the like," which 7 Am.Jur. 2d § 13 Attorney General chooses to characterize as the "prosecuting attorney." Am.Jur. at page 15 states:

> This office [the "prosecuting attorney"] unlike that of the attorney general, is of comparatively modern creation, with its powers and duties chiefly prescribed by statutory or constitutional provision.

At a later page in the same section Am.Jur. notes that:

> If, however, the right to bring a certain action falls within the common-law powers of the attorney general, and the power to bring such action is not specifically granted to the prosecuting attorney by statute, the latter cannot bring the action. Similarly, prosecuting attorneys whose powers are statutory cannot encroach upon the powers of the attorney general who is a constitutional officer possessing common-law powers. 7 Am.Jr.2d § 13 at page 16.

Am.Jur. even cites a Mississippi Supreme Court case, State ex rel. Patterson v. Warren, 180 So.2d 293 (Miss. 1965), so holding based upon the proposition that this is in part due to the fact that if the subject matter is state-wide, as distinguished from local, there is an advantage in precluding "prosecuting attorneys" from proceeding with such litigation.

3. The State Attorney attempts to analyze cases and law review articles and other treatises, to assert that his office evolved from the office of Attorney General in England, but the authorities refute his position; they confirm the following:

a. The Attorney General is not an officer of the Courts but of the Crown, an Executive Officer. The Attorney General of the State of Florida is a position established under the Constitution, as part of the Executive Branch -- as opposed to the State Attorney established as part of the Judicial Branch. The law review article that the State Attorney Brief cites at page 10, notes that the Attorney General was "subject to the control only of the Crown, not to the usual disciplinary authority of the courts over

attorneys." 9 N.C. Cent. L.J., supra, at 4-5. It also notes that "the states have almost uniformly adopted a system of local prosecutors alien to the common law." 9 N.C. Cent. L.J., supra, at 31.

b. There are jurisdictions in the United States in which even Attorney Generals retain their common law powers only in the absence of a constitutional or statutory provision abrogating "those common law powers in a specific area, directly or indirectly, or where those powers and duties may have been entrusted to another official or agency of the State." See N.C. Cent. L.J., supra, page 2 (noting in fact that Florida is one of the jurisdictions in which powers and duties may be entrusted to an agency of the State). Here, the Florida Legislature, as the Second District so held, delegated authority to such an agency, the DER. To the degree the Legislature stated a desire for alternative enforcement, it specified the methods -- none of which include the one requested by the State Attorney herein.

c. The State Attorney's Brief at page 12 asserts that the Attorney General in the State of Florida has the authority to appear in Courts on behalf of public rights, but fails to note that the Attorney General acts pursuant to the statutory language in Section 16.01 of the Florida Statutes. Section 16.01 states:

> The Attorney General:
>
> * * *
>
> (4) Shall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state.
>
> (5) Shall appear in and attend to such suits or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States.
>
> (6) Shall have and perform all powers and duties incident or usual to such office.

Thus, to argue that the Attorney General of the State of Florida has the authority to do certain things but omit the statutory legislation that specifically authorizes the Attorney General to take such action, creates an incorrect analogy -- which must fail because of the very statutory authority relevant to each specific constitutional officer. The statutes conferring powers upon the Attorney General and the State Attorney show that the Florida Legislature understood how to confer the right to prosecute, so that the State Attorney could have the type of broad power that he is claiming here. However, such broad authority was not conferred upon the State Attorney but, rather, upon the Attorney General. The legislation relating to the two offices is different, and that refutes the State Attorney's claims. Thus, State v. S.H. Kress & Co., 155 So. 823, 827 (Fla. 1934), relied upon by the State Attorney's Brief at page 12, does state that the Attorney General had the power to bring a suit to "protect property and revenue" of the State, but it was because of the language noted by the Court that enabled the Attorney General to appear before the Court in such suits "in which the state may be a party, or in anywise interested" (our emphasis).

The State Attorney in pages 12 and 13 of his Brief cites decisions in other Courts and other authorities, but this appears to be an attempt to rely on other jurisdictions as a way of escaping the controlling statutory law of the State of Florida.[8]

d. The State Attorney's Brief, at page 14, asserts that it is "significant to note that no cases have been found which limit the common law powers devolving to the State Attorney from the State Attorney General to only those pertaining to criminal authority." The assertion incorrectly

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[8]These cases relied upon are distinguished in the Summary of Cases, Part 1, infra.

presumes there were any common law powers "devolving" from the State Attorney General to the State Attorney. It also ignores the very cases cited in the subsequent paragraph by the State Attorney. Such cases show that any common law powers which the State Attorney possesses are limited to criminal powers, and are derived from the Florida Statute adopting the common law, for all attorneys, where not in conflict with other legal requirements. Thus, while the State Attorney's Brief at page 14, asserts that "the common law roots of the office of state attorney in Florida have similarly been recognized" the two cases he cites refute his position. Miller v. State, 28 So.2d 208, 210 (Fla. 1900), the first case, was a criminal case, not a civil case. While Miller, supra, referred to a common law power available to the State Attorney in criminal matters, the Court did not suggest such power came from the Attorney General. To the contrary, Miller, supra at 210, referred to the State Attorney's statutory duty. While it is correct that Miller also recognized the common law, it did not suggest that the State Attorney existed at common law. The mere fact that one can rely upon the common law does not mean that reliance has devolved from the Attorney General -- especially since the legislature has confirmed its existence.

The second case relied upon in the State Attorney's Brief at page 14 is State v. Mitchell, 188 So.2d 684 (Fla. 4th DCA 1966). It involved a criminal proceeding and also refers to the common law duty of the public prosecutor to prepare indictments. It confirms again that when the term "prosecution" is utilized, the common law reference assumes a criminal case. It also notes that the "common law" is available to the courts, the grand jury and the state attorney due to Section 2.01 of the Florida Statutes, specifically adopting the common law to the extent it is "not inconsistent with the Constitution and laws of the United States and the laws of this state." State v. Mitchell, supra at 688, note 11.

It is ironic that State v. Mitchell, supra at 687, notes, in describing the State Attorney, that: "The vigor of the state attorney in the use of the processes of the court should be sustained and commended in all instances except where the rights of others are impaired or denied" (emphasis added).

e. The State Attorney's Brief at pages 14 and 15 argues that "principles governing the construction of statutes are generally applicable to the interpretation of a Constitutional provision." As a result, the State Attorney argues that it is presumed that the framers of the Constitution had a "working knowledge of the English language." Assuming this to be correct, the State Attorney's Brief at pages 14, 15, and 16 is self-defeating, since after the statement that he is a "prosecuting officer" the word "and" (a coordinating conjunction) is used before the statement that a State Attorney "shall perform other duties prescribed by general law." See Article V, Section 17 of the Florida Constitution.

Since the "prosecuting officer" term is not synonymous with the Attorney General's powers appearing elsewhere in the Florida Constitution (see Article IV, Section 4c), as noted above the term "prosecuting officer" relates to the criminal aspects of the State Attorney's job. This means that the "and" refers to any other duties that the State Attorney has, and requires that they must be prescribed by "general law."

f. The State Attorney's Brief at page 15 incorrectly argues that his duties as prosecuting attorney are distinct from those prescribed by general law, and that it must be presumed that the "framers of the Florida Constitution were cognizant of the common law duties of the State Attorney." As noted above, if they were, they knew there were no such duties -- because at common law there was no such office. The State Attorney is attempting to merge his office with that of the Attorney General. Yet the

Attorney General cannot be synonymous with the State Attorney, since as noted the Attorney General is a position created by a separate section of the Constitution and is governed by a separate enabling statute.

g. The State Attorney's Brief at page 16 then cites cases in other jurisdictions -- again avoiding Florida law. The cases cited by the State Attorney's Brief at pages 16 and 17 are also not applicable for the proposition that the State Attorney tries to suggest, as is shown by analysis of those cases in the Summary of Cases following the text of this Brief.[9]

(h) The ultimate refutation of the State Attorney's position comes at page 18 of his Brief, where he asserts that:

> Since FLA. CONST. art. V, §17 provides no specific authority for the legislature to restrict the inherent duties of the office of state attorney, one must conclude from a plain reading of that provision that, at the very least, the state attorney in Florida has those common law duties which have devolved to the office. As noted above, those common law duties include the duty to prosecute all suits, civil and criminal on behalf of the State, where the State is interested, and to prosecute all actions, civil or criminal, necessary for the protection and defense of the property and revenue of the State.

This is an accurate summary of the statutory enabling legislation that describes the role of the Attorney General. The Attorney General does have these powers to prosecute and to proceed in civil and criminal and equity cases where the State "is a party, or is in anywise interested."

However, as noted above, the State Attorney, under the enabling legislation which he himself has relied upon, only has the authority to participate where the State is a party. There is no statutory provision which allows him to proceed merely because of his "interest", as is the case with the Attorney

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[9]See Summary of Cases, Part 2, infra for analaysis of the cases cited in the State Attorney's Brief at pages 16-17.

General. It is for the foregoing reasons that the State Attorney's Brief at page 18 is incorrect in asserting that he has "civil as well as criminal authority independent of any statutory provisions to initiate an action on the State's behalf, pursuant to Sections 403.141(1) and 403.161(1)." While the Second District did recognize the State Attorney's authority to initiate a criminal proceeding, pursuant to Section 403.161(3), he has not done so here. The failure to provide a similar provision authorizing a civil proceeding, is a statutory refutation of the position taken by the State Attorney herein.

(i) The State Attorney's Brief at pages 19-24 asserts that assuming for the purpose of argument that Article V, Section 17 alone did not provide sufficient authority, Section 27.02 does. He asserts as a basis for this that Section 27.02, Florida Statutes, is "not unique to Florida" and "substantially similar" language is in other States. The problem with this is that:

(1) It ignores the specific differences between the legal authority expressly conferred upon the Florida Attorney General to participate in a case in which the State is a "party" or in which the State might allege an "interest" and the statutory authority of the State Attorney, which requires that the State be a party.

(2) The cases cited by the State Attorney refute his position, because they do not involve statutes similar to Section 27.02, in which the State must be a party. The examples in the State Attorney's Brief at pages 20-22 refute his position:

(a) State v. Fox, 594 P.2d 1093 (Idaho 1979), involved a case in which a prosecuting attorney in a local area had the right to initiate a civil action; but there the statute (contrary to the State Attorney's assertion at page 20 of his Brief) was not "substantially similar to

Section 27.02 Florida Statutes". In fact, in State v. Fox, the Court specifically noted that the statute there stated that the prosecuting attorney could proceed if "the people, or the state, or the county, are interested, or are a party." Thus, there was a specific conferral of statutory authority to proceed on that particular prosecuting attorney due to his being "interested" in State v. Fox, supra, which is missing here.

(b) In State ex rel. Beck v. Bossingham, 152 N.W. 285 (S.D. 1915), the South Dakota Court also interpreted a statute under which a local state attorney had the "duty" to proceed with a "civil action", if the "state or county is interested, or a party." Again, the difference in the statutes precludes the State Attorney from arguing (as he attempted at page 21 of his Brief) that State ex rel. Beck, supra, involved "language contained in a statute substantially similar to Section 27.02, Florida Statutes."

(c) In Dolezal v. Bostick, 139 P. 964 (Okla. 1914), the Oklahoma Court also interpreted a statute which allowed a local attorney in that case (referred to as a county attorney) to proceed in a case if either "interested or, a party". The terms "interested or a party" involved there distinguish Dolezal, supra at 968, from the case here, and confirm again that the State Attorney's Brief at page 21 is incorrect when he states that Dolezal involved "a statute substantially similar to Section 27.02, Florida Statutes."

(d) The Attorney General's Opinion of the State of Wisconsin in 25 Op. Att'y Gen. 549 (1936), according to the State Attorney's Brief at page 22, "construed a Wisconsin State statute substantially similar to Section 27.02, Florida Statutes." Nevertheless, in the Wisconsin case, the statute allowed a criminal prosecutor, referred to there as a district attorney, to proceed in a matter if the "state or the county is interested or a party". Thus, this case is also easily distinguished by the difference in the statutory language.

The State Attorney's Brief at page 22 asserts that he can rely upon a commentator's note in Powers and Duties of the Prosecuting Attorney: Quasi-Criminal and Civil, 25 J. Crim. L. & Crimin. 21, 30, for the proposition that "The laws of most of the states contain general sections making it the duty of the prosecuting attorney to prosecute or defend all actions, civil or criminal, in which the state or county is a party or is interested" (emphasis added).

The language in the cases and the authorities relied upon confirm that unless there is a provision stating interest, in addition to being a party the State Attorney cannot rely on decisions that he has cited.

j. The State Attorney's Brief at page 24 argues that the Second District cited over 20 specific general laws which explicitly give the State Attorney authority to independently proceed with civil suits, but that is not significant. The State Attorney so asserts because the Wisconsin Attorney General's opinion suggests that the ability to proceed in a case in which the State or the county may be a party, or may be interested, means exercising discretion, and specific statutory authorization means a mandate to proceed. The difficulty with the State Attorney's argument is that he overlooks the fact that his statutory enabling legislation states that the State or county must first be a party, and does not provide that interest is sufficient -- as contrasted to the Wisconsin statute which provided that "interest" in a case was sufficient for standing. Thus, if in a jurisdiction where a state attorney may either be a party or interested in litigation, the specific legislation providing a state attorney with the authority to proceed were not really necessary, such a result would not assist this State Attorney in this State -- under the statute upon which he is forced to rely, which does not given him such a broad authority.

k. The State Attorney's Brief at page 26 argues that in Inhabitants of Clinton v. Heagney, 55 N.E. 894 (Mass. 1900), a court held that a town solicitor's "prosecution" of a civil suit could include its initiation, and a town prosecutor was not confined to the pursuit of a remedy after proceedings. However, Inhabitants of Clinton, supra, was a 1900 case not involving a law or state attorney relevant here. The Supreme Judicial Court of Massachusetts, in Worcester, was interpreting a statute in which it confirmed it was only dealing with the civil side of the Court, and with a town solicitor who was able "to prosecute all litigation to which the town is a party." The town solicitor was not under that provision defined as a "prosecuting officer," and in the phrase utilized there was no requirement that the litigation already be instituted.

l. The State Attorney's Brief at page 27 asserts that the term "party" in Section 27.02 does not mean a "party" in terms of being named in litigation as a party, but could be one concerned with an affair or matter. However, the references that the State Attorney relies upon are not Florida cases interpreting Section 27.02, and they are cases cited out of context. The division and parsing of the statute, and logic, suggest the fallacy inherent in the State Attorney's position. The cases cited also refute his position. See Summary of Cases, Part 3, infra.

The State Attorney must be a party to a particular suit under Section 27.02, and reliance upon being a party in terms of having an interest in an affair is misplaced. The Florida Legislature has shown by its authorization for the Attorney General, due to being a party or having an interest, that (to use the State Attorney's phrase) it had and has "a working knowledge of the English language" and "knew the ordinary rules of grammar and the meaning of the words." The failure to confer the same broad authority to

sue on the State Attorney as conferred on the Attorney General speaks for itself.

C. The State Attorney's Brief at pages 27-31 finally suggests that his ability to prosecute as a party under Section 27.02 of the Florida Statutes is in the interest of the State and public policy. The State Attorney seeks to represent the interests of the State involved "whenever injury or harm is threatened or occurs to the property or revenue of the State, or where a violation of State law has occurred."

The authority for representing the public cited by the State Attorney refutes his position. The case he relies upon is State of Florida v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976). There the Fifth Circuit allowed the Attorney General of the State of Florida, not a State Attorney, to proceed in a Federal antitrust action, because the State Attorney did have the right as a matter of statute to proceed in a Federal case if the State were a party or had an interest. In addition, the Court noted that there was no agency that had expressed an interest, or had anything to lose by the State Attorney General's proceeding. Here, it should be noted that the DER has taken jurisdiction and for reasons discussed below has a great deal to lose by the approach taken by the State Attorney -- as do all State agencies and citizens of the State of Florida. The ultimate refutation of the State Attorney's case is shown by the public interest which he invokes. The following should be noted:

1. If the State Attorney can become involved in civil litigation whenever he perceives injury or harm is threatened to the property or revenue of the State, then the State Attorney can use the same approach he attempted here with regard to environmental matters to usurp the legitimate rights of other agencies under the State of Florida. The State Attorney here

is trying to gain a judicial foothold contrary to constitutional and legislative prohibitions, to work his way from the waters of the State across the beaches, and into the State highway system, and into the State banking and Department of Revenue proceedings.

2. The public interest cannot be served by creating anarchy in our state-wide agencies. Even cases in other jurisdictions cited by the State Attorney have noted that it would be unconstitutional to strip powers that would belong in a state wide office such as an Attorney General and try to place them elsewhere, since the State at large elects a state-wide officer by definition. As a result, to so tamper with constitutional officers is to deprive the people of their constitutional rights and to impair the obligation of contracts. See, e.g., Ex Parte Corliss, 114 N.W. 962, 975 (N. Dak. 1907). If each State Attorney took a different interpretation of Chapter 403 and filed suits, as could be the case based upon the theory of the State Attorney involved here, the very environmental protection which the State Attorney says he seeks to insure would be lost. It would be this way with all of the state-wide legislation, and not only the legislation but the agencies would be destroyed. In addition, there would be no way of obtaining rules, because State Attorneys would not have to promulgate rules under Chapter 120 of the Administrative Procedure Act.

As noted, there is no traditional legal justification for such a position as taken herein by the State Attorney, but if we must go to England for analogy, then it certainly is appropriate to fight this form of official imperialism on the beaches, so to speak, before the State Attorney can initiate his next logical attack on the State governmental structure.

It is finally appropriate to note that if English history were relevant in any respect in this case, it is only insofar as one might invoke the lesson

taught by the improper approach used by the State Attorney, to rely improperly on headnotes taken out of context, which has required a paper chase that should not have been necessary. In that respect it is appropriate, especially in view of the State Attorney's reliance upon English tradition, to conclude by citing an English case which sums up the tortured reasoning invoked by the State Attorney. The preface of the book titled The Paper Chase[10] cites and quotes the following decision of Fog, L.J., in Rex v. Haddock in the Court of Criminal Appeal (Haddock, Misl. Cas. C. Law 31. Herbert, Ed; 1927):

> ... citizens who take it upon themselves to do unusual actions which attract the attention of the police should be careful to bring these actions into one of the recognized categories of crimes and offenses for it is intolerable that the police should be put to the pains of inventing reasons for finding them undesirable ... It is not for me to say what offense the appellant has committed, but I am satisfied that he has committed some offense, for which he has been most properly punished.

In our criminal justice system, we have government of laws and not men. In our civil justice system, especially as it relates to the sovereign, we have a government of laws not of law-enforcement authorities. The law enforcement authorities must conform to the law -- not the law to the desires of the law enforcement authorities. That was the holding of the Second District in this case.

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[10]John Jay Osborn, Jr., The Paper Chase (Warner Books Edition 1971), at the third page.

IV. CONCLUSION

For the foregoing reasons, the Appellee General Development Corporation submits that the State Attorney is incorrect and requests that:

(i) the judgment of the District Court of Appeal, Second District should be affirmed; and,

(ii) such other relief as may be appropriate be granted in favor of General Development Corporation including an award of attorneys' fees and costs as prevailing party under Chapter 120.

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V. CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the Answer Brief on the Merits of Appellee General Development Corporation (and accompanying Appendix) was served by United States mail this 31st day of August, 1984, on:

The Honorable James A. Gardner
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-and-

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