IN THE SUPREME COURT

STATE OF FLORIDA

CASE NO. 74,724

RIDGEWOOD PROPERTIES, INC.

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF COMMUNITY AFFAIRS,

Appellee.

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE DEPARTMENT OF COMMUNITY AFFAIRS

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INTRODUCTION TO BRIEF

The Department attaches an Appendix to the brief, which includes the opinion of the District Court, the Final Order issued by the Department and the Recommended Order issued by the Hearing Officer. Citations to the Appendix are (A. ____). Citations to the transcript of hearing and the record are (T.Vol. ____, R. ____). All record page numbers shall correspond to those numbers listed on the Index to Record on Appeal in the First District Court.

STATEMENT OF THE CASE

The Department of Community Affairs (Department) accepts Ridgewood Properties' Statement of the Case with the following exceptions:

1. The Department filed a single exception to the Recommended Order requesting that the Hearing Officer's Conclusion of Law with respect to the interpretation of the Department's aggregation rule be rejected because the **1985** Acquisition Project was an integral part of the original Maitland Center and was not required to be **"aggregated"** within the meaning of Rule **28-11,** Florida Administrative Code. (A. **6-8)**

2. In accordance with Ridgewood's request in its Exception Number **8,** Secretary Pelham corrected a scrivener's error in Finding of Fact Number 34 of the Final Order by the addition of the single word **"east"** to reflect that the property purchased by the Downs, Dye group was split by the interstate highway (1-4). This correction is clearly supported by evidence in the record and

conforms to the Hearing Officer's Finding of Fact No. 40. (A. 27; R. 216; T.Vol. 11, R. 89-92)

STATEMENT OF THE FACTS

The Department objects to Ridgewood's Statement of the Facts in that the recitation of facts includes "facts" which are contrary to or in conflict with the facts found by the Hearing Officer, "facts" which were rejected by the Hearing Officer in the Recommended Order as not supported by the evidence in the record, and "facts" which are argumentative and clearly intended to prejudice this tribunal. The Department offers as a substitute the following facts:

On March 8 through 11, 1988, a formal Section 120.57(1), Florida Statutes (F.S.), hearing was held in Orlando, Florida to determine whether the Maitland Center office development was required to undergo development of regional impact (DRI) review in accordance with the requirements of Section 380.06, F.S.

On March 8, 1988, the Department called Thomas G. Pelham, Secretary of the Department of Community Affairs, as a witness to testify as to matters of agency policy. The Hearing Officer ruled Mr. Pelham was also qualified as an expert in matters of land use planning. (T.Vol. I, R. 304-317) Thomas Pelham has been the Secretary of the Department of Community Affairs since February 2, 1987. (T.Vol. I, R. 305) Mr. Pelham's qualifications are shown on his vitae, admitted as Exhibit 179 (R.2305-2309) and discussed during his testimony. (T.Vol. I, R. 304-317).

Mr. Pelham testified to the Department's interpretation of the criteria listed in Section 380.06(20), F. S., the vested rights provision of the DRI statute, and the determination of vested rights through the binding letter of interpretation process set forth in Section 380.06(4), F.S. **(T.Vol. I, R. 324-337, 345-352, 358-420, 420)**

On June **8, 1988,** the Hearing Officer issued his Recommended Order, with his recommendation that the Department enter a Final Order requiring Ridgewood Properties to undergo DRI review for the original Maitland Center development but not for the portion of the development known as the **1985** Acquisition Project. **(A.10-58)** On September **27, 1988,** Secretary Pelham issued the Final Order which adopted the Findings of Fact and Conclusions of Law in the Recommended Order with the exception of a minor technical correction for Finding of Fact Number **34,** and modification of Conclusions of Law Number **11** and **25.** (A. **3-8)** Ridgewood Properties appealed that Final Order to the First District Court on October **19, 1988.** The opinion filed by the First District Court on September **8, 1989** affirmed in all respects the Final Order issued by Secretary Pelham on September **27, 1988.** (A. **01-02)**

As to the issues raised in Ridgewood's brief which are beyond the question certified by the First District Court of Appeal, the Department adopts, as the basis for its statement of additional relevant facts, the Findings of Fact contained in the Hearing Officer's Recommended Order dated June **8, 1988,** and affirmed by the First District Court of Appeal:

At the hearing, the parties agreed and stipulated that, for the purposes of this administrative proceeding, the original Maitland Center is a development of regional impact as established in Section 380.0651, F.S., and Rule 28-24, Florida Administrative Code (F.A.C.). (A. 12, 15) The planned development of the original Maitland Center has resulted in an office complex containing more than two million square feet of office space. (A. 15) The provisions of Chapter 380, F.S., mandating review of developments of regional impact (DRI) were enacted in 1972 and took effect on July 1, 1973. (A. 18)

At all times, CMEI knew generally of the DRI statutes and rules, including the procedures for obtaining a binding letter of interpretation of vested rights, but did not initiate contact with the Department, or its predecessor, advising of its plans to develop the original Maitland Center or the 1985 Acquisition Project. (A. 33)

On December 9, 1985, CMEI transferred to Ridgewood Properties, Inc., its assets, including the remaining undeveloped 8.5 acres within the original Maitland Center and the undeveloped 5.0 acres within the 1985 Acquisition Project and Ridgewood also accepted all of CMEI's liabilities. (A. 18) On December 30, 1985, Ridgewood entered into an Indemnity Agreement with Pier I Imports, Inc., and Sunbelt Nursery Group, in which Ridgewood agreed to indemnify and hold the other parties wholly and completely harmless from liabilities, costs, damages and expenses incurred by them for any act, omission or obligation which occurred during CMEI's corporate operations. (A. 18)

Ridgewood's sole justification for the office complex not having gone through the DRI process was its contention that, prior to the DRI law's effective date of July 1, 1973, the actions of the City of Maitland, and the developer's reliance upon them, created vested rights that caused Maitland Center to be exempt from DRI review. (R. 3602-3624) Ridgewood's evidence revealed the following facts, as found by the Hearing Officer, regarding its claim of vested rights in the original Maitland Center development.

In December, 1971, the City of Maitland, at the request of the Dye, Downs partnership, annexed approximately 130 acres of property that was to be the site of the original Maitland Center development and approved the requested zoning of that property in the form of new zoning regulations that would specifically; accommodate office development. (A. 26-27) In January, 1972, the partnership purchased the property, which purchase had been; contingent upon the annexation and zoning. (A. 27) Other than the annexation and zonings of the property in 1971 and 1973, the ordinances and minutes of the Maitland City Commission meeting held before July 1, 1973 do not show any actions taken by the City in regard to the property that would become the Maitland Center development. (A. 25-29) Some detailed plans, including multifamily residential development, and maps were given to the City by the partnership, but Ridgewood did not prove that; ;any of them were approved by the City. (A. 28)

The original Maitland Center development was not exempted by the City from the subdivision regulations in force in 1973, which

required, among other things, preliminary and final plat approval prior to the commencement of development. (A. **27)** Although certain other assurances with regard to the development of the original Maitland Center were requested by the partnership, Ridgewood did not prove that the City agreed to allow the partnership to commence development without it having to obtain the required approvals other than just building permits. (A. **27)** Further, Ridgewood was unable to prove exactly what documents the City had allegedly destroyed in **1979** or whether they would have helped prove its claim of vested rights, because all the ordinances and minutes of the City Commission meetings that would have evidenced formal City approval of development in the original Maitland Center were preserved and available to Ridgewood. (A. **29-30)**

In October, **1972,** the City **of** Maitland approved a building permit for a movable 2,000 square foot temporary office building to be constructed on property east of Interstate Highway 4 (I-4), which was acquired in the same transaction as that property west of 1-4, but was not part of the planned office park. (A. **27)** In October, **1973,** the partnership closed on the purchase of the additional 100 acres (which comprised the balance of the original Maitland Center property) on which it held an option. (A. **29)**

Between **1973** and **1977,** no development of the original Maitland Center went forward. (A. **30)** In **1977,** Cousins Mortgage and Equity Investment (Cousins) acquired the property by foreclosure of a development mortgage loan it had made to the partnership in **1973.** (A. **13,30)** In late **1979,** Cousins merged

into CMEI, Inc. (CMEI), which became the surviving entity and which took ownership of the original Maitland Center property. (A. 13,30) After the foreclosure and merger, plans for development began in earnest. Between August, 1979 and September, 1983, CMEI submitted to the City of Maitland for approval eight preliminary plats for the original Maitland Center and cleared portions of the land, constructed the internal roadways, the entrance to the original Maitland Center and the drainage facilities and installed water, sewer and utility lines. (A. 13)

In 1985, CMEI purchased a 26-acre parcel of land from the City of Maitland and proposed to develop it as part of the Maitland Center office complex. (A. 16-17) CMEI designated the 1985 Acquisition Project as "Maitland Center, Section **XV"** on the preliminary plat approved by the City of Maitland on February 26, 1985, in permit applications, in future correspondences and was in name and in fact an addition to the original Maitland Center development. (A. 16-17) Each parcel sold within both the 1985 Acquisition Project and the original Maitland Center was subject to the terms and conditions of the architectural and landscaping design standards and the restrictive covenants that were prepared by the Post, Buckley engineering firm at the request of CMEI to govern and insure the uniformity of the architectural design and landscaping of each building within each parcel. (A. 17)

Between 1981 and 1986, the Department received inquiries, which did not contain specific facts or information regarding the overall size of the original Maitland Center, from third parties

concerning the DRI status of projects on parcels with the office complex and of the Maitland Center. (A. 32) In December 1984, the Department sent CMEI a monitoring letter which expressed concern that the Maitland Center development was a DRI and requested the submittal of an application for a binding letter of interpretation of the DRI status of the development. (A. 32) CMEI refused and asserted vested rights. (A. 32-33)

During the numerous contacts between the Department and Ridgewood concerning the DRI status of the Maitland Center development, Ridgewood, also, refused to apply for a binding letter of interpretation of vested rights, but did request an informal determination from the Department. (A. 33) The eventual result of these contacts was the filing of a Notice of Violation and Order for Corrective Action by the Department on March 3, 1987. A formal Section 120.57(1), F.S., hearing was held and culminated in the Final Order now under appeal. (A. 3-63)

SUMMARY OF THE ARGUMENT

This was a case of first impression before the First District Court of Appeals and is a case of first impression before this tribunal. The First District certified the following to this tribunal as a question of great public importance:

> "Is it a violation of a party's due process rights in an administrative hearing for the head of a department to appear as an expert witness when that same department head later enters the Final Order in the case?"

Ridgewood asserts that it is violative of due process for

an agency head to sign a final order approving a Division of Administrative Hearings' Hearing Officer's Recommended Order after the agency head has testified as a witness in the formal hearing before the Hearing Officer. Without citing any facts or basis, Ridgewood contends that there was an "astounding level of deference accorded to the [department head] and his testimony by the Hearing Officer" which rendered the hearing fundamentally unfair and violative of Ridgewood's due process rights. (Ridgewood's brief at p. 19) Ridgewood fails to acknowledge the fact that the other competent substantial evidence in the record, with or without Secretary Pelham's testimony, failed to establish under Chapter 380, F.S., and Florida caselaw that it had a vested right to be exempt from the development of regional impact process required in Section 380.06, F.S.

The Administrative Procedure Act (APA), Chapter 120, F.S., was promulgated by the Legislature to establish uniform adjudicative procedures to be used by state administrative agencies in the administration and enforcement of their statutes. The salient feature of Florida's APA was the requirement that independent, impartial hearing officers conduct formal fact-finding hearings, with sworn testimony and right of cross-examination, "in all proceedings in which the substantial interests are determined by an agency." (Section 120.57, F.S.) That chapter, and the rules promulgated thereunder, were clearly designed to provide due process to the litigants.

The hearing held below complied with the provisions of Section 120.57(1), F.S., in that Ridgewood had "an opportunity to

respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of fact and orders, to file exceptions to any order or Hearing Officer's Recommended Order, and to be represented by counsel." (Section 120.57(1)(b)4., F.S.) Ridgewood's counsel availed himself greatly of the opportunities described in the preceding statute.

Secretary Pelham was chosen as the Department's witness to testify about the Department's vested rights policy because he is the ultimate authority on the determination of agency policy. His position and responsibilities require him to manage and supervise all the Department's divisions and programs, establish agency policy and interpret the numerous statutes and rules which the Department is required to administer.

Secretary Pelham's actions in issuing a Final Order following the administrative proceeding comported in all accords with the provisions and requirements of Chapter 120, F.S., and current law. He accepted the Hearing Officer's Findings of Fact, as mandated in Section 120.57(1)(b), and only changed those Conclusions of Law in which the Hearing Officer had incorrectly applied the Department's aggregation rule, Chapter 28-11, F.A.C. The actions of Secretary Pelham in applying Departmental policy to the facts found by the Hearing Officer and in rejecting Ridgewood's Exceptions does not automatically render the administrative process unfair or prejudiced against Ridgewood. Anyone performing that task would have had to apply the same policies and interpretations as applied by Secretary Pelham.

Further, a review of current Florida caselaw clearly supports his actions and decisions.

Ridgewood did not choose to avail itself of other provisions specified in Chapter 120, F.S., to ensure that due process is afforded to every substantially affected person litigating within the administrative forum. Section 120.71, F.S., provides for the disqualification of an agency official when his impartiality is questioned and for the appointment or substitution of a third person to issue the final order. Ridgewood never attempted to use this provision to have Secretary Pelham disqualified or replaced at any time, before, during or after, the administrative proceeding, despite its concerns about his alleged **"obvious"** bias. Having failed to avail itself of the proper administrative remedy, Ridgewood should not be allowed to come to this Court to cry **"foul."**

Ridgewood's downfall came from its inability to prove its claim of vested rights, not from a lack of due process. The parties stipulated at the commencement of the administrative hearing that the original Maitland Center (240 acres with over two million square feet of office development)' is a DRI as is established in Section 380.0651, F.S., and Rule 28-24, F.A.C. Once that stipulation was entered, the burden of proof fell upon Ridgewood to establish that it was exempt from the DRI review process.

1/ This total does not include that acreage or the square footage constructed or to be constructed in the 1985 Acquisition Project, the adjacent parcel which was added to the original Maitland Center site in 1985.

Ridgewood was unable to prove that its predecessor had obtained an authorization by the City of Maitland to commence development of the Maitland Center DRI on which development rights could vest under Section 380.06(20), F.S.

The Department is not required to adopt its vested rights interpretation as a rule because each vested rights determination is made on the basis of a particular set of facts and issued in accordance with the provisions of Section 380.06(20) and Chapter 120, F.S. and supporting caselaw.

ARGUMENTS

INTRODUCTION

In 1972, the Florida Legislature passed the Florida Environmental Land and Water Management Act of 1972, codified as Chapter 380, F.S. The purpose of this Act was to protect the natural resources and environment of the state, facilitate orderly and well planned development and protect the health, welfare, safety and quality of life of Florida citizens. As stated in the purpose (Section 380.021, F.S.), ". . .it is necessary that the State establish land and water management policies to guide and coordinate local decisions relating to growth and development; . . ." Section 380.06, F.S., Developments of Regional Impact, was specifically designed to address and mitigate the regional impacts of "any development which, because of its character, magnitude, or location would have substantial effect upon the health, safety, or welfare of citizens of more than one county." The Legislature approved, by Joint Resolution HCR 73-1039, the numerical thresholds for the identification of developments of regional impact (DRI) throughout the state. The DRI guidelines and standards were codified as Rule Chapter 22F-2, F.A.C. [now Rule Chapter 28-24, F.A.C.] and became effective July 1, 1973. Since that date, if a development is a DRI, it is required to comply with the provisions of Section 380.06, F.S.

As noted by the courts,

> "...the Development of Regional Impact process does not replace local regulatory procedures which must be followed by all property owners seeking to develop their property. Rather, the DRI process imposes additional restraints on the rights of the owner or developer of a large scale development which will have regional as well as local impact, to make use of his property." Friends of the Everslades, Inc. v. Board of County Commissioners of Monroe County, 456 So.2d 904, 908 (Fla. 1st DCA 1984) (emphasis added by the Court); Suwannee River Council Boy Scouts of America v. State Department of Community Affairs, 384 So.2d 1369, 1374 (Fla. 1st DCA 1980).

Chapter 380 is a general law enacted pursuant to the state's police powers. It is equally at force throughout Florida and prevails over local government zoning and regulatory procedures. General Electric Credit Corporation v. Metropolitan Dade County, 346 So.2d 1049, 1054 (Fla. 3d DCA 1977).

Ridgewood admitted, prior to hearing and by stipulation at hearing, that the original Maitland Center office complex is a DRI. Ridgewood claimed that Maitland Center could avoid DRI review because it possessed vested development rights. The DRI statute contains a provision designed to recognize constitutionally protected property interests that may have accrued to a landowner during the course of the development of his property prior to the effective date of the statute. Section 380.06(20), F.S.,[2] is the DRI **"grandfather"** clause which sets out certain criteria that must be met by the developer or landowner before his right to complete his DRI development may be

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2/ Formerly codified at Section 380.06(12), F.S. (1973).

said to have **"vested"** under this statute. Because of Ridgewood's stipulation of DRI status, the major issue at the hearing concerned that vesting provision: whether Ridgewood has met its burden of establishing that the Maitland Center development meets the vested rights criteria in the law and is thereby exempted from the DRI process which would apply to it.

I. THE ACTIONS OF THE HEARING OFFICER AND SECRETARY PELHAM DID NOT DEPRIVE RIDGEWOOD OF ITS DUE PROCESS RIGHTS.

Ridgewood's due process rights were clearly not violated by any action of the Hearing Officer or Secretary Pelham. **"The** essential elements of due process are notice, opportunity to be heard, and an opportunity to defend in an orderly proceeding before a tribunal having jurisdiction of the **cause."** Burton v. Walker, 231 So.2d 20, 21 (Fla. 2nd DCA 1970). See also: Fickle v. Adkins, 394 So.2d 461 (Fla. 3d DCA 1981).

Ridgewood was given a full evidentiary, fact-finding hearing before an independent, impartial hearing officer, who found that Ridgewood did not prove its claim of vested rights. Ridgewood then sought judicial review of the Final Order, which incorporated, in full, the Hearing Officer's Findings of Fact, alleging a due process violation. That Final Order was affirmed **"in** all **respects"** by the First District Court of Appeals, after it reviewed the entire record and the alleged prejudicial actions of the Hearing Officer and Secretary Pelham. In other words, Ridgewood sought review of its vested rights claim in two forums (administrative and judicial) and lost in both. Now it seeks a "third bite at the apple."

A. THE PROCEEDING BELOW WAS CONDUCTED IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 120, FLORIDA STATUTES, THE ADMINISTRATIVE PROCEDURE ACT, AND WAS NOT A VIOLATION OF RIDGEWOOD'S DUE PROCESS RIGHTS.

Ridgewood received a full, impartial fact-finding administrative hearing in accordance with the provisions of Chapter 120, F.S., The Administrative Procedure Act (APA), which was promulgated by the Legislature to provide uniformity in the rulemaking and adjudicative procedures used by the administrative agencies of the state of Florida. It expressly supersedes all other provisions of the Florida Statutes which are related to rulemaking, agency orders, administrative adjudication, licensing or judicial review or enforcement of administrative action for state agencies.

A formal administrative hearing provides due process if it ensures that a party has an opportunity for a full evidentiary hearing before an impartial hearing officer so that the agency's actions determining his interests will not be arbitrary and capricious, but will be based on substantial, competent evidence. Due process is also ensured by provision of a written record of the proceeding which can be judicially reviewed. Deel Motors, Inc., v. Department of Commerce, 252 So.2d 389 (Fla. 1st DCA 1971); McCullen Ford, Inc., v. Calvin, 308 So.2d 189 (Fla. 1st DCA 1974). All of these purposes were met in the administrative proceeding in which Ridgewood participated.

A formal hearing conducted pursuant to Florida's APA provides due process to the parties. Section 120.57, F.S., sets out the proceedings in which the "substantial interests of a

party are determined by an agency...." Section 120.57(1), F.S., governs the proceedings in which a disputed issue of material fact is to be determined and is commonly termed a formal administrative hearing. It is conducted by a hearing officer assigned by the Division of Administrative Hearings, unless it falls within one of the exceptions listed in paragraph (a) under subsection (1). After a hearing has been granted, the parties receive at least 14 days notice of the hearing date. The notice includes the following information:

> a. A statement of the time, place, and nature of the hearing.
> b. A statement of the legal authority and jurisdiction under which the hearing is to be held.
> c. A reference to the particular sections of the statutes and rules involved.
> d. . . . a short and plain statement of the matters asserted by the agency and by all parties of record at the time notice is given. . . (Section 120.57(1)(b)2., F.S.)

At the hearing itself, the parties are allowed to "respond, to present evidence and argument on all issues involved, to conduct cross-examination and [to] submit rebuttal evidence..." (Section 120.57(1)(b)4., F.S.) The same statutory provision authorizes all litigants to submit proposed Findings of Fact and orders to the hearing officer for consideration in his preparation of the Recommended Order, and to file exceptions to the Hearing Officer's order or the proposed order of another party.

The Hearing Officer's Recommended Order consists of his Findings of Fact [which are mandated to be based exclusively on the evidence of the record and on matters recognized (Section

120.57(1)(b)8., F.S.)], Conclusions of Law, interpretation of administrative rules and recommended action. Each Recommended Order is filed with the agency head and each party which has at least 10 days to submit written exceptions to it. (Section 120.57(1)(b)9, F.S.)

The agency is authorized, by statute, to adopt the Hearing Officer's Recommended Order as the Final Order of the agency or to review and reject or modify the Conclusions of Law and the interpretation of administrative rules in the Recommended Order in its Final Order. (Section 120.57(1)(b)10., F.S.) The agency, however, may not reject or modify any Findings of Fact unless the agency has determined from a review of the complete record "that the Findings of Fact are not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law." (Section 120.57(1)(b)10., F.S.)

Section 120.68, F.S., establishes that "(1) A party who is adversely affected by final agency action is entitled to judicial review . . ." This statute sets out the procedures to be followed by the appealing party and the agency, and the remedies available to the reviewing court if it finds that the agency's action was erroneous.

Nothing in Chapter 120, F.S., prohibits an agency head from participating as a witness in the administrative proceeding. Nor are there any other statutory provisions or Florida judicial law which prohibit such participation by the agency head.

A review of the record below clearly reveals that Ridgewood Properties was given adequate notice of the formal administrative hearing (R. **3581-3585)** to enable it to adequately prepare for the hearing. The depositions of numerous witnesses were taken by Ridgewood's attorneys. Ridgewood also took the deposition of Secretary Pelham on February **10, 1988,** almost one month prior to the hearing at which he testified.

At the hearing, Ridgewood was given every opportunity by the Hearing Officer to respond to issues and objections raised by the Department, to cross-examine Secretary Pelham, submit rebuttal evidence, and to present its case in chief. The Hearing Officer allowed Ridgewood to prepare and submit a Memorandum of Law in support of its position and Proposed Recommended Order, in lieu of a closing argument at hearing. (R. **181-206)** As allowed by statute, Ridgewood also submitted its Exceptions to the Hearing Officer's Recommended Order and to the Department's Proposed Recommended Order. (R. 212-244)

After having participated fully in the administrative hearing by availing itself of every opportunity to put forth its argument and evidence, and then obtaining judicial review of the Final Order, Ridgewood cannot now persuasively argue that it failed to receive its due process rights.

B. THE HEARING OFFICER'S ACCEPTANCE OF SECRETARY PELHAM AS AN EXPERT WITNESS WAS PROPER AND WELL WITHIN HIS DUTIES AND RESPONSIBILITIES AS ESTABLISHED IN CHAPTER 120, FLORIDA STATUTES.

Throughout its argument, Ridgewood repeatedly objects to the Hearing Officer's acceptance of Secretary Pelham as an expert in land use planning, matters related to Chapter 380, and agency policy and his testimony at hearing. Ridgewood has cited no statute or other authority, and the Department is aware of none, that prohibits an agency head from being a witness and signing the Final Order. It is, also, well-established law in Florida that, "It is the Hearing Officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); McDonald v. Department of Banking and Finance, 346 So.2d 569, 579 (Fla. 1st DCA 1977). Neither the agency nor a reviewing court is authorized to reweigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its own desired conclusion.

The Hearing Officer did not err in his determination that Secretary Pelham's extensive background, as reflected in his curriculae vitae (R. 2305-2309), qualifies him to testify as an expert. Even though he was qualified as an expert in the three areas, Secretary Pelham testified only on the subject of the Department's vested rights interpretation. His position as the

Secretary of the Department clearly establishes Mr. Pelham's expertise in the Department's policies and interpretations of the various provisions of the DRI statute which the Department is required to administer and enforce. By virtue of his position, Mr. Pelham is the ultimate authority on the Department's determination of agency policy and statutory interpretation, and, thus, the most appropriate agency representative available to testify on those matters. Secretary Pelham has acquired a clear understanding of the Department's vested rights policy during his private legal practice of land use law and his term as Secretary. (T.Vol.I, R. **308-310, 324-326, 328-337, 346-347, 349-354, 358-420)** Despite Ridgewood's allegations, Secretary Pelham's testimony did not stand alone in the record. It was clearly substantiated by the testimony of Michael Garretson, Robert Rhodes and Tasha Buford and documentary evidence submitted by the parties. (R. **1015; 113-1120; 1781-1798; 1804-1806; 1807-1811; 2289-2304; 2622-2624; 2625-2641; 2642-2645; 2646-2648; 2649-2654; 3079-3082, 3086-3089;** T.Vol.IV, R. **1002-1015; 1113-1120)**

Secretary Pelham did not testify on the main issues in the case. Ridgewood had already stipulated that the original Maitland Center was a DRI. Secretary Pelham gave no testimony to establish or refute any <u>fact</u> concerning the alleged existence or possession of the authorization to commence development on which Ridgewood's vested rights claim was based. Secretary Pelham's testimony was directed to Ridgewood's defense that Department policy, both present and historical, was more liberal than Florida caselaw on vested rights. The thrust of the Secretary's

testimony was a refutation of Ridgewood's claim that zoning alone could be authorization to commence development under the Department's policy on vested rights.

The Hearing Officer's determination of the question of vested rights and Secretary Pelham's statements of agency policy are further borne out by a review of Florida caselaw since **1979** addressing the issue of the Department's application of its vested rights interpretation. See: Compass Lake Hills Development v. State, Department of Community Affairs, **379** So.2d **376** (Fla. 1st DCA **1979)** and City of Ft. Lauderdale V. State. Division of Local Resource Management, 424 So.2d 102 (Fla. 1st DCA **1982);** and Arguments II and 111, herein.

With his decision clearly supported by the evidence in the record and further reinforced by existing caselaw, the Hearing Officer did not err in accepting Secretary Pelham as an expert in matters related to land use planning, Chapter **380,** F.S., and agency policy. Nor were the Hearing Officer's actions "biased and prejudicial" when he considered Secretary Pelham's testimony, as well as the other evidence in support thereof, to reach his conclusion that Ridgewood did not prove that it had received an authorization to commence development on which vested rights could be founded.

Ridgewood fails to acknowledge that the burden of proof was upon'them to present sufficient evidence to establish an authorization to commence development of the Maitland Center DRI. Ridgewood cannot now be heard to shift the blame to Secretary Pelham for their failure to do so.

C. SECRETARY PELHAM'S REVIEW OF THE RECOMMENDED ORDER AND ISSUANCE OF THE FINAL ORDER DID NOT DEPRIVE RIDGEWOOD OF ITS DUE PROCESS RIGHTS.

Ridgewood alleges that its due process rights were further prejudiced by Secretary Pelham's subsequent rendering of the Final Order, because he rejected Ridgewood's Exceptions to findings and conclusions which it alleged were based solely on Secretary Pelham's testimony. This point is totally without merit.

In his Recommended Order, the Hearing Officer first rejected the findings and conclusions which were proposed by Ridgewood in its order, which then became the Exceptions on which Secretary Pelham was required to rule. Clearly, the Hearing Officer's findings were based on his review of the evidence in the record, as required by Section **120.57(1)(b)8.,** F.S. As was shown previously, Secretary Pelham's testimony on agency policy did not stand alone in the record and did not touch upon any facts that would support or refute Ridgewood's claim of vested rights. Thus, the Hearing Officer's decision to reject the proposed findings and conclusions could not have been based solely upon Secretary Pelham's testimony. Secretary Pelham's Final Order simply re-affirmed the Hearing Officer's decisions.

Further, a review of the challenged findings and conclusions reveal that Ridgewood's argument cannot be sustained. The Hearing Officer's findings and interpretation of the letters interpreting vested rights status (pre-1974, known as LIVRs) and the binding letters interpreting vested rights status (post-1974, known as BLIVRs) (R. 088, Paragraphs 28, 29 & 30) can easily be

substantiated by reviewing the letters and do not require any reliance on Secretary Pelham's testimony to be understood. (R. **1781-1795; 1804-1806; 1807-1811; 2289-2304; 2622-2624; 2646-2648)** A review of the two BLIVRs not referenced by the Hearing Officer (R. **2625-2641; 2649-2654)** supply additional support to his findings and reasoning.

Additionally, a review of the evidence submitted **by** the parties patently supports the Hearing Officer's findings in Paragraphs **30** and **31** (R. 089), which dealt with the evolution of the Department's vested rights policy. Ridgewood itself offered the testimony from previous Department employees which substantiated those findings. (T.Vol IV, R. **1002-1015, 1113-1120;** R. **3079-3082)**

The Conclusions of Law (Paragraphs **29-32)** determining that neither zoning nor rezoning was an authorization to commence development for vested rights purposes, simply resulted from the application of the existing Florida caselaw, consistent with the Department's policy, to the facts found earlier. If the findings and conclusions were not what Ridgewood wanted, it was not the fault of the Hearing Officer or Secretary Pelham, it was the fault of Ridgewood for failing to provide the evidence necessary to prove its claim.

Secretary Pelham's actions in reviewing the Recommended Order and issuance of the Final Order also complied fully with the requirements of Section **120.57(1)(b)10, F.S.** This statutory provision mandates that an agency accept the factual determinations of a Hearing Officer unless those Findings of Fact

are not based upon substantial, competent evidence. This mandate is clearly supported by Florida caselaw. See: Florida Department of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Heifetz v. Department of Business Regulation, 475 So.2d 1277 (Fla. 2st DCA 1985); Kimball V. Hawkins, 364 So.2d 463 (Fla. 1978); and McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977). If the evidence under review supports two inconsistent findings, it is the Hearing Officer's function to decide the issue, not the agency or a reviewing court. Heifetz, supra. In accord with these principles of law, Secretary Pelham did not reweigh the evidence or alter the Findings of Fact made by the Hearing Officer. He was simply accepting the Hearing Officer's decisions on the findings of fact and application of law to those facts, when he rejected Ridgewood's exceptions.

Thus, Secretary Pelham's adoption of the Hearing Officer's Findings of Fact and rejection of Ridgewood's Exceptions were not prejudicial because those actions were based on Florida law. The minor correction of Finding of Fact No. 34, the addition of the word "east," was made pursuant to Ridgewood's Exception No. 8 and to comport with the evidence and Finding of Fact No. 40. **(R.** 212; T.Vol 11, R. 543-545, 567, 589, 615, 619-620, 641; R. 2310-2314; 2467; 2468; 2469; 2472; 2581)

The two Conclusions of Law were changed because they were contrary to the legislative intent of the aggregation rule and the Department's previous interpretations and applications of the rule. Those changes were entirely proper because an agency's

interpretation of its statutes or rule should be accorded great weight by reviewing courts and should only be overturned where clearly erroneous. Public Employee Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985).

Secretary Pelham's testimony about agency policy and his subsequent issuance of the Department's Final Order did not violate Ridgewood's due process rights. Secretary Pelham was not prohibited by statutory or decisional law from testifying in the proceeding, even though he would be issuing the Final Order. Ridgewood participated in the formal administrative hearing in which it was given every opportunity, and utilized each one, to plead its case and present evidence in support thereof and to rebut the evidence submitted by the Department.

The finder of fact in the formal administrative hearing was an independent, impartial hearing officer with no connection to the Department or Secretary Pelham. Ridgewood's "due process" rights were protected by the Section 120.57(1), F.S., hearing process. In fact, Ridgewood's due process rights could not possibly have been violated, since Ridgewood chose judicial review of the Final Order, pursuant to Section 120.68, F.S., alleging due process violations, and the First District Court affirmed the order in every respect.

It must be remembered that the burden of proof to establish vested rights was and is upon Ridgewood, who is claiming them. Under the facts of this case and Florida law, Ridgewood totally failed to show that there was an authorization to commence development of the Maitland Center prior to July 1, 1973. It was

this failure, not a lack of due process, which resulted in the terms and conditions of the Final Order.

D. RIDGEWOOD FAILED TO FOLLOW THE APPROPRIATE PROCEDURES TO PROTECT ITS RIGHTS IF IT BELIEVED THE FORMAL ADMINISTRATIVE HEARING PROCEDURES OF SECTION 120.57(1), FLORIDA STATUTES, WAS NOT FAIR.

Despite its contentions that its due process rights were being abridged, Ridgewood chose not to exercise the remedy established in Section **120.71,** F.S., to prevent Secretary Pelham from entering the Final Order. Section **120.71** provides:

> (1) Notwithstanding the provisions of **s. 112.3143,** any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding. If the disqualified individual holds his position by appointment, then the appointing power may appoint a substitute to serve in the matter from which the individual is disqualified. . . .
>
> **(2)** Any agency action taken by a duly appointed substitute for a disqualified individual shall be as conclusive and effective as if agency action had been taken by the agency as it was constituted prior to any substitution.

Ridgewood did not, at any time, before, during or after the administrative hearing even attempt to avail itself of the protections of Section **120.71,** F.S. The administrative hearing was held on March **8** through 11, **1988** and the Final Order was issued on September **27, 1988.** Ridgewood had five full months in

which to protect its rights and it chose to sit back and do nothing.

After having willfully chosen not to exhaust the appropriate administrative remedy that would have prevented the alleged violation of its rights, Ridgewood now comes to this Court to request that the Final Order be reversed because of the alleged prejudicial actions of Secretary Pelham and the Hearing Officer. Such a demand for relief is not timely, is not deserved and should not be granted.

If, however, this Court feels that Ridgewood was deprived of due process, the appropriate remedy would be to remand the Final Order to be re-issued by a Department official other than Secretary Pelham. The resulting **"new"** Final Order would, in all probability, be identical to the one remanded. The person reviewing the record and Recommended Order would be required to accept the Findings of Fact, as written, and to apply the very same Departmental policies and interpretations and Florida law which were applied by Secretary Pelham.

The First District Court agreed with the Hearing Officer's decision that Ridgewood did not prove its claim of vested development rights. If the decision on the merits of the case was correct, it could make no difference who signed the Final Order. Ridgewood has made no showing whatsoever that the decision in this case would or could have been different but for Secretary Pelham's involvement. In fact, every decision of the Hearing Officer and Secretary Pelham was found by the First District Court to be in accord with established Florida law.

11. ANNEXATION AND ZONING OF THE ORIGINAL MAITLAND CENTER PROPERTY IS NOT AN AUTHORIZATION TO COMMENCE DEVELOPMENT PURSUANT TO SECTION 380.06(20), FLORIDA STATUTES, AND DOES NOT ENTITLE IT TO VESTED DEVELOPMENT RIGHTS.

A. THE HEARING OFFICER'S CONCLUSION THAT REZONING IS NOT AN AUTHORIZATION TO COMMENCE DEVELOPMENT UNDER SECTION 380.06(20), FLORIDA STATUTES, IS SUPPORTED BY ESTABLISHED DEPARTMENT POLICY AND FLORIDA CASELAW.

The pertinent provisions of the DRI vested rights statute [Section 380.06(20)] are:

> Nothing in this Section shall limit or modify the rights of any person to complete any development that has been authorized by registration of a subdivision pursuant to local subdivision plat law, or by a building permit or other authorization to commence development on which there has been reliance and a change of position and which registration or recordation was accomplished, or which permit or authorization was issued, prior to July 1, 1973. If a developer has, by his actions in reliance on prior regulations, obtained vested or other legal rights that in law would have prevented a local government from changing those regulations in a way adverse to his interest, nothing in this chapter authorizes any governmental agency to abridge those rights.
>
> . . .
>
> (b) For the purposes of this act, the conveyance of, or the agreement to convey, property to the county, state, or local government as a prerequisite to zoning change approval shall be construed as an act of reliance to vest rights as a determined under this subsection, provided such zoning change is actually granted by such government.

In plain language, this statute allows a developer to complete a development of regional impact that was authorized to commence prior to July 1, 1973 without gaining approval under the DRI process if the development was authorized by one or more of the following actions:

1. Registration of the subdivision with the Florida Division of Land Sales and Condominiums, pursuant to chapter 498, prior to July 1, 1973;

2. Recordation of plat showing the development, pursuant to a local subdivision plat ordinance, prior to July 1, 1973;[3]

3. Issuance of building permits by the appropriate local government before July 1, 1973, which authorizes the development on which vested rights is being sought: or

4. Issuance of other authorization to commence development, which is accompanied by good faith reliance and change of position prior to July 1, 1973.

Ridgewood did not claim and the evidence did not indicate that the original Maitland Center development had vested rights which accrued under the criteria listed in paragraphs 1 through 3 above. As was shown by the evidence, the land was never registered, pursuant to Chapter 498, with the Florida Division of Land Sales and Condominiums. The property was not platted prior to July 1, 1973. The only building permit issued by the City of Maitland before July 1, 1973 allowed the construction of a 2,000 square foot movable sales office building, which was located on one acre of land east of 1-4, not even on the original Maitland Center site.

Ridgewood's only possible claim of vested rights arises under the statutory wording allowing some "other authorization to

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3/ Platting prior to July 1, 1973, pursuant to local subdivision law is the only action under this provision that does not have to be accompanied by reliance and change of position in order to establish vested rights.

commence development, prior to July 1, 1973. Ridgewood alleges that the annexation of the property on which the Maitland Center office complex was eventually built into the City of Maitland and the zoning of that property, in December, 1971, to accommodate uses, including offices, by the City of Maitland is that "other authorization."

Based on the facts of this case, the Hearing Officer found that the annexation and zoning by the City of Maitland in 1971 did not authorize the commencement of development on the property now known as the Maitland Center. In fact, as is usual in zoning and rezoning situations, the Dye, Downs partnership had to receive additional plat approvals and building permits from the City before it could commence construction or development, as defined in Chapter 380, of the property. The Hearing Officer specifically found that, at the time the City annexed and zoned the property, it did not exempt the partnership from compliance with its subdivision regulations which required, among other things, the submission and approval of preliminary and final plats before development could commence on the property. (A. 13, 27) The first of the series of the nine Maitland Center plats was approved by the City of Maitland in July, 1980 - seven years after the effective date of the DRI law. (A. 13)

The First District Court provided decisional support for the Hearing Officer's determination that, under DRI law, rezoning is not an authorization to commence development or upon which a developer has a vested right to rely. City of Ft. Lauderdale v. State. Division of Local Resource Management, 424 So.2d 102 (Fla.

1st DCA 1982). In that case, the Court was faced with the same issue presented in this one: what constituted "authorization to commence development" for the vesting of development rights, under Section 380.06(20), Florida Statutes. The City of Ft. Lauderdale appealed the binding letter of interpretation issued by the Department of Veteran and Community Affairs (predecessor of Department herein) which found the City did not possess vested rights in the development of a 1,000-foot extension to an existing 6,000-foot runway at the Ft. Lauderdale Executive Airport. Local government rezonings were clearly held to be insufficient. The Court held:

> The Resolutions of 1967 and 1969 do not constitute approval to do anything and are merely advisory in effect with no legally binding status. Second, the mere act of rezoning does not constitute such an authorization, as it has long been held that property owners do not have a vested right in zoning ordinances. City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428 (Fla. 1954); Town of Larso v. Imperial Homes Corp., 309 So.2d 571 (Fla. 2d DCA 1975). Third, the City's purchase of the land itself does not vest any right in the runway extension for the record affirmatively establishes that the City's purpose in purchasing this property was to provide additional "clear zone" for the then existing runway. The mere fact that the City may have envisioned a different use for the land at some future date, without more, cannot endow that later development with vested rights status. There being no concrete evidence of any authorization to commence development by July 1, 1973, we find that the City has not demonstrated its entitlement to vested rights status for the runway extension. (at 103)

Ridgewood argues that "rezoning" is sufficient authorization to commence development because of its inclusion in the definition of "development permit" as "any building permit,

zoning permit, plat approval, or rezoning, certification, variance, or other action having the effect of permitting development as defined in this Chapter." Many jurisdictions did not have complicated or sophisticated processes for development approval during the 1970's and zoning alone was sometimes all that was necessary before development could begin on a piece of land. In such jurisdictions, where zoning was the only local action preceding development itself, and where there was substantial development completed before the DRI law went into effect on July 1, 1973, such factual circumstances might support a claim of vested rights, both under common law and under the Section 380.06(12) [now 20], F.S., grandfather clause.

However, the facts of this case clearly demonstrate that, within the City of Maitland, zoning did not authorize the developer to begin construction on his property. As noted earlier, the subdivision regulations then in effect required the developer to submit and receive approval of both preliminary and final plats prior to obtaining building permits and commencing construction on the property. (R. 3121, tab 17,19) As we know, preliminary and final plat approvals were received between 1979 and 1985 for the parcels within the Maitland Center development. (R. 1153-1164) Thus, the Hearing Officer properly concluded that neither the rezoning, even coupled with annexation, nor" anything else the City of Maitland did with respect to the property before July 1, 1973, [could] be considered a permit or an authorization to commence development, as defined in Chapter 380." (A. 50)

Ridgewood's argument that paragraph (b) of section 380.06(20), F.S., fully supports its position that rezoning was an authorization sufficient to vest rights is erroneous. This paragraph provides that the conveyance of or agreement to convey property to the local government, state or county as a prerequisite to obtain a zoning change would constitute reliance so as to vest development rights. As pointed out by the Hearing Officer, this particular provision "pertains to reliance, which is not an issue, not to the question whether zoning is an 'authorization to commence development.' Even if it pertained to the latter, it addresses the quite different circumstances where a local government entered into a land-for-zoning contract with a developer." (A. 49) There is a total absence of evidence in the record suggesting that Ridgewood's predecessors actually conveyed or agreed to convey any property to the City to obtain the zoning approvals sought for the original Maitland Center property.

B. A REVIEW OF LEGISLATIVE HISTORY IS UNNECESSARY TO THE DETERMINATION OF THE VESTED RIGHTS ISSUE IN THIS CASE.

It is established law in Florida that courts look at legislative history only to resolve an ambiguity in a statute. Department of Legal Affairs v. Sanford-Orlando Kennel, Inc., 434 So.2d 879 (Fla. 1983). As in the facts of this case, where the statute is clear on its face, there is no need for the Court to look further than the statute itself. Additionally, the Department's interpretation of the vested rights provision has been repeatedly upheld by Florida courts. See: Compass Lake

Hills Development v. Department of Community Affairs, 379 So.2d 376 (Fla. 1st DCA 1979) and City of Fort Lauderdale v. State, Division of Local Resource Manasement, 424 So.2d 102 (Fla. 1st DCA 1982).

It is also established law that an agency's construction of a statute it is charged with administering should be given great weight by the Court and should be sustained, even if another interpretation may be possible or preferable. See: Humhosco, Inc. v. The Department of Health and Rehabilitative Services, 476 So.2d 258 (Fla. 1st DCA 1985); Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 495 So.2d 209 (Fla. 1st DCA 1986); Department of Environmental Resulation v. Goldring, 477 So.2d 532 (Fla. 1985); Miller v. Agrico Chemical Co., 383 So.2d 1137 (Fla. 1st DCA 1980); and Reedy Creek Improvement District v. State Department of Environmental Resulation, 486 So.2d 642 (Fla. 1st DCA 1986). Further, the administrative construction of that statute should not be overturned by the Court unless it is clearly erroneous. Island Harbor Beach Club, Ltd. v. Department of Natural Resources, supra.; Shell Harbor Group, Inc. v. Department of Business Resulation, 487 So.2d 1141 (Fla. 1st DCA 1986).

Therefore, a review of legislative history is unnecessary and Ridgewood's argument based upon ancient debate prior to the enactment of the DRI law should be disregarded by this Court. As found by the Hearing Officer, the legislative history was "not particularly enlightening and does not lead to the conclusion that Ridgewood has vested rights." (A. 51)

To lend credence to Senator Graham's statement about zoning and rezoning in its legislative history argument, Ridgewood relies heavily on Bresar V. Britton, 75 So.2d 753 (Fla. 1954), cert. denied, 348 U.S. 972 (1955), for the proposition that a developer can have vested rights in zoning. Although Ridgewood alludes to Bresar and the case cited therein [Texas Co. v. Town of Miami Springs, 44 So.2d 808 (Fla. 1950)], a reading of the cases reveals that both were decided not on the zoning issue but rather on very specific actions taken by both the landowner and the local government, which would have resulted in an inequitable situation if the landowner had not prevailed. In both cases, the landowner relied, to his detriment, on formal actions taken by the local government with full knowledge of the landowner's proposed use of his property and knowledge of his subsequent reliance on those actions.

It is true that, in some of the cases cited by Ridgewood, a local zoning action was one of several existing factors considered by the courts before finding that a developer had proceeded so far toward completion of his development that the principle of equitable estoppel would prevent a down-zoning. There may even exist a jurisdiction where zoning is the only regulatory action necessary by the local government prior to commencement of construction of the project, but the City of Maitland is not one of those jurisdictions. (R. 3121, tab 17, 19) Still, the existence of such equitable estoppel cases does nothing to support Ridgewood's position in this case.

The City of Maitland merely passed an ordinance annexing and zoning the original Maitland Center property in December, **1971.** (R. **2339)** By its own ordinances, the City required all developers to receive preliminary and final plat approvals before commencing development. (R. **3121,** tab **17, 19)** Roads, sewers, water, plats and building permits for this office complex were not issued or constructed until **1979-1980,** well after the July 1, **1973** effective date of the DRI law. (R. **1229, 1232, 1244-1250, 1262, 1285, 2693, 2697, 2746)**

Neither the City nor the state, through its enforcement action now under review by this court, has sought to down-zone Ridgewood's property or to revoke permits already issued, even those issued illegally[4], to Ridgewood, its predecessors, or the subsequent purchasers of the Maitland Center property. Rather, in this case, the developer is required by law, enacted pursuant to the state's police powers, to undergo a DRI review to assess and mitigate regional impacts resulting from the construction of the office complex. The DRI review process is simply an additional review procedure, which every large-scale development must undergo in furtherance of the public health, safety and welfare. As stated by the Hearing Officer, ". . . a local government can indeed be estopped from changing zoning after

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[4] Chapter **380** requires review and approval of a DRI prior to commencement of construction, which was not done in this case. Application of the DRI process at this time will require assessment of the regional impacts of the existing development plus that of the undeveloped parcels within Maitland Center, and proper mitigation of those impacts prior to any further development of the site.

rights in the zoning have vested . . . But compelling a landowner to undergo DRI review does not change the zoning regulations to which he is subjected; it only forces him to address the impacts of development allowed by local zoning." **(A. 52-53)**

In the instant case, the Department is not attempting to change Ridgewood's zoning or revoke permits issued to construct Maitland Center. It is simply trying to end the developer's willful avoidance of the DRI process that has existed since the project began in 1979 and to require the same adherence to the law from this developer that has been observed by virtually all others similarly situated throughout the state.

The Hearing Officer considered the evidence and testimony and correctly applied the law to the facts of this case. After a four-day hearing, the evidence was extensively summarized in the Findings of Fact and the Hearing Officer concluded,

> Under Section 380.04(1) and (2), . . . making an actual change in the use or appearance of land, even by just clearing for purposes of construction is 'development.' But a change in zoning is not 'development.' The facts are clear that Maitland's annexation and zoning of what was to become original Maitland Center did not authorize the Dye, Downs group to commence development." **(A. 49-50)**

Thus, the Hearing Officer clearly understood and applied Florida law in his determination that requested rezoning was not an authorization to commence development under Maitland's ordinances and Section 380.06(20), F.S. The state, under the circumstances present here, is not estopped from applying Section 380.06 requirements to this DRI.

111. THE HEARING OFFICER CORRECTLY DETERMINED THAT ANNEXATION AND REZONING, EVEN COUPLED WITH OTHER FACTORS, DID NOT CONSTITUTE AN AUTHORIZATION TO COMMENCE DEVELOPMENT PURSUANT TO SECTION 380.06(20), FLORIDA STATUTES.

In argument at pages 37-41 of its brief, Ridgewood discusses three additional factors which it claims constitute "other authorization to commence development" when considered with the annexation and zoning of the Maitland Center property by the City of Maitland in December, 1971. The Hearing Officer either rejected the alleged legal significance of these factors urged by Ridgewood or found that there was not a sufficient factual basis to establish their existence. (A. 27, 56; R. 159)

These factors are: 1) a contract for purchase of the property contingent upon rezoning and annexation; 2) local government commitment that building permits were the only requirements prior to construction; and 3) issuance of a building permit for the construction of a temporary movable office building.

The Hearing Officer found the Maitland Center property was the subject of a purchase contract between the Dye, Downs group and S.C. Battaglia, which was conditioned upon annexation of the property into the City of Maitland and zoning to allow office use. (A. 26) At least one City Commissioner testified that he knew of the contingent basis of the contract, but the City was not a party to the contract. (T.Vol. 11, R. 581) The City Commission minutes did not indicate that this "knowledge" was present or the basis for its actions in the annexation or zoning ordinances. (R. 2322, 2335-2341)

In Compass Lakes Hills Development v. Department of Community Affairs, 379 So.2d 376 (Fla. 1st DCA 1979), the court found that "awareness" of a plan of development by the Board of County Commissioners, as evidenced by their affidavits, did not constitute authorization to commence development sufficient to vest development rights because minutes of the Commission meetings are the best evidence of the official knowledge and acts of that body.

Contrary to Ridgewood's allegation, the Hearing Officer found that "Ridgewood did not prove that the city agreed that the owners of the property would be allowed to commence development on the property within the approved zoning restrictions without any additional approvals other than building permits." (A. 27) He also found that the City of Maitland approved a building permit for a small temporary office building in October, 1972. (A. 27) However, the issuance of that building permit vests only the building for which it was approved.

The issuance of a permit to do a specific activity does not carry with it the authorization to undertake more than that specific activity, even where the activity is known by the agency to be only a part of an overall plan. Department of Environmental Regulation v. Oyster Bay Estates, 384 So.2d 891 (Fla. 1st DCA 1980). In that case, the court found that the permit issued to construct a navigational channel did not authorize the developer to construct the inland canals within his vested DRI subdivisions, even though the permitting agency knew of the overall plan of development at the time the permit was issued.

In the instant case, the building permit authorized, on its face, nothing other than the construction of the **2,000** square foot movable sales office building. (R. **2995-2996)**

The Department has always accepted building permits issued prior to July 1, **1973** as authorization to commence development for purposes of Section **380.06(20)** vesting determinations. However, the amount of vested development is dependent upon the amount of development shown of the face of the permit. See: Department of Environmental Regulation v. Oyster Bay Estates, **384** So.2d **891** (Fla. 1st DCA **1980).** In this case, the development permit authorized the construction of a **2,000** square foot temporary office building on property, which is located east of the original Maitland Center site. The single building permit did not carry authorization to commence development on any other building or property within the Maitland Center site. (R. **2995-2996)**

No evidence was presented in this case that the City of Maitland, prior to July 1, **1973,** approved any master plan for the Maitland Center development or that this building was an integral part of that plan. Under the doctrines set forth in Compass Lake Hills Development v. State, Department of Community Affairs, supra., the approval of a specific plan of development showing specific amounts, types and locations of development is an "other authorization to commence development" sufficient to vest rights when accompanied by reliance and change of position. The issuance of building permits and the construction of buildings would constitute authorization to commence development of a DRI

with reliance and change of position, if the buildings were a distinct part of an approved plan of development. In the facts of this case, the issuance of a single building permit for the 2,000 square foot temporary office building, which was not even on the Maitland Center site, was not in furtherance of an approved development plan and it did not authorize or "vest" the development of a 2.3 million square foot office complex.

IV. THE DEPARTMENT'S INTERPRETATION OF THE VESTED RIGHTS LAW IS APPLICABLE TO RIDGEWOOD, EVEN THOUGH IT HAS NOT BEEN PROMULGATED AS A RULE.

A. THE DEPARTMENT'S INTERPRETATION OF THE VESTED RIGHTS LAW DOES NOT CONFLICT WITH SECTION 380.06(20), FLORIDA STATUTES, NOR WITH PRIOR APPLICATION OF THAT PROVISION.

Ridgewood's position that the Department's interpretation of vested rights is contrary to and inconsistent with the statute fails to acknowledge that the only appellate decisions ruling upon the issue have solidly supported the Department's interpretation of the law. A formal governmental approval of a specific plan of development must be established in order to constitute an "authorization to commence development" that shows the extent to which the development is vested. See: Compass Lake Hills Development v. State, Department of Community Affairs, supra. Compass Lake Hills was a case of first impression, requiring the Court to review a binding letter of interpretation and to construe Section 380.06(12), since renumbered Section 380.06(20).

The developer of Compass Lake Hills appealed the Department's binding letter of interpretation of vested rights

which found that only four of its six large acreage units were vested and exempt from DRI review. The issue before the Court was whether the evidence presented on the two units in question was sufficient to show an "authorization to commence development," the first element of a claim of vested rights under the DRI vested rights provision. In upholding the Department's determination that rights were not vested, the Court stated:

> In determining whether rights have vested under Section 380.06(12) [now (20)], the existence of a development plan is of critical importance. The plan shows what the developer intends to do with the land, and once the development is approved, what he is permitted to do. . . It also serves as a basis for a ruling on any proposed modification or changes. . . Without a plan, neither the Department nor the local government can determine what the developer has the right to do, nor can either determine later whether the vested plan is being carried out. (at 379)

As discussed in a prior argument, the Department's application and interpretation of the Section 380.06 vested rights provision was also upheld in City of Fort Lauderdale v. State, Division of Local Resource Management, supra.

Ridgewood's arguments about what the Department's policies might have been from 1973 through 1979 are irrelevant, misleading and have been rejected by the Hearing Officer. There has been no showing that, prior to developing Maitland Center, Ridgewood or its predecessors knew or even made any attempt to find out what the Department's policy was. In addition, although the Department has had statutory authority since 1974 to issue binding letters of interpretation on vested rights matters under Section 380.06(4), F.S., neither Ridgewood nor its predecessors

ever sought or obtained such a letter. Unlike the Appellants in both the Compass Lake Hills and City of Ft. Lauderdale cases, supra., who applied for, obtained and then appealed binding letters of interpretation of vested rights status issued by the Department, in the instant case, CMEI and Ridgewood consciously chose to ignore the prescribed administrative remedy of a binding letter and proceeded to develop a massive DRI in violation of the law. Ridgewood and its predecessor even resisted the Department's written suggestions that they obtain a binding letter if they believed their development plans were exempt from DRI review.

The only legally binding way of limiting the Department to a particular interpretation or application of the law to a set of facts is through issuance of a binding letter of interpretation. "A binding letter of interpretation issued by the state land planning agency shall bind all state, regional and local agencies, as well as the developer." Section 380.06(4)(d), F.S. Ridgewood did not use this administrative remedy that has been available since 1974.

Instead, it has stonewalled and studiously avoided addressing its responsibilities under the law. Since 1974, the pertinent wording of the grandfather clause in Section 380.06(20) [formerly (12)] has clearly stated the criteria that must be met by Ridgewood and all other DRI developers to establish vested rights. Without a binding letter of interpretation stating development rights have vested, a DRI developer proceeds at his own peril. The developer of the Maitland Center office complex

DRI should not have commenced development in 1979 until DRI approval had been obtained under the law.

The Department's interpretation and application of the vested rights provision in Section 380.06, F.S., has been upheld by Florida appellate courts and that same opinion was independently reached by the Hearing Officer and affirmed by the First District Court in this case. Ridgewood's argument should be rejected.

B. THE DEPARTMENT IS NOT REQUIRED TO ADOPT ITS INTERPRETATION OF THE VESTED RIGHTS PROVISION AS A RULE, BECAUSE EVERY VESTED RIGHTS DETERMINATION IS MADE AND ISSUED IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 120, FLORIDA STATUTES.

It is well known that policy statements relied upon by an agency can take the form of a rule, an order, or incipient policy. Florida Cities Water Company V. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980). A rule is defined by Chapter 120, F.S., as "agency statement of general applicability that implements, interprets or prescribes a law or policy..." An order is defined by Chapter 120, F.S., as "final agency action which does not have the effect of a rule...". Incipient policy arises when an agency, in the adjudication of individual cases, develops policy which will be generally applicable to future cases. Those policy statements are actually a hybrid of a rule and an order.

Although a rule may be the preferred form of policy statement, the Administrative Procedure Act

> also recognizes the inevitability and desirability of refining incipient agency policy through adjudication of individual

> cases. There are quantitative limits to the detail of policy that can effectively be promulgated as rules, . . . and even the agency that knows its policy may wisely sharpen its purposes through adjudication before casting rules." McDonald v. Department of Banking and Finance, 346 So.2d 569, 581 (Fla. 1st DCA 1977).

In the administration of the DRI law, there are virtually an infinite number of factual situations in which a vested rights question might arise. A **"rule"** cannot possibly raise or answer all or even many of the possible factors or combination of factors that can and do arise in vested rights determinations. The law itself is a clear statement which cannot be changed or altered by a rule. The Department addresses each fact situation in the binding letter of interpretation process, which provides for an informal Section 120.57(2) proceeding, or, if requested, even a formal Section 120.57(1) hearing. (Rule 9J-2.016(16), F.A.C.)

As further support for the APA's recognition of the necessity of policy statements in a form other than a rule, the Court stated in McDonald:

> The agency's final order in 120.57 proceedings must describe its "policy within the agency's exercise of delegated discretion" sufficiently for judicial review. Section 120.68(7). By requiring agency explanation of any deviation from **"an** agency rule, an officially stated policy, or a prior agency practice," Section 120.68(12)(b) recognizes there may be "officially stated agency policy" otherwise than in **"an** agency rule"; and, since all agency action tends under the APA to become either a rule or an order, such other "officially stated agency **policy"** is necessarily recorded in agency order. (at 582)

It is further recognized that Section 120.57 proceedings

enable an affected party to challenge an agency's non-rule policy which may have a substantial affect on his interests. McDonald at 578, 583. It is the agency's responsibility to explain and justify its action. See: Manasota-88 Inc. v. Gardinier, Inc., 481 So.2d 948 (Fla. 1st DCA 1986). In an enforcement proceeding, such as this one, the formal hearing process is the forum for the Department to explain and justify its actions and establish its conformity to the law of vested rights and Section 380.06(20).

> To the extent an agency may intend to rely upon or refer to such a [non-rule] policy, it must be established by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved and the agency must expose and elucidate its reasons for its discretionary action. Manasota-88, Inc. v. Gardinier, Inc., 481 So.2d 948, 950 (Fla. 1st DCA 1986); Albrecht v. Department of Environmental Regulation, 353 So.2d 883, 886 (Fla. 1st DCA 1977), cert. denied, 359 So.2d 1210 (Fla. 1978); McDonald v. Department of Banking and Finance, 346 So.2d 569, 582-583 (Fla. 1st DCA 1977); Florida Cities Water Company v. Florida Public Service Commission, 384 So.2d 1280, 1281 (Fla. 1980).

In its Final Order entered in this case, the Department has clearly complied with the requirements of Chapter 120 by accepting the Hearing Officer's Findings of Fact (based on the evidence presented), Conclusions of Law and has specified the Department's order for action required to be taken by Ridgewood on the set of facts reviewed at hearing.

The Department maintains record of all its vested rights determinations in its files as binding letters of interpretation of vested rights (BLIVR). These determinations of vested rights clearly address the facts of each case, the law and policy used by the Department in its determination and the Department's

order. (For example, see Department's Exhibit 123 - R. 1781; Ridgewood's Exhibit 64 - R. 2625) Pursuant to Rule 95-2.016 (16), F.A.C., these **"orders"** can be entered through informal administrative proceedings [Section 120.57(2)] and are available for public inspection in the form of microfiche or, more recent cases, files within the Department.

Thus, Ridgewood's argument that the Department's action is invalid without an adopted rule is spurious and not supported by the pertinent law.

C. THE DEPARTMENT MET ITS BURDEN OF JUSTIFYING ITS INTERPRETATION OF THE VESTED RIGHTS PROVISION OF SECTION 380.06, FLORIDA STATUTES.

As discussed above, when an agency elects to adopt or utilize policy in its determination of agency action, the agency must support that decision by expert testimony, documentary evidence or other evidence appropriate to clearly elucidate the reasons for the action. See: Manasota-88, Inc. v. Gardinier, Inc., supra.; Florida Cities Water Company v. Public Service Commission, supra. The Department has fully complied with this requirement by its introduction of testimony by Secretary Pelham, the agency head, and by documentary evidence in the form of binding letters of determination of vested rights. (R. 1781; 1804; 1807; 2622-2649) A review of the binding letters determining vested rights status placed in the record clearly reflects the Department's compliance with the requirement of Chapter 120, F.S., with regard to the contents of an **"order."** As discussed previously the Department's interpretation and

application of the vested rights provisions has been reviewed and accepted by Florida courts.

In this instance, a Hearing Officer has correctly interpreted the law of vested rights and applied it to the facts presented during a formal Section 120.57(1) hearing. The Department's interpretation of the law as applied in this case was in accord (with one exception) with the Hearing Officer's. His Recommended Order was adopted virtually intact. (A. 3-63)

"Courts should accord great deference to administrative interpretation of statutes which the administrative agency is required to enforce." Pan American Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 719 (Fla. 1983); Department of Environmental Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985). Further, as long as the interpretation of the statute is consistent with the legislative intent, is supported by substantial competent evidence and is not clearly erroneous in its application, a reviewing court must defer to the agency's interpretation. Reedy Creek Improvement District v. State, Department of Environmental Resulation, 486 So.2d 642 (Fla. 1st DCA 1986); Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 495 So.2d 209 (Fla. 1st DCA 1986). Finally, it has also been held that: "When an agency committed with authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible or even, in the view of some, preferable." Humhosco, Inc. v. Department of Health and Rehabilitative Services, 476 So.2d 258, 261 (Fla. 1st DCA 1985).

CONCLUSION

For the reasons set forth hereinabove, the Department requests this Court to enter an Order finding that Ridgewood's due process rights were not violated and affirming the Final Order of the Department.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the f regoing brief has been served by mail or hand delivery on: Christopher C. Skambis, Esq., Foley & Lardner, P.O. Box 2193, Orlando, Florida 32802-2193; and Bill L. Bryant, Esq., Foley & Lardner, P.O. Box 508, Tallahassee, Florida 32302, this 3rd day of November, 1989.

Diana M. Parker

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