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

INITIAL BRIEF OF APPELLANT RIDGEWOOD PROPERTIES, INC.

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STATEMENT OF THE CASE

On March 3, 1987, Thomas G. Pelham as Secretary of the Department of Community Affairs (hereinafter "the Department") issued a Notice of Violation and Order for Cessation and Corrective Action (hereinafter "the Notice and Order") directed to Appellant Ridgewood Properties, Inc. (hereinafter "Ridgewood") (R. 3625). The Notice and Order contained findings of fact and conclusions of law reflecting the Department's belief that Ridgewood's predecessor, CMEI, Inc., had developed a project commonly called Maitland Center which was a development of regional impact (hereinafter "DRI") but had not sought development approval and was not otherwise exempt from application of Chapter 380, Florida Statutes (1987).

Ridgewood responded to the Notice and Order by filing a Petition for Formal Administrative Proceedings (hereinafter "the petition") on March 24, 1987 (R. 3602). The petition denied the material allegations of the Notice and Order and contained affirmative defenses to the Notice and Order.

The proceeding was referred to the Division of Administrative Hearings. Administrative Hearing Officer, J. Lawrence Johnston was assigned to conduct the final hearing on the matter.

The final hearing was conducted on March 8-11, 1988. The only witness testifying on behalf of the Department in its case-in-chief was Department Secretary Thomas G. Pelham (TR. VOL. I, p. 305). Over objection (TR. VOL. I, p. 271-275, 315), Secretary Pelham was permitted to testify as an expert witness on

behalf of the Department and was qualified over objection (TR. VOL. I, p. 315-318) by the Hearing Officer as an expert in "land use planning," "matters related to Chapter 380, Florida Statutes" and "departmental policy" (TR. VOL. I, p. 318).

Both the Department (R. 112-152) and Ridgewood (R. 153-180) submitted proposed recommended orders, and Ridgewood submitted a memorandum in support of its proposed recommended order (R. 181-206) with leave of the Hearing Officer (TR. VOL. IV, p. 1152).

The Hearing Officer rendered his Recommended Order on June 8, 1988, finding against Ridgewood on its contentions regarding vested rights, statute of limitations and estoppel but also finding that a 26-acre parcel of property acquired from Maitland in February 1985 (hereinafter the "1985 Acquisition Parcel") should not be aggregated with original Maitland Center for purposes of development approval review (R. 62-111).

Ridgewood filed exceptions to the Recommended Order (R. 212-244) all of which were rejected in the Final Order rendered September 27, 1988 by Secretary Pelham (R.l-61). The Department filed a single exception to the Recommended Order requesting that the Hearing Officer's conclusion of law with respect to aggregation be rejected so that the 1985 Acquisition Parcel would be aggregated with original Maitland Center for purposes of development approval review (R. 207-211). Secretary Pelham incorporated the Department's exception in his final order and also modified Finding of Fact Number 34. While Ridgewood excepted to a portion of finding a

fact Number 34, neither Ridgewood nor the Department excepted to that finding of fact in the manner necessary to result in Secretary Pelham's modification.

A timely Notice of Appeal to the First District Court of Appeal was filed with the Department on October 20, **1988.** The First District rendered its opinion (Appendix, p. 1) on September **8, 1989** affirming the final order but certifying the following question to this Court 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 timely filed its Notice to Invoke Discretionary Jurisdiction with the First District Court of Appeal on September 15, **1989.**

STA OF FACTS

Citations to the Record on Appeal shall be reflected as (R.). Citations to the transcript of testimony shall be identified as (TR. VOL. __, p. __) and shall refer to the pages by record page number, Exhibits will be identified by (D. Exh. __) for Department exhibits and (R. Exh. __) for Ridgewood exhibits.

A. Secretary Pelham's Participation in the Proceedings Below

Thomas G. Pelham, a Florida lawyer, a law school professor and private practitioner, was appointed as Secretary of the Department in February, 1987 (TR. VOL. I, p. 309). On March 7, 1987, Mr. Pelham, as Secretary of the Department, issued the Notice of Violation (R. 3625) containing findings of fact and conclusions of law based on an investigation performed by Department Staff (D. Exh. 111, 120, 121).

Secretary Pelham was listed as a potential witness on the Department's witness list (R. 3472) incorporated in the Pre-hearing Stipulation (R. 3463). The witness list reflected the Department's intent to call Secretary Pelham as an expert witness in "land use planning" (R. 3472). Ridgewood objected, in the presence of Secretary Pelham, on due process grounds, to the Department's use of Secretary Pelham as an expert witness both before he was called as a witness (TR. VOL. I, p. 271-5) and after ~~voir dire~~ with regard to his qualifications (TR. VOL. I, p. 315). In addition, Ridgewood objected (TR. VOL. I, p. 315) to Secretary

Pelham's qualifications as a land use planner in that he had no education, training or experience as a land use planner (TR. VOL. I, p. 312-3). Finally, Ridgewood objected to his qualifications as an expert in the areas of "matters related to Chapter 380" and "departmental policy" in that (i) he was not qualified by training or experience to render opinions in those areas, (ii) those areas are not commonly recognized areas of expertise and, (iii) he was not listed on the Prehearing Stipulation as an expert in those areas (TR. VOL. I, p. 315-6). All objections were overruled (TR. VOL. I, p. 316-7). Secretary Pelham was the sole witness making the Department's case-in-chief.

At the close of the Department's case, Ridgewood moved for an involuntary dismissal of the Notice of Violation (TR. VOL. I, p. 421-444). After Ridgewood completed its argument on the motion, the following exchange occurred between the Hearing Officer and counsel for the Department:

> The Hearing Officer: Does the Department wish to add anything to what Secretary Pelham has argued as the proper interpretation of the various laws we've been talking about:
>
> Mr. Jordan: Well, just one thing and with that in mind I won't repeat what he said. (Emphasis supplied.)

(TR. VOL. I, p. 444).

The hearing officer's recommended order (R. 62) found for the Department on the subjects covered by Secretary Pelham's

testimony (Id. at Conclusions ¶¶ 26-33) and against the Department on aggregation (Id. at Conclusions ¶¶ 8-12) the sole subject not covered by his testimony.

In issuing his final order, Secretary Pelham rejected all of Ridgewood's exceptions, accepted the Department's sole exception and modified a factual finding to which neither Ridgewood nor the Department excepted (R. 1-61, 212-244, 207-211). Ridgewood excepted to the admission in evidence of Secretary Pelham's testimony on the same basis as its hearing objections (R. 212-244, Exceptions 69-71). The final order did not recite that Secretary Pelham reviewed the 3900 page record of the administrative proceeding (R. 1).

B. Authorization to Commence Development

In the early 1970's, the City of Maitland (hereinafter "Maitland") was a small, country town of approximately 5000 inhabitants (TR. **VOL.** 11, **p.** 501, 577). Maitland had no planning department (TR. **VOL.** 111, p. 724). Maitland operated informally and kept sketchy minutes of its proceedings (TR. **VOL.** II, p. 479, 501). Not until November, 1970 did Maitland adopt a subdivision ordinance (R. 3121, Tab 17). The ordinance was to be administered by the City Manager and the requirements of the ordinance could be waived for large scale development (Id. at §§ 15 & 16).

Foreseeing the need for an increased tax base in a predominantly residential community and anticipating construction of the Maitland Boulevard/Interstate Highway 4 Interchange, Maitland

initiated annexation discussions with S.C. Battaglia, the owner of the property which was to become original Maitland Center (TR. VOL. 11, p. 573).

In May, 1971 Dean Downs, John E. Dye and Albert E. Strickland (hereinafter "the partnership") entered into an option agreement to purchase certain property from S.C. Battaglia, including property on the west side of Interstate Highway 4 (hereinafter "I-4"), comprising a portion of that which is now known as original Maitland Center (TR. VOL. 11, p. 468-9, 516-18, 540-2, 582, 706). The option was exercised, resulting in a purchase contract that was contingent on annexation of the property into Maitland and rezoning of the property west of 1-4 into specified, moderate and high-density commercial and residential uses (Id.). John E. Dye and Dean Downs were the principal participants in the rezoning and annexation process (TR. VOL. 11, p. 478, 577-8). The price to be paid for the property was approximately five times its value as it was then zoned (TR. VOL. 11, p. 519). If the property was not zoned in a manner satisfactory to the partnership, the property would not have been purchased or annexed into Maitland (TR. VOL. 11, p. 468-9, 614). A large parcel of property on the east side of 1-4, which was also subject to the option, was not annexed or purchased as a result of Maitland's unwillingness to grant the requested rezoning (TR. VOL. 11, p. 539).

Maitland did not have zoning categories sufficient to deal with the partnership's requested rezoning (TR. **VOL.** 11, p. 531, 584, 609-11). In negotiating the zoning categories to be applied to the property on the west side of 1-4, detailed presentations were made to the Maitland City Council by the partnership (TR. **VOL.** 11, p. 463, 503-6, 529-30, 578-9, 617, 666). The new zoning categories were created specifically to accomodate that which the partnership desired to do with the property (TR. **VOL.** 11, p. 575, 611, 613). The entire City Council was made aware of the nature and extent of the proposed development and that the partnership intended to develop the property to the maximum permitted density (TR. **VOL.** 11, p. 503-6, 611, 613, 617, 575, **VOL.** 111, p. 730). The development currently existing on the property is virtually the same as the development described to the City Council in 1971 (TR. **VOL.** 11, p. 581, 612, **VOL.** 111, p. 806-7). In the process of negotiating the annexation and rezoning, Maitland made five additional commitments beyond the requested rezoning' which included commitments that the new zoning would be permanent and that Maitland would require only building permits for construction of the project after annexation (R. Exh. 2; TR. **VOL.** 11, **p.** 486-7, 536-8, 587, 612, 625, 690-1, 708). At the Maitland

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1/ The hearing officer rejected Ridgewood's proposed Finding of Fact No. 24 and found proposed findings 23, 25 and 26 "subordinate to facts found" despite the admission of Respondent's Exhibit 2 and the unrebutted testimony of five witnesses including the seller's attorney, a partnership principal, a former city council member, a former city manager and a DOT appraiser that those commitments were made.

City Council meeting on December 7, 1971, Maitland adopted new interchange commercial zoning categories and applied those categories to the property being annexed and rezoned at that meeting, including original Maitland Center (TR. VOL. 11, p. 531, 584, 611; R. 3121, Tabs 27 & 28, R. Exh. 6, 9, 10).

The partnership purchased the initial 130 acres of property in January, 1972, after the annexation and rezoning, retaining a seven-year option on the remaining 100 acres of original Maitland Center. Subsequently, the partnership exercised the option and purchased the remaining 100 acres. In addition, another 30 acres of property contiguous to the northwest corner of the original parcels, which had been held under three separate ownerships, were purchased pursuant to the same contingent arrangement and were annexed and rezoned under the same conditions by Maitland (TR. VOL. II, p. 540-2, 592; R. Exh. 148, 150A).

In June, 1972, Maitland permitted a conditional use on a one-acre parcel of property east of 1-4, owned by the partnership and annexed but not rezoned in the original December, 1971 annexation. The permitted conditional use was for a 2000 square foot office building to be used as a preview center for the project. The conditional use required that six months after completion of the Maitland Boulevard/I-4 Interchange, the building had to be moved to the west side of 1-4. The building was specifically designed to be moved and was to serve as the tennis club for a multi-family residential development on the annexed and rezoned property west of 1-4. A building permit for the preview center

was issued by Maitland and the building was constructed in 1972 (TR. VOL. II, p. 543-4, 590-1, 620-1, 644; R. Exh. 22, 23, 24, 26, 29, 150Y).

Numerous plans, maps, drawings, brochures and other documents were created by the partnership, detailing the nature and extent of development for the project (R. Exh. 1, 19, 32, 34, 39, 45, 52, 1502, 161, 169, 170, 171). Those documents reflect a project in a very advanced stage with more information than is necessary for DRI review (TR. VOL. 111, p. 922, 925-6). The nature and extent of the development is easily determinable from the brochure (R. Exh. 45) and the construction schedule (R. Exh. 34).

That any maps, plans or other documents regarding original Maitland Center as conceived in the early 1970s exist in Maitland's files is an accident according to Phyllis Holvey, the City Clerk since 1970 (TR. VOL. 111, p. 829). The Department has previously resorted to oral testimony in another case involving a development within Maitland because of Maitland's records destruction (R. Exh. 173, Garretson Depo. at p. 38). Corroborating evidence of the loss or destruction of previously submitted, and in some cases, approved plans, is present (R. Exh. 29, 150Y and TR. VOL. 111, p. 818-9; R. Exh. 52 and TR. VOL. 11, p. 598-605, 629, 662, 701, 708; R. Exh. 32 and TR. VOL. 111, p. 849-54; R. Exh. 51 and TR. VOL. III, p. 850-1).

Maitland did have in its files a construction phasing schedule received by it in early January, **1973** (TR. VOL. 11, p. **667,** VOL. 111, p. **840-2;** R. Exh. **34).** Maitland also maintained a copy of the project brochure reflecting sizes and locations of particular elements of the development (R. Exh. **45;** TR. VOL. 111, p. **839).** Maitland even provided its consultants preparing its **1973** comprehensive development plan with a portion of the brochure reflecting proposed development on the west side of 1-4 (R. Exh. **44;** TR. VOL. 111, p. **728).** The partnership's draftsman testified that shopping center plans were in the construction document phase and that residential plans had been completed in the manner set forth in the brochure (TR. VOL. 11, p. **660, 671).**

Construction of the project by the partnership was commenced with the building of the tennis club/preview center. However, the State's delay in constructing the Maitland Boulevard/ 1-4 Interchange pushed the project into a recessionary period. In addition, the partnership lost one of the partners by his untimely death (TR. VOL. 11, p. **566).**

The Department stipulated to the existence of adequate reliance and change of position to support vested rights and that those rights run with the land (TR. VOL. 11, p. **549-52;** R. **3463,** ¶ 4, p. 5).

C. Legislative History and Department Policy

Chapter 380, Florida Statutes, was enacted during the 1972 legislative session. The original version of the bill contained a limited vested rights provision in Part I, Section 5, subsection 16, providing for vested rights in the context of areas of critical state concern (R. 3121, Tab 1). That provision required substantial reliance and a material change of position to vest rights once a timely authorization to commence development was established. The portion of the bill addressing developments of regional impact initially did not contain a vested rights provision.

During the legislative process, the Senate Natural Resources and Conservation Committee held hearings on the bill on February 15 and 22, 1972 (R. 3121, Tabs 9 & 10). On March 6, 1972, the Senate Ways and Means Committee held a hearing on the bill (R. 3121, Tab 8). The principal Senate sponsor of the bill, Bob Graham, addressed the Ways and Means Committee. During his presentation, Senator Graham specifically equated the definition of development permit, which includes a zoning permit or rezoning, with an authorization to commence development under the vested rights provision (R. 3121, Tab 8, p. 15, 1. 12-19). Further, virtually every example used by Senator Graham in the discussion of that provision dealt with zoning. Senator Graham's comments reflected an intent to incorporate principles of common law

estoppel in the vested rights provision (R. 3121, Tab 8, pp. 15-18). Senator Graham specifically equated estoppel against a local government based on zoning with estoppel against the State under Chapter 380 (R. 3121, Tab 8, p. 17, l. 15 to p. 18, l. 19, p. 21, l. 7-13).

The Ways and Means Committee offered numerous amendments intended to weaken the legislation, including an amendment adopted in the Ways and Means Committee reducing the entire legislation to a study commission (R. 3121, Tab 2). The requirement of substantial reliance and material change of position was amended to require only reliance and a change of position, thereby broadening the vested rights provision (R. 3121, Tabs 2 through 7).

Chapter 380, Florida Statutes, took effect July 1, 1973. The Department initially applied the statute *so* that rezoning was a sufficient authorization to commence development for purposes of vested rights. Other than Secretary Pelham, every witness testified that the Department's initial policy was to include rezoning, without more, as an authorization to commence development. The first bureau chief to apply the statute in 1973, Robert Rhodes, testified to that fact and authored a contemporaneous exhibit reflecting that construction (TR. VOL. IV, P. 1003-4, 1014-16; R. Exh. 56), as did former planner and subsequent bureau chief, James May (TR. VOL. 111, p. 976), and former Director of the Division of Resource Planning, Michael Garretson (R. Exh. 173, Garretson Depo. at p. 6-7). Mr. Garretson also testified that the policy on vested rights changed between 1979 and 1983 (Id. at

p. 28-29). Finally, Tasha Buford, former DRI Section Administrator, confirmed the change in policy (TR. **VOL. IV,** p. 1115-17). Several exhibits corroborate this testimony (R. Exh. 63, 65, 66; D. Exh. 123) and impeach Secretary Pelham's testimony.

Secretary Pelham testified that he or someone on his behalf reviewed every one of numerous binding letters on vested rights issued by the Department since 1973 (TR. **VOL.** I, p. 313-14). Secretary Pelham purported to disclose the Department's policy and criteria for determining vested rights, stating that the policy requires, in all instances not specified in the statute, a formally approved detailed development plan. The evidence offered to support the policy was limited (TR. **VOL.** I, p. 329-338). Secretary Pelham further testified that the Department's vested rights policy was long standing, clear, and well established but that the Department has failed to adopt a rule implementing that policy (TR. **VOL.** I, p. 314-15). This policy is purportedly represented in the binding and advisory letters issued by the Department (TR. **VOL.** I, **p.** 361). Those records contain incomplete files and no subject matter index (TR. **VOL. I,** p. 388-93, 396-410).

SUMMARY OF THE ARGUMENT

The administrative hearing in this case was fundamentally unfair and violative of Ridgewood's due process rights. The agency head, Thomas Pelham,

(i) was the chief executive responsible for the investigatory staff which recommended issuance of the Notice of Violation;

(ii) issued the Notice of Violation based on his staff's investigation;

(iii) was the chief executive responsible for the prosecuting attorneys;

(iv) voluntarily appeared as the Department's sole witness in its case-in-chief and as its only expert witness;

(v) reviewed and ruled on exceptions challenging the existence of competent, substantial evidence to support certain findings on which his testimony was the Department's only evidence; and

(vi) issued the final order.

In essence, Secretary Pelham investigated, found probable cause, and prosecuted Ridgewood while acting as the sole complaining witness and ultimate judge of the facts and law.

The Department of Community Affairs has ordered that Ridgewood Properties, Inc. undergo DRI review for a development known as Maitland Center. Ridgewood asserts that it is exempt from DRI review for one or more of several reasons.

Section 380.06(12), Florida Statutes (1972), now § 380.06(20), Florida Statutes (1987), provides for vesting rights which existed prior to adoption of the statute creating the DRI review process. For rights to vest, reliance and a change of

position by the developer and some authorization to commence development by a local government must exist. In this case the Department has stipulated to the existence of reliance and change of position. Ridgewood demonstrated the requisite authorization to commence development by the rezoning and simultaneous annexation of the property now known as original Maitland Center by Maitland prior to the July 1, 1973 effective date of the statute. The plain meaning of § 380.06(12), Florida Statutes (1972) and its successor sections is that rezoning is sufficient authorization to commence development necessary to vest rights. To the extent that § 380.06(12), Florida Statutes (1972) and its successor sections are ambiguous, legislative history supports the construction that rezoning is a sufficient authorization to commence development.

Ridgewood also asserts that other acts by Maitland in addition to rezoning and simultaneous annexation constitute sufficient authorization to commence development necessary to vest rights. These acts include approval of a building permit for a building within Maitland Center, and commitments by the City that building permits were the only further requirement for development.

The Department's non-rule policy interpreting § 380.06(12), Florida Statutes (1972) and successor sections cannot be

applied to Ridgewood in this case because the policy is in conflict with the statutory vested rights provision and the Department's prior application of that provision. Further, the Department has failed to adopt a rule explicating its policy as required by Chapter 120, Florida Statutes, even though the policy has purportedly been uniformly applied for over ten years. The Department has also failed to meet its burden of justifying the necessity for its non-rule policy as applied in this specific case.

I. THE AGENCY HEAD VOLUNTARILY TESTIFIED *AN* EXPERT WITNESS ON BEHALF OF THE AGENCY AND SUBSEQUENTLY RENDERED THE AGENCY'S FINAL ORDER RENDERING THE PROCEEDINGS FUNDAMENTALLY UNFAIR AND VIOLATIVE OF RIDGEWOOD'S DUE PROCESS RIGHTS

In the course of the administrative proceeding, Secretary Pelham acted as (i) the employer of the investigatory staff, (ii) the initial finder of probable cause based on the staff recommendation, (iii) the sole substantive witness on behalf of the agency and as an expert witness in particular, (iv) the employer of the department's prosecuting attorneys, and (v) the ultimate judge of the facts and law.

Art. I, § 9, Fla. Const. and U.S. Const. amend. V and XIV, § 1 provide that no person may be deprived of life, liberty or property without due process of law.

The vested right to use its real property in a less restrictive and less costly manner, which Ridgewood sought to protect in the administrative proceeding, is a property right

protected by these constitutional provisions.2

Since both the federal and state due process clauses apply3, "... the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The answer to that question invariably contains a requirement that the determination to deprive a person of life, liberty or property must be made by a fair and impartial tribunal. Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) ["And, of course, an impartial decisionmaker is essential"]; In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) ["A fair trial in a fair tribunal is a basic requirement of due process]; Morrissey v. Brewer, supra at 488-9. ["...the minimum requirements of due process...include...a 'neutral and detached' hearing body..."]. This requirement is applicable "to administrative agencies which adjudicate as well as to courts." Gibson v. Berryhill, 411 U.S. 564, 579, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973); Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

2/ See, e.g., Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972); Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 95 L.Ed. 565. Whether the property rights are determined to exist or not, after an adequate hearing, is irrelevant to a determination of whether the property rights are of a type entitled to due process protection. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

3/ For purposes of U.S. Const. amend. XIV, §1, state action is that action by which the state commenced and pursued the administrative proceeding under review. See, Tribe, L.H., American Constitutional Law (2d.ed. 1988) at p. 1688 et seq.

Far from being impartial, fair or neutral and detached, the administrative forum in this case was infected with adjudicative partisanship in the person of Secretary Pelham. A review of the record before the hearing officer reflects an astounding level of bias on the part of Secretary Pelham and an astounding level of deference accorded to him and his testimony by the hearing officer.

Secretary Pelham was listed on the Department's witness list as an expert witness in land use planning. He was the sole expert witness for the Department and the sole witness called on behalf of the Department in its case-in-chief. At the hearing, the Department sought to qualify him as an expert in "land use planning", "matters related to Chapter 380, Florida Statutes" and "agency policy". Secretary Pelham had no training, experience or education as a land use planner. His sole qualification was that, as a private law practitioner, he "... worked very, very closely with land use planners..." (TR. VOL. I, p. 313). "Matters related to Chapter 380, Florida Statutes'' is not a commonly recognized area of expertise and was not listed on the pre-hearing stipulation as an area in which he would testify. Secretary Pelham had been employed by the agency for approximately one year at the time he was requested to render his opinion on agency policy over a period of 15 years. He was not listed on the pre-hearing stipulation as an expert in agency policy either. Over objection, he was qualified in all areas by the hearing officer.

Secretary Pelham's testimony was unabashed advocacy on issues of factual and legal opinion. At the close of the Department's case-in-chief, Ridgewood moved for an involuntary dismissal. After counsel for Ridgewood completed his argument, the hearing officer turned to counsel for the Department and asked:

> Does the Department wish to add anything to what Secretary Pelham has argued as the proper interpretation of the various laws we've been talking about? (TR. VOL. I, p. **444)**

Understanding the implications of that question, recognizing that his argument had been made for him by Secretary Pelham as witness and cognizant that Secretary Pelham would make the ultimate decision, counsel for the Department responded:

> Well, just one thing and with that in mind, I won't repeat what he said (TR. VOL. I, p. **444)**.

The hearing officer's question was not a mere slip of the tongue. Secretary Pelham's testimony was replete with prolix argument in response to simple questions. For instance, when asked to identify statutory language which contained an element of the Department's purported policy on vested rights his response

[Continued on next page.]

included a contention that the agency's interpretation was entitled to great weight[4] and that case law supported his contentions (TR. VOL. I, p. 366). His testimony was contradicted by the Department's (D. Exh. 123) and Ridgewood's exhibits (R. Exh. 63, 65, 66), by every other witness (TR. VOL. IV, p. 1003-4, 1014-16, R. Exh. 56; TR. VOL. 111, p. 976; R. Exh. 173, Garretson Depo. at p. 6-7, 28-9; TR. VOL. IV, p. 1115-17) and by his own writings prior to his government service. **See**, Pelham, Regulating Developments of Regional Impact: Florida and the Model Code, 29 U. Fla. L.R. 789 (Fall 1977) at fn. 88, p. 807. He was permitted to review a page of deposition testimony of another witness and then testify at length concerning that which he believed the witness meant (TR. VOL. I, pp. 338-48). Objections before and during that testimony were overruled and a motion to strike it was denied.

The hearing officer made critical findings of fact and conclusions of law consistent with Secretary Pelham's testimony. (R.62-111 at Findings of Fact ¶¶ 28-31 and Conclusions of Law

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4/ Even if applicable in an administrative proceeding, this is an incorrect statement of law. See, State Department of Ins. v. Ins. Svcs. Office, 434 So.2d 908 (Fla. 1st DCA 1983) and compare with Miller v. Agrico Chemical Co., 383 So.2d 1137, 1139 (Fla. 1st DCA 1980); Hillsborough County Env. Prot. Comm'n v. Frandorson Properties, 283 So.2d 65 (Fla. 2d DCA 1973) and Heftler Construction Co. v. Dept. of Revenue, 334 So.2d 129 (Fla. 3d DCA 1976), cert. denied, 341 So.2d 1982 (Fla. 1977). Beyond that, it represents an epidemic of bootstrap arguments by agencies in administrative proceedings. This is a rule of judicial deference not administrative deference. Agency policies initially must be supported by substantial competent evidence in a fair and impartial tribunal, not rubber-stamped by administrative deference. Once properly supported, judicial deference can apply in proper circumstances.

¶¶ 28-33). He found for Ridgewood only on the aggregation issue which was the sole subject on which Secretary Pelham did not testify.

In issuing his final order, Secretary Pelham rejected exceptions to findings based on his testimony and rejected exceptions to evidentiary rulings involving his testimony (R. 212-244, Exceptions 3-7, 27-29, 62, 69-71). In rejecting those exceptions, Secretary Pelham necessarily ruled that his testimony was competent, substantial evidence to support the hearing officer's findings. However, Secretary Pelham accepted and incorporated in his final order the sole exception raised by his attorneys (R. 207-211).

The proceedings below were demonstrably unfair as a matter of fact as set forth above and were also demonstrably unfair as a matter of law. Both Florida and federal courts have long recognized that the roles of advocate or witness and adjudicator are inherently incompatible.

In Goldberg v. Kelly, supra, welfare benefits for New York City residents were terminated after an informal discussion with a caseworker followed by seven days' notice of a right to review of the proposed termination by a higher official. If the review resulted in a determination adverse to the recipient, then benefits were terminated. After termination of benefits, the recipient could obtain a hearing before an independent hearing officer. The Supreme Court held that due process was satisfied only if the recipient was afforded a pre-termination evidentiary

hearing before an impartial decisionmaker who did not participate in making the decision under review.

In Morrissey v. Brewer, supra, the Supreme Court held, in the context of parole revocation proceedings, that the minimum requirements of due process included "a neutral and detached hearing body" at both the preliminary and final determinations with regard to revocation. With respect to the preliminary determination, the court stated:

> ... we need make no assumptions [regarding the parole officer's neutrality or hostility] one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them.

408 U.S. at 486. Then, the Court required a second impartial factfinder at the final revocation hearing.

In the context of the present case, Secretary Pelham's functions went far beyond those of a parole officer. His testimony was the evidence against Ridgewood which he then evaluated. Neither the hearing officer nor the agency head can remain objective in evaluating the evidence under those circumstances.

Perhaps the closest case to the present one is In re Murchison, supra. In that case a Michigan statute allowed a judge to convene a "one-man grand jury," require witnesses to appear and testify, hold those witnesses in contempt for their refusal to answer questions and for alleged perjury and then to try the witnesses on the contempt charges. In holding that

federal due process requirements were not met by that scheme, Justice Black, speaking for a six-member majority wrote

> Moreover, as shown by the judge's statement here [regarding White's alleged insolence] a "judge-grand jury" might himself many times be a very material witness in a later trial for contempt. If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant.

349 U.S. at 138-9.

The spectacle in this case is not any less appalling than the one described by Justice Black. The concept is so foreign to our notions of fairness that Section 90.607, Florida Statutes makes a judge incompetent to testify in a trial before him. The reasons for the rule are eloquently stated in Graham, Michael H., Handbook of Florida Evidence § 90.607 (1987 ed.):

> The reasons for automatically rendering the judge incompetent are obvious. The role of witness is plainly destructive of the court's image of impartiality, however impartial the trial judge may be in fact.

No objection is necessary to preserve this ground for appeal. Id. No objection need be made so that a party will not be forced to try a case before a judge whose credibility has been attacked.

Florida has long recognized that combining the roles of advocate and advisor to the adjudicating body are inherently incompatible and a violation of due process. 1972 Op. Atty Gen.

Fla. 072-64 (March 8, 1972); McIntyre v. Tucker, 490 So.2d 1012 (Fla. 1st DCA 1986). The cited attorney general's opinion contains this spirited description of due process in the context of administrative proceedings:

> Natural justice requires not only that the accused be heard, but that he be given a fair hearing by an impartial tribunal. The right to such a fair hearing is an inexorable safeguard and one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment to the United States Constitution and Section 9 of the Declaration of Rights of the Florida Constitution. As a minimal requirement such proceedings must be free from any just suspicion of prejudice, unfairness, fraud or oppression. Due process of law is not satisfied by a hearing which is only colorable or illusory. What is required is a reasonable opportunity to be heard which affords a party a fair and full opportunity to protect his constitutional rights.

1972 Op. Atty Gen. Fla. 072-64 (March 8, 1972) at 114. To comply with due process requirements, the attorney general opined that a state regulatory board must use two lawyers in disciplinary proceedings -- one to advise the board and one to prosecute the licensee.

The remedy for this violation of Ridgewood's rights is plain. Since Secretary Pelham's testimony was not competent, the hearing officer lacked competent substantial evidence to support his findings as did Secretary Pelham. Since the only competent evidence supports directly contrary findings, Ridgewood should prevail and the case should be remanded for

entry of a final order in favor of Ridgewood.[5]

Having jurisdiction in this case based on the certified question addressed above, this Court has plenary jurisdiction to review other issues properly preserved for review below. Tillman v. State, 471 So.2d 32 (Fla. 1985). Ridgewood requests that the Court address the following additional questions. The questions have not previously been addressed by this Court. They are not likely to be addressed by a court of appeal other than the First District and they would form a basis on which this Court could rule without being forced to decide the constitutional issue presented.

II. REQUESTED REZONING AS A CONDITION OF ANNEXATION CONSTITUTES *AN* AUTHORIZATION TO COMMENCE DEVELOPMENT SUFFICIENT TO VEST DEVELOPMENT RIGHTS PURSUANT TO SECTION 380.06(12), FLORIDA STATUTES (1972)

(A) THE PLAIN MEANING OF § 380.06(12), FLORIDA STATUTES (1972), AND ITS SUCCESSOR SECTIONS IS THAT REZONING IS A SUFFICIENT AUTHORIZATION TO COMMENCE DEVELOPMENT

As enacted in 1972, § 380.06(12), Florida Statutes (1972), now § 380.06(20), Florida Statutes (1987), provided as follows[6]:

> Nothing in this section shall limit or modify the rights of any person to complete any

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5/ Section 120.68, Florida Statutes (1987).

6/ The effective date became July 1, 1973.

> development that has been authorized by registration of a subdivision pursuant to chapter 478, by recordation 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 the effective date of the rules issued by the administration commission pursuant to subsection (2) of this section. 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 interests, nothing in this chapter authorizes any governmental agency to abridge those rights.

The statute permits any person, not merely the developer, to complete any development for which an authorization to commence development has been obtained. "Development" was defined in § 380.04, Florida Statutes (1972), as

> (1) "Development" means the carrying out of any building or mining operation or the making of any material change in the use or appearance of any structure or land and the dividing of land into three or more parcels.
>
> (2) The following activities or uses shall be taken for the purposes of this chapter to involve development, as defined in this section:
>
> * * * *
>
> (b) A change in the intensity of use of land, such as an increase in the number of dwelling units in a structure or on land or a material increase in the number of businesses, manufacturing establishments, offices, or dwelling units in a structure or on land.
>
> * * * *
>
> (4) "Development," as designated in an ordinance, rule, or development permit includes all other development customarily associated

> with it unless otherwise specified. When appropriate to the context, development refers to the act of developing or to the result of development. Reference to any specific operation is not intended to mean that the operation or activity, when part of other operations or activities, is not development. Reference to particular operations is not intended to limit the generality of subsection (1).

"Development permit" was defined in § 380.031(3), Florida Statutes (1972), now § 380.031(4), Florida Statutes (1987), as follows:

> (3) A "development permit" includes 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. [Emphasis supplied].

Reading these sections in pari materia reflects that a zoning change or rezoning was considered by the legislature to have the effect of authorizing development. The word "authorize" is a synonym for the word "permit". Webster's Ninth New Collegiate Dictionary (1984). Pursuant to § 380.04(4), "development" in the context of a development permit, i.e., rezoning, includes all other development customarily associated with it, i.e., an actual physical change in the intensity of the use of land.

The required "authorization to commence development" thus becomes a permit or permission to commence a change in the intensity of the use of land which one is then entitled to complete under § 380.06(12), Florida Statutes (1972), and includes all

other development, i.e., building, customarily associated with it including the act of developing.

If the Legislature left any doubt concerning the proper construction of the vested rights provision in 1972, the Legislature acted thereafter to make its original intent unquestionably clear. Confirming that rezoning was an authorization to commence development, the Legislature amended § 380.06(12) in 1974 to add the following language:

> For the purpose of determining the vesting of rights under this subsection, approval pursuant to local subdivision plat law, ordinances, or regulations of a subdivision plat by formal vote of a county or municipal governmental body having jurisdiction after August 1, 1967, and prior to July 1, 1973, shall be sufficient to vest all property rights for the purposes of this subsection and no action in reliance on, or change of position concerning such local governmental approval shall be required for vesting to take place. For the purpose of this act the conveyance or 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 riahts as determined under this subsection. provided such zoning change is actually granted by such government. [Emphasis supplied].

The last sentence of this amendment is telling. If rezoning was not an authorization sufficient to vest rights then why would a transfer or agreement to transfer property be reliance only if the transfer was a prerequisite to zoning change approval and the zoning change was granted? The answer to the question is plain -- because the zoning change was an authorization on which reliance could be placed.

For reasons discussed later, this construction makes sense in the context of common law estoppel principles because the local government in these circumstances had to be approving a requested zoning change (as opposed to a general zoning ordinance amendment) and therefore had the requisite knowledge on which estoppel could be based. No developer would agree to convey property for an unwanted zoning change.

Further, Ridgewood's interpretation is identical to the Department's interpretation through 1978. The staff reports contained in Respondent's Exhibit 63 (at R. 2624), Repondent's Exhibit 65 (at R. 2645) and Respondent's Exhibit 66 (at R. 2647-8) identify rezoning as the only actual authorization to commence development, The staff report for Respondent's Exhibit 63 (at R. 2624) specifically states "[t]he only authorization to commence development which the developer has is rezoning." The most damning exhibit is the Department's Exhibit 123, a December 1978 binding letter on Dunn's Terminal which states as a Conclusion of Law:

> The rezoning of the property in 1963 and the subsequent rezoning in 1969, pursuant to reorganization of the City of Jacksonville, establishes authorization for development of the petroleum storage facility for which reliance and change of position could be demonstrated. Exh. 123 at p. 1785.

As reflected earlier in that same document, no local building permits for any buildings, tanks, warehouses or other facilities had been obtained (D. Exh. 123 at R. 1784) and that reliance was determined as based on zoning alone (Id.).

(B) TO THE EXTENT THAT § 380.06(12), FLORIDA STATUTES (1972) AND ITS SUCCESSOR SECTIONS ARE AMBIGUOUS, LEGISLATIVE HISTORY SUPPORTS THE CONSTRUCTION THAT REZONING IS AN AUTHORIZATION TO COMMENCE DEVELOPMENT

The Department can not contend that the vested rights provision is unambiguous unless it adopts Ridgewood's construction of it. The words "or other authorization to commence development" are inherently ambiguous absent application of existing statutory definitions in the manner described by Ridgewood. If the court determines that Section 380.06(12), Florida Statutes (1972) is ambiguous, legislative history, including committee hearing tapes, should be considered as an aid in construction of the statute. Jacksonville Electric Authority v. Dept. of Revenue, 486 So.2d 1350 (Fla. 1st DCA 1986).

Substantial evidence was submitted to the hearing officer regarding the legislative history of Chapter 380 generally and Section 380.06(12) in particular. A portion of the evidence submitted was rejected improperly by the hearing officer.7

Even without Mr. May's thesis, the legislative history of the vested rights provision strongly supports Ridgewood's contention. First, the legislation must be placed in its historical context. As reflected in the existing retained history, no

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7/ See, Ridgewood's Exhibit 57, the master's thesis of James May which was erroneously rejected as evidence. Section 120.58 (1)(a), Florida Statutes (1987). Fla. Admin. Code Rule 22I-6.026; Harris v. Game and Freshwater Fish Comm'n, 495 So.2d 806 (Fla. 1st DCA 1986); Spicer v. Metropolitan Dade County, 458 So.2d 792 (Fla. 3d DCA 1984).

groundswell of environmental consciousness was sweeping through the legislature. Attempts to derail the legislation were numerous and but for a broad provision protecting existing rights the legislation likely would not have passed.[8] At the time the legislation was passed, the primary development control used by local government was zoning.

Senator Bob Graham was the principal sponsor of the legislation. When he appeared before the Senate Ways and Means Committee on March 6, 1972, the topic of vested rights was discussed at length.[9] Virtually every example used by Senator Graham related to zoning. The discussion started with a question from

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8/ This legislative atmosphere is evidenced by the fact that the original vested rights provision required substantial reliance and material change of position which was required by the doctrine of equitable or common law estoppel. The terms **"substantial"** and "material" were deleted from the bill as passed and have never been reinserted (R. 3121, Tab 4). The deletion of these terms had the unquestionable effect of broadening the scope of the provision. **Any** reliance or change in position became sufficient to vest rights whether or not substantial or material. This provision was then inserted in the Development of Regional Impact portion of the bill which did not initially contain a vested rights provision. At one point in the legislative process, an amendment was adopted in the Ways and Means Committee reducing the entire legislation to a study commission (R. 3121, Tab 2).

9/ Any contention that the Ways and Means Committee hearing is unimportant because it dealt with a different section of the bill is a subterfuge. Whether pre-existing development rights are curtailed by designation of an area as one of critical state concern or by designation of a project as a development of regional impact is not important. The development rights being curtailed are the same. As a result, that which the vested rights provision seeks to protect is the same.

Senator Haverfield on page 14 line 9 of the hearing transcript. As part of his response, Senator Graham referred to the vested rights provision as follows:

> ... Now second, you read subsection 16 immediately following. It says, if you have a vested right by virtue of the kind of development permit that you received, building permit or other authorized permit for this development, or if you had in any other way acquired vested rights, then you are protected under whatever the regulations were. (R. 3121, Tab 8, p. 15, l. 12-19) [Emphasis supplied.]

Note that Senator Graham equated the terms "authorization to commence development" in the statute to "development permit" in his comments.[10]

The discussion did not end at that point. Again Senator Haverfield probed with regard to the vested rights provision at page 15 line 20 to page 16 line 20 and Senator Graham responded:

> This subsection 16 is a connocation [sic, probably "codification"] of the current law. And back to that point. For instance, if you were in Dade County and you had reached the point, by virtue of reliance upon the existing law, then Dade County could not change the zoning, or change the subdivision law or whatever it was effecting [sic] it. This is how the current law states what your rights are.
>
> The same applies under this first statement. If you reach the point that does not require the acquisition of this building, you can substantially rely upon the Dade County law to the point which you have vested rights.

10/ This is consistent with Robert Rhodes testimony (TR. VOL. IV, p. 1003) that the term "authorization to commence development" in the vested rights provision was intended to subsume the statutory definition of "development permit" which led to his construction of the statute as Bureau Chief of the Department's predecessor agency.

You're protected under the provisions as made, existing prior to the designated area of state concern and prior to development regulations. The same standards apply today until some individual county may change it some. (Id. 16 l. 21 to p. 17 l. 14) [Emphasis supplied.]

The most telling exchange between Senators Haverfield and Graham then occurred beginning at page 17 line 15:

> Senator Haverfield: Senator, wouldn't you agree with me that you really don't have vested rights in zoning.
>
> Senator Graham: You have that power. The courts have ruled that once you have made a material action, material reliance on that zoning that you can apply **a** vested right, and the local government cannot change your land use regulation.
>
> Senator Haverfield: But this says, if you have acquired vested rights, and shifts the burden to you to prove it, you can't prove it. That's a long series of litigation.
>
> Senator Graham: That is exactly the situation today. Let's say you own some property. Let's say you've got it zoned, zoned what? Apartments. The county now wants to change the zoning ordinance of the county. Question: Do you as a developer, you reach the position that the county is estopped from changing the land use regulations on you because of the actions which you took in reliance on the fact that your property was zoned apartments.
>
> Now, if the answer to that question is, yes, if they are estopped, the state is estopped under subsection 16. If the answer is, no, you have not taken those kinds of steps which the courts have deliniated [sic] as being necessary to achieve vested rights, then, no, you haven't achieved them. The same standards for the state currently apply. (Id. p. 17 l. 15 to p. 18 l. 19) [Emphasis supplied.]

The connection between zoning and the vested rights provision could not be clearer. As Senator Graham stated, Florida courts had held that vested rights in zoning exist. See, e.g., Bregar v. Britton, 75 So.2d 753 (Fla. 1954), cert. denied, 348 U.S. 972 (1955). Then, using a zoning example he succinctly sets forth the standard. If the local government is estopped from changing the zoning, the state is estopped to apply Chapter 380.11

Senator Graham summed up his comments with regard to vested rights in the following terms:

> This is a codification of current Florida law on this subject. This is the terminology which the courts have used. If this committee would like to propose an amendment of some other language - this is what we're trying to say. If the local government can't do it to you, the state can't. (R. 3121, Tab 8, p. 21 l. 7-13) [Emphasis supplied.]

In the present case, Maitland would be estopped to change the zoning or deny building permits in that (a) it had knowledge of the partnership's plans (b) it changed the zoning on request to help accomplish those plans and (c) reliance and change of position occurred. Since Maitland is estopped, the Department can not apply Chapter 380 to Ridgewood.

11/ Bregar is not an anomaly. Florida courts and commentators have long concluded that equitable estoppel can be based on zoning. See Understanding the Doctrine of Equitable Estoppel in Florida, 38 U. Miami L. Rev. 187 (Jan. 1984) at pp. 206-208 ["when rezoning of a landowner's property is done at the owners request, it is a sufficient government act upon which to base equitable estoppel"].

As reflected above, Bregar was part of then current Florida law on the subject of equitable estoppel against a local government at the time of Senator Graham's comments. In that case, Britton purchased certain property which was rezoned three years after the purchase from Agricultural to "C-2" commercial zoning at his request so that he could construct a drive-in movie theatre. Immediately after adoption of the rezoning resolution Britton spent $28,000 for sound equipment and accessories. Thereafter, the county unilaterally rescinded its rezoning resolution. The trial court found for Britton and ordered to county to issue him a building permit. The Supreme Court affirmed.

The holding below requires a rejection of this Court's holding in Bregar v. Britton, 75 So.2d 753 (Fla. 1954). The holding also requires a rejection of unequivocal legislative history including subsequent amendment of the vested rights provision adverse to the Department's contention.

Principles of common law or equitable estoppel would preclude Maitland from changing the zoning and, more importantly, would preclude Maitland from refusing to issue building permits. Bregar v. Britton, 75 So.2d 753 (Fla. 1954); Town of Largo v. Imperial Homes Corp., 309 So.2d 571 (Fla. 2d DCA 1975). The only remedies in Chapter 380 applicable to this case are prohibitory. No further development is allowed pending compliance with Chapter 380. Since Maitland cannot refuse building permits, the

Department is estopped from accomplishing the same result through application of Chapter 380.

III. REQUESTED REZONING AS A CONDITION OF ANNEXATION COUPLED WITH

i) A CONTRACT FOR PURCHASE AND SALE CONDITIONED ON ANNEXATION AND REZONING,

ii) COMMITMENTS BY THE LOCAL GOVERNMENT THAT BUILDING PERMITS ARE THE ONLY FURTHER REQUIREMENT, AND

iii) ISSUANCE OF A BUILDING PERMIT FOR AND CONSTRUCTION OF A PREVIEW CENTER

COMPRISE AN AUTHORIZATION TO COMMENCE DEVELOPMENT SUFFICIENT TO VEST DEVELOPMENT RIGHTS PURSUANT TO SECTION 380.06(12), FLORIDA STATUTES (1972)

The Department did not except to, reject or modify the hearing officer's finding that the contract for purchase and sale of original Maitland Center was conditioned on rezoning and annexation. As a result, the Department is bound by that finding. Section 120.57(1)(b)(10), Florida Statutes (1987). The Department further stipulated that reliance and change of position existed (TR. VOL. 11, p. 545-52) and that vested rights run with the land (R. 3463, ¶ 4, p 5). "Option vesting'' has long been recognized as creating vested rights. Town of Largo v. Imperial Homes Corp., 309 So.2d 571 (Fla. 2d DCA 1975).

Unrebutted evidence established that Maitland had detailed knowledge of the proposed project, had committed to require only

building permits[12] and, other than by a formal vote reflected in city council minutes, had approved the project. Maitland's files contained drawings, maps, plans, charts, and brochures reflecting the nature, extent and location of development. One of those documents was used by Maitland to allow its consultant to prepare its 1973 comprehensive development plan. An express commitment by the local government coupled with detailed knowledge of the development is an adequate basis for estoppel without more.

Section 380.06(12), Florida Statutes (1972) specifically provides that a building permit is an authorization to commence development. The partnership obtained a building permit for and constructed a preview center which was to be moved after completion of the Maitland Boulevard/I-4 interchange. The preview center was to become a tennis clubhouse for a multi-family residential development. The building was specifically designed to be moved. (TR. VOL. 11, p. 543-4, 590-1, 620-1, 644; R. Exh. 29).

The Department contends that the building permit only vests rights for that single building. This attempt to constrict the statutory mandate is contrary to the express terms of the statute and prior agency precedent.

12/ Ridgewood's Exhibit 2 and testimony of seller's attorney Arnold, partnership principal Downs, Councilman Jackson, City Manager Johnston and DOT Appraiser Corry (TR. VOL. 11, p. 486-7, 536-8, 587, 612, 625, 690-1, 708). Waiver of subdivision ordinance requirements for major projects is specifically authorized by Maitland's ordinance (R. 3121, Tab 17, § 15). Further, the ordinance does not apply if subdivision is not contemplated (R. 3121, Tab 17, § 6, definition of subdivision).

A building permit is a "development permit" as defined in § 380.031(3), Florida Statues (1972). Section 380.04(4), Florida Statutes (1972) provides that development in the context of a development permit (here, a building permit) includes "... all other development customarily associated with it...." Section 380.06(12), Florida Statutes (1972) provides that a developer may complete any development which he has been authorized to commence by means of a building permit. The development of the project being "previewed" at a preview center is certainly customarily associated with it and therefore may be completed.

As reflected in Department's Exhibit 123 and Ridgewood's Exhibit 64, rezoning coupled with a building permit for a portion of a project has been held by the Department to be an authorization sufficient to vest rights. In the case of Petitioner's Exhibit 123, the Department appeared to rely solely on the rezoning before July 1, 1973 to find vested rights for a proposed warehouse; however, a building permit for a bulkhead was also obtained before July 1, 1973. No building permit was obtained for the proposed warehouse. Similarly, in the case of Ridgewood's Exhibit 64, building permits had not been obtained for a number of stores in a shopping mall, yet rights were held to have vested even for those stores.

Whether based on the plain meaning of the statute or the Department's prior precedent, the partnership's building permit

for its preview center is sufficient to vest rights for the original Maitland Center development.

With all of the quarreling over that which comprises an authorization to commence development, the Department attempts to ignore the import of the second sentence of § 380.06(12), Florida Statutes (1972) which provides:

> 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 interests, nothing in this chapter authorizes any governmental agency to abridge those rights. [Emphasis supplied.]

As defined in § 380.031(5), Florida Statutes (1972), the term "governmental agency" includes the State of Florida and its agencies. Section 380.031(7), Florida Statutes (1972) defines "land development regulations" to include local zoning regulations.

As previously reflected, no Maitland ordinance or regulation precluded the partnership from developing its property to the full extent of the zoning authorization. No impact fees, other exactions or mitigation were required. Any attempt to impose those requirements would abridge rights of the partnership to the extent that those rights were obtained in reliance on prior local government zoning regulations.

Ridgewood has shown that principles of equitable or common law estoppel would have compelled Maitland to issue

building permits to it whether based on case law[13] or express commitment.[14] The state cannot now abridge those rights by attempting to force compliance with Chapter 380.

IV. THE DEPARTMENT'S NON-RULE POLICY ON VESTED RIGHTS DETERMINATIONS CANNOT BE APPLIED TO RIDGEWOOD

Through the testimony of Secretary Pelham[15] the Department attempted to justify its "interpretation" of the vested rights provision based on its "non-rule policy." The Department contended that rezoning was not a sufficient authorization to commence development and that some sort of detailed map or written plan must be "formally approved" to establish vested rights. The only purported rationale for this "interpretation" of the vested rights provision offered by Secretary Pelham was (i) that evaluation of impacts was not possible without a specific development plan and (ii) that the Department cannot otherwise determine the nature and extent of the development being authorized so as to be able to determine the extent of the vested rights.

13/ Bregar v. Britton, 75 So.2d 753 (Fla. 1954); Town of Largo v. Imperial Homes Corp., 309 So.2d 571 (Fla. 2d DCA 1975); Understanding the Doctrine of Equitable Estoppel in Florida, 38 U. Miami L. Rev. 187 (Jan. 1984).

14/ See note 12, infra.

15/ Ridgewood does not waive its contention that Secretary Pelham's testimony as an expert witness in this proceeding was improper and that his qualification as an expert was improper.

A. THE DEPARTMENT'S NON-RULE POLICY IS IN CONFLICT WITH THE STATUTORY VESTED RIGHTS PROVISION AND THE DEPARTMENT'S PRIOR APPLICATION OF THAT PROVISION

The Department cannot alter a legislative enactment by claiming an interpretation or policy at odds with the statute. An agency's interpretations, rules and policies must be consistent with the statutes involved. State Dept. of Bus. Reg. v. Salvation, Ltd., Inc., 452 So.2d 65 (Fla. 1st DCA 1984).

Salvation is particularly close to the present case. In that case, the statute specified four criteria entitling an applicant to a special beverage license. By rule, the Beverage Division sought to impose an additional criterion. The hearing officer invalidated the rule, rejecting the Division's contention that the purpose of the Florida beverage law would be defeated without the added criterion. The First District affirmed.

In the present case, the Department seeks to impose two additional criteria as necessary to establish vested rights -- "formal approval" of a "detailed plan." The statute requires neither.

"Formal approval" is not a statutory requirement of Section 380.06(12), Florida Statutes (1972). That requirement has been appended by the Department without a rule and without authority. If "formal approval'' were required, the statute would have included that requirement. In its 1974 amendment to Section 380.06(12), Florida Statutes, the Legislature acknowledged that

formal approval was not required to establish vested rights in adding the following provision:

> For the purpose of determining the vesting of rights under this subsection, approval pursuant to local subdivision plat law, ordinances, or regulations of a subdivision plat by formal vote of a county or municipal governmental body having jurisdiction after August 1, 1967, and prior to July 1, 1973, shall be sufficient to vest all property rights for the purposes of this subsection and no action in reliance on, or change of position concerning such local governmental approval, shall be required for vesting to take place.

The amendment provides a bonus for those who obtained formal approval for certain types of authorizations but does not require formal approval for all authorizations. Absent that formal approval, reliance and change of position must be shown. Formal approval is not now and has never been a statutory requirement.

Moreover, the Department's purported policy conflicts with its prior application of the vested rights provision. Even Secretary Pelham, despite his sworn protestations to the contrary, has previously recognized that a zoning change was a sufficient authorization to commence development on which to base vested rights. In Regulating Developments of Regional Impact: Florida and the Model Code, 29 U. Fla. L. Rev. 789 (Fall 1977), Secretary Pelham wrote in footnote 88 on page 807:

> ELA contains a vested rights provision which essentially provides that development authorized prior to the effective date of ELA by any authorization to commence development, e.g., recordation of subdivision plat, land sales registration, or zoning change, upon which

> there has been reliance and a change of position, is not subject to the DRI review process. Fla. Stat. § 380.06(12) (Supp. 1976). The provision incorporates the doctrine of equitable estoppel, which is well established in the decisional law of Florida. See, e.g., Sakolsky v. City of Coral Gables, 151 So.2d 433 (Fla. 1963); Texas Co. v. Town of Miami Springs, 44 So.2d 808 (Fla. 1950); City of Gainsville v. Bishop, 174 So.2d 100 (Fla. 1st D.C.A. 1965). [Emphasis supplied.]

The remainder of the article contains no qualification or explanation of that statement and is consistent with the plain meaning of the statute. In addition, Secretary Pelham acknowledges the equitable estoppel roots of the Chapter 380 vested rights provision.

Secretary Pelham was not alone in his relatively contemporaneous understanding of the provision. The testimony of prior Department employees, Rhodes, May, Garretson and Buford, reflects that the Department's predecessor agency originally applied the statute in a manner reflecting that rezoning with detrimental reliance was sufficient to vest rights.[16] Ms. Buford went so far as to state that the changed interpretation resulted from the hiring of Larry Keesey, now the Department's general counsel.

16/ The testimony of these individuals and Secretary Pelham's article must create serious questions regarding Secretary Pelham's objectivity and credibility. The Secretary testified that he, or someone on his behalf, has reviewed every binding letter and non-binding letter and stated that no such regular application of the statute occurred. Contrary to the Secretary's attempts to distinguish prior LIVRs and BLIVRs, Rhodes and Garretson stated unequivocally that the Department had used a zoning change without more as a sufficient authorization to vest rights. Ridgewood's Exhibits 56, 63, 65 and 66 and the Department's Exhibit 123 corroborate the testimony of Rhodes and Garretson.

The Department's original interpretation is entitled to great weight if any interpretation by the Department is imbued with added value. Miller v. Agrico Chemical Co., 383 So.2d 1137, 1139 (Fla. 1st DCA 1980); Hillsborough County Env. Prot. Comm'n v. Frandorson Properties, 283 So.2d 65 (Fla. 2d DCA 1973); Heftler Construction Co. v. Dept. of Revenue, 334 So.2d 129 (Fla. 3d DCA 1976), cert. denied, 341 So.2d 1082 (Fla. 1977).

B. THE DEPARTMENT ILLEGALLY FAILED TO ADOPT RULES PURSUANT TO CHAPTER 120, FLORIDA STATUES, DESPITE ITS CLAIMS OF UNIFORM APPLICATION OF CLEAR, LONG STANDING NON-RULE POLICY

Secretary Pelham testified that the Department's non-rule policy on vested rights "is so clear cut, so well established and has been for such a long period of time that it really isn't necessary to do anything in order to instruct [the Department's employees] to follow our policy." He made that sworn statement in the face of (i) no subject matter index for the records from which the confines of that policy is discernible, (ii) his own complaints regarding the incompleteness of those very files and (iii) records and testimony indicating the "policy" initially followed by the Department was not consistent with its current policy.

An agency's failure to adopt appropriate rules under these circumstances is inexcusable. If the non-rule policy is as clear, well-established and long-standing as Secretary Pelham contends, then the Department has ignored numerous prior warnings regarding rule adoption. General Development Corp. v. Div. of State Planning, 353 So.2d 1199 (Fla. 1st DCA 1977); McDonald v.

Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977); Dept. of Administration v. Stevens, 344 So.2d 290 (Fla. 1st DCA 1977); Albrecht v. Dept. of Environmental Regulation, 353 So.2d 883, 887 (Fla. 1st DCA 1977), cert. denied, 359 So.2d 1210 (Fla. 1978) [Orders may not be employed to prescribe substantive standards "of general applicability,'' for which the APA requires rules]. As a result, its action based on that policy should be invalidated. General Development Corp. v. Div. of State Planning, 353 So.2d 1199 (Fla. 1st DCA 1977).

The failure to maintain a subject matter index of the orders forming the basis of its policy is a further violation of Chapter 120 by the Department. McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977). The absence of an index coupled with the incompleteness of the Department's files, provides no one --not a local government, not a Department employee and not this court -- with the ability to discern the Department's policy from those records.

C. THE DEPARTMENT FAILED TO MEET ITS BURDEN OF JUSTIFYING ITS NON-RULE POLICY

The Department's purported policy and its rationale to support that policy in this case collapse of their own weight. That the Department's policy is an extension of, and not within the statute, is apparent by examining another identified authorization in § 380.06(12), Florida Statutes (1972). The statute specifically identifies a subdivision plat as an "authorization." The Department placed in evidence the subdivision plats prepared by

CMEI's engineers for Maitland Center (D. Exh. 1-9). Ridgewood placed Maitland's subdivision ordinances from 1970 forward in the record as part of its official recognition request (R. 3121, Tab 17 et seq.). Maitland has never required the formal approval of a master plan as part of its subdivision ordinance. The filed plats do not reflect the amount or location of proposed development yet had they been recorded by July 1, 1973, they would have constituted an authorization to commence development under the statute.

The Department knows the maximum amount of development permitted at Maitland Center by virtue of the zoning on the property. Maitland authorized that amount of development. Neither Maitland nor Chapter 380 requires more detail. Further, the requirement of formal approval of a detailed map or plan is not the least restrictive alternative available to meet the Department's rationale. Informal approval or acquiescence by the local government are sufficient for estoppel purposes and should be sufficient for vested rights.[17] The Department's failure to follow the least restrictive path to achieve its "non-rule policy" goal requires invalidation of that policy.

17/ In fact rights have been held to vest based on only preliminary informal approvals. See, Project Home, Inc. v. Town of Astatula, 373 So.2d 710 (Fla. 2d DCA 1979). Equitable estoppel can be based on an act or an omission. Town of Largo v. Imperial Homes, Corp., 309 So.2d 571, 572 (Fla. 2d DCA 1975).

Secretary Pelham's contention that impacts could not be determined without formal approval of a development plan is spurious. While formal approval of a detailed development plan may be important in a DRI review proceeding, impacts are irrelevant in a vested rights determination. Rights vest irrespective of impacts.

As a result of its failure to adopt a rule, the Department bears the burden of justifying its policy in this proceeding. Manasota-88, Inc. v. Gardinier, Inc., 481 So.2d 948 (Fla. 1st DCA 1986); Island Harbor Beach Club, Ltd. v. State Dept. of Nat. Res., 495 So.2d 209 (Fla. 1st DCA 1986). The Department's failure to place in evidence, in this proceeding, sufficient proof to sustain its policy as a rule in a formal rule adoption proceeding, is fatal. Manasota-88, Inc. v. Gardinier, Inc., supra.

CONCLUSION

For the reasons set forth hereinabove, including the prejudicial lack of due process in the administrative proceeding below, Ridgewood requests that this Court reverse the opinion of the First District Court of Appeal, answer the certified question in the affirmative and remand this proceeding to the agency for entry of a final order in favor of Ridgewood.

RESPECTFULLY SUBMITTED this 10th day of October, 1989.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to C. Laurence Keesey, Esquire, General Counsel, David Jordan, Esquire, Diana Parker, Esquire, Department of Community Affairs 2740 Centerview Drive, Tallahassee, Florida 32399 – 2100, and J. Lawrence Johnston, Hearing Officer, Division of Administrative Hearings, 2009 Apalachee Parkway, Tallahassee, Florida 32399-1500, this 10th day of October 1989.

Christopher C. Skambis