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

REPLY BRIEF OF APPELLANT RIDGEWOOD PROPERTIES, INC.

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The Department totally has failed to respond to the due process question certified by the First District Court of Appeal and briefed by Ridgewood. Rather, the Department attempts to resolve an issue of constitutional dimension by reminding this Court of the statutory requirements of Chapter 120, Florida Statutes, which are not in issue. The Department's brief is of little help to the Court in deciding the certified question.

In addition, the Department has misrepresented the record in this case and has made expedient and inconsistent arguments. Ridgewood has been sorely mistreated at the hands of the Department throughout these proceedings. This Court must not merely correct the wrong done to Ridgewood but must preserve the administrative process as an acceptable means of dispute resolution. Fairness and the appearance of fairness must both be maintained. The Department's desire to prevail at any cost was epitomized by Secretary Pelham's blatant advocacy during his testimony and is further manifested by the Department's answer brief.

The Department first attempts to minimize Secretary Pelham's role as adjudicator[1] and then devalues his role as witness[2]. The

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1/ Secretary Pelham only "accepted the Hearing officer's Findings of Fact'' and "only changed those Conclusions of Law in which the Hearing Officer had incorrectly applied the Department's aggregation rule ...." Answer Brief at p. 10,

2/ "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." Answer Brief at p. 20. "Secretary Pelham did (cont. on page 2)

Department's contention is absurd. Secretary Pelham was the Department's sole witness with regard to vested rights. Since the Department has no vested rights rule, it must prove its policy and support that policy as in rule adoption proceedings. 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). Without Secretary Pelham's testimony[3] nine prior agency rulings with regard to vested rights were in the record. A review of those exhibits shows:

a) Department Exhibit 123 (R. 1781-98) unequivocally supports Ridgewood's contentions that rezoning alone is a sufficient authorization to commence development. See, Ridgewood's Initial Brief at p. 30.

b) Department Exhibits 125 (R. 1804-6), 126 (R. 1807-11) and 174 (R. 2289-2304) all reflect rezoning as an authorization to commence development. That some have additional authorizatons is irrelevant as discussed below. Rezoning is described as an authorization to commence development.

c) Ridgewood's Exhibits 63 (R. 2622-4, 65 (R. 2642-5) and 66 (R. 2646-8) are discussed in Ridgewood's Initial Brief at p. 30 and support Ridgewood's contentions.

d) Ridgewood's Exhibit 64 (R. 2625-41) is discussed in Ridgewood's Initial Brief at p. 39 and supports Ridgewood's contentions.

e) Ridgewood's Exhibit 67 (R. 2649-54) is the Final Order which led to Compass Lake Hills Development v. State, Dept. of Community Affiars, 379 So.2d 376

2/ cont.
not testify on the main issues in this case.'' Answer Brief at p. 21. Yet, "... the major issue at the hearing ... [was] whether Ridgewood has met its burden of establishing ... vested rights ..." Answer Brief at p. 15.

3/ Even with Secretary Pelham's testimony the Department totally failed to meet its burden as set forth in Ridgewood's Initial Brief at pp. 41-48.

(Fla. 1st DCA 1979). This exhibit can not lend support to the Department's contention because Jackson County had no zoning ordinance. Id. at 379. Since rezoning as an authorization to commence development is the principal issue in this case, Compass Lake Hills is irrelevant.

Apparently, the Department does not believe that the Court will review the record on appeal. The Department also contends that the testimony of Rhodes, May, Garretson and Buford support its contentions. This is a misrepresentation:

a) Rhodes, the first bureau chief to apply the statute on behalf of the Department's predecessor and an aide to a House sponsor of the legislation, testified that the Department's initial policy was that rezoning, without more, was an authorization to commence development. (TR. Vol. IV, p. 1003-4, 1014-16). Rhodes authored a contemporaneous exhibit reflecting that policy (R. Exh. 56).

b) May, a subsequent bureau chief confirmed Rhodes' testimony (TR. Vol. III, p. 976).

c) Garretson, the Director of the Division of Resource Planning, agreed with Rhodes' testimony (R. Exh. 173, Garretson Depo. at p, 6-7) and that the policy changed between 1979 and 1983. (Id. at pp. 28-9). His testimony is supported by the December 1978 BLIVR (D Exh. 123) which finds rezoning is the sole authorization to commence development.

d) Buford testified that the Department policy changed in response to hiring Mr. Larry Keesey as General Counsel. (TR. Vol. IV, p. 1115-17).

All of these documents and witnesses are refuted only by Secretary Pelham's contention that "formal approval'' of "a plan of development'' has always been required. Secretary Pelham's testimony is the linch pin of the Department's case. Without his testimony the Department's policy does not appear in this record. Without his testimony, the justification for the change in the Department's

policy does not exist in the record.

The only means of discerning the Department's policy from the nine exhibits identified above is to accept a negative implication -- because some of them show more than rezoning as an authorization, more is required. That implication is irrational. Those prior orders with "more" do not establish the minimum necessary authorization to commence development. By contrast, Department Exhibit 123, a December 1978 order, eloquently establishes the minimum without equivocation:

> 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. (R. at p. 1785)

Ridgewood Exhibit 63 is briefer -- "[t]he only authorization to commence development which the developer has is rezoning.'' (R. 2624).

The Department contends that its interpretation of the statutes governing its operation is entitled to great weight. The Department's original interpretation is entitled to great weight, if any interpretation by the Department is given 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).

Secretary Pelham's testimony was not only material to the issues in the case but was absolutely necessary for the Department to

prevail. His role as adjudicator was not the rubber stamp of the Hearing Officer's findings which the Department portrays. Secretary Pelham rejected the one "conclusion of law" on which he did not offer testimony as to "agency policy". He had to rule that his own testimony was competent, substantial evidence of the Department's policy and its justification. A more clearly inconsistent role can not be imagined. The fact that his role was not the initial finder of fact is a distinction without a difference. The relationship between the agency head and the hearing officer is like the relationship between a special master and a trial judge or a trial judge and an appellate judge. If either the trial judge testifies before the special master or the appellate judge testifies before the trial judge, due process is offended if the witness becomes the adjudicator. The fact that further judicial review exists does not vitiate the violation. The entity subjected to that procedure has been deprived of the ability to contend that the greater weight of the evidence supports its position. To assert that twenty minutes of argument before an appellate court panel satisfies due process which was denied in a four day hearing involving a 4000 page record is ludicrous.

The Department makes an additional contention in its answer brief that Ridgewood should have invoked Section 120.71, Florida Statutes, seeking disqualification of Secretary Pelham. Again, the Department attempts to trivialize the constitutional issue rather than address it. Beyond that, (i) the Department has never before raised this issue (ii) the statute was not intended to address the circumstances of this case requiring a suggestion of bias to be filed before the agency proceeding (not possible here)

and (iii) Ridgewood objected before Secretary Pelham testified, during his testimony, moved to strike portions of his testimony and excepted to his testimony, which is either adequate compliance with the statute or reflects the futility in attempting compliance.

The Department's position is disingenuous at best. Secretary Pelham is an experienced administrative law practitioner and law professor. He was represented by three lawyers at the hearing. He was present during Ridgewood's objections and motion to strike. He purportedly reviewed and rejected Ridgewood's exceptions specifically directed to his testimony. (R. 212 at ¶ 69-72). The Department's contention is another transparent attempt to misdirect the Court's attention from the real issue in this case and to avoid responding to the violation of Ridgewood's due process rights.

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)

As set forth in Part III of its initial brief, Ridgewood's vested rights claim is not based solely on the terminology "other authorization to commence development" contained in Section 380.06(12), Florida Statutes (1972).

On page 30 of its answer brief, the Department purports to paraphrase the statutory vested rights provision contending that the statute requires "recordation of a plat showing the development'' (emphasis supplied) and "building permits" (emphasis supplied). The statute does not require a plat "showing the development." Plats do not "show the development.'' Department Exhibits 1 through 9 are the Maitland Center plats prepared in the late 1970s and early 1980s.

Those exhibits do not reflect the nature and extent of development to be placed on the property. They merely show how the property is to be divided into three or more parcels. Nothing in Maitland's subdivision ordinance (R. 3121, Tab 17) requires more. Had Ridgewood's predecessors recorded the same plats prior to July 1, 1973, Maitland Center would be vested. The Department attempts to extend the statutory requirement to create a justification for its unauthorized construction that formal approval of a plan of development is necessary to create an "authorization to commence development" under the statute. Since platting is a sufficient authorization and does not reflect the nature and extent of development, the legislature could not have been concerned with whether or not the nature and extent of development is disclosed in an "authorization" other than as limited by zoning.

The Department's pluralization of the statutory authorization of a single building permit reflects another attempt by the Department to legislate. The Department contends at pages 40-41 of its answer brief that a single building permit for one building or portion of a development is not a sufficient authorization to vest other buildings in or portions of that development. The Department's contention is at odds with its own agency policy as reflected in its orders. Respondent's Exhibit 64 (R. 2625) reveals that the Department determined that the 1,273,428 square feet of retail shopping at nearby Altamonte Mall was vested based on zoning[4] and the

4/ The staff report (R. 2626) contained in Exhibit 64 recognizes rezoning as an authorization to commence development in addition to authorization in the form of some building permits.

issuance of some, but not all, necessary building permits. Similarly, Department Exhibit 123 (R. 1781) identifies only dredge and fill and bulkhead construction permits, without local building permits for any other portion of the development, but considers the entire 320 acre warehouse and petroleum storage facility vested based on those limited permits. These exhibits reflect the bankruptcy of The Department's attempt to distinguish adverse precedents from its own files.

The Hearing Officer's failure to find that Maitland did not exempt Ridgewood's predecessors from compliance with its subdivision regulations is not supported by competent substantial evidence. The Department's contention that events occurring in the late 1970s have any bearing on whether vested rights existed on July 1, 1973 is simply wrong on both legal and logical relevancy grounds. The scope and extent of Ridgewood's vested rights are determined as of July 1, 1973, not at a remote time. If Ridgewood chose, for whatever reasons, not to engage in a conflict with Maitland and therefore submit to additional requirements, that was Ridgewood's prerogative. Ridgewood has not waived any rights with regard to compliance with Chapter 380. Ridgewood's remote subsequent acts with respect to Maitland can not be used to measure its vested rights with respect to the Department.

If Maitland did not exempt Ridgewood from its subdivision regulations, the result does not change. Whether or not other "approvals" are required to begin construction is irrelevant. Neither the statute nor the Department's orders require that every step in the development process, short of breaking ground, be accomplished

in order to vest rights. Land sales registration and plat recordation are preliminary steps which antedate building permits but which constitute authorizations to commence development. The Department attempts at page 31 of its answer brief to equate the phrase "authorization to commence development" with "authorization to begin construction.'' The two phrases are not equivalent.

In Part II(B) of its answer brief, the Department engages in circular logic with respect to the applicability of legislative history in this case. The Department contends that the statute is clear on its face, despite its failure to identify a definition of "other authorization to commence development", because the First District purportedly upheld the Department's construction of the statute in two prior cases. However, as discussed infra, those cases are factually distinct and the court did not have the benefit of the legislative history or the prior Department orders that are present in this case.

The Department failed to distinguish Bregar v. Britton, 75 So.2d 753 (Fla. 1954), cert. denied, 348 U.S. 972 (1955). The only formal action taken by the local government in Bregar was to rezone the property at Britton's request. As in the present case, the local government knew of Britton's plans, just as Maitland knew in detail of the plans of Ridgewood's predecessors.[5] No question exists in the present case that the City of Maitland knew, in detail, of the plans of Ridgewood's predecessors for the development and that Ridgewood's predecessors relied on the "formal approval'' rezoning in spending substantial sums to pursue those plans.

5/ See, Statement of Facts, initial brief at pp. 6-11.

Bregar is directly on point and can not be distinguished.[6]

The Department attempts to stretch Dept. of Env. Reg. v. Oyster Bay Estates, Inc., 384 So.2d 891 (Fla. 1st DCA 1980), to apply to the present case. As Senator Graham stated in his presentation to the Ways and Means Committee, Section 380.06(12), Florida Statutes (1972), was intended to codify existing law at the time of its enactment (R. 3121, Tab 8, p. 16 line 21). Further, Oyster Bay Estates does not stand for the broad proposition claimed by the Department, does not involve Chapter 380 and the holding is vitiated by Chapter 380 itself and the Department's own orders.

Oyster Bay Estates merely stands for the proposition (i) that reliance and change of position must be demonstrated, and (ii) that the reliance must be on a specific authorization and the authorization must encompass the necessary improvements. As reflected above, in both the Altamonte Mall (R. Exh. 64) and to a lesser extent Dunn's Terminal (D. Exh, 123) cases, a building permit on a different element of the project was held sufficient to vest the remainder of the project which had not been permitted. Further, the grandfather provision contained in Section 380.06(12), Florida Statutes (1972), specifically permits the completion of any development which is commenced.

The Department also attempts to extend the holdings of Compass Lake Hills Development v. Department of Community Affairs, 379 So.2d

6/ An unbiased commentator has opined that Bregar stands for the proposition cited by Ridgewood. 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 owner's request, it is a sufficient government act upon which to base equitable estoppel"].

376 (Fla. 1st DCA 1979) and City of Fort Lauderdale v. State, Division of Local Resource Management, 424 So.2d 102 (Fla. 1st DCA 1982).

In Compass Lake Hills, the court was faced with a development in an unregulated county. As reflected in the opinion at page 379, Jackson County did not even have a zoning ordinance. As a result, the maximum permitted development was not capable of ascertainment. Quite clearly, in a totally unregulated county, a requirement of approval (not necessarily formal approval) of a specific plan of development is necessary to establish an estoppel. The same is not true in a county having zoning ordinances which contain use limitations, setbacks, height restrictions and other criteria by which the nature and extent of development can be guaged. Again, the underpinnings of equitable estoppel would require an act or omission on the part of the local government which would form the basis of the estoppel. Zoning is such an act, while mere awareness of a plan of development is not. One needs both the act or omission and knowledge on the part of the local government, together with reliance and change of position to establish an estoppel. Those elements were absent in Compass Lake Hills and are present here.

City of Ft. Lauderdale v. State, 424 So.2d 102 (Fla. 1st DCA 1982) is easily distinguishable. As a predicate, the Court should note an absence of factual description in the opinion which makes application of the holding difficult. No description of any reliance or change of position appears. In the context of estoppel, the case is truly unfathomable because the city was apparently contending it was estopped by its own actions. Beyond that, the court did not have

any legislative history before it and no evidence of prior agency interpretation. Finally, the case simply does not stand for the proposition argued by the Department.

The court held that "mere rezoning" is not an authorization to commence development because vested rights do not exist in zoning, citing City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428 (Fla. 1954) and Town of Largo v. Imperial Homes Corp., 309 So.2d 571 (Fla. 2d DCA 1975). The Department ignores that which was meant by the phrase "mere rezoning." The fact that the court cites equitable estoppel cases in this context reflects the equivalence of the common law concept and the statutory vested rights provision. A review of the cases cited in City of Ft. Lauderdale makes the correct meaning apparent.

In City of Miami Beach, the landowner prepared plans for his property based on existing zoning which was impressed on the property by virtue of a general amendment to a zoning ordinance. The amendment was not sought by the landowner with the intent to develop within the confines of the requested rezoning. The landowner merely owned property that happened to fall within an area to which a general amendment was applicable. He proceeded to create plans within that zoning classification for a hotel with diverse basement shops. After obtaining a foundation permit, the city changed its zoning ordinance to permit only limited types of basement shops as ancillary uses. The approved foundation plans did not show specific types of uses. As a result, estoppel was held not to apply.

By contrast, in Town of Largo, estoppel was held to bar the

City's attempt to downzone property after it had been rezoned at the property owner's request. The Second District distinguished City of Miami Beach and described the circumstances in the following terms:

> The mere purchase of land does not create a right to rely on existing zoning. City of Miami Beach v. 8701 Collins Ave., Fla. 1954, 77 So.2d 428. But, there is more here. At Imperial's request, the Town zoned the Trotter Tract to a multiple-family classification. At that time the town knew that Imperial planned a multiple-family high-rise development and that the purchase of the land by Imperial was contingent upon obtaining multiple-family zoning. With knowledge that Imperial would rely thereon, the Town approved the requested rezoning. Thereafter, Imperial bought the land and commenced the elaborate preparations necessary to the construction of a large development. Its master plan might well have been submitted earlier had the Town not changed certain setback requirements in 1971 which necessitated the redrawing of plans. Not until April 12, 1972, did Imperial have any notice that the Town officials contemplated a change in the zoning to single family. By that time Imperial had spent, or was obligated to spend, $310,000 for the land and over $69,000 in architectural fees, interest, taxes, sewer permits, and other direct development costs.

309 So.2d at 573. The contingent purchase of the property reflects reliance and change of position but not authorization.[7] The key point is that the requested rezoning is an act sufficient to create an estoppel and therefore sufficient to vest rights.

Having cited both City of Miami Beach and Town of Largo in support of its statement in City of Fort Lauderdale, the First District's

7/ Even if the Department contends that Town of Largo turns on the contingent nature of the purchase, the unrebutted facts in this proceeding reflect a contingent purchase and the hearing officer so found (R. 78, Paragraph 35). The finding was not challenged by the agency and therefore is binding on the agency. Section 120.57(1)(b)(10), Florida Statutes.

intent is explained. A general zoning amendment is "mere rezoning" and is insufficient to vest rights or create an estoppel. However, a requested rezoning which is granted[8] is not a "mere rezoning" and is sufficient "authorization to commence development" because Florida courts had long held that requested rezoning was sufficient to vest rights[9] assuming reliance and a change of position.

To apply City of Fort Lauderdale as argued by the Department would require a determination that the First District intended to disregard the Supreme Court's holding in Bregard v. Britton, 75 So.2d 753 (Fla. 1954) and related cases despite an explanation for the court's statement that does not require that improper rejection of Supreme Court precedent. The Department's contention 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. The Hearing

8/ This analysis dovetails the 1974 amendment to § 380.06(12), Florida Statutes, providing that transfer of property contingent on rezoning is sufficient reliance and change of position if the rezoning request is granted.

9/ See, note 6, supra

Officer found and the Department acknowledges at pages **37-8** of its answer brief that Maitland could not change Ridgewood's zoning or deny Ridgewood building permits. In the words of Senator Graham, applying the Chapter **380** vested rights provision: "If the local government can't do it to you, the state can't" (R. **3121,** Tab **9,** p. **21 1. 7-13).**

CONCLUSION

For the reasons set forth hereinabove and in Ridgewood's Initial Brief, 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 28th day of November, **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 28th day of November, **1989.**

Christopher C. Skambis