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IN THE SUPREME COURT OF FLORIDA

WIREGRASS RANCH, INC., Petitioner,	)	Case No. 82,463
vs.	)	DCA No. 92-01653
SADDLEBROOK RESORTS, INC., and SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, Respondents.	)	

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT SADDLEBROOK'S ANSWER BRIEF

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STATEMENT OF THE CASE AND THE FACTS

Wiregrass' Statement of the Case and the Facts misstates the record, including the bases for the Southwest Florida Water Management District's ("SWFWMD's") "Order Closing File" and for the Second District Court of Appeal's reversal of that order. In addition, Wiregrass' Statement omits several key facts necessary to a full understanding of this appeal. These misstatements and omissions are corrected below.

I. Wiregrass' Civil Action Against Saddlebrook.

In 1983, Wiregrass Ranch, Inc. ("Wiregrass") brought a nuisance action against Saddlebrook Resorts, Inc. ("Saddlebrook"), Porter v. Saddlebrook Resorts, Inc., Case No. 83-1860, in the Sixth Judicial Circuit Court, Pasco County, claiming that post-development surface water discharges from Saddlebrook, which lies upstream of Wiregrass' property, exceeded pre-development discharges. (R:1420, Recommended Order at 4-5.) Wiregrass contended that Saddlebrook's surface water discharges should be returned to pre-development, 1973 levels. (Id. at 5, 13.)[1]

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[1] The civil action went to trial in 1989, and in May 1989 the jury returned a verdict for Wiregrass. In December 1990, the trial court vacated the verdict and ordered a new trial on the ground that newly-discovered evidence established that Wiregrass' key expert witness had testified falsely both at trial and at deposition shortly before trial. In March 1992, the Second District affirmed the order of a new trial on the grounds that, under this Court's decision in Westland Skating Center, Inc. v. Gus Machado Buick, Inc., 542 So. 2d 959 (Fla. 1989), the trial court had erred in excluding evidence of the reasonableness of Saddlebrook's land use and in making liability dependent solely upon a county planning ordinance. Porter v. Saddlebrook Resorts, Inc., 596 So. 2d 472 (Fla. 2d DCA 1992). The Second District did not reach, and therefore left undisturbed, the trial court's order

(continued...)

In response to Wiregrass' complaints, in February 1990 Saddlebrook applied to SWFWMD for a Management and Storage of Surface Water ("MSSW") permit approving the redesign of Saddlebrook's drainage system. (Id. at 5.) The primary purpose of the proposed redesign is to return peak flow discharges during a 25-year storm event to pre-development, 1973 levels, as Wiregrass contends is necessary in the civil action. (Id.)

After an extensive, fifteen-month review, SWFWMD recommended approval of Saddlebrook's permit application by a Staff Report dated April 29, 1991 and a Notice of Proposed Agency Action dated May 3, 1991. (Id. at 8.)

II. Wiregrass' Petition And Claims Concerning Runoff Volume.

Wiregrass timely filed a Petition for Formal Administrative Hearing contesting SWFWMD's proposed issuance of Saddlebrook's MSSW permit. SWFWMD referred the petition to the Department of Administrative Hearings for hearing. (Id. at 2.)

By agreement, the parties submitted the direct testimony of their respective witnesses in prefiled written form. (See R:40, 10/21/91 Order re Prefiled Testimony.) For their prefiled direct examinations, Wiregrass simply transcribed and repeated verbatim the same testimony it had previously offered in the 1989 trial of its civil claims against Saddlebrook. Wiregrass likewise submitted the same exhibits which it had previously offered in the prior civil trial. (See, e.g., R:342, Hearing Tr., Vol. I at 43; R:96,

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[1] (...continued)
of a new trial on the separate grounds of newly-discovered evidence and false testimony. See 596 So. 2d at 473.

Wiregrass' Motion For Abeyance at 1.) This evidence focused primarily on Wiregrass' claims that the annual volume of runoff onto its property had increased as a result of Saddlebrook's development, resulting in millions of dollars of damage due to wetlands expansion and increased fill costs. (See, e.g., Wiregrass Hearing Ex. 36 (D. Fuxan prefiled direct) at 12-15; Wiregrass Hearing Ex. 39 (R. Callahan prefiled direct) at 7-29.)

III. The Formal Administrative Hearing And The Hearing Officer's Recommended Order.

The formal administrative hearing on Wiregrass' petition was held on December 2-4, 1991 and February 11, 1992. (R:1420, Recommended Order at 1.) It generated a five-volume, 740-page record, exclusive of more than 200 pages of prefiled direct testimony. A total of ten witnesses presented live testimony. More than 70 exhibits were admitted into evidence. Thereafter, the parties filed more than 90 pages of proposed findings of fact, conclusions of law, and other post-trial submissions.

On March 31, 1992, the Hearing Officer issued a thirty-page Recommended Order, which found that Saddlebrook had satisfied SWFWMD's permitting criteria and recommended that SWFWMD enter a final order granting Saddlebrook's permit application. (R:1420, Recommended Order.) The Recommended Order specifically addressed each of the claims raised by Wiregrass at the hearing, including those concerning alleged damage from increases in annual runoff volume. (Id. at 17-19, 21-22.) In particular, the Hearing Officer found that:

- "Saddlebrook's existing surface water management system has not caused a significant increase in the annual volume of runoff onto Wiregrass' property."

- "The evidence does not establish that Wiregrass has suffered, or will suffer, any adverse impact due to an increase in the annual volume of runoff from Saddlebrook as a result of the design, or redesign, of the system, or as a result of urbanization, or otherwise."

(Id. at 17-19.) The Recommended Order also specifically rejected the following findings proposed by Wiregrass on the ground that they were "not proven and contrary to the greater weight of the evidence":

- "The Ranch has experienced an increase in wetland acreage . . . due to an increase in water levels caused by the stormwater discharge off of Saddlebrook's property."

- "[T]he Ranch property has experienced increased flooding which have [sic] adversely impacted the land uses on the property."

(See R:1420, Recommended Order at 27-30; R:1249, Wiregrass' Proposed Recommended Order at 5, 6, 9, 11.)

Pursuant to Rule 40D-1.564(1), Wiregrass filed 20 pages of Exceptions to the Hearing Officer's Recommended Order on April 20, 1992. (R:1454, Wiregrass 4/20/92 Exceptions to Recommended Order.) Those Exceptions asserted that the Hearing Officer's findings and conclusions with respect to Wiregrass' claims of increased annual runoff volumes and damage -- which Wiregrass had previously contended were central to SWFWMD's permitting decision -- were "irrelevant and immaterial." (R:1454, Wiregrass Exceptions at 14, 15, 17-18. See R:160, Porters' Mem. in Opp. to SWFWMD Motion in Limine at 21, 25.)

IV. Wiregrass' Voluntary Dismissal Of Its Petition.

Pursuant to the Florida Administrative Procedure Act (Section 120.59) and SWFWMD's rules (Rule 40D-1.565), the Recommended Order and Wiregrass' Exceptions were scheduled to be considered by SWFWMD's Governing Board, and a final order entered, on April 28, 1992. However, on April 23, 1992, five days before the Governing Board meeting, Wiregrass filed a "Notice of Withdrawal or Voluntary Dismissal of Petition for Formal Administrative Hearing." (R:1475, 4/23/92 Notice.) By this Notice, Wiregrass purported to voluntarily dismiss its petition and thereby prevent the Governing Board from considering the Recommended Order and issuing a final order. (Id.)

In an April 27, 1992 letter to SWFWMD's General Counsel and members of the Governing Board concerning this Notice, Wiregrass' counsel claimed that Wiregrass was "forced to" abandon its challenge because "the Hearing Officer's recommended order went beyond the review of the permitting issues," presumably by deciding the very volume and damage claims which Wiregrass had previously claimed were central to the administrative proceeding. (R:1480, 4/27/92 Letter of Wiregrass' Counsel.) Counsel's letter also made clear that Wiregrass was dismissing its petition in an attempt to prevent the Recommended Order from becoming final and thereby precluding relitigation of these same issues in the retrial of Wiregrass' civil action against Saddlebrook:

> Since the Hearing Officer's recommended order went beyond the review of the permitting issues and ruled on issues prejudicial to the civil proceedings, we were forced to file the voluntary

> dismissal abandoning our challenge to Saddlebrook's permit.

(Id. (emphasis added).) In a legal memorandum attached to the letter, Wiregrass' counsel asserted that "[t]he voluntary dismissal of the Petition For Formal Administrative Hearing will terminate SWFWMD's jurisdiction in this matter so as to preclude the subsequent entry of a final order . . . ." (Id.)

At the April 28, 1992 Governing Board meeting, SWFWMD's counsel sided with Wiregrass on the effect of Wiregrass' notice of withdrawal. Thus, SWFWMD counsel advised the Board that Wiregrass' notice automatically and necessarily divested the Board of jurisdiction to consider the Recommended Order and left the Board with no option but to close the file:

> [T]he withdrawal of the petition by the petitioner means that the Board cannot and is without jurisdiction to take action on the recommended order; that the Board cannot issue a final order . . . . [I]t's our legal opinion that you don't have jurisdiction to enter a final order.

(R:1485, 4/28/92 Hearing Tr. at 8.) This advice was based entirely on Wiregrass' and SWFWMD counsels' reading of John A. McCoy Florida SNF Trust v. Department of Health & Rehabilitative Services, 589 So. 2d 351 (Fla. 1st DCA 1991). (R:1485, 4/28/92 Hearing Tr. at 36-38.)

The Board expressed serious policy concerns with this result. For example, Chairman Black noted that if such belated withdrawals were allowed, an applicant whose permit was denied could file a petition, force the District to incur the time and expense of a formal hearing, and then, if he did not like the hearing officer's decision, simply withdraw the petition, file a

new application and commence a new proceeding in the hope that another hearing officer would rule in his favor. (Id. at 15.) "[T]his can go on and on forever, and we've got to plug that loophole." (Id. at 16; see also id. at 45-46, 49-50.)

In response, SWFWMD's counsel did not advance any contrary policy considerations to support Wiregrass' belated withdrawal. Instead, counsel advised the Board that it could regulate such belated withdrawals only prospectively, by adopting a rule:

> If the Board perceives that there is a problem in this situation where we're bound by laws that we don't necessarily like, there are things I think we could probably do in our rules to do something about it.

(Id. at 14.) However, absent a rule limiting a petitioner's right to dismiss, the Board lacked jurisdiction to reject Wiregrass' notice and enter a final order:

> [I]n the absence of making express provision for this type of situation in our rules, we are bound by the McCoy case which says that jurisdiction is divested. . . . I think we can fix this problem with a rule change. But as we sit here today, our rules just don't say that.

(Id. at 42.)

The Board made clear that it disagreed with Wiregrass' last-minute withdrawal and that, but for its counsel's advice, it would disregard Wiregrass' notice and enter a final order:

> [SWFWMD's counsel]: [O]ne of Saddlebrook's problem[s] with this whole thing is that Wiregrass can come in at the last minute and do a withdrawal.
>
> James Cox: I'm not sure what the civil rules are, but that don't seem right to me.
>
> John Hammer: Amen!

> James Cox: It may be legal, but it ain't right.
>
> [SWFWMD's counsel]: Again, the legal result is sometimes not the equitable result. But, again, I think there is something we can do to fix our rules for future situations.
>
> James Cox: I'm talking about the current situation.

(Id. at 45-46.)

In the end, the Board felt constrained to follow its counsel's legal advice. The Board therefore entered an "Order Closing File" stating that Wiregrass' "Notice of Withdrawal divests [SWFWMD] of jurisdiction to enter a final order in [this] matter," and approved Saddlebrook's permit as if no petition had been filed, no hearing had been held, and no decision had been rendered. (R:1536, 4/28/92 Order Closing File.) The Board did not "opt" to adopt this Order. (Wiregrass Brief at 4.) As even Wiregrass conceded below, the Board was told it had no choice in the matter -- "it was without jurisdiction to proceed further." (Answer Brief of Wiregrass, Sept. 1, 1992, at 4.)

Immediately thereafter, Board Member Harrell made the following motion:

> I think the gentleman representing Saddlebrook has showed all the equities and our problems with the law. I think we ought to go back and readdress our law. And if we don't have jurisdiction, I'd like to recommend that our legal counsel go back, revisit our rules to see how we can . . . prevent a similar occurrence in the future and make [a] report to the Regulation Committee, ultimately back to the Board.

(R:1485, 4/28/92 Hearing Tr. at 49-50.) The Governing Board immediately passed this motion unanimously and without further discussion. (Id.)

V. The Second District's Reversal of SWFWMD's "Order Closing File".

Saddlebrook appealed, and the Second District reversed SWFWMD's "Order Closing File" on July 9, 1993. Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 18 Fla. L. Weekly D1590 (Fla. 2d DCA July 9, 1993).

The Court began its analysis by making clear that the issue before it was SWFWMD's jurisdiction to determine whether, despite Wiregrass' attempt to withdraw, SWFWMD could enter a final order on the Hearing Officer's decision on Wiregrass' Section 120.57 petition:

> Saddlebrook contends that allowing the voluntary dismissal without the issuance of a final order in regard to matters litigated before the hearing officer allows a relitigation at a later date of those matters even though the MSSW permit was issued to Saddlebrook.
>
> * * *
>
> We do not believe we are required to determine in this appeal whether or not Saddlebrook's concerns are justified or legitimate. That is a matter for SWFWMD to eventually determine. However, by construing Wiregrass' notice of withdrawal or voluntary dismissal to automatically terminate SWFWMD's jurisdiction, SWFWMD has effectively precluded itself from the ability to determine the very issues Saddlebrook now raises here.

(18 Fla. L. Weekly at D1591; emphasis in original.)

The Court found that Wiregrass' "lack of jurisdiction" argument was refuted by fundamental and well-settled principles of Florida administrative law, including the distinction between agency jurisdiction over a permitting proceeding and the administrative process through which the agency exercises its jurisdiction over that proceeding. (See, e.g., id. at D1591.)

SWFWMD's jurisdiction was invoked by the filing of Saddlebrook's application for a MSSW permit. That jurisdiction was not divested by Wiregrass' purported withdrawal of its petition for a formal hearing, an aspect of agency process:

> [I]n a permitting process, the jurisdiction of an agency is activated when the permit application is filed. Jurisdiction to proceed in that permitting process to a conclusion of whatever process has been activated is only lost by the agency when the permit is issued or denied or when the permit applicant withdraws its application prior to completion of the fact-finding process.

(Id. at D1593; emphasis in original.)

Explaining this holding, the Court analyzed a number of statutory provisions and administrative rules that make clear an agency's broad authority and discretion with respect to administrative process, including the circumstances under which dismissal of a Section 120.57 formal proceeding will be allowed. (Id. at D1591-92.) The Court also noted the absence of any statutory, rule or other basis for Wiregrass' claimed "right" to unilaterally and automatically divest an agency of jurisdiction to enter a final order absent a rule limiting that "right". (Id. at D1593.) Finally, the Court noted the illogic of Wiregrass' argument (and McCoy's holding) that an agency can create for itself jurisdiction that would not otherwise exist by simply adopting a rule:

> The McCoy Court correctly observes that an administrative agency is limited to such jurisdiction as is conferred by legislative enactment. An agency cannot enlarge, reduce or modify its jurisdiction by its own action. Yet, the McCoy court reasons that [Middlebrooks v. St. Johns River Water Management District, 529 So. 2d 1167 (Fla. 5th DCA 1988),] is distinguishable

> because the water management district involved there had adopted a rule which allowed it, in the face of a notice of voluntary dismissal, to retain jurisdiction that the district would have been without absent the adoption of its own rule. Since an agency cannot confer jurisdiction upon itself, the adoption of an agency rule should have no effect upon jurisdiction.

(Id. at D1593; emphasis in original.)

Accordingly, the Second District reversed SWFWMD's "Order Closing File" and remanded to SWFWMD for further proceedings consistent with the Court's opinion. (Id.)[2]

SUMMARY OF ARGUMENT

The Second District properly rejected Wiregrass' argument that the "withdrawal" of its Section 120.57 petition -- after formal hearing and the Hearing Officer's issuance of a recommended decision -- somehow divested SWFWMD of jurisdiction to determine whether it would enter a final order adopting or rejecting the Hearing Officer's proposed findings. Applying well-settled principles of Florida administrative law, the Court correctly held that SWFWMD's jurisdiction was invoked by Saddlebrook's permit application and that SWFWMD, therefore, had authority to proceed to a conclusion of whatever process had been activated during the course of the permitting proceeding, including Wiregrass' Section 120.57 petition for formal hearing:

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[2] On remand, the SWFWMD Governing Board entered a Final Order on October 25, 1993 adopting the findings of fact and conclusions of law in the Hearing Officer's Recommended Order in their entirety. See Wiregrass Ranch, Inc. v. Saddlebrook Resorts, et al., Case No. 91-3658, Final Order (October 25, 1993). Wiregrass' appeal to the Second District from that Final Order is pending.

> To restate our conclusion, in a permitting process, the jurisdiction of an agency is activated when the permit application is filed. Jurisdiction to proceed in that permitting process to a conclusion of whatever process has been activated is only lost by the agency when the permit is issued or denied or when the permit applicant withdraws its application prior to completion of the fact-finding process.

Id. (emphasis in original).

Wiregrass does not challenge this holding. Indeed, it is forced to concede that it "is a correct statement of law." (Brief at 29.) Instead, Wiregrass bases its attack on a purported "factual error" or "erroneous assumption" concerning Wiregrass' argument that the Court simply did not make -- that Wiregrass' "withdrawal" terminated not only SWFWMD's jurisdiction on Wiregrass' Section 120.57 petition, but also its jurisdiction in the entire "Chapter 373 permitting process", and thereby prevented the issuance of a permit. (Brief at 9. See also id. at 6, 8, 11, 12, 17, 26, 27, 28, 29, 30, 31.)

When this straw man is stripped away, all that remains is the same argument, grounded on McCoy, that was made and rejected below -- absent "a rule which prohibits the voluntary dismissal of a petition after the hearing officer has announced his recommendations, the withdrawal or dismissal of that petition by the petitioner will terminate the jurisdiction . . . of the agency to act on the petition." (Brief at 10.)

Wiregrass simply ignores the Second District's careful refutation of this argument. For example, Wiregrass offers no rebuttal with respect to McCoy's confusion of agency jurisdiction and administrative process, or McCoy's failure to recognize an

agency's broad jurisdiction and discretion to regulate administrative process, including the circumstances under which dismissal of Section 120.57 petitions will be allowed. See Saddlebrook Resorts, Inc., 18 Fla. L. Weekly at D1591-93. Similarly, Wiregrass does not even attempt to show where "in applicable statutory provisions, in the rules adopted by SWFWMD, or in the model rules of administrative procedure, there is a provision for a 'voluntary dismissal' of a proceeding in the permitting process by a party who is not an applicant without agency approval." See id. at D1593. Finally, Wiregrass never explains why, if an agency cannot confer jurisdiction upon itself, its adoption of a rule limiting voluntary dismissal can somehow create jurisdiction that would not otherwise exist. See id.

In sum, Wiregrass is forced to attack a straw man because it has no response to the Second District's actual holding and analysis. It is not the Second District's analysis that is "confused", "flawed" or grounded on "erroneous assumptions" (e.g., Brief at 8, 9, 30), it is Wiregrass'.

ARGUMENT

I. The Second District Properly Held That Wiregrass' Attempted Withdrawal Of Its Petition After Hearing And Decision Did Not Divest SWFWMD Of Jurisdiction To Enter A Final Order.

The Second District correctly held that it was up to SWFWMD to determine what effect it would give Wiregrass' attempt to withdraw its Section 120.57 petition after hearing and decision. This is not a matter of agency jurisdiction. Rather, it is a matter of administrative process that, within the constraints of

Section 120.57 and the agency's rules, is subject to the authority and discretion of the agency. An agency may choose to accept such a dismissal and decline to enter a final order. But a Section 120.57 petitioner cannot by its own unilateral act divest an agency of jurisdiction and thereby prevent that policy choice.

The Second District began its analysis by summarizing Saddlebrook's argument:

> Saddlebrook contends that allowing the voluntary dismissal without the issuance of a final order in regard to the matters litigated before the hearing officer allows a relitigation at a later date of those matters even though the MSSW permit was issued to Saddlebrook.

Saddlebrook Resorts, Inc., 18 Fla. L. Weekly at D1591. The Court then observed, correctly, that this was a matter for SWFWMD to determine. Id. However, SWFWMD -- by accepting Wiregrass' argument that its notice of withdrawal divested SWFWMD of jurisdiction -- had improperly precluded itself from resolving the very policy question Saddlebrook raised:

> We do not believe we are required to determine in this appeal whether or not Saddlebrook's concerns are justified or legitimate. That is a matter for SWFWMD to eventually determine. However, by construing Wiregrass' notice of withdrawal or voluntary dismissal to automatically terminate SWFWMD's jurisdiction, SWFWMD has effectively precluded itself from the ability to determine the very issues Saddlebrook now raises here.

Id. (emphasis in original). Accordingly, the Court held:

> In an administrative agency "permitting" or "licensing" context or process, a jurisdictional focus, as seen in McCoy and subsequent cases, is proper when (and perhaps only when) the party seeking to voluntarily dismiss the proceeding is the "permit" applicant. Where the party seeking to voluntarily dismiss a permitting proceeding is a party other than the applicant, we conclude that

> jurisdiction of the agency is not lost by that third party's attempted or actual withdrawal from the proceedings.

Id. (footnote omitted; emphasis in original). Thus, an agency has "[j]urisdiction to proceed in that permitting process to a conclusion of whatever process has been activated," including entering a final order in a Section 120.57 formal proceeding where the petitioner attempts to "withdraw" its petition after hearing and decision. Id. at D1593.

The Court grounded this holding on well-settled principles of Florida administrative law that Wiregrass nowhere disputes, including the fundamental distinction between agency jurisdiction and administrative process:

> [W]hen a party (Saddlebrook) applies to an agency (SWFWMD) for a permit, the agency jurisdiction is invoked and its permitting process is activated. Jurisdiction and process are not synonymous. "Licensing" (permitting) is the subject of a separate section (§ 120.60) of the Administrative Procedure Act. Section 120.60(1) specifically provides that licensing (the process) "is subject to the provisions of s. 120.57" Section 120.57 is the provision of the Administrative Procedure Act which governs the agency process when the agency is determining substantial interests of parties. Section 120.57 provides for two types of process in determining those interests. Section 120.57(1) applies to "Formal Proceedings" and section 120.57(2) applies to "Informal Proceedings."

Id. at D1591 (emphasis in original). In short, "the agency permitting jurisdiction is invoked when a party seeks a permit; the process of exercising that jurisdiction is governed by either the 'formal' or 'informal' method provided by Section 120.57." Id.

The Court next analyzed statutory provisions and SWFWMD rules that make clear that SWFWMD has broad authority and

discretion with respect to administrative process, including whether it will continue with a Section 120.57(1) formal hearing where the petitioner seeks to dismiss its petition.

First, where, as here, fact issues have been raised, Section 120.57(1) "requires a formal proceeding unless waived by all parties to the proceeding." Id. at D1592 (emphasis in original). SWFWMD's rules make clear that it is a "party" in such proceedings. See id.; Fla. Admin. Code R. 40D-1.504. Thus, a petitioner cannot waive a formal proceeding on its own. The agency has to approve that waiver, and may insist upon a hearing even where the petitioner no longer wants one. This is made clear by SWFWMD's Rule 40D-1.521(5), which expressly provides that "those persons who have petitioned for formal proceedings (Wiregrass) may waive their right to formal proceedings (voluntary dismissal of petition) and such waiver may be granted (or denied) at the option of SWFWMD":

> Petitioners entitled to a hearing pursuant to Subsection 120.57(1), Florida Statutes, may waive their right to a formal hearing and request an informal hearing before the Board pursuant to Subsection 120.57(2), Florida Statutes, which may be granted at the option of the District."

18 Fla. L. Weekly at D1592 (quoting Fla. Admin. Code R. 40D-1.521(5)) (court's emphasis).

Second, Section 373.413, "the substantive statute that governs the issuance of permits for MSSW," likewise "provides for the exercise of discretion by the administrative agency" to hold a formal proceeding even where it is not requested by another party:

> If no substantial objection to the application is received, the governing board or the department,

> after proper investigation by its staff, may at its discretion approve the application without a hearing.

Id. (quoting § 373.413(5), Fla. Stat. (1989)) (court's emphasis). This discretion to dispense with a hearing would be meaningless unless the agency also could require a hearing where no substantial objection was received.[3]

Finally, the Court observed that Wiregrass could point to no statutory or other basis for its claimed "right" to dismiss its petition and thereby "divest" the agency of jurisdiction to enter a final order:

> [N]owhere in applicable statutory provisions, in the rules adopted by SWFWMD, or in the model rules of administrative procedure, is there a provision for a "voluntary dismissal" of a proceeding in the permitting process by a party who is not an applicant without agency approval.

Id. at D1593. The only possible source for Wiregrass' claimed right that the Court could find (and Wiregrass has advanced no other) was Rule 40D-1.524, entitled "Motions". See id. It provides that a party may make any motion permitted under the Florida Rules of Civil Procedure. Fla. Admin. Code R. 40D-1.524. The Court observed that, if the notice of dismissal in civil cases authorized by Civil Rule 1.420(a) is considered to be a "motion",

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[3] The last sentence of Section 373.413(5), upon which Wiregrass relies, addresses the situation where a "substantial objection to the application" is received:

> Otherwise, [SWFWMD] shall set a time for hearing in accordance with the provisions of chapter 120.

(See Brief at 23-24.) The fact that SWFWMD must conduct a hearing where a substantial objection is received, is completely irrelevant to SWFWMD's expressly stated "discretion" to hold a hearing even when a substantial objection is not received.

Rule 1.420 may provide a basis for Wiregrass' claimed dismissal right. Saddlebrook Resorts, Inc., 18 Fla. L. Weekly at D1593. However, Rule 1.420(a) also imposes important limits on this "right": where, as here, dismissal is sought after hearing and submittal of the case for decision, the case "shall not be dismissed . . . except on order of the court and upon such terms and conditions as the court deems proper." Fla. R. Civ. P. 1.420(a)(2).[4] Rule 1.420(a), therefore, does not have the effect of automatically and necessarily divesting the tribunal of jurisdiction that Wiregrass asserts, and "Wiregrass' position that their notice of voluntary dismissal deprived SWFWMD of jurisdiction to proceed to a final order would still be doomed." 18 Fla. L. Weekly at D1593 (emphasis in original). The Court noted that this was confirmed by Middlebrooks v. St. Johns River Water Management District, 529 So. 2d 1167 (Fla. 5th DCA 1988). There,

> the court found that the St. Johns district did not lose jurisdiction to enter its final order after receiving a hearing officer's recommended order even when the permit applicant withdrew his

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[4] Rule 1.420(a)(1) codifies the well-settled principle, recognized in Florida since at least the early 1800's, that a voluntary dismissal must be taken before the action is submitted to the fact-finder for decision. See Dobson v. Crews, 164 So. 2d 252, 255 (Fla. 1st DCA 1964) ("The Supreme Court of this State has repeatedly recognized . . . that [a voluntary dismissal] must be taken before the jury retire") (citing cases), aff'd, 177 So. 2d 202 (Fla. 1965). As the Dobson court explained:

> A plaintiff should not come up to the judicial trough and not be required to drink therefrom without valid excuse. Any other conclusion would permit a litigant to trifle with the processes of the court and to make a mockery of the administration of justice.

164 So. 2d at 259.

> application. * * * The Middlebrooks court correctly reasoned that, applying Rule 1.420(a)(1), a proceeding could not be voluntarily dismissed without agency approval after the fact-finding hearing officer had concluded the hearing process and submitted a recommended order to the district.

Id.

In sum, in a thorough and well-reasoned opinion the Second District correctly rejected Wiregrass' argument that a Section 120.57(1) petitioner's attempt to "withdraw" its petition after hearing and decision can somehow unilaterally "divest" the agency of "jurisdiction" to decide whether to enter a final order with respect to the hearing officer's decision.

II. Wiregrass Attacks A Straw Man; The Second District Did Not Confuse The Section 373 Permitting Process On Saddlebrook's Application With The Formal Hearing On Wiregrass' Section 120.57 Petition.

Although Wiregrass quibbles with certain portions of the Court's analysis, it does not challenge the Court's holding:

> [I]n a permitting process, the jurisdiction of an agency is activated when the permit application is filed. Jurisdiction to proceed in that permitting process to a conclusion of whatever process has been activated is only lost by the agency when the permit is issued or denied or when the permit applicant withdraws its application prior to completion of the factfinding process . . . .

(Brief at 29, quoting 18 Fla. L. Weekly at D1593.) Indeed, Wiregrass is forced to concede that this holding "is a correct statement of law." (Brief at 29.)

Instead, Wiregrass attacks a straw man -- the Second District's supposed assumption that, under Wiregrass' view, Wiregrass' withdrawal of its Section 120.57 petition "terminated the power" of SWFWMD under Section 373 "to grant or deny

[Saddlebrook's] pending application for the permit." (Brief at 8.) According to Wiregrass, the Second District

> failed to recognize . . . that the Chapter 373 jurisdiction of SWFWMD to grant or deny a permit is not impacted by the withdrawal of a petition filed pursuant to Chapter 120.57.

(Brief at 8.) Wiregrass parrots this straw man over and over again as if repetition will somehow make it true. (See, e.g., Brief at 6, 8, 11, 12, 17, 26, 27, 28, 29, 30, 31.)

It is not. The Court made no such assumption. To the contrary, it noted that, after SWFWMD entered the "Order Closing File" on Wiregrass' Section 120.57 petition, "the governing board approved the issuance of Saddlebrook's MSSW permit application." Saddlebrook Resorts, Inc., 18 Fla. L. Weekly at D1591. Neither the parties nor the Court questioned SWFWMD's jurisdiction to do so. That was not even an issue.

What was at issue was whether Wiregrass' purported withdrawal of its Section 120.57 petition "divested" SWFWMD of "jurisdiction" to enter a final order adopting, rejecting or modifying the Hearing Officer's recommended decision, as Wiregrass had urged and SWFWMD had ruled below. (Order Closing File, Vol. X, p. 1536.) The Court framed this issue, and summarized its holding on it, as follows:

> Saddlebrook contends that allowing the voluntary dismissal without the issuance of a final order in regard to the matters litigated before the hearing officer allows a relitigation at a later date of those matters even though the MSSW permit was issued to Saddlebrook.
>
> * * *

> We do not believe we are required to determine in this appeal whether or not Saddlebrook's concerns are justified or legitimate. That is a matter for SWFWMD to eventually determine. However, by construing Wiregrass' notice of withdrawal or voluntary dismissal to automatically terminate SWFWMD's jurisdiction, SWFWMD has effectively precluded itself from the ability to determine the very issues Saddlebrook now raises here.

18 Fla. L. Weekly at D1591.

Thus, the Court did recognize that Wiregrass' "dismissal" of its petition for a formal hearing under Section 120.57 did not divest SWFWMD's jurisdiction to proceed with the Section 373 permitting process. However, it went on to address the issue in this appeal, holding that Wiregrass' dismissal likewise did not divest SWFWMD of jurisdiction to proceed with the Section 120.57(1) "formal" proceeding Wiregrass had initiated:

> Therefore, we conclude that jurisdiction of the agency to proceed with the permitting process is not lost because one or more of the parties desires to dispense with a formal proceeding or hearing. Neither is the discretion of the agency to proceed with a formal proceeding lost by the action of a party (who is not the permitting applicant) seeking to withdraw from the proceeding.

Id. at D1592 (emphasis in original).

Wiregrass' straw man is further refuted by an examination of its alleged "basis" -- what Wiregrass terms an "implication" from a single sentence in the Court's opinion that Wiregrass calls (mistakenly) a "footnote":

> Where the party seeking to voluntarily dismiss a permitting proceeding is a party other than the applicant, we conclude that jurisdiction of the agency is not lost by that third party's attempted or actual withdrawal from the proceeding.

(Brief at 6, quoting 18 Fla. L. Weekly at D1591.) Read in context, it is clear that when the Court referred in this passage to the attempted dismissal of "a permitting proceeding", it meant any proceeding initiated as part of the permitting process, including a Section 120.57 petition like Wiregrass' here. See, e.g., id. at D1593 (referring to Wiregrass' dismissal "of a proceeding in the permitting process"). Similarly, when the Court referred to its conclusion that "jurisdiction of the agency is not lost," it meant not only jurisdiction to issue the permit (an issue that was not in dispute), but also "jurisdiction to proceed to a conclusion of whatever process had been activated," including entering a final order in a Section 120.57 proceeding filed as part of the Section 373 permitting process (the issue that was before the Court). This is made clear by the Court's holding:

> To restate our conclusion, in a permitting process, the jurisdiction of an agency is activated when the permit application is filed. Jurisdiction to proceed in that permitting process to a conclusion of whatever process has been activated is only lost by the agency when the permit is issued or denied or when the permit applicant withdraws its application prior to completion of the fact-finding process.

Id. at D1593.

In short, the Second District did not "misapprehend" Wiregrass' argument. It simply rejected Wiregrass' argument, on grounds that Wiregrass nowhere disputes.

Equally unfounded is Wiregrass' related legal argument that Section 373.413 and Section 120.57 provide for two separate and distinct proceedings and two completely different types of hearings. (See, e.g., Brief at 20, 21, 24.) Although this point

is not central to the Second District's holding, it is critical to Wiregrass' attack.

If, as Wiregrass asserts, Section 120.57 governs only "hearings" and not the action of the Governing Board in approving a permit application "without a hearing" under Section 373.413, then Saddlebrook's permit application could move forward outside the provisions of Section 120.57. If, on the other hand, Section 120.57 governs not only the process of agency approval where a petition for a formal hearing has been filed, but also the process of agency approval where objections have not been filed, Wiregrass' "lack of jurisdiction" argument loses its force. As the Second District observed, Wiregrass' withdrawal of its petition -- even if it were accepted by SWFWMD -- would not terminate the Section 120.57 proceeding. It would simply mean a change in process from a formal proceeding under Section 210.57(1) to an informal proceeding under Section 120.57(2). This change would not deprive SWFWMD of its power to enter a final order. 18 Fla. L. Weekly at D1592. See, e.g., Fla. Admin. Code R. 28-5.503.

Thus, Wiregrass repeatedly calls the Court "confused" because it fails "to distinguish among the types of 'hearings' available under §373.413 and §120.57" and to recognize that the process whereby a permit is issued where no objection is filed is somehow exempt from Section 120.57. (Brief at 20. See also id. at 21, 24.)

In fact, it is Wiregrass that it confused. Section 120.57 expressly states that its provisions govern all proceedings

in which the substantial interests of a party are determined by an agency:

> The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency. . . .

Section 120.57, Fla. Stat. (1989). That this specifically includes all action regarding permits is confirmed by SWFWMD Rule 40D-1.600, which provides that Section 120.57 governs "[a]ll District action regarding the issuance, suspension, annulment, withdrawal, revocation and denial of permits." Fla. Admin. Code R. 40D-1.600. As the Second District recognized:

> [T]he agency permitting jurisdiction is invoked when a party seeks a permit; the process of exercising that jurisdiction is governed by either the "formal" or "informal" method provided by section 120.57.
>
> * * *
>
> It must be again emphasized that the permitting process is exercised only by means of one of two alternatives, formal or informal proceedings.

18 Fla. L. Weekly at D1591, D1592.

Section 120.57, therefore, governs and prescribes the process the agency must follow in ruling on an applicant's permit application where a section 120.57 petition is not filed in a Section 373.413 permitting proceeding. It also regulates the process the agency must follow when a third party such as Wiregrass files and then later attempts to withdraw a Section 120.57(1) petition for a formal hearing. If the agency accepts the withdrawal of the petition, the process simply changes from a Section 120.57(1) formal proceeding to a Section 120.57(2) informal proceeding:

> [O]nce jurisdiction is invoked in a licensing proceeding the process may change from formal to informal or vice versa at the request of the parties and the option of SWFWMD.

18 Fla. L. Weekly at D1592 (emphasis in original). If the agency refuses to recognize the attempted withdrawal of the petition, the process continues as a Section 120.57 formal proceeding:

> Neither is the discretion of the agency to proceed with a formal proceeding lost by the action of a party (who is not the permitting applicant) seeking to withdraw from the proceeding. This would be true even when the nonapplicant party seeking to withdraw is the party who first sought the formal proceeding.

Id. at D1592.

Section 373 is not to the contrary. It is a substantive grant of authority to water management districts to regulate surface water within the state, including the issuance of MSSW permits. It does not purport to set forth procedures for approving permits that are not governed by the Administrative Procedure Act. Thus, the following language from Section 373.413(5), upon which Wiregrass bases its argument, simply describes an informal proceeding under Section 120.57(2), which does not require a hearing:

> If no substantial objection to the application is received, the governing board or the department, after proper investigation by its staff, may at its discretion approve the application without a hearing.

Brief at 22-23. See also Fla. Admin. Code R. 40D-1.501(2) ("Proceedings before the Board are informal proceedings. A permit

applicant or other affected person desiring a formal proceeding must submit a petition . . . ."[5]

In sum, Section 120.57 governs all administrative process where substantial interests of parties are decided. This specifically includes the process that occurs during a permitting proceeding under Section 373, whether it concerns the applicant's request for a permit or a petitioner's objections to the issuance of a permit.[6]

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[5] Wiregrass' approach would lead to "balkanization" and lack of uniformity in the procedural requirements applicable to the myriad substantive grants of statutory authority to Florida agencies and thereby defeat the very purpose of the Administrative Procedure Act. As the Legislature expressly found in enacting the APA:

> The intent of the Legislature in enacting this complete revision of chapter 120 is to make uniform the rulemaking and adjudicative procedures used by the administrative agencies of this state. To that end, it is the express intent of the Legislature that chapter 120 shall supersede all other provisions in the Florida Statutes, 1977, relating to rulemaking, agency orders, administrative adjudication, licensing procedure, or judicial review or enforcement of administrative action for agencies as defined herein to the extent such provisions conflict with chapter 120, ...

Section 120.72(1)(a), Fla. Stat. (1989). See also A. England & H. Levinson, Florida Administrative Practice Manual, §11.02(a) ("One of the primary purposes of the APA was to bring procedural regularity to a wide range of agency functions . . . .").

[6] Likewise unfounded is Wiregrass' attack on the following sentence in the Second District's decision:

> Formal proceedings necessitate a hearing, whereas an informal proceeding may, at the request of the parties and at the option of the agency, proceed without a hearing.

See Brief at 23-24 (quoting 18 Fla. L. Weekly at D1592). This is an accurate and non-controversial statement of well-settled Florida law. See, e.g., Village Saloon, Inc. v. Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation, 463 So. 2d 278, (continued...)

III. The Second District Properly Rejected McCoy.

When Wiregrass' straw man is stripped away, all that remains is Wiregrass' blind reliance on John A. McCoy Florida SNF Trust v. Department of Health & Rehabilitative Services, 589 So. 2d 351 (Fla. 1st DCA 1991), without any attempt to defend its analysis or to respond to the Second District's thorough refutation of its holding. (Brief at 12-19.)

In McCoy, McCoy and several competitors applied to the Florida Department of Health and Rehabilitative Services ("HRS") for a Certificate of Need ("CON") for the construction of a nursing home. 589 So. 2d at 351. After a comparative review, HRS issued a Notice of Intent to grant McCoy's application, and a competing applicant filed a Section 120.57(1) petition for a formal hearing challenging HRS's proposed action. Id. at 351-52. Following the formal hearing, the hearing officer entered an order recommending that HRS deny both McCoy's and the competitor's applications. Id. at 352. Thereafter, the competitor voluntarily dismissed its petition. Id. HRS entered a final order anyway, adopting the

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[6] (...continued)
284 (Fla. 1st DCA 1984) ("Section 120.57(1) governs formal proceedings and necessarily requires the holding of a hearing. Informal proceedings under section 120.57(2), on the other hand, may proceed with or without a hearing.") (emphasis in original). Nevertheless, Wiregrass mischaracterizes this sentence as a holding that SWFWMD has "the option to proceed without a hearing" where one has been requested pursuant to Chapter 120.57. See Brief at 23. But that is not what the challenged sentence states. It expressly refers to the agency's option to proceed with a hearing even though the parties have waived one -- not to dispense with a hearing where the parties have requested one.

hearing officer's recommended decision and denying both McCoy's and the competitor's applications. Id.

The First District reversed HRS's final order. Id. The court noted that "[i]n other cases, [the First District] has established that a voluntary dismissal of the petition for an administrative hearing divests HRS of jurisdiction to further review a CON application." Id., citing RHPC, Inc. v. Department of Health and Rehabilitative Services, 509 So. 2d 1267 (Fla. 1st DCA 1987), and Humana of Florida, Inc. v. Department of Health and Rehabilitative Services, 500 So. 2d 186 (Fla. 1st DCA 1986), rev. denied, 506 So. 2d 1041 (Fla. 1987). The Court stated that "this jurisdictional principle has also been applied to administrative proceedings before other agencies." Id., citing Rudloe v. Department of Environmental Regulation, 517 So. 2d 731 (Fla. 1st DCA 1987), and Orange County v. Debra, Inc., 451 So. 2d 868 (Fla. 1st DCA 1983).

The McCoy court was wrong. To begin with, it failed to recognize the distinction between agency jurisdiction and administrative process. Had it done so, it necessarily would have concluded that the competing applicant's attempted manipulation of HRS' certification process could not deprive HRS of jurisdiction to enter its final order denying both McCoy's and the competitor's CON applications. The competitor's petition for a Section 120.57(1) formal hearing did not invoke HRS's jurisdiction; McCoy's CON application did. Consequently, the competitor's withdrawal of its petition could not divest HRS of jurisdiction to enter a final order; only the issuance or denial of McCoy's CON application, or

the withdrawal of that application prior to completion of the fact-finding process, could do that. In short, the competitor's petition for a formal administrative hearing affected only the process through which HRS exercised its permitting jurisdiction. It could not confer or deny jurisdiction.

Further, none of the cases relied upon by McCoy (and, in turn, Wiregrass) supports its holding that a non-applicant's voluntary dismissal of a petition for an administrative hearing divests an agency of jurisdiction. For example, in RHPC, Inc. v. Department of Health & Rehabilitative Services, 509 So. 2d 1267 (Fla. 1st DCA 1987), a CON applicant voluntarily dismissed its own application and HRS entered an order refusing to reinstate it. 509 So. 2d at 1268-69. The First District affirmed HRS's order on the ground that the voluntary dismissal of the application terminated HRS's jurisdiction to consider further any issues related to that application. Id. Similarly, in Orange County v. Debra, Inc., 451 So. 2d 868 (Fla. 1st. DCA 1983), an applicant for a rule withdrew its application. 451 So. 2d at 869. Thereafter, the Florida Land and Water Adjudicatory Commission acknowledged the withdrawal of the application and denied the request of Orange County, a third-party, to issue a final order denying the application. Id. at 869.

Humana of Florida, Inc. v. Department of Health & Rehabilitative Services, 500 So. 2d 186 (Fla. 1st DCA 1986), rev. denied, 506 So. 2d 1041 (Fla. 1987), and Rudloe v. Department of Environmental Regulation, 517 So. 2d 731 (Fla. 1st DCA 1987), are even more inapposite. Neither involved a non-applicant's voluntary dismissal of an administrative petition. Rather, both involved

third-party intervenors who failed to timely file their own petitions and, therefore, had only a derivative right to a hearing dependent upon another petitioner's continuation of its challenge to the proposed agency action. See Humana, 500 So. 2d at 187-88; Rudloe, 517 So. 2d at 732-33.

In addition to lacking case support, the McCoy holding is contradicted by other cases in which the First District has upheld an agency's retention of "jurisdiction" following a voluntary dismissal, even where the party seeking dismissal was the applicant. For example, in Department of Professional Regulation v. Marrero, 536 So. 2d 1094 (Fla. 1st DCA 1988), rev. denied, 545 So. 2d 1360 (Fla. 1989), the court held that it was for the State Board of Medicine to determine in the first instance whether it retained jurisdiction to deny an application for a license to practice medicine even though the applicant had withdrawn his application. Id. at 1096. Similarly, in Department of Environmental Regulation v. Letchworth, 573 So. 2d 967 (Fla. 1st DCA 1991), the court upheld an agency's determination that a complainant's attempted withdrawal of his administrative complaint did not deprive it of jurisdiction to consider that complaint. Id. at 568-69. The court ruled that it was for the agency to determine what effect, if any, to give the complainant's attempted withdrawal. Id. See also Couch v. Turlington, 465 So. 2d 557 (Fla. 1st DCA 1985) (voluntary surrender of teaching license did not divest agency of jurisdiction to enter final order revoking license).

More fundamentally, McCoy's reasoning is internally inconsistent. On the one hand, the court acknowledged that an agency "is limited to such jurisdiction as is conferred by legislative enactment," and cannot confer jurisdiction on itself. At the same time, it held that, had HRS adopted a rule restricting belated dismissals, it would have retained jurisdiction to enter a final order. 589 So. 2d at 352 ("Unlike the agency in Middlebrooks v. St. Johns River Water Management District, 529 So. 2d 1167 (Fla. 5th DCA 1988), HRS has not adopted a rule which serves to restrict a petitioner's ability to voluntarily dismiss a proceeding."). This fatal flaw was summarized by the Second District below:

> The McCoy court, with all due respect to our colleagues there, makes a strange analysis in order to distinguish Middlebrooks. The McCoy court correctly observes that an administrative agency is limited to such jurisdiction as is conferred by legislative enactment. An agency cannot enlarge, reduce or modify its jurisdiction by its own action. Yet, the McCoy court reasons that Middlebrooks is distinguishable because the water management district involved there had adopted a rule which allowed it, in the face of a notice of voluntary dismissal, to retain jurisdiction that the district would have been without absent the adoption of its own rule. Since an agency cannot confer jurisdiction upon itself, the adoption of an agency rule should have no effect upon jurisdiction.

18 Fla. L. Weekly at D1593 (emphasis in original). Wiregrass makes no response.

Finally, Middlebrooks v. St. Johns River Water Management District, 529 So. 2d 1167 (Fla. 5th DCA 1988), undercuts, rather than supports, Wiregrass' McCoy-based argument. While that case stands for the proposition that an agency has the authority to bar

belated notices of withdrawal, it does not hold that an agency can do so only after adopting a procedural rule to that effect.

In Middlebrooks, the St. Johns Water Management District approved Middlebrooks' consumptive use permit application, but with limitations. 529 So. 2d at 1168. Middlebrooks challenged the District's limitations by filing a petition for formal administrative hearing pursuant to Section 120.57. Id. at 1169. Middlebrooks lost the subsequent hearing and, thereafter, filed exceptions to the hearing officer's recommended order. Id. Like Wiregrass, Middlebrooks then filed a notice of voluntary dismissal on the eve of the final hearing before the District's Governing Board. Id. The District rejected Middlebrooks' last-minute withdrawal and entered a final order adopting the hearing officer's recommended order. Id.

The Fifth District affirmed. Analogizing a formal administrative hearing to a civil trial, the court held that a voluntary dismissal filed after formal hearing and issuance of a recommended order does not prevent the District from entering a final order:

> [T]he hearing officer in an administrative proceeding is analogous to a jury. He is the fact-finder. The District Board is like a trial judge in a jury case. . . . After the fact-finder retires to deliberate the outcome, it is too late under Rule 1.420(a) to take a voluntary dismissal. Here the hearing officer had concluded his fact-finding process, and filed his tentative "verdict." He had "retired."

529 So. 2d at 1169.

Notably, the St. Johns District in Middlebrooks did not have a procedural rule prohibiting withdrawal of petitions after

the conclusion of an administrative hearing. (Brief at 10.) It had no rule relating to dismissal of administrative proceedings at all. What it did have was a rule generally adopting the Florida Rules of Civil Procedure to the extent they were not inconsistent with the agency's own rules. 529 So. 2d at 1169. The Fifth District concluded that this rule incorporated by implication the substance of Fla. R. Civ. P. 1.420 which, by its terms relates only to the voluntary dismissal of civil actions. Id.; Fla. R. Civ. P. 1.420. The Fifth District then applied Rule 1.420 to the case before it by analogizing administrative proceedings to jury trials. 529 So. 2d at 1169.

The foundation of the Middlebrooks court's analysis, therefore, was its direct analogy between judicial trials and administrative proceedings, and the compelling policy considerations for applying the long-settled rules relating to voluntary dismissal in the former to the latter. The court explained, for example, that to allow a petitioner to voluntarily dismiss its petition after the issuance of the recommended order would provide an advantage not available to other litigants -- the advantage of "20/20 hindsight":

> In this case, Middlebrooks allowed the hearing to proceed to conclusion. The fact-finder not only "retired", but he rendered a proposed "verdict." Middlebrooks knew when he sought to withdraw what the outcome in the case was most likely going to be. To allow him to dismiss at that point would afford him the advantage of 20/20 hindsight. No other party dismissing pursuant to Rule 1.420(a)(1) is allowed such an advantage.

529 So. 2d at 1170.

Wiregrass openly seeks this same unfair advantage in this case. Under its view, a petitioner could challenge proposed agency action, force the agency (and in this case the applicant) to spend tens of thousands of dollars litigating the issues it has raised, and then, if the decision is not to its liking, avoid any consequences by simply withdrawing its petition and treating as a nullity everything that happened as part of the proceeding, including the hearing and the hearing officer's decision.

This "heads-I-win, tails-you-lose" approach to administrative litigation is precisely what the Fifth District in Middlebrooks -- and the Second District in this case -- rejected. And for good reason. Saddlebrook's MSSW application sought only conceptual approval of its proposed drainage system redesign. Implementation of that redesign requires construction permitting at which time Wiregrass could attempt to relitigate the same challenges that the Hearing Officer rejected here. In addition, Wiregrass' claims concerning annual runoff volume and damage have already been litigated twice -- first in the 1989 civil trial where the verdict was vacated due to false expert testimony sponsored by Wiregrass, and a second time at Wiregrass' adamant insistence in this administrative proceeding. Entry of a final order raises the possibility, to be ruled upon in the first instance by the trial court, that a third trial of these issues -- a retrial in the civil case -- may be wholly or partially avoided.

In sum, the SWFWMD Board made clear its determination that post-hearing dismissals should not prevent entry of a final order. That determination is supported by common-sense equities

and hundreds of years of judicial precedent. Wiregrass offers no policy reason why this determination could not be implemented here, particularly in view of the Board's stated desire to do so. Instead, Wiregrass relies on a technical "jurisdiction" argument that elevates form over substance and is wrong as a matter of law.

The basis for argument -- McCoy -- is fatally flawed and the Second District properly rejected it. The McCoy court failed to recognize the fundamental distinction between jurisdiction and process, the authorities upon which it is based do not support its holding, it is contradicted by other First District decisions, and its reasoning is internally inconsistent.

CONCLUSION

The Second District did not "confuse", "misinterpret", or "misapprehend" anything. Rather, it correctly identified, cogently explained, and properly applied well-settled principles of Florida administrative law.

At bottom, Wiregrass is attempting to prevent SWFWMD's Governing Board from implementing its clear policy choice. This was made clear by SWFWMD's counsel and the Board when they entered the Order Closing File from which Saddlebrook appealed:

> [SWFWMD's counsel]: [O]ne of Saddlebrook's problem[s] with this whole thing is that Wiregrass can come in at the last minute and do a withdrawal.
>
> James Cox: I'm not sure what the civil rules are, but that don't seem right to me.
>
> John Hammer: Amen!
>
> James Cox: It may be legal, but it ain't right.

> [SWFWMD's counsel]: Again, the legal result is sometimes not the equitable result. But, again, I think there is something we can do to fix our rules for future situations.
>
> James Cox: I'm talking about the current situation.

(R: 1485, 4/28/92 Hearing Tr. at 45-46.)

SWFWMD's counsel was wrong. Here "the legal result" is "the equitable result." The authorities make clear that SWFWMD retained jurisdiction to enter a final order adopting the Hearing Officer's findings and conclusions despite Wiregrass' belated attempt to withdraw from the proceeding.

The decision of the Second District Court of Appeal should be affirmed.

Dated: February 17, 1994

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Respondent Saddlebrook's Answer Brief to be served on the following persons by Federal Express on February 17, 1994:

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