STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEN JOHNSON and COASTAL DEVELOPMENT CONSULTANTS,	)	
Petitioners,	)	
vs.	)	CASE NO. 94-2043DRI
BOARD OF COUNTY COMMISSIONERS OF FRANKLIN COUNTY, FLORIDA,	)	
Respondent,	)	
and	)	
THOMAS H. ADAMS,	)	
Intervenor.	)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Hearing Officer of the Division of Administrative Hearings, on August 22-23 and September 9, 1994, in Apalachicola, Florida.

APPEARANCES

For Petitioners: L. Lee Williams, Jr., Esquire
William J. Peebles, Esquire
MOORE, WILLIAMS, ET AL.
306 East College Avenue
Tallahassee, Florida 32302

For Respondent: Alfred O. Shuler, Esquire
SHULER & SHULER
34 4th Street
Apalachicola, Florida 32320

For Intervenor: John Tobin, Esquire
64 Revere Beach Boulevard
Revere, Massachusetts 02151

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioners should obtain an amendment to a development order which would allow multi-family residential development on the property of the Petitioners, presently designated as commercial property, on St. George Island, Franklin County, Florida. Included within that general issue are questions involving whether the proposed amendment is a "substantial deviation" from that 1977 development order, what vested rights, if any, the Petitioners have to develop their property, and whether the development, as proposed and as delineated in

the testimony and evidence, is consistent with the development order and any vested rights thus acquired by the Petitioners.

PRELIMINARY STATEMENT

The Petitioners' cause of action became ripe for adjudication upon the filing of a petition for appeal with the Florida Land and Water Adjudicatory Commission on February 17, 1994. That petition was transmitted to the Division of Administrative Hearings and the undersigned Hearing Officer for formal proceeding. On June 30, 1993, the Petitioners had filed with the Respondent a notification of proposed change to a previously-approved development of regional impact (DRI) in accordance with Chapter 380, Florida Statutes. That proposed amendment, if approved, would allow the development of multi-family residential units and condominiums on the Petitioners' property on St. George Island, Florida.

A public hearing was held on the proposed amendment by the Respondent on December 7, 1993 and upon a motion to deny it, the Respondent voted to deny the amendment. The Respondent issued an order setting forth the denial on January 4, 1994, in which the Respondent took the position that the owners of the property should apply for an amendment to the development order, specifying densities of uses permitted for the property and that future applications for development orders concerning the property should address storm water, sewage disposal, fire safety, emergency evacuation, water supply, and provide reasonable assurances that the quality and productivity of Apalachicola Bay will be maintained.

A formal hearing was conducted by the undersigned Hearing Officer on the above-mentioned dates. The Petitioners presented the testimony of Warren Emo, an architect and planner; Steve Leitman, an environmental consultant; Gary Volenec, a professional engineer specializing in waste water and environmental engineering; Helen Spohrer; Mary Lou Short; Dan Garlick, an environmental consultant and planner; Randy Armstrong, a biologist and environmental consultant; and Ben Johnson, representing the Petitioner entity. Petitioners' Exhibits 1-19 were admitted into evidence.

The Respondent presented the testimony of Woody Miley, manager of the Apalachicola Estuarine Research Reserve; Richard Deadman, a planning manager with the Department of Environmental Protection (DEP); Mike Donovan, senior planner for the Apalachee Regional Planning Council (ARPC); and Alan Pierce, county planner and emergency management director for Franklin County. The Respondent's Exhibits 1-11 were admitted into evidence.

The Intervenor presented the testimony of Charles Shiver; John Kintz, the potable water section supervisor for the northwest district of DEP; Jonathan May, acting wastewater supervisor and wastewater permitting engineer for DEP; Daniel Tonsmeire, assistant water resource planner for the Northwest Florida Water Management District (NWFWMD); Lee Edmiston, research coordinator for the Apalachicola Estuarine Research Reserve (Reserve) and Thomas H. Adams, the Intervenor himself. The Intervenor's Exhibits 2-7, 9, 10, and 13 were admitted into evidence.

Subsequent to the hearing, the parties had the proceedings transcribed and availed themselves of the right to submit Proposed Recommended Orders containing proposed findings of fact and conclusions of law. Those proposed findings of fact have been addressed in the rendition of this Recommended Order and are

specifically ruled upon again in the Appendix attached hereto and incorporated by referenced herein.

FINDINGS OF FACT

1. A development order (DO) was approved by the County on September 10, 1977 providing for a DRI for approximately 1,200 acres of property on St. George Island in Franklin County, Florida. The 1,200 acres to which the 1977 DO relates is not contiguous. It is separated into two parcels, one of which is located on the east end of St. George Island, adjacent to the state park, which contains 33-1/3 acres designated as "commercial". It is identified as the "Sunset Beach Commercial Area" in that 1977 DO. That same area is also referred to as Three Hundred Ocean Mile, Gorrie Ocean Mile, or Sunset Beach. The remaining portion of the 1,200 acres is located between 12th Street West and the Bob Sikes Cut, and is generally referred to as the "Plantation". The Plantation DRI property is divided by the 1977 DO into both residential and commercial areas. There are two designated commercial areas in the Plantation property, one of which is adjacent to Bob Sikes Cut and is approximately 100 acres in size. The other commercial area is approximately 150 acres in area and is referred to as the "Airport Commercial Area" or the "Nick's Hole Commercial Area". These areas are collectively referred to in the 1977 DO as the "Plantation Commercial Areas". The remainder of the Plantation DRI property consists of 900 to 1,000 platted, residential lots designated as "Residential Areas". Approximately 250 of these lots are already developed with single-family residences. The Petitioners are successor-in-interest to a portion of the Plantation property, owning approximately 58 acres within the Airport or Nick's Hole Commercial Area. This property is hereinafter described as "Petitioners' Property" and is depicted in Exhibits 9, 17, 18 and 19 adduced by the Petitioners.

2. The 1977 DO limits the total commercial area which can be developed to not more than 200 acres even though a larger portion is commercially designated. Thus, the development of the 58 acres at issue in this proceeding will not result in the limit in the 1977 DO being exceeded. The 1977 DO authorizes commercial development within the Plantation Commercial Areas, shown by page 5 of the Petitioners' Exhibit 2 in evidence. The 1977 DO thus provides that the commercial areas shall include one or more high quality resort hotels and motels, with affiliated uses such as tourist shops, restaurants, recreational amenities and similar activities. The 1977 DO provides that because specific plans for the two areas were indefinite at the time of the enactment of the 1977 DO, those areas would not be re-zoned at that time; but re-zoning of the areas would be granted upon final approval of the plans by the Respondent, "which approval shall not be unreasonably withheld". "Condominiums and multi-family residential structures shall not be allowed in any of the areas shown by Exhibit "A" without the prior consent of the Respondent. Before development is commenced in the commercial areas, plans and specifications for the site clearing and construction shall be submitted to the Respondent for review and approval. Upon such approval, the specific area in question shall be re-zoned to allow the requested land use."

3. The 1977 DO has been amended several times. Two of the amendments enacted in 1985 and 1987 specifically authorize condominium and multi-family residential development within the Plantation Commercial Areas.

4. The Franklin County zoning ordinance, Ordinance No. 75-7 (Zoning Ordinance), was in effect on September 20, 1977, when the 1977 DO was enacted. The Ordinance authorized condominium and multi-family residential development as

part of the "commercial designation" applicable to St. George Island in the Plantation Commercial Areas. A "Tourist Commercial District" is established in Section 630 of the Zoning Ordinance, and this land use is specifically applicable to the islands within Franklin County. Section 631 of the Ordinance includes within the "Principal Permitted Uses" hotel, motel, restaurant and gift shops and all uses within R-2 multi-family districts. Section 520 of the Zoning Ordinance, "Multi-Family Residential District", sets forth principal permitted uses, which include "multiple dwellings including townhouses, apartment houses . . .".

5. The Petitioners acquired their 58-acre parcel in 1991 after the entry of the 1977 DO and the two amendments referenced above. Exhibit "D" to the 1977 DO is depicted in Petitioners' Exhibit 3 in evidence. This exhibit, which includes the Petitioners' property, has been recorded in the Franklin County Public Records since 1977. The exhibit indicates the intensity of the contemplated development approved for the Petitioners' property. The portion south of Leisure Lane reflects the following densities: 525 to 675 hotel rooms; food and beverage outlets and other amenities associated with those hotel rooms; 65,000 to 82,000 square feet of resort shops and commercial business use; and 685 surface parking spaces (in addition to the parking spaces which would be located below the hotel). Those densities were calculated based upon the coverages depicted on "Exhibit D". The figures do not include that portion of the Petitioners' property north of Leisure Lane, which was also approved for commercial development.

The Proposed Development

6. "Resort Village", the proposed development, would consist of residential and multi-family development, hotel and inn and related commercial uses, such as retail shops and restaurants. Recreational amenities would be provided, such as a club house, swimming pool, tennis courts, racquetball courts and exercise facilities. The amenities would be available to surrounding property owners, as well. St. George Island is a resort vacation area, and the proposed development in Resort Village would be compatible with those uses. Approximately 150 of the 250 developed homes in the Plantation are in rental programs.

7. The Franklin County Comprehensive Plan and its land use goals, objectives and policies includes a "mixed-use residential" land use category, limited to developments such as DRI's. That category includes recreational, commercial, retail, office, and hotel and motel development, as well as multi-family residential uses. That category is very similar to the description of the Plantation Commercial Areas contained in the 1977 DO. Resort Village is the only parcel remaining in the Plantation area available for this type of development.

8. The Petitioners in the St. George Plantation Owners Association, Inc. entered into an agreement in October, 1992 providing for certain density and other restrictions on the Petitioners' property. These restrictions include density limitations of 3.9 residential units per gross acre; 19.5 hotel units per gross acre; and 12,000 square feet of miscellaneous commercial development per gross acre. The Petitioners also agreed not to exceed a 35-foot height limitation which was less than that previously approved by the County in the Plantation Commercial Areas.

9. The development restrictions agreed to by the Petitioners are more stringent than those previously approved for development in the Plantation

Commercial Areas and allowed-for by the County zoning code in effect in 1977 or currently authorized and allowed in commercial and multi-family developments in the County. The Petitioners have also agreed to limit the total impervious surface area to no more than 40 percent; to maintain a 50-foot buffer adjacent to wetlands; to maintain a large portion of the 58 acres in its naturally-vegetated state and not to seek permission to develop any of the DEP "jurisdictional wetlands" adjacent to Apalachicola Bay. Thus, all development will be on uplands without any permitting sought or development in wetlands and waters of the State.

Character of Prior Development Approvals

10. In the 1985 amendment to the 1977 DO, the County approved the mixed-use development of 352 multi-family units on 76.5 acres and a hotel conference center of 386 hotel units on 11 acres. The 1987 amendment approved by the County re-affirms a permitted development of the 352 multi-family units on 76.5 acres, and includes a resort-convention center/hotel with 250 units, a marina/motel with 40 units, and a "harbor house", consisting of 60 units, as well as the other authorized development. Additionally, the County approved, and there was constructed in the early 1980's, two projects in the commercial district in the center of the Island: The Villas of St. George, with a density of approximately 16.6 multi-family units per acre, and the Buccaneer Inn, with a density of approximately 44 hotel/motel units per acre. On September 2, 1981, the County approved a mixed-use development in the Sunset Beach Commercial Area in close proximity to the Bay, consisting of 252 multi-family residential units and 150 motel units, a density of nine multi-family units per acre, and 25 hotel/motel units per acre. Additionally, the Respondent recently authorized single-family residential units in this area.

11. The Buccaneer Inn, the Villas of St. George, and the Sunset Beach development all have more dense development than Resort Village would have, with a higher percentage of impervious surface, leaving very little natural vegetation. The Respondent recently approved and took an active role in encouraging and facilitating residential developments served by aerobic septic systems in the commercial district in the center of the Island. It did so by granting a variance for setbacks and an easement for waste water purposes. The densities for these developments are 4.3 residential units per acre, greater than the 3.9 residential units per acre the Petitioners have voluntarily imposed as a restriction on their property.

Reliance on Prior Approvals

12. The Petitioners, prior to acquiring the property, studied and researched the public records of Franklin County and other documents and did considerable investigation to become familiar with the 1977 DO, as well as the 1985 and 1987 amendments and what was allowed pursuant to those amendments. Additionally, the Petitioners had conversations with Alan Pierce, the Franklin County Planner, concerning the development of their property both prior to and after purchasing the property. In one conversation with Mr. Pierce prior to purchase, the Petitioners were advised by Mr. Pierce that in order to develop the Resort Village concept, the Petitioners would be better advised to acquire "commercially-designated" property within the Plantation, instead of trying to get single-family lots re-zoned. There is no evidence that the Petitioners were placed on notice by any documents or communication from Franklin County officials that they would not be able to develop the Resort Village proposal on their property.

13. After purchasing the property, the Petitioners continued communicating with Mr. Pierce and other Franklin County officials. Mr. Pierce was aware that the Petitioners were expending considerable resources in attempting to secure the necessary government permits and approvals, as well as doing market research, real estate development planning, and other activities related to the parcel in question. The Petitioners expended in excess of $500,000.00, as a result of their efforts in the preparation for development of the Resort Village, including fees to engineers, attorneys, architects, and various environmental specialists and consultants, as of December 1993.

Development Review Process Under the 1977 Development Order

14. The 1977 DO provides that it "is consistent with the local land development regulations of Franklin County, Florida." The DO contains "conceptual land plans", which are incorporated and made a part of the DO. The conceptual land plans are contained in "Exhibits A-F" to the 1977 DO. Two of the exhibits, "Exhibit A" and "Exhibit D", contain the conceptual plans for the development of the Petitioners' Property. The 1977 DO does not expressly set forth the specific densities for development of the Petitioner's Property, but the intensity of the contemplated development for a portion of the Petitioner's Property is shown on "Exhibit B" to the 1977 DO, as further described above.

15. If the Petitioners had not sought an amendment to the 1977 DO to include multi-family use, they would have simply submitted a specific site plan to the Respondent "for review and approval". Upon approval of the site plan, the Respondent would automatically re-zone the property as applicable. The automatic re-zoning of the property was re-confirmed at the Respondent's June 8, 1981 board meeting. See, Petitioners' Exhibit 15, page 3, in evidence.

16. If at the time the site plans are approved, state or federal approvals are still necessary, the Respondent is required to cooperate with the Petitioners in obtaining those approvals, as long as substantial, adverse data is not developed with regard to environmental damage and as long as cooperation does not require the expenditures of monies by the County. Since the Petitioner sought an amendment to the 1977 DO, pursuant to Section 380.06(19), Florida Statutes, to allow multi-family uses, the Petitioners address these issues as part of the Chapter 380, Florida Statutes, process, prior to submitting a detailed site plan.

Franklin County's Development Review Process

17. In order for commercial development to be effective in Franklin County, a site plan must be submitted for review and approval to the Planning and Zoning Commission. The Commission checks to insure compliance with setback requirements, parking requirements, impervious surface area, and other criteria set forth in Franklin County's ordinances. Information is also provided in the site plan approval process with regard to the treatment of waste water and the treatment and detention of storm water. After site plan approval, an applicant must next obtain any necessary waste water permits from either HRS or DEP, depending on the size of the project. A storm water permit from DEP must be obtained and a certificate from the utility system that potable water is available for the development. After these permits are obtained, an applicant must submit building plans and a building permit can then be issued. Franklin County has not adopted a process whereby it independently studies or evaluates the impact of the DRI. Franklin County relies upon the state permitting and regulatory process for that data.

Waste Water and Storm Water

18. The 1977 DO specifically addresses "sewage treatment and drainage control" and requires assurance that the planned development "will not cause pollution of Apalachicola Bay or other environmental damage". Under the 1977 DO, waste water treatment should be addressed at the site plan stage, which can occur before any or all of the permitting processes begin. The Petitioners presented considerable testimony regarding both the pending waste water treatment permit and the manner in which storm water would be addressed.

19. Waste water will be treated by an advanced waste water treatment system (AWT). It will be a municipal-type facility with Class I reliability and will be of a higher quality than any similar facility in Franklin County. The AWT plant provides the highest level of treatment available for domestic waste water. It will remove approximately 93 percent of the nitrogen content, 91 percent of the phosphorus, and 97 percent of the bio-chemical oxygen demand in the waste water effluent. Contrastingly, aerobic septic systems remove typically 13 percent, 0 percent, and 50 percent of the nitrogen, phosphorus, and bio-chemical oxygen demand, respectively.

20. The Petitioners propose to build the AWT plant in 30,000-gallon phases. They will install aerobic septic systems during the first years of development, until enough waste water is generated to efficiently operate the AWT plant. This will require a flow of approximately 5,000 gallons per day. The Petitioners have agreed to start construction on the AWT plant once 5,000 gallons of waste water is being generated and to disconnect all aerobic systems, once a permit to operate the treatment plant is issued by DEP. The Petitioners have also agreed not to exceed 10,000 gallons of flow at any time on the aerobic system.

21. In order to dispose of treated effluent, the Petitioners propose to use three sub-surface absorption cells. These will be used on a rotating basis so as to minimize the amount of effluent which will percolate to the ground water at each location.

22. There is considerable testimony regarding the importance of Nick's Hole to the Apalachicola Bay ecosystem. The Petitioners' property does not actually border Nick's Hole, but is in close proximity to it. The relative location of Nick's Hole and the Petitioners' property is depicted on Exhibit 9 in evidence. Unrefuted testimony by the Petitioners' expert witnesses, Gary Volenec and Steve Leitman, established, through their ground water study, that none of the waste water from the Resort Village development would migrate to Nick's Hole or to the marshes adjacent to it. Twenty percent of the ground water, at most, might eventually migrate toward the marsh and the Pelican Point Bay area, east of the airport and north of the Petitioners' property, with at least 80-90 percent of the treated waste water migrating toward the Gulf, in accordance with the ground water gradient in the area of the Petitioners' property. These studies did not require a specific site plan in order to be conducted accurately. Rather, they depend solely on the location of the absorption fields, as proposed, and the flow of the ground water, as revealed by the ground water study.

23. It must be remembered that DEP, through its permitting process, has ultimate control over the specific location of the absorption fields, their configuration, construction, and manner of use and operation, as is true of the waste water plant itself. After the waste water plant is constructed, the underground water, as part of the operating permit of the plant, will be

constantly monitored, as will the operation of the plant. If problems arise, constituting adverse effect or the potential thereof on the ground water or surrounding surface waters, which cannot be immediately remedied, the DEP has the authority to shut the plant down.

24. The volume of water flowing from the Apalachicola River into the Bay is approximately a minimum of 16 billion gallons per day. The average daily rainfall on Pelican Point Bay and the surrounding wetlands is 296,000 gallons, if apportioned on a daily basis. The amount of water flowing in and out of the Pelican Point Bay/Nick's Hole area with each tidal exchange is approximately 72 million gallons. If it be assumed that the maximum amount of treated waste water, which would be 120,000 gallons per day if development were effected without the proposed multi-family amendment (which would reduce that maximum amount to 90,000 gallons per day) and the maximum percentage of migration to Apalachicola Bay (20 percent) occurred, the maximum amount of water eventually getting into Apalachicola Bay after treatment would be 24,000 gallons per day. However, if the multi-family amendment were adopted and the Petitioners' proposed development proceeded accordingly, the maximum volume of water generated from Resort Village would be reduced to 18,000 gallons per day (90,000 GPD x 20 percent = 18,000).

25. The Intervenor expressed much concern that the sewage treatment plant would be located in a flood-prone area. This is not relevant concerning the addition of multi-family development to the permitted development on the property since, even if no amendment were sought and development proceeded as presently allowed under the 1977 DO, as amended, a waste water treatment plant treating as much as 120,000 gallons per day would be necessary. In any event, however, the Petitioners would be required to address such flooding concerns as part of the permitting process regarding waste water and storm water permits sought from the DEP at the appropriate time. Further, the critical components of the plant, including absorption cells, are required by the DEP to be well-elevated so that they can withstand the most severe storm events.

26. The Petitioners' expert witness, Randall Armstrong, testified as to how Resort Village's storm water plan would be designated and permitted. Since the Petitioners' property is on Apalachicola Bay, a Class II designated water, as well as an outstanding Florida water, the DEP has specific storm water requirements which have to be met before a permit can be issued. Although the detail or design for the storm water system is dependent on formal site plans, it is represented by the Petitioners that all storm waters will be captured, allowed to percolate into the ground, and that no storm water will be accumulated and discharged into the waters of the Bay or the Gulf. Ultimate approval of the amendment by Final Order in this proceeding should be conditioned on a binding agreement between the parties concerned to that effect. However, for areas that will remain in their natural state, even after development on the property, the flow patterns for storm water will not change.

27. The Respondent and the Intervenor are also concerned that storm water, under certain conditions, might flow from the Petitioners' property across the airport and into the marshes adjacent to Nick's Hole, even in the present, undeveloped condition. If that, in fact, occurs, the development of Resort Village will not alter that, for areas which remain in their natural state. If development occurs near or adjacent to the airport, any storm water will be captured and treated accordingly under the Petitioners' voluntary proposal, in any event.

28. According to testimony in the record, DEP, in both its waste water and storm water permitting and regulatory processes, is keenly aware and sensitive to the location of the Petitioners' property and the importance of activity on that property to the health of Apalachicola Bay. The Petitioners' will not be able to get a building permit to develop the property until the Petitioners have both the waste water and storm water permits. The granting of either of those permits will require extensive scientific investigation and demonstration of reasonable assurances that the various environmental concerns, in terms of water quality, the public interest and cumulative impacts of such projects, as provided in the pertinent provisions of Chapter 403, Florida Statutes, and attendant rules, will not be adversely affected. In any event, the addition of multi-family-type development will have no adverse effect on the issues concerning sewage and waste water treatment and will actually result in a reduction in the conceivable, maximum daily flows versus the development, in the commercial sense, already permitted under the 1977 DO, as amended.

Flooding Issues

29. The Respondent and the Intervenor also expressed concerns about potential flooding at the St. George Island site in question. While Richard Deadman indicated in his testimony that DEP had concerns regarding development of the Petitioners' property, such as flooding on St. George Island, Mr. Deadman stated that his concerns were passed on to others in DEP and would be taken into account in the relevant permitting processes. The Respondent and the Intervenor also expressed concerns regarding the impact of the development on hurricane evacuation and traffic densities. The Respondent and the Intervenor's witness, Mike Donovan from the ARPC, testified that the counsel's study showed that Resort Village would have no significant impact on the regional road system, which includes the bridge from the mainland to St. George Island.

Potable Water Issues

30. The Respondent and the Intervenor also were concerned regarding the availability of potable water. Based upon the testimony of the Intervenor's witness, John Kintz from DEP, the capacity of potable water for the utility on St. George Island is very near, if not already at, capacity. Clearly, for any additional development to occur within the area served by the St. George Island water utility, whether multi-family, single-family, or commercial development, the capacity of the utility will have to be increased. If not, water hookups will not be available; and, therefore, building permits cannot be granted in Franklin County.

31. The water utility does have an application pending at the NWFWMD to increase its water supply capacity. Fees paid by the Resort Village to the utility will assist it in providing for additional water capacity expansion. The Petitioners already have purchased 15,000 gallons capacity per day from the utility which is enough potable water to serve the project in the first several years of development. The Petitioners will continue purchasing potable water capacity on an as-needed basis as long as it is available and when it becomes available. In any event, if potable water is not adequately available, building permits cannot be granted and the development cannot proceed.

32. In terms of the lower densities, projected sewage flows, restrictions on parking and impervious surfaces, and the other factors delineated in the above Findings of Fact, the Resort Village development will have less adverse impact than the development already allowed by the 1977 DO, as amended, for the site in question. Thus, the Resort Village, as proposed by the Petitioners will

not constitute a substantial deviation from the types of development activities permitted by that 1977 DO, as amended.

33. Although concerns were expressed by a number of witnesses, and by the Respondent and the Intervenor, concerning the potential pollution of Apalachicola Bay or other environmental damage to the Bay and its ecosystem, no preponderant testimony or evidence was presented which could establish that the development of Resort Village would cause such pollution or environmental damage. Such concerns will be thoroughly addressed in the permitting and regulatory processes, for the various permits referenced above, in any event. The Resort Village, however, was demonstrated to have no additional adverse impact on any waters, wetlands or ground water subject to state regulation, in addition to or different from that posed by the uses already permitted by the 1977 DO, as amended.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

35. Pursuant to Section 380.07(2), Florida Statutes, a development order issued by a local government in a Chapter 380, Florida Statutes, proceeding can be appealed to FLAWAC, which, under Section 380.07(5), Florida Statutes, is required to hold a hearing pursuant to the provisions of Chapter 120, Florida Statutes. This contemplates that FLAWAC (or the undersigned Hearing Officer) will conduct a de novo evidentiary hearing pursuant to Section 120.57, Florida Statutes. Thus, local zoning provisions previously reviewed by certiorari to the circuit courts were shifted by the legislature, through the enactment of Chapter 380, Florida Statutes, to the FLAWAC. See, Manatee County v. Estech General Chemical Corporation, 402 So.2d 1251, 1253 (Fla. 2d DCA 1981), review denied, 412 So.2d 468 (Fla. 1982); Fairfield Communities v. Florida Land and Water Adjudicatory Commission, 522 So.2d 1014, and Transgulf Pipeline v. Board of County Commissioners, 438 So.2d 879.

36. Further, FLAWAC has a policy-making role in this process by the express statutory empowerment under Section 380.07(4), Florida Statutes, "to grant or deny permission to develop pursuant to Chapter 380 standards, and to attach conditions and restrictions to its decisions." Fairfield Communities v. Florida Land Water Adjudicatory Commission, Id. at 1014.

37. The local government, Franklin County, is protected in this process since:

> if the local government entity conducts its hearing with adequate procedural safeguards, such a hearing would presumably be considered full and complete by the Commission or its hearing officer and admitted into evidence at the Section 120.57 hearing. As such, the record of the local government hearing could provide competent, substantial evidence to support findings of fact made by the Commission or its hearing officer notwithstanding other evidence which might be adduced by the applicant at the Section 120.57 hearing.

Transgulf Pipeline v. Board of County Commissioners, Id. at 879. No cross-examination was allowed at the Respondent's December 7, 1993 meeting. Therefore, the record of that "hearing" does not reflect the provision of due process, procedural safeguards and is not admissible, competent, substantial evidence in this proceeding. The transcript of that December 7, 1993 Board of County Commission meeting, for the decision in dispute, is not in evidence.

38. Regardless of how the local government hearing is conducted, the local government has all of the rights provided to any party in a Section 120.57, Florida Statutes, proceeding. This includes the right to have witnesses attend, conduct cross-examination, make legal objections, and to present whatever evidence it deems appropriate subject to the normal admissibility standards. Scharrer v. Department of Professional Regulation, Division of Real Estate, 536 So.2d 320 (Fla. 3d DCA 1988), review dismissed, 542 So.2d 1334; and Chestnut v. School Board of Hillsborough County, 378 So.2d 1237 (Fla. 2d DCA 1979).

Vested Rights Issue

39. Statutory Vesting: The 1977 DO was entered pursuant to Chapter 380, Florida Statutes, and is, therefore, a DRI. Vested rights under a DRI are specifically recognized in Chapter 163, Florida Statutes, at Section 163.3167(8), Florida Statutes. That section provides that:

> Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development or regional impact pursuant to chapter 380 . . .

These vested rights are valid with regard to any "consistency" or "concurrency" requirements of Franklin County under Section 163.3194, Florida Statutes, or Section 163.3202, Florida Statutes. See, American Newland Associates v. State Department of Community Affairs, 11 F.A.L.R. 5205 (Fla. Dept. of Community Affairs 1989). See, also, Huckleberry Land Joint Venture v. State Department of Community Affairs, 11 F.A.L.R. 5706 (Fla. Dept. of Community Affairs 1989).

40. The Department of Community Affairs (DCA), which has jurisdiction pursuant to Section 120.565, Florida Statutes, to issue declaratory statements, interpreting Chapter 163, Florida Statutes, issued its opinion in In the Matter of: Petition for Declaratory Statement by Sarasota County, 14 F.A.L.R. 772, 775 (Fla. Dept. of Community Affairs 1992), as follows:

> . . . it is the Department's opinion that, under Section 163.3167(8), Florida Statutes, development rights specifically granted in a DRI development order issued prior to the effective date of a revised comprehensive plan are vested from the concurrency and consistency provisions of Chapter 163, Florida Statutes.

41. This legislative grant of vested rights is in addition to vested rights afforded to property owners under substantive Florida law:

> In applying Section 163.3167(8), Florida Statutes, local governments should bear in mind that although this vesting provision is statutory in nature, it does not replace the common law doctrine of equitable estoppel. Equitable estoppel still remains a remedy

> available to owners and developers which local government should consider on a case-by-case basis.

42. Section 163.3167(8), Florida Statutes, has been interpreted to "grandfather" or "vest" a developer's right to complete his project as originally approved by the local government under its existing comprehensive plan and land development regulations. See, Gulfstream Development Corporation v. Florida Department of Community Affairs, 11 F.A.L.R. 1018 (Fla. Dept. of Community Affairs 1988). These rights remain "without the further necessity of the commencement and good-faith continuation of his development". Id. at 1024. The vested rights remain even if a development order is amended since:

> The issuance of an amended development order does not abridge the vested aspect of the provisions of the development order that were not changed by the amendment. The rights granted under those unchanged portions of the development order would still be protected by Subsection 163.3167(8). Id. at 1026.

See, also, General Development Corporation v. State Department of Community Affairs, 11 F.A.L.R. 1032 (Fla. Dept. of Community Affairs 1988). Thus, the Petitioners have been shown to be statutorily vested to develop their property under the 1977 development order.

43. Common Law Vesting-Equitable Estoppel: The substantive law of vested rights is based upon the premise that government must deal fairly with citizens. Daniell v. Sherrill, 48 So.2d 736 (Fla. 1950). The substantive law in Florida employs the term "vested rights" and "equitable estoppel" interchangeably. See, City of Key West v. R.L.J.S. Corp., 537 So.2d 641, 644 (Fla. 3d DCA 1989), fn. 4. This rule of law often repeated by the Florida courts concerns whether a property owner: (1) in good-faith reliance; (2) upon an act of government; (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be inequitable and unjust to destroy the rights he has acquired. See, Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10 (Fla. 1976); City of Key West v. R.L.J.S. Corp., supra.; City of Lauderdale Lakes v. Corn, 427 So.2d 239 (Fla. 4th DCA 1983); Board of County Commissioners of Metropolitan Dade County v. Lutz, 314 So.2d 815 (Fla. 3d DCA 1975); Town of Largo v. Imperial Homes Corporation, 309 So.2d 571 (Fla. 2d DCA 1975); City of North Miami v. Margulies, 289 So.2d 424 (Fla. 3d DCA 1974). Thus, under these decisions, if vested rights are established by a landowner, local government is equitably estopped from enforcing a change in zoning regulations or other ordinances which would destroy or limit the landowner's vested rights.

44. The Petitioners herein have expended in excess of $500,000.00 beyond the purchase price of the property in attempting to develop the property, pursuant to the 1977 DO. This sum is well in excess of the $8,000.00 and $28,000.00 amounts expended in Project Home, Inc. v. Town of Astatula, 373 So.2d 710 (Fla. 2d DCA 1978); and Bregar v. Britton, 75 So.2d 758 (Fla. 1954), respectively, which sums were deemed sufficient by the courts therein to secure the landowner's vested rights.

45. The 1977 DO does not establish densities or intensities of use. Also, the Petitioners have not made substantial physical improvements to the Petitioners' Property. However, the absence of specific approvals, such as building permits and the lack of any physical improvements to property, do not

preclude vesting of development rights. See, Town of Longboat Key v. Mezrah, 467 So.2d 488 (Fla. 2d DCA 1985); Town of Largo v. Imperial Homes Corporation, supra. In the case of Centervillage Limited Partnership v. City of Tallahassee, Case No. 90-6431VR (DOAH, December 27, 1990), the Hearing Officer specifically rejected the city's argument that the property owner was required to establish that it had received specific density or intensity of use approval from the city to be entitled to a vested rights determination. The Hearing Officer determined that preliminary environmental permits and a conceptual agreement were sufficient to establish the vested right to develop the property as proposed by the owner.

46. The Petitioners have established each element of common-law vesting and the Petitioners have the right to develop the property subject only to the limitations set forth in the 1977 DO and subject to any required permitting by regulatory agencies in which the multiple concerns expressed in these proceedings by the Respondent and the Intervenor would doubtless be addressed at length.

47. The 1977 DO established specific uses, and "Exhibit D" to that Order reflects that very high densities and intensities of uses were contemplated. The Petitioners presented expert testimony that the following densities could be calculated from "Exhibit D" to the 1977 DO: 525-675 hotel rooms; food and beverage outlets and other amenities associated with the hotel rooms; 65,000 to 82,000 square feet of retail space; and 685 surface parking spaces. These figures do not include that portion of the Petitioners' Property north of Leisure Lane, which is also approved for commercial development.

48. Commercial development is limited in the 1977 DO by allowing commercial use of only 200 of the total 1,200 plus acres encumbered by the DO and by requiring assurances that any planned development "will not cause pollution of Apalachicola Bay or other environmental damage". Therefore, the maximum densities and intensities of use for the Petitioners' vested property are controlled only by the ability to provide reasonable assurances that the proposed development will not cause such pollution or cause environmental damage. The factors which are controlling are the uses, densities and intensities of uses of the proposed development and the infrastructure proposed to serve the development, which factors are inter-related. By way of example, the waste water treatment facility proposed by the Petitioners for the Resort Village will support a higher density and intensity of use than an alternative treatment facility.

49. The Petitioners' proposed development is a low-density development. The Petitioners have established that the inclusion of multi-family uses will result in less impact than a purely commercial development already specifically authorized under the 1977 DO. The densities and intensities of use have been voluntarily restricted by agreement with the neighboring property owners' association, which agreement in its elements should be made binding upon the parties in the Final Order issued herein. In fact, the densities proposed are less than the densities currently authorized for commercial and multi-family developments in Franklin County under its comprehensive plan.

50. Additionally, the Petitioners have agreed to treat waste water by an advanced waste water treatment system and method and to hold and treat storm water generated from the development to avoid any discharge from the Petitioners' Property, as well as to refrain from seeking any permitting or permission to develop in any state jurisdictional wetlands. The Petitioners have established in these proceedings that the Resort Village development

proposed will not cause pollution to the Bay or other environmental damage, subject to the investigation requirements and conditions attendant to obtaining the storm water and waste water treatment, construction and authorization permits from the DEP. Therefore, concerning the requested amendment to the 1977 DO, the Petitioners have established their vested right to develop the Resort Village development, as proposed, subject to obtaining those permits, as well as site plan approval and the relevant building permits.

51. Substantial Deviation: Pursuant to Subsection 380.06(19), Florida Statutes, any change to a previously-approved DRI DO, which "creates a reasonable likelihood of additional regional impact: or creates a regional impact not previously reviewed," constitutes a substantial deviation and is required to undergo additional Chapter 380, Florida Statutes, development of regional impact review. The development proposed by the Petitioners does not constitute a substantial deviation. As discussed above, the owner is vested pursuant to the 1977 DO to develop the property commercially with a more intense and dense type of use. The proposed development is consistent with those vested rights and does not create any additional impacts. In fact, it would create less impacts. The only change proposed is the addition of multi-family uses. The inclusion of multi-family uses in the development, in fact, reduces the impact of the project. Consequently, the proposed change is not a substantial deviation.

52. Pursuant to the 1977 DO, the Respondent's approval is required for multi-family use. However, this requirement must be construed and interpreted to preclude any arbitrary or unreasonable denial of a request for multi-family use. See, L.V. McClendon Kennels, Inc. v. Investment Corporation of South Florida, 490 So.2d 1374 (Fla. 3d DCA 1986); Kies v. Hollub, 450 So.2d 251 (Fla. 3d DCA 1984); and Burger King Corp. v. Austin, 805 F. Supp. 1007 (S.D. Fla. 1992). The Respondent presented no evidence which would justify the denial of the requested amendment.

53. Although the Petitioners are vested against the consistency and concurrency requirements of the current Franklin County comprehensive plan, the proposed development with its multi-family use is actually consistent with the land use goals of mixed-use development described in that plan. The Respondent has previously approved the mixed-use development, including multi-family uses at the Bob Sikes Cut property, which has the same commercial designation as the Petitioners' Property under the 1977 DO. Additionally, the Respondent has approved numerous other multi-family uses, as described in the above Findings of Fact.

54. It is undisputed that the Resort Village, as proposed with the multi-family use, will be of lesser intensity of use than developing the property entirely commercial. Thus, it has been shown that there is no reasonable basis to deny the proposed amendment.

55. Alternatively, the 1977 DO should be interpreted to allow condominium and multi-family uses within the Plantation Commercial Areas as a "special exception". The Franklin County zoning ordinance which was in effect in 1977 and the current Franklin County zoning ordinance were admitted into evidence. Franklin County Zoning Ordinance No. 75-7 provides some understanding of the section of the 1977 DO entitled "3.B.(v) Plantation Commercial Areas", which contains a statement that "Condominiums and multi-family residential structures shall not be allowed in any of the areas shown by Exhibit 'A' without the prior consent of the Board". The Petitioners' Property is a part of the area shown by Exhibit A.

56. As shown in the above Findings of Fact, the commercial zoning in existence at the time of the entry of the 1977 DO authorized condominium and multi-family residential development as part of the commercial designation for property on St. George Island. It may reasonably be concluded that Franklin County intended simply to treat a request to include a multi-family use as a "special exception". Multi-family uses within the Plantation Commercial Areas could have easily been precluded under the 1977 DO by simply omitting the phrase "without the prior consent of the Board".

57. There is a difference between seeking a rezoning of property and seeking a special exception. "In the case of a special exception, where the applicant has otherwise complied with those conditions as set forth in the zoning code, the burden is upon the zoning authority to demonstrate by competent, substantial evidence that the special exception is adverse to the public interest." Rural Newtown, Inc. v. Palm Beach County, 315 So.2d 478, 480 (Fla. 4th DCA 1975). Stated another way, "a special exception is a permitted use to which the applicant is entitled unless the zoning authority determines according to the standards in the zoning ordinance that such use would adversely affect the public interest". Id. at 480.

58. Thus, the burden would be on the Respondent to "demonstrate, by competent substantial evidence presented at the hearing, and made a part of the record, that the (special) exception requested by Petitioners did not meet such standards and was, in fact, adverse to the public interest". Irvine v. Duval County Planning Commission, 495 So.2d 167 (Fla. 1986). There is no competent, substantial evidence in the record of this proceeding that allowing multi-family use as a part of the development of the Petitioners' commercially-designated property would in any way be adverse to the public interest.

59. The Respondent and the Intervenor have expressed numerous concerns over the impact of the development of the Petitioners' Property. However, the Respondent cannot deny or limit the development rights based upon unsubstantiated concerns. For example, the Petitioners would be required to obtain permits for storm water and waste water treatment facilities and operations from the DEP, as well as site plan approval from the Respondent. The Respondent has no separate permitting requirements for storm water or waste water treatment, and no Franklin County ordinance exists which provides for standards of review for storm water or waste water facilities and operations. The Respondent, therefore, has no discretion to deny any development rights based upon any concerns regarding storm water or waste water treatment. That is a matter for the review, regulation and permitting authority of the DEP.

60. Local government must promulgate its public policy by virtue of a duly-enacted ordinance, otherwise, its application would be subject to the caprice of the local government officials. Southern Co-Op Development Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983); Garvin v. Baker, 59 So.2d 361 (Fla. 1952); City of Naples v. Central Plaza of Naples, Inc., 303 So.2d 423 (Fla. 2d DCA 1974). Quoting with approval from the lower court, the Florida Supreme Court in Garvin v. Baker, supra. at 362, stated:

> Should the city desire to effectuate some sound public policy within its authority, this should be done by duly enacted ordinances setting up standards to guide a citizen in carrying on its affairs. Otherwise, a citizen could act only subject to the unknown and

> uncertain views of a public official or several public officials, as experienced from time to time.

See, also, Southern Co-Op Development Fund v. Driggers, supra.

61. In the case of City of Naples v. Central Plaza of Naples, Inc., supra., the court considered the denial of a special exception to construct multi-family housing. The city argued, in support of its denial, that the proposed development would substantially increase traffic and create excessive demands on utilities and other services. The court held that, as pertinent as those matters may seem to be, the city did not have the right to consider them in making the determination. The court stated: "The only criteria upon which the Council could legally base its decision were those set forth in the ordinance . . . " Id. at 425.

62. In the case of Colonial Apartments v. City of Deland, 577 So.2d 593 (Fla. 5th DCA 1991), the landowner submitted site plans to construct apartments at a density of 13 units per acre. At a city commission meeting, adjoining landowners voiced opposition and succeeded in getting the city commission to limit the development to six units per acre. The Fifth District reversed this action and stated at 597-598:

> We agree with the city that project density is a legitimate concern and go further in stating that it is a most important concern. But it is a concern that must be addressed and expressed in appropriate ordinances. A community should be developed in accordance with planned action. Development decisions should not be made in reaction to an application that relies on an ordinance establishing a density no longer acceptable to the majority of the current members of a governing body. Owners are entitled to fair play; the lands which may represent their life fortunes should not be subjected to ad hoc legislation.

63. An owner seeking development approval under a local ordinance who satisfies the legal requirements of the ordinance is entitled to the approval. City of Lauderdale Lakes v. Coin, 427 So.2d 239 (Fla. 4th DCA 1983); Broward County v. Narco Realty, 359 So.2d 509 (Fla. 4th DCA 1978). As stated by the court in Broward County v. Narco Realty, supra., at 510:

> All persons similarly situated should be able to obtain plat approval upon meeting uniform standards. Otherwise, the official approval of a plat application would depend on the whim or caprice of the public body involved.

64. The Respondent does not have the discretion to deny a site plan approval based upon policies or concerns which are not included in a duly-enacted ordinance applicable to the Petitioners' vested property.

RECOMMENDATION

Based on the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties it is

RECOMMENDED that a Final Order be entered by the Florida Land and Water Adjudicatory Commission which:

1. Supersedes the January 4, 1994 order in its entirety;

2. Amends the 1977 Development Order to specifically allow multi-family use for the Petitioners' Property in the manner proposed by the Petitioners;

3. Determines that the amendment to this 1977 Development Order does not constitute a substantial deviation under Chapter 380, Florida Statutes;

4. Determines that the Petitioners have vested rights to develop their property at the densities and intensities of use proposed, subject to issuance of appropriate permits for storm water and waste water treatment construction and operation, site plan approval by Franklin County, and which incorporates the voluntary agreements and restrictions entered into by the Petitioners with the adjoining property owners;

5. Requires Franklin County to follow the same procedures and guidelines in the site plan approval process and building permit process for development of the Petitioners' Property as it does for every commercial or multi-family developments in Franklin County, Florida.

DONE AND ENTERED this 11th day of January, 1995, in Tallahassee, Florida.

P. MICHAEL RUFF
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of January, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 94-2043DRI

Petitioners' Proposed Findings of Fact

The Petitioners' proposed findings of fact are accepted to the extent they are not inconsistent with those made above by the Hearing Officer. They are rejected to the extent that they are so inconsistent, as being unnecessary, immaterial, or not supported by preponderant evidence of record.

Respondent's and Intervenor's Proposed Findings of Fact

The Intervenor's proposed findings of fact have been adopted by reference by the Respondent.

1-9. Accepted, but not necessarily material to resolution of the issues presented to the Hearing Officer.

10. Accepted.

11. Rejected, as not entirely in accord with the preponderant weight of the evidence as developed at hearing.

12-15. Accepted, but not entirely as to materiality inasmuch as this is a de novo proceeding with resolution of the issues presented dependent upon evidence adduced at a de novo hearing. These proposed findings are, in essence, illustrative of the procedural history of this case.

16-30. Accepted, to the extent that they actually constitute proposed findings of fact, and rejected to the extent that they merely constitute recitations of testimony. Although they are accepted, the concerns expressed are not material to the narrow range of issues presented in this proceeding, as opposed to the permitting proceedings to come concerning the storm water and waste water construction and operation permits which must be sought from the DEP. Moreover, the feared impacts which the concerns expressed in proposed findings of fact 16-30 relate have not been proven by preponderant evidence in view of the character of the proposed development, the decision by the developer not to seek permitting or to do any development in jurisdictional wetlands and in view of the less dense and intense type of development proposed herein versus that already permitted in terms of commercial designated use already allowed by the 1977 Development Order. Thus, these proposed findings of fact are largely irrelevant and immaterial to the issues presented in this particular proceeding.

31-35. Rejected, as constituting largely recitations of testimony, rather than proposed findings of fact, as being immaterial, in part, to the specific issues presented for resolution in this proceeding, as delineated in the above Findings of Fact and Conclusions of Law made by the Hearing Officer and as subordinate to the findings of fact in these particulars made by the Hearing Officer. They are largely irrelevant due to the discussion and conclusions of law made by the Hearing Officer, which are predicated on the Hearing Officer's findings of fact supported by the preponderant evidence of record.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the agency written exceptions to this Recommended Order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the Final Order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
LAND AND WATER ADJUDICATORY COMMISSION

BEN JOHNSON and COASTAL
DEVELOPMENT CONSULTANTS, INC.

Petitioners,

vs.

BOARD OF COUNTY COMMISSIONERS OF FRANKLIN COUNTY, FLORIDA,

FLWAC CASE NO. APP 94-023
DOAH CASE NO. 94-2043DRI

Respondent,
and

THOMAS H. ADAMS,

Intervenor.
_____/

FINAL ORDER

This cause came before the Governor and Cabinet, sitting as the Florida Land and Water Adjudicatory Commission (the "Commission"), On April 11, 1995, on Petition filed by Ben Johnson and Coastal Development Consultants, Inc., pursuant to Rule 42-2.002, Florida Administrative Code, initiating an appeal of an order issued by the Board of County Commissioners of Franklin County, Florida, denying Petitioner's Application for Amendment to the St. George Island Development Order dated September 20, 1977.

On April 12, 1994, the Commission granted a Motion to Intervene filed by Thomas H. Adams, a landowner adjacent to the property subject to the stated Development Order. The proceeding was referred to the Division of Administrative Hearings for a hearing on the merits of Petitioner's claims. A formal hearing was held on August 22-23 and September 9, 1994, in Apalachicola, Florida, before hearing officer P. Michael Ruff. The hearing officer issued his Recommended Order on January 11, 1995.

Subsequent to the hearing and the issuance of the Recommended Order, the Department of Community Affairs presented its Motion to Intervene, stating its substantial interest in the outcome of the proceeding as the State land planning agency. While the Department filed its motion at a late stage in the proceeding, we grant the motion to intervene noting the importance of the Department's role in the regional planning and development of this environmentally sensitive property.

Based upon a review of the record as a whole, the Commission, hereby rejects the Recommended Order as further specified herein. Therefore the Commission denies the proposed amendment to the St. George Island DRI development order.

FACTUAL SETTING

Petitioners are the owners of 58 acres on St. George Island, Florida, presently designated as commercial under the terms of a development order issued by Franklin County in 197. The property is part of what has been referred to in the development order as the Plantation Commercial Area. The property is within an area which has just recently lost its status as an area of critical state concern. While there are other areas of property designated as commercial within the 1200 acres covered by the 197 development order, the order provides primarily for the development of 900 to 1000 single family residential lots within the area designated as the "Plantation" on St. George Island. Currently about one-quarter of those lots have been developed as residential homes. When the development order was finalized in 19, an exhibit "D" was attached which partially described the commercial development intended for the Petitioner's property. Exhibit "D" includes "bubbles" with hand sketched areas labeled "resort shops," "beach club area," "future commercial," and "possible inn site." The order itself provides that the Plantation Commercial Area shall include one or more resort quality hotels or motels with the attendant commercial uses ancillary to those establishments. The plans for the development of these areas were indistinct in 197, but the order includes language that the commercial areas could not be used for the, construction of multifamily units or condominiums without the prior consent of the County. There is no specific proposal within the record from which the densities and intensities planned by the petitioner can be determined. There was also no specific plan showing

proposed densities and intensities before the County at the time they denied petitioners request.

The hearing officer recommended that this commission enter a final order which would' allow the Petitioners "to develop their property at the densities and intensities of use proposed Recommended Order, at page 35. This statement is made even though the Recommended Order does not contain any description of the proposed densities and intensities of use. Although the Recommended Order does describe the densities and intensities of use which, under at least one interpretation, could be developed under the original 197 DRI development order, apparently the Petitioners did not propose any specific densities or intensities of use for approval. The findings of fact made by the hearing officer therefore are not based upon competent, substantial evidence in the record as to the densities and intensities planned by the petitioner since such a proposal is not a part of the record.

Although such imprecision may have passed muster in the infancy of the DRI process, under presently effective statutes and rules, a proposed change must specify the location, density and intensity of approved projects.

The portion of the DRI statute which deals with amendments to approved DRI orders, Section 380.06(19), Florida Statutes (1993), measures proposed changes by, for example: 50 dwelling units, 75 hotel or motel units, 60,000 square feet of office development, and similar numerical thresholds for other types of development. Also, the rule which specifies the form and contents for DRI orders, Rule 9J-2.025, Florida Administrative Code, requires:

- Copies of development plans or specifications
- If approved, contain a description of the development which is approved, and specifies and describes
  - Acreage attributable to each use,
  - the magnitude of each land use,
  - open space,
  - areas for preservation,
  - structures or improvements to be placed on the property, including locations,
  - other major characteristics of the development
- Compliance and buildout dates.

None of these parameters can be derived from the Recommended Order, or from the record. Therefore, the Commission cannot know what would be approved by a final order which simply adopted the Recommended Order.

From this single mistaken factual finding flow the conclusions of law made by the hearing officer. Since we must find that factual determination-to be without competent, substantial, record support, we must likewise reject the conclusions of law respecting vested rights and equitable estoppel. Further, we find that the conclusions of law equating the developers situation to a "special exception" in zoning matters, is without support in Florida law.

INTERVENOR' S EXCEPTIONS

Intervenor's exceptions based upon the absence of specific information in the record to support the hearing officer's conclusions as to the density and intensity of the planned development are granted for the reason earlier specified. (See; exceptions to findings number 5, 14, 25, and 33) .

Intervenor's exceptions to findings of fact numbered 15, 3, 12, 22, 26 and 27, are mooted by the action of the Commission. Intervenor's exceptions to the conclusions of law are granted to the extent that they assert that the hearing officer's legal conclusion are premised on his erroneous conclusion that specific densities and intensities can be gleaned from the evidence found in the record. All other exceptions to the conclusions of law are found to be moot.

RESPONDENT' S EXCEPTIONS

Respondent's exceptions based upon the absence of specific information in the record to support findings of specific densities and intensities, are granted upon the same reasons stated for granting like exceptions filed by Intervenor. (See: exceptions to findings 5 and 9). Exceptions to factual findings 10 and 12 are mooted by the action of the Commission. Respondent's exceptions to the conclusions of law are granted to the extent that they assert that the hearing officer's legal conclusions are premised on his erroneous conclusion that specific densities and intensities can be gleaned from the evidence found in the record. All other exceptions to the conclusions of law are found to be moot.

CONCLUSION

The Commission, therefore rejects the Recommended Order for the reasons stated above, and issues this final order denying the proposed amendment to the St. George Island DRI development order. Pursuant to Section 380.08(3), Florida Statutes (1993), the following changes in the development proposal will make it eligible to receive approval:

1. Competent and substantial evidence on the record pursuant to a public hearing in Franklin County, to address the change in land use to condominiums and multifamily residences.
2. The proposal of a specific plan of development, which includes the density, intensity, and location of the proposal, and also complies with the other requirements in Chapter 380, Florida Statutes, and Rule 9J-2, Florida Administrative Code.
3. A sufficient plan and design for an advanced wastewater treatment facility, including provisions for monitoring the impacts of effluent disposal.
4. Limitations on the amount and type of development which may occur prior to the construction of the advanced wastewater treatment facility, so that the facility is constructed as soon as sufficient flow is available for treatment.
5. Provisions for providing' potable water to the development from a central water system and limitations on the number of temporary wells.
6. Provisions for addressing impacts to wetlands.
7. Provisions pertaining to stormwater management and flood control including limitations on the amount of non-pervious

surface and non-naturally vegetated surface in the development.

8. Provisions for hurricane evacuation.

9. Elimination of any dock or walkway system to Apalachicola Bay.

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Commission, Office of Planning and Budgeting, Executive Office of the Governor, The Capitol, Room 2105, Tallahassee, Florida 32399-0001; and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of Appeal. Notice of Appeal must be filed within 30 days of the day this Order is filed with the Clerk of the Commission.

DONE AND ORDERED, this 11th day of April, 1995, in Tallahassee, Florida.

_____

ROBERT B. BRADLEY, Secretary
Florida Land and Water
Adjudicatory Commission

FILED with the Clerk of the Florida Land and Water Adjudicatory Commission this 12th day of April, 1995.

_____

Patricia A. Parker
Clerk, Florida Land and Water
Adjudicatory Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following persons by United States mail or hand delivery this 12th day of April, 1995.

_____

ROBERT B. BRADLEY, Secretary
Florida Land and Water
Adjudicatory Commission

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Honorable Sandra Mortham
Secretary of State
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