STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDGEWATER BEACH OWNERS ASSOCIATION, INC.,	)	
Petitioner,	)	
vs.	)	CASE NO. 95-0437DRI
BOARD OF COUNTY COMMISSIONERS OF WALTON COUNTY and KPM, LTD.,	)	
Respondents,	)	
and	)	
DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Intervenor.	)	

RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its assigned Hearing Officer, Donald R. Alexander, on April 13 and May 26, 1995, in DeFuniak Springs, Florida.

APPEARANCES

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For Respondent: (KPM) Martha Harrell Chumbler, Esquire
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For Intervenor: David L. Jordon, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Walton County had authority to adopt resolution 93-2, which extends the termination date of the Edgewater Beach Condominium development order.

PRELIMINARY STATEMENT

This matter began on January 27, 1993, when petitioner, Edgewater Beach Owners Association, Inc., filed a petition under Section 380.07(2), Florida Statutes, with the Florida Land and Water Adjudicatory Commission (FLWAC) challenging the adoption of resolution 93-2 by respondent, Walton County. The resolution constitutes an amended development order reviving an expired development of regional impact order. An amended petition was thereafter filed by petitioner on April 1, 1993. On April 13, 1993, FLWAC dismissed the amended petition for lack of standing.

After petitioner appealed the order of dismissal, the order was reversed and remanded by the court in the case of Edgewater Beach Owners Association, Inc. v. Board of County Commissioners of Walton County, Florida et al, 645 So.2d 541 (Fla. 1st DCA 1994). In its opinion, the court concluded that the amended petition contained sufficient factual allegations to show that petitioner was "an owner of . . . affected property" within the meaning of the law, and thus it had standing to being this action. In accord with the court's mandate, on January 31, 1995, FLWAC forwarded this matter to the Division of Administrative Hearings with a request that a hearing officer be assigned to conduct a hearing.

By notice of hearing dated February 15, 1995, a final hearing was scheduled on April 13, 1995, in DeFuniak Springs, Florida. A continued hearing was held at the same location on May 26, 1995. Prior to the first hearing, intervenor, Department of Community Affairs, filed a petition to intervene which was granted by order dated March 21, 1995.

At final hearing, petitioner presented the testimony of James J. Mallett, a professional engineer and accepted as an expert in stormwater design, stormwater utilities, and retention pond designs; Shirl Williams, a Walton County assistant administrative supervisor; Albert E. Paris, a real estate developer; and David J. Russ, an attorney and accepted as an expert in urban and regional planning. Also, it offered petitioner's exhibits 1-18, 20, 22-26 and 31-33. All exhibits were received in evidence. Respondent, KPM, Ltd., who is the owner of the subject property, presented the testimony of John Lewis, a professional engineer and accepted as an expert in the design of stormwater systems. Also, it offered KPM's exhibit 1 which was received in evidence. Intervenor presented the testimony of J. Thomas Beck, its chief of the bureau of local planning and accepted as an expert in regional planning. Also, it offered intervenor's exhibits 1-6. All exhibits were received in evidence. Finally, the parties stipulated into evidence joint exhibits 1-8, and the undersigned took official recognition of ten items.

The transcript of hearing (two volumes) was filed on June 7, 1995. Proposed findings of fact and conclusions of law were filed by the parties on

June 26, 1995. A ruling on each proposed finding has been made in the Appendix attached to this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In 1981, Edgewater Development Associates, Ltd. applied for a development order for the Edgewater Beach Condominium project (the project), a development of regional impact (DRI) for a 15.4 acre parcel of property located in Walton County between County Road 2378 and the Gulf of Mexico. On June 8, 1982, respondent, Walton County (County), issued resolution 82-12 (the original development order) authorizing the development of the project.

2. Although not then required by law to do so, but consistent with its policy for all DRI orders, the County included within Section 6 of the original development order the following provision regarding an expiration date:

> The development order shall remain in effect for a period of ten years or until the development is complete and all certificates of occupancy are issued by Walton County, whichever occurs first, provided that upon application by the developer, the county may extend the duration of the development order.

Therefore, without an extension, the original development order was scheduled to expire on June 8, 1992.

3. The project was originally authorized to include six phases with 476 condominium units and associated recreational facilities. When completed, the 476 units were to be located within a horseshoe-shaped building, with an east and west wing connected at the top of the horseshoe by a lobby area. Phases I and II, consisting of 175 units, were completed by 1984 but phases III through VI have never been constructed. Petitioner, Edgewater Beach Condominium Association, Inc. (EBOA or petitioner), is a Florida condominium association and the owner of phases I and II.

4. On June 8, 1987, Edgewater Development Associates, Ltd. lost by foreclosure the approximately seven acres upon which the remaining four phases of the project were to be constructed. On July 10, 1987, EAB Realty of Florida, Inc. acquired title to that property. However, it never developed any of the remaining four phases. In May 1992, title to the property was transferred to respondent, KPM, Ltd. (KPM), and one of the KPM partners, Kero Investments, Inc. (Kero). KPM now owns the entire parcel.

5. In early May 1992, or approximately a month before the original development order was to expire, representatives of KPM asked the County's assistant administrator with responsibility for planning and zoning about extending that order. They were told that they merely had to ask the Commission for such an extension.

6. Relying on these instructions, KPM appeared before the County Commission on May 26, 1992, requesting that the termination date of the original development order be extended for thirty-five months. The Commission granted the request and voted to allow the extension. Shortly thereafter, however, KPM

and the County were informed by intervenor, Department of Community Affairs (DCA), that the action by the County on May 26, 1992, was ineffective because it failed to comply with all of the requirements of Section 380.06, Florida Statutes. KPM was told that in order to extend a DRI development order termination date, it must file a formal notice of proposed change with the County, and the County would then give public notice of the hearing at which the change was to be considered. Until these procedures were followed, no further development could occur once the expiration date had passed.

7. On June 5, 1992, KPM filed with the County a formal notice of proposed change requesting that the build-out date and expiration date of the original development order be extended to May 8, 1995.

8. Thereafter, the DCA informed the County and KPM that, after June 8, 1992, the right to develop the property covered by the original development order had expired. It also advised them that further development of the property would have to be preceded by further DRI review, namely, either a notice of proposed change or formal abandonment. Petitioner received the same information when it inquired about the possibility of constructing an addition to phases I and II. In light of this advice, on July 17, 1992, KPM's counsel withdrew its application for extension and stated that he understood that the withdrawal caused the original development order to expire as of June 8, 1992.

9. KPM then selected the notice of proposed change option because it felt that the DRI development order had value and that the abandonment procedure was basically the same as that required for a notice of proposed change. Had not KPM received this advice from DCA, it could have built up to 35 units per acre on the property, without any height restriction, under the local comprehensive plan then in effect.

10. On September 28, 1992, KPM submitted another notice of proposed change in which it requested that the build-out dates and the termination date for phases III through VI be extended until January 1, 1999. On December 7, 1992, KPM revised its notice of proposed change to request certain changes in the project's configuration, including replacing the condominiums in phase III with townhouses and reducing the number of units in that phase from 42 to 19.

11. The County treated the notice of proposed change as a presumptive substantial deviation to the original development order under Section 380.06(19)(e)3., Florida Statutes. In other words, the proposed changes were presumed by statute to create additional regional or state impacts so as to require further DRI review. However, that presumption could be rebutted by evidence submitted at a public hearing before the local government.

12. Kero was the record owner of the portion of the property covered by the September 1992 notice of proposed change. This included a beachfront parcel of approximately 50 feet by 400 feet on the eastern boundary of the undeveloped portion of the DRI and a parking lot. Kero was fully aware of the requested changes and authorized Albert Paris, the owner of one of the other KPM partners, to file the application.

13. On January 26, 1993, the County adopted the amended development order in issue here (resolution 93-2), which approved the extension of build-out and termination dates and the change in phase III configuration requested by KPM. In doing so, the County determined that, based on certain conditions placed in the amended development order, the amendment to the original development order was not a substantial deviation and thus it required no further DRI review. The

DCA concurred in this determination. The amended development order requires, however, that before construction of phases IV through VI may commence, KPM must submit additional information to the County for approval and for another amendment to the DRI development order pursuant to Section 380.06(19), Florida Statutes.

14. Contending that the amended development order was invalid, petitioner filed an amended petition on April 1, 1993. As clarified by the parties in the prehearing stipulation, petitioner cites three broad grounds for invalidating that order: (a) the original development order was constructively abandoned and therefore could not be amended, (b) the right to request an amendment of the original development order did not transfer to KPM, a successor owner to the original developer, and (c) the County did not have authority to revive the original development order and extend its termination date. In its proposed recommended order, however, petitioner addresses only the third issue, that is, whether the County had authority to revive an expired development order. By failing to address the remaining claims, the undersigned assumes that petitioner has abandoned these contentions. Nonetheless, and for the sake of providing a complete factual and legal record in the event of an appeal, the undersigned will discuss the other two issues.

B. Standing

15. In its amended petition, as clarified by the court's opinion in Edgewater Beach Owners Association, Inc. v. Board of County Commissioners of Walton County, Florida, 645 So.2d 541 (Fla. 1st DCA 1994), petitioner contends it has standing as an affected land owner to challenge the amended development order because its retention pond would be affected by the development. In other words, petitioner alleges that "the 'intensity' of the use of the retention pond would increase beyond its current use under KPM's plan."

16. Under the original stormwater plans for the project, a 10,000 square foot wet retention pond designed to capture stormwater runoff was constructed that straddles what is now the boundary between petitioner's and KPM's property. Approximately 3,000 square feet of the pond are located on KPM property. The pond was intended to serve all six phases of the project.

17. Assuming KPM develops its property, and the surface stormwater from that development is released into the wet retention pond, the pond will be impacted. However, KPM intends to utilize a stormwater design for phase III that provides for the retention of 100 percent of its stormwater on its own property. A retaining wall built along the edge of the pond would prevent any surface water runoff from KPM's development from entering the pond. Since surface water now flows into the pond from KPM's property in its undeveloped state, the retaining wall plan will not increase, and will probably decrease, the volume of water currently entering the pond.

18. Notwithstanding this reduction in surface water runoff, petitioner contends that the development proposed on KPM property will influence the ground water flow into the retention pond. More specifically, it argues that in light of the geophysical characteristics of the property, some of the water which percolates from KPM's retention ponds will flow underground and impact the function of petitioner's retention pond.

19. There will, of course, be a lateral exchange of water between KPM's and petitioner's property. In other words, in the same way that petitioner would be affected by KPM, KPM would also be affected by petitioner. This

exchange of water is uncontrollable and also occurs between petitioner's property and all other adjacent properties. However, there is no evidence of record as to whether KPM's development would have any discernable effect on the water table. That is to say, there is no evidence to support a finding that, beyond the lateral exchange of water that now occurs, the proposed development would have a measurable impact on the water table. Even petitioner's own expert conceded as much. Given these considerations, it is found that the intensity of the use of petitioner's retention pond will not increase beyond its current use under KPM's plan. Therefore, petitioner is not an affected land owner and thus it lacks standing to bring this action.

C. Was the Original Development Order Constructively Abandoned?

20. In the prehearing stipulation, petitioner argues that the original developer constructively abandoned the original development order. According to petitioner, this occurred either through foreclosure of the original developer's interests or through actions or omissions by KPM.

21. The DCA does not recognize constructive abandonment as a concept applicable to DRI development orders. Indeed, the only mechanism for abandoning a DRI development order is the procedure set forth in Rule 9J-2.0251, Florida Adminstrative Code. KPM made no attempt to initiate the abandonment procedures specified in the rule.

22. There is insufficient evidence to establish that KPM evinced an intent to abandon development of its property. Rather, the evidence establishes that KPM considered the original development order to be valuable and took affirmative steps to assure its viability. While it is true that the prior owner of the property did go bankrupt, even petitioner's expert recognized that bankruptcy alone could not be deemed to constitute an abandonment of a DRI development order.

23. As to the contention that KPM had no right to seek the changes approved by the County since it was not the original developer of the project, the evidence establishes that almost all DRIs in Florida have been sold subsequent to the issuance of their original DRI development orders. The DCA regards a DRI development order as incidental to the land itself, with the rights and obligations of the development order transferring to subsequent purchasers when title is transferred. In other words, a DRI development order runs with the land. Therefore, as the successor in title to the land, KPM had the right to seek changes approved by the County.

D. Can An Expired Development Order be Revived?

24. Petitioner further contends that a local government has no authority to revive a DRI development order after it has expired. In this case, the County issued an amended development order on January 26, 1993, or almost six months after the original development order had expired.

25. The build-out date in a development order is the date by which the developer is to have completed the vertical structures. This date is important for assessing impacts such as public capacity (e. g., water, sewer and transporation). If a build-out date is missed, there may no longer be adequate public capacity to accommodate the proposed development.

26. A termination date is the date at which the development order expires. Until 1985, there was no requirement in chapter 380 that a DRI development order

include an expiration date. The expiration date is typically set at two to five years after the build-out date. This date provides a local government with the specific point in time at which it can determine whether the proposed development is still compatible with the community.

27. The local government must determine whether an extension of the development order would create additional regional or state impacts, and if not, whether the extension should be granted. If the proposed change creates additional regional impacts, it constitutes a substantial deviation which must undergo additional DRI review. Even if the local government determines that the extension of a development order, after expiration, will not create additional regional or state impacts, the local government has the authority to deny such an extension.

28. On the other hand, the DCA has only one decision with respect to termination date extensions - - whether such an extension will create additional regional or state impacts. Consequently, the DCA regards the extension of a termination date as largely a local decision.

29. Since at least 1987, or well before the expiration of the original development order, the DCA has advised local governments and DRI developers that expired DRI development orders could be revived by the local government based on local considerations, such as whether the development is still compatible with the surrounding community. This interpretation of the statute was not shown to be clearly erroneous or unreasonable.

30. Petitioner's expert disagreed with the above interpretation since he opined that permitting a local government to revive an expired development order would defeat efforts to plan for the future and hamper the ability of adjacent local governments to implement their plans of development. While this view may have some justification from a planning perspective, the DCA's interpretation of the DRI statutes is also reasonable.

31. The amended development order in issue approved both an extension of the termination date and an extension of build-out dates. The DCA determined that the changes actually approved would not create additional regional or state impacts. Petitioner has not challenged this determination.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.57(1) and 380.07, Florida Statues.

33. As the party challenging the amended development order, petitioner bears "both the ultimate burden of persuasion and the burden of going forward." Young v. Department of Community Affairs, 625 So.2d 831, 835 (Fla. 1993).

34. In order to have standing to challenge a development order under Section 380.07(2), Florida Statutes, petitioner must be "the owner, the developer, or the state land planning agency." In this case, petitioner has alleged that it is "the owner" of affected property, that is, it owns a retention pond that will be impacted by KPM's development. Or, as stated by the court in Edgewater Beach Owners Association, Inc. v. Board of County Commissioners of Walton County, Florida et al, 645 So.2d 541, 543 (Fla. 1st DCA

1994), in order to prove up its allegations of standing at hearing, petitioner must show that "the 'intensity' of the use of the retention pond would increase beyond its current use under KPM's plan."

35. The greater weight of evidence shows that petitioner failed to prove that, under KPM's plan, the intensity of the use of the retention pond will increase beyond its current use. Indeed, the evidence shows that such surface water runoff will likely decrease by virtue of a new stormwater design to be used by KPM. At the same time, there is no evidence that water percolating from KPM's retention ponds will flow underground and impact petitioner's water table in any discernable way. This being so, it is concluded that petitioner fails to qualify as an affected property owner, and thus it lacks standing to bring this appeal. Notwithstanding this conclusion, however, the undersigned will address the other issues raised by petitioner in the event an appeal is taken by any party.

36. Petitioner first argues that the original development order has been constructively abandoned, either through foreclosure of the original developer's interests or through actions or omissions by KPM. As previously stated in finding of fact 21, Rule 9J-5.0251, Florida Administrative Code, establishes the only mechanism by which a developer can abandon a DRI. This rule is derived from Section 380.06(26), Florida Statutes, which requires the DCA to adopt rules to "establish the process for local governments to follow in the event a developer proposes to abandon its (DRI)." Significantly, the statute does not reference any alternative mechanism for abandoning a DRI development order, and the DCA interprets the statute to mean that such an order can only be abandoned through the formal procedures promulgated by the agency. This interpretation of the law has not been shown to be clearly erroneous or unreasonable, and the same has accordingly been accepted.

37. Petitioner further alleges that KPM abandoned the DRI through its actions or omissions. For the reasons set forth in finding of fact 22, this argument is deemed to be without merit.

38. Finally, petitioner contends that the County lacked authority to revive and extend an expired development order. More specifically, petitioner argues in its proposed recommended order that the authority to revive such an order is inconsistent with the requirement in Section 380.06(15)(c)2., Florida Statutes, that development orders include a termination date. There are no reported appellate decisions or final administrative orders which address this issue.

39. Section 380.06(15)(c)2., Florida Statutes, provides that the development order "shall include a termination date that reasonably reflects the time required to complete the development." The statute is silent on whether a local government has authority to extend that termination date. For the following reasons, the undersigned concludes that the County had authority to adopt resolution 93-2.

40. To begin with, Section 380.06, Florida Statutes, was not intended to limit a local government's authority to make decisions regarding development within its jurisdiction. Rather, the DRI statute establishes additional procedures, over and above those already imposed by state and local regulations, for the review of any development having regional impact. Indeed, case law confirms this proposition. See, e. g., Friends of the Everglades v. Board of County Commissioners of Monroe County, 456 So.2d 904, 908 (Fla. 1st DCA 1984).

41. In addition, under the provisions of Section 125.01(1)(w), Florida Statutes, a county is granted authority to

> (p)erform any other acts (in addition to those specifically enumerated) not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.

Section 125.01(3)(b), Florida Statutes, further emphasizes the breadth of county authority. That paragraph reads as follows:

> The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution.

Thus, a non-charter county, such as Walton County, has broad power to act through its home rule powers, unless the legislature has adopted either a special or general law that is clearly inconsistent with a county's exercise of such power. Because the County already has such authority by virtue of section 125.01, it is unnecessary for section 380.06 to include an express grant of authority to local governments allowing the revival of expired development orders, whether or not the order relates to a DRI or to a non-DRI development.

42. Further, there is no express prohibition or preemption in Section 380.06, Florida Statutes, that suggests a legislative intent to bar a local government from reviving expired development orders. In fact, Section 380.06(19), Florida Statutes, contemplates that a local government may make amendments to DRI development orders in addition to those expressly delineated. For example, subparagraph (19)(e)3. of that statute provides that:

> any change not specified in paragraph (b) or paragraph (c) shall be presumed to create a substantial deviation. This presumption may be rebutted by clear and convincing evidence.

As reflected in finding of fact 11, the County considered KPM's request for revival of the original development order as a presumptive substantial deviation under the foregoing statute. After the inclusion of certain conditions in the amended development order, however, it concluded that the change was not a substantial deviation.

43. In light of the broad authority given to counties under section 125.01, and the obvious recognition of the legislature that local governments can make changes to a DRI development order in addition to those expressly enumerated in the DRI statute, it is concluded that the absence of an express statement in section 380.06 authorizing the revival of an expired DRI development order cannot be construed to prohibit such action by the County.

44. This conclusion is consistent with the DCA's long-standing interpretation of the law that a development order continues to exist in some form even after the passing of the expiration date, and a decision to revive and extend the effective date, or not, is reposed in the local government based on local considerations. This interpretation of chapter 380 was not shown to be clearly erroneous or unreasonable and has been accepted by the undersigned.

45. Finally, it is unnecessary to reach the issue of whether KPM must undergo further DRI review and comply with all County regulations in effect as of January 26, 1993. This is because the issue was not previously raised before FLWAC, and a resolution of that question is not necessary to decide this case.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Florida Land and Water Adjudicatory Commission issue a final order dismissing the amended petition of Edgewater Beach Owners Association, Inc.

DONE AND ENTERED this 26th day of July, 1995, in Tallahassee, Florida.

DONALD R. ALEXANDER
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 26th day of July, 1995.

APPENDIX TO RECOMMENDED ORDER

Petitioner:

1. Partially accepted in finding of fact 13.
2. Partially accepted in finding of fact 1.
3. Partially accepted in finding of fact 3.
4. Covered in the preliminary statement.
5-6. Partially accepted in finding of fact 1.
7-8. Partially accepted in finding of fact 3.
9-11. Partially accepted in finding of fact 2.
12. Rejected as being unnecessary.
13-14. Partially accepted in finding of fact 3.
15-18. Partially accepted in finding of fact 4.
19. Rejected as being unnecessary.
20-21. Partially accepted in finding of fact 6.
22. Partially accepted in finding of fact 7.
23. Partially accepted in finding of fact 8.
24-25. Partially accepted in finding of fact 10.
26. Partially accepted in finding of fact 13.
27. Rejected as being unnecessary.
28. Partially accepted in finding of fact 12.
29. Rejected as being unnecessary.
30-41. Partially accepted in findings of fact 15-19.
42-45. Rejected as being unnecessary.
46-61. Partially accepted in findings of fact 24-31.

Respondents:

1. Partially accepted in findings of fact 1 and 3.
2. Partially accepted in finding of fact 3.
3. Partially accepted in finding of fact 4.
4. Partially accepted in finding of fact 3.
5. Partially accepted in finding of fact 4.
5. Partially accepted in finding of fact 5.
6-7. Partially accepted in finding of fact 6.
8. Partially accepted in finding of fact 7.
9-10. Partially accepted in finding of fact 8.
11. Partially accepted in finding of fact 9.
12. Partially accepted in finding of fact 10.
13. Partially accepted in finding of fact 12.
14. Partially accepted in finding of fact 13.
15. Partially accepted in finding of fact 14.
16-24. Partially accepted in findings of fact 15-19.
25-28. Partially accepted in findings of fact 20-22.
29-32. Partially accepted in finding of fact 23.
33-42. Partially accepted in findings of fact 24-31.

Intervenor:

1. Rejected as being unnecessary.
2. Partially accepted in findings of fact 1 and 3.
3-4. Partially accepted in finding of fact 3.
5. Partially accepted in finding of fact 4.
6. Covered in preliminary statement.
7-8. Partially accepted in finding of fact 2.
9-11. Partially accepted in finding of fact 6.
12. Partially accepted in finding of fact 7.
13. Partially accepted in finding of fact 11.
14. Partially accepted in finding of fact 25.
15. Partially accepted in finding of fact 26.
16. Partially accepted in finding of fact 11.
17. Partially accepted in finding of fact 8.
18-19. Partially accepted in finding of fact 10.
20. Partially accepted in finding of fact 13.
21. Partially accepted in finding of fact 29.

Where a proposed finding has been partially accepted, the remainder has been rejected as being unnecessary for a resolution of the issues, cumulative, irrelevant to a resolution of the issues, not supported by the evidence, or a conclusion of law.

COPIES FURNISHED:

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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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DISTRICT COURT OPINION

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

EDGEWATER BEACH OWNERS ASSOCIATION, INC.,

Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF WALTON COUNTY, FLORIDA, and KPM LTD., and DEPARTMENT OF COMMUNITY AFFAIRS,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 95-4110
DOAH CASE NO. 95-437DRI

Opinion filed January 22, 1997.

An appeal from an order of the Florida Land & Water Adjudicatory Commission.

Richard H. Powell of Powell & Strom, P.A., Fort Walton Beach and David A. Theriaque, Tallahassee, for Appellant.

Martha Harrell Chumbler and Nancy G. Linnan, of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Tallahassee, for appellee KPM, Ltd.; George Ralph Miller, DeFuniak Springs, for appellee Board of County Commissioners of Walton County; and Stephanie M. Gehres, General Counsel, and David L. Jordan, Deputy General Counsel, Tallahassee for appellee Department of Community Affairs.

BARFIELD, C. J.

The Florida Land and Water Adjudicatory Commission (FLWAC) did not err in ruling, on remand from this court, 1/ that Edgewater Beach Owners Association, Inc. did not have standing to appeal a 1993 resolution of the Board of County Commissioners of Walton County which amended a 1982 development of regional impact (DRI) development order to extend the expiration date and build-out dates of the Edgewater Beach Condominium project and approve design changes requested by the subsequent developer, KPM Ltd. This determination moots all other issues raised on appeal. The FLWAC order is AFFIRMED.

ERVIN, J. CONCURS; BENTON, J. SPECIALLY CONCURS WITH WRITTEN OPINION.

BENTON, J., concurring specially.

I concur fully in the judgment of the court and in the majority opinion, and accept appellees' contention that the decision in Londono v. City of Alachua, 438 So.2d 91 (Fla. 1st DCA 1983) answers appellant's argument that, simply because the Edgewater Beach Owners Association (Association) "administers a portion of the property on which the DRI development order is located, it must be considered an owner and granted section 380.07(2) standing in this case." Nor does the result we reach today represent a repudiation of the doctrine of the law of the case.

The last time the Association appealed an order of the Florida Land and Water Adjudicatory Commission (FLWAC) dismissing the Association's administrative appeal for lack of standing, we reversed, saying:

> In conclusion, we find that appellant Edgewater [Beach Owners Association] is an "owner" under the terms of Section 380.07(2), and therefore has standing to appeal the amended development order rendered by the Board of County Commissioners.

Edgewater Beach Owners Ass'n, Inc. v. Board of County Comm'rs of Walton County, 645 So.2d 541, 543 (Fla. 1st DCA 1994). The appeal we now decide concerns the same administrative appeal to FLWAC from the same amended development order that the Board of County Commissioners of Walton County entered in 1993.

Fortunately for litigants and appeals courts alike, most litigation does not involve even a single appeal. Whatever else it may accomplish, an appeal consumes additional resources. Reflecting this reality, an important rule of decision has been devised for litigation that bubbles up repeatedly into the appellate courts: Once actually decided by the highest court to which the case goes, the law of the case cannot be revisited, with rare exceptions not applicable here.

> "Law of the case" refers to the principle that the questions of law decided on an appeal to a court of ultimate resort must govern the case in the same court and the trial court through all subsequent stages of the proceeding. Or, as otherwise stated, whatever is once established between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts in the case.

3 Fla. Jur. 2d Appellate Review s 414 (1978). But the "doctrine of the law of the case applies only to issues actually or impliedly presented and decided on appeal, and not to mere dicta, or to issues not considered. See 3 Fla. Jur. 2d Appellate Review s 421 (1978)." Golden v. State, 528 So.2d 50, 51 (Fla. 1st DCA 1988); Myers v. Atlantic Coast Line Ry. Co., 112 So.2d 263 (Fla. 1959); State v. Florida State Improvement Comm'n, 60 So.2d 747 (Fla. 1952); Crabtree v. Aetna Cas. and Sur. Co., 438 So.2d 102 (Fla. 1st DCA 1983). See Hart v. Stribling, 25 Fla. 435, 6 So. 455, 459 (1889).

When the present case was first before the Court, we "h[e]ld that the petition is sufficient under the statute to [allege].. appellant's standing as

an affected land owner." [Edgewater], 645 So.2d at 543 [emphasis supplied]. Our holding went no further than that, despite the use of the word "find" in the opinion's conclusory paragraph. The case was then in no posture for anybody- - certainly not an appellate court, in the first instance--to make any finding. Findings made on remand by the administrative law judge--or hearing officer, as he was then known, see Life Care Ctrs. of Am., Inc. v. Sawgrass Care Ctr. Inc., 21 Fla. L. Weekly D2847, D2489 n.4 (Fla. 1st DCA Nov. 21, 1996) --refute the allegations we earlier held sufficient as a matter of pleading to support a claim of standing. Our decision today comports fully with the question of law actually decided when we saw the case last.

ENDNOTE

1/ Edgewater Beach Owners Association, Inc. v. Board of County Commissioners of Walton County, 645 So.2d 541 (Fla. 1st DCA 1994)