STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MEADOWBROOK NEIGHBORHOOD ASSOCIATION, INC.; LYNN HILL; A.A. SULKES; PHILIP BENNETT; VERA HARPER; and CARLOS McDONALD,	)	
Petitioners,	)	
vs.	)	Case No. 00-3907
CITY OF TALLAHASSEE; GEORGE K. WALKER, TRUSTEE; GENESIS GROUP; and TTK, L.L.C.,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 5, 2001, in Tallahassee, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Kenneth D. Goldberg, Esquire
1725 Mahan Drive, Suite 201
Tallahassee, Florida 32308-5201

For Respondent: (City) Linda R. Hurst, Esquire
City Hall, Second Floor
300 South Adams Street
Tallahassee, Florida 32301-1731

For Respondents: (Walker and others) Jay Adams, Esquire
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1804

STATEMENT OF THE ISSUE

The issue is whether the site plan for the Evergreens project should be approved.

PRELIMINARY STATEMENT

This matter began on July 28, 2000, when the Developmental Review Committee of Respondent, City of Tallahassee, approved a site plan for a project which involved the construction of 416 apartment units on approximately 24.56 acres of land located just south of East Mahan Drive, Tallahassee, Florida. In approving the application, the Committee determined that the project was exempt from consistency and concurrency requirements of the Comprehensive Plan by virtue of its vested status, as reflected in a Stipulation and Settlement Agreement entered in DOAH Case No. 91-4109VR.

On August 28, 2000, Petitioners, Meadowbrook Neighborhood Association, Inc., Victor Cordiano, Lynn Hill, A. A. Sulkes, Philip Bennett, Vera Harper, and Carlos McDonald, who represent, or are, residents who live in the area, filed their Petition for Formal Proceedings with the Tallahassee-Leon County Planning Commission to contest that decision. Victor Cordiano was later withdrawn as a party. Pursuant to its By-Laws, the Commission then referred the matter to the Division of Administrative Hearings on September 20, 2000, with a

request that an Administrative Law Judge be assigned to conduct a formal hearing.

Respondents' Motion to Dismiss the petition for lack of jurisdiction was heard on October 18, 2000, and was denied by Order dated October 25, 2000. Thereafter, the matter was scheduled for a final hearing on November 29, 2000, in Tallahassee, Florida. At Petitioners' request, the matter was rescheduled to December 11, 2000, at the same location. By ore tenus motion made on December 8, 2000, the City of Tallahassee moved for another continuance on the ground that the hearing had not been advertised in a local newspaper, as required by its Code of Ordinances. Accordingly, the final hearing was rescheduled to January 5, 2001. Finally, Petitioners' Motion in Limine to exclude two issues raised by Respondents in the Joint Pretrial Statement was denied.

At the final hearing, Petitioners presented the testimony of Sarah Cawthon, president of the Meadowbrook Neighborhood Association, Inc., and Dorothy Inman-Crews, a former City Commissioner. Also, they offered Petitioners' Exhibits 1-20, which were received in evidence. Respondent, City of Tallahassee, presented the testimony of Dwight R. Arnold, Jr., Land Use and Environmental Services Administrator, and James R. English, City Attorney and accepted as an expert in municipal law. Also, it offered City Exhibits 2-16. All

exhibits were received in evidence. Exhibits 4 and 11 are the depositions of John Davis and Tom Printy, respectively, both City employees. Respondents, George K. Walker, Genesis Group, and TTK, L.L.C., presented the testimony of George K. Walker. They also offered Respondents' Exhibits 1 and 2, which were received in evidence.

The Transcript of the hearing (two volumes) was filed on January 23, 2001. Proposed Findings of Fact and Conclusions of Law were filed by the parties on January 22, 2001, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

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

a. Background

1. In this land use dispute, Petitioners, Meadowbrook Neighborhood Association, Inc.; Lynn Hill; A.A. Sulkes; Philip Bennett; Vera Harper; and Carlos McDonald (Petitioners), have contested a decision by the Developmental Review Committee (DRC) of Respondent, City of Tallahassee (City), to approve a Type B site review application for a project known as Evergreens at Mahan (Evergreens). In its decision, the DRC exempted the project from the consistency and concurrency requirements of the City's Comprehensive Plan

based upon a 1991 agreement by the City and the property owner which conferred vested rights on the property. Thus, the project was never reviewed for compliance with the concurrency and consistency requirements of the City's Comprehensive Plan.

2. If the application is approved, the applicant will be authorized to commence the process for constructing 416 apartment units in ten three-story buildings on approximately 24.56 acres of land located just south of the intersection at East Mahan Drive and Riggins Road in Tallahassee, Florida. The apartment complex will be one of the largest in the City. The application was filed by Respondent, Genesis Group (Genesis), acting as an agent for the owner of the property, Respondent, George K. Walker, Trustee (Walker). After the application is approved, Walker is contractually obligated to sell the property to Respondent, TTK, L.L.C. (TTK), a New Hampshire developer, who will actually construct the complex.

3. In response to the DRC's decision, on August 9, 2000, Petitioners filed a Notice of Intent to File Petition for Formal Proceedings. On August 28, 2000, Petitioners filed their Petition for Formal Administrative Proceedings. As grounds for denying the application, Petitioners contended that a Stipulation and Final Settlement Agreement (Settlement Agreement) entered into by Walker and the City on August 6, 1991, in DOAH Case No. 91-4109VR determining that the property

was presumptively vested violated in a number of respects the City's Vested Rights Review Ordinance (Ordinance); that any vested rights acquired on the property have expired under Section 18-104(1)(c), Code of Ordinances; and the site plan is inconsistent with the City's Comprehensive Plan and Land Development Code. As to the latter ground, the parties have agreed that this issue need not be addressed now, but rather it can be considered by the DRC in the event Petitioners prevail on the merits of this action. Other than the vesting status, no issues have been raised regarding the site plan itself.

4. On September 11, 2000, the Commission entered its Determination of Standing. Pursuant to the Bylaws of the Commission, the matter was forwarded to the Division of Administrative Hearings (DOAH) on September 20, 2000, for an evidentiary hearing.

b. The parties

5. Meadowbrook Neighborhood Association, Inc. (Association) is a not-for-profit corporation organized on February 18, 2000, and existing under the laws of the State of Florida. The Association represents approximately 200 of the 279 homeowners who reside in the Meadowbrook neighborhood. The Meadowbrook neighborhood is zoned for Residential Preservation-1 and has a residential density of less than

three units per acre. A portion of the Meadowbrook neigborhood is adjacent to the proposed project.

6. Lynn Hill, A.A. Sulkes, Philip Bennett, Vera Harper, and Carlos McDonald reside and own property in the Meadowbrook neighborhood. Their property either abuts, or is close to, the location of the proposed Evergreens project. All are members of the Association and bring this action in their individual capacity and as a member of the Association.

7. During the course of the hearing, Respondents stipulated to the standing of all Petitioners.

8. The City is a municipal corporation of the State of Florida. It has authority to review proposed site plans for real property located within the City's geographic boundaries.

9. Genesis is a Tallahassee consulting firm which prepared the application for Walker and acted as his agent in seeking approval of the site plan for the Evergreens project.

10. TTK, a New Hampshire limited liability corporation, is a developer and builder of real property, and has a contract to purchase the site of the Evergreens project pending final approval of the site plan by the City.

11. Walker is the owner of the approximately 30-acre parcel (the subject property) which is at issue in this proceeding, and is the applicant for the Evergreens site plan.

The Evergreens project will be located on 24.56 acres of this 30-acre parcel.

c. The property and its history

12. The subject property has been owned by the Walker family, either as a part of a consortium of investors or in trust, for more than 70 years. Since the mid-1960's, Walker has controlled the property as trustee for himself and his brother. The site of the apartment complex lies a few hundred feet south of the intersection of East Mahan Drive (U.S. 90) and Riggins Road. Approximately 11.738 acres of the land sit on the eastern side of Riggins Road while the remaining 12.821 acres sit on the western side. The remainder of the property, which consists of around 7 or 8 acres, is situated just north of the apartment site, fronts on East Mahan Drive, and is currently zoned commercial. The Meadowbrook neighborhood begins approximately 1,250 feet or so south of Mahan Drive and sits on around 100 acres. The boundaries of the neighborhood abut the southern and southeastern ends of the project site.

13. The relevant history of the property goes back to January 9, 1926, when the original plat of Glenwood Estates was recorded in Leon County (County). The property was located in the County, but not within the City, and was owned by a group that included Walker's father. The subject property was identified in the plat as Blocks L and M. The

Glenwood Estates plat did not contain any statements establishing use or density for the subject property.

14. On April 7, 1943, Glenwood Estates was replatted for taxation purposes. Walker's mother, a widow and the heir of Walker's father, was among the owners of the property. The 1943 replat reconfigured the subject property as a single, large acre parcel. The replat does not contain any statements establishing uses or densities for the platted parcels.

15. Prior to 1967, Glenwood Estates became the sole property of Walker's mother. Upon her death, the property was placed in trust for the benefit of Walker and his brother. George K. Walker is the named trustee of the property.

16. On March 22, 1989, the remaining property owned by Walker was subdivided into three parcels; two of the small parcels on the southwestern corner of Riggins Road and Mahan Drive were sold, thereby reducing the size of the subject property by approximately 1.56 acres.

17. By 1991, the 1943 replat of Glenwood Estates had been resubdivided a minimum of seven times which changed the replat substantially from its original configuration. Five of the resubdivisions involved the Meadowbrook tract. Since 1989, the subject property has been configured as a large parcel of approximately 30 acres. Since 1991, the subject

property is the only property in the replat that Walker has owned.

18. In addition to his ownership of the subject property, until 1971 Walker owned approximately 69 acres of land that presently constitute a large part of the Meadowbrook neighborhood. On October 6, 1971, Walker entered into a contract for the sale of that land. Among the conditions of the sale was a requirement that the property consisting of the Meadowbrook neighborhood be rezoned R-3; that the property that is the proposed apartment site be rezoned RM-2; and that the property fronting Mahan Drive be rezoned C-1. Costs of the rezoning were to be shared equally by the buyer and seller. At the time of this sale, the subject property and the Meadowbrook tract were undeveloped.

19. In 1972, the County rezoned the property consisting of the Meadowbrook neighborhood as R-2 for single-family residential development; rezoned the approximately 25-acre portion of the subject property north of the Meadowbrook tract as RM-2, for multi-family residential development; and rezoned the property fronting Mahan Drive as C-1 for commercial development. The multi-family zoning on the property that is the proposed location for the Evergreen project authorized a range of dwelling units from single-family to two-family to multi-family up to a maximum of 17.4 units per acre.

20. One of the conditions of the 1971 sale was the granting of an easement by Walker to the buyer (Collins Brothers) to extend Riggins Road south from Mahan Drive to the northern boundary of the Meadowbrook tract. At the time of the sale, there was no direct access from the Meadowbrook tract north to Mahan Drive.

21. On an undisclosed date, Collins Brothers was forced into receivership. Therefore, between 1971 and 1980, there was no development on the Meadowbrook tract or the subject property, other than the roughing-out of the location of what was to become Riggins Road.

22. In 1980, Guardian Mortgage Investors (Guardian) took over the previous buyer's interest. At that time, Walker entered into a road construction agreement with Guardian in which he agreed to pay one-half of the road construction costs to extend Riggins Road south from Mahan Drive to the Meadowbrook subdivision. Guardian agreed to pay one-half of the road construction costs as well as all of the cost for the installation of the main water and sewer trunk lines, except for laterals which were to be installed at Walker's expense.

23. In 1981, the construction of Riggins Road and the main water and sewer trunk lines were completed. The minimum allowable width of Riggins Road from Mahan Drive to the northern boundary of the Meadowbrook tract was 30 feet.

However, it was constructed 36 feet wide so that it could serve not only the Meadowbrooks neighborhood, but also Walker's future development. For the same reason, even though the minimum right-of-way for this section of Riggins Road was 60 feet, an extra 20 feet (or 80 feet in all) were dedicated for the right-of-way. No development has occurred on the subject property since this dedication.

24. The sewer main serving the Meadowbrook neighborhood is a gravity feed system flowing into a pump station within the Meadowbrook neighborhood. From there, it is pumped into a force main to a point under or adjacent to Riggins Road approximately 50 feet into the property that is zoned RM-2. From there, the system is again a gravity feed system flowing north under Mahan Drive to another pump station. If the sewer system had been installed to serve only the Meadowbrook neighborhood, it could have consisted only of a forced main system between the two pump stations. However, because further development was anticipated, the developer installed a gravity feed system that flowed through the RM-2 property, through the C-1 property, and under Mahan Drive at considerably more expense than a forced main system. Both the water and sewer systems have the capacity to serve 670 domestic equivalent units in the RM-2 and C-1 portions of the subject property. Following their completion, the water and

sewer facilities, and Riggins Road, were dedicated to the City. Since 1983 or 1984, the City has owned, operated, and maintained Riggins Road and the water and sewer lines from Mahan to the Meadowbrook neighborhood.

25. On April 14, 1983, Walker petitioned the City to annex his property. By Ordinance No. 83-0-2185 adopted on December 30, 1983, the Walker property, the Meadowbrook neighborhood, and considerable other properties were annexed into the City. Prior to annexation, Walker received assurance from the City that the annexation would not affect his ability to develop the RM-2 and C-1 portions of his property.

d. The City's vesting process

26. On July 16, 1990, the City adopted its 2010 Comprehensive Plan. Concurrent with its adoption, the City adopted a Vested Development Rights Review Ordinance (Ordinance), which established "the sole administrative procedures and standards by which a property owner" could assert that he had acquired certain property rights and obtain a vested rights determination from the City. The Ordinance is codified as Article VII of Chapter 18 of the City's Code of Ordinances.

27. The Ordinance established the administrative procedures and standards for common law or statutory vesting. A property that was determined to be vested under the

Ordinance was exempt from the application of the consistency and concurrency requirements of the City's 2010 Comprehensive Plan. Once a property is found to be exempt, or vested, it retains that status in perpetuity.

28. In order to claim vested development rights under the Ordinance, a property owner was required to apply for a vested rights determination with the City's Planning Department within 120 days of July 16, 1990. A failure to timely file an application constituted a waiver of any vested rights claim.

29. However, a property owner whose property was located within a recorded subdivision, or unrecorded subdivision which the City determined had satisfied the City's infrastructure requirements, did not have to submit an application for a vested rights determination. In those cases, vested rights were "presumed," based upon the infrastructure requirements being satisfied, and the property was "presumptively" vested from the concurrency and consistency requirements of the City's Comprehensive Plan pursuant to Section III.1.a. of the Ordinance. The right of a property owner to assert that his property is presumptively vested can be made at any time, even today.

30. After reviewing its land development records, on July 25, 1990, the City published in the Tallahassee Democrat

a lengthy list of recorded and unrecorded subdivisions it had determined were presumptively vested from the concurrency and consistency requirements of the City's Comprehensive Plan. The subject property, identified on the City's tax rolls by Tax I.D. #11-28-20-071-000-0, was included within the City's list of presumptively vested recorded subdivisions. The notice stated that it was the City's intent to only exempt subdivisions for which streets, stormwater management facilities, utilities, and other infrastructure required for development had been completed by July 16, 1990.

31. Recorded subdivisions included on the list of exempt subdivisions were presumed to have satisfied the infrastructure requirements. The City did not inspect recorded subdivisions to ensure compliance with the infrastructure requirements, but presumed the existence of the requisite infrastructure. Any recorded subdivision subsequently determined not to be in compliance with the infrastructure requirements could be removed from the exempt list. Unrecorded subdivisions were not included on the exempt list unless they had first been physically inspected to ensure compliance with the infrastructure requirements.

e. Walker's application for vested rights

32. On October 17, 1990, the City's Director of Growth Management instructed that Walker's property be removed from

the list of exempt subdivisions due to the resubdivision of the original plat and because all of the infrastructure was not in place. At that time, however, there was no provision in the Ordinance that made resubdivision a factor in the determination of an exemption or vesting. On the other hand, the issue of infrastructure was a valid consideration.

33. On November 13, 1990, Walker timely submitted an application for a vested rights determination on the basis that his property was entitled to vesting under the common law. The City assigned Number V.R.0195T to the application.

34. On January 8, 1991, in accordance with Section III.3.b. of the Ordinance, the City Planning Department determined that the subject property was not vested and notified Walker that Application Number V.R. 0195T was denied. No reason was given. The letter of denial advised him of his rights to contest the planning staff's denial of his vested rights.

35. On January 22, 1991, Walker notified the City of his decision to challenge planning staff's denial of his vested rights application. He elected to waive his right to a hearing before the City Staff Committee, and he requested a hearing before DOAH pursuant to Section III.3.c. of the Ordinance.

36. On July 3, 1991, the City referred Walker's request for an administrative hearing to DOAH on the planning staff's denial of Application Number V.R.0195T. The request was assigned DOAH Case Number 91-004109VR. On July 9, 1991, the case was scheduled for a hearing on August 29, 1991.

37. During the pendency of the DOAH case, and at the request of the City, Walker and his counsel met with representatives of the City, including a Planning Department staffer and an assistant city attorney. Before the meeting, Walker reconfirmed with City officials that his property had been rezoned to C-1, RM-2, and R-2 in 1972, and that the necessary water and sewer lines were in place to serve his property. After learning at the meeting that infrastructure for the property had already been built, the City agreed to find Walker's property vested to the extent that the infrastructure was in place. In other words, Walker would be allowed to develop as many units as the existing infrastructure would accommodate.

38. After the meeting, Walker secured an affidavit from Wayne Colony, the engineer who designed the water and sewer system for the property and the southern extension of Riggins Road. In his affidavit dated August 6, 1991, Coloney attested that the sewer line between Mahan Drive and the Meadowbrook neighborhood was designed to serve the single-family

residences, the RM-2 property and the C-1 property; that the sewer line had the capacity to serve 670 residential equivalent units in the RM-2 and C-1 portions of that property; and that the sewer had sufficient capacity for the maximum density of development on the RM-2 and C-1 portions of the property. A letter from the City's Water and Sewer Department dated August 1, 1991, also confirmed that the City had "the necessary water and sewer lines to serve the property." Finally, Riggins Road and the stormwater drain to serve the property had been completed in the early 1980's. With this information in hand, counsel for the City agreed that the property was presumptively vested.

39. On August 6, 1991, or just prior to the scheduled administrative hearing, counsel for Walker and the City executed the Settlement Agreement which declared the subject property an exempt subdivision based upon Section III.1.a.1. of the Ordinance, and presumptively vested the property from the consistency and concurrency requirements of the City's 2010 Comprehensive Plan. The Settlement Agreement authorized the development of the subject property for up to 670 residential equivalent units. The Settlement Agreement also stated that there was no time frame in which the Walker property was required to commence or complete development, and that the property was vested in perpetuity.

40. On August 7, 1991, the Settlement Agreement was filed with DOAH. On August 8, 1991, an Order Approving Stipulation and Final Settlement Agreement was entered. Therefore, an administrative hearing was never held on Application V.R.0195T.

41. Walker's application was one of hundreds of vested rights applications being processed by the City at that time. Although many of the specific details underlying the City's decision to approve the settlement are not known now because of the passage of time, the subsequent loss by the City of Walker's application file, and the sheer number of applications then being processed, the City Attorney is certain that he would have known about the petition and the underlying facts before he authorized the Assistant City Attorney to execute the agreement. Based on the information then available, the City Attorney now says that Walker clearly qualified for either common law or presumptive vesting.

42. Petitioners contend that the Assistant City Attorney (and/or City Attorney) lacked authority to settle the case without obtaining specific prior authority from the City Commission; however, the more credible and persuasive evidence shows otherwise. This is true even though the Ordinance does not specifically address the settlement of vested rights cases.

43. The City Attorney's policy is and has been to involve the affected City staff in settlement negotiations rather than negotiating without the consent of his client. Moreover, the present City Attorney, and his two predecessors, have always considered it a part of their inherent authority to settle litigation on the City's behalf when it is in the best interest of the City to do so. The only exception to this inherent authority is when there is a budgetary impact; in those cases, prior approval must be obtained before committing the City to spending money. Here, however, there was no fiscal impact resulting from the Walker settlement. Further, at no time after the Settlement Agreement was signed has the City Commission ever expressed its disagreement with the City Attorney's interpretation of the Ordinance, taken steps to curtail his inherent authority, or acted to vacate the Settlement Agreement. Therefore, in the absence of any credible evidence to the contrary, it is found that the Assistant City Attorney, after consultation with the City Attorney and appropriate City staff, had the authority to execute the Settlement Agreement on behalf of the City without prior City Commission approval.

44. Petitioners also contend that based upon the language in Section III.3.e.7. of the Ordinance, there was no authority for the hearing officer to approve the Settlement

Agreement until a substantive review of the information which formed the basis for the agreement had been made. The cited provision sets forth the criteria upon which the decision of the hearing officer in a vested rights case must be based. They include an evidentiary presentation by the parties at a formal hearing, adherence to certain land use guidelines and relevant case law, and a recommended order at the conclusion of the proceeding.

45. The City points out, however, that under its interpretation of the Ordinance, once the parties learned that the property was exempt and the dispute had been settled, the criteria in Section III.3.e.7. did not apply. In those situations, no useful purpose would be served in requiring the parties to go through the formality of a de novo hearing. Otherwise, the parties (including the taxpayers) would be required to expend time, resources, and energy to litigate a matter in which no material facts were in issue. Accordingly, the City's interpretation of the Ordinance is found to be the most logical and reasonable, and it is found that the DOAH hearing officer had the authority to accept the parties' settlement without conducting a hearing.

46. Petitioners next contend that when the Settlement Agreement was executed, the City lacked sufficient evidence to show that Walker had installed the infrastructure necessary

for presumptive vesting. More specifically, they assert that except for Wayne Colony's affidavit, and the letter from the City, there was no evidence to support that determination. Petitioners go on to contend that not only must the primary roadways and water and sewer lines be built before the vesting cut-off date, but the "on-site" water and sewer lines, stormwater facilities, and other facilities necessary to begin vertical construction on each apartment building must also be in place. This contention is based on Section III.1.a.1. of the Ordinance which requires that in order for a subdivision to attain exempt status, the "streets, stormwater management facilities, utilities, and other infrastructure required for the development must have been completed as of July 16, 1990."

47. The City Attorney's testimony on this issue is found to be the most persuasive. According to his interpretation of the Ordinance, only that infrastructure necessary to serve the subdivision must be completed in order to qualify for vesting. Conversely, on-site or private infrastructure does not have to be completed in order to satisfy the terms of the Ordinance. Therefore, on-site infrastructure is not a factor in determining whether a property qualifies for an exempt status. Indeed, as the City Attorney points out, if Petitioners' interpretation of the Ordinance were accepted, there would be "no vested lots in the City" since infrastructure is never

extended from the public street to the lot prior to its development.

48. Finally, Petitioners contend that the Settlement Agreement is invalid because Walker's application in DOAH Case No. 91-4109VR was for common law vesting while the Settlement Agreement made a determination that the property was presumptively vested.

49. As a practical matter, there is no difference between property being exempt or being vested. Under either category, the property would not have to meet the requirements of the Comprehensive Plan. Here, the evidence shows that Walker's property qualified for both common law and presumptive vesting. Since the two types of vesting have the same practical effect, the validity of the Settlement Agreement has not been impaired.

f. Expiration of vested rights

50. Sections II.5.a., d., and i. of the Ordinance provide, respectively, that for purposes of a vested rights determination, an "[e]xempt subdivision," "[f]inal subdivision plat approval," or "[a]ny other development order which approved the development of land for a particular use or uses at a specified intensity of use and which allowed development activity on the land for which the development order was issued" shall be deemed a final development order.

51. Section IV.1.c. of the Ordinance provides that "[a]ll final development orders shall expire in one year or such shorter time as may be adopted unless it is determined that substantial development has occurred and is continuing in good faith."

52. Petitioners argue that the Settlement Agreement constitutes a "development order" within the meaning of the foregoing provisions of the Ordinance, and because no activity has occurred on the land since the Settlement Agreement was approved in 1991, the development order has expired by operation of the law. For the following reasons, this contention has been rejected.

53. The Settlement Agreement did not approve "the development of land for a particular use or uses at a specified intensity of use" and did not allow "development activity on the land." Further, it did not allow the owner to pull building permits and commence development on his land. Rather, it simply determined which set of rules and regulations (pre-1990 or post-1990) Walker had to comply with in order to develop his property. Therefore, it cannot be "[a]ny other development order which approved the development of land for a particular use or uses at a specified intensity of use and which allowed development activity on the land for which the development order was issued."

54. At the same time, a recorded subdivision such as Glenwood Estates is "complete" since all necessary infrastructure is in place. It has no expiration date, and no further development remains to be done to show "continuing good faith," as that term is used in the Ordinance. Therefore, even if the Walker property technically meets the definitions of an "exempt subdivision" or a "final subdivision plat approval," the expiration provisions of the Ordinance still do not apply.

55. Finally, the City has never applied the expiration provisions of the cited provision to terminate the exempt status of a recorded subdivision, nor has it construed a vested rights determination as being a "final development order" within the meaning of the Ordinance. This interpretation of the Ordinance is found to be reasonable, and it is hereby accepted.

g. Equitable estoppel

56. As noted earlier, when Walker sold the Meadowbrook tract (69 acres) to Collins Brothers in 1972, he made the sale contingent on his obtaining not only residential zoning for the Meadowbrook tract, but also upon obtaining commercial and multi-family zoning on the remainder of the tract. Thus, he sold the site in reliance on his ability to develop the remainder of the tract in conformance with his master plan.

57. As a part of that sale, Walker gave the purchasers credit towards the purchase price to defray one-half of the cost of installing the infrastructure for the entire 100-acre parcel, again in reliance on his ability to develop the property. When Collins Brothers defaulted, he paid the successor developer (Guardian) the money necessary to defray one-half of the cost of the communal infrastructure, and he paid additional funds for water and sewer taps and a storm drain, again in reliance on his ability to develop the property.

58. Walker also petitioned the City to annex his property in the early 1980's based on a representation by the City that the annexation would not affect his ability to develop his property. After the annexation, Walker has continued to pay property taxes to the City based upon the value of the property to be developed under the property's C-1 and RM-2 zoning.

59. In addition, Walker encumbered his property to secure loans in reliance on his ability to develop it in accordance with the terms of the Settlement Agreement.

60. After the Settlement Agreement was approved, the City adopted a site-specific zoning plan which impacted Walker's property. Walker agreed to reduce the maximum density he might otherwise have obtained through litigation in

reliance upon the City's representation that the Settlement Agreement remained in effect and that his rights under that Agreement would survive in perpetuity.

61. Finally, Walker has entered into an option contract for the sale of his property to TTK based upon the validity of the Settlement Agreement. He has also expended substantial monies to further that sale and to develop his site plan.

h. Other contentions

62. Petitioners have also contended in their Proposed Recommended Order that "[t]he creation of new lots through the re-subdivision of the parent parcel [in 1989] subjects the property under review to the consistency and concurrency provisions in the City's 2010 Comprehensive Plan." Because this contention was not raised in the initial pleading or in the parties' Joint Pretrial Statement, it has been disregarded.

63. Finally, the Association points out that multiple three-story apartment buildings will be constructed immediately adjacent to single-family homes in the Association with only an 8-foot fence and a 30-foot setback dividing the two areas. In addition, its members logically fear that the project will generate additional traffic, crime, and pollution and result in the lowering of property values in the neighborhood. It also asserts that the developer has never

been willing to sit down with neighborhood members and attempt to compromise on any design aspect of the apartment complex. While these concerns are obviously legitimate and well-intended, they are not relevant to the narrow issues raised in this appeal.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Article XXIV, Sections 24.1 et. seq., Tallahassee Code of Ordinances.

65. Section 24.3.C. provides in part that a decision of the DRC

> become[s] final fifteen (15) calendar days after [it is] rendered unless a party files a notice of intent to file a petition for formal proceedings in accordance with the bylaws and completes the application by filing a petition for formal proceedings within thirty (30) calendar days after the decision is rendered.

66. Here, a Notice of Intent to File a Petition for Formal Proceedings and a Petition for Formal Proceedings were timely filed by Petitioners. Once a standing determination is made, as it was here, Section 24.3.C. provides that the Commission shall "conduct [de novo] quasi-judicial proceedings in accordance with section 24.6 below." Among other things, Section 24.6.B. authorizes the Commission to "contract with the Division of Administrative Hearings for [administrative

law judges] to conduct hearings on petitions for formal proceedings filed pursuant to subsection 24.3.C. above."

67. While Section 24.6. fails to address the burden of proof in a Commission land use proceeding, the party seeking approval of a Type B site plan application should logically bear the burden of proving by a preponderance of the evidence that it is entitled to approval of the application. See, e.g., Durward Neighborhood Assoc., Inc. et al. v. City of Tallahassee et al., DOAH Case No. 98-4234 (City of Tall.-Leon Cty Plan. Comm., October 5, 1999). Thus, Respondents are required to present a prima facie case of entitlement, taking into account the objections raised by Petitioners.

68. In their complaint, Petitioners allege that various procedural requirements in the Ordinance were not met when the Settlement Agreement was executed, and therefore the Settlement Agreement is not valid. More specifically, they contend that the City Attorney had no authority to settle pending litigation in DOAH Case No. 91-4109VR without prior City approval; that the DOAH hearing officer was required to conduct a de novo hearing before the vested rights determination could be made; that Walker applied for common law vesting in DOAH Case No. 91-4109VR, but the Settlement Agreement determined that his property was presumptively vested, a type of vesting different from that applied for; and

that the City had insufficient evidence before it to make a determination that the necessary infrastructure for the subdivision was in place. They also contend that the Settlement Agreement is a final development order as defined by the Ordinance, and because Walker failed to commence and continue substantial development within one year following its issuance, the development order has expired. Finally, the undersigned has rejected as being untimely a contention that the 1989 resubdivision of the property subjects the property under review to the consistency and concurrency provisions in the City's Comprehensive Plan.

69. Initially, it is noted that virtually all of Petitioners' contentions turn on a proper interpretation of relevant sections of the Ordinance. As the local government charged with the responsibility of interpreting and enforcing the Ordinance, the City should be accorded deference in how it interprets the Ordinance, unless its interpretation is shown to be plainly erroneous. Compare, e.g., Little Munyon Island v. Dep't of Envir. Reg., 492 So. 2d 735, 737 (Fla. 1st DCA 1986) (state agency determination with regard to a statute's interpretation and applicability will receive great deference in the absence of clear error or conflict with legislative intent). Here, the undersigned has accepted the City

Attorney's expert testimony as being the most persuasive on this issue.

70. Petitioners first contend that the City Attorney lacked authority to settle a vested rights case without prior City Commission approval. While it is true that the Ordinance does not contain a specific grant of authority to the City Attorney, or his designee, to settle vested rights cases, the more persuasive testimony supports a conclusion that he possesses such inherent authority. Indeed, the accepted evidence shows that for more than 25 years, the City Attorney has had the inherent authority to settle those matters having no fiscal impact without prior City Commission approval. There was no credible evidence to contradict this finding.

71. Petitioners also contend that because Walker applied for common law vesting, the Settlement Agreement is invalid because it found the property to be presumptively vested. Again, however, the more persuasive evidence shows that there is no practical distinction between exempt or vested property. In either case, any development on the property would be reviewed as vested. Therefore, the fact that the relief granted in the Settlement Agreement varied in that respect from the relief sought in the application does not affect its validity.

72. Petitioners further contend that the Settlement Agreement is invalid since the Ordinance contemplates that a formal hearing on the facts underlying the approval of vested rights must be held, and that a settlement by the parties does not obviate the need for a hearing. As noted in the Findings of Fact, however, once the parties settle a matter, there would be no purpose in them going through the hearing process except to announce to the tribunal that the matter had settled. Were this not so, the parties would be required to expend time, money, and resources when no disputed issue of fact existed. Such a construction of the Ordinance is illogical and unreasonable and would produce an absurd result. Finally, the undersigned notes that Leon County, which has an identical vesting ordinance and shares the Planning Department with the City, has construed its ordinance in the same manner and settled at least two vesting cases without a formal hearing. See DOAH Case Nos. 91-0355VR and 91-4106VR.

73. Petitioners next contend that because the on-site infrastructure for the individual apartment buildings was not complete as of July 16, 1990, the property cannot qualify for vesting. Again, the more persuasive evidence shows that in order to satisfy the Ordinance, only the infrastructure necessary to serve the subdivision is required. Here, the record clearly demonstrates that the stormwater drain, water

and sewer utilities, and Riggins Road were complete well before the cut-off date for vesting.

74. Petitioners' final contention is that the Settlement Agreement constitutes a final development order within the meaning of the Ordinance, and that it expired one year after issuance because there was no continuous construction on the site. Although the Ordinance is not a model of clarity in this respect, for the reasons set forth in Findings of Fact 50-55, this argument must also fail.

75. In light of the above conclusions, it is unnecessary to reach the issues of whether the City is equitably estopped to deny the validity of the Settlement Agreement or, assuming that the Settlement Agreement is invalid, Walker would now qualify for vesting.

76. Finally, Petitioners should not be faulted for bringing this action. Their concerns were genuine and well-founded, for few, if any, homeowners relish the thought of having a 416-unit apartment complex in their back yard. Under the circumstances presented here, however, no relief is available.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Tallahassee-Leon County Planning Commission enter a final order granting the Type B site plan review application filed by George K. Walker which determined that his property is presumptively vested.

DONE AND ENTERED this 8th day of February, 2001, in Tallahassee, Leon County, Florida.

_____
DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of February, 2001.

COPIES FURNISHED:

Kenneth D. Goldberg, Esquire
1725 Mahan Drive, Suite 201
Tallahassee, Florida 32308-5201

Linda R. Hurst, Esquire
City Hall, Second Floor
300 South Adams Street
Tallahassee, Florida 32301-1731

Jay Adams, Esquire
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1804

Jean Gregory, Clerk
Tallahassee-Leon County Planning Commission
City Hall
300 South Adams Street
Tallahassee, Florida 32301-1731

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this matter.