IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT IN AND FOR CITRUS COUNTY, FLORIDA

CITRUS COUNTY, FLORIDA, a political subdivision of the State of Florida,

Petitioner,

vs. **CASE NO.: 2019-CA-843A**

CITY OF INVERNESS, a municipal corporation of the State of Florida,

Respondent.

_____/

ORDER GRANTING PETITION FOR CERTIORARI

THIS MATTER came before the Court on a Petition for Certiorari by Citrus County, Florida. The Court reviewed the Petition for Certiorari; the City of Inverness's Amended Response to Petition for Writ of Certiorari; Intervenor, New Horizon Funding, Inc.'s Amended Brief in Opposition to Citrus County, Florida's Petition for Certiorari; the County's Reply to Amended Response; and the County's Response to Amended Brief. The Court also reviewed the records of this case and all documents pertinent to the case, and being fully advised in the premises finds as follows:

I. BACKGROUND

A. Facts at issue.

1. New Horizon Funding, Inc.'s ("NH") applied to the City of Inverness ("City" or "the City") for voluntary annexation of about 206 acres parcel located in an unincorporated part of Citrus County, Florida ("County" "the County"). *See* Pet. App., 4. The City sought a review of the annexation and hired Owen Beitsch of GAI Consultant. Beitsch

concluded NH's request satisfied requirements of Chapter 171, Florida Statutes and recommended approval of the annexation. *See Id.* at 17-29.

2. The City held a public meeting on May 4, 2019 where Ordinance 2019-737 was discussed. *See Id.* at 30. The City Council of the City of Inverness ("City Council") voted unanimously to approve the ordinance. *Id.*

3. On June 4, 2019, the City Council held a public hearing to address adopting Ordinance 2019-737. *Id.* at 230. The evidence presented at the hearing included testimony from John Eden, principal and attorney for NH, and County Attorney, Denise Lyn. Mr. Eden in his arguments relied on Beitsch's report. *Id.* at 279-80. The County objected to approval of the ordinance raising legal arguments. The County objected to Beitsch's report because it was not signed, and he was not present at the hearing. The County also contested the findings of the Report over "contiguity" and "compactness" requirements of section 171.044, Florida Statutes. *Id.* at 280-88. Ultimately, the City Council adopted Ordinance 2019-737.

4. Ordinance 2019-737 declared in part:

> (B) The petition and supporting documentation submitted by New Horizon has been reviewed and satisfies each and every requirement of section 171.044, Florida Statutes.
>
> (C) The area proposed to be annexed is contiguous along a substantial part of the boundaries of its boundaries with the existing boundaries of the City of Inverness
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> .
>
> (D) The area proposed to be annexed is concentrated in a single area and does not create enclaves, pockets, or finger areas in serpentine patterns, as those terms are defined by law.

Pet. App., 308. The Ordinance also found that "said lands are contiguous to the present City limits of the City of Inverness. That said lands are now incorporated and lie in the same county

and City, and when annexed, would form a reasonably compact addition to the incorporated territory of said City." *Id.* at 311.

B. ***The County's Petition for Certiorari.***

1. The County in its Petition seeks a writ quashing City Ordinance 2019-737 ("the Ordinance") adopted on June 4, 2019. The County complains the annexation violates the contiguity and compactness requirement of Florida's annexation law as well as impermissibly creates a pocket of unincorporated land between the City and the NH parcel. The County cites sections 171.031 and 171.044, Florida Statutes to support this assertion.

2. The County argues it was denied procedural due process because it did not have an opportunity to cross-examine the City's expert Beitsch, the author of the report the City used as a basis for the ordinance. Beitsch was not present at the hearing and could not be cross-examined. The County asserts it was a party to the annexation and should have had a chance to cross-examine the person who drafted the report.

3. The County also claims the City failed to observe essential requirements of law in adopting the Ordinance. First, the County asserts Lake Spivey is not a "body of water" that amounts to a "minor geographical division" thus contiguity requirement is not satisfied. The County contends section 171.044, Florida Statutes (2019) states unincorporated property which is contiguous to a municipality may request annexation. But, section 171.031(11), Florida Statutes (2019) permits annexation if the separation of property is due to "a body of water, or watercourse." Next, the County argues compactness requirement is not satisfied because the annexation of NH creates about 300-acre unincorporated "pocket" between the NH parcel and the City. The County refers to section 171.031(12), Florida Statutes which states creating

"enclaves, pockets, or finger areas in serpentine patterns" of incorporated or unincorporated land violates the "compactness" requirement.

4. Finally, the County alleges the City's decision is not supported by competent substantial evidence because the evidence presented at the hearing/meeting does not support approval of the annexation. At the hearing the City presented an annexation map and Betisch's report, but the County asserts the City failed to present a staff report or testimony from "professional" staff member; and no testimony from Betisch. The County also argues Betisch's report amounts to inadmissible hearsay.

C. ***The City's Amended Response to the Petition for Writ of Certiorari.***

1. The City in its Amended Response alleges the Ordinance does not violate established principles of law. The City claims the County is not a party, so it did not have right to cross-examine witnesses. The City maintains the County was afforded due process by providing notice and opportunity to be heard. Further, the City argues the County lacks standing to raise substantive challenges to the Ordinance.

2. The City argues the County may be a "party affected" under section 171.031(5), Florida Statutes (2019), but that does not afford a "party affected" the right to a "full judicial hearing." The City asserts the County was afforded notice and opportunity to be heard. It was given notice and opportunity to be heard as a participant not a party but did not have the right to cross-examine witnesses.

3. The City contends section 171.081, Florida Statutes (2019) limits how an affected party can challenge the annexation:

a. Local government failed to comply with procedure requirements of Chapter 171, or

b. Local government failed to comply with other substantive requirements of Chapter 171, and the requirements apply to his/her property.

The City contends, based on section 171.081, Florida Statutes, the County lacks standing to challenge the City's annexation. The City also claims the City Council applied the correct law when approving the annexation. Specifically, the annexation met the statutory requirements of contiguity and compactness.

4. The City also argues it did comply with the essential requirements of law and competent substantial evidence supports that the NH parcel is contiguous and reasonably compact. The City contends evidence presented at the hearing included an annexation map, legal description, witness testimony and Betisch's report.

D. ***The Intervenor's Amended Brief in Opposition.***

1. The parties filed a joint stipulation permitting New Horizon, Inc. to intervene in this matter, and the Court granted the request.

2. NH in its Amended Brief asks the Court to deny the County's Petition. NH argues the lower proceeding was a quasi-judicial proceeding and the County does not enjoy the same as rights as afforded in a "full judicial hearing." NH alleges the County is a participant so is not entitled to cross-examine witnesses. NH asserts the County may be a party affected but is not an actual party. NH argues that even if the County was a party there still was no due process violation.

3. NH also argues essential requirements of law were met. NH contends contiguity requirement was met because the NH parcel is contiguous to the City by virtue of Lake Spivey and the Lake is not an obstacle to annexation. Additionally, NH asserts

compactness requirement was met because the "pocket" is not a pocket because it doesn't create a "small and isolated" pocket of unincorporated land.

4. Finally, NH contends the City's action is supported by competent, substantial evidence. The evidence used by the City included, necessary information to consider the compactness and contiguity requirements and Betisch's report. NH claims no one challenged Betisch's qualifications and the report, even if it is hearsay, is admissible in administrative hearings.

II. ANALYSIS

A. ***Standard of Review.***

1. Circuit courts review annexation ordinances by certiorari under section 171.081, Florida Statutes. *See City of Auburndale v. Town of Polk City,* 898 So.2d 1101, 1102 (Fla. 2d DCA 2005); *City of Tallahassee v. Kovach,* 733 So.2d 576, 577–78 (Fla. 1st DCA 1999). In this first-tier review, the court determines only: whether the lower tribunal afforded the parties' procedural due process; whether the essential requirements of law were observed; and whether the lower tribunal's action was supported by competent, substantial evidence. *See Broward County v. G.B.V. Int'l, Ltd.,* 787 So.2d 838, 842–44 (Fla.2001); *Haines City Cmty. Dev. v. Heggs,* 658 So.2d 523, 530 (Fla.1995). The court may not reweigh the evidence or substitute its judgment for that of the agency. *Haines City Cmty. Dev.,* 658 So.2d at 529 (citing *Educ. Dev. Ctr. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So.2d 106, 108–109 (Fla.1989)).

B. ***Procedural due process.***

1. The Florida Constitution and United States Constitution both provide protection to litigants and "[p]rocedural due process requires that each litigant be given proper notice and a

full and fair opportunity to be heard." *Carmona v. Wal-Mart Stores, East, LP*, 81 So. 3d 461, 463 (Fla. 2d DCA 2011) (citations omitted). When assessing whether or not a violation of due process has occurred the court must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest; absent such a deprivation there can be no denial of due process. *See Carillion Community Residential v. Seminole County*, 45 So. 3d 7 (Fla. 5th DCA 2010).

2. The Ordinance was noticed for the City's regular public meeting on June 4, 2019. The meeting was reported and transcribed. The County's representative was County Attorney Denise Lyn. County Attorney Lyn attended the meeting and was permitted to speak against the Ordinance. *See* Pet. Ann., 280-88. The County complains it was not afforded due process because it did not have the opportunity to cross-examine an author of a report relied on by the City. *Id.* at 283. In the annexation proceeding below the City did rely on a report authored by Owen Beitsch. Beitsch did not appear at the meeting and thus was unavailable for questions. *Id.* at 293.

3. Annexation proceedings, like the one below, are legislative in nature. *City of Lake Mary v. Seminole County*, 419 So.2d 737 (Fla. 5th DCA 1982). In the annexation proceedings below, the County was a "party affected" as defined in section 171.031(5), Florida Statutes. The County was not a party to the NH parcel voluntary annexation itself. Thus, the County's assertion it had the "right" to cross-examine witnesses as it were a party to a judicial proceeding in the annexation below is not correct.

4. The City Council listened to public input, heard from an Attorney hired by the City to give advice and answer questions, discussed the Ordinance openly and in the public eye, and ultimately voted on the record to adopt the Ordinance. *See generally*, Pet. Ann., 276-300.

5. It is clear from the record the County knew of the City's public meeting to discuss and vote on the Ordinance. Indeed, the County Attorney attended the public meeting and addressed the City Council on the record and spoke against the Ordinance. *Id.* at 280-88 Clearly the County received notice of the public hearing in advance. After the City adopted the annexation Ordinance, the County filed its Petition for a Writ of Certiorari seeking to quash the Ordinance, hence this very proceeding. Thus, the County has been afforded procedural due process.

C. ***Essential requirements of law.***

1. A departure from the essential requirements of the law necessary for "the issuance of a writ of certiorari is something more than a simple legal error." *Fassy v. Crowley*, 884 so. 2d 359, 363-64 (Fla. 2d DCA 2004). In *Fassy*, the Second District Court of Appeal found that "[t]here must be a violation of a clearly established principle of law resulting in a miscarriage of justice." *Id.* (citation omitted). The inquiry is not as concerned "with the mere existence of legal error as much as with the seriousness of the error." *Id.* Moreover, failure to observe the essential requirements of the law is synonymous with failure to apply "the correct law." *Id.* However, a misapplication of the correct law or an erroneous interpretation of a law does not rise to the necessary level. *See Ivey v. Allstate Insurance Co.,* 774 So.2d 679, 682-83 (Fla.2000). A decision "made according to the form of the law and the rules prescribed for rendering it, although it may

be erroneous in its conclusion as applied to the facts, is not an illegal or irregular act or proceeding remedial by certiorari." *Id.* at 682.

2. The County asserts the annexation amounts to a violation of clearly established principle of law in that the NH parcel violates Florida law's requirement of contiguity and compactness. The County relies on Chapter 171, Florida Statutes which governs annexation. Specifically, section 171.044(1), Florida Statutes "[t]he owner.., of real property in an unincorporated area of a county which is contiguous to a municipality and reasonably compact may petition the governing body of said municipality that said property be annexed to the municipality."

3. Contiguousness

a. Property is contiguous when "[a] substantial part of a boundary of the territory sought to be annexed by a municipality is coterminous with a part of the boundary of the municipality." § 171.031(11), Fla. Stat. (2019); *see also Sanford v. Seminole County,* 538 So.2d 113, 115 (Fla. 5th DCA 1989) (noting that "contiguous" in annexation has been defined as "touching or adjoining in a reasonably substantial ... sense").

b. The City departed from the essential requirements of the law in determining the property was contiguous. The NH parcel has no part of its boundary coterminous with any part of any boundary of the City. Simply put, the City and the NH parcel do not touch or adjoin in any reasonably substantial sense and do not share a common boundary at all. Indeed, over 5,000 feet of water separate the NH parcel and the City. Additionally, the NH parcel is some one-and-a-half miles from the City by roadway. *See* Pet. Ann., 284-85, 290:12-19. One would have to travel over a mile on a highway to traverse the overland separation between the

nearest boundary of the City and the nearest boundary of the NH parcel. One would have to travel nearly a mile over Lake Spivey to traverse the water separation between the nearest boundary of the City and the nearest boundary of the NH parcel.

c. Although an opinion by the Florida Attorney General is not binding on this Court, Attorney General opinions are persuasive authority that may be considered by this Court in considering the issues on review. A substantially similar annexation issue such as this was addressed in opinion 86-43 of the Attorney General. *See* Op. Att'y Gen. Fla. 1986-43 (1986). The two salient differences in the instant case and in opinion 86-43, the City of Avon Park, the annexing city, owned the parcel sought to be annexed. The other difference is the parcel sought to be annexed was some 2,000 feet away across a lake.

d. The issue at hand in opinion 86-43 was framed as follows:

> "Does s. 171.044, F.S., permit the City of Avon Park to voluntarily annex a parcel of property, which on one side is contiguous to the municipality but is separated from the municipality by a body of water and which is surrounded on the other sides by unincorporated territory?"

The situation regarding physical proximity of the City of Avon Park and the parcel sought to be annexed was described more precisely in opinion 86-43:

> "The property proposed to be annexed is roughly quadrilateral in shape. According to your letter and the maps attached to your letter of inquiry, a body of water, Lake Glenada, lies between the property in question and the City of Avon Park. The parcel is otherwise surrounded by unincorporated territory of the county. At no point does the land sought to be annexed physically abut any of the municipality's corporate boundaries. The distance across the lake to the property sought to be annexed from the present city limits is approximately 2,000 feet. You have advised this office that the property is owned by the City of Avon Park."

e. As in this case, the parcel in opinion 86-43 had no part of its boundary coterminous with any part of any boundary of the City of Avon Park. As in the instant case, the

parcel in AGO 86-43 was otherwise surrounded by unincorporated territory of the county. As noted above, the NH parcel is separated from the City by some 5,000 feet across a lake. In AGO 86-43 a lake separated the City of Avon Park and the parcel sought to be annexed by 2,000 feet.

f. In opinion, 86-43, the Attorney General concluded that the fact the parcel to be annexed was 2,000 feet across a lake was not, taken alone, fatal to the annexation desires of the City of Avon Park:

> "Thus, the fact that a body of water running parallel with and between the territory sought to be annexed and the annexing municipality does not, in and of itself, prevent annexation. However, while the presence of such a division does not prevent the annexation, it must not, as a practical matter, prevent the territory sought to be annexed and the annexing municipality from becoming a unified whole with respect to municipal services or prevent their inhabitants from fully associating and trading with each other, socially and economically. This requirement would appear to pose a problem to the proposed annexation. Based upon my examination of the maps supplied to this office for review, this limitation or qualification would not appear to be satisfied in the instant inquiry since the lake appears to prevent the territory sought to be annexed and the municipality from becoming a unified whole with respect to municipal services and to prevent their inhabitants (if any) from fully associating and trading with each other, socially and economically."

Thus, part of the problem was the annexation of the parcel across the lake also meant "the territory sought to be annexed and the municipality [are prevented] from becoming a unified whole with respect to municipal services and to prevent their inhabitants (if any) from fully associating and trading with each other, socially and economically."

g. The Attorney General concluded the opinion by stating:

> "Therefore, I am of the opinion, unless and until judicially determined otherwise, that the City of Avon Park may not voluntarily annex a parcel of property separated from the municipality by a lake and otherwise surrounded by unincorporated land when such annexation would result in the creation of a municipal enclave surrounded by unincorporated property and when such property would be geographically isolated from the municipality preventing, as a practical matter, the property to be annexed and the municipality from becoming a unified whole."

See Op. Att'y Gen. Fla. 1986-43 (1986). Because the NH parcel annexation violates the requirement of contiguousness, is geographically isolated from the City such there can be no unified whole, and creates an enclave surrounded by a lake and unincorporated county lands, City Ordinance 2019-737 violates an essential requirement of the law. For this reason, City Ordinance 2019-737 is quashed.

4. Compactness

a. Section 171.044(1), Florida Statutes (2018), also requires the property is "reasonably compact." Compactness is defined as "concentration of a piece of property in a single area and precludes any action which would create enclaves, pockets, or finger areas in serpentine patterns. Any annexation proceeding in any county in the state shall be designed in such a manner as to ensure that the area will be reasonably compact." § 171.31(12), Fla. Stat. (2019). The requirements of section 171.044(1), Florida Statutes is to "assure the creation of geographically unified and compact municipalities." *City of Sunrise v. Broward County*, 473 So. 2d 1387, 1389 (Fla. 4th DCA 1985). The Fourth District Court of Appeal in *City of Sunrise* found that annexation of property that creates "enclaves" and "finger areas" violates the compactness requirement. *Id.* Meanwhile, the Fifth District Court of Appeal in *Sanford v. Seminole County,* 538 So.2d 113, 115 (Fla. 5th DCA 1989) defined pockets "as small isolated area or group." "The statutory requirement that pockets not be created by annexations was intended to insure that no vestiges of unincorporated property be left 'in a sea of incorporated property.'" *City of Center Hill v. McBryde*, 952 So. 2d 599, 603 (Fla. 5th DCA 2007) (citation omitted).

b. The Court finds the City's annexation of NH parcel creates an impermissible pocket of incorporated City land wholly surrounded by unincorporated areas that violates the compactness requirements. The annexation would create an area of unincorporated County land between the parcel and the City, in effect creating a "pocket." Thus, the Court finds the approval of the annexation did not meet the essential requirements of law.

D. ***Competent, substantial evidence.***

Because the City's Ordinance 2019-737 is quashed because it violates contiguousness, prevents a ununified municipal whole, and creates an enclave surrounded by a lake on one side and unincorporated county lands on the three remaining sides, an essential requirement of law, the Court will not engage in an analysis of whether or not the City's action was supported by competent, substantial evidence.

III. CONCLUSION

The Court finds that the County has established a basis to grant the writ of certiorari. The City's approval of Ordinance 2019-737 did not meet the essential requirements of law. This amounts to more than a simple legal error. This amounts to a violation of clearly established law resulting in a miscarriage of justice. The Court finds the annexation of NH parcel violates the contiguous and compactness requirements of section 171.044, Florida Statutes (2019). For these reasons, the City Ordinance 2019-737 will be quashed.

It is, therefore, **ORDERED AND ADJUDGED:**

1. The Petitioner, Citrus County, Florida's Petition for Certiorari is GRANTED.
2. The City of Inverness, Ordinance 2019-737 is hereby QUASHED.

DONE AND ORDERED in Chambers, at Inverness, Citrus County, Florida, on this 29 day of June 2021.

PETER M. BRIGHAM
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing *Order Granting Petition for Certiorari* has been furnished to the following by email or U.S. Mail this 30 day of June 2021.

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