IN THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR LEVY COUNTY, FLORIDA

CASE NUMBER: 38-2024-CA-000075-CAAM
Circuit Civil Division

JEFFRY FERGUSON and
KIMBERLY SWIFT,
Petitioners,

-vs-

LEVY COUNTY, a political subdivision of the State of Florida,

and RYAN THOMAS, 3RT SAND MINE, In Re: SPECIAL EXCEPTION SE 23-01
Respondents.

ORDER ON PETITION FOR WRIT OF CERTIORARI

THIS CAUSE having come before the court upon Petitioners Petition for Writ of Certiorari and this court having reviewed said Petition, the Respondents' Response in Opposition to Petition for Writ of Certiorari, the Petitioner's Reply, the relevant transcripts, exhibits, case history, and applicable law, finds as follows:

1. This Court has jurisdiction to issue writs of certiorari consistent with Article V, Section 5(b) Florida Constitution and Florida Rule Appellate Procedure 9.030(c)(3). Petitioner filed the Petition for Writ of Certiorari seeking judicial review of a quasi-judicial decision by Levy County Board of County Commissioners (e.g., the lower tribunal) pursuant to Florida Rules of Appellate Procedure 9.100(b), (c) and 9.190(b)(3).

2. The Respondents, after Order Directing Response issued on 5/16/24, and pursuant to Rule 9.100(j), filed a response on 6/12/24 to which the Petitioner then filed a Reply per Rule 9.100(k).

3. The subject of this review is the quasi-judicial decision of the Levy County Board of County Commissioners (hereafter referred to as “BOCC”) rendered on 3/19/24, approving a 1,100-acre sand mine after Defendant, 3RT Sand Mine submitted a Petition seeking Special Exception (No. SE 23-01 hereafter referred to as “Application”).

4. Petitioners allege in the Petition that the hearing of 3/19/24 was not properly advertised under the Levy County Code 50-3 "Notice" and they were not given proper certified mailing notice of the hearing and were therefore unaware of the hearing and did not attend, but desired to present testimony and evidence in opposition to the sand-mine special exception. The Petitioners also allege the published advertised notice was also not in conformity with the Levy County Code and/or applicable Florida Statutes.

5. The Petitioners further allege that the Applicant failed to meet their burden of proof that the application met the essential requirement of law contained in Levy County Land Development Code 50- 719 "Special exceptions for major mining operations; criteria, standards and conditions" in addition to failing to meet the Code requirements for notice of the quasi-judicial hearings held by the BOCC and seek judicial review to quash and reverse the quasi-judicial approval.

6. A prior hearings was held before the BOCC on 5/1/23 and at said hearing the Application was continued to 7/10/23. A copy of the Notice for the 5/1/23 hearing and the mailing list for the Notice is included as part of the County's Appendix. (Cty. App. 6 at 98-104). Among the people that were mailed copies of the Notice were Petitioners, Kimberly Adair Swift at 11551 NE 51st Place, Bronson, Florida 32621, and Jeffry L. Ferguson at 4610 NE 121st Avenue, Williston, Florida 32696. (Cty. App. 6 at 98-104). Regarding the hearing of 7/10/23, On June 22, 2023, notice was published in the Levy Citizen, a weekly newspaper published within Levy County, notifying the public that the Planning Commission would consider the Application on July 10, 2023, and that the Board of County Commissioners (the "Board") would hear the matter on July 25, 2023.

(Cty. App. 8 at 109-110). On July 25, 2023, the Application was removed from the agenda and rescheduled for quasi-judicial public hearing on the Application for December 5, 2023. After presentation of the Application, discussion, public comment and commencement of deliberation by the BOCC, the Board ultimately voted to continue the hearing to February 6, 2024, at which time the BOCC reconvened and reopened the public comment and deliberation stages. A vote to approve the Application passed and the Board directed the City Attorney to prepare a written Order to be considered at the March 19, 2024, meeting. On March 19, 2024, the BOCC met and voted to approve the Order which approved the Application and conditions governing the development of the subject property and authorized the Chairman to execute said Order. The Petition under review was then filed on April 18, 2024.

7. The Subject Property consists of approximately 1,100 acres (including the mine property and access to CR 337) located in Section 35, Township 12S, Range 17 E. Levy County Florida. (Cty. App. 2 at 18-20). The current land use and zoning of the Subject Property under the County's Land Development Code ("LDC") was A/RR (Agricultural/Rural Residential) and has historically been utilized for farming and crops. The Levy County Land Development Code allows a mine to be developed in agriculture-rural residential zoning if a special exception is granted by the county commission. Major mining excavation and fill activity operations are listed as a special exception within the land use/zoning district A/RR. (Cty. App. 2 at 18-20).

8. It is undisputed that, in its granting of Application for special exception, BOCC was acting in a quasi-judicial, rather than a legislative, capacity. As such, review of its decision is proper by way of certiorari. See *Hirt v. Polk County Board of County Commissioners*,578 So. 2d 415, 416 (Fla. 2d DCA 1991) (Certiorari is the proper method to review the quasi-judicial actions of a Board of [the] County, whereas injunctive and declaratory suits are the proper way to attack a Board's legislative actions).

9. "In first tier certiorari proceedings as here, the circuit court is limited to a

determination of the following: (1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence." See, *Broward County v. G.B.V. International, Ltd.*, 787 So.2d 838 at 843 (Fla.2001) quoting *Deerfield Beach v. Valliant*, 419 So. 2d 624 at 626 (Fla. 1982) (emphasis added), see also *City of Dania*,761 So. 2d at 1092; *Heqqs*,658 So. 2d at 530.

10. In considering a petition for writ of certiorari, "a court has only two options—it may either deny the petition or grant it and quash the order at which the petition is directed. The court may not enter any judgment on the merits of the underlying controversy or direct the lower tribunal to enter any particular order." *Clay Cnty. v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1181 (Fla. 1st DCA 2007) (citing *Broward Cnty. v. G.B.V. Intl*, 787 So. 2d 838, 843-44 (Fla. 2001)).

11. In certiorari the reviewing court will not undertake to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination. The appellate court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment which also must accord with the essential requirements of the law. It is clear that certiorari is in the nature of an appellate process. It is a method of obtaining review, as contrasted to a collateral assault. See, *DeGroot v. Sheffield* 95 So. 2d 912 (Fla. 1957).

12. While the Petition under review contains assertions and averments of the potential and practical impact of the approval of the application submitted by the respondent, this court limits its review as set forth in paragraphs 9, 10, and 11, above.

13. **NOTICE**: Levy County Code 50-3(a) which addresses requirements of Public Notice and specifies that notice by mail be sent via certified mail.

"Levy County Code Sec. 50-3 Types of public notice. (*a) Mailed notice.*

The applicant is responsible for sending supplemental mailed notice. The mailed notice must identify the property appraiser's parcel identification number(s) for the subject property, the physical address of the subject property (if no address is assigned, the general vicinity or nearest intersection); the date, time, and location of the public hearing; and a general description of the application. The ***notice must be mailed by certified mail*** *at least 15 calendar days prior to the date of the hearing to all real property owners whose property lies within 300 feet, or 2,500 feet for a special exception for electric generating facilities, or 2,500 feet for a special exception for mining (without blasting and 49 or less one way truck trips per day), or two miles for a special exception for mining (that includes blasting or 50 or more one way truck trips per day) from any property line of the property that is the subject of the application. Addresses for mailed notice must be obtained from the county property appraiser's current ad valorem tax records.*

Subsection (b) of 50-3 also requires posted notice as follows:

(b) Posted notice. Notice signs (which can be obtained from the county planning and zoning office) must be posted by the applicant as follows: (2) Location of signs. a. Street frontage. One sign shall be placed along each road that fronts the property. Signs should be placed on the property (not within the road right-of-way) ***so as to be visible from the road.***

Subsection (c) of 50-3 addresses requirements of notice via published advertisement:

c) Published advertisement. The county will publish notice of each meeting at least ten calendar days prior to the date of the meeting and, at a minimum, ***the notice must contain the following information****: ……*

*(5) That "****In accordance with F.S. § 286.0105****, should any person decide to appeal any decision made with respect to any matter considered at this meeting, such person will need a record of the proceedings, and for such purpose, may need to ensure that a verbatim record of the proceeding is made, which record includes the testimony and evidence upon which the*

appeal is to be based"

Florida Statute 286.0105 states as follows*:*

286.0105?Notices of meetings and hearings must advise that a record is required to appeal.—Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. The requirements of this section do not apply to the notice provided in s. 200.065(3).

History.—s. 1, ch. 80-150; s. 14, ch. 88-216; s. 209, ch. 95-148.

The Petitioner alleges that procedural due process was not accorded as the notice mailed was not via certified mail, the posted notice was not visible from the road as the signage was left fallen to the ground, and the record evidence of the published advertisement notices did not contain the required language set forth in 50-3 or F.S. 286.0105.

Regarding the issue of notice, Respondents advance argument that the requirements of 50-3 are not controlling and that the provision of the Levy County Code establishing the requirements of notice for the Application which are relevant to this case are solely contained in Sections 50-719 and 50-798. The Respondent suggests that because Section 50-3 was adopted by the BOCC on December 5, 2023, and became effective on December 12, 2023, and the Application under review was filed prior to the effective date of this code provision, the notice requirements of 50-719 and 50-798 dictate the controlling notice requirements which are determinative in this case.

Although the assertion regarding the effective date of 50-3 is not in dispute, the applicability of said section of the Code is.

Section 50-719(11)(d)(11) states, in relevant part:

(*11) Public notice requirement**. In addition to any other notice requirements** for a special exception contained within division 5of article XIII, the extent of the notice required to be provided to surrounding property owners for an application for a special exception for a major mining operation shall be extended from 300 feet to two miles in the event that the proposed major mining operation includes blasting or 50 or more one-way truck trips per day. The additional cost incurred by providing notice beyond 300 feet shall be calculated and paid for by the applicant prior to the public hearing on the special exception to be held before the planning commission*.

Significantly, it should be noted that the procedural notice provisions set forth in Section 50-3 were adopted prior to the final approval of the Application. Thus, this Section, being procedural in nature and not substantive, is controlling as to the Application made but not yet approved. See, *Patronis v. United Insurance Company of America*, 299 So. 3d 1152, 1157 (1st DCA, 2020) citing *State Farm Mutual Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995). Also, ("a procedural or remedial statute is to operate retrospectively"), while "substantive" laws may not be applied retroactively if they abolish or curtail protected rights or impose unconstitutional obligations. See, Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc., 127 So. 3d 1258, 1272 (Fla. 2013).

14. While the Respondent asserts notice was mailed, the record evidence and exhibits submitted do not establish the requirement of **certified mail** was adhered to. Further, the exhibits of record which represent the public notices advertised in the newspaper did not contain the required language set forth in F.S. 286.0105. This court finds that Section 50-3, in addition to Sections 50-719 and 50-798 and F.S. 286.0105, are controlling. Thus,

procedural due process regarding notice was not accorded the Petitioner.

15. **BURDEN OF PROOF**: The Respondent correctly discusses the following as it relates to the issue of whether the Respondents failed to meet their burden of proof in obtaining the approval of the Application: under this Court's limited scope of review, it must be determined whether the record contains any competent substantial evidence to support the decision that was ultimately made. In evaluating the evidence presented, it matters not whether there is also evidence to support a conclusion different from that reached by the Board, for "[t]he point is that when the facts are such as to give the County Commission a choice between alternatives, it is up to the County Commission to make that choice—not the circuit court." *Metro Dade County* v. *Blumenthal*,675 So. 2d 598, 606 (Fla. 3d DCA 1995). It is not for the reviewing court to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination. "The...court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment..." *DeGroot* v. *Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

16. In conformity with the foregoing, there remain two issues of the several raised by the Petitioner that warrant comment as it relates to presentation of record evidence at the time of approval of the Application and whether it meets the required showing necessary.

a. **Traffic Study**. Levy County Code Section 50-719(d)(3)(d) states, in relevant part: *d. "Hauling requirements. The applicant shall ensure that neither public nor private property will be damaged by the hauling of material, and that hazardous traffic conditions will not be created, as shown by* ***a traffic study*** *prepared by a traffic engineer licensed in the State of Florida,* ***which study shall be submitted by the applicant with the application."***

> At hearing on February 6, 2024, the following discussion took place when the BOCC was reviewing the Application (at page 25, line 25

through page 27 line10 February 6, 2024, Transcript filed with the Clerk of Court, docket entry no. 8):

MS. HECTUS: Warrants for the installation of auxiliary lanes, acceleration and 2 deceleration, and left-turn lane shall be investigated.

COMMISSIONER BROOKS: Madam Chair?

CHAIRMAN MILLS: Yes, Commissioner Brooks.

COMMISSIONER BROOKS: Can you please clarify for us what "warrants for the installation" and "*shall be investigated*" specifically mean?

MS. HECTUS: So, per the planning commission, when they were talking about this, they weren't sure that the -- based on what the traffic study said, *they were not sure that these -- that there was a cause to have these acceleration and deceleration lanes, and they wanted us to look into it further by talking to the road department*, etc. I believe Alice is here from the road department, but they also -- after the information was brought to them, also did not think it warranted it.

MR. VANDEURSEN: *We're planning to have the traffic engineer that did the traffic study evaluate it and submit the information to the road department and see what they all say.*

COMMISSIONER BROOKS: Alice, I know in the past that when we have looked at these types of lanes and different projects, a number of things have been taken into account, trips, things of that nature. Is that what we're talking about? here, is looking at –

MS. LALONDE: Yes, the vehicle trips per day. It did not warrant it at this time. We will re-evaluate the situation. Once it's open, we will do more traffic counts and go from there,but at this time, no, it does not warrant.

While the Code requires a traffic study to be submitted with the application, the above colloquy confirms continued study in the future which runs counter to the premise that the Code would require such a study to be in existence to *assure no degradation of road infrastructure* (as required by 50-719(6)) and/or assurance *that the mining operation would not be detrimental to the areas residents or businesses, or the public health, safety, or welfare of the community as a whole* (as required by 50-719(11)). Future plans to complete a traffic study is not what is contemplated by the applicable Code.

b. **Wildlife Impact Study:** An additional safeguard and requirement of the applicable Code contemplates a completed wildlife impact study prior to Application approval. In the record evidence submitted, transcripts of the following hearing reveal such a requirement was not met prior to approval (transcript Page 19 line 18 through page 20 line 4 of the February 6, 2024, transcript of proceedings before the BOCC filed with the Clerk of Court at docket entry no. 8):

MS. HECTUS: Number 12: Meet all FWC and DEP 19 threatened and endangered species guidelines and regulations for habitat protection and restoration.

MR. VANDEURSEN: That's not a problem Mr. Thomas has been in conversations with FWC, and ***we're kind of waiting to go forward with that*** because creatures or animals can come and go on the property. If we would have done this in May, 2 it's different today than what it was then. So we want to -- ***we want to be able to move forward, and we will comply with that.***

The position articulates a desire to move forward with approval prior to compliance with the requirement of having a wildlife impact study completed before any such approval. While a proffered hypothetical explanation is offered, without substantively ever being corroborated as being reasonable and/or in conformity with the Code, non-compliance with the Code's expectations and directives remains. A willingness to comply in the future does not equate to the requirement of actual compliance at the time of approval of Application.

17. The Florida Supreme Court in *DeGroot* 95 So. 2d 912, 916 described "competent substantial evidence" as follows:

We have used the term 'competent substantial evidence' advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Becker v. Merrill*, 155 Fla. 379, 20 So.2d 912; *Laney v. Board of Public Instruction*, 153 Fla. 728, 15 So.2d 748. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. *Jenkins v. Curry,* 154 Fla. 617, 18 So.2d 521. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.' Schwartz, American Administrative Law, p. 88; The Substantial Evidence Rule by Malcolm Parsons, Fla. Law Review, Vol. IV, No. 4, p. 481; *United States Casualty Company v. Maryland Casualty Company*, Fla.1951, 55 So.2d 741; *Consolidated Edison Co. of New York v. National Labor Relations Board*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126.

18. Given the foregoing examples of incomplete studies and/or those not yet performed, all of which which were necessarily required prior to approval of the Application, as well as there being clear indication that future study remains necessary, it cannot be said that there is competent substantial evidence supportive of the decision to approve the Application.
19. Given the foregoing findings that procedural due process regarding notice was not accorded to Petitioners, that the essential requirements of applicable law were not observed, and that the quasi-judicial judgment to approve the Application was not supported by competent, substantial, evidence, it is, therefore

ORDERED and ADJUDGED that the Petition for Writ of Certiorari is GRANTED and the approval of the Application to which it is directed is

hereby QUASHED.

DONE AND ORDERED on Tuesday, September 17, 2024.

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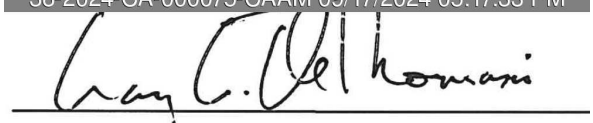

Craig C. DeThomasis, Circuit Judge
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies have been furnished by U.S. Mail or via filing with the Florida Courts E-Filing Portal on Tuesday, September 17, 2024, to the following:

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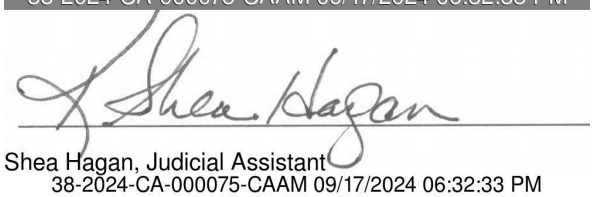

Shea Hagan, Judicial Assistant
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