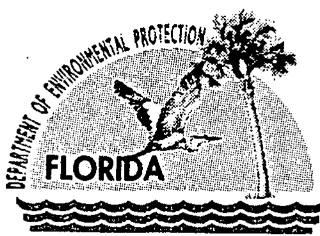


Department of
Environmental Protection

Jeb Bush
Governor

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Colleen M. Castille
Secretary

August 21, 2006

Mr. David A. Theriaque, Esq.
Theriaque Vorbeck & Spain
433 North Magnolia Drive
Tallahassee, Florida 32208

Dear Mr. Theriaque:

Thank you for your correspondence regarding the air construction permit issued earlier this year to Sumter Cement Company, LLC. I have forwarded your legal issue to our Office of General Counsel. If you would like to discuss this issue further, please feel free to contact Ms. Patricia Comer, Esq., at 850/245-2288.

Sincerely,

Trina L. Vielhauer
Chief
Bureau of Air Regulation

cc: Ms. Patricia Comer, OGC

THERIAQUE VORBECK & SPAIN

Attorneys at Law
433 North Magnolia Drive
Tallahassee, Florida 32308
Telephone: (850) 224-7332
Facsimile: (850) 224-7662

FACSIMILE TRANSMISSION COVER SHEET

TO: Trina L. Vielhauer, Chief

FAX NUMBER: 922-6979

FROM: David A. Theriaque, Esquire

DATE: August 16, 2006

NUMBER OF PAGES (including cover page): 12

MESSAGE:

LETTER DATED AUGUST 16, 2006, FROM DAVID A. THERIAQUE, ESQUIRE, TO TRINA L. VIELHAUER, CHIEF, REGARDING FINAL PERMIT NO. 1190041-001-AC (SUMTER CEMENT PLANT).

If you encounter any difficulty in receiving this transmission, please call (850) 224-7332.

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL AND IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPY OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE. THANK YOU.

THERIAQUE VORBECK & SPAIN

ATTORNEYS AT LAW

REPLY TO: TALLAHASSEE

August 16, 2006

VIA TELEFACSIMILE AND UNITED STATES MAIL

Trina L. Vielhauer, Chief
Bureau of Air Regulation
Florida Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Re: ***Final Permit No. 1190041-001-AC (PSD-FL-358) (Sumter Cement Company, LLC - Center Hill)***

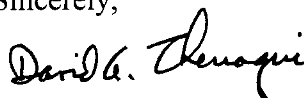
Dear Ms. Vielhauer:

On or about February 6, 2006, the Florida Department of Environmental Protection ("Department") issued the above-referenced Final Air Construction Permit to Sumter Cement Company, LLC ("SCC"), to construct a 1,715,500 tons per year (clinker) portland cement plant in the City of Center Hill, Sumter County, Florida. Our law firm represents Monty McBryde, who owns real property located at 7732 CR 736, Center Hill, Sumter County, Florida, which is directly adjacent to, and surrounded on three (3) sides by, the property that is the subject of the Final Air Construction Permit.

On February 2, 2006, our client filed two (2) lawsuits challenging the City of Center Hill's approval of the limerock mine and cement plant proposed by SCC. On August 8, 2006, the Circuit Court granted our client's Petition for Writ of Certiorari, thereby invalidating the City's annexation of SCC's property and the City's approval of a conditional use permit for the proposed limerock mine and cement plant. (For your convenience, I have enclosed a copy of the Court's Order on Writ of Certiorari). In light of the Circuit Court's ruling invalidating the City's approval of the proposed cement plant which is the subject of the Final Air Construction Permit, we respectfully submit, on behalf of Mr. McBryde, that it would be appropriate for the Department to investigate whether to rescind or otherwise revisit the Final Air Construction Permit.

I appreciate your attention to this matter. Please do not hesitate to call me if you have any questions or need any additional information.

Sincerely,



David A. Theriaque

DAT/kr

Enclosure

cc: Monty McBryde

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IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR SUMTER COUNTY, FLORIDA

CLYDE McBRYDE and
WILLIAM SANDER,

Petitioners,

and

SUMTER COUNTY, FLORIDA,

Intervener,

v.

CASE NO.: 2006-CA-000166

CITY OF CENTER HILL, FLORIDA,
a municipal corporation, and SUMTER
CEMENT COMPANY, LLC, a Florida
Limited Liability Company,

Respondent.

______________________________/

ORDER ON WRIT OF CERTIORARI

THIS CAUSE having come before this Court on Writ of Certiorari, after carefully reviewing the file, the Petitioner's Writ, the Respondent's Response, the Petitioner's Reply, and after conducting oral arguments in support of the Party's Briefs, provides the following Memorandum of Law is support of the Order:

MEMORANDUM OF LAW IN SUPPORT OF THE ORDER

Standard of Review

Circuit Court review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and

judgment are supported by competent substantial evidence. Haines City Cmty. Dev. v. Heggs, 658 So.2d 523, 530 (Fla. 1995). Competent substantial evidence is that which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957).

Background

1. The Center Hill City Commission ("City") approved three ordinances outlined as follows: (1) a petition requested by Sumter Cement Company, LLC, ("SCC") to voluntary annex 1,235 acres of unincorporated land in Sumter County; (2) a rezoning application from SCC for the annexed property; and (3) a request by SCC for a Conditional Use Permit ("CUP") authorizing the annexed property to be used as a limerock mine and cement plant.

2. Petitioner McBryde is an owner of real property directly adjacent to and surrounded on three sides by the proposed limerock quarry and cement plant. Petitioner Sanders owns property within one mile of the proposed mining and cement plant operation and will be adversely affected by noise, pollution, environmental changes, and excessive traffic.

3. The Petitioners claim the City departed from the essential requirements of law in annexing, rezoning, and issuing a CUP for SCC's property because:

a. The annexed property is not "reasonably compact" as required by Section 171.044, Florida Statutes (2005);

b. The City impermissibly rezoned the property prior to amending its Comprehensive Plan to include the annexed property, contrary to Section 171.062(2), Florida Statutes (2005);

c. The City's issuance of a CUP violates Section 13-772 of the Sumter County Land Development Code ("LDC");

d. The City's issuance of a CUP violates Section 13-143 of the Sumter County LDC; and,

e. The City's issuance of a CUP violates the City's LDC.

4. The City and SCC responded to the Writ on March 22, 2006, in their Response to the Order to Show Cause. Also, on April 8, 2006, Sumter County was granted permission to intervene. On April 17, 2006, the Petitioners Replied to the Response and on April 20, 2006, Sumter County joined in the Reply adopting the Petitioners arguments as they applied to the County. Oral arguments were held on June 27, 2006.

Analysis of Legal Issues

A. Whether the annexed property is "reasonably compact."

1. Section 171.044, Florida Statutes (2005) sets forth the requirements for voluntary annexation and provides that the "owner . . . of real property in an unincorporated area of a county which is contiguous to a municipality and reasonably compact may petition the . . . municipality [for annexation]." Additionally, Section 171.031(12), Florida Statutes, defines "compactness" as a "concentration of property in a single area and precludes any action which would create enclaves, pockets, or finger areas in serpentine patterns."

2. The Petitioners argue that SCC's proposed annexation creates an impermissible pocket of unincorporated territory surrounded by municipal property and impermissibly attempts to elude the creation of an enclave with lessed-out property. See Martin County v. City of Stuart, 7 Fla. L. Weekly Supp. 255 (Fla. 19th Jud. Cir. Ct. Dec. 3, 1999) (invalidating an annexation where the applicant lessed-out a small portion of its property in an attempt to avoid creating an enclave). Further, the Petitioners point out that the Respondent's own expert admitted he did not know what a "pocket" was for the purposes of annexation.

3. In Response, the City and SCC argues that Martin County is not persuasive authority. Additionally, the Respondents cite City of Sanford v. Seminole County for the proposition that Florida Statutes do not define "pockets" but Webster's defines the term as "a small isolated area." 538 So.2d 113, 115 (Fla. 5th DCA 1989). The Respondents argue the alleged pocket created in the present annexation is about 100 acres, whereas the pocket created in Martin County was a small 25 acres. The Respondents conclude the present annexation is permissible because the "pocket" created is not "small."

4. In this case, it is clear from the proposed annexation map that the annexation results in creation of an impermissible pocket of unincorporated property surrounded by hundreds of acres of municipal property. Whether "small" or "big," the City's voluntary annexation departs from the essential requirements of law because the annexed property creates a pocket. Furthermore, the Respondent's argument that the annexation does not create a pocket is not supported by competent substantial evidence because the Respondent's own expert did not know what a pocket was for the purposes of annexation.

B. Whether the City impermissibly rezoned the annexed property

1. Section 171.062(2), Florida Statutes, provides that if "the area annexed was subject to a county and use plan and county zoning or subdivision regulations, these regulations remain in full force and effect until the municipality adopts a comprehensive plan amendment that includes the annexed area."

2. The Petitioners argue the annexed property was subject to the Sumter County Comprehensive Plan and Zoning Regulations at the time of annexation and the City did not amend its Comprehensive Plan to include the annexed property at the City Commission Public Hearing. Thus, the Sumter County land use and zoning regulations remained in full force and

effect on the annexed property. Despite the plain language of Section 171.062(2), the City Commission adopted Ordinance No. 05-17, which rezoned the property with a City "Agricultural" zoning designation. The Petitioners conclude that rezoning the annexed property with a City zoning designation when the property was still governed by the County's zoning regulations violated Section 171.062 (2).

3. In response, the City and SCC argue that rezoning the subject property from County Agricultural to City Agricultural had no effect on Sumter County's Comprehensive Plan because the subject property was already zoned Agricultural for Sumter County and mining is a conditional use for the County's Agricultural zoning code as well. Further, SSC and the City expressly conditioned the issuance of its CUP upon compliance with Sumter County's regulations. At oral arguments, the Respondents relied on St. Johns/St. Augustine, Committee v. City of St. Augustine for the proposition that it is permissible to modify the use of annexed property before amending the Comprehensive plan. 909 So.2d 575 (Fla. 5th DCA 2005). However, St. Johns/St. Augustine is a per curiam denied decision and the proposition of law cited comes from a dissenting opinion. Thus, reliance on such a decision is wholly misplaced.

4. Although the City could have easily avoided violation of Section 171.062 (2), the Petitioners are technically correct that the City did not follow the proper procedure because they rezoned the newly annexed property before amending the City Comprehensive Plan. Thus, the City departed from the essential requirements of law and procedural due process was not properly accorded.

C. Whether the City's issuance of a CUP violates Section 13-772 of the Sumter County LDC.

1. As stated above, Sumter County's land use and zoning regulations governed the annexed property. Section 13-772 of Sumter County's LDC provides that "[a]ll lands approved

for limerock mining activity after February 3, 1992 shall be adjacent to existing, legally permitted mine sites with no intervening non-compatible uses." Further, the annexed acreage exceeds the 1000 acre per ten years allocation limit of Section 13-722(d)(2)(b), Sumter County LDC for limerock mining.

2. The Petitioners point out that although Sumter County has certified that the adjacent land ("Mazak Parcels") has never been used for mining, the Respondents testify that mining has and continues to occur on the Mazak Parcels. The Respondents suggest the owners of the Mazak Parcels deleted there old mining permits solely for the purpose of making their property "non-adjacent" but continue to operate the other parts of their property as a mine. Further, the Respondents seem to acknowledge the 1450 acres annexed property exceeds the 1000 acre limit of Section 13-772, but argue the error is harmless because they will not be mining more than 1000 acres per ten year period over the life of the whole 1450 acre mine. The Respondents contend the 1000 acre per ten year limit is controlled by operational permits, not by annexation and zoning regulations.

3. At oral arguments, the Sumter County attorney stated that the County strictly construes the adjacency requirement. The Respondent's argue that the County merely looks to "historical uses" of mining on adjacent parcels.

4. Whether the Mazak Parcels constitute an "existing, legally permitted mine site" is not a question that is before this Court. This Court will defer to Sumter County's strict construction of the adjacency requirement. Evidence shows that the parcels were "removed from a conditional use permit for limerock mining" in February 2005 and Sumter County confirmed that the parcels did not constitute an "exiting, legally permitted mine site." It appears that SCC's "historical use" argument comes from the testimony of the City's land use planner at a hearing,

which is directly contrary to Sumter County's interpretation of its own LDC. Accordingly, based on the County's strict construction of the adjacency requirement, the City's annexation departs from the essential requirements of law because the annexed property does not meet the adjacency requirement of Section 13-772 of Sumter County's LDC.

Additionally, it appears that neither the Respondents or the Petitioner's are correct regarding the 1000 acre per ten year allocation limit of Section 13-722(d)(2). This Court's reading of Section 13-722(d)(2)(a) indicates that the Comprehensive plan allocation "planning period," which set forth to 1000 acre limit, expired on February 2, 2002. Thus, this Court will not consider the "1000 acre limit" argument.

D. Whether the City's issuance of a CUP violates Section 13-143 of the Sumter County LDC.

1. Section 13-143 of the Sumter County LDC sets forth general criteria for review of use permits, including factors that affect the public interest. Such factors include traffic effects, the availability of sanitary, utility, drainage, emergency services, and other similar facilities. Other factors considered are compatibility with existing uses and the impact of nuisance or hazardous uses.

2. The Petitioners argue that Section 13-143 mandates compliance with the listed public interest criteria, but the City failed to evaluate such criteria in approving the CUP for the annexed property, thereby departing from the essential requirements of law. In response, the City and SCC argue that they have considered these factors. However, a review of the testimony reveals the City did not adequately review factors affecting the public interest. For example, the City acknowledges an inability to provide sewer services but hope to obtain a grant in the future. Further, the City Engineer acknowledges he has not done a traffic and fire services analysis yet because the area was still under the County's umbrella.

3. In sum, it appears that, at the very least, procedural due process was not properly accorded because the City has not properly planned for the annexation and forthcoming limerock mine and cement plant.

E. Whether the City's issuance of a CUP violates the City's LDC.

1. The Petitioners argue the City's LDC states in Chapter 7, Section 1(d)(3) that "[a]ny specific accessory use or structure which is not addressed within this chapter shall not be located on any lot." However, Chapter 7 is devoid of any provision authorizing a cement processing plant as an accessory use. Further, Chapter 5, Section 2(a) governs "Agricultural" zoning and expressly prohibits Industrial land uses. Industrial land uses include mining operations. Thus mining operations are expressly prohibited from being located on property zoned Agriculture under the City's LDC. In response, the City and SCC argue that any alleged violations of their own LDC will no longer matter once they amend the City's Comprehensive Plan.

2. On review of the Respondent's argument, it is clear that they are, in effect, acknowledging the Petitioner's argument that they "put the cart before the horse" by rezoning the subject property Agricultural before amending their Comprehensive Plan when the subject property was still governed by the Sumter County Comprehensive Plan. Thus, by authorizing a cement processing plant as an accessory use and approving mining on property zoned "Agricultural," the City did not properly accord procedural due process because they subject property was still governed by Sumter County's Comprehensive Plan.

CONCLUSION

The City's annexation of the subject property via Ordinance No. 05-07 impermissibly created a "pocket" of unincorporated area surrounded by a municipal area, thereby departing

from the essential requirements of law. Further the Respondent's argument that a "pocket" was not created is not supported by competent substantial evidence.

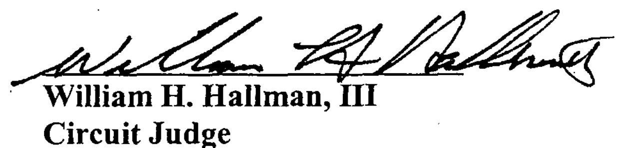
The City departed from the essential requirements of law and procedural due process was not properly accorded when the City rezoned the subject property Agricultural via Ordinance No. 05-17 before amending their Comprehensive Plan when the subject property was still governed by the Sumter County Comprehensive Plan.

Based on Sumter County's strict construction of the adjacency requirement, the City's annexation departs from the essential requirements of law because the annexed property does not meet the adjacency requirement of Section 13-772 of Sumter County's LDC.

Procedural due process was not properly accorded under Section 13-143 of the Sumter County LDC because the City has not sufficiently reviewed criteria for review of use permits, including factors that affect the public interest such as traffic effects or the availability of sanitation. Based on the foregoing, it is hereby;

ORDERED AND ADJUDGED: That, the Petitioner's Writ of Certiorari is **GRANTED**. Ordinance No. 05-07 (annexation), Ordinance No. 05-17 (rezoning), and Ordinance No. 05-18 (conditional use permit) are hereby **QUASHED**.

DONE AND ORDERED in Chambers, at Bushnell, Sumter County, Florida, on this _8_ day of August, 2006.



William H. Hallman, III
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following individuals by U.S. Mail/Courthouse box delivery this 8 day of August, 2006.

Randall N. Thornton, Esq.—Attorney for Sumter County
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Lake Panasoffkee, FL 33538

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BY: Christine D. Frazier
Judicial Assistant