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

CITY OF BROOKSVILLE,
a Florida municipality,
Petitioner,

vs. Appellate Case No.: 5D17-1139

HERNANDO COUNTY, a
political subdivision of the
State of Florida,
Respondent.
_____/

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

From the First-Tier Review by the Circuit Court of the Fifth Judicial Circuit In and For Hernando County, Florida of Five Voluntary Annexations by the City
Case No. 09-016015 CI-021
Before the Honorable Donald E. Scaglione

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SUMMARY OF ARGUMENT

The first-tier reviewing Court departed from the essential elements of law by granting the Amended Petition for Certiorari on the basis that the City's use of a power-of-attorney did not comply with the voluntary annexation procedures of Chapter 171, Fla. Stat. Ann. A departure from the essential elements of the law also occurred when the first-tier reviewing court failed to dismiss the Amended Petition for Certiorari for lack of jurisdiction. Petitioner requests this Court to sanction Respondent's Counsel for the inclusion of legal matters that are scandalous and disparaging, which have no rational relationship to a challenge of matters within the scope of Chapter 171, Fla. Stat. Ann.

ARGUMENT

I. THE USE OF A POWER-OF-ATTORNEY THAT SPECIFICALLY REFLECTS THE INTENT OF THE LANDOWNER TO APPOINT A CITY THAT PROVIDES WATER AND/OR SEWER SERVICE, THE AUTHORITY TO FILE A PETITION FOR VOLUNTARY ANNEXATION COMPLIES WITH THE VOLUNTARY ANNEXATION PROCEDURES OF SECTION 171.044, FLORIDA STATUTES.

The County cites to the case of *County of Volusia v. City of Deltona*, 925 So. 2d 340 (Fla. 5th DCA 2006) for the proposition that "[a] municipality can even combine the agreement to provide utility services and a petition for voluntary annexation into a single document." [See *Response Brief of Hernando County*, p. 9]. The language from the *Volusia County* Court case actually reads,

> *"The City entered into a pre-annexation agreement with Leffler before adopting the annexation ordinance. The agreement doubled as Leffler's annexation petition and was signed by the City before it passed the ordinance."* *County of Volusia,* 925 So. 2d 340.

It appears from the reading of the *Volusia County* case, the actual pre-annexation agreement signed by the property owner was used as both the agreement and as the petition for annexation. There were not two documents as the County has suggested, only the pre-annexation document. This recognition by the Court would indicate that a document signed by the property owner would be sufficient by itself to serve as the petition for annexation. Further, there would be no need for the use of a power of attorney from the property owner to the City.[1] The Brooksville City Council had before it all recorded Utility Service Agreements signed by the property owners to perform its due diligence under § 171.044(2), Fla. Stat. Ann., that all property owners had voluntarily requested annexation. [See *Pet. COB* # 8 pp. 64-78; # 9 pp. 112-127; # 10 pp. 165-167; # 11 pp. 188-206; and # 12 pp. 243-261]. The City's use of the power-of-attorney for each property owner was redundant, in that it was only reconfirming what each landowner had promised under the utility service agreement.

[1] The only exception would be for the annexation of the property of Mr. & Mrs. Griffin, who executed an Irrevocable Power-of-Attorney for annexation, and not a utility service agreement.

It has been held that the failure to recognize the existence and use of a power of attorney is a departure from the essential requirements of law. [See *Deutsche Bank Nat. Trust Co. v. Prevratil*, 120 So. 3d 573, 575 (Fla. 2d DCA 2013)]. If it is a departure from the essential elements of law to not recognize a power of attorney, it certainly is a departure from the essential elements of law not to recognize a recorded agreement signed by the landowner, which was witnessed, and notarized requesting annexation.

The County argues that there is no prejudice to the City if this Court declines certiorari and allows the passage of the ordinances to be quashed. Further, the County argues that it would be an easy process for the City to start over, collect petitions from the affected landowners, and start anew. Undoubtedly, the City will face again the charges of racial discrimination that occurred throughout this country in prior generations as a reason to challenge the same parcels to be annexed. Further, the City would be forced again to participate in a dispute resolution process that was never intended to be resolved by the inclusion of such scandalous and inflammatory allegations. If this issue remains unresolved, judicial labor will continue, great expense to the taxpayers will continue, and the annexed property landowners' water bills will continue to be twenty-five percent (25%) higher than city residents.

The County has suggested that an unpublished circuit court ruling in a certiorari proceeding, offers no precedential value. [See *County's Response Brief*,

p. 23]. Trial courts do not create precedent. [See *State v. Bamber*, 592 So. 2d 1129 (Fla. 2d DCA 1991), *approved*, 630 So. 2d 1048 (Fla. 1994)]. However, the same cannot be said of a circuit court sitting in an appellate capacity.

This Court in *Mouzon v. Mouzon*, 458 So. 2d 381, 392 (Fla. 5th DCA 1984) opined in a footnote a well-reasoned definition of legal precedent and its value. This definition is as follows:

> "*A legal precedent is a binding determination of a point of law by a court in an actual case in which that point is properly presented and duly considered and in which that determination is essential to the rationale employed and the conclusion reached in that case. When an appellate opinion assigns multiple reasons to support its determination of a point of law, or multiple points of law to support its conclusion, each reason or point becomes embodied in the rationale and resolution or determination of the case and has precedential value.*"

While a circuit court sitting in its appellate capacity may not create *stare decisis* authority by its decisions, it may very well provide precedential value to another court. Such precedential value would be a miscarriage of justice by inviting other courts to depart from the essential requirements of law by not recognizing the intent of a landowner and the contract obligations of a municipality.

II. THE COUNTY WAIVED ITS RIGHT TO SEEK CERTIORARI REVIEW BY THE CIRCUIT COURT BY NOT PASSING A RESOLUTION TO INVOKE THE DISPUTE RESOLUTION PROCESS *[SECTION 171.081 FLORIDA STATUTES]* BETWEEN THE CITY AND COUNTY WITHIN THIRTY (30) DAYS OF PASSAGE OF CONTESTED ANNEXATIONS.

The City gave the statutory notice requirements for annexations to the County for all of its eleven annexations. All of these annexations used a power of attorney, and all but one used a recorded utility service agreement signed by the property owner. The first comment regarding these annexations from the County to the City was that it had no comment. Two public hearings were held and only one comment came from one of the owners of the annexed properties, a representative from the Grace World Outreach Church, Inc. [See *Pet. COB* # 15 p. 331].[2]

The only negative response from County was received five days before the second hearing for the last contested annexation.[3] Noticeably absent from this response was any reference that the annexations took place because of past and/or present alleged racial discrimination or that the petitions for annexations were invalid allegedly because they were not voluntary annexations. Thus, the County

[2] Mr. Ron Hansen had only a question about whether the Church could keep its current law enforcement vendor for traffic control.

[3] Four of the contested annexations had already been passed and adopted by the Brooksville City Council. The December 17th letter was received just prior to the second reading of the annexation of the Brooksville Christian Church. [See *Pet. COB* # 13 pp. 320-321].

decided not to challenge five other annexations even though the City used a power of attorney to support a petition for annexation.

III. THE FIRST-TIER REVIEWING COURT IN AN ANNEXATION CHALLENGE LACKS JURISDICTION OVER THE PARTIES IN A DISPUTE RESOLUTION PROCESS THAT IS REQUIRED TO BE INITIATED AND COMPLETED BEFORE THE COMMENCEMENT OF A CERTIORARI CHALLENGE.

The Florida Legislature created Chapter 171 in 1974 to pre-empt all general and special laws related to annexation. [*See* § 171.022, Fla. Stat. Ann.]. The sole and exclusive criterion for challenging a municipal government's failure to comply with Chapter 171 is through the filing of a petition for writ of certiorari. [See *SCA Services of Florida, Inc. v. City of Tallahassee*, 418 So. 2d 1148 (Fla. 1st DCA 1982); and *City of Ormond Beach v. City of Daytona Beach*, 794 So. 2d 660, 661 (Fla. 5th DCA 2001)]. In 2006, the Florida Legislature amended § 171.081, Fla. Stat. Ann., to include a reference to the use of the dispute resolution process in Chapter 164, *Florida Statutes*. The County argues, and the Circuit Court adopted the argument, that the reference to Chapter 164 is an adoption of all procedures in Chapter 164. In particular, this argument would include the application of section 164.0041, *Florida Statutes*, that in a lawsuit against two public entities, the case progress would be abated in order for the dispute resolution process to go forward.[4]

[4] The *City of Ormond Beach*, 794 So. 2d 660 case, also stands for the proposition that Cities cannot restrict annexation in right-to-serve agreements. *Ormond Beach* at 663.

The abatement process in Chapter 164 applies to where a governmental entity "*files suit*" against another governmental entity. "Files suit" is not the same as filing a petition for certiorari where legislative action is final and an appellate process has begun.

This argument also fails because § 171.081, Fla. Stat. Ann., is the exclusive process to be used in challenging annexation decisions. While the scope of Chapter 164, *Florida Statutes*, may include the subject of annexation,[5] disputing governmental entities may invoke the dispute resolution process without litigation regarding a wide range of issues that may or may not be enumerated in the defined scope. When the dispute resolution process is invoked in a challenge to an annexation dispute, it must be invoked pursuant to § 171.081(2), Fla. Stat. Ann., i.e., within thirty (30) days of the passage of the annexation ordinances. Further, Chapter 164 does not envision a circuit court judge acting in an appellate capacity to be drug into the dispute resolution process. By the County initiating the certiorari challenge first and then initiating the dispute resolution process after thirty (30) days from the passage of the challenged annexation ordinances, the Circuit Court Judge is now involved in a process that the Legislature did not intend.

It is well established that an amendment by implication occurs when it appears the latter statute was intended as a revision of the subject matter of the former or

[5] *See* § 164.1052(2), Fla. Stat. Ann.

when there is an irreconcilable repugnancy between the two, so that there is no way the former rule can operate without conflicting with the latter. [*See State v. J.R.M.*, 388 So. 2d 1227 (Fla. 1980)]. If the total application of Chapter 164 to Chapter 171 creates irreconcilable conflict between the two, an amendment by implication occurs which is disfavored by our Florida courts.

The County cited the case of *Brindise v. U.S. Bank Nat. Ass'n*, 183 So. 3d 1215 (Fla. 2d DCA 2016), *review denied*, SC16-300, 2016 WL 1122325 (Fla. Mar. 22, 2016) for the proposition that a failure to comply with pre-suit requirements under § 559.715, Fla. Stat. Ann., was not a jurisdictional matter and that Plaintiff bank could continue its lawsuit. However, it must be noted that the majority opinion found that Brindise, as the debtor, had waived all notice under the contractual note and mortgage. [*Brindise* at 1221]. The dissenting opinion in *Brindise* noted that this Court in *Burt v. Hudson & Keyse, LLC*, 138 So. 3d 1193 (Fla. 5th DCA 2014) stood for the proposition that the failure to follow the pre-suit requirements of § 559.715, Fla. Stat. Ann., was a defense. The total jurisdictional defense, however, was not reached in the *Burt* case due to the nature of the appeal from a summary judgment.

Whether pre-suit compliance is jurisdictional is based on a case-by-case basis. In *Torrey v. Leesburg Reg'l Med. Ctr.*, 796 So. 2d 544 (Fla. 5th DCA 2001), a failure to encourage pretrial settlement, a failure to provide a verified medical expert opinion which indicated whether the affiant offering the opinion had ever been

disqualified, and a failure to provide discovery materials was jurisdictional. In many of these cases, it is what opportunity the party who failed to adhere to pre-suit requirements had that determines the outcome of the jurisdictional issue. In this case, the County had numerous opportunities before the passage of the challenged annexation ordinances and thirty (30) days subsequent to the passage to initiate the dispute resolution process. The County chose not to adhere to the appeal process of Chapter 171, *Florida Statutes*. Because of that choice, the failure to follow the pre-suit requirements should cause the first-tier appeal to fail on jurisdictional grounds.

The denial of the City's Motion to Dismiss the certiorari challenge by the County was a departure from the essential elements of the law.

IV. SANCTIONS SHOULD BE APPLIED FOR INJECTING ERRONEOUS RACIAL ALLEGATIONS INTO ANNEXATION CHALLENGES.

The County's only response to the City's requested sanctions is that this Court lacks jurisdiction to apply sanctions because its pleadings occurred at the trial Court level, citing the case of *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 569 (Fla. 2005), *as revised on denial of reh'g* (Sept. 29, 2005), as revised on denial of reh'g (Sept. 29, 2005). The County's introduction of alleged racial discrimination allegations first surfaced in its Petition for Certiorari.[6] Those allegations are supported by the

[6] Before any certiorari challenge, the only written concern lodged by the County against the challenged annexations had to do with traditional challenges of a combination of whether the annexed properties created enclaves, pockets or fingers

County's filing of five newspaper articles,[7] of which none of the subject matter complained of, was before the City Council that passed the five challenged annexations. [See *Pet. COB* # 23 pp. 418-419; # 24 pp. 420-421; # 26 pp. 429-431; #27 pp. 432-436; and # 28 pp. 437-439]. These allegations have no legal basis in any certiorari challenge under Chapter 171, Florida Statutes. The justification given by the County Attorney's Office was that the inclusion of those allegations was to get the attention of those that should have been paying attention to the concerns of the County.

> MR. COLLER: *I, too, am going to be careful of about what I say, because obviously I don't want to mislead.*
>
> *And, Jon, correct me if I'm wrong, but absent the count that was so inflammatory, there was no dialogue going on whatsoever, so it may have brought this to the attention of a lot of people that just weren't paying attention.*[8]

The City hopes that the County has this Court's attention on the inclusion of legal arguments that have no basis in law and are designed to harass, disparage and annoy the City.

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in serpentine patterns and whether the annexed parcels were contiguous. This letter of concern also raised the issue that the annexation of the Brooksville Christian Church was annexing property outside of the City's First Right to Serve Agreement with the County. [*See Pet. COB* # 13 pp. 321-322].

[7] All five of these newspaper articles were written by the same Hernando Times Columnist.

[8] Comment made by County Attorney Garth Coller at *Pet. COB* #32 p. 507.

CONCLUSION

WHEREFORE, the City prays for an order quashing the order of the Circuit Court, dismissing this matter for lack of jurisdiction and remanding back to the Circuit Court for the imposition of sanctions and award of attorney fees.

Respectfully submitted this
26th day of May, 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the forgoing document, ***PETITIONER'S REPLY BRIEF***, complies with the font and general requirements of Fla. R. App. P. 9.100.

/s/Clifford A. Taylor----
Clifford A. Taylor, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of May 2017, the foregoing, ***PETITIONER'S REPLY BRIEF*** was served via email this day to all persons listed below:

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