

**IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND
FOR SUMTER COUNTY, STATE OF FLORIDA,
CIVIL DIVISION**

ROCKING G, INC.

Petitioner,

CASE NO: 2010 CA 001255

v.

**SUMTER COUNTY BOARD OF
COMMISSIONERS,**

Respondent.

RULE 9.100(f) PETITION FOR WRIT OF CERTIOARI

**James E. Wade, Esquire
Florida Bar No. 0374083
116 Bushnell Plaza
Bushnell, Florida 33513
Telephone: (352)568-2500
*Attorney for Petitioner***

Petitioner, ROCKING G, INC. (the “Petitioner” or “Rocking G”), files this Petition for Writ of Certiorari (“Petition”) for review of the decisions of the Respondent Sumter County (the “County”) Board of Commissioners (the “Commission”) on appeals of the Respondent Planning Manager (the “Staff”) Determinations, dated July 1, 2010 (“Staff Determinations”). The Commission departed from the essential requirements of law, failed to afford the Petitioner due process, and took action that was not supported by competent substantial evidence in ruling that two existing mine pits are legally abolished for failure to register, have lost all vested rights as a pre-existing and non-conforming use, and cannot be used to meet the adjacency requirement for application purposes of a new mine conditional use and operating permit. The Petitioner states the following in support of this Petition:

I. JURISDICTIONAL STATEMENT

This Petition is sought pursuant to Sumter County Code Section 13-236(d), which provides that a party adversely affected by a final action of the Commission shall file a Petition for review to the Circuit Court of Sumter County, Florida. Petitioner seeks certiorari review from this Court as a matter of right. *See Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195 (Fla. 2003) (first-tier review of zoning board decision at the circuit court level is a matter of right); *see also Hirt v. Polk County Board of County Commissioners*, 578 So. 2d 415

(certiorari is proper method to review quasi-judicial actions of board of county commissioners). Jurisdiction is conferred upon this Court and the procedures which govern this Court's exercise of jurisdiction are found in the following Florida Rules of Appellate Procedure: Rule 9.030(c)(3), Rule 9.100(b) and (c), and Rule 9.190(b)(3). This Petition is timely filed within thirty days after the decision made at the hearing on September 14, 2010, since no formal written order was issued or served on Petitioner.

II. EXECUTIVE SUMMARY

It is undisputed that “two existing mine pits have been continuously used [on Rocking G’s property] for mining activities and operations from their inception in the early 1960’s with no intervening or contrary uses. The mining activities and/or mining operations have not been abandoned or ceased.” See affidavit of Frank Wade and Aerial Maps. (T15, T22, T23, A8, A11, A12) The Petitioner has proven, without any evidence to the contrary from Staff or contained in the record, that rock was excavated, stored and stockpiled continuously for several decades. Since the reserved stockpiles have been mostly used up, the Petitioner now seeks to continue excavation in order to accomplish reconfiguration, the creation of lakes and reclamation to create a safe and useful site for the future.

The Petitioner wrote a letter, dated June 21, 2010, to the Staff to request a pre-application meeting to discuss the process of obtaining County permitting for a

rock mine reclamation and reconfiguration project on their property. See June 21, 2010 Letter from Jim Wade. (A2) This letter described the nature of the existing mining pits, the existing mining activities, and the proposed reclamation project that was approved by the Department of Environmental Protection (“DEP”). (A3) The Petitioner sought to discuss the County requirements for any permitting that it needed to move forward. Instead of scheduling the requested meeting, Staff responded with a determination that “...this is not a vested mine...”, “...property is not adjacent to a legally permitted mine...”, “...it’s the staff’s determination that it would not be eligible for a limerock mine, and they could not mine the property.” (T9, T10) See July 1, 2010 letter from Bradley Cornelius. (A4)

Simply stated, a mine that began in the 1960’s and has continuously maintained “mining activities,” which is defined to include processing such as storage of stockpiled rock, should be considered either a non-conforming or vested lawful mine for location purposes, whether or not it was registered. The Commission’s decision to interpret a series of County ordinances to find that Rocking G does not satisfy the technical adjacency requirement unconstitutionally strips Rocking G of vested non-conforming use rights, as well as valuable property rights in the minerals on its property. Astoundingly, the Commission ignores the importance of Rocking G’s property rights, while not providing a single public policy concern that supports its decision. It is abundantly clear that the

Commission departed from the essential requirements of the law, failed to provide procedural due process while infringing on Rocking G's substantive property rights and the Commission's decision is not supported by any competent substantial evidence.

III. NATURE OF RELIEF SOUGHT

The Petitioner requests that this Court: issue a Writ of Certiorari quashing the actions taken by the Staff and the Commission; remand the matter to the Commission; and order the Commission to act in a manner consistent with the findings and rulings of this Court and the laws of the State of Florida by reversing the determination of the Staff.

IV. STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

ROCKING G is the record owner of approximately 80 acres of real property in Sumter County, Florida upon which are located two existing mine pits. Lime rock mining activities and operations, including removal of over-burden, excavation, processing and storage of lime rock, have been continuous, from the inception of the two existing mine pits in the early 1960's, with no intervening or contrary uses. The original mining began before Sumter County had mining ordinances and was allowed to continue as a pre-existing use. It is undisputed that the mining activities or mining operations have not been abandoned or ceased, as the Staff did not make a single attempt to dispute the evidence of such activities.

See affidavit of R. Frank Wade. (A8)

Rocking G sought and obtained the required Environmental Resource Permit, Permit No. 0202175-00 issued May 13, 2003, (A3) from the Florida Department of Environmental Protection (“DEP”) to proceed with a new mining project as an expansion of the original excavation area and to include reconfiguration and reclamation of the two existing mine pits, with such expanded area to result in increasing the existing mine pits from the current 5.88 acres to create two lakes of 11.4 and 15.9 acres for a total of 27.3 acres of open water surrounded by pasture and other undisturbed lands.

Related to and in preparation for seeking the Environmental Resource Permit from DEP, Petitioner expended substantial funds for soil borings and testing to determine the quantity and quality of limerock as a construction resource and to determine the methodology and technology required for excavation and removal. Additionally Petitioner hired consultants and experts for surveying, engineering and planning purposes to prepare and present the appropriate applications and documentation to obtain such permit from the DEP. The permit obtained complied with and utilized best management practices to minimize environmental impacts to avoid intrusion into jurisdictional wetlands and to provide for excavation without any de-watering to protect the natural habitat of surrounding lands and native species. As a result of the efforts of Petitioner, the

DEP issued the ERP indicating that the State of Florida in fact approved the plans of Rocking G for their reclamation and reconfiguration project, and as a part of this process, Sumter County received notification to which they filed no objections. (T10)

A substantial expansion of a pre-existing or non-conforming use typically requires compliance with regulations enacted after the prior use began, so on June 21, 2010, Rocking G submitted a letter of inquiry (A2) to the Staff requesting a pre-application meeting to discuss specific local requirements for proceeding with this project. Instead of scheduling the requested meeting to discuss this process, the Staff, through its Planning Manager, unilaterally determined that the subject two existing mine pits were not properly registered pursuant to a County ordinance 90-12 enacted in 1990 and further unilaterally determined that such failure to register resulted in a determination that all vested rights were terminated. (A4)

The Staff then concluded that since the two existing mine pits had lost all vested rights, that they were effectively non-existent and could not be considered to meet neither the adjacency requirement set forth in the County Comprehensive Plan adopted February 2, 1992 nor the mining ordinance County Code Section 13-772 adopted in 1996, which required new mines to be located *adjacent to legally permitted existing mines*.

The critical problem with the Staff's interpretation of the Code provisions is

that it failed to recognize and or failed to reconcile the internal conflict that the Comprehensive Plan imposes an adjacency requirement as set forth in Section 13-772, but also attempts to incorporate and utilize a previously registered requirement under Section 90-12, which does not contain such adjacency requirement.

The Staff acknowledged that Rocking G has a valid Environmental Resource Permit issued by the state department, DEP, and that the County did not object to the issuance of such permit, although the County was provided ample notice to do so by the State. (T10) The Staff further acknowledged that the two existing mine pits are physically located on the real property owned by Rocking G, but concluded that such pits do not in fact *legally* exist under their interpretation of the County's Code. The Staff then found that based on the conclusion that existing pits do not legally exist, a new mine cannot properly meet the requirement of being located adjacent to an existing mine.

Rocking G objected, and pursuant to the County Code, Rocking G filed an appeal to the Commission, (A5) who conducted a quasi-judicial hearing on this matter on September 14, 2010. Under the County Code Section 13-236(a)(3)e, the Staff was required to meet, "... the initial burden of presenting to the commission sufficient evidence and argument to justify the order, requirement, decision or determination appealed." (T4)

The record contains competent substantial evidence, filed by Rocking G, of the continued uninterrupted use as a pre-existing non-conforming use of the subject property. See affidavit and aerial maps. (A8, A11, A12)The Staff failed to present any competent substantial evidence to the contrary and failed to object to the submission or validity of this record evidence.

The record evidence filed by Rocking G also indicates that the Staff failed to provide adequate notification or due process for a taking of substantial rights without compensation to Rocking G, or its predecessors of record, regarding the requirements of forfeiture of substantial rights by failure to register, contrary to the specific language of the County Ordinance 90-12. (A10) The Staff failed to submit any evidence to the contrary, failed to present competent substantial evidence of adequate notice to Rocking G, or its predecessors of record, and failed to object to the submission or validity of the record evidence filed by Rocking G.

The Staff failed to meet its burden to present competent substantial evidence to support the Staff's unilateral decision to terminate vested rights for lack of registration contrary to the specific language of County Ordinance 90-12. The Staff failed to meet its burden to present competent substantial evidence to support staff's unilateral decision that failure to register under County Ordinance 90-12 is a sufficient basis to abolish the continuation of a pre-existing non-conforming use contrary to the specific language of County Ordinance 90-12.

The Commission failed to determine specific reasons or findings of facts to support the affirmation of the Staff's determination that failure to register effectively terminated all rights to continued use of pre-existing and non-conforming use of subject property and legally abolished the actual existence of the two existing mine pits owned by Rocking G.

This appeal follows.

V. STANDARD OF REVIEW

“[C]ircuit Court review of an administrative agency decision under Florida Rule of Appellate Procedure 9.030(c)(3) 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); *City of Deerfield Beach v. Valliant*, 419 So. 2d 624, 626 (Fla. 1982); *Orange County v. Butler*, 877 So. 2d 810 (Fla. 5th DCA 2004). In completing the competent substantial evidence determination, this Court must determine whether the “necessary quantum of evidence was presented” to the Commission to support its decision. *Lee County v. Sunbelt Equities, II*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993).

Additionally, the Commission's decision is subject to “strict scrutiny” review by the circuit court; the same as is applied in the review of other quasi-judicial

decisions. *Bd. Of County Comm'rs v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993); *Lee County*, 619 So. 2d at 1002. "Since the property owner's right to own and use his property is constitutionally protected, review of any governmental action denying or abridging that right is subject to close judicial scrutiny." *Snyder v. Bd. Of County Comm'rs*, 595 So. 2d 65 (Fla. 5th DCA 1991), *aff'd* 627 So. 2d 469 (Fla. 1993).

VI. THE PETITIONER WAS NOT AFFORDED PROCEDURAL DUE PROCESS.

A. The Commission Deprived the Petitioner of its Vested Property Rights Without Affording Due Process of Law.

There is absolutely no evidence in the record indicating the Petitioner received adequate notice or due process regarding the determination that failure to register under one County ordinance, 90-12, would result in the impossibility to comply with the requirements of a later-enacted ordinance Section 13-772. Accordingly, the Petitioner was unconstitutionally deprived of its due process rights, requiring this Court to quash the Commission's actions.

Specifically, the Staff and the Commission relied on Section 13-772 to determine that Rocking G has no right to locate its new mine adjacent to the two existing mine pits because Rocking G's predecessor failed to register within the 90 day window set forth in the 1990 ordinance, 90-12. The Commission has effectively stripped Rocking G of its substantive property rights, based upon the

retroactive application of the adjacency requirement ordinance enacted six years after the registration period, without providing adequate notice, due process or any method or other opportunity to cure the earlier failure to register.

Moreover, the face of the 90-12 ordinance clearly does not include anything that would put a property owner on notice that the failure to register would result in the deprivation of the property owner's right to mine at the time of the ordinance or to apply for local permitting to mine in the future. Pursuant to 90-12, Section 13.166.1(D)(5), provides the penalties for failure to register:

[a]ny mine which has not applied for registration within the time period specified in 13-1.66.1(D)(3) [90 days] shall lose any vested rights of grandfathering for the *operation* of such mine. In order to operate such mine, the mine shall be required to comply with all provisions of this code including obtaining an approved mining site plan, *operating* permit, and proper zoning. (emphasis added).

Clearly, the intent of the ordinance was to require those property owners who did not register within the short 90-day window to comply with all regulations and permitting set forth in the ordinance from the effective date of the ordinance forward. In other words, those property owners, including the Petitioner, would not maintain vested non-conforming use rights to *operate* the mine the way they did prior to the ordinance. The plain language of the ordinance does not, however, indicate that the failure to register would result in the loss of the vested property right to mine, as the drafters likely contemplated that such a deprivation would be an unconstitutional infringement on the land owner's property rights.

Due process clearly requires that any premature termination of pre-existing non-conforming use of property entitles the land owner to reasonable notice and an opportunity to realize a return on its investment or must be compensated for an unreasonable taking without just compensation.

The Commission, based on the erroneous recommendation of the Staff, unlawfully extended and expanded the scope of Section 90-12 and, as a result, deprived Rocking G of substantive property rights without affording due process of law. The Commission erroneously found that the loss of operating rights for failure to register is equivalent to a termination of common law vested rights to continue a pre-existing non-conforming use. And, to add insult to injury, the Commission made this determination without adequate notice, procedural due process or compensation for the taking of substantial rights to mine and use the lime rock. As a result of the Commission's decision, Rocking G was essentially deprived of: the right to apply for County permitting to expand its mining operation; the right to enjoy the beneficial use and profit of its lime rock mineral rights; and its vested nonconforming use right to operate as a continuously existing mine in the County.

The later enacted ordinance, 13-772, which states that the location of a new mine must be adjacent to a *legally permitted* existing mine, is an unconstitutional violation of Petitioner's due process rights by an ex post facto application of new

penalties for failure to register under 90-12. Property owners were never provided notice that failure to register under the 1990 ordinance would, several years later, result in loss of their vested property rights.

As set forth in *Delk v. Dep't of Prof. Reg.*, “due process includes prohibition against ex post facto laws which deprive a citizen of life, liberty or property based on conduct occurring before the effective date of the prohibition. It is a basic tenet of common law pleading that ‘the allegata and probata must correspond and agree.’” 595 So. 2d 966 (Fla. 5th DCA 1992) (citing *Rose v. State*, 507 So. 2d 630 (Fla. 5th DCA 1987)). This basic notion of due process of law requires that not only must the proof at trial or hearing be that conduct charged in the accusatorial document, but also that the conduct proved must legally fall within the statute or rule claimed to have been violated. Conduct occurring before the effective date of the prohibition does not meet this standard.

Procedural due process rights include providing adequate notice of taking substantial rights without compensation, as mandated by the Florida and Federal Constitution. This Court should find that Rocking G was deprived of its constitutional rights and order a reversal of the Commissions decision.

B. The Commission's Failed to Comply with Due Process by Considering and Affirming the Staff's Unilateral Decision to Determine the Elimination of Rocking G's Vested Rights When a Vested Rights Determination Was Not Requested.

Rocking G merely requested a preliminary meeting with the Staff Planning Manager to determine the necessary steps Rocking G must take to comply with the County Code to proceed with its reclamation project that was approved by the state. The Staff did not schedule a meeting, but instead interpreted a series of County ordinances to essentially determine that Rocking G was ineligible to merely apply for the appropriate permitting. (A2, A4)

Minimally, procedural due process in quasi-judicial proceedings requires a fair and impartial hearing. *See, e.g. Ridgewood Props. v. Dept. of Cmty. Affairs*, 562 So. 2d 322, 323 (Fla. 1990) (“An impartial decision maker is a basic constituent of minimum due process”). Rocking G was not given a fair and impartial hearing when the Commission meeting was centered on the unilateral determination of the Staff that was not requested by Rocking G, yet had the effect of depriving Rocking G of vested property rights.

Mining in Sumter County is a permissible use as a special or conditional use of properties designated as agricultural, which is the case of Petitioner's property, and normally would be subject to public hearing review and decisions regarding such applications by both the Development Review Committee (DRC) and the Zoning and Adjustment Board (ZAB) prior to being presented to the Commission

for final approval, however, in the instant case, Staff simply determined that Petitioner was ineligible due the predecessor owner's failure to register under 90-12 and thus was legally abolished without further due process or hearing. The Commission summarily agreed to uphold such determination without substantial competent evidence to support its decision.

Moreover, the Commission's clear deference to the Staff's determination and the County Attorney's endorsement (T60) of such was an impermissible due process violation. *See Cherry Communications, Inc. v. Deason*, 652 So. 2d 803, 805 (Fla. 1995) (extending *Ridgewood* holding to legal advisers of the board and holding that commission attorney playing dual role as prosecutor before the commission and legal advisor to the commission during deliberations was due process violation). The Commission did not take the time to engage in analysis of the evidence presented to it or to determine whether the Staff's recommendation was supported by the law and by competent and substantial evidence. Instead, the Commission readily deferred to the Staff's recommendation on the second vote.

C.f. (T17) (Chairman Giplin: "Thank you Mr. Cornelius that was very thorough as always);" (T60) (Mr. McAteer: And just for the record, I am in concurrence with the staff recommendation. Chairman Gilpin: I certainly appreciate that. We do appreciate that. As always, you keep us on the right track, and much appreciated. So at this point I would either accept a motion or some

further discussion.)

The Commission's inappropriate deference to the Staff was clear when the majority of the Board's limited discussion at the hearing was restricted to the "alternatives" for Rocking that the Staff laid out in the July 1, 2010 letter. See discussion herein in Section VIII.A. of Commissioner Hoffman's impermissible comments and reliance on the Staff's listed "alternatives." For instance, Commissioner Hoffman stated (T58, T59):

I go back to Option 4 that Mr. Cornelious presented, and that was to develop that property. That is still a possibility, without establishing a commercial mine, mining process...I agree...[that] the property owner should be able to do something with his property, and I'm reading this thinking well, Mr. Cornelious has offered an opportunity to do that.¹

In spite of the fact that the letter did not lay out how these alternatives were legally or factually permissible, and the fact that the Staff did not present competent evidence to support these alternatives, the Commissioners acted as if those were their only options.

VII. THE COMMISSION'S ACTIONS DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW.

By summarily affirming the Staff's determination, the Commission departed from the essential requirements of the law. Specifically, the Commission's action:

¹ Option 4 in the Staff's July 1, 2010 letter is: "Complete reclamation of the old lime rock pits without "mining" (i.e. lime rock removed only used on site and not sold or transferred)." As stated, the alternatives or options laid out in this letter are not substantiated by law or fact, but rather the opinions and testimony of the Staff.

(i) was arbitrary and unreasonable; (ii) deprived the Petitioner of vested property rights without affording the property owner due process of law; and (iii) deprived the Petitioner of a substantial benefit of its property, which amounted to a “taking” without just compensation under the Florida and Federal Constitutions. These departures from the essential requirements of law, alone, require this Court to quash the Commission’s actions.

An administrative decision is a departure from the essential requirements of the law when it “amounts to ‘a violation of a clearly established principle of law resulting in a miscarriage of justice.’” *Teddler v. Fl. Parole Comm’n*, 842 So. 2d 1022, 1024 (Fla. 1st DCA 2203) (quoting *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983)). In other words, “[a] failure to observe the essential requirements of the law has been held synonymous with a failure to apply ‘the correct law.’” *Fassy v. Crowley*, 884 So. 2d 359, 364 (Fla. 2d DCA 2004) (quoting *Haines City Cmty. Dev v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *Dept. Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 658 (Fla. 5th DCA 2001)).

A. The Commission’s Ruling was Arbitrary and Unreasonable.

The Commission departed from the essential requirements of the law because its decision to affirm the Staff’s determination was both arbitrary and unreasonable. As such, this Court should issue a Writ of Certiorari quashing the actions of the Commission and direct the Commission to reverse the determination.

The Petitioner concedes that the Commission has the right to reasonably regulate mining operations under its police powers to advance community interests, but this right is certainly not unlimited. *See Dade County v. Florida Mining & Materials Corp.*, 364 So. 2d 31, 34 (Fla. 3d DCA 1978). In light of the fact that Petitioner's proposed use of the property would not constitute a land use detrimental to public health, safety, welfare or morals, and in fact, would serve many community interests, the Commission's strict adherence to the Staff's interpretation of the County ordinances is impermissible. *Id.*

In *Florida Mining*, the county had denied a property owner's request for an unusual use and variance for rock mining in an environmentally sensitive zone in the East Everglades, as the county's master plan prohibited such a use. The circuit court issued a writ of certiorari and ordered the county to grant property owner's desired variance and unusual use permit to allow the mining. *Id.* That court explained that although the county may place reasonable restrictions on the use of property through its zoning powers, these restrictions are "as a whole, unreasonable, discriminatory, arbitrary and capricious [because] they have no reasonable basis in the police power." *Id.* at 33.

The Third District affirmed this decision and found that the county's denial of the variance and permit was both arbitrary and unreasonable, as the county had permitted similar mining activities on surrounding tracts after adopting the plan. *Id.*

at 34. Additionally, the court explained that it was unreasonable for the county to solely rely on the strict compliance with the language of the plan, while ignoring the particular facts of the case. *Id.*

As noted above, the Commission in the instant case failed to identify a single public policy concern that would prevent the land from being used in the proposed manner. The Commission actually failed to identify *any* legitimate reason to uphold the staff's determination that a series of County ordinances should be interpreted to effectively mean that Rocking G did not maintain a vested right to mine its two existing pits for failure to register under a decade old ordinance and, as a result, did not meet the technical locational requirement of a subsequent ordinance. This was clearly arbitrary and discriminatory because, without any justification, the Commission's decision to affirm has now prevented the Petitioner from even initiating the application process for County permitting required for the proposed reclamation project.

Furthermore, the Commission's actions were discriminatory in that Rocking G was denied the opportunity to apply to mine the areas adjacent to physically existing mines, unlike other mines in the area. Surrounding mining operations in the county have been permitted to mine, and certainly apply to mine, areas that are adjacent to their physically existing mines. As in *Florida Mining*, permitting surrounding land owners to engage in substantially similar activities makes the

denial of Rocking G's request even more arbitrary and discriminatory. 364 So. 2d at 34. The Commission's reliance on the technical interpretation of the Code provision: "must be adjacent to existing *legally permitted* mine sites" is insufficient to deny Rocking G of its existing vested right to mine is impermissible because it is unfair and discriminatory. This is particularly insufficient in that the Commission provided absolutely no rationale for its decision.

B. The Commission's Actions Deprived the Petitioner of Vested Property Rights without Adequate Notice and an Opportunity to be Heard.

Mineral rights present a unique situation in the context of the vested rights doctrine; however, these unique rights are of substantial value to property owners. In this case, the undisputed evidence reflects that the Petitioner maintains a vested right to engage in mining activities on its property, as predecessor property owners have done since the early 1960s. Nonetheless, the County blatantly denied the existence of Rocking G's vested rights by determining that its mines do not legally exist. This Court should find it extremely inequitable for the Commission to infringe upon Rocking G's vested right with out any legitimate community interest to justify such infringement.

Florida common law provides that vested rights may be established if a property owner or developer has (1) in good faith reliance, (2) upon some act or omission of government, (3) made such a substantial change in position or has incurred such extensive obligations and expenses (4) that it would make it highly

inequitable to interfere with the acquired right. *See Monroe County v. Ambrose*, No. 3D-02-716, 2003 WL 22900537, at *3 (Fla. 3d DCA Dec. 10, 2003).

The Petitioner made it clear to the Commission that Rocking G has, in fact, satisfied each element of this standard and has a vested right to operate its mine on its property with its two physically existing mine pits. In good faith, Rocking G relied on the acts and omissions of the County, who did not object to the continuous mining activities that took place on the property, and incurred significant expenses with substantial time and effort dedicated to their proposed reclamation project.

The Petitioner presented evidence that shows that mining activities have been open and obvious for several decades, despite the lack of County permits to excavate and dig in the ground. In fact, Commissioner Breeden stated that he himself considered buying lime rock, from these very mines, for Sumter County from Rocking G's predecessor, further evidencing the county's knowledge and acceptance of Rocking G's mining activities. (T55) Rocking G relied on the County's continuing acceptance of existing mining activities and maintained the good faith belief that it had the vested right to engage in the same mining activities it had since ownership.

Rocking G and predecessor-land owners agree that all mining activities must comply with current county ordinances and the comprehensive plan, as they do not claim a grandfathered right to old mining practices that pre-date such legislation.

The plain language of Ordinance 90-12 in conjunction with the county's acts and omissions led Rocking G to believe that the failure to register for mining permits in 1990 simply required all subsequent mining activities to comply with current regulations set forth by the county. As such, Rocking G endured extensive planning and undertook a number of expenses to prepare for their reclamation project.

It is inequitable to rely solely on a technical interpretation of a locational requirement to prohibit Rocking G from applying for the necessary local permits for its state-approved reclamation proposal. The County did just that.

C. Without justification, the County Ignored both County and State Mandates that Emphasize Protection of Property Rights.

The County, including the Commission and the Staff, impermissibly disregarded the Rocking G's property rights in making its determination and thus, violated both state and county mandates. This is a clear departure from the essential requirements of the law.

Both the State of Florida's and Sumter County's Comprehensive Plans recognize the importance of the protection of property rights. Section 187.201(14)(a) provides that "Florida shall protect private property rights and recognize the existence of legitimate and often competing public and private interests in land use regulations and other government action." Fla. Stat. § 187.201(14)(a) (2010). Similarly, Section 13-801 of Sumter County Comprehensive Plan states:

The commission strongly believes that the property owner's rights are founded in the U.S. Constitution and the Florida Constitution and excessive governmental regulations applied to lawfully existing development violates the rights of property owners and that the commission should make every effort to comply with the State mandates...in such a way as to equitably administer the effects of such mandates on property owners.

Despite the express vow of protection, the Commission failed to give adequate consideration to the substantial and unfair affect their decision had on Rocking G's existing and vested property rights.

Although the elimination of nonconforming uses is a recognized goal of all local governmental planning, Florida takes a stricter view than most states on attempts to eliminate uses in derogation of landowner's rights. See, e.g., *Thomas v. City of Crescent City*, 503 So. 2d 1299 (Fla. 5th D.C.A. 1987). "Because 'zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner." *Id.* at 1301 (quoting *Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 553 (Fla. 1973)).

Rather than giving the adjacency requirement a broad and fair interpretation in light of Rocking G's right to use and benefit from its property, the Commission accepted a narrow interpretation from the Staff. This Court should find that the

Commission erred by failing to interpret the ordinances in favor of the property owner, and in doing so quash the Commission's actions.

D. The Commission's Actions Deprived the Petitioner of a Substantial Benefit of its Property, which Amounted to a Taking Without Just Compensation.

The County exceeded its police power by failing to scrutinize the balance between the public interest in its determination and the impact of its determination on Rocking G's property rights. Under the Due Process Clause of the Federal constitution, the County's actions constituted invalid exercises of the county's police power because there is no evidence that the determination is substantially related to any valid health, safety or welfare consideration. In short, the Commission's decision resulted in an unconstitutional taking of Rocking G's property rights without just compensation, and this alone is a basis for reversal.

In *Lewis v. City of Atlantic Beach*, the Fifth District explained the constitutional implications of zoning regulations infringing on nonconforming use rights of property owners:

The application of zoning regulations to restrict an existing use of property, resulting in substantial diminishing of its value, may constitute a "taking" by the governmental agency which requires the payment of compensation under well-established principles of constitutional law. To avoid these consequences, zoning regulations generally "grandfather" the continuation of existing nonconforming uses on property subject to the zoning classification. By the same token therefore, it is reasonable to conclude that the termination of such grandfathered nonconforming uses may result in a "taking" for

constitutional purposes unless the basis of such termination accords with applicable legal principles.

467 So. 2d 751, 754 (Fla. 5th DCA 1985).

In the instant case, the Commission failed to recognize the consequences in ignoring Rocking G's nonconforming use rights and a taking without just compensation occurred.

As the Eleventh Circuit explained, to determine whether a taking without just compensation has occurred, courts must employ a balancing test by weighing the benefit to the public against the detriment to the individual. *Bickerstaff Clay Products Co. v. Harris County*, 89 F.3d 1481, 1488 (11th Cir. 1998) (citing *Gradous v. Bd. Of Comm'rs*, 256 Ga. 469 (Ga. 1986)). "In practical terms, the balancing test means that an aggrieved land owner must show that the zoning decision presents a significant detriment to the landowner and is insubstantially related to public health, safety, morality, and welfare."

As discussed throughout, the County's actions resulted in a substantial deprivation of the Petitioner's property rights, including the right to mine, the right to benefit from the lime rock on its property, and the right to make improvements to the property. The Commission's infringement of these rights, particularly in light of the failure to weigh these rights against any community concerns, is unconstitutional and the Petitioner is entitled to compensation in an amount equivalent to the deprivation.

VIII. THE COMMISSION'S RULING IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The Commission did not issue an order setting forth its factual and legal findings and it remains unclear what evidence, if any, it relied on by voting to affirm the Staff's determination. Similarly, there is no evidence that the Commission undertook an analysis of neither the undisputed facts presented by the Petitioner nor the relevant provisions of the County ordinances when determining the rights of the Petitioner. It is, accordingly, evident that the Commission's actions were not supported by competent substantial evidence and must be quashed.

There was absolutely no evidence presented at the Hearing to support the affirmation of the Staff's determination that Rocking G's two existing mine pits do not *legally* exist and that all vested rights have been eliminated due to the failure to register contrary to the specific language of Ordinance 90-12. The evidence presented was that lime rock mining activities and operations, including removal of over-burden, excavation, processing and storage of lime rock, have been continuous, from the inception of the two existing mine pits in the early 1960's, with no intervening or contrary uses. The record contains no evidence that the pre-existing non-conforming use of the property for mining activities and mining operations have ever been abandoned or ceased.

A. The Competent Substantial Evidence Standard.

Substantial evidence is “such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred.” *Marion County v. Priest*, 786 So. 2d 623, 625 (Fla. 5th DCA 2001) (quoting *De Groot v. Sheffield*, 495 So. 2d 912, 916 (Fla. 1957). For substantial evidence to also be competent, the evidence relied on “should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” *Id.*

As noted by the Florida Supreme Court in *Florida Power and Light v. City of Dania*, this Court should not attempt to reweigh the evidence heard by the Board; rather, the Court is “constrained to determine simply whether the [administrative body's] decision was supported by competent substantial evidence.” 761 So. 2d 1089, 1093 (Fla. 2000).

Pursuant to County Code Section 13-236(a)(3)e, that the Staff was required to meet, “... the initial burden of presenting to the commission sufficient evidence and argument to justify the order, requirement, decision or determination appealed” prior to any presentation by the Petitioner. The Staff’s interpretation of the series of ordinances did not amount to competent substantial evidence to justify the Commission’s decision because it ignored many of the rights involved and failed to address undisputed facts presented by Rocking G.

B. Conclusory Statements and Opinions, Unsupported by facts, do not Provide Competent Substantial Evidence.

In the instant case, one of the very few questions asked by the Commission was whether neighboring parties objected to the reclamation project.

C.f. (T46) (Commissioner Breeden: “As far as adjacent landowners, who is the closest non-Rocking G owner, I guess, that would be affected?”); (Mr. Cornelius: “The closest – any kind of concentration of residential property is east, and it’s well beyond 500 feet.”) (T46)

Any reliance by the Commission on these answers is impermissible, as many courts have reviewed denials of quasi-judicial decisions for locally unpopular land uses where the zoning authority relies upon opposition by neighboring residents in attempting to carry its burden. Courts uniformly have held that such “plebiscites” or “polls” of the neighboring residents are not a sound basis for a decision. *See, e.g., Irvine v. Duval County Planning Comm’n*, 466 So. 2d 357, 367 (Fla. 1st DCA 1985) (Zehmer, J. dissenting), *aff’d* 495 So. 2d 167 (Fla. 1986); *Pollard v. Palm Beach County*, 560 So. 2d 1358, 1360 (Fla. 4th DCA 1990); *Flowers Baking Co. v. City of Melbourne*, 537 So. 2d 1040, 1041 (Fla. 5th DCA 1989).

Additionally, “[c]ompetent substantial evidence does not include ‘laymen's opinions' unsubstantiated by any competent facts.’” *City of Apopka v. Orange County*, 299 So. 2d 657, 660 (Fla. 4th DCA 1974). Speculation about what might happen, unsubstantiated by any competent facts, is not competent evidence.

Marion County, 786 So. 2d at 626 (citing *Metro. Dade County v. Blumenthal*, 675 So. 2d 598, 607 (Fla. 3d DCA 1995)).

Furthermore, since commissioners serve as the ultimate decision maker at the hearings, commissioners are generally not competent to testify. *See, e.g., Ridgewood*, 562 So. 2d at 323; *Blumenthal*, 675 So. 2d at 604-05 (holding that it was error for circuit court to focus on comments of individual board member in reviewing zoning decision). The role of a commissioner in a quasi-judicial proceeding is generally limited to reviewing the facts and arguments presented and making a determination based upon the facts that have been established. *City of Apopka*, 299 So. 2d at 659.

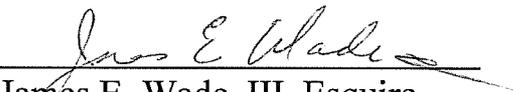
In the instant case, even Mr. McAteer, the County attorney, acknowledged that Commissioner Hoffman's statements impermissibly amounted to testimony² and any reliance by the Commission on Commissioner Hoffman's notion that Rocking G will seemingly be able to complete the project it proposed to do even if the Staff's determination is affirmed is impermissible. In particular, Commissioner Hoffman stated: "That was your idea from what you said Mr. Cornelius, that the developer or the owner of this property are not really interested in establishing a commercial mine. They want to hook it up with a lake and some property around this lake." (T37, T38) After Mr. McAteer advised that he was "bleeding into

² (T38) Mr. McAteer: "Now we're starting to bleed into testimony."

IX. CONCLUSION

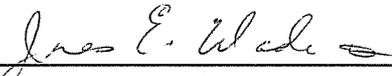
The Commission's decision did not comply with the essential requirements of the law, did not provide procedural due process and was not supported by competent substantial evidence and, therefore, should be quashed by this Court. The Petitioner requests that this Court: issue a Writ of Certiorari quashing the actions taken by the Staff and the Commission; remand the matter to the Commission; and order the Commission reverse the determination of the Staff.

Respectfully Submitted,


James E. Wade, III, Esquire
Florida Bar No. 0374083
116 Bushnell Plaza
Bushnell, FL 33513
Phone: 352-568-2500
Fax: 352-568-2501
Attorney for the Petitioner

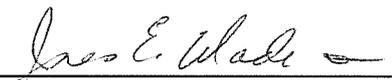
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been sent by [] Hand Delivery [] Facsimile [x] U.S. Mail to: Derrill L. McAteer, Esquire, The Hogan Law Firm, Post Office Box 485, Brooksville, Florida 34605, this 13th day of October, 2010.


James E. Wade, III, Esquire
Florida Bar No. 0374083
116 Bushnell Plaza
Bushnell, FL 33513
Phone: 352-568-2500
Fax: 352-568-2501
Attorney for Petitioner

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this Petition is in compliance with the font requirements of Rule 9.100(1), Florida Rules of Appellate Procedure, Times New Roman, 14 point.


James E. Wade, III, Esquire
Florida Bar No. 0374083

APPENDIX

Reference to the appropriate page(s) of the September 14, 2010, proceedings shall be made by T. followed by the page number. Reference to the appropriate page(s) of the supporting appendix shall be made by A. followed by the page number.

ITEM

1. Transcript: Board of Sumter County Commissioners
In Re: Rockin G Inc. Proposed Limerock Mine
Proceedings: Hearing for Appeal of Staff Determination
Before: Doug Gilpin – Chairman
Date: September 14, 2010
Time: 5:10 p.m. to 6:20 p.m.
Place: Sumter County Government Offices
910 North Main Street, Room 142
Bushnell, Florida
Reported by: Lois C. Grigg
Notary Public
State of Florida at Large
2. Letter from James E. Wade, III to Brad Cornelius - AICP Planning Manager – Sumter County dated June 21, 2010.
3. Letter from Department of Environmental Protection to Jim Wade dated May 13, 2003 with attachments.
4. Letter from Brad Cornelius AICP Planning Manager –Sumter County to James E. Wade, III, P. A. dated July 1, 2010.
5. Letter from James E. Wade, III, P.A. to Doug Gilpin, Chairman – Sumter County Board of County Commissioners dated July 23, 2010.
6. Letter from Derrill L. McAteer with The Hogan Law Firm to James E. Wade, Esquire dated July 30, 2010.

7. Letter from James E. Wade, III, P.A. to Doug Gilpin, Chairman Sumter County Board of County Commissioners dated August 11, 2010.
8. Affidavit of R. Frank Wade – Regarding Rocking G, Inc. Reclamation and Reconfiguration Project.
9. Letter from James E. Wade, III, P.A. to Derrill L. McAteer, Esquire Hogan Law Firm, LLC dated August 12, 2010.
10. Sumter County Ordinance No. 90-12.
11. Sumter County GIS Maps for years: 1970, 2006, 2007, 2008 and 2009.
12. Large Aerial Maps for years – 2002, 1974, 1983, 1997 and 2000.

(original copy of aerials part of record provided from clerk) not attached hereto.

