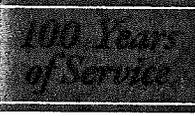


SHUTTS
&
BOWEN
LLP



SCOTT A. GLASS
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E-MAIL ADDRESS:
sglass@shutts.com

April 19, 2011

VIA FED EX

Clerk of the Courts
Civil Division
Sumter County Courthouse
215 E McCollum Avenue
Bushnell, FL 33513

Re: *James David Shelley, Jr. and Barbara Shelley v. Board of County
Commissioners of Sumter County, Florida; Case No.:*

Dear Madame Clerk:

Enclosed herewith for filing in the above captioned matter are the following:

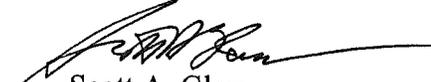
1. Civil Cover Sheet;
2. Original Petition for Writ of Certiorari;
3. Petitioners' Appendix; and
4. This firm's check in the amount of \$400 representing the filing fee.

I have also enclosed a copy of the Petition which I would appreciate having date-stamped and returned to me for my files in the self-addressed, postage pre-paid envelope provided.

If you have any questions, comments or concerns, or if I have overlooked anything you require in order to file these items, please call me to advise me of the same. In the meantime, thank you very much for your attention to this matter.

Sincerely,

SHUTTS & BOWEN LLP


Scott A. Glass



Enclosures

cc: George Angeliadis, Esq.
Sumter County Attorney

300 South Orange Avenue, Suite 1000, Orlando, Florida 32801 • ph 407.423.3200 • fx 407.425.8316 • www.shutts.com

FORM 1.997. CIVIL COVER SHEET

The civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form shall be filed by the plaintiff or petitioner for the use of the Clerk of Court for the purpose of reporting judicial workload data pursuant to Florida Statute 25.075. (See instructions for completion.)

I. CASE STYLE

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

Plaintiff **JAMES DAVID SHELLEY, JR. and
BARBARA SHELLEY,**

Case #: _____

Judge: _____

vs

Defendant **BOARD OF COUNTY COMMISSIONERS
OF SUMTER COUNTY, FLORIDA.**

II. TYPE OF CASE (If the case fits more than one type of case, select the most definitive category.) If the most descriptive label is a subcategory (is indented under a broader category), place an x in both the main category and subcategory boxes.

- | | |
|---|---|
| <ul style="list-style-type: none"> <input type="checkbox"/> Condominium <input type="checkbox"/> Contracts and indebtedness <input type="checkbox"/> Eminent domain <input type="checkbox"/> Auto negligence <input type="checkbox"/> Negligence—other <ul style="list-style-type: none"> <input type="checkbox"/> Business governance <input type="checkbox"/> Business torts <input type="checkbox"/> Environmental/Toxic tort <input type="checkbox"/> Third party indemnification <input type="checkbox"/> Construction defect <input type="checkbox"/> Mass <input type="checkbox"/> Negligent security <input type="checkbox"/> Nursing home negligence <input type="checkbox"/> Premises liability—commercial <input type="checkbox"/> Premises liability—residential <input type="checkbox"/> Products liability <input type="checkbox"/> Real property/Mortgage foreclosure <ul style="list-style-type: none"> <input type="checkbox"/> Commercial foreclosure \$0 - \$50,000 <input type="checkbox"/> Commercial foreclosure \$50,001 - \$249,999 <input type="checkbox"/> Commercial foreclosure \$250,000 or more | <ul style="list-style-type: none"> <input type="checkbox"/> Homestead residential foreclosure \$0 - <input type="checkbox"/> Homestead residential foreclosure \$50,001 - <input type="checkbox"/> Homestead residential foreclosure \$250,000 or more <input type="checkbox"/> Nonhomestead residential foreclosure \$0 - \$50,000 <input type="checkbox"/> Nonhomestead residential foreclosure \$50,001 - \$249,999 <input type="checkbox"/> Nonhomestead residential foreclosure \$250,000 or more <input type="checkbox"/> Other real property actions \$0 - \$50,000 <input type="checkbox"/> Other real property actions \$50,001 - \$249,999 <input type="checkbox"/> Other real property actions \$250,000 or more <input type="checkbox"/> Professional Malpractice <ul style="list-style-type: none"> <input type="checkbox"/> Malpractice—business <input type="checkbox"/> Malpractice—medical <input type="checkbox"/> Malpractice—other professional <input checked="" type="checkbox"/> Other - Certiorari review <ul style="list-style-type: none"> <input type="checkbox"/> Antitrust/Trade regulation <input type="checkbox"/> Business transactions <input type="checkbox"/> Constitutional challenge—statute or ordinance |
|---|---|

- Constitutional challenge—proposed amendment
- Corporate trusts
- Discrimination—employment or other
- Insurance claims
- Intellectual property
- Libel/Slander
- Shareholder derivative action
- Securities litigation
- Trade secrets
- Trust litigation

III. REMEDIES SOUGHT (check all that apply):

- monetary;
- nonmonetary declaratory or injunctive relief;
- punitive

IV. NUMBER OF CAUSES OF ACTION: []

(specify) _____

V. IS THIS CASE A CLASS ACTION LAWSUIT?

- yes
- no

VI. HAS NOTICE OF ANY KNOWN RELATED CASE BEEN FILED?

- no
- yes If "yes," list all related cases by name, case number and court.

VII. IS JURY TRIAL DEMANDED IN COMPLAINT?

- yes
- no

I CERTIFY that the information I have provided in this cover sheet is accurate to the best of my knowledge and belief.

Signature 
Attorney or party

Fla. Bar # 0911364
(Bar # if attorney)

Scott A. Glass
(type or print name)

April 19, 2011
Date

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

JAMES DAVID SHELLEY, JR. and
BARBARA SHELLEY

Petitioners,

CASE NO.: _____

DIVISION NO.: _____

v.

BOARD OF COUNTY COMMISSIONERS
OF SUMTER COUNTY, FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Comes now, Petitioners, James David Shelley, Jr. and Barbara Shelley, by and through their undersigned counsel, and pursuant to Fla. R. App. P. 9.030(c)(3) and 9.100, and consistent with the requirements of §§13-236(c) and (d) of the Sumter County Land Development Code, petitions for a writ of certiorari to review a final decision of Respondent, Board of County Commissioners of Sumter County, Florida (hereafter "BCC"), reached on March 22, 2011 and finally rendered and reduced to writing on March 29, 2011.¹

¹ A true and correct copy of the letter from the Sumter County Director of Planning & Development notifying the Shelleys of the BCC's decision is set forth under tab "A" of Petitioner's Appendix filed herewith. References to the Appendix will be to App. "___," p. ___, with appropriate reference to tabs and page numbers inserted.

Statement of Facts

Petitioners own approximately 630 acres of agriculturally zoned land on the north side of C-48E adjacent to the eastern county boundary in unincorporated Sumter County (the “Shelley Property”). *See, Sumter County Board of Commissioners Executive Summary with Staff Report Attached thereto*, App. B, p.2. CompostUSA, Inc., a Florida for-profit corporation headquartered in Winter Garden, Orange County, Florida, desires to locate a commercial composting operation on approximately 86 acres (the “Subject Property”) of the Shelley Property. *Id.* Accordingly, the Shelleys and CompostUSA approached the Sumter County Planning and Development Department to find out what County permits would be required.

Unfortunately, composting is not specifically identified within §13-362, “Table of Permitted Uses,” Sumter County’s Land Development Code (the “Code”). *See, Applicable Sumter County Land Development Code Provisions*, App. C. In cases such as this, where an applicant desires to engage in a use that is not specifically identified in the Code, the County Planning and Development staff looks for the most similar type of use that is in the Table of Permitted Uses. Once staff has identified the most similar use they subsequently apply the zoning and permitting Code provisions applicable to that use to the requested, but unlisted, use. App. B, p.2. In the instant case, staff reviewed the characteristics of the

proposed composting use and determined that it would be most similar to a landfilling or recycling operation. *Id.*

A landfilling and recycling operation, and thus by default a composting operation, may be permitted as a conditional use in Sumter County if it is to be located on land with a designated agricultural future land use and with agricultural zoning. *Id.* The Subject Property satisfies both of these requirements. *Id.* Therefore, the Shelleys and CompostUSA were directed by staff to submit an application for a Conditional Use Permit (a "CUP"). *Id.* They did so and the application was assigned Case No. C2010-0001 by the County. *Id.*

Code §13-143(a)(1) and §13-143(a)(2) set forth the general criteria that an applicant for a conditional use permit must satisfy in order to gain approval. Those specific criteria are as follows:

1. *the use must be in harmony with the purpose and intent of the zoning code;*
2. *the use must be compatible with surrounding uses and existing and anticipated land use patterns in the area;*
3. *the use must not adversely effect (sic) the public interest. Adequate traffic circulation, sanitary, utility, drainage, refuse management, emergency services and similar necessary facilities and services shall be available for the use. A use shall not create hazardous vehicular or pedestrian traffic conditions, or parking congestion, or generate traffic that exceeds the capability of roads and streets serving the use, or otherwise affect public safety. It shall not adversely affect the county's ability to provide essential public services.*

4. *the site must be suitable for the proposed use, considering flood hazard, drainage, soils, and other conditions which may pose a danger to life, health or property. The site upon which a use is located shall have suitable drainage, access, ingress and egress, off-street parking, storage and loading areas;*
5. *the location, construction, operation, and maintenance of the use shall have no more than a minimal adverse effect on the environment and public health safety, and welfare;*
6. *the kind and extend of improvements proposed and the cooperation of the developer concerning changes deemed advisable shall be considered;*
7. *unless specifically provided otherwise, the use shall comply with all general code requirements and the requirements of the zoning district in which it is located (including setbacks);*
8. *the use must not be detrimental to the neighborhood environment and must not unduly infringe on the rights of property owners in the vicinity of the use;*
9. *a vehicular parking or traffic problem must not be created, and the vehicular average daily traffic created on local roads must not be increased by more than five (5) percent. Staff, reviewing agencies and the commission may rely on input from the Florida Department of Transportation, the Florida Highway Patrol and the Sumter County Sheriff's office in making this determination; and,*
10. *if found necessary and effective, the site upon which the use is located shall have screening and buffering sufficient to minimize interference with the enjoyment of surrounding properties. The impact of nuisance or hazardous features involved in the use shall be minimized by buffers such as screening open areas.*

See, App. C, §13-143(a)(1) and §13-143(a)(2).

In order to demonstrate that the proposed composting operation would satisfy these conditional use criteria, and consistent with the requirements of the Code, the Shelleys and CompostUSA submitted a substantial amount of supporting technical data with their application and in response to requests for additional information received from the County. Among the documentation that was submitted were: (1) *Concept Plans for Conditional Use Permit CompostUSA*, see, App. D; (2) *Preliminary Geotechnical Exploration Report*, prepared by Universal Engineering Sciences, see, App. E; (3) *Minor Land Development Traffic Analysis*, prepared by Kimley-Horn and Associates, Inc., see, App. F; and (4) *Miscellaneous Correspondence and Documentation Regarding Environmental Matters*, App. G.

Once the County planning and development staff and the County's outside expert consultants determined that all of the documentation they needed to thoroughly review the application had been submitted, the County's staff and outside consultants proceeded with their professional review of the application. Once their review was completed, the County staff issued a report finding that the CUP application had satisfied all of the relevant Code criteria and should be approved. App. B, *passim*.

Among the specific findings made by the staff, as reflected in the staff report, were that the proposed location of the composting use on the east side of the Shelley Property maximized its distance from the nearest developed residential

area, which was approximately 1700 feet away. App. B, p.4. Staff also concluded that the adjacent property to the east is undeveloped, located within the City of Leesburg, and was part of a Development of Regional Impact called Renaissance Trails that has been abandoned. *Id.* Likewise, staff determined that the property to the north was also part of this abandoned DRI and is currently vacant with an agricultural zoning classification even though it was annexed into the City of Wildwood. *Id.* Finally, staff concluded that the closest non-applicant property to the south that was actually developed with a home site is approximately 2000 feet away from the Subject Property. *Id.*

With regard to environmental conditions, the County's hydro-geological consultant, Tetra Tech, noted that, while part of the Subject Property was located within a 100 year flood plain and contained wetlands, the area actually used for composting, the windrows, would maintain a minimum separation of 200 feet from the wetland area and would not encroach within the 100-year flood plain. Tetra Tech also stated that all other environmental issues, including any odor mitigation needed, could and should be properly addressed in the operating permit the applicant would still be required to obtain in order to operate the composting facility even if the CUP was approved. *See*, App. B, pp. 4-5. *See also*, App. C, §§13-171(b)(4) and 13-172(e).

Staff also noted that, in addition to having to undergo another round of public hearings in Sumter County in order to obtain an operating permit, CompostUSA would not be allowed to operate its proposed facility until it obtained permits from the Florida Department of Environmental Protection, the Southwest Florida Water Management District, and perhaps other State and Federal Regulatory agencies whose expertise in the regulation of such facilities far exceeded that of the County. App. B, p.5.

In light of the competent substantial evidence that had been submitted and reviewed by staff and the County's outside consultants, the staff recommended that the CUP be approved subject to twelve specific conditions, including that the applicant obtain the required Operations Permit and strictly adhere to the detailed operating plans and representations that would be incorporated therein. Staff also included certain conditions related to the composting operation's traffic circulation, including a limit of not more than 20 trucks per day. Conditions were also recommended regarding appropriate buffering and odor control, among other items. App. B, p.7.

Pursuant to the requirements of the Code, after staff and the County's outside consultants thoroughly reviewed the CUP application and came up with the staff recommendation, the application was duly noticed for a public hearing before the Sumter County Zoning & Adjustment Board on December 20, 2010. App. H.

At that meeting the item was continued to the Zoning & Adjustment Board's February 7, 2011 meeting. App. B, p. 1. On February 7, 2011, after hearing from the applicant and members of the public, both pro and con, and after extensive deliberation and discussion, the Zoning & Adjustment Board recommended approval of the Conditional Use Permit with an amendment to Condition #11 by a vote of 7 to 4. *Id.* The amended language recommended by the Zoning & Adjustment Board called for an odor mitigation and management plan to be submitted as part of the Operating Permit. *Id.*

In accordance with Code §13-142, the Zoning & Adjustment Board's February 7, 2011 recommendation, along with the staff recommendation, was forwarded to the BCC for a quasi-judicial public hearing and final decision on March 22, 2011. Prior to the BCC's consideration of the CUP application, however, the County sent out 19 notices to owners of property located within 500 feet of the overall 630 acre Shelley Property inquiring as to whether they would approve or disapprove the application. Four notices were returned, three disapproving and one approving. App. B, p. 8. Those in opposition cited concerns about traffic, storm water, potential adverse impacts to their property value and the generation of flies and odors that they attributed to the Shelley's existing land application of Class B residuals on their property pursuant to a Sumter County Special Use Permit that was issued in 2009 and which expires on May 18, 2011.

See, Assorted Correspondence, App. I. None of the objectors, however, purported to have any particular expertise with regard to transportation planning, real estate valuation, hydro-geology or other environmental or technical issues. *Id.*

Finally, on March 22, 2011, the BCC held a public hearing on the CUP application. As part of their agenda packet, each Commissioner received the staff report, the applicant's supporting documentation and the aforementioned correspondence. Several of the Commissioners also acknowledged at the outset of the public hearing that they had received telephone calls about the application. *See, Hearing Transcript*, App. J, pp. 2-4. Thereafter, Mr. Brad Cornelius, the Sumter County Director of Planning & Development, presented the staff recommendation of approval, noting the recommended conditions of approval. App. J, pp. 4-27. Among the recommended conditions was a condition that the Shelley's not extend their Special Use Permit for land application of septage and that they also cease spreading Class A residuals on their property despite the fact that no permit is required to spread Class A residuals on agricultural land. *Id.* at 17-18.

Mr. Cornelius further pointed out that approval of the CUP would not actually authorize CompostUSA to begin operations as they would first need to apply for an Operating Permit and go through a separate staff evaluation and public hearing process. *Id.* at 8-9. Likewise, he advised the BCC that CompostUSA

would not be allowed to operate until it applied for and received separate permits from the Southwest Florida Water Management District and the Florida Department of Environmental Protection. *Id.* at 16-17, 25. In conclusion, County staff recommended that, with the conditions staff and the consultants were recommending, the application met the criteria for approval of a CUP as set forth in the staff report. App. B.

After the staff presentation a representative of CompostUSA, Mr. Glenn Stewart, gave a brief presentation to the BCC and explained how CompostUSA utilizes a proprietary inoculant and the Modified Static Aerobic Pile composting method. He explained that this method generates heat from the outside in which means that once the inoculant is applied the compost piles, known as windrows, remain undisturbed for 30 to 40 days, whereas conventional composting requires that the windrows be turned a minimum of five times in a fifteen day period to ensure proper heating of all material. He further testified about the procedures CompostUSA uses to lay a base of material and a cover of material to minimize odors and prevent excess moisture, seepage or runoff. *Id.* at 28-33.

Mr. Stewart further entered a brochure about CompostUSA's operations into the record which explained that, because the windrows aren't turned for 30 to 40 days, by the time they are turned the material is composted to such a degree that they do not produce significant offensive odors when they are turned. *See, Copy of*

brochure, App. K. The brochure, and Mr. Stewart, further explained that the windrows are turned a second time approximately two weeks later and that the process is totally completed within 60 days. *Id.* Mr. Stewart also entered a bag of the completed product into the record. App. L.

After Mr. Stewart testified the BCC heard sworn testimony from ten members of the public. First to speak was Claudia Schwalback, a resident of the Villages. She suggested that the BCC defer action on the application until more information could be gathered about CompostUSA. App. J, pp. 35-36.

Ms. Schwalback was followed by Robin Simmons, a resident of Center Hill who provided the BCC with a handout of material that was entered into the record. *See, Simmons Handout*, App. M. The handout stated that she had toured a CompostUSA site at another location and found it did not match the photos in CompostUSA's brochure. Additionally, she offered hearsay testimony that a number of people had complained about a CompostUSA site in Marion County. *Id.* With regard to the Marion County operation she also submitted a copy of a letter sent to CompostUSA almost a full year earlier, on April 20, 2010 by the Florida Department of Environmental Protection. In the letter, the DEP advised Mr. Stewart that they had received complaints about odors emanating from the

operation and directed Compost USA to take corrective measures within 30 days.²

Simmons Handout, Exhibit C, App. M.

Ms. Simmons' handout also included a copy of an even older letter about the Marion County CompostUSA operation. This letter, from the Marion County Zoning Manager, was addressed to Craig Conrad Enterprises, Inc. and stated that the Zoning Department was seeking to revoke the Marion County Special Use Permit because of alleged violations of conditions of approval. Specifically, the letter alleged that an on-site sign showed the wrong operating hours, that the overall use and configuration of the site was not consistent with the approved concept plan, and that the approved compost referenced did not contemplate sludge cake composting. *Simmons Handout, Exhibit D, App. M.* No copy of the approved permit or concept plan was included in Ms. Simmons' handout, nor did Ms. Simmons include any public records or other documentation showing how the matter had ultimately been resolved other than her own hearsay testimony that the permit had been revoked. App. J, pp. 38-39.

² It should be noted that no evidence was entered into the record by Ms. Simmons, or anyone else, that CompostUSA did not take the actions required by DEP and adequately address the problem in a timely manner as required. Nor was any public record or other evidence entered showing any subsequent DEP actions in regard to any CompostUSA facility. In fact, Mr. Stewart subsequently testified that the issue at the Marion County facility was timely resolved as required and no further action was taken by DEP. App. J, p. 63.

Finally, the Ms. Simmons' handout included a resolution adopted by the City Council of the City of Center Hill objecting to the placement of the compost company proposed by CompostUSA on Highway 48 in the vicinity of Center Hill. The resolution stated that Center Hill heard testimony from a number of concerned citizens, residents and non-residents alike, at its meeting on March 8, 2011 and that, by a show of hands, they indicated their opposition to the proposed CUP. The resolution also stated that, "testimony presented and documentation submitted gave rise to concerns for the safety of the residents, especially as it may affect ground water," and that the City did not see how it would benefit from the composting operation so the City Council resolved to oppose it.³ *Simmons Handout, Exhibit E*, App. M.

Robin Simmons' testimony was followed by Valerie Simmons who testified that she was opposed to the CUP application, because she had visited the Marion County site and was not impressed and thought that the operation on the Shelley Property would be equally unimpressive. App. J, p. 41.

Rhonda Morgan, of Center Hill, then testified that she was opposed to the CUP application because of her health. She then read into the record an undated e-

³ Neither the Simmons handout, nor the resolution itself, stated what the testimony before the Center Hill City Commission actually was, whether it was given under oath, what the qualifications were of the people testifying, if any, or incorporated any of the alleged "documentation." Thus, presentation of the resolution was actually double hearsay.

mail that someone else had allegedly sent to DEP complaining about noise and odor at the Marion County location. App. J., pp. 44-45. *Undated e-mail*, App. N.

Ms. Morgan was followed by David Shelley, who offered rebuttal to the testimony of the opponents.⁴

Mr. Shelley was followed by Ken Merritt of Center Hill who stated that he was opposed to the application because Mr. Shelley was applying sludge to his property while the County was requiring other people to put their septic tanks below ground. App. J, pp. 50-51. Mr. Merritt did not explain what this had to do with the CUP application or the proposed composting operation.

The next speaker was Jack Brandon, a land use attorney from Lake Wales, Florida, who spoke on behalf of JK Stewart Properties, LLC, the owner of an approximately 8600 acre ranch located to the west and north of the Subject Property. He testified that he and his client had toured the Marion County CompostUSA facility and that he was not speaking in opposition to the application but simply wanted to encourage the BCC to incorporate staff's proposed conditions, especially the condition that there be no further land application of sludge on the overall Shelley Property. App. J, pp. 51-53.

⁴ Inasmuch as the Court is not allowed to reweigh the evidence in certiorari but is instead limited to reviewing the record to determine whether the board's decision is supported by competent substantial evidence, Petitioners will not recount herein the testimony of those neighbors who supported the conditional use permit application.

Next to speak was David Dunn, who spoke in favor of the application.⁵ Immediately following Mr. Dunn was Yvonne Taylor who spoke in opposition. Ms. Taylor prefaced her remarks by noting that she lives “a good ways” from the Subject Property, probably two miles or so. App. J, p. 55. She then testified that she opposed the project because of her fear that the composting operation if approved would result in contamination of the Upper and Lower Floridan Aquifers. She stated that she believed the Subject Property to be a sink-hole prone area and approval of the composting operation would be a recipe for disaster in light of the fact that that there already many septic tanks, a meat packing plant, rock mines, and old dump site and Port-O-Lets in Center Hill. She further stated that she believes all of these things adversely affect the aquifer, particularly the blasting done at the rock mining operations. *Id.* at 55-56. Ms. Taylor, however, did not state precisely how any of these uses are actually impacting the aquifers or what facts would lead her to believe that the composting operation would have an adverse impact on the aquifers. Nor did Ms. Taylor submit any evidence as to her qualifications, if any, to provide competent substantial testimony regarding hydrogeology or any environmental science discipline. She also, again without laying any factual basis for her opinion, stated that she did not believe that Sumter

⁵ Again, inasmuch as the Court is limited to reviewing the record for competent substantial evidence that would support the BCC’s decision, Petitioner will not recount the lay testimony of those neighbors who supported Petitioner’s application at the public hearing.

County would adequately monitor the operation of the composting facility if were approved. *Id.* at p.60.⁶

Subsequent to Ms. Taylor's lay testimony, Marvin Lancaster of Webster, Florida spoke in favor of the application, followed by CompostUSA's representative, Mr. Stewart's rebuttal testimony. *Id.* at pp. 61-66.

Upon conclusion of Mr. Stewart's rebuttal testimony, the BCC chairman called for board discussion. *Id.* at p.67. The County Commissioner in whose district the composing operation would be located, Commissioner Mask, led off the discussion. He first stated that he had received numerous complaints in the past about odors emanating from the existing septage land application operation on the Shelley Property and then stated that:

these folks have been through enough with that type of situation. I do not plan to impact them in a negative way again with anything like that. I think based on the testimony presented here tonight, there is no way I would be able to support that, and I would encourage my fellow Board Members to do the same.

Id. at pp. 67-68.

⁶ Ms. Taylor also insinuated that there is a nefarious and concealed connection between the Shelleys and CompostUSA that goes much further than a simple landlord-tenant relationship and that there might be other, hidden partners pulling the strings, stating that in cases like this "tentacles go very, very deep and there are people involved in situations that are hard to believe." She ultimately admitted, however, that she had no factual basis for her conspiracy theory. App. J, pp. 58-59.

After Commissioner Mask stated that he would be opposing the CUP “based on the testimony” presented at the hearing and encouraged his fellow Commissioners to do likewise, Commissioner Breeden quickly indicated that he would not be relying on such unqualified lay testimony and hearsay. He stated that when he and Mr. Yoder had visited the Marion County CompostUSA site on March 17, 2011 (*see, id.* at p. 3) they were unable to detect any odors outside the perimeter of that site. *Id.* at 69. He also noted that seven or eight of the County’s Zoning and Adjustment Board Members had also visited CompostUSA’s Marion County site and that Board had ultimately recommended approval of the Conditional Use Permit by a vote of 7 in favor and 4 not in favor. *Id.* at 70. Finally, he noted that staff had come up with about 14 conditions that would ensure that the proposed composting operation would meet the applicable Code criteria. *Id.*

A third Commissioner then asked Commissioner Mask to clarify his position as the District Commissioner. Commissioner Mask responded that he, “would encourage my fellow Commissioners to not approve this.” *Id.* at 71. The inquiring Commissioner then responded, “that’s what I thought you said, but I wanted to make sure. And because it is in your area, I give great weight to that.” *Id.* Finally, the last Commissioner stated that, “I think we’ve had a good presentation on both sides. I simply can’t support it.” *Id.* at 72.

Chairman Burgess then offered his rationale for opposing the application stating that, “with the amount of people that have spoken up on this thing, including the Center Hill resolution here from the City Council, I think there’s an indication certainly of concern for this issue.” *Id.* The Chairman then invited the District Commissioner to offer a motion and Commissioner Mask moved to deny the application. Commissioner Hoffman seconded the motion and the CUP application was then denied by a vote of 4 to 1. *Id.*

Scope of Review

In reviewing a petition for writ of certiorari, the Court is charged with determining: (1) whether the local government afforded the petitioner procedural due process; (2) whether the local government’s decision was supported by competent substantial evidence; and, (3) whether the local government’s decision constituted a departure from the essential requirements of law. *City of Deerfield Beach v. Valliant*, 419 So.2d 624 (Fla. 1982). If the court determines that the local government failed to adhere to any of these criteria the court must quash the decision. *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957).

Argument

Petitioners do not dispute that they were afforded procedural due process. However, even the most liberal review of the record in this case clearly shows that

the BCC's decision is not supported by competent substantial evidence. In fact, a comprehensive review of the record demonstrates that the BCC's decision is not supported by any competent substantial evidence whatsoever. Therefore, the BCC has failed the second prong of the *Valliant* test. Likewise, a review of the record shows that the BCC failed the third prong of *Valliant*. Specifically, the BCC deviated from the essential requirements of law by using Petitioner's public hearing to simply conduct a plebiscite to determine which way the political winds were blowing.

- A. The BCC's decision to deny the Conditional Use Permit Application Must be Quashed because it was not supported by competent substantial evidence in the record.

In determining whether to grant or deny a conditional use permit, the governing body must apply existing law to the facts surrounding the application. Accordingly, consideration of a conditional use permit application is a quasi-judicial proceeding. *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993). Thus, in the instant case the Sumter County Board of County Commissioners was charged with holding a public hearing to adduce facts, apply the existing law to those facts and to reach a reasoned and factually-based conclusion. *Snyder*, 627 So. 2d at 476; *City of Apopka v. Orange County*, 299 So.2d 657 (Fla. 4th DCA 1974).

In order for a local governing board to conclude that something is a fact, as opposed to unsupported opinion or popular sentiment, the law requires that each factual determination be supported by competent substantial evidence presented to the board. *City of Deerfield Beach v. Valliant, supra*. Competent evidence is defined as, “evidence sufficiently relevant and material to the ultimate determination ‘that a reasonable mind would accept it as adequate to support the conclusion reached.’” *City of Hialeah Gardens v. Miami Dade Charter Foundation, Inc.*, 857 So.2d 202, 204 (Fla. 3rd DCA 2003) quoting *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957). Likewise, substantial evidence has been defined as, “evidence that provides a factual basis from which a fact at issue may reasonably be inferred.” *Id.*; *Metropolitan Dade County v. Blumenthal*, 675 So.2d 598 (Fla. 3rd DCA 1995).

Further, it has long been settled law in Florida that lay testimony is not competent substantial evidence on technical planning issues. *Jesus Fellowship, Inc. v. Miami-Dade County*, 752 So.2d 708 (Fla. 3rd DCA 2000); *Pollard v. Palm Beach County*, 560 So.2d 1358 (Fla. 4th DCA 1990)(opinion testimony, unsubstantiated by facts, is neither competent nor substantial evidence). Likewise, lay witnesses’ opinions that a proposed land use will devalue homes in the area are insufficient to support a finding that such devaluation will occur. *City of Apopka v. Orange County*, 299 So.2d 657, 659-60 (Fla. 4th DCA 1974). There must be

evidence other than lay witnesses' opinions to support such claims. *BML Invs. V. City of Casselberry*, 476 So.2d 713, 715 (Fla. 5th DCA 1985).

A review of the record in the instant case, however, shows that this non-competent, non-substantial "evidence" is exactly what the Sumter County Board of County Commissioners relied upon when it denied CompostUSA's application. Rather than rely on true competent substantial evidence presented to it in the form of the applicant's experts' studies and reports, or the competent substantial evidence presented to it in the form of the County's own professional planning staff's report and expert consultants' opinions, the Board, at best, chose to rely solely upon unsubstantiated lay testimony and hearsay presented by the opposition as evidenced by Commissioner's Mask's statement that, "based on the testimony presented here tonight, there is no way I would be able to support that, and I would encourage my fellow Board Members to do the same." App. J, pp. 67-68.

While Commissioner Mask relied on the testimony presented at the March 22nd hearing, and urged his fellow Commissioners to also rely on that testimony in denying the application, the transcript of that hearing shows that not a single witness testifying in opposition to the application was qualified as an expert in planning, land use, hydrology, geology, engineering, biology, chemistry, transportation, engineering, real estate valuation or even agricultural best

management practices. Instead, the record reveals that only lay witnesses testified. App. J, pp. 35-60.

Some of the lay witnesses testified, without recitation to underlying facts or scientific studies, that they believed the composting operation would generate excessive and intolerable odors. App. J, pp. 33, 57. Others thought that the application should be denied based on their apparent belief that issuance of one DEP compliance letter was a sufficient reason to deny CompostUSA permission to ever operate a composting facility in the future, here or anywhere else.⁷ App. J, p. 39. Another witness appeared to mistakenly believe that raw sewage would be composted on site. App. J, p. 50. One witness urged denial based on her personal beliefs that neither the Southwest Florida Water Management District nor the Florida Department of Environmental Protection would be able to properly evaluate the proposed operation but would instead simply allow CompostUSA to pollute the aquifer at will. App. J, pp. 56-58, 60.

⁷ As stated earlier, the undisputed evidence shows that CompostUSA timely complied with DEP's directions. Moreover, the DEP letter and the other selective partial public records presented by the opposition are hearsay. While hearsay may be admitted in a quasi-judicial proceeding, its mere admission does not convert it to competent substantial evidence which can be used as the basis for a final decision. *See, Forehand v. School Board of Gulf County*, 600 So.2d 1187 (Fla. 1st DCA 1992)(while hearsay is generally admissible in administrative proceedings, hearsay alone does not constitute substantial competent evidence). Fundamental tenets of due process require that an applicant be afforded prior notice and an opportunity to challenge the veracity and context of documentary evidence if such documents are used to undergird denial of his application.

While the record clearly shows that at least one of the Commissioners, and likely others, based their vote on such unqualified lay testimony, the transcript also appears to show that the Chairman ignored both the competent and incompetent evidence and based his decision on a simple headcount. Specifically, the Chairman clearly stated, “with the amount of people that have spoken up on this thing, including the Center Hill resolution here from the City Council, I think there’s an indication certainly of concern for this issue.” App. J. p. 72. After making his blunt reference to the numbers and the action taken by a separate political body without jurisdiction, the Chairman went on to vote against the application without any reference whatsoever to substantial competent evidence adduced at the hearing.⁸

It is clear that rather than meet their obligation to base their decision on competent substantial evidence, the majority of the BCC elected to give undue emphasis to the opposition’s preference to not have a composting operation located on the Shelley’s 630 acre agricultural ranch. The preferences of neighbors, or even the desires of a nearby town, however, are insufficient to override the Petitioners’ right to use their land, subject to reasonable and appropriate conditions, for a

⁸ Not only is the Center Hill resolution hearsay, it is actually double hearsay as it purports to be based on testimony presented to that City’s Commission without indicating by whom such testimony was given, what such witnesses qualifications were, or even any specifics about such testimony. In essence, it simply states that a bunch of people are opposed to this so we are, too, although we don’t know exactly why.

lawful and permissible use. *See, Conetta v. City of Sarasota*, 400 So.2d 1051, 1053 (Fla. 2nd DCA 1981)(suggesting that a land-use decision cannot be “based primarily on the sentiments of other residents”).

The threshold necessary for a local government to meet the competent substantial evidence requirement is quite low. In fact, if this Court can find *any* competent substantial evidence in the record that rationally supports the BCC decision, then this Court would have to uphold that decision. *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So.2d 1270 (Fla. 2001); *Dorian v. Davis*, 874 So.2d 661 (Fla. 5th DCA 2004)(noting that *any* competent substantial evidence in the record is enough to support a local government’s determination). It is clear, however, that even such a negligible threshold cannot be overcome by the record in the instant case. Accordingly, the decision of the Sumter County BCC must be quashed and the application remanded for a decision based on competent substantial evidence.

- B. The BCC’s decision to deny the Conditional Use Permit Application must also be quashed because the BCC departed from the essential requirements of law by simply conducting a plebiscite public hearing and making an arbitrary and capricious political decision.

As demonstrated above, the only competent evidence contained in the record is from the applicant’s experts’ reports and the BCC’s own staff which found that, with reasonable and appropriate conditions, the application met all of the Code

requirements.⁹ Rather than presenting competent evidence to the contrary, the opponents relied on numbers and political savvy, including gathering the support of another politically elected body, to convince the BCC to simply reject the application without factual support. In doing so, the BCC departed from the essential requirements of the law.

The purpose of a quasi-judicial public hearing is not to provide the County Commission an opportunity to poll the neighborhood to see which way the political winds blow. The purpose of a public hearing is to provide interested parties an opportunity to present competent witnesses and other evidence from which the Commission may make a reasoned decision consistent with applicable Code provisions. *City of Apopka v. Orange County*, 299 So.2d 657, 659 (Fla. 4th DCA 1974). In order to withstand judicial scrutiny the BCC's decision must be grounded upon facts which have been established, not "upon the wishes of persons who appear for or against the granting of the application," but rather on facts adduced at the hearing. *Id.*

"The function of the board of county commissioners is to hold public hearings, hear neighborhood residents, and obtain facts, not to hold a plebiscite; a

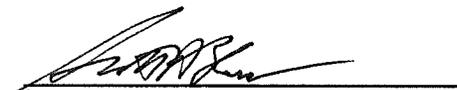
⁹ Petitioner is not asking the Court to reweigh the evidence and direct the BCC to approve the application. The Court does not have the power to do so in certiorari. Petitioner points to the staff recommendation simply to illustrate that the BCC's decision is contrary to the only competent evidence in the record which implies that the decision was not based on evidence, but instead on politics.

majority's desires or opinions can never control the zoning decision." *Foley v. Orange County*, FLW Supp. 1702FOLE (9th Cir. October 21, 2009), citing *City of Apopka, supra*. See also, *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993)(quasi-judicial decisions are not wholly discretionary political decisions but rather must be rationally based upon evidence adduced at a fair hearing). A review of the record in the instant case clearly shows that the BCC has failed to adhere to this essential requirement of the law and simply made an arbitrary, capricious political decision.

An arbitrary decision is one "not supported by the facts or logic." *Board of Clinical Lab. Personnel v. Florida Assn. of Blood Banks*, 721 So.2d 317 (Fla. 1st DCA 1998). An action is capricious when it is "taken irrationally, without thought or reason." *Id.* In the instant case the BCC completely ignored its professional staff report and recommendation in favor of unsubstantiated lay opinion, emotional appeals and inappropriate political considerations. The Board's decision to reject the DRC recommendation was a purely political response. Because the BCC's decision was arbitrary and capricious, the Court has no choice but to quash it.

WHEREFORE, Petitioners having shown that the Respondent's decision to deny Petitioner's application is not supported by competent substantial evidence in the record, and that Respondent deviated from the essential requirements of the law by making an arbitrary, capricious and political decision unsupported by either the

facts or law, Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari and quash the Sumter County Board of County Commissioner's decision and award such other and further relief as the Court deems just and appropriate.



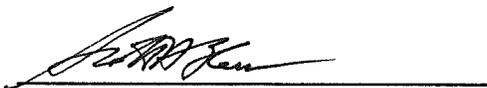
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CERTIFICATE OF SERVICE

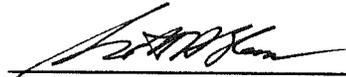
I hereby certify that a copy of the foregoing Petition for Writ of Certiorari and supporting Appendix were served this 19th day of April, 2011, via U.S. Mail to George Angeliadis, Sumter County Attorney, The Hogan Law Firm, 20 South Broad Street, Brooksville, FL 34601-2829.



Scott A. Glass, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was typed in Times New Roman 14 point and is in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).



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