**IN THE DISTRICT COURT OF APPEAL**
**FIFTH DISTRICT OF FLORIDA**

FLAGLER COUNTY BOARD
OF COUNTY COMMISSIONERS,

Petitioner,

v.

Case No. _____
Lower Court Case No. 2017-CA-000117

JAY AND DAWN SWEATT,
Owners of Two-Year-Old Dog
Named BACCHUS,

Respondents.
_____/

**PETITION FOR WRIT OF CERTIORARI**

The Petitioner, FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS, ("County" or "County Commission") petitions the Court for issuance of a Writ of Certiorari quashing the Order and Opinion of the Circuit Court, Seventh Judicial Circuit, in and for Flagler County, Florida, pursuant to Florida Rules of Appellate Procedure 9.100 and 9.030(b)(2)(B) and Article V, Section 4 of the Florida Constitution.

## I. Jurisdiction

Petitioner invokes this Court's jurisdiction pursuant to Rules 9.030(b)(2)(B) and 9.100, Fla. R. App. P., and Article V, Section 4(b)(3) of the Florida

Constitution. The County is challenging the Order and Opinion rendered by the Circuit Court in and for Flagler County on August 17, 2017. (App. at 1-9).

## II. Preliminary Statement

The County is seeking this certiorari review because the Circuit Court's decision creates precedent within the Seventh Judicial Circuit as to the handling of dangerous dog cases by local governments. Four elements of the ruling below are contrary to the quasi-judicial principles applicable to dangerous dog cases at the local level. All of them center on whether the local government should adhere to rules applicable to quasi-judicial proceedings in reviewing a hearing officer's recommendation. The County's contention is that there should be adherence to those principles. First, for a dog classification review, the local government should not be a party to the proceedings but rather the quasi-judicial decision maker. It should be neutral when a dog owner seeks review of the decision of the animal control agency. Second, the legal counsel to the local government (its county or city attorney) should not be an advocate of either position in the hearing conducted by the local government. Third, the local government should have the authority to determine that the individual injured may appear by counsel because the individual has suffered injury in fact. Lastly, after considering the findings and conclusions of law of a hearing officer, the local government should be able to determine if there was competent substantial evidence to support the hearing officer's findings

and whether an error of law was committed. The Circuit Court ruling below, respectfully, decides these questions in the negative and thereby disturbs the quasi-judicial matrix when local governments are acting in such capacities. These are the reasons for this certiorari petition.

## III. Statement of the Facts and Proceedings

This matter arose under Section 767.12, Fla. Stat. (2015), the "Dangerous Dog Statute." In July 2015, the Respondents' dog, Bacchus, bit the face of eight-year old RW, a friend of the Respondents' son, RS, causing severe injury requiring over forty sutures. RW had come to the Sweatts' residence to play with RS when the attack occurred. Flagler County Animal Control made an initial determination that Bacchus was a dangerous dog as defined in Section 767.11(1)(a), Fla. Stat. (2015).

The Respondents' (Mr. and Mrs. Sweatt, parents of RS) contested the determination and requested a hearing, a right afforded dog owners under Section 767.12(1)(d), Fla. Stat. (2015). The matter was assigned to a Hearing Officer to conduct an evidentiary hearing pursuant to County Code Section 5-67 and the Flagler County Administrative Hearing Ordinance, County Code Sections 2-301 – 2-308 (collectively, "the Ordinance"). (App. at 10-12 and 104-105). The Hearing Officer made findings of fact, conclusions of law, and a recommended decision to the County in accordance with the Ordinance. The Hearing Officer found that

Bacchus met the definition of dangerous dog under Section 767.11, Fla. Stat. (2015), because the dog caused disfiguring lacerations requiring sutures. Nevertheless, after weighing conflicting testimony, the Hearing Officer found that RW was unlawfully on the property when the attack occurred. Thus, the Hearing Officer recommended that Bacchus not be classified as a dangerous dog pursuant to Section 767.12(1)(b), Fla. Stat. (2015), which exempts dogs from the classification when the injury was sustained by a person who was "unlawfully on the property," *id.*, when the injury occurred. (App. at 14 and 69).

At the quasi-judicial hearing of the County Commission to consider the Hearing Officer's recommendation, the county attorney provided extensive instructions to the County Commission on the procedures and requirements of the hearing. (App. at 52-53). The County Commission members disclosed any ex parte communications they had received. The County Commission then heard arguments by the attorney for the Respondents in support of the Recommended Order and arguments by RW's attorney in opposition to the Recommended Order as per the Ordinance. The County Commission also took public comment although the county attorney announced that public comment could not be considered as evidence. (App at 54). No new evidence was admitted or considered at the hearing of the County Commission per the instructions given. The County Commission then discussed the case at length and ultimately found no competent

substantial evidence that RW was on the Respondents' property "unlawfully" when the attack occurred. The County Commission voted 4-1 to declare Bacchus to be a dangerous dog and issued an Adjudicatory Order with its findings and conclusions of law.[1] The Adjudicatory Order required the Respondents to identify Bacchus by tattoo or implant, to keep him in a secure enclosure, to have him leashed and muzzled in public, but did not require euthanasia. (App. at 55).

The Respondents appealed the Bacchus' dangerous dog classification to the County Court in accordance with Section 767.12(1)(d), Fla. Stat. (2015). This is a case of first impression for the County inasmuch as it is the first instance in which a dog owner has appealed a dangerous dog classification under Chapter 767, Fla. Stat.

The County Court, Judge Melissa Moore-Stens, determined after a hearing that the appeal process contemplated by the Dangerous Dog Statute is by a petition for "writ of certiorari using first-tier certiorari review, as described in *Haines City Cmty. Dev. v. Heggs*, 658 So.2d 523 (Fla. 1995)". (App at 34-36). Accordingly, the Respondents filed a Petition for Writ of Certiorari. (App. at 37-69).

During the pendency of the appeal the Legislature in 2016 amended the Dangerous Dog Statute, specifying that appeals in dangerous dog cases are to the

[1] The most objective summary of the facts and proceedings up through the decision of the County Commission is contained in its Adjudicatory Order.

circuit court, thereby rectifying an anomaly in the Florida Statutes that required county courts to sit in an appellate capacity for dangerous dog cases. When the appeal was filed in 2015, Section 767.12(1)(d), Fla. Stat. (2015) read in part:

> "Once a dog is classified as a dangerous dog…the owner may file a written request for a hearing in the county court to appeal the classification….Each applicable local governing authority must establish appeal procedures that conform to this paragraph."

(App. at 14). After the 2016 amendment, Section 767.12(4), Fla. Stat. (2016), now reads in part:

> "The owner may appeal the classification, penalty, or both, to the circuit court in accordance with the Florida Rules of Appellate Procedure after receipt of the final order…. Each applicable local governing authority must establish appeal procedures that conform to this subsection."

(App. at 17). Because of the statutory amendment, the County Court transferred the appeal to the Circuit Court. (App. at 71-72).

The Circuit Court, Judge Scott DuPont, issued an Order to Show Cause, and the County timely filed a Response to the Respondents' Petition for Writ of Certiorari. The next day, the Circuit Court then ruled, *sua sponte*, prior to any status conference or hearing, that the Circuit Court instead had jurisdiction of the appeal pursuant to Rule 9.030(c)(1)(C), Fla. R. App. P. (App. at 122). The Circuit Court stated that the case would not proceed by certiorari review, but as a direct appeal pursuant to Rule 9.110, Fla. R. App. P. Regardless of this ruling, however,

the Circuit Court kept in place the three prong test of first-tier certiorari review as described in *Heggs* at 530 and *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982). (App. at 123).

The County filed a Motion for Rehearing or Reconsideration. (App at 124-131.) The County asserted in its motion its interest in determining the procedures contemplated in the Ordinance, particularly since this appeal was one of first impression in Flagler County and therefore of precedential significance. (App at 130). The County scheduled and noticed the motion for hearing.

In its motion, the County contended that since the statute did not specify the exact method of appeal, the Circuit Court should look to the legislative history. (App at 126-127). The Staff Analysis of the bill amending Section 767.12, Fla. Stat., expressly provides that such an appeal is commenced by a petition for writ of certiorari:

> "The bill also: Transfers jurisdiction over appeals of final orders in dangerous dog cases from county court to circuit court which is consistent with current law. Appeals may be commenced by filing a petition for writ of certiorari within 30 days of the rendition of the final order."

House of Representatives Staff Analysis, CS/CS/CS/HB 21, January 19, 2016. (App. at 126). In a footnote, the Staff Analysis cites Rule 9.100(c), Fla. R. App. P., which requires a petition for certiorari be filed within 30 days of rendition of the order to be reviewed. (App. at 126-127). Regardless of the Staff Analysis, and

despite the Dangerous Dog Statute specifically requiring the local governing authority to establish appeal procedures, the Circuit Court denied the Motion for Rehearing or Reconsideration before the hearing scheduled on the motion took place. (App. at 132-135).

Next, the Respondents moved for oral arguments on the merits of the appeal. However, before oral arguments were scheduled, the Court issued its Order and Opinion quashing the County Commission's Adjudicatory Order, prompting the County to file this Petition for Writ of Certiorari.

## IV. Nature of Relief Sought

Petitioner seeks entry of a writ of certiorari quashing the Circuit Court's Order and Opinion rendered on August 17, 2017.

## V. Standard of Review

In the context of a second-tier certiorari review of a circuit court ruling in a dangerous dog case under Chapter 767, Fla. Stat., this Court has stated:

> "The standard of review of an appellate decision of the circuit court of a local administrative decision is (1) whether the parties received due process and (2) whether the circuit court applied the correct law."

*City of Ocala v. Green*, 988 So.2d 114, 115 (Fla. DCA 5th 2008) *citing Miami-Dade County v. Omnipoint Holdings, Inc.,* 863 So.2d 195 (Fla. 2003); and *Broward County v G.B.V. Int'l, Ltd.*, 787 So.2d 838 (Fla. 2001). The Florida Supreme Court explained in *Omnipoint Holdings* that "second-tier review is

simply another way of deciding whether the lower court 'departed from the essential requirements of law.'" *Omnipoint* at 199 *quoting Heggs* at 530. The Florida Supreme Court has explained that second-tier certiorari should not be used simply to grant a second appeal, but is reserved for situations where the lower court did not afford procedural due process or departed from the essential requirements of law. *Allstate Insurance Co. v. Kaklamanos*, 843 So.2d 885, 889 (Fla. 2003). "A district court should exercise its discretion to grant certiorari review *only* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Id. quoting Heggs*, at 528.

The County does not argue herein a denial of due process. The only issue is the second prong, whether the Circuit Court applied the correct law.

## VI. Argument

### A. The Circuit Court Departed from the Essential Requirements of Law When It Exercised Appellate Jurisdiction When the Hearing Transcript of the County Commission Was Never Filed and the Adjudicatory Order Was Not Timely Filed.

The County notes that when the Respondents appealed the decision of the County to the courts, they did not file transcripts of the hearings before the Hearing Officer or the County Commission with its original Notice of Appeal on October 6, 2015. Neither did it attach the order it was appealing to its Notice of Appeal. Respondents only attached the Adjudicatory Order with its Amended Notice of

Appeal filed in January 2016. (App. at 136-141). Respondents never filed the hearing transcript of the County Commission proceedings or the transcript of the Hearing Officer's evidentiary proceeding. And they filed the order to be appealed well beyond the jurisdictional timeframe required by the Appellate Rules. The County pointed out these flaws in its response to the petition for the writ. (App. at 74-75). The County submits that this, in and of itself, is a sufficient basis to find the Circuit Court lacked appellate jurisdiction. *See, Felder v. Hull*, 953 So.2d 621 (Fla. 4th DCA 2007); *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979).

The Respondents eventually filed their Petition for Certiorari, including an appendix, but never included a transcript of the evidentiary hearing before the Hearing Officer or of the hearing before the County Commission. While the County raised these points in its response to the Petition, the Circuit Court never addressed them at any point in its rulings. The County would have repeated these points in the hearing on its Motion for Rehearing or Reconsideration filed in response to the Circuit Court's *sua sponte* Order on Proceedings, as well as during oral arguments on the merits. Unfortunately, the Circuit Court denied these opportunities by ruling before the hearing and oral arguments took place.[2] In so

[2] The County could not have filed a rehearing motion because the Order and Opinion was not sent out by the Clerk for twelve days following its rendition. The

doing, the Circuit Court departed from the essential requirements of law by proceeding without jurisdiction over the appeal.

**B. The Circuit Court Applied the Wrong Law by Ruling the Appeal Would Not Proceed as Certiorari Review.**

The Circuit Court's Order on Proceedings claimed jurisdiction over the appeal pursuant to Rule 9.030(c)(1)(C), Fla. R. App. P., for the review of administrative action provided by general law. (App. at 122). The Order on Proceedings further stated that the appeal would proceed, not as a first-tier certiorari review, but as an appeal pursuant to Rule 9.110, Fla. R. App. P. *Id*. The Order on Proceedings states:

> "Upon consideration of section 767.12(4), Florida Statutes (2016), the Court finds that it has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(C) for review of administrative action provided by general law. Therefore, the Court shall henceforth consider this matter as an appeal, and it shall proceed pursuant to Rule 9.110."

This contravened the previous ruling of the County Court that the appeal would proceed as first-tier certiorari review. (App. at 35-37). Although the Circuit Court has the authority to overturn a county court, characterizing the appeal as a direct appeal pursuant to Rule 9.110, Fla. R. App. P., contradicts the well settled principle of Florida law described by the Florida Supreme Court in *De Groot v.*

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time to file a rehearing motion had expired by the time the County had obtained the Order and Opinion from the Clerk.

*Sheffield*. 95 So.2d 912 (Fla. 1957). The Court there held that the proper method of review of quasi-judicial decisions of local governments is by petition for writ of certiorari. *See also, Board of County Comm'rs v. Snyder*, 627 So.2d 469, 474 (Fla. 1993); *Park of Commerce Assocs. V. City of Delray Beach*, 636 So.2d 12, 15 (Fla. 1994); and *G.B.V. Int'l, Ltd.* at 845.

There is no dispute that the hearing before the County Commission was a quasi-judicial proceeding. (App. at 53-57). Neither the Respondents, nor any judge on the case, questioned that the proceedings below were quasi-judicial. The county attorney's instructions to the County Commission described the proceedings as quasi-judicial, and no objection was lodged by Respondents' counsel to those instructions. Moreover, the County Commission expressed its decision in an order, titled "Adjudicatory Order," in a case captioned document. *Id*.

Furthermore, notwithstanding its ruling that the appeal would proceed pursuant to Rule 9.110, Fla. R. App. P., the Circuit Court nevertheless determined that the standard of review would be the three prong test of first-tier certiorari review, as described in *Heggs* at 530, *citing City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982). (App. at 123). The Circuit Court, indeed, correctly identified the three certiorari prongs for its level of review: (1) whether procedural due process was accorded the parties; (2) whether the essential

requirements of the law were observed; and (3) whether the administrative findings and order are supported by competent substantial evidence. *Id*.

Indisputably, the *Heggs* standard of review upon which the Circuit Court relies is the test for courts in certiorari proceedings, not the broader standard of review used in plenary appeals such as *de novo* or abuse of discretion. Moreover, that portion of *Heggs* upon which the Circuit Court relies for the standard of review states that the court's review proceeds as a matter of original jurisdiction under Rule 9.030(c)(3), Fla. R. App. P., for writ of certiorari, not Rule 9.030(c)(1)(C), Fla. R. App. P., as the Circuit Court's Order on Proceedings would have it. The Florida Supreme Court, in *Heggs*, states:

> "We have held that circuit 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." (emphasis supplied).

*Heggs* at 530.

But, if the Circuit Court stated the correct test but invoked the wrong rule, is this not harmless error? No, because the ruling by the Circuit Court, if not challenged, would be the standard for Flagler County until this Court in another case might decide differently. Given the likely paucity of dangerous dog cases reaching the Fifth District, the County would have to accept that the standard of

review would be by plenary appeal. This standard gives the reviewing court more authority to adjudicate the merits of the underlying controversy and to direct specific action of a party, in this case, a local governmental agency. Although the Circuit Court is applying the test of certiorari review, it is granting itself the authority to conduct a broader review than that established by Florida certiorari jurisprudence.

In a certiorari proceeding, a reviewing court cannot enter a judgment on the merits of the underlying controversy. Rather, the court's role is to either grant or deny the petition. *See, G.B.V. Int'l*. *See also, Clay County v. Kendale Land Dev., Inc.,* 969 So.2d 1177, 1180-81 (Fla. 1st DCA 2007). If a court grants a petition for certiorari, the court is limited to quashing the order below and directing the lower tribunal to consider the matter in a new quasi-judicial hearing. *City of Atlantic Beach v. Wolfson*, 118. So.3d 993 (Fla. 1st DCA 2013).[3]

The County was not able to argue or discuss the ramifications of the direction the Circuit Court decided to pursue since it held no hearing on the County's timely motion for rehearing, nor did it conduct oral arguments on the "appeal." In its rehearing motion, the County pointed out that nothing in Section

[3] Failure to do this would violate the separation of powers doctrine and deny the public its right to notice and public hearing concerning, in this case for example, the classification of a dangerous dog.

767.12, Fla. Stat., before or after the 2016 legislative amendment specifies the exact method of appeal of dangerous dog classifications. (App. at 125-126). Article V, Section 5(b) of the Florida Constitution and Rule 9.030(c), Fla. R. App. P., grant circuit courts jurisdiction over multiple types of appeals, including review of administrative action if provided by general law as well as review by certiorari.

The Circuit Court denied the County's rehearing motion, finding that the statute unambiguously conferred jurisdiction to review dangerous dog classifications as a direct appeal. (App. at 133). In its Order, the Circuit Court stated:

> "The Court finds no ambiguity in the statute. The statute clearly and plainly provides that the Court has the authority to review the administrative decision as an appeal…. If the meaning of the statute is clear, the Court can go no further than applying the language of the statute…Here, the Court finds no intention to confer certiorari review."

*Id*. On the contrary, for one example, Black's Law Dictionary defines "appeal" broadly enough to encompass varying types of judicial review, "To seek review from a lower court's decision by a higher court." The plain meaning of the statute is not unambiguous as the Circuit Court states.

The word, "appeal" in Section 767.12, Fla. Stat. (2016), is reasonably susceptible to multiple interpretations. In fact, the nature of appeals of dangerous dog determinations established by local jurisdictions prior to the 2016 legislative

amendments to the Dangerous Dog Statute run the gamut from review by petition for certiorari to direct appeal to *de novo* hearings. (App. at 24). Moreover, this Court acknowledged this ambiguity in *Marion County v. Grunnah*:

> "The statute [767.12] clearly specifies that the challenge be filed in the county court, but arguably is ambiguous as to whether the county court is required to hear the controversy *de novo*, or by more narrow review in the nature of an appellate proceeding."

962 So. 2d 931, 932 (Fla. DCA 5th 2007).[4]

When the meaning of a statute is ambiguous, courts look to the legislative intent, including as reflected in staff analyses. *See e.g.*, *American Home Assurance Company v. Plaza Materials Corporation*, 908 So.2d 360, 368 (Fla. 2005); *GTC, Inc. v. Edgar*, 967 so.2d 681,788 (Fla. 2007); and *Machhione v. State,* 123 So.3d 114, 119 (Fla. 5th DCA 2013). A review of the legislative history of the Dangerous Dog Statute prior to 2016, including committee reports and analysis, shows the Legislature chose not to amend or clarify the provision requiring applicable local authorities to establish appeal procedures for dangerous dog classifications. However, as indicated by the County in its motion for rehearing, the Staff Analysis of the bill amending Section 767.12, Fla. Stat. (2015), expressly provides that

[4] This Court did not resolve the issue of the nature of appeals of dangerous dog classifications and disposed of the *Grunnah* case on other grounds. *Grunnah* at 933.

appeals of dangerous dog classifications are to be commenced by a petition for writ of certiorari:

> "The bill also: Transfers jurisdiction over appeals of final orders in dangerous dog cases from county court to circuit court which is consistent with current law. Appeals may be commenced by filing a petition for writ of certiorari within 30 days of the rendition of the final order." House of Representatives Staff Analysis, CS/CS/CS/HB 21, January 19, 2016.

(App. at 126). Thus, the latest expression of Legislative intent supports the County's position that an appeal of a dangerous dog classification should proceed as a petition for certiorari, which position is also consistent with well established principles of Florida law as described by the Florida Supreme Court in *Snyder*. The Circuit Court applied the wrong law in its Order on Proceedings by holding that the appeal would not proceed as a petition for writ of certiorari.

### C. The Circuit Court Applied the Wrong Law by Usurping the Authority Over Dangerous Dog Proceedings Conferred on the County by the Legislature.

Additionally, by its rulings in the Order on Proceedings and Order Denying the County's Motion for Rehearing or Reconsideration, the Circuit Court usurped the authority granted by the Legislature to the County as the local animal control authority. Section 767.12(4), Fla. Stat. (2016), states:

> "Upon a dangerous dog classification and penalty becoming final after a hearing….[t]he owner may appeal the classification, penalty, or both, to the circuit court in accordance with the Florida Rules of Appellate Procedure after receipt of the final order. If the

> dog is not held by the animal control authority, the owner must confine the dog in a securely fenced or enclosed area pending resolution of the appeal. ***Each applicable local governing authority must establish appeal procedures that conform to this subsection.***" (emphasis supplied).

(App. at 17). Section 767.11(5), Fla. Stat. (2016), defines "Animal control authority" as:

> "…an entity acting alone or in concert with other local governmental units and authorized by them to enforce the animal control laws of the city, county, or state. In those areas not served by an animal control authority, the sheriff shall carry out the duties of the animal control authority under this act."

(App. at 13). There is no dispute that the County is the local governing authority in Flagler County under the Dangerous Dog Statute, both before and after the 2016 amendment. Respondents never contested this fact, and the Circuit Court cites to nowhere in the record or in the law to suggest otherwise.

The Legislature unambiguously conferred upon the County the authority and obligation to establish appeal procedures of dangerous dog classifications, subject to the Florida Rules of Appellate Procedure. The County has done so through its Ordinance, consistent with the Dangerous Dog Statute and applicable principles of common law, and has asserted this authority at every step of these proceedings including through this Petition. Section 5-67 of the Ordinance adopts the applicable provisions of Chapter 767, Fla. Stat., by reference and provides that a dog owner may appeal the initial classification of his or her dog to the County

Commission. (App. at 10). Further, Section 2-307 of the Ordinance provides that "decisions of the County Commission in dangerous dog cases are "subject to judicial review as provided by law." (App. at 106).[5] The Ordinance incorporated the 2016 legislative amendment by reference. The County had no need to amend its Ordinance since the process was already cast as a quasi-judicial proceeding.

Put simply, the County, not the Circuit Court, is the entity tasked with establishing appeal procedures pursuant to and confined by the strictures of the Section 767.12, Fla. Stat. (2016). The County established a quasi-judicial process for dangerous dog determinations and asserts that the proper method of judicial review is by petition for writ of certiorari. The Respondents availed themselves of these protections, and the County applied its Ordinance correctly. Thus, the Circuit Court applied the wrong law by usurping the prerogative of the County by contravening the certiorari procedures for dangerous dog cases established by the County. Since this is a case of first impression in Flagler County, it is critical that the proper method of judicial review be determined.

[5] The Administrative Procedure Act does not govern the County in dangerous dog proceedings. Appellate review of quasi-judicial proceedings not governed by the Administrative Procedure Act are commenced by filing a petition for certiorari in accordance with Rule 9.100(c)(2), Fla. R. App. P. *See*, Rule 9.190(b)(3), Fla. R. App. P.

**D. The Circuit Court Applied the Wrong Law When It Ruled the County Commission Should Not Have Allowed Counsel for RW to Speak During the Quasi-Judicial Hearing.**

The Circuit Court's Order and Opinion states:

> "First, the Court finds that the Board exceeded its authority and violated its own rules by allowing non-party RW, through his counsel, to present arguments in opposition to the Recommended Order. Sec. 2-306 specifies that only **parties** to the proceeding are permitted to present argument. The only parties to the proceedings whereby Bacchus was to be classified as a dangerous dog were his owners, the Sweatts, and the County, which was seeking to enforce its code. Therefore, the only parties entitled to argue before the Board were the Sweatts and the County. However, other than instructing the Board on its role, the applicable standard of its review, and the proper procedures to follow, the County Attorney made absolutely no argument either opposing or supporting the Recommended Order. Instead, the attorney representing RW, a non-party to the proceedings, was allowed to present argument before the Board. In addition to being a clear violation of Sec. 2-306, this error by the Board deprived the Sweatts of their due process rights." (emphasis original)

(App. at 6). Section 2-306 of the Ordinance in pertinent part provides:

> "The procedure before the board shall be as follows:
> (1) The party supporting the recommended order shall have five (5) minutes to address the board in favor of the recommended order.
> (2) The party opposing the recommended order shall have five (5) minutes to address the board in opposition to the recommended order.
> (3) The party supporting the recommended order shall have three (3) minutes for rebuttal."

(App. at 106). The Circuit Court's ruling is correct in one respect: in the quasi-judicial hearing, the County was seeking to enforce its own Ordinance. This is precisely why the County followed the Ordinance by allowing the parties opposing

and supporting the Recommended Order to present oral arguments. The County did not support or oppose the Recommended Order. It did not act as a party to the quasi-judicial proceeding, and nothing in its Ordinance or the law required it to be a party. The County's only interest was in following the mandates of Chapter 767, Fla. Stat., and the Ordinance in order to serve the residents of the County and accord due process to the affected parties in the aftermath of a tragic event. RW suffered injury in fact with forty-four sutures to his face and therefore had a unique interest in the outcome of the case. RW was the party opposed to the Recommended Order and clearly had standing.

The Circuit Court states in the Order and Opinion that by allowing counsel for RW to present argument, the County denied the Respondents due process of law. (App. at 6). The quality of due process required in a quasi-judicial hearing is not the same as that entitled to a party in a full judicial proceeding, nor are quasi-judicial proceedings controlled by strict rules of evidence and procedure. Nonetheless, certain standards of basic fairness must be adhered to in order to afford due process. Consequently, a quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Jennings v. Dade County*, 589 So.2d 1337, 1340 (Fla. 3rd DCA 1991).

The extent of procedural due process protection varies with the character of the interest and nature of the proceeding involved. There is, therefore, no single unchanging test that may be applied to determine whether the requirements of procedural due process have been met. Courts instead consider the facts of the particular case to determine whether the parties have been accorded constitutional due process. *Carillon Cmty. Residential v. Seminole Cnty*., 45 So.3d 7, 9 (Fla. 5th DCA 2010). The proceeding itself must only be "essentially fair." *Carillon Cmty. Residential* at 9 (*citing Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed.2d 120 (1997)).

Here, the Respondents had notice of the initial determination that Bacchus is dangerous by the County's Animal Control Authority and were heard by the Hearing Officer through their legal counsel. (App. at 58). Respondents also received notice and were heard through their counsel at the quasi-judicial hearing of the County Commission. *Id*. Respondents' due process rights were also adequately protected through the county attorney's instructions to the County Commission at the hearing. Allowing the victim of the attack who suffered injury in fact to speak through his counsel as the party opposed to the Recommended Order did not prevent the Respondents from presenting their argument nor impede a fair and impartial proceeding. The Respondents were given time, and they did reply to the arguments of the attorney representing RW. The Circuit Court cites to

no place in the record that shows the hearing was unfair or biased. Nor has the Circuit Court indicated that RW's counsel argued something that tainted the decision of the County Commission with partiality.

### E. The Circuit Court Applied the Wrong Law When It Ruled the County Must Be a Party to Quasi-Judicial Hearings Before the County.

The Circuit Court also held in its Order and Opinion that the County should have argued against the Hearing Officer's Recommended Order during the hearing before the County Commission:

> "The only parties to the proceedings whereby Bacchus was to be classified as a dangerous dog were his owners, the Sweatts, and the County, which was seeking to enforce its code. Therefore, the only parties entitled to argue before the Board were the Sweatts and the County. However, other than instructing the Board on its role, the applicable standard of its review, and the proper procedures to follow, the County Attorney made absolutely no argument either opposing or supporting the Recommended Order. Instead, the attorney representing RW, a non-party to the proceedings, was allowed to present argument before the Board. In addition to being a clear violation of Sec. 2-306, this error by the Board deprived the Sweatts of their due process rights."

(App. at 6). In other words, the Circuit Court ruled that the County should have been a party in a quasi-judicial proceeding before the County. The County submits that the Respondents' due process rights would have been clearly violated if, as the Circuit Court would have it, the County were to argue as a party in an adversarial quasi-judicial proceeding in which it was sitting as the decision maker. The

County would be acting simultaneously in quasi-prosecutorial and quasi-judicial roles, to be both judge and party, upending any normal semblance of due process.

The Circuit Court goes so far as to suggest that the county attorney should have argued before the County Commission against the recommendation of the Hearing Officer. The County respectfully submits that such an approach would create a conflict of interest prohibited by the Rule 4-1.7 of the Rules Regulating The Florida Bar and would have tainted the impartiality of the members of the County Commission who would be inclined to favor the argument of their own regular counsel. Ironically, in asserting that the County Commission violated the Respondents' due process rights, the Circuit Court suggests the County embark in an adversarial proceeding in which the County is both a party and judge.

In fact, the Ordinance commands that the matter be presented, not argued, by the county attorney: "Upon receipt of a recommended order, the county attorney shall place the matter on the agenda of the board for its consideration at its next regular meeting." Code Section 2-305, (App. at 106). In this case, the county attorney counseled the County Commission before the hearing began that the County Commission members only consider the arguments of the parties opposing and supporting the Recommended Order along with the evidence that was in the administrative hearing record. The Adjudicatory Order states:

> "The County Attorney gave extensive instructions to the Board regarding the role of the Board in the quasi-judicial hearing. Specifically, the County Attorney instructed the Board that it could not consider news media accounts or any information given to the Board members outside of the hearing, but could only consider the evidence presented to the hearing officer along with the arguments of the party supporting and the party opposing the Recommended Order. The Board could not consider any information or facts presented at its review hearing unless it was in the administrative hearing record. The County Attorney explained that the Board must determine whether the factual findings of the Recommended Order were supported by competent substantial evidence and whether the hearing officer applied the correct law. The County Attorney further explained that competent substantial evidence was evidence that is fact-based and material, sufficient enough that a reasonable person would accept the information as adequate to support a conclusion."

(App. at 54). The instructions of the County Attorney to the County Commission, as well as advising all others present, as to the nature of the process, is typical in virtually every quasi-judicial proceeding where the government attorney is well advised to explain the process to avoid decisional error. In sum, the Circuit Court applied the wrong law in holding that the County should have argued as a party before itself.

### F. The Circuit Court Applied the Wrong Law by Holding that the County Commission Exceeded Its Authority by Reweighing the Evidence and Rejecting the Hearing Officer's Finding that RW was Unlawfully on the Premises.

The County Commission agreed with the Hearing Officer that Bacchus met the definition of a dangerous dog, but did not find competent substantial evidence to support the Hearing Officer's conclusion that RW was unlawfully on the

property when the attack occurred. (App. at 55). However, according to the Circuit Court's Order and Opinion, the County was constrained by the Ordinance to either wholly reject or wholly accept the findings of fact, conclusions of law, and recommendation of the Hearing Officer's Recommended Order. (App. at 6). The Circuit Court's Order and Opinion states:

> "Second, the Court finds that the Board exceeded its authority and violated its own rules by its piecemeal treatment of the Recommended Order—rejecting part and accepting part of the order. The Ordinance at issue clearly states that the board 'shall vote to *either uphold or reject* the recommended order.' Sec. 2-307. In the instant case, the Board had no authority to partly accept and partly reject the Recommended Order. In overstepping its authority under Section 2-307, the Board failed to observe the essential requirements of law and deprived the Sweatts of the right of due process."

*Id*. Thus, the Circuit Court provides an interpretation of the County Ordinance in reaching its conclusion that the County did not observe the essential requirements of law because the County Commission modified the Findings of Fact and Conclusions of Law of the Hearing Officer. (App. at 7-8).

First, as discussed above the County Commission did not modify any finding of fact, and the Circuit Court points to no part of the record that this was done. It only rejected the conclusion that RW was a trespasser, determining that there was no substantial competent evidence to support that outcome. What the County Commission did was follow the instructions of the County Attorney that it "must determine whether the factual findings of the Recommended Order were

supported by competent substantial evidence and whether the hearing officer applied the correct law." (App. at 54). The record demonstrates that the County Commission did this and nothing more.

The County Commission received the record created before the Hearing Officer in time to review before the County's quasi-judicial hearing. At the hearing before the County Commission, the county attorney instructed the County Commission to disregard a report of an expert of the Sweatts upon which the Hearing Officer relied because it was not based on any of the facts elicited during the evidentiary hearing:

> "Finally, the County Attorney instructed the Board that the narrative of events at the time of the dog bite in the Canine Behavior Consultant's Report, based on interviews with the Sweatts conducted by the Consultant, was in error. The Report stated that RW rang the doorbell rapidly and constantly, immediately before he entered the home at the time of the attack. This was not corroborated by any testimony and the evidence in the record specifically stated this did not occur. Further, the hearing officer had not made a contrary finding in the Recommended Order. The County Attorney instructed the Board to disregard this interpretation of events contained in the Report…"

(App. at 54). Per the Adjudicatory Order, the Board did not find competent substantial evidence that RW was trespassing when the attack occurred:

> "Upon hearing argument and after extensive discussion, the Board by majority vote determined that there was not competent substantial evidence to support the finding of the hearing officer that RW was unlawfully on the property. The testimony of RS, RW and their parents indicated that RS and RW were friends and neighbors for

several years who frequently visited each other's homes. Testimony of Jay Sweatt also indicated that on several occasions, RW visited the Sweatts' home without any prior telephone call or text, a trend that increased in the months leading up to the attack. Dawn Sweatt testified that on numerous occasions, RW entered the Sweatts' home without knocking or after a few knocks. Further, Jay Sweatt also testified that on previous occasion, RW let himself in to the Sweatts' residence and that Jay Sweatt attempted to tell RW to knock or ring the doorbell before entering, but did not unequivocally instruct RW (or his parents) not to enter the home in this manner. Jay Sweatt further testified he answered the door the first time RW visited on the day of the attack and told RW not to come back until RS telephoned. However, there is also evidence that on RW's first visit on the day of the attack, the Sweatts' twelve-year old daughter, SS, told RW to return in one hour. Finally, there is no evidence that when RW returned, any member of the Sweatt family was surprised; they expected him to return. There was conflicting evidence as to whether RS or RW opened the door on the second visit immediately prior to the attack. SS testified that she heard a knock before the attack and did not see the front door or the attack. Dawn Sweatt testified that she heard the doorbell, but was upstairs and did not see or hear the attack. RW testified that the door was locked, that he knocked and rang the door bell, and RS opened the door. RS testified that RW opened the door. RS testified that RW opened the door and that he rang the door bell. RS testified that he was going upstairs to ask his mother if could play with RW at the time of the attack. However, he said he witnessed the attack and screamed for his mother. The hearing officer asked RS how he knew it was RW at the door if he hadn't opened it. He responded, by the way RW had rung the doorbell….The Board by majority vote does not conclude that RW was a trespasser or otherwise unlawfully on the property when the attack occurred given the competent substantial evidence from the hearing. The evidence overwhelmingly shows that RW was just a young boy visiting his friend's house to play on the July 4th weekend. RW was a friend of RS who frequently visited RS's home on many occasions and most recently, often unannounced. Under the circumstances of this case, the Board by majority vote finds that RW had implied consent to enter the house."

(App. at 55-56). The Board did not reweigh the evidence or use any new evidence. There was no evidence in the record showing the young boy of eight years old was a "trespasser" or "unlawfully on the property" of his close friend on the July 4th weekend.

The Circuit Court ruled that the "Board impermissibly changed Hearing Officer Cino's findings of fact and conclusions of law…." (App. at 8). However, the County Commission never modified any findings of fact, but simply did not find competent substantial evidence in the record to support the Hearing Officer's conclusion and recommendation.

Notably, the Ordinance provides that the Hearing Officer's Recommended Order is just that, a recommendation. Section 2-304. (App at 105). The Ordinance specifically provides for review of the Recommended Order "at its next regular meeting." Section 2-305. (App. at 106). The operative provision for this issue is Code Section 2-307, which provides:

> "Sec. 2-307.- Decision of board.
> At the conclusion of the presentation provided for herein, the board shall vote to either uphold or reject the recommended order, which action shall constitute the action of the board on the question. That action and the record created both before the hearing officer and before the board shall be subject to judicial review as provided by law."

*Id*. Clearly, the County Commission has not "delegated" its power to the Hearing Officer. It retains the final authority on the matter. The Ordinance specifically

provides it may vote to accept or reject a recommended order. Therefore, the County Commission must have some authority to reject findings of fact or conclusions of law as they encounter them. Otherwise, the hearing before the County Commission would be a rather hollow gesture.

Finally, it is an error to read the Ordinance to somehow prevent the County Commission from rejecting particular findings of fact or conclusions of law. Certainly the Ordinance does not say this. Moreover, just how would the County Commission validly "vote to reject" a recommendation without taking this approach? The fact that the County Commission took no evidence at the hearing protected the Respondents' due process interests.

Actually, the County Attorney's instructions were conservative and protected the Respondents' due process interests. There is no statute applicable to local governments like Section 120.57(1)(l), Fla. Stat. (2015), which limits state agencies to only rejecting findings of fact that are not supported by competent substantial evidence. The five cases cited by the Circuit Court in the Order and Opinion all involve state agencies or school districts. The County is a political subdivision of the State, not an agency, and while the procedures of agencies under Chapter 120, Fla. Stat., are analogous to the Ordinance, Chapter 120 does not control quasi-judicial hearings of the County Commission in dangerous dog cases.

*See*, *Florida Water Services Corp. v. Robinson*, 856 So.2d 1035, 1038 (Fla. 5th DCA 2003). Thus, it could be argued that the power of the County Commission to reject the Recommended Order was much broader under its Chapter 125, Homerule Powers Act, than what the County Attorney said they were.

Where the County Commission, a political subdivision of the State, decides to reject findings it does not think are supported by competent substantial evidence is just the process the Circuit Court would have if the County were a state agency and not a local government. *See*, *Heifetz v. Department of Business Regulation*, *Div. of Alcoholic Beverages & Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985). Since the County Commission has the authority to review the evidence under a broader standard of review or even to amend the Ordinance to allow for hearings *de novo*, the discretion of the County Commission was actually limited at the hearing by the County Attorney. The County Commission was well within its rights to reject a finding of the Hearing Officer that was not supported by competent substantial evidence. The Circuit Court applied the wrong law by misreading the Ordinance to limit the County Commission to wholly accept or reject the Recommended Order.

**G. The Court Applied the Wrong Law by Reweighing the Evidence and Substituting Its Own Judgment Rather than Reviewing the Record for Competent Substantial Evidence**

When reviewing the decision of County Commission, the Circuit Court must find that the record was devoid of competent substantial evidence in order to overturn the local government's decision. *Florida Power & Light Co. v. City of Dania*; *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So.2d 1082, 1091 (Fla. 1978). When performing its certiorari review the Circuit Court is prohibited from re-weighing or evaluating the evidence presented before the tribunal or agency whose order is under examination. The Circuit Court's role is to merely examine the record made below to determine whether the County had before it competent substantial evidence to support its findings and judgment and which also is in accord with the essential requirements of the law. *De Groot*; *City of Deland v. Benline Process Color Co.*, 493 So.2d 26, 28 (Fla. 5th DCA 1986).

Substantial evidence is such evidence as will establish a substantial basis of fact from which one fact at issue can be reasonably inferred, i.e., such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *De Groot.* To be competent, the evidence relied on to sustain the ultimate finding should be sufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion reached. *Id.*

It is not the Circuit Court's role to determine which testimony should be given the most weight, nor to determine whether some testimony or evidence should have been rejected. In *Florida Power & Light Co. v. City of Dania*, the

Court reviewed a proceeding in which the City of Dania had denied Florida Power's application for a variance in order to develop an electrical power substation. The Court stated:

> "As noted above, the City Planning and Zoning Board recommended denial of FPL's application. The Commission then conducted a review of the application, heard testimony from both sides at a lengthy hearing, and ultimately agreed with the Planning and Zoning Board -- unanimously. At the circuit court level, a solitary judge quashed the Commission decision, ruling as follows: "The [homeowners] failed to show by competent substantial evidence that such use [was inconsistent with the Dania Code][.]" This ruling was improper. Under Vaillant, the circuit court was constrained to determine simply whether the Commission's decision was supported by competent substantial evidence. The circuit court instead decided anew whether the homeowners had shown by competent substantial evidence that the proposed use was deficient. In other words, a single judge conducted his own de novo review of the application and, based on the cold record, substituted his judgment for that of the Commission as to the relative weight of the conflicting testimony. The circuit court thus usurped the fact-finding authority of the agency."

*Florida Power & Light Co*., 761 So.2d 1089, 1093.

Thus, even if this Court could have reached a different result if it was the trier of fact, it must still affirm the County Commission's quasi-judicial decision if the record contains any competent substantial evidence to support that decision. *City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc*., 567 So.2d 955, 957 (Fla. 4th DCA 1990), rev. denied, 581 So.2d 165 (Fla. 1991)("The test is not whether one side produced more experts than the other, but rather whether

there was any substantial competent evidence upon which to base the commission's conclusion.")

The Circuit Court here did not review the record to determine whether there was competent substantial evidence to support the finding of the County Commission that RW was *not* a trespasser or otherwise unlawfully on the property when the attack occurred. In fact, since the Respondents did not include a transcript of the evidentiary hearing or of the quasi-judicial hearing, it is difficult to ascertain how the Circuit Court concluded that the County Commission erred by not finding competent substantial evidence that RW was unlawfully on the premises when the attack occurred. Certainly without the benefit of transcripts, the Circuit Court could not have reviewed the record to determine whether there is competent substantial evidence to support the finding of the County Commission that RW was a young boy visiting a friend to play and had implied consent to enter the house where the attack occurred. Nor did the Circuit Court provide the opportunity of a hearing in which these inquiries could be addressed. Rather the Circuit Court concluded *ipso facto*, without any citation to the Adjudicatory Order or the record, that the County Commission only reviewed the record to identify evidence that opposed the Recommended Order. (App. at 8). The Circuit Court does not list any particular finding of fact or conclusion of law of the County Commission that was not supported by competent substantial evidence. The

Circuit Court's conclusion is clear. How the Circuit Court arrived at that conclusion is murky at best.

As to conclusions of law, the County Commission is clearly entitled to reject any conclusions of law of the Hearing Officer, especially where they involve the elements of a violation of its own Dangerous Dog Ordinance, Section 5-67, which incorporates state law, "F.S. §§ 767.10 through 767.16 or their successor". Even under the more restrictive Chapter 120 process, state agencies have the power to "reject or modify conclusions of law over which it had substantive jurisdiction". Section 120.57(1)(l), Fla. Stat. (2015), *Barfield v. Dep't of Health, Bd. Of Dentistry*, 805 So.2d 1008 (Fla. 1st DCA 2001).

The Circuit Court's Order and Opinion does not even mention that the burden of proving the trespass by the eight-year old boy is on the Respondents, as it is an affirmative defense. The Circuit Court did not address that legal principle.

The County Commission had the authority to reject the Hearing Officer's conclusions. It did not fail to meet the essential requirements of law or violate the Respondents' due process rights by not finding competent substantial evidence that RW was a trespasser when he was attacked.

## VII. Conclusion

The Circuit Court applied the wrong law and departed from the essential requirements of law resulting in a miscarriage of justice, releasing a dog from basic

restrictions that protect the public where the person attacked was known to the dog and was a frequent visitor to the house where he played with his friend and the dog. The writ should be granted, and the Circuit Court's Order and Opinion should be quashed.

RESPECTFULLY SUBMITTED this 18th day of September 2017.

__/s/Albert J. Hadeed_____
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email this 18th day of September 2017 to the Honorable Scott DuPont, Circuit Court Judge for the Seventh Judicial Circuit, at tdavis@circuit7.org and Vincent Lyon, Esq., counsel for the Respondents at vlyon@palmcoastlaw.com.

_____/s/ Albert J. Hadeed_____
Albert J. Hadeed
Counsel for Petitioner

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition for Writ of Certiorari has been prepared using Times New Roman 14pt font in compliance with Florida Rule of Appellate Procedure 9.100(l).

_____/s/ Albert J. Hadeed_____
Albert J. Hadeed
Counsel for Petitioner