Dear Editor,

Well, it seems like a long time since the Cape Coral City Council voted 4-3 on December 12 to annex land at the gateway of Matlacha and Pine Island. I have continued to follow the issue and wish to report on the next part of my journey. One thing is for sure, there is still more to discover.

I see this ordinance as a grave assault on the sovereignty of Lee County and the rights of its residents to enjoy our delicate and non-urban environment. At the City Council hearing, I met many incredibly talented and wise neighbors who presented a broad range of perspectives as to why the ordinance is offensive to us. I learned a great deal from them, and I look forward to these new friendships.

Here are some of the reasons why I have come to believe the ordinance will not survive review by the courts.

A. LACK OF PROPER NOTICE: We cannot know the full extent of the City's failures in this regard, as the only notice we were aware of was the posting of a sign at the property only a few days before the hearing. Moreover, the documents I obtained from the City website were inadequate to advise anyone of the true nature of this action. The City's own proposal was amended without any notice or explanation only a day or two before the hearing. To my knowledge, no one from the City of Cape Coral reported its plans to Lee County, which has an obvious interest on behalf of its residents and voters here in Matlacha and on Pine Island.

I am told this is standard operating practice for Cape Coral: operate in the dark. So far, I have seen plenty of evidence of this type of undemocratic behavior by Cape Coral. The consequence in this case was that none of us Lee County voters was able to speak with our representatives and our government leaders to learn the facts and object. This is the hallmark of a city government that lacks confidence in the righteousness of its own decisions.

B. ILLEGALITY OF THE 2012 PURCHASE: Many have asserted that the 2012 purchase of these properties is void *ab initio,* as the action was *ultra vires*. This is Latin/legal lingo that means the City exceeded its power in purchasing land outside its boundaries. Consequently, according to the Latin, the purchase is void from the beginning. I am told that the City produced a $1.5 million cashier's check to bid – when the check writing authority was limited to $50,000 – and then "borrowed" water and sewer money to complete the $13 million purchase of almost 500 parcels, among which were these 5 parcels.

I am sure a City cannot use water and sewer taxes to invest in land. There are many other allegations about the purchase that I have heard but will not repeat for lack of evidence. However, when litigation is filed, the lawyers may be allowed by the judge to engage in "discovery" of the facts: meaning putting persons under oath to answer questions.

C. VIOLATION OF LEE COUNTY LAW: While the documents attached to the ordinance notice include largely illegible drawings, it is clear that the City proposes to severe the long thin section of Lot A, the eastern-most lot, without applying for authority to do so with Lee

County authorities. Take a look at the photographs attached. This long piece, which some call a "bill of a small tooth sawfish" and some the "string of a balloon", runs between the county road and Matlacha Isle. If this portion of Lot A were annexed into the City, its annexation would defeat "contiguity" of the land to the City boundary: that is, the majority of the annexed land would be adjacent to county land, not City land. In addition, if the "bill" or "string" were not eliminated from the annexed land, it creates an illegal "enclave": the area of county land [Matlacha Isle] would be completely surrounded by city land. So, the City is playing games with the legally platted territory. This type of conduct is routinely described by the Florida courts – and the Florida Attorney General – as a "subterfuge" to defeat the true purpose and intention of the annexation statute. The City is engaging in Gerrymandering.

D. THE LAND IS NOT "CONTIGUOUS" WITH CITY BOUNDARIES: As I indicated above, Florida law requires that land being annexed by a city be "contiguous" with a substantial portion of the adjacent city boundary. This rule prevents a city from jumping around the county plucking out parcels that have no geographical connection to the city. After the City Council vote, I asked the City Council to put in the record the opinions of the City Attorney assuring the voting Council Members that this annexation is legal. There are none. Therefore, the City has made no effort to demonstrate that the county land is "contiguous" to the boundary of the City.

The City cannot demonstrate the legality of the annexation because none of the lots is adjacent to land conducive to urban use. The land across the canal to the north and the land across Pine Island Road to the south is mangrove and wetlands *owned by the State of Florida*. The City never told anyone this important fact. This land was deeded to the State of Florida in April of 1977 for perpetual use as "wilderness" area. Therefore, the lots sought to be annexed are themselves a type of "enclave" because the City cannot use the wilderness land surrounding the lots. The deed requires that the mangroves and wetlands remain in their natural condition in perpetuity. Is that hiding the ball?

Well, what about the portion of residential Cape Coral across the canal from the rounded knob of Lot A that sticks out into the canal? Is that contiguous? There are several problems with such a claim. First, Florida law does not allow "corner" annexation: in other words, if you have a square of city land and a square of county land which touch only at one corner, the touching is not enough to establish "substantial" contiguity.

Second, there is a very long mangrove island in the canal that separates Lot A from residential Cape Coral. Because that land is in the canal, it is owned by the State of Florida. That land interferes with the adjacency necessary to meet the contiguity requirement.

E. THE LAND IS NOT "COMPACT" AS REQUIRED BY LAW: The Florida annexation statute also requires the land to be "compact": Subsection 171.03l1(12) of the Florida Statutes defines compactness to mean a "concentration of a piece of property in a single area and precludes" the creation of "enclaves, pockets or finger areas in serpentine patterns." The Florida courts and the Attorney General, in order to explain the concepts of compactness and the prohibition against the creation of enclaves, frequently turn to the following quotation from a legal treatise:

> The legal as well as the popular idea of a municipal corporation in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies, a *collective body of inhabitants*--that is, a *body of people* collected or gathered together in one mass, not separated into distinct masses, and having *a community of interest* because residents of the same place, not different places. So, as to territorial extent, *the idea of a city* is one of unity, not of plurality; of compactness or contiguity, not separation or segregation.

I have italicized some key words. Simply put, this annexation is unlawful because *there are no residents* on either the parcels owned by the city or in the wilderness lands owned by the State of Florida. Putting the two together does not make a city.

F. ANNEXATION MAKES NO SENSE: Annexation statutes are intended to benefit people: the people of a city, and the people of a growing community adjacent to the city. By a democratic process, the folks outside the city may wish to come within the boundaries of the city to enjoy the benefits of the city: water, sewer, schools, governance, and the like. In return for these benefits, the folks originally outside the city then must pay taxes to the city. The city benefits from this increased tax base and from the industry of new residents.

Annexation statutes are not intended to empower cities to take advantage of their neighbors. Not only is there no *quid pro quo* offered by the city to the "residents" of the annexed lands, there are no residents to receive the *quid* for their *pro*.

In 1893 before many states had annexation statutes, the City of Denver was groaning under the burden of heavy taxes and loans. So the Colorado legislature passed an Act to include within the boundaries of the City of Denver a large area of agricultural lands 3 miles outside of Denver in Jefferson County. The consequence of the Act was that the land-owner was burdened with the taxes and debts of the City of Denver, a bill for which he was in no ways responsible. The Supreme Court of Colorado had to decide whether it could overturn an act of the state legislature. The Court was faced with the following question, as stated by Justice Elliott:

> Is there . . . in the present case, no check that can curb the vaulting ambition of a great city in its efforts to enlarge its corporate boundaries and increase its corporate revenues?

The Supreme Court of Colorado struck down the Act. Just as a body may grow, so too may a city. But a part of the body does not grow apart from the body. And so too a territory not adjacent to a city cannot be a part of the city.

G. THE ORDINANCE IS ULTRAVIRES: The one thing the City has made clear, if the annexation takes place it plans to re-zone the land. As with the Seven Islands, I anticipate the City Council to seek "the highest and best use" for the land, in order to obtain the greatest profit: eight story buildings. This is an entrepreneurial function which is beyond the authority of the City. Nor do the ends justify the means. Otherwise, Cape Coral would be able to purchase and annex all of Matlacha and Pine Island. Do not be misled by the word that the City has a grant to

build boat ramps. First, the grant can be shifted to other locations. Second, why would the City need to re-zone the property to build boat ramps? Third, are you kidding me? Five boat ramps at "crash corner"? More likely, the City has in mind a marina to service the boats tied up at the new Seven Islands project.

H. THE ANNEXATION STATUTE IS NOT INTENDED TO BE USED IN THIS MANNER: The City purports to annex the adjacent land through the "voluntary annexation" procedures of Florida law. However, the voluntary annexation statute does not contemplate that a city would be on both sides of the process: because the city is on both sides, there is nothing "voluntary" about it. In this case, there is no affected party who can challenge the ordinance, as only a resident of the city or the annexed area may object. There are no residents of the annexed land.

I. WE LIKE IT LIKE THIS: We choose to live in Matlacha and Lee County, not in Cape Coral. We tried that. Cape Coral government, as far as we can see, is oblivious to the environment. In only three years, we have seen the waters of Matlacha become even more polluted.

J. WE DON'T TRUST CAPE CORAL CITY GOVERNMENT: No offense, but from what we have seen with the Seven Islands, we do not trust you. In searching the history of Cape Coral, I discovered that the original developer of Cape Coral got into trouble digging the ubiquitous canals and piling the dredgings up for building lots. This is also reported in the court filings of attorney Ralf Brookes, suing the City for restoration of the Ceitus Boat Lift Barrier. As was the custom, the developer was digging away before his permit was granted. Lo and behold, his permit was denied in 1976 by the Florida Department of Environmental Regulation [DER now DEP]. As reported by Mr. Brookes, DER said that the project would result "in long term degradation of water quality of the coast ecosystem," "alter the existing watershed by eliminating the natural drainage pattern," "accumulation of sediment, debris, nutrients, and toxic substances," "creation of stagnant areas of water," "interference with the conservation of fish, marine life, and wildlife, and other natural resources," and "destruction of natural marine habitats, grass flats suitable as nursery or feeding grounds for marine life . . . ." DER also cited "Major discharges at the beginning of the wet season or during a major storm will deliver a massive slug of pollutants directly into the coastal waters."

The developer then entered into a Consent Order with DER in 1977. Under this Consent Order, the developer was required to create spreader systems and barriers, including the Ceitus Barrier on the west and barriers on the canal into the Caloosahatchee River on the east. The purpose of these barriers was to retain pollutants while allowing fresh water flow to the Gulf. And so what happened to this project? Not surprisingly, the developer bailed. Somehow – I will find out – all of his interest in the property, along with the obligations under the Consent Order to build and maintain the spreader system and the Ceitus Barrier, was taken over by the City of Cape Coral.

And now we know the results of that takeover: the City of Cape Coral has removed the Ceitus Barrier, and the discharge of pollutants has become a reality. And to date, the City

refuses to rebuild the Ceitus Barrier until some higher power makes it comply with the obligation it undertook almost 30 years ago.

So why trust Cape Coral when it assures us that the annexation will not ruin our island life.

Very Respectfully,

Michael Hannon
Matlacha