STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GATEWAY SOUTHEAST PROPERTIES, INC. and CITY OF DORAL,	)	
Petitioners,	)	
vs.	)	Case Nos. 06-0918GM 06-1548GM
DEPARTMENT OF COMMUNITY AFFAIRS, TOWN OF MEDLEY, and WASTE MANAGEMENT, INC. OF FLORIDA,	)	
Respondents.	)	

SUMMARY FINAL ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on May 17, 2006. The hearing was conducted by telephone, with counsel being located in Miami, Aventura, Fort Lauderdale, and Tallahassee.

APPEARANCES

For Petitioner: (Gateway)
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For Petitioner: (City of Doral)
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For Respondent: (Waste Management)	Douglas M. Halsey, Esquire White & Case, LLP Wachovia Financial Center, Suite 4900 200 South Biscayne Boulevard Miami, Florida 33131-2352
For Respondent: (Town)	Barbara J. Riesburg, Esquire Roth, Rousso, Katsman, Schneider, LLP 18851 Northeast 29th Avenue, Suite 900 Aventura, Florida 33180-2847
For Respondent: (Department)	Richard E. Shine, Esquire Department of Community Affairs 2555 Shumard Oak Boulevard Tallahassee, Florida 32399-2100

STATEMENT OF THE ISSUE

The issue in this case is whether the land development regulation adopted by Respondent, Town of Medley (Town), by Ordinance No. C-306 on September 6, 2005, is consistent with the Town's Comprehensive Plan (Plan).

PRELIMINARY STATEMENT

This matter began on September 6, 2005, when the Town adopted Ordinance No. C-306, which amended its Municipal Code (Code) by adding the definition of "Public Facilities" in Section 62-1 and by amending in two respects Section 62-61, which governs nonconforming uses.

On October 6, 2005, Petitioner, Gateway Southeast Properties, Inc. (Gateway), filed a Petition with the Town alleging that the Ordinance was not consistent with the Town's Plan, as required by Section 163.3213(3), Florida Statutes (2005).[1] When the Town did not respond to its petition within

thirty days, on November 7, 2005, Gateway filed a Petition with Respondent, Department of Community Affairs (Department). Id.

On December 6, 2005, the Department conducted an informal hearing with the parties, as authorized by Section 163.3213(4), Florida Statutes. On February 21, 2006, the Department issued its Determination of Consistency of a Land Development Regulation (Determination). See Gateway Southeast Properties, Inc. v. Town of Medley et al., Case No. DCA06-LDR-015 (Feb. 21, 2006) 2006 Fla. ENV LEXIS 13. The Determination concluded that the allegations made by Gateway should more appropriately be raised in a different forum and that the land development regulation was consistent with the Plan. On March 15, 2006, Gateway filed its Request for Formal Hearing (Request) with the Division of Administrative Hearings (DOAH). While not raising any issues of material fact, the Request generally alleged that as a matter of law the land development regulation was inconsistent with various provisions in the Plan and that the Department applied the wrong legal standard in making its Determination. Because Respondent, Waste Management, Inc. of Florida (Waste Management), operates a landfill in the Town, which Gateway feared would be expanded by virtue of the Ordinance, Gateway's Petition named Waste Management as a co-Respondent.[2]

By Notice of Hearing dated March 28, 2006, a final hearing was scheduled on April 25 and 26, 2006, in Miami, Florida. By Order dated April 12, 2006, however, the hearing was cancelled on the undersigned's own motion since the Petition raised no disputed issues of material fact, and it appeared that oral argument, rather than an evidentiary hearing, would be more appropriate.

On April 13, 2006, Gateway filed a Motion for Summary Final Order (Motion) under Section 120.57(1)(h), Florida Statutes. On May 1, 2006, a Response to the Motion was filed by the Department, while the Town and Waste Management jointly filed a Memorandum of Law in Opposition to the Motion and Cross-Motion for Summary Final Order (Cross-Motion).

On February 9, 2006, the City of Doral (City) filed a Petition with the Town also alleging that the land development regulation was inconsistent with the Plan. On March 2, 2006, the Town provided a response to the Petition by asserting that the claim was barred by collateral estoppel due to the Department's Determination issued on February 21, 2006. On April 27, 2006, the City filed a Motion to Intervene and Incorporated Petition with DOAH seeking to intervene in Case No. 06-0918GM. This filing was treated as a new case under Section 163.3213(5)(a), Florida Statutes, was assigned Case No. 06-1548GM, and was consolidated with Case No. 06-0918GM by

Order dated May 1, 2006. The City has joined in Gateway's Motion and in opposition to the Cross-Motion.

Oral argument on the Motion and Cross-Motion was held on May 17, 2006. All parties participated in the hearing by telephone.

Besides the pleadings filed in this matter, Gateway filed five volumes of documents, which were attached to its Petition and are included in the Record. Volume I includes the Town's Evaluation and Appraisal Report dated June 23, 2005; certain documents obtained from the Town through a public records request; the Town's Complaint in a circuit court action filed against Waste Management on November 3, 2003; Gateway's Petition for Writ of Certiorari filed in circuit court on October 5, 2005, seeking review of Ordinance C-306; a solid waste disposal agreement executed by Miami-Dade County and Waste Management on July 3, 1998; a draft of a development agreement between the Town and Waste Management dated September 8, 2005; and Waste Management's Answer, Affirmative Defenses, and Counterclaim filed on January 13, 2004, in response to the Town's lawsuit. Volume II includes transcripts of (1) the Town meeting on October 5, 2005, concerning a request by Waste Management to expand its landfill pursuant to Ordinance C-306; (2) the Town meeting on a draft development agreement between the Town and Waste

Management held on September 8, 2005; and (3) the informal hearing conducted by the Department on December 7, 2005. Volumes III and IV contain copies of Part I of the Town's Plan, while Volume V contains a copy of Part II of the Plan. In addition, copies of (1) the development agreement between the Town and Waste Management and (2) Ordinance C-940 adopted by the Town on March 7, 2006, which were attached to the two Petitions, have been included in the Record. Except for background purposes, however, all items which post-date the adoption of the Ordinance are not relevant to the issues raised herein and have been considered for that purpose only.

During the course of the oral argument, the Department relied upon two administrative decisions not previously cited which it says are pertinent to the issues raised by the Motion and Cross-Motion. Those decisions are Johnson et al. v. City of Tarpon Springs, DOAH Case Nos. 95-6205GM and 95-6206GM (DOAH Aug. 30, 1996) 1996 Fla. ENV LEXIS 155, and Sierra Club, Inc. v. Nassau County, Case No. DCA02-OR-154 (DCA May 16, 2002)[3]. On May 22, 2006, Gateway and the City filed a Joint Reply to DCA's Newly-Cited Cases. Finally, the Transcript of the oral argument was filed on June 2, 2006.

FINDINGS OF FACT

Based upon the record presented by the parties, the following undisputed findings of fact are determined:

1. The Town appears on a map to be located in the northern part of Dade County, south of U.S. Highway 27 and east of the Florida Turnpike, and just south of the City of Hialeah Gardens and southwest of the City of Hialeah. Besides a Plan originally adopted in December 1988, and amended from time to time, the Town also has a Code containing its land development regulations.

2. Waste Management owns and operates a landfill in the Town known as the Medley Landfill & Recycling Center located at 9350 Northwest 89th Avenue.[4] Because the landfill has been in operation since 1952, or long before the Plan was adopted, the landfill is considered a nonconforming use under Section 62-61 of the Town's Code.

3. On September 6, 2005, the Town adopted Ordinance C-306 which amended Section 62-61 of the Code to create a new procedure for allowing the expansion of qualifying facilities operating as nonconforming uses. (Except for Section 62-61, which is found in the Town's land development regulations, there are no provisions in the Plan itself relating to nonconforming uses.) Prior to the adoption of the Ordinance, Subsection 62-61(b) provided the following limitation on the expansion of nonconforming uses:

> (b) The lawful use of land existing at the time of the passage of this chapter, although such use does not conform to the

> provisions of this chapter may be continued; provided, however, that no such nonconforming use shall be enlarged or increased, nor shall any nonconforming use be extended to occupy a greater area of land than that occupied by such use at the time of the passage of this chapter.

4. Ordinance C-306 amended Subsection 62-61(b) as follows to allow for an exception to the rule against enlargement or expansion of nonconforming uses:

> (b) The lawful use of land existing at the time of the passage of this chapter, although such use does not conform to the provisions of this chapter, may be continued; provided, however, that no such nonconforming use shall be enlarged or increased <u>except as provided in subsection (d) hereof</u>, nor shall any nonconforming use be extended to occupy a greater area of land than that occupied by such use at the time of the passage of this chapter.

5. To implement the exception against enlargement or expansion of nonconforming uses, the Ordinance further amended Section 62-61 by adding a new Subsection (d) to read as follows:

> (d) Any nonconforming use which serves as a Public Facility may be enlarged up to fifteen percent of the current building and/or land area of such use after formal approval by the Town Council via resolution according to the Municipal Code of Medley, Florida. Before approving such enlargement or increase the Town Council shall conduct at least two public hearings. The basis for calculation of such enlargement or increase shall exclude buildings and/or land areas not currently operating as a Public facility, though contiguous thereto.

The new provision allows any nonconforming use which serves as a Public Facility to be enlarged or increased up to fifteen percent of its current building or land areas after formal approval by the Town Council by resolution.

6. Because the Code did not define the term "Public Facilities," Ordinance C-306 amended Section 62-1 (the definitions portion of the Code) by adding a new Subsection (a), which reads as follows:

> (a) "Public facilities" means major capital improvements, including, but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities.

As is evident from a reading of the definition, the term "public facilities" is not limited to solid waste facilities, but it also includes seven other types of public facilities.

7. Gateway is the owner of real property commonly known as Medley Commerce Center, which is located in the Town immediately adjacent to and north of Waste Management's landfill. On October 6, 2005, Gateway filed a Petition with the Town alleging that the Ordinance was not consistent with the Plan in various respects. The Town did not respond to Gateway's Petition within thirty days after receipt of the Petition.

8. Because no response was made by the Town, on November

7, 2005, Gateway filed a Petition with the Department requesting that the Department declare the Ordinance inconsistent with the Town's Comprehensive Plan (Plan). See § 163.3213(3), Fla. Stat. The Petition referred to a Complaint filed in a circuit court case, Town of Medley v. Waste Management Inc. of Florida, Case No. 03-25832 CA 13, as stating the reasons for inconsistency. Although a copy of the Complaint was not attached to its Petition, Gateway later supplied the Department with a copy.

9. After conducting an informal hearing on December 7, 2005, on February 21, 2006, the Department issued its Determination. In general terms, the Determination concluded that the concerns in Gateway's Petition should more appropriately be raised in a circuit court action under a different provision in Chapter 163, Florida Statutes, through a challenge to any development order or approval that authorizes the expansion of a nonconforming public facility. See Determination, paragraph 17.

10. On March 15, 2006, Gateway filed its Request with DOAH contending generally that the Ordinance was inconsistent with the Plan and that the Department had used the wrong legal standard in determining that the Ordinance was consistent with the Plan.

11. The City, which appears on a map to lie directly

south of the Town, shares a border with the Town in the area of Waste Management's landfill property. On February 9, 2006, the City filed a Petition with the Town seeking to have the Town declare that the Ordinance was inconsistent with its Plan. The Petition raised the same issues as did Gateway. On March 2, 2006, the Town provided a response to the Petition by asserting that the claim was barred by collateral estoppel due to the Department's Determination issued on February 21, 2006.

12. The City then waived its right to have the Department conduct informal proceedings under Section 163.3213(4), Florida Statutes, and filed a Motion to Intervene and Incorporated Petition with DOAH on April 27, 2006. Although the City sought to intervene in Case No. 06-0918GM, the filing was treated as a new filing under Section 163.3213(5)(a), Florida Statutes, was assigned Case No. 06-1548GM, and was consolidated with Gateway's case. Except for one additional consistency claim, discussed below, the filing raises the same issues as did Gateway.

13. The purpose of Ordinance C-306, as expressed in Section 2 thereof, is as follows:

> PURPOSE: The limited increase or enlargement of nonconforming uses allowed by this ordinance is intended to further the goals, objectives and policies of the Town's Comprehensive Plan found in the

Sanitary Sewer, Solid Waste, Drainage, Potable Water, and Natural Ground Water Aquifer Recharge Element as well as the Intergovernmental Coordination Element.

14. The Plan's Sanitary Sewer, Solid Waste, Drainage, Potable Water, and Natural Ground Water Aquifer Recharge Element (Element) in the Future Land Use Element (FLUE) identifies as its primary (and only) goal the "[p]rovision of needed public facilities in a manner that protects public and private investments in existing facilities and promotes compact urban growth." (Vol. IV, Record, page 603). Objective 1 of the same Element provides that an aim of the Plan is the "[p]rovision of sanitary sewer, solid waste, drainage and potable water facilities and services to meet existing and projected demands identified in this Plan." Id. Policy 1.2 also indicates that the Town is to "[i]mplement procedures to ensure that adequate facility capacity is available or will be available at the time a new development permit is issued." Id.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.57(1)(h) and 163.3213(5)(a), Florida Statutes.

16. Where the Department has found a land development

regulation to be consistent with the local comprehensive plan, as it did here, the parties in an appeal to DOAH shall be "the petitioning, substantially affected person, any intervenor, the state land planning agency, and the local government."[5] § 163.3213(5)(a), Fla. Stat. For purposes of resolving the Motion and Cross-Motion, Respondents agree that Petitioners are substantially affected persons and have standing to challenge the land development regulation.

17. The purpose of the proceeding before DOAH is not to determine whether the Department's Determination should be sustained. Rather, the purpose is to consider, in a de novo setting, whether the land development regulation is consistent with the local government's comprehensive plan.

18. Section 120.57(1)(h), Florida Statutes, provides in part that

> any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.

See also Fla. Admin. Code R. 28-106.204(4).

19. All parties agree that there are no genuine issues of material fact. Therefore, summary disposition of the dispute is appropriate.

20. Section 163.3194(1)(b), Florida Statutes, requires that "[a]ll land development regulations . . . shall be consistent with the adopted comprehensive plan, or element or portion thereof . . . ." Therefore, it is incumbent on Petitioners to show that the challenged land development is not consistent with the Plan.

21. "The adoption of a land development regulation by a local government is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan." § 163.3213(5)(a), Fla. Stat. This means that "if reasonable persons could differ as to its propriety," a land development regulation must be upheld. Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). See also Martin County v. Section 28 Partnership, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000)(where there is "evidence in support of both sides of [a land development regulation], it is difficult to determine that the [Town's] decision is anything but 'fairly debatable'").

22. Gateway (joined in by the City) argues in its Motion that the Department departed from the essential requirements

of the law by applying the wrong legal standard when it rendered its Determination.[6] It also contends that both facially and on an as-applied basis, the Ordinance is inconsistent with numerous provisions within the Plan, as well as Florida Administrative Code Rule 9J-5.023. Finally, Gateway argues that the regulation is inconsistent with the nonconforming use doctrine, which it says in Florida prohibits the expansion of nonconforming uses. In response, Respondents generally assert that because the Ordinance has no project specific application to the Plan, that is, it does not reference any particular project or authorize any development, it is facially consistent with the Plan. They also contend that the regulation is not self-executing in that it does not approve the expansion or enlargement of any public facility; rather, the Town is still required to go through a public hearing process before issuing any development approval pursuant to the regulation. Finally, they argue that virtually all of the consistency allegations in the Motion (as well as the two Petitions) relate to future impacts that may occur if and when the Town authorizes the expansion of a public facility. Because another statutory remedy exists under Chapter 163, Florida Statutes, to address those concerns, Respondents argue that it is inappropriate to consider these types of issues at this time.

23. The Ordinance only applies to Public Facilities that are nonconforming uses under Section 62-61, creating a procedure to give the Town the flexibility to permit the limited expansion of certain uses that do not conform to the uses established by other local land development regulations. It does not apply to a specific project (such as Waste Management's landfill) or authorize development; rather, it may be applied to any number of future projects where the Town may choose to enter into a development agreement or issue a development order. Given the wide range of public facilities that are covered by the Ordinance, the regulation can conceivably be applied in numerous ways.

24. The Ordinance is not self-executing. It amends Section 62-61 to allow the Town to permit the increase or enlargement of qualifying nonconforming uses. Before an increase or enlargement can occur, the owner of the Public Facility must obtain approval from the Town after it holds public hearings to determine whether the use is a nonconforming Public Facility and whether the proposed expansion is within the allowable limits. Once those determinations are made, the Town must formally adopt a resolution to authorize the proposed expansion. If the Town authorizes specific development that is inconsistent with the Plan, that decision can be challenged under another remedy

found in Chapter 163, Florida Statutes. Therefore, any alleged impacts from the expansion of a public facility will not occur until the regulation is implemented.

25. Under Section 163.3194(3)(a), Florida Statutes, "a land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such . . . regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan . . . ." In addition, Florida Administrative Code Rule 9J-5.023(2) provides that "[t]he term 'compatible' means that the land development regulations are not in conflict with the comprehensive plan[,]" while "[t]he term 'further' means that the land development regulations take action in the direction of realizing goals or policies of the comprehensive plan."

26. Ordinance C-306 takes action in the direction of realizing goals or policies of the Plan. As noted in Finding of Fact 13, the purpose of the Ordinance is to allow a "limited increase or enlargement of nonconforming uses . . . to further the goals, objectives and policies of the Town's Comprehensive Plan found in the Sanitary Sewer, Solid Waste, Drainage, Potable Water, and Natural Ground Water Aquifer Recharge Element . . . ." In this vein, the cited Element

identifies as its primary (and only) goal the "[p]rovision of needed public facilities in a manner that protects public and private investments in existing facilities and promotes compact urban growth." (Vol. V, Record, page 603) Objective 1 of the Element establishes as its aim the "[p]rovision of sanitary sewer, solid waste, drainage and potable water facilities and services to meet existing and projected demands identified in this Plan." Id. Policy 1.2 also indicates that the Town is to "[i]mplement procedures to ensure that adequate facility capacity is available or will be available at the time a new development permit is issued." Id. Because it is fairly debatable that Ordinance C-306 provides a mechanism to enable the Town to ensure that the foregoing goal, objective, and policy can be met, the Ordinance "take[s] action in the direction of realizing goals or policies of the comprehensive plan" and thus furthers the Town's Plan.

27. At the same time, the undersigned notes that most, if not all, of the arguments raised by Gateway and the City concern the application of Ordinance C-306 to an expansion of Waste Management's landfill, rather than the consistency of the Ordinance with the Plan. Because the Town determined that the landfill qualified as a public facility under the Ordinance on March 6, 2006, and authorized an expansion of the

landfill, Petitioners have a separate remedy under Chapter 163, Florida Statutes, to pursue those claims.

28. Notwithstanding the availability of a separate remedy, the undersigned has considered the consistency arguments raised in the Motion to determine if they overcome the fairly debatable threshold.[7] In order to prevail under this test, Gateway and the City have the stringent burden of demonstrating that there can be no reading or interpretation of the Ordinance that is even arguably consistent with the Plan.

29. Petitioners first argue that because the expansion of nonconforming public facilities is not expressly provided for in the Plan, the regulation must be inconsistent with the Plan. However, local comprehensive plans are intended to provide an enabling framework for land development regulations, not to provide a list of each and every permissible development option. See § 163.3177(1), Fla. Stat. Significantly, there is no provision in the Plan which prohibits the expansion of public facilities. In this respect, it is at least fairly debatable that the regulation is consistent with the Plan.

30. Petitioners also argue that the Plan establishes the maximum amount of lands in the Public Buildings and Facilities land use category of the FLUE at 5.2 acres, and that amount of

land has already been used up with existing facilities, thus giving rise to an inconsistency with the FLUE. Tables I and III of the FLUE do indicate that in 1988, when the original Plan was adopted, the existing Public Buildings and Facilities land use accounted for 5.2 acres. (Vol. V, Record, pages 499 and 520) Since that time, however, "close to 700 acres of land or more" have been annexed by the Town, some of which have already been, or are now in the process of being, redesignated with new land uses. (Volume II, Record, pages 145-46) Moreover, Table 4 of the FLUE indicates an anticipated acreage of 7.0 acres for Public Buildings and Facilities in the year 2000. (Vol. V, Record, page 525) Given these considerations, it is at least fairly debatable that FLUE Tables I, III, and IV are simply a reflection of the status of acreage reserved for Public Facilities when the Plan was adopted, and they are not intended to freeze the acreage reserved for Public Facilities at the 1988 or 2000 levels, as alleged in the Motion.

31. Petitioners further contend that the Ordinance allows the expansion of Public Facilities onto land designated for some other use. However, the Ordinance does not purport to allow land uses where those uses are proscribed by the Plan, or otherwise trump the Plan provisions.

32. Petitioners argue that neither the Town's Capital

Improvements Element (CIE) or its Capital Improvement Plan identify the expansion of private landfills as permitted capital improvements and therefore an inconsistency between the regulation and those provisions arises. (According to the Town's Evaluation and Appraisal Report dated June 22, 2005, however, there is no Capital Improvement Plan in the Plan. Vol. I, Record, page 10.) Assuming arguendo that the expansion or enlargement of nonconforming public facilities contemplated by the Ordinance is a capital improvement that must be identified in the CIE, and that all such projects will trigger the expenditure of Town funds, as Gateway suggests, it is still premature to require the identification of a particular project in the CIE until development is actually authorized. In this case, when the Ordinance was enacted on September 6, 2005, no development approval had been granted.

33. Gateway and the City next point out that the Sanitary Sewer and Solid Waste Sub-Element (Sub-Element) of the Sanitary Sewer, Solid Waste, Drainage, Potable Water, and Natural Ground Water Aquifer Recharge Element provides that the Medley landfill is scheduled to be "phased out over the next three years under an agreement signed last year with Dade County." (Vol. V, Record, page 591) Because the regulation would allow an expansion of the landfill, Petitioners cite this as an obvious inconsistency with the Sub-Element. The

cited text was prepared in December 1988, when the Plan was originally adopted, as a part of the Town's Level of Service and Capacity Analysis. According to the text of the Plan, it was based on the assumption that the three-year phase-out would occur "[a]s the Medley landfill fills up and reaches capacity." Id. It is at least fairly debatable that these provisions do nothing more than reflect the then-current status of the landfill in December 1988. Further, until future development is approved, and the landfill actually "fills up and reaches capacity," the regulation is arguably consistent with this language.

34. Finally, the City has contended (in its Petition) that when it adopted the regulation, the Town failed to adhere to Objective 1 and Policy 1.3 of the Intergovernmental Coordination Element, which require that the Town maintain "coordination among the governmental entities within the Town of Medley's areas of concern" and "[p]rovide for exchange of information regarding requests for changes of zoning or land use within the area of city limits." (Vol. V, Record, page 652) At most, however, these provisions simply require the Town to give interested persons the opportunity to provide input when making zoning or land use decisions. There is no allegation by Gateway or the City that they were denied this opportunity.

35. Based on the foregoing, it is concluded that it is at least fairly debatable that the land development regulation is "not in conflict with the comprehensive plan" and is therefore "compatible" with the Plan. Fla. Admin. Code R. 9J-5.023(2).

36. Because the Ordinance has not been shown to be "inconsistent with the plan," as a matter of law, the Town and Waste Management are entitled to a favorable disposition of this matter. Yusem, supra; § 163.3213(5)(a), Fla. Stat.; Fla. Admin. Code R. 9J-5.023.

37. To summarize, because there is no genuine issue as to any material fact, for the reasons cited above, the Town and Waste Management are entitled as a matter of law to the entry of a final order in their favor. The Cross-Motion is accordingly granted, and Gateway's Motion is denied. Because the City has raised the same arguments as Gateway, and agreed that the Motion and Cross-Motion are dispositive of its interests as well, final disposition of the cases is appropriate as to both Petitioners.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Cross-Motion for Summary Final Order filed by the Town of Medley and Waste Management Inc. of

Florida is granted, and the challenged land development regulation adopted by Ordinance C-306 is determined to be consistent with the Town of Medley's Comprehensive Plan.

DONE AND ORDERED this 14th day of June, 2006, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of June, 2006.

ENDNOTES

1/ All references are to Florida Statutes (2005).

2/ These fears appear to be well-founded. For background purposes only, it is noted that on March 6, 2006, or six months after Ordinance C-306 was enacted, the Town adopted Resolution C-940, which found Waste Management's landfill to be a public facility within the parameters of Ordinance C-306, and authorized Waste Management to expand its landfill by 26.244 acres (or by 12.66 percent). Whether that action has been challenged by Petitioners is not of record.

3/ Neither case appears to be directly on point. In both cases, a land development regulation was determined to be inconsistent with a provision in the local government's comprehensive plan. In Sierra Club, supra, the Department determined that a Nassau County regulation, which allowed

wetland buffers averaging fifty feet, did not further three wetland protection policies found in the Conservation Element. Except for a review of the regulation and the three policies, no further analysis of the plan was made. See Determination of Inconsistency of Nassau County Land Development Regulation 6.5, page 13. Johnson, supra, is more factually similar to this case. In Johnson, an administrative law judge (ALJ) determined that a City of Tarpon Springs regulation authorizing the construction of swimming pools and pool screen enclosures within thirty feet of the shoreline was facially at odds with a thirty-foot setback policy in the Coastal Zone and Conservation Element. Id. at *15-16. Although the ALJ concluded that only a facial review of the regulation and policy was necessary to support his determination, out of "fairness to the City," he nonetheless undertook a more extensive review of the City's comprehensive plan to support that conclusion. Id. at *16.

4/ According to the Development Agreement between Waste Management and the Town, Waste Management operates a Class I landfill that occupies 207.039 acres, of which 141 acres are currently permitted for solid waste disposal.

5/ Under this statutory scheme, Waste Management should be labeled as an intervenor whose rights to participate are dependent on whether it is a "substantially affected person." See also § 163.3213(2)(a), Fla. Stat. However, Waste Management was named a co-Respondent by Gateway, apparently with the Department's acquiescence, and the filing arrived at DOAH in that posture.

6/ Because it is not the purpose of this proceeding to determine whether the Department's Determination should be sustained, see Conclusion of Law 17, it is unnecessary to reach this issue. Likewise, whether the regulation violates the doctrine of nonconforming uses is not a consideration under Section 163.3213, Florida Statutes, or Florida Administrative Code Rule 9J-5.023 in determining the consistency of a land development regulation.

7/ When determining whether a land development regulation is facially consistent with a comprehensive plan, it logically follows that one need only examine the regulation itself and any plan provisions that are directly affected or implemented by the regulation. Here, the Ordinance amends an existing land development regulation concerning nonconforming uses (which are found only in the Code) and does not directly implement any Plan provision except portions of one Element; thus, the

extensive analysis suggested by Petitioners is unnecessary. Conversely, in determining whether the regulation can be applied in a manner that is consistent with the Plan, it is necessary to consider the specific development being authorized and the Plan provisions that come into play. During oral argument, the Department represented that the Ordinance, as enacted, could theoretically be implemented (or applied) in hundreds of ways, thus making an as-applied analysis impractical at this stage of the process. Because of this, the Legislature has provided a separate statutory remedy to challenge a development or project that implements a land development regulation.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.