

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CEMEX CONSTRUCTION MATERIALS)
FLORIDA, LLC, OLD CORKSCREW)
PLANTATION, LLC, OLD CORKSCREW)
PLANTATION V, LLC, TROYER)
BROTHERS FLORIDA, INC., AND FFD)
LAND COMPANY, INC.,)
)
Petitioners,)
)
vs.) Case No. 10-2988GM
)
LEE COUNTY,)
)
Respondent,)
)
and)
)
FLORIDA WILDLIFE FEDERATION,)
COLLIER COUNTY AUDUBON SOCIETY,)
CONSERVANCY OF SOUTHWEST)
FLORIDA, INC., ESTERO COUNCIL)
OF COMMUNITY LEADERS, INC., AND)
NICK BATOS,)
)
Intervenors.)
_____)

RECOMMENDED ORDER

The final hearing in this case was held on October 26 through October 28, 2011, in Fort Myers, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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and Nick Batos:

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STATEMENT OF THE ISSUES

The issues to be determined in this case are whether the amendments to the Lee County Comprehensive Plan that were adopted through Ordinance Nos. 10-19, 10-20, 10-21 and Remedial Ordinance No. 10-43 ("Plan Amendments") are "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2011).^{1/}

PRELIMINARY STATEMENT

On March 3, 2010, Lee County adopted comprehensive plan amendments relating to resource extraction (limerock mining) in the Density Reduction/Groundwater Resource ("DR/GR") area of southeast Lee County through the adoption of Ordinance Nos. 10-19, 10-20 and 10-21. On May 11, 2010, the Department of Community Affairs ("DCA") issued a notice of its intent to find some of the amendments not in compliance with the Local Government Comprehensive Planning and Land Development Regulation Act, chapter 163, part II, Florida Statutes (the

"Act"). DCA then filed a petition with DOAH to challenge these amendments. Petitions to intervene were granted for Cemex Construction Materials Florida, LLC, Old Corkscrew Plantation, LLC, Old Corkscrew Plantation V, LLC, Troyer Brothers Florida, Inc., Alico Land Development, Inc., Old Corkscrew Golf Club, Inc., FFD Land Company, Inc., Florida Wildlife Federation, Collier County Audubon Society, Conservancy of Southwest Florida, Inc., Estero Council of Community Leaders, Inc., and Nick Batos.

Lee County, DCA, and some of the Intervenors entered into a settlement agreement, which required Lee County to adopt certain remedial comprehensive plan amendments. On November 1, 2010, Lee County adopted the remedial amendments through Ordinance Number 10-43. On December 12, 2010, DCA issued its Cumulative Notice of Intent, determining that the remedial amendments were in compliance with the Act.

After the remedial amendments were adopted, Alico Land Development, Inc., and Old Corkscrew Golf Club, LLC, filed notices of voluntary dismissal. The remedial amendments did not resolve all of the issues raised by the current Petitioners and they filed a Joint Amended Petition to challenge the revised amendments. The parties were then realigned.

On August 30, 2011, Petitioners amended their petition again to reduce the scope of their challenge. Jurisdiction was

relinquished to the DCA to take final action on the amendments that were no longer being challenged.

Based on the changes to the Act brought about by the passage of chapter 2011-139, Laws of Florida, DCA moved to have itself dismissed as a party to the proceeding and the motion was granted. The Administrative Law Judge ruled that chapter 163, as revised by chapter 2011-139, Laws of Florida, would govern the case. The Florida Wildlife Federation and Collier County Audubon Society, Inc., filed a motion in limine to exclude the application of revised chapter 163, which was denied.

At the final hearing, Petitioners' Exhibits 3-5, 10, 13, 17, 19-35, 37-39, 46-47, 53-55, 59, 62-65, 69, 74-75, 84-85, and 102 were admitted into evidence. Petitioners presented the expert testimony of Denis Roza (civil engineering and mining), David DePew (planning and comprehensive planning), and Alan MacVicar (mining development and permitting). Respondent's Exhibits 1-46 were admitted into evidence. Respondent presented the expert testimony of Paul O'Connor (planning), William Spikowski (planning), and Kevin Erwin (ecology). Intervenors Conservancy of Southwest Florida, Inc., Estero Council of Community Leaders, Inc., and Nick Batos presented the testimony of Nicole Ryan Johnson, Don Eslick and Nick Batos. Batos' Exhibits 1-9 were admitted into evidence. Intervenors Florida Wildlife Federation ("FWF") and Collier County Audubon Society

presented the testimony of Nancy Payton, Brad Cornell, David Onorato, Darrell Land (panther expert), and Jason Lauritsen (woodstork expert). FWF's Exhibits 1-5 were admitted into evidence. FWF presented the deposition of Mike McDaniels of the Department of Economic Opportunity in lieu of his live testimony.

The five-volume Transcript of the final hearing was filed with DOAH. The parties submitted proposed recommended orders that were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Lee County is a political subdivision of the State of Florida and has adopted a comprehensive plan (the "Lee Plan") that it amends from time to time pursuant to chapter 163, part II.

2. Petitioner Cemex Construction Materials Florida, LLC ("Cemex") is a Florida limited liability company operating a business in Lee County. Cemex submitted written comments to Lee County during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with their adoption.

3. Petitioner Troyer Brothers Florida, Inc. ("Troyer") is a Florida corporation that owns real property in Lee County on which it conducts agricultural operations. Troyer submitted

written comments to Lee County during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with their adoption.

4. Troyer's property is shown on Lee County planning maps as a "potential mining area."

5. Petitioners Old Corkscrew Plantation LLC and Old Corkscrew Plantation V, LLC (collectively "OCP") are Florida limited liability companies that own real property in Lee County. OCP submitted written comments to Lee County during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with their adoption.

6. OCP's property is shown on Lee County planning maps as a "potential mining area."

7. Petitioner FFD Land Company, Inc. ("FFD") is a Florida corporation that owns real property in Lee County on which it conducts agricultural operations. FFD submitted written comments to Lee County during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with their adoption.

8. Florida Wildlife Federation ("FWF") is a not-for-profit corporation in Florida. The corporate objectives of the FWF are to promote wildlife, wildlife habitat, and the use and enjoyment of Florida's natural resources. The FWF is involved in

activities to protect endangered and threatened species, including the endangered Florida panther.

9. FWF timely submitted objections, recommendations and comments to Lee County during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with their adoption.

10. FWF has over 25 members who reside in Lee County. FWF members use the public lands in the southeast portion of the County for enjoyment of natural resources.

11. Collier County Audubon Society ("CCAS") is a not-for-profit Florida corporation. CCAS runs programs, field trips, education for children, and advocates the conservation of wildlife. CCAS members and staff work with the staff at the Corkscrew Swamp Sanctuary, which is located partially in southeast Lee County.

12. CCAS submitted objections, recommendations and comments to Lee County during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with their adoption.

13. Conservancy of Southwest Florida Inc. ("CSWF") is a not-for-profit Florida corporation with over 5,000 members, about 400 of whom own property or reside in Lee County. CSWF's purpose and mission is to protect natural resources and the quality of life for CSWF members in Southwest Florida.

14. CSWF owns real property in Lee County. CSWF pays local taxes to operate a business in Lee County.

15. CSWF submitted written comments to Lee County during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with their adoption.

16. Nick Batos owns and resides on property in Lee County near the DR/GR. He made comments to Lee County during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with their adoption.

17. Nick Batos uses the DR/GR for recreational activities, including golf. He is affected by the truck traffic on Corkscrew Road.

18. Estero Council of Community Leaders, Inc. ("ECCL") is a Florida not-for-profit corporation with representatives of 35 to 40 communities and organizations as members. The DR/GR is located immediately east and south of ECCL member communities Stonybrook, Wildcat Run, and Bella Terra.

19. ECCL is involved in growth management issues affecting its member communities, particularly truck traffic on Corkscrew Road and mining impacts to the creeks, streams, and wetlands that its member communities share with the DR/GR. ECCL pays local taxes to operate a business in Lee County.

20. A substantial number of ECCL members use the wildlife, recreational, and water resources of the DR/GR. A substantial

number of its members are affected by truck traffic on Corkscrew Road.

21. ECCL made oral or written comments to Lee County during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with their adoption.

The DR/GR

22. There are two areas designated DR/GR in the Lee County Comprehensive Plan. These areas were established primarily to reduce residential density and to protect groundwater resources. The DR/GR area at issue in this case is in the southeastern portion of the County and consists of approximately 83,000 acres.

23. The land within the DR/GR is relatively flat and has a high water table. It is an environmentally diverse area which contains wetlands and other habitat used by the endangered Florida panther and wood stork, and the threatened black bear, Big Cypress fox squirrel, and bald eagle.

24. The DR/GR includes potable water wellfields which currently provide about 40 percent of water delivered by the County's potable water utility.

25. The other land uses within the DR/GR are agricultural (row crops, pasture and citrus), low-density residential (one dwelling unit per 10 acres), and mining.

Limerock Mining

26. The Legislature has designated limerock as a critical and strategically important state resource, the adequate supply of which will affect local, regional, and state transportation facilities. See § 337.0261(2), Fla. Stat.

27. The mining activity in the DR/GR is primarily the extraction of construction aggregate materials (limerock).^{2/} Limerock is excavated and used primarily for road base and road surfaces, concrete and asphalt, and construction materials.

28. The DR/GR is one of only a few areas in Florida that contain significant deposits of high-quality limerock (relatively harder rock with fewer impurities), which is required for road surfaces and for making asphalt and concrete. Limerock for these purposes must meet certification criteria established by the Florida Department of Transportation ("FDOT").

29. The mines in the DR/GR supply most of the limerock in Southwest Florida. The other sources are mines in Collier County and Charlotte County and limerock imported from the Yucatan and shipped to the Port of Tampa.

30. The seven-county region of Collier, Lee, Charlotte, Glades, Hendry, Manatee, and Sarasota Counties constitutes the primary market for limerock from the DR/GR.

Land Use Planning in the DR/GR

31. After Lee County created the DR/GR, concerns arose regarding the compatibility of existing and future land uses within the area. These concerns were generated in part by the increase in applications to expand limerock mining along Corkscrew Road.

32. Limerock mining adversely affects wildlife by replacing habitat with open pits. Limerock mining adversely affects residential uses because of the noise and vibrations associated with blasting, by the truck traffic, and by the replacement of more natural landscapes with industrial landscapes.

33. Residential and conservation uses adversely impact limerock mining by impeding production of the resource.

34. The Board of County Commissioners of Lee County appointed an ad hoc committee to look at the DR/GR land use issues and to make recommendations to the Board. Public meetings were held to obtain public input on the issues. The County undertook a review of the past studies of the area and commissioned new studies to determine how to better manage the conflicting land uses.

35. The County hired a consultant, Dover Kohl & Partners ("Dover Kohl"), to conduct a comprehensive new evaluation of the southeastern portion of the County, including the DR/GR. The

Dover Kohl "team" included experts in town planning, comprehensive planning, ecological planning, transportation planning, environmental planning, and surface and groundwater modeling. The team did not include an expert in limerock mining or the limerock market.

36. Dover Kohl produced several reports of findings and recommendations for the DR/GR. These studies included the "Ecological Memorandum of the Density Reduction/Groundwater Resource Area" (which analyzed and ranked lands for restoration), the "Lee County Truck Impact Analysis" (which evaluated mining truck impacts), a "Comprehensive Hydrological Study", a document entitled "Natural Resources Strategies for Southeast Lee County Planning for the Density Reduction Groundwater Resource Area", and a document entitled "Prospects for Southeast Lee County" (the "Prospects Report").

37. Appendix B to the Prospects Report, entitled "Limerock Production and Demand," was prepared by William Spikowski, a planner. Appendix B describes the results of Spikowski's analysis of limerock supply and demand through the 2030 planning period.

38. The County's planning for future limerock mining in the DR/GR included the objective of clustering future mining close to areas that are already disturbed in order to protect

natural resources, wildlife habitat, groundwater recharge areas, and residential uses.

The Plan Amendments

39. Petitioners' principal objections are with Lee Plan Map 14, entitled "Future Limerock Mining Overlay" ("Map 14"), Table 1(b), entitled "Year 2030 Allocations," and new Goal 33 and its associated objectives and policies.

40. Map 14 depicts an area of about 9,000 acres where limerock mining is allowed to occur in the DR/GR. There are lands with limerock "reserves" that lie outside of the area designated for future mining on Map 14, but these lands are not currently being mined and are not currently designated for mining uses.

41. Table 1(b) of the Future Land Use Element, entitled "Year 2030 Allocations," shows the total acreage allocated for Industrial land uses for Southeast Lee County as 7,246 acres. Mining is an industrial use. This acreage figure includes old mines, current mines, and approved new mines.

42. New Goal 33 and its policies provide:

GOAL 33: SOUTHEAST LEE COUNTY. To protect natural resources in accordance with the County's 1990 designation of Southeast Lee County as a groundwater resource area, augmented through a comprehensive planning process that culminated in the 2008 report, *Prospects for Southeast Lee County*. To achieve this goal, it is necessary to address the inherent conflict between

retaining shallow aquifers for long-term water storage and extracting the aquifer's limestone for processing into construction aggregate. The best overall balance between these demands will be achieved through a pair of complementary strategies: consolidating future mining in the traditional Alico Road industrial corridor while initiating a long-term restoration program to the east and south to benefit water resources and protect natural habitat. Residential and commercial development will not be significantly increased except where development rights are being explicitly concentrated by this plan. Agriculture uses may continue, and environmental restoration may begin. This goal and subsequent objectives and policies apply to Southeast Lee County as depicted on Map 1, Page 2.

OBJECTIVE 33.1: LIMEROCK MINING. Designate on a Future Land Use Map overlay sufficient land near the traditional Alico Road industrial corridor for continued limerock mining to meet regional demands through this plan's horizon (currently 2030).

Policy 33.1.1: Limerock mining is a high-disturbance activity whose effects on the surrounding area cannot be completely mitigated. To minimize the impacts of mining on valuable water resources, natural systems, residential areas, and the road system, Map 14 identifies Future Limerock Mining areas that will concentrate limerock mining activity in the traditional Alico Road industrial corridor east of I-75. By formally identifying such areas in this plan and allowing rezonings for new and expanded limerock mines only in the areas identified in Map 14, limerock resources in or near existing disturbed areas will be more fully utilized and the spread of limerock mining impacts into less disturbed environments will be precluded until such time as there is a clear necessity to do so (and Map 14 is amended accordingly). Inclusion of land on

Map 14 does not restrict the rights of landowners to use their land for other allowable purposes.

Policy 33.1.2: Most land identified on Map 14 is in the Density Reduction/Groundwater Resource land use category (see Policy 1.4.5) and will also be subject to those special requirements. Future Limerock Mining land outside the DR/GR area will also be subject to requirements of the appropriate designation on Map 14. Goal 10 and its objectives and policies contain additional guidance on mining. The Land Development Code will continue to provide additional details on mining approvals and operations.

Policy 33.1.3: Concurrent with the update of Map 14 in 2010, the Lee Plan was amended to improve the ability to efficiently mine in Future Limerock Mining areas. An exception was made to the requirement in Policy 1.4.5 that DR/GR land uses must demonstrate compatibility with maintaining surface and groundwater levels at their historic levels. Under this exception, land in Future Limerock Mining areas may be rezoned for mining when the impacts to natural resources including water levels and wetlands are offset through appropriate mitigation within Southeast Lee County. The Land Development Code will be amended and maintained to include provisions for assessing and mitigating mining impacts and for transferring residential development rights from land zoned for limerock mining pits. Appropriate mitigation for water levels will be based upon site-specific data and modeling acceptable to the Division of Natural Resources. Appropriate wetland mitigation may be provided by preservation of high quality indigenous habitat, restoration or reconnection of historic flowways, connectivity to public conservation lands, restoration of historic ecosystems or other mitigation measures as

deemed sufficient by the Division of Environmental Sciences. It is recommended that, whenever possible, wetland mitigation be located within Southeast Lee County. The Land Development Code will be revised to include provisions to implement this policy.

Policy 33.1.4: Table 1(b) contains industrial acreage in Southeast Lee County that reflects the acreage of limerock mining pits needed to meet local and regional demand through the year 2030. The parcel-based database shall be of existing land uses described in Policy 1.7.6 will be updated at least every seven years to reflect additional data about limerock mining in Southeast Lee County, including mining acreage zoned (project acres and mining pit acreage), pit acreage with active mine operations permits, acreage actually mined, and acreage remaining to be mined. Current totals are based on data compiled in *Prospects for Southeast Lee County* for the year 2006. Future amendments will reflect any additional data that becomes available through routine monitoring reports and bathmetric surveys or other credible sources. The industrial acreage totals for Southeast Lee County that are found in Table 1(b) for Planning Community #18 will be used for the following purposes:

1. In accordance with Policies 1.1.1 and 1.7.6, new mine development orders and mine development order amendments may be issued provided that the industrial acreage totals in Table 1(b) are not exceeded. For purposes of this computation, the proposed additional limerock pit acreage, when added to the acreage of limerock pits already dug, cannot exceed the acreage limitation established in Table 1(b) for Planning Community #18.
2. By monitoring the remaining acreage of land rezoned for mining but not yet mined, Lee County will have critical information to

use in determining whether and to what extent the Future Limerock Mining areas in Map 14 may need to be expanded in the future to meet local and regional demands.

Data and Analysis

43. The County's planning consultant, Spikowski, undertook the task of estimating the acreage of future limerock mining lands that would be sufficient to meet the future regional demand for limerock through 2030. Spikowski has no specialized training in geology, engineering, or the mining industry.

44. Much of the information about limerock reserves and production in the DR/GR is proprietary and unavailable to the public. Mining data in the public records of Lee County and regulatory agencies is limited. The County cannot be fairly criticized for failing to use data that were unavailable and which are still unavailable.

45. There is little public information about the quality and extent of limerock deposits in the DR/GR, which vary substantially. It is difficult to predict the uses that will be made of the rock, which is dependent on its quality and other market factors.

46. The volume of extracted and extractable limerock must be estimated from indirect and incomplete information in permit applications, such as requested mining depths, core samples, and post-mining bathymetric data.

47. Spikowski analyzed future limerock demand within the market region using two approaches. For the first approach he used the per capita rate of 9 tons,^{3/} which he found in the Rawl Report. The authors of the Rawl Report obtained the 9 tons per capita figure from the Florida Limerock and Aggregate Institute ("FLAI").

48. The Rawl Report is marked "Draft For Peer Review." No final report was ever issued.

49. Petitioners contend that the mining industry in Florida prefers 10.7 tons per capita as an estimate of limerock demand. This figure appears in a 2002 United States Geological Survey ("USGS") report entitled "Sociocultural Dimensions of Supply and Demand for Natural Aggregate -- Examples from the Mid-Atlantic Region, United States," which states that "per capita demand for aggregate in the United States has grown to about 10.7 tons per person per year."

50. The 2008 report of the Strategic Aggregates Review Task Force, commissioned by the Florida Legislature, states that in 2004 it was determined that Florida needed 7 or 8 tons of aggregate per capita per year. The report also states that 2004 was on the "steep slope of the upward trend of the housing boom" and that "[t]he economic slowdown will actually cause a reversal of the generally upward trend of consumption."

51. Spikowski's use of 9 tons per capita is supported by relevant data and analysis.

52. Spikowski estimated population growth in the seven-county market region, using medium population projections that he obtained from the University of Florida Bureau of Economic Business and Research ("BEBR"). Multiplying the regional population projections by 9 (tons per capita), Spikowski got the total tons of limerock needed to meet future demand in the region.

53. Spikowski then reduced this number by 20 percent, based on his estimate that 20 percent of the limerock demand in the seven-county region has been historically supplied by mines outside the DR/GR. Petitioners attacked the figure of 20 percent, but did not establish in the record a percentage that is more reliable.

54. Spikowski then determined how many acres of mines in the DR/GR were able to meet the regional demand from 1980 to 2006. Using this same ratio of acres mined to tons of limerock produced, Spikowski estimated that 6,259 acres of mining land would be needed to meet the regional demand through 2030.

55. Petitioners claim that Spikowski overestimated the amount of limerock produced per acre from the DR/GR. However, if that is true, then it would follow that the demand for limerock from the DR/GR was proportionately smaller.

56. Spikowski used a second analytical approach based on a comparison between new construction activity, measured by housing starts, and total limerock production. He first derived the ratio between past limerock production and past housing starts. Using this ratio, he determined how much limerock would correspond to the number of projected future housing starts in the region. Converting the future tons needed into acres in the manner discussed above, Spikowski determined that 3,761 additional acres of mining lands would be required to meet the future demand.

57. Spikowski then weighted his two analytical approaches to arrive at a final estimate of mining acreage needed to meet the future demand, which resulted in a final allocation of 4,397 acres.

58. Petitioners argue that Spikowski's weighting was in error because he should have added the demand created by new construction activity to the demand created to maintain existing structures. That critique is not material. Both of Spikowski's approaches yielded estimates of total future demand, but were far apart. His weighting was to account for their relative reliability. Petitioners urged the use of a per capita approach, which is consistent with Spikowski's heavier weighting for his own per capita approach.

59. Petitioners contend that Spikowski used inappropriate and unreliable data and employed methodologies that were not professionally accepted in calculating the DR/GR limerock production, supply, regional demand, and mining acreage needed to meet future demand. Spikowski's approaches to developing estimates of local supply and regional demand were necessary because much of the data had not been developed, compiled, or analyzed by anyone else. His approaches were logical and he used relevant and appropriate data. Spikowski's analysis was professionally acceptable as a planning function.

60. Petitioners attacked Spikowski's data and analysis, but Petitioners offered no comparable alternative analyses of past production in the DR/GR, past demand, future demand, and future mining acreage needed, other than to cite the national per capita figure of 10.7 tons from the 2002 USGS report. Petitioners did not produce the data to show that 10.7 tons per capita is accurate for Florida or for the seven-county region.

61. The data and analysis in the public reports in the record which Petitioners consider reliable, taken as a whole, do not prove that Spikowski underestimated the future mining acreage needed to meet the regional demand through 2030.

Internal Consistency

62. Spikowski determined that the total acreage of mines that are permitted or likely to be permitted during the planning

period is 5,807 acres, which are included on Map 14. That represents a surplus of 1,410 acres over his projected demand of 4,397 acres.

63. Petitioners contend that Map 14 is inconsistent with Objective 33.1 to "[d]esignate on a Future Land Use Map overlay sufficient land . . . for continued limerock mining to meet regional demands through this plan's horizon (currently 2030)." Based on the findings made above, Map 14 designates sufficient mining lands and, therefore, is consistent with Objective 33.1.

64. Petitioners contend that Table 1(b) also fails to allocate sufficient mining acreage. The future mining area on Map 14 and the industrial acreage listed in Table 1(b) do not match because at the adoption hearing for the Plan Amendments, the County amended Map 14 to add property owned by Florida Rock. For reasons that were not made clear in the record, Lee County did not amend Table 1(b) to add the Florida Rock acreage.

65. Policy 1.7.6 states that Table 1(b) is intended to depict the extent of land uses needed through the year 2030. It also states that no new development orders may be issued that would cause the acreage totals in Table 1(b) to be exceeded. Policy 33.1.4 applies this prohibition to mining approvals. Policies 1.7.6 and 33.1.4 plainly indicate that the acreage on Table 1(b) controls future mining through 2030 and cannot be exceeded even if there is more mining acreage depicted on Map

14. Table 1(b) would have to be amended to allow the stated industrial acreage to be exceeded.

66. However, the acreages in Table 1(b) include the 4,397 mining acres determined by Spikowski to be sufficient to meet the regional demand, which was found to be supported by relevant and appropriate data. Therefore, although Map 14 includes additional acreage for future mining, no inconsistency is created because both Table 1(b) and Map 14 can be fairly described as designating sufficient acreage to meet the regional demand through 2030.

67. Petitioners contend that the Plan Amendments are inconsistent with Policies 158.1.10, 158.3.5 and 158.6.1 of the Economic Element of the Lee Plan.

68. Policy 158.1.10 provides:

Evaluate the current land development regulatory and fiscal structure to identify and remove, where appropriate, the unwanted impediments to ensuring development is fiscally beneficial.

Petitioners did not establish what the evaluation required by this policy must entail. Lee County's extensive investigation of land use issues in the DR/GR reasonably qualifies as an evaluation for the purposes of the policy.

69. Policy 158.3.5 provides:

Lee County will ensure that adequate land is allocated in the comprehensive plan to meet

future commercial, industrial, agricultural, residential, and recreational needs.

As found above, the County's allocation of future mining lands is sufficient and, therefore, the Plan Amendments are consistent with this policy.

70. Policy 158.6.1 provides:

Before adopting any new regulation which potentially imposes new costs to taxpayer and private business, Lee County first will generally assess the impact of that regulation upon the local economy and will adopt such regulations only in cases of compelling public need.

Objective 158.6 refers to "a system of development regulations" to implement economic goals, objectives, and policies, which strongly suggests that the assessment required by Policy 158.6.1 is directed to land development regulations and not to plan amendments. Petitioners did not show what criteria a "general economic assessment" must meet. The general assessment of local economic impact and compelling public need is inherent in the County's study of conflicting land uses in the DR/GR, and then the County's balancing of the conflicting uses by allocating sufficient mining lands to meet regional limerock demand through the planning period, but clustering and otherwise restricting future mining to protect, among other things, rare wildlife resources.

71. Petitioners contend that the Plan Amendments are inconsistent with Goal 10 which acknowledges that limerock is a natural resource and requires the County to protect natural resource areas from incompatible urban development. The Plan Amendments reflect the balance struck by the County between mining and other competing land uses in the DR/GR. Goal 10 and Goal 33 both indicate that the balance is to be achieved by designating sufficient mining lands to meet the regional demand through 2030. Because it is found that this objective is achieved through Map 14 and Table 1(b), the Plan Amendments are consistent with Goal 10.

72. Petitioners argue that Table 1(b) is internally inconsistent because the County uses BEBR medium population projections to allocate every land use in Table 1(b) except mining, which is expressly linked to Policy 33.1.4 and Appendix B of the Dover Kohl Report. As discussed in the Conclusions of Law, the County is not required to use BEBR population projections to allocate lands to meet regional needs.

Meaningful and Predictable Standards

73. Policy 33.1.1 states that "the spread of limerock mining impacts into less disturbed environments will be precluded until such time as there is a clear necessity to do so (and Map 14 is amended accordingly)."

74. The parties disputed whether a showing of clear necessity was also required to amend Table 1(b). The County's interpretation of the Plan Amendments as not requiring a showing of clear necessity to amend Table 1(b) is a reasonable interpretation.

75. The term "clear necessity" is not defined in the Plan Amendments and is not a planning term. However, both the words "clear" and "necessity" have common meanings and contextual meanings that are relatively straightforward.

76. The word "clear" has the common meaning of plain and free from ambiguity. See Webster's New Collegiate Dictionary, 205 (1979).

77. The meaning of the term "necessity" is plain from the context: a necessity to designate more mining lands because the existing amount is insufficient to meet the regional demand for limerock through the planning horizon.

78. Petitioners assert that substantial time is required for planning and permitting a new mine and that without a "pre-determination" of clear necessity, a mining company would be at risk of wasting substantial time and money. However, all businesses face uncertainty when they want to use land in a way that is impossible without a comprehensive plan amendment.

79. Petitioners also complain about the use of the terms "significant adverse impact," "adaptive resource management,"

and "corrective measures." The terms "significant adverse impact" and "corrective measures" are common regulatory terms. All three terms are used in the Plan Amendments in reference to future zoning and development orders. It is in such orders that the particular application of these terms would be detailed.

Adequate Choices

80. Section 163.3177(6)(a)4. states that the amount of land designated for future planned uses "should allow the operation of real estate markets to provide adequate choices for permanent and seasonal residents and businesses and may not be limited solely by the projected population." Petitioners contend that the Plan Amendments will not allow adequate choices related to the real estate market for mining lands.

81. Petitioners' evidence was insufficient to establish what the term "adequate choices" means for the real estate market related to limerock mining. The testimony that the Plan Amendments will cause there to be only one mining company by 2030 was speculative and not persuasive. Petitioners failed to prove that the Plan Amendments will prevent adequate choices.

Suitability

82. Petitioners argued that Lee County failed to consider the suitability of the mining lands it designated on Map 14 with regard to the character of the soils and natural resources. The

record shows that consideration of the suitability of the affected lands was a central part of the planning effort.

CONCLUSIONS OF LAW

Applicable Law

83. In general, the law in effect at the time final agency action is taken is the appropriate law to apply, absent vested or similar rights. See Bruner v. Bd. of Real Estate, 399 So. 2d 4 (Fla. 5th DCA 1981). If a new law becomes effective after preliminary agency action, but before final action, applying the new law to the final action is not a retroactive application of the new law. See Lavernia v. Dep't of Prof. Reg., 616 So. 2d 53 (Fla. 1st DCA 1993), rev. den., 624 So. 2d 267 (Fla. 1993).

84. Under chapter 163, a plan amendment cannot take effect until a final administrative order is issued. See § 163.3184(3)(c)(4), Fla. Stat. Therefore, this case is governed by the provisions of chapter 163, Florida Statutes, as revised by chapter 2011-139, Laws of Florida. See also § 163.3161(12), Fla. Stat. ("any new amendments must comply with the requirements of this part").

Standing

85. To have standing to challenge a comprehensive plan amendment, a person must be an "affected person," which is defined as a person owning property, residing, or owning or operating a business within the boundaries of the local

government, and who made timely comments to the local government regarding the amendment. See § 163.3184(1)(a), Fla. Stat.

86. Petitioners and Intervenor Batos have standing as "affected persons" under section 163.3184(1)(a), Florida Statutes.

87. In general, an association has standing to sue on behalf of its members when a substantial number of them would have standing to sue in their own right and the interests that the association seeks to protect are germane to its purposes. See Fla. Builders Ass'n v. Dep't of Labor and Emp't Sec., 412 So. 2d 351 (Fla. 1982).

88. Florida Wildlife Federation, Collier County Audubon Society, Conservancy of Southwest Florida, and Estero Council of Community Leaders, Inc., all have standing as affected persons because a substantial number of their members would have standing to sue in their own right and the interests that the associations seek to protect are germane to their purposes.

The Ultimate Issue

89. A person challenging a plan amendment must show that it is not "in compliance" as that term is defined in section 163.3184(1)(b):

"In compliance" means consistent with the requirements of ss. 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248, with the appropriate strategic regional policy plan, and with the principles for

guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable.

90. Among other reasons, Petitioners contend that the Plan Amendments are not in compliance because they are inconsistent with section 337.0261(3), which provides:

No local government shall approve or deny a proposed land use zoning change, comprehensive plan amendment, land use permit, ordinance, or order regarding construction aggregate materials without considering any information provided by the Department of Transportation regarding the effect of such change, amendment, permit decision, ordinance, or order would have on the availability, transportation, and potential extraction of construction aggregate materials on the local area, the region, and the state.

91. This contention must fail because section 337.0261(3) is not included in the list of statutes with which an amendment must be consistent. The Legislature chose not to make consistency with section 337.0261(3) a compliance criterion. Like the requirements in chapter 163 regarding public notice, which are also not listed in section 163.3184(1)(b), the remedy for a violation of section 337.0261(3) must be sought elsewhere.

92. Even if consistency with section 337.0261(3) were part of the compliance determination, Petitioners failed to prove that Lee County adopted the Plan Amendments without considering information provided to the County by the FDOT. It is noted

that no evidence indicated FDOT's opposition to the Plan Amendments.

93. Likewise, Petitioners' contention that the Plan Amendments are inconsistent with section 163.3161(10), regarding private property rights, must fail because that statute is not mentioned as a compliance criterion in section 163.3184(1)(b).

The Burden and Standard of Proof

94. As the challengers, Petitioners have the burden of proof. Lee County's determination that the Plan Amendments are "in compliance" is presumed to be correct and shall be sustained if Lee County's determination of compliance is fairly debatable. See § 163.3184(5)(c), Fla. Stat.

95. The term "fairly debatable" is not defined in chapter 163. The Florida Supreme Court held in Martin County v. Yusem, 690 So. 2d. 1288 (Fla. 1997) that "[t]he fairly debatable standard is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." Id. at 1295.

96. The standard of proof to establish a finding of fact is preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

Data and Analysis

97. Section 163.3177(1)(f) requires that all plan amendments be based on relevant and appropriate data and an analysis by the local government. The statute explains:

To be based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue.

98. The data which may be relied upon in this proceeding is not limited to the data identified or used by the local government. All data available to the local government and in existence at the time of adoption of the Plan Amendments may be presented. See Zemel v. Lee Cnty., 15 F.A.L.R. 2735 (Dep't of Cmty. Affairs Final Order, June 22, 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994).

99. Relevant analyses of data need not have been in existence at the time of adoption of a plan amendment. Data existing at the time of adoption may be analyzed through the time of the administrative hearing. Id.

100. Data supporting an amendment must be taken from professionally accepted sources. See § 163.3177(1)(f)2., Fla. Stat. However, local governments are not required to collect original data. Id.

101. The methodology used in data collection must be professionally acceptable, but the question of whether one professionally acceptable methodology is better than another cannot be evaluated. Id.

102. Petitioners argue that because the Rawl Report did not undergo peer review, it is not professionally acceptable. There is no evidentiary presumption that the statements contained in a technical report which has not undergone peer review are false, inaccurate, or otherwise unreliable. Many technical reports do not undergo peer review, but are regularly accepted into evidence. The issue is a matter of the weight to be given the report.

103. The record contains numerous reports whose authors did not appear as witnesses. When reports are introduced to defend against a claim that a plan amendment is not supported by data and analysis, the reports can be admitted, not for the truth of the matters asserted in the reports, but to show that the plan amendment is supported by data and analysis. For that purpose, the reports are not hearsay.

104. Hearsay statements may also be admitted to supplement or explain non-hearsay evidence or evidence which is exempt from the rule excluding hearsay. See § 120.57(1)(c), Fla. Stat.

105. Petitioners failed to prove that the Plan Amendments are not based on relevant and appropriate data and analysis.

Internal Consistency

106. The elements of a local comprehensive plan must be coordinated and consistent. See § 163.3177(2), Fla. Stat.

107. Petitioners failed to prove beyond fair debate that the Plan Amendments cause the Lee Plan to be internally inconsistent.

Meaningful and Predictable Standards

108. Comprehensive plans must provide "meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations." § 163.3177(1), Fla. Stat.

109. Both the words "clear" and "necessity" have common meanings and contextual meanings that are reasonably meaningful and predictable.

110. The standard of "clear and convincing" proof is regularly used in the law, where it is understood to mean evidence of such weight that it produces in the mind of the trier of fact a firm belief without hesitancy. See Evans Packing Co. v. Dep't of Agric. and Consumer Serv., 550 So. 2d 112, 116 (Fla. 1st DCA 1989). This standard of proof can be met when there is contrary evidence if the evidence supporting a fact is, itself, unambiguous. See Westinghouse Elec. Corp.,

Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

111. Whether the requirement to demonstrate a clear necessity is the best approach to accomplish the County's purposes is irrelevant in this compliance determination. Petitioners failed to prove that the Plan Amendments do not provide meaningful and predictable standards for the use and development of land.

Minimum Amount of Land

112. Section 163.3177(1)(f)3. requires comprehensive plans to be "based on permanent and seasonal population estimates and projections" and "based on at least the minimum amount of land required to accommodate the medium projections of the University of Florida's Bureau of Economic and Business research for at least a 10-year planning period."

113. Some of the parties argued that this section was not intended to require the use of BEBR population projections for mining or other industrial land uses. That argument does not need to be addressed because the more obvious point is that section 163.3177(1)(a)(f)3. does not require local governments to designate lands needed to serve regional needs based on regional population projections. The statute is addressing local needs based a projection of the local government's own population.

114. It is academic whether the Act should require local governments to designate sufficient lands to meet regional needs, in general, or to meet the regional need for mining lands, in particular. The Act does not require it. The Legislature has only gone so far as to require local governments to consider any input from the FDOT when adopting an amendment that affects limerock mining. See § 337.0261(3), Fla. Stat.

115. Petitioners complained about the "cap" on mining lands created by the Plan Amendments. Every future land use designation on a future land use map creates a cap on the land use because there cannot be an expansion of the use without a comprehensive plan amendment. The Act does not prohibit these kinds of caps. In fact, it requires them. See § 163.3177(6)(a), Fla. Stat. (future land use element must designate the "extent" of various land uses).

116. Petitioners failed to prove that the Plan Amendments do not accommodate BEBR medium population projections for at least a 10-year planning period.

Adequate Choices

117. Section 163.3177(6)(a)4. provides that the amount of land designated for future land uses "should" allow for the operation of real estate markets to provide "adequate choices" for business.

118. Petitioners failed to prove that the Plan Amendments do not designate a sufficient amount of land to allow for the operation of real estate markets to provide adequate choices for business.

Suitability for Proposed Use

119. Section 163.3177(6)(a)8., applicable to future land use map amendments, requires that such amendments be based on an analysis of the suitability of the plan amendment for its proposed use, considering soils, topography, and natural resources.

120. Petitioners failed to prove that the Plan Amendments are not based on an analysis of the suitability of the affected lands for their proposed uses.

SUMMARY

121. In summary, Petitioners failed to prove beyond fair debate that the Plan Amendments are not in compliance.

RECOMMENDATION

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

RECOMMENDED that the Department of Economic Opportunity enter a final order determining that the Plan Amendments adopted through Lee County Ordinance Nos. 10-19, 10-20 and 10-21, and as modified by Remedial Ordinance No. 10-43, are in compliance.

DONE AND ENTERED this 21st day of February, 2012, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of February, 2012.

ENDNOTES

1/ All references to the Florida Statutes are to those in effect in 2011.

2/ "Construction aggregate materials" is defined in section 337.0261(1), Florida Statutes, as "rushed stone, limestone, dolomite, limerock, shell rock, cemented coquina, sand for use as a component of mortars, concrete, bituminous mixtures, or underdrain filters, and other mined resources providing the basic material for concrete, asphalt, and road base."

3/ This and all other references to tons is in "short tons," rather than metric tons.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.