

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ECONOMIC
OPPORTUNITY,

Petitioner,

vs.

Case No. 15-0704

LAKE COUNTY AND RUBIN GROVES OF
CLERMONT, LLC,

Respondents.

RECOMMENDED ORDER

The final hearing in this case was held May 20 and 21, 2015, in Tavares, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUES

The issues to be determined in this case are whether a development order approved by Lake County is consistent with the Lake County Comprehensive Plan, the Lake County land development regulations, and the Principles for Guiding Development in the Green Swamp Area of Critical State Concern.

PRELIMINARY STATEMENT

On January 28, 2014, the Lake County Board of County Commissioners adopted Ordinance 2014-7, which approved a development order for property owned by Respondent Rubin Groves of Clermont, LLC ("Rubin Groves"). Petitioner Department of Economic Opportunity ("DEO") filed an appeal to the Florida Land and Water Adjudicatory Commission, which then referred the matter to DOAH to conduct an evidentiary hearing and issue a recommended order.

At the final hearing, DEO presented the testimony of Rebecca Jetton, Administrator for Areas of Critical State Concern at DEO; Rick Hartenstein, Senior Land Use Planner with Lake County; Dr. Jonathan Arthur, State Geologist and Director of the Florida Geological Survey, accepted as an expert in geology and

hydrogeology; Dr. Stuart Norton, Florida Geologic Survey Environmental Consultant, accepted as an expert in geology and hydrogeology; and Dr. Samuel Upchurch, Vice President and Senior Principle Geologist at SDII Global Corporation, accepted as an expert in geology and hydrogeology. DEO Exhibits 1 through 24 were admitted into evidence.

Rubin Groves presented the testimony of Sheldon Rubin, the owner of Rubin Groves; Kenneth Randall Wicks, accepted as an expert in civil engineering and site development and design; Nicholas Andreyev, accepted as an expert in groundwater modeling as it relates to stormwater, and groundwater engineering; William A. Ray, accepted as an expert in planning, environmental studies, and natural science; Fred Schneider, County Engineer; and Harvey Harper, accepted as an expert in stormwater and water quality. Rubin Groves' Exhibits 1 through 3 and 5 through 18 were admitted into evidence.

Lake County presented no witnesses and offered no exhibits.

The four-volume Transcript of the final hearing was filed with DOAH. The parties filed Proposed Recommended Orders which were considered by the Administrative Law Judge in preparing this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner DEO is the state land planning agency with the authority and responsibility to review development orders issued in Areas of Critical State Concern.

2. Respondent Lake County is a political subdivision of the State with jurisdiction over the affected property.

3. Respondent Rubin Groves is a Florida limited liability company doing business in Lake County. Rubin Groves is the owner of the approximate 131 acres in Lake County ("the Property") on which development was approved by the Ordinance.

Background

4. The Property is located within the Green Swamp Area of Critical State Concern and more particularly within the Lake Wales Ridge. The Property's future land use designation under the Lake County Comprehensive Plan is Green Swamp Ridge.

5. The topography of the Property is generally a hill, bounded by U.S Highway 27 to the east, a wetland to the west, and properties approved for mixed-use residential uses to the north.

6. Existing elevations are approximately 130 feet NGVD at the wetland on the western boundary of the Property, 140 feet NGVD on eastern boundary at U.S. 27, with the top of the hill in the center portion of the property at an elevation of about 180 feet NGVD.

7. In June 2010, Rubin Groves filed a pre-submittal application with Lake County that proposed a borrow pit (mining) operation for the Property. The County informed Rubin Groves that mining was prohibited in the Green Swamp Ridge and Rubin Groves took no further action on the pre-submittal application.

8. In February 2013, Lake County approved Rubin Groves' application to rezone the Property. Ordinance No. 2013-8 rezoned the Property from Agricultural to Planned Unit Development ("PUD"), allowing a mixed-use development of 490 single-family residential units and 24.54 acres of commercial uses.

9. Less than a year later, Rubin Groves applied to amend the PUD to allow "mass grading" of the Property to make it relatively level to accommodate a residential development for the elderly and disabled (mobility-impaired).

10. The Mass Grading Plan calls for removing 2.4 to 3.0 million cubic yards of sand from the Property. The average cut or change in elevation would be 11 to 12 feet. The deepest cut, near the center of the Property, would be about 30 feet.

11. The contractor that Rubin Groves would hire to extract and remove the sand from the Property would sell the sand and the income would be applied to offset the costs charged to Rubin Groves for the work.

12. The Lake County Community Design staff recommended denial of the application based upon the following: (1) the activities proposed in the Mass Grading Plan constitute mining; (2) mining is prohibited in the Green Swamp Ridge future land use category in the Lake County Comprehensive Plan ("Comp Plan"); (3) the Mass Grading would result in the property's elevation being lowered more than the 10-foot limit in the Lake County Code; (4) the applicant failed to demonstrate that the Mass Grading Plan was necessary to develop the site; and (5) the Mass Grading Plan did not comply with the Green Swamp Principles for Guiding Development, sections (1), (2) (7) and (10).

13. On January 28, 2014, the Board of County Commissioners of Lake County approved the rezoning application, including the Mass Grading Plan, through the adoption of Ordinance No. 2014-7.

Whether Sand Mining is Allowed in the Green Swamp Ridge

14. In the previous version of the Comp Plan, mining was expressly prohibited in the Green Swamp Ridge future land use category.

15. In the current Comp Plan, there are four future land use categories established within the Green Swamp: Green Swamp Ridge, Green Swamp Rural, Green Swamp Rural/Conservation, and Green Swamp Core/Conservation. For each category, the Comp Plan lists "Typical Uses" and "Typical Uses Requiring a Conditional Use Permit."

16. Mining is not listed as a typical use in any category, and it is not similar to any listed typical use.

17. In all categories except Green Swamp Ridge, sand mining is listed as a typical use requiring a conditional use permit.

18. The format of these Comp Plan provisions, together with the fact that sand mining was expressly prohibited in the previous version of the Comp Plan, plainly indicates that sand mining is not an allowed use in the Green Swamp Ridge future land use category.

Whether the Proposed Mass Grading is Mining

19. The Comp Plan defines "Mining Activities" as:

The mining of materials, ore or other naturally occurring materials from the earth by whatever method, including the removal of overburden for the purpose of extracting and removing from the site such underlying deposits and all associated clearing, grading, construction, processing, transportation and reclamation on the property, and includes the term pre-mining activities and lake creation but shall not be deemed to include activities associated with site surveying, environmental monitoring, mineral exploration or the sinking or operation of test wells and similar activities.

20. Section 6.06.01(F) of the Lake County Code creates eight exemptions to the requirement to obtain a mining conditional use permit and they are activities not commonly considered to be mining. For example, excavating and removing dirt to install a swimming pool does not require a mining

conditional use permit. Excavating and removing dirt to install a swimming pool is not commonly considered to be a mining activity.

21. The broad definition in the Comp Plan could allow for absurd applications, contrary to its ordinary meaning, if the term was interpreted to mean the removal of any amount of material from the ground for any purpose. The definition of "mining activities" must be read in conjunction with section 6.06.01(F) of the Lake County Code and the latter, along with common sense, provide guidance for what is mining.

22. It is not mining to excavate soil to install a swimming pool because mining is commonly understood to involve more than the excavation of a small amount of material in a small amount of time. Mining is commonly understood to be an ongoing business of extracting and selling a large volume of material.

23. One of the exemptions from the requirement to obtain a mining conditional use permit is excavation associated with construction activities:

Excavation in conjunction with bona fide commercial, industrial or Subdivision Construction provided a Construction approval or Building Permit has been obtained from the County and Excavation is completed and Construction initiated within a reasonable period of time from the date that Excavation is initiated. Said time period shall be determined by the County based upon the type of Construction and shall be indicated on the written exemption document. Excess Overburden

generated as a result of the bona fide Construction may be Removed offsite only as follows:

a. Excess overburden generated as a result of the bona fide Construction may be removed offsite so long as the County Manager or designee is provided written notice during Construction approval or Building Permit application process and so long as the total amount of material removed offsite is not greater than two hundred (200) percent of the minimum stormwater retention/detention volume required.

b. If the [200 percent limit] is exceeded or excavation is not storm water related, the County Manager or designee may give approval for removal of such excess Overburden if the applicant shows that removal of such excess Overburden is necessary for development of the Site due to physical factors of the Land or Permitting requirements from a governmental agency. In making this decision, the County Manager or designee shall consider the following factors:

- (1) Unique physical characteristics and topography of the Land involved;
- (2) Engineering and environmental factors requiring overburden removal;
- (3) Whether excavation and removal of Overburden is necessary for access to the property;
- (4) Permitting requirements of state, local and federal governmental agencies; or
- (5) Such other matters that may be deemed appropriate by the County Manager or designee.

24. Rubin Groves proposes to remove much more than 200 percent of the volume needed for stormwater retention/detention.

Rubin Grove says it intends to seek the approval of the County Manager for exemption from the requirement to obtain a mining conditional use permit. However, as noted above, Ordinance 2014-7 approves the Mass Grading Plan and, therefore, already authorizes Rubin Groves to exceed the 200 percent criterion.

25. Rubin Groves believes it qualifies for the exemption for excavation associated with construction because of its need to level the Property to make the subdivision suitable for mobility-impaired residents. However, that explanation falls short of demonstrating necessity because it does not explain why the Property could not be leveled by moving sand from higher areas of the Property to lower areas. Rubin Groves did not explain why so much sand has to be removed from the Property, but there is some evidence indicating the reason is to allow the residential development to be constructed upon the deeper soils that are denser and more stable.

26. The exemption for bona fide construction activities, like the other activities exempted in Section 6.06.01(F) is not intended to allow mining. The Mass Grading Plan is sand mining because it involves activities that are indistinguishable from the business of sand mining.

27. The estimated volume of sand to be removed, 2.4 to 3.0 million cubic yards, equates to 133,333 to 166,666 truckloads of sand.

28. One of Rubin Groves' experts stated that, if there was a road construction project which needed the sand, Rubin Groves might be able to extract and haul away the sand in nine or ten months. However, even at the lower figure of 133,333 truckloads, removal in 10 months would amount to about 444 truckloads per day with no days off; an ambitious pace. It is more reasonable to believe removal of the sand would take over a year to complete, perhaps much longer if there are no suitable road projects.

29. A year-long or longer operation of extracting and hauling away sand in 133,333 to 166,666 truckloads, and selling it for roadbuilding and other construction projects, is indistinguishable from the business of sand mining. It conforms with the common meaning of "mining."

30. Rubin Groves argues that it does not matter how much sand it wants to remove (even "a zillion" cubic yards) because Rubin Groves' purpose is not sand mining. According to that view, even if sand removal at the Rubin Groves site would (otherwise) amount to the largest sand mine in Florida, it could not be regulated as mining because Rubin Groves' purpose is to build a residential subdivision afterward. However, the Mass Grading Plan is indistinguishable from sand mining by a landowner who has no plans to develop a residential subdivision afterward.

31. The reason there are special regulations in the Comp Plan and Lake County Code (and elsewhere) for mining activities

is to address the impacts associated with mining. The regulations are not concerned with the land use ambitions of landowners or with the profitability of their enterprises. Rubin Groves' interpretation of the Lake County Code is inconsistent with the plain intent of the Comp Plan and Lake County Code because its interpretation would allow mining impacts, but not make them subject to the mining prohibitions and regulations that were adopted to address mining impacts.

32. Rubin Groves' argument about purpose is unpersuasive. Rubin Groves' purpose is to mine sand and then build a subdivision.

33. Rubin Groves' argument that the Mass Grading Plan would not be regulated as mining by the Department of Environmental Protection ("DEP") under Florida Administrative Code Rule 62C-39 is also unpersuasive. First, whether the Mass Grading Plan is subject to state regulation has not been determined by DEP. The term "extraction" is defined in rule 62C-39.002(7) to exclude excavation "solely" in aid of on-site construction, but that begs the question whether DEP would view the Mass Grading Plan as solely for on-site construction.

34. Second, rule 62C-39 contains state reclamation standards and implements chapter 378, Florida Statutes, entitled "Land Reclamation." Under DEP's reclamation regulatory program, there is no obvious state reclamation issue associated with sand

mining on lands approved for construction activities. That does not foreclose a local interest in regulating the land use impacts of mining activities.

The Exemption Procedure

35. Pursuant to section 6.06.01(F) of the Lake County Code, approval to remove overburden that exceeds 200 percent of the volume required for stormwater retention must be obtained from the County Manager. However, the County Manager did not approve Rubin Groves' Mass Grading Plan. It was approved by the Board of County Commissioners in Ordinance 2014-7.

36. Rubin Groves argues that it qualifies for an exemption under Section 6.06.01(F), but the Board of County Commissioners approved the Mass grading Plan without making any finding that the Mass Grading Plan was not mining or that it qualified for exemption from the requirement to obtain a mining conditional use permit.

37. Lake County's approval of the Mass Grading Plan is inconsistent with Section 6.06.01 of the Lake County Code.

Ten Percent Lot Grading Limitation

38. The Mass Grading Plan would change the elevation of the Property more than 10 feet.

39. Section 9.07.00 of the Lake County Code addresses lot grading and prohibits elevation changes that exceed 10 feet. The

parties disputed whether this section applies to the Property. DEO contends it applies; Rubin Groves disagrees.

40. Section 9.07.00 states that it applies to "development that is wholly within or partially within any flood hazard area." The Mass Grading Plan is not within a flood hazard area.

41. The Lake County Engineer testified that the County does not interpret Section 9.07.14 as applicable to subdivision grading, but only to the grading of individual residential lots.

42. The preponderance of the evidence shows Section 9.07.00 is not applicable to the Mass Grading Plan.

Principles for Guiding Development

43. The Green Swamp is one of the most significant sources for water recharge to the Floridan Aquifer. It is centered along the potentiometric high for the aquifer as well. The potentiometric high is the level to which water would rise in an open well and affects ground water flow because water flows from high-pressure areas to low-pressure areas.

44. The Principles for Guiding Development in the Green Swamp Area of Critical State Concern adopted by the Administration Commission are set forth in Florida Administrative Code Rule 28-26.003. The Principles have also been adopted into the Lake County Comp Plan.

45. Rule 28-26.003(1) sets forth the objectives to be achieved for the Green Swamp:

- (a) Minimize the adverse impacts of development on resources of the Floridan Aquifer, wetlands, and flood-detention areas.
- (b) Protect the normal quantity, quality and flow of ground water and surface water which are necessary for the protection of resources of state and regional concern.
- (c) Protect the water available for aquifer recharge.
- (d) Protect the functions of the Green Swamp Potentiometric High of the Floridan Aquifer.
- (e) Protect the normal supply of ground and surface water.
- (f) Prevent further salt-water intrusion into the Floridan Aquifer.
- (g) Protect or improve existing ground and surface-water quality.
- (h) Protect the water-retention capabilities of wetlands.
- (i) Protect the biological-filtering capabilities of wetlands.
- (j) Protect the natural flow regime of drainage basins.
- (k) Protect the design capacity of flood-detention areas and the water-management objectives of these areas through the maintenance of hydrologic characteristics of drainage basins.

46. DEO contends the Mass Grading Plan would violate the Principles for Guiding Development for the Green Swamp Area of Critical State Concern in rule 28-26.003(1) (a), (b), (c), (e), (g), (j), and (k).

47. DEO objects to so much of the vadose zone being removed from the Property. The vadose zone is the layer of material between the land surface and the top of the water table. The vadose zone acts as a filter to remove contaminants as water moves through it. It stores water, creating a buffer for water recharge into the aquifer below it and regulates the rate at which water recharges. It also affects evapotranspiration and runoff.

48. DEO contends the Mass Grading Plan would reduce storage capacity and filtration, cause "surges" of groundwater which would adversely affect the surrounding wetlands, reduce recharge and change the potentiometric high, adversely affect the water retention capabilities of wetlands, and alter the natural flow regime of drainage basins.

49. The evidence presented by DEO was insufficient to prove that the storage capacity of the Property would be reduced by the Mass Grading Plan. In a scenario where the water table is near the ground surface, removal of soil can substantially reduce water storage, but DEO's theory for loss of storage was not persuasively demonstrated in this situation where the vadose zone would still be about 24 feet deep after the Mass grading Plan.

50. DEO's evidence regarding the possibility of karst features on the Property was not compelling because it was not shown that the Mass Grading Plan would affect current water

movement associated with any karst features. The proper placement of stormwater facilities to avoid karst features is a matter for stormwater permitting.

51. The preponderance of the record evidence supports DEO's claim that the filtration capacity of the Property would be reduced by the Mass Grading Plan. However, DEO did not rebut Rubin Groves' evidence that nutrient loading to groundwater from the Property would decrease. DEO did not show that the reduction of filtration capacity would result in a measurable adverse impact to groundwater.

52. The evidence presented by DEO was insufficient to prove that the Mass Grading Plan would cause "pulse" flow to the nearby wetlands. The Mass Grading Plan does not involve soil removal within four or five hundred feet of the wetlands. In a scenario where the water table is near the ground surface, removal of soil can affect water storage and the slow release of water to wetlands, but DEO's theory for pulse flow was not persuasively demonstrated in this situation where the vadose zone would still be about 24 feet deep after the Mass Grading Plan.

53. The evidence presented by DEO was insufficient to prove that the Mass Grading Plan would reduce recharge to the Floridan Aquifer.

54. In summary, DEO did not prove that the Mass Grading Plan would have a measurable or more than de minimis adverse

impact on the Floridan Aquifer and associated water resources which the Principles for Guiding Development are intended to protect.

CONCLUSIONS OF LAW

55. Ordinance No. 2014-7 authorizes development as defined in section 380.04, Florida Statutes (2014), and is a "development order" as that term is defined in section 380.031(3).

56. DEO is authorized to appeal local government development orders located within Areas of Critical State Concern to the Florida Land and Water Adjudicatory Commission, pursuant to section 380.07.

57. Hearings under section 380.07 are de novo hearings. See Young v. Dep't of Cmty Aff., 625 So. 2d 831 (Fla. 1993).

58. DEO, as the challenger of Ordinance 2014-07, has the burden of proof.

59. The standard of proof to establish a finding of fact is preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2014).

60. Section 380.05(16) prohibits development within any Area of Critical State Concern except in accordance with "this chapter." Accordingly, development in the Green Swamp Area of Critical State Concern must be consistent with the Lake County Comprehensive Plan, the Lake County land development regulations,

and the Principles for Guiding Development for the Green Swamp Area of Critical State Concern.

61. Rubin Groves argues that DEO's objections to the Mass Grading Plan are premature because Rubin Groves has yet to seek an exemption from the County Manager pursuant to section 6.06.01(F). However, Ordinance 2014-7 expressly approves the Mass Grading Plan, so it is ripe for review in this proceeding.

62. The Mass Grading Plan would constitute mining activities as defined in the Comp Plan and consistent with the ordinary meaning of mining.

63. Sand mining is prohibited in the Green Swamp Ridge future land use category. Therefore, Ordinance 2014-7, by authorizing mining in the Green Swamp Ridge, is inconsistent with the Comp Plan.

64. The evidence presented in this case suggests that a blanket prohibition against sand mining in the Green Swamp Ridge may not be appropriate because sand mining will not always cause adverse impacts to the water resources of the Green Swamp Area of Critical State Concern. However, until the Comp Plan is amended, all sand mining is prohibited.

65. The procedure in section 6.06.01(F) of the Lake County Code for approving the removal of overburden in excess of the 200 percent criterion was not followed. The Board of County Commissioners approved the Mass Grading Plan without making

findings necessary for the exemption from the requirement to obtain a mining conditional use permit. Even under Rubin Groves' argument that the Mass Grading Plan is not mining, Ordinance 2014-7 is inconsistent with section 6.06.01(F).

66. All development orders issued within the Green Swamp Area of Critical State Concern must be consistent with each of the Principles for Guiding Development. DEO did not meet its burden to prove the Mass Grading Plan would have a measurable or more than de minimus adverse impact on the Floridan Aquifer and associated resources. The Mass Grading Plan was not shown to be inconsistent with the Principles for Guiding Development.

RECOMMENDATION

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

RECOMMENDED that the Florida Land and Water Adjudicatory Commission issue a final order determining that Ordinance 2014-7 is invalid because it is inconsistent with the Lake County Comprehensive Plan and land development regulations.

DONE AND ENTERED this 21st day of August, 2015, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
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Filed with the Clerk of the
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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.