

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CEMEX CONSTRUCTION MATERIALS  
FLORIDA, LLC, AND LAKE LOUISA,  
LLC,

Petitioners,

vs.

Case Nos. 15-4711GM  
15-5278GM  
16-0628GM

LAKE COUNTY,

Respondent,

and

SOUTH LAKE CROSSINGS I, LLC;  
SOUTH LAKE CROSSINGS II, LLC;  
SOUTH LAKE CROSSINGS III, LLC;  
CLONTS GROVES, INC.; CATHERINE  
E. ROSS GROVES, INC.; AND CRA-  
MAR GROVES, INC.,

Intervenors.

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RECOMMENDED ORDER

The final hearing in this case was held July 12 and 13,  
2016, 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 ISSUE

The issue to be determined in this case is whether the Wellness Way Area Plan Map and Text Amendment to the Lake County Comprehensive Plan ("Remedial Amendment") adopted through Lake County Ordinance No. 2016-1 is "in compliance," as defined in section 163.3184(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

In July 2015, Lake County amended its Comprehensive Plan to establish a Wellness Way Sector Plan. The amendment was submitted to the Department of Economic Opportunity ("DEO") for review. These Petitioners filed a petition for hearing to challenge the amendment and it was assigned DOAH Case No. 15-4711GM. In September 2015, DEO determined that the

amendment was not in compliance and filed a petition for hearing which was assigned DOAH Case No. 15-5278GM. Petitioners were granted leave to intervene in the case.

In December 2015, Lake County and DEO entered into a compliance agreement, which settled their disputes. The compliance agreement called for Lake County to adopt the Remedial Amendment which would establish the Wellness Way Urban Service Area. On January 5, 2016, the Remedial Amendment was adopted by Lake County by Ordinance No. 2016-1. Petitioners filed an amended petition in DOAH Case No. 15-4711GM to challenge the validity of the Remedial Amendment. On February 1, 2016, DEO issued a written determination that the Remedial Amendment was in compliance. On February 4, 2016, Petitioners filed a separate petition for hearing to challenge the Remedial Amendment, which was assigned DOAH Case No. 16-0628GM. The three cases were then consolidated for hearing.

At the final hearing, Joint Exhibits 1-16 were admitted into evidence. Petitioners presented the testimony of Charles Gauthier, accepted as an expert in comprehensive planning; Ryan Mahoney, the corporate representative of Cemex Construction Materials Florida LLC ("Cemex"); and Matthew McNulty, the corporate representative of Lake Louisa, LLC. Petitioners' Exhibits 1-18, 25, 32-33, 40, 43-45, 57, 59-66, and 68 were admitted into evidence.

Lake County presented the testimony of Robert Chandler; Cristopher Schmidt; Fabricio Ponce, accepted as an expert in transportation planning; and Jim Hall, accepted as an expert in comprehensive planning. Lake County's Exhibits 2, 5, 10-11, 21, 23, 28-29, and 31-32 were admitted into evidence.

Intervenors presented no witnesses. Intervenors' Exhibits 1-9, 13-15, 18, and 23 were admitted into evidence.

Petitioners' Exhibit 86 and Lake County's Exhibit 34 were placed in the record as proffers. They were not considered by the Administrative Law Judge.

The two-volume Transcript of the final hearing was filed and made a part of the record. The parties filed proposed recommended orders that were considered by the Administrative Law Judge in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### The Parties

1. Petitioner Cemex is a Florida limited liability company doing business in Lake County. Cemex made timely objections and comments to Lake County on the Remedial Amendment.

2. Petitioner Lake Louisa is a limited liability company that owns property in Lake County. Lake Louisa made timely objections and comments to Lake County on the Remedial Amendment.

3. Cemex leases 1,200 acres of land in Lake County from Lake Louisa. The leased property is located within the area affected by the Remedial Amendment.

4. Cemex proposes sand mining on the leased property and obtained all the required state permits. Prior to adoption of the Remedial Amendment, Cemex sought a conditional use permit from Lake County for its proposed sand mining.

5. Respondent Lake County is a political subdivision of the State of Florida and adopted the Lake County Comprehensive Plan, which it amends from time to time pursuant to section 163.3184, Florida Statutes.

6. Intervenors South Lake Crossings I, LLC; South Lake Crossings II, LLC; South Lake Crossings III, LLC; Clonts Groves, Inc.; Catherine Ross Groves, Inc.; and Cra-Mar Groves, Inc., (referred to collectively as "South Lake") own 2,500 acres in Lake County which are subject to the Remedial Amendment. Intervenors made timely comments to Lake County on the Remedial Amendment.<sup>1/</sup>

#### The Wellness Way Area

7. The Wellness Way Area comprises 15,471 acres in southeastern Lake County. It is bordered by U.S. Highway 27 to the west, the City of Clermont to the north, and Orange County to the east.

8. Currently, the Wellness Way Area is mostly designated as agricultural with some small areas of residential and industrial uses. However, there is only one active agricultural operation. The majority of properties within the Wellness Way Area are large tracts of unused land. Directly east of the Wellness Way Area, in Orange County, is the Horizon West Sector Plan which consists of 23,000 acres and is one of the fastest growing areas in the United States.

The Remedial Amendment

9. To address DEO's objections to the Lake County Wellness Way Sector Plan, the County adopted the Remedial Amendment which converted the Sector Plan into the Wellness Way Urban Service Area. Based on the terms of the settlement agreement, the ordinance adopting the Remedial Amendment, and Lake County's stipulation on the record, the Wellness Way Sector Plan no longer has force or effect.

10. The Remedial Amendment creates five future land use categories within the Wellness Way Area: Town Center and Wellness Way 1 through Wellness Way 4. Each future land use category allows a mix of uses, but with different density and intensity limits in each category. The highest density and intensity limits are in the Town Center category, located along U.S. Highway 27. The lowest limits are in the Wellness Way 4 category.

11. The Town Center and Wellness Way 1-3 categories have identical permitted and conditional land uses. Wellness Way 4 allows fewer types of land uses and no residential land use because the land is publicly owned and contains a large wastewater reclamation facility.

12. The new land use categories provides for a distribution of land uses by percentage of total land area within the category. In Town Center, the distribution is 25 percent non-residential, 45 percent residential, and 30 percent open space. In Wellness Way 1-3, the distribution is 10 percent non-residential, 60 percent residential, and 30 percent open space.

13. The allowable residential density for each category differs. The Town Center has a minimum density of 6.0 dwelling units per net buildable acre ("du/ac") and a maximum density of 25 du/ac. Net buildable acre is defined as gross acres minus wetlands, waterbodies, and open spaces. Wellness Way 1 has a minimum density of 3 du/ac and a maximum density of 20 du/ac. Wellness Way 2 has a minimum density of 2.5 du/ac and a maximum density of 15 du/ac. Wellness Way 3 has a minimum density of 2 du/ac and a maximum density of 10 du/ac. Wellness Way 4 has no density criteria because residential uses are not allowed.

14. The allowable intensity for non-residential uses in each category also differs. The Town Center has a minimum average Floor Area Ratio ("FAR") of 30 percent and a maximum

average FAR of 200 percent. Wellness Way 1 has a minimum average FAR of 25 percent and a maximum average FAR of 200 percent. Wellness Way 2 has a minimum average FAR of 20 percent and a maximum average FAR of 200 percent. Wellness Way 3 has a minimum average FAR of 15 percent and a maximum average FAR of 200 percent. Wellness Way 4 has no intensity criteria.

15. Implementation of the Remedial Amendment goals, objectives, and policies is to be accomplished through the review and approval of planned unit developments ("PUDs").

16. Despite the density allowances stated above, the total number of dwelling units that can be included in a PUD are further controlled by Policy I-8.2.1.1, which ties residential development to job creation. For each dwelling unit proposed in a PUD, a certain number of jobs must be created through the setting aside of areas for non-residential uses. The jobs-to-housing ratio assumes that one job is created for every 450 square feet of non-residential development.

17. Each land use category has a different jobs-to-housing ratio applicable to approved PUDs. In Town Center, the jobs-to-housing ratio is 2.0 to 1.0, meaning 900 square feet of non-residential development must accompany every proposed dwelling unit. In Wellness Way 1, the jobs-to-housing ratio is 1.75 to 1.0. In Wellness Way 2, the ratio is 1.50 to 1.0. In Wellness Way 3, the ratio is 1.35 to 1.0.



18. In the Remedial Amendment, the information and criteria for a PUD application are more detailed and extensive than under the Comprehensive Plan provisions for PUDs outside the Wellness Way Area. For example, a PUD application under the Remedial Amendment must include a report on the PUD's impact on transportation facilities and the need for additional transportation improvements, and a detailed plan for public facilities, such as potable water, sanitary sewer, and schools.

19. The Remedial Amendment requires each PUD to establish Wellness Way Corridors, which serve as buffers around the border to connect job hubs and neighborhoods through trails and other pedestrian facilities.

#### Meaningful and Predictable Standards

##### Sand Mining Approval

20. Petitioners contend the Remedial Amendment fails to provide meaningful and predictable standards governing sand mining within the Wellness Way Area.

21. Sand mining is listed as a conditional use in all land use categories. Comprehensive Plan Objective III-3.5 and its policies, which address sand mining, were not changed by the Remedial Amendment. They prohibit mining in environmentally sensitive areas which cannot be reclaimed, require mining within aquifer protection zones to be performed in a manner that would not negatively impact water quality, and require mining operators

to demonstrate a practical and environmentally sound reclamation plan.

22. Under the Remedial Amendment, an application for a conditional use in the Wellness Way Area must be combined with a PUD application and must comply with the detailed PUD criteria of new Policy I-8.7. By combining a conditional use application with a PUD application, Lake County can impose additional conditions designed to assure the conditional use will be compatible with the surrounding land uses.

23. The Remedial Amendment adds more criteria and greater detail than exists currently in the Comprehensive Plan for reviewing a proposal for sand mining. Adding these review criteria is not a failure to provide meaningful and predictable standards.

#### PUD Densities and Intensities

24. Petitioners contend that the densities and intensities within the Wellness Way Area cannot be reasonably predicted because Policy I-8.2.1.2 permits the density and intensity of developments to exceed or fall below the required maximum and minimum densities and intensities of use so long as a PUD as a whole fits within the limits. Petitioners' evidence on this point was not persuasive. Applying density and intensity limits to the entire area of a PUD is not unreasonable and does not fail to provide meaningful and predictable standards.

### Location of Future Land Uses

25. A more persuasive argument made by Petitioners is that the land use planning flexibility in the Remedial Amendment goes too far because the location of particular land uses will not be known until PUDs are approved. Lake County's arguments in this regard do not overcome the fact that, under the Remedial Amendment, the determination where land uses will be located in the Wellness Way Area is deferred to the PUD process. The Remedial Amendment itself does not establish the location of future land uses in the Wellness Way Area. A landowner or citizen cannot predict where future land uses will be located in the Wellness Way Area.

26. Lake County did not present evidence to show that any other local government comprehensive plan in Florida uses a similar planning approach. There appears to be no other comprehensive plan amendment that was the subject of a DOAH proceeding which left the location of future land uses unspecified in this way.

### Potential PUDs

27. Petitioners contend that the Remedial Amendment fails to provide meaningful and predictable standards because applications for development approvals in the Wellness Way Area are reviewed on a case-by-case basis for their effect on approved and "potential PUDs." Policy I-8.7.1 provides:

Until and unless a PUD is approved by the Lake County Board of County Commissioners, the property in the WWUSA area shall maintain the existing zoning (e.g. A, R-1, CFD, PUD). All applications for development approvals (i.e. lot splits, conditional use permits, variances, etc.) on any property within the WWUSA area shall be reviewed on a case-by-case basis for the effect of such development approval on adopted or potential PUDs and compliance with the general principles of the Urban Service Area.

28. The Remedial Amendment's requirement that development approvals account for potential PUDs makes it impossible to predict how Lake County will make a land use decision because it is impossible to know or account for an unapproved, potential PUD. This standard lacks meaning and predictability for guiding land development.

#### Case-by-Case Approvals

29. Petitioners assert that Policy I-8.7.1 also creates internal inconsistency because it requires all development to be approved through the PUD process, but then appears to also provide for non-PUD development approvals on a case-by-case basis. The testimony presented by Lake County seemed to support Petitioners' claims. Exceptions can be stated in a comprehensive plan without constituting an internal inconsistency. However, the ambiguity of Policy I-8.7.1 causes it to lack meaning and predictability for guiding land development.

## Urban Form Guiding Principles

30. Policy I-8.2.2 of the Remedial Amendment sets forth guiding principles for development derived from the goals, objectives, and policies for the Wellness Way Area and establishes principles to guide development. Petitioners argue that the principles are not meaningful and predictable standards for the use and development of land because they were described by a Lake County witness at the final hearing as "aspirational."

31. The policy itself states that, "These guiding principles shall be specifically demonstrated in the PUDs." The plain meaning of this statement is that application of the principles is mandatory. A witness' testimony cannot alter the plain meaning of a policy for purposes of an "in compliance" determination.

## Data and Analysis

### Planning Timeframes

32. Petitioners contend that the Remedial Amendment is not supported by appropriate data and an analysis because they address only infrastructure needs at the time of the Wellness Way Area's buildout in 2040; no intermediate timeframes were used. Although section 163.3177(5)(a) requires comprehensive plans to "include at least two planning periods, one covering at least the first 5-year period occurring after the plan's adoption and one covering at least a 10-year period," the statute is less clear on

the requirements applicable to a comprehensive plan amendment. Petitioners' evidence and argument on this claim was insufficient to meet their burden of proof.

#### Potable Water Supply

33. Petitioners claim the Remedial Amendment is not supported by appropriate data and an analysis to show that the demand for potable water will be met at buildout. Petitioners' evidence was insufficient to prove this claim.

#### Internal Consistency

##### Goal I-8

34. Petitioners argue that Goal I-8 of the Remedial Amendment contains an impermissible waiver of any Comprehensive Plan goals, objectives, or policies that conflict with the Remedial Amendment. Goal I-8 provides:

The following Objectives and Policies shall govern the WWUSA as depicted on the Future Land Use Map. In the event that these Goals, Objectives or Policies present either an express (direct) or implied (indirect) conflict with the Goals, Objectives and Policies that appear elsewhere in the comprehensive plan, the provision elsewhere in the comprehensive plan that is in direct or indirect conflict with a Wellness Way Goal, Objective or Policy shall not apply to the WWUSA area. All Goals, Objectives and Policies in the Lake County Comprehensive Plan that do not directly or indirectly conflict with this Goal and associated Objectives and Policies shall apply to the WWUSA area depicted in the Future Land Use Map.

35. Goal I-8 gives no hint as to the nature or the number of potential direct or indirect conflicts that could arise. As explained in the Conclusions of Law, the goal creates an unlawful waiver of unidentified inconsistencies.

Urban Service Area

36. The Wellness Way Area is intended to be an urban service area. "Urban service area" is defined in section 163.3164(50):

"Urban Service Area" means areas identified in the comprehensive plan where public facilities and services, including, but not limited to, central water and sewer capacity and roads, are already in place or are identified in the capital improvements element. The term includes any areas identified in the comprehensive plan as urban services areas, regardless of local government limitations."

37. Petitioners contend the Capital Improvements Element of the Comprehensive Plan is inconsistent with the Remedial Amendment because Lake County did not amend the Capital Improvements Element to address public facilities and services in the Wellness Way Area. Lake County responds that it does not own or operate the utility companies that would provide the services, but who owns and operates the utilities has no effect on the statutory requirement to do public utility planning.

38. Lake County argues that it was sufficient for the County to simply identify the utility providers. Section

163.3164(50) requires more. It requires the identification of public facilities and services. Furthermore, section 163.3177(3)(a) requires a capital improvement element "to consider the need for and location of public facilities."

39. The Remedial Amendment creates an internal inconsistency in the Comprehensive Plan by providing for greater growth and a new urban service area in the Wellness Way Area without amending the Capital Improvements Element to address the greater growth or the urban service area.

40. The Capital Improvements Element should have been amended to include some of the data and analysis that was used to support the Remedial Amendment.

#### CONCLUSIONS OF LAW

##### Standing

41. To have standing to challenge a comprehensive plan amendment, a person must be an "affected person," which is defined in section 163.3184(1)(a) 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.

42. In this case, the parties stipulated that Petitioners and Intervenors are affected persons.

43. A party must be adversely affected by final agency action in order to appeal the decision. § 120.68, Fla. Stat.



Petitioners proved that the Remedial Amendment would likely impede their sand mining operations by creating an unpredictable and arbitrary approval process. Petitioners are adversely affected by the Remedial Amendment.

Burden and Standard of Proof

44. As the challengers of the Remedial Amendment, Petitioners have the ultimate burden of persuasion. A person challenging a comprehensive 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.

45. Lake County's determination that the Remedial Amendment is "in compliance" is presumed correct and must be sustained if the Town's determination of compliance is fairly debatable. See § 163.3184(5)(c), Fla. Stat.

46. The term "fairly debatable" is not defined in chapter 163, but the Florida Supreme Court held in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997) that "[t]he fairly debatable standard is highly deferential standard requiring approval of a

planning action if reasonable persons could differ as to its propriety.” Id. at 1295.

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

Meaningful and Predictable Standards

48. Section 163.3177(1) requires a comprehensive plan to include 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.

49. It is a requirement of all comprehensive plans that they show the location of future land uses. See § 163.3177(6)(a), Fla. Stat. The Remedial Amendment’s failure to show the location of future land uses is a violation of section 163.3177(6)(a).

50. Because identifying the location of future land uses is probably the most fundamental standard in a comprehensive plan for guiding land development, the failure to identify the location of future land uses is a failure to provide meaningful and predictable standards as required by section 163.3177(1). By allowing the location of land uses to be determined outside of the comprehensive planning process and, instead, in the land development regulation process (via PUD approvals), the Remedial Amendment fails to provide meaningful guidance for land development.

51. Policy I-8.7.1 lacks meaning and predictability to guide development because it requires that development proposals account for "potential" PUDs, and makes unclear when PUDs are required and when they are not.

Data and Analysis

52. Section 163.3177(1)(f) requires that all plan amendments be based on relevant and appropriate data and an analysis by the local government. Petitioners failed to prove the Remedial Amendment is not based on appropriate data and an analysis.

Internal Consistency

53. The elements of a comprehensive plan must be consistent. § 163.3177(2), Fla. Stat.

54. A comprehensive plan may state that certain provisions will control over other provisions in the event of a conflict, but such statements must be sufficiently focused so there can be a reasonable understanding of where the conflicts could arise. For example, if a policy establishing a maximum residential density in the coastal zone is made controlling in the review of a proposed future land use map amendment over conflicting policies in a comprehensive plan, it would be understood to mean that the density limit is controlling over policies associated with higher densities such as policies that encourage infill or affordable housing. Goal I-8 gives no hint as to the nature or

the number of potential direct or indirect conflicts that exist or could arise. By excusing all internal inconsistencies that exist or might arise, Goal I-8 renders the statutory requirement for internal consistency meaningless.

Summary

55. Petitioners proved beyond fair debate that the Remedial Amendment is not in compliance.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Administration Commission issue a final order determining that the Remedial Amendment adopted by Lake County Ordinance No. 2016-1 is not in compliance.

DONE AND ENTERED this 21st day of November, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of November, 2016.

ENDNOTE

<sup>1/</sup> The finding regarding the participation of Intervenors in the adoption of the Remedial Amendment is assumed from the parties' stipulation that Intervenors are affected persons.

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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.