

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HEINRICH BRACKER,

Petitioner,

vs.

Case No. 18-3597GM

CEMEX CONSTRUCTION MATERIALS  
FLORIDA, LLC; AND HERNANDO  
COUNTY, FLORIDA,

Respondents.

\_\_\_\_\_ /

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case in Brooksville, Florida, on October 30 through November 1, 2018, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jane West, Esquire  
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For Respondent Hernando County, Florida:

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STATEMENT OF THE ISSUE

Whether Hernando County Comprehensive Plan Amendment CPAM 1702, adopted by Ordinance No. 2018-12 on June 12, 2018, is "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2017).<sup>1/</sup>

PRELIMINARY STATEMENT

On June 12, 2018, Hernando County adopted CPAM 1702 (the "Plan Amendment"), which changes the future land use designation of approximately 730 acres within Hernando County (the "Plan Amendment Area"). The Plan Amendment changes the designation of approximately 572 acres from Residential to Mining, and another approximately 156 acres from Residential and Regional Commercial Overlay to Commercial.

On July 12, 2018, Petitioner filed a Petition with the Division of Administrative Hearings challenging the Plan

Amendment pursuant to section 163.3184.<sup>2/</sup> Petitioner alleges that the Plan Amendment renders the Plan internally inconsistent, contrary to 163.3177(2); fails to react appropriately to available data to the extent necessary, as required by section 163.3177(1)(f); and fails to establish meaningful and predictable standards for the use and development of land, and provide meaningful guidelines for the content of more detailed land development regulations, as required by 163.3177(1).

The case was originally assigned to Administrative Law Judge Francine M. Ffolkes, and scheduled for final hearing September 18 through 21, 2018. The parties jointly filed a Motion for Continuance on September 13, 2018, which was granted, with a status report required by September 17, 2018. Following consideration of the status report, Judge Ffolkes rescheduled the final hearing for October 30 through November 2, 2018.

The case was transferred to the undersigned on September 26, 2018. The docket reflects a number of motions, which were granted, in part, and narrowed the issues in dispute. The parties filed a pre-hearing stipulation on October 26, 2018, and the hearing commenced as re-scheduled in Brooksville on October 30, 2018.

At the final hearing, the parties' Joint Exhibits J1 through J9 were admitted in evidence.

Petitioner testified on his own behalf and presented the testimony of Sean McGlynn, accepted as an expert in water quality, springsheds, and the hydrological components of springs; Dennis Clark, accepted as an expert in drilling and blasting, blasting seismology, and mining planning and practices; Dr. Thomas St. Clair, accepted as an expert in the fields of adaptive management and large scale ecosystem restoration; Jim Studiale, accepted as an expert in land use and comprehensive planning; Diane Oriza; and Alyce Walker. Petitioner introduced Exhibits P2(a) and (e) through (h), P5(a) and (c), P12, P18 through P20, P22, P24, P25, P28, P30 through P33, and P35, which were admitted in evidence.

Respondent, Hernando County ("Respondent" or "County"), presented the testimony of Ronald Pianta, Respondent's Planning and Zoning Director, who was accepted as an expert in land use and comprehensive planning.

Respondent, Cemex Construction Materials Florida, LLC ("Cemex"), presented the testimony of Charles Gauthier, accepted as an expert in land use and comprehensive planning; Mark Stephens, accepted as an expert in civil engineering; geology; hydrogeology; hydrology; mine planning, design, and permitting; and groundwater assessment monitoring; Lee Walton, accepted as an expert in wildlife ecology, wetlands, and gopher tortoises; Jeffrey Straw, accepted as an expert in drilling, blasting

seismology, vibration monitoring, and the effect of blasting on structures; Dr. Hank Fishkind, accepted as an expert in economics and economic impacts; and James Morris. Respondents jointly introduced Exhibits R1, R8, R10 through R13, R14(a) through (c), R19, R21, R22, R24 through R29, R32 through R37, R39, R40, R49 through R51, R53 through R60, R62, R63, R66, R74, R75, R87, R90, R97, R98, and R100 through R109, which were admitted in evidence.

A six-volume Transcript of the final hearing was filed with the Division on January 28, 2019. On January 31, 2019, the undersigned granted, in part, Petitioner's Motion for Extension of Time to Submit Proposed Recommended Orders, ordering the parties to submit proposed recommended orders on or before March 1, 2019.<sup>3/</sup> In response to Respondents' Joint Motion for a Brief Extension of Time, filed March 1, 2019, the undersigned again extended the deadline for filing proposed recommended orders to March 11, 2019. The parties each timely filed Proposed Recommended Orders, which have been carefully considered by the undersigned in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### The Parties and Standing

1. Petitioner, Heinrich Bracker ("Petitioner"), owns property and resides in Hernando County. His property is

adjacent to the Plan Amendment Area. Petitioner submitted oral or written comments regarding the Plan Amendment during the transmittal hearing.

2. The County is a political subdivision of the State of Florida with the duty and responsibility to adopt and amend a comprehensive growth management plan pursuant to section 163.3167, Florida Statutes.

3. Cemex owns property and operates a business within the County, and seeks to develop the Plan Amendment Area for limerock mining. Cemex provided oral or written comments to the County during both the transmittal and adoption hearings on the Plan Amendment.

#### Existing Conditions

4. The Plan Amendment Area is 730 undeveloped acres currently designated for future Residential use, a portion of which is also subject to a Regional Commercial Overlay district.

5. The Plan Amendment Area contains deposits of hard limestone, a material which is utilized in the construction of roads, as well as other uses requiring high-quality limestone.

6. The Plan Amendment Area is bounded on the north by County Road 484/Fort Dade Avenue, portions of which are a canopy road. The property north of Fort Dade Avenue is designated Mining, and is the site of Cemex's existing Brooksville South limestone mining operation (the "Brooksville Quarry").

7. Traveling west, Fort Dade Avenue turns south, roughly forming the western boundary of the Plan Amendment Area. The majority of the property west of the Plan Amendment Area is designated Residential, although the northwestern most area is designated Rural and a small section at the southwest corner is designated Commercial.

8. The Spring Hill African American Cemetery ("the Cemetery") is located at the western corner of the Plan Amendment Area boundary, south of Fort Dade Avenue.

9. Traveling south, Fort Dade Avenue intersects with State Road 50, a four-lane divided highway known as Cortez Boulevard, which forms the southern boundary of the Plan Amendment Area. The property southwest of Cortez Boulevard is designated Commercial and is developed with a mix of commercial and industrial uses. The property to the southeast is designated Rural and is largely undeveloped, with the exception of the Bayfront Health Brooksville Hospital ("the Hospital").

10. The Hospital is located across Cortez Boulevard from the Plan Amendment Area. The site is a designated Planned Development and is developed with the Hospital and appurtenant medical and commercial uses.

11. The eastern boundary of the northern half of the Plan Amendment Area is Eureka Drive, a local street providing access to several residences east of the Plan Amendment Area, including

Petitioner's residence. There is no physical boundary on the southeast portion of the Plan Amendment Area. All of the property east of the Plan Amendment Area is designated Residential, with the exception of the northeast corner, which is Rural. This area is primarily developed with low density rural residential uses. Many of the residences are accessed from Ft. Dade Avenue.

12. In summary, the Plan Amendment Area is bordered by primarily Residential to the east and west, predominately Rural to the south, and Mining to the north.

The Plan Amendment

13. The Plan Amendment changes the future land use designation of 573.47± acres of the Plan Amendment Area from Residential to Mining ("the Mining Area"), and the remaining 156.53± acres from Residential, with a Regional Commercial Overlay, to Commercial ("the Commercial Area").

14. The Plan Amendment adds the following text to the County Comprehensive Plan, Section D:

SECTION D:

FUTURE LAND USE MAPPING CRITERIA & LAND USES  
ALLOWED

MINING

CPAM-17-02 shall meet the following stricter standards:



Criteria 1: Blasting techniques shall incorporate the best available techniques and methods to minimize adverse impacts to natural and manmade features. The blasting techniques shall be designed and implemented to minimize impacts to adjoining land uses.

Criteria 2: A "Good Neighbor Policy" is required prior to rezoning the property for mining to address any potential damage that may occur as a result of mining activities.

Criteria 3: The applicant will provide right-of-way to the County in a manner required by the County Engineer for a California Street to Citrus Way future transportation corridor in accordance with the Functionally Classified Roadways Map for Hernando County and the MPO Long Range Transportation Map.

Criteria 4: When mining ceases on the property, the applicant shall provide for the portion of the identified future transportation corridor from Fort Dade Avenue to SR 50 along the eastern portion of the property as part of the mining reclamation requirements in a manner required by the County Engineer.

Criteria 5: There shall be a minimum 200-foot setback and buffer from the mining property line in mining area adjacent to the historic cemetery in the northwest corner of the parcel.

Criteria 6: There shall be a minimum 400-foot setback and buffer from the property line to the nearest mining area adjacent to the SR 50 right-of-way. The existing treed area along SR 50 within this setback shall be preserved as an undisturbed visual buffer.

Criteria 7: Protection of the Fort Dade Tree Canopy. The following steps will be taken to protect the Fort Dade tree canopy:

- a. A minimum 200-foot setback and buffer shall be provided along Fort Dade Avenue between the tree canopy and mining activities;
- b. An enclosed overhead conveyor to move materials from the [Brooksville Quarry] to the existing facilities shall be required[;]
- c. The enclosed overhead conveyor shall be constructed to a height and location that will minimize or prevent damage to the tree canopy;

Criteria 8: To compensate for the loss of viable wildlife habitat, Cemex shall be required to mitigate through the provision of a conservation easement over other property that provides a viable wildlife habitat adjacent to the Florida Ecological Greenways Network. The type and amount of habitat necessary to mitigate impacts shall be identified by the comprehensive wildlife survey. The final mitigation location and acreage shall be determined prior to rezoning the property for mining.

Criteria 9: The mining reclamation plan shall be designed in a manner that allows for the long-term end use and redevelopment of the property as a viable mixed-use community.

### The Mining Process

15. During the mining of limestone, the soil above the limestone, or "overburden," is removed by bulldozers and other heavy equipment in phases as mining progresses. This overburden is stockpiled and set aside for future reclamation use.

16. The limestone is fractured using techniques such as blasting and mass excavator machinery. The excavated limestone

is loaded onto haul trucks within the quarry, which transport the material to a primary crusher that reduces the size of the material.

17. In the instant case, the primary crusher will be located and utilized in the Mining Area. The crushed material will then be placed on a conveyer that will transport it across Fort Dade Avenue for further processing at the Brooksville Quarry.

18. Blasting during the mining process generates three potential off-site impacts: ground vibration, air overpressure, and flyrock. Ground vibrations are the result of energy from a blast that manifests as vibrations transmitted through the earth away from the immediate blast site. The state has established ground vibration limits in Florida Administrative Code Chapter 69A-2.

19. Air overpressure is the airborne shockwave or acoustic transient generated by an explosion. Air overpressure is measured in decibels, and Florida's standard is a maximum of 133 decibels.

20. Flyrock is the term describing pieces of limerock that are thrown into the atmosphere during a blast. Flyrock may exceed the boundaries of a mining site and land on adjacent or neighboring property. The occurrence of flyrock can be minimized by maintaining good mining practices.

## The Reclamation Process

21. After mining is complete, the Mining Area will be reclaimed. The Plan Amendment requires the mining reclamation plan to be designed in a manner that allows for the long-term end use and redevelopment of the property as a viable mixed-use community.

22. The reclamation process entails the replacement of the overburden soils on the bottom of the quarry floor to a thickness of about eight feet, creating a finished grade approximately 16 feet above the historic high ground water level. Utility lines and other infrastructure to support redevelopment of the Mining Area may be installed in this area. The rest of the overburden soil will be used for sloping on some of the quarry walls.

23. In addition to the requirements of the Plan Amendment, the reclamation process must meet the requirements of the State Department of Environmental Protection and the County Comprehensive Plan and Land Development Regulations ("LDRs").

## Petitioner's Challenges

24. Petitioner alleges the Plan Amendment is not "in compliance" because it (1) creates internal inconsistencies with the existing comprehensive plan; (2) is not supported by data and analysis; and (3) fails to create meaningful and predictable standards for the use and development of land.

## Internal Consistency

25. Section 163.3177(2) directs that "the several elements of the comprehensive plan shall be consistent," in furtherance of the major objective of the planning process to coordinate the elements of the local comprehensive plan.

26. Petitioners challenge the Plan Amendment as inconsistent with the following goals, objectives, and policies of the existing comprehensive plan.

### FLU Objective 1.01H

27. First, Petitioner challenges the Plan Amendment as inconsistent with Future Land Use ("FLU") Objective 1.01H, which reads as follows: "Protect established residential areas and provide for redevelopment of historically platted lands."

(emphasis added). Petitioner argues that the Plan Amendment fails to protect his and surrounding residences in close proximity to the Mining Area, as well as the adjacent Residentially-designated properties, from the adverse effects of limerock mining.

28. The comprehensive plan recognizes the inherent inconsistency between residential and mining uses. The Mapping Criteria for the Mining land use category describes its purpose as "[t]o allow for the extraction of mineral resources where the impact on major residential areas will be minimal."

29. The term "established residential area" is not defined in the comprehensive plan. The relevant dictionary definition of "establish" reads:<sup>4/</sup>

**3a:** to make firm or stable

**b:** to introduce and cause to grow and multiply  
*//establish* grass on pasturelands

**4a:** to bring into existence: FOUND  
*//established* a republic

**b:** BRING ABOUT, EFFECT  
*// established* friendly relations

**5a:** to put on a firm basis: SET UP  
*//establish* his son in business

**b:** to put into a favorable position

**c:** to gain full recognition or acceptance of the role  
*//established* her as a star

30. There are nine lots along Eureka Drive, which adjoins the Plan Amendment area to the northeast. Eight of the nine lots are developed as residential, some with appurtenant structures. Some of the residences are mobile homes while others are site built. Two of the residences are new construction, including Petitioner's residence. The area is developed as low density, rural residential.

31. There are no non-residential uses in the area.

32. Residential use has been brought into effect in the area and, as evidenced by the new construction, is continuing to grow.

33. The residential area to the northeast of the Plan Amendment area is an established, although not major, residential area.

34. In analyzing whether the Plan Amendment creates an internal inconsistency with Objective 1.01(H), the focus is on whether the established residential area is "protected" from the adverse effects of the proposed mining use.

35. Comprehensive Plan Objective 1.01(S) and its implementing policies require the County to establish buffers in its LDRs as a part of the development review and approval process.

36. The County has adopted LDRs which govern the height, opacity, and width of buffers required between differing land uses. The mining activity authorized pursuant to the Plan Amendment will be subject to the LDRs during the permit approval process.

37. In addition to the direction to adopt LDRs addressing buffers, the Comprehensive Plan directly addresses required buffers between mining uses and contiguous properties. The Comprehensive Plan requires a minimum 100-foot setback with a

visual buffer from the property line of the Plan Amendment Area to any construction or mining activity on the property.

38. Cemex's planning expert testified that this setback was sufficient to protect the adjoining residential uses from the impacts of the mining activity. Petitioner's planning expert opined that the setback ought to be a minimum of 1000 feet, based upon his familiarity with the requirements of Polk County and research into setbacks in other counties. He introduced no support for his opinion other than that these are the standards required in other jurisdictions.

39. Petitioner's expert prepared and introduced an exhibit overlaying two different setback distances, 300 feet and 1000 feet, on an aerial photograph of the residential area northeast of the Plan Amendment Area. The exhibit shows those distances from the property line of the Plan Amendment area into the adjoining properties. The relevance was unclear, since setbacks and buffers are required to be established on the property proposing the new land use, not vice versa. Petitioner's expert witness testimony was not persuasive.

40. The fact that the comprehensive plan includes a mandatory 100-foot setback, which applies to this development scenario, is the best evidence of "protection" afforded by the comprehensive plan. The setback may be increased during the



permitting phase when the plans go through review under the LDRs.

41. Petitioner did not prove that the Plan Amendment is inconsistent with FLU Objective 1.01H.

FLU Objective 1.07F

42. Petitioner next challenges the Plan Amendment as internally inconsistent with FLU Objective 1.07F and Policy 1.07F(7), which read as follows:

Create a self-contained medical campus incorporating the use of the Brooksville Regional Medical Center and surrounding lands by providing for hospital and health care-related uses.

\* \* \*

(7) The Brooksville Regional Medical Center Planned Development District and its health care-related activities shall be protected from encroachment by incompatible land uses. An infrastructure analysis shall be used to demonstrate that adequate public facilities will be provided, prior to the issuance of any development order. (emphasis added).

43. Petitioner's expert, James Studiale, testified that he believes the Plan Amendment is inconsistent with Policy 1.07F(7) because the Mining Area will encroach upon the Brooksville Regional Medical Center Planned Development District (the "District"). Studiale stated that he believes that encroachment occurs when one use is "hurting" another use because it is so near.

44. Petitioner introduced the testimony of Dennis Clark, who was accepted as an expert in drilling and blasting, blasting seismology, and mining planning and practices. Mr. Clark testified that mining uses impact surrounding uses by both ground vibration and air overpressure, as well as potential for fly rock. He expressed opinions that the hospital and its occupants will be impacted to varying degrees "depending on the blast and the density of the rock and the compositions."

45. Mr. Clark agreed that, in order to understand the potential impacts of a mining operation with respect to the hospital, he would need to know the number of blast holes in a particular blast, the loading parameters for the blast holes, the amount of stemming on top of the explosives in the blast holes, the locations of the blast holes, the orientation of the blast holes, the type of detonators used, the sequence and timing of the blasts, as well as the physical condition of the hospital.

46. Mr. Clark agreed that blasting in close proximity to structures can be done safely, and admitted that he has personally blasted safely within three feet of a hospital wall.

47. Petitioner argues that the potential impacts of mining, including ground vibration, air overpressure, and flyrock, will encroach upon, and negatively impact, or "hurt,"

the district and its healthcare-related activities, in violation of Objective 1.7 and Policy 1.7(F).

48. Petitioner's argument was not persuasive. Policy 1.07F(7) does not bear on external impacts to the District. As Respondents' planning expert, Charles Gauthier, explained, the District is a customized future land use designation with "inward looking" policies. The language of Policy 1.07F(7) calls for protection against encroachment of incompatible uses within the District, and Objective 1.07F works in concert with Policy 1.07F(1) to prohibit retail commercial or general office development as a primary use.

49. As noted by both Mr. Gauthier and County Planning and Zoning Director, Ronald Pianta, the intent of Policy 1.07F is to prevent infiltration of nonmedical-related uses that would consume land within the District. The second sentence in Policy 1.07F(7) supports this interpretation because the sentence calls for an infrastructure analysis to demonstrate adequate public facilities prior to issuance of any development order. Mr. Gauthier explained that it would be illogical to view the adequate public facilities requirement as extending beyond the District. Even Petitioner's planning expert, Mr. Studiale, agreed that the purpose of the District is to protect the area around the Hospital for medical-related uses.

50. Assuming, arguendo, that Objective 1.07F and Policy 1.07F(7) were interpreted to regulate uses outside of the District, Petitioner did not establish that the Plan Amendment would "hurt" the District or its activities. Mr. Clark's testimony regarding off-site impacts was speculative and dependent upon many factors within the exclusive control of the mining operators. The Plan Amendment requires Cemex to design and implement blasting techniques to minimize impacts on adjoining land uses. Based on Mr. Clark's testimony, off-site impacts, including ground vibration, air overpressure, and flyrock, can be controlled and minimized by careful scheduling, spacing, orientation, and timing of blasts. As such, Petitioner did not prove the Plan Amendment would "hurt" District operations.

51. Petitioner did not prove the Plan Amendment is inconsistent with FLU Objective 1.07F and Policy 1.07F(7).

Mining Element Goal 1.08

52. Next, Petitioner alleges the Plan Amendment is inconsistent with Mining Element Goal 1.08, which reads as follows:

Hernando County shall protect its citizens, air, land and water resources from the adverse effects of resource extraction and ensure that the disturbed areas are reclaimed to wholesome condition as soon as reasonably possible.

53. Goal 1.08 is implemented by four objectives and implementing policies that set standards for earthen dams, mining setbacks, berms and buffers, and reclamation activities. Petitioner does not allege that the Plan Amendment is inconsistent with any of the objectives and policies implementing Goal 1.08.

54. The Plan Amendment requires the reclamation of the Mining Area for purposes of redevelopment for mixed uses upon the completion of mining activities.

55. The County Comprehensive Plan is formatted with goals, objectives, and policies which describe how the County's programs, activities, and land development regulations will be initiated, modified, or continued to implement the comprehensive plan in a consistent manner. § 163.3177(1), Fla. Stat. In the context of the Community Planning Act, goals are statements of long-term vision or aspirational outcomes and are not measurable in and of themselves. Goals must be implemented by intermediate objectives and specific policies to carry out the general plan goals. With regard to Goal 1.08, Petitioner did not allege that the Plan Amendment was inconsistent with any of the implementing objectives or policies.

56. The County introduced evidence that it has adopted standards for earthen dams, mining setbacks, berms and buffers, and reclamation activities, as required by Goal 1.08 and its

implementing policies. Petitioner introduced no evidence that the Plan Amendment failed to comply with any of those standards.

Objective 1.10B and Policy 1.10B(3)

57. The last internal inconsistency alleged by Petitioner is with Mining Element Objective 1.10B and Policy 1.10B(3), which read as follows:

For all land added to the mining category, protect ecological features and natural resources from the adverse impacts of resource extraction.

\* \* \*

Resource extraction shall not be allowed in areas of habitat known to support viable populations of threatened and endangered species.

58. Petitioner asserts that the Plan Amendment allows mining in an area known to support a viable population of gopher tortoise, a listed threatened species. According to the Listed Species Survey (the "Flatwoods Report") conducted by Cemex's environmental consultant, 54 gopher tortoise burrows were discovered in the abandoned citrus habitats on-site.

59. The parties introduced conflicting evidence of whether 54 burrows constituted a viable population of gopher tortoise. Petitioner's expert, Thomas St. Clair, offered testimony based on the Flatwoods Report and not on any independent survey or knowledge of the subject property. The Flatwoods Reports lists nine different threatened or endangered species, describes their

habitat preferences, their likelihood of occurrence on the site, and their listed status. Mr. St. Clair indicated that the Flatwoods Report concludes the site does not support a viable population of any of the other eight species, and that, in his opinion, the report suggests there is a viable population of gopher tortoises. His precise testimony was, "[B]ased on the fact that there is not a statement about whether or not there's a viable population, we might conclude - and I conclude - that there is a viable population of gopher tortoises on the site." This testimony amounts to an argument that two negatives make a positive. The argument was not persuasive.

60. When pressed by the undersigned, Mr. St. Clair expressed his opinion that a viable population is "one where you have active reproduction and that population is sustaining itself over time." He testified that, based on the presence of both "abandoned and active burrows" on a large area indicates a viable population. Mr. St. Clair later said the combination of "active and inactive burrows" in the area led him to conclude the population was viable.

61. The Gopher Tortoise Survey incorporated in the Flatwoods Report mapped all active and inactive, but not abandoned, burrows on the site. The map indicating the location of the 54 burrows does not distinguish between active and inactive burrows. Nor was there any testimony to distinguish

active from inactive burrows on the site. All of the burrows could be either active or inactive. Mr. St. Clair's testimony was not persuasive.

62. The most persuasive evidence on the issue was offered by Cemex's expert, Lee Walton. Mr. Walton is a gopher tortoise expert and the author of the Flatwoods Report. He testified that the gopher tortoise habitat on site is poor quality, located in degraded orange groves, with limited food resources. When he surveyed the property in 2017, there were 54 burrows; down from 61 burrows identified when he surveyed the property six years earlier. He also noted the absence of juvenile tortoises during both surveys. Juveniles are necessary to support a viable population.

63. Finally, Respondents introduced a report prepared by The Gopher Tortoise Council, dated July 24, 2013, which indicates that a minimum viable population of gopher tortoises is 250 adults. The report refers to groups of less than 50 tortoises as "small non-viable populations."

64. Petitioner did not prove that the Plan Amendment Area includes habitat known to support a viable gopher tortoise population.

65. Petitioner did not prove the Plan Amendment is inconsistent with Objective 1.10B and Policy 1.10B(3).



## Data and Analysis

66. Section 163.3177 requires plan amendments to “be based upon relevant and appropriate data and an analysis by the local government.” The statute provides, “[t]o 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 amendment at issue. Id.

67. Further, “data must be taken from professionally accepted sources.” § 163.3177(1)(f)2., Fla. Stat. The statute does not require original data collection by local governments.

68. In his Proposed Recommended Order, Petitioner generally argues that the Plan Amendment is “not based upon and fails to react appropriately to relevant, appropriate, or professionally acceptable data and analysis,” but identifies no specific data or analysis that is contrary to the Plan Amendment.

69. Petitioner does highlight the fact that the County has 13,000 acres currently designated for mining use, arguing that the conversion of this property to mining use is not supported on that basis.

70. The Plan Amendment is supported by extensive data identifying the Plan Amendment Area as located within the Hernando County Brooksville Ridge, which contains viable and valuable deposits of limestone known as Suwannee limestone;

expert geologist, Mark Stephens' confirmation that a reserve of this limestone exists beneath the Mining Area; and the location of the Plan Amendment Area adjacent to the existing Brooksville Quarry, which allows efficiencies in production and processing of the limestone on site.

71. The Plan Amendment is based on data from the County and from the Bureau of Economic and Business Research at the University of Florida that, although the Mining Area is currently designated for Residential use, market conditions are such that residential development in the area is not likely in the near future. This finding is further supported by data documenting an excess supply of residentially designated property in the County.

72. The Plan Amendment is supported by Dr. Henry Fishkind's analysis, based on data available at the time the Plan Amendment was adopted, that the Plan Amendment will generate \$38 million in net fiscal revenue to the County during the 20-year lifespan of the mining operation.

73. Petitioner did not introduce any relevant credible data or analysis which contradicted the voluminous data submitted in support of the application.

74. Petitioner did not prove the Plan Amendment is not supported by relevant and appropriate data and analysis, or that

it does not react to available data and analysis in an appropriate way.

Meaningful and Predictable Standards

75. Finally, Petitioner alleges the Plan Amendment is inconsistent with section 163.3177(1), which requires that a local comprehensive plan "shall establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development regulations."

76. In his Petition, Petitioner alleged the Plan Amendment "eliminates from the County's Comprehensive Plan existing meaningful guidelines focused on residential growth for the content of more mine zoning." Petitioner further alleged that the Plan Amendment fails to provide meaningful and predictable standards for protecting, preserving, enhancing, conserving, and restoring Hernando County's environmentally sensitive natural resources. Petitioner did not cite to any particular aspect of the change in use or any particular language of the Plan Amendment alleged to fall short of meaningful and predictable standards.

77. The Plan Amendment does not delete or eliminate any provision of the existing Comprehensive Plan. The Plan Amendment changes the future land use designation of the Plan Amendment Property and adds text setting criteria to be followed

in the mining and reclamation process. These criteria are in addition to other regulations imposed on mining and reclamation uses through the Mining Element and the County's land development regulations.

78. Petitioner argues in his Proposed Recommended Order that the Plan Amendment does not provide meaningful standards for the development of land because it does not react appropriately to relevant, appropriate, or professionally-acceptable data and analysis. That argument is a simple restatement of his data and analysis challenge, which was not proven.

79. Petitioner alternately argues that the development standards in the Plan Amendment are not predictable because they conflict with other existing provisions of the Comprehensive Plan. This is another repackaging of Petitioner's internal inconsistency argument, which was not proven.

80. Petitioner did not prove that the Plan Amendment fails to provide meaningful and predictable standards for the use and development of land or for the establishment of more detailed land development regulations.

#### CONCLUSIONS OF LAW

81. The Division of Administrative Hearings has jurisdiction over the subject matter and parties hereto pursuant

to sections 120.569, 120.57(1), and 163.3184(5), Florida Statutes.

82. To have standing to challenge or support a plan amendment, a person must be an affected person as defined in section 163.3184(1)(a). Petitioner is an affected person within the meaning of the statute.

83. Cemex is an affected person within the meaning of the statute.

84. "In compliance" means "consistent with the requirements of sections 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." § 163.3184(1)(b), Fla. Stat.

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

86. 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 a highly deferential requiring approval of a planning action if reasonable persons could differ as to its propriety." Id. at 1295.

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

Internal Inconsistencies

88. Petitioner did not prove beyond fair debate that the Plan Amendment created any internal inconsistencies with the cited provisions of the Comprehensive Plan.

89. Petitioner did not prove the Plan Amendment fails to protect established residential areas, as stated in FLU Objective 1.01H. While Petitioner introduced evidence of larger setbacks for mining adjacent to residential uses established by other jurisdictions, he did not prove that the County's minimum 100-foot buffer was beyond fair debate.

90. Moreover, a compliance determination is not a determination of whether a comprehensive plan amendment goes far enough to achieve its purposes. See Manasota-88 v. Dep't of Cmty. Aff., Case No. 02-3897 (Fla. DOAH May 14, 2004; Fla. DCA Aug. 13, 2004) (plan amendment "in compliance" although the local government designated wildlife greenway could have been larger to accommodate more species); McSherry v. Alachua Cnty., Case No. 02-2676 (Fla. DOAH Oct. 18, 2004; Fla. DCA May 22, 2005), aff'd, 903 So. 2d 194 (Fla. 1st DCA 2005) (while the County would have been better served to refine its definition of "strategic ecosystem" to include standards set forth elsewhere

in the plan, the failure to do so does not invalidate the definition under the "fairly debatable" standard). As well stated by Administrative Law Judge Stevenson in Geraci v. Department of Community Affairs, Case No. 95-0259 (Fla. DOAH Oct. 14, 1998; Fla. DCA Jan. 13, 1999), aff'd, 754 So. 2d 35 (Fla. 1st DCA 1999), "Petitioner's burden was not to show that [Petitioner's preferred land use classification] was better, but that [the assigned land use classification] was non-compliant to the exclusion of fair debate."

91. Likewise, Petitioner did not prove that the County's interpretation of Objective 1.07F and Policy 1.07F(7), to regulate uses internal to the District, was beyond fair debate. Petitioner's arguments that the Plan Amendment would "hurt" the hospital district were unpersuasive.

92. Finally, Petitioner's challenge on the basis of Objective 1.10B is also rejected. Petitioner did not prove that the County's interpretation of "viable populations" of gopher tortoise was beyond fair debate.

#### Other Allegations

93. Based on the foregoing Findings of Fact, Petitioner did not prove beyond fair debate that the Plan Amendment fails to react appropriately to data and analysis or fails to provide meaningful and predictable standards for the use and development of land.

Conclusion

94. Petitioner has not proven beyond fair debate that the Plan Amendment is inconsistent with section 163.3177(1) and (2), Florida Statutes.

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 Plan Amendment CPAM 1702, adopted by Hernando County Ordinance 2018-12, on June 12, 2018, is "in compliance," as that term is defined by section 163.3184(1) (b), Florida Statutes.

DONE AND ENTERED this 1st day of May, 2019, in Tallahassee, Leon County, Florida.



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SUZANNE VAN WYK  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of May, 2019.



ENDNOTES

<sup>1/</sup> Except as otherwise provided herein, all references to the Florida Statutes are to the 2017 version, which was in effect when the Plan Amendment was adopted.

<sup>2/</sup> Petitioner originally raised challenges related to both the Mining Area and the Commercial Area, but later withdrew its challenge relating to the Commercial Area.

<sup>3/</sup> Pursuant to Florida Administrative Code Rule 28-106.216(2), the parties waived the requirement that this Recommended Order be issued within 30 days after the date on which the Transcript was filed.

<sup>4/</sup> "Establish" Definition, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/establish> (last visited April 24, 2019).

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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.