

BEFORE THE LAKE COUNTY BOARD OF COUNTY COMMISSIONERS

**In re: Rubin Groves of
Clermont, LLC**

PH #21-13-1

**MEMORANDUM OF LAW IN SUPPORT OF
RUBIN GROVES OF CLERMONT, LLC PUD AMENDMENT, PH # 21-13-1**

This Memorandum of Law in Support of the Rubin Groves of Clermont, LLC Planned Unit Development amendment application filed in Lake County, Florida (PH # 21-13-1) is filed with Lake County and copied to the distribution list below this 17th day of January, 2014.

Question Presented

Is the grading plan under consideration in the PUD Amendment (hereafter called “Grading Plan”) inconsistent with or in violation of the Lake County Comprehensive Plan (hereafter called “Plan”) as “mining” or ”mining activity”, which is prohibited within the Green Swamp Area of Critical State Concern Ridge Land Use Classification?

Brief Answer

No. The Grading Plan is not inconsistent with or in violation of the Lake County Comprehensive Plan because (1) the Grading Plan is not “mining” or “mining activity” as defined within the Plan, because the Owner’s “purpose” is not removal of the material, and because (2) sand mining is not prohibited within the Ridge Land Use Classification.

Facts

Rubin Groves PUD is an existing Planned Unit Development (Lake County Ordinance 2013-8), located on the west side of U.S. Highway 27, one mile north of the Polk County line and U.S. Highway 192 (hereafter called the “PUD” or the “Property.”) The PUD is approved for 490 residential units and 24.54 acres of commercial development. The PUD is within an area described by Lake County staff as “predominately commercial development along U.S. Hwy 27,” with a “mix of residential types ... together with assorted commercial uses (general and convenience retail, general and fast food restaurants, auto repair, and medical services)...” Staff Report dated 1/23/2013, PH #3-13-1, hereafter called “Staff Report.”)¹

¹ All documents referenced in this Memorandum are a part of the rezoning file maintained at the Lake County Planning & Zoning Department, and their attachment is omitted to avoid repetition and unmanageable length. If any recipient of this Memorandum wishes copies of any document referenced, they may contact Rick Hartenstein, Senior Planner, Lake County, or this author.

Soon after the rezoning to PUD, which was approved by the Lake County Board of County Commissioners on February 26, 2013, the Owner began the pre-submittal process with Lake County staff to obtain approval of a Phase I Construction Plan/Grading Plan. The grading plan submitted at that time was substantially the same as the current Grading Plan under consideration. The Owner's plan was (and is) to construct a handicap-friendly residential development, to accommodate the needs of the elderly, infirm and handicapped. (See Statement in Support, filed by applicant with PUD Amendment Application.) In furtherance of that purpose, the Owner filed the Grading Plan, which would regulate the grading of the developed portion of the PUD property (greater than 40% of the property is open space, which in large part is not subject to the mass grading at issue in this case.)

Implementation of the Grading Plan will result in the Property being graded from a current peak elevation of 178' NGVD (the current peak elevation covers less than 3% of the Property area) to a relatively flat elevation with a maximum height of 145' NGVD. (See Report for Geotechnical Investigation and Water Balance Analysis, Rubin Groves Development, US Hwy 27, Lake County, Florida, Andreyev Engineering, Inc., December 13, 2013, Page 4, hereafter called "Andreyev Report.") The seasonal high water table is estimated to be a maximum of 121' NGVD. Andreyev Report, Page 3. Accordingly, the final grade is measured by the Andreyev Report as an average of twenty-four (24) feet above the seasonal high water table.

The Andreyev Report and the Mass Grading and Excavation Report prepared by Wicks Engineering, Inc., concluded that the Grading Plan would (1) have no effect on the amount of recharge onsite, (2) protect the quality of recharge by providing sufficient filtering capacity above the groundwater table, (3) protect existing surface water flows, and (4) not result in harm to wetlands on or off site. Those conclusions have not been rebutted by Lake County staff or by the Department of Economic Opportunity (hereafter called "DEO"), which has statutory review authority over the Grading Plan and the PUD Amendment.

Lake County staff has recommended denial of the PUD Amendment, alleging several inconsistencies with the Lake County Land Development Regulations and the Lake County Comprehensive Plan (See Staff Report.) The DEO wrote a letter to Lake County dated October 31, 2013, and an e-mail to Lake County dated December 20, 2013, voicing similar comments. The parties met in a conference call to discuss the issues on January 14, 2014. As a result of the conference call, the parties agreed the central issue is consistency with the comprehensive plan, focusing on the definition of "mine" and "mining activities" within the Plan. This Memorandum is drafted to address that issue, as well as the issue of prohibition of mining within Ridge Land Use Classification, which has been assumed by the parties to date.

Discussion

I. The Grading Plan is Not a Mine or Mining Activity

A "mine" is defined by the Lake County Comprehensive Plan as:

An area of Land on which Mining Activities have been conducted, are being conducted or are planned to be conducted.

Mining Activity is defined by the Lake County Comprehensive Plan as:

The mining of minerals, 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.

The definition of Mining Activity is not clearly written, is vague, and is subject to interpretation. First, the definition begins to define Mining Activity by utilizing the term “mining of minerals”; using the word to help define itself. If one is not engaging in “the mining of minerals,” then such activity is not Mining Activity under the definition. But “mining of minerals” would need to be defined using the definition of Mining Activity, resulting in a circular and vague definition.

Second, to be Mining Activity such “mining of minerals” must be undertaken for the “purpose of extracting and removing from the site such underlying deposits...” Emphasis added. If this clause isn’t given meaning, then under the definition, any removal of material from any site at any time anywhere in Lake County would be considered Mining Activity, and would not be allowed without a Mining Site Plan and Operating Permit. That result would be absurd and unworkable for Lake County government and for the citizens of Lake County. To the author’s knowledge and belief, that draconian interpretation has never been used by Lake County staff.

Therefore, the purpose of the project must be considered, under at least two basic tenets of statutory construction; (1) to give meaning to all words within the provision, *American Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 366 (Fla. 2005); and (2) to avoid an absurd result, *Delgado v. State*, 776 So. 2d 233, 241 (Fla. 2000).

So, what can “purpose” mean in the context of the definition? The Plan contains no definition of “purpose,” so we would look first to the general legal definition. Black’s Law Dictionary, Sixth Edition, defines “purpose” as:

That which one sets before him to accomplish or attain; an end, intention, or aim, object, plan, project. Term is synonymous with ends sought, an object to be attained, an intention, etc.

Here, the Owner’s “purpose” has been clear since he filed for the original PUD in the fall of 2012. The Owner wishes to construct a mixed-use subdivision, the residential portion of which is exceptionally handicap-friendly and accessible. This purpose is evidenced by (1)

ongoing discussions with Lake County staff since early 2013 about the grading plan, (2) the pre-application submittals for the Grading Plan immediately after the PUD approval in February of 2013, (3) the application for PUD Amendment and especially (4) the Statement in Support submitted by the Owner and his attorney, setting out in great detail the reason for the Owner's request. Rubin Groves of Clermont, LLC, "set before him to accomplish" the "end ... aim, object, plan, project ..." of constructing a handicapped-accessible and friendly residential community. To accomplish that purpose, the owner hired an engineer and other consultants, and developed a construction plan which grades the Property nearly flat, while at the same time preserving environmental conditions and protecting existing grades along the property lines that are compatible with the existing neighboring development. The Owner's "purpose", as defined by the Owner and as shown by the evidence and record, indicate the Owner has never had the "*purpose of extracting and removing from the site ... underlying deposits*". His "purpose" is to construct a subdivision, not dig a mine.

Further, to evaluate the "purpose" of the project, the intent of the Owner must be paramount. Were the Plan to delegate to Lake County staff or any other administrative office the responsibility to subjectively determine an applicant's intent, or "purpose," such determination would be an unbridled discretion of authority and would be void as violative of the separation of powers doctrine. The Florida Supreme Court has stated that it is so basic as to be "hornbook law" that a statute (or Plan Policy) which delegates power to an administrator or executive must so clearly define the power that the administrator is precluded from acting through whim, showing favoritism, or exercising unbridled discretion. *Lewis v. Bank of Pasco County*, 346 So. 2d 53, 56 (Fla. 1976). In this case, for an administrator to determine an applicant's "purpose" without the Plan further defining such term, would obviously vest the administrator with unbridled discretion in violation of law.

At best, the extraction of material from the site is incidental, which term is also not defined in the Plan. According to Black's Law Dictionary, 6th Edition, "incidental" is defined as:

Depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose.

As discussed above, the "main purpose" of the project, as expressed by the only entity with actual knowledge (the Owner) and as shown by the record in this case, is clearly to construct a handicap-friendly subdivision. The Grading Plan developed to implement that purpose has the incidental effect of requiring the transport material from the site. Any attempt by Lake County or DEO staff to assign other motives or purposes to the Project is speculative, without basis in fact, and if applied would be an unlawful delegation of legislative authority.

Lake County and DEO staff have alleged (1) the Owner's request for a waiver under Lake County Land Development Regulation 6.06.01.F.2 to remove more than 200% of minimum stormwater requirements constitutes "mining" (See DEO email dated December 20, 2013, "... [t]herefore, at this point, it appears that any excavation, removal and transport off-site of overburden in excess of the Lake County Code maximum of 200% constitutes mining," and (2) that simply the volume of material the Owner is requesting to remove causes the Grading Plan to

be a “mine.” See Lake County Staff Report for PH 21-13-1, Page 5, Line 11, stating “[b]ased on these definitions and magnitude of the proposed excavation, the requested overburden removal clearly constitutes mining...”

It is the author’s belief that such positions were receded from in the parties’ later conference call, however, it is important to note that the Plan definition of Mining Activity has no reference to amount of minerals removed – it references only the purpose of removal. Of course, any party requesting removal of over 200% of the minimum stormwater volume needed for a particular project must still comply with LDR Section 6.06.1.F.2, which conditions such approvals.² However, the volume of the requested removal of overburden is not an appropriate factor in the determination of the presence or absence of Mining Activity, unless it could be shown to be an expression of the “purpose” of the removal.

Finally, and perhaps most importantly, the Florida Supreme Court has repeatedly noted that the “polestar” of statutory interpretation is the intent of the adopting body. *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006); see also Statutory Construction in Florida: In Search of a Principled Approach, Peter D. Webster, Sylvia H. Walbolt, Christine R. Davis *Florida Coastal Law Review*, 2008, noting the Florida Supreme Court has referenced this “polestar” guide more than thirty-five times between 2000 and July 2007. In this case, the parties are fortunate to not have to look far to determine the intent of the adopter, for the adopter of all of the pertinent documents -- the Plan, the definitions of Mine and Mining Activity, the Mining Ordinance and the PUD -- is the same body that will hear the PUD Amendment Application – the Lake County Board of County Commissioners. Therefore, we have a unique opportunity to get from the Horse’s Mouth the intent of the Horse in adopting the definitions of Mine and Mining Activity in the Plan, and how those definitions should be applied in this case. Such determination should, under applicable statutory rules of interpretation, be dispositive.

II. Sand Mining is Not Prohibited in GSACSC Ridge Land Use Classification.

Were the ultimate conclusion of the grading plan be that it constitutes Mining Activity, the parties have been proceeding under the assumption that it would not be allowed at its location within the Ridge Land Use Classification of the Green Swamp Area of Critical State Concern. However, such determination is not dictated by the Plan.

Plan Policy 1-4.2.2 governs the Ridge classification. Such policy does not contain a list or chart of allowed and prohibited uses; instead the policy lists several “Typical Uses” and “Typical Uses Requiring a Conditional Use Permit.” These lists are in no way complete or definitive.

² It is important also to note that the Lake County Mining Ordinance, LDR Section 6.06, was comprehensively rewritten and readopted after the adoption of the current Comprehensive Plan definitions of Mine and Mining Activity. In the re-adoption of the Mining Ordinance, the waiver provisions of Section 6.06.1.F.2 were retained, lending credence to the idea that the adopters of the Plan and the Mining Ordinance (the Lake County Commission) believed 6.06.1.F.2 to be viable and in force.

“Typical uses” are not defined within the Plan. Black’s Law Dictionary, 6th Edition, does not define “typical,” so a general definition should be used. Mirrian-Webster.com defines “typical” as:

Constituting or having the nature of a type; or combining or exhibiting the essential characteristics of a group.

In this case, the “typical uses” sections of the policy cannot be taken as a complete list, but are to be used as examples of the type of development allowed within Ridge.³

It is pertinent that the other two land use classifications within the Green Swamp Area of Critical State Concern do list sand mining under “Typical Uses Requiring a Conditional Use Permit,” but that notation is by no means dispositive. It is more important to note that the drafters and adopters of the Plan showed they knew exactly how to prohibit specific uses, by doing so clearly and plainly in several instances. For example, Plan Policy 1-4.4.1 specifically and unequivocally prohibits new school facilities from locating within any Green Swamp Land Use Category except Ridge. Policy I-4.4.11 prohibits all new industrial uses in all Green Swamp Land Use Categories. These policies are solid evidence that the drafters and adopters of the Plan knew how to prohibit and limit specific uses, and did so where they intended. Such specific prohibitions support the interpretation that the Plan adopters did not intend to specifically prohibit all sand mining within the Ridge category. See for example, *Meghrig v. KFC Western, Inc.* 516 U.S. 479, 486 (1996), where the Supreme Court struck down recovery by EPA of cleanup costs from a private entity, noting that Congress had demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and the language used to do so was not included in the statute at issue, RCRA; and see *FCC v. NExtWave Personal Communications, Inc.*, 527 U.S. 293, 302 (2003), declining to find an exception to bankruptcy law, noting that when Congress has created such exceptions, “it has done so clearly and expressly.”

It is the author’s position that the partial lists of “Typical Uses” in Policy 1-4.2.2 are for illustration only and not intended to be all-inclusive, and that the inclusion of specific language prohibiting specific uses in the Green Swamp Area of Critical State Concern indicates a lack of intent to prohibit sand mining in the Ridge classification.⁴ However, as noted in the discussion regarding the definition of Mining Activity above, the polestar of the interpretation of Policy 1-4.2.2 is the adopter’s intent, and the Lake County Board of County Commissioners, as adopter of that Policy, is entitled to state its intent in the adoption of the Policy and its opinion as to its interpretation, which is dispositive.

³ The previous Comprehensive Plan did specifically define allowable land uses within Ridge Land Use Category in Policy 1-1.15.8, by way of specific exclusion, proving again that innovation is not always improvement.

⁴ One reasonable alternative explanation for the omission of sand mining as a “Typical Use Requiring Conditional Use Permit” within Ridge Land Use Classification is that the drafters and adopters believed not enough undeveloped land remained within Ridge to support a commercial sand mine use, and therefore there was no need to include sand mining in the “Typical Uses” list. The Ridge classification only covers a few hundred acres, most developed, along the west side of south U.S. Hwy 27.

Conclusion

I. The Grading Plan does not establish a Mine and is not Mining Activity under the definitions contained within the Lake County Comprehensive Plan, because:

1. To not give meaning to the “purpose” of the excavation under the definition would fail to give meaning to the entire definition and would result in an absurd result – that any removal of soil from any site in Lake County would qualify as a “mine”; and
2. Without quantitative, measurable standards, the subjective evaluation of “purpose” by Lake County or DEO staff is unlawful unbridled discretion; and
3. The Owner’s “purpose” has objectively been shown by its applications, communications with staff, and support documentation to be construction of a handicap-friendly residential development. Any exporting of material from the site is incidental to such “purpose”; and
4. The Lake County Board of County Commissioners, as the drafter and adopter of the Plan and the definitions of Mine and Mining Activity, are the ultimate interpreters of their intent in adopting the Plan and the definitions.

II. Even if the Grading Plan were deemed a Mine or Mining Activity, it would still be allowable because sand mining is not prohibited in the Ridge Land Use Classification of the Green Swamp Area of Critical State Concern, because:

1. Plan Policy 1-4.2.2, governing the Ridge land use classification, does not contain a list or chart of allowed and prohibited uses, but only contains “typical” uses.
2. The Plan drafters and adopters demonstrated clearly they knew how to prohibit uses in individual land use classifications, by doing so in several instances; and
3. The Plan drafters and adopters demonstrated their intent to not prohibit sand mining in Ridge land use classification by not specifically prohibiting such use.

For the reasons stated herein, the Grading Plan is not inconsistent with or in violation of the Lake County Comprehensive Plan.



Jimmy D. Crawford, Esquire
Merideth Nagel, P.A.
450 East Highway 50, Suite 4
Clermont, Florida 34711
(352) 394-7408
Jimmy.crawford@mnagellaw.com

DISTRIBUTION LIST (by e-mail):

Erin Hartigan, Esquire, Assistant Lake County Attorney

Rick Hartenstein, Senior Planner, Lake County Growth Management

Amye King, Lake County Growth Management Director

Rebecca Jetton, Administrator, Areas of Critical State Concern

Florida Department of Economic Opportunity

Sherry Spiers, Esquire, Attorney, Florida Department of Economic Opportunity

Robin S. Branda, Planning Analyst, Florida Department of Economic Opportunity