

Hopping Green & Sams

Attorneys and Counselors

March 27, 2019

Via Electronic Mail

Terrance E. Schmidt
501 Riverside Ave.
Suite 903
Jacksonville, FL 32202
tes@bledsoejacobson.com

Re: Mosaic Claim for Dispute Resolution Pursuant to § 70.51, Fla. Stat.

Dear Mr. Schmidt:

This firm represents Mosaic Fertilizer, LLC (Mosaic) in the above-referenced dispute. We submit this Mediation Statement in furtherance of the public mediation scheduled for April 3, 2019.

Factual and Procedural Background

This dispute involves Desoto County's (County) decision on July 25, 2018, to deny Mosaic's request to rezone approximately 14,000 acres for phosphate mining. Mosaic contends that the County improperly denied the requested rezoning and disputes the reasons offered by the Board of County Commissioners (BOCC) for denying the request.

Background and History of the Subject Property: The BOCC's decision denied Mosaic's application for an Official Zoning District Atlas amendment (also called a "rezoning") to change the existing zoning classification from Agriculture 10 (A-10) to Phosphate Mining-Industrial (PM-I) of Mosaic-owned land totaling 14,053.4+ acres (the "Subject Property"). *See attached Figure depicting Subject Property.* Mosaic owns 8,985 acres immediately adjacent to the Subject Property that has been zoned for phosphate mining since September 29, 1981 (Ordinance No. 81-10) and depicted on the then newly established Zoning District Map as M-I zoned land. The revised, current zoning classification for the 8,985 acres of adjacent land is PM-I. *See attached Figure depicting Mosaic Property Zoned PM-I.*

On September 28, 2010, the BOCC adopted Ordinance No. 2010-26, which amended the Future Land Use Element of the County's Comprehensive Plan to create a Generalized Phosphate Mining Overlay (GPM-O/Mining Overlay) designation. *See attached Figure depicting Mining Overlay.* The Ordinance also amended the Future Land Use Map to assign over 25,000 acres to the Mining Overlay based on data and analysis which established the presence of mineable phosphate reserves on the property. The approved Mining Overlay includes the Subject Property and the 8,985 acres of Mosaic land currently zoned PM-I located adjacent to the Subject Property.

Mosaic has property interests in 23,038.8 acres within the Mining Overlay. As noted above, 8,985 acres are already zoned for phosphate mining. On December 14, 2016, Mosaic submitted its application seeking to rezone the remaining 14,053.4 acres of this property within the Mining Overlay from A-10 to PM-I. Among other things, Mosaic's application addressed each of the

fifteen factors under Section 20-1498, DeSoto County Land Development Regulations, which the BOCC must consider in evaluating whether to approve a rezoning request. The rezoning will not permit mining to begin on the property. Rather, Mosaic must also obtain a Mining Master Plan and Operating Permit from the County. Applications for both remain pending. *See attached Figure depicting Mining Master Plan and Operating Permit Boundary.*

On May 24, 2018, the DeSoto County Development Director issued his Development Department Report, concluding that Mosaic's application satisfied all fifteen factors for approval of a rezoning request. On June 6, 2018, the DeSoto County Planning Commission also found that Mosaic's application and testimony satisfied all fifteen factors for approval of a rezoning request and voted to recommend BOCC approval of Mosaic's rezoning request.

On July 24 and 25, 2018, the BOCC considered Mosaic's rezoning request at a duly-noticed public hearing. The BOCC voted to deny the rezoning through a development order rendered August 2, 2018 as BOCC Ordinance No. 2018-13. This development order denied Mosaic's rezoning on the grounds that the application failed to comply with seven of the fifteen factors identified in Section 20-1498, including:

- Factor 2: The existing land use pattern
- Factor 3: Creation of an isolated district unrelated to adjacent and nearby districts
- Factor 7: Whether the proposed change will adversely influence living conditions in the area
- Factor 8: Whether the proposed change will create or excessively increase traffic
- Factor 9: Whether the proposed change will create a drainage problem
- Factor 11: Whether the proposed change will adversely affect property values in the adjacent area
- Factor 15: Whether the change suggested is out of scale with the surrounding area

Instead of filing a lawsuit to challenge this decision, Mosaic chose to engage in alternative dispute resolution with the County as provided by Florida's Land Use and Environmental Dispute Resolution Act. This process began when Mosaic submitted a Claim for Dispute Resolution Pursuant to Section 70.51, Florida Statutes, on August 14, 2018. The County responded to Mosaic's Claim for Dispute Resolution on January 23, 2019.

Legal Analysis – Competent and Substantial Evidence

Mosaic disagrees with the reasons the BOCC offered for denying Mosaic's rezoning application. A rezoning must be supported by competent substantial evidence. *See, e.g., Orange County v. Lust*, 602 So. 2d 568, 569 (Fla. 5th DCA 1992). The zoning authority's decision must be "based on evidence a reasonable mind would accept to support a conclusion." *Id.* "For the action to be sustained, it must be reasonable based in the evidence presented." *Id.* The BOCC's findings were unreasonable and not based on competent substantial evidence for the following reasons.

Factor 2: The existing land use pattern

The BOCC concluded that the rezoning would “significantly alter[] the existing, historic land use pattern and use” of the surrounding land. Ord. 2018-13, p. 3. The BOCC also found that “rezoning will allow residential and agricultural uses to continue until mining commences.” Ord. 2018-13 p.3. These two findings are in direct conflict. Since the Subject Property is currently used for residential and agricultural land uses and the rezoning would allow those uses to continue, the rezoning could have no impact on the existing land use and land use pattern.

Instead, the BOCC’s negative finding on the existing land use pattern was based on phosphate mining activities which were not being approved via the rezoning. Commissioner Langford concluded that approval of the rezoning would allow Mosaic to “start lifting the dirt and changing the whole outlook of that country out there.” Transcript, 450:1-2. There is no evidence in the record, however, showing the property would be inconsistent with the existing land use pattern after the rezoning. On the contrary, all of the record evidence indicates that the rezoning does not permit mining to begin. *See, e.g.*, T. at 7:25-8:2 (“a rezoning does not and will not allow this applicant to turn the first shovel of dirt.”). This is because in addition to the rezoning, Mosaic must receive approval of a Mining Master Plan and Operating Permit. The County acknowledged this in its Response to Mosaic’s Claim for Dispute Resolution, stating “Even if the rezoning application had been approved, Mosaic could not commence mining.” Response at 3. In addition, as a matter of law, “mining is a temporary land use.” § 378.202, Fla. Stat. Mosaic’s application and testimony pointed out that the pre-mining and post-mining land use patterns will be unchanged. As such, the finding that the rezoning is inconsistent with Factor 2 is unreasonable and not supported by competent substantial evidence.

Factor 3: Creation of an isolated district unrelated to adjacent and nearby districts

The BOCC concluded that the rezoning would be inconsistent with adjacent land uses which are primarily agricultural. Ord. 2018-13, p. 3. As the County planner explained, “this factor relates to spot zoning.” T. at 24:1-2. The “well-established” definition of spot zoning is “the piecemeal rezoning of small parcels of land to a greater density, leading to disharmony with the surrounding area.” *Bird-Kendall Homeowners Ass’n v. Metro. Dade Cty. Bd. of Cty. Comm’rs*, 695 So. 2d 908, 909 n. 2 (Fla. 3d DCA 1997) (emphasis added).

The BOCC acknowledged in its consideration of Factor 2 that “... approximately 9,000 acres owned or controlled by the applicant are already zoned PM-I in the immediate vicinity of the 14,057.50 + acres which is now sought to be rezoned PM-I.” Ord. 2018-13, p. 3. If approved, the rezoning to PM-I would not create an “isolated district unrelated to adjacent and nearby districts.” The subject property is contiguous to 8,985 acres of land with the same PM-I zoning classification.

There is no evidence that the rezoning would result in spot-zoning or create a small isolated district. On the contrary, Mosaic’s property borders property that is already zoned PM-I, and rezoning it would simply create one large mining district, allowing mining on areas already identified as appropriate for mining under the Mining Overlay.

Factor 7: Whether the proposed change will adversely influence living conditions in the area

The BOCC concluded that approval of the “rezoning would have an immediate adverse influence on living conditions in the area.” Ord. 2018-13, p. 3. However, as discussed with regard to Factor 2 above, the unrefuted evidence in the record demonstrates that the rezoning itself does not authorize mining. As such, approval of the rezoning would not affect living conditions in the area.

In addition, as discussed with regard to Factor 3 above, 8,985 acres located immediately adjacent to the Subject Property were zoned for phosphate mining in 1981. The BOCC made no finding that the existing PM-I zoning has adversely influenced living conditions in the area. As such, a finding that this rezoning would adversely affect living conditions is unreasonable and not supported by competent substantial evidence.

Factor 8: Whether the proposed change will create or excessively increase traffic

The BOCC concluded that approval of the rezoning would increase traffic congestion, cause delay, and adversely impact public safety because of a proposed railway crossing to support mining activities. Ord. 2018-13, p. 3. Again, however, as discussed above with regard to Factors 2 and 7, the rezoning does not authorize mining activities. The BOCC gave no consideration as to whether the rezoning of the adjacent 8,985 acres to PM-I in 1981 caused traffic congestion, at that time, or at any time since 1981. The BOCC did not consider the rezoning, but instead based its analysis of this factor on the future possibility that Mosaic would construct a railroad crossing over SR 70 – a crossing that could only happen if Mosaic obtained all County mining approvals and Florida Department of Transportation approvals. As such, a finding that the rezoning would impact traffic is unreasonable and not supported by competent substantial evidence.

Factor 9: Whether the proposed change will create a drainage problem

The BOCC concluded that mining on the rezoned property would create drainage problems. Ord. 2018-13, p. 3. Again, this finding conflates the effects of the rezoning with the effects of mining and, therefore, is unreasonable and not based on competent substantial evidence.

Once again, the BOCC failed to consider whether the adjacent 8,985 acres already zoned PM-I created a drainage problem. No evidence was introduced during the rezoning proceeding demonstrating the existing PM-I zoning created a drainage problem in 1981 or at any time since.

Rezoning approval would not authorize Mosaic to undertake any earth disturbing activity, and clearly does not allow the initiation of phosphate mining operations on the property. Rather, rezoning would allow the existing agricultural land uses to continue on the Subject Property but would not allow construction or other land-disturbing activities that could affect the existing drainage patterns.

Effects of a proposed phosphate mine on drainage and groundwater resources is a specific factor that must be addressed during the Mining Master Plan review process – per Sec. 20-973 “(13) *An assessment of the impact of the proposed phosphate mining activities on surface water and groundwater hydrology, including effects on peak and average stream base flow.*” Additionally, the County Code prohibits any surface alterations related to development of a phosphate mine until the BOCC approves an Operating Permit - “*No pre-mining construction activities preparatory to actual mining or beneficiation may be undertaken prior to the issuance of an operating permit.*” Sec. 20-973 (d)(2).

In addition, under Section 20-571 of the County Code, activities are exempt from the County’s stormwater management requirements where “stormwater management permits are required by the Federal, State, or Southwest Florida Water Management District regulations. . . .” Prior to beginning any mining activities, Mosaic will be required to obtain Federal and State water management and wetland permits. For these reasons, the County’s conclusion that the rezoning will cause drainage problems is unreasonable.

Factor 11: Whether the proposed change will adversely affect property values in the adjacent area

The BOCC concluded that the rezoning would affect property values in the adjacent area. Ord. 2018-13, p. 4. This finding is not supported by competent substantial evidence. Mosaic presented the testimony of a certified real estate appraiser. T. at 47:12-21. He examined recent sales in DeSoto County for properties located adjacent to Mosaic land that is currently zoned PM-I and compared those transactions with sales of otherwise similar properties that do not border the existing PM-I zoning district. T. at 57:22-22. This analysis showed that proximity to property zoned PM-I does not decrease property values. T. at 15-22. Commissioner Langford expressly rejected this competent evidence and substituted “my gut” and “common sense” in its place. T. at 453:13-454:6. This is not competent substantial evidence and findings based upon same are unreasonable.

Factor 15: Whether the change suggested is out of scale with the surrounding area

The BOCC concluded that the rezoning is out of scale with the surrounding area due to the size of the area proposed to be rezoned. Ord. 2018-13, p. 4. This is nonsensical. The area to be rezoned is adjacent to nearly 9,000 acres already zoned PM-I. As such, the finding is unreasonable and unsupported by competent substantial evidence.

Legal Analysis – Fundamental Fairness

The underlying proceedings and decision of the BOCC to deny Mosaic’s application for rezoning also violated fundamental principles of fairness.

Expert Witnesses. The BOCC simply designated certain individuals as expert witnesses with no inquiry into their qualifications or experience. Mosaic was not allowed to cross-examine the witnesses determined by the County to constitute “expert witnesses.” Moreover, there was no

evidence presented to establish the witnesses' qualifications as an expert, the subject matter upon which the witnesses were qualified to render expert testimony, and no corresponding limitation as to the scope of the experts' testimony.

Fair Notice. The BOCC decision was premised, in large part, on phosphate mining and the perceived effects of mining on the community. Mosaic had no notice the Board would render its decision on information related specifically to phosphate mining and the effects of phosphate mining, i.e. the criteria set forth in Sections 20-972, 20-973 and 20-974, DeSoto County Code, applicable to phosphate mining master plans and operating permits. Mosaic was not given the opportunity to present evidence on the criteria set forth in Sections 20-972, 20-973 or 20-974, although the Board based its rezoning decision on those criteria.

Ex Parte Communications. Each of the five members of the BOCC stated that they had been contacted by and communicated with members of the public in advance of the BOCC proceedings. However, the individual Commissioners did not identify who contacted them, the substance of the communications, or whether those communications had any effect on their ultimate decision. There was a reference by each Commissioner to having "filed the paperwork" identifying ex parte communications, but no other information regarding those communications was entered into the record before the BOCC.

Settlement Position

The County's denial of the rezoning is arbitrary, unreasonable, unsupported by competent substantial evidence and, as such, constitutes an unfair burden on Mosaic's property interests. With that said, Mosaic is prepared to negotiate in good faith and is hopeful that the public mediation session will result in a settlement agreement acceptable to both Mosaic and the BOCC.

Mosaic looks forward to participating in the mediation process, resolving any differences with the County, avoiding the burdens and expense of litigation for all parties, and working to further our shared interest in making DeSoto County an even better place to live and work.

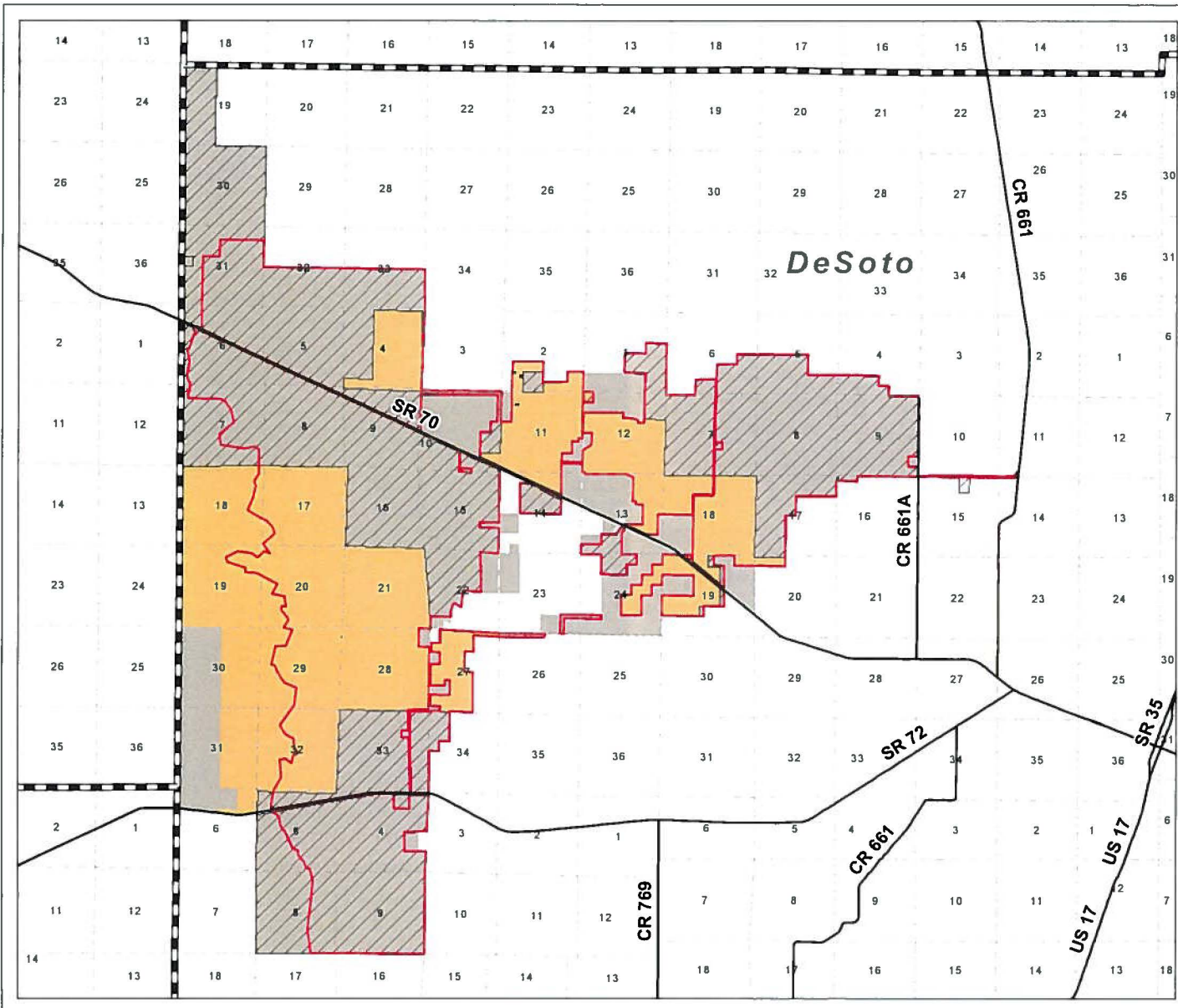
We look forward to mediating with you on April 3, 2019.

Respectfully submitted,

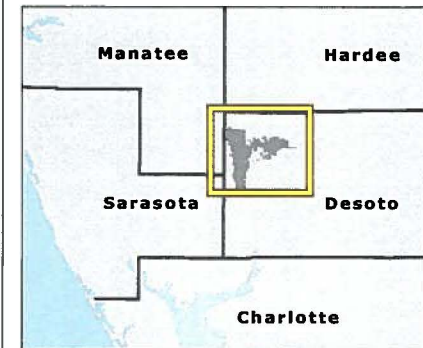
A handwritten signature in blue ink, appearing to read "Mohammad O. Jazil", with a stylized flourish extending to the right.

Mohammad O. Jazil
Vinette G. Godelia

Mediation Statement Figure

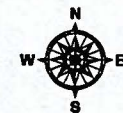


Location Key



Legend

- Roads
- - - County Lines
- Section Lines
- MMP and OP Boundary
- ▨ Subject Property
- Mosaic Property Zoned PM-1
- Mining Overlay



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