



REPRESENTING  
**ALEX SINK**  
CHIEF FINANCIAL OFFICER  
STATE OF FLORIDA

In The Matter Of:

LEE COUNTY, FLORIDA

Case No.: 90308-07-FM

Petition for Declaratory Statement before the  
Florida Department of Financial Services.

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### DECLARATORY STATEMENT

THIS CAUSE came on for consideration upon the Petition for Declaratory Statement (hereinafter "Petition") filed on behalf of Lee County, Florida, and Constantine Notte (hereinafter "Petitioner"), with the Department of Financial Services, Division of State Fire Marshal (hereinafter the "Department"), on May 11, 2007. Upon consideration thereof, and being duly advised, the Chief Financial Officer, as State Fire Marshal, finds as follows:

1. The Chief Financial Officer, as State Fire Marshal, has jurisdiction over the subject matter and the parties to this matter.

2. This Declaratory Statement is premised upon the assertions of fact set forth in the Petition. Any modification to those assertions of fact could alter the conclusions set forth in this Declaratory Statement. None of the assertions of fact are admitted by the Department as being true and Petitioner's questions are being answered as purely hypothetical. If any of the facts asserted by Petitioner are untrue or materially incomplete, the conclusions of this Declaratory Statement could be significantly different.

3. If the Petition contains various legal assertions, conclusions, and arguments, those assertions, conclusions, and arguments are not adopted by the Department and are not used as legal premises or authority for the conclusions of this Declaratory Statement. Legal assertions, conclusions, and arguments are considered only to illustrate the manner in which Petitioner may be an affected person entitled to have the Department issue this Declaratory Statement.

#### BACKGROUND AND FACTS ASSERTED

4. Petitioner is charged with enforcement of Section 552.30, *Florida Statutes*, and Rule 69A-2, *Florida Administrative Code*.

5. This Declaratory Statement was requested pursuant to the provisions of Sections 120.565, *Florida Statutes*, Chapter 28.105, *Florida Administrative Code*, and Rule 69A-60.007, *Florida Administrative Code*, which authorize a substantially affected person to seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory or rule provision as it applies to Petitioner's particular set of circumstances.

6. The subject of the Petition is Section 552.25 and Subsection 552.30(1), *Florida Statutes*.

7. Petitioner is the Defendant in the lawsuit styled Schwab Materials, Inc. v. Lee County, Florida, case number 06-CA-003003, in the Circuit Court of the Twentieth Judicial Circuit.

8. The Plaintiff in Schwab Materials alleges generally that Section 552.30(1), *Florida Statutes*, "vests exclusive authority to regulate blasting for mining purposes with the State Fire Marshal."

9. The Plaintiff specifically alleges that Section 552.30(1), *Florida Statutes*, pre-empts the

Industrial Planned Development District's ("IPD's") Resolution which prohibits blasting for mining purposes, and in which the IPD declared that "blasting for mining therefore became a permitted use of the property, subject to state permitting requirements."

10. If the Plaintiff's proposed interpretation of the statute is correct, the County would lose all authority to apply its land development regulations ("LDRs") to determine whether blasting is an allowable land use, countywide. Such an interpretation would jeopardize the County's ability to regulate the health, safety, and welfare of County residents. Such an interpretation would also prevent the County from performing its statutory duty to enact and enforce LDRs, and to protect against incompatible land uses.

11. Petitioner has adopted LDRs, including zoning restrictions on land within "planned development districts," such as the IPD Zoning District. All development within the IPD Zoning District requires the approval of a master concept plan. In 1990, the County adopted a resolution which re-zoned the subject property to IPD zoning and approved a master concept plan for the subject property. That resolution allowed mining and excavation to a depth of twenty (20) feet, and prohibited blasting.

12. The general question presented is whether the Fire Marshall's authority under Chapter 552, *Florida Statutes*, to regulate the use of explosives is so broad as to pre-empt the authority of counties to regulate blasting as a land use, and to prohibit blasting when blasting would be incompatible with adjoining land uses, would violate land development regulation, or would be inconsistent with the County's Comprehensive Plan.

13. The County contends that Section 552.30(1), *Florida Statutes*, does not pre-empt its authority to regulate blasting as a land use. Petitioner's construction of the statutory scheme would

operate to impair the authority of the County to enforce LDRs which prohibit, among other things, land uses which are incompatible with uses on adjoining lands. Lee County, as a charter county acting under its powers of self-government under Article VIII, Section 1(g) of the Florida Constitution, has enacted LDRs which include the enactment of zoning districts and the authority, in the IPD zoning district, to prohibit land use that does not comply with an adopted master plan. The County is obligated by statute to adopt such LDRs, to create land use categories, and in its LDRs, to "ensure the compatibility of adjacent uses." Section 163.3202(2)(b), *Florida Statutes*. The primacy of local government jurisdiction in land development regulation derives from traditional rights of access to government, a historical preference "stronger than law." Cross Key Waterways v. Askew, 351 So. 2d 1062, 1065 (Fla. 1977). The County has broad authority to regulate all aspects of land use, including blasting at construction materials mining sites. Petitioner contends that Section 552.30(1), *Florida Statutes*, does not expressly or impliedly pre-empt its LDRs, and that its LDRs do not conflict with the statutes. Petitioner contends that the Fire Marshal has the authority to regulate blasting methods but no authority to regulate blasting for purposes of land use planning.

14. Notice of receipt of the Petition herein was published in Volume 33, Number 24 of the *Florida Administrative Weekly*, on June 15, 2007.

#### QUESTIONS

15. The Petition poses the following questions:

A. If a county has adopted a resolution and a site-specific master plan prohibiting the use of blasting on a given piece of property, is that resolution or master plan pre-empted by Section 552.30(1), *Florida Statutes*?

B. If a county's LDRs provide the County with authority to prohibit blasting at a given location, is the county's authority pre-empted by Section 552.30(1), *Florida Statutes*?

C. Does Section 552.30(1), *Florida Statutes*, have the effect of rendering blasting a permitted use in areas where LDRs would otherwise authorize a county to prohibit blasting?

D. Does Section 552.30(1), *Florida Statutes*, pre-empt a county from determining whether blasting would be incompatible with the adjacent land use and then applying the county's land use ordinances which may prohibit, restrict, or condition approvals of land uses which may be incompatible with adjacent uses?

E. Does Section 552.30(1), *Florida Statutes*, pre-empt a county from determining whether blasting in a particular area would constitute a nuisance and so applying county ordinances which regulate or restrict an activity which is a nuisance?

#### DISCUSSION

16. The Department has authority pursuant to Section 120.565, *Florida Statutes*, to issue Declaratory Statements relating to the application of its statutes, rules, and orders to a substantially affected person's particular set of circumstances.

17. Chapter 552, *Florida Statutes*, entitled, "Manufacture, Distribution and Use of Explosives," was enacted in 1955. Section 552.13, *Florida Statutes*, directs the Division of State Fire Marshal to:

Make, promulgate, and enforce regulations setting forth minimum general standards covering manufacture; transportation other than on a public street, road, or highway (including loading and unloading); use; sale; handling; and storage of explosives. Said regulations shall be such as are reasonably necessary for the protection of the health, welfare, and safety of the public and persons possessing, handling, and using such materials and shall be in substantial conformity with generally accepted standards of safety concerning such subject matters. Such regulations shall be adopted by the division pursuant to the provisions of chapter 120.

18. The foregoing language is both authority for, and a limitation of, the Department's rulemaking, pursuant to which the Department promulgated Chapter 69A-2, *Florida Administrative Code*. The scope of these rules is the manufacture, storage, transportation, sale, use and handling of explosives, and blasting agents in the State of Florida.<sup>1</sup> Construction materials mining activity is addressed in Rule 69A-2.024, *Florida Administrative Code*, which implements Section 552.30(1), *Florida Statutes*. The Section provides that:

(1) Notwithstanding the provisions of s. 552.25, the State Fire Marshal shall have the sole and exclusive authority to promulgate standards, limits, and regulations regarding the use of explosives in conjunction with construction materials mining activities. Such authority to regulate use shall include, directly or indirectly, the operation, handling, licensure, or permitting of explosives and setting standards or limits, including, but not limited to, ground vibration, frequency, intensity, blast pattern, air blast and time, date, occurrence, and notice restrictions. As used in this section, "construction materials mining activities" means the extraction of limestone and sand suitable for production of construction aggregates, sand, cement, and road base materials for shipment offsite by any person or company primarily engaged in the commercial mining of any such natural resources.

19. Section 552.25, *Florida Statutes*, states that:

Nothing contained in this chapter shall affect any existing ordinance, rule or regulation pertaining to explosives of any incorporated city, town, county, or other local governmental entity in this state not less restrictive than the provisions of this chapter and rules promulgated pursuant thereto, or affect, modify or limit the power of such incorporated cities, towns, counties, or other local governmental entities to make ordinances, rules or regulations hereunder pertaining to explosives within their respective corporate limits.

20. Section 552.30, *Florida Statutes*, was enacted well after Section 552.25, *Florida Statutes*.

The enacting legislation did not repeal Section 552.25, *Florida Statutes*, nor did a later amendment to Section 522.30, *Florida Statutes*, in 2003. The Legislature intended that both provisions be effective; therefore, the two sections must be harmonized.

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<sup>1</sup> Fla. Admin. Code R. 69A-2.001.

21. The Department expressed its interpretation of the interplay between the two statutes through the promulgation of Rule 69A-2.024(1), *Florida Administrative Code*, which excludes from its scope, “[a]ny person or company not primarily engaged in commercial mining of limestone and sand suitable for production of construction aggregates, sand, cement, and road base materials remains subject to the provisions of Section 552.25, F.S.”

22. The Department’s “sole and exclusive authority to promulgate standards, limits, and regulations” is also limited by the terms of Section 552.30 *Florida Statutes*, to “directly or indirectly, the operation, handling, licensure, or permitting of explosives and setting standards or limits, including, but not limited to, ground vibration, frequency, intensity, blast pattern, air blast and time, date, occurrence and notice restrictions”

23. The Florida Legislature has granted the Department the sole and exclusive authority to promulgate standards, limits, and regulations relating to the use of explosives in conjunction with construction materials mining activities. The Department interprets this language to pre-empt regulations relating to “how,” or under what circumstances, explosives may be used, not “where” mines may be located. It is recognized that under some circumstances, local land use regulations could “indirectly” regulate how explosives are used, if, for example, mining is prohibited by a local regulation. Nevertheless, the interpretation adopted by the Department is consistent with a contextual reading of Section 552.30, *Florida Statutes*, which addresses *how* blasting is conducted rather than *where* it is conducted, and in light of the fact that the Department’s expertise statutorily lies in firefighting and prevention, not land use. A broader interpretation of the pre-emption would permit construction materials mining in areas clearly unsuitable for such mining activities.

NOW, THEREFORE, in accordance with the foregoing, and the statutes and rules cited therein, it is hereby declared that:

1. Petitioner is a substantially affected person entitled to the issuance of this Declaratory Statement.

2. Question A. If a county has adopted a resolution and a site-specific master plan prohibiting the use of blasting on a given piece of property, is that resolution or master plan pre-empted by Section 552.30(1), *Florida Statutes*? Answer: Not if the local regulation constitutes a bona fide land use ordinance and not a legal subterfuge for regulating the circumstances under which explosives may be used in construction materials mining activities.

3. Question B. If a county's LDRs provide the county with authority to prohibit blasting at a given location, is the county's authority pre-empted by Section 552.30(1), *Florida Statutes*? Answer: Same as Question A.

4. Question C. Does Section 552.30(1), *Florida Statutes*, have the effect of rendering blasting a permitted use in areas where LDRs would otherwise authorize a county to prohibit blasting? Answer: Same as Question A.

5. Question D. Does Section 552.30(1), *Florida Statutes*, pre-empt a county from determining whether blasting would be incompatible with the adjacent land use and then applying the county's land use ordinances which may prohibit, restrict or condition approvals of land uses which may be incompatible with adjacent uses? Answer: Same as Question A

6. Question E. Does Section 552.30(1), *Florida Statutes*, pre-empt a county from determining whether blasting in a particular area would constitute a nuisance and so applying county ordinances which regulate or restrict an activity which is a nuisance? Answer: Yes, the Department has sole and

exclusive authority to regulate the use of explosives, including, directly or indirectly, the operation, handling, licensure, or permitting of explosives and setting standards or limits, including, but not limited to, ground vibration, frequency, intensity, blast pattern, air blast and time, date, occurrence, and notice restrictions in conjunction with construction materials mining activities. The local regulation of those legislatively-delegated activities and standards under the authority to regulate “nuisances” is deemed to be pre-empted.

#### NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Declaratory Statement is entitled to seek review of this Declaratory Statement pursuant to Rule 9.110, *Florida Rules of Appellate Procedure*, because pursuant to Section 120.565, *Florida Statutes*, a Declaratory Statement constitutes final agency action and is therefore subject to judicial review pursuant to Section 120.68, *Florida Statutes*. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida, and a copy of the same with the appropriate district court of appeal, within thirty days of rendition of this Declaratory Statement.

ENTERED in the City of Tallahassee, Leon County, Florida, this \_\_\_\_ day of \_\_\_\_\_, 2007.

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Eric Miller  
Deputy Chief Financial Officer

Copies furnished to:

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