

EXHIBIT A
Item 4.B



City of North Port

Office of the City Attorney

Response to Request for Legal Services

To: Nicole Galehouse – Neighborhood Development Services/Planning

From: Michael Golen, Assistant City Attorney

Through: Amber L. Slayton, City Attorney

Date: October 12, 2018

Re: Request for Legal Services – Ordinance 2018-40 – Phosphate Mining

The above-referenced Request for Legal Services has been reviewed.

The attached Ordinance has been revised so as to be legally correct as to form. Please be aware that the language contained in this Ordinance depends upon the adoption of Ordinance 2018-43 being adopted first. If Ordinance 2018-43 is not adopted first, this Ordinance will need to be revised and re-advertised.

Additionally, the following is from a previous legal opinion provided to you on August 13, 2017, regarding the city placing an outright ban on phosphate mining. The question implicated both preemption and property rights concerns as follows:

It is well settled that the state can restrict the home rule powers of counties and municipalities through preemption. State preemption precludes a city or county from exercising authority in a particular area. The Florida courts have recognized two types of preemption: express and implied.

Express preemption “requires that the statute contain specific language of preemption directed to the particular subject at issue.” *Tallahassee Memorial Regional Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996). Although phosphate mining is primarily governed by Florida State Statutes Chapter 373, 378 and 403, Title 62, Florida Administrative Code, there is no express preemption in any of those chapters regarding mining.

“Implied preemption occurs if a legislative scheme is so pervasive that it occupies the entire field, creating a danger of conflict between local and state laws.” *Id.* Whether an implied preemption exists is a question for the courts to decide, as it is not based on statutory law. I found no case law addressing this issue with respect to a mining ban. A court may find implied preemption here given the breadth of the state’s authority with regards to mining and water reclamation, including but not limited to: rule-making, reviewing reclamation applications, permitting, enforcement, etc. However, Florida Statutes Section 378.204, dealing with land reclamation, which is required after

land disturbance, states that this “part shall not be construed as giving the department permitting authority over mining operations.” Certainly, this section supports an argument that there is no implied preemption. But the only way to know for sure is to test the issue by creating an ordinance banning phosphate mining.

The other concern is to ensure that a ban would not impact the property rights of owners. Should a property owner be either in the process of developing property for mining or purchased property with an expectation to mine phosphate, the city could run afoul of the takings clause.¹ This could be particularly applicable if there have been inquiries, applications or discussion regarding same.

I found no city that has banned mining, perhaps because mining does not usually take place in urban areas. There are a few counties who regulate mining, including Manatee County. A well-crafted ordinance regulating mining, rather than banning it, should not implicate the legal concerns set forth above.

Please let me know if there are any questions, comments, or concerns. If your department refuses any proposed revisions or makes any additional changes, the document will require additional legal review. Otherwise, no further action will be taken on this Request for Legal Services.

If you accept all revisions, the matter will be deemed concluded once the City Attorney’s Office receives a final version of the document containing all changes. The file will then be closed.

¹ This also may implicate vested rights and the Bert J. Harris, Jr. Private Property Rights Protection Act. *See* Fla. Stat. §§ 70.001 – 70.80.

PUBLIC NOTICE - CITY OF NORTH PORT

NOTICE OF INTENT TO AMEND THE CITY OF NORTH PORT UNIFIED LAND DEVELOPMENT CODE

PROPOSED ORDINANCE NO. 2018-40

NOTICE IS HEREBY GIVEN, pursuant to the provisions of Section 166.041(3)(a), Florida Statutes and Section 9.01 (b) of the Charter of the City of North Port, and Chapter 1, Article II, Section 1-12 of the City's Unified Land Development Code (ULDC), that the City of North Port proposes to adopt Ordinance No. 2018-40, Amendment to the City of North Port Florida Unified Land Development Code (ULDC).

A Public Hearing will be held before the Planning and Zoning Advisory Board designated as the Local Planning Agency (LPA) on **Thursday, November 1, 2018 at 9:00 a.m.** in the City Hall Commission Chambers, 4970 City Hall Boulevard, North Port, Florida 34286.

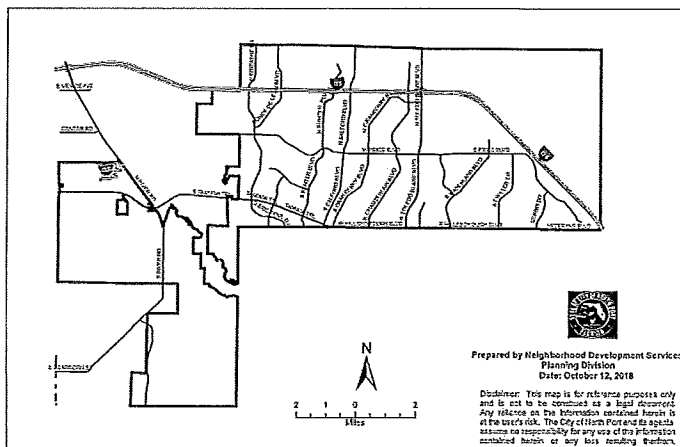
A Public Hearing for the first reading of Ordinance 2018-40 will be held before the North Port City Commission in Commission Chambers on **Tuesday, November 27, 2018 at 6:00 p.m.**, or as soon thereafter as the matter may be heard. The second and final reading will be held before the North Port City Commission in Commission Chambers on **Tuesday, December 11, 2018 at 1:00 p.m.**, to consider enactment of Ordinance No. 2018-40.

These Public Hearings will be held in the North Port City Hall Commission Chambers, 4970 City Hall Boulevard, North Port, Florida, 34286.

ORDINANCE NO. 2018-40

(Amendment to the City of North Port Unified Land Development Code related to Phosphate Mining by amending Chapter 14 Earthmoving, Dredging and Fill Regulations, Article I General, and by creating Article V - Definitions)

AN ORDINANCE OF THE CITY OF NORTH PORT, FLORIDA, AMENDING THE UNIFIED LAND DEVELOPMENT CODE OF THE CITY OF NORTH PORT, FLORIDA, RELATED TO PHOSPHATE MINING BY AMENDING CHAPTER 14 - EARTHMOVING, DREDGING AND FILL REGULATIONS, ARTICLE I - GENERAL, SECTION 14-9 - PROHIBITED ACTIVITIES, AND BY AMENDING ARTICLE V - DEFINITIONS; PROVIDING FOR ADOPTION; PROVIDING FOR CONFLICTS; PROVIDING FOR SEVERABILITY; PROVIDING FOR CODING; AND PROVIDING AN EFFECTIVE DATE.



Note: This map covers all of the incorporated areas of the City of North Port, Florida. The proposed Ordinance 2018-40, (Adoption of Amendments to the City of North Port Unified Land Development Code) applies to the entire City of North Port as depicted on this map.

All interested parties are invited to appear and be heard in respect to this Ordinance at the public hearings in the City Hall Commission Chambers. Written comments filed with the Planning and Zoning Advisory Board and the City Commission will be heard and considered and will be made a matter of public record at these meetings. These public hearings may be continued from time to time as announced at the hearings, as may be found necessary. The file pertinent to Ordinance 2018-40, TXT-18-165, may be inspected by the public at the Neighborhood Development Services Department, Planning Division, and in the City of North Port City Clerk's Office, 4970 City Hall Boulevard, North Port, Florida 34286, during regular business hours.

NO STENOGRAPHIC RECORD BY A CERTIFIED COURT REPORTER IS MADE OF THESE MEETINGS. ACCORDINGLY, ANY PERSON WHO MAY SEEK TO APPEAL A DECISION INVOLVING THE MATTERS NOTICED HEREIN WILL BE RESPONSIBLE FOR MAKING A VERBATIM RECORD OF THE TESTIMONY AND EVIDENCE AT THESE MEETINGS UPON WHICH ANY APPEAL IS TO BE BASED (SEE F.S.S. 286.0105).

NOTE: PERSONS WITH DISABILITIES NEEDING ASSISTANCE TO PARTICIPATE IN ANY OF THESE PROCEEDINGS SHOULD CONTACT THE CITY CLERK'S OFFICE 48 HOURS IN ADVANCE OF THE MEETING (SEE F.S.S. 286.26).

NONDISCRIMINATION: The City of North Port does not discriminate on the basis of race, color, national origin, sex, age, disability, family or religious status in administration of its programs, activities or services.

AMERICAN WITH DISABILITIES ACT OF 1990 - The North Port City Hall is wheelchair accessible. Special parking is available on the west side of City Hall and the building may be accessed from the parking area. Persons with hearing difficulties should contact the City Clerk to obtain a hearing device for use during meetings.

Kathryn Peto,
City Clerk

