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*Defending Florida's Ecosystems
and Communities*

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May 29, 2007

The Honorable Doug Coward
Board of County Commissioners
2300 Virginia Avenue
Ft. Pierce, FL 34982

Re: Wetlands "Preemption" Issue

Dear Commissioner Coward,

Virginia Sherlock of LITTMAN SHERLOCK & HEIMS, referred to us your question regarding whether state wetland permitting laws found in section 373.414, Fla. Stat. preclude the County from adopting and enforcing a policy that prohibits impacts to wetlands within its boundaries. For the reasons explained below, Florida's Growth Management Act (Ch. 163, Part II, Fla. Stat.) provides the County with the power to enact and enforce a local comprehensive plan policy that prohibits development impacts to wetlands, and such a policy is not precluded from doing so by state law and rules on wetland permitting and mitigation.

Water Resources Protection Act: Ch. 373, Fla. Stat.

The Florida Water Resources Protection Act – Ch. 373, Fla. Stat. - is intended to carry out the policies of Article II, Section 7 of the Florida Constitution by preserving natural resources, protecting fish and wildlife, minimizing stormwater impacts to surface waters, and providing for the management of water resources. The Act provides the Department of Environmental Protection (DEP) and the water management districts (hereinafter "District") with the responsibility of regulating the State's wetlands through the environmental resource permitting (ERP) program.

The ERP permitting program grants the water management districts the authority to require permits and impose reasonable conditions to assure that "the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works," comply with the provisions of Ch. 373, Fla. Stat., any applicable rules promulgated thereto, and will not harm water resources.

Section 373.414, Fla. Stat. directs the water management districts to require applicants for an ERP to provide reasonable assurances that state water quality standards will not be

violated and that the permitted activity in or on surface waters or wetlands will not be contrary to the public interest. Section 373.414 (1)(a), Fla. Stat. lists the criteria the District must consider in determining whether the action will be contrary to the public interest.¹

If the applicant is unable to meet these criteria, section 373.414 (1)(b), Fla. Stat. requires the agency to “consider measures proposed by or acceptable to the applicant *to mitigate* adverse effects that may be caused by the regulated activity.” *Id.* (emphasis added). Section 373.414 (1)(b)(4), Fla. Stat., further provides:

“If *mitigation* requirements imposed by a local government for surface water and wetland impacts of an activity regulated under this part cannot be reconciled with mitigation requirements approved under a permit for the same activity issued under this part, the *mitigation* requirements...including application of the uniform wetland mitigation assessment method...shall be controlled by the permit issued under this part.” *Id.* (emphasis added).

Section 373.414 (18), Fla. Stat. directs the districts “to develop a uniform mitigation assessment method for wetlands and other surface waters” and that this method shall provide an exclusive and consistent process for determining the amount of mitigation required to offset impacts to wetlands and other surface waters, and, once effective, shall supersede all rules, ordinances and variance procedures from ordinances *that determine the amount of mitigation* needed to offset such impacts.” *Id.* (emphasis added). The uniform mitigation assessment method (UMAM) “shall be binding on the...local governments...and shall be the sole means *to determine the amount of mitigation needed* to offset adverse impacts to wetlands and other surface waters.” *Id.* (emphasis added). The uniform mitigation assessment method was adopted by rule and is codified at Title 62, Chapter 345, Fla. Admin. Code.

The 1985 Florida Growth Management Act: Chapter 163, Florida Statutes

The Local Government Comprehensive Planning and Land Development Regulation Act (Ch. 163, Part II, Fla. Stat.) requires all local governments to adopt a comprehensive plan determining the allowable uses, densities and intensities and development standards for all lands within their boundaries, and ensure that all development be consistent with the adopted plan.² The Act grants counties the power and responsibility:

- (a) “to plan for their future development and growth, to adopt and amend comprehensive plans, or elements or portions thereof,
- (b) to guide their future development and growth,
- (c) to implement adopted or amended comprehensive plans by the adoption of appropriate land development regulations or elements, and
- (d) to establish, support, and maintain administrative instruments and procedures to carry out the provisions and purposes of this act.” § 163.3167 (1), Fla. Stat.

¹ These criteria are also contained in Title 40E, Ch. 4, Fla. Admin. Code, and the South Florida Water Management District’s *Basis of Review for Environmental Resource Applications* § 4.2.3.

² See §§ 163.3167, 163.3177, 163.184, Fla. Stat.

A local comprehensive plan must also be consistent with the State Comprehensive Plan, which contains similar wetland protection mandates. The State Plan has a goal to “maintain the functions of natural systems and the overall present level of surface and ground water quality.” § 187.100 (7)(a), Fla. Stat. It has policies to “protect and use natural water systems,” “encourage the development of a strict floodplain management program by state and local governments designed to preserve hydrologically significant wetlands,” “protect surface and groundwater quality and quantity in the state,” and “reserve from use that water necessary to support...recreation and the protection of fish and wildlife.” § 187.100 (7)(b), Fla. Stat. The State Plan emphasizes the need to “protect and acquire unique natural habitats and ecological systems, such as wetlands.” The plan establishes additional policies that “conserve wetlands,” “protect and restore ecological functions of wetland systems to ensure their long-term environmental, economic and recreational value,” and “*emphasize the acquisition and maintenance of ecologically intact systems in all land and water planning, management, and regulation.*” § 187.100 (9)(a) and (b), Fla. Stat. (emphasis added).

Plans are required to include goals, objectives and policies that, among other requirements, protect, conserve and appropriately use natural resources and other areas with development constraints,³ coordinate land uses with topography, soils, and the availability of infrastructure,⁴ and provide for the compatibility of adjacent land uses.⁵ Recently, the Department of Community affairs reviewed the County’s environmental policies and noted how these protective measures may benefit the community and the environment.⁶

Future land uses are to be allocated based upon surveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area; the character of undeveloped land; the availability of public services; and the need for redevelopment.⁷ This general data and analysis requirement is supplemented by the specific data and analysis requirements in other sections of the statute and Rule 9J-5 concerning the identification and analysis of natural resources and other areas with development constraints, the suitability of land for various uses, and the availability of facilities, services and infrastructure.⁸

State planning law authorizes (indeed requires) local communities to direct inappropriate or intense land uses away from environmentally sensitive wetlands and enables counties to

³ See § 163.3177 (6)(d), Fla. Stat. Among the required elements of plan is a conservation element, which must provide for “the conservation, use, and protection of natural resources in the area, including air, water..., *wetlands*, ... estuarine marshes, soils, ... flood plains, rivers, bays, lakes, harbors, ... fisheries and wildlife, marine habitat, ..., and other natural and environmental resources.” *Id.* (emphasis added).

⁴ Rule 9J-5.006 (3)(b)(1), F.A.C.

⁵ Rule 9J-5.006 (3)(c)2, F.A.C.

⁶ See *Integrating Hazard Mitigation Into Comprehensive Plans, St. Lucie County Profile*, Florida Department of Community Affairs (2006).

⁷ § 163.3177 (6)(a), Fla. Stat.; Rule 9J-5.006 (2)(c), F. A. C.

⁸ See, e.g., Rule 9J-5.006 (2)(a) and (b); Rule 9J-5.013 (1), F.A.C.

consider the “big picture.”⁹ This is the basic distinction between planning (which only local governments can do) and permitting. “[P]ermitting is not planning and planning is not permitting....”¹⁰

Permitting programs help ensure that if activities must occur in or around wetlands, they minimize impacts to the extent practicable.¹¹ But, permitting programs by and large do not plan for future land development and do not use and identify and implement long-range goals, objectives and policies based on a comprehensive assessment of natural resources in a particular area in light of future growth projections and community needs and desires. Because permitting focuses on the “how” rather than the “what,” “where,” and “when,” relying on a permitting program alone to plan for the future “is a losing proposition.”¹²

Section 163.3184 (6)(c), Fla. Stat. demonstrates that Florida law allows comprehensive plans to adopt policies and land use designations requiring wetland impacts to be avoided altogether, but preempts only the mitigation aspects of any permitting program a local government may choose to rely upon. That section prohibits DCA from requiring local governments to duplicate or exceed the any federal, state, or regional permitting program, but expressly authorizes DCA to make compliance determinations regarding plan densities and intensities.

“When a federal, state, or regional agency has implemented a permitting program, the state land planning agency shall not require a local government to duplicate or exceed that permitting program in its comprehensive plan or to implement such a permitting program in its land development regulations. Nothing contained herein shall prohibit the state land planning agency in conducting its review of local plans or plan amendments from making objections, recommendations, and comments or making compliance determinations regarding densities and intensities consistent with the provisions of this part.” *Id.*

The Legislature added this language to emphasize that local government’s role is to take a land use planning approach rather than a permitting approach. Thus, **the most basic requirement in the Act, and the fundamental distinction between planning and permitting, is that local comprehensive plans must “designate proposed future general distribution, location, and extent of the uses of land”** § 163.3177 (6)(a), Fla. Stat. They must define each land use category in terms of *type* of uses included and *specific standards for the density or intensity* of use. *Id.* (emphasis added). Further, they must adopt *standards to be followed in the control and distribution of population densities and building and structure intensities.* *Id.* (emphasis added). **The legal authority and requirement to establish the extent, location and**

⁹ *Id.*

¹⁰ Mary Jane Angelo, *Integrating Water Management and Land Use Planning: Uncovering the Missing Link in the Protection of Florida’s Water Resources?* 12 J. Law. & Pub. Pol’y 223 (2001).

¹¹ See South Florida Water Management District, *Basis of Review*, Section 4.2.3.

¹² See Angelo *infra* note 9 at 232-34.

intensity of future land uses (a power clearly not available to state or regional permitting agencies) is one of the most critical and strictly enforced requirements of the Act.¹³

Ch. 373, Fla. Stat. does not prevent the County from adopting and enforcing a comprehensive plan policy that prohibits development of wetlands. The bottom line of state law is that local governments – not the State – have the sole authority to determine the allowable land use and zoning designations for all lands based on their analysis and policy decisions relative to the full range of environmental, infrastructure, community character, need and other issues relevant to comprehensive planning. If the result of that decision is that wetlands are not appropriate for development, then a comprehensive plan policy to that effect is entirely valid.¹⁴ **It is only when a local government chooses to allow wetland impacts and sets a permitting program to regulate such impacts, that state law precludes the adoption of mitigation standards that are more stringent than those adopted by the State.**

The “Plain Meaning” of Section 373.414, Fla. Stat. Limits its Application to Instances Where Wetland Development is Permitted Subject to Mitigation.

The plain meaning of a statute determines legislative intent. *Citizens of the State of Fla. v. Public Service Comm.*, 425 So. 2d 534 (Fla. 1982); *Trushin v. State*, 475 So. 2d 1290 (Fla. 3d DCA 1985). “[T]he Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute.” *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976). Thus, if the language employed in a statute has a clear meaning that meaning controls. Further, in construing a statute, courts cannot attribute to the legislature intent beyond that expressed. *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988); *Bill Smith, Inc. v. Cox*, 166 So. 2d 497 (Fla. 2d DCA 1964).

Section 373.414 (1)(b), Fla. Stat. expressly applies only where an agency, in deciding to grant or deny an environmental resource permit (ERP), is considering proposed wetland mitigation measures to offset the impacts of regulated wetland alteration activity. Section 373.414 (1)(b)(4), Fla. Stat. further provides that if *mitigation* requirements imposed by a local government for wetland impacts cannot be reconciled with *mitigation* requirements approved under a state permit for the same activity, the *mitigation* requirements are controlled by the ERP.

Therefore, if a County program allowed development of wetlands subject to mitigation, section 373.414 (1)(b), Fla. Stat. would likely require the mitigation requirements to be controlled by the ERP. **However, if a County’s Comprehensive Plan prevents impacts to wetlands, thereby precluding the use of mitigation, this state “pre-emption” is inapplicable.**

¹³ *Village of Key Biscayne v. Dept. of Comm. Affairs*, 696 So. 2d 495 (Fla. 3d DCA 1997).

¹⁴ Martin County and Monroe County are just two examples of local governments that have maintained comprehensive plan policies for many years that preclude any impacts to wetlands. See Martin County Growth Comprehensive Plan § 9.4.A.7.a-d. (2006); Monroe County Year 2010 Comprehensive Plan, Policy 102.1.1 (providing a 100% open space requirement for undisturbed wetlands) (2006).

The express language of the statute should end any debate on this question. Nevertheless, an Attorney General Opinion¹⁵ provides further support for this conclusion. In 1994, the Martin County Attorney asked the State Attorney General the following question:

Does Section 373.414(1)(b), Florida Statutes, prohibit a local government from prohibiting development of wetland areas under its county comprehensive growth management plan when the water management district or the Department of Environmental Protection has granted a permit that would allow development of wetlands subject to mitigation requirements?

At the time, the Martin County Comprehensive Plan prohibited the alteration and development of viable wetland areas except in certain circumstances, and the County did not allow for wetlands mitigation. With few exceptions, this is still the case today.¹⁶ The Florida Attorney General opined that:

“I find nothing in section 373.414(1)(b), Florida Statutes, that seeks to alter the power of a local government pursuant to its comprehensive plan to control growth and development within its boundaries. Rather, **the provisions of section 373.414, [Fla. Stat.], would appear to apply only to those instances in which development of wetlands is permitted subject to mitigation...**Section 373.414(1)(b), [Fla. Stat.], thus appears to apply when local government regulations permit the development of wetlands and there is a conflict between state and local mitigation requirements. In such cases, the state mitigation requirements will prevail over any mitigation requirements adopted by the local government that cannot be reconciled with those of Part IV, [Ch.] 373, [Fla. Stat.]. **Where, however, as in the instant inquiry development of wetlands is not permitted under the local government’s comprehensive growth plan, the statute would appear to be inapplicable.**”¹⁷

Because section 373.414, Fla. Stat. applies only to instances where development of wetlands is permitted subject to mitigation, it is inapplicable where a policy prohibits development of wetlands and thus, precludes the use of mitigation. Legislative direction on how something is to be done is a prohibition against it being done any other way. *Alsop v. Pierce*, 19 So. 2d 799 (Fla. 1944); *Devin v. City of Hollywood*, 351 So. 2d 1022, 1025 (Fla. 4th DCA 1976). By instructing the State, its agencies and local governments to apply the requirements of section 373.414 only to those instances where wetland development is permitted subject to mitigation, the Legislature has effectively prohibited its application to those instances where wetland development is prohibited and mitigation is a non-issue.

The adoption in 2004 of the UMAM mitigation methodology from section 373.414 (18), Fla. Stat., and the implementing administrative rule do not alter this analysis. Section 373.414 (18), Fla. Stat. supersedes “all rules, ordinances and variance procedures from ordinances” only

¹⁵ Atty. Gen. Op. 94-102 (December 6, 1994) available at <http://myfloridalegal.com/opinions>.

¹⁶ See Martin County Comprehensive Growth Management Plan, § 9.4.A.7.a.-d. (2006).

¹⁷ Atty. Gen. Op. 94-102 (December 6, 1994).

to the extent they are needed to “*determine the amount of mitigation* needed to offset such impacts.” As the UMAM rule (Rule 62-345.100 (3)(a), Fla. Admin. Code) explains, “this method is not applicable to activities for which mitigation is not required.” Thus, when a County chooses to adopt a plan policy prohibiting all wetland impacts, with no option for mitigation, UMAM’s mitigation requirements would not apply.

Section 373.414, Florida Statutes, Does Not Preempt a County from Adopting and Enforcing Policies that Prohibit Wetlands Development.

The Attorney General Opinion found section 373.414 did not “preempt” Martin County from adopting and enforcing policies that prohibited wetlands development. As the Attorney General explained, “[s]ection 373.414(1)(b), [Fla. Sta.] does not preempt the ability of local government to prohibit development of wetland areas under the county comprehensive growth management plan when the [State] has issued a permit allowing development of wetlands subject to mitigation requirements.”¹⁸

Courts have recognized two types of legislative preemption. “Express preemption” occurs where there is a specific statement that the legislative scheme of a senior legislative body (in this case the State) preempts the legislative scheme established by a junior legislative body (in this case the County). “Implied preemption” is triggered when a legislative scheme by a junior legislative body conflicts with a legislative scheme by a senior legislative body, which is so pervasive that it completely occupies the field. *Hillsborough County v. Florida Restaurant Association, Inc.*, 603 So. 2d 587 (Fla. 2d DCA 1993).

Ch. 373, Fla. Stat., Rule 62-345, Fla. Admin. Code, and the Water Management District’s *Basis of Review*, do not explicitly preempt local governments from prohibiting development impacts to wetlands. In addition, Ch. 373 does not appear to be so pervasive that it completely occupies the field, thereby preventing local prohibitions on wetland impacts. Rather, section 373.414, Fla. Stat. acknowledges the existence of local government regulation of wetlands, and requires the state rules to control only when local mitigation requirements, for instance, cannot be reconciled with the state rules.¹⁹ Thus, section 373.414 does not preempt local government authority to prohibit impacts to wetlands through comprehensive planning. There have been no significant changes to the relevant statutes and rules since 1994 that suggest Chapter 373 preempts the County from prohibiting wetland development.

¹⁸ Atty. Gen. Op. 94-102 (December 6, 1994).

¹⁹ See also section 373.414 (18) which references section 403.182, Fla. Stat.. Pursuant to section 403.182, local governments may implement a State approved local program to control surface water pollution. As a part of this program, local governments may establish mitigation programs for wetlands or other surface waters and in the event that the UMAM methodology were ever invalidated by a court, the mitigation rules adopted by an approved local program under section 403.182 may control. §373.414 (18), Fla Stat.

Conclusion

Section 373.414, Fla. Stat. does not preclude the County from adopting and/or enforcing policies that prohibit wetlands impacts, thereby prohibiting mitigation. The fundamental reason is the County's authority under the Growth Management Act to restrict development of wetlands within its boundaries. State planning laws and wetland laws are to be read to work in harmony²⁰, and the State's pre-emption of the method determining wetland mitigation does not preclude a local government from making the planning decision that wetlands are not appropriate places for development. The Growth Management Act expressly requires local governments to direct development away from environmentally sensitive areas²¹ while Ch. 373 sets forth the exclusive method of determining mitigation for any agency – state or local – that implements a wetland regulatory program. This month, the Florida Legislature reaffirmed the important role local programs play in protecting wetlands when it failed to pass a proposed bill that would have prohibited local governments from enacting or enforcing wetland regulatory programs.²²

Thus, it is clear that the County is fully authorized to determine what land uses to allow where, and is not required to allow any development in wetlands.

If you have any questions, please feel free to contact us.

Sincerely,

Jason Totoiu
Staff Counsel

Richard Grosso
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CF:jt

cc: Vanessa Bessey
Virginia Sherlock

²⁰ Courts have a duty to harmonize and reconcile two statutes and to find a reasonable field of operation that will preserve the force and effect of each. *American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524 (Fla. 1938).

²¹ Rule 9J-5.006 (3)(a), F.A.C.

²² See Florida House Bill 957 available at www.myfloridahouse.gov. See also "18 Words Imperil 3-Million Acres" *St. Petersburg Times*, March 31, 2007.