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CIRCUIT COURTS—ORIGINAL

Counties—Zoning—Development orders—Conservation wetlands—County policy providing for adjustment of actual wetlands line once formal delineation has been obtained from water management district cannot be used to approve additional density on island designated as conservation wetlands without first submitting amendment to comprehensive plan future land use map—Density of 169 units allowed by planned development rezoning of portion of island is inconsistent with maximum allowable density of 41 units established by comprehensive plan—Standing—Where plaintiffs demonstrated actual recreational use of island to conduct kayak outings and engage in wildlife photography and ongoing activities related to conservation resources of island and showed that their interests will be adversely affected by increased inconsistent density, plaintiffs are aggrieved and adversely affected parties with standing to challenge consistency of development order with comprehensive plan—Development order quashed

ERIC TITCOMB, ROBERT WEINTRAUB, JULIE FERREIRA, Plaintiffs, v. NASSAU COUNTY, Defendants. Circuit Court, 4th Judicial Circuit, in and for Nassau County. Case No. 06-201-CA, Div A. January 26, 2009. Brian J. Davis, Judge. Counsel: Ralf Brookes, Cape Coral. David Hallman. Fred Franklin, Jr..

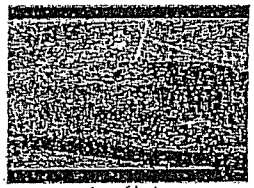
AMENDED FINAL ORDER

[Original Opinion at 16 Fla. L. Weekly Supp. 161a]

The court held a *de novo* trial on October 6, 7 and 24, 2008 on remaining Count I, a statutory action brought pursuant to Florida Statutes Section 163.3215, in the above styled action. Plaintiffs allege that the planned development rezoning is inconsistent with the maximum allowable density established by the Nassau County Comprehensive Plan. At rehearing on January 16, 2009, the Court found cause to hereby amend its Final Order Entered December 22, 2008.

The Court heard testimony from witnesses called by the parties over the course of two days on the substantive issue of whether the development order was inconsistent with the density established by the Comprehensive Plan and then reconvened for an additional half day of testimony regarding standing.

The parcel in question is the southern portion of Crane Island, which is designated as Conservation Wetlands in the Comprehensive Plan and is privately owned. This parcel is located entirely within in the Category 1 hurricane evacuation zone and the 100 year flood plain. The northern end of Crane Island is a parcel owned by the Florida Inland Navigation District, and this northerly portion is not part of the development proposal.



Crane Island
Aerial Photograph, Plaintiffs' Exhibit 1

The development proposal for the privately-held southern portion of the island includes 166 residential dwelling units and a marina to be dredged out from the island's interior. The island is currently unbridged and the development proposal includes a bridge to provide vehicular access to Crane Island.

The current Future Land Use Map shows Crane Island as wetlands, which corresponds to the "Conservation—Wetlands" land use designation as described in the text of the Future Land Use Element of the Comprehensive Plan. The land use category of "Conservation-Wetlands" is limited to a maximum allowable density of 1 unit per 5 acres under the Comprehensive Plan. The Comprehensive Plan establishes a maximum allowable density on "Conservation Wetlands" at "no greater than 1 unit per 5 acres." *See*, Nassau County Comprehensive Plan FLUM; Policy 1.04A.02.

Because the planned development area on Crane Island is approximately 207 acres the maximum allowable density under the "Conservation-Wetlands" land use designation would allow approximately 41 units. The proposed planned development rezoning would allow 169 units greatly exceeding the maximum allowable density.

The County and Intervenors argue that the Comprehensive Plan contains a Policy 1.09.03 that provides for adjustment of the actual wetlands line once a formal delineation has been obtained from the St. Johns Water Management District. (*Transcript Vol. 1, p 108-111*). The County, in part based upon a memorandum from the County Attorney, utilized this policy to approve the additional density on Crane Island without first submitting an amendment to the Comprehensive Plan Future Land Use Map. (*Transcript Vol. 2, p 540*).

Witnesses from the State of Florida Department of Community Affairs (DCA) described Policy 1.09.03 as a "ground-truthing" policy necessary because the scale and scope of Future Land Use Maps are inadequate to delineate the exact wetlands boundaries on individual parcels. (*Transcript Vol. 1, p 108-111*).

However, the Department of Community Affairs Chief of Comprehensive Planning Mike McDaniel and Department of Community Affairs General Counsel Shaw Stiller testified that DCA informed the County and the Applicant in this case that Policy 1.09.03 could not be used or applied to Crane Island in the manner proposed to change the land use designation of Crane Island to increase density "to go from 41 units to 169 units". (*Transcript Vol. 1, pp. 95-96, 108, 112, 232-234, 238*).

The Department of Community Affairs witnesses testified that the planned development would be inconsistent with the Comprehensive Plan (*Transcript Vol. 1, p. 230*[1]) and that "Policy 1.09.03 (as previously approved by DCA) could not be used in a manner that would change the land use designation for the entire privately held portion of Crane Island, *Id.* and a Comprehensive Plan Amendment supported by data and analysis would be required to amend the Future Land Use Map designation for such a large scale change. (*Transcript Vol. 1, pp. 112-116, 232-234*).

The State of Florida Department of Community Affairs witnesses testified that they had in fact visited Crane Island, (*Transcript Vol. 1, p 227*) recognized that Crane Island was designated 1 unit per 5 acres not only because it was a wetland (*Transcript Vol. 1, p. 239, lines 1-5*) but that Crane Island was also located in the coastal high hazard area (*Transcript Vol. 1, p 240*) and within the 100 year floodplain (*Transcript Vol. 1., p. 122*). The DCA approved the current "conservation/wetlands" land use designation for Crane Island as part of a 1993 Stipulated Settlement Agreement with the DCA. (*Trancript Vol 2., p.529*). Former County Attorney Mike Mullins admitted in his testimony that the Department of Community Affairs "continued to insist that it [Crane Island] had to be "Conservation/Wetlands" because it was an island" and that "If Crane Island was not conserva-

tion/wetlands, they [DCA] would not approve Nassau County's comp plan. That is what I reported to the Board" [of County Commissioners]. *(Transcript Vol 2., p.528-529)*[2].

The County originally agreed to the designation of Conservation for Crane Island and in fact, did submit multiple applications to amend the Comprehensive Plan FLUM designation specifically for Crane Island seeking additional density. Each of these previous Comprehensive Plan Amendments received negative objections, recommendations or comments from the Department of Community Affairs acting as the state land planning agency charged with review of Comprehensive Plan Amendments. Each of these proposed amendments to the Comprehensive Plan to change the land use designation on Crane Island from "Conservation Wetlands" to various other categories were eventually withdrawn after receiving the Department of Community Affairs' negative comments.

The County and Applicants then invoked Policy 1.09.03 to increase the density of Crane Island without submitting a formal Comprehensive Plan Amendment. The former County Attorney also admitted in his testimony that the Department of Community Affairs had specifically informed him in meeting (specifically called to discuss the issue) that use of Policy 1.09.03 to change the density of Crane Island would violate state statutes and would be impermissible. The County, nonetheless, utilized the Policy to approve 169 units on Crane Island without amending the Future Land Use Map designation for Crane Island.

The State of Florida Department of Community Affairs Chief of Comprehensive Planning and Department of Community Affairs General Counsel testified that this would violate Chapter 163 and Florida Administrative Code 9J-5 because it would "have the effect of amending" the Comprehensive Plan without submitting a Comprehensive Plan Amendment to the Future Land Use Map to the appropriate regional and state agencies for review and comments, including the state land planning agency.

The State of Florida Department of Community Affairs General Counsel testified that to utilize Policy 1.09.03 in this manner would lead to an "absurd result" *(Transcript Vol. I p. 238)* that would violate state statutes. While Policy 1.09.03 "on its face" did not violate state statutes, and that the Policy could be used to make minor adjustments to land use districts to correspond to wetlands delineation lines once formalized by the water management district without violating state statutes, use of the Policy to make large-scale changes to the Future Land Use Map of whole cloth would violate state statutes and deprive the reviewing agencies an opportunity to object, comment and make recommendations and the public participation in the Comprehensive Plan Amendment process as set forth in Chapter 163, Florida Statutes.

The use of Policy 1.09.03 as an "end-run" around the State of Florida Department of Community Affairs after previous attempts at amending the Comprehensive Plan designation for Crane Island had failed or been withdrawn also deprived the Department of Community Affairs of the ability to find the Comprehensive Plan "in compliance" or "not in compliance" with Florida Statutes Chapter 163 and F.A.C. 9J-5 and the opportunity for public participation that is further afforded citizens within the County who had submitted comments on a proposed comprehensive plan amendment to seek a formal administrative hearing before an Administrative Law Judge at the Division of Administrative Hearings (DOAH).

Chapter 163, Part II, Florida Statutes, the Local Comprehensive Planning and Land Development Regulation Act ("Local Comprehensive Planning Act"), requires each local government in Florida to prepare and adopt a local comprehensive plan containing mandatory elements that address important issues such as land use, traffic circulation, conservation, coastal zone management, and the adequacy of facilities and infrastructure. After a local government has adopted its comprehensive plan, §163.3194(1)(a) of the Local Comprehensive Planning Act requires that all actions taken by the local government in regard to development orders be consistent with the adopted local comprehensive plan. § 163.3215, Florida Statutes. Development and development orders, which must be consistent with the Comprehensive Plan, are defined by §163.3194(3), Florida Statutes. Section 163.3194(3), Florida Statutes defines "consistency" as follows:

> (a) A development or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspect of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and *densities* or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.
>
> (b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, or other aspects of the development are compatible with or further the objectives, policies, land uses, and *densities* or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

The planned development rezoning at issue in this case is a "development order" that must be consistent with the density set forth in the Comprehensive Plan. Pursuant to §163.3215(1), Fla. Stat. "any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order... which materially alters the use or *density* or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part." *Pinecrest Lakes, Inc. v. Shidel*, 795 So.2d 191, 194 (Fla. 4 DCA, 2001).

The *non-deferential standard of strict judicial scrutiny* applies in actions challenging a zoning action on grounds that a proposed project is inconsistent with the comprehensive land use plan. *Pinecrest Lakes* 795 So. 2d at 197.

As the state of Florida Department of Community Affairs witnesses noted, the Local Comprehensive Planning Act largely places the obligation for enforcement of the consistency requirement on citizens. "The statute [Fla. Stat. 163.3215] authorizes a citizen to bring an action to enjoin official conduct that is made improper by the statute." *Pinecrest Lakes*, 795 So.2d at 197. Section 163.3215(1) provides that "any aggrieved or adversely affected party" may bring a civil action for injunctive or other relief against any local government to prevent the local government "from taking any action on a development order which materially alters the use or *density* or intensity of use" on a tract of property in a manner that is not consistent with the adopted local comprehensive plan.

Once a local government has adopted its comprehensive plan, Section 163.3194(1)(a) of the Local Comprehensive Planning Act or Growth Management Act, requires that all actions taken by the local government in regard to development orders be consistent with the duly-adopted local comprehensive plan unless a plan amendment is submitted and approved by the state Department of Community Affairs prior to approval of the inconsistent action. See, *Machado v. Musgrove* 519 So.2d 629 (Fla. 3rd DCA 1987) affirmed en banc at 1988 Fla. App. Lexis 705; 13 Fla. L. Weekly D522 (1998) review denied *Machado v. Musgrove*, 529 So. 2d 694 (Fla. 1988).

The Florida Supreme Court in *Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993) held that a rezoning must be consistent with Comprehensive Plan. See also, *Pinecrest Lakes, Inc. v. Shidel*, 795 So.2d 191 (Fla. 4th DCA, 2001) cert. denied 821 So.2d 300 (Fla. 2002) (inconsistency with comprehensive plan).

The Court finds the density approved by the development order to be inconsistent with the maximum allowable density established by the Nassau County Comprehensive Plan.

Upon hearing the testimony of plaintiffs as to standing, the Court further finds that plaintiffs have standing to bring this action.

Crane Island appears in its current state to be undeveloped, although certain areas of Crane Island have been impacted by the

activities of the Florida Inland Navigation District. Crane Island's tree canopy, as shown on aerials, wholly covers the uplands of Crane Island other than the wetland marsh that surrounds the area to the immediate north, east and southern end of the island. The western portion of the island is directly adjacent to the intracoastal waterway of the Amelia River, and the intracoastal waterway's navigation channel passes within a few feet of the western uplands of Crane Island. Crane Island is currently undeveloped except for dredge spoils placed on and around the island by the Florida Inland Navigation District, which are now vegetated.

Plaintiffs testified that they actually use the area adjacent to Crane Island to lead both organized and informal kayak outings and for wildlife photography due to its scenic beauty, conservation values and recreational opportunities. Plaintiffs actually used the area adjacent to Crane Island and the Florida Inland Navigation District lands on Crane Island itself in order to observe and conduct kayak outings to view and photograph Crane Island's conservation resources. *Payne v. City of Miami*, 927 So.2d 904 (Fla. 3rd DCA, 2005); *Education Development Center, Inc. v. Palm Beach County*, 751 So.2d 621, 623 (Fla. 4th DCA, 1999).

Plaintiff, Eric Titcomb is a certified outings leader for Sierra Club who has obtained special wilderness first aid and "Florida Master Naturalist" training in order to lead multiple kayak outings to and around Crane Island both as an official guide for Sierra club outings and as an informal guide for outings with others. He testified that he intended on continuing to lead outings to Crane Island in the future, but could not take kayak tours to the area to experience the same conservation values if Crane Island were allowed to develop at the density allowed by the subject development order because it would no longer be a conservation area that he would be able to visit and experience the same conservation resources and that he would have to find another location if development at this density were approved. Similarly, Julie Ferreira is an apprentice outings leader for Sierra and is actively engaged in obtaining her outings leader certification. She too has been on organized and informal training outings to Crane Island and actually utilizes the area surrounding Crane Island for enjoyment of recreational activities that are dependent upon the conservation resources of Crane Island. Plaintiff Robert Weintraub also utilizes the area surrounding Crane Island for recreational fishing and utilizes the conservation resources afforded by Crane Island's tree canopy, to photograph resident and migratory birds on this island habitat in the intracoastal waterway for natural photography as an avid wildlife photographer.

All plaintiffs have appeared at public hearings regarding the development order and also appeared at numerous hearings on the prior applications to amend the Comprehensive Plan for Crane Island that were later withdrawn. Robert Weintraub and Eric Titcomb also attended the meeting with the state of Florida Department of Community Affairs at which the County was informed that Policy 1.09.03 should not be used to change the land use designation to increase density on Crane Island without a Comprehensive Plan Amendment. As a remedial statute, section 163.3215 should be liberally construed to advance the intended remedy, i.e., to ensure standing for any party with a protected interest under the comprehensive plan who will be adversely affected by the governmental entity's actions. *Parker v. Leon County*, 627 So.2d 476, 479 (Fla.1993); *Putnam County Environmental Council, Inc. v. Board of County Com'rs of Putnam County*, App. 5 Dist., 757 So.2d 590 (2000); *Education Development Center, Inc. v. Palm Beach County*, 751 So.2d 621, 623 (Fla. 4th DCA, 1999).

Plaintiff's testimony at trial was sufficient to show actual recreational use of the area in question to both conduct kayak outings and engage in wildlife photography, as specific on-going activities related to conservation resources on Crane Island, and that their interests will be adversely affected by the increased inconsistent density, which is an interest protected by the Comprehensive Plan. Plaintiff's testimony is sufficient to show an interest that exceeds the interest of the general public in "community good." Plaintiffs testified as to their personal use and with the specificity that is directly related to their claims and interest in protecting Crane Island from inconsistent development densities.

Accordingly, upon consideration, it is

ORDERED AND ADJUDGED

1. The Court finds plaintiffs to be "aggrieved or adversely affected" parties with standing within the purview of Florida Statutes Section 163.3215.

2. The Court finds the density approved by the development order to be inconsistent with the maximum allowable density established by the Nassau County Comprehensive Plan.

3. The Court hereby quashes, reverses and vacates the inconsistent development order granting approval.

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[1](Vol. 1, p. 230 "the PUD [Planned Unit Development] purports to assign a higher density to Crane Island than is allowed by the future land use map and Chapter 163 is quite clear that every action taken on a development order specifically including densities needs to be consistent with the Comprehensive Plan.")

[2]This testimony by the former County Attorney was supported by DCA witness Shaw Stiller "one of the things the County was instructed to do to bring its plan into compliance was to designate these areas wetland, maritime forests, as conservation" *(Trancript Vol 2., p.529)*.

* * *

Criminal law—Search and seizure—Detention—Where law enforcement officers were not aware that private security guards had detained defendants until officers arrived at apartment complex to assist in breaking up disturbance, and officers did not ask guards to take any action on their behalf, guards were not agents or instruments of state to whose actions Fourth Amendment protections against unreasonable searches and seizures apply—Because stop by officer to inform defendants of order to leave under criminal trespassing statute was consensual encounter, defendants should have been free to leave while officer was preparing trespass warnings, and detention while officer held defendants' identification and ran background checks was unlawful—Motion to suppress granted

STATE OF FLORIDA v. THOMAS H. SEYMORE. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Criminal Division. Case No. 08-CF-010025-A, Division D. December 19, 2008. Thomas P. Barber, Judge.

ORDER GRANTING MOTION TO SUPPRESS

THIS CAUSE was heard on October 29 and November 24, 2008 on the defendant's Motion to Suppress Unlawfully Obtained Evidence filed pursuant to Rule 3.190(h & i), *Fla.R.Crim.P.* The court, having reviewed the applicable legal authorities, hearing arguments of counsel, testimony of witnesses, and being otherwise fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that defendant's Motion is GRANTED for the following reasons:

Background

Thomas H. Seymore ("defendant") is charged with Carrying a Concealed Firearm and Possession Of Cannabis. He filed a Motion to Suppress on October 1, 2008 raising two legal issues: (1) Whether the security guards who initially detained him were acting as State agents; and (2) Whether the search of the vehicle he was occupying was improper because the credibility of the law enforcement dog can not be established. At the hearing on October 29, 2008 a third potential legal issue arose: Whether defendant was illegally detained by Tampa Police subsequent to his initial detention by security guards.

Facts

On May 24, 2008, at approximately 10:00 p.m., defendant and a co-defendant, Darrin Cogman, were on the property of the River Oaks Apartments. Neither defendant is a legal resident of the River Oaks Apartments. Ashley Richardson, who is a legal resident of the River

by Richard Grosso and Jason Totoiu

Planning and Permitting to Protect Wetlands: The Different Roles and Powers of State and Local Government

The First District Court of Appeal's recent decision in *Johnson v. Gulf County*, Case No. 1D08-6189 (Fla. 1st DCA 2009), reinforced the principle that a local government has the authority under F.S. Ch. 163, Part II, to regulate and even prohibit development within wetlands.[1] In *Johnson*, the court overturned a trial court ruling that, because neither the U.S. Army Corps of Engineers nor the Florida Department of Environmental Protection asserted jurisdiction over an approximately two-acre tract of wetlands, the county was not required to enforce a provision in its comprehensive plan prohibiting development within 50 feet of wetlands.[2] The First District held that when the plain language of a county's comprehensive plan prohibited development within 50 feet of wetlands, regardless of whether those wetlands are under the jurisdiction of federal and/or state permitting agencies, the county has the authority and duty under F.S. Ch. 163, Part II, to enforce its comprehensive plan and prohibit development from occurring within these areas.[3] "The jurisdiction of these two agencies," wrote the court, "is not determinative of the county's jurisdiction to administer its comprehensive plan and land use regulations."[4]

The First District's decision in *Johnson* did not involve an express claim that the county was legally preempted from establishing and enforcing restrictions on development near wetlands, but presumes and illustrates the broad authority local governments have in adopting and enforcing comprehensive plan policies to regulate development within wetlands. This article examines the recurring issue in environmental and land use law of just how far local governments may go in regulating developments within wetlands and to what extent state permitting rules may preclude or preempt local wetland protection ordinances.

As this article explains, the fundamental difference between Ch. 163 and state wetland permitting laws found in F.S. Ch. 373 is that the former gives authority to local governments *alone* to determine, in the first instance, the most appropriate use of all lands, including wetlands, while state permitting laws are intended to ensure that all impacts to wetlands that do occur as a result of permitted development are adequately offset. Accordingly, local governments have broad authority to limit and even prohibit development within wetlands and are not preempted from doing so by state environmental permitting laws. Only in the case where mitigation is required by a local government to offset impacts to wetlands do state permitting rules preclude local governments from implementing their own mitigation requirements. As development and other activities strain Florida's wetland systems, the Growth Management Act should become an increasingly important tool for local governments to direct development away from these sensitive resources while advancing programs, such as the Comprehensive Everglades Restoration Plan, that are intended to ensure the continued functioning of important wetland systems. Together, state permitting and planning rules can work in harmony to protect Florida's most threatened resources.

Why Protect Wetlands?

Wetlands play an extremely important role in Florida's complex ecosystem. Wetlands provide habitat for a wide variety of fish and wildlife, are an integral part of the life cycle of two-thirds of the commercial fish and shellfish harvested along the Atlantic Coast and in the Gulf of Mexico, and offer numerous water cleansing and flood protection functions.[5] Before Europeans settled in America, most of South Florida, from Lake Okeechobee to Florida Bay, consisted of freshwater forested or herbaceous wetlands.[6] Yet, Florida's ever increasing population and desire to accommodate such growth has resulted in a 50 percent loss of the state's wetlands.[7]

Florida's Wetland Permitting Program: F.S. Ch. 373

The Florida Water Resources Protection Act, F.S. Ch. 373, is intended to carry out the policies of Fla. Const. art. II, §7, by preserving natural resources, protecting fish and wildlife, minimizing storm water impacts to surface waters, and providing for the management of water resources. The Florida Water Resources Protection Act provides the Department of Environmental Protection (DEP) and the water management districts (the districts) with the responsibility of regulating the state's wetlands through the environmental resource permit (ERP) program.

The ERP program grants DEP and the districts the authority to require permits and impose reasonable condi-

tions to assure that the construction or alteration of any storm water management system, dam, impoundment, reservoir, appurtenant work, or works, comply with the provisions of F.S. Ch. 373, any applicable rules, and will not harm water resources.[8]

F.S. §373.414 directs the districts to require applicants for an ERP to provide reasonable assurances that state water quality standards will not be violated. State permitting rules require applicants to eliminate or reduce development impacts to wetlands and demonstrate that the permitted activity in or on surface waters or wetlands will not be contrary to the public interest. F.S. §373.414(1)(a) lists the criteria the districts must consider in determining whether the action will be contrary to the public interest.[9]

If the applicant is unable to eliminate or reduce wetland impacts and meet these criteria, F.S. §373.414(1)(b) requires the permitting agency to "consider measures proposed by or acceptable to the applicant *to mitigate* adverse effects that may be caused by the regulated activity." F.S. §373.414(1)(b) (4) 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 (emphasis added).

F.S. §373.414(18) directs the districts "to develop a uniform mitigation assessment method for wetlands and other surface waters." Commonly referred to as "UMAM," 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."[10] 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."[11] UMAM was adopted by rule and is codified at Fla. Admin. Code Title 62, Ch. 345.

The 1985 Florida Growth Management Act: F.S. Ch. 163

In Florida, local governments have the exclusive authority to make the basic determinations about the appropriate land uses throughout their jurisdictions, including wetlands, based on a broad range of factors, including wetland ecology. The Local Government Comprehensive Planning and Land Development Regulation Act (F.S. Ch. 163, Part II) (the act) 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.[12]

Directly relevant to the protection of wetlands is F.S. §161.3161(3):

> It is the intent of this act that...local governments can...*encourage the most appropriate use of land, water, and resources*.... Through the process of comprehensive planning, it is intended that...local government can...conserve, develop, utilize, and protect natural resources within their jurisdictions. (Emphasis added.)

The act grants counties the power and responsibility to 1) plan for their future development and growth; 2) adopt and amend comprehensive plans, or elements or portions thereof and to guide their future development and growth; 3) implement adopted or amended comprehensive plans by the adoption of appropriate land development regulations or elements, and; 4) establish, support, and maintain administrative instruments and procedures to carry out the provisions and purposes of this act.[13]

A local comprehensive plan must also be consistent with the state comprehensive plan,[14] 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."[15] It also 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."[16] 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."[17] 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,[18] coordinate land uses with topography, soils, and the availability of infrastructure,[19] and provide for the compatibility of adjacent land uses.[20]

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.[21] This general data and analysis requirement is supplemented by the specific data and analysis requirements in other sections of the statute and the statute's implementing regulations (Fla. Admin. Code 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.[22] Fla. Admin. Code 9J-5.013(a)-(b) expressly requires local governments to direct development away from wetlands and other environmentally sensitive areas where such development is incompatible with their protection and conservation:

> (a) Wetlands and the natural functions of wetlands shall be protected and conserved. The adequate and appropriate protection

and conservation of wetlands shall be accomplished through a comprehensive planning process which includes consideration of the types, values, functions, sizes, conditions and locations of wetlands, and which is based on supporting data and analysis. (b) *Future land uses which are incompatible with the protection and conservation of wetlands and wetland functions shall be directed away from wetlands....* Land uses shall be distributed in a manner that minimizes the effect and impact on wetlands.... Where incompatible uses are allowed to occur, mitigation shall be considered as one means to compensate for loss of wetland functions. (Emphasis added).

Thus, while DEP and the districts have the authority and responsibility to ensure the protection of the state's wetland and water resources through the environmental resource permitting program, they do not decide whether a subdivision, shopping center, or other proposed land use for which the ERP is being sought is the appropriate land use for the area. That is the role and responsibility of local governments for all lands (uplands and wetlands) within their borders. It is not lost or preempted by the existence of a state or federal regulatory program or choice not to exercise regulatory jurisdiction.

F.S. §163.3184(6)(c) specifically addresses the overlap of permitting programs with the fundamental planning function of local governments. Comprehensive plans may require that wetland impacts be avoided altogether and that only low-intensity uses be allowed in or near them. Florida law preempts only the mitigation aspects of any permitting program a local government may choose to rely upon when it does allow development or other impacts to wetlands. The act prohibits the Department of Community Affairs from requiring local governments to duplicate or exceed any federal, state, or regional permitting program, but expressly authorizes the agency to make compliance determinations regarding planning 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.[23]

This language emphasizes that the local government's role is land use planning in terms of determining what type and what intensity of uses may be allowed in wetlands. The legislature sought only to avoid duplicative permitting requirements. 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...."[24] They must define each land use category in terms of *type* of uses included and *specific standards for the density or intensity* of use.[25] Further, they must adopt *standards to be followed in the control and distribution of population densities and building and structure intensities.*[26] The legal authority and requirement to establish the extent, location, and 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.[27]

Florida's Wetland Permitting Program Does Not Preempt Local Government's Ability to Prohibit Impacts to Wetlands

The limitations imposed by F.S. §373.414(1)(b) apply only when a local government allows for the development of wetlands subject to mitigation. F. S. §373.414(1)(b)(4) 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, F.S. §373.414(1)(b) 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 "preemption" is inapplicable.

The express language of the statute should end any debate on this question. Nevertheless, an attorney general opinion[28] provides further support for this conclusion. In 1994, Martin County 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.[29] The 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.[30]

Because F.S. §373.414 applies only to instances when 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. By instructing the state, its agencies, and local governments to apply the requirements of F.S. §373.414 only to those instances when wetland development is permitted subject to mitigation, the legislature has effectively prohibited its application to those instances when wetland development is prohibited and mitigation is a nonissue. The attorney general opinion concluded that F.S. §373.414 did not "preempt" Martin County from adopting and enforcing policies that prohibited wetlands development.

The adoption in 2004 of the Uniform Mitigation Assessment Methodology (UMAM) set forth in F.S. §373.414 and the implementing administrative rule do not alter this analysis. F.S. §373.414(18) supersedes "all rules, ordinances and variance procedures from ordinances" only to the extent they are needed to "determine the amount of mitigation needed to offset such impacts." As the UMAM rule (Fla. Admin. Code 62-345.100(3)(a)) explains, "this method is not applicable to activities for which mitigation is not required." Therefore, the UMAM rule would govern the mitigation requirements for a local government program that allows for the filling of wetlands. However, 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.

Thus, neither Ch. 373 nor Ch. 163 precludes local governments from adopting and enforcing a comprehensive plan policy that prohibits development of wetlands and a comprehensive plan policy to that effect is entirely valid.[31] 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.

Why Planning for Wetland Protection Is Important

It may appear to be a fairly simple proposition, but it is worth emphasizing: Permitting is not planning, and planning is not permitting.[32] Whereas state permitting laws prescribe how much environmental damage is allowed by a particular land use, state planning law requires local communities to direct inappropriate or intense land uses away from environmentally sensitive wetlands and enables local governments to consider the "big picture."[33] Permitting programs help ensure that if activities must occur in or around wetlands, they implement design modifications to minimize impacts.[34] 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."[35] It is in view of these inherent limitations in the permitting process that local government prohibitions on wetland development through sound planning play a critical role in ensuring that some of the most important wetland systems remain protected. The current effort to restore the Florida Everglades provides an excellent example of the application of these principles.

Everglades Restoration

The historic Florida Everglades once flowed from the headwaters of Shingle Creek to Florida Bay.[36] However, in an effort to manage for flood control, Congress authorized the Central and South Florida Project in 1948.[37] This massive engineering effort resulted in the construction of more than 1,000 miles of canals and levees which forever changed Florida's landscape and stymied the Everglades' natural sheet flow of freshwater to sea.[38] More than half of the Everglades' original wetlands were lost.[39] In 2002, Florida expressed its commitment to restoring the Everglades in partnership with the federal government under the Comprehensive Everglades Restoration Plan (CERP).[40] CERP includes 68 project components throughout a 16-county region intended to provide increased water storage and delivery, restore a more natural water flow, and reestablish connections within the greater Everglades ecosystem.[41]

Development activities occurring in close proximity to, or within the footprint of, CERP project sites may result in significant wetland impacts, not to mention engineering obstacles, depending on their intensity and location. Development in these areas may require a dredge and fill permit from the U.S. Army Corps of Engineers (Corps) under the Clean Water Act[42] and/or a state ERP[43] before any alteration of wetlands can occur. Both the Corps and the districts have implemented permitting regulations and policies that guide their respective agencies in reviewing development proposals that may conflict with federal restoration project goals.[44] While these regulations and policies discourage applicants from building

within the footprint of CERP project sites, courts have not yet determined whether the rules strictly prohibit applicants from building in these areas.[45]

Many local governments have a particular interest in Everglades restoration and stand in a unique position to advance CERP through increased wetland protection. Several of Florida's coastal communities have been plagued by harmful releases of freshwater from Lake Okeechobee into their local estuaries.[46] Without CERP, these releases are likely to continue to wreak havoc not only on these local resources, but also on local economies that depend upon the estuaries for fishing, recreation, and tourism.[47] These local governments, committed to advancing the goals of conservation programs such as CERP, have a strong economic incentive to protect their wetlands[48] and enjoy strong legal authority in the Growth Management Act to prohibit incompatible development within and adjacent to wetlands important to the restoration and protection of this important natural system.[49]

Conclusion

F.S. §373.414 does not preclude a local government from adopting and enforcing comprehensive planning policies that prohibit wetlands impacts, and/or which allow only very low-density uses on and near wetlands, thereby prohibiting mitigation. This springs from the authority under Ch. 163 to establish the most appropriate uses and densities and intensities of land within its jurisdiction (based on a variety of factors) and to restrict development of wetlands. State planning laws and wetland laws are to be read to work in harmony,[50] and the state's preemption of the method for determining wetland mitigation does not preclude a local government from making the planning decision that wetlands are not appropriate places for development.

Ch. 163 requires local governments to direct development away from environmentally sensitive areas,[51] while Ch. 373 sets forth the exclusive method of determining mitigation for any agency — state or local — that implements a wetland regulatory program.

The Florida Legislature has repeatedly reaffirmed the important role local programs play in protecting wetlands and has rejected attempts to prohibit local governments from enacting or enforcing wetland regulatory programs.[52] The legislature's commitment to preserving the local government's valuable role in wetland protection should be noted and respected, and local governments should be encouraged to utilize their authority under Ch. 163 to divert development away from the most sensitive areas within their boundaries, including those areas necessary for the success of such important state conservation commitments as Everglades restoration.❑

[1] *Johnson v. Gulf County*, Case No. 1D08-6189 (Fla. 1st D.C.A. Dec. 22, 2009).

[2] *Id.* at *13-14.

[3] *Id.* at *15-16 (finding that where the comprehensive plan unambiguously provides that "[d]evelopment within 50 feet of coastal waters and wetlands (including salt marsh areas) will be prohibited," the plain language of the plan controls and the trial court erred by accepting expert testimony and other "parol evidence" to determine the meaning and intent of the plan's land use policy).

[4] *Id.* at *20.

[5] *See* John Fumero, *1994 Survey of Florida Law —At a Crossroads in Natural Resource Protection and Management in Florida*, 19 NOVA. L. REV. 77, 79-80 (1994).

[6] Southeast Environmental Research Program, Florida International University Center for Plant Conservation, *Current Conditions of Florida Ecosystems*, AN ACTION PLAN TO CONSERVE THE NATIVE PLANTS OF FLORIDA (1995), *available at* http://everglades.fiu.edu/serp/action/current.html.

[7] John C. Tucker, *Biodiversity Conservation and Ecosystem Management in Florida: Obstacles and Opportunities*, 13 FORDHAM ENVTL. L. J. 1, 12-13 (2001) (noting that "Florida's burgeoning population and development have severely stressed the state's natural resources, including water, wildlife, and habitat"; this has resulted in a loss of over 50 percent of the state's wetlands).

[8] An operating agreement sets forth the responsibilities of the DEP and the four water management districts in administering the program. Florida Department of Environmental Protection, *See Summary of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida* (Oct. 1, 2007), http://www.dep.state.fl.us/water/wetlands/docs/erp/overview.pdf.

[9] These criteria are also contained in FLA. ADMIN. CODE Title 40E, Ch. 4; and South Florida Water Management District, *Basis of Review for Environmental Resource Applications* §4.2.3.

[10] FLA. STAT. §373.414(18) (emphasis added).

[11] *Id.* (emphasis added).

[12] *See* FLA. STAT. §§163.3167, 163.3177, 163.184.

[13] FLA. STAT. §163.3167(1).

[14] FLA. STAT. §163.3184(1)(b).

[15] FLA. STAT. §187.100(7)(a).

[16] FLA. STAT. §187.100(7)(b).

[17] FLA. STAT. §§187.100(9)(a) and (b).

[18] *See* FLA. STAT. §163.3177(6)(d). Among the required elements of the 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).

[19] FLA. ADMIN. CODE R. 9J-5.006(3)(b)(1).

[20] FLA. ADMIN. CODE R. 9J-5.006(3)(c)2.

[21] FLA. STAT. §163.3177(6)(a); FLA. ADMIN. CODE R. 9J-5.006(2)(c).

[22] *See, e.g.*, FLA. ADMIN. CODE R. 9J-5.006(2)(a) and (b); FLA. ADMIN. CODE R. 9J-5.013(1).

[23] FLA. STAT. §163.3184(6)(c).

[24] FLA. STAT. §163.3177(6)(a).

[25] *Id.* (emphasis added).

[26] *Id.* (emphasis added).

[27] *See Village of Key Biscayne v. Dept. of Comm. Affairs*, 696 So. 2d 495 (Fla. 3d D.C.A. 1997).

[28] 94-102 Op. Att'y Gen. (Dec. 6, 1994), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/04A011118F940F948525621F004B33EE.

[29] *See* Martin County Comprehensive Growth Management Plan, §§9.4.A.7.a-d (2006).

[30] 94-102 Op. Att'y Gen. (Dec. 6, 1994), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/04A011118F940F948525621F004B33EE.

[31] 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 (2006) (providing a 100 percent open space requirement for undisturbed wetlands).

[32] Mary Jane Angelo, Nelson Symposium on Florida's Growth Management Legislation, *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, 232 (2001); *see also California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 587 (1987) (defining land use planning as "in essence choosing particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits").

[33] *Id.* at 233.

[34] *See* South Florida Water Management District, *Basis of Review* §4.2.3.

[35] Angelo, Nelson Symposium on Florida's Growth Management Legislation, *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 at 232-34 (2001).

[36] *See* Development of the Central & South Florida (C&SF) Project, *Why Restore the Everglades — Part 1: Understanding the Everglades Ecosystem — Past & Present*, http://www.evergladesplan.org/about/why_restore_pt_01.aspx.

[37] *See* S. Fla. Water Mgmt. Dist., Central and Southern Florida Project Comprehensive Review Study, *Final Integrated Feasibility Report and Programmatic Environmental Impact Statement*, Summary, at i (1999).

[38] *Id.*

[39] *Id.* at iii.

[40] Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement (January 9, 2002) (pursuant to Water Resources Development Act, Pub. L. 106-541, §601).

[41] *Id.*

[42] 33 U.S.C. §1344 authorizes the Secretary of the Army, acting through the Corps, to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

[43] FLA. STAT. §373.414.

[44] *See* U.S. Army Corps of Engineers Clean Water Act Implementing Regulations at 33 C.F.R. §§320.4(a)(1), 320.4(g)(4), 320.4(g)(5); South Florida Water Management District, *Basis of Review for Environmental Resource Applications*; FLA. STAT. §373.414, and *supra* note 9.

[45] 33 C.F.R. §320.4(a)(1) requires the Corps to evaluate a project's "probable impacts" to the public interest and South Florida Water Management District, *Basis of Review for Environmental Resource Applications* §4.2.3, sets forth a similar public interest test for the issuance of environmental resource permits. Given that CERP is an environmental restoration project of national importance, it would appear that the siting of a development project within a CERP footprint would be a consideration under both of these public interest tests, and depending on the facts of each particular case, a potential basis for denial where a project would be contrary to that public interest. *See also* 33 C.F.R. §320.4(g)(5) (noting that the Corps will evaluate the compatibility of proposed activities in the area of a federal project).

[46] S. Fla. Water Mgmt. Dist., Central and Southern Florida Project Comprehensive Review Study, *Final Integrated Feasibility Report and Programmatic Environmental Impact Statement*, Summary at iii (1999).

[47] *Id.* at iii-iv.

[48] *See* Debra Alise Spungin, *Troubled Waters: Florida's Isolated Wetlands in the Aftermath of* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 26 NOVA. L. REV. 371, 382 (2001) ("[H]ome to Everglades National Park, Florida's economy is dependent upon the health and vitality of its natural system.").

[49] Obviously, local planning or zoning rules that have the impact of precluding all "economically viable" uses of a landowner's property as a whole, or causing the owner to bear an "inordinate burden," could result in property rights liability under the state or U.S. Constitution or Florida's "Private Property Rights" legislation. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.* 482 U.S. 304 (1987); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981), *cert. denied, sub. nom., Taylor v. Graham*, 454 U.S. 1083 (1981); and Bert J. Harris, Jr., Private Property Rights Protection Act, FLA. STAT. §70.001, given that many of the proposed CERP footprints lie within areas that are currently designated agricultural or other low intensity land uses (1:20 or 1:40 residential), instances where development limitations deny a landowner of all or most of the land's economically viable use should be rare if current low-intensity land uses are allowed to continue. They can be avoided through the use of a limited property rights waiver provision authorizing the approval of the least intensive development necessary to prevent a property rights violation. Local governments can also remedy these situations through public acquisition of the lands in lieu of permitting.

[50] 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*, 180 So. 524 (Fla. 1938).

[51] FLA. ADMIN. CODE R. 9J-5.013(3)(a)-(b).

[52] *See* H.B. 957, 2008 Leg. (Fla. 2008); *see also* Rebecca Catalanello and Craig Pittman, *18 Words Imperil 3-Million Acres*, ST. PETERSBURG TIMES, March 31, 2007.

Richard Grosso *is a professor of law at the Shepard Broad Law Center, Nova Southeastern University School of Law in Ft. Lauderdale, and the general counsel and executive director of the Everglades Law Center, Inc., a public interest environmeantal and land use law firm.*

Jason Totoiu *is staff counsel at the Everglades Law Center. He earned his undergraduate degree from Emory University and his law degree from Tulane Law School.*

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