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MEMORANDUM

From: Jason Totoiu
To: Maggy Hurchalla, Martin County Conservation Alliance
Re: Local Government Authority Over Wetlands and Mitigation Requirements
Date: February 21, 2017

Questions Presented:

1. May a local government prohibit development within wetlands, regardless of their size?

2. If a local government allows for development within wetlands, may it impose wetland mitigation policies that differ from the Uniform Mitigation Assessment Method under state law?

Short Answer:

1. Yes. Local governments have the complete authority through their local comprehensive plans to determine whether and in what circumstances development may occur in wetlands. Counties, such as Martin County, may prohibit development within wetlands and their authority to do so has long been recognized by the courts and the Florida Attorney General.

2. No. If a local government chooses to allow development in wetlands, state law governs the amount of mitigation needed to offset any impacts. Under Chapter 373, Florida Statutes, state law provides the exclusive process for determining the amount of mitigation required to offset impacts to wetlands and other surface waters. This Uniform Mitigation Assessment Method (UMAM) shall supersede all rules, ordinances and variance procedures from ordinances that determine the amount of mitigation needed to offset such impacts.

Discussion:

Under Florida law, local governments have complete legal authority over whether, and in what circumstances (and to what extent), to allow development impacts to wetlands. The First Circuit District Court of Appeals in *Johnson v. Gulf County*, 26 So. 3d 33 (Fla. 1st DCA 2009) reinforced the principle that a local government has the authority under its local comprehensive planning powers to prohibit development within wetlands. Once, however, a local government decides to allow development in wetlands, its wetland *mitigation* policies are preempted by state wetland permitting law.

The distinction is the product of the policy decision in state law that local governments – not the state - make land use decisions, but wetland permitting is the primary responsibility of the state. While local governments may maintain their own wetland permitting requirements in addition to those of the state, their mitigation requirements, as a matter of efficiency and uniformity, cannot conflict with those of the state.

> Section 373.414(1)(b) (4), Fla. Stat. (2016) states that:
> "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, including application of the uniform wetland mitigation assessment method adopted pursuant to subsection (18), the mitigation requirements for surface water and wetland impacts shall be controlled by the permit issued [under the state wetland permitting program by DEP or a water management district]" (emphasis added).

Those state wetland permit mitigation requirements are in turn governed by §373.414(18), Fla. Stat. which mandates "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." §373.414(18), Fla. Stat. (2016) (emphasis added).

> The administrative rule which adopted this uniform mitigation method:
> "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 and to award and deduct mitigation bank credits." §373.414(18), Fla. Stat. (2016) (emphasis added)

This statutory and rule limitation on the amount of mitigation applies only when a local government allows for the development of wetlands subject to mitigation. If a local government program allowed development of wetlands subject to mitigation, §373.414(1)(b) would require the mitigation requirements to be controlled by the state

permit. However, if a local government's comprehensive plan prevents impacts to wetlands, thereby precluding the use of mitigation, this state "preemption" is inapplicable.

The authority of a local government to avoid being limited to potentially weaker state wetland protections was emphasized in a 1994 formal Attorney General's opinion to Martin County, which answered 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 destruction in exchange for mitigation. The Attorney General's Opinion declared that:

> "nothing in section 373.414(1)(b), ... 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." 94-102 Op. Att'y Gen. (Dec. 6, 1994)

Because the statutory mitigation preemption applies only when development of wetlands is permitted subject to mitigation, it does not apply where a local land use plan 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.

This ruling is obviously consistent with the express language of the state mitigation law, §373.414(18), which 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." *Id.* (emphasis added). As the administrative mitigation rule (Fla. Admin. Code 62-345.100(3)(a)) explains, "this method is *not applicable to activities for which mitigation is not required.*" *Id.* (emphasis added)

Conclusion:

If a local government chooses to allow wetland impacts, the state's mitigation requirements control those of the local government, which may not require more stringent mitigation than that required by the state. It is only by maintaining stricter comprehensive plan policy prohibiting all or most wetland impacts, with no option for mitigation, that a local government can ensure that it protects its wetlands to a greater extent than the state may choose to do.

Authors Note: A more detailed analysis of these issues is provided in a 2010 article published in the Florida Bar Journal. *See* Richard Grosso and Jason Totoiu, *Planning and Permitting to Protect Wetlands: The Different Roles and Powers of State and Local Government*, 84 FLORIDA BAR JOURNAL No. 4, 39 (April, 2010).