



APPLICATION FOR INTERVENOR STATUS

RECEIVED
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BY: MK Clerk

INFORMATION ABOUT THE PETITIONER		For Office Use Only	
APPLICATION FEE: \$400.00 (LDR) 11.03.06			
FILE NAME:			
FIRST NAME: Brian	LAST NAME: DiVentura		
MAILING ADDRESS			
STREET	CITY	STATE	ZIP
377 NW Canna Way Jensen Beach, FL 34957			
CONTACT INFORMATION			
WORK PHONE 772-485-9674	EMAIL 2diventuras@comcast.net		
CELL PHONE			
PETITIONER'S REPRESENTATIVE IF APPLICABLE			
FIRM/ORGANIZATION NAME:			
FIRST NAME:		LAST NAME:	
MAILING ADDRESS			
STREET	CITY	STATE	ZIP
CONTACT INFORMATION			
WORK PHONE	EMAIL		
CELL PHONE			
LIST OBJECTIONS TO BE INCLUDED IN AGENDA:			

By cross examination of Staff and/or the Applicant demonstrate the project described in Ordinance 2466-2021 is not consistent with Comprehensive Growth Management Plan, Conservation Element, Policies such as 5.A5.5 and 5.A5.6 Also, portions of the Land Development Code.

Signature:

Date:

6/2/2021

Florida Attorney General Advisory Legal Opinion

Number: AGO 94-102

Date: December 6, 1994

Subject: County not prohibited from regulating dev. of wetlands

**Ms. Noreen Dreyer
Martin County Attorney
2401 Southeast Monterey Road
Stuart, Florida 34996**

**RE: ENVIRONMENTAL PROTECTION, DEPARTMENT OF--WATER MANAGEMENT DISTRICTS--
WATER--COUNTIES--LOCAL GOVERNMENT--LAND USE AND PLANNING--county not
prohibited by statute from regulating development of wetlands under county
comprehensive growth management plan. s. 373.414; Part IV, Ch. 373, Fla.
Stat. (1994 Supp.).**

Dear Ms. Dreyer:

You ask substantially 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 the wetlands subject to mitigation requirements?**

In sum:

**Section 373.414(1)(b), Florida Statutes, does not preempt the ability of a
local government to prohibit development of wetland areas under the county
comprehensive growth management plan when the Department of Environmental
Protection or the appropriate water management district has issued a
permit allowing development of wetlands subject to mitigation
requirements.**

**You state that the Martin County Comprehensive Growth Management Plan
prohibits the alteration and development of viable wetland areas except in
certain circumstances. Such circumstances include, for example, when no
upland alternative exists, for certain riparian uses, and to avoid a total
taking of property.**

**A question has arisen as to whether section 373.414(1)(b), Florida
Statutes, preempts a local government from prohibiting the development of
wetland areas if the Department of Environmental Protection (department)
or the appropriate water management district (district) has issued a
permit allowing development in the wetland area subject to mitigation
requirements.**

Section 373.413(1), Florida Statutes, provides that with certain exceptions, the department or governing board of a district may require permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will adhere to the provisions of Part IV, Chapter 373, Florida Statutes, and rules adopted thereunder and will not be harmful to the water resources of the district. Persons seeking to construct or alter such a system are required to apply to the department or governing board of the district.[1]

Provisions for mitigation and mitigation banking are provided in section 373.4135, Florida Statutes, as means of offsetting or minimizing the adverse impacts of such construction or alteration. Section 373.414(1)(b), Florida Statutes, which provides additional criteria for such activities in surface waters and wetlands, states in pertinent part:

"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 for surface water and wetland impacts shall be controlled by the permit issued under this part."

While there are provisions in Part IV, Chapter 373, Florida Statutes, that are preemptive, nothing in section 373.414, Florida Statutes, indicates an intent to preempt local governments from prohibiting or regulating the development of wetlands or from imposing mitigation requirements when such development is permitted. The language of section 373.414, Florida Statutes, itself recognizes that the statute is not preemptive by stating that those local mitigation requirements that cannot be reconciled with the requirements of the Part IV, Chapter 373, Laws of Florida, must give way to the state requirements.[2]

In contrast, for example, section 373.421, Florida Statutes, which provides methods for delineating wetlands, specifically states:

"Subsequent to legislative ratification, the wetland definition in s. 373.019(17) and the adopted wetland methodology shall be binding on the department [of Environmental Protection], the water management districts, local governments, and any other governmental entities. Upon ratification of such wetland methodology, the Legislature preempts the authority of any water management district, state or regional agency, or local government to define wetlands or develop a delineation methodology to implement the definition and determines that the exclusive definition and delineation methodology for wetlands shall be that established pursuant to s. 373.019(17) and this section. . . ."[3]

No such preemptive language exists in section 373.414, Florida Statutes, nor does the statute or chapter appear to be so pervasive as to completely occupy the field, thereby preventing local regulation.[4] In fact, with certain exception such as section 373.421, supra, Part IV, Chapter 373, Florida Statutes, appears to contemplate the existence of local regulations.[5]

According to your letter, the county's growth management plan prohibits the development of wetlands with certain limited exceptions. The purpose of the growth management plan is to guide and control future development. [6] Such a plan is necessary so that local governments can preserve and enhance present advantages and encourage the most advantageous use of land, water and resources, consistent with the public interest.[7] Section 163.3167(1), Florida Statutes, in setting forth the scope of the Local Government Comprehensive Planning and Land Development Regulation Act, states that counties have the power and responsibility, among other things, "[t]o plan for their future development and growth" and "[t]o adopt and amend comprehensive plans, or elements or portions thereof, to guide their future development and growth." Among the elements required of such a plan is:

"A conservation element for the conservation, use, and protection of natural resources in the area, including air, water, water recharge areas, wetlands, waterwells, estuarine marshes, soils, beaches, shores, flood plains, rivers, bays, lakes, harbors, forests, fisheries and wildlife, marine habitat, minerals, and other natural and environmental resources. . . . The land use map or map series in the future land use element shall generally identify and depict the following:

1. Existing and planned waterwells and cones of influence where applicable.
2. Beaches and shores, including estuarine systems.
3. Rivers, bays, lakes, flood plains, and harbors.
4. Wetlands.
5. Minerals and soils. . . ."[8] (e.s.)

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, Florida Statutes, would appear to apply only to those instances in which development of wetlands is permitted subject to mitigation.

Section 373.441(1)(e), Florida Statutes, provides that the Department of Environmental Protection, after consultation with the water management districts, adopt rules by December 1, 1994, to guide the participation of counties, municipalities, and local pollution control programs in an efficient system. Thus, the statute requires that provisions be made for ensuring the consistency of permit applications with local comprehensive plans. In addition, section 373.441(2), Florida Statutes, provides that "[n]othing in this section affects or modifies land development regulations adopted by a local government to implement its comprehensive plan pursuant to chapter 163."

Section 373.414(1)(b), Florida Statutes, 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, Chapter 373, Florida Statutes. 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.

Accordingly, I am of the opinion that section 373.414, Florida Statutes, does not prohibit a local government from prohibiting development of wetland areas under its comprehensive growth management plan.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tjw

[1] Section 373.413(2), Fla. Stat. (1993).

[2] And see s. 373.430(1)(b), Fla. Stat. (1993) (it shall be a violation of Part IV, Chapter 373, and it shall be prohibited for any person to, among other things, fail to comply with any rule, regulation, order or permit issued by local government pursuant to their lawful authority under Part IV, Chapter 373).

[3] Section 373.421(1), Fla. Stat. (1994 Supp.).

[4] See *Hillsborough County v. Florida Restaurant Association, Inc.*, 603 So. 2d 587 (Fla. 2d DCA 1992), in which the court recognized two types of preemption, an express preemption by a specific statement of preemption and an implied preemption whereby the legislative scheme must be so pervasive that it completely occupies the field.

[5] See, e.g., s. 373.414, Fla. Stat. (1994 Supp.) (in the event of a conflict between local and state mitigation requirements, the state requirements will control); s. 373.430(1)(b), *supra*; s. 373.441(1)(b), Fla. Stat. Cf. s. 373.023, Fla. Stat., stating that all the waters of the state are subject to the provisions of the chapter unless exempted by law and that no state or local government agency may enforce, except as to water control, and rule or order affecting such waters unless such rule or order has been filed with the department except as provided therein.

[6] See s. 163.3161(2), Fla. Stat. (1993), setting forth the intent and purpose of the Local Government Comprehensive Planning and Land Development Act.

[7] Section 163.3161(3), Fla. Stat. (1993).

[8] Section 163.3177(6)(d), Fla. Stat. (1993).

Wetland Rapid Assessment Procedure Field Data Sheet

Wetland Area		Date	Wetland Type		Evaluators	
W1	Impact	1/13/2020	641	FLUCCS	EW Consultants, Inc. SFWMD J. Huffman/J. Philips	
Permit #						

Wildlife Utilization		Wetland Overstory		Wetland Ground Cover		Adjacent Upland/Buffer	
Existing	1	Existing	n/a	Existing	1	Existing	1
Proposed	0	Proposed	n/a	Proposed	0	Proposed	0

Wetland Hydrology		Land Use (LU)		Pre-Treatment (PT)		WQIT (LU + PT)/2	
Existing	2	Existing	2.150	Existing	0	Existing	1.075
Proposed		Proposed	0	Proposed	0	Proposed	0

WRAP Score	
Existing	0.41
Proposed	0.00

Comments

Wildlife Utilization:

Existing; Limited by disturbed uplands surrounding the wetland
Proposed: Direct impact

Wetland Overstory:

Existing; N/A Naturally a non-forested wetland invaded by some Melaleuca & Casuarina spp.
Proposed: N/A

Wetland Groundcover:

Existing; Some native graminoids; Invaded by L. peruviana, Salix spp., and Pennisetum spp.
Proposed: Direct impact

Upland Buffer:

Existing; Dominated by exotic vegetation and non natural habitats
Proposed: Direct impact

Wetland Hydrology:

Existing; Impacted by former agricultural drainage; still supports wetland conditions.
Proposed: Direct impact

Land Use:

Existing; Low density residential, some natural areas, improved pasture/mowed grasses
Proposed: Direct impact

Pre-Treatment:

Existing; None. Water inflows from offsite nursery and uplands disturbed by trash dumping/ORVs.
Proposed: Direct impact

Wetland Rapid Assessment Procedure Field Data Sheet

Wetland Area		Date	Wetland Type		Evaluators
W2	Impact	4/23/2020	641	FLUCCS	EW Consultants, Inc.
Permit #					

Wildlife Utilization		Wetland Overstory		Wetland Ground Cover		Adjacent Upland/Buffer	
Existing	1	Existing	n/a	Existing	1	Existing	1
Proposed	0	Proposed	n/a	Proposed	0	Proposed	0

Wetland Hydrology		Land Use (LU)		Pre-Treatment (PT)		WQIT (LU + PT)/2	
Existing	1	Existing	2.1	Existing	0	Existing	1.025
Proposed		Proposed	0	Proposed	0	Proposed	0

WRAP Score	
Existing	0.34
Proposed	0.00

Comments

Wildlife Utilization:

Existing; Limited by adjacent landuse and dense exotic vegetation cover
 Proposed: Direct impact

Wetland Overstory:

Existing; N/A Naturally a non-forested wetland, invaded by Melaleuca spp.
 Proposed: N/A

Wetland Groundcover:

Existing; Minimal due to melaleuca overstory. Dominated by swamp ferns and barren.
 Proposed: Direct impact

Upland Buffer:

Existing; Dominated by exotic vegetation and non natural habitats
 Proposed: Direct impact

Wetland Hydrology:

Existing; Impacted by former agricultural drainage.
 Proposed: Direct impact

Land Use:

Existing; Previously agricultural, now vacant in transition
 Proposed: Direct impact

Pre-Treatment:

Existing; None. Adjacent to nursery and disturbed uplands w/ ORV activity.
 Proposed: Direct impact

Wetland Rapid Assessment Procedure Field Data Sheet

Wetland Area		Date	Wetland Type		Evaluators
W3	Impact	4/23/2020	641	FLUCCS	EW Consultants, Inc.
Permit #					

Wildlife Utilization		Wetland Overstory		Wetland Ground Cover		Adjacent Upland/Buffer	
Existing	1.5	Existing	n/a	Existing	1	Existing	1
Proposed	0	Proposed	n/a	Proposed	0	Proposed	0

Wetland Hydrology		Land Use (LU)		Pre-Treatment (PT)		WQIT (LU + PT)/2	
Existing	1.5	Existing	2.3	Existing	0	Existing	1.125
Proposed		Proposed	0	Proposed	0	Proposed	0

WRAP Score	
Existing	0.41
Proposed	0.00

Comments

Wildlife Utilization:

Existing; Limited by disturbed uplands surrounding the wetland and apparent ORV activity.
Proposed: Direct impact

Wetland Overstory:

Existing; N/A Naturally a non-forested wetland
Proposed: N/A

Wetland Groundcover:

Existing; Limited diversity and sparse due to ORV activity. 50/50 native/invasive exotic
Proposed: Direct impact

Upland Buffer:

Existing; In part natural pine flatwoods, but dominated by exotic vegetation and non natural habitats
Proposed: Direct impact

Wetland Hydrology:

Existing; Impacted by former agricultural drainage.
Proposed: Direct impact

Land Use:

Existing; Previously agricultural, now vacant in transition
Proposed: Direct impact

Pre-Treatment:

Existing; None. Extensive ORV impacts.
Proposed: Direct impact

Wetland Rapid Assessment Procedure Field Data Sheet

Wetland Area		Date	Wetland Type		Evaluators
W4	Impact	4/23/2020	641	FLUCCS	EW Consultants, Inc.
Permit #					

Wildlife Utilization		Wetland Overstory		Wetland Ground Cover		Adjacent Upland/Buffer	
Existing	0.5	Existing	n/a	Existing	0.5	Existing	1
Proposed	0	Proposed	n/a	Proposed	0	Proposed	0

Wetland Hydrology		Land Use (LU)		Pre-Treatment (PT)		WQIT (LU + PT)/2	
Existing	0.5	Existing	2.1	Existing	0	Existing	1.0625
Proposed		Proposed	0	Proposed	0	Proposed	0

WRAP Score	
Existing	0.24
Proposed	0.00

Comments

Wildlife Utilization:

Existing; Limited by adjacent landuse and dense exotic vegetation cover
 Proposed: Direct impact

Wetland Overstory:

Existing; N/A Naturally a non-forested wetland; Invaded by Casuarina spp. and thespesia spp.
 Proposed: N/A

Wetland Groundcover:

Existing; Nearly barren, covered in needles, scattered ferns.
 Proposed: Direct impact

Upland Buffer:

Existing; Dominated by exotic vegetation and non natural habitats
 Proposed: Direct impact

Wetland Hydrology:

Existing; Impacted by adjacent ditch excavation for agricultural drainage.
 Proposed: Direct impact

Land Use:

Existing; Previously agricultural, now vacant in transition
 Proposed: Direct impact

Pre-Treatment:

Existing; None. Adjacent to nursery and disturbed uplands w/ ORV activity.
 Proposed: Direct impact

Wetland Rapid Assessment Procedure Field Data Sheet

Wetland Area		Date	Wetland Type		Evaluators
W5	Impact	4/23/2020	641	FLUCCS	EW Consultants, Inc.
Permit #					

Wildlife Utilization		Wetland Overstory		Wetland Ground Cover		Adjacent Upland/Buffer	
Existing	1.5	Existing	n/a	Existing	1.5	Existing	2.5
Proposed	0	Proposed	n/a	Proposed	0	Proposed	0

Wetland Hydrology		Land Use (LU)		Pre-Treatment (PT)		WQIT (LU + PT)/2	
Existing	1.5	Existing	2.5	Existing	0	Existing	1.25
Proposed		Proposed	0	Proposed	0	Proposed	0

WRAP Score	
Existing	0.55
Proposed	0.00

Comments

Wildlife Utilization:

Existing; Limited by disturbed upland habitats surrounding the site and ORV activity.
Proposed: Direct impact

Wetland Overstory:

Existing; N/A Naturally a non-forested wetland
Proposed: N/A

Wetland Groundcover:

Existing; Native; Diversity and density appropriate for this wetland system.
Proposed: Direct impact

Upland Buffer:

Existing; Dominated by pine flatwoods, but encroached exotic vegetation (earleaf acacia)
Proposed: Direct impact

Wetland Hydrology:

Existing; Near normal; potentially affected by nearby drainage ditch.
Proposed: Direct impact

Land Use:

Existing; Previously agricultural, now vacant in transition
Proposed: Direct impact

Pre-Treatment:

Existing; None. Impacted by ORVs.
Proposed: Direct impact

Wetland Rapid Assessment Procedure Field Data Sheet

Wetland Area		Date	Wetland Type		Evaluators
W6	Impact	4/23/2020	641	FLUCCS	EW Consultants, Inc.
Permit #					

Wildlife Utilization		Wetland Overstory		Wetland Ground Cover		Adjacent Upland/Buffer	
Existing	1.5	Existing	n/a	Existing	1	Existing	2
Proposed	0	Proposed	n/a	Proposed	0	Proposed	0

Wetland Hydrology		Land Use (LU)		Pre-Treatment (PT)		WQIT (LU + PT)/2	
Existing	2	Existing	2.5	Existing	0	Existing	1.25
Proposed		Proposed	0	Proposed	0	Proposed	0

WRAP Score	
Existing	0.52
Proposed	0.00

Comments

Wildlife Utilization:

Existing; Limited by disturbed uplands surrounding the wetland and apparent ORV activity.
Proposed: Direct impact

Wetland Overstory:

Existing; N/A Naturally a non-forested wetland
Proposed: N/A

Wetland Groundcover:

Existing; 100% native monoculture likely due to previous ORV activity that deepened the wetland
Proposed: Direct impact

Upland Buffer:

Existing; Pine flatwoods, but dominated by exotic vegetation and non natural habitats
Proposed: Direct impact

Wetland Hydrology:

Existing; Impacted by former agricultural activities and ORV activity.
Proposed: Direct impact

Land Use:

Existing; Previously agricultural, now vacant in transition
Proposed: Direct impact

Pre-Treatment:

Existing; None. Extensive ORV impacts.
Proposed: Direct impact

Wetland Rapid Assessment Procedure Field Data Sheet

Wetland Area		Date	Wetland Type		Evaluators	
W7	Impact	1/13/2020	643	FLUCCS	EW Consultants, Inc. SFWMD J. Huffman/J. Philips	
Permit #						

Wildlife Utilization		Wetland Overstory		Wetland Ground Cover		Adjacent Upland/Buffer	
Existing	1.5	Existing	n/a	Existing	1	Existing	1
Proposed	0	Proposed	n/a	Proposed	0	Proposed	0

Wetland Hydrology		Land Use (LU)		Pre-Treatment (PT)		WQIT (LU + PT)/2	
Existing	2	Existing	2.3	Existing	0	Existing	1.125
Proposed		Proposed	0	Proposed	0	Proposed	0

WRAP Score	
Existing	0.44
Proposed	0.00

Comments

Wildlife Utilization:

Existing; Limited by disturbed uplands surrounding the wetland.
Proposed: Direct impact

Wetland Overstory:

Existing; N/A Some Annona spp. , naturally a non-forested, invaded by melaleuca spp. and Salix spp.
Proposed: N/A

Wetland Groundcover:

Existing; Limited diversity and sparse. 50/50 native/invasive exotic
Proposed: Direct impact

Upland Buffer:

Existing; In part natural pine flatwoods, but dominated by exotic vegetation and non natural habitats
Proposed: Direct impact

Wetland Hydrology:

Existing; Impacted by former agricultural drainage; still supports wetland conditions.
Proposed: Direct impact

Land Use:

Existing; Previously agricultural, low density residential, now vacant in transition
Proposed: Direct impact

Pre-Treatment:

Existing; None. Impacted by trash dumping and abandoned motor vehicles.
Proposed: Direct impact

In assessing the likelihood of use of a site by listed species, the sufficiency of proposed survey methodology, and any information provided as reasonable assurance under this section, the Agency will consider comments and recommendations received from the FWC, the U.S. Fish and Wildlife Service, comments from the applicant, and other water-resource related public comments. Scientific literature, and technical assistance documents such as the “*Florida Wildlife Conservation Guide*” at: myfwc.com/conservation/value/fwcg/ (2011), management plans, recovery plans, and habitat and conservation guidelines also will be considered.

10.2.2.1 Compliance with **sections 10.2.2 through 10.2.3.7 and 10.2.5 through 10.3.8, below**, will not be required for regulated activities in isolated wetlands less than one half acre in size, unless:

- (a) The wetland is used by endangered or threatened species;
- (b) The wetland is located in an area of critical state concern designated pursuant to Chapter 380, F.S.;
- (c) The wetland is connected by standing or flowing surface water at seasonal high water level to one or more wetlands, and the combined wetland acreage so connected is greater than one half acre; or
- (d) The Agency establishes that the wetland to be impacted is, or several such isolated wetlands to be impacted are cumulatively, of more than minimal value to fish and wildlife.

10.2.2.2 Alterations in wholly-owned ponds that were entirely constructed in uplands and that are less than one acre in area and alterations in drainage ditches that were constructed in uplands will not be required to comply with the provisions of **sections 10.2.2 through 10.2.2.3, 10.2.3 through 10.2.3.7, and 10.2.5 through 10.3.8 below**, unless those ponds or ditches provide significant habitat for endangered or threatened species. This means that, except in cases where those ponds or ditches provide significant habitat for endangered or threatened species, the only environmental criteria that will apply to those ponds or ditches are those included in **sections 10.2.2.4 and 10.2.4 through 10.2.4.5, below**. This provision shall only apply to those ponds and ditches that did not require a permit under Part IV, Chapter 373, F.S., or that were constructed for purposes other than mitigation pursuant to a permit under Part IV, Chapter 373, F.S. This provision does not apply to ditches constructed to divert natural stream flow.

10.2.2.3 The assessment of impacts expected as a result of proposed activities on the values of functions will be based on a review of scientific literature, ecologic and hydrologic information, and field inspection. When assessing the value of functions that any wetland or other surface water provides to fish, wildlife, and listed species, the factors that the Agency will consider are:

- (a) Condition – this factor addresses whether the wetland or other surface water is in a high quality state or has been the subject of past alterations in hydrology, water quality, or vegetative composition. However, areas impacted by activities in violation of an Agency rule, order, or permit adopted or issued pursuant to Chapter 373, F.S., or Part VIII of Chapter 403, F.S. (1984 Supp.) as amended, will be evaluated as if the activity had not occurred;
- (b) Hydrologic connection – this factor addresses the nature and degree of off-site connection, which may provide benefits to off-site water resources through detrital export, base flow maintenance, water quality enhancement or the provision of nursery habitat;