

Enhancement and Restoration Opportunities for Local Government Land

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Introduction

Local governments may own many acres of sensitive land which they wish to restore, enhance or otherwise environmentally improve. However, many local governments do not have the economic resources necessary to make the desired ecological improvements. New opportunities

are available to local governments that did not exist prior to 2019. This article explores opportunities available to local governments to restore or enhance environmentally sensitive land at no cost to the local governments, with potentially even a profit for the local government.

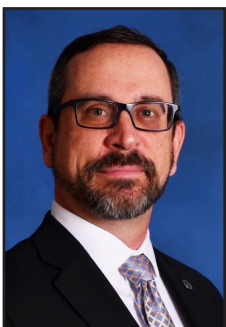
Local governments in Florida

recognize that the protection of wetlands and other surface waters is preferred to destruction and mitigation. However, the desire to protect environmentally sensitive lands must be balanced against the desire for responsible economic growth. Chapter 373, Florida Statutes assists in this goal.

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Chair's Report

By Don Crowell



As I sit here writing this, I have very mixed emotions. Yesterday we decided that we needed to hold the Annual Local Government Law in Florida Seminar and the Section Annual Meeting virtually again. I am so disappointed by that and wish that the COVID-19 vaccination progress was far enough along to

believe that having the seminar and meeting in person would be safe and wise. Unfortunately, that is not the case. Needing to cancel the hotel contract to avoid cancellation charges, the practical realities overwhelmed my preferences. I can't wait for the day when I can see you all in person again.

That said, I am hopeful and excited. Why? Because the more I have worked closely with Chair-Elect Amanda Coffey and Secretary/Treasurer Janette Smith, and so many other committee leaders and

members, I see such a tremendous future for the section just waiting to burst open in bloom once this pandemic is behind us. The ideas they have are going to continue to

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CHAIR'S REPORT

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drive the section forward in leaps and bounds to be the best source of information, continuing legal education, networking, and support for the diverse local government law practitioners in Florida. I won't steal their thunder by prematurely revealing their thoughts and plans, but the future looks very bright to me!

I am also excited because by the time you are reading this I am hoping that the new cclgl.org website will be up and running. It has taken a lot of time, work, and thoughtful creativity from a team to bring this into a new, modern, user-friendly, and adaptable website. We hope to use this new site to communicate much more to you and make many

more resources easily available to you. This is your website! If you have a substantive local government law topic that you want to write a brief note about for the benefit of the section, we will have a place to publish those. This will allow for timely topics to be addressed. It will be a repository for our documents and seminar offerings. The calendar will be much easier to use and track for all of our important events. Our sponsors and awardees will have recognition for their contributions to the section and the area of local government law. I can't wait for you to see it and I hope that it serves your needs to a whole new level.

As I write this, we also are moving through strategic planning for the section to help us determine or confirm the direction of the section into the future. If you see a survey come out from the section it would be very

helpful if you would spend 5 minutes and give us your thoughts. We will certainly do our best to consider all of the different ideas and viewpoints to make the section the best it can be to meet your needs.

Finally, since this is my last Chair's column, I want to say thank you! Thank you to you, the membership, that entrusted me with this position. I am honored to have served you. Thank you to the leaders and the heavy lifters – you have answered my calls and done tremendous work whether you were new on a committee or a past chair carrying on traditions and practices without a thought to your years of sacrifices to the section. And finally thank you to Ricky Libbert for her hard work through listening to my hopes and frustrations and helping to see them done or satisfied. The section couldn't get anything done without you!



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ANNOUNCING THE NEW City, County and Local Government Law Section Website

<https://www.cclgl.org/>

Easier
Navigation

.....
New Features



LOCAL GOVERNMENT LAND

from page 1

Under Chapter 373, Florida Statutes, works and activities which alter the surface of land must have an environmental resource permit (ERP) from the Florida Department of Environmental Protection (DEP) or one of the state's five water management districts. Under Part IV of Chapter 373, Florida Statutes, any project, construction or alteration of the surface of land requires an ERP. Fla. Admin. Code R. 62-330.010(2) states:

The ERP program governs the following: construction, alteration, operation, maintenance, repair, abandonment and removal of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, and works¹ (including docks, piers, structures, dredging, and filling located in, on or over wetlands or other surface waters, as defined and delineated in chapter 62-340, F.A.C.)....

Developers must explore design modifications to avoid, reduce, minimize or eliminate adverse impacts. Remaining impacts may be offset by mitigation. This presents the opportunity for local governments to make environmentally sensitive lands available for enhancement or restoration to offset impacts from development. This may allow local governments to have sensitive lands restored using third party dollars, when the local government does not have the funds itself.

At the federal level, Section 404 of the Clean Water Act (CWA), Title 33 of the United States Code (U.S.C.), § 1251 et seq., governs discharges of dredge or fill materials into waters of the United States. In the past, applicants had to obtain a permit from the Army Corps of Engineers (Corps) under Section 404 of the Clean Water Act, for activities which discharge dredge and fill materials into a water of the United States. DEP has now assumed the 404 federal permitting role in Florida. Applicants for a Section 404 permit must avoid and minimize impacts. Thereafter, mitigation may also be considered, again providing an opportunity for the enhancement or restoration of local government land.

There are two primary mitigation options to address state or federal mitigation requirements.² These options may be utilized to address the financial requirements to enhance sensitive local government land. First, permittee-responsible enhancement or restoration of local government land may be used to satisfy a private developer's mitigation requirements or the mitigation requirements of another governmental entity. Second, local government land could be used in a public-private partnership to create a mitigation bank.

Permittee-Responsible Third-Party Mitigation on Local Government Land

In 2012, the Legislature significantly limited the ability of all governmental entities to establish mitigation banks, ROMAs or to provide third party mitigation.³ The 2012 amendments to subsection 373.4135(1)(b), Fla. Stat. broadly prohibited mitigation on government conservation lands. This subsection stated in part: "a governmental entity may not create or provide mitigation for a project other than its own unless the governmental entity uses land that was not previously purchased for conservation..."

Under the 2012 amendments, in order to provide mitigation for a project other than its own, a governmental entity must have used property that was not purchased for conservation and which met the same financial assurances as required by section 373.4136, Florida Statutes. This meant governmental entities could generally no longer use their property for third party permittee-responsible mitigation. Opponents argued that this change hampered local government conservation and restoration plans by eliminating the ability to have other government agencies and third parties restore or enhance conservation lands through mitigation.

In some geographic areas, there is no mitigation bank, or the mitigation bank does not offer the necessary type of credit necessary to offset a specific type of impact.⁴ This restriction sometimes created burdensome challenges for applicants when they were not located in the same drainage basin as a mitigation bank.

Because of these challenges the Legislature stated in 2019 that it "also recognizes that certain timing and geographical constraints could result in the unavailability of mitigation bank credits for a certain project upon completion of the project's application."⁵ To address the situation when credits are unavailable, in 2019 the Legislature amended Subsection 373.4135(1)(b), Fla. Stat. to state:

If state and federal mitigation credits are not available to offset the adverse impacts of a project, a local government may allow permittee-responsible mitigation consisting of the restoration or enhancement of lands purchased and owned by a local government for conservation purposes, and such mitigation must conform to the permitting requirements of s.373.4136.

Therefore, if the property requiring mitigation is not within the service area of a mitigation bank, a local government may allow permittee-responsible mitigation on land it purchased for mitigation. While this section of the statute changed in 2019, for the most part, local governments have not taken advantage of the new provision in order to have public land restored with third party dollars.

This modification pertains only to local governments. Therefore, this section does not generally allow land owned by the state, a water management district or other agency of the state to be utilized for third party mitigation. Since state land and state agency land purchased for conservation cannot generally be used for mitigation, it makes the option for restoration or enhancement of local government land even more valuable.

The mere fact that a project is in the mitigation service area of a bank does not necessarily mean credits are available. The credits must generally be of the same type in order to offset the impact. For example, as discussed above, marsh credits cannot offset impacts to a forested wetland. If the impacts and mitigation bank are not in the same drainage basin, credits would not be considered available unless a demonstration is made that unacceptable cumulative impacts will not occur by mitigating outside the drainage basin.

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The need for third party mitigation may arise, for example, if an entity such as the Florida Department of Transportation works with a local government to provide mitigation for road projects within the boundaries of the local government. Another example might be where a developer wishes to develop a local residential/commercial development. Mitigation opportunities are not limited to large entities, although mitigation for a large entity may be less complicated than multiple smaller entities.

Section 373.4135, Florida Statutes creates the opportunity for permittee-responsible mitigation. This does not necessarily mean that the mitigation work must be done by the third-party permittee. It simply means that the third-party permittee must be responsible under the permit. At the request of the local government, a third-party permittee may contract with the local government to have the local government do the work. However, despite any private contractual provisions, the third-party permittee will continue to be liable under the permit for the work. The local government would also have ultimate responsibility under the permit since it is the owner of the land.

Just like with mitigation banks, mitigation on local government property must generally be the same community type as the impacts to be offset. For example, forested wetland impacts must be offset by forested wetland mitigation, not marsh mitigation. Impacts and mitigation also must generally be in the same drainage basin, unless a cumulative impact analysis demonstrates that impacts are offset in another basin.⁶

When a local government provides mitigation for a third party, it may present a complicated permitting scenario. While the permitting is complicated, it is possible to achieve with proper planning. The permitting complications may be well worth it if local government land can be restored or enhanced with no cost to local taxpayers.

The restrictions in Section 373.4135, Florida Statutes do not

restrict the use of local government for use as mitigation for single-family lots or homeowners under section 373.4135(7), Florida Statutes. Also, the restrictions do not prevent the local government land from being used for water quality purposes.

Exceptions

The Legislature created exceptions to the restrictions Section 373.4135, Florida Statutes available for third party mitigation:

- Mitigation provided for single-family lots or homeowners under section 373.4135(7), Florida Statutes;
- Entities authorized in chapter 98-492, Laws of Florida (Greater Orlando Aviation Authority);
- Mitigation provided for electric utility impacts certified under part II, of chapter 403, Florida Statutes; or
- Mitigation provided on sovereign submerged lands under section 373.4135(6), Florida Statutes.

These exceptions may be utilized by any government entity, not just local governments.

Use of Local Government Land for Creation of a Mitigation Bank

Section 373.4135, Florida Statutes encourages the creation of mitigation banks to offset adverse environmental impacts regulated under Chapter 373, Florida Statutes. Mitigation banks are restored, managed and permanently protected lands that contain wetlands. In advance of development actions, mitigation banks give developers approved alternatives to offset unavoidable wetland impacts while still contributing to the protection and restoration of Florida's wetland ecosystems. Banks provide compensation, expressed as a "credit", which can involve a variety of activities including habitat creation, restoration, enhancement, preservation or management. Credits can subsequently be withdrawn to offset unavoidable wetland impacts that will occur at a project development site.⁷

As discussed above, Section 373.4135, Fla. Stat., creates many restrictions for mitigation on conservation land. However, these

restrictions do not appear to apply to the use of local government land for a mitigation bank. Subsection 373.4135(1)(a), Fla. Stat. states in part:

...Except when a local government has allowed a public or private mitigation project to be created on land it has purchased for conservation purposes pursuant to this paragraph, a governmental entity may not create or provide mitigation for a project other than its own unless the governmental entity uses land that was not previously pursued for conservation and unless the governmental entity provides the same financial assurances as required for mitigation banks permitted under s. 373.4136.

Therefore, local governments may partner with private mitigation banks to restore and enhance local government property. Under a public/private contract between the local government and the banker, targeted public lands can be restored and endowed for their perpetual management by the local government. Substantial revenue may be generated for both the local government and its private partners.

The objectives of utilizing a public/private contract are to have the private banker front end all costs, permit the project, restore the land, market and sell the credits, establish a management trust for the long-term care of each site and provide a revenue stream to the governmental entity. This revenue will cover the appraised land value for purchase price of the bank site, all staff costs and an additional profit amount for the local government.⁸

A mitigation bank in the City of Pembroke Pines provides an excellent example of a mitigation bank public private partnership. The City of Pembroke Pines is the owner of the "Florida Wetlandsbank," now known as the Pembroke Pines Mitigation Bank, the first mitigation bank in Florida. The City, as the owner of the bank property, entered an agreement with "Florida Wetlandsbank" to allow the construction and implementation of the bank on City owned property. This has been an economically successful venture for the City.

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The SFWMD has two successful examples of mitigation banks using public/private contractual agreements. The first is a public private partnership for the Loxahatchee Mitigation Bank. Tetra Tech entered a public-private partnership with the SFWMD to create the 1,254-acre Loxahatchee Mitigation Bank in Palm Beach County, Florida. In its restored state the bank provides a large, sustainable, and contiguous land area adjacent to an ecologically significant natural area, the Arthur R. Marshall Loxahatchee National Wildlife Refuge. The bank's objective emphasizes restoring a degraded ecosystem that would otherwise continue to degrade and negatively affect adjacent natural areas. Activities undertaken at the bank have resulted in an increase in ecosystem functions and values including habitat restoration and enhancement, ground water recharge, water quality improvement, increased flood storage capacity, and increased wildlife utilization. The project resulted in the restoration of degraded wetlands within the historic limits of the Florida Everglades.⁹

The second example is a public/private partnership for the 635-acre Corkscrew Regional Mitigation Bank owned by the SFWMD. This bank was originally permitted and developed by Mariner Properties Development, Inc. under contract with the SFWMD. Corkscrew Mitigation, LLC now operates the bank. This bank provides the restoration of over 390 acres of drained pastureland to a native hydric pine system matrix containing cypress, marsh, prairie, wetland hardwood, and upland areas. Approximately 240 acres of native wetlands and uplands were enhanced through hydrological improvements, exotic vegetation control and maintenance, and implementation of prescribed burns. The objective of the bank is to provide freshwater, forested, and herbaceous wetland mitigation credits to offset development project impacts to wetlands within portions of Lee, Hendry, and Collier Counties.¹⁰

Conclusion

Third party mitigation on government property provides an excellent means for local governments to recover the cost of restoring and enhancing government land. Mitigation banks also have the advantage of not only restoring and enhancing

government land, but also may provide a revenue stream to local governments.

Endnotes:

1 "Works" is an extremely broad term. Subsection 373.403(5), Fla. Stat. states: "Works" means all artificial structures, including but not limited to ditches, canals, conduits, channels, culverts, pipes, and other construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state."

2 These options are still subject to certain restrictions discussed herein. Subsection 373.4135(1)(b), Fla. Stat.

3 Ch. 2012-174, Laws of Fla.

4 For example, an impact to a forested wetland must be offset by a forested wetland credit. The impact cannot be offset by a credit pertaining to another type of habitat.

5 Subsection 373.4135(1)(b), Fla. Stat.

6 Mitigation may occur outside the drainage basin if a cumulative impact analysis demonstrates the mitigation offsets the impacts within the drainage basin. See Subsection 373.414(8), Fla. Stat.

7 For more information on mitigation banks generally see *Mitigation Banks in Florida*, Susan Roeder Martin and John Fumero, Environmental and Land Use Law Treatise, October 2020, http://eluls.org/treatise/pdf/9_19.pdf.

8 <https://www.sfwmd.gov/doing-business-with-us/mitigation-program>

9 <https://www.tetrattech.com/en/projects/loxahatchee-mitigation-bank>

10 <https://environment.com/index.php/2009/04/corkscrew-regional-mitigation-bank/>

NEED TO UPDATE YOUR ADDRESS?

The Florida Bar's website (www.FLORIDABAR.org) offers members the ability to update their address and/or other member information.

The online form can be found on the website under "Member Profile."





CALENDAR OF EVENTS

City, County and Local Government Law Section – Annual Meeting

May 17, 2021

12:00 noon

Zoom

Executive Council Meeting

June 10, 2021

9:30 a.m.

Zoom

47th Annual Public Employment Labor Relations Forum

October 14 - 15, 2021

Rosen Plaza Hotel

Orlando

Executive Council Meeting

October 14, 2021

5:00 p.m.

Rosen Plaza Hotel

Orlando