



Brevard County Board of County Commissioners

2725 Judge Fran Jamieson
Way
Viera, FL 32940

Legislation Text

File #: 1175, **Version:** 1

Subject:

Wetlands Protection - Comprehensive Plan Amendments

Fiscal Impact:

No fiscal impact

Dept/Office:

Natural Resources Management Department

Requested Action:

Staff requests Board direction regarding Comprehensive Plan Amendments - Wetlands Protection - related to the 1.8% impact allowance for some residential development, and no-net-loss wetlands mitigation.

Summary Explanation and Background:

On March 7, 2019, the Board directed staff to bring back potential modifications to the Brevard County Comprehensive Plan (Comp Plan) and Wetlands Protection ordinance for consistency with the minimum standards set forth by the Florida Department of Environmental Protection (FDEP) and St. Johns River Water Management District (SJRWMD). Of specific interest were the residential policies and the 1.8% threshold established for residential impacts to wetlands.

At the November 12, 2019, regular meeting, staff presented background and historical information, and multiple options that may be considered individually or in combination. After a brief discussion, the Board tabled the item until January 2020 to provide time for both the Board and a group of development interest stakeholders, represented by Mr. Bruce Moia, to review and consider the information presented in the agenda report.

Staff subsequently contacted Mr. Moia, who selected the meeting date of January 21, 2020. Staff attempted further coordination with Mr. Moia and were assured of a timely delivery of his proposal, but have received no language proposals from him. However, Staff did receive a forwarded email which contains Mr. Moia's proposed Comprehensive Plan language modifications. This forwarded email sent to the Commissioners for Districts 1, 2, 4, and 5 was obtained from a Commission office. As staff received this email only very recently, there has been only limited time to conduct a proper review with comments by staff to address any concerns which may be discovered. Staff will attempt to complete that review by the time of the Board meeting on January 21, 2020. Should staff's review of Mr. Moia's proposal be completed timely, staff will provide comments for the Board to consider (see Option 5 below).

Below are the previously presented five options, with one additional option addressing a concern regarding no-net-loss wetlands mitigation, and the exportation of wetlands and their beneficial functions outside of

Brevard County.

Potential Modifications to Policies Related to Residential Development and 1.8%

FS 163.3177(6)(d) (attached) requires that land uses be distributed in a manner that minimizes the effect and impact on wetlands, and requires data and analysis to support requested policy modifications. An approach consistent with state statute is required.

Modifications to the Comp Plan can be submitted for the 2020 fall cycle transmittal (due June 30, 2020) for consideration by the Department of Economic Opportunity (DEO), distribution to other stakeholders, and county public hearings.

Option 1:

As discussed below, the 1.8% criteria arose from an application of the state's 4,000 SF stormwater threshold to equate a number to the established one unit to five-acre density.

Staff can conduct an analysis of Building Department and Property Appraiser data to determine if typical single-family home sizes have increased since 2011, and modify the 1.8% (4,000 SF per 5 acre parcel) allowance accordingly.

Option 2:

Recognizing the role of wetlands and their ability to improve water quality, Palm Bay has established residential densities based on the availability of centralized sewage service.

Applying a 4,000 SF allowance to "1 unit per 3 acres where centralized sewage service is required and available," yields a 3% impact allowance. Staff can conduct an analysis to determine what potential impacts this proposal would have on wetlands; and whether this language would be an appropriate option for Brevard County.

Option 3:

Recently, staff have encountered development proposed within wetlands on parcels less than five acres in platted subdivisions approved by Brevard County. These wetlands may not have been delineated at the time of subdivision approval; either because they did not exist, or did not meet the state definition of wetlands at the time of approval. This was the case in 2018 with a parcel in Otter Trace, Merritt Island, and this year with a parcel in Eagle Pointe, Titusville. The proposed development on both parcels was permitted by applying the 1.8% retroactively over the entire subdivision, and a Consent Vested Rights action, respectively.

A better process is requested to adequately address development of the last remaining lots in platted subdivisions. For example, the Otter Trace parcel effectively depleted the allowable 1.8% of impacts for the subdivision, disallowing any further impacts in the subdivision for any remaining undeveloped lots. This requires subsequent applicants to seek an administrative action per Section 62-507, Comprehensive plan interpretation appeal procedure; presentation of claims for regulatory takings, Bert Harris Act, or vested rights claims. While this could be an effective solution in most cases; it is an inconvenience to both the applicant, staff and the Board.

Staff requests to conduct an analysis of the potential impacts to wetlands; and, if appropriate, draft policy

language that would permit impacts to wetlands not previously identified in existing platted subdivisions. This would put us in better alignment with the State. The Comp Plan requires no-net-loss of wetlands, so staff requests that mitigation be provided for any permitted impacts.

Option 4:

Conservation Element, Objective 5, establishes a requirement of no-net-loss of functional wetlands in Brevard County. The State takes a regional watershed approach to wetlands mitigation. SJRWMD regulates 18 counties in northeast and east-central Florida, covering 12,283 square miles in 22 watershed basins. Brevard County has two watershed basins, the Upper St. Johns River Basin and Indian River Lagoon Basin, extending over seven Central Florida counties.

As development continues in Brevard County, mitigation options within the county are reduced. The State sometimes requires mitigation in an adjacent county (e.g., Indian River, Volusia, Osceola). This results in the loss of flood protection and other localized wetland functions in Brevard County. Some mitigation likely comes into Brevard County from impacts in adjacent Counties; however, staff does not know to what extent wetlands are exported and imported, or if it is possible to identify this through state permits or mitigation bank records.

Staff requests direction to further research the extent of out-of-county mitigation, and potential options to ensure consistency with Comp Plan mitigation policies.

Option 5:

Review and analyze the recently received concepts and language for modifications proposed by Mr. Moia, and report back to the Board. Staff only recently received Mr. Moia's proposal (attached) with limited time for review to include it in this agenda report.

Option 6:

Make no revisions to Wetland Protection Comprehensive Plan Policies.

Option 7:

Other Board direction.

Origin of 1.8% Threshold

In July 2007, a citizen request was made by The Viera Company related to a hearing of the Viera DRI Substantial Deviation #2 and proposed Comprehensive Plan Amendments. The Board directed staff to work directly with The Viera Company and their consulting planners/engineers/scientists, and the environmental community (Parties) to resolve issues specifically related to wetlands. During the following 2½ years, numerous public meetings were held, where the parties discussed various aspects of the text and map amendments.

The 1.8% threshold, adopted by the state in 1995, was based on the state-established stormwater standards for all projects developing 4,000 SF or more of impervious surfaces. During county wetland policy development, the Parties considered 4,000 SF adequate to construct a primary residence and associated impervious areas required for a single family home site. Therefore, the Parties agreed to apply the state's 4,000 SF stormwater threshold to the County's allowable wetland density of one unit per five acre - thus establishing a numerical value of 1.8% for the allowable wetland impact area within a residential property

available for development:

$$\begin{aligned} 4,000 \text{ SF} &= 0.09 \text{ acre} \\ 0.09 \text{ acres} \div 5 \text{ acres} &= 1.8\% \end{aligned}$$

The 1.8% is applied uniformly to provide flexibility for developing single family lots less than five acres established after the adoption of the Wetland Protection policies of the Brevard County Comprehensive Plan (September 9, 1988), new subdivisions and multi-family parcels greater than five acres, New Town Overlays, DRIs, PUDs, and if applicable, mixed-use land development activities. The 2007-C Comprehensive Plan amendments were unanimously adopted in December 2009. The Florida Department of Community Affairs subsequently approved the amendments in 2010. The corresponding land development regulations were adopted March 23, 2011.

County (Planning) vs. State Regulation (Permitting) Requirements for Wetlands

There are distinct wetland protection requirements assigned to the state for permitting, and to local governments for planning. SJRWMD (and in some cases, FDEP) issues permits in 18 Florida counties for wetland impacts and mitigation. **The Brevard County Comp Plan is currently consistent with the planning standards established by the state for county wetland protections;** for permitting, Brevard County defers to the state (typically SJRWMD) for the delineation of wetlands, the avoidance and minimization of wetland impacts, and the mitigation of impacts. For isolated wetlands less than one-half acre in size, the state defers wetland protection measures to local government permitting and their Comprehensive Plan policies.

The state permitting agencies do not consider where wetland impacts should or should not be allowed. That planning function is the responsibility of local jurisdictions. Florida Statute Chapter 163, Community Planning Act, requires local governments to adopt a Comprehensive Plan determining the allowable uses, densities, intensities, and development standards for all lands within their boundaries. Comp Plan policies must be based on relevant and appropriate data and analysis, and provide meaningful and predictable standards for the use and development of land. Comp Plans must include a Conservation Element addressing the conservation, use and protection of natural resources existing within the jurisdiction, including wetlands; and a Coastal Element, addressing plans and principles to be used to control development and redevelopment to eliminate or mitigate the adverse impacts on coastal wetlands. Section 163.3177(d)2.k., F.S., requires local governments to have planning policies that direct “future land uses that are incompatible with the protection and conservation of wetlands and wetland functions away from wetlands.”

Division of Administrative Hearings (DOAH) Case 96-2174GM

Wetland protection planning policies relative to residential development in Brevard have changed over the years in response to community input, Board direction, and legal challenges.

In April 1995, the Board directed staff to initiate a Comp Plan amendment to repeal Objective 5 of the Conservation Element pertaining to wetlands. The Board was concerned that the policies were duplicative of various state and federal permitting processes. The effort was challenged by the state and several intervenors as noncompliant with state law. After numerous language modifications; two stipulated settlements were reached in 1997 and 1999. In November 1999, the state approved Comp Plan amendments for Brevard. A chronology of proposed Conservation Element Policy 5.2.F amendments in DOAH Case 96-2174GM is attached; as is the 475-page appendix.

Additional Research

- DEO
Staff recently consulted with the DEO regarding the submittal process, procedures, and review criteria for Comp Plan amendments. DEO outlined the submittal process, procedures and review criteria. DEO reiterated to staff the requirements of F.S. Chapter 163, specifically:
 - FS 163.3177(6)(d) - principles, guidelines, and standards for conservation that provide long-term goals and which protect and conserve wetlands and the natural functions of wetlands,
 - The requirement that land uses be distributed in a manner that minimizes the effect and impact on wetlands, and
 - The requirement for data and analysis to support proposed policy amendments.
- Other Jurisdictions' Regulation
Staff examined wetland policies/ordinances of Palm Bay, Titusville, Miramar, and Volusia, Indian River, and Martin Counties. All have Future Land Use, Conservation, and/or Coastal Element policies protecting wetlands; some are more restrictive than Brevard County. Below is a brief summary of key elements of each jurisdiction:

Palm Bay

- Residential density within wetlands is 1 unit per 5 acres for areas on septic; and 1 unit per 3 acres where centralized sewage service is required and available.
- Vegetated buffers are required to be maintained or created between all developed areas and wetlands.
- No more than ten percent of the wetland within the property boundary may be permitted to be filled.
- Mitigation requirements are deferred to the state.

Titusville

- Wetlands 5 acres or more in size are designated as a conservation land use and wetlands less than 5 acres are subject to review to determine what protection, if any, they should receive from development.
- No net loss of functional wetlands.
- Protection of wetlands determined by the functional value of the wetland (e.g., flood storage, size, habitat protection).

Miramar

- Utilizes "Compatibility of Land Uses Relative to the Wetland Benefit Index."
- Distribute land uses to avoid or minimize impacts to the greatest degree practicable.

Volusia County

- No-net-loss of wetland function.
- Development within wetlands one-half acre or smaller is exempt.
- A 25- to 50-foot buffer required adjacent to and surrounding all wetlands

- In determining whether the proposed development is permissible, Volusia County takes into consideration 13 criteria, including:
 - The ability of the wetland to receive, store, and discharge surface water runoff so as to contribute to hydrological stability and control of flooding and erosion.
 - The ability of the wetland to provide filtration and nutrient assimilation from surface water runoff.
 - The cumulative impacts of the proposed development on the wetland system in combination with other developments which have been permitted or constructed in the same drainage basin.
 - The technical feasibility of any proposed wetland mitigation plans and the likelihood of their success in restoring or replacing the environmental benefit altered by the development.
 - Whether and the extent to which a proposed project must be located within a wetland or water body in order to perform the project's basic functions.

Indian River County

- No-net-loss of natural functions and values of wetlands and deepwater habitats through implementation of the Comprehensive Wetlands Management Program.
- A minimum of ten square feet of native buffer shall be provided for each linear foot of wetland or deepwater habitat perimeter that lies adjacent to uplands.
- A 1 unit per 40 acres density is established in all estuarine wetland systems & shallow water habitats, and contains density transfer standards.
- Prohibits impacts unless the activity is necessary to prevent/eliminate public hazard, or would provide direct public benefits which would exceed loss. Avoidance and minimization of impacts is always required.

Martin County

- No-net-loss applies to the functions and values of wetlands, the spatial extent of wetlands and wetland buffers, and secondary impacts to the functions of wetlands or wetland buffers.
- 75-foot buffers are required; reduction waivers are available.
- Martin County does not establish densities within wetlands, but does contain density transfer standards.

Martin County has very robust policies, likely the most thorough and restrictive of counties near Brevard. They allow no negative impacts within wetlands or wetland buffers except in specific provisions. There are exceptions for pre-Comp Plan (April 1982) parcels, however; there are specific limitations. Allowable impacts for both residential and non-residential parcels are based on "reasonable uses." For example single family lots are limited to 3,000 sq. ft. of development footprint (excluding septic system). Non-residential developments must minimize fill for "reasonable use." Waivers are also available for access to uplands and water, public utilities, and shoreline stabilization. Other waivers may be granted by the Board of County Commissioners, with "clear, substantial competent evidence that the application of the regulations in this division preclude all reasonable economically viable use of the property." Comprehensive Preserve Area Management Plans (PAMPs) are required for all projects containing upland preserve areas, wetland preserve areas, wetland buffers, Shoreline Protection Zone, or hardened shorelines.

Clerk to the Board Instructions:

None