

# **THE GOPHER TORTOISE AND UPLAND HABITAT PROTECTION IN FLORIDA**

## **LEGAL AND POLICY CONSIDERATIONS**

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### **I. Introduction**

For decades regulatory policy has emphasized the protection of wetlands as a discrete component in the mosaic of ecosystems that represents the landscape. Upland habitat, the preferred habitat of humans, has been primarily protected through land acquisition programs and, incidentally, through protected species regulation. Few species better underscore the problems with this approach to conservation policy better than the Gopher Tortoise. This long-lived, slow moving indicator of habitat health is in the midst of a precipitous decline.<sup>1</sup>

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<sup>1</sup> On May 1, 2002 a petition to reclassify the Gopher Tortoise from “Species of Special Concern” to “Threatened” was filed with the Florida Fish and Wildlife Commission. Petition of Bradley J. Gruver, PhD, Florida Fish and Wildlife Commission (1 May 2002). The petition states that the Gopher Tortoise has declined by more than 50% within three generations, hence meeting applicable criteria for a “threatened” designation. Rule 68A-1.004, Florida Administrative Code.

Most conservation biologists and advocates regard the single species approach to biodiversity management to be poor public policy. Yet this has been the primary regulatory tool for the protection of upland habitat. As upland ecosystems diminish and degrade local governments have begun to exercise unique enabling authority to fill the regulatory vacuum. The broad “home rule” authority to exercise land use controls under traditional zoning concepts has generally been left to local government. Over time, these concepts have become increasingly sophisticated, adapting themselves to developments in science and technology, as well as law and human necessity. Increasingly the protection of upland habitats, and the species that rely on them, has entered the lexicon of local land use decisionmaking.

## II. Overview of Gopher Tortoise Biology

The gopher tortoise (*Gopherus polyphemus*) is a medium-sized turtle with a broad head and short tail.<sup>2</sup> It is the only species of living tortoise that occurs throughout the coastal plain of the southeastern United States with most populations being found in north-central Florida and southern Georgia.<sup>3</sup> In these areas, gopher tortoises live in dry habitats with well-drained sandy soils. These habitats are ideal for the digging habits of gopher tortoises. Using their specialized forelimbs, gopher tortoises dig burrows up to 47 feet in length.<sup>4</sup> These burrows protect them from fire, predators, and extremes in climate.<sup>5</sup> They also protect as many as 81 other animal species some of which are threatened (Scarab beetle, E. indigo snake, and Florida mouse).<sup>6</sup>

Gopher tortoises are believed to live in excess of 60 years, which are conservative estimates considering that no accurate method exists to age tortoises older than 30-40 years of age. Depending on the region, females take between 10-15 years (Northern Florida) and 21 years (Southern Georgia) to reach maturity. Females produce on average one clutch per year consisting of 6 eggs, though it is estimated that they may only produce a *successful* nest every 10 years when predation is considered.<sup>7</sup> Landers (1980)<sup>8</sup>

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<sup>2</sup> Cox, J., D. Inkle, and R. Kautz. 1987. Ecology and habitat protection needs of gopher tortoise (*Gopherus polyphemus*) populations found on lands slated for large-scale development in Florida. Fla. Game and Fresh Water Fish Comm., Nongame Wildl. Program Tech. Rep. No. 4. 69 pp.

<sup>3</sup> Auffenberg, W. and R. Franz. 1982. The status and distribution of the gopher tortoise (*Gopherus polyphemus*). Pp. 95-126 *In* North American tortoises: conservation and ecology. Wildlife Research Report 12. U.S. Fish and Wildlife Service, Washington, D.C.

<sup>4</sup> Ernst, C.H. and R.W. Barbour. 1972. Turtles of the United States. The University of Kentucky, Lexington. 347 pp.

<sup>5</sup> . Auffenberg, W. and J.B. Iverson. 1979. Demography of terrestrial turtles. Pp. 541-569 *In* Harless, M. and N. Norlock (eds.). Turtles: research and perspectives. Wiley-International, New York. 718 pp.

<sup>6</sup> Speake, D.W. 1981. The gopher tortoise burrow community. Pp. 44-47 *In* Lohofener, R., L. Lohmeier, and G. Johnston (eds.). Jackson, D. R., and E. G. Miltrey. 1989. The fauna of gopher tortoise burrows. Pages 86-98 *in* J. E. Diemer, D. R. Jackson, J. L. Landers, J. N. Layne, and D. A. Wood (eds.). Gopher Tortoise Relocation Symposium Proceedings, Florida Game and Fresh Water Fish Commission, Nongame Wildlife Program, Technical Report Number 5, Tallahassee. The future of gopher tortoise habitats. Proc. 2<sup>nd</sup> Annu. Mtg. Gopher Tortoise Council. Florida State Museum, Gainesville, FL.

<sup>7</sup> Diemer, J. E. 1986. The ecology and management of the gopher tortoise in the southeastern United States. *Herpetologica* 42:125-133.

estimates that only 1-3 of 100 hatchlings will ever reach sexual maturity. Animals such as raccoons, foxes, skunks, armadillos, and fire ants ravage burrows annually in search of food, feeding on both eggs and juvenile tortoises. Adult and juvenile tortoises are also threatened with predation upon leaving the burrow.

The life of a gopher tortoise revolves around its burrow. Efforts to protect the gopher tortoise have centered on the importance these burrows play in providing refuge a wide range of species. This list includes species which are themselves threatened or endangered, and in some cases represent shelter which these animals cannot live without.<sup>9</sup> Residents include the indigo snake (threatened species), pine snake (species of special concern), gopher frog (species of special concern), Florida mouse (threatened species), opossum, armadillo, burrowing owl (species of special concern), gopher cricket, and scarab beetles (threatened species). These burrows are the life-blood of upland habitats providing refuge from temperature, humidity and the regenerative fires.

Gopher tortoises are known to occupy a wide variety of upland habitats where they respond to both physical environmental features and various plant assemblages.<sup>10</sup> It is generally accepted that gopher tortoises require certain biotic features to maintain a healthy habitat. These include, the presence of well-drained, sandy soils that allow easy burrowing, an abundance of herbaceous ground cover and a generally open canopy with sparse shrub cover.<sup>11</sup> The Florida Fish and Game Commission has identified nine habitat types which it considers important gopher tortoise habitat; North Florida Coastal Strand, South Florida Coastal Strand, North Florida Flatwoods, South Florida Flatwoods, Sand Pine Scrub, Longleaf Pine-Turkey Oak Hills, Mixed Hardwood and Pine, Upland Hardwood Hammocks and Oak Hammocks.<sup>12</sup> Periodic natural fires play an important role in maintaining tortoise habitat by opening up the canopy and promoting growth of herbaceous food plants. If natural fires are suppressed, habitats may become unsuitable for tortoises. However, there are also intervened habitats such as pasture land where gopher tortoises have managed to do quite well.<sup>13</sup>

### **III. Management Issues Affecting the Gopher Tortoise and its Habitat**

The unique biology and habitat requirements of the gopher tortoise presents a number of issues that must be addressed in providing for its management. These issues are intimately related to their biology and natural history and include the following:

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<sup>8</sup> Landers, J.L. 1980. Recent research on the gopher tortoise and its implications. Pp. 8-14 *In* Franz, R., and R. J. Bryant (eds.). The dilemma of the gopher tortoise – is there a solution? Proc. 1<sup>st</sup> Ann. Mtg. Gopher Tortoise Council. Florida State Museum, Gainesville, Fl.

<sup>9</sup> Pucket, C., and R., Franz. 2000. From a document originally published by the Gopher Tortoise Council and other citizens in 1980 and currently found at [www.gophertortoisecouncil.org](http://www.gophertortoisecouncil.org).

<sup>10</sup> Cox, J., D. Inkley, and R. Kautz. 1987. Ecology and habitat protection needs of gopher tortoise (*Gopherus polyphemus*) populations found on lands slated for large-scale development in Florida. Fla. Game and Fresh Water Fish Comm., Nongame Wild. Program Tech. Rep. No. 4. 69pp.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> (Ashton and Ashton 2002).

- **Habitat loss through land use conversion.**
  - Gopher tortoise habitat preferences – open canopy forested lands with sandy well- drained soils- also represent a preferred landscape for human development
  - Gopher tortoise habitat is underrepresented in conservation lands in Florida
- **Habitat modification/loss through inadequate management**
  - Absence of fire or a surrogate to regenerate habitat
  - Forestry practices: monocultures of pine create a canopy too dense to allow sufficient sunlight to reach the ground. This limits food production. It also may limit the availability of sunny sites which females must find for nesting.
  - Habitat (land) fragmentation by development, roads, etc reduces individual population sizes and threatens viability.
- **Loss of Individuals through human take**
  - Tortoises have historically filled a culturally significant dietary need
  - Tortoises are a preferred species in the pet trade
  - Highway mortality is a significant contributor to tortoise mortality. Low mobility compounds highway mortality
- **Disruption of population dynamics by human relocation and habitat fragmentation**
  - Human movement of tortoises can disrupt population genetics.
  - Minimum viable population size and associated habitat requirements (e.g. area required to maintain population)
  - Small isolated populations are doomed to extinction. Transportation corridors and land use conversions reduce and fragment habitat.
- **Upper Respiratory Tract Disease**
  - Can spread among virgin populations through introduction of infected individuals
  - Increases cost and nature of relocation programs

#### **IV. Management Strategies That Address Management Issues Affect the Gopher Tortoise And its Habitat**

The preferred Gopher Tortoise management strategy must be *in situ* conservation. *In situ* conservation requires adequate area for resident tortoises in populations likely to maintain population viability over time, and the ability for populations, especially small populations, to exchange genetic material. Of the nine habitat types that the Florida Fish and Wildlife Commission considers appropriate gopher tortoise habitat the Florida Natural Areas Inventory lists five of those habitats as underrepresented natural communities in need of conservation.<sup>14</sup> *In situ* conservation is a difficult strategy to pursue on private lands subject to land use conversion. If individual developments can be sited so that tortoises and their burrows are not harmed then there is no requirement that a landowner provide adequate habitat for the otherwise unmolested resident tortoises, let alone consider whether the resident tortoises are members of a viable population.

Moreover, even private lands managed as gopher tortoise habitat can be fragmented as a result of adjacent land use change, compromising population viability. As a result *in situ* conservation can still lead to population decline. The conservation strategy that attempts to address this *in situ* problematic is based on the creation of wildlife corridors. Wildlife corridors are generally thought of as patches of habitat, often linear, that conjoin two larger habitats, often protected areas, and facilitate genetic exchange among wildlife populations. However, for the Gopher Tortoise, otherwise effective corridors can be compromised by formidable barriers such as transportation infrastructure.<sup>15</sup>

If individual tortoises must be “taken” because of permitted land use conversion, then the species’ protected status triggers the environmental policy known as mitigation. On site mitigation generally requires a land owner to relocate gopher tortoises to suitable habitat outside the development envelope and to dedicate that habitat to conservation purposes in perpetuity. Off site mitigation generally requires the relocation of disturbed tortoises to lands that have been set-aside as gopher tortoise reserves, pursuant to a management plan that considers population viability and habitat health. In some cases tortoises can also be entombed in their burrows and mitigation is accomplished through in lieu fees or habitat acquisition. The Florida Fish and Wildlife Commission has promulgated guidelines which deal directly with appropriating gopher tortoise habitat, relocating tortoises and the taking of tortoises in Florida. These are described in below.

Once the issue of habitat conservation has been addressed, the habitat must itself be managed to suit tortoise needs. Gopher Tortoises have evolved in fire dependent upland ecosystems. Fire maintains the quality of the habitat for gopher tortoises as well as all other species that it has co-evolved with. Tortoises require a well-drained open canopy landscape for burrowing, thermoregulation and foraging. Fire suppression changes the composition of the forest, and permits hardwood succession to replace the fire-dependent

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<sup>14</sup> Florida Forever Natural Needs Assessment 2001. The underrepresented communities include: pine flatwoods, upland pine forests, scrub, xeric hammocks, longleaf pine-xeric forests, upland pine forests, and upland hardwood forests).

<sup>15</sup> Pucket and Franz 2000, Ashton and Ashton 2002

ecosystem.<sup>16</sup> As the canopy closes in the successional forest the light dependent herbaceous groundcover on which the tortoise depends diminishes, degrading its habitat.<sup>17</sup> Fire policy in Florida discourages “wildfires” as a threat to lives and property. Hence natural wildfire has diminished in the state.

The primary management strategy for maintaining fire-dependent ecosystems is prescribed burning, also known as controlled burning. Public policy in Florida encourages prescribed burning. These practices serve to open up the canopy, thus allowing ample light to reach the forest floor encouraging the growth of tortoise forage with minimum soil disturbance.<sup>18</sup> Fire also serves to maintain the integrity of pine forests and impedes plant succession. In addition to maintaining forest integrity, fire serves to stimulate growth in many important herbaceous tortoise foods (Cox et. al 1997). Unfortunately, the incentives to undertake controlled burns have not significantly increased the desire of non-public landowners to do so. In fact, prescribed burning on private lands has continued to decline, and it is becoming increasingly difficult on some public lands. Herbicides and mechanical harvesting have served as replacement techniques on some actively managed private lands where prescribed burning is problematic. Unfortunately, these management practices may also be detrimental to tortoises.

Individual tortoises also experience predation from humans and from subsidized predators, such as feral and owned dogs and cats. The Gopher Tortoise was a culturally accepted protein source in rural southern communities, and remains so in the Florida Panhandle. Tortoises are also a highly sought after species in the illegal pet trade. Cats kill hatchlings and juveniles while dogs attack adults.<sup>19</sup> Raccoons and Opossums, generalist species that thrive in human dominated ecosystems, predate eggs and juveniles. Motorized vehicles remain a major source of tortoise mortality.

The primary management strategy that addresses human predation comes from the Gopher Tortoise’s status as a protected species. It is unlawful to intentionally shoot or kill a protected species, and collecting them can only be done with a permit from the FFWC. Predation by owned pets and managed feral cat colonies may also violate federal and state wildlife laws. Outlawing the hunting of gopher tortoises has been a relatively successful management strategy for addressing the human predation management issue.

When considering any management strategy concerning the gopher tortoise, long-term goals must be addressed. Because of the long time period to maturity and the low replacement of individuals within a given population it may take many reproductive seasons for an individual to replace itself.<sup>20</sup> Management strategies must account for the

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<sup>16</sup> Cox et. al 1997.

<sup>17</sup> While gopher tortoises feed upon a wide variety of plants, they primarily feed on broadleaf grasses, wiregrass, grass-like asters, legumes, and fruits (Garner and Landers 1981). A more composite list of the common plant families and the species within those families has been compiled by Ashton and Ashton (2002) and reveals the extensive variety of plants upon which they feed.

<sup>18</sup> Pucket and Franz 2000

<sup>19</sup> Ashton and Ashton 2002

<sup>20</sup> Ashton and Ashton 2002

longevity of individuals and the low fecundity of these animals so that populations not only survive, but also actually increase in their preserved or new habitat. Only with long term and biologically informed management strategies can gopher tortoises escape the apocalyptic predictions for their future survival.

## **V. Legal Status of the Gopher Tortoise and its Habitat in Florida**

The legal status that has been conferred on the Gopher Tortoise will dictate how it is managed and the conservation strategies that will apply to it. The Gopher Tortoise has been listed as an Appendix II species under the Convention of Trade in Endangered Species, restricting trade in the species. It is listed as a threatened species over some of its range by the federal Endangered Species Act (outside of Florida), which protects the individual animal and, in some cases, its habitat. It has been listed a “Species of Special Concern” by the State of Florida Fish and Wildlife Conservation Commission, which protects individual tortoises and their burrows. Local governments may also have independent authority to protect Gopher Tortoises and the their habitat and some have chosen to exercise this authority. These levels of protection and their implications for management are discussed below.

### **A. International Status under the Convention on International Trade in Endangered Species (CITES)**

The gopher tortoise is listed and protected as an Appendix II species under the Convention on International Trade in Endangered Species (“CITIES”).<sup>21</sup> An appendix II listing means that the gopher tortoise may become endangered or threatened unless international trade is strictly controlled. The United States is a party to the CITES convention and has adopted regulations to implement it. It is illegal for any person subject to the jurisdiction of the United State to import, export or re-export an Appendix II species without a permit from the United States Fish and Wildlife Service.<sup>22</sup> It is also illegal to possess any listed species that has been imported, exported or re-exported without a permit.<sup>23</sup>

### **B. Federal Status under the Endangered Species Act (ESA)**

n July 7, 1987, the United States Fish and Wildlife Service listed the gopher tortoise as a threatened species<sup>24</sup> under the ESA throughout portions of Alabama, Mississippi, and

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<sup>21</sup> See 50 C.F.R. § 23 (2002). The purpose of the CITIES agreement is to regulate international trade in species of animals and plants listed as Appendix I, II or III. *Id.* Appendix I includes species threatened with extinction that are or may be affected by trade. *Id.* Appendix II includes species that may become threatened with extinction unless trade is strictly controlled. *Appendix III* includes species that any member nation identifies as being subject to regulation within its jurisdiction for purposes of preventing exploitation, and for which it needs international cooperation to succeed in its goal of minimizing or reducing harm to the species.

<sup>22</sup> 50 C.F.R. § 23.11.

<sup>23</sup> 50 C.F.R. § 23.11 (e).

<sup>24</sup> 16 U.S.C. § 1532 (20). A “threatened species” is defined by the ESA as “[a]ny species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range”.

Louisiana, west of the Mobile and Tombigbee rivers.<sup>25</sup> In these areas it is illegal to possess, sell or take individual gopher tortoises without obtaining prior approval from the Secretary of the Interior.<sup>26</sup> However, because of this limited geographic listing area, gopher tortoises throughout most of their range, including Florida, receive no explicit protection under the federal Endangered Species Act. Tortoises may incidentally benefit, however, from ESA protections accorded other species that have similar habitat preferences, such as the Florida Scrub Jay.

### **C. State Status under the Constitutional and Statutory Authority of the FFWC**

The Florida Constitution contains a specific provision requiring the creation of the Florida Fish and Wildlife Conservation Commission (“FFWC”).<sup>27</sup> The State constitution provides that the FFWC “[s]hall exercise the regulatory and executive powers of the state with respect to wild animal life”.<sup>28</sup> Hence, regulatory authority to protected species in Florida stems not from legislation, but from the State Constitution.<sup>29</sup> Pursuant to its constitutional mandate, the FFWC adopted rule 68-A1.002 which codifies the agency’s broad authority to regulate ‘all wild animal life’ within the jurisdiction of the State of Florida.

The Florida Legislature has also adopted protected species legislation.<sup>30</sup> Under the Florida ESA, the Legislature recognizes that Florida has more endangered and threatened species than any other state in the continental United States<sup>31</sup>. Under the statute it is unlawful to intentionally kill or wound any fish or wildlife designated by the FFWC as endangered, threatened, or of special concern.<sup>32</sup> These terms are not defined by statute however, and the legislature has deferred to the constitutional regulatory authority of the FFWC for a more nuanced definition of protected species “takings.”<sup>33</sup>

The FFWC has created three categories of endangerment – endangered, threatened, and “of special concern”. Endangered species are defined as those the FFWC has designated to be “so few or depleted in number or so restricted in range or habitat...that it is in imminent danger of extinction...”.<sup>34</sup> Under rule 68A27.003, “No person shall pursue molest, harm, harass, capture, possess or sell any... endangered species... or parts thereof or their nests or eggs except as authorized by specific permit”. A threatened species is

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<sup>25</sup> 50 C.F.R. § 17.11 (2002).

<sup>26</sup> 50 C.F.R. § 17.31 (2002).

<sup>27</sup> FLA. CONST. art 4, § 9.

<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> FLA STAT § 372.072.

<sup>31</sup> FLA STAT § 372.072(2).

<sup>32</sup> FLA STAT § 372.0725.

<sup>33</sup> The State ESA does require FFWC to issue an updated annual plan for the management and conservation of endangered and threatened species, including criteria for research and management priorities. Id. At

<sup>34</sup> 68A-1.004 (26), this definition includes criteria for determining when a species should be listed as endangered.

one that is “facing a very high risk of extinction in the future...”.<sup>35</sup> It is illegal to take, possess, transport, molest, harass or sell any threatened species or their nests or eggs without a specific permit.<sup>36</sup> The word “harm” does not appear in the list of prohibited conduct for threatened species (as it does for endangered species). The import of this distinction is not clear. However, the word harm has been interpreted broadly in federal case law to include the modification of habitat. .<sup>37</sup>

The FFWC has listed the gopher tortoise as a ‘species of special concern’ in rule 68A-27.005. “[S]pecies of special concern” are those that the FFWC has determined “face a moderate risk of extinction in the future.”<sup>38</sup> As a ‘species of special concern, it is illegal to take, possess or sell any gopher tortoise, their parts, nests or eggs. Interestingly, both the “harm” provision from the proscriptions for endangered species, and the “harass” provision from the proscriptions for threatened species, are absent from the proscriptions for species of special concern. Nonetheless, the legal import these distinctions have given that all categories of endangerment include a prohibition on “taking” protected species and the FFWC definition of “take” includes “taking, attempting to take, pursuing, hunting, molesting, capturing or killing any wildlife... or their nests or eggs....”<sup>39</sup> Under this definition it appears that the main difference between a state endangered or threatened listing and a “of special concern” listing is the level of difficulty in obtaining an incidental take permit.<sup>40</sup>

The gopher tortoises’ listing in 68A-27.005 further states that the gopher tortoise 1) is significantly vulnerable to habitat modifications, environmental alterations, human disturbances, or human exploitation, and may soon become threatened, 2) may already qualify as threatened but for limited or lacking data, and 3) may occupy an unusually vital ecological niche that should it decline significantly in numbers, other species would be adversely affected.

Permits to take, possess or transport gopher tortoises may be authorized by the FFWC or any Florida agency.<sup>41</sup> The limitation on this authority is that permits for taking “species

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<sup>35</sup> 68A01.004 (77), this definition includes criteria for determining when a species should be listed as threatened.

<sup>36</sup> 68A-27.004.

<sup>37</sup> See. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (U.S. Dist. Col. 1995). Holding that the USFW’s definition of “harm”, which included “significant habitat modification or degradation that actually kills or injures wildlife” was reasonable.

<sup>38</sup> 68A01.004 (73), this definition includes criteria for determining when a species should be listed as a species of special concern.

<sup>39</sup> 68A-1.004 (76)

<sup>40</sup> For endangered species, a permit should only be issued when the permitted activity ‘will clearly enhance the survival potential of the species’, 68A-27.003; for threatened species, a permit will only be issued ‘for scientific or conservation purposes and only upon a showing... that the permitted activity will not have a negative impact on the survival of the species’, 68A-27.004; for species of special concern, any state agency may issue a permit for take after reasonably concluding that the permitted activity will ‘not be detrimental’ to the survival of the species, 68A-27.004.

<sup>41</sup> 68A-27.005(1)(a). No person is permitted to take...any species of special concern...or their nests or eggs “except as authorized by [FFWC] regulations or by permit from the executive director or by statute or regulation of any other agency...”. *Id.* The only limitation is that permits may only be issued upon a

of special concern” can be issued only upon a reasonable conclusion that the permitted activity will not be detrimental to the survival of the species.<sup>42</sup> The FFWC has adopted administrative guidelines for the issuance of take permits. These are discussed below in the section addressing state administration of gopher tortoise protections.

Rule 68A-27.005 further states that the gopher tortoise 1) is significantly vulnerable to habitat modifications, environmental alterations, human disturbances, or human exploitation, and may soon become threatened, 2) may already qualify as threatened but for limited or lacking data, and 3) may occupy an unusually vital ecological niche that should it decline significantly in numbers, other species would be adversely affected.

It is also important to note that there is a current FFWC petition to reclassify the gopher tortoise from a “species of special concern” to a threatened species under rule 68A-27.0012.<sup>43</sup> The petition asserts that gopher tortoise populations have declined at least 50% over the last three generations; therefore the species meets the threatened species criteria listed in 68A-1.004 (77). The additional protection afforded to gopher tortoises under a listing of threatened could be substantial because of additional restrictions on the issuance of “incidental take” permits. Under its current listing as a species of special concern, incidental take permits can be issued by statute or through the regulation of ‘any state agency’ so long as the activity is not detrimental to the potential survival of the species.<sup>44</sup> However, as a threatened species, incidental take permits for gopher tortoises cannot be issued “except as authorized by specific permit from the Executive Director,<sup>45</sup> permits being issued only for scientific or conservation purposes...”<sup>46</sup> Furthermore, the Executive Director can only issue these permits after the applicant has shown the activity will have no negative impact on the survival potential of the species.<sup>47</sup> Therefore a listing of ‘threatened’ would appear to have the potential to significantly change the management prescriptions authorized under the current incidental take guidelines.

## **VI. State Authority to Protect Upland Habitat**

While the Florida constitution provides for the regulation of wildlife there is no similar explicitly stated constitutional authority to protect the habitat upon which wildlife depends. States have inherent authority under the police powers to protect the health, safety and welfare of their residents and many environmental regulations are promulgated under this broad sanction.<sup>48</sup> Florida has taken a restrained view of its police power and protected the environment on the basis of specific media, such as air and water, on the basis of its status as a trustee in the case of submerged lands and wildlife, or to protect

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reasonable conclusion that permitted activity will not be detrimental to the survival potential species of the species. *Id.* There is no regulatory requirement for coordination between agencies. *See Id.*

<sup>42</sup> 68A-27.005.

<sup>43</sup> Petitioner is Bradley J. Gruver, Ph.D. of the FFWC.

<sup>44</sup> 68A-27.005(1)(a).

<sup>45</sup> 68A-1.004 (27). The Executive Director is the administrative head of the FFWC.

<sup>46</sup> 68A-27.004 (1)(a)

<sup>47</sup> *Id.*

<sup>48</sup> This authority is conferred through federalism principles set forth in the United States Constitution. *See* U.S. CONST. amend. X.

special places of “statewide significance.” Thus wetlands are protected on the basis of their surficial connection to “waters of the state;” wildlife and water are treated as “fugitive resources” subject to the public trust doctrine; and the Florida Keys have been declared an “Area of Critical State Concern. Uplands without special status do not enjoy any similar regulatory protection except to the extent they may harbor protected species and loss of habitat will result in the take of individuals of those species. The state has, however, recognized the importance of upland habitat and protected species in local land use control and reinforced the authority to local governments to consider upland habitat through growth management processes described more fully below.

## **VII. Local Government Authority to Protect Gopher Tortoises and their Habitat**

### **A. Home Rule: Inherent Local Government Authority**

Under the Florida Constitution, the original authority for local governments to regulate was constrained by Dillon’s Rule, which limited local government’s authority to areas where express power was granted by the Legislature.<sup>49</sup> In 1968, the Florida Constitution was revised to give local governments broad “governmental, corporate and proprietary powers unless otherwise provided by law”.<sup>50</sup> Thus, the constitutional revisions granted ‘home rule authority’ to charter counties and municipalities within Florida to regulate and manage the affairs of local government.<sup>51</sup>

Chapter 125 of the Florida Statutes was enacted by the Florida Legislature to expand and reinforce the home rule authority of counties, including non-charter counties.<sup>52</sup> Chapter 125 generally grants the governing body of a county the power to carry on county government. Under the statute, this authority includes the power to establish and administer programs of conservation, to the extent that such programs are consistent with general and special law.<sup>53</sup> Consequently, local governing boards have full authority to act unless the Legislature has pre-empted the regulation.<sup>54</sup> Additionally, the statute provides that local government powers should be “liberally construed” to carry out the statutory intent of granting local governments the home rule authority to regulate.<sup>55</sup> The Legislature also states that enumerated powers “shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to

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<sup>49</sup> FLA. CONST. art. VIII, § 8 (repealed 1968).

<sup>50</sup> FLA. CONST. art. VIII, § 2(a).

<sup>51</sup> See FLA. CONST. Art. VIII, § 1(g), and § 2(b).

Art. VIII, § 1(g) provides:

Counties operating under county charters shall have all the powers of local self-government not inconsistent with general, or with special law approved by the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Art. VIII, § 2(b) provides: Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

<sup>52</sup> FLA. STAT. Ch. 125 (2001).

<sup>53</sup> FLA. STAT. Ch. § 125.01(1) (2001).

<sup>54</sup> Id.

<sup>55</sup> FLA. STAT. § 125.01(3) (2001).

carrying out such powers enumerated”.<sup>56</sup> The practical conservation effect of this home rule authority is that local governments may enact regulations addressing protected species and upland habitat generally, and gopher tortoises and their habitat specifically – provided that these regulations do not conflict with federal or state law, and the unique constitutional status of the Florida Fish and Wildlife Commission.

## **B. Delegated Authority to Local Governments to Protect Upland Habitats**

### **Florida’s Local Government Comprehensive Planning and Land Development Regulation Act**

Florida’ Local Government Comprehensive Planning and Land Development Regulation Act, often referred to as the “Growth Management Act,” Chapter 163, Sections 163.3161 through 163.3217, Florida Statutes, requires each local government in Florida to adopt a comprehensive land use plan<sup>57</sup> for the lands within its jurisdiction<sup>58</sup>, and prohibits local governments from approving or authorizing development, and from enacting land development regulations, except in conformity with the adopted comprehensive plan.<sup>59</sup> The Growth Management Act, and implementing rules, give a broad mandate and authorization for local governments to protect upland habitats<sup>60</sup>, as evident from the following provisions (emphasis supplied):

a. Future Land Use Element. Section 163.3177(6)(a), Fla. Stat., requires each comprehensive plan to include a future land use element designating “...proposed future general distribution, location, and extent of the uses of land for...recreation, conservation...and other categories of the public and private uses of land... The future land use plan shall be based upon surveys, studies, and data regarding the area, including...the character of undeveloped land...”

Rule 9J-5.006(3), F.A.C., requires the future land use element to be based on “An analysis of the character and magnitude of existing vacant or undeveloped land in order to determine its suitability for use, including...Natural resources”<sup>61</sup>; and to contain objectives and policies which “...Ensure the protection of natural resources...Provision

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<sup>56</sup> Id.

<sup>57</sup> Section 163.3167(1)(b) and (2), Fla. Stat.; see also, s.163.3161(8) and 125.01(g)(h), Fla. Stat.

<sup>58</sup> See Section 163.3171, Fla. Stat.

<sup>59</sup> See Sections 163.3161(5), 163.3194(1)(a) and (b), 163.3201, 163.3202(1), and 163.3215, Fla. Stat. For an overview of the Act, see Symposium Article: Florida's Growth Management Act: How Far We Have Come, And How Far We Have Yet To Go, Richard Grosso, 20 Nova L. Rev. 589 (Winter, 1996), and Review of Florida Legislation; Article: Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process, Thomas G. Pelham, William L. Hyde, and Robert P. Banks, 13 Fla. St. U.L. Rev. 515 (Fall, 1985). See also, *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987).

<sup>60</sup> Protecting Threatened Ecosystems and Habitats Through Florida’s Growth Management System, Defenders of Wildlife (2001), White Paper prepared by Henry Lee Morgenstern, Esq., with the assistance of Laurie Macdonald, M.S., and Richard Grosso, Esq.

<sup>61</sup> Rule 9J-5.006(2)(b)4., F.A.C.

for compatibility of adjacent land uses...Protection of... **environmentally sensitive land...**”<sup>62</sup>

Rule 9J-5.006(5), F.A.C., requires that comprehensive plans control urban sprawl, and establishes the following primary indicator of a failure to control urban sprawl: “As a result of premature or poorly planned conversion of rural land to other uses, fails adequately to protect and conserve natural resources, such as...**native vegetation, environmentally sensitive areas...and other significant natural systems.**”

b. Conservation Element. Section 163.3177(6)(d), Fla. Stat., requires each comprehensive plan to include a conservation element for the “...conservation, use, and protection of natural resources in the area, including...**forests...wildlife...and other natural and environmental resources.**”

Rule 9J-5.003(28), F.A.C., defines “conservation uses” as “...activities or conditions within land areas designated for the purpose of conserving or protecting natural resources or environmental quality, including...**protection of vegetative communities or wildlife habitats.**”

Rule 9J-5.013, F.A.C., provides that the purpose of the conservation element is to promote the conservation, use and protection of natural resources; requires analysis of “Areas which are the location of recreationally and commercially important...wildlife,..., and vegetative communities including forests, indicating known dominant species present and **species listed by** federal, state, or **local government** agencies as endangered, threatened or species of special concern,<sup>63</sup> and requires the adoption of specific objectives and policies which “Conserve, appropriately use and protect...**native vegetative communities including forests...and wildlife, wildlife habitat...**”<sup>64</sup>, and “for the...Protection of native **vegetative communities** from destruction by development activities...Restriction of activities known to adversely affect the survival of **endangered and threatened wildlife**...Protection and conservation of the natural functions of...**wildlife habitats**...Protection of existing natural reservations identified in the recreation and open space element...Designation of **environmentally sensitive lands for protection based on locally determined criteria** which further the goals and objectives of the conservation element...”<sup>65</sup>

Rule 9J-5.003(41), F.A.C., defines “**environmentally sensitive lands**” as “...areas of land or water which are **determined necessary by the local government, based on locally determined criteria**, to conserve or protect natural habitats and ecological systems.”<sup>66</sup>

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<sup>62</sup> Rule 9J-5.006(3)(b)4. and (c)6., F.A.C.

<sup>63</sup> Rule 9J-5.013(1)(a)5., F.A.C.

<sup>64</sup> Rule 9J-5.013(2)(b)3. and 4., F.A.C.

<sup>65</sup> Rule 9J-5.013(1)(c)3., and 5-9, F.A.C.

<sup>66</sup> Though not applicable to the determination of comprehensive plan compliance with the Growth Management Act, it is interesting to note that for purposes of land acquisition under the Preservation 2000 Program, Rule 9K-4.002(17), F.A.C., defines “listed species” to mean “...animal species listed as endangered, threatened or of special concern by the Florida Game and Fresh Water Fish Commission in

c. Recreation and Open Space Element. Section 163.3177(6)(e), Fla. Stat., requires a recreation and open space element indicating a comprehensive system of public and private sites for recreation, including...natural reservations...”

d. Land Development Regulations. Section 163.3202, Fla. Stat., requires local governments to adopt land development regulations that “...contain specific and detailed provisions necessary or desirable to implement the adopted comprehensive plan and shall as a minimum...Regulate the use of land and water for those land use categories included in the land use element and ensure the compatibility of adjacent uses and provide for open space...and...Ensure the protection of **environmentally sensitive lands** designated in the comprehensive plan...”<sup>67</sup>

e. State Comprehensive Plan. Local government comprehensive plans are required to be consistent with the state comprehensive plan, the provisions of which are to be considered as a whole and not in isolation.<sup>68</sup> The provisions of the state comprehensive plan include the following “...Florida shall protect and acquire **unique natural habitats and ecological systems**, such as...tropical hardwood hammocks, palm hammocks, and virgin longleaf pine forests, and restore degraded natural systems to a functional condition<sup>69</sup>...**Conserve forests...and wildlife** to maintain their environmental, economic, aesthetic, and recreational values<sup>70</sup>...Acquire, retain, manage, and inventory public lands to provide recreation, conservation, and related public benefits<sup>71</sup>...Prohibit the destruction of **endangered species** and **protect their habitats**<sup>72</sup>...Maintain, as one of the state's primary economic assets, the environment, including...**forests**...and natural resources<sup>73</sup>...”

f. Other Support in the Growth Management Act. Other statements of legislative intent in the Growth Management Act supporting the authority of local governments to protect its natural resources and upland habitats include:

Section 163.3161, Fla. Stat., provides that “It is the intent of this act that its adoption is necessary so that local governments can encourage the most appropriate use of land, water, and resources, consistent with the public interest... preserve, promote, protect, and improve the appearance and general welfare... conserve...and **protect**

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Rules 39-27.003, 39-27.004, and 39-27.005, Florida Administrative Code; plant species listed as endangered or threatened in Sections 581.185(5)(a)-(b), Florida Statutes; or any plant or animal species identified or designated in the comprehensive plan or ordinance by the local government as being of local concern and warranting special protection.”

<sup>67</sup> See 163.3202(1) and (2)(b) and (e), Fla. Stat.

<sup>68</sup> See Sections 163.3177(10)(a), (b), 163.3184(1)(b), Fla. Stat.

<sup>69</sup> Section 187.201(9)(a), Fla. Stat.

<sup>70</sup> Section 187.201(9)(b)1., Fla. Stat.

<sup>71</sup> Section 187.201(9)(b)2., Fla. Stat.

<sup>72</sup> Section 187.201(9)(b)3., Fla. Stat.

<sup>73</sup> Section 187.201(21)(b)3., Fla. Stat.

**natural resources**<sup>74</sup> ... The provisions of this act in their interpretation and application are declared to be the **minimum requirements** necessary to accomplish the stated intent, purposes, and objectives of this act; to protect... environmental... resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state<sup>75</sup> ...”

Rule 9J-5.001(4), F.A.C., states “As **minimum criteria**, these criteria are **not intended to prohibit a local government** from... adopting... a comprehensive plan which is more **specific, detailed, strict, or which covers additional subject areas**... as long as the comprehensive plan is in compliance with Chapter 9J-5, F.A.C., Chapter 163, F.S., and any other applicable laws or rules.”<sup>76</sup>

Section 163.3177(10)(d), Fla. Stat., provides that “Chapter 9J-5, Florida Administrative Code, **does not mandate the... limitation, or elimination of regulatory authority**, nor does it authorize the adoption or require the repeal of any rules, criteria, or standards of any local... agency.”<sup>77</sup>

The authority of local governments to protect upland habitats is further recognized in agency final orders on challenges to comprehensive plans<sup>78</sup>, in

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<sup>74</sup> Section 163.3161(3), Fla. Stat.

<sup>75</sup> Section 163.3161(7), Fla. Stat.

<sup>76</sup> The phrase “and any other applicable laws or rules” is not to be read to broaden the bases for a compliance challenge beyond those specified in the definition of “In compliance” in Section 163.3184(1)(b), Fla. Stat.; see p. 47 of Rec. Order in Robbins v. Dept. of Comm. Affairs and City of Miami Beach, DOAH Case No. 97-0754GM (Dept. Comm. Affairs Final Order, Dec. 9, 1997) (allegations concerning inconsistency with city charter rejected as not a compliance issue); and Preserving Rural Property Values, Inc. v. Dept. of Comm. Affairs and Alachua County, DOAH Case No. 02-2676GM (DOAH Order on Motions, Sept. 10, 2002) (allegations of inconsistency with Florida Right to Farm Act, common law riparian rights, and state regulations on local pollution programs and wetland mitigation stricken as non-jurisdictional).

<sup>77</sup> See also Rule 9J-5.005(9), F.A.C., and The Link Between Comprehensive Planning and Environmental Permitting, Terrell K. Arline, Esq., 1000 Friends of Florida (1999).

<sup>78</sup> See Dept. Comm. Aff. v. Collier County, ER FALR 99:259 (Ad. Comm., June 22, 1999) (explicitly recognizing the county’s role in providing crucial habitat to listed species; policies that only encouraged and did not require preservation, and did not specify minimum area to be preserved, were not in compliance); Heartland Environmental Council v Highlands County, ER FALR 96:185, 1996 WL 1059751 (Dept. Comm. Aff., Nov. 25, 1996) (Growth Management Act does not limit requirements for protection of natural resources to threatened and endangered species; existence of federal and state permitting processes do not preempt local governments with respect to protecting natural resources on lands used for agricultural purposes and is not dispositive of whether min. requirements of Act have been met for protection of wildlife); St. Marks River Protection Association v. Wakulla County, 17 FALR 4541, 4542-3, ER FALR 95:047 (Dept. Comm. Aff., April 28, 1995) (any inference that existence of state regulatory program for **gopher tortoises** allows a local government to abdicate its duty to address natural resource issues in its comprehensive plan is rejected, as it would ignore the clear distinction between regulatory permitting and land use planning). Upland protection policies are also the subject of the following decisions: Dubin v. Lee County, ER FALR 00:088 (Dept. Comm. Aff., February 4, 2000) (comprehensive policy for **off-site mitigation of gopher tortoises**, if unavailable conflicts make on-site protection infeasible); Growth and Environmental Organization v. Sarasota County, ER FALR 97:108 (Dept. Comm. Aff., April 18, 1997) (policies for protection of native habitats); Royal Professional Builders v. Village of Royal Palm Beach and Crestwood Lake Associates, ER FALR 97:144 (Dept. Comm. Aff., July 31, 1997) (policies on protection of

administrative and judicial challenges to development orders<sup>79</sup>, and agency action approving land development regulations.<sup>80</sup>

g. Limitations or Qualifications in the Growth Management Act Affecting Local Authority.

(1) Data and Analysis: Comprehensive plan elements are required to be based upon the best available data that are relevant and appropriate to the element involved.<sup>81</sup> A local comprehensive plan providing for protection of upland habitat could be challenged for lack of reliable data to support the mapping or establishment of the habitat boundaries<sup>82</sup> or on the basis that the habitat protections are not justified by the needs of the species.<sup>83</sup> But, as addressed above, given the broad discretion of local governments

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environmentally sensitive lands); Geraci v. Hillsborough County, 99:046 (Dept. Comm. Aff., Jan. 12, 1999) (protections for significant wildlife habitat).

<sup>79</sup> See Department of Community Affairs v. Young, ER FALR 95:040 (FLWAC April 11, 1995), Rec. Order par. 29 (permits violated land clearing code intended to promote and encourage the protection of unique and biologically important natural resources, including pinelands and Key Deer); Harbor Course Club, Inc. v. Department of Community Affairs, 510 So.2d 915 (Fla. 3d DCA 1987) (indiscriminate clearing of tropical hardwood hammock and wildlife habitat held to be inconsistent with comprehensive plan and land development regulations; Department of Community Affairs v. Holzinger, (Final Order Dec. 17, 1993) (development order rejected for failure to comply with open space requirements for various habitat types; to obtain valid permits, applicants must substantially reduce the footprint of the house); Dept. Comm. Aff. v. Charlotte County and MRP Land Trust, ER FALR 98:285 (FLWAC, Nov. 24, 1998) (to overcome presumption that developer is entitled to proceed under less stringent Notice of Proposed Change process, rather than Development of Regional Impact review, developer would have been required to show area was no longer bald eagle “habitat,” which covers more than just nesting activities; County’s determination of no substantial deviation was rejected).

<sup>80</sup> While a special situation, as part of the Florida Keys Area of Critical State Concern established by pursuant to Section 380.0552, Fla. Stat., the Governor and Cabinet sitting as the Administration Commission adopted Rule 28-20.025(8)(R), amended the Monroe County land development regulations to define “regionally important plant species” to be those native plant species identified as endemic, uncommon, or rare in the county’s regionally important plant species...or as identified by the Center for Plant Conservation, the Florida Natural Areas Inventory, or the Florida Committee on Rare and Endangered Plants and Animals.” See Section 380.0552(7)(c), Fla. Stat., providing as a principle for guiding development, with which comprehensive plan amendments must be consistent, “To protect upland resources...tropical biological communities...native tropical vegetation (for example, hardwood hammocks and pinelands), dune ridges and...wildlife, and their habitat.”

<sup>81</sup> See Section 163.3177(6)(a), (8), and (10)(e) and (i), Fla. Stat., and Rules 9J-5.005(2), 9J-5.006(2)(b)4., and 9J-5.013(1)(a)5., F.A.C.

<sup>82</sup> See Florida Wildlife Federation v. Collier County, ER FALR 01:111, 01:056 (Dept. Comm. Aff., March 6, 2001), affirmed, 27 Fla. L. Weekly D1305 (Fla. 1<sup>st</sup> DCA 2002) (Closing the Gaps report was recognized as a good general document when used on a large scale, but was rejected for establishing land cover on the small scale required for local planning purposes, in this case the establishment of Natural Resource Protection Areas for panthers).

<sup>83</sup> For cases involving carrying capacity approaches to land planning, see Department of Community Affairs v. Monroe County and 1000 Friends of Florida, ER FALR 95:148 (Ad.Com. 12/12/95), affirmed, 703 So.2d 480 (Fla. 1st DCA 1997) (the greater the potential harm to an environmental feature, the greater the extent of action a professional planner would recommend); Responsible Growth Management Coalition v. Lee County, ER FALR 99:192 (Dept. Comm. Aff., Jan. 12, 1999) (Panther Habitat Protection Plan suggests that south Florida may be nearing its carrying capacity for panthers); , so that further habitat loss means further panther loss; Department of Community Affairs v. Monroe County and 1000 Friends of Florida, ER FALR 95:148 (Ad.Com., Dec. 12, 1995), affirmed, 703 So.2d 480 (Fla. 1st DCA 1997)

to define environmentally sensitive lands, protect and maintain natural resources and the character of the community, and to curb urban sprawl, and given that the compliance criteria are only minimum criteria, local governments may protect upland habitats based more generally on data concerning the value of the ecological or vegetative communities as a whole, rather than on just the limited basis of the needs of a particular species.

(2) Vagueness: Comprehensive Plan goals, objectives, and policies must establish meaningful guidelines to guide the implementing land development regulations. Depending on how the upland habitats and the associated protections are defined and drafted, they may be susceptible to compliance challenges on the basis of vagueness.

(3) Property Rights: While administrative challenges to comprehensive plans based upon State Comprehensive Plan and Growth Management Act<sup>84</sup> provisions for protection of private property rights have consistently failed<sup>85</sup>, the specter of property rights challenges in the judicial arena should be a much greater concern for local governments regulating upland habitats.

(4) Agricultural Exemption: Though the future general distribution, location, and extent of agricultural land uses must be designated and mapped in local comprehensive plans, and include density and intensity standards<sup>86</sup>, the Growth Management Act also excludes agriculture and silviculture from the definition of “development.”<sup>87</sup> There are conflicting decisions and opinions on whether the statute mandates, or merely authorizes,

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(allowing additional development on Big Pine Key and No Name Key is inconsistent with data and analysis and expert testimony indicating that Key deer population has reached its carrying capacity).

<sup>84</sup> Section 163.3161(9), Fla. Stat., which is not a “compliance” provision pursuant to Section 163.3184(1)(b), Fla. Stat., and Rule 9J-5.005(8), F.A.C., express legislative and agency intent that constitutionally protected private property rights should be respected, but recognize that takings claims may only be tried in judicial actions.

<sup>85</sup> See Lost Tree Village Corp. v. Indian River Shores, City of Vero Beach, and DCA, ER FALR 01:200 (Policy and rules did not absolutely prohibit development on offshore island, and thus did not conflict with State Comprehensive Plan goal on private property rights; consideration was given to transferable development rights; the claim bordered on a determination of inverse condemnation, which was beyond the factual record and jurisdiction of the proceeding); Monroe County Chowder and Marching Society, Inc. v. Administration Commission, ER FALR 97:151 (DOAH May 21, 1997), affirmed, 703 So.2d 480 (Fla. 1st DCA 1997) (both property rights and the environment have been weighed and considered); Department of Community Affairs v. Monroe County and 1000 Friends of Florida, ER FALR 95:148 (Ad. Com., Dec. 12, 1995), affirmed, 703 So.2d 480 (Fla. 1st DCA 1997) (policy was consistent with takings law; notably this is a Comprehensive Plan and not a zoning ordinance, and further the policies concerning land acquisition, transferable development rights, opportunities to increase a project score under the Permit Allocation System, mitigation options, and other mechanisms are designed to avoid “as applied” takings in the future); Plan commits to purchase of lands rendered unbuildable; the Permit Allocation System does not impose a development ban, nor deprives constitutionally protected rights: it allocates permits); Rosignol v. Islamorada and Dept. Comm. Aff., ER FALR 02:022 (Dec. 6, 2001) (the community envisioned by the city is not required to achieve the highest and best use for the greatest number of property owners within the city’s planning jurisdiction.); Geraci v. Hillsborough County, 99:046 (Dept. Comm. Aff., Jan. 12, 1999) (an administrative agency cannot rule on a takings claim).

<sup>86</sup> Section 163.3177(6)(a), Fla. Stat.

<sup>87</sup> See Section 380.04(2)(e), Fla. Stat., which is incorporated into the Growth Management Act by Section 163.3164(6), Fla. Stat.

local governments to exempt agriculture from the development approval process.<sup>88</sup> Either way, the result is that a local government's ability to adopt and enforce comprehensive plans and land development regulations directed at protecting upland habitats from agricultural impacts is limited or complicated by the statutory definition of "development."

**5. Strategies:** Local government strategies for upland habitat protection may include, among other things, land acquisition programs, biodiversity or mitigation impact fees,<sup>89</sup> Habitat Conservation Plans authorized under 10 of the Endangered Species Act<sup>90</sup>, ecological design standards and guidelines for land development<sup>91</sup>, clustering, open space<sup>92</sup>, and transferable development rights<sup>93</sup> programs and regulations.

### C. Limitations on Local Authority

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<sup>88</sup> See Florida Wildlife Federation v. Collier County, ER FALR 01:111 (Dept. Comm. Aff., March 6, 2001), affirmed, 27 Fla. L. Weekly 1305 (Fla. 1<sup>st</sup> DCA 2002) (impacts of agriculture are exempt from Chapter 163, Fla. Stat., but not the requirement to depict on future land use map; Environmental Confederation of S.W. Fla. v. Dept. Com. Aff. and Collier County, (Dept. Comm. Aff., 1998), affirmed 727 So. 916 (Fla. 1<sup>st</sup> DCA) (Comprehensive plan amendment that reinstated the agricultural exemption was permissible because they apply to specific development activities of site alteration, drainage, and land clearing and are limited in application to agricultural activities; local government is entitled to avail itself of the statutory exemption without data and analysis); Environmental Confederation, ER FALR 97:219 (Rec. Order, not incorporated in Order of Remand) (blanket exemption for agriculture was not supported by data and analysis); Corkran v. Administration Commission, ER FALR 97:118 (DOAH, April 21, 1997) and Heartland Environmental Council v Highlands County, ER FALR 96:185, 1996 WL 1059751 (Dept. Comm. Aff., Nov. 25, 1996) (Dept. Comm. Aff. has no authority to regulate agriculture; local governments, however, may institute land development regulations relating to agriculture; Dept. interpreted that agricultural exemption rule and rule for Big Cypress Area of Critical State Concern limiting site alteration to 10% of the site are complementary, and that if land is exempt for agricultural purposes and is later altered for development, alteration would be limited to 10%); see also Charles River Laboratories v. Monroe County, ER FALR 97:152 (DOAH 1997) (fences and other building activity are not excluded from the definition of development, even if primarily for agricultural purposes; that monkeys bred for medical research are "livestock" is not at all clear); see also Section 163.3177(10)(g), Fla. Stat., and Hunt v. Marion County, ER FALR 95:122 (Dept. Comm. Aff., Sept. 21, 1995) (definitions in Rule 9J-5.003 are not mandatory, they merely provide clarification, and the local government is free to use other definitions in its CP so long as they generally conform with the codified definition); see also Compatible Planning of Land Use Intensities With Wildlife and Wildlife Habitat, Thomas W. Reese, Esq.

<sup>89</sup> A. Dan Tarlock, at 598-602; Local Government Environmental Mitigation Fees: Development Exactions, The Next Generation, Thomas W. Ledman, 45 Fla. L. Rev. 835.

<sup>90</sup> A. Dan Tarlock, at 605-612.

<sup>91</sup> See the Ecological Design Manual for Lake County, at <http://www.ecfrpc.org/EcoDesignManual.htm>.

<sup>92</sup> See Sumter Citizens Against Irresponsible Development v. Dept. And Sumter County, ER FALR 01-209 (DCA May 23, 2001), affirmed, ER FALR 02:123, (Fla. 5<sup>th</sup> DCA 2002) (upholding comprehensive plan policy requiring approximately 90% of land area to be maintained in land uses such as agriculture, conservation, and open space).

<sup>93</sup> See Transfer of Development Rights Revisited, American Planning Association (Feb. 9, 2000); Glisson v. Alachua County, 558 So. 2d 1030, 1037 (Fla. 1<sup>st</sup> DCA 1990); Successful Growth Management Techniques: Observations from the Monkey Cage, Charles L. Siemon, *The Urban Lawyer*, Vol. 29, No. 2 (Spring 1997).

Local governments must exercise their powers for a valid public purpose.<sup>94</sup> Furthermore, the means chosen to serve the public purpose must not be arbitrary or unreasonable.<sup>95</sup>

## 1. General Limitations: Preemption Doctrine

A local government regulation may be inconsistent with state law in two ways. First, in areas where both the state and local governments have authority to legislate, the local government regulation may not directly conflict with a state statute. Second, a local regulation may be found inconsistent with state law if the Florida Legislature or the Florida Constitution preempted regulation of a particular subject. The following sections address whether local governments are preempted from regulation of upland habitat, gopher tortoise habitat or gopher tortoises themselves.

“Inconsistent with general law” under Article VIII, section (1)(g) of the Florida Constitution has been interpreted by the Florida Supreme Court to mean contradictory in the sense that local and state legislation cannot coexist.<sup>96</sup> When a local government regulation and state law cannot coexist, local regulations are considered inferior to state law.<sup>97</sup> Therefore, state law prevails in the event of a direct conflict.<sup>98</sup> However, if a local regulation merely supplements a state statute, the local regulation may co-exist with the statute.<sup>99</sup>

A local regulation may be inconsistent with state law is if the legislature has preempted that particular subject.<sup>100</sup> In Florida, there are two recognized types of preemption: express and implied.<sup>101</sup> Express preemption occurs when the legislature specifically preempts an area or subject using the specific language “preemption to the state”.<sup>102</sup> Because of this exact language requirement, it is never difficult to determine when the state legislature has an expressed intent to preempt. Implied preemption is a more difficult and nuanced analysis, discussed briefly below.

Implied preemption is recognized in Florida when a local ordinance or regulation intrudes upon an area in where state legislation is so pervasive that it shows legislative intent to preempt that particular area.<sup>103</sup> Imputed legislative intent is limited to only the specific area where the Legislature has expressed intent to act as the sole regulator.<sup>104</sup> The actions of a local government will be held impliedly preempted if there is a danger of direct conflict with that area of state legislation.<sup>105</sup>

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<sup>94</sup> State v. City of Sunrise, 354 So.2d 1206, 1209 (Fla. 1978).

<sup>95</sup> Carter v. Town of Palm Beach, 327 So.2d 130 (Fla. 1970).

<sup>96</sup> State v. Sarasota County, 549 So. 2d 659, 660 (Fla. 1989).

<sup>97</sup> See City of Miami Beach v. Rocio Corp., 404 So. 2d 1066, 1070 (Fla. 3d DCA, 1981).

<sup>98</sup> See id.

<sup>99</sup> See id.

<sup>100</sup> See Lowe, 766 So. 2d at 1207.

<sup>101</sup> See Id.; Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc., 681 So. 2d 826, 831 (Fla. 1<sup>st</sup> DCA 1996).

<sup>102</sup> See Lowe, 766 So. 2d at 1207.

<sup>103</sup> See Hillsborough County v. Florida Restaurant Assoc, Inc., 603 So. 2d 587, 590 (Fla. 2d DCA 1992).

<sup>104</sup> See Lowe, 766 So. 2d at 1207.

<sup>105</sup> Id.

**2. Wildlife Regulation Preemption:** The Florida Constitution vests the Florida Fish and Wildlife Conservation Commission with authority for regulating hunting and wild animal life.<sup>106</sup> The principle of state wildlife primacy over local regulation is well established.<sup>107</sup> Courts will invalidate local ordinances in clear conflict with state authority on hunting and wildlife.<sup>108</sup> On the other hand, courts will often seek to interpret local regulations and state law harmoniously, in effort to uphold local regulation where not clearly in conflict with state law.<sup>109</sup> In contrast to regulation of wildlife species, biodiversity is not yet an organizing concept for federal or state regulatory programs, so local governments have considerable authority and discretion to define their regulatory niche.<sup>110</sup> It follows, then, that a local regulation prescribing gopher tortoise protection or mitigation in a manner that conflicts with state regulations will be invalidated on preemption grounds; a local regulation directed more generally to gopher tortoise habitat might survive such a challenge; and a local regulation directed even more broadly to protection of entire natural vegetative community types or ecosystems would certainly not be preempted.

**3. Right to Farm Act:** Section 823.14(6), Fla. Stat., an amendment to the Florida Right to Farm Act, preempts local governments from adopting regulations that restrict or limit an activity of a bona fide farm operation, with an agricultural classification for ad valorem property tax purposes, where such activity is regulated through implemented best management practices formally adopted by rule by the State Dept. of Environmental Protection, Dept. of Agriculture and Consumer Services, or water management district.<sup>111</sup>

Since gopher tortoises often occupy habitat that is also used for “farms,” especially when farms are forestry operations, a preemption analysis under this statute is required. This requires a determination of whether the operation in question is subject to approved “best management practices” by one of the regulatory entities listed in the statute. However, this does not necessarily end the inquiry concerning whether a local government may

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<sup>106</sup> Article IV, Section 9, Florida Constitution.

<sup>107</sup> Local Government Protection of Biodiversity: What Is Its Niche?, A. Dan Tarlock, 60 U. Chi. L. Rev. 555, 603-605 (Spring, 1993).

<sup>108</sup> See New York v. County of Suffolk, 531 N.Y.S.2d 180 (N.Y. 1988) (ordinance prohibiting leg hold animal traps invalidated); Miller v. Manchester, 834 S.W.2d 905 (Mo. App. E.D. 1992) (ordinance precluding steel animal traps invalidated).

<sup>109</sup> See Miramar v. Bain, 429 So.2d 40 (Fla. 4<sup>th</sup> DCA 1983) (upholding a local ordinance banning front yard fencing, where a state regulation for possession of cougars allowed for alternate means of animal fencing); Miller v. City of Town and Country, 62 S.W. 3d 431 (Mo. App. E.D. 2001) (upholding an ordinance requiring hunters on government land to seek permission from government landholder first).

<sup>110</sup> A. Dan Tarlock, *supra* at 555, 561, 603-605.

<sup>111</sup> For discussions and varying interpretations of the scope of application of the Right to Farm Act, see The Florida Right to Farm Act Amendment – A Local Government Perspective, Jon Van Arnam; Collier County’s Authority to Regulate Agricultural Uses: Florida’s Right to Farm Act, Thomas W. Reese (Memorandum, February 11, 2002), and identically titled memorandum by Martha H. Chumbler (February 14, 2002); see also Comment: “Right to Farm” Statutes – The Newest Tool in Agricultural Land Preservation, Randall W. Hanna, 10 Fla. St. U.L. Rev. 415 (Fall 1982); see also the Florida Rural Land Stewardship program codified in Section 163.3177(11), Fla. Stat.

regulate the species or habitat. It may be useful to inquire further into the nature of the “best management practices” the regulatory authorities require. For example, Best management practices for a particular forestry operation may be limited to those designed to protect streams and wetlands through riparian buffers. Since these practices do not regulate farm operations to protect upland habitat or species that occur on upland habitat, the regulatory preemption may not apply.

**4. Other Legal Challenges:** Local regulations to protect upland habitats may generate challenges for lack of authority, substantive due process (ex., arbitrary and capricious, or lack of rational nexus between the regulation and a legitimate government objective), vagueness, vested rights, regulatory takings, Bert Harris Act,<sup>112</sup> regulatory takings, invalid exactions, and equal protection<sup>113</sup>.

## **VIII. Administration of Gopher Tortoises Protection Policies**

### **A. State Administration of Gopher Tortoise Protection Policies**

The FFWC administers its gopher tortoise protection policies pursuant to its regulatory authority to prohibit the “take” of individual tortoises or their burrows. FFWC has developed and issued guidelines to define what options are available to individuals who seek permits.<sup>114</sup> Currently there are five available options:

- 1) Avoid developing in the area occupied by tortoises
- 2) Develop so as to avoid gopher tortoise burrows by avoiding concentrations of burrows and/or staying at least 25 feet from individual burrow entrances
- 3) Mitigate for activities that will probably entomb or kill tortoises
- 4) Relocate tortoises that would otherwise be “taken” to an off-site location
- 5) Relocate tortoises to on-site location

Options 1 and 2 are only minimally disruptive to gopher tortoises and consequently require no permits from the FFWC. However, options 3-5 require FFWC permits for incidental take and relocation.

#### *Option 3: Mitigation for Incidental Take – The Habitat Protection Option*

An individual may choose to entomb or kill gopher tortoises on development land if an adequate amount of tortoise habitat is preserved and managed in perpetuity.

Applicants for *The Habitat Protection Option* must provide the following information:

1. Name of the owner or developer
2. Location of the site to quarter, quarter section

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<sup>112</sup> See Chapter 70, Fla. Stat., the Bert J. Harris, Jr. Private Property Rights Protection Act; see also Property Rights – 2000 Update, Ronald L. Weaver & Andrew D. McNamee, Fla. Bar Course No. 4972R, p.15.23-15.39, and Article: Florida's Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?, Julian C. Juergensmeyer, 48 Fla. L. Rev. 695 (September, 1996).

<sup>113</sup> A. Dan Tarlock, at 583-598.

<sup>114</sup> *Available Options to Address the Presence of Gopher Tortoise on Lands Slated for Development*; Florida Fish and Wildlife Conservation Commission. August 13, 2001.

3. Map, preferably on a topographic 1:24,000 quadrangle or larger scale map, showing areas where taking will occur and landmarks or roads to allow site inspection
4. Evidence that the specific land use proposed that will necessitate this permit has been approved by the development orders, DRI development orders, land clearing permits, or building permits are satisfactory. In many cases, some judgment may be necessary in determining whether proposed evidence is sufficient.
5. Map showing areas occupied by tortoises with densities up to 0.8/acre and areas occupied by densities greater than 0.8/acre
6. Acres in each category
7. How applicant proposes to protect the required amount of habitat.

The amount of preserved land required to mitigate for the incidental take is directly related to the density of gopher tortoises on the development site. If tortoise density is 0.8 tortoise/acre or greater, then an area of land equivalent to 25% of habitat being destroyed must be preserved.<sup>115</sup> For a tortoise density between 0.4 and 0.79, an area of land equivalent to 15% of the habitat being destroyed must be preserved.<sup>116</sup> If tortoise density is less than 0.4, the percentage of land that must be preserved per acre is calculated by multiplying the tortoise density by 37.5.<sup>117</sup> If individuals meet these standards for preserving upland habitat, the FFWC presumes that any taking incidental to the development will not adversely affect the survival potential of gopher tortoises. Therefore, the individual meets the requirements of rule 68A.

If an individual chooses this mitigation option, habitat may be preserved in one of three ways. First, the individual may protect an on-site occupied area of the proper size in relatively large continuous blocks. Typically these blocks are no smaller than 25 acres, however exceptions may be made if adequate gopher tortoise protection can be reasonably assured within a smaller area. Because these preservation blocks must be maintained in perpetuity, the creation of a permanent conservation easement is usually required.<sup>118</sup> Second, the individual may purchase a proper sized parcel of land adjacent to public lands that are managed in a manner consistent with protecting gopher tortoises. Then the developer must donate that land to the public landowner.<sup>119</sup> Finally, the individual may choose to purchase the appropriate upland acreage from a mitigation bank. However, this option is limited in regions where mitigation banks limited or are not proposed or anticipated.<sup>120</sup>

If all of these criteria are met, the FFWC will issue a permit to the applicant. But this permit will have the following conditions:

1. On projects likely to be controversial or likely to affect a large number of gopher tortoises, staff may require a 21-day appeal before any taking can occur

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *See Id.* The multiple 37.5 is calculated by dividing 15 (the standard mitigation percentage) by 0.4 (the standard tortoise density).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

2. For off-site mitigation, the applicant must have a second letter or receipt from the FFWC in his possession confirming that habitat protection options have been completed
3. For on-site protection, the applicant must have a letter from the FFWC confirming that the FFWC is in possession of a recorded copy of a satisfactory conservation easement on the protected area

#### *Options 4 and 5: Relocation of Gopher Tortoises*

The FFWC generally discourages the relocation of wildlife. Relocation has potentially negative impacts on both resident and relocated populations which can include animal stress, the introduction of diseases and parasites, and overpopulation. Because of these negative consequences, the FFWC views relocation as a last resort where development is imminent and all reasonable alternatives have been exhausted. Between the option of on-site and off-site relocation, the FFWC prefers on-site relocations because the chance of negative impacts is reduced.

The FFWC offers two different relocation permits depending on the type and extent of an individual's desired relocation. A "standard tortoise relocation permit" is required for all off-site relocations and for on-site relocations of more than five tortoises. A "special tortoise relocation permit" is available for the relocation of five or fewer tortoises on-site. All applications for permits are processed through the FFWC's Office of Environmental Services ("OES"). According to the permit guidelines, within 90 days of the relocation, the donor area should be surveyed to describe the total number gopher tortoises on the land and the general characteristics of the area must be examined. Additionally, all active and inactive burrows should be plotted on a map.<sup>121</sup> Recipient areas, whether on-site or off-site, should be similar to the donor site in both character and quality. Furthermore, any type of relocation requires a management plan. This management plan requirement can be satisfied by filing for a conservation easement or by obtaining other formal management guarantees from the entities owning and controlling the recipient areas.

#### *On-site Relocation*

An on-site relocation area is an area that is contiguous to or abuts the development site from which the gopher tortoise was removed and which shares the same owner as the development site. Tortoises may be relocated on-site up to a density of three gopher tortoises per acre of suitable habitat.

#### *Off-site Relocation*

Off-site relocation areas are those areas that do not meet the definition of an on-site recipient area. Off site relocation areas for gopher tortoises must be within 50 miles to the north or south of the donor area but may be any distance to the east or west of the donor area. Relocations of 20 or fewer gopher tortoises should be to areas already occupied by gopher tortoises or to areas which abut already occupied areas. Relocations

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<sup>121</sup> *Id.* Active burrows are defined as those with recently disturbed soil at the mouth. Inactive burrows are those burrows that appear to be maintained but do not have disturbed soil at the mouth.

of more than 20 tortoises should be to areas either void of gopher tortoises or occupied at levels well below carrying capacity. Furthermore, in an effort to help avoid the spread of Upper Respiratory Track Disease (“URTD”), measures should be taken to test gopher tortoises before any off-site relocation. If less than 5 tortoises are to be relocated, all must be tested for URTD. If between 5 and 10 are to be relocated, at least 5 must be tested at random. If more than 10 are to be relocated, then the greater of 25% (up to a maximum of 25 tortoises) or five tortoises must be tested for URTD. Those that test positive may only be relocated on-site.

All gopher tortoises should be captured, transported and released within a 24-hour period. Furthermore, no tortoises should be relocated on days when the low temperature is predicted to be below 50 °F. During summer months, releases should not be made during the hottest part of the day.

## **B. Local Government Administration of Gopher Tortoise and Upland Habitat Protection Policies**

Most local governments have an internal review system for administration of species and habitat protection. The process usually begins with the submittal of an application, usually to develop a parcel of land that may or may not contain upland habitat or protected species. The land has value to the applicant typically measured in dollars per unit raw land cost, dollars per approved unit, and return on investment after calculating the costs to “improve” the land through clearing, bulldozing, adding fill, digging water retention ponds or re-creating slough flow-ways around proposed building footprints or lots to be sold for construction of homes or multi-family developments. Amenities, such as lakefront, canal front, and views of natural areas are also factored in as they may raise the desirability of the lot, and hence each individual lot’s selling price.

The land also has an inherent “natural” value as habitat. Often this value is not considered by an applicant seeking return on an investment. Local governments charged with protecting the health, safety and welfare of their residents can consider the land’s natural value through the application review process. Both the process and the extent to which upland habitat and protected species values are considered in this process varies from one jurisdiction to another.

Administrative systems for the review of applications at the local government level include staff review, which is accomplished by transferring hard-copies and a transmittal routing sheet from one department to the next. Each department will review the application for specific concerns. These concerns are narrowly defined by each department’s specific charge and are often reduced to a checklist. One potential mechanism to increase the scrutiny of “natural values,” is by including additional items on the staff review checklist. (For example, the fire chief could review development applications not only for building fire code compliance, but also for its impact on controlled burning on adjacent conservation properties).

Some local governments have initiated Development Review Committees in which staff from various departments sit at a round table and go through their comments and concerns related to the application together or one at a time. This facilitates inter-departmental coordination, i.e., each department knows the reasons why the other departments have made certain requests. This helps eliminate internal inconsistencies within local government review. DRC meetings are subject to Florida's Sunshine Law<sup>122</sup> and the public should be allowed to attend and make brief oral comments or submit longer written comments. After the staff has determined an application is complete and issued its recommendation for approval, approval with conditions or denial, typically one or more public hearings are conducted.

Local City Councils and Boards of County Commissions can delegate either their full approval authority or the ability to make advisory decisions to the Council or Commission to either local planning or growth director, hearing officers, special masters or to one or more Committees or Commissions, typically called Planning Commissions, and may even have additional hearings sometimes called Environmental Advisory Committees. These committees are often filled by political appointments by the Council. Members may be professionals, business people, or lay persons. Administrative appeals are usually available from these committees, although sometimes only the applicant, and not an affected citizen is allowed to appeal, which may violate procedural due process concerns if judicial review is not later provided in circuit court. Of course, the city council or county commission may also simply retain the authority to hear larger or more controversial development applications itself.

Larger projects over a certain size or intensity are usually, but not in all jurisdictions, brought back before the City Council or County Commission for site plan review, typically called Major Development Application, Planned Development Application, and Major or Minor Conditional Uses Requests. These larger projects often engender greater public concern and participation. Hearings can last for many hours. Citizens can provide eyewitness testimony and express their concerns. Expert witnesses may take the stand or podium on behalf of the citizens, the developer or the local government itself.<sup>123</sup>

Inter-governmental coordination and consultation between local governments and the Florida Fish and Wildlife Conservation Commission and United States Fish and Wildlife Service is typically informal. Although Florida Statutes 163 contemplated intergovernmental review, it is not generally enforced in a formal process of system. Rather it is done through letters from one agency to the other. Local governments may not even wait until all state and federal comments or concerns are resolved before they schedule final public hearings on applications. The recommendations or concerns of the FFWCC and USFWS are not given full weight or authority but are taken into account as recommendations to the local government

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<sup>122</sup> Evergreen The Tree Treasurers v. Charlotte County 810 So. 2d 526 (Fla. 2<sup>nd</sup> DCA, 2002)

<sup>123</sup> The Florida Supreme Court has treated local land use decisionmaking as "quasi-judicial" in nature. In cases involving development review rules have evolved that force the legislative face of local governments to adopt a judicial fact-finding role.

### C. Citizen's Enforcement of Local Government Gopher Tortoise and Upland Habitat Protection Policies

Many local governments have listed species policies in their existing Comprehensive Plans. Comprehensive Plan policies are enforceable in circuit court regardless of any lack of implementing ordinances. If there are protected species or upland habitat protection implementing ordinances these too, can be enforced in circuit court, albeit through a different procedural route.

Citizens and environmental organizations have a variety of remedies if the local governments (1) refuse to abide by (or require developers to comply with) the local comprehensive plan policies, goals and objectives or (2) the developer and city do not comply with local land development regulations found in the City or County Code. Both types of actions must be brought within 30 days of the local government approval or all remedies, including jurisdiction of the courts will be lost. Moreover, recent legislation has substantially narrowed the standing available to local environmental groups.

#### 1. Comprehensive Plan Consistency

Once a local government has adopted its comprehensive plan, the Local Comprehensive Planning Act or Growth Management Act<sup>124</sup>, requires that all actions taken by the local government in regard to development orders be consistent with *each and every* goal, objective and policy of *each and every* element contained in the adopted local comprehensive plan.<sup>125</sup> The Growth Management Act, Florida Statutes 163.3215, also creates a cause of action commonly referred to as a "Consistency Challenge", enabling citizens to seek judicial review if a development order is inconsistent with local comprehensive plans. This statutory action creates a *de novo* (or brand new) hearing conducted as a trial before a circuit court judge for comprehensive plan consistency. Recent legislative amendments change this to an appellate type review, if the local government adopts a hearing officer or special master administrative hearing procedure, usually held before the County Commission or City Council hearings themselves<sup>126</sup>.

The judge may issue an order declaring the development order to be inconsistent with the comprehensive plan, the *demolition and removal* of any and all development that is completed under the inconsistent development order and order restoration of habitat on the subject property pursuant to the recent appellate court opinion in *Pinecrest Lakes v Shidel*, 795 So. 2d 191 (Fla 4<sup>th</sup> DCA, Sept 2001), 802 So. 2d 486 (Fla 4<sup>th</sup> DCA, Dec 2001), Florida Supreme Court Opinion SC01-2429 (May 31, 2002), 2002 Fla. Lexis 1260

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<sup>124</sup> Section 163.3194(1)(a)

<sup>125</sup> *Machado v. Musgrove* 519 So.2d 629 (Fla. 3<sup>rd</sup> DCA 1987) affirmed en banc at 1988 Fla. App. Lexis 705; 13 Fla. Law W. 522 (1998) review denied *Machado v. Musgrove*, 529 So. 2d 694 (Fla. 1988).

<sup>126</sup> Florida Statutes 163.315 as amended by SB 1906 (2002 Session). It is important to bring experts to any hearing officer/special master hearings or the public meetings that are established by the local government. And to request a court reporter to appear at the public meetings in the event that a transcript must be ordered if a challenge or judicial review is required.

## 2. Land Development Regulations

In addition to the Comprehensive Plan Policies, which are enforceable in their own right, development orders must also meet the standards and criteria contained in the local Land Development Regulations or Land Development Code contained within the City or County Code of Ordinances. A development order that is not in compliance with a specific land development code section can be challenged by Petition for Writ of Certiorari within 30 days of the date the decision is “rendered.”

Although the action should if possible be filed within 30 days of any oral decision or vote by the local government, “rendering” can often buy additional days if needed, but a better practice is to file then amend or supplement with the written local resolution when it is made available. “Rendering” has been adjudged to be reducing the decision to writing, and “the filing of a signed, written order with the clerk of the lower tribunal”<sup>127</sup>

Certiorari for review of local action is by right.<sup>128</sup> Certiorari is governed by Florida Rules of Civil Procedure 1.630 and Appellate Rule 9.100 and 9.190. Usually, what is allowed by one rule is also allowed by the other, albeit with slightly different language, timing or procedural requirements. The standard of review at the circuit court level is a three prong review for (1) procedural due process (2) essential requirements of law and (3) was there substantial competent evidence to sustain the decision.<sup>129</sup> Courts will not overturn differences of opinion with regard to facts, hence most successful challenges are brought on grounds of a clear violation of the language of the code itself (e.g., essential requirements of law). At the District Court of Appeals in a subsequent challenge is filed, the court will only look to a 2 prong test in its review: (1) procedural due process and (2) essential requirements of law.<sup>130</sup>

To bring a petition for certiorari it is important that the citizen place into the record written and oral testimony concerning how they are affected, their objections and evidence into the record through expert witness opinion, eyewitness facts and documentation at the underlying hearing. A transcript of the underlying hearing(s) at the local government will also be required as an Appendix with the filing or can be filed shortly thereafter.

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<sup>127</sup> Grady v. Lee County, 458 So.2d 1211 (Fla. 2<sup>nd</sup> DCA, 1984).

<sup>128</sup> Ceslow v. Board of County Commissioners of Palm Beach County, 428 So.2d 701 (Fla 4<sup>th</sup> DCA, 1983) (review of final action by a lower agency “full review of administrative action is given as a matter of right.”) See also, Cherokee Crushed Stone v. City of Miramar, 421 So.2d 684 (Fla. 4<sup>th</sup> DCA, 1982).

<sup>129</sup> City of Deerfield Beach v. Valliant 419 So. 2d 624 (Fla 1957)

<sup>130</sup> City of Deerfield Beach v. Valliant 419 So. 2d 624 (Fla 1957)