

DATE: 2.13.2008

## MEMORANDUM

RE: Waterway Markers and Enforcement Issues in Chapter 327

### **Signage, Restricted Areas, and Local Government Enforcement of Vessel Regulation in Florida**

Local governments have raised questions recently about their ability to regulate boating activities in their jurisdictions. Such questions often arise in the context of local governments seeking to regulate for reasons ranging from resource protection to safety and vessel safety to noise problems. Local governments sometimes become confused when they discover that they may not get a permit to place regulatory signs denoting an area where a duly-passed local ordinance somehow limits boating. This memo explores the statutory and regulatory sources of confusion over uniform waterway marker permitting and local government authority to regulate vessels in Florida.

State law contains general prohibitions on placement of any waterway markers without a permit.<sup>1</sup> In addition, state law indicates that certain “boating restricted areas”<sup>2</sup> cannot be enforced unless the

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<sup>1</sup> See, e.g. FLA. STAT. § 327.40(2)(b)1 (“No person or municipality, county, or other governmental entity shall place any safety or navigation markers in, on, or over the waters or shores of the state without a permit from the division.”); FLA. STAT. § 327.41(4) (“No person or municipality, county, or other governmental entity shall place any regulatory markers in, on, or over the waters or shores of the state without a permit from the division pursuant to 327.40.”).

<sup>2</sup> This is defined as “an area of the waters of the state within which the operation of vessels is subject to specified restrictions or from which vessels are excluded.” FLA. ADMIN. CODE r. 68D-23.103(1)(i).

restrictions have a sign.<sup>3</sup> As altered over the years, statutes no longer make clear that this same limitation applies to boating restricted areas enacted pursuant to § 327.60.<sup>4</sup>

Chapter 327, Florida Statutes, also contains three separate sections recognizing local government authority to regulate vessels. Each of the three sources of independent local government authority recognized as a basis for applying for waterway markers (i.e. Florida Statute §§ 327.22, 327.60, or 370.12(2)(p)) contains strict limits on local government authority.<sup>5</sup>

Section 327.22 appears to limit its grant of authority to regulation of “vessels resident” in the municipality or county. This section has thus far not been used to establish restricted areas since such restricted areas would, under the interpretation limiting this authority to “vessels resident,” only apply to such vessels and not to vessels resident in other jurisdictions but only temporarily in the jurisdiction with the restricted area based on section 327.22.<sup>6</sup> This section appears to be a relic of the

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<sup>3</sup> FLA. STAT. §§ 327.22(1), 327.46(2) (2006). At least one court case also implies that the need for signage to enforce a boating restricted area also applies to local ordinances passed under authority other than that of 327.22(1) and 327.46(2). *See* Lee Cty. v. Lippi, 662 So. 2d 1304, 1306 (Fla. 2d DCA 1995). The Lippi court qualified its holding that the local government could regulate personal watercraft, clarifying that the ordinance was enforceable only as long as the restricted areas established by the ordinance were properly marked in accordance with the waterway marking regulations existing at the time. *Lippi*, 662 So. 2d at 1307.

<sup>4</sup> The first restricted areas, enacted by chapter 63-105, § 7, of the Laws of Florida, were the predecessor to modern statute section 327.60. This stated that it was unlawful “to cooperate a vessel within a restricted area which has been clearly marked by buoys or some other distinguishing device . . . in accordance with and marked as authorized by section 371.521.”

<sup>5</sup> Local governments may also apply for a waterway marker permit if the local government requested and was granted by FWC a restricted area according to the terms of Florida Statute section 327.46. This is not listed as a type of “independent” local government authority to establish a boating restricted area since section 327.46 only authorized a local government to request the restricted area from FWC.

<sup>6</sup> In its entirety, section 327.22(1), titled “Regulation of vessels by municipalities or counties,” provides:

Nothing in this chapter shall be construed to prohibit any municipality or county that expends money for the patrol, regulation, and maintenance of any lakes, rivers, or waters, and for other boating-related activities in such municipality or county, from regulating vessels resident in such municipality or county. Any county or municipality may adopt ordinances which provide for enforcement of noncriminal violations of restricted areas which result in the endangering or damaging of property, by citation mailed to the registered owner of the vessel. Any such ordinance shall apply only in legally established restricted areas which are properly marked as permitted pursuant to ss. 327.40 and 327.41. Any county and the municipalities located within the county may jointly regulate vessels.

One might argue that the limitation in the first sentence (i.e.—“vessels resident in such municipality or county”) does not apply to the second sentence’s grant of authority to local governments to adopt ordinances for enforcement of restricted areas. Such an interpretation would appear to conflict with FWC interpretation of section 327.22(1) as indicated by FWC regulations. *See*

past when local governments could charge registration fees for resident vessels and the vessel registration statutes were a part of this same chapter; vessel registration is now Chapter 328 of the Florida Statutes.

The most used of the sources of local government authority for creating boating restricted area—section 327.60—indicates only that local ordinances passed pursuant to it may not conflict with Chapter 327 or any regulations passed pursuant to Chapter 327.<sup>7</sup>

Local government may also regulate boat speed and operation outside of the Florida Intracoastal Waterway to protect manatees.<sup>8</sup> Again, this local government authority is substantially limited by statutory and regulatory criteria and such regulation may not take effect until approved by FWC.<sup>9</sup>

Consideration of Chapter 327 and its attendant regulations results in numerous questions about the authority of local governments to enact vessel regulations, apply for permits for signage for local regulations, and enforce local regulations. This memo highlights some of these areas of uncertainty.

## **I. Waterway Marker Permitting Criteria: Limitations on Local Government Authority to Regulate Vessels**

FWC regulations express a specific intent to insure that “regulatory markers noticing boating restricted areas created pursuant to sections 327.22, 327.60, and 370.12, F.S., are authorized **only for the purposes of protecting human life and limb, vessel traffic safety and maritime property, and manatees.**”<sup>10</sup> The regulations also state:

It is further the intent of this chapter that **no boating restricted area be established, continued in effect, or enforced for the purpose of noise abatement or for the protection of shoreline, shore-based structures, or upland property from vessel wake or shoreline wash.** As provided in section 327.33(2), F.S., “vessel wake and shoreline wash resulting from the reasonable and prudent operation of a vessel shall, absent negligence, not constitute damage or endangerment to property.” The wake resulting from the reasonable and prudent

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FLA. ADMIN. CODE r. 68D-23.104(2)(f)1 (“If the application is for regulatory markers, the applicant must enclose therewith proof of the lawful imposition of restrictions on the speed or operation of vessels for which the regulatory markers are requested, as follows:

1. A copy of an ordinance adopted pursuant to Section 327.22, F.S., which imposes the restriction **only upon vessels resident within the county or municipality** imposing the restriction”).

<sup>7</sup> The statute provides that “[n]othing in [the above-referenced] sections shall be construed to prevent the adoption of any ordinance or local law relating to operation and equipment of vessels, except that no such ordinance or local law may apply to the Florida Intracoastal Waterway and except that such ordinances or local laws shall be operative only when they are not in conflict with this chapter or any amendments thereto or regulations thereunder.”

<sup>8</sup> FLA. STAT. § 370.12(2)(p) (2006).

<sup>9</sup> *Id.* If FWC and the local government disagree on the provisions of an ordinance, a committee will review the technical data and resolve the dispute. *Id.*

<sup>10</sup> FLA. ADMIN. CODE r. 68D-23.101(2)(c)(emphasis added).

operation of a vessel is a force which should be anticipated by the owners of property adjacent to the navigable waters of this state.<sup>11</sup>

Regulations do specify that regulatory zones prohibiting vessels or limiting the types of vessels in an area may be established when necessary for the safety of different user groups.<sup>12</sup> Finally, the regulations specify other instances where statutes indicate FWC may not grant permits.<sup>13</sup>

Thus, in practical terms, the permitting criteria for waterway markers mean that § 327.60(1)<sup>14</sup> actually grants very limited authority to local governments to regulate vessel operation since such regulation cannot go beyond the strict permitting criteria for waterway markers in creating a “boating restricted area.”

## II. Some Regulations that May Not Require Waterway Markers

One significant area of uncertainty in Florida vessel law is the ability of local governments to enforce their ordinances restricting the place, time, or manner of vessel usage if the limitation does not appear on waterway markers permitted by FWC. The case of *Lee County v. Lippi*<sup>15</sup> could be interpreted to indicate that boating restricted areas could indeed only be enforced where appropriate signage, pursuant to statute and rule, has been placed.<sup>16</sup> In addition, *Lippi* also emphasized that according to statute, local ordinances passed under the authority of 327.60 are only valid “when they are not in conflict with this chapter or any amendments thereto or regulations thereunder.”<sup>17</sup>

Strict application of this rule, combined with the enormously broad scope of “boating restricted area,”<sup>18</sup> would mean that even jurisdiction-wide regulations might be deemed unenforceable without a sign. For example, if a local government enacts an ordinance that regulates boating across the entire local government’s jurisdiction, would this need signage to be enforceable? Where would the signs need to be placed to allow enforcement of the “boating restricted area?” As another example: Expansive interpretation of the need for signage to enforce any “boating restricted area” and the prohibition in regulations on signage for noise abatement would mean that even though statutes clearly allow counties to regulate noise, counties could not enforce such regulations because they

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<sup>11</sup> FLA. ADMIN. CODE r. 68D-23.101(3)(emphasis added).

<sup>12</sup> FLA. ADMIN. CODE r. 68D-23.105(1)(d)3.

<sup>13</sup> *See, e.g.* FLA. ADMIN. CODE r. 68D-23.101(4)(a)-(e) (disallowing waterway markers for ordinances applicable to the Intracoastal Waterway; ordinances pursuant to 370.12(2)(p) unless approved by FWC; ordinances discriminating against personal watercraft; ordinances discriminating against airboats unless passed by a 2/3 majority; and ordinances regulating the anchoring of non-live-aboard vessels in navigation that are outside of the boundaries of a mooring field marked in accordance with 327.40).

<sup>14</sup> “Nothing in these sections shall be construed to prevent the adoption of any ordinance or local law relating to operation and equipment of vessels, except that no such ordinance or local law may apply to the Florida Intracoastal Waterway and except that such ordinances or local laws shall be operative only when they are not in conflict with this chapter or any amendments thereto or regulations thereunder.” FLA. STAT. §§ 327.60(1) (2006).

<sup>15</sup> 662 So.2d 1304, (2<sup>d</sup>DCA, 1995).

<sup>16</sup> *Id.* at 1307.

<sup>17</sup> *Id.* at 1306 (citing Florida Statute § 327.60(1)).

<sup>18</sup> This is defined as “an area of the waters of the state within which the operation of vessels is subject to specified restrictions or from which vessels are excluded. FLA. ADMIN. CODE r. 68D-23.103(1)(i).

could not get permits from FWC for waterway markers indicating the “boating restricted area,” resulting in a situation where regulations (and their interpretation) passed pursuant to a statute conflict with other statutes in the same chapter.

Closer analysis reveals only two places in statute that limit enforcement of boating restrictions to those that are marked; these appear in the specific context of section 327.22 and section 327.46. Section 327.22 grants local governments the authority to regulate vessels resident in the local government’s jurisdiction. This includes the ability to pass an ordinance that allows for the “enforcement of noncriminal violations of restricted areas which result in the endangering or damaging of property, by citation mailed to the registered owner of the vessel. *Any such ordinance shall apply only in legally established restricted areas which are properly marked as permitted pursuant to ss. 327.40 and 327.41.*”<sup>19</sup> FWC has indicated that it has never received an application for signage based on the authority of 327.22.

The second place in statute where enforcement and signage are mentioned is section 327.46(2), which provides that “[i]t is unlawful for any person to operate a vessel in a prohibited manner or to carry on any prohibited activity, as defined in this chapter, deemed a safety hazard or interference with navigation as provided above within a restricted water area which has been clearly marked by regulatory markers as authorized under this chapter.” Two points merit discussion with regard to section 327.46. First, does this sentence, which is sub-paragraph two in section 327.46, only refer to the “restricted areas” discussed by section 327.46 generally? Likely it does, which means it only applies to restricted areas established by rule by FWC. Second, regardless of the answer to the first question, section 327.46 does not specify that failure to mark a restriction on boating means that the restriction cannot be enforced. Stating that failure to obey a posted restriction is illegal is not necessarily the same as stating that it is legal to *not* obey a restriction that has not been posted. As demonstrated by section 327.22, the Legislature knows how to say “shall” when it means “shall.” Furthermore, section 327.41 notes that “[a]ny county or municipality which has been granted a restricted area designation, pursuant to s. 327.46, for a portion of the Florida Intracoastal Waterway within its jurisdiction or which has adopted a restricted area by ordinance pursuant to s. 327.22, s. 327.60, or s. 370.12(2)(p), or any other governmental entity which has legally established a restricted area, *may* apply to the commission for permission to place regulatory markers within the restricted area.” The Legislature should not be presumed to say “may apply” when it could have said “must apply to be able to enforce the restriction” much like it did in section 327.22. Recent case law indicates that failure to mark, with properly permitted uniform waterway markers, an area in which boating activity is regulated does not invalidate a local ordinance, but it may serve as an affirmative defense to enforcement.<sup>20</sup>

Finally, even the *Lippi* case<sup>21</sup> mentioned above does not necessarily say that all “boating restricted areas” must be marked by signs. Rather, the court in *Lippi* mentioned that did not hold that Lee County could enforce the boating restricted area at issue in that case without properly marking the area in accordance with the regulations. *Id.* at 1307. However, the boating restricted area at issue in *Lippi* did not affect an entire water body or the entire county’s jurisdiction. Instead, the boating restricted area applied to a limited and defined area of the county’s waters. The court’s statement regarding signs as potentially necessary to enforce the restriction would serve to give the public

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<sup>19</sup> Emphasis added.

<sup>20</sup> *City of Marco Island v. Dumas*, slip op. at 10, case no. 07-81-MOA-RC (Fla. Collier Cty. Ct. 2007).

<sup>21</sup> *Lee County v. Lippi*, 662 So.2d 1304, (2<sup>d</sup> DCA, 1995).

notice of the restriction and where it is effective. Additionally, the court in *Lippi* held that Chapter 327 did not preempt the regulation of vessels by local government. *Id.* at 1306. Current FWC regulations, however, do limit local government regulation of vessels to the purposes listed in statute, thus preempting the general police power of local government to regulate for the health, safety, and welfare of its citizens. It appears odd, at best, to interpret regulations to effect a preemption not found in statute and to create a conflict with another statute in the chapter the regulations implement.

Rather than strict application of the need to place waterway markers for any regulation of boating or the need to mark only those based on 327.22 (which are non-existent) and those based on 327.46, another interpretation would focus on whether the boating restricted area is of a sufficiently limited area within a water body that the only effective notice to the public is through signage.<sup>22</sup> This would allow for enforcement of boating regulations that affect the entire jurisdiction just as, for example, general noise regulations or other general regulations are enforced based on the premise that the public is charged with knowledge of the laws. Such an interpretation might also allow for enforcement of regulations affecting the entirety of a water body, particularly if such a water body is accessible to the public only by a limited number of public boat ramps at which notice of the regulation could be posted.

While the above analysis would offer a way to escape the conclusion that absolutely no boating regulation, other than those denoted by signs, could be enforced, case law addressing the issue has only discussed the issue of signage when the boating restricted area in question was a small portion of a much larger water body.<sup>23</sup> Thus, it is unclear how FWC and the courts would react to the argument that jurisdiction-wide or water body-wide regulations should be enforceable without waterway markers.

### **III. A Clear Exception to Signage: Inland Lakes and their Associated Canals**

In 2005, the Florida Legislature amended the Florida Vessel Safety Law to exempt local governments and other governmental entities from the permitting requirements described above when placing informational, canal, regulatory, emergency, and special event markers on inland lakes and their associated canals. This exemption was made applicable to local governments and other governmental entities so long as they place the markers within fifty feet of the shoreline, except that special event markers and markers indicating swimming areas may be placed farther than fifty feet from the shoreline. No definitions were provided for these markers except “informational markers.” The term “informational markers” was not defined specifically, but rather through a nonexclusive list that includes such markers as those indicating the end of a boat ramp, no swimming and swimming areas, and underwater hazards.

Many of the types of signage listed in this exception were not previously considered “waterway markers” subject to the need to apply for a permit for placement. Thus, the “exemption” ironically increased the number of signs requiring permits. In response, FWC passed, pursuant to its statutory authority, a rule temporarily exempting such additional signs from the need for a waterway marker permit. This temporary exemption from permitting expired at the end of 2006.

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<sup>22</sup> Such an interpretation also fits well with FWC’s demonstrated concern with notice to the public about boating regulations. *See, e.g.* FLA. ADMIN. CODE r. 68D-23.104(3)(d).

<sup>23</sup> *Lee County v. Lippi*, 662 So.2d 1304, (2<sup>d</sup> DCA, 1995).

If one assumes that boating restricted areas covering less than an entire water body or local government jurisdiction require waterway markers to put the public on notice, may local governments now post signs within 50 feet of the shoreline and enforce the corresponding regulatory zones that would not receive permits for posting under current FWC waterway marker regulations? The answer is probably yes. Arguably Chapter 327 has not generally preempted all local government home rule authority to regulate boating. Signs within 50 feet of the shoreline that comply with uniform waterway marker standards for design are likely within the authority of local government to install and enforce.

#### **IV. Local Government Regulation of Noise**

Sections 327.391(1)-(2), Florida Statutes, specifically regulate airboat exhaust and require that airboats must utilize an automotive-style muffler, underwater exhaust, or other manufactured device capable of adequately muffling sound. In addition, Florida Statute section 327.65 requires the use of muffling devices on every internal combustion engine used in a vessel. Section 327.65 further provides that if a county wishes to impose additional noise regulations on vessels, it may adopt the model regulation provided in that section.

Since state statutes address regulation of boat noise, the question then becomes whether local government home rule police power authority to regulate boat noise for the health, safety, and welfare of the people has been preempted. The use in section 327.65 of the word “may,” and not “shall” or “must,” supports an interpretation that the adoption of the section’s model regulation by a county is permissive rather than mandatory. The case of *Moore v. State* held that section 327.65(2) was permissive in effect and did not preempt municipalities from regulating airboats as a nuisance. If adoption of the model regulation is permissive, one could argue that a county could permissibly adopt and enforce a noise ordinance that is different, and stricter, than the model regulation without conflicting with subsection 327.65(2).

Subsequent to the *Moore* case, the Florida Fish and Wildlife Conservation Commission (FWC), the State agency charged with implementing boating regulations in Chapter 327 of the Florida Statutes, amended its regulations. These changes included adding rule 68D-23.101(3), which states that it is an intent of FWC rules to ensure that no boating restricted areas be created or enforced for the purpose of noise abatement. However, section 327.65 explicitly contemplates the option of a county to impose noise regulations through the use of boating restricted areas by granting counties the authority to impose additional noise regulations “on the waters of [the] county or on a specified portion of the waters of [the] county.” This may indicate that this portion of rule 68D-23.101(3), Florida Administrative Code contradicts the statute, or, alternatively, that generally-applicable noise ordinances such as those contemplated by § 327.65 do not require signage to be effective and enforced.

After the addition of FWC’s rule stating its intent not to permit signs for restricted areas for noise abatement, Florida’s then-Attorney-General Charlie Crist issued an opinion which concluded, based largely on the amended FWC rules, that local governments are foreclosed from regulating noise more strictly than allowed for in Florida Statute section 327.65. While the Attorney General’s analysis does

not directly say that local governments cannot regulate more strictly because of preemption, it appears that preemption is the basis of the conclusion.

Thus, as with other portions of Chapter 327 and its regulations, local government authority to regulate noise is shrouded in uncertainty. The state of uncertainty as to local government authority has given birth to great variance and conflict in local regulation of boating, leading to concomitant confusion for boaters and law enforcement. Statutory and regulatory changes need to clarify the scope of local government authority to regulate boating, including making a clear, transparent process for local governments that does not involve the permitting of waterway markers as the chief limitation on the ability of local governments to enforce local boating regulations.