



2024 ORANGE COUNTY CHARTER REVIEW COMMISSION (CRC)

Sustainable Growth & Charter Cleanup Committee

Wetlands Protection Final Report and Recommendation to the Charter Review Commission

May 1, 2024

Committee Members:

Eric R. Grimmer, Chair
Rishi Bagga
Dick Batchelor
Tom Callan
Chuck O'Neal
Eugene Stoccardo

Summary of Recommendation

The Sustainable Growth & Charter Cleanup Committee recommends that a charter amendment adding wetlands protection to Section 704.B. of the Charter not be placed on the 2024 General Election ballot, because based on the information gathered by the Committee, the County's preemptive authority concerning wetlands protection already exists.

However, the Committee recommends that the CRC Final Report include a recommendation to the 2028 CRC that it revisit the issue to confirm that the County has in fact been applying its new wetlands protection ordinance within municipalities to the extent provided by Section 704.B.

Overview of Committee Process / Basis for Recommendation

At its January 30, 2024 meeting, the 2024 Orange County Charter Review Commission ("CRC") referred to the Sustainable Growth & Charter Cleanup Committee (the "Committee") a charter amendment topic proposed by citizen Gabrielle Milch to amend Section 704 of the Charter to provide that when the County ordinances set minimum standards for "protecting wetlands", such County ordinances will prevail over municipal ordinances if they are stricter. Initial language was prepared for this charter amendment and is attached as Exhibit "A".

At its February 16, 2024 meeting, the Committee received a presentation from Elizabeth "Liz" Johnson, Assistant Manager, Environmental Protection Division concerning the County's wetlands protection program, recent comprehensive revisions to the County's wetlands protection ordinance, and the County's history of application of its wetlands

protection ordinances within municipalities. That same day, Tanya Wilson, Director of the Planning, Environmental, and Development Services Department, provided the Committee with a memo addressing a potential wetlands protection amendment. (copy attached as Exhibit “B”).

In both the presentation and staff memo, County staff advised the Committee that the County has long interpreted the existing language of Section 704.B. to encompass wetlands protection regulations. Specifically, the staff memo advised the Committee as follows:

Section 704.B.1 currently reads “County ordinances shall be effective within municipalities and shall prevail over municipal ordinances when “The county sets minimum standards for **protecting the environment by prohibiting or regulating air or water pollution**, ... but only to the extent that such minimum standards are stricter than the applicable municipal standards.” (Emphasis added.) Currently many of the articles within Chapter 15 (Environmental Control), Orange County Code are compared against applicable municipal regulations to determine compliance with this Charter provision (Article III, Air Quality Control; Article VI, Pumping and Dredging Control; Article VII, Lakeshore Protection; Article IX, Dock Construction; Article X, Wetland Conservation Areas; and Article XV, Boat Ramps).

Most recently, Chapter 15, Article X, Orange County Code was updated to develop new or improved wetland and surface water protection standards. These new standards become effective June 1, 2024. All municipalities within the county were engaged as stakeholders in that process. The Environmental Protection Division is working to determine whether each municipality is meeting or has a plan to meet these new standards before June 1.

The Committee discussed the County’s new wetland protection standards becoming effective June 1, 2024, as compared to the County’s longstanding standards. In the context of applying the County’s prior standards, the general message was that, at least with respect to one important example, the City of Orlando, the County had not previously applied its wetlands protection standards within the City because the County’s then present standards were not more strict than the City’s. This matter was discussed in a 2010 memo from the County Attorney’s office (copy attached as Exhibit “C”), in which the office engaged in an evaluation of the County’s and City’s wetlands protection regulations under the preemption provisions of Section 704.B.

As indicated in the staff memo and discussed at the Committee’s February 16, 2024 meeting, the County’s new wetland protection standards are substantially stricter than the prior standards, and County EPD intends to apply the stricter standards within municipalities. Staff further noted that Section 15-363(c) of the County’s new wetlands

protection ordinance makes specific reference to the exercise of the County's relevant authority under the Charter, stating as follows:

Orange County shall assert jurisdiction in, on, over and under wetlands and surface waters within the county and will regulate activities that affect these natural resources pursuant to this article and consistent with the comprehensive plan and **Orange County Charter.**" (Emphasis added in staff memo.)

County staff further expressed concern that to add "protecting wetlands" to the list of preempted municipal regulation subjects would be not only redundant, but that it could inadvertently support a narrower reading of the existing "protecting the environment by prohibiting or regulating air or water pollution" language that is currently maintained to encompass other topics under Chapter 15 (Environmental Control) of the Orange County Code, including boat docks and boat ramps.

After this meeting, General Counsel Vose communicated with the County Attorney's office and confirmed it is still the office's legal interpretation that the existing "protecting the environment by prohibiting or regulating air or water pollution" language of Section 703.B. encompasses wetlands protection. Further, General Counsel Vose later advised the Committee that the preemption language added to SB 1420 (2024) could preempt the CRC from placing the contemplated amendment on the ballot, as the amendment could be interpreted to preempt municipal land development regulations, as wetlands regulations are sometimes categorized.

Based on this information, at its April 24, 2024 meeting, the Committee voted to recommend that a charter amendment adding wetlands protection to Section 704.B. not be placed on the 2024 General Election ballot, because based on the information gathered by the Committee, the County's preemptive authority concerning wetlands protection already exists. The Committee further voted to recommend that the CRC Final Report include a recommendation to the 2028 CRC that it revisit the issue to confirm that the County has in fact been applying its new wetlands protection ordinance within municipalities to the extent provided by Section 704.B.

Note: The CRC Sustainable Growth and Charter Cleanup Committee has not recommended that the following charter amendment be placed on the 2024 General Election ballot. The language is included for historical purposes, and in support of the Committee’s recommendation that the 2028 CRC revisit the issue, as described above.

Exhibit “A”

Ballot Proposal: The ballot title and ballot summary for this question are as follows:

**EFFECT OF COUNTY ORDINANCES
PROTECTING WETLANDS WITHIN
MUNICIPALITIES**

Amending the County Charter to provide that when the County sets minimum standards for protecting wetlands, such County ordinances shall be effective within municipalities and prevail over municipal ordinances when the County’s minimum standards for protecting wetlands are stricter.

_____ Yes
_____ No

Text Revisions: Upon approval of this question at referendum, the following portions of the Orange County Charter are amended to read as follows:

Sec. 704. Conflict of county ordinances with municipal ordinances; preemption.

- A. Except as provided in this section, no county ordinance shall be effective within a municipality if the municipality maintains an ordinance covering the same subject matter, activity or conduct as the county ordinance.

- B. County ordinances shall be effective within municipalities and shall prevail over municipal ordinances when:
 - 1. The county sets minimum standards for (a) regulating adult entertainment, and (b) protecting the environment by prohibiting or regulating air or water pollution, and (c) protecting wetlands, and (~~d~~e) prohibiting or regulating simulated gambling or gambling, but only to the extent that such minimum standards are stricter than the applicable municipal standards.

...

- C. The intent of this section is that no person within a municipality shall be governed simultaneously by two sets of ordinances covering the same subject matter, activity or conduct, except in matters of minimum adult-entertainment standards, or pollution regulatory standards, or wetlands protection standards, simulated gambling or gambling prohibitions or standards, or rezoning or comprehensive-plan amendments that affect public schools with attendance zones that straddle any municipal boundary. In absence of an ordinance within a municipality on a subject, the county ordinance on that subject shall govern.

Exhibit "B"



Interoffice Memorandum

February 15, 2024

TO: Eric Grimer, Sustainable Growth & Charter Clean Up Committee Chair, 2024 Orange County Charter Review Committee
-AND-
2024 Charter Review Committee Members

FROM: Tanya Wilson, AICP, Director
Planning, Environmental, and Development Services

SUBJECT: February 16, 2024, Sustainable Growth and Charter Clean Up Committee Meeting

On June 15, 2023, the Orange County Charter Review Commission (CRC) submitted proposals to the Sustainable Growth and Charter Cleanup Committee (Committee) relating to affordable housing and the protection of wetlands. The following provides a summary of each proposal and information for consideration at the Committee's upcoming February 16, 2024, meeting.

AFFORDABLE HOUSING TRUST FUND AMENDMENT

The Orange County Board of County Commissioners ("BCC") accepted the Housing for All 10-Year Action Plan in December of 2019. The Housing for All Action Plan focuses on reducing regulatory barriers, leveraging new financial resources, targeting areas of transit access and employment opportunities, and engaging the community and industry in addressing the housing challenges of the region. The strategies detailed in the Action Plan are intended to increase and diversify the existing housing stock in Orange County and make housing more affordable. The establishment of the Housing Trust Fund, a substantial recommendation of the 10-Year Action Plan, is intended to incentivize the construction and preservation of affordable and attainable housing, encourage Missing Middle housing types, and meet other housing needs identified by the 10-Year Action Plan. As an implementing tool of the Housing for All 10-Year Action Plan, the local Housing Trust Fund will move the County closer to realizing the following Housing for All goals:

- Create new housing units;
- Diversify the County's housing stock;
- Preserve existing affordable units;
- Integrate social capital and economic development; and

- Educate potential homeowners and renters.

As a direct result of the Housing Trust Fund, it is projected that a minimum of 6,500 certified affordable units will be produced or preserved in Orange County by 2030. By leveraging local Trust Fund dollars with other state and federal resources, the greater Housing for All goal of creating or preserving 11,300 affordable units by 2030 can be achieved. These policies and strategies may also assist in the development of mixed-income housing developments, thus assisting in the production of attainable (commonly known as “workforce housing”) units.

On March 24, 2020, the BCC unanimously adopted Ordinance No. 2020-09 and established the Affordable Housing Trust Fund Program (“Program”) and the Affordable Housing Trust Fund (“Trust Fund”). For the purposes of implementing the Program and providing assistance through the Trust Fund. The ordinance also provided a framework for the annual budget requirements of the Trust Fund, administration of the Program, and adoption of the Affordable Housing Trust Fund Plan.

As recommended by the Housing for All 10-Year Action Plan and defined in the ordinance, the Housing Trust Fund is established for the purpose of creating and preserving affordable rental and ownership housing for very-low-income (30-50% AMI), low-income (50-80% AMI), and moderate-income (80- 120% AMI) persons and households in Orange County. The Trust Fund may also support the development of mixed-income housing for middle-income persons and households (up to 120% AMI) in Orange County. Additionally, Trust Fund assistance may support shared costs where affordable units are mixed with attainable and market-rate units and there is a benefit to the affordable units.

Proposed Charter Amendment Language

Sec. 713. –Affordable Housing Trust Fund.

A. Affordable Housing Trust Fund to remain in continued existence. The Affordable Housing Trust Fund ("Trust Fund") initially established in Chapter 2, Article VIII, Division 2 of the Orange County Code shall remain in continued existence, as modified from time to time by ordinance in a manner not inconsistent with the requirements of this section.

B. Purposes of Trust Fund. The purpose of the Trust Fund is to provide the financial resources and the leverage necessary to create and preserve affordable housing units in Orange County. The purposes of the Trust Fund may be further specified by ordinance.

C. Revenue sources. The Trust Fund shall be funded as directed by the board of county commissioners, and may be comprised of the following sources:

- (1) General revenue fund monies appropriated to the Trust Fund by the board of county commissioners as part of the annual budget;
- (2) Funds voluntarily contributed by municipalities that may elect to participate in the Trust Fund and programs funded by the Trust Fund;

- (3) Grants or donations of money, property, or any other thing of value made to the Trust Fund;
- (4) Mandatory or voluntary payments, including but not limited to fees from new commercial and residential development, made pursuant to development policies established by ordinance; and
- (5) Other sources as established by ordinance.

D. Continuing Nature of Trust Fund. Unless otherwise directed by the board of county commissioners or required by applicable law, unspent portions of the Trust Fund, repayments of principal and interest on loans provided from the Trust Fund, and interest earned from the deposit or investment of monies from the Trust Fund:

- (1) Shall remain in the Trust Fund, to be used exclusively for the purposes of the Trust Fund;
- (2) Do not revert to the general revenues of the County; and
- (3) Any appropriations do not lapse.

E. Administration and Oversight of Trust Fund. The Trust Fund shall be administered, appropriated, and expended in a manner consistent with the purposes of the Trust Fund. The Trust Fund shall be administered in a manner that allows the Trust Fund to leverage other sources of public funds and private investment. The Trust Fund shall be included in the annual audit.

F. Implementation by Ordinance. No later than July 1, 2025, the board of county commissioners shall amend Chapter 2, Article VIII, Division 2 of the Orange County Code to implement the minimum requirements of this section. The board of county commissioners may adopt additional implementing ordinances not inconsistent with the requirements of this section.

Staff Comments for Committee

The Charter Amendment is attempting to ensure the Affordable Housing Trust Fund continues in perpetuity. The proposed language is essentially similar to the language found under Chapter 2, Article III of the Orange County Code of Ordinances. However, the proposed charter language proffered under Section 713 (C)(4) allowing “Mandatory or voluntary payments including but not limited to fees from new commercial and residential development” may require additional studies to justify the fee amounts. Also adding this item to the Charter Amendment may cause concern and inadvertently deter development amongst some industry groups.

It should be noted that Chapter 2, Article III, Section 2-296 of the Orange County Code allows for an annual budget allocation of \$10,000,000 from the general fund for the Affordable Housing Trust Fund program. Additionally, each fiscal year “this amount shall increase by 10% over the immediately preceding fiscal year budgeted amount. The Board in its discretion may decide to change the amount of any such annual budgeted

amounts". As such, the Committee should consider including this annual increase as part of the proposed charter language under Section 713 (C) – Revenue Sources and maintain language that affords the board discretion to change that amount should market conditions become unfavorable.

The other item that would need to be clarified in any implementation ordinance is C-3 which allows for "...*donation of money, property or any other thing of value made to the trust fund*". This language is very broad and somewhat ambiguous. We would need to add in a future ordinance subject to the review and acceptance by the BCC to clarify and define what exactly those "any other thing of value" would be.

WETLANDS PROTECTION AMENDMENT

Section 704.B.1 currently reads "County ordinances shall be effective within municipalities and shall prevail over municipal ordinances when "The county sets minimum standards for **protecting the environment by prohibiting or regulating air or water pollution**, ... but only to the extent that such minimum standards are stricter than the applicable municipal standards." (Emphasis added.) Currently many of the articles within Chapter 15 (Environmental Control), Orange County Code are compared against applicable municipal regulations to determine compliance with this Charter provision (Article III, Air Quality Control; Article VI, Pumping and Dredging Control; Article VII, Lakeshore Protection; Article IX, Dock Construction; Article X, Wetland Conservation Areas; and Article XV, Boat Ramps).

Most recently, Chapter 15, Article X, Orange County Code was updated to develop new or improved wetland and surface water protection standards. These new standards become effective June 1, 2024. All municipalities within the county were engaged as stakeholders in that process. The Environmental Protection Division is working to determine whether each municipality is meeting or has a plan to meet these new standards before June 1.

Proposed Charter Amendment Language

Sec. 704. Conflict of county ordinances with municipal ordinances; preemption.

A. Except as provided in this section, no county ordinance shall be effective within a municipality if the municipality maintains an ordinance covering the same subject matter, activity or conduct as the county ordinance.

B. County ordinances shall be effective within municipalities and shall prevail over municipal ordinances when:

1. The county sets minimum standards for (a) regulating adult entertainment, and (b) protecting the environment by prohibiting or regulating air or water pollution, and (c) protecting wetlands, and (d)e prohibiting or regulating simulated gambling or gambling, but only to the extent that such minimum standards are stricter than the applicable municipal standards.

...

C. The intent of this section is that no person within a municipality shall be governed simultaneously by two sets of ordinances covering the same subject matter, activity or conduct, except in matters of minimum adult entertainment standards, or pollution regulatory standards, or wetlands protection standards, simulated gambling or gambling prohibitions or standards, or rezoning or comprehensive-plan amendments that affect public schools with attendance zones that straddle any municipal boundary.

In absence of an ordinance within a municipality on a subject, the county ordinance on that subject shall govern.

Staff Comments for Committee

Since Section 704.B.1. of the Charter already allows for the new wetland code to prevail over a municipal code for the protection of the environment/water, the insertion of a particular reference to “wetland protection” seems redundant. Furthermore, newly adopted Section 15-363(c) (the Purpose section of Article X) shall read: “Orange County shall assert jurisdiction in, on, over and under wetlands and surface waters within the county and will regulate activities that affect these natural resources pursuant to this article and consistent with the comprehensive plan and **Orange County Charter.**” (Emphasis added.)

In evaluating the topic by the Charter Subcommittee, consideration should be given to guard against whether the specific expression of “wetlands” could create an opportunity for a new interpretation related to other articles within the Environmental Control chapter that would not be specifically referenced in the Charter provision (i.e., boat docks, boat ramps). Staff is also concerned about the potential impacts to staffing that will be triggered by the new oversight, monitoring, permitting and enforcement. There should be clarification on which entity is intended to do the actual permitting – i.e. the municipality or the County. There should also be clarification on what the definition of “wetlands protections” entails i.e. Dock permits, boat ramps, lakeshore clearing, or wetland impacts?

Cc: Homer Hartage, Chair, 2024 Orange County Charter Review Committee
Lee Shira, Vice Chair, 2024 Orange County Charter Review Committee
Byron W. Brooks, AICP, County Administrator



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Exhibit "C"

MEMORANDUM

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 Cathy Saravanja, CP
 Maria Vargas, ACP

TO: Lori Cunniff, Manager, Environmental Protection Department

THROUGH: Thomas B. Drage, Jr., County Attorney *TBD*

FROM: David J. Bass, Assistant County Attorney *(initials)*

DATE: May 7, 2010

RE: Orange County Regulation of Wetlands in the City of Orlando

INTRODUCTION

This memorandum addresses the issue of whether Orange County is required by the Orange County Charter to impose its wetlands protection ordinance within the municipal boundaries of the City of Orlando. In accordance with §704 of the Orange County Charter, the answer depends on whether the County's wetland protection ordinance is stricter than the City's (or, conversely, if the City's ordinance is no less strict than the County's). A review of the applicable City of Orlando and Orange County ordinances, as currently written, leads to the conclusion that the City's ordinance is no less strict than the County's, and the County would not be able to impose its wetlands regulations within the municipal boundary of the City of Orlando. The following discussion provides the analysis that was performed to make this conclusion.

DISCUSSION

Section 704(B) of the Orange County Charter states "County ordinances shall be effective within municipalities and shall prevail over municipal ordinances when....the county sets minimum standards for....protecting the environment by prohibiting or regulating air or water pollution, but only to the extent that such minimum standards are stricter than the applicable municipal standards."

The City of Orlando's wetlands protection ordinance is found in §63.290 of the City's Code. Additional wetlands regulations are found in the Conservation Element of the City's Growth Management Plan (GMP). Orange County's wetland regulations are detailed in Chapter 15, Article X of the Orange County Code.

The County's code uses the term "conservation area" synonymously with wetland, and classifies wetlands into three distinct categories: (1) Class I conservation areas, (2) Class II conservation areas, and (3) Class III conservation areas. The City's GMP also uses a three-tiered system, whereby wetlands fall into three categories: (1) Tier One (Protected Wetlands), (2) Tier Two, and (3) Tier Three.

The relevant portions of the City's "Tier One" wetland and the County's "Class I Conservation Area" (both of which are generally considered wetlands of high quality) have similar language and protection:

County: *"The removal, alteration or encroachment within a Class I conservation area shall only be allowed in cases where no other feasible or practical alternatives exist that will permit a reasonable use of the land or where there is an overriding public benefit." Additional language includes: When encroachment, alteration or removal of Class I conservation areas is permitted, habitat compensation or mitigation as a condition of development approval shall be required."* §15-419(1)a Orange County Code.

City: *"The removal, alteration, or encroachment within an area designated as a Protected Wetland [Tier One Wetland] shall only be allowed where the applicant is able to demonstrate that there is no practical alternative which reduces or avoids the adverse impact to the wetland." Additional language includes: "When wetland impacts are permitted, mitigation above and beyond that required by other regulatory agencies shall be required."* City of Orlando Conservation Element Policy 1.4.4.

The City of Orlando Code §63.290, *et seq* categorizes wetlands into Protected Wetlands, Transitional Wetlands, and Altered Wetlands. Furthermore, §63.293 of the City Code states that all (100%) of Protected Wetlands shall be retained, and that "...no dredging, filling, grading, excavation or development shall be permitted in retained wetlands." This implies that Protected (Tier One) Wetlands cannot be impacted at all.

For the City's "Tier Two" wetland and the County's "Class II Conservation Area":

County: *"Mitigation for Class II conservation areas should be presumed to be allowed unless habitat compensation is contrary to the public interest."* §15-419(1)b Orange County Code.

City: *"The City of Orlando shall protect these [Tier Two] environmentally sensitive lands consistent with the applicable environmental regulatory agencies' permitting requirements."* City of Orlando Conservation Element Policy 1.4.4.

For the City's "Tier Three" wetland and the County's "Class III Conservation Area":

County: *"Mitigation shall be allowed for Class III conservation areas in all cases."* §15-419(1)c Orange County Code; Note: Class III conservation areas by the County's standard are isolated wetlands less than 5.0 acres which do not otherwise qualify as Class I or Class II conservation areas. §15-364(c) Orange County Code.

City: *"For wetlands less than 0.5 acres in size...the City shall consider whether the wetlands contain Endangered or Threatened Species, or Species of Special Concern, or are of special significance. If any of these conditions are met, the City may notify the appropriate Water Management District and request that they regulate impacts to these wetlands under their discretionary jurisdiction."* City of Orlando Conservation Element Policy 1.4.4; Note: Tier Three wetlands, as defined by the City, are those that are less than 0.5 acres in size. City of Orlando Conservation Element Policy 1.4.4.

The City's GMP Conservation Element has a special wetlands protection clause for Orlando International Airport (OIA) property, which says that a permit from the applicable state or federal agency on OIA property *"...shall be sufficient to demonstrate compliance with the City's wetland regulations."* The County has previously taken the position with other municipalities (Oakland and Eatonville) that if "the applicable municipal standards" were identical to applicable water management district (WMD) or Florida Department of Environmental Protection (FDEP) wetlands regulations, they would be deemed to be at least as strict as the County's wetland ordinance, and that the County would not impose its wetlands regulations within those jurisdictions. Therefore, for properties located within OIA property, the County would not be able to impose its wetlands jurisdiction.

Thus, the wetlands protection language for both the City and County show essentially the same protection for both Tier One/Class I and Tier Two/Class II wetlands. In fact the City's are arguably more protective. For Tier Three/Class III, the protection standards are essentially the same with the possible exception of small (less than 0.5 acres) wetlands within the City which have no "Endangered or Threatened Species, Species of Special Concern, or are of special significance." If these small wetlands do exhibit one of these characteristics, the City may have the WMD regulate. If they do not, then the City (or the WMD) may opt to not require mitigation. The County might require mitigation for small, isolated wetlands less than 0.5 acres in size, even in the absence of one of these factors. However, in reviewing the entire range of wetlands protection standards for both the City and County for all classes of wetlands, the protection standards are of essentially equal strength.

With respect to wetland buffers, the §63.294 of the City Code mandates a minimum 100-foot buffer (setback) from a "protected" wetland and a 50-foot setback

from other "retained" wetlands (transitional or altered). In contrast, the City's GMP Conservation Element (Policy 1.4.5) requires a 50-foot buffer for Protected Wetlands, and a minimum 15-foot, average 25-foot buffer for Preserved (retained) Wetlands. The County Code has no specific mentions of buffers, except in the Econlockhatchee River Protection area, where minimum 25-foot, average 50-foot buffers are required for Class I and II conservation areas. On the whole, the wetland buffers for the City are no less strict than the County's.

CONCLUSION

This analysis of wetlands standards of both the City of Orlando and Orange County demonstrates that the City's regulations are no less strict than the County's. Therefore, §704 of the Orange County Charter does not allow County imposition of its wetlands ordinances within the City of Orlando.

cc: Joel Prinsell, Deputy County Attorney
Tara Gould, Assistant County Attorney
John Lowndes, Assistant County Attorney

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