

FORUM TO GATHER PUBLIC COMMENT RE: CONSERVATION ELEMENT/WETLANDS

Wednesday, May 19, 2010, 5:30 p.m.

Staff members present were Ernie Brown, Director, Natural Resources Management Office; Darcie McGee, Natural Resources Management Office, Amanda Elmore, Natural Resources Management Office; Candy Hanselman, Planning & Development Department.

Public attendance was as follows: Nita Harris; Beth McMillen, Marine Resources Council; Mary Hillberg; Bill Hillberg; Jason Steele; Leroy Wright; Tom Schuller; Laurie Schuller; Jim Zuhlke; Allen Cowart; Billy Kempfer; Robert Day; Matthew West, Ivey Planning Group; Clair Gambao, Mary Sphar; and Ty Harris.

The audience was invited to participate in a poll, with results as follows:

Disagree - 4 (50%)
Agree - 4 (50%)
Needs work - 9 (82%)
Send, as is - 2 (18%)

Ernie Brown narrated a Power Point presentation regarding the Brevard County Comprehensive Plan, Conservation Element, Wetlands, as follows: /1/ Objective 5; /2/ Why Brevard County has a Comprehensive Plan; /3/ Why Brevard County regulates wetlands; /4/ Wetland facts; /5/ Why NRMO is proposing modifications to Objective 5; /6/ Pending policy language; /7/ Policy 5.1; /8/ Policy 5.2; /9/ Policies 5.3 through 5.5. Mr. Brown answered questions from the audience regarding the points made in the presentation, and the process for transmittal and adoption of the changes.

Public comment was given, as follows:

Beth McMillen – Ms. McMillen, Assistant Director, Marine Resources Council, stated that the council is concerned about the proposed amendments, because wetlands play an important role in maintaining water quality. She added that wetlands function as filters, removing sediment, nutrients and other pollutants before they enter the Indian River Lagoon and the St. Johns River. She said that wetlands also provide cover, forage and nesting habitats for birds, fish and other species. She added that studies by Dr. Grant Gilmore indicate that the Indian River Lagoon has naturally less wetlands than any other estuary on the eastern seaboard, and has been disproportionately impacted by development. Ms. McMillen stated that further loss of wetlands would have serious negative impacts to the fishery of the Indian River Lagoon. She added that the lagoon is worth 800-million, annually, to the local economy, and compromising its viability would undermine our community. She said that the proposed amendments eliminate current restrictions of commercial, industrial and institutional development in wetlands and replace them with a promise of creating some future requirements, which would leave a time gap with no requirements. She added that if the justification is to provide greater consistency with State growth management policies, while maintaining consistency with FAC Chapter 9J-5.0133, then the amendment should be written to address the State requirements first. She said that this will ensure that there is not a lapse of time in which the County has no regulations. Ms. McMillen stated that the current requirements were created after an expensive, extended legal battle with the Sierra Club, Indian River Audubon and the Florida Native Plant Society, and to change them unilaterally now would be to open up a legal can of worms. She further stated that MRC urges the Commission to keep the present wetland requirements, until consistent wetland language can be drafted. She said that they also recommend following the same process used with the surface water provisions to produce a community consensus. Ms. McMillen said that she disagrees with the changes, and it needs work.

Tom Schuller – Mr. Schuller, Brevard County Farm Bureau, stated that the plan definitely needs some work. He said that one of the major things it needs is a working group like the other elements had. He added that one of the largest players to be affected by this is agriculture, and they were notified about this at the 11th hour. He said that the Farm Bureau has a liaison with the County Extension Office, but the Extension Office was not made aware of it. He added that the Farm Bureau relies on the Extension Office to know what is going on, and

he asked that they be made aware, in the future, as it would be helpful to the ag community. Mr. Schuller stated that 5.2-C, would make the landowner responsible for damages. He added that there is a huge problem in the north end of the County with four-wheelers destroying wetlands on private property, without the owner's permission, and to make a landowner responsible for those damages would be wrong. He said that he has problems with 5.2-C including residential, as it is almost a land grab. He added that he would suggest having the language remain the same. Mr. Schuller said the he would like to see the last issue regarding the ag exemption moved to the front, right under 5, and to have the words "which do not result in permanent degradation or destruction of the wetlands", stricken.

Leroy Wright – Mr. Wright spoke on behalf of the Florida Wildlife Federation, for which he was formerly a regional director for Central Florida. He said that since he missed the last two forums, his comments would cover everything, in general. He stated that he was founder, and past president of Save the St. Johns River, Inc., and a current board member of the St. Johns River Alliance. He said that the thousands of citizens he represents do not support any changes to Objectives 3, 4 and 5 of the Comp Plan. He said that he would urge the BCC to respect the vast majority of citizens in Brevard County who want to continue the excellent protection of floodplains, wetlands and surface waters. Mr. Wright said that in recent years, approximately 70 percent of Brevard citizens voted to tax themselves in order to purchase and protect sensitive lands. He added that our county is unique in that we have three rivers and an ocean, all located within a 30-mile wide district, and these natural resources provide economic viability, as well as passive recreation for our citizens. He said that in 1997, he led an effort, with the support of the County Commission and 14 of the 16 municipalities, which resulted in the securing of a Federal designation of the St. Johns River as an American Heritage River, making it one of 14 named out of 126 rivers that had applied. Mr. Wright stated that even limited commercial or industrial development in the 10-year floodplain of the St. Johns River or the Indian River Lagoon must not be allowed. He added that references to proposed buffer areas in the 10- and 25-year floodplain are unacceptable as it relates to the water/shoreline areas. He said that in any given year, the water on the shoreline rises in the St. Johns River as much as five feet, and on the Indian and Banana Rivers, tidewaters constantly change the water shoreline area. He added that landowners in the 10-year floodplain should consider other alternative uses of their property. He said that wind turbine farms could be a profitable solution. Mr. Wright said that another consideration would be to sell the land to the State. He added that in 1998, the former Duda Ranch owner reluctantly sold over 14,000 acres of annual, 10- and 25-year floodplain to the State. He added that in 1991, in the successful challenge of a proposed 1,000-home golf course development on Lake Poinsett, the Governor, and Cabinet, ordered coordinated floodplain protection policies from all five water management districts, and that document was published in 1993. He said that the document was basically written to assist local governments in dealing with floodplain issues, and it clearly indicates that developments should be moved from these 10- and 25-year flood areas. Mr. Wright stated that in 2005, through an unanimous vote of the St. Johns River Alliance, the upper basin was approved by the Water Management District as a SWIM water body, and the SWIM plan was released in 2007. He said that we must strive to improve the water quality of the St. Johns River. He concluded by saying that the floodplains, wetlands and surface water protections must remain, as is. He said that he disagrees with the changes, and it needs more work.

Billy Kempfer – Mr. Kempfer stated that he represents ag and Kempfer Cattle Company. He said that the definition of functional wetlands need to be addressed. He added that he was involved in the original Comp Plan in 1985, and functional wetlands, at that point in time, were true functional wetlands. He added that a lot of the language was based around the functionality of wetlands, especially the commercial and industrial, which had to be a true wetland, not just something that looked like it maybe could be a wetland, which is the way it is interpreted today. Mr. Kempfer said that his suggestion for 9J-5 is that it should follow whatever the statute is that allows for the exemption of agricultural practices, whether it be in the front, back, or in the middle. He stated that in opposition to the lady who spoke first, a lot of the isolated small wetlands that are classified wetlands have none of the wonderful functions that a lot of people think they have. He said that he mostly agrees with the concept of the ordinance, but it needs a little work.

Allen Cowart – Mr. Cowart stated that the County should not have more regulations on a piece of property than the State or Federal agencies have. He added that he does not know if that is as well-addressed as it could be in the new additions. He said that he agrees with Mr. Kempfer in that there are a lot of isolated areas that they are calling wetlands, manmade areas, that were just a low depression, and all of a sudden it is a wetland. He added that he thinks there should be a distinction of the age of a wetland. He said that if a hole is dug, and in a week a fern is growing, it is not viable wetland. He added that pieces of property, one acre and smaller, in residential development, should have more area available for mitigation, or they should be allowed to use more of their property. Mr. Cowart stated that he is kind of neutral on the language. He said that he is not in agreement with the changes 100 percent, as is, because it does not address that wetland issue. He added that it needs a little work.

Claire Gambao said that they could use the term “historical wetlands”.

Mr. Cowart said that that would be a good term.

Ernie Brown stated that the definition of wetlands, like it or not, is purely relegated to the State, unless they delegate the program to a local government. He added that Broward County has a delegated program, and they can go out and determine jurisdiction of what a wetland is.

Mr. Cowart stated that if the State says they will let you mitigate a piece of property, and they have no issue with it, then he does not understand why Brevard County would have an issue with it. He added that there should be no conflict there, especially when we are looking at going forward and advancing with commercial or residential, because the County is going to gain income and a lot of potential growth. He said that the fact that there is a conflict needs to be addressed.

Matthew West – Mr. West, Ivey Planning Group, stated he did not like the survey chart, because it calls for either up or down. He added that the current process is a legislative process, and there are still opportunities to make changes before adoption, which will be at the end of the year. He said that the Devil is in the details about the policy that says the County “shall” adopt these regulations to deal with impacts to wetlands. He added that one of the things the State will want is a date to show when it will happen. He said that that is something that can be fixed before transmittal or adoption. Mr. West stated that even though people are saying it needs work, it is not something that they would have to wait until next year to fix the policies. He added that he watched the video of the October workshop on the website twice, and he did not come away with the impression that the Commission was only focused on changing the wetlands policies for commercial and industrial. He said that he may send written comments regarding the mixed-use, versus the industrial, because he is really not sure whether the new language is helpful, or not. Mr. West stated that he would say it needs work, but it could be sent with fixes that could be made before next Thursday’s transmittal. He added that some other things could be fixed in the two or three months while the State is reviewing it, and before it is brought back for adoption. He said that policy is being written now, and the Devil is in writing the regulations, afterwards, to implement the policy. He stated that he would say to send it, but some of the changes could be made before Thursday and brought up then. He added that some of the larger issues could be resolved before adoption. He said that the new language is better than the current language, and provides more flexibility, and considers the property owner more.

Ty Harris – Mr. Harris, Daytona Beach, represented the owner of the Farmton tract. He stated that they have been monitoring, with a lot of concern, any of the changes to floodplains, surface waters and wetlands. He said that, overall, they agree with the changes that are being made, as they are a step in the right direction. He added that when you look at the Comprehensive Plan, overall, these concepts of mixed-use development, compact urban development, you see that the wetland policy and floodplain policy encourage sprawl. Mr. Harris stated that the definition of sprawl is one house on five acres, one house on five acres, fence it off, tear down the trees, one house on five acres. He said that that is what the current policies do. He added that

someday, Farmton would like to be able to do mixed-use development but, right now, they cannot do it. He said that his client would like to stay in unincorporated Brevard County, so they would encourage the County to go ahead and transmit it, although it is not perfect, and there needs to be more work done to it. He said that until they start hearing the comments from the State, and they are able to start working through some of the issues for adoption, they do not know what is going to happen. He added that until it is transmitted, they will not know what the comments will be from the Department of Community Affairs. Mr. Harris said that the longer we wait, there will be a whole set of issues that we do not even know exist yet. He added that we need to start finding out what those issues are and incorporating those into the changes that everybody has discussed. He said that he also agrees that there has to be a timeline set for adopting the regulations, because what will happen is that there are no regulations, and there is a conflict between the policies and the regulations, which screws everybody up. Mr. Harris repeated that there needs to be a date for adopting regulations that will reflect the Comprehensive Plan changes. He said that he would vote to agree and send.

Mary Sphar – Ms. Sphar stated that the definition of functional wetlands, and placement of that particular definition in reference, is very important. She added that she has seen a couple of legal opinions on that, one from Mr. Knox and one from another attorney, that lead her to believe that that is of crucial importance. She said that she does not agree with putting a date in, because she has seen dates get bumped into the future many times, and it is not the way to go. She added that someone from higher up decided that they were not going to have a working group, as suggested by the ag people, which she thought might have been a good idea. She said that that should all happen before the changes go up. Ms. Sphar stated that we can be assured that the wetlands language changes that were part of the Viera Amendment will become part of our Comprehensive Plan, very soon. She added that the Viera Amendment includes changes to the residential wetlands policy, and a new policy for mixed-use land development activities. She said that a stipulated settlement agreement was signed, and so all the reasonable changes that were made to accommodate smart growth are set to go into effect. Ms. Sphar stated that it is unfortunate that some Commissioners felt the need to rush headlong into amending the commercial/industrial wetlands policies before they had any idea of how the new mixed-use language would work in practice. She asked that it be noted that the Viera Company is just fine with the changes made for mixed-use, and they do not need the commercial policies to be modified. She added that the consultant for the Platts also said that they are ready to comply with existing Comp Plan policies, assuming that the mixed-use language is available. Ms. Sphar said that, lately, she has reviewed a number of amendments for land use designations of DRI proportions, and they are all using the principles of the new urbanism, the smart growth planning strategies, that Viera Company used. She added that the mixed-use policies, worked out in two years of negotiation with Viera Company, may be what is really needed in terms of modification for smart growth commercial development. She said that other than the new institutional language, which is fine, she has nothing good to say about the proposed language. Ms. Sphar stated that the proposed commercial/industrial language eliminates the existing restrictions and substitutes a promise that the County will come up with some criteria in the future to deal with infill and commercial strip areas. She added that what is left is a huge gaping hole in the regulations, where anything goes with regard to commercial and industrial development in non-forested wetlands. She said that she predicts that this will not be acceptable to the DCA, as the proposed amendments do not satisfy DCA's criteria for an amendment to be found in compliance. She added that she does not believe there is any way the wetlands amendments can beat Florida Hometown Democracy, because the DCA will reject them. She said that it will get sidetracked to the legal route, the mediation, and the 120-hearing route. She concluded by saying that the Commission should not transmit the wetlands amendments.

Bob Day – Mr. Day stated that he was on staff when the Comp Plan was put together in the '80's. He said that he was glad to see the institutional language. He added that clarification needs to be added regarding de minimis. He added that he would have to agree that commercial/industrial do not have a place in wetlands. He said that there are some exceptions for around I-95 interchanges that apparently came in somewhere in the mid '90's. He added that perhaps the language should be maintained that says that the primary thing is no commercial/industrial in wetlands, but there may be some exceptions, based on certain criteria. Mr. Day stated

that the date issue needs to be resolved. He said that he would probably submit some written comments. He concluded by saying that there are some points in the changes that he agrees with, and some he does not, and it needs more work.

Mary Hillberg – Ms. Hillberg stated that she was representing the North Merritt Island residents, north of the Barge Canal. She added that she is also a member of various environmental groups. She said that they have met and discussed the changes, and they very much object to the language in the changes, in terms of the industrial and the commercial density increases for the wetlands. She added that the reason given for the changes was to stop annexations, so she asked several different areas in the County if they could give her a list of what annexations were accomplished, and why. Ms. Hillberg stated that there evidently is not any data available, so there is no telling what moves annexations. She added that, from experience, she feels that everyone recognizes that it is utilities and land use that moves annexations, and it has nothing to do with building on wetlands, or building in floodplains, or impeding the surface water. She stated that she agrees that a date would be a pertinent thing to put in, and that there should be working groups. She added that something that is this important to this area should not be put together so quickly and then rushed through. Ms. Hillberg said that the public venues had been very-well held, but there should be an accountability for more people to come, because there are a lot more people who are interested. She presented three maps. The first map was a Brevard County wetlands map, showing freshwater emergent wetlands in dark blue, and estuarine and marine deepwater in light blue. Ms. Hillberg said that she could not figure out anything from that map, because it looks like it is all wetlands. She said that she does not think that map is of any use. The second map was a St. Johns River Water Management District map, containing the most recent data that they have. Ms. Hillberg said that she thinks this map could be very useful. She added that the blue is wetlands, and you can see that they follow the St. Johns River, and they are in recognizable places. She added that none of these maps could be used as a legal document, but is the best they can do right now. Ms. Hillberg stated that she had wanted to find out how they decide what wetlands are, and she found out that they look at the soil, the plants, the flora and fauna, and then decide if all those things are conducive to a wetland, and if they are, then they decide it must be a wetland. She said that the third map is showing the soil hydrology in Brevard County. She pointed out that the dark blue is water, and the slash marks are hydric soils. She said that hydric soils do not mean that there is wetland; however, hydric soils are involved in wetlands. She added that if you have a wetland, you definitely have hydric soils, but you do not necessarily have to have a wetland in order to have hydric soils. She said that these soils represent a huge coverage of Brevard County and, in particular, the area down south on the other side of 95 has this soil in abundance. Ms. Hillberg said that she disagrees and thinks it needs more work. She added that she thinks that all of the people need to be involved, including developers, residents, and the County.

Nita Harris – Ms. Harris stated that her concern is that the wetlands are not clearly identified. She added that there are wetlands, and then there are wetlands that are certainly more environmentally sensitive than others. She said that she thinks, without a clearer definition, we are looking at more trouble than we have now. She added that environmentally sensitive wetlands are also involved in more flooding, and there is an impact there that is not clearly defined. She said that she does not totally disagree with all of the wording, but there needs to be considerably more work, and the County Commissioners should not rush to send this off without having more work. She stated that she did not want to be placed in a survey category.

Ernie Brown told the audience that he has a very tight deadline, and if anyone wants to submit written comments, he would like to receive them by the next day, if possible.

The forum ended at 7:20 p.m.