

ARTICLE V. - APPLICABLE WETLAND MITIGATION^[7]

DIVISION 1. - GENERALLY

Sec. 30-111. - Statutory authorization.

The legislature of the State of Alabama authorized local government units to adopt regulations designed to promote the public health, safety and general welfare of its citizenry consistent with its comprehensive plan, the City of Orange Beach does ordain as follows.

(Ord. No. 2005-855, Art. I(A), 1-18-2005)

Sec. 30-112. - Findings of fact.

- (1) The wetland resources of the City of Orange Beach do provide significant socioeconomic, environmental and recreational values to the City and its residents and visitors in the form of flood and storm damage protection, erosion control, groundwater recharge, water quality improvement and fish and wildlife productivity.
- (2) When local wetlands are seriously impacted or destroyed, these aforementioned values are lost to the city.
- (3) When wetlands are permitted by the relevant regulatory agencies to be mitigated in areas other than the city, these aforementioned values remain lost to the city.

(Ord. No. 2005-855, Art. I(B), 1-18-2005)

Sec. 30-113. - Statement of purpose.

The purpose of this subchapter is to prevent harm to the human and natural environment from water pollution, increased flooding and loss of groundwater supply that may result when natural wetlands are drained, filled or otherwise subjected to uses incompatible with public health, safety and welfare. This subchapter is intended to achieve these purposes by:

- (1) Providing a method of identifying wetlands within the planning and zoning jurisdiction of the City of Orange Beach;
- (2) Establishing regulations that permit reasonable economic use of wetlands consistent with sound wetlands conservation practices;
- (3) Guiding development adjacent to wetlands to prevent harm to wetlands and protect property from potential flood damage; and
- (4) Establishing procedures to assure compliance with the Federal Clean Water Act (33 U.S.C. Sec. 1251 et seq.) and with state regulations that may affect wetlands.

(Ord. No. 2005-855, Art. I(C), 1-18-2005)

Sec. 30-114. - Objectives.

The objectives of this article are to:

- (1) Protect the public health, safety and general welfare;
- (2) Minimize expenditure of public money for costly flood control projects due to adverse impacts to the

- natural flood waters storage capability of wetlands;
- (3) Minimize adverse impacts to the city's groundwater resources resulting from elimination of natural groundwater recharge areas (i.e., wetlands) in the city;
 - (4) Minimize adverse impacts to wildlife habitat resulting from the removal of wetland acreage from the city;
 - (5) Minimize the erosive effects of waves and wakes on the shorelines of the city that are protected naturally by estuarine wetland vegetation;
 - (6) Maximize the water quality improving capabilities of the city's wetlands;
 - (7) Ensure the valuable recreational qualities of wetlands remain viable for present and future enjoyment;
 - (8) Work toward the goal of establishing an Orange Beach Wetland Preservation Program;
 - (9) Provide for practicable alternatives to wetland mitigation through various mechanisms, contingent upon municipal council approval.

(Ord. No. 2005-855, Art. I(D), 1-18-2005)

Secs. 30-115—30-120. - Reserved.

DIVISION 12. - PROVISIONS

Sec. 30-121. - Lands to which this article applies.

This article shall apply to all land lying within the corporate limits of Orange Beach and south of the Intracoastal Waterway (ICW).

(Ord. No. 2005-855, Art. II(A), 1-18-2005)

Sec. 30-122. - Compliance.

No projects requiring-by the relevant federal and state regulatory agencies—wetland mitigation will be permitted unless the federal and state mitigation plan is to be executed in the City of Orange Beach south of the ICW and approved by majority vote of the municipal council, or an in-lieu fee payment is made to the city in order to replace the lost ecological or stormwater functions of the impacted wetland. An approvable mitigation plan consists of the following:

- (1) Deed restriction on future development in perpetuity of the mitigation tract;
- (2) The ratio of mitigation is, at a minimum, that required by the relevant federal and/or state agency(ies) with jurisdiction of such wetland(s);
- (3) Fee-title dedication of wetlands or transitional area to the City of Orange Beach or other entity approved by the municipal council;
- (4) "In-lieu" fee payments per acre (for the mitigation tract: that is, if a one-acre tract is proposed to be impacted and the approval ratio for mitigation is 2:1, then the in-lieu fee would be two times the per acre fee). The in-lieu fee rate will be determined by the municipal council;
- (5) An appropriate level of restoration work on another wetland tract owned by the city or some other council approved entity or restricted by deed, in perpetuity, at the council's discretion;
- (6) All projects located south of the Intracoastal Canal will be required to be mitigated south of the Intracoastal Canal;

- (7) All wetlands resulting from mitigation, preserved by mitigation or otherwise deed restricted, or remaining on tract after mitigation will be so designated by a deed restricting document approved by the City and recorded with the Judge of Probate of Baldwin County, Alabama.

An application to mitigate wetlands shall be made to the community development department for its review and recommendation to the city council. The application shall include, but not be limited to, the following information:

- (1) \$250.00 fee;
- (2) One copy of the completed application;
- (3) Three 24" x 36" copies, and then ten reduced size (not to exceed 11" x 17") copies of a signed and sealed topographic boundary survey of the mitigation site (including a legal description of the property) prepared by a professional land surveyor licensed in the State of Alabama;
- (4) One copy of a deed which states the ownership of the property;
- (5) A list certified by the Baldwin County Revenue Commissioner's office of the names and addresses of property owners within 500 feet of the proposed mitigation site. The applicant shall pay all costs associated with notification of landowners.

Upon receipt of the community development department's recommendation, the city council shall make a determination of acceptability.

The wetlands mitigation application form is available upon request from the Orange Beach department of community development.

Any proposed project or development, or component of a project or development which is properly the subject of a Corps of Engineers' Nationwide permit program and is not otherwise objectionable to any state agency with regulatory authority, shall be considered approved by right and does not require council consideration, provided all federal and state agency approvals are obtained. The following uses are examples of uses which require no council approval but may require other government agency permits or approvals.

- (1) Agricultural uses, except feed lots, but including general farming, grazing, gardening, sustained-yield forestry in accordance with a management plan approved by the state forester, nurseries and the erection and maintenance of wire agricultural fences;
- (2) Hunting, trapping and fishing, where not otherwise prohibited by law;
- (3) Parks, when left in a natural state, wildlife and natural preserves, recreational uses, including swimming, boating, natural-surface hiking and bridle paths and educational and scientific uses;
- (4) Uses incidental to the enjoyment of residential property; and
- (5) Maintenance of existing boat channels, provided that the applicant has received a permit from the relevant federal and state regulatory agencies and that dredging will be limited as follows:
 - (a) Dredging shall be located so as to minimize adverse impacts on vegetation;
 - (b) Dredging shall not adversely change water circulation;
 - (c) The size of the dredged areas shall be limited to the minimum required for boat ingress and egress;
 - (d) Dredged material shall not be disposed of within any lake, wetland or flood hazard areas or in any manner that is unlawful or would constitute a public or private nuisance; and
 - (e) Reserved.
 - (f) Maintenance and repair of existing streets, roads, highways and public utilities; provided that maintenance repair is done in such a way that avoids or minimizes adverse impacts on wetlands.

(Ord. No. 2005-855, Art. II(B), 1-18-2005)

Sec. 30-123. - Abrogation and greater restrictions.

Where this article and another conflict or overlap, whichever poses the more stringent restrictions shall prevail.

(Ord. No. 2005-855, Art. II(C), 1-18-2005)

Sec. 30-124. - Interpretation.

In the interpretation and application of this article, all provisions shall be:

- (1) Considered as minimum requirements; and
- (2) Liberally construed in favor of the governing body and where due to varying interpretation the city council shall be the final arbiter of the meaning of and application of said ordinance.

(Ord. No. 2005-855, Art. II(D), 1-18-2005)

Sec. 30-125. - Penalties for violation.

Any person, firm, partnership or corporation that violates any provision of this ordinance shall upon conviction be punished by a fine of not less than \$500.00 or imprisonment for a term not to exceed 30 days or both, at the discretion of the court for each day the violation continues.

(Ord. No. 2005-855, Art. II(E), 1-18-2005)

Sec. 30-126. - Impossibility of compliance.

In the event the federal or state regulatory wetland mitigation plan and permit is a practical impossibility to implement on property south of the ICW within the city, the applicant may petition the city council for approval of an alternate location for mitigation, but, if and only if, same is approved by the federal and/or state agencies which had previously approved the applicant's plan and issued a permit therefore and same is approved by any and all other federal, state and local agencies, the alternate plan may implicate.

(Ord. No. 2005-855, Art. II(F), 1-18-2005)

Sec. 30-127. - Special uses.

The following special uses may be permitted by special use permit so long as such special use is authorized in accordance with City of Orange Beach Ordinances provided that all required federal and state permits have been obtained prior to filing the application for the special use permit:

- (1) Structures accessory to permitted uses, provided that they do not obstruct water circulation, threaten water quality, create erosion hazards or disrupt significant wildlife habitat. Such structures include, but are not limited to:
 - (a) Temporary structures not intended for human habitation or sheltering livestock;
 - (b) Boat anchorages, moorings and piers;
 - (c) Walkways, benches, informational displays, directional signs, foot bridges and observation decks;

and

- (d) Residential wells.
- (2) Enhancement of wetlands to improve wildlife habitat in accordance with a plan recommended by City of Orange Beach planning commission approved by the city council.
 - (3) Public infrastructure, other than buildings and electrical substations, but including public utilities, streets, roads, and bridges, provided that:
 - (a) There is no practicable alternative route outside the wetland;
 - (b) The public need cannot be met by existing facilities or the modification thereof;
 - (c) The proposed facility is designed to allow the unimpeded circulation of water in the wetland, control runoff from paved surfaces in accordance with subsection (4), below, and otherwise minimize adverse impacts on the wetland;
 - (d) Any filling, excavating or draining must be necessary for the construction and maintenance of the proposed facility and done in a way that minimizes adverse impacts on the wetland;
 - (e) Erosion control measures are taken in accordance with the U.S. Department of Agriculture Natural Resource Conservation Service Field Office Technical Guide; and
 - (f) Underground utilities are installed in watertight conduits.
 - (4) Stormwater collection, provided that there is no practicable alternative site, outside the wetlands and that a wetland utilization plan is prepared by the applicant and approved by an engineer designated by the city of review such alternate plan(s) list steps for monitoring surface and subsurface water quality and a schedule of periodic maintenance of the wetland while in use as a stormwater collection facility; and further provide that net flow does not exceed the wetland's natural water storage capacity and that the stormwater undergoes pretreatment as described in subparagraph (b) below to prevent silt, debris, and chemical pollutants from entering the wetland.
 - (a) No special use permit (special exception) for stormwater collection use of a wetland shall involve decreasing the wetland's natural water storage capacity or placing more than 25 percent of the volume of a constructed collection basin in an existing wetland(s). No constructed collection basin shall occupy more than 10 percent of the area of an existing wetland. The natural outflow from a wetland shall not be changed so as to increase or decrease the normal pool elevation. Minor alteration of a wetland's contour may be permitted for the installation of facilities accessory to stormwater inflow and outflow.
 - (b) Pretreatment measures may include sedimentation basins, vegetated swales and buffer strips. Riprap made of natural rock may be used only where vegetation cannot control erosion. Storm drains may not discharge directly into a wetland. The lining of swales with paving materials shall not be permitted.
 - (c) No stormwater collection facility shall be constructed within a forested wetland, but overflow into a forested wetland may be permitted.
 - (d) No more than one constructed collection basin may be placed within a single, contiguous wetland without approval of the city council.
 - (e) Any portion of a wetland used for stormwater collection shall remain part of the wetlands.
 - (f) No special use permit (special exception) shall be granted for stormwater collection use of a wetland subject to divided ownership unless the applicant first obtains and records a city approved easement of use from the owners of all other affected properties, and complies with all other laws and ordinances of the city.

(g) A constructed outflow to a regulated municipal drain requires approval of the municipality.

(Ord. No. 2005-855, § II, 1-18-2005)

Sec. 30-128. - Administration/enforcement.

- (1) The director of community development shall enforce the provisions of this article in the manner and form and with the powers/provided by the City of Orange Beach and this article.
- (2) In addition to the enforcement powers and penalties for violation described, the city may institute civil proceedings in a court of competent jurisdiction to compel restoration of wetlands damaged in violation of this ordinance and or injunctive relief and any other relief at law or equity. Such action may also be instituted by anyone who is especially damaged by the violation of any portion of this article.

(Ord. No. 2005-855, Art. 3, 1-18-2005)

Sec. 30-129. - Variances.

- (1) The city council may grant variances from the provisions of this article provided the applicant established that:
 - (a) The grant of the proposed variance complies with all other City of Orange Beach ordinances; and
 - (b) The grant of the proposed variance will not adversely affect the water quality, volume of groundwater supply or flood storage capacity of the wetlands.
- (2) Variances shall give the minimum relief necessary to alleviate the applicant's hardship.
- (3) No variance shall permit stormwater runoff from a street, parking area or roof of an industrial or commercial building to be directed into a wetland without prior treatment.
- (4) Variances and special use permits may be granted only if the applicant demonstrates that all required federal and state permits have been obtained.
- (5) No variance or special use permit shall allow construction or dredging to disturb waterfowl breeding areas during breeding season or fish spawning areas during spawning season.
- (6) Whenever a variance or special use permit is granted for a use that may alter the grade or contour of land in a wetland, the City Council shall require that, upon completion of the proposed construction, the applicant will restore the land as closely as possible to its original grade and contour.
- (7) Where all or part of a wetland would be destroyed or substantially altered by a proposed development, the city council shall require mitigation by the applicant and his/her successors in interest according to the following standards:
 - (a) Replacement of lost wetlands at a ratio of not less than 2:1, providing the same or superior environmental benefits;
 - (b) Periodic maintenance of replacement wetlands shall be carried out by the applicant or be his/her successors in interest for a minimum of three years to control erosion, remove nuisance vegetation and assure the establishment and survival of predominantly hydrophytic vegetation;
 - (c) The city council may require the applicant to post a bond or other performance guarantee sufficient to assure the city that satisfactory completion or replacement wetlands;
 - (d) The city council may permit replacement at a ratio of not less than 2:1 in as close proximity as possible to the wetlands. All replacement wetlands shall be located within the corporate limits of the City of Orange Beach south of the ICW;
 - (e) The authorization of replacement wetlands shall not be used as a means of permitting avoidable losses

of natural wetlands.

Mitigation: Any wetland to be destroyed within the corporate limits of the City of Orange Beach south of the ICW shall be mitigated on the same island within the corporate limits, or, if approvable by the city council, an in-lieu fee payment made to the city, at a rate determined by the city council. The wetland created by mitigation must contain the same diversity of plants and animals as the wetland being destroyed as required by the corps of engineers and/or any state agency with regulatory authority.

Coordination: All requests to mitigate wetlands will be coordinated with and approval obtained from the corps of engineers, Alabama Department of Environmental Management (ADEM) and the U.S.

Application to mitigate wetlands shall be made to the community development department for its review and recommendation to the city council. Applicant shall provide application and ten maps (scale one inch: 100 feet) with three maps reduced size, not to exceed 11" x 17", and color photographs as needed. All costs associated with notification of landowners within 500 feet and the general public shall be paid by applicant. If applicant requests a special meeting of the city council, a fee of \$250.00 shall be paid. Upon receipt of the department of community development's recommendation, the city council shall make a determination of acceptability.

Permit: Upon approval of the city council to mitigate wetlands, the building official may issue a building or other permit. Any person, firm, partnership or corporation that destroys or damages wetlands without a permit shall be punishable per this ordinance.

(Ord. No. 2005-855, Art. 4, 1-18-2005)

Sec. 30-130. - Definitions.

Words used in this article are intended to have their common-sense meanings unless defined otherwise. The definitions and rules of construction that apply to the Orange Beach Zoning Ordinance are intended to apply to this article unless a different definition or rule is provided for.

- (1) *Adverse impact.* Anything that would destroy, harm, impair, diminish or degrade the value or utility of a wetland for pollution control, flood prevention, groundwater recharge or habitat for fish and wildlife.
- (2) *Approved wetland mitigation* means any wetland mitigation plan or proposal approved and permitted by the United States Army Corps of Engineers and/or the Alabama Department of Environmental Management.
- (3) *Development.* Any improvement or change to property brought about by human activity, including, but not limited to the construction of buildings and other structures, mining, dredging, filling, grading, paving, excavation or drilling.
- (4) *Fill material.* Any solid material that displaces water or reduces water-holding capacity.
- (5) *Hydrophytic vegetation.* Plant life growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content Plant species of this type are listed in: P. B. Reed, Jr., "National List of Plant Species that Occur in Wetlands (North Central Region 3), Biological Report 88(24), (Washington, DC: U.S. Fish and Wildlife Service, 1988).
- (6) *National Wetlands Inventory (NWI).* A series of maps produced by the U.S. Fish and Wildlife Service showing the location and classification of wetlands in standard topographical areas.
- (7) *Natural water storage capacity.* The maximum volume of water that a wetland can contain up to its

ordinary high water mark without alterations to its natural grade or contour.

- (8) *Ordinary high water mark.* A mark delineating permanent or periodic inundation or prolonged soil saturation sufficient to support hydrophytic vegetation, in general terms, it indices the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape.
- (9) *Periodic maintenance.* Ordinary inspection and repair of facilities accessory to use of a wetland. This includes erosion control and removal of silt and non-hydrophytic vegetation in ways that do not substantially disturb hydrophytic plant and animal life. Periodic maintenance does not include any modification of a wetland's contour or natural water storage capacity.
- (10) *Practicable alternative.* An alternative in terms of the size or location of a proposed development that would accomplish the development's basic purpose and would avoid or reduce adverse impact on a wetland.
- (11) *Significant public benefit.* Those uses of a public nature that promote and enhance the public health, safety or general welfare, and include significant recreational projects or uses of a regional benefit.
- (12) *Wetland.* An area that is inundated or saturated by surface or groundwater at a frequency and duration that under "normal circumstances supports a prevalence of hydrophytic vegetation. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites, including but not limited to, irrigation, drainage ditches, grass lined swales, canals, retention facilities, waste water treatment facilities, farm ponds, landscape amenities, or those wetlands unintentionally created as a result of the construction of a road, street or highway. Wetlands shall include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands.

(Ord. No. 2005-855, Art. 5, 1-18-2005)

Sec. 30-131. - Coordination and nonapplication.

- (1) Notwithstanding anything contained herein, no application made pursuant to this article for a building or other permit, or variance shall be accepted unless the applicant first obtains all necessary federal and state permits, approvals, waivers or letters of nonapplicability.
- (2) This article does not apply to:
 - (a) Artificially constructed ponds, drainage ditches, stormwater collection basins, gravel pits or waste treatment lagoons, except to the extent that such used are restricted or prohibited by this ordinance in a wetland, or same were required to be constructed as part of authority to construct within a wetland pursuant to this ordinance.
 - (b) Wetlands or portions thereof for which federal and/or state permits for fill were issued prior to the adoption of this ordinance or prior to the extension of the municipal city limits or planning jurisdiction over the area which the permits were issued, or to
 - (c) Any area or use excluded from local planning by federal or state law.

(Ord. No. 2005-855, Art. 6, 1-18-2005)

Secs. 30-132—30-150. - Reserved.