April 7, 2004

Mr. Jeff Jordan
Alabama Department of Conservation & Natural Resources
Lands Division, Coastal Section
23210 US Hwy 98 Suite B-1
Fairhope, AL 36532

RE: Wetland Mitigation Ordinance for the City of Orange Beach, Alabama

Dear Jeff:

Thank you for contacting the Mississippi-Alabama Sea Grant Legal Program with your question about the Wetland Mitigation Ordinance for the City of Orange Beach, Alabama. Please be aware that I am not licensed to practice law in Alabama, and this letter is not formal legal advice. Rather, this letter summarizes the Sea Grant Legal Program's understanding of the law applicable to your situation.

The Orange Beach ordinance adds a condition to building permits for projects within the city limits and south of the Intracoastal Waterway that require wetland mitigation under state and/or federal law: for such building projects, wetland mitigation must be performed within that geographic area. The purpose of the ordinance is to preserve for the city the wetlands functions that are lost when mitigation is performed elsewhere (for example, in a wetland mitigation bank that is spatially and ecologically distant from Orange Beach). These functions include enhancement of water quality and quantity, flood protection, wildlife habitat, erosion protection, and recreation.

Your question, as I understand it, is whether Orange Beach has the authority to add this wetlands mitigation condition to building permits by ordinance. The answer is yes, for the reasons discussed below.

***The police power***

The "police power" refers to the authority of state and local governments to establish and enforce laws protecting the public's health, safety, and general welfare.[1] It is an extremely extensive power. Under

[1] *See* BLACK'S LAW DICTIONARY 486 (pocket ed. 1996).

the police power, and consistent with state law, an Alabama municipality may enact "all appropriate ordinances for the protection of the peace, safety, health and good morals of the people affected thereby."[2] City ordinances requiring the procurement of a building permit prior to construction are valid exercises of the police power.[3] Although I could locate no Alabama case directly on point, it is generally accepted that this power extends to applying conditions to building permits if the conditions are themselves legitimate exercises of the police power.[4] Regulations protecting wetlands are considered to be legitimate exercises of the police power (although, again, I could find no Alabama case directly on point).[5] It follows that wetlands regulation, because it is legitimately subject to the city's police power, is valid as the subject of a condition on a building permit.

***Consistency with state law***

Municipal ordinances must be "not inconsistent with" state laws.[6] An ordinance is considered to be inconsistent with state law if it prohibits conduct that is otherwise permitted under state law, [7] or permits conduct otherwise prohibited under state law.[8] From our phone conversation I gathered that you are concerned there may be some conflict between the ordinance and state law. In my opinion, there is not.

The Orange Beach ordinance does not itself prohibit or permit any activity; it merely limits the city's discretion to grant building permits. If a building project requires wetland mitigation under state or federal law, the city may grant a building permit if the mitigation is to be done in Orange Beach, but not if the mitigation is to be done elsewhere. In other words, the city puts a condition on the building permit. A condition is not a prohibition.[9] The ordinance neither permits nor prohibits the filling of wetlands, and does not require mitigation that is not already required by the federal or state government.

In short, because the Orange Beach ordinance neither prohibits activity permitted by state law nor permits activity prohibited by state law, it is not inconsistent with state law.

***Takings***

Although we did not discuss the potential takings issue, I will address it briefly here because it often comes up in the context of government regulations relating to property use.

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[2] *City of Homewood v. Wofford Oil Co.*, 169 So. 288, 290 (Ala. 1936); Ala. Code § 11-45-1 (2004).
[3] *City of Robertsdale v. Baldwin County*, 538 So.2d 33, 36 (Ala. Civ. App. 1988); *see also* Ala. Op. Att'y Gen. No. 2001-094 (2001) (enforcement of flood damage prevention ordinance enacted as building code).
[4] *See, e.g., Robinson v. City of Seattle*, 830 P.2d 318, 331 (Wash. 1992) ("In the exercise of the police power regarding property use, such as in zoning and building permit requirements, government may legitimately impose many types of restrictions or development conditions on a landowner"); *Brous v. Smith*, 106 N.E.2d 503, 506-07, (N.Y. 1952) (upholding town law that conditioned granting of a building permit upon improvement of access road); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987) (recognizing validity of permit conditions for legitimate police power purposes).
[5] *See, e.g., Basile v. Town of Southampton*, 678 N.E.2d 489, 491 (N.Y. 1997) (regulation requiring special town approval for construction on wetlands was legitimate exercise of police power); *Zerbetz v. Municipality of Anchorage*, 856 P.2d 777, 782, n.5 (Alaska 1993) (listing cases).
[6] ALA. CONST. art. IV, § 89.
[7] *Ala. Disposal Solutions-Landfill, L.L.C. v. Town of Lowndesboro*, 837 So.2d 292, 302 (Ala. Civ. App. 2002).
[8] *E.g., Cabiness v. City of Tuscaloosa*, 104 So.2d 778, 780 (Ala. 1958).
[9] *See Nollan*, 483 U.S. at 836-37.

The Fifth and Fourteenth Amendments to the U.S. Constitution protect private property owners from having their property taken by the state for public use without compensation (a situation commonly referred to as a "taking"). The Constitution protects against more than just physical appropriation; the U.S. Supreme Court has declared, "if regulation goes too far, it will be recognized as a taking."[10]

A condition on a building permit is not usually considered to be a taking, as long as the condition is within the permitting authority's police power and advances legitimate state interests.[11] A regulation that denies the property owner "all economically viable use of his land" – by, for instance, entirely forbidding construction – may be a taking.[12] The Orange Beach ordinance, as explained above, is a legitimate exercise of the city's police power, and does not deny the permit applicant all economically viable use (in fact, it denies *no* economically viable use). The ordinance does not "take" property.

***Conclusion***

Jeff, it is my opinion that the Orange Beach Wetland Mitigation Ordinance is valid because it is a legitimate exercise of the city's police power, it is not inconsistent with state law, and it does not "take" private property for public use. I would be very happy to research any aspect of this issue in more detail, or to research any other legal issue you might have.

Thanks again for bringing your question to the Mississippi-Alabama Sea Grant Legal Program.

Sincerely,

Josh Clemons
Research Counsel
Mississippi-Alabama Sea Grant Legal Program

cc: Phillip West, City of Orange Beach

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[10] *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (emphasis added).
[11] *Nollan*, 483 U.S. at 834-37.
[12] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, the landowner was prohibited by the challenged state statute from building any permanent inhabitable structures on his land. The Orange Beach ordinance prohibits nothing.