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### BROAD AND CASSEL ATTORNEYS AT LAW

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## PRIMARY ISSUES AND ENVIRONMENTAL CONCERNS IN REAL ESTATE

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In the last 30 years, an unprecedented number of land and environmental laws and regulations have been enacted in the United States, especially in Florida. Although enacted with good intentions at the time, these laws are often complex and burdensome even for the most seasoned business executive. To help navigate this regulatory maze, more and more Florida businesses and property owners seek legal advice before acquiring and developing land, expanding business operations, or bring new business to Florida. Doug Rillstone is a partner at Broad and Cassel's Orlando office who focuses his practice on Environmental Law. He highlights the following substantive and procedural issues most frequently experienced by community, commercial, retail, and industrial developers in Florida.

### SUBSTANTIVE

In the 1800's, Florida was not considered a destination location and in fact, emblazoned on one of its first flags was "Leave Us Alone." In the last several decades, Florida has evolved to one of the most desirable states in the nation to live. With wonderful weather most of the year, plenty of jobs, and no state income tax, Florida's population growth is one of the highest in the nation with nearly 16.5 million residents (2001 U.S. Census Bureau estimate). Florida residents demand a high level of service, comfortable and affordable housing convenient to jobs, retail areas, recreational areas, schools, and plenty of roads. At the same time, Floridians have a strong desire to preserve Florida the way it "was."

In response to these market demands, community developers face enormous challenges. Substantive environmental issues that are commonly experienced with land development projects are wetlands, wildlife, water quality, and water supply.

### Wetlands

Nearly 30 to 50 percent of any given parcel of land in Central Florida is considered by regulatory agencies as wetlands. A landowner is required to obtain at least three different approvals from three separate regulatory bodies under three independent regulatory systems just to turn over a shovel full of dirt in a wetland. Agencies often hold the landowner to a high burden before developing in a "wetland" whether the wetland is in a wet cattle pasture in Polk County, a drainage area in an old orange grove, or a hardwood swamp adjacent to the Wekiva River.

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## **Wildlife**

Next to Hawaii and California, Florida has the highest number of state and federally protected wildlife species. Many of these species occur in the same areas Floridians seek to live - along the water, next to wooded wetlands, and in areas that are dry with good drainage. Under existing laws, the protections afforded to these species is often greater than protections provided for some landowners. Some protected species have recovered to a point where they can be found in urban environments. With the increases in these species' populations, there is a greater likelihood of conflict with real estate development. For example, who would have ever thought that a development project could come to a screeching stop because of the presence of a small and elusive reptile such as a skink? Wildlife issues have and will continue to be contentious because of the breadth of existing law. One need only look at the fallout from the lawsuits concerning the Florida Manatee and panther to see the impact on landowners, developers, homeowners, and boaters.

## **Water Supply and Quality**

Florida has historically been dependent on groundwater and surface water for three competing users - agriculture, people and the environment. Some people think Florida does not have enough water to meet existing water supply demands, much less meet the growing water supply needs for an expanding population. Others think the available water supply should be allocated first to the environment and agriculture, then for human consumption. Finally, others think Florida is not doing enough to protect the quality of Florida's existing water supply.

Clearly, a parcel's suitability for development may be compromised by the presence or suspected presence of a listed species, the upland/wetland mix, or in Central Florida, the proximity of the parcel to systems such as the Wekiva River, Econlockhatchee River or Tomoka River. For example, a parcel of land may have a manageable contamination issue, but its proximity to the Wekiva River may control its suitability for development. Environmental issues generally do not discriminate against land development projects on the basis of

the end land use.

As Florida's population continues to grow and mature, environmental issues associated with wetlands, wildlife, water supply and water quality will occur more frequently and with greater intensity.

## **PROCEDURAL**

### **Timing is Everything**

In addition to dealing with habitat concerns and substantive environmental issues, timing, predictability, and consistency are issues common to all land development projects in Central Florida. Those in the development industry in today's economic and regulatory environment need to know with consistency and predictability what approvals are necessary to develop a project. The criteria to obtain these approvals and how long it will take to get these approvals.

On most projects, it is essential to assemble a team of professionals to navigate a proposed project through the regulatory maze in a timely fashion. As my high school football coach often said "prior proper planning precludes poor performance." Up front planning on land development projects often leads to fewer delays and can often predict and lead to quicker resolution of truly substantive issues.

### **What is my responsibility as a business and/or landowner?**

Well, let me put it this way. If you buy or own contaminated property, the regulatory agencies are likely going to look to you to assess and clean up the contamination. If your employees are handling wastes that are considered hazardous, there may be harsh consequences if they are not handled and disposed of consistent state and federal regulations. In some instances, the storage of raw material on the ground without proper permits can lead to regulatory enforcement actions. Often ignorance will not be a defense with regulatory issues associated with contaminated property. If you have or acquire land that has wetlands or has the potential of being occupied by a protected species, you will have to either avoid these landscape features, incorporate the features in your development plan, if you have that flexibility, or be prepared to run the regulatory

gauntlet to impact these features. Once again, the statement that I did not know those features were present does not create any short-cuts when navigating the regulatory maze to obtain the necessary regulatory approvals.

It has been my experience that in most instances, the assemblage of a team of professionals and prior proper planning and preparation is generally the best elixir in navigating the regulatory maze. In addition, it is important to know more about the facts and applicable law before proceeding down any course, rather than being educated during the process by those who seek to regulate your business. Clearly identify and rank your objectives, and have a plan to achieve those objectives. Never be so foolish as to follow a plan blindly, but maintain the flexibility to respond with a change in course, if necessary. Finally, up front investigation of historical facts can some times reveal entitlements that have remained effective over the years and which may provide additional flexibility in achieving your objectives, whether your objective is to develop property, expand a business or respond to a continually changing regulatory environment.

Environmental issues remain a hot topic in Florida and will continue to be so as long as people choose Florida as their destination state or home. Once one issue is resolved, the battle shifts to a different front with new and more pressing challenges. The issues have become increasingly more complex in areas such as wildlife regulation, and, in some instances, have become adversarial to the point where the system becomes so complicated or burdensome it creates disincentives for long-term project planning and development.

*As Florida continues to grow, the challenge is to balance the needs of the environment and natural lands, while providing an exceptional climate in which to live, work and play. Broad and Cassel is committed to playing an important role in this important yet fragile balance. For additional information about Broad and Cassel's Land Use and Environmental Law Practice Group, visit our website at [www.broadandcassel.com](http://www.broadandcassel.com) or contact Doug Rillstone at 407-839-4200.*