



To: Landon Knapp, Coastal Resilience Program Manager, South Carolina Sea Grant

From: Amy Kraitchman, Ocean and Coastal Law Fellow

Re: Options for Local Wetlands Protection Ordinances in South Carolina (NSGLC-24-04-06)<sup>1</sup>

Date: November 6, 2024

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## Advisory Summary

The South Carolina Sea Grant Consortium (SCSGC) reached out to the NSGLC for assistance in understanding how the recent U.S. Supreme Court decision in *Sackett v. EPA* affects wetlands protection in the state. Specifically, SCSGC was interested in how the decision affects wetlands that no longer fall under federal protection and what options are available to municipalities that wish to provide local protections that exceed existing state and federal law. This advisory memo first discusses federal regulations of wetlands and the recent *Sackett* decision. It then examines existing wetlands regulations in South Carolina and examples of local wetlands protections in the Southeast region and across the country.

## Introduction

Wetlands, also commonly referred to as bogs, bayous, marshes, or swamps, are vital for protecting water quality and aquatic ecosystems.<sup>2</sup> Wetlands also help to control flooding and can be an important economic source to communities.<sup>3</sup> The United Nations estimates that about 1 in 8 people globally rely on wetlands in some way for their livelihood.<sup>4</sup> Even though wetlands are an important resource and ecosystem, many globally are under threat due to activities such as drainage and filling, and pollution.<sup>5</sup> In 2004, the U.S. Environmental Protection Agency (EPA) estimated that the U.S. “loses about 60,000 acres of wetlands each year.”<sup>6</sup>

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<sup>2</sup> Sarah Gibbens, *What Are Wetlands, and Why are They so Critical for Life on Earth?*, NAT’L GEOGRAPHIC (Feb. 24, 2023), <https://www.nationalgeographic.com/environment/article/what-are-wetland-ecosystems>.

<sup>3</sup> *Life Interlaced: Wetlands and People*, UNITED NATIONS, <https://www.un.org/en/observances/world-wetlands-day> (last visited Sept. 25, 2024).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; *Threats to Wetlands*, ENV’T PROT. AGENCY (2001), [https://www.epa.gov/sites/default/files/2021-01/documents/threats\\_to\\_wetlands.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/threats_to_wetlands.pdf).

<sup>6</sup> *Wetlands Overview*, ENV’T PROT. AGENCY (2004), [https://www.epa.gov/sites/default/files/2021-01/documents/wetlands\\_overview.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/wetlands_overview.pdf).



Despite declining numbers, it is estimated that there are about 290 million acres of wetlands in the United States today.<sup>7</sup> However, not all wetlands are protected equally. Certain wetlands that fall within the scope of the federal Clean Water Act (CWA) are protected by permitting programs managed by the EPA and U.S. Army Corps of Engineers (Corps). The responsibility for protecting the remaining wetlands, referred to often as non-jurisdictional wetlands, falls to the states. The level of protection offered by state programs can vary drastically depending on the state, leaving many non-jurisdictional wetlands without any protections from development or other threats.

Following the U.S. Supreme Court’s 2023 ruling in *Sackett v. EPA*,<sup>8</sup> the regulatory landscape changed as millions of acres of wetlands previously understood to fall within the scope of CWA lost federal protection.<sup>9</sup> In *Sackett*, the Supreme Court held that the EPA and Corps test for determining what waters and wetlands are considered “jurisdictional” was too broad and redefined is a “Waters of the United States” (WOTUS). This holding has upended wetlands protection across the country, as not just the EPA and Corps, but also state and municipalities react to the new, narrower, scope.

It is important to note that *Sackett*’s test for jurisdictional wetlands departs from the scientific understanding of what a wetland is. The general scientific understanding is that a wetland is any land “where water covers the soil, or is present either at or near the surface of the soil all year or for varying periods of time during the year, including during the growing season.”<sup>10</sup> The CWA does not rely on this definition for wetlands to determine jurisdiction. Instead, the Corps considers if a wetland is a WOTUS. The EPA and Corps The new definition of WOTUS as adopted by the U.S. Supreme Court in *Sackett* is not based on science but on statutory interpretations of laws and regulations. Legal definitions of wetlands vary considerably with some states and local jurisdictions incorporating more scientific understanding of wetlands and others relying on the federal approach.

In response to *Sackett*, some states have made efforts to strengthen existing programs or enact new protections. For example, in Colorado, the Governor recently signed HB24-1379 to “fill[] a regulatory gap created by” *Sackett*.<sup>11</sup> The new law requires the State Water Quality Control

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<sup>7</sup> *Wetlands and Streams Most in Danger After the U.S. Supreme Court’s Sackett v. EPA Ruling*, EARTHJUSTICE (May 14, 2024), <https://earthjustice.org/feature/sackett-epa-wetlands-supreme-court-map>.

<sup>8</sup> *Sackett v. EPA*, 598 U.S. 651(2023).

<sup>9</sup> EARTHJUSTICE, *supra* note 7.

<sup>10</sup> *What is a Wetland?*, ENV’T PROT. AGENCY (Apr. 25, 2024), <https://www.epa.gov/wetlands/what-wetland>. Specifically, “Wetlands are areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” *How Wetlands are Defined and Identified Under CWA Section 404*, ENV’T PROT. AGENCY (July 1, 2024), <https://www.epa.gov/cwa-404/how-wetlands-are-defined-and-identified-under-cwa-section-404>.

<sup>11</sup> Press Release, Gov. Jared Polis Signs Legislation to Protect Colorado’s Wetlands and Streams, Provide Regulatory Certainty for Businesses and Individuals, Colo. Dep’t Pub. Health & Env’t (May 30, 2024),



Commission to create a new dredge and fill permitting program by December 31st, 2025 in order to protect vulnerable wetlands and waterways from future development activities.<sup>12</sup> However, other states have moved in the opposite direction, rolling back state wetlands protections to align with federal jurisdiction. For example, earlier this year the Indiana Governor signed House Bill 1383, which stripped protections from some wetlands by reclassifying them as “Category II” wetlands.<sup>13</sup> This change will allow for more land development to occur on parcels with isolated wetlands.<sup>14</sup>

For other states, the status of state wetlands protections are still unclear. In North Carolina, for example, the 2023 Farm Bill removed state protections for non-jurisdictional wetlands and left millions of acres vulnerable.<sup>15</sup> Despite the Governor initially vetoing the bill, the Farm Bill still successfully passed out of the general assembly in June 2023.<sup>16</sup> Then in February 2024, the North Carolina Governor attempted to restore some protections for these wetlands through Executive Order No. 305 (EO 305) which set targets to restore and protect wetlands and direct agencies to adopt “no net loss” policies to protect wetlands on state lands.<sup>17</sup> By 2040, the Executive Order hopes to conserve and restore millions of acres of wetlands.<sup>18</sup> However, it is unknown if the legislature will attempt to overturn the protections provided by EO 305 in the 2025 legislative session. As state legislatures and regulators grapple over what state wetland protections look like, it is left up to counties, cities, towns, and the public to advocate for greater wetlands protection.<sup>19</sup>

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<https://cdphe.colorado.gov/press-release/gov-jared-polis-signs-legislation-to-protect-colorados-wetlands-and-streams-provide>.

<sup>12</sup> *Id.*; *HB24-1379 Regulate Dredge & Fill Activities in State Waters*, COLO. GEN. ASSEMBLY, <https://leg.colorado.gov/bills/hb24-1379> (last visited Sept. 26, 2024).

<sup>13</sup> Casey Smith, *Bill Further Rolling Back Indiana Wetland Protections is First to Land on Governor’s Desk*, IND. CAP. CHRON. (Feb. 7, 2024), <https://indianacapitalchronicle.com/2024/02/07/bill-further-rolling-back-indiana-wetland-protections-is-first-to-land-on-governors-desk/>. In Indiana, Class III wetlands have the most protection and Class I wetlands do not have any protections. *Id.*

<sup>14</sup> *Id.* A Class II wetland is one that “supports moderate habitat or hydrological functions,” and can be isolated if it “is dominated by native species” but does not have “rare, threatened or endangered species.” *State Regulated Wetland Class Determination*, IND. DEP’T OF ENV’T MGMT. 1 (2021), [https://www.in.gov/idem/wetlands/files/state\\_regulated\\_guidance\\_class\\_determination.pdf](https://www.in.gov/idem/wetlands/files/state_regulated_guidance_class_determination.pdf) (emphasis omitted).

<sup>15</sup> *Senate Bill 582/ SL 2023-63*, N.C. GEN. ASSEMBLY, <https://ncleg.gov/BillLookUp/2023/S582> (last visited Oct. 30, 2024).

<sup>16</sup> *Id.*; Walker Lingston, *Numerous N.C. Wetlands Lose Protections Under Farm Act and SCOTUS Case*, DAILY TAR HEEL (Sept. 5, 2023), <https://www.dailytarheel.com/article/2023/09/city-north-carolina-wetlands-farm-bill-environmental-impacts>.

<sup>17</sup> N.C. Exec. Order No. 305 (2024). State agencies were directed to “strive to protect, enhance, and fully restore equality and extent of North Carolina’s forested lands and wetlands in accordance with a goal of “no-net-loss” and to identify lands that could qualify for federal protections. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See, e.g.*, Charles Swenson, *Call For County Wetlands Ordinance Follows Supreme Court Ruling*, COASTAL OBSERVER (Jun. 1, 2023), <https://coastalobserver.com/call-for-county-wetlands-ordinance-follows-supreme-court-ruling/> (discussing a call in Georgetown County to include a “resilience element” to the county’s comprehensive plan to protect wetlands); Press Release, Conservation Groups Move to



Wetlands protections at the state and local levels take their cue from the CWA and federal protections. Based on federal jurisdiction, states and municipalities can shape their wetlands regulations to protect non-jurisdictional wetlands that are still crucial for ecosystem health. Thus, understanding the existing federal regulations is important for understanding where protections are needed to fill regulatory gaps.

## Federal Regulation of Wetlands

### I. Legal landscape pre-*Sackett*

Under the CWA, the EPA and Corps have jurisdiction over “navigable waters” and must protect them from pollution from point sources, such as pipes and drainage ditches.<sup>20</sup> “Navigable waters” are defined in the Clean Water Act as “waters of the United States, including the territorial sea” (WOTUS). Determining what waters are covered under WOTUS, however, has been difficult. The U.S. Congress did not define WOTUS in the CWA and previous attempts by EPA and Corps to define it have been controversial.

Since the 1970s, a large point of contention over WOTUS has been over the extent to which wetlands and other non-navigable waters (i.e., ponds, streams, intrastate rivers and lakes) should fall under CWA jurisdiction. Since the first publication of a WOTUS regulation, the agencies and Supreme Court have gone back-and-forth over the issue in multiple cases, starting with *United States v. Riverside Bayview Homes, inc. (Riverside Bayview)* in 1985.<sup>21</sup>

In *Riverside Bayview*, the Supreme Court upheld the Corps’ 1977 rule that asserted jurisdiction over all wetlands that abutted jurisdictional waters (e.g. navigable waters) and had a significant effect on navigable waters’ quality and aquatic ecosystems.<sup>22</sup> However, a few years later, the Supreme Court refused to uphold a regulation that attempted to assert federal jurisdiction over wholly isolated waters. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, the Corps attempted to extend their jurisdiction under the CWA to isolated intrastate wetlands and ponds that are not adjacent to traditional navigable waters since they are used by federally protected migratory birds.<sup>23</sup> The Supreme Court struck down this rule

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Defend Remaining Federal Wetlands Protections From Acts, Southern Environmental Law Center (May 8, 2024), <https://www.southernenvironment.org/press-release/conservation-groups-move-to-defend-remaining-federal-wetlands-protections-from-attack/> (announcing a group of environmental non-profits motioning to intervene in *White v. EPA*—a case challenging the EPA’s and Corps’ 2023 rule following *Sackett*).

<sup>20</sup> The CWA requires permits to discharge pollutants from point sources and mandates EPA and Corps to implement programs such as Total Maximum Daily Loads (TMDLs) and establishing water quality standards. EPA and the Corps work together to determine jurisdiction and ensure compliance with the CWA.

<sup>21</sup> *United States v. Riverside Bayview Homes, inc.*, 474 U.S. 121 (1985).

<sup>22</sup> *Id.* at 139.

<sup>23</sup> *Solid Waste Agency of Northern Cook County v. U.S.*, 531 U.S. 159 (2001).



because they found that it exceeded the Corps' authority under the CWA and because regulating wholly intrastate waters was a state power.<sup>24</sup>

Prior to *Sackett* the most recent case to consider CWA coverage of wetlands was in *Rapanos v. United States*.<sup>25</sup> *Rapanos*, address the Corps assertion of jurisdiction over wetlands that were tributaries to WOTUS when they output into navigable waters, even when the wetland did not abut—not adjacent to—navigable waters.<sup>26</sup> The Court struck down this rule, again finding that the agency exceeded its authority under the CWA. Out of *Rapanos* came the “significant nexus” test.<sup>27</sup> Under the significant nexus test, a wetland that “either alone, or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity” is considered to be a WOTUS, and thus covered under the CWA.<sup>28</sup>

Following *Rapanos*, the Corps and EPA used the significant nexus test to guide their case-by-case jurisdictional determinations. The agencies also issued a new regulation in January 2023 incorporating this test into their definition. The 2023 WOTUS definition encompassed all navigable waters, interstate waters, and territorial waters, their tributaries and all adjacent wetlands.<sup>29</sup> Wholly intrastate lakes, ponds, streams, and wetlands would be considered WOTUS when they have either a continuous surface connection or a significant nexus to a WOTUS. Essentially, all waters that the Corps and EPA determine connect to WOTUS were considered jurisdictional waters, even if the connection was not visible at the surface.

## II. *Sackett v. EPA* (2023)

The *Sackett* case centers around the Idaho property of Michael and Chantell Sackett. In 2004, the Sacketts purchased their property and began to backfill it in order to build a home.<sup>30</sup> After learning of their actions, the EPA told the Sacketts that they had violated the CWA by failing to obtain a permit prior to their developments activities and ordered them to undertake restoration activities immediately in order to restore the wetland, or face civil penalties.<sup>31</sup> The Sacketts argued that the EPA lacked jurisdiction to assert civil penalties over them because wetlands are not WOTUS; EPA claimed that they did have jurisdiction over the wetlands on the Sackett's property because they connected to an “unnamed tributary” that fed into the Priest Lake, a navigable water.<sup>32</sup> Both the District Court and the Ninth Circuit Court of Appeals agreed with the

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<sup>24</sup> *Id.* at 174.

<sup>25</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>26</sup> *Id.* at 727.

<sup>27</sup> The court did not have a majority opinion in *Rapanos*. Instead, there was a 4-1-4 split of the Justices. Justice Scalia wrote the plurality opinion. Justice Kennedy, writing for himself, created the significant nexus test for determining tributaries of WOTUS.

<sup>28</sup> *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in judgement).

<sup>29</sup> Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004, 3143 (2023).

<sup>30</sup> *Sackett*, 598 U.S. 651, 662 (2023).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 662–663.



EPA's determination under the significant nexus test.<sup>33</sup> The Sacketts appealed to the decision to the Supreme Court.

The second time the case made it to the Supreme Court, the court stated that instead of relying on the significant nexus test, the Corps should have been using a different test from the *Rapanos* case. The majority asserted that the proper jurisdictional test is whether the wetlands are indistinguishable from WOTUS—meaning only wetlands adjacent to other jurisdictional waters would be covered.<sup>34</sup> In their reasoning, the court relied on Congress's use of “navigable waters” in the CWA, as a sign of their intent to limit federal jurisdiction only to traditional navigable waters and their adjacent tributaries and wetlands.<sup>35</sup> The Court outlined two situations where assertion of federal jurisdiction over a wetland would be proper: (1) when the wetland is adjacent to or abuts a WOTUS or (2) when there is a continuous surface connection between a wetland and traditional navigable water in such a way where you cannot determine where the wetland ends and where the navigable water begins.<sup>36</sup> Based on this determination, the wetlands on the Sackett's property are not WOTUS.

As this interpretation of the WOTUS definition is much narrower than prior definition, many wetlands will likely fall outside the scope of the CWA and the associated federal protections. Wetlands that the Corps had previously determined were jurisdictional because of how they affect water quality and ecosystems, will no longer be entitled to protections if they do not have continuous surface connections. These wetlands are now left vulnerable to development unless they are protected by state or local law.

### III. Corps Charleston District Office Jurisdiction Determinations

Corps regional offices—such as the Charleston District Office in South Carolina—conduct jurisdictional determinations of wetlands and other waterbodies for development permit applications and planning purposes.<sup>37</sup> These determinations are optional and can be requested by parties to assist with the permitting process. EPA recommends landowners to request jurisdictional determinations prior to building on their property.<sup>38</sup>

#### a. Bluffton Jurisdictional Determinations

Prior to *Sackett*, the Corps had published seven jurisdictional determinations for properties in Bluffton. In all but one, the Corps determined that the wetlands surveyed were not WOTUS.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 674.

<sup>35</sup> *Id.* at 677.

<sup>36</sup> *Id.* at 684.

<sup>37</sup> *Jurisdictional Determinations and Delineations*, ARMY CORPS OF ENG'RS, <https://www.sac.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations-and-Delineations/> (last visited Aug. 26, 2024).

<sup>38</sup> *Sackett*, 598 U.S. 651, 670 (2023).



These determinations suggest that assertions of CWA jurisdiction in the area were rare prior to *Sackett*.

- In 2016, field observation of a 2.07-acre wetland and 3 smaller wetlands ranging in .0 to .31 acres lead to the determination that they were all not covered under the CWA.<sup>39</sup> The 3 small wetlands were considered non-jurisdictional because they were all small, isolated depressions that resulted from development and did not have outlets for the water to flow out of and connect to navigable waters or WOTUS. Similarly, the larger wetland was also a result of construction/excavation activity from development that filled up with water after being abandoned and did not have any connection to navigable waters or WOTUS.
- In 2018, field observation of an upland 1.938-acre wetland led to the determination it was not navigable or a WOTUS.<sup>40</sup>
- In 2018, a field observation determined that a .25-acre wetland was not jurisdictional because the wetland was surrounded by upland development, could only receive water via runoff, and did not have an outlet or surface connection to a WOTUS or other navigable water.<sup>41</sup>
- In 2021, a field determination of a site that had 1 stream, 9 wetlands, and 6 ponds and determined that all of them were excluded from CWA jurisdiction. The stream was excluded because it did not connect to any protected waters, nor did it show any indication that it flowed naturally. The Corps could not determine if the stream received water from another source or if it only responded to receiving water from heavy precipitation. The 9 wetlands ranged in size of .13 to 2.39-acres were non-jurisdictional because the Corps could not determine if they abutted or otherwise connected to navigable waters or WOTUS. None of the wetlands met the criteria for “adjacent” wetlands. Lastly, the 6 ponds, ranging in size from .06 to .44-acres, were determined to be construction depressions/excavations or artificial “stormwater control feature” that it did not meet the criteria for a confined WOTUS.<sup>42</sup>

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<sup>39</sup> *Approved Jurisdictional Determination Form: USC Bluffton Campus Expansion*, ARMY CORPS OF ENG’R (2016), <https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/April2016/SAC-2016-0429-Form-1-2of2-USC-Bluffton-Campus-Expansion.pdf>.

<sup>40</sup> *Approved Jurisdictional Determination Form: Bluffton Storage Road Project Site*, ARMY CORPS OF ENG’R (Jan. 25, 2018), [https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/January\\_2018/SAC-2017-01930\\_Bluffton\\_Storage\\_Site.pdf?ver=2018-02-01-123632-967](https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/January_2018/SAC-2017-01930_Bluffton_Storage_Site.pdf?ver=2018-02-01-123632-967).

<sup>41</sup> *Approved Jurisdictional Determination Form: Boys & Girls Club of Bluffton*, ARMY CORPS OF ENG’R (Apr. 2018), [https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/April\\_2018/SAC-2018-00069\\_Boys\\_and\\_Girls\\_Club\\_of\\_Bluffton.pdf?ver=2018-04-27-082212-437](https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/April_2018/SAC-2018-00069_Boys_and_Girls_Club_of_Bluffton.pdf?ver=2018-04-27-082212-437).

<sup>42</sup> *Approved Jurisdictional Determination Form: Dominion Energy Okatie to Bluffton*, ARMY CORPS OF ENG’R (Jan. 13, 2021), [https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/January\\_2021/SAC-2020-01594\\_Dominion\\_Energy\\_Okatie\\_to\\_Bluffton\\_Tie\\_Transmission\\_Line.pdf?ver=03H7kwhDNcZ\\_iC8ns0JHWg%3d%3d](https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/January_2021/SAC-2020-01594_Dominion_Energy_Okatie_to_Bluffton_Tie_Transmission_Line.pdf?ver=03H7kwhDNcZ_iC8ns0JHWg%3d%3d).



- In 2021, a .1-acre stormwater pond was excluded from CWA jurisdiction because it was a constructed depression/ excavation that was constructed entirely “upland.”<sup>43</sup>

Only one field observation resulted in a jurisdictional wetland determination:

- In 2017, a wetland was determined to be jurisdictional because it abutted an unnamed perennial tributary, had a continuous surface connection to a larger wetland system and the unnamed tributary, and the unnamed tributary flowed about 2 miles before dumping into the Atlantic Ocean.<sup>44</sup>

Under the *Sackett* ruling, this wetland most likely would no longer be considered jurisdictional since it does not have a continuous surface connection to a traditional navigable water. While the Corps did find a surface water connection through the tributary system, it’s not connected in a way where you cannot determine where the wetland ends and where the navigable water begins. The description of the flow of water from the wetland into the unnamed tributary that connects to the ocean—a traditional navigable water—implies that whoever was doing the field observation could tell where one waterbody ended and the other began.

Since *Sackett*, the Corps have returned to their “pre-2015” definition of WOTUS. Part of the reason why they use the pre-2015 definition is because the Charleston District Corps Office cannot use the 2023 amended regulations in South Carolina due to ongoing litigation.<sup>45</sup> However, as the Corps and EPA create new regulations that comply with *Sackett*, this process is likely to change again.

### **South Carolina wetlands protection**

States can choose to enact additional protections that go beyond federal wetlands regulations. Prior to *Sackett*, about half of the states have enacted some type of state-level wetlands protection.<sup>46</sup> These protections varied in coverage and approach (i.e., monitoring, restoration

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<sup>43</sup> *Approved Jurisdictional Determination Form: Bluffton Senior Assisted Living Expansion*, ARMY CORPS OF ENG’R (Jan. 13, 2021), [https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/March\\_2021/SAC-2020-01395\\_Bluffton\\_Senior\\_Assisted\\_Living\\_Expansion\\_Tract\\_Beaufort\\_County.pdf?ver=b5V9tlBvvxK4iqe wi7J7dg%3d%3d](https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/March_2021/SAC-2020-01395_Bluffton_Senior_Assisted_Living_Expansion_Tract_Beaufort_County.pdf?ver=b5V9tlBvvxK4iqe wi7J7dg%3d%3d).

<sup>44</sup> *Approved Jurisdictional Determination Form: Bluffton Parkway and Buck Island Tract*, ARMY CORPS OF ENG’R (Nov. 14, 2017), [https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/November2017/SAC-2006-00601\\_Bluffton\\_Pkwy\\_Buck\\_Island\\_Tract.pdf?ver=2017-11-17-080434-990](https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/November2017/SAC-2006-00601_Bluffton_Pkwy_Buck_Island_Tract.pdf?ver=2017-11-17-080434-990).

<sup>45</sup> *E.g., Approved Jurisdictional Determination in Light of Sackett v. EPA: Weehaw Tract*, ARMY CORPS OF ENG’R 1 (May 2024), [https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/May\\_2024/SAC-2007-00528\\_Weehaw\\_Tract.pdf?ver=JlJ0dbipQbGHccXPc3M8Rw%3d%3d](https://www.sac.usace.army.mil/Portals/43/docs/regulatory/jds/May_2024/SAC-2007-00528_Weehaw_Tract.pdf?ver=JlJ0dbipQbGHccXPc3M8Rw%3d%3d).

<sup>46</sup> Alex Brown, *Half the Nation’s Wetlands Just Lost Federal Protection. Their Fate is up to States.*, IDAHO CAPITAL SUN (Jun. 16, 2023), <https://idahocapitalsun.com/2023/06/16/half-the-nations-wetlands-just-lost-federal-protection-their-fate-is-up-to-states/>.





activities, water quality regulations).<sup>47</sup> As previously discussed, many states have since changed their wetlands regulations. Wetlands regulations in South Carolina has been limited.<sup>48</sup> Development activities require a permit from the South Carolina Department of Environmental Services when they occur within designated critical areas and will impact wetlands, dunes, tidelands, beaches, and coastal waters.<sup>49</sup> Additionally, Wetlands located in the coastal zone may receive some secondary protections as part of federal consistency reviews conducted pursuant to the Coastal Zone Management Act.<sup>50</sup> Wetlands located outside of these zones, receive limited protections. Wetlands located outside of these areas are only protected under CWA—when jurisdictional—or local ordinances.

In 2012, the South Carolina Legislature established the Isolated Wetlands and Carolina Bays Task Force (Task Force) “to review, study, and make recommendations concerning issues related to isolated wetlands and Carolina Bays in South Carolina.”<sup>51</sup> The Task Force issued its report in 2013, which provided recommendations to the legislature of actions they could take to protect isolated wetlands and Carolina Bays. The Task Force made recommendations of how the legislature could strengthen existing voluntary conservation programs to include protections for Carolina Bays and isolated wetlands, which were at the time unprotected. The Task Force also examined the existing state and federal regulatory landscape, but did not make any comments or suggestions on either.<sup>52</sup>

In their report, the Task Force specifically examined how existing tax credits, conservation banks, and a heritage fund could be adapted to include Carolina Bays, isolated wetlands, and smaller wetlands that are ecologically important. These programs either provide funds to municipalities and state agencies to purchase wetlands from landowners or provide tax credits to landowners who donate their land to municipalities in order to preserve wetlands in a land trust. For the most part, these programs require cooperation between the state, municipalities,

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<sup>47</sup> *State Wetland Protection: Status, Trends & Model Approaches*, ENV’T L. INST. (2008), [https://www.eli.org/sites/default/files/eli-pubs/d18\\_\\_06.pdf](https://www.eli.org/sites/default/files/eli-pubs/d18__06.pdf).

<sup>48</sup> *Wetlands*, S.C. DEP’T OF NAT. RES., <https://www.dnr.sc.gov/wildlife/wetlands/> (last visited Oct. 17, 2024).

<sup>49</sup> *Id.* Additionally, about 20 wetlands are managed by the agency through different state preservation programs. *Id.*

<sup>50</sup> Coastal Zone Consistency – Federal, S.C. DEP’T OF ENV’T. SERV., <https://www.des.sc.gov/programs/bureau-coastal-management/beachfront-management/coastal-zone-consistency-federal> (last visited Oct. 31, 2024).

<sup>51</sup> *Isolated Wetlands and Carolina Bays Task Force*, S.C. HOUSE (Aug. 27, 2013), <https://www.scstatehouse.gov/CommitteeInfo/IsolatedWetlandsandCarolinaBaysTaskForce/August272013Meeting/Final%20Task%20Force%20Report.pdf>. The Task Force was established to produce definitions and standards for Carolina Bay and isolated wetlands and to make recommendations on how to strengthen existing protections. However, there is no indication that any actions were taken based on their findings.

<sup>52</sup> *Id.* at 5–6. At the time, the Department of Environmental Services had a guide to wetlands regulation, however it is no longer publicly available.



landowners, and non-profits.<sup>53</sup> Land trusts can be especially beneficial for lands or waterways that are outside the scope of state or federal jurisdictional protections, however each program has its own limitations.<sup>54</sup>

South Carolina's tax code includes two tax credits that allow landowners to donate land to municipalities in order to create land trusts.<sup>55</sup> One tax credit is specifically for conservation of lands generally, and the other is for land that is home to endangered species. Under the general credit, a landowner may gift "land for conservation or for a qualified conservation contribution" in exchange for a tax credit.<sup>56</sup> The amount credit depends on the amount of land or wetland donated. The state or local government cannot acquire the land via eminent domain or by purchasing the land from the owner. Additionally, not all landowners with wetlands can apply for the tax credit.<sup>57</sup> There is also a tax credit for land donated for "certified management areas for endangered species . . . or for nongame and wildlife species."<sup>58</sup> This credit operates in a similar way to the other one. These programs can protect wetlands but are not something that a municipal can force or require landowners to use. Additionally, it is possible that wetlands in Bluffton, or similar municipalities, would not qualify for these tax credits, or, if they do qualify, are small enough that a landowner would not feel incentivized to take part in the tax credit program. However, it is good to know about these tax credits in order to inform residents about them and encourage their use for those who may be looking to sell their land but do not want it developed.

South Carolina also has a Heritage Trust Program.<sup>59</sup> Under this program, the state works with The Nature Conservancy to protect natural and cultural resources. The heritage program operates out of the State Department of Natural Resources and requires approval from legislative committees, the State Budget and Control Board, and others in order to receive funding to acquire property under the program.<sup>60</sup> Additionally, the process of acquiring land under the program takes a long time, about "six months to several years" once funding is approved.<sup>61</sup> Between the process of getting approval and actually acquiring the land, the Heritage Trust is a longer process and may not be feasible for municipalities to solely rely on for wetlands protection. Additionally, since the program operates more at the state level, municipalities

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<sup>53</sup> *Wetlands Protection: Partnering with Land Trusts*, ENV'T PROT. AGENCY (2021), [https://www.epa.gov/sites/default/files/2021-01/documents/wetlands\\_protection\\_partnering\\_with\\_land\\_trusts.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/wetlands_protection_partnering_with_land_trusts.pdf).

<sup>54</sup> *Id.*

<sup>55</sup> S.C. Code Ann. §§ 12-6-3515; 12-6-3520.

<sup>56</sup> S.C. Code Ann. § 12-6-3515(C)(1). Specifically, the landowner must donate the "fee simple title to real property." *Id.* at § (B)(1)(b).

<sup>57</sup> Relevant for this report, wetlands in intertidal zones are not included. In their report, the Task Force recommended the inclusion of "Non-jurisdictional, isolated wetlands and Carolina Bays," however that recommendation was not adopted by the legislation. S.C. HOUSE, *supra* note 51, at 12.

<sup>58</sup> S.C. Code Ann. § 12-6-3520.

<sup>59</sup> S.C. Code Ann. §§ 51-17-10–150.

<sup>60</sup> *The Heritage Trust Program, Est. 1974*, S.C. HERITAGE TR., <https://heritagetrust.dnr.sc.gov/history.html> (last visited Oct. 25, 2024).

<sup>61</sup> *Id.*



interested in protecting lands would not have any say in how the land is protected or which lands are protected.

If a municipality does decide to pursue a land trust, there is potentially funding available through the South Carolina Conservation Banking Act.<sup>62</sup> The Conservation Bank Act provides funds to state agencies, municipalities, counties, and charitable non-profits to acquire land from “willing sellers” for the preservation of and public access to specific habitats and ecosystems.<sup>63</sup> In order to receive funds, an applicant must meet certain criteria set out in the act.<sup>64</sup> If approved, the grants or loans can also be used for conservation easements, or easements to protect and provide public access.<sup>65</sup> However, they cannot be used to operate, maintain, or manage acquired land or to “eliminate or unreasonably restrict hunting, fishing, farming, forestry, timber management, or wildlife habitat management.”<sup>66</sup> This fund could be an option for a municipality, however the guidance on if a wetland qualifies is unclear. While one of the factors considered is the value of a wetland or riparian habitat, it does not provide any additional information on what wetlands fall into that category.<sup>67</sup>

### **Beaufort County Resource Protection Standards**

Beaufort County’s Community Development Code (CDC) has a natural resources standard that applies to tidal and non-tidal wetlands.<sup>68</sup> Under the standard, all property that is in unincorporated parts of the County must submit a Natural Resource Survey prior to development approval.<sup>69</sup> Planned United Developments, single family homes and duplexes, “family compounds,” and some subdivisions are exempt from submitting a natural resources survey.<sup>70</sup> If the development is approved, steps must be taken to protect the natural resources present.

Tidal and non-tidal wetlands are undefined in the CDC. A resource protection barrier is required around resources, similar to a buffer.<sup>71</sup> The barrier must be four-feet high and “prevent encroachment by people and vehicles.”<sup>72</sup> No dirt, building material, or debris shall be placed or disposed of within the barrier.<sup>73</sup> Resource protection barrier is otherwise undefined in the CDC.

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<sup>62</sup> S.C. Code Ann. § 48-59-20.

<sup>63</sup> *Id.* at § 48-59-20(3), (5).

<sup>64</sup> *Id.* at § 48-59-70(D)

<sup>65</sup> *Id.* at §§ 48-59-140, 100(A).

<sup>66</sup> *Id.* at §§ 48-59-110, 130.

<sup>67</sup> *Id.* at § 48-59-70(D)(2) (“value of proposal for the conservation of riparian habitats, wetlands, water quality, watersheds of significant ecological value, critical aquifer recharge areas, estuaries, bays or beaches.”). Additional requirements for applications are found at 48-59-70(I).

<sup>68</sup> *Natural Resources Standard*, BEAUFORT CNTY,

[https://library.municode.com/sc/beaufort\\_county/codes/community\\_development\\_code?nodeId=ART5SUZO\\_DIV5.11REPRST](https://library.municode.com/sc/beaufort_county/codes/community_development_code?nodeId=ART5SUZO_DIV5.11REPRST) (last visited Nov. 5, 2024); 5.11.20.

<sup>69</sup> 5.11.20(A).

<sup>70</sup> *Id.* at (C).

<sup>71</sup> *Id.* at (F)(1).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*



Within a tidal wetland, only water-dependent activities and uses are allowed, such as boardwalks and observation decks.<sup>74</sup> All development must have prior approval from the Corps and State Office of Resource Management.<sup>75</sup> Similarly, only boardwalks, trails and access paths, and sewer and stormwater facilities are allowed in non-tidal wetlands.<sup>76</sup> Some structures are allowed on non-tidal wetlands when it is determined that they cannot be located elsewhere.<sup>77</sup> If a non-tidal wetland is filled, then mitigation is needed.<sup>78</sup>

While this standard only applies to unincorporated land in the county, it is good to know because some land outside the incorporated areas of towns within the county, such as Bluffton, could be affected by this regulation. Sensitive areas along the borders of town and county jurisdiction may be impacted as the CDC does not prohibit many development activities.

### **Bluffton’s Existing Flood Ordinance**

The Town of Bluffton adopted a flood damage ordinance in 2008.<sup>79</sup> The adoption and enforcement of floodplain management regulations is one of the requirements of the National Flood Insurance Program. The purpose of the ordinance is to “protect human life and health,” minimize property damage in flood areas, and encourage construction practices that minimize losses in these areas.<sup>80</sup> The ordinance applies to all areas of special flood hazard, as identified by the Federal Emergency Management Agency (FEMA).<sup>81</sup> A special flood hazard area is anywhere where “the land in the floodplain within a community [is] subject to a one percent or greater chance of being equaled or exceeded in any given year.”<sup>82</sup> In an area of special flood hazard, a development permit is needed for every activity except single family homes.<sup>83</sup>

The ordinance does not restrict development within flood hazard areas; however, development is not supposed to occur in the floodplain if alternative sites exist. If an applicant can demonstrate that the new structures cannot be located outside the floodplain and that floodplain encroachments will be minimized, development permits may be issued provided certain conditions are met.<sup>84</sup> Development conditions include the use of construction methods and practices that minimize flood damage, elevation and anchoring of structures, and use of

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<sup>74</sup> 5.11.30.

<sup>75</sup> *Id.* at (A).

<sup>76</sup> 5.11.40(A)–(E).

<sup>77</sup> *Id.* at (A).

<sup>78</sup> *Id.* at (B).

<sup>79</sup> *Flood Damage Prevention*, BLUFFTON, [https://library.municode.com/sc/bluffton/codes/code\\_of\\_ordinances?nodeId=COOR\\_CH19FLDAPR](https://library.municode.com/sc/bluffton/codes/code_of_ordinances?nodeId=COOR_CH19FLDAPR) (last visited Oct. 25, 2024).

<sup>80</sup> Sec. 19-3.

<sup>81</sup> *Id.* at § 19.4.

<sup>82</sup> *Id.* at § 19-21.

<sup>83</sup> *Id.* at § 19.4.

<sup>84</sup> *Id.* at §§ 19-34, 19-51.



floodproof materials.<sup>85</sup> There are also development conditions for development of elevators, garages, and “swimming pool utility equipment rooms.”<sup>86</sup>

Although wetlands can reduce the impacts of flooding, this ordinance is not designed to provide protections to wetlands. Rather, Bluffton’s flood damage ordinance seeks to ensure new development is constructed in a way to minimize damage to structures. It would not be a good model for a wetland preservation ordinance.

### **Bluffton’s Unified Development Ordinance**

Some wetlands within Bluffton’s jurisdiction may already receive protection through the Unified Development Ordinance (UDO) and associated Official Zoning Map. The Zoning Map sets forth the boundaries for fourteen zoning districts, including the Preserve (PR) district. The PR district is “intended to preserve and protect sensitive environmental areas, restrict development that could compromise these areas, and maintain open spaces that provide an ecological and aesthetic value to the community.”<sup>87</sup> Very little development is allowed in the PR district. Residential uses are restricted, and the only allowed uses are agricultural uses and structures, governmental buildings, parks, museums, and utilities.<sup>88</sup> Wetland areas falling within the PR district are protected from development by these zoning provisions. One option would be for the Town to consider expanding the coverage of the PR district to cover other sensitive environmental areas through a Zoning Map amendment.

### **Bluffton History District Overlay**

Bluffton also has a historic district overlay that could be used as a model to protect vulnerable wetlands within their jurisdiction. An overlay zoning district is a special zoning district that can be placed over existing traditional zoning districts—e.g., residential, commercial, or industrial zones—that create additional requirements for that zone.<sup>89</sup> Overlays are often used to protect “historic buildings, wetlands, steep slopes, and waterfronts.”<sup>90</sup> The overlay applies to all structures in Historical Preservation Overlay Districts.<sup>91</sup> In order to repair fences, roofs, gutters, windows, shutters, and patios/porches on a structure in the district, applicants must submit a

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<sup>85</sup> *Id.* at § 19-52.

<sup>86</sup> *Id.* at §§ 19-52(8)–(10).

<sup>87</sup> *Town of Bluffton Unified Development Ordinance*, BLUFFTON 75 (Aug. 10, 2011), <https://www.townofbluffton.sc.gov/DocumentCenter/View/391/Unified-Development-Ordinance-UDO-PDF>.

<sup>88</sup> *Id.*

<sup>89</sup> Elizabeth A. Garvin, *Making Use of Overlay Zones*, 43 *Planning Commissioners J.* 1,1 (2001).

<sup>90</sup> *Property Topics and Concepts*, AMERICAN PLAN. ASS’N, [https://www.planning.org/divisions/planningandlaw/propertytopics.htm#:~:text=Basics%20%E2%80%94%20An%20overlay%20zone%20is,in%20their%20community's%20best%20interest](https://www.planning.org/divisions/planningandlaw/propertytopics.htm#:~:text=Basics%20%E2%80%94%20An%20overlay%20zone%20is,in%20their%20community's%20best%20interest.). (last visited Nov. 5, 2024).

<sup>91</sup> *Historic Preservation Overlay District*, BLUFFTON, [https://library.municode.com/sc/bluffton/codes/code\\_of\\_ordinances?nodeId=COOR\\_CH21EMMACIEM\\_ARTIIIIZODEPR\\_S21-206HIPROVDI](https://library.municode.com/sc/bluffton/codes/code_of_ordinances?nodeId=COOR_CH21EMMACIEM_ARTIIIIZODEPR_S21-206HIPROVDI) (last visited Nov. 5, 2024); Sec. 21-206.



Certificate of Appropriateness along with their building permit.<sup>92</sup> Certificates are issued by the Historic Preservation Commission.<sup>93</sup>

While this historic preservation overlay would not be helpful for protecting non-jurisdictional wetlands, it does provide some guidance on how a wetlands overlay could work. Whether a municipality chooses to adopt a new ordinance or to establish an overlay on top of their existing zoning code, the level of protection and amount of development permitted varies greatly. Choosing the right fit depends on a municipality's existing zoning code, priorities, and state level regulations (if any exist).

### **Municipal options to protect non-jurisdictional wetlands**

Most local governments across the country have the ability to restrict development, require permits prior to development, or to prohibit certain activities under various zoning and land use laws. As long as their actions are not preempted by, or conflict with, state or federal law, local governments and municipalities can pass their own ordinances to protect ecosystems, natural resources, and culturally significant resources they view as valuable and important. Below are some examples of local resource protections from South Carolina and other states that highlight the range of options potentially available.

#### **I. Southeast Examples**

##### **a. Hilton Head Island, South Carolina: Flood Protection Permit Requirement**

Hilton Head's land management ordinance contains natural resource protections for resources such as wetlands.<sup>94</sup> The wetlands protection section outlines general performance and wetland buffer standards that apply to all development within the town.<sup>95</sup> No one may undertake any work in a wetland buffer without first receiving a Natural Resources Permit from the town. These provisions are meant to "protect and conserve natural wetlands that control flooding" by regulating the development and activities around them.<sup>96</sup>

Wetland is defined as "An area that is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. To be considered a *wetland*, the following three criteria must be met: 1) the presence of hydric soil; 2) the prevalence of hydrophytic vegetation; and 3) the presence of wetland hydrology."<sup>97</sup>

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<sup>92</sup> Sec. 21-206(a). Requirements for the application are found at 21-206(b).

<sup>93</sup> *Id.* at (c).

<sup>94</sup> *Natural Resources Protection*, HILTON HEAD ISLAND, [https://library.municode.com/sc/hilton\\_head\\_island/codes/land\\_management\\_ordinance?nodeId=CH16-6NAREPR\\_SEC.16-6-102WEPR](https://library.municode.com/sc/hilton_head_island/codes/land_management_ordinance?nodeId=CH16-6NAREPR_SEC.16-6-102WEPR) (last visited Nov. 1, 2024).

<sup>95</sup> 16-6-102(C)-(D).

<sup>96</sup> 16-6-102(A).

<sup>97</sup> 16-10-105.



A wetland buffer is “A strip of upland area along the outer edge of a wetland intended to consist of undisturbed vegetation.”<sup>98</sup> Buffers are required along the perimeter of all wetlands. The average and minimum width of the buffer varies depending on the type of development and wetland (e.g., tidal or freshwater). The ordinance explicitly prohibits certain developments from occurring in buffers: 1) dumping or filling; 2) placing sod or gardens; and 3) removing or disrupting soil except for when it minimally disturbed for planting trees.<sup>99</sup>

Certain activities are permitted in buffers such as: 1) maintaining existing wetland buffers and bulkheads; 2) constructing and maintaining public pathways and access points, and “associated structures” needed for recreational and water-based activities; 3) view corridor and vegetation maintenance; and 4) “essential development” such as stormwater facilities, sewers, utility and other telephone lines.<sup>100</sup> Town officials are allowed to add additional protection measures for these activities when they deem it is necessary to “adequately protect . . . water quality and mitigate any loss of or damage to wildlife habitat or native plant communities.”<sup>101</sup>

In addition, the ordinance regulates other activities such as the use of fertilizer or pesticides or when the activity will degrade or affect water quality.<sup>102</sup> Development adjacent to and around wetlands that will: 1) cause erosion; 2) disturb vegetation; 3) alter the natural flow; or 3) cause additional sediment to be deposited on the wetland are subjected to additional requirements.<sup>103</sup>

Alterations, or changes, to wetlands are only allowed when the developers shows that there are “no reasonable alternative layout or design[s] that would avoid disturbance of [the] wetland and still practically accomplish the overall basic purpose of the proposed development or activity.”<sup>104</sup> However, alterations must still adhere to best management practices, “innovative technology, [] preservation, and legal protection (e.g., deed restrictions, conservation easements).”<sup>105</sup> When alternations are accepted, mitigation efforts must be adopted to ensure that there are “no net loss to the wetland’s values, functions, and area.”<sup>106</sup>

Acceptable mitigation efforts include revegetation, restoration, creation, preservation, mitigation banking, or payment of fees.<sup>107</sup> Mitigation on-site is preferred; however off-site mitigation within the Hilton Head Island watershed is allowed.<sup>108</sup> For any mitigation efforts taken, the project must

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<sup>98</sup> *Id.*

<sup>99</sup> 16-6-102(D)(3)(a)(i)–(iv).

<sup>100</sup> *Id.* at (D)(3)(b)(i)(1)–(8). Tree and vegetation removal is only allowed when it is determined that: the trees are dying, dead, or diseased; not native and a threat to native species; and have fallen or how limbs that are blocking the natural flow of water or blocks walkways/paths. *Id.* at (D)(3)(b)(i)(9).

<sup>101</sup> *Id.* at (D)(3)(b)(iii).

<sup>102</sup> *Id.* at (C).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at (E)(1)(a) (emphasis omitted).

<sup>105</sup> *Id.* at (E)(1)(b) (emphasis omitted).

<sup>106</sup> *Id.* at (E)(1)(c).

<sup>107</sup> *Id.* at (E)(2)(a).

<sup>108</sup> *Id.* at (E)(4).



be maintained at a 75% survival rate for a 3-year period by the applicant.<sup>109</sup> They must also report every six months to the town on the mitigation project for that period.<sup>110</sup>

The ordinance also includes guidance for other activities that relate to wetland protection. For example, it includes standards for view corridors.<sup>111</sup> It also allows for vegetation in buffers to be removed or trimmed to create view corridors except for the removal of healthy trees and vegetation.<sup>112</sup> While Hilton Head Island’s ordinance is based on providing flood protection, the standards and provisions in the ordinance could be adopted in other municipalities that either are looking to adopt existing flood ordinances or want to create new flood and wetlands protections. The ordinance still allows for most development to occur as long as mitigation efforts are also taken, showing a balance between development, flood protections, and wetlands protection.

#### b. Savannah, Georgia: Wetland Buffers

Savannah’s zoning code contains natural resources standards, including standards for wetlands and wetland buffers “to prevent or minimize possible damage from activities that may degrade, destroy or otherwise negatively impact the value and function of wetlands and marshes.”<sup>113</sup> The ordinance requires buffers around all wetlands and marshes that are subject to this ordinance.<sup>114</sup> The ordinance applies to all proposed “land disturbance, building or demolition permits” within a wetland or local marsh.<sup>115</sup> Land disturbing activities proposed within a wetland or marsh must receive a Modified Wetland and Marsh Buffer Permit from the City Manager or their designee.<sup>116</sup> Modified Wetland and Marsh Buffer Permits will only be issued if the City Manager, or their designee, determine that there are no other feasible alternatives available that will not disturb the wetland, marsh, or buffer.<sup>117</sup> However, disturbances to the wetland and buffer must still be as minimal as possible.<sup>118</sup>

Wetlands are defined as “An area that is inundated or saturated by surface water or groundwater at a frequency and distribution sufficient to support, and under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation. Wetlands generally include swamps, marshes, bogs and similar areas.”<sup>119</sup> Wetland determination is done by the Corps. Prior to the City Manager issuing a permit, the applicant must have a wetland delineation done to confirm that “the

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<sup>109</sup> *Id.* at (11)(a).

<sup>110</sup> *Id.* at (11)(b).

<sup>111</sup> *Id.* at (D)(4).

<sup>112</sup> *Id.* at (D)(4)(a)–(c).

<sup>113</sup> *Natural Resources Standards, SAVANNAH*, <https://online.encodeplus.com/regs/savannah-ga/doc-viewer.aspx?tocid=001.004.008.004.011#secid-5835> (last visited Nov. 1, 2024).; §§ 10.4.1–10.5.1.

<sup>114</sup> 10.5.1.

<sup>115</sup> 10.4.1.

<sup>116</sup> 10.5.6.

<sup>117</sup> 10.5.7(c).

<sup>118</sup> *Id.*

<sup>119</sup> 13.2.





proposed activity is not located within a jurisdictional wetland.”<sup>120</sup> If a jurisdictional wetland is present, then the applicant must receive authorization from the Corps to proceed with the proposed activity.<sup>121</sup>

Buffers are areas adjacent to protected wetlands and marshes that “serve[] to protect” the areas.<sup>122</sup> All buffers must have at least a 35-foot width.<sup>123</sup> A buffer’s measurement is based on the Corps’ jurisdictional determination and delineation.<sup>124</sup>

Permitted activities within a buffer include: 1) maintenance of public sewer, stormwater, and water lines and facilities; 2) land disturbances from exempt government activities that were already in effect or were approved after the ordinance; 3) general repairs and emergency maintenance needed to “preserve life and/or property;” 4) forestry or silviculture and restoration activities; 5) creation of access paths.<sup>125</sup> A permit from the City Manager to do any of these activities, does not exempt an applicant from complying with other ordinances, state laws, or federal regulations.<sup>126</sup> Certain activities are outright prohibited in buffers: 1) clearing or burning vegetation; 2) filling or dumping; 3) using pesticides or chemical fertilizers; 4) septic systems; and 5) keeping or grazing animals.<sup>127</sup>

Variations may be granted for state or federal agencies to do specific activities in buffers.<sup>128</sup> The ordinance does not specify if there are any additional criteria for such variations to be issued.

While Savannah’s buffer requirements do establish a layer of local oversight and some additional protection for jurisdictional wetlands, it does not create any additional substantial requirements on developers who have already met the Corps permit requirements. If a developer already has approval from the Corps, they likely have met Savannah’s permit requirements as well. Furthermore, the ordinance does not regulate non-jurisdictional wetlands, leaving those areas still vulnerable to development pressures unless there are state protections in place as well. This type of ordinance allows for city oversight of development without creating additional restrictions.

c. DeKalb County, Georgia: Environmentally Sensitive Overlay

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<sup>120</sup> 10.4.3.

<sup>121</sup> *Id.*

<sup>122</sup> 13.2.

<sup>123</sup> 10.5.4.

<sup>124</sup> *Id.* at (a).

<sup>125</sup> 10.5.6(a)–(l).

<sup>126</sup> 10.5.3.

<sup>127</sup> 10.5.5(a)–(j).

<sup>128</sup> 10.5.8.



Dekalb County, Georgia uses an overlay zoning district to create protection for environmentally sensitive areas.<sup>129</sup> While Dekalb County’s environmentally sensitive areas protects mountain and forests areas, and associated views, similar overlay zoning districts can be created for wetlands protection. Dekalb County uses overlay zoning districts to protect and preserve “environmental elements unique to said land areas.”<sup>130</sup>

The board of commissioners determines what areas qualify as environmentally sensitive and impose an overly zoning district.<sup>131</sup> The overlay creates extra protections for the area and restrictions on development. When the board of commissioners establishes an overlay zone they are to be “accompanied by an official zoning map amendment” that identifies the protected areas.<sup>132</sup>

A variety of restrictions can be imposed with the overlay district. In Dekalb County, these include regulating the heights of structures to protect viewshed, limiting the amount of development or impervious surfaces; or how much land can be “cleared, graded, and improved.”<sup>133</sup> The overlay district regulations does allow for the transfer of development rights in sensitive areas and “encourage[s] and facilitate private or public conservation easements.”<sup>134</sup> The ordinance also authorizes the board to enact any additional development restrictions necessary to protect resources “while authorizing reasonable and economically feasible uses of such lands.”<sup>135</sup>

While the environmentally sensitive areas overlay zoning districts mostly has been used to protect mountains and open green space, similar overlays could be used in a wetlands context. As previously discussed, overlays do not require changes to existing zoning codes and simply create additional restricts for the area. Bluffton already has a historical preservation overlay, which indicates that a wetlands overlay is a possible option to add additional protections in some areas.

#### d. Tampa, Florida: Wetland Buffers

Tampa’s supplemental zoning and land use regulations includes a requirement for wetlands buffers within a subdivision about trees, landscaping, and upland habitat. The code requires buffers around “impacted wetlands.”<sup>136</sup> The code applies to all development “landward of”

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<sup>129</sup> *Environmentally Sensitive Land Overlay Regulations*, DEKALB CNTY, [https://library.municode.com/ga/dekalb\\_county/codes/code\\_of\\_ordinances?nodeId=CODECO\\_CH27ZO\\_ART3OVDIRE\\_27-3.3\\_DIVISION\\_3ENSELAOVRE\\_S3.3.2CROVZODIENSELA](https://library.municode.com/ga/dekalb_county/codes/code_of_ordinances?nodeId=CODECO_CH27ZO_ART3OVDIRE_27-3.3_DIVISION_3ENSELAOVRE_S3.3.2CROVZODIENSELA) (last visited Nov. 1, 2024).

<sup>130</sup> Sec 3.3.1.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> 3.3.3(A)–(F).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Natural Resources: Trees, Landscaping, Wetlands, Uplands*, TAMPA, [https://library.municode.com/fl/tampa/codes/code\\_of\\_ordinances?nodeId=COOR\\_CH27ZOLADE\\_ART](https://library.municode.com/fl/tampa/codes/code_of_ordinances?nodeId=COOR_CH27ZOLADE_ART)



wetlands.<sup>137</sup> Development may occur only when it “minimize[s] any adverse effect on the wetland and its hydroperiod and shall be conducted in a manner that will ensure that soil erosion or other discharge of containments will not occur to the detriment of the wetland.”<sup>138</sup> In order to develop within a buffer, an applicant must receive prior approval from the Tampa Planning and Development Department (PDD).<sup>139</sup>

Wetlands are defined as “[l]and that is inundated or saturated by surface or ground water in years of normal water conditions that falls under the jurisdictions of one [] or more of the following agencies: the Florida Department of Environmental Protection, the U.S. Army Corps of Engineers, the Southwest Florida Water Management District, the Hillsborough County Environmental Protection Commission, and the Tampa Port Authority.”<sup>140</sup>

Buffers are meant to protect wetlands from “upland activities such as development” that may have an adverse impact on a wetland.<sup>141</sup> All buffers must be at least 15-foot wide.<sup>142</sup> When required, erosion control methods must be landward of the wetland buffer.<sup>143</sup> Erosion control methods are determined and maintained at a line that is determined by PDD.<sup>144</sup> The line is not to be less than 15 feet landward of the existing buffer and all natural vegetation is to remain “intact and undisturbed.”<sup>145</sup> Erosion control methods are not required and only used when PDD deem it necessary.

Permitted activities within buffers include 1) boardwalks and right-of-way easements; 2) some above ground stilted structures and fences; 3) installation of below ground utility lines and sprinklers; 4) replacing and maintaining existing vegetation; and development approved by the city prior to the passing of this ordinance.<sup>146</sup> Applications and determinations must for these activities must be submitted to the PDD prior to development occurring.<sup>147</sup> Also “spreader swales and discharge structures” are permitted within buffers—as long as their construction and use do not adversely impact the wetland—and any other proposed development that receives an environmental resource permit from the Southwest Florida Water Management District or the Florida State Department of Environmental Protection.<sup>148</sup> Variances to buffer widths are only

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[VISURE\\_DIV4NARETRLAWUPHA\\_SD4TRMIMEPRRE\\_S27-284.4.2TRPLPEMITR](#) (last visited Nov. 1, 2024); 27-286(b).

<sup>137</sup> 27-286(a).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at (d).

<sup>140</sup> 27-43.

<sup>141</sup> 27-286(b).

<sup>142</sup> *Id.* The average width is 25 feet. *Id.*

<sup>143</sup> *Id.* at (e).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at (d).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at (c)(1)–(2).



allowed when “reasonable use is denied and approval for the development has been obtained by the appropriate regulatory agency.”<sup>149</sup>

This buffer regulation provides some base level protections for wetlands but also allows for most proposed development to occur near a wetland in a buffer. Since the ordinance is not very specific, it leaves a lot of room for interpretation by the PDD. This regulation allows for PDD to balance wetlands protections with development needs. Overall, this regulation focuses more on controlling what development occurs around the wetland than on protecting the integrity of wetland itself, showing another way to balance development and protection goals.

e. Wilmington, North Carolina: Supplemental Ordinance

Within Wilmington’s land development codes, there are supplement development regulations which include a conservation resources regulation. The regulation is meant to “protect important environmental resources” in the city and creates additional regulations for lands that are subject to this code.<sup>150</sup> The regulations apply to any parcel that contains, “partially or wholly,” a conservation resource or a “resource setback.”<sup>151</sup> If the city manager determines that a conservation resource or setback is located on a parcel, then a development permit will not be issued for any “land disturbing activities.”<sup>152</sup> Development permits for affected parcels will only be issued when additional measures are taken to protect the resource through the use of buffers and setbacks.<sup>153</sup>

Conservation resources that are protected under this regulation include natural ponds, freshwater marshes, and three types of wetlands—headwater swamp/swamp forest, pocosin, and savannah.<sup>154</sup> Wetlands are determined based on the North Carolina Coastal Region Evaluation of Wetland and the North Carolina Coastal Region Evaluation of Wetland Significance (NC-CREWS) rating.<sup>155</sup> Under the NC-CREWS rating, wetlands are evaluated based on their (1) potential risk, (2) water quality functions, (3) wildlife habitat functions, and (4) hydrology functions.<sup>156</sup> Based on these factors, there are four wetland ratings: (1) Exceptional Functional

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<sup>149</sup> *Id.* at (j).

<sup>150</sup> *Conservation Resources Regulations*, WILMINGTON, [https://library.municode.com/nc/wilmington/codes/code\\_of\\_ordinances?nodeId=PTIITECO\\_CH18LAD\\_ECO\\_ART6SUDERE\\_DIVIICORERE\\_S18-341GE](https://library.municode.com/nc/wilmington/codes/code_of_ordinances?nodeId=PTIITECO_CH18LAD_ECO_ART6SUDERE_DIVIICORERE_S18-341GE) (last visited Nov. 1, 2024).

<sup>151</sup> 18-341.

<sup>152</sup> *Id.* at (c)(1).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at (d)(5); *NC-CREWS Fact Sheet*, DEPT OF ENV’T QUALITY, <https://www.deq.nc.gov/documents/pdf/wetlands/nccrewsfacts/download>; *Strategic Plan for Improving Coastal Management in North Carolina*, DEPT. OF ENV’T QUALITY (1999), <https://www.deq.nc.gov/documents/pdf/wetlands/nccrewsdoc/download#:~:text=The%20North%20Carolina%20Coastal%20Region,habitat%2C%20and%20hydrologic%20functions%20of.>

<sup>156</sup> *NC-CREWS Fact Sheet*, *supra* note 155.



Significance, (2) Substantial Functional Significance, (3) Beneficial Functional Significance, and (4) non-wetland.<sup>157</sup> Wetlands is not otherwise defined in the municipal's code.

The Wilmington regulations impose a setback, similar to a buffer, requiring that “[a]ll structures and impervious surfaces . . . be set back from the conservation resource.”<sup>158</sup> The distance of a setback is determined based on the type of activity (residential v. nonresidential) and the type of resource.<sup>159</sup> Encroachment of structures into setbacks are allowed if certain conditions are met to protect the resource from runoff and other harms.<sup>160</sup> For certain conservation resource, part of the setback must be a vegetated buffer.<sup>161</sup> All buffers must have at least a 35-foot width.<sup>162</sup>

Permitted activities within buffers include: (1) docks and piers; (2) boat ramps; (3) access trails and pathways; (4) view corridors; (5) shoreline stabilization and erosion control structures; and (6) removing hazards such as “damaged” trees.<sup>163</sup> In addition, the regulations include “general performance controls” that allow for some developments, “Improvements,” to occur near conservation resources when certain conditions are present.<sup>164</sup> These conditions include: (1) the improvement must be to “protect or enhance the enjoyment” of the resource; (2) to access parts of the parcel that would otherwise be inaccessible due to the conservation resource, road, or utilities; (3) to access waterfront and construct a boat ramp/ pier, if the “entire waterfront along a parcel is inaccessible” due to the resource; or (4) to “[m]itigate impacts permitted by the U.S. Army Corps of engineers for infrastructure improvements.”<sup>165</sup> Additionally, stormwater runoff from structures on these affected parcels must not “discharge directly into natural bodies or conservation resources without vegetated filtration,” instead runoff should be routed elsewhere.<sup>166</sup> Lastly, the board of adjustment may grant a variance to allow the construction of “water-dependent structures” in a resource—such as erosion control measures, bulkheads or piers— when certain conditions are met.<sup>167</sup>

Certain activities are exempt from these regulations if they occur on parcels that are smaller than 1 acre and are not a part of a larger development project/subdivision that is subject to the regulation in this ordinance.<sup>168</sup> The exempted activities are: (1) constructing a single-family homes or duplexes and (2) “Commercial, industrial, office or institutional” development.<sup>169</sup>

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<sup>157</sup> *Id.* Wetlands can be deemed as “Unable to Evaluate” if it is determined that they have been “recently altered.” *Id.*

<sup>158</sup> 18-341(d)(5).

<sup>159</sup> *Id.* at (d)(5)(h).

<sup>160</sup> *Id.* at (d)(5)(a)–(e).

<sup>161</sup> *Id.* at (e)(2). This condition applies to: (1) salt marshes; (2) brackish marshes; (3) freshwater marshes; (4) “wetlands contiguous with tidal wetlands;” (5) tidal shores; and (6) primary nursery areas. *Id.*

<sup>162</sup> *Id.* at (e)(3)(a).

<sup>163</sup> *Id.* at (e)(3)(d)–(f).

<sup>164</sup> *Id.* at (d)(2).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at (d)(4).

<sup>167</sup> *Id.* at (d)(6).

<sup>168</sup> *Id.* at (b)(1)–(2).

<sup>169</sup> *Id.*



Additionally, development of an “urban waterfront,” as defined in that state administrative code, is exempt from these requirements if additional conditions are met.<sup>170</sup>

While the ordinance does allow for development on small parcels, for the most part it limits development to activities that allow for public access and enjoyment of the resources and that have minimal disturbance. Unlike some of the other ordinance examples, it does not have any mitigation requirements, so no obligation is imposed on developers to make up for any lost wetland functions if their development is approved. This regulation provides protection from most development, however, does not shield wetlands from all the adverse effects of approved developments. This shows another way municipalities can balance development and protection policies when both are priorities.

f. Virginia: Wetland Ordinance and Board

In January 2024, Virginia enacted legislation authorizing local governments to establish wetlands boards and setting forth model ordinance language.<sup>171</sup> Any pre-existing wetlands ordinance prior to January 1, 2024, must be amended to conform to this model ordinance. If a town, city, or county chooses not to enact the wetland zoning ordinance within one year of it being enacted in a surrounding municipality, then all applications from that town, county, or city will be made by a neighboring municipality’s wetlands board.<sup>172</sup> Wetlands boards are comprised of 5–7 residents who are appointed by the “local governing body” to serve 5-year terms with rotating expiration dates.<sup>173</sup>

This wetland ordinance is intended to cover all “coves, ponds, and natural waterways adjacent to or connecting to [specifically named] bodies of water” and is meant to regulate the “use and development of wetlands.”<sup>174</sup> The ordinance applies to both “vegetated wetlands” and “nonvegetated wetlands.” A vegetated wetland is defined as wetlands that lie “between and contiguous to mean low water and an elevation above mean low water equal to the fact one and one-half times the mean tide range” and are home to species like wildrice, rice cutgrass, and saltmarsh.<sup>175</sup> A “nonvegetated wetlands” is defined as wetlands that lie “contiguous to mean low waters and between low water and high water, including those unvegetated areas of . . . North Landing River and its tributaries subject to flooding by normal and wide tides but not hurricane or tropic storm tides.”<sup>176</sup>

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<sup>170</sup> *Id.* at (b)(3).

<sup>171</sup> *Article 2. Wetlands Zoning Ordinance and Wetlands Boards, VIRGINIA*, <https://law.lis.virginia.gov/vacodefull/title28.2/chapter13/article2/> (last visited Sept. 25, 2024).

<sup>172</sup> 28.2-1303 §§ (A), (C).

<sup>173</sup> *Id.* at § (A).

<sup>174</sup> 28.2-1302 § 2.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*



Certain activities are allowed within wetlands without local oversight as long as they are otherwise permitted under law.<sup>177</sup> These activities include things such as 1) constructing and maintain piers, fences, boathouse; 2) cultivating and harvesting shellfish, and 3) agriculture and other recreational activities.<sup>178</sup> Normal maintenance and construction of living shorelines and navigational aids are also allowed.<sup>179</sup> Any other proposed development of a wetland requires an application for a permit to the Wetlands Board.<sup>180</sup> All permit applications must be open for “public inspection,” have a public hearing within 60 days of receiving an application, and decision from the board within 30 days of the public hearing.<sup>181</sup> Permits are approved by at least 3 affirmative votes from 5 member boards or 4 affirmative votes from a 7 member boards.<sup>182</sup>

Newport News, Virginia, is an example of a municipality that has actually adopted this model ordinance and wetlands board.<sup>183</sup> The ordinance is almost exactly the same with the additional of sections providing additional guidance for the board. For example, Sec. 44-11 provides that the board may require proof of credit or bonds along with a development permit and Sec. 44-12 which provides additional guidance to the board on how to balance wetlands protection with development.<sup>184</sup> Newport News provides an example of how municipalities can take the model ordinance and adapt it based on their resources, staff, and policy choices.

The model ordinance basically requires every type of development that would interfere with a wetland’s function be subject to public comment and approved by the wetland board. This allows for the board to have full control over deciding what types of activities occur in wetlands, and to ensure that wetlands are protected. This is the only example found where the public is allowed to participate in the permitting process, which is unique and allows for an additional check to ensure that development and protections needs are balanced. Due to this, this type of ordinance is more restrictive of what activities are allowed, and require municipalities to have the funds, staff, and resources available to have this level of control over development. Not every municipality will have the staff or resources to create a wetlands board or to restrict development in this way. However, for those that can, it proves a high level of protection for non-jurisdictional wetlands.

g. Washington State: Critical Area Protections

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<sup>177</sup> *Id.* at § 3.

<sup>178</sup> *Id.* at § 3(1)–(12).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at § 4(A).

<sup>181</sup> *Id.* at §§ 5–6, 7(C). The requirements for what must be included in an application can be found at § 4(B).

<sup>182</sup> *Id.* at § 7(A).

<sup>183</sup> *Wetlands*, NEWPORT NEWS,

[https://library.municode.com/VA/Newport\\_News/codes/Code\\_of\\_Ordinances?nodeId=CD\\_ORD\\_CH44WE](https://library.municode.com/VA/Newport_News/codes/Code_of_Ordinances?nodeId=CD_ORD_CH44WE) (last visited Nov. 5, 2024); Sec. 44-1.

<sup>184</sup> “[T]he board shall preserve and prevent the despoliation and destruction of wetlands within its jurisdiction while accommodating necessary economic development in a manner consistent with wetlands preservation and any standards set by the Commonwealth.” Sec. 44-12.



Multiple municipalities in Washington State, such Clark County and the City of Bothell, have implemented the use of critical area ordinances to protect wetlands from development. The Washington State Growth Management Act (GMA) requires all cities and counties in the state adopt critical areas regulations.<sup>185</sup> Critical areas include wetlands.<sup>186</sup> In 2023, the GMA was amended to required cities and counties “include the best available science in developing policies and development regulations to protect the functions and values of critical areas.”<sup>187</sup> Even though all cities and counties are required to designate and protect critical areas, the specific regulations can vary.

Clark County’s critical areas ordinance covers wetlands, aquafer recharge areas, flood and geologic hazard areas, and designated habitat areas.<sup>188</sup> In 2023, Clark County amended their critical areas ordinance to adhere to the best available science directive for wetlands and fish and wildlife habitat conservation areas.<sup>189</sup> The purpose of these conservation areas is “to protect the functions and values of wetlands and fish and wildlife habitat conservation areas with special consideration to conserve or protect measures necessary to preserve and or enhance anadromous fisheries.”<sup>190</sup> Specifically the goal is “no net loss [of] functions and values” and to “[e]ncourage restoration and enhancement of wetlands.”<sup>191</sup> The critical areas acts as an overlay on top of other zoning laws; when there is a conflict between other zoning ordinances and conversation area requirements, the most protective regulations will be applied.<sup>192</sup>

Under the requirements, all land use and development activities require a permit or authorization from the county when they “alter a wetland, wetland buffer, or fish and wildlife habitat conservation area.”<sup>193</sup> Permits or authorization will not be granted without reasonable measures to ensure compliance with the ordinance.<sup>194</sup>

A wetland is defined in the county code as:

areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Wetlands do not

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<sup>185</sup> WASH. REV. CODE §§ 36.70A.010–36.70A.904.

<sup>186</sup> *Id.* at § 36.70A.030(6).

<sup>187</sup> *Id.* at § 36.70A.172.

<sup>188</sup> *Critical Areas Ordinances*, CLARK CNTY, <https://clark.wa.gov/community-planning/critical-areas-ordinances> (last visited Sept. 6, 2024).

<sup>189</sup> *Wetlands and Fish and Wildlife Habitat Conservation Areas*, CLARK CNTY, <https://www.codepublishing.com/WA/ClarkCounty/?comp-ClarkCounty40/ClarkCounty40450/ClarkCounty40450.html> (last visited Nov. 4, 2024); 40.445.010.–40.445.080.

<sup>190</sup> 40.445.010(A)(1).

<sup>191</sup> *Id.* at (A)(2)–(3).

<sup>192</sup> 40.445.010(C)(2).

<sup>193</sup> *Id.* at § (B)(1).

<sup>194</sup> *Id.* at (B)(2).





include those artificial wetlands intentionally created from non-wetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from non-wetland areas created to mitigate conversion of wetlands.<sup>195</sup>

Only certain categories of wetlands are covered under the ordinance. Officials use the Washington State Department of Ecology Wetland Rating System for Western Washington to determine what category a wetland falls into.<sup>196</sup> There are 4 types of wetlands under this system: Category I, Category II, Category III, and Category IV. Category I wetlands are the most sensitive to disturbance and “are relatively undisturbed and contain some ecological attributes that are impossible to replace within a human lifetime, or provide a very high level of functions.”<sup>197</sup> Category I wetlands include bogs and “[m]ature and old growth forested wetlands.”<sup>198</sup> Category II wetlands are more common than Category I wetlands but are still difficult “to replace[] and provide high levels of some functions.”<sup>199</sup> Category III wetlands have “a moderate level of functions” and “have been disturbed in some ways and are often less diverse or more isolated from other natural resources in the landscape than Category II wetlands.”<sup>200</sup> Lastly, a Category IV wetland has low levels of functions and “should be replaceable, and in some cases may be improved.”<sup>201</sup> The wetland category determines what the required buffer width and requirements, the level of intensity of activity that can occur, and mitigation ratio.

Buffers are required around all wetlands. Wetland buffer widths are determined based on the wetland’s category, “rating habitat score, and the intensity of land uses proposed on development sites.”<sup>202</sup> The buffers required to protect water quality functions is available at Table 40.445.020-3.

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<sup>195</sup> 40.100.070.

<sup>196</sup> 40.445.020(B)(4); *Washington State Wetland Rating System for Western Washington 2014 Update*, WASHINGTON DEP’T OF ECOLOGY (2015), <https://apps.ecology.wa.gov/publications/documents/1406029.pdf>.

<sup>197</sup> 40.445.020(B)(4)(a)(1).

<sup>198</sup> *Id.* at (B)(4)(a)(1)(a).

<sup>199</sup> *Id.* at (B)(4)(a)(2).

<sup>200</sup> *Id.* at (B)(4)(a)(3).

<sup>201</sup> *Id.* at (B)(4)(a)(4).

<sup>202</sup> *Id.* at (B)(5)(a). The land use intensity matrix is available at table 40.445.020-1. The intensity depends on such factors as the lot size, extent of development, extent of vegetation, and the amount of public roads and utilities in the developed area. *Id.*



covenant by the county, however the covenant can be waived by a county official.<sup>203</sup> There are some permitted activities that are allowed in wetlands and buffers such as 1) roads, trails and utility lines; 2) “[e]cological enhancement and restoration projected;” 3) stormwater management facilities; and 4) some forest and agricultural practices.<sup>204</sup> Additionally some temporary activities are allowed in buffers if they do not require permeant structures and do not reduce the size or function of the wetland or buffer.<sup>205</sup>

Additional activities are exempt from the ordinance and do not require review and approval from the county. These activities include: 1) repairing existing structures, homes, utilities and public facilities; 2) removing “nuisance plants,” hazard trees, and harvesting vegetation; and 3) utility connections when there are no “practical alternatives.”<sup>206</sup> These activities do not require any mitigation efforts to be undertaken. Additionally, other minor exemptions may be permitted, on a case-by-case basis when 1) they result from unusual conditions or circumstances that “are not applicable to other lands in the same vicinity or zoning district;” 2) are not caused by the applicant; is necessary to preserve a “substantial property right;” and 3) do not harm public welfare or other nearby properties.<sup>207</sup> These minor exemptions must still comply with the overall Comprehensive Plan.

When loss of function or value is unavoidable, the permittee must “take actions to restore, replace, preserve, or enhance ecological functions to the extent necessary to ensure no net loss,” i.e. mitigation.<sup>208</sup> All compensatory mitigation must be completed “immediately following disturbance and prior to, recording, use or occupancy of the development.”<sup>209</sup> The permittee is responsible for maintaining the compensatory mitigation for a certain amount of time based on the “complexity of the mitigation” project, and the timeframe for when the full functions and values of the wetland are expected to be replaced by.<sup>210</sup> Mitigation efforts should generally be done within the same watershed as the wetland losing function and value unless “the applicant can demonstrate that off-site mitigation is ecologically preferable.”<sup>211</sup> Mitigation is preferred, however permanent preservation and protection of a wetland and buffer is allowed. In order for a

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<sup>203</sup> *Id.* at 40.445.030(B)(2)(d). The Covenant can be waived when the development is not compensatory mitigation, is “located entirely on a public right-of-way” easement, and when it is an “ecological restoration project.” *Id.*

<sup>204</sup> *Id.* at (B)(3), (C)(1)(a).

<sup>205</sup> *Id.* at (C)(2)(b)(3). In some circumstances buffers may be reduced up to 25% based on the type of activity and the intensity of the activity. *Id.* at (C)(2)(a)(1)–(2). Table 40.445.030-4 shows the type of disturbance allowed (i.e., lights, noise, runoff, dust, etc.) and the required measures to minimize impacts. Table 40.445-.20-1 shows the extent of development and vegetation allowed on lots based on the land use intensity of the activity (low, moderate, high).

<sup>206</sup> 40.455.040(A)(1); Table 40.445.040-1

<sup>207</sup> 40.445.050(A)(2).

<sup>208</sup> *Id.* at 40.445.030 (B)(4).

<sup>209</sup> *Id.* at (B)(4)(b).

<sup>210</sup> *Id.* at (B)(5)(a)–(b). Table 40.445.030-1 shows the minimum maintenance periods based on the elements used by the permittee. Table 40.445.030-3 shows the mitigation ratio for each category of wetland and the type of mitigation efforts (reestablishment, rehabilitation, enhancement, etc.).

<sup>211</sup> *Id.* at (C)(1)(b)(2).



permittee to use permanent preservation and protection methods, they must show that 1) it is the best option; 2) that the area is “under threat of undesirable ecological change;” 3) the ratio for protection is higher for preservation than if they combined mitigation and preservation efforts; 4) preservation can be achieved through conservation easements and land trusts; and 5) the area is of “high quality or critical for the health of the watershed or basin.”<sup>212</sup>

The city of Bothell has similar requirements for wetlands under their critical areas ordinances. Bothell’s critical areas regulation designates, classifies, and limits development of “ecologically sensitive and hazardous areas present in shoreline jurisdiction.”<sup>213</sup> Bothell uses the Federal Wetland Delineation Manual and the Washington Wetland rating system to determine the category of wetlands.<sup>214</sup> “All areas within the city meeting the wetland designation criteria in the federal Wetland Delineation Manual, regardless of any formal identification, are . . . designated critical areas.”<sup>215</sup> Wetland buffers vary depending on the type of wetland.<sup>216</sup> Wetland buffer widths can be increased and decreased—when mitigation measures are taken—by the shoreline administrator.<sup>217</sup>

Some activities such as 1) harvesting wild crops; 2) conservation and preservation efforts; 3) “[d]rilling for utilities;” and 4) removing nonnative invasive species are allowed in wetlands in Bothell without an applicant having to submit a critical area report.<sup>218</sup> However, an applicant must submit a critical area report, if the activity will result “in a loss to the functions and values of a wetland or wetland buffer.”<sup>219</sup> Additionally, development and building permits may be submitted for other activities as long as other criteria is met.<sup>220</sup>

Buffers are meant to be used at all mitigation sites in the city.<sup>221</sup> Additional permitted activities are allowed in buffers, such as 1) recreational view spots and trails; 2) stormwater

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<sup>212</sup> *Id.* at (C)(1)(4).

<sup>213</sup> *Critical Areas in Shoreline Jurisdiction*, BOTHELL, <https://bothell.municipal.codes/BMC/13.13> (last visited Nov. 4, 2024); 13.13.010.

<sup>214</sup> 13.13.020(A). The Federal Wetland Delineation Manual was created in 1987 and is meant to be the “guideline[] and methods” for identifying and delineating wetlands “for purposes of Section 404 of the Clean Water Act.” *Corps of Engineers Wetlands Delineation Manual*, U.S. ARMY CORPS OF ENGINEERS vii (1987), <https://www.nae.usace.army.mil/Portals/74/docs/regulatory/JurisdictionalLimits/wlman87.pdf>. It defines a wetland as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” *Id.* at 9.

<sup>215</sup> 13.13.020(A)

<sup>216</sup> *Id.* at (F)(5); Table 13.13.020-1.

<sup>217</sup> *Id.* at (F)(5)(c)–(d).

<sup>218</sup> *Id.* at (D).

<sup>219</sup> *Id.*

<sup>220</sup> 13.13.010(K)(3)(a)–(j). Other potentially permissible activities are similar to the allowed activities in Clark County and include things such as 1) using pesticides and fertilizers; 2) constructing navigation aids; 3) removing hazardous trees and other vegetation; 4) maintaining public nonmotorized trails and right-of-ways; and 5) temporary or minor utility projects. *Id.*

<sup>221</sup> 13.13.020(F)(5)(g).



facilities/infrastructure, and 3) other public access and recreation sites such as fishing access spots.<sup>222</sup> All activities in wetlands and buffers must show that “short- and long-term impacts . . . will not degrade the functions and functional performance of the wetland.”<sup>223</sup> Depending on the category of wetland, there are additional prohibition of certain activities. For example, only “low-impact public access and recreation facilities” are allowed in Category I wetlands.<sup>224</sup>

Like Clark County, proposed developments in wetlands or other critical areas must take steps to mitigate the impacts. Mitigation is an alternative when there is no other way to avoid, minimize, or rectify adverse impacts to wetlands.<sup>225</sup> Mitigation efforts such as using “appropriate technology,” relocating part of the project off the wetland, and restoration should be used when impacts to the wetland and buffer cannot otherwise be avoided.<sup>226</sup> When possible, mitigation efforts “in-kind and on-site” should be taken when possible in order to maintain the function and value of the wetland.<sup>227</sup> However, Bothell does allow for mitigation and compensatory mitigation to ensure “equivalent or greater biologic functions” of an impacted wetland off-site.<sup>228</sup> Compensatory mitigation is only to be used when other mitigation efforts are not available.

Lastly, land wholly within a category I, II, or III wetland and its buffer is not allowed to be subdivided.<sup>229</sup> Land partially within a category I, II, or III wetland or wetland buffer can be subdivided when each proposed lot is accessible outside of the wetland or buffer, and when it meets other lot size requirements in the county.<sup>230</sup> Finally, access roads and utilities for subdivisions can be in wetlands and buffer areas when there is no other alternative available.<sup>231</sup>

Clark County and the City of Bothell’s critical area designations are extremely comprehensive ordinances that are likely not replicable in states without similar state-level planning support. As such, they also provide high levels of protection and oversight on development around wetlands. Since the state land use laws require counties, cities, and towns to adopt these critical area ordinances, there are no questions about the authority of municipalities to do so. For municipalities outside of Washington, these ordinances provide examples of how development and protections can be balanced in a way that favors wetlands protections and varies requirements based on the type of development activities occurring.

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<sup>222</sup> *Id.* at (F)(5)(i).

<sup>223</sup> *Id.* at (F)(1).

<sup>224</sup> *Id.* at (F)(3).

<sup>225</sup> *Id.* at (G)(1).

<sup>226</sup> *Id.* at (C)(1). However, unlike Clark County, “[i]f specific standards, such as buffers and vegetation requirements, are provided in this chapter, then the city shall not require additional mitigation sequencing.” *Id.* at (C)(2).

<sup>227</sup> *Id.* at (D)(2).

<sup>228</sup> *Id.* at (G).

<sup>229</sup> *Id.* at (H)(1).

<sup>230</sup> *Id.* at (H)(2).

<sup>231</sup> *Id.* at (H)(3).



## South Carolina Considerations

Municipalities in South Carolina wishing to enact protections for non-jurisdictional wetlands have several options. Municipalities can provide protections by amending existing zoning codes, establishing overlay districts, or adopting wetland-specific ordinances. There is no right way to establish protections. Instead, how a municipality chooses to enact wetlands protection will depend on their development priorities, funds, staff, and other resources. Bluffton, for example, might consider establishing a wetlands protection overlay because they already have a historical preservation overlay, if they determine it works with their available resources and complies with the zoning code. Municipalities that do not wish to enact overlays, could instead adapt existing flood ordinances to also provide wetlands protection, similar to Hilton Head's ordinance.

Regardless of the option selected, there are several key elements that should be considered, if a municipality decides to develop local wetlands protections. Municipalities must balance many competing needs and policies, including economic development and environmental protection. The exact framework for wetlands protections in any given municipality will depend on how restrictive a municipality wants to be on development, how much power their zoning/development authority, and the municipality's staff and financial capacity to implement and enforce a program. However, regardless of these factors, there are a few elements that are common across most local wetlands protections.

### I. Elements to include in a new ordinance

#### a. Definition of a wetland

Every ordinance should include a definition of wetlands. This helps to define the scope of regulations and protections. As seen above, definitions vary. Some municipalities, like Hilton Head, rely on more scientific-based definitions that cover more types of wetlands. Others, like Savannah, have definitions that are more align with the Corps' definition, limiting protections to jurisdictional wetlands. South Carolina does not have any state-level wetland definitions or classification guidance that municipalities must follow, thereby enabling more flexibility in crafting definitions. So, municipalities looking to protect a broader range of non-jurisdictional wetlands post-*Sackett*, need to adopt more scientific-based definition, like Hilton Head.

#### b. Buffers

Many wetland ordinances include some type of buffer or setback to protect wetland areas from development. These buffers usually allow some development in them, while preventing most development from occurring on the wetland itself. By using a buffer, municipalities can control what development occurs near a protected wetland.

If seeking to impose a buffer requirement, a municipality must decide how they will measure the buffer. Some have a basic width that apply to all wetlands; however, others, like Clark County and Wilmington, use a matrix that determines the width based on the type of activity and type of wetland. A chart or matrix that determines the width of a buffer can be helpful if there are



multiple types of wetlands that the ordinance is meant to protect since it considers their size and functions. For instance, smaller wetlands may not need as big of a buffer, so implementing a chart that determines the buffer size based on the size of a wetland would allow for more development on a parcel than a generic buffer size.

#### c. Allowable Activities

Almost every wetlands ordinance above sets forth in this a list of allowable activities that can occur on a wetland or buffer. Some activities, such as public access trails or vegetation maintenance, are usually allowed without needing a permit or prior approval from the body enforcing the ordinance.

Other activities may need a permit or prior approval before they proceed. For these activities, the ordinance may require certain criteria to be met in order to receive approval or a permit. Criteria can range from using mitigation to protect the integrity of a wetland to restrictions on the development (i.e. what type of development or how big it can be). The ordinance should lay out what the criteria for receiving approval for a develop should be and how the developer can comply with the requirements. Some ordinances include criteria of what must be submitted along with the application (i.e. a delineation of the wetland or approval from another development board or agency).

A common criteria for allowable activities is the use of mitigation when a wetland's function or size would be impacted by the development. Mitigation usually requires the developer to either prevent harm to the wetland and/or to restore lost functions elsewhere. The body in charge of carrying out the ordinance would most likely be the one to approve of mitigation methods allowed.

Municipalities should also consider if there are some activities that are outright prohibited. Some ordinances include activities that are prohibited from occurring on wetlands, with no exceptions. Meaning, developers cannot get a permit or variance to do these activities on the wetland. It is up to a municipality to determine what or if any activities are prohibited in a wetland or buffer. Depending on development needs and policies, some may prohibit activities on a wetland but allow them to occur in a buffer. These activities can range from not removing native plant species (i.e. Hilton Head) to prohibiting certain development. Municipalities that choose to restrict some types of development also tend to include variances for state or federal projects.

#### d. Exempt Activities

Exempt activities are activities that are allowed for some particular reason, usually because the activity was already permitted under a different ordinance or state or federal law. Exemptions may also be granted for development approved prior to the passing of the new regulations (i.e. Wilmington). Exemptions can also include activities that do not need permits or prior approval, such as maintenance of the environment or existing structures. A municipality may consider including a list of exempt activities if there are some activities they know must occur in the



protected area, and do not want to make them go through the permitting/approval process, however they are not required.

e. Variances

All wetland protection ordinances should include a provision related to variances. A variance process provides protections from takings claims. A taking occurs when a government either takes land for public use, or when a regulation restricts a property owner’s ability to use their land to the extent that it is essential seized.<sup>232</sup> A municipality can cause a regulatory taking if their wetlands ordinance is so restrictive that a property owner can no longer use their property at all—not just for the purpose they intended when they acquired the property right.<sup>233</sup>

Not every example ordinance above includes takings protections, however, most include some sort of language that is meant to protect against potential claims. For instance, both Clark County and the City of Bothell include language about ensuring that effected property owners can still make “reasonable economic use” of their land. In the City of Bothell, if a property owner believes that all reasonable use has been denied, then they must show that the inability to make reasonable use of the property is unique to their property based on “irregular lot shape, size or natural features and the application of [the ordinance]” and not from the property owners’ own actions or actions of the property owner prior to the adoption of this rule.<sup>234</sup> Only then will any proposed alteration be accepted, still only it will only be “the minimum necessary to allow for reasonable economic use.”<sup>235</sup> This section then allows the City to reexamine the restrictions for that specific parcel of land, and grant a variance if necessary. If a municipality is worried about potential takings claims brought against them, then they may want to consider adding similar language into their ordinance as a safeguard.

Additionally, a municipality can include variances as a way to protect against takings. A variance is a type of exemption to zoning ordinance.<sup>236</sup> Variances allow for normally prohibited activities to occur on a property, determined on a case-by-case basis.<sup>237</sup> A municipality may consider including a variance as a way to protect against takings by allowing some development to occur if the property owner may otherwise not be able to make reasonable use of their property (i.e. Tampa). A municipality considering including a variance may consider also including requirements for what a property must do in order to receive a variance.

f. Mechanism

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<sup>232</sup> *Takings*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/takings> (last visited Nov. 4, 2024).

<sup>233</sup> *Agins v. Tiburon*, 447 U.S. 255 (1980). The standard for this is: 1) if a landowner can make “economically viable use” of their property and 2) if the regulation “substantially advances legitimate [] interests.” *Id.* at 260.

<sup>234</sup> 40.445.050(B)(1).

<sup>235</sup> *Id.*

<sup>236</sup> *Variance*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/variance> (last visited Nov. 4, 2024).

<sup>237</sup> *Variances*, UNIV. WISC. <https://fyi.extension.wisc.edu/landusetraining/variances/> (last visited Nov. 4, 2024).



How a municipality wishes to enforce wetlands protections depends on (1) their current zoning codes and development plans and (2) what kind of power their zoning board has. Most of the examples above are additional regulations that are built upon the foundation of the existing zoning code. The best method for adopting wetlands protections will vary by municipality. Some municipalities may already authorize the establishment of overlay districts, and the adoption of a wetlands protection overlay could be a straightforward process. Other municipalities may desire to amend their zoning code language or adopt a stand-alone wetland protection ordinance.

Additionally, a municipality must consider who will be in charge of enforcing the ordinance. This person, or entity, would also be in charge of determining when development is allowed, granting variances, monitoring compliance, and enforcing violations. In the examples above, most authorized either the city manager or board of commissioners/zoning board to carrying out the ordinance. Virginia is the only outlier in that it requires the establishment of a separate wetlands board. Creating a separate board that can determine which wetlands fall under the ordinance and approve any/all development in wetlands and buffers may be desirable in order to ensure there is an independent body acting in the interest of the community and environment. However, that option is most likely not practical for many municipalities which are often resource-constrained with limited staff. It may be more feasible to use an existing zoning board or staff. Whoever a municipality chooses to enforce the ordinance, it needs to be clearly stated in the ordinance so that developers, municipal officials, and general public know who is making the determinations.

Only one example found included an explicit provision for public participation. Depending on the chosen mechanism, there may opportunities for public participation during standard zoning processes. If not, a municipality may want to consider including a public hearing or public comment period on each proposed development activity, especially if the public is concerned about wetland conservation. If public participation is included in an ordinance, then the standards should be included with the permit application/ determination section.

#### g. Enforcement

Municipalities should consider how they will ensure that the wetland protection requirements are followed. Enforcement can include ongoing monitoring to document compliance and prosecution of violations after the fact. Some ordinances above require monitoring to occur for a set amount of years after an activity is approve (i.e. Clark County) or to maintain the vegetation and buffer (i.e. Hilton Head and Tampa). Requiring monitoring and maintenance ensures that the wetland and buffer are taken care of after the development occurred. These activities are usually required in addition to a development permit and mitigation efforts. If a developer does not comply with mitigation, maintenance, or monitoring efforts, then they risk losing their permit (if development is not completed), fees, or even litigation.

Another way to enforce regulations would be through fines and penalties. Fines for ordinance violations can be brought against a developer for developing without a permit or violating the terms of their permit. Most zoning codes have a penalties section that lays out penalties for violating zoning ordinances; in Hilton Head, for example, any violation of the code is punishable





by fine or up to 30 days in jail.<sup>238</sup> Additionally, each day the violation occurs, counts as a new offense can be penalized. A new ordinance is not required to include a penalties section, all of the examples above did not have a specific natural resource protection penalty, but a municipality should consider if they wish to rely on existing penalty schemes or create a new penalty/enforcement section.

## Conclusion

Wetlands protection at the municipal level vary widely from very restrictive of all development to not very restrictive. Some municipalities, like Tampa do not limit development as much as simply impose additional requirements/approval for developers to get prior to beginning their activities. The level of protection often depends on whether there are state-level protections and requirements in place. In Washington and Virginia, the state has provided requirements and model ordinances for municipalities to adopt which allows for these ordinances to be more comprehensive and for development to be more restricted at the local level. These models are not replicable everywhere as not every state has deferred such power to the local level.

For local governments where state wetland regulations are either in flux after *Sackett* or are being drastically rolled back, adopting comprehensive zoning ordinances may not be feasible. However, overlays like Dekalb County or flood protection-based requirements like Hilton Head may be more feasible since they do not require drastic changes to existing zoning laws and regulations. Overlays or other forms of permitting requirements do not restrict or prohibit all forms of development, but rather require local approval prior to beginning a project to ensure sensitive areas are protected. As federal and state wetlands regulations continue to change, it will be up to municipal governments to find and adopt the best fit for them when they want to further protect these vital resources.

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<sup>238</sup> *General Penalty*, HILTON HEAD ISLAND, [https://library.municode.com/sc/hilton\\_head\\_island/codes/code\\_of\\_ordinances?nodeId=TIT1THCO\\_CH5\\_GEPE\\_S1-5-10GEPECOVI](https://library.municode.com/sc/hilton_head_island/codes/code_of_ordinances?nodeId=TIT1THCO_CH5_GEPE_S1-5-10GEPECOVI) (last visited Nov. 5, 2024); Sec. 1-5-10.