



FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION  
OFFICE OF THE GENERAL COUNSEL

MEMORANDUM

To: FWC Captive Wildlife Program  
Through: James V. Antista, General Counsel *James V. Antista*  
From: Carla J. Oglo, Assistant General Counsel  
Date: May 17, 2007  
Re: LOCAL ORDINANCES AND THE REGULATION OF CAPTIVE WILDLIFE

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This memorandum addresses the applicability of local ordinance and zoning codes to the regulation of captive wildlife. For purposes of this memorandum, the term captive wildlife means wildlife regulated under Rule 68A-6, F.A.C.

Background

As the population of Florida grows and urban sprawl consumes rural Florida, captive wildlife facilities which were originally on fairly rural land are now found amidst urban and suburban development. Local governments are concerned about the proximity of captive wildlife to people and, based on a relatively few cases of escape, believe in stronger local control over captive wildlife. These concerns are prompting local governments to consider adopting ordinances and zoning codes which directly regulate captive wildlife or to consider zoning codes which directly define the appropriate neighborhoods for the possession of captive wildlife. Both the local governments and those who have captive wildlife facilities are looking to the Florida Fish and Wildlife Conservation Commission (FWC) for guidance as to whether or not, or to what extent, these ordinances and zoning codes may be enacted consistent with the authority granted to the FWC by the Florida Constitution. In order to address this issue, it is necessary to understand some history about regulation of captive wildlife in Florida.

FWC's predecessor agency, the Game and Fresh Water Fish Commission, did not always have constitutional authority over all captive wildlife. In 1960, the Florida Supreme Court held that the then Game and Fresh Water Fish Commission had the authority to regulate *ferae naturae* or untamed animals in the wild, but the agency did not have the authority to regulate ownership of the animals once they became the property of someone, especially non-native animals. Barrow v. Holland, 125 So.2d 749 (Fla. 1960). In response to this issue, the Legislature enacted section 372.921 and 372.922 to authorize GFC to regulate captive wildlife, including wildlife possessed as pets or for exhibition or sale.

In 1974, the Florida Constitution was amended to empower GFC to "exercise the regulatory and executive powers of the State with respect to wild animal life and freshwater aquatic life." Article IV, Section 9, of the Florida Constitution. This constitutional provision has been interpreted to mean that GFC has constitutional authority over all fish and wildlife whether in the wild or in captivity. Charles River Laboratories, Inc. v. Florida Game and Fresh Water Fish

Commission, DOAH Case No. 96-2017 , affirmed at 717 So.2d 1003 (Fla. 1<sup>st</sup> DCA 1998). In 1998, the citizens of Florida voted to amend the state constitution in order to create the Florida Fish and Wildlife Conservation Commission which continued the grant of constitutional authority to the commission regulated all wildlife. The authority of FWC to regulate captive wildlife as part of its constitutional authority is no longer in question. Miramar v. Bain, 429 So.2d 40 (Fla. 4<sup>th</sup> DCA 1983) and Haddock & Greyhound Breeders Assn. of Fla. v. Florida Game and Fresh Water Fish Commission, DOAH Case No. 86-3341RP (decided May 19, 1997). Furthermore, FWC rules take precedence over legislative enactments which conflict with those rules. Whitehead v. Rogers, 223 So.2d 330 (Fla. 1969); Beck v. Game and Fresh Water Fish Commission, 33 So.2d 594 (Fla. 1948); State ex rel. Griffin v. Sullivan, 30 So.2d 919 (Fla. 1947) and Price v. City of St. Petersburg, 29 So.2d 753 (Fla. 1947).

Chapter 372, Florida Statutes is now considered to be in aid of FWC's constitutional authority by providing the authority for license fees and penalties for violations of FWC rules on captive wildlife. Rule Chapter 68, Florida Administrative Code provides the administrative rules relating to captive wildlife and Rule 68A-5.004, F.A.C. provides for suspension or revocation of licenses for a violation of the rules. This licensing and permitting program has extensive regulations regarding standards for possessing, housing, feeding, transporting, exhibiting, transferring, caring or selling animals. These regulations involve inspecting the property before the permit is issued. These regulations ensure both the safe and humane treatment of the animals and the public health safety and welfare. In 2007, the Legislature, in response to the escape of Burmese python into the Everglades National Park and to assist FWC in dealing with other reptiles of concern, enacted HB 1505 which provides for enhanced penalties for repeat offenders of captive wildlife violations and for repeat offenders. Both the statutes and the rules are providing a comprehensive and uniform state licensing and permitting process for the possession, exhibition and sale of captive wildlife.

#### Local government and captive wildlife

Formerly, Rule 68A-6.0022(5)(a)5.b, F.A.C. required appropriate neighborhoods for wildlife. It states:

##### 5. Facility Requirements:

b. In order to assure public safety, Class I and Class II wildlife shall only be kept in **appropriate neighborhoods** and, accordingly, facilities that house such wildlife shall meet the requirements of this rule subsection. Compliance with these requirements is a necessary condition for licensure. For purposes of this subsection, a "facility" means the site at which Class I or Class II carnivores are kept or exhibited. Applicants shall submit documentation verifying that the construction of the facility, its cages and enclosures is not prohibited by county ordinances and, if within a municipality, municipal ordinance.

This rule has been replaced by Rule 68A-6.003, F.A.C., to be effective January 1, 2008. The rule deletes the appropriate neighborhood provision and states in pertinent part:

#### **68A-6.003 Facility and Structural Caging Requirement for Class I, II and III Wildlife.**

(2) In order to assure public safety, the facilities for the housing of Class I and Class II wildlife shall meet the requirements of this rule. Compliance with these requirements is a necessary condition for licensure. For the purposes of this rule, a "facility" means the site at which Class I or Class II wildlife are kept or exhibited. **Applicants shall submit documentation verifying that the construction of the facility, its cages and enclosures are not prohibited by county ordinance and, if within a municipality, municipal ordinance.**

## 5. Zoning:

Facilities housing the following Class I wildlife may not be located on property within an area **zoned solely for residential use**. Changes in zoning subsequent to the issuance of the license or permit shall not be disqualifying provided the license is maintained in a current and valid status.

- a. Primates (all listed species)
- b. Cats (all listed species)
- c. Bears (family *Ursidae*)
- d. Elephants (family *Elephantidae*)
- e. Rhinoceros (family *Rhinocerotidae*)
- f. Hippopotamuses (family *Hippopotamidae*)
- g. Cape Buffalos (*Syncerus caffer caffer*)

### (c) Exemptions:

The following Class I and Class II wildlife are exempt from the facility requirements as listed above:

#### 1. Permits authorizing possession of infants only including:

a. Class I or Class II carnivores until they reach 25 pounds or six (6) months of age, which ever comes first, provided written documentation is available to verify the age of the animal, the animal is marked or otherwise identifiable, and the animal is provided space for exercise on a daily basis:

b. Class I and II primates until they reach the age of twelve (12) months, provided written documentation is available to verify the age of the animal, the animal is marked or otherwise identifiable, and the animal is provided space for exercise on a daily basis.

#### 2. Crocodylians four (4) feet in length or less.

3. Cats: Ocelots (*Leopardus pardalis*), Servals (*Leptailurus serval*), Caracals (*Caracal caracal*), Bobcats (*Lynx rufus*), African golden cats (*Profelis aurata*), Temminck's golden cats (*Profelis temmincki*), and Fishing cats (*Prionailurus viverrina*).

4. Non-human primates: Uakaris (*genus Cacajao*), Bearded sakis (*genus Chiropotes*), and Guenons (*genus Cercopithecus*) not including De Brazza's monkey (*Cercopithecus neglectus*), Blue monkey (*Cercopithecus mitis*), Preuss's monkey (*Cercopithecus preussi*) or any other non-human primate of the genus *Cercopithecus* which exceeds the normal adult weight of fourteen (14) pounds.

(d) Any Class I or Class II wildlife exempt from meeting the facility requirements of this rule must meet the following:

1. Class I wildlife shall not be possessed in **any multi-unit dwellings** or on any premises consisting of less than one quarter acre of land area.

2. Class II wildlife shall not be possessed in **multi-unit dwellings** unless the dwelling in which they are housed is equipped with private entrance, exit and yard area.

3. A fence sufficient to deter entry by the public, which shall be a minimum of five (5) feet in height, shall be present around the premises wherein Class I or Class II animals are housed or exercised outdoors.

(e) The above requirements shall be effective January 1, 2008, but shall not apply to those facilities licensed to possess captive wildlife species prior to that date. After January 1, 2008, those licensees that desire to expand their inventory to include a family of Class I or Class II species not previously authorized at their facility location shall comply with the requirements here in. Requests to upgrade wildlife classification authorizations shall be considered new applications for license purposes.

*Specific Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const., 372.921, 372.922 FS. History—New 8-1-79, Amended 6-21-82, Formerly 39-6.03, Amended 6-1-86, 7-1-90, 7-1-92, 2-1-98, Formerly 39-6.003, Amended 1-1-08.*

City of Miramar v. Bain, 429 So.2d 40 (Fla. 4<sup>th</sup> DCA 1983) held that and state that the local governments are not authorized to adopt ordinances relating to captive wildlife which conflict with the authority of FWC. See also, Attorney General Opinion 2002-23 (March 15, 2002). These opinions also state that FWC has exclusive authority to enact rules and regulations

governing wildlife. This means that local governments cannot directly regulate captive wildlife, even if the local ordinance is more restrictive than the FWC rules and regulations and even if FWC has no rules or regulations that apply to that particular area. But the District Court of Appeal in City of Miramar v. Bain recognized that local government had some sphere of control to determine “appropriate neighborhoods” and commented about Rule 68A-6.02 (then the “appropriate neighborhood rule” and predecessor to recently repealed Rule 68A-6.0022) as follows:

We construe Rule 68A-6.02(5)(c) to mean that prior to issuance of a permit, applicants must demonstrate to the Commission that they can provide satisfactory caging facilities without violation of existing city or county building and zoning regulations. This construction provides for harmonious blending of the Commission’s permit requirements and city and county building and zoning regulations. It also insures that wildlife will only be maintained in appropriate neighborhoods.

City of Miramar v. Bain at 43.

Under the City of Miramar v. Bain decision, the Fourth District Court recognized that local government could adopt a comprehensive land use plan, **zoning code or building code** that would ensure that permitted wildlife is maintained in suitable neighborhoods or locations as long as those regulations do not discriminate against captive wildlife. Under the former rule, FWC could give deference to these building codes and zoning ordinance to determine the “appropriate neighborhood” for wildlife. However, the new rule deletes the appropriate neighborhood language and, in our view renders the City of Miramar v. Bain language, as to local government sphere of local control over wildlife through zoning, inapplicable.

The new rule, to be effective January 1, 2008, offers no deference to local government to determine appropriate neighborhoods for wildlife; therefore, there is no authority under FWC rules for local governments to determine appropriate neighborhoods for wildlife. FWC interprets Rule 68A-6.003 to only allow local government to control the structural requirements of buildings, that is, the building or facility must meet the requirements of the building code. The new rule further states that Class I captive wildlife may not be possessed in areas zoned “residential only”; other Class I and II wildlife which are exempt from facility requirements (small cats and small primates) may not be possessed in “multi-unit dwellings”. It has become a common occurrence for local governments to attempt to regulate some aspect of captive wildlife, which requires FWC to, on ad hoc basis, deal with draft local ordinances on captive wildlife. We hope this memorandum will help local government better understand the role of the state in regulation of captive wildlife and captive wildlife facilities.

The following are examples of some local actions or ordinances that FWC believes are either authorized or unauthorized by the Article IV, Section 9, Florida Constitution and FWC rules thereto.

#### **Types of actions or ordinances which are authorized**

- Local government can establish “residential use only” zoning, which can in effect prohibit certain kinds of Class I wildlife. Local governments are authorized to regulate the abatement of public nuisances such as poor sanitation or noise that may be associated with the keeping of wildlife provided the ordinance does not distinguish between nuisances from animals and nuisances from other sources.

- Local government can control structural requirements of buildings and if a property owner wants to build a structure for their animals, the structure must comply with local building codes. Local government can regulate the building of the structures as long as it does not distinguish between structures for wildlife and structures for other purposes.
- Local government can regulate commercial activity provided that captive wildlife is not discriminated against through this regulation.
- Local government may regulate the possession and discharge of firearms within municipal boundaries (FWC requests that portions of Wildlife Management Areas within municipalities be exempted from such restrictions).
- Local government may control the use of local government-owned property and facilities and prohibit or regulate exhibitions thereon, so long as the regulation is directed to behaviors which may be addressed under local police power, and does not regulate wildlife.
- Local government can require persons engaged in occupations to comply with registration requirements. This might require a captive wildlife facility to disclose and describe the captive wildlife in possession.

#### **Types of action or ordinances which are not authorized**

- Local government is prohibited by the constitution, statute and rules from prohibiting the possession, breeding or sale of captive wildlife.
- Local government cannot establish zoning classifications which expressly regulate or prohibit possession of wildlife. Local government cannot prohibit the possession of Class I or II wildlife in zoning classifications such as mixed use residential or commercial.
- Local government may not regulate in the area of taking, possession, transportation or sale of wildlife, even if the ordinance is more restrictive, and even if there is no specific FWC rule dealing with that particular issue. These areas are preempted by FWC rules and regulations.
- Local government may not regulate in the areas of hunting or fishing, even if the ordinances are more restrictive than FWC rules and regulations, and even if there is no specific FWC rule dealing with that particular issue. These areas are preempted by FWC's rules and regulations.
- Local governments that create their own captive wildlife permitting and regulatory system are in conflict with Article IV, Section 9. If the ordinance gives the locality the authority to deny a permit for the possession of captive wildlife regulated by FWC, that permitting system would be in conflict with FWC's authority unless the ordinance is in effect as registration program that allows a person to possess wildlife if authorized by FWC provided that possessors of captive wildlife must register with local government.

## **Conclusion**

The Florida Constitution, FWC rules and those Florida Statutes in aid of the Commission provide authority for comprehensive and uniform state-wide regulation and control of captive wildlife by FWC. The Florida Courts have upheld FWC's exclusive authority in this area. Local government regulatory authority in the area of captive wildlife is limited. This governing structure is designed to provide state-wide regulation of captive wildlife without overlapping or conflicting local ordinances.