Right to Farm Act, fish pond construction

Number: INFORMAL

Date: June 28, 2010

The Honorable Rudy Garcia
Senator, 40th District
414 Senate Office Building
404 South Monroe Street
Tallahassee, Florida 32399-1100

Dear Senator Garcia:

You have asked this office to comment on whether the Right to Farm Act prohibits local governments from requiring public hearing approval for a fish pond excavation to conduct aquaculture activity. You have constituents in Dade County who have received aquaculture certificates from the Department of Agriculture and Consumer Services and wish to construct ponds to engage in aquaculture operations on farms currently operated for agricultural products. These constituents have been advised by the department that their certification is all that is necessary to engage in such activity, but Miami-Dade County has taken the position that its ordinance requiring public hearing must be followed. As you note, aquaculture is considered farming in this state and would be governed by the Right to Farm Act.[1]

Regrettably, this office may not comment on the actions of a local government, absent a request from that entity. This office has also been advised that the issue of public hearings being required for excavations is presently the subject of litigation in Miami-Dade County. As such, the office will not comment on the issue in an effort to avoid intruding on the powers of the judiciary. The following general comments are offered in an attempt to be of assistance to you in determining whether legislative action or clarification may be needed.

Section 33-16 of the Miami-Dade Code of Ordinances imposing a number of requirements on certain excavation projects, including a public hearing, impacts the construction of ponds for an aquaculture facility. Section 33-16 provides:

"(a) Public hearing required for certain excavations; exception. No excavation below the level of any street, highway, or right of way shall be made except upon approval after public hearing; provided no public hearing is required for excavations for the following purposes:

* * *

(6) Lake excavations west of the salt barrier line shall also be allowed without a public hearing in all districts within the developable boundaries of the adopted metropolitan development pattern map of the Comprehensive Development Master Plan as may be amended from time to time. Public hearings will be required in all areas east of the salt barrier line. Applicants may choose to go to public hearing for lake excavation approval even if same is not required; provided, however, that if an unusual use is requested, applicants shall proceed in accordance with

Section 33-13. In order to receive a waiver from the public hearing requirement, applicants must submit complete excavation plans to the Department. The Department shall review lake excavation plans for compliance with the requirements noted below. All plans shall be reviewed and approved or denied by the Department within fifteen (15) days from the date of submission. Applicants shall have the right to extend the fifteen-day period upon timely request made in writing to the Department. Staff shall have the right to extend the fifteen-day period by written notice to the applicant that additional information is needed to process the plan. Denials shall be in writing and shall specifically set forth the grounds for denial. If the plan is disapproved by the Department on the grounds of requirement (6)b, (6)j, (6)l, or (6)r below, the applicant may appeal to the Community Zoning Appeals Board in accordance with procedure established for appeals of administrative decision in Section 33-311(c). Disapprovals on all other grounds listed below may be appealed to the Community Zoning Appeals Board as unusual use requests in accordance with procedure established in Section 33-13."

Section 823.14, Florida Statutes, the "Florida Right to Farm Act,"[2] recognizes the importance of agricultural production to this state's economy, stating that the "encouragement, development, improvement, and preservation of agriculture will result in a general benefit to the health and welfare of the people of the state."[3] The purpose of the act is to protect reasonable agricultural activities conducted on farm land from nuisance suits.[4] As noted above, aquaculture is considered a farming activity under the act. I would also note that a farm operation does not become a nuisance under the act due to a change in the type of farm product produced.[5]

Section 823.14(6), Florida Statutes, provides in part that:

"It is the intent of the Legislature to eliminate duplication of regulatory authority over farm operations as expressed in this subsection. Except as otherwise provided for in this section and s. 487.051(2), and notwithstanding any other provision of law, *a local government may not adopt any ordinance, regulation, rule, or policy to prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation* on land classified as agricultural land pursuant to s. 193.461, where such activity is regulated through implemented best management practices or interim measures developed by the Department of Environmental Protection, the Department of Agriculture and Consumer Services, or water management districts and adopted under chapter 120 as part of a statewide or regional program. . . ."[6] (e.s.)

In Attorney General Opinion 2001-71, this office was asked whether a zoning compliance permit was required for nonresidential farm buildings in order to assure that such construction complied with setback lines under the county's zoning plan. As the opinion points out, the legislative history of subsection (6) quoted above states that the amendment was to preclude a local government from adopting laws, ordinances, regulations, rules or policies to prohibit, restrict, regulate, or otherwise limit any continuing farm operation on any land currently engaged in bona fide production of a farm product.[7] Thus, a farming operation that falls within the coverage of section 823.14, Florida Statutes, would by definition, comply with the agricultural zoning classification of the land and would not be subject to county regulations or restrictions that attempt to limit such an operation.

As this office stated in Attorney General Opinion 2001-71, the prohibition against local ordinances that limit or restrict an activity of a bona fide farm operation on land that is classified

as agricultural would not preclude application of zoning regulations that do not have such an intent or effect. Thus, this office concluded that a nonresidential farm building would be subject to a zoning compliance permit to the extent such a permit requirement does not prohibit, restrict, regulate, or otherwise limit an activity of the farm. Since a setback requirement for building construction would not necessarily limit a farm's operation, this office stated that setback restriction would apply to construction.

In Attorney General Opinion 2009-26, this office was asked whether a county has the authority to enforce its zoning regulations regarding the construction of a building on land classified as agricultural under section 193.461, Florida Statutes, if the regulations do not limit the operational activity of the bona fide farm operation. Citing to Attorney General Opinion 2001-71, it was concluded that county zoning regulations could be applied to buildings on agriculturally classified lands if such regulations did not interfere with the bona fide operations of the farm. In that instance, there was a question as to whether the building at issue was in fact a residential structure which would be subject to the building code.

I trust that you will understand the inability of this office to provide more direct comments regarding this matter at this time, but that the discussion above will be of assistance.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] Section 823.14(3)(a), Fla. Stat., defines "Farm" for purposes of the act to mean "the land, buildings, support facilities, machinery, and other appurtenances used in the production of farm or aquaculture products." *See also* s. 597.002, Fla. Stat., declaring the Legislature's intent that "aquaculture is agriculture and, as such, the Department of Agriculture and Consumer Services shall be the primary agency responsible for regulating aquaculture, any other law to the contrary notwithstanding."

[2] *See* s. 823.14(1), Fla. Stat., providing the title to the act.

[3] Section 823.14(2), Fla. Stat.

[4] *Id*. *See Pasco County v. Tampa Farm Service, Inc*., 573 So. 2d 909 (Fla. 2d DCA 1990) ("legislature certainly has valid reasons to protect established farmers from the expense and harassment of lawsuits aimed at declaring this vital industry to be a nuisance."). Section 823.14(4)(a), Fla. Stat., generally provides that a farming operation which has been in existence for at least one year and which was not a nuisance at the time of its established date of operation shall not be a public or private nuisance if the farm operation conforms to generally accepted agricultural and management practices.

[5] Section 823.14(4)(b), Fla. Stat.

[6] *Cf*. s. 163.3162(4), Fla. Stat., stating:

"Except as otherwise provided in this section and s. 487.051(2), and notwithstanding any other law, including any provision of chapter 125 or this chapter, a county may not exercise any of its powers to adopt any ordinance, resolution, regulation, rule, or policy to prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation on land classified as agricultural land pursuant to s. 193.461, if such activity is regulated through implemented best management practices, interim measures, or regulations developed by the Department of Environmental Protection, the Department of Agriculture and Consumer Services, or a water management district and adopted under chapter 120 as part of a statewide or regional program; or if such activity is expressly regulated by the United States Department of Agriculture, the United States Army Corps of Engineers, or the United States Environmental Protection Agency."

And see J-II Investments, Inc. v. Leon County, 908 So. 2d 1140 (Fla. 1st DCA 2005) (plain, unambiguous terms of s. 163.3162(4), Fla. Stat., prevent counties from adopting ordinances relating to agriculture, but does not address enforcement of provisions already in place; if the Legislature intended to include the term "enforce" in the statute, it clearly could have done so).

[7] Florida Senate Staff Analysis and Economic Impact Statement, CS/CS/SB 1904, April 11, 2000.