



June 16, 2017

Mr. David Foley
1015 N. Solandra
Orlando, Florida 32807

**Florida Fish
and Wildlife
Conservation
Commission**

Dear Mr. Foley:

In response to your request, please find attached a certified copy of the following documents:

Memorandum Re: LOCAL ORDINANCES AND THE REGULATION OF CAPTIVE WILDLIFE

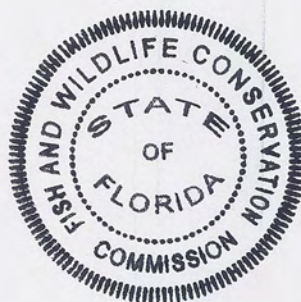
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I, Hollie Weathersbee, Agency Clerk for the Florida Fish and Wildlife Conservation Commission, do hereby certify that the attached documents are a true and correct duplication of the Agency's record copy of the documents described in the above paragraph.

Signature

June 16, 2017

Date



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Exhibit A



FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION
LEGAL OFFICE

MEMORANDUM

To: FWC Captive Wildlife Program
From: Carla J. Oglo, Assistant General Counsel
Date: 5/24/17
Re: LOCAL ORDINANCES AND THE REGULATION OF CAPTIVE WILDLIFE

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. Concerns over noise, smell or perceived danger associated with captive wildlife may prompt local governments to consider adopting ordinances which regulate captive wildlife or to consider zoning ordinances which define the appropriate neighborhoods for the possession of captive wildlife. Local governments and captive wildlife licensees are looking to the Florida Fish and Wildlife Conservation Commission (FWC or Commission) for guidance as to whether or not, or to what extent, these local ordinances 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 the regulation of captive wildlife in Florida.

FWC's predecessor agency, the Game and Fresh Water Fish Commission (GFC), did not always have constitutional authority over all captive wildlife. In 1960, the Florida Supreme Court held that the then GFC had the authority to regulate *ferae naturae* or untamed animals in the wild, but 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. The authority of GFC to regulate captive wildlife as part of its constitutional authority was affirmed in Miramar v. Bain, 429 So.2d 80 (Fla. 4th DCA 1983).

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 to regulate all wild animal life. Article IV, Section 9 of the Florida Constitution gives the legislature the authority to enact laws in aid of the commission, not inconsistent with this section. Several provisions of Chapter 379, Florida Statutes (F.S.), are in aid of FWC's authority to regulate captive wildlife, providing fees for captive wildlife licenses and penalties for captive wildlife rule violations.

Exhibit A

In 2007, the Legislature, in response to the escape of Burmese pythons 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. Both the statutes and the rules provide a comprehensive and uniform state licensing and permitting process for the possession, exhibition and sale of captive wildlife.

The Regulation of the Possession, Exhibition and Sale of Wildlife in Florida

FWC has exercised the powers given to it by promulgating rules regulating the possession, exhibition and sale of wildlife. Rule 68A-1.002, Florida Administrative Code (F.A.C.), declares that "All wild animal life within the jurisdiction of the State of Florida, whether such wild animal life is privately owned or otherwise, is subject to the regulation of the Commission." Rule 68A-6.0011(1), F.A.C., requires all persons, except in limited circumstances, to obtain a permit from the commission in order to lawfully "possess any native or non-native wildlife in captivity."

The majority of FWC's captive wildlife rules can be found in Chapter 68A-6, F.A.C. Related rules for conditional and prohibited species can be found in Chapter 68-5, F.A.C. ; listed species in Chapter 68A-27, F.A.C; wildlife rehabilitation facilities in Rule 68A-9.006, F.A.C.; falconry in Rule 68A-9.005, F.A.C.; alligator farms in Rule 68A-25.004, F.A.C., hunting preserves in Rule 12.010, F.A.C., and game farms in Rule 68A-12.011, F.A.C.

Captive wildlife have been categorized into three classes. Class I wildlife are considered to pose the most real or potential threat to Florida, such as lions, tigers, bears and gorillas. Rule 68A-6.0021(1), F.A.C., prohibits Class I wildlife from being possessed as personal pets. Class II wildlife are considered to pose less of a threat than Class I wildlife, like smaller monkeys, smaller cats and smaller canines. Class III wildlife are considered to pose the least threat to Florida and include every species not listed as a Class I or Class II species. Wildlife classifications can be found in Rule 68A-6.002, F.A.C. Licenses issued by FWC indicate the activity authorized, location authorized as well as the type and number of animals that the licensee is authorized to possess. See, Rule 68A-6.0022(1), F.A.C.

Florida's captive wildlife regulations are among the most stringent in the nation. Rule 68A-6.0023(6). F.A.C., requires persons possessing wildlife to document the source and supplier of every animal possessed, as well as the birth, death, sale and transfer of every animal possessed. Rule 68A-6.0023(7), F.A.C., requires licensees to maintain these records and make them available upon FWC's request. Rule 68A-4.006 requires licensees to allow the inspection of the facility housing the wildlife.

FWC investigators routinely conduct inspections of captive wildlife facilities to ensure cage size, construction and security requirements are followed to ensure public safety. FWC investigators also inspect to ensure that humane treatment is provided and sanitary conditions are in place for the animals. The penalties for most, but not all, captive wildlife violations are criminal and increase with repeat violations. Facility requirements can be found in Rules 68A-6.0023, 68A-6.003, 68A-6.004 68A-6.0041 and 68A-6.007, F.A.C. Penalties for captive wildlife violations can be found in Section 379.4015, F.S.

Determination of Appropriate Neighborhoods by the Commission

Section 379.303(1), F.S., requires FWC to establish rules and requirements necessary to ensure that permitted wildlife possessed as personal pets be maintained in appropriate neighborhoods. The commission considers, prior to issuance of a permit, the property where captive wildlife will

be housed. The way in which the commission has done so has changed over the years. Prior to 2008, Rule 68A-6.0022(5)(b), FWC required applicants for class I and class II permits to show that the wildlife would be kept in "appropriate neighborhoods," and to submit documentation verifying that the construction of the facility, its cages and enclosures were not prohibited by local ordinances.

The current version of Rule 68A-6.003, F.A.C., requires facilities housing Class I and Class II wildlife to meet certain ownership requirements, be of a certain size, contain an appropriate buffer zone, and be enclosed by a perimeter fence. The rules no longer require applicants to show the wildlife would be kept in "appropriate neighborhoods" and that the required cages and enclosures would not be prohibited by a county or municipal ordinance. In place of such requirements, Rule 68A-6.003(3)(2), F.A.C., directs commission staff to provide notice of an initial permit application to the county or municipality in which a proposed Class I or Class II wildlife facility is to be located. This gives the local governments the opportunity to ensure that the facility is in compliance with local ordinances. Notification to local governments is not required for applications for Class III licenses.

Local Ordinances and Captive Wildlife

The Commission and local governments have powers provided to them by the Florida Constitution. Article VIII of the Florida Constitution grants local governments broad powers of self-governance, but prohibits local governments from passing ordinances inconsistent with general law. Article IV, Section 9 of the Florida Constitution grants the Commission the exclusive authority to regulate wildlife.

In City of Miramar v. Bain, 429 So. 2d 40, (Fla. 4th DCA 1983), the city sought an injunction to require removal of the fence Ms. Bain had constructed in her front yard in violation of a Miramar ordinance prohibiting any type of fence in the front yard of a home. Ms. Bain, who had a permit from the Commission to possess cougars, asserted that the city lacked jurisdiction to require removal of the fence because the Commission had exclusive jurisdiction of the matter and it had approved the fence after an inspection of the property.

The Court stated that a legislative enactment or municipal ordinance, if in conflict with the regulations of the Commission, must give way to the Constitutional mandate establishing the Commission, citing Whitehead v. Rogers, 223 So.2d 330 (Fla. 1969). See also, Attorney General Opinion 2002-23 (March 15, 2002).

Before Ms. Bain constructed the fence in her front yard, she had maintained her cougars in the back yard, which was in compliance with both Commission regulations and City of Miramar ordinances. As Ms. Bain met the requirements of the Commission with the existing back yard fence and she offered no evidence showing that the construction of the front yard fence resulted from a requirement of the Commission, the court found no conflict existed between the regulations of the Commission and the ordinances of the City of Miramar. The City of Miramar prevailed.

It should be noted that the language in Miramar v. Bain, regarding applicants being required to provide satisfactory caging facilities without violation of existing city or county building and zoning regulations and to show that the wildlife would be kept in appropriate neighborhoods is based upon rule language which was removed and is not in the current captive wildlife regulations.

Exhibit A

In Whitehead v. Rogers, 223 So. 2d 330 (Fla. 1968), Mr. Rogers had been issued a hunting license by the Commission. He went hunting during open season for mourning doves, which included Sundays, and was arrested for violating a statute which prohibited the discharge of firearms on Sundays. The Court found the statute in conflict with the Commission's constitutional authority to regulate Sunday hunting and prohibited the prosecution of Mr. Rogers for this offense. Because the state legislature could enact only "laws in aid of, but not inconsistent with," the Game Commission's constitutional grant of authority, the court reasoned that the statute was void to the extent it prohibited an activity that was expressly authorized by the Game Commission. *Id.* at 330–31.

The federal district court for the Middle District of Florida recently weighed in on an alleged conflict between the Commission's authority and local zoning ordinances. See, Foley v. Orange Cnty., 638 Fed. Appx. 941, 2013 U.S. Dist. Lexis 114054. An appellate court vacated the district court's order finding the district court lacked jurisdiction to rule on this issue. While the vacated order is not binding on any courts, the court's order gives us some insight as to how courts with jurisdiction will rule on this issue. In Foley, local zoning ordinances prohibited the Foleys from using their residence for "commercial aviculture, aviaries" and the "breeding, keeping, and raising of exotic animals."

The Foley court held that Orange County could not use its land use ordinances to regulate the possession or sale of captive wildlife and invalidated the ordinance. Those ordinances specifically sought to prohibit the use of Plaintiffs' residence for "commercial aviculture, aviaries" and the "breeding, keeping, and raising of exotic animals." The court found that those land uses specifically target activities that fall within the exclusive authority of the commission, whose rules on the topic are the governing law of the state. See, e.g., Grant, 935 So. 2d at 523 (holding a charter county in Florida may only "enact county ordinances not inconsistent with general law").

The court in Foley did an excellent job analyzing the Commission's authority and possible conflicts with that authority. A portion of that analysis is provided below:

In sum, Florida law provides that the state legislative power over captive wildlife was transferred to the Florida Fish and Wildlife Conservation Commission. Art. IV, § 9, Fla. Const.; see also Sylvester v. Tindall, 18 So. 2d 892, 900 (Fla. 1944). The effect of the transfer of that portion of the state's legislative power was to divest the state legislature of authority to regulate the possession and sale of captive wildlife, Beck v. Game and Fresh Water Fish Commission, 33 So. 2d 594, 595 (Fla. 1948), and vest that power in the commission, State ex rel. Griffin v. Sullivan, 30 So. 2d 919, 920 (Fla. 1947). The commission therefore assumed the regulatory authority that the legislature had prior to the transfer. Caribbean Conservation, 838 So. 2d at 497. As such, the rules adopted by the commission are tantamount to legislative acts, Airboat Ass'n of Florida, Inc., 498 So. 2d at 630, and become the governing law of the state, Griffin, 30 So. 2d at 920. Any and all laws in conflict with the commission's rules are consequently void. Whitehead, 223 So. 2d at 330–31.

Even if the Court were to accept Orange County's characterization of its ordinances as generally applicable—which it does not because the ordinances are not crafted in that way—Orange County still could not enforce its ordinances banning commercial aviculture against Plaintiffs. See Whitehead, 223 So. 2d at

330–31. In *Whitehead*, the Florida Supreme Court held that a statute prohibiting shooting on Sunday was void to the extent it prohibited an activity that was specifically authorized by the Game Commission. *Id.* at 330–31. Like the hunter in *Whitehead*, who was issued a permit by the Game Commission that authorized him to hunt on Sunday, Plaintiffs were issued a permit by the commission authorizing them to possess and sell class III birds from their residence. *See id.* Thus, like the statute in *Whitehead*, Orange County’s ordinances are void to the extent such ordinances prohibit Plaintiffs from possessing and selling class III birds from their residence. *See id.*

In Conclusion

Case law indicates that land use and other local ordinances that specifically target activities that fall within the exclusive authority of FWC to regulate wildlife are in direct conflict with FWC’s authority and are void.

Case law indicates that if an ordinance is of general applicability (not specific to wildlife), and captive wildlife licensees are able to comply with both the local ordinance and FWC rules, the ordinance will not be seen as in conflict with FWC’s authority. For example, an ordinance prohibiting any type of fence in the front yard of a home was determined to not be in conflict with the Commission’s authority because the licensee was able to have her facility in the back yard and comply with both Commission rules and local ordinances.

Case law indicates that even if an ordinance is of general applicability (not specific to wildlife), it will be seen as in conflict with FWC’s authority if the ordinance prevents captive wildlife licensees from conducting activities authorized by FWC rules. For example, an ordinance that prohibits any fencing in a particular area would likely conflict with FWC’s authority as perimeter fencing is required for Class I and Class II wildlife facilities. The ordinance would conflict with FWC’s authority as it would prohibit Class I or Class II wildlife licensees from possessing their wildlife in that area. If an ordinance is seen as in conflict with FWC’s authority, the ordinance would be void to the extent that it would prohibit an activity authorized by FWC rules.

Exhibit A