ALTERNATIVES FOR CONSERVATION AND PRESERVATION OF WETLANDS AND OTHER ENVIRONMENTALLY SENSITIVE AREAS

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August 5, 2004

A. <u>Wetlands and Environmentally Sensitive Areas</u>: Wetlands, wetland functions and wetland regulations have been thoroughly described by other speakers. Other areas of importance are called "Environmentally Sensitive Areas" ("ESA") which include almost any type of regulated or recognized natural resource, and is often a convenient phrase used to emphasize target areas for protection.

ESA's have been described to include:

- **Essential habitat for threatened and endangered species;**
- **Wetlands;**
- **Scientifically recognized rare ecological communities;**
- **Steep slopes;**
- **Flood prone areas;**
- **Riparian habitats and corridors;**
- **Fisheries and wildlife habitat;**
- **Hardwood bottomland habitats;**
- **Coastal areas, dunes and barrier islands;**
- **Historic and cultural properties.**

This list is by no means exhaustive and such ESA's may also be included in another description pertaining to a particular program, ordinance, regulation or statute. For example:

I. Linear projects or pipelines regulated by the Office of Pipeline Safety and the U.S. Department of Transportation, Research and Special Programs Administration are now required by final rule codified in 49 CFR Part 195 to consider the effects of a hazardous liquid pipeline release on drinking water and ecological areas which the regulations refer to as "Unusually Sensitive Areas" ("USA").

USA's include:

- **Drinking water resources;**
- **Sole source acquifer recharge area;**
- **Ecological resources such as a multi-species assemblage area;**
- **migrating bird concentration area; and**
- **an area containing imperiled species.**

II. Clean Water Act:

Requirements of the Clean Water Act ("CWA") § 404 refer to "waters of the United States" (33 CFR § 328) which includes wetlands, mudflats, etc.

The CWA § 404(b)(1) guidelines refer to wetlands as "Special Aquatic Sites" (40 CFR § 230.3). the U. S. Army Corps of Engineers during the CWA § 404 permit application process must consider other sensitive areas and consult with other agencies that exercise jurisdiction over sensitive areas such as endangered and threatened species and their habitat (USFWS), historic and cultural sites (SHPO), coastal resources (ADEM) and

fish and wildlife species and their habitats (USFWS, NMFS, and State Conservation Department).

III. Endangered Species Act, 16 U.S.C. § 1519, 16, C.F.R. Part 17, addresses environmentally sensitive areas, the habitat of sensitive species, and protections of the species and habitat.

IV. Floods: Floodplains, floodways, flood prone areas, mudslide prone areas and their associated hazards and benefits have been described as environmentally sensitive areas. National Flood Insurance Act, 42 U.S.C. § 4001; and Executive Order, 11988 – May 24, 2977, 42 F.R. 26951.

B. Alternative protection procedures available for conservation and preservation of wetlands and other environmentally sensitive areas include the following:

I. Education/Voluntary Stewardship: Education is the most important alternative, as well as the most frustrating. It is cost effective, but requires everyone to participate, the landowner, neighbors, community, agencies, tax assessors, appraisers, real estate agents, local officials, schools, etc.

Over 70 percent of the land base, including wetlands and other environmentally sensitive areas, are owned by private and industrial landowners who genuinely care about and are familiar with the ecological importance of their properties.

Voluntary stewardship may include:

- **hands off or leaving the wetlands and adjacent areas alone to function naturally;**
- **limit or restrict activity in wetland areas;**

- establish vegetative buffers on adjacent properties to protect wetland areas from encroachment of sediment and stormwater;
- restore damaged areas and remove invasive plant species;
- avoid draining and filling;
- limit access, paved surface and treat stormwater; and
- develop a management plan.

II. Public and Private Sale: Often called a bargain sale, the outright purchase of all or a portion of the real property interest by a land trust, conservation organization, or government agency has been used most often in Alabama.

Some of the more recognized purchases have been

- Acreage around Weeks Bay and Bon Secour Bay by Weeks Bay Reserve Foundation, State of Alabama and USFWS;
- Little Point Clear, Grand Bay Savannah by The Nature Conservancy;
- Mobile Delta acreage by the Coastal Land Trust, Forever Wild, and State of Alabama;
- Robinson Island by City of Orange Beach;
- Village Point Park by City of Daphne/Trust for Public Lands.

This alternative is one of the more costly and can result in political and local opposition.

The group acquiring the land outright or in fee, then has land management responsibility and local governments may receive less ad valorem tax. The property, as with any purchase of real property, is transferred by warranty or quitclaim deed.

Land trusts are normally IRS § 501(c)(3) nonprofit organizations designed to acquire and develop properties for conservation and preservation, as well as advocate land use controls and development restrictions. Land trusts receive money for acquisition costs

through donations by individuals, corporations, foundations, and government grants. They are local, such as Weeks Bay Reserve Foundation, Alabama Coastal Foundation, Coastal Land Trust; State, such as Forever Wild and the Alabama Land Trust; or national, such as The Nature Conservancy and Trust for Public Lands.

III. Charitable Donation/Gift: Wetlands and environmentally sensitive areas may be transferred to a willing recipient (land trust, conservation organization or government agency) by gift which may qualify as a charitable donation. If qualified, the donor may be entitled to income or estate tax deductions and favorable publicity.

Donations may be outright, with reserved rights, a life estate, a transfer at less than fair market value, or of a conservation easement.

IV. Conservation Easements:

(A) Legal Considerations for Conservation Easements:

(1) Legal Documents: The conservation easement or restrictive covenant is a part of a legal transaction that involves a number of procedures and professionals prior to beginning the document preparation stage. The operating documents may include baseline documentation, appraisals, affidavits, title reports, management plans and other commitments.

(2) Goals and Intentions: The easement and all related documents and proposed management will depend on development and determination of the Grantor's goals and intent, the purpose (land protection, charitable donation, income and estate tax deductions, or obtaining a permit to conduct regulated activities), and the future of the property.

(3) Grantee Organization: State statutes and federal tax law dictate that the Grantee Organization be a qualified organization pursuant to parameters set forth in those laws. Normally, the organization must be a government entity or a charitable organization whose primary purpose (at least, a stated purpose) is to acquire property for conservation purposes or acquire an interest in such properties by conservation easements, etc. The Grantor must be satisfied that Grantee Organization's policies, management and future will be a compatible fit.

(B) Preparation of the Conservation Easement:

(1) Once other preliminary matters have been decided and accomplished, the parties may then proceed with formalizing the relationship and drafting the conservation easement agreement. State, local, and federal laws and regulations should be identified, reviewed, and consulted throughout the drafting process. The drafting should take place with independent legal representation of the Grantor and the Grantee to ensure that there are clear understandings of all of the ramifications, purposes, and agreements of the parties. The conservation easement statutes of Alabama are attached hereto as Exhibits A and B.

(2) The provisions of the conservation easement agreement should be carefully drafted to reflect the full intention of the parties, the purposes of the agreement, and to fully comply with any applicable law. While many items could be considered for inclusion, basic provisions, at a minimum, should include the following:

- Recitations
- Identification of the Grantor
- Grantee Organization

- **Grant and Conveyance**
- **Purpose and Duration**
- **Prohibited Uses and Activities**
- **Grantor's Reserved Rights**
- **Enforcement and Inspection**
- **Other Provisions**

Examples of formal conservation easement agreements are attached as Exhibit C.

(a) Recitations: The recitations should be extensive and provide the background information and the understandings of the parties. Examples of information that should be included in a recitation includes providing a confirmation of title, explaining the desires of the Grantor and Grantee, explaining the desire to create a long-term commitment (if not perpetual), reference to state or local laws supporting the conservation purposes, a description of the structural, functional and statement of public benefit values of the property, and reference to the baseline documentation, if not included as a part or exhibit to the conservation easement.

(b) Identification of the Grantor: The owner of the property and type of ownership should be identified. In addition to recitations and the identification of the Grantor in the document, a title report or abstract that will confirm title and type of ownership of the Grantor should be obtained. A title report will also identify any claims, judgments, or lien holders who may have an interest or claim an interest in the property. Examples of such liens would include:

- **Judgment of creditors**
- **Lawsuits pending against the owner**

- **Taxes**
- **Mortgage or pledge**
- **Easements/rights of way**
- **Prior reservations**
- **Recorded leases**

(c) Grantee Organization: The Grantee Organization should be identified as an organization that can accept and hold the interest granted.

(i) "Holder" under most statutes is defined as:

- **A governmental body empowered by the law of the state or the United States to hold an interest in real property; or**
- **A private, non-profit, charitable or educational corporation, association or trust, the purposes or powers of which include retaining or protecting the natural, scenic, historical or open-space values of real properties, assuring the availability of real property for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air or water quality, or preserving the natural, historical, architectural, archeological or cultural aspects of real property which is the recipient or Grantee of a conservation easement.**

(ii) A determination of who the Grantor wants to do business with, who will hold the easement and, if necessary, who will enforce the easement are critical to the long-lasting relationship and existence of the conservation easement and purposes of the conservation easement.

(iii) In the conservation easement agreement, the Grantee should be identified as a governmental body or charitable organization with requisite purposes and powers described by the statutes.

(iv) For Internal Revenue Service purposes and for tax considerations, the Grantee Organization should be a qualified organization as defined in IRC Section 170(h)(3).

(3) The Grant and Conveyance: The conveyance and grant of an easement must be for consideration or value to be effective. This may be by way of reciting that the consideration is the payment of money from the Grantee to the Grantor or by covenants and promises made, such as covenants of the Grantor to the Grantee, mutual covenants, or covenants of the Grantee to the Grantor. State laws should be consulted for full compliance.

The grant and conveyance (whether for money or gift) should be made voluntarily by the Grantor of the conservation easement to the Grantee. "Grant," "Bargain" and "Sell" are statutory words of warranty in Alabama. Use of these words, though they may be limited expressly by the language of the instrument, provide that the Grantor has the right to transfer an interest in the property, transfer unencumbered title to the property, and is in peaceful possession of the property. Exceptions and limitations to these statutory warranties are expressly allowed by statute. Ala. Code. § 35-4-271.

Conveyance should recite the statute or law applicable (most state conservation easement statutes require that the statute be specifically mentioned). The easement should be granted for one or more specific purposes set forth in the statute, or referenced and described in a separate provision of the agreement.

(4) Purpose and Duration: The purpose of the conservation easement should be spelled out in specific terms, either in the granting clause or in a separate purpose provision. The purpose should be explained by an affirmative description. Each state statute recites general categories of recognized conservation purposes.

IRC Section 170 (h) defines "conservation purpose" as follows:

> "(a) the preservation of land areas for outdoor recreation by, or the education of, the general public,
> (b) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
> (c) the preservation of open space (including farmland and forest land) where such preservation is –
>
> 1. for the scenic enjoyment of the general public, or
> 2. pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
>
> (d) the preservation of an historically important land area or a certified historic structure."

State statutes should be consulted to determine what, if any duration requirement may be necessary to qualify an easement as a conservation easement. The time period in Alabama, for example, can be the lesser of 30 years or the life of the Grantor. The duration or term can be stated from one year (or less) to "in perpetuity." In order to qualify for federal income or estate tax deductions, the term must be perpetual. The Louisiana conservation easement statute provides that a conservation easement duration will be unlimited unless the parties agree otherwise.

(5) Prohibited Uses: This provision may be called "Prohibited Uses" or "Conservation Restrictions" as described in the Alabama Forever Wild

Amendment (See Exhibit B). The provision may be general in description, however, the more specific the prohibited activity, the less interpretation or construction necessary to enforce the easement terms. The prohibited activities should be designed to protect the conservation purposes of the easement or, as described in Louisiana, the servitude. Examples could include restrictions on subdivisions, land clearing, filling or excavation, restrictions on construction of structures and commercial use (other than compatible uses or consistent uses, such as farming, timber management, limited buildings, educational activities, and hunting or fishing).

Those rights and uses that are not prohibited may be exercised by the Grantor by implication or specific reservation. "Other rights" may be further restricted by allowing the use "so long as such use does not adversely affect or impair the conservation purposes" of the easement.

Federal law prohibits surface mining, except as regard a "qualified mineral interest." A qualified mineral interest includes subsurface hydrocarbons and access thereto unless the ownership of minerals was severed from the surface prior to June 13, 1976, and there is a very remote likelihood of production of the minerals. IRC § 170(h)(5)(B) and § 170(h)(6).

(6) <u>Grantor's Reserved Rights</u>:

(a) <u>Specific Matters:</u> Like other provisions of the easement, these "reserved rights" should be specific. Grantor can and will argue that any right or use not prohibited can be exercised. Reserved rights should not be inconsistent with the conservation purposes or adversely affect the conservation purposes or functions.

Examples of reserved rights will vary greatly depending on purpose, location, Grantor, and site-specific features.

Subdivisions, buildings, improvements, recreational activities (hunting, fishing, trapping, camping, boating), research, pile-supported structures, timber management, mineral extraction, occupation of the property, farming or ranching activities, or the ability to lease the property to others are some general reserved rights that come to mind.

(7) Enforcement and Inspection: Provisions expressing the rights of the Grantee Organization and any third parties to enforce the provisions of the easement, to protect the purposes, and to periodically inspect the property are very important to the intent of the parties.

(8) Other Provisions: Other essential provisions should address tax liability, indemnities, condemnation, assignment by the Grantee Organization, amendments to the easement, abandonment, or termination.

Each conservation easement or restrictive covenant is different and should be treated on a site-specific and Grantor-specific basis. Knowledge of the Grantor or the Grantor's family, the Grantor's intentions and goals, the land and the Grantee Organization must be obtained to successfully draft the easement agreement and address the duties of each party.

The examples attached to this presentation are provided solely for discussion and reference. You should note that no form can or will be suitable for any situation without attention to detail and the need to customize the documents. Additional reference materials that should be of interest and usefulness include the following:

(a) *Conservation Easement Handbook* by Janet Diehl and Thomas S. Barrett, Land Trust Alliance, 1988.

(b) *Model Conservation Easement and Historic Preservation Easement,* 1996, Thomas S. Barrett and Stefan Nagel, Land Trust Alliance, 1996.

(c) *Preserving Family Lands, Book III,* Stephen J. Small, 2002.

(d) *The Federal Tax Law of Conservation Easements,* Stephen J. Small and Land Trust Alliance, 1997.

(e) *The Landowner's Guide to Conservation Easements,* Stephen Bick and Harry L. Haney, Jr., 2001.

(C) "In Perpetuity": The duration or term of a conservation easement is usually discussed in state statutes such as the Alabama Conservation Easement Act (See Exhibit A). The Alabama Act supports the duration contained in the Easement Agreement or if no duration is stated, it will be "the lesser of 30 years or the life of the Grantor, or upon the sale of the property by the Grantor." In other words, the Alabama Act can be interpreted to allow a duration "in perpetuity".

"In Perpetuity", magic words that are essential to qualify a conservation easement for the Federal tax benefits under IRC Section 170(h).

> "IRC Section 170(h) provides in part as follows:
>
> ...
>
> (2) Qualified Real Property Interest - - for purposes of this subsection, the term "qualified real property interest" means any of the following interests in Real Property:

(A) The entire interest of the donor other than a qualified mineral interest.
(B) A remainder interest, and
(C) A restriction (granted in perpetuity) on the use which may be made of the real property.

...

(5) Exclusively for Conservation Purposes - - for purposes of this subsection--

Conservation purpose must be protected - - A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity...."

"In perpetuity" is also extensively discussed in the Treasury Regulations § 1.170A-14.

"Perpetual" is defined by Black's Law Dictionary as "continuous", "never ceasing", "enduring", and by Webster's Dictionary as "continuing forever", and "everlasting". Will a conveyance of a conservation easement in perpetuity then last forever?

The perpetual nature of the character, duration, existence and obligations under a conservation easement may be affected by a number of events, circumstances and provisions of the agreement such as:

(1) amendment
(2) condemnation
(3) changed circumstances
(4) extraordinary events
(5) termination
(6) modifications
(7) inheritance
(8) judicial interpretation

(D) Challenges to Existing Easements: As the conservation easement movement ages, the challenges of perpetuating the original structure of the conservation easement becomes more evident. Once the conservation easement is in place and operations restricted by the terms, reality, second-guessing and to some extent, regret may enter the picture.

Land trusts and recipient organizations should be cautious to involve and educate all of the potential grantor family including the individuals, or family members, stockholders or interest holders. Involvement, understanding and consent by all will not prevent future problems, however, they will help build a long term cooperative relationship.

The motivation to challenge or remove the development restrictions of a conservation easement on property may involve the original grantor whose intentions have changed, financial conditions, next generation's opinions and desires to control the property, changes in organization structure or agenda, changes in society or cultural trends, or enforcement actions.

What we do today to protect the natural environment or pieces of it, seems a great advancement from our procedures 20 years ago. What will our actions of today look like 20 years from now?

Challenges may be filed to invalidate restrictions or to enforce restrictions contained in conservation easements.

An excellent article addressing various challenge issues is by M. Thompson and J. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Theme and Approaches To Date*,

78 Denver University Law Review 373 (2001). In the article, the authors describe several categories of challenge cases including third party enforcement and defense, actions that attack the validity of the restrictions, and enforcement and judicial interpretation.

(1) Burgess v. Breakell, 1995 Conn. Super. LEXIS 2290 (Conn. Aug. 7, 1995), involved an action by a neighbor, a third party, against the landowner, Breakell, alleging violations of a conservation easement which restricted the Breakell property requiring it to be maintained wild and natural for scientific, educational and environmental purposes for the preservation of its natural features. Breakell was conducting a logging operation on the property. The state court reviewed the conservation easement statute and concluded that the third party did not have standing and dismissed the suit holding that only the holder of the easement could file suit to enforce the restriction.

(2) Madden v. The Nature Conservancy, 823 F. Supp. 815 (D. Mont. 1992) involved a reservation and conservation restriction on Shining Mountain Ranch in Montana in a deed of property from The Nature Conservancy to the predecessors in title to Madden. The title acquired by Madden, according to the court, was subject to the restrictions and the reservation of enforcement rights by The Nature Conservancy. The court looked at the intent of the original parties and the whole document to render its interpretation.

(3) The Court in Redwood Construction Corporation v. Doornbosch, 670 N.Y. S. 2d 560 (N.Y. App. Div. 1998) held that the conservation easement language did not specifically prohibit Redwood's activity. Redwood owned property adjacent to the Doornbosch property which was encumbered by a conservation easement

restricting improvements that affected the natural open and scenic nature of the property. Doornbosch though, in granting the conservation easement, reserved the right to convey the property or other rights therein so long as the conveyance was consistent with the terms of the easement. Redwood offered to purchase an access easement across the Doornbosch property (and conservation easement) from the Redwood development to a public road. The holder of the easement objected, but the court, interpreting the language of the conservation easement, found that the proposed use would not be inconsistent with the terms of the easement.

V. Deed Restrictions: These are clauses and provisions included in the deed for a specific purpose of limiting full use of the property interest transferred.

A deed restriction may prohibit certain land uses and activities that may destroy, damage or alter the wetland areas or the environmentally sensitive areas. Tax breaks may be available when the development potential of the property is limited.

VI. Restrictive Covenants: Covenants are agreements imposed on land use to act or refrain from acting in a certain manner. Covenants may be personal to a particular class or attach and run with the land. If no duration is imposed, the duration of a covenant will be for a reasonable time period. Restrictions reservations and covenants should be carefully and specifically drafted.

Examples of restrictive covenants include subdivision restrictions and wetland mitigation requirements. The Corps of Engineers routinely requires the imposition of use restrictions and covenants on properties used for mitigating wetland impacts. (See Exhibit D.)

VII. Management Agreements / Conservation Plans: Through education and cooperation, the use of voluntary management agreements can be an effective wetland protection tool. The agreements may be initiated by an agency or organization with a landowner to conduct or change land use operations pursuant to a coordinated plan throughout a watershed, as a stream or coastal corridor, or to address a particular concern such as stormwater, erosion, animal waste, access, or restoration. Incentives may include economic benefits, cost-sharing, tax relief, and publicity. Examples of management agreements are attached as Exhibit E.

Mitigation and Conservation Banking are alternatives for agencies or landowners who recognize the need and economics associated with mitigation under the Clean Water Act and the Endangered Species Act. Any permit applicant required to mitigate unavoidable impacts (individual, DOT, utilities, etc.) may be willing to invest in or purchase credits from a bank if no or few reasonable alternatives exist or such would be in the best interest of the community or species. The landowner has a management alternative and regulatory agencies receive mitigation and conservation activities without the cost of acquisition.

The criteria for wetland banks must meet the requirements set forth in the *1995 Federal Guidance for the Establishment, Use and Operation of Mitigation Banks*, Fed. Reg. 58605, Nov. 28, 1995. Conservation banks must meet the requirements of *USFWS, Guidance for the Establishment, Use and Operation of Conservation Banks* (2003).

VIII. Land Use Regulation:

(A) Local: Open space, stormwater, watershed protection, floodplain issues and wetland protection are popular topics of local land use regulations.

(1) Open Space Planning:

"Open Space" is a term used to describe undeveloped and unimproved surface areas. In the planning process, open space may include existing farm lands, timberlands, riparian buffers, neighborhood parks, greenbelts, coastal and riverine shorelines, and other environmentally sensitive areas.

Open Space is defined in Article II, Paragraph 2.2.420 of the Fairhope Zoning Ordinance as:

> "2.2.420 *Open Space*: An area open to the sky which may be on the same lot with a building. The area may include, along with the natural environmental features swimming pools, tennis courts or any other recreational facilities. Streets, structures for habitation, and the like shall not be included.
>
> a. *Open Space, Permanent Usable, in Planned Unit Development*: (a) privately-owned and occupied area of a separate lot, outside of any buildings on the lot, (2) privately-occupied open space assigned to an individual dwelling unit in a project and not occupied by the dwelling, (3) public open space. Any spaces not occupied by buildings or privately-owned lots or privately occupied space. This public open space may consist of access driveways, off-street parking spaces, pedestrian walkways, play areas, landscaped areas, sports areas and any other areas suitable for the common enjoyment of the residents of the project."

Open Space has received attention as developments proceed without a coordinated and acceptable land use plan, and as unimproved properties are developed without concern for long term effects of density, recreation, weather or the downstream effects of development.

A Comprehensive Plan for Land Use may be proposed and adopted by a community according to the Alabama Code to guide development, land use and reuse of property

considering concerns of city planners, citizens, and at times, landowners. Alabama Code § 11-52-8.

Examples of local land use plans include:

- **Fairhope Comprehensive Land Use Plan**
- **Comprehensive Plan for the City of Mobile, as amended May 19, 1998.**

The Mobile Planning Commission has adopted a comprehensive plan for the City of Mobile. Mobile also has a zoning ordinance, subdivision ordinance, and a land use ordinance.

"Planning" has been distinguished from "zoning" by the Alabama Supreme Court as follows:

> **"Broadly speaking, 'planning' relates to the systematic and orderly development of a community with particular regard for streets, parks, industrial and commercial undertakings, civic beauty and other kindred matters properly within the police power. 'Zoning' is primarily concerned with the regulation of the use of property, to structural and architectural designs of buildings, and the character of use to which the property or the buildings within classified or designated districts may be put." *Roberson v. City of Montgomery*, 233 So. 2d 69, 72 (Ala. 1970).**

Planning and review procedures for open space are sanctioned by Alabama Code § 11-52-11. The planning commission has the authority to require submission and approval of both public and private plans addressing, among other things, parks, playgrounds or open spaces, before construction.

In Wisconsin, the Town of Dunn's land use plan was developed 20 years ago to address what was described as "burgeoning and haphazard development that threatened agriculture and the rural character of the town."

The Town developed a plan to maintain their idea of the Town's heritage. They wanted to keep taxes low by encouraging the agricultural base. They wanted to discourage growth, protect open space and environmentally sensitive areas. They enacted land use controls, subdivision restrictions and allotted funds for acquisition of land and conservation easements.

The Town now purchases development rights. They found that conservation easements work better than zoning.

The Town created a land trust to permanently protect farmland and open spaces.

The Town works with the resident for education, recycling and cleanup programs.

The benefits of open space have been recited in the Tennessee Tax Code § 67-5-1001, *et seq.*, entitled "Classification and Assessment – Agricultural, Forest and Open Space."

The Tennessee Legislature recited reasons for protecting open space:

> **"(1) The existence of much agricultural, forest and open space land is threatened by pressure from urbanization, scattered residential and commercial development, and the system of property taxation, this pressure is the result of urban sprawl around urban and metropolitan areas which also brings about land use conflicts, creates high costs for public services, contributes to increased energy usage, and stimulates land speculation;**
>
> **(2) The preservation of open space in or near urban areas contributes to:**
>
> > **(a) The use, enjoyment and economic value of surrounding residential, commercial, industrial or public use lands;**
> >
> > **(b) The conservation of natural resources, water, air, and wildlife;**
> >
> > **(c) The planning and preservation of land in an open condition for the general welfare;**

(d) A relief from the monotony of continued urban sprawl; and

(e) An opportunity for the study and enjoyment of natural areas by urban and suburban residents who might not otherwise have access to such amenities;

(3) Many prime agricultural and forest lands in Tennessee, valuable for producing food and fiber for a hungry world, are being permanently lost for any agricultural purposes and that these lands constitute important economic, physical, social, and esthetic assets to the surrounding lands and to the people of Tennessee;

(4) Many landowners are being forced by economic pressures to sell such agricultural, forest, or open space land for premature development by the imposition of taxes based, not on the value of the land in its current use, but on its potential for conversion to another use."

Other planning options appear in zoning or subdivision regulations which allow planned unit developments (PUD's) or planned mixed use districting (PMUD's). Each of these classifications encourage clustering of structures, flexibility of design and use of open space.

In the Fairhope Zoning Ordinance, Article VI, paragraph 6.1, open space is addressed as a part of PUD's:

"The intent of a planned unit development is to permit such flexibility and provide performance criteria for unified development which:

. . . .

(4) Enhance the appearance of the area through preservation of natural features, the provision of underground utilities and the provision of recreation areas and open space in excess of existing zoning and subdivision requirements."

Mobile and other municipalities have similar provisions in their zoning ordinances. Another flexible planning classification is called the planned residential development (PRD) which is described in the Baldwin County Zoning Regulations, in Article 23. PRD's are discussed in a recent case, *Fort Morgan Civic Association Inc v. Baldwin County Commission*, 2003 Ala. Civ. App. LEXIS 7 (January 10, 2003).

Open space is further encouraged by:

(a) The statutory recognition of conservation easements in Alabama:

(i) Conservation Easements, Alabama Code § 35-18-1, et seq.; and

(ii) Forever Wild Amendment, Alabama Constitution of 1901, Amendment 543.

(b) Flood Hazard Zoning Ordinances:

(i) Mobile Ordinance No. 65-082, 1993 "Ordinance Establishing Control of Stormwater Drainage Facilities and Land Disturbance Activities and to Establish Land Use and Control Measure in Special Flood Hazard Areas; and

(ii) Flood Ordinance of the City of Fairhope, Ordinance No. 668.

(c) Restrictions on Use of Beaches and Dunes:

(i) ADEM ADMIN Code Reg. 335-8 (Coastal Regulations;

(ii) Gulf Shores Zoning Ordinance, Article I, Section 8-11, Coastal Construction Setback Line; and

(iii) Town of Dauphin Island Zoning Ordinance.

(d) River Riparian Protection:

(i) The City of Trussville established a Cahaba River Overlay District within which, by zoning ordinance, stream and riverside setbacks, buffers and riparian zones have been encouraged and required to protect the River from chemical, pesticide and sedimentation runoff, and to preserve floodplain areas.

(B) State laws addressing wetlands and environmentally sensitive areas:

(1) Coastal Resources: Preservation, Development, etc. of Coastal Areas, Alabama Code § 9-7-11, et seq.; ADEM ADMIN Code Reg. 335-8-1, et seq.;

(2) Wild Life Resources: Department of Conservation and National Resources, Alabama Code § 9-2-1, et seq.; Wildlife and Fisheries, § 9-11-1; Marine Resources, § 9-12-1; Public Lands, § 9-15-1;

(3) Alabama Water Resources, Alabama Code § 9-10B-3, addressing water quantities;

(4) ADEM Water Quality Regulations:

(a) ADEM ADMIN Code Reg. 335-6-10, Water Quality Criteria;

(b) ADEM ADMIN Code Reg. 335-6-11, Water Use Classification;

(c) ADEM ADMIN Code Reg. 335-6-12;

NPDES Stormwater Regulations)Phase I and Phase II) construction sites; and

ADEM ADMIN Code Reg. 335-6-6, NPDES direct discharges.

(C) Some federal laws that effect land use include:

(1) National Environmental Policy Act, 42 U.S.C. § 4321. For every major federal action that significantly effects the quality of the human environment (42 U.S.C. § 4332(2)(c)), a detailed Environmental Impact Statement (EIS) describing environmental impacts of the proposed action and alternatives to the proposed action must be in accordance with the regulations and procedures established by the Council on Environmental Quality regulations, 40 C.F.R. pt. 1500, et seq.

Although one case, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 8 E.L.R. 20288 (U.S. Sup. Ct., April 3, 1978), the U.S. Supreme Court noted that NEPA is a procedural requirement rather than a substantive law. However, the requirement to prepare an adequate Environmental Impact Statement would definitely have an effect on land use decisions.

(2) The Clean Water Act, 33 U.S.C. § 1251, et seq. The Clean Water Act has several sections and programs that effect land use.

(a) Clean Water Act § 303 (33 U.S.C. § 1313(b)) provides procedure for identifying waters which remain polluted even after technological standards have been applied. Limits or waste loads must be established by each state (or failure to do so by EPA) which meet current state and water quality standards. EPA regulations at 40 C.F.R. pt. 130 address the Total Maximum Daily Loads (TMDL) for receiving waters. A TMDL is a written quantitated plan and analysis for obtaining and maintaining water quality standards in all seasons for a specific water body. For existing industries, the

establishment of TMDLs following the identification of a specific polluted water where existing water quality standards, water use classifications, and NPDES limits have not been successful means more stringent permit limits and additional cost to meet the new standards. A Montana court prohibited the state from issuing any new NPDES permits or amending existing permits for road building projects, construction projects, or permits for upgrading the public drinking water system until the state complied with Section 303(d) as a water quality limited segment. *Friends of Wild Swan v. EPA*, D. Mont. CV-97-35-M-DWM, 10-13-00. As TMDLs for pollutants such siltation and sediment are developed, activities effecting waters impaired by such pollutants will be restricted and control procedures more pronounced. TMDL procedures must address all pollution, including non-point source pollution, according to the court in Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000). This will substantially increase construction site erosion control costs, mandate monitoring for all pollutants for which TMDLs are discussed, and have a costly effect on the municipal sewage treatment and stormwater drainage systems.

(b) Clean Water Act § 319, Non-Point Source Pollution and Watershed Management. The Clean Water Act § 319 directed that states consider the effects of non-point source pollution and establish watershed management plans. after coordination with various stakeholders, including local governments, watershed users, landowners, and citizens, a plan for each watershed should be drafted and implemented. Although education and information are big parts of the management directive, we expect that the implementation stage will also include direct land use controls.

(c) Clean Water Act § 402:33 U.S.C. § 1342. In the event that a development will produce or need to discharge pollutants directly to navigable

waters, including wetlands, from a pipe or another point source, an owner, developer, or contractor must first obtain a general or individual National Pollutant Discharge Elimination System (NPDES) permit. These discharges may be from commercial or industrial operations directly to surface waters, or from sewage and waste from municipal water treatment facilities or from stormwater runoff. ADEM administers the NPDES program in Alabama, subject to EPA regulations (40 C.F.R. 122), rules and regulations found at ADEM Admin. Code Reg. 335-6-6, the provisions of the Alabama General Stormwater Permit for Construction Sites, and the proposed ADEM Admin. Code Reg. 335-6-12 (expected to be effective in January 23, 2003).

(d) Clean Water Act § 404 (33 U.S.C. § 1344) and Regulations Found at 33 C.F.R. § 320 and 40 C.F.R. § 230. These refer to the prohibitions against dredging or filling "waters of the United States" without a permit. Wetlands or other water bodies, including certain floodplains, cannot be dredged or filled without first applying for a Section 404 permit.

(3) Clean Air Act (42 U.S.C. § 7401). Air quality data, air emission limitations, and monitoring data are required for any construction and operating permits. Ozone non-attainment and air emission limits will be limiting factors for any business.

ADEM is the regulatory agency in Alabama administering the Clean Air Act and the requirements of the Alabama Air Pollution Control Act (Ala. Code § 22-28-1) and the ADEM regulations (§ 335-3).

(4) Endangered Species Act (16 U.S.C. § 1531, et seq., and Regulations at 50 C.F.R. § 17.3). Any land disturbing activity, hazardous activity or

development may be required to obtain a wild life survey to confirm the existence of nonexistence of federally listed or state protected species. The study is normally required as part of many land use permit procedures. In addition, the non-game regulations of the Alabama Department of Conservation and Natural Resources, Rule 220-2-92, should be consulted. these regulations provide certain procedures for permitting and protection of state protected species which may pose an additional obstacle to certain siting and operating activities.

(5) Historic Properties. The National Historic Properties Act, 16 U.S.C. § 470, requires federal agencies to consider historic and cultural properties effected by land use activities. State law also protects certain state historic properties and burial grounds. The Alabama State Historical Preservation Officer (SHPO) will be required to review properties, permit applications, and development plans as part of other permitting activities to determine the existence and preservation requirements of cultural resources and historic properties of state and national significance. Regulations requiring cultural resources surveys of areas impacted by any land use project are found at 40 C.F.R. § 1502.

(6) National Flood Insurance Act (42 U.S.C. § 4001) and Flood Regulations 40 C.F.R. pt. 60.