## Section C.2: Considerations for Evaluating Local Governmental Controls

An important factor to consider in evaluating the durability and protectiveness of Non-Recorded Institutional Controls ("**NRICs**") is whether the control in question is one that the Department can appropriately rely upon as a long-term control.

As specified above, to be legally sufficient, institutional controls must all meet the definition of an institutional control in Section 376.301(22), F.S. (as renumbered in Ch. 2016-184, Laws of Florida) (i.e., "the restriction on use or access to a site to eliminate or minimize exposure to petroleum products' chemicals of concern, drycleaning solvents, or other contaminants. Such restrictions may include, but are not limited to, deed restrictions, restrictive covenants, or conservation easements."). Other restrictions which may meet the statutory definition include a declaration of restrictions common to a plat; recorded homeowners' association ("**HOA**") or property owners' association ("**POA**") rules and regulations; and covenants, conditions, and restrictions ("**CCRs**").

It is important to note that local ordinances that prohibit installation or use of water wells (even in conjunction with a requirement to use of a municipal water supply) are not enforceable because the exclusive authority to regulate the consumptive use of groundwater rests with the Department and water management districts (WMDs).[1] Courts have recognized and upheld this "exclusive authority."[2]

Because of the WMDs' authority over water well permitting, WMD water well permitting rules (or the rules of a county, county health department, or other local government which has received delegation of water well permitting authority from a WMD pursuant to Fla. Stat. §§ 373.308–309 ("Delegated Local Government")), which (i) require that permits be obtained prior to the construction or modification of potable, irrigation, or other water wells subject to permitting requirements under Part III of Chapter 373, F.S.; and (ii) prohibit the permitting of such regulated wells in areas of known groundwater contamination, if such permitted wells would increase the potential for harm to public health, safety and welfare or would degrade the water quality of the aquifer by causing pollutants to spread,[3] may constitute legally sufficient governmental controls when coupled with a system or

**Deleted:** institutional controls other than RCs

**Deleted:** products,'

**Deleted:** ").

**Commented [TMH1]:** FBA intends to open discussions with FDEP regarding the statutory standard at 376.301(22) and the requirement that ICs "minimize exposure" to contaminants. It is FBA's opinion that elimination of risk posed by circumstances based on an assumption that exposure will result from a violation of law or a restrictive covenant, or a circumstance that is highly unlikely, given the totality of circumstances, including practical and real world considerations, is not required. This is addressed in FBA's cover letter.

**Deleted:** insufficient

**Deleted:** Districts

[1] *See* § 373.217(2), Fla. Stat. (stating that Chapter 373 is "the exclusive authority for requiring permits for the consumptive use of water."); § 373.217(3), Fla. Stat. (Specifically stating that if any provision of Part II of Chapter 373, as amended, "is in conflict with any other provision, limitation, or restriction which is now in effect under any law or ordinance of this state or any political subdivision or municipality, or any rule or regulation promulgated thereunder, Part II shall govern and control, and such other law or ordinance or rule or regulation promulgated thereunder shall be deemed superseded for the purpose of regulating the consumptive use of water." An exception is made for the Florida Electrical Power Plant Siting Act.); & § 373.217(4), Fla. Stat. (expressly preempting "the regulation of the consumptive use of water.").

[2] See Marion County. v. Greene, 5 So. 3d 775, 777 (Fla. 5th DCA 2009); Sw. Florida Water Mgmt. Dist. v. Charlotte County, 774 So. 2d 903, 918 (Fla. 2nd DCA 2001); Thomas v. Sw. Florida Water Mgmt. Dist., 864 So. 2d 455, 456 (Fla. 5th DCA 2003); and Heartland Environmental Council v. DCA and Highlands County, ¶ 169, DOAH Case No. 94-2095GM.

[3] *See*, i.e., applicable within the Southwest Florida Water Management District ("**SWFWMD**"), Fla. Admin. Code r. 40D-3.505(3) ("[t]he District will deny a permit application to construct a water well if use of the well would increase the potential for harm to public health, safety and welfare, or if the proposed well would degrade the water quality of the aquifer by causing pollutants to spread.")

procedure by which areas of known groundwater contamination are reflected and/or recorded in a WMD's or Delegated Local Government's GIS computer database (or similar system) to prevent or condition the issuance of water well construction permits in areas of groundwater contamination.

In addition, statutory provisions prohibit the Department and WMDs from requiring a water use permit "for domestic consumption of water by individual users."[4] Because permitting of water use is preempted to the state and the state specifically exempts domestic self-supply from use permitting, it would be improper to rely on a local government prohibition of water use as an institutional control.

While city and county ordinances that prohibit the installation or use of potable water wells on their own are not legally sufficient, other, legally sufficient ordinances could suffice as an institutional control after a site specific evaluation. For example, ordinances or comprehensive plan provisions that require property owners to hook up any improvement to a community, county or municipal water system without also requiring the property owners to use the water system could suffice. Local governments may, and routinely do, require that any development within the jurisdiction be connected to any existing municipal water system for potable water supply, if supply lines are available within a specific distance of the property on which development/redevelopment is contemplated. This may be evidenced by a local ordinance or comprehensive plan provision requiring connection, both of which are enforceable under Florida law. Such provisions may be sufficient to demonstrate that the NRIC restriction on use or access to a site to eliminate or minimize exposure, or an ordinance that prohibits the location of wells on property owned by the local government passing the ordinance could likewise suffice. Keep in mind that legally sufficient local governmental controls must also suffice as controls that are adequately protective of human health and the environment given the specifics of the site in question to be accepted by the Department. For example, these mandatory hook-up ordinances often allow private wells for irrigation or other non-potable purposes. Site/project managers must decide whether continued use of the groundwater for non-potable use is still protective of human health and the environment. For such issues, site/project managers should look to other considerations relative to the irrigation water exposure pathway, such as an evaluation of concentrations in groundwater as compared to the applicable Irrigation Water Screening Levels ("**IWSLs**") set forth in the June 28, 2016 Letter, *Update to the assumptions for the development of irrigation water screening levels (IWSLs),* from University of Florida Center for Environment & Human Toxicology to the Department.

Deleted: Districts

Deleted: regulation

Deleted: regulation

Deleted: such prohibitions

Deleted: controls

Deleted: local

Deleted: Or,

[4] § 373.219(1), Fla. Stat. Domestic consumption includes "the use of water for the individual personal household purposes of drinking, bathing, cooking, or sanitation" and "[a]ll other uses shall not be considered domestic." § 373.019(6), Fla. Stat.