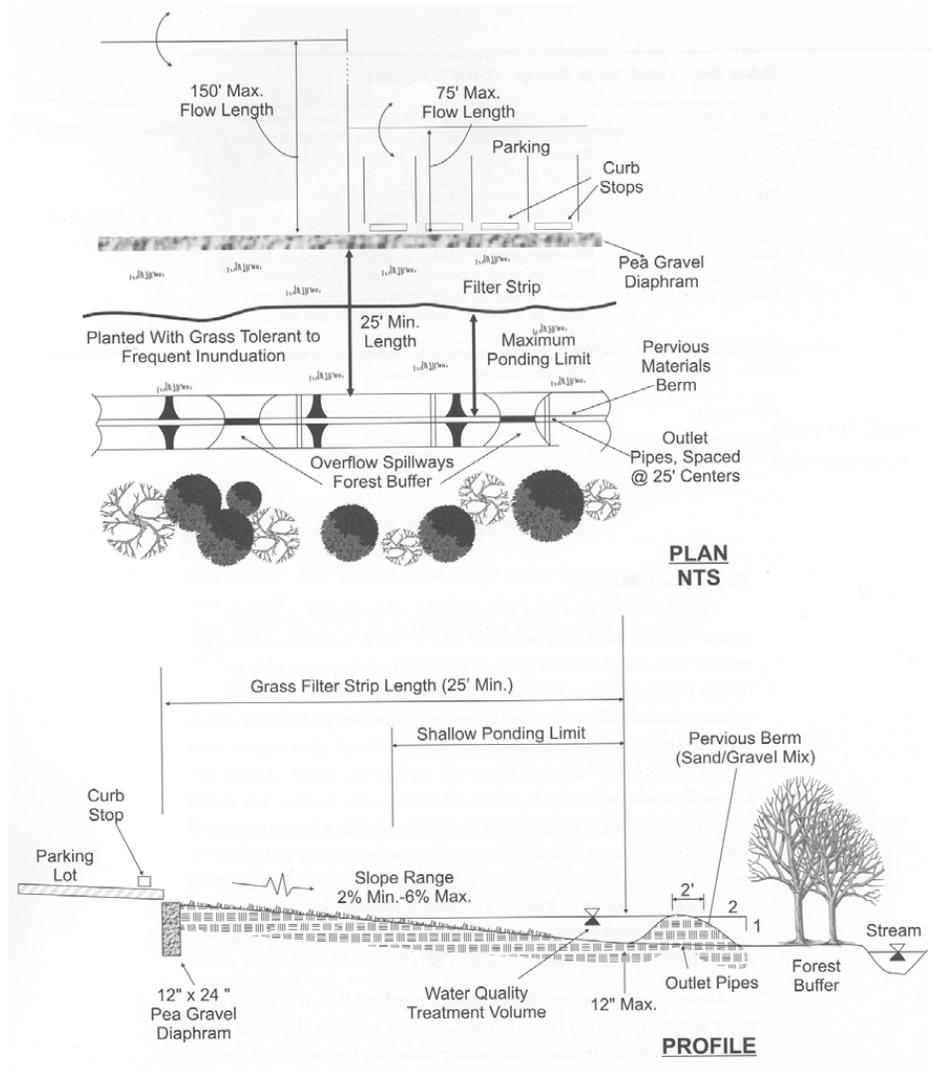


# Weathering the Storm(water): Implementing Low-Impact Development Stormwater Management for New Residential Development in Florida



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## I. Introduction to Low-Impact Development and Related Permitting Concerns

Despite over twenty years of Florida's implementation of stormwater permitting at the state level, nitrogen and phosphorous pollution from stormwater runoff continue to impair many waterways around the state. Florida's Department of Environmental Protection released a report in 2007 indicating that some current design criteria for centralized stormwater systems do not provide the levels of pollution reduction for nitrogen and phosphorous that had been assumed for many years and are required as part of Florida's state regulation of stormwater.<sup>1</sup> These developments have led to the Florida Department of Environmental Protection to announce that it has begun development of a new statewide stormwater rule.<sup>2</sup> At the same time, stormwater experts, including the U.S. Environmental Protection Agency,<sup>3</sup> increasingly advocate a paradigm shift from the centralized stormwater systems now typically required of new develop to a suite of stormwater management strategies that fall under the rubric of "low-impact development" (LID).<sup>4</sup> LID stormwater practices seek to prevent degradation of surface water quality and reduction of groundwater recharge after development has occurred.<sup>5</sup>

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<sup>1</sup> Harvey H. Harper & David M. Baker, Environmental Research & Design, Inc., Evaluation of Current Stormwater Design Criteria within the State of Florida (June 2007). The report notes that dry detention fails to meet the required pollutant mass removal efficiency of 80% defined in state rules, *id.* at 5-26, 5-27, as does wet detention, *id.* at 5-35, 5-39-40, resulting in the conclusion that most design criteria in the permitting rules fail to achieve the 80% to 95% removal efficiencies required by Florida Administrative Code Chapter 62-40 for mass removal. *Id.* at 6-1. The report goes on to recommend certain design criteria to achieve required removal efficiencies through dry retention alone or wet detention as part of treatment train system. *Id.* at 6-3 through 6-23.

<sup>2</sup> Florida Administrative Weekly, Vol. 33, Number 21 (May 25, 2007).

<sup>3</sup> See, e.g. Office of Water, United States Environmental Protection Agency, Low Impact Development (LID): A Literature Review (document EPA-841-B-00-005, October 2000) (hereinafter LID Literature Review); Non-Points Source Control Branch, U.S. Environmental Protection Agency, Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices (document EPA-841-F-07-006, December 2007); U.S. Environmental Protection Agency "Low-Impact Development (LID) page" at [www.epa.gov/nps/lid/](http://www.epa.gov/nps/lid/).

<sup>4</sup> Expansion of the National Pollutant Elimination Discharge System's applicability to certain stormwater discharges has helped spur development of LID stormwater approaches. St. George's County, Maryland is credited as being the first and most progressive local government in implementing LID stormwater strategies. See, e.g. Office of Water, United States Environmental Protection Agency, Low Impact Development (LID): A Literature Review, ii (Executive Summary) (document EPA-841-B-00-005, October 2000); "Interview With Larry Coffman, the Low-Impact Development Innovator," available at [http://www.gradingandexcavation.com/sw\\_0709\\_stormcon.html](http://www.gradingandexcavation.com/sw_0709_stormcon.html). The term low-impact development was originally coined in about 1993 or 1994 by Larry Coffman. See, e.g. *id.*

<sup>5</sup> Current stormwater practices often remove stormwater from individual parcels as quickly as possible. The resulting stormwater typically contains fertilizers, heavy metals from roadways, and other pollutants. This polluted water collects in centralized locations—stormwater treatment ponds—where some pollutants settle out before the stormwater is released or infiltrates. Soil and plants act as natural filters for stormwater contaminants, but current practices often fail to maximize these benefits. Another effect of the current stormwater system's focus on rapid collection and centralization is decreased recharge to underground water resources as rapid centralization minimizes on-site infiltration possibilities and allows increased evaporation at central collection ponds before the water can infiltrate into the ground.

LID stormwater management focuses on minimizing the runoff from individual parcels by maximizing water storage, infiltration, and uptake.<sup>6</sup> LID utilizes both structural and non-structural techniques to accomplish this. The line between structural and non-structural practices often blurs; many design aspects, such as minimization of road widths, constitute both a design technique (i.e.—non-structural) as well as a structural technique (i.e.—because the resulting construction is different). With this caveat in mind, some examples of non-structural techniques include maintenance of open areas/clustering of development, preservation of the maximum feasible amount of existing tree cover, streets designed to minimize linear road length, minimized road widths, decreased/eliminated on-street parking, shared driveways, and minimization of compaction of soils by heavy equipment. The general public may often fail to realize that a design or construction difference, such as tree canopy—which intercepts light rain and decreases the velocity of heavy rain—and increased open space, forms part of an integrated LID stormwater management plan. This indicates a need for on-going educational campaigns to create awareness of LID, especially for those living in developments where LID has been implemented.

Structural LID elements may include constructed swales and rain gardens, underground or above ground exfiltration tanks, cisterns/rain barrels, green roofs, downspouts disconnected from impervious surface, and porous pavement. As with the non-structural methods, structural LID methods utilize many landscape features that the general public would likely not recognize as important stormwater management structures such as swales, small depressions, rain gardens, etc. In keeping with the LID concept of treating with stormwater as close to its source as possible, LID stormwater elements may be on individual lots as well as on common areas of the development. In some cases, future lot owners may not understand and appreciate the function of such landscape features and may eliminate them, thus undermining the integrity of an LID stormwater system. Concerns about placement of LID elements on private parcels and other concerns with the long-term maintenance and operation of LID stormwater elements have led to reluctance on the part of Florida's water management districts (WMDs) to permit LID stormwater systems as a replacement for centralized stormwater systems. Some of these concerns can be addressed by only siting LID elements on common areas of the development, but the inherently more dispersed nature of LID may make placement on private property important in some instances.<sup>7</sup>

Much of the concern over LID placement on private parcels harkens back to failures to maintain and enforce stormwater infrastructure in the form of back-yard swales in the early days of stormwater regulation in Florida. While several jurisdictions around the country have

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<sup>6</sup> See generally, Office of Water, United States Environmental Protection Agency, Low Impact Development (LID): A Literature Review (document EPA-841-B-00-005, October 2000).

<sup>7</sup> Placing LID elements only common areas of the development means that the operations and maintenance issues only change as much as LID may or may not need more maintenance than centralized stormwater systems. However, limiting the use of LID to common areas may not always be feasible or the best approach. This paper proceeds on the assumption that we are capable of developing effective legal strategies to ensure the operation and maintenance of LID stormwater elements on private parcels when appropriate, thus giving greater flexibility in design to protect our water resources.

incorporated LID into their stormwater regulatory and permitting programs,<sup>8</sup> such programs often face challenges due to lack of resources for effective monitoring and enforcement.<sup>9</sup>

Florida's water management districts feel comfortable with the relatively clear legal system in place for approval and enforcement of permits and operation and maintenance commitments for centralized stormwater systems. As a general rule the responsibility to operate and maintain the stormwater management system in residential developments falls on the homeowners' association of a new development,<sup>10</sup> which owns both the stormwater infrastructure as well as the common areas where the central stormwater infrastructure is typically located. In contrast to this, LID structures are often spread across many private parcels in a development, thus complicating the motivation, the ability, and the legal right of the homeowners' association to operate and maintain each LID element.<sup>11</sup> Some current water management district regulations

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<sup>8</sup> See, e.g. Prince George's County, Maryland, Council Bill 67-2001 (codified at Subtitle 4, Division 4 of the Prince George's County Code and incorporating by reference the Prince George's County Stormwater Management Design Manual (August 2001)). Island County, Washington Land Development Standards, section 11.03.220; Lacey, Washington, Zero Effect Drainage Discharge Ordinance, Chapter 14.31 (December, 1999); City of Issaquah, Washington Municipal Code, sec. 13.28; Island County, Washington Land Development Standards, Section 11.03.260 (noting that the owner of record is responsible for maintenance and establishing deed restrictions that run with the land). The U.S. E.P.A notes that in Denver, Colorado, sites designed to reduce "directly connected impervious cover" may use a lower site impervious area to calculate required stormwater storage capacity (DUDFCD, 1992) and Maryland regulations allow disconnected rooftops to be subtracted from the site's total impervious cover in stormwater permitting calculations (MDE, 2000). U.S. EPA website "On-Lot Treatment," available at <http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=81>

<sup>9</sup> For example, LID practices have been part of the stormwater permitting system of Prince George's County since 2000. Permits require the holder to submit periodic reports by an engineer certifying that the LID system is functioning as designed. Permit holders have not been submitting these reports and the county's public works department lacked the administrative resources to follow up on the failures to file the proper reports. A new county administration is currently working to remedy this through new administrative resources and procedures. Personal communication with Rey DeGuzman, Prince George's County Department of Public Works and Transportation (October 10, 2007).

Portland, Oregon has also been permitting stormwater systems incorporating LID for many years. During the early years of the program, there was little focus on resources for oversight once permitting was accomplished. Now Portland has a staff person dedicated to visiting sites with permitted LID systems and doing public outreach regarding such structures. Experience in Portland has taught those administering the program that their limited administrative resources have greater impact when they dedicate themselves more to public outreach and education than to enforcement since a single enforcement action can consume so many resources. Personal communication with Henry Stevens, Portland, Oregon, Bureau of Environmental Services (Feb. 8, 2008).

<sup>10</sup> This article only addresses LID stormwater permitting for new residential development. Redevelopment and commercial development present different issues that must be considered.

<sup>11</sup> Both centralized and LID stormwater systems require on-going maintenance. "Generally, bioretention facilities require replacement of dead or diseased vegetation, mulching as needed, and replacement of soils after 5–10 years. Grass swales require periodic mowing and removal of sediments. Maintenance of permeable pavements requires annual high-powered vacuuming of the area to remove sediments." Office of Water, United States Environmental Protection Agency, Low Impact Development (LID): A Literature Review i (Executive Summary) (document EPA-841-B-00-005, October 2000).

may be used to permit certain LID practices.<sup>12</sup> However, any LID alternatives not currently included in water management district rules would have to be permitted as “alternative” systems, but alternatives require the applicant to carry a heavy burden to demonstrate the effectiveness of a proposed system—without any guarantee that a permit will be forthcoming.

Local governments that regulate stormwater face the same issues as do the WMDs: How does the local government best allocate limited resources to ensure the long-term operation and maintenance of permitted LID elements?

This article begins to address the need for a legal framework that helps Florida’s WMDs and local governments ensure that legally-required LID stormwater elements will be perpetually operated and maintained and minimizes the need for monitoring and enforcement activities by WMDs or local governments. The article begins with a brief exploration of the regulatory framework for stormwater management at the federal and state levels. The article distinguishes between WMD and local government control of stormwater in Florida and initially discusses each of them separately. The article then examines the ability of local governments and WMDs to impose and enforce development conditions as part of stormwater permitting. Homeowners’ associations and community development districts are then examined as tools to promote the long-term maintenance and operation of LID elements in larger developments.

## **II. Background: The Regulatory Framework for Stormwater Management**

Prior to passage of the Federal Water Pollution Control Act in 1972, which is commonly referred to as the Clean Water Act (CWA),<sup>13</sup> federal water pollution law focused on water quality, but there existed no effective mechanism to assure that water quality was indeed protected.<sup>14</sup> The CWA maintained language regarding water quality in the form of total maximum daily loads (TMDLs)<sup>15</sup> but also added the use of technology to reduce discharges of pollution as a major focus.<sup>16</sup> The CWA forced adoption of technology by requiring point sources of pollution—such

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<sup>12</sup> See, e.g. FLA. ADMIN CODE r. 40C-42.024(2)(f). Water management districts in Florida have developed design criteria for some LID methods, such as swales and exfiltration. St. Johns River Water Management District has criteria for underground exfiltration as does Southwest Florida Water Management District and South Florida Water Management District. St. Johns River Water Management District and Suwannee River Water Management District have design and performance criteria for swales.

<sup>13</sup> Technically the Clean Water Act consisted of the 1977 amendments to the 1972 Federal Water Pollution Control Act, but common usage refers to the federal statutory structure for water pollution control as “The Clean Water Act.”

<sup>14</sup> See, e.g. OLIVER A. HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION (1999); Water Permitting 101, Office of Wastewater Management, U.S. Environmental Protection Agency, available at [www.epa.gov/npdes/pubs/101pape.pdf](http://www.epa.gov/npdes/pubs/101pape.pdf) (last visited May 16, 2008).

<sup>15</sup> Water Permitting 101, Office of Wastewater Management, U.S. Environmental Protection Agency, available at [www.epa.gov/npdes/pubs/101pape.pdf](http://www.epa.gov/npdes/pubs/101pape.pdf) (last visited May 16, 2008).

<sup>16</sup> See, e.g. *id.*

as industrial discharges—to have a permit issued through the National Pollutant Discharge Elimination System (NPDES).<sup>17</sup>

The NPDES program succeeded in drastically reducing pollution from PSs. Significant reductions in point-source pollution increased the relative importance of non-point sources of pollution (NPSs), such as stormwater runoff, which now constitute the largest contributor to water-quality problems.<sup>18</sup> This realization led to regulation of some NPSs through the NPDES permitting for certain municipal separate storm sewer systems (MS4s). The first MS4s were permitted under “Phase I” and additional MS4s now must secure NPDES permits under “Phase II.”<sup>19</sup> Florida’s Department of Environmental Protection (DEP) has been delegated the authority to implement the federal NPDES stormwater permitting regime in Florida.<sup>20</sup>

DEP also has a statutory mandate under state law to protect water quality.<sup>21</sup> DEP has delegated this authority to the state’s five water management districts.<sup>22</sup> The water management districts implement their authority to protect the state’s water resources through environmental resource permits.<sup>23</sup> The permit process looks carefully at the stormwater impacts of development,<sup>24</sup> and

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<sup>17</sup> 33 U.S.C. § 1341.

<sup>18</sup> See, e.g. Thomas K. Ruppert, *Water Quality Trading and Agricultural Nonpoint Source Pollution: An Analysis of the Effectiveness and Fairness of EPA’s Policy on Water Quality Trading*, 15 VILL. ENVTL. L.J. 1, 3 (2004).

<sup>19</sup> The U.S. Environmental Protection Agency promulgated rules for Phase I in 1990. [www.dep.state.fl.us/water/stormwater/npdes/index.htm](http://www.dep.state.fl.us/water/stormwater/npdes/index.htm). The Phase II rule expanded NPDES stormwater permitting requirements from large and medium MS4s to small MS4s. 40 C.F.R. §§ 122-24 . Phase II regulates all small MS4s located in urbanized areas and all small MS4s whose discharges cause or have the potential to cause adverse water quality impacts. Regulated small MS4s must design their stormwater management programs to reduce the discharge of pollutants to the maximum extent practicable, protect water quality, and satisfy the appropriate water quality requirements of the Clean Water Act. The U.S. Environmental Protection Agency promulgated rules for Phase I in 1990. [www.dep.state.fl.us/water/stormwater/npdes/index.htm](http://www.dep.state.fl.us/water/stormwater/npdes/index.htm).

<sup>20</sup> 60 Fed. Reg. 25,718 (May 12, 1995); FLA. STAT. § 403.0885 (2007).

<sup>21</sup> FLA. STAT. §§ 373.403-.468 (2007).

<sup>22</sup> FLA. STAT. § 373.069 (2007). The state’s five water management districts are the Suwannee River Water Management District, the Southwest Florida Water Management District, the South Florida Water Management District, the St. Johns River Water Management District, and the Northwest Florida Water Management District. The Northwest Florida Water Management District (NWFMD) only received authorization to develop its own environmental resource permitting program by legislation passed in 2006. 2006 Laws of Florida, ch. 228; FLA. STAT. § 373.4145 (2007). NWFMD was scheduled to begin reviewing permits as of October 1, 2007.

<sup>23</sup> See, e.g. FLA. ADMIN. CODE r. 40C-4.041 (environmental resource permitting rules for the St. Johns River Water Management District).

<sup>24</sup> While DEP’s stormwater permitting is limited to new development, DEP also maintains authority to require corrective action “when existing stormwater facilities cause or contribute to violations of state water quality standards.” FLA. ADMIN. CODE r. 62-25.001(2).

DEP rules indicate that permits may not issue if the development or its stormwater system will contribute to or cause a violation of water quality standards.<sup>25</sup>

Local governments in Florida enjoy home rule authority<sup>26</sup> that allows them to also regulate stormwater as long as the program does not conflict with state or federal law. Some local governments have taken advantage of this authority and implemented their own regulatory requirements for stormwater.<sup>27</sup>

Thus, certain MS4s and many private development projects in Florida must secure permits that include review of their proposed stormwater systems. Both the MS4 permitting program and Florida's environmental resources permitting programs contain stricter regulatory requirements for proposed systems in an area with existing water quality violations. For example, state laws and regulations state that once a waterbody violates state water quality standards, the water management districts may not approve any permits that cause or contribute to the water quality violation.<sup>28</sup> As an example of implementation, one can examine the approach of the St. Johns River Water Management District (SJRWMD).

SJRWMD rules echo the limitation that no stormwater system that causes or contributes to a violation of water quality standards will receive a permit.<sup>29</sup> However, since stormwater and its

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<sup>25</sup> FLA. ADMIN. CODE r. 62-25.040(4). *See also, e.g.* FLA. ADMIN. CODE r. 40C-42.023(1)(a) (“To receive a standard general or individual permit under this chapter the applicant must provide reasonable assurance based on plans, test results and other information, that the stormwater management system: Will not result in discharges from the system to surface and ground water of the state that cause or contribute to violations of state water quality standards.”).

<sup>26</sup> Charter counties enjoy home rule via the authority of the Constitution of Florida, Art. VIII, § 1(g). Non-charter counties have those powers granted to them by law. FLA. CONST. Art. VIII, § 1(h). The law gives non-charter counties broad home-rule authority. FLA. STAT. § 125.01 (2007).. Municipalities also enjoy broad home-rule authority. Fla. Const. Art. VIII § 2(b), FLA. STAT. § 166.021 (2007).

<sup>27</sup> *See, e.g.* City of Gainesville Code of Ordinances, § 30.270 (2007); Martin County Land Development Regulations, § Sec. 4.383 (2007).

<sup>28</sup> FLA. ADMIN. CODE r. 62-25.040(4).

<sup>29</sup> FLA. ADMIN. CODE r. 40C-42.023(1)(a). Florida administrative code rule 40C-4.301(1)(e) also states that a permit shall not issue for development that will cause violation of water quality standards or anti-degradation policies in the Florida Administrative Code. However, rule 40C-4.301(2) refers to section 12.2.4.5 of the St. Johns River Water Management District's Applicant's Handbook: Management and Storage of Surface Waters, which creates an escape valve for situations in which water quality standards are already being violated by allowing a permit applicant to propose mitigation if the proposed development will contribute to existing water quality violations.

WMDs have the authority to require corrective action when a stormwater system causes or contributes to a violation of water quality standards. FLA. ADMIN. CODE r. 62-25.001(2). *See also, e.g.* FLA. ADMIN. CODE r. 40C-42.011(2) (rule of the St. Johns River Water Management District) (“A permit under this chapter will be required only for certain stormwater management systems as defined herein. This provision shall not affect the District's authority to require appropriate corrective action whenever any system causes or contributes to violations of state water quality standards.”).

contribution to pollution are inherently difficult to measure due to their inconsistent nature,<sup>30</sup> SJRWMD rules establish certain engineering and design requirements for the structures associated with a centralized stormwater system and assume that compliance with such design standards ensures that discharges from such stormwater systems will not cause or contribute to violations of water quality standards.<sup>31</sup> New research has demonstrated, however, that the design standards result in stormwater systems that often fail to adequately treat stormwater for the key water quality indicators of phosphorous and nitrogen.<sup>32</sup> Thus, new residential developments, particularly in areas with impaired waters, may need LID as part of a stormwater system that meets state regulatory requirements.

In addition, the federal Clean Water Act requires that Florida's DEP list as impaired and develop a total maximum daily load (TMDL) for any water segment that fails to meet its designated water quality standard.<sup>33</sup> Once TMDLs are set, DEP must develop a Basin Management Action Plan (BMAP) that assigns a portion of the TMDL to point sources (i.e.—those regulated by NPDES permits) and nonpoint sources. MS4 NPDES permits cannot be renewed unless the change to all NPDES permits for the area will result in assurances of attainment of water quality in the affected waterbody.<sup>34</sup> Due to the difficulty in quantifying actual pollution discharges from MS4s, compliance with TMDL allocations is determined based on implementation of best management practices (BMPs) that water quality modeling indicates will keep discharges within the parameters of the TMDL. The implementation plans—designed to achieve the TMDL and end violation of state water quality standards—will establish the specific activities that MS4s will need to undertake in order to receive their permits.<sup>35</sup> Since current stormwater practices

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<sup>30</sup> Cf. e.g. Thomas K. Ruppert, *Water Quality Trading and Agricultural Nonpoint Source Pollution: An Analysis of the Effectiveness and Fairness of EPA's Policy on Water Quality Trading*, 15 VILL. ENVTL. L.J. 1, 12-13 (2004) (discussing use of modeling due to the difficulty of monitoring non-point source pollution such as stormwater).

<sup>31</sup> See, e.g. FLA. ADMIN. CODE r. 40C-42.023(2)(a) (pointing out that if an applicant complies with criteria in rules FLA. ADMIN. CODE r. 40C-42.024, -42.025, -42.026, and -42.0265, it will be assumed that any discharges will not cause or contribute to violations of water quality standards).

<sup>32</sup> See *supra*, note 1 and accompanying text. Phosphorous and nitrogen are considered key pollutant indicators because a system that treats adequately for them will also treat adequately for total suspended solids, biological oxygen demand, and other significant pollutants. Harper & Baker, *supra* note 1 at 6-24.

<sup>33</sup> 33 U.S.C. 1313(d)(1) (2006). A TMDL calculates the amount of a pollutant that a water body can receive and still meet the water quality standard designated for the water body. Despite passage of the TMDL provisions in 1972, Florida's effort to implement TMDLs did not begin until 1999 with the signing of a consent decree that ended a federal court case against the EPA for EPA's failure to implement the TMDL program in Florida since the state had not done so. See, e.g. Florida Wildlife Federation, Inc., et al. v. Browner, No. 4:98CV356 (N.D. Fla.).

<sup>34</sup> 33 U.S.C. 1313(d)(4)(A) (2006) (“ . . . where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this [TMDL] section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard. . . .”)

<sup>35</sup> E-mail communication with Daryll Joyner, Fla. Dept. of Env'tl. Prot., TMDL Program Administrator, May 31, 2007.

often fail to adequately treat for phosphorous and nitrogen, new tools will be necessary to meet regulatory requirements. Thus, with the increasing number of impaired waters in Florida, many MS4s may need to incorporate LID techniques into their suite of BMPs to achieve the pollution reductions necessary for MS4 permit renewal.<sup>36</sup>

Realization of the water quality treatment limitations of current centralized stormwater systems combines with state regulatory requirements and imminent application of TMDL limitations to force Florida to improve stormwater treatment. By pushing water treatment further upstream, literally to the rooftop, LID techniques can help. Regulators, however, need assurances that legal and administrative means exist to ensure perpetual operation and maintenance of LID stormwater elements.

### **III. Differing Authorities and Mechanisms for Stormwater Regulation**

The legal tools available for creating legally-enforceable stormwater obligations vary depending on the authority that seeks to establish them. Stormwater systems typically require an environmental resource permit from the area's water management district (WMD).<sup>37</sup> The WMDs require reasonable assurances of financial, legal, and administrative capability to provide for perpetual operation and maintenance (O&M) of the system. If O&M for some reason breaks down, the WMDs need an expedient process available to pursue the permit holder and reestablish the integrity of the permitted stormwater system. Under current WMD practice, the O&M permit holder for centralized stormwater systems in new residential developments is usually the homeowners' association (HOA),<sup>38</sup> which incorporates covenants, conditions, and restrictions (CCRs) that give the HOA authority to accomplish this.

Local governments may also have their own permit programs for the stormwater. Review of the stormwater system may form part of the development process and legal requirements may be involved as part of conditional land use zoning, planned unit development (PUD) review, or other development approval. This article discusses the differences between WMD and local government authority, but ultimately concludes that great similarity exists in the possible approaches both may take towards ensuring long-term maintenance of development of a stormwater system for which they have permit authority.

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<sup>36</sup> Despite the creation of a number of TMDLs in Florida, MS4 permitting has not yet been affected because the Florida Department of Environmental Protection will implement TMDLs through the Basin Management Action Plan (BMAP) process. BMAPs will require permitted MS4s to complete activities prescribed by the BMAPs, but this has not occurred anywhere in the state yet. E-mail communication with Daryll Joyner, Fla. Dept. of Env't'l. Prot., TMDL Program Administrator, May 31, 2007.

<sup>37</sup> FLA. STAT. § 373.413 (2007) (requiring permits construction or alteration of a stormwater management system, dam, impoundment, or reservoir). The three largest WMDs have very similar permitting standards for their respective environmental resource permits. *Compare, e.g.* FLA. ADMIN. CODE r. 40C (St. Johns River Water Management District) *with* FLA. ADMIN. CODE 40E (South Florida Water Management District) *and* FLA. ADMIN. CODE 40D (Southwest Florida Water Management District).

<sup>38</sup> Formation of HOAs in new developments is governed by Chapter 720 of the Florida Statutes.

## **IV. Water Management Districts and Stormwater Permitting**

Florida's water management districts (WMDs) have statutory authority to require stormwater permits for large residential development.<sup>39</sup> The permitting criteria of WMDs typically require assurances that the stormwater permit holder has the legal, administrative, and financial capacity to ensure perpetual O&M of a proposed stormwater system. WMDs often accept an HOA as the permit holder that gives these assurances and holds responsibility for perpetual O&M.<sup>40</sup> An HOA permit holder usually suffices for typical centralized storm water systems as the system is located on common property owned by the HOA and maintenance of the system has many benefits and few drawbacks for any particular property owner in the HOA.

Despite the relatively minimal responsibilities related to centralized stormwater systems, problems sometimes arise with HOAs as permit holders. For example, an HOA may cease to collect assessments for maintenance of the stormwater system. This breakdown could occur for several reasons, most of which are more common and severe in smaller HOAs.<sup>41</sup> It may be that operation of the HOA is more by personality and whim rather than by the HOA's governing documents or state statutes governing HOAs. Other common problems, especially in the smaller HOAs, include unfilled leadership positions in the HOA, required meetings not being held, and members and board members not attending meetings.<sup>42</sup>

If HOAs can fail to effectively maintain a centralized stormwater system on common property of the HOA, the viability of small HOAs as permit holders for an LID stormwater system with elements on individual parcels remains problematic. Will HOAs have the political will, financial resources, and legal authority to effectively operate and maintain LID infrastructure? WMDs retain the legal authority to enforce LID requirements on individual lots even if the HOA fails to do so, but again, the greater question is how to ensure enforcement when the permitting authority lacks the resources to monitor compliance, lot-by-lot, throughout its jurisdiction.

## **V. Local Government Implementation of LID**

### *A. Overview*

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<sup>39</sup> FL. STAT. § 373.413 (2007). As an example of the threshold requiring an environmental resource stormwater permit, *see* St. Johns River Water Management District, Applicant's Handbook: Management and Storage of Surface Waters, § 3.3.1 (requiring a permit for construction of 4,000 sq. ft. of impervious or semi-pervious surface area subject to vehicular traffic, construction of 9,000 or more sq. ft. of impervious surface, or construction of 5 acres or more of recreational area).

<sup>40</sup> *See, e.g.* St. Johns River Water Management District Management and Storage of Surface Waters Handbook, section 7.1.2, available at [www.dep.state.fl.us/legal/rules/surfacewater/sjmssw.pdf](http://www.dep.state.fl.us/legal/rules/surfacewater/sjmssw.pdf).

<sup>41</sup> This does not mean that such problems cannot occur in larger HOAs, but, generally speaking, larger HOAs will be more professionally managed and may include full-time employees.

<sup>42</sup> Florida Statutes allow any member of an HOA that fails to fulfill sufficient board positions to constitute a quorum to apply to the circuit court for appointment of a receiver. FL. STAT. § 720.205(4) (2007).

Local governments may impose additional stormwater permit requirements above and beyond those required by the WMDs.<sup>43</sup> For example, local governments may decide to give additional protection to resources such as springs and springsheds. A local government may thus want to require new developments to reduce nutrient inputs more than the relevant WMD and ensure no net loss of water quantity for aquifer recharge. Local governments may accomplish these and other stormwater goals through the same mechanisms as the water management districts: use of an HOA and attendant CCRs.

In this approach, the local government requires the HOA of a new development to adopt covenants, conditions, and restrictions (CCRs) designed to ensure O&M of LID stormwater elements. Local governments *cannot*, as a general rule, enforce private CCRs that are unrelated to the local government's use of its regulatory authority.<sup>44</sup> However, when local government exercises its authority and properly imposes LID and related CCRs on a development, the local government has authority to enforce the requirements it imposed, even on individual parcel holders.<sup>45</sup> Confusion sometimes results when people believe the local government is "enforcing" the CCRs when in reality the local government is enforcing the requirements, conditions, or limitations inherent in the development approval that gave rise to the CCRs.

CCRs still do form an important permit requirement as they constitute the basis for the HOA's ability to enforce the requirements imposed by the local government. HOA enforcement of its CCRs related to LID O&M requirements is so important because local governments seldom have the resources to conduct monitoring and enforcement activities over myriad LID elements on individual private properties.<sup>46</sup> Thus, it is in the local government's interest to create a dynamic where the HOA for a new development with LID requirements will ensure the O&M requirements for LID elements within the HOA.

Local governments have several opportunities to require CCRs as conditions on new developments: as part of a planned unit development (PUD) proposal, during a requested rezoning to allow development, as part of local government approval of a "development of regional impact" (DRI) as outlined in Florida Statutes,<sup>47</sup> or as part of a local stormwater permitting process.<sup>48</sup> Local government may also impose LID O&M requirements through

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<sup>43</sup> See, e.g. Martin County Land Development Regulations, § Sec. 4.383 (2007).

<sup>44</sup> Cf. Palm Point Property Owners' Ass'n of Charlotte County, Inc. v. Pisarski, 626 So.2d 195 (Fla. 1993) (noting that the only parties that may enforce CCRs of a homeowners association are successors in interest to the original developers, owners of property in the subdivision, or one to whom the right of enforcement has been assigned).

<sup>45</sup> See, e.g. *infra* section V.B. (discussing local government enforcement of LID requirements).

<sup>46</sup> One possible exception to this may be local governments with a stormwater utility that has jurisdiction over a new development. This paper contemplates developments not subject to a stormwater utility as many counties do not have stormwater utilities for their unincorporated area and many large residential developments occur in unincorporated areas.

<sup>47</sup> FLA. STAT. § 380.06(6) (2007).

<sup>48</sup> A local stormwater "permitting" program may effectively be incorporated into the standard development approval process if stormwater issues are addressed as part of the local comprehensive plan and implemented in the local government's land development regulations.

conditions in a development permit *without* requiring an HOA and CCRs, but instead placing the burden for O&M on each parcel owners. Some local governments have adopted just such an approach and are now working to evaluate the results of years of permitting as they continue to do outreach and extension.<sup>49</sup> This approach is not ideal as it leaves all monitoring and enforcement responsibility with the local government—a heavy cost in resources for local governments to bear. In addition, private property owners may lack the incentive, expertise, and funds to supply proper O&M. A better approach is to assign O&M funding and responsibility to the HOA with local government authority to directly enforce O&M conditions on parcel owners as an important backstop for the possible failure of HOAs to comply with their duties.<sup>50</sup>

#### B. *Local Government Enforcement of LID Requirements*

Case law in Florida and elsewhere suggests that local governments have the authority to enforce against individual parcel owners limitations or restrictions imposed as a condition of a PUD approval<sup>51</sup> or as part of a conditional rezoning,<sup>52</sup> including when the limitation specifically appears in CCRs. Even an easement imposed as part of development plan can be enforced by the local government that imposed it regardless of whether or not the local government appears as a beneficiary in the terms of the easement.<sup>53</sup>

Courts have emphasized two points when finding that local governments have the authority to enforce property conditions or restrictions against subsequent purchasers. First, courts have pointed out the necessity of local governments being able to grant PUD permits with perpetual conditions since if this could not be done, local governments would be less willing to be flexible and grant permits that require conditions or restrictions to protect the public safety, health, and welfare.<sup>54</sup> Second, current property owners must have either actually known or have had

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<sup>49</sup> This is the approach taken some jurisdictions. For example, Island County, Washington uses a “Private Drainage Facility Maintenance Agreement.” (copy on file with author).

<sup>50</sup> This backstop role of the local government would function by the local government doing random spot checking of the O&M reports submitted to it pursuant to requirements in the HOA’s CCRs as well as doing site visits to confirm the veracity of a random sample of monitoring reports.

<sup>51</sup> See, e.g. *Palm Beach Polo v. Village of Wellington*, 918 So.2d 988 (Fla. 4<sup>th</sup> DCA 2006), *review denied*, 929 So.2d 1053 (Fla. 2006) (allowing for local government enforcement of PUD conditions); *Los Ranchos de Albuquerque v. Shiveley*, 791 P.2d 466 (N.M. Ct. App. 1989) (finding that municipality had standing to challenge an HOA’s removal of restrictive covenants that were a condition of development approval for the subdivision); *Sayler v. City of Durham*, 663 P.2d 803 (Or. App. 1983) (finding that city had authority to enforce an easement that was imposed as part of the city’s approval of the PUD plat); *Story Bed & Breakfast v. Brown County*, 819 N.E. 2d 55, 64 (Ind. 2004) (finding that county may enforce PUD conditions against subsequent developers that were aware of the PUD designation of the property).

<sup>52</sup> *Metropolitan Dade County v. Fountainbleau Gas & Wash, Inc.*, 570 So. 2d 1006 (Fla. 3d DCA 1990) (upholding limitations on development imposed as part of conditional rezoning requested by prior owner); *Westminster Homes v. Town of Cary*, 554 S.E. 2d 634 (N.C. 2001) (finding that town could enforce against subsequent purchasers conditions imposed as part of a conditional rezoning).

<sup>53</sup> *Sayler v. City of Durham*, 663 P.2d 803 (Or. App. 1983).

<sup>54</sup> *Los Ranchos de Albuquerque v. Shiveley*, 791 P.2d 466, 471 (N.M. Ct. App. 1989). The same rationale applies to conditional rezonings as well.

constructive notice<sup>55</sup> indicating the restrictions on the property.<sup>56</sup> When permit limitations are reflected in CCRs, the CCRs give the HOA itself enforcement authority and give notice of the restrictions to property owners.<sup>57</sup>

### C. *Limitations on HOA Authority*

Once CCRs have been agreed to as part of a development permit or rezoning by local government, the HOA loses the authority to unilaterally alter those aspects of CCRs that fulfill permit or development approval requirements. In one case, a developer, HOA, and subsequent property purchasers in a development voted to alter CCRs imposed as part of a PUD.<sup>58</sup> When the municipality challenged this action, the reviewing court noted that once the restricted covenants were agreed to as a condition of development approval, the restrictions became, in effect, a rezoning even though no specific ordinance was passed.<sup>59</sup>

### D. *Developments of Regional Impact*

Florida Statutes describe a special process for approval of large developments that qualify as developments of regional impact or DRIs.<sup>60</sup> A DRI must secure a development order from the applicable local government before proceeding.<sup>61</sup> Approval of a DRI and issuance of a development order at the local level often requires a comprehensive plan amendment as part of the development approval process.<sup>62</sup> The need for a comprehensive plan amendment and a local development order offers local government the opportunity to add requirements for an LID stormwater system and procedures that assure the long-term O&M of required LID elements. Such conditions should be included in the comprehensive plan amendments to the future land use map for the DRI as well as the ordinance approving the DRI, thus creating constructive notice for future developers or purchasers.

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<sup>55</sup> Constructive notice means that a person is presumed by law to be aware of a fact, regardless of whether the person was actually aware of the fact; constructive notice is often based upon availability of information in the public record.

<sup>56</sup> *See, e.g.* Palm Beach Polo v. Village of Wellington, 918 So.2d 988 at 993, 997 (Fla. 4<sup>th</sup> DCA 2006); Story Bed & Breakfast v. Brown County, 819 N.E. 2d 55, 63-65 (Ind. 2004); Metropolitan Dade County v. Fountainbleau Gas & Wash, Inc., 570 So. 2d 1006, 1007 (Fla. 3d DCA 1990).

<sup>57</sup> CCRs appear in the public record as the Declaration of Covenants, Conditions, and Restrictions must be recorded in the public record. In addition, title to properties subject to the CCRs should contain reference to the public record where the CCRs appear.

<sup>58</sup> Los Ranchos de Albuquerque v. Shiveley, 791 P.2d 466 (N.M. Ct. App. 1989).

<sup>59</sup> *Id.* at 467, 468.

<sup>60</sup> FLA. STAT. § 380.06 (2007).

<sup>61</sup> FLA. STAT. § 380.06(6) (2007).

<sup>62</sup> *Cf. e.g. id.*

*E. Effect of the Marketable Record Title Act on CCR Enforcement*

Chapter 712 of the Florida Statutes provides that an owner of property holds record marketable title to the property free from other interests and restrictions except for certain classes of restrictions<sup>63</sup> or unless the interests or restrictions are rerecorded within thirty years of the root of title.<sup>64</sup> The Act specifies that any HOA desiring to preserve any covenant or restriction must comply with the requisites of the act to preserve the covenant or restriction.<sup>65</sup>

Thus, for an HOA to preserve its CCRs, the HOA must notice an HOA meeting and pass by 2/3 a resolution in favor of preserving the CCRs of the HOA.<sup>66</sup> Were an HOA to choose *not* to preserve CCRs that were required as a condition of a development approval by a local government, the local government would still retain authority to enforce the condition(s) since local government authority does not depend on the CCRs but rather on the inclusion of the conditions in a permit, PUD, or conditional rezoning. However, failure of the HOA to preserve the CCRs could end the HOA's authority to monitor and enforce the CCRs. The HOA's enforcement ability must be maintained, though, since part of this approach to LID requires the HOA to be the first line O&M. To assist in this, the LID permit requirements should specifically discuss the Marketable Record Title Act and expressly obligate the HOA to maintain the effective status of the CCRs and the ability of the HOA to enforce the required CCRs.<sup>67</sup>

*F. Summary of Local Government Authority to Require and Enforce LID Elements*

Local governments possess the authority to require LID-stormwater-related CCRs to ensure long-term O&M of required as a condition of development approval. This may be done through a local government stormwater permit program, through a conditional rezoning application, through the PUD permit approval process, or through the development or regional impact (DRI) process. For future parcel holders to be subject to local government LID requirements, the requirements must appear in the public record, creating actual or constructive notice for subsequent parcel holders.

While local governments retain authority to enforce LID requirements on individual parcels, this presents administrative challenges for the limited resources of local governments. When imposing LID stormwater elements on private parcels in new development, local governments should require that the HOA monitor and enforce the required LID elements. HOAs have many tools at their disposal to make this possible, but it is up to the local government to review proposed HOA governing documents to ensure they include relevant provisions and legal authority to assure the local government that the HOA possesses the legal, financial, and administrative capacity to ensure perpetual O&M of the required LID elements. In addition,

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<sup>63</sup> FLA. STAT. §§ 712.03(1), (3)-(8) (2007).

<sup>64</sup> FLA. STAT. § 712.03(2) (2007).

<sup>65</sup> FLA. STAT. § 712.05 (2007).

<sup>66</sup> FLA. STAT. § 712.05 (2007).

<sup>67</sup> The permit or development order could impose a set fine if the HOA fails to maintain the effectiveness of the HOA's CCRs. If the CCR were not to maintain the viability of its CCRs, the local government would still have the authority to enforce directly against property owners.

local governments should be prepared to conduct spot monitoring and follow up enforcement to ensure that HOA's fulfill their responsibilities for LID O&M.

In summary, local governments and WMDs face problems similar to those of local government in attempting to monitor all of the conditions on the many permits issued each year. This has led both local governments and WMDs to use HOAs as the administrative unit responsible for O&M of stormwater permitting systems. HOAs as currently structured have some weaknesses as the permit holder responsible for O&M of centralized stormwater systems and such weaknesses might be accentuated in the context of an LID stormwater system. This leads to consideration of modifying HOA CCRs for LID stormwater or utilizing different legal tools. The following section addresses the first of these two options.

## **VI. Recommendations for Ensuring Long-term Operation and Maintenance of LID Stormwater Systems**

While the bases of authority for WMDs and local government to require LID may differ, they face similar challenges in designing an approach that minimizes the need for local government or WMD monitoring and enforcement activities. This section addresses two possible tools for local governments or WMDs to use: the first subsection considers HOAs and the second subsection considers community development districts (CDDs).

### *A. Recommendations for O&M Requirements of LID Stormwater Practices Enforced via HOA Documents*

Whether LID CCRs are required by a local government or a WMD, the permitting authority should ensure that potential purchasers of property subject to LID requirements will have either actual or constructive notice of the LID requirements.<sup>68</sup> The legal minimum for notice for CCRs required in a PUD is that the CCRs are incorporated into the master plan of the PUD which, upon approval, effectively becomes the zoning for the development.<sup>69</sup> In addition, the development's recorded plat should include reference to the CCRs as well. In the case of conditional rezonings, the zoning map should be modified to include a reference number for the rezoning ordinance for all properties affected by the rezoning. If restrictions or conditions are not available in such public records or filed as deed restrictions for every parcel involved in a development, they might not be enforced by a court since there is no reasonable avenue for potential purchasers to be aware of the restriction. While LID CCRs imposed by a WMD do not become part of the public zoning for the property, the existence of the HOA and CCRs will appear in a title search, giving a new purchaser constructive or actual notice of the CCRs.<sup>70</sup> CCRs imposed by a WMD should recite that they are requirements of the water management district's stormwater permit, thereby giving constructive notice of the permit requirements via the HOA CCRs.

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<sup>68</sup> See *supra* note 55.

<sup>69</sup> See, e.g. *New Smyrna Beach v. Andover Dev.*, 672 So. 2d 618 (Fla. 5<sup>th</sup> DCA 1996).

<sup>70</sup> See, e.g. *supra* section V.B. (discussing actual or constructive notice to subsequent purchasers).

Even though local governments and WMDs may enforce LID stormwater requirements for a development on individual parcels within the development, administration of enforcement is easier and more realistic if a single entity serves as the O&M body for each development. To accomplish this, permitting authorities should charge the HOA with the responsibility and authority to ensure compliance with O&M requirements related to LID elements on individual parcels as well as common areas. The HOA should also serve as a mechanism to educate existing and potential property purchasers about LID infrastructure on common property and private lots within the community. To increase the likelihood that an HOA carries out its duties, the local government or WMD should require assurances that the HOA has the legal, financial, and administrative capabilities to accomplish this.<sup>71</sup> These requirements are addressed here in order.

### *1. Legal Assurances of HOA Capacity*

Permitting authorities—whether WMD or local government—should require the developer to formalize the conditions imposed in the conditional rezoning, PUD, development approval, or WMD permit by incorporating necessary provisions in the CCRs. This can be done through the following steps.

First, a right to enter private property containing LID stormwater elements must be established. The CCRs should incorporate a comprehensive, detailed map/engineering design plan for all LID stormwater elements on each property within the development. The CCRs should grant the HOA and the HOA's agents legal right to enter on each parcel with LID elements to inspect, maintain, and repair LID elements on the property.<sup>72</sup> To assure this legal right of entry, each parcel in the development should be subject to an easement in favor of the HOA, its agents, and the permitting authority to enter the parcel for inspection or O&M purposes. The deed of each property should include a list of the specific easements for that property along with a copy (or an incorporation by reference) of the map/engineering design plan of the LID elements on the specific property. Each easement should stipulate that the servient estate holder must refrain from any activity that would damage or eliminate LID elements on the servient estate.<sup>73</sup> As

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<sup>71</sup> Water management districts in Florida already require that applicants for permits provide reasonable assurances that the applicant has legal, financial, and administrative capabilities to fulfill the requisites of the permit. This practice should be extended to local government stormwater permitting. Parallel requirements of procedural assurances by WMDs and local governments simplify the permit process for applicants even if the local government has stricter substantive requirements.

<sup>72</sup> Any documents required to be recorded with the clerk of the county court (such as easements) or the Secretary of State (such as HOA governance documents) should be required to be recorded before any sales of lots may occur. *See, e.g.* St. Johns River Water Management District Environmental Resource Permitting General Conditions, condition 8 (October 3, 1995).

<sup>73</sup> HOA CCRs could differ in how they treat intentional activities that damage LID elements. The easiest administrative procedure is to aggregate all costs associated with all aspects of the stormwater system within the HOA, whether costs be due to maintenance or repair to intentional or accidental damage, and stipulate in HOA's governing documents how this is assigned to HOA members. This, however, may be viewed by some as allowing a property owner that intentionally engages in activities that damage LID elements on his or her property to risk only paying a fraction portion of the cost of repair (and fines to the HOA) if caught. Thus, HOA CCRs could use special individual assessments for costs

another legal deterrent, pursuant to the provisions of section 720.305(2), Florida Statutes, the articles of incorporation, the bylaws, and the declaration of covenants, conditions, and restrictions should provide for fines and for suspension of rights of a member or members' tenants or guests to the use of common areas should an HOA member violate CCRs related to permitted LID elements on the member's parcel, including failure to pay assessments.

Second, CCRs and related easements should also include notice of the HOA's obligation to ensure the maintenance of LID stormwater elements on common area *and on private parcels*.

Third, the O&M permit and HOA governing documents should note that the permitting authority may levy fines directly against the HOA if, as evidenced by lack of maintenance to LID structures on individual parcels, the HOA fails to fulfill its stormwater obligations. Permit or development approval conditions should note that the permitting authority may also enforce directly against parcel owners if they damage or destroy LID elements on their own lots.<sup>74</sup> Local government or WMD enforcement should include the costs to repair or replace LID infrastructure damage caused by a homeowner if the homeowner or HOA fails to do so.

## 2. *Financial Assurances of HOA Capacity*

HOAs can provide financial assurances by committing the HOAs ability to levy assessments on its members. First, the HOA documents must describe costs eligible to be paid by assessments, the types of assessments (if more than one), and how each member's proportional share of assessments is calculated.<sup>75</sup> Establishing special individual assessments makes it possible to directly charge repair costs and fines to individual lot owners when appropriate.<sup>76</sup> Proposed assessments for each property could be proportional to the LID elements on each parcel, but this is not necessary.<sup>77</sup>

Second, any permit related to the LID stormwater systems should require that HOA articles of incorporation, bylaws, and CCRs specify that the HOA shall maintain regular assessments sufficient to fund expected monitoring and operation and maintenance activities for the LID

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due to damage to LID elements that result from intentional activities of the property owner (even if the intention of the activity was not destruction of the LID element) and resulting fines. Under such a scenario, typical operation and maintenance would still be funded by regular assessments to HOA members as stipulated in the HOA's governing documents.

<sup>74</sup> As indicated by *Saylor v. City of Durham*, *supra* Part V.B., restrictions may not need to specify that the local government can enforce directly against individual lot owners, but it remains advisable to do this so that property owners are more conscious of this authority.

<sup>75</sup> FL. STAT. § 720.308 (2007).

<sup>76</sup> See following discussion of accidental damage to LID elements versus damage due to intentional activities.

<sup>77</sup> While special assessments by local governments or special districts have strict proportionality requirements, *see, e.g. infra* section VI.B.5 (discussing benefits special assessments and maintenance special assessments in the context of community development districts), Florida Statute section 720.308 gives HOAs great latitude in setting the proportion of HOA expenses that correspond to each property.

elements and entire stormwater system.<sup>78</sup> These documents should also specify that the HOA must assess sufficient funds to create and maintain reserves for maintenance, repair, and replacement of LID elements. The estimated funds necessary for monitoring, O&M, and reserves for maintenance and repair should be established in budgets that the HOA is required to adopt each year.

The easiest administrative procedure is to aggregate all costs associated with all aspects of the stormwater system within the HOA, whether costs be due to maintenance or repair to intentional or accidental damage, and stipulate in HOA's governing documents how this is assigned to HOA members. This, however, may be viewed by some as allowing a property owner that intentionally engages in activities that damage LID elements on his or her property to risk only paying a fraction portion of the cost of repair (and fines to the HOA) if caught. Thus, HOA CCRs could specify use of special individual assessments for repair costs due to damage to LID elements that result from intentional activities of the property owner (even if the intention of the activity was not destruction of the LID element) and resulting fines imposed on the HOA. Under such a scenario, typical operation and maintenance would still be funded by regular assessments to HOA members as stipulated in the HOA's governing documents. If HOA documents do distinguish between accidental / act-of-god damage to LID elements on private property and damage resulting from intentional activities of parcel owners, HOA documents should also establish HOA fines on the latter.<sup>79</sup>

One weakness of HOAs as the entity giving financial assurances is that HOAs may suffer cash-flow problems if several members refuse to pay assessments. The HOA does have the legal right to establish liens for assessments (but not fines), the HOA would have to go through the lengthy—and expensive and divisive—foreclosure process to collect on the lien or wait until the property is sold. This means that the HOA will likely eventually receive the assessments, but this may be little consolation if the HOA lacks funds to fulfill its responsibilities in the interim.

In addition to obligating the assessment authority of the HOA, other means of financial assurances may include bonding, letters of credit, or guarantees. If any of these are used, the numbers on which they are based should reflect the proposed budget of the HOA for activities related to O&M of LID elements. Even if any of these mechanisms are used, they do not obviate the need to carefully address regular assessments, individual special assessments, and fines in the HOA governing documents.

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<sup>78</sup> A permit could also require that the applicant provide the permitting authority estimated budgets of proposed assessments and financing dedicated to monitoring and O&M of LID stormwater elements in the development, but the utility of such a requirement would depend on the permitting authority's administrative capacity to review such estimates and take action when appropriate; this seems unlikely to occur.

<sup>79</sup> FL. STAT. § 720.305(2) (2007). Statutes limit the total of \$100 per violation per day fines to \$1,000 unless governing documents of the local government specify otherwise. A local government must decide if it will request an HOA to increase this limit in its governing documents as a requisite to receiving a permit. Note that HOAs have less power to enforce the collection of fines than assessments. *Compare, e.g.* FLA. STAT. § 720.305(2) (noting that an HOA “fine shall not become a lien against a parcel”) *with* FLA. STAT. § 720.3085 (2007) (allowing an HOA to foreclose on a lien that originates from an unpaid assessment of the HOA).

### 3. *Assurances of HOA Administrative Capacity*

Finally, the permitting authority should require assurances of the HOA's administrative capacity to enforce O&M requirements. Administrative requirements present great challenges as anecdotal evidence indicates this is area where HOAs often fail. The administrative failure of HOAs to hold meetings and fulfill the obligations of the HOA most often occurs with smaller HOAs. Larger HOAs more frequently have the resources to hire professionals to manage the HOA, usually resulting in better compliance with permit conditions and better CCR compliance and enforcement. Permitting authorities should require that giving reasonable assurances of the administrative capacity to fulfill O&M requirements may be met by the HOA maintaining a contract with a third party to conduct monitoring and maintenance of LID elements on individual properties. The HOA governing documents should specify that this contractual expense constitutes part of costs covered by the regular assessments for the LID stormwater system.

Use of a third-party contractor still presents the possible problem of a confluence of interests between the third-party contractor and the HOA: both will want the monitoring to be as quick and easy as possible and neither party necessarily has an inherent desire to preserve the public's interest in effective functioning of the LID stormwater system. For example, if a current contractor finds problems with an HOA's LID stormwater system, the HOA might want to switch to a different (i.e.—more permissive, less rigorous, cheaper, or unethical) contractor. Requiring that all third-party monitoring/O&M contractors possess certification in the monitoring and O&M of LID before being eligible to serve as contractors under an LID permit could help overcome possible collusion between contractors and HOAs as well as promote the technical expertise of contractors. As WMDs or local governments conduct spot checks of required reporting on LID reporting requirements on O&M activities under each contract/permit, discovery that a contractor has not properly complied with established professional standards in monitoring, O&M, or reporting would result in the contractor's loss of certification. If LID permits and related contracts are properly drafted, loss of certification by a third-party contractor would result in the loss of all current contracts for O&M of LID stormwater systems.<sup>80</sup> Maintenance of certified status for contractors could include requisites for reporting actual or likely violations both to the HOA and to the permitting authority for the LID system, whether it be a local government or WMD.

This possible approach creates additional complexity and expense and contains many questions that require careful consideration. Who would conduct the certification? Who would pay for the certification? Would there be enough certified contractors sufficiently dispersed around the state? How long does the certification last? Who would ensure that contractors that lose certification are not still benefiting from outstanding contracts?

Finally, the CCRs should require that each parcel owner apply for approval to the HOA board before engaging in any construction, additions, significant landscape changes, or addition of any impervious surface. This serves two distinct purposes. First, it help avert cases in which a parcel

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<sup>80</sup> An LID permit condition should stipulate that HOA contracts with certified contractors specify that loss of certification by a contractor constitutes breach of the contract, thus giving rise to liability on the part of the contractor.

owner plans to engage in activities that would affect LID elements on the parcel.<sup>81</sup> Second, it can prevent overloading of the stormwater system by ensuring that impervious area does not exceed limits stipulated by the controlling permit or development permit. The permitting authority should require that the governing documents and O&M permit indicate the circumstances under which the HOA shall provide notice to the permitting authority if the HOA knows of LID permit violations or when a homeowner has applied to the HOA for permission to engage in construction/remodeling/additions or significant landscape changes.

#### 4. *Educating Parcel Owners About LID*

Despite great focus in this article on legal drafting designed to ensure enforceability of LID requirements, creating a dynamic that minimizes the need for enforcement by the permitting authority represents the ideal scenario. Two elements assist in creating this dynamic. First, as noted above, the HOA should have an incentive to self-police. Imposition of fines directly on the HOA for the non-compliance of members can help create this dynamic. Second, education of homeowners in the subdivision about the LID elements within the HOA—and especially those on the property of each property owner—will contribute to maintenance of LID elements. Limited public awareness of the nature and importance of LID elements that parcel owners could easily destroy them through new landscaping, additions, or other activities without even knowing that they were damaging part of an integrated stormwater system. Even if parcel owners are aware that a swale or depression is technically part of a stormwater system, they may still more readily choose to damage or destroy it if they do not fully understand and appreciate its importance as part of the larger, integrated stormwater management system of the area. As part of the educational effort, HOA members should be presented with an overview of stormwater regulation and water quality as well as the legal requirements for LID in the HOA and the ramifications of failure to comply. Laws themselves act as an educational force with normative value and increase the effectiveness of concurrent educational programs.<sup>82</sup>

The education process begins with the CCRs, as each property purchaser should review them carefully. Unfortunately, many property owners never carefully review the CCRs for their HOA before purchasing. Thus, there arises a need for additional educational components. An HOA should be required to put in place a process for educating new and existing HOA members on the LID elements within the HOA. This role could be combined with that of the monitoring/maintenance contractor discussed above.<sup>83</sup> Even if not combined, the structure of this requirement should reflect that of the structure for the third-party inspection/maintenance

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<sup>81</sup> Since addition of impervious surface typically create more stormwater runoff, the LID system permit and CCRs should contain both parcel-specific and development-wide limits on impervious surface areas.

<sup>82</sup> *See generally*, The Canadian Centre for Pollution Prevention and Cullbridge Marketing and Communications, *The Impact of By-Laws and Public Education Programs on Reducing the Cosmetic / Non-Essential, Residential Use of Pesticides: A Best Practices Review* (February 26, 2004), available at <http://www.cbsm.com/Reports/Pesticides.pdf> (last visited May 16, 2008).

<sup>83</sup> Extensive contracting requirements may place a proportionally larger financial burden on smaller HOAs. Thus, it may be feasible to allow smaller HOAs to fulfill the educational requirements through cooperation with, for example, extension agents from the University of Florida's Institute of Food and Agricultural Sciences.

contractor. As with the inspection/maintenance contractor, the LID permit or development approval should require that the HOA's governing documents include a mandatory assessment for paying an LID consultant/educator that will, at minimum, educate new and existing HOA members on the LID elements within the HOA.<sup>84</sup> Education consultants should also be certified,<sup>85</sup> with the certification standards establishing minimum activity requirements. Such minimums should state that each property transfer in the HOA should be followed by a mandatory meeting between the purchaser and the LID consultant/educator to introduce the property owner to the LID elements on the newly-purchased property.<sup>86</sup> Social marketing strategies could play a key role in the educational component.

In conclusion, HOAs may still provide reasonable permit holders for LID stormwater systems in certain circumstances. The size of the HOA has in the past been one of the single most important indicators of the HOA's ability to fulfill its duties as a permit holder. The apparent reason for this is the professionalism and resources available for managing the HOA's business. To ensure minimum standards of professionalism and knowledge for inspection and maintenance of LID elements on individual properties, HOAs should be required to generate sufficient assessments to fund the hiring of a third-party agent—who is certified to defined minimum criteria—to conduct monitoring and maintenance activities. A similar approach could ensure on-going educational activities on LID for those in the HOA.

#### *B. Community Development Districts*

Community Development Districts (CDDs) offer an alternative to HOAs in some situations as the permit holder for an LID-based stormwater system.<sup>87</sup> Current rules of WMDs allow CDDs to serve as the permit holder.<sup>88</sup> This section discusses powers and responsibilities of CDDs

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<sup>84</sup> The assessment for this mandatory contract should be included in the HOA's governing documents.

<sup>85</sup> Such a proposed certification process involves issues similar to those for certification of third-party contractors for inspection and maintenance as discussed above.

<sup>86</sup> In the case of leased or rented properties, it may be more important to reach the tenant occupying the house rather than the owner.

<sup>87</sup> Florida Statute section 190.002(1)(a) states:

There is a need . . . to provide a reasonable alternative for the establishment, power, operation, and duration of independent districts to manage and finance basic community development services; and that, based upon a proper and fair determination of applicable facts, an independent district can constitute a timely, efficient, effective, responsive, and economic way to deliver these basic services, thereby providing a solution to the state's planning, management, and financing needs for delivery of capital infrastructure in order to service projected growth without overburdening other governments and their taxpayers.

<sup>88</sup> See, e.g. FLA. ADMIN. CODE r. 62-25.027(1)(b); St. Johns River Water Management District Management and Storage of Surface Waters Handbook, section 7.1.1(b), available at [www.dep.state.fl.us/legal/rules/surfacewater/sjmssw.pdf](http://www.dep.state.fl.us/legal/rules/surfacewater/sjmssw.pdf); South Florida Water Management District, Environmental Resource Permit Information Manual, Volume IV (2007), section 9.1(a)2, available at

before looking at the critical issues involved in possible use of CDDs to provide the requisite legal and financial assurances of O&M for LID stormwater systems.

### *1. Establishing a Community Development District*

Florida Statutes section 190.005 details the steps to create a CDD. To create a CDD of 1,000 acres or more, application must be made to the Florida Land and Water Adjudicatory Commission<sup>89</sup> with an application fee of \$15,000.00. CDDs may span more than one local government jurisdiction. Districts established across county boundaries shall be required to maintain records, hold meetings and hearings, and publish notices only in the county where the majority of the acreage within the districts lies.<sup>90</sup> Section 190.005(2) states the only method to establish a CDD of less than 1,000 acres is by “ordinance adopted by the county commission of the county having jurisdiction over the majority of land in the area in which the district is located.”<sup>91</sup> Therefore if a developer or community of less than 1000 acres wants to create a CDD it will go through a petition process to be approved with the local government in whose jurisdiction the proposed CDD is located. The types of information required on applications to local governments or the Florida Land and Water Adjudicatory Commission are the same,<sup>92</sup> but local jurisdictions may require additional information.

The second main requirement to establish a CDD is written consent of all property owners in the proposed district.<sup>93</sup> Due to the difficulty of achieving universal consent of a group of landowners after land is subdivided and sold, this requirement will typically limit CDD’s to large properties purchased for large-scale development.

### *2. The Powers and Responsibilities of a Community Development District*

CDD’s have many of the same powers that local governments possess. These powers include the ability to sue or be sued, own property, appoint employees, adopt rules pursuant to Chapter 120 of the Florida Statutes, buy or lease office space, borrow money and issue bonds and certificates, and raise funds necessary to conduct district activities.<sup>94</sup> A CDD may contract for professional services as well.<sup>95</sup> The board of supervisors also has the ability to levy and assess taxes and

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[https://my.sfwmd.gov/portal/page?\\_pageid=734,1456583,734\\_1456471&\\_dad=portal&\\_schema=PORTAL&navpage=rulescriteria](https://my.sfwmd.gov/portal/page?_pageid=734,1456583,734_1456471&_dad=portal&_schema=PORTAL&navpage=rulescriteria).

<sup>89</sup> FLA. STAT. §190.005(1) (2007).

<sup>90</sup> FLA. STAT. §190.005(1)(b)(3) (2007)

<sup>91</sup> FLA. STAT. §190.005(2) (2007).

<sup>92</sup> *Compare* FLA. STAT. §190.005(1)(a) and §190.005(2)(a) (2007). One substantial difference is that an application to the Florida Land and Water Adjudicatory Commission must be accompanied by a \$15,000 application fee, FLA. STAT. §190.005(1)(b)1 (2007), whereas the fee for applications to local governments are not set by statute.

<sup>93</sup> FLA. STAT. §190.005(1)(a)(2) (2007).

<sup>94</sup> FLA. STAT. §190.011 (2007).

<sup>95</sup> *Id.*

special assessments within the district to raise money for a multitude of uses.<sup>96</sup> A CDD is also given the power to enforce these assessments much like a local government.<sup>97</sup>

In addition to these powers, CDDs have numerous responsibilities. A CDD must have a board of supervisors that has the power to manage the district.<sup>98</sup> This board “shall employ, and fix the compensation of, a district manager.”<sup>99</sup> This manager must supervise works of the district and preserve and maintain any improvement or facility constructed under the authority of the CDD statute.<sup>100</sup> In addition, CDDs have several administrative and reporting requirements pursuant to statute. For example, the financial records of the board shall be audited by an independent certified public accountant at least once a year.<sup>101</sup> CDDs must provide financial reports as required by Chapter 190 of the Florida Statutes (CDDs) as well as Chapter 218 of the Florida Statutes (“Financial Matters Pertaining to Political Subdivisions”).<sup>102</sup> On or before each June 15, CDDs must prepare a proposed budget for the coming year and submit a copy for comment to the general purpose local government.<sup>103</sup> In addition, a CDD must provide sufficient copies of full disclosure information of CDD financing to any developer working within the district.<sup>104</sup> If the CDD board assumes the responsibility for water management and control and intends to fund this by special assessment, then the board must have an engineer develop a comprehensive water management and control plan, including the cost of the plan.<sup>105</sup> The plans must be made available to the public and the board must hold a hearing on them.<sup>106</sup>

### 3. *Enforcement Issues Associated with Community Development Districts*

Stormwater permit requirements have typically been drafted into the CCRs of an HOA to ensure a legally-binding obligation on the part of each landowner in a development to contribute to the O&M of centralized stormwater systems on common areas. This mechanism would not work with CDDs as they lack the statutory authority to enforce CCRs.

In the case of *Hernandez v. Trout Creek Development Corp*, Florida’s Second District Court of Appeals held that CDDs lack the statutory authority to enforce restrictions in declarations of CCRs.<sup>107</sup> In *Hernandez*, a group of homeowners within a CDD appealed a trial court judgment

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<sup>96</sup> FLA. STAT. §190.021-190.022 (2007)

<sup>97</sup> FLA. STAT. §190.024-190.35 (2007).

<sup>98</sup> FLA. STAT. §190.006(1) (2007).

<sup>99</sup> FLA. STAT. §190.007(1) (2007).

<sup>100</sup> FLA. STAT. §190.007(1) (2007).

<sup>101</sup> FLA. STAT. §190.007(2) (2007).

<sup>102</sup> FLA. STAT. §190.008(1) (2007).

<sup>103</sup> FLA. STAT. §190.008(2) (2007).

<sup>104</sup> FLA. STAT. §190.009 (2007).

<sup>105</sup> FLA. STAT. §190.013(1) (2007).

<sup>106</sup> FLA. STAT. §190.013(2) (2007).

<sup>107</sup> 779 So. 2d 360, 362 (Fla. 2d DCA 2000).

stating that a voluntary homeowners association and the CDD both possessed the authority to enforce covenants and deed restrictions within a community in the CDD.<sup>108</sup> The appeals court stated that the homeowners' association had an enforcement right since the development had assigned its right to enforce to the homeowners association. However, the appeals court reversed the lower court holding that the CDD also had the power to enforce the same regulations.<sup>109</sup> The appeals court reasoned that a CDD only had the statutory power to manage and finance basic services for community development whereas the power to enforce residential communities' covenants, such as requiring review of construction by an architectural review board, exceeds the statutory authority of a CDD.<sup>110</sup> The court further explained that these CCR regulations would not fall under the "related issues" a CDD has the authority to enforce simply because they would improve property values and therefore make it easier for a CDD to repay its debt.<sup>111</sup>

The *Hernandez* case itself did not foreclose the possibility of a CDD using CCRs to enforce LID stormwater requirements. A possible implication of *Hernandez* was that CCRs *that did directly relate to the statutory purposes of the CDD could* be enforced. In 2004, however, the Florida Legislature amended the CDD statute and eliminated the possibility of new CDDs with the authority to enforce CCRs even if the CCRs form an integral part of the statutory authority of the CDD. Florida Statute section 190.012(4)(b) provides that a CDD board may only adopt rules to enforce CCRs under *very* limited circumstances. First, the CDD may not have any HOA as defined in Florida Statute Chapter 720 within the boundaries of the CDD. Second, the CDD must have existed *prior* to June of 2004. Third, the majority of the board must have been elected by qualified electors of the CDD. Fourth, the CDD must record adopted rules within 60 days after their passage. These combined conditions effectively eliminate CDD enforcement of HOA CCRs as a possible mechanism to assure that landowners do not undermine LID structural elements on their parcels and that the LID system receives proper O&M.

#### 4. *Beyond CCRs: Using Parcel-Specific Easements in a CDD*

While statutes rarely allow CDDs to enforce CCRs, this does not spell the end of CDDs as an avenue for providing assurances of a legal right to ensure O&M for LID stormwater structures. In fact, CDDs can combine their statutory authority with parcel-specific easements to present an powerful alternative to HOA CCRs for O&M of LID elements.

Statutes empower CDDs to hold diverse property interests, including easements.<sup>112</sup> A developer forming a CDD could, using the CDD engineer's water control and management plan,<sup>113</sup> identify

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<sup>108</sup> *Id.* at 361.

<sup>109</sup> *Id.*

<sup>110</sup> *Cf. id.* at 361.

<sup>111</sup> *Id.*

<sup>112</sup> FLA. STAT. §190.003(20) (2007) (noting that "water management and control facilities' includes all real and personal property an any interest therein, rights, easements, and franchises of any nature relating to any such water management and control facilities or necessary or convenient for the acquisition, construction, reconstruction, operation, or maintenance thereof").

and grant easements to the CDD for all private lands within the district which are to have LID stormwater elements on them, whether the “element” be a swale, rain garden, exfiltration trench/tank, or any other LID stormwater technique.<sup>114</sup> Easements should be individual to each parcel and should include the maps/diagrams developed for use in construction of the stormwater system. Each easement should contain language allowing the CDD or its representatives/agents access to the property to inspect and maintain any LID elements included in the easement documents. Easements should also include language forbidding the owner of the servient estate from damaging, modifying, or interfering with the functioning of the LID elements included in the easement documents. This language should include the obligation of the property owner to repair/replace any LID element damaged by the action of the servient estate owner; if the owner fails to do this in a timely manner, the easement should specify that the easement holder (the CDD) or its representative may do so and charge the servient estate through the CDD’s assessment power. If the CDD charges the servient estate through an assessment, the assessment becomes a lien on the property.<sup>115</sup>

If establishment of the stormwater regime in the context of a CDD will serve to fulfill stormwater requirements of both local government and the local WMD, the easement for each parcel should also specify that the LID elements on the parcel form part of a stormwater management system required by both the WMD and local government. The easement should thus also specify that both the WMD and local government are parties to the easement and they or their agents may enter to inspect or maintain the LID structures on the parcel. Additionally, each easement should specify that the CDD may not alienate the CDD’s easement interests without the written consent of any unit of government that required the associated LID structures.<sup>116</sup> These easements and their associated maps provide other advantages as well: they provide additional notice for prospective purchasers that a parcel has LID stormwater structures on it that must be respected as part of an integrated stormwater system, and they avoid the need of an HOA to reaffirm the HOA’s CCRs every thirty years according to the dictates of the Marketable Record Title Act.<sup>117</sup>

##### 5. *CDDs and Generation of Funds for LID Operation and Maintenance*

Florida Statutes grant a CDD the right to impose ad valorem taxes, non-ad valorem assessments (for both debt repayment and operations and maintenance), and user rates and fees. Authority to

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<sup>113</sup> This is required of a CDD that intends to assume responsibility for providing water management and control. FLA. STAT. §190.013 (2007). *See supra* note 105 and accompanying text.

<sup>114</sup> Under Florida’s conservation easement statute, FLA. STAT. 704.06 (2007), CDDs could also accept more innovative easements such as maintenance of open space (thus limiting the ability to increase the footprint of existing structures) or maintenance of certain trees.

<sup>115</sup> *See infra* Section VI.B.5 (discussing special assessments).

<sup>116</sup> In light of the case law discussed above for HOAs and CCRs, it is probable that courts would void any attempted alienation of CDD easement interests based on the local government’s or WMD’s interest in the CDD maintaining the property interest. Despite this, better practice counsels inclusion of this explicitly in both the easement as well as the CDD’s rules.

<sup>117</sup> *See supra* section IV.E.

levy ad valorem taxes by CDDs has been used very seldom by CDDs;<sup>118</sup> use of special assessments is more common.<sup>119</sup> The ability to generate revenue through these mechanisms offers a powerful tool for CDDs to establish and maintain LID stormwater infrastructure. Special assessment authority also makes CDDs an attractive option as permit holders for WMDs and also for local government stormwater permits as this ensures that CDDs have the ability to raise the money necessary to fund on-going monitoring and O&M of LID stormwater structures. Additionally, CDDs have effective tools to collect assessments they charge. Special assessments for bonds may be placed on the county tax rolls, thus imparting the county's full authority to collect taxes, create a lien on the property against which they are assessed, and enforce in the same manner as county taxes.

Special assessments are unique in that they are not "taxes" as usually understood.<sup>120</sup> Rather, special assessments are charges to property based on the specific benefit a property receives from an infrastructure project.<sup>121</sup> Special assessments for properties in the CDD must be determined by the CDD's board based upon a report of the CDD's engineer and must be apportioned relative to the benefit received.<sup>122</sup> "In reviewing a special assessment, a two-prong test must be addressed: (1) whether the services at issue provide a special benefit to the assessed property; and (2) whether the assessment for the services is properly apportioned."<sup>123</sup> A special assessment does not necessarily require that the benefit be unique or different in type or degree

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<sup>118</sup> CDDs, as independent special districts, fall within the class of special districts whose power to bond ad valorem tax revenue has been construed as limited by Art. VII, sec. 12 of the Florida Constitution, which requires approval by referendum. *See* Dr. Gregory L. Strand v. Escambia Cty., Fla., et al., 32 Fla. L. Weekly S550, 32 Fla. L. Weekly S587, No. SC06-1894 (September 6, 2007, as amended September 28, 2007). However, *Strand* expressly notes that bonds secured by assessments do not fall within the ambit of Art. VII, sec. 12 of the Florida Constitution, and thus do not require a voter referendum for approval. *Id.* at 17. Since CDDs virtually always use assessments rather than ad valorem taxes as the pledge for bonds, *Strand* will not affect most CDDs.

<sup>119</sup> Most CDDs do not levy true benefit assessments under 190.021 which requires an annual report of the district engineer. Instead, CDDs typically levy assessments pursuant to 190.022, which does not require an annual report of an engineer. Nonetheless, CDDs that undertake water management must have a plan developed by an engineer. *See supra* notes 105 and 113 and accompanying text.

<sup>120</sup> *See, e.g.* City of Boca Raton v. State, 595 So.2d 25, 29 (Fla.1992).

<sup>121</sup> Most CDDs have an assessment allocation report prepared by an assessment consultant or financial advisor typically for debt and also sometimes for operations and maintenance assessments. In relation to debt assessments, the engineer prepares the engineer's report which outlines the public infrastructure to be provided by the CDD. The assessment consultant takes the engineer's report and allocates the cost of the infrastructure to the various properties within the CDD based on benefit. Sometimes all properties pay an equal amount and sometimes not. For example, a residential development where all properties will be 2000 square foot homes on similar size lots will likely have every unit paying the same assessment. However, where there is a mixed use project or a project with different types or sizes of product, typically the assessment consultant will assign each product type/size an equivalent assessment unit (EAU) or an equivalent residential unit (ERU) factor.

<sup>122</sup> FLA. STAT. §190.021(2) (2007).

<sup>123</sup> Lake County v. Water Oak Management Corp., 695 So.2d 667, 669 (Fla. 1997).

from benefits provided the community as a whole.<sup>124</sup> Rather, “the test is whether there is a ‘logical relationship’ between the services provided and the benefit to real property.”<sup>125</sup>

The obvious benefit to a parcel of construction of LID stormwater elements, even if such elements are *on the parcel charged*, is that the LID elements contribute to the CDD’s work of water management and control, increase the value of the parcel by making it developable, and increase the marketability of the parcel (because it is serviced by a legally-permitted stormwater system). In other words, as with standard, centralized stormwater systems, LID elements prevent flooding and water movement problems associated with development. Another benefit to each parcel is the ability of the development to receive requisite permits and, in the longer term, to maintain compliance with permits requiring a stormwater system.

There are multiple methods of formulating how each property should be assessed. Some of these include front footage, use, property area, and fair market value added. The need for apportionment in the LID stormwater infrastructure context is analogous to the apportionment necessary for a stormwater fee.<sup>126</sup> The level of detail used to apportion stormwater fees varies dramatically, in part because increasing the accuracy of the apportionment increases the administrative costs of assessing the fee. Thus, many stormwater utilities only individually assess commercial properties and apply an “Equivalent Residential Unit” (ERU) to single-family homes.<sup>127</sup> Use of ERUs for stormwater fee apportioning has withstood challenge.<sup>128</sup> Use of a standardized unit has been upheld in large part because stormwater, unlike potable water, gas, and electricity, cannot be metered.<sup>129</sup> Thus, reasonable statistical calculations determined to arrive at equitable apportionment of benefit to properties should also offer a viable option in the realm of special assessments for LID infrastructure.

In addition to a special assessment for construction that charges each parcel for the costs of the LID stormwater infrastructure on the particular parcel as well as that parcel’s proportionate share of stormwater infrastructure on common areas, a CDD should have a maintenance assessment that also covers both on-parcel and common-area LID infrastructure. Typically, special assessments serve to construct infrastructure, not conduct routine maintenance or repair. Statutes give CDDs authority to levy special assessments for the *maintenance* of facilities and projects of the CDD.<sup>130</sup> Such assessments must be apportioned to properties in proportion to the benefits received by each parcel.<sup>131</sup> The special benefit to assessed properties comes in the form of

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<sup>124</sup> County v. Water Oak Management Corp., 695 So.2d 667, 669 (Fla. 1997). The term special benefit may be defined differently in different situations. Cf. *id.* at note 2.

<sup>125</sup> *Id.* (citing Whisnant v. Stringfellow, 50 So.2d 885 (Fla.1951); Crowder v. Phillips, 146 Fla. 440, 1 So.2d 629 (1941)(on rehearing)).

<sup>126</sup> Collier County v. State, 733 So.2d 1012, 1018- 19 (Fla.1999) (noting the similarities between fees and special assessments).

<sup>127</sup> See, e.g. City of Gainesville v. State, 863 So.2d 138, 142 (Fla. 2003).

<sup>128</sup> City of Gainesville v. State, 863 So.2d 138, 146-48 (Fla. 2003).

<sup>129</sup> *Id.* at 147.

<sup>130</sup> FLA. STAT. § 190.021(3) (2007).

<sup>131</sup> *Id.*

guaranteed monitoring and maintenance of the LID structures as well as compliance with the legal mandates requiring monitoring and O&M of LID stormwater structures. As with a special assessment for construction, the inspection and maintenance costs of these systems should be allocated to each property within the district with a basic formula that assesses each property on the basis of what systems it has, the size of the property, the lifespan of the LID elements, and the cost to maintain/replace the LID elements on the parcel.

## **VII. Condominium Developments: Single-Family Homes Without a Private Parcel**

The most significant problem separating LID from centralized stormwater management in the eyes of many regulators is that LID structures may occur on private property. Regulators worry that property owners often feel they have the right to do whatever they want on their property despite legal limitations to the contrary. A new type of development may offer a way to assuage this fear. Some new developments that look exactly like single family home developments are actually structured as condominium associations where the owners only own the inside of their house, and a condominium association holds the right and responsibility to maintain the exterior of all structures and the common areas (i.e.—what would ordinarily be the private parcels). Organizing a development this way should give greater security to regulators for two reasons. First, a condominium development means that all LID structures will be on common property owned by the condominium association. Second, the owners of units in such condominium developments will inherently understand that they personally have no rights to modify anything that is not inside of their house. Due to the current development slump, it is not yet clear whether such condominium developments will increase and whether Floridians will want this type of development.

## **VIII. Conclusion**

As development continues to advance in Florida, strategies to address stormwater must advance as well. Scientists indicate that the centralized stormwater systems that represented progressive stormwater management a quarter century ago do not sufficiently address today's nitrogen and phosphorous problems in stormwater. Persistent violations of water quality standards for nitrogen and phosphorous in Florida are poised to impose increasingly difficult legal barriers to development and stormwater permitting through the implementation of both the water management districts' permitting in Florida as well as federal law's total maximum daily load (TMDL) program, which does not allow for issuance of federal permits for discharges of a contaminant that is already causing a violation of water quality standards.<sup>132</sup> These trends require development and implementation of modifications and alternatives to the centralized stormwater systems Florida has used for a quarter century.

LID stormwater strategies have the ability to either supplant or augment standard, centralized stormwater management strategies, simultaneously improving surface water quality and

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<sup>132</sup> The TMDL provisions appear at 33 U.S.C. 1313(d). Stormwater systems that require a National Pollutant Discharge Elimination System permit may not be able to secure such permit if a TMDL is in effect for the area. *See, e.g.* 33 U.S.C. 1313(d)(1)C and 40 C.F.R. 130.12(a) (noting that NPDES permits cannot conflict with the plans submitted pursuant to the TMDL mandate).

generating increased aquifer recharge. These LID methods differ from centralized stormwater systems in that LID methods are more dispersed by nature. Placing LID stormwater elements on common areas of a development adds only minor complexity to the O&M questions, but the inherently dispersed nature may also lead to situations in which it is appropriate or necessary to place them on private parcels as well, thus potentially leading to their placement on private parcels in a development rather than just on common areas, creating difficult legal challenges in assuring perpetual operation and maintenance (O&M) of such systems. Review of existing legal tools and precedents indicates opportunities to create a permit structure by local governments or water management districts (WMDs) that may help ensure the O&M of LID stormwater infrastructure even when on private parcels.

Proposed permitting of LID by local governments and WMDs must confront the frequent lack of financial and administrative resources to oversee thousands upon thousands of LID structures on individual parcels. Proper structuring of education, incentives and disincentives in conditions imposed on an HOA as permit holder, including third-party inspection and maintenance, should suffice to ensure proper O&M by the HOAs of large developments. To achieve this, HOA CCRs should include carefully crafted language to ensure the administrative, legal, and financial resources necessary to monitor and enforce LID-related CCRs. Smaller developments will likely continue to present greater challenges, just as they already do with centralized stormwater management systems. In fact, it may be that creating a comprehensive management scheme to ensure long-term O&M of LID elements would be too costly for small developments as it would impose a higher per-household burden in small developments. Thus, it is particularly important with smaller HOAs to site LID elements as much as possible, or even exclusively, on common areas.

Florida statutes also present larger developments with the option of using a community development district (CDD) as the entity responsible for maintaining LID infrastructure on individual parcels. This can occur through strategic use of easements and the ability of a CDD to generate, through assessments, the funds necessary for monitoring activities and maintenance. The greater organizational/professional management of CDDs and their greater power in collecting assessments gives them clear advantages over HOAs as permit holders for LID stormwater systems.<sup>133</sup> The single largest factor that will limit the feasibility of a CDD is the larger cost to establish the CDD relative to an HOA.

A third possibility that would convert LID on private parcels into LID on common property with no obvious visual difference is the condominium development model. Further investigation is required to ascertain the acceptability of such a model to consumers and, by extension, to the development community.

Regardless of which approach is used, it is not possible to create a permit process that entirely negates the need of the permitting authority to invest some amount of resources in monitoring

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<sup>133</sup> Even though both HOAs and CDDs may establish liens on property for unpaid assessments, CDDs have the significant advantage that they may place their assessments on the county tax roles. This means that if a property owner does not pay a CDD assessment, the county will sell a tax certificate on the property and the CDD still gets its operating revenue. An HOA cannot do this, and when one or members of an HOA fails to pay the required assessment, the HOA is short that amount in its operating expenses.

and enforcement. Monitoring and enforcement will always cost money, but costs can be shifted to some degree. Permit requirements for HOAs and condominium associations to fund third-party contracts or requirements for CDDs to monitor, maintain, and educate owners allows much of the monitoring and enforcement burden to be shifted away from the permitting authority. To maintain the integrity of such a system, permitting authorities will still need to dedicate sufficient resources to conduct random checks of contracting, reporting, and activities by third-party contractors and CDDs, including enforcement/legal costs for identified problems. Random checks will only continue to serve a deterrent effect if it is almost certain that discovered violations lead to enforcement and payment of penalties.

Violations of state and federal water quality standards and the failure of current stormwater practices to fix our water quality problems will inexorably push toward incorporation of LID stormwater practices into the toolbox of local and state regulators of stormwater. Both local governments and WMDs should examine their ability to use the tools presented here to ensure the perpetual O&M of LID stormwater requirements.