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

To be legally sufficient, ICs must meet the definitional requirements of Section 376.301(22), F.S.[[1]](#footnote-2)  For FDEP to rely on an ordinance as an IC, the ordinance must be protective of human health and the environment, and also be legal pursuant to Florida law and case law.

To meet the legal requirements to be an IC, the local government instituting the control must have authority to do so. Local ordinances that prohibit installation or use of potable water wells are not legally sufficient as ICs because local governments do not have the authority to prohibit those wells. Courts have recognized and upheld the “exclusive authority” of FDEP and the water management districts (WMD) to regulate the consumptive use of groundwater.[[2]](#footnote-3) In addition, statutory provisions prohibit FDEP and the WMDs from requiring a consumptive use permit “for domestic consumption of water by individual users.”[[3]](#footnote-4)  Because permitting of water use is preempted to the state, and the state specifically exempts domestic self-supply from regulation, it would be improper for FDEP to rely on a local government prohibition of water use as an IC.

Because of the WMDs’ authority over water well permitting, WMD water well permitting rules (or the rules of a county, county health department, or other local government which has received delegation of water well permitting authority from a WMD pursuant to Fla. Stat. §§ 373.308–309 (Delegated Local Government)), which (i) require that permits be obtained prior to the construction or modification of potable, irrigation, or other water wells subject to permitting requirements under Part III of Chapter 373, F.S.; and (ii) prohibit the permitting of such regulated wells in areas of known groundwater contamination, if such permitted wells would increase the potential for harm to public health, safety and welfare or would degrade the water quality of the aquifer by causing pollutants to spread,[[4]](#footnote-7) may constitute legally sufficient governmental controls when coupled with a system or procedure by which areas of known groundwater contamination are reflected and/or recorded in a WMD’s or Delegated Local Government’s GIS computer database (or similar system) to prevent or condition the issuance of water well construction permits in areas of groundwater contamination. Proof of the delegated authority must be submitted with the IC package for OGC’s review.

However, there may be other legally sufficient ordinances that can be used as ICs or as part of a layered approach[[5]](#footnote-11) to provide sufficient controls on the property. For example, local governments may, and routinely do, require that any development within the jurisdiction be connected to any existing municipal water system for potable water supply, if supply lines are available within a specific distance of the property on which development/redevelopment is contemplated. This may be evidenced by a local ordinance or comprehensive plan provision adopted by ordinance requiring connection, both of which are enforceable under Florida law. Such provisions may be legally sufficient IC restriction that can be used as part of a layered approach to site closure (e.g., the local government also has been delegated well permitting authority as noted above). Although a municipality or other local-governmental or quasi-governmental (e.g., seaports, airports) entity may not prohibit others from installing wells, unless specifically delegated that authority, such entities may adopt ordinances that prohibit the location of wells on property owned by the entity passing the ordinance and such ordinances may also be sufficient ICs.

Legally sufficient local governmental ordinances used as ICs must be adequately protective of human health and the environment. While mandatory hook-up ordinances may be legally sufficient, they do not and cannot prohibit the use of private wells for irrigation or other non-potable purposes. Site managers must decide whether use of the groundwater for non-potable uses is still protective of human health and the environment.

OGC will work with the site manager to review and evaluate local ordinance packages on a case by case basis.

1. “Institutional controls” means the “restriction on use or access to a site to eliminate or minimize exposure to petroleum products’ chemicals of concern, drycleaning solvents, or other contaminants. Such restrictions may include, but are not limited to, deed restrictions, restrictive covenants, or conservation easements.” [↑](#footnote-ref-2)
2. *See* § 373.217(2), Fla. Stat. (2019)  (stating that Chapter 373 is “the exclusive authority for requiring permits for the consumptive use of water...”); § 373.217(3), Fla. Stat. (2019) (Specifically stating that if any provision of Part II of Chapter 373, as amended, “is in conflict with any other provision, limitation, or restriction which is now in effect under any law or ordinance of this state or any political subdivision or municipality, or any rule or regulation promulgated thereunder, Part II shall govern and control, and such other law or ordinance or rule or regulation promulgated thereunder shall be deemed superseded for the purpose of regulating the consumptive use of water.” An exception is made for the Florida Electrical Power Plant Siting Act; & § 373.217(4), Fla. Stat. (2019) (expressly preempting “the regulation of the consumptive use of water.”). *See also* Marion County. v. Greene, 5 So. 3d 775, 777 (Fla. 5th DCA 2009); Sw. Florida Water Mgmt. Dist. v. Charlotte County, 774 So. 2d 903, 918 (Fla. 2nd DCA 2001); Thomas v. Sw. Florida Water Mgmt. Dist., 864 So. 2d 455, 456 (Fla. 5th DCA 2003); and Heartland Envtl. Council, Inc. v. Highlands Cty and Dep't of Cmty. Aff., 169, No. 94-2095GM (Fla. DOAH Oct. 15, 1996 (Recommended Order); Fla. DCA Nov. 25, 1996 (Agency Final Order)). [↑](#footnote-ref-3)
3. § 373.219(1), Fla. Stat. (2019) (stating that “no permit shall be required for domestic consumption of water by individual users.” Domestic consumption includes “the use of water for the individual personal household purposes of drinking, bathing, cooking, or sanitation” and “[a]ll other uses shall not be considered domestic.” § 373.019(6), Fla. Stat. (2019). [↑](#footnote-ref-4)
4. *See*, e.g., applicable within the Southwest Florida Water Management District, Fla. Admin. Code r. 40D-3.505(3) (“[t]he District will deny a permit application to construct a water well if use of the well would increase the potential for harm to public health, safety and welfare, or if the proposed well would degrade the water quality of the aquifer by causing pollutants to spread.”) [↑](#footnote-ref-7)
5. A “layered approach” to conditional closure is one in which multiple ICs are used which may individually be insufficient but collectively provide a legally and technically sufficient control. [↑](#footnote-ref-11)