

ARTICLE XI PERDIDO KEY HABITAT CONSERVATION

Sec. 30-281. Short title/scope/administration.

This article may be known as the "habitat conservation program." Program participation by landowners is voluntary. Only those properties identified in the Orange Beach Perdido Key Habitat Conservation Plan (HCP) shall be eligible for participation. This Article shall be administered by the city's department of coastal resources.

(Ord. No. 2021-1391 , § 1, 6-15-2021)

Sec. 30-282. Findings.

- (a) The City of Orange Beach is situated on the barrier island known as Perdido Key which provides habitat for, and is within the historical range of, certain species protected by the Endangered Species Act of 1973, as amended (the "Act"), (16 U.S.C. 1534 et seq.), including the Perdido Key beach mouse (*Peromyscus polionotus trissyllepsis*), hereafter referred to as the PKBM.
- (b) The United States Department of Fish and Wildlife Service (USFWS) is the primary federal agency charged with conservation, protection, and recovery of threatened and endangered species.
- (c) Section 9 of the Act broadly prohibits any conduct that would harm endangered or threatened species and forbids significant habitat modification that kills, injures or impairs essential behaviors of protected species, such as breeding, feeding, or sheltering.
- (d) As a result, private landowners as well as the city are prohibited from engaging in land disturbing activities on certain properties without first obtaining an incidental take permit issued by the USFWS—a process that can take years to complete.
- (e) USFWS has developed a collaborative program that enables cities to partner with USFWS to protect, restore, and manage important habitats on private and public land by adopting a habitat conservation plan (HCP) that complies with federal law; specifically, section 10 of the Act.
- (f) On December 3, 2019, the city council adopted Resolution No. 19-234 authorizing the mayor to submit an application to USFWS for a city-wide incidental take permit to authorize the city to approve development projects that meet or exceed the criteria set forth in the HCP, and to issue individual authorization of coverage permits for those projects, which would relieve private owners of the obligation to acquire an individual ITP from USFWS.
- (g) On April 27, 2021, USFWS approved the city's HCP and has issued the city the city-wide incidental take permit (ITP) (Permit No. ES48931D) that covers all properties identified in the HCP.
- (h) As a condition of the ITP, the city is required to implement and monitor all of the requirements set forth in the HCP for a period of 30 years, including performance measures and habitat protection such as predator control, trash management, dune restoration, public education, post construction monitoring, wildlife lighting, vehicle access management and long-term maintenance of habitat areas. In order to meet these obligations, the city is required to establish fees in an amount needed to cover the costs of compliance.
- (i) The Perdido Key property consists of 73.74 acres.

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- (j) The ITP allows for impact on 36.872 acres of Perdido Key property over the 30 years of the ITP, with 36.872 acres required to remain preserved.
 - (k) The ITP limits the impact to Perdido Key property to 12.29 acres every five years.
 - (l) The HCP established by this article is in the public interest because conservation and permitting will be more consistent and localized; the amount of time required to obtain development permits will be dramatically reduced; creates efficiencies not possible with individual plans; and is more efficacious in protecting endangered and threatened species.
 - (m) The program established by this article is voluntary for private landowners, and nothing in this article will prevent any landowner from seeking an individual ITP directly from USFWS.
- (Ord. No. 2021-1391 , § 1, 6-15-2021)

Sec. 30-283. Purpose and intent.

- (a) The purposes of this article are to create and implement a habitat conservation plan that will reduce the need for individual incidental take permit applications for non-federal developments and city-owned public infrastructure improvements; to reduce conflicts between listed species and economic development activities; and to facilitate creative partnerships between the public and private sectors as well as federal, state and municipal agencies.
- (b) This article will protect species that are deemed "threatened," "endangered," or "species of special concern," by the USFWS.
- (c) This article establishes rules and regulations that will protect such species by:
 - (1) Maintaining and enhancing the valuable diversity and distribution of plant and animal species within the city;
 - (2) Preserving the ecological values and functions of the habitats;
 - (3) Providing for habitat corridors; and
 - (4) Minimizing habitat fragmentation.
- (d) This article is not intended to authorize any violation of the Marine Turtle Protection Act, F.S. § 379.2431, as amended, or the Endangered Species Act.

(Ord. No. 2021-1391 , § 1, 6-15-2021)

Sec. 30-284. Definitions.

The following terms and phrases, when used in this article, shall have the following meanings, unless the context clearly indicates a different meaning:

Authorization of coverage permit means an individual permit issued by the city to a landowner of Perdido Key property under the city's ITP pursuant to the habitat conservation plan.

Chemical herbicide means any agent intended to kill or inhibit growth of vegetation, including glyphosate.

Department means the City of Orange Beach Department of Coastal Resources.

Director means the director of the department or his or her designee.

Eligibility period means each five-year period commencing April 27, 2021 (the date of issuance of the city's ITP by USFWS).

Eligibility threshold means 12.29 acres for each eligibility period.

Habitat conservation plan or *HCP* means the habitat conservation plan approved by the USFWS for the city (and any amendments thereto).

Habitat means the natural environment of the PKBM, including any undeveloped or unimproved property within the corporate limits of the city located on Perdido Key.

Habitat impact is any activity that harms, degrades or impairs habitat, including land disturbance activities and the application of any chemical herbicide.

Land disturbance activity means any activity that changes the physical conditions of the land form, vegetation or hydrology, including the application of chemical herbicides, excavation, clearing, grubbing, and grading.

Native vegetation means primary, secondary, and scrub vegetation, scrub dunes, and other such native vegetation that sustains the essential life history functions of federally protected species.

Perdido Key property means privately-owned lands on Perdido Key in an area bordered on the east by the Florida/Alabama state line, on the south by the mean high water line of the Gulf of Mexico, and on the north by Old River.

(Ord. No. 2021-1391 , § 1, 6-15-2021)

Sec. 30-285. Permit required.

- (a) No person may engage in any land disturbance activity on any Perdido Key property without first having obtained an individual ITP issued by the USFWS, or an authorization of coverage permit under the city's ITP pursuant to this article.
- (b) An authorization of coverage permit issued pursuant to this article is in addition to all other permits required by federal, state, and local laws.

(Ord. No. 2021-1391 , § 1, 6-15-2021)

Sec. 30-286. Valid dates.

- (a) The authorization of coverage permit is valid only for the dates and areas specified in the permit. If no work is initiated within six months from the date the permit is issued, the permit shall become void.
- (b) No person may construct beyond the dates specified in the permit unless such person makes an extended application before the expiration of the initial permit and a new permit or permit extension is granted.

(Ord. No. 2021-1391 , § 1, 6-15-2021)

Sec. 30-287. Permit applications/issuance.

- (a) *Application.* Permit applications shall be submitted to the department on such forms as may be required by the director. Applicants shall provide information sufficient to show compliance with this article. By submitting an application, an applicant shall be required to certify that such applicant has read and is familiar with the terms, conditions and requirements of the HCP, the ITP the related documentation referenced therein and a draft of the city's form of authorization of coverage permit, including (i) the requirements of subjecting the subject property to recorded declaration of covenants and recorded conservation easement for the impacted areas, which areas must be legally surveyed at the applicant's expense, (ii) the obligations

to maintain and manage the property as required therein, (iii) the obligation to pay the fees set forth herein, and (iv) such other matters as the director may provide, all on such forms and with such content as the director may establish from time to time.

- (b) *Limitation for each eligibility period.* Under the ITP, the acreage of Perdido Key property available for impact is limited to the eligibility threshold for each eligibility period, up to an aggregate of 36.872 acres of total impact. Therefore, unless expressly approved by USFWS, the city is not permitted to issue authorization of coverage permits providing for impact in the aggregate of more than the eligibility threshold in each eligibility period.
- (c) *Priority of applications.* Applications shall generally be accepted on a first-come first-served basis; however, if multiple applications are submitted on the same day which would have the effect of requesting impact of more than the aggregate eligibility threshold available for that eligibility period (taking into account any prior applications which have been accepted for that eligibility period), the director shall establish a methodology for a random drawing to determine the order of priority for that day. Qualified applications shall be received in that order until an application would exceed the aggregate eligibility threshold for that eligibility period.
- (d) *Application partly exceeding eligibility threshold.* For the application that is partly within the applicable eligibility threshold and partly exceeds it, (i) if the amount of excess is less than one acre, the director shall contact USFWS and request approval for an exception, and (ii) if the amount of the excess is greater than one acre or, if the amount of excess is less than one acre and USFWS denies the request for approval, then the applicant shall have the right, for a period of 30 days, to resubmit an application which would have impact within the eligibility threshold (and upon failure to do so, the application shall be deemed rejected), or the applicant may withdraw the application. The city shall have no liability for any denial of such request for approval by USFWS. If the application is withdrawn (or if the applicant fails to resubmit within such time period), the city shall proceed along the same lines with the next succeeding qualified applicant(s) for that day on which the eligibility threshold was exceeded (if applicable).
- (e) *Maintenance of priority for succeeding eligibility period.* Any qualified applicant whose proposed impacted acreage was above the eligibility threshold shall maintain such applicant's priority position for the next succeeding eligibility period, unless such applicant withdraws the application.
- (f) *Issuance.* If the director determines that an applicant has satisfied the requirements of this article and that the proposed impacted acreage is within the eligibility threshold for the applicable eligibility period (as determined above), the director shall issue the authorization of coverage permit or notify the applicant that the permit has been denied and the reason for the denial. No permit shall be issued to any person who has failed to comply with the requirements of this article.
- (g) *Appeal.* Any person who (1) has been denied a permit; (2) has had a permit revoked; or (3) believes that the fees imposed are incorrect or invalid, has the right to appeal the denial, revocation, or fee imposition, upon written request to the city council within ten days from the denial. The city council shall act on a timely written request at its next regularly scheduled meeting following the date that is seven days after the filing of the appeal. The standard of review on appeal to the city council is whether the department exceeded its authority or otherwise abused its discretion. An appeal shall be filed with the city clerk with a conspicuous note on the front stating: "[APPEAL TO CITY COUNCIL REGARDING AUTHORIZATION OF COVERAGE PERMIT]."

(Ord. No. 2021-1391 , § 1, 6-15-2021)

Sec. 30-288. Permit fees.

- (a) Permit fees shall be established by the city council upon recommendation of the director in an amount sufficient to recover the costs of administering the HCP.

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- (b) The department is responsible for collecting fees. There is hereby established a fund to be called the Perdido Key CMF Fund. All fees shall be deposited into the Perdido Key CMF Fund, and may only be used for the activities authorized by the ITP and the HCP (including personnel, overhead and administrative expenses associated therewith or allocable thereto).
 - (c) *Initial fee.* Applicants shall pay a one-time primary impact fee of \$100,000.00 per each acre (or fraction thereof) of permanent habitat impact. The initial fee shall be paid upon, and as a condition to, issuance of the authorization of coverage permit, but in any event, at least 30 days prior to commencing each phase of development.
 - (d) *Annual fee.* Applicants permitted pursuant to this article shall additionally pay an annual, recurring fee as follows:
 - (1) Single family, townhomes and duplex residences:\$201.00 per bedroom
 - (2) Hotels:\$201.00 per hotel room.
 - (3) Residential condominiums and apartments:\$201.00 per unit.
 - (4) Commercial and retail developments:\$201.00 per parking space.

If the certificate of occupancy is issued July 1 or later, the first-year annual fee will be reduced by 50 percent. If there is an applicant for a project which does not fall within one of the foregoing categories, the city council may establish a specific annual fee for that category.

- (e) *Adjustments.* The amount of the annual fee shall be adjusted annually on December 1st of each year in an amount equal to the 12-month percentage change as of December 1 of the prior year based upon the U.S. Department of Labor, Bureau of Labor Statistics (BLS) Consumer Price Index for All Urban Consumers (CPI-U). Annual price adjustments shall be calculated using the simple percentage method.
- (f) *Collection procedures for annual fees.* The initial annual fee shall be due and payable prior to and as a condition to being issued a certificate of occupancy. Thereafter, annual fees shall be due and payable not later than January 31st of each year. The department shall endeavor to issue invoices for annual fees at least 30 days before the due date; provided, however, no failure to issue or delay in issuing an invoice shall relieve the permittee of the obligation to pay the annual fee.
- (g) *Lien.* The annual fees shall be the personal obligation of the owner of the subject property; but to secure the collection of such annual fees, there shall be a lien against the subject property in favor of the city. The lien may be enforced by sale of such property in the same manner in which the foreclosure of a municipal assessment for public improvements is authorized.
- (h) *Late fees.* All annual fees not paid within 30 days from the due date shall be assessed a late fee in the amount of five percent of the amount owed. Additionally, all annual fees not paid within 30 days from the due date shall commence accruing interest at the rate of six percent per annum.

(Ord. No. 2021-1391 , § 1, 6-15-2021)

Sec. 30-289. Liability and enforcement.

- (a) It shall be unlawful for any person to engage in any land disturbance activity on Perdido Key property without first obtaining an individual incidental take permit (ITP) issued by the USFWS or an authorization of coverage permit issued by the city.
- (b) It shall be unlawful for any person to violate any conditions of the authorization of coverage permit issued pursuant to this article.
- (c) It shall be unlawful for any person to fail to pay the fees imposed pursuant to this article.

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- (d) It shall be unlawful for any person to move, destroy, or in any way disturb a nest marker placed by an entity authorized by USFWS to place nest markers to protect and monitor sea turtle and shorebird nests.
 - (e) Any natural or legal person who violates any provision of this article shall upon conviction be punished by a fine of not less than \$50.00 nor more than \$500.00 or imprisonment for a term not to exceed 30 days or both, at the discretion of the court for each day the violation continues.
 - (f) Violations of this article shall be prosecuted in accordance with chapter 2 of this Code.
 - (g) The city shall not be liable for any impacts to federally protected species resulting from violations of this article.
 - (h) The city may also bring a civil action to enjoin or enforce the provisions of this article.

(Ord. No. 2021-1391 , § 1, 6-15-2021)