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GROWTH MANAGEMENT IN FLORIDA: FOCUS ON THE COAST

DONNA R. CHRISTIE*

I. INTRODUCTION

In 1972 Congress passed the Coastal Zone Management Act[1] to encourage states "to preserve, protect, develop, and where possible, to restore or enhance" the nation's coastal zone.[2] During the 1970s, most of the country's coastal states and territories developed coastal management plans guided by this legislation.[3] Development of the Florida plan, however, was an arduous and frustrating experience that did not culminate until September 1981.[4] One commentator noted that part of the problem in developing a coastal plan for Florida resulted from the fact that the entire state "arguably is in the 'coastal zone.' "[5] Comprehensive state planning, rather than regulation of a narrow belt along the shore, was seen as necessary for successful coastal management because of the intimate relationship of the state's ecological systems.[6] Statewide legislation addressing land and water use management formed the basis for Florida's networked plan.

Florida's 11,000 miles of tidal coastline, which includes 1,160 miles of sandy beaches,[7] remained vulnerable to intense development pressures despite the patchwork coastal plan. While statewide and regional planning is a necessary reinforcement for coastal

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1. 16 U.S.C. §§ 1451-1464 (Supp. III 1985).

2. *Id.* at § 1452(1).

3. Twenty-five of the thirty-five eligible coastal states and territories had developed federally approved plans by September 1980. *See* Eliopoulos, *Coastal Zone Management: Program at a Crossroads*, [Monograph No. 30] Env't Rep.(BNA) at 24-25 (Sept. 17, 1982).

4. *See generally*, O'Connell, *Florida's Struggle for Approval Under the Coastal Zone Management Act*, 25 NAT. RESOURCES J. 61 (1985). [Note: A typographical error in this article results in 1984 being identified as the Florida plan approval date rather than 1981.]

5. Finnell, *Coastal Land Management in Florida*, 1980 AM. B. FOUND. RES. J. 303, 309.

6. *Id.* at 309-10. *See also* Brindell, *Florida and Coastal Zone Management*, 54 FLA. B.J. 295, 298 (1980), which notes:

> Florida's relatively low land elevation, high water table, many rivers of inland origin which empty into coastal waters, extensive coastline, and the generally close proximity of all land locations to the Atlantic Ocean or Gulf of Mexico make it difficult if not impossible to establish a scientifically rational boundary which excludes inland areas having no significant effect on coastal waters.

7. O'Connell, *supra* note 4, at 61.

management in Florida, the approach did not necessarily reflect the special needs of the coasts. The beaches, shores, and coastal barriers that are an essential part of the state's economic base form a first line of defense for the mainland from storms and provide essential habitats for numerous species. They are also home to more than seventy-nine percent of the state's 10.9 million people; coastal counties are expected to absorb more than eighty-two percent of the state's growth in the 1980s as Florida becomes one of the country's most populous states.[8] Even if viewed only from the perspective of growth management, the problems of Florida's coastal areas are unique, requiring special consideration in a management scheme.

Management of Florida's phenomenal growth and protection of the coasts became issues of increased public awareness in Florida in the mid-1980s. The 1985 Florida Annual Policy Survey, a public opinion poll conducted each year by the Survey Research Center in the Policy Sciences Program at Florida State University, identified growth management as the number one citizen concern in the state.[9] Nearly twenty-nine percent of the citizens surveyed listed growth management as the state's most important problem, while only about thirteen percent gave a priority to crime (including drugs).[10] The legislature was presented with a clear mandate.

The response to this call for management of growth in the state was an integrated package of legislation that reflected the special importance of managing coastal development. The Florida State and Regional Planning Act of 1984,[11] the State Comprehensive Plan,[12] the Growth Management Act of 1985,[13] and the Coastal Zone Protection Act of 1985[14] provided for planning for coastal resources management at the state, regional, and local levels, regulation of coastal development, and stricter control of state spending in coastal areas.

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8. EXECUTIVE OFFICE OF THE GOVERNOR, FLORIDA'S STATE PLAN 10 (submitted to the 1985 Florida Legislature).

9. Parker & Oppenheim, *Florida Annual Policy Survey* 3-12 (1985).

10. *Id.* at 6.

11. 1984 Fla. Laws ch. 84-257 (codified in scattered sections of FLA. STAT. ch. 186 (1985)).

12. FLA. STAT. ch. 187 (1985).

13. 1985 Fla. Laws ch. 85-55 (codified in scattered sections of FLA. STAT. chs. 163, 161, and 380 (1985)).

14. 1985 Fla. Laws ch. 85-55, § 36 (codified at FLA. STAT. §§ 161.52-.58 (1985 & Supp. 1986)).

II. THE PLANNING ELEMENT

Florida's planning framework incorporates and integrates planning at the state, regional, and local levels. Although this planning scheme is applicable to the entire state, the growth rate in coastal counties has made planning for coastal areas particularly important. The State Comprehensive Plan,[15] agency functional plans,[16] regional policy plans,[17] and local government comprehensive plans[18] all must address the needs of coastal areas and are bound by a thread of consistency.[19]

The Florida State and Regional Planning Act of 1984 required development of the State Comprehensive Plan as the first stage of the state's new planning effort.[20] Although adopted by the legislature in 1985 as chapter 187, Florida Statutes, the State Plan does not create "law," but is, rather, the state's primary "direction-setting document" and provides "long-range policy guidance."[21] The Plan consists of twenty-five goals with 362 policies outlined as a guide for implementation of the goals. The Coastal and Marine Resources Goal of the State Plan provides:

> (a) Goal.—Florida shall ensure that development and marine resource use and beach access improvements in coastal areas do not endanger public safety or important natural resources. Florida shall, through acquisition and access improvements, make available to the state's population additional beaches and marine environment, consistent with sound environmental planning.
> (b) Policies.—
> 1. Accelerate public acquisition of coastal and beachfront land where necessary to protect coastal and marine resources or to

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15. FLA. STAT. ch. 187 (1985). Section 187.201(9) sets out the Coastal and Marine Resources element of the State Comprehensive Plan.

16. *See* FLA. STAT. § 186.021 (1985). Agency functional plans are statements of agency policy and programs which further and support the goals of growth management and the State Comprehensive Plan.

17. *See* FLA. STAT. § 186.507 (1985). Regional plans are developed by each of the state's eleven regional planning councils and must contain an analysis of the region's needs and resources, as well as a statement of the region's goals and policies related to growth management.

18. FLA. STAT. §§ 163.3161-.3215 (1985 & Supp. 1986).

19. *See* FLA. STAT. § 186.022 (1985) (consistency of agency functional plans with the state plan); FLA. STAT. § 186.508 (Supp. 1986) (consistency of regional policy plans with the state plan); FLA. STAT. § 163.3184(1)(b) (Supp. 1986) (consistency of local government plans with state and appropriate regional plans).

20. *See* FLA. STAT. § 186.008 (1985). *See generally* Rhodes & Apgar, *Charting Florida's Course: The State and Regional Planning Act of 1984*, 12 FLA. ST. U.L. REV. 583 (1984).

21. FLA. STAT. § 187.101(1)-(2) (1985).

meet projected public demand.

2. Ensure the public's right to reasonable access to beaches.

3. Avoid the expenditure of state funds that subsidize development in high-hazard coastal areas.

4. Protect coastal resources, marine resources, and dune systems from the adverse effects of development.

5. Develop and implement a comprehensive system of coordinated planning, management, and land acquisition to ensure the integrity and continued attractive image of coastal areas.

6. Encourage land and water uses which are compatible with the protection of sensitive coastal resources.

7. Protect and restore long-term productivity of marine fisheries habitat and other aquatic resources.

8. Avoid the exploration and development of mineral resources which threaten marine, aquatic, and estuarine resources.

9. Prohibit development and other activities which disturb coastal dune systems, and ensure and promote the restoration of coastal dune systems that are damaged.

10. Give priority in marine development to water-dependent uses over other uses.[22]

The State Plan and two specialized agency functional plans — the state water use plan[23] and the state land development plan[24] — provide guidance for development by state agencies of agency functional plan.[25] Each agency functional plan contains objectives and operating procedures to ensure specific, measurable progress toward state goals (including the coastal and marine resources goal), evaluates agency implementation of the State Plan, and guides agency activities and budgeting.[26]

Regional policy plans, like agency functional plans, must be consistent with the State Comprehensive Plan.[27] Each of the state's

22. FLA. STAT. § 187.201(9) (1985).

23. *See* FLA. STAT. § 373.036 and § 186.002(2) (1985).

24. *See* FLA. STAT. § 380.031(17) and § 186.002(2) (1985).

25. *See* FLA. STAT. § 186.002(2) (1985). Although the state water use plan and the state land development plan are technically designated agency functional plans at FLA. STAT. § 186.021(3) (1985), the plans clearly are intended to provide guidance to other state agencies and regional planning councils. Guidelines for preparation of agency functional plans provide that the state water use plan and the state land development plan are a "special subset" and "an additional guide for agencies" with "broader applicability" and having "implications for other agencies." Executive Office of the Governor, Agency Functional Planning Instructions 1 (1985) [hereinafter EOG Instructions].

26. FLA. STAT. § 186.021(1) (1985). *See also* Rhodes & Apgar, *supra* note 20, at 594-95. *See generally* EOG Instructions, *supra* note 25.

27. FLA. STAT. § 186.508(1) (Supp. 1986). The Executive Office of the Governor (EOG) reviews regional plans for consistency with the State Comprehensive Plan, and the gover-

eleven regional planning councils develops a plan for its region and adopts the plan as rules.[28] The regional plans will be used to evaluate developments of regional impact[29] and local government comprehensive plans.[30]

Local government plans have been required to include a coastal element since the original enactment of the Local Government Comprehensive Planning Act of 1975.[31] Earlier, the lack of a requirement for coordination of local plans with state and regional plans and policies[32] exacerbated the general inadequacy of previous requirements to deal with the tremendous growth of Florida's coastal communities.[33] The Local Government Comprehensive Planning and Land Development Regulation Act of 1985[34] addressed both of these problems by requiring consistency of local plans with state and regional plans[35] and by substantially expanding the requirements for the coastal management element of local plans.[36]

The legislature expressed a general intent that "local government comprehensive plans restrict development activities where such activities would damage or destroy coastal resources, and [that such plans] protect human life and limit public expenditures in areas . . . subject to destruction by natural disaster."[37] The re-

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nor's comments are included in the plans' comment sections before the plans are returned to the regional planning council. Once a plan is adopted as a rule, the EOG can challenge it if the governor's comments were rejected and the plan is inconsistent with the State Plan. *Id.*

28. *Id.*

29. *See* FLA. STAT. § 380.06(12) (1985). For a discussion of Florida's program for review of developments of regional impact, see Frith, *Florida's Development of Regional Impact Process, Practice, and Procedure*, 1 J. LAND USE & ENVTL. L. 71 (1985).

30. *See* FLA. STAT. § 163.3184(4)-(5) (Supp. 1986).

31. *See* FLA. STAT. § 163.3177(6)(g) (1975). The coastal element only required local governments to set out general policy relating to enhancement or maintenance of the coastal environment and use of coastal resources. These coastal elements did not become part of the state's coastal zone management program.

32. *See* FLA. STAT. § 163.3184 (1975). The state land planning agency and regional planning councils had authority under the 1975 legislation only to review and comment upon local government comprehensive plans. There was no mechanism for requiring consistency with state policies or even for assuring that local plans met the requirements of ch. 163, Florida Statutes.

33. *See, e.g.*, ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE, FINAL REPORT 98-99 (1984).

34. 1985 Fla. Laws ch. 85-55, §§ 1-20 (codified in scattered sections of FLA. STAT. ch. 163 (1985)).

35. *See* FLA. STAT. § 163.3177(9)(c) and § 163.3184(1)(b) (Supp. 1986).

36. *See* FLA. STAT. § 163.3178 and § 163.3177(6)(g) (Supp. 1986).

37. FLA. STAT. § 163.3178(1) (Supp. 1986).

quirements mandated by the legislature to implement this intent are so extensive that a complete discussion of the coastal management element of local comprehensive plans is beyond the scope of this paper. Although the following list simplifies the coastal management components, it provides a notion of the comprehensiveness of the planning scheme. Each coastal community plan must include in its coastal management element, at a minimum:

- a component to address the effects of point and non-point sources of water pollution on estuaries;
- a component for hazard mitigation, including population evacuation;
- a component for beach and dune protection and restoration;
- a redevelopment component to eliminate inappropriate and unsafe development;
- a shoreline use component identifying public access to beaches and water-dependent development;
- designation of high hazard coastal areas;
- a component addressing management and regulatory techniques for controlling development to mitigate the threat to human life and to protect the coastal environment; and
- a comprehensive master plan for deepwater ports within the local government's jurisdiction.[38]

The coastal management element, read together with conservation[39] and recreational[40] elements of local plans, and instructions to use ecological planning principles[41] and to preserve living and nonliving resources of the coastal zone,[42] form a strict planning framework for coastal management.

The Local Government Comprehensive Planning and Land Development Regulation Act gives the coastal management element a special status by requiring the element to guide the local government's decision making and program implementation with respect

38. FLA. STAT. § 163.3178(2)(c)-(k) (1985 & Supp. 1986). *See also* FLA. ADMIN. CODE ANN. r. 9J-5.012 (1986).

39. Local government comprehensive plans are required to include a "conservation element for the conservation, use, and protection of natural resources in the area, including air, water, water recharge areas, wetlands, waterwells, estuarine marshes, soils, beaches, shores, flood plains, rivers, bays, lakes, harbors, forests, fisheries and wildlife, marine habitat, minerals, and other natural and environmental resources." FLA. STAT. § 163.3177(6)(d) (Supp. 1986).

40. The recreation element requires a "comprehensive system of public and private sites for recreation, including . . . natural reservations, parks and playgrounds, parkways, beaches and public access to beaches . . . ." FLA. STAT. § 163.3177(6)(e) (Supp. 1986).

41. FLA. STAT. § 163.3177(6)(g)5 (Supp. 1986).

42. FLA. STAT. § 163.3177(6)(g)3 (Supp. 1986).

to the following objectives:

> 1. Maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values.
> 2. Continued existence of viable populations of all species of wildlife and marine life.
> 3. The orderly and balanced utilization and preservation, consistent with sound conservation principles, of all living and nonliving coastal zone resources.
> 4. Avoidance of irreversible and irretrievable loss of coastal zone resources.
> 5. Ecological planning principles and assumptions to be used in the determination of suitability and extent of permitted development.
> 6. Proposed management and regulatory techniques.
> 7. Limitation of public expenditures that subsidize development in high-hazard coastal areas.
> 8. Protection of human life against the effects of natural disasters.
> 9. The orderly development and use of ports . . . to facilitate deepwater commercial navigation and other related activities.
> 10. Preservation, including sensitive adaptive use of historic and archaeological resources.[43]

In addition to augmenting local plan requirements, the 1985 growth management legislation mandated the implementation of local plans by the adoption of consistent development regulations.[44] These regulations will be reviewable by the state land planning agency, the Department of Community Affairs, to determine whether a local government has adopted regulations meeting statutory minimum requirements.[45] Any "substantially affected person"[46] may challenge a land development regulation as inconsistent with the local government comprehensive plan within twelve

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43. FLA. STAT. § 163.3177(6)(g)1-10 (Supp. 1986).

44. FLA. STAT. § 163.3202 (Supp. 1986).

45. FLA. STAT. § 163.3202(4) (Supp. 1986). This review is very narrow and only applies when the agency has "reasonable grounds to believe that a local government has *totally failed to adopt* . . . [statutorily required] regulations . . . ." *Id.* (emphasis added). The Department of Community Affairs may institute an action in circuit court to require adoption of required regulations if, after review and consultation, a local government has not adopted the required land development regulations.

46. "Substantially affected person" is defined in relation to FLA. STAT. ch. 120, the Florida Administrative Procedure Act. FLA. STAT. § 163.3213(2)(a) (1985). For an in-depth discussion of this standard, see Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U.L. REV. 965 (1986).

months of the adoption of the plan.[47]

Florida's planning legislation now provides a potentially strong basis for management of the coastal areas. The key will be in successful implementation of the plans. The time frame envisioned in the legislation for plan development[48] may be overly optimistic, and the costs associated with implementation may create additional impediments. However, Florida has taken a decisive first step toward effective growth management and management of the coastal zone.

III. THE STATE FUNDING ELEMENT

The Coastal Barriers Resources Act[49] focused national attention on federal government funding and activities that directly or indirectly subsidized development of sensitive barrier islands and beaches.[50] Florida had been no less guilty than other states and the federal government in providing infrastructure and programs that encouraged growth in areas that are most vulnerable to storms and erosion and that the state most wanted to protect.[51]

In September 1981, the state took its first steps to correct this destructive strategy. Governor Bob Graham issued Executive Order 81-105 which instructed state agencies to:

> 1. Give coastal barriers, which include barrier islands, beaches, and related lands, high consideration in existing state land acquisition programs, and priority in the development of future acquisition programs.
> 2. Direct state funds and federal grants for coastal barrier projects only in those coastal areas which can accommodate growth, where there is a need and desire for economic development, or where potential danger to human life and property from natural hazards is minimal. Such funds shall not be used to subsidize growth or post disaster redevelopment in hazardous coastal barrier areas. Specific consideration shall be given to the impacts

47. FLA. STAT. § 163.3213(3) (1985).

48. Local government comprehensive plans that include a coastal management element must be completed between July 1, 1988, and July 1, 1990. All other local government plans must be completed between July 1, 1989, and July 1, 1990. FLA. STAT. § 163.3167(2)(a)-(b) (Supp. 1986).

49. 16 U.S.C. §§ 3501-3510 (1982).

50. *See generally* Donovan, *Government Subsidy of Coastal Barrier Development*, 1 J. LAND USE & ENVTL. L. 271, 277-82 (1985); Note, *Barrier Islands: The Conflict Between Federal Programs That Promote Preservation and Those That Promote Growth*, 33 S.C.L. REV. 373, 375-81 (1981).

51. *See, e.g.*, Donovan, *supra* note 50, at 282-87.

of proposed development or redevelopment with respect to hazard mitigation.

3. Encourage, in cooperation with local governments, appropriate growth management so that population and property in coastal barrier areas are consistent with evacuation capabilities and hazard mitigation standards.[52]

A previously issued Attorney General's opinion suggested that an executive order of the governor was an ineffective and unenforceable tool for implementing coastal management strategies and protecting coastal barriers.[53] The requirements of the Administrative Procedures Act, chapter 120 of the Florida Statutes, and the limited nature of the governor's inherent powers under Florida's governor and cabinet system of government, severely restricted the use of executive orders to implement state policy. Further action was necessary to assure that state programs would complement, rather than undermine, coastal management and protection.

A plan for selection and acquisition of coastal lands by the Department of Natural Resources, a first step in the Save Our Coasts program, was originally approved by the governor and cabinet in late 1981 to implement the first of the governor's directives.[54] In 1983, however, the legislature partially superseded the plan by enacting statutory criteria and procedures for land acquisition programs.[55] Under current procedures, potential acquisitions are ranked by a selection committee composed of the Secretaries of the Departments of Environmental Regulation and Community Affairs, the Executive Directors of the Department of Natural Resources and the Game and Fresh Water Fish Commission, and the Directors of the Division of Historic Resources of the Department of State and the Division of Forestry of the Department of Agriculture and Consumer Services, or their respective designees.[56] Criteria for establishing priority of sites include: suitability of the land for outdoor recreation; the ability to meet an identified outdoor need, including consideration of accessibility of the location to users; quality of the natural resources; potential for loss of the property through alteration or conversion to other uses; ownership

52. Executive Order No. 81-105 (1981).

53. *See* 1981 FLA. ATT'Y GEN. ANN. REP. 144-49.

54. Resolution of the Florida Governor and Cabinet (sitting as the head of the Department of Natural Resources) (Sept. 15, 1981).

55. FLA. STAT. § 259.035(2)(c) (Supp. 1986).

56. FLA. STAT. § 259.035(1) (Supp. 1986).

patterns; and cost.[57] Each actual acquisition must be approved by the governor and cabinet.[58]

Through December 19, 1986, the Save Our Coasts program has allowed the state to acquire 88,372 acres of coastal lands in developed and undeveloped areas.[59] The Save Our Coasts program, along with the Save Our Rivers, Save Our Everglades, the Land Acquisition Trust Fund, and the Conservation and Recreational Lands acquisition programs, has made Florida's land acquisition program the most extensive in the United States.[60]

The coastal infrastructure policy of the Coastal Zone Protection Act of 1985 reinforces the expenditure limitation approach of the governor's 1981 order.[61] Section 380.27 of the Florida Statutes forbids the use of state funds for constructing bridges or causeways to coastal barrier islands that are not currently accessible by bridge or causeway.[62] The coastal infrastructure policy also emphasizes state-local cooperation. The state will not allocate funds to expand infrastructure unless the construction is consistent with the approved coastal management element of local government comprehensive plans.[63] Section 163.3178, Florida Statutes, states the intent of the legislature that local governments also cooperate in developing funding policies. Local governments are instructed to design their comprehensive plans to "limit public expenditures in areas that are subject to destruction in natural disaster."[64] The goals advanced in the governor's 1981 executive order have now become enforceable state law and policy, and a major element of the state's scheme for managing growth in coastal areas.

IV. COASTAL CONSTRUCTION REGULATION

The State of Florida has regulated coastal construction since 1970 under the Beach and Shore Preservation Act.[65] Originally, the Act established a construction setback requirement of fifty feet

57. *See* FLA. STAT. § 259.035(2)(c) (Supp. 1986), and FLA. ADMIN. CODE ANN. r. 16D-10.0051(2)(b) (1986).

58. FLA. STAT. §§ 259.04(c)-(d) (1985).

59. *See* LAND ACQUISITION SELECTION COMM., ANNUAL REPORT 10 (Dec. 1986). These acquisitions represent 356,141 feet (67.45 miles) of ocean and gulf frontage.

60. Telephone interview with Charles Hardee, Chief of Bureau of Land Acquisition, Florida Department of Natural Resources, in Tallahassee, Florida (Mar. 16, 1987).

61. *See supra* note 52, at § 1.

62. FLA. STAT. § 380.27(1) (1985).

63. FLA. STAT. § 380.27(2) (1985).

64. FLA. STAT. § 163.3178(1) (Supp. 1986).

65. FLA. STAT. ch. 161 (1985 & Supp. 1986).

from the mean high water line.[66] In 1971, however, the legislature authorized the Department of Natural Resources (DNR) to establish Coastal Construction Control Lines (CCCLs) which would supercede the setback lines.[67] Because these construction controls are imposed to prevent erosion or damage to beach and dune systems, CCCLs are only established for sandy beaches.[68]

Procedural requirements have caused substantial delay in establishing and updating CCCLs on a county by county basis. The 1985 legislation eliminated many of the requirements of the state's Administrative Procedure Act[69] and expedited the process for CCCL establishment.[70] Current procedures require a public hearing, adoption by the governor and cabinet, and recording of the CCCL in county public records.[71] Adoption of CCCLs is not subject to rule challenge or drawout proceedings, but can be subject to an invalidity challenge, once adopted.[72]

CCCLs are based on the 100-year storm surge[73] and are intended to preserve beaches and dune systems and protect adjacent properties.[74] Construction seaward of the control lines is strictly regulated, but not prohibited. An applicant for a permit for construction seaward of the CCCL must supply engineering data on shoreline stability and storm tides, and design features and information on potential impacts of the structure to clearly justify the location of the structure.[75] DNR may also grant a permit in cases where existing adjacent structures form a "reasonably continuous and uniform construction line" further seaward of the CCCL if the existing structures have not been "unduly affected by erosion . . . ."[76]

The legislation authorizes administration of CCCLs through local government coastal construction zoning and building codes.[77] These codes must be approved by DNR as adequate to protect

66. FLA. STAT. § 161.052(1) (Supp. 1970).

67. *See* FLA. STAT. § 161.053(11) (Supp. 1986), and Maloney & O'Donnell, *Drawing the Line at the Oceanfront*, 30 U. FLA. L. REV. 383, 384 (1978).

68. FLA. STAT. § 161.053(1) (Supp. 1986).

69. FLA. STAT. §§ 120.54(4), 120.54(17) (Supp. 1986).

70. *See* FLA. STAT. § 161.053(2) (Supp. 1986).

71. *Id.*

72. *Id.*

73. Shows, *Florida's Coastal Setback Line—An Effort to Regulate Beachfront Development*, 4 COASTAL ZONE MGMT. J. 151, 154-56 (1978).

74. FLA. STAT. § 161.053(1) (Supp. 1986).

75. FLA. STAT. § 161.053(5)(a) (Supp. 1986).

76. FLA. STAT. § 161.053(5)(b) (Supp. 1986).

77. FLA. STAT. § 161.053(4) (Supp. 1986).

shorelines and property, and DNR retains a veto power over granting exceptions to the local requirements.[78] Presently, no local governments are administering CCCLs pursuant to this authority.[79]

In 1985, the legislature amended the Beach and Shore Preservation Act to create a second zone of jurisdiction — the thirty-year erosion zone.[80] This zone is based on DNR's projection on a case by case basis of the seasonal high water line as it will exist thirty years after the application for a construction permit.[81] Within this zone, virtually all new construction is prohibited.[82]

To partially ameliorate the impact of this regulation on coastal property owners, the legislation provides that DNR may issue a permit for a single-family dwelling for the parcel so long as:

> 1. The parcel for which the single-family dwelling is proposed was platted or subdivided by metes and bounds before [October 1, 1985];
> 2. The owner of the parcel for which the single-family dwelling is proposed does not own another parcel immediately adjacent to and landward of the parcel for which the dwelling is proposed;
> 3. The proposed single-family dwelling is located landward of the frontal dune structure; and
> 4. The proposed single-family dwelling will be as far landward on its parcel as is practicable without being located seaward of or on the frontal dune.[83]

This exception to the prohibition on building structures within the thirty-year erosion zone was clearly intended to sidestep the issue of whether the regulation constituted an unconstitutional "taking" of property by the state.[84] By assuring at least one reasonable use of coastal property, the legislature sought to ensure that the regulation does not preclude *all* economically reasonable

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78. *Id.*

79. Telephone interview with Harold Bean, Chief of Bureau of Coastal Data Acquisition, Florida Department of Natural Resources, in Tallahassee, Florida (Mar. 12, 1987). Lee and Okaloosa counties currently administer portions of their shorelines through delegation prior to enactment of § 161.053(4), Florida Statutes, in 1978.

80. FLA. STAT. § 161.053(6)(b) (Supp. 1986).

81. *Id.* The statute limits the thirty-year erosion zone to areas seaward of the CCCL in areas where it has been established.

82. *Id.* The section does not prohibit the construction of single family dwellings, coastal or shore protection structures, minor structures, or piers. FLA. STAT. §§ 161.053(6)(b)-(c), 161.053(9) (Supp. 1986).

83. FLA. STAT. § 161.053(6)(c) (Supp. 1986).

84. *See generally* Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVTL. L. 105 (1985).

uses of property.[85] It is clear, however, that some properties will not even meet the conditions for single-family dwellings, and the owners will be denied all use of the property for major construction purposes.[86] The state's best justifications, of course, are that the regulation is necessary to prevent public harm to life and property,[87] and that building a structure that may be under water within the lifetime of the mortgage is not reasonable.

The 1985 legislation adds a second line of defense against "taking" attacks. Section 161.57 of the Florida Statutes requires that sellers of property located totally or partially landward of the CCCL fully apprise purchasers of the nature of the property and the regulatory restrictions on its use.[88] Such notice would preclude future purchasers of coastal property from claiming that the regulation frustrated *reasonable*, investment-backed expectations and resulted in a "taking" of property.[89] Although at least one permit has been denied for failure to meet the conditions for a single-family dwelling, the erosion zone prohibitions have not yet been chal-

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85. The fifth amendment to the United States Constitution prohibits government from taking private property for government purposes without compensation. The fourteenth amendment prohibits government from taking unreasonable or arbitrary action against private citizens. In interpreting these provisions, the United States Supreme Court has concluded that there is no single test or rationale for determining if an unconstitutional taking of property has occurred. *See* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). *See also* Penn Central Transp. Co. v New York City, 438 U.S. 104, 124 (1977). However, one frequently asked question in the case by case analysis is whether the government action precludes all economically reasonable uses of the regulated property. *See, e.g.*, Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1381-83 (1981).

86. For a complete discussion of the taking issue in relation to requirements of the thirty-year erosion zone, see Oosting, *Regulation of Coastal Construction Under Florida Statute Section 161.053 and the Taking Issue*, 2 J. LAND USE & ENVTL. L. 219 (1987).

87. The Florida Supreme Court in Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1380-81 (1981) recently outlined various factors a court should consider in determining whether a taking without just compensation has occurred. Two principal factors considered were whether the regulation promotes a public benefit or prevents a public harm and whether the regulation promotes the health, safety, welfare, or morals of the public. *Id.*; *see also* Nectow v. Cambridge, 277 U.S. 183, 188 (1928); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Even when government action has prohibited the most beneficial use of property, the regulation has been upheld if found to promote the public's health, welfare, or safety. *See* Goldblatt v. Hempstead, 369 U.S. 590, 592-93; Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n.8 (1976).

88. *See* FLA. STAT. § 161.57(1) (1985).

89. The United States Supreme Court has recently stated that factors of particular significance in identifying a governmental taking of property are the economic impact of the regulation, the interference with reasonable, investment-backed expectations, and the character of the governmental action. MacDonald, Sommer & Frates v. Yolo County,___U.S.___, 106 S. Ct. 2561, 2586 (1986). *See also* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-28 (1977); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1383 (1981).

lenged in Florida courts.[90]

The question of whether coastal construction control requirements and erosion zone prohibitions would apply to repairs, modifications, or reconstruction of existing structures within those zones created a major controversy in the 1985 legislature. Owners asserted an unlimited right to rebuild or repair existing structures within the CCCLs or thirty-year erosion zones. Environmentalists took the position that structures that are subject to destruction in coastal storms are probably imprudently built and should be prohibited or meet all new state requirements before rebuilding or repair can be carried out.

A compromise was eventually struck which provided that the Act's CCCL and thirty-year erosion zone requirements would apply to all new construction except "modification, maintenance, or repair to any existing structure within the limits of the existing foundation which does not require, involve, or include any additions to, or repair or modification of, the existing foundation . . . ."[91] Although DNR may permit rebuilding of structures within the confines of an original foundation if coastal construction control requirements are met, the agency may not allow expansion of the structure seaward of the thirty-year erosion projection.[92] The 1986 amendments allowed DNR some flexibility to permit rebuilding that might be safer or less environmentally damaging than rebuilding a structure on the original foundation. At its discretion, DNR may issue a permit to rebuild a structure landward of the original foundation if the relocation will not cause further damage to beach and dune systems.[93]

The Coastal Zone Protection Act of 1985[94] amended chapter 161 of the Florida Statutes to create a third jurisdictional area for the coast — the coastal building zone.[95] The legislature intended that strict construction standards apply to this "most sensitive portion

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90. *See* Oosting, *supra* note 86, at 242.

91. *See* FLA. STAT. § 161.053(12) (1985).

92. *Id.*

93. *Id.* at § 161.053(12) (Supp. 1986).

94. The Coastal Zone Protection Act of 1985, FLA. STAT. §§ 161.52-.58 (1985), was substantially amended in 1986 to deal with problems in the original legislation. *See* 1986 Fla. Laws ch. 86-191, §§ 2-5. For a complete discussion of the original provisions and the problems, see Jernigan, *Amendments to the Coastal Zone Protection Act of 1985: What's New for Coastal Building in 1986 and Why It Happened*, Fla. Mun. Rec. 2 (Oct. 1986). The following discusssion deals with the Act as amended.

95. FLA. STAT. § 161.54(1) (Supp. 1986).

of the coastal area."[96] The zone includes the area from the seasonal high water line to a line 1500 feet landward of the CCCL for high energy beaches,[97] and in other areas to the most landward velocity zone line established for federal flood insurance purposes.[98] Barrier islands are also included in the coastal building zone up to 5000 feet landward of the CCCL or the entire island, whichever is less.[99]

Within the coastal building zone, major structures must meet certain minimum construction standards. The original requirements were substantially amended in 1986 to clarify boundaries and building standards and to make the standards consistent with federal flood insurance requirements.[100] The current standard requires that major structures[101] conform to the state minimum building code[102] and the 1986 revisions to the 1985 Standard Building Code.[103] In addition, structures must be designed, located, and constructed in compliance with the National Flood Insurance Program[104] and be able to withstand wind velocities of 110 miles

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96. FLA. STAT. § 161.53(5) (1985).

97. FLA. STAT. § 161.54(1) (Supp. 1986).

98. *Id.* The 1985 legislation originally required that the zone be 3,000 feet landward of the mean high water mark in areas where CCCLs had not been established. FLA. STAT. § 161.54(1) (1985). In many areas, however, the mean high water line had not been established. Building zones could not be delineated without costly and lengthy surveys. *See* Jernigan, *supra* note 94, at 2-3.

99. FLA. STAT. § 161.55(5) (Supp. 1986). The definition of coastal barrier island is broadly drawn to include virtually all islands fronting ocean waters except areas that have been separated from the mainland by manmade channels. FLA. STAT. § 161.54(2) (Supp. 1986). The entire area of the Florida Keys within Monroe County is designated a coastal building zone. FLA. STAT. § 161.55(5) (Supp. 1986).

100. FLA. STAT. §§ 161.54(1), 161.54(12), 161.55(1), 161.56(2), 161.56(3) (Supp. 1986); *See* Jernigan, *supra* note 94.

101. FLA. STAT. § 161.54(6)(a) (Supp. 1986) provides that: " 'Major structure' means houses, mobile homes, apartment buildings, condominiums, motels, hotels, restaurants, towers, other types of residential, commercial, or public buildings, and other construction having potential for substantial impact on coastal zones."

102. FLA. STAT. § 161.55(1)(a) (Supp. 1986).

103. FLA. STAT. § 161.55(1)(d) (Supp. 1986). Mobile homes are required to conform to the Federal Mobile Home Construction and Safety Standards or the Uniform Standards Code ANSI book A-119.1 and to requirements of the National Flood Insurance Program. FLA. STAT. §§ 161.55(1)(b)-(c) (Supp. 1986).

104. FLA. STAT. § 161.55(1)(c) (Supp. 1986). The National Flood Insurance Program, 42 U.S.C. §§ 4001-4128 (1977), is administered by the Federal Insurance Administration to provide insurance to property owners in flood-prone areas. Flood-related erosion protection was added to the program by the Flood Disaster Protection Act of 1973 [Pub. L. 93-234 (1973)]. The Act requires the purchase of flood insurance to receive any form of federal assistance for acquisition or construction purposes for buildings located within a flood-related hazard area.

To qualify for federal flood insurance, local communities must require permits for all proposed construction. These permits must be reviewed to determine if new construction in

per hour.[105]

The 1986 amendments clarified the application of coastal building zone requirements to substantial improvements to coastal property. The standards apply to construction or repair of an existing structure that equals or exceeds a cumulative total of fifty percent of the market value of the structure.[106]

The design and structural requirements for minor structures[107] are minimal and are primarily intended to reduce adverse impacts on the beach and dune systems and adjacent properties.[108] The definition of such structures presumes that they will be considered "expendable under design wind, wave, and storm forces."[109] The Act, therefore, precludes the construction of any rigid coastal or shore protection structures intended primarily to protect a minor structure.[110]

Local governments were required to adopt building codes and enforce the requirements of this Act by January 1, 1987. In addition, the more stringent state standards continue to apply within CCCLs. The building requirements of the Coastal Zone Protection Act will primarily affect areas landward of the CCCL and expand regulation of areas with low energy coastlines that do not have CCCLs established.

Florida's three-fold and two-tiered regulation of construction on the coast has great potential for protecting life, property, and natural resources. The approach, however, is not without criticism. First, the multiple jurisdictions and requirements are potentially confusing for property owners and local regulators. The 1986 amendments to chapter 161 have helped local governments by removing technical jargon and conflicts with federal regulation, and

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flood-prone areas meets government imposed safety and building standards. *See* 44 C.F.R. pts. 59 & 60 (1986).

105. FLA. STAT. § 161.55(1)(d) (Supp. 1986). Major structures in the Keys must withstand wind velocities of 115 miles per hour. Mobile homes are exempted from these requirements. *Id.*

106. FLA. STAT. § 161.54(12) (Supp. 1986). *See also* FLA. STAT. § 161.54(5) (Supp. 1986).

107. FLA. STAT. § 161.54(6)(b) (Supp. 1986) provides in part:

> "Minor structure" means pile-supported, elevated dune and beach walkover structures; beach access ramps and walkways; stairways; pile-supported, elevated viewing platforms, gazebos, and boardwalks; lifeguard support stands; public and private bathhouses; sidewalks, driveways, parking areas, shuffleboard courts, tennis courts, handball courts, racquetball courts, and other uncovered paved areas; earth retaining walls; and sand fences, privacy fences, ornamental walls, ornamental garden structures, aviaries, and other ornamental construction.

108. *See* FLA. STAT. § 161.55(2) (Supp. 1986).

109. FLA. STAT. § 161.54(6)(b) (Supp. 1986).

110. FLA. STAT. § 161.55(3) (Supp. 1986).

by establishing training programs for building inspectors and contractors.[111] The disclosure provisions of section 161.57 may function to educate buyers concerning the degree of regulation on coastal property,[112] but the statute provides no express remedy against a seller who fails to disclose.

Second, the approach is clearly expensive. The cost of establishing coastal construction control lines has been estimated at five dollars per foot.[113] This cost, however, must be measured against the damage prevented. In one study, the cost of hurricane damage to structures seaward of the CCCL was nearly five times greater than for structures landward of the CCCL.[114]

Thirty-year erosion zones are to be established on a case by case basis[115] and, theoretically, should not entail the expense involved in the county by county establishment of CCCLs. In fact, gathering historical measurement data and establishing change rates will require data bases that are likely to be expensive to create and maintain.[116] The methodologies for determining the thirty-year erosion zones are much more theoretical than for CCCLs,[117] but must be technically defensible. The burden on affected property is so great that DNR will be subject to challenges that the designation of a zone is "arbitrary and capricious" if the methodologies do not have a justifiable scientific basis.[118]

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111. *See* Jernigan, *supra* note 94, at 4-5.

112. *See supra* notes 88-89 and accompanying text.

113. *See* Shows, *supra* note 73, at 160.

114. *Id.* at 157.

115. FLA. ADMIN. CODE ANN. r. 16B-33.024(1) (1986).

116. *E.g.*, Regulations from the Department of Natural Resources anticipate the development of computer software for creating, maintaining, and updating a historical data base that will contain necessary information for determining horizontal shoreline change rates. *Id.* at r. 16B-33.024(4)(a) (1986).

117. The determination of the thirty-year erosion zone involves more than simply multiplying the historic yearly erosion rate by thirty. Judgments, founded on some scientific basis, must be made concerning the effects of inlets, existing coastal and shore protection structures, naturally occurring beach or coastal features of substantially indurated character, and beach restoration and renourishment projects. *See id.* at r. 16B-33.024(3)(c)-(e).

118. A recent opinion indicates, however, the Florida courts will give great deference to DNR's choice of scientific technique or methodology "absent a showing that the agency's action is either arbitrary, capricious, an abuse of discretion, or not reasonably related to the statutory purpose." Island Harbor Beach Club v. Department of Natural Resources, 495 So. 2d 209, 217-18 (Fla. 1st DCA 1986). The court concluded that:

> The complexity of the scientific and technical issues in this case and the consequent deference necessarily given to DNR's expertise vividly illustrate the limited role an appellate court can play in resolving disputes arising out of an administrative agency's exercise of delegated discretion in respect to technical matters requiring substantial expertise and "making predictions . . . at the frontiers of sci-

V. CONCLUSION

During the 1970s, coastal zone management became an important issue. In Florida, however, management of the coasts could not be physically or politically segregated from management issues throughout the state.[119] Today the focus in Florida is on growth management. In this context, it finally has become clear that there are special problems and management issues unique to the coasts, if only because most of the population is concentrated there. Managing growth in Florida cannot be accomplished without a rigorous management regime for the coasts.

Florida has answered this challenge with a coordinated state, regional, and local planning program; funding and infrastructure policies that will complement coastal planning; and strict regulation of coastal construction. These measures put the state in the forefront of coastal management. But the state has been in this position before. In the 1970s, Florida's innovative planning and coastal protection legislation was considered a model for other states. Ineffective implementation, inadequate funding, and subsequent weakening of the laws by more conservative legislatures virtually halted the state's progress.[120] Florida's challenge is clear if the state is to overcome this "legacy of lack of follow-through."[121]

The legislature has enacted a program than can potentially deal with the phenomenal growth the state expects in the next decades; state and regional agencies have begun to establish the planning framework for this program. But the "top down" approach requires local governments to bear much of the burden of implementing the state's far-reaching plans. The local governments will be able to meet their responsibilities only if provided technical support from state and regional agencies and adequate funding. The support given local governments at this crucial stage of imple-

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> ence." . . . It has become clear to us . . . that the setting of coastal construction control lines for the purpose of adequately protecting the beaches and dunes of this state is not a matter of scientific certainty. The legislature's use of scientific terms and words of art in the organic statute, without setting forth more precise definitions, has compelled us to accord considerable — if not extraordinary — deference to DNR's interpretation of these terms and its selection of scientific techniques and methodologies to be employed in carrying out its statutory responsibilities. (citations omitted).

Id. at 223.

119. *See supra* notes 5-6 and accompanying text.

120. *See* Finnell, *supra* note 5, at 314, 321-22.

121. *See generally* RuBino, *Can the Legacy of a Lack of Follow-Through in Florida State Planning Be Changed?*, 2 J. LAND USE & ENVTL. L. 27 (1986).

menting growth management and coastal protection strategies will likely determine the success or failure of the state's attempt to manage growth in the state's most populous and most sensitive area — the coastal zone.