Section 10. THE AREA OF CRITICAL STATE CONCERN PROGRAM

ASKEW v. CROSS KEY WATERWAYS
372 So.2d 913 (Fla. 1979)

SUNDBERG, Justice.

We deal today with the constitutionality of the provisions of Section 380.05(1), Florida Statutes (1975), for designation of areas of critical state concern by use of the criteria stated in Section 380.05(2)(a) and (b), Florida Statutes (1975). The issue reaches us by appeal from two separate decisions of the District Court of Appeal, First District, which have been consolidated for review by this Court.

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Responding to the policy and mandate contained in Article II, Section 7, Florida Constitution,1/ in 1972 the legislature enacted the "Florida Environmental Land and Water Management Act," Chapter 72-317, Laws of Florida, Chapter 380, Florida Statutes. Section 380.05(1)(a) of the enactment empowers the division of State Planning to recommend areas of critical state concern to the Governor and cabinet acting as the Administration Commission. In its recommendation the Division of State Planning must designate the boundaries of the proposed area of critical state concern, explain the reasons for its conclusion that the area is of critical concern to the state or region, the dangers which would result from uncontrolled or inadequate development of the area, and the advantages to be gained from the development of the area in a coordinated manner. In addition, the Division of State Planning recommends specific principles for guiding the development of the proposed area.

Section 380.05(2), Florida Statutes (1975), enunciates the criteria which the division of State Planning shall utilize in determining whether to recommend designation of a particular area as one of critical state concern:

(2) An area of critical state concern may be designated only for:
(a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional or statewide importance.

1. (2) Art. II, section 7, Fla.Const., reads:

"Natural resources and scenic beauty.-- It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."

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(b) An area significantly affected by, or having a
significant effect upon, an existing or proposed major
public facility or other area of major public investment.
(c) A proposed area of major development potential,
which may include a proposed site of a new community,
designated in a state land development plan.

Prior to submitting a recommendation with respect to an area of
critical state concern to the Administration Commission, the
Division of State Planning must give notice to all local
governments and regional planning agencies included within the
proposed boundaries, including any notice required by Chapter
120, Florida Statutes (1975), the Administrative Procedure Act,
the provisions of which govern the actions taken by the Division
of State Planning and the Administration Commission under Chapter
380. Section 380.05(4) and (6), Florida Statutes (1975); Section
120.72, Florida Statutes (1975).

Within 45 days after receiving the recommendations of the
Division of State Planning, the Administration Commission must
either reject the recommendations or adopt them with or without
modification. Thereafter, by rule, the Administration Commission
designates the area of critical state concern and approves the
principles for guiding development of the designated area.
Section 380.05(1)(b), Florida Statutes (1975). The
Administration Commission is statutorily prohibited from
designating more than five percent, in the aggregate, of the land
within the state (approximately 1.8 million acres) as an area of
critical state concern. Section 380.05(17), Florida Statutes
(1975).

Section 380.05(5) provides that:

After the adoption of a rule designating an area of
critical state concern the local government having
jurisdiction may submit to the state land planning agency
its existing land development regulations for the area, if
any, or shall prepare, adopt and submit new or modified
regulations, taking into consideration the principles [for
guiding development] set forth in the rule designating the
area as well as the factors that it would normally consider.

Subsection (7) of Section 380.05 directs the Division of
State Planning to provide technical assistance to the local
government in the preparation of the proposed land development
regulations. If the Division of State Planning determines that
the land development regulations submitted by the local
government comport with the principles for guiding development,
it shall by rule approve the locally-promulgated land development
regulations. Section 380.05(6). The regulations are not
effective until the Division of State Planning's rule approving
them becomes effective which, under Section 120.56(11), Florida
Statutes (1975), is 20 days after it is filed with the Secretary
of State.
If the relevant local government fails to propose land development regulations within six months of adoption of the rule designating the area of critical state concern or, if such regulations have been proposed but the Division of State Planning concludes that they do not comply with the principles for guiding development for the area, within 120 days thereafter the Division of State Planning must recommend land development regulations to the Administration Commission. Section 380.05(8). The Administration Commission is allowed forty-five days after the receipt of recommended regulations, if any, from the Division of State Planning within which to reject the same or adopt them with or without modification. The Administration Commission must establish the land development regulations, by rule, within the forty-five day period as well. This rule must specify to what extent the regulations will supersede or supplement local land development regulations. Section 380.05(8). Although the regulations are administered by the local government, the Division of State Planning may initiate judicial proceedings to compel their enforcement if it concludes that local administration is inadequate. Section 380.05(8) and (9). Chapter 380 possesses the flexibility to conform to changed needs and conditions of a designated area of critical state concern by permitting the local government to propose new land development regulations after the initial regulations have been approved by the Division of State Planning or the Administration Commission. Section 380.05(10). It is essential under the statutory scheme that land development regulations become effective within twelve months after the adoption of the rule designating the area of critical state concern. If this condition is not fulfilled, the designation terminates and the area may not be redesignated for a period of one year after the termination. Section 380.05(12).

The Act affects regulation of virtually all development in an area of critical state concern: all building, mining, and changes in the use or appearance of land, water and air and appurtenant structures; material increases in the density of its use; alteration of shores and banks; drilling; structural demolition; clearing adjacent to construction; and deposit of waste or fill. Excepted are work by road agencies and other utilities; structural maintenance affecting only the interior or the color or exterior decoration of a structure; the use of structures for customary dwelling purposes; changes of usage within the same regulated class of use; changes in ownership; and changes in rights of access, riparian rights, easements and covenants affecting rights and land. Section 380.04.

The controversy before us results from actions taken by the Administration Commission of the Department of Administration in designating the Green Swamp area of critical state concern and the Florida Keys area of critical state concern and, in the case of the former, adopting land development regulations.

The criteria for designation of an area of critical state concern set forth in Section 380.05(2)(a) and (b) are constitutionally defective because they reposit in the
Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection.

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The deficiency in the legislation here considered is the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest.

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Under the provisions of Section 380.05, the Administration Commission "fleshes out" what it has in the first instance conceived. In the words of Justice Whitfield in State v. Atlantic Coast Line Ry., supra, the function of the Administration Commission under Section 380.05(1) and (2)(a) and (b) involves the exercise of primary and independent discretion rather than the determination "within defined limits, and subject to review, [of] some fact upon which the law by its own terms operates . . ." 47 So. at 972. In contrast, by The Big Cypress Conservation Act of 1973, Section 380.055, Florida Statutes (1975), the legislature conceived the areas of critical state concern and left to the Division of State Planning and the Administration Commission the task of "fleshing out" through adoption of land development regulations.

Our research in other jurisdictions fails to disclose one instance in which the legislative branch has unconditionally delegated to an agency of the executive branch the policy function of designating the geographic area of concern which will be subject to land development regulation by the agency. For example, in CECED v. California Coastal Zone Conservation Commission, 43 Cal.App.3d 306, 118 Cal.Rptr. 315 (Dist.Ct.App. 1974), the California court sustained against an unlawful delegation attack broad powers of regional commissions to issue development permits within the California coastal zone designated by the Coastal Conservation Act of 1972. Any development in the designated coastal area was subject to permitting by an appropriate regional commission pending formulation and submission for adoption by the legislature of a comprehensive California Coastal Zone Conservation Plan. The court approved the standard in the Act, which required a finding before permitting, that "... the development will not have any substantial adverse environmental or ecological effect" and that "... the development is consistent with, the findings and declarations set forth in Section 27001 and with the objectives set forth in Section 27302." It dealt with the delegation issue in the following language:

The constitutional doctrine prohibiting delegation of legislative power rests on the premise that the Legislature may not abdicate its responsibility to resolve the "truly fundamental issues" by delegating that function to others or by failing to provide adequate directions for the implementation of its declared policies. (Citations omitted) Consequently, where the Legislature makes the fundamental policy decision and delegates to some other body

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the task of implementing that policy under adequate safeguards, there is no violation of the doctrine. (Citations omitted.) * * * * *

The "substantial adverse environmental or ecological effect" standard is more specific than the broad "health, safety, or general welfare" guideline upheld in Candelstick and the cases cited above. [Candelstick Properties, Inc. v. San Francisco Bay CND Commission, 11 Cal.App.3d 557, 89 Cal.Rptr. 897 (Dist.Ct.App. 1970)]. Although application of the standard calls for the exercise of judgment and discretion, by the very nature of the legislative goals, considerable discretion must of necessity be vested in the Commission. As the court in Friends of Mammoth v. Board of Supervisors, 8 Cal.3d 247, 271, 104 Cal.Rptr. 761, 777, 502 P.2d 1049, 1065, said of the "significant effect on the environment" phrase in the California Environmental Quality Act: To some extent this is inevitable in a statute which deals, as the EQA must, with questions of degree. The statutory criteria to be observed by the Commission and the regional commissions in carrying out the tasks delegated to them clearly satisfy constitutional requirements. The fact that the Commission is required to weigh complex factors in determining whether a development will have a substantial adverse environmental or ecological effect does not, as plaintiffs charge, mean that unbridled discretion has been conferred on it. A statute empowering an administrative agency to exercise a judgment of a high order in implementing legislative policy does not confer unrestricted powers. (Citations omitted)

The language of the California court is not dissimilar to that used by Justice Whitfield in State v. Atlantic Coast Line Ry., supra. However, the striking difference between the California Act and the statutory scheme here under consideration lies in the fact that the California Act geographically circumscribed by its own terms both the coastal zone and the area within the coastal zone within which the regional commissions were authorized to require development permitting. Furthermore, the permitting function was an interim measure pending adoption by the legislature of a comprehensive Coastal Zone Conservation Plan.

In J.M. Mills, Inc. v. Murphy, 116 R.I. 54, 352 A.2d 661 (1975), the Rhode Island Supreme Court dealt with the validity of the Fresh Water Wetlands Act. The Act provides for regulation of all fresh water wetlands. The Act defines its geographical jurisdiction, declares the state policy with regard to wetlands, and requires the approval of both the Director of the Department of Natural Resources and the municipality in which the land is located before wetlands may be altered. Plaintiff landowner sought a declaratory judgment challenging the functions vested in the Director and the municipalities as being an unlawful delegation of legislative power. On appeal by the plaintiff from an adverse decision in the trial court, the supreme court affirmed. After noting that the nondelegation doctrine has been relaxed of late, the court reasoned that the adequacy of
legislative standards could best be measured against the intended purpose of the legislation. Having enunciated these general principles the court stated:

With these general principles in mind, we proceed to consider the validity of a delegation of authority to the director of the Department of Natural Resources to disapprove applications to alter fresh water wetlands. Section 2-1-21 requires anyone who would alter the character of a wetland to obtain the approval of the director and fixes the governing standard as the "best public interest." The plaintiffs argue that this is not a meaningful standard. In response to this contention, we first note that the director is given jurisdiction over only a very limited area, wetlands. The term "wetlands" is precisely defined in 2-1-20. In a previous case where this court found a valid delegation of authority to the Blackstone Valley Sewer District Commission, City of Central Falls v. Halloran, 94 R.I. 189, 179 A.2d 570 (1962), we placed great weight on the fact that the administrative agency was given discretion to act only in a well-defined geographical area. Here, also, the scope of administrative authority is clearly confined.

352 A.2d at 666 (emphasis supplied).

It is apparent that the Rhode Island court was materially influenced by the fact that the administrative agency was granted discretion to act only in a geographical area well-defined by the legislature.

To the same effect is the case of Toms River Affiliates v. Dept. of Environmental Protection, 140 N.J.Supern. 135, 355 A.2d 679 (1976), upholding against constitutional attack the New Jersey Coastal Area Facility Review Act. The Act establishes boundaries for the "coastal area" of the state and declares that this area constitutes "an exceptional, unique, irreplaceable and delicately balanced physical, chemical and biologically acting and interacting natural environmental resource ...." The State Department of Environmental Protection is designated as the agency to administer the Act and is granted authority to adopt rules and regulations to effectuate its purposes. After declaring the purposes of the legislation, the Act proceeds to list the facilities subject to its provisions. In denying the challenge that the Act does not provide adequate standards for its administration, the New Jersey court approved some rather nonspecific standards when coupled with procedural safeguards designed to insure against unreasonable and unwarranted administrative action. Nonetheless, the geographic area to be regulated by the administrative agency was discreetly defined by the Act.

In 1974, Massachusetts enacted St.1974, c. 637, "An act protecting land and water on Martha's Vineyard" which is patterned after The American Law Institute, Model Land Development Code. ALI, A Model Land Development Code, Art. 7 (1966). Section 380.01, Florida Statutes (1973), was likewise modeled after an earlier draft of Article 7 of the American Law Institute Model Code. The Martha's Vineyard Act was the subject
of litigation in Island Properties, Inc. v. Martha's Vineyard Commission, 361 N.E.2d 385 (Mass.1977). The test in this case did not touch upon the subject of unlawful delegation and, therefore, the decision is not persuasive in the instant cases. It is instructive to note, however, that in implementing the ALI model code the Massachusetts legislature expressly delineated the geographical area of Martha's Vineyard within which the Martha's Vineyard Commission is authorized to designate districts of critical planning concern. Under the terms of the Massachusetts act the commission was charged with developing standards and criteria for identification of areas of critical planning concern within the boundaries of the island, which standards and criteria were subject to and received the approval of the Secretary of Communities and Development. The Massachusetts scheme, then, is similar to that adopted by the Florida Legislature for the "Big Cypress Area" (Section 390.055) insofar as establishment of the geographic perimeters in which the agency may exercise its discretion is concerned.

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Under the fundamental document adopted and several times ratified by the citizens of this State, the legislature is not free to delegate to an administrative body so much of its lawmaking power as it may deem expedient. And that is at the crux of the issue before us. Appellants argue that Section 380.05 requires that all land development regulations be consistent with the principles for guiding development which are adopted contemporaneously with the designation of an area of critical state concern and, therefore, there can be no abuse in the process. We concur that the provisions of Section 380.05 coupled with Chapter 120, Florida Statutes, are calculated to assure procedural due process. Nonetheless, the standard by which land development regulations are to be measured is not a standard articulated by the legislature but one determined by the Administration Commission through formulation of principles for guiding development. In short the primary policy decision of the area of critical state concern to be designated as well as the principles for guiding development in that area are the sole province of an administrative body.

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Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy.

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Accordingly, until the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of nondelegation of legislative power to be viable in this State. Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program. The criteria contained in Section

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380.05(2)(a) and (b), Florida Statutes (1975), do not comply with this constitutional imperative.

Our decision today need not impair the ability of our state government to protect the resources and facilities described in Section 380.05(2)(a) and (b), however. In complying with the policy and mandate of Article II, Section 7, Florida Constitution, the legislature need only exercise its constitutional prerogative and duty to identify and designate those resources and facilities. It may be done in advance as with the Big Cypress area of critical state concern, Section 380.055, Florida Statutes (1975), or through ratification of administratively developed recommendations as in the case of the California Coastal Zone Conservation Plan, CREED v. California Coastal Zone Conservation Commission, supra. In either case the ultimate selection of priorities for areas of critical state or regional concern will rest with representatives of our government charged with such responsibilities under our Constitution.

THE CRITICAL AREA PROGRAM SUMMARIZED
(Source: Department of Community Affairs)

The Areas of Critical State Concern program is authorized by Section 380.05, Florida Statutes, part of the Florida Environmental Land and Water Management Act of 1972. The Act provides that the State land planning agency (The Florida Department of Community Affairs) may recommend to the Administration Commission specific areas of "critical state concern." The statute allows designation of areas with significant environmental resources, historical resources or sites, or areas impacted by an existing or proposed major public facility.

The Administration Commission may adopt the recommendation by a rule setting boundaries of the area and principles to guide development. Once an area is designated by rule, affected local governments have 180 days to submit land development regulations consistent with the principles set forth in the rule. If the local government fails to submit regulations, or its proposals are insufficient, the State agency may propose regulations. If the agency's proposals are adopted by the Administration Commission, the local government must apply the regulations.

Three critical areas have been designated: The Big Cypress Swamp, the Green Swamp, and the Florida Keys. The Florida Legislature, through the Big Cypress Conservation Act of 1973, designated the Big Cypress Swamp as Florida's first area of Critical State Concern. The Big Cypress Swamp encompasses 358,000 acres of estuaries, marshland, and cypress swamp, and it is part of the watershed for the Everglades National Park. The Green Swamp, a major recharge area for the Floridan Aquifer was designated by the Governor and Cabinet in July 1974. The Florida Keys, a unique chain of 97 islands with environmental and historic resources important to tourists and residents were
designated by the Governor and Cabinet as the third Area of Critical State Concern in April 1975.

In August 1977, the First District Court of Appeal in Cross Keys Waterways, Inc. v. Askew, et. al., ruled that Section 380.05, F.S., was unconstitutional .... In November 1978, the Florida Supreme Court upheld the decision of the District Court. In December 1978, a special session of the Legislature redesignated and extended the critical area regulations and established a joint legislative committee to propose amendments. That committee developed several recommendations which were incorporated into Section 380.05 in 1979. A major amendment provides stronger legislative oversight of the program through legislative review of each designation by the Governor and Cabinet. The Legislature "may reject, modify or take no action relative to the adopted rule." Legislative confirmation of each designation is not required. No state land development regulations can be established until after the legislative review.

Another provision added to Chapter 380, F.S., in 1979 requires the appointment by the Governor of a Resource Planning and Management Committee before a formal designation can occur. The Committee brings together State, regional and local agencies, and interest groups, and emphasizes voluntary intergovernmental cooperation to solve growth and resource management problems. If the Committee's efforts prove unsuccessful, the Governor can then seek a formal critical area designation through the Administration Commission.

Since 1979, four Resource Planning and Management Committees have been appointed. The Charlotte Harbor and the Suwannee River Resource Planning and Management Committees were appointed as a prerequisite to their possible designation as Areas of Critical State Concern. The green swamp and the Florida Keys Resource Planning and Management Committee were established to review land development regulations and determine if such regulations meet the requirements for repeal of the critical area designation. [Recent committee appointments include the Northwest Florida Coast, the East Everglades and Kissimmee River Basin Resource Planning and Management Committees.] On the whole, these committees seem to have worked effectively on a wide range of issues.

[Florida Statutes section 380.045 Resource planning and management committees; objectives; procedures.—
(1) Prior to recommending an area as an area of critical state concern pursuant to s. 380.05, the Governor, acting as the chief planning officer of the state, shall appoint a resource planning and management committee for the area under study by the state land planning agency. The objective of the committee shall be to organize a voluntary, cooperative resource planning and management program to resolve existing, and prevent future, problems which may endanger those resources, facilities, and areas described in s. 380.05(2) within the area under study by the state land planning agency.]
Areas of Critical State Concern

Designated Areas of Critical State Concern
1. Big Cypress
2. Green Swamp
3. Florida Keys

Resource Planning and Management Programs
(Management Plans Adopted)
4. Charlotte Harbor Area
5. Suwannee River Basin
6. Hutchinson Island

(Committee Developing Plan)
7. Northwest Florida Coast
8. Everglades
9. Kissimmee River Basin

1984 data
Described Areas

Big Cypress Swamp - The Florida Legislature, through the Big Cypress Conservation Act of 1973, designated Big Cypress Swamp as Florida’s first Area of Critical State Concern. Development activity within the Big Cypress Swamp ACSC continues to be monitored by DCA. This consists of meetings with local government planning officials and the South Florida Water Management District. In addition, the Department has increased its coordination with State agencies in Tallahassee (i.e., Big Cypress Task Force, DNR Land Acquisition programs) in an effort to participate more effectively in their decisions.

Green Swamp - The Green Swamp, a major recharge area for the Floridan Aquifer was designated an ACSC by the Governor and Cabinet in 1974. The entire Green Swamp critical area is contained within Polk and Lake Counties. Polk County is near adopting ordinances that would satisfy the State’s Principles for Guiding Development. DCA staff is continuing to work with Lake County to remove the designation. Until that time, DCA will continue to review development permits for their conformance with ACSC standards and maintain the Green Swamp Resource Planning and Management Committee to review proposed local government ordinances and plan revisions.

Florida Keys - The Department’s program in the Florida Keys involves three major functions: (1) the Governor’s Resource Planning and Management Committee; (2) the monitoring and enforcement of the ACSC program; and (3) a cooperative planning effort between Monroe County and DCA. This cooperative effort is funded by $320,000 allocated by the Florida Legislature. Of this sum, $209,000 will be passed through to the County for development of a revised comprehensive plan. The Department is using the remaining money to hire a planning coordinator and appropriate staff, located in Key West, to oversee this effort. In addition, the Department has hired staff, also located in Monroe County, to conduct an extensive monitoring and enforcement program.

[Franklin County - Franklin County was designated an ACSC by the 1985 legislature.]

Resource Planning and Management Programs

Charlotte Harbor (completed) - DCA is monitoring local government compliance with the Charlotte Harbor Management Plan. This is accomplished by staff visits to the area, along with information provided by numerous members of the public. Lines of communication are maintained with local officials, water management districts, and the Southwest Florida Regional Planning Council. The DCA has also initiated discussions with the State
agencies which participated in the preparation of the Charlotte Harbor Management Plan to clarify their respective authorities in implementing the plan's policies and objectives.

Suwannee River (completed) - The DCA has recently hired two part-time building inspectors to monitor development along the Suwannee River Basin for compliance with the Suwannee River Floodplain Management Ordinance. This ordinance was adopted by 11 counties and 4 municipalities on the recommendation of the Suwannee River Resource Planning and Management Committee. The monitoring program is in cooperation with the Suwannee River Water Management District where the DCA staff are located. In addition, these staff members are available to assist local governments in coordination with State agencies.

Hutchinson Island (on-going) - The Hutchinson Island Resource Planning and Management Committee is in the final stages of adopting a Management Plan (a final recommendation is due in October). At that time DCA will review the plan to determine if it adequately addresses State and regional issues. If it does, DCA will initiate a monitoring program to assure that the principles outlined in the Management Plan are complied with by State, regional, and local governments.

Proposed Areas [Now appointed.]

Everglades - A major Resource Planning and Management Program is a component of Governor Graham's "Save Our Everglades" initiative. This effort will examine resource issues in South Florida from the Kissimmee River to Florida Bay and from the Fakahatchee Strand to the East Everglades. Two Resource Planning and Management Committees will be established (an East Everglades Committee and a Kissimmee Committee) to analyze resource management problems and propose solutions.

Northwest Florida Coast - This Committee, soon to be appointed, is in response to the tremendous development pressure now occurring on the coast of Northwest Florida. This Committee, which will be implemented in two phases, will examine the complex issues of coordinating large scale development in an area with limited public facilities and experience dealing with growth management issues. The Okaloosa-Walton County area will be the focus during the first phase. Escambia, Santa Rosa and Bay Counties will be addressed in the second phase.
Section II. SPECIAL MANAGEMENT AREAS AND STATE LAND
ACQUISITION PROGRAMS

In addition to the Area of Critical State Concern Program, the state of Florida has a variety of other programs and laws to protect special areas or provide public recreation. These programs include:

- Aquatic Preserves System
- State Wilderness System
- Conservation and Recreation Lands
- Environmentally Endangered Lands


FLORIDA'S AQUATIC PRESERVES SYSTEM

State Concern

Through Florida's Aquatic Preserve Act of 1975 (Chapter 258, F.S.) the state manages 30 estuarine and marine aquatic preserves within the coastal zone. The Act was passed to set aside certain state-owned submerged lands and associated coastal waters in areas which have exceptional biological, aesthetic, and scientific value as state aquatic preserves or sanctuaries for the benefit of future generations. A designated Aquatic Preserve may include open water areas, coastal marshes mangrove islands, grass flats, sandy beaches, and other features of estuarine, lagoon and nearshore marine tidal water bodies.

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The majority of aquatic preserves are either in or near regions of increasing urbanization. Competition for the use of these areas is great. Many wetland areas within or adjacent to the preserves were filled in the past to create useable "dry" land. Conversely, significant portions have been dredged to provide fill materials or to create navigation channels. In some cases, coastal marshes and mangrove swamps have been drained for mosquito control and to improve upland properties. Exploratory wells have been drilled, shell and sand has been mined, and structures of all shapes and sizes have been erected. In addition, some of the areas have experienced increasing amounts of pollution of various forms. Concern over these problems resulted in passage of the Aquatic Preserve Act.

Selection Criteria

All of the aquatic preserves were selected on the basis of being areas of submerged lands (and associated waters) which were of exceptional value. The purpose essentially is to maintain them in their natural or existing condition, or to restore them.
Additional general criteria which further describe the nature of the designated preserves are: 1) each area includes only state-owned lands or water bottoms specified by law; 2) privately-owned lands or water bottoms are excluded except where negotiated with a private owner; and 3) all established aquatic preserves exclude: a) any publicly-owned and maintained navigation channel or other authorized (by the U.S. Congress) public works project designed to improve or maintain commerce and navigation, and b) all lands which may be lost through subsidence or artificially induced erosion.

In addition to these requirements, the Act also specifies that each of the preserves be characterized as being of one or more of three principal types: (1) biological, where certain forms of animal or plant life, or their supporting habitat, is to be protected; (2) aesthetic, where certain scenic qualities or amenities are to be maintained; and (3) scientific, where other particular qualities or features are to be maintained. Six aquatic preserves, Estero Bay, Rookery Bay, Coupon Bight, Lignumvitae Key, North Fork St. Lucie River, and Cockroach Bay remain to be formally designated as belonging in one or more of these three types.

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These ... guidelines serve to direct the management of the aquatic preserves. Specific prohibitions in the Act include:

1. The sale, lease or transfer of state submerged lands except when it is in the public interest;

2. Any further dredging or filling of submerged lands except in certain instances such as authorized public navigation projects and other authorized projects for the creation and maintenance of marinas, piers, etc.;

3. The drilling of gas or oil wells;

4. The erection of certain structures; and

5. The discharging of wastes or effluents when such action substantially departs from the intent of the Act.

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In addition, the Trustees can permit ... uses and activities which may not have been specifically provided for but which are found to be compatible with the intent of the Act. Hence, although these areas are called preserves, several uses and activities are permitted which may have some affect on the existing conditions in the areas.

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FLORIDA'S STATE WILDERNESS SYSTEM

State Concern And Program Fulfillment Of That Concern

The State Wilderness System Act (also in Chapter 258, F.S.) provides for the selection and management of state lands set aside as State Wilderness Areas in order to protect and enhance their natural qualities.

These areas are predominantly in a natural undisturbed condition, and are in need of additional protection by the state. Some of these areas are very fragile and are vulnerable to many of man's activities. In addition, some areas are near developing urbanized regions and thus are subject to secondary effects of neighboring development, such as pollution, disruption of habitat, and over-intensive recreation. These wild or natural areas possess certain features which are valuable resources and thus desirable to preserve. Their ecological value as important bird and fish habitats, breeding grounds, and natural botanical areas, as well as their aesthetic and educational values were recognized by the state by enacting the State Wilderness System Act.

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Selection Criteria

As with aquatic preserves, each wilderness area is one or more of three principal types: 1) biological, 2) aesthetic and 3) scientific. Each may contain desirable aspects of all three types. A "biological" type of wilderness area is one which is set aside to promote certain forms of animal life in its supporting habitats; "aesthetic" wilderness areas protect certain scenic qualities; and "scientific" areas, preserve certain features (which may or may not include biological or aesthetic qualities) for scientific or educational purposes.

All wilderness areas must be large enough to at least include those principal features which would justify their establishment. There is no limit on the number of wilderness areas the state may establish but each area must be justified by its intrinsic merit, according to the provisions of the Act and rules established by the Board of Trustees.

Certain priority guidelines must be set to ensure that the most appropriate wilderness areas are selected first. In general, the order of the selection and establishment of areas is governed by the relative vulnerability of their features. Specifically, the Board of Trustees is required to give high priority to areas which: 1) are in close proximity to urban or rapidly developing areas; 2) are in imminent danger from the effects of some other activity; 3) are intended to protect rare or endangered species or unique features; or 4) constitute the last vestiges of an area's natural conditions.

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Management Guidelines/Authorities

The Board of Trustees is required to adopt rules and regulations to ensure that all wilderness areas are regulated under a uniform set of general management criteria. These prohibit alteration of physical conditions within any wilderness area except:

1. Minimum development which is consistent with the public's convenience and necessity and is in accordance with the Act itself; and
2. Approved activities which are designed to enhance the area's quality or utility.

Other general management criteria are:

1. That all human activity within the area may be subject to additional rules and regulations that have been applied (in accordance with the Act) to that specific area; and
2. That other uses or human activities which were not originally contemplated under the guidelines, may be permitted if found to be compatible by the Board of Trustees.

Within these guidelines, various public uses are permitted, as long as they are compatible with those purposes for which the area was established. Permitted uses include:

1. Hiking
2. Bathing
3. Fishing
4. Boating
5. Hunting
6. Picnicking
7. Sightseeing
8. Camping
9. Nature Study
10. Research

In addition, wilderness areas may be designated and used for water storage areas or ground water recharge areas.

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CONSERVATION AND RECREATION LANDS:
ENVIRONMENTALLY ENDANGERED LANDS

State Concern and Program Fulfillment of That Concern

As the direct result of the state's concern for preserving valuable and irreplaceable natural resources, the Land Conservation Act of 1972 (Chapter 259, P.S.) was enacted. It authorized the state to issue, upon approval of the voters, $200 million of state bonds for purchase of environmentally endangered lands.

The concern which led to the passage of this act stemmed largely from the recent realization that Florida's extraordinary natural systems were being rapidly degraded or destroyed. 'Man's insufficient regard for the value of the state's natural systems was a basic cause for this problem. The state's rapid population growth, coupled with inadequate governmental controls, further contributed to Florida's environmental degradation.

In response to these problems, the Environmentally Endangered Lands (EEL) Program was instituted. The Program is designed to complement existing regulatory programs and contribute to the overall effectiveness of the state's environmental protection efforts. Hence, the acquisition of valuable lands was viewed as an effective method for meeting the state's concern for protecting Florida's environmental resources. Additional sources of funding, as well as further emphasis on areas of special management, were provided in 1979 when the state legislature established the Conservation and Recreation Lands Trust Fund (Section 253.023, P.S.) administered within the Department of Natural Resources.

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[Criteria are listed in order from Step 1 through Step 7. Evaluation of each proposed acquisition project is to begin with the first step by the selection committee, proceed in an orderly manner through each step, until all steps are satisfied. Evaluation of a proposed acquisition project is to cease when any of the steps, 1 through 6, are not satisfied. These steps are summarized as follows:

Step 1 - Public purpose and conformance to management plans in accordance with Section 259.04(1) and 253.03(7), P.S., i.e., acquisition projects are to be acquired to meet one or more stated public purpose for:

1. Environmentally Endangered Lands, such as:

   a. Those areas of ecological significance, the development of which by private or public units, would cause the deterioration of submerged lands, inland or coastal waters, marshes, or wilderness areas essential to the environmental integrity of the area of of adjacent areas:}
b. Those areas which, in the judgment of the Game and
Fresh Water Fish Commission, Department of Natural
Resources, or Department of Environmental Regulation, would
require a remedial public works project to limit or correct
environmental damage if developed; or

c. Any beaches or beach within the state which have
been eroded or destroyed by natural forces or which are
threatened or potentially threatened, by erosion or
destruction by natural forces.

2. Use as outdoor recreation lands.

3. Lands acquired in the public interest, such as:

a. For use and protection as natural floodplain,
marsh, or estuary, if the protection and conservation of
such lands is necessary to enhance or protect water quality
or quantity or to protect fish or wildlife habitat which
cannot otherwise be accomplished through local and state
regulatory programs;

b. For use as state parks, recreation areas, public
beaches, state forests, wilderness areas, or wildlife
management areas;

c. For restoration of altered ecosystems to correct
environmental damage that has already occurred; or

d. For preservation of significant archaeological or
historical sites.

Projects that are proposed for purchase as EEL acquisitions must
be in conformance with the comprehensive plan to conserve and
protect environmentally endangered lands in the state. All
proposed projects must conform to the state land management plan
for acquisition, management and disposition of all state-owned
lands to ensure maximum benefit and use, when the plan is
developed.

Step 2 - Ecological, recreational, archaeological, or historic
value:

1. Projects are to be evaluated for their ecological value
as natural resources, including consideration of species of fish
and wildlife, habitat, geological features, water quality and
quantity, contribution to quality of adjacent areas, and other
considerations.

2. Projects are to be evaluated for their recreational
value, including consideration as parks, sites for both primitive
camping and recreational vehicular camping, sites for hiking,
canoeing, fishing, hunting, and other recreational activities.
3. Projects are to be evaluated for their archaeological and historical value including value to the educational and scientific community of the State and to the public as a whole and potential for restoration or maintenance to insure availability for the public use and enjoyment.

4. Projects are to be evaluated to ensure that there is no available existing suitable state-owned lands.

Step 3 - Ownership Pattern:

1. Projects are to be evaluated for functional usability by the public, including appropriate access, proximity to potential users, sufficient areal extent for stated public purpose, and other appropriate considerations.

2. Projects are to be evaluated for manageability in accordance with stated public purpose, including the degree of protection afforded natural or cultural resources, proximity to other parcels of state-owned land, potential for development of public facilities, capability for restoration and maintenance, and other appropriate considerations.

3. Projects are to be evaluated to ascertain if any portion of the project may already be in public ownership, including local, state or federal ownership.

4. Projects are to be evaluated in relationship to the type of land, the stated public purpose and the quantity of that type already available to the public.

Step 4 - Vulnerability and Endangerment:

1. Projects are to be evaluated for vulnerability, that is, susceptibility to degradation caused by man's activities, directly or indirectly, including encroaching residential or commercial activity, land alteration activities, land-use changes and other considerations that may create an adverse impact on the proposed project.

2. Projects are to be evaluated for endangerment, that is, the potential for actual destruction or degradation by man's activities of the resources which form the basis of the stated public purpose, including development plans for the parcel, loss of the resource unless adequately protected or maintained, and other considerations that may result in an irreplaceable loss to the state.
Step 5 - Location:

1. Projects are to be evaluated for their location within the State to achieve a balance of available resources for the public including consideration of historical or archaeological significance, environmental significance, or recreational significance, and consideration of unique qualities of different areas of the State.

2. Projects are to be evaluated for their local, regional or state-wide significance to the public, including consideration of recreational needs, water quality or quantity needs, environmental needs, and other appropriate considerations.

3. Projects are to be evaluated for their proximity to urban areas to provide a reasonable balance of available resources for the benefit and welfare of the public.

Step 6 - Cost:

Projects are to be evaluated for their availability for purchase in accordance with the stated public purpose and evaluated in view of the availability of other local, state or federal funding to accomplish the stated public purpose.

In addition, projects are to be evaluated in terms of unit cost in relationship to the regional cost of land and the need of the region for the resources, as well as in terms of their cost for development, restoration, maintenance or management.

Step 7 - Additional Criteria:

The Committee can use additional criteria as appropriate to achieve the legislative intent to insure the availability of public lands for recreation for the people residing in urban and metropolitan areas of the State, more particularly those areas exhibiting the greatest concentration of population, as well as those people residing in less populated, rural areas and to achieve the conservation and protection of valuable archaeological and historical sites and environmentally unique and irreplaceable lands as valued ecological resources.

Criteria in this step are optional and additional to the essential criteria in Steps 1 through 5. Identification of this additional criteria is not to be used as a reason to cease further consideration of a proposed acquisition project.
Section 12. PROTECTION OF BEACHES, DUNES, AND BARRIER ISLANDS

Beaches, dunes, and barrier islands are the most sensitive areas of the coastline. They are also the most attractive areas for recreation and development. Development on beaches and dunes has caused serious erosion of these areas, resulting in loss of recreation areas, habitat, public facilities, and storm protection the beaches and dunes had provided. Federal, state, and local governments have, perhaps inadvertently, encouraged growth in these sensitive areas by providing infrastructure, flood insurance, and disaster relief.

There are two approaches that can be taken to regulating development on beaches, dunes and barrier islands. First, growth can be regulated directly by restricting or prohibiting structures that will contribute to erosion of the shore or that will be located in unsafe or unstable areas. Because government subsidies have stimulated growth, withholding of government support for development on barriers and beaches may provide a second, indirect means of regulation. This section will discuss the application of these approaches at the state and federal levels.


Introduction

Recent years have witnessed a surge of public concern over the adverse environmental impact of rapid and unrestrained real estate development. Nowhere has this public awareness been more evident than in Florida. Within a span of five years the state’s legislature has enacted measures to regulate developments of regional impact, protect ecologically critical areas, and promote comprehensive and environmentally sound land use planning throughout the state. From the outset, Florida’s coastal zone has received special attention as an area of crucial economic importance to the state that poses unique problems of land use regulation and planning. In 1970, the legislature created the Coastal Coordination Council to direct research and coordinate planning for sound management of the coastal zone. Moreover, the congressionally enacted Coastal Zone Management Act of 1972 has provided federal resources and encouragement that have served to intensify the state’s efforts in developing a comprehensive program for managing the resources of the coastal zone.

Florida has not, however, relied solely on long-range programs to ensure preservation of oceanfront and coastal property. Recognizing the pressing problems of coastal flooding
and beach erosion, the legislature enacted measures in both 1970 and 1971 that imposed coastal construction setback lines for all of the state’s high-energy beaches. The 1970 Act, an interim measure, required all construction begun after July 27, 1970, to be landward of a line fifty feet upland of mean high water. The following year the legislature authorized establishment of an engineered setback line for the high-energy beaches of each coastal county. Although the Florida legislature has not enacted comparable measures for restricting land use on the state’s vast vegetated, estuarine, and wetlands shores, the Department of Environmental Regulation has become involved in regulating construction, excavation, and filling on tidal wetlands as part of its overall efforts to control water pollution.

In addition to these state-level operations, several local communities in Florida have developed various regulatory measures for their coastal areas. A number of local governments have enacted coastal construction and excavation setback ordinances to protect the dunes, bluffs, and vegetation of their high-energy beaches. One county has adopted measures to protect shoreline mangroves and other coastal wetlands vegetation. Other communities have developed special land use programs and site-specific building codes to ensure reasonable use of coastal property within their respective jurisdictions.

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The Coastal Environment

Natural Dynamics of a High-Energy Beach

Sand beaches and dunes comprise a very small and unstable part of Florida’s coastal zone. Forming a narrow band along the shores of the Atlantic Ocean and the Gulf of Mexico, they offer some of the state’s most attractive and most hazardous locations for real estate development. Without adequate controls on construction and excavation, oceanfront development could destroy not only man-made structures but also beaches and dunes.

Flood and erosion are natural occurrences in the life of a sand beach. A single great storm can eradicate an entire beach and dune system leaving upland property directly exposed to the forces of ocean winds and waves. Normally, the high-energy beach provides its own natural defenses. The upward slope of the shore as it emerges from the water edge serves to dissipate wave energy; coastal vegetation stabilizes the sand beach and absorbs the direct forces of wind and water; and wind-borne sand accumulates in dunes that not only buffer the impact of high winds and waves but also provide important sand supplies for restoring flood-eroded beaches.

Because of the inevitable loss of sand due to the action of waves and longshore currents, the survival of a sand beach depends primarily upon its ability to regenerate. Under natural conditions, the mechanism of littoral drift will ensure a balance between erosion and accretion. The same forces of waves and currents that remove sand will also transport it along the shore.
and deposit it at some other point on the beach. In addition, the littoral drift will transport sand from the ocean bottom to the beach, thereby restoring or enlarging it.

The intrusion of stable, artificial structures into the natural setting of a high-energy beach can easily destroy its defenses and disrupt its natural regeneration. For example, a bulkhead or other vertical, impermeable structure interrupts the shore's natural slope and directly blocks the full force of waves. The result is a turbulent, scouring action at the base of the structure that accelerates the removal of sand and undermines not only the beach but the structure itself. Further upland, excavation and construction can destroy vegetation and dunes which are vital to the stability and safety of the beachfront. Equally important, the development of shorefront property can interfere with the process of littoral drift, upsetting the balance of erosion and accretion necessary for the survival of a high-energy beach.

Thus, the major purpose of a coastal setback is to keep developmental activities from encroaching upon the shore and interfering with the natural defenses and regeneration of a beach. Natural beach contours should dictate the location of a setback line. For example, excavation or construction should be kept upland of dune formations in order to preserve the dunes' protective and restorative functions. Another physical feature that requires protection is the beachfront bluff or storm berm. The presence of beachfront bluffs normally indicates that the seaward beach area is subject to periodic flooding and erosion. Indeed, the vertical seaward face of the bluff itself is a product of erosion. The storm berm, on the other hand, is an elevated sand formation created by severe wave action depositing sand in a clearly marked ridge; and even where such berms support diverse vegetation, they would likely be overtopped by severe storm flooding. Thus, construction and excavation should be set back well landward of the seaward edge of bluffs or berms and whatever stabilizing vegetation is present should be preserved as much as possible.

Because beachfront vegetation exerts such an important stabilizing influence on a high-energy beach, the proper siting of construction and excavation should be determined according to the presence of certain species. Pioneer vegetation, comprising the seaward fringe of vegetation, is the species in need of the most protection because its major function is to stabilize fragile dune formation. Developmental activities normally should not be allowed in areas where pioneer vegetation is the dominant species. Immediately landward of pioneer vegetation, scrub vegetation predominates and protects areas behind it from storm tides, winds, and erosion. Although not as crucial as pioneer vegetation, these species should also be protected either by prohibiting construction and excavation or by ensuring that development will not result in their destruction.

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Legal Problems in Implementing the Model Ordinance: Special Features of a Coastal Setback

A coastal setback line should be contrasted with traditional setback provisions that regulate land use in a stable, manmade environment of streets, buildings, and platted lots. The coastal setback operates in the dynamic natural environment of high-energy beaches and coastal wetland. Consequently, its location, purposes, and permanency may differ markedly from its traditional counterpart. While the coastal setback raises many of the legal problems associated with urban setbacks, the instability of the coastal area adds an element of uncertainty to the resolution of these problems.

The features of the coastal area can vary from one location to another and change within one location over a period of time. The natural contours and dynamics of the shore can vary drastically within a small area; what might be necessary to protect beach and upland property in one location might not be necessary a short distance away. For example, a decision that a setback line has been properly established on one section of a beach would not preclude a nearby property owner from challenging its application to his parcel. Similarly, even though a line has been properly determined for a property at a particular point in time does not mean it cannot be challenged or altered at some future date if changing shore conditions render it too stringent or permissive. Whether the location of the line is arbitrary and therefore susceptible to attack on equal protection grounds is a complicated issue of fact which can be resolved only by a precise determination of the environmental conditions existing at a specific time on a specific property. Thus, the variable and changing features of the beachfront and the wetlands tend to make any setback line a provisional regulatory measure as susceptible to change as the environment it seeks to protect.

State and Federal Regulations

The setback and permitting provisions of the model ordinance should be distinguished from other regulatory measures affecting the development of coastal property. For example, the ordinance provisions are independent of the mean high water line, whereas, in Florida the mean high water line is the baseline for setting the interim setback line on high-energy beaches. Any proposed development should be in compliance with this interim line or with the state's engineered setback requirements administered by the Department of Natural Resources.

Another important regulatory line is the hundred year flood line which designates the boundary of high-hazard areas for coastal construction and sets the required elevation for new structures under the National Flood Insurance Program. Although the model ordinance itself does not specify any elevation standards, its permit provisions require that a proposed structure meet the standards of the national program.

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Adoption of a local ordinance to regulate coastal development would not necessarily duplicate state and federal programs. For example, with the approval of the Department of Natural Resources, two counties in Florida have chosen to administer their own local controls over beachfront development rather than to rely upon the department's coastal setback regulations. As long as local regulation meets or exceeds minimal standards established by state and federal authorities, local governments can play a major role in regulating coastal development within their jurisdiction.

Problems of Nonconforming Use, Equitable Estoppel, Exceptions and Nuisance

An owner of coastal property initially must determine which provisions of the [model] local ordinance, if any, are controlling. This is essentially a question of timing. Under the ordinance, if a nonconforming structure is "existing or under construction at the effective date," the setback regulations normally do not apply to the modification, maintenance, or repair of the structure. Such construction, however, must meet three requirements. First, alterations that increase the size and/or lower the elevation of the structure are prohibited. Thus construction may occur only within the existing foundations and above the first dwelling floor or lowest deck of the existing structure. Second, the construction must meet those requirements for a permit under the ordinance that are designed to minimize its adverse impact on the coastal environment. Third, the restoration of a nonconforming structure that was damaged or destroyed by coastal flooding or erosion is prohibited. The last provision stems from the fact that the entire purpose of the model ordinance would be defeated if structures in violation of the setback and proven to have an adverse impact on the beach or to be vulnerable to flood damage are allowed to be maintained and reconstructed.

If a project does not meet the ordinance's deadline, the common law doctrine of equitable estoppel might still prevent imposition of setback and permit requirements on a particular property. In contrast to the ordinance's grandfather provision which requires an owner to show the existence or actual construction of a structure, equitable estoppel requires an owner to show only that he has relied on prior official approval to make substantial investments in his project. If such detrimental reliance can be shown, the doctrine protects the owner from changes in land use regulation.

Both the ordinance's grandfather provision and common law equitable estoppel, however, may be unavailable if an owner has knowledge of a pending change in land use restrictions that will affect his property. Florida courts have often applied the "red flag doctrine" if an owner has adequate warning that his planned use of land will be prohibited by pending changes in local ordinances. In Sharrow v. City of Ania [83 So.2d 274 (Fla. 1955)], the doctrine was applied to impose a setback line that
was enacted after an owner had received a building permit for his property. The court argued that the owner had full knowledge of the pending setback restrictions when he received his permit and therefore must develop his property in compliance with them. The red flag doctrine could be invoked if the owner of coastal property undertakes development that would violate the pending model ordinance. The central issue in such cases is whether the owner had sufficient knowledge of the pending change to realize his project would be subject to its restrictions. The proposal of and subsequent public hearings on an ordinance in a particular locality arguably are sufficient red flag warnings. Once these events have transpired an owner could not avoid the new setback requirements simply by beginning construction or by making substantial investments in his project.

A mistake in issuing an official permit for construction that actually violates the local ordinance would not allow an owner to invoke equitable estoppel. In Godson v. Town of Surfside [150 Fla. 614, 8 So.2d 497 (1942)], the Supreme Court of Florida held that an owner could be forced to remove a completed addition to his beachfront dwelling despite the fact that earlier the city had approved his permit application. The permit had failed to show that the proposed addition would violate local setback restrictions on the beach, but the mistake did not allow the owner to invoke the protections of equitable estoppel.

Certain structures are excepted from the setback regulations of the ordinance. Generally, these exceptions include improvements that enhance the coastal property owner’s access to and use of adjacent coastal waters. Catwalks, footbridges, docks, and boat shelters are allowed seaward of the setback as noncommercial appurtenances to the littoral property. In order to minimize adverse environmental effects, however, such structures would be subject to the permit requirements of the ordinance which restrict their location, size, and design.

A structure in full compliance with the model ordinance might still constitute a public or private nuisance. Although the ordinance is designed to prevent environmental degradation, an approved development might cause destruction of dunes and coastal vegetation as well as create or aggravate flooding, erosion, and pollution problems. The adverse impact of such development on public areas below the mean high water line should be sufficient grounds for a public nuisance claim. Yet one major roadblock to public nuisance actions has been the claim that the state, either by legislative action or by constitutional amendment, has legalized a type of pollution, thereby lifting it out of the category of a public nuisance. The same reasoning might be applied successfully against a local government. During the laissez-faire period, courts tended to overprotect the right to own and use private property and failed to recognize the ecological consequences of pollution. Consequently, injunctions were denied in most cases on the alternate grounds that the nuisance did not exist or that the economic importance of the polluter’s operations caused the equities to be balanced in favor of the polluter.
In a recent Florida decision, the First District Court of Appeal rejected a public nuisance suit in which a beachfront project not only had failed to comply with the state’s setback line but also had been approved by the Department of Natural Resources. [Shevin v. Indico Corp., 319 So.2d 173 (Fla. 1st DCA 1975)] The court simply upheld the findings of the trial court, however, and did not rule out such claims as a matter of law. In light of today’s environmental consciousness, whether compliance with the model ordinance or express approval by local authorities would automatically preclude the bringing of a public nuisance action is questionable. Of course, only after this issue has been tested in light of current public policy will the answer become clearer. In any event, a private nuisance claim might be available to riparian owners adversely affected by improper siting or design of coastal development regardless of compliance with the ordinance.

**Legal Challenges to the Model Ordinance**

An individual owner may directly challenge the proposed ordinance in a number of ways. First, the local government’s location of the setback line may be challenged on procedural grounds. The ordinance expressly requires three steps: prior scientific surveys, public notice, and public hearings. Failure to adhere to these formal guidelines could jeopardize the validity of any setback regulation. Indeed, Florida’s courts undoubtedly would insist not only that formal procedures be followed but also that such procedures adequately insured consideration of all issues and views relevant to establishing a setback line under the ordinance. In Hesh v. Trustees of the Internal Improvement Fund [37 Fla. Supp. 1 (Dade County Cir. Ct. 1971)], the Circuit Court of Dade County overturned a local bulkhead line on procedural grounds despite the fact that formal public notice and hearings had been provided. Scrutinizing the record of the proceedings, the court determined that local officials had dominated the proceedings in such a way as to prevent presentation of adverse views and consideration of all relevant issues. Thus mere formal adherence to the ordinance’s procedural provisions is not sufficient to meet the threshold procedural requirements.

The substantive validity of a setback could also be subject to attack. Initially, an owner could apply to the local governing body for review and revision of the established line. As previously noted, changing natural conditions at the shore could undermine the substantive validity of a setback by altering the physical features or vegetation upon which the line was established. Such changes could warrant not only local government review but also judicial review; there is clear precedent in Florida for the proposition that a change of conditions enables an owner to challenge an existing land use restriction in the courts.

Florida’s courts, however, presume the validity of any official determination of what land use regulations are needed
for the public welfare. Local government need only show that its regulation can be supported on grounds that are "fairly debatable." The existence of evidence against a disputed setback line, even evidence which might well have sustained establishing a different line, is not determinative. Local government need only demonstrate that substantial evidence supports its decision. Consideration of comprehensive surveys and the provision of adequate public hearings, moreover, undoubtedly would lend further support to the local government's position. Nonetheless, this presumption of validity could be overcome by sufficient technical evidence and expert testimony marshalled against a proposed setback line.

Variance Procedures and Problems

An owner wishing to undertake construction at variance with established setback restrictions must apply directly to the local governing body. The ordinance authorizes discretionary variances and attempts to provide sufficient guidelines for such governmental action. A threshold requirement for obtaining a variance is a showing of hardship on the part of an affected landowner. An owner, however, would not be able to meet this requirement if the hardship proves to be self-induced. For example, a developer might plat his subdivision so that a series of small-sized lots straddle the setback line. Without a variance, no construction would be feasible on these seaward lots. Nevertheless, the hardship imposed by the setback could be avoided by alternative platting that would enlarge the seaward lots at the expense of upland parcels. By choosing to locate his small lots on the seaward boundary of the subdivision the developer has created the complained-of hardship. Such hardship should not be considered legitimate grounds for granting a discretionary variance.

In addition to a showing of hardship, an applicant for a variance must also meet the requirements for a permit under the ordinance. The list of permit conditions ought to be sufficiently clear to obviate any challenge on the grounds of inadequate criteria for granting or denying a variance. Unless both public officials and private individuals have such guidelines, the entire variance procedure is subject to attack.

The validity of variance procedures under the ordinance may be undermined if a local governing body grants an excessive number of variances. In Florida, setback restrictions can become unenforceable against an individual who is denied a variance when several other property owners in the area have been successful in obtaining one. Essentially, the courts argue that a refusal to grant a variance after several have been allowed in similar circumstances is arbitrary and capricious on the part of the administrative authority and will not be sustained. Furthermore, the presumption of validity accorded to the initial establishment of a setback line probably would not be applied to variances. Whereas most courts defer to local government's decisions on the location of a setback as being quasi-legislative, these courts
generally consider decisions on individual variances to be quasi-judicial or administrative in nature and thus subject to closer judicial scrutiny.

The Taking Issue

Since the United States Supreme Court’s decision in

v. Fox [274 U.S. 603 (1927)], courts have generally sustained setback lines as legitimate regulatory measures not requiring public compensation. This policy is justified for several reasons. A setback usually has a minimal adverse impact on the use of a particular property. Although it prohibits construction and excavation on one segment, the setback allows other uses of that segment and permits all uses of the remainder; thus, the value of property as a whole often remains unimpacted. In addition, an individual owner derives certain benefits from setback restrictions: the value of property is directly enhanced by proper siting of structures and indirectly enhanced by the imposition of the same restrictions on neighboring property. Finally, when the effects of setback restrictions are assessed in the aggregate, they clearly serve a legitimate public purpose by promoting the safety, health, and aesthetic appeal of a community.

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A number of flood plain zoning cases have allowed complete prohibition of development without requiring the state to compensate the affected landowner. Emphasizing the magnitude of public harm prevented by these restrictions, courts have regarded beneficial uses such as agriculture or recreation sufficient to avoid a compensable taking.

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The New Jersey courts have addressed this issue directly in the companion cases of Spieglet v. Borough of Beach Haven [218 A.2d 129 (1966), cert denied, 385 U.S. 831 (1966); and 291 A.2d 377 (1971)]. The initial decision by the state’s supreme court upheld an ordinance establishing a setback line for coastal areas subject to severe storm damage. Considering both the potential public harm and the probable private losses that would result from any construction seaward of the building line, the court concluded that the “regulation prescribed only such conduct as good husbandry would indicate that plaintiffs should themselves impose on the use of their own lands.” The mere fact that the setback line might prohibit all construction on a given property was insufficient to sustain a claim of taking. An owner must also show “the existence of some present or potential beneficial use of which he has been deprived.” From the court’s perspective, the erection of a building in a hazardous area where it is almost certain to be severely damaged or destroyed could not be regarded as a project bringing any real economic benefit to the landowner. Thus, by prohibiting such construction the regulation merely affirmed what natural conditions alone would dictate to a reasonable person.
That the ordinance was valid on its face, however, did not prevent the plaintiff from asserting his claim of taking.
Indeed, in subsequent litigation Spiegel convinced the state's appellate division that at least one of his proposed projects could meet the threshold requirement laid down by the supreme court. He first demonstrated that technically his planned dwelling could be constructed seaward of the setback line in such a way as to withstand predicted storm forces. He further showed that it would be economically feasible for him to undertake such a project. He thereby established to the satisfaction of the court that the proposed use of his land would be to his benefit.
Having recognized Spiegel's real beneficial interest in developing the property, the court then found little difficulty in holding the imposition of the setback, which effectively precluded all construction on Spiegel's property, "to constitute a taking."

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Recognition of the hazards to the landowner and the potential harm to the public posed by homes and other structures in flood-prone areas has prompted some courts to uphold prohibition of all construction without compensating the affected landowner. Moreover, if natural conditions themselves prove sufficiently hazardous or inhospitable to obviate any profitable use of a property, the reasoning advanced by both Spiegel and just affords another basis for severely regulating land use without compensation. Indeed, these latter cases might provide the most persuasive arguments for sustaining coastal restrictions. Construction and excavation in areas subject to flooding, erosion, and ecological degradation do not represent reasonable beneficial uses of land, and thus the denial of such uses should not be regarded as a compensable taking.

Conclusion

Rapid and largely unrestrained real estate development along the coastal zone poses unique problems of land use regulation and planning. Two dichotomies permeate this theme: the first is the ubiquitous conflict between the right of a landowner to the free use of his land and the power of the state to regulate unreasonable use of property; second is the desire for growth and development, which historically and almost by definition disregarded ecological and environmental consequences.
Fortunately, our coastal environment increasingly is being considered a valuable treasure rather than an exploitable one.
Obviously, resolution of the competing interests will involve a delicate balancing process. Comprehensive local regulation of coastal construction and excavation can serve a vital and necessary function in resolving coastal zone problems. The model ordinance which follows is designed to assist coastal communities in implementing their planning programs.

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1. In order to preserve dunes and natural shoreline processes, and control construction in hazardous or unstable areas, the Beach and Shore Preservation Act and the Coastal Zone Protection Act of 1985 establish three zones of regulation in coastal areas - coastal construction control lines, thirty-year erosion lines, and coastal building zones.

Coastal construction control lines (CCCLs) are established by the Department of Natural Resources (DNR) for each county with open, sandy beaches to define the beach-dune system subject to severe fluctuations based on the 100-year storm surge. DNR may establish segments of a CCCL landward of the 100-year storm surge zone, "provided such ... segments do not extend beyond the landward toe of the coastal barrier dune structure that intercepts the 100-year storm surge." The 1985 amendments to chapter 161 require the Governor and Cabinet to adopt the CCCL after a public hearing.

Chapter 161 provides that once a CCCL is established, "no person ... shall construct any structure whatsoever seaward thereof; make any excavation, remove any beach material, or otherwise alter existing ground elevations ...; or damage or cause to be damaged such sand dune or the vegetation growing thereon seaward thereof except as hereinafter provided." The language is not a complete prohibition on construction seaward of the CCCL. DNR can grant or approve permits for construction seaward of the CCCL if there already exists a reasonably continuous and uniform construction line closer to the line of mean high water than the CCCL or the property owner supplies adequate data on shore and dune stability and storm tides to demonstrate that the siting and design of the project will not endanger the dune system, existing structures, or adjacent properties.

The thirty-year erosion line is intended to limit construction in areas where the shoreline is unstable by prohibiting permits for major structures seaward of the line. The line is to be based on DNR projections of what area will be seaward of the seasonal high-water line within thirty years of the date of application for a permit. The CCCL creates the landward limit of the thirty-year erosion line. The legislation provides, however, that where the prohibition precludes construction, a permit for a single-family dwelling may be issued if:

1. The parcel for which the single-family dwelling is proposed was platted or subdivided by metes and bounds before the effective date of this section [Oct. 1, 1985];
2. The owner of the parcel ... 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; 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.

The CCCL requirements and the prohibitions relative to the thirty-year erosion line do not apply to "any 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 of the structure." "Specifically excluded from this exemption are seawalls or other rigid coastal or shore protection structures...." In the case of rebuilding a major structure, e.g., after a major hurricane, the act provides that:

[the department may, however, at its discretion, issue a permit for the repair or rebuilding within the confines of the original foundation of a major structure.... Under no circumstances shall the department permit such repair or rebuilding that expand the capacity of the original structure seaward of the 30-year erosion projection.... However, in reviewing applications for rebuilding, the department shall specifically consider changes in shoreline conditions, the availability of other rebuilding options, and the design adequacy of the project sought to be rebuilt.

The coastal building zone is defined as an area 1500 feet landward of the CCCL in areas where it is established and 3000 feet landward of the mean high-water line in other coastal areas. The zone extends to as much as 5000 feet from the CCCL on barrier islands. Within the coastal building zone, major structures must meet state minimum structural requirements, including conforming to the Standard Building Code and being designed to withstand a 100-year storm event.

2. A major problem in the management of barrier islands, beaches, and dunes has been the fact that both federal and state programs, including flood insurance, transportation programs, sewage treatment facility funding, and disaster relief, have tended to subsidize growth in the sensitive barrier areas. The federal government has enacted legislation to limit continued subsidization of growth on undeveloped barriers.

Section 341(d) (1) of the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35 established a new section 1321 of the National Flood Insurance Act of 1968. Section 1321(a) states that no new federal flood insurance coverage shall be provided on or after October 1, 1983, for any new construction or substantial
Improvements of structures located on undeveloped coastal barriers (now the Coastal Barriers Resources System). Many of Florida's islands do not qualify under the definition of coastal barrier in the Act because they are coquina or limestone based, rather than sandy sediment. In spite of the many areas not included as barriers, over half the total area ineligible for flood insurance is located in Florida, Texas and Louisiana.

The Coastal Barrier Resources Act, P.L. 97-378, bans direct and indirect federal subsidies for development on barrier islands designated part of the Coastal Barrier Resources System. New federal assistance is prohibited for roads, bridges, sewer systems, and VA and FHA housing loans. There are exceptions for energy development, national defense and Coast Guard activities, maintenance of navigation channels and facilities, and enhancement of fish and wildlife habitats.

Bostic v. United States, 581 F. Supp. 254 (1984), discusses the Coastal Barrier Resources System:

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II. Legislative Background

Bills to enact a Coastal Barrier Resources Act were originally introduced in April, 1981. Prior to passage of Initially proposed legislation, the Omnibus Budget Reconciliation Act of 1981 (hereinafter OBRA) was signed into law on August 13, 1981. Section 341(d)(1) of OBRA established a new section of the National Flood Insurance Act of 1968, 42 U.S.C. 4029, which provided that no new federal flood insurance would be provided on after October 1, 1983, for new construction or substantial improvements of structures located on undeveloped coastal barriers to be designated by the Secretary of Interior.

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In accordance with the directive of Section 341 OBRA, the Secretary established a Coastal Barriers Task Force to conduct the requisite study. This study by the Task Force resulted in the creation of ... maps which designated undeveloped coastal barriers. The Secretary reported his findings to Congress on April 13, 1982.

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During the time that the Department of Interior Task Force had been fulfilling its responsibilities under OBRA, in fact, during the final stages of agency action, Congress passed CBRA [16 U.S.C. 3501 at seq.], which was signed into law by the President on October 18, 1992.

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The final maps referred to in Section 4 of CBRA superseded and replaced the proposed [OBRA] maps ....

III. The Coastal Barrier Resources Act

The enactment of CBRA established the Coastal Barrier Resources System (hereinafter CBRS or the System) ... which
consists of undeveloped coastal barriers located on the Atlantic and Gulf coasts of the United States.

Section 5(a)(1) of CBRA prohibits new federal expenditures or financial assistance within the CBRS. Effective October 1, 1983, the financial assistance prohibited explicitly includes flood insurance ....

Section 3 of CBRA defines an "undeveloped coastal barrier" to mean:

(A) A depositional geologic feature (such as a bay barrier, tombolo barrier spit or barrier island that --

(i) consists of unconsolidated sedimentary materials,

(ii) is subject to wave, tidal and wind energies, and

(iii) protects landward aquatic habitats from direct wave attack; and

(B) all associated aquatic habitats, including the adjacent wetlands, marshes, estuaries, inlets, and nearshore waters; but only if such features (i) contain few manmade structures and these structures, and man's activities on such feature and within such habitats, do not significantly impede geomorphic and ecological processes, and (ii) are not included within the boundaries of an area established under Federal, State, or local law, or held by a qualified organization ... primarily for wildlife refuge, sanctuary, recreational, or natural resource conservation purposes.

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The purpose of CBRA is manifold:

The Congress declares it is the purpose of this Act to minimize the loss of human life, wasteful expenditure of Federal revenues and the damage to fish, wildlife, and other natural resources associated with the coastal barriers along the Atlantic and Gulf coasts ....

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Congress' goal is to be accomplished by:

... restricting future federal expenditures and financial assistance which have the effect of encouraging development of coastal barriers ... and by considering the means and measures by which the long-term conservation of these fish, wildlife, and other natural resources may be achieved.

In achieving its goal, Congress has expressly confined its curtailment of federal assistance to undeveloped coastal barriers.

The requirement that only those coastal barriers containing few man-made structures be included in the system serves two purposes. First, the denial of federal assistance to existing developed communities, many of which have been established for many years, would be inequitable. Second, in areas where development has already taken place, the structures and man's activities in these areas tend to interfere with the natural processes and change the essential nature of coastal barriers. [House Report]
The original criterion used by Congress to make a threshold determination of developed and undeveloped barriers was whether there existed approximately one structure per five (5) acres of fastlands. With this beginning point the Committee examined the maps proposed by the Secretary and made its determinations regarding the barriers. [Section 4 of CBRA references and adopts maps for the CBRS.]

3. Florida has also taken measures to limit subsidization of growth in sensitive coastal areas. Governor Graham issued the following Executive Order in 1981:

EXECUTIVE ORDER NUMBER 81-105

WHEREAS, it is the policy of the State of Florida to protect and manage Florida’s extensive, fragile coastal resources, in order to enhance the recreational, scientific and natural resource values, for both present and future Floridians; and

WHEREAS, coastal barriers, which include barrier islands, beaches, and related lands, are essential to the maintenance of these coastal resources; and

WHEREAS, these coastal barriers serve to reduce Florida’s vulnerability to natural hazards, particularly hurricanes, thereby reducing the ever-present threat to human life, private and public property, and other resources in the coastal areas; and

WHEREAS, these coastal barriers are vulnerable to hurricanes, other storm damage and geologic composition, and are continuously altered by wave, tidal, and wind actions; and

WHEREAS, these coastal barriers are a source of beauty and enjoyment, in addition to contributing billions of dollars to the State’s economy annually; and

WHEREAS, past utilization of coastal barriers often has not taken place in a manner consistent with public safety and economic welfare; and

WHEREAS, certain State actions, programs, and funding policies have historically subsidized and encouraged development on coastal barriers resulting in loss of barrier resources, increased vulnerability of human life, health, and property and the recurring obligation of tax dollars; and

WHEREAS, the Florida Legislature, the Governor, the Cabinet, and various state agencies have recognized the importance of protecting these critical coastal areas and sought to manage
these resources in a manner consistent with the principles of public safety, economic development, and resources;

NOW, THEREFORE, I, BOB GRAHAM, as Governor and Chief Executive of the State of Florida, by virtue of the authority vested in me by the Constitution and the Laws of the State, do hereby issue the following order effective immediately:

The Secretaries of the Departments of Commerce, Environmental Regulation, Health and Rehabilitative Services, Transportation, Veteran and Community Affairs and Director of the Governor’s Office of Planning and Budgeting are directed to take the following actions as applicable to their agencies:

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 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 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.

Signed 4 September 1981

4. An Attorney General’s opinion suggested that the executive order was an ineffective and unenforceable tool for protecting coastal barriers. The coastal infrastructure policy of the Coastal Zone Protection Act of 1985, however, reinforces the governor’s expenditure limitation approach. The act provides that "[s]tate funds shall be used for the purposes of constructing bridges or causeways to coastal barrier islands ... which are not accessible by bridges or causeways..." and the state will not expend funds to expand infrastructure unless it is consistent with the approved coastal management element of local comprehensive plans. In addition, section 153.3179 provides that "it is the intent of the Legislature that local government comprehensive plans ... limit public expenditures in areas that are subject to destruction in natural disaster."
CONCLUSION: THE FUTURE OF COASTAL MANAGEMENT IN FLORIDA

In the early 1970s, Florida seemed to be at the forefront of the environmental and coastal management movement. Florida’s legislation and programs were innovative, but in large part reactionary. Former Governor Reuben Askew was quoted as saying that if governments were "judged solely on their response to the environmental crisis, I’m confident that Florida would walk away with the honors." Once environmental crises of the early 1970s — hurricanes, floods, droughts, water shortages — had passed, public interest waned, and programs suffered from insufficient funding and conservative implementation and interpretation.

The environmental conservatism that dominated the late 1970s perhaps peaked in 1978 when the state legislature "downgraded" the state comprehensive plan to advisory, rejected as draft state coastal plan, and passed the Coastal Management Act. The "No New Nothing Act," as the coastal act was dubbed, mandated the Department of Environmental Regulation to create a coastal management program from existing legislation and authorities. In spite of this limitation and the apparent "lack of and environmental base, an economic development base, or a local government base," Florida developed a program that received federal approval in 1981.

In a 1983 Coastal Discussion Paper prepared for the Governor’s Coastal Resources Citizen’s Advisory Committee and the Office of Coastal Management, Tina Bernd-Cohen summarized the strengths and weaknesses of the Florida program:

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The program:

- provides a clear program focus on coastal and coastal-related issues
- provides a central location for coordinating, tracking, and reviewing coastal activities, research, and programs
- provides a federal-state-local partnership in coastal management
- provides an institutional framework within which complex coastal issues, policies, and problems which cross jurisdictional boundaries can be resolved through coordinated state management and joint problem-solving
- provides a state voice in federal activities through federal consistency reviews and monitors federal level policies and regulatory changes which may affect Florida

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. fosters a greater awareness of complex coastal issues and the impact of development on natural resources, while providing staff expertise to address the problems and policy issues and solve problems.
. directs coastal funding to address issues and solve problems.
. maintains Florida's eligibility to receive federal funds for coastal management, interagency coordination, and state policy planning.

Weaknesses of the program, which impede its effective implementation and limit its applicability as a comprehensive resource management program, are related to limitations placed on the program by the Florida Coastal Management Act. The program:

. is based on existing state statutes which are fragmented and single purpose oriented.
. cannot require state agencies to coordinate management activities or bind agencies to joint policy decisions and negotiated conflict settlements.
. has a weak state-local partnership in coastal management because local participation is voluntary.
. is supported by insufficient state resources to carry out the program without federal assistance.
. is underutilized by state agencies, the Governor, and the legislature.

* * *

Florida's program has been crippled from its inception by insufficient state funding and staffing, and now funding from federal sources has also dwindled. Although Congress has persisted in its support for the coastal zone management program, President Reagan has "zero budgeted" coastal programs for the past two years. Like other environmental programs, the federal coastal zone program has received less emphasis under the current administration. Under the "new federalism," the states have suddenly found themselves in a leadership role for environmental protection and coastal management after almost two decades of federal government initiative.

In Florida, the pendulum also has swung in regard to public concern for and awareness of environmental issues. Predictions of Florida's growth by the end of the century have focused attention on the inadequacies of state programs. A recent survey of Florida citizen's identified growth management as Florida's most important problem. Although the rubric has changed from coastal management to growth management, the issues are still the same -- comprehensive planning and management of land use and natural resources, protection of unique and sensitive areas, and maintenance of Florida's "high quality of life."
Florida's legislature has accepted its new role and mandate, and in 1983 and 1984 enacted landmark water resources and wetlands protection legislation. In 1985, the adoption of the State Comprehensive Plan and the enactment of the Growth Management Act and the Coastal Zone Protection Act greatly enhanced the state's capability to manage coastal uses and resources. Among the major achievements of the 1985 legislation are:

- strengthening of the coastal management elements of local government comprehensive plans;
- requiring state review of local plans for consistency with the State Comprehensive Plan and providing a mechanism for encouraging consistency;
- limitations on infrastructure funding that subsidizes growth on barrier islands and growth that is inconsistent with the coastal management element of local government comprehensive plans;
- prohibitions on major structures in areas subject to erosion;
- limitations on post-hazard rebuilding of coastal structures;
- special coastal construction standards designed to protect the dunes, shorelines, structures, and lives.

The next step must be strong, effective, well-funded implementation with continued public support. Public awareness, education, and support are not only the impetus for legislative action, but the key to effective implementation.

Without a public consensus, the program will only limp along with forced and begrudging compliance. Florida cannot afford to operate the program without the help of the citizens, who must be educated as to the need for the program and be shown, by agency example, that the relationship between state regulation and local implementation need not be adversarial. County Commissioners will not enforce the program if their constituency regards it as a handicap instead of a personal need and goal. The public and local government form the foundation of the arch, without which the keystone program will fall. The state does not have the power, personnel, or funds to simply impose the program. It must persuade local government to incorporate coastal environmental considerations in all appropriate decisions and it must provide the technical expertise at state, regional, and local levels to advise local government. Continuous, flexible, progressive, informed, and imaginative planning must be the watchword. Guy, Florida's Coastal Management Program: A Critical Analysis, II Coastal Zone 107, 2119, 241-2 (1983).