DEVELOPMENT OF COUNTY AND LOCAL ORDINANCES DESIGNED TO PROTECT THE PUBLIC INTEREST IN FLORIDA'S COASTAL BEACHES

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Florida Sea Grant

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INTRODUCTION

Coastal areas traditionally have played a vital role in this nation's development. Small colonies which clustered around natural harbors have blossomed into huge metropolitan cities. Throughout our history the coastal shoreline has been considered an unlimited resource. Only recently an awareness has evolved that a great deal of the natural, historic, scenic, cultural, aesthetic, and recreational value of our coastal environment is lost forever as a result of private development. Beaches, that is, those which remain public, have become as crowded and confused as the cities from which the public seeks weekend sanctuary.

Although in many coastal areas the public has the right to use the shore between the mean high and mean low water lines, and in some cases the right to use the adjacent soft sand areas, there is frequently no ready means of access to these areas. Moreover, coastal dune, wetland, and estuarine beaches are not always adequately protected by present legislation. In short, our nation's coastal beaches are disappearing rapidly.

In addition to the need for effective beach access legislation, it would be extremely advantageous for individual counties to establish appropriate construction setback lines to prevent destruction of dunes, wetlands, and coastal beaches and estuarine beaches between this line and the water's edge. In order to assist local, coastal communities in dealing with these problems, a one year study was undertaken at the University of Florida, College of Law, by Frank E. Maloney, Dean Emeritus and Professor of Law, Principal Investigator on the project, and Dan Fernandez, Director of the Center of Competence for Eastern U. S. Water Law, Associate Investigator. The purpose of this project was to develop model public beach access and coastal construction setback and permitting ordinances. The

study was suggested by the Florida Coastal Coordinating Council--now the Department of Natural Resources, Bureau of Coastal Zone Planning--and was funded by the Sea Grant Program of the National Oceanic and Atmospheric Administration, Department of Commerce (Grant No. R/L-2), and the University of Florida. Research for and development of the model ordinances was undertaken with the assistance of Anthony J. O'Donnell, Anthony R. Parrish, and James M. Reinders, University of Florida, College of Law. It was through their diligent work that this study was accomplished, and their assistance is gratefully acknowledged.

All of the coastal states were surveyed to determine what types of coastal beach, estuarine beach, coastal wetlands, and coastal dune protection have been attempted. In addition, numerous coastal communities throughout Florida were contacted. They supplied copies of ordinances that proved very helpful in developing the model ordinances which incorporate and expand upon the best elements of existing laws. Furthermore, valuable input was received from officials of various Florida counties, as well as from representatives of the Florida Department of Natural Resources, the Southwest Florida Regional Planning Council, and other state and federal agencies.

This report is divided into two parts. Part One addresses the public beach access issue. Generally, this part discusses public rights in the seashore, current beach access legislation, and the role of local governments. Part Two treats the problem of coastal construction. It begins with a discussion of the coastal environment and expands upon the role of local legislation and the legal problems involved in implementing local regulations. Each part includes a model ordinance designed to aid local, coastal communities in providing for public beach access and establishing restrictions on coastal construction to protect coastal dunes, wetland, and estuarine beaches.

The model ordinances are not designed to completely inhibit all coastal

development. Such an endeavor would be extremely unreasonable. Obviously, the rights of private landowners and developers must be respected. What is sought is simply that the natural beauty of our beaches be respected and preserved as well. In sum, the ordinances aim at sound land use planning whereby local governments can evaluate environmental consequences in advance of development so that a reasonable balance can be reached between public and private interests.

PART I. PUBLIC BEACH ACCESS: A GUARANTEED PLACE TO SPREAD YOUR TOWEL

As the nation's shoreline undergoes continuing development, and as public demand for access to beach recreational areas increases, the age-old problem of guaranteeing public beach access becomes ever more critical.[1] Our beaches are disappearing, both literally, through the processes of erosion, and figuratively, behind rows of fences and "No Trespassing, Private Beach" signs. In 1971, the Corps of Engineers estimated that approximately one-fourth of the total national shoreline was undergoing "serious erosion".[2] More detrimental to public beach recreation is the growth of private control over sand beaches.[3] While the public has the right to use the tidelands[4] in most coastal areas, this right encompasses only the area between the mean high and low tide lines.[5] In many cases there is neither a guaranteed right of access to the tidelands nor a right to use the dry-sand area above the high tide line. Private ownership of dry-sand and upland areas can, consequently, foreclose any meaningful recreational use of beach areas by the public, turning publically owned tidelands into de facto private beaches.

Only two states, Texas and Oregon, have passed strong state legislation to protect public beach rights.[6] In the absence of such legislation, the burden of providing adequate public beach access inevitably falls upon local governments. This article offers a model ordinance designed to provide a means for coastal communities to insure the provision of adequate public beach areas. As background for the model ordinance, discussion will focus on common law theories supporting public beach rights, state and federal legislation, and the "taking" issue, which is particularly relevant in the area of mandatory dedication of land by developers prior to subdivision plat approval.

I. Public Rights in the Seashore

Public rights in the foreshore or wet sand area (the area between the mean high tide and mean low tide lines) date back to the Roman civil law. Great flowing waters, the sea and its shores were res communes -- things open to common use by all citizens.[7] The law protected public rights in unhindered navigation and fishing, and guaranteed free access to navigable waters and the foreshore.[8] The concept that navigable waters and tidelands were stamped with a public trust waned somewhat during the Middle Ages. After the Norman Conquest of England, the Crown's sovereign authority over land, the jus privatum, was extended to the sea and the lands beneath it. The King could thus convey title or rights to private citizens in any portion of the shore, a practice which grew to such extent that by the time of the Magna Carta commercial activities in England's waterways were being severely restricted by private landowners.[9] This prompted a growing awareness of the public value of the shorefront and its incompatability with private ownership. The end result was that after the signing of the Magna Carta in 1215, the tidelands and navigable waters were stampted with a public trust, the jus publicum, and were thereafter generally regarded as held for the benefit of the public even where title was granted to private individuals.[10]

By the time of the American Revolution this doctrine, while well established, was still beset by inconsistencies.[11] The thirteen original colonies succeeded to all the rights held by the Crown, subject only to those ceded by the Constitution to the federal government.[12] Thus ownership of all lands covered by tidal waters was vested in the sovereign states.[13] State ownership of the tidelands and of submerged lands beneath navigable waters was confirmed by the United States Supreme Court; however, the state's title was

> title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein...

> freed from the obstruction or interference of private parties...and the idea that (a state's) legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation... is a proposition that cannot be defended.[14]

A state, therefore, could only dispose of lands held in trust for the public when the rights of the public would not be infringed. It is to be noted that, as regards beaches, only the wet sand areas were directly impressed with this trust.[15] Other doctrines are required to protect the public's interest in dry-sand areas and to procure access over private lands.

A. Custom

One traditional common law concept widely used to acquire and protect public beach rights is that of custom.[16] Custom has been defined as a "usage or practice of the people which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of law with respect to the place or subject matter to which it relates."[17] The English common law noted several requirements for a right to be designated as customary; to be enforceable, a custom had to be (1) ancient, (2) reasonable and peaceable, (3) exercised without interruption, (4) of certain boundaries, (5) obligatory, or compulsory, and (6) not inconsistent with other customs or law.[18] The theory underlying the doctrine is that any usage ancient enough to go back beyond the memory of man must have been based on a legal right and therefore should be given the force of law.

Until very recently, American acceptance of custom was confined to a few early New Hampshire cases,[19] the reason being that America was not an old enough country for a usage to stem from "time immemorial".[20] In 1969, however, the Oregon supreme court in State ex rel Thornton v. Hay[21] met this objection by noting that "European settlers were not the first people to use the dry-sand area as public land."[22] Having thus resolved the antiquity requirement, the court preferred custom over prescription or implied dedication in order to avoid the prolonged tract-by-tract litigation required by the latter two theories.[23]

There has been debate as to just how broadly the decision in Thornton should be read.[24] If the decision is applicable to the entire Oregon coastline, it may be criticized on due process grounds since littoral owners of other beach areas were not heard as to whether their particular beaches were subject to usage by the public.[25] A narrower reading of the decision would make it binding only on the littoral owner before the court. While this would avoid constitutional and evidentiary problems, it would deprive custom of its greatest practical advantage -- the avoidance of tract-by-tract litigation.

The Thornton decision is also open to criticism on several other grounds. First, the requirements for custom were not so clearly satisfied as the Oregon court implied.[26] Second, the court's statement that the decision "takes from no man anything which he has had a legitimate reason to regard as exclusively his"[27] seems to conflict with the United States Supreme Court's holding in Borax Consolidated, LTD. v. Los Angeles[28] which held that a federal patent conveys title to the mean high tide line.

To date, only Hawaii has followed Oregon's lead and used custom to secure public rights in beaches.[29] The Florida judiciary has recognized the doctrine of custom in dictum only. In City of Daytona Beach v. Tona-Rama, Inc.[30] the Florida supreme court acknowledged that where the public's use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, then custom exists and public use cannot be denied by a beachfront owner.[31] However, the court stated that the public has no interest in the land itself and cannot use the doctrine to prohibit the landowner from making reasonable use of his land.[32] Two strong dissenting opinions argued that the majority's approach would lead to continuing development of Daytona's beaches to the detriment of the public.[33]

A narrow interpretation of the custom doctrine as applying only to individually litigated beach areas, while free of constitutional and evidentiary

problems, is of limited use in establishing public rights in beach areas. Since the state can only claim an easement by public use on particular beaches, the customary-right approach is less productive than other theories which require shorter periods of public use. Barring strong legislative support, the doctrine of custom is of limited use in securing public rights in beach areas. However, it may be helpful in conjunction with a claim of public easement in private beachfront property to prevent the owners from claiming as a defense that they had granted the public permission for past use.[34]

B. Dedication

Dedication is another doctrine that can be used to secure the public's interest in dry-sand areas, even if it is only the right of passage to the tideland. The doctrine is applicable to specific areas, so that single tract litigation is required.[35] Dedication is defined as "the devotion of property to a public use by an unequivocal act of the owner, manifesting an intention that it shall be accepted and used presently or in the future."[36] Two elements are involved: the intention of an owner to offer land or some interest therein, and the acceptance of such an offer by the public.[37] The most interesting aspect of dedication is that both the owner's intent to dedicate and acceptance by the public may be implied.[38] Furthermore, once a dedication is deemed to have occurred, it is not revocable by the owner or his successors and the public cannot lose rights thus obtained through non-use or adverse possession.[39]

Originally the courts applied dedication most often in connection with wildlands,[40] apparently feeling that other methods were more appropriate for obtaining public beaches. In Seaway Co. v. Attorney General,[41] the Texas Court of Civil Appeals ruled that evidence showing a 60 year continuous use of a specific stretch of privately owned beach by the public for recreational purposes was sufficient to show the dedication of a prescriptive easement in

the beach. Subsequent California cases[42] followed this Texas lead in finding intent to dedicate from private owners' and their predecessors' failure to take early and definite action to curtail public use of their property.

The aspect of dedication that has provoked the most discussion is that the intent to dedicate, or animus dedicandi, may be implied. In Gion v. City of Santa Cruz and Dietz v. King[43] the California supreme court held that the public had acquired a recreational easement in privately owned dry-sand and upland areas. Since the private owners had made no significant objection to the public usage for a period of five years, they were presumed to have intended to dedicate the to public use.[44] In order to negate the presumption, a private owner would have to show either that he actually granted the public permission to use the land or that he made bona fide attempts to prevent public use.[45]

The Gion-Dietz approach shortened the "waiting period" for vesting of rights in the public from twenty or more years, which may be required by prescription or adverse possession,[46] to a mere five years. The legal fiction of a presumed intent to dedicate by which this shortening was accomplished, however, has been severely criticized.[47]

Florida apparently has not relaxed the "intent to dedicate" requirement, even though there is some early precedent for allowing implied dedication of easements through acquiescence.[48] As shown in Tona-Rama, if the court decides to protect private over public interests, a finding of an implied dedication can easily be avoided by holding that the use by the public was permissive.[49] Florida seems to agree with Maryland[50] that the distinction between dedication and prescription should not be lost, and that implying a dedication solely through long public use by loosely construing the requirement of intent to dedicate is but a form of prescription for which all of the prerequisites for prescriptive rights should be met.[51]

C. Prescription

Most courts agree that in either prescription or adverse possession, a right is acquired only through actual, continuous and uninterrupted use by the claimant of the lands of another for a prescribed period.[52] Most importantly, the use must be adverse and inconsistent with the owner's use, and be so open or notorious that knowledge of it can be imputed to the owner.[53] The use cannot be permissive, since a permissive use never ripens into a prescriptive right.[54] Adverse possession has the additional requirement of "possession" rather than mere use.[55]

Despite all these requirements, prescription can be an effective means for obtaining an easement across private property, especially where there is no presumption that the public's use of land is by implied license.[56] Since the public and beachfront owners often share the use of a stretch of beach, the degree of adversity required by a given jurisdiction is a critical factor in determining the effective scope of the doctrine. The supreme court of Florida took a restrictive view in Tona-Rama, indicating that something close to adverse possession by the public, rather than mere adverse use of the property, is required.[57] A more liberal approach was adopted by the Texas court in Seaway, which held that

> use by the owners and others at the same time raises the presumption that user by others is permissive only but there may be present in a given case sufficient evidence to show user by the others under a claim of right. Mere joint use is not determinative. If the nature of the use is such as to show to the owner that the users are claiming under a right independent of any permission from him, there is the requisite adverseness.[58]

If prescription is to be of value in acquiring beach access, other courts will have to follow the Texas approach.

D. Public Trust Doctrine

The public trust doctrine states that certain lands to which title is

vested in the state are held in trust for the use of all the people of the state.[59] Consequently, any alienation of such lands by the state must be in the public interest.[60] This doctrine encompasses many areas besides beaches and has been used in the past to protect parklands.[61] Its applicability in the beach area is generally limited to the tidelands or wet sand area. Although public rights in tidelands were once limited to fishing and navigation,[62] the clear trend is towards protection of all recreational activities appropriate to the beach environment.[63] Such activities may be regulated by the state even to the extent of allowing motor vehicles to drive upon the tidelands.[64] Upland owners whose property extends to the high water line share all the rights held by the public with one important difference: they are guaranteed access to the water by virtue of their ownership.[65] Since an upland owner is under no obligation to provide the public with an avenue by which to reach the lands held in trust for them, the construction of a fence and the posting of "No Trespassing" signs may have the effect of turning public tidelands into private beaches. As a result, long stretches of private property and solid blocks of apartments and condominiums have effectively removed hundreds of beaches, including many of the finest, from the public's reach.[66] Of course, once an access way is provided, private owners may not lawfully restrict lateral traverse of the tidelands;[67] but even here upland owners have sometimes successfully discouraged public usage by the erection of high "sea walls" and "groins".[68]

A New Jersey decision, Borough of Neptune City v. Borough of Avon-by-the-Sea,[69] recently breathed new vitality into the public trust doctrine as applied to beach access. In that case, non-residents of Avon-by-the-Sea were charged higher usage fees than residents for using a municipally owned beach. The New Jersey supreme court held that while municipalities may validly charge reasonable beach usage fees they may not discriminate in any respect between residents and non-residents.[70] The court stated in rather significant dictum that:

> The observation to be made is that the statements in our cases of an unlimited power in the legislature to convey such trust lands to private persons may well be too broad. It may be that some such prior conveyances constituted an improper alienation of trust property or at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein. For example, the conveyance of tide-flowed lands bordered by an ocean dry sand area in private ownership to the owner thereof may well be subject to the right of the public to use the ocean waters. And, whether or not there was any such conveyance of tidal land, the problem of a means of public access to that land and the ocean exists.[71]

The Avon decision, at least as far as New Jersey is concerned, has altered the public trust doctrine considerably.[72] The decision implies that courts can protect the public's rights in trust property, or what was once trust property, by denying inconsistent use of such property or of other property adjoining it.[73] The "obligations" the court referred to certainly include allowing the public free access to tidelands. What is unclear is whether the decision also means that the public should have the right to use the dry-sand area which may be privately owned. Two justices on the Avon court were concerned that it did. In dissenting, they said that a municipality should have the right to fence in its entire property to the high water mark and to restrict the use thereof to its own residents.[74] By implication, private beachfront owners should be able to do the same, and, if public beach access is desired, eminent domain is the proper method for obtaining it.[75] The majority suggested that while eminent domain might be the preferred solution given unlimited funds, there may be other viable solutions, such as a public trust doctrine flexible enough "to meet changing conditions and needs of the public it was created to benefit."[76]

II. Beach Access Legislation

Legislation in the beach access area, both at federal and state levels, has been understandably slow in developing. No matter how strongly an elected lawmaker feels about the public's rights in coastal areas, he must hesitate

before confronting one of America's most cherished institutions--the right of an individual to own and freely use or control property. The issue, as recently stated, is: "How can a broader range of policy considerations be incorporated into decision processes at the local level, when the impacts of the decisions transcend jurisdictional lines?"[77] This question has been receiving some tentative answers which will be briefly examined here.

A. Federal Efforts

The Coastal Zone Management Act of 1972 (CZMA)[78] represents the federal government's strongest statement concerning use of coastal areas. The Act recognizes that increasing development and demands upon coastal resources have generated an urgent need for protective legislation,[79] and that present state and local land and water regulating arrangements are inadequate for this purpose.[80] However, rather than preempt state and local efforts, the Act recognizes that

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority...by assisting the states in cooperation with federal and local governments...in developing land and water use programs for the coastal zone.[81]

In short, the preservation of beach resources is a local responsibility. Congress has merely advanced the incentive by increasing the availability of funds for this purpose.

Despite the fact that local governments have often shown themselves susceptible to pressure from developers this may be the best approach. After all, "a town government is charged with protecting the interests of the town residents, not the public at large. Clearly there is a need for a broader perspective, but this perspective should not be allowed to arbitrarily preempt the legitimate concerns of the coastal municipalities."[82]

The problem is to convince local governments of the need for comprehensive

coastal zone management, including the provision of public beach access. To do this, the CZMA employs a traditional carrot and stick approach. First, at the state level, the Act authorizes an initial federal grant paying up to two thirds of the cost of developing a statewide coastal zone management program,[83] an expensive job coastal states must eventually assume anyway. Subsequent grants, however, are dependent upon the satisfactory development of such a program.[84] After a program has been approved, annual grants of up to two-thirds of state implementation costs are authorized. While the requirements for a satisfactory program are necessarily vague, the Act does specify that any state program shall include the power

> to acquire fee simple and less than fee simple interests in lands, waters and other property through condemnation or other means when necessary to achieve conformance with the management program.[85]

Furthermore, a state program must also provide criteria and standards for local implementation in the absence of direct state land and water use regulation.[86] Incentive for local government action is provided through allocation of a portion of the state grant for local implementation of the state program.[87] Federal oversight control is assured by a provision for funding termination if a state fails to adhere to an approved program.[88]

Congress' continuing interest in the problem of public beach access is reflected in the recent enactment of comprehensive amendments to the CZMA.[89] A new provision requires state coastal planning programs to include "A definition of the term 'beach' and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, historical, esthetic, ecological, or cultural value."[90] The amendments provide for an overall allocation of $25,000,000 per year, for five years, to cover up to 50 percent of the cost of acquiring lands needed for "access to public beaches and other public coastal areas...."[91]

Other than the CZMA, federal beach access legislation has been limited to several proposed versions of a National Open Beaches Bill.[92] The compromise but still controversial flavor of these proposals is readily apparent:

> "(T)he beaches of the United States are impressed with a national interest and the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution."[93]

If an Open Beach Bill is ever enacted, such general language would be of only limited benefit in procuring beach access unless coupled with stronger and more specific provisions.[94]

B. State Efforts

The leading state legislation on beach access has come from Texas and Oregon. The Oregon statute,[95] which was relied upon heavily in the Thornton decision,[96] declares that the entire Oregon coastline, except those portions disposed of by the state before July 5, 1947, belongs to the state to be administered as a state recreation area.[97] Furthermore, where public use of beach areas "has been sufficient to create easements in the public through dedication, prescription, grant or otherwise, it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreational resources."[98] This does not mean that private individuals can be divested of their rights in land which, under the Borax decision, may extend to the mean high tide line.[99] It does, however, provide Oregon courts with a strong legislative statement supporting preference of public over private rights in beach areas in doubtful cases.

The Texas legislature has enacted even stronger statutes.[100] The public access provision, however, is limited to areas to which the public has already acquired a right of use or easement through one of the common law theories.[101] A major improvement over Oregon's statute is that

> In any action brought or defended under this Act...a showing that the area in question is embraced within the area from mean low tide to the line of vegetation shall be prima facie evidence that:
> (1) the title of the littoral owner does not include the right to prevent the public from using the area for ingress and egress to the sea;
> (2) there has been imposed upon the area subject to proof of easement a prescriptive right or easement in favor of the public for ingress and egress to the sea.[102]

There are criminal penalties and fines for the display of any communication at any public beach which states that the public does not have the right of access to such public beach.[103]

Except for Oregon and Texas, state legislation has largely been piecemeal. Florida's beach access legislation affords a good example. A statement of the public's interest in beach areas is noticeably absent from the Florida Beach and Shore Preservation Act.[104] There is, however, a provision for the purchase of public access easements.[105] Also, under the Outdoor Recreation and Conservation Act,[106] the Division of Recreation and Parks of Florida's Department of Natural Resources may exercise the power of eminent domain to acquire any and all rights which may be necessary for the use and enjoyment of public waterways.[107] The Department is also authorized to assist local governments financially in the acquisition of local beach properties, and is urged by the legislature to give priority to applications relating to the acquisition of public beaches in urban areas.[108]

III. The Role of Local Governments

There do not appear to be any simple answers to the beach access problem. It is unlikely that the United States Supreme Court will soon declare the right of public access to the beach a fundamental right.[109] It is equally unlikely, with all the other demands on state treasuries, that state governments will allocate adequate funds to solve the problem through the exercise of eminent domain. Local governments are thus faced with the problem of how to go about procuring public beach access without alienating beachfront property owners and

without bankrupting local treasuries.

A. Eminent Domain and the Police Power

The federal government, the states, and authorized counties and municipalities are clearly impowered to purchase or condemn land for park and recreational purposes.[110] Beaches have been recognized as suitable for the creation of public parks.[111] Therefore, as the dissenters in Borough of Neptune City v. Borough of Avon-by-the-Sea[112] pointed out, eminent domain at first glance appears to be the cure-all for the beach access problem. This is not the case. The federal and most state constitutions prohibit the taking of private property for public use without just compensation.[113] Just compensation for beach property, especially after development, is extremely expensive. There are other problems as well. For example, it is also generally required that there be a necessity for the taking of private property.[114] The necessity requirement builds in a "Catch 22". Beaches in relatively non-populated areas are exempt from forced acquisition by the state until there is adequate population within a reasonable distance to justify it. By the time the area is sufficiently populous, the property is prohibitively expensive.[115] For this reason there is more and more interest in the acquisition of easements, rather than fee simple interests in beach lands.[116] Such easements can be either positive or negative in nature.[117] Since the owner's interests may overlap with the public's, and since all the public requires is access to the publicly owned wet sand area and, in some cases, the right to use the dry-sand area for recreational purposes, it seems reasonable that some upland owners might consent to sell easements in their properties.[118] Furthermore, with such compatible usage, the courts would be less likely to hold an exercise of the state's eminent domain power, or even the police power to be unlawful since the upland owner would still be able to make beneficial use of his property.[119] Nevertheless, the purchase of easements would still be expensive, and might be resisted by taxpayers who object to

purchasing what they tend to regard as theirs anyway.

A further possibility to be explored is a potential residual effect of exercising the state police power to protect beach areas. Obviously, a direct exercise of the police power to obtain beach access would probably constitute an unconstitutional deprivation of private property. However, each state has the power to reasonably regulate the use of private property in the interest of public safety and welfare.[120] With over 25 percent of the nation's shoreline suffering serious erosion,[121] with many beach lands being irreparably destroyed, and with the availability of federal help to control such erosion tied to the existence of sufficient public access,[122] regulation designed to stop uncontrolled development which is unreasonable and injurious to the public shores would appear to be a legitimate exercise of the police power.[123] Furthermore, if the reasoning of the Wisconsin supreme court in the recent decision of Just v. Marinette County[124] is followed, local governments may be able to prevent construction in dry-sand areas as well. In Just the court sustained a prohibition on the filling of wetlands by reasoning that the property owner's interest in his property should be based only upon the uses for which it is suited in its "natural state".[125] Since the land was unfit for development without artificial fill, the regulation precluding such use did not deprive the landowner of a real interest in his property.[126] Therefore, no compensable taking has occurred. Arguably, the same reasoning could be applied to beach areas which are unsuited for development without artificial means for stabilizing the sand.[127] This is not to suggest that the police power should be used to obtain beach access under the guise of protecting public safety. Clearly such action would be invalid. However, it should be a valuable side-effect of valid beach and shore protection measures, and should be considered in the planning process.

B. Mandatory Dedication

As public need for recreation increases with rapidly expanding urbanization,[128] there is evident an ever-increasing conflict between public beach use and the rights of private landowners. This conflict must inevitably lead to some reevaluation of private littoral owners' property rights.[129] The goal is to provide for the development of coastal lands in a manner that both increases their value and allows public recreational use. This goal can be achieved through land-use planning administered by local government regulatory authority. This section details operation of a traditional land-use mechanism--subdivision exaction--as an effective means of ensuring public beach access.

State and local legislation throughout the nation has sought to condition approval of subdivision development upon the developer's consent to some exaction. The required dedication of essential community services such as streets,[130] sidewalks,[131] water and sewer lines[132] is now a well accepted aspect of subdivision regulation.[133] Required dedications classified as exactions typically go beyond these normal public services,[134] requiring donation of land for schools,[135] parks, or recreational purposes.[136]

Most subdivision litigation has involved exactions.[137] Developers have most frequently challenged exactions as an unconstitutional taking of private property without just compensation.[138] No settled doctrine has evolved in response to these challenges; a reading of the cases discloses only generally applicable, broad principles rather than definitive answers.

One rationale that has been used to validate mandatory dedication requirements is that the attempt to secure plat approval is voluntary. In Billings Properties, Inc. v. Yellowstone County,[139] this rationale was used to uphold a statute requiring dedication of land as a precondition to plat approval. The court reasoned that the developer was not required to sell by plat,[140] and therefore the owner voluntarily dedicated some land to the public in exchange

for the advantage and privilege of having his plat recorded. The court concluded that this was a reasonable exercise of the police power.[141]

A second theory, employed by some courts, is the economic benefit test enunciated in Jordan v. Menomonee Falls.[142] In that case, the court reasoned that by approving a plat the municipality enabled a developer to subdivide his land, thereby increasing its economic value.[143] In return for the benefit derived, a developer should dedicate land to meet the demands created by his activities and the resulting influx of new residents.[144] The difficulty with this approach is that it assumes subdivision of property is a privilege rather than a right and consequently fails to address the basic question of the right to use property subject to reasonable regulation under the police power.[145]

A third approach was articulated in Pioneer Trust and Savings Bank v. Village of Mount Prospect,[146] in which the Illinois supreme court stated:

> (I)f the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the regulation is permissible; if not, it is forbidden and amounts to a confiscation of property in contravention of constitutional prohibitions rather than reasonable regulation under the police power.[147]

Applying this "specifically and uniquely attributable" test, the court found the required dedication for recreational facilities unlawful and confiscatory. Although the strict approach of Pioneer Trust is not frequently followed, the majority of courts still accept the premise upon which the theory was predicated; that is, that a need for parks and recreational facilities must be created by increased subdivision growth in order to justify mandatory dedication.[148] In almost every instance where the strict approach has been taken, dedicatory requirements have been held unconstitutional.[149]

Realizing the difficult burden imposed upon a municipality to demonstrate that a required dedication for a park or school site is to meet a demand solely attributable to the creation of new subdivision,[150] some courts have allowed exactions if evidence establishes a rational nexus between the exactions and the

public needs created by a new subdivision.[151] Other courts, while purportedly applying the "specifically and uniquely attributable" test, have found the test satisfied on the basis of legislative enactments enabling local governments to require exactions. The test is satisfied by a presumption of legislative validity.[152]

A modern and progressive approach to the exactions question may be found in the leading case of Associated Home Builders, Inc. v. City of Walnut Creek.[153] In that case, a state statute[154] authorized the governing body of a city or county to require that a subdivider dedicate land or pay fees in lieu thereof for park or recreational purposes. The municipality enacted an ordinance requiring a subdivider to provide one-half acre of parkland for each 1,000 new residents, or a fee equal in value to such land.[155] The developer challenged the state statute contending that it amounted to a deprivation of private property without just compensation. The court upheld the constitutionality of the act based upon the economic benefit theory[156] and the state police power,[157] finding that the statute could be justified on the basis of a general public need for recreational facilities caused by present and future subdivisions.[158]

Courts customarily consider the reasonableness of the police power under general rubrics, including arbitrariness, confiscation and discrimination.[159] Dedicatory statutes and regulations have been declared invalid as confiscatory if they require an excessive dedication of property[160] and as arbitrary when they bear no relation to the need created by the developers' activities.[161]

An alternative to required dedication of land which has found increasing acceptance in recent years is the concept of "in-lieu" payments.[162] The purpose of in-lieu payments in a subdivision regulation scheme is to permit or require a developer to make monetary payment to public authorities to contribute to the cost of land for public services such as parks and schools. Such payments are typically required when the size or location of a subdivision make actual dedications economically burdensome or inappropriate from a public use

standpoint.[163]

While statutes in a number of states provide for payment of a fee in lieu of land dedication,[164] this approach has been criticized when use of the money is not limited solely to the subdivision generating the fees.[165] In Gulest Associates, Inc. v. Town of Newburgh[166] an ordinance which provided that the funds collected were to be used for the benefit of the entire town was held unconstitutional.[167] Courts have held that failure to limit expenditure of fees to benefit the subdivision from which they were collected constitutes an illegal tax.[168] The Gulest decision was later overruled in Jenad, Inc. v. Village of Scarsdale,[169] in which the court took note of the fact that although some subdivisions may be too small to allow for open space to be set aside within them, they still increase the need for open space and parkland; therefore, it is reasonable to assess developers as long as the funds are earmarked for use in the town or village.[170] This line of reasoning was further extended in Walnut Creek, which suggested that the fee collected from one developer may be used in another part of the city to maintain proper balance between the number of persons in the community and the amount of parkland available.[171] Indeed, the court noted that it would be patently unfair and perhaps discriminatory to require one property owner to dedicate land while exacting no contribution from another simply because of fortuitous circumstances of size or location of the subject property.[172]

The court in Walnut Creek also held that assessing an in-lieu fee on the basis of market value of land which would otherwise be dedicated was a sufficiently definite standard.[173] "The question of fair market value is litigated frequently in the courts and no authority cited requires a more precise definition."[174] The court further stated the criteria for determining when a fee should be required in lieu of dedication may be as broad as whether "the slope, topography and geology of the site as well as its surroundings are suitable for the intended

use of the park."[175] Finally, fees may be used for acquisition of land or for improvement of recreational lands already acquired, but not for unrelated purposes.[176]

C. Subdivision Exactions and Public Beach Access

Subdivision exactions are increasingly viewed by the courts as a valid regulatory mechanism to overcome the problem of the rapid disappearance of park and recreational space in urbanized areas. As such they constitute a means of land-use planning capable of allowing reasonable coastal land development while preserving adequate public beach access. While most of the demand for public beach access comes from areas outside coastal subdivisions, the existence of such subdivisions aggravates the access problem by cutting off existing access, raising land values and creating a pattern of land use that makes future purchase of beach access more difficult and expensive.[177] Moreover, dedication requirements generally involve only a small percentage of a subdivision tract or its value, and this cost is ultimately borne by the new residents rather than a particular developer.[178]

Requiring mandatory dedication of land or in-lieu fees for beach access as a precondition to plat approval has several advantages. Subdivision exactions can be utilized on a local level where the affected public wields its greatest influence. Local boards can implement an exactions requirement with relative ease and minimum expense. The expense of litigation and evidentiary problems associated with establishing a common law easement are avoided.[179] Finally, exactions affect areas about to undergo extensive development and force developers to pay the costs otherwise borne by the public.

Despite these advantages, subdivision exactions are not the final solution to the problem of adequate public beach access. The major problem lies in the fact that such exactions apply only to new areas facing development. A developer must seek plat approval before dedication is required. Consequently, older

developments and even new developments on previously approved plats are not affected.[180] This problem is exacerbated in states like Florida where the cyclical nature of land speculation has left vast numbers of vacant platted lots.[181] Moreover, it is often unclear whether a developer who seeks to build or convert to a condominium development must comply with subdivision regulations.[182] Nevertheless, while subdivision exaction is only one of several available means of preserving public beach access, it does have potential for assuring substantial beach areas for public use.

IV. Conclusion

This part of the report has discussed the legal principles which are currently used to secure public beach access. However, much more is needed. The public's right to the foreshore is diminishing, in effect, as upland and dry-sand areas undergo extensive development. While the need to reverse this trend grows with our increasing population, so does the cost of such an undertaking. Until state and federal governments allocate sufficient funds to purchase an adequate supply of public beaches, the burden rests largely with municipal and county governments. The Model Beach Access Ordinance presented in this report is offered to assist local communities in alleviating their burden.

MODEL BEACH ACCESS ORDINANCE

The basic objective of this model ordinance is the provision of public beaches and public access ways needed to meet increasing public demands for beach recreation areas in a time of expanding coastal development by private owners. In order to deal with diverse factual patterns of prior public use and present or future development, the ordinance incorporates a broad range of approaches, including common law theories, purchase, eminent domain, and mandatory dedication of land by developers.

Alterations of the following model will no doubt be necessary to meet the particular needs of any given community. This is especially true regarding adoption in states other than Florida, which has served as the legal focus of the ordinance. For example, Section Four, which deals with formation of a Comprehensive Beach Access Plan, places responsibility for this plan with the local planning agency mandated by the Local Government Comprehensive Planning Act of 1975 (Fla. Stat. § 163.3161 et. seq.). A required element of the Comprehensive Plan envisioned by this act is provision for public beach access. In other jurisdictions, a local government might designate any other existing planning body to fulfill this role and to avoid any overlapping of functions, make maximum use of available personnel and expertise and coordinate beach access planning with broader land use programs.

The primary function of the planning agency is formulation of a comprehensive plan which will guide regulation of pre-existing public rights, dedicatory requirements, purchase, the exercise of eminent domain and provisions for support facilities. Considerable initial investigation will be required to assess present and

future public needs and to integrate the different sources of public beach ownership, use and access rights into an overall plan.

Local ordinances cannot, of course, achieve the sweeping impact and effectiveness of state-level legislation. More states must follow the lead of Texas and Oregon if we are to preserve beach resources for future generations. Each passing day of governmental inaction, however, makes the problem more acute and solutions more difficult. Therefore, local governments must act quickly in the areas of coastal zone management and the preservation of public beaches. The goal is to create a comprehensive plan which is both responsive to public needs and fair to private landowners. Careful planning and vigorous implementation of a public beach program within the framework of this model ordinance offers a viable means of attaining this goal.

MODEL PUBLIC BEACH ACCESS ORDINANCE

SECTION ONE: SHORT TITLE

This ordinance shall be known as the Public Beach Access Ordinance.

SECTION TWO: FINDINGS OF FACT AND OBJECTIVES

2.1 Findings of Fact.

(a) The public beaches are lands held in trust for the people;

(b) The citizens of the state have the rightful use of such public beaches;

Commentary. The rights of the public in coastal areas are discussed at notes 3-10 and 54-72 supra. For a more detailed history and discussion, see R. Clark, Water & Water Rights § 36.4(b)(1967); H. Farnham, Water & Water Rights (1904); F. Maloney, Water Law and Administration 353-57 (1968); Owens & Brower, Public Use of Coastal Beaches 16-83 (1976); Dunscombe, Riparian and Littoral Rights (1970); Maloney & Ausness, The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping, 53 N.C.L. Rev. 186, 189-193 (1974); Note, Public Rights in Georgia's Tidelands, 9 Ga. L. Rev. 79 (1974). The operative language is drawn from Ore. Rev. Stat. §§ 390.610-.690 (1968) and Vernon's Ann. Civ. Stat. § 5415d (1975).

(c) The citizens of _____ (local unit) maintain and support the public beaches;

Commentary. This support may take several forms, such as federal and state erosion control expenditures, as well as expenses for cleaning, lifeguards and other peripheral local services.

(d) The _____ (governing body) deems it essential for the promotion, protection and improvement of the public health, safety, comfort, good order, convenience and general welfare that all citizens have reasonable access to and use of such public beaches;

Commentary. The foregoing language is modeled after that found in Ore. Rev. Stat. § 390.610 (1968); Vernon's Ann. Civ. Stat. Art. 5415d § 1 (1975); Proposition 20, Cal. Coastal Zone Conservation Act of 1972; Cal. Public Resources Code § 10002.

(e) Development of coastal areas by private landowners frequently increases demand for recreational areas, restricts access to public beaches, and adds to the cost of acquiring public access ways.

2.2 Objectives.

In order to secure for the public access to and enjoyment of the natural resource amenities of the beaches of _____ (local unit), and to protect and develop beach resources for the greatest benefit of all citizens, it is hereby declared to be the legislative intent of this ordinance to provide for the planned and orderly development of coastal lands so as to ensure the provision and maintenance of public beaches and public access ways and the preservation and use of public beach rights which have arisen through prescription, custom, dedication or otherwise.

SECTION THREE: DEFINITIONS

Unless specifically defined below, words or phrases shall be interpreted so as to give them the meaning they have in common usage and to give this ordinance its most reasonable application.

(a) "Beaches" are all coastal sandy areas along the Gulf of Mexico or Atlantic Ocean, including wet sand, dry sand and immediate upland areas.

(b) "Coastal lands" as used in this ordinance shall mean those lands adjacent to the Gulf of Mexico or Atlantic Ocean, including beaches and their immediate uplands, and designated in the Comprehensive Beach Access Plan as subject to regulation under this ordinance.

(c) "Public Access Ways" are lands over which the public has a right of traverse to reach public beaches.

(d) "Public beach" shall mean any beach which has been dedicated to the public or in which the public has acquired a right of use by easement, prescription,

custom, government ownership, or any other act, law or instrument.

(e) "Support facilities" shall mean shelters, equipment, restrooms, parking areas and other facilities necessary for the safe, healthful and convenient use and enjoyment of public beaches.

(f) "Subdivision" shall mean the division of a parcel of land, whether improved or unimproved, into three or more lots or parcels of land for the purpose, immediate or future, of transfer of ownership. For purposes of this ordinance, the term "subdivision" shall include condominium development.

Commentary. The definition of beaches is limited to coastal sandy areas since the ordinance is aimed at acquisition and preservation of recreational areas rather than broader aspects of coastal zone management or land use planning.

The definition of public beach takes into account the fact that as a result of common law theories of dedication, prescription and custom the public may acquire rights to uplands and dry sand areas in addition to the publically owned foreshore. These same theories are a source of public rights of traverse or public access ways. Additional public beaches and public access ways will be created through the mandatory dedication requirements of § 5 of the ordinance.

The definition of "subdivision" varies among jurisdictions, with the number of lots involved being generally from three to six. In order to achieve a maximum regulatory impact the smaller of these common numbers was chosen for purposes of triggering the mandatory dedication requirements of Section Five of the model ordinance. The particular definition employed is based on that found in Fla. Stat. § 163.170(7).

SECTION FOUR: PUBLIC BEACH PLANNING AND ADMINISTRATION

The _____ mandated by the Local Government Comprehensive
(local planning agency)

planning Act of 1975 shall have primary responsibility for administration of this ordinance.

4.1 Powers and Duties.

The _____ shall prepare and make recommendations to the
(local planning agency)

_____ regarding the adoption of a Comprehensive Beach Access Plan
(governing body)

which will provide regular and frequent public beaches and public access ways capable of meeting present and forseeable public recreational needs. In developing the Comprehensive Beach Access Plan, the _____ (local planning agency) should consider, among other factors:

(a) the location and extent of areas to which the public has acquired rights of use or traverse through prescription, custom, dedication or otherwise, and the possibilities for regulation, relocation, expansion and improvement of such areas where desirable;

(b) the location of lands to be acquired through mandatory dedication under Section Five of this ordinance;

(c) areas appropriate for acquisition through purchase and exercise of eminent domain;

(d) methods for obtaining federal, state, local and private funding;

(e) the location of environmentally sensitive areas requiring special protection; and

(f) the availability of and optimal location for support facilities.

4.2 Beach Access Map.

To the extent feasible or practical, the _____ (local planning agency) shall present its findings, conclusions and proposals in the form of a Beach Access Map available to the general public. The map should designate, along with other relevant data, the location and extent of public beaches, public access ways, environmentally sensitive areas, coastal lands subject to future development under the mandatory dedication requirements of this ordinance, areas of contemplated public purchase, and the nature and location of support facilities.

4.3 Procedures.

(A) General Rules.

The _____ (local planning agency) shall establish general rules of procedure and select its officers.

(B) Public Participation.

The _____ (local planning agency) shall establish procedures for providing effective public participation in the comprehensive planning process and preparation of the comprehensive plan. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public hearings, information services, and consideration of and response to public comments.

(C) Public Hearings.

Public hearings shall be conducted after due public notice consisting of publication of notice of the time, place, and purpose of such hearing at least twice in a newspaper of general circulation in the area.

(D) Public Meetings and Records.

All meetings of the agency shall be public meetings and all records public records.

(E) Adoption of the Comprehensive Plan.

After preparation of the comprehensive plan and compliance with the provisions of Fla. Stat. § 163.3184 on intergovernmental comment procedures, the _____ (governing body) may in a manner prescribed by law and by vote of a majority of its total membership, adopt the proposed plan in whole or part, and may adopt it with changes or amendments.

(F) Amendment of the Comprehensive Plan.

Amendment of the comprehensive plan shall be in the manner provided for

original adoption of the plan, except that the _____ may by
(governing body)
majority vote and after public notice and a public hearing, adopt specific amendments affecting less than 5 percent of the land of the jurisdiction.

(G) Assessment and Evaluation of the Comprehensive Plan.

The planning program shall be a continuous process. The _____ shall prepare periodic reports at least once every five years and at lesser intervals as required by the _____. The report shall compare plan
(planning agency) (governing body)
objectives and actual results, evaluate social and economic effects, assess unforseen problems and opportunities, and may suggest changes in the comprehensive plan. Any action on the report will constitute an amendment of the comprehensive plan.

4.4 Implementation of the Comprehensive Plan.

(A) Intent.

It is the intent of this ordinance that an adopted comprehensive plan shall be implemented, in part, by the adoption and enforcement of appropriate local regulations controlling zoning, subdivision, building and construction, and other land development. Where relevant, the enactment, amendment and enforcement of these regulations shall be based on, consistent with, and a means of implementation for the adopted comprehensive plan. Land development regulations proposed subsequent to adoption of a comprehensive plan shall be referred to the _____ (planning agency) for review and recommendation regarding the relationship of such proposals to the comprehensive plan. If a recommendation is not forthcoming within 2 months of the referral, the _____ may proceed without it.
(governing body)

Commentary. As noted earlier, the provision of the ordinance are tailored to the laws of Florida. Thus the utilization of

the planning agency mandated by the Local Government Comprehensive Planning Act of 1975, Fla. Stat. § 163.3161 et. seq. This act requires that all local governments within the State of Florida prepare a comprehensive plan by July 1, 1979 to guide and control future land development. A required element of this plan is a recreation and open space provision for a comprehensive system of public sites for recreation, including beaches and public access to beaches. Fla. Stat. § 163.3177 (6)(e). In addition to home rule powers, municipalities and counties are given the power and responsibility to plan for future development and to adopt and implement comprehensive plans through adoption of appropriate land development regulations. The procedural requirements of this Section are derived from and are consistent with those of the above Act.

In other jurisdictions the following alternative provisions for a planning agency may be utilized:

4.1 Establishment of a Public Beach Access Commission. (Alternative)

The _____ (governing body) shall establish a Public Beach Access Commission and appoint members thereto, or the commission may consist of the _____ (governing body) or any other existing planning commission or board.

4.2 Terms of Office; Removal from Office; Vacancies. (Alternative)

Members of the commission shall be appointed for staggered terms of such length as may be determined by the _____ (governing body) and shall serve until their successors are appointed. Original appointment may be made for a lesser number of years so that the terms of the said members shall be staggered. The _____ (governing body) may remove any member of the commission for cause after written notice and public hearing. Any vacancy occurring during the unexpired term of office of any member shall be filled by the _____ (governing body) for the remainder of the term. Such vacancy shall be filled within thirty (30) days after the vacancy occurs.

4.3 Officers, Rules of Procedure, Consultants and Advisors. (Alternative)

(a) The commission shall elect a chairman and a vice-chairman from among its members.

(b) The commission shall meet at regular intervals and at such other times as the chairman or commission may determine. It shall adopt rules for the transaction of its business and keep a properly indexed record of its resolutions, transactions, findings and determinations, which record shall be a public record.

(c) The commission may, subject to the approval of the _____ (governing body) employ such experts, technicians, and staff as may be deemed proper and pay their salaries, contractual charges and fees, and such other expenses as are necessary to conduct the work of the commission.

SECTION FIVE: DEDICATION OF LAND

5.1 Approval of Development Plans and Issuance of Building Permits.

As a condition for obtaining approval for a subdivision[or the issuance of a permit for building] on coastal lands, the subdivider [or applicant] shall contract to dedicate land, or a fee in lieu thereof to the public. The amount of the dedication shall be _____% of the land or its value prior to development. Lands dedicated will be used to provide public beaches, public access ways and support facilities. In lieu payments will be expended for the same purposes and in a manner designed to benefit the general area of a subdivider[or applicant] making the payment.

5.2 Location and Physical Requirements.

The location and physical requirements of land dedicated for public beaches and public access ways shall be determined by the _____ (local planning agency) based on the Comprehensive Beach Access Plan.

5.3 Method of Providing Land.

Land for public beaches and public access ways may be provided by deed, easement, dedication or any other method which guarantees public use in perpetuity and is approved by the _____ (local planning agency).

5.4 Waiver of Requirements.

To the extent that enforcement of this Section will create an unduly severe hardship, the _____ (governing body) may waive the requirements of this Section.

5.5 Transfer of Development Rights.

Where a subdivider[or applicant] has conveyed lands for public beaches or public access ways, the _____ (governing body) may authorize the transfer of development rights to lands adjacent to the lands so conveyed. The number of development rights which may be transferred and the method by which such transfer is accomplished shall be determined by the _____ (governing body).

5.6 Procedures.

The _____ (local planning agency) shall have preliminary responsibility for determining the form of dedications, the location and physical requirements of lands dedicated, methods of dedication, waiver of requirements and transfer of development rights in a manner consistent with the purposes and provisions of an adopted comprehensive plan. Within a reasonable time, not to exceed two (2) months of an offer to dedicate pursuant to this ordinance and after public notice and hearing, the _____ (local planning agency) shall make its recommendations to the _____ (governing body). The _____ (governing body) may, by a majority vote and in a manner provided by law, accept or modify in whole or part the recommendations of the _____ (local planning agency).

5.6 Procedures. (Con't)

Commentary. The authority of local governments to require mandatory dedication of land as a precondition to plat approval is discussed at notes 125 to 180 supra.

Attention is drawn to the fact that dedication may be conditioned on approval of building permits. At least one jurisdiction has upheld a similar requirement--Southern Pacific Co. v. City of Los Angeles, 51 Cal. Reptr. 197 (Dist. Ct. App. 1966), appeal dismissed per curiam, 87 S. Ct. 767 (1967). Other courts, particularly in Florida, take the position that such a requirement constitutes an unauthorized tax. See, e.g., Broward County v. Janis Development Corp., 311 So.2d 371 (4th D.C.A. Fla. 1975).

The actual percentage of land required to be dedicated should be based on a careful study of projected population and development trends and beach recreation needs. Percentage requirements ranging from 4% to 11% have been held valid. (Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25 394 P.2d 182 (1964) and Aunt Hack Ridge Estates, Inc. v. Planning Commission of Danbury, 27 Conn. Supp. 74, 230 A.2d 45 (1967).). Flat percentage requirements have, however, been held to be arbitrary on their face. Frank Ansuini, Inc. v. Cranston, 264 A.2d 910 (R.I., 1970); Admiral Development Corp. v. City of Maitland, 267 So.2d 860 (4th D.C.A. Fla. 1972).

Expenditures of in-lieu payments has been limited to the immediate area of the developer making the payment to comply with the limitations of the more conservative line of cases (see Aunt Hack Ridge, supra). However, progressive cases such as Walnut Creek require no such limitation.

SECTION SIX: OPERATION OF PUBLIC BEACHES AND PUBLIC ACCESS WAYS

6.1 Maintenance.

The _____ (local recreation dept.) shall have the duty and responsibility to maintain and promote the condition of all public beaches, public access ways and support facilities affected by the provisions of this ordinance.

Commentary. See Brickell v. Town of Fort Lauderdale, 78 So. 681 (Fla. 1918) stating that there is a duty on a city as trustee of the public rights in dedicated lands to maintain public uses in those lands.

A similar responsibility is imposed on areas affected by a public interest or right, however acquired, to assure safe, healthful and attractive beach recreation areas. For a similar provision, see Vernon's Ann. Civ. Stat., Art. 5415d-1(c) and § 5 (1975).

6.2 Signs.

The _____ (local recreation dept.) may provide signs or other markings to indicate the location and extent of public beaches, public access ways and support facilities.

Commentary. Since public beach areas will invariably adjoin private property, signs designating the extent of available public areas and services are desirable to avoid encroachment upon and abuse of privately owned areas.

6.3 Charging of Fees.

The _____ (local recreation dept.) may impose reasonable and nondiscriminatory fees for the use of public beaches and public access ways acquired through purchase by or dedication to the _____ (local government).

Commentary. Reasonable and nondiscriminatory fees provide a legitimate and readily available means of offsetting the cost of acquiring and maintaining beach recreational areas and facilities. See Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47 (N.J. 1972)(allowing reasonable and nondiscriminatory fees); Vernon's Ann. Civ. Stat., Art. 5415d-1, § 3(d) and 8 (authorizing fees for the use of beach parking and other facilities). See also, City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 78 (Fla. 1974), stating that rights of customary use of the dry sand area of beaches is subject to appropriate governmental regulation.

SECTION SEVEN: OBSTRUCTION OF PUBLIC BEACHES AND PUBLIC ACCESS WAYS

No person, firm, corporation, association, or other legal entity shall create, erect, or construct any obstruction, barrier or restraint which is inconsistent with or interferes with the exercise of any public rights, except as otherwise authorized by the _____ (governing body). Violation of this provision shall constitute a misdemeanor punishable by fine or imprisonment of not more than $_____ or greater _____ days.

SECTION SEVEN: (Con't)

Commentary. Language derived from Vernon's Ann. Civ. Stat., Art. 5415d, § 1. See City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 78 (Fla. 1974), stating that an owner of land cannot make any inconsistent use of that land which interferes with public rights acquired through custom or prescription.

SECTION EIGHT: INTERPRETATION

This ordinance is intended to increase the availability of public beaches and public access ways, and nothing in this ordinance shall be construed so as to diminish or restrict public beach rights and privileges which exist or may come into existence in any other manner.

SECTION NINE: SEVERABILITY

It is the intention of the _____ (governing body) that each separate provision of this ordinance shall be deemed independent of all other provisions herein, and it is further the intention of the _____ (governing body) that if any provisions of this ordinance be declared to be invalid, all other provisions thereof shall remain valid and enforceable.

SECTION TEN: EFFECTIVE DATE

11. See Note, Public Rights in Georgia's Tidelands, 9 Ga. L. Rev. 79, 89 (1974).

12. See Martin v. Waddell's Lessee, 41 U. S. 367 (1842).

13. Farnham, supra note 7 at 167.

14. Illinois Central Railroad Co. v. Illinois, 146 U. S. 387, 452-54 (1892).

15. See Borax Consolidated, Ltd. v. Los Angeles, 296 U. S. 10 (1935). While most coastal states hold that the wet sand area between mean high water and mean low water is held in trust for its citizens, Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania and Virginia hold that private ownership of uplands extends to the low water mark. Maloney and Ausness, The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping, 53 N.C. L. Rev. 185, 200-203 (1974).

16. See 26 U. Fla. L. Rev. 586 (1973); 29 U. Miami L. Rev. 149 (1974); 2 Fla. St. L. Rev. 806 (1974).

17. Black's Law Dictionary 461 (4th ed. rev. 1968).

18. For an extended discussion of the requisites of customary rights, see Note, The English Doctrine of Custom in Oregon Property Law: State ex. rel. Thornton v. Hay, 4 Envir. Law 383, 395-410 (1974). According to Blackstone, "To make a particular custom good, the following are necessary requisites.
    1. That it have been used so long, that the memory of man runneth not to the contrary...
    2. It must have been continued...
    3. It must have been peaceable, and acquiesced in; not subject to contention and dispute...
    4. Customs must be reasonable...
    5. Customs ought to be certain...
    6. Customs, though established by consent, must be (when established) compulsory...
    7. Lastly, customs must be consistent with each other..."
    1 Blackstone, Laws of England 76-78 (1758).

19. See, e.g., Perley v. Langley, 7 N.H. 233 (1834); Knowles v. Dow, 22 N.H. 387 (1851), Nudd v. Hobbs, 17 N.H. 524 (1845).

20. Delaplane v. Crenshaw, 56 Va. (15 Gratt.) 457, 470-75 (1860). Further reliance is placed on the fact that recording systems have been in effect since the formation of this county. Gillies v. Orienta Beach Club, 159 Misc. 675, 681 289 N.Y.S. 733, 739-40 (Sup. Ct. 1935).

21. 254 Ore. 584, 462 P.2d 671 (1969).

22. 462 P.2d at 678.

23. Id. at 676.

24. See Note, The English Doctrine of Custom in Oregon Property Law, 4 Envir. Law 383, 395-410 (1974); Note, Public Access to Beaches, 22 Stan. L. Rev. 564, 584-85 (1970); Comment, Judicial and Legislative Protection of the

Public's Rights in Florida Beaches, 25 U. Fla. L. Rev. 586, 590-92 (1973).

25. Note, Public Access to Beaches, 22 Stan. L. Rev. 564, 584-85 (1970).

26. See Dept. of Natural Resources v. Ocean City, 274 Md. 1, 13, 332 A.2d 630, 638 (1975).

27. 462 P.2d 671, 78 (1969).

28. 296 U.S. 10 (1935).

29. In re Ashford, 50 Hawaii 314, 440 P.2d 76 (1968).

30. 294 So.2d 73 (Fla. 1974).

31. Id. at 78.

32. Id.

33. Id. at 79, 81.

34. Id.

35. See Dietz v. King, 2 Cal. 3d 29, 465 P.2d 50 (1970).

36. 11 McQuillin, The Law of Municipal Corporations § 33.02 at 627-30 (3d ed. rev. 1968).

37. See Note, Public Access to Beaches, 22 Stan. L. Rev. 564, 572-75 (1970); See also Miller v. Bay-to-Gulf, Inc., 141 Fla. 452, 193 So. 425 (1940).

38. Id.; Miami Beach v. Miami Beach Development Co., 153 Fla. 107, 14 So.2d 172 (1943). The United States Supreme Court recognized implied dedication almost 150 years ago. Barclay v. Howell's Lessee, 31 U.S. (5 Pet.) 498 (1832).

39. See Note, Public Access to Beaches, 22 Stan L. Rev. 564, 572-75 (1970).

40. See, e.g., South Park v. Montgomery Ward & Co. 248 Ill. 299, 93 N.E. 910 (1910), (park); Codman v. Crocker, 203 Mass. 146, 89 N.E. 177 (1909), (common).

41. 375 S.W.2d 923 (Tex. Civ. App. 1964).

42. Gion v. City of Santa Cruz, Dietz v. King, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

43. Id..

44. 465 P.2d at 58.

45. Id. at 57. This a departure from the rulings of earlier courts which held that long, unobstructed public use of beaches was presumed to be under a revocable license from the owner. See, e.g., F.A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 P. 62 (1915); City of Manhattan Beach v. Cortelyou, 10 Cal. 2d 653, 76 P.2d 483 (1938).

46. See Degnan, Public Rights in Ocean Beaches: A Theory of Prescription, 24 Syracuse L. Rev. 935 (1973)(hereinafter cited as Degnan); 3 Am. Jur. 2d Adverse Possession § 9-11. The actual period required is generally set by statute.

47. See, e.g. Note, Californians Need Beaches--Maybe Yours!, 7 San Diego L. Rev. 605 (1970); Note, Public Access to Beaches: Common Law Doctrines and Constitutional Challenges, 48 N.Y.U. L. Rev. 369 (1973); Comment, This Land Is My Land, 44 So. Cal. L. Rev. 1092 (1971).

48. City of Palmetto v. Katsch, 86 Fla. 506, 98 So. 352, 353 (1923).

49. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 77 (Fla. 1974).

50. See Dept. of Natural Resources v. Ocean City, 332 A.2d 630, 635 (Md. 1975).

51. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 77-78 (Fla. 1974).

52. See, e.g., Downing v. Bird, 100 So.2d 57, 64-65 (Fla. 1958); City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73 (Fla. 1974); Degnan, supra note 46.

53. Downing v. Bird, 100 So.2d 57, 64-65 (Fla. 1958); Seaway Co. v. Attorney General, 375 S.W.2d 923, 936 (Tex. Civ. App. 1964).

54. Downing v. Bird, 100 So.2d 57, 65 (Fla. 1958).

55. "The real practical difference between adverse possession and prescription is that the former relates to and results in full and complete title to property, whereas prescription relates to incorporeal heriditaments, or rights such as easements." 3 Am. Jur. 2d Adverse Possession § 4.

56. The majority position is that once a claimant has shown an open, notorious and continuous use for the prescribed period, his use is presumed to be adverse. See Annot., 170 A.L.R. 776, 778-89 (1947). The case for acquisition of recreational easements in appropriate dry-sand areas through public prescription is made in Note, Public Rights in Ocean Beaches: A Theory of Prescription, 24 Syr. L. Rev. 935 (1973).

57. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 77 (Fla. 1974).

58. Seaway Co. v. Attorney General, 375 S.W.2d 923, 938 (Tex. Civ. App. 1964).

59. White v. Hughes, 190 So. 446, 49 (Fla. 1939). See Sax, The Public Trust in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 473, 484-85 (1970).

60. Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 453 (1892); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972).

61. See Citizens to Preserve Overton Park v. Volpe, 401 U. S. 402 (1971).

62. Farnham, supra Note 7 at 172-174; Illinois Central Railroad Co. v. Illinois, 146 U. S. 387, 452 (1892).

63. White v. Hughes, 190 S. 446, 450 (Fla. 1939); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N. J. 1972).

64. White v. Hughes, 190 S. 446, 450 (Fla. 1939).

65. "A littoral owner has a right in the foreshore adjacent to his property separate and distinct from that of the general public...(it) is a property right and is valuable, and although it must be enjoyed in due subjection to rights of the public, it cannot be arbitrarily or capriciously destroyed. A littoral owner can enjoin as a nuisance interference by a private person with this right. A littoral owner has been held to have the right to build a pier out to the line of navigability; a right to accretion; a right to navigation... and a right of access from every part of his frontage across the foreshore." Marks v. Whitney, 98 Cal. Rptr. 790, 491 P.2d 374 (1971).

66. Private property accounts for about 70 percent or 28,500 miles of the U. S. shoreline, excluding Alaska. GAO, National Efforts to Preserve The Nations Beaches and Shorelines--A Continuing Problem at 40 (1975).

67. Freed v. Miami Beach Pier Corp., 93 Fla. 888, 112 So. 841 (1927); Adams v. Elliott, 128 Fla. 79, 174 So. 731 (1937).

68. The State of Texas, recognizing that illegal fences and signs of all description are constantly erected by those wishing to discourage public use of beaches, has provided criminal penalties for so doing. Vernon's Ann. Civ. Stat., art. 5415 d-2 (1975).

69. 294 A.2d 47 (N.J. 1972).

70. Id. at 55.

71. Id. at 54.

72. See Note, Water Law--Public Trust Doctrine Bars Discriminatory Fees to Nonresidents for Use of Municipal Beaches, 26 Rut. L. Rev. 179, 180-88 (1972).

73. 294 A.2d 47, 54 (N.J. 1972).

74. Id. at 57.

75. Id. at 56.

76. Id. at 54.

77. Ducsik, supra Note 1 at 212.

78. 16 U.S.C.A. § 1451 et. seq. (1972).

79. Id. § 1451 (c).

80. Id. § 1451(g).

81. Id. § 1451(h).

82. Ducsik, supra Note 1 at 213 (1974).

83. 16 U.S.C.A. § 1454 (1972).

84. Id. § 1454(c).

85. 16 U.S.C.A. § 1455(d)(2)(1972).

86. Id. § 1455(e)(1)(A),(B).

87. Id. § 1455(f).

88. 16 U.S.C.A. § 1458(b)(1972).

89. Pub. L. No. 94-370 (July 26, 1976).

90. Id. § 305(b)(7).

91. Id. § 315(2).

92. See H.R. 10394, 93d Cong., 1st Sess. (1973); H.R. 1676, 94th Cong., 1st Sess. (1975).

93. H.R. 10394 § 202, 93d Cong., 1st Sess. (1973).

94. The 1975 version of the Bill contains the following presumptions, similar to those of the Texas Open Beaches Act (note 100 infra):
"(1) a showing that the area is a beach shall be prima facie evidence that the title of the littoral owner does not include the right to prevent the public from using the area as a common.
(2) a showing that the area is a beach shall be prima facie evidence that there has been imposed upon the beach a prescriptive right to use it as a common." H.R. 1676 § 315(e)(1)-(2), 94th Cong., 1st Sess. (1975).

95. Ore. Rev. Stat. §§ 390.610-.690 (1968).

96. 254 Ore. 584, 462 P.2d 671 (1969).

97. Ore. Rev. Stat. § 390.720 (1968).

98. Id. § 390.610(2).

99. Supra note 96, at 675.

100. Vernon's Ann. Civ. Stat., art. 5415 d et. seq. (1975).

101. Id. § 5415 d(1).

102. Id. § 5415 d(2).

103. Id. § 5415 d-2(1).

104. Fla. Stat. §§ 161.011 et. seq. (1975). The stated purposes of the Act is to "...make provision for publicly financed beach nourishment and restoration programs and establish and clarify the property rights of the state and private upland owners arising from or created by such programs." Fla. Stat. § 161.141 (1975).

105. Id. § 161.091 (a).

106. Fla. Stat. §§ 375.011 et. seq. (1975).

107. Id. § 375.031 (6).

108. Id. § 375.065 (1),(2).

109. See Note, Access to Municipal Beaches: The Formulation of a Comprehensive Legal Approach, 7 Suffolk L. Rev. 936, 957 (1973).

110. Ducsik, supra note 1 at 137-152.

111. See Yosemite Park and Curry Co. v. Collins, 20 F. Supp. 1009 (N.D. Cal. 1937); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 56 (N.J. 1972).

112. 294 A.2d 47, 56 (N.J. 1972).

113. U. S. Const. amend. V; Fla. Const. art. 10, § 6 (1975).

114. See, e.g., Shedd v. Northern Indiana Pub. Serv. Co., 206 Ind. 35, 188 N.E. 322 (1934); State ex.rel. Mitchell v. State Highway Comm. 163 Kan. 187, 182 P.2d 127 (Kan. 1947); Baxter v. Louisville, 224 Ky. 604, 6 S.W.2d 1074 (1928).

115. Speculation may drive the price of beach land up even without dramatic population increases. Dennis Ducsik cites the Point Reyes National Seashore in California as an example. Originally estimated in 1962 to cost $14 million, by 1968 the cost had risen to $58 million. Ducsik, supra note 1 at 82.

116. See, Note, Public Rights in Ocean Beaches: A Theory of Prescription, 24 Syr. L. Rev. 935 (1973); Comment, Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches 25 U. Fla. L. Rev. 586 (1973).

117. Affirmative (positive) easements entitle the easement owner to do affirmative acts on the land in the possession of another. Negative easements take from the owner of the servient tenement the right to do some things which, were it not for the easement, he would have a right to do on his own land. C. Smith & R. Boyer, Survey of the Law of Property 383 (2d ed. 1971).

118. See Hartzog, Lader & Richards, Public Beach Access & Recreation in South Carolina (1976).

119. The "taking" issue will come increasingly to the fore as more and more communities attempt to protect public rights in coastal areas. A thorough discussion of the subject is beyond the scope of this paper but may be found in D. Rice, "Taking" By Regulation and the North Carolina Coastal Management Act (Univ. of N. Car. Sea Grant July 1976).

120. See generally, Ducsik, supra note 1 at 152-71; and Bosselman et al, The Taking Issue (1973). It is generally accepted that land use regulations for recreational purposes are a valid exercise of the police power. See Broesche, Land Use Regulation for the Protection of Public Parks and Recreation Areas, 45 Tex. L. Rev. 110 (1966). For cases upholding municipally required dedications for recreational purposes, see Associated Home Builders v. Walnut Creek, 484 P.2d 606 (1971); Aunt Hack Ridge Estates, Inc. v. Planning Comm. of Danbury, 230 A.2d 45 (1967); and Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (1966).

121. GAO, National Efforts to Preserve the Nations Beaches and Shorelines--A Continuing Problem, at 1, (1975).

122. For a discussion of federal participation in state and local erosion control projects, see H. Marshall, Cost Sharing as an Incentive to Attain the Objectives of Shoreline Protection (1973).

123. See D. Rice, "Taking" By Regulation and the North Carolina Coastal Management Act at 62-71 (Univ. of N. Car. Sea Grant, July 1976).

124. 56 Wisc. 2d 7, 201 N.W.2d 761 (1972).

125. 201 N.W.2d at 771.

126. Id. at 770-71. Recently, in Sibson v. State, 336 A.2d 239 (N.H. 1975), the New Hampshire Supreme Court upheld a similar wetlands statute using the Just rationale.

127. Seawalls, groins, pilings, etc., are all evident in beach construction projects, often with adverse impact on the beach itself. See Trustees of Internal Improvement Fund v. Ocean Hotels, Inc. 40 Fla. Supp. 26 (Palm Beach County Ct. 1974).

128. Comment, Subdivision Regulation: Requiring Dedication of Park Land or Payment of Fees as a Condition Precedent to Plat Approval, 1961 Wis. L. Rev. 310 n.2.

129. See generally, Note, Public Access to Beaches, 22 Stan. L. Rev. 564 (1969); Commentary, Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches, 25 U. Fla. L. Rev. 586 (1973); H.R. 6656, 91st Cong., 1st Sess. (1969), (seeking to extend the public area of the beach landward from the mean high water line to the vegetation line).

130. Coronado Development Co. v. McPherson, 189 Kan. 174, 368 P.2d 51 (1962).

131. Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966).

132. Jordan v. Menomonee Falls, 28 Wisc.2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4 (1966).

133. D. Hagman, Urban Planning and Land Development Control Law § 138 at 253 (1971) (hereinafter cited as Hagman); Juergensmeyer and Wadley, Florida Subdivision Control Law § 9.02 (1976) (hereinafter cited as Juergensmeyer).

134. Juergensmeyer, supra note 133 at § 9.02.

135. Jordon v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W. 442 (1965), appeal dismissed, 385 U.S. 4 (1966).

136. E.g., Associated Home Builders v. City of Walnut Creek, 4 Cal.3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), appeal dismissed, 404 U.S. 878 (1972); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

137. Hagman, supra note 133 at 253.

138. Cases dealing with attacks on statutes and ordinances requiring dedication of land or in lieu payments are collected in Annot., 43 A.L.R.3d 862 (1972).

139. 144 Mont. 25, 394 P.2d 182 (1964).

140. Id. at 32, 394 P.2d at 186.

141. Id. The voluntariness theory has been criticized, however, as merely constituting a means of avoiding the constitutional issues. R. Anderson, American Law of Zoning § 19.39. at 481 (1968), cited in Note, Mandatory Dedication of Land by Developers, 26 U. Fla. L. Rev. 41, 45 (1973)(hereinafter cited as Mandatory Dedication).

142. 28 Wis.2d 608, 137 N.W.2d 442 (1965).

143. Id. at 613, 137 N.W.2d at 448.

144. Id.

145. See Mandatory Dedication, supra note 141 at 46, citing, for a criticism of this theory on constitutional grounds, Landau, Urban Concentration and Land Exactions for Recreational Use: Some Constitutional Problems in Mandatory Dedication Ordinances in Iowa, 22 Drake L. Rev. 71, 81-82 (1972).

146. 22 Ill.2d 375, 176 N.E.2d 799 (1961).

147. Id. at 380, 176 N.E.2d at 802.

148. See, Jordon v. Village of Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4 (1966); Mandatory Dedication, supra note 141 at 47.

149. E.g., Aunt Hack Ridge Estates, Inc. v. Planning Commission of Dansbury, 27 Conn. Supp. 74, 230 A.2d 45 (1967); See generally Mandatory Dedication, supra note 141.

150. Jordon v. Village of Menomonee Falls, 28 Wis. 2d 608, 617, 137 N.W.2d 442, 447 (1965), appeal dismissed, 385 U.S. 4 (1966).

151. Id. at 618, 137 N.W.2d at 448; Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966).

152. E.g., Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 35, 394 P.2d 182, 188 (1964), stating "(t)he question of whether or not the subdivision created the need for a park or parks is one that already has been answered by our legislature." Id. The problem with this approach is that it allows a legislative body to answer the question upon which the validity of a statute depends. See, Johnson, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 Cornell L. Q. 871, 914 (1967).

153. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), appeal dismissed, 404 U.S. 878 (1972).

154. Cal. Bus. & Prof. Code § 11546 (West Supp. 1973).

155. Section 10-1.516 Walnut Creek Municipal Code.

156. 4 Cal.2d 633, 644, 484 P.2d 606, 615, 94 Cal. Rptr. 630, 639.

157. Id.

158. 4 Cal.3d at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.

159. Mandatory Dedication, supra note 141 at 48-49.

160. East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969). (Effect of dedication was to diminish value of property by approximately one-third its value---over $90,000).

161. See, e.g., Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 71, 264 A.2d 910, 914 (1970) (statute requiring dedication of at least 7% of the area to be subdivided is arbitrary on its face); accord, Admiral Dev. Corp. v. City of Maitland, 267 So.2d 860 (4th D.C.A. Fla. 1972).

162. Juergensmeyer, supra note 133 § 9.02.

163. Id., § 9.04.

164. E.g., Cal. Bus. & Prof. Code § 11546 (West Supp. 1973); Mont. Rev. Codes § 11-602 (Supp. 1971); N.Y. Town Law § 277(1) (McKinney Supp. 1972).

165. E.g., Carlann Shores, Inc. v. City of Gulf Breeze, 26 Fla. Supp. 94 (Cir. Ct. 1966); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of Dansbury, 27 Conn. Supp. 74, 230 A.2d 45 (Super. Ct. 1967).

166. 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960), aff'd, 15 App. Div. 2d 815, 225 N.Y.S. 538 (2d Dep't. 1962).

167. Id. at 1007, 209 N.Y.S.2d at 732.

168. E.g., Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of Dansbury, 27 Conn. Supp. 74, 78, 230 A.2d 45, 47 (Super. Ct. 1967).

169. 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S. 955 (1966).

170. Id. at 84, 218 N.E.2d at 675, 271 N.Y.S. at 957.

171. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

172. Id. at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.

173. Id. at 646, 484 P.2d at 616, 94 Cal. Rptr. 640.

174. Id.

175. Id.

176. Id. at 647, 484 P.2d at 617, 94 Cal. Rptr. at 641.

177. Note, Public Access to Beaches, 22 Stan. L. Rev. 564, 567-72 (1970).

178. Mandatory Dedication, supra note 141 at 51.

179. See text accompanying notes 16 to 58 supra.

180. Juergensmeyer, supra note 133 at § 17.01.

181. Id.

182. See 1 Rohan, Condominium Law & Practice § 3.07 (1975).

PART II. DRAWING THE LINE AT THE OCEANFRONT

The Role of Coastal Construction Set-Back Lines in Regulating Development of the Coastal Zone

Recent years have witnessed a surge of public concern over the adverse environmental impact of rapid and unrestrained real estate development.[1] 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,[2] protect ecologically critical areas,[3] and promote comprehensive and environmentally sound land use planning throughout the state.[4] From the outset, Florida's coastal zone has received special attention as an area of crucial economic importance to the state[5] which poses unique problems of land use regulation and planning.[6] In 1970, the legislature created the Coastal Coordinating Council to direct research and coordinate planning for sound management of the coastal zone.[7] Subsequently, with the passage of the Coastal Zone Management Act of 1972[8] federal resources and encouragement have served to intensify the state's efforts in developing a comprehensive program for managing the resources of the coastal zone.[9]

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 two successive measures in 1970 and 1971 that mandated the imposition of coastal construction setback lines for all of the state's high-energy beaches.[10] As an interim measure, the legislature imposed a setback line fifty feet upland of mean high water[11] and required all construction begun after July 27, 1970 to be landward of this line.[12] The following year the legislature authorized establishment of an engineered setback line for the high-energy beaches of each coastal county.[13]

Florida's legislature has not, however, enacted comparable measures for restricting land use on the state's vast vegetated, estuarine, and wetlands shores.[14] Nevertheless, the state's 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.[15]

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,[16] bluffs,[17] and vegetation[18] of their high-energy beaches.[19] At least one county has adopted measures to protect shoreline mangroves and other coastal wetlands vegetation.[20] Still other communities have developed special land use programs[21] and site-specific building codes[22] to ensure reasonable use of coastal property within their respective jurisdictions.[23]

I. The Model Ordinance. Preliminary Problems.

The extensive experience of Florida's state and local governments in regulating coastal development has provided the primary background for the model ordinance proposed by this study.[24] The ordinance attempts to incorporate the best features of relevant state legislation,[25] administrative regulations,[26] local ordinances,[27] building codes,[28] and land-use plans[29] to present a comprehensive and workable scheme of local regulation.[30]

The model ordinance combines two types of land use regulation designed to minimize the adverse environmental impact of coastal development: (1) a coastal setback line[31] and (2) a coastal permitting system.[32] The ordinance contemplates the division of coastal property into two zones. First, a Preservation Zone would extend from the established setback line seaward.[33] No construction[34] or excavation[35] would be allowed in this zone without first meeting the requirements for a variance[36] or an exception[37] under the ordinance. Second, a Conservation Zone would extend from the setback line landward a distance sufficient to protect

coastal dunes, bluffs, wetlands, and vegetation currently unprotected by existing setback lines.[38] Construction in this area would be subject to design restrictions such as elevation on pilings, and excavation would be regulated so as to minimize its adverse effects on the coastal environment. Any construction or excavation undertaken in either the Preservation Zone or the Conservation Zone would require a special permit under the ordinance.[39]

The objectives and scope of the model ordinance reflect its comprehensive approach toward regulating coastal development on all types of shores--not only the oceanfront high-energy beaches but along vegetated, estuarine, and wetland shores as well.[40] Such comprehensive coverage of coastal property in a single local ordinance presents some difficulties. First, there is a question as to whether local governments should be engaged in regulating coastal land use when the environmental problems and many of the developmental projects in the coastal zone extend beyond both the borders and the capabilities of individual communities. Under such circumstances, it is argued, a regional, state, or national program would be more effective than a local regulatory scheme.[41]

Without discounting this objection, it would seem that local regulation of coastal construction and excavation can prove valuable. Traditionally, land use controls have been within the province of local governments. Furthermore, it is clear from the legislative history of the Coastal Zone Management Act that Congress did not intend to discourage local action in coastal zone management. As the Report of the Senate Commerce Committee states, "local plans and programs should be allowed to continue to function under the state management program."[42] This position is consistent with other national environmental legislation which recognizes the authority of local governments to adopt their own anti-pollution programs.[43] Similarly in Florida, local communities have been allowed, and indeed encouraged, to provide their own land use controls[44] and not simply to rely on the minimal standards and remote enforcement mechanisms of federal and state authorities.[45]

A second difficulty with implementing a comprehensive coastal ordinance is that land use regulation serves different purposes in different coastal settings. On oceanfront beaches the primary purpose is to minimize damage from flooding and erosion by protecting sand dunes, bluffs, and beachfront vegetation.[46] In contrast, the major purpose of regulatory measures along vegetated, estuarine, and wetlands shores is to minimize the adverse effects of upland development on the marine-related ecology of tidal lands and waters.[47]

A proper handling of these differing coastal settings and regulatory purposes requires different kinds of scientific and technical expertise on the part of local authorities. Whereas a botanist might be needed to determine the precise location of coastal wetlands vegetation, an engineer familiar with the dynamics and physical features of high-energy beaches would be required to establish the proper setback lines along beachfront dunes, bluffs, and storm berms. Providing such expertise and implementing the ordinance in all coastal areas may well prove burdensome for a local government.[48]

It should be emphasized, however, that the comprehensive coverage of various coastal locations within a single ordinance has its merits. The coastal environment is a delicately balanced and interdependent ecological system which demands comprehensive protection if its economic, recreational, and aesthetic values are to be preserved.[49] Little is achieved by prohibiting destruction of dunes and vegetation on high-energy beaches if continued disruption and despoilation of adjacent estuaries and wetlands are allowed. Coastal frontage is both highly attractive for residential and commercial development and of limited availability, so that restrictions on land development in one type of coastal setting can only increase pressure for development in other, less protected coastal areas.[50]

A final objection to the use of a model ordinance is that it might not prove the most effective and flexible way for a local community to regulate coastal land use. The distinct and often unique features of each coastal location would

in some instances seem to require a site-specific building code[51] or special land use plan[52] rather than an all-encompassing model local ordinance. The development of such codes or plans for each separate coastal area, however, requires expenditure of time and money that many communities are unable or unwilling to bear.[53] Preparation of such regulations, moreover, would entail lengthy delays, leaving the local government with the alternative of imposing a moratorium on coastal development[54] or allowing coastal property to remain unregulated during the interim.[55]

The proposed model ordinance, on the other hand, attempts to incorporate many of the features of a site-specific approach while minimizing both the burdens on local government and the delays in implementation. Each regulatory provision of the ordinance is linked to the characteristics of the specific property being regulated. Both the setback regulations and the permitting restrictions are based upon the extent to which such features as dunes, bluffs, beachfront vegetation, and wetlands vegetation are present and in need of protection.[56] In addition, the ordinance provides for considerable flexibility in its implementation. Where the requirements of the setback prove overly stringent, the local authorities may grant a variance, and where the setback proves too permissive local authorities may still deny a permit for construction or excavation upland of the line.[57] Furthermore, the major expense of establishing the setback and providing the necessary surveys for purposes of a permit would be borne by the applicant rather than the local government.[58] Finally, adoption of the model ordinance would in no way preclude the implementation of more detailed site-specific building codes and land-use regulations. It would, however, serve as a necessary restraint on coastal development pending completion of such additional local controls.[59]

In summary, the model ordinance calls for a major commitment by a local government to undertake a comprehensive regulatory program. The ordinance is drafted so that it can be amended to provide for only setback regulations or only a permitting system.[60] Likewise, its provisions can be amended to cover only certain types of

coastal property such as high-energy beaches or coastal wetlands.[61] Insofar as various types of coastal property are located within a single community, however, the comprehensive approach provided in this ordinance should be maintained intact.

II. The Coastal Environment

A. Natural Dynamics of a High-Energy Beach.

Sand beaches and dunes comprise a very small and unstable part of Florida's coastal zone.[62] 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 portends destruction not only of man-made structures but of beach and dunes as well.[63]

Flood and erosion are natural occurrences in the life of a sand beach. A single great storm can eradicate an entire beach and dunal system leaving upland property directly exposed to the forces of ocean winds and waves.[64] Normally, the high-energy beach provides its own natural defenses. The slope of the shore as it emerges from the water 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.[65]

The survival of a sand beach depends primarily upon its ability to regenerate. Unable to prevent losses of sand to the action of waves and longshore currents, a beach must maintain a balance between erosion and accretion. Under natural conditions, the mechanism of littoral drift will ensure this balance. 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.[66] In addition, the dynamics of littoral drift will transport sand brought from the ocean bottom to

restore or enlarge the beach.[67]

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 blocks the full force of waves directly. 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.[68] Further upland, excavation and construction can destroy vegetation and dunes vital to the stability and safety of the beachfront.[69] 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.[70]

The major purpose of a coastal setback, then, is to keep developmental activities from encroaching upon the shore and interfering with the natural defenses and regeneration of a beach.[71] Natural beach contours provide a good indication as to where such a setback should be located. The presence of dune formations dictate that any excavation or construction be kept upland so as to preserve the dunes' protective and restorative functions.[72] Another physical feature that requires protection is the beachfront bluff or storm berm.[73] 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.[74] 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.[75] 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.[76]

Beachfront vegetation exerts an important stabilizing influence on a high-energy beach, and the presence of certain species can also be used to determine the proper siting of construction and excavation on a particular property.[77] The species most in need of protection are those characterized as pioneer vegetation comprising the seaward fringe of vegetation. The major function of such vegetation is the stabilization of fragile dune formations.[78] Normally no developmental activities should be allowed in areas where pioneer vegetation constitutes the dominant species.[79] Immediately landward of pioneer vegetation, scrub vegetation predominates and protects areas behind it from storm tides, winds, and erosion.[80] 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.[81]

B. Coastal Wetlands

To a far greater degree than oceanfront beaches, coastal wetlands are essential to marine ecology. It is estimated that from 68% to 98% of all commercially harvested fish and shellfish spend part of their life cycle in the tidal waters of coastal wetlands.[82] In addition, the wetlands provide a wildlife habitat, especially for waterfowl and wading birds.[83]

The vegetation and soils of wetlands areas perform an important function in protecting the quality of adjacent coastal waters by filtering out the sediments and nutrients of upland runoff.[84] Indiscriminate development, particularly dredge and fill activities,[85] can disrupt this natural filtration system in two ways. First, it increases the amount of upland pollution entering the wetlands and adjacent coastal waters. Secondly, development can simultaneously reduce the filtering capacity of the wetlands by interfering with the flushing action of tidal ebb and flow, removing wetlands vegetation, and altering land elevations in such a way as to destroy the natural storage and dispersal of upland runoff by the

wetlands area.[86]

The major functions of setback restrictions and permit requirements in wetlands would be to preserve coastal vegetation, protect the ecological interaction between shorelands and water, and minimize the adverse effects of upland runoff and other pollution on shore and marine life. Rather than emphasizing engineering considerations so important for flood and erosion control on high-energy beaches, establishment of setback restrictions would be based on ecological criteria that would ensure minimal intrusion of construction and excavation into the shore's fragile eco-system.

The most appropriate basis for regulating land use in coastal wetlands is the pattern of vegetation growing in a particular area.[87] Typically coastal wetlands vegetation types occupy distinct zones depending on the degree of salinity and length of tidal inundation that particular species can tolerate.[88] Submerged wetlands vegetation occupies the outer or seaward zone and include various species of mangrove and salt marsh plants.[89] The area beyond the submerged vegetation is usually characterized as a transition zone where salt and freshwater influences merge and wetlands vegetation is gradually superseded by plants characteristic of upland growth.[90]

Generally, submerged wetlands vegetation should be maintained as a buffer between upland development and the shore. Consequently all construction and excavation should be set back from the landward boundaries of such vegetation. The wetlands vegetation of the transitional zone also requires protection, and development here should be permitted only if alteration of ground elevations and damage to indigenous vegetation are minimized.[91]

III. Legal Problems in Implementing the Model Ordinance

A. Special Features of a Coastal Setback

A coastal setback line should be contrasted with traditional setback provisions that regulate land use in a stable, man-made environment of streets,

buildings, and platted lots. The coastal setback operates in the dynamic natural environment of high-energy beaches and coastal wetlands. Consequently, its location, purposes, and permanency may differ markedly from its traditional counterpart. While raising many of the same legal problems associated with urban setback restrictions, the coastal setback does so in a highly unstable setting that adds an element of uncertainty to the resolution of these problems.

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. The natural contours and dynamics of the shore can vary dramatically in a given area, and what might be necessary to protect beach and upland property in one area might not be necessary a short distance down the coast.[92] Whether the location of the line is arbitrary or raises problems of equal protection presents complicated issues of fact based upon the precise environmental condidtions existing on a specific property.[93] Likewise, even though a line has been properly determined for a given property does not mean it cannot be challenged or altered at some future date if changing shore conditions render it overly stringent or permissive.[94] 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.

B. 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. The ordinance operates independently of the mean high water line which normally determines the boundary between state and private ownership of coastal lands.[95] The mean high water line does, however, provide the baseline for setting the State of Florida's interim setback line on high-energy beaches.[96]

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.[97]

Another important regulatory line is the 100-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.[98] 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.[99]

Any development of coastal wetlands is likely to encounter both state and federal authorities. In Florida, for example, the Department of Environmental Regulation would require a permit for excavation or filling in areas of submerged or transitional wetlands vegetation.[100] Additionally, the Corps of Engineers under its recently expanded jurisdiction over tidal wetlands would have regulatory authority over such developmental activity.[101]

Adoption of a local ordinance to regulate coastal development would not necessarily duplicate state and federal programs. For example, at least two counties in Florida have received approval by the Department of Natural Resources to administer their own local controls over beachfront development rather than relying upon the DNR's coastal setback regulations.[102] Assuming that 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 jurisdictions.

C. Problems of Non-Conforming Use, Equitable Estoppel, Exceptions and Nuisance.

The initial problem facing an owner of coastal property is to determine which, if any, of the provisions of the local ordinance are controlling. This is essentially a question of timing. Under the ordinance, if a non-conforming structure is

"existing or under construction at the effective date," then the setback regulations would normally not apply to the modification, maintenance or repair of the structure.[103] Such construction, however, must meet three requirements. First, it may only occur within the existing foundations and above the first dwelling floor or lowest deck of the existing structure so that the size and elevation of the structure is maintained. In addition, any such construction must meet the requirements for a permit under the ordinance so that its adverse impact on the coastal environment will be minimized. Finally, the ordinance prohibits restoration of any non-conforming structure whose damage or destruction has been caused by coastal flooding or erosion.[104] This 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.[105]

Should a project 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. By contrast to the ordinance's "grandfather" provision, the common law doctrine does not require an owner to show the existence or actual construction of a structure. To interpose equitable estoppel, an owner need only demonstrate that he has relied on prior official approval to make substantial investments in his project.[106] If such detrimental reliance can be shown, the doctrine protects the owner from changes in land use regulation.[107]

Both the ordinance's "grandfather" provision and common law equitable estoppel, however, might be unavailable in cases where 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" in instances where an owner has adequate warning that his planned use of land will be prohibited by pending changes in local ordinances.[108] In Shanow v. Dania[109] this "red flag" approach was applied to impose a setback line 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 would have to develop his property in compliance with them.[110] The "red flag doctrine" could arguably be invoked where the owner of coastal property undertakes development that would violate the pending model ordinance. The central question in such cases would be whether the owner had sufficient knowledge of the pending change to realize his project would be subject to its restrictions. Once the ordinance has been proposed in a particular locality and public hearings have been held, it would seem that sufficient "red flag" warnings would exist. An owner would then be prevented from avoiding the new setback requirements simply by beginning construction or by making substantial investments in his project.[111]

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[112] 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 the city had earlier approved his permit application.[113] 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.[114]

The setback regulations of the ordinance do not apply to certain excepted structures. Generally, these exceptions include improvements that enhance the coastal property owner's access to and use of adjacent coastal waters.[115] Catwalks, foot-bridges, docks and boat shelters would be allowed seaward of the setback as non-commercial appurtenances to the littoral property. Such structures, however, would nonetheless be subject to the permit requirements of the ordinance which would restrict their location, size and design so as to minimize any adverse environmental effects.[116]

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, it is possible that an approved development would result in destruction of dunes and coastal vegetation as well as create or aggravate flooding, erosion, and pollution problems. Arguably, 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.[117] 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. This led them, for the most part, either to deny the existence of the nuisance altogether,[118] or to refuse an injunction because the economic importance of the polluter's operations caused the equities to be balanced in favor of the polluter.[119]

In a recent Florida decision, the First District Court of Appeal rejected a public nuisance suit where a beachfront project both complied with the state's setback line and had been approved by the Department of Natural Resources.[120] In its opinion, however, the court simply upheld the findings of the trial court and did not rule out such claims as a matter of law.[121] It would seem then that, in light of today's environmental consciousness, perhaps neither compliance with the model ordinance nor express approval by local authorities would automatically preclude the bringing of a public nuisance action.[122] 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.[123]

D. 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 decision as to the location of the setback line may be challenged on procedural grounds. The ordinance expressly requires the steps of prior scientific surveys, public notice, and public hearings, and failure to adhere to these formal guidelines could well jeopardize the validity of any setback regulation.[124] Indeed, Florida's courts would undoubtedly 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 Heeb v. Trustees of the Internal Improvement Fund,[125] 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.[126] Mere formal adherence to the ordinance's procedural provisions, then, would not be sufficient to sustain the validity of a setback line.

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.[127] 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.[128] Not only could such changes warrant a review by the local government, there is clear precedent in Florida to the effect that a change of conditions enables an owner to challenge an existing land use restriction in the courts as well.[129]

It should be recognized, however, that Florida's courts accord a presumption of validity to any official determination as to 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."[130] 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.[131] Consideration of comprehensive surveys and the provision of adequate public hearings, moreover, would undoubtedly lend further support to the local government's position.[132] Nonetheless, it is possible that sufficient technical evidence and expert testimony could be marshalled against a proposed setback line to overcome this presumption of validity.

E. Variance Procedures and Problems.

An owner wishing to undertake construction at variance to established setback restrictions must apply directly to the local governing body.[133] 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.[134] An owner would not, however, 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.[135]

In addition to a showing of hardship, an applicant for a variance must also meet the requirements for a permit under the ordinance.[136] 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. Both public officials and private individuals must have such guidelines lest the entire variance procedure be subject to attack.[137]

The validity of variance procedures under the ordinance may be undermined if a local governing body grants an excessive number of variances. There is clear precedent in Florida that 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.[138] 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.[139] 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 thereby subject to closer judicial scrutiny.[140]

F. The Taking Issue.

Since the Supreme Court's decision in Gorieb v. Fox,[141] courts have generally sustained setback lines as legitimate regulatory measures not requiring public compensation.[142] A setback usually has a minimal adverse impact on the use of a particular property; although prohibiting 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 unimpaired.[143] 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.[144]

Various approaches have been proposed by courts and commentators alike for determining when land use regulation becomes a compensable taking.[145] American courts generally follow two approaches: the "dimunition in value" test[146] and the "residual beneficial use" test.[147] To a large extent, the difference between the two approaches is a matter of judicial perception - one court might view the glass as being half-empty, another half-full. The "dimunition in value" approach looks to the potential value of property and measures the loss incurred as a result of regulation. Adoption of this approach usually indicates a restrictive judicial attitude toward land use control and will often result in a determination that a taking has occurred.[148] When the dimunition in value "reaches a certain magnitude, in most if not all the cases there must be an exercise of eminent domain and compensation to sustain the act."[149] There exists no clear standard, however, for determining how great the dimunition must be. Indeed, courts adopting the dimunition test have upheld regulations resulting in extensive losses without requiring public compensation.[150]

Other jurisdictions, including Florida, emphasize the beneficial uses remaining to a landowner under a given regulation. If there exists some beneficial use to which the property may be reasonably adapted, then these courts will normally reject a taking claim.[151] In recent years the "residual beneficial use" approach has tended to expand considerably the permissible scope of land use regulation. This tendancy is especially pronounced where disputed regulations have been imposed for purposes of flood control and environmental protection.[152] Indeed, 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 been content to regard such beneficial uses as agriculture or recreation as sufficient remaining

benefit to avoid a compensable taking.[153]

The residual beneficial uses relied upon in the flood plain zoning decisions might well prove difficult to establish where the regulated areas are coastal wetlands or beaches. Unlike inland flood plains that are often suitable for agriculture, wetlands and oceanfront property normally require filling, construction, or some other improvement to have any economic value for a private owner. To prohibit all development, then, would be to eliminate all potentially beneficial uses. Even under the most liberal interpretation of the "remaining beneficial use" test, such a prohibition might well constitute a compensable taking.

It should be recognized, however, that any such "taking" decision would proceed from the proposition that the regulated property could, if left unregulated, be devoted to some use of economic benefit to its owner. For where property has no economic potential, regulation of its use would deprive the owner of no real interest. The assumption that land can support an economically beneficial use, though rarely questioned by the courts, is not always valid - especially for wetlands and beachfront property. Here the natural features of the land often prove so inhospitable or hazardous as to destroy its potential for profitable development. Under such circumstances, it is difficult to see how even the severest of restrictions could result in a compensable taking.

The New Jersey courts have addressed this issue directly in the companion cases of Spiegle v. Borough of Beach Haven.[154] 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 oceanward of the building line, the court concluded the "regulation prescribed only such conduct as good husbandry would dictate that plaintiffs should themselves impose on their own lands."[155] The mere fact that the setback line migh prohibit all construction on a given property was insufficient to sustain a "taking" claim.

An owner must also show "the existence of some present or potential beneficial use of which he has been deprived."[156] 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. By prohibiting such construction, then, the regulation merely affirmed what natural conditions alone would dictate to a reasonable person.[157]

That the ordinance was valid on its face, however, did not prevent the plaintiff from asserting his "taking" claim altogether. Indeed, in subsequent litigation Spiegle 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.[158] He thereby established to the satisfaction of the court that his proposed use of his land would in fact be to his benefit.[159] Having recognized Spiegle'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 Spiegle's property, "to constitute a taking."[160]

Significantly, a recent decision by Wisconsin's supreme court concerning the regulation of wetlands adopted a rationale similar to that developed in Spiegle for resolving the "taking" question. In Just v. Marinette County,[161] the court sustained a prohibition on the filling of wetlands as a valid exercise of the police power. More importantly, the court dismissed plaintiff's taking claim by invoking a rather novel "natural state" standard for assessing the value of his interest in the affected property. As the court stated:

> "The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling."[162]

The court argued that the value of plaintiff's interest in his property should instead be based only upon the uses for which it was suited in its natural state. As the wetlands area was clearly unfit for residential development in the absence of artificial fill, the court concluded that a regulation which effectively precluded such use deprived plaintiff of no real interest in his property and thus did not constitute a compensable taking.[163]

In summary, adoption of the modern "remaining beneficial use" test has allowed considerable dimunition of property values through zoning regulation. This trend is especially pronounced in flood zoning cases. 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.[164] Moreover, where natural conditions themselves prove so hazardous or inhospitable as to obviate any profitable use of a property, the reasoning advanced by both Spiegle and Just affords yet another basis for severely regulating land use without compensation. Indeed, these latter cases might well 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 therefore the denial of such uses should simply not be regarded as a compensable taking.

IV. Conclusion

Rapid and largely unrestrained real estate development along the coastal zone poses unique problems of land use regulation and planning. Two dichotomics permeate this theme. First, there 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. Secondly, there is the desire for growth and development which historically almost by definition disregarded ecological and environmental consequences. Fortunately, our coastal environment is increasingly being considered a valuable treasure rather than an exploitable one. Obviously, resolution of the competing interests will involue 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 local, coastal communities in implementing their planning programs.

MODEL COASTAL CONSTRUCTION AND EXCAVATION SETBACK AND PERMIT ORDINANCE

This model ordinance combines two types of land use regulation designed to minimize the adverse environmental impact of coastal development: (1) a coastal setback line and (2) a coastal permitting system. The ordinance contemplates the division of coastal property into two zones. First, a Preservation-Setback Zone would extend from the established setback line seaward. No construction or excavation would be allowed in this zone without first meeting the requirements for a variance or an exception under the ordinance. A second zone, the Conservation-Permitting Zone, would extend from the setback line landward a distance sufficient to protect coastal dunes, bluffs, wetlands, and vegetation left unprotected by the setbacks. Construction in this area would be subject to design requirements such as elevation on pilings, and excavation would be regulated so as to minimize its adverse effects on the coastal environment. Any construction or excavation undertaken in either the Preservation-Setback Zone or the Conservation-Permitting Zone would require a special permit under the ordinance.

The objectives of the model ordinance reflect its comprehensive approach toward regulating coastal development on all types of shores--not only on oceanfront high-energy beaches but along vegetated, estuarine, and wetlands shores as well. Such comprehensive coverage of coastal property in a single ordinance presents some difficulties. First, land use regulation serves different purposes in different coastal settings. On oceanfront beaches the primary purpose is to minimize damage from flooding and erosion by protecting sand dunes, bluffs and beachfront vegetation. By contrast, the major purpose of regulatory measures along vegetated, estuarine, and wetlands shores is to minimize the adverse effects of upland development on the marine-related ecology of tidal lands and waters.

To ensure that these differing coastal settings and regulatory purposes are properly handled in turn requires different kinds of scientific and technical expertise on the part of local authorities. Whereas a botonist might be needed to determine the precise location of coastal wetlands vegetation, an engineer familiar with the dynamics and physical features of high-energy beaches would be required to establish the proper setback lines along beachfront dunes, bluffs, and storm berms. Providing such expertise is likely to prove expensive for a local government attempting to regulate land use in coastal areas.

In sum, the model ordinance calls for a major commitment by a local government to undertake a comprehensive regulatory program. The ordinance, however, is drafted so that it can be amended to provide for only setback regulations or only a permitting system. Likewise, its provisions can be amended to cover only certain types of coastal property such as high-energy beaches or coastal wetlands. Insofar as various types of coastal property are located within a single community, however, the comprehensive approach provided in this ordinance should be maintained intact.

COASTAL CONSTRUCTION AND EXCAVATION SETBACK AND PERMIT ORDINANCE

SECTION ONE: STATUTORY AUTHORIZATION, FINDINGS OF FACT, PURPOSES AND OBJECTIVES.

1.1 Statutory Authorization.

The Legislature of the State of _____ (state) has authorized the _____ (governing body) of _____ (local unit) to provide and maintain for the citizens of _____ (local unit) standards which insure their health, safety and welfare including regulations on land use designed to minimize damage from coastal flooding, shore erosion, and ecological degradation of coastal property and coastal waters. Pursuant thereto, the _____ (governing body) of _____ (local unit), _____ (state) does ordain as follows:

Commentary. The language of this provision as well as of Sections 1.2 and 1.3 is modeled after provisions contained in the United States Water Resources Council's 1972 publication, Regulation of Flood Hazard Areas to Reduce Flood Losses, Vol. 1, p. 521 §§ 1.0-1.3. Despite the recent enactment of several state and federal coastal management programs, local governments continue to serve an important function in regulating coastal development. See Proceedings of the Wetlands Symposium, State Univ. of N.Y., Stony Brook, p. 20 (1972). In fact, many state programs contemplate an active role for local authorities in implementing coastal regulations. See, e.g., Wash. Rev. Code §§ 90.58.010 - .930 (1975); Fla. Stat. § 163.1361, et. seq. (1975). Moreover, many localities have been active in developing their own special controls on coastal construction and excavation. See, e.g., Coastal Construction Codes For Estero Island, Lee County, Fla. Ord. No. 76-3, -7 (1976); Chatham County Shore Protection Ordinance, Savannah, Georgia Metropolitan Planning Commission (1976); and Palm Beach County Coastal Construction and Excavation Setback Ordinance, Palm Beach County, Fla. Ord. No. 72-12 (1972).

In Florida a local community adopting the model ordinance should attempt to coordinate its program with state level efforts to regulate land use in coastal areas. First, the ordinance should be adopted as part of the community's overall land use plan contemplated by the "Local Government Comprehensive Planning Act of 1975". Fla. Stat. § 163.1361, et. seq. (1975). In addition, the local community should attempt to coordinate its regulation of

construction and excavation with the Department of Natural Resources which currently administers the statewide coastal setback line for high-energy beaches under Florida Statue § 161.053. See, e.g., No. St. Johns County Management Plan, Florida Coastal Engineers, Inc., Jacksonville, Florida (April 1974); and Benton, Coastal Construction Setback Lines, 50 Fla. Bar. J. 627, 628-9 (Dec. 1976). Finally, the local government's regulation of coastal wetlands should be carried out in conjunction with the state's Department of Environmental Regulation which regulates development of wetlands areas under Chapter 403 of the Florida Statutes. See especially, Rules of the Department of Environmental Regulation, Florida Administrative Code Ch. 17-4.01-.31 (1976).

1.2 Findings of Fact.

(a) The coastal areas of _____ (local unit) are subject to flooding, erosion, and ecological degradation which result in loss of property, health and safety hazards, destruction of marine life, and despoilation of coastal wetlands and coastal waters, all of which adversely affect the public welfare;

(b) Losses associated with coastal flooding, beach and shore erosion, and ecological degradation of coastal property and coastal waters are caused in part by construction and excavation undertaken on coastal property which destroy or alter beachfront dunes and bluffs, beachfront vegetation, and coastal wetlands vegetation.

1.3 Statement of Purpose.

It is the purpose of this ordinance to protect coastal property and coastal waters of _____ (local unit) from flooding, erosion, and ecological degradation by the establishment of construction and excavation setback regulations and permit requirements to further the objectives stated below:

1.4 Objectives.

The objectives of this ordinance are:

(a) To protect human health, safety, and welfare;

(b) To minimize public expenditures for flood, erosion, and pollution

control and restoration projects;

(c) To protect beachfront dunes, bluffs, and vegetation necessary for maintaining the stability and protective features of high-energy beaches;

(d) To preserve coastal wetlands vegetation necessary for providing a natural habitat for marine organisms and other wildlife, for protecting upland property from flood and erosion damage, and for minimizing the adverse effects of upland pollution on the quality of coastal waters;

(e) To insure that coastal property and coastal waters retain their economic, recreational, and aesthetic value for littoral property owners and the general public.

Commentary. The format of the above provisions follows that suggested by the model regulations of the United States Water Resources Council, Regulation of Flood Hazard Areas, supra. Both the purpose and objectives of the ordinance were drawn from the provisions of several different state and local enactments as well as from secondary works dealing with coastal zone regulation. See especially, State of Florida House Bill No. 4014, "Florida Coastal Wetlands Act of 1976" (Introduced in 1976); Environmental Land Management Study Committee, Recommendations on the Coastal Zone and Wetlands of Florida, Environmental Land Management (Dec., 1973); California Coastal Zone Conservation Commission, California Coastal Plan pp. 38-42 (Dec., 1975); Dept. of Land Conservation and Development, Draft Coastal Goals pp. IV-29 et. seq. (Salem, Oregon, 1976); and Ausness, Land Use Controls in Coastal Areas, 9 Calif. West. L. Rev. 391 (Spring, 1973).

SECTION TWO: DEFINITIONS.

Unless specifically defined below, words or phrases used in this ordinance shall be interpreted so as to give them the meaning they have in common usage and to give this ordinance its most reasonable application.

2.1 Beachfront Bluff or Storm Berm Line.

The line determined by those points located on the seaward-most edge of the elevated, vegetated banks or ridges found adjacent to high-energy beaches fronting the Atlantic Ocean or Gulf of Mexico. In any area where there is no clearly

marked bluff or storm berm line, recourse shall be had to the nearest clearly marked bluff or storm berm line on each side of such area; and the bluff or storm berm line for the unmarked area shall be the line of average or constant elevation connecting the two adjacent, clearly marked bluff or storm berm lines.

Commentary. The language of this definition is drawn from two local ordinances in Brevard County, Florida. See Cape Canaveral Code Ch. XII, § 2, 651.05; and Satellite Beach Ordinance No. 130, Amend. 1. See also, Model Zoning Ordinance for High Risk Erosion Areas, Department of Natural Resources, State of Michigan (July, 1975). At the suggestion of Mr. William Sensabaugh, coastal engineer for the State of Florida's Department of Natural Resources, both bluffs and storm berms are included. The presence of beachfront bluffs normally indicates that beaches seaward of the bluff are subject to periodic flooding and erosion. The storm berm is itself created by severe wave action depositing sand in a clearly marked ridge, and would likely be overtopped by storm flooding. In either case, construction should be undertaken well landward of bluffs or berms despite the fact that dunes or beachfront vegetation exist seaward.

2.2 Beachfront Dune Line.

The line determined by the crests or the highest points in elevation of existing, vegetated sand dunes along the high-energy beaches fronting the Atlantic Ocean or Gulf of Mexico. In any area where there is no clearly defined dune line, recourse shall be had to the negrest clearly marked dune lines on each side of such area; and the dune line for the unmarked area shall be the line of average or constant elevation connecting the two adjacent dune lines. The location of such line shall not be based upon occasional, un-vegetated sand dunes nor upon the artificial addition to or removal of sand dunes along the beach.

Commentary. The operative language of this definition is drawn primarily from local ordinances in Palm Beach County, Florida. See Palm Beach County Ordinance No. 72-12 (1972); Riviera Beach Ordinance No. 310 (1973). Although no dunal system is stable, the highest dunes would normally be those farthest upland and would also be the ones with the heaviest cover of stabilizing vegetation. See Davis, Stabilization of Beaches and Dunes by Vegetation in Florida, Report No. 7, Florida Sea Grant Program, Fig. 33, p. 31 (1975); and Savannah, Georgia Metropolitan Planning Commission, Chatham County Shore Protection Ordinance, § 2-3 (E) (1976).

2.4 Beachfront Pioneer Vegetation.

Any of the following vegetational species or combination of such species existing on coastal property:

Coastal Beardgrass	Andropogon spp.
Beach Oraches	Atriplex spp.
Sea Rockets	Cakile spp.
Sand-spurs	Cenchrus spp.
Golden Asters	Chrysopsis spp.
Small Croton	Croton linearis
Bermuda Grass	Cynodon dactylon
Pennyworts	Hydrocotyle spp.
Beach Morning Glories	Ipomoea spp.
Evening Primrose	Oenothera spp.
Prickly Pear Cactus	Opuntia austrina
Panic Grass	Panicum amarum
Small Cordgrass	Spartina patens
Rush Grass	Sporobolus virginicus
St. Augustine Grass	Stenophorum secundatum
Sea-blite	Sueda linearis
Sea Oats	Uniola paniculata
Finger Grass	Digitaria adscendens

Commentary. The species included as pioneer vegetation are based upon a listing in Davis, Stabilization supra at 18. Although pioneer vegetation exerts an important stabilizing influence on beachfront dunes and bluffs, such vegetation, as its name suggests, occurs primarily on the seawardmost areas of the beach. Where pioneer plants are the dominant species, no construction or excavation should normally be allowed. (See § 2.11 below for definition of "Dominant Plant Species".)

2.5 Beachfront Transitional Vegetation.

Any of the following vegetational species or combination of such species existing on coastal property:

Groundsel Bushes	Baccharis spp.
Buckthorns	Bumelia spp.
Australian Pines	Casuarina spp.
Sea Grape	Coccoloba unifera
Gopher Apple	Geobalanus oblongifolius
Hollies	Ilex spp.
Marsh Elder	Iva frutescens
Magnolia	Magnolia grandiflora
Wax Myrtle	Myrica cerifera
Cactus	Opuntia spp.
Wild Olive	Osmanthus americanus
Bay Leaves	Persea spp.
Live Oak	Quercus Virginiana
Cabbage Palm	Sabal palmetto

2.5 Beachfront Transitional Vegetation (Cont.)

Beach Berry	Scaevola plumieri
Brazilian Pepper	Schinus terebinthifolius
Saw Palmetto	Serenoa repens
Greenbriar Vines	Smilax spp.
Spanish Bayonets	Yucca spp.

Commentary. The species included as transitional vegetation are based upon a listing of "Northeast Scrub Plants" in Davis, Stabilization, supra at 23. The species would vary considerably in different regions, and the above list should be regarded as appropriate only for the coasts of Northeast Florida. Vegetation that might be considered transitional often occurs in seaward areas dominated by pioneer vegetation. Each locality, therefore, should adopt its own vegetational species. For discussion of the various regions in Florida see Davis, Stabilization, supra, 14-29. For a discussion of the use of vegetation in establishing a coastal setback line, see Purpura and Sensabaugh, Coastal Contruction Setback Line, Marine Advisory Program, Univ. of Florida, SUSF-SG-74-002 (1974).

2.6 Beachfront Vegetation Line.

The line determined on coastal property by the seaward boundary of natural terrestrial vegetation (but excluding vegetation where either Submerged Wetlands Vegetation or Beachfront Pioneer Vegetation constitutes the dominant plant species). In any area where there is no clearly marked line of terrestrial vegetation, recourse shall be had to the nearest clearly marked vegetation lines on each side of such area; and the vegetation line for the unmarked area shall be the line of average or constant elevation connecting the two adjacent lines of vegetation. The location of such line shall not be based upon occasional vegetation on the shore nor upon the artificial addition or removal of land or vegetation.

Commentary. The language of this provision is based primarily on local ordinances of Manatee and Broward Counties, Florida. See Holmes Beach Ordinance No. 150.3; Hallandale Code § 32-223. Excluded from the species of vegetation to be used in determinating this line are both Submerged Wetlands Vegetation and Beachfront Pioneer Vegetation where such vegetation constitutes the dominant plant species of an area. The predominance of these two types of vegetation indicates that the area of coastal property is likely to be regularly innundated by tidal ebb and flow or subject to periodic erosion by wave action. See Rules of the Department of Environmental Regulation, Florida Administrative Code Ch. 17 - 4.02 (17) (1976); and Davis, Stabilization, supra at 7-8.

2.7 Coastal Property.

Any land contiguous or adjacent to the coastal waters of _____.
(local unit)

Commentary. The language of this definition is drawn primarily from the definition of "submerged lands" in the Rules of the Department of Environmental Regulation, Fla. Adm. Code, Ch. 17-4.02 (17) (1976). The purpose of this definition is to distinguish coastal property from riparian property adjacent to inland fresh water bodies.

2.8 Coastal Waters.

The waters of the Atlantic Ocean or the Gulf of Mexico, and of bays, inlets, estuaries, rivers, tidal creeks, bayous, lagoons, or other surface water bodies [with a measurable chloride content of [_____] and] subject to tidal ebb and flow under normal weather conditions.

Commentary. The language of this provision is based primarily upon Louisiana House Bill No. 1315 S 2002 (2) (1976), Appendix B (1-b); and State of Washington Shoreline Management Act, EC1105-2-11, (July 30, 1974). See also, Laws of Massachusetts Annot., Ch. 131, § 40 (1974); Monroe County, Florida Ordinance No. 7608 (1975). Coastal waters include both natural and artificial water bodies subject to tidal ebb and flow regardless of navigability or ownership. It should be emphasized that this definition based upon ebb and flow is used solely for purposes of regulation and does not affect existing local law with respect to title held by either public or private owners or to the boundaries of coastal property. See generally, Maloney, Plager, Baldwin, Water Law and Administration, Chapter 2 (1968).

2.9 Conservation-Permitting Zone.

The area of coastal property extending [150] feet landward of the coastal setback line or lines established pursuant to Section Four of this ordinance, or the area landward of the coastal setback line or lines on which any species or combination of species designated by this ordinance as Submerged Wetlands Vegetation, Transitional Wetlands Vegetation, Beachfront Pioneer Vegetation, or Beachfront Transitional Vegetation constitutes the dominant plant species, whichever distance landward is greater.

Commentary. This provision follows the approach of Florida's Department of Environmental Regulation in ascertaining the area

of wetlands subject to dredge and fill regulations. See Rules, supra, Fla. Adm. Code, Ch. 17-4.02 (19)(1976). Rather than relying solely upon a fixed distance, the ordinance attempts to link regulatory authority to the natural environment of a specific coastal property. For comparable site specific ordinances that follow a zonal approach in regulating coastal development, see North St. Johns County Management Plan, Florida Coastal Engineers, Inc., Jacksonville, Florida (April, 1974); and "Coastal Construction Codes for Estero Island", Lee County, Fla. Ord. No. 76-3, -7, (1976).

2.10 Construction.

The placing, building, erection, extension, or material alteration of any structure the use of which requires permanent or temporary location on the ground or attachment to a structure having a permanent or temporary location on the ground.

Commentary. The language of this definition is drawn primarily from Palm Beach County Ord. No. 72-12 § 1(c)(1972). Both permanent and temporary structures are included. See, e.g., Proposed Ordinance for regulating land use in an "Area of Critical Environmental Concern", Dade County Department of Planning, Miami, Florida § 5(Z). The definitions of "construction" as well as of "excavation" at § 2.12 include a narrower scope of developmental activities than covered by the definition of "development" in "The Florida Environmental Land and Water Management Act of 1972". See Fla. Stat. § 380.04 (1975). Thus, such activities as sub-dividing or zoning changes would not be within the regulatory scope of this ordinance.

2.11 Dominant Plant Species.

Vegetational species or combination of species which comprise greater than fifty percent (50%) of the vegetation indigenous to a specific area of coastal property.

Commentary. This definition follows the operational interpretation used by Florida's Department of Environmental Regulation in locating "submerged" and "transitional" wetlands areas. See Rules, supra, Fla. Adm. Code, Ch. 17-4.02 (17), (18), and (19)(1976). Determination of the dominant plant species is required to establish the Conservation-Permitting and Preservation-Setback Zones as well as the Beachfront Vegetation Line under this ordinance. (See § 2.6, -.9, -.15.). Compare the definition of "dominant plant community" used by ecologists, E. Odum, Fundamentals of Ecology at 251-52 (1959).

2.12 Excavation.

The removal, addition, or alteration of soil, sand or vegetation by digging,

dredging, filling, drilling, cutting, scooping, or hollowing out.

Commentary. This definition is based on provisions in the "Palm Beach County Coastal Construction and Excavation Setback Ordinance", Palm Beach County Ordinance No. 72-12 (1972); and the Virginia Beach City Code Ch. 31, § 31-1.

2.13 Landward.

In a direction upland or away from the coastal waters contiguous to a specific parcel of coastal property.

Commentary. For a similar definition, see "Coastal Construction Codes for Estero Island", Lee County Ordinance No. 76-3, § 8-254 (1976).

2.14 Person.

Any individual, corporation, governmental agency, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal entity.

Commentary. This definition is taken from A Model Land Development Code (Proposed Official Draft) The American Law Institute, § 1-201 (16)(1975).

2.15 Preservation-Setback Zone.

The area of coastal property seaward of the coastal setback line or lines established pursuant to Section Four of this ordinance.

Commentary. The preservation-setback zone established by this ordinance should be distinguished from the more expansive "preservation zone" used for state-wide coastal planning under the Coastal Zone Management Act. See "Coastal Zone Management: An Overview", 20 Environmental Comment 1 (April, 1975). Under the model ordinance, the preservation-setback zone would generally include the seaward fringe of coastal property so as to protect dunes, bluffs, pioneer vegetation, and submerged wetlands vegetation from all construction or excavation. For comparable local regulations, see North St. Johns County Management Plan, supra; and Lee County Ordinance No. 76-3.-7 (1976).

2.16 Seaward.

In a direction toward the coastal waters contiguous to a specific parcel of coastal property.

2.16 Seaward (Cont.)

Commentary. This definition is based on that found in the "Coastal Construction Codes for Estero Island", Lee County Ordinance No. 76-3, § 8-254 (1976).

2.17 Submerged Wetlands Vegetation.

Any of the following vegetational species or combination of such species existing along the shore of coastal property:

Batis	Batis maritima
Big Cordgrass	Spartina cynosuroides
Black Mangrove	Avicennia germinans
Black Rush	Juncus roemerianus
Cuban Shoalweed	Diplanthera wrightii
Leather Fern	Acrostichum aureum
Manatee Grass	Syringodium filiformis
Red Mangrove	Rhizophora mangle
Rubber Vine	Rhabdadenia biflora
Smooth Cordgrass	Spartina alterniflora
Turtle Grass	Thalassia testudinum
Widglon Grass	Ruppia maritima
White Mangrove	Laguncularia racemosa
	Spartina bakeri

Commentary. The above species of wetlands vegetation are those generally found in Florida immediately adjacent to the shore and are regularly inundated by the tides. The species are drawn from those listed as indigenous to "submerged lands" in Rules of the Department of Environmental Regulation, Fla. Adm. Code, Ch. 17-4.02 (17) (1976). At the suggestion of Dr. Landon Ross of Florida's Department of Environmental Regulation, one additional species, Spartina bakeri, has been included. It should be noted that not all species associated with coastal wetlands come under the definition of submerged vegetation, but only those generally found at the seaward fringe of a wetlands area. The species, moreover, would vary from region to region, with different and less diverse species appearing in northern areas. See e.g., Code of Virginia, § 62.1-13.2 (f)(1972).

2.18 Submerged Wetlands Vegetation Line.

The line determined by the landward limits of submerged wetlands vegetation which constitutes the dominant plant species and spreads naturally and continuously inland from the shore.

Commentary. The language of this provision is drawn primarily from Monroe County, Florida Ord. No. 75-17 (1975). It should be noted

that the wetlands vegetation must meet three basic tests to be used in establishing the vegetation line. First, the species or combination of species must comprise the dominant species of the area. (See § 2.11 for definition of dominant plant species.) Second, the species must spread naturally inland. Where indigenous coastal wetlands vegetation has been induced to grow well inland of its natural location by artificial means such as mosquito ditches or drainage canals, the landward limits should be based solely upon the natural growth. (Interview with Mr. Robert Usherson, Dade County, Fla. Dept. of Planning; telephone conversation with Dr. Ronald Gaby, Gaby and Gaby, Inc., Miami, Fla.) Finally, the vegetation must spread in a reasonably continuous fashion from the shore. Isolated areas of such vegetation could exist well inland but would not be included in determining the vegetation line. See Monroe County Ord. No. 75-17 (1975).

2.19 Transitional Wetlands Vegetation.

Any of the following vegetational species or combination of such species existing on coastal property:

Aster	Aster tenuifolius
Beach Carpet	Philoxerus vermicularis
Button Wood	Concarpus erecta
Glasswort (annual)	Salicornia bigelovii
Glasswort (perennial)	Salicornia virginica
Key Grass	Monanthochloe littoralis
Salt Grass	Distichlis spicata
Sea Blite	Suaeda linearis
Sea Daisy	Borrichia frutescens
	Borrichia arborescens
Sea Grape	Coccoloba uvifera
Sea Lavender	Limonium carolinianum
Sea Purslane	Sesuvium portulacastrum
Switch Grass	Spartina patens
Railroad Vine	Ipomoea pes-caprae

Commentary. The above species of wetlands vegetation are those generally found in Florida immediately landward of Submerged Wetlands Vegetation. (See § 2.17 above). The species are based on those listed as indigenous to the "transitional zone of a submerged land" in Rules of the Department of Environmental Regulation, Fla. Adm. Code, Ch. 17-4.02 (19)(1976). The species included in transitional wetlands vegetation would vary from region to region.

SECTION THREE: GENERAL PROVISIONS.

3.1 Lands to Which This Ordinance Applies.

This ordinance shall apply to all coastal property within the jurisdiction of

_____.
(local unit)

Commentary. The provision is modeled after United States Water Resources Council, Regulation, supra, Vol. 1, p. 522, § 2.1, but substitutes the two zones for the three flood districts used in flood plain zoning. See Maloney and Dambly, Model Flood Plain Management Ordinance 16 Natural Resources Journal at 714 (July, 1976).

3.2 Compliance.

No construction or excavation shall hereafter be undertaken within the Preservation-Setback or Conservation-Permitting Zones of coastal property without full compliance with the setback regulations and permit requirements of this ordinance.

3.3. Interpretation.

(a) In the interpretation and application of this ordinance, all provisions shall be considered minimal requirements and construed liberally to effectuate the purposes and objectives of this ordinance.

(b) This ordinance is not intended to repeal, abrogate, or impair any existing easements, covenants, or deed restrictions which impose more stringent restrictions on coastal construction or excavation. Where more than one provision of this ordinance applies to a given coastal property, whichever provision imposes the more stringent restrictions shall prevail. Where this ordinance conflicts with or overlaps another ordinance or statute pertaining to the protection of the coastal environment, whichever imposes the more stringent restrictions on construction and excavation shall prevail.

Commentary. The general provisions of this section are modeled after U. S. Water Resources Council, Regulations, supra, Vol. 1, pp. 522-23, §§ 2.4-2.6.

SECTION FOUR: COASTAL SETBACK LINES.

4.1 Establishment of Coastal Setback Lines. (Alternative 1)

No person may undertake any construction or excavation within the Preservation-Setback or Conservation-Permitting Zones of coastal property until the setback line or lines required by this ordinance for such property have been established by the _____ (local authority). An application for the establishment of a coastal setback line shall be filed with the _____ (local authority) in the manner and form and with such information (including biological, hydrographic, and topographic surveys) as the _____ (local authority) deems necessary. Within sixty (60) days of receiving such application and after public hearing of which at least thirty (30) days prior notice has been given by publication for three consecutive weeks in a newspaper of general circulation in _____ (local unit), the _____ (local authority) shall establish the coastal setback line or lines fifty (50) feet landward of whichever of the following lines is the greatest distance landward from coastal waters:

(a) the beachfront bluff or storm berm line

(b) the beachfront dune line

(c) the beachfront vegetation line

(d) the submerged wetlands vegetation line.

Commentary. This first alternative places the burden upon the individual owner to request that the local authority locate the setback line on his property and to provide adequate information for establishing the line pursuant to the ordinance. The advantages of this individualized approach are twofold. First, the local authority would not be required to survey all coastal property at one time but instead would establish setbacks only on those parcels which an owner plans to develop. Second, the expense of topographic and other appropriate surveys would be borne by the individual owner. The application for establishment of a setback would in most instances be coupled with a permit application pursuant to Section Six of the ordinance so as to avoid both unnecessary delays and duplication of expense in providing scientific and technical information on the physical and biological features of a particular parcel of coastal property.

4.1 Establishment of Coastal Setback Lines. (Alternative II)

The _____ of _____, after having obtained what-
(governing body) (local unit)

ever biological, hydrographic, and topographic surveys of coastal property is deemed necessary, and after public hearing of which at least thirty (30) days prior notice has been given by publication for three consecutive weeks in a newspaper of general circulation in _____, shall establish the coastal
(local unit)

setback line or lines fifty (50) feet landward of whichever of the following lines is the greatest distance landward from coastal waters:

(a) the beachfront bluff or storm berm line

(b) the beachfront dune line

(c) the beachfront vegetation line

(d) the submerged wetlands vegetation line.

Commentary. The language of this provision is drawn primarily from Fla. Stat. § 253.122 (1971) repealed Fla. Stat. § 253.1221 (1973), which empowered local governments to establish the bulkhead lines within their respective jurisdictions. There are a number of problems with attempting to establish setback lines on a community-wide basis. First, the expense in time and money for a local government is likely to be great. In addition, such an approach would result in lengthy delays that would require general moratoria on coastal development pending the establishment of the setbacks. Finally, a good deal of confusion, inefficiency, and procedural difficulties are likely to result. See, e.g., Heeb v. Trustees of Internal Improvement Fund, 37 Fla. Supp. 1 (C. C. Dade Cty., 1971).

It should be noted that there are four possible base lines for establishing a coastal setback line under the ordinance. Any single parcel of coastal property might be subject to all four depending on which one imposes the greatest setback at any given location. Each setback line is linked to the environmental characteristics of the specific property being regulated and is based upon the extent to which such features as dunes, bluffs, storm berms, and vegetation are present and in need of protection. This approach is considered better suited for environmental protection of each coastal area than would a regulatory scheme based solely upon horizontal distances from the mean high water line or the elevations of the property being regulated. See, e.g., Coastal Marshlands Protection Act, Ga. Code Ann. § 137 (b); Fla. Stat. § 161.052 (1975); and Cal. Gov't Code Ann., § 66610 (West Supp. 1973).

4.2 Recordation.

Upon establishment of the coastal setback line or lines as herein provided, a drawing or map showing the location of the line or lines shall be promptly filed in the public records of _____ (local unit), and shall be adopted, filed, and enforced as part of any existing coastal or other land use plan of _____ (local unit).

4.3 Review.

Upon application by the owner of the affected coastal property, the _____ (governing body) of _____ (local unit) shall review the establishment of the coastal setback line or lines and may, after public notice and hearing as provided in § 4.1, approve or alter such line or lines in accordance with the setback provisions of this ordinance.

> Commentary. The language of these provisions is drawn primarily from Fla. Stat. § 253.122 (1971). Recordation of the setback affords notice to subsequent purchasers as to the restrictions imposed upon the property. Review by the governing body insures that decisions by the local authority would be subject to legislative scrutiny and revision.

SECTION FIVE: COASTAL SETBACK REGULATION, EXCEPTIONS, VARIANCES, AND NON-CONFORMING USES.

5.1 Setback Regulation.

No person may undertake any construction or excavation on coastal property seaward of any coastal setback line established for such property pursuant to Section Four of this ordinance.

5.2 Exceptions.

The setback regulations of this ordinance shall not apply to the construction of catwalks, docks, piers, boat shelters, footbridges, observation decks and other similar structures, provided that such structures are elevated on pilings or in such other manner as to permit the unobstructed flow of tidal waters

and upland runoff and to preserve the natural contours and vegetation of coastal property, and further provided that such structures meet the requirements for a Coastal Construction and Excavation Permit ennumerated in Section Six of this ordinance.

Commentary. The exceptions listed in this provision are drawn primarily from those listed in Florida House Bill No. 4014, "Florida Coastal Wetlands Act of 1976" (Introduced in 1976); and Wetlands Zoning Ordinance, Code of Virginia § 62.1-13.5 (Supp. 1972). It should be noted that these exceptions apply only to the setback regulations of the ordinance. Such construction is still subject to the permit restrictions of Section Six.

5.3 Variances.

A variance to the setback regulations of this ordinance may be authorized by the _____ upon receipt of an application from an owner of coastal (governing body)

property which demonstrates an undue hardship from imposition of such regulations and which also meets the requirements for a Coastal Construction and Excavation Permit ennumerated in Section Six of this ordinance.

5.4 Non-Conforming Uses.

The setback regulations of this ordinance shall not apply to any modification, maintenance, or repair of any non-conforming structure existing or under construction at the effective date of this ordinance, provided that such modification, maintenance, or repair: (1) is undertaken within the limits of the existing foundation and above the first dwelling floor or lowest deck of such structure, (2) meets the requirements for a Coastal Construction and Excavation Permit ennumerated in Section Six of this ordinance, and (3) had not been necessitated by damage due to flood or erosion.

Commentary. The provisions for variances and non-conforming uses are modeled after Fla. Stat. § 161.053 (2)(a), (8) (1976) and Fla. Adm. Code, Vol. III, Ch. 16B-25.04 (1976). The model ordinance, however, adopts the approach recommended by Florida's Environmental Land Management Study Committee by prohibiting restoration of any non-conforming structure whose damage or destruction has been caused

by coastal flooding or erosion. See Recommendations on the Coastal Zone and Wetlands of Florida, Environmental Land Management, 99 (Dec., 1973). It should also be noted that variances require a showing of hardship on the part of an applicant and may only be granted by the local governing body.

SECTION SIX: COASTAL CONSTRUCTION AND EXCAVATION PERMITS.

6.1 Required Permit.

No person shall undertake any construction or excavation within the Preservation-Setback Zone or the Conservation-Permitting Zone of coastal property as defined in this ordinance without having first obtained a Coastal Construction and Excavation Permit from the _____ (local authority).

6.2 Permit Application.

An application for a Coastal Construction and Excavation Permit shall be filed in the manner and form and with such information (including appropriate biological, hydrographic, hydrological, topographic, and water quality studies) as the _____ (local authority) may require. Such requirements may be varied according to the type, location, or size of the proposed construction or excavation.

Commentary. The above provisions are modeled after the proposed "Florida Coastal Wetlands Act", Fla. House Bill 4014 (Introduced in 1976).

6.3 Permit Requirements.

A Coastal Construction and Excavation Permit shall be issued upon demonstration by the applicant that the proposed construction or excavation:

(a) will not be contrary to the objectives of this ordinance;

(b) will be in compliance with the standards of the National Flood Insurance Program;

(c) will be in compliance with the Coastal Setback Regulations of Section Four and Five of this ordinance;

(d) will not cause or contribute to erosion, reliction, avulsion, accretion, shoaling, or scouring of coastal property;

(e) will not have significant adverse effects upon coastal property or coastal waters in any of the following ways:

(1) through destruction of Beachfront Pioneer Vegetation, Beachfront Transitional Vegetation, Submerged Wetlands Vegetation, or Transitional Wetlands Vegetation;

(2) through destruction or alteration of beachfront dunes, bluffs, storm berms, or vegetation that contribute to maintaining the stability and protective features of high-energy beaches;

(3) through interference with or alteration of the normal tidal ebb and flow of coastal waters;

(4) through lowering of existing ground elevations;

(5) through interference with or alteration of the normal drainage of coastal property;

(6) through degradation of the quality of coastal waters.

Commentary. The permit requirements are based on a number of different state and local provisions. See especially, Fla. House Bill 4014 (Introduced in 1976); Coastal Marshlands Protection Act of 1970, Ga. Laws No. 1332, § 45-140 (1970); Shore Protection Ordinance, City of Savannah Beach Ord. § 103 (B)(1) (1976); Lee County Ord. No. 76-3 (1976); and Shoreline Management Act of 1971, Wash. Rev. Code § 90.58.140 (1975).

SECTION SEVEN: PENALTIES.

7.1 Restoration.

Any construction or excavation undertaken in violation of this ordinance shall forthwith be corrected after written notice by the _____ (local authority).

In the event that corrective action is not taken as directed within a reasonable time, the _____ (governing body) may, at its own expense, take corrective action to restore the coastal property. The cost thereof shall become a lien upon the coastal property upon which such illegal activity occurred.

7.2 Fines.

Any person undertaking construction or excavation in violation of this ordinance is guilty of a misdemeanor, punishable by a fine of not less than [$100], nor more than [$1,000]. Such person shall be deemed guilty of a separate offense for each day during which a violation of this ordinance is committed or continues.

Commentary. The penalties are modeled after provisions of Fla. House Bill 4014 (Introduced in 1976).

SECTION EIGHT: SEVERABILITY.

Each separate provision of this ordinance is deemed independent of all other provisions herein so that if any provision or provisions of this ordinance be declared invalid, all other provisions thereof shall remain valid and enforceable.

SECTION NINE: EFFECTIVE DATE.

Footnotes to Part II

1. See generally, Veri, Jenna, & Bergamaschi, Environmental Quality by Design: South Florida, 165-182 (U. of Miami Press, 1975), (hereinafter cited as Veri).

2. See Fla. Stat. § 380.06 (1975). The regulation of "Developments of Regional Impact" is part of the Florida Environmental Land and Water Management Act of 1972.

3. See Fla. Stat. § 380.05 (1975), regulating "Areas of Critical State Concern."

4. See Fla. Stat. § 163.1361 et. seq. (1975), enacted as the "Local Government Comprehensive Planning Act" of 1975.

5. See Veri, supra at note 1, p. 71: "The earliest pioneers in South Florida wisely chose the ridge of the coastal strip for their settlements. Here they found refuge from flooding, relief from mosquitoes, and a view of the sea. The trend continues, as 75% of the residents of Florida live and work in coastal counties."

6. See Environmental Land Management Study Committee, Recommendations on the Coastal Zone and Wetlands of Florida, Environmental Land Management, 76-10 (December, 1973); and Florida Department of Natural Resources, Recommendations for Development Activities in Florida's Coastal Zone (1973).

7. Laws of Florida, ch. 70-259 (1970). The Council's functions are presently under the Bureau of Beaches and Shores, Division of Marine Resources within the Department of Natural Resources.

8. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (1972).

9. See generally, Ausness, Land Use Controls in Coastal Areas, 9 Calif. West L. Rev. 391 (Spring 1973). Under the direction of the Department of Natural Resources, the state is preparing its preliminary plans for approval by the Office of Coastal Zone Management of the National Oceanic and Atmospheric Administration.

10. It is estimated that 25% of the state's beaches are subject to "critical erosion", another 70% face "non-critical erosion", with the remaining beaches neither growing nor eroding. See Recommendations on the Coastal Zone and Wetlands of Florida, supra at note 6, p. 98.

11. The Mean-High Water Line is established under the Coastal Mapping Act administered by the Department of Natural Resources. Fla. Stat. §§ 177.25-.40 (1975). It is defined as the intersection of the plane of mean-high water with the land. See generally, Maloney & Ausness, The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping, 53 N. C. L. Rev. 185 (Dec. 1974).

12. Fla. Stat. § 161.052 (1975).

13. Fla. Stat. § 161.053 (1975).

14. The state's House of Representatives failed to approve a bill to regulate coastal wetlands in 1976. See House Bill No. 4014, "Florida Coastal Wetlands Act of 1976" (1976). Other states, however, have adopted wetlands legislation. See, e.g., "Coastal Wetlands Control Act", Ga. Code Ann. §§ 45-136 to 147 (1974); "Wetlands Control Act", Me. Rev. Stat. Ann., Title 38, §§ 471-478 (1974); "Coastal Wetlands Protection Act", Mass. Gen. Laws Ann. Ch. 130 § 105 (1965).

15. See Fla. Stat. Ch. 403 (1975); Rules of the Department of Environmental Regulation, Fla. Adm. Code, Ch. 17-4.01 et. seq. (1976).

16. See, e.g., "Palm Beach County Coastal Construction and Excavation Setback Ordinance", Palm Beach County Ordinance No. 72-12 (1972).

17. See, e.g., Cape Canaveral Code, Ch. XII, § 2, 651.05; and Satellite Beach Ordinance No. 130, Amend. 1.

18. See, e.g., Holmes Beach Ordinance No. 150.3; and Hallandale Code, § 32-223.

19. The "high-energy beach" is a shore fronting the open ocean and dominated by sand and dunal features. See Riedl & McMahan, High Energy Beaches Coastal Ecological Systems of the United States, Vol. 1 (The Conservation Foundation, 1974).

20. See, e.g., Monroe County Ordinance No. 75-17 (1975) which is designed primarily to preserve shoreline mangrove communities.

21. See, e.g., No. St. Johns County Management Plan, Florida Coastal Engineers, Inc., Jacksonville, Florida (April 1974).

22. See, e.g., "Coastal Construction Codes for Estero Island", Lee County Ordinance No. 76-3, 76-7 (1976).

23. Both the Northern St. Johns County plan and the Codes for Estero Island were developed in response to the State of Florida's coastal setback program under Fla. Stat. § 161.053 as an alternative to the setback line proposed by the Department of Natural Resources.

24. State statutes and local ordinances from other jurisdictions were also used in developing the ordinance. The primary focus, however, has been on the Florida experience.

25. See especially, Fla. Stat. § 161.053 (1975); and House Bill No. 4014, "Florida Coastal Wetlands Act of 1976"(1976).

26. See especially, Rules of the Department of Environmental Regulation, Fla. Adm. Code, Ch. 17-4.01 et. seq. (1976).

27. See especially, "Palm Beach County Coastal Construction and Excavation Setback Ordinance", Palm Beach County Ordinance No. 72-12 (1972); Cape Canaveral Code, Ch. XII, § 2, 651.05; Holmes Beach Ordinance No. 75-17 (1975), and Wetlands Zoning Ordinance, Code of Virginia § 62.1-13.5 (supp. 1972).

28. See "Coastal Construction Codes for Estero Island", Lee County Ordinance No. 76-3, 76-7 (1976).

29. See North St. Johns County Management Plan, Fla. Coastal Engineers, Inc., Jacksonville, Florida (April 1974).

30. Other useful reference materials in preparing this ordinance include Veri, supra at note 1; Environmental Land Management Study Committee, Recommendations on the Coastal Zone and Wetlands of Florida, Environmental Land Management, (December, 1973); Ausness, Land Use Controls in Coastal Areas, 9 Calif. West L. Rev. 391 (Spring 1973); Purpura & Sensabaugh, Coastal Contruction Setback Line, Marine Advisory Program, U. of Florida, SUSF-SG-74-002; and Davis, Stabilization of Beaches and Dunes by Vegetation in Florida, Report No. 7, Florida Sea Grant Program (1975).

31. See Sections Four and Five of the model ordinance.

32. See Section Six of the model ordinance.

33. See the definition of "Preservation Zone" at Section 2.15 of the model ordinance.

34. See Section 2.10 for the definition of "Construction" under the model ordinance.

35. See Section 2.12 for the definition of "Excavation" under the model ordinance.

36. The variance provision is Section 5.3 of the model ordinance.

37. The exceptions under the ordinance are provided in Section 5.2.

38. See Section 2.9 for the definition of "Conservation Zone" under the model ordinance.

39. See Section 6.1 of the model ordinance.

40. See Section 1.4 for a summary of the objectives of the model ordinance.

41. Mr. Arthur Harper, Legal Counsel for General Development Corporation, raised this problem in a discussion of an early draft of the model ordinance. The State of Florida's Local Government Comprehensive Planning Act of 1975, Fla. Stat. § 163.3161 et. seq. (1975) also encourages a regional approach to land use planning rather than relying upon individual local communities.

42. S. Rep. No. 92-753, 92nd Cong., 2nd Sess. at p. 5 (1972).

43. See, e.g., Clean Air Act, 42 U.S.C. § 1857d-1 (1970).

44. See, e.g., Local Government Comprehensive Planning Act of 1975, Fla. Stat. §§ 163.3161 et. seq. (1975).

45. The recent extension of the Corps of Engineers' jurisdiction over wetlands, for example, has given regulatory authority to the Corps that it might not be able to exercise effectively. See generally, Schneider, Federal Control Over Wetlands Areas: The Corps of Engineers Expands Its Jurisdiction, 28 U. Fla. L. Rev. 787 (Spring 1976).

46. See generally, Veri, supra at note 30, pp. 71-78; Purpura and Sensabaugh, supra at note 30.

47. See generally Veri, supra at note 30, pp. 116-127; Ausness, supra at note 30, pp. 408-410.

48. Mr. William Sensabaugh, Coastal Engineer for Florida's Department of Natural Resources, raised this problem with respect to early drafts of the model ordinance. In addition to the problems of expertise and expense, Mr. Sensabaugh also pointed out that such an all-encompassing regulatory scheme might prove more difficult politically than would a less ambitious ordinance. In general, Mr. Sensabaugh favored a site-specific approach to regulating coastal development as being the best method for ensuring a professional and effective program.

49. See generally, Ausness, supra at note 30, pp. 391-394; Teclaff & Teclaff, Saving the Land-Water Edge from Recreation, for Recreation, 14 Ariz. L. Rev. 39 (1972).

50. See Schaefer, Conservation of Biological Resources of the Coastal Zone, Coastal Zone Management: Multiple Use With Conservation 39 (J. Bahtz ed. 1972); Environmental Land Management Study Committee, supra at note 30.

51. See, e.g., "Coastal Construction Codes for Estero Island", Lee County Ordinance No. 76-3, 76-7 (1976).

52. See, e.g., North St. Johns County Management Plan, Florida Coastal Engineers, Inc., Jacksonville, Florida (April 1974).

53. Preparation of the Estero Island building codes cost approximately $60,000. Interview with Mr. William Sensabaugh.

54. Without a moratorium, many coastal projects could be started prior to implementation of local regulations, thus precluding enforcement by the local government. See discussion infra at notes 121-126.

55. For an example of a major coastal development begun during the interim between passage and implementation of Florida's engineered coastal setback line legislation, see State ex. rel. Shevin v. Inidico Corp., 319 So.2d 173 (1st D.C.A. 1975).

56. See especially, Sections 2.1, 2.2, 2.6, 2.9 and 2.18 of the model ordinance.

57. See Section 5.3 of the model ordinance for variances and Section 6.3 for permit requirements.

58. See Sections 4.1 (Alternative I) and 6.2 of the model ordinance.

59. For example, a site-specific building code could be prepared for each specific area. As each code is completed it would supersede the model ordinance in regulating development in that area. This approach has been followed in Florida under Fla. Stat. §§ 161.052 and .053 (1975) where an interim setback established statewide has been progressively superseded by engineered setbacks for each coastal county. See generally, Purpura & Sensabaugh, supra at note 30.

60. The appropriate deletion of definitions under Section Two should accompany any such amendment.

61. In Florida a local wetlands land use ordinance would seem to be of great value given the minimal state level regulation in the area.

62. See Purpura & Sensabaugh, supra at note 30; Veri, supra at note 30, p. 74.

63. Florida's statewide coastal construction setback is designed to serve both as a protection of upland property against flood damage and as a means of controlling beach erosion. Fla. Stat. § 161.053(1) (1975).

64. See Collier, Eshagi, & Cooper, "Interaction of Waves, Beaches and Dunes", in Engineering Criteria for Evaluating Proposals for Design and Location of Structures in Variance to Florida's Coastal Construction Set-Back Line, Ch. IV (1-9) (Unpublished draft, Dept. of Coastal Engineering, U. of Fla., January, 1976).

65. See U. S. Army Coastal Engineering Research Center, Shore Protection Manual, Dept. of the Army, Corps of Engineers, Vol. I-III (1973); Veri, supra at note 30, pp. 74-79; Collier et. al., supra at note 64, Ch. V, 1-4.

66. "The pattern of movement in the Gulf of Mexico is not well defined, but along the Atlantic shore the longshore current is the dominant sand transport mechanism. Although there is some seasonal variation in the direction of this littoral drift, the net effect is southward with as much as 500,000 cubic yards of sand moving past some points in a year." Veri, supra at note 30, p. 74.

67. The major sources of sand supply have been from sands carried out to sea by upland runoff and streams as well as marine fossil shells and eroded coral. Waves and currents will bring these sources into shore from a depth of 30 feet. Unfortunately, the damming of major rivers and the destruction of marine life through pollution and dredge and fill activities have sharply reduced these important sources of beach sand. Veri, supra at note 30, pp. 74-75.

68. See Figure 36 in Veri, supra at note 30, p. 78.

69. Id. at 77-78.

70. See Id., Figures 34 and 35, p. 77.

71. For example, the function of the setback line established by Florida's Department of Natural Resources is to move construction sufficiently landward to ensure "the protection of upland properties (from flooding) and the control of beach erosion." Fla. Stat. § 161.053(1) (1975).

72. See Section 2.2 of the model ordinance; Veri, supra at note 30, p. 79, and Purpura & Sensabaugh, supra at note 30.

73. See Section 2.1 of the model ordinance.

74. Bluffs are characteristic of much beachfront in Brevard County, Florida. For an example of the scarping due to erosion of beachfront property, see Davis, supra at note 30, Figure 16, p. 16.

75. Interview with Mr. William Sensabaugh, Coastal Engineer for the State of Florida's Department of Natural Resources.

76. Under the model ordinance development would be setback 50 feet from the seaward edge of bluffs and berms, and the vegetation stabilizing the area would be further protected by the ordinance's permit requirements. See Sections 4.1 and 6.3(e)(1)(2).

77. See especially, Davis, supra at note 30, pp. 29-32.

78. Id. at 30-32.

79. Id.

80. Id. at 31-32.

81. Id. at 30.

82. Morgan, Legal Aspects of North Carolina Coastal Problems, 49 N. C. L. Rev. 857 (1971).

83. Veri, supra at note 30, pp. 117-119.

84. Id. at 124-129.

85. Alteration of wetlands can be accomplished by channelization to enhance natural drainage, dredging one area to provide fill for another section, or transporting fill from upland sources to the wetlands.

86. See Veri, supra at note 30, pp. 116-127; Ausness, supra at note 30, p. 393.

87. Veri, supra at note 30, pp. 116-117; Rules of the Department of Environmental Regulation, Florida Adm. Code, Ch. 17-4.02 (17) - (19) (1976).

88. Id.

89. Id.

90. Id.

91. Id. at 120-123.

92. See, e.g., Spiegle v. Borough of Beach Haven, 381 A.2d 377, 385-87 (N.J. App. 1971), where the court found different setbacks needed for beachfront property owned by a single individual and located in close proximity to each other.

93. The model ordinance provides four different baselines for establishing the setback on coastal property. Any single property could be subject to all four depending upon the natural features present in different areas. By the same token, adjacent properties could well be subject to different setbacks if each property has different physical or vegetational characteristics.

94. The provision for review of an established setback places no time limitation on an owner of coastal property. See Section 4.3 of the model ordinance.

95. See Maloney & Ausness, supra at note 11; and Fla. Stat. §§ 177.25-40 (1975).

96. Fla. Stat. § 161.052(1) (1975).

97. Fla. Stat. § 161.053 (1975).

98. Rather than regulating the location of structures, the flood line regulates their elevation and prescribes certain design restrictions on structures below that line. See Maloney & Dambly, The National Flood Insurance Program - A Model Ordinance For Implementation of Its Land Management Criteria, 16 Nat. Res. J. 665 (July 1976).

99. See Section 6.3 (b) of the model ordinance.

100. See Rules of the Department of Environmental Regulation, Fla. Adm. Code Ch. 17-4.02 (17)(18)(1976).

101. See Schneider, supra at note 45.

102. See "Coastal Construction Codes for Estero Island", Lee County Ordinance No. 76-3, 76-7 (1976); North St. Johns County Management Plan, Fla. Coastal Engineers, Inc., Jacksonville, Fla. (April 1974).

103. See Section 5.4 of the model ordinance.

104. Id.

105. See Recommendations on the Coastal Zone and Wetlands of Florida, Environmental Land Management 99 (Dec. 1973).

106. See, e.g., City of Hollywood v. Hollywood Beach Hotel, Co., 283 So.2d 867 (4th D.C.A. 1973); Edelstein v. Dade County, 171 So.2d 611 (3d D.C.A. 1965).

107. See Naples v. Crans, 292 So.2d 58 (2d D.C.A. 1974). But see Gies v. Fischer, 146 So.2d 361 (Fla. 1962), where the Florida Supreme Court held that imposition of a bulkhead line on property previously conveyed by the state could not be estopped unless the owner had already acquired a filling permit from either the Corps of Engineers or the state's Trustees of Internal Improvement Trust Fund.

108. But see, Sakolsky v. City of Coral Gables, 151 So.2d 433 (Fla. 1963), where the court held that "the 'red flags' of a political contest in which the success of certain candidates may alter the voting pattern of the governing municipal body" are not sufficient to invoke the doctrine.

109. 83 So.2d 874 (Fla. 1955).

110. Id. at 875-6.

111. For a similar problem of an owner creating his own difficulties with respect to variances, see text accompanying notes 134-135 infra.

112. 150 Fla. 614, 8 So.2d 497 (Fla. 1942).

113. Id. at 498-9.

114. Id. The coastal setback was set 40 feet landward of the high water line. That the court would sustain removal of the structure indicates that the provision for restoration in the model ordinance (Section 7.1) would be enforced by the courts against violators of the ordinance.

115. See Section 5.2 of the model ordinance. For a general discussion of the rights of access and wharfing held by littoral owners, see Maloney, Plager & Baldwin, Water Law and Administration §§ 41, 44 and 46 (1968).

116. See Section Six of the model ordinance which provides for no exceptions to its permitting requirements.

117. See Juergensmeyer, Common Law Remedies and Protection of the Environment, 6 U. B. C. L. Rev. 215 (1971); 25 Texas L. Rev. 96 (1946). For example, in 1930 Florida added a section to its state constitution providing a fifteen-year tax exemption to particular industries as an inducement for establishing plants in Florida. In the case of National Container Corp. v. State ex. rel. Stockton, 138 Fla. 32, 180 So. 4 (1939), the Florida Supreme Court held that this exemption necessarily granted the polluter immunity from public nuisance suits. Similar results were reached by the Florida court in subsequent cases involving the drilling of oil wells in tidal waters pursuant to an oil lease statute; Watson v. Holland, 155 Fla. 342, 20 So.2d 388 (1944); and the operation of an airport under a municipal ordinance; Brooks v. Patterson, 159 Fla. 263, 31 So.2d 472 (1947). This defense also has been applied to operations in areas zoned for commercial use. Gerring v. Gerber, 28 Misc. 2d 271, 219 N.Y.S.2d 558 (Sup. Ct. 1961).

118. Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954); Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886).

119. See, e.g., Richard's Appeal, 57 Pa. 105 (1868). Not all of the early cases, however, treated the environment so harshly. See, e.g., Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

120. State ex. rel. Shevin v. Indico Corp., 319 So.2d 173 (1st D.C.A. 1975).

121. Id. at 174-75.

122. In the Indico case a four day trial was held on the issue of whether the construction project constituted a public nuisance despite the fact that the parties stipulated that the project was not in violation of any state or local regulation. Id. at 175.

123. Damage to neighboring property could not only arise from flooding but also from erosion or pollution caused or aggravated by improperly located construction or excavation.

124. See Section 4.1 of the model ordinance setting forth the alternative procedures for establishing a coastal setback.

125. 37 Fla. Supp. 1 (C.C. Dade County, 1971).

126. Prior to passage of F.S. S 253.1221, the state's bulkhead lines were established by local authorities pursuant to public hearings on the location of the line.

127. See Section 4.3 of the model ordinance.

128. See discussion, supra at notes 92-94.

129. See Stokes v. City of Jacksonville, 276 So.2d 200 (Fla. 1973). The traditional application of change of conditions occurs in urban areas where zoning regulations become outmoded by changes in the character of a given area.

130. See City of Miami v. Lachman, 71 So.2d 148 (Fla. 1953), app. dism'd, 348 U.S. 906, 75 S. Ct. 292 (1954); Dade County v. Epstein, 181 So.2d 556 (3d D.C.A. 1965).

131. Id.

132. See Metropolitan Dade County v. Fletcher, 311 So.2d 738 (3d D.C.A. 1975); Hall v. Korth, 244 So.2d 766 (3d D.C.A. 1971).

133. See Section 5.3 of the model ordinance, which confers authority to grant variances solely on the local governing body and not the local authority charged with implementing the ordinance.

134. The hardship requirement of Section 5.3 should be contrasted with the variance provision under Fla. Stat. § 161.053 (1975) which does not require any hardship to be demonstrated by a property owner seeking a variance to the state's coastal setback line.

135. See, e.g., Corsino v. Grover, 148 Conn. 299, 170 A.2d 267 (1961); Rodee v. Lee, 14 N.J. Super. 188, 81 A.2d 517 (N.J. App. 1951); and Richman v. Philadelphia Zoning Board of Adjustment, 391 Pa. 254, 137 A.2d 280 (1958).

136. See Section 5.3 of the ordinance which essentially relies on the permit requirements of Section 6.3 as criteria for granting a variance.

137. See, e.g., Mayflower Property, Inc. v. City of Ft. Lauderdale, 137 So.2d 849 (2d D.C.A. 1962).

138. See, e.g., City of Miami v. Woolin, 387 F.2d 893 (5th Cir. 1968); Toothacker v. City of Ft. Lauderdale, 38 Fla. Supp. 43 (C.C. Broward County 1972).

139. See Toothacker v. City of Ft. Lauderdale, 38 Fla. Supp. 43, 45-46 (C.C. Broward County 1972).

140. See, e.g., Ward v. Village Skokie, 26 Ill. 2d 415, 186 N.E.2d 529, 533 (Ill. 1962); Fasano v. Board of County Commissioners of Washington County, 507 P.2d 23 (Ore. 1973); and R. Anderson, American Law of Zoning §§ 14.01 et. seq. (1968).

141. 273 U. S. 603, 47, S.Ct. 675 (1927). Accord, City of Miami v. Romer, 58 So.2d 849 (Fla. 1952).

142. A setback, however, may be challenged as arbitrary and capricious even though the taking issue is not raised. See, e.g., Mayer v. Dade City, 82 So.2d 513 (Fla. 1955).

143. See, e.g., Curry v. Young, 285 Minn. 387, 173 N.W.2d 410 (Minn. 1969); Hoshour v. County of Contra Costa, 203 Cal. App. 2d 602, 21 Cal. Rptr. 714 (1962).

144. The aggregate effect of setback restrictions is especially important on the beachfront where flooding, erosion, and despoilation of the shore's natural beauty can all be aggravated by improper siting of structures.

145. See generally, F. Bosselman, D. Callies & J. Banta, The Taking Issue (1973); Dunham, Flood Control via the Police Power, 107 U. Pa. L. Rev. 1098 (1959); Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

146. The dimunition test originates with Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

147. Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938), is generally regarded as the classic articulation of the residual use test.

148. See, e.g., Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964), where a local flood plain ordinance prohibiting residential development was declared a taking despite the fact that such uses as marinas, clubhouses, recreation, and agriculture were permitted. The Dooley decision should be distinguished from a pure dimunition in value case, however, for the court indicated that the entire purpose of the zoning was to "contemplate a dimunition in land value and subsequent acquisition by some government agency." Id. at 773. See also, State v. Johnson, 265 A.2d 711, 713 (1970), where the Maine Supreme Court overturned the state's wetlands regulation as applied on grounds that it unduly diminished the value of landowner's property.

149. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

150. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962), where the U. S. Supreme Court adopted the dimunition test but declared that "a comparison of values before and after (regulation)... is by no means conclusive" to the taking issue. See also, Candlestick Properties, Inc. v. San Francisco Bay Conservation & Development Comm'n, 11 Cal. App.3d 557, 89 Cal. Rptr. 897, 906 (1970), which found no impermissible dimunition resulting from prohibition of coastal development.

151. See Ocean Villa Apartments, Inc. v. City of Ft. Lauderdale, 70 So.2d 901 (Fla. 1954).

152. See Plater, The Taking Issue in a Natural Setting: Floodlines and the Police Power, 52 Texas L. Rev. 201, 232-34 (1974).

153. See Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973); and Turner v. County of Del Norte, 24 Cal. App.3d 311, 101 Cal. Rptr. 93 (1972). In both these cases, the courts made a point to emphasize the degree of public harm prevented by the stringent regulations on land use. The basic approach seems to be that the greater the potential harm to the community, the more restrictive the regulations may be on development. In reality, this argument addresses the substantive validity of the regulation rather than the taking issue. Approaching the public harm/private loss issue from the perspective of the dimunition in value test, Maine's Supreme Court argued the opposite way: that the costs of protecting the public welfare ought to be borne by the public and not by individual private landowners. State v. Johnson, 265 A.2d 711, at 716 (Me. 1970). This view echoes J. Holmes' conclusion in Pennsylvania Coal v. Mahon "that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. 393, at 415.

154. 46 N.J. 479, 218 A.2d 129 (1966), cert. denied, 385 U.S. 831 (1966); Spiegle v. Borough of Beach Haven, 116 N.J. Super. 148, 281 A.2d 377 (App. Div. 1971).

155. 218 A.2d at 137.

156. Id.

157. Id.

158. Spiegle v. Borough of Beach Haven, 281 A.2d 377, 385 (App. Div. 1971).

159. Id. at 385-86.

160. Id. at 386. Spiegle failed, however, to convince the court that this other proposed residential construction on another portion of the beach would be "economically feasible". Given the natural constraints of the exposed and unstable shore, the cost of building a safe structure would be in the court's view have been prohibitive. The court thus concluded that "this tract has no present beneficial use for residential construction" and that Spiegle was "entitled to no compensation as to this property." Id. at 387.

161. 56 Wisc.2d 7, 201 N.W.2d 761 (1972).

162. 201 N.W.2d at 771.

163. Id. at 770-71. The same rationale used in Just was recently adopted by the New Hampshire Supreme Court in Gibson v. State, 336 A.2d 239 (N.H. 1975) to uphold a similar wetlands statute.

164. See generally, Plater, The Taking Issue in A Natural Setting: Floodlines and the Police Power, 52 Texas L. Rev. 201 (1974).