

THE BEACH AND SHORE PRESERVATION ACT: REGULATING COASTAL CONSTRUCTION IN FLORIDA

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I. OVERVIEW

Any construction activity within a coastal area will most likely be subject to a variety of federal, state, and local restrictions and regulations. These regulations affect anyone planning construction

within the regulated coastal zone, whether that "person" is a beachfront homeowner adding an extension to a house, a small business owner opening a beachfront restaurant, a corporate developer building a multi-million dollar complex, or a city rebuilding a sea wall or engaging in a beach restoration project. Florida has one of the nation's most comprehensive coastal construction regulatory schemes: the Beach and Shore Preservation Act (BSPA).¹ An important aspect of coastal construction in Florida is that it is generally governed by state statute, particularly the BSPA, while most other land use and zoning regulations are set primarily by local ordinances.

This Article presents an overview of the BSPA and its effects on developers and landowners of Florida coastal property. Before delving into the BSPA, this Article first presents brief overviews of general beach and shore facts, the objectives of coastal construction regulation, and Florida's coastal protection efforts prior to the BSPA. The Article then examines the BSPA, including its regulations, violation provisions, exceptions, and notice requirements. The following sections then address the administrative permitting and review procedures, significant case law, and a critical analysis of the BSPA.

The subject of coastal regulation in general, and the scope of the BSPA in particular, covers a wide array of issues, most of which are beyond the scope of this Paper. This Article focuses specifically on coastal construction regulations of the BSPA and does not delve into the many other related issues, such as local zoning codes and building regulations, regulatory takings,² beach access,³ and wetlands

1. FLA. STAT. ch. 161 (1993).

2. Any discussion of land use regulations inherently involves the "takings" issue, which is beyond the scope of this text. For more detailed analyses of regulatory takings claims regarding coastal regulations, see Susan L. Oosting, *Policing the Beaches: Regulation of Coastal Construction Under Florida Statute, Section 161.053 and the Taking Issue*, 2 J. LAND USE & ENVTL. L. 219 (1986); Michael A. Pfundstein & Maria C. Charles, *Florida's Coastal Construction Regulations and the Taking Issue: The Complexities of Drawing Lines in the Sand*, 6 J. LAND USE & ENVTL. L. 255 (1991); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Charles L. Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVTL. L. 105 (1985); Harold N. Skelton, *Houses on the Sand: Takings Issues Surrounding Statutory Restrictions on the Use of Oceanfront Property*, 18 B.C. ENVTL. AFF. L. REV. 125 (1990). See also *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981).

3. For beach access discussions, see generally Frank E. Maloney et al., *Public*

regulation.⁴

Beach Access: A Guaranteed Place to Spread Your Towel, 29 U. FLA. L. REV. 853 (1977); Karen Oehme, *Judicial Expansion of the Public Trust Doctrine: Creating a Right of Public Access to Florida's Beaches*, 3 J. LAND USE & ENVTL. L. 75 (1987).

4. For an overview of Florida's wetlands regulations, see generally DAVID SALVESEN, *WETLANDS: MITIGATING AND REGULATING DEVELOPMENT IMPACTS* (Urban Land Institute ed., 1990); Mary F. Smallwood et al., *The Warren S. Henderson Wetlands Protection Act of 1984: A Primer*, 1 J. LAND USE & ENVTL. L. 211 (1985); Bruce Wiener & David Dagon, *Wetlands Regulation and Mitigation After the Florida Environmental Reorganization Act of 1993*, 8 J. LAND USE & ENVTL. L. 521 (Spring 1993 Supp.).

II. GENERAL BEACH AND SHORE FACTS

A. America's Coasts

Coastal areas are a unique natural resource, requiring special attention and government protection. The coastal environment is a system of delicately balanced and interdependent ecological subsystems. As a natural resource, the coast is "richer than the Rocky Mountains, [and] more biologically important than even the wildlife of Alaska."⁵ Coastal dunes and beaches also serve to protect the uplands by absorbing violent wave attack from the sea.⁶ The United States Supreme Court has acknowledged the important role which the coasts serve,⁷ and Congress has also recognized the "[i]mportant ecological, cultural, historic and esthetic values in the coastal zone which are essential to the well-being of all citizens."⁸

In addition to these ecological considerations, the coasts have enormous economic significance. Coastal land is highly attractive for both residential and commercial development. Over half of the nation's inhabitants now live within fifty miles of coastal areas, although coastlines comprise less than ten percent of the United States' total land mass.⁹

5. Oliver A. Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 MD. L. REV. 358, 405 (1988); see Milner B. Schaefer, *Conservation of Biological Resources of the Coastal Zone*, in COASTAL ZONE MANAGEMENT: MULTIPLE USE WITH CONSERVATION 35, 35-38 (J.F. Brahtz ed., 1972).

6. E. Warren Shows, *Florida's Coastal Setback Line — An Effort to Regulate Beachfront Development*, 4 COASTAL ZONE MGT. J. 151, 152 n.1 (1978).

7. See, e.g., *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842) (applying public trust doctrine to coastal property).

8. 16 U.S.C. § 1451(e) (1988); see *id.* § 1452(2)(B) (announcing congressional policy to encourage and assist programs in order to provide for "the management of coastal development to minimize the loss of life and property caused by improper development"). The Florida Legislature has declared, "[T]he beaches and . . . the coastal barrier dunes . . . adjacent to such beaches . . . represent one of the most valuable natural resources of Florida." FLA. STAT. § 161.053(1)(a) (1993).

9. Tom Morganthau et al., *Don't Go Near the Water*, NEWSWEEK, Aug. 1, 1988, at 42, 47 (stating 70% of the population lives within fifty miles of the nation's coastlines and that the concentration continues to increase); cf. Robert O'Dell & Laura S. Howorth, *Alabama Tidelands After Phillips Petroleum v. Mississippi: Time to Reinvigorate the Public Trust*, 20 CUMB. L. REV. 365, 365 (1989) (stating 50% of the population lives within fifty miles of the coast).

B. Florida

Florida has 11,000 miles of tidal coastline, including over 1,160 miles of sandy beaches.¹⁰ Most Floridians live within fifty miles of the Atlantic Ocean or the Gulf of Mexico, simply because the Florida peninsula is no wider than ninety-five miles at any one point.¹¹ Over three-fourths of Floridians live in counties bordering the ocean, and projections indicate that over eighty percent of the state's population growth will be in the coastal areas.¹² Florida's coastal population continues to increase at an alarming rate, as more than seven hundred people flock to Florida's coast each day.¹³ The coastal zone has clearly become Florida's "most populous and most sensitive area."¹⁴

III. GOALS OF COASTAL CONSTRUCTION REGULATION

Coastal construction regulation has two primary goals: to protect beaches from erosion and to protect structures. Construction on or seaward of a natural dune system reduces or destroys the protection otherwise provided by nature, which endangers the beach-dune system as well as the imposing structure and other nearby properties.¹⁵ In order to prevent or minimize such damage, governments

10. Donna R. Christie, *Growth Management in Florida: Focus on the Coast*, 3 J. LAND USE & ENVTL. L. 33, 33 (1987); see Daniel W. O'Connell, *Florida's Struggle for Approval Under the Coastal Zone Management Act*, 25 NAT. RESOURCES J. 61, 61 (1985). These measurements include sounds, bays, harbors, and other bodies of water. See ALLEN MORRIS, *THE FLORIDA HANDBOOK 1993-1994*, at 538 (24th ed. 1993). The "general outline of the suncoast" is approximately 1,200 miles long. *Id.*; see BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, 1994 FLORIDA STATISTICAL ABSTRACT 273 (28th ed. 1994) (stating Florida has 1,350 statute miles of general coastline and 8,426 statute miles of tidal shoreline).

11. O'Connell, *supra* note 10, at 61.

12. Christie, *supra* note 10, at 34; see Oehme, *supra* note 3, at 75.

13. See *Coastal Barrier Resource Act Amendments of 1990: Hearings on S. 2729 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 101st Cong., 2d Sess. 57 (1990) (noting "900 new residents" arrive in Florida every day and "eighty percent of them will . . . choose to live near the coast). Florida's population increase may be far greater than 900 new residents per day, as this estimate may only include those people who officially report their change of domicile. It may not include the untold thousands of unreported aliens, homeless people who do not register their domiciliary, and "snowbirds" who live in Florida while maintaining their official residence in another state.

14. Christie, *supra* note 10, at 50-51.

15. See Frank E. Maloney & Anthony J. O'Donnell, Jr., *Drawing the Line at the Oceanfront: The Role of Coastal Construction Setback Lines in Regulating Development of the Coastal Zone*, 30 U. FLA. L. REV. 383, 389-91 (1978).

impose “setback requirements,” which require coastal activity to be located a minimum distance from the shoreline. Setback regulations, such as Florida's “coastal construction control lines” of the BSPA,¹⁶ attempt to move construction sufficiently landward to protect upland properties from flood damage and control beach erosion.¹⁷

A. Protecting Beaches and Dunes from Erosion

The primary purpose of coastal construction regulation is to preserve the beach and dune system from accelerated erosion resulting from the introduction of artificial structures. A sandy beach survives through its ability to regenerate from the destructive forces of ocean winds and waves,¹⁸ but artificial structures can easily destroy the defenses of a high-energy beach and disrupt its natural regeneration.¹⁹ The introduction of a stable, artificial structure such as a bulkhead can interfere with the process of littoral drift and accelerate the removal of sand, thereby undermining the beach, as well as the structure itself.²⁰ Coastal construction creates not only longterm littoral and storm-erosion damage, but may also result in immediate economic harm, through the resulting loss of usable beach areas.²¹

Government restrictions on coastal construction are therefore necessary in order to “keep development activities from encroaching upon the shore and interfering with the natural defenses and regeneration of a beach.”²² This protection is desperately needed, as the

16. See *infra* text accompanying notes 45–59.

17. See FLA. STAT. § 161.053(1)(a) (1993). See Maloney & O'Donnell, *supra* note 15, for a discussion of setback lines. For an analysis of the economic ramifications of Florida's setback requirements, see Shows, *supra* note 6.

18. Maloney & O'Donnell, *supra* note 15, at 389–90.

19. *Id.* at 390. A stable artificial structure may upset the balance of erosion and accretion necessary for the survival of a high-energy beach. This may interrupt the shore's natural slope and block the full force of waves, resulting in a turbulent, scouring action at the base of the structure. The artificial structures may further jeopardize the beaches by impounding reserves of sand and hard objects along the beaches, which may slow or prevent dune-beach rebuilding. See ALBERT R. VERI ET AL., ENVIRONMENTAL QUALITY BY DESIGN: SOUTH FLORIDA 75–78 (1975); Shows, *supra* note 6, at 155–56.

20. See Maloney & O'Donnell, *supra* note 15, at 390.

21. Shows, *supra* note 6, at 155–56.

22. Maloney & O'Donnell, *supra* note 15, at 390; see VERI ET AL., *supra* note 19, at 71–78; Shows, *supra* note 6, at 152.

nation's coastal zones already face serious threat. To wit, approximately one-fourth of the nation's 85,240 shoreline miles are already "significantly eroding,"²³ with twenty-five percent of Florida's beaches subject to "critical erosion" and another seventy percent facing "non-critical erosion."²⁴

B. Protecting Artificial Structures from Storm and Erosion Damage

The second overriding goal of coastal construction regulation is to protect structures from storm and beach damage. High winds, waves, and rains may cause direct damage to beachfront properties, as dramatically evidenced by the attack of Hurricane Andrew in the Miami area. The potential damage to structures is not, however, limited to this direct assault, as the resulting erosion of underlying land can be equally destructive. A single storm can move the shoreline literally hundreds of feet landward, thus destroying improperly located or constructed buildings.²⁵ Coastal construction regulations strive to minimize susceptibility to storm and erosion damage by establishing setback lines²⁶ and imposing construction and building standards.²⁷

IV. FLORIDA'S COASTAL ZONE REGULATION PRIOR TO THE BEACH AND SHORE PRESERVATION ACT

A. History

The Florida Legislature has granted special attention to the state's coastal zone as an area of crucial environmental and eco-

23. COUNCIL ON ENVTL. QUALITY, EIGHTEENTH AND NINETEENTH ANNUAL REPORTS 105-06 (1987-88).

24. ENVIRONMENTAL LAND MGMT. STUDY, REPORT TO THE GOVERNOR AND THE LEGISLATURE 98 (Dec. 1973). The remaining beaches are neither growing nor eroding. *Id.*

25. OFFICE OF COASTAL ZONE MANAGEMENT, DEP'T OF COMMERCE, BIENNIAL REPORT TO THE CONGRESS ON COASTAL ZONE MGMT. 22 (1991).

26. The prophylactic benefit of setback requirements was evidenced in Bay County, Florida, during the 1975 Hurricane Eloise attack, where buildings located seaward of the coastal construction control lines suffered losses at a rate almost five times greater than those structures located behind the line. Shows, *supra* note 6, at 157-58.

27. Much of the physical damage caused by Hurricane Andrew in September 1992 would have been avoided if those structures had been built under today's requirements. Interview with Paden Woodruff, Florida Department of Natural Resources, in Tallahassee, Fla. (Nov. 16, 1992).

conomic importance and has recognized the zone's unique problems of land use regulation and planning.²⁸ Although Florida was one of the first states to install a coastal setback line,²⁹ the State did not take any official action to protect and manage its coastline until 1961 with the passage of the Shore and Beach Preservation Act, the BSPA's predecessor,³⁰ and did not begin serious coastal protection efforts until the 1970s.³¹ Even the BSPA did not impose setback requirements on coastal construction until it was amended in 1970.³²

B. Current Coastal Protections

The coastal zone is now the most strictly regulated area in Florida.³³ The legislature has mandated strong support for beach protection,³⁴ the Florida Constitution mandates that “[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty,”³⁵ and Florida courts are prone to uphold coastal regulations.³⁶ Florida implements its coastal protection goals through the coordination of state, regional, and local planning programs, which places Florida “in the forefront of coastal management.”³⁷ The remainder of this Article addresses the state's primary

28. See VERI ET AL., *supra* note 19.

29. Shows, *supra* note 6, at 151.

30. 1961 Fla. Laws ch. 246 (codified at FLA. STAT. ch. 161 (1963)), *amended and revised* by 1965 Fla. Laws ch. 408 (codified as amended at FLA. STAT. ch. 161 (1965)); see Oosting, *supra* note 2, at 219; *infra* text accompanying notes 38–50.

31. The legislature created the Coastal Coordination Council in 1970. 1970 Fla. Laws ch. 259 (codified at FLA. STAT. § 370.0211 (1971)). The Florida Task Force on Resource Management was formed in 1971, which led to numerous land use acts, including the Florida State Comprehensive Planning Act of 1972, the Florida Environmental Land and Water Management Act of 1972, and the Florida Water Resources Act of 1972. See generally Maloney & O'Donnell, *supra* note 15, at 383–84; Thomas G. Pelham et al., *Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U. L. REV. 515, 517 & n.4 (1985); Rupert Riedl & Elizabeth A. McMahan, *High Energy Beaches*, in 1 COASTAL ECOLOGICAL SYSTEMS OF THE UNITED STATES 180 (H.T. Odum et al. eds., 1974).

32. 1970 Fla. Laws ch. 231, § 1 (codified at FLA. STAT. § 161.052 (1971)). This amendment created “setback” lines, which were then replaced by coastal construction control lines in 1971. See *infra* text accompanying notes 51–55.

33. Oosting, *supra* note 2, at 216.

34. FLA. STAT. § 161.053(1) (1993); see *infra* text accompanying note 39.

35. FLA. CONST. art. II, § 7.

36. Oosting, *supra* note 2, at 221; see *infra* text accompanying notes 228–35.

37. Christie, *supra* note 10, at 50.

source of coastal construction regulation, the BSPA.

V. THE BEACH AND SHORE PRESERVATION ACT

A. Introduction

Coastal construction is regulated in Florida by the Beach and Shore Preservation Act.³⁸ In creating the BSPA, the legislature recognized that the beaches and coastal barrier dunes are one of the state's most valuable natural resources: "it is in the public interest to preserve and protect [the beaches] from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access."³⁹ The BSPA contains three major parts. Part I regulates construction and other physical activity on Florida's coastal beaches.⁴⁰ Part II establishes and regulates beach and shore preservation districts,⁴¹ and Part III, the Coastal Zone Protection Act of 1985, sets forth strict requirements for activities or construction within the coastal building zone.⁴² The Department of Environmental Protection (DEP) has the primary responsibility of coastal construction regulation, permitting, and enforcement of the BSPA.⁴³

The central focus of the BSPA is the establishment of coastal construction control lines (hereinafter "control lines") along sandy beach counties fronting the Atlantic Ocean, the Gulf of Mexico, and the Straits of Florida.⁴⁴ Once a control line has been established, the BSPA then prohibits most coastal construction and other activities seaward of that line.⁴⁵ Coastal construction is defined to include

38. See FLA. STAT. ch. 161 (1993).

39. *Id.* § 161.053(1)(a).

40. *Id.* §§ 161.011–.212.

41. *Id.* §§ 161.25–.45.

42. *Id.* §§ 161.52–.58.

43. *Id.* § 161.053(1)(a). DEP is governed by the administrative rules set forth in chapters 16B-33 and 16B-41 of the *Florida Administrative Code*. See *id.* § 20.255(3) (transferring existing duties and legal authority of Department of Natural Resources and Department of Environmental Regulation to Department of Environmental Protection).

44. *Id.* § 161.053(1)(a).

45. *Id.* § 161.053(2). The BSPA specifies that no party may construct any structure, excavate, remove beach material or otherwise alter the existing ground elevation, drive any vehicle on or otherwise cause damage to such sand dune or vegetation seaward of the control line, unless otherwise provided. *Id.* For an overview of what may be allowed under the "unless otherwise provided" clause, see *infra* text accompanying notes 93–117.

“any work or activity which is likely to have a material physical effect on existing coastal conditions or natural shore and inlet processes.”⁴⁶ The BSPA also prohibits all vehicular traffic on coastal beaches and dunes,⁴⁷ although it allows for certain exceptions,⁴⁸ and further authorizes local governments to charge a reasonable beach access fee, providing these fees are used only for “beach-related” activities.⁴⁹

After passing the requirements set forth by the BSPA, the developer's or landowner's regulatory concerns are not over, as a wide array of other national, state, and local regulations may also restrict or prohibit coastal development.⁵⁰ These other regulations are beyond the scope of this Article, however.

B. Establishing Coastal Construction Control Lines

The BSPA vests the Department of Environmental Protection (DEP) with the authority and duty to establish control lines, but first requires DEP to determine that a setback line is necessary.⁵¹

46. FLA. STAT. § 161.021(6) (1993).

47. *Id.* § 161.58(1). This section, added by amendment in 1985, prohibits “driving any vehicle on, over, or across any dune, or native stabilizing vegetation of the dune system.” *Id.* Violation of this statute constitutes a second degree misdemeanor, which is punishable by a fine of up to \$500 or imprisonment up to 60 days. *Id.* (citing FLA. STAT. §§ 775.082(4)(b), .083(1)(e) (1993)). Prior to the creation of § 161.58, “driv[ing] any vehicle on, over, or across any sand dune” was included (and still is) within the “general” list of prohibited activities under § 161.053(2). *Id.* § 161.053(2); see *supra* note 45.

48. See FLA. STAT. § 161.58 (1993).

49. *Id.* § 161.58(3). Beach-related activities include beach maintenance, traffic maintenance and parking, beach-related law enforcement and liability insurance, and beach-related sanitation, lifeguard, or other staff purposes. *Id.*; see *City of Daytona Beach Shores v. Board of Trustees*, 483 So. 2d 405 (Fla. 1985) (allowing city to impose beach access fee); *New Smyrna Beach v. Board of Trustees*, 543 So. 2d 824 (Fla. 5th Dist. Ct. App. 1989) (allowing city to impose reasonable beach access fee). For an extensive analysis of beach access, see also Maloney et al., *supra* note 3; Oehme, *supra* note 3.

50. For an overview of Florida's numerous regulations relating to its coasts and land usage, see generally Donna R. Christie, *Florida's Ocean Future: Toward a State Ocean Policy*, 5 J. LAND USE & ENVTL. L. 447 (1990).

51. FLA. STAT. § 161.053(2) (1993). “Coastal construction control lines shall be established by the department only after it has been determined . . . that the establishment of such control lines is necessary for the protection of upland properties and the control of beach erosion.” *Id.* Section 20.255(3) of the *Florida Statutes* transferred the existing duties and legal authority of the Department of Environmental Regulation and the Department of Natural Resources to the Department of Environmental Protection.

The coastal construction control line is still sometimes referred to by the more

DEP makes this determination by conducting comprehensive hydrographic, engineering, and topographic surveys,⁵² combining sophisticated computer modeling with various physical criteria.⁵³ DEP then uses this information to place the control line where it may “provide a minimum level of storm protection for structures and for control of beach erosion.”⁵⁴ This engineered determination, which varies by county, replaces the uniform setback standard of fifty feet upland of the mean high water line, as initially established by the BSPA in 1970.⁵⁵

To determine a control line, DEP uses the “100-year storm surge” line, defined as “that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions.”⁵⁶ The Department may also extend a control line further than the 100-year surge line in order to protect a dune system which lies landward of the 100-year line, but may not extend the control line “beyond the landward toe of the coastal barrier dune.”⁵⁷

Under the BSPA, only DEP has the authority to establish control lines, but local governments may establish their own coastal construction *zoning and building codes*, provided that such zones

general term “setback line.” See, e.g., Shows, *supra* note 6, at 154 (referring to BSPA as “the Setback Line Act”).

52. See FLA. STAT. § 161.053(2) (1993); Shows, *supra* note 6, at 154.

53. See generally FLA. STAT. § 161.053(2) (1993); Shows, *supra* note 6, at 154. The DEP uses a complicated and highly technical process to establish a control line. These criteria include ground elevations in relation to historical storm and hurricane tides, predicated maximum wave uprush, beach and off-shore ground contours, vegetation line, erosion trends, the dune or bluff line (if any exist), and existing upland development. FLA. STAT. § 161.053(2) (1993); see Shows, *supra* note 6, at 154–55.

54. Shows, *supra* note 6, at 154; see FLA. STAT. § 161.053(2) (1993).

55. See 1970 Fla. Laws, ch. 231 (codified at FLA. STAT. § 161.052(1) (1971)). The provision for a variable, engineered determination for control line placement was introduced by the 1971 amendment. 1971 Fla. Laws ch. 280, § 1 (codified at FLA. STAT. § 161.053 (1971)). The “mean high-water line,” as defined by the Florida Coastal Mapping Act of 1974, is the intersection of the plane of mean high water with the land. FLA. STAT. § 177.27(15) (1993).

56. FLA. STAT. § 161.053(1)(a) (1993). “To establish the reach of flood waters from a 100-year hurricane, the information is obtained on the characteristics of a storm of that interval, the characteristics of the shoreline that receives the storm’s impact, and the effects of landfalling as opposed to alongshore storms.” Shows, *supra* note 6, at 154. This 100-year storm surge line used to determine a control line is the “same benchmark used by the Federal Insurance Administration in developing flood insurance premiums.” *Id.*

57. FLA. STAT. § 161.053(1)(a) (1993).

and codes are approved by DEP.⁵⁸

C. Re-establishing Coastal Construction Control Lines

The BSPA originally required the Department of Natural Resources, DEP's predecessor, to conduct reviews of established control lines every five years.⁵⁹ The Department of Natural Resources, however, lacked the resources to carry out this mandate, and the legislature subsequently repealed the mandatory five-year review in its 1978 amendment.⁶⁰ Although five-year reviews are no longer mandatory, the DEP conducts ongoing "re-establishments" of existing control lines. The BSPA now provides that any control line which has not been updated since 1980 "shall be considered a critical priority for re-establishment."⁶¹

The need to re-establish existing control lines is threefold. First, as the shoreline recedes, the existing control lines may no longer reflect the current 100-year storm surge line.⁶² Second, the technology and methodology used to establish control lines has been greatly improved and standardized since many of the lines were initially determined. In particular, many of the earlier control lines were determined before the advent of the 100-year storm surge line, which DEP now uses as the standard benchmark to set a control line.⁶³ Finally, many of the earlier control lines were inaccurate because they were determined more by political influences than by scientific data.⁶⁴

58. *Id.* § 161.053(4); see *Town of Longboat Key v. Mezrah*, 467 So. 2d 488 (Fla. 2d Dist. Ct. App. 1985); *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332 (Fla. 4th Dist. Ct. App. 1983) (allowing city to establish local zoning ordinances); *infra* text accompanying notes 215–20.

59. 1971 Fla. Laws ch. 280, § 1 (codified at FLA. STAT. § 161.053(1) (1971)); see FLA. STAT. § 20.255(3) (1993) (transferring the existing duties and legal authority of Department of Resources and the Department of Environmental Regulation to DEP).

60. 1978 Fla. Laws ch. 257 (codified as amended at FLA. STAT. § 161.053 (Supp. 1978)).

61. FLA. STAT. § 161.053(3) (1993); see *Island Harbor Beach Club v. Department of Nat. Resources*, 495 So. 2d 209 (Fla. 1st Dist. Ct. App. 1986); *infra* text accompanying notes 176–86.

62. Interview with Hal Bean, Chief of the Coastal Data Acquisition Bureau, Florida Department of Natural Resources, in Tallahassee, Fla. (Nov. 20, 1992). To compensate for this beach erosion, DEP moves the control lines an average of 150 to 200 feet landward upon re-establishment. *Id.*

63. *Id.*; see Shows, *supra* note 6, at 154.

64. Interview with Hal Bean, *supra* note 62. DEP is currently completing re-estab-

D. Two Other Zones of Regulation: The Thirty-Year Erosion Line and the Coastal Building Zone

In addition to the control lines, the BSPA establishes two other zones of regulation on coastal construction: the thirty-year erosion line and the coastal building zone.

The BSPA was amended in 1985⁶⁵ to further protect the state's shores from imprudent coastal construction by adding, in addition to the control line, a second zone of prohibition — the thirty-year erosion line.⁶⁶ This amendment prohibits most construction seaward of the thirty-year erosion line,⁶⁷ which DEP projects as the point “seaward of the seasonal high-water line within thirty years after the date of [the permit] application.”⁶⁸ The thirty-year line may not, however, extend landward of a pre-established control line.⁶⁹ A major aspect of the thirty-year line is that rather than establishing a set, uniform line (such as the control line), the erosion line is determined *individually* for each case.⁷⁰ This case-by-case determination entails additional time and expense for DEP and, more importantly, creates inconsistent results and uncertainty among landowners and developers.⁷¹

In addition to the thirty-year erosion line, the 1985 legislature also enacted the Coastal Zone Protection Act (hereinafter “Act”).⁷²

ishment of the control lines for Palm Beach, Pinellas, and Bay counties. Telephone Interview with Tom Waters, Department of Environmental Protection (Mar. 30, 1995). Once these three projects are finished, the control lines for all of the state's twenty-four coastal counties will be re-established using the 100-year storm surge line. *Id.*

65. See 1985 Fla. Laws ch. 55, § 33.

66. FLA. STAT. § 161.053(6)(b) (1993).

67. *Id.* The BSPA provides an exception for single-family dwellings that satisfy certain requirements. See *infra* text accompanying notes 93–95.

68. FLA. STAT. § 161.053(6)(b) (1993). The procedures for projecting the 30-year erosion zone are found at FLA. ADMIN. CODE ANN. r. 16B-33.024 (1986). DEP uses a “horizontal contour recession” model, which projects the erosion line thirty years in the future by “horizontally shifting the profile which is depicted on the survey submitted as part of the permit application, in the landward direction a distance equalling thirty times the shoreline change rate obtained by the staff and expressed in terms of feet per year.” FLA. ADMIN. CODE ANN. r. 16B-33.024(3)(h) (1986).

69. FLA. STAT. § 161.053(6)(b) (1993).

70. Pfundstein & Charles, *supra* note 2, at 288.

71. See *infra* text accompanying notes 240–42.

72. 1985 Fla. Laws ch. 55, § 36 (codified at FLA. STAT. §§ 161.52–.58 (1993) (appearing as Part III of the BSPA)).

The Act imposes yet a third coastal regulatory zone, the coastal building zone,⁷³ which is the area extending from the seasonal high water line to a line fifteen hundred feet landward of the control line.⁷⁴ The coastal building zone extends even further for coastal barrier islands, up to a line five thousand feet landward from the control line or the width of the entire island, whichever is less.⁷⁵

In passing the Act, the legislature “recognize[d] that coastal areas play an important role in protecting the ecology . . . [and] have been subjected to increasing growth pressures; and that unless these pressures are controlled, the very features which make coastal areas economically, aesthetically, and ecologically rich will be destroyed.”⁷⁶ The Act manages “the most sensitive portion of the coastal area . . . through the imposition of strict construction standards in order to minimize damage to the natural environment, private property, and life.”⁷⁷

The Act identifies and establishes construction requirements for three different categories of structures: (1) major structures; (2) minor structures; and (3) nonhabitable major structures.⁷⁸ Major structures include buildings such as houses (including mobile homes), hotels, condominiums, and “other construction having the potential for substantial impact on coastal zones.”⁷⁹ All major structures must conform to the state building codes, as well as the 1986 revisions to the 1985 Standard Building Code.⁸⁰ The Act further

73. See FLA. STAT. § 161.54(1) (1993). Another definition of “coastal zone,” as provided by South Carolina, is “all coastal waters and submerged lands seaward to the state’s jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas.” S.C. CODE ANN. § 48-39-10 (Law Co-op. 1987 & Supp. 1993); see *infra* notes 248, 250.

74. FLA. STAT. § 161.54(1) (1993). “Seasonal high-water line” is defined as “the line formed by the intersection of the rising shore and the elevation of 150 percent of the local mean tidal range above local mean high water.” *Id.* § 161.053(6)(a)(2). Local governments having jurisdiction over the property involved are authorized to enforce the Coastal Zone Protection Act. *Id.* § 161.56.

75. *Id.* § 161.55(5). For those areas fronting the Gulf of Mexico, Atlantic Ocean, Florida Bay, or Straits of Florida which do not have an established control line, the Coastal Zone Protection Act applies in the land areas seaward of the most landward velocity zone established by the Federal Emergency Management Agency for the purpose of federal flood insurance. *Id.*; see *id.* § 161.54(1).

76. *Id.* § 161.53(1).

77. *Id.* § 161.53(5).

78. *Id.* § 161.55.

79. *Id.* § 161.54(6)(a).

80. *Id.* § 161.55(1)(a), (d).

requires that all major structures conform to standards of the National Flood Insurance Program and be constructed to withstand wind velocities of 110 miles per hour.⁸¹

Minor structures, which the Act considers “expendable under design wind, wave, and storm forces,” include walkover structures, viewing platforms, gazebos, driveways, and tennis courts.⁸² Minor structures have fewer restrictions than major structures, but must also be designed, constructed, and located in compliance with the National Flood Insurance Program.⁸³

The third category, nonhabitable major structures, is a catch-all for a wide array of structures such as swimming pools, parking garages, water and sewage treatment plants, electrical power plants, streets, bridges, and even lakes and canals.⁸⁴ The Act requires these structures to be designed so as “to produce the minimum adverse impact on the beach and dune system” and also to comply with the National Flood Insurance Program and all other applicable state and local standards not otherwise expressed.⁸⁵ These requirements (for all three categories of structures) extend certain building and construction requirements which would otherwise apply only seaward of a control line even further landward.

E. Violations of the Beach and Shore Preservation Act

Once a control line has been established, any unauthorized construction or excavation seaward of the line violates the statutory provisions and is declared to be a public nuisance.⁸⁶ The BSPA then authorizes DEP to require the offender to remove the structure or refill the excavation.⁸⁷ If the offender does not comply within a reasonable time, the department may then perform the work itself and

81. *Id.* § 161.55(1)(c) (requiring major structures to be “designed, constructed, and located in compliance with National Flood Insurance Program regulations” found in 44 C.F.R. pts. 59, 60); *id.* § 161.55(1)(d). The 110 miles per hour “wind velocity” standard is increased to 115 miles per hour for structures in the Florida Keys; mobile homes are exempted from this requirement. *Id.*

82. *Id.* § 161.54(6)(b).

83. *Id.* § 161.55(2)(d). Even where the Act allows for a minor construction, it specifically prohibits construction of a rigid coastal or shore protection structure built to protect that minor structure. *Id.*

84. *Id.* § 161.54(6)(c).

85. *Id.* § 161.55(3).

86. *Id.* § 161.053(7).

87. *Id.*

assess its costs involved as a lien on that property.⁸⁸

Violation of the control line restrictions constitutes a first degree misdemeanor⁸⁹ and is considered a separate offense, punishable by fines of up to \$10,000 for *each day* of the violation.⁹⁰ The primary purpose of these harsh penalties (as with any regulation) is to give the law some “teeth” in order to promote compliance and provide suitable punishment for violators. However, this provision may also serve an even greater purpose, as declaring structures seaward of the control lines to be public nuisances provides the state with a viable defense against potential regulatory takings claims.⁹¹ DEP also has the authority to suspend or revoke an existing permit if the activity or permit holder is found to violate BSPA rules, regulations, or other laws.⁹²

F. Exceptions and Exemptions

Although the BSPA sets strict prohibitions against coastal construction, it allows for certain exceptions, including single-family dwellings, grandfathered activities, and maintenance and repair activity.

1. Single-Family Dwelling

The primary exception to the BSPA's coastal construction restrictions is the single-family dwelling exception, which authorizes DEP to permit a house to be built seaward of the thirty-year erosion

88. *Id.* DEP has ordered violators to remove the structure and has filed liens upon violators for the fines incurred, but has not exercised its authority to remove the structure itself and charge its costs to the violator. Interview with Paden Woodruff, *supra* note 27.

89. FLA. STAT. § 161.053(8) (1993).

90. *Id.* § 161.054(1). This provision applies to violations of §§ 161.050 and 161.053 and to any other rule or order proscribed by DEP thereunder. *Id.*; see FLA. ADMIN. CODE ANN. r. 16B-33.020 to .021 (1985).

91. See FLA. STAT. § 161.053(7) (1993). If an activity is deemed a public nuisance, the government may prevent an owner from using property in a way that causes harm, without the need to compensate the affected parties. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 144 (1977) (Rehnquist, J., dissenting) (citing *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887)); see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting); see also *infra* text accompanying notes 228–35.

92. FLA. ADMIN. CODE ANN. r. 16B-33.019(1)–(3) (1985); see *infra* text accompanying note 148.

line, providing certain statutory criteria are satisfied.⁹³ The single-family dwelling exception serves two primary purposes. First, it protects the interests of landowners and developers by allowing them to place a house in a location which would otherwise be prohibited by the BSPA. Second, and more significantly, it helps to isolate the state from regulatory taking claims by landowners who would otherwise be prevented from use of their property.⁹⁴ “This exception . . . was clearly intended to sidestep the issue of whether the [BSPA] constituted an unconstitutional ‘taking’ of property by the state. By assuring at least one reasonable use of coastal property, the legislature sought to ensure that the regulation does not preclude *all* economically reasonable uses of property.”⁹⁵

2. Maintenance and Repair

Under subsections 161.053(12) and (13) of the *Florida Statutes*, the BSPA provides certain exceptions to its coastal construction prohibitions for maintenance and repair of existing structures. Subsection (12) grants a general exemption from the restrictions of section 161.053 for repair, modification, and maintenance to existing structures.⁹⁶ Such activity, however, is limited to the above-ground

93. FLA. STAT. § 161.053(6)(c) (1993). The statutory criteria to qualify for the single-family dwelling exception are as follows:

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

Id.

94. The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, guarantees that “[n]o person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V; see FLA. CONST. art. 1, § 9; *id.* art. X, § 6. See generally Sax, *supra* note 2; Siemon, *supra* note 2; Skelton, *supra* note 2.

95. Christie, *supra* note 10, at 44–45; Oosting, *supra* note 2, at 241–42 (this exception “attempted to avoid deprivation of all use of beachfront property by including the discretionary single-family exception”); see Pfundstein & Charles, *supra* note 2, at 261 (“This exception represents the Legislature’s deliberate attempt to reduce the potential risk for claims alleging the regulation constitutes a taking requiring the State to compensate the landowner.”).

96. FLA. STAT. § 161.053(12) (1993).

structure and may not involve the underlying foundation.⁹⁷ This exception does not apply to seawalls or other coastal protection structures, nor to any modification below the first dwelling floor or lowest deck.⁹⁸ The owner of a house located seaward of a control line may therefore repair, expand, or modify the house — even add another floor — without the need of a DEP permit, so long as such repair is within the limits of the existing underlying foundation.

Subsection (13) also provides maintenance and repair exceptions.⁹⁹ At first glance, subsection (13) may appear to be a redundant duplication of subsection (12). In addition, it may be difficult to distinguish between the two sections, i.e., the foundation's "limits" of subsection (12), versus its "confines" of subsection (13), or to determine which provision applies in any given instance.¹⁰⁰ Upon closer analysis, however, several major factors distinguish the two subsections. A primary distinction between the two is that a permit under subsection (13) involves numerous conditions and is within DEP's *discretion* whether to issue,¹⁰¹ whereas subsection (12) provides for a general exemption, not requiring DEP permission or even granting DEP such discretion. A related issue is that subsection (13) still requires the applicant to receive DEP permission,¹⁰² where activity under subsection (12) is automatically exempt, bypassing any need for a DEP permit.

The second major difference between these two provisions is that repair to or rebuilding of the *foundation itself* is permitted under subsection (13), but not under subsection (12). Subsection (12) applies primarily to common maintenance and repair which does not affect the existing (and intact) foundation, such as adding a new interior wall as part of a house remodeling.¹⁰³ Subsection (13), however, contemplates more extensive damage or maintenance which affects the underlying foundation. Rebuilding or repair of the foundation itself may be permitted under subsection (13), so long as such activity is "within the confines of the original foundation" (which

97. *Id.* The maintenance and repair exemption applies within the 30-year erosion zone as well as seaward of the control line. *Id.*

98. *Id.*

99. *Id.* § 161.053(13).

100. *See id.*; *id.* § 161.053(12).

101. *Id.* § 161.053(13)(a).

102. *Id.* § 161.053(13).

103. *Id.* § 161.053(12).

would include the area where the foundation *was* located if the structure is destroyed by a violent storm).¹⁰⁴ If the construction does not affect the underlying foundation, it falls within the permissible limits of subsection (12) and does not require a DEP permit; but if it does affect the underlying foundation, then subsection (13) applies, and a DEP permit is required.

Subsection (13) is further distinguished from subsection (12) in that it also allows the landowner to relocate the structure, which subsection (12) does not provide.¹⁰⁵ Such relocation is, however, permitted only so long as the move is landward of the original location, causes no further harm to the beach/dune system, and does not expand the capacity of the original structure seaward of the 30-year line.¹⁰⁶ An additional distinction is that (12) applies to any existing structure, where (13) applies only to major structures.¹⁰⁷

The owner of property located within the 30-year line may therefore be permitted to rebuild a structure, but not to *expand* it.¹⁰⁸ Confusion, and inevitably legal challenges, may arise as to whether construction activity will pass as a “repair or rebuilding,” or whether it constitutes an impermissible “expansion.” This issue should prove particularly relevant in the wake of the massive repair efforts resulting from Hurricane Andrew's path of destruction in South Florida.¹⁰⁹

3. Grandfathered Activities

The BSPA provides a grandfathered activities exemption for structures which existed or were under construction before the ap-

104. *Id.* § 161.053(13)(a).

105. *Id.*

106. *Id.* § 161.053(13)(a)–(b). This section further specifies that any “[p]ermits issued under [subsection (13)] shall not be considered precedential as to the issuance of subsequent permits.” *Id.* § 161.053(13)(d).

107. *Id.* § 161.053(13)(a).

108. *See* Christie, *supra* note 10, at 46.

109. The BSPA repair regulations will not, however, be as significant a factor for post-Hurricane Andrew repair as they could have been, because the major brunt of Andrew's destruction skipped over coastal property, striking landward of the control line. Interview with John L. Beven, Meteorologist with the National Hurricane Center, in Tallahassee, Fla. (Nov. 13, 1992). The control line issue was more relevant for repair efforts after Hurricane Hugo, which destroyed much of South Carolina's coastline in September 1989. *Id.*

plicable control line was established.¹¹⁰ In order to qualify for this exemption, DEP had originally required the applicant to demonstrate that “continuous physical activity” occurred on the structure, without stopping, for more than six months.¹¹¹ The underlying policy behind the “ongoing activity” requirement was to prevent abuse of the grandfather exemption. For example, a developer could merely start a foundation digging or sink a single fencepost for the sole purpose of keeping the development on hold for years while retaining the right to later develop or sell that property when its value increased.¹¹²

The continuous physical activity requirement has, however, been declared invalid by the First District Court of Appeal of Florida. In *Department of Natural Resources v. Wingfield Development Co.*, the court concluded this rule was an invalid enlargement of its statutory provision.¹¹³ The court recognized the valid objective behind the continuous activity requirement, but concluded that the proper authority to adopt such a rule lies with the legislature and not with DEP or the courts.¹¹⁴ In response to *Wingfield*, the continuous activity rule has been repealed and replaced by rule 16B-33.004 of the *Florida Administrative Code* which now defines “under construction” as *ongoing*, rather than continuous.¹¹⁵ In addition, the Florida Legislature recently amended section 161.053 to now extend the grandfather exemption for three years and to further specify

110. FLA. STAT. § 161.053(9) (1993).

111. FLA. ADMIN. CODE ANN. r. 16B-33.002(56) (1991) (repealed 1992). This rule specifically precluded “all construction after construction activity has remained stopped for at least six months” from the “under construction” exemption. *Id.*; see *Department of Nat. Resources v. Wingfield Dev. Co.*, 581 So. 2d 193 (Fla. 1st Dist. Ct. App. 1991); *infra* text accompanying notes 188–93.

112. See, e.g., *Wiese v. Department of Nat. Resources*, Case No. 83-1177 (Department of Admin. Hr'gs Nov. 10, 1983) (unpublished opinion) (holding that merely placing one piling on site did not constitute construction activity, and therefore would not entitle petitioner to “grandfathered” exemption).

113. *Wingfield*, 581 So. 2d at 198 (“Rule 16B-33.002(56) and DNR's requirement of ‘continuous construction’ are rules that constitute invalid exercises of delegated legislative authority.”).

114. *Id.*

115. FLA. ADMIN. CODE ANN. r. 16B-33.004(1)(a) (1992) (emphasis added). This rule became effective May 12, 1992, to replace rule 16B-33.001(56). This new rule defines “under construction” as “the ongoing physical activity at the time of consideration of the exemption referenced in Subsection 161.053(9), of placing the foundation of, or continuation of construction above the foundation of, any structure seaward of the established coastal construction control line or the set back line.” *Id.*

that "continuous" means following a reasonable sequence of construction without significant or unreasonable periods of work stoppage."¹¹⁶

DEP conducts extensive coastline inspections immediately prior to the setting of the coastal construction control line, in order to determine which activities were actually undertaken prior to the effective date of the line. Prior to *Wingfield*, DEP continued these inspections on a regular basis to determine if the activity had ceased for at least six months which would divest the property owner of the grandfather exemption. The *Wingfield* ruling, however, has eliminated the need for DEP to conduct such ongoing inspections.¹¹⁷

G. Notice Requirement: The Seller's Disclosure Statement

The 1985 amendment to the BSPA created a disclosure statement provision which requires the owner of property located partially or totally seaward of a control line to provide adequate notice to potential buyers of the existence and nature of the BSPA regulations.¹¹⁸ This disclosure may, however, be waived in writing by the purchaser.¹¹⁹

The Florida Legislature specifically expressed its intent behind this notice requirement to protect prospective purchasers, finding "it is necessary [that potential purchasers] are fully apprised of the character of the regulation of the real property . . . and, in particular, that such lands are subject to frequent and severe fluctuations."¹²⁰ Although the stated intent of the notice requirement is to protect the consumer, the state's underlying, although unstated, motive is more likely to reduce the potential of regulatory taking claims by landowners who are prevented from developing their coastal property.¹²¹ Owners of affected property stand a much weak-

116. 1992 Fla. Laws ch. 191, § 1. The DEP, however, still determines what constitutes "significant" or "unreasonable" periods of work stoppage.

117. Interview with Paden Woodruff, *supra* note 27.

118. 1985 Fla. Laws ch. 55 (codified at FLA. STAT. § 161.57(2) (1993)).

119. *Id.* § 161.57(2).

120. *Id.* § 161.57(1). The landowner must also provide the buyer with an affidavit or survey indicating the location of the control line. *Id.* § 161.57(2).

121. Christie, *supra* note 10, at 45 (stating that notice requirement of "1985 legislation adds a second line of defense against 'taking' attacks"). The first line of defense is the single-family dwelling exception of § 161.053(5)(c). See *supra* text accompanying notes 93-95.

er chance of proving that the BSPA regulations have frustrated their “reasonable investment-backed expectations” after they have received notice of the regulations affecting that property.¹²²

VI. PERMITTING PROCEDURES

A. DEP's Authority to Grant Permits

The BSPA requires a DEP permit for almost any construction activity seaward of an established control line,¹²³ and the party seeking the permit must convince DEP that such activity is clearly justified by the facts and circumstances.¹²⁴ In reviewing the permit request, DEP considers a wide range of criteria, including engineering data, design features, and potential impacts, and may further require engineering certificates to assure the adequacy of the project's design.¹²⁵ The department must consider both longterm as well as shortterm effects in its review process.¹²⁶

The DEP has wide discretion to approve coastal construction permits for prudent coastal development and grant exceptions to the general prohibitions of section 161.053.¹²⁷ The department may, for example, allow construction seaward of a control line if existing structures in the same area “have established a reasonably continuous and uniform construction line [seaward of the control line] and

122. Christie, *supra* note 10, at 45. See *supra* note 1 for references to analyses of the takings issue. *But see* Vatalaro v. Department of Env'tl. Reg., 601 So. 2d 1223 (Fla. 5th Dist. Ct. App.) (finding that denial of dredge and fill permit constituted an “inverse condemnation,” because it prevented all economically viable uses of the property, *regardless* of the landowner's adequate notice that the property was subject to wetlands regulations), *rev. denied*, 613 So. 2d 3 (Fla. 1992).

123. FLA. STAT. § 161.053(2)(5) (1993). Proscribed activities include building, excavating, removing beach material, altering existing ground elevations, driving vehicles, and causing damage to sand dunes or vegetation. *Id.* § 161.053(2); see *supra* note 45 and accompanying text.

124. FLA. ADMIN. CODE ANN. r. 16B-33.005(1) (1985). The applicant bears the burden of proving these facts and circumstances. See *Woodholly Assocs. v. Department of Nat. Resources*, 451 So. 2d 1002 (Fla. 1st Dist. Ct. App. 1984); *infra* text accompanying notes 194–99.

125. FLA. STAT. § 161.053(5)(a), (d) (1993). Other considerations include the potential cumulative effects upon the beach/dune system, interference with public beach access, and protection of sea turtles and endangered plant communities, and mitigation or financial assurances. *Id.* § 161.053(5)(a)–(c), (f).

126. FLA. ADMIN. CODE ANN. r. 16B-33.024 (1985), provides the rules for the thirty-year erosion projection procedure.

127. FLA. STAT. § 161.053(5)(a) (1993).

the existing structures have not been unduly affected by erosion.”¹²⁸ The DEP also has the power to limit construction which interferes with public access to beaches, require the applicant to provide mitigation and/or financial or other assurances of compliance with permit conditions, and require public notice filing of these conditions.¹²⁹

B. Permitting Procedures

Permitting under the BSPA is a licensing activity and therefore subject to the provisions of the Florida Administrative Procedure Act (APA).¹³⁰ The administrative rules governing the BSPA are set forth in chapters 16B-33 and 16B-41 of the *Florida Administrative Code*. Chapter 16B-33 implements permits sought under section 161.053 of the BSPA for structures landward of the mean high-water line.¹³¹ This chapter would typically apply to landowners and developers planning to construct, repair, or expand houses, condominiums, or hotels located within the coastal zone but behind the mean high-water line. The newly enacted chapter 16B-41, on the other hand, implements section 161.041 permits, for structures seaward of the mean high-water line.¹³² This chapter would be most applicable to local government entities planning shore protection activities, such as seawalls, jetties, groins, breakwaters, excavation dredging, or artificial beach nourishment.¹³³

These regulatory rules authorize DEP to impose strict requirements upon an applicant seeking a coastal construction permit. Under this authority, DEP may require an applicant to locate the construction as far landward as possible,¹³⁴ design the structures so as to minimize adverse impacts on the beach/dune system,¹³⁵ provide

128. *Id.* § 161.053(5)(b).

129. *Id.* § 161.053(5)(e), (f).

130. *See id.* ch. 120. *See also infra* text accompanying notes 153–75 for a more comprehensive discussion of the administrative review and appeal procedures governing agency permits.

131. FLA. ADMIN. CODE ANN. r. 16B-33.001 (1985). Chapter 16B-33 implements FLA. STAT. §§ 161.052–.054, .071, 370.02. *See* FLA. ADMIN. CODE ANN. r. 16B-33.001.

132. FLA. ADMIN. CODE ANN. ch. 16B-41.001 (1992). Chapter 16B-41 implements FLA. STAT. §§ 161.041–.042, .051, .0535, .054, .061, .071, .121, .131, .142, .201, .212. *See* FLA. ADMIN. CODE ANN. r. 16B-41.001.

133. FLA. STAT. § 161.041(1) (1993).

134. FLA. ADMIN. CODE ANN. r. 16B-33.007(1) (1992); *see* Department of Nat. Resources Final Order No. 2911 (Dec. 3, 1984) (unpublished opinion).

135. FLA. ADMIN. CODE ANN. r. 16B-33.007(2) (1991).

DEP with evidence the proposed activity is necessary and clearly justified,¹³⁶ comply with structural and wave load capacity standards,¹³⁷ provide evidence of ownership and legal description of the property,¹³⁸ submit permit fees with the application,¹³⁹ and obtain local approval of the proposed activity.¹⁴⁰ The administrative rules also encourage, but do not require, the applicant to consult with the DEP staff both prior to and during the application process, but such consultation is not binding upon the staff.¹⁴¹

C. Termination, Suspension, Revocation, and Transfer of Permits

1. Expiration and Extension

A coastal construction permit under the BSPA is issued in the name of the specified property owner¹⁴² and expires three years after the date of the final order granting the permit,¹⁴³ until the activity is certified complete,¹⁴⁴ or when the property is sold or transferred.¹⁴⁵ Once a permit has expired, all work must cease unless an extension or new permit is granted, although DEP may still require the applicant to conduct mitigating work which was ordered as a condition of the permit.¹⁴⁶ The holder of an expired permit may apply to DEP for an extension of up to twelve months to complete the work, or may apply for a completely new permit which will be treated as an initial application and subject to a complete DEP review.¹⁴⁷

2. Suspension and Revocation

DEP also has the authority to suspend or revoke a permit when

136. *Id.* r. 16B-33.007(7).

137. *Id.* r. 16B-33.007(6).

138. *Id.* r. 16B-33.008(2)(b).

139. *Id.* r. 16B-33.008(5).

140. *Id.* r. 16B-33.005(6). DEP will not contravene local zoning or setback requirements, but is not bound by local laws "which are contrary to the purposes of chapter 161, Florida Statutes." *Id.*

141. *Id.* r. 16B-33.011. The review and appeal procedures for BSPA permit applications are discussed *infra* Part VII.

142. *Id.* r. 16B-33.016.

143. *Id.* r. 16B-33.017(5).

144. *Id.* r. 16B-33.017(2).

145. *Id.* r. 16B-33.016.

146. *Id.* r. 16B-33.017(3).

147. *Id.* r. 16B-33.017(4), (6).

the department finds the applicant has failed to comply with the applicable laws, rules, or regulations of the BSPA or if substantial shoreline changes occur subsequent to the permit issuance.¹⁴⁸ The “shoreline changes” provision applies only to activities not yet under construction and when the shoreline changes render the previously permitted activities adverse or ineffective.¹⁴⁹

3. Transfer

Although a permit generally terminates upon sale of the property, it may be transferred to a new owner, who must apply for the transfer and provide evidence of ownership.¹⁵⁰ Any changes to the project or alterations of the permit conditions must comply with the “modification of permit” requirements,¹⁵¹ and the new owner will be held liable for any nonconforming or unpermitted work which occurs upon the property subsequent to sale.¹⁵²

VII. REVIEW AND APPEAL PROCEDURES

The BSPA contains certain provisions for review and appeal procedures and is primarily governed by the Florida Administrative Procedure Act.¹⁵³ Most review and appeal issues under the BSPA involve challenges to either the establishment of a control line or the denial of a construction permit.

A. Establishment of a Coastal Construction Control Line

Control lines are promulgated as rules and are therefore subject to the rulemaking requirements of the APA.¹⁵⁴ The BSPA, does, however, eliminate two procedural safeguards otherwise provided in the APA. Control lines become effective upon *filing* with the Secretary of State's office, the twenty-day waiting period between the filing of an adopted rule with the secretary of state's office and the

148. *Id.* r. 16B-33.019(1), (4).

149. *Id.* r. 16B-33.019(4).

150. *Id.* r. 16B-33.016.

151. *Id.* r. 16B-33.016(3).

152. *Id.* r. 16B-33.016(4).

153. FLA. STAT. ch. 120 (1993).

154. *Id.* § 161.053(2). Control lines are filed in the official public records of any county or municipality in which they are located. *Id.*

effective date of that rule has specifically been eliminated.¹⁵⁵ Secondly, the adoption of a control line is *not* subject to a proposed rule challenge or drawout proceeding prior to adoption, as would otherwise be provided.¹⁵⁶ These procedural steps were eliminated in order to expedite DEP's ability to establish a control line, without being "drawn out and delayed every step of the way with administrative challenges."¹⁵⁷ The result is that a potentially affected party may not challenge a pending control line determination until DEP adopts its proposed rule and actually establishes the setback line.

Once the control line has been adopted, however, a substantially affected party may then seek an administrative hearing to challenge the validity of that determination.¹⁵⁸ If this administrative process does not prove successful, the party may then seek judicial review,¹⁵⁹ but must first exhaust all remedies available through the administrative procedure.¹⁶⁰

155. *Id.* The 20-day waiting period is provided for in FLA. STAT. § 120.54(13) (1993).

156. *Id.* § 161.053(2). The rule challenge and drawout proceedings are provided for in FLA. STAT. § 120.54(4) and (17), respectively.

157. Interview with Paden Woodruff, *supra* note 27; *see St. Joe Paper v. Department of Nat. Resources*, 536 So. 2d 1119, 1121 (Fla. 1st Dist. Ct. App. 1988) (denying review rights in order "to provide a smooth, uninterrupted procedure for adoption of control lines by prohibiting those rule challenge proceedings which would normally occur prior to the final adoption of a rule").

158. FLA. STAT. § 161.053(2) (1993). Once established, the control line is reviewable by the state appellate courts under FLA. STAT. § 120.68 (1993); *see St. Joe Paper*, 536 So. 2d at 1121 (noting availability of judicial review under § 120.68); *see also* Department of Nat. Resources v. Wingfield Dev. Co., 581 So. 2d 193, 197 (invalidating requirement of continuous construction to qualify for grandfathered activities exemption); *supra* text accompanying notes 113–17; *infra* notes 188–93.

159. Judicial review is available pursuant to § 120.68 of the *Florida Statutes*. FLA. STAT. § 161.053(2) (1993). A landowner "who feels that [the established control line] is unduly restrictive or prevents a legitimate use of his property shall be granted a review of the line upon written request . . . [and DEP's decision] shall be subject to judicial review as provided in chapter 120." *Id.* Landowners who are denied the desired use of their property through the denial of a building permit may also invoke a § 120.57 challenge which is reviewable by the appellate court. *See id.*

160. *See Key Haven Associated Enters. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 156 (Fla. 1982); *Gulf Pines Mem. Park, Inc. v. Oaklawn Mem. Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978); *St. Joe Paper*, 536 So. 2d at 1124–25; *Smith v. Willis*, 415 So. 2d 1331, 1333–34 (Fla. 1st Dist. Ct. App. 1982). *But see* FLA. STAT. § 253.763 (1993) (providing that "[a]ny person substantially affected by a final action of any agency with respect to a permit may seek review . . . in the circuit court . . . solely to determin[e] whether final agency action is an unreasonable exercise of the state's police power constituting a taking") (emphasis added); *Bowen v. Department of Env'tl. Reg.*, 448 So. 2d 556, 569 (Fla. 2d Dist. Ct. App. 1984).

B. Approval or Denial of a Permit

After receiving an application for a construction permit, DEP must notify the applicant within thirty days of any apparent errors or omissions in the application.¹⁶¹ Moreover, the DEP must request any additional information, if needed, from the applicant within thirty days.¹⁶² After receiving this information, DEP then has ninety days to take final action, and the permit is issued by default if DEP fails to take final action or request a hearing within those ninety days.¹⁶³ If the permit application must be considered by the governor and cabinet, DEP issues public notice of intended agency action to persons who have requested such notification.¹⁶⁴ After receiving all necessary information, DEP issues a notice of intent to issue or deny the permit.¹⁶⁵

Affected parties, i.e., the applicant who is denied the permit or third parties challenging the intended issuance of the permit, may seek and receive a formal administrative hearing before the Department of Administrative Hearings (DOAH).¹⁶⁶ The DOAH hearing officer then makes findings of fact and conclusions of law and issues a recommended order.¹⁶⁷ DEP may reject or modify the hearing officer's conclusions of law, but must accept the findings of fact, so long as the findings are supported by competent, substantial evidence in the record.¹⁶⁸ This decision by DEP constitutes final agency action

161. FLA. ADMIN. CODE ANN. r. 16B-33.012(2) (1985).

162. *Id.*

163. FLA. STAT. § 120.60(2) (1993); *see* *Adec, Inc. v. Department of Nat. Resources*, 507 So. 2d 1225 (Fla. 5th Dist. Ct. App. 1987) (issuing construction permit by default); *infra* text accompanying notes 213–14; *see also* *Department of Transp. v. Calusa Trace Dev. Corp.*, 571 So. 2d 543 (Fla. 2d Dist. Ct. App. 1990).

164. FLA. ADMIN. CODE ANN. r. 16B-33.012(7) (1985). This notice comes in the form of the printed agenda item, including staff evaluation and recommendation, for the cabinet meeting at which the application is to be considered. A point of entry is provided to the applicant and all other interested persons requesting notice, who then have 21 days from receipt of notice to request a hearing. If no such request is made within 21 days, the right to a hearing is waived. If the governor and cabinet's decision is different from the agency recommendation, an additional 21 days are granted from the date of the cabinet's announcement of its decision. *Id.* r. 16B-33.012(8)(d).

165. *Id.* r. 16B-33.012(8).

166. *See* FLA. STAT. §§ 161.212(2) (1993).

167. *Id.* § 120.57.

168. *Id.* § 120.57(1)(b)(10); *see, e.g., Asphalt Pavers, Inc. v. Department of Transp.*, 602 So. 2d 558, 561 (Fla. 1st Dist. Ct. App. 1992); *St. Joseph Land & Dev. Co. v. De-*

which is then subject to judicial review.¹⁶⁹

When challenging the agency rule, a party may choose to contest the validity of the agency action in the district court of appeal or may bring a regulatory taking claim to the circuit court.¹⁷⁰ When contesting the validity of the rule, i.e., that the rule is arbitrary, capricious, or not in compliance with the authorizing statute, the appellant may not seek judicial review until all administrative remedies have been exhausted.¹⁷¹ When alleging a taking, however, a party need not first exhaust all administrative remedies, and may seek judicial review directly upon DEP's initial decision to deny the permit.¹⁷² Takings challenges are entitled to this expedited access to judicial review, bypassing the need to first exhaust all administrative remedies, because hearing officers are not authorized to rule on constitutional issues such as takings claims. The circuit court's review is, however, then limited to "whether [the] final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation,"¹⁷³ and the court may not consider the merits of the permit denial.¹⁷⁴ In any BSPA challenge, the prevailing party, whether the agency or the affected landowner, may also receive costs and attorney's fees.¹⁷⁵

partment of Nat. Resources, 596 So. 2d 137, 140 (Fla. 1st Dist. Ct. App.), *rev. denied*, 604 So. 2d 487 (Fla. 1992); *Heifetz v. Department of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st Dist. Ct. App. 1985).

169. FLA. STAT. §§ 161.212(2), 120.68 (1993).

170. *Id.* §§ 120.68, 253.763. *See Key Haven Associated Enters. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982).

171. *See* FLA. STAT. § 253.763 (1993).

172. *See id.* *See generally Key Haven*, 427 So. 2d at 156.

173. FLA. STAT. § 161.212(2) (1993). If the court determines the regulation constitutes a taking, it must then remand the action to DEP which must agree either to issue the permit, pay appropriate monetary damages, or modify its decision to avoid an unreasonable exercise of police power. *Id.* § 161.212(3). If the agency fails to take action within a reasonable period of time, the court may order performance of any of these alternatives. *Id.* § 161.212(4).

174. *Key Haven*, 427 So. 2d at 160 (stating that "by electing the circuit court as the judicial forum, a party foregoes any opportunity to challenge the permit denial as improper . . . arbitrary or capricious or as failing to comply with the intent and purposes of the statute"); *see Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1380-81 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); *Vatalaro v. Department of Envtl. Reg.*, 601 So. 2d 1223, 1227 (Fla. 5th Dist. Ct. App.), *rev. denied*, 613 So. 2d 3 (Fla. 1992).

175. FLA. STAT. § 161.212(5) (1993); *see infra* note 246 and accompanying text.

VIII. CASE LAW

Most of the case law under the BSPA involves administrative challenges to DEP's rules or actions. These disputes typically involve challenges to DEP's interpretation of statutory or regulatory language, establishment of a control line, adoption of a certain method to determine a control or erosion line, denial of a construction permit, or third party challenges to a permit issuance. In deciding these cases, Florida courts follow the general rule of according great deference to the agency's decisions and expertise.

A. Deference to DEP's Expertise

The seminal case regarding challenges to DEP's decisionmaking authority under the BSPA is *Island Harbor Beach Club, Ltd. v. Department of Natural Resources*, where the First District Court of Appeal of Florida upheld a determination of DEP's predecessor, the Department of Natural Resources.¹⁷⁶ Island Harbor Beach Club challenged the department's proposed amendment to re-establish a control line in Charlotte County, Florida.¹⁷⁷ A DOAH formal hearing upheld the proposed rule; Island Harbor then appealed the DOAH decision to the district court, claiming the rule was invalid on several bases.¹⁷⁸ Island Harbor's first claim was that the department exceeded its authority by amending its definition of "beach/dune system."¹⁷⁹ Island Harbor also argued that even if the department had such authority, the definition which it adopted exceeded its statutory authority.¹⁸⁰ The court rejected both claims, finding the Department of Natural Resources' construction of the phrase

176. *Island Harbor Beach Club, Ltd. v. Department of Nat. Resources*, 495 So. 2d 209 (Fla. 1st Dist. Ct. App. 1986).

177. *Id.* at 211. The department sought to amend rule 6B-26.20 of the *Florida Administrative Code* as authorized by § 161.053(2) of the *Florida Statutes*, and appellants then filed a petition challenging the validity of the proposed amendments, pursuant to §§ 120.54(4) and 120.56 of the *Florida Statutes*. *Id.*

178. *Id.*

179. *Id.* at 214. Appellants alleged that because Department of Natural Resources had already established definitions of an existing "beach" and "dune," it was exceeding its authority in construing new definitions of a nonexisting beach/dune system that may develop in the future. *Id.*

180. *Id.* at 215. Island Harbor alleged "[section 161.053] contains no reference to either beach or dune." *Id.*

“beach/dune system” was proper, did not exceed the agency's statutory jurisdiction, and did not exceed the purpose of the BSPA.¹⁸¹ Island Harbor then presented various challenges to the methodologies used and conclusions reached by the department to determine control line locations, claiming the method adopted did not bear a reasonable relationship to the purpose of section 161.053 of the BSPA.¹⁸² The court addressed and then rejected each challenge, finding that a reasonable relationship existed between the department's decisions and the purpose of the BSPA.¹⁸³

Island Harbor exemplifies the general rule that Florida courts will grant great deference to administrative agency decisions and will not disturb an agency's exercise of its delegated authority absent a showing that the agency actions were arbitrary, capricious, or an abuse of the agency's administrative discretion.¹⁸⁴ As the court noted, “The complexity of the scientific and technical issues . . . [require the] deference necessarily given to DNR's expertise [and] vividly illustrate the limited role an appellate court can play in resolving . . . technical matters requiring substantial expertise.”¹⁸⁵ The court concluded that the legislature's use of scientific terms in setting control line standards “compels [the court] to accord considerable — if not extraordinary — deference to DNR's interpretation of . . . scientific technique or methodologies.”¹⁸⁶

As the *Island Harbor* court indicated, judicial deference toward agency discretion is particularly strong when applying the agency's special expertise, rather than defining or interpreting common terms. This judicial deference was further evidenced in *St. Joseph Land & Development Co. v. Department of Natural Resources*, where

181. *Island Harbor*, 495 So. 2d at 215.

182. *Id.* at 215–22. The department adopted the “three-foot wave” methodology to determine what portion of the beach/dune system would be subject to severe fluctuations in the event of a 100-year storm, and used the “2.5 multiplier factor” to calculate erosion projections. *Id.*

183. *Id.* at 215–16. The court found the three-foot wave methodology “bears a reasonable relationship to the statutory purpose because the area covered by the three-foot wave is shown to be part of the dynamic cyclical beach-dune system.” *Id.*

184. *Id.* at 218; see *Agrico Chem. Co. v. Department of Env'tl. Reg.*, 365 So. 2d 759 (Fla. 1st Dist. Ct. App. 1978); *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st Dist. Ct. App. 1977). See generally 1 FLA. JUR. 2D *Administrative Law* § 41 (1977).

185. *Island Harbor*, 495 So. 2d at 223 (citing *Carstens v. Nuclear Reg. Comm'n*, 742 F.2d 1546, 1577 (D.C. Cir. 1984)).

186. *Id.*

the court affirmed the department's interpretation of property "fronting" the Gulf of Mexico, as well as its choice of scientific methodology used to establish control lines.¹⁸⁷

Although this judicial deference to agency discretion is generally very strong, as evidenced in *Island Harbor* and *St. Joseph*, it is not absolute. A leading example of a successful BSPA rule challenge is *Department of Natural Resources v. Wingfield Development Co.*¹⁸⁸ Wingfield Development Company challenged the Department of Natural Resources' interpretation of the term "under construction" to require continuous physical activity, with periods of inactivity lasting no more than six months, in order to qualify for an exemption from control line permit requirements under the grandfathered activity exemption.¹⁸⁹

The court agreed with Wingfield that this rule constituted an invalid exercise of the department's delegated legislative authority.¹⁹⁰ The continuous activity requirement, concluded the court, enlarged and modified the department's statutory authority by authorizing the department to continuously determine whether exempt structures remained under continuous construction after a control line was established.¹⁹¹ The court noted that chapter 161 of the *Florida Statutes* authorized the department to determine whether a structure is under construction *prior* to establishing a control line, but did "not authorize DNR to determine whether a structure *remain[ed]* under construction or whether construction [was] abandoned after that date."¹⁹² As a result of this decision, the continuous

187. *St. Joseph Land & Dev. Co. v. Department of Nat. Resources*, 596 So. 2d 137, 138-40 (Fla. 1st Dist. Ct. App.), *rev. denied*, 604 So. 2d 487 (Fla. 1992); *see* FLA. ADMIN. CODE ANN. r. 16B-26.016 (1986). The methodology used by the department to establish control lines included a complex computer model which projected the expected 100-year storm tides and utilized extensive weather and topographic data to predict the effect of such tides. *St. Joseph*, 596 So. 2d at 139-40. The court dismissed the case, having concluded that the projections were not invalid or unreasonable and that the hearing officers' findings were supported by competent, substantial evidence. *Id.*

188. 581 So. 2d 193 (Fla. 1st Dist. Ct. App. 1991).

189. *Id.* at 195-97; *see* FLA. STAT. § 161.053(9) (1991) (grandfathered activity exemption); FLA. ADMIN. CODE ANN. r. 16B-33.002(56) (1985) (repealed 1992); *see supra* text accompanying notes 113-17.

190. *Wingfield*, 581 So. 2d at 197-98.

191. *Id.*

192. *Id.* at 198 (emphasis added). Judge Schwartz dissented, arguing that "under construction" . . . clearly connotes a continuum — an extension over a period of time — rather than a situation as it exists at a particular point." *Id.* (Schwartz, J., dissenting).

activity rule has subsequently been repealed and replaced with a new definition of "under construction."¹⁹³

B. Third Party Standing to Challenge Permits

A second major issue involving the BSPA arises when affected third parties challenge DEP's decision to grant an applicant's coastal construction permit. A leading case under this scenario is *Woodholly Associates v. Department of Natural Resources*, where the department granted a permit to the city of Hollywood, Florida, to construct certain improvements seaward of the control line.¹⁹⁴ Woodholly, the developer of a condominium located adjacent to the site of the proposed development, challenged the department's decision to grant the permit to the city.¹⁹⁵

As discussed earlier in this Article, the applicant for a coastal construction permit has the burden of proving the necessity for construction seaward of a control line.¹⁹⁶ The *Woodholly* court determined that the city had met this burden and allowed the city to proceed with its planned construction.¹⁹⁷ A third party who disputes the permit must do more than simply challenge the permit issuance; the third party has the additional burden of identifying the *specific* areas of controversy and alleging a factual basis to show the applicant has failed its burden of proof.¹⁹⁸ Woodholly's challenge was defeated because it "simply failed to make an issue . . . of the matter of which it complain[ed] . . . and presented no evidence to contradict the prima facie showing made by the City."¹⁹⁹

A third party challenge was also at issue in *Town of Palm Beach v. Department of Natural Resources*, where a condominium landowner applied for a permit to conduct landscaping activities on its property seaward of the Palm Beach County control line.²⁰⁰ In this

193. FLA. ADMIN. CODE ANN. r. 16B-33.004(1) (1992); see FLA. STAT. § 161.053(9) (1993). See also *supra* note 115 and accompanying text for a more comprehensive discussion.

194. *Woodholly Assoc. v. Department of Nat. Resources*, 451 So. 2d 1002 (Fla. 1st Dist. Ct. App. 1984).

195. *Id.* at 1003.

196. See FLA. STAT. § 161.053(2) (1993); *supra* text accompanying note 124.

197. *Woodholly Assoc.*, 451 So. 2d at 1004.

198. *Id.*

199. *Id.*

200. *Town of Palm Beach v. Department of Nat. Resources*, 577 So. 2d 1383, 1385

case, the third party was the town of Palm Beach, which challenged the condominium's proposed activities on the grounds that the town owned a park and beach located nearby which would suffer damage if the landscaping activity proceeded.²⁰¹ The Department of Natural Resources responded that it lacked jurisdiction to grant the applicant's permit because the proposed activities did "not involve excavation or removal and destruction of native vegetation, [and] therefore no permit [was] required."²⁰² The department also argued that even if such a permit was needed, the town lacked standing to request a formal hearing because it failed to show substantial interest in the outcome of the hearing.²⁰³

The Fourth District Court of Appeal disagreed with the department's contention, recognizing that Florida statutes designated the department (now DEP) as the state agency responsible for processing applications and issuing permits "for all coastal construction, physical activity, or structures pertaining thereto."²⁰⁴ As the court noted, the department regulates coastal construction, which is defined to include "any work or activity *which is likely to have a material physical effect on existing coastal conditions or natural shore process*" including the proposed landscaping activities.²⁰⁵ The court also rejected the argument that the Town lacked standing to bring this challenge. The adverse impacts to the beach/dune system alleged by the Town were found to constitute an injury in fact to environmental organizations and owners of nearby properties, thereby conferring standing on the Town and the right to contest the department's findings before an administrative hearing.²⁰⁶ A third party challenge to a Department of Natural Resources permit was also brought forward in *Key Biscayne Council v. Department of Natural Resources*, where the council challenged the grant of a permit to

(Fla. 4th Dist. Ct. App. 1991). The proposed activity included trimming of beach/dune vegetation and removal of non-indigenous vegetation. *Id.*

201. *Id.* The Town was joined by other owners of nearby property and by the Sierra Club as co-appellants. *Id.*

202. *Id.* The department notified the applicant that a permit would not be required if the landscaping activities consisted merely of trimming and maintenance of native salt-resistant dune vegetation. *Id.*

203. *Id.*

204. *Id.* at 1385–86; FLA. STAT. § 370.02(5)(a)2 (1993); *see id.* § 20.255(3).

205. *Town of Palm Beach*, 577 So. 2d at 1386 (citing FLA. STAT. § 161.021(6)); *see* FLA. ADMIN. CODE ANN. r. 16B-33.004(7)(f) (1992).

206. *Town of Palm Beach*, 577 So. 2d at 1388.

the Sonesta Beach Hotel to build an addition to its Key Biscayne hotel seaward of an established control line.²⁰⁷

C. Challenges to Coastal Construction Control Lines and Denial of Permits

Other BSPA cases involve various other administrative issues, particularly challenges to the establishment of a control line, or denial of a coastal construction permit.²⁰⁸ In *St. Joe Paper Co. v. Department of Natural Resources*, for example, a group of property owners challenged the establishment of a control line on their property.²⁰⁹ The First District Court of Appeal upheld the establishment of the control line, finding the line did not constitute a cloud on the property owners' legal title, as it merely limited the use of the property, but did not diminish the title or possessory rights.²¹⁰

The court declined to entertain *St. Joe Paper Company's* complaint that the department lacked jurisdiction to establish the control line on its property, concluding that the department should be allowed to make the initial decision regarding the merits of the jurisdiction issue.²¹¹ The district court affirmed the circuit court's dismissal of the case on the grounds that the challenging party must first exhaust its administrative remedies before seeking judicial review, noting that "St. Joe has not demonstrated that it cannot obtain adequate relief from the administrative remedies available to it."²¹²

In *Adec, Inc. v. Department of Natural Resources*, the department denied the landowner's application for a permit to erect struc-

207. *Key Biscayne Council v. Department of Nat. Resources*, 579 So. 2d 293, 294-95 (Fla. 3d Dist. Ct. App. 1991).

208. See *supra* text accompanying notes 153-75 for a discussion of the review and appeal procedures available under the BSPA.

209. *St. Joe Paper Co. v. Department of Nat. Resources*, 536 So. 2d 1119, 1122 (Fla. 1st Dist. Ct. App. 1988). The property owners requested the court to declare that the department lacked jurisdiction to establish the control line. *Id.* Alternatively, the owners wanted the court to declare that the control line constituted an easement on their land, in which case an action to quiet title was appropriate. *Id.*

210. *Id.* at 1124.

211. *Id.*

212. *Id.* at 1125; see *Key Haven Associated Enters. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982). For a review of the administrative remedies available, see *supra* notes 153-75 and accompanying text.

tures seaward of a control line.²¹³ The denial was, however, reversed, and the applications were deemed approved by default because the department did not approve or deny the application within its ninety-day time limit.²¹⁴

Another issue which may give rise to judicial action involves a local government granting variances to its building and zoning ordinances under the authority of the BSPA.²¹⁵ For example, in *Town of Longboat Key v. Mezrah*, the town granted a variance for construction of a townhouse seaward of a control line.²¹⁶ The town then attempted to rescind the variance, and Mezrah successfully challenged the rescission.²¹⁷ The town was equitably estopped from rescission its variance because the rescission was based purely upon political reasons, rather than upon any unsuitability of the project.²¹⁸ As the court noted, "to allow [the town] to rescind the variance at this stage would be highly inequitable and unjust."²¹⁹ The court further stated, "The clear purpose of the [chapter 161] legislation is to *regulate* construction seaward of the coastal construction control line, *not* to prohibit it."²²⁰

IX. CRITICISMS OF THE BEACH AND SHORE PRESERVATION ACT

Although Florida's BSPA is a very comprehensive and generally effective means of preserving the state's coastal property, the Act is not without its faults and criticisms,²²¹ which this section briefly examines.

213. *Adec, Inc. v. Department of Nat. Resources*, 507 So. 2d 1225, 1225 (Fla. 5th Dist. Ct. App. 1987). Adec sought the permit pursuant to § 161.053(5)(a) of the *Florida Statutes*. *Id.*

214. *Id.*; see FLA. STAT. § 120.60(2) (1993) (ninety-day requirement); see also *Department of Transp. v. Calusa Trace Dev. Corp.*, 571 So. 2d 543 (Fla. 2d Dist. Ct. App. 1990).

215. See *supra* note 58 and accompanying text.

216. *Town of Longboat Key v. Mezrah*, 467 So. 2d 488 (Fla. 2d Dist. Ct. App. 1985).

217. *Id.* at 492.

218. *Id.*

219. *Id.*

220. *Id.* at 490.

221. See generally Christie, *supra* note 10, at 48–51.

A. The Act Is Confusing

Any regulatory scheme can be a source of confusion and debate, and the BSPA is certainly no exception. Perhaps the BSPA's most confusing element is the three different regulatory zones which it imposes. A property owner or potential developer may find it very difficult to distinguish between the control line,²²² the thirty-year erosion line,²²³ and the coastal building zone²²⁴ and may not know which regulatory zone applies.

Another source of confusion in the BSPA is the maintenance and repair exceptions of subsections 161.053(12) and (13) of the *Florida Statutes*.²²⁵ Property owners wishing to repair their homes may find it difficult to determine whether such activity falls within the *limits* or the *confines* of the existing foundation and whether subsection (12) or (13) applies (which will determine whether a DEP permit is necessary).²²⁶

A third source of confusion is the dual administrative rule scheme governing the BSPA. Depending upon the situation, coastal construction permits and regulations may be governed by chapter 16B-33 of the *Florida Administrative Code* or by chapter 16B-41.²²⁷ This dual regulatory scheme, in addition to the administrative provisions of the Florida Administrative Procedure Act, may prove confusing as landowners and developers strive to interpret and decide which set of rules apply to their particular situation.

B. The Act Involves the Possibility of a Regulatory Taking

Any type of land use regulation inherently involves the possibility of an impermissible regulatory taking which requires compensation to the affected landowners.²²⁸ The thirty-year erosion line may severely reduce the value of privately owned beachfront property by prohibiting development. This diminution in value could frustrate reasonable investment-backed expectations of the

222. See *supra* text accompanying notes 44–58.

223. See *supra* text accompanying notes 66–71.

224. See *supra* text accompanying notes 72–77.

225. See *supra* text accompanying notes 96–109.

226. See *supra* text accompanying notes 96–109.

227. See *supra* text accompanying notes 130–52.

228. See *supra* notes 91, 94 and accompanying text.

beachfront property owner, which may constitute a taking.²²⁹

The Florida Legislature attempted to prevent such takings claims resulting from the BSPA by enacting the single-family dwelling exception, which significantly reduces the possibility of a deprivation of *all* use of beachfront property by allowing landowners to build their “dream house” upon otherwise restricted coastal property.²³⁰ The single-family exception may not, however, provide total insulation from takings claims, as it still leaves open the possibility of denying a landowner the right to build if the planned house does not meet the statutory requirements of the exception.²³¹

Although the single-family dwelling exception may protect the state from a takings challenge based upon the “deprivation of economically viable uses of the land” argument, the BSPA may still effect a taking based upon a different argument: the “diminution of value.”²³² A landowner affected by the BSPA may also allege the restrictions have resulted in a diminution of value to his property, thus giving rise to a takings claim.²³³

When faced with a takings challenge over a land use regulation, Florida courts generally invoke a balance of interests test which weighs the harm to be prevented by the regulation against its effect on the property owner's rights.²³⁴ Under this test, the courts accord land use regulations, including the BSPA, a strong presumption of constitutionality. Courts are therefore likely to uphold the BSPA, finding the Act's benefits of protecting the state's coastline outweigh

229. See Pfundstein & Charles, *supra* note 2, at 291.

230. FLA. STAT. § 161.053(6)(c) (1993); see *supra* text accompanying notes 93–95.

231. FLA. STAT. § 161.053(6)(c) (1993); see Christie, *supra* note 10, at 48; Oosting, *supra* note 2, at 45.

232. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

233. See Pfundstein & Charles, *supra* note 2, at 290. Although diminution in value is a basis to allege a regulatory taking, it should not, by itself, establish a taking. *Goldblatt*, 369 U.S. at 594 (stating “[a]lthough a comparison of values before and after is relevant . . . it is by no means conclusive”).

234. See *McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989) (upholding local setback ordinance against landowner's “inverse condemnation” claim); *Atlantic Int'l Inv. Corp. v. State*, 478 So. 2d 805 (Fla. 1985); *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984) (holding that ruling which finds agency action valid is “separate and distinct” from takings claim); *Key Haven Associated Enters. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982) (outlining procedure for challenging permit denial as unconstitutional taking of private property); *Smith v. City of Clearwater*, 383 So. 2d 681 (Fla. 2d Dist. Ct. App. 1980); *Broward County v. Capeletti Bros., Inc.* 375 So. 2d 313 (Fla. 4th Dist. Ct. App. 1979), *cert. denied*, 385 So. 2d 755 (Fla. 1980).

any resulting loss of use of a landowner's property. Backed by the statutory and constitutional direction to preserve the state's beaches, Florida courts generally uphold the BSPA regulations, "hav[ing] no trouble finding beach protection to be a vital and valid exercise of police power."²³⁵

C. The Act May Hinder Development

The restrictions imposed by the BSPA may prevent a landowner from developing a parcel, and other potential developers may likewise be discouraged from purchasing the land because of the regulatory prohibitions against construction. These regulatory prohibitions may therefore restrict the free alienability of the affected land, thus hindering development and growth in Florida.²³⁶

D. The Expense May Be High

Protecting the state's coastline is not cheap. The costs involved in establishing, reviewing, and administering control lines were estimated at five dollars per foot in 1978,²³⁷ and these costs have increased over the past seventeen years.²³⁸ For example, in 1992, it was estimated that the Palm Beach County control line would cost the state \$171,000 to establish, plus an additional \$60,000 per year in annual permitting expenses.²³⁹ With the constantly increasing

235. Oosting, *supra* note 2, at 221. See generally *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1380-81 (Fla.) (setting forth criteria to determine validity of such exercise of police power including physical invasion, diminution in value, conferring public benefit versus preventing private harm, promotion of public health, safety, or welfare, arbitrary and capricious application, and curtailment of investment-backed expectations), *cert. denied*, 454 U.S. 1083 (1981); Mitchell B. Haigler et al., *The Legislature's Role in the Taking Issue*, 4 FLA. ST. U. L. REV. 1 (1976).

236. See Donald C. Dowling, Jr., *General Proposition and Concrete Cases: The Search for a Standard in the Conflict Between Individual Property Rights and the Social Interest*, 1 J. LAND USE & ENVTL. L. 353, 376 (1985); see also Pfundstein & Charles, *supra* note 2, at 289; Shows, *supra* note 6, at 162-63.

237. Shows, *supra* note 6, at 160. Professor Shows' estimation included "mandatory five-year reviews" which have since been eliminated, although DEP conducts re-establishment of the control lines. See *supra* text accompanying notes 59-64.

238. Interview with Paden Woodruff, *supra* note 27.

239. JOINT CENTER FOR ENVTL. & URB. PROBLEMS, FLORIDA ATLANTIC UNIV., ECONOMIC IMPACT STATEMENT FOR PALM BEACH COUNTY COASTAL CONSTRUCTION CONTROL LINE (1992). This estimate, as is generally the case, has proven to be low. Palm Beach County has undertaken years of litigation which will increase the actual cost of establishing the control line. Telephone Interview with Tom Waters, *supra* note 64.

budgetary pressures on the Florida Legislature, this expense may spur further debate over the BSPA and focus more attention on the cost of beach protection.

E. A Case-by-Case Determination Creates Uncertainty and a Chilling Effect

DEP projects the thirty-year erosion line on a case-by-case basis for *each* completed permit application, which means the erosion line varies with every application.²⁴⁰ Making these individual determinations, rather than using a standard, uniform regulatory line (as found in most other zoning ordinances), increases DEP's time, effort, and expense.

In addition to the increased costs, these ad hoc determinations may pose an even greater threat: a chilling effect on future development. The case-by-case establishment of erosion lines deprives landowners and developers of a predictable method to plan building and development on their land which creates uncertainty and hesitation by potential coastal developers and buyers.²⁴¹ This hesitancy results in an economic chilling effect on purchase and development of Florida property.²⁴²

F. The Act Provides Insufficient Mechanisms for Review

Another aspect of the BSPA which may draw criticism is that the Act does not provide an adequate mechanism for an affected party to review DEP's determination of the thirty-year erosion line, which then forces the injured landowner into litigation in order to determine whether the thirty-year determination is valid.²⁴³ However, an affected party may still seek an administrative review through chapter 120, and the BSPA does provide for review of a control line.²⁴⁴

240. FLA. STAT. § 161.053(6)(b) (1993); FLA. ADMIN. CODE ANN. r. 16B-33.024(1) (1985); *see supra* text accompanying notes 66–71.

241. *See generally* Haigler, *supra* note 235, at 4.

242. *See* Oosting, *supra* note 2, at 221 (noting that “the lack of more predictable guidelines . . . has had a chilling effect on both economic development and growth management”); *see also* Pfundstein & Charles, *supra* note 2, at 289.

243. *See* Haigler, *supra* note 235, at 4.

244. FLA. STAT. § 120.54(4) (1993). The BSPA allows for review by written request of a person “who feels [that the control line] is unduly restrictive or prevents a legitimate

A second criticism regarding the procedural aspects of the BSPA is that it eliminates two important procedural safeguards which are normally guaranteed under chapter 120: the twenty-day waiting period and the rule challenge and drawout proceeding.²⁴⁵ The absence of these procedural safeguards may result in the denial of due process and administrative rule-challenge opportunities to affected parties, inevitably resulting in increased legal challenges and litigation.

G. Costs and Fees Are Awarded to the Prevailing Party

In a court challenge arising from the BSPA, the prevailing party — whether the agency or the affected landowner — is entitled to an award of costs and attorney's fees.²⁴⁶ This provision has the benefit of providing an incentive for affected persons to bring court challenges, as they will be compensated for their costs when they prevail. The award of costs and fees is, however, a double-edged sword. Affected parties with legitimate claims may be intimidated from pursuing their legal rights, fearing that an unfavorable ruling will cost them not only their legal expenses, but the costs and attorney's fees of the defendant, DEP, as well. Thus, the BSPA may have a chilling effect on affected parties in the legitimate pursuit of their legal rights.

X. CONCLUSION

Florida's BSPA is a very comprehensive piece of legislation and generally accomplishes its two primary objectives of preserving Florida's beach/dune system and protecting artificial structures. The BSPA strives to strike a balance between many diverse and often conflicting interests: protecting the state's beach and dune system and preserving its aesthetic and scenic value; protecting structures from wave, wind, and erosion damage; preserving landowners' rights to develop their property; promoting economic growth and development; encouraging free alienability of land; and assuring local governments autonomy to enact building and zoning regulations and

use of his property." *Id.* § 161.053(2); see FLA. ADMIN. CODE ANN. r. 16B-33.010(1) (1985) (elaborating on review provision).

245. See FLA. STAT. § 120.54(13), (17) (1993); *supra* text accompanying notes 154–57.

246. FLA. STAT. § 161.212(5) (1993).

to engage in beach development, preservation, or restoration activities. All of these interests must also be weighed against constitutional takings concerns, as well as budgetary constraints upon the state.

The BSPA is, overall, a well thought-out plan which takes all of these various interests into consideration, although it does certainly have its weaknesses. A primary criticism of the BSPA is that its case-by-case determination of thirty-year erosion lines creates uncertainty and inconsistency which hinders economic development.²⁴⁷ By publicly recording the erosion line determination much of this uncertainty, and its resulting chilling effect, could be reduced.²⁴⁸ Other criticisms of the BSPA include arguments that it is confusing, may result in regulatory takings, is expensive, denies affected parties sufficient means for administrative review, and chills parties from pursuing their legitimate rights due to fear of double costs and attorney's fees if they do not prevail.²⁴⁹

Furthermore, some weaknesses of the BSPA may not be readily apparent and may not be realized until they arise in response to a major storm, flood, or hurricane. Many flaws in South Carolina's version of the BSPA, for example, became apparent only after the advent of Hurricane Hugo which then prompted South Carolina to fine-tune its coastal protection statutes.²⁵⁰

The drawbacks found in the BSPA are, however, generally outweighed by the benefits which it brings, including protection of the state's coasts and beaches from imprudent construction, reduced flood losses to the beach and to artificial structures, larger postconstruction beach areas, reduced erosion, reduced storm damage to artificial structures, preservation of the beaches' ability to naturally regenerate after storm and flood damage, preservation of the aesthetic, scenic, and recreational value of the beaches, and protection of coastal vegetation and wildlife.²⁵¹ "Although the [coast-

247. See *supra* text accompanying note 240.

248. South Carolina, for instance, has enacted a setback statute similar to Florida's thirty-year erosion line, but the setback line is recorded publicly, thus eliminating much of the uncertainty inherent with Florida's ad hoc determination. S.C. CODE ANN. §§ 48-39-280 to -290 (Law. Co-op. Supp. 1993).

249. See *supra* text accompanying notes 222-46.

250. Interview with Donna R. Christie, Associate Professor of Law, Florida State University College of Law, in Tallahassee, Fla. (Nov. 16, 1992); see S.C. CODE ANN. §§ 48-39-280 to -290 (Law. Co-op. Supp. 1993).

251. See Shows, *supra* note 6, at 160-61. All of these benefits result in a higher

al construction control line] program may continue to be the focus of criticism, statewide concern for the beaches of Florida seems sufficient to assure its retention in one form or another for the immediate future."²⁵²

market value of Florida land. *Id.*

252. *Id.* at 163.