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September 16, 2011

Matthew W. Capps, Executive Director
Dauphin Island Park & Beach Board
109 Bienville Blvd.
Dauphin Island, AL 36528

Re: Coastal Barrier Resources Act Maps and Policies (MASGC 11-008-11)

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Dear Matthew:

As you requested on August 5th, the Mississippi-Alabama Sea Grant Legal Program has conducted research on the Coastal Barrier Resources Act and its impact on barrier island property. This memo provides an overview of those issues. This information is intended as advisory research only and does not constitute legal representation of the Dauphin Island Park & Beach Board or its constituents.

By email and follow-up phone conversation, you related that the U.S. Fish & Wildlife Service was currently revising maps of the Coastal Barrier Resources System on Dauphin Island, Alabama. You asked how inclusion on the maps would impact Dauphin Island Park & Beach Board's property. This response provides an overview of the Coastal Barrier Resources Act and related restrictions on federal financial assistance. The letter concludes by discussing impacts on designated properties and associated legal challenges.

Coastal Barrier Resources Act

The Coastal Barrier Resources Act is designed to combine environmental protection efforts with federal fiscal responsibility by limiting federal financial support of coastal barrier development. The CBRA seeks to minimize loss to human life from hazardous coastal development, preserve natural resources of barrier islands, and restrict federal assistance for coastal development on barrier islands. To further these goals, the CBRA established the Coastal Barrier Resources

System in 1982. The System encompasses undeveloped coastal barriers along the Gulf of Mexico, Atlantic and Great Lakes coasts. The U.S. Fish & Wildlife Service maintains the CRBA maps which are periodically updated. The maps are available online at: http://www.fws.gov/habitatconservation/coastal_barrier.html.

Federal Financial Assistance Limitations

The CBRA does not limit development of property within the Coastal Barrier Resources System. But it does restrict “future Federal expenditures and financial assistance which have the effect of encouraging development of coastal barriers.” 16 U.S.C.A § 3501. This includes federal flood insurance coverage, non-disaster emergency relief, government loans, new infrastructure like roads and bridges, and other federal assistance.¹ The flood insurance restriction applies to any new development or substantial improvement of existing structures located within the mapped areas.

There are several notable exemptions to the CBRA. Regardless of designation within the CBRS, federal financial assistance may continue for the following:

- Any use or facility related to energy resources if the use must be carried out on, in, or adjacent to a coastal water because it requires access to the coastal water body;
- Maintenance and improvements of existing federal navigation channels, including disposal of related dredge materials;
- Maintenance and repair (but not expansion) of public roads and structures that are essential links in a larger network;
- Military activities essential to national security; and
- Coast Guard facilities.

Additionally, these items can receive federal financial assistance so long as the particular expenditure is consistent with the CBRA:

- Projects to protect fish and wildlife resources and habitats, including acquisition of related lands;
- Air and water navigation aids and devices;
- Projects under the Coastal Zone Management Act or the Land and Water Conservation Fund Act;
- Scientific research;
- Emergency assistance essential to saving lives, protecting public health and safety, and protecting property if the actions are pursuant to federal disaster relief laws and are necessary to alleviate the emergency;
- Maintenance and repair (but not expansion) of public roads and infrastructure; and
- Nonstructural shoreline stabilization projects that mimic, enhance, or restore a natural shoreline system.

¹ Financial assistance is defined as and “includes any contract, loan, grant, cooperative agreement, or other form of assistance, including the insurance or guarantee of a loan, mortgage, or pool of mortgages.” 16 U.S.C. § 3505.

Impact to Property Located Within the Map Boundaries

The CBRA imposes no restrictions on a private property owner's ability to develop his property, and therefore, does not constitute a taking of property rights. It instead narrows the availability of federally funded expenditures in the region by limiting access to programs like federal flood insurance. The Dauphin Island Park & Beach Board may still build upon its property within the CBRS (assuming compliance with all other applicable laws) but may no longer qualify for federally subsidized programs and assistance.

You specifically asked about a legal case arising on Topsail Island, North Carolina. In that case, developers unsuccessfully challenged the inclusion of their property within the Coastal Barrier Resources System. The property owners argued that including their property on the map violated their substantive due process rights (meaning the government took away their property without appropriate justification). The court rejected this argument because including the property substantially related to the CBRA's objectives. According to the court:

Withdrawing the federal flood program . . . on the less developed portion of Topsail Island prevents wasteful subsidies for construction that would not be feasible if developers had recourse only to the private insurance market. Withdrawing such federal largess also lessens the incentive to build on a coastal barrier subject to flood damage, thereby minimizing "the loss of human life."

Bostic v. United States, 753 F.2d 1292 (4th Cir. 1985). Since including the property on the map rationally related to the CBRA's objectives, the government's actions were appropriately justified and the developers' substantive due process rights were not violated.

There is very little additional caselaw dealing with the CBRA, and no reported decisions from Alabama. However, the *Bostic* decision suggests that a legal challenge of this nature would be unsuccessful.

I hope you find this information helpful. If you have any additional questions, please let me know.

Sincerely,

/s/ Niki L. Pace
Research Counsel