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Mississippi-Alabama Sea Grant Legal Program
254 Kinard Hall, Wing E
University, MS 38677
Phone: (662) 915-7775 FAX: (662) 915-5267
Email: waterlog@olemiss.edu
Internet: http://masglp.olemiss.edu

May 31, 2011

Rhonda Price
GOMA Coastal Community Resiliency Priority Issue Team Coordinator
Mississippi Dept. of Marine Resources
1141 Bayview Avenue
Biloxi MS 39530

Re: Gulf of Mexico States' Coastal Land Use Planning Laws (MASGC 11-008-03)

This product was prepared by the Mississippi-Alabama Sea Grant Legal Program under award number NA10OAR4170078 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

Dear Rhonda:

Please find attached the summaries of state laws within the five Gulf of Mexico states pertaining to land use along coastal areas, as requested by the Coastal Community Resiliency PIT in support of their efforts to develop a Risk and Resilience Management Toolbox as called for in in the Governors' Action Plan II. Specifically, the research was conducted in support of Action Step #4: "Research existing policies guiding coastal development and make recommendations to enhance resilience." The attached information is intended as advisory research only and does not constitute legal representation of the members of the CCR Team, the Gulf of Mexico Alliance, the Department of Marine Resources, or their constituents. It represents our interpretations of the relevant laws and regulations.

In late 2009, the GOMA Resilience Team asked the Mississippi-Alabama Sea Grant Legal Program to research ***state-specific*** policy and planning frameworks guiding coastal development across the Gulf States (Work plan Sub-Action 4: Step 1). To provide the PIT with snapshot of the state policies guiding coastal development, this report compiles information in three primary areas: (1) local government authority, (2) enabling legislation for land use planning, and (3) implementation of the states' coastal zone management programs. Other state laws affecting coastal development, such as flood insurance or wetlands protections laws, are also briefly summarized.

The report was prepared using traditional legal research methods. For each state, state laws and regulations were searched using Westlaw, an online legal database, for any provisions addressing coastal land use planning. Web searches were also conducted to provide additional information, particularly on coastal zone management programs. Where appropriate, relevant links to online sources have been included in the report.

During the preparation of this report, the Texas Coastal Program was undergoing significant changes. As noted in the report, Texas's Coastal Council will sunset this fall. As a result, Texas is currently re-structuring/reorganizing certain aspects of its coastal program. Once these issues have been resolved, the Legal Program will either update this report or issue a supplemental report to provide the PIT with a summary of those changes.

Upon completing a draft summary, the Legal Program submitted the information to the CCR PIT's Toolkit Working Group to obtain feedback on the summary. During the five-week comment period, valuable feedback was received from all five states. One frequently raised comment was the need to expand the scope of this report to include coverage of the federal laws impacting coastal development. Because Step 1 of Sub-Action 4 explicitly calls for the research of "state-specific policy and planning frameworks," the attached report only includes a brief discussion of federal laws that have resulted in state-specific planning programs, such as the Coastal Zone Management Act. A comprehensive summary of all the federal laws that impact coastal development was beyond the scope of this project. However, if the PIT feels that information is necessary to complete Sub-Action 4, the Legal Program recommends the development of a supplemental report focused on federal laws impacting coastal land use.

I hope you find this information helpful. The Mississippi-Alabama Sea Grant Legal Program would like to thank the Louisiana Sea Grant Law and Policy Program and Christa Rabenold, Coastal Management and Hazards Specialist, NOAA/OCRM/CPD, for their assistance in the preparation of this report. If you would like additional information or have follow up questions, please let me know.

Sincerely,

/s/ *Niki L. Pace*
Niki L. Pace
Research Counsel
Mississippi-Alabama Sea Grant Legal Program

STATE COASTAL DEVELOPMENT LAWS IN THE GULF OF MEXICO

I. INTRODUCTION

II. ALABAMA

III. FLORIDA

IV. LOUISIANA

V. MISSISSIPPI

VI. TEXAS

I. INTRODUCTION

Although the objective of this report is to provide an overview of state laws impacting coastal land use in the Gulf of Mexico, a brief discussion of certain federal laws is necessary to set the stage for the state law provisions that follow. For instance, the five Gulf States all have coastal management programs set up in accordance with the Coastal Zone Management Act, a federal statute. In addition, state ownership and management of the submerged lands is derived from the Public Trust Doctrine, an element of federal common law. Other federal laws which have driven the development of state coastal development programs and continue to influence state land use law and policy include the National Flood Insurance Program, Robert T. Stafford Disaster Relief and Emergency Assistance Act, the Coastal Barrier Resources Act and the Clean Water Act's Section 404 program (wetlands). Because many of the state laws and policies discussed in this report were developed directly in response to these federal laws, a basic understanding of how these laws work is essential to understanding the state frameworks and a brief discussion of each follows. It is important to note, however, that this is not intended to be a comprehensive discussion of federal law, as many federal laws impact coastal development in a variety of ways. Rather, it is an attempt to highlight the federal motivation behind the primary state coastal land use programs.

A. Coastal Zone Management Act[1]

In 1972, recognizing the value and importance of our nation's coastal zone and the need to balance the competing needs and interests, Congress enacted the Coastal Zone Management Act (CZMA) (16 U.S.C. §§ 1451-1464). The CZMA encourages U.S. coastal and Great Lake states and territories (states) to develop and implement management programs that guide the wise use of land and water resources along their coasts. It does so by providing federal funding to help states develop and administer these programs, which are required to give "full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development." (16 U.S.C. § 1452(2)).

The National Coastal Zone Management Program is a voluntary partnership between the federal government and the states. The act includes basic requirements for state programs while also giving states the flexibility to identify coastal zone boundaries and create programs that address their unique coastal situations. In addition to this and the program development and administration grants, other incentives for states to participate in the CZMA include federal consistency and the Coastal Zone Enhancement Grant Program.

The CZMA is administered by NOAA's Office of Ocean and Coastal Resource Management. Today, 34 of 35 coastal states, including all of the Gulf states, have federally approved coastal management programs. Together, they protect more than 99 percent of the nation's ocean and Great Lakes coastline.

Recognizing the primacy of states in making decisions that affect their coastal zones, Congress introduced federal consistency into the CZMA to provide states with a valuable mechanism to

[1] Courtesy of Christa Rabenold, Coastal Management and Hazards Specialist, NOAA/OCRM/CPD.

manage their coastal uses and resources and to facilitate cooperation and coordination with federal agencies. The provision requires that federal agency activities that may have reasonably foreseeable effects on a land or water use or natural resource in a state's coastal zone be "consistent to the maximum extent practicable with the enforceable policies of approved state management programs." (16 U.S.C. § 1456(c)(1)). It also requires that non-federal applicants for federal licenses, permits, and financial assistance conduct their activities in a manner consistent with the enforceable policies of the approved state programs. (16 U.S.C. § 1456(c)(3)(A); 16 U.S.C. § 1456(d)).

More information is available at: http://coastalmanagement.noaa.gov/programs/czm.html.

B. The Public Trust Doctrine

The Public Trust Doctrine (PTD) provides that public lands, waters, and living resources in the state are held by the state in a trust for the benefit of all people, and establishes a servitude of public use on those lands. The PTD applies when public trust lands are altered, developed, conveyed, or otherwise managed. Natural and man-made geographical changes caused by occurrences such as water diversion projects, erosion, subsidence and sea level rise affect the public trust and the rights of adjacent riparian landowners.

Land and water bottoms held in the public trust are held in the public capacity of the state and are subject to public use. The public may access and use state-owned submerged lands so long as the use does not interfere with the rights of other members of the public. States may manage lands held in the public capacity in accordance with state law. As a result, activities on submerged lands generally require a permit from the relevant state lands agency.

The PTD began as an element of federal common law but has since been adopted by states. In general, the PTD protects the public's right to use submerged lands for navigation, commerce, and fishing. However, states may modify these basic rights through state law, and state specific variations are discussed in later sections of this report under each state.

C. National Flood Insurance Act[2]

Until the late 1960s, the national response to floods consisted primarily of disaster relief and flood control structures. This did not reduce losses or discourage development in flood-prone areas; it may have actually encouraged development, in some instances. Insurance was not available to cover flood losses, and the potential for flooding was often overlooked in planning development activities.

In 1968, in the face of accelerating development and population density in flood-prone areas and the associated escalating costs of flood-related disaster relief, Congress passed the National Flood Insurance Act (42 U.S.C. §§ 4001-4129) to create a flood insurance program that would provide protection against flood losses and encourage sound land use. (42 U.S.C. § 4001(c)(1)). In regard to land use, the act aimed to "encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood

[2] Courtesy of Christa Rabenold, Coastal Management and Hazards Specialist, NOAA/OCRM/CPD.

damage and minimize damage caused by flood losses," and "guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards." (42 U.S. C. §§ 4001(e)(1) and (2)).

Simply, the National Flood Insurance Program (NFIP):

- Identifies, studies, and maps flood-prone communities,
- Provides an insurance alternative to federal disaster assistance,
- Enables residents in participating communities to purchase flood insurance in exchange for floodplain management regulations,
- Prohibits federal agencies from financing acquisition or construction of buildings and some disaster assistance in the floodplains in nonparticipating communities, and
- Requires flood insurance for all federally backed mortgages in special flood hazard areas.

Communities that participate in the NFIP must adopt and enforce floodplain management regulations. The minimum requirements for NFIP regulations focus primarily on how to build structures in special flood hazard areas (areas subject to a 1 percent or greater chance of flooding in any given year, also known as the "100-year" or "base" flood). Requirements apply to newly constructed buildings, as well as those that are substantially damaged or improved; new subdivisions; and new and replacement water supply systems and sanitary sewage systems. General requirements address siting; site drainage; anchorage; building materials, methods, and practices, including elevation and floodproofing (where appropriate); placement of utilities, and use of space below the base flood elevation. Requirements are more stringent for construction in the V Zone, which is subject to coastal high hazard flooding (waves during the 100-year flood that are at least three feet high).

The Community Rating System (CRS) was established in 1990 to provide incentives for communities to adopt regulations that exceed the minimum requirements of the NFIP. Participating communities receive flood insurance discounts that reflect reduced flood risk. Discounts range from 5 to 45% and are determined by class ratings which are based on the number of credits earned for a community's floodplain management activities. Communities can earn credits for public information activities that advise people about the flood hazard, flood insurance, and ways to reduce flood damage; regulations that provide increased protection to new development (including open space and stormwater regulations); and flood damage reduction efforts, such as comprehensive floodplain management planning and acquisition and relocation programs.

The NFIP and CRS are administered by the Federal Emergency Management Agency's Federal Insurance and Mitigation Administration. Nationwide, nearly 21,000 communities participate in the NFIP. Approximately 1,100 of these communities are also participating in the CRS; more than half of these communities are coastal.

Coastal Community Participation in the NFIP and CRS

State	# of Coastal[1] Communities in/not in NFIP[2]	# of Coastal[1] Communities in CRS[3]
Florida	458/11[4]	217
Alabama	24/0	3
Mississippi	14/0	11
Louisiana	81/1	23
Texas	166/2	20

[1]"Coastal" is defined here as any community in a state's coastal zone as defined in their federally approved coastal zone management program.
[2]The number of communities ***not*** in the NFIP refers to communities that have been mapped, have special flood hazard areas, and are not participating. Source: The National Flood Insurance Program Community Status Book. November 2010. http://www.fema.gov/fema/csb.shtm
[3]Source: Community Rating System (CRS) Communities and their Classes. October 2010. http://www.fema.gov/library/viewRecord.do?id=3629
[4]The Florida coastal zone is the entire state.

More information is available at: http://www.fema.gov/business/nfip/index.shtm.

D. Robert T. Stafford Disaster Relief and Emergency Assistance Act[3]

Hazard mitigation is "sustained action taken to reduce or eliminate long-term risk to people and their property from hazards." It is most effective when based on a long-term, comprehensive, and inclusive effort that takes place pre-disaster and has been proven to be cost-effective; saving $4 for every dollar spent.

In recent decades, the importance of hazard mitigation, and pre-disaster hazard mitigation, in particular, has been emphasized in disaster relief law. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (42 U.S.C. § 5121 et seq.) provides the statutory authority for most federal disaster relief and was enacted in 1988 as an amendment to the Disaster Relief Act of 1974. As amended by the Disaster Mitigation Act of 2000, the Stafford Act requires state, Indian, Tribal, and local governments to undertake a risk-based approach to reducing risks from natural hazards through mitigation planning in order to be eligible for certain types of nonemergency federal disaster assistance and hazard mitigation funding. State plans must be updated and reapproved every three years. Local plans must be updated and reapproved every five years.

Land use planning and regulation plays a large role in hazard mitigation planning and implementation. In their hazard mitigation plans, local governments are required to explain how their mitigation plans will be incorporated into other planning and regulatory mechanisms and programs, including, but not limited to, comprehensive, capital improvements, recovery, economic development, transportation, historic preservation, conservation, restoration, and open space plans; zoning, subdivision, erosion control, stormwater, and floodplain management ordinances; and building codes.

[3] Courtesy of Christa Rabenold, Coastal Management and Hazards Specialist, NOAA/OCRM/CPD.

The hazard mitigation planning program is administered by the Federal Emergency Management Agency's Federal Insurance and Mitigation Administration. All five Gulf states have approved plans. Florida's plan is "enhanced," which means that it demonstrates an increased commitment to comprehensive mitigation planning and implementation and is eligible for a larger percentage of post-disaster Hazard Mitigation Grant Program funding.

Coastal Local Government Hazard Mitigation Plan Status

State	# of Coastal[1] Local Governments[2] with Federally Approved Hazard Mitigation Plans[3]
Florida	475[4]
Alabama	24
Mississippi	14
Louisiana	87
Texas	154[5]

[1]"Coastal" is defined here as any jurisdiction in a state's coastal zone as defined in their federally approved coastal zone management program.

[2] "Local government" means "a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (regardless of whether the council of governments is incorporated as a nonprofit corporation under state law), regional or interstate government entity, or agency or instrumentality of a local government; an Indian tribe or authorized tribal organization, or Alaska Native village or organization; and a rural community, unincorporated town or village, or other public entity, for which an application for assistance is made by a state or political subdivision of a state." (42 U.S.C. § 5122 (7)).

[3]Source: Hazard Mitigation Plan Status List for State, Local, and Indian Tribal Governments. March 2009. http://www.fema.gov/library/viewRecord.do?fromSearch=fromsearch&id=3571.

[4]The Florida coastal zone is the entire state.

[5]Six were approvable pending adoption.

For more information, visit http://www.fema.gov/plan/mitplanning/index.shtm.

E. Coastal Barrier Resources Act[4]

Coastal barriers and their associated waters serve a number of important functions. They provide valuable habitats; contain resources of scenic, scientific, recreational, natural, historic, archeological, cultural, and economic importance; and defend the mainland against storms. However, given their location, low elevation, narrowness, and ever-shifting sands, coastal barriers are vulnerable to coastal storms and are generally unsuitable for development.

In 1982, the Coastal Barrier Resources Act, 16 U.S.C. § 3501 et seq., was enacted to "minimize the loss of human life, wasteful expenditure of federal revenues, and the damage to fish, wildlife, and other natural resources associated with the coastal barriers along the Atlantic and Gulf coasts and along the shore areas of the Great Lakes." § 3501(b). Specifically, the law:

- Created the John H. Chafee Coastal Barrier Resources System, which is comprised of undeveloped coastal barriers along the Atlantic, Gulf, and Great Lakes coasts, and
- Applies a non-regulatory, market-based approach to conservation that restricts access to all federal programs that expend funds or provide financial assistance in support of

[4] Courtesy of Christa Rabenold, Coastal Management and Hazards Specialist, NOAA/OCRM/CPD.

development (e.g., critical infrastructure, flood insurance, and post-disaster relief) within the system (unless specifically exempted).

Through this approach, the law aims to protect coastal barriers through less federal involvement, not more, and it shifts the risk and associated costs away from the federal taxpayer and onto those who choose to develop on the unpredictable lands. While the law discourages development by restricting federal financial assistance that aids or encourages construction or purchase of structures, infrastructure, and facilities within the system, it is important to note that it does not prohibit private, state, and locally funded activities or preempt or curtail state power.

Today, approximately 3.1 million acres of land and associated aquatic habitat are part of the Coastal Barrier Resources System. The act is administered by the U.S. Fish and Wildlife Service, which maintains the repository for the maps that depict the system and advises federal agencies, landowners, and Congress regarding whether properties are in or out of the system and what kind of federal expenditures are allowed under the law.

More information is available at http://www.fws.gov/habitatconservation/coastal_barrier.html.

F. Clean Water Act § 404 – Wetlands

Enacted in 1972, the Clean Water Act regulates dredge and fill activities in wetlands through its Section 404 permitting program. (33 U.S.C. § 1344). Because wetland areas are frequently found along the Gulf coast, this federal law has the potential to significantly impact coastal development. Under Section 404, land use activities proposing to fill in wetlands require a permit. The permit may include many factors such as a limit on how much of a wetland area (if any) can be filled, a buffer around the wetland area, and wetland mitigation activities to compensate for any loss wetlands.

The U.S. Army Corps of Engineers (USACE) oversees the permitting process but a state agency may become authorized to run the permitting process by the USACE. (33. U.S.C. § 1344(h)). A state may become authorized to issue wetland permits by petitioning the USACE for approval and demonstrating that the state program is as robust as the federal requirements. In some cases, a state agency may have partial authority over wetland permitting. For instance, the Mississippi Department of Marine Resources implements wetland permitting within the Mississippi coastal zone (but not the entire state) through a Memorandum of Agreement with the regional USACE districts. Often, the USACE, in partnership with state agencies, provides a joint permit application that combines the USACE permit with applicable state permitting requirements.

The USACE (or state permitting authority) may issue individual permits or the USACE may govern categories of activities through the issuance of general permits on a state, regional, or nationwide basis for any category of activities are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Pre-permit meetings are encouraged to ease the permit process.

II. ALABAMA

A. Type of Rule

Alabama applies the Dillon rule, meaning that local governments only have those powers that were specifically given to them by the state constitution or legislative statute. In other words, unless a state statute specifically authorizes the local government to enact planning regulations, that local government lacks the ability to do so. Where there is uncertainty over who has power or jurisdiction, the assumption is that the state has authority until a court determines otherwise. (Ala. Op. Att'y Gen. No. 2010-045 (Feb. 26, 2010) (municipalities may engage only in activities authorized by the Legislature)).

B. State Enabling Legislation for Planning

1. Municipalities:

Alabama defines municipality as "cities or towns." (ALA. CODE § 11-52-1(1)). Cities are generally incorporated areas of 2000 or more inhabitants. (ALA. CODE § 11-40-6). Alabama recognizes eight classes of municipalities based on population size. (ALA. CODE § 11-40-12). Alabama has enacted municipal planning authority under state law. (ALA. CODE §§ 11-52-1 to -85). These code provisions contain four separate articles:

- Article 1: General Provisions
- Article 2: Control of Subdivisions Generally
- Article 3: Reservation of Subdivision Land for Public Streets
- Article 4: Zoning

Municipal plans are authorized by ALA. CODE § 11-52-2 which provides: "Any municipality is hereby authorized and empowered to make, adopt, amend, extend, add to, or carry out a municipal plan as provided in this article and to create by ordinance a planning commission with the powers and duties herein."

Where municipalities develop plans, Alabama law specifies the following requirements of the plan:

> Such plan, with the accompanying maps, plats, charts, and descriptive matter shall show the commission's recommendations for the development of said territory, including, among other things, the general location, character and extent of streets, viaducts, subways, bridges, waterways, waterfronts, boulevards, parkways, playgrounds, squares, parks, aviation fields and other public ways, grounds and open spaces, the general location of public buildings and other public property, the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power and other purposes, the removal, relocation, widening, narrowing, vacating, abandonment, change of use or extension of any of the foregoing ways, grounds, open spaces, buildings, property, utilities or

terminals; as well as a zoning plan for the control of the height, area, bulk, location, and use of buildings and premises. (ALA. CODE § 11-52-8).

2. Counties:

In Alabama, counties only have planning authority if the state allows. For example, the state has allowed Baldwin County, located along the Gulf Coast, some planning and zoning authority. (ALA. CODE § 45-2-261). As discussed below, counties may also create county planning commissions for the purposes of enforcing land-use planning in flood prone areas. (ALA. CODE § 11-19-8).

3. Regional:

Alabama state law also authorizes regional planning authority. (ALA. CODE § 11-85-1 to -111). This chapter contains six articles:

- Article 1: Regional Planning Commissions Generally
- Article 2: Regional Planning Commissions for Comprehensive Advisory Planning and Research
- Article 3: Comprehensive Advisory Planning and Research by Municipal, County, Regional, Etc., Planning Commissions, Etc.
- Article 4: Regional Planning and Development Commissions, Including list of powers and duties
- Article 5: Confirmation of Operating Regional Planning and Development Commissions
- Article 6: Alabama Revolving Loan Fund Authority

Regional Plans are authorized by ALA. CODE § 11-85-4 which requires that plans be based "on comprehensive studies of the present and future development of the region with due regard to its relation to neighboring regions and the state as a whole and to neighboring states."

Plans must "show the commission's recommendations for the physical development of the region and may include, among other things, the general location, extent and character of streets, parks and other public ways, grounds and open spaces, public buildings and properties, and public utilities (whether publicly or privately owned or operated) which affect the development of the region as a whole or which affect more than one political subdivision of the state within the region, the general location of forests, agricultural, and open development areas for purposes of conservation, food and water supply, sanitary and drainage facilities, or the protection of future urban development and a zoning plan for the control of the height and area or bulk, location, and use of buildings and premises and of the density of population."

Master plans must also "be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the region and of public improvements and utilities which do not begin and terminate within the boundaries of any single municipality or which do not relate exclusively to the development of any single municipality and which will, in accordance with the present and future needs of the region and the state, best promote health,

safety, morals, order, convenience, prosperity and general welfare, as well as efficiency and economy in the process of development."

C. Alabama's Public Trust Doctrine

Alabama does not have a well developed public trust doctrine. Instead, the PTD is generally limited to the basic federal doctrine (navigation, commerce, and fishing). Alabama does recognize the public right to navigation through its Constitution which proclaims that "all navigable waters shall remain forever public highways, free to the citizens of the state and United States …." (Ala. Const. Art. I, § 24). Alabama also extends the PTD to submerged lands: "All the beds and bottoms of the rivers, bayous, lagoons, lakes, bays, sounds and inlets within the jurisdiction of the state of Alabama are the property of the state of Alabama to be held *in trust for the people thereof*." (ALA. CODE § 9-12-22). Along tidal properties, land below the mean high tide line belongs to the state. In non-tidal waters, land below the mean low water mark belongs to the state. (ALA. ADMIN. CODE r. 220-4-.09).

D. Coastal Zone Management

The Alabama Department of Environmental Management (ADEM) oversees Alabama's Coastal Area Management Program (CAMP), an approved coastal management program under the Coastal Zone Management Act.

1. Implementing Laws and Regulations:

Alabama's enforceable policies are found in Alabama Administrative Code, Chapter 335-8-1, -2. The following summarizes some key provisions relating to land use.

a. Chapter 335-8-1

Chapter 335-8-1 establishes the general provisions of the Coastal Area Management Plan necessary for administering the permitting, regulatory and enforcement functions of the program. These regulations also identify permissible uses within the coastal management area including: 1) the exercise of riparian rights by the owner of the riparian rights, 2) the normal maintenance and repair of bulkheads, piers, roads and highways existing on August 14, 1979, 3) construction of minor structures and repairs which will not constitute a substantial improvement and which will not obstruct public access, and 4) the normal maintenance and repair of railroads and utilities.

b. Chapter 335-8-2

Provisions specific to coastal activities are found in Chapter 335-8-2 and provide guidance on types of uses permitted in the coastal area. When evaluating a project, ADEM will consider whether the project will adversely impact these coastal resources: 1) historical, architectural or archaeological, 2) wildlife and fishery habitat especially the designated critical habitats of endangered species, and 3) public access to tidal and submerged lands, navigable waters and beaches or other public recreational resources. Projects found to be inconsistent with a

designated special management area are expressly precluded. This chapter also includes specific provisions for certain activities including dredge/fill activities, shoreline stabilization and erosion mitigation, and beach and dune protections. Specifically, development along gulf front beaches and dunes are restricted through a construction control line. (ALA. ADMIN. CODE r. 335-8-2-.08).

A copy of Alabama's enforceable policies is available online at:
http://adem.alabama.gov/alEnviroRegLaws/files/Div8Eff4-26-95.pdf

2. Planning & Programs:

ADEM oversees land-use permitting in the coastal area through its Coastal Permitting Program. Projects having the potential to impact Alabama's coastal resources are subject to review pursuant to ADEM's Coastal Rules.

Example projects include:

- Construction on Gulf-fronting properties
- Commercial and Residential Development on Properties Greater than 5 Acres
- Projects Impacting Wetlands and/or Water Bottoms
- Construction of new, or expansion of existing marinas
- Installation of Groundwater Wells with a Capacity Greater than 50 gallons per minute (GPM)
- Siting, Construction and Operation of Energy Facilities
- Shoreline Stabilization Projects
- Discharges to Coastal Waters

More information is available at:
http://adem.alabama.gov/programs/coastal/coastalPermitting.cnt

E. Other State Laws Affecting Coastal Land Use

1. Comprehensive Land Use Management in Flood Prone Areas

This statute authorizes county governments to establish comprehensive land-use management plans in flood prone areas lying outside municipal city limits. Flood prone areas are defined as "any area with a frequency of inundation of once in 100 years as defined by qualified hydrologists or engineers using methods that are generally accepted by persons engaged in the field of hydrology and engineering." (ALA. CODE § 11-19-1 to 19-24). The following land use measures are authorized in flood prone areas: zoning ordinances, subdivision regulations, building codes, health regulations, and other applications and extensions of the normal police power to provide safe standards of occupancy for prudent use of flood-prone areas.

For affected areas, the law requires land-use measures to provide restrictions based on probable exposure to flooding. The measures specified shall:

(1) Prohibit inappropriate new construction or substantial improvements in the flood-prone areas;
(2) Control land uses and elevations of all new construction within the flood-prone area;
(3) For coastal flood-prone areas prescribed land uses and minimum elevations of the first floors of buildings and include consideration of the need for bulkheads, seawalls, and pilings;
(4) Be based on competent evaluation of the flood hazard as revealed by current authoritative flood-prone information;
(5) Be consistent with existing flood-prone management programs affecting adjacent areas and applicable to appropriate state standards; and
(6) Prescribe such additional standards as may be necessary to comply with federal requirements for making flood insurance coverage under the National Flood Insurance Act of 1968 available in this state. (ALA. CODE § 11-19-4).

2. Alabama Disaster Recovery Program

Under the Alabama Disaster Recovery Program, county and municipal governments must have a current emergency operations plan, a debris management plan, and a hazard mitigation plan to be eligible for funds from the Alabama Disaster Recovery Fund. (ALA. CODE § 31-9-83).

III. FLORIDA

A. Type of Rule

1. Municipalities

Florida municipalities are governed by Home Rule, as opposed to Dillon Rule (which limits local government authority to that which is specifically given to them by the state constitution or legislative statute). The Florida Formation of Municipalities Act establishes the procedures for municipal formation. (FLA. STAT. § 165.031). Municipalities are created by law and must be incorporated. (FLA. STAT. § 165.041).

The Florida constitution and the Municipal Home Rule Powers Act establish Florida's Home Rule authority.

As stated by the Municipal Home Rule Powers Act:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
>
> (2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.

(FLA. STAT. § 166.021(1)-(2)).

2. Counties

Florida counties operating under a county charter also have home rule. The Florida constitution provides:

> Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Fla. Const. art. VIII, § 1.

B. State Enabling Legislation for Planning

Florida planning authority is set forth in the Local Government Comprehensive Planning and Land Development Regulation Act (FLA. STAT. §§ 163.3161-3217). The act authorizes incorporated municipalities and counties to adopt and amend comprehensive plans. Where the

local government fails to meet this requirement, the regional planning authority is authorized to adopt and amend the comprehensive plan, as needed. (FLA. STAT. § 163.3167). The act specifies both required and optional elements of the comprehensive plan. (FLA. STAT. § 163.3177).

With regard to coastal management, the act requires "that local government comprehensive plans restrict development activities where such activities would damage or destroy coastal resources, and that such plans protect human life and limit public expenditures in areas that are subject to destruction by natural disaster." (FLA. STAT. § 163.3178).

C. Florida's Public Trust Doctrine

Florida incorporates the public trust into its constitution: "The title to lands under navigable waters, … including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people." (Fla. Const., art 10, § 11). Florida extends the public trust doctrine to all lands below mean high tide. The public trust rights include navigation, commerce, fishing, and "other easements allowed by law." (*Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909)). The provision "and other easements allowed by law" suggests that the Florida public trust doctrine may be expanded in the future.

D. Coastal Zone Management

The Florida Coastal Management Program is based on a network of agencies implementing 24 statutes that protect and enhance the state's natural, cultural and economic coastal resources. The goal of the program is to coordinate local, state and federal agency activities using existing laws to ensure that Florida's coast is as valuable to future generations as it is today.

The Florida Coastal Management Act designates the Florida Department of Environmental Protection (FDEP) as the lead agency responsible for directing the implementation of the statewide coastal management program. The act networked the state's existing coastal planning statutes and united them under the Florida Coastal Management Program. (FLA. STAT. § 380.205-380.27).

1. Implementing Laws and Regulations:

As noted above, Florida complies with the Coastal Zone Management Act through 24 state statutes. Below are those provisions relating to land use.

a. Chapter 161: Beach and Shore Preservation

The Beach and Shore Preservation Act (BSPA) was passed in order to better protect Florida's beach and dune systems from unwise, imprudent construction. The beach and dune systems are an invaluable resource for the State due to their ability to provide natural wildlife habitats and protection for upland property. Thus, the BSPA attempts to protect these systems from construction that could accelerate erosion, increase the vulnerability of upland properties, or interfere with public access to the beach. (FLA. STAT. § 161.011-161.045).

Part I provides the statutory authority for the Beach Erosion Control Program, the Coastal Construction Control Line Program, and the Environmental Permitting Program, which fall under the control of the Bureau of Beaches and Coastal Systems within the FDEP. It also regulates construction occurring on the state's beaches. In order to engage in a coastal construction or reconstruction project below the mean high water line, including efforts to protect the shoreline, a permit must be obtained from the FDEP. There can be no construction of dwellings, hotels, apartment buildings, seawalls, or similar structure (including patios, garages, or swimming pools) within 50 feet of the mean high water line at any riparian location (FLA. STAT. § 161.052). Furthermore, any coastal construction below the mean high water line that endangers human life, health, or welfare, proves to be undesirable, or is determined to be unnecessary is to be removed or altered by either FDEP or the abutting landowner. (FLA. STAT. § 161.061).

Part II establishes Beach and Shore Preservation Districts and gives local governments the authority to protect the beach and dune system. It also establishes coastal construction control lines (CCCL) on a county basis along the state's sandy beaches and outline the area of the beach that is subject to fluctuation due to 100-year storms or other devastating weather conditions. The establishment of a CCCL creates an area within FDEP's jurisdiction where higher standards for siting and design criteria exist for construction and related activities. FDEP can grant general permits for minor, nonhabitable structures, such as decks, fences, and sidewalks. Coastal counties and municipalities can establish coastal construction zoning and building codes instead of the CCCL, as long as FDEP determines that the zones and codes are adequate to preserve and protect the beach and dune systems from imprudent construction. (FLA. STAT. §161.053).

Part III regulates any construction occurring landward of the CCCL by establishing a Coastal Building Zone in which construction shall be managed with stricter standards to minimize damages to the natural environment and private property. The coastal building zone consists of land from the seasonal high-water line to a line 1,500 feet landward from the coastal construction control line. (FLA. STAT. § 161.54). For the construction of minor structures, such as stairways, driveways, parking areas, and sidewalks, care must be taken to ensure minimum adverse impact on the beach and dune systems. (FLA. STAT. § 161.55). Nonhabitable major structures, such as swimming pools and parking garages, must also be designed to ensure minimum adverse impact on the beach and dune system. Construction must be located sufficiently landward of the beach to permit natural shoreline fluctuations and preserve dune stability.

b. Chapter 163: Growth Management; County and Municipal Land Use Planning

The Local Government Comprehensive Planning and Land Development Regulation Act, also known as Florida's Growth Management Act, requires each county within the state, as well as many municipalities, to adopt local comprehensive plans to guide future growth and development. These comprehensive plans must contain elements addressing future land use, transportation, housing, coastal management, conservation, recreation and open spaces, and infrastructure. (FLA. STAT. § 163.3164). Local comprehensive plans must provide for land use compatibility around existing and planned airports. In these comprehensive plans, local governments must include procedures to provide for coordination of all development activities

with other units of other local governments or with the federal government. (FLA STAT. § 163.3177).

Coastal provisions restrict development activities that could potentially damage or destroy coastal resources and require those plans to protect human life while also limiting public expenditures in areas prone to natural disasters. Where these plans outline hazard mitigation principles and the protection of human life from hurricanes and other natural disasters, the ability to evacuate those living along the coast must be considered in the future land use plan. Similarly, such plans must also discuss means to protect the dune system from erosion, the elimination of unsafe development in the coastal zone, the need for water-dependant facilities for the public along beach and shoreline areas, and the mitigation of threats to human life and the coastal environment as part of new development projects. (FLA. STAT. § 163.3178). However, the coastal provisions only applies to coastal counties or municipalities where certain marine vegetation makes up the dominant plant community. (FLA. STAT. § 380.24).

After a comprehensive plan has been adopted as part of the Growth Management Act, all new developments and new land regulations must be consistent with the plan. Inconsistent land regulations existing when the plan is adopted must be subsequently amended to come into conformity with the plan. Counties and municipalities must amend or adopt land development regulations consistent with the local comprehensive plan, and these local regulations must regulate the certain uses of land while also providing for the protection of environmentally sensitive areas. (FLA. STAT. §§ 163.3194, 163.3202).

The Florida Local Government Development Agreement Act authorizes local governments to establish the procedures by which a person may enter a development agreement with the government. These procedures strengthen the public planning process, encourage sound capital improvement planning, assure there is adequate capital for the development, encourage private participation in the comprehensive planning process, and reduce development costs. (FLA. STAT. § 163.3220-163.3243).

c. Chapter 186: State & Regional Planning

The Florida State Comprehensive Planning Act was established to create an integrated planning system and to ensure coordination between all levels of government to address the issues raised by the state of Florida's continual growth and development. Under this act, the Governor's office is to propose a state comprehensive plan to provide long-range guidance for the social, economic, and physical growth of the state, taking particular notice of the problems, opportunities, and needs related to land use throughout the state. This comprehensive plan is to be revised biennially in order to consider the growing needs of the state. As part of the state's comprehensive plan, the state must establish priorities regarding coastal planning and resource management, and the Strategic Regional Policy Plans must address coastal planning consistently with the state's policy set forth in the comprehensive plan. (FLA. STAT. § 186.001-186.031).

Under the Florida Regional Planning Council Act, regional planning councils are required to adopt Strategic Regional Policy Plans that address regional issues in a manner consistent with the state comprehensive plan. Regional planning councils must submit a proposed comprehensive

regional policy plan to the Executive Office of the Governor that considers regional resources, infrastructure needs, and other issues with significant regional importance. (FLA. STAT. § 186.501-186.513).

d. Chapter 253: State Lands

The Board of Trustees of the Internal Improvement Trust Fund of the state is authorized to acquire, administer, manage, control, supervise, conserve, protect, and dispose of lands belonging to the state of Florida. Lands held by the Board of Trustees are held in trust for the use and benefit of the public. (FLA. STAT. § 235.001). These state lands include:

- Swamp and overflowed lands
- Lands owned by the state by right of its sovereignty
- Tidal lands
- Lands covered by shallow waters of the Atlantic Ocean or Gulf of Mexico, as well as state-owned lands covered by fresh water
- Parks, reservations, lands or bottoms set aside in the name of the state, with the exception of lands set aside for transportation purposes

State lands are to be "managed to serve the public interest by protecting and conserving land, air, water, and the state's natural resources, which contribute to the public health, welfare, and economy of the state." (FLA. STAT. § 253.034). State lands and natural resources are, furthermore, to be managed such that these resources will be available for the benefit and enjoyment of the public and future generations. (FLA. STAT. § 253.001-253.86).

e. Chapter 258: State Parks and Aquatic Preserves

Chapter 258 governs state parks and aquatic preserves. In Florida state parks and aquatic preserves, certain activities and structures are not considered to be compatible with the preservation of these lands for public use.

Aquatic Preserves refer to state-owned submerged lands in areas which have exceptional biological, aesthetic, and scientific value have been set aside as aquatic preserves or sanctuaries for the benefit of future generations. (FLA. STAT. § 258.36). Generally speaking, privately owned lands are excluded from designation as an aquatic preserves except by specific agreement with the landowner. (FLA. STAT. § 258.40). Bulkhead lines waterward of the mean high water mark within the preserve cannot be approved unless it would better serve the public interest to do otherwise – for example, if public bridge or road construction projects have no alternative other than the bulkhead line.

Furthermore, in state aquatic preserves, there can be no dredging or filling of submerged lands unless the Board of Trustees grants a permit for specified activities, including:

- Minimum dredging for public navigation projects;
- Minimum dredging as required for creating and maintaining marinas, piers, or docks;

- Maintaining existing navigation channels;
- Improving or expanding public utility installations; and
- Installing and maintaining oil and gas transportation facilities.

Under FLA. STAT. § 258.42, structures generally may not be erected within aquatic preserves, except certain structures that comply with specified conditions, including:

- Private residential docks, if constructed for the reasonable access of riparian owners.
- Private residential multislip docks or commercial docking facilities, if located within a reasonable distance of either a publicly maintained navigation channel or a natural channel that will allow for the operation of watercraft without having an adverse impact on marine resources.
- Structures for shore protection, including seawalls, navigational aids, or public utility crossings

f. Chapter 259: Conservation and Recreation Lands

The Conservation and Recreation Lands Trust Fund was established within the FDEP in order to finance the purchase of state lands for the benefit of the public, specifically for the maintenance of the state's natural resources, air and water quality, and natural resource based recreation. (FLA. STAT. § 259.032). These lands are to be acquired for conserving environmentally unique lands, protecting endangered or threatened species, restoring and protecting ecosystems and forests to conserve water, coastal, timber or recreational resources, and to otherwise benefit the public.

When these state lands are acquired, they are to be managed for the conservation and protection of valuable state resources, and public recreation is to be allowed on these lands to the extent to which it is compatible with the purposes of conservation and protection. Public recreational activities that do not conflict with conservation and protection of state resources include: fishing, hunting, camping, bicycling, hiking, nature study, swimming, boating, canoeing, horseback riding, diving, birding, sailing, and jogging. (FLA. STAT. § 259.032).

The Florida Forever Act establishes a framework for acquiring habitat conservation areas, natural floodplains, fragile coastlines, functional wetlands, groundwater recharge areas, sustainable forest land. By acquiring these lands for the state, Florida aims to restore water resources, wildlife habitats, recreation space, wetlands and coastal open space that has been lost or faces destruction as the state's population increases. (FLA. STAT. § 259.105). The Florida Forever Act replaced the Florida Preservation 2000 Program.

g. Chapter 260: Florida Greenways and Trails Act

The Florida Greenways and Trails Act establishes the procedures by which the state of Florida may create a statewide system of greenways and trails for recreation and conservation. These trails are to be managed to preserve ecosystems and wildlife habitats while also providing recreational opportunities including equestrian activities, hiking, bicycling, canoeing, jogging, and historical and archeological interpretation, with the goal of improving the health and welfare

of the public. (FLA. STAT. § 260.012). Under the Greenways and Trials Act, FDEP is to establish, develop, and publicize these greenways and trials to permit public recreation where public access would not damage the state's natural resources or unnecessarily impact sensitive wetlands or wildlife habitats. (FLA. STAT. §§ 260.011-260.021).

h. Chapter 267: Historical Resources Act

The Florida Historical Resources Act governs the use of publicly owned historical or archeological resources that are located on land or waters belonging to the state. This act encourages the preservation of historic resources for the benefit of the public by identifying, registering, protecting and preserving historical resources belonging to the public. Under the act, the Division of Historical Resources is authorized to develop a comprehensive statewide historic preservation plan and ensure that state historical and cultural sites are identified, acquired, and appropriately protected. (FLA. STAT. § 267.031). The act created the Florida Historical Commission to work in conjunction with the Division of Historical Resources when identifying, protecting, and maintaining historical sites within the state. (FLA. STAT. § 267.0612). The Division of Historical Resources has the authority under this act to issue permits to scientific and educational institutions for excavation on state lands designated as an archeological landmark. (FLA. STAT. § 267.12).

i. Chapter 288: Commercial Development and Tourism

As a whole, Chapter 288 establishes the state's goal of promoting the Florida business, trade, and tourism in an effort to further the state's economic growth. Enterprise Florida, Inc. is the principal economic development organization for the state and is responsible for creating policies that support the growth and development of Florida's existing businesses, recruiting new businesses to the state economy, and supporting small businesses and the development of rural economies. (FLA. STAT. § 288.9015).

Under this Chapter, the Florida Fish and Wildlife Conservation Commission works in conjunction with the Florida Tourism Industry Marketing Corporation and other local tourism and governmental organizations to develop nature-based recreation (including fishing, hiking, canoeing, camping, hunting, and other leisure activities related to the state's lands, waters, fish, and wildlife) and foster the sustainable use of natural resources. (FLA. STAT. § 288.0658).

j. Chapter 334: Transportation Administration

Chapter 334 establishes the Florida Transportation Code and sets forth the responsibilities of the state, counties, and municipalities in terms of developing and maintaining the transportation system. Under the Transportation Code, the state Department of Transportation has the authority to plan a safe and viable statewide transportation system by acquiring and disposing of property, developing minimum standards for the design, construction, maintenance, and operation of public roads, and conduct research for the improvement of the statewide transportation system. Furthermore, the Department of Transportation has the responsibility of enhancing environmental benefits, including air and water quality, prevent roadside erosion, conserving

natural roadside growth and scenery, and implementing and maintaining roadside conservation, enhancement, and stabilization programs. (FLA. STAT. § 344.044(26)).

k. Chapter 339: Transportation Finance and Planning

Chapter 339 outlines the Florida Transportation Plan that defines the state's long-term transportation goals over the next 20 years. This annually updated plan must take into account the State Comprehensive Plan and consider the preservation of the existing transportation infrastructure, enhancing Florida's economic competitiveness, improving travel choices to ensure mobility, protecting and enhancing the environment, promoting energy conservation, and improving the quality of life for Floridians. (FLA. STAT. § 339.155).

Working in conjunction with metropolitan planning organizations, the Department of Transportation must also develop and implement a system for managing various problem areas with regard to transportation, including highway pavement, bridges, highway safety, traffic congestion, public transportation facilities, and intermodal transportation facilities. (FLA. STAT. § 339.117).

l. Chapter 373: Water Resources

Chapter 373 includes the Florida Water Resources Act that provides for the management of water resources in order to promote the conservation, replenishment, recapture, enhancement, development and proper use of surface and groundwater. As a public resource, water is to be managed on a state and regional basis and allocated throughout the state to meet all reasonable and beneficial uses. In order to properly conserve and manage the state's water resources, FDEP established water management districts. (FLA. STAT. § 373.026).

FDEP, in cooperation with the regional water management districts, is authorized to develop the Florida Water Plan, which is to include the FDEP's programs related to water supply and quality, flood management and protection, FDEP's water quality standards, and the district water management plan. Water management districts are authorized to develop a similar plan on a regional level. (FLA. STAT. 373.036). Lands may be dedicated to water management districts when necessary to carry out district water improvement projects. These dedicated lands are to be used for the public purposes of the district, and conveyances may be made conditional, such that if these lands are not used for public purposes or are abandoned, then the lands will revert back to the granting agency. (FLA. STAT. § 373.056).

m. Chapter 375: Outdoor Recreation and Conservation Lands

The Outdoor Recreation and Conservation Act authorizes the FDEP to develop and implement a multipurpose outdoor recreation plan for the state. By describing statewide recreational needs and opportunities, the plan is to estimate the need for additional recreational options and propose means to implement those opportunities. (FLA. STAT. § 375.021). FDEP may acquire land needed for recreational opportunities under FLA. STAT. § 375.031 and § 375.032, and FDEP will be responsible for overseeing the development and uses of these acquired lands and water areas. In

doing so, FDEP may also construct, improve, and maintain structures and facilities on the land as needed. (FLA STAT. §§ 375.011-375.47).

n. Chapter 376: Pollutant Discharge Prevention and Removal

Under the Pollutant Discharge Prevention and Control Act, the coast of Florida is to be preserved as a source of public and private recreation. Accordingly, the coastal waters, estuaries, tidal areas, and adjoining beaches must be preserved in pristine condition while also allowing for multiple uses to provide for the broad promotion of public and private interests. To preserve the coastline, the FDEP is authorized under this statute to contend with coastal hazards and require the containment of pollutants along the coast. (FLA. STAT. § 376.021).

o. Chapter 377: Energy Resources

Under FLA. STAT. § 377.24, in order for any person to drill a well in search of oil or gas, the person must provide notice to the Division of Resource Management (DRM) within FDEP and apply for a drilling permit. Abandoned wells and dry holes must promptly be plugged and the owner of the well must provide notice of his intention to abandon the well and seek approval to do so from DRM. Drilling permits will not be granted within the corporate limits of a municipality unless approved by the municipal governing authority. Permits will also not be granted within the state's tidal waters abutting a municipality or within three miles of the corporate limits as measured from the mean high tide line, unless approved by the municipal governing authority. Furthermore, no drilling permits will be granted on improved beaches (those with at least 10 hotels, apartment buildings, residents or other structures used for residential purposes) or in tidal waters abutting an improved beach, unless the county commissioners authorize the permit.

When considering whether a drilling permit should be granted, DRM is to consider the likelihood of oil or gas being present in a quantity sufficient to justify exploration as well as the nature, character and location of the land involved – whether the land is rural or urban, whether the land has been developed for residential or business purpose or whether the land remains vacant, and whether the lands are in a location making it likely for improvements and developments to occur in the future.

p. Chapter 380: Land and Water Management

Under the Florida Environmental Land and Water Act, local governments are to implement plans to guide local growth and land use and development in order to provide a water management system that will reverse the deterioration of water quality throughout the state and provide optimum utilization of the state's water resources. (FLA. STAT. § 380.021). This act establishes two land use programs - the designation of Areas of Critical State Concern (FLA. STAT. § 380.05) and the review of large-scale land development through the Development of Regional Impact procedures (FLA. STAT. § 380.06).

In Areas of Critical State Concern, specific management plans are to be enacted to protect these areas from being damaged by issues related to population growth by regulating land use and

development. Currently, there are four areas that have been designated under this provision – the City of Apalachicola, the City of Key West and the Florida Keys, the Green Swamp, and the Big Cypress Swamp.

The Developments of Regional Impact (DRI) program regulates land uses that stand to have a substantial effect on the health, safety or welfare of the public by providing regional and state oversight through an appeals process. When developments are reviewed under this program, FDEP ensures that the developments are in compliance with state law, identifies the potential impacts that such development may have, and makes recommendations to local governments for approving or not approving developments, or approving these developments subject to mitigation measures being used. (FLA. STAT. § 380.06).

The Florida Quality Developments Program was developed as an alternative to the original DRI program. The Florida Quality Developments Program encourages development that has been planned in such a way as to take into consideration the protection of Florida's natural amenities and the cost to local government of providing services to a growing community. The developer of a Florida Quality Development must protect wetlands, provide for the integrity of water bodies, dunes, and beaches, protect archaeological sites and areas that include habitat for endangered or threatened species. Furthermore, Florida Quality Developments require developers to consider open spaces, recreation, energy infrastructure, and consistency with the state comprehensive plan, the land development plan, and local governmental comprehensive plans. This program prohibits developments that generate certain amounts of hazardous or toxic substances as well as those that encourage dredge and fill activities. (FLA. STAT. § 380.061).

The Florida Communities Trust Act established two land acquisition programs by which local governments or non-profit organizations may acquire parks, open space, greenways, and areas for aquaculture. The Florida Communities Trust is part of the Florida Forever Program and receives 21% of the total Florida Forever appropriations for the Parks and Open Space grant program and 2.5% of the Florida Forever appropriations for the Stan Mayfield Working Waterfronts Program. (FLA. STAT. §§ 380.501-380.515).

q. Chapter 403: Environmental Control

The Florida Air and Water Pollution Control Act recognizes that any pollution to the state's air and water harmful to public health and welfare, destructive to wildlife, and impairs domestic, agricultural, industrial, and other uses of air and water. The overall purpose of this act is to conserve, protect, and improve the quality of Florida's air and water in order to preserve a healthy water supply, preserve the state's wildlife, and maintain levels of air quality that supports both human health and plant and animal welfare, which in turn promotes the state's social and economic development. (FLA. STAT. § 403.021).

The FDEP is authorized to control air and water pollution by approving long-term plans designed to provide for air and water quality control and pollution abatement, administer and enforce air and water pollution laws and regulations, adopt new air and water quality control laws and regulations (consistent and in compliance with the federal Clean Air and Clean Water Acts) that control emissions from vehicles, effluent limitations, pretreatment requirements, and

performance standards, and establish air and water quality standards for the state as a whole or for regions of the state as deemed necessary by the department. (FLA. STAT. § 403.061).

The Water Resources Restoration and Preservation Act, section 403.0615, requires the department to establish a program to restore and preserve bodies of water and to enhance public access where necessary. Under this Act, the Department must adopt criteria for allocating preservation and restoration funds, including the degree of water quality degradation, the extent to which the water is polluted, the public uses and ecological value of the water, and the commitment of local government resources to assist in restoration efforts.

Section 403.705 establishes the state's solid waste management program, which provides guidelines for the orderly storage, processing, recovery, and disposal of solid waste within the state of Florida. In order to determine where additional hazardous waste disposal facilities are to be sited, each county is to complete a hazardous waste management assessment and designate areas within the county at which storage facilities could be constructed if need requires. The local government that has jurisdiction over the county's designated hazardous waste facility is to determine if the proposed site is consistent with local government comprehensive plans and local land use ordinances and regulations. If the siting request does not comply with local government procedures, then the person requesting to develop the hazardous waste facility may request a variance, the denial of which is appealable to the Governor of the state. The Governor may grant the variance if the facility will not have a significant adverse impact on the environment, the surface or groundwater of the area, or the economy. (FLA. STAT. § 403.723).

Under the Electrical Power Plant and Transmission Line Siting Act, the department is charged with developing a procedure for the selection and utilization of sites for electrical generating facilities such that these facilities will not have an adverse impact on the people, wildlife, the location and growth of industry, or natural resources of the state. (FLA. STAT. § 403.502). In order to construct an electrical power plant, an applicant must receive a permit, and in the permit application the applicant must include a statement on the consistency of the site with existing land use plans and zoning ordinances in effect on the state that the application was filed.

r. Chapter 553: Building and Construction Standards

The Florida Building Code contains the laws and rules that govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities. Local governments may impose more stringent building requirements than the state if the need requires. (FLA. STAT. § 553.73).

In order to construct, repair, or demolish a building within the state of Florida, a person, firm or corporation must first obtain the proper permit. No permits may issue until the local building code inspector and fire safety inspector have both approved the plans.

s. Chapter 582: Soil and Water Conservation

The Department of Agriculture and Consumer Services may organize soil and water conservation districts if the Department determines that there is a need, in the interest of public

health, safety, and welfare, for such a district in the proposed area. The supervisors of a soil and water conservation district have the authority to develop regulations governing land uses within the district in order to conserve soil and prevent soil erosion. Before promulgating any land use regulations, the supervisors must notify landowners in the district of their intention to hold a referendum for the landowners to indicate their approval or disapproval of the proposed regulations. Only if a majority of the votes cast in the referendum approve the regulations can the district adopt the regulations. (FLA. STAT. § 582.10).

Under section 582.22, the district has the authority to implement regulations concerning the construction of terraces, dikes, ponds, ditches, and similar structures; requiring the use of certain cultivation methods; preventing cultivation in highly erosive areas; and providing for other means and operations to assist with soil conservation and soil erosion preventions. If the landowner can demonstrate that complying with the land use regulations present great practical hardship, the landowner may apply for a variance with the district. (FLA. STAT. § 582.26).

2. Planning & Programs:

a. Waterfronts Florida

Many of Florida's traditional waterfronts have seen dramatic economic and social changes in the last two decades. Today many communities are interested in revitalizing their waterfronts - areas that have experienced neglect and deterioration over the years. The Waterfronts Florida program designates three communities biennially to receive training, innovative technical assistance, and limited financial assistance as they develop and implement revitalization plans. The Department of Community Affairs' Waterfronts Florida Partnership program assists designated communities in organizing, visualizing, and implementing locally-based plans. Implementation of the program is dependent upon available funding.

E. Other State Laws Affecting Coastal Planning

1. Chapter 298: Drainage and Water Control

FLA. STAT. § 298.01 authorizes the formation of water control districts, which construct, complete, operate, maintain, repair, and replace all works and improvements necessary to execute the water control plan. These functions include cleaning, straightening, widening, and changing the course of canals, ditches, drains, rivers, watercourses, or natural streams; constructing and maintaining canals, ditches, levees, dikes, reservoirs, floodways; and constructing any other works or improvements that have been deemed necessary to preserve the waterworks within the districts. The Water Control District also has the authority to implement comprehensive water control activities, including flood protection, water quality management, and water quality improvement. (FLA. STAT. § 298.22).

Each water control district must develop a water control plan that contains descriptions of land use within the district, a map outlining the legal boundaries of the district and identifying any subdistricts, engineering drawings and narratives that describe the facilities within each district and their capacity for management and storage of surface waters and potable water supply, and a

description of any environmental or water quality program that the water control district either has implemented or will implement in the future. The water control plan must be approved by the appropriate water management district. (FLA. STAT. § 298.225).

IV. LOUISIANA[5]

A. Type of Rule

1. Home Rule Charter

A home rule charter provides the structure and organization, powers and functions of the parish, which may include the exercise of any power and performance of any function necessary, requisite or proper for the management of its affairs, not denied by general law or inconsistent with the constitution.

Home Rule structure can be in varying forms: President-Council form, Council-Administrator form, Parish Commission Form.

Subject to and not inconsistent with this constitution, any local governmental subdivision may draft, adopt, or amend a home rule charter.

The legislature shall enact no law the effect of which changes or affects the structure and organization or the particular distribution and redistribution of the powers and functions of any local governmental subdivision which operates under a home rule charter. (Louisiana Constitution, Article 6 § 5, 6).

2. Police Jury

The typical governing body of the parish is called the police jury. Not every parish is governed by a police jury, but 41 of the 64 parishes use this system.

The police jury is the legislative and executive government of the parish, and is elected by the voters. Its members are called jurors, and together they elect a President as their chairman. The President presides over the police jury and serves as the head of the parish government.

Police juries range in size, depending on the population of the parish, from three to fifteen. Many parishes are quite rural and therefore have small police juries. Wide latitude is given to organize and administer the police jury's business. (LA. REV. STAT. ANN. § 33:1221 et. seq.).

B. State Enabling Legislation for Planning

1. Municipalities:

Under Louisiana law, a municipality refers to an incorporated area with a population greater than 200 inhabitants. (LA. REV. STAT. ANN. 33:1). Municipal power to make land use planning ordinances is set forth in LA. REV. STAT. ANN. 33:102. Under this statute, every parish and every municipality may make, adopt, amend, extend, add to, or carry out official plans; create by

[5] Courtesy of Louisiana Sea Grant Law and Policy Program.

ordinance a planning commission with the powers and duties provided by the statute; and appropriate funds for the commission.

The general duties of municipal planning commissions in making land use planning ordinances include making and adopting a master plan for the physical development of the municipality. (LA. REV. STAT. ANN. § 33:106). Municipal planning commissions also serve as a municipal zoning commission.

Municipal planning commissions "shall make careful and comprehensive surveys and studies of present conditions and future growth of the municipality and its environs." (LA. REV. STAT. ANN. § 33:107).

The municipality's master plan "shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the parish or municipality, as the case may be, and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development; including, among other things, adequate provision for traffic, the promotion of safety from fire and other dangers, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, the adequate provision of public utilities and other public requirements, and in the case of a municipal planning commission, vehicular parking." (LA. REV. STAT. ANN. § 33:107).

2. Parishes:

The general duties of parish planning commissions include making and adopting a master plan for the physical development of the unincorporated territory of a parish. (LA. REV. STAT. ANN. § 33:106).

Parish planning commissions, in adopting a master plan, "shall make careful and comprehensive surveys and studies of present conditions and future growth of the parish, with due regard to its relation to neighboring territory and to the relation of unincorporated territory in the parish to incorporated territory therein." (LA. REV. STAT. ANN. § 33:107).

The master plan created by a parish planning commission is, in almost all respects, the same as that created by a municipal planning commission. The parish master plan "shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the parish or municipality, as the case may be, and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development; including, among other things, adequate provision for traffic, the promotion of safety from fire and other dangers, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, the adequate provision of public utilities and other public requirements." (LA. REV. STAT. ANN. § 107).

Instead of Parish Planning Commissions, many parishes have Parish Development Boards. which may be created and organized by a police jury under the provisions of LA. REV. STAT. ANN. §§ 33:121-130. The duties of Parish Development Boards include creating a plan for parish resources and facilities. These plans may contain information showing the location and condition of the streets, highways, bridges, waterways, parks, aviation facilities, commercial airlines, pipe lines, railroads, electric power lines, mines, factories, forests, other natural resources, public utilities, and other pertinent and appropriate information. (LA. REV. STAT. ANN. § 33:127). Parish Development Boards will not be established in any parish containing a municipality of more than three hundred thousand. (LA. REV. STAT. ANN. § 33:121). No parish may simultaneously have both a parish planning commission and parish development board. (LA. REV. STAT. ANN. § 33:130).

3. Regional:

Regional planning areas consist of urbanized areas in municipalities and surrounding parishes. Under LA. REV. STAT. ANN. § 33:131, "the legislative bodies of any municipality and a surrounding or contiguous parish; or any two or more contiguous municipalities; or of any one or more municipalities and one or more parishes all forming a single urbanized or suburbanized area; or of any one or more municipalities and one or more parishes all forming a single urbanized area of more than fifty thousand population and including municipalities and parishes contiguous thereto, hereinafter referred to as "urbanized areas" are hereby authorized to create a regional planning area out of their combined territories, and the police jury of any parish may likewise join with one or more counties in an adjoining state forming a single area for a like purpose."

Ordinances adopted by each municipality and parish involved in the regional planning area provide for the creation of a regional planning commission. The general duties of regional planning commissions include making regional development plans; making studies of the resources and problems occurring in the regional planning area; preparing lists of the region's natural resources, public works, and private facilities deemed important to regional development; and provide information to civic groups, private persons, and public officials who request such information regarding regional or metropolitan development. (LA. REV. STAT. ANN. § 33:135).

4. State Planning Districts

Louisiana has also implemented State Planning Districts under LA. REV. STAT. ANN. §§ 33:140.181,182: The legislature finds that problems of growth and development in urban and rural regions of the state so transcend the boundary lines of local government units that no single unit can plan for their solution without affecting other units in the region; that various multi-parish planning activities conducted under various laws of the United States are being conducted in an uncoordinated manner; that intergovernmental cooperation on a regional basis is an effective means of pooling the resources of local government to approach common problems; and that the assistance of the state is needed to make the most effective use of local, state, federal, and private programs in serving the citizens of such urban and rural regions.

C. Louisiana's Public Trust Doctrine

Elements of Louisiana's Public Trust Doctrine are scattered throughout the Louisiana Civil Code, the Revised Statutes, the Louisiana Constitution of 1974, and Louisiana judicial decisions. The public trust is comprised of all waters subject to the ebb and flow of the tide, whether navigable or not, and all navigable waters. The sea, the seashore, the beds and waters of navigable rivers, and the beds, banks and waters of navigable lakes are also included. Louisiana's unique geography has led to uncertainty as to the scope of the public trust, since many lakes and bayous rather far from the Gulf are subject to tidal overflow. The treatment of non-navigable tideland is unclear.

Land lost to dereliction and accretion on the banks of navigable rivers has the effect of enlarging the public trust at the expense of riparian landowners. Pursuant to Louisiana Title 41:1702, landowners can bear the expense of rebuilding land lost to erosion, subsidence, compaction and sea level rise since July 1, 1921, if they can prove their prior property boundaries by survey. For landowners who cannot afford this expense, ownership of the land subsumed by the water transfers to the State.

Land and water bottoms held in the public trust are held in the public capacity of the state and are subject to public use. So long as these lands are designated for the public use, they cannot be alienated by the state, although the state may exact mineral and other leases on the land.

D. Coastal Zone Management

1. Implementing Laws and Regulations:

Louisiana State and Local Coastal Resources Management Act (SLCRMA) of 1978 (LA. R.S. 49:214.21 et seq.) is Louisiana's approved Coastal Zone Management Act (CZMA) program that sets criteria and establishes guidelines for protecting, developing, and restoring the natural resources of the delineated coastal zone.

2. Planning & Programs:

A coastal use permit is required for certain activities in the coastal zone, including, but not limited to: dredging or discharges of dredged or fill material; levee siting, construction, operation and maintenance; hurricane and flood protection facilities; urban developments; energy and mining activities; shoreline modification; and recreational and industrial development.

A coastal use permit is not required for certain activities in the coastal zone, including, but not limited to: activities occurring wholly on lands five feet above mean sea level, agricultural, forestry or aquaculture activities on lands consistently used in the past for such activities, hunting, fishing, trapping, and the preservation of scenic, historic, and scientific areas and wildlife preserves, normal maintenance or repair of existing structures including emergency repairs of damage caused by accident, fire, or the elements, construction of a residence or camp, or other uses which do not have a significant impact on coastal waters.

Louisiana allows coastal zone parishes that have developed approved local coastal management plans to regulate "uses of local concern" within their boundaries. These uses directly and significantly affect coastal waters and are in need of coastal management, but are not uses of state concern.

A copy of the Coastal Zone Management Act for Louisiana can be found at: http://www.legis.state.la.us/lss/lss.asp?doc=103633.

E. Other State Laws Affecting Coastal Land Use

1. Coastal Protection & Restoration Authority

The Coastal Protection & Restoration Authority shall represent the state's position in policy relative to the protection, conservation, enhancement, and restoration of the coastal area of the state through oversight of integrated coastal protection projects and programs and by addressing activities which require a coastal use permit which could significantly affect integrated coastal protection projects and programs.

The authority shall develop, coordinate, make reports on, and provide oversight for a comprehensive coastal protection master plan and annual plans, working in conjunction with state agencies, political subdivisions, including flood protection authorities, levee districts, and federal agencies.

The authority shall develop procedures in accordance with the Administrative Procedure Act and take actions against any entity, including political subdivisions, to enforce compliance with the comprehensive master coastal protection plan. (LA. REV. STAT. ANN. § 49:214.50,51).

2. Governor's Advisory Commission on Coastal Protection, Restoration and Conservation

The Mission of the Coastal Advisory Commission on Coastal Protection, Restoration, and Conservation includes but is not limited to assisting the State of Louisiana in the development and implementation of a holistic plan to achieve a sustainable coastal ecosystem, encompassing the entirety of Louisiana's fragile coast from the Pearl River to the Sabine River, all predicated upon uncompromised engineering, scientific and ecological principles.

It does this by advising the Governor and the Executive Assistant on integrated coastal activities relative to the overall status and direction of the state's coastal protection program. It reviews programs, conditions, trends, and scientific and engineering findings which affect integrated coastal protection, in order to make recommendations for improvements to the state's integrated coastal protection, efforts.

The Commission develops advice with respect to the identification and resolution of conflicts among agencies and stakeholders related to integrated coastal protection efforts and to assist in the identification of any other activity which might conflict with the integrated coastal protection, efforts. (LA. REV. STAT. ANN. § 49:214.4.1).

3. The Wetlands Coastal Planning, Protection and Restoration Act (aka the Breaux Act)

The Coastal Wetlands Planning, Protection and Restoration Act of 1990, otherwise known as the "Breaux Act," is a Congressional program designed to support the development of a comprehensive coastal restoration program with the goal of "no net loss of wetlands." The Act stipulates that a coalition of five federal agencies work with coastal states in a coast-wide approach, providing around $50 million each year for coastal projects. The Breaux Act has implemented 78 projects over the last 15 years. Congress recently reauthorized funding for CWPPRA through 2019. (16 U.S.C. §§ 3951-3956).

The Breaux Act Task Force is comprised of the State of Louisiana, the Louisiana Department of Natural Resources, the Louisiana Governor's Office, the U.S. Environmental Protection Agency, the U.S. Army Corp of Engineers, the U.S. Department of the Interior, the U.S. Department of Agriculture, and the U.S. Department of Commerce. The implementation of projects proposed by the Breaux Act Task Force is based on an evaluation by the Coastal Restoration and Coastal Engineering division of the Department of Natural Resources.

The Breaux Act outlines the distribution of funds. Seventy percent of funds, not to exceed $70 million, are allocated to develop and implement Louisiana restoration and coastal plans. Fifteen percent of funds are allocated to the National Coastal Wetlands Conservation Grant program, including $2.5 million for Texas wetlands assessment, and another 15% of the funds, not to exceed $15 million, are allocated to conduct activities authorized by the North American Wetlands Conservation Act.

In Louisiana, the federal and State governments have a plan in place to cost-share on restoration projects, construction, and maintenance. The federal government shares in 85% of project costs and Louisiana funds the remaining 15%. Federal funding for the Breaux Act is established by 16 U.S.C. 777c, or the Federal Aid in Sport Fish Restoration Act. This Act authorizes the Secretary of the Interior to distribute 18.5 per centum of each annual appropriation made in accordance with the Act for the Coastal Wetlands Planning, Protection, and Restoration Act.

Since 1991, the Breaux Act has provided $33-44 million per year in federal funding for Louisiana restoration projects.

4. The Louisiana Scenic Rivers Act

The Louisiana Scenic Rivers Act established the Louisiana Natural Scenic Rivers System, which is comprised of around 3000 miles of designated rivers and streams throughout the state. The purpose of the Act is to protect, preserve and enhance the aesthetics and ecologies of free-flowing Louisiana water bodies and the wildlife dependent on them. (LA. REV. STAT. ANN. §§ 1840-1856).

Certain activities are prohibited on Louisiana scenic rivers, including channelization, clearing and snagging, channel realignment, reservoir construction, and the commercial cutting of trees within 100 feet of the ordinary low water mark. For any other activities on or near scenic rivers that may have an impact on them, very specific permits are required. Permits are submitted for

multi-agency review by the Department of Wildlife and Fisheries, the Department of Environmental Quality, the Department of Agriculture and Forestry, the Department of Culture, Recreation and Tourism, and other state agencies of interest. The Secretary of Wildlife and Fisheries makes permit decisions based on the findings of the other agencies and on public feedback.

Rivers and streams can be nominated for inclusion by local legislators. The Department of Wildlife and Fisheries will then conduct a study on the waterway and determine whether or not it meet the minimum qualifying criteria.

V. MISSISSIPPI

A. Type of Rule

Mississippi has statutorily adopted Home Rule for both municipalities and county governments (as opposed to Dillon Rule which limits local government authority to that which is specifically given to them by the state constitution or legislative statute).

1. Municipalities:

Mississippi recognizes three types of municipal classifications based on population size: cities (2,000+), towns (300-1,999), and villages (<300). However, only cities and towns may incorporate, and planning authority is limited to incorporated municipalities. (MISS. CODE ANN. § 21-1-1). Under the Municipal Home Rule statute, a municipality may act on matters of local interest but may not act on matters of statewide interest, at least to the extent that there is no specific provision made by general law and to the extent that there is no inconsistency with the state constitution or any other statute or law of the state.

The Municipal Home Rule statute (MISS. CODE ANN. § 21-17-5) provides a general grant of power to all cities within the state to manage and control municipal affairs, and adopt ordinances with respect to the management and control of municipal affairs, with several specific restrictions. First, city actions cannot be inconsistent with the Mississippi Constitution of 1890, the Mississippi Code of 1972, or any other statute or law of the state. Second, the municipality cannot levy taxes of any kind without express legislative authority.

The Home Rule statute states in pertinent part:

> The governing authorities of every municipality of this state shall have the care, management and control of the municipal affairs and its properties and finances. In addition to those powers granted by specific provisions of general law, the governing authorities of municipalities shall have the power to adopt any orders, resolutions or ordinances with respect to such municipal affairs, property, and finances which are not inconsistent with the Mississippi Constitution of 1890, the Mississippi Code of 1972, or any other statute or law of the state of Mississippi, and likewise shall have the power to alter, modify and repeal such orders, resolutions or ordinances. Except as otherwise provided . . ., the powers granted to governing authorities of municipalities in this section are complete without the existence of or reference to any specific authority granted in any other statute or law of the State of Mississippi.

2. Counties:

Home Rule was made applicable to county governments by § 60 of the County Government Reorganization Act of 1988 (MISS. CODE ANN. § 19-3-40):

> The Board of Supervisors of any County shall have the power to adopt any orders, resolutions or ordinances with respect to County affairs, property and finances, for which

no specific provision has been made by general law and which are not inconsistent with the Mississippi Constitution, the Mississippi Code of 1972, or any other statute or law of the State of Mississippi; and any such Board shall likewise have the power to alter, modify and repeal such orders, resolutions or ordinances. Except as otherwise provided …, the powers granted to Boards of Supervisors in this section are complete without the existence of or reference to any specific authority granted in any other statute or law of the State of Mississippi. Such orders, resolutions or ordinances shall apply Countywide except when the governing authorities of any municipality situated within a County shall adopt any order, resolution or ordinance governing the same general subject matter. In such case the municipal order, resolution or ordinance shall govern within the corporate limits of the municipality.

B. State Enabling Legislation for Planning

Mississippi planning authority can be found at MISS. CODE § 17-1-1 to 17-1-39, which gives governing authorities general planning authority. Zoning authority is set forth in § 17-1-7 and provides:

> the governing authority of each municipality and county may divide the municipality or county into zones of such number, shape and area as may be deemed best suited to carry out the purposes of [of Mississippi's planning authority]. Within the zones created, the governing authority of each municipality and county may … regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All regulations shall be uniform for each class or kind of buildings throughout each zone, but regulations in one zone may differ from those in other zones.

1. Local Planning Commissions

Local planning commissions are authorized, but not required, to develop comprehensive plans. (MISS. CODE ANN. § 17-1-11). No plan can be adopted until a public hearing is held.

Mississippi defines comprehensive plan to mean: "a statement of public policy for the physical development of the entire municipality or county adopted by resolution of the governing body" that includes specified minimum requirements set out by statute:

(i) Goals and objectives for the long-range (twenty (20) to twenty-five (25) years) development of the county or municipality. Required goals and objectives must address, at a minimum,
- Residential, commercial and industrial development;
- Parks, open space and recreation;
- Street or road improvements; and
- Public schools and community facilities.

(ii) A land use plan which designates in map or policy form the proposed general distribution and extent of the uses of land for residences, commerce, industry, recreation and open space, public/quasi-public facilities and lands. Background

information shall be provided concerning the specific meaning of land use categories depicted in the plan in terms of the following: residential densities; intensity of commercial uses; industrial and public/quasi-public uses; and any other information needed to adequately define the meaning of such land use codes. Projections of population and economic growth for the area encompassed by the plan may be the basis for quantitative recommendations for each land use category.

(iii) A transportation plan depicting in map form the proposed functional classifications for all existing and proposed streets, roads and highways for the area encompassed by the land use plan and for the same time period as that covered by the land use plan. Functional classifications shall consist of arterial, collector and local streets, roads and highways, and these classifications shall be defined on the plan as to minimum right-of-way and surface width requirements; these requirements shall be based upon traffic projections. All other forms of transportation pertinent to the local jurisdiction shall be addressed as appropriate. The transportation plan shall be a basis for a capital improvements program.

(iv) A community facilities plan as a basis for a capital improvements program including, but not limited to, the following:

- Housing;
- Schools;
- Parks and recreation;
- Public buildings and facilities; and
- Utilities and drainage.

2. Regional Planning Commissions

Mississippi authorizes the creation of regional planning commissions by any two or more counties and municipalities. Regional planning commissions act in an advisory capacity to local counties and municipalities and work to coordinate regional land use activities. Regional planning commissions may include to interstate planning commissions. (MISS. CODE ANN. § 17-1-29 to 1-35).

C. Mississippi's Public Trust Doctrine

Mississippi courts have recognized public trust purposes as including transportation, fishing, swimming and recreation, the development of mineral resources, and environmental preservation. Mississippi has adopted two statutes that describe its public trust doctrine with regards to coastal areas: the Public Trust Tidelands Act (MISS. CODE ANN. §§ 29-15-1 to 29-15-7) and the Coastal Wetlands Protection Act (MISS. CODE ANN. §§ 49-27-1 to 49-27-5). Both laws are part of Mississippi's Coastal Program and are further discussed below.

D. Coastal Zone Management

The Mississippi Coastal Program is comprised of a network of agencies with authority in the coastal zone. The Department of Marine Resources, through the Office of Coastal Ecology, serves as the lead agency. (MISS. CODE ANN. § 57-15-6).

1. Implementing Laws and Regulations:

Mississippi implements its Coastal Program through three statutory provisions: 1) Public Trust Tidelands Act, 2) Coastal Wetlands Protection Act, and 3) Marine Resources Laws. The following describes those provisions and their relation to land use.

a. Public Trust Tidelands Act

This act declares that the public policy of the state is "to favor the preservation of the natural state of the public trust tidelands and their ecosystems and to prevent the despoliation and destruction of them, except where a specific alteration of specific public trust tidelands would serve a higher public interest in compliance with the public purposes of the public trust in which such tidelands are held." (MISS. CODE ANN. § 29-15-3(1)). The act gives the Mississippi Supreme Court the authority to resolve any disputes about the location of the boundary between the state's public trust tidelands and the upland property and to confirm the mean high water boundary line. (MISS. CODE ANN. § 29-15-3(2)).

The act requires the Secretary of State to create a map of the public trust tidelands, which depicts the boundary as the current mean high water line where shoreline is undeveloped, and in developed areas or where there have been encroachments, the map depicts the boundary as the determinable mean high water line nearest the effective date of the Coastal Wetlands Protection Act (1973). The state recognizes that the boundary of the public trust tidelands is ambulatory – that the land subject to the public trust may increase with inland expansion of tidal waters and that it may decrease and become property owned by the contiguous upland owner because of other factors. Also, the state recognizes the common law doctrine as it pertains to such tidelands, submerged lands, and riparian and littoral rights and declares such to be the law of the state. (MISS. CODE ANN. § 29-15-7).

People may lease the public trust tidelands, or submerged lands, and are responsible for any county or municipal tax levy upon the leasehold interest. (MISS. CODE ANN. § 29-15-11). All public projects of any federal, state, or local governmental entity which serve a higher public purpose of promoting the conservation, reclamation, preservation of the tidelands and submerged lands, public use for fishing, recreation, or navigation, or the enhancement of public access to such lands is exempt from any use or rental fees. (MISS. CODE ANN. § 29-15-13).

b. Coastal Wetlands Protection Act

The Coastal Wetlands Protection Act declares that the public policy of the state is "to favor the preservation of the natural state of the coastal wetlands and their ecosystems and to prevent the despoliation and destruction of them, except where a specific alteration of specific coastal

wetlands would serve a higher public interest in compliance with the public purposes of the public trust in which the coastal wetlands are held." (MISS. CODE ANN. § 49-27-3).

The act does not apply to several activities, areas, and entities, such as "the accomplishment of emergency decrees of any duly appointed health officer of a county or municipality or of the state, acting to protect the public health," and hunting, fishing, swimming, and hiking where permitted and causes no material harm to the wetlands. (MISS. CODE ANN. § 49-27-7).

Any person proposing to conduct a regulated activity is required to submit a Joint Application and Notification Form for processing by the Mississippi Department of Marine Resources and the U.S. Army Corps of Engineers.

A "regulated activity" is defined as any of the following activities:

- The dredging, excavating or removing of soil, mud, sand, gravel, flora, fauna or aggregate of any kind from any coastal wetland;
- The dumping, filling or depositing of any soil, stones, sand, gravel, mud, aggregate of any kind or garbage, either directly or indirectly, on or in any coastal wetlands;
- Killing or materially damaging any flora or fauna on or in any coastal wetlands;
- The erection on coastal wetlands of structures which materially affect the ebb and flow of the tide; and
- The erection of any structure or structures on suitable sites for water dependent industry.

(MISS. CODE ANN. § 49-27-5(c)).

c. Marine Resources Laws

These provisions include the creation of Mississippi's coastal program including permitting and regulatory oversight authority. (MISS. CODE ANN. § 57-15-6).

2. Planning & Programs

a. Wetlands Permitting Program

The Wetlands Permitting Program coordinates the permitting of wetland uses within the state's coastal zone among the permitting authorities (DMR, Department of Environmental Quality, and the U.S. Army Corps of Engineers). The most significant regulated activities are dredging and filling. The program is also responsible for reviewing proposed projects for federal consistency.

b. Coastal Preserves Program

The Coastal Preserves Program strives to effectively preserve, conserve, restore, and manage Mississippi's coastal ecosystems. The state has identified 20 coastal preserve areas and aims to acquire land within these areas and manage them to safeguard and protect their natural characteristics, ecological integrity, environmental functions, and economic and recreational

values. In 2009, more than 44,000 acres of the identified lands were under protective ownership of the state (35,000+ acres) or the federal government (10,000 acres).

E. Other State Laws Affecting Coastal Planning

1. Sea Wall Act

Mississippi's Sea Wall Act authorizes state and local governments to exercise eminent domain where needed to construct and repair sea walls. (MISS. CODE ANN. § 65-33-1). Though known as the Sea Wall Act, the provisions also apply to breakwaters, bulkheads, shore stabilization structures, causeways, bridges, breakwaters, or other necessary structures or improvements needed to protect roads and highways.

2. Floodplain Management for Public Lands and Buildings

Mississippi requires that all state owned lands and buildings carry national flood insurance and that the Department of Finance and Administration adopt floodplain management criteria and procedures necessary for flood insurance. Additionally, no state agency is authorized to expend any state, federal or special funds for the construction, renovation, repair or placement of any structure in a designated floodplain, floodway or coastal high hazard area, or to allow for the construction, renovation, repair or placement of any privately owned structure onto state-owned land in a designated floodplain, floodway or coastal high hazard area unless such agency has previously obtained the necessary permits required by the Department of Finance and Administration to comply with the regulations of the Federal Emergency Management Agency (FEMA), National Flood Insurance Program and the state's floodplain management regulations. (MISS. CODE ANN. § 29-13-1).

VI. TEXAS

A. Type of Rule

At present, Texas is the only state in the U.S. where there is a mix of land use authority: home rule and general law (Dillon's rule). Dillon rule means that local governments only exercise powers specifically granted to them by the state constitution or legislative statute.

1. General Law Cities (& Counties)

General Law, or Dillon's Rule, applies to cities and towns with populations of 5,000 or less and most counties (exception being Padre Island in Cameron and Willacy counties); they operate according to specific state statutes, which define their powers and duties. They are restricted to doing only what the state has specifically granted them to do. If a general law city or county has not been granted the express or implied power by the state to initiate a particular action, none may be taken. (Texas Const. art. 11, § 4).

2. Home Rule Cities

Home rule cities are cities with populations of more than 5,000 in which citizens have adopted home rule charters. A charter is a document that establishes the city's governmental structure and provides for the distribution of powers and duties among the various branches of government. In order to be implemented, the charter must be approved by the people at an election. Likewise, changes in the charter must be approved by a vote of the people. The legal position of home rule cities is the reverse of general law cities. Rather than looking to state law to determine what they may do, as general law cities must, home rule cities look to the state constitution and state statutes to determine what they may not do. Thus, if a proposed home rule city action has not been prohibited or pre-empted by the state, the city generally can proceed. (Texas Const. art. 11, § 5).

B. State Enabling Legislation for Planning

1. Municipalities

Texas municipal regulatory authority is set forth in the Texas Local Government Code. General zoning authority is found in Chapter 211 – Municipal Zoning Authority. Chapter 211 distinguishes cities with populations greater than 290,000. These larger cities that adopt comprehensive plans are provided additional authority. (TEX. LOC. GOV'T CODE § 211.021).

Comprehensive planning authority is can be found in Texas Local Government Code Chapter 213 (TEX. LOC. GOV'T CODE § 213.002) which provides:

> (a) The governing body of a municipality may adopt a comprehensive plan for the long-range development of the municipality. A municipality may define the content and design of a comprehensive plan.

(b) A comprehensive plan may:

- Include but is not limited to provisions on land use, transportation, and public facilities;
- Consist of a single plan or a coordinated set of plans organized by subject and geographic area; and
- Be used to coordinate and guide the establishment of development regulations.

(c) A municipality may define, in its charter or by ordinance, the relationship between a comprehensive plan and development regulations and may provide standards for determining the consistency required between a plan and development regulations.

2. Counties

County zoning authority is also found in the Texas Local Government Code at Chapter 231 and includes detailed information for certain geographical locations in Cameron and Willacy counties such as Padre Island, Military Zones, or Amistad Recreational Area. County commissioners may establish or abolish county planning commissions. (TEX. LOC. GOV'T CODE § 232.092).

C. Texas's Public Trust Doctrine

Texas holds state lands in trust for the public. The public trust doctrine extends to all navigable water bodies and submerged lands. Along the shore, public trust rights in submerged lands include hunting, fishing, navigation, "and other lawful purposes." (*Diversion Lake Club v. Heath*, 86 S.W.2d 441, 444 (Tex. 1935)). In the context of navigable streams, Texas has also recognized the rights navigation, fishing, recreation, and commercial. (*Tex. River Barges v. City of San Antonio*, 21 S.W.3d 347, 352 (Tex. App. 2000)). Under Texas law, any stream with an average width of 30 feet is deemed navigable by law. (TEX NAT. RES. CODE § 21.001(3)).

Texans have a historic use of the dry beach along the Gulf of Mexico. The beaches provide a source of transportation, commerce, and recreation. The mean high tide mark delineates the "wet beach" from the "dry beach." Landowners may own property extending to the mean high tide mark but the "wet beach" is held by the State in public trust. For more information about public use of the Gulf beaches, see the Texas Open Beaches Act discussed below.

D. Coastal Zone Management

The Texas Coastal Management Program is based primarily on the Coastal Coordination Act of 1991 (33 TEX. NAT. RES. CODE ANN. §201 *et. seq.*). Laws authorizing the Coastal Management Program (CMP) and outlining its elements are found in the Texas Natural Resources Code Chapter 33 (TEX. NAT. RES. CODE § 33.052 -.053). The Coastal Coordination Council, a public/private council chaired by the Texas Land Commissioner, has handled management of the Texas Coastal Program. **However, the Coastal Coordination Council is set to expire on September 1, 2011 under the Texas Sunset Act. (TEX. NAT. RES. CODE § 33.211). Upon the**

expiration of the Coastal Coordination Council, authority is transferred to the Texas General Lands Office.

The following summarizes the functions of the Coastal Management Program as overseen by the Coastal Coordination Council and will need updating following any new programmatic changes resulting from the expiration of the Council (as noted in the preceding paragraph).

1. Implementing Law and Regulations:

Currently, Texas's implementing regulations for its Coastal Management Program can be found in the Texas Administrative Code, Title 31 Natural Resources and Conservation. (31 TEX. ADMIN. CODE § 1, et seq.). The following includes provisions relating to land use:

a. Part 1 General Land Office
   - Includes coastal area planning and coastal protections.

b. Part 2 Texas Parks and Wildlife Department
   - Includes fisheries, wildlife, and resource protection.

c. Part 4 School Land Board
   - Includes public coastal lands and state-owned lands and flats.

d. Part 5 Boards for Lease of State-owned Lands
   - Requires activities be consistent with the Coastal Program.

e. Part 16 Coastal Coordination Council (Set to sunset, see above).
   - Establishes coastal management program, goals and priorities.

f. Part 17 Texas State Soil and Water Conservation Board
   - Includes flood control provisions.

g. Part 18 Texas Groundwater Protection Committee
   - Addresses groundwater contamination.

2. Planning & Programs

a. Grants Program

The Grants program is administered by the General Lands Office (GLO). Through the Grants Program, the CMP awards NOAA grant funds to local entities for projects that support access to beaches, bays, and other coastal natural resources areas. The Council established the following categories for use of these funds by coastal communities: Coastal Natural Hazards Response, Critical Areas Enhancement, Shoreline Access, Waterfront Revitalization and Ecotourism Development, Permit Streamlining/Assistance and Governmental Coordination, Information and Data Availability, Public Education and Outreach, and Water Quality Improvement.

b. Nonpoint Source Pollution Control Program

The Nonpoint Source Pollution Control Program, also administered by GLO, supports and protects natural habitats and wildlife by identifying sources of coastal non-point source pollution and developing recommendations for its prevention. On July 3, 2003, NOAA and the EPA granted Conditional Approval to the Program. At that time, Texas had to meet five more conditions to gain full approval of its program. As of 2008, one of those conditions had been met. Full approval of the Texas Program is currently pending.

c. Coastal Permit Service Center

The Coastal Permit Service Center (PSC) provides direct access to permitting agency staff and offers project-specific technical assistance during the pre-application process. The PSC serves as a clearinghouse for coastal permitting activities on the lower Texas coast. It is a point of contact with the public to provide basic permitting assistance, offering information, guidance, and application forms. It maintains a website containing the Joint Permit Application Form and permitting information. It receives and reviews these applications for completeness, then forwards them to the proper agencies.

d. Coastal Preserve Program

Coordinated by the GLO, the Coastal Preserve Program is designed to protect unique coastal areas and fragile biological communities, including important colonial bird nesting sites. Under the Texas CMP, coastal preserves are any lands owned by the state that are designated and used as parks, recreation areas, scientific areas, wildlife management areas, wildlife refuges, or historic sites and that are designed by the Texas Parks and Wildlife Department (TPWD) as being coastal in character. Under the Coastal Preserve Program, the GLO leases coastal lands to the TPWD, which manages them as preserves. Currently, there are four coastal preserves: Armand Bayou, Christmas Bay, Welder Flats, and South Bay.

E. Other State Laws Affecting Coastal Planning

1. Texas Open Beaches Act

The Open Beaches Act (OBA) protects the public's rights of access to and use of public beaches. If the public has acquired an easement or right of use to an area, then the public has the free and unrestricted right to that area. “Public beach” means any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized by right or custom. This definition does not include a beach that is not accessible by a public road or public ferry. "Line of vegetation" means the extreme seaward boundary of natural vegetation that spreads continuously inland. (TEX. NAT. RES. CODE § 61.001-61.025).

The OBA provides a means of enforcing the public's rights. It is an offense against the public policy of the state for any person to create, erect, or construct an obstruction, barrier, or restraint that will interfere with the public's right to public beaches. The Commissioner of the General Land Office is authorized to strictly enforce the prohibition against encroachments on and interferences with the public beach easement. In 2009, Texas voters amended the state constitution to incorporate the OBA. Currently, the rolling easement implied in the OBA is being reviewed as a result of a Texas Supreme Court opinion in November 2010 (*Severance v Patterson*).

2. Rolling Easement Doctrine

As discussed in the OBA, Texas has a long history of public access along its Gulf facing beaches. The public beach access, or easement, extends from the mean low tide line to the vegetation line. In other words, the vegetation line acts as boundary between the public access area and the upland property owner. In Texas, this easement is allowed to move as the vegetation line moves and is referred to as a "rolling easement." Where the shoreline gradually shifts inland, the Texas rolling easement moves inland as well. Combined with the enforcement mechanisms of the OBA, Texas can require the removal of structures that are now located on the public beach because of the moving vegetation line. As noted above, application of the rolling easement doctrine is under review by the Texas Supreme Court.

3. Dune Protection Act

The Dune Protection Act (DPA) requires the commissioner's court of any county with public beaches bordering on the Gulf of Mexico to establish a dune protection line on the Gulf shoreline. The county may allow the governing body of a municipality to assume this responsibility within its corporate limits and extraterritorial jurisdiction. The dune protection line can be established up to 1,000 feet landward of the mean high tide line. The DPA protect dunes and dune vegetation from adverse effects resulting directly or indirectly from construction activities in a critical dune area or seaward of a dune protection line. A permit from the county commissioner's court or city is required for construction activities seaward of the dune protection line that impact dunes or dune vegetation. (TEX. NAT. RES. CODE §§ 63.001, *et seq*.).

4. GLO Beach/Dune Rules

The GLO Beach/Dune Rules are the implementing regulations for the OBA and the DPA. The Beach/Dune Rules require local governments to adopt beach access and dune protection programs and to integrate them into a single Beach Access and Dune Protection plan consisting of procedural and substantive requirements for permitting beachfront construction and management of the beach/dune system within their jurisdiction. The Beach Access and Dune Protection plans are certified by the GLO as being consistent with the OBA and DPA. (31 TEX. ADMIN. CODE § 15.1, et al.).