Property

James J. Brown*
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Abstract

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KEYWORDS: law, property
I. Introduction

The cases in this survey of Florida property law were published during the period of the latter half of 1986 to the Fall of 1987. What is written here does not represent every decision on the subjects categorized, nor does it represent a comprehensive review of the fundamental laws analyzed by them. Many cases were chosen because they contained something of particular interest to those who need to be made aware of critical problems. Some were chosen for those who knew of old, unsettled questions now being answered. The rest were chosen because they had vivid conflicts (i.e., policies and dissents), had interesting subjects, or by chance, had caught my attention. I have reviewed and chosen to write on each case’s particular features which I feel to be of interest to an audience predominantly comprised of practitioners. With these reasons in mind and a concern over time and printed space, certain parts of some cases have been omitted for insignificance.

II. Waterfront Property Rights in State Created Accretion

Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.,1 presents a new rule interpreting Florida Statute section 161.051 (1981). "...Section 161.051 applies to accreted land of an upland owner who caused the accretion and does not apply to an upland owner who did not participate in the improvements which caused the accretions."2

Several factors cause this decision to be of significant interest. The statute, involving coastal construction, was enacted in 1965 and has remained unamended through the time of this writing. Prior litigation on this statute, excluding this appeal from the Second District Court of
Appeal, involved only two disputes, concerning state reclamation and state erosion projects, but none of which are precisely on point with this conflict. Thus, ambiguity in the statute giving rise to this ruling escaped legislative or judicial scrutiny for 23 years. The Florida Supreme Court's 4-2 decision produced a strongly worded division over the interpretive meaning of the 1927 Florida high court case of Martin v. Busch. By its decision, the Court moved Florida jurisprudence from a minority to a majority view on rights to accreted lands. And, it ruled against the Board of Trustees of the Internal Improvement Trust Fund (TIITF) on a sovereignty lands question, a position the Board has not recently had to face in other disputes.

The simple facts involved a state-constructed jetty placed in Gulf waters directly off beach resort property in Pinellas County, Florida. As a direct and proximate result of the jetty's presence, five acres of new land gradually built up in front of another property approximately one-half mile south of the jetty. The land was purchased by accretion from the wave process. It was admitted that the land owner was in no way responsible for this result. Both the owner of the waterfront property on which this new land was deposited and the state laid a title claim to the accreted soil. The state based its claim on Florida Statute section 161.051 (1981), wherein accretions created by its projects are owned by the state; the trial court agreed with the state. In opposition, the landowner alleged the unconstitutionality of this statutory provision and alleged a vested title right by common law as to all accretions to its waterfront property. The Florida Supreme Court held for the land owner, stating "that the upland waterfront owner, Sand Key, is entitled to the accretion because it did not participate in the improvements which, together with natural causes, resulted in the accretion."

Thus, the owner was vested with all present and future rights to accretions arising from its littoral interests. It also approved the decision of the district court, which held that the statute was constitutional.

For application purposes, the court's holding and dicta are educationally informative about accretions and relations. Common law recognizes that riparian or littoral landowners, possessing a constitutionally protected property interest, have a definite right to receive accretions which is a vested right. Natural additions to the shore should follow the title to the shore. Note that emphasis up to this point has been placed upon "natural" changes because "artificially" created ones may not vest. Private land owners cannot create accretion to their own property by constructing structures or improvements because they would be divesting the Board of TIITF of sovereignty lands. Now, however, by this new decision, where the accretion occurs somewhat naturally from artificial structures created elsewhere by the state or one of its agencies, or by the state permitting private structures, the private owner's right to the land is also vested.

Although the outcome appears to be uncomplicated and relatively uncontroversial, the court's opinions are anything but. In order for the reader to appreciate the interpretive differences over common law principles which divided these justices, selected arguments from the majority and dissent will be compared. The contrasts should prove to be instructively enlightening; however, it will be left to future casenote and comment writers to resolve the academic validity between the positions.

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conflict. Although the last half of the second sentence, which stated that “any additions or accretions to the upland caused by erection of such works or improvements shall remain the property of the state if not previously conveyed,” might arguably apply to this conflict, the District Court’s statement as to why it did not apply provided a clearer reason. “It is unclear whether the legislature intended for Section 161.051 to apply only to the upland owner of the improved property or also to the upland littoral owners whose property becomes accreted because of the improvement.” Keep in mind the two-parcel contract. One lot had the jetty constructed in front of it; this was the “improvement” mentioned in the statute. The other lot, one-half mile away, had a “gradual and imperceptible accumulation of soil” naturally or artificially added to its frontage above the mean high water line. Thus, because the statute was silent on the issue of pseudo-natural accumulations allegedly caused by a state approved structure, the title to the new land in front of the second lot became the focus for this dispute. Since common law was not being abrogated by this statute, it had to be applied; herein began the judicial dispute.

Does the application of common law rules from Martin v. Buch control the conflict?

special district, or any public agency shall construct and install projects when permits have been properly issued, such works and improvements shall be the property of said person, firm, corporation, county, municipality, township, special district, or any public agency where located, and shall thereafter be maintained by and at the expense of said person, firm, corporation, county, municipality, township, special district, or other public agency. No grant under this section shall affect title of the state to any lands below the mean high water mark, and any additions or accretions to the upland caused by erection of such works or improvements shall remain the property of the state if not previously conveyed. The state shall be in no way liable for any damages as a result of erections of such works and improvements, or for any damages arising out of construction, reconstruc-
tion, maintenance, or repair thereof, or otherwise arising on account of such works or improvements.

21. Id.
23. Sand Key, 512 So. 2d at 935.
24. Id. at 935 where this court implicitly adopts the district court’s interpretation of the statutory language partially quoted in text accompanying note 22 supra.

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The Majority Opinion:

Martin’s sole issue was a boundary dispute, and the parties were arguing over which survey should be used to identify the ordinary high water mark.

The Dissent:

The majority’s statement that Martin’s sole issue was a boundary dispute is correct. That is the “sole issue” here as well: where is the boundary between public and private ownership of these accreted lands?

The majority, feeling that a narrow focus would be of no help in its current deliberations, set aside the case’s minority rule influence. Justice Ehrlich, writing for himself and Justice McDonald rejected, at length, any attempt to minimize the significance of Martin. For example, they pointed out that the survey dispute was required in order to identify a title ownership of previously inundated lake property, sovereignty lands, as a direct and proximate result of state drainage projects. The plaintiff in Martin tried to identify that which was lake (state owned) and that which was dry land (privately owned or capable of being owned) because his original deeds included legal descriptions which relied upon existing ordinary high water marks around Lake Okeechobee. Subsequent drainage lowered the water line, thereby raising questions about these marks of reference. It was the Justice’s thesis that the title dispute to such “newly uncovered” land was directly analogous to the ownership conflict over Sand Key’s new lands.

Could a private landowner be vested with the new, state created land? Martin dicta stated no because:

the doctrine of relicion is applicable where from natural causes water recedes by imperceptible degrees, and does not apply where land is reclaimed by governmental agencies as by drainage operations.

25. Id. at 939.
26. Id. at 942.
27. Id. at 942-43.
28. Martin v. Buch, 93 Fla. 574, 112 So. 2d 281 (1957), cited by Sand Key, 512 So. 2d at 940 (majority opinion), 944 (dissenting opinion).
conflict. Although the last half of the second sentence, which stated that "any additions or accretions to the upland caused by erection of such works or improvements shall remain the property of the state if not previously conveyed," might arguably apply to this conflict, the District Court's statement as to why it did not apply provided a clearer reason. "It is unclear whether the legislature intended for Section 161.051 to apply only to the upland owner of the improved property or also to the upland littoral owners whose property becomes accreted because of the improvement." Keep in mind the two-parcel contract. One lot had the jetty constructed in front of it; this was the "improvement" mentioned in the statute. The other lot, one-half mile away, had a "gradual and imperceptible accumulation of soil" naturally or artificially added to its frontage above the mean high water line. Thus, because the statute was silent on the issue of pseudo-natural accumulations allegedly caused by a state approved structure, the title to the new land in front of the second lot became the focus for this dispute. Since common law was not being abrogated by this statute, it had to be applied; herein began the judicial dispute.

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21. Id.
22. Sund Key Associates, 458 So. 2d at 371.
23. Sund Key, 512 So. 2d at 935.
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27. Id. at 942-43.
28. Martin v. Busch, 93 Fla. 574, 112 So. 2d 281 (1927), cited by Sund Key, 512 So. 2d at 946 (majority opinion), 944 (dissenting opinion).
The Majority:

We reject the Trustees’ contention that the dicta in Martin means that riparian owners are divested, not only of their riparian or littoral right to accretions, but also of their property’s water-front characteristics. This Court expresses no such intent in Martin v. Busch. 29

The Dissent:

...Their land lost its “waterfront characteristics” to the limited extent that the owners held title up to the ordinary high water mark as it existed in 1904. The land at issue, which was between this line and the water line as it existed in 1927, continued to belong to the state. 30

Is Martin as unpersuasive as the Majority concludes?

The Majority:

...This Court expresses no such intent in Martin v. Busch, and, in fact, the concurring opinion of Justice Brown states that Martin does not involve the rights to accretion and reliction. 31

The Dissent:

...A concurring opinion does not represent the holding of the court. Even so, Justice Brown concurs with the court's holding and a simple reading of his opinion clearly shows that the private landowner was a “riparian owner” owning title to the high water mark as it existed at the time of the deed; the riparian rights doctrine of relition would not under these facts vest title in the private owner. 32

In furtherance of its point the dissent cited to the six Florida decisions following Martin. 33

It then stated:

29. Sand Key, 512 So. 2d at 940-41.
30. Id. at 944-45.
31. Id. at 941.
32. Id. at 945.
34. Sand Key, 512 So. 2d at 946.
35. Id. at 940.
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The Dissent:

...Their land lost its "waterfront characteristics" to the limited extent that the owners held title up to the ordinary high water mark as it existed in 1904. The land at issue, which was between this line and the water line as it existed in 1927, continued to belong to the state.68

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29. Sand Key, 512 So. 2d at 940-41.
30. Id. at 944-45.
31. Id. at 941.
32. Id. at 945.

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Thus, it unequivocally appears that this rule of Martin v. Busch is clearly in conflict with the majority's treatment of this case. If to serve a public purpose the state through drainage operations causes water to recede, thus exposing sovereign lands, and title remains in the state, then when the state to serve a public purpose causes sovereign lands to become accreted by construction of a jetty, title to these lands, too, should remain in the state. Because this issue is critical for resolution of this case, it is my view that we should either adhere to this point of Martin v. Busch or else expressly overrule it, but certainly not misstate the factual underpinnings of the case which the majority opinion blatantly does. It is my opinion that Martin v. Busch has served us well and should be reaffirmed.64

When state projects produce results, such as lowering water levels or creating accumulations of new sandy areas, are such results achieved by "imperceptible degrees," which was part of Martin's definition of repletion?

The Majority:

...It then defines repletion as occurring by the imperceptible recession ... and ... that reclamation by a drainage operation is not repletion by "imperceptible degrees." The case cited, Baumhart v. McClure, explains the distinction between upland property that disappears under the water suddenly and property that disappears slowly and gradually and then reappears. ...69

The Dissent:

...It would fly in the face of known physical laws and plain common sense to presume that a deliberate drainage operation in an enormous fresh water lake such as Lake Okeechobee was anything other than slow and imperceptible. The majority's confusion apparently lies in its failure to understand the difference between the physical process of repletion and the legal doctrine of repletion. Repletion is a physical fact: It is the slow and imperceptible recession of the water which leaves exposed formerly submerged lands. The doctrine of repletion deals with the legal consequences which flow


34. Sand Key, 512 So. 2d at 946.
35. Id. at 940.
from the physical process. . .\textsuperscript{39}

Thus, the two sides differed fundamentally and persistently over the words from Martin which stated that governmental agency reclamation results did not fall within the legal doctrine of reliction. Unavoided in this give and take over artificial or unnatural consequences was the principle that, when natural forces physically create new soil, the riparian owner is vested with title.

A last comparison between the justices' strong views in this case can be seen in their acceptance or rejection of the certified question:

The Majority:

Pursuant to section 161.05, Florida Statutes (1981), is the state entitled to accreted land of only the upland owner of the improved property or to the accreted land of all upland littoral owners, whether or not they participated in or contributed to the improvement?\textsuperscript{39}

The Dissent:

When a public entity erects a structure which causes sovereignty lands to become exposed by the process of accretion is the state entitled to the accreted lands of all upland littoral owners?\textsuperscript{39}

Closing Comment

Enough has been presented here for the reader to conclude that this is a popular opinion for the private property owner. Whether it is a well-reasoned and supported decision, relying as it does on other state's decisions\textsuperscript{39} which were not expressly shown to apply to these facts, is open to a difference of view. The decision does not expressly overrule the Martin precedent. Does it implicitly overrule it? Or, are the Dissenters' arguments sufficiently definite to permit a subsequent challenge to this entire question? Legal writers, please note. You have much to mull over here!

36. Id. at 945.
37. Id. at 934.
38. Id. at 941.
39. Id. at 936-37, citing general rules of accretion.

III. Housing Discrimination

Metropolitan Dade County Fair Housing and Employment Appeals Board v. Sunrise Village Mobile Home Park, Inc.\textsuperscript{40} presented a conflict between the retirement community's right to use its property under the protection of age restrictions\textsuperscript{41} and a local government's power to regulate against all discrimination, specifically age. This conflict reached the Supreme Court of Florida as a certified question of great public importance.

Under the principles enunciated in White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979), the Metropolitan Dade County Code prohibits reasonable age discrimination in housing\textsuperscript{42} as well as the ordinance prohibits reasonable age discrimination in housing.

Factualy, prior to a 29-year old man's attempt to buy a mobile home in an age-restricted mobile home subdivision, Dade County had enacted an ordinance which prohibited discrimination in housing. The court expressly deemed illegal in the ordinance, (beside listing such factors as race, color and religion), specifically discrimination on the basis of age.\textsuperscript{43} When the mobile home park objected to the sale to the young man and moved to bar his entry into the home, he filed a complaint with the county Fair Housing and Employment Appeals Board. The Board found a violation of the anti-discrimination ordinance and decreed for the young buyer. The mobile home park appealed and was successful through the Third District. White Egret was the basis for finding that certain acts of age discrimination were reasonable and therefore permissible as a means for effectuating elderly housing.

40. 511 So. 2d 962 (Fla. 1987), hereinafter Sunrise Village II.
41. White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979).
43. Sunrise Village II, 511 So. 2d at 963. The ordinance prohibited discrimination in housing based on race, color, religion, ancestry, sex, marital status, age (defined as a chronological age of 18 or older), natural origin, physical handicap, or place of birth. METROPOLITAN Dade COUNTY, FLA., CODE § 11A, Article I.

The Code section violated, § 11A-3(1), expressly prohibited persons from refusing to rent or lease, or otherwise deny or withhold any housing accommodation because of age.
from the physical process. . . . *9

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policies.\textsuperscript{44} Arguments by the mobile home park owners, who faced an imagined but potentially real risk that their retirement subdivision community or neighborhood might undergo a disruptive change in occupancy and resident activity, tried to elevate the primacy of the common law over that of the local legislative ordinance. They said that \textit{White Egret} made it constitutionally permissible in Florida to reasonably restrict individual rights according to age where housing was concerned. Therefore, when a county-wide ordinance barred such a restriction, it was contradictory and should not be enforceable. Fortunately, in assessing the merits of these assertions, it is not possible to determine from a reading of either the Third District Court of Appeal or the Florida Supreme Court opinions whether the Metropolitan Dade County government's ordinance was a simple act (1) to eradicate discrimination between Whites, Blacks and Hispanics in retirement restricted subdivisions, parks, and condominiums or (2) to eradicate such discrimination in all places without specifically considering the history in age-limited residential enclaves. If the ordinance never considered the enclaves of the elderly, then this would constitute a substantial oversight about a major component of the voters of that jurisdiction. It would also call into serious question the fulfillment of due process by this legislative body to which the Florida Supreme Court gave so much discretion and deference.\textsuperscript{46}

What is clear in the opinion of the Supreme Court of Florida, in their strict construction and application of \textit{White Egret}. This 1979 decision is about a private restrictive covenant for a condominium project developed, sold, and occupied by persons from the private sector. It has no language within it which suggests that a contractual provision might be stretched to apply to public law conflict.

In \textit{White Egret}, however, no legislative body had enacted any statute or ordinance in contravention of the condominium association's restrictive covenant. Therefore, although \textit{White Egret} stands for the proposition that reasonable age restrictions imposed by private

\textsuperscript{44} \textit{Sunrise Village I}, 485 So. 2d at 868. The court was influenced by \textit{Taxpayers Association v. Weymouth Township, 80 N.J. 6, 364 A.2d 1016 (1976) cert. denied 430 U.S. 977 (1977).}

\textsuperscript{45} \textit{Sunrise Village II}, 511 So. 2d at 965 (citing \textit{Kahn v. Shorin, 416 U.S. 351}).

"Courts may not substitute their social and economic beliefs for the judgment of legislative bodies which are elected to pass laws, nor may the judiciary pass on the wisdom of legislative enactments."

\textsuperscript{46} Id.\textsuperscript{.}

\textsuperscript{47} Id.\textsuperscript{.}

\textsuperscript{48} Eliminating invidious discrimination in housing is within government's power: \textit{Brown County v. La Rosa, 505 So. 2d 422 (Fla. 1987).}

\textsuperscript{49} Id.

\textsuperscript{50} Id. Dade County's ordinance to prohibit age discrimination in retirement housing was a constitutional exercise of governmental home rule powers.

\textsuperscript{51} \textit{Sunrise Village I}, 485 So. 2d at 867.
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Arguments by the mobile home park owners, who faced an imagined but potentially real risk that their retirement subdivision community or neighborhood might undergo a disruptive change in occupancy and resident activity, tried to elevate the primacy of the common law over that of the local legislative ordinance. They said that *White Egret* made it constitutionally permissible in Florida to reasonably restrict individual rights according to age where housing was concerned. Therefore, when a county-wide ordinance barred such a restriction, it was contradictory and should not be enforceable. Unfortunately, in assessing the merits of these assertions, it is not possible to determine from a reading of either the Third District Court of Appeal or the Florida Supreme Court opinions whether the Metropolitan Dade County government's ordinance was a simple act (1) to eradicate discrimination between Whites, Blacks and Hispanics in retirement restricted subdivisions, parks, and condominiums or (2) to eradicate such discrimination in all places without specifically considering the history in age-limited residential enclaves. If the ordinance never considered the enclaves of the elderly, then this would constitute a substantial oversight about a major component of the voters of that jurisdiction. It would also call into serious question the fulfillment of due process by this legislative body to which the Florida Supreme Court gave so much discretion and deference.

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In *White Egret*, however, no legislative body had enacted any statute or ordinance in contravention of the condominium association's restrictive covenant. Therefore, although *White Egret* stands for the proposition that reasonable age restrictions imposed by private parties are enforceable, *White Egret* is wholly inapplicable to a situation in which the restrictive provision is contrary to a local ordinance.

Having cleared the field of this substantive argument, the Court was free to explore the public law side of the conflict. With ease and multiple citations it was concluded that Metropolitan Dade County had all of the home rule powers necessary to enact anti-discrimination ordinances, which obviously were based on legitimate public policy goals. Governmental discretion, something courts are loathe to second, justified police power assertions of which this ordinance was one. Where social and economic beliefs enter into such a legislative decision, the Supreme Court was not going to pass on the wisdom of that decision. The ordinance was upheld; the answer to the certified question was no; and the county was faced with the possible disintegration of adult housing enclaves, a result first noted by Judge Baskin writing for the district court.

This 5-1 opinion by Chief Justice McDonald leaves undefined for future conflicts any standards by which to strike a balance between worthy private restrictions and worthy public ones on the critical societal needs for housing. It would appear on a careful reading of the opinion that non-issues, like a government's authority to enact a police power regulation, were decided. No one would rationally argue against these police power assertions per se, nor their policy foundations. In a vacuum, the goals are legitimate. As applied and tested under our constitutional constraints, however, they conflict with other equally legitimate goals. Thus, achieving some balance between government and citizen desires presents a dilemma of fundamental proportions. What should have been in focus, for example, is that legislative restrictions may exist but only within the constitutional bounds that they be reasonably related to the needs of the jurisdiction. With that in mind, two questions should have been answered: Whether large numbers of retirement groups were guilty of invidious discrimination? Was this ordi-
nance a reasonable solution to that offensive conduct? The answers would provide evidence to justify a nexus between need and legislation; but a satisfaction of the government's burden on this test was lacking as Judge Overtin pointed out in his dissent.68

The government's burden of proof could have been of greater concern also; they must prove reasonableness. Was the ordinance reasonably designed with a concern for elderly housing, as the goal was expounded upon in the district court's opinion69 and in Overtin's dissent,68 or was it designed with adult discriminatory conduct in mind, only? Was the ordinance a response to proof that the housing needs of the young were being thwarted by private restrictions on age? And shouldn't it be of some concern whether the effect of this ordinance is reasonable with regard to county housing policies, national housing policies, which expressly benefit the elderly,68 and private rights of ownership?68 When one court states, "the effect of the ordinance is to eliminate all adult and retirement housing in its jurisdiction ..."69 and another judge writes, "If this ordinance is strictly applied in the manner contemplated by the majority, it clearly will eliminate beneficial federally supported mortgage funded for senior citizen developments in Dade County,"66 the unreasonableness of the ordinance in both means and effect are called seriously into question.

The Supreme Court of Florida's opinion on these issues will be revisited by scholars and, eventually, by litigants, because our complex communities are having to face the tension of balancing these vital interests.

IV. Mechanics' Liens

A. Notice Requirements

Prior to instituting an action to enforce a lien, the unpaid party must deliver an affidavit to the owner, the party with whom they are in

[52. Sunrise Village II, 551 So. 2d at 967.
53. Sunrise Village I, 485 So. 2d at 867-68.
54. Sunrise Village II, 551 So. 2d at 966.
56. Sunrise Village II, 551 So. 2d at 967.
57. Sunrise Village I, 485 So. 2d at 867.
58. Sunrise Village II, 551 So. 2d at 967.
60. See generally, Fla. STAT. § 713.30 (1985).
61. Id. citing St. Regis Paper Co. v. Quality Pipeline, 469 So. 2d 820, 823 (Fla. 1st Dist. Ct. App. 1987).
62. Id.
63. Id.
64. See generally, Fla. STAT. § 713.30 (1985).
65. Id. citing St. Regis Paper Co. v. Quality Pipeline, 469 So. 2d 820, 823 (Fla. 1st Dist. Ct. App. 1987).
66. Copula, 509 So. 2d at 1346.
67. Id.]
nance a reasonable solution to that offensive conduct? The answers would provide evidence to justify a nexus between need and legislation, but a satisfaction of the government's burden on this test was lacking as Judge Overton pointed out in his dissent.** The government's burden of proof could have been of greater concern also; they must prove reasonableness. Was the ordinance reasonably designed with a concern for elderly housing, as the goal was espoused upon in the district court's opinion** and in Overton's dissent,*** or was it designed with adult discriminatory conduct in mind, only? Was the ordinance a response to proof that the housing needs of the young were being thwarted by private restrictions on age? And shouldn't it be of some concern whether the effect of this ordinance is reasonable with regard to county housing policies, national housing policies, which expressly benefit the elderly,** and private rights of ownership?**** When one court states, "the effect of the ordinance is to eliminate all adult and retirement housing in its jurisdiction . . ." and another judge writes, "If this ordinance is strictly applied in the manner contemplated by the majority, it clearly will eliminate beneficial federally supported mortgage funds for senior citizen developments in Dade County,"***** the unreasonableness of the ordinance in both means and effect are called seriously into question.

The Supreme Court of Florida's opinion on these issues will be revisited by scholars and, eventually, by litigants, because our complex communities are having to face the tension of balancing these vital interests.

IV. Mechanics' Liens

A. Notice Requirements

Prior to instituting an action to enforce a lien, the unpaid party must deliver an affidavit to the owner, the party with whom they are in

52. Sunrise Village II, 511 So. 2d at 967.
53. Sunrise Village I, 485 So. 2d at 867-68.
54. Sunrise Village II, 511 So. 2d at 966.
56. Sunrise Village II, 511 So. 2d at 967.
57. Sunrise Village I, 485 So. 2d at 867.
58. Sunrise Village II, 511 So. 2d at 966.

87. This affidavit, stating the name or names of unpaid lienors, shall be delivered to the property owner at least five days before filing a cause of action.** This statutory requirement, recently analyzed in Remada Devel. Co. v. Rauch,** was reaffirmed in Quality Industries, Inc. v. Keyes.** In this 1987 opinion by the Second District Court of Appeals, the unpaid contractor delivered his affidavit to the owners not merely five days before, but sixteen days before filing a counterclaim against the owner's suit to discharge the earlier-filed contractor's claim of lien. Thus, having fulfilled the statutorily mandated condition precedent, which is founded on due process considerations, the contractor was deemed to have been procedurally successful.

In the second issue of the Keyes decision, section 713.30 of the Florida Statutes was interpreted as giving the contractor cumulative remedies.*** The court reasoned that contractors have any other remedy at law, in addition to the claim of lien.

Coquina, Ltd. v. Nicholson Cabinet Co.,**** explored the policy and application behind section 713.06(3)(d).***** This provision requires that a delivery of affidavit occurs 5 days before instituting suit. If a contractor fails to meet this condition precedent, he is vulnerable standing on grounds for dismissal.****** The owner argued for dismissal on the fact that the contractor delivered his affidavit only three days, not five, before filing suit. Chief Judge Smith, of the First District Court of Appeals, wrote at some length on whether the two-day deficiency should be the basis for denying the contractor's lawsuit.

He reasoned that the 5-day requirement for service of the contractor's affidavit is a condition precedent for perfecting or satisfying jurisdiction.****** And, although its failure may justify a motion to dismiss, it is

60. 444 F.2d 1097, 1109 (5th Cir. 1971).
61. 509 So. 2d at 1249.
64. (citing St. Regis Paper Co. v. Quality Pipeline, 469 So. 2d 820, 822 (Fla. 1st Dist. Ct. App. 1987).
66. Coquina, 509 So. 2d at 1346.
67. Id.
a jurisdictional error which is remedial after the initial filing of a petition. As a statutory requirement, it may be waived, as here, when a party files a notice of contest of lien under section 713.22(2). Analyzing the affidavit’s purpose of avoiding double payments for labor or materials, the judge stated that the 5-day period lost its significance as a jurisdictional prerequisite after the notice of contest and refusal to pay was filed. The statute “does not purport to delay the acquisition of a lien until five days after serving the affidavit, but only suspends the right of action on a lien for that period.” In the case at hand, the parties had acted so as to submit themselves to the jurisdictional requirements of the statute. Because the appellant had not shown or demonstrated to the court any public policy reason or legislative purpose behind a strict adherence to the five-day requirement for barring a filed claim after the sixty-day contest period became operative, the court concluded:

We therefore find no basis upon which to hold that the five-day requirement should be incorporated into the wholly unrelated sixty-day provision so as to arbitrarily bar a lien claimant who becomes subject to this reduced period for institution of legal action on his claim.

B. Special Fabricator Materialman

Where a product is especially manufactured for one building site and cannot be sold for use in another project, the statutes provide a materialman’s right to perfect a mechanics’ lien upon the filing of a

“notice to contractor” within 45 days. When a 45-day period commences to run it was the issue over which the Third District Court of Appeal split in this case of first impression, Oolite Industries, Inc. v. Millman Construction Co., Inc. The majority ruled that the period began from the moment fabrication of the special product began. Within 45 days from that date, a notice must be given. In opposition, Chief Judge Schwartz interpreted the statutory language as permitting 45 days notice “either from commencing work on the materials, or from their actual incorporation into the improvement.” In this case, the materialman supplier to a subcontractor filed the “notice to contractor” within the time during which the special product was being incorporated into the building. This point of departure between the opposing views, whether the statutory language compels the notice from one point, the commencement of fabrication in a warehouse, or from alternative points, either fabrication or incorporation into the structure, remains an unsettled conflict in Florida law.

The majority’s view of this conflict raised in statutory language, “Either before beginning or within 45 days after beginning to furnish labor, materials or supplies...” is not specifically explained either through definition of terms or case precedent. Since the statute is expressly “either-or”, a one position decision that the notice must be given from reference to fabrication is confusing. It does not illuminate the statutory language.

Conversely, the well supported dissent construed “furnish materials” to mean incorporating them into the structure. As defined,

http://nsuworks.nova.edu/nlr/vol12/iss2/6
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68. Id., citing Askew v. County of Volusia, 450 So. 2d 233 (Fla. 5th Dist. Ct. App. 1984), which states that a defect in the notice requirement may be corrected after the lawsuit is filed, provided that the time for filing the lawsuit will not expire before the error is corrected.

69. Id. Upon the filing of a notice of Contest of Lien, the lien claimant has only 60 days from the date of the notice having been served to enforce its lien, not the one year period specified in § 713.22(1). The court then asked, “Whether a suit filed prematurely because not filed at least five days after the serving of the contractor’s affidavit under section 713.06(3)(d), can nevertheless be considered a timely filing in order to meet the 60-day requirement of section 713.22(2).”

70. Id.

71. Id.

72. Id.

73. Section 713.23(1)(d) of the Florida Statutes state in pertinent part: Either beginning or within 45 days after beginning to furnish labor, materials, or supplies, a lienor who is not in privity with the contractor, except a laborer, shall serve the contractor with notice in writing that the lienor will look to the contractor’s bond for protection on the work.


75. Id. at 656.

76. Id. at 657.

77. Id. at 655-66. Unfortunately, the four cases cited do not deal with the particular circumstances faced by special fabricators.

78. Id. In so doing, the dissent points to Section 713.01(6) of the Florida Statute which defines “furnish materials” in pertinent part as follows: “Furnish materials” means to supply materials which are incorporated in the improvement . . . including specially fabricated materials for incorporation in the improvement.
thereby, a materialman has an “either-or” option for rendering notice within a 45-day time frame. The dissent reasoned that this interpretation is more consistent with the policy reasons behind singling out materialmen of special building products for statutory protection. Under this approach, if the product is being incorporated into the structure, the materialman can file within 45 days of these acts of incorporation. However, where it appears, after fabrication has commenced, that construction problems may prevent the special product's incorporation, then he is provided the first alternative means of notice (filing within 45 days of fabrication of the material). Either way, the statute gives the special fabricator the right of affirmative protection.

According to this decision, because the materialman's product was being incorporated, and notice was rendered within the prescribed time for acts of incorporation, a ruling which solely focuses on notice from acts of fabrication is an academic exercise, at best. Further, the effect of the decision appears harsh to the contractor, who may have relied on a plain meaning reading of the statute, and overly generous to the defaulting general contractor and its bonding surety, who may not have to pay for a special product which has become an integral part of a structure. Consequently, on the face of the decision, the spirit of the Mechanics’ Lien Law appears to have been violated.

V. Lender Disbursements in Compliance With section 713.06(3): Kalbes v. California Federal Savings and Loan Ass’n. 81

Construction mortgage loan agreements regularly vest the lender with the sole authority for: (1) disbursing construction funds; (2) disbursing funds for the release of recorded mechanics’ liens; and (3) deciding when to directly pay the contractors, laborers, and suppliers. 82 Such absolute control, when exercised with diligent care, provides the lender with protection of its security interest in the indebted improvement. But, when a payment or payments are made after a lender receives subcontractor “notices”, suggesting non-payment by the general contractor, the lender may be less than careful, and is subjecting the borrower-building owner to the burden of a double payment. This dilemma arises because the lender’s loan contract form has neither a provision nor room for a provision which protects the borrower from legitimate liens which are perfected as a result of the negligent exercise of absolute control by the bank or savings and loan association. The fact that subcontractors and suppliers may not be in privity with the owner, and deal through the general contractor, adds yet another dimension to the owner’s risk.

It was risk factors such as those above which were at the heart of the dispute between a residence owner and a savings and loan lender in Kalber. The mortgage lending fund disburser was found to have paid the general contractor after having “notice” from unsatisfied subcontractors, a violation of Florida Statute Section 713.06(3). 83

81. Construction loan provisions:
10. The Association will disburse the “Construction Fund” at such times and in such amounts as in its sole discretion it deems advisable, justifiable or necessary, and provided, however, that all requisitions for disbursements shall be in compliance with the terms of this Agreement, and this Agreement shall not be in default in any manner. The Association, at its option, may require the owner to approve all disbursements before they are actually made.

The Association shall have the right to disburse from the “Construction Fund” without the written approval or order of the Owner or his designated agent, such sums or as may be required to procure the release of the above property from the lien of any recorded mechanic’s lien, provided, however, that the Association shall first give the Owner not less than ten (10) days’ written notice of its intention to procure such release.

11. The Association reserves unto itself the right to pay directly to all materialmen, subcontractors, laborers, their bills for labor, materials or services furnished to the construction job, and upon the Association’s election to enforce this provision, the Contractor agrees to deliver or cause to be delivered unto the Association all bills or requisitions for payment from the laborers, subcontractors and materialmen in order that said bills or requisitions may be paid by the Association directly to said payees.

82. This section of the Mechanics’ Lien chapter expressly addresses the protective rights of those not in privity with the owner, materialmen, laborers, and
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The lender, pleading immunity from liability upon the authority of Rice v. First Federal Savings & Loan Association of Lake County, attempted to extend this ruling to all of its actions with reference to building construction in the principal case. Unfortunately, the court found it applicable only on the law limiting collateral liability to that arising from construction inspections by mortgage lenders. Where Rice held that this inspection did not raise a right in the owner to be protected against faulty construction, the lender, here, was extrapolating its allegation to include the conclusion that sole authority over disbursements to suppliers and materialmen did not render it liable for the results of contractual disputes between these collateral parties and the general contractor. The court rightly rejected such an extrapolation. Physical construction defects (i.e., latent) and a mortgage lender’s ability to detect them before disbursement is an entirely different matter from that here. Specifically, the lender was presumed to know the state’s law, was able to inform itself of that law with comparative ease, and was informed of an unpaid claim from a collateral party. Since Rice’s influence over this conflict was so limited, and there appeared to be no other Florida decision remotely connected to these facts, the court drew from other jurisdictions to solve this issue of first impression.

Ohio, Arkansas and Indiana cases of mortgage lender negligence over disbursements which violated the states’ mechanic lien laws were cited. The essence of these cases, which were directly on point, is that where the lending institution-mortgagee insists upon controlling disbursements, it cannot disregard compliance with local laws which involve unpaid bills for material and labor. To do so would be an act of negligent disregard for the interests of the borrower-landowner. “One who undertakes to act for another in the disbursing of funds is answerable for failure to do so with due care.”

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84. 207 So. 2d 22 (Fla. 2d Dist. Ct. App. 1968).
85. Kalten, 497 So. 2d at 1257.
86. Kalten, 497 So. 2d at 1258.
Arkansas: Speights v. Arkansas Savings & Loan Ass’n, 239 Ark. 587, 393 S.W. 2d 228 (1965).

VI. Easements

A. Right of Way Improvement

What is an “improvement” to a right of way easement? Shadow West Apartments, Ltd. v. State held that construction of a gas line under an express municipal easement was not an improvement within the undefined terms of the grant. By this answer, the Second District gave a basis for reversing and vacating the trial court’s summary judgment originally favoring the defendant, D.O.T. At issue in this quiet title action was whether the City of Clearwater had made an improvement to the right of way easement within the prescribed ten year period, thereby preventing a reversion of title to the servient estate owner, the initiator of this litigation. The court looked to specific terms, right-of-way, to interpret the undefined general term, improvement.

In common usage, a “right-of-way” is a path or thoroughfare upon which movement from one point to another can occur, or it can be a land mass over which, for example, a transmission line is placed. An improvement affecting a right-of-way to be used as a “roadway”, therefore, necessarily involves the surface of the land within the easement. It is our judgment that the subterranean installation of a gas line is not an “improvement” to the “right-of-way”, contemplated by the grantor for a “roadway”, for it involves neither the construction, installation, nor maintenance upon the property’s surface which would render it capable of functioning as

90. Id. at 591 (citing State v. Thompson, 191 So. 2d 381, 385 (Fla. 1958)).
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85. Kalbes, 497 So. 2d at 1257.
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Ohio: Falls Lumber Co. v. Heman, 114 Ohio App. 2d 262, 181 N.E. 2d 711
(1961).
Arkansas: Speights v. Arkansas Savings & Loan Ass’n, 239 Ark. 587, 393 S.W. 2d 228 (1965).
87. Id., paraphrasing Falls Lumber Co. v. Heman, 114 Ohio App. 2d 262, 181

On the strength of these cases, the third district held
... the lender had a duty to the owner to exercise reasonable care to see that the payments were made in compliance with the mechanics’ lien law. To hold otherwise would mean that a lender, secure in the knowledge that its mortgage would have priority over mechanics’ liens, could make disbursements for the account of the owner with absolute immunity.

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88. Id.
90. Id at 591 (citing State v. Thompson, 191 So. 2d 381, 385 (Fla. 1958)).
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Noting the Court's focus upon the gas line and roadway use, it is uncertain whether the city's other act within the ten years was significant. Clearwater permitted a cable TV firm to lay its cable and place its equipment in and on the right-of-way.

For easement drafting purposes, defining general terms which will influence the expected use of the dominant tenant's estate should be minimally required and expected. For municipal government concerns, avoidance of time limited reversions might be based upon clear evidence of a usage which is consistent with the reason for the easement grant in the first place.

B. Easements of Necessity

Easements of necessity, defined in Florida Statute section 704.01 (1983) and explained in common law precedent, continue to depend upon a factual finding of absolute necessity, not simply a reasonable necessity, for their judicial recognition. Two cases, where the implied grant of way of necessity is expressly recognized, add to the body of precedent which interpret Florida Statutes section 704.01(1) (1983).\textsuperscript{92} One of the three elements is that the parcel be landlocked.\textsuperscript{93} Further, there should be "no other reasonable and practicable way of ingress or egress and [the easement] is reasonably necessary for the beneficial use."\textsuperscript{94} The interpretive conflict in the recent cases involves "reasonable and practicable way" and "reasonably necessary" for access to the landlocked parcel in question.

When no express easement exists in favor of the landlocked parcel, it matters not how many alternative unprotected points of access to a public highway the parcel may have, the necessity remains strict. This is a recognized but often unstated fact because the owners of the alternative access points may hold at any right of way usage. The user has no right to prevent the blockage and is landlocked, once again. This was the factual situation in Matthews v. Quarles where the servient estate holder unsuccessfully alleged that an alternate easement over the

\textsuperscript{91} Shadow West Apartments, Ltd., 498 So. 2d at 591.
\textsuperscript{92} Matthews v. Quarles, 504 So. 2d 1246, 1247 (Fla. 1st Dist. Ct. App. 1986).
\textsuperscript{93} Id. (citing Roy v. Euro-Holland Vastgoed, B.V., 404 So. 2d 410 (Fla. 4th Dist. Ct. App. 1981)).
\textsuperscript{94} FLA. STAT. § 704.01(1) (1983).

adjacent property should prevent a court from finding the requisite necessity.\textsuperscript{95} When one lacks a legally recognized and protected right of way it cannot be considered reasonable and practicable; thus the Court had a basis for finding strict and absolute necessity to judicially create an easement.\textsuperscript{96}

In Lykes Bros., Inc. v. Clements, the strict necessity was substantiated by the presence of a creek running across the entire length of the landlocked parcel. The trial court findings on strict necessity focused upon the dimensions of the creek which would have to be forded in order to cross another lot to reach a road. At its narrowest, shallowest point for crossing during the 30-60 days of flood season, the creek was 100 feet wide and 3 to 8 feet deep. Thus, in order to have continual access, the landlocked owner would have to build a bridge on his land.\textsuperscript{97} Yet "bridge" is not included within the statutory definitions of "practicable" as used in "practicable way of access", noted above.\textsuperscript{98} In opposition to a claim for way of necessity, Fox Investments v. Thomas\textsuperscript{99} was proffered by the servient landowner, Lykes, over whose land a right of way existed. This way was a direct and continuous, yet informal, access to a state road. The use of Fox was in substantiation of an extinguishment argument about the Lykes way of access. The landlocked owner had an alternative but intermittent access out across the creek onto its other land to reach an access road. However, a factual finding of strict necessity by the trial court, affirmed by this Second District Court, nullified this allegation and permitted Fox to be readily distinguished.\textsuperscript{100}

C. Express Easements — Co-Users

Express easements are not rights exclusive to the dominant user but must be used together with the servient land owner. Only when the instrument expresses a use right, which is exclusive, will Florida courts

\textsuperscript{95} Matthews, 504 So. 2d at 1247-48.
\textsuperscript{96} Matthews, 504 So. 2d at 1248 (citing Tortoise Island Communities, Inc. v. Morero & Co., Inc., 489 So. 2d 22 (Fla. 1986) for the proposition that an easement by implication requires an absolute necessity, not merely a reasonable one).
\textsuperscript{97} Lykes Bros. v. Clements, 501 So. 2d 1302 (Fla. 2nd Dist. Ct. App. 1986).
\textsuperscript{98} FLA. STAT. § 704.03 (1985).
\textsuperscript{99} Lykes Bros., Inc., 501 So. 2d at 1304 (citing Fox Investments v. Thomas, 501 So. 2d 1021 (Fla. 2d Dist. Ct. App. 1983)).
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B. Easements of Necessity

Easements of necessity, defined in Florida Statute section 704.01 (1983) and explained in common law precedent, continue to depend upon a factual finding of absolute necessity, not simply a reasonable necessity, for their judicial recognition. Two cases, where the implied grant of way of necessity is expressly recognized, add to the body of precedent which interpret Florida Statutes section 704.01(1) (1983). One of the three elements is that the parcel be landlocked.

Further, there should be "no other reasonable and practicable way of egress or ingress and [the easement] is reasonably necessary for the beneficial use." The interpretive conflict in the recent cases involves "reasonable and practicable way" and "reasonably necessary" for access to the landlocked parcel in question.

When no express easement exists in favor of the landlocked parcel, it matters not how many alternative unprotected points of access to a public highway the parcel may have, the necessity remains strict. This is a recognized but often unstated fact because the owners of the alternative access points may halt at will any right of way usage. The user has no right to prevent the blockage and is landlocked, once again. This was the factual situation in Matthews v. Quarles where the servient estate holder unsuccessfully alleged that an alternate easement over the adjacent property should prevent a court from finding the requisite necessity. When one lacks a legally recognized and protected right of way it cannot be considered reasonable and practicable; thus the Court had a basis for finding strict and absolute necessity to judicially create an easement.

In Lykes Bros., Inc. v. Clements, the strict necessity was substantiated by the presence of a creek running across the entire length of the landlocked parcel. The trial court findings on strict necessity focused upon the dimensions of the creek which would have to be forded in order to cross another lot to reach a road. At its narrowest, shallowest point for cross during the 30-60 days of flood season, the creek was 100 feet wide and 3 to 8 feet deep. Thus, in order to have continual access, the landlocked owner would have to build a bridge on his land. Yet "bridge" is not included within the statutory definitions of "practicable" as used in "practicable way of access", noted above. In opposition to a claim for way of necessity, Fox Investments v. Thomas was proferred by the servient landowner, Lykes, over whose land a right of way existed. This way was a direct and continuous, yet informal, access to a state road. The use of Fox was in substantiation of an extinguishment argument about the Lykes way of access. The landlocked owner had an alternative but intermittent access out across the creek onto its other land to reach an access road. However, a factual finding of strict necessity by the trial court, affirmed by this Second District Court, nullified this allegation and permitted Fox to be readily distinguished.

C. Express Easements — Co-Users

Express easements are not rights exclusive to the dominant user but must be used together with the servient land owner. Only when the instrument expressly a use right, which is exclusive, will Florida courts

91. Shadow West Apartments, Ltd., 498 So. 2d at 591.
93. Id. (citing Roy v. Euro-Holland Vastgood, B.V., 404 So. 2d 410 (Fla. 4th Dist. Ct. App. 1981)).
95. Matthews, 504 So. 2d at 1247-48.
96. Matthews, 504 So. 2d at 1248 (citing Tortoise Island Communities, Inc. v. Morris, 499 So. 2d 22 ( Fla. 1986) for the proposition that an easement by implication requires an absolute necessity, not merely a reasonable one).
99. Lykes Bros., Inc., 501 So. 2d at 1304 (citing Fox Investments v. Thomas, 41 So. 2d 1011 (Fla. 2nd Dist. Ct. App. 1983)).
100. Lykes Bros., 501 So. 2d at 1304-05.
support the exclusion of co-users.193 This Florida rule was reaffirmed in Stephens v. Dobbins.194

VII. Attorney Malpractice

A. Tolling of Statute of Limitations

The statute of limitations on attorney malpractice is not tolled when a wronged client exercises his legal rights to obtain relief by bringing collateral litigation.198 Although this holding may be contrary to Richards Enterprises, Inc. v. Swafford199 it was the resulting opinion of Judge Cobb in the Fifth District.200 In this case, the attorney’s malpractice consisted of failing to obtain a close-out abstract following a real estate sale. That abstract would have shown a deed filing involving two-thirds of the fee title entered of record immediately before closing. After closing and upon discovery of the oversight, the buyer was offered a refund of his money. However, he chose to litigate in order to obtain a free and clear title. This litigation, which would not have exonerated the attorney from the malpractice, was interpreted as having no effect upon tolling the Statute of Limitations.201

B. Scope of Employment: Mechanics’ Liens

In the area of Mechanics’ Liens, a recent First District Court of Appeals case held that when an attorney is hired to resolve the unsatisfactory performance of a general building contractor, whose residential construction is incomplete, that attorney is responsible for his client’s compliance with Florida’s Mechanics Lien Law.202 This rule has particularly strong force where the attorney is aware of lien claims from materialmen and subcontractors of the discharged contractor.203 The con

104. 495 So. 2d 1210 (Fla. 5th Dist. Ct. App. 1986).
105. Graham, 499 So. 2d at 63.
106. Id. The court stated: “Moreover, since the collateral litigation, irrespective of its outcome, could not have negated Graham’s delinquent act . . . that litigation did not toll the running of the malpractice statute of limitations.” Id.
108. Id. at 1114.
109. Id. at 1111.
110. Id.
111. Id. at 1112-14. The court noted that the first step for an owner who wishes to have a construction project completed after a contractor has terminated would be to either pay all liensors in full or pro rata, or record an affidavit prior to recommencement of construction stating that all liensors except those listed in the affidavit have been paid in full. Id. at 1112. See FLA. STAT. § 713.07(4) (1981).
112. McCurry, 506 So. 2d at 1111. The court stated: “There is competent substantial evidence to support the finding that appellant — although as recognized by the trial court, an able and well qualified attorney — failed in this instance to measure up to the applicable minimum standard for attorneys practicing in this field.” Id. at 1118.
113. FLA. STAT. § 713.07(4) (1981) (regarding the specific procedure that must be followed by an owner who desires to complete a project after a contractor has been terminated).
114. FLA. STAT. § 713.13 (1981) (regarding the requirement that the owner record a new notice of commencement for the resumption of construction).
support the exclusion of co-users. This Florida rule was reaffirmed in Stephens v. Dobbin. 168

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Under such a limited view of the scope of employment, the clients improperly filed recommencement notices in accordance with the statutorily prescribed procedures. 177 This failure subjected them to successful mechanics’ lien claims in excess of $30,000 and legal fees of over $1,000. The owners received a final judgment in their nonjury trial court case and that judgment was affirmed. 178

The opinion is an excellent dissertation on the owner protective features of section 713.07(4) 179 and 713.13 of the Florida Statutes. 180 At this point, it should be noted that had the mechanics’ lien law referring procedures been fulfilled, the owner would have merely been liable for the contract price, which was only $356.60.

The attorney’s interpretation of the limitation on his employment could not withstand scrutiny under the following facts. From his first meeting with the client, the attorney knew that substantial work on the house had to be completed at a cost in excess of that specified in the

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105. Graham, 499 So. 2d at 63.
106. Id. The court stated: “Moreover, since the collateral litigation, irrespective of its outcome, could not have negated Graham’s delinquent act . . . that litigation did not toll the running of the malpractice statute of limitations.” Id.
108. Id. at 1114.
contract.  "It should have been apparent to [him] that construction had to be recommenced and that the Eppolios would not need to protect themselves from liability for lien claims which would exceed the original contract price."  In subsequent meetings and during the months following the firing of the contractor, lien work took up the vast majority of the attorney's billed hours.  One year was spent on lien claims for this client.  "[I]t is clear from the evidence that the Eppolios relied on [him] to handle the lien aspects of their case and [he] should have at least been competent of such reliance."  Further, the attorney assumed, without substantial factual basis or inquiry, that the client had adhered to the mechanics' lien law.  During the year of work on multiple lien claims, the attorney encouraged the clients to enter into negotiations with claimants in order to obtain releases.  He failed to inform his client that the Florida law would protect him and thus render such negotiations unnecessary.  When the attorney informed the owner about the lien law, the court found the advice to be an inadequate explanation of rights and obligations.

The attorney also failed to inform his client of the consequences of noncompliance.  Giving the client an unmarked copy of the Florida statute was deemed to not "provide [a] reasonable assurance that the clients would do that which was necessary to provide the protections afforded by [the Lien Law]."

[A]n attorney who undertakes the kind of lawyer-client relationship as existed in the case at bar owes a duty to the client to assure that the client is at least specifically advised of the procedures to be followed in order to protect the interests of the client under the Mechanics' Lien Law.

VIII. Real Estate Contract Cases

A. Conditions: Financing and Time of the Essence

The rights of a contract vendee, who fails to satisfy conditions in a "time of the essence" contract, versus the rights of a subsequent vendee in the same parcel were the focus of litigation in Garcia v. Alfonso.  The first vendee was not able to obtain mortgage financing within the 30 days specified in the contract, although they were able to do so within 21 days thereafter.  The vendor entered a second contract of sale 12 days after the expiration of the 30 day period and the first vendee sought to prevent the sale by an action in specific performance.  He was unsuccessful.  As this per curiam opinion pointed out, Florida law has consistently denied specific performance to parties who fail to satisfy contract conditions.  Specifically, a real estate contract vendee will be unsuccessful in an attempt to obtain specific performance when specific contract conditions are unsatisfied. This ruling is a continuation of Florida common law precedent as enunciated in Robinson v. Abreu and Sun Bank v. Lester.

B. Right of First Refusal and Options

A right of first refusal is "a right to elect to take specified property at the same price and on the same terms and conditions as those contained in a good faith offer and ... ripens into an option once an owner manifests a willingness to accept a good faith offer."  Exercise of the right, in effect, constitutes exercise of the option.  So if a holder of a right of first refusal were to exercise that right within specified time by notifying the vendor, he would be viewed as having perfected that option.

115. McCurry, 506 So. 2d at 1114.
116. Id.
117. Id. This amount was $4,050.00. The total amount of billed hours was $5,000.00.
118. Id.
119. Id. at 1115.
120. Id.
121. Id.
122. Id. at 1116.
123. 490 So. 2d 130 (Fla. 3d Dist. Ct. App. 1986).
124. Id. at 131.
125. Id. at 131. See also Robinson v. Abreu, 345 So. 2d 404 (Fla. 2d Dist. Ct. App. 1977); Sun Bank v. Lester, 404 So. 2d 141 (Fla. 3d Dist. Ct. App. 1981), rev. denied, 412 So. 2d 467 (Fla. 1982) (a party is not entitled to specific performance where a deposit is untimely and time was of the essence).
126. Garza, 490 So. 2d at 131.
128. Pearson, 497 So. 2d at 900.
129. 497 So. 2d 898 (Fla. 2d Dist. Ct. App. 1986).
contract.\(^{118}\) "It should have been apparent to [him] that construction had to be recommenced and that the Eppolitos would not need to protect themselves from liability for lien claims which would exceed the original contract price."\(^{118}\) In subsequent meetings and during the months following the firing of the contractor, lien work took up the vast majority of the attorney’s billed hours.\(^{117}\) One year was spent on lien claims for this client.\(^{[1]}\) It is clear from the evidence that the Eppolitos relied on [him] to handle the lien aspects of their case and [he] should have at least been aware of such reliance.\(^{118}\) Further, the attorney assumed, without substantial factual basis or inquiry, that the client had adhered to the mechanics’ lien law. During the year of work on multiple lien claims, the attorney encouraged his clients to enter into negotiations with claimants in order to obtain releases. He failed to inform his client that the Florida law would protect him and thus render such negotiations unnecessary. When the attorney informed the owner about the lien law, the court found the advice to be an inadequate explanation of rights and obligations.\(^{118}\)

The attorney also failed to inform his client of the consequences of noncompliance.\(^{118}\) Giving the client an unmarked copy of the Florida statute was deemed to not "provide [a] reasonable assurance that the [clients] would do that which was necessary to provide the protection afforded by [the Lien Law]."\(^{118}\)

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exercised his rights by letter, met the 120 day period as expressed in the contested contract. As a result, Judge Danahy was able to hold for the optionee, reversing a motion to dismiss that had been granted by the trial court.130

In Green v. First American Bank and Trust, the optionee did not exactly conform his exercise of right of first refusal to the original purchase offer at hand. His offer was 10% below the original purchase offer because he refused to pay a brokerage commission. Florida Law requires a sufficient and adequate match of an offer to constitute a protectible right.131 In Judge Downey’s Fourth District Court of Appeals opinion, one sees that the optionee’s letter response used questionable phrasing and never expressly adopted the same terms and condition which were found in the original purchase offer. Also, by deposit, the optionees admitted that they never intended to pay a price which included a brokerage commission.

Green involved a second issue regarding the Acceptance of Benefits Doctrine. The court described the doctrine as “a longstanding principle or rule that one who recovers a judgment and accepts the benefits provided therein may not thereafter seek to reverse the judgment.” However, the appeals Court found grounds for applying the McMillen exception to that rule. It reasoned that the exception applied because Green gained nothing more by his acceptance of the judgment.132

[130. Id. at 900.
131. 511 So. 2d 569 (Fla. 4th Dist. Ct. App. 1987).
133. Green, 511 So. 2d at 572. See also, Carter v. Carter, 141 So. 2d 591, 590-93 (Fla. 1st Dist. Ct. App. 1962).
134. Green, 511 So. 2d at 572.
135. McMillen v. Fort Pierce Financing & Construction Co., 108 Fla. 492, 146 So. 567 (1933). The Florida Supreme Court, recognized the following exception to the Acceptance of Benefits Doctrine: [T]he general rule does not apply when an amount found in favor of a litigant by a judgment or decree is due him in any event — when there is no controversy over his right to receive and retain it — so that the only question to be determined by the appellate tribunal is whether he is or is not entitled to a greater or additional sum.
Id. at 496, 146 So. at 569.
136. Green, 511 So. 2d at 573. The court reasoned that Green’s 15% interest in

C. Strict Construction

The flexibility of mortgage finance terms contained in a residential real estate contract was addressed in Zepfier v. Neandross.137 In that case, Judge Allichstein ruled that when the contract language about financing is clear and unambiguous on its face, the contract’s condition is not satisfied as a matter of law when the actual loan commitment facts don’t fit within the limitations set up by the contingent provision of the sale/purchase agreement.138 The contract called for a rate “not to exceed” 13-1/2% (fixed) over 30 years. The Buyer’s attempted purchase was with a loan commitment rate quoted at 13% (adjustable) with a cap of 2.5%. This excess over the max of 13.5% was held to not comply with the terms of the agreement and therefore the Buyers were entitled to a refund of their deposit.139

D. Coastal Construction Control Line Regulations

Island Harbor Beach Club, Ltd. v. Department of Natural Resources140 was not reviewed by the Florida Supreme Court until early in 1987, thus bringing it into the purview of this subject survey. It is a case of major proportions because its impact will be seen on every barrier island and sandy beach in Florida.

The First District Court of Appeal affirmed a hearing officer’s final order which upheld as valid a proposed administrative rule relocating the coastal construction control line for Charlotte County.141 It also sustained the goal implementation terminology of Florida Statutes Section 161.053. In its broadly interpreted language, the statute was found to vest discretionary powers in the Department of Natural Resources (DNR) for setting regulatory guidelines and standards for limiting construction on the coastal barrier dunes and adjacent sandy beaches in order to protect them. The goal was recognized, the agencies’ discretionary powers identified, and the application of the powers upheld. Henceforth, and as a result, DNR will be setting or approving the

The property was acquired via a trust agreement entered into by the beneficiaries. Thus, "no such thing by the judgment."

137. 495 So. 2d 401 (Fla. 4th Dist. Ct. App. 1986).
138. Id. at 903.
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140. 495 So. 2d 209 (Fla. 1st Dist. Ct. App. 1986), rev. denied, 503 So. 2d 327 (Fla. 1987).
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137. 497 So. 2d 401 (Fla. 4th Dist. Ct. App. 1986).
138. Id. at 903.
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coastal construction control lines in every location fronting on the Gulf, the Straits, or the Atlantic using the methodology analyzed in this decision.

This dispute arose when DNR, following the procedures set forth in section 161.053, held administrative hearings to re-establish Charlotte County's coastal construction control line. When it began to be clear that the potential relocation of this line meant that some barrier islands would remain in their natural state and that some new construction would not be in contact with any mainland sandy beach, the property owners actively participated in the hearings and then filed their appeal.\(^\text{144}\) Why, they asked, was it necessary to establish a new control line when it was not evident that the shorelines had changed significantly since the line was established in 1977?\(^\text{145}\) If the statute spoke of beach and dune systems, how could the control line be proposed so far inland? Wasn't DNR attempting to control flooding and wasn't this an unreasonable expansion of the statutory aim?\(^\text{146}\) Other more detailed challenges to DNR's interpretation of its statutory powers were also made by the petitioners; those challenges will be touched upon in a summary of the holdings of this well written and clearly organized opinion.

E. Statutory Warrant of Authority

Section 161.053\(^\text{148}\) states its purpose immediately: to protect

\[\text{142. Id. at 211 at nn. 2-3.}\]
\[\text{143. Id. at 219.}\]
\[\text{144. Id. at 216.}\]
\[\text{161.053 Coastal construction and excavation; regulation on county basis.}\]

1. The Legislature finds and declares that the beaches in this state and the coastal barrier dunes adjacent to such beaches, by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable natural resources of Florida and that it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, and endanger adjacent property and the beach-dune system. In furtherance of these findings, it is the intent of the Legislature to provide that the department establish coastal construction control lines on a county basis along the sand beaches of the state fronting on the Atlantic Ocean or the Gulf of Mexico. Such lines shall be established so as to define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm

\[\text{beaches and dunes from imprudent construction which undermines the}\]

\[\text{surge, storm waves, or other predictable weather conditions. However, the department may establish a segment or segments of a coastal construction control line further landward than the impact zone of a 100-year storm surge, provided such segment or segments do not extend beyond the landward toe of the coastal barrier dune structure that intercepts the 100-year storm surge. Such segment or segments shall not be established if adequate dune protection is provided by a state-approved dune management plan. Special siting and design considerations shall be necessary seaward of established coastal construction control lines to ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties.}\]

(2) Coastal construction control lines shall be established by the department only after it has been determined from a comprehensive engineering study and topographic survey that the establishment of such control lines is necessary for the protection of upland properties and the control of beach erosion. No such line shall be set until a public hearing has been held for each area involved. After the department has given consideration to the results of such public hearing, it shall, after considering ground elevations in relation to historical storm and hurricane tides, predicted maximum wave uprush, beach and offshore ground contours, the vegetation line, erosion trends, the dune or bluff line, if any exist, and existing upland development, set and establish a coastal construction control line and cause such line to be duly recorded in the public records of any county and municipality affected and shall furnish the clerk of the circuit court in each county affected a survey of such line with references made to permanently installed monuments at such intervals and locations as may be considered necessary. Upon the establishment, approval, and recordation of such control line or lines, no person, firm, corporation, or governmental agency shall construct any structure whatsoever seaward thereof; make any excavation, remove any beach material, or otherwise alter existing ground elevations; drive any vehicle on, over, or across any sand dune; or damage or cause to be damaged such sand dune or the vegetation growing thereon seaward thereof except as hereinafter provided. Control lines established under the provisions of this section shall be subject to review at the discretion of the department after consideration of hydrographic and topographic data which indicates shoreline changes that render established coastal construction control lines to be ineffective for the purposes of this act or at the written request of officials of affected counties or municipalities. Any riparian upland owner who feels that such line as established is unduly restrictive or prevents a legitimate use of his property shall be granted a review of the line upon written request. After such review, the department shall decide if a change in the control line as established is justified and shall so notify the person or persons making the request. The decision of the department shall be subject to judicial review as provided in chapter 120.

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coastal construction control lines in every location fronting on the Gulf, the Straits, or the Atlantic using the methodology analyzed in this decision.

This dispute arose when DNR, following the procedures set forth in section 161.053, held administrative hearings to re-establish Charlotte County’s coastal construction control line. When it began to be clear that the potential relocation of this line meant that some barrier islands would remain in their natural state and that some new construction would not be in contact with any mainland sandy beach, the property owners actively participated in the hearings and then filed their appeal.442 Why, they asked, was it necessary to establish a new control line when it was not evident that the shorelines had changed significantly since the line was established in 1977?443 If the statute spoke of beach and dune systems, how could the control line be proposed so far upward? Wasn’t DNR attempting to control flooding and wasn’t this an unreasonable expansion of the statutory aim?444 Other more detailed challenges to DNR’s interpretation of its statutory powers were also made by the petitioners; those challenges will be touched upon in a summary of the holdings of this well written and clearly organized opinion.

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142. Id. at 211 at nn. 2-3.
143. Id. at 219.
144. Id. at 216.

161.053 Coastal construction and excavation; regulation on county basis. - The Legislature finds and declares that the beaches in this state and the coastal barrier dunes adjacent to such beaches, by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable natural resources of Florida and that it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, and endanger adjacent property and the beach-dune system. In furtherance of these findings, it is the intent of the Legislature to provide that the department establish coastal construction control lines on a county basis along the sand beaches of the state fronting on the Atlantic Ocean or the Gulf of Mexico. Such lines shall be established so as to define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions. However, the department may establish a segment or segments of a coastal construction control line further landward than the impact zone of a 100-year storm surge, provided such segment or segments do not extend beyond the landward toe of the coastal barrier dune structure that intercepts the 100-year storm surge. Such segment or segments shall not be established if adequate dune protection is provided by a state-approved dune management plan. Special siting and design considerations shall be necessary seaward of established coastal construction control lines to ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties.

(2) Coastal construction control lines shall be established by the department only after it has been determined from a comprehensive engineering study and topographic survey that the establishment of such control lines is necessary for the protection of upland properties and the control of beach erosion. No such line shall be set until a public hearing has been held for each area involved. After the department has given consideration to the results of such public hearing, it shall, after considering ground elevations in relation to historical storm and hurricane tides, predicted maximum wave uprush, beach and offshore ground contours, the vegetation line, erosion trends, the dune or bluff line, if any exist, and existing upland development, set and establish a coastal construction control line and cause such line to be duly recorded in the public records of any county and municipality affected and shall furnish the clerk of the circuit court in each county affected a survey of such line with references made to permanently installed monuments at such intervals and locations as may be considered necessary. Upon the establishment, approval, and recordation of such control line or lines, no person, firm, corporation, or governmental agency shall construct any structure whatsoever seaward thereof; make any excavation, remove any beach material, or otherwise alter existing ground elevations; drive any vehicle on, over, or across any sand dune; or damage or cause to be damaged such sand dune or the vegetation growing thereon seaward thereof except as hereinafter provided. Control lines established under the provisions of this section shall be subject to review at the discretion of the department after consideration of hydrographic and topographic data which indicates shoreline changes that render established coastal construction control lines to be ineffective for the purposes of this act or at the written request of officials of affected counties or municipalities. Any riparian upland owner who feels that such line as established is unduly restrictive or prevents a legitimate use of his property shall be granted a review of the line upon written request. After such review, the department shall decide if a change in the control line as established is justified and shall so notify the person or persons making the request. The decision of the department shall be subject to judicial review as provided in chapter 120.

Published by NSUWorks, 1988 29
natural systems, accelerates erosion and endangers other property when protective beach-dune systems are removed. DNR is expressly delegated the authority to set county coastal construction control lines, which, thereby, “define that portion of the shore area which is subject to sever fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions.”\textsuperscript{146} The line may be set further landward than the impact zone of a storm surge, “provided such segment or segments [of the line] do not extend beyond the landward toe of the coastal barrier dune structure.”\textsuperscript{147} The Department must base its determination upon engineering studies and topographic surveys. Using such new information, when existing lines were found to be ineffective in achieving the statutory goals stated above, discretion was given to re-establish a new line.\textsuperscript{148} The statute set forth seven factors for the Department to consider in determining the position of a line.\textsuperscript{149} In practice, DNR experts used:

\begin{enumerate}
\item the landward limit of penetration of the three-foot wave height during a 100-year storm event;
\item the landward limit of beach or dune erosion incident to a 100-year storm event;
\item the limit of the washover deposits incident to a 100-year storm event;
\item the erosional trend over five years.\textsuperscript{150}
\end{enumerate}

Statistical information was analyzed in computer models for prediction purposes. From this information, DNR had justifiable data for determining the landward limits of beach or dune erosion during a 100-year storm event and the landward penetration of a three-foot wave.\textsuperscript{151}

Sections 1 and 2 have been subsequently revised. The revisions would not have affected the results in this case. \textit{Fla. Stat.} \textsection 163.053 (Supp. 1986); 1987 \textit{Fla. Sess. Law Serv.} ch. 87-97, \textsection 13 (West).

\textsuperscript{146} \textit{Fla. Stat.} \textsection 163.053(1) (1983).
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Fla. Stat.} \textsection 161.053(2) (1983).
\textsuperscript{149} \textit{Id.} The department should consider: “(1) ground elevations in relation to historical storm and hurricane tides; (2) predicted maximum wave uprush; (3) beach and offshore ground contours; (4) the vegetation line; (5) erosion trends; (6) the dune or bluff line, if any exist; and (7) existing upland development. \textit{Id.}

\textsuperscript{150} Island Harbor Beach Club, Ltd., v. Department of Natural Resources, 495 So. 2d 209, 213 (Fla. 1st Dist. Ct. App. 1986).
\textsuperscript{151} \textit{Id.}

\section*{Property}

\subsection*{The Holdings}

DNR’s jurisdiction to establish lines is not strictly limited to the location of the sand beach and dune system, it may extend landward or upland of the beach, contrary to the petitioner’s allegations.\textsuperscript{152} “[T]he statutory phrase ‘beach-dune system’ is properly construed to mean that portion of the coast where there has been, or is expected to be, over time, and as a matter of natural occurrence, cyclical and dynamic emergence, destruction, and reemergence of beach and dune structures.”\textsuperscript{153} It was held to be the word “system” which gave the Department its authority to broadly apply its jurisdiction inland.\textsuperscript{154} Thus, using the topographic and engineering evidence, as analyzed by computer model, the determination that barrier islands constituted an entire “system” and were not susceptible to construction, was a finding the court could not disturb on either jurisdictional or evidentiary grounds.\textsuperscript{155}

Use of data about the landward reach of a three-foot wave was a DNR method which was reasonably related to locating the construction line. The argued fact that this inland reach might not suffer the severe fluctuations of the immediately impacted beach-dune area during this once in a hundred year storm event was unpersuasive in the court’s analysis. It felt that as long as it was shown that a three-foot wave would move inland much deeper where dunes were lacking, a relationship sufficient to justify implementing the statutory purpose in setting new, more inland control lines had been established.\textsuperscript{156}

The scientific methodologies used by DNR, and its predictive evidence submitted at the administrative hearings were albeit new or unsettled or comparatively uncertain, not exaggerated, or grounds for setting aside the Department’s determinations.\textsuperscript{157} The legislature vested the agency with the discretion to create and use such scientific techniques. “This federal standard\textsuperscript{158} is consistent with the general rule in

\begin{enumerate}
\item Id. at 213-14.
\item Id. at 214.
\item Id.
\item Id. at 215.
\item Id. at 216. The court stated, “[T]he area covered by the three-foot wave is shown to be part of the dynamic cyclical beach-dune system.” Id. See also Agri Co. v. Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1st Dist. Ct. App. 1978), cert. denied, 376 So. 2d 74 (Fla. 1979).
\item Id. at 217-18.
\item Scientific evidence is admissible in a federal administrative proceeding be-
\end{enumerate}
natural systems, accelerates erosion and endangers other property when protective beach-dune systems are removed. DNR is expressly delegated the authority to set county coastal construction control lines, which, thereby, “define that portion of the beach-dune system which is subject to sever fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions.” The line may be set further landward than the impact zone of a storm surge, “provided such segment or segments of the line do not extend beyond the landward toe of the coastal barrier dune structure.”

The Department must base its determination upon engineering studies and topographic surveys. Using such new information, when existing lines were found to be ineffective in achieving the statutory goals stated above, discretion was given to re-establish a new line. The statute set forth seven factors for the Department to consider in determining the position of a line. In practice, DNR experts used:

1. The landward limit of penetration of the three-foot wave height during a 100-year storm event;
2. The landward limit of beach or dune erosion incident to a 100-year storm event;
3. The limit of the washover deposits incident to a 100-year storm event;
4. The erosional trend over five years.

Statistical information was analyzed in computer models for prediction purposes. From this information, DNR had justifiable data for determining the landward limits of beach or dune erosion during a 100-year storm event and the landward penetration of a three-foot wave.
Florida that an agency's exercise of delegated legislative authority will not be disturbed on appeal unless shown by a preponderance of the evidence to be arbitrary, capricious, or an abuse of administrative discretion.168

Even though the shoreline may not have visibly changed between the time when the original coastal construction control line was set and the commencement of hearings and litigation because the net effect of erosion and accretion was equal, DNR's repositioning of the control lines was supported by competent and substantial evidence.169

DNR need not demonstrate that every segment of the coastline has undergone an adverse change before it can review and determine that the established control line is not effectively fulfilling the statutory purpose; significant changes to a substantial portion of the coast are sufficient to warrant revisiting the entire line in a particular county.170

DNR calculations and scientific evidence were comprised of one overestimation and several conservative underestimations of several factors. Such evidence supported the administrative findings and this court's affirmance because the competent and substantial evidence standard had not been violated.171

Finally, contrary to one's first impression of due process notice rights, DNR may enforce its interpretation of "beach-dune systems" before publication and adoption as an administrative rule.172 The court deferred to the Department's broad discretionary powers in the absence of plaintiffs' pleadings to the contrary.

cause regulatory agencies are accorded great deference about policy making and subject-matter expertise. Id. at 218 (citing Baltimore Gas and Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 103 (1983)).

159. Id. at 218 (citing Agrico Chem. Co. v. Department of Environmental Regulations, 365 So. 2d 759 (Fla. 1st Dist. Ct. App. 1978)).

160. Id. at 219. Between 1974 and 1982, it was proven that 59,000 cubic yards of beach material was lost; and that the mean sea level moved closer to shore over 40 feet of the Charlotte County coastline. Id.

161. Id. By footnote 9 and dicta at pg. 220, the court strictly construed DNR's broad right to assemble and apply any new scientific data in order to carry out a statutory mandate.

162. Id. at 220.

163. Id. at 221.

Property

Conclusion

The complexity of the scientific and technical issues in this case and the consequent deference necessarily given to DNR's expertise vividly illustrate the limited role an appellate court can play in resolving disputes arising out of an administrative agency's exercise of delegated discretion in respect to technical matters requiring substantial expertise and "making predictions ... at the frontiers of science."174

The new coastal construction control line which we hereby approve will, at many locations along the Charlotte County coast, subject most of, and sometimes the entire, land mass of the barrier islands to regulation by DNR under section 161.053, Florida Statutes (1983). The line is not set at dunes immediately adjacent to the beach front. Appellants' right to use and erect structures upon the land they privately own may be seriously circumscribed in many of the areas covered by the amended rule. Evaluation of the economic, environmental, and geophysical concerns underlying the wisdom and desirability of so regulating land use along Florida beaches is, however, a political matter for determination by the legislature, not this court.175
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164. Id. at 223.

165. Id. at 224.