


UP AGAINST THE SEAWALL

After Last Year's Hurricanes, a New Storm
Over Property Rights and Beach Protection
Engulfs Florida's Coast

JOHN GIBEAUT



EMMETT F. Hildreth Jr. already has the headline written. "D-A-D: The Day After Dennis," he suggests as he stands on the beach near his home in the Florida Panhandle and describes the damage from one of the most powerful hurricanes ever to strike the area.

The first 2005 storm to make landfall as a hurricane, Dennis slammed into the Panhandle at 2:25 p.m. Sunday, July 10, 2005, a Category 3 storm with maximum sustained winds of more than 125 mph and a storm surge of up to 10 feet.

Though the eye of the storm passed near Pensacola Beach, some 50 miles west of Hildreth's beachfront place in Walton County, the damage in Walton nevertheless was awesome.

Eleven seven-figure homes along the county's 26-mile coast had fallen into the Gulf of Mexico, along with a half-dozen swimming pools and a garage. Another three dozen single and multifamily dwellings were in danger of collapse because the storm surge had undermined their foundations.

But another storm still rages a year later, as state and federal agencies, the county, environmentalists and the beachfront property owners argue over more than 100 seawalls and other erosion-control structures the residents erected after Dennis to keep their homes high and dry.

"It's all walled, as far as you can see," Hildreth says as he faces landward from the water's edge, his arms outstretched. Before Dennis came to town, Walton County had only a handful of seawalls.

The Florida Department of Environmental Protection says some of the walls—all of which lack the necessary state permits—almost certainly will have to be removed. The U.S. Fish and Wildlife Service says the walls threaten the nesting grounds of endangered sea turtles. It can sue or criminally prosecute owners who don't take steps to reduce potential damage to turtle habitats. Environmentalists want to get rid of the walls altogether.

The only issue the groups don't argue over is that the administrative proceedings and litigation to straighten out everything will take years.

But the tale of Florida's and Walton County's experience with the seawalls is anything but a cautionary one. Similar scenes play out from Maine to Hawaii as questions of law and public policy arise over the wisdom of rebuilding or fortifying homes in delicate coastal areas after storms and other disasters.

"There are legions of stories around the country of landowners in coastal areas desperately trying to hang onto disappearing beachfront property," says John D. Echeverria, executive director of the Environmental Law and Policy Institute at Georgetown University Law Center.

RIGHTS AND RESPONSIBILITIES

THE 2005 SEASON WAS ONE OF THE most destructive on record, and forecasters predict more numerous and stronger hurricanes in the years ahead. Despite the dangers, many local and state governments—Florida's among them—remain in the business of luring development to the coast. It's rarely a question of whether people should be able to rebuild after storms. It's simply a matter of when.

"Except for the shortage of money, I don't see any limitation on any of this stuff," says Charles Pattison, executive director of 1000 Friends of Florida, a watchdog organization that keeps tabs on the state's growth.

While coastal development is largely a matter of state law, a series of federal proposals to speed up the recovery from Hurricane Katrina

drew raised eyebrows from the ABA Section of Environment, Energy and Resources. Particularly troubling was a broadly worded bill introduced by Sen. James M. Inhofe, R-Okla., that would allow the Environmental Protection Agency to issue 120-day waivers of any statute or regulation if needed "to respond, in a timely and effective manner, to a situation or damage relating to Hurricane Katrina." By spring, however, the bill remained in the Committee on Environment and Public Works, which Inhofe chairs.

The section supports the use of waivers under existing law, but opposes new ones proposed last fall after Katrina struck the Gulf Coast.

"Some of the proposals were of such a broad sweep that this controversy over the seawalls just wouldn't happen," says Irma Russell, a visiting law professor at Pace University in White Plains, N.Y., and author of the section's comments on the bill and other federal proposals. The permitting authorities "simply would say, 'Go away. We don't want to listen to you anymore.'"

In the states, the fight over reconstructing the coast features on one side developers and property owners, who hold the threat of Fifth Amendment takings claims over government officials who restrict their ability to build in fragile areas. On the other side stand various advocacy groups that say increased coastal development threatens not only the environment, but also public health and safety as growing populations fleeing storms overrun already inadequate roads, bridges, shelters and other facilities.

Stuck in the middle are state and local governments, which must balance property rights against environmental and public safety concerns and try to reduce exposure to liability.

"They're on the end of the spear as far as the takings issue is concerned," says Pensacola lawyer George R. Mead II. He represents a homeowners association fighting Walton County and the state's denial of its application to install geotubes—long, sand-filled cylinders that are supposed to keep the beach from washing away.

All the while, emotions seethe as property owners say they have a right to protect their homes, while critics say the owners really just want to keep

the public beach to themselves.

"It's hard to find a middle ground on this," says Robert H. Thomas, managing attorney for the Honolulu office of the Pacific Legal Foundation, a public interest law firm that backs property owners. "Every time someone sneezes on the shoreline, it's front-page news."

Though Florida hardly is unique, its 2,276 miles of coastline is the longest in the continental United States and the most vulnerable to hurricanes. About 80 percent of the Sunshine State's 17 million residents live within 20 miles of the coast.

"Florida is a state that's based on growth and development," says Tallahassee lawyer Thomas G. Pelham, former secretary of the Florida Department of Community Affairs, the state agency responsible for overseeing that growth. "We're getting 1,000 new residents a day."

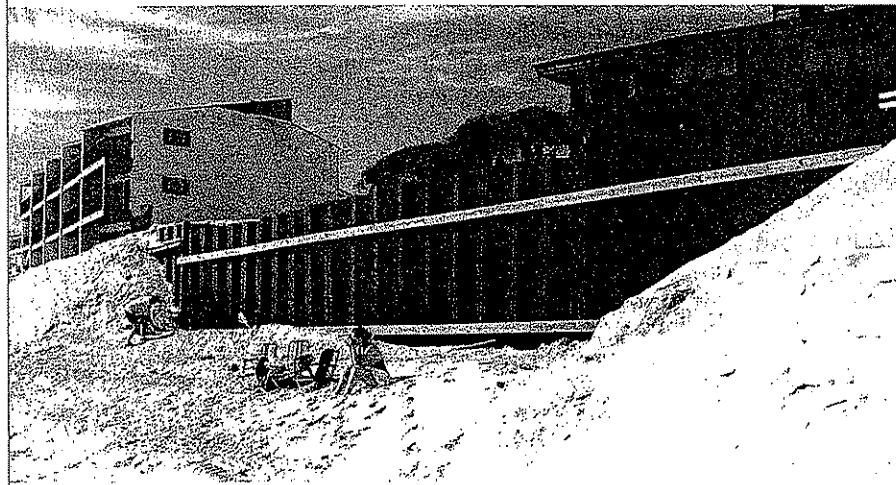
Many of those newcomers flock to the barrier islands that ring Florida and other coastal states. As the term suggests, barrier islands serve as natural buffers between storms and the mainland.

Their beauty also makes them attractive to developers. But barrier islands are notoriously unstable because they are essentially big sandbars with contours that regularly shift with normal ocean currents and wave action. It does not take the storm of the century to wipe out everything on a barrier island.

Seawalls and similar structures—collectively called coastal armoring—may save buildings from going into the drink. But most engineers and government authorities discourage their use because they ultimately can destroy beaches.

In their natural state, beaches along eroding shorelines maintain their width by retreating toward land as the water rises. A seawall, however, blocks the path of retreat, so the water erodes the beach right up to its base. (See the diagram on page 49.) In addition, female sea turtles, which weigh 250 pounds or more, can't scale the walls to come ashore and lay their eggs.

"If that armoring remains, there's enough evidence that we may lose our beaches," says Anita Page, executive director of the South Walton Community Council, which opposes the seawalls.



Top: An aerial photo of damage from July 2005's Hurricane Dennis to beaches in Walton County, Fla. Center: In February, a wooden seawall is erected behind a steel one crossing over a Walton County beach access point. Walton County has allowed this construction so that the seawalls between the private residences on either side of the beach access would be connected. Bottom right: By the time turtle nesting season started in May, seawall construction was finished, and workers had completely covered the seawalls with sand. Bottom left: Tourists try to find a dry spot below a newly installed seawall at a Walton County beach in March.

PHOTOGRAPH BY FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION;
PHOTOGRAPHS BY RICHARD FOWLKES; PHOTOGRAPH BY WWW.EASTHILLPHOTO.COM



Walton County lies in a largely rural region where the live oaks and Spanish moss of the Old South meet modern coastal Florida along a beachfront stretch of swank homes that some call the Emerald Coast. Others call it the Redneck Riviera because many of the tourists and seasonal residents come from Alabama, Mississippi and other parts of the Southeast.

Panhandle counties like Walton also make up Florida's historical political power base. Long suspicious of state government in the capital of Tallahassee, Panhandle counties have always marched to their own tune, even as power shifted after World War II with rapid development to the south.

For example, arguing that hurricanes hardly touch there, Panhandle lawmakers for years managed to exempt the region from stricter building codes imposed on the rest of the state to reduce storm damage. After several unsuccessful attempts, the rest of the legislature ended the Panhandle exemption this spring.

The politicians' meteorological prognostications notwithstanding, it only took a few hours in July 2005 for hurricane-induced beach erosion to erupt into a crisis for Walton County, which depends on its coast for 90 percent of its property taxes. That's not to mention the bundles of money tourists spend in the increasingly popular vacation destination.

Though extreme in scope, the Walton County seawall standoff draws together key points of the laws governing coastal land use.

Like the politicians, county residents along the Gulf had grown complacent over the years. After all, it had been a decade since the last major storm struck the area.

But the beachfront owners quickly awakened when they saw the damage Dennis left behind. The storm surge, caused by wind and low pressure associated with hurricanes, had taken a 300-foot bite out of a line of 15- to 30-foot-tall bluffs above the beach, where the homes stand.

SEAWALL FRENZY

THE DAY AFTER DENNIS, COLLEEN M. Castille, secretary of the state Department of Environmental Protection, issued an emergency order allowing counties to grant 60-day permits for temporary seawalls to protect property threatened by the Gulf. In no time, Walton County officials were hip-deep in the temporary permits, issuing them to 243 owners, about 150 of whom eventually built seawalls. Among the contracting companies pulling permits was one owned by a county commissioner who voted for them.

Though Florida statutes and the state administrative code envision easily removable sandbags and wood pilings as temporary measures, the Walton County beachfront owners had something else in mind. They erected massive fiberglass and galvanized steel barriers that reach down to sea level—15 feet or more beneath the surface—and stand another 15 feet above ground. Anchored, covered with sand,

Since November, nearly 150 property owners along Walton County's coastline have built seawalls; pictured here beneath the piled sand that covers them.

planted with sea oats and costing about \$1,000 a foot, the walls were anything but temporary.

"I've got a quarter of a million dollars into it," says part-time resident Stephen Holmes, a partner in a Menlo Park, Calif., venture capital firm. "This is my retirement money."

After Castille's order, Walton County seawall construction took off like nobody's business. The pace shocked some residents, who watched as trucks and other equipment smashed through protective sand dunes to gain access to the beach.

The property owners knew they ultimately would need state permits if the walls were to remain. But one of their lawyers says he came up against another kind of wall when he tried to get some advance indication of what DEP officials would approve.

Thomas G. Tomasello says he usually advises his clients to come to him first before trying to deal with state bureaucrats. But he says even he got nowhere when he contacted DEP on behalf of a Walton County condominium association. And Tomasello is a former DEP general counsel.

"I couldn't get any cooperation from them," says Tomasello, who practices in Tallahassee. "I said, 'This just isn't working.' I told my client, 'Just build it with the emergency permit, and we'll deal with it later.'"

By the time turtle nesting season began May 1, the seawalls were finished, and the trucks, bulldozers, cranes and pile drivers all had pulled out. Now the property owners face the difficult task of getting permanent DEP permits after the fact.

TABLES TURN FOR TURTLES

OWNERS ALSO MUST DEAL WITH FISH and Wildlife over the turtle question.

Before the seawalls, about 20 turtles a year nested on Walton County beaches. Now Richard Fowlkes wonders whether the turtles will nest there again. The combination of storm damage and construction in many areas had left only a few feet of beach, hardly enough for a turtle to lay its eggs without them being carried out to sea by the next tide.

What's more, the county allowed some contractors to replace sand with red clay hauled in from the interior instead of the sugary white substance that makes Gulf beaches some of the world's finest. The red clay doesn't just clash aesthetically with the native white sand. It also can spook turtles back into the Gulf before they make their nests.

"The county gave them a green

light to do whatever they wanted," says Fowlkes, a retired photojournalist who with other volunteers marks and monitors turtle nests to make sure people don't disturb them. "The temporary structures morphed into permanent ones. No way is a turtle going to be able to climb those steep walls. The only place for them to go is on that little strip of beach where it's almost for sure guaranteed that they're going to be washed out."

The property owners say the storms, not the seawalls, damaged the turtle habitat. In fact, they say they've improved the beach with their own money.

The death of a rare Kemp's Ridley sea turtle in a dredge in May forced the U.S. Army Corps of Engineers to halt an unrelated beach restoration project off Walton County until October. It was the third turtle killed since the project began this year.

Though Fish and Wildlife can sue and even criminally prosecute uncooperative owners under the Endangered Species Act, lawyer Tomasello doubts that will happen. He sees the agency as a bully that threatens local governments and individuals with a parade of legal horrors that never ar-

rives. "I don't think Fish and Wildlife has the grit to sue."

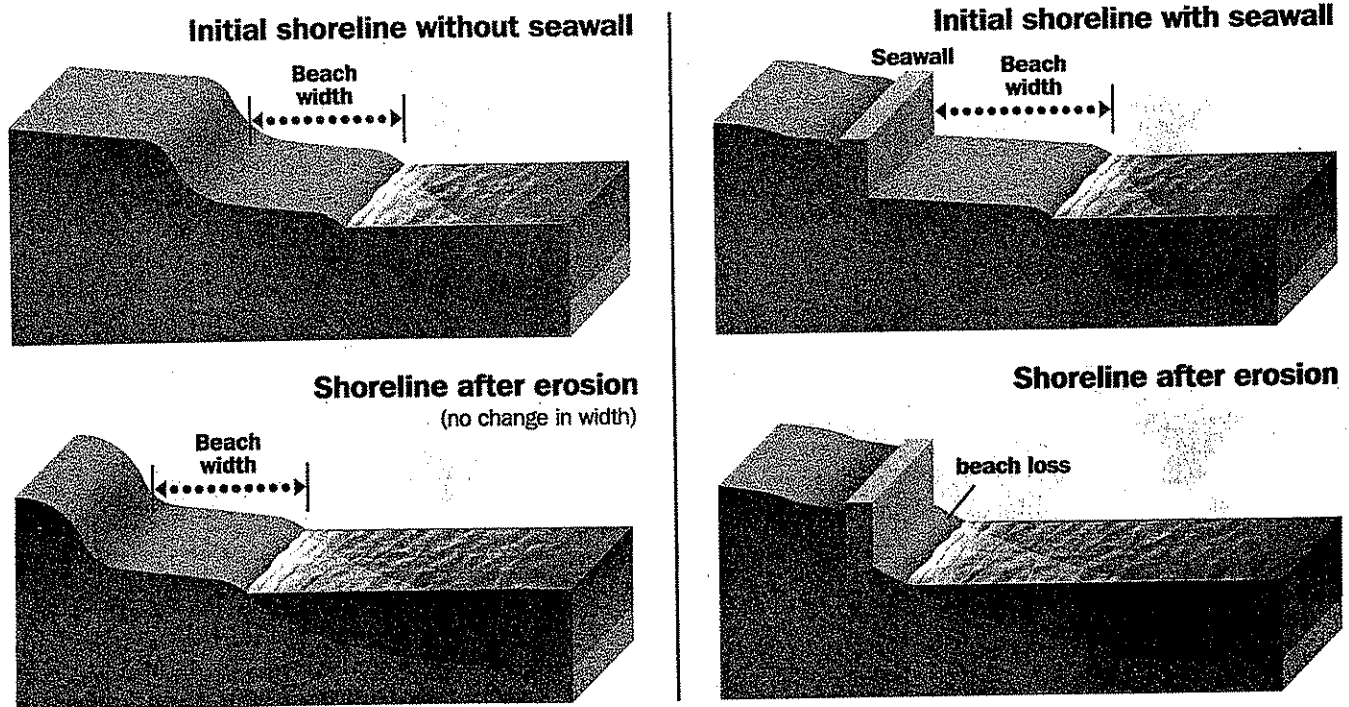
The agency declined comment. Citing potential litigation, DEP spokesman Anthony De Luise also declined to respond to similar remarks Tomasello directed toward his department, except to say Tomasello's clients must wait like everyone else for permit applications.

For its part, the county says it's out of the seawall business, though it continues to work with the owners and Fish and Wildlife to address concerns for turtles and other endangered species that may inhabit the area. County Attorney David A. Hallman says owners who ignored the requirements of DEP and other agencies did so at their own risk.

"My board authorized folks to do temporary armoring and nothing more," Hallman says. "If I tell you to build temporary armoring, and you build something more elaborate, it's not my responsibility. The hard decisions now lie with DEP."

Hildreth says he and his neighbors have plowed at least \$70 million into the structures, which they prefer to call "upland retaining walls." He, too, doubts any government agency or

Seawalls and Beach Loss



Source: U.S. Army Corps of Engineers (1991)

LOOKING AT LUCAS

The question of rebuilding in coastal areas resides almost exclusively in state law, but one U.S. Supreme Court decision sets the tone.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the justices held 6-3 that the state supreme court erred in denying a developer compensation for two lots on a barrier island by declaring planned home construction on them in violation of the public interest. The developer had purchased the lots for \$975,000, but a state set-

back law enacted after he bought the property prohibited building there because it was too close to the Atlantic Ocean. After the Supreme Court decision revived the developer's takings claim, the state on remand paid for the lots.

Now, with the devastation of the 2005 hurricane season, one leading environmental advocate says it's time for the court to reverse *Lucas*.

"I'd just love to have an opportunity to re-litigate *Lucas* today," says John D. Echeverria, head of Georgetown Law Center's Environmental Law and Policy Institute. "If we re-litigated *Lucas* after Katrina, hands down it comes out the other way."

He notes that Justice Anthony M. Kennedy concurred in the judgment and refused to go along with the majority's conclusion that such a ban almost always would result in a taking. He also sees hope for reversal in new Chief Justice John G. Roberts Jr.'s successful defense before the high court of a takings challenge to land-use regulations in Lake Tahoe when Roberts was in private practice.

Though *Lucas* also suggests that a taking has to render property virtually worthless to merit

compensation, courts in states like Florida go further and make payouts for partial takings. Other state courts, though, have used subsequent Supreme Court takings precedent to dull the bludgeon *Lucas* can wield.

LINGLE'S EXAMPLE

THE MASSACHUSETTS SUPREME JUDICIAL COURT IN 2005 UPHOLD coastal building restrictions using *Lingle v. Chevron Inc.*, 544 U.S. 528,

which was also decided in 2005 and held that land-use regulations that "substantially advance" a legitimate state interest can defeat a takings claim. The Massachusetts case involved a lot on the southeastern tip of Cape Cod, surrounded by the Atlantic on three sides. *Gove v. Zoning Board of Appeals of Chatham*, 831 N.E.2d 865.

Given the property's location and the lack of evidence to the contrary, the court had no problem in establishing state interest. Though the owner couldn't build a home on the lot, the court noted that the state had not physically occupied the property or rendered it totally worthless. In doing so, the Massachusetts court followed *Lingle's* suggestion that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change."

Echeverria says more state courts should step up to the plate with that approach. "If you create the impression that people can make stupid building decisions and get bailed out, then people will keep making stupid building decisions."



John Echeverria

court will force their removal.

"The beachfront property owners have been hurt unmercifully by the storms," he says. "To make them tear out these walls would be without conscience. Why shouldn't property owners be able to protect their homes or businesses?"

Florida law may not be so benevolent, as one company learned when it went ahead and began building condominiums in Martin County on the Atlantic coast. The developer had been warned that the project may not receive final approval after legal challenges to it had run their course.

Despite the developer's protests that it stood to lose \$3.3 million, a trial judge ordered the demolition of five buildings in various stages of completion, including two that were nearly totally occupied. The Florida Fourth District Court of Appeal in West Palm Beach showed no sympathy in affirm-

ing the order. *Pinecrest Lakes Inc. v. Shidel*, 795 So. 2d 191 (2001).

"If the rule of law requires land uses to meet specific standards, then allowing those who develop land to escape its requirements by spending a project out of compliance would make the standards of growth management of little real consequence," wrote appeals Judge Gary M. Farmer. "It would allow developers such as this one to build in defiance of the limits, then escape compliance by making the cost of correction too high."

Walton County's first coastal armoring litigation may come from the Retreat Homeowners Association, the client Pensacola lawyer Mead represents in its effort to install geotubes. As talks with the state and county continued this spring, Mead already was researching a takings claim.

In late April, he received an unexpected boost in the case from other

Walton County property owners fighting a renourishment project, which restores beaches by pumping more sand onto them. In somewhat counterintuitive arguments, the owners maintained the project constituted a taking because the state denies them property rights over the added sand, even if it increases the size of their lots, and because the new sand also would cut their property off from direct access to the water. The First District Court of Appeal in Tallahassee agreed with the owners and ordered the project scuttled. *Save Our Beaches Inc. v. Florida DEP*, No. 1D05-4086 (April 28). Not before the court, however, were the questions of whether the taking requires a condemnation trial or compensation.

As Mead sees it, the state's denial of the geotubes already has deprived his client of partial use of the property, perhaps worth as much as \$250,000 a

month in compensation. He shudders at what a taking of all 90 lots on the site could entail.

"My clients are willing to spend \$1.7 million to protect themselves, and we may have a takings claim that could wind up costing tens of millions of dollars," Mead says. "I don't get it."

REINING IN DEVELOPMENT

BESIDES CASE LAW, THE STATE ALSO has set a strong political precedent when it comes to saving Florida from Floridians. Pattison of 1000 Friends recalls how legislators in the 1970s wrested control of runaway development in the Florida Keys from the locals and turned it over to the state by designating the Keys as an area of critical state concern.

"The state was not going to sit back and let local governments ruin everything," says Pattison, a regional and urban planner who helped implement the project for the community affairs department.

Like sports records, though, political precedents are made to be broken. The 2006 edition of the Florida Legislature lifted the designation, effective in 2009.

But at least on paper, Florida has one of the nation's strongest laws to control development. The 1985 Growth Management Act requires local and regional governments to submit to the state comprehensive plans that cover all aspects of growth, from transportation to sanitation. The state can reject plans that don't meet minimum standards and can punish local governments that fail to enforce the law.

The act brought the concept of zoning to the Panhandle for the first time, including to large sections of the urbanized Pensacola area. It also discourages development along the coast.

"I think the process is unraveling—steadily," says former Community Affairs Secretary Pelham, who administered the act in its early days. Pelham also has served as chair of the ABA State and Local Government Law Section's committee on land use, planning and zoning.

"There's been an increasing deference to the property rights side of the equation, and it's in full swing today," Pelham says. Then

he ticks off a list of key state agency positions and legislative posts held or controlled by developers. Many of those same agency heads, legislators and developers dominated the state's Coastal High Hazard Study Committee, established by Gov. Jeb Bush last fall to explore ways to alleviate future storm damage. The upshot: a Florida that just can't say no.

"It takes strong political leadership to overcome that sort of pressure," Pelham says. "That's just a fact of life in Florida, even though we've had laws on the books for years restricting development in coastal areas."

Legislators may have brought Pelham's nightmare to life this spring when they unanimously adopted a bill that would allow local governments to increase population densities in coastal areas, provided the development can meet minimum evacuation times. The developer can avoid that requirement, however, through unspecified "payment of money, contribution of land, and construction of hurricane shelters and transportation facilities."

While the bill could make construction more difficult in many more congested parts of the state, it actually could speed it up in the still relatively undeveloped Panhandle, where evacuation times aren't a crucial issue.

Republican Charlie Clary is Walton County's state senator and sponsor of an earlier version of the legislation. He also sits on the Bush study committee and knows he'll never please everyone.

"It's a fine line of protecting private property rights and the community," says Clary, an architect. "There's never a magic fix. You just have to have flexibility."

But Walton County officials and residents can't expect Clary and the legislature to bail them out of the seawall mess.

"I don't know if we can resolve the current seawall situation legislatively," Clary says. "That's an issue for the county, the property owners and the state [agencies]."

The DEP approval process for permanent permits, meanwhile, has broken out of the gate at a crawl. By mid-May, the agency had approved only three of 66 applications and denied one because the wall was built too close to the water.

Some observers say the agency is buying time because turtle nesting season began May 1 and runs through Oct. 31, meaning contractors can't bring heavy equipment onto the beach to remove any illegal walls. Nesting season also ends a few days before Florida's gubernatorial election. Because of term limits, Bush can't run again. So the prospect of a new governor with different priorities for the coast could chill DEP officials from acting quickly.

But despite the potential for litigation in Walton County, experts in land use and planning say insurance ultimately will decide the issue writ large. Most private insurers offering wind and flood coverage have pulled out of Florida, leaving the state to pick up the cost of rebuilding through its own insurance program. Storm damage claims by coastal residents mean higher premiums for people who don't live anywhere near the sea.

"If I tell you your insurance premium is going to go up 125 percent every year, I think you'll get people's attention," Pattison says.

Property owner Hildreth also is an Alabama-licensed litigator. And he sounds every bit the part as he sits behind his desk and delivers the summation of his case for seawalls. As if he were standing before the bench or a jury, he describes a taking through an examination of Walton's beachfront homes the day after Dennis.

"No. 1," he says, "they were unsellable. There was nothing to buy. No. 2, you could not personally use them. The county red-tagged them [as unsafe]. No. 3, you couldn't rent them out. No tourists would take them. And No. 4, you can't insure them. If you can't sell it, if you can't use it, if you can't rent it, and you can't insure it, it's worthless." ■

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