

Sea-Level Rise and Flooding: Legal, Fiscal, & Regulatory Challenges for Local Governments, Part I

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The Big Players for Us in the Legal Realm

- Takings law
- Tort law
- Sovereign immunity

We the People

of the United States, in order to form a more perfect Union, establish justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. 1

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and seven Years a Citizen of the United States, and who, when elected, shall not, when he shall be chosen, have been seven Years a Citizen of the United States, and who, when elected, shall not, when he shall be chosen, have been seven Years a Citizen of the United States, and who, when elected, shall not, when he shall be chosen, have been seven Years a Citizen of the United States.

"Takings" in the U.S. Constitution

Representatives and direct Taxes shall be apportioned among the several States which may be added to this Union, according to their respective Numbers, which shall be determined by adding to all free Persons, bound to Service for a Term of Years, and including Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least one Representative, and until such Enumeration shall be made, the State of New Hampshire shall be entitled to have three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York nine, New Jersey five, Pennsylvania seven, Delaware one, Maryland five, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Electors in that State shall fill such Vacancies. The House of Representatives shall choose their Speaker and other Officers, and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for a Term of six Years, and each State shall have two Senators.

"... nor shall private property be taken for public use, without just compensation."

The Senate shall consist of two Senators from each State, chosen by the Legislature thereof, for a Term of six Years, and each State shall have two Senators. The Electors in each State shall have Qualifications requisite for Electors of the most numerous Branch of the State Legislature. No Person shall be a Senator who shall not have attained to the Age of thirty Years, and seven Years a Citizen of the United States, and who, when elected, shall not, when he shall be chosen, have been seven Years a Citizen of the United States, and who, when elected, shall not, when he shall be chosen, have been seven Years a Citizen of the United States.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and seven Years a Citizen of the United States, and who, when elected, shall not, when he shall be chosen, have been seven Years a Citizen of the United States, and who, when elected, shall not, when he shall be chosen, have been seven Years a Citizen of the United States.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than removal from Office, and disqualification to hold any Office of Honor, Profit or Trust under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Tort Law & Sovereign Immunity

- Tort
 - Civil wrong
 - Damages usually = \$\$\$\$
- Sovereign Immunity
 - Ancient doctrine of “rex non potest peccare” (the king can do no wrong)
 - Doctrine waived for some torts, but not all
 - Does not apply to takings

Local Government Liability: When and Why

Liability Takes Many Forms

- Potential liability for permitting risky dev.
- Cost of maintenance for new infrastructure in at-risk areas
- Increased costs for flood insurance
- Liability if local gov't causes flooding
 - Tort (civil damages) or “taking” of property (Drake v. Walton County, 6 So. 3d 717, 720-21 (1st DCA 2009))
 - Can be due to development approval



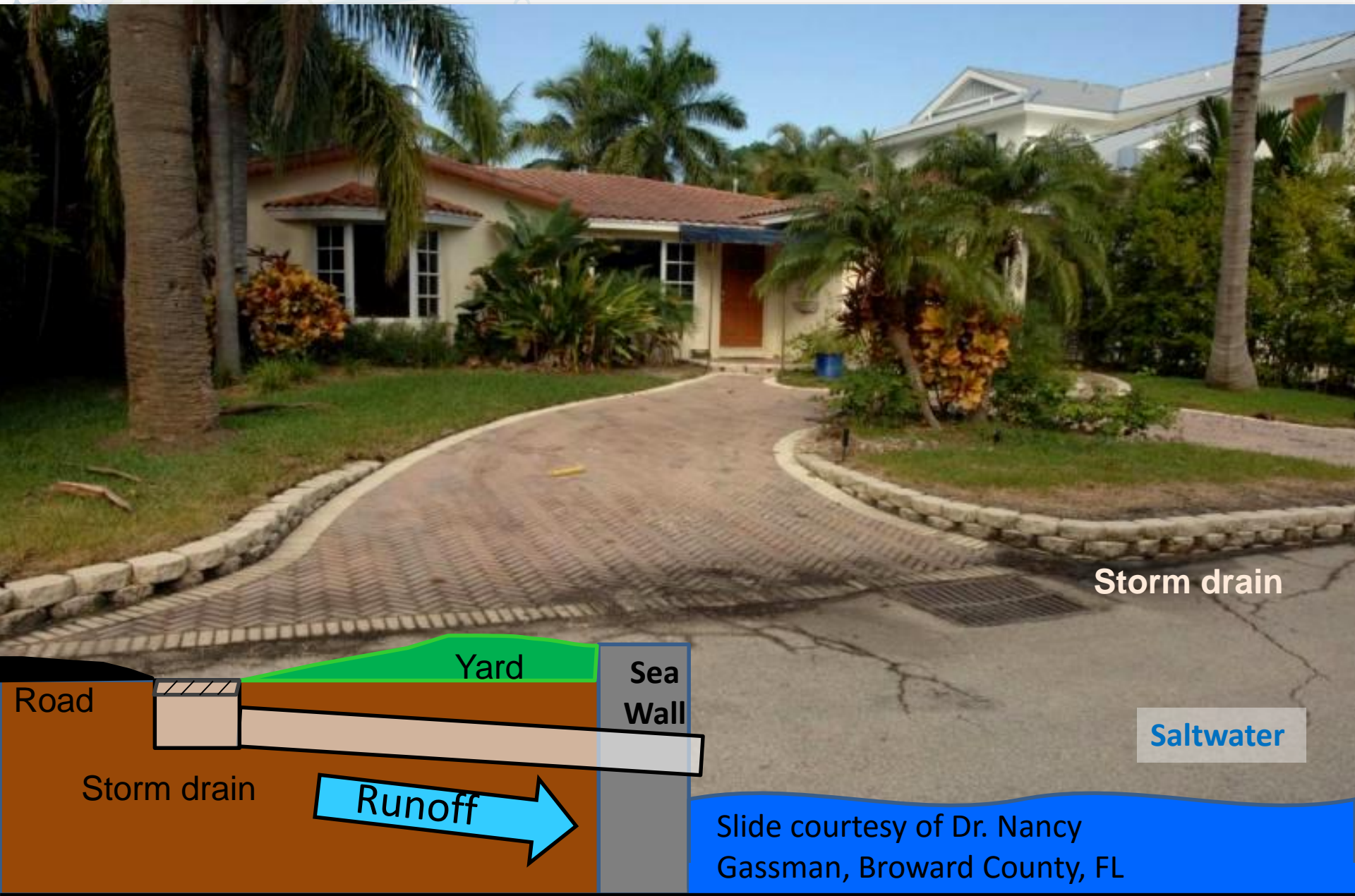
Jordan et al. v. St. Johns County



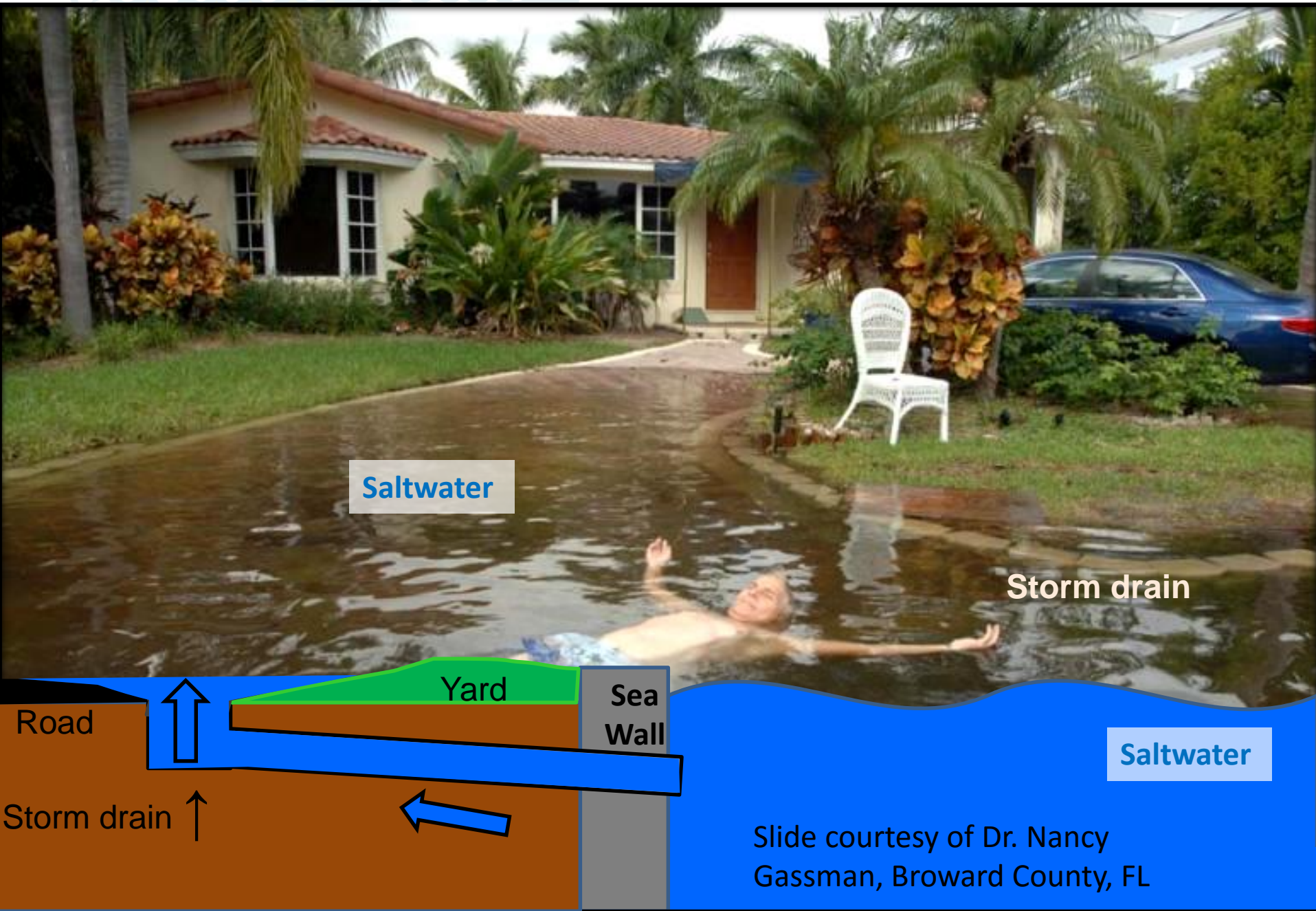


SLR, Drainage, and Local Governments

Drainage Under Average Tidal Conditions



Drainage Challenge with Sea Level Rise



Slide courtesy of Dr. Nancy
Gassman, Broward County, FL

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Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea-level Rise

by Thomas Ruppert and Carly Grimm

- No duty of local gov't to provide drainage
 - As with many services, *authority* or *power* to provide, but not duty (fire, police, etc.)
- However, if provided, duty to maintain arises
 - Maintenance must be done with reasonable care
 - Liability for failure to maintain

Maintenance vs. Upgrade

- Immunity through “planning” vs. “operational” distinction
 - Immunity for planning as this is legislative
 - No immunity for “operations;” always a duty to act with reasonable care to avoid harm to others



Seawall Ordinances

- Miami Beach
 - New minimum heights when built or rebuilt
 - Tied to future road heights and SLR
- Ft. Lauderdale
 - Also new minimum heights for new or rebuilt
 - *Also*, possible citation to property owners for allowing tidal water to flow across their property and impacting adjacent properties



Fiscal Challenges for Local Government

Florida Sea Grant College Program



Rights and Responsibilities for Protecting Private Property

- No legal duty to protect private property other than maybe maintenance of existing infrastructure
 - “Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression.’”
 - “[Constitutional protections] generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”

DeShaney vs. Winnebago Dept. of Social Services, 489 U.S. 189 (1989)

LOUISIANA FLOOD:

'Ignored and screwed,' this town aims to ease flood rules

Emily Holden, E&E reporter

Published: Tuesday, September 6, 2016




Tylene Magee and her daughters, Danette Floyd and Roxanne Abraham, stand in front of the family home in Denham Springs, La., which was destroyed by several feet of water in historic flooding. Photo by Emily Holden.

CENTRAL, La. — Late one night after freak flooding submerged most of this small Louisiana city, local leaders stood at the pulpit of a Baptist church packed with distressed residents and made a bold promise.

Despite the now-apparent flood risk, Central would make it as easy as possible to rebuild — even if it meant it might be less protected from the same kind of historic flooding that submerged much of the city last month.



Denham Springs City Council member wants to gauge public input on city's future with NFIP

John Dupont | The News Updated Sep 13, 2016  0



DENHAM SPRINGS – A city council member will recommend the City of Denham Springs host a public hearing to gauge response on withdrawal from the National Flood Insurance Program.

Calendars

Coming Up!

Updated Sep 14, 2016

Fiscal Challenges

- How to pay for infrastr.
- Tax and fee burdens on properties
- Property values
- Market signals— bonds
- If relocation, how? Why? When? Where? Buyouts?
- Distributive effects of potential policies

Sea Level Rise May Pose Challenges For Some US Local Governments

Sea level rise already affects some communities and in the long term may pressure some communities' operations, capital funding requirements, and indebtedness.

Sea level rise is a manifestation of global climate change that is already having noticeable effects on some communities situated along the U.S. coasts. Risks include heightened damage from episodic events such as hurricanes and storm surges (event risk) in addition to more chronic damage from pervasive flooding and permanent loss of land. These risks present a myriad of financial and logistical challenges to local governments.

To date, sea level rise has not played a material role in Fitch's assessment of the fundamental credit characteristics of any of its rated issuers. Fitch's special report, "[Event Risk and Overall Credit Resiliency](#)" provides more detail. However, there are real threats faced by governments in coastal areas. As the effects of sea level rise upon issuers' credit fundamentals become known and measurable, over time these considerations may take on greater importance as a credit factor in Fitch's rating decisions.

Sea Level Rise Increasingly Important in Government Planning

Municipal utility operations in coastal areas are susceptible to disruption from sea level rise as flooding and saltwater intrusion can affect water quality as well as the ability of utilities to treat sewerage, generate power, and dispose of solid waste. Long-term municipal planning efforts are becoming increasingly focused on protecting public facilities and private property near coastlines and in flood plains. Four counties in south Florida — one of the most vulnerable and highly populated regions in the U.S. facing imminent sea level rise — Miami-Dade, Broward, Palm Beach, and Monroe counties have joined together to form the Southeast Florida Regional Climate Change Compact Counties to create an action plan to address the effects of climate change. Sea level rise was one factor in Miami-Dade Water and Sewer Department's decision to spend an additional \$800 million to build a new wastewater treatment plant and expand an existing plant in order to minimize flows to treatment plants situated along the coast. The following map depicts relative sea level variations in the U.S. from 1854 to 2006.

Sea-Level Rise Adaptation Financing at the Local Level in Florida¹

Thomas Ruppert, Esq.² and Alex Stewart³

September 2015

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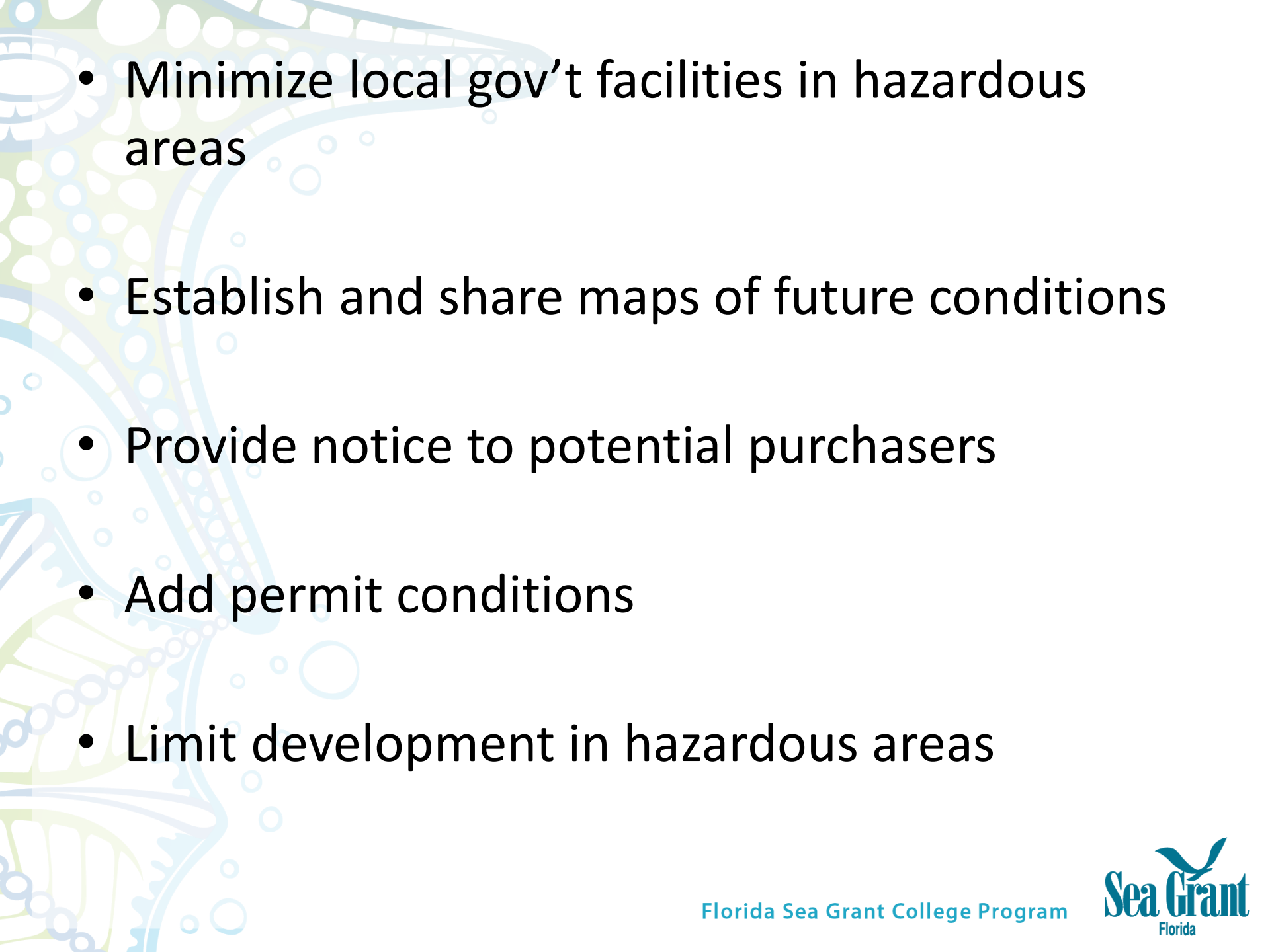
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Diminishing Potential Local Government Liability

Florida Sea Grant College Program



- 
- Minimize local gov't facilities in hazardous areas
 - Establish and share maps of future conditions
 - Provide notice to potential purchasers
 - Add permit conditions
 - Limit development in hazardous areas

Keep your own facilities out of harm's way

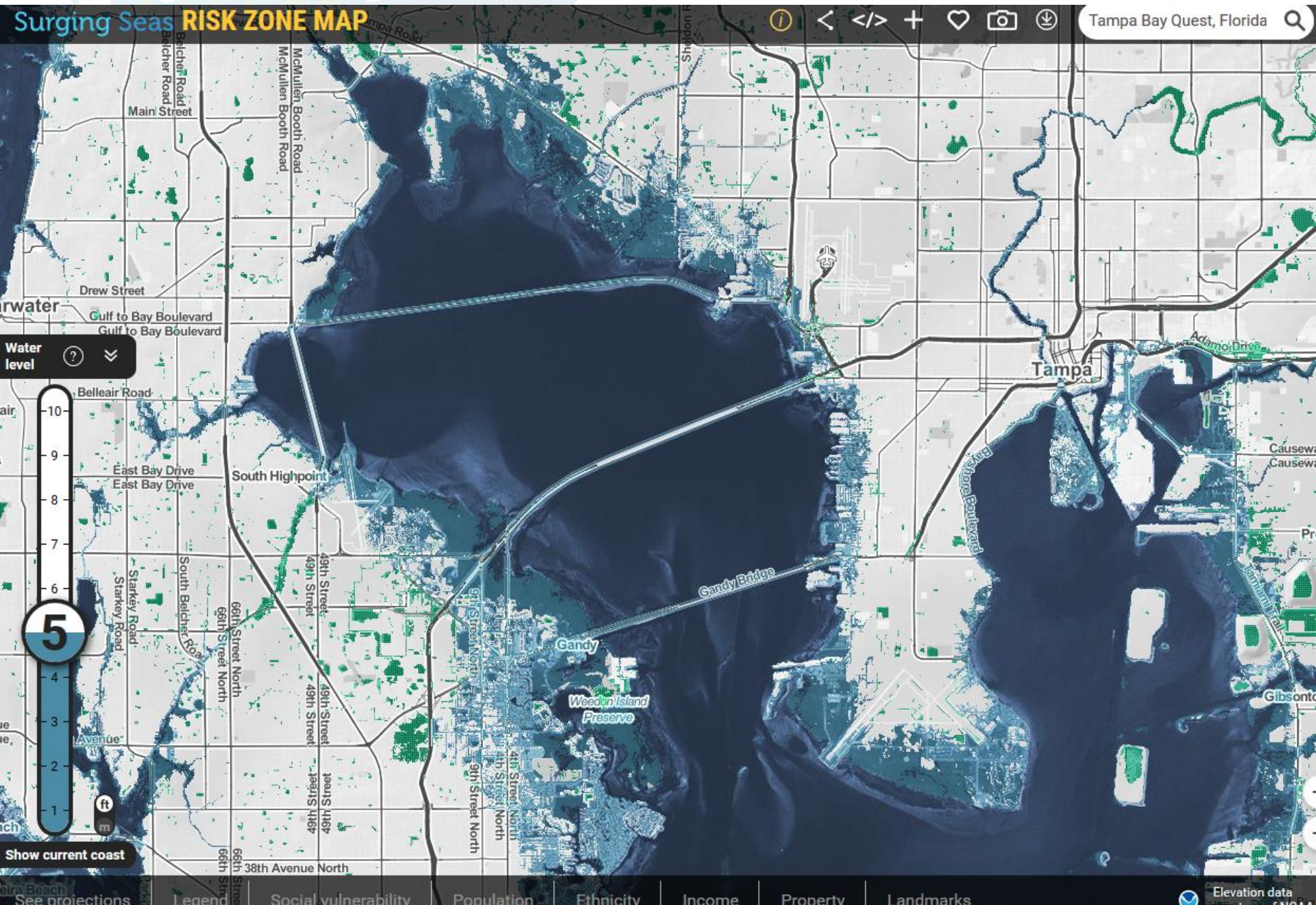


Miami-Dade Example:

Resolution setting policy for Miami-Dade County; directing the Mayor to require all County infrastructure projects to consider potential impacts of sea level rise during all project phases

Resolution No. R-451-14

Providing Information



• Florida Statute §161.57

“The Legislature finds that it is necessary to ensure that the purchasers of interests in real property located in coastal areas partially or totally seaward of the coastal construction control line as defined in s. 161.053 are fully apprised of the character of the regulation of the real property in such coastal areas and, in particular, that such lands are subject to frequent and severe fluctuations.”

Florida's Coastal Hazards Disclosure Law:
Property Owner Perceptions of the Physical and
Regulatory Environment



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JULY 2012

UF Levin College of Law
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REASONABLE INVESTMENT-BACKED EXPECTATIONS: SHOULD NOTICE OF RISING SEAS LEAD TO FALLING EXPECTATIONS FOR COASTAL PROPERTY PURCHASERS?

THOMAS RUPPERT*

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Florida's Coastal Hazards Disclosure Law: Property Owner Perceptions of the Physical and Regulatory Environment

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California Coastal Com'n Permits

SPECIAL CONDITIONS

Assumption of Risk, Waiver of Liability and Indemnity

By acceptance of this permit, the applicant acknowledges and agrees (i) that the site may be subject to hazards from bluff and slope instability, erosion, landslides, waves, and sea level rise; (ii) to assume the risks to the applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

Potential Legal Import of Notice

- *Penn Central's* 3-part analysis
- “Reasonable investment-backed expectations”
- How might notice affect expectations????
- “Acknowledgement” not a problem
- Questionable: waiver/release, assumption of the risk, hold harmless



KATRINA HIGH WATER 2005

Bay St. Louis officials oppose Hurricane Katrina high-water markers on highway

Published: Saturday, July 23, 2011, 9:00 PM



By **The Associated Press**

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Bay St. Louis, Miss., officials want **high-water markers** placed by the state at Mississippi Highway 603 and Interstate 10 camouflaged so they no longer commemorate the tragedies of **Hurricane Katrina** in 2005.



The **Sea Coast Echo** reports there are two high-water markers at the intersection, one facing north and the other facing south on Mississippi 603. They were placed there following Katrina to commemorate the area's comeback from the killer storm. In Katrina, water ran up the roadway so



Prevent Hazard-Prone Development

- “. . . [I]t is the intent of the Legislature that local government comprehensive plans . . . protect human life and limit public expenditures in areas that are subject to destruction by natural disaster.
 - Fla. Stat. § 163.3178(1)(2014).
- “A redevelopment component which outlines the principles which shall be used to eliminate inappropriate and unsafe development in the coastal areas when opportunities arise.”
 - Fla. Stat. § 163.3178(2)(f)(2014).

Parting Thoughts

- Legal landscape, like the coast line, seems stable on most days, but in reality is always evolving
- Past focus on liability for seeking to mitigate hazards through land use regulation should not be the exclusive consideration
- Need to consider potential liabilities for when construction is allowed

“[A] foolish man . . . built his house on sand. The rain came down, the streams rose, and the winds blew and beat against that house, and it fell with a great crash.”

Matthew 7: 26-27

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