

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

Thomas Ruppert
Coastal Planning Specialist



The Big Players for Us in the Legal Realm

- Takings law
- Tort law
- Sovereign immunity

of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, and secure the Blessings of Liberty to ourselves and to the United States of America.

Article. I

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 the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

“T. L. C.”

"Takings" in the U.S. Constitution

not exceed three fifths of all other Slaves. The actual Emancipation 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 determine. The number of Representatives shall not exceed one for every fifty thousand, but each State shall have at least one Representative; and until such emancipation 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 ten, New Jersey five, Pennsylvania six, Delaware one, Maryland six, Virginia ten, North Carolina six, South Carolina six, and Georgia three.

Where vacancies happen in the Representation from any of the said Counties, the House of Representatives shall fill such Vacancies.

Article 3. The Senate of the United States shall be composed of two Senators from each State chosen by the Legislature thereof for six years, and each

"nor shall private property be taken for

public use, without just compensation."

No Slave shall be admitted who shall not have attained to the Age of 21 Years, and been once granted a Pardon by the Council, and not when admitted, be a Slaveholder of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, shall have no vote, only a tie, and shall be elected in the same manner.

The Senate shall choose their own officers, and shall elect a President pro tempore, in the absence of the President of the United States.

This should have the word Power to try with say passed over. When sitting for that I agree they shall be on their feet or by motion. When the same

Coastal Hazards Summit

February 13-14, 2013

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



Do all roads lead to a “taking”?

Michigan Law Review

Volume 113 | Issue 3

2014

Passive Takings: The State's Affirmative Duty to Protect Property

Christopher Serkin

Vanderbilt Law School, chris.serkin@vanderbilt.edu

Inaction as Taking

- Action vs. inaction
 - Negative vs. positive rights
- “Passive takings should arise when property is subject to such regulatory control that the government is understood to be responsible for the resulting harm, whether it acts or not. Or, to put it in affirmative terms, the government should have a constitutional duty to act when it is complicit in creating the conditions that are responsible for harm to property.”
- What is missing from this????

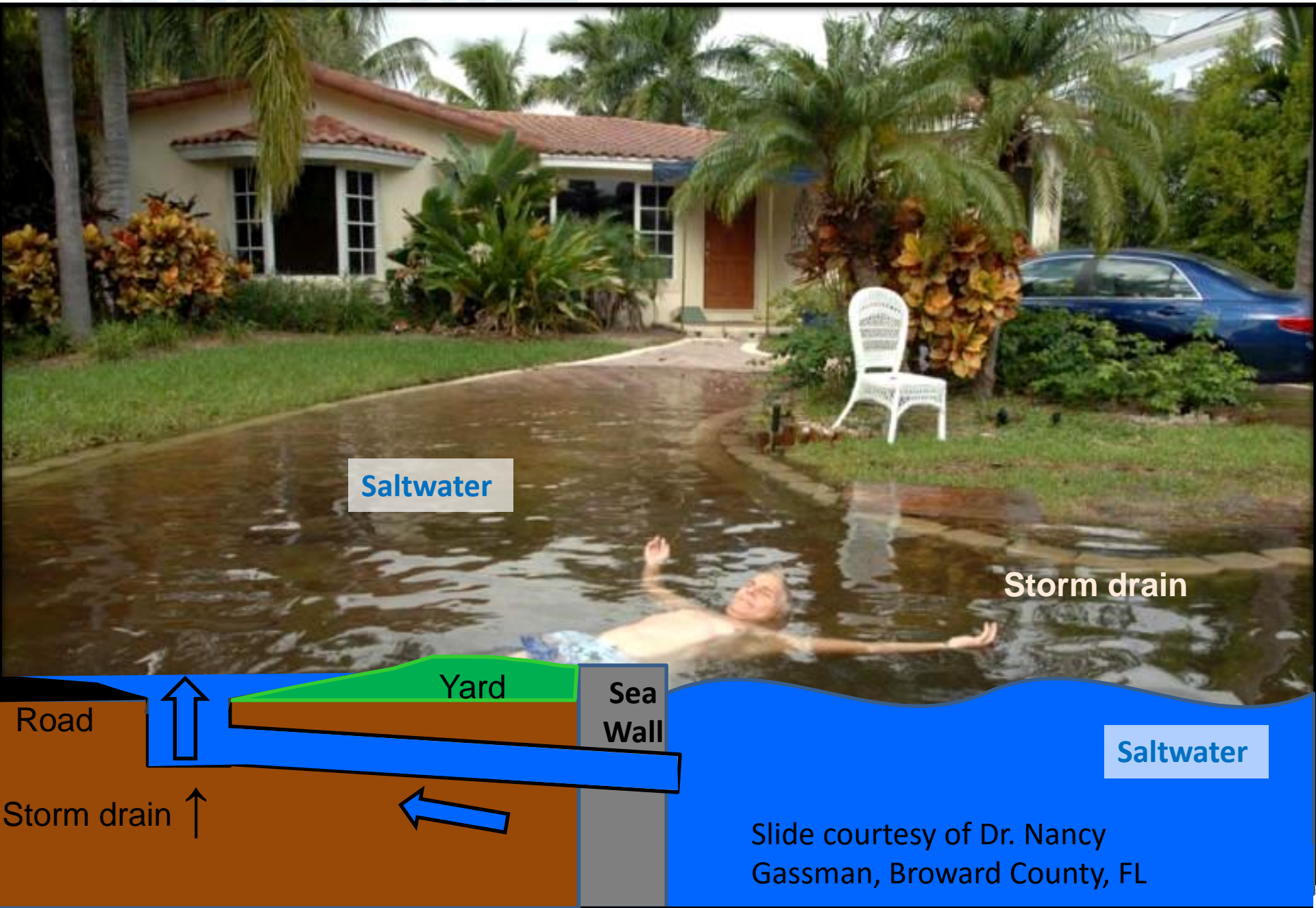


SLR, Drainage, and Local Governments

Drainage Under Average Tidal Conditions



Drainage Challenge with Sea Level Rise



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

The Florida Bar Journal

[Advertising Rates](#) • [Submission Guidelines](#) • [Archives](#) • [Subscribe](#) • [News](#)

November, 2013 Volume 87, No. 9

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

Contents

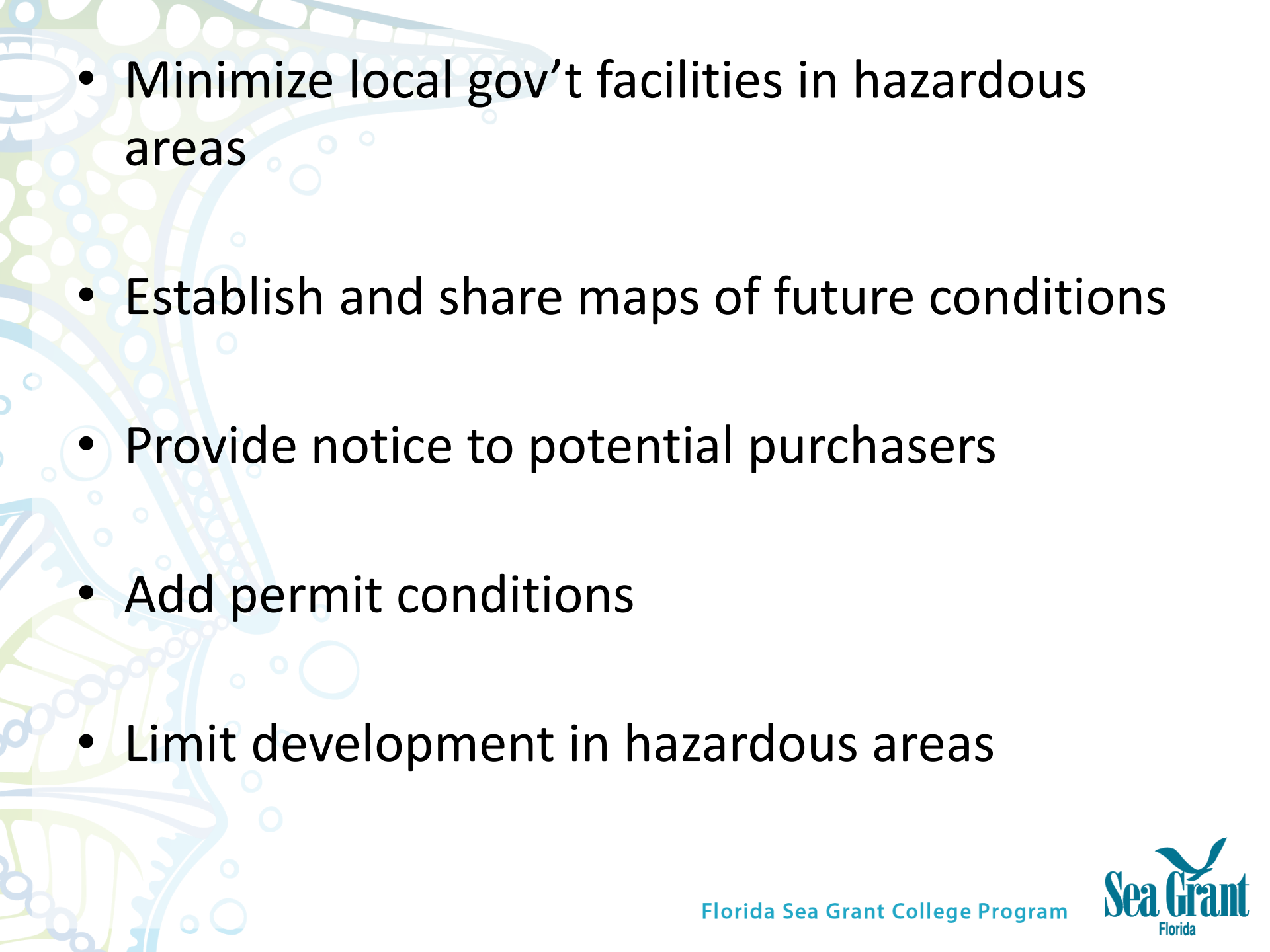
I.	Introduction	2
II.	Ad Valorem Taxes and Municipal Service Taxing Units	4
A.	Authority	4
B.	Potential Legal Issues/ Legal Challenges	5
C.	Strengths and Weaknesses	5
D.	Summary of Appropriateness for Use in SLR Adaptations	6
III.	Special Assessments and Municipal Service Benefit Units (MSBU)	6
A.	Authority	6



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

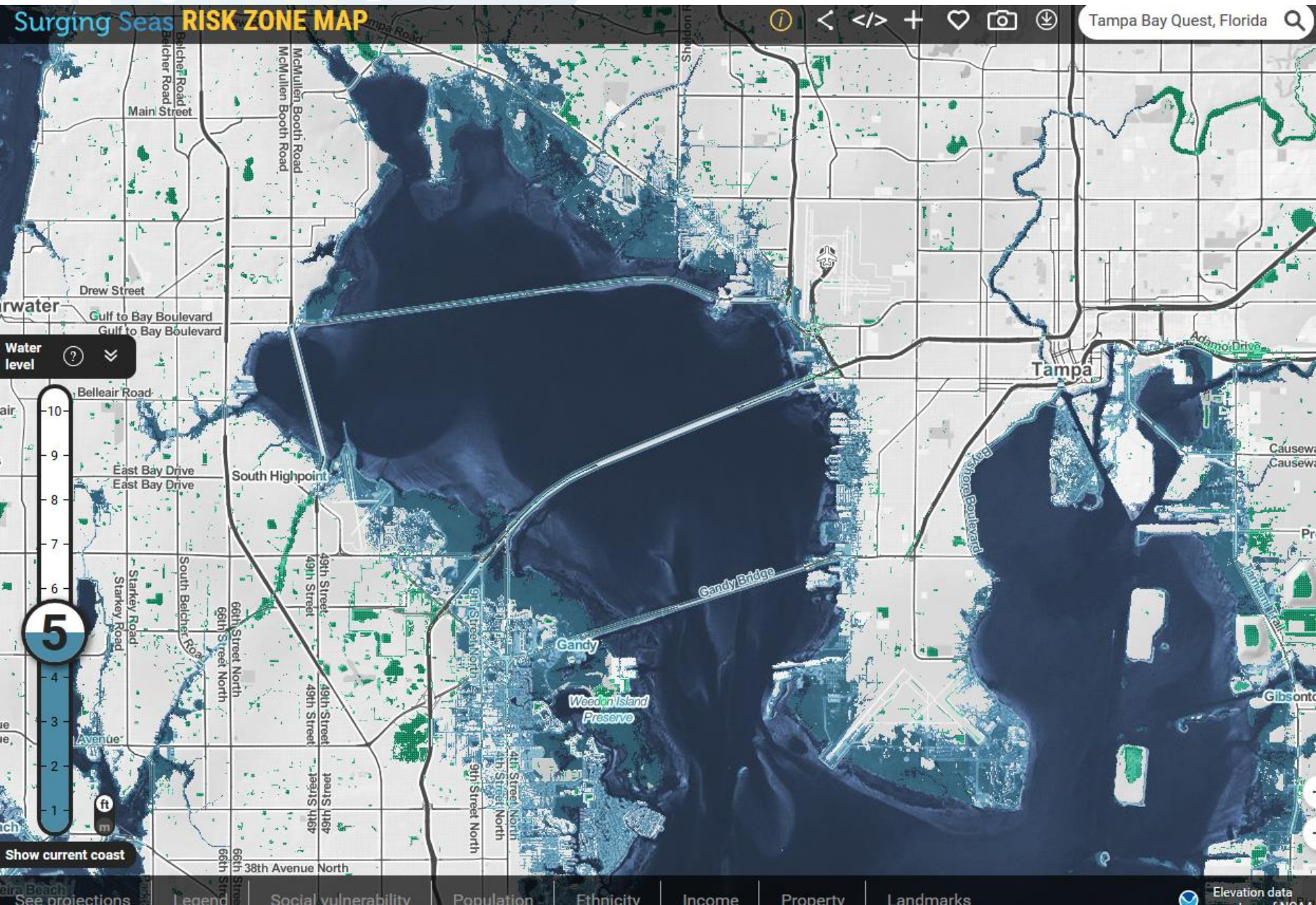


Miami-Dade Example:

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



KEVIN WOZNIAK
GARIN DAVIDSON
TOM ANKERSEN

JULY 2012

UF Levin College of Law
Conservation Clinic
UNIVERSITY of FLORIDA

Sea Grant
Florida

Southeast
Climate Consortium

Florida
Climate Institute



TP-194

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

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.

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 coastal scene featuring a large, weathered concrete structure in the foreground, possibly a remnant of a building or a breakwater. The structure has a circular opening and is surrounded by dry vegetation and rocks. In the background, a rocky shoreline meets the ocean under a clear blue sky. A lifeguard stand is visible on the right side of the image.

“[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

Thomas Ruppert
Coastal Planning Specialist
Florida Sea Grant College Program
TRUPPERT@UFL.EDU
www.flseagrant.org/coastalplanning