

Coordinating Adaptation Response through Comprehensive Plans and Codes (+Regulation and Litigation)

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RESILIENCY-RELATED STATE LAW AND POLICY



Photo: Erin Deady



Photo: Erin Deady

FLORIDA POLICY ON GHG REDUCTIONS AND CLIMATE

- ▶ EO 07-127: Reduction of emissions to 2000 levels by 2017, to 1990 levels by 2025, and by 80% of 1990 levels by 2050 & California vehicle emission standards reductions (22% by 2012 and 30% by 2016).
- ▶ Building Efficiencies/Energy Code, Chapter 553, F.S. increasing standards
- ▶ HB 7123: Model Green Building Code (2007)
- ▶ HB 697 (GHG reduction strategies in local government's Comprehensive Plan). Some requirements later eliminated.
- ▶ HB 7135 (State and Local Government Buildings "greener")
- ▶ HB 7179 (PACE)- financing wind resistance/energy efficiency initiatives
- ▶ [Adaptation Action Areas \(2011\)](#)
- ▶ HB 7117 (Energy Bill- 2012)- increase solar output
- ▶ 2015- 5 Bills Passing Related to flood insurance, wind insurance, construction standards/building codes, Citizen's insurance, [Peril of Flood \(SB 1094\)](#)
- ▶ 2016- Solar Constitutional Amendments
- ▶ 2017- SB 90 on solar disclosures and Amendment 4 Implementation & Natural Hazards coordination
- ▶ 2020- [Section 161.551, F.S. Sea Level Impact Projection Studies for state-funded projects](#)
- ▶ 2021- [Section 380.093, F.S. Resilient Florida program](#)

DEFINITIONS/AUTHORITY FOR AAA

Definition: “Adaptation action area” or “adaptation area” means a designation in the coastal management element of a local government’s comprehensive plan which identifies one or more areas that experience coastal flooding due to extreme high tides and storm surge, and that are vulnerable to the related impacts of rising sea levels for the **purpose of prioritizing funding for infrastructure needs and adaptation planning**. S. 163.3164(1), F.S.

Authority: At the option of the local government, develop an adaptation action area designation for those low-lying coastal zones that are experiencing coastal flooding due to extreme high tides and storm surge and are vulnerable to the impacts of rising sea level. Local governments that adopt an adaptation action area may consider policies within the coastal management element to improve resilience to coastal flooding resulting from high-tide events, storm surge, flash floods, stormwater runoff, and related impacts of sea-level rise. Criteria for the adaptation action area may include, but need not be limited to, areas for which the land elevations are below, at, or near mean higher high water, which have a hydrologic connection to coastal waters, or which are designated as evacuation zones for storm surge. S. 163.3177(6)(g)(10), F.S.

A CASE STUDY: AAA APPROACH & MAPS

3 Types of AAAs:

1. **Infrastructure/Assets AAA**- Example Policies to address structures, assets & facilities
2. **Residential Neighborhood AAA**- Example Policies to address private development
3. **Natural Resources AAA**- Example Policies to address habitat/shoreline

Review results of the vulnerability assessment for the year 2040 and determine the scope of the sea level rise impacts (based on NOAA Intermediate High 17” or other projection) for that particular type of AAA. Those results and analysis will provide the **basis** for the mapping component of the example AAAs. Key team discussions have included the following basic goals for the AAA map series:

1. Residents should be able to look at the maps and **easily determine** if they are within or outside of that particular AAA.
2. Lines should generally follow streets or other easily **understandable “markers”**. For instance, a demarcation of everything NOAA Intermediate High by 2040 (17”) serves as the basis for an AAA, but the actual “line” where that inundation falls based on tidal conditions and land elevation may have to be altered so it does not cut across someone’s property where a portion of the property is in and also out of the AAA at the same time.
3. For infrastructure/assets: Generalized **land area and specific structures** can be identified within an AAA.
4. A **manageable number of AAAs and maps** at a scale to see impacts.

EXAMPLE MONROE COUNTY AAA APPROACH & MAPS

Objective 1.0 - The County shall improve resiliency and address vulnerabilities through the establishment of Adaptation Action Areas (AAA), or a similar geographic concept as defined by the County, to identify areas within the County that experience coastal flooding, storm surge and sea level rise and use the AAAs to provide targeted strategies improving resilience, reducing risks, prioritizing funding, creating adaptation planning standards and sharing information.

Type of AAA	Number of AAAs	Information
<i>Infrastructure and Assets</i>	7	Includes roads, utility facilities, government and institutional buildings & impacted Heritage Trail
<i>Residential Neighborhoods</i>	15	Number of lots by type: Residential: 5167 Vacant: 2361 Commercial: 84 Government: 12 Utilities: 6
<i>Natural Resource</i>	10	Acres of Land that are not Tier 1 (environmentally sensitive land) in Natural Resource AAA: Tier 1: 12156.408 Acres Tier 2, Tier 3, or Tier 3A: 544.875 Acres No Tier - Military Designation: 2067.310 Acres (This is on the naval air station island near Key West)

CASE STUDY FOR AAAs- Supporting Maps

Residential Neighborhood Adaptation Action Areas
R2111 Resiliency Planning Grant
Monroe County, Florida

Projection: NOAA Intermediate High
Year: 2040
Water Rise (Inches): 17
Scenario: MHHW
Page: 2 of 16

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PROJECT PARTNERS

Environmental & Technical Systems
344 S. Woodland Blvd.
DeLand, Florida 32720
(386) 937-2314
www.clearviewgeographic.com

Adaptation Action Areas (Residential Neighborhood)

Mile Marker

Natural Area Adaptation Action Areas
R2111 Resiliency Planning Grant
Monroe County, Florida

Projection: NOAA Intermediate High
Year: 2040
Water Rise (Inches): 17
Scenario: MHHW
Page: 5 of 11

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PROJECT PARTNERS

Environmental & Technical Systems
344 S. Woodland Blvd.
DeLand, Florida 32720
(386) 937-2314
www.clearviewgeographic.com

Adaptation Action Areas (Natural Areas)

Non-Tier I Overlay Districts

Threatened and Endangered Species Focus Areas

Infrastructure and Assets Adaptation Action Areas
R2111 Resiliency Planning Grant
Monroe County, Florida

Projection: NOAA Intermediate High
Year: 2040
Water Rise (Inches): 17
Scenario: MHHW
Page: 2 of 8

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Adaptation Action Area (Public Infrastructure)

Trench Drains

Catch Basins

Impacted Catch Basins

Roadways

Impacted Roadways

Facilities

Mile Marker

Public Land Owner

County

Estimated Water Depth (ft)

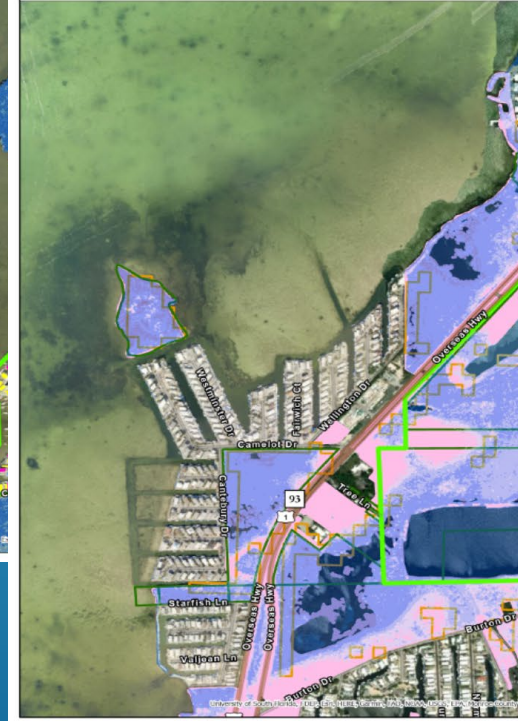
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0.5 - 1

1 - 2

2 - 3

3+



PERIL OF FLOOD LEGISLATION

Section 163.3178(2)(f), F.S.: A redevelopment component that outlines the principles that must be used to eliminate inappropriate and unsafe development in the coastal areas when opportunities arise. The component must:

- ▶ 1. Include development and redevelopment principles, strategies, and engineering solutions that reduce the flood risk in coastal areas which results from high-tide events, storm surge, flash floods, stormwater runoff, and the related impacts of sea-level rise.
- ▶ 2. Encourage the use of best practices development and redevelopment principles, strategies, and engineering solutions that will result in the removal of coastal real property from flood zone designations established by the Federal Emergency Management Agency.
- ▶ 3. Identify site development techniques and best practices that may reduce losses due to flooding and claims made under flood insurance policies issued in this state.
- ▶ 4. Be consistent with, or more stringent than, the flood-resistant construction requirements in the Florida Building Code and applicable flood plain management regulations set forth in 44 C.F.R. part 60.
- ▶ 5. Require that any construction activities seaward of the coastal construction control lines established pursuant to s. 161.053 be consistent with chapter 161.
- ▶ 6. Encourage local governments to participate in the National Flood Insurance Program Community Rating System administered by the Federal Emergency Management Agency to achieve flood insurance premium discounts for their residents.

PERIL OF FLOOD, SLIP AND RESILIENT FLORIDA

- ▶ Approximately 50% of local governments have completed Peril of Flood amendments (for those that have a Coastal Element)
- ▶ Previous DEP grant program (RPGs) prioritized Peril of Flood compliance as a funding area
- ▶ Section 380.093, F.S.: (3) Subject to appropriation, the department may provide grants to a county or municipality to fund the costs of community resilience planning and necessary data collection for such planning, including comprehensive plan amendments and necessary corresponding analyses that address the requirements of s. 163.3178(2)(f)...
- ▶ (3)(d) (d) A vulnerability assessment conducted pursuant to paragraph (b) must include all of the following, **if applicable**: 1. Peril of flood comprehensive plan amendments that address the requirements of s. 163.3178(2)(f), if the county or municipality is subject to such requirements and has not complied with such requirements as determined by the Department of Economic Opportunity.
- ▶ Can SLIP studies be a useful tool beyond just compliance with Section 161.551, F.S. for use by local governments to help inform infrastructure design in Codes? Yes.

OTHER REGULATORY & POLICY ISSUES FOR ROADS

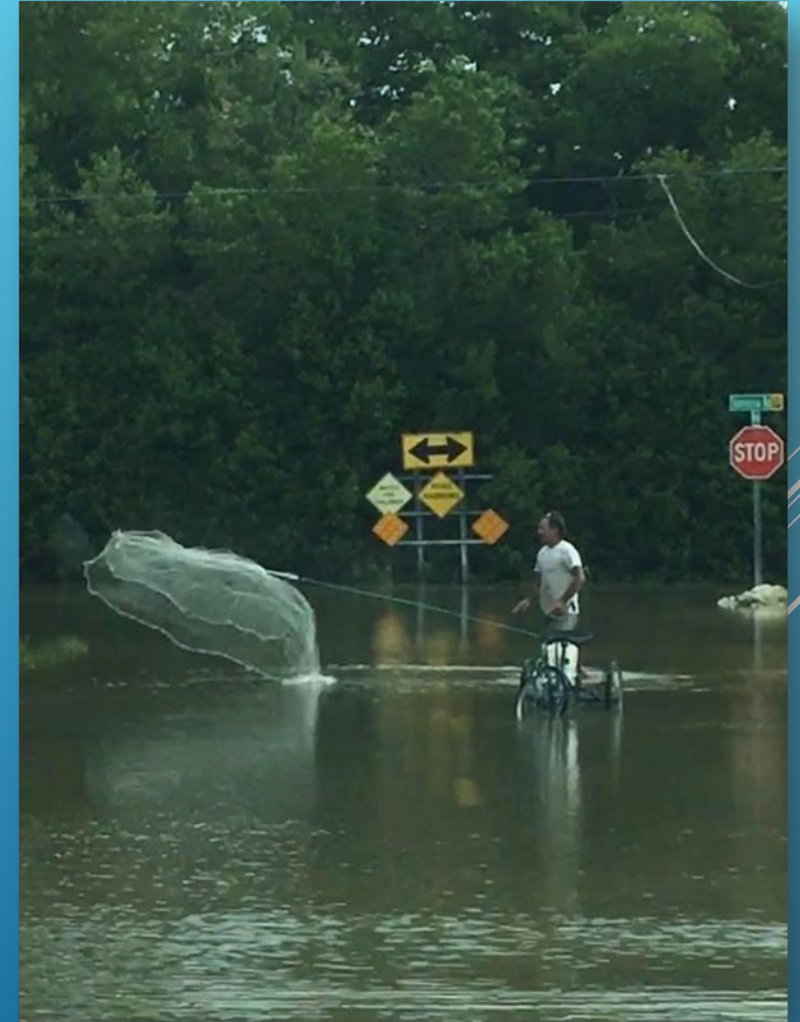
Scope	Entity	Issues
Road abandonment	Section 336.09 and 336.125, F.S.	Is local procedure in Code same as statutory requirements or does it require more?
Greenbook Standards	<i>FDOT- Section 336.045, F.S.</i>	Minimum standards for design, construction, and maintenance of roads , which are published in the “Manual of Uniform Minimum Standards for Design, Construction, and Maintenance for Streets and Highways”. The Greenbook is intended for all projects not on the state and national highway systems (+ design exceptions).
Road/Drainage permitting	<i>WMD- ERP Criteria</i>	WMD does not DIRECTLY regulate sea level rise in design , but applicant may need to respond to functionality questions during permitting process (can address quality and management of quantity).

OTHER REGULATORY & POLICY ISSUES FOR ROADS

Scope	Entity	Issues
Stormwater criteria	DEP/WMDs	Current rulemaking to strengthen quality component of ERP program which hasn't been updated in decades. Climate and sea level rise issues likely a discussion. Quantity = quality.
State delegation of 404	Corps to State	Still playing out and not likely to be a factor unless wetlands mitigation is involved.
SLIP	DEP	Sea Level Impact Projection (SLIP) rulemaking ongoing to require sea level analysis for projects receiving ANY state funds . Local government use of tool (for design standards in Code?)

WHAT DOES EXISTING VOLUNTARY REAL ESTATE DISCLOSURE COVER FOR FLOODING?

3. Water Intrusion; Drainage; Flooding:
 - (a) Has past or present **water intrusion** affected the Property? Yes No Unknown
 - (b) Have past or present **drainage or flooding problems** affected the **Property**? Yes No Unknown
 - (c) Is any of the Property located in a **special flood hazard area**? Yes No Unknown
 - (d) Is any of the Property located **seaward of the coastal construction control line**? Yes No Unknown
 - (e) Does your lender require **flood insurance**? Yes No Unknown
 - (f) Do you have an **elevation certificate**? If yes, please attach a copy. Yes No Unknown
 - (g) If any answer to questions 3(a) - 3(d) is yes, please explain: _____



Kristen Key Szpak, 10/19/20

REAL ESTATE DISCLOSURE LAWS FOR FLOODING

- ▶ No Florida statutes or regulations generally requiring a real estate seller to disclose information about property to a prospective buyer on a specified form were located. “No statutes or regulations address flood related disclosures”. National Association of Realtors, 2019 “State Flood Hazard Disclosures Survey”
- ▶ *Johnson v. Davis*, 480 So.2d 625, 629 (Fla.1985) ...where the seller ...knows the facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer”. This duty of disclosure extends to latent flooding problems. *Young v. Johnson*, 538 So. 2d 1387 (Fla. 2d Dist. Ct. App. 1989).
- ▶ *Nelson v. Wiggs*, 699 So. 2d 258, 259 (Fla. 3d DCA 1997), Florida homebuyers sought rescission of their home purchase after the seller failed to disclose that the property had a flooding problem. Court found that a buyer is required to “take reasonable steps to ascertain the material facts relating to the property and to discover them” and held that effects of seasonal flooding are considered “readily observable” by a buyer, and, therefore, do not need to be disclosed.
- ▶ Enhanced disclosure example: **Leon County Code of Laws**, Section 12-8(b)--
 - ▶ ... unlawful for a seller or landlord of residential property, with knowledge that such property has experienced flooding or is otherwise floodprone, to fail to disclose such facts in writing ... when such flood conditions are not readily observable and are not known ...the failure ... to provide such disclosure in advance of entering into either a purchase and sale ... or written lease agreement ... shall create a rebuttable presumption that the seller or landlord has failed to disclose facts that materially affect the value of such property ... and can recover from the seller...”
- ▶ Real estate disclosure requirements in local codes can be a powerful tool to help improve resiliency efforts in flood risk disclosures generally and in shoreline policy (example, Broward County seawall disclosure in Ordinance)

OTHER EVOLVING LAWS & REGULATIONS

Infrastructure design, example: Broward County Groundwater conditions / Ordinance No. 2017-16

“...it is no longer prudent to rely solely upon historic and current environmental conditions as the basis for infrastructure planning, design, and permitting...”

Freeboard

Section 553.73(5), F.S. was amended in 2010 to allow communities to adopt local administrative amendments to implement the flood provisions of the FBC and local technical amendments to adopt flood provisions that are more stringent than the FBC (also called “higher standards”)

Confluence of water quality and stormwater design?

In 2020, the Florida Legislature passed Senate Bill 712, also known as the Clean Waterways Act, now Chapter 2020-150, Laws of Florida and directed DEP and WMDs to update stormwater design and operation regulations under Part IV, Chapter 373, Florida Statutes (F.S.), using the latest scientific information.



Photo: Robert Lawton

SEAWALL REGULATIONS (ONLY TWO EXAMPLES)

City of Miami	Broward County
6' NAVD and 8' NAVD SLR by 2070	Prior to 1/1/2035 = 4' but must accommodate 5' by 1/1/2050
Substantial Repairs can trigger compliance; 50% length, repairs > 50% cost of new seawall or BH or elev. change > than 50% length	Substantial Repairs can trigger compliance; > 50% length or appurt. structure > 50% value
Defines disrepair	Defines disrepair
Specifies materials; Promote living shorelines	Promote enhancing habitat
POs are prohibited from tidal water entering property to flow to adjacent properties or public ROW	POs are prohibited from tidal water entering property to flow to adjacent properties or public ROW (trespass of water = public nuisance)
Code enforcement + initiate abatement w/in 180 days and begin repairs w/in 265 days; complete in 18 months	Failure to maintain = violation; progress within 60 days and complete w/in 265
	Allows automatically elevated structure not dependent on human intervention
	<u>Disclosure on tidally influence area and meeting min. barrier elevation stds.</u>



FUNDING STRATEGIES FOR RESILIENCY

Taxes

Direct taxes (i.e., property taxes) and indirect taxes (i.e., sales taxes and use taxes) levied for lawful public purpose. Local discretionary sales surtaxes ie; **infrastructure + resiliency?**

Assessments/Special Districts

Charge against property receiving 1) special benefit and 2) fairly apportioned. Authorized by specific statutes or home rule authority.

Bonding

General Obligation (full faith and credit of an issuer with taxing power) and Revenue (payable with specific sources of revenue ie; utilities).

Impact Fees or TIF

Fees for the impact of new development (link between additional facilities and growth. "Tax increment": the difference between the assessed value of the property before and after the redevelopment project.

User Fees

Payments for voluntarily purchased services which benefit the specific individual to the exclusion of non-feepayers such as **stormwater utility**.

Grants

New trends include: **disaster recovery** funds for resiliency and infrastructure; traditional uses to address stormwater, septic and water quality; moving from planning to implementation.

MIAMI BCH STORMWATER ASSESSMENT (SETAI V. MB)

- ▶ Plaintiffs seek restitution for stormwater utility payments
- ▶ Challenges stormwater utility fee:
 - ▶ 1. Declaratory judgment that City's stormwater fee is invalid (disproportionate impacts in fee calculation)
 - ▶ 2. Restitution for illegally assessed tax
 - ▶ 3. Breach of contract
- ▶ City filed MTD denied 3/2020
- ▶ Plaintiffs filed two amended complaints and case is still in discovery

Issue	Argument
Invalid fee-method of calculation for ERU disproportionately impacts commercial and multi-family property owners.	Section 403.031 (17), F.S. requires stormwater fees be charged based on relative contribution to the need for stormwater system. Different rates okay but can't be arbitrary or unreasonable. Using data about residential impervious surface area to calculate fees and lumping property types together (resi & comm) does not reflect commercial property contribution and must be invalidated (reliance on: City of Gainesville v. State, 63 So. 2d 138 (2003)).
Restitution	Local government must refund illegally assessed tax so long as it was not paid voluntarily (reliance on: City of Key W., 81 So. 3d 494, 500 (Fla. 3d DCA 2012)).
Breach of contract	Plaintiffs are City utility customers and receive services on the basis of contracts which were materially breached by City with imposition of improper fee (reliance on S. 403.031 (17), F.S.).

KEY BISCAYNE BOND CHALLENGE (TELLEZ V. VILL OF KB)

- ▶ Tellez seeks to nullify \$100 bond for the **purpose** of “financing costs of improvements relating to mitigating the effects of sea level rise and flooding, protecting the Village’s beaches and shoreline and hardening infrastructure to the effects of hurricanes”
- ▶ Challenges referendum (on primarily procedural grounds):
 - ▶ 1. Village improperly borrowed more without an ordinance
 - ▶ 2. Voters asked “for” or “against” the bonds v. “yes” or “no”
 - ▶ 3. Ballot language confusing and the Village Reso approving Referendum did not contain the projects articulated on Village website

Issue	Disposition
Ordinance	Village hasn't borrowed any money yet. When it does, it needs to pass an ordinance (Section 4.03(b) of Village Charter).
For/against v. yes/no	Voters must be “afforded an opportunity to express themselves fairly”- here yes. <i>State v. Special Tax Sch. Dist. No. 1 of Dade Cty.</i> , 86 So. 2d 419, 419 (Fla. 1956).
Confusing language	Court says no: language clear (see purpose above) and plaintiff failed to meet clearly and conclusively defective language standard. <i>Metro Dade Cty. V. Shiver</i> , 365 So. 2d 210, 213 (Fla. 3d DCA 1978).

SOME OF THE BIG LEGAL AND POLICY ISSUES

- ▶ Overview of some of the big takings issues:
 - ▶ Liability for takings for failure to maintain with reasonable care (St. Johns County)
 - ▶ Nuisance for seawall induced flooding
 - ▶ Takings of dock structures in relation to seawall modification
 - ▶ Takings determinations factoring in benefits of “adaptation” (*Borough of Havey Cedars v. Karan*, 214 N.J. 384 (2013)).
- ▶ Levels of service/torts:
 - ▶ Duty to maintain v. upgrade infrastructure: what is “maintenance” with continued tidal inundation?
 - ▶ Apportioning costs: who pays for what level of service when everyone is not receiving the same?

Lawsuit filed over 'critically unsafe' road to Alligator Point

Jeff Burlew, Tallahassee Democrat | Published 4:22 p.m. ET April 10, 2019 | Updated 10:35 p.m. ET April 11, 2019

LOCAL NEWS

Seawall projects swallow up homeowners' docks as cities battle rising seas

By SUSANNAH BRYAN and BROOKE BAITINGER
SOUTH FLORIDA SUN SENTINEL | OCT 04, 2019 | 1:10 PM



SLR & ROADS/FLOODING TORTS, TAKINGS, DISCLOSURES AND POLICIES



Photo: Erin Deady



Photo: Erin Deady

STATE OF SLR-RELATED CASE LAW

- ▶ There is currently **no case law** in the State of Florida that directly addresses government liability when flooding damages private property as a result of sea level rise.
- ▶ However, there is existing, helpful case law regarding the **construction and maintenance of infrastructure projects**, such as roads and drainage, which can provide some assistance in determining what responsibility a government entity (GE) has for managing flooding in general.
- ▶ A GE has a **responsibility to maintain the infrastructure and assets it owns, builds, and maintains**, but there is some **uncertainty** about what that responsibility may be in response to **a condition it does not control – sea level rise and the government has not “acted” to create.**



CAUSES OF ACTION: TORTS V. TAKINGS

Torts:

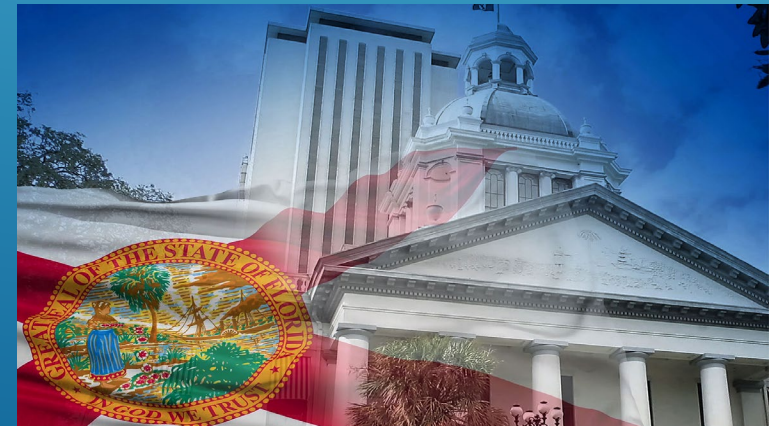
- ▶ It depends on whether the **injury** was caused by operational- or planning-level conduct **on the part of the GE**.
- ▶ GEs can be liable to property owners where there is a **breach of duty** in the course of executing adopted policy (**operational**-level conduct), but Florida courts typically do not tread into the purview of a GE's discretion to engage in legislative or executive functions (**planning**-level conduct).

Takings:

- ▶ If a GE experiences **a benefit from the use of private land at the expense of a protected property interest** that is **infringed** upon or damaged due to a GE's actions, a taking may arise.
- ▶ Takings inquiries are heavily fact-specific, but where a GE project **diverts traditional floodwaters onto private property** such that an **involuntary servitude** arises, a finding of inverse condemnation is likely.

FORECASTS AND PREDICTIONS OF LEGAL AND POLICY ISSUES

- ▶ Will Champlain Towers be an issue of Condo Association reform (procedural) or will there be other related issues (like flooding, disclosures, location, risk?)
- ▶ State is getting more active in planning, funding, legislation and leadership (ie; roll out of Resilient Florida)
- ▶ Pressure to **legislate**:
 - ▶ Solutions, funding sources
 - ▶ More comprehensive flood disclosures (Bi-partisan)?
- ▶ Local government response:
 - ▶ Planning and changing regulations
 - ▶ More mapping of risk and SLR available
 - ▶ Funding capital improvements is likely to require debt financing / special assessments, etc.
- ▶ Presidential / congressional politics (ie; Earmarks this year)
- ▶ Flood insurance reform
- ▶ Litigation:
 - ▶ Among property owners individually on flooding and its source
 - ▶ More takings litigation in terms of impacts on private properties and/or against government to compel or prevent actions
 - ▶ Against realtors by aggrieved property owners
- ▶ “**Expertise and tools**” to determine risk causes and solutions





THANK YOU

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