

October's Featured Article

Sea Level Rise Legal and Policy Issues for Local Governments

**Richard Grosso, Esq., Professor of Law, Shepard Broad College of Law
Nova Southeastern University**

Our Annual Conference last month had many engaging and interesting speakers, including Richard Grosso, Director of the Environmental & Land Use Law Clinic & Professor of Law at the Shepard Broad College of Law at Nova Southeastern University, who presented on legal and policy issues for local governments relating to Sea Level Rise. We received many compliments about Professor Grosso's discussion and later asked him to convert his presentation into an article for all of our readers. Richard has an extensive resume, having served as the Executive Director and General Counsel of the Everglades Law Center, Inc; the Legal Director for 1000 Friends of Florida; and as an attorney for Florida's land use and environmental agencies. He has 30 years of experience as a practicing lawyer and policy advocate and has successfully litigated several of the most important and precedential land use, environment and property rights legal cases protecting Florida's environment. The article does not reflect a formal position of FSBPA, but we are most appreciative of Richard's contributions to our conference and the October edition of Shoreline. Thank you!

[Click here for the article.](#)

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**2017 Tech Conference
Abstract Deadline
extended until
October 17, 2016**

For complete details, visit
www.fsbpa.com/tech-conference.html

THANK YOU FOR JOINING US! FSBPA'S 59th ANNUAL CONFERENCE

A big thank you to the attendees, speakers, exhibitors and sponsors who joined us for the 2016 Annual Conference, September 14-16 in Naples. We hope you had a valuable experience and a memorable time! Your participation was key to making the conference a success.

FSBPA would like to give two special notes of appreciation - one to Senator Jack Latvala, the incoming Chairman of the Senate Appropriations Committee, for delivering an enthusiastic keynote supporting a legislative beaches initiative for predictable annual funding for beach and inlet management projects. Our second note of appreciation goes to Collier County for organizing excursions for attendees outside of the conference times. Hatchlings, stingrays, and mangroves – Oh My!

If you were not able to attend or want to view available presentations from the conference, they will be posted on FSBPA's website later this month - www.fsbpa.com/publications/2016-annual.html.

Following are a few pictures from the conference including Debbie Flack with Senators Dennis Jones and Jack Latvala, a trio of beach champions for Florida, and.....participants of the water slide competition (just one of those unscheduled excursions)!



2016 ANNUAL CONFERENCE AWARD WINNERS

Presented during the Awards Banquet, Thursday, September 15

Congratulations Award Winners!



Per Bruun

Distinguished Service Award

“In grateful appreciation for your significant contributions to the management and preservation of Florida’s beaches, one professional position and one project at a time”

Cliff Truitt



Local Government Award

“For exceptional leadership and involvement supporting the protection of Florida’s beaches, especially your demonstrated commitment to the Collier County Beach Management Program”

J. Gary McAlpin

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Richard Bonner Award

“In recognition of outstanding service by an individual representing the U.S. Army Corps of Engineers”

Jason Harrah



Member of the Year Award

“For setting the standard of excellence and commitment to the preservation of Florida’s beaches, and for exemplary contribution and leadership to this Association”

Leanne Welch

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WRDA 2016 – Notes for Florida

The U.S. House and Senate passed their respective key water infrastructure bills last month. WRDA 2016 will hopefully be headed for conference soon to work out differences between the two chambers and then to the President's desk for signature before the end of the year. WRDA addresses flood protection and other water-related resource projects and provides authorizations and some funding for the U.S. Army Corps of Engineers to implement these water infrastructure projects.

Both bills authorize the following Florida projects:

- Daytona Beach – a feasibility study for flood protection.
- Port Everglades Harbor Navigation Project – total cost estimated at ~\$322.7M.
- Flagler County – hurricane and storm damage risk reduction project, total cost estimated at ~\$14.2M for the initial shoreline restoration project.

Both bills have several other issues of interest to our members – a few of these are summarized below.

Beneficial Use of Dredged Material:

- The Senate bill provides for the placement of dredged material from one authorized project to another if certain provisions are met, such as enhancement of protection from flooding caused by storm surges or sea level rise, provided the cost associated with the placement of the dredged material is reasonable in relation to the associated environmental, flood protection, and resiliency benefits.
- The House bill authorizes a pilot program to carry out 10 projects for the beneficial use of dredged material. Regional teams will be assigned to assist in the implementation of the projects under the program, and a report on the findings of the regional beneficial use is due two years after WRDA 2016 is approved.

South Atlantic Coastal Study:

- The Senate bill directs the USACE South Atlantic Division to conduct a study of the coastal areas within its jurisdiction to identify the risks and vulnerabilities of those areas to increased storm damage as a result of sea level rise. Not later than 4 years after WRDA 2016 is enacted, the Army is to report its recommendations on the actions to address the risks and vulnerabilities to Senate and House Committees.
- The House bill requires the USACE South Atlantic Division to conduct a comprehensive study on the flood risks for vulnerable population in areas within their jurisdictional boundary and allocates \$6M to carry out the study.

Use of Non-Domestic Sand Sources:

- Florida Congresswoman Lois Frankel and Congressman Carlos Curbelo introduced an amendment to the House bill to provide local communities the option to seek foreign sand sources for shore protection projects. The amendment passed by voice vote on 9/28 and was engrossed into the bill.

Sea Level Rise Legal and Policy Issues for Local Governments

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I. Introduction

In August 2016, the real estate website *RealtyTrac* reported that flood risk is the most important natural hazard that discourages buyers. It projected that over next 5 years flood-prone areas will grow about 25% slower than others. National home sales were projected to increase about 2.6 % in the next year, but, for example, in Miami-Dade (rated a "very high" risk of hurricane storm surges and general flooding), sales are projected to drop 9 % over the year. <http://www.realtytrac.com/news/home-prices-and-sales/2016-natural-hazard-housing-risk-index/>

The United States Supreme Court has recognized "the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years..." *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007). Sea level rise will "erode beaches; drown marshes and wetlands; damage barrier islands, habitat, and ecological processes; cause saline intrusion into freshwater ecosystems and groundwater; increase flooding or inundation of low-lying areas; and damage or destroy ... property and infrastructure." Bacher and LeJava, *Shifting Sands and Burden Shifting: Local Land Use Responses to Sea Level Rise in Light of Regulatory Takings Concerns*, 35 No. 8 Zoning and Planning Law Report 1 (Aug. 2012)

Local governments with the responsibility to protect citizens and natural resources, and the desire to encourage new value-added investment and development, have compelling reasons to demonstrate to increasingly exacting investors and residents that they are truly prepared to minimize and manage accelerating sea level rise and storm surge impacts.

II. The Legal/ Policy Issues For Local Governments

The primary specific legal and policy issues presented by sea level rise are (1) increased flooding; (2) actual loss of property to erosion or inundation; (3) increased infrastructure construction, maintenance or relocation costs; (4) saltwater intrusion into drinking water wellfields; (5) protection of nearshore natural resources for fishing, recreation and other uses in potential conflict with a desire to armor property and nourish beaches; (6) the need to re-assess planning and zoning allowances and requirements; (7) potential liability for flooding and other impacts of inadequate infrastructure intended to reduce flooding or loss of land; and (8) how to allocate all of these costs between the public and private landowners.

The challenge for local governments, and other agencies, is to be truly prepared for, and resilient in face of (1) the enormity of the task, (2) disincentives to long term planning and decision-making, (3) political and social resistance to change, and (4) potential legal resistance.

Strong legal and policy tools are available to meet these major challenges. The key tools available to local governments are the (1) ability to use the comprehensive planning authority to minimize exposure and maximize protection of coastal resources and dwellers; and (2) ability to allocate costs and risks to the private sector for their own lands and projects.

III. The Law Supports Strong Action In Regard To Sea Level Rise

A. Most Effective Tool: Future Land Use Planning

The most important tools are land use planning and related infrastructure decisions. Determinations of where and how we live and build decide almost everything about our ability to respond to sea level rise, and avoiding hazards is surely the most effective way to deal with them. Legally, the ability to make planning decisions about the appropriate allowable land uses, densities or intensities and building standards is a power that is exclusive to a local government. Neither the state nor the federal government can decide what the appropriate use and intensity is for any parcel of land. "Land use planning ... chooses particular uses for the land; environmental regulation ... does not ... but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *SWANCC v. USACOE*, 531 U.S. 159, 191 (2001).

Comprehensive plan decisions are "legislative" - subject to the most deferential standard of review when legally challenged. A court may not overturn such an action unless it is not even "fairly debatable"; any valid planning rationale will uphold the decision. *Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997). Comprehensive plans make the basic policy decisions about the type and intensity/density of land uses, based on "the big picture" evaluation of a variety of quantifiable and unquantifiable factors. These aren't decisions a court can generally overturn.

The Community Planning Act's provisions for the provision of or payment for necessary infrastructure by developers, and its provisions concerning the factors used to determine the appropriate amount, location and types of development essentially require financial and ecological sustainability. A Comprehensive Plan sets the distribution, location, and extent of land uses, and the densities/ intensities of buildings for all land, based on the character of land, topography, and natural resources, and available water supply, public facilities, and services. §163.3177(6) (a), F.S. The law requires that comprehensive plans be "based upon relevant and appropriate data" and "analysis". Data must be "professionally accepted", and plans must react to this information "in an appropriate way and to the extent necessary" §163.3177(1) (f), F.S. Next, §163.3177 (6) (g) 5, F.S., requires that local governments "[u]se ecological planning principles and assumptions" to determine suitability for development". Given the overwhelming bulk of data now available on sea level rise and climate change, any planning decision that ignores this information will be legally deficient.

B. Recommended Planning Approaches

1. Limits on Amount of Development in Vulnerable Areas

These legal requirements easily support not allowing unsuitable development in vulnerable areas. When asked to increase allowable land uses, and when determining if current allowances may be too much, local governments should consider the potential financial and other demands on (1) erosion protection; (2) flood protection; (3) emergency management; (4) infrastructure construction, expansion or upgrades, including roads, water and sewer pipes, beach nourishment and property armoring (and potential liability for failures that cause flooding, erosion, etc.); (5) cleanup and re-building after storms (6) coastal resources,

sand migration/ loss, habitat migration and other environmental impacts. Local governments can and should decline to place more people and buildings in harm's way, or in areas that would require or encourage substantial investment, infrastructure, or unwise amounts of public resources for protection efforts.

Denying increases in allowable uses is the initial step. There is no property right to an "up-planning" or "up-zoning" unless the currently allowed uses are not economically viable. *Brevard County v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993). The law also supports reducing what can be built, and how, if current allowances are no longer supported by current data and analysis. New standards can be applied to redevelopment. If current science or engineering show prior allowances inappropriate, local governments can require non-conforming uses to comply with new standards after they are demolished or substantially damaged. Such "down-plannings" should be done where the ecological and physical vulnerability of specific areas make them appropriate. Uses, densities and intensities may be reduced as long as the reductions do not go so far as to preclude any economically viable use of the land. There is generally no vested right to the continuation of existing zoning allowances. In *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA 1990), land use amendments that reduced residential density from 1 unit per acre to 1 unit per 5 acres were not held to be a "taking" since the change was not arbitrary, and the remaining uses were economically viable. The validity of the amendments was strongly supported by the fact that they were adopted under Florida's growth management law.

In a case of direct relevance to the impacts of climate change and sea level rise, *Lee County v Morales*, 557 So.2d 652 (Fla. 2nd DCA 1990) rejected a "takings" claim where a down-zoning of a barrier island from a *commercial* designation to a limited use category which still allowed the owner an economically viable use. The rezoning reacted to an expert's study and addressed legitimate environmental, public safety, erosion, and storm damage concerns.

2. Meaningful Set Backs / Buffer/ Open Space Requirements

The resilience of natural systems to sea level rise can be increased by preserving as much connected and diverse open space as possible to ensure that natural areas large and healthy enough to adapt to sea level rise remain intact. Keeping structures far enough away from projected water levels to allow for natural shoreline and habitat migration as seas rise is important. Just protecting lands currently classified as wetlands will not prevent a complete loss of the nearshore and land-based coastal resources required to maintain fisheries and other nature-based economic and recreational functions for a community. Large setbacks also provide safety and economic benefit by avoiding repetitive loss and repairs, and potentially avoiding the need for coastal armoring.

Local coastal building restrictions are not preempted by state coastal construction rules. *GLA & Assoc. v. City of Boca Raton*, 855 So.2d 278 (Fla. 4th DCA 2003). Setbacks and open space requirements do not generally "take" the subject portion of the private property of which they are a part. Courts determine whether a taking has occurred by viewing the regulatory impact on the property "as a whole," and not some distinct segment thereof. *DEP v. Schindler*, 604 So. 2d 565, 568 (Fla. 2d DCA 1992).

Setbacks, and other standards, are strongly supported by the legal requirements for comprehensive plans to restrict development that would damage coastal resources, and protect human life and limit public expenditures in areas subject to destruction by natural disaster." § 163.3178 (1), F.S. Plans must protect the coastal zone environment, and wildlife and marine life; limit public expenditures that subsidize development in coastal high-hazard areas, and protect human life against the effects of natural disasters. § 163.3177 (6), F.S. They must control development and redevelopment to eliminate or mitigate the adverse impacts on

coastal wetlands; living marine resources; barrier islands, including beach and dune systems; unique wildlife habitat; historical and archaeological sites; and other fragile coastal resources.” § 163.3178 (2), F.S.

Finally, other key relevant planning requirements that support stronger open space and setbacks include those for (1) hazard mitigation and protection of human life against the effects of natural disaster (including hurricane evacuation); (2) protecting beaches and dunes from human-induced erosion (and restoring altered beaches and dunes); (3) eliminating inappropriate and unsafe development; and (4) public access to beaches and shorelines. § 163.3178 (2), F.S.

3. Water –Dependency Land Use Requirements

The critical nature of the basic land use decision about vulnerable areas, and the compelling nature of the competing demands for use in the coastal zone, suggests the adoption of a “water dependency” requirement, such as that found in federal wetlands permitting law, and in some states, for land use and zoning designations in vulnerable areas. Florida law requires that comprehensive plans consider the need for water-dependent and water-related facilities along shoreline areas. § 163.3178 (2), F.S.

4. Building Standards: New 2015 Coastal Management Requirements

The land use standards recommended above are also supported by §163.3178(2) (f), F.S., which requires comprehensive plans to “eliminate inappropriate and unsafe development in the coastal areas when opportunities arise.” That law also requires measures that directly translate to stricter construction standards in vulnerable areas, including the requirements for (1) development and redevelopment strategies, and engineering solutions that reduce the flood risk in coastal areas; (2) the removal of coastal real property from flood zone designations; and (3) development techniques and best practices that may reduce losses due to flooding.

5. Impact Assessment

Staff reports on planning and development applications should analyze the potential impacts on sea level rise resiliency. This could include the loss of native vegetation or flood and freshwater water storage functions, the temperature impacts of the projected replacement of natural land with asphalt, or the energy requirements of the resulting land use form), impacts on saltwater intrusion, erosion, and the capacity for future landward habitat migration and other impacts. Such an analysis is most effective if correlated to policies and standards in the plan and regulations.

C. Cross-Cutting Considerations

Any relevant government actions that impact sea level rise resiliency should reflect an understanding of the following cross-cutting considerations.

1. Cumulative Impacts

Ecosystems that are already degraded are more vulnerable to, and less able to adapt. By more stringently preventing man made adverse impacts, government can greatly increase ecosystem resilience. Meaningful cumulative impact analysis is necessary to reduce the adverse impacts of development decisions on climate and sea level rise resiliency. Of particular relevance is the requirement that local government coastal management plans (which must protect human life and control development to protect the coastal

environment, based on cumulative impacts) §163.3178(2) (j), F.S. State coastal construction permits, wetland permits, and consumptive water use permits must also be based on cumulative impacts. §§161.041 (1)-(2); 161.053(4) (a); 373.016(2); 373.414(8) (a), F.S.

2. Scientific or Engineering Debate or Uncertainty

It is likely that someone will dispute some aspect of every land use planning, development order standard-setting or individual approval or denial decision because there is some disagreement or uncertainty about projected impacts and wisdom of the decision. That is not a legally valid basis to legally challenge such decisions, as long as they are sound and not arbitrary. This is a particularly important consideration in sea level rise – related decisions, especially when the needs exists to adopt more stringent approaches.

“[T]he police power of the state is not static. The courts are duty bound to recognize its expansion in proper cases to meet conditions which necessarily change as business progresses and civilization advances.” *L. Maxcy, Inc. v. Mayo*, 139 So. 121, 131 (Fla. 1931).

Courts defer to the technical and scientific expertise of agencies so long whose actions have a rational basis and are not scientifically arbitrary. This applies especially where there is scientific uncertainty and competing scientific positions. Courts recognized the precautionary principle supports regulation that resolves doubt in favor of protection. See Grosso, *Regulating For Sustainability: The Legality of Carrying Capacity-Based Environmental and Land Use Permitting Decisions*, 35 Nova L. Rev. 711, 770-772 (Summ. 2011). This deference has some limits. A court must defer to an agency's expertise, but only to the extent that the agency utilizes, rather than ignores, its experts." *DOW v Babbitt*, 958 F. Supp. 670, 685 (D. DC. 1997).

3. Inter-governmental / Regional Coordination

The Southeast Florida Regional Climate Change Compact, adopted by Monroe, Miami-Dade, Broward and Palm Beach counties and several municipalities, may be the leading regional collaboration effort in the country. The Compact's Action Plan calls for “concerted action in reducing greenhouse gas emissions and adapting to regional and local impacts of a changing climate”, through locally – tailored application of 110 action items under seven goal areas over the next five years. The policy recommendations will be implemented through, among other things, (1) existing legal structures, planning and decision-making processes; (2) development of new policy guiding documents, with mutually consistent goals and progress indicators, by local and regional governing bodies; and (3) processes for focused and prioritized investments. *A Region Responds to a Changing Climate*, Regional Climate Action Plan, S.E. Fla. Regional Compact (Oct. 2012). (<http://www.southeastfloridaclimatecompact.org/wp-content/uploads/2014/09/regional-climate-action-plan-final-ada-compliant.pdf>).

Coordination and collaboration can be particularly useful for local governments, in particular, those with relatively fewer resources, providing the opportunity to take advantage of the information and expertise held by state and federal agencies and other local governments. The benefits of regional cooperation include:

- **Physical effectiveness:**

Given the interconnected nature of sea level rise impacts, a local government's efforts can be thwarted by its neighbors. Effective responses must be coordinated across city lines.

- **Additional legal support for strong planning & regulatory measures:**

A strict planning or zoning scheme that is intended to resolve regional, as well as local, issues, will have more legal support if challenged if it is part of a coordinated regional effort, as opposed to a clearly ineffective effort to address an issue that is purely regional and not local. *City of Boca Raton v. Boca Villas Corp.*, 371 So. 2d 154, 155, 159 (Fla. 4th DCA 1979).

- **Coherence of message, and increased potential for funding.**

A stronger argument can be made for congressional and legislative funding if the appropriations are for coordinated efforts that have appeal to a broader range of members than those whose districts represent just one city or county. Also, many grant opportunities rank collaborative efforts higher in competitive ranking systems.

4. Place –Based Rules

Because the most effective regulatory decisions, and those most capable of passing political and judicial scrutiny, are place – specific, local ordinances should be avoid a “one size fits all” approach and establish standards for land use and development that are tailored to specific areas defined by their level of contribution or vulnerability to climate and sea level rise impacts. Overlay Zones - an additional zoning designation applied over an existing land use or zoning districts to establish additional, typically stricter, standards for development) are a useful way to avoid the problem of establishing general standards that are too strict in some areas and too weak in others.

The boundaries of the overlay should follow the geographic areas that should be subject to specific land use and building standards, such as those areas that are susceptible to flooding and rising sea levels, and those that will be important for landward terrestrial and aquatic habitat migration. Florida’s statutory authorization for the designation of local “Adaptation Action Areas” is one example of a sea level rise adaptation tool available to local governments. §§163.3164(1); 163.3177(6) g.10, F.S. The South Florida Regional Planning Council has prepared two technical documents that relate to AAAs, and which can be found on its website. (*Adaptation Action Areas: A Planning Guidebook for Florida’s Local Governments* (2015); *Adaptation Action Areas: Policy Options for Adapting Planning for Rising Sea Levels* (2013)). Two good examples of sea level –rise specific planning efforts are provided by the city Fort Lauderdale, whose AAA project is the first pilot project in the state, and Broward County, which was recognized by the American Planning Association for developing first climate change comprehensive plan element in Florida.

D. Important Additional Property Rights Points

1. Very High Standard For Plaintiffs

The vast majority of planning and development decisions that increase use and development limits to protect a community from sea level rise, if done right, will not violate property rights. Few “takings” lawsuits are successful; such claims tend to have more political impact than actual legal support. Government should not fail to meet its responsibility to protect the public due to out-sized fear of “takings” lawsuits. The law is more supportive of strong government action than is commonly understood.

The only automatic “takings” (inverse condemnations) occur when government (1) physically enters private land by, for example, flooding it, or forcing an owner to place something upon land; or (2) regulates an individual so much that it deprives her land of “all economically beneficial use”. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031-32 (1992).

Those are rare situations. Most “regulatory takings” cases involve “ad hoc factual inquiries”, with no “set formula” or “mathematically precise variables” to decide if a taking has occurred, but instead “guideposts” and “careful examination ... of all the relevant circumstances.” These include the “economic impact of the regulation” on the owner; the extent to which the regulation “has interfered with” a landowner’s “distinct investment-backed expectations”; and the “character of the governmental action.” Other factors include the magnitude of the economic impact on the owner and the degree to which it interferes with reasonable expectations. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)

The legal “bottom line” is that a regulation is a taking if, in the eyes of a court, it “goes too far”. Regulations are surely not “takings” just because they increase development restrictions or decrease allowable uses or intensities. Courts recognize that regulation “involves the adjustment of rights for the public good”, and that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). Courts have rejected “takings” lawsuits where regulation caused fair market reductions of 50-95 percent. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (reducing property value by over 90 percent); *Graham*, 399 So. 2d at 1382. (75-percent reduction of value not a taking); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (regulations could result in a 95-percent loss without requiring compensation as a taking).

Under Florida’s Constitution, private property rights and the public interest to be balanced. *DCA. v. Moorman*, 664 So. 2d 930, 933 (Fla. 1995). Also, a landowner has:

“no absolute and unlimited right to change the essential natural character of his land ... to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.” *Graham v Estuary Prop., Inc.*, 399 So.2d 1374 (Fla. 1981).

Florida’s *Harris Act* is intended to compensate landowners in more situations than would the Constitution, but still requires an owner to prove, with appraisals and other information, an “*inordinate* burden” on an existing use or a vested right. § 70.001, F.S. This standard is not well defined. Susan Trevarthen, *Columns: City, County and local Government Law: Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims*, 78 Fla. Bar J. 61, 62 (2004); Grosso and Hartsell, *Old McDonald Still Has a Farm: Agricultural Property Rights After the Veto of S.B. 1712*, Fla. Bar. J. **March, 2005**, Vol. 79, No. 3. No appeals court has found a *Harris Act* violation, but they have rejected several. *M&H Profit, Inc. v. Panama City* 28 So.3d 71(Fla. 1st DCA 2009); *Holmes v. Marion County*, 960 So.2d 828 (Fla. 5th DCA 2007); *Jacksonville v. Coffield*, 18 So.3d. 589 (Fla. 1st DCA 2009). The Act does not prohibit new policies and standards to protect communities from sea level rise and storm surge.

2. Awareness of Sea Level Rise & Regulation

Federal and state takings law protect “reasonable, investment-backed expectations and / vested rights to use of the property. The *Harris Act* protects reasonably foreseeable, non-speculative future land uses, which are suitable for the subject property and compatible with adjacent land uses. § 70.001(3) (b) (2), F.S. The science and emerging regulatory scheme related to sea level rise is likely to render certain hoped-for uses speculative and not reasonably foreseeable. The increasing general public awareness of sea level rise and the inclusion of responsive policies and development standards into land use plans and zoning codes will tend to reduce an owner’s reasonable investment-backed expectations of development that is incompatible

with increased water levels. As one court said, rejecting a takings claim in the Keys, a landowner is “free to take investment risks in a regulated environment, but can’t look for compensation when speculation proves ill-taken.” *Good v. United States*, 39 Fed. Cl. 81, 112-14 (1997)

3. The Compelling Nature of the Issue Supports Strong Rules

The more imperative the governmental interest, the farther regulation can go without being a “taking”. The character and purpose of a regulation compared to the impact on the landowner is a key factor. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Regulations designed to prevent a public harm are less likely to be “takings”, and those that are designed to prevent public “nuisances”, may even be immune from takings liability. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). An illustrative case is *Gove v Zoning Board of Appeals*, 444 Mass. 754 (2005), which rejected a “takings” claim against the denial of approval for a single family home in a specially – zoned area that was vulnerable to storm tides, major flooding and significant erosion. The court noted that “the character of the governmental action...is the type of limited protection against harmful private land use that routinely has withstood [takings claims]. It is not at all clear that Gove has legitimate property interests in building a house on lot 93.”

Both the uncertainty of the full implications of sea level rise and impacts, and the dramatic nature of the most severe of them will likely allow strict regulation to withstand takings suits. Density and building restrictions designed, in whole or in part, to protect offsite impacts relative to public (including adjoining land) flooding, safety, evacuation, and related interests should be written to emphasize those issues, and to reference the relevant state planning act requirements which either support or require them. The Act requires that plans protect human life against the effects of natural disasters, allow the ability to safely evacuate the coastal population, and eliminate inappropriate and unsafe development in the coastal areas. § 163.3177 (6), F.S.

4. There is No Property Right to a Subsidy

“Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.” *Koontz v. St. John’s River Management District*, (2013).

This recent U.S. Supreme Court ruling supports strict regulations that tolerate zero adverse impacts to other properties or natural resources outside the boundaries of a landowner’s property. Allowances beyond that are gratuitous policy decisions made at the expense of the public at large. There is no property right to a subsidy. Government may require impact fees that cover 100% of any public cost of providing public facilities or services to private property. Impact fees, land dedications, and other “exactions” are not a “taking” if (1) there is a “nexus” between the exaction and a legitimate governmental interest, and (2) the amount of the exaction is “roughly proportional” to the nature and extent of a project’s impact. Precise mathematical calculations are not required – only a sound determination that the required dedication is related in nature and extent to the projected impact. *Dolan v. City of Tigard*, 512 U.S. 374, 389-391 (1994).

The enormity of the public costs associated with the use of private land in ways that increase the fiscal, physical, ecological and other costs to the public from climate change and sea level rise will likely require government to substantially decrease or cease altogether taxpayer subsidy of development in that exacerbates these problems, and substantially increase standards for development approval to preclude any offsite impacts. Such market – based approaches offer the greatest legal and policy discretion to government. They are also strongly supported by the state’s planning act, which recognizes that, in the event

of a natural disaster, the state may provide financial assistance to local governments for the reconstruction of roads, sewer systems, and other public facilities. Thus, comprehensive plans must limit public expenditures in areas that are subject to destruction by natural disaster or that subsidize development in coastal high-hazard areas. §§163.3177 (6) (g) 6, & 163.3178 (1), F.S.

Infrastructure siting decisions are generally discretionary, and infrastructure improvements can rarely be compelled. The law, and the responsibility to make prudent risk-management decisions, strongly support decisions to (1) avoid new infrastructure improvements in vulnerable areas; (2) abandon infrastructure in hazardous areas as it is substantially damaged or reaches the end of its useful life; (3) re-locate deteriorating infrastructure in vulnerable areas; (4) protect in place “critical asset” infrastructure that, as a practical matter, cannot be relocated; and (5) adopt infrastructure design standards for new or expanded facilities that ensure the safe functioning of the facility over its expected lifetime.

5. A Last Word About Property Rights

The potential for the relatively rare property rights violation should not cause government to water - down its development standards. Agencies should write the rules as strictly as necessary to meet the realities of sea level rise, but allow an alternative governmental action that can avoid a property rights violation in those few cases where the application of the general requirements truly would be a “taking”. Under Florida law, agencies can grant relief where a landowner can prove that a property rights violation would occur as a result of the strict application of a land use requirement. This allows a restriction to be enforced in most situations while authorizing relief where a strict application would violate property rights. Agencies that choose to grant limited variances should include language in the variance document that, by accepting the variance, the landowner assumes all financial risk of constructing and maintaining the approved structures.

Transferable development rights can allow a government to completely prohibit construction in vulnerable areas by granting the owner “transferrable” rights that can be sold to owners of targeted development sites to allow them to secure approval for maximum allowable uses or intensities. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); Messer, Transferable Development Rights Programs: An Economic Framework for Success, 3 *Journal of Conservation Planning* 47, 52 (2000). A successful TDR program requires the political will and discipline to require purchase of a TDR to achieve optimal development in targeted areas, instead of simply granting land use or zoning amendments.

Finally, land acquisition gives government the greatest degree of control over the location of infrastructure and development, reduces public expenditures on risk mitigation and post-disaster relief, and protects ecosystems. These benefits, compared to the costs of flood and storm protection, and re-building structures after storms, often make acquisition the smart investment.

The amount of sea level rise and climate - vulnerable land, however, is likely to be beyond any reasonable means of government (and private) agencies to buy all or most of it. The scale and critical nature of the safety, ecological, social and other impacts of the problem will require government to maximize its regulatory tools, using land acquisition selectively. The nature of sea level rise – whereby the sea threatens to “take” private property to more than regulation – calls for a major re-assessment of the political will to exercise the police power to protect the public interest.

A passage from a recent Fla. Supreme Court decision signals how measures taken to respond to sea level rise will be viewed when challenged as a “taking”. Ruling that an owner’s property right to contact with the water was not “taken” by a beach re-nourishment project that created a strip of public land between the private ownership and the Gulf, the Court wrote that the:

“Act seeks a careful balance between the interests of the public and ... private upland owners. *** [It] prevents further loss of public beaches, protects existing structures, and repairs prior damage. *** [T]he Act promotes the public's economic, ecological, recreational, and aesthetic interests in the shoreline.”[and thus] effectuates the State's constitutional duty to protect Florida's beaches in a way that reasonably balances public and private interests. Without the ... renourishment ..., the public would lose vital economic and natural resources. *As for the upland owners, the ... renourishment protects their property from ... storm damage and erosion while preserving their ... rights to access, use, and view.* Consequently, just as with the common law, the Act ... achieves a reasonable balance of interests and rights to uniquely valuable and volatile property interests.” *Stop the Beach Renourishment*, 998 So.2d 1102, 1115.

The Court also noted that, by creating a buffer area of beach on state land, the Act removes the upland owner's concomitant risk of losses and repairs due to erosion. After re-nourishment, the risk of loss and repair lies more with the State than with the upland owner.” 998 So.2d at 1119.

Private property rights bar government simply “from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *First English Evangelical Lutheran Church of Glendale v. LA County*, 482 U.S. 304 (1987). Given the threat posed by sea level rise to both the public and individual landowners, and the benefit of resilience measures to both, courts are likely to uphold all strict but fair measures required to meet fulfill government’s dual obligations.

E. The Other Side of the Liability Issue – Failure to Adequately Protect the Public

The law is uncertain and evolving relative to potential government liability for undertaking or approving construction that floods or otherwise harms others, or for maintaining infrastructure that proves inadequate to prevent flooding and other impacts. The future impact of sea level rise on traditional legal theories of liability is an unknown that suggests great caution by local governments. The potential for successful suits increases as the science/ data on sea level rise, flooding and storm surge projections becomes more generally known and quantified. Specific areas of potential liability likely include:

- **Liability for traditional flooding and erosion, with increased impacts and damages, along with greater potential for negligence liability resulting from greater available technical information about flooding and erosion potential.**

This may be particularly applicable to areas impacted by government – maintained dikes, dams, levees, fills, ditches, culverts, and road construction where significant losses may occur if design frequencies are exceeded, and benefits to some lands come at the expense of others.

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- **Inadequate Planning/ Zoning Decisions – Allowing Inappropriate Development**

The failure to revise flood maps or require new flood protection elevations and development standards could result in increased flooding and flood damages. The failure to update comprehensive plans and regulations in the face of generally available data/ analysis about flooding and related hazards may increase liability. Approving development where available information supports a denial may increase liability. Courts in some states have held government liable for negligence for building permits that increased flood hazards on other property.

- **Responsibility to maintain or upgrade infrastructure in vulnerable areas.**

Jordan et al. v. St. Johns County, 63 So. 3d 835 (Fla. 5th DCA 2011) *potentially* establishes an affirmative duty on local governments to upgrade infrastructure to accommodate higher water levels or other changed conditions. Coastal landowners sued a county for failing to maintain a low-lying, county-owned, coastal road when the degradation of the road from storms and erosion precluded access to their land. The court found the county had a duty to “reasonably maintain” and repair the road as necessary to provide “meaningful access” to the private lands, and remanded the case to the trial court to determine whether the county had fulfilled this duty. It held that governmental inaction in the face of an affirmative duty to act can be a “taking” where it denies access to private land. This may suggest that government *inaction* may be grounds for a takings claim if the government had a “duty to act”. This case may however, simply highlight the distinction between the responsibility to maintain infrastructure once provided or maintenance responsibility is accepted, versus the discretionary decision to provide or upgrade infrastructure.

Generally in Florida, however, “discretionary” or “planning” governmental functions are likely immune from liability, but “operational” actions may give rise to liability. Florida courts have not ruled on whether local governments are liable when storm water system that were properly designed when installed, and continuing to function as designed are rendered inadequate by changed circumstances, like sea level rise. Courts in other states have found local governments immune from liability when exercising their discretionary authority to modify drainage systems in response to changed conditions, finding no liability from a choice not to upgrade. Florida courts will likely follow this rule given that they have ruled that the duty to maintain roads does not include the duty to upgrade them” *Dep’t of Transp. v. Konney*, 587 So. 2d 1292, 1294 (Fla. 1991)

Application of these decisions to drainage infrastructure in the context of changing sea level rise and flooding impacts, is, however, uncertain. A strong argument remains that sea level rise is a changed condition that would render system redesigns discretionary “upgrades” rather than “maintenance”, thus allowing a local government to decide not to upgrade the facility. Ultimately, courts will likely defer to a local government’s policy discretion about how to allocate limited local funds to best address sea level rise impacts. *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1022 (Fla. 1979); *FDOT v. Konney*, 587 So. 2d 1292 (Fla. 1991)).

Even given the uncertain nature of some of these liability theories, and the strong government arguments against liability, caution to reduce the opportunity for such claims in the future is in order. All proposed new or redevelopment in vulnerable areas is a potential liability to some extent. As the stakes get higher (as more damage occurs more often), the costs of even successfully defending lawsuits may grow. Useful strategies to reduce potential liability include:

- Avoid potential liabilities resulting from development or infrastructure approval more strenuously by (1) denying land use plan changes that would increase intensity in vulnerable areas; and (2) not extending public infrastructure into such areas.
- Adopt policies and regulations that prohibit all but *de minimus* adverse offsite physical (including flooding) or environmental impacts from development.
- Update flood zone, sea level rise projection and related maps from recognized sources and consistency analysis on that updated information.

Further research and analysis regarding potential liability issues can be found at the following sources, upon which this discussion has been based.

- Kusler, *Legal Issues in Upgrading Flood Maps to Reflect Climate Change, Other Changed Conditions* (April 2016), http://www.aswm.org/pdf_lib/legal_issues_in_upgrading_flood_maps_kusler_0416.pdf
- Ruppert & Grimm, *Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea Level Rise*, Fla. Bar. J., Vol. 87, No. 9 (Nov. 2013)
- Maxine Burkett, *Litigating Climate Change Adaptation: Theory, Practice, and Corrective (Climate) Justice* 42 ELR 11144, 11153 (2012)

IV. Conclusion

Local and other agencies should adopt or maintain clear (stay away from vague words like “encourage” and “discourage” where possible) and strong sea level rise protections that are reasonable, but which err on the side of caution. The technical support for, and stated intent of, these measures should identify the multiple, overlapping issues that require them. That setback, for example, that protects an environmentally important natural floodplain or adjacent upland, also protects the safety of adjoining structures and citizens. Limiting allowable uses and densities in vulnerable areas serves those same functions, and protects public budgets.

The best approaches are also comprehensive and fair. While not required to address an entire suite of related problems at the same time, local governments should also consider complementing strict rules on new development with reasonable measures (storm water utilities, retrofit requirements, special taxing units, etc.) to address the contribution of existing development to the problems addressed by new development rules. We are all in this together.

There is no need to panic or hide our heads in the sand. But we must and can understand and limit potential liabilities and problems that may come with development in vulnerable places, and change, where necessary, how we have historically done business, to respond to the current reality and future projections of sea levels. The technical, legal and policy tools necessary to meet the challenge are there for us to use.

Author’s Note:

This article includes substantial material previously published in the following publications: (1) *Planning and Permitting to Reduce and Respond to Global Warming and Sea Level Rise in Florida*, J. Land Use & Env. Law., Vol 30, No. 2, 201 (Spring 2015); (2) *Planning and Permitting to Reduce and Respond to Global Warming and Sea Level Rise*, 6 J. Animal and Environmental L. 41 (2015), <https://drive.google.com/file/d/0B0gclmiUSq5ETIVZSW1meIFzcm8/view?pref=2&pli=1>; and (3) *Regulating for Sustainability: The Legality of Carrying Capacity – Based Environmental and Land Use Permitting Decisions*, 35 Nova L. Rev. 711 (Summer 2011)

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Duval County Shore Protection Project – September 2016

*By Gabriel Todaro
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U.S. Army Corps of Engineers
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**US Army Corps
of Engineers®**

The Duval County Shore Protection Project in Jacksonville, Florida began on 17 September 2016. The project will place sand on seven miles of eroded beaches, including Jacksonville Beach, Neptune Beach, and a portion of Atlantic Beach. Dredging and sand placement operations will run continually for 24 hours per day until November 2016, barring unforeseen events.

The goal of engineered shore projects is to reduce risk and promote coastal resilience. Shore projects help to reduce the damages – economic, environmental, infrastructure, human health and safety – of tropical storms and hurricanes. Coastal communities with engineered beaches have historically fared much better than those without. Thousands of residents and businesses in Duval County benefit from this shore project because storm events erode the new beach rather than destroying coastal infrastructure. Along with providing economic stability and opportunities, beach nourishment projects also have inherent benefits in restoring critical habitat for shorebird and marine turtle nesting.

The initial construction of the Duval County project occurred in 1978-80 and since then, five principal renourishments have transpired (1985-87, 1991, 1995, 2005, and 2011) in addition to periodic placement of sand dredged from navigation projects. Beach renourishment occurs about every five to six years to maintain beaches as part of the project.



Aerial Photo of Jacksonville Beach Looking North from 10th Avenue South.

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The beach nourishment project will widen the beach berm between 20 to 60 feet and raise the elevation of the beach by about 3 to 5 feet.

The U.S. Army Corps of Engineers awarded the 2016 construction contract 28 June to Great Lakes Dredge & Dock (GLD&D) Company for \$13,572,170. The Federal Government is funding the renourishment in partnership with the City of Jacksonville, Florida Department of Environmental Protection, and Duval County. The project is funded 61.6% federally and 38.4% locally.

The beach will remain open to the public outside of the work areas. However, the construction will close segments of about 1,200 feet in length at a time. The work is expected to proceed about 500 feet long the shore each day. Public access over the dredging pipes will occur roughly every 300 to 400 feet.

Beach fill construction will start at the south end of Jacksonville Beach (around 37th Avenue South), progress southward to the St. John's County Line, and then northward from the origin. The contractor will establish four or five subline/pipeline "landings" on the shore in Jacksonville Beach, one in Neptune Beach, and two in Atlantic Beach. The contractor will pump sand through the pipeline toward the south, and then toward the north, from each landing site.

Residents living close to the beach and near the active construction will likely hear heavy equipment and backup alarms, which the law requires. The Corps of Engineers asks the public to use caution around the construction areas and to be patient with the temporary construction as the project progresses.

The U.S. Army Corps of Engineers is providing a weekly updated progress map of the project at the following web address:

<http://www.saj.usace.army.mil/Missions/Civil-Works/Shore-Protection/Duval-County/>

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FDEP Division of Water Resource Management Agency Updates



New Beaches, Inlets and Ports Permit Manager

Mr. William "Zach" Boudreau has joined the Beaches, Inlets and Ports Program as a permit manager. Zach has a bachelor's degree from Franciscan University in Psychology and a masters in Biology from Northeastern University in Boston. He is finishing his Ph.D. in Marine Ecology at Florida State University.

New Coastal Construction Control Line Permit Manager

Mr. John Glunn has joined the Coastal Construction Control Line Program as a permit manager. John has an engineering degree from the University of Florida, and 35 years of experience working in the Department's Division of Air Resource Management. He has returned to the Department for a new career and will be working on projects in East Central Florida and Collier County, among others.

Strategic Beach Management Plan Revisions Near Complete

The draft revisions to the Strategic Beach Management Plan were issued August 31, 2016, and a webinar to answer questions and take comments was held September 27, 2016. Comments will be taken until October 12, 2016. Please direct comments and missing data to William.Weeks@dep.state.fl.us. Please also note that the 2016 version of the Critical Erosion Report is on the Department's webpage under Beaches publications.

Notice of an Incident or Discovery of Pollution

Governor Scott has directed the Florida Department of Environmental Protection (DEP) to issue an emergency rule that establishes new requirements for public notification of pollution incidents to take effect immediately. This emergency rule will require the owner, operator of any facility, including a city or county government, to provide notification of incidents or discovery of pollution within 24 hours to DEP, local governments and the general public through the media.

The new rule will apply regardless of whether the impacts of the pollution remain on-site. This will apply to any pollution affecting Florida's air or water resources, such as unauthorized discharges of treated and untreated wastewater and industrial wastewater releases.

Please see <http://www.dep.state.fl.us/pollutionnotice/> for additional information and a copy of the emergency rule.

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Shoreline

A monthly electronic publication of the Florida Shore & Beach Preservation Association.

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CALENDAR OF EVENTS

FSBPA Conferences

February 8 - 10, 2017

2017 Tech Conference

Hutchinson Island Marriott, Stuart, Florida

Call for Abstracts Deadline extended to October 17, 2016

September 27-29, 2017

2017 FSBPA Annual Conference

**Westin Fort Lauderdale Beach Resort,
 Fort Lauderdale, FL**

OTHER DATES OF INTEREST

October 25-28, 2016

ASBPA

2016 National Coastal Conference

Long Branch, NJ

November 15-16, 2016

Atlantic Intracoastal Waterway Association Annual Conference

Sheraton Norfolk Waterside Hotel

Norfolk, Virginia

February 24-26, 2017

20th Annual Florida Marine Turtle Permit Holder Meeting

Wyndham Garden Hotel

Gainesville, Florida

February 28-March 2, 2017

ASBPA Coastal Summit

Washington, DC

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