

Sea Level Rise and Flooding: Legal, Fiscal and Regulatory Challenges for Local Governments

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Overview

- Regulatory Challenges
 - “Takings” law and Florida’s Bert J. Harris, Jr., Private Property Rights Protection Act
- Legal liability and infrastructure
 - Drainage
 - Roads
 - Wastewater
- Fiscal Challenges

We the People

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

Article 1

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

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

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

"Takings" in the U.S. Constitution

Section 3. The actual Commencement shall be made in the first Year after the first Meeting of the Congress of the United States, and within every subsequent Term of two Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least one Representative, and until such Enumeration shall be made, the State of New Hampshire shall be entitled to have three, Massachusetts eight, Rhode Island and Providence Plantations five, Connecticut four, New York six, New Jersey four, Pennsylvania eight, Delaware six, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

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

Section 8. The Congress of the United States shall be composed of Senators from each State, chosen by the Legislature thereof for six Years, and each State shall have two Senators.

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

Section 9. The Privilege of the Writ of Habeas Corpus shall be suspended only when in Cases of Rebellion or Invasion the public Safety may require it. No Bill of Attainder or Ex Post Facto Law shall be passed.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; or enter into any Compact or Agreement with a foreign State; or grant any Title of Nobility.

Section 11. The President shall have the right to grant Reprieves and Pardons for all Offences against the United States, except in Cases of Impeachment. He shall have Power to fill up all Vacancies that may happen during the Absence of the President or when he shall be disabled from the Exercise of his Powers.

Section 12. The Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. No Person shall be a Senator who shall not have attained to the Age of thirty Years, and seven Years a Citizen of the United States, and who, when elected, shall not, when elected, have been seven Years a Citizen of the United States, and who, when elected, shall not, when elected, have been seven Years a Citizen of the United States.

Section 13. The President shall have the right to grant Reprieves and Pardons for all Offences against the United States, except in Cases of Impeachment. He shall have Power to fill up all Vacancies that may happen during the Absence of the President or when he shall be disabled from the Exercise of his Powers.

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Bert J. Harris Act (Ch. 70)

- Inordinate burden on property
 - Lots of confusion due to similar language
- Focus on two types of “existing use”
 - Current
 - Future: rsbly foreseeable, non-spec, suitable for property, **and** compatible with adjacent land uses
- Definitions of “suitable” and “compatible” but no *in pari materia* interpretation
- Safest to regulate floodplains and flooding



SLR, Drainage, and Local Governments

Drainage Under Average Tidal Conditions

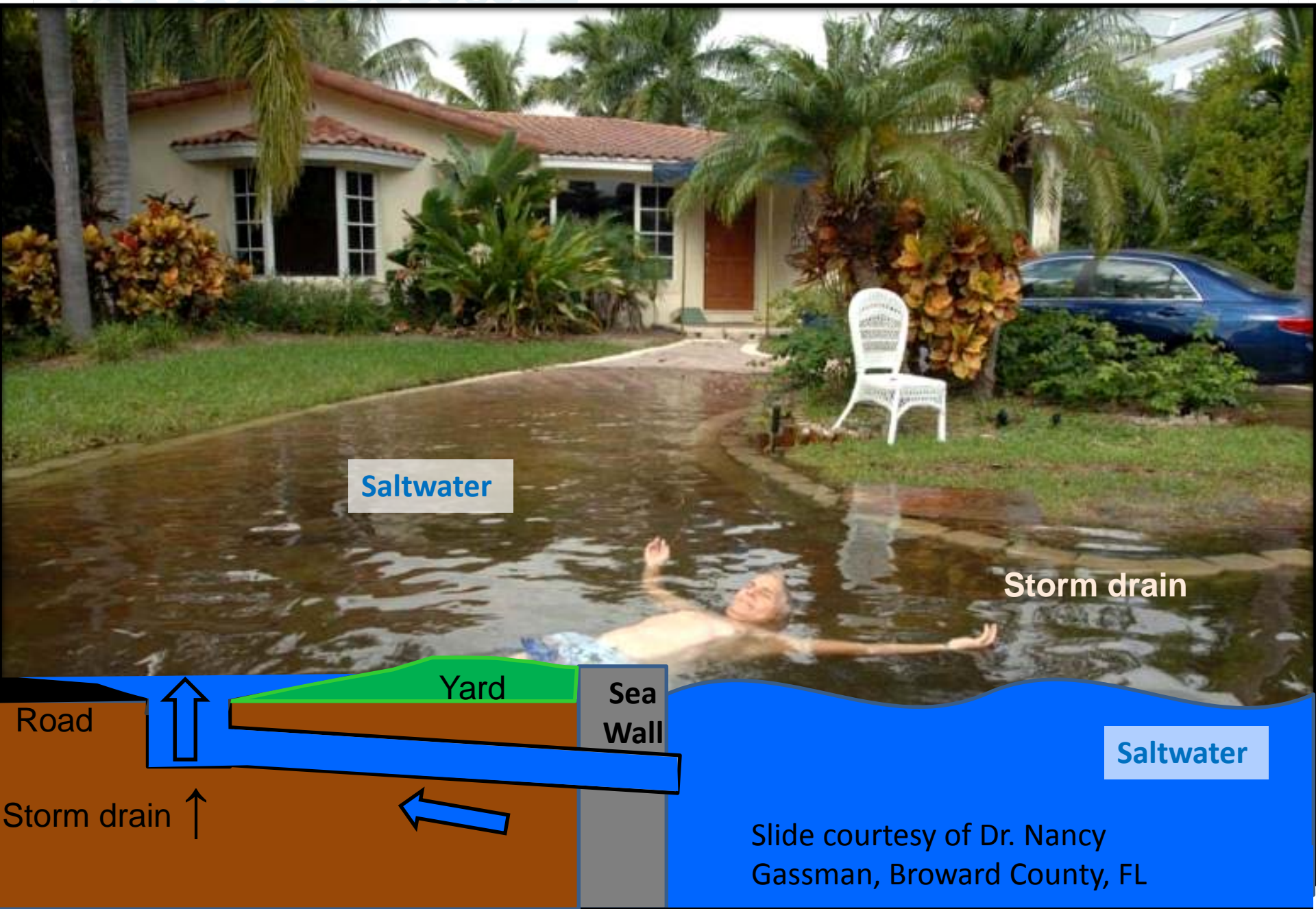


Storm drain

Saltwater

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

Drainage Challenge with Sea Level Rise



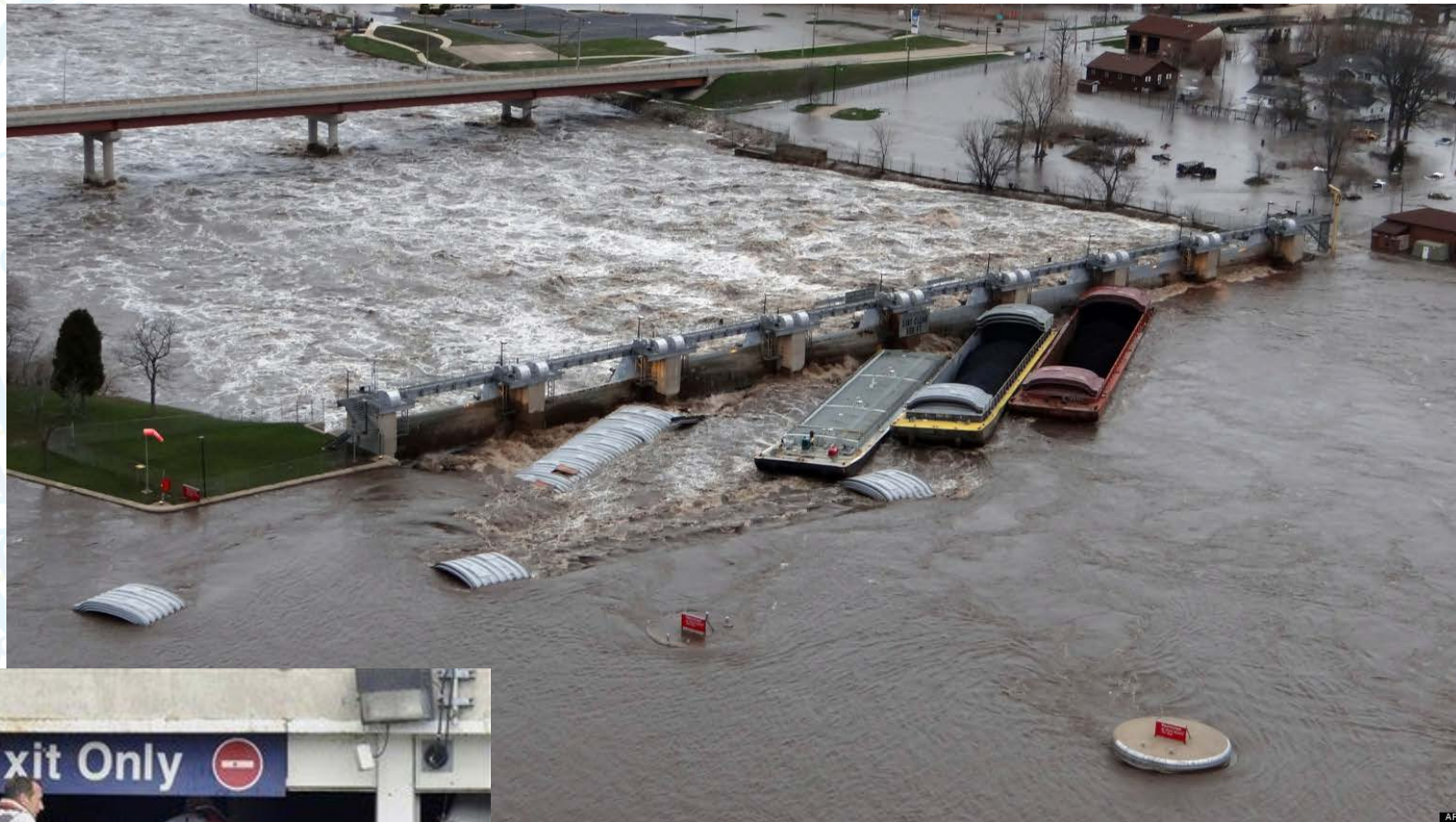
Saltwater

Storm drain

Saltwater

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

Chicago Flooding: April 2013



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

by Thomas Ruppert and Carly Grimm

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

Maintenance vs. Upgrade

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



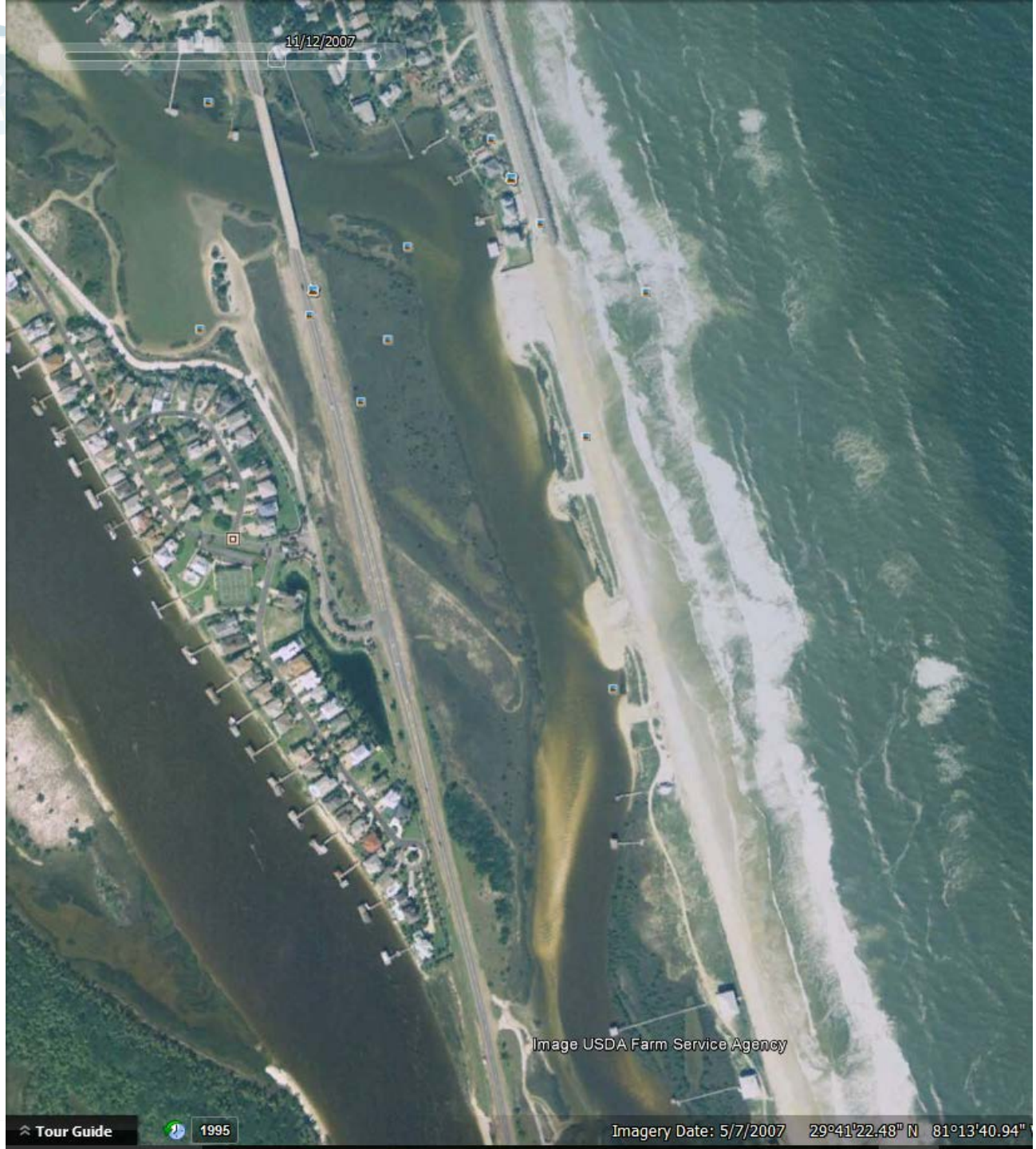
The Miami Beach Example



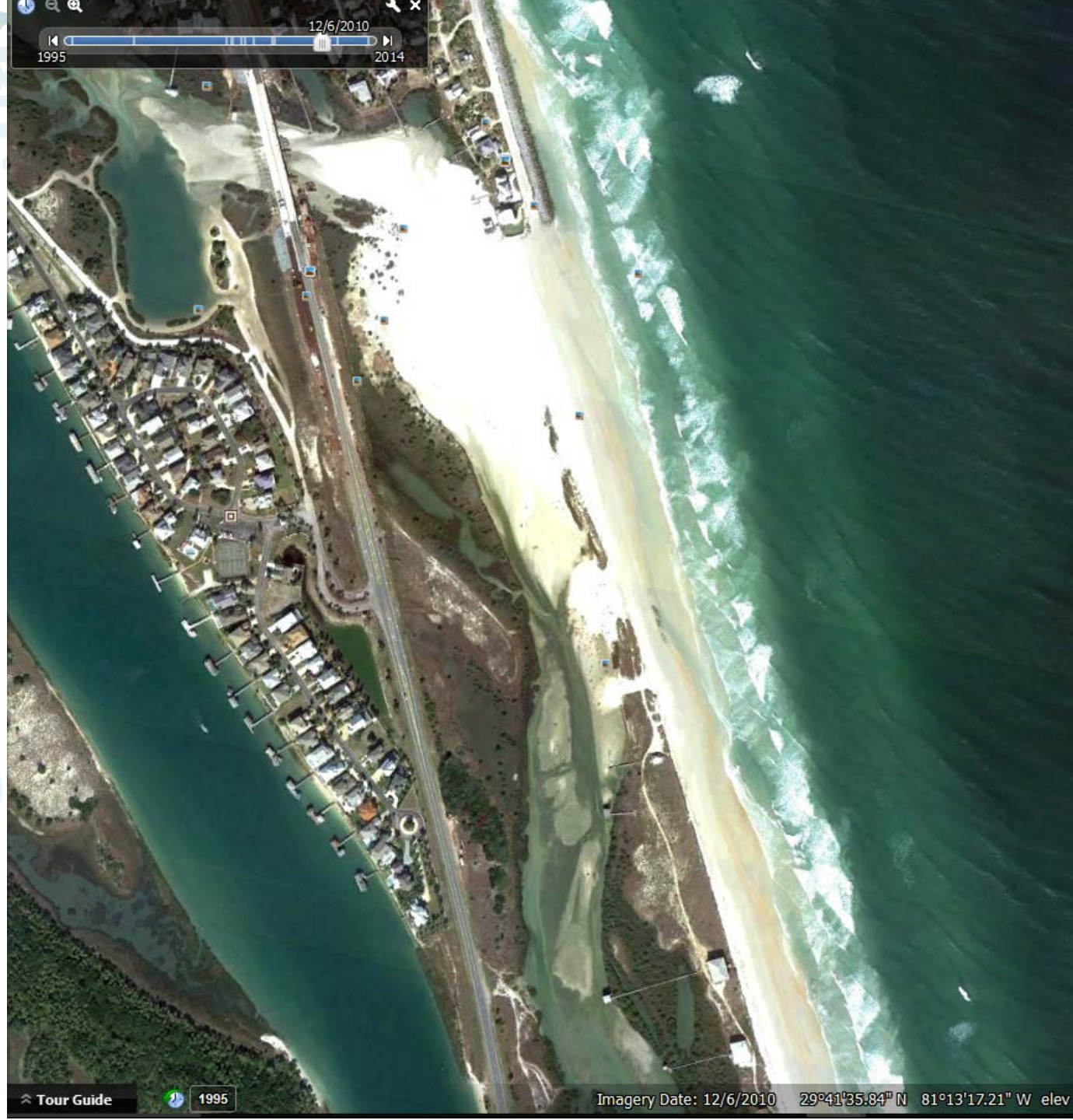


SLR, Roads, and Local Governments

11.12.2007



12.6.2010







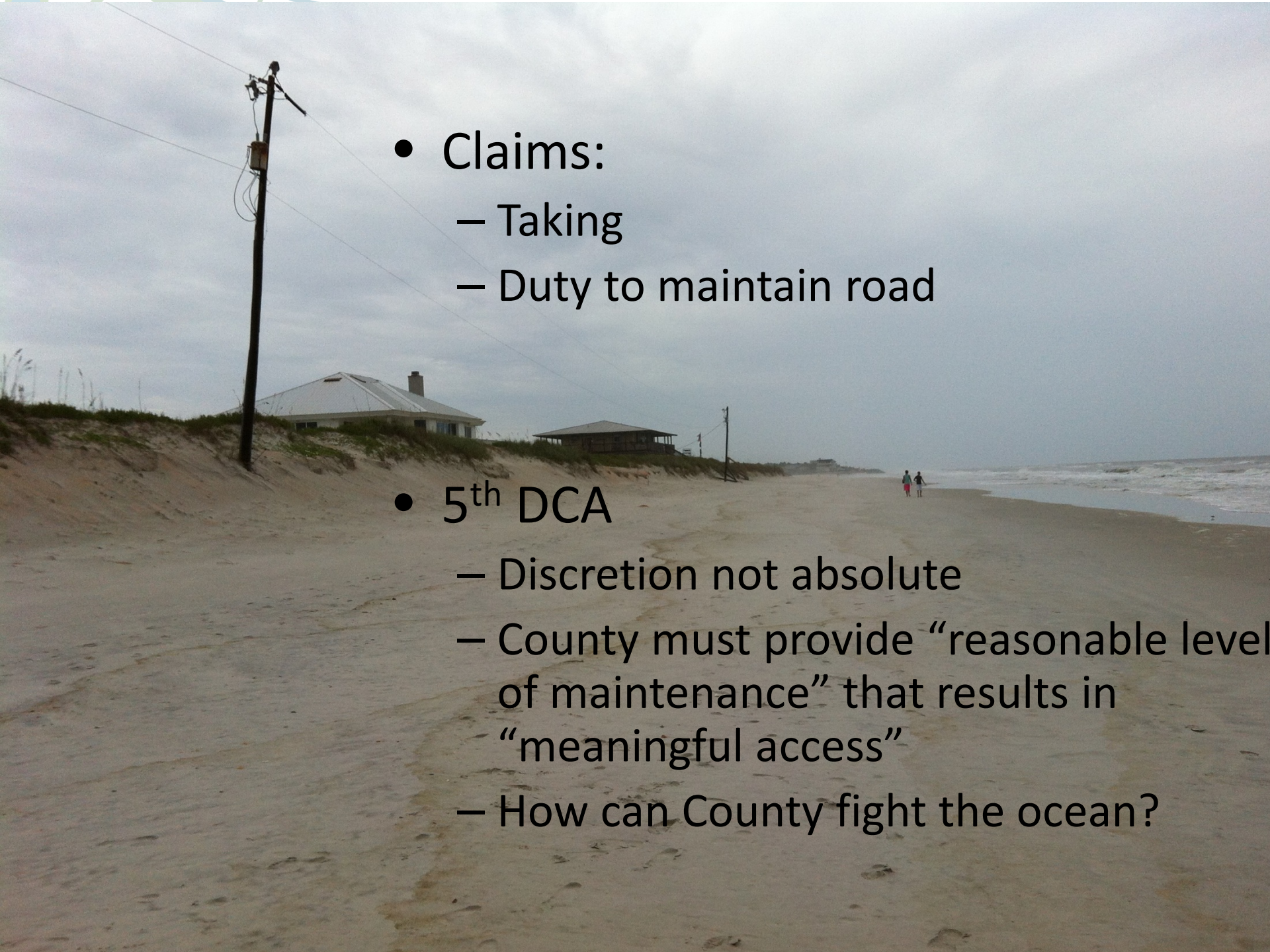
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Some Key Facts

- 3 residences when County acquired in '79
- All owners that testified acquired after 1980
- Sporadic County maintenance
- County frustration expressed at meetings
 - Too expensive to maintain; study proving same
- More \$ from FEMA in 2000
- \$2.3 M from 2000-2005; avg. of \$244K/yr/mile
- 2008 study: ~\$13.1M plus \$5.7-8.5 M/3 yrs
- Responded to all emergency calls

- 
- A photograph of a coastal area. In the foreground, there is a wide, sandy beach. To the left, a utility pole stands on a sand dune. Behind the dune, a white house with a chimney is visible. Further down the beach, another smaller structure is seen. In the distance, two people are walking on the beach near the water's edge. The sky is overcast and grey.
- Claims:
 - Taking
 - Duty to maintain road

- 5th DCA
 - Discretion not absolute
 - County must provide “reasonable level of maintenance” that results in “meaningful access”
 - How can County fight the ocean?

Settlement Agreement Excerpt from Summer Haven Case

If a catastrophic weather event occurs that destroys a substantial portion of any part of the paved or unpaved portion of the Old A1A right-of-way from Blocks 66 to 23, the County agrees to make timely and good faith efforts to obtain State, Federal, and/or other available funds to restore, to the greatest extent reasonably possible, the condition of Old A1A from Block 66 to Block 23 as it existed as of the date of this Settlement Agreement and Release, subject to any regulatory limitations imposed upon the County in making this effort. The County also agrees that it will, prior to obtaining any available State or Federal funds, and subject to other demands placed upon the County resources by said catastrophic weather event, make timely and good faith efforts to provide temporary vehicular access to all properties from Block 66 to Block 23,

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.”

But, the U.S. Supreme Court says. . .

- 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)





SLR, Wastewater, and Local Governments





SLR, Finances, and Local Governments

Where's the Money?

- Increasing infrastructure costs
- Tax revenues decreasing?
- How to limit local gov't expenditures?
 - Model ordinance for environmentally compromised roads?
 - Increased use of MSBUs?
 - More bonds? Ratings linked to resilience?
 - Buyout programs? Additional issues. . . .

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

Matthew 7: 26-27

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