

Infrastructure & Sea-Level Rise: Legal Challenges for Local Government Maintenance of Infrastructure

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Overview

- Context
- Infrastructure as a Legal Liability
- Legal Case Study: *Jordan v. St. Johns County*
- Funding cleanup of what we leave behind



Elevating
Roads in
Miami
Beach

Back-flow preventer
in Tampa Bay
neighborhood



Elevated
injection
pump
station:
Key West

Reality, Tradeoffs, & Perspectives

- Not going to protect everything
- Who shoulders losses? Why? How?
- Local gov't tradeoffs and perspectives
 - Protect constituents/avoid risk
 - Protect tax base/grow
 - Avoid legal liability
 - Politics

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 hereby constitute this Constitution for the United States of America.

Article. 1

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

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

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

Representatives and electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Numbers or Representatives in each State shall not exceed one for every thirty thousand, but each State shall have at least one Representative, and each Representative shall, when elected, be a Citizen of the United States, and when elected, shall be seven Years.

The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of five Years, in such Manner as they shall direct. The Number of Representatives shall not exceed one for every thirty thousand, and each State shall have at least one Representative, and each Representative shall, when elected, be a Citizen of the United States, and when elected, shall be seven Years.

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Section 9. The Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Section 10. The Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.



SLR, Drainage, & Local Governments

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

- Why the difference?
 - For existing, people now depend on it
 - No right to depend on what hasn't been built
 - Separation of gov't powers
 - Need to preserve the discretionary power of the legislative branch
- Distinguish
 - Immunity for planning as this is legislative
 - No immunity for “operations;” always a duty to act with reasonable care to avoid harm to others



SLR, Seawalls, & Local Governments



New Sea Wall Ordinances

- Miami Beach—new seawall minimum heights
- Fort Lauderdale
 - Citation for allowing salt-water to flow over your property and flood others
 - <https://gyr.fortlauderdale.gov/greener-government/climate-resiliency/seawall-maintenance>
- And many others already done or working to establish new minimum heights
- Does this violate property rights?
- Who should have to pay?



Memorandum

Memorandum No: 17-016

Date: January 26, 2017

To: Honorable Mayor and Commissioners

From: Lee R. Feldman, ICMA-CM, City Manager

Re: Enforcement of the City's Seawall Ordinance - ULDR Section 47-19.3

As you are aware, the City of Fort Lauderdale adopted amendments to ULDR Section 47-19.3 on June 21, 2016 (CAM #16-0662) to establish construction standards that ensured seawalls and similar structures contributed to coastal resilience and mitigated the effects of tidal flooding and sea level rise. The ordinance included two provisions under which a property owner may receive a code violation:

1. Failing to maintain a seawalls in good repair and setting a timeline of 365 days for completion of repairs if cited; and
2. Requiring owners to prevent tidal waters entering their property from impacting others properties or the public right of way and setting a timeline of 365 days for remedy if cited.



A SLR Case Study on Roads and Local Government Liability

Jordan et al. v. St. Johns County



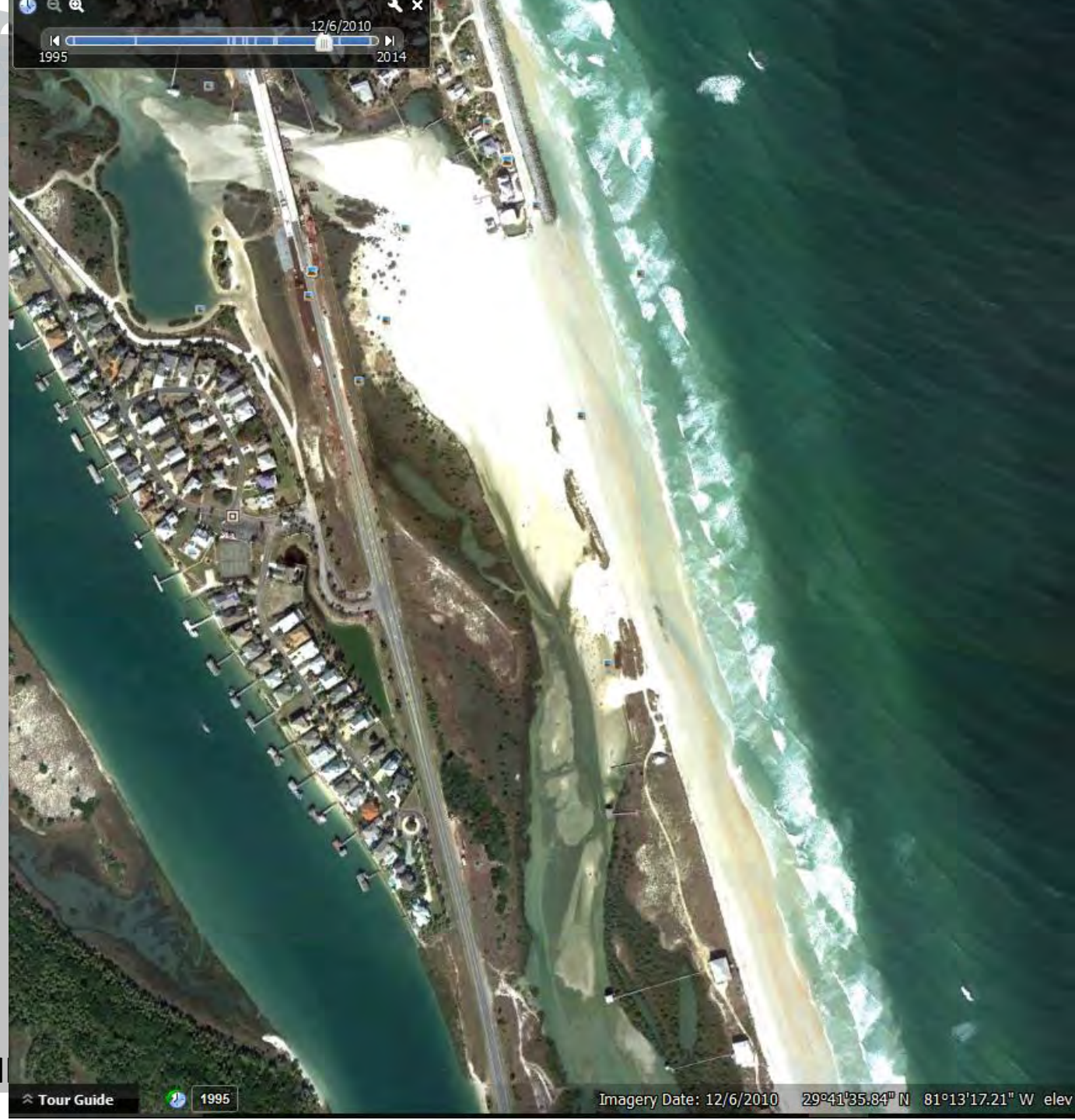
Photo by Thomas Ruppert, Florida Sea Grant, 2018

11.12.2007



Nov. 16, 2018, Roger William

12.6.2010



Nov. 16, 2018, Roger Wil



Example home
prior to hurricanes
Matthew (2016)
And Irma (2017)

Same home after Hurricane Matthew (2016)

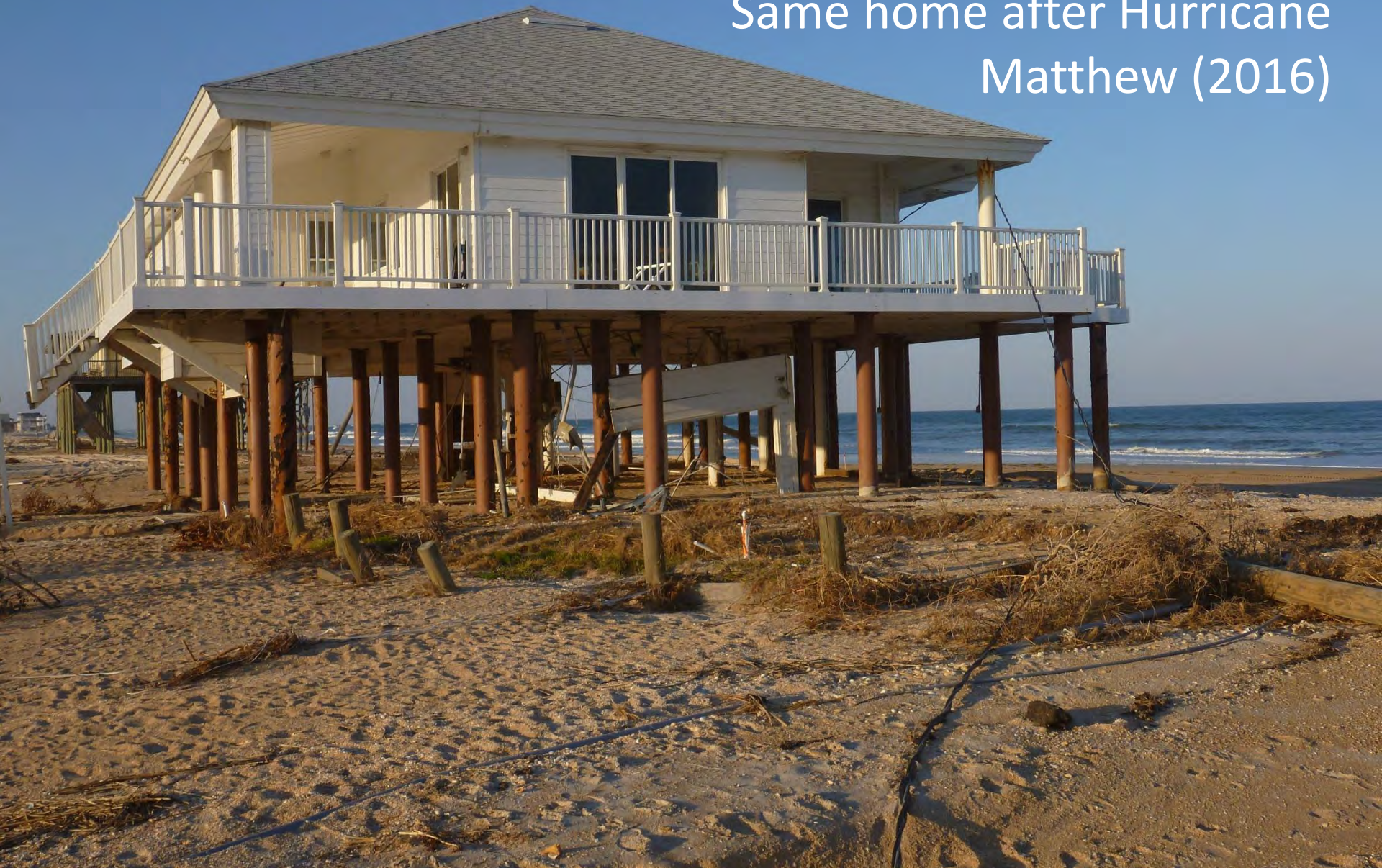


Photo by Thomas Ruppert, Florida Sea Grant, 2016

Florida Sea Grant College Program

Sea Grant
Florida

After Hurricane Irma (2017)

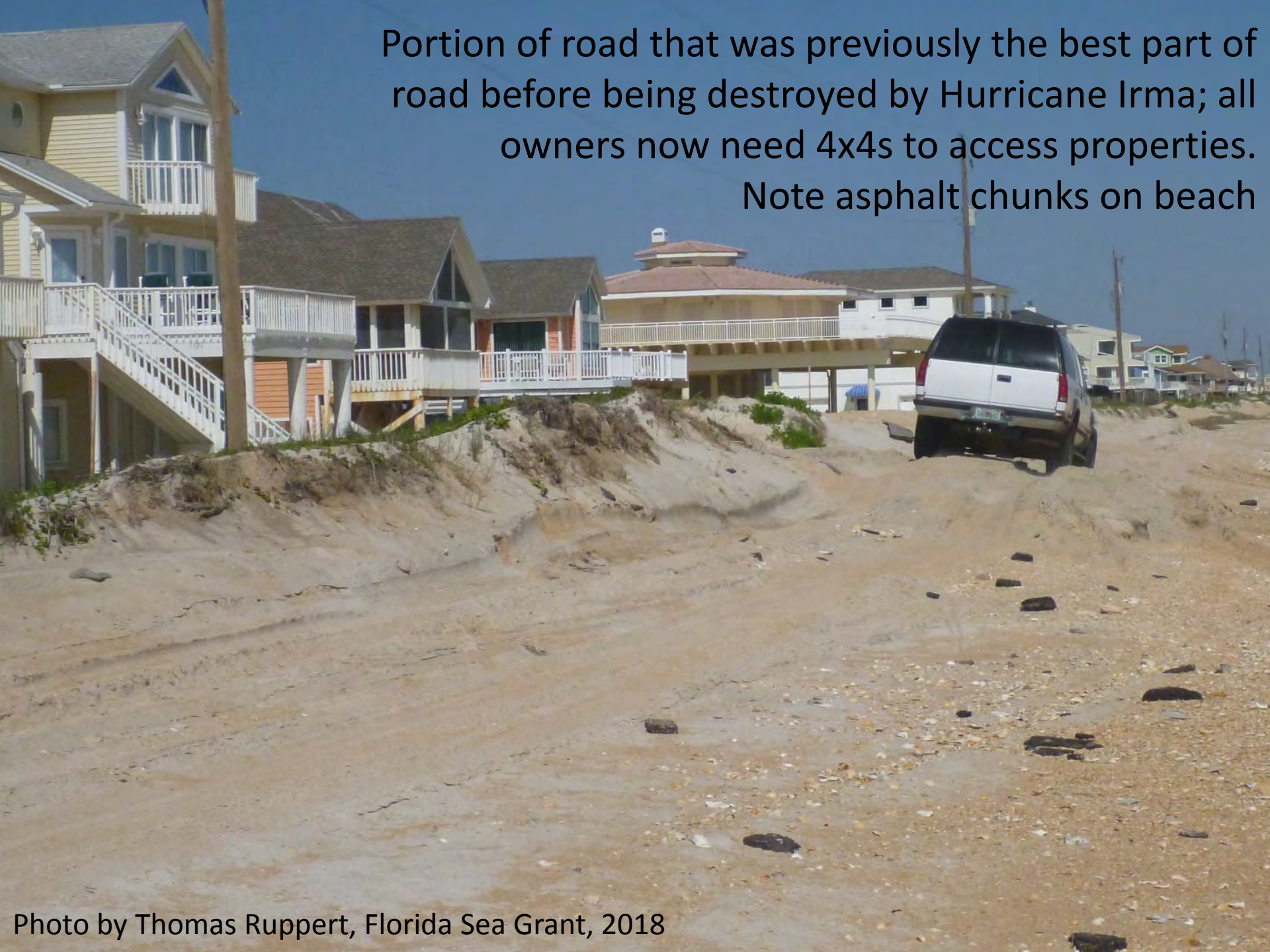


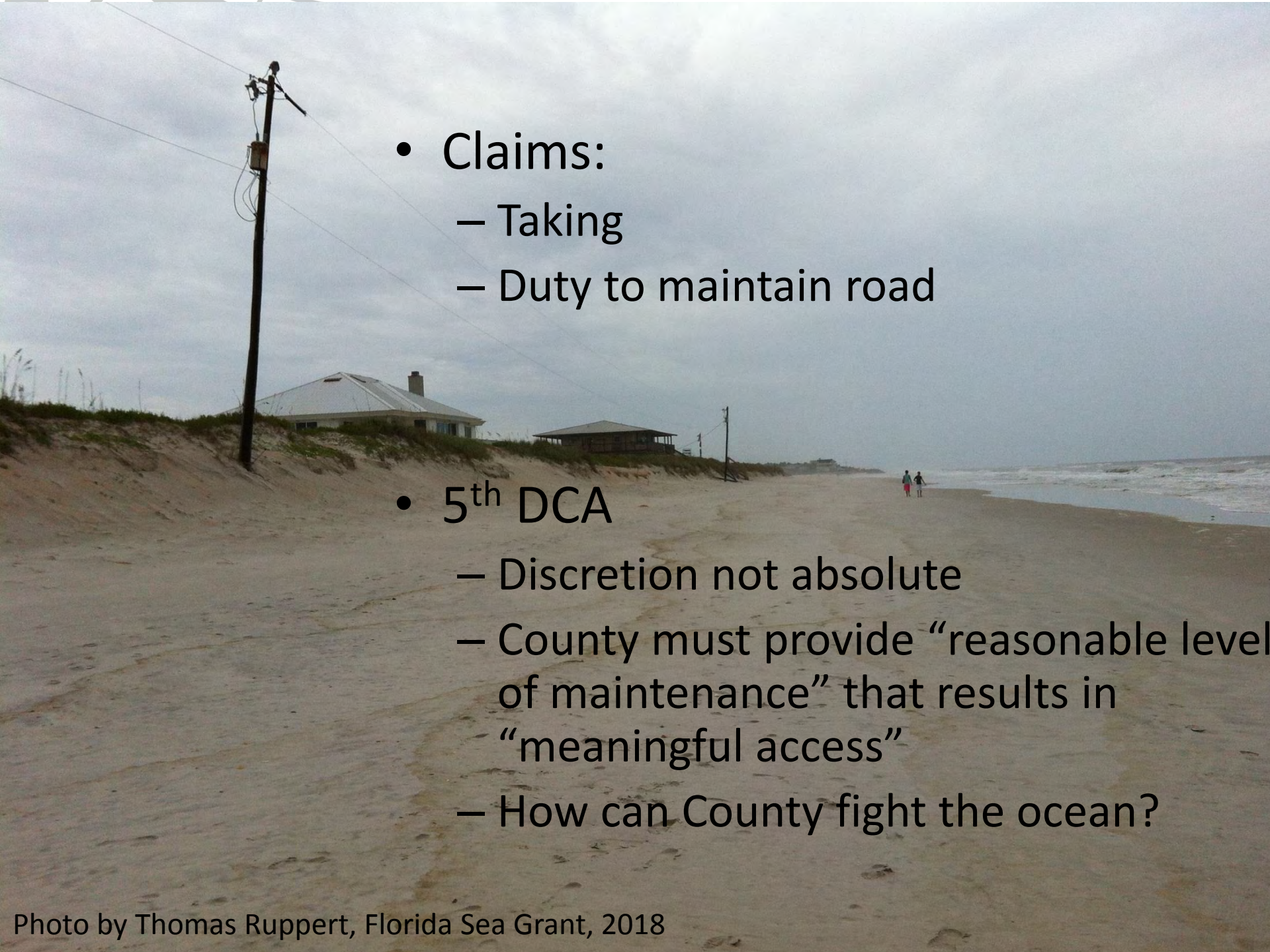
Photo by Thomas Ruppert, Florida Sea Grant, 2018

Florida Sea Grant College Program



Portion of road that was previously the best part of road before being destroyed by Hurricane Irma; all owners now need 4x4s to access properties. Note asphalt chunks on beach



- 
- 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?

Thesis: Judicial interpretation of “maintenance” responsibilities for infrastructure may determine extent of local government discretion in how local governments address sea-level rise.

Non-discretionary/
maintenance/
ministerial duties



vs.

Discretionary/
planning/policy



Separation of Powers

“The founders of our country well understood that the concentration of power threatens individual liberty and established a bulwark against such tyranny by creating a separation of powers among the branches of government. . . .

We are a country that jealously guards the separation of powers, and we must be ever-vigilant in that endeavor.”

— City of Chicago v. Jefferson B. Sessions, No. 17-2991
(7th Circ., April 19, 2018)

Rights and Responsibilities for Protecting Private Property

- No legal duty to protect private property other than 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)

But. . . . New Case Law

- St. Bernard Parish Gov't v. United States, 887 F.3d 1354 (Fed. Circ. 2018)
- Affirmative gov't action requisite
- Focus on harm from “maintenance” (or lack thereof) sounds in tort, *not* under 5th Amend.
- *all* Florida trial courts still bound by the *Jordan* decision,
- *BUT*, other state courts not bound by *Jordan*



What Can Local Governments Do?

Florida Sea Grant College Program



Road Design in the Florida Keys

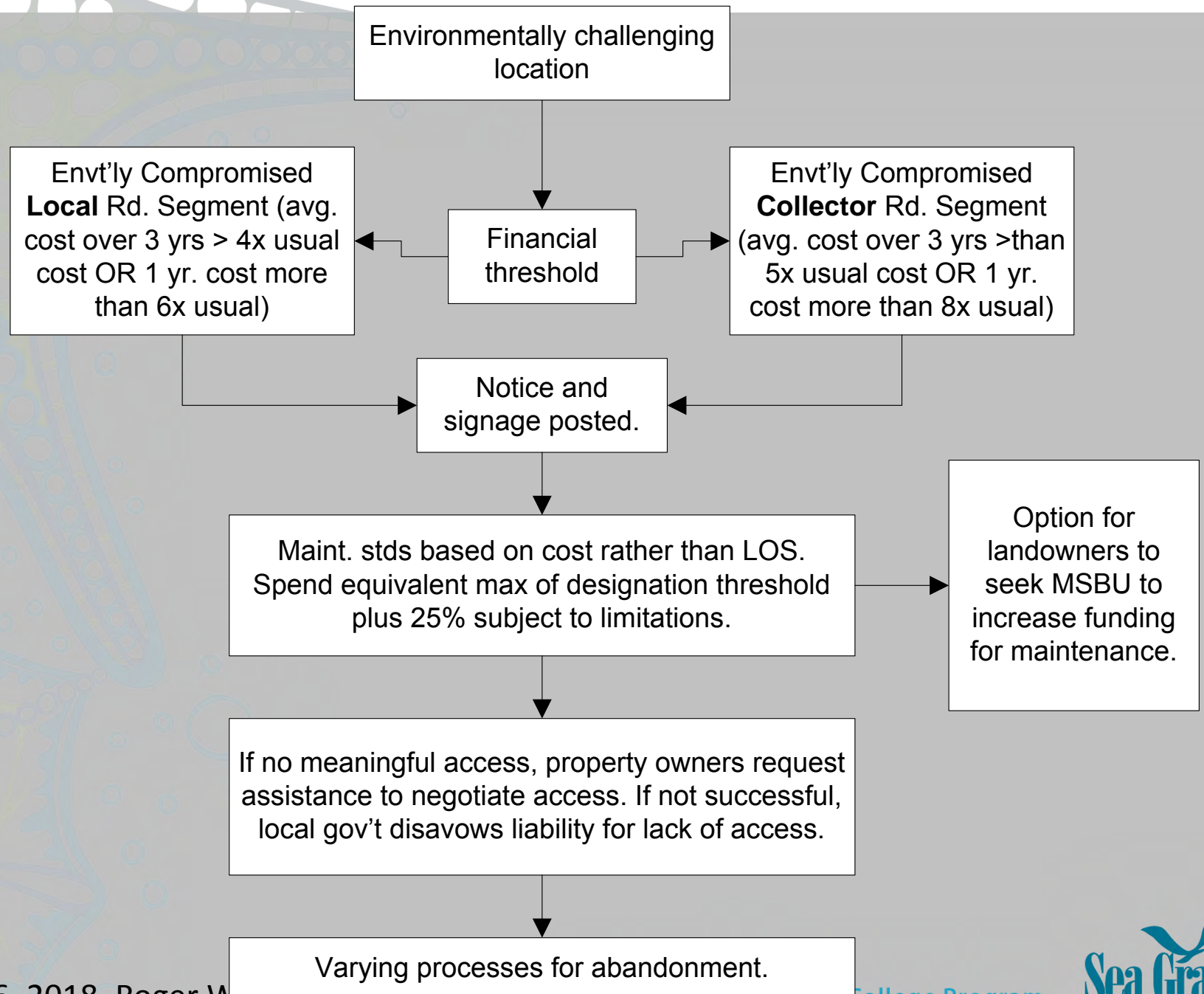
Ultimately, as an “interim measure”, the County adopted a Resolution with standard road design criteria that included:

1. Determine the useful life of the project
2. Incorporate sea level rise estimates for that year (using a median estimate)
3. Add the elevation for “not to exceed” 7 days of flooding
4. Elevate to that level

Slide courtesy of Erin Deady, Esq.,
President, Erin L. Deady PA

Another Option: Florida Sea Grant Model Roads Ordinance

- Sets financial criteria thresholds
- Exceptions to LOS for “environmentally compromised road segment”
- Must add signage to designated roads
- Assistance in negotiation if a lack of “meaningful access”
- MSBU option for additional funding
- Abandonment procedures outlined



Capital Improvement Planning

- Capital improvement planning (CIP) is a clear representation of the legislative duty
 - Involves extensive discretion
 - All about planning and making choices balancing different policy considerations
- Possibly integrate limits on infrastructure expansion or rebuild/redesign and creating more clarity on “ministerial/maintenance” activities vs. “discretionary/planning/legislative” actions



Our Future Coastlines

Florida Sea Grant College Program





What Will Become of Our Beaches and Coastlines?



Nov. 16, 2018, Roger Williams U. Law

Vacated and Abandoned Property

- Will anyone really want the “new” waterfront property created by SLR?
- Ugly
- Squatters
- Illegal activities
- Pollution



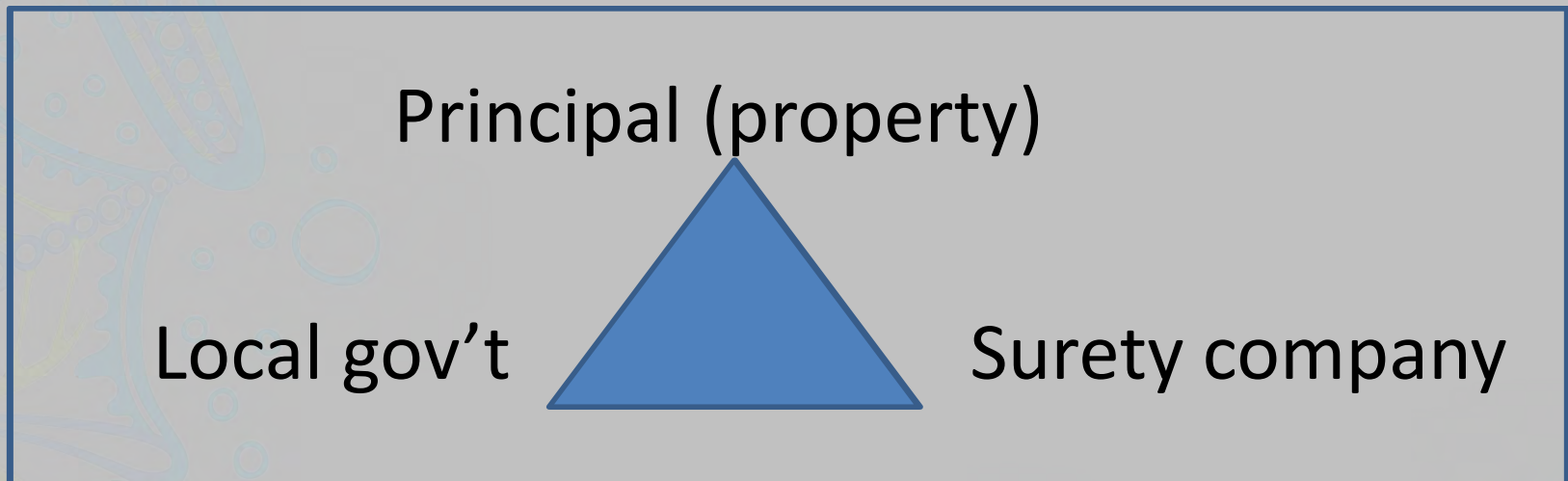
Need for Cleanup

- How to fund?
- General tax revenue?
- Surety bonds?
- “Reverse PACE” style funding ?



Surety Bonds

- If contract not properly performed, surety co. pays
 - NOT the same as insurance: purchaser of bond remains liable to surety for costs



Surety Bonds

- Federal and state laws require use in contracting
- Common tools for:
 - Mine reclamation
 - General contractors
 - Maintenance obligations (e.g. for HOAs responsible for stormwater facilities)
 - Probably not realistic tool for most SFHs

Surety Bond

- Need for clarity in authority, process, criteria, and opportunity to apply
 - Dillon Rule vs. Home Rule states
- When to impose requirement?
 - Only for new permits? Potential for a takings challenge as an “exaction”
 - *Nollan/Dolan* tests and *Koontz* issues
 - Upon designation of an area? Such as an overlay zone based on vulnerability assessment.
 - Safer from “exaction” claims

Property Assessed Clean Up and Preservation

- PACUP
 - Establish clean up costs on a parcel-by-parcel basis
 - Projected timeline to reach full cleanup amount
 - Payments based on info, including safe interest rate calculation
- Administrative costs
- “Special benefit”?
- Home rule authority?



Property Assess Clean Up Program

- PACUP
 - Establish clean up costs on a parcel-by-parcel basis
 - Projected timeline to reach full cleanup amount
 - Set payment schedule based on info and including safe interest rate calculation
- Significant administrative costs
- Challenge of special assessments: What's the “special benefit” to assessed property?
- Is home rule authority sufficient?

Can we do it?

- Drivers and impediments
- Can innovation and creativity overcome the same impediments that have stopped us to date?
 - Myopia, amnesia, optimism, inertia, simplification, and herding (psychological biases from “The Ostrich Paradox”)
 - Politics, limited pool of worry, immediacy, financial loss, etc.

What to Do

1. Engage the community and talk about *values*
2. Avoid adding more people or infrastructure to current and future hazard-prone areas
3. Inform those that are there about current and future risk
4. Downzone the most hazardous areas
5. Increase design standards based on future scenarios (elevation, drainage)
6. Realistic long-term CIP acknowledging future increases in costs and decreased revenue

Potential Legal Import of Notice

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



KATRINA HIGH WATER 2005

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

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



By **The Associated Press**



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



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



REASONABLE INVESTMENT-BACKED EXPECTATIONS: SHOULD NOTICE OF RISING SEAS LEAD TO FALLING EXPECTATIONS FOR COASTAL PROPERTY PURCHASERS?

THOMAS RUPPERT*

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

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JULY 2012

UF|Levin College of Law
Conservation Clinic
UNIVERSITY of FLORIDA

Sea Grant
Florida



Southeast
Climate Consortium



Florida
Climate Institute

Supporting Articles

- Thomas Ruppert & Carly Grimm, *Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea-Level Rise*, FLORIDA BAR JOURNAL, Vol 87, No. 9 (2013), available at <https://www.floridabar.org/news/tfb-journal/?durl=/DIVCOM/JN/jnjournal01.nsf/Articles/D1CD8A7E6519800885257C1200482C39>
- Thomas Ruppert, *Castles—and Roads—in the Sand: Do All Roads Lead to a “Taking”?*, 48 Env’tl Law Reporter 10914 (2018) https://www.flseagrant.org/wp-content/uploads/Castles-and-Roads-In-the-Sand_2018_48_ELR_10914.pdf
- Emma Hollowell and Thomas Ruppert, [Seawalls & Sea-Level-Rise-Induced Flooding: Addressing Public and Private Infrastructure](#) , 34 Env’tl. and Land Use Law Section Reporter of the Fla. Bar 4 (June 2017)



THE THREE LITTLE PIGS: CLIMATE CHANGE EDITION

“[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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