Planning and Legal Issues Related to Climate Change

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October 12, 2018
Big Pine Key and Vicinity, 7 inches Sea Level Rise (2030, High Scenario)
Big Pine Key and Vicinity, 24 inches Sea Level Rise (2060, High Scenario)
The Facts About Climate Law, Planning & Policy

- What’s coming up that local governments are facing
- Some key regulations, policies and cases
- Who’s doing it (so it’s not so scary)?
- Is there liability?
- New directions on climate law and policy
Florida Planning and Legal Issues
STATUTES AND PLANNING INITIATIVES
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 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
Flood Peril Legislation (SB 1094)

What are the principle requirements?

1. Development and redevelopment principles and strategies, that reduce the flood risk in coastal areas from high-tide events, storm surge, flash floods, stormwater runoff, and the related impacts of sea-level rise.
2. Best practices for the removal of coastal real property from FEMA flood zones.
3. Site development techniques that may reduce losses and claims made under flood insurance policies.
4. Be consistent with, or more stringent than, the flood-resistant construction requirements in the Florida Building Code and flood plain regulations.
5. Construction activities consistent with Chapter 161.
6. Encourage local governments to participate in the National Flood Insurance Program Community Rating System.

POF is now tending to drive SLR and Climate issues being addressed in Comprehensive Plans; Some local governments are also creating separate elements to address the issues: Broward & Monroe are examples.
# Example Planning Efforts Around the State

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>West Coast, Southeast Florida</td>
<td>Regional Collaboration and involvement of regional planning councils</td>
</tr>
<tr>
<td>Broward</td>
<td>Enhanced modeling: seawall heights and future conditions groundwater maps</td>
</tr>
<tr>
<td>Miami Beach</td>
<td>Stormwater pumps, road elevation and seawall policy</td>
</tr>
<tr>
<td>Ft. Lauderdale</td>
<td>Adaptation Action Areas (19), seawall ordinances for design criteria</td>
</tr>
<tr>
<td>Monroe County</td>
<td>Road elevation policy accounting for sea level rise and demonstration projects &amp; SLR Modeling through CRS (to achieve “4” rating)</td>
</tr>
<tr>
<td>East Central FL</td>
<td>Satellite Beach- HAZUS modeling and plan development (new Volusia and Brevard initiatives)</td>
</tr>
<tr>
<td>St. Augustine</td>
<td>Historic properties, post-Matthew infrastructure and planning</td>
</tr>
<tr>
<td>Multiple Cities/Counties</td>
<td>Sustainability/Climate/Vulnerability planning initiatives (Central FL, West Coast, South Florida)</td>
</tr>
<tr>
<td>DEO</td>
<td>Pilot / demonstration vulnerability analyses in 3 communities</td>
</tr>
<tr>
<td>DEP- Resilient Shorelies</td>
<td>Two cycles of grant funding and other resources/information exchange</td>
</tr>
<tr>
<td>Non-Coastal</td>
<td>Sunrise- Sustainability planning and vulnerability analysis (tie to coastal structures)</td>
</tr>
<tr>
<td>Yankeetown</td>
<td>AAAs based on natural areas to transition and serve as “coastal barriers”</td>
</tr>
</tbody>
</table>
Sample Planning Strategy

How do these requirements relate to or affect planning activities and infrastructure investments in the short- and mid-term?

**Development/Redevelopment Strategies**
- Compliance (POF) Strategy (timeline and scope)
- Frame “development”
- Short term capital projects
- AAAs

**Comprehensive Plan**
- Comp Plan Goals, Objectives and Policies
- Review land uses

**Land Development Regulations**
- LDRs: Development / design standards
- Areas subject to flooding
- ESLs
- Infrastructure LOS

**Short Term**
- Compliance (POF) Strategy (timeline and scope)
- Frame “development”
- Short term capital projects
- AAAs

**Mid Term**
- Comp Plan Goals, Objectives and Policies
- Review land uses

**Long Term**
- LDRs: Development / design standards
- Areas subject to flooding
- ESLs
- Infrastructure LOS
## Monroe County: Road Design Methodology

### Final Roads Report: Appendix 1 narratively describes the steps in the process so they can be applied in other areas

<table>
<thead>
<tr>
<th>Sands Community</th>
<th>Twin Lakes Community</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tidal datum based on current tidal epoch MHHW (NAVD88)</td>
<td>Elevation addition to not exceed 7 days of flooding annually based on 2015 sea level</td>
</tr>
<tr>
<td>Sea level rise estimate using IPCC AR5 Median (2015 to 2040)</td>
<td>Resulting target minimum elevation for roads (2040)** (NAVD88)</td>
</tr>
</tbody>
</table>

| -1.1” | 6.0” | 5.4” | 10.3” |
| -7.0” | 6.0” | 5.4” | 4.4” |

The negative values are in relation to the NAVD88 datum, where zero is a point approximately equal to the low point of the roadways in the two communities.

Criteria adopted by Resolution
The Law: Where Does Climate Change Show Up?

- ESA
- NEPA
- CAA
- CWA
- MMPA
- FOIA/1st Amendment
- Energy Policy Act
- Global Climate Change Act
- Corporate Reporting/Securities Disclosure
- FTC

- “Cap-and-trade” regulation where GHGE’s are capped and allocated through the distribution of “allowances” representing a right to emit.
- NEPA 
- ESA
- CWA
- MMPA
- FOIA/1st Amendment
- Energy Policy Act
- Global Climate Change Act
- Corporate Reporting/Securities Disclosure
- FTC

- 885 Cases as of 6/2018
- Columbia Law School Tracking Database

- Protestors and scientists
- Failure to consider climate in permits
- Money damages and common law claims
- Protect my future
Basic State Legal Concepts in Government Actions/Liability for Capital Improvements and Roads

But wait, there’s one more thing to consider… government inaction *(Jordan v. St. John’s County)*…

<table>
<thead>
<tr>
<th>1. What is the maintain v. upgrade obligation?</th>
<th>Generally cases have found there is a duty to “maintain” (roads) but no duty to “upgrade”. There is no direct case on duty to maintain or upgrade from sea level rise yet…</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. What actions can be taken or not? Planning versus operations.</td>
<td>Duty to maintain or upgrade due to sea level rise could depend on whether road design decisions are deemed “discretionary planning” actions or “non-discretionary operations/maintenance” actions.</td>
</tr>
<tr>
<td>3. Why is planning versus operation important?</td>
<td>Once you build it, you must maintain it with “reasonable care” to function as designed (now it becomes a non-discretionary operations).</td>
</tr>
<tr>
<td>4. Sovereign Immunity</td>
<td>Discretionary planning decisions are immune from liability under the Tort Claims Act. Cases have held there is no liability for failure to build, expand or modernize capital improvements, cases have deemed these “planning” actions (road widening). Nor liability for basic design of roadway and decision on whether or not to upgrade (planning level).</td>
</tr>
</tbody>
</table>
Tort & Sovereign Immunity, Takings
Sovereign Immunity and Torts

- Corps not liable
- Case originally filed
- MRGO contribution to maintenance of I
- MRGO contributed to protection
  - "Certainly by 2000, the MRGO had eroded MR-GO..."
  - Braden wrote
- May 4, 2016 Judgment
  - Lower 9th Ward
- Appeal July 6, 2016
  - Arkansas G. for government immunity
  - Amendment to the Flooded property
- "...and absent
  - reading natural
  - inevitably would
  - for centuries,"
  - Braden Parish and
  - inking)
  - relying heavily
  - it’s possible
  - owner of the
Court of Appeals for the Federal Circuit tossed the award of damages by U.S. Claims Court in the suit over the effects of the MR-GO. The appeals court found that the suit was based solely on the damaging effects of the MR-GO, a 72-mile shortcut connecting the Gulf of Mexico to the Industrial Canal in New Orleans. The MR-GO, built by the Army Corps of Engineers before Katrina, was closed with a dam in 2009. The lower court ruling was based largely on the failure of the Corps to anticipate the level of flooding that occurred. We conclude that the government cannot be liable on a takings theory for inaction and that the arguments never considered whether the levee may not have contributed to the flood of Katrina, rather than on actions the Corps did take.

“We cannot, at this stage of the proceedings, determine that the government action in constructing and operating MR-GO, rather than on actions the Corps did take to reduce the effects of the MR-GO, rather than on actions the Corps did take to reduce the effects of the MR-GO, was the proximate cause of the flooding.”
Inaction: Jordan v. St. John’s County

• 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?
  – Government inaction CAN rise to the level of taking but no opinion on whether it does under these facts in Jordan

• St. Barnard Parish persuasive, but not binding, holding no liability for inaction
Borough dars v. Karans

- 3 story
- Without it, had
  - Karans
- Court determ
- taken f
  - Benefi
- Trial just
- NJ Supreme
- Revers

Karans had 56% chance of storm damage (over 200 year "protection life"

sought to exclude testimony on benefits of "just compensation" when a portion of private

– how do you calculate the "benefits"

warded $375k in just compensation (upheld at appellate

Court says erroneous valuation -- look at FMV

sider testimony on benefits)

and remand -- so what did they get???????

property is

benefit

before and after

18
Nuisance

UNREASONABLENESS ON THE PART OF A DEFENDANT CONTINUANCE OF ACTS FOR AN UNREASONABLE PERIOD CAUSAL CONNECTION BETWEEN DEFENDANT AND NUISANCE COMPLAINED OF EXISTENCE OF INJURY OR DAMAGE THREAT
**Plaintiff v. Fossil Fuel Companies**

- **Kivalina** - Nuisance claim for $ from the energy industry for flooding damage caused by discharging greenhouse gases (GHGs) into the atmosphere, and that it was a joint venture. EPA decided how GHG emissions should be regulated, and that it was necessary to issue the Clean Air Act.

- **Connecticut v. EPA** - both for private parties and the public interest, and that it was necessary to issue the Clean Air Act.

- **Oil States v. Greenpeace** - decided how the Clean Air Act should be interpreted, and that it was necessary to issue the Clean Air Act.

- **AEP v. Tennessee Valley Authority** - decided how the Clean Air Act should be interpreted, and that it was necessary to issue the Clean Air Act.

- **San Mateo County, Marin County and the City of Imperial Beach v. Chevron** - (37 D’s) public nuisance claims preempted by the Clean Air Act, and that it was necessary to issue the Clean Air Act.

- **USSC in Kivalina** - if an individual driving a car (and thus contributing to emissions) could also be a defendant, how can a court determine who was liable?
  - **Causation v. “substantial factor”**
  - **Vulnerability assessments as evidence?**

- **Comer v. Murphy***
  - Claims preempted by the Clean Air Act, and that it was necessary to issue the Clean Air Act.
  - Vulnerability assessments as evidence and persistently create doubt.”
Flooded homeowner sues bank for recommending he reject flood insurance

By L.M. Sixel | October 2, 2017

Deola Ali bought a house in Kingwood six years ago and considered buying flood insurance. Instead, he says, he followed the advice of his mortgage lender, which said he didn't need flood insurance because the property wasn't in a flood plain.
Ali v. JP Morgan Chase Bank

- Homeowner received mortgage financing advise, home insurance advise. Allegation: Negligent, unlawful advice on the lack of need for flood insurance. Theory: Homeowner relied on Chase’s wrongful advice leading to a “foreseeable injury”.  
- Filed 9/23/17 in U.S. District Court Southern District of Texas, Trial set for 2/18/19.
- Claims of Negligence, Negligent Misrepresentation, and Strict Liability in Tort.
### Other Evolving Legal Aspects

<table>
<thead>
<tr>
<th>NFIP Reform</th>
<th>Corps of Engineers</th>
<th>NEPA</th>
<th>FFRMS</th>
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<tbody>
<tr>
<td>- FIRM Existing Flood Risk</td>
<td>- Corps &quot;(Engineer Technical Letter 1100-2-1) covering &quot;Procedures to Evaluate Sea Level Change: Impacts, Responses and Adaptation&quot; (July 2014)&quot;</td>
<td>- Agency experience and expertise to determine whether an analysis of emissions/climate change impacts would be useful.</td>
<td>- Federal investments implemented through Hazard Mitigation Assistance Grants and the Public Assistance Program.</td>
</tr>
<tr>
<td>- Technical Mapping Advisory Council</td>
<td>- Previous &quot;Incorporating Sea-Level Change Considerations in Civil Works Programs&quot;</td>
<td>- &quot;Rule of reason&quot; to ensure the type and level of analysis is appropriate for the anticipated environmental effects of the project.</td>
<td>- FEMA continues to consider communities in or near floodplains.</td>
</tr>
<tr>
<td>- Future flood risk</td>
<td>- Sea level rise calculator (2017) with 3 scenarios</td>
<td>- &quot;8/2/16 Guidance - # on GHGEs if feasible backwards&quot;</td>
<td>- Land, land use, construction for &quot;federal projects&quot;.</td>
</tr>
<tr>
<td>- Expired 9/30 and reauthorized until 12/8</td>
<td>- Guidance on Inland Climate Change</td>
<td>- Early 2017- CEQ directed to withdraw</td>
<td>- Executive Order revoking FFRMS signed 8/15 17</td>
</tr>
<tr>
<td>- Band aid or full reform?</td>
<td>- Principles for Risk in Planning</td>
<td></td>
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Public Trust Doctrine

THE PRINCIPLE THAT CERTAIN NATURAL AND CULTURAL RESOURCES ARE PRESERVED FOR PUBLIC USE, AND THAT THE GOVERNMENT OWNS AND MUST PROTECT AND MAINTAIN THESE RESOURCES FOR THE PUBLIC’S USE.
Public Trust Theories - Juliana v. U.S.

- **Plaintiffs**
  - young people ages 8-19, Earth Guardians and Dr. James Hansen (acting as guardian)
  - Allegations: fossil fuels burn carbon, U.S. allowed emissions to get out of control, and they sought: (1) a declaration their constitutional and public trust rights have been violated and (2) an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce CO2 emissions

- **Defendants** – US, DOE, EPA, OMB, etc. filed M2D

- **Trial:** October 29, 2018
For the purposes of this motion, those facts are undisputed. Questions before the Court:

1) whether D’s are responsible for harm caused by climate change,
2) whether P’s may challenge D’s’ climate in court, and
3) whether this Court can direct D’s to change their policy without violating the separation of powers doctrine.

Case is Making Headway

• 11/10/16 – “This lawsuit is not about proving that climate change is happening or that human activity is driving it.

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1) whether D’s are responsible for harm caused by climate change,
2) whether P’s may challenge D’s’ climate in court, and
3) whether this Court can direct D’s to change their policy without violating the separation of powers doctrine.

Motion Defendants’ petition for writ of mandamus and emergency stay of discovery and trial filed by the United States (7/5/18).

Order issue of defendants’ protective order and stay of discovery pending

Petition motion for a writ of mandamus and emergency stay of discovery and trial filed by the United States (10/23/18).

Motion Court reviewing defendants’ protective order and stay of discovery.
Reynolds v. FL

- State of Florida (Rick Scott), DEP, DACS, Board of TIITF and PSC
- Filed 4/16/18, 2d Circuit, 8 youth plaintiffs aged 10-19

• Motion to Dismiss filed by all Defendants 7/6/18 (political question, etc.)
  - Basis: legislative not something for court to decide

• Judge filed motion of recusal 10/1/18 (four days before trial)

Reynolds v. FL • State of Florida (Rick Scott), DEP, DACS, Board of TIITF and PSC • Filed 4/16/18, 2d Circuit, 8 youth plaintiffs aged 10-19 • Motion to Dismiss filed by all Defendants 7/6/18 (political question, etc.) • Judge filed motion of recusal 10/1/18 (four days before trial) • Youth and climate
Why the Law of Climate Change Matters: From Paris to a Local Government Near You

by Erin L. Deady

Climate change has received much national attention recently, but the laws, regulations, issues, and caselaw evolution, have a history that is not well known. International strategies are one important element in solving the climate change challenge. Impacts locally such as street flooding, compromised drainage, habitat and species changes, accountability, and liability confluence bring a new reality to the importance of understanding what is being done, or not done, at all levels of government. This article summarizes the climate change law highlights at the international, state, and local levels and provides insight as to why it matters.
Update on the Legal and Planning Issues of Climate Change Facing Florida

by Erin L. Deady

Without tracing a complete history back to approximately 2006, the State of Florida has had a relationship with climate change, sea level rise ("SLR"), and greenhouse gas ("GHG") management longer than most might think. For this overview, the focus is on recent advancements in state law and local strategies utilized across the state. Local governments continue to be on the frontlines of navigating these concepts. One thing is clear, the law surrounding climate change, flooding, and adapting to changing future environmental conditions are intertwined with efficiency and emissions. Another piece of legislation addressed issues such as green building, efficient land use patterns, energy conservation, GHG emissions in planning, and prompted the Florida Building Commission to make recommendations on energy efficiency, among other provisions.

Within the current state administration, agencies are still working on climate change related issues. This administration has focused more on technical assistance to local governments and emergency management guides and compilations of resources for local governments that want to start addressing SLR in their policy framework. Most recently, the Florida Department of Environmental Protection has formed the Florida Resilient Coastlines initiative, awarding an initial wave of grant funding to local governments for coastal adaptation and resiliency planning. In addition, the Department will continue its Coastal Partnership Initiative grant program, which funds some resiliency projects implemented by local governments.
Forthcoming….

• “Roads to Nowhere in 4 States: State and Local governments in the Atlantic Southeast Facing Sea Level Rise” (Columbia Journal of Environmental Law)

• Florida, Georgia, South Carolina and North Carolina
  – Sea level rise projected impacts in 4 states
  – Compare contrast each state (and local government’s) duties related to road ownership and maintenance
  – Discontinued maintenance and/or abandonment
  – Takings liability
  – Adaptation response and policy examples
Thank You

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