



Sea level rise adaptation: Funding sources

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A future of adapting to sea level rise (SLR) is the reality for local governments in Florida. Indeed, as of the 2015 revision of Florida Statutes 163.3178, local governments in certain affected communities are now required to consider SLR adaptation measures in their comprehensive plans. Because the implementation of those adaptive efforts in the decades ahead will be extremely costly, it is time to begin asking: How can the public finance projects meant to adapt to SLR while encouraging robust development, and how can private developers plan for a future clouded by the threat of SLR-related risks and regulations? Rather than taking adversarial positions, local government and private developers can explore together the various different financing options avail-

able under Florida law to fund SLR adaptation efforts that also promote healthy development. Fortunately, there is a smorgasbord of possibilities – some more mainstream, some less conventional, some not yet tried – that can be considered to mutually aid both development and adaptation. These funding sources are available whether a coastal community chooses to address these challenges directly through SLR adaptation efforts, or indirectly as a component of a typical storm surge resiliency and nuisance flooding program.

1. **Ad Valorem Taxation.** While an imprecise tool, local governments can use ad valorem property taxes to fund SLR adaptation. Ad valorem property taxes empower cities and counties to fund a broad variety of projects for the general benefit of

residents and property, and they are imposed under the theory that contributions must be made by the community at large to support the various functions of the government. Accordingly, ad valorem taxes may generally be imposed to fund any projects that support a legitimate government function regardless of whether particular taxpayers receive a special or direct benefit from the project funded. That said, local governments and developers can expect to receive political pushback from citizens if general property taxes are used to shoulder the burden of development-related adaptation.

2. **Special Assessments.** The Florida Statutes provide broad authority to local governments to levy special assessments to fund, among other

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From the Chair

As I write my last Chair’s Message as Chair of the Environmental and Land Use Law Section, I feel privileged to have served the Section as Chair this past year, and as a member of the Executive Council since 2004. I have worked with some of the finest lawyers and best people, many whom have become dear friends. Section members, I urge you to become involved in the ELULS. You can “dip your toe in the water” by becoming a member of a committee that interests you. The

Section always needs more member involvement, and I can tell you from my experience that what you give in time and talent will be far outnumbered by what you gain in professional and personal growth, satisfaction, and friendship.

The Section is very fortunate to have Janet Bowman as its incoming Chair. Chair-Elect (maybe Chair at the time of publication) Janet is the Director of Legislative Policy and Strategies at The Nature Conser-

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things: (1) guttering and draining of streets, boulevards, and alleys; (2) construction, reconstruction, repair, renovation, and upgrading of sewer, canal, drains, and stormwater management systems; (3) construction and reconstruction of water supply systems, including aquifer storage and recovery, and desalination systems; (4) construction and reconstruction of seawalls; (5) drainage and reclamation of wet, low, or overflowed lands; and (6) capital improvements and municipal services including sewer and street improvement. Notably, a special assessment does not qualify as a tax and is not subject to the ad valorem taxation limitations under Florida law. However, to be valid, a special assessment must generally pass a two-prong test: (1) the property burdened by the assessment must derive a “special benefit” from the project or service funded by the assessment, and (2) the assessment for the project or service must be properly apportioned. The basic theory behind a special assessment is that the portion of the community which is required to bear the assessment must receive some special benefit from it. While ad valorem taxes are broad in impact and use, special assessments can and must be targeted. Local governments in Florida that are beginning to adapt to SLR have used special assessments to, for example, raise the height of fixed bridges or raise the grading of residential streets.

Florida counties may utilize two possible alternatives for providing municipal services pursuant to Section 125.01, Florida Statutes. The Municipal Service Benefit Unit (MSBU) assessment requires that the property assessed receive a special benefit, both proportionate and directly correlated to the assessment. In the alternative, counties may impose a Municipal Service Taxing Unit (MSTU) that provides benefits generally, but not directly proportional to the benefit given to the assessed property. Florida cities on the other hand can utilize the statutory alternative method of providing for non ad-valorem assessments found in Section 170.07, Florida Statutes, or any other lawfully enacted

local procedure for imposing special assessments.

While special assessments aimed at combating SLR are typically “passive” vis-à-vis new development (that is, they often target infrastructure projects in already affected areas), they can be crafted to “actively” work with and incentivize adaptive development. For example, a municipality might specially assess a district slated for adaptive remediation, but except new development from the assessment to the extent other or related adaptive measures are taken by the developer, ideally at a lower cost.

For essentially built-out cities and counties or targeted redevelopment areas, special assessments can not only address immediate threats, but also establish a prospective level of service for any given piece of infrastructure that internalizes nuisance flooding projections and, more broadly, SLR impacts. The approved Capital Improvement Plan (CIP) sets the Level of Service (LOS), and can reflect changing data on SLR, as well as, changing infrastructure costs, all within the jurisdiction’s existing authority to maintain roadways.

3. User Fees. Certain SLR adaptation projects can be financed through user fees relating to the provision of a related governmental service, such as a stormwater utility. User fees are charged in exchange for a particular governmental service which benefits the party paying the fee and are typically, but not always, paid by choice, in that the party paying can opt not to use the service. Whereas a special assessment is typically a specific levy designed to recover the cost of an improvement that confers a particular benefit on a property, a user fee is a charge to a person who actually uses a service, with the fees set as the cost of providing the service. Think of utility fees – e.g., water or sewer. Notably, Florida law expressly empowers local governments to create and operate stormwater utilities and to adopt stormwater utility fees to construct and maintain stormwater management systems. New stormwater management systems designed to withstand anticipated SLR-related flooding events (as well as increased storm surge due to the anticipated effects of climate change generally) can be built or reconstructed alongside development, with user fees used

to fully or partially fund the systems.

4. Development Impact Fees. Regulators often impose conditions when issuing permits for new development or substantial redevelopment (i.e., the renovation or expansion of existing structures). Conditions that require a property owner to convey a property interest are called exactions, and impact fees are one type of exaction that offset costs associated with the corresponding development (such as infrastructure needs). Such impact fees may be another good source of funding for infrastructure projects relating to SLR. For example, a city may require a developer to pay a fee to cover the cost of flood-proofing city infrastructure that services the new development. Other exactions might include requiring adherence to more restrictive, forward-looking zoning requirements or requiring the dedication of easements to, for example, preserve natural buffers or floodways. To avoid a regulatory takings challenge, local governments will want to work to ensure a rough proportionality between the exaction and the impact of the proposed development.

Rather than viewing impact fees or other SLR-related exactions as costly regulations to be reflexively combated or avoided, developers can work with local governments to ensure that relevant regulations work to incentivize development resulting in adaptive growth. One way to harmonize the typically short-time horizon of development projects with the long-view of local governments in adapting to SLR is to explore the possibility of amortizing development impact fees over the useful life of new development – in effect, creating a hybrid development impact fee / proactive special assessment. Another forward-thinking alternative may be to create an endowment that could receive voluntary proffers from developers – and other private donations as well – and place those funds into an interest-bearing or invested trust fund to be used for SLR adaptation efforts (and possibly helping residents in need of adaptation assistance), similar to a municipal workforce housing trust fund program.

An emerging funding tool is the statutory mobility fee imposed pursuant to an approved Mobility Plan as contemplated in Section 163.3180(5) (f) or (i), Florida Statutes. Mobility fees can fund projects that do not

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fit the conventional transportation concurrency model. Infrastructure improvements for multimodal facilities could be designed using a level of service that accounts for SLR, and a development's impacts would thus capture the increased cost of construction for that SLR-adaptive infrastructure.

5. Municipal Bonds. Issuing bonds can be another option to finance capital improvement projects that address SLR. Types of municipal bonds include: (1) general obligation bonds, which are secured by the full faith and credit and taxing power of the municipality; (2) ad valorem bonds, which are secured by the proceeds of ad valorem taxes levied on real and tangible personal property; (3) revenue bonds, which are payable from revenues derived from sources other than ad valorem taxes and which do not pledge the property, credit, or general tax revenue of the municipality; and (4) improvement bonds, which are payable solely from the proceeds of special assessments

levied for an assessable project. The third and fourth categories are most relevant here, primarily because general obligation and ad valorem bonds generally require voter approval.

For example, in 2015, the City of Miami Beach authorized an issuance of revenue bonds in a maximum amount of \$100 million, with a maximum interest rate of 5.25%, and a maturity date not later than September 2045, to fund upgrades to the City's stormwater system, including the installation of new pump stations and the conversion of injection pumps. As part of the bond issuance, the City authorized revenue from stormwater utility fee increases a year earlier to be pledged as security for the City's obligations under the bonds.

Green bonds may also prove attractive for SLR-related projects. Green bonds are debt securities issued to raise capital specifically to support climate-related or environmental projects, to encourage sustainability, or to facilitate the development of high-impact sites. More specifically, green bonds finance projects aimed at energy efficiency, pollution

prevention, sustainable agriculture, fishery and forestry, the protection of aquatic and terrestrial ecosystems, clean transportation, sustainable water management, and the cultivation of environmentally friendly technologies.

6. State, Federal, and Non-Profit Grants and Subsidies. State, federal, and non-profit grants and subsidies may be available to fund SLR adaptive projects alongside development. Such grant funds often are targeted at specific types of adaptation measures, and many are directed at the public acquisition of land for conservation purposes. SLR-acquisition programs are typically thought of as targeting either undeveloped property at risk from SLR or at discouraging development by preemptively purchasing developed properties in order to remove at-risk structures. Alternatively, land might be conserved in order to provide an environmental benefit to the public, such as to allow strategic flooding and water control.

Grants through federal agencies can be significant, although they tend to be highly competitive. FEMA, for



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example, operates a Pre-Disaster Mitigation Program to help states and local governments implement sustained pre-disaster natural hazard mitigation programs to reduce the overall risk to people and structures from future hazardous events, while also reducing the likelihood of reliance on federal funding in future disaster scenarios. The U.S. Department of Housing and Urban Development (HUD) also provides grants; in January 2016, HUD announced awards in the aggregate amount of \$1 billion to fund resilient housing and infrastructure projects in communities impacted by natural disasters and climate change. Numerous other federal grant funding opportunities can be found in NOAA's U.S. Climate Resilience Toolkit, available on their website.

Additionally, local governments in areas of Florida affected by SLR have been allocated funds through Florida Department of Environmental Protection (FDEP) programs designed to safeguard critical natural resources. For example, FDEP's Everglades Restoration Revenue Bonds program provides funding for the acquisition and improvement of land, water areas, and related property interests and resources, as contemplated under the Comprehensive Everglades Restoration Plan and the Keys Wastewater Plan (among other plans). Projects benefiting the City of Key West have, for example, been funded by FDEP's Everglades Restoration Revenue Bonds.

Given the current political climate in Washington, D.C. and Tallahassee – which is generally pro-infrastructure spending, anti-regulation, and pro-business and development – SLR projects that undertake adaptive measures coupled with large infrastructure development and private construction may receive highlighted attention in the competition for grants and subsidies.

7. Transferable Development Rights. One tool with significant potential for use in SLR adaptation, including as a cost-saving measure for both developers and local governments, is a transferable development rights (TDR) program. A TDR program is designed to achieve

land preservation or promote less intensive use of property by allowing a landowner to sever development rights over ecologically valuable or sensitive land (the “sending area”) and to sell them to an area where the local government wants to encourage development (the “receiving area”). The development rights are monetized based on the level of development that the local government's base zoning code would allow, such as a certain number of units per acre, and the buyer can then use the credits to exceed the default density standards or building height requirements in the receiving area.

Similar to cap-and-trade in other environmental regulation contexts, TDRs can also be marketized – a local government could allow property owners to buy and sell TDRs to permit large scale protection and large scale development. Similarly, TDRs can be small-scaled in connection with SLR projects – single developments could be permitted to offset regulatory shortfalls by financing related SLR-adaptive projects. The use of such market-based tools often also provide local governments with lower risk of litigating costly regulatory takings cases that might arise from traditional regulatory tools such as zoning modifications and exactions.

8. Community Development Districts. Community Development Districts (CDDs) are created pursuant to Chapter 190, Florida Statutes, by developers, with approval either locally through a county (if less than 2,500 acres) or through the State (if 2,500 acres or more). Once the statutory time limits and number of residents is triggered, the changeover from developer control to resident-electoral control occurs. In the past, the U.S. Internal Revenue Service had questioned whether CDDs were truly forms of local government; however, no formal rulemaking has surfaced, and currently a CDD is recognized as a type of public governmental entity, regardless of whether it is developer or resident controlled. Therefore, all of its capital improvements are essentially public improvements. Construction of the improvements can benefit from tax-exempt municipal bonds, and the CDD can set a level of service for each capital improvement, taking into account a specific target SLR indicator, based on individual-

ized risk assessment and cost-benefit analyses for that community.

9. Community Redevelopment Agency. A Community Redevelopment Agency (CRA) is created pursuant to Chapter 163.360, Florida Statutes, when a city or county identifies areas of statutory blight in a particular geographic area within the county or city. The funding mechanism – tax increment financing (TIF) – consists of setting a base valuation of the ad valorem property values within the area, and setting aside in a special fund any increase in revenue generated from rising property values. That captured increase, in turn, funds capital projects identified in an adopted CRA Plan. Statutorily, “blight” can include an inadequate street layout and unsafe or unsanitary conditions, both of which could exacerbate the negative conditions associated with SLR. In theory, a CRA could make findings of blight based on inadequate existing infrastructure and flooding propensities, and then identify capital improvements necessary to address those issues.

10. Public-to-Private Transfer of Roads. County roads within residential subdivisions can be transferred back to private homeowner association (HOA) control by utilizing the statutory mechanism found in Section 336.125, Florida Statutes. A motivated HOA could then improve roadways and drainage to accommodate for SLR via a special HOA assessment. Although the cost would be borne by private residents, they would also have greater control over the level of service they wish to achieve in their own SLR-adaptive project.

11. Public-Private Partnerships. Public-private partnerships (P3s) may provide another funding source. P3s are contractual arrangements between governmental and private entities under which the private entities assume greater involvement in the financing and delivery of capital improvement projects that benefit the public in exchange for revenue-sharing opportunities and/or completion bonuses. P3s have typically been used in Florida to finance transportation infrastructure projects; however, in 2013, the legislature expanded the potential uses for P3s to other public purposes. P3s allow governments to fund projects where public funds are lacking, despite

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traditional limitations prohibiting governments from commencing projects without available and allocated public funding. Under P3 arrangements, a private entity typically pays for the design, construction, and/or operation of the project or facility for a period of time, and, in return, receives revenues generated from the operation of the project or facility in order to realize a return on its investment. Private entities may be authorized to impose fees on the public for use of qualifying projects or facilities funded in this manner. Many potential SLR infrastructure projects might be amenable to a P3 structure.

12. Local Discretionary Taxes. Counties and certain municipalities also have the power to levy local discretionary taxes, such as sale surtaxes and tourist development taxes, and dedicate those revenues to certain environmental remediation projects, such as those targeting beach erosion. Florida counties have historically used tourism development taxes to support natural resources used and enjoyed by tourists, and SLR-adaptive projects may fit into this funding scheme. However, tourist development taxes, which are regulated pursuant to Section 125.0104, Florida Statutes, are limited to funding only specific, statutorily-authorized expenditures. Absent a concerted effort to expand the traditional categories of authorized expenditures for tourism advertisement (beach renourishment, building of convention centers and sports arenas, and the like), local governments cannot recast their needs beyond immediate tourism impacts. Some local governments have been successful at shepherding legislative changes targeting isolated local conditions, such as Spring Break public safety. However, in order for tourist development taxes to be available more broadly to address infrastructure needs, especially SLR initiatives, the Florida Legislature or Florida courts would likely need to reinterpret not only what draws tourists to the State, but also what infrastructure is needed to support them, to authorize the use of tourist development taxes for such projects. In the meantime, counties

may wish to explore whether an area within their jurisdiction qualifies under Chapter 380, Florida Statutes, as an “area of critical state concern,” and implement a tourist impact tax pursuant to Section 125.0108, Florida Statutes.

13. Government Risk Financing. Lastly, one available option for managing a local government’s financial exposure to SLR is to incorporate ex-ante instruments into an overall risk financing strategy, such as reserve funds, catastrophe bonds, or parametric reinsurance. Catastrophe bond products were developed in the aftermath of the 1994 earthquake in Los Angeles and Hurricane Andrew in 1992. There currently is a robust market for catastrophe bonds, and, catastrophe bond products may become an increasingly utilized option by governmental entities in the future dealing with the effects of climate change. Another example is a parametric hurricane policy incepted to a governmental actor. The State of Alabama obtained the first parametric cover for a U.S. governmental entity. Payments are intended to offset the economic costs of hurricanes, with payment triggered by hurricane wind speed. As SLR and its consequences – flooding, saltwater intrusion, changing shorelines, etc. – become more definitive and predictable, risk financing options may become less available and less practical. That said, local governments and developers might explore the possibility of co-issuing catastrophe bonds to finance development at higher-cost

adaptive levels offset by the risk of SLR-related exposure. Sophisticated bonding or re-insurance products are precisely the type of novel and cooperative measures which may permit development to compete and succeed while still adapting to our changing environment.

While the timeframes and immediate interests of local governments and private developers may seem to diverge on the costs and regulations required to adapt to sea level rise, the long-term goals and objectives of both public and private interests are actually in tight harmony. It is in everyone’s interest to promote vibrant development and redevelopment that will aid – and itself embody – adaptation to the realities of sea level rise. We all want our communities to grow and thrive despite the rising tides. Local governments and private actors can work hand in hand to explore and implement funding options that target that intersection of interests.

Endnotes

Isabelle C. Lopez is the City Attorney for the City of St. Augustine and has been Board Certified in City, County and Local Government Law since 2004.

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