

LAND USE CLIMATE CHANGE BUBBLES RESILIENCE, RETREAT, AND THE DUE DILIGENCE DEFENSE

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LAND USE CLIMATE CHANGE BUBBLES

MARKET SIGNALS

Land Use Climate Bubbles are popping up across the nation at an increasingly rapid rate.

These bubbles provide extensive, objective evidence that climate change is real and must be dealt with on the ground, where these bubbles are occurring.

This evidence includes: slow real estate sales or no sales, disappointing appraisals, and difficulties in getting casualty insurance and mortgages.



SIDNEY IN RETREAT

Repeated flooding caused extensive damage to the downtown business district and nearby residential neighborhood.

Following the second storm event, the market for purchasing property in the affected area disappeared.

After much land use planning, the community decided to retreat: to relocate the business district and adjacent homes in the high-risk area to higher elevations.

This is an award-winning NY Rising Community.



PROPOSED PLAN FOR SIDNEY'S RETREAT



BUBBLES IN EVERY REGION

- *Northeast*, Sidney, New York
- *Gulf Coast*, Isle de Jean Charles, LA
- *Southeast*, Miami-Dade, Florida
- *Southwest*, Spicewood Beach, Texas
- *Northwest*, Oso, Washington
- *Great Plains*, Elkhart, Kansas



ISOLATED BUBBLES OR SEMAPHORE FOR THE NATION?

- These economic disruptions operate as a semaphore: a system that is sending communities clear signals as these bubbles form that they must embrace resilience and, sometimes, retreat.
- The bubbles are signals emerging from the private market that cause local leaders to review their land use plans, regulations, and practices and to adjust them to reflect new realities.
- After the second flood in Sidney, the market signals changed.



THE REGULATORY SOLUTION: NO BUILD ZONING

Why Not Create a New Zoning District?

NBZ: The No Build Zone

Because, in *Lucas*, the Supreme Court declared that such a total taking of value is compensable unless the development would be prevented by nuisance law or other background principles of state law.

Upon remand, no such background law was found and the court awarded Lucas compensation in excess of \$1 million.



LEGAL AND PRACTICAL BARRIERS

- *Lucas* – despite possible doctrinal exceptions this is uncharted territory that most local councils won't want to travel.
- Norms – politicians go for the photo op and always promise financial aid to rebuild “a better, stronger community.”
- Ideology – this will not happen again because we don't believe in climate change because, if we did, we might have to call on government to solve the problem and we don't like government intervention.

Private market signals - can overcome these barriers.



NEW KNOWLEDGE ARISING FROM LAND USE CLIMATE CHANGE BUBBLES

Scalia's Leeway: "[C]hanged circumstances or new knowledge may make what was previously permissible no longer so."

- Brokers: fewer sales or no sales
- Brokers: lower prices
- Insurance Agents: higher premiums, less availability, problems with subsidized policies.
- Banks and the Secondary Market: climate change risks are being accounted for
- Equity Investors: Risk Averse



NON-REGULATORY TECHNIQUES EMBED MARKET SIGNALS IN LAND USE SYSTEM

- Comprehensive Plan
- Special Area Plans and Maps
- Establish Expanding Review Zone
- Establish Pre-Application Process
- Review and Approval Protocols
 - Conditions Negotiated



COMPREHENSIVE PLAN ILLUSTRATION

- Comprehensive Plan Component –Collier Co, Fla.
“**Policy 10.6.2:** For shoreline development projects where an EIS is required, an analysis shall demonstrate that the project will remain fully functional for its intended use after a **six-inch rise in sea level.**”

San Francisco Bay, Calif.	Miami-Dade County, Fla.
New York City, N.Y.	Town of Duck, N.C.
East Hampton, N.Y.	Tillamook County, Or.
Malibu, Calif.	Falmouth, Mass.
Barnstable, Mass.	Bainbridge Island, Wash.

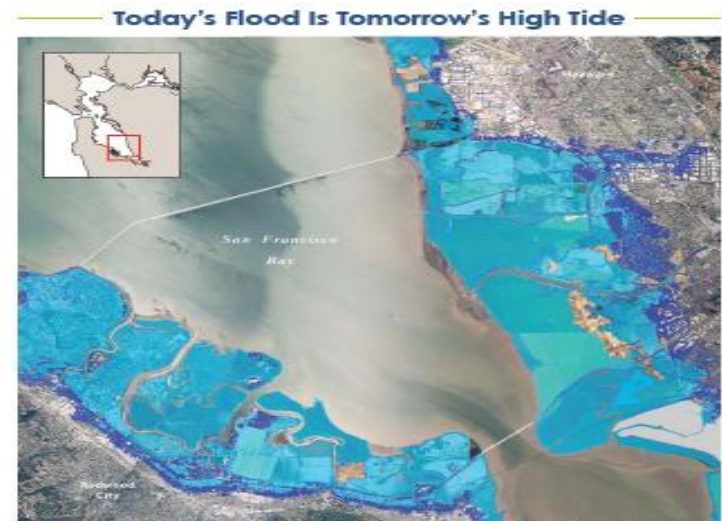
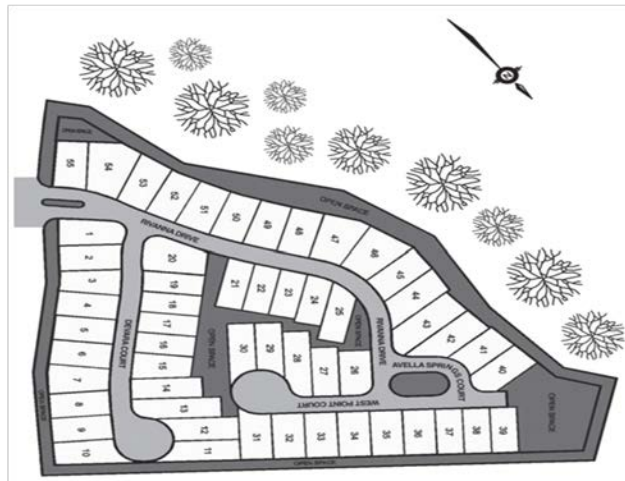
MEMORIALIZIZING SEA LEVEL RISE

- Adopt SLR Component to the Comprehensive Plan
- Adopt Third Party SLR Projections (1 ft.) and SLR Overlay Map



PROJECT SUBMISSION REQUIREMENTS

- Site Plan Superimposed on SLR Overlay Map
- Building Locations Sited & Useful Life Noted
- Assess: Potential Sea Level Rise and Storm Surge Damage
- Request Evidence of Financing and Insurance



CONTINGENCY BARGAINING

- “These buildings and improvements will not be damaged within their useful lives.”
- “But, what about these SLR and storm surge projections?”
- “They are uncertain.”
- “But ... what if ...? Can we discuss contingencies?”



NEGOTIATING CONDITIONS TO SITE PLAN APPROVAL

- Board Approval Subject to Conditions
- Deed Restrictions
 - Based on Sea Level Rise
 - Expands Using Mean High Tide Line as Boundary
 - Requires Removal of Structures Pre-inundation
- Using Financial Instruments to Cover Damage:
 - Bonding and Insurance
 - Letter of Credit



THE DUE DILIGENCE DEFENSE: WE DIDN'T TAKE YOUR PROPERTY, THE MARKET DID

- Buyer Beware: Overlay Map
- Realities of Securing:
 - Equity Investors
 - Construction Loans
 - Long-Term Mortgages
 - Insurance
- Discounted Present Value of Project Accounting for Contingent Future Damages
- Negotiating the Conditional Project Approval
- The Negotiation itself may render the project infeasible
- We didn't take your property, the market did!



AT THE NATIONAL LEVEL A CHOICE OF STRATEGIES:

Paul Krugman: Dystopian Strategy

Along come some scientists declaring that unrestricted pursuit of self-interest will destroy the world, and that government intervention is the only answer. It doesn't matter how market-friendly you make the proposed intervention; this is a direct challenge to the libertarian worldview. And the natural reaction is denial — angry denial. Read or watch any extended debate over climate policy and you'll be struck by the venom, the sheer rage, of the denialists.



DAN KAHAN, CLIMATE SCIENCE COMMUNICATION

A Positive Solution Is At Hand!

In describing the progress made in creating a compact regarding climate action in Southeast Florida, Yale Law Professor Kahn notes that the compact negotiations put a “a *different question* from the one put in the national climate change debate. The latter forces Southeast Floridians, like everyone else, to express ‘who they are, whose side they are on.’ In contrast, the decision-making of the Compact is effectively, and insistently, testing *what they know* about how to live in a region that faces a serious climate problem.”



IS LOCAL ACTION ENOUGH?

- It depends. How do you think about federalism?
- Top Down: Logical, but nothing is happening!
- Bottom Up: Parochial - limited jurisdiction, capacity and resources.
- State and Federal governments can use their resources to incentivize, encourage, and backstop this positive local trajectory.
- If you plan realistically for the future, we will support you.
 - Data and Maps
 - Technical Assistance
 - Planning Grants
 - Project funding



URBAN AFFAIRS JOURNAL, JAN. 2015

CITIES AND SUSTAINABILITY

The authors demonstrate that “more policy making occurs in states with a multilevel governance framework supportive of local sustainability action.” Solving the problems with the local land use legal system is not about taking away local power, but showing respect for local democratic systems and offering support to build a better system.

We need to discover and implement methods of using federal and state policies and resources to support, guide, and sustain these recently evolved local land use law regimes and possibly, in so doing, creating a more integrated and efficient federal system of environmental law.



MEANINGFUL SIGNALS IN SIDNEY

- Destruction of a Neighborhood
- Declining Real Estate Prices
- Non-existent sales
- Drastically lowered appraisals
- Lack of casualty insurance
- Unavailability of mortgages
- Loss of jobs
- Decline in community character



Reaction: “Here is a local problem to be solved. Let’s go get some help.”



LAND USE CLIMATE CHANGE BUBBLES RESILIENCE, RETREAT, AND THE DUE DILIGENCE DEFENSE

THANK YOU

