Climate Change Adaptation: Policy Options & Legal Considerations

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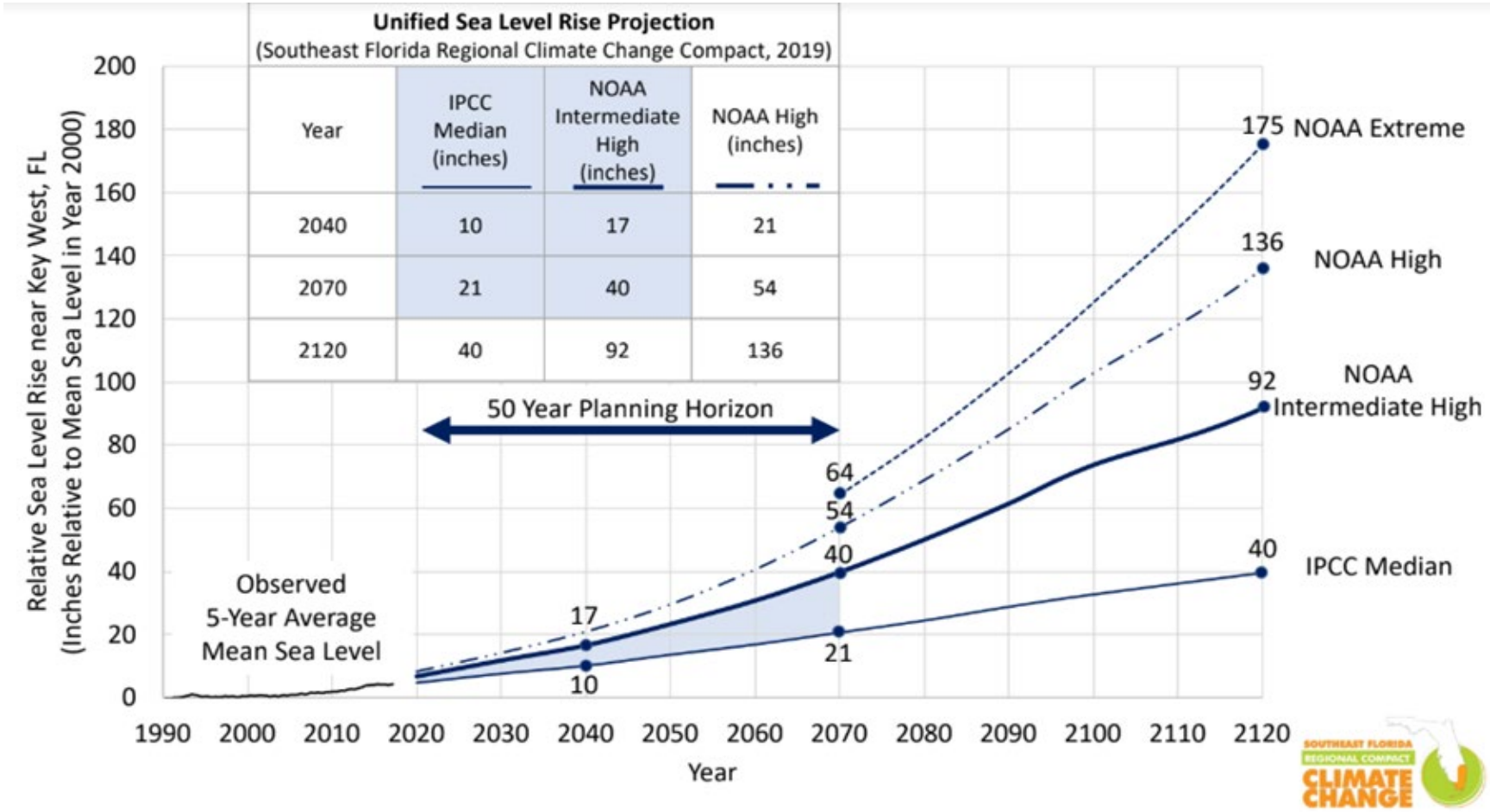
Initial Steps Towards Adaptation

1. Gather Reliable Data
2. Inform and Engage the Public
3. Prioritize Investment Decisions and Evaluate Financing Options
4. Amend Comprehensive Plans
5. Implement Regulatory and Market-Based Tools
6. Monitor Private Sector Forces
7. Keep an Eye on Future Retreat Landscape

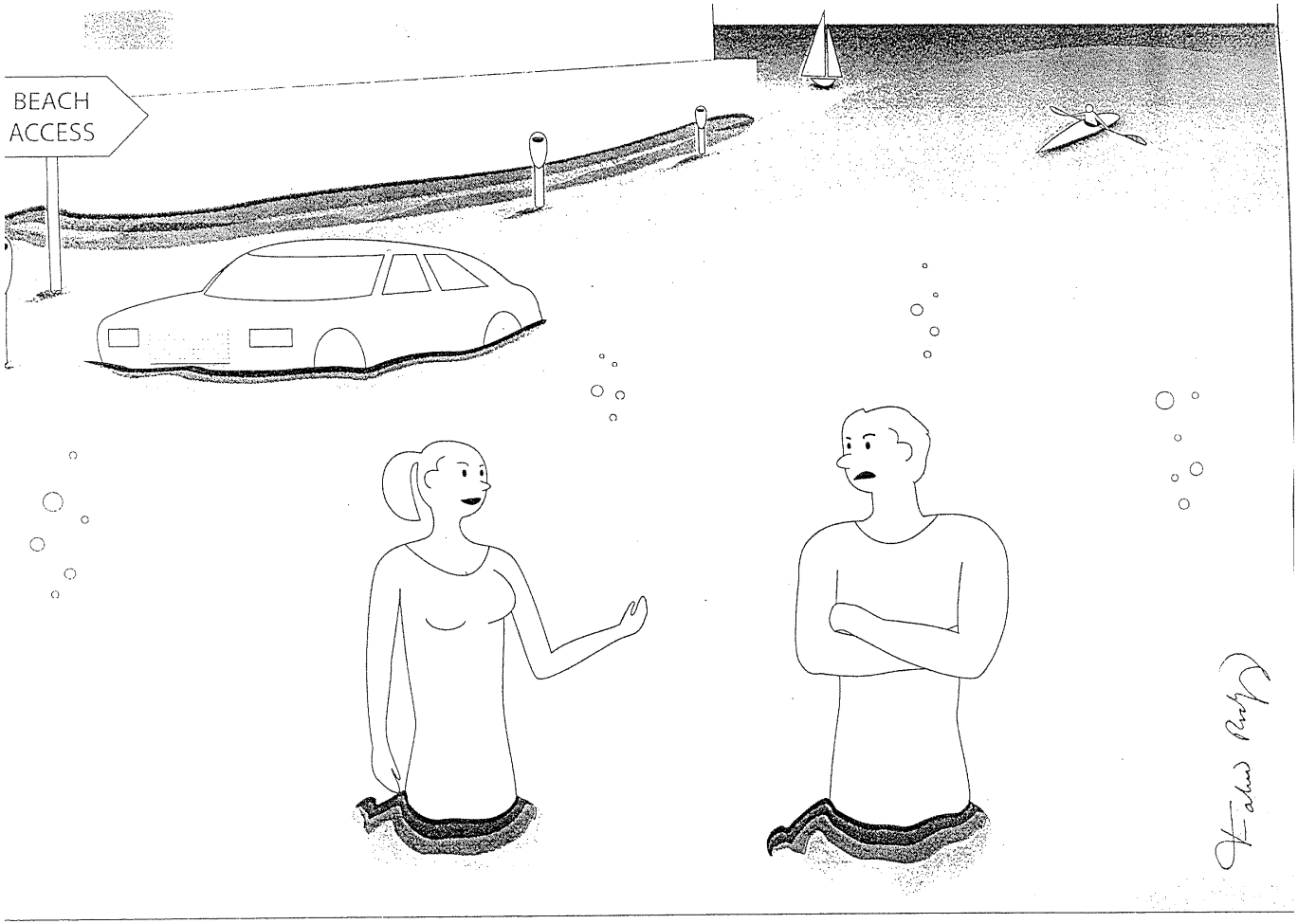
Gathering Data

- The Need for Reliable/Actionable Data
- Critical Data Examples:
  - Working from Unified/Consensus Projections for Sea Level Rise
  - Regional Risk Assessments
  - Local Elevation Measurements
  - Comprehensive Vulnerability Assessments

Gathering Data



Informing and Engaging the Public



I wonder when the city is going to do something about trash pits.

Don't hold your breath. I'm still waiting for them to do something about the traffic circles.

Informing and Engaging the Public

- Encouraging Local Investment of Resources
- Preparing Taxpayers to Fund Adaptations
- Encouraging Responsible Self-Reliance
- Providing Residents with Data
  - Generally No Affirmative Legal Duty for Government to Notify of Natural Risks
  - But Potential Legal (and Practical) Benefits of Providing Specific Notices

Government Infrastructure Adaptations

- Prioritizing Governmental Investments
- Litigation Risks Associated with Investments
  - Judicial deference to Investment Decisions
  - Obligation to Exercise Due Care
  - Inverse Condemnation (Maintenance Versus Upgrading)
  - Substantive Due Process Overlay

Financing Adaptation Costs

- Ad Valorem Taxation
- Developmental Impact Fees
- Special Assessments (MSBUs/MSTUs)
- User Fees and Utility Fees
- Sales tax and tourist development taxes
- Green Bonds
- State, Federal, and Non-Profit Grants and Subsidies
- Public-Private Partnerships

Comprehensive Planning

- Florida Statutes, Chapter 163
- Planning Horizon?
- Some Key Elements of Comprehensive Plans Implicated:
  - Infrastructure and Capital Improvements
  - Future Land Use
  - Coastal Management
  - Natural Resources and Wetlands
  - Public Safety and Hurricane Evacuation

Comprehensive Planning

- Florida SB 1094 (2015): The coastal-management redevelopment component must now contain: "... development and redevelopment principles, strategies, and engineering solutions that reduce the flood risk in coastal areas which results from high-tide events, storm surge, flash floods, stormwater runoff, *and the related impacts of sea-level rise*."

Adaptation Action Areas (AAAs)

- "At the option of the local government, develop an adaptation action area designation for those low-lying coastal zones that are experiencing coastal flooding due to extreme high tides and storm surge and are vulnerable to the impacts of rising sea level." Fla. Stat. § 163.3177(6)(g)(10).
- Inclusion Criteria
- Subzones
  - Adaptation Areas
  - Restoration Areas
  - Growth Areas

Legal Considerations When Utilizing Regulatory Tools

- Constitutional Takings Law
  - Fifth Amendment provides that no taking may be done "without just compensation."
  - Regulatory takings analysis considers: (i) the character of the governmental action, (ii) the economic impact of the regulation, and (iii) the reasonable investment-backed expectations of the owner.
- Florida's Bert Harris Act
- Substantive Due Process

Regulatory Tools for Adaptation, Examples

- Zoning Tools
  - Overlay Zones
  - Downzoning
- Building Codes, and Resilient Design
  - Elevation Restrictions
  - Encouraging Innovative Building Designs
  - Accessibility, Historical Preservation, Aesthetic, and Environmental Considerations

Regulatory Tools for Adaptation, Examples

- Conditional Development and Exactions
- Setbacks and Buffers

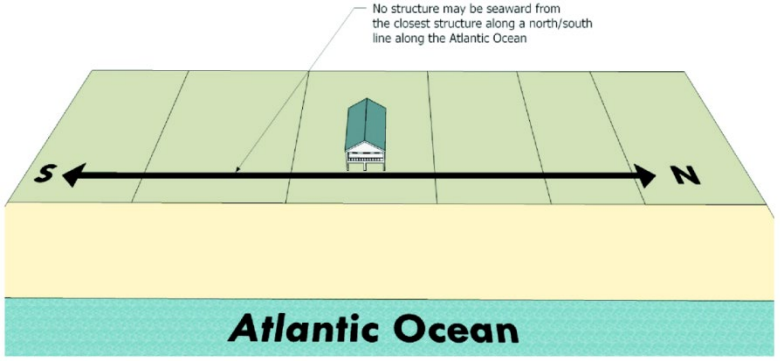


Figure 4-20 Waterfront Yards along Atlantic Ocean

- Rebuilding Restrictions
- Hard and Soft Armoring

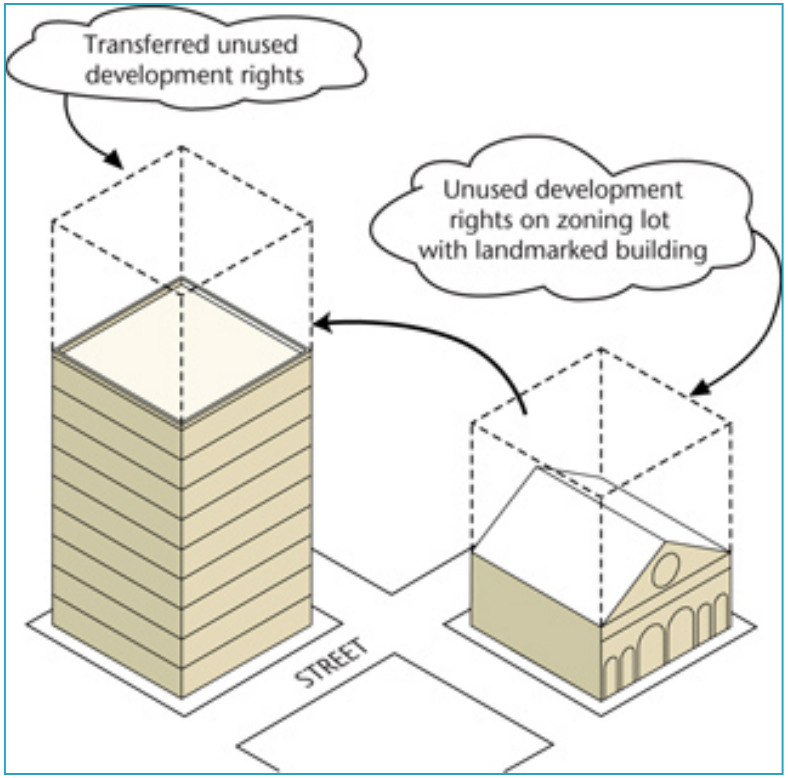


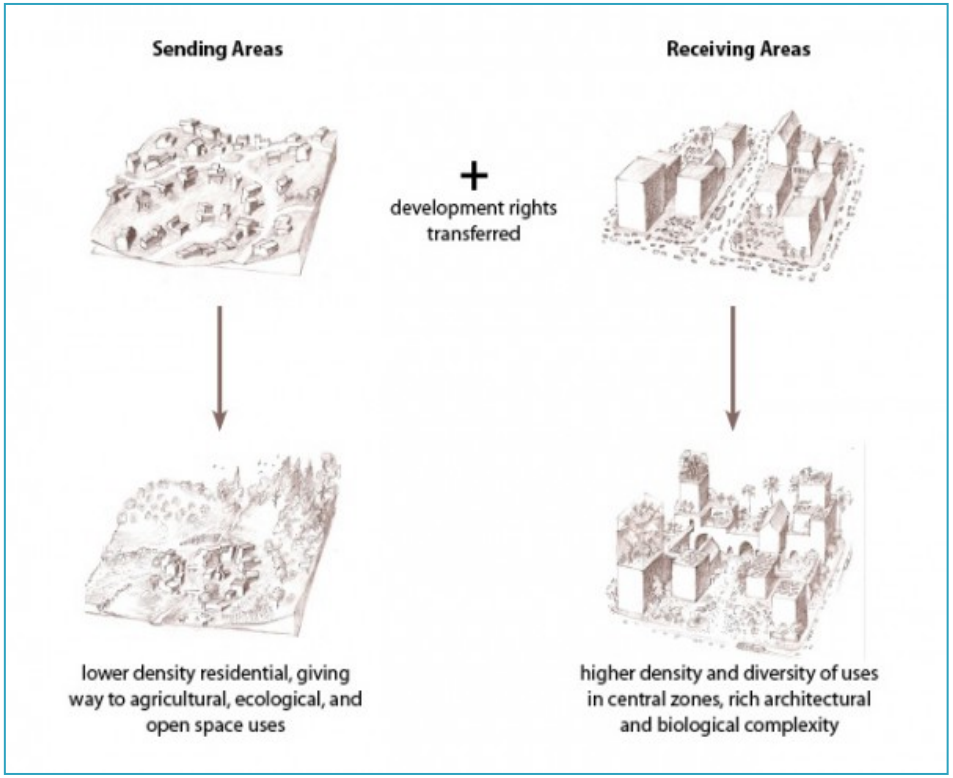
Land Acquisitions, Types

- Land Acquisitions (Voluntary)
- Land Acquisitions (Eminent Domain)
- Conservation Easements

Market-Based Tools, Examples

- Transferable Development Rights





Market-Based Tools, Examples

- Tax Incentives
- Other Incentives
- Mandating Risk Disclosures in Real Estate Transactions

Monitoring Private Sector Forces

- Real Estate Market
- Mortgage Industry
- Insurance Industry



Preparing for Long-term Retreat

- Precedent for Retreat





- Legal questions regarding:
  - Reducing Services
  - Taxation Issues Where Services are Reduced
  - Relocating Residents
  - Clean-up of Abandoned Land

Looking Ahead

- Work together at all levels of government (and with non-profits and the private sector) to gather and frequently update reliable, actionable, local data.
- Use comprehensive strategies, working across governmental departments, and with an eye towards a long planning horizon.
- Consider litigation risks associated with taking or *not* taking certain actions.
- Begin planning now, and identify the best funding sources and start saving and investing now.