



# DISCLOSURES AND PROJECTIONS

Avoiding Liability Scenarios...  
Planning for the New Reality

## JOHNSON V. DAVIS AND SEA LEVEL RISE

- Is Sea Level Rise a latent condition or a patent condition?
- The more SLR science is known, the more patent the condition.
- What duties do real estate brokers and salespeople have in the age of SLR?
  - What duties do homeowners have?
  - What obligations do mortgage lenders have?
  - What role does the government have?

# SEA LEVEL RISE DISCLOSURES

- State Legislatures Have An Urgent Task...To Require Formal SLR Notices in Imminent and Future Real Estate Sales
- Simply stated, residential property purchasers in sea level rise (SLR) threatened zones need informed notice and protection.
- In Florida, sellers and real estate licensees must advise potential buyers about certain environmental hazards that could affect the health, safety and welfare of purchasers. Concerns about groundwater contamination, lead based paint and plumbing materials, radon gas, asbestos, formaldehyde gas, underground storage tanks and dumps with hazardous waste are of relevance and significance in all residential real estate transactions.

## SLR AND REAL ESTATE DISCLOSURES

Thus far, however, in most states, there is no requirement to advise buyers that sea level rise may be a latent condition that will affect their future acquisition.

This flies in the face of the general duty of sellers and those practicing under certain real estate laws to disclose all known facts that materially affect the value of residential real estate when those conditions are not readily observable to buyers.



## SEA LEVEL RISE DISCLOSURES

- When given notice of SLR in residential real estate transactions in 2013 and 2014, purchasers may wish to finance with a 15 year mortgage, not a conventional 30 year mortgage. The difference between the two types of loans, considering the repayment of principal and interest, is enormous.
- Being on notice about and understanding SLR issues pertaining to a specific property can affect a purchaser's decision to acquire the property. Not being told can lead to costly and protracted litigation for all involved in the transaction.

## LITIGATION AND BROKEN DREAMS

As sea level rise ascends to a priority issue for the general population, legislatures and real estate professionals need to consider fair and reasonable SLR notice statutes in residential and even commercial realty transactions. The failure to take on such an initiative can result in litigation, not to mention broken dreams of residential property purchasers and business owners.

**In Leon County, they took action.**

# LEON COUNTY TAKES ACTION

The Leon County Code of Laws, Section 12-8...

Requires disclosure of “known flood conditions on residential properties to prospective buyers or tenants.”

Purpose: “...to protect the health, safety, and welfare of its citizens and to promote an environment free from risk and fear of the damage and disruption of lives that result from the flooding of residential property.”

## SECTION 12-8 (B)

“It shall be unlawful for a seller or landlord of residential property, with knowledge that such property has experienced flooding or is otherwise flood prone, to fail to disclose such facts in writing to a prospective buyer or tenant when such flood conditions are not readily observable and are not known to the prospective buyer or tenant.”



## SECTION 12-8 (B)

“...the failure of a seller or landlord to provide such disclosure in advance of entering into either a purchase and sale agreement, in the case of prospective buyer, or an oral or written lease agreement, in the case of a prospective tenant, shall create a rebuttable presumption that the seller or landlord has failed to disclose facts that materially affect the value of such property and shall entitle the purchaser or tenant to seek to recover from the seller, in accordance with the remedies available at law, any damages resulting from such failure to disclose.”

## POTENTIAL ERRORS AND OMISSIONS CLAIMS

- Real Estate Agents
- Real Estate Brokers
  - Attorneys
  - Developers

# TECHNOLOGY TO THE RESCUE

Predictions based upon:

- Storm surge
- Groundwater levels
- Peer-reviewed projections of sea level rise in specific areas
- Tidal flooding
- Vertical flooding
- Severe weather events

## TECHNOLOGY PROVIDES OPTIONS

Adapt property?

Fix roads and public infrastructure?

Sell?

Rent?

How long do I have?

Is my community ready?

# BOND RATING & INSURANCE COMPANIES WILL FORCE POLITICAL WILL





# THE LAWYERS ROLE IN CREATING SOLUTIONS

Smarter Transactions & Legislative Reforms

# IF WASHINGTON AND TALLAHASSEE FAIL TO PLAN...LAWYERS HAVE A SPECIAL OPPORTUNITY

- You are on the front lines of transactions and litigation.
- You are problem solvers.
- New laws and regulations take years to develop and go through the challenge process.
- We don't have the luxury of time.



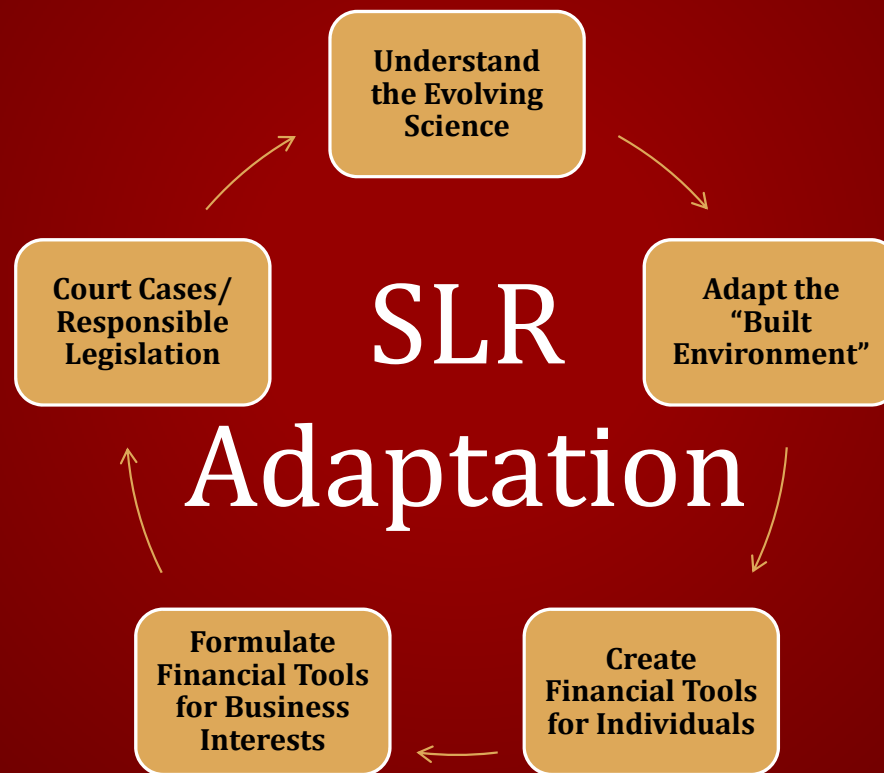
# WHAT CAN CONGRESS DO TODAY TO PREPARE FOR SEA LEVEL RISE (SLR)?

- America does not have the financial tools to help people adapt to rising waters.
- Preparing for intruding oceans means more than just adapting our “built environment.”
- As lawyers, we have unique perspectives on how to prepare our economy for fiscal impacts of SLR.





# ADAPTATION STRATEGIES



# SEA LEVEL RISE ADAPTATION ACCOUNTS

One tool to start preparing for property abandonment in the decades ahead may be an "SLR Relocation Account."

Here's how such a program would work:

Modeled after the current Roth IRA savings program, qualified homeowners who can no longer safely reside in their homes due to encroaching waters would be allowed to save money to allow them to move to areas not threatened by rising ocean waters.

Such deposits into the relocation account would be tax-deductible if certain qualifications are met.



The funds could only be used for new housing financing or rental options. Those utilizing SLR Savings Accounts would also have to keep their existing mortgage or rental obligations current and avoid defaults.

Qualified individuals could include homeowners in areas identified annually by local governments as vulnerable to SLR. E.g. **Adaptation Action Areas**.

With savings accumulating over a period of 10 to 25 years or more, the increasingly expensive financial burden of securing a new place to live, whether by ownership or rent, would be eased for the future.

In those areas of the nation where sea level rise offers local relocation alternatives, individuals and families would be able to keep up their mortgage and rental payments, while at the same time saving critical funds for the future.

# SEA LEVEL RISE MORTGAGE MODIFICATIONS

Consider the example of a property owner who purchased a house in a vulnerable SLR area in the year 2000. At that time he or she never heard of rising seas, and SLR science was just beginning to formulate credible projections for coming decades. The borrower committed himself to a 30 year mortgage.



# SEA LEVEL RISE MORTGAGE MODIFICATIONS

Fully intending to stay in the property for as long as possible, the borrower ultimately learns his property has a finite term of usefulness as swelling seas pose increasing risk to the health, safety and security of the his family and neighborhood.



12/30/2015

12/30/2045

As the waters incrementally rise towards the maturity of the mortgage, the property becomes increasingly hard to sell.

# SEA LEVEL RISE MORTGAGE MODIFICATIONS

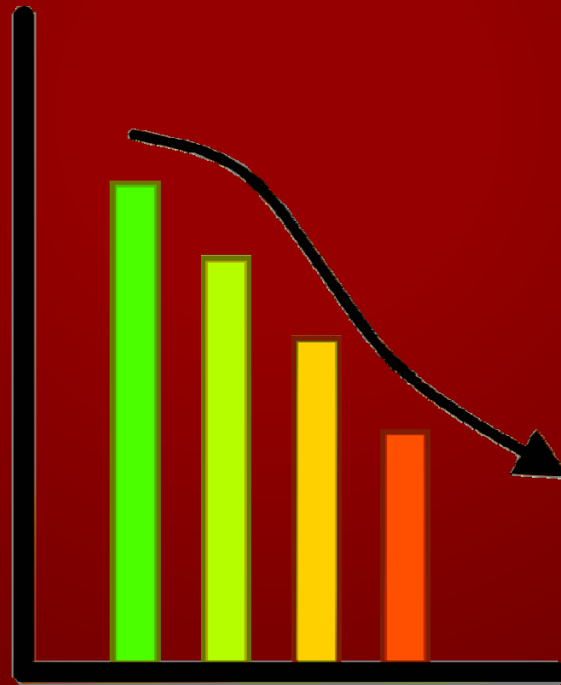
Forced to stay in his home, the homeowner cannot pay off the mortgage balance early.

The lender and borrower face difficult choices never before encountered in the world of real estate and finance.

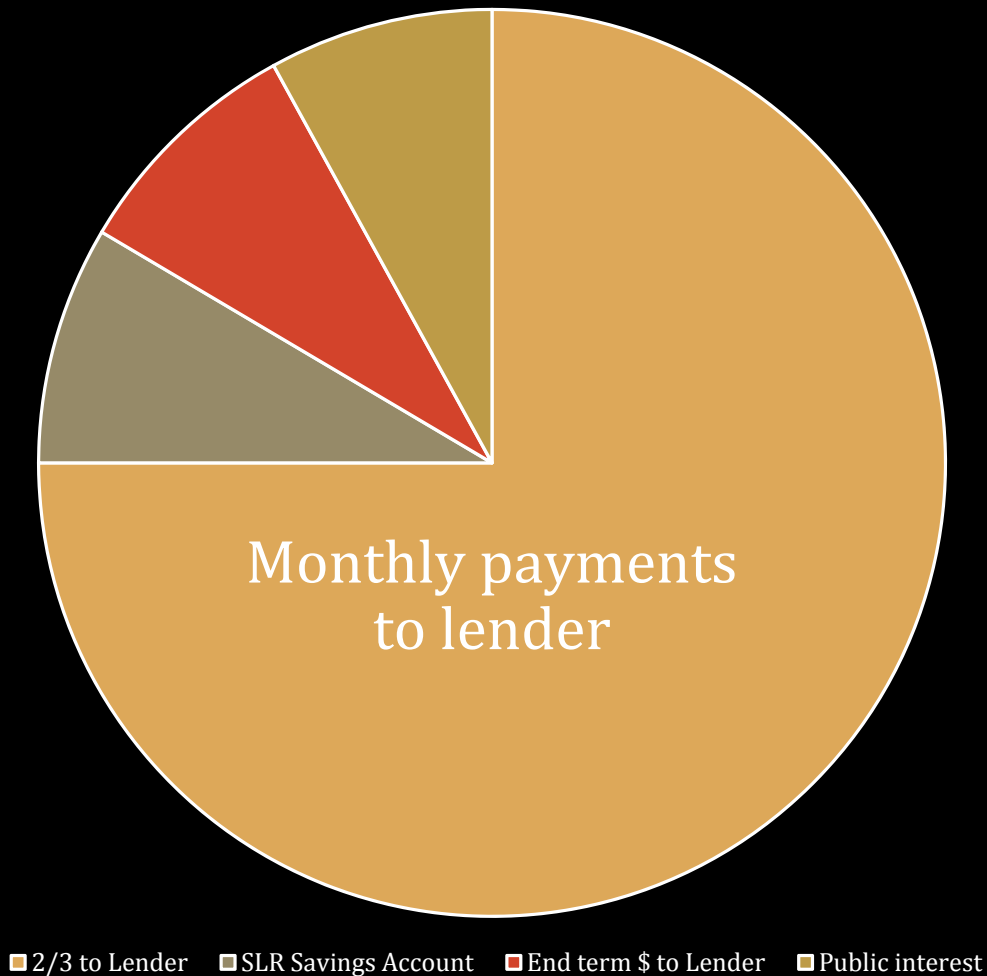
When regularly and then permanently flooded, borrowers will not want to make a choice between paying their mortgage obligations or, alternatively, defaulting and finding a new venue in which to live. Bad credit and a judgment against the homeowner would result from a default on the original mortgage obligation, making it almost impossible for him to qualify for a new loan.

# SEA LEVEL RISE MORTGAGE MODIFICATIONS

Banks will not want to foreclose on these distressed properties.



## SLR MORTGAGE MODIFICATIONS

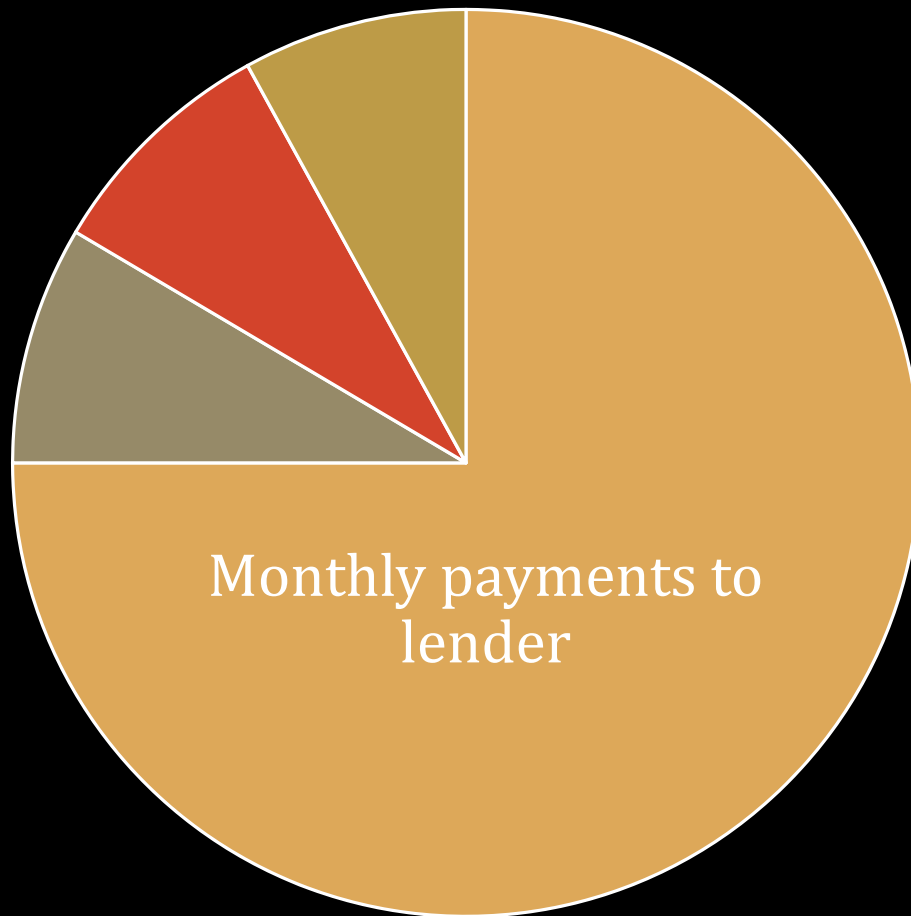


- Allow property owners to save to move elsewhere when conditions mandate.
- Money for the mortgage lender at the end of the habitable period.
- Money to environmentally “shore up the property.”
- Lender gets “first option” to finance new property
- Federal and State tax credits to lenders to encourage participation



## SLR MORTGAGE MODIFICATIONS

- Lender agrees not to foreclose
- Borrowers do not suffer adverse credit scores
- Social fabric is kept intact in an orderly manner
- Community anxiety is lessened by a structured program



■ 2/3 to Lender ■ SLR Savings Account ■ End term \$ to Lender ■ Public interest

# ENVIRONMENTAL CREDIT REPORTING REFORM



Fairness of a 7 year adverse credit score?

# SLR OFFERS AFFORDABLE HOUSING OPPORTUNITIES



# CONDOMINIUM ASSOCIATIONS AND HOA'S

**Fiduciary Duties  
of Board  
Members**

**Adequate  
Reserves**

**Adaptation  
Programs**

**Understanding  
Public  
Infrastructure  
Impacts**

**Maintenance  
Assessments**

**Architectural Review Boards**

A universe of opportunities for creative legal problem solving...



# ENVIRONMENTAL PROPERTY LOSSES AND THE FEDERAL TAX CODE

It is 2010. Mr. Smith has a house situated in a sea level rise vulnerable area. His intent is to keep the property in his family for decades to come.

Twenty years later, he finishes paying off his mortgage, and is “free and clear.”

Gradually, through the years, however, Mr. Smith has repeated flooding which manifests itself as water intrusion from beneath the ground.

# ENVIRONMENTAL PROPERTY LOSSES AND THE FEDERAL TAX CODE

The problem escalates each year. No matter what steps Smith takes to deal with the issue, parts of his property become increasingly unusable.

Within 40 years of purchasing the property, he cannot afford to keep bailing it out. His cherished property is no longer usable and his dreams are crushed. The only party interested in the property is the state, since ocean waters have evicted Smith's and his family.

# ENVIRONMENTAL PROPERTY LOSSES AND THE FEDERAL TAX CODE

“Casualty Loss” does not apply

Sea level rise is not sudden...it is *progressive...gradual*





People in Satellite Beach, Florida may want answers to this question sooner than later. According to the South Florida Sun Sentinel on April 20, 2014, **“The city eventually may have to abandon some homes along the oceanfront and move toward multi-family housing complexes on higher ground, said John Fergus, a member of the city's planning advisory board.”**

Before that happens, affected landowners will most likely be looking to the tax laws to see what help they can get when they permanently leave their properties.

They may not find an adequate answer.

# MySeaLevelRise.org

Financial Adaptation  
American Law & SLR  
Adaptation Action Areas  
Agriculture & Farming