September 2017

HOT TOPIC ALERT

State & Local Coastal Policies

With two bordering oceans, there is an enormous amount of coastal property in the United States. According to the Office for Coastal Management, the country has 95,439 miles of shoreline. That is nearly four times the circumference of the earth. According to the National Ocean Service, 39% of the population of the U.S. (123.3 million people) lived in a county directly on the shoreline in 2010 and that amount is projected to increase by an additional 10 million people by 2020.

State Flood Seller Disclosures

See how your state compares for flood disclosure laws

Much of the property near the coastline is at risk of damage from storm surges. The business analytics firm CoreLogic estimates that 6.9 million homes on the Atlantic and Gulf coasts are at risk of storm surge damage in 2017. The estimated reconstruction cost of those homes could be more than $1.5 trillion. These are the figures for what is predicted to be a lighter than average year for storms.

It is not possible to predict with absolute certainty what property is going to be affected by storm surges or flooding. Flood forecasting that covers a large area relies on a number of different types of data. The data that is used most frequently as a predictor of flood risk is historical data of prior flooding. This type of information can be useful and important when considering individual properties. If a property has a history of flood damage, a potential buyer may be justified in assuming that there is a risk of this happening in the future. The history may also be worth knowing for other reasons, as a warning that there may be lingering structural issues caused by past water damage.

The publicly available data about flooding that is compiled by government agencies may not tell much about whether this particular property is at risk. Obviously, a potential buyer can't make use of this information if he/she doesn't know it. To allow buyers to make informed decisions about flood risk, sellers in over half of all

U.S. jurisdictions are required to make specific flood-related disclosures. In 29 states and in the District of Columbia, the state-prescribed disclosure form requires such a disclosure. Note that most states require disclosure of material defects in a property, so any flood damage would probably need to be disclosed by a seller.

The most commonly required disclosure is whether the property is in a designated flood plain, flood zone, or wetland. The New York disclosure form also encourages buyers to "check public records concerning the property." Flood zone disclosure is required in twenty-nine states. Among the states that have flood-related disclosure requirements, only three states and the District of Columbia are silent regarding flood zones. While Michigan requires disclosure of flooding or flood damage, and also requires disclosure of whether the seller has flood insurance on the property, there is no requirement that a buyer be informed that a property is in a flood zone (note that flood insurance coverage is available regardless of whether property is in a flood zone). Tennessee requires disclosure of a "requirement that flood insurance be maintained on the property," as well as "[f]looding, drainage or grading problems," but not whether the property is in a flood zone. Likewise, the suggested Minnesota form asks if the seller is aware of any flooding on the property, but says nothing about the property being in a flood zone. The District of Columbia form only asks about "actual knowledge" of damage due to flooding.

The required disclosure in California is noteworthy for the detail that is required. Sellers must disclose whether their property is in a Federal Emergency Management Agency (FEMA) designated special flood hazard area (Zone "A" or "V," or whether the property is in an area of potential flooding as "shown on a dam failure inundation map"). The inundation maps are kept by the Office of Emergency Services. If the property being sold is located in a special flood hazard area, that fact must be disclosed if the transferor or the seller's agent actually knows that the property is within a special flood hazard area; or if the local jurisdiction has compiled a list of properties located in the special flood hazard area, and a notice identifying the location of the parcel list has been posted. If the property is in an area designated as an area of potential flooding, the seller or his/her agent must disclose that fact if either of them have actual knowledge of the designation. If the local jurisdiction has compiled a list of properties, by parcel, located in the inundation area and a notice identifying the location of the list has been posted. The information that must be disclosed is compiled and maintained by governmental agencies. If there was an error or inaccuracy in the disclosure based on information furnished by an agency, the seller or his/her agent are not liable, provided they used ordinary care in obtaining and transmitting the information.

The question of whether there actually has been flooding on the property is an important one for assessing the risk of future flooding. All but eight of the states that require flood-related disclosures have a requirement that the seller disclose any known flooding. The flooding that has to be disclosed may be limited. In Iowa and Kentucky, sellers must disclose flooding "problems," without any guidance as to what constitutes a "problem," such as whether flooding is a problem if it occurs only rarely. In Illinois, the seller must disclose flooding or recurring leakage problems, but the statute specifically mentions flooding or leakage problems only in a crawl space or basement.

Interestingly, six of the states without flood-related disclosure requirements are coastal states at risk for flooding from storm or tidal surges. Florida, for example, is regarded as having the highest risk from flooding due to climate change of any state, but there is no statewide requirement that the flood risk or flooding history of a property be disclosed to a buyer. While there are local requirements, such as in Miami-Dade County (applicable only to unincorporated parts of the county), most sellers in the state are not required to make disclosures related to flooding. Lenders in non-disclosure states may also require flood insurance.

Massachusetts, for example, requires flood insurance for properties in designated special flood hazard areas, but sellers are under no obligation to inform buyers that the property is in such a zone.

State Responses to Flooding (or Future Floods)

A flood is a costly, and potentially deadly event. It is often possible to make an accurate prediction of where they will happen, but whether they will happen at any given time depends on a number of facts, such as recent weather patterns. A flood-prone area could go without a flood for some time.

Sea Level Rise Measures

A flood is not the only watery intrusion that affects property owners. Rising sea levels will also have effects on virtually all coastal communities. Unlike a flood, rises in the sea level are slow but continuous. The rise will also cause widespread destruction, as tidal flooding (flooding due largely to routine fluctuations in the tides, rather than storm surges or precipitation) increases. According to one estimate, by 2035, moderate increases in the sea level will cause 167 communities to be effectively inundated by flooding ("effectively inundated" is defined as 26 or more floods per year).

As King Canute of England is supposed to have demonstrated in the 11th Century, the ocean cannot be stopped. Slowing its rise may also be a formidable challenge. This does not mean that nothing is being done to protect coastal communities. Many states are taking action and adopting policies to mitigate the effects of rising sea levels. In Virginia, the legislative Joint Subcommittee on Coastal Flooding was established to make recommendations to develop a comprehensive and coordinated planning effort to address recurrent flooding, and to recommend both short- and long-term strategies to minimize the impact of recurrent flooding. The Subcommittee's work in 2014 resulted in six bills passed by the General Assembly in 2015. The recommended bills passed included measures to require the state to update its flood protection plan at least once every five years.

Other states are also moving forward. In New York, the Coastal Management Program advocates for specific policies, and also acts as a coordinator for programs of all state agencies that affect coastal areas. The Program works to achieve a balance between development, recreational, and conservation goals. In Texas, the Coastal Management Program funds projects in areas such as natural hazards response and critical areas enhancement. State coastal zone management programs are actively addressing many different issues relating to coastal flooding.

One recommended measure that was not approved was to require sellers of real estate, "[a]s part of required disclosures, [to] advise purchasers to exercise due diligence, including obtaining a flood certification and a lender determination of whether the property is located in a flood zone and whether flood insurance is required." Instead, legislation was passed that requires the owner of residential property to inform prospective purchaser that the owner makes no representations with respect to whether the property is located in one or more special flood hazard areas, and advises purchasers to exercise whatever due diligence they deem necessary.

There may be little that states can do to stop or slow rising sea levels. On the other hand, states can make policies to help residents of the state avoid the worst effects of rising sea levels. Many states have adopted plans or policies to address the problem.

One of the most far-reaching and ambitious plans in recent years was adopted in Louisiana. Louisiana is a state that is especially vulnerable to rising sea levels. Its coastline is a complex ecosystem that also has economic importance for its natural resources and is seaports. To slow the loss of this coastline, and to restore some of what has already been lost, a 50-year Coastal Master Plan has been developed. The Plan recommends 124 coastal projects, including restoration, structural protection, and nonstructural risk

reduction projects. State agencies are directed to "administer their regulatory practices, programs, projects, contracts, grants, and all other functions vested in them in a manner consistent with the Coastal Master Plan and public interest to the maximum extent possible." The Plan passed the Legislature on June 2, 2017 by a nearly unanimous vote (the vote in the Senate was 33-1; the vote in the House was 93-0).

Resiliency Efforts

One of the key elements of any policy that addresses rising sea levels is resilience, or how to prepare for a flood. The causes of flooding, like a storm surge or tidal anomaly, cannot be prevented. There are, however, steps that states can take to mitigate the effects of a disaster.

This year, New Hampshire passed legislation allowing municipalities to establish coastal resilience incentive zones. Properties in the zones would be eligible for tax relief and other incentives for measures designed to increase a property's resiliency. Such measures may include elevation and free-board renovations, elevation of mechanicals, construction of resilient natural features, enhancement or creation of tidal marshes, or even movement to a higher area within the municipality.

Hawai'i has followed the approach of allowing local governments to decide on resiliency measure. The Hawaii Climate Change Mitigation and Adaptation Initiative, approved by the Governor on June 8, 2017, creates a state commission on adaptation to, and mitigation of, the effects of climate change. The purpose of the Commission is to provide policy direction, facilitation, coordination, and planning among state and county agencies, federal agencies, and other partners as appropriate. Existing climate change mitigation and adaptation efforts will be identified, and recommendations will be made for how to meet or exceed the state mitigation goals. The Commission is directed to submit an annual report to the Governor and Legislature, and conduct a comprehensive review of the implementation. The first step for the Commission is to focus on and develop sea level rise vulnerability and adaptation reports.

Preventive Measures

A healthy shoreline can be an important flood-prevention measure. Sand dunes absorb some of the worst effects of wind and water, easing the impact on buildings further inland. Over-development in coastal zones puts additional stress on the shoreline, and makes the effects of storms worse.

In 2016, the South Carolina Legislature passed SB 139 (Act 197), a law that its proponents call the "strongest protection for South Carolina beaches in 25 years." The law places limits on construction along the state's shoreline. One key provision of the law is to establish a policy of "retreating" from the shoreline. The Department of Health and Environmental Control is directed to establish a baseline limit for new construction that may not be moved towards the water after December 31, 2017.

Beach Nourishment

If the beach is washing away, why can't we just put down some more sand and rebuild it? This intuitive response is known as beach nourishment. Beach nourishment, sometimes called beach filling or beach replenishment, involves adding large amounts of sand or sediment to combat erosion and or add width to the beach. Beach nourishment offers several advantages over "hard" beach stabilization structures like seawalls. A seawall only protects the beach behind the wall, letting the area between the wall and the water blow away. Beach nourishment widens the entire beach.

Beach nourishment has its disadvantages. There is a short-term effect on the sea life living on the beach, or in the sediment used. One important drawback of beach nourishment is that it is expensive. The expenses are also recurring, as the nourishment is not permanent and must be repeated over time. Communities that choose beach nourishment have had to develop creative means of funding these projects.

In northern Dare County, North Carolina, nourishing the local beaches was projected to cost $38.6 million. In order to prevent the costs from falling too hard on any community, the three towns with the beaches and the County came up with a cost-sharing agreement. The costs of the project would be split 50/50 between the county and the towns. The County will raise its share of the funds by dedicating a part of the occupancy tax, and by issuing a limited obligation bond. The towns are raising their shares of the cost through increased ad valorem taxes and bonds. Taxes are increased on all properties in the towns, but most of the increases fall on owners of property immediately adjacent to the beach.

In South Carolina, the state offers matching funds for beach nourishment to counties and municipalities. Governments that apply for the funding must have a state-approved Local Comprehensive Beach Management Plan in place. Many of the state grants, such as the grant to the City of Isle of Palms, are in conjunction with federal grants offered to mitigate the effects of Hurricane Matthew in 2016.

Property Tax Credits for Improvements

Restoring the shore line can be a costly proposition. Measures passed recently in Virginia and Maryland may help to ease some of the financial burden.

In Virginia, living shoreline projects are exempt from property taxes. A living shoreline uses plants, stone, sand, and other materials to reduce erosion and enhance shoreline habitat. The natural connection between water, shoreline, and uplands is preserved. In order to qualify for the tax exemption, a living shoreline project must be approved by the Virginia Marine Resources Commission or the local wetlands board. It may not be a type of project prohibited by local ordinance. The tax exemption was effective July 1, 2016.

In Maryland, the state's existing law regarding property tax exemptions for erosion control structures was amended, effective for tax years beginning June 30, 2017. Counties in Maryland are allowed to adopt a property tax exemption for property that has erosion control structures or devices. The new law modifies the requirements for the local exemptions to provide that the exemption will be allowed only if the structures or devices meet certain standards. Counties will also be able to extend the credit to property with non-structural shoreline stabilization measures (at present, only Anne Arundel and Dorchester Counties allow the credit).

Septic Systems

Since the beginning of time, humanity has had to deal with the same problem: what to do with waste? Large, densely-populated communities can deal with the problem by building sewage treatment systems. Smaller communities, or individuals located at a distance from such a plant, rely on septic systems. A septic system drains sewage into a tank where waste matter eventually separates from the wastewater. The water is then drained into a field, which also filters the water before it runs off.

Septic systems in coastal areas pose special problems. Many coastal areas have sandy soil that does not work well as a filter for wastewater, so contaminants are released into the water. The water table is also high in these areas, which allows drain fields to be saturated, making them poor filters. Septic systems in coastal areas are also vulnerable to hazards such as erosion, storm damage, and high-velocity flooding. A failed septic system will release untreated waste that can contaminate water and beaches. Marine life can be contaminated, and a rapid release of a high

volume of nutrients such as nitrogen can be a shock to the coastal ecosystem. Beaches suffer in both appearance and cleanliness when raw sewage is released.

In Maryland, a state with approximately 52,000 septic systems on land within 1,000 feet of tidal waters, there are detailed regulations for the construction of septic systems in new construction located in the Chesapeake Bay and Atlantic Coastal Bays critical areas. New septic systems in those areas must use the "best available technology" for the removal of nitrogen from wastewater. Systems must be properly maintained and operated, and every system must include a two-year operation and maintenance contract and a two-year warranty.

The Maryland regulation was modified in the fall of 2016. Septic systems installed outside of critical areas are no longer required to use the best available technology. Local governments, however, may continue to require it.

Florida has special regulations for on-site sewage and septic systems installed in the Florida Keys. The regulations relate to the location of septic systems, and to the design and construction of the systems. Owners are required to have a maintenance contract with an approved maintenance entity. Undocumented or unpermitted systems must be removed.

Local Responses to Flooding (or Future Floods)

Although state governments have an important role to play in setting and implementing coastal policy, local governments have also undertaken significant efforts. For example, resiliency planning can be part of a community's overall plan for development. Smart growth policies such as flexible land-use policies and targeted investment can contribute to a community's resiliency. The U.S. Environmental Protection Agency (EPA) and Federal Emergency Management Agency (FEMA) have adopted a Memorandum of Agreement that allows the two agencies to work together to assist communities with becoming more resilient. One of the projects under this memorandum involved in developing a "safe growth" plan for the San Francisco Bay Area. The plan first assessed the vulnerabilities of communities and housing in the area. The second phase of the plan was to develop strategies for resilience. In all, 40 strategies to reduce vulnerabilities were adopted.

In 2012, Hurricane Sandy showed how vulnerable New York City is to flooding from the sea. Sandy caused a total of $71.4 billion dollars in damage, and was responsible for 52 deaths in the city. In response, in 2014, city government embarked on a campaign to make the city more resilient. The campaign, called OneNYC, is a long -term plan that is an attempt to confront the environmental challenges the City will face in the future. One of the most important challenges is protection from flooding. Regulations mandating flood-resistant construction in flood plains have been added to the City Building Code. Infrastructure to prevent flooding has also been proposed for areas that were hit hard by flooding from Sandy, as well as for neighborhoods that were not severely impacted but that are vulnerable to future flooding. City officials are optimistic about the continuing

success of the plan. In October of 2016, Mayor de Blasio stated that "substantial progress" has been made on the resiliency plan.

Groundwater Protection

Chesapeake Bay is a long arm of the ocean surrounded by densely populated land. This population puts a lot of stress on the Bay's ecosystem. Runoff from the populated areas pollutes the Bay. In addition, the freshwater aquifer is shrinking due to the water needs of the people. This shrinkage not only uses up a crucial natural resource, but it also allows saltwater from the Bay to leach into the aquifer, making its unusable. Depleting the aquifer lowers the level of the land over the aquifer, making it more vulnerable to tidal flooding.

An innovative program developed by the Hampton Roads Sanitation District in Eastern Virginia has been started to slow or stop this process. Called SWIFT, for Sustainable Water Initiative for Tomorrow, the program is designed to ensure a sustainable source of groundwater for the area while addressing other environmental challenges for Chesapeake Bay. SWIFT will take already highly treated wastewater that would otherwise be discharged into local rivers that flow into the Bay. The water will be purified so it becomes drinking quality water. The purified water would then be treated to match the existing groundwater chemistry and added to the local aquifer. The treated water will significantly reducing the amount of nutrients such as nitrogen and phosphorus that discharged into the rivers, and ultimately, into the Bay.
SWIFT was launched in September of 2016. The initiative's research facility, which is where the water will be purified, is expected to be completed in April of 2018.

Other coastal communities are moving forward with groundwater replenishment. The City of Clearwater, Florida, has started work on a groundwater replenishment program that involves purified wastewater. That project is expected to be operational in 2020.

Septic Systems

Many coastal states do not have rules or laws that relate specifically to septic systems in coastal areas. While there are usually rules that apply statewide, the special problems of septic systems near the coast are not addressed. In those situations, local governments have often been able to craft policies that meet local needs.
Wareham, Massachusetts, at the head of Buzzard's Bay, has 54 miles of shoreline within its borders. The shoreline is an important economic asset for the town, attracting boaters, fishers, and swimmers. In recent years, residents started to notice that the quality of the water appeared to be deteriorating, due to the presence of too much nitrogen. Nitrogen enters the water from systems that do not treat sewage, such as septic systems. To address the problem, Wareham adopted regulations limiting septic systems near waterways. No new septic systems may be installed within 150 feet of a waterway. New systems constructed within 500 feet of a waterway must be systems that reduce nitrogen.

Other coastal communities have acted to regulate septic systems. Nantucket prohibits the installation of septic systems on properties that have access to a common sanitary sewer. The town also has adopted detailed regulations for the construction of septic systems, and the composition of soils absorption systems. Suffolk County on Long Island has initiated a pilot program to replace existing septic systems with new, cleaner systems. The new systems that will be installed can remove up

to 70% of the nitrogen from household sewage. Because the new systems are expensive—up to twice the cost of a conventional system—the County is offering grants to help pay the expenses. ■

NOTE: As of September 6, 2017, the National Flood Insurance Program (NFIP) is set to expire on September 30, 2017 unless U.S. Congress reauthorizes the program. The National Association of REALTORS® urges Congress to pass H.R. 2874, "The 21st Century Flood Reform Act." Within H.R. 2874, NFIP is reauthorized for five years, caps the NFIP rate at $10,000 per year for property owners, sets aside $1 billion in grant dollars to help property owners mitigate their risk, directs FEMA to develop more granular rate tables, and increases access to private market flood insurance. Look for updates here.

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State Issues Tracker: Database with over thirty real estate related issues and state laws. Examples include: Transfer Taxes, Seller Disclosures, Broker Lien Laws, Foreclosure Procedures, Sales Tax on Services, Licensing Requirements & Maintenance, etc.

White Papers: Comprehensive reports prepared for NAR on issues directly impacting the real estate industry. Examples include: Rental Restrictions, Land Banks, Sales Tax on Services, State & Local Taxation, Building Codes, Hydraulic Fracturing, Foreclosure Property Maintenance, Climate Change, Private Transfer Fees.

Growth Management Fact Book: Analysis of issues related to land use and modern growth management topics include: density— rate of growth, public facilities and infrastructure, protection of natural resources, preservation of community character, and affordable housing.

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