

DROWNING IN PLACE: LOCAL GOVERNMENT COSTS AND LIABILITIES FOR FLOODING DUE TO SEA-LEVEL RISE

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Many areas of Florida are experiencing increased tidal flooding due to sea-level rise (SLR). Florida has experienced eight to nine inches of SLR over the past 100 years.¹ The roughly four and one-half inches of rise in the last 50 years has decreased the efficiency of some older stormwater systems designed to function with lower sea levels. As a result, tidal waters back up within the drainage systems and stormwater systems drain slower, causing more frequent flooding. Tens of billions of dollars of real estate in Florida are potentially at risk due to SLR and its commensurate flooding.²

How should local governments respond? Miami Beach, which has become infamous for tidal flooding, is incorporating sea-level rise into plans for spending more than \$200 million to expand the city's drainage system.³ But costs for addressing flooding will only rise with the waters, potentially drowning local governments in rising debt if not rising water. This raises the question as to whether local governments must prevent flooding due to SLR at any cost. Do local governments have a *duty* to perform this type of protective upgrade on outmoded drainage and flood controls or is this government action discretionary? As SLR-induced flooding causes greater inconvenience and even damage to property, will municipalities be faced with the difficult choice between expending millions of taxpayer dollars for these improvements or being subject to lawsuits from private property owners seeking damages?

Generally, claims for damages to property have been brought against local governments under both tort and constitutional taking theories. This article examines Florida jurisprudence in both since each has proven to be somewhat unpredictable, providing no definitive answer to the question of who shoulders the liability for SLR-related flooding. The article then discusses the responsibilities of local governments for drainage and applies relevant precedent to determine potential liability. Where important legal liability questions have not been squarely addressed in the realm of drainage, this article draws analogies and inferences from law developed around other types of infrastructure, such as roadways.

Flooding Damage: Tort Claims

In 1973, Florida waived sovereign immunity in tort actions with passage of Florida's torts claim act.⁴ This opened the door to flooding damage cases by private citizens against local governments. Tort claims involving municipal infrastructure or services, however, may still be subject to sovereign immunity despite this statutory waiver. The Florida Supreme Court has held that despite the passage of the torts claim act, certain "discretionary" governmental functions remain immune from tort liability because such "planning" level functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance.⁵ Such planning-level functions contrast with "operational" levels of government decisionmaking.

Duties Regarding Drainage

A tort claim cannot proceed unless the defendant owed a duty to the plaintiff. However, local governments in Florida have no general duty to provide drainage. Statutes grant many powers that *allow* local governments to engage in the construction and management of drainage, but these are discretionary duties.⁶ The Florida Supreme Court has established, however, that once a government entity has undertaken to provide protection from flood damage through the construction of a storm sewer pump or other similar system, it assumes the duty to do so with reasonable care.⁷ When a local government provides this type of infrastructure, it "thereby assume[s] the duty to maintain and operate the system so that it [will] properly drain off expected excess water and prevent flooding."⁸ In the face of SLR and more frequent tidal flooding, this seemingly straightforward duty raises significant questions. As many of Florida's drainage systems were designed before reliable climate change or SLR data was available, it remains unclear what type of government action is presently encompassed by the duty to maintain existing stormwater systems.

Sea-level Rise and Drainage — Duty or Discretion?

SLR impacts stormwater systems through three mechanisms that cause flooding. First, a higher sea level may cause high tides to back up through the stormwater system, causing flooding in the very areas in which the system is to drain. Second,

SLR may not directly flood the land but it may cause previously dry drainage infrastructure to fill with saltwater, meaning that the affected volume of stormwater infrastructure is not available for the immediate storage of stormwater. A third related, and less appreciated, impact is that higher sea levels can cause a system to drain at increasingly slower rates. The system drains less efficiently because elevated sea levels reduce the vertical drop in the stormwater system, reducing the speed at which water travels through the system. Under this scenario, a rainstorm that would not have flooded an area a few decades ago may now flood the same area even if the stormwater system has been properly “maintained” to function as it was designed.

This leads us to ask the (literally multi-) million dollar question: When, due to sea-level rise, a stormwater system is no longer able to prevent flooding in areas it once protected, has the local government failed to “reasonably maintain” the system and, therefore, breached a duty? Or would changes to the system to ensure the prevention of flooding qualify as a discretionary “upgrade” to the system?

Florida case law to date has not directly ruled on the issue of whether changed circumstances that cause increased flooding despite a stormwater system still in its proper design condition results in liability for a failure to “maintain” or if changed circumstances leading to flooding indicates that a local government has discretion as to whether to “upgrade” the system. Courts in states that have addressed this specific question have found that local governments enjoy immunity when they exercise their discretionary authority as to whether to modify drainage systems in response to changed conditions.⁹ In other words, other states have essentially found that there is no obligation to “upgrade” (*i.e.*, no liability for damages from not upgrading) when the “upgrade” is essentially what we in Florida would call a discretionary, “planning-level” decision rather than a nondiscretionary, “operational” function.

Still, since Florida has not directly addressed this question in the context of drainage, a helpful parallel in Florida can be drawn from case law regarding road infrastructure. Florida courts have engaged in a thorough discussion of the legally significant distinction between discretionary, planning-level and nondiscretionary, operational- and maintenance-level functions in ruling on whether local governments are obligated to expand or improve roadways. The Florida Supreme Court has held that local governments have a duty to reasonably maintain existing roads and traffic controls.¹⁰ The court has clarified, however, that this duty applies only to a road “as it exists” and “does not contemplate maintenance as the term may sometimes be used to indicate obsolescence and the need to upgrade a road.”¹¹ The court has further emphasized that the duty to reasonably maintain roadways does not encompass an obligation to upgrade a road through such measures as road widening or changing the means of traffic control.¹² These latter measures have been deemed discretionary functions that may not be compelled by the courts, as such judicial interference would violate the separation of powers doctrine.

Whether local governments have a duty to upgrade existing drainage systems to effectively drain greater volumes of stormwater will depend upon whether courts classify this action as a discretionary, planning-level or a nondiscretionary, operational- and maintenance-level function. This same determination will dictate whether sovereign immunity bars an individual plaintiff’s flooding claim, as the former category of functions is still immune to tort claims. Although parallels can be drawn from the road infrastructure context, the planning versus operation/maintenance distinction remains a complex challenge for courts. This distinction on which immunity hinges is so unclear that it has been said that “[t]he enigma is now shrouded in mystery.”¹³

It remains to be seen how this mystery will play out in Florida courts when they encounter claims for damage due to drainage systems that are no longer draining as well as a result of SLR. Since the failure of drainage systems to function as effectively due to SLR represents a changed situation that would require a redesign of the system to provide the level of service previously provided, it would seem to make more sense to classify this as an “upgrade” rather than “maintenance.” In this case, a local government decision not to upgrade would be covered by sovereign immunity, insulating the local government from flooding damage claims by those impacted if a drainage system is not upgraded.

To further shroud this enigma, the planning- versus operational-level activity is not the only limitation to Florida’s waiver of sovereign immunity. Regarding stormwater systems, the waiver of sovereign immunity is further limited by F.S. §373.443, which provides complete immunity to the water management districts, the state, and their employees or agents against

claims challenging the issuance of any permit, the issuance or enforcement of any order relative to maintenance or operation, measures taken to protect against failures during emergencies, and control or regulation of any relevant stormwater system.

Finally, the policy implications of the questions presented will challenge courts. While courts will likely be loath to allow local governments to simply do nothing about property owners that suffer from insufficient infrastructure to service their properties,¹⁴ The types of challenging decisions about how to allocate limited local funds to best address flooding issues represents a quintessentially legislative function with which the judiciary should not interfere due to the doctrine of separation of powers.

Flooding Damage: Taking Claims

Property owners who wish to avoid the tangle of sovereign immunity analysis have often chosen to bring claims under a theory of a constitutional taking of private property. The advantage to this approach is that sovereign immunity does not prevent a takings claim.¹⁵

Pleading a taking rather than a tort does not necessarily mean easy sailing for plaintiffs as Florida takings jurisprudence for claims based on flooding also has an expansive and muddled history. Generally, to support a claim for inverse condemnation, flooding must be caused by government action that results in “an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury, to the property.”¹⁶ Florida courts have deemed the “permanent” invasion element of a taking satisfied where periodic flooding occurs, is expected to recur, and is sufficient to deprive a property owner of all reasonable use of his or her land.¹⁷ However, a recent U.S. Supreme Court case indicates that periodic flooding, even if only temporary, may result in a compensable takings claim for damage to property.¹⁸ Thus, it appears that government action causing even periodic flooding on a temporary basis may be a taking, depending on the specific facts of the situation.

Note, however, that in every case, there must be a *government action* that causes the flooding. The *inaction* of government has historically been insufficient to support a claim for inverse condemnation.¹⁹ One recent Florida case, however, may call this general principal into question.

Government *Inaction* as a Basis for Inverse Condemnation

In *Jordan et al. v. St. Johns County*, 63 So. 3d 835 (Fla. 5th DCA 2011), landowners brought suit against the county alleging it failed to reasonably maintain a county-owned road known as “old A1A” to such an extent that the county deprived the landowners access to their land, resulting in a taking of property.

As a low-lying coastal road, old A1A is subjected to continuous damage from natural forces, such as storms and erosion. According to the county, the only feasible way to protect the road from the “ravages of the ocean” was an expenditure by the county of more than \$13 million to elevate the height of the road by placing large amounts of sand along its entire length from the right-of-way down to the mean high-water mark.²⁰ The county argued it would have to spend an additional \$5 to \$8 million every three to five years to maintain that protection.

The county argued it could not spend these sums because they represented more than the entire county budget for repair and maintenance of 800 miles of roads in the county.

The court affirmed that the county had a duty to “reasonably maintain” and repair old A1A in such a way as to result in “meaningful access.” The case was remanded to determine whether the county had fulfilled this duty. More significantly, however, the court held

that “governmental inaction — in the face of an affirmative duty to act — can support a claim for inverse condemnation.”²¹ This case, for the first time, established a precedent that government *inaction* may be grounds for a plaintiff to bring a constitutional takings claim if the government had a duty to act.

This newly minted rule again focuses on the importance of determining the scope of local government duties to provide drainage. If a court were to determine that local governments must maintain a “level of service” for drainage rather than maintain the existing infrastructure itself, this could force local governments into the difficult choice between spending

what may amount to unrealistic sums of money to keep everyone's property dry or risk facing legal liability. This liability could present itself in either an inverse condemnation claim or a tort claim, both based on the local government's failure to fulfill a "duty" related to drainage.

Another case that may impact local government liability for maintenance of potable water and sewer systems is *Charlotte County v. Rotonda Project, LLC*, 91 So. 3d 249 (Fla. 2d DCA 2012). The case's 20-year history and rather unique facts make it challenging to adequately characterize here. Nonetheless, it is important to consider the case as it holds potential to be either very broadly or very narrowly construed as precedent for future cases. In *Rotonda*, a private developer installed a water and sewer system as a condition of the state for a development permit and as part of a prohibition on use of any septic systems. The county eventually purchased this system. As large parts of the land serviced by the system were vacant for many years, the county stopped services of the system to those areas and cannibalized parts until those areas of the system were not functional. However, the county continued to tax the land as if the services were available and still represented that they were available to a subsequent purchaser of the property, who expected to develop it with single-family homes as it was platted. However, since the sewer system was no longer functioning and on-site septic was prohibited by the earlier development permit, the county would not allow the parcels to be developed as single-family homes.

In the resulting lawsuit, the court held that the county, "by its regulations, actions and inaction has caused a substantial deprivation of the economic use of Plaintiff's property and denied Plaintiff's reasonable investment-backed expectations in violation of Article X, Section 6 of the Florida Constitution, entitling the Plaintiff to full compensation, attorney's fees, costs and interest."²²

It will be worth local governments watching how the court's holding in *Rotonda* will be applied as precedent. Will it be applied very narrowly? "A taking occurs only when the [c]ounty knowingly creates the impossibility of use of land through destruction of utilities and then misrepresents this." Or will it be applied broadly? A taking occurs when a local government "by its regulations, action, and inaction has caused a substantial deprivation of the economic use of...property and denied...reasonable investment-backed expectations...."²³

Another key element for local governments to examine is how this case, like others discussed above, treated sovereign immunity. The county claimed that the developer's financial loss arose from the county's tort of misrepresentation of the availability of necessary services. However, the plaintiff avoided problems of sovereign immunity by filing the case as a takings claim rather than a tort. This seems to be a growing theme.

Conclusion

Decisions determining local government legal liability to provide infrastructure are of great public importance and have far-reaching implications for local governments as our oceans continue to rise. Florida courts face two possible paths with divergent consequences: First, impose an affirmative duty on municipalities to upgrade drainage systems to accommodate SLR. This will leave local governments vulnerable to both tort and inverse condemnation claims in the event of flooding — the only way to avoid such an outcome being massive expenditures of taxpayer money from already strained government budgets. Alternatively, courts could rule that local governments may be held liable for maintenance to drainage infrastructure only *as it exists* and that changes to address SLR should be considered "upgrades"; under this scenario, a decision not to upgrade would be immune from liability because the decision involves legislative discretion. In the latter case, property owners would not be able to force local governments to alter drainage regardless of cost. This would preserve the ability of local governments to continue to make legislative decisions about how and where limited funds for drainage are best spent in making changes to local drainage systems to address the impacts of SLR.

¹ See, e.g., Permanent Service for Mean Sea Level, Key West data, *available at* <http://www.psmsl.org/data/obtaining/stations/188.php>.

² Southeast Florida Regional Climate Change Compact Counties, *A Region Responds to a Changing Climate, Regional Climate Change Action Plan* at 9 (Oct. 2012), *available at* <http://southeastfloridacclimatecompact.org/pdf/Regional%20Climate%20Action%20Plan%20FINAL%20ADA%20Compliant.pdf>.

³ Curtis Morgan, *Deep Trouble: How Sea-Rise Could Cause Havoc in South Florida*, The Miami Herald, March 10, 2013.

⁴ Fla. Stat. §768.28 (2012).

⁵ *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1022 (Fla. 1979); see also *Dep't of Transp. v. Konney*, 587 So. 2d 1292 (Fla. 1991).

⁶ See, e.g., Fla. Stat. §170.01(1)(a) & (b) ("Any municipality of this state may, by its governing authority...provide for the...guttering, and draining of streets, boulevards, and alleys...[o]rder the construction, reconstruction, repair, renovation, excavation, grading, stabilization, and upgrading of greenbelts, swales, culverts, sanitary sewers, storm sewers, outfalls, canals, primary, secondary, and tertiary drains, water bodies, marshlands, and natural areas, all or part of a comprehensive stormwater management system, including the necessary appurtenances and structures thereto and including, but not limited to, dams, weirs, and pumps."); Fla. Stat. §403.0893 (granting local governments authority for certain mechanisms to fund stormwater management).

⁷ *Slemp v. City of North Miami*, 545 So. 2d 256, 258 (Fla. 1989).

⁸ *Id.* See also *Southwest Fla. Water Management Dist. v. Nanz*, 642 So. 2d 1084, 1086 (Fla. 1994) ("Having assumed control of this drainage system and undertaken to operate and maintain said drainage system, [d]efendants, and each of them, had a duty and obligation to prudently operate, control, maintain, and manage said system so that it would work properly and drain off excess waters so as not to cause flooding in the area. Defendants owed said duties and obligations to your [p]laintiffs, residents and/or owners of homes and real property serviced by the drainage system."); *Tranon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985); *Collazos v. City of West Miami*, 683 So. 2d 1161 (Fla. 3d DCA 1996).

⁹ See, e.g., *Alden v. Summit Cty.*, 679 N.E.2d 36, 38 (Ohio Ct. App. 1996); *Coleman v. Portage Cty. Eng'r*, 975 N.E.2d 952, 960 (holding a claim based on a failure to upgrade is a claim based on a failure of design and construction, for which political subdivisions enjoy immunity, and not a claim based on a failure to properly maintain, for which political-subdivision liability may be extant).

¹⁰ *Dep't of Transp. v. Neilson*, 419 So. 2d 1071, 1078 (Fla. 1982).

¹¹ *Id.*

¹² *Dep't of Transp. v. Konney*, 587 So. 2d 1292, 1294 (Fla. 1991).

¹³ *Neilson*, 419 So. 2d at 1079 (Sunberg, J., dissenting).

¹⁴ See, e.g., *Jordan et al. v. St. Johns County*, 63 So. 3d 835 (Fla. 5th DCA 2011).

¹⁵ *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 316 n.9 (1987).

¹⁶ *S. Florida Water Mgmt. Dist. v. Basore of Florida, Inc.*, 723 So. 2d 287, 288 (Fla. 4th DCA 1998).

¹⁷ *Elliott v. Hernando County*, 281 So. 2d 395, 396 (Fla. 2d DCA 1973) (holding that plaintiff's property rights had been sufficiently infringed to demonstrate a taking under the Florida Constitution when the government diverted the natural flow of rain waters to appellants' real property and subsequently rendered the property unusable and unsanitary. Such flooding was considered "permanent" in that rain is a condition that is reasonably expected to continually reoccur in the future).

¹⁸ *Ark. Game & Fish Com'n v. United States*, 133 S. Ct. 511 (2012).

¹⁹ *Griffin Broadband Communs., Inc. v. United States*, 79 Fed. Cl. 320, 324 (2007) ("A necessary component of any takings claim is that the [g]overnment actually took property, whether by physical invasion or regulatory action...."). See also Robert Meltz, *Substantive Takings Law: A Primer*, a paper presented at The 12th Annual CLE Conference on Litigating Regulatory Takings and Other Legal Challenges to Land Use and Environmental Regulations at 14-15 (Nov. 2009), available at http://www.vjel.org/docs/Takings%20Conference/Meltz_Vermont_conf%20-%20takings_primer.pdf.

²⁰ Brief for Appellee at 1, *Jordan v. St. Johns County*, 63 So. 3d 835 (Fla. 5th DCA 2011).

²¹ *Jordan v. St. Johns County*, 63 So. 3d 835, 839 (Fla. 5th DCA 2011).

²² *Rotonda Project, LLC. v. Charlotte County*, Case No. 07-4374-CA at 15 (20th Cir. Jan. 8, 2010), *affirmed by Charlotte County v. Rotonda Project*, 91 So. 3d 249 (Fla. 2d DCA 2012), available at <http://charlottefl.com/outreach/Cases/Rotonda1-StateCourtCase/OrderOnLiability-1-8-10.pdf>.

²³ *Id.*

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