

# Castles—and Roads—in the Sand: Do All Roads Lead to a “Taking”?

by Thomas Ruppert

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## Summary

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The law has been slow to acknowledge the unprecedented nature of sea-level rise. Unless and until the law adapts, past case law on coastal hazards exacerbated by sea-level rise provides the best guidance. This Article critically examines a Florida case that addressed local government liability for coastal erosion damage to a road and dramatically altered Florida law in two key respects. First, the case altered and expanded the concept of “maintenance” of road infrastructure by a local government as the baseline duty that must be met to avoid potential legal liability. Second, the case introduced into Florida law the controversial idea that “inaction” may support a Fifth Amendment takings claim. The Article traces how other courts have unwittingly or carelessly introduced “inaction” into their takings jurisprudence, and evaluates whether and when inaction should be sufficient basis for a takings claim. It draws out serious policy implications of the case in light of sea-level rise, and makes recommendations to address fallout from the case.

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Sea-level rise (SLR) and its impact on coastal infrastructure now represent everyday realities in many communities. While numerous local governments in Florida and elsewhere have begun incorporating SLR into planning decisions through ordinances and resolutions,<sup>1</sup> and even implementing adaptations through new standards,<sup>2</sup> few legal cases have arisen that directly address SLR. Nonetheless, since SLR often manifests itself through familiar coastal hazards such as erosion and tidal and storm-surge flooding, cases that address the impacts of these coastal hazards can be a useful guide to show how courts might address SLR.<sup>3</sup>

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1. See, e.g., THOMAS RUPPERT & ALEX STEWART, HOUSTON ENDOWMENT, DRAFT: SUMMARY AND COMMENTARY ON SEA-LEVEL RISE ADAPTATION LANGUAGE IN FLORIDA LOCAL GOVERNMENT COMPREHENSIVE PLANS AND ORDINANCES (2015), [https://www.flseagrant.org/wp-content/uploads/Ruppert-Updated-Sea-Level-Language\\_7.2.15.pdf](https://www.flseagrant.org/wp-content/uploads/Ruppert-Updated-Sea-Level-Language_7.2.15.pdf). See also Miami-Dade County, Fla., Resolution No. R-451-14 (May 6, 2014) (requiring that all county infrastructure projects initiated after the date of the resolution consider SLR projections and potential impacts during the greater of 50 years or the design life of the project), <https://www.miamidade.gov/govaction/legistarfiles/MinMatters/Y2014/140804min.pdf>.
2. As examples, in Florida, see Erin L. Deady, *Why the Law of Climate Change Matters: From Paris to a Local Government Near You*, 91 FLA. B.J. 54 n.50 (2017) (discussing a Monroe County (i.e., the Florida Keys) ordinance implementing a provisional design standard for elevating roads based on a pilot project), and Thomas Ruppert & Emma Hollowell, *Seawalls & Sea-Level-Rise-Induced Flooding: Addressing Public and Private Infrastructure*, 34 ENVTL. & LAND USE L. SEC. REP. FLA. B. 4 (2017) (discussing an innovative method of addressing flooding occasioned by subpar seawalls in Fort Lauderdale); Miami Beach, Fla., Ordinance No. 2016-4009 (May 11, 2016) (addressing SLR and flooding by, among other things, adding a minimum of one foot of freeboard and allowing up to five feet of freeboard above base flood elevation without such elevation counting in calculation of maximum building heights and defining the “future crown of road” as an elevation benchmark in permitting), and Ordinance No. 2016-4010 (May 11, 2016) (addressing SLR and flooding by, among other things, defining a “future adjusted grade,” setting increased minimum yard elevations and establishing maximum yard elevations, and requiring that commercial building first floor heights along rights-of-way that have not yet been raised be sufficient to allow elevation of the first floor to the base flood elevation plus minimum freeboard once the adjoining right-of-way is elevated as planned).
3. For an argument that courts should consider SLR as a unique phenomenon to which the usual legal rules about ambulatory boundaries in the coastal zone should not apply, see Alyson C. Flournoy, *Beach Law Cleanup: How Sea-Level Rise Has Eroded the Ambulatory Boundaries Legal Framework*, 42 VT. L. REV. 89 (2017).

This Article analyzes the Florida case of *Jordan v. St. Johns County*.<sup>4</sup> *Jordan* forced Florida's Fifth District Court of Appeal to address a challenging environmental issue: coastal erosion that makes ordinary maintenance of infrastructure prohibitively expensive. While the appellate case was decided several years ago—and eventually settled before a decision on remand—the case merits careful analysis and dissection due to two specific issues the appellate case addresses that dramatically impact local governments. First, the case introduced into Florida a duty on the part of local governments to “provide a reasonable level of [road] maintenance that affords meaningful access” regardless of environmental conditions—such as erosion—that may make typical maintenance of a road technically and financially infeasible. Second, the case then leveraged this new-found duty as the basis for introducing into Florida law the idea that government inaction—as opposed to government action—could support a takings claim when there is a duty to act.

While the *Jordan* case occurred in the state court system of Florida, the potential ramifications reverberate far beyond Florida. The case has already been cited by a Maryland court for its newly minted Florida law that government inaction can support a taking.<sup>5</sup> The case has also been cited by law professors arguing for dramatic alteration of the notion of property rights under the U.S. Constitution's Fifth Amendment.<sup>6</sup> Thus, the seemingly insular nature of this case belies its potential impact across the country, particularly in light of changing environmental conditions due to SLR.

The Article focuses on two specific issues in the appellate court decision: a judicially created duty regarding roads, and a judicial holding, unprecedented in Florida, that government *inaction* can support a takings claim of private property under the Fifth Amendment.<sup>7</sup> Part I provides background on the trial court and appellate court decisions. Part II discusses issues surrounding the duty of maintenance as used in *Jordan*. First, I give a critical evaluation of the appellate court's use of precedent in outlining the duty of maintenance. Second, I argue that the appellate court fundamentally erred by failing to differentiate between two different uses of the word “maintenance.” The first use is as a legal term of art related to the widespread legal distinction in sovereign immunity determinations for government between planning-level/legislative versus min-

isterial decisions. The second use of “maintenance” reveals one of its common meanings: to “maintain” something in existence. Using the word in both of these ways simultaneously contributed to the problematic analysis in the *Jordan* appellate case. Based on this confusion in the use of the word “maintenance,” Part II concludes that the *Jordan* appellate court may have violated the separation-of-powers doctrine by invading the territory of the local government legislative branch.

Part III evaluates “inaction” as used in the *Jordan* appellate decision. It acknowledges a split among courts nationally as to whether “inaction” by government can provide a basis for a Fifth Amendment takings claim. To demonstrate the importance of careful review of the facts and law of original cases when citing them as precedent, this part reviews an example where courts, without careful analysis of precedent, allowed the word “inaction” to move from dictum in previous cases to the asserted holding of a case in Minnesota law. Finally, I assert that in the *Jordan* case, there was no “inaction” on the part of the defendant county that contributed to the taking asserted by the plaintiffs.

Part IV outlines potential policy implications of the *Jordan* appellate court decision, including the decision's potential to cause financial chaos for local governments and promote redistribution of wealth from general taxpayers to coastal property owners. Part V moves on to note possible lessons from the case and presents recommendations, ranging from those most specific to the scenario in *Jordan*—such as cautioning local governments when accepting anything for “free”—to those at the broadest scale—such as our societal need in the face of SLR to regain a vibrant dialogue on what we mean by “property.”

Part VI provides a conclusion; and due to new federal case law in *St. Bernard Parish Gov't v. United States* that developed after initial drafting of this Article, a newly added Part VII addresses that case and its implications.

## I. The Background of *Jordan*

The procedural history of *Jordan* is a lengthy one, moving from trial court, to appellate court, to a rejection of rehearing by the Fifth District Court of Appeal, to a rejected appeal by the Florida Supreme Court, and ultimately to a settlement agreement. This part provides background on the trial court and appellate court decisions.

### A. Facts and Trial Court Opinion

In *Jordan v. St. Johns County*,<sup>8</sup> landowners brought suit against St. Johns County concerning a county-owned

4. 63 So. 3d 835 (Fla. Dist. Ct. App. 2011).

5. *Litz v. Maryland Dep't of the Env't*, 131 A.3d 923 (Md. Ct. Spec. App. 2016).

6. See, e.g., Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345 (2014); Michael Pappas, *A Right to Be Regulated?*, 24 GEO. MASON L. REV. 99 (2016). But see David Dana, *Incentivizing Municipalities to Adapt to Climate Change: Takings Liability and FEMA Reform as Possible Solutions*, 43 B.C. ENVTL. AFF. L. REV. 281 (2016).

7. *Jordan*, 63 So. 3d at 839.

8. *Jordan v. St. Johns County*, No. 05-694, slip op. at 2 (Fla. Cir. Ct. May 21, 2009), *aff'd in part, rev'd in part*, *Jordan v. St. Johns County*, 63 So. 3d 835,

road known as “Old A1A.” This road provided plaintiffs access to their properties in a neighborhood known as Summer Haven.<sup>9</sup> The state of Florida had originally built State Highway A1A on a low-lying, narrow spit of sand between the Summer Haven River and the Atlantic Ocean in the 1950s in the area at issue. Within just a few years, however, severe erosion led the state of Florida to acquire a new right-of-way further inland away from the shoreline in order to reroute 1.6 miles of State Highway A1A.<sup>10</sup>

St. Johns County accepted by deed the 1.6 miles of the old right-of-way from the state in 1979,<sup>11</sup> and this section of the road became known as Old A1A. At that time, the 1.6-mile length of road had only three homes on it, and while the road was still somewhat passable, the pavement had been eroded and washed out in some areas.<sup>12</sup> Subsequent to acquiring the right-of-way, the county permitted the construction of 25 additional homes even as the road “steadily deteriorated.”<sup>13</sup> In 1981, a storm washed out additional parts of the road, and by 1984, about one mile of the road was totally destroyed by storms.<sup>14</sup> Even after suit was filed in 2005, erosion and degradation of the road continued; substantial breaches developed in the spit of sand on which Old A1A sits, thus destroying even the roadbed itself for part of the 1.6 miles at issue.<sup>15</sup>

Due to the location on a low-lying, narrow spit of sand between the Atlantic Ocean and a river, no other land-based access routes existed. Some properties may have been accessible by boat until 2008, when the Atlantic Ocean breached the former road’s location and began filling part of the Summer Haven River with sand, effectively destroying that segment of the river.<sup>16</sup>

Due to the erosion, some homes were lost, and several property owners lost road access to their properties; some properties were only accessible by a way of necessity<sup>17</sup> called the “pig trail.”<sup>18</sup> The county never formally abandoned Old A1A, but its history of maintenance and repair was “spotty,” consisting of pothole repairs, clearing sand on a paved portion of the road, putting lime rock on a portion without pavement, and using heavy equipment to smooth sections of the road consisting only of sand.<sup>19</sup> Between 1981 and

2000, the county spent varying amounts of money trying to repair and maintain the road as it was continually being washed out.<sup>20</sup>

Further, with significant assistance from federal and state funds, between 2000 and 2005, the county spent an average of \$244,305 per year, per mile, to maintain Old A1A, as opposed to an average of \$9,656 per year, per mile, for all other county roads.<sup>21</sup> In 2005, the county enacted a one-year building moratorium due to concerns with public safety in the Summer Haven area; this moratorium was renewed multiple times and remained in place until 2008.<sup>22</sup> During the moratorium, one owner applied for and received a permit, under an exception provision of the moratorium, to build a residence along Old A1A, while the county erected a berm along the length of the road and “repared the southern section.”<sup>23</sup>

In 2005, plaintiffs filed suit alleging several counts; most pertinent to this Article was the allegation that the county failed to maintain Old A1A to such an extent that the property owners were deprived of access to their property, resulting in a taking.<sup>24</sup> The plaintiffs sought an injunction to force the county to maintain the road.<sup>25</sup>

The trial court granted summary judgment in favor of St. Johns County, reasoning that “[t]he Florida Supreme Court has made it clear that in order to recover on a claim of inverse condemnation based upon a theory of impaired access, the landowner must prove that governmental action (and not inaction) caused the loss of access.”<sup>26</sup> The trial court cited *Rubano v. Department of Transportation* to support this assertion.<sup>27</sup> In *Rubano*, the Florida Supreme Court stated that “[p]roof that the governmental body has effected a taking of the property is an essential element of an inverse condemnation action.”<sup>28</sup>

Following *Rubano* in *Jordan*, the trial court stated that a “government act causing loss of access must be affirma-

837 (Fla. Dist. Ct. App. 2011).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 3.

13. *Id.*

14. *Id.*

15. *Id.*

16. In 2016, the Florida Legislature appropriated \$2.8 million to dredge out the sand that the breach had placed in the Summer Haven River. Sheldon Gardner, *Summer Haven River Dredging Gets \$2.8 Million in Funding*, FLA. TIMES-UNION, Mar. 22, 2016, <http://jacksonville.com/news/metro/2016-03-22/story/summer-haven-river-dredging-gets-28-million-funding>.

17. The common-law rule of an implied grant of a way of necessity is codified into Florida law at Florida Statutes §704.01(1) (2017). Additionally, Florida Statutes expanded on the common-law way of necessity by providing for a way of necessity for properties that did not qualify under the common-law rule. FLA. STAT. §704.01(2) (2017). If an easement is found under the statutory rule, compensation to the servient estate may be claimed. *Id.* §704.04 (2017).

18. *Jordan*, No. 05-694, slip op. at 3.

19. *Id.*

20. *Id.* at 4.

21. *Id.*

22. *Id.* at 5.

23. *Id.* at 5-6.

24. *Id.* at 2. Other claims asserted by the property owners included the following: Count I for declaratory relief seeking a ruling that the county had a duty to provide residents with emergency services such as fire protection, ambulance, and police services and that the county had a duty to maintain the road to state and local specifications so that these services could access plaintiffs’ properties; Count II for injunctive relief, requesting temporary and permanent injunctions requiring the county to repair and maintain the road; Count III for inverse condemnation, which is the focus of this Article; Count IV for declaratory judgment that the county’s building moratorium in Summer Haven violated plaintiffs’ due process rights and resulted in damages; and Count V for inverse condemnation wherein plaintiffs claimed that the building moratorium deprived plaintiffs of the beneficial use of their properties and resulted in a compensable taking of their property. Again, this Article focuses on the inverse condemnation claim of Count III and the related request for declaratory relief to force the county to maintain the road as contained in Count I.

25. *Id.*

26. *Id.* at 12.

27. *Id.*; see also *Rubano v. Department of Transp.*, 656 So. 2d 1264, 1266 (Fla. 1995).

28. *Rubano*, 656 So. 2d at 1266 (citing *Kendry v. Division of Admin.*, 366 So. 2d 846, 849 (Fla. 1989)).

tive in nature.”<sup>29</sup> The trial court also noted: “it is uncontested that the initial and primary *action* that caused damage to ‘Old A1A’ was the natural forces of storms and ocean waves.”<sup>30</sup> Concluding that “there is no genuine issue of material fact regarding impairment of access,” the trial court ruled that the “[a]lleged County inaction in the face of such damage cannot, as a matter of law, support Plaintiffs’ inverse condemnation claim in this case.”<sup>31</sup>

## B. District Court of Appeal Opinion

The plaintiff property owners appealed. On appeal, the court affirmed the trial court’s disposition of several of the property owners’ claims.<sup>32</sup> However, in rejecting the trial court’s grant of summary judgment on the declaratory judgment count of the county’s duty to maintain the road (Count I), the appellate court held that “[t]he County must provide a reasonable level of maintenance that affords meaningful access, unless or until the County formally abandons the road,”<sup>33</sup> and that “disputed issues of material fact remained regarding the level of road maintenance the County had provided and the level of maintenance it should have provided.”<sup>34</sup> The appellate court conceded that “natural forces have played a role in the degradation of the road and that the County has performed some level of maintenance,” but remanded the case to the trial court to decide “whether the level of maintenance provided has been reasonable or whether it has been so deficient as to constitute *de facto* abandonment.”<sup>35</sup>

The appellate court also reversed the trial court’s dismissal of Count III for an inverse condemnation claim based on diminished access,<sup>36</sup> holding that “governmental inaction—in the face of an affirmative duty to act—can support a claim for inverse condemnation.”<sup>37</sup>

## II. Jordan’s Duty to Maintain

The appellate court in *Jordan* expanded any duty for maintenance well beyond existing precedent—and with no statutory backing—to create a “duty to reasonably maintain ‘Old A1A.’”<sup>38</sup> Such an expansion of this duty is ill-advised in the *Jordan* case, as it is possible the work necessary to achieve “meaningful access” for the road segment at issue

may exceed “reasonable maintenance,” determination of which falls within the realm of planning-level decisions within the discretion of the county as a core part of its quintessential legislative function.

This part examines how the court in *Jordan* asserted a duty to maintain despite lack of statutory and on-point case law. Next, the focus turns to how use of the word “maintenance” contributed to how the *Jordan* court might have reached such surprising and expansive results. Then the analysis looks at how the *Jordan* court’s failure to carefully consider possible meanings of “maintenance” contributed to creating precedent that potentially violates the separation-of-powers doctrine.

### A. Twisting Precedent: Jordan’s Use of Walton

The appellate court in *Jordan* asserted that “governmental inaction—in the face of an affirmative duty to act—can support a claim for inverse condemnation.”<sup>39</sup> For the appellate court to reach this conclusion, the court first had to find a duty, for without an obligatory duty, there could arise no argument that failure to fulfill the duty (i.e., “inaction”) had potentially caused a taking.<sup>40</sup>

In *Jordan*, the appellate court relied on *Ecological Development v. Walton County*<sup>41</sup> to establish that St. Johns County had a duty to maintain Old A1A.<sup>42</sup> In *Walton*, the government disavowed and discontinued all maintenance on roads in a suburban development due to prior improper construction.<sup>43</sup> In *Walton*, the county voted to formally end maintenance of the roads at issue.<sup>44</sup> The county then discontinued all maintenance on these roads<sup>45</sup> while not formally closing or abandoning them.<sup>46</sup> It instead determined that it would no longer maintain the roads, but did

39. *Id.* at 839.

40. Note that in law, the issue of whether a party has a “duty of care” usually arises in the context of tort law cases. Clarifying the relationship between torts and takings, Robert Meltz asserts:

The takings-tort blur typically arises with physical, rather than regulatory, interferences with private property. If a taking claim alleges the unlawfulness or unreasonableness of a government act, a court may discern a tort. And when a governmental invasion of property is short-lived, not sufficiently intrusive, and/or unlikely to recur, it may fall short of a taking and merely amount to a tort such as trespass. The fact that the property injury was not deliberate may also relegate it to tort status. The Federal Circuit uses a two-part inquiry for distinguishing physical takings from possible torts. First, a taking results only when the government intends to invade a property interest or the invasion is the direct, natural, or probable result of an authorized activity, as opposed to an incidental or consequential injury. Second, the invasion must secure a benefit to the government at the expense of the property owner, or at least preempt the owner’s right to enjoy his property for an extended period. The case law is split on whether the same facts can give rise to both takings and tort claims. Answering yes, a recent [Court of Federal Claims] decision states: “While not all torts are takings, every taking that involves invasion or destruction of property is by definition tortious.”

Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGICAL L.Q.* 307, 315 (2007) (emphasis added).

41. 558 So. 2d 1069 (Fla. Dist. Ct. App. 1990).

42. *Jordan*, 63 So. 3d at 837.

43. *Walton*, 558 So. 2d at 1070.

44. *Id.*

45. *Id.*

46. *Id.*

29. *Jordan*, No. 05-694, slip op. at 13 (citing *Palm Beach County v. Tessler*, 538 So. 2d 846 (Fla. 1989) (holding that owners of commercial property located on a major public roadway were entitled to a judgment of inverse condemnation when the county government blocked access to property by constructing a retaining wall directly in front of their property), and *Anhoco Corp. v. Dade County*, 144 So. 2d 793 (Fla. 1962) (holding that when the county dug ditches to convert an established service road into a limited access highway, the abutting property owners were entitled to compensation for the destruction of their previously existing right of access)).

30. *Jordan*, No. 05-694, slip op. at 12.

31. *Id.* at 14.

32. *Jordan v. St. Johns County*, 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011).

33. *Id.* at 838.

34. *Id.* at 835.

35. *Id.* at 839.

36. *Id.*

37. *Id.*

38. *Id.* at 838.

not intend to relinquish control through the official statutory procedure either.<sup>47</sup> The court therefore held, “We find nothing within these [state] statutory provisions allowing the county to abandon its duty of maintenance, while at the same time retaining the power to ‘provide and regulate’ the right-of-way as a county road . . . .”<sup>48</sup>

By contrast, in *Jordan*, St. Johns County continued to provide maintenance to Old A1A, even spending far more on it per mile than other county roads<sup>49</sup>; St. Johns County did not vote to end maintenance of Old A1A as the county did in *Walton*.<sup>50</sup> St. Johns County may have continued its maintenance based on the holding of *Walton* that “total renunciation by the County of its maintenance duties on county roads, while maintaining the status of such roads as county roads for public use,” was not permissible.<sup>51</sup> St. Johns County may have thought that its stance would not give rise to a taking since—unlike in *Walton*—St. Johns County had never renounced its maintenance duties for the road and in fact continued some level of maintenance, but this was not the end result.

As the trial court in *Jordan* emphasized, even though the county in *Walton* could not place the roads on a “no maintenance” schedule without proper statutory abandonment, “the frequency, quality and extent of maintenance of the roads” remained discretionary with the county.<sup>52</sup> The appellate court in *Jordan* then held that the “frequency, quality and extent” of road maintenance—even if discretionary—must be “reasonable” and result in “meaningful access” even in the face of repeated and significant damage caused by forces of nature. As discussed below in Part II.C., the expansion of this duty to include substantive measures presents a fundamental separation-of-powers issue.

### B. When “Maintaining” a Road Is No Longer Just “Maintenance”

In the appellate court’s effort to find a duty of St. Johns County to “maintain” Old A1A, the court held that “the County’s discretion is not absolute. The County must provide a reasonable level of maintenance that affords meaningful access. . . .”<sup>53</sup>

This section evaluates the appellate court’s use of the word “maintenance.” The evaluation concludes that a key component that led the appellate court to part of its hold-

ing—that inaction of a local government may support a potential takings claim—originates in the appellate court’s conflation of the word “maintenance” as a legal term of art and “maintenance” as the word may be commonly understood in ordinary speech. Distinguishing between the two different uses of the word “maintenance” first requires an explanation of sovereign immunity in tort law in Florida.

Florida law—and with similar analogies in most states—has established that local governments owe a non-discretionary duty to properly operate and maintain their infrastructure, such as roads<sup>54</sup> or drainage facilities.<sup>55</sup> The tort law “duty” placed upon local governments reflects the same “duty” applied to all actors in society to exercise reasonable, prudent care to avoid injuring others. In this sense, the word “maintenance” has a specific legal meaning for local governments and their potential legal liability: the ordinary, prudent, reasonable use of care in operation and “maintenance” of infrastructure, or sufficient warning (e.g., signage) of conditions that would otherwise be unsafe.

But what, specifically, falls within the bounds of this use of the word “maintenance” as a legal term of art, and why? These represent important questions because the answers determine when courts will allow liability to accrue to local governments for how they operate, essentially meaning that courts will be allowed to second-guess the decisions and actions made by local governments.

Courts have delineated the bounds of the obligatory duty of “maintenance” used as a legal term of art by distinguishing the mandatory duty of “maintenance,” also referred to as a “ministerial” duty, from “planning-level” or “discretionary” functions of local government. Under Florida’s waiver of sovereign immunity, local governments may be held liable under tort law for harms resulting from the local government’s failure to fulfill mandatory “maintenance” or “ministerial” functions, but *not* for any harm resulting from “discretionary” or “planning-level” decisions of the local government.<sup>56</sup> The trial court in *Jordan* correctly noted precedent holding that “judgmental, planning-level decisions are immune from suit . . . [t]here is no liability for the failure of a government entity to build, expand, or modernize capital improvements such as buildings or roads.”<sup>57</sup> The *Jordan* trial court distinguished these from “operational-level” actions, for which “a governmental entity has a common law duty of care.”<sup>58</sup>

Courts around the country have had to grapple with when they should second-guess the decisions of local or state government legislative or executive authorities

47. *Id.*

48. *Id.* at 1071-72.

49. *Jordan v. St. Johns County*, No. 05-694, slip op. at 4 ¶ 13 (Fla. Cir. Ct. May 21, 2009) (noting that during fiscal years 2000-2005, the county spent an average of \$244,305 a year per mile on the road at issue compared to an average of \$9,656 a year per mile for other county roads). Even if one accepts that most funding came from the state of Florida and the Federal Emergency Management Agency as requested and coordinated by the county, the lowest possible portion noted from St. Johns County (5%) still amounts to \$12,215.25 per year per mile for maintenance from 2000 to 2005, which is still significantly more than the typical per mile cost of maintenance for all other roads in the county.

50. *Id.* at 4; *Walton*, 558 So. 2d at 1070.

51. *Walton*, 558 So. 2d at 1071.

52. *Jordan*, No. 05-694, slip op. at 10.

53. *Jordan v. St. Johns County*, 63 So. 3d 835, 838 (Fla. Dist. Ct. App. 2011).

54. *See, e.g., Department of Transp. v. Neilson*, 419 So. 2d 1071, 1073 (Fla. 1982).

55. *Slemp v. City of North Miami*, 545 So. 2d 256, 258 (Fla. 1989) (noting that once a local government has undertaken to provide flood protection, it assumes the duty to do so with reasonable care); *Southwest Fla. Water Mgmt. Dist. v. Nanz*, 642 So. 2d 1084, 1086 (Fla. 1994) (same).

56. *Department of Transp. v. Konney*, 587 So. 2d 1292, 1296 (Fla. 1991).

57. *Jordan*, No. 05-694, slip op. at 8 (citing *Neilson*, 419 So. 2d at 1071; *Tranon Park Condo. Ass’n, Inc. v. City of Hialeah*, 468 So. 2d 912, 912 (Fla. 1982)).

58. *Jordan*, No. 05-694, slip op. at 8 (citing *Neilson*, 419 So. 2d at 1071).

based upon the distinctions between maintenance/ministerial duties and discretionary/planning-level functions. This requires courts to carefully consider the roles of the coordinate branches of government: legislative, executive, and judicial.

In *Commercial Carrier Corp. v. Indian River County*,<sup>59</sup> Florida adopted the approach used by California courts in the case of *Johnson v. State*.<sup>60</sup> Florida at the same time adopted the test in *Evangelical United Brethren Church v. State*<sup>61</sup> as a useful tool to analyze the distinction between planning versus operational or discretionary versus ministerial.<sup>62</sup> The questions posed in this analysis are:

- (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
- (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
- (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?<sup>63</sup>

All this discussion highlights how use of the word “maintenance” in the tort law context of determining the scope of duty of a local government has a very specific meaning as a legal term of art. The scope of “maintenance” as a legal term of art contrasts with “planning-level” or “discretionary” functions.

Applying these questions to the facts of the *Jordan* case, the answer to each question is “yes.” First, it “necessarily involve[s] a basic governmental policy, program, or objective” since the cost to do beach nourishment that would even allow the county to replace, repair, and upgrade the road at issue would have cost more than \$13 million in its first year alone, more than St. John County’s entire 2009 road and bridge maintenance budget.<sup>64</sup> The decision by St. Johns County to not spend more than its entire road and bridge maintenance budget on 1.6 miles of road necessarily was a decision “essential to the realization or accomplishment of th[e] . . . program [of road and bridge mainte-

nance] . . . as opposed to one which would not change the course or direction of the . . . program.” The decision clearly “require[d] the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved.” The decision required the County to evaluate how much to spend to address potential legal problems and a very small but very upset portion of its constituents on less than two miles of road, considering that the road and bridge maintenance budget was for over 200,000 residents, 1,026 miles of road, and 47 bridges.<sup>65</sup> And finally, St. Johns County “possess[ed] the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision” since the county has statutory authority to conduct road and bridge “maintenance.”

The level of work required to keep Old A1A as a functional roadway—for example, even the work necessary to decide whether it was feasible to attempt to rebuild the road—appears much more like a policy-level planning decision such as expansion, rebuilding, or modernizing a road than it does mere “maintenance” that could routinely be expected of staff. Indeed, an engineering study obtained by St. Johns County informed county officials that the most likely solution to the problem of the road washing away would be a \$13 million beach nourishment program to create land on which a new road could be constructed.<sup>66</sup> The decision not to expend \$13 million of taxpayer money on infrastructure upgrades to serve two dozen homes was a planning-level or policy decision, not staff-level, operational conduct comparable to filling potholes, fixing cracks, or doing other repairs. By holding otherwise, the appellate court in effect redefined “maintenance” to include the duty to fund any necessary upgrades if “maintenance,” due to intervening natural forces, was inadequate in providing “meaningful access.”

This surprising result stems from the appellate court in *Jordan* using the word “maintenance” in two different ways at the same time. The appellate court appeared to use the word “maintenance” as a legal term of art that appears in discussions of sovereign immunity as discussed above.<sup>67</sup> However, at the same time, the court used the word “maintenance” or “maintain” in its common understanding of “to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline.”<sup>68</sup> While these two uses clearly have some overlap, the factual scenario laid out by the trial court in *Jordan* and discussed above demonstrated how the dictionary definition is much broader than the use of the word that delineates the duty of local governments under tort law and waives local government immunity. Had the appellate court strictly and carefully

59. 371 So. 2d 1010, 1022 (Fla. 1979).

60. 447 P.2d 352 (Cal. 1968).

61. 407 P.2d 440 (Wash. 1965).

62. *Commercial Carrier Corp.*, 371 So. 2d at 1022.

63. *Evangelical United Brethren Church*, 407 P.2d 440.

64. The trial court noted as an accepted fact that replacing the road would have had an initial cost of \$13.1 for beach nourishment alone plus an additional \$5.7-\$8.5 million every three to five years thereafter. *Jordan v. St. Johns County*, No. 05-694, slip op. at 5 (Fla. Cir. Ct. May 21, 2009). In 2009, the total St. Johns County expenditures for all “road & bridge maintenance” totaled \$9,617,471. ST. JOHNS COUNTY, FLORIDA, 2009 FINANCIAL PLAN 85 (2008) (County Expenditures by Service Area, Transportation, Transportation Trust Fund, Road & Bridge Maintenance), <http://co.st-johns.fl.us/OMB/media/FY2009FinancialPlan.pdf>. As of 2018, St. Johns County maintained a total of 1,026.7 miles of roads and 47 bridges from this budget. Personal Communication of author with St. Johns County Road & Bridge Division of the Public Works Department, May 24, 2018.

65. *See, id.*

66. *Jordan v. St. Johns County*, No. 05-694, slip op. at 5 (Fla. Cir. Ct. May 21, 2009).

67. *Cf., e.g., Jordan*, No. 05-694, slip op. at 8 (citing Department of Transp. v. Neilson, 419 So. 2d 1071, 1071 (Fla. 1982); Trianon Park Condo. Ass’n, Inc. v. City of Hiialeah, 468 So. 2d 912, 912 (Fla. 1982)).

68. Merriam-Webster Dictionary, *Maintain*, <https://www.merriam-webster.com/dictionary/maintain> (last visited June 25, 2018).

limited its use of the words “maintenance” and “maintain” to exclusively either their common, dictionary meanings or their uses as legal terms of art, the appellate court could not have concluded that the factual scenario at issue in *Jordan* potentially represented a failure of St. Johns County to conduct “maintenance” as that word is used as a legal term of art.

The *Jordan* case’s admonition to achieve “meaningful access” via “reasonable maintenance” would appear to extend the duty of St. Johns County beyond ministerial “maintenance” to a legal duty to include upgrading Old A1A to address the extensive forces of nature at work on the road. The appellate court in *Jordan* effectively threatened imposition of a duty on the government both to maintain and upgrade Old A1A since anything that can normally be called “maintenance”—like repairing, patching, cleaning, and so forth of the road—would not undo the work of the sea that obliterated both the road and even the very land on which the road had been built. Yet it is well established that decisions to build or change a road, determine its position, as well as “failure to extend a road,” are types of judgmental, planning-level decisions.<sup>69</sup> The county could not conduct ministerial or operational-level maintenance on parts of the road, road subbase, and even the land on which the subbase had been located since they had been washed away by the Atlantic. The duty to maintain only applies 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.”<sup>70</sup>

This legal distinction between maintaining a road and upgrading one exists for the very good reason that one inherently involves policy and legislative issues that the other does not. The appellate court’s reasoning in *Jordan* that potentially allowed legal liability against St. Johns County for a failure to “maintain” threatened to strip St. Johns County of much of the discretion it previously possessed. The case, especially in light of SLR and changing coastlines, established a potentially dangerous precedent that enjoys little or no support from statutory law or prior case law. The appellate court’s conflation of the common and legal-term-of-art meanings of “maintenance” generated this anomalous and confusing result.

### C. Separation of Powers: Does *Jordan* Constitute Judicial Law Making?

The appellate court in *Jordan* used the word “maintenance,” but the court confused the common understanding of the word with the meaning of the word as a legal term of art. “Maintain” as a legal term of art in tort law falls squarely on the side of a ministerial/operational-level responsibility for which the government will be held liable if it fails to

meet it. In common speech, to “maintain” can also mean to keep something in existence. Factually, the appellate court seems to have been using the word “maintain” in the latter sense.

The need to spend at least \$13 million on beach nourishment before even beginning to recreate a road that serves a small handful of homes so that the road is “maintained” in existence<sup>71</sup> cannot be compared to the cost to, say, fill potholes or sweep sand off the road or to mill and resurface an existing road as part of periodic “maintenance.” The appellate court confused these definitions and used the word in a way that led the appellate court to invade the local government’s legislative duty and authority to make the challenging decisions that balance important interests such as property rights, fiscal responsibility, and public rights. This confusion led the appellate court to do exactly what it should not: “interfere with a government’s discretionary judgmental decisions.”<sup>72</sup> This violates the idea that courts cannot invade the legislative domain of the local elected body.<sup>73</sup>

It could be argued that the appellate court had the right to “interfere with the discretionary function[ ] of the legislative . . . branch”<sup>74</sup> since the county in *Jordan* had allegedly violated the constitutional rights of the plaintiffs by infringing on their property rights, which are protected by the Constitution’s Fifth Amendment. According to this assertion, the argument runs thus: Under tort law, there is a duty to “maintain” the road at question. Based on failure to fulfill this duty, the local government is liable for a constitutional violation of property rights, thus giving the courts the right to interfere in the discretionary action of the local government even despite the separation-of-powers doctrine. However, this argument fails because the very basis of the supposed “duty” only arises if the “maintenance” were a ministerial, “operational-level” task, not a discretionary, planning-level decision<sup>75</sup>; as has been demonstrated above, this is not the case.

### III. “Inaction” as a Basis for a Taking

Courts in Florida have historically required that a taking of private property occur as a result of government *action*<sup>76</sup>; this is consistent with many courts across the country that have reached the same conclusion.<sup>77</sup> The *Jordan* case

71. *Jordan*, No. 05-694, slip op. at 5 ¶ 16.

72. *Id.*, slip op. ¶ 34 (citing *Trianon Park Condo. Ass’n, Inc.*, 468 So. 2d at 920).

73. *Id.*, slip op. at 9. Cf. Serkin, *supra* note 6, at 385 (similarly noting this concern, but asserting that “passive takings are critically different from the [ ] judicial review of agency inaction”).

74. *Trianon Park Condo. Ass’n*, 468 So. 2d at 918.

75. Cf., e.g., *Commercial Carrier Corp.*, 371 So. 2d at 1020-22 (adopting the “discretionary function” doctrine in Florida law and implemented through distinguishing “planning-level” decisions from “operational-level” ones).

76. *Schick v. Florida Dep’t of Agric.*, 504 So. 2d 1318, 1320 (Fla. Dist. Ct. App. 1987).

77. See, e.g., *Hall v. United States*, 84 Fed. Cl. 463, 472 (Fed. Cl. 2008) (citing cases requiring “action” rather than “inaction” and that the action must be governmental, not private); *Nicholson v. United States*, 77 Fed. Cl. 605, 620 (Fed. Cl. 2007) (stating:

In no case that we know of has a governmental agency’s failure to act or to perform its duties correctly been ruled a taking. Indeed,

69. See, e.g., *Neilson*, 419 So. 2d at 1076 (citing *Ingham v. State Dep’t of Transp.*, 399 So. 2d 1028, 1028 (Fla. Dist. Ct. App. 1981); *Payne v. Palm Beach County*, 395 So. 2d 1267, 1267 (Fla. Dist. Ct. App. 1981)) (emphasis added).

70. *Neilson*, 419 So. 2d at 1078 (referring to *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1010 (Fla. 1979)).

serves as a wake-up call for what seems to be a growing split among courts: whether government *inaction* can serve as the basis for a constitutional taking of private property, in addition to government action. This important question has only in the past few years begun to receive more attention, with some courts finding “inaction” insufficient to support a takings claim<sup>78</sup> and others finding it enough under certain circumstances.<sup>79</sup>

Many of the cases discussing action versus inaction seem to be arguing about “inaction” as a failure to conduct regular maintenance on a specific piece of infrastructure rather than “inaction” at a legislative, policymaking level that sets direction for how infrastructure generally is maintained or developed.<sup>80</sup> For example, in *Georgia Power Co. v. United*

*States*, the court found, *inter alia*, that “a taking may not result from [a] discretionary inaction [of the government].”<sup>81</sup> In at least one case in which the inaction alleged to give rise to a taking was planning-level/discretionary, the court had no trouble in immediately dismissing the notion that such “inaction” could result in a taking.<sup>82</sup>

This reaffirms the idea that even if “inaction” may support a claim of a taking under very limited circumstances, the arguments against this remain strongest at the policy and planning level of local government decisionmaking.<sup>83</sup> The focus on action versus inaction in takings, then, presents a potential minefield where courts should tread carefully to avoid running afoul of the doctrine of separation of powers. If inaction ever suffices to justify a takings claim, the potential policy problems inherent in the proposition, as discussed further below, merit developing strict limits on such a policy.

### A. “Precedent” for Inaction as a Taking

The court of appeals in the *Jordan* case broke new legal ground in Florida by holding that government *inaction* in the face of a duty to act could result in a taking. This happened with little to no legal analysis of the profound and disputed issue of action versus inaction and all the attendant concerns for separation of powers and preservation of appropriate legislative discretion at the local level. Rather, the court of appeals merely stated that it “conclude[s] that governmental inaction—in the face of an affirmative duty to act—can support a claim for inverse condemnation.”<sup>84</sup>

Many states, such as Florida, recognize a distinction between “planning-level” functions versus “operational-level” functions; the former may not be subjected to judicial scrutiny and receive sovereign immunity, whereas the latter do not since everyone is bound to act with reasonable care in their operations. *See, e.g.*, Thomas Ruppert & Carly Grimm, *Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea-Level Rise*, 87 Fla. B.J. 29 (2013), available at <https://www.floridabar.org/news/tfb-journal/?durl=%2FDIVCOM%2FJN%2Fjournal01.nsf%2FArticles%2FD1C D8A7E6519800885257C1200482C39>. The argument that the distinction between planning-level versus operational-level decisions should be legally relevant in considering whether inaction can serve as a basis for a takings claim receives further treatment below.

81. 224 Ct. Cl. 521, 527 (Ct. Cl. 1980).

82. *Parker Ave., L.P. v. City of Philadelphia*, 122 A.3d 483, 487-89 (Pa. Commw. Ct. 2015) (noting that “one of the bedrock principles of democracy is that legislators cannot be compelled to use their lawmaking powers in specific ways and, subject to judicial review, must have the freedom to wield their authority as they see fit”).

83. *See, e.g.*, cases cited by St. Johns County in the *Jordan* case (“It is well established that decisions concerning the maintenance of and need to construct roadways, bridges, and other similar services are political questions outside the purview of the courts.” *Gargano v. Lee County Bd. of County Comm’rs*, 921 So. 2d 661 (Fla. Dist. Ct. App. 2006); “A governmental entity’s decision not to build or modernize a particular improvement is a discretionary judgmental function with which we have held that the courts cannot interfere.” *Trianon Park Condo. Ass’n v. City of Hialeah*, 468 So. 2d 912, 920 (Fla. 1985):

The decision to build or change a road, and all determinations inherent in such a decision, are of the judgmental, planning-level type. To hold otherwise would . . . supplant the wisdom of the judicial branch for that of the governmental entities whose job it is to determine, fund, and supervise necessary road construction and improvements, thereby violating the separation of powers doctrine. *Department of Transp. v. Neilson*, 419 So. 2d 1071, 1077 (Fla. 1982)).

84. *Jordan v. St. Johns County*, 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011).

the proposition has profound implications. The Federal Circuit, in a non-flooding context, has very recently held that such conduct may not be redressed under the 5th Amendment takings clause. *See Acadia Tech., Inc. v. United States*, 458 F.3d 1327 (Fed. Cir. 2006) (property that depreciated in value resulting from Customs Service’ unreasonable delay in subjecting property to forfeiture proceedings is not grounds for takings claim). The Court has consistently required that an affirmative action on the part of the Government form the basis of the alleged taking.

*see id.* at 621 (noting also that “[t]he key to distinguishing ‘a taking from an incidental injury is the presence on the part of the Government of an intent to appropriate”); *Alves v. United States*, 133 F.3d 1454, 1458, 28 ELR 20577 (Fed. Cir. 1998) (“Moreover, because the ‘character of the government’s action’ is important in a takings analysis, we note that there was no governmental action here at all.” (internal citations omitted)); *Slicer v. City of St. Johns*, Docket No. 298068, LEXIS 2445, at \*\*28-29, 2012 WL 609277 (Mich. Ct. App. Dec. 6, 2012) (emphasizing a requirement to plead “affirmative actions directly aimed at the property” to state a takings claim); *State v. Nixon*, 250 S.W.3d 365, 372 (Mo. 2008). *See also* Peter Byrne, *Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change*, 11 Vt. J. ENVTL. L. 625, 637 (2010) (“I know of no precedent for a government omission (rather than an act) providing a basis for a taking[ ] claim.”).

78. *See, e.g., Welgosh v. City of Novi*, No. 318516, 2015 Mich. App. LEXIS 601, at \*\*15-16 (Mich. Ct. App., Mar. 19, 2015) (noting:

Plaintiffs [sic] attempt to recast the City’s failure to enforce the building code as an affirmative act of “maladministration” [ . . . is], at its core, . . . based on an omission, i.e., inadequate inspection. Plaintiffs fail to cite any caselaw or other authority supporting that a government’s failure to enforce regulations or a building code might constitute an inverse taking.

*Sunflower Spa LLC v. City of Appleton*, No. 14-C-861, 2015 U.S. Dist. LEXIS 91242 (E.D. Wis. July 14, 2015); *Harris County Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016) (noting that “[o]nly affirmative conduct by the government will support a takings claim. We have always characterized a takings claim as based on some affirmative ‘act’ or ‘action’ of the government,” though this is based on Texas’ constitutional protection of property rather than the Constitution’s Fifth Amendment); *Davis v. City of Lawrence*, 797 P.2d 892 (Kan. Ct. App. 1990); *Hinojosa v. Department of Natural Res.*, 688 N.W.2d 550 (Mich. Ct. App. 2004) (finding no taking because plaintiffs alleged no affirmative state action); *Grunwald v. City of Castle Hills*, 100 S.W.3d 350 (Tex. App. 2002).

79. *See, e.g., State ex rel. Livingston Court Apartments v. City of Columbus*, 721 N.E.2d 135 (Ohio Ct. App. 1998). *Cf. also Alves*, 133 F.3d at 1458 (implying the possibility of a taking by inaction by breaching a duty owed but noting in that case that the government’s “failure to [stop harmful private action] successfully does not breach any duty owing to [the plaintiffs]”). *Cf. also Litz v. Maryland Dep’t of the Env’t*, 131 A.3d 923 (Md. Ct. Spec. App. 2016) (holding the possibility of a taking based on inaction if there existed “a general or specific statutory duty to act” or on the basis of a “Consent Order [that may have] created an affirmative duty to act.”).

80. *See, e.g., Livingston Court Apartments*, 721 N.E.2d 135; *Sunflower Spa LLC*, 2015 U.S. Dist. LEXIS 91242 (finding that a decision not to replace water mains despite frequent ruptures did not rise to the level of taking as it was not an “action” of the government; rather a remedy, if available, would be through a tort action for negligence).

This contradicts the 1995 Florida Supreme Court decision in *Rubano*, which made clear that a taking resulting from diminution in property access must result from governmental action.<sup>85</sup>

The appellate court in *Jordan*, however, is not the only jurisdiction to attempt to establish that inaction may support a taking. As noted above, a number of other cases throughout the country discuss whether or not governmental inaction may support a takings claim. However, too often, as in the *Jordan* case, inaction as a basis for a takings claim has crept into the law through careless or inaccurate treatment of limited case precedent while more relevant case law remains overlooked. Consider the following example from Minnesota case law.

Minnesota courts have asserted that government inaction may support a takings claim. To support such a proposition, the court in *Evenson v. City of St. Paul Board of Appeals*<sup>86</sup> relied on a quote from *Czech v. City of Blaine* to reach the conclusion that governmental inaction could support a takings claim.<sup>87</sup> In *Czech*, the owner of a mobile home park challenged the city council's denial of his application for rezoning.<sup>88</sup> Due to the "general characteristics of the property," the court determined that the land was virtually useless for anything other than a mobile home park, deeming the denial of rezoning an unconstitutional taking.<sup>89</sup> While the court referred to the denial as "inaction," the city's denial of a requested rezoning was, in fact, an action by local government in response to an application, not inaction<sup>90</sup>; the city acted upon the requested rezoning by choosing to deny it. Use of the word "inaction" was *obiter dictum*,<sup>91</sup> and should not have been used as precedent.

*Czech* itself refers to two additional cases, *C.F. Lytle Co. v. Clark* and *County of Freeborn v. Claussen*,<sup>92</sup> for purported support for the assertion that "[f]or there to be an unconstitutional taking a landowner must demonstrate that he has been deprived, through government action or inaction, of all reasonable uses of his land."<sup>93</sup> As in *Czech*, the *Clark* case also involved a denial by the government for a building permit due to rezoning.<sup>94</sup> The court in *Clark* held

that "[f]or there to be a taking the landowner must show he has been deprived of all reasonable uses of his land."<sup>95</sup> Although the claims and arguments of both cases are similar, *Czech* supports its government inaction argument by citing *Clark*,<sup>96</sup> a case that never asserts inaction as the basis for an unconstitutional taking and never even uses the word "inaction."<sup>97</sup> Thus, *Clark* in no way supports *Czech*'s superfluous mention of inaction as potentially supporting a taking. Rather, it seems that the *Czech* case only cites to *Clark* for *Clark*'s substantive standard for a taking—deprivation of all reasonable uses of land—and the *Czech* case carelessly added the word "inaction" to the definition of a taking without any support from *Clark* for this addition.

The other case relied upon by the *Czech* court for the holding that inaction can lead to a taking offers no support either. In *County of Freeborn v. Claussen*, the court dealt with a county's denial of a rezoning permit.<sup>98</sup> The Minnesota Supreme Court, in holding that the defendant had the right to petition for rezoning, stated that "[i]f, in fact, the land cannot be used for residential purposes, it may well be an unconstitutional taking without due process of law to deny defendant the right to rezone."<sup>99</sup> *Claussen* does not mention government inaction as potentially supporting a claim of a taking of property; in fact the word "inaction" appears only once in the *Claussen* opinion when the court notes that "the county board, through its inaction, adopted the recommendation and denied the petition."<sup>100</sup>

In other words, because Minnesota law indicates that the Planning Advisory Commission's recommendation is adopted if the county board takes no further action within a statutorily prescribed period, the county board effectively denied the requested rezoning. However, this, again, is not a case of inaction in the face of a duty to act. The local government had no duty to act. The local government had the authority to grant or deny the rezoning. A denial could be accomplished either through an explicit decision of the county board, or the county board could effectively adopt the recommendation to deny the zoning through operation of law by allowing time to pass without issuing an approval or denial. By whichever method it was accomplished, the county board did act on the rezoning request by denying it. Denial of a rezoning request constitutes action, not inaction.

*Clark* and *Claussen* both fail to provide support for the proposition in *Czech* that government inaction may support a claim of a taking of property. The only manner in which one could, theoretically, find such support would be by assuming that the court treats permit or rezoning denial as "inaction." However, in Florida, the act of

85. *Rubano v. Department of Transp.*, 656 So. 2d 1264, 1266-67 (Fla. 1995).

86. 467 N.W.2d 363, 365 (Minn. Ct. App. 1991) (holding that a denial of a property owner's request for a waiver of a vacant building fee, based on the owner's failure to submit a plan to return the building to appropriate occupancy, did not constitute a taking).

87. 253 N.W.2d 272, 275 (Minn. 1977).

88. *Id.*

89. *Id.*

90. This is also true in Florida: see, e.g., *Alexander v. Town of Jupiter*, 640 So. 2d 79, 82 (Fla. Dist. Ct. App. 1994) (holding that "the permit denial was government regulatory action which amounted to a temporary taking of all use of the property" (emphasis added)). See, e.g., *Dade County v. Bulk Carriers, Inc.*, 450 So. 2d 213, 216 (Fla. 1984) (explaining that a government agency's "dredge and fill" permit denial constitutes government action that may necessitate a "separate condemnation proceeding" as a remedy).

91. "A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." BLACK'S LAW DICTIONARY 449 (Pocket ed. 1996).

92. *Czech*, 253 N.W.2d at 274; 491 F.2d 834 (10th Cir. 1974); 203 N.W.2d 323 (Minn. 1972).

93. *Id.*

94. *Clark*, 491 F.2d at 838.

95. *Id.*

96. *Id.*

97. *Id.* at 834.

98. *Claussen*, 203 N.W.2d at 324.

99. *Id.* at 327.

100. *Id.* at 324.

approving or denying a permit is well established as a government *action*.<sup>101</sup>

Thus, the Minnesota case of *Evenson* indeed mentions “inaction” as a possible basis for an unconstitutional taking, but use of the word “inaction” in that case, the *Czech* case cited by it, and the cases cited by *Czech*, all fail to demonstrate any instance in which government *inaction* in fact played a role in the case. The cases all fail to provide any substantive support in statute or precedent for including “inaction” as a potential basis for a taking of private property. Rather, all the cases demonstrate either a careless or unnecessary inclusion of the word “inaction.”

Dissecting the Minnesota case law that allegedly finds that government “inaction” can support a valid takings claim demonstrates a similarity to the “duty” of St. Johns County in Florida to maintain Old A1A so as to afford property owners “meaningful access.”<sup>102</sup> Both assertions are based upon a faulty and incomplete analysis of prior case law, amounting to the creation of a new principle of law concealed by a thin veneer of supposed precedent. It is important to conduct careful analysis of how court decisions rely on prior precedent, since once one court says what the law is, other courts often seem to follow suit without carefully examining the reasoning and precedent supporting the case being cited. Mistakes or carelessness in evaluating the holding of prior cases or treating prior cases as precedent have dangerous implications when inclusion of the word “inaction” is taken seriously by other courts.<sup>103</sup>

In summary, a split has developed among courts, with most finding that no regulatory taking of property may ever occur without specific government action, and a few holding that inaction may support a takings claim *if there is an affirmative duty to act* on the part of the government. However, even those courts asserting that *inaction* can support a claim have not yet coalesced around clear criteria regarding how to define what “duty,” if any, will support a claim of a taking of property.

The importance of takings law to property owners and governmental entities highlights the importance of the need for greater clarity in this area. Based on the United States’ historical focus on “negative” rather than “positive” rights<sup>104</sup> and clear historical interpretation of the Fifth

Amendment’s property protections in this light,<sup>105</sup> it seems appropriate *not* to allow drastic expansion of the Fifth Amendment to governmental inaction generally. Doing so would allow property owners to remake the Fifth Amendment’s shield against arbitrary government action into a sword that property owners could wield against government to force it to be an insurer to guarantee that owners get what they desire from their property.<sup>106</sup>

If “inaction in the face of a duty to act” is to be held sufficient to support a takings claim, the “duty” should be narrowly construed to clearly articulated *duties*—not just “powers” or “authorities”—*owed to specific, identifiable individuals* rather than just “the public” in statutes, ordinances, or contracts. Further, any “duty” to act should *not*, like in the *Jordan* case, be based on the mere duty as established by tort law. In Florida, as in many states, government is only subject to tort liability for duties that are “ministerial” in nature, not for any discretionary or planning-level decisions that result in harm. But allowing a tort-claim case based on “failure to maintain” as a takings claim short-circuits the courts’ consideration of deference to the legislative branch.

This becomes even more ironic when a court uses the supposedly ministerial “duty” of maintenance—which only avoids sovereign immunity if it is “ministerial” in nature—to establish the same duty that now forms the basis for a claim of “inaction supporting a taking.” Merely changing the way the claim is presented (i.e., as a taking rather than a tort) now allows plaintiffs and courts to completely ignore the long and significant precedent and policy considerations surrounding the distinctions between ministerial actions and discretionary/policy-level/planning decisions in the law. This back door for plaintiffs to plead a claim as a taking rather than as a tort thus seems illegitimate, as it short-circuits the tort claims route’s consideration of sovereign immunity.

Indeed, this ability to base a claim on a tort law duty without being subject to tort law’s sovereign immunity analysis is the reason that plaintiffs seek to plead claims as takings rather than torts. Limiting any “duty” to those owing to specified individuals as clearly articulated in statutes, ordinances, or contracts maintains the proper balance

101. *E.g.*, *Dade County v. Bulk Carriers, Inc.*, 450 So. 2d 213, 216 (Fla. 1984) (explaining that a government agency’s “dredge and fill” permit denial constitutes government action that may necessitate a “separate condemnation proceeding” as a remedy); *Alexander v. Town of Jupiter*, 640 So. 2d 79, 82 (Fla. Dist. Ct. App. 1994) (holding that “the permit denial was government regulatory *action* which amounted to a temporary taking of all use of the property” (emphasis added)).

102. *Jordan v. St. Johns County*, 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011).

103. For example, the court in *Litz v. Maryland Dep’t of the Env’t*, 131 A.3d 923 (Md. Ct. Spec. App. 2016), cited to *Jordan*, 63 So. 3d 835. The court in *Litz* also cited to *Evenson v. City of St. Paul Bd. of Appeals* for the proposition that Minnesota recognizes the potential for inaction to serve as the basis of a taking. *Litz*, 131 A.3d at 931. *Litz* was also cited to for its proposition of “inaction” supporting a takings claim in the case of *State v. Braverman*, 137 A.3d 377, 388 (Md. Ct. Spec. App. 2016). This string of citations demonstrates how poorly supported judicial decisions that essentially create new law can take on a life of their own through repetition.

104. *See, e.g.*, Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL.

L.J. 69, 108-10 (2006) (discussing distinction between negative rights as “freedom from” government interference and positive rights as “freedom to” have certain rights guaranteed by the government).

105. *See, e.g.*, *DeShaney v. Winnebago Dep’t of Soc. Servs.*, 489 U.S. 189, 195-96 (1989) (“[Constitutional protections] generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual”) and

[l]ike its counterpart in the *Fifth Amendment*, the *Due Process Clause of the Fourteenth Amendment* was intended to prevent government “from abusing [its] power, or employing it as an instrument of oppression.” . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

(Internal citations omitted.)

106. *Cf. United States v. Sponenbarger*, 308 U.S. 256, 260 (1939) (“[T]he ‘Fifth Amendment does not make the Government an insurer that the evil of floods be stamped out.’”).

of protecting property and preserving separation between legislative and judicial functions, as the distinction between “ministerial” versus “discretionary/policy-level/planning” decisions in tort law seeks to do.<sup>107</sup>

## B. Government (In)Action Versus Natural Causes

The natural forces affecting Old A1A should have received greater consideration as part of the appellate court’s review of the *Jordan* case. As the appellate court conceded, “natural forces have played a role in the degradation of the road.”<sup>108</sup> If these natural forces and their impacts would have occurred regardless of state action, this should, according to precedent, lead to the conclusion that there was no taking.

In *Drake v. Walton County*, the court held that the county’s actions in physically diverting stormwater onto the appellant’s land constituted inverse condemnation.<sup>109</sup> However, the *Drake* court noted that the case would have been “in a completely different posture had [a]ppellant’s property been flooded by the hurricane itself, without the County’s intervention.”<sup>110</sup>

The U.S. Court of Appeals for the Eleventh Circuit made a similar observation in the case of *Anthony v. Franklin County*.<sup>111</sup> In *Anthony*, plaintiffs sued Franklin County for a taking when the county ended ferry service to the island on which the plaintiffs had a home. In response, the court noted that “[t]he plight in which appellants claim to find themselves has not been produced by the county but by nature itself.”<sup>112</sup>

*United States v. Sponenbarger*<sup>113</sup> presented a scenario in which government also tried, but failed, to protect property. In *Sponenbarger*, respondent sued the United States, “alleging that the Mississippi Flood Control Act of 1928, and construction contemplated by that Act, involved . . . ‘intentional, additional, occasional flooding, damaging and destroying’ of her land.”<sup>114</sup> In *Sponenbarger*, the government had constructed dams intending to lessen damages resulting from flooding. With respect to these dams, the U.S. Supreme Court held that “[t]he Government has not subjected respondent’s land to any additional flooding,

above what would occur if the Government had not acted; and the Fifth Amendment does not make the Government an insurer that the evil of floods be stamped out universally before the evil can be attacked at all.”<sup>115</sup>

The trial court in *Jordan* stated that “[a]lthough Plaintiffs alleged that St. Johns County’s *inaction* (failure to maintain ‘Old A1A’ and repair storm damage) caused loss of access to their properties, it is uncontroverted that the initial and primary *action* that caused damage to ‘Old A1A’ was the natural forces of storms and ocean waves.”<sup>116</sup> Yet despite the obvious role played by erosion and the ocean in the context of the road at issue in *Jordan*, the appellate court decision in *Jordan* minimized the natural forces at work on Old A1A in order to highlight what St. Johns County had or had not done with respect to the road. But in the *Jordan* case, the only actions of the county were attempts to fix the road and provide access; when these were insufficient to offset the overwhelming impacts of the Atlantic Ocean, the appellate court held that the county could potentially be liable anyway.

To characterize the efforts by St. Johns County to mitigate the damaging effects of this erosion of the road as “inaction” fails to square with the facts ascertained at the trial court level. Natural forces like the storms and tides continuously washing away Old A1A no longer make it a mere routine, ministerial function to keep the road at the same standard as is common for other county roads.<sup>117</sup> St. Johns County attempted to address the damage,<sup>118</sup> but the overwhelming natural forces were impossible to combat without expending what the St. Johns County Commission decided were excessive public funds to do what seemed more like an *upgrade* than mere ministerial, routine *maintenance* of a road for a few homes situated precariously on a spit of sand.<sup>119</sup> St. Johns County’s “inaction” did not cause Old A1A to erode and become impassible.<sup>120</sup> Instead, the damage occurred as a result of natural forces outside the control of St. Johns County.<sup>121</sup>

It is with this recurrent fact pattern that we reach the heart of the issue. Even though the court in *Jordan* claims St. Johns County had a duty to maintain Old A1A after damage occurred, the damage to Old A1A did not occur because the government failed in its duty to take precautionary or remedial measures.<sup>122</sup> The damage occurred

107. For more on the separation-of-powers issue, see *supra* Part II.C.

108. *Jordan*, 63 So. 3d at 839.

109. 6 So. 3d 717, 718 (Fla. Dist. Ct. App. 2009).

110. *Id.* at 719; see also *Ressel v. Scott County*, 927 S.W.2d 518, 520 (Mo. Ct. App. 1996) (holding that there is no viable claim for inverse condemnation when the asserted damage is the result of natural forces); *Brown v. School Dist. of Greenville County*, 161 S.E.2d 815, 817 (S.C. 1968) (holding that plaintiff’s complaint that his property was damaged by the county’s refusal to alter the slope of the school’s property, which would have alleviated the flooding of his property, did not state a claim for inverse condemnation since it failed to allege that an affirmative government act caused the flooding); *Stark v. Albemarle County*, 716 F. Supp. 934, 938 (W.D. Va. 1989) (holding that the plaintiff’s complaint alleging that the county’s flood culvert failed to alleviate the flooding of its property did not state a claim for inverse condemnation since it did not allege that a specific government act caused the flooding).

111. 799 F.2d 681 (11th Cir. 1986).

112. *Id.* at 685-86.

113. *United States v. Sponenbarger*, 308 U.S. 256 (1939).

114. *Id.* at 260.

115. *Id.* at 266. See, e.g., *Big Oak Farms, Inc. v. United States*, 105 Fed. Cl. 48, 57 (Fed. Cl. 2012) (holding that the plaintiff must allege facts to show that the flooding authorized by the government exceeds the flooding that would have occurred before such authorization).

116. *Jordan v. St. Johns County*, No. 05-694, slip op. at 12 (Fla. Cir. Ct. May 21, 2009).

117. See *supra* Parts II.B. and II.C. (discussing the planning-level versus ministerial duty types of “maintenance”).

118. *Jordan v. St. Johns County*, 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011).

119. *Id.* at 836. See also *supra* note 21 and accompanying text (noting that St. Johns County spent about 25 times as much per mile per year to “maintain” the road at issue in the *Jordan* case as the county spent on typical county road maintenance) and *supra* Part II.B. (discussing the distinction between “ministerial” duties not protected by sovereign immunity and legislative or policy decisions, which are protected by sovereign immunity).

120. *Jordan*, 63 So. 3d at 838.

121. *Id.*

122. *Id.*

despite countless precautionary measures and more than \$2.3 million dollars in repairs over five years for less than two miles of road.<sup>123</sup> Effectively, because both the trial court and appeals court recognized that the county in fact had taken some degree of action, what the appeals court meant by *inaction* was *not enough action* to satisfy the property owners, or the appeals court.

*Jordan* forced Florida's Fifth District Court of Appeal to address a challenging environmental issue: coastal erosion that makes ordinary maintenance of infrastructure prohibitively expensive. Instead of addressing this issue directly, the court characterized the unsuccessful maintenance efforts of the county as government "inaction" in the face of an expanded "duty" to maintain so as to align with a takings analysis. The Fifth District Court of Appeal's treatment of this issue holds great import as the scope of such erosion, flooding, and damage to infrastructure continues to increase with rising sea levels.<sup>124</sup>

#### IV. The Policy Implications of *Jordan*

Why go to such lengths to deconstruct the "duty to maintain" held binding on St. Johns County, and whether or not inaction (or not enough action) can form the basis of a takings claim? After all, the *Jordan* case that is the focus here was last in court more than seven years ago and was eventually settled by the litigants. The decision deserves extended and critical treatment because the *Jordan* court made two radical assertions that essentially created new law in Florida, despite the court's attempt to create a veil of precedent: first, that local governments have a duty to provide "a reasonable level of maintenance that affords meaningful access," and second, that government inaction can support a takings claim.

Combined, this expanded duty and the holding that inaction can support a takings claim stand poised as existential threats to littoral local governments as sea levels continue to rise, exacerbating erosion and flooding threats to roads and other infrastructure. The decision threatens to force local governments to decide between spending potentially ruinous sums on futile efforts to maintain infrastructure to service inherently at-risk properties or to risk legal liability for the "inaction" of not sufficiently "maintaining" infrastructure. But this is not even really a choice, as either one constitutes allowing property owners to use the courts to force taxpayers to pay for the inherently increasing risk to low-lying and coastal properties.

#### A. Wealth Redistribution and Bankrupting Local Government

The appellate court's decision in *Jordan* could lead to redistribution of wealth from general taxpayers and public coffers to private property owners situated and choosing to live on roads at risk from erosion or inundation due to SLR.<sup>125</sup> By compensating owners for harms caused by natural hazards beyond the control of local governments—or by requiring local governments to spend unrealistic amounts of money to upgrade or create new infrastructure in response to extreme—and often unprecedented—environmental challenges—the *Jordan* court risked making St. Johns County, and, consequently, the taxpayer, an insurer of the private property right to access and an insurer against natural hazards. This contradicts established law of the Supreme Court.

The *Jordan* trial court noted this by citing to case law indicating that the Fourteenth Amendment to the Constitution does not make government responsible for taking affirmative action to protect private property.<sup>126</sup> Another Supreme Court decision said essentially the same for the Fifth Amendment's private-property protections: the decision in *Sponenbarger*<sup>127</sup> held that the "Fifth Amendment does not make the Government an insurer that the evil of floods be stamped out." The potential implications of the *Jordan* appellate court decision to make government the insurer of private property rights—such as the right of access at issue in the *Jordan* case—cannot be overstated in their potential for forcing local governments to spend the taxes of the many for the benefit of a few.<sup>128</sup>

Further, there may be a "moral hazard" and equity component involved in these circumstances. In some instances, such as was observed by the trial court in *Jordan*, it was clear to property owners that erosion and degradation of the road had been taking place for decades prior to the building of all but three of the houses there.<sup>129</sup>

125. This analysis is most relevant to roads that serve primarily or exclusively as local access to low-density residential development. The concerns, pressures, and analysis differ significantly when the road serves as a major thoroughfare. For an example of the latter and erosion problems, see the challenges of current Florida State Road A1A in Fort Lauderdale as impacted by Tropical Storm Sandy in 2012 and A1A in Flagler Beach as impacted by Hurricane Matthew in 2016.

126. *Jordan*, No. 05-694, slip op. at 14 (citing to *DeShaney v. Winnebago Dep't of Soc. Servs.*, 489 U.S. 189 (1989) ("holding that the 14th Amendment to the U.S. Constitution does not require states to act affirmatively to protect the . . . property of its citizens")).

127. *United States v. Sponenbarger*, 308 U.S. 256, 260 (1939).

128. In fact, in addition to the vast sums of money spent in efforts to "maintain" the road at issue in the *Jordan* case, the legal bill of the county for defending the lawsuit brought by a handful of property owners amounted to just less than \$1 million. This represents a significant legal bill for a county that then had about 200,000 residents.

129. *Jordan*, No. 05-694, slip op. at 23:

Plaintiffs as a group are intelligent, well educated professionals (doctors, lawyers, college professors, etc.) who decided to purchase property on a barren sand dune. It was obvious when they acquired title that the road seaward of their lots had been eroded from seas and storms that caused some of the pavement to wash away. It was also obvious that the State of Florida—with more resources than the County for studies, renourishment projects, repairs and rebuilding—had abandoned the road because of ero-

123. *Jordan v. St. Johns County*, No. 05-694, slip op. at 4 (Fla. Cir. Ct. May 21, 2009).

124. See, e.g., CENTER FOR OPERATIONAL OCEANOGRAPHIC PRODUCTS AND SERVICES, U.S. DEPARTMENT OF COMMERCE, SEA LEVEL RISE AND NUISANCE FLOOD FREQUENCY CHANGES AROUND THE UNITED STATES (2014).

Ironically, landowners in such situations may be seeking a windfall: they purchase the property more cheaply than typical coastal property due to erosion and associated access problems, and then they seek to use the legal system to force taxpayers to pay to fix the very situation that allowed them to purchase the property at a discounted price in the first place.

### B. Judicial Activism Invading the Legislative Domain

The inherent division of power in the Constitution between the different branches of government is designed to “minimize the threat of . . . tyranny” that arises when all the powers of the government are concentrated within only one body.<sup>130</sup> That is, the desire to protect the discretion of local legislative bodies to make policy decisions leads to another reason for expending so much energy addressing the Fifth District Court of Appeal’s decision in *Jordan*. County commissions in Florida, when acting in good faith and within their statutory authority, should by law be accorded wide discretion, not to be controlled by the courts.<sup>131</sup> Moreover, as a general rule, the judiciary will not question “the allocation of local governmental resources among various authorized programmatic objectives.”<sup>132</sup>

sion. The road has degraded because of the natural progression of Mother Nature. It is doubtful that there is any permanent fix to the erosion problem.

We often feel much more compassion for property owners who were hit by hazards of which they were not aware. This is part of the argument supporting the mandatory provision of notice of coastal hazards, such as SLR, to prospective purchasers of coastal property. See, e.g., Thomas Rupert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. LAND USE & ENVTL. L. 239 (2011).

Due to the ongoing erosion and access issues at the area in question, St. Johns County passed an ordinance “requiring permit applicants at Summer Haven to sign ‘Assumption of Risk’ Agreements, holding the county harmless from damages or loss of access caused by erosion.” *Jordan*, No. 05-694, slip op. at 17 n.2. While the trial court noted that it was not “called on to rule upon this practice,” the court called the policy “coercive and repugnant.” *Id.*

The court’s animosity to this policy is surprising as it seems a reasonable way to protect property rights to allow people to build in extremely hazardous and unsafe places if those wanting to build there assume the risks they are inherently undertaking and do not seek to force the public to pay for such obvious risks. Furthermore, such a policy has been accepted standard practice in coastal permitting in California for many years. See, e.g., CALIFORNIA COASTAL COMMISSION, STAFF REPORT ON APPLICATION NUMBER 5-11-260, at 1, 4 (2012) (on file with author).

In any case, St. Johns County’s policy requiring “Assumption of the Risk” agreements was repealed as part of the eventual settlement of the *Jordan* case. See Settlement Agreement and Release, Exhibit A at 3, *Jordan v. St. Johns County*, No. 05-694 (Fla. Cir. Ct. May 1, 2013) (on file with author).

130. Johnny C. Burris, *The Administrative Process and Constitutional Principles: Separation of Powers*, 75 FLA. B.J. 1, 28 (2001) (quoting Johnny C. Burris, *Administrative Law, 1987 Survey of Florida Law*, 12 NOVA L. REV. 299, 302 (1988)). See also *Jordan*, No. 05-694, slip op. at 8 (“No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided in the [Florida] Constitution. *Art. II, Section 3, Fla. Const.*”).

131. *Isleworth Grove Co. v. Orange County*, 84 So. 83, 84 (Fla. 1920).

132. John Martinez, *Discretion and Purpose in Providing Services: Scope Note, in 3 LOCAL GOVERNMENT LAW* §18:1 (Thomson Reuters Supp. 2016). See also Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624 n.105 (2006):

The most important fiscal role in local government is to decide on the level and mix of taxes and expenditures that best match the

Accordingly, the county should only have needed to demonstrate that any maintenance, or supposed lack of maintenance, was a reasonable exercise of the county’s discretion in how it expends its limited road maintenance funds as part of its legislative power, in which it may consider a number of factors including traffic volume, public safety, costs, degree of difficulty, current and future environmental conditions, and so on.<sup>133</sup> Had the appellate court limited its holding to a need to perform “reasonable maintenance,” St. Johns County could likely have made a strong argument that spending more than 25 times as much for maintenance per mile as typical on a county road surely reached at least to the level of “reasonable maintenance,” if not far beyond. However, the appellate court added that any “reasonable maintenance” had to result in “meaningful access.”<sup>134</sup>

St. Johns County was confronted with a situation where fewer than two dozen homes, purchased or built on an obviously eroding spit of sand that had clearly been eroding for decades, were experiencing diminished access; the work that needed to be done to make the road at issue in *Jordan* as serviceable as most county roads would likely have cost, in the span of only a decade or two, at least \$1 million per home or more.<sup>135</sup> The county made the legislative decision not to spend a disproportionate share of their limited road maintenance resources on only one short stretch of road comprising less than 0.2% of the county’s road miles.<sup>136</sup> When the court saw fit to question this policy judgment of St. Johns County and impose the court’s own substantive standard for access the county must supply, it demonstrated a court potentially violating the principle of separation of powers by making substantive decisions on difficult social and policy questions that lie at the heart of the legislative domain of local government. Commentators have also observed that courts may not be the best first choice for establishing important real property law and policy changes related to changes taking place culturally, economically, or in the natural world.<sup>137</sup>

While the precedent of *Jordan* could eventually pose a risk for highly urbanized areas such as south Florida, the stakes will be higher much sooner for more modest local

needs and preferences of the local population. That local governments take this allocation function seriously is evidenced by the wide variety of choices they actually make.

133. See *Jordan*, No. 05-694, slip op. at 8; *Trianon Park Condo. Ass’n, Inc. v. City of Hialeah*, 468 So. 2d 912, 920 (Fla. 1982); *Perez v. Department of Transp.*, 435 So. 2d 830, 831 (Fla. 1983).

134. *Jordan v. St. Johns County*, 63 So. 3d 835, 838 (Fla. Dist. Ct. App. 2011).

135. *Jordan*, No. 05-694, slip op. at 5 ¶ 16.

136. See, e.g., *supra* notes 64, 66, and 71, and accompanying text (citing to a report referenced by the *Jordan* trial court indicating a minimum likely cost of \$13.1 million for initial beach nourishment to reconstruct land for a new road and maintenance costs of about \$5.7-\$8.5 million every three to five years thereafter; note that these costs are probably too low since, as the trial court noted, the assessment on which it was based “has proven incorrect” because subsequent erosion at the area in issue had actually been far worse than predicted).

137. For a strong critique against courts using the Constitution’s private-property protection in the Fifth Amendment to establish critical property law norms without broad-based policy law discussion by the public and legislative bodies, see, e.g., ERIC FREYFOGLE, *ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND* (2007).

governments that have a smaller tax base and limited resources to dedicate to the redesign of coastal infrastructure in light of SLR. Forcing these local governments to provide “reasonable maintenance that results in meaningful access” could create economic catastrophe by limiting the discretion of local government to determine how to best allocate scarce infrastructure funding. This could mean subjecting local governments to a choice between bankruptcy through infrastructure spending or through legal liability to property owners for failure to “maintain” road infrastructure in the face of rising seas.<sup>138</sup>

## V. Lessons and Recommendations

The case of *Jordan* does not mention sea-level rise. Nevertheless, the case serves as a bellwether for governmental units in Florida and beyond about how courts may impose liability for environmental impacts beyond the control of the same governmental units being assigned liability. The resulting untenable situation should teach us a few things. Below appear some possible lessons and responses that follow from *Jordan*, moving from those most specific to the *Jordan* case and its particular circumstances to the broadest implications and their relation to the increasing impacts of SLR.

First, looking most narrowly, *Jordan* could be seen as a lesson to local governments to think twice before accepting any property or infrastructure, even for free. The right-of-way at issue in *Jordan* originally belonged to the Florida Department of Transportation (FDOT). Even after relocating the road to newly purchased right-of-way further inland in the 1960s, FDOT remained owner of the right-of-way at Old A1A until 1979. At that time, St. Johns County made a crucial error: accepting the right-of-way from FDOT, even though this meant being responsible for a road that had already been under severe attack from erosion for almost 30 years and had been replaced by a relocated road more than a decade earlier. Government entities need to remember that once they own something, they now shoulder whatever responsibilities the laws and the courts assign them for that property or infrastructure.<sup>139</sup>

Second, *Jordan* indicates it might be time for local government attorneys in Florida—and beyond—to start broadening their ideas of how to avoid takings liability in

the age of SLR. Since the creation of regulatory takings in 1922<sup>140</sup> and subsequent key takings cases,<sup>141</sup> local governments have primarily thought of takings claims—successful and unsuccessful—as stemming primarily from limiting what property owners can do with their property. The simplest solution to avoid potential takings liability with this understanding was to minimize limits on landowners and their use of their land.

Arguably, St. Johns County did just this in the *Jordan* case by issuing permits to build additional houses along the right-of-way that had long been eroding. Even though there were only three homes on Old A1A when St. Johns County accepted the right-of-way, by the time the plaintiffs filed suit more than 20 years later, 25 additional residences had been permitted. Had St. Johns not permitted these homes, it might have faced takings litigation at the time of permit denial.

However, allowing the homes has resulted in its own costs for St. Johns County. The county now has constant problems with the road, almost \$1 million in legal fees for a county of only about 225,000 residents, and millions of dollars in maintenance costs, particularly after adding costs incurred by St. Johns County to clean up the area and provide access to residents after Hurricane Matthew in 2016 and Hurricane Irma in 2017 decimated the road and opened another inlet.<sup>142</sup> Since there is no end in sight for the current problems of St. Johns County with the road, it merits asking whether St. Johns County might have been better off having set up a zoning or regulatory scheme that would have prevented further development and taken the risk of takings liability back in the 1980s, rather than having committed themselves to decades of fighting the ocean due to the decision of a handful of property owners to build on a spit of sand between a river and the ocean.

On a related note, a third lesson: local governments—as well as state and federal—should immediately begin to enact policies that ensure that property owners and potential property purchasers are clearly aware of the physical risks of purchasing or building in low-lying or hazardous, dynamic areas such as along beaches.<sup>143</sup> In fact, St. Johns

138. In theory, it should not be as likely that courts will saddle local governments with liability if local governments fail to upgrade drainage infrastructure as increased flooding results from SLR. See Ruppert & Grimm, *supra* note 80. However, the analysis in the cited article cannot guarantee that a court will not make a break with existing case law and statute as the appellate court did in the *Jordan* case.

139. Ironically, it bears noting that both the *Jordan* trial court and the *Jordan* appellate court cited to the case *Ecological Dev., Inc. v. Walton County*, 558 So. 2d 1069 (Fla. Dist. Ct. App. 1990). In *Ecological Development*, the local government had accepted designation of the roads in a development as public roads. The local government then ended up in the legal battle that resulted in the case because the local government voted to end any maintenance of the public roads because the local government asserted that improper construction by the developer had resulted in excessive maintenance costs. Again, the lesson: government should be careful of what it accepts, even for free.

140. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

141. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 22 ELR 21104 (1992).

142. An additional issue that should receive consideration in the area of the road is wastewater and water quality. The homes on the spit of sand in question have septic systems rather than centralized sewer service. Several of these systems suffered damage during Hurricane Matthew, after which one could see elements of septic systems on the beach. The efficacy of treatment in a septic system placed in sand just above sea level in between the ocean and a river might cause some to wonder about public health impacts.

143. The state of Florida does have a statute—Florida Statute §161.57 (2016)—that requires sellers of certain coastal property to notify potential purchasers that the property may be subject to natural hazards and additional regulations. However, the wording, structure, and implementation of this statute has been demonstrated to be largely ineffective, as noted in KEVIN WOZNIAK ET AL., FLORIDA SEA GRANT TECHNICAL PAPER NO. 194, FLORIDA'S COASTAL HAZARDS DISCLOSURE LAW: PROPERTY OWNER PERCEPTIONS OF THE PHYSICAL AND REGULATORY ENVIRONMENT (2012), available at [https://www.law.ufl.edu/\\_pdf/academics/centers-clinics/clinics/conservation/tp194\\_coastal\\_hazards\\_disclosure\\_law.pdf](https://www.law.ufl.edu/_pdf/academics/centers-clinics/clinics/conservation/tp194_coastal_hazards_disclosure_law.pdf). The inefficacy of the law could be easily addressed by better drafting of language and procedures for implementation. *Id.*; see also Ruppert, *supra* note 129. Even with improved notice, it is still

County attempted to do exactly this and more when the county passed an ordinance repealing a development moratorium on the area at issue in the legal case and requiring that property owners wishing to build in the area, as a condition of receiving a permit, sign “hold-harmless” agreements acknowledging that the property owners would accept the risk.<sup>144</sup> The county saw this as a way to maximize the ability of property owners to make desired use of their property while avoiding saddling the county and its taxpayers with financial liability for the decisions of the private property owners who take such an obvious risk. However, the trial court went out of its way to criticize this policy as “coercive and repugnant”<sup>145</sup> even though such a policy has long been accepted practice in California.<sup>146</sup> As part of the eventual settlement agreement, St. Johns County agreed to rescind the ordinance requiring hold-harmless agreements as a permit condition.<sup>147</sup>

A fourth possible lesson from the *Jordan* case is that local governments need to begin considering the future and long-term costs associated with infrastructure for which they are responsible. The situation with the road in the *Jordan* case drove St. Johns County to enact an ordinance that allowed the county to designate certain roads as being in “environmentally challenging locations.”<sup>148</sup> Such designation results in allowing of an exception to typical design standards.<sup>149</sup> This ordinance and the *Jordan* case inspired others, including this author, to go even further with a model ordinance that seeks to limit the financial liability of local governments for road infrastructure.<sup>150</sup> And Monroe County, Florida—a.k.a. the Florida Keys—conducted a pilot project to begin developing cost estimates for raising roads in response to SLR.<sup>151</sup> The county subsequently adopted the recommendations from the pilot project as their interim road elevation methodology and standards while the county conducts a “Countywide Roads Analysis” to “develop an understanding of the economic and policy impacts of

adopting an annual allowable flooding return period with a sea level rise assumption for future road improvement projects.”<sup>152</sup> In other words, the county seeks to carefully understand what the price tag might be—and whether the county can afford it—before it commits to trying to design roads to specific minimum elevations.

Even if local governments adopt ordinances such as the one in St. Johns County, the cited model ordinance, or take the approach of Monroe County in efforts to limit local government expenditures for roads, local governments may also need to address other types of infrastructure. Maintenance of potable water, central sewer, or any other publicly provided service may also become radically more expensive than usual due to environmental conditions in some low-lying or coastal areas. In some cases, this may lead local governments to want to limit expenditures in such areas. Is such limitation on public expenditures a legislative/planning-level recognition by local government that natural processes are changing the services they can realistically supply? If so, sovereign immunity would attach and courts should not interfere. Or would such a limitation be interpreted as “inaction” in the face of a duty to maintain, as in the *Jordan* appellate court decision? If so, liability could accrue to the local government. Or would such a limitation be interpreted as the “action” of “disinvestment” in an area?<sup>153</sup> If it represents the action of disinvestment, should that still be considered outside the purview of the courts based on a separation-of-powers-doctrine argument that courts should not interfere with such quintessential legislative decisions?

To avoid the worst problems potentially stemming from the *Jordan* case, governments need to begin to argue—and courts need to recognize—that the word “maintain” has more than one meaning. On one hand, “maintain” can mean “upkeep.” We might “maintain” a house by painting it or replacing the shingle roof when it gets old. This is the type of “maintenance” commonly understood in law to be necessary for government to conduct on its property and infrastructure or suffer tort liability when harm occurs from a failure to maintain. But “maintain” can also mean to preserve or uphold something. For example, if a hurricane blows the roof off of your house, “maintaining” your house might require repairing the walls and interior, and building a whole new roof.

While the difference between the “maintenance” of replacing your house’s shingles at the end of their useful life and “maintenance” of your house by rebuilding the house and replacing the entire structure of the roof appears clear, the appellate court in the *Jordan* case failed to see the difference between “maintaining” a road in the

not clear just how much courts will take notice into account when a takings claim arises. See, e.g., Ruppert, *supra* note 129, at 266-67 (citing to case law that included notice to property owners).

144. *Jordan v. St. Johns County*, No. 05-694, slip op. ¶ 61 and n.2 (Fla. Cir. Ct. May 21, 2009) (referencing Ordinance No. 2008-45).

145. *Id.*

146. See, e.g., CALIFORNIA COASTAL COMMISSION, STAFF REPORT ON ITEM W9A ON APPLICATION #5-11-260, sec. III.1, at 4 (2012) (including several special conditions such as an “assumption of the risk, waiver of liability and indemnity” and requiring that this and other special conditions be recorded in the public record and referenced as covenants, conditions, and restrictions on the property) (on file with author). In fact, it was the county attorney’s familiarity with this language in California that inspired St. Johns County to add it to their ordinances (Personal Communication with St. Johns County attorney Patrick McCormack).

147. *Jordan*, No. 05-694, slip op., Exhibit A at 3 (“The County agrees to repeal the language in its Ordinance 2008-45 requiring that a hold harmless agreement be signed as a condition for obtaining a building permit.”) (on file with author).

148. St. Johns County, Fla., Ordinance No. 2012-35 (Dec. 12, 2012).

149. *Id.* §§2 and 3.

150. THOMAS RUPPERT ET AL., FLORIDA SEA GRANT, ENVIRONMENTALLY COMPROMISED ROAD SEGMENTS—A MODEL ORDINANCE (2015), available at [https://www.flseagrant.org/wp-content/uploads/Envirtntly\\_Comp\\_Rds-FINAL\\_10.20.15\\_1.pdf](https://www.flseagrant.org/wp-content/uploads/Envirtntly_Comp_Rds-FINAL_10.20.15_1.pdf).

151. Deady, *supra* note 2, at 56.

152. Monroe County, Fla., Resolution No. 028-2017 (Jan. 18, 2017).

153. For discussion of disinvestment as an adaptation strategy, see, e.g., Travis M. Brennan, *Redefining the American Coastline: Can the Government Withdraw Basic Services From the Coast and Avoid Takings Claims?*, 14 OCEAN & COASTAL L.J. 101 (2008). See also David A. Lewis, *Constitutional Property Law Analysis of State and Local Government Disinvestment in Infrastructure as a Coastal Adaptation Strategy* (Apr. 30, 2012) (unpublished manuscript, on file with author).

sense of repaving or fixing potholes as non-discretionary duties versus “maintaining” the road in existence as the Atlantic Ocean removed the pavement, the subbase, and even the dry land where the road used to be. As noted in Part II.B. above, these two contrasting understandings of “maintain” reflect the split between the legal concepts of planning-level/discretionary functions that are the hallmark of the legislative branch of government, versus non-discretionary/ministerial duties expected of anyone and subject to assignment of liability by the judicial branch of government when such duties are not fulfilled and cause harm. Lawyers and courts that understand and apply this difference will not involve themselves in the same issues of separation of powers in which the court in *Jordan* involved itself.

Additionally, *Jordan* indicates an urgent need on the part of lawyers, local governments, academics, and courts to carefully consider whether and when “inaction” should serve as a sufficient basis for a takings claim. Analysis of whether inaction should be sufficient to support a takings claim hinges on two key questions: Can inaction *ever* serve as a basis for a taking? And, if it can, what is the source of the duty to act? *Jordan* answered the first question affirmatively without ever asking it, even though historically state action clearly presented a prerequisite for arguing a taking; even if there was no intent to take property, still, action on the part of government was required.

For the second question, *Jordan* found no duty in statute but discovered one in precedent through twisting facts and holdings in two cases and ignoring language and facts in cases that better represent the facts of the case at hand. However, due to the massive policy implications noted above, we should fear a court making such dramatic shifts to our law with so little support. If we were to conclude that governmental inaction could support a taking, we should then define with great caution exactly how and when the duty to act that can support the claim of inaction actually arises. Based on examination of cases cited to above, it appears that the best way to limit fallout from an “inaction” doctrine would include limiting duties only to those owed to specific individuals and clearly and explicitly defined in statute or in legally binding contracts.

Finally, at the highest level, the *Jordan* case offers the opportunity—or even demands—that we take a step back and begin to consider where we are in our understanding of property. How did we come to the point that private property owners can use the courts and a constitutional protection from arbitrary government action to force uninvolved taxpayers to fund the exorbitant yet natural and unsurprising costs of the property owners’ risk taking? Would this case have played out the same way shortly after our Constitution was ratified in 1789? Very likely, it would not have come out the same. After all, the very idea of “property” changes over time. Unfortunately, the reality of the changeable nature of our definition of property has not only been lost over the past several decades, it has been replaced with a mythology that “property” is some eternal,

carved-in-stone thing that is sacred.<sup>154</sup> Those familiar with the legal history of property recognize this as a myth, but we have not done enough to address the misunderstanding of “property” that now passes as understanding in our popular culture.

So why does all this matter and what does it have to do with SLR? It matters because of the significant costs of adapting to SLR. We stand poised at the start of a great debate about who pays, how, and why for the almost unimaginable costs of SLR.<sup>155</sup> Who pays to try to protect property for as long as possible? Who pays if we cannot afford—or choose not—to protect property from the rising seas? Ostensibly, these sound like legal questions, but they are much more. They queue up other, more fundamental questions: Is it fair that private property owners lose their property? Should we treat all owners of at-risk properties the same, or favor more those whose ownership extends back before broader awareness of the future impacts of SLR? Is it fair to make taxpayers—even those that are non-landowners—pay for the losses that property owners suffer for where they choose to live? Is it fair to bankrupt local governments, either through attempting to provide the same level of service and quality of life that residents expected before SLR started accelerating or through legal liability if they do not? Ultimately, all these questions hinge in part on how we define property.

These normative questions must be robustly confronted by us as a culture before we can move toward design of appropriate legal policies to help in the challenge of adapting to rising sea levels. But we are ill-equipped for such a task today. It is not about being smart enough, it is that we lack the tools, historical perspective, and intellectual framework today to even have a robust discussion about the nature of property. We have been fed a fast-food diet of over-simplified, trite expressions about “private property” that leave us full but entirely undernourished. We need to recapture the substantial, nutritious history and dialogue around the meaning of the simple word “property” to have the stamina that will allow a protracted wrestling match with the normative questions with which adapting to SLR will confront us.

One author who has sought to reclaim vibrant dialogue on the meaning of property is Eric Freyfogle. Professor Freyfogle has noted:

At the center of today’s debate [about property] . . . Lies a collective failure on our part to think clearly and intently about the institution [of property], how it works, why it exists, and many shapes it can take, in terms of landowner rights and responsibilities. . . . In operation, [the right to property] is less an individual right than a tool society uses to promote overall social good. Important truths about

154. Cf. Flournoy, *supra* note 3, at 141-42 (referring to the “very simplistic binary thinking that some property rights rhetoric promotes: the ‘it’s my property or it’s not’ argument”).

155. See, e.g., *id.* at 116 (noting that “we may need a framework designed to deal with a situation that will largely entail allocating losses, not gains”).

this arrangement have largely passed from our collective memory. We need to regain these truths.<sup>156</sup>

During recent generations, we have allowed the concept of property to wither; we have lost the vibrant, sometimes violent, dialectic by which we define ourselves and our world in part through the process of defining property. SLR and its challenges provoke us to reclaim our right, indeed our need, for a constant dialogue about the meaning of property. By engaging with deeper, more considered notions of property, we can more effectively and intelligently address the issues of adapting to SLR, such as balancing the costs to the public and to property owners and protecting the fiscal health and sustainability of local, state, and federal governments.

## VI. Conclusion

The effects of SLR have already begun to remake our world in Florida and beyond in the form of increased flooding, coastal erosion, and property damage. This problem will become increasingly burdensome as sea levels continue to rise. The decision from *Jordan* serves as an uncomfortable reminder that some infrastructure may need to be significantly altered or upgraded far beyond anything that may have in the past been considered “maintenance.” The appellate court in *Jordan*, without explicitly acknowledging it, redefined “maintenance” to mean doing whatever it takes, including performing prohibitively expensive upgrades, to ensure that the local infrastructure continues to provide “meaningful access.” This is troublesome considering that it goes far beyond the traditional notion of maintenance as routine work that keeps roads serviceable under relatively stable environmental conditions.<sup>157</sup>

As SLR costs exponentially increase, we need to ask ourselves some fundamental questions that have no easy or comfortable answers: Do historic precedents on property, infrastructure, and maintenance liability make sense in light of the changed reality of more rapid SLR? Should “maintenance” of existing infrastructure include a public obligation to keep infrastructure in place at any cost? If not, what is the threshold? If yes, does a failure to do so result in a “taking” of private property by “inaction”? How much will SLR cost us in additional disaster losses, erosion, and inundation? Who should shoulder these costs? Should takings law force the taxpayer to become the insurer of private development decisions? What “rights” does ownership of property provide to make claims against government for harms not directly and solely controlled by government?

The complexity and policy importance of these and many other questions begs for sustained, open, involved debate based on wide-ranging perspectives and concerns;

this is the very core of the legislative branch of government. Instead, the appellate court in *Jordan* ignored the new reality of SLR, used questionable reasoning, and twisted interpretation of past precedent to provide its preferred answers to these questions without even openly acknowledging that it was doing so. Will courts invade the legislative function and form our policies responding to SLR by expanding the “rights” of property owners to the point that the public has to pay whenever a property owner suffers harm, whether that harm is primarily caused or controlled by government? Let us hope that we, the public, through our elected officials and their legislative offices, will be the ones to openly discuss and debate the challenges posed by SLR and climate change and ensure that our laws, and especially our law of property, reflect our societal interests as we answer these questions.

## VII. Postscript: The St. Bernard Parish Case

This Article argues that *Jordan* represents a poorly reasoned legal decision when viewed through the lens of past law and precedent. It also focuses heavily on the significant potential for negative policy outcomes that could be driven by interpretation of the *Jordan* decision. Subsequent to the drafting of this Article, the U.S. Court of Appeals for the Federal Circuit released its opinion reversing the Court of Federal Claims’ decision in *St. Bernard Parish Gov’t v. United States*.<sup>158</sup> This decision’s analysis so dramatically conflicts with the holding of *Jordan* and so affects the analysis of this entire Article that it merits a concluding section all its own.

The Federal Circuit reviewed the decision in *St. Bernard Parish Gov’t v. United States*,<sup>159</sup> which had found the U.S. Army Corps of Engineers (the Corps) liable to property owners for a temporary taking due to flooding caused by the Corps’ construction, expansions, and operation of the Mississippi River Gulf Outlet (MRGO) in Louisiana. In part, this finding was based on the foreseeability of the flooding that occurred with Hurricane Katrina<sup>160</sup>; but it was also based on failure to adequately maintain the MRGO.<sup>161</sup> Thus, similar to *Jordan*, “government inaction” formed a core part of the theory of liability in the case.<sup>162</sup>

The appellate court, however, directly rejected this notion when it concluded that “the government cannot be liable on a takings theory for inaction.”<sup>163</sup> The court also stated that proving a claim of a taking by flooding “requires the plaintiffs to establish that government *action* caused the injury to their properties—that the invasion was the ‘direct, natural, or probable result of an *authorized*

156. FREYFOGLE, *supra* note 137, at xiv.

157. See, e.g., Robin Kundis Craig, “Stationarity Is Dead”—Long Live Transformation: Five Principles for Climate Change Adaptation Law, 34 HARV. ENVTL. L. REV. 9 (2010) (arguing for a “principled flexibility model of climate change adaptation law” that will increase the “resilience and adaptive capacity of socio-ecological systems”).

158. 887 F.3d 1354, 48 ELR 20065 (Fed. Cir. 2018).

159. 121 Fed. Cl. 687, 45 ELR 20084 (2015).

160. *Id.* at 720-23.

161. *Id.* at 726, 729, 731, 733, 738, 746 (each page contains language that “Plaintiffs established that the Corps’ construction, expansions, operation, and failure to maintain the MR-GO caused” increase storm surge and flooding).

162. *St. Bernard Parish Gov’t*, 887 F.3d at 1357.

163. *Id.*

activity.”<sup>164</sup> Other unambiguous statements by the court include: “On a takings theory, the government cannot be liable for failure to act, but only for affirmative acts by the government”<sup>165</sup>; “Supreme Court precedent and our own precedent have uniformly based potential takings claims on affirmative government acts,”<sup>166</sup>; and “Takings liability must be premised on affirmative government acts.”<sup>167</sup>

The *St. Bernard Parish* court does note that “a taking may not result from this discretionary inaction absent a duty to act.”<sup>168</sup> At first blush, this might seem to potentially accord with the holding of the appeals court in *Jordan*, since the *Jordan* court explicitly found a duty on the part of the county to maintain the road at issue there<sup>169</sup> and stated that inaction in the face of a duty to act could support a takings claim.<sup>170</sup> However, further reading of the appellate opinion in *St. Bernard Parish* demonstrates likely disagreement with the *Jordan* holding and *Jordan*’s “duty” to maintain.

The *St. Bernard Parish* court made a distinction that has long caused confusion in takings cases: the distinction between tort law and takings law. Plaintiffs very often seek to portray cases of property harm as takings claims rather than tort claims due to broad immunity from many tort claims at many levels of government.<sup>171</sup> *St. Bernard Parish* clearly states that “[w]hile the theory that the government failed to maintain or modify a government-constructed project may state a tort claim, it does not state a takings claim.”<sup>172</sup> The court furthers the distinction by citing to *Moden v. United States*<sup>173</sup> for its language that “The government’s liability for a taking does not turn, as it would in tort, on its level of care.”<sup>174</sup> By honing in on the distinctions between tort and takings, the *St. Bernard Parish* court addresses the problem, noted above, of potentially creating a “back door” to avoiding sovereign immunity for a tort case based on a lack-of-maintenance issue by pleading the case as a takings case.<sup>175</sup>

In other words, if what a plaintiff seeks to complain about is really “maintenance” in the legal-term-of-art sense of a ministerial duty, then the plaintiff does not need access to takings law for compensation because the tort claim will likely not be barred by sovereign immunity. However, if the “maintenance” complained of reaches into the realm of

planning/discretionary/legislative issues, allowing a plaintiff to recast the same claim now as a takings based on inaction for failure to fulfill the duty, a court now risks violating the doctrine of separation of powers by invading the legislative domain, just as courts seek to avoid by ensuring that the only “duty” in tort law is one that is ministerial in nature.

Further relevant to the holding of *Jordan*, the Federal Circuit noted that in the context of flooding, the lower court had applied the wrong legal standard. The appellate court in *St. Bernard Parish* emphasized that “the [takings] causation analysis requires the plaintiff to establish what damage would have occurred without government action.” Thus, in that case, rather than ask, as the lower court did, whether MRGO had made flooding worse, the legal standard applied should have been a “compar[ison of] the flood damage that actually occurred to the flood damage that would have occurred if there had been no government action at all.” Stated alternatively, “Causation requires a showing of ‘what would have occurred’ if the government had not acted.”<sup>176</sup>

To put this in terms relevant to the *Jordan* case, the legal standard asked by the appellate court there maybe should not have been “Did the county perform reasonable maintenance that resulted in meaningful access?” but rather, “Did the landowners lose more access due to the actual maintenance activities of the county?” Such a question would place emphasis back where the trial court in the *Jordan* case had placed it: on the primary role played by the Atlantic Ocean and erosion as the real causes of loss of property owner access,<sup>177</sup> not the actions of the county that were insufficient to overcome the forces of nature.<sup>178</sup>

The clear rejection in *St. Bernard Parish* of the “failure-to-maintain-can-support-a-takings-claim” theory supported by the appellate court in *Jordan* could obviate some of the fears expressed in the “policy implications” part of this Article.<sup>179</sup> For this to happen, *St. Bernard Parish*’s holding would have been applied rather than that of *Jordan*. In the state of Florida, however, *Jordan* remains binding precedent on all state trial courts in Florida.<sup>180</sup> *Jordan*, however, is only persuasive precedent for other Florida district courts of appeal.<sup>181</sup> As they are not bound by either decision, federal district and appellate courts in Florida, or anywhere else, may treat both *Jordan* and *St. Bernard Par-*

164. *Id.* at 1359-60 (emphasis added).

165. *Id.* at 1360.

166. *Id.* at 1361.

167. *Id.* at 1362.

168. *Id.* (citing *Georgia Power Co. v. United States*, 224 Ct. Cl. 521, 527 (Ct. Cl. 1980), cert. denied, 450 U.S. 981 (1981)).

169. *Jordan et al. v. St. Johns County*, 63 So. 3d 835, 838 & 839 (Fla. 5th Dist. Ct. App. 2011).

170. *Id.* at 839.

171. See, e.g. Sandra B. Zellmer, *Takings, Torts, and Background Principles*, 52 WAKE FOREST L. REV. 193, 194-95 (2017).

172. *St. Bernard Parish Gov’t*, 887 F.3d at 1360.

173. 404 F.3d 1335 (Fed. Cir. 2005).

174. *St. Bernard Parish Gov’t*, 887 F.3d at 1360 (citing *Moden v. United States*, 404 F.3d 1335, 1345 (Fed. Cir. 2005)).

175. See *supra* paragraph accompanying note 107 (discussing conceptual problems with avoiding the “ministerial” versus “discretionary/policy-making/planning” distinctions of tort law by simply pleading cases about quality of maintenance as takings cases).

176. *Id.* at 1362 (citing *United States v. Archer*, 241 U.S. 119 (1916)).

177. *Jordan v. St. Johns County*, No. 05-694, slip op. at 12 (Fla. Cir. Ct. May 21, 2009), *aff’d in part, rev’d in part*, *Jordan v. St. Johns County*, 63 So. 3d 835, 837 (Fla. Dist. Ct. App. 2011).

178. *Cf., e.g. St. Bernard Parish Gov’t*, 887 F.3d at 1361 (citing *United States v. Sponenbarger*, 308 U.S. 256 (1939) for the proposition that, when the government undertakes to protect a large area from flooding, “the Government does not owe compensation under the *Fifth Amendment* to every landowner which it fails to or cannot protect.”); see also *id.* at 1365 (discussing idea that causation analysis even in non-flooding contexts must include evaluation of all related government action, not just action that increases risk of harm to property)).

179. See *supra* Part IV.

180. *E.g. Nader v. Fla. Dep’t of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 717 (Fla. 2012) (citing to *Pardo v. State*, 596 So. 2d 665 (Fla. 1992)).

181. *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992) (citing *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th Dist. Ct. App. 1976)).

ish as persuasive precedent.<sup>182</sup> And, of course, state courts in other states are typically not bound by federal case law on federal questions unless they choose to be so bound.<sup>183</sup>

Still, the analytical force of *St. Bernard Parish* as well as its holding largely accord with the majority views on the issues analyzed. Thus, they should help local government legislative bodies to retain their discretion—and responsibility—to make what will often prove to be excruciatingly difficult decisions about when and where to draw the line on what the local government can afford to do to keep existing infrastructure in place and functioning in light of climate change and SLR impacts. This reinforces the importance of promoting informed, vibrant discussions of the difficult local-level issues of how to address the impacts of sea-level rise, such as increased flooding and erosion. It also may cut short efforts by property owners to re-forge the Fifth Amendment's shield of protection from arbitrary government action into a sword to wield against the government and taxpayer, forcing them to become insurers responsible for protecting private property owners' investments, or at least the property investments of those that can afford to sue a governmental entity.

Ultimately, the holding in *St. Bernard Parish* makes more feasible—and likely safer from legal challenge—some of the recommendations provided above. For example, local governments may now want to consider passing ordinances addressing infrastructure in environmentally challenging

areas.<sup>184</sup> Local governments should consider efforts to evaluate the long-term prognoses of increased infrastructure maintenance costs versus future revenue streams; based on such analysis, local governments should begin to pass policies and disseminate information that helps to appropriately shape the long-term expectations of property owners about which infrastructure in which areas will likely be able to be maintained. Any such efforts on the part of local government will involve clearly articulating and following a vision that distinguishes between non-discretionary/ministerial duties of “maintenance” versus discretionary/legislative efforts to rebuild/replace/redesign infrastructure that no longer provides the level of service it formerly did due to climate change or sea-level rise impacts.

Finally, the *St. Bernard Parish* holding should reassure local governments that undertake efforts to decrease flooding through drainage and elevation projects. These local governments can protect themselves from potential future legal liability from flood damages by ensuring that they have ample data and analysis to prove to a court that any flood damages that occurred are equal to or less than any flood damages that would have occurred *had the local government done nothing to address flooding*. In other words, as long as the local government can prove that a program of flood protection did not make flooding worse on a property, there should be no liability to the property owner for flood damage.

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182. Federal district and circuit courts are bound by precedent of the Supreme Court and superior courts within their own circuit. As the Court of Appeals for the Federal Circuit serves as the appellate court for the Court of Federal Claims, *St. Bernard Parish* is only binding on the Court of Federal Claims.

183. Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and Erie State Law Predictions*, 3 SETON HALL CIR. REV. 1, 16-18 (2006).

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184. See *supra* notes 148-52.