Roads and Sea-Level Rise Part II:The Case of *Jordan v. St.*

Johns County

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Specials thanks to St. Johns County Attorney Patrick McCormack



Jordan et al. v. St. Johns County

- 1950s Old A1A built after private properties purchased
- 1960 -- State of Florida reroutes to "New A1A"
- 1979 State deeds Old A1A to St. Johns County
- 2005 Temporary residential building moratorium enacted
- 2005 Complaint filed against St. Johns County
- 2008 Moratorium repealed
- May 2009 Summary Judgment for County granted on all Counts
- May 2011 Fifth DCA affirms in part (3 Counts) and reverses in part (2 Counts)
- December 2011 Florida Supreme Court declines review
- January 2013 Settlement Agrmt with most property owners

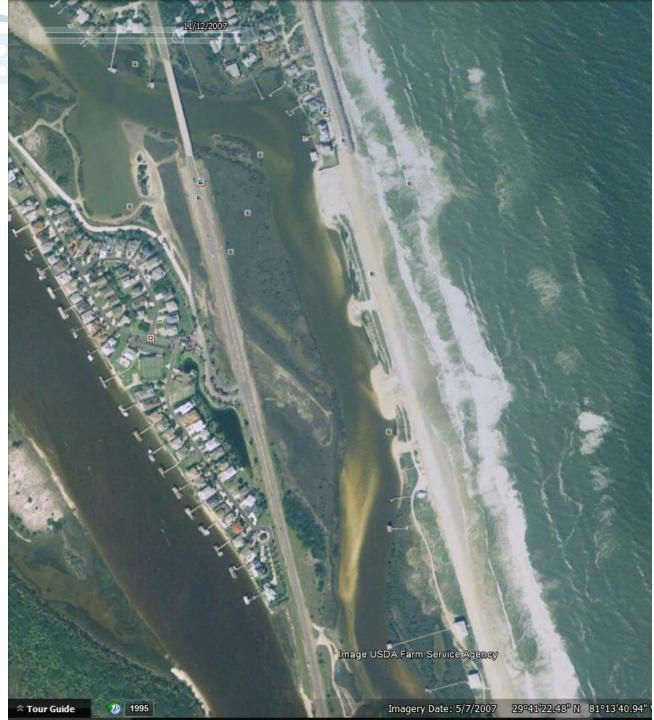


Some Facts

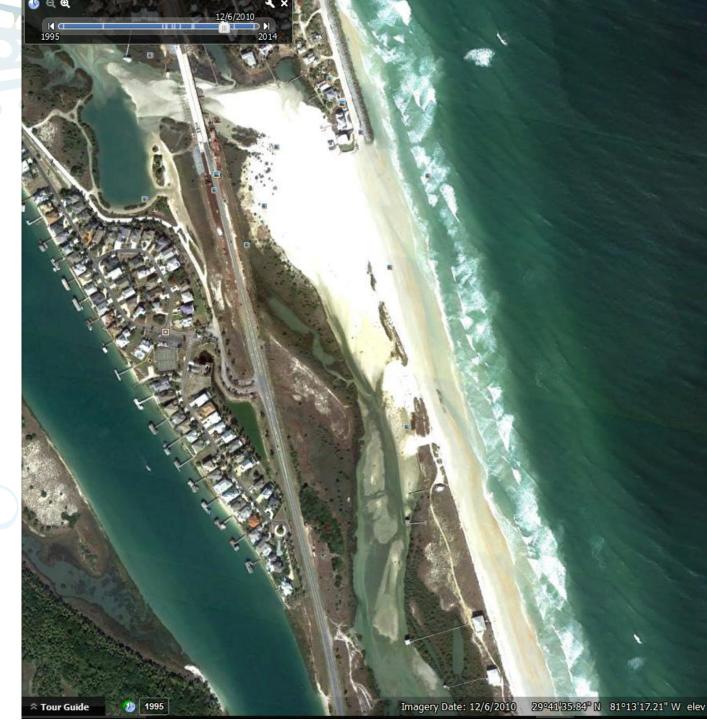
- 3 residences when County acquired in '79
- All owners that testified acquired <u>after</u> 1980
- Sporadic County maintenance
- County frustration expressed at meetings
 - Too expensive to maintain; study proving same
- More \$ from FEMA in 2000
- \$2.3 M from 2000-2005; avg. of \$244K/yr/mile
- 2008 study: ~\$13.1M plus \$5.7-8.5 M/3 yrs
- Responded to all emergency calls



11.12.2007



12.6.2010





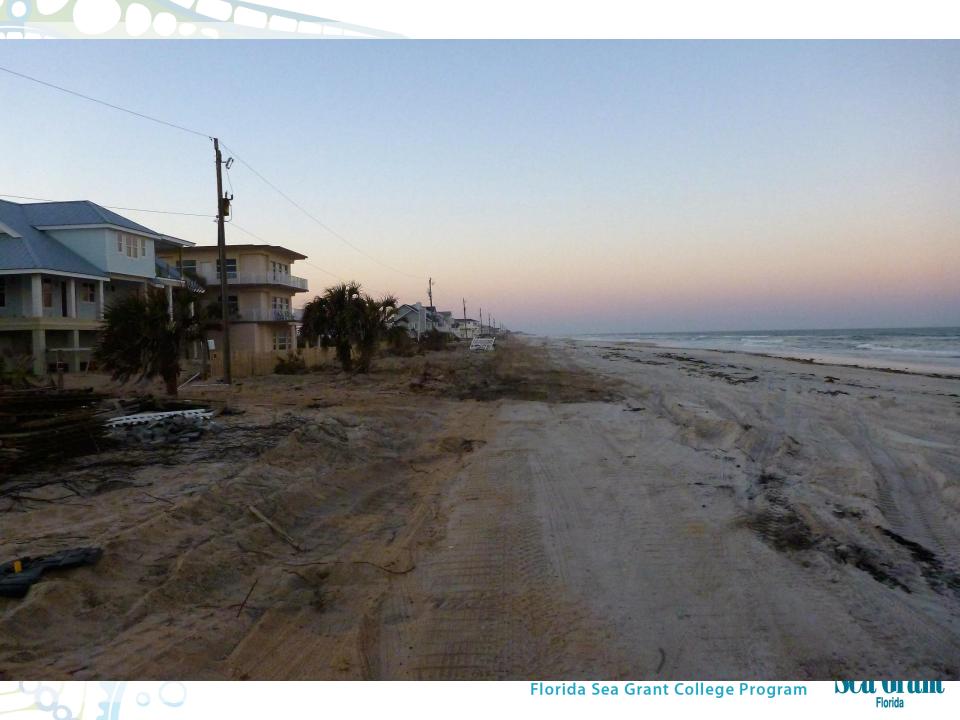


























Trial Court

- Summary judgement for County
 - All references in statute about roads are permissive grants of powers, not duties
 - Multiple references to DISCRETION
- Non-interference of courts:
 - "An action taken by the majority board of a county commissioners on any subject within the authority given such board by statute is not reviewable by courts, in absence of fraud or abuse of discretion clearly shown."
 - "A court cannot invade the administrative duties of a board of county commissioners, but can only determine whether their action was illegal vel non."
 - "The courts cannot interfere with a government's discretionary judgmental decisions."



Trial Court (cont.)

- No "duty" to maintain or provide emergency services (but. . . . MSBU)
- No permanent injunctive relief
- Natural forces were "action" that deprived owners, not any action of county
 - "This Court is also unaware of any Florida case holding that governmental inaction can be the basis for a loss of access inverse condemnation claim."



DUTY TO MAINTAIN ROADWAY?

(Separation of Powers/Sovereign Immunity)

"A county is not obligated, nor can it be compelled, to perform or provide for any particular level of maintenance, except as it voluntarily assumes to do."

Ecological Development, Inc. v. Walton County, 558 So.2d 1069, 1071 (Fla. 1st DCA 1990)



"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."

Dept. of Transp. v. Neilson, 419 So.2d 1071, 1077 (Fla. 1982)



DUTY TO MAINTAIN ACCESS (St. Johns County's View)

"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 Board of County Commissioners, 921 So.2d 661 (Fla. 2d DCA 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 Hileah, 468 So.2d 912, 920 (Fla. 1985)



Jordan on appeal?

State ex rel. White v. MacGibbon, 84 So. 91 (Fla. 1920)
Holding: BCC had standing to sue to force County Clerk
to expend funds for road construction that BCC had
authorized.

"Under our statutes, boards of county commissioners are given plenary power and authority over the location, building repairing, and keeping in order the public roads in their respective counties...

and it is made one of their continuous duties to locate, build, repair and keep roads in good order."

Id. at 82

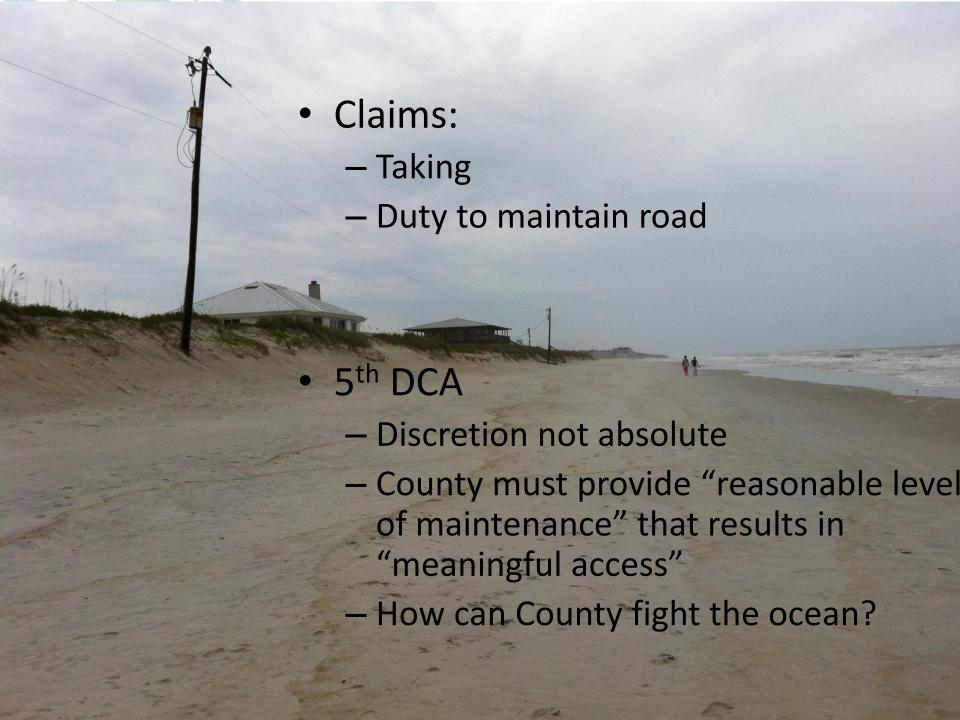


Ecological Development, Inc. v. Walton County, 558 So.2d 1069 (Fla. 1st DCA 1990)

Holding: Walton County could not place county roads in a "no maintenance" status and retain them as public thoroughfares.

(Citing MacGibbon for that proposition)





Rights and Responsibilities for Protecting Private Property

- No legal duty to protect private property other than maybe maintenance of existing infrastructure
 - "Like 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."
 - "[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."

DeShaney vs. Winnebago Dept. of Social Services, 489 U.S. 189 (1989)





PASSIVE TAKINGS: THE STATE'S AFFIRMATIVE DUTY TO PROTECT PROPERTY

Christopher Serkin*

The purpose of the Fifth Amendment's Takings Clause is to protect property owners from the most significant costs of legal transitions. Paradigmatically, a regulatory taking involves a government action that interferes with expectations about the content of property rights. Legal change has therefore always been central to regulatory takings claims. This Article argues that it does not need to be and that governments can violate the Takings Clause by failing to act in the face of a changing world. This argument represents much more than a minor refinement of takings law because recognizing governmental liability for failing to act means that, in at least some circumstances, the Constitution compels the government to protect property. Such liability runs counter to conventional understandings of constitutional law in which the Constitution primarily enshrines negative liberties. And yet this liability follows surprisingly naturally from leading takings and property theory. The Takings Clause, then, can serve as a previously unrecognized basis for affirmative governmental obligations. The Article ultimately illustrates this new category of passive takings with the example of sea-level rise, arguing that ecological threats may compel the government either to respond or pay compensation for the damages resulting from this ecological change.



Do all roads lead to a "taking"?

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Passive Takings: The State's Affirmative Duty to Protect Property

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Inaction as Taking

- Action vs. inaction
 - Negative vs. positive rights
- "Passive takings should arise when property is subject to such regulatory control that the government is understood to be responsible for the resulting harm, whether it acts or not. Or, to put it in affirmative terms, the government should have a constitutional duty to act when it is complicit in creating the conditions that are responsible for harm to property."
- What is missing from this????



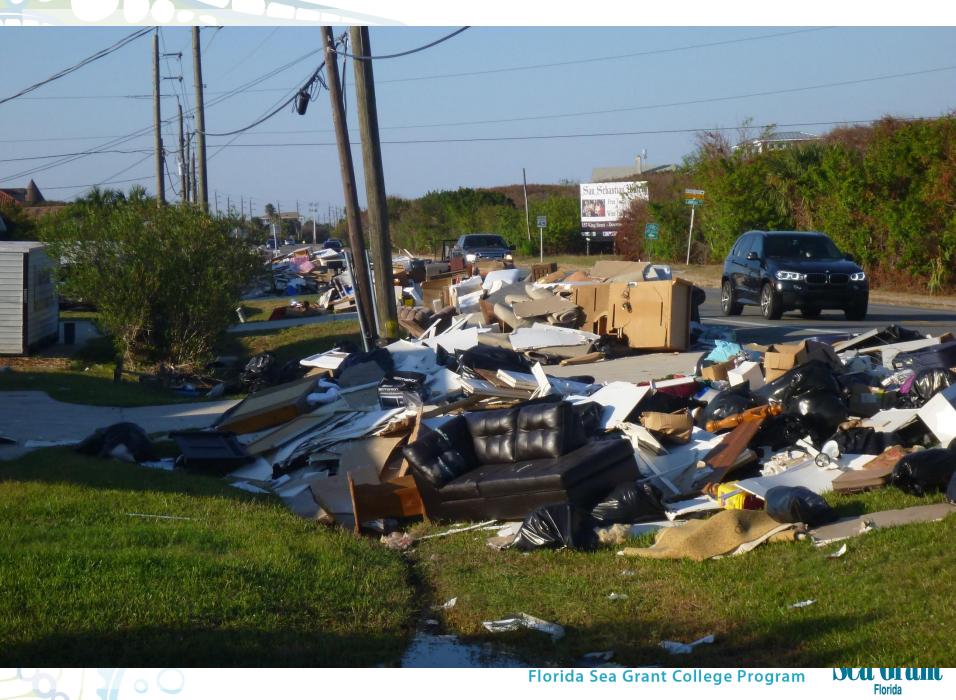
Settlement Agreement Excerpt from Summer Haven Case

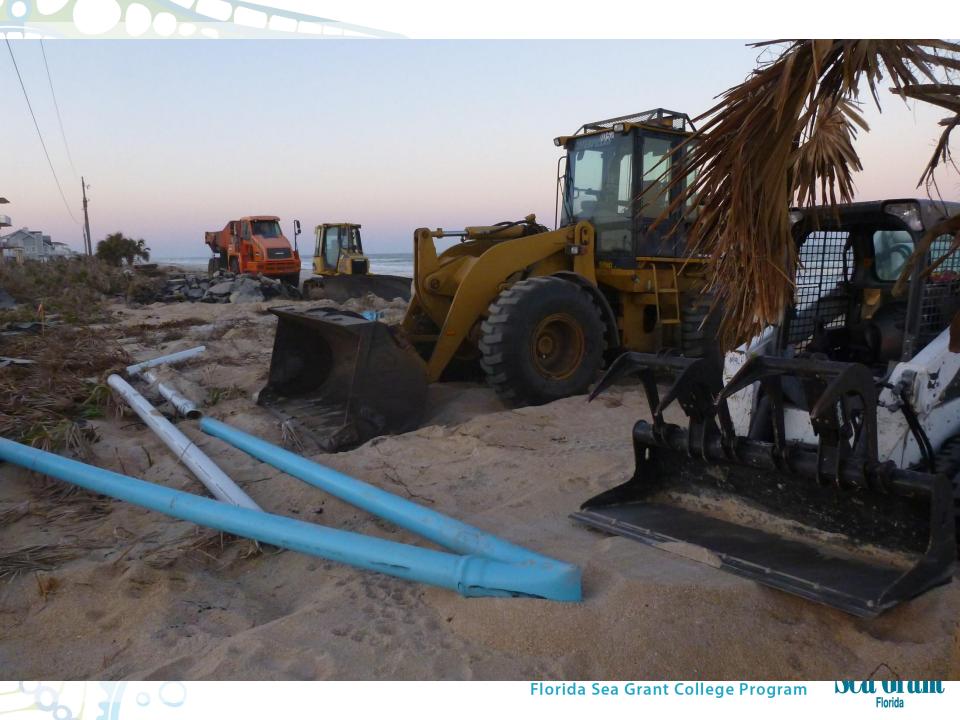
If a catastrophic weather event occurs that destroys a substantial portion of any part of the paved or unpaved portion of the Old A1A right-of-way from Blocks 66 to 23, the County agrees to make timely and good faith efforts to obtain State, Federal, and/or other available funds to restore, to the greatest extent reasonably possible, the condition of Old A1A from Block 66 to Block 23 as it existed as of the date of this Settlement Agreement and Release, subject to any regulatory limitations imposed upon the County in making this effort. The County also agrees that it will, prior to obtaining any available State or Federal funds, and subject to other demands placed upon the County resources by said catastrophic weather event, make timely and good faith efforts to provide temporary vehicular access to all properties from Block 66 to Block 23,













Environmentally Compromised Roads: A Model Ordinance

Balancing Local Gov't Responsibilities and Fiscal Resources in Road Maintenance



Purposeful Design

- Process to provide maximum feasible protection to affected properties
- Provide fiscal backstop for local gov't road expenditures
- Ordinance designed to minimize risk of successful legal claims
 - Possible sovereign immunity from tort claims
 - Takings claims difficult; only court decides



Overview of Ordinance

- Sets financial criteria thresholds
- Exceptions to LOS for "environmentally compromised road segment"
- Must add signage to designated roads
- Assistance in negotiation if a lack of "meaningful access"
- MSBU option for additional funding
- Abandonment procedures outlined



Definitions

- LOS: County-defined level of service for roads
- Envt'lly challenging location: typical road constr., maint., or stds. infeasible to meet due to naturally occurring conditions
 - Repeatedly damage or threaten road to extent that not safe;
 - Repair, maint. requires materials, processes, or techniques not standard for other roads in county;
 - Presence, maint. or repair has detrimental impact on natural resources; or
 - Location of road requires permitting or mitigation from federal or state authorities for activities that otherwise are considered routine maintenance.



Definitions (cont.)

- "Envt'lly compromised local road segment"
 - Annual per-mile cost avg. over 3 yrs. for typical maint. is 4x
 or more usual cost per mile; or
 - Annual per-mile cost in 1 yr. for typical maint. Is 6x or more usual cost per mile
- "Envt'lly compromised collector road segment"
 - Annual per-mile cost avg. over 3 yrs. for typical maint. is 5x
 or more usual cost per mile; or
 - Annual per-mile cost in 1 yr. for typical maint. Is 8x or more usual cost per mile



