Public Funds, use on private roadway

Number: AGO 2012-33

Date: September 20, 2012

Subject:
Public Funds, use on private roadway

Mr. Hal A. Airth
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Post Office Box 448
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RE: PUBLIC FUNDS--PRIVATE PROPERTY--DECLARATION OF EMERGENCY--use of public funds; entry onto private property. s. 252.38, Fla. Stat.; Part I, Ch. 252, Fla. Stat.

Dear Mr. Airth:

On behalf of the Suwannee County Board of County Commissioners, you have asked for my opinion on substantially the following questions:

1. May the County use public funds to repair washouts on private non-roadway property created by water run-off from a public road? Similarly, may the County enter private property and remove materials that were washed from the public roads onto the private property? May the County act in either case with or without a declared local state of emergency?

2. If a sink hole opens on private property then impacts public property, may the County enter the private property to seal the sink hole while repairing the public property? Similarly, if a sink hole opens on public property then runs on to private property, may the County enter and repair the damage to the private property? Is the response different if the work performed on private property is necessary to protect the public property? May the County act in either case with or without a declared local state of emergency?

In sum:

1. In light of the broad language contained in the State Emergency Management Act authorizing local governments to act to protect county citizens and their property, it is my opinion that county resources may be utilized in this effort and that Suwannee County may dedicate county funds to the repair of washouts on private non-roadway property that have been caused by water run-off from a public roadway. Likewise, public funds could be dedicated to the repair of sinkholes on private property that impact public property. This conclusion is based on the extensive powers delegated to local governments under the State Emergency Management Act and such authority would not extend to the county in the absence of a declared local state of emergency. Further, the Suwannee County Commission must still independently determine that these emergency repairs accomplish a valid public purpose as is required in the State Emergency Management Act.

2. In light of potential for charges of violations of section 810.09, Florida Statutes, this office would suggest, should the Suwannee County Commission determine to commit county manpower to the repair of sinkholes and non-roadway property which affect public property, that the county secure consents from the landowners of such private property to enter and remain on the property while performing emergency repairs.

While you have asked a number of questions relating to washouts and sinkholes, I understand all of these questions to involve two central issues: 1) whether the county is authorized to use public funds to repair private property damaged during an emergency and 2) whether the county may enter onto private property to effect these repairs. Therefore, this discussion is directed to these issues.

Question One – Use of Public Funds

According to your letter, Tropical Storm Debby dumped massive amounts of rain in Suwannee County in a short period of time. As a result of that intense rainfall, water flowing off county roads has caused severe washouts on private property. You have drawn my attention to a previously issued opinion of this office, Attorney General Opinion 98-22, in which it was concluded that Citrus County could use county funds to keep private roads passable during a declared state of emergency under section 252.38, Florida Statutes, if the county commission determines that such an expenditure satisfied a county purpose. You have asked whether section 252.38, Florida Statutes, would authorize the county to make the proposed expenditures of public funds when the damage was caused by runoff from public roads. You also ask whether this statutory language would authorize the dedication of public funds to the repair of sinkholes that may have appeared on private property and that impact public property.

It is a basic proposition of Florida law that the expenditure of public funds must be used primarily for a public purpose.[1] Thus, the expenditure of county funds must meet a county purpose, rather than a private purpose.[2] The issue has most frequently occurred in relation to the repair of public roadways and the courts of this state and this office have concluded that public funds may only be spent for the construction, maintenance, or repair of public roads.[3]

The situation in Attorney General Opinion 98-22, like the situation you have described in Suwannee County, involved a local declaration of emergency pursuant to section 252.38, Florida Statutes, and the county's duties to protect lives and property under such a declaration. The situation presented to this office in Attorney General Opinion 98-22 was a case of first impression and involved Citrus County's attempt to keep private roads passable by supplying assistance to subdivision residents who had requested county assistance in the form of culverts, fill dirt, equipment, and manpower to keep these roads and streets open. In light of the local declaration of emergency and the specific terms of section 252.38, Florida Statutes, this office concluded that Citrus County was statutorily authorized to use county funds to keep private roads passable during a declared state of emergency.

Part I of Chapter 252, Florida Statutes, is the "State Emergency Management Act."[4] The Legislature expressed its intent for the adoption of the act in part as follows:

"It is the intent of the Legislature to reduce the vulnerability of the people and property of this

state; to prepare for efficient evacuation and shelter of threatened or affected persons; to provide for the rapid and orderly provision of relief to persons and for the restoration of services and property; and to provide for the coordination of activities relating to emergency preparedness, response, recovery, and mitigation among and between agencies and officials of this state, with similar agencies and officials of other states, with local and federal governments, with interstate organizations, and with the private sector."

Pursuant to section 252.34(4)(c), Florida Statutes, specific emergency management responsibilities include "[r]esponse to emergencies using all systems, plans, and resources necessary to preserve adequately the health, safety, and welfare of persons or property affected by the emergency." More specifically, section 252.38(3)(a)1., Florida Statutes, authorizes political subdivisions such as counties "[t]o appropriate and expend funds [and to] provide for the health and safety of persons and property . . . ." Further, a political subdivision, in carrying out its emergency management powers, may "assign and make available for duty the offices and agencies of the political subdivision, including the employees, property, or equipment thereof relating to . . . transportation, construction, and similar items or services for emergency operation purposes . . . ."[5] Again, all of these powers are tied to a declared state of emergency under Part I, Chapter 252, Florida Statutes.

In exercising its emergency management powers, a county "has the power and authority to waive the procedures and formalities otherwise required of the political subdivision by law pertaining to . . . [p]erformance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community;"[6] and the "[a]cquisition and distribution, with or without compensation of supplies, materials, and facilities."[7] The county is also authorized to suspend the usual procedures and formalities required for the "[a]ppropriation and expenditure of public funds."[8]

The "State Emergency Management Act" recognizes that "[s]afeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state."[9] Thus, the Legislature has made a determination that, under these extreme conditions, the safeguarding of private property and the expenditure of public funds to do so does satisfy a public purpose.

In light of the broad language contained in the State Emergency Management Act authorizing local governments to act to protect county citizens and their property, it is my opinion that county resources may be utilized in this effort and that Suwannee County may dedicate county funds to the repair of washouts on private non-roadway property that has been caused by water run-off related to a storm emergency. Further, this statutory language would also appear to authorize the dedication of public funds to the repair of sinkholes that may have appeared on private property and impact public property. As my conclusion is based on the extensive powers delegated to local governments under the State Emergency Management Act, this authority would not extend to the county in the absence of a declared local state of emergency. In addition, the Suwannee County Commission must still independently determine that these emergency repairs accomplish a valid public purpose as is required in the State Emergency Management Act.[10] As this office noted in Attorney General Opinion 98-22, county funds may be expended to repair private roads during an emergency declared pursuant to section 252.38, Florida Statutes, "provided that the county first makes appropriate legislative findings as to the

purpose of the expenditure and the benefits which would accrue to the county."

Question Two – Entry onto Private Property

Both your first and second questions require consideration of whether section 252.38, Florida Statutes, provides authorization for local governmental agents to enter onto private property in order to make emergency repairs. As you have provided me with no specifics regarding the location of the property in question or the ownership of any such property, my comments must be general in nature.

Section 252.38, Florida Statutes, provides for the emergency management powers of political subdivisions. Section 252.38(3), Florida Statutes, states that each political subdivision, in carrying out the provisions of sections 252.31 - 252.90, Florida Statutes, has the power and authority:

"To request state assistance or invoke emergency-related mutual-aid assistance by declaring a state of local emergency in the event of an emergency affecting only one political subdivision. The duration of each state of emergency declared locally is limited to 7 days; it may be extended, as necessary, in 7-day increments. Further, the political subdivision has the power and authority to waive the procedures and formalities otherwise required of the political subdivision by law pertaining to:

a. Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community.
b. Entering into contracts.
c. Incurring obligations.
d. Employment of permanent and temporary workers.
e. Utilization of volunteer workers.
f. Rental of equipment.
g. Acquisition and distribution, with or without compensation, of supplies, materials, and facilities.
h. Appropriation and expenditure of public funds."

Thus, the Legislature has granted local governments broad powers to deal with declared states of emergency by utilizing public resources. However, despite the broad powers granted, the entry onto private property by governmental agents presents several potential problems for governmental entities and agents.

Under common law theory, every man's land is deemed to be enclosed so that every entry thereon is, except by consent, a trespass.[11] The basis of the wrong lies in the disturbance of possession. This disturbance of possession may result from such acts as the unauthorized cutting and removal of trees[12] or the digging of a trench to carry utility pipes without having a right-of-way.[13]

As described in Florida's statutes relating to burglary and trespass, section 810.09, Florida Statutes, a person who enters upon or remains in any property other than a structure or conveyance[14] without authorization may commit the offence of trespass on property other than a structure or conveyance. Trespass on property other than a structure or conveyance is a first

degree misdemeanor. Thus, a local government might well be concerned that its agent's unauthorized entry onto private property either to retrieve public property or to perform repairs could subject both the agency and the agent to liability and criminal prosecution.

In light of possible trespass concerns, this office would suggest, should the Suwannee County Commission determine to commit county manpower to the repair of sinkholes and non-roadway property which affect public property, that the county secure consents[15] from the landowners of such private property to enter and remain on the property while performing such emergency repairs or retrieving county property.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* Art. VII, s. 1, Fla. Const., which by implication limits the imposition of taxes and the expenditure of tax revenue to public purposes.

[2] *See* Op. Att'y Gen. Fla. 73-222 (1973) and *Collins v. Jackson County*, 156 So. 2d 24 (Fla. 1st DCA 1963) (county not authorized to expend funds to maintain municipal roads which have not been designated as county roads).

[3] *See Padgett v. Bay County*, 187 So. 2d 410 (Fla. 1st DCA 1966); *Collins v. Jackson County, supra*; Ops. Att'y Gen. Fla. 75-309 (1975) and 73-222 (1973).

[4] Section 252.31, Fla. Stat., contains the short title.

[5] Section 252.38(3)(a)4., Fla. Stat.

[6] Section 252.38(3)(a)5.a., Fla. Stat.

[7] *Id.* at 5.g.

[8] Section 252.38(3)(a)5.h., Fla. Stat.

[9] Section 252.38, Fla. Stat.

[10] *See* Ops. Att'y Gen. Fla. 98-22 (1998) and 88-52 (1988) (upon making the appropriate findings that an expenditure of county funds for lobbying serves a county purpose and is in the public interest, the board of county commissioners may expend county funds for lobbying); 86-87 (1987) and 74-227 (1974) (municipal funds may be used to support position on annexation).

[11] *See Harris v. Baden*, 17 So. 2d 608 (Fla. 1944), *Leonard v. Nat Harrison Associates, Inc.*, 122 So. 2d 432 (Fla. 2d DCA 1960).

[12] *National Rating Bureau, Inc. v. Florida Power Corp.*, 94 So. 2d 809 (Fla. 1956).

[13] *Okaloosa County Gas District v. Enzor*, 101 So. 2d 406 (Fla. 1st DCA 1958).

[14] The statute provides that it applies to a structure or conveyance:

"1. As to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in s. 810.011; or
2. If the property is the unenclosed curtilage of a dwelling and the offender enters or remains with the intent to commit an offense thereon, other than the offense of trespass, commits the offense of trespass on property other than a structure or conveyance."

[15] Consent is an absolute defense to an action for trespass provided the consent is given by the possessor of the land or one competent and authorized to give such consent and provided further that the acts of the party accused of the trespass do not exceed, or are not in conflict with, the purposes for which such consent was given. *See* 55 Fla. Jur. 2d *Trespass* s. 9; *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 US 930, 53 L.Ed.2d 245, 97 S.Ct. 2634 (U.S. 1977); *Florida Power Corporation v. Parker*, 370 So. 2d 45 (Fla. 1st DCA 1979), *cert. denied*, 381 So. 2d 766 (Fla. 1980).