IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO: CA05-694

DIVISION: 65

ROBERT and LINNIE JORDAN,
Husband and wife, et. al.,

Plaintiffs/Counterclaim Defendants,

Vs.

ST. JOHNS COUNTY,

Defendant/Counterclaim Plaintiff/
Third Party Plaintiff,

THE ABOVE REFERENCED COUNTERCLAIM
DEFENDANTS and JAMES L. MCMILLAN as
Successor trustee to the DOROTHY K. MCMILLAN
MARITAL TRUST and DOROTHY K. MCMILLAN
REVOCABLE TRUST;

And

GUNDIE BONNER, et. al.,

Third-Party Defendant.
_____/

FINAL SUMMARY JUDGMENT

This cause was before the Court upon Defendant St. Johns County's (the "County") Amended Motion for Partial Summary Judgment (Counts I, II, and IV), Amended Motion for Summary Judgment as to Impaired Access (Count III), and Motion for Summary Judgment on Count V of the Amended Complaint. The County seeks judgment in its favor on all Counts of Plaintiff's Amended Complaint. The Court has reviewed said Motions, has heard argument of able counsel, has reviewed the extensive memoranda , exhibits and citations therein, and otherwise being fully advised in the premises, upon consideration thereof finds that there exist no genuine issues of material fact and that the County is

entitled to Final Summary Judgment on all Counts of the Amended Complaint. In support thereof, the Court

FINDS:

PLAINTIFFS' CAUSES OF ACTION

Plaintiffs filed their Amended Complaint for Declaratory Relief, Injunctive Relief, and Inverse Condemnation. In **Count I** for Declaratory Relief, Plaintiffs seek a ruling that the County has a duty to provide them with emergency services such as fire protection, ambulance and police services. Because the county road to their properties is in poor condition, they also seek a ruling that the County must make reasonable repairs and maintain the road to state and local specifications in order to assure Plaintiffs' access to emergency services, and access to their properties. In **Count II** for Injunctive Relief, Plaintiffs ask the Court for a temporary and permanent injunction requiring the County to repair and maintain the road, based on the same factual scenario. (In their Response in Opposition to St. Johns County's Motions for Summary Judgment, Plaintiffs concede they are no longer seeking *temporary* injunctive relief). In **Count III** for Inverse Condemnation, Plaintiffs aver that the County's failure to properly maintain the road has compromised their access, and such inaction amounts to a taking of their property rights without just compensation. In **Count IV** for Declaratory Judgment, Plaintiffs seek a declaration that County Ordinances which established a building moratorium violated their substantive due process rights, causing damages. Lastly in **Count V** for Inverse Condemnation, Plaintiffs allege that the moratorium deprived them of the beneficial use of their properties creating a taking for which they should be compensated.

FINDINGS OF FACT

The following material facts are not in dispute:

1. Plaintiffs are owners of land located at Summer Haven, a subdivision in the southernmost part of St. Johns County. Their lots face the Atlantic Ocean, and are separated from the water only by a road and right of way owned by the County. On the rear, the lots abut the Summer Haven River. The land in question is essentially a sand dune approximately 1.6 miles long with water on both sides. It consists of 65 lots (referred to as "Blocks" on the plat map) with Lot 1 being at the northern tip and Lot 65 at the southern tip. There are no trees on Summer Haven other than a few sporadic palms.

2. The Plaintiffs access their properties (as best they can) by the County owned road, known as "Old A1A." "Old A1A" runs parallel to the ocean on this spit of land and connects to the newer SR A1A at the north and south ends. "Old A1A" was acquired by the County in 1979 after the State abandoned it and re-routed SR A1A westward of the Summer Haven River. The State abandoned the road because of extensive erosion. (*Gee & Jensen Beach Erosion Analysis*). The road had been degraded from storms and tides before

the County acquired title from the State. The original house built at Summer Haven, which existed there in 1952, eventually floated off its foundation. The newer built homes are all elevated to comply with "modern coastal high hazard building practices."Id.

3. Of the Plaintiffs whose testimony is included in the record, owners of two lots acquired their property in 1980; owners of two other lots acquired their property in 1981; and fourteen others acquired their property after 1987. When the County acquired the road in 1979 there were only three residences erected along "Old A1A". Since then 25 residences have been permitted. All of the residences are located seaward of the Coastal Construction Control Line.

4. At the time the County acquired the road, part of the pavement was washed out. According to Plaintiffs, the road was paved from south to north to at least Block 22 and maybe as far as Block 15. Plaintiffs further acknowledge that the mean high water mark encroached on the northern part of the road from five to ten feet in the area of Blocks 1 through 11. The road was passable although not completely paved when the county acquired it in 1979. In 1981 a strong Nor'easter washed out chunks of the road in the northern part and took out the dunes in that area. In 1984 approximately one mile of the road was totally destroyed by storms.

5. The road has steadily deteriorated since the county acquired it. At present, there are three basic sections of the road: the south portion which is paved; the middle portion which is not paved but is graded; and the north portion which is non-existent, with part of the road area and all of the right of way being below the mean high water mark. At the north end owners access their property via an established way of necessity over private property, referred to as the "pig trail."

6. Since this suit was filed a substantial breach has occurred in the north section creating a "new inlet." According to Plaintiffs, "The Taylor property (Block 3) is now gone and underwater during high tide. Recent events and the history of the area indicate, unless the problem is addressed and the County takes corrective action, the entire county road and public right of way at Summer Haven will disappear within 5 to 10 years..." *(See, Plaintiff's "Old A1A" at Summer Haven—Background History and Facts, 1978 to the Mid 1980's, at page 26)(hereinafter referred to as "Plaintiff Background History and Facts).*

7. The County's history of maintaining and repairing the road has been spotty. Throughout its ownership the County has kept "Old A1A" on its list of public roads. It has provided some routine maintenance such as: repairing potholes in the asphalt and clearing off sand in the south section; putting lime rock down on the unpaved middle section (until prohibited by state agencies) and grading; and knocking down escarpments or drop-offs with heavy equipment in the north section. The county's efforts in this regard are largely complaint driven or at the request of owners. (*See, Joseph Stephenson, St Johns County Public Works Director, Transcript of Proceedings September 7, 2007).*

8. In 1981 after a heavy Nor'easter, the County acting through its Board of County Commissioners voted 3-2 to spend $8,250 make the road "passable." This was done at the request of a Summer Haven property owner (Block 23 in the middle section) whose property was rendered practically inaccessible because of the storm damage. The Board minutes clearly indicate that the County was in a quandary trying to solve the impossible problem of spending money to re-establish the road, knowing that future washouts were inevitable. In the Board minutes, one commissioner emphasized that "this is a one-shot repair and will *not* be repeated if another storm washes it away" and that the County "will either abandon the road or do nothing if that happens." The Chairman advised "that anything done would not necessarily be permanent, the next storm could wipe it all out." (*BOCC Minutes-- November 24, 1981*).

9. The storms in 1984 and 1985 did wipe out a large portion of the road. The Board voted *not* to spend any money to rebuild the road. (*BOCC Minutes-- October 22, 1985*). By one estimate the cost to maintain "Old A1A" would be $15,000 every 6 to 9 months or more frequently depending on the weather. (*BOCC Minutes –April 23, 1985*). In 1985 owners petitioned the Board to vacate the road so they could have it as a private road. The Board clearly admitted that "the county is in a dilemma" and there is "not a simple solution," noting that the Department of Natural Resources had enacted more stringent rules that would affect the County's options for repairs. (*BOCC Minutes-- November 12, 1985*).

10. In January 1986 the Board voted not to vacate the road, but ordered an engineering study. The firm of Gee and Jenson submitted a Beach Erosion Analysis in August, suggesting five alternative resolutions---from "do nothing," to installing a rip-rap revetment, to three different scenarios using long sand-filled fabric tubes placed parallel to the road. The costs ranged from $2,690,000 to $607,200 with the level of protection being directly related to cost.

11. In March 1986 the Board gave an owner permission to rebuild 500' of the road, but emphasized that the rebuilt portion "will be maintained by the property owners and at no time will the county spend money to maintain that road." (*BOCC Minutes –March 25, 1986*).

12. The County expended very little money on repairs or maintenance until 2000 when the County was able to obtain money from FEMA to make emergency repairs to address hurricane damages. The FEMA repair projects took place from 2001 to 2005, but they were temporary "fixes" not intended to be a permanent solution.

13. The County points out that $2,345,328 was expended from fiscal years 2000 to 2005 to repair "Old A1A." That averages $244,305 a year per mile, as compared to an average of $9,656 a year per mile for all other county roads. The Plaintiffs do not dispute the County's figures but point out that the County contributed only 5%-12.5% on the various projects with the rest of the money coming from FEMA (75%-90%) and the State (5%-12.5%).

14. In 2005 the County exercised its police power for the protection of public health and safety, and enacted a temporary one-year moratorium on building permits at Summer Haven (*Ordinance 2005-85).* According to the Ordinance, continuing erosion of the road was creating a difficult environment for the delivery of emergency services. "Due to repeated storm events, resulting erosion and required repeated repairs, there are increasing public safety concerns pertaining to placing more residents or additional construction into the moratorium subject area." *Id.* Building permits for new residences were prohibited unless the owner could show "fully compliant access" for the next ten years. The Ordinance did allow for repairs not exceeding 50% of the home's value, alterations that would not increase the existing footprint of homes, boat houses, structures not intended for human habitation, and piers. The Ordinance indicated that the County was "actively pursuing the feasibility of financing options that could best support appropriate engineering, permitting, and construction activities, to improve access reliability and public safety in the subject area. " *Id.*

15. The moratorium was renewed by the County and stayed in place until its repeal in September 2008 (*Ordinance 2008-45).* The repeal ordinance also created the Summer Haven Municipal Service Taxing Unit (MSBU) to assess taxes on Summer Haven property owners "to provide road construction, beach erosion control and renourishment services." (As of this writing, the MSBU has not been implemented—no special taxes have been assessed.). During the moratorium period, none of the Plaintiffs applied for a permit to build a residence. One owner (not a party to this law suit) did apply and was granted a permit to build a residence, albeit with a number of requirements to satisfy.

16. Also during the moratorium period, the County obtained an extensive and expensive engineering study (PBS&J study) "to determine the erosion pattern at Summer Haven Beach, to determine whether or not any engineering solutions to the erosion problem were possible and, if so, to determine the feasibility and order-of-magnitude cost of such solutions." *(Affidavit of Joe Stephenson, St. Johns County Public Works Director--January 14, 2009).* The study found that erosion at Summer Haven was limited to a shoreline "envelope" where periodic erosion occurred, and it would be unlikely that erosion would advance to overwhelm the upland area. (This assessment has proven to be incorrect because storm waters have caused a breach in the north section, creating a "new inlet"). The study also determined that the most likely solution to the problem, which could likely be permitted by the Florida Department of Environmental Protection, was a beach renourishment program. (*Stephenson Affidavit*). The initial cost of the program would be approximately $13.1 million, with an additional $5.7 to $8.5 million every three to five years thereafter. (*Stephenson Affidavit*). A beach renourishment project would be a capital expenditure that would have to be approved annually by the Board of County Commissioners. (*Stephenson Affidavit*).

17. While the Moratorium was in effect, the County also erected a berm along the length of "Old A1A"and repaved the southern section (FEMA projects). Routine maintenance, sporadic as it might have been, also took place.

18. As to emergency services to Summer Haven, since acquisition of "Old A1A" the county has always responded to calls. There has never been a call that the county has not responded to. Because of the road conditions the county is not able to take large, heavy trucks to respond. However the County has smaller vehicles, boats, and all terrain vehicles that can be used. As in any situation, the type of equipment, the number of responders, and the degree of services is decided by the supervisor in charge at the scene. (*See, Bobby Hall, St. Johns County Fire Rescue Chief, Transcript of Proceedings June 25, 2007).*

19. Additional findings of fact are set forth below as they relate to the specific Counts of the Amended Complaint.

ANALYSIS AND CONCLUSIONS OF LAW

20. Summary Judgment is not to be granted unless there is no genuine issue of material fact, and the Court must draw every possible inference in favor of the non-moving party. *Craven v. TRG-Boynton Beach Ltd.*, 925 So.2d 476 (Fla. 4th DCA 2006). As counsel for the County stated in his summation, "It's the facts that matter, that are not in dispute." The Court agrees.

COUNT I: THE REPAIR, MAINTENANCE AND/OR RESTORATION OF "OLD A1A" IS DESCRETIONARY WITH THE COUNTY. THE LEVEL OF EMERGENCY SERVICES PROVIDED TO RESIDENTS OF "OLD A1A" IS DISCRETIONARY WITH THE COUNTY.

21. St Johns County is a political subdivision. *Section 1.01(8), F.S.* Counties are established under the state Constitution at Article VIII (1) which provides for local government at the county level. The administration of local government is set out by statute. *Chapters 124-164, F.S.* Their powers and duties are set out by statute.

22. Under Section 125.01 , entitled "*Powers and duties*," the specific powers and duties of the county are enumerated and include *inter alia* the power to : adopt rules of procedure; provide for prosecution and defense of legal causes; provided and maintain county buildings; provide fire protection; provide hospitals, ambulance service, and health and welfare programs; provide parks, recreation areas, libraries and museums; prepare and enforce comprehensive plans; establish and enforce zoning and business regulations; adopt housing codes; establish community redevelopment programs, flood and beach erosion control and drainage; provide waste and sewage collection; provide public transportation; provide and regulate roads, tunnels and bridges; license and regulate taxis; regulate the sale of alcohol; enter into inter-local agreements; establish/abolish municipal service taxing or benefit units; levy and collect taxes; borrow and expend money;

issue bonds; require reports and accounts from county offices and officers; adopt ordinances and prescribe fines and penalties; create civil service systems and boards; require annual budgets from county officials; employ independent certified accountants to audit funds; place questions or propositions on the ballot; approve or disapprove industrial bonds; use ad valorem taxes for preservation and restoration of ecosystems and historical sites; enforce the Florida Building Code; and prohibit tourist business entities from advertising themselves as convention or tourist bureaus. *Section 125.01(a)-(dd),F.S.*

23. Additionally, "The enumerated powers herein shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated, including, specifically , authority to employ personnel, expend funds, enter into contractual obligations and purchase or lease and sell or exchange real or personal property." *125.01(3)(a), F.S.*

24. Notably under the statue that sets forth the "Powers and duties" of the county (*Section 125.01, F.S.*) there does not appear to be any statutory mandate for the county to provide and maintain roads. Rather the language of the statute provides that the county shall have the *power* to provide and regulate roads. The primary statutory source for the "powers and duties" of county government is long on "powers" but woefully short on "duties." The statute gives the county "the *power* to carry on county government." *Section 125.01(1).*

25. Roads are specifically dealt with in the Florida Transportation Code, Chapter 334, F.S., which delineates the responsibilities of the state, the counties and municipalities "in the planning and development of transportation systems serving the people of the state and … the development of an integrated balanced statewide transit system." *Section 334.035, F.S.* Under the code, "The prevailing principles to be considered in planning and developing these transportation systems are: preserving the existing transportation infrastructure; enhancing Florida's economic competitiveness; and improving travel choices to ensure mobility. This code is necessary for the protection of the public safety and general welfare and for the preservation of all transportation facilities in the state." *Id.*

26. The statute gives guidance by setting forth aspirational principles, as distinguished from mandates or duties.

27. Chapter 336, County Road System, sets up a county road jurisdiction and system, and provides a formula of fuel tax distribution that allows funding for county road construction, maintenance and reconstruction. County commissioners are "invested with the general superintendence and control of the county roads and structures within their respective counties, and they may establish new roads, change and discontinue old roads, and keep the roads in good repair in the manner herein provided." *336.02(1)(a), F.S.* The statute uses the permissive "may" rather than the mandatory "shall." Unfortunately, after a thorough reading of the statute, the court has found no guidance as to how a county must maintain a deteriorating road.

28. The statute does provide the county with authority to levy a gas tax that can be used only for transportation expenditures, but it does not tell the county how to spend the tax money. *Section 336.021, F.S.*

Any surplus of gas tax funds not otherwise committed by the county… "shall be used on any road in the county at the discretion of the county governing body." *336.023(2), F.S.* Likewise, commissioners "may employ labor and provide equipment as may be necessary…for constructing and opening of new roads or bridges and repair and maintenance of any existing roads and bridges."*Section 336.41, F.S.* Again, the statute is discretionary.

29. Just as with state road programs, the county's road program is subject to funding availability. In deciding where the transportations funds should be spent, the county commissioners must consider such things as priorities, traffic volumes, public health and safety, maintenance costs, environmental impact, functional classifications, available right of way, amount of work involved, degree of difficulty, availability of necessary materials, feasibility, and local needs. Certainly, the decision of how to allocate limited county transportation funds is within the discretion of the Board of County Commissioners after considering all relevant factors.

30. The County concedes it has a duty to maintain its roads, based on case law cited in its Amended Motion for Partial Summary Judgment: *Trianon Park Condominium Association , Inc. v. City of Hialeah*, 468 So.2d 912 (Fla. 1985) (hereinafter "*Trianon*"); *Department of Transportation v. Neilson*, 419 So.2d1071 (Fla. 1982) (hereinafter "*Neilson*"); and *Perez v. Department of Transportation*, 435 So.2d 830 (Fla. 1983) (hereinafter "*Perez*"). Plaintiff's counsel correctly argues that these cases were decided in the context of governmental tort liability, as to whether a governmental entity can be held liable in tort for its own negligent acts. However, the analysis in those cases is relevant to the case *sub judice.*

31. Basically those courts made a distinction between a government's *actions* and its *decisions*. This distinction is sometimes referred to as "operational-level" (actions) as opposed to "judgmental planning level" (decision making). *See, Neilson* at 1073. A governmental entity has a common law duty of care, just like any individual, not to be negligent in its conduct. *See, Trianon.* A governmental entity also has a duty to warn for known dangers. *See, Perez.* Under Section 768.28, F. S., sovereign immunity is waived and the government may be liable for its tortuous conduct. Examples of conduct that may expose a government to tort liability are government employees negligently operating a motor vehicle, or negligently handling a firearm in the course of employment. *See, Trianon* at 920.

32. By contrast "judgmental, planning-level" decisions are immune from suit. *Neilson,* at 1075, citing *Commercial Carrier Corp. v. Indian River County,* 371 So.2d 1010 (Fla. 1979). Decisions to build or change a road, and all the determinations inherent in such a decision, are of a judgmental, planning- level type. *Neilson* at 1077. There is no liability for the failure of a government entity to build, expand, or modernize capital improvements such as buildings or roads. *Trianon* at 920. The basic design of a roadway and decisions concerning whether or not to upgrade and improve a roadway are judgmental, planning-level

functions. *Perez* at 831. A governmental entity's decision not to build or modernize a particular improvement is a discretionary judgmental function. *Id.*

33. An action taken by the majority board of 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. *Davis v. Keen*, 192 So. 200 (Fla. 1939). See also, *Mathis v. Lovett*, 215 So.2d 490 (Fla. 1st DCA 1968). A court cannot invade the administrative duties of a board of county commissioners, but can only determine whether their action was illegal *vel non. Broward County Rubbish Contractors Association v. Broward County,* 112 So.2d 898 (Fla. 2d DCA).

34. The courts cannot interfere with a government's discretionary judgmental decisions. Trianon, *at* 920. The power of the state government is divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided in the Constitution. *Art II, Section 3, Fla. Const.*

35. Both Plaintiffs and the County cite to the case of *Ecological Development, Inc. v. Walton County,* 558 So.2d 1069 (Fla. 1st DCA 1990) (hereinafter "*Walton County*"), in support of their respective positions. In that case the Board of County Commissioners voted to stop all maintenance and repairs on roads in a subdivision that were previoulsy dedicated and accepted by the county as public roads. The county put the roads on a "no maintenance" status because they had been improperly constructed, resulting in "considerable maintenance problems." The developer sought damages, declaratory and injunctive relief, and a writ of mandamus. The lower court denied all relief. The appellate court held that the developer was entitled to declaratory relief, finding that the county could not abandon its obligation to maintain its public roads. The court supported its ruling by quoting from the Florida Supreme Court in *State ex rel White v. MacGibbon*, 79 Fla. 132, 84 So. 91 (1920): "Under our statutes the 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 so to locate, build, repair, and keep said roads in good order.*" 558 So.2d at 1071 (emphasis supplied by the *Walton County* court).

36. The Florida Supreme Court in *MacGibbon* cited to no statute, case or reference to support its statement that the County had a "duty" to keep its roads in "good order." In fact, in *MacGibbon* the duty of the county to maintain its roads was not the issue. There, the Board of County Commissioners had brought an action for mandamus against the Clerk of Court to require him to make funds available to purchase clay pits for construction of roads. Even if one accepts the "duty" language in MacGibbon as something more than *obiter dictum*, no Florida court except *Walton County* has ever used the quoted language in *MacGibbon* to impose a duty on the county to maintain its roads in "good order."

37. Still, in its ruling the *Walton County* court deferred to the county's discretion: "Finally, while we find that declaratory relief is warranted, we find *no basis* for relief by way of injunction or writ of mandamus

to compel the county to *immediately resume maintenance work*, or to *restore the roads to their prior condition*." 558 at 1072 (emphasis supplied). The court specifically held that the "relief sought in this proceeding does not encompass any declaration by the court with respect to the county's exercise of its discretion regarding the frequency, quality, or extent of maintenance for the roads in question." Id.

38. Essentially the *Walton County* court found that the county could not place public roads on a "no maintenance" schedule unless it was willing to abandon them through statutory procedures-- but the frequency, quality and extent of maintenance of the roads was discretionary with the county.

39. On the issue of emergency services, the Court finds that the County has no duty to provide emergency services to the individual Plaintiffs in this case. *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So.2d 912, 914-5 (Fla. 1985) ("There has never been a common law duty to individual citizens for the enforcement of police power functions."). "How a governmental entity... exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been common law duty of care. This discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials, as well as the discretionary authority given fire protection agencies to suppress fires."*Id.* at 919.

40. In accord with its holding in *Trianon*, the Florida Supreme Court in *City of Daytona Beach v. Palmer*, 469 So.2d 121 (Fla. 1985) held that, "[T]here has never been a common law duty of care to individual property owners to provide fire protection services. Further, we find no statutory duty of care upon which to base governmental liability for [failure to provide such services]." *Id.* at 122.

41. Plaintiffs argue that the County's duty to provide emergency services to its citizens derives from Section 252.38, *Florida Statutes,* St. Johns County Ordinance 94-12 (later replaced by Ordinance 2008-34) and St. Johns County Ordinance 95-17. Plaintiffs further argue that such legislative enactments create an independent duty to provide emergency services to the individual Plaintiffs in this case.

42. However, under Florida law, it is clear that legislative enactments for the benefit of the general public do not create an independent duty to individual citizens, unless the enactments specifically indicate an intent to do so. *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 408 So. 2d 912, 922 (Fla. 1985) (Statutes and regulations enacted under the police power to protect the public and enhance the public safety do not create duties owed by the government to citizens as individuals without the specific legislative intent to do so.) *See also Chancellor Media Whiteco Outdoor v. Department of Transportation*, 795 So. 2d 995 (Fla. 5th DCA 2001) (rejecting plaintiffs' claim that Chapter 590 of the Florida Statutes, which describes the duties and responsibilities of the Division of Forestry, created a duty of protection during wildfires).

43. This Court finds that Section 252.38, *Florida Statutes,* does not create a statutory duty on the part of the County to provide emergency services to the individual Plaintiffs. Section 252.38 is part of the "State

Emergency Management Act." Section 252.311, which sets forth the legislative intent of the Act, makes it clear that: (1) the statute was enacted to protect the public and enhance the public safety, and (2) there was no specific legislative intent to create duties owed to individual citizens. Moreover, Section 252.33 states that the Act "shall not be construed to affect the jurisdiction or responsibilities of police forces or firefighting forces."

44. The Court also finds that neither St. Johns County Ordinance 94-12, nor its successor Ordinance 2008-34 creates any duty to provide emergency services to the Plaintiffs in this case. Section 5 of Ordinance 94-12 does state that the County shall make available fire protection services and facilities "to and for all assessed property within the MSBU." (Emphasis added.) However, no property was ever assessed for the cost of fire services under that Ordinance or under its successor Ordinance 2008-34. (See Exhibit P to Defendant's Motion for Partial Summary Judgment.) Therefore, neither ordinance ever created a duty to provide fire services to any property owner in St. Johns County.

45. With regard to Ordinance 95-17, the Court finds that this is a general ordinance created to establish uniform County-wide standards for certification of basic life-support, advance life support, and non-emergency medical transportation services and to create rules and regulations for operation of ambulances and other medical transportation services in St. Johns County. When reviewing this ordinance, it is clear that: (1) this ordinance was enacted to protect the general public and enhance public safety, and (2) there was no specific legislative intent to create duties owed to individual citizens. Therefore, the Ordinance does not create any duty to individual citizens. Based on the foregoing the Court finds as a matter of law that the County has no duty to repair or restore "Old A1A" or to provide fire protection for Plaintiffs in any particular manner other than as established in the discretion of the Board of County Commissioners.

COUNT II: PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF.

46. Plaintiffs have requested that this Court issue a permanent injunction requiring the County to repair and maintain "Old A1A" and the underlying right of way in a reasonable manner so that they and emergency services vehicles will have uninterrupted and dependable access to the their property. The County has been challenged in its maintenance efforts due to the physical conditions present at Summer Haven and limitations imposed by the Florida Department of Environmental Protection. (Exhibits B and C of Defendant's Motion for Summary Judgment). Some lots are accessable only by ATV'S and four-wheel drive vehicles.

47. If Plaintiffs' claims for permanent injunction were granted, the Court would be mandating a requirement of perpetual specific performance by St. Johns County to maintain and repair "Old A1A" in a manner acceptable to the Plaintiffs. Entry of such an order would entangle the Court in road maintenance issues to an unprecedented and unacceptable degree, and would in effect transform the Court into a permanent

oversight authority for St. Johns County Public Works Department. Florida law does not permit entry of such an injunction.

48. Perpetual injunctions for specific performance are unenforceable, and trial courts abuse their equity powers if they attempt to impose them. *Abbey Park Homeowners Association v. Bowen*, 508 So.2d 554 ,555 (4th DCA 1987); *Indian Trail Homeowners Assn., Inc. v. Roberts*, 577 So. 2d 998, 999 (Fla. 4th DCA 1991). Perpetual injunctions are improper because they "project... the judiciary into overseeing specific performance ad infinitum... an endless duty inappropriate to its function." *Florida Jai Alai, Inc. v. Southern Catering Services, Inc.*, 388 So.2d 1076, 1078 (Fla. 5th DCA 1980) ("We are not aware of any authority which would support endless injunctive relief of this sort.") *Id.* Florida law does not permit entry of such injunction.

COUNT III: PLAINTIFFS ARE NOT ENTITLED TO A FINDING OF INVERSE CONDEMNATION.

49. Plaintiffs have alleged that the County's inaction in failing to properly maintain and repair the "Old A1A" right of way has caused diminished access to their properties and that an inverse condemnation "taking" has occurred as a result.

50. It is undisputed that "Old A1A" and its right of way have been repeatedly damaged by storms and related wave action. (Amended Complaint, ¶¶ 33-47). Although 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. St. Johns County has made efforts to protect, maintain and repair "Old A1A," right of way, but obviously not in a manner acceptable to Plaintiffs.

51. There is no evidence in the record that the County has engaged in any affirmative act that caused or contributed to causing the diminished access alleged by Plaintiffs. Neither is there any evidence that St. Johns County has ever taken any legislative action to vacate or abandon the road and right of way.

52. The 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:

> Proof that the governmental body has effected a taking of the property is an essential element of an inverse condemnation action . . . [A] taking may occur when governmental action causes a loss of access to one's property even though there is no physical appropriation of the property itself. (Emphasis added.) *Rubano v. Department of Transp.*, 656 So. 2d 1264, 1266 (Fla. 1995) (citations omitted).

53. Governmental actions may include such things as legislation to limit driveway openings to property, closing an abutting street, or changing the grade of an abutting street. *Id.* at 1267.

54. Based upon *Rubano* and other relevant Florida case law, it is clear that the governmental act causing loss of access must be affirmative in nature. See e.g. *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 judgment of inverse condemnation when the county government blocked access to property by constructing a retaining wall directly in front of their property); *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.)

55. The legislative action of vacating a roadway can also form the basis for an inverse condemnation claim. However, this Court is unaware of any Florida case upholding such a claim in the absence of a resolution, ordinance, or other affirmative enactment by a legislative body establishing the *de jure* vacation or abandonment of a roadway. See e.g. *Pinellas County v. Austin*, 323 So. 2nd 6 (Fla. 2nd DCA 1975) (a street can only be vacated through approval of an appropriate public body and, by having taken action necessary to close a street, such body becomes liable for compensation to those whose right of access has been taken away.) There is no record evidence of any such enactment by St. Johns County in the instant case.

56. 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. In the recent case of *Drake v. Walton County* __So. 3d_ , 2009 WL 981218 (Fla. 1st DCA, April 14, 2009), the Court held that county action in physically diverting hurricane floodwater onto the appellant's land constituted inverse condemnation, but also stated that the case "would be in a completely different posture had appellants' property been flooded by the hurricane itself, without the county's intervention." In the instant case, as with similar facts in *Drake v. Walton County*, "Old A1A" has been damaged by storms and ocean wave action, without St. Johns County's intervention.

57. Other jurisdictions have reached similar conclusions. See, e.g., *Ressel v. Scott County*, 927 S.W. 2nd 518 (Mo.App.Ed., 1996) (holding that there is no viable claim for inverse condemnation when the asserted damage is the result of natural forces). See also *Brown v. School Dist. Of Greenville County*, 251 S.C. 220, 161 S.E.2d 815, 817 (S.C. 1968) (Plaintiff's complaint that his property was damaged by the county's refusal to alter the slope of a 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); *Wildensten v. East Bay Regional Park Dist.*, 231 Cal.App.3d 976, 283 Cal.Rptr. 13, 16 (Cal. Appl. Dist. 1991) (Plaintiff's complaint that a park district's refusal to stabilize its undeveloped land which created landslides that damaged his property did not state a claim for inverse condemnation since it did not allege that an affirmative government act caused the landslides); *Electro-Jet Tool & Mfg. Co. v. City of Albuquerque*, 114 N.M. 676, 845 P.2d 770, 773 (N.M. 1992) (Plaintiff's complaint that city operated drainage ditches that flooded its property was insufficient to state a claim for inverse condemnation since it failed to allege that a specific, deliberate government act caused the flooding); *Starks v. Albemarle County*, 716 F.Supp. 934, 938 (W.D. Va. 1989) (Plaintiffs' complaint that 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 governmental act caused the flooding); *See also, DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.3d.2d 249 (1989) (holding that 14th Amendment to the Federal Constitution does not require states to act affirmatively to protect the...property of its citizens). " The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall...deprive any person of life, liberty, or property, without due process of the law." "But nothing in the language of the Due Process Clause itself requires the State to protect life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, *not as a guarantee of certain minimal levels of safety and security.*") *Id.* At 195. (emphasis supplied).

58. In the instant case, as with the property owners in the cases cited above, there is no genuine issue of material fact regarding the cause of the impairment of access. Specifically, it is uncontroverted that damage to the "Old A1A" right of way has historically been caused by storms and ocean wave action. Alleged County inaction in the face of such damage cannot, as a matter of law, support Plaintiffs' inverse condemnation claim in this case. The Court finds as a matter of law the County has not effectuated a taking of Plaintiffs' properties.

COUNT IV: THE TEMPORARY BUILDING MORATORIUM ON SUMMER HAVEN WAS REASONABLY RELATED TO THE COUNTY'S OBJECTIVE OF PROTECTING THE PUBLIC HEALTH AND SAFETY. THE MORATORIUM WAS VALID AND DID NOT VIOLATE PLAINTIFFS' SUBSTANTIVE DUE PROCESS RIGHTS.

59. In addition to storm damage, Plaintiffs allege that the County's failure to maintain and repair "Old A1A" in a reasonable manner has deprived them of their only viable emergency services access route. Without question, "Old A1A" and the Summer Haven subdivision represent a difficult environment for providing emergency services, as well as routine matters such as garbage collection and repairs services.

60. On September 15, 2005, the County enacted a temporary moratorium prohibiting issuance of residential building permits at Summer Haven. Certain construction projects, including structures not intended for habitation, were allowed. The language of the moratorium ordinance ("2005 Moratorium") indicates that it was intended to protect the public's health, safety, and welfare in the subject area while the County investigated the feasibility of improving public safety there:

> WHEREAS, the Board of County Commissioners ("Board") of St. Johns County, Florida is entrusted with the responsibility to establish reasonable ordinances, policies and regulations to further the general public health, safety and welfare of the community; and
>
> WHEREAS, the Board has heard evidence pertaining to the effects of repeated storm events resulting in erosion and requiring repeated repairs to a portion of the particular area of St. Johns County known as Summer Haven (Blocks 3-65, Map Book 155); and
>
> WHEREAS, the Board finds that preserving the status quo pertaining to construction activity in the subject area is rationally related to the County's objective of protecting the general public health, safety, and welfare of the community; and
>
> WHEREAS, the Board finds that Blocks 3-65, although each distinct, are similarly situated in terms of presenting a difficult environment for fire/rescue, and other emergency services; and
>
> WHEREAS, a temporary building moratorium does not rise to the level of a regulatory taking if the moratorium is rationally related to advancing a legitimate public purpose. See, *WCI Communities, Inc. v. City of Coral Springs*, 885 So.2d 912 (Fla. 4th DCA 2004)[1]; and
>
> WHEREAS, the St. Johns County enactment of a temporary moratorium in this instance is for a public purpose (public health, safety and welfare) that is in a higher degree than was found lawful in the recent *WCI Communities* case; and
>
> WHEREAS, when legislation is passed that does not target a protected class, the rational basis test is applied; and
>
> WHEREAS, in the present instance, there is no legally recognized special "protected class;" and
>
> WHEREAS, under the rational basis test, judicial review gives great deference to legislation; and
>
> WHEREAS, public health, safety and welfare is a legitimate public purpose recognized by Florida courts; and
>
> WHEREAS, on May 4, 2005, the Board, as a preliminary step toward forming a formal moratorium, directed County staff to cease approvals of building permits for a portion of the particular area of St. Johns County known as Summer Haven (Blocks 3 through 65 (Map Book 1, Page 155), "the subject area"); and
>
> WHEREAS, on June 6, 2005, members of the Board requested staff to research financing options for engineering and construction activities and to prepare a building permit moratorium ordinance for the subject area.
>
> NOW THEREFORE, BE IT ORDAINED by the Board of County Commissioners of St. Johns County, Florida as follows:

[1] WCI Communities, Inc. v. City of Coral Springs, 885 So. 2nd 912 (Fla. 4th DCA 2004). ("It is well settled that permissible bases for land use restrictions include concerns about the effect of proposed development on traffic, on congestion, on surrounding property values, on demand for city services, and on other aspects of the general welfare.")

Section 1. Findings and Statement of Intent. The Board of County Commissioners of St. Johns County, Florida (the "Board") hereby finds, determines and declares the following:

A. Due to repeated storm events, resulting erosion and required repeated repairs, there are increasing public safety concerns pertaining to placing more residents or additional construction into the moratorium subject area.

B. The subject area has unique characteristics due to its history, proximity to water bodies, and property features that distinguish the subject area from other portions of the County in terms of roadway erosion problems.

C. St. Johns County is actively investigating the feasibility of financing options that could best support appropriate engineering, permitting, and construction activities, to improve access reliability and public safety in the subject area.

61. The moratorium was extended twice for a total of 36 months. On September 2, 2008, the moratorium was repealed (Ordinance No. 2008-45) ("the Repeal Ordinance") for the following stated reasons:

WHEREAS, in February 2006, the Board enacted Ordinance No. 2006-15 creating the Summer Haven Municipal Service Taxing Unit ("MSTU") and authorized the MSTU to annually levy ad valorem taxes within the MSTU to provide road construction, beach erosion control and renourishment services, facilities and programs, administrative, legal and other expenses pertaining to the MSTU; and

WHEREAS, prior to the Board collecting funds through the MSTU, the County authorized funding pertaining to a beach erosion control study for the purposes of Summer Haven; and

WHEREAS, during the period of temporary moratorium, the County devoted significant activity to the subject area pertaining to beach renourishment, reasonable maintenance under the circumstances; and

WHEREAS, the County, through contract with Post, Buckley, Schuh & Jernigan ("PBS&J") contracted for and received a beach engineering study providing engineering data and financial construction estimates; and

WHEREAS, significant among the findings of the PBS&J study was the identification of a shore line envelope with a seaward edge and a landward edge. While periodic erosion within the envelope has occurred, there is no indication that the erosion will advance to the point where it will generally and permanently overwhelm the upland portion of the subject area; and

WHEREAS, access to the properties in the subject area has not changed significantly since the enactment of Ordinance No. 2005-85 in September 2005; and

WHEREAS, Building Code requirements pertaining to safety have become more stringent since the enactment of the moratorium in 2005 and now better protect the public; and

WHEREAS, one or more property owners from the subject Summer Haven area have addressed the Board and indicated that they do not want a new road built, that they are aware of the environmental and beach erosion circumstances of the Summer Haven area, but are willing to build in the area accepting those circumstances; and

WHEREAS, there is disagreement among various property owners of the subject Summer Haven area as to whether the area should be fully accessible or left more remote, or to what extent any possible engineering remedy to the subject area would be, including associated costs for the benefited property owners; and

WHEREAS, the Board is now in a position to more appropriately weigh the factors of public safety, beach erosion characteristics, historical access issues, and risk management pertaining to construction of dwelling units in the subject area.

NOW, THEREFORE, BE IT ORDAINED by the Board of County Commissioners of St. Johns County, Florida, as follows:

Section I. Findings and Statement of Intent. The Board of County Commissioners of St. Johns County, Florida, hereby finds, determines and declares the following:

> Having duly weighed the balance between the risk associated with constructing dwelling units and certain other structures in the described Summer Haven area, with the property owners' desire to build dwelling units and other structures in the face of the unique environment, erosion, access, and public safety issues, that, with appropriate property owner acknowledgment and acceptance of the associated risks and access issues, the Board is willing to recognize and accept the desire of the property owners to more fully develop the subject area.[2]

62. In the absence of a fundamental constitutional right, substantive due process challenges are analyzed under the rational basis standard. *WCI Communities, Inc. v. City of Coral Springs*, 885 So. 2d 912 (Fla. 4th DCA 2004).

63. The rational basis standard is highly deferential to governmental reasoning. *Id.* at 914.There is no fundamental constitutional right at issue in this case. When examining zoning and planning laws for substantive due process violations, the only question to be asked by this Court is whether a rational relationship exists between the ordinance and any conceivable legitimate governmental objective. *Id.* If the question is "at least debatable," there is no substantive due process violation. *Id.*

64. Florida courts have repeatedly held that a legislative action will not be considered arbitrary and capricious if it has a rational relationship with a legitimate general welfare concern. *Martin County v. Section 28 Partnership, Ltd.*, 772 So. 2d 616 (Fla. 4th DCA 2000); *Gardens Country Club, Inc. v. Palm Beach County*, 712 So. 2d 398, 404 (Fla. 4th DCA 1998).

65. In other words, a legislative act will withstand a substantive due process challenge under the rational basis test if the governmental entity: (1) identifies a legitimate state interest that (2) it could rationally conclude would be served by the ordinance. *City of Lauderhill v. Rhames*, 864 So. 2d 432, 438

[2] Pursuant to the Repeal Ordinance the County has implemented a coercive and repugnant policy of requiring applicants at Summer Haven to sign "Assumptions of Risk" Agreements, holding the county harmless from damages or loss of access caused by erosion, but the Court has not been called on to rule upon this practice.

(Fla. 4th DCA 2003). . *See also, WCI Communities, Inc.*, 885 So. 2d at 914. The rational basis test "is generally easily met." *City of Lauderhill* at 438.

66. Furthermore, "the legislation must be sustained if there is any conceivable basis for the legislature to believe that the means they have selected will tend to accomplish the desired end. Even if the court is convinced that the political branch has made an improvident, ill-advised, or unnecessary decision, it must uphold the act if it bears a rational relation to a legitimate governmental purpose." *City of Lauderhill v. Rhames*, 864 So. 2d 432, 438 (Fla. 4th DCA 2003).

67. Federal courts have repeatedly held that moratoria are lawful planning tools which preserve the status quo to ensure that problems are not created or exacerbated while finalizing permanent development strategy. See, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) and its progeny.

68. Florida courts have also held that building moratoria are used to satisfy legitimate government purposes. *WCI Communities, Inc.*, 885 So. 2d at 914 (moratorium rationally related to City's attempt to preserve status quo while it formulated a regulatory land use plan, and thus did not violate due process); *Bradfordville Phipps Limited Partnership v. Leon County*, 804 So. 2d 464, (Fla. 1st DCA 2002) (development was lawfully suspended for 22 months until the county completed a stormwater runoff study.)

69. Other states and municipalities have lawfully prohibited the building of residential structures in areas vulnerable to erosion caused by storms and close proximity to the ocean, and have recognized the danger to rescue personnel and the need to protect public health, safety and welfare. See e.g., *Gove v. Zoning Board of Appeals of Chatham*, 444 Mass. 754 (2005).

70. Pursuant to the rational basis test, an ordinance is presumed constitutional and "[t]he burden is on the challenger to demonstrate that it does not bear a reasonable relationship to a proper state objective." *State v. Busey*, 463 So. 2d 1141, 1144 (Fla. 1985). The Plaintiffs in this case have not presented any evidence to overcome that presumption or to create a genuine issue of material fact with regard thereto.

71. St. Johns County has established on the face of the moratorium ordinances a legitimate governmental purpose for their enactment: protecting the general safety and welfare of the community. Plaintiffs brought this case in part over concerns for their safety due to limited access by emergency vehicles. The stated purpose of the County's temporary moratorium was to address these concerns.

72. This Court finds as a matter of law that the County's stated purposes for the moratorium bear a rational and reasonable relationship to a legitimate concern for public safety: the risk of increased construction density in an environmentally vulnerable area; the need to preserve the status quo until environmental and engineering studies were made; and safety and welfare for residents and emergency personnel.

COUNT V: THE COUNTY'S MORATORIUM DID NOT AMOUNT TO INVERSE CONDEMNATION FOR WHICH PLAINTIFFS ARE ENTITLED TO DAMAGES.

73. Plaintiffs allege that St. Johns County's temporary moratorium on certain building activities at Summer Haven Beach constituted a taking of their properties through inverse condemnation. The moratorium prohibited the issuance of residential building permits. During the 36 months that the moratorium was in effect, none of the Plaintiffs sought any building permits to build residential structures, nor did they apply for any modification or variance of the ordinances for use of their properties.

74. Some building activity was excluded from the moratorium:

A. Building Permits for the repair of existing structures, when the cost of repair does not exceed fifty percent (50%) of the value of the structure as listed by the St. Johns County Property Appraiser, as of the date this Ordinance enacted.

B. Building permits pertaining to remodeling of existing structures, where remodeling does not increase the building square footage.

C. Building permits for construction in areas that are determined by the County Administrator to have fully compliant access, and are reasonably likely to remain having fully compliant access for the next ten years. *2005 Moratorium*, Pg. 3.

75. As stated previously, one property owner (a non-plaintiff) requested and was granted a permit to build a residence under the "fully compliant access" exception. Five other property owners applied for, and were granted, building permits for repair and remodeling of residential structures under other moratorium exclusions. (Exhibits G, H and J to Defendant's Motion for Summary Judgment.)

76. Plaintiffs make much of the fact that county staff and department heads were unfamiliar with the term "fully compliant access," but these people were being asked in deposition to define the term in the context of on-going litigation, so their reluctance is understandable. It does not appear of record that any Plaintiffs ever requested an explanation of the term at any time.

77. Whether property had "fully compliant access" was to be initially determined by County staff members by reference to the St. Johns County Land Development Code. If access to the property was determined not to be compliant with the Land Development Code, the applicant could have exercised either or both of the following appeal rights:

a. First, pursuant to Section 10.01.01 of the Land Development Code, the applicant could have requested that the County Administrator look to the Comprehensive Plan for further guidance in interpreting the particular provision of the Land Development Code at issue and modify the staff decision; or

b. Alternatively, the applicant could have appealed to the Board of County Commissioners to obtain a variance from the County's Land Development Code access requirements. (Exhibits G and J to Defendant's Motion for Summary Judgment.)

78. Such variances have been granted in the past for properties located elsewhere in St. Johns County with access that did not meet the County's Land Development Code access requirements. (Exhibit J to Defendant's Motion for Summary Judgment.)

79. No Summer Haven property owner ever made any attempt to obtain a variance or to utilize either of the appeal procedures outlined above. (Exhibits G, I and J to Defendant's Motion for Summary Judgment.)

80. Land use regulatory inverse condemnation claims can be established in one of two ways:

a. By showing that a regulation denies all economically beneficial or productive use of property. (These are commonly referred to as per se or categorical takings. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)); or

b. If no per se or categorical taking has occurred, by showing that the economic impact of the regulation on the property and the extent to which the regulation has interfered with the claimant's distinct investment backed expectations, outweigh governmental interest in protecting the safety and welfare of its citizens. *See*, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-125 (1978).

81. Before an inverse condemnation can be found under the *Penn Central* analysis, the claim must be ripe for judicial determination. This is known as the ripeness doctrine. The ripeness doctrine does not apply to per se/categorical takings under *Lucas v. South Carolina Coastal Council*, in which all

economically beneficial or productive use of property has been eliminated. *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561 (Fla. 4th DCA 2002).

82. An inverse condemnation claim is not ripe for judicial review under the *Penn Central* analysis until the government entity "has reached a final decision regarding the application of the regulation to the property at issue." *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561, 570 (Fla. 4th DCA 2002), citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

83. A final decision cannot be reached until at least one meaningful application has been filed before the governmental entity. *Taylor v. Village of North Palm Beach*, 659 So.2d 1167, 1173 (Fla. 4th DCA 1995).

84. "[A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules, a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by the law. As a general rule, until these ordinary processes have been followed, the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561, 571 (Fla. 4th DCA 2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)).

85. "Without a final decision, it is impossible for the courts to determine whether land has retained any reasonable beneficial use, or if expectation interests have been destroyed." *Tinnerman v. Palm Beach County*, 641 So.2d 523, 525 (Fla. 4th DCA 1994).

86. Ripeness requires a clear delineation of permitted uses so that the extent of the taking can be analyzed. Without such delineation, the courts are left to speculate as to what actions governmental entities would have taken had applicants pursued available alternatives. *Id.* at 525-526; See also *Bradfordville Phipps Limited Partnership v. Leon County*, 804 So.2d 464 (Fla. 1st DCA 2001).

87. A futility exception exists to the ripeness requirement in a regulatory takings claim where, "by virtue of the past history, repeated submissions would be futile [or] when the government entity concedes that any other development would be impermissible." *Lost Tree Village Corp.*, 838 So. 2d at 571.

88. Plaintiffs allege that it would have been futile for a landowner to have applied for a variance during the moratorium. However, Florida courts have repeatedly held that futility is not established until at least one meaningful application has been filed. *Tinnerman v. Palm Beach County*, 641 So. 2d 523 (Fla. 4th DCA 1994).

89. During the entire time that the moratorium ordinances were in effect, none of the Plaintiffs ever requested an exception that would have allowed them to build a residential structure. None of the Plaintiffs ever requested issuance of any building permits to construct new homes. None of the Plaintiffs ever sought to utilize the available appeal process. None of the Plaintiffs ever applied for a variance. For these reasons, St. Johns County never reached any final decision regarding any of Plaintiffs' properties as required by Florida law. *Lost Tree Village Corp., supra.*

90. Under these circumstances, it is impossible for this Court to determine whether St. Johns County would have denied building permits associated with the property of any of the Summer Haven Plaintiffs, or to determine the nature and extent of the alleged taking under the *Penn Central* balancing test. *Taylor v. Village of North Palm Beach*, 659 So.2d 1167, 1173 (Fla. 4th DCA 1995).

91. Accordingly, this Court finds as a matter of law that the Plaintiffs' inverse condemnation claim alleged in Count V is not ripe for judicial determination. The Court also finds as a matter of law that, because the applicable moratorium ordinance has now been repealed, Plaintiffs' claim of inverse condemnation taking during the moratorium can never be ripe for review.

92. In view of this ruling, no discussion of *Penn Central* balancing of interests is necessary.

93. With regard to the *Lucas* per se taking analysis, this Court finds as a matter of law that during the moratorium period, Plaintiffs were not deprived of all economically beneficial or productive use of their properties. In reaching this conclusion, the Court relies upon the United States Supreme Court's reasoning in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002). In that case, the Supreme Court held that a thirty-two month moratorium prohibiting virtually all development on the shores of Lake Tahoe was not a per se or categorical taking of all beneficial or productive use because "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use because the property will recover in value as soon as the prohibition is lifted." *Id.* at 332.

94. Based upon the reasoning of *Tahoe-Sierra*, no Plaintiff in the instant case has been deprived of all economic and productive use of property. See also *Leon County v. G.J. Gluesenkamp, Jr.*,

873 So.2d 460 (Fla. 4th DCA 2004) and *Bradfordville Phipps Limited Partnership v. Leon County*, 804 So.2d 464 (Fla. 4th DCA 1991), both of which adopted and applied the *Tahoe-Sierra* analysis.

95. It does not appear that the moratorium interfered with Plaintiff's continued everyday use of their property. They were temporarily limited on building activity, but not completely deprived. They were allowed to construct certain structures, and some building activity was exempt from the moratorium. Such allowable uses preclude any finding of categorical or per se taking of all beneficial or productive use of their properties. *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So.2d 1377 (Fla. 4th DCA 1994); *Jacobi v. City of Miami Beach*, 678 So.2d 1365 (Fla. 3rd DCA 1996); and *Tinnerman v. Palm Beach County*, 641 So.2d 523 (Fla. 4th DCA 1994).

CONCLUSION

Plaintiffs have urged the court against entry of summary judgment because the "County has a duty to maintain "Old A1A" as it existed when the County took title to the road in 1979, and the condition of "Old A1A" at that time is a highly disputed question of fact precluding summary judgment." (*Plaintiff's Background History and Facts*, page 8). The Court disagrees that the County has a duty to perform what essentially amounts to a restoration or rebuilding of the road. Given the "new inlet" at Summer Haven, it would be impractical if not impossible to restore the road. The County does not even own those portions of the road under the mean high water mark because they have become state land.

The County in its infinite wisdom may decide to undertake a beach restoration project, but that is in the sound discretion of the County after considering many different factors including costs and effectiveness. There being no duty to restore to 1979 condition, the court finds that the condition of the road 30 years ago (prior to most, if not all, plaintiffs' acquisitions of their properties) is irrelevant.

As a general observation, 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 erosion. 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. The law does not require any one to do a futile act. *Haimovitz v. Robb,* 130 Fla. 844, 178 So. 827 (1938). Upon consideration thereof, the Court finds that the County is entitled to Summary Judgment in its favor on all counts as a matter of law.

ACCORDINGLY, it is

ORDERED AND ADJUDGED:

1) Summary Judgment is GRANTED on all Counts.
2) Defendant St. Johns County does not have a duty to maintain, repair or reconstruct "Old A1A" in any particular manner other than as established in the discretion of the Board of County Commissioners.
3) Defendant St. Johns County does not have a duty to provide emergency services to owners at Summer Haven in any particular manner other than as established in the discretion of the Board of County Commissioner.
4) The temporary moratorium enacted, then repealed, was reasonably related to the County's purpose of protecting public safety and welfare and did not constitute a "taking" of Plaintiff's property.
5) Plaintiffs are not entitled to injunctive relief.

DONE AND ORDERED in chambers at St. Augustine, St. Johns County, Florida, this 21 day of MAY, 2009.

PATTI A. CHRISTENSEN-ACTING CIRCUIT JUDGE

Copies to: 5-21-09 cw

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