

# Environmentally Compromised Road Segments—A Model Ordinance<sup>1</sup>

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## Introduction

The authors developed this model ordinance in direct response to the events outlined in the legal case *Jordan v. St. Johns County*.<sup>5</sup> An article detailing the legal research supporting the design of this article will be forthcoming.

Matter in brackets [...] in the following model ordinance represents material that either may or must be tailored to any specific local government considering adopting this ordinance in whole or in part. The numbers appearing in the draft ordinance in brackets were numbers placed there by the authors as an example of numbers that could be used by a local government seeking to reach a balance between assisting property owners as much as possible with access to their property while also seeking to protect other taxpayers and roads by not dedicating an unreasonable amount of resources to a small portion of the local government's road system.

In addition, based on Florida Statute Section 336.045(6), it may be necessary to have a comprehensive plan amendment to allow variation from design standards.<sup>6</sup>

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<sup>5</sup> Robert & Linnie Jordan, et al v. St. Johns County, Case No. CA05-694 (Fla. 7th Jud. Cir. May 21, 2009), *aff'd in part, rev'd in part* by Jordan v. St. Johns County, 63 So. 3d 835, 837 (Fla. 2011).

<sup>6</sup> Fla. Stat. §336.045(6) ("If the governing body of a county or municipality has adopted a design element as part of its comprehensive plan pursuant to part II of chapter 163, the department shall consider such element during project development of transportation facilities. The design of transportation facilities constructed by the department within the boundaries of that county or municipality must be consistent with that element to the maximum extent feasible.").

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***Caveat: This ordinance and any commentary are for educational and policy-discussion purposes. They do not constitute legal advice and do not create an attorney-client relationship. Local governments should not implement this model, in whole or in part, without consulting their attorney for specific legal advice.***

## **PREAMBLE**

The purpose of this Ordinance is to address (a) The natural forces' degradation and damage to public roads, streets, highways, bridges, sidewalks, curbs and curb ramps, crosswalks, bicycle ways, hiking and walking paths and trails, underpasses, overpasses, and other improved public rights-of-way used for travel or recreation (hereinafter "right(s)-of-way," "road(s)," or "roadways" (however, in no event shall such reference to "road(s)" or "roadways" be construed to refer to private rights-of-way, private roads, or other improved private rights-of-way used for travel)), (b) The significant costs of construction, maintenance, remediation, repair, and operations incurred by governmental entities with respect to these naturally damaged roadways, and (c) To establish procedures and means that may be taken by the governmental entity to maintain a reasonable level of meaningful access to private properties connected to the roadways or to abandon the roadways and terminate public maintenance responsibility thereof.

WHEREAS, [ADDITION OF LOCALLY RELEVANT INFORMATION AS NEEDED AND AVAILABLE]; and

WHEREAS, erosion, flooding, and other environmental challenges may pose challenges to effective maintenance of [CITY/COUNTY] roads either now or in the future; and

WHEREAS, rising mean sea level increases the rate at which oceanfront land will be eroded, the elevation to which a given storm surge will rise, and increases flooding risk due to impacts on [CITY/COUNTY]'s stormwater system; and

WHEREAS, pursuant to Florida Statutes (FS) Ch. 334, the Florida Department of Transportation (DOT) has the power to develop and adopt uniform minimum standards and criteria for the design, construction, maintenance, and operation of public roads, and such adopted standards allow for design exceptions in some circumstances; and

WHEREAS, Section 336.045, FS provides for the uniform minimum standards for design, construction, and maintenance of streets, roads, highways, bridges,

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sidewalks, curbs and curb ramps, crosswalks, bicycle ways, underpasses, and overpasses; and

WHEREAS, Section 163.3178(1), FS, provides it is the intent of the Legislature that local governments restrict development activities where such activities would damage or destroy coastal resources and that such plans protect human life and limit public expenditures in areas that are subject to destruction by natural disaster; and

WHEREAS, Section 163.3178(2)(f), FS requires local governments that must have Coastal Elements of their Comprehensive Plans to include development and redevelopment principles, strategies, and engineering solutions that reduce the flood risk in coastal areas which result from high-tide events, storm surge, flash floods, stormwater runoff, and the related impacts of sea-level rise; and

WHEREAS, Section 163.3177(6)(g)6, FS, requires local governments to limit public expenditures that subsidize development in coastal high hazard areas; and

WHEREAS, through the enactment of Section 627.351(6)(a)5.b., FS, the Florida Legislature has discouraged development on certain properties by prohibiting Citizens Property Insurance Corporation from insuring newly constructed or substantially renovated major structures on properties seaward of the coastal construction control line established pursuant to Section 161.053, FS, or within the Coastal Barrier Resources System as designated by 16 U.S.C. ss. 3501-3510 [REFERENCE TO THE COASTAL BARRIER RESOURCES SYSTEM MAY NOT BE APPLICABLE TO SOME LOCAL GOVERNMENTS]; and

WHEREAS, through the enactment of the Coastal Barrier Resources Act, 16 U.S.C. ss. 3501-3510, the U.S. government has discouraged development by prohibiting most federal expenditures that would encourage development in designated coastal areas deemed worthy of protection [REFERENCE TO THE COASTAL BARRIER RESOURCES SYSTEM MAY NOT BE APPLICABLE TO SOME LOCAL GOVERNMENTS]; and

WHEREAS, [CITY/COUNTY] has in place a comprehensive plan policy [ADD REFERENCE TO POLICY] to limit expenditures that subsidize development in coastal high hazard areas; and

WHEREAS, the [CITY/COUNTY] is aware of the potential for coastal erosion, flooding, or a rising water table to cause damage to private property and roads and other infrastructure [CITE TO LOCAL VULNERABILITY ASSESSMENT OR LOCAL DOCUMENTATION OF EROSION/FLOODING]; and

WHEREAS, the Fifth District Court of Appeal of Florida concluded in *Jordan v. St. Johns County*, 63 So.3d 835 (Fla. 5th DCA 2011) that a county must provide

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a reasonable level of public road maintenance that affords meaningful access to land unless the county has followed the statutory procedures for abandoning it; and

WHEREAS, St. Johns County and the plaintiffs reached a settlement, among other things, obligating St. Johns County to make good-faith efforts to maintain the condition of the road at issue in *Jordan v. St. Johns County*; and

WHEREAS, the accommodation between St. Johns County and plaintiffs provides a basis for a means to balance private property rights and community interests; and

WHEREAS, it is anticipated that the disruptive impacts of sea-level rise on [CITY/COUNTY] will increase and passage of this Ordinance provides adequate time for owners of potentially at-risk properties to adjust their reasonable investment-backed expectations; and

WHEREAS, the [CITY/COUNTY] seeks to place limits on exorbitant maintenance costs for certain road segments or lawsuits that can reasonably be anticipated and avoided;

NOW, THEREFORE,

## **Environmentally Compromised Road Segments Ordinance**

### *1. Ordinance purpose and authority*

This ordinance specifically creates exceptions to the Levels of Service (LOS) and design standards for roads established by [COUNTY/CITY] for those roadways that meet the criteria below. Pursuant to the State of Florida, Department of Transportation, Manual of Uniform Minimum Standards for Design, Construction and Maintenance for Streets and Highways (May 2011 edition) (a.k.a. “Florida Greenbook”), any road categorized as “environmentally compromised” under this ordinance shall be the subject of a requested design/maintenance exception based on the justification process in Chapter 14 of the Florida Greenbook.

### *2. Definitions*

- a. “Environmentally challenging location” means a location where typical road construction, remediation or repair criteria and standards are infeasible due to naturally occurring conditions resulting in:
  - i. Environmental conditions that repeatedly damage or threaten the road to the extent that standard automobiles and light trucks, law enforcement patrol cars or fire and medical

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emergency vehicles, or vehicles providing services such as trash collection are not able to safely use the road per the documented determination of an appropriate local authority or official; or

- ii. Environmental conditions that require materials or processes to maintain, repair, or rebuild the road that are not standard materials or processes for other roads in the [COUNTY/CITY]; or
- iii. Environmental conditions where the presence, maintenance, repair, or rebuilding of the road has an identifiable detrimental impact on a natural resource (such as, but not limited to, a wetland, dune, estuary, sanctuary, hammock, shoreline, habitat management or wildlife conservation area) or adjacent private property; or
- iv. Environmental conditions where maintenance, repair, or rebuilding activities necessary to keep the road in service increase or exacerbate the detrimental impact of the road on a natural resource or adjacent private property; or
- v. Locations being subject to permitting or mitigation requirements of a state or federal agency for activities that would be considered routine maintenance and repair in other locations in [COUNTY/CITY] and not subject to such permitting requirements.

b. “Environmentally compromised local road segment” means a segment of local road, as defined in Florida Statute Section 334.03(14), in an environmentally challenging location for which one of the following conditions exists:

- i. The annual per-mile cost averaged over [three (3)] consecutive fiscal years to maintain the paved road segment to the same standard as is common among similar roads in the [COUNTY/CITY] (excluding already-designated environmentally compromised road segments) exceeds by a factor of [four (4)] or more the annual per-mile cost to maintain roads (excluding already-designated environmentally compromised road segments) [COUNTY/CITY]-wide averaged over the same period; or
- ii. The annual per-mile cost in a given fiscal year to maintain the paved road segment to the same standard as is common among other roads in the [COUNTY/CITY] (excluding already-

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designated environmentally compromised road segments) exceeds by a factor of [six (6)] or more the annual per-mile cost to maintain roads (excluding already-designated environmentally compromised road segments) [COUNTY/CITY]-wide averaged over the given fiscal year plus the [two (2)] immediately preceding fiscal years. This does not include periodic rebuilding of road segments provided that the need for rebuilding is not more frequent than normal for similar roads in the [COUNTY/CITY] due to the environmentally challenging location.

- c. “Environmentally compromised collector-road segment” means a collector road segment, as defined in Florida Statute Section 334.03(4), in an environmentally challenging location for which one of the following conditions exists:
- i. The annual per-mile cost averaged over [three (3)] consecutive fiscal years to maintain the paved road segment to the same standard as is common among other roads in the [COUNTY/CITY] (excluding already-designated environmentally compromised road segments) exceeds by a factor of [five (5)] or more the annual per-mile cost to maintain roads (excluding already-designated environmentally compromised road segments) [COUNTY/CITY]-wide averaged over the same period; or
  - ii. The annual per-mile cost in a given fiscal year to maintain the paved road segment to the same standard as is common among other roads in the [COUNTY/CITY] (excluding already-designated environmentally compromised road segments) exceeds by a factor of [eight (8)] or more the annual per-mile cost to maintain roads (excluding already-designated environmentally compromised road segments) [COUNTY/CITY]-wide averaged over the given fiscal year plus the [two (2)] immediately preceding fiscal years.
- d. In this ordinance, “environmentally compromised road segment” includes both “environmentally compromised local road segments” and “environmentally compromised collector road segments.”

### ***3. Process for designating environmentally challenging locations and environmentally compromised road segments***

- a. The elected officials of the [COUNTY/CITY] will designate environmentally

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challenging locations and environmentally compromised local or through-road segments by ordinance. The ordinance must include at least the following information:

- i. The basis upon which the designation is based, and
  - ii. The beginning and end point of the environmentally challenging location or environmentally compromised road segment as measured in feet from the centerline of the nearest intersecting right-of-way, and
  - iii. The parcel number, street address number, and owner's name, as listed by the Property Appraiser's or Tax Collector's Office, of all parcels fronting the designated location, and
  - iv. The parcel number, street address number, and owner's name, as listed by the Property Appraiser's or Tax Collector's Office, of all parcels whose property owners must pass over that road segment to access their property, and
  - v. A map showing the designated environmentally challenging location or environmentally compromised road segment, the measurements from the nearest intersection specified in 3.a.ii. preceding, and the boundaries, parcel numbers, and street address numbers of parcels identified in 3.a.iii. and 3.a.iv immediately preceding.
- b. The [COUNTY/CITY] will mail, U.S. Mail Return Receipt Requested or equivalent, at least 30 days prior to the first reading of the draft ordinance, notice in conformance with the requirements of Section 125.66, FS (County) and Section 166.041, FS (Municipality), to each property owner listed in the draft ordinance, at the address of record maintained by the Property Appraiser's Office or Tax Collector's Office, a notice of the first reading. The notice will include either a draft copy of the ordinance or a place and dates and times when individuals can obtain a copy of the draft ordinance.
- c. The [COUNTY/CITY] will post where it normally posts official notices of meetings at least 30 days prior to the first reading of the ordinance the notice mailed to property owners as well as a list of the parcels and owners listed in the draft ordinance.

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#### *4. Signage of Environmentally Compromised Road Segments*

Any road segment designated as an environmentally compromised road segment shall, within one month of designation, be clearly marked at the beginning and end of the segment as well as at any access points from intersecting public roads and, if applicable, at intervals of no greater than one-half mile. Such notice shall, in compliance with the Florida Greenbook, Chapter 18, comply with “Conventional Road” size and design requirements in the Federal Highway Administration’s (FHWA) Manual on Uniform Traffic Control Devices. Such signage shall state: “WARNING: [DAMAGED, ERODED, or other warnings as appropriate to the specific situation such as STANDING WATER, NARROWED ROAD, BROKEN ASPHALT, DETERIORATED SHOULDER, WASHOUTS, or other wording as appropriate] road surface ahead. Road may not be suitable for all types of traffic.”

#### *5. Maintenance Standard for Environmentally compromised road segments*

- a. The maintenance standard for designated environmentally compromised road segments will be the standard to which the road segment can be maintained with expenditures that do not exceed by more than [twenty-five percent (25%)] the per-unit-area cost sufficient to categorize the segment as an environmentally compromised road segment. [COUNTY/CITY] will not exceed the per-unit-area cost threshold for designation plus [twenty-five percent (25%)] for maintenance for any environmentally compromised road segment from general road maintenance funds. This limitation does not apply to additional funding sources not available for [COUNTY/CITY]-wide road maintenance, such as, but not limited to, grants or funds from a special-benefit unit such as the one described below in 7.a.-d.
- b. In a good-faith effort to reasonably maintain environmentally compromised road segments, to provide meaningful access for property owners, and to balance these with responsible management of public fiscal resources, [COUNTY/CITY] will spend [COUNTY/CITY]-wide on an average per-unit-area basis over any [three] consecutive fiscal years, at least [one and one half (1.5)] times the average per-unit-area cost to maintain all other roads (excluding already designated environmentally compromised road segments) [COUNTY/CITY]-wide over the same period up to the point where:
  - i. The average cost to maintain all environmentally compromised road segments over the [three] most recently completed fiscal years equals or exceeds [one hundred percent (100%)] of the cost to maintain all other road segments in the [COUNTY/CITY] during the same period, in which case, at the discretion of the

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[COUNTY/CITY] legislative body, the [COUNTY/CITY] reserves the option to spend no more than [half (50%)] its road maintenance funds in each of the current and next fiscal years on environmentally compromised road segments, apportioned among the segments at the discretion of the [COUNTY/CITY] legislative body; or

- ii. The per-unit-area cost in a given fiscal year to maintain all environmentally compromised road segments exceeds by a factor of [ten (10)] or more the per-unit-area cost to maintain roads (excluding already-designated environmentally compromised road segments) [COUNTY/CITY]-wide averaged over the [three (3)]most recently completed fiscal years, in which case, at the discretion of [COUNTY/CITY] elected officials, the [COUNTY/CITY] reserves the option to spend no more funds on environmentally compromised road segments during that fiscal year and no more than [half (50%)] its road maintenance funds in the next fiscal year on environmentally compromised road segments, apportioned among the segments at the discretion of the [COUNTY/CITY] legislative body.

#### ***6. Lack of meaningful access of property***

- a. One or more owners of properties who lack meaningful access to their property due to severe degradation or loss of an environmentally compromised road segment shall, in writing, request assistance from the [COUNTY/CITY] Clerk:
  - i. To open negotiations with all property owners affected, as defined in 3.a.iii. and 3.a.iv. above, by the environmentally compromised road segment, to facilitate affected owners creating among themselves mutual easements for access to properties lacking meaningful access; or
  - ii. To establish a statutory way of necessity as provided for in Florida Statutes subsection 704.10(2). [COUNTY/CITY] shall assist such property owners as feasible and deemed reasonable by [COUNTY/CITY].
  - iii. [COUNTY/CITY] shall assist such property owners as feasible and deemed reasonable by [COUNTY/CITY].
- b. If the [COUNTY/CITY]'s involvement and assistance as noted in 6.a.i. and 6.a.ii. does not result in meaningful access for all affected property owners, [COUNTY/CITY] shall not be held liable for the inability of property owners to secure access since [COUNTY/CITY] is neither directly

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nor indirectly responsible for the natural causes that created the environmentally compromised road segment and had informed property owners in a timely manner via this ordinance of the potential for such loss.

- c. Properties without pre-existing development or with pre-existing development that has not been subject to documented consistent and active use for the preceding three years shall have no claim on [COUNTY/CITY] for any assistance or damages since any such claim would involve speculative losses and since [COUNTY/CITY] was neither directly nor indirectly responsible for the natural causes that created the environmentally compromised road segment and had informed property owners in a timely manner via this ordinance of the potential for such loss.

#### ***7. Additional Funding for Environmentally Compromised Road Segments: Creation of MSBU***

- a. [COUNTY/CITY] may, at its discretion, establish a Municipal Services Benefit Unit (MSBU) or utilize other lawful assessment powers, to raise additional funds for maintenance of environmentally compromised road segments. The process for this is established in Ordinance \_\_\_\_\_.
- b. A positive vote of eligible electors in a referendum to establish an MSBU per Ordinance \_\_\_\_\_ for an environmentally compromised road segment is not binding upon the [COUNTY/CITY] legislative body. However, such positive vote shall be a requirement if the [COUNTY/CITY] wishes to have authority to issue bonds for work with the MSBU funds as a repayment method for the bonds.
- c. In case of establishment of an MSBU for an environmentally compromised road segment, the [COUNTY/CITY] will continue to contribute at least the amount specified in Section 5 above towards maintenance of the road segment.
- d. Establishment of an MSBU does not abrogate the [COUNTY/CITY]'s authority to abandon environmentally compromised road segments as established in Section 3 of this ordinance. However, an environmentally compromised road segment with an MSBU may not be abandoned during any period in which the MSBU is to serve as the repayment method for outstanding bonds issued on the basis of the MSBU. If an environmentally compromised road segment with an active MSBU is abandoned by [COUNTY/CITY], any funds remaining in the MSBU shall be refunded to the property owners in proportion to the amount contributed by owners on behalf of each property involved.
- e. The [COUNTY/CITY] shall also be permitted to utilize other authority to

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established a funding or assessment mechanism as permitted by law.

**8. Termination of environmentally compromised road segment designation:**

All or a portion of an environmentally compromised road segment that has not been abandoned by [COUNTY/CITY] that is contiguous to that portion of the [COUNTY/CITY]'s road network that is not environmentally compromised shall no longer be so designated at such time as for [three (3)] consecutive fiscal years the per-unit-area cost to maintain it to the same as is common among other roads in the [COUNTY/CITY] is less than [one and one half (1.5)] times the average per-unit-area cost to maintain roads (excluding environmentally compromised road segments) [COUNTY/CITY]-wide over the same period.

**9. Abandonment of Environmentally Compromised Road Segments**

a. Abandonment to an authorized entity

- i. Upon the written and notarized request delivered to the [COUNTY/CITY] Clerk of at least [ten percent (10%)] of the property owners whose sole means of public or private road access is the environmentally compromised road segment, at the next [COUNTY/CITY] election the [COUNTY/CITY] will conduct a referendum among such property owners to determine whether a supermajority as specified in 336.125(1)(a)2, FS of such property owners voting in that referendum approve the [COUNTY/CITY] abandoning the compromised segment of right-of-way and any portion of right-of-way which the compromised segment separates from the rest of the [COUNTY/CITY]'s road network and deeding it to the property owners as a non-dedicated roadway to maintain as those property owners desire at their expense. If the referendum is successful, the [COUNTY/CITY]'s legislative body will hold a vote on abandoning that portion of right-of-way and deed it to a properly authorized entity of those property owners.
- ii. For purposes of this subsection, a "properly authorized entity" means an entity that fulfills the requirements of Section 336.125, FS.
- iii. If such an abandonment is approved by the electors and executed by the [COUNTY/CITY], no compensation shall be due the property owners since: 1) easements for access are available, 2) [COUNTY/CITY] is neither directly nor indirectly

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responsible for the natural causes that created the environmentally compromised road segment, and 3) [COUNTY/CITY] had informed property owners by this ordinance in a timely manner of the potential for such loss.

- b. Abandonment without a properly authorized entity.
  - i. Upon the written and notarized request delivered to the Clerk of [COUNTY/CITY] of at least [ten percent (10%)] of the property owners whose sole means of public or private road access is the environmentally compromised road segment, the [COUNTY/CITY] shall, at the next [COUNTY/CITY] election, hold a referendum in which property owners whose sole means of public or private road access is the environmentally compromised road segment may vote to request that the [COUNTY/CITY] abandon the environmentally compromised road segment, and any portion of right-of-way which the compromised segment separates from the rest of the [COUNTY/CITY]'s road network, per the statutory process in Section 336.125, FS. The [COUNTY/CITY] legislative body shall consider such abandonment upon an affirmative vote of at least the percentage specified in 336.125(1)(a)2 of the electors eligible for the referendum.
  - ii. Prior to abandonment by [COUNTY/CITY], [COUNTY/CITY] will assist affected property owners as specified in sections 6.a.i., 6.a.ii., and 6.a.iii above.
  - iii. If such abandonment is approved by the electors and executed by the [COUNTY/CITY], no compensation shall be due the property owners if easements for access are available.
- c. After a road segment has been continuously designated as environmentally compromised for [six (6)] years, [COUNTY/CITY] may choose, regardless of the desires of affected property owners, to abandon such road segment, and any portion of right-of-way which the compromised segment separates from the rest of the [COUNTY/CITY]'s road network, per the processes in Chapter 336, FS.
  - i. Prior to abandonment by [COUNTY/CITY], [COUNTY/CITY] will assist affected property owners as specified in sections 6.a.i., 6.a.ii, and 6.a.iii., above.
  - ii. If such abandonment occurs, no compensation shall be due the property owners if easements for access are available. If compensation is due for a taking of property rights due to lack of

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access, compensation will be determined based on a property value assuming the level of access available during the last year prior to road abandonment.

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