

**MEMORANDUM CONCERNING VENICE’S LEGAL OBLIGATIONS
REGARDING FLAMINGO DITCH**

To: The City of Venice

From: Bowen|Schroth – June 20, 2025

I. Introduction and Summary of Answered Questions.

Bowen|Schroth, as special counsel for the City of Venice (“City”), answers the following questions posed by the City after legal research and review of the documents and information listed in Exhibit “A” attached hereto:

1. To what extent, if any, does the plat language and other documents concerning Flamingo Ditch obligate the City to maintain Flamingo Ditch?

The plat language conveys a common law public dedication of streets, roads, and drainage canals, which includes, in part, Flamingo Ditch. Private property owners own Flamingo Ditch subject to easements, and such ownership extends to the centerline of Flamingo Ditch. There is no mandatory obligation on the part of the City to perform maintenance or construction because of the plat or any other recorded documents such as easements, interlocal agreements, deeds, or restrictions.

2. What are the City’s current responsibilities under Florida law to maintain or operate Flamingo Ditch?

The City must continue to maintain Flamingo Ditch consistent with the original operational design and function.

3. Under what circumstances must the City upgrade Flamingo Ditch to handle increased flows due to development, climate change, and future weather events?

As a general rule, Florida law does not require the City to retrofit or expand capital projects like roadways or stormwater systems based on changed conditions such as climate change and hurricane and storm seawater surge. However, if a city changes the conditions which necessitate upgrades to prevent damage to private property, then a city should upgrade the system to prevent the damage caused by such change. For example, if new city development and infrastructure diverts water from city-owned property to private property causing flood damage then the city should upgrade the system to accommodate the diversion of increased water flow from the city’s changing of the conditions. There is no

evidence the City changed conditions which resulted in flood damage. The natural condition of the land is low-lying and flood prone. Furthermore, there is not an obligation to design a stormwater system which prevents flooding caused by extreme weather events such as hurricanes.

4. If the City opts for non-mandatory improvements, does that create additional operational duties or obligations?

If the City voluntarily undertakes partial improvements or expansions, it must properly operate and maintain them.

II. Flamingo Ditch History.

- (i) Flamingo Ditch is natural low-lying part of Venice Island. The area around Flamingo Ditch experiences flooding, particularly during hurricane and major storm events, and has been designated a Special Flood Hazard Area for over 40 years.
- (ii) Prior to annexing into the City, development plats were approved and recorded in Sarasota County for Golden Beach Condominium in 1954, with subsequent plats approved and recorded in 1955 and 1994. The area was already largely developed in the 1970s.
- (iii) Flamingo Ditch is not owned by the City. It is owned by adjacent private property owners whose lot lines extend to the centerline of the ditch.
- (iv) The State of Florida owns the area at the beach where Flamingo Ditch discharges into the Gulf when there is no storm surge.
- (v) In the 1990s, in an effort to manage stormwater flow into the Gulf, a wooden structure was installed to allow stormwater to flow through.
- (vi) In 2013, the City of Venice obtained temporary construction easements from private landowners to implement a demucking project with the goal of improving water quality and increasing stormwater drainage to the Gulf.
- (vii) In 2014, the demucking project was performed.
- (viii) The wooden structure deteriorated over time and, following flooding in the area in August 2017, the City of Venice obtained a permit from the Florida Department of

Environmental Protection, in compliance with the requirements of §161.053, Fla. Stat., to remove the structure.

- (ix) In 2024, Hurricanes Helene and Milton brought record storm surge to Florida and the City of Venice including the flood hazard area around Flamingo Ditch. The storm surge breached the dune system.
- (x) In 2024, the City hired Coastal Protection Engineering, LLC., to conduct a feasibility study and make recommendations to the City Council concerning Flamingo Ditch.

III. Plats, Easements, and Agreements Do Not Impose an Obligation to Maintain Flamingo Ditch.

The original Golden Beach plat¹ contains a public use dedication for streets and roads.² A subsequent Golden Beach plat³ contains a public use dedication of streets, roads, and drainage canals. A 1994 replat⁴ of Flamingo Drive property contains a dedication of the utility and drainage easements, as well as any other easements shown on the plat, to the City of Venice.

There are two designations of plat dedications; (i) common law and (ii) statutory. A statutory dedication divests the owner of title to the land and “can occur when the government constructs or maintains a road⁵ continuously for four years or when the government maintains a road, though created by a private entity, for seven years.” *Pelican Creek Homeowners, LLC v. Pulverenti*, 243

¹ Recorded in Plat Book 7, Page 64 and 64A, Public Records of Sarasota County, Florida (1954).

² The governing statute for a statutory dedication in existence at the time of the original plat would have been §341.59, Fla. Stat., which was repealed in 1955. It is currently codified as §95.361, Fla. Stat., which is similar to the original statutory provision, with the addition of a provision for a dedication to municipalities. *See Lehmann v. Cocanut Bayou Assn., Inc.*, 269 So.3d 599 (Fla. 2d DCA 2019) (Where no statute was in place under which a statutory dedication could have occurred, the dedication is a common law dedication by operation of law).

³ Recorded in Plat Book 7, Page 96 and 96A, Public Records of Sarasota County, Florida (1954).

⁴ Recorded in Plat Book 36, Page 44, Public Records of Sarasota County, Florida (1994).

⁵ Section 95.361, Fla. Stat., contains language exclusive to roadways, therefore the application of the statute to navigable waters, such as canals, must be determined by a Court. *Pelican Creek, infra.* at 473 n.2 (the applicability of §95.361, Fla. Stat., to navigable water ways is subject to judicial determination).

So.3d 467, 471 (Fla. 5th DCA 2018) (Where the dedication did not refer to the governing statute and there was no evidence of intent by the developer to create a statutory dedication, the dedication of the canal and drainage easement was a common law dedication and title remained with the developer subject to the public easement). Where a map of the subject property containing a recitation of the statutory subsection under which dedication has occurred is made public record, there is prima facie evidence of a statutory dedication. *Id.* (Without reference to the applicable statute in the dedication or evidence to suggest that a statutory dedication was the intent of the developer, a common law dedication is presumed).

Under a common law dedication, land is set apart for public use, which is established through “the intention of the owner, clearly indicated by his words or acts” as well as “an acceptance by the public of the dedication.” *City of Palmetto v. Katsch*, 86 Fla. 506, 510, 98 So. 352, 353 (1923). The intention of the owner’s dedication and acceptance by the public “must be clear and unequivocal.” *Bishop v. Nussbaum*, 175 So.2d 231, 232 (Fla. 2d. DCA 1965). A common law dedication does not divest the owner of title to the land. The boundaries of a common law dedication are codified under §177.085, *Florida Statutes*, which creates a presumption that the ownership of the landowners abutting the easement extends to the center of the easement, absent any provision to the contrary. §177.085, *Florida Statutes*, indicates that the ownership interest in abutting property is reversionary; however, “in the context of a common law dedication, the abutting owners have fee simple subject to the dedication.” *Pelican Creek, supra.* at 473.

Here, the plat dedication is likely a common law dedication. There is no statutory reference in the relevant Golden Beach plat dedications, among which drainage canals are included as

dedicated to public use.⁶ This fact, coupled with the fact that the language of § 95.361, Fla. Stat., pertains exclusively to roads, indicates that the Golden Beach plat dedication is likely a common law dedication, whereby the owners retain title in fee simple subject to the easement(s), and because the plat language contains no evidence of a contrary intention, their respective ownership extends to the center line(s) of the easement(s), or other appropriate boundary (the center line of Flamingo Ditch). The plat recorded in Plat Book 7, Page 96 and 96A, includes Flamingo Ditch, labeled as an “existing drainage lake,⁷” as well as a labeled easement along the property line. Therefore, the property owners abutting Flamingo Ditch own their respective property subject to the public easement encompassing Flamingo Ditch, and such ownership extends to the center line of the Flamingo Ditch easement consistent with all surveys and ownership records.

Section 177.081, Fla. Stat., requires every plat of a subdivision to contain a dedication by the record owner, but “nothing [under § 177.081, Fla. Stat.] shall be construed as creating an obligation upon any governing body to perform any act of construction or maintenance within such dedicated areas, except when the obligation is voluntarily assumed by the governing body.” Fla. Stat. § 177.081(3) (2024). There is no obligation under the plat for the City to construct or maintain Flamingo Ditch. Similarly, easements, agreements, deed restrictions, and other documents

⁶ A Golden Beach plat dedication from 1955, recorded in Plat Book 9, Page 45, includes streets, as well as alleys, thoroughfares, parks, canals, and drainage easements to the public with no statutory reference. Aero, Inc. prepared this plat as well as both earlier plats.

⁷ The plat language did not reserve riparian rights in the developer. Where riparian rights are not reserved by the dedicant, public riparian rights exist appurtenant to platted streets where the street extends to the water. *See City of Tarpon Springs v. Smith*, 88 So.2d 613 (Fla. 1921); *see also Burkart v. City of Ft. Lauderdale*, 168 So.2d 65 (Fla. 1964) (Where the developer reserved riparian rights, the developer’s successors maintained riparian rights together with accreted lands). Riparian rights are not proprietary rights and, to the extent that private riparian rights exist, such rights are limited by regulatory rights of government. See §253.141, Fla. Stat.; Sid Ansbacher & Susan Cobb Grandin, *Local Government Riparian Rights and Authority*, Fla. B.J., JUNE 1996, at 87. All of Flamingo Ditch is owned by private property owners subject to easements and the plat.

concerning Flamingo Ditch do not obligate the City to take any action concerning Flamingo Ditch. The City's maintenance obligations due to its historical voluntary maintenance are detailed in section IV below.

IV. The City Must Continue to Maintain Flamingo Ditch Consistent with its Original Design and Function as it Historically has.

A municipality cannot be compelled to perform any maintenance or construction on property it does not own except where such maintenance or construction is voluntarily assumed. See Ecological Dev., Inc. v. Walton Cnty., 558 So. 2d 1069, 1071 (Fla. 1st DCA 1990). Whether the voluntary maintenance begets a continuing responsibility is fact-specific and depends on the type of construction or maintenance assumed. Broadly, there is a duty to “assume[] the responsibility . . . with reasonable care.” See Slemph v. City of N. Miami, 545 So.2d 256, 258 (Fla. 1989) (“Once the city has undertaken to provide [protection to individual property owners from flooding due to natural causes], by building a storm sewer pump system, for example, it assumes the responsibility to do so with reasonable care”). Following public dedication and a voluntary undertaking to perform maintenance, the municipality cannot “relieve itself of all duties⁸ with respect to maintenance.” *Id.*; see also Jordan v. St. Johns County, 63 So.3d 835 (Fla. 5th DCA 2011) (Government has a duty to reasonably maintain public roads⁹ dedicated to the public use and that the government has discretion as to the level of maintenance, provided such maintenance is meaningful to the public use).

⁸ Relief of maintenance obligations can be undertaken by way of a formal abandonment, outlined under §177.107, Fla. Stat. Complete abandonment of reasonable maintenance obligations may give rise to an inverse condemnation claim.

⁹ Most cases concerning maintenance functions and obligations involve public road maintenance.

The City has voluntarily undertaken several maintenance obligations concerning Flamingo Ditch. Though there is no agreed obligation to continue to maintain Flamingo Ditch, the voluntary assumption of the projects that the City of Venice has historically undertaken obligates it to maintain those projects to function as originally designed. Though discretion is afforded to the government as to the extent of the maintenance performed, once steps have been taken to provide some mitigation against flooding, the City must continue to provide those protections in a reasonable and meaningful manner. The projects that the City has assumed,¹⁰ in addition to the routine inspections¹¹ undertaken by the City, obligates the City to reasonably mitigate some flooding in the Flamingo Ditch area consistent with its original design.

Since the enactment of §768.28, *Florida Statutes*, in 1975, which waived sovereign immunity, Florida courts have established a stable framework for analyzing municipal liability for capital projects. A government's decision not to construct, enlarge, or modernize a public improvement, whether a road, drainage channel, or facility, remains a discretionary policy choice shielded from tort liability. See *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985); *Department of Transp. v. Konney*, 587 So. 2d 1292 (Fla. 1991); *Department of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982).

Once the government actually establishes or takes over an improvement, it must operate and maintain it as designed. See *Slemp v. City of N. Miami*, 545 So. 2d 256 (Fla. 1989); *City of St. Petersburg v. Collom*, 419 So. 2d 1082 (Fla. 1982); *Department of Transp. v. Neilson*, 419 So. 2d at 1077; *see also Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989) ("An operational function . . .

¹⁰ Source: Flamingo Ditch Fact Sheet

<https://www.venicegov.com/home/showpublisheddocument/13263/638773842716430000>

¹¹ Source: City of Venice NPDES Report, <https://sarasota.wateratlas.usf.edu/upload/documents/2020-Venice-NPDES-AR.pdf#:~:text=Outfall%205%20,1%20100>

is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented”). Planning and design decisions fall within the discretionary realm and are immune from tort suits. See *Trianon Park*, 468 So. 2d at 918; *Neilson*, 419 So. 2d at 1077. The term “discretionary” in this context means that the governmental act involved an exercise of executive or legislative power such that, for the court to intervene by way of tort law it inappropriately would entangle itself in fundamental questions of policy and planning. See *Department of Health and Rehab. Services v. Yamuni*, 529 So.2d 258, 260 (Fla.1988). These principles were set out in *Department of Transportation v. Neilson*, where the Florida Supreme Court held that decisions on how to align roads, install traffic devices, or address an intersection’s hazards involve planning-level functions beyond court interference.

As a general rule, the government has no duty to maintain, correct, or modify naturally occurring conditions. See *Selvin v. DMC Regency Residence, Ltd.*, 807 So. 2d 676, 679 (Fla. 4th DCA 2001) (“The fundamental proposition that drowning is a risk inherent in any body of water leads to some equally fundamental legal principles. The owner of a body of water is not liable merely because a child may be too young or of insufficient intelligence to understand the open and obvious danger of the water . . . to shift the responsibility to the lake owner, by virtue of ownership alone, is” unreasonable”); *Slemp v. City of N. Miami*, 545 So. 2d 256, 258 (Fla. 1989) (Cities do not have “a duty to protect individual property owners from flooding due to natural causes”). The government also has no duty to maintain or correct dangerous private land or conditions arising there. Before the City voluntarily undertook to improve Flamingo Ditch, the City had no duty to maintain Flamingo Ditch.

Flamingo Ditch was a natural tidal wetland and outfall on Venice Island that drained surrounding lowlands to the Gulf. See 2004 Island of Venice Study Update. When the City of

Venice was incorporated in the 1920s, Flamingo Ditch and the nearby Deertown Gully existed as natural beach drainage channels emptying to the Gulf. *Id.* In its undeveloped state, the Ditch was a coastal lagoon or slough, periodically exchanging water with the Gulf.

Suburban growth reached the Golden Beach area in the 1960s and early 1970s. At that time, Developers did not implement effective stormwater design or elevation standards for private developments. Developers built roads and homes at low elevations without retention ponds. Flamingo Ditch became the de facto stormwater outlet for the Developer's new developments, but it was never formally improved or adopted as a municipal or county stormwater drainage facility.

Although the ditch was platted, private landowners held title to the underlying property, with lot lines extending to the center of Flamingo Ditch. The City received a 20-foot easement along part of the ditch, but that easement did not compel municipal maintenance. Until the 1970s, Flamingo Ditch served as a private natural feature that met a public need, with no stormwater utility fund in place. Residents, presumably with some City assistance, handled minor upkeep, and tidal flow provided natural flushing.

Florida law treats a city's decision to build or operate public infrastructure as a discretionary "planning-level" function protected by sovereign immunity. Once a city opts to operate and maintain a facility, however, it assumes an "operational-level" duty to keep it in a reasonably maintained condition or warn of known hazards. *See Avallone v. Board of County Comm'rs*, 493 So.2d 1002, 1005 (Fla. 1986); *Butler v. Sarasota County*, 501 So.2d 579, 579 (Fla. 1986). Some view Flamingo Ditch as a natural feature on private land, not expressly included on its Stormwater Utility Map and thus, not part of the City's stormwater system. Under that view, the City's role in the Flamingo Ditch's maintenance could remain discretionary. However, the City's prior acts impose an obligation of reasonable maintenance.

In Breaux v. City of Miami Beach, the Florida Supreme Court noted that whether a government “operates” a facility depends on the totality of the circumstances, not a “formal designation.” *Breaux v. City of Miami Beach*, 899 So.2d 1059 (Fla. 2005)at 1064–65 (citing *Garcia v. Dep’t of Nat. Res.*, 753 So.2d 72 (Fla. 2000)). In *Breaux*, the Court found that because Miami Beach had knowledge of public use and built facilities for beachgoers, it “held [the area] out” as a public swimming area and owed the public an operational level duty. *Id.* That conduct triggered an obligation to keep the property in a reasonably safe condition and warn of known hazards. *Id.*¹²

By the mid-1990s, the City began installing and repairing drainage outfalls, relying on the ditch as a stormwater conduit. *Southwest Fla. Water Mgmt. Dist., Manasota Basin Board Meeting Notebook* (Feb. 10, 2010), pg. 86 of the PDF. (“During the first beach nourishment project in 1996, the [Flamingo Ditch] channel walls were braced with wooden structures. The structures were removed when the outfall was heavily damaged during a storm in 1999 . . . aerial photos show Flamingo Ditch was converted from an open channel to a pipe outfall in 1996, and then to a box outfall around 2000. A drawdown pipe was installed in 2003”).

Improvements continued in the 2010s. In 2011, the City and the Southwest Florida Water Management District (SWFWMD) pursued cooperative funding for outfall modifications, flood attenuation, and other drainage upgrades. *Id.* In 2013, Venice again partnered with SWFWMD and secured temporary construction easements from many private property owners for permission to

¹² See *Diamond K Corp. v. Leon Cnty.*, 677 So. 2d 90, 91 (Fla. 1st DCA 1996) (County’s expansion of stormwater drainage into a private creek, causing repeated flooding on claimant’s land due to increased runoff from permitted development and enlarged culverts, was potentially compensable). See also *Hillsborough Cnty. v. Gutierrez*, 433 So. 2d 1337, 1338 (Fla. 2d DCA 1983) (holding county potentially liable for inverse condemnation when permitted subdivision drainage system and fill dirt disrupted natural drainage, causing persistent flooding on claimant’s land). Bowen|Schroth is finalizing a legal memorandum analyzing issues concerning potential inverse condemnation claims.

dredge Flamingo Ditch. The City then completed a large-scale cleanup that removed accumulated muck, improved water quality, and enhanced “stormwater flow.” City’s Flamingo Ditch Fact Sheet.

A natural bottleneck at the outfall remained at the beach. A heavy rain in August 2017 caused flooding, and the deteriorated wooden box culvert contributed to the problem. The City’s Stormwater Maintenance Division secured a permit in 2018 to remove the old outfall, re-contour the outlet, and install dune-stabilizing plants. This project allowed stormwater to discharge more freely and reinforced the ditch’s role in Venice’s drainage network.

Removal of the structure *did not* increase the volume of stormwater reaching the Gulf – it only allowed that volume to flow out more efficiently. The City explained in a news release, “The same volume of stormwater will discharge from Outfall 5 as did before; it will just flow through a natural, vegetated channel.” Venice described the Flamingo Ditch lagoon at that time as “a healthy water body” that provided natural treatment of stormwater before discharge. The City’s voluntary improvements indicate that Flamingo Ditch had become part of the City’s stormwater system, even though the City’s lack of ownership limits the City’s ability to act significantly without express consent of the private property owners.

City maps and NPDES (National Pollutant Discharge Elimination System) permit documents reflect that Flamingo Ditch is part of Venice’s Municipal Separate Storm Sewer System (MS4). The City’s Stormwater Utility Map identifies four outflows and one drain discharging into the ditch, and the engineering department numbers it “Beach Outfall 5.” As an MS4 outfall, the ditch appears in Venice’s NPDES Annual Reports, which require it to be inspected and maintained by the City. These acts show an operational-level decision to include Flamingo Ditch in the City’s stormwater system with limitations because of the City’s lack of ownership, but with some

easement rights to maintain. Because of the City’s prior decisions and voluntary acts, it has an obligation to maintain Flamingo Ditch as it has been maintained historically.

V. There is no Obligation for the City to Expand or Upgrade its Existing System.

The Florida Supreme Court ruled that “there is no liability for the failure of a governmental entity to build, expand, or modernize capital improvements” *Trianon Park Condo. Ass’n, Inc. v. City of Hialeah*, 468 So. 2d 912, 920 (Fla. 1985). Thus, the City “does not . . . in the abstract . . . [have] a duty to protect individual property owners from flooding due to natural causes.” *Slemp v. City of N. Miami*, 545 So. 2d 256, 258 (Fla. 1989). However, if local government “accepted ownership of the drainage system”¹³ or builds “a storm sewer pump system, for example, it assumes the responsibility to do so with reasonable care . . . and . . . to maintain and operate the system If the city negligently fails to properly maintain or operate the system, it can be held liable” *Slemp v. City of N. Miami*, 545 So. 2d 256, 258 (Fla. 1989).¹⁴

¹³ See *Leon Cnty. v. Smith*, 397 So. 2d 362, 363 (Fla. 1st DCA 1981). *Leon County* is instructive here because of the similar issues involving acceptance of a platted drainage system, increased development, and connection between privately built drainage to local government stormwater utility system. The issues in *Leon County*, namely acceptance of a plated drainage system, increased development, and connection between privately built drainage and the local government stormwater utility system, are similar to the issues the City faces and provide a helpful example. *Id.* Prior to development, most rainwater in the affected area “percolated into the ground.” Severe storms would cause flooding on the appellees’ property, but the flooding was sporadic and infrequent. When development began, the drainage system was designed to drain surface water through a ditch to the boundary line of the appellees’ property with no provisions made for the flow of water across appellees’ land. As development continued, damage to appellees’ property continued. Drainage from other county-owned land was connected to the drainage system. The county enclosed the drainage easement and installed a pipe. The installation of the pipe increased water flow velocity, which resulted in several ditches carved out on appellees’ land. The appellees’ property was ultimately rendered useless with a finding that they were “deprived of all beneficial use and enjoyment of their property.”

¹⁴ The concurring and dissenting opinions in *Slemp* suggest the majority held that the City of Miami would be negligent if its stormwater system did not prevent flooding. See *Slemp v. City of N. Miami*, 545 So. 2d 256, 258 (Fla. 1989) Overton dissenting, (“The majority places on cities and counties a duty to insure private property owners from water damage when there is a government-maintained drainage system serving their property. It requires local governmental entities to pay damages even though the damage was less than it would have been had the drainage system not been there.”). However, state and federal courts recognize *Slemp* did not stand such a broad proposition. See *Palermo v. Brevard Cnty.*, No. 6:20-CV-2217-PGB-DCI, 2021 WL 3015259, at *5 (M.D. Fla. May 24, 2021) (“*Slemp v. City of N. Miami*, 545 So. 2d 256, 258 (Fla. 1989) (holding that “the city’s alleged failure to maintain and operate its pumps properly is an operational level activity”); see also *Trianon Park Condo. Ass’n v. City of Hialeah*, 468 So. 2d 912, 924 (Fla. 1985) (explaining that operational decisions are not immune”).

The Florida Supreme Court has often stated that “a governmental entity can be liable with respect to maintenance where it has failed to maintain existing . . . devices in accordance with their original design.” *Perez v. Dep't of Transp.*, 435 So. 2d 830, 831 (Fla. 1983) (citing *Dep't of Transp. v. Neilson*, 419 So. 2d 1071, 1077 (Fla. 1982)). The Court has also “emphasized” that maintenance liability does not arise from “obsolescence” or the “need to upgrade” *Id.* citing *Dep't of Transp. v. Neilson*, 419 So. 2d 1071, 1077 (Fla. 1982)). However, at this point, the specific contours of Flamingo Ditch's original design and intended function remain unclear. Additional modeling and analysis on this point could better define the scope of the City's maintenance obligation. Nevertheless, so long as Flamingo Ditch is kept in the condition required by its original design, the City's duty of maintenance is satisfied.

This rule applies, even when new, more stringent statutory design standards are enacted after the acceptance or completion of the capital project. See *Dep't of Transp. v. Neilson*, 419 So. 2d 1071, 1078 (Fla. 1982) (rejecting “the contention that the failure to comply with standards and criteria for design, construction, and maintenance of public roads and highways established” by statute “subjects governmental entities to suit.”). Because of that principle, the enactment of updated LDRs and Comprehensive Plan elements does not obligate the City to modernize Flamingo Ditch, unless the City voluntarily decides to replace or substantially alter it, at which point new standards could apply.

As previously noted, when a local government accepts ownership of or builds a drainage system, it must maintain and operate it with reasonable care. See *Slemp v. City of N. Miami*, 545 So. 2d 256, 258 (Fla. 1989) (“Once the city has undertaken to provide such protection, by building a storm sewer pump system, for example, it assumes the responsibility to do so with reasonable care”). However, the Florida Supreme Court “emphasized” that “a governmental entity could not

be liable where the allegation of failure to maintain was used to indicate obsolescence and the need to upgrade” *Perez v. Dep’t of Transp.*, 435 So. 2d 830, 831 (Fla. 1983) (citing *Dep’t of Transp. v. Neilson*, 419 So. 2d 1071, 1077 (Fla. 1982)). However, expenditures associated with fulfilling the government’s maintenance obligations are a legislative decision, and “it [is] not a judicial function to determine what [is] suitable road construction or when funds must be spent to upgrade existing roads.” *Dept. of Transp. v. Konney*, 587 So.2d 1292, 1294 (Fla. 1991) (citing *Perez v. Dept. of Transp.*, 587 So.2d 830 (Fla. 1983)).

Thus, because Venice integrated Flamingo Ditch into its system, the City must keep that ditch in the condition required by its then-existing design. However, it is not legally obligated to enlarge or re-engineer Flamingo Ditch unless it voluntarily decides to do so. Decisions to adopt new standards, expand capacity, or retrofit for modern conditions remain planning-level decisions protected by sovereign immunity.

The Florida Supreme Court has made clear that “a governmental entity can be liable with respect to maintenance where it has failed to maintain existing . . . devices in accordance with their original design.” *Perez v. Dep’t of Transp.*, 435 So. 2d 830, 831 (Fla. 1983). In *Corp. of President of Church of Jesus Christ of Latter-Day Saints v. St. Johns River Water Mgmt. Dist.*, the court denied a landowner’s failure to maintain lawsuit under a “maintenance exemption” because it failed to prove the “original design specifications” for the water dikes. *Corp. of President of Church of Jesus Christ of Latter-Day Saints v. St. Johns River Water Mgmt. Dist.*, 489 So. 2d 59 (Fla. 5th DCA 1986). The landowner wanted the government to rebuild them to their original function, but lacked records to establish that baseline. *Id.* Courts will not infer an original design without proof.

In Barnes v. Dist. Bd. of Trustees of St. Johns River State Coll., the plaintiffs alleged that the state college's stormwater infrastructure caused flooding on their property. *Barnes v. Dist. Bd. of Trustees of St. Johns River State Coll.*, 147 So. 3d 102 (Fla. 1st DCA 2014). In analyzing those claims, the First District Court of Appeals highlighted the difference between (1) complaints about the drainage system's original design or post-incident upgrade and (2) day-to-day operational tasks like unclogging drains or repairing a weir.

In Barnes, the college faced allegations that it failed "to design, adapt, and operate its drainage network in a responsible way." *Id.* Much of the evidence, however, focused on whether the college should have re-engineered a retention pond or undertaken broader improvements after heavy rains breached a retaining wall. The Court found the Plaintiffs' allegations were "more closely into the category of planning level immunity." *Id.* at 108 (citing *Kaweblum ex rel. Kaweblum v. Thornhill Estates Homeowners Ass'n, Inc.*, 801 So. 2d 1015, 1016 (Fla. 4th DCA 2001); *Tucker v. Gadsden County*, 670 So. 2d 1053, 1054 (Fla. 1st DCA 1996)).

The claims in Barnes, related to an "inadequate weir" or a "clogged drain," may arguably be operational issues if they involved straightforward maintenance or minor repairs. *Barnes*, 147 So. 3d at 108–09. The trial court viewed these deficiencies as evidence that the college might have failed in its operational duty. Yet on appeal, the First District Court of Appeal noted that even these allegations "appear . . . quite thin as a basis for denying summary judgment," suggesting that the real crux of the lawsuit hinged on whether the college should have redesigned or upgraded the ponds to meet larger storm events. *Id.* at 109. The plaintiffs takings claim was also dismissed on under immunity grounds under Chapter 373 *Florida Statutes*. See Barnes v. Dist. Bd. of Trustees of St. Johns River State Coll., 147 So. 3d 102, 104 (Fla. 1st DCA 2014).

The government is not responsible for damages from hurricanes or other extreme weather events. *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354,1358 (Fed. Cir. 2018)(Government is not responsible for flood damage caused by Hurricane Katrina); *Chabot v. City of Sauk Rapids*, 422 N.W. 2d 708 (Minn., 1988) (City not responsible for failing to hold back water in natural holding pond to protect landowner's property despite city's engineering report that suggested the pond be increased in size.); *City of Watauga v. Taylor*, 752 S.W.2d 199 (Tex., 1988) (City undertaking stormwater issues has no duty to provide facilities adequate for all reasonably anticipated floods, but can be held liable for negligently constructed or maintained facilities). Accordingly, because the City did not create the flood-prone conditions of Flamingo Ditch,¹⁵ it does not have an obligation to expand or upgrade its existing system and is not responsible for damage caused by hurricane storm surge.

Respectfully Submitted,



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¹⁵ When a local government “creates a known dangerous condition that is not readily apparent to persons who could be injured by the condition,” it must warn the public or otherwise protect them from harm. *City of St. Petersburg v. Collom*, 419 So. 2d 1082, 1083 (Fla. 1982). This principle, often referred to as the “Collom trap” doctrine, is an exception to the general rule that a government’s planning-level decisions remain immune from suit. *See Gadsden County v. Crosby*, 670 So. 2d 1053, 1054 (Fla. 1st DCA 1996). The known dangerous condition exception to sovereign immunity has four primary components. First, the government must create or contribute to a hazard. Second, the hazard must not be readily apparent to the public. Third, the government must know or should have known, of the hazard. Fourth, it must fail to fix or warn of the hidden danger. *Collom*, 419 So. 2d at 1083. If all these elements are met, the task of warning or correcting the condition becomes an operational duty.

EXHIBIT A
Documents and Data Reviewed

o Relevant Golden Beach Plat History

- Golden Beach plat, recorded in Plat Book 7, Pages 64 and 64A, public records of Sarasota County, FL (1954)
- Golden Beach plat, recorded in Plat Book 7, Pages 96 and 96A, public records of Sarasota County, FL (1954)
- Golden Beach plat, recorded in Plat Book 9, Page 45, public records of Sarasota County, FL (1955)
- Golden Beach plat (Unit 4), recorded in Plat Book 36, Page 44, public records of Sarasota County, FL (1994)

o Easements

- Grant of Easement for pump station, instrument number 2013109530, public records of Sarasota County, FL
- Temporary Construction Easement, instrument number 2013109532, public records of Sarasota County, FL
- Temporary Construction Easement, instrument number 2013109533, public records of Sarasota County, FL
- Temporary Construction Easement, instrument number 2013109534, public records of Sarasota County, FL
- Temporary Construction Easement, instrument number 2013109535, public records of Sarasota County, FL
- Temporary Construction Easement, instrument number 2013109536, public records of Sarasota County, FL
- Temporary Construction Easement, instrument number 2013109537, public records of Sarasota County, FL
- Temporary Construction Easement, instrument number 2013109538, public records of Sarasota County, FL
- Temporary Construction Easement, instrument number 2013109539, public records of Sarasota County, FL

- Temporary Construction Easement, instrument number 2013109540, public records of Sarasota County, FL
- Temporary Construction Easement, instrument number 2013109541, public records of Sarasota County, FL
- o Interlocal Agreement with Sarasota County & Annexations Ordinances for Specific Properties near Flamingo Ditch:
 - August 13, 2002, Interlocal Agreement between Venice and Sarasota County annexing enclaves.
 - City Resolution 2002-26 approving August 13, 2002 Interlocal Agreement and 18 separate City Ordinances annexing properties near Flamingo Ditch into the City.
- o Declaration of Condominium – Golden Beach:
 - Certificate of Amendment to the Declaration of Condominium of Golden Beach Condominium Residences, instrument number 2006197575, public records of Sarasota County, FL
 - Association provided flood insurance coverage
 - Certificate of Amendment to the Declaration of Condominium of Golden Beach Owners Association, instrument number 2008105599, public records of Sarasota County, FL
 - Association provides only fire and extended coverage insurance, which does not include flooding
 - Certificate of Amendment to the Declaration of Condominium of Golden Beach Owners Association, instrument number 2019054003, public records of Sarasota County, FL
 - Amended and Restated Declaration of Condominium of Golden Beach Condominium Residences, instrument number 2023173928, public records of Sarasota County, FL
- o Additional Resources:
 - Progress Update Presentation (Feasibility Study) - March 11, 2025

- Golden Beach and Flamingo Ditch: Overview of the hydrological conditions of the residential neighborhood surrounding Flamingo Ditch (PowerPoint presentation)
 - City of Venice Comprehensive Plan 2017-2027
 - City of Venice NPDES MS4 Annual Report - 2020
 - City of Venice [2024 Adopted Flood Zone Map Information](#)
 - City of Venice Land Development Regulations
 - City of Venice Code of Ordinances
 - [Island of Venice Flood Study Update](#)
 - Notable Data
 - Stormwater Improvement Projects Map, 2002
 - Stormwater Management Plan Report, 1998
 - [Flamingo Ditch Fact Sheet](#)
 - Notable Data
 - 2013 Dredging Project
 - 2018 Outfall Repair
 - Stormwater Utility Map
 - Shows three outfalls and one pipe draining into Flamingo Ditch
 - [The Venice Atlas](#)
 - Notable Data
 - [Venice Beach Outfalls](#)
 - [Flood Zone Information](#)
 - [Utilities Map](#)
 - [National Hurricane Center Storm Surge Risk Map](#)
 - Preliminary Coastal Stormwater Outfalls Evaluation (Venice Beach Restoration Project) for the City of Venice, November 1992
- o [Coastal Planning & Eng'g, Inc., Coastal Stormwater Outfalls Evaluation—Preliminary Report, Venice Beach Restoration Project \(Nov. 1992\);](#)

- o [U.S. Army Corps of Engineers, Jacksonville Dist., *EA: Venice Beach HSDR Project* \(2014\)](#)
- o [Fla. Dep't of Env't Protection, *Strategic Beach Management Plan: Southwest Gulf Coast Region* \(Div. of Water Res. Mgmt., May 2018\)](#)
- o [City of Venice, *Island of Venice Flood Study Update*](#)
- o Erickson Consulting Engineers, Inc. & City of Venice, *Flamingo Ditch – TS Debby Flooding* (Aug. 2012),
<https://www18.swfwmd.state.fl.us/Erp/Export/ViewDoc/uecinczo.pdf> (last visited May 1, 2025).
- o Erickson Consulting Engineers, Inc. & City of Venice, *Flamingo Ditch Gulf Outfall Improvements: Project Description* (2012),
<https://www18.swfwmd.state.fl.us/Erp/Export/ViewDoc/for14le1.pdf> (last visited May 1, 2025).
- o Erickson Consulting Engineers, Inc. & City of Venice, *Flamingo Ditch Gulf Outfall Improvements: Project Description* (2012),
<https://www18.swfwmd.state.fl.us/Erp/Export/ViewDoc/pfxz1jrd.pdf> (last visited May 1, 2025).
- o Karyn Erickson & Bobbi Claybrooke, *Offshore Stormwater Discharges: A Solution to Existing Beach Dune Outfalls*, Presentation at the Fla. Shore & Beach

Preservation Ass'n 2014 Technical Conf. (2014),

<https://www.fsbpa.com/2014TechPresentations/Erickson2.pdf> (last visited May 1,

2025

