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## ARTICLES

### “WHEN THE WIND BLOWS”: THE ROLE OF THE LOCAL GOVERNMENT ATTORNEY BEFORE, DURING, AND IN THE AFTERMATH OF A DISASTER

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*I beg you take courage; the brave soul can mend even  
disaster.*<sup>1</sup>

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1. Catherine II of Russia, quoted at Thinkexist.com, *Catherine II Quotes*, [http://thinkexist.com/quotes/catherine\\_ii/](http://thinkexist.com/quotes/catherine_ii/) (accessed Jan. 17, 2007).

## I. INTRODUCTION

In the Ojibwa<sup>2</sup> tongue, the term for disaster is *whangdepootenawah*: “an unexpected affliction that strikes hard.”<sup>3</sup> When disasters do strike, it immediately becomes obvious that the legal issues involved in local government disaster planning are some of the most misunderstood and confusing aspects of the entire process of disaster preparation and recovery. This makes the prudent involvement of the local government attorney essential. The local government attorney is encumbered with the responsibility of understanding and interpreting the seemingly conflicting and ever-changing body of federal, state, and local regulatory laws, rules, and guidelines. It is likewise the local government attorney who is called upon to be the bearer of bad news regarding the legal consequences of a public entity’s failure or inability to execute an effective disaster-recovery plan properly. This Article will explore the evolving body of emergency management law, as well as the practical, and at times impractical, application of that law. The Article’s analysis of state law will focus on Florida, but its discussion of the challenges that a disaster poses should resonate with all local government attorneys.

## II. THE LAW

While the local government attorney clearly must be familiar with a wide variety of matters, the knowledge of federal, state, and local laws governing emergency preparedness and response is one of the most critical. Failure to follow the requirements of all applicable laws during each phase of a disaster may significantly impact a local government’s ability to receive assistance in its most crucial time of need.

### A. Federal Emergency-Response Legislation

In recognition of the loss and disruption caused by disaster, Congress has declared that “special measures, designed to assist

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2. The Ojibwa, also known as the Chippewa, were considered one of the largest and most powerful Great Lakes Native American tribes east of the Mississippi. *Native Americans: Chippewa*, <http://www.nativeamericans.com/Chippewa.htm> (accessed Jan. 17, 2007).

3. Ambrose Bierce, *The Devil’s Dictionary* 204 (Am. H. 1983).

the efforts of the affected States in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas, are necessary.”<sup>4</sup> From disaster preparation to post-disaster recovery, it is Congress’ intent, through its emergency-response legislation, “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities . . . .”<sup>5</sup> This assistance consists of improving and expanding disaster relief, providing private and public federal assistance programs, encouraging development of comprehensive disaster plans, improving coordination and responsiveness, encouraging hazard mitigation through land use and construction controls, and encouraging the procurement of insurance to reduce reliance upon federal aid.<sup>6</sup> Under this approach, the federal role in emergency management is clearly more facilitative than directive.

Specifically, “[t]he Federal Government shall provide necessary direction, coordination, and guidance, and shall provide necessary assistance, . . . so that a comprehensive emergency preparedness system exists for all hazards.”<sup>7</sup> The responsibility for emergency preparedness “vests” in the federal government, the states, and their political subdivisions jointly.<sup>8</sup> During a disaster, however, a presidential declaration of emergency must initiate the federal response.<sup>9</sup>

A presidential declaration may be issued, at the president’s discretion, upon the request of the governor of an affected state that meets certain criteria, and upon “a finding that the situation is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.”<sup>10</sup> Further, the president may initiate an emergency response without a governor’s request in those circumstances

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4. 42 U.S.C. § 5121(a)(2) (2006).

5. *Id.* at § 5121(b).

6. *Id.*

7. *Id.* at § 5195.

8. *Id.*

9. *Id.* at § 5189(b).

10. *Id.* at § 5191(a).

for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.<sup>11</sup>

The effect of a presidential declaration upon an affected state is extensive.<sup>12</sup> Under such authority, the president is authorized to do the following: direct the resources of any federal agency to assist state and local governments; coordinate disaster relief among federal, state, local, and private providers; provide technical and advisory assistance on a myriad of issues related to health and safety; assist with debris removal; assist in providing medicine, food, and other essential supplies to state and local governments; and provide any other assistance necessary to the protection of life and property.<sup>13</sup> The extent of financial assistance, however, is limited absent congressional oversight and approval.<sup>14</sup>

### B. Florida's Emergency-Response Legislation

Federal law states that a governor, before requesting a federal emergency declaration, must act in accordance with governing state law and initiate the state's own emergency plan.<sup>15</sup> In contrast to federal restrictions on the president's authority, however, Florida law does not condition the governor's ability to declare a state of emergency on any specific prerequisite other than the existence of an actual or impending "emergency."<sup>16</sup> Any emergency declaration results in the classification of the situation as a disaster and makes state assistance available to respond to the

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11. *Id.* at § 5191(b).

12. For a more detailed discussion of the role of the federal government in an emergency, see David G. Tucker & Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 *Stetson L. Rev.* 837, 861–867 (2001).

13. 42 U.S.C. § 5192(a).

14. *Id.* at § 5193(b).

15. *Id.* at § 5191(a).

16. Fla. Stat. § 252.36(2) (2006). An "emergency" is defined as "any occurrence, or threat thereof, . . . which results or may result in substantial injury or harm to the population or substantial damage to or loss of property." *Id.* at § 252.34(3). A state of emergency may be terminated by the governor or by concurrent resolution of the legislature, but in no event shall a declaration last longer than sixty days absent renewal by the governor. *Id.* at § 252.36(2).

disaster.<sup>17</sup> In addition, the declaration of a state of emergency activates local emergency management plans, allows for such assistance as the distribution of necessary supplies and equipment within the possession of the State,<sup>18</sup> and vests authority in the governor as commander in chief of the Florida National Guard and “other forces available for emergency duty.”<sup>19</sup>

Further, a state of emergency provides the governor with additional authority not otherwise present, such as the ability to impose curfews, order evacuations, determine means of ingress and egress to and from affected areas, and “commandeer or utilize private property” subject to compensation.<sup>20</sup> It should be noted that a local government generally exercises similar authority in the execution of its adopted emergency management plan. While, in practical application, aspects of emergency preparedness, response, and recovery such as evacuations and curfews are more often exercised by the local government, such authority must necessarily be subordinate to any order that the governor issues.

Unfortunately, emergency management is an all too familiar exercise in Florida. If Tornado Alley is defined as the “geographic corridor in the United States . . . [that] receives more tornados than any other,”<sup>21</sup> then Florida certainly sits within Hurricane Alley. As a state historically within the sights of many a hurricane eye, Florida has a State Emergency Management Act that is both extensive and complex.<sup>22</sup> Like the president, who looks to the Federal Emergency Management Agency (FEMA) to implement federal emergency programs, the governor, while maintaining ultimate state authority during a disaster, relies upon the Division of Emergency Management (the Division) for the administration of the State Emergency Management Act.<sup>23</sup> The Division is

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17. *Id.* at §§ 252.34(1)(b), 252.36(3). Disasters can be classified as minor, major, or catastrophic. *Id.* at § 252.34(1). While minor disasters require only minimal state or federal assistance, major and catastrophic disasters will “likely exceed local capabilities” and require more extensive assistance. *Id.*

18. *Id.* at § 252.36(3)(b).

19. *Id.* at § 252.36(4).

20. *Id.* at § 252.36(5)(d), (e), (g), (k).

21. The Weather Channel, *Weather Glossary*, <http://www.weather.com/glossary/t.html> (accessed Nov. 16, 2006).

22. See generally Fla. Stat. §§ 252.31–252.60 (containing the provisions of the State Emergency Management Act).

23. *Id.* at § 252.35. While the governor has always maintained this ultimate authority, the Division was under the direct control of the Department of Community Affairs until

“responsible for maintaining a comprehensive statewide program of emergency management,” and for “coordination with efforts of the Federal Government[,] with other departments and agencies of state government, with county and municipal governments and school boards, and with private agencies that have a role in emergency management.”<sup>24</sup> The Division’s responsibility to carry out the provisions of the State Emergency Management Act also includes the duty to “create, implement, administer, adopt, amend, and rescind rules, programs, and plans needed to carry out the provisions of [Florida Statutes Sections] 252.31–252.90 . . . .”<sup>25</sup>

In this role, the Division is specifically responsible for such activities as the preparation and implementation of Florida’s comprehensive emergency management plan under the legislature’s direction, as well as the establishment of standards for local emergency management plans to ensure consistency with the state plan.<sup>26</sup> The State Emergency Management Act provides the Division with additional authority to fund certain financial assistance programs,<sup>27</sup> to review local government comprehensive emergency management plans,<sup>28</sup> and to establish rules governing the operation of local emergency management agencies.<sup>29</sup> Moreover, the Division maintains oversight of, and rulemaking authority for, such mandates to local governments as maintaining a registry of persons with special needs;<sup>30</sup> providing for the evacuation and sheltering of their citizens; and adequately addressing “preparedness, response, recovery, and mitigation.”<sup>31</sup> A local government’s compliance with such standards is often linked to critical funding.<sup>32</sup> For example, receipt of funds from the Emergency

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legislative amendments passed in 2006. *Infra* nn. 73–74 and accompanying text.

24. *Id.* at § 252.35(1).

25. *Id.* at § 252.35(2)(x). Specific rules that the Division has promulgated in carrying out this directive may be found in Subtitle 9G of the Florida Administrative Code.

26. Fla. Stat. § 252.35(2)(a), (d).

27. Specifically, the Department of Community Affairs administers the “Emergency Management, Preparedness, and Assistance Trust Fund to local emergency management agencies and programs pursuant to criteria specified [by] rule.” *Id.* at § 252.373(2).

28. *Id.* at § 252.35(2)(c).

29. *Id.* at § 252.35(2)(b).

30. *Id.* at § 252.355(1).

31. Fla. Admin. Code Ann. r. 9G-6.0023(2) (2006).

32. *Id.* at r. 9G-19.014(1) (providing for loss of current or future funding and requiring the repayment of funds already awarded when local governments fail to comply with any of the conditions of the funding).

Management, Preparedness, and Assistance Trust Fund requires that, at a minimum, a local emergency management agency located in a county with a population of more than 75,000 have a program director who works at least forty hours a week in that capacity.<sup>33</sup> It is, therefore, essential that local government attorneys familiarize themselves with these requirements, and ensure compliance, prior to the occurrence of any impending or actual disaster.

### C. County Governments' Statutory Authority and Responsibility

Irrespective of the significant, and apparently concurrent, role that the State maintains in the local emergency management function, it is the local government that is on the front line of any disaster. Thus, the local government attorney should become intimately familiar with the local comprehensive emergency plan and with the extent and limitations of authority that a local government may exercise during an impending or realized disaster.

Since the adoption of the State Emergency Management Act in 1974, the Florida Legislature has expressly declared that "[s]afeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state."<sup>34</sup> Pursuant to this declaration, counties are specifically empowered to serve the emergency management function for both their incorporated and unincorporated areas.<sup>35</sup> Such authority requires the establishment of a county emergency management agency and the creation of an emergency management plan that is consistent with the state plan.<sup>36</sup> In addition, each county emergency management agency must appoint a director who meets the qualifications established in a job description approved by the county, and who is to serve under the county's direction.<sup>37</sup> The director is accountable for the "organization, administration, and operation of the county emergency management agency" and is responsible for the coordination of emergency management ac-

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33. Fla. Stat. § 252.373(2)(a); Fla. Admin. Code Ann. rr. 9G-11.004(1), 9G-19.004(1), 9G-19.005.

34. Fla. Stat. § 252.38.

35. *Id.* at § 252.38(1)(a).

36. *Id.*

37. *Id.* at § 252.38(1)(b).

tivities.<sup>38</sup> The director also serves as the county's liaison to other state and local entities.<sup>39</sup> Accordingly, a county must inform the Division of Emergency Management of its appointment of a director and all other personnel within the local emergency management agency.<sup>40</sup>

The director of a local emergency management agency, however, need not be a direct employee of the county. As the statute specifically allows, a county may choose to appoint as director either a county constitutional officer or an employee of a constitutional officer, as long as the county provides the Division with advance notification of its intent to make the appointment.<sup>41</sup> Notably, however, no distinction exists between the authority and responsibility of an appointed constitutional officer or employee thereof and any other individual who may be appointed to such position.<sup>42</sup> State law thus unambiguously provides for a level of oversight consistent with a county government's "innate responsibility" to safeguard its citizens.<sup>43</sup> It is, therefore, advisable for the local government attorney to recommend a clear delineation of responsibilities and oversight of this position should the county elect to appoint as director an individual who would not traditionally be subject to the county's control.

Such a delineation may appropriately be accomplished through an interlocal agreement in accordance with Florida Statutes Chapter 163. The Florida Interlocal Cooperation Act provides statutory authority for local governments to

cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population,

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* This provision requires the direct appointment of an individual by the county. *Id.* It does not permit the appointment of an agency, nor can it be read to provide authority for a constitutional officer to appoint an employee. *Id.*

42. *See id.* (giving all directors, however appointed, the same responsibilities and authority).

43. *See supra* nn. 34–36 and accompanying text (describing the inherent duties and powers of county governments under the State Emergency Management Act).



and other factors influencing the needs and development of local communities.<sup>44</sup>

This ability of local governmental entities to exercise power jointly or to agree to provide services to each other is not limitless, however. While public agencies may jointly exercise “any power, privilege, or authority which such agencies share in common and which each might exercise separately,”<sup>45</sup> an interlocal agreement cannot “extend the existing authority of the parties to the agreement . . . when not all the parties to the interlocal agreement possess independent authority” to act.<sup>46</sup>

A review of the State Emergency Management Act establishes that any local actions taken during an emergency are taken on the sole authority of the local government.<sup>47</sup> As noted earlier, a county, as a political subdivision of the State, may act independently to “make, amend, and rescind such orders and rules as are necessary for emergency management purposes and to supplement the carrying out of the provisions of [Sections] 252.31–252.90,” provided that such orders and rules are not inconsistent with any orders or rules of the State.<sup>48</sup> In so acting, a political subdivision shall have the power and authority, among other acts, to do the following: “provide for the health and safety of persons and property, including emergency assistance to the victims of any emergency”; “appoint, employ, remove, or provide, with or without compensation, coordinators, rescue teams, fire and police personnel, and other emergency management workers”; “establish, as necessary, a primary and one or more secondary emergency operating centers to provide continuity of government and direction and control of emergency operations”; “assign and make available for duty the offices and agencies of the political subdivision, including the employees, property, or equipment thereof relating to firefighting, engineering, rescue, health, medical and related services, police, transportation, construction, and similar items or services for emergency operation purposes”; and “request

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44. Fla. Stat. § 163.01(2) (2006).

45. *Id.* at § 163.01(4).

46. Fla. Atty. Gen. Op. 97-10 (Feb. 14, 1997) (available at 1997 WL 68127).

47. *See generally* Fla. Stat. § 252.38 (describing the authority of local political subdivisions in emergency situations).

48. *Id.* at § 252.46(1).

state assistance or invoke emergency-related mutual-aid assistance by declaring a state of local emergency.”<sup>49</sup>

No constitutional officer is provided such authority, so there can be no joint exercise of that authority.<sup>50</sup> Therefore, any interlocal agreement allowing a constitutional officer, or employee thereof, to serve as a county’s emergency management director should not purport to delegate to the director any authority that belongs exclusively to the county. Further, the agreement should clearly require the approval and oversight of the county as the party ultimately liable for any noncompliance.

#### D. Municipalities’ Statutory Authority and Responsibility

Unlike counties, municipalities are not required to create an emergency management agency, but rather are “encouraged to create municipal emergency management programs” in coordination with the county’s emergency management agency.<sup>51</sup> Should the municipality elect to do so, its authority is not independent. Rather, a municipal emergency management plan must comply not only with those laws and rules applicable to counties, but also with its county’s emergency management plan.<sup>52</sup> In the absence of a separate municipal plan, the municipality is subject to the county’s plan.<sup>53</sup> Regardless of whether a municipal plan exists, a municipality must coordinate its requests for federal and state emergency response assistance with the county in which it is located.<sup>54</sup>

This is not to say, however, that a municipal attorney has less responsibility than any other local government lawyer in an emergency situation. To the contrary, while a municipal attorney does need to be constantly aware of the hierarchy of authority that the State Emergency Management Act creates, he or she will

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49. *Id.* at § 252.38(3)(a).

50. A narrow exception to this statement is that sheriffs have a limited authority to declare a state of emergency. Fla. Stat. § 870.042(1) (2006). The circumstances under which this may occur are clearly delineated in Section 870.043. For a further discussion of law enforcement’s role in emergency management, see *infra* Part II(E).

51. *Id.* at § 252.38(2).

52. *Id.*

53. *Id.*

54. *Id.* Notwithstanding this provision, reimbursement requests made through a federal disaster assistance program do not require coordination with the county. *Id.*

be called upon to make the same difficult decisions and to perform the same analyses in a crisis situation as a county attorney. Notwithstanding any limitations on its authority, a municipality is included within the definition of a “political subdivision” for purposes of the Act<sup>55</sup> and thus possesses the same expansive emergency power and authority as a county.<sup>56</sup>

#### E. The Role of County and Municipal Law Enforcement

County and municipal law enforcement agencies have an indisputably critical and essential role in the preparation for, and implementation of, an emergency management response. Specifically, law enforcement is responsible for enforcing the rules and orders promulgated by state and local authorities pursuant to the State Emergency Management Act.<sup>57</sup> Law enforcement, however, has limited authority to act independently in a crisis situation.

Sheriffs or designated city officials are authorized to declare a state of emergency within their jurisdictional limits<sup>58</sup> independently of county or municipal action when

there has been an act of violence or a flagrant and substantial defiance of, or resistance to, a lawful exercise of public authority and [when], on account thereof, there is reason to believe that there exists a clear and present danger of a riot or other general public disorder, widespread disobedience of the law, and substantial injury to persons or to property, all of which constitute an imminent threat to public peace or order and to the general welfare of the jurisdiction affected or a part or parts thereof . . . .<sup>59</sup>

Under such authority, a sheriff or designated city official “may order and promulgate” such emergency measures as imposing curfews and closing places of public assemblage, with any limitations and conditions the official may deem appropriate.<sup>60</sup> The

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55. *Id.* at § 252.34(8).

56. For a discussion of counties’ emergency powers under the Act, see *supra* Part II(C).

57. Fla. Stat. § 252.47.

58. *Id.* at § 870.042(1).

59. *Id.* at § 870.043.

60. *Id.* at § 870.045(1), (4).

state of emergency can continue for up to seventy-two hours without approval from any other government official.<sup>61</sup>

In comparison, the authority of a local government to impose emergency measures pursuant to its emergency management authority is not limited to an impending threat of riot, general public disorder, or widespread disobedience of the law.<sup>62</sup> To the contrary, a local government may impose a wide array of restrictions pursuant to its inherent responsibility to protect the life and property of its citizens during times of declared emergency.<sup>63</sup> Thus, communication between law enforcement and local government both during and after a disaster regarding the need for such measures is essential to the maintenance of an orderly recovery phase.

### III. LESSONS LEARNED, OR FORGOTTEN?

In 2004, Florida suffered devastating losses from a series of four hurricanes that crossed the state in rapid succession—Charley, Frances, Ivan, and Jeanne.<sup>64</sup> Subsequently, during the 2005 legislative session, approximately eighteen bills were filed that would have had a direct impact on emergency management.<sup>65</sup> Of those eighteen bills, only one survived.<sup>66</sup> A review of

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61. *Id.* at § 870.047. The state of emergency may, however, be terminated by act of the governor, county commission, or city council prior to the expiration of seventy-two hours. *Id.* An extension of this time period may occur “by request from the public official and the concurrence of the county commission or city council.” *Id.*

62. *See id.* at § 252.38(3)(a)(5) (allowing a political subdivision to declare a state of local emergency whenever any emergency occurs that affects only that subdivision).

63. *Id.* at § 252.38.

64. Natl. Climatic Data Ctr., *Climate of 2004 Atlantic Hurricane Season*, <http://www.ncdc.noaa.gov/oa/climate/research/2004/hurricanes04.html> (last updated Dec. 13, 2004).

65. Fla. H. 1937, 2005 Reg. Sess. (Apr. 4, 2005); Fla. H. 1551, 2005 Reg. Sess. (Mar. 7, 2005); Fla. H. 1125, 2005 Reg. Sess. (Feb. 24, 2005); Fla. H. 751, 2005 Reg. Sess. (Feb. 8, 2005); Fla. H. 621, 2005 Reg. Sess. (Jan. 26, 2005); Fla. H. 347, 2005 Reg. Sess. (Jan. 14, 2005); Fla. H. 191, 2005 Reg. Sess. (Jan. 5, 2005); Fla. Sen. 2616, 2005 Reg. Sess. (Mar. 8, 2005); Fla. Sen. 2092, 2005 Reg. Sess. (Mar. 7, 2005); Fla. Sen. 1604, 2005 Reg. Sess. (Feb. 18, 2005); Fla. Sen. 1544, 2005 Reg. Sess. (Feb. 16, 2005); Fla. Sen. 1488, 2005 Reg. Sess. (Feb. 15, 2005); Fla. Sen. 1228, 2005 Reg. Sess. (Feb. 8, 2005); Fla. Sen. 662, 2005 Reg. Sess. (Jan. 12, 2005); Fla. Sen. 572, 2005 Reg. Sess. (Dec. 21, 2004); Fla. Sen. 442, 2005 Reg. Sess. (Dec. 8, 2004); Fla. Sen. 240, 2005 Reg. Sess. (Nov. 16, 2004); Fla. Sen. 232, 2005 Reg. Sess. (Nov. 16, 2004).

66. The surviving bill was Senate Bill 592. As adopted, it provided that the failure to possess an occupational license while offering goods and services for sale during a declared emergency is a misdemeanor; that the governor may authorize any business selling certain commodities to operate in violation of an established curfew; and that the governor may

the failed legislation shows that much of it was almost prophetic, given the subsequent 2005 hurricane season. For example, legislation mandating that nursing homes have a source of alternate electrical power capable of providing power for a specified period, and requiring priority restoration of electrical power to such facilities, died in committee.<sup>67</sup> The devastating impact of Hurricane Katrina during the 2005 hurricane season unequivocally demonstrated the necessity of such critical requirements.<sup>68</sup>

But while the unforgettable images of Florida property damage in 2004 apparently did not spur action, the inescapable images of human tragedy in 2005 appear to have had a much more profound impact. In comparison to the eighteen bills filed in the 2005 legislative session, approximately thirty-three bills were filed during the 2006 session.<sup>69</sup> Several laws were enacted as a result, and many provisions from those bills that failed individually were swept into House Bill 7121.<sup>70</sup> The new legislation that

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provide for the extension of solid waste disposal facilities' hours of operation by executive order. 2005 Fla. Laws ch. 283. All other bills were either vetoed or died in committee or on calendar.

67. Fla. Sen. 240, 2005 Reg. Sess.; Fla. Sen., *Senate 0240: Relating to Nursing Homes/Electrical Service*, [http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI\\_Mode=ViewBillInfo&BillNum=0240](http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&BillNum=0240) (accessed Mar. 1, 2006).

68. See e.g. Dave Reynolds, *Witnesses: Poor Planning and Follow-through Led to Hundreds of Katrina Deaths*, Inclusion Daily Express, <http://www.inclusiondaily.com/archives/06/02/02/020206/lakatrina.htm> (Feb. 2, 2006) (reporting that almost twenty percent of those who died in Hurricane Katrina were in hospitals or nursing homes and that many of these facilities had improperly installed electrical switches and generators).

69. Fla. H. 7139, 2006 Reg. Sess. (Mar. 16, 2006); Fla. H. 7125, 2006 Reg. Sess. (Mar. 15, 2006); Fla. H. 1721, 2006 Reg. Sess. (Mar. 15, 2006); Fla. H. 1435, 2006 Reg. Sess. (Mar. 3, 2006); Fla. H. 1359, 2006 Reg. Sess. (Feb. 28, 2006); Fla. H. 1209, 2006 Reg. Sess. (Feb. 21, 2006); Fla. H. 911, 2006 Reg. Sess. (Jan. 27, 2006); Fla. H. 739, 2006 Reg. Sess. (Jan. 17, 2006); Fla. H. 707, 2006 Reg. Sess. (Jan. 13, 2006); Fla. H. 603, 2006 Reg. Sess. (Jan. 4, 2006); Fla. H. 545, 2006 Reg. Sess. (Dec. 19, 2005); Fla. H. 285, 2006 Reg. Sess. (Oct. 25, 2005); Fla. H. 249, 2006 Reg. Sess. (Oct. 14, 2005); Fla. H. 165, 2006 Reg. Sess. (Sept. 20, 2005); Fla. H. 89, 2006 Reg. Sess. (Aug. 23, 2005); Fla. Sen. 2488, 2006 Reg. Sess. (Mar. 2, 2006); Fla. Sen. 2486, 2006 Reg. Sess. (Mar. 2, 2006); Fla. Sen. 2386, 2006 Reg. Sess. (Mar. 1, 2006); Fla. Sen. 2256, 2006 Reg. Sess. (Feb. 22, 2006); Fla. Sen. 2154, 2006 Reg. Sess. (Feb. 16, 2006); Fla. Sen. 1888, 2006 Reg. Sess. (Feb. 9, 2006); Fla. Sen. 1708, 2006 Reg. Sess. (Jan. 27, 2006); Fla. Sen. 1588, 2006 Reg. Sess. (Jan. 25, 2006); Fla. Sen. 1484, 2006 Reg. Sess. (Jan. 23, 2006); Fla. Sen. 1058, 2006 Reg. Sess. (Dec. 6, 2006); Fla. Sen. 862, 2006 Reg. Sess. (Nov. 16, 2005); Fla. Sen. 678, 2006 Reg. Sess. (Nov. 9, 2005); Fla. Sen. 638, 2006 Reg. Sess. (Nov. 8, 2005); Fla. Sen. 590, 2006 Reg. Sess. (Nov. 4, 2005); Fla. Sen. 568, 2006 Reg. Sess. (Nov. 3, 2005); Fla. Sen. 528, 2006 Reg. Sess. (Oct. 28, 2005); Fla. Sen. 426, 2006 Reg. Sess. (Oct. 21, 2005); Fla. Sen. 156, 2006 Reg. Sess. (Sept. 8, 2005).

70. House Bill 7121 was enacted on June 1, 2006, and amends a wide variety of statutes in an attempt to improve Florida's emergency management capabilities. 2006 Fla.

survived independently included the following: state facilities suitable for use as public shelter space must be made available to local governments, and a list of such facilities must be created;<sup>71</sup> amendments to a local government comprehensive plan covering areas subject to coastal high-hazard regulations must establish a specific level of service with regard to hurricane evacuation clearance times;<sup>72</sup> and the Division of Emergency Management is now directly answerable to the governor.<sup>73</sup> While the Department of Community Affairs will continue to provide support services and assistance in nonemergency matters, the Division is no longer under its control, supervision, or direction.<sup>74</sup> Similar to the manner in which a county government exercises authority over its local emergency management agency, the Division's director will now be appointed by the governor, to serve at his or her pleasure.<sup>75</sup>

But clearly the most significant legislation to be adopted in 2006 was House Bill 7121 (HB 7121), which became Chapter 2006-71 of the Laws of Florida. This sweeping legislation has provided both extensive mandates and significant opportunities for local governments that could, in and of themselves, be the subjects of an article. Thus, the local government lawyer should review these changes beyond their cursory treatment in this Article.

HB 7121 provides more than \$150 million in appropriations to further disaster planning and response.<sup>76</sup> Building upon the lessons learned from prior storm seasons, the Legislature committed significant funding to enhance public education, improve local emergency operation centers, retrofit shelters, improve storage capacity for needed supplies, equip special-needs shelters with a permanent alternate power source, and assist in evacuation planning.<sup>77</sup> Each local government must equip its special-needs shelters with a permanent alternative power supply with the "capacity . . . to provide . . . for necessary medical equipment for persons

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Laws ch. 71.

71. 2006 Fla. Laws ch. 67.

72. *Id.* at ch. 68, § 2.

73. *Id.* at ch. 70.

74. *Id.*

75. *Id.*

76. *Id.* at ch. 71, §§ 2-7.

77. *Id.* at ch. 71, § 1.

housed in the shelter and for heating, ventilating, and air-conditioning the facility.”<sup>78</sup> This must occur by June 1, 2007.<sup>79</sup>

A clear sign of lessons learned is that the need for alternate power supplies seems to be the theme throughout HB 7121.<sup>80</sup> One commodity found to be indispensable to disaster response and recovery is fuel. Because evacuations necessarily require fuel, certain existing retail fuel facilities within close proximity to an evacuation route must take steps to install an alternate power source “capable of operating all fuel pumps, dispensing equipment, life-safety systems, and payment-acceptance equipment” by the start of the 2007 hurricane season.<sup>81</sup> As of July 1, 2006, no “newly constructed or substantially renovated motor fuel retail outlet” may receive a certificate of occupancy unless such capability exists.<sup>82</sup>

After a disaster, communities depend on fuel for recovery activities including the operation of generators, government officials’ assessment of damage, and the operation of emergency-response vehicles.<sup>83</sup> For that reason, all motor fuel terminal facilities and wholesalers must also be capable of providing fuel through an alternate generated power source by June 1, 2007.<sup>84</sup> This equipment must be available within thirty-six hours, and must remain available for at least seventy-two hours after a disaster.<sup>85</sup> However, facilities whose owners operate a fleet of motor vehicles or sell fuel exclusively to such a fleet are exempt.<sup>86</sup> The many local governments that own and operate their own fuel terminals will likely fall under this exemption.

Beyond ensuring an ability to dispense fuel is the need to ensure its availability for essential government functions. The Flor-

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78. *Id.* at ch. 71, § 1(2).

79. *Id.*

80. *E.g. id.* at ch. 71, §§ 1(2), 2.

81. Fla. Stat. § 526.143(3)(a) (2006).

82. *Id.* at § 526.143(2).

83. See Carol Brzozowski, *The Impact of Outage*, 4 Distributed Energy (May/June 2006), [http://www.gradingandexcavation.com/de\\_0605\\_impact.html](http://www.gradingandexcavation.com/de_0605_impact.html) (discussing the problems arising when power outages render gas stations inoperable); Jeff Ostrowski, *Lawmakers Want Gas Stations to Have Generators*, Palm Beach Post (Oct. 29, 2005) (discussing Floridians’ frustrations with fuel shortages that resulted after hurricanes knocked out power, leaving otherwise undamaged gas stations unable to provide fuel).

84. Fla. Stat. § 526.143(1).

85. *Id.*

86. *Id.* at § 526.143(4)(b).

ida Disaster Motor Fuel Supplier Program addresses this issue.<sup>87</sup> Each county can elect to participate in this program, which allows a retail motor fuel outlet located in the county “to participate in a network of emergency responders to provide fuel supplies and services to government agencies, medical institutions and facilities, critical infrastructure, and other responders, as well as the general public,” during a state of emergency declared by the governor.<sup>88</sup> These outlets must be capable of providing fuel within twenty-four hours after a disaster<sup>89</sup> and must give priority to State Emergency Response Team members.<sup>90</sup> Further, emergency management officials may permit these facilities to operate during any imposed curfew for the purpose of providing fuel to emergency personnel.<sup>91</sup>

Because each county has the option of deciding whether to participate in the fuel program, once the decision is made, local emergency management agencies are responsible for administering the program.<sup>92</sup> This responsibility includes the establishment of criteria for evaluating a motor fuel outlet’s readiness and ability to participate in the program.<sup>93</sup> In addition, a county may charge a fee for the cost of reviewing and accepting a motor retail facility into the program.<sup>94</sup> A local government, however, is expressly preempted from regulating the placement of the alternate power source at any fuel facility, or otherwise regulating any other type of retail facility that the State has approved to participate in emergency response.<sup>95</sup>

While ensuring the availability of motor fuel in a disaster is clearly essential, another lesson learned from the most recent bout of hurricanes is that a loss of power may prevent escape for,

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87. *Id.* at § 526.144.

88. *Id.* at § 526.144(1)(c).

89. *Id.* at § 526.144(1)(d).

90. *Id.* at § 526.144(3).

91. *Id.* at § 526.144(2).

92. *Id.* at § 526.144(1)(b).

93. *Id.* at § 526.144(1)(d).

94. *Id.* at § 526.144(1)(f).

95. *Id.* at § 526.144(4). The Division of Emergency Management was also charged with studying the feasibility of incorporating nongovernmental agencies and private entities in the State’s emergency management plan to provide for the distribution of essential commodities. 2006 Fla. Laws ch. 71, § 8. As part of this review, the Division is to establish criteria by which local regulation of retail establishments would be preempted during a disaster. *Id.*



or assistance to, a certain segment of the population—specifically, those citizens who reside in multiple-story buildings.<sup>96</sup> Accordingly, HB 7121 addresses the necessity for an alternate power supply source to ensure vertical accessibility. Existing multifamily residential dwellings that are seventy-five feet or more in height and that contain a public elevator must now have at least one such elevator pre-wired for an alternate power source capable of operating after a disaster.<sup>97</sup> The power source must also be capable of operating the building’s connected fire alarm system and providing emergency lighting in public areas.<sup>98</sup> The owner or manager of such a multifamily dwelling unit was required to submit engineering plans to the local building inspector by December 31, 2006, establishing this capability, and the county must verify the installation and operation of such improvements and report to the local emergency management agency no later than December 31, 2007.<sup>99</sup>

As of the date of enactment, newly constructed multifamily residential dwellings must be built to meet this requirement, and the local government inspector must provide verification of the installation and operation of the alternate power source to the local emergency management agency prior to occupancy of the building.<sup>100</sup> All such buildings installing alternate power supplies must also maintain a generator key in a lockbox for emergency access.<sup>101</sup>

As Hurricane Katrina demonstrated, however, it was not merely an inability to evacuate that kept people from heeding the warnings of emergency officials.<sup>102</sup> More emotional issues often

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96. See Bob LaMendola, *Care Needs Get Higher Priorities after Storms*, S. Fla. Sun-Sentinel 1A (July 7, 2006) (noting that the sick and the elderly can become trapped in their homes when storms put elevators out of operation); Aaron Sharockman, *Condo Is Evacuated for Lack of Utilities*, St. Pete. Times 1 (Sept. 30, 2004) (describing the experiences of residents of a high-rise condominium after Hurricane Jeanne knocked out facilities dependent on electricity, including elevators, which eventually caused local officials to declare the building uninhabitable).

97. Fla. Stat. § 553.509(2) (2006). Specifically, the elevator must provide service to building residents for a certain number of hours each day for five days following a disaster. *Id.*

98. *Id.* at § 553.509(2)(b).

99. *Id.*

100. *Id.* at § 553.509(2)(c).

101. *Id.* at § 553.509(2)(d).

102. See Quincy C. Collins, *Should I Stay or Should I Go? Decision Is Personal, with*

play a role in the decision not to evacuate. For example, the thought of leaving a beloved pet behind to suffer during a time of disaster is unthinkable to many people.<sup>103</sup> Moreover, animals that are left behind not only suffer from lack of care and food, but can pose hazards for government personnel attempting to conduct recovery activities.<sup>104</sup> In recognition of these concerns, HB 7121 charges the Division of Emergency Management, in conjunction with the Department of Agriculture and Consumer Services, with the development of strategies within the shelter component of the State Emergency Management Plan for the evacuation of persons with pets.<sup>105</sup> Once established, these strategies must also be reflected in local governments' emergency management plans.<sup>106</sup>

Finally, HB 7121 includes a substantial rewrite of Florida Statutes Section 381.0303 regarding special-needs shelters.<sup>107</sup> The new provisions attempt to delineate more clearly the division of

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*Many Variables*, Sun Herald (Biloxi, Miss.) A2 (Aug. 28, 2005) (describing various residents' reasons for deciding not to evacuate before Hurricane Katrina, including concern over pets, fatalistic attitudes about storms, and the expense of hurricane preparation); Maria L. La Ganga & Elizabeth Mehren, *Gulf Coast Besieged*, L.A. Times 1 (Sept. 24, 2005) (reporting that, for many elderly or disabled residents, the stress and physical hardships of evacuation can lead to an increased risk of injury or death); Meghan Gordon & James Varney, *Katrina Evacuation Plan Remains the Model*, New Orleans Times-Picayune 9 (May 28, 2006) (listing lack of personal transportation, the inconvenience of evacuation, and the survival of past storms as reasons that led one in five Gulf Coast residents to decide against evacuating during Hurricane Katrina).

103. See Emily Bazar, *Post-Katrina Chaos Forces Painful Choice to Leave Pets*, U.S.A. Today 4A (Sept. 23, 2005) (describing one New Orleans evacuee's heartbreak at leaving his pets behind, a choice he referred to as "the worst decision ever"); *Legislation*, Bucks Co. (Pa.) Courier Times 6A (Sept. 23, 2005) (reporting on federal legislation introduced by lawmakers concerned that many people who ultimately died in Hurricane Katrina remained in their homes because they could not take their pets if they evacuated).

104. See Ann M. Simmons, *Owners to Sue over Katrina Pet Shootings*, L.A. Times 11 (Sept. 9, 2006) (noting that sheriff's deputies had reported having to shoot vicious dogs found wandering the streets after Hurricane Katrina); Alison Vekshin, *House Bill Aims to Assure Evacuation of Pets in Disaster*, Las Vegas Rev.-J. 2B (May 23, 2006) (noting lawmakers' concerns that abandoned animals could pose a threat to rescuers and returning evacuees); *CNN Sat. Morning News* (CNN Sept. 17, 2005) (TV broad.; transcr. available from <http://transcripts.com/TRANSCRIPTS/0509/17/smn.02.html>) (reporting on rescue workers' concerns that the large number of starving, abandoned animals in New Orleans after Hurricane Katrina was becoming a health hazard).

105. Fla. Stat. § 252.3568.

106. *Id.*

107. 2006 Fla. Laws ch. 71, § 20. HB 7121 also expands and improves the process for notifying people with special needs of the ability to register with local emergency management agencies for special assistance. 2006 Fla. Laws ch. 71, § 16 (amending Fla. Stat. § 252.355).

responsibilities for the operation and staffing of such facilities.<sup>108</sup> Undoubtedly, the most vulnerable members of our population, those with special needs, often pose a tremendous challenge for local governments attempting to provide adequate care for a diverse group of individuals and ailments. Consequently, home health agencies,<sup>109</sup> nurse registries,<sup>110</sup> and hospice providers<sup>111</sup> must now include within their comprehensive emergency management plans a method to provide to their patients, within a special-needs shelter, continued services of the same type and quantity as the services provided prior to evacuation.<sup>112</sup> Moreover, a link between these entities and the local emergency operations center may be established to provide information to assist the entity in reaching a client in a specific disaster area.<sup>113</sup> In addition to the above-noted medical providers, home medical equipment providers are now also required to have an emergency management plan.<sup>114</sup> Such providers are subject to the same requirements for establishment of continued service to their patients within a special-needs shelter and are likewise able to establish a link to the local emergency operations center for reaching clients after a disaster.<sup>115</sup>

Challenges for the future of emergency management will necessarily involve the continued implications and implementation of HB 7121. A local government's compliance with, and utilization of, such provisions will undoubtedly serve to ensure the welfare of its citizens. Additionally, those issues that failed to pass, such as regulations pertaining to the sheltering of sexual offenders, will certainly return in some form during the 2007 session.<sup>116</sup> Thus,

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108. Fla. Stat. § 381.0303 (2006).

109. 2006 Fla. Laws ch. 71, § 21 (codified at Fla. Stat. § 400.492 (2006)).

110. *Id.* at ch. 71, § 23 (codified at Fla. Stat. § 400.506(16)).

111. *Id.* at ch. 71, § 24 (codified at Fla. Stat. § 400.610(1)(b)).

112. Prior versions of the statutes regulating these facilities simply required the facilities to have plans providing for continued services to special-needs patients in case of an emergency, without requiring that the services be of the same type and quantity as those provided before the emergency, and often without specifically referencing evacuations. Fla. Stat. §§ 400.492, 400.506(16), 400.610(1)(b) (2005).

113. 2006 Fla. Laws ch. 71, §§ 21, 23, 24 (codified at Fla. Stat. §§ 400.492(3), 400.506(16), 400.610(1)(b), respectively).

114. 2006 Fla. Laws ch. 71, § 26 (codified at Fla. Stat. § 400.934(20)(a)).

115. 2006 Fla. Laws ch. 71, § 26 (codified at Fla. Stat. § 400.934(21), (22)).

116. Such legislation has previously been introduced, but has failed. Fla. Sen. 638, 2006 Reg. Sess. (Nov. 8, 2005); Fla. H. 165, 2006 Reg. Sess. (Sept. 20, 2005). Many local gov-

the local government lawyer should remain vigilant and aware as he or she assumes the role of advocate and counselor in the eye of the storm.

#### IV. THE ROLE OF THE LOCAL GOVERNMENT ATTORNEY BEFORE, DURING, AND AFTER THE STORM

Something as seemingly perfunctory as defining the role of the local government attorney in a post-disaster world can prove to be an arduous task. Due to the diverse nature of Florida's political subdivisions in such terms as size, sophistication, and resources, it would not be prudent to assume that the roles local government attorneys may be asked to play are the same throughout the State. Consequently, it is incumbent upon the attorney to learn, in advance, what will be expected of him or her in a disaster scenario. It is not at all uncommon for attorneys to be thrust into roles or given responsibilities that are not only outside of their job descriptions, but consist of areas of the law that are alien to them. Further, attorneys operating in an emergency or crisis environment are routinely asked to render timely legal decisions with either incorrect or insufficient information at best. Aggravating this situation is the fact that the power outages that accompany most disasters deny attorneys the use of electronic research, the ability to confer with colleagues, access to computer databases, and the use of other helpful resources. Finally, elected and appointed officials, likely to be overwhelmed by operational decisions often cloaked in political overtones, will look to the local government attorney to assist them in making a myriad of difficult, emotionally charged decisions, many of which are not supported by venerable precedent, black-letter law, or established policies and procedures.

By way of anecdote, in the aftermath of Hurricane Katrina, lawyers in Louisiana marshaled their numbers in an effort to respond to the needs of clients and the general public. In response to this crisis, the Louisiana Bar Association, recognizing both the need for, and willingness of, attorneys to step out of their various

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ernments, however, have already passed such legislation at the local level. *E.g.* Ord. Code Jacksonville (Fla.) § 674.501 (2005) (requiring registered sexual predators or offenders to notify shelter operators of their status immediately upon entering a shelter).

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areas of expertise and comfort zones, created the *Emergency/Disaster Training Manual for Volunteer Lawyers Following Hurricane Katrina*.<sup>117</sup> Of the panoply of issues these lawyers faced, the most prevalent were:

- Assistance with filing for emergency assistance;
- Assistance with insurance claims (life, property, medical, etc.);
- Counseling on lessor-lessee, homeowner, and other housing problems;
- Assistance with home repair contracts;
- Assisting in consumer protection matters, remedies, and procedures;
- Counseling on mortgage foreclosure problems;
- Replacement of important legal documents destroyed in the natural disaster, such as wills, green cards, and the like . . . ;
- • •
- Drafting of powers of attorney;
- Estate administration (insolvent estates);
- Tax questions;
- Preparation of guardianships and conservatorships; [and]
- Referring individuals to local or state agencies which might be of further assistance (e.g. consumer affairs).<sup>118</sup>

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117. La. St. B. Assn., *Emergency/Disaster Training Manual for Volunteer Lawyers Following Hurricane Katrina* (Morrison & Foerster 2005) (available at <http://www.lsba.org/home1/FinalManual.pdf>).

118. *Id.* at 6 (numbers from original source have been omitted and replaced with bullets and punctuation has been modified for consistency).

Putting the Louisiana experience into a purely local government law perspective, the local government attorney will undoubtedly be called upon to:

- Ensure that his or her governmental entity complies with federal and state declarations of disaster;
- Draft and enforce local declarations of emergency, and ensure that these declarations are lawfully renewed as needed;
- Draft contracts for the utilization of private resources;
- Muddle through and become familiar with the myriad federal and state regulations and codes governing outside assistance;
- Clearly define the effect of the most current FEMA regulations related to debris removal and reimbursement; and
- Take whatever steps are necessary to protect both the body politic and the entity's employees and volunteers from liability.

Local government attorneys play another crucial role. They must assist their respective entities in navigating the issues that emergency preparedness and response present by playing "a key role in creating functional models for intergovernmental coordination and cooperation."<sup>119</sup> Alan D. Cohn, chair of the Legal Issues Working Group of the National Urban Search and Rescue Response System Advisory Committee, defined this role to include the following:

- Understanding the sources and limitations of state and local government authority to prepare for and respond to catastrophic incidents;
- Knowing federal, state, and local statutes, regulations, and ordinances governing emergency preparedness and response, including those involving intergovernmental cooperation, hazardous materials response, and terrorism;

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119. Alan D. Cohn, *Mutual Aid: Intergovernmental Agreements for Emergency Preparedness and Response*, 37 Urb. Law. 1, 3 (2005).

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- Assisting in the construction of lines of authority for emergency preparedness and response that are consistent with both applicable legal authorities and identified operational prerogatives;
- Mediating among competing factions, either within a single jurisdiction (police, fire and rescue, emergency medical services) or among different jurisdictions or different levels of government (federal, state, local, . . . , etc.);
- Understanding workers’ compensation and tort liability issues, including the workers’ compensation exclusive remedy provision, the boundaries and limits of sovereign immunity, and applicable tort claims statutes;
- Addressing interoperability issues, including interoperable communications and equipment issues that require interpretation of legal standards and rulings; and
- Making sure that legal issues do not hamstring emergency operations, while ensuring that arrangements for emergency operations minimize the legal risk to participating jurisdictions.<sup>120</sup>

By remaining cognizant of the above, the local government attorney is in a better position to diffuse interlocal governmental rivalries and to refute claims that the attorney is invariably a part of the problem and not the solution.

#### V. A COMMON CHALLENGE

Although each disaster brings with it its own unique challenges, certain significant commonalities exist. For example, California officials conducting wildfire after-action reports in the 1970s noted the following problems:

- Too many people reporting to one supervisor;
- Different emergency response organizational structures;

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120. *Id.*

- Lack of reliable incident information;
- Inadequate and incompatible communications;
- Lack of a structure for coordinated planning between agencies;
- Unclear lines of authority;
- Terminology differences between agencies; [and]
- Unclear or unspecified incident objectives.<sup>121</sup>

These findings are telling indeed, as you need only review the report generated by the House Select Bipartisan Committee on Hurricane Katrina to note striking similarities to the California report, especially with regard to the bureaucratic maze that public servants, attorneys among them, are often required to negotiate.<sup>122</sup> Both of these reports make clear that pre-planning and prior coordination with neighboring public entities are key factors essential to emergency preparedness and response. Local government attorneys should take the time to review one another's ordinances and resolutions in an effort to eliminate both duplicative effort and language that serves to hamper rather than foster intergovernmental cooperation.

To help achieve this goal of cooperation, the National Emergency Management Association has identified some of the steps local governments should take:

- Identify potential hazards . . . using an identification system common to all participating jurisdictions;
- Conduct joint planning, intelligence sharing and threat assessment development . . . [and] joint training at least biennially;

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121. Incident Command Sys., *National Training Curriculum: History of ICS 1–2* (Nat'l. Wildfire Coordinating Group 1994) (available at <http://www.nwcg.gov/pms/forms/compan/history.pdf>) (cited in Cohn, *supra* n. 119, at 5) (punctuation has been modified for consistency).

122. Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina, *A Failure of Initiative*, H.R. Comm. Rpt. 109-377 (Feb. 15, 2006) (available at <http://www.gpoaccess.gov/serialset/creports/katrina.html>). A review of the Committee's Executive Summary of Findings alone discloses striking parallels between the problems in California in the 1970s and those in New Orleans in 2005. *Id.* at 1–5.



- Identify and inventory the current services, equipment, supplies, personnel and other resources . . . ; [and]
- Adopt and put into practice the standardized incident management system approved by the State Emergency Management Agency.<sup>123</sup>

In addition, something as seemingly basic as learning whether emergency radio systems utilized by various entities can “talk to one another” when traditional telecommunications systems break down<sup>124</sup> affords the attorney the opportunity to ensure continuity of communications or to initiate the steps necessary to create continuity.

## VI. MUTUAL AID AGREEMENTS

The entire notion of intergovernmental cooperation most clearly manifests itself in the creation and execution of mutual aid agreements. Florida law permits political subdivisions to enter into mutual aid agreements designed to provide reciprocal emergency aid during those times when one entity’s resources are insufficient for the job at hand.<sup>125</sup> Florida law likewise empowers the governor to enter into mutual aid agreements or compacts with other states during times of disaster or emergency.<sup>126</sup> Need-

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123. Model Intrastate Mutual Aid Legislation art. III (Natl. Emerg. Mgt. Assn. 2004) (available at <http://www.emacweb.org/?150>) (numbers from original source have been omitted and replaced with bullets, and punctuation has been modified for consistency).

124. Public emergency management entities across the nation are implementing 800 megahertz radios that utilize a trunking radio system. A trunking radio system is a single system that can act as though it were several separate, larger systems. *See* Cohn, *supra* n. 119, at 39–40 (discussing the effectiveness of such a system during the attack on the Pentagon on September 11, 2001). A radio system using trunking can be organized to provide groups of users and access arrangements tailored to meet local needs when traditional telecommunications equipment fails. *Id.*

125. Fla. Stat. § 252.40(1). This Section, entitled “Mutual aid arrangements,” reads:

The governing body of each political subdivision of the state is authorized to develop and enter into mutual aid agreements within the state for reciprocal emergency aid and assistance in case of emergencies too extensive to be dealt with unassisted. Copies of such agreements shall be sent to the [Division of Emergency Management]. Such agreements shall be consistent with the state comprehensive emergency management plan and program, and in time of emergency it shall be the duty of each local emergency management agency to render assistance in accordance with the provisions of such mutual aid agreements to the fullest possible extent.

126. Fla. Stat. § 252.40(2). This Section reads:

less to say, mutual aid relationships are essential to fulfilling an entity's emergency preparedness obligations. Rare is the local government entity that is staffed, equipped, and in possession of all of the knowledge and resources necessary to meet every conceivable disaster, natural or man-made, that comes its way. This is especially true when the disaster is of the magnitude of Hurricane Katrina. To be sure, a disaster almost by definition includes conditions, events, or occurrences of such magnitude or severity that the normal governmental services are insufficient, ill-prepared, or inadequate to respond. Consequently, reliance on mutual aid, joint powers, and intergovernmental assistance agreements becomes expected and the norm. Help from another municipality may come in the form of equipment, supplies, information, technology, and personnel. The duration and severity of the disaster will likely dictate the extent of assistance required from other governmental entities, whether local, state, or federal.<sup>127</sup>

As you would imagine, the utility and effectiveness of a mutual aid agreement will be wholly contingent upon the manner in which it is drafted. Although "one size fits all" agreements seldom translate well from region to region, there are nevertheless some key components that should be included in every agreement. Mr. Cohn, of the National Urban Search and Rescue Response System Advisory Committee, identified the following critical considerations that any attorney should address when drafting a mutual aid agreement:

- Clarify the legal authorities under which the jurisdictions are entering into the agreement, taking into account any limitations those authorities impose on the jurisdiction;

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The Governor may enter into a compact with any state if she or he finds that joint action with that state is desirable in meeting common intergovernmental problems of emergency management planning or emergency prevention, mitigation, response, and recovery.

127. Howard W. Swanson, *The Delicate Art of Practicing Municipal Law under Conditions of Hell and High Water*, 76 N.D. L. Rev. 487, 497 (2000); see also Joseph Jarret, *In Times of Disaster: Minimize Local Government Business Interruptions*, 86 Pub. Mgt. 21, 22–23 (Dec. 2004) (providing suggestions for local governmental interaction with state and federal emergency management officials).

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- Set forth the procedures to be used for requesting and providing assistance;
- Clarify workers’ compensation arrangements, including whether each jurisdiction will be responsible for providing workers’ compensation coverage for its own employees or whether the requesting jurisdiction will provide such coverage, and whether employees of the responding jurisdiction are intended to become special employees of the requesting jurisdiction for the purposes of the response;
- Address liability and immunity issues, including how governmental immunities are intended to apply . . . ;
- Identify whether reimbursement will be available for services provided, and if so, set forth procedures, authorities, and rules for payment, reimbursement, and allocation of costs;
- Require each jurisdiction to develop [and share] standard operating procedures describing how the mutual aid agreement will be implemented; and
- Require the use of a standardized incident command or management system . . . .<sup>128</sup>

Mr. Cohn further identified the following important, but less critical, drafting considerations:

- Spell out notification procedures;
- Define relationships with other agreements among jurisdictions;

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128. Cohn, *supra* n. 119, at 21. With regard to governmental immunities, Florida law provides:

Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party’s negligence or to assume any liability for the other party’s negligence.

Fla. Stat. § 768.28(19) (2006).

- Recognize qualifications and certifications (e.g., emergency medical technician, paramedic) across jurisdictional lines;
- Encourage participation by a broad range of emergency responders;
- Mandate joint planning, training, and exercises, with liability provisions operating as if an actual emergency had occurred;
- Set up protocols for interoperable communications;
- Develop forms, manuals, and other job aids to facilitate requests for aid, recordkeeping regarding movement of equipment and personnel, and reimbursement;
- Include a provision requiring arbitration of disputes concerning reimbursement; and
- Keep agreements as short as possible, and use appendices and standard operating procedures where possible.<sup>129</sup>

Recognizing the importance of mutual aid agreements, the Florida Association of County Attorneys created a standardized Mutual Aid Agreement.<sup>130</sup> The Agreement recognizes that, “in terms of major or catastrophic disaster, . . . the needs of the residents of the local communities will most likely be greater than individual local resources . . . available to meet such needs.”<sup>131</sup> Consequently, counties throughout Florida have entered into these agreements in the hopes of fostering greater intergovernmental cooperation, as well as encouraging a pooling of talent and resources.

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129. Cohn, *supra* n. 119, at 21–22.

130. The Florida Association of County Attorneys (FACA) is a non-profit organization affiliated with the Florida Association of Counties whose mission is to enhance the professionalism and technical expertise of attorneys employed by Florida’s counties. FACA, *About Us*, <http://www.fl-counties.com/legal/faca.shtml> (accessed Mar. 1, 2007). For more information or a copy of the Association’s mutual aid agreement, contact Joseph G. Jarret, Esquire, President, 2006–2007, at [josephjarret@polk-county.net](mailto:josephjarret@polk-county.net).

131. Model Mutual Aid Agreement 1 (FACA 2005) (copy on file with *Stetson Law Review*).

### VII. A WORD ABOUT VOLUNTEERS

Volunteers can be indispensable partners in disaster recovery operations. Unfortunately, they can also be the bane of emergency management officials' existence if not properly managed. Often, entities are put in the tenuous position of hosting volunteers who lack necessary skills and who, despite their good intentions, prove to be more of a liability than an asset. Often, the unsavory task of culling out those volunteers who benefit operations from those who unwittingly hamper them falls to the local government attorney. Volunteers must be managed much like other human resources, with the glaring distinction that they are in the area for wholly altruistic reasons. They offer their time, talents, abilities, and equipment, give of wallet and purse, and permit the use of their real property. Florida law extends workers' compensation benefits to volunteers, a fact that local governments should consider prior to giving out volunteer assignments.<sup>132</sup> Further, some volunteers donate items that are not needed by disaster victims or workers. It is therefore advisable to establish a central clearing area so that items can be sorted and distributed accordingly.

### VIII. DONATIONS MANAGEMENT

Author Jean Cox suggests that public entities should have in place a donations management plan designed to account for items received and to ensure that items of most use to the response and recovery effort are distributed in a timely manner.<sup>133</sup> In discussing the operation of New York's Comprehensive Emergency Management Plan during the terrorist attacks of September 11, 2001, Ms. Cox provided three checklists based on the Plan for managing donations in all phases of a disaster:

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132. See Fla. Stat. § 440.02 (2006) (excluding volunteers generally from the definition of employees entitled to receive workers' compensation, but creating an exclusion within the exclusion for volunteers for governmental entities).

133. Jean Cox, *Managing Donated Resources Following Catastrophic Events*, in *A Legal Guide to Homeland Security and Emergency Management for State and Local Governments* 201, 203 (Ernest B. Abbott & Otto J. Hetzel eds., ABA 2005).

*Preparing for Donations Management*

- Annually update the donations management plan by canvassing all human service agencies that address human services needs before and after a disaster;
- Develop and maintain an inventory of warehouse facilities;
- Develop a toll-free number to handle inquiries;
- Establish procedures to accept cash;
- Develop and maintain a database for recording offers of donated monies, goods[,] and services;
- Establish a policy for distributing the goods remaining after the relief effort ends;
- Exercise the donations plan; [and]
- Designate and train staff on the donations management team.<sup>134</sup>

*Responding to a Disaster with a Donations Management Plan*

- Activate the donations management plan;
- Alert local, state, and federal governments;
- Notify the volunteer network;
- Place the donations management team on stand-by, and determine staffing and support needs based on the incident;
- Identify warehouse space and staging areas and secure agreements for their use, if necessary;
- Search the database to identify goods or previous offers that may be useful in this event;

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134. *Id.* (numbers from original source have been omitted and replaced with bullets, and punctuation has been modified for consistency).

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- Coordinate with the public information officer to encourage the media to request that goods and services be held locally until needed;
- Initiate a toll-free line and phone bank for donated goods and services;
- Maintain continuous contact with involved agencies through the donations management team, to ensure a smooth flow of goods and services to the disaster area;
- Monitor news accounts, to the extent practicable, to anticipate the number and type of goods that may arrive and try to divert them to the appropriate staging or warehouse areas;
- Prepare daily status reports that document any issues and track the goods going into and out of the warehouses or staging areas; [and]
- Maintain all records of purchases, rentals, loans, and agreements to facilitate potential reimbursement.<sup>135</sup>

*Post-Emergency*

- Assess the continuing needs of the agencies involved in the recovery effort;
- Determine if the scale of the donations management team is still appropriate to the effort;
- Scale back the team if needed;
- Ensure the database has been updated;
- Assist with thank you letters; [and]
- Conduct a post-event evaluation.<sup>136</sup>

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135. *Id.* at 203–204 (numbers from original source have been omitted and replaced with bullets, and punctuation has been modified for consistency).

136. *Id.* at 204 (numbers from original source have been omitted and replaced with bullets, and punctuation has been modified for consistency).

*IX. FINAL THOUGHTS*

Oscar Wilde once wrote, “To expect the unexpected shows a thoroughly modern intellect.”<sup>137</sup> Lawyering for a local government entity during a crisis is rarely planned or anticipated. Disasters generate a wide array of crises, making it almost impossible to foresee even a substantial fraction of the situations that will mandate legal acumen and intervention. Alfred O. Bragg, III, who served as legal counsel to the Florida State Emergency Response Team during the devastating hurricanes of 2004, later observed that, “Like the potential universe of smaller emergencies bred by one large disaster, the potential universe of legal issues awaiting emergency management counsel has no boundaries; counsel may expect almost anything.”<sup>138</sup> Howard D. Swanson, a Local Government Fellow with the International Municipal Lawyers Association, offered the following advice to local government attorneys, based on his experiences in the Office of the City Attorney for Grand Forks, North Dakota, during a period of severe flooding:<sup>139</sup>

- Become involved in emergency management planning. Make sure that the emergency manager is aware of what services you can provide and the benefits of allowing your involvement. Demonstrate that you will be a help, not an impediment.
- Participate in any emergency or disaster drills that might be held[, and don’t hesitate to recommend those that aren’t being held].
- Be available to perform more than one function in combating an emergency or disaster. This may require you to serve as a legal advisor in addition to performing other functions such as equipment and supply pro-

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137. Oscar Wilde, *An Ideal Husband*, in *The Complete Works of Oscar Wilde* 482, 526 (Barnes & Noble, Inc. 1994).

138. Alfred O. Bragg, III, *Experiencing the 2004 Florida Hurricanes*, in *A Legal Guide to Homeland Security and Emergency Management*, *supra* n. 133, at 139, 143.

139. Interestingly, the challenges facing Mr. Swanson during the flooding that plagued North Dakota cities in 2000 and the experiences of co-author Joseph G. Jarret during the spate of hurricanes that plagued Polk County (Frances, Charley, and Jeanne) in 2004 are strikingly similar.



curement, volunteer coordination, evacuation and housing coordination, sandbagging, directing traffic . . . whatever is required. Request to be located in the emergency operation center during times of emergency or disaster, if possible.

- Be available for drafting emergency or disaster declarations or proclamations. Pre-drafted forms may be of assistance[;] however, be sure to include sufficient flexibility to address whatever circumstances confront the municipality. Maintain an expansive grant of authority with liberal interpretation in any proclamation or declaration. Emergencies and disasters are inherently unpredictable. Encourage the proper official issuing the proclamation or declaration to take full advantage of any length of time the declaration can be made effective. It can be rescinded earlier if appropriate. This will retain flexibility for the community. There may, however, be competing political considerations to be weighed.
- Be as familiar as possible with state statutes, local ordinances, and charters regarding emergency authority, process and procedure, and limitations. It is also helpful to have some familiarity with the Federal Disaster Relief Act and [the] Stafford Act.
- Review local ordinances relating to emergencies and disasters and ensure that the ordinances grant as much authority as permitted, with as much flexibility and durability as possible. Problems and solutions during a disaster are not easy to predict. Consequently, [greater] authority over a longer duration may be of significant assistance to your community. Make sure your local ordinances addressing emergency and disaster situations are current and apply to something more than simply the cold war or nuclear attack. The ordinance should be drafted to apply to the most unanticipated emergencies and disasters.
- Be able to identify what penalties may apply to any persons violating the provisions of an emergency declaration, proclamation, or any order issued as a result thereof. Is it a fine or might it include jail time? In this regard, also anticipate the possibility of correctional

centers being inaccessible or inoperative as well as courthouses being closed.

- Ensure that the emergency ordinances provide abilities to waive and possibly modify ordinances during the effective time of the proclamation. In specific instances, you may wish to be able to waive or modify inspection fees, building codes, inspection processes, occupancy certificates, zoning requirements, procurement requirements, etc.
- Be familiar with what authority the municipality may have over consumer protection, particularly in the areas of scams (charitable scams and contractor scams), unscrupulous contractors, price gouging, and fraud. Consider the possibility of a “one stop shop” which might include the police department, local inspections department, local permitting offices, state consumer protection divisions, state attorney general’s office, secretary of state’s offices, and others providing consumer protection and assistant services.
- Assist in the preparation of all necessary contract and emergency plan documents to allow coordinated responses and intergovernmental activities.
- Remain flexible. No matter what you think will happen, something else likely will. Make sure you and your staff are available to respond on short notice to needs of key emergency management and response team members.
- Review and have available for consultation mutual aid, joint power, and intergovernmental assistance agreements. Have an idea of what is contained in those documents well before they are actually needed. Identify what governmental entities you have such agreements with and when the agreements may be invoked. You should also be familiar with who can activate or invoke the provisions of such agreements.
- Make yourself available for the public information officers’ needs. Against virtually all of my preconceived notions, I found that providing concise and accurate information to the public information officer and, where appropriate, directly communicating with the media,

became imperative. It reduced anxiety and provided helpful information for virtually everyone.

- Where possible, have access to a computer with CD and online capability. The ability to perform legal research under less than ideal circumstances (something other than your comfortable office) may become essential.
- Expect the unexpected.<sup>140</sup>

H.G. Wells once said, “Human history becomes more and more a race between education and catastrophe.”<sup>141</sup> It can only be hoped that in the field of emergency management, the calming, steadying hand of the local government attorney will help to win the race.

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140. Swanson, *supra* n. 127, at 501–503. The Robert T. Stafford Disaster Relief and Emergency Assistance Act, which Swanson references, provides the president with the authority to fund the restoration of property damaged by a major disaster. 42 U.S.C. §§ 5172, 5174 (relating to the restoration of public or nonprofit private facilities and to private, owner-occupied residences, respectively). The Act also allows the president to provide additional funding to enhance the restored facility’s ability to resist similar damage in future disasters. *Id.* at §§ 5172(c)(2)(B), 5174(c)(2)(A); *see also* 44 C.F.R. § 206.226(e) (2005) (providing that the cost of any requirements to mitigate against future hazards that FEMA places on restoration will be eligible for federal assistance). To demonstrate the truth of Swanson’s final admonition—to expect the unexpected—the Authors point out that, in 2004, while Polk County was in the process of recovery operations necessitated by Hurricanes Charley and Frances, Hurricane Jeanne was making landfall.

141. H.G. Wells, *The Outline of History* vol. II, 594 (MacMillan Co. 1921).