FLORIDA'S LAW OF STORMS: EMERGENCY MANAGEMENT, LOCAL GOVERNMENT, AND THE POLICE POWER

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I. INTRODUCTION: EMERGENCY MANAGEMENT AND LOCAL GOVERNMENT

In the nineteenth century, the term "law of storms" described rules of navigation, which, when followed, would allow a sailing vessel to avoid the most dangerous and violent parts of a hurricane.[1] Like the nineteenth century mariners, twenty-first century local governments confront challenges from natural and man-made disasters and might benefit from a discussion of the applicable law under which they will have to navigate through such disasters. Indeed, leading climatologists predict an increase in the number and severity of hurricanes in the coming decades.[2] "Florida is more susceptible to hurricanes than any other state."[3] Because of Florida's population concentrations, hurricanes threaten the safety of large numbers of people and have the potential to cause extensive

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1. Henry Piddington, *The Sailor's Horn-book for the Law of Storms: Being A Practical Exposition of the Theory of the Law of Storms* pt. I, § 19, 9 (7th ed., Williams & Norgate 1889).

2. William M. Gray et al., *Colorado State University: Department of Atmospheric Science, Forecasts, Early April Forecast of Atlantic Basin Seasonal Hurricane Activity for 1996, Likely Increase of Landfalling Major Hurricanes in Coming Decades* <http://typhoon.atmos.colostate.edu/forecasts/1996/hurr_apr96/node6.html> (accessed Feb. 2, 2001).

3. James A. Henry, Kenneth M. Portier & Jan Coyne, *The Climate and Weather of Florida* 169 (Pineapple Press, Inc. 1994).

property damage.[4] Florida also is threatened by wildfires, which result from a dangerous combination of droughts and lightning.[5] Local governments must act exigently to protect their citizens from the threat of hurricanes and wildfires and the havoc they cause.

Local governments exercise their most basic and yet most coercive powers when managing responses to these threats to protect the health, safety, and welfare of their citizens. Ineffective responses to imminent emergencies can leave a local government unable to make the most of resources otherwise available to manage emergencies and ameliorate their effects on the public. Failure to define roles well in advance may result in poorly managed responses to natural disasters by state officials unfamiliar with local conditions and by local officials constrained by real or perceived state-imposed limitations. Such poorly managed responses may raise litigable issues of damage.

Each level of government — federal, state, and local — has a role to play in managing emergencies. The federal government, acting through the Federal Emergency Management Agency, plays a significant role in mitigating the effects of natural disasters and helping to develop protective predisaster strategies.[6] The state government plays a crucial role in mobilizing resources and coordinating responses to disasters.[7] But local government, especially county government, has perhaps the most important operational role to play in protecting the public. The local government, after all, is the unit of government closest to the affected public and therefore the most accountable. Local decision-makers may be called upon to order evacuations or prevent people from returning to damaged houses. Elected local board members are more likely to be confronted by their constituents about an emergency decision than a decision-maker far removed from the scene. Despite this obvious fact, the authority of local governments to protect their populations has been incorrectly and unnecessarily circumscribed.

This Article serves a threefold purpose. First, it argues that political subdivisions of the State of Florida have, as an incident of home rule, the necessary police powers to act to protect citizens unless the state has expressly preempted such power. The police power provides a legal framework within which local officials are

4. *Id.* at 200–201.
5. *Id.* at 126, 155.
6. *Infra* nn. 201–257 and accompanying text.
7. *Infra* nn. 139–148 and accompanying text.

able to take actions necessary to protect the public and negates erroneous limitations on local government's authority to act in an emergency. Second, this Article discusses the relationships between and roles of state, local, and federal governments in managing emergencies, particularly the federal role in mitigation and predisaster planning. Third, the Article provides some practical suggestions based on the experiences of Escambia County, Florida, since 1994, in dealing with hurricanes and other natural disasters.[8]

II. USING THE POLICE POWER TO TAKE EMERGENCY ACTION

A. The Police Power in General

The police power "aims directly to secure and promote the public welfare, and it does so by restraint and compulsion."[9] Public welfare includes the protection of public safety, order, and morals.[10] The police power encompasses a broad range of sovereign powers, including, for example, the power to regulate business for the public welfare as well as the power to grant "licenses to use public property" (such as utility franchises).[11]

The police power also authorizes the government to order an evacuation in the face of an imminent natural or man-made disaster.[12] Measures ordinarily not within the scope of a local government's power may be enacted during an emergency to meet the "need for immediate governmental action to protect the public welfare."[13] "In an emergency situation, fundamental rights . . . may

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8. Since 1994, Escambia County has been directly threatened or actually struck by tropical storms Alberto, Beryl, and Earl; by hurricanes Danny, Erin, Georges, and Opal; and by flooding attributed to El Niño. During this same period, Escambia County was included in five presidential disaster declarations (four for hurricanes and one for flooding attributed to El Niño). Letter from Janice R. Kilgore, Emerg. Preparedness Dir., Escambia County, to David G. Tucker, County Atty., Escambia County, *Storm History* 1 (July 26, 2000) (copy on file with Authors).

9. Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* § 3, 3 (Callaghan & Co. 1904). The power may best be explained by the Latin maxim *salus populi suprema est lex* — "[t]he good of the people is the chief law." J.M. Cohen & M.J. Cohen, *The Penguin Dictionary of Quotations* 112 (Penguin Bks. Ltd. 1977).

10. Freund, *supra* n. 9, at §§ 9–10, 7.

11. *Id.* at § 561, 588.

12. Fla. Stat. § 252.38(3)(a)(5) (2000).

13. Eugene McQuillin, *The Law of Municipal Corporations* vol. 6A, § 24.18, 60 (Gail A. O'Gradney & Julie A. Rozwadowski eds., 3d rev. ed., Clark Boardman Callaghan 1997).

be temporarily limited or suspended."[14] The exercise of the police power in this manner interferes with the personal liberties of citizens and represents the most extreme use of the power.[15] Police power is inherent in the sovereignty of every state and is reserved to the states through the Tenth Amendment.[16] It may be delegated to counties or municipalities. Both the state and local governments may exercise the police power to protect the safety of the public.[17]

A local government's ability to carry out emergency management functions is derived from its police power. Any analysis of the police power of a county or municipality necessarily must consider the relationship of the county or municipality to the state in which it is located. This analysis will depend on what police power has been delegated and what police power has been preempted.

B. Delegation of the Police Power to Local Government

1. Express Delegation

The police power may be delegated by statute, through charter, or even, when authorized by the legislature, through an administrative or executive order.[18] North Carolina, for example, has expressly delegated the emergency police power to municipalities by statute.[19] The North Carolina Supreme Court has confirmed that this statute delegates the state's police power.[20] This delegation is in addition to the powers conferred through North Carolina's home rule statute.[21] An express statutory delegation of powers eliminates ambiguity. One might argue that Florida Statutes Section 252.38(1)(c) contains an express delegation, because it requires the emergency management agency from each county to manage emergencies within the county's boundaries.

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14. *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996).

15. Freund, *supra* n. 9, at § 446, 477.

16. *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919); *see generally U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (containing a useful discussion of the allocation of power between state and federal government).

17. *See City of N. Miami Beach v. Metro. Dade County*, 317 S.2d 110, 112 (Fla. Dist. App. 3d 1975) (holding that municipal water plants are subject to county regulation).

18. *See* McQuillin, *supra* n. 13, at § 24.18, 60 (describing legislative action taken in response to housing shortages).

19. N.C. Gen. Stat. Ann. § 14-288.12(a) (LEXIS L. Publg. 1999).

20. N.C. Gen. Stat. Ann. § 160A-174 (LEXIS L. Publg. 1999).

21. *State v. Dobbins*, 178 S.E.2d 449, 458 (N.C. 1971).

2. Implied Delegation through General Welfare or Home Rule Delegations

The delegation of police power also may occur through so-called "general welfare" clauses in a statute or charter.[22] It may be found in home rule statutes as well.[23]

Prior to the adoption of the 1968 Constitution, counties in Florida had only such powers as were expressly granted to them by the legislature and those that arose by necessary implication.[24] However, as a result of the 1968 Constitution revision and the enactment of Chapter 71-14,[25] counties were clothed with home rule powers. "The legislative and governing body of a county shall have the power to carry on county government."[26] The supreme court explained the effect of Chapter 71-14 as follows: "Unless the Legislature has pre-empted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule power."[27] The power to carry on county government must include enough power to discharge innate responsibilities, such as acting decisively to safeguard the lives and property of the county's citizens.

C. Preemption of the Police Power

Even when a local government has home rule police power through an express or implied delegation, the state may nevertheless reclaim some of that power through preemption. Preemption may be express or implied.[28] Express preemption requires that a "statute contain specific language of preemption directed to the particular subject at issue."[29] Section 364.01(2), which regulates

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22. McQuillin, *supra* n. 13, at § 24.43, 119; *see* John F. Dillon, *Commentaries on the Law of Municipal Corporations* vol. 1, § 304, 560–561 (5th ed., Little, Brown & Co. 1911) (discussing such clauses).

23. *Santa Rosa County v. Gulf Power Co.*, 635 S.2d 96, 99 (Fla. Dist. App. 1st 1994).

24. *Crandon v. Hazlett*, 26 S.2d 638, 642 (Fla. 1946).

25. This law was codified as Section 125.01 in 1971. Fla. Stat. § 125.01 (2000).

26. *Id.* § 125.01(1).

27. *Speer v. Olson*, 367 S.2d 207, 211 (Fla. 1978); *see generally Santa Rosa County*, 635 S.2d at 99 (discussing the breadth of home rule power).

28. *Tallahassee Meml. Regl. Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 S.2d 826, 831 (Fla. Dist. App. 1st 1996).

29. *Santa Rosa County*, 635 S.2d at 101.

telecommunications companies, provides an instructive example.[30] It reads as follows:

> It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies, and such preemption shall supersede any local or special act or municipal charter where any conflict of authority may exist. However, the provisions of this chapter shall not affect the authority and powers granted in s. 166.231(9) or s. 337.401.[31]

The legislative intent to exclude local regulation of this subject matter is unambiguous and was so stated in *Santa Rosa County v. Gulf Power Company*.[32] The court held that this language precluded the imposition of local franchise fees on telecommunications companies.[33] "Implied preemption occurs if a legislative scheme is so pervasive that it occupies the entire field . . . ."[34] The First District Court of Appeal opined that

> courts should be careful in imputing an intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers.... The scope of the preemption should also be limited to the specific area where the Legislature has expressed their will to be the sole regulator.[35]

Even when the legislature has implemented its own substantial regulatory scheme regarding a particular subject, courts have declined to find implied preemption.[36] These decisions suggest that, unless there is a threat to the pervasive regulatory scheme of the state, the actions of a local government will not be found to have been preempted.

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30. Fla. Stat. § 364.01(2) (2000).
31. *Id.*
32. 635 S.2d 96 (Fla. Dist. App. 1st 1994).
33. *Id.* at 101.
34. *Id.*
35. *Tallahassee Med. Ctr.*, 681 S.2d at 831.
36. *E.g. St. Johns County v. N.E. Fla. Builders Assn.*, 583 S.2d 635, 642 (Fla. 1991) (State scheme for funding school boards is not so pervasive as to preclude imposition of educational facilities impact fee by county commissioners.); *Santa Rosa County*, 635 S.2d at 100 (State regulation of electric utility fee setting is not so pervasive as to preempt noncharter county from imposing electric utility franchise fee.); *Hillsborough County v. Fla. Restaurant Assn.*, 603 S.2d 587, 590–591 (Fla. Dist. App. 2d 1992) (State regulation of the sale of alcoholic beverages did not preempt requirement for placement of signs warning of dangers of alcohol.).

D. Limits to the Police Power

1. Courts Will Remedy Excessive Use of the Police Power by Examining the Use of the Police Power under Takings Jurisprudence

Although the police power gives broad authority, it is not an unlimited grant of power. The Florida Supreme Court articulated the following rule regarding the exercise of police power: "It is well settled that the exercise of police power is confined to those acts which may reasonably be construed as being expedient at least for the protection of public safety, public welfare, public morals, or public health."[37]

The court elaborated in a later case,

> The legislative authority in this legitimate field of the police power, like as in other fields, is fenced about by constitutional limitations, and it cannot properly be exercised beyond such reasonable interferences with the liberty of action of individuals as are really necessary to preserve and protect the public health. It has been said that the test, when such regulations are called in question, is whether they have some actual and reasonable relation to the maintenance and promotion of the public health and welfare, and whether such is in fact the end sought to be attained.[38]

The judicial approach to this subject has been consistent for over forty years and is well reflected in the opinions of the district courts of appeal. These courts have not overtly challenged legislative determinations that emergencies exist.[39] Instead, their inquiry has focused on whether the actions taken by the government in those emergencies caused compensable harm.

The threat to human safety posed by hurricanes, wildfires, and other natural disasters is so obvious that extreme measures are justified. For example, in the devastating aftermath of Hurricane Andrew, both the United States District Court for the Southern

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37. *Sweat v. Turpentine & Rosin Factors, Inc.*, 150 S. 617, 618 (Fla. 1933).

38. *Varholy v. Sweat*, 15 S.2d 267, 270 (Fla. 1943).

39. The Second District Court of Appeal came close to questioning an emergency determination in its decisions in the late 1980s and early 1990s on citrus canker. *Infra* nn. 88–103 and accompanying text.

District of Florida and the United States Court of Appeals for the Eleventh Circuit found the situation justified the imposition of a curfew.[40] The Eleventh Circuit, in *Smith v. Avino*,[41] noted conditions justifying imposition of a broad curfew[42] and specifically observed that "[i]n an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended."[43]

When the threat is not so apparent, however, the exercise of the police power may expose a local government to liability. When measures seem disproportionate to the threat, courts have found the exercise of police power to constitute a compensable taking.[44] A review of decisions in which the state's actions dealing with agricultural emergencies were challenged illustrates the legal framework under which a court might review actions taken during an emergency. The decisions also provide a useful guide to the exercise of the police power and to what extent courts may defer to the exercise of that power.

The courts have been particularly sensitive to those actions in which the state destroyed property.[45] However, when the rights of individuals or the uses of property are restricted but not destroyed, the courts have been reluctant to find compensable harm.[46] In decisions concerning the destruction of property, the Authors found distinctions between destruction of property that was deemed imminently dangerous (and thus not compensable) and destruction of property not found to be an imminent threat, which was compensable.

In *Corneal v. State Plant Board*,[47] the Florida Supreme Court was confronted with actions taken by the State to destroy citrus trees threatened by spreading decline, a disease caused by the burrowing nematode.[48] The court found that destruction of infected

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40. *Smith v. Avino*, 866 F. Supp. 1399, 1405 (S.D. Fla. 1994), *aff'd*, 91 F.3d at 105.

41. 91 F.3d 105 (11th Cir. 1996).

42. *Id.* at 108–109.

43. *Id.* at 109.

44. *E.g. Dept. of Agric. & Consumer Servs. v. Polk*, 568 S.2d 35, 40 (Fla. 1990).

45. *E.g. Dept. of Agric. & Consumer Servs. v. Mid-Fla. Growers, Inc.*, 521 S.2d 101, 105 (Fla. 1988).

46. *E.g. Avino*, 91 F.3d at 109–110 (upholding government's right to impose a curfew following an emergency and affirming the denial of damages demanded because of the curfew); *Flake v. State*, 383 S.2d 285, 288 (Fla. Dist. App. 5th 1980) (permitting a ten month quarantine of citrus stock without compensation).

47. 95 S.2d 1 (Fla. 1957).

48. *Id.* at 2.

trees was not compensable,[49] but concluded that the destruction of healthy trees to create a buffer to prevent the spread of the disease was compensable.[50] This holding was based on the slowness with which spreading decline progressed from tree to tree.[51] This slow spread of the nematode influenced the court's analysis of the relationship between the challenged government action and the threat posed.[52] The court based its judgment on the fact that the healthy trees were not *imminently* dangerous.[53] As a result, the State Plant Board owed compensation to owners of healthy trees that were destroyed.[54] A subsequent decision clarified that *Corneal* was founded on the Florida Constitution's prohibition against taking private property without just compensation.[55]

After *Corneal*, in *Conner v. Carlton*,[56] the Florida Supreme Court upheld a statute that authorized the destruction of cattle infected with brucellosis and allowed compensation to the owner at less than the market rate.[57] The *Carlton* court relied on the nature of the disease and the fact that the cattle posed an imminent threat not only to other cattle, but also to human health and safety.[58] The validity of the State's exercise of police power was upheld, and no additional compensation was awarded.[59]

The high court continued to consider the compensability of exigent actions taken under the police power in light of the imminent threat posed by the destroyed property. In the mid-1980s, for example, the State of Florida determined that an emergency existed because of the outbreak of citrus canker.[60] The State instituted a policy to quarantine and destroy citrus nursery stock that was or could have been infected with this disease.[61] The First and Fifth District Courts of Appeal upheld the destruction of the citrus stock as a valid exercise of the police power.[62] They declined to rule on

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49. *Id.* at 6.
50. *Id.* at 6–7.
51. *Id.* at 5.
52. *Id.*
53. *Id.* at 6.
54. *Id.* at 6–7.
55. *State Plant Bd. v. Smith*, 110 S.2d 401, 405, 408 (Fla. 1959).
56. 223 S.2d 324 (Fla. 1969).
57. *Id.* at 328.
58. *Id.* at 327.
59. *Id.* at 329.
60. *Nordmann v. Fla. Dept. of Agric. & Consumer Servs.*, 473 S.2d 278, 280 (Fla. Dist. App. 5th 1985); *Denney v. Conner*, 462 S.2d 534, 536 (Fla. Dist. App. 1st 1985).
61. *Nordmann*, 473 S.2d at 278; *Denney*, 462 S.2d at 536.
62. *Nordmann*, 473 S.2d at 280; *Denney*, 462 S.2d at 537.

whether such destruction was compensable.[63] However, the Second District Court of Appeal, while upholding the power of the state to destroy citrus stock, found the destruction of healthy but suspect stock compensable.[64]

In affirming the Second District Court of Appeal, the supreme court found that healthy but suspect trees did not pose such an imminent threat to public safety as to be noncompensable losses.[65] This determination was fact specific and relied, first, on the attenuated relationship between the destroyed citrus stock at issue and the citrus stock that was actually infected and, second, on the manner in which the stock had been handled to minimize the likelihood of the spread of citrus canker.[66]

The supreme court, in *Department of Agriculture and Consumer Services v. Polk*,[67] narrowed the broad sweep of its earlier holding in *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Incorporated*.[68] The *Polk* court upheld a finding by the trial court that the destruction of apparently healthy citrus trees within a 125-foot radius of a diseased tree was not compensable.[69] This clarification was important, because by the plain language in *Mid-Florida Growers*, destruction of healthy but suspect stock was compensable.[70] Such a rule would have had a severe impact on regulatory efforts to protect the public safety in a wide range of contexts. Applying the rule literally to citrus canker, for example, would have meant that destruction of stock that actually had been infected with the disease (and was therefore an imminent threat) but that had not yet displayed symptoms of the disease, would have been compensable. However, by holding that destruction of stock within a 125-foot radius from the infected plant was not compensable, the supreme court implicitly recognized some level of healthy but suspect plants that *could* be imminent threats for which compensation would not be required.[71]

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63. *Nordmann*, 473 S.2d at 280; *Denney*, 462 S.2d at 537.

64. *State v. Mid-Fla. Growers, Inc.*, 505 S.2d 592, 595 (Fla. Dist. App. 2d 1987), *aff'd*, 521 S.2d 101 (Fla. 1988).

65. *Mid-Fla. Growers*, 521 S.2d at 105.

66. *Id.* at 104.

67. 568 S.2d 35 (Fla. 1990).

68. 521 S.2d 101 (Fla. 1988).

69. 568 S.2d at 40.

70. 521 S.2d at 103 n. 1, 105.

71. The majority noted that had the trial court found Polk's entire nursery to be either a nuisance or an imminent public threat, "no taking would have occurred and no compensation would be required." *Polk*, 568 S.2d at 39 n. 2.

Perhaps the best statement of the way in which the supreme court actually applies the rule set out in *Corneal* was stated by Justice Rosemary Barkett in her concurring opinion in *Polk*.[72] She referenced the reasoning in *Pennsylvania Coal Company v. Mahon*[73] and wrote that even a valid exercise of the police power may "go[ ] too far" in interfering with a property or economic right.[74] She expressly retreated from the public benefit-public harm dichotomy set out in *Mid-Florida Growers*, because she believed the dichotomy lent itself too easily to contradictory interpretations.[75] Her reasoning is the only consistent explication of how the supreme court decided liability in the canker cases and foreshadowed the disapproval of the public benefit-public harm dichotomy by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*.[76] In *Polk*, the court returned, more or less, to the rule in *Corneal*, requiring an imminent threat to justify a noncompensable taking, but allowing some flexibility for hidden threats.[77] The court had diluted this rule in *Mid-Florida Growers*.[78]

In *Corneal*, the supreme court recognized that the state "may require precautions within the whole range of possible danger," short of the destruction of property, and that such precautions might not be compensable.[79] Indeed, the court in *Corneal* relied on its earlier decision in *State Plant Board v. Roberts*,[80] which arose from the 1915 outbreak of citrus canker.[81] In *Roberts*, the plaintiffs challenged the propriety of a quarantine of their citrus stock within a radius of one mile of infected trees.[82] The court upheld the quarantine.[83] A 1980 Fifth District Court of Appeal case, *Flake v. State*,[84] stated this rule directly.[85] In *Flake*, a quarantine of approximately ten months was "precautionary and not destructive," therefore, there was no compensable harm.[86]

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72. *Id.* at 47–49 (Barkett, J., concurring specially).
73. 260 U.S. 393 (1922).
74. *Polk*, 568 S.2d at 48 (Barkett, J., concurring specially).
75. *Id.*
76. 505 U.S. 1003 (1992).
77. 568 S.2d at 43.
78. 521 S.2d at 104–105.
79. 95 S.2d at 4.
80. *State Plant Bd. v. Roberts*, 72 S. 175 (Fla. 1916).
81. 95 S.2d at 4 (citing *Roberts*, 72 S. at 176).
82. 72 S. at 176–177.
83. *Id.* at 177.
84. 383 S.2d 285 (Fla. Dist. App. 5th 1980).
85. *Id.* at 288.
86. *Id.* at 289.

Emergency measures less than physical destruction of property and less than total takings also may be compensable.[87] In *Conner v. Reed Brothers, Incorporated*,[88] the Second District Court of Appeal determined that a quarantine rose to the level of a taking.[89] The judges noted that they would have reached a different outcome had they determined there was a threat to public safety.[90] This case reinforces the supreme court rule that a threat must be real and imminent to support a local government's claim that the emergency measure does not result in a compensable taking.[91]

It is beyond the scope of this Article to explore the nuances of the many confusing cases that characterize takings jurisprudence. However, practitioners should be aware that takings law will almost certainly provide guidance in litigation in which a party, allegedly aggrieved by an emergency action of a local government, seeks redress.

2. Judicial Review Centered on the Nature of an Emergency

The very nature of the threat to be combatted by a quarantine was the focus of review by appellate judges in 1990.[92] The *Reed Brothers* court noted that the quarantine was intended to protect economic interests only,[93] which apparently did not equate to protecting public safety. However, almost three years earlier, in *State v. Mid-Florida Growers, Incorporated*,[94] the Second District Court of Appeal considered the threat of economic disaster to the citrus industry enough of a threat to justify the actions taken to fight citrus canker.[95] In the three years between the two decisions, a scientific controversy arose regarding whether the particular strain of citrus canker in question was dangerous.[96] The language in *Reed Brothers* indicated that the court no longer believed that

87. *Conner v. Reed Bros., Inc.*, 567 S.2d 515, 518 (Fla. Dist. App. 2d 1990).
88. 567 S.2d 515 (Fla. Dist. App. 2d 1990).
89. *Id.* at 518.
90. *Id.* at 519.
91. *Id.* (citing *Carlton*, 223 S.2d at 327).
92. *Id.*
93. *Id.* at 516.
94. 505 S.2d 592 (Fla. Dist. App. 2d 1987).
95. *Id.* at 595.
96. *Polk*, 568 S.2d at 45–46 (McDonald & Overton, JJ., concurring specially) (describing the scientific controversy).

citrus canker was as dangerous as had been thought in earlier cases.[97]

Even so, the Second District Court of Appeal carefully worded its opinion in an effort to preserve the latitude of the State to act exigently.[98] Specifically, the court looked to *Carlton* to show deference to the police power and the State's right to destroy imminently harmful property without compensation.[99] In *Carlton*, of course, there was a threat to human life and safety that was not present in *Reed Brothers*.[100] *Reed Brothers* nevertheless reinforces the importance of identifying the threat to the public.[101] Because of the scientific controversy surrounding the nature of the threat discussed in *Reed Brothers* and the absence of a risk to public health and safety, the court concluded that the quarantine was "both a lawful exercise of police power *and* a constitutional taking."[102]

A useful example of judicial review of state action in the wake of an emergency comes from the Virgin Islands in the aftermath of Hurricane Hugo.[103] After conditions in the Virgin Islands improved from the situation in the immediate aftermath of the hurricane, the governor of the Virgin Islands limited, but did not lift, the curfew.[104] The plaintiff challenged the curfew and a Virgin Islands territorial court invalidated it.[105] The governor appealed to the federal district court in its appellate capacity, and that court overturned the territorial court's decision.[106]

The court reasoned as follows:

> While the court agrees that the curfew is approaching the point at which it may become of so little value that it is outweighed by the burden it imposes on the free exercise of constitutional rights, this court recognizes that the need for a curfew does not vanish overnight. *Although conditions may no longer be as serious* as they once were, it is equally clear that *the island has*

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97. 567 S.2d at 519.

98. *Id.*

99. *Id.* (citing *Carlton*, 223 S.2d at 327).

100. 223 S.2d at 328 (A threat to human health was caused by a communicable disease spread by cattle.).

101. 567 S.2d at 519.

102. *Id.* at 517 (emphasis added).

103. *Moorhead v. Farrelly*, 727 F. Supp. 193, 201 (D.V.I. 1989) (referred to as *Moorhead II* because of an earlier case dealing with the same parties and subject, discussed at *infra* pt. III(B)).

104. *Id.* at 195 (The curfew in St. Croix, however, was not modified.).

105. *Id.* at 196.

106. *Id.* at 202.

> *not* completely *returned to normal.* Whether the conditions warrant the curfew is a difficult question not easily answered with a simple "yes" or "no." A *court's role* in the aftermath of an emergency as serious as that presented by Hurricane Hugo *is to review, with deference,* the decision of the executive; at all times, however, under such conditions, the executive must be permitted to make the decision in the first instance.[107]

E. Conclusion

The police power is a source of power available to local governments under which, in an emergency situation, they may take extraordinary action to protect the public. The police power is delegated by the state, either expressly or through some grant of power allowing the local government to act in furtherance of the general welfare. Unless otherwise preempted, local governments have broad discretion in exercising the police power.

However, judicial review of actions taken by local governments is a significant check on the police power. Perhaps the most significant challenge occurs in a takings context. Judicial review of whether emergency actions under the police power are takings depends on the magnitude of the threat addressed by the challenged act. *Avino, Carlton,* and *Moorhead v. Farrelly* [108] suggest that, when human life and safety are threatened, the courts will not find compensable violations of civil or property rights.[109] The citrus canker cases suggest that when the threat to the human life and safety is not imminent, courts will apply a higher level of scrutiny to police power actions. The higher scrutiny depends on the degree of the imminent threat to the public and how closely the measure taken addresses the potential harm to the public.

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107. *Id.* at 201 (emphasis added).

108. 727 F. Supp. 193 (D.V.I. 1989) (*Moorhead II*).

109. *Avino*, 91 F.3d at 109; *Moorhead II*, 727 F. Supp. at 201–202; *Carlton*, 223 S.2d at 328 (quoting *State Plant Bd.*, 110 S.2d at 407–408).

III. HOME RULE AND EMERGENCY MANAGEMENT

A. Implied Emergency Powers without Home Rule

Even in the absence of home rule statutes, courts have accorded local governments implied powers to act exigently in emergencies.[110] The determination of whether an emergency exists has long been subject to the reasonable discretion of a local governing body.[111] John F. Dillon suggested that the means to carry out mandates to protect the public safety did not need to be expressly enumerated.[112]

The early decision in *Harrison v. Mayor of Baltimore*[113] illustrates the use of the implied police power. After the City of Baltimore imposed a quarantine,[114] the court found that a general delegation of power from the Maryland legislature to the city to enact "all laws and ordinances necessary to preserve the health of the city, prevent and remove nuisances; to prevent the introduction of contagious diseases within the city, and within three miles of the same," gave the city council the discretion to control persons entering the harbor until the public safety could be assured.[115] The city council was found to be vested with the discretion to determine the best means to carry out the delegation, which was to quarantine passengers on a ship.[116] The principle is analogous to modern decisions to evacuate threatened areas and control movement into stricken ones — namely, that the police power includes the authority, within reasonable limits, to control or relocate people for the sake of public safety.

Another early commentator also saw *Harrison* as an exercise of implied police power.[117] Professor Ernst Freund noted, "In case of an epidemic disease local authorities are allowed to exercise incisive powers over person and property which in the absence of immediate danger would not be sustained under a delegation couched in

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110. *E.g. City of Coral Gables v. City of Miami*, 190 S.2d 427, 428–429 (Fla. 1939); *Dudley v. Orange County*, 137 S.2d 859, 861, 863 (Fla. Dist. App. 2d 1962).

111. *E.g. Glackman v. City of Miami Beach*, 51 S.2d 294, 296 (Fla. 1951); *State ex rel. Swift v. Dillon*, 79 S. 29, 30 (Fla. 1918).

112. Dillon, *supra* n. 22, at vol. 2, § 712, 1083.

113. 1 Gill 264 (Md. 1843) (available in 1843 WL 2183 (Md. Dec. 1843)).

114. *Id.* at *2.

115. *Id.* at *9.

116. *Id.*

117. Freund, *supra* n. 9, at § 141, 131.

general terms."[118] More common examples of the exercise of this facet of the police power include the power to order evacuations to protect the public from hazardous materials incidents or other localized man-made hazards.

Often, in the past, there was little time, because of the lack of early warning technology, to prepare for calamities like hurricanes or to take steps like ordering evacuations. As a result, few Florida courts wrestled with this issue. Looking back over the years, however, one can see that Florida's local governments exercised implicit emergency powers in the wake of such disasters.

In 1939, for example, the Florida Supreme Court considered a franchise dispute between two municipalities.[119] The City of Miami's power to make emergency adjustments to the terms of an urban railroad franchise to meet exigencies caused by a hurricane was undisputed.[120] The litigation resulted when the changes became permanent, with significant tax consequences for the franchisee.[121] The specific facts concerned the replacement of street cars with buses on a temporary, emergency basis.[122] The court never questioned the city's ability to make emergency adjustments to the franchise agreement on a temporary basis nor did its analysis rely on an express delegation of power by the legislature.[123] The court implicitly recognized the power of the municipality to act in an emergency.

At least one more recent Florida case (still prior to adoption of the 1968 constitution) was consistent with this approach. In *Dudley v. Orange County*,[124] the Second District Court of Appeal found that the Civil Defense Act and police power authorized the county to take actions to protect public safety in the face of natural disasters.[125] The Civil Defense Act then in force, a predecessor statute to current Chapter 252, did not include any specific enumeration of local government emergency powers.[126]

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118. *Id.* (footnotes omitted).
119. *City of Coral Gables*, 190 S. at 427–428.
120. *Id.* at 428–429 (The court never discussed the city's emergency powers.).
121. *Id.* at 428.
122. *Id.*
123. *Id.* at 428–429.
124. 137 S.2d 859 (Fla. Dist. App. 2d 1962).
125. *Id.* at 861, 863.
126. Fla. Stat. § 252.16 (1961).

B. Emergency Powers under Home Rule-Like Grants of Power

A modern case finding implicit authority for government to act exigently under a grant of authority similar to Florida's is *Moorhead v. Farrelly* (*Moorhead I*).[127] *Moorhead I* arose from the imposition of a curfew in St. Croix of the United States Virgin Islands, in the wake of Hurricane Hugo.[128] The case is instructive, because the relationship between territories such as the Virgin Islands and the federal government has been analogized to the relationship between local governments and states.[129] Congress has retained plenary power over territories of the United States.[130] Pursuant to this power, Congress authorized the Virgin Islands legislature to exercise "the ordinary area of sovereign legislative power" so long as such enactments were not inconsistent with governing federal law.[131]

In *Moorhead I*, the governor of St. Croix imposed a curfew after Hurricane Hugo.[132] The organic law of the Virgin Islands[133] authorized the governor to issue executive orders not in conflict with any applicable law.[134] The organic law included a list of emergency powers, but the list did not include the power to impose curfews as a result of natural disasters.[135] However, the Virgin Islands legislature adopted an emergency management act that expressly gave the governor the power to impose curfews.[136] The curfew was upheld by reasoning that the governor had the power to impose the curfew based on the act of the Virgin Islands legislature, which was enacted without an express authorization from Congress.[137]

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127. 723 F. Supp. 1109 (D.V.I. 1989) (*Moorhead I*).
128. *Id.* at 1110–1111.
129. *Talbott v. Bd. of County Commrs. of Silver Bow County*, 139 U.S. 438, 446 (1891); *Natl. Bank v. County of Yankton*, 101 U.S. 129, 133 (1879).
130. U.S. Const. art. IV, § 3.
131. *Virgo Corp. v. Paiewonsky*, 384 F.2d 569, 579 (3d Cir. 1967).
132. 723 F. Supp. at 1111.
133. 48 U.S.C. §§ 1541–1645 (1994).
134. *Id.* § 1591.
135. *Id.*
136. *Moorhead I*, 723 F. Supp. at 1112.
137. V.I. Code Ann. tit. 23, § 1125 (Supp. 1988).

IV. ALLOCATION OF EMERGENCY MANAGEMENT POWERS UNDER EXISTING LAW

A. Powers of the State

Under Florida law, the allocation of the police power for emergency management between state and local authorities is confusing to say the least. At the state level, the governor is vested by Article IV of the State Constitution with supreme executive power, including command of all State military forces "not in active service of the United States" and the "power to call out the militia to preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion."[138] In addition, the governor is authorized by the legislature to exercise certain functions in an emergency management context as well.[139] Section 252.36 authorizes the governor to assume control over the State's emergency management functions when local authorities are unable to deal with an emergency beyond their control.[140] The legislature has provided a list of powers the governor possesses in such situations.[141] These include, *inter alia*, the power to "[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area" and to control ingress to and egress from such an area.[142] The governor's enumerated powers also include, directly or indirectly, those powers necessary to meet the dangers presented by emergencies.[143]

The legislature also conferred certain emergency management functions upon the Division of Emergency Management of the Department of Community Affairs.[144] In a nonemergency environment, the department performs planning functions, which include development of comprehensive state emergency management plans and coordination with local governments.[145] During a disaster, the Department coordinates mitigation and recovery efforts and implements the provisions of Chapter 252 dealing with emergency

138. Fla. Const. art. IV, § 1(a), (d).
139. Fla. Stat. § 252.36 (2000).
140. *Id.* § 252.36(1)(a).
141. *Id.* § 252.36(5).
142. *Id.* § 252.36(5)(e), (g).
143. *Id.* § 252.36(5).
144. Fla. Stat. §§ 252.34(2), 252.35 (2000).
145. *Id.* § 252.35(2)(a).

management.[146] In contrast with the legislature's delegations to the governor, the legislature has not expressly delegated operational control to the Department, although the governor may delegate his operational authority to the Department.[147]

B. Powers of Counties

The legislature determined 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."[148] However, the legislature *expressly* authorized counties to waive required statutory formalities to carry out their innate emergency management responsibilities.[149] Yet, the case law has determined that such express authorization to carry out enumerated emergency functions may not be necessary.[150] And so the question recurs: Do counties possess operational powers to act exigently to discharge their innate responsibilities? The answer depends on whether the legislature has granted exclusive authority to the state in the field of operational emergency management.

Express preemption language is not contained in Chapter 252. The legislative history of that chapter is also devoid of any evidence of preemptive intent.[151] Absent such language, there is no express preemption of a county's police power to act exigently.

Nor does the regulatory scheme support an implied preemption of emergency powers. The only specific enumeration of broad operational powers applies to the governor,[152] who is authorized as follows:

> In the event of an emergency beyond local control, the Governor . . . may assume direct operational control over all or any part of the emergency management functions within this state, and she or he shall have the power through proper process of law to carry out the provisions of this section.[153]

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146. *Id.* § 252.35(1)–(2).
147. *Id.* § 252.36(1)(a).
148. *Id.* § 252.38.
149. *Id.* § 252.38(3)(a)(5).
150. *Dudley*, 137 S.2d at 861.
151. Fla. H. Comm. on Govtl. Operations, H. 2799, *Bill Summary, State Disaster Act of 1974* (n.d.); Fla. H. Comm. Appropriations, Comm. Substitute H. 2799, *Fiscal Note* (May 9, 1974).
152. Fla. Stat. § 252.36(1).
153. *Id.* § 252.36(1)(a).

Significantly, this authorization is permissive. She or he "may" take such actions, but she or he is not required to do so. This statute, on its face, contemplates some level of operational emergency management by local governments since the governor may act only if the situation is "beyond local control."[154] Section 252.38(3)(a)(5) authorizes political subdivisions to declare local emergencies for disasters only affecting one subdivision.[155] Section 252.34(1)(c) defines "[m]inor disaster" as one "within the response capabilities of local government."[156] Because the statute leaves ample room for local action, it does not support an argument that the legislature intended for the state to be the sole actor in emergency management.

Arguably, an express delegation of the power to perform emergency management does exist in Chapter 252. Specifically, Section 252.38(1)(c) provides in pertinent part that "[e]ach county emergency management agency shall perform emergency management functions within the territorial limits of the county within which it is organized . . . ."[157] The phrase "emergency management" is defined in Section 252.34(4).[158] In particular, Section 252.34(4)(c) appears to be the appropriate delegation by the legislature for

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154. *Id.*
155. *Id.* § 252.38(3)(a)(5).
156. *Id.* § 252.34(1)(c).
157. *Id.* § 252.38(1)(c).
158. *Id.* § 252.34(4). Section 252.34(4) defines emergency management as follows:

> (4) "Emergency management" means the preparation for, the mitigation of, the response to, and the recovery from emergencies and disasters. Specific emergency management responsibilities include, but are not limited to:
>
> (a) Reduction of vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from natural, technological, or manmade emergencies or hostile military or paramilitary action.
>
> (b) Preparation for prompt and efficient response and recovery to protect lives and property affected by emergencies.
>
> (c) Response to emergencies using all systems, plans, and resources necessary to preserve adequately the health, safety, and welfare of persons or property affected by the emergency.
>
> (d) Recovery from emergencies by providing for the rapid and orderly start of restoration and rehabilitation of persons and property affected by emergencies.
>
> (e) Provision of an emergency management system embodying all aspects of preemergency preparedness and postemergency response, recovery, and mitigation.
>
> (f) Assistance in anticipation, recognition, appraisal, prevention, and mitigation of emergencies which may be caused or aggravated by inadequate planning for, and regulation of, public and private facilities and land use.

Id. § 252.34(4)(a)–(f).

political subdivisions to act exigently.[159] As a practical matter, that section has not been construed in that manner by the state.[160] As a result, it is necessary to find other sources of authority to allow counties to act exigently in emergencies.

Counties enjoy a certain level of inherent police power under Section 252.38(1), which allows them to take exigent action in addition to those powers they already possess under general delegations of the police power.[161] The legislature has delegated the police power through its recognition that political subdivisions have "innate responsibility" for public safety.[162] The term "innate responsibility" first appeared in Chapter 74-285, in which the legislature adopted the basic content of the current Chapter 252.[163] Webster defines the term "innate" as "belonging to the essential nature of something" and also "derived from the mind or the constitution of the intellect rather than from experience."[164] The legislature's determination that political subdivisions have an innate responsibility to safeguard the lives and property of their citizens necessarily implies that political subdivisions also must have operational power to discharge that responsibility.[165] This view also is consistent with the court decisions from Florida and other states discussed in Part II.[166]

However, in 1983, Attorney General Jim Smith opined that, prior to the effective date of Chapter 83-334, counties lacked even the common law power to declare a state of emergency and that after that date counties still lacked any substantive or operational emergency management powers outside of Governor Bob Graham's Executive Order Number 80-29 or those listed in Section 252.38.[167] The attorney general noted that counties could not enact

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159. *Id.* § 252.34(4)(c).

160. For example, in 1995 the Board of County Commissioners of Escambia County submitted a request for an Attorney General Opinion that proposed such an interpretation. Letter from David G. Tucker, County Atty., Escambia County, Fla., to Robert A. Butterworth, Atty. Gen., Fla., *Attorney General Opinion* 1 (Feb. 1, 1995) (copy on file with Authors). The attorney general declined the invitation, relying instead on Executive Order Number 80-29. Fla. Atty. Gen. Op. 95-34 (Apr. 3, 1995) (available in 1995 WL 236912).

161. Fla. Stat. §§ 125.01(1)(t), (w), 252.38(1).

162. Fla. Stat. § 252.38.

163. 1974 Fla. Laws ch. 74-285.

164. *Webster's New Collegiate Dictionary* 590 (G. & C. Merriam Co. 1981).

165. *See Miami Beach Airline Serv., Inc. v. Crandon*, 32 S.2d 153, 155 (Fla. 1947) (holding that a county authorized to provide a proprietary function has the "power to operate it efficiently").

166. *Supra* nn. 18–28 and accompanying text.

167. Fla. Atty. Gen. Op. 83-59 at *1, *4 (Sept. 13, 1983) (available in 1983 WL 163709).

ordinances in conflict with state law, but then stated that enacting ordinances without any express authorization created a conflict with state law.[168] The decisions on which the attorney general relied do not support that conclusion.

In *City of Miami Beach v. Rocio Corporation*,[169] a municipal ordinance was invalidated, because the court found it to be in conflict with a state statute.[170] The *Rocio* court did *not* hold that the subject matter of the invalid ordinance was preempted to the state.[171] Instead, it recognized the municipality's home rule power to regulate any subject not expressly preempted to the state.[172] The court also recognized the right of local governments to regulate concurrently with the state so long as the local regulation did not expressly conflict with state law.[173] The issue was not whether a local government could regulate without an express authorization from the state, but rather whether the adopted local ordinance conflicted with a state statute.[174]

The attorney general's 1983 opinion also failed to recognize those decisions of Florida's courts that specifically discussed the powers to act in an emergency.[175] Based on the authorities discussed in Part II,[176] the authorization provided in Chapter 83-334 merely codified the existing common law. In addition, some provisions of Section 252.38, pertaining to the waiver of formalities, mirror other statutory provisions such as the exemption from the requirements of the Consultants Competitive Negotiation Act (CCNA) in the event of "valid public emergencies certified by the agency head."[177] Indeed, years before the enactment of Chapter 83-334, the attorney general opined that, in the context of the CCNA, the question of whether an emergency existed was to be determined initially by the county commission.[178] This 1975 opinion is consistent with the decisions previously discussed. Similarly, Chapter 125 included a provision for enactment of emergency ordinances for many years prior to the

168. *Id.*
169. 404 S.2d 1066 (Fla. Dist. App. 3d 1981).
170. *Id.* at 1071.
171. *Id.* at 1069.
172. *Id.*
173. *Id.* at 1070.
174. *Id.* at 1071.
175. *E.g. Dudley*, 137 S.2d at 861–863.
176. *Supra* pt. II.
177. Fla. Stat. §§ 252.38(3)(a)(5), 287.055(3)(a) (2000).
178. Fla. Atty. Gen. Op. 075-78 (Mar. 18, 1975).

adoption of Chapter 83-334.[179] Contrary to the attorney general's 1983 opinion, counties had both statutory and common law authority to act exigently in emergencies.

These inconsistent positions may be attributable to the 1974 amendments to Chapter 252, in which the legislature repealed an express authorization to declare emergencies.[180] In the context of contemporaneous legislative understanding of home rule and similar statutory amendments at that time, such an amendment would have been unremarkable and would not have had a substantive effect on local powers.[181] The courts also understood that local governments could act as long as their actions were not in conflict with state statutes.[182] Subsequent opinions of the attorney general, however, were not consistent with the legislative understanding of home rule. The attorney general relied on the principle of statutory construction, "*expressio unius est exclusio alterius*," to limit the power of local governments.[183] Analysis of the cases relied on by the attorney general in 1983 indicates that local governments do in fact have the authority to legislate and to act concurrently with the state in the field of emergency management, *so long as the local action does not directly conflict with state law*.[184]

Operationally, the attorney general's opinion raises troubling questions even for purely local emergencies. If the attorney general's analysis is correct, then local governments lack the authority to evacuate citizens for local emergencies such as hazardous material spills or nuclear accidents. If there is no threat of violence, sheriffs may not rely on the provisions of Chapter 870 to grant them the power to act exigently.[185] The attorney general's opinions require state intervention even in purely local emergencies if the political subdivision must do more to protect the public safety than that

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179. Fla. Stat. § 125.66(3) (1971).

180. Fla. Stat. § 252.071(2) (1973) (repealed 1974).

181. *See generally* Steven L. Sparkman, *The History and Status of Local Government Powers in Florida*, 25 U. Fla. L. Rev. 271, 294–298 (1973) (discussing legislation enacted to implement home rule powers provided for in the 1968 Florida Constitution).

182. *State v. Orange County*, 281 S.2d 310, 311 (Fla. 1973); *but see City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 S.2d 801, 803 (Fla. 1972) (concluding that doubts about whether a "municipality possesses a specific power" should be resolved against the municipality).

183. Sparkman, *supra* n. 181, at 305; *see* Fla. Atty. Gen. Op. 83-59 at *4. This maxim is a guide to interpretation and should not be used as substantive rule of law. *City of Miami v. Cosgrove*, 516 S.2d 1125, 1127–1128, 1128 n. 2 (Fla. Dist. App. 3d 1987); *Smalley Transp. Co. v. Moed's Transfer Co.*, 373 S.2d 55, 56 (Fla. Dist. App. 1st 1979).

184. *Rocio Corp.*, 404 S.2d at 1069–1071.

185. Fla. Stat. ch. 870 (2000).

which the attorney general believes is expressly authorized by statute.

This conflict must be resolved to permit local governments having home rule power to declare and manage emergencies. Otherwise, local governments will be forced to determine which emergencies they are legally empowered to manage without having criteria on which to base their decision.

C. Allocation of Power between Counties and Municipalities

One operational question is whether a county's emergency management powers prevail over municipal ordinances that might be in conflict. Case law and statutes support the conclusion that the county prevails. The Florida Constitution divides powers between counties and municipalities.[186] In counties in which the electorate has adopted charters, the Constitution requires that the charter prescribe whether county or municipal ordinances prevail in the event of a conflict.[187] For those counties not operating under a charter, the Florida Constitution specifies that a county ordinance in conflict with a municipal ordinance is not effective within the municipality to the extent of such conflict.[188]

However, the limitation on the effect of noncharter county ordinances within municipal boundaries is not a blank check for municipalities to opt out of county regulatory schemes.[189] Municipal ordinances must serve a municipal purpose.[190] Opting out of a county regulatory system does not serve a municipal purpose.[191] The court in *City of Ormond Beach v. County of Volusia*[192] noted that the only purpose of the challenged municipal ordinances was to "opt out" of the county's impact fee system.[193] The city ordinances represented

186. Fla. Const. art. VIII, §§ 1–2.
187. *Id.* § 1(g).
188. *Id.* § 1(f).
189. *City of Ormond Beach v. County of Volusia*, 535 S.2d 302, 305 (Fla. Dist. App. 5th 1988).
190. *City of Boca Raton v. Gidman*, 440 S.2d 1277, 1280 (Fla. 1983).
191. *City of Ormond Beach*, 535 S.2d at 305. Although Volusia County was a charter county, the court noted that its charter contained a provision limiting the effectiveness of county ordinances within municipalities to the extent that they conflict with municipal ordinances. *Id.* at 303.
192. 535 S.2d 302 (Fla. Dist. App. 5th 1988).
193. *Id.* at 304.

a municipal effort to "veto" the county's impact fee, which was not a valid municipal purpose.[194]

A county's emergency management program would probably have county-wide supremacy under the law of these cases. To ensure smoother emergency management, however, the legislature has mandated supremacy of the county plan.[195] Specifically, the legislature required that "[e]ach municipal emergency management plan must be consistent with and subject to the applicable county emergency management plan."[196] Municipalities are not required to have emergency management plans. If they do not, they are served by their county.[197] Regardless of whether a municipality has a plan, the county's plan prevails.[198]

Although the legal answer favors counties, in an operational context, there may not be time for a county to involve the judicial process to enforce its emergency management plan within a recalcitrant municipality. As suggested below, such intergovernmental conflict is best resolved before an emergency develops.[199]

D. The Federal Role in Emergency Management

1. The Stafford Act and the Federal Emergency Management Agency (FEMA)

The federal government has no inherent police power.[200] However, it may act pursuant to an expressly enumerated power in the Constitution in situations that also permit simultaneous exercise of state police power.[201] Nevertheless, the federal government plays an important role in efforts to recover from natural disasters, especially through various coordination activities and through fiscal relief for disaster victims. The federal government acts in these situations through FEMA.[202]

Although FEMA was first established by Executive Order, Congress has lent its approval of the agency and ratified its

194. *Id.* at 304–305.
195. Fla. Stat. § 252.38(2).
196. *Id.*
197. *Id.*
198. *Id.*
199. *Infra* pt. V.
200. *Hamilton*, 251 U.S. at 156.
201. *Id.*
202. 42 U.S.C. § 5195 (1994).

activities both by appropriations and by amendments to the Robert T. Stafford Disaster Relief and Emergency Assistance Act.[203] The opening part of the Act is framed as an authorization by Congress to the president to "provide technical assistance to the States,"[204] to allocate funds to update state disaster assistance plans and other matters of a general nature.[205] In addition to his other powers under the Stafford Act, the president has overall authority to implement the Act by regulation.[206]

2. Declaration of a Major Disaster

The disaster assistance features of the Stafford Act come into play when the governor of a state requests that the president declare a "major disaster" in that state in accordance with the Act.[207] The request from the governor must assert that the state has done all it can do to meet the disaster and that the disaster nevertheless exceeds the capacity of the state to meet the emergency with its own resources.[208] A governor who meets these conditions may expect FEMA to forward a favorable recommendation for the president to issue a major disaster declaration.[209]

Nothing in the Act implies that Congress intended to limit the inherent discretion of the president in the exercise of his official powers. The Act merely creates a process for the president to declare a major disaster if he decides to do so.[210] A recent regulation identifies the factors FEMA will consider when it prepares its recommendation to the president.[211] These factors are by necessity inexact. The only portion of the regulation that is specific in its guidance is Section 206.48(a)(1), which in effect makes one dollar per person in the state's population the threshold amount of damage

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203. 42 U.S.C. §§ 5121–5195 (1994) (the Stafford Act). Congress amended the Stafford Act, and President William Jefferson Clinton signed those amendments on October 30, 2000. *Disaster Mitigation Act of 2000*, Pub. L. No. 106-390, 114 Stat. 1552 (2000) (available in WL, US-PL database). Citations to the Act in the United States Code include the amendments resulting from Public Law Number 106-390.

204. 42 U.S.C. § 5131(b).

205. *Id.* § 5131(d).

206. *Id.* § 5164.

207. *Id.* § 5170; 44 C.F.R. § 206.36(a) (1999).

208. 42 U.S.C. § 5170; 44 C.F.R. at § 206.36(b).

209. 44 C.F.R. § 206.37(a)–(c) (1999).

210. 42 U.S.C. § 5131.

211. 44 C.F.R. § 206.48 (1999).

the state must meet or exceed for FEMA to recommend that the president declare a major disaster.[212]

In addition, the Act addresses the role of FEMA and other federal agencies if the president declares a disaster in one or more states and calls for the appointment of subordinate officials to act for FEMA and for any state affected by the disaster.[213] Acting through FEMA, the president has the authority to designate a Federal Coordinating Officer (FCO) from FEMA professionals.[214] One of the FCO's responsibilities is to go to the scene of the disaster to report on the situation to both FEMA and the president.[215] The FCO also must "make an initial appraisal of the types of relief" needed most[216] and "coordinate the administration of [such] relief" through private organizations such as the American National Red Cross and the Salvation Army.[217] In addition, the president may require the governor of a requesting state to designate a State Coordinating Officer (SCO).[218] The regulations specify the additional duties of the FCO and SCO.[219]

3. Disaster Response

The president's declaration of a major disaster is the prelude to a large infusion of assistance to the requesting state. The Act gives the president the authority to direct "any Federal agency, with or without reimbursement, to utilize its authorities and [its] resources . . . in support of State and local assistance efforts."[220] In addition, the president has the authority to "coordinate all disaster relief assistance" to the states[221] and may provide assistance "to affected State and local governments" in five discrete categories.[222] This presidential authority also includes the power to direct any federal agencies to "provide assistance essential to meeting immediate threats to life and property resulting from a major disaster."[223]

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212. *Id.* at § 206.48(a)(1).
213. 42 U.S.C. § 5143; 44 C.F.R. § 206.41 (1999).
214. 42 U.S.C. § 5143(a); 44 C.F.R. at § 206.41(a).
215. 42 U.S.C. § 5143(b); 44 C.F.R. at § 206.41(a).
216. 42 U.S.C. § 5143(b)(1).
217. *Id.* § 5143(b)(3).
218. *Id.* § 5143(c); 44 C.F.R. at § 206.41(c).
219. 44 C.F.R. § 206.42(a)–(b) (1999).
220. 42 U.S.C. § 5170a(1).
221. *Id.* § 5170a(2).
222. *Id.* § 5170a(3).
223. *Id.* § 5170b(a).

The president may direct federal agencies to lend or donate "[f]ederal equipment, supplies, facilities, personnel, and other resources . . . for use or distribution" in accordance with the Act.[224] In addition to medicine, food, and consumable supplies,[225] the president may direct federal agencies to contribute assistance from nine service categories in the wake of a disaster.[226] One of these is the removal of debris from a disaster scene.[227] Another provides for "search and rescue, emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine, and other essential needs, including movement of supplies or persons."[228] To augment available assistance further, the governor of the affected state also may "request the President to direct the Secretary of Defense to utilize the resources of the Department of Defense" in responding to the disaster.[229]

4. Disaster Assistance

The foregoing provisions of the Act are intended to provide direct assistance to the affected state and its political subdivisions in responding to a major declared disaster, often as the disaster is still unfolding. Public Law Number 106-390 has in effect rewritten portions of the Stafford Act to give the president authority, "in consultation with the Governor of a State," to render financial assistance and in-kind services to individuals and households who have needs directly resulting from a major disaster.[230] This includes financial assistance for temporary housing based on the local rental market,[231] as well as the use of actual housing units owned by the government[232] up to the end of the period of assistance, which expires eighteen months after the declaration of a major disaster by the president.[233]

In addition, financial assistance of up to $5,000 is available to pay for repairs to owner-occupied private dwellings damaged by the disaster and to defray the costs of mitigation measures to prevent

224. *Id.* § 5170b(a)(1).
225. *Id.* § 5170b(a)(2).
226. *Id.* § 5170b(a)(3).
227. *Id.* §§ 5170b(a)(3)(A), 5173.
228. *Id.* § 5170b(a)(3)(B).
229. *Id.* § 5170b(c)(1).
230. 114 Stat. at 1566–1567 (amending 42 U.S.C. § 5174).
231. *Id.* at 1567.
232. *Id.* at 1567–1568.
233. *Id.* at 1568.

a recurrence of the same kind of damage from future disasters. Other assistance not exceeding $10,000 is available to replace owner-occupied private dwellings damaged by the disaster.[234] Applicable flood insurance requirements are binding on an owner who receives such assistance; the president has no authority to waive these requirements.[235]

Finally, an individual or household lacking permanent housing who occupies a temporary dwelling unit furnished as in-kind housing assistance may purchase it from the government for use as a permanent residence.[236] The president also may provide financial assistance for up to seventy-five percent of the costs of "medical, dental, and funeral expenses,"[237] transportation costs, and unspecified personal property costs resulting from a major disaster.[238] In any event, no one recipient may receive more than $25,000 in disaster assistance for any one disaster.[239]

5. Disaster Mitigation

The foregoing provisions of the Stafford Act give the president authority to utilize federal resources to respond to a major disaster and to render material assistance to the affected state and its residents. This assistance is remedial in the sense that it is intended to enable the affected state and its residents to recover from the direct consequences of the disaster. Other programs established by the Stafford Act are preventive in character.[240] These programs provide federal "mitigation" assistance to the affected state to prevent the recurrence of the same kind of damage in future disasters.[241]

Although the Act does not make eligibility for mitigation assistance contingent on the occurrence of any particular kind of disaster, such assistance is commonly provided to mitigate the effects of flooding.[242] Under the Hazard Mitigation Grant Program, the owner of a structure in a zone known to be vulnerable to flooding may receive assistance to pay for construction to raise the structure

234. *Id.*
235. *Id.*
236. *Id.* at 1569.
237. *Id.* at 1570.
238. *Id.*
239. *Id.*
240. 42 U.S.C. § 5170c.
241. *Id.* § 5170c(a).
242. *Id.*

to a safe elevation.[243] The Act gives the president authorization to defray up to seventy-five percent of the cost of such measures.[244] One purpose of mitigation assistance is to relieve the pressures on the National Flood Insurance Program, which compensates the owners of insured structures damaged by disasters.[245] The mitigation programs reflect a determination by Congress that it is in the national interest to defray the cost of construction to prevent future damage, rather than to indemnify the same owners time after time for the same damage in a series of similar disasters.[246] Although the construction costs to raise a structure to a safe elevation may be substantial, such costs are likely to be much less than rebuilding the same structure after each recurring flood.

The conditions for eligibility under the Hazard Mitigation Grant Program are minimal.[247] Public Law Number 106-390 added Section 323 to the Stafford Act, which carried over the substance of a former requirement that any construction funded by disaster assistance under the Act shall be performed "in accordance with applicable standards of safety, decency, and sanitation and in conformity with applicable codes, specifications, and standards."[248] Although the Act does not enumerate all the measures eligible for funding under the Hazard Mitigation Grant Program, the kinds of projects for which assistance is most often approved fall into the following two categories: first, the renovation of a structure to remove it from the zone of foreseeable danger from flooding or other damage, usually by elevating the structure to a level at or above the base flood elevation or by relocating it outside the flood zone altogether; and second, the acquisition by the state or local government of real property prone to flooding or other recurrent damage for open-space recreational or preservation uses.[249]

Under the regulations that implement the property acquisition portion of mitigation assistance, state and local governments, Indian tribes and tribal organizations, and private nonprofit organizations are all eligible for assistance.[250] Public Law Number 106-390 makes available increased federal mitigation assistance of up to twenty

243. 44 C.F.R. §§ 206.431–206.434 (1999).
244. 42 U.S.C. § 5170c(a).
245. 44 C.F.R. § 206.131 (1999).
246. 42 U.S.C. § 5176; 44 C.F.R. at § 206.434(b)(5).
247. 44 C.F.R. at § 206.434.
248. 114 Stat. at 1559 (to be codified at 42 U.S.C. § 5165a).
249. 42 U.S.C. § 5170c(b)(2); 44 C.F.R. at § 206.434(c)–(d).
250. 44 C.F.R. at § 206.434(a).

percent for any major disaster if the qualifying state, local, or tribal government has in place a mitigation plan approved by the president.[251] The general eligibility requirements are framed to ensure that the project, *inter alia*, will prevent recurrent damage in future disasters and that it will be cost-effective.[252] In addition, the regulations impose the following requirements for property acquisition: The land "shall be dedicated and maintained in perpetuity for uses compatible with open space, recreational, or wetlands management practices," and only new structures in keeping with those uses will be allowed.[253] Thus, mitigation assistance enables local governments to purchase land prone to flooding and put it to beneficial public use.

Public Law Number 106-390 also authorizes the president, for the first time, "to provide technical and financial assistance to States and local governments" to implement predisaster hazard mitigation measures.[254] This amendment also allows the president to establish a National Predisaster Mitigation fund to defray the costs of such assistance.[255] In addition to technical assistance, the fund may pay for up to seventy-five percent of actual mitigation costs.[256] The authority for predisaster mitigation assistance under Section 203 expires the last day of 2003.[257]

6. Conclusion

Although local governments and states bear the brunt of operationally managing responses to natural disasters, the federal government plays an important role in assisting with immediate clean-up and recovery efforts, long term recovery for victims, and mitigation efforts to avert damage resulting from future natural disasters.

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251. 114 Stat. at 1558 (to be codified at 42 U.S.C. § 5165).
252. 44 C.F.R. at § 206.434(b)(5)(i)–(ii).
253. *Id.* at § 206.434(d)(1)(i)–(ii).
254. 114 Stat. at 1553–1554 (to be codified at 42 U.S.C. § 5133).
255. *Id.* at 1554, 1556.
256. *Id.* at 1555.
257. *Id.* at 1557.

V. PRACTICAL CONSIDERATIONS FOR LOCAL GOVERNMENT LEGAL DEPARTMENTS AND OTHER INTERESTED PARTIES

The following subsections describe a few practical considerations based on Escambia County's experience in dealing with hurricanes and natural disasters since 1994. Advanced preparation by legal departments can help local governments prepare for and manage natural disasters and other emergencies and minimize the number and effect of citizen lawsuits following emergency government action.

A. Local Government's Staff as Final Policy-Makers under Federal Civil Rights Law

Local government officials should be aware that in disaster response, as in other matters, they are considered the final policy-makers for purposes of litigation under federal civil rights law.[258] The county manager was found to be the final policy-maker for the purpose of the *Avino* litigation.[259] The Eleventh Circuit affirmed, but expressly declined to rule on this point.[260] This decision warns local governments not to become complacent about their responsibilities during disasters and other emergencies.

B. Declaration of Emergency

The declaration of an emergency is an important first step in confronting a particular threat. The decision to declare an emergency should be made by the legislative governing body itself if possible, preferably through some formal vehicle such as a resolution. This may require special meetings convened at inconvenient times. Section 252.46 requires that emergency orders and rules implementing emergency management functions be administered in accordance with Chapter 120, which contains standards governing emergency orders in general.[261] However, there is no provision in Chapter 120 specifically governing standards for emergency orders issued by local governments pursuant to Chapter 252.

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258. *Avino*, 866 F. Supp. at 1402–1403.
259. *Id.*
260. *Avino*, 91 F.3d at 107.
261. Fla. Stat. § 252.46(1) (2000).

However, Chapter 120 does contain standards governing emergency rule-making.[262] Those standards require that the adoption procedure be "fair under the circumstances";[263] that the action be only that "necessary to protect the public interest";[264] and that "[t]he agency publish[ ] in writing . . . the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances."[265] The findings are subject to judicial review[266] but, as discussed in Part II(D), case law and the nature of the emergency will guide the scrutiny and deference paid to such findings.[267] The prudent course for local officials is to include in a declaration of emergency such findings as would satisfy the emergency rule-making requirements of Section 120.54(4).[268] This will obviate the questions whether a declaration of emergency was a rule or an order and what standards would govern any other emergency orders of local governments.

To deal with situations when the governing body cannot be convened, an emergency management ordinance should provide that if it is not possible to convene the board of county commissioners to declare an emergency, the chairman, vice chairman, individual county commissioners, and certain senior staff may declare an emergency. Although an individual cannot adopt a resolution, the form of this declaration could be through some type of order, proclamation, or declaration, so long as it included the same findings as a resolution adopted by the governing body as a whole. This procedure also will be helpful in the event a plaintiff seeks judicial review under Section 120.54.[269]

The declaration of an emergency should include findings regarding the nature of the threat, its potential to harm human life and safety, and a statement that the governing body or declaring individual has considered the information upon which the findings are based. If the emergency is declared by an individual rather than by the governing body, the declaration also should recite that efforts were made to convene the governing body. If the threatened disaster

262. Fla. Stat. § 120.54(4) (2000).
263. *Id.* § 120.54(4)(a).
264. *Id.* § 120.54(4)(a)(2).
265. *Id.* § 120.54(4)(a)(3).
266. *Id.*
267. *Supra* pt. II(D).
268. Fla. Stat. § 120.54(4).
269. *Id.* § 120.54(4)(a)(3).

does not occur, the findings will assist a reviewing court in the event a plaintiff challenges the legitimacy of the declared emergency and will demonstrate good faith compliance with Chapter 120. Such a challenge might arise, for example, when the chairman of a governing board declares an emergency, but the threat misses the area and litigation ensues.

The declaration should be made as early as reasonably necessary. The earlier an emergency is declared, the more time is available to carry out evacuations or other exigent measures. Once the state of emergency has been declared, elected officials have done all they are legally required to do and the staff is then free to implement contingency plans.

All declarations, whether in the form of board resolutions or declarations by an authorized official, should be attested to by the entity's clerk to ensure the validity and regularity of the process. In addition, the declarations should be of limited duration to meet standards for exercising emergency police power.

C. Preprinted Orders and Resolutions

Preprinted forms based on anticipated needs also are useful. The forms include a resolution for the board of county commissioners as well as declarations of emergency for each person authorized to declare the emergency. Preprinted evacuation, reentry control, and curfew orders can be helpful. These forms, which include necessary findings, should also be available at the emergency operations center. These preprinted forms should include spaces that can be completed with information relevant to the specific emergency at hand. They should be ready to be used "off the shelf" when necessary.

Some areas also use a "Refusal to Evacuate" form. The forms typically will be signed by people who refuse to leave a threatened area. The legislature has determined that failure to follow a lawful order issued pursuant to an emergency declaration under Chapter 252 is a misdemeanor of the second degree.[270] As a practical matter, it does not seem to serve a useful purpose to charge someone with a crime for failing to take steps for his or her own safety. Thus, these forms serve the following two purposes: first, they assist the postdisaster cleanup of human remains and second, they may cause people to consider more seriously the consequences of their decisions

270. Fla. Stat. § 252.50 (2000).

for themselves and their families. These forms release the local government from liability resulting from an individual's failure to evacuate. The forms also may authorize disposal of the person's remains in any manner necessary to protect the public safety and waive any cause of action by the person's heirs or estate for damages arising from the disposal.

D. Coordinate with Other Governmental Entities and Elected Officers

Local government attorneys should ensure that interlocal agreements that coordinate emergency management functions with other governmental entities are in place well before they are needed. Mutual aid agreements between political subdivisions within Florida are expressly authorized.[271] Interlocal agreements with entities within or outside Florida are also authorized.[272] Such agreements can minimize impediments to disaster response such as intergovernmental rivalries. Agreements distributing responsibilities among and between law enforcement agencies also should be in place. For example, during Hurricane Erin, Baldwin County, Alabama closed access from Florida into the Alabama half of Perdido Key, hindering the ability of Florida residents to evacuate that barrier island. Initially the decision seemed to make sense, because access to the Key was denied. On the other hand, closing the border hurt evacuation efforts, because escape routes were limited for residents of both states. Since that time, agreements have been reached so that Florida residents can evacuate through Alabama and vice versa.

One way to ensure effective coordination is to identify all the different governmental units and agencies that might be called upon to carry out emergency management functions. For example, in even numbered years, hurricanes or other disasters could affect elections. The legislature has created a framework under which the election process may be altered during an emergency through the Elections Emergency Act, codified in Sections 101.731 through 101.74.[273] The Act provides for the rescheduling of elections and relocation of polling places due to emergency circumstances[274] and requires development of emergency contingency plans that direct the manner

271. Fla. Stat. § 252.40 (2000).
272. Fla. Stat. § 163.01 (2000).
273. Fla. Stat. §§ 101.731–101.74 (2000).
274. *Id.* § 101.733.

in which local officials conduct elections under emergency conditions.[275] Election officials also should coordinate contingency plans with the United States Department of Justice in any area where a plaintiff has prevailed under the Voting Rights Act, the affected local government has entered into a consent decree in litigation under the Act, or a change in election procedures has made preclearance necessary under Section 5 of that Act.[276]

E. Stick to the Plan

Once an emergency is declared, county staff should comply with any emergency management plans in place. Compliance with emergency management plans strengthens governmental claims of immunity that may otherwise have been waived.[277] One commentator notes the paucity of case law on this matter, but explores the relationship of doctrines of sovereign immunity with levels of plan compliance, beginning with plan development itself and working through plan implementation.[278] Legal departments should communicate with emergency managers to ensure that emergency plans are current and that those who will be called upon to implement any such plans are aware of what the plan contemplates. Moreover, local governments may face tort liability for actions taken by employees that are not discretionary parts of an emergency response.[279]

F. Get out of the Way and Help

The legal department should stand by as a reservoir of volunteer labor to staff rumor control lines, carry out damage assessment, and perform other tasks as needed. Rumor control is an essential function, particularly in situations in which media reports over radio and television cause mass panic, as was the case during Hurricane Opal. In that situation, media reports caused masses of

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275. *Id.*

276. *See* 42 U.S.C. § 1973(c) (1994) (providing preclearance procedures that must be followed when election procedures are modified).

277. *See generally* Ken Lerner, *Governmental Negligence Liability Exposure in Disaster Management*, 23 Urb. Law. 333 (Summer 1991) (discussing negligence exposure resulting from emergency management action).

278. *Id.*

279. *See e.g. Torres v. U.S.*, 979 F. Supp. 1054, 1056 (D.V.I. 1997) (federally deputized police officer was engaged in nondiscretionary activity while driving government car in performance of his duties when he was involved in motor vehicle accident and so was not entitled to discretionary function immunity under the Disaster Relief Act).

people who were not in evacuation zones to flee for safety, clogging evacuation routes. Rumor control can help avoid this problem.

VI. CONCLUSION

The cases in which courts have reviewed emergency decisions made by local governments, although few, have one common theme. From the City of Baltimore's nineteenth century quarantine[280] to the twentieth century havoc of Hurricane Hugo in St. Croix,[281] courts have found that local governments have sufficient police power to act exigently to protect the public safety, either with or without an express delegation of such power. Actions or regulations that "go[ ] too far"[282] may be reviewed under takings principles. The amount of scrutiny given by a court to the emergency action will vary depending on whether the action in question protected human life and safety or only purely economic interests. Actions taken to protect purely economic interests, when protecting human life and safety was not an issue, have received stricter scrutiny and less deference.

While few Florida cases have considered this or analogous matters, all have reached conclusions favoring the power of local government. The Attorney General's 1983 opinion reached a contrary conclusion without properly construing this case law and is therefore flawed. Local governments have sufficient home rule power to act to protect the public safety, even if such emergency acts include ordering evacuations or controlling reentry to stricken areas.

Recognition that local governments have inherent home rule powers to manage emergencies unless such powers have been preempted to the state makes the task of both local and state emergency management officials easier. Local officials will know they have flexibility to act decisively, while state officials will retain full and plenary authority to require coordination and planning and to intervene exigently where necessary. Such local powers are recognized by case law and by statute. The time has come for these local powers to be given operational meaning.

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280. *Harrison*, 1 Gill 264 (available in 1843 WL 2183 at *2).
281. *Moorhead II*, 727 F. Supp. at 195–196.
282. *Polk*, 568 S.2d at 48 (Barkett, J., concurring specially).