Water Management District, sovereign immunity

Number: INFORMAL

Date: January 27, 1998

The Honorable Howard E. Futch
Representative, District 30
Post Office Box 33198
Indiatlantic, Florida 32903-0198

RE: WATER MANAGEMENT DISTRICTS--SOVEREIGN IMMUNITY--SPECIAL DISTRICT--immunity of water management district for errors when it takes no remedial or corrective action. ss. 373.443 and 768.28, Fla. Stat.

Dear Representative Futch:

Thank you for considering this office as a source for assistance as to whether sovereign immunity for a water management district includes immunity for harmful errors and actions if no corrective action is taken by the district.

Section 373.443, Florida Statutes, provides immunity for stormwater management, stating:

"No action shall be brought against the state or district, or any agents or employees of the state or district, for the recovery of damages caused by the partial or total failure of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works upon the ground that the state or district is liable by virtue of any of the following:
(1) Approval of the permit for construction or alteration.
(2) The issuance or enforcement of any order relative to maintenance or operation.
(3) Control or regulation of stormwater management systems, dams, impoundments, reservoirs, appurtenant work, or works regulated under this chapter.
(4) Measures taken to protect against failure during emergency."

"Stormwater management system" is defined in section 373.403(10), Florida Statutes, to mean

"a system which is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system."

The above statute, in providing for immunity, does not appear to make such immunity necessarily contingent upon the district taking corrective action.

I am enclosing a copy of the 1994 decision of the Supreme Court of Florida in *Southwest Florida Water Management District v. Nanz*,[1] which considered the 1987 version of the above statute. Section 373.443, Florida Statutes, was amended in 1989 to provide specific immunity from

liability arising from stormwater management. Justices Kogan, Harding, and Wells concluded that the 1989 amendment to the statute did not immunize a water management district from liability for damages arising from failure of a stormwater management system *prior to* the amendment. Instead, the district's liability for such damages would be controlled by section 768.28, Florida Statutes. Since the majority opinion concluded that the complaint stated a claim of operational-level negligence, the Court held that the district was potentially liable for the alleged acts and the trial court erred in dismissing the complaint.

Chief Justice Grimes in his concurring opinion, joined in by Justices Overton and McDonald, concluded that contrary to the implication of the majority opinion, the 1989 amendment did not materially change section 373.443, Florida Statutes, because the words "dams, impoundments, reservoirs, and appurtenant work" all relate to a stormwater management system. Rather, the statute appeared to grant total immunity for damages caused by a break in the enclosure of water or a release of water caused by an equipment failure regardless of whether there was operational negligence. However, liability for damages not caused by a partial or total failure would be determined by the planning-operational dichotomy of section 768.28, Florida Statutes.

Section 768.28, Florida Statutes, provides a limited waiver of immunity for the state "and for its agencies or subdivisions" to the extent provided in the act.[2] Subsection (1) of the statute provides in part:

"Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act."

This waiver of immunity is limited to $100,000 on any claim or judgment by one person, or $200,000 for all claims arising out of the same judgment or occurrence regardless of "whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974."[3] Section 768.28(2), Florida Statutes, defines "state agencies or subdivisions" to include, among others, "the independent establishments of the state; . . . and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities[.]" A water management district created pursuant to law falls within the purview of the above definition.[4]

Since the adoption of section 768.28, Florida Statutes, Florida courts have recently been called upon to clarify the concept of governmental tort liability.[5] In addressing this issue the Supreme Court of Florida stated that despite the legislative intent of section 768.28, Florida Statutes, to waive sovereign immunity on a broad basis, certain discretionary governmental functions remain immune from tort liability.[6] In order to identify those functions, the courts have distinguished between "planning" and "operational" levels of decision-making by governmental agencies. For use on a case-by-case basis, a test has been adopted for distinguishing between discretionary and other executive or administrative processes:

"(1) Does the challenged act, omission, or decision necessarily involve a basic governmental

policy, program, or objective?
(2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?"[7]

If all the questions in this test can be answered "yes" when applied to a particular set of circumstances, then the governmental conduct is discretionary and "nontortious." If one or more questions call for a negative answer, then further inquiry is necessary. This test is intended to assist in distinguishing between the discretionary planning or judgment phase and the operational phase of government. To subject the government to tort liability for operational phase activities, there must first be either an underlying common law or statutory duty of care in the absence of sovereign immunity. In situations where no common law or statutory duty of care exists for a private person, no governmental liability exists.

The Supreme Court of Florida in *Trianon Park Condominium Association, Inc. v. City of Hialeah* [8] placed governmental functions and activities into four categories: (1) legislative, permitting, licensing, and executive officer functions; (2) enforcement of laws and the protection of the public safety; (3) capital improvements and property control functions; and (4) providing professional, educational, and general services for the health and welfare of the citizens. The Court stated:

"In considering governmental tort liability under these four categories, we find that there is no governmental tort liability for the action or inaction of governmental officials or employees in carrying out the discretionary governmental functions described in categories [1 and 2] because there has never been a common law duty of care with respect to these legislative, executive, and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care. On the other hand, there may be substantial governmental liability under categories [3 and 4]. This result follows because there is a common law duty of care regarding how property is maintained and operated and how professional and general services are performed. . . ."[9]

As the above discussion makes clear, a determination of a water management district's potential liability will depend upon the particular facts of any given situation and thus presents mixed questions of law and facts that cannot be resolved by this office. I trust, however, that the above informal comments may be of some assistance in resolving these issues.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

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[1] 642 So. 2d 1084 (Fla. 1994).

[2] *See* Art. X, s. 13, Fla. Const., recognizing that the immunity of the state may be waived by general law.

[3] *See* s. 768.28(5), Fla. Stat.

[4] *See, e.g., Southwest Florida Water Management District v. Nanz*, 642 So. 2d 1084 (Fla. 1994); Op. Att'y Gen. Fla. 78-113 (1978) (East Beach Water Control District, a public corporation, is within the definitional purview of s. 768.28, Fla. Stat.).

[5] *See Commercial Carrier Corporation v. Indian River County*, 371 So. 2d 1010 (Fla. 1979) and *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985).

[6] *Commercial Carrier Corporation, supra* at 1022; *Trianon Park Condominium Association, Inc., supra* at 918.

[7] *Trianon Park Condominium Association, Inc., supra* at 918.

[8] 468 So. 2d 912, 919 (Fla. 1985).

[9] *Id.* at 921.