

LEGAL ISSUES WHEN MANAGING PUBLIC ROADS AFFECTED BY SEA LEVEL RISE: **GEORGIA**

Marine Extension and Georgia Sea Grant | Carl Vinson Institute of Government



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SPRING 2019

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A NOTE OF THANKS

is due also to Thomas Ruppert, J.D., Florida Sea Grant, Erin Deady, J.D., Erin Deady P.A., and Heather Payne, Assistant Professor of Law, Seton Hall Law School, for providing guidance and feedback on this white paper. We are especially grateful to Yee Huang, J.D., who provided exceptional research support and editing assistance.

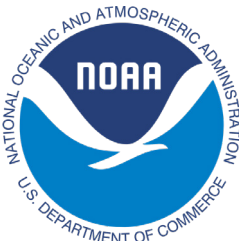
PROJECT BACKGROUND

This white paper is one outcome of a four-state regional project funded by the National Oceanic Atmospheric Administration (NOAA), Florida Sea Grant, Georgia Sea Grant, South Carolina Sea Grant, and North Carolina Sea Grant (Project No.: FY2014–2018: NA14OAR4170084). Coastal communities are increasingly becoming aware of the risks to their ecosystems, homes, and economies because of increased flooding, more extreme storm surges, and sea level rise. Reducing risk on the coast will be achieved by means of a variety of approaches, including policy and regulatory changes, natural resource protection, structural and non-structural intervention and investment, and retreat. A project team involving researchers, legal and policy experts, and law students have assisted coastal communities in four states – Florida, Georgia, South Carolina, and North Carolina – to prepare for present vulnerabilities and projected future conditions based on likely sea-level rise scenarios. This paper is part of the project’s objective to analyze legal and policy factors affecting adaptation responses, focusing on the state and local levels. Additional white papers associated with this project may be found at <http://gacoast.uga.edu/>.



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INTRODUCTION

The low-lying barrier islands and beach communities of Georgia are increasingly vulnerable to sea level rise. Coastal areas near Tybee Island, for example, have already experienced approximately ten inches of sea-level rise since 1935, and this trend is expected to accelerate in the future.¹ As low-lying areas like Tybee Island become more frequently inundated, damage to critical infrastructure such as roads will result. Such regular damage will make maintaining roads more costly. To avoid expensive maintenance, decision-makers may face hard questions about whether to continue maintaining public roads or whether it is more cost-effective to abandon them. Sea level rise and coastal flooding *will not* follow jurisdictional boundaries, and their effects will likely touch all levels of government simultaneously. For Georgia's coastal communities, adapting to sea level rise will be a group effort that will need to happen at a local level.

The state, counties, and municipalities have a legal duty to maintain existing public roads. In cases where a poorly maintained road results in harm to life or property, the government entity could face a lawsuit for failing to maintain the road or negligently performing its responsibilities. Depending on the circumstances, a court may hold that the entity must pay damages or that the entity must continue to maintain the road adequately, or both.

| KEY POINTS OF THIS PAPER INCLUDE:

- Determining “who owns the road” is critical because it defines who has the authority to act with respect to road closure, maintenance, and repair. In Georgia, counties own the largest percentage of road miles, with 68% percent of roadways under their jurisdictional control.
- Counties and municipalities have a legal duty to maintain public roads under their jurisdictional control as long as the roads remain open for public use. This duty will not change with more frequent flood damage from sea level rise to coastal roads, but the cost of maintaining roads and frequency of road repairs are likely to increase.
- If litigation arises out of a local government's failure to maintain roads, the outcome may depend on whether the entity was a county or a municipality. Counties have a greater ability to claim sovereign immunity than municipalities in Georgia. This discrepancy may hinder efforts for cohesive regional planning for adaptation and resilience.

¹Tybee Island Sea Level Rise Adaptation Plan 2 (2016).

- Adopting policies that specifically address road damage caused by coastal flooding will be essential, and counties and municipalities in Georgia must carefully consider what policies to adopt. Georgia courts have found that, if a policy is in place and directs a public official to act, that act is considered ministerial. Sovereign immunity does not apply to ministerial acts, potentially rendering a local government liable open to a lawsuit for negligence. Arguably, this factor – the presence of a policy – can create a perverse incentive for counties and cities to not adopt policies related to road maintenance and sea level rise.
- The specter of liability for adopting a policy can create a perverse incentive for counties and municipalities to not adopt policies related to road maintenance and sea level rise. Given the uncertainty inherent in planning for sea level rise, providing local governments with sovereign immunity protections for developing plans to maintain roads damaged by increased flooding caused by sea level rise may be necessary.
- Faced with increased road maintenance and repair costs or liability for failing to maintain roads, counties and municipalities may lawfully abandon roads by following statutory procedure. However, county and municipal officials should be aware of potential takings claims: if abandonment of a public road substantially interferes with a property owner's right to access his or her property via the public road, a compensable taking has occurred under Georgia law.
- Governmental officials may take steps to mitigate monetary liability, such as by providing continued access to a private road or by limiting the section of road abandoned to the damaged portion without changing an abutting property owner's access to the road.

This paper first addresses the threshold question of jurisdictional control of roads for government entities faced with questions about maintaining or abandoning roads damaged by increased coastal flooding. It then explains the multi-step analysis that governments must take to evaluate their duties to maintain roads in order to avoid liability. The paper discusses in detail how counties and municipalities can discontinue their duties to maintain roads through the process of abandonment. Lastly, this paper discusses how abandonment can lead to takings liability. This paper is not intended to provide legal advice. Rather, it is a policy paper designed to highlight potential legal questions that are likely to arise in the context of community adaptation to sea level rise. Communities facing such questions should consult with their legal counsel when considering adaptation actions.

ROAD JURISDICTION AND DUTIES:

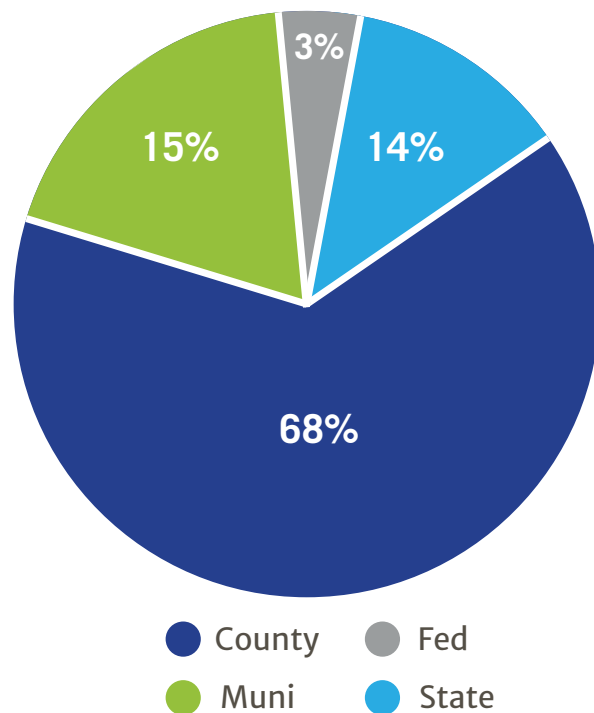
Who is responsible for the road?

Determining “who owns the road” is critical because it defines who has the authority to act with respect to road closure, maintenance, and repair. In Georgia, counties own the largest percentage of road miles. Of the total 128,134 miles of roads and highways in Georgia, counties own 58,257 miles of rural roads and 29,156 miles of urban roads, or approximately 68% percent of the roadways. Municipalities own 4,078 miles of rural roads and 15,757 miles of urban roads, or 16% percent of the roadways. The Georgia Department of Transportation, the state highway agency, owns 12,588 miles of rural roads and 5,361 of urban roads, or 14% of the roadways.²

Of course, while understanding road ownership will be essential to determining which jurisdiction has authority to act (or has a duty to act), road miles “owned” does not necessarily translate into vehicle miles traveled – large numbers of people often travel on a concentrated number of roads. While Georgia has more rural road miles than urban, for example, urban roads carry a larger percentage of vehicle traffic. In Georgia, approximately 60 million miles are traveled annually. Of that amount, 14.9 million are vehicles miles traveled on rural roads while 45.6 million are traveled on urban roads.³ Inventorying high traffic areas and essential transportation infrastructure will be critical for addressing climate impacts on road infrastructure.⁴

Evaluating the legal issues surrounding public roads must begin by determining who has jurisdictional control, or legal responsibility, over the road. While jurisdiction may seem obvious, different roads in a single municipality or county may fall under the jurisdictions of different government entities. Moreover, as a practical matter, increased coastal flooding is highly unlikely to follow jurisdictional boundaries, and the effects will likely touch all levels of government simultaneously. For these reasons, local government entities need to correctly identify their respective responsibilities as they begin to assess their obligations with respect to roads in the context of increased flooding and sea level rise.

GEORGIA: PERCENTAGE OF ROAD MILES BY OWNERSHIP



² U.S. Dep’t of Transp., Office of Highway Policy Information, “Highway Statistics Series 2012” (Oct. 2013).

³ U.S. Dep’t of Transp., Office of Highway Policy Information, “National Highway System Travel – 2016” (Sept. 2017).

Under Georgia law, each government entity has control and responsibility for all construction, maintenance, or other work related to the roads within their jurisdictional control⁵:

- The Georgia Department of Transportation (GDOT) has jurisdiction over roads within the state highway system.⁶
- Georgia counties have jurisdiction over roads within each respective county’s road system, including county roads extending into any municipality within the county.⁷
- Municipalities have jurisdiction over their municipal street systems, which consist of the public roads within a municipality that are not classified as county roads or state roads.⁸

GDOT has a statutory duty to improve, manage, and otherwise maintain the state highway system. Counties have a duty to maintain county roads in a condition so that “ordinary loads, with ordinary ease and faculty, can be continuously hauled over such public roads.”⁹ As long as the road remains public, counties must repair and maintain damaged roads. Sea level rise can affect roads by causing more frequent flooding, road base failure, and pavement damage.

Municipalities have a general duty to keep the roads in their street systems reasonably safe. More specifically, municipalities have a “duty to keep their streets in repair, and they are liable for injuries resulting from defects after actual notice, or after the defect has existed for a sufficient length of time for notice to be inferred.”¹⁰ Municipalities’ duty to keep streets safe applies both to dangerous conditions brought about by the forces of nature and brought about by persons, and extends to conditions adjacent to or suspended over the street.¹¹ Thus, low-lying municipalities must keep their roads reasonably safe and must repair roads damaged – by sea level rise, coastal flooding or otherwise – if the municipality has notice of the unsafe conditions.

GEORGIA ROAD MILES

RURAL						URBAN					
State	County	Town/ Muni	Other	Fed	Rural Total	State	County	Town/ Muni	Other	Fed	Rural Total
12,588	58,257	4,078	90	2,775	77,788	5,361	29,156	15,757	31	41	50,346

TOTAL 128,134 miles

4. Potential Impacts of Climate Change on U.S. Transportation, Transportation Research Board Special Report 290, National Research Council of the National Academies (2008), available at <http://onlinepubs.trb.org/onlinepubs/sr/sr290.pdf>.

5. O.C.G.A. §§ 32-2-2(a)(1), 32-4-41(1), 32-4-91.

6. O.C.G.A. § 32-2-2.

7. O.C.G.A. § 32-4-1; O.C.G.A. § 32-4-41(1).

8. O.C.G.A. § 32-4-1(3); O.C.G.A. § 32-4-91(a).

9. *Id.*

10. *Roquemore v. City of Forsyth*, 274 Ga. App. 420, 423 (2005). A municipality may also be liable for portions of the state highway system that lies within a municipality’s corporate limits where the municipality agreed to perform the necessary maintenance. *City of Fairburn v. Cook*, 188 Ga. App. 58, 64, 372 S.E.2d 245, 251 (1988).

11. *Roquemore*, 274 Ga. App. at 423.; see also *City of Fitzgerald v. Caruthers*, 332 Ga. App. 731, 734 (2015) (holding that the duty applies to rotting tree beside street).

BREACH OF GOVERNMENT DUTIES

When coastal or low-lying roads are damaged and not repaired or are inadequately repaired, an injured plaintiff could bring two types of legal actions: a negligence action or a mandamus action. A successful negligence claim must prove four elements:

1. The entity had a legal duty to conform to a standard of conduct;
2. The entity breached that standard;
3. The entity's breach caused the injury; and
4. Damages or loss resulted from the harm.¹²

In a mandamus lawsuit, the plaintiff is asking the court to compel the entity by law to do something – to direct the performance of a legal duty. Georgia law specifically gives county citizens the authority to seek a writ of mandamus to compel counties to maintain county roads.¹³ Georgia's general mandamus statute may be used to bring mandamus suits against counties by non-county citizens. It is also how mandamus suits are brought against municipalities.¹⁴ Mandamus actions can be used to challenge an entity's failure to perform a ministerial duty or a discretionary duty where the exercise of discretion is capricious and arbitrary or a gross abuse of discretion.¹⁵

A third potential legal action is a nuisance lawsuit: If a governmental entity fails to maintain or repair a road damaged by sea level rise, storms, flooding, or erosion, a plaintiff could allege that the entity is maintaining a nuisance and seek an injunction. Georgia law defines nuisance as “anything that causes hurt, inconvenience, or damage to another” and establishes a four-year statute of limitations.¹⁶ State law also treats municipalities different than the state or counties. For a municipality to be liable for a nuisance, the act complained of must last for some time and be continuous or regularly repetitious; a failure to act must be in violation of a duty to act; and the municipality must fail to act within a reasonable time after knowledge of the defect or dangerous condition.¹⁷ In contrast, for the state or a county to be found liable, the nuisance must cause damage that arises to the level of a constitutional taking.¹⁸

In Georgia, nuisance claims against governmental entities are frequently related to sewer construction and maintenance and damages related to overflows or water damage.¹⁹ The nuisance approach has not been used in the context of failure to maintain a road or governmental responsibility for repairing damage caused by flooding caused by natural occurrences. Recurrent flooding

¹² *Fletcher v. Water Applications Distrib. Group, Inc.*, 333 Ga. App. 693, 696 (2015).

¹³ O.C.G.A. § 9-6-21(b).

¹⁴ O.C.G.A. § 9-6-21(b), O.C.G.A. § 9-6-20. *Burke Cnty v. Askin*, 291 Ga. 697, 701 (2012).

¹⁵ *Scarborough v. Hunter*, 293 Ga. 431, 435 (2013); see also O.C.G.A. § 9-6-21(a) (“[M]andamus shall not be confined to the enforcement of mere ministerial duties.”). The following section discusses the difference between ministerial and discretionary duties.

¹⁶ O.C.G.A. § 41-1-1.

¹⁷ *Mayor of Savannah v. Palmerio*, 242 Ga. 419, 426-427 (1978). See also *Roquemore v. City of Forsyth*, 274 Ga. App. 420, 423

¹⁸ See *DeKalb Cty. v. Orwig*, 261 Ga. 137, 402 S.E.2d 513 (1991); *Duffield v. DeKalb Cty.*, 242 Ga. 432 (1978).

¹⁹ See *DeKalb and Duffield*; see also *Morris v. Douglas Cty. Bd. of Health*, 274 Ga. 898 (2002); *Goode v. City of Atlanta*, 274 Ga.App. 233 (2005); and *City of Columbus v. Myszka*, 246 Ga. 571 (1980).

caused by sea level rise and storm surge, however, often involve both natural occurrences and failing infrastructure. Should such events result in a “regularly repetitious condition,” it is possible that nuisance claims in this context may be successful.²⁰

DEFENDING AGAINST LEGAL CLAIMS

In addition to presenting facts that refute a plaintiff’s claim, a governmental entity in Georgia may assert sovereign immunity in cases related to road repair and maintenance. In Georgia, the state is immune from suit when the roadway’s plan or design substantially complies with the generally accepted engineering design standards.²¹

The following section discusses counties’ and municipalities’ ability to assert the defense of sovereign immunity. Because counties have a greater ability to claim sovereign immunity than municipalities, issues for larger-scale adaptation and resilience planning efforts may arise as city and county governments have different liability standards.

At the city and county levels, sovereign immunity applies to discretionary duties, but not to ministerial duties, and means that the entity is not liable for injuries caused by the entity’s negligence. Importantly, the ability to assert sovereign immunity differs for counties and municipalities: state law expressly waives municipalities’ immunity from liability for injuries caused by their failure to keep roads reasonably safe and remove defects. Thus, counties have greater latitude to claim immunity than municipalities.

Georgia courts define a *discretionary* act as one that “calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.”²² Georgia courts define a *ministerial* duty as one where “procedures and instructions [on which the duty is based are] so clear, definite and certain as merely to require the execution of a relatively simple, specific duty.”²³ Courts have generally held that a duty related to roads is ministerial if it is mandatory²⁴ or becomes necessary after a discretionary decision making body delegates the duty to a county official by enacting a policy.²⁵

Even though Georgia courts have yet to establish a universal, easy-to-apply rule to determine whether a duty is ministerial or discretionary, the most influential factor is the presence of a policy that directs officials to repair or maintain a road after being notified of a defect or dangerous condition. If a policy is in place, the duty is considered ministerial,

²⁰ See *City of LaGrange v. Whatley*, 146 Ga.App. 174, 246 S.E.2d 5 (1978) (emphasizing that “[a] single isolated act of negligence not continuous or recurrent, is not sufficient to show a negligent trespass constituted a nuisance.”). The Second Restatement of Torts similarly provides that “the flooding of the plaintiff’s land, which is a trespass, is also a nuisance if it is repeated or of long duration....” Restatement (Second) of Torts § 821D (1979).

²¹ O.C.G.A § 50–21–24 (10). *Georgia Dep’t of Transportation v. Balamo*, 343 Ga. App. 169, 171, 806 S.E.2d 622, 624 (2017), cert. denied (May 7, 2018).

²² *Banks v. Happoldt*, 271 Ga. App. 146, 149 (2002).

²³ *Rhodes*, 307 Ga. App. at 506.

²⁴ *Edmond*, 231 Ga. App. at 871 (“Such ‘discretion,’ however, did not change the fact that the tree must be removed.”).

²⁵ *Joyce*, 196 Ga. App. at 96.

sovereign immunity is waived, and a suit may go forward. If a policy directs an official to act in the specific circumstance at issue, the fact that the official has discretion in how he performs the act does not render the duty discretionary.

Arguably, this factor – the presence of a policy – can create a perverse incentive for counties and cities to not adopt policies related to road maintenance and sea level rise. However, adopting policies that specifically deal with road damage caused by coastal flooding will be essential in the future. Government entities need these policies to adapt to sea level rise, but they must be aware of their legal implications. Governmental entities wishing to assess the merits of a sovereign immunity defense should consult an attorney with experience in this area. Given the uncertainty inherent in planning for sea level rise, providing local governments with sovereign immunity protections for developing plans to maintain roads damaged by increased flooding caused by sea level rise may be necessary.

| *Counties and County Officials: Claiming Immunity for Failure to Maintain Roads*

Counties and county officials acting in their individual capacity are not liable for discretionary acts, such as the failure to maintain roads, and counties are not liable for ministerial acts.

Georgia counties are not liable for injuries arising from a failure to maintain roads because state law provides counties with generous sovereign immunity: A county is not liable for suit unless specified by statute.²⁶ County officials sued in their individual capacity may also claim official immunity from liability for discretionary actions done without willfulness, malice, or corruption.²⁷ However, a county official may be liable for negligently performing a ministerial duty.

As discussed above, the presence of a policy is often determinative. In *Norris v. Emanuel County*, the court held that county employees' decision when and how to repair a road that was damaged by heavy rainfall was discretionary. Even though the county officials knew the road was washed out, there were "no guidelines or procedures in place" for determining how exactly to repair the damage, nor did the county officials receive a specific directive.²⁸ Where a decision is left to the personal judgment of government officials, the court reasoned, such decisions are properly characterized as discretionary.

²⁶ Ga. Code Ann. § 36-1-4.

²⁷ GA CONST Art. I, § 2, ¶ IX (d).

²⁸ *Norris*, 254 Ga. App. at 118. In *Brown v. Taylor*, the court held that county employees were immune from liability because their duty to repair a six-inch drop off at a road shoulder due to broken pavement was discretionary. *Brown*, 266 Ga. App. at 177. In reaching its decision, the court noted that there was no formal or written policy regarding road maintenance, no evidence that county officials were on notice of the defect, and that no employee had been instructed to inspect or repair the shoulder. Compare *Joyce v. Van Arsdale*, 196 Ga. App. 95 (1990) (holding that DOT's directive to county to repair bridge gave rise to a ministerial duty).

²⁹ *Barnard v. Turner Cnty.*, 306 Ga. App. 235, 239 (2010). The court in *Lincoln County v. Edmond* held that a county official's duty to remove a tree was ministerial, even though a county policy granted the official the discretion to choose how he would remove the tree. The court reasoned that such discretion did not change the fact that the policy required the official to remove the tree once he had notice that the tree was obstructing the street. 231 Ga.

In contrast, the court in *Barnard v. Turner County* held that a county official's duty to take remedial action after being put on notice that a road was flooding was ministerial because a policy was in place to direct the official to act. Even though the policy granted the official discretion on how to act, the court concluded that because the official had actual notice of the defect, and because a county policy required the official to report and fix this type of defect upon notice, the duty was ministerial.²⁹

| *Municipalities and Municipal Officials: Claiming Immunity for Failure to Maintain Roads*

Municipalities cannot claim sovereign immunity from liability for injuries caused by their failure to maintain roads in a reasonably safe condition and by their failure to remove defects after notice, which are considered ministerial duties. State law waives municipalities' immunity from liability for injuries caused by their "neglect to perform or for improper or unskillful performance of their ministerial duties."³⁰ A municipality's function of improving or maintaining its roads in a safe condition has long been held to be ministerial in nature.³¹ Furthermore, state law also explicitly waives immunity for a municipality's failure to keep streets free from defects after notice.³² Thus, municipalities cannot claim sovereign immunity for injuries resulting from their failure to keep streets reasonably safe or removing defects after flooding has damaged a road. In effect, sovereign immunity protects municipalities and municipal officers sued in their official capacity to a much lesser extent than it protects counties.

Municipalities may assert sovereign immunity for negligent performance or nonperformance of governmental functions.

Municipalities can claim sovereign immunity from liability for their negligent performance or nonperformance of their governmental functions. Generally, activities that are undertaken primarily for public benefit rather than for revenue production are governmental functions.³³ Primarily, governmental functions related to roads include acts related to traffic control. In *McKinley v. City of Cartersville*, the court held that the city's failure to erect a four-way stop at an intersection of a public road was not a dangerous condition that could exempt the city from immunity.³⁴

ROAD ABANDONMENT: A CONSIDERATION WHEN UNABLE TO MAINTAIN ROADS

Counties and municipalities can discontinue their duties relating to a road by abandoning it. To do so, counties and municipalities must follow the specific statutory procedures. If the entity does not follow the correct procedure, a court may decide that the road is not abandoned and

³⁰ O.C.G.A. § 36-33-1

³¹ *Caruthers*, 332 Ga. App. at 733.

³² O.C.G.A. § 34-3-93(a).

³³ *City of Atlanta v. Durham*, 324 Ga. App. 563, 565 (2013).

³⁴ 232 Ga. App. 659, 660 (1998).

that the entity still has the previously discussed legal duties. The following discussion provides an overview of the required procedural steps for abandonment for county and municipal roads. GDOT is authorized by statute to dispose of any property or rights or interests in public roads.³⁵

Abandonment Procedure: Counties

Counties can abandon a road if the county board of commissioners determines that the road has ceased to be used by the public to the extent that no substantial public purpose is served by it or is otherwise in the best public interest.³⁶ The procedures to abandon roads are:

1. Counties must abandon the road by certification, recorded in its minutes, accompanied by a plat or sketch of the abandoned road.
2. Counties must give notice to property owners located on the road, publish notice of the county's determination in the newspaper, and hold a public hearing on the issue.
3. Counties must notify the Department of Transportation within three months after a road is abandoned.
4. Counties must obtain the approval of the Department of Transportation if abandonment requires any expenditure of federal or state funds.
5. Counties must give notice to municipalities into which or through which any part of the road passes, who can choose to designate the road as a municipal street.³⁷

Once the road is abandoned, the entity is relieved of its duties and “the rights of the public in and to the section of the road as a public road shall cease.”³⁸

Abandonment Procedure: Municipalities

Municipalities are authorized to abandon any public road that is under their respective jurisdictional control when abandonment is deemed in the public's best interest or the street ceases to be used by the public to the extent that no substantial purpose is served by it.³⁹ The procedure

1. Municipalities must abandon the street by certification, recorded in its minutes, accompanied by a plat or sketch of the abandoned street.
2. Municipalities must give notice to property owners located on the street.
3. Municipalities must obtain the approval of the Department of Transportation if the abandonment requires any expenditure of federal or state funds.
4. Municipalities must notify the Department of Transportation after the municipal street is abandoned.⁴⁰

³⁵ O.C.G.A. § 32-2-2.

³⁶ O.C.G.A. § 32-7-1; *Scarborough I*, 288 Ga. at 689-90

³⁷ O.C.G.A. § 32-7-2(b).

³⁸ *Pass v. Forester GA Real Estate Group, Inc.*, 337 Ga. App. 244, 246 (2016); See also O.C.G.A. § 37-7-2(b)(1).

³⁹ O.C.G.A. § 32-7-1

⁴⁰ O.C.G.A. §§ 32-7-2(c) & 32-4-91.

to abandon a road is:

Notably, however, there is no public hearing requirement, and no requirement that a notice be published in a newspaper. Additionally, municipalities are not required to provide notice to other jurisdictions for the purpose of allowing those other jurisdictions the opportunity to accept the street to be abandoned into their public road systems.

Once the municipal road is abandoned, the municipality is relieved of its ministerial duty to repair because the road is no long part of its municipal street system,⁴¹ and the rights of the public in and to that street as a public road cease.⁴²

Challenging Abandonment Decisions

An individual can challenge an entity's decision to abandon a road, but the decision is discretionary and difficult for a court to reverse. Individuals wishing to challenge the decision to abandon a road may seek a writ of mandamus that, if granted by the court, could compel the entity to continue maintaining the road.⁴³ But in these cases, the only question before the trial court is whether the governing board's decision to abandon the road was so arbitrary and capricious that it amounted to a "gross abuse of . . . discretion."⁴⁴ In reaching their decision, courts may not substitute the board's judgment with that of its own, but rather must only look at whether the board's decision is support by sufficient evidence.

When deciding whether abandonment is proper, courts and public boards consider a variety of factors, including the financial burden of the maintaining the road, the public's dependence on

An individual may challenge the decision to abandon a road, but generally the decision is difficult to reverse.

the road, and what caused a decrease in the public's use of the road. In *Scarborough v. Hunter*, the court held that evidence that the county would need to rebuild the road at a cost of \$600,000 to \$800,000, and that plaintiff's less expensive proposal would not make the road stable, supported the board's decision.⁴⁵ The county board's decision in *Scarborough* was also supported by evidence that no houses or business were located on the road and that the public was not using the road.⁴⁶

⁴¹ See O.C.G.A. § 32-4-93 (duty only applies to "public roads of its municipal street system"). 232 Ga. App. 659, 660 (1998).

⁴² O.C.G.A. § 32-7-2(c).

⁴³ O.C.G.A. § 9-6-21 or § 9-6-20.

⁴⁴ *Scarborough*, 293 Ga. at 436.

⁴⁵ *Id.* at 438; see also *Torbett v. Butts Cnty.*, 271 Ga. 521, 522 (1999) (holding that evidence that the County's road budget would not support reconstruction was sufficient).

⁴⁶ *Scarborough*, 293 Ga. at 437. Similarly, the county board in *Torbett v. Butts County* considered evidence that no residents lived on the portion of road the county wanted to abandon, and trial court upheld the board's decision, in part, because "there was no improved structures on it and no homeowners or businesses would be left without public access to road frontage if it were closed." 271 Ga. at 522.

⁴⁷ For example, the *Smith* court, while affirming the trial court's decision that the Athens-Clarke County board's decision to abandon a road was not arbitrary and capricious, held that sufficient evidence supported the finding that the road served no substantial public purpose, even though plaintiff owned property, but did not live, along the road. *Smith v. Bd. of Comm'n of Athens-Clarke Cnty.*, 264 Ga. 316, 316 (1994).

However, abandonment may also be proper in certain situations even if the road abuts private property.⁴⁷ Georgia appellate courts have yet to decide whether an abandonment of a populated road, which abutting property owners use as their only access point, is proper. Given courts' persistent attention to whether or not property owners live on a road when reaching decisions in these cases, the fact that multiple homeowners live on the road would likely be an influential factor. Of course, putting all of these issues aside, abandoning a road could result in intense political pressure, making such decisions profoundly difficult.

ABANDONMENT AND TAKINGS

Under Georgia law, the government cannot take private property for public purposes without paying just and adequate compensation for such property.⁴⁸ If an entity abandons a public road that abuts a landowner's property, and such abandonment substantially interferes with such landowner's ability to enter and exit his property via that public road, a compensable taking of private property may have occurred. There are no reported takings cases in Georgia involving abandonment of roads by a local government, however. It is possible that the broad authority given to local governments in Georgia to abandon property would lessen the likelihood that a court would find a taking.

Abandonment will result in a compensable taking if a jury finds that the abandonment substantially interfered with a property owner's access to his property.

Courts in Georgia have found in "easement of access" cases that limiting access to property can be a taking. In such a situation, the landowner can sue the government entity that abandoned the road, and the entity will have to pay out any decrease in the value of the property. In order to constitute a taking of property, government action must result in a deprivation of a special property right, rather than a general property right that is shared by the public. Under Georgia law, the right to enter and exit one's property by using a public road, usually referred to by courts as an "easement of access," is a special property right held by owners of property that abuts that road.⁴⁹ If this easement of access is substantially interfered with due to abandonment, the property owner that possesses the easement is entitled to compensation even if an alternative route to and from his property exists.

In *Circle K General, Inc. v. Department of Transportation*, the court applied this rule in a case involving a DOT construction project.⁵⁰ As a result of the project, Circle K no longer had direct access to a public highway that once abutted its property, but instead only had access to a new service road. The court held that Circle K's easement of access had been impaired. It was up to the jury, the court explained, to determine whether Circle K's access was "substantially interfered with," and if so, the decrease in property value that DOT must pay. Importantly, the court held that access to the service road was not automatically a sufficient substitute for access to the highway.

⁴⁸ GA CONST Art. 1, § 3, ¶ 1.

⁴⁹ *Dougherty Cnty. v. Hornsby*, 213 Ga. 114, 116 (1957).

⁵⁰ 196 Ga. App. 616, 617 (1990).

⁵¹ *Hornsby*, 213 Ga. at 116.

If abandonment only results in an inconvenience of access, that inconvenience is not compensable unless the inconvenience is special to the landowner. In addition to the “easement of access,” abutting property owners have a general right “to use and enjoy the highway” that they share with the public, elimination of which is not compensable under the Constitution.⁵¹ Courts classify inconvenience of access as a general right rather than a special right. This issue arises most commonly when an entity abandons or dead ends only a portion of a public road, resulting in an inconvenience of travel but not a direct interference with the landowner’s ability to access his property via the road.⁵²

City and county officials who are contemplating abandonment should be aware of possible takings claims and take steps to mitigate possible monetary liability. Although continued access to a private road will not prevent a successful lawsuit, it may help mitigate the decrease in the property’s value, and thus help decrease the amount of damages to which the landowner is entitled. Entities should stress the owner’s option to purchase the property from the entity, if such option is available, when it gives notice to an abutting property owner of abandonment. If an entity can abandon only the most damaged portion of the road, without changing an abutting property owner’s access to the road and from there to the greater road system, it will significantly decrease the possibility of takings liability.

CONCLUSION

Sea level rise will likely damage county and municipal roads in low-lying communities. Whether an entity has an obligation to maintain roads and can be held liable for injuries caused by negligent maintenance or be compelled to continue maintenance depends on whether it has jurisdiction and the specific facts of the case. Entities can defend themselves during lawsuits by refuting the elements of the plaintiff’s legal claim or by asserting an affirmative defense, such as sovereign immunity. Sovereign immunity protects counties and municipal officials from liability for injuries caused by their discretionary decisions concerning roads, but not their ministerial duties. Because municipalities have expressly waived immunity in certain circumstances related to roads, it is more difficult for them to assert the defense than it is for counties.

Counties and municipalities may avoid maintenance liability by abandoning roads damaged by sea levels rise or other occurrences. But, these entities must be aware that abandonment can lead to its own form of liability for an entity: an unlawful taking of private property if abandonment substantially interferes with an abutting property owner’s right to access his property.

Understanding these issues will be crucial as impacts from sea level rise and coastal flooding become more prevalent.

⁵² *In Tift County v. Smith*, a property owner brought an action for an alleged taking of private property due to Tift County dead-ending the public road on which the owner lived. The property owner claimed that because of the county’s act, his commute to a nearby town became longer and required him to take an occasionally hazardous road, a burden that affected the value of his property in an extent peculiar to his property. The court disagreed, explaining that the property owner had the same access to the road abutting his property, as the county did not alter this part of the road. 219 Ga. 68, 69 (1963).