JONES FOSTER
JOHNSTON & STUBBS, P.A.

Memo

TO: Mayor and Town Council

VIA: Kirk Blouin, Town Manager

CC: Paul Brazil; Rob Weber; Jay Boodheshwar

FROM: John C. Randolph, Town Attorney

RE: Groins

DATE: May 30, 2018

This memorandum is in response to questions that have been raised relating to the liability of the Town, if any, for assuming the responsibility and control of improvements to groins located on private properties in the Town and extending to the sovereign lands of the state below mean high water.

The first, and most recent question raised, is whether or not the Town assumes any liability as a result of applying for and obtaining a permit for the improvement and reconstruction of these groins. It is my opinion that applying for and obtaining a permit, in and of itself, does not place any liability on the Town. Once a permit is obtained the Town may or may not move forward with the improvement and reconstruction of the groins. Further, there is a distinction in the law between discretionary governmental functions and operational activities.

Discretionary Governmental Functions vs. Operational Functions

A municipality remains immune from tort liability for decisions involving discretionary governmental functions. However, such immunity does not exist within the category of operational functions. For example, a municipality is immune from liability for a discretionary decision as to whether or not to install a traffic signal light, but once the signal light is in place, it is the responsibility of the municipality to maintain the light properly, without negligence, and in the event it is found that the town is negligent in the maintenance of the traffic signal, the town would have liability.

This same rule of law applies to the ultimate decision of the Town relating to the installation and improvement of the groins. The decision of the Town to undertake the responsibility to improve the groins is a discretionary decision for which the Town enjoys immunity, particularly since it will have received a permit from the state to make such improvements. However, once that decision is made, by assuming control and making improvements to the groins, the Town would be obligated to act responsibly and reasonably and in accordance with acceptable standards of care

and common sense in the design, construction and maintenance of the improved groins. Therefore, the Town would be liable for any injuries resulting from the Town's negligence in designing, constructing or maintaining the improved groins.

Once a government decides to act, whether out of obligation or free choice, it must act responsibly and reasonably under the existing circumstances and in accordance with acceptable standards of care and common sense. See, Commercial Carrier Corp. vs. Dade County, 371 So.2d 1010, (Fla. 1979), holding that maintenance of a traffic signal light which is in place, maintenance of a traffic sign at an intersection and maintenance of the painted letters "STOP" on pavement of highway do not fall within the category of governmental activity which involves broad policy or planning decisions, but fall within the category of operational level activity and hence did not involve "discretionary governmental functions" which remain immune from tort liability. Thus, once a government decides to act, the government is liable for its negligence in the performance of that act. In the case of Matthews vs. City of St. Petersburg, Fla. 400 So.2d 841 (Fla.2d DCA 1981), a plaintiff brought a wrongful death action against the city stemming from the death of a child due to the city's alterations to a creek in the city park. The plaintiff alleged that the city's concrete encasement on the sides of a creek, coupled with its failure to then erect a barrier around the banks, was dangerous and caused or contributed to the child's death. The court determined that an issue of fact existed as to whether a concrete creek encasement was designed and constructed appropriately. The court further found that the city was immune from its discretionary decision of whether to alter or amend the natural state of the creek but remanded the case for a factual determination as to whether the city was negligent in designing and constructing the concrete encasement. Accordingly, once the Town assumes control of the groins and makes improvements to the groins, the Town must design, construct and maintain the improved groins in accordance with acceptable standards of care and common sense. If the Town is negligent in its efforts to improve the groins, the Town would be liable for any injuries to individuals resulting from the Town's negligence.

In addition to the above, please note that case law has held that a "property owner generally cannot be held liable for dangerous conditions which exist in natural or artificial bodies of water unless they are so constructed as to constitute a trap or unless there is some unusual nature not generally existent in similar bodies of water." See, Tremblay vs. South Florida Water Management District, 560 So.2d 1219, (Fla. 3d DCA 1990), holding that the presence of cement blocks in shallow water near the shore of a canal was not an unusual circumstance of the type which could form the basis of liability by water management district which maintained the canal.

Damages to Real Property Caused by Improvements to Groins

In addition to the question of negligence, the question might be raised as to whether or not the Town is liable for damages to real property caused by improvements to the groins. In the absence of any unjustified entry on land of which the fee is held by a private owner, the construction and maintenance of a public improvement (such as a groin) under legislative authority in such a manner as to inflict an injury to an adjacent land that would be actionable without such authority does not constitute a taking of such land unless the owner is substantially ousted and deprived of all beneficial use of the land affected. See, Paty vs. Town of Palm Beach, 29 So.2d 363 (Fla. 1947). (Copy attached). In Paty, the Florida Supreme Court held that damage to land along the ocean because of the washing away of the land by water after construction under statutory authority of a groin by the Town of Palm Beach that changed the current was damage without injury and landowners could not recover against the Town. See also, Certain Interested Underwriters vs. City

of St. Petersburg, 864 So.2d 1145, which applied the Paty rational to takings claims and held that when government actors cause damage to property as a result of their lawful action performed without negligence, no compensable taking has occurred under the Florida constitution. Accordingly, the Town would not be responsible for any damages to real property caused by the Town's improvements to the groins, so long as the Town was not negligent in its improvement of the groins.

Other Issues

The above deals with the issues of liability which may accrue to the Town as a result of undertaking the responsibility of improving groins which are, presumably, now considered as the responsibility of the private property owners from whose property the groins extend. I say presumably because I have not researched whether or not all of these groins are indeed private or the sole responsibility of the private property owners. It is important to note that if the Town undertakes this project, although it will not need the permission of private property owners to improve the groins which are located on sovereign lands of the state (the Town having received a permit from the state to make such improvements on the sovereign land), to the extent the Town needs to gain access to the private property above the mean high-water line, it will need to receive a construction easement and approval from the private property owner to remove, alter or reconstruct that portion of the groin which is on the private property.

It is appropriate also in this regard for me to call to the attention of the Mayor and Town Council Florida Statute 161.061, which provides that a property owner abutting sovereign lands on which there is located a groin determined by the state to serve no public purpose, which is dangerous to or in any way dangers human life, health or welfare, or which proves to be undesirable or becomes unnecessary as determined by the department, shall be responsible for adjusting, altering or removing that portion of the groin below the mean high-water line after written notice from the state. "Adjustments, alterations, or removals required by this section shall be accomplished at no cost to the state. The decision of the department as to whether to adjust, alter, or remove such coastal construction or structure shall be final, and the department shall set a reasonable time within which the adjustment, alteration, or removal shall be accomplished. In the event that the upland property does not adjust, alter, or remove any coastal construction, or other structure, including groins, jetties, moles, breakwaters, seawalls, revetments, or other structures if of a solid or highly impermeable design upon sovereignty lands of Florida, below the mean high-water line, when requested or directed by the department in accordance with subsection (1) of this section, the department may alter, adjust, or remove such coastal construction or structures at its own expense, and the costs thereof shall become a lien upon the property of said abutting upland property owner.

I do not know the extent to which this section has been considered by the state or the Town in regard to those groins which the Town is considering improving at its expense.

I hope this information is helpful in your consideration of this matter. I will be happy to attempt to answer any legal questions you may have in regard to same. I would leave to Rob Weber and Paul Brazil the answers to any questions you may have in regard to the permitting process or the investigations made by their department in regard to the issues of the existing groins.

JCR/jcl
Attachment
P:\DOCS\13156\00008\MEM\1UZ3239.DOCX

158 Fla. 575
Supreme Court of Florida, Division B.

PATY et al.
v.
TOWN OF PALM BEACH.

Feb. 4, 1947.
|
Rehearing Denied March 26, 1947.

Synopsis
Action by B. F. Paty and others against the Town of Palm Beach, a municipal corporation, to recover for damage to plaintiffs' land from waters of ocean as result of construction of a groin by defendant. From a judgment for defendant, the plaintiffs appeal.

Affirmed.

West Headnotes (1)

[1] **Eminent Domain**
⇐ Wetlands and coastal protection
Water Law
⇐ Boat basins, revetments, and groins
Water Law
⇐ Injuries from improvements
148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking;Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(2) Wetlands and coastal protection
(Formerly 148k2(10))
405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1246 Right to Wharf Out, Build Docks, and Support Shore
405k1250 Structures
405k1250(4) Boat basins, revetments, and groins
(Formerly 270k41(1) Navigable Waters)
405 Water Law
405XV Navigable Waters
405XV(B) Rights of Public
405XV(B)2 Improvement of Channels and Streams
405k2543 Injuries from improvements
(Formerly 270k41(1) Navigable Waters)
Damage to land along ocean because of washing away of land by water after construction under statutory authority of a groin by city of Palm Beach that changed current was damage without injury, and landowners could not recover from city. Acts 1941, c. 21469, § 4.

4 Cases that cite this headnote

*576 **363 Appeal from Circuit Court, Palm Beach County; Jos. S. White, judge.

Attorneys and Law Firms

C. D. Blackwell, of West Palm Beach, for appellants.

Alley, Drew, Burns & Middleton, R. C. Alley, E. Harris Drew, C. Robert Burns and Elwyn L. Middleton, all of West Palm Beach, for appellee.

Opinion

BARNS, Justice.

The trial court sustained a demurrer to the appellant's declaration and, appellant not electing to further amend, the Court entered a final judgment against the appellant-plaintiff and he appeals and assigns as error the sustaining of defendant's demurrer.

The substance of the question presented as flowing from appellant's assignments of error is: Is a trespass or wrong made to appear when a municipal corporation builds a groin from the shore of the Atlantic Ocean out into the waters of the ocean, and the groin changes the natural action and the currents of the ocean so as to cause them to whip around to the south of the groin and to beat against and to excessively wash away plaintiff's land? The question states the substance of plaintiff's declaration. The rights of private owners as well as the rights of the public depend somewhat on the character of the water on which the land borders and the nature of the proprietary interest in the

land both below and above the surface of the water. The waters of the sea are usually considered a common enemy. See note in 6 L.R.A.,N.S., 162.

For other relative cases not deemed applicable here see Katenkamp et al. v. Union Realty Co., 11 Cal.App.2d 63, 53 P.2d 387, and, Cal.App., 93 P.2d 1035; Revell v. People, 177 Ill. 468, 52 N.E. 1052, 43 L.R.A. 790, 69 Am.St.Rep. 257.

The City of Palm Beach by Section 4 of Chapter 21469, Sp.Acts 1941, has been authorized to protect its Ocean Boulevard and the lands lying westerly thereof against danger of destruction because of action of the sea by the construction of seawalls, bulkheads and groins.

*577 'Any injury or damage which is occasioned by the doing of a lawful act or the exercise of a legal right, or by doing a thing, authorized by law, in the authorized way, is damnum absque injuria. Damage resulting from such an act, to be actionable, must be coupled with some negligence or misconduct, or the act must have been done at a time, or in a manner, or under circumstances, which render the actor chargeable with want of proper regard for the rights of others. In doing a lawful thing in a lawful way no legal right is invaded, although the act may result in damage to another.

'* * * Nor can an action be maintained for damages resulting to individuals from acts done by persons in the execution of a public trust and for the public benefit, acting with due skill and caution and within the scope of their authority.

'* * * Nevertheless, the mode of exercising a legal right, where there is a choice of means, may of itself give a cause of action, and an act which, in many cases, is in itself lawful, becomes unlawful when by it damage has accrued to the property of another, especially if it is such an act as is calculated, in the ordinary course of events, to damage another if done intentionally **364 and without just cause or excuse.' 1 Am.Jur.Sec. 33, pages 425, 426.

It appears that the appellee is sued for doing of an authorized act and the exercise of a lawful right and that the damages were without wrong.

Affirmed.

THOMAS, C. J., and BUFORD and ADAMS, JJ., concur.

All Citations

158 Fla. 575, 29 So.2d 363

End of Document