

March 25, 2005

VIA UNITED PARCEL SERVICE
OVERNIGHT DELIVERY

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Federal Emergency Management Agency - Region IV
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RE: Disaster Number: FEMA-1545-DR-FL
Disaster Number: FEMA-1561-DR-FL
PA Applicant: City of XXXXXXXX
PW Numbers: [REDACTED]
First Appeal

By this letter, the above-referenced applicant appeals the denial of reimbursement for debris removal costs incurred by City of XXXXXXXX during the occurrence of Hurricanes Frances and Jeanne, FEMA-1545-DR-FL and FEMA-1561-DR-FL, respectively. The amount of money in dispute is approximately \$368,477.27.

Background

This appeal concerns FEMA's denial of funding for debris removal costs from non-system roads or roads that are located within gated communities in the City of XXXXXXXX. Specifically, the City of XXXXXXXX appeals the denial of reimbursement of debris removal costs within gated communities as well as debris removal costs from other non-system roads.

Discussion

In 2004, Florida endured one of the most devastating hurricane seasons in recorded history. Four major hurricanes made landfall within a six (6) week period, destroying homes, businesses and public infrastructure; worst of all, the hurricanes claimed the lives of more than 117 people. In response to the massive destruction wrought by the storms, the President issued four (4) disaster declarations and eventually declared that the hurricanes impacted all 67 counties. The Robert T. Stafford Disaster Assistance and Emergency Relief Act, as amended, 42 U.S.C. §5121 et seq., (Stafford Act) governs the administration of disaster assistance following a Presidentially-declared disaster and the regulations implementing the Stafford Act are found in Title 44 of the Code of Federal Regulations. Under the Stafford Act the President may confer his authority for the response

recovery and mitigation effort during a declared disaster event to the Director of the Federal Emergency Management Agency (FEMA). More specifically the federal regulations relevant to the present matter are found at 44 C.F.R. §206.224.

I. Definitions of "road" and types of road systems in Florida

To understand the rationale behind why debris removal from non-system roads is eligible, it is necessary to define roads under Florida law. "All roads which are open and available for use by the public and dedicated to the public use, according to law or by prescription, are hereby declared to be, and are established as, public roads." *Fla. Stat.* §335.01. Further, Florida law divides public roads into four (4) systems: State Highway Roads, The State Park Road System, the county road system and the city street system. *Id.*

In addition, Florida law defines several types of roads and road systems, including, but not limited to:

(1) "Arterial road" means a route providing service which is relatively continuous and of relatively high traffic volume, long average trip length, high operating speed, and high mobility importance. In addition, every United States numbered highway is an arterial road.

(4) "Collector road" means a route providing service which is of relatively moderate average traffic volume, moderately average trip length, and moderately average operating speed. Such a route also collects and distributes traffic between local roads or arterial roads and serves as a linkage between land access and mobility needs.

(7) "Controlled access facility" means a street or highway to which the right of access is highly regulated by the governmental entity having jurisdiction over the facility in order to maximize the operational efficiency and safety of the high-volume through traffic utilizing the facility. Owners or occupants of abutting lands and other persons have a right of access to or from such facility at such points only and in such manner as may be determined by the governmental entity.

(8) "County road system" means all collector roads in the unincorporated areas of a county and all extensions of such collector roads into and through any incorporated areas, all local roads in the unincorporated areas, and all urban minor arterial roads not in the State Highway System.

(11) "Functional classification" means the assignment of roads into systems according to the character of service they provide in relation to the total road network. Basic functional categories include arterial roads, collector roads, and local roads which may be subdivided into principal, major, or minor levels. Those levels may be additionally divided into rural and urban categories.

(13) "Limited access facility" means a street or highway especially designed for through traffic, and over, from, or to which owners or occupants of abutting land or other persons have no right or easement of access, light, air, or view by reason of the fact that their property abuts upon such limited access facility or for any other reason. Such highways or streets may be facilities from which trucks, buses, and other commercial vehicles are excluded; or they may be facilities open to use by all customary forms of street and highway traffic.

(15) "Local road" means a route providing service which is of relatively low average traffic volume, short average trip length or minimal through-traffic movements, and high land access for abutting property.

(23) "Road" means a way open to travel by the public, including, but not limited to, a street, highway, or alley. The term includes associated sidewalks, the roadbed, the right-of-way, and all culverts, drains, sluices, ditches, water storage areas, waterways, embankments, slopes, retaining walls, bridges, tunnels, and viaducts necessary for the maintenance of travel and all ferries used in connection therewith

(26) "State Park Road System" means roads embraced within the boundaries of state parks and state roads leading to state parks, other than roads of the State Highway System, the county road systems, or the city street systems.

(27) "State road" means a street, road, highway, or other way open to travel by the public generally and dedicated to the public use according to law or by prescription and designated by the department, as provided by law, as part of the State Highway System.

Fla. Stat. § 334-03

Under these definitions, the roads in questions are limited access facility roads or local roads. As previously stated, the Governor has the authority to compel various state and local agencies to remove debris (or cause it to be removed) from private property, limited access facility roads and local roads. When he acts to eliminate threats to life, health and safety, he legally obligates the local or state agency to remove the debris.

II. Federal, state and local law authorizes the removal of debris from non-system roads to eliminate threats to public health and safety

A. Federal law and regulation

The Stafford Act provides that

The President, whenever he determines it to be in the public interest, is authorized--

- (1) through the use of Federal departments, agencies, and instrumentalities, to clear debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters;
- ...

42 U.S.C. §5173

In addition, the federal regulation implementing this law is found at 44 C.F.R. §206.224. It states, in pertinent part,

- (a) **Public interest.** *Upon determination that debris removal is in the public interest, the Regional Director may provide assistance for the removal of debris and wreckage from publicly and privately owned lands and waters. Such removal is in the public interest when it is necessary to:*

- (1) *Eliminate immediate threats to life, public health, and safety; or*
- (2) *Eliminate immediate threats of significant damage to improved public or private property; or*
- (3) *Ensure economic recovery of the affected community to the benefit of the community-at-large; or*

- (b) **Debris removal from private property.** When it is in the public interest for an eligible applicant to remove debris from private property . . . clearance of the living, recreational and working area is eligible...

44 C.F.R. §206.224 (a) and (b), (Emphasis added)

Clearly, the United States Congress approves the removal of debris from privately owned property by the Federal Emergency Management Agency (FEMA). Moreover, Congress finds it necessary for FEMA to reimburse debris removal from privately owned property when it is in the public interest to do so. Congress expressly finds that debris removal is in the “public interest” when it eliminates immediate threats to life, public health, safety or significant damage to improved public or private property; or is necessary to ensure the economic recovery of the affected community to the benefit of the community at-large.

In the present case, the City of XXXXXXXX, a political subdivision of the State of Florida and, therefore, an eligible applicant, determined that the debris generated by Hurricanes Frances and Jeanne were immediate threats to the public health and safety and presented an immediate threat of significant damage to public and private property. As discussed below, the City of XXXXXXXX is obligated to remove the debris that threatens the residents of the City, whether on private property, non-system roads, limited access roads or public roads.

B. State law

1. Powers of the Governor

State law vests in the Governor or his designee the responsibility for meeting the dangers presented to the state and its people by emergencies. *Fla. Stat. §252-36(1)(a)*. State law gives him all power and authority granted to him under Title 17, Chapter 52 of the Florida Statutes, Emergency Management, and simultaneously implements the state, local and interjurisdictional emergency plans. *Fla. Stat. §252-36(2)(3)*. Moreover, state law allows the Governor to “delegate emergency responsibilities to the officers and agencies of the state and of the political subdivisions thereof ... and [to] utilize the services and facilities of existing officers and agencies of the state and of the political subdivisions thereof.” *Fla. Stat. §252-36(8)*.

With regard to debris removal on private property, state law authorizes the Governor to remove debris from private property. The law states that the Governor may, among other things,

(l) Authorize the use of forces already mobilized as the result of an executive order, rule, or proclamation to assist the private citizens of the state in cleanup and recovery operations during emergencies when proper permission to enter onto or into private property has been obtained from the property owner. The provisions of §768.28(9) apply to this paragraph.

Fla. Stat. §252-36(5)(l) (Emphasis added)

Further, the law gives the Governor authority to direct the activities of various state and local departments to clear roadways. The law states,

The Governor shall formulate and execute plans and rules for the control of traffic in order to provide for the rapid and safe movement or evacuation over public highways and streets of people, troops, or vehicles and materials for national defense or for use in any defense industry and may coordinate the activities of the departments or agencies of the state and the political subdivisions thereof concerned directly or indirectly with public highways and streets in a manner which will best effectuate such plans.

Fla. Stat. §252-36(10)

These statutes illuminate the Governor’s authority to use all public and private resources as necessary to cope with the disaster as well as to eliminate threats to public health and safety. This authority includes using public and private resources to clear public highways and streets and to remove debris from private property. Clearly, state law authorizes debris removal from limited access facility roads and public roads as defined, *supra*. It is a

reasonable extrapolation that if the legislature allowed “cleanup and recovery operations” from private property that it would allow “cleanup and recovery operations” from limited access facility roads as well.

There is little, if any, difference between a limited access facility road and a road in a gated community. Because state law authorizes the Governor to commence cleanup and recovery operations on private property and, reasonably, limited access facility roads, it is reasonable to believe that the law authorizes the Governor to commence those same operations on roads in gated communities. The threat to the public health and safety of citizens on limited access roads or in gated communities is no less than the threat to citizens on any other type of road in the county. The threat is the same – debris, whether piled high or scattered, poses a threat to the health and safety of the public and the state legislature tasks the Governor to take measures to eliminate that threat. The Governor, through the implementation of the local and interjurisdictional recovery plans, delegates that authority to the executive officer of the political subdivision. In the current instance, the Governor gave the Mayor the authority to meet the challenges of the disasters and that reasonably means removing debris from all roads regardless of classification.

2. Powers of political subdivisions during emergencies

During a state of emergency, the Florida statutes provide power to the political subdivisions of the state. At *Fla. Stat. §252-38*, the law declares, “safeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state.” Further, the statute articulates the powers averred to the political subdivisions and states in pertinent part,

- (a) In carrying out the provisions of ss. 252.31-252.90, each political subdivision shall have the power and authority:
 - 1. To appropriate and expend funds; make contracts; obtain and distribute equipment, materials, and supplies for emergency management purposes; *provide for the health and safety of persons and property, including emergency assistance to the victims of any emergency*; and direct and coordinate the development of emergency management plans and programs in accordance with the policies and plans set by the federal and state emergency management agencies.
 - ...
 - 5. ...Further, the political subdivision has the power and authority to waive the procedures and formalities otherwise required of the political subdivision by law pertaining to:
 - a. *Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community.*
 - ...
 - h. *Appropriation and expenditure of public funds.*

Fla. Stat. §252-38 (Emphasis added)

Pursuant to the above-cited authority, the Governor can utilize all the resources of state government and all political subdivisions of the state to cope with a disaster. Each city has the “innate responsibility to safeguard the life and property of its citizens.” Thus, whenever and wherever an emergency threatens the people of the City of XXXXXXXX, the Mayor, via power delegated from the Governor, can take measures necessary to eliminate the threat.

Hurricane-generated debris threatened the health and safety of XXXXXXXX residents. The debris was scattered throughout the City and made roads impassable; this was a direct threat to life and property as it prevented access to emergency vehicles. The debris posed threats to property as they created fire hazards and the large numbers of limited sightline restrictions on roadways endangered motorists and pedestrians. The debris created a significant and immediate threat to life as mountains of debris became havens for rodents, West Nile mosquitoes, flies, termites and other vermin. Not only was it within the power of the City to eliminate these threats, it was its innate responsibility to eliminate them. How can FEMA suggest that this innate responsibility is dependent upon the location of the debris? Surely, FEMA does not intend to imply that the lives or property of those living on roadways that are not completely public in character are of any less value or importance than those residents who live on public access roads?

State law provides wide latitude to the City when protecting its citizens during an emergency; the law allows the City to “waive the procedures and formalities otherwise required of the political subdivision by law pertaining to performance of public work and *taking whatever prudent action is necessary to ensure the health, safety and welfare of the community.*” This passage demonstrates the Florida legislature’s recognition that there would be instances in which the emergency required the suspension of normal practices, policies and procedures. Certainly, the landfall of two major hurricanes within a few hundred feet of each other within three weeks surely qualifies as an extraordinary circumstance requiring that the City take the only prudent action it could with respect to protecting its residents and their property from storm-related debris on non-system roads – its removal and the immediate neutralization of the threat.

C. Local law

The City of XXXXXXXX recodified its ordinances in 1983 and enacted The Code of Ordinances of the City of XXXXXXXX, Florida. The Code of Ordinances of the City of XXXXXXXX (hereinafter, City Ordinance) provides insightful and authoritative guidance related to debris removal on private property, non-system roads and within gated communities. The City Ordinance further justifies reimbursement of debris removal costs on private property, non-system roads and within gated communities.

1. Disposal of refuse within the City of XXXXXXXX

The Commissioners of the City of XXXXXXXX (hereinafter City Commissioners) clearly stated its intent to establish a system for the orderly disposal of refuse generated within the City’s jurisdiction. The City Commissioners state, “Every person in possession, charge or control of any place in or from which . . . tree trimmings or yard trash is created, accumulated or produced shall provide and at all times keep in a suitable place readily accessible for city collection...” *Code of Ordinances of the City of XXXXXXXX, Florida, §16-18(a)*. The City Ordinance states “no person shall deposit refuse in any place within the city limits except as specifically authorized by this chapter.” *Id.*, at §16-22(g) Therefore, pursuant to this authority, the City of XXXXXXXX prohibits the accumulation of debris or the allowance of the accumulation of debris on any real property within the City, whether public or private. Further the City found that to maintain the health, welfare and safety of its residents, it was necessary for the City Commissioners to provide a comprehensive program of solid waste disposal. *Id.*, §16-23.

In its effort to outline the parameters of that comprehensive program, the City Commissioners state,

All occupants of premises in the city, whether residential or commercial, shall have accumulations of refuse removed and disposed of by the city or its authorized representatives and shall pay the monthly collection fee as defined in section 16-31 of this article, except for customers exempted by the city manager under section 16-24.

Code of Ordinances of the City of XXXXXXXX, Florida, §16-23.

Section 24 of the City Ordinance states,

All refuse accumulated in the city shall be collected, conveyed and disposed of by the city government or pursuant to agreement with said government. No other agency shall remove refuse originating within the limits of the city from any premises in the city or transport said refuse through the streets of the city, or dump, incinerate or in any other manner dispose of said refuse originating within the limits of the city, or contract for or permit themselves to be employed or engaged for any such removal, transportation or disposal.

Code of Ordinances of the City of XXXXXXXXX, Florida, §16-24

Accordingly, the City Ordinance requires that the City of XXXXXXXXX remove all debris generated within the City, regardless of its origin. When this requirement is coupled with the power and responsibility of the City Commission to eliminate threats to public health, safety and welfare posed by refuse generated within the City, it is clear that the law obligates the City of XXXXXXXXX to collect, remove and dispose of refuse generated within the City limits. This refuse, by definition, includes debris.

2. Nuisances on property

The City Ordinance prohibits establishing a nuisance consisting of solid waste within the city. The City Ordinance states,

No person in charge of or in control of any object or condition within the city, whether as owner, tenant, occupant, lessee or otherwise, shall allow any such object or condition defined as a nuisance by this article to remain on any private or public property within the city nor shall the owner or person in control of real property within the city allow such condition or object on the property, ...

Code of Ordinances of the City of XXXXXXXXX, Florida, §16-46

The City Ordinance defines “nuisance” in two distinct ways. First, the City Ordinance defines a nuisance as a type of object and states that an object can be a nuisance when it is

- (1) Junk, consisting of unsightly, worn-out or discarded material of little or no residual value including scrap metal, scrap lumber, wastepaper products, discarded building materials, or other debris, the accumulation of which has an adverse effect upon neighborhood or city property values, health, safety or general welfare;

....

Code of Ordinances of the City of XXXXXXXXX, Florida, §16-46 (Emphasis added)

Thus, the City Ordinance plainly describes debris as a nuisance when it has an adverse effect upon a neighborhood, or the general health, safety or welfare of the City. It is highly likely that hurricane-related debris caused by high winds, storm surge and flooding would have an adverse effect throughout the City. Such debris would have a detrimental impact upon the health, safety and welfare of citizens in the immediate area as well as creating a deleterious condition around XXXXXXXXX.

Additionally, the City Ordinance describes nuisance as a condition. It states,

Nuisance as a condition means a certain state of being or situation located on property which:

- (1) *Injures or endangers the comfort, repose, health or safety of any person; or*
...
- (4) *Interferes with, obstructs or renders dangerous for passage on any public or private street, alley, highway, right-of-way, easement, sidewalk, stream, ditch, channel or drainage of any property; or*
...
- (9) Any trash, litter, *debris*, ... bricks, concrete, lumber, building materials, or dead or decaying plants, (except for compost piles) or animals of any kind; or
- (10) *Any condition which provides, or could provide, harborage for rats, mice, snakes, insects or other vermin; or*
...

Code of Ordinances of the City of XXXXXXXX, Florida, §16-48 (Emphasis added)

As defined, hurricane-related debris is a nuisance. It endangers the health and safety of residents living adjacent to the debris because they must navigate through and around the debris to traverse the City. Further, debris dispersed by the hurricane around the City of XXXXXXXX interferes with, obstructs and renders dangerous vehicular and pedestrian passage on public and private streets and sidewalks. Hurricane debris on sidewalks and roadways, whether public or private, interferes with school-aged children trying to walk to the bus stop, parents traveling to work or retrieving their toddlers from daycare. It imperils their travels, whether walking or via motor vehicles. Such interference and obstruction makes the debris a nuisance that must, by ordinance, be removed whether on public or private property.

The City Ordinance defines debris strewn on sidewalks and roadways as a nuisance condition. Moreover, because such debris “could provide, harborage for rats, mice, snakes, insects or other vermin,” the debris represents a nuisance that must be eliminated. The City Ordinance states, “Prompt removal or abatement of any nuisance which is stored, maintained or displayed on property within the city is declared essential to the public health, safety, esthetics, general welfare and good order of the city.” *Code of Ordinances of the City of XXXXXXXX, Florida, §16-47*. Pursuant to this provision, the City Commissioners determined that prompt abatement of nuisances was essential to public health. As such, the City Ordinance requires debris removal on private property, limited access and public roads and inside gated communities. If the City of XXXXXXXX allowed nuisances on private property, in areas serviced by non-system roads or inside gated communities, the City would be in the awkward position of having essentially acquiesced in the nuisances or of permitting lawlessness. Obviously, neither is an acceptable position for the City Commissioners. Therefore, it was necessary for the City to authorize the debris removal in these areas to both avert the impending health disaster caused by Frances and Jeanne and to avoid fostering a perception of allowing gated community residents to break the law without consequence.

The elimination of a public health and safety threat is a paramount responsibility for the City of XXXXXXXX. As evidenced by the statutes, regulations and local code cited above, each level of government, federal, state and local, recognize the City’s responsibility to meet and purge the City of this threat. The United States Congress, the Florida Legislature and the City Commissioners expressly and implicitly authorize the City to use whatever means at its disposal to remove anything that imperils the populace. Therefore, City of XXXXXXXX requests

that the Federal Emergency Management Agency reverse its prior decision denying eligibility for debris removal costs on private property, including non-system roads and within gated communities because the removal of that debris was necessary to eliminating a threat to public health and safety.

III. Debris removal on privately owned property was the legal responsibility of the City of XXXXXXXX

As stated above, state law empowers the Governor to “delegate emergency responsibilities to the officers and agencies of the state and of the political subdivisions thereof ... and [to] utilize the services and facilities of existing officers and agencies of the state and of the political subdivisions thereof.” *Fla. Stat. §252-36(8)*. Practically, this means that the Governor may delegate his power to the City Commissioners and the Mayor to take actions during emergencies. This power includes entering private property to remove debris. When the Governor declared the disaster and state of emergency, the removal of the debris became the legal responsibility of the City of XXXXXXXX and was, therefore, eligible for FEMA reimbursement.

The City of XXXXXXXX is responsible for the welfare of its citizens. It is obligated to provide a safe and peaceful living environment to all its residents. During the declared disasters, the City was, as *Fla. Stat. §252-38* declares, responsible for “safeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state.” The law authorizes the City to “tak[e] whatever prudent action is necessary to ensure the health, safety and welfare of the community.” *Fla. Stat. §252-38*. Thus, the Florida Legislature not only approved the City’s removal of debris from private property, but also the assumption of legal responsibility for that debris removal and any other action necessary to ensure the health, safety and welfare of the community. Because it is the City’s legal responsibility to eliminate threats and ensure the health and safety of its residents, debris removal from private property is the City meeting its statutory obligation.

Conclusion

This appeal articulates a basis for the Federal Emergency Management Agency to reimburse the City of XXXXXXXX for its debris removal operations associated with the City’s recovery from Hurricane Frances and Hurricane Jeanne. The basis for the decision to reimburse the City is founded upon federal and state law and a long-standing local ordinance. This appeal demonstrates why the Stafford Act, the Code of Federal Regulations, Florida Statutes and the City of XXXXXXXX Ordinances authorize debris removal from private property and roads that are not a part of any recognized state road system. Further, this appeal demonstrates why debris removal from private property and such roads and streets is the legal responsibility of the City as it derives its authority from the Governor. The above-cited regulations state one singular and overriding purpose: that at no other time is a government’s responsibility greater than when it is called upon to aid its citizens during an emergency or disaster. These authorities echo the mandate that disaster victims must be protected from threats to their lives, health and property and they empower government officials to take whatever actions necessary to eliminate threats.

Therefore, the City of XXXXXXXX requests that the Federal Emergency Management Agency review its denial of reimbursement for debris removal from non-system roads and roads within gated communities and that it fund those project worksheets based on the authority stated herein.