August 5, 2004

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RE: Advisory request, liability for breakwaters at Alonzo Landing Salt Marsh Habitat Restoration

Dear LaDon,

Last week you phoned with a question about potential liability issues at a restoration project on which MASGC is a partner. The project, the Alonzo Landing Salt Marsh Habitat Restoration, entails placing approximately 112 pyramidal, prefabricated concrete breakwaters offshore of Saw Grass Point Salt Marsh ("marsh") and seeding them with oysters to create oyster reefs. The project goal is to protect the marsh from natural and anthropogenic erosion. NOAA is funding the project through the Gulf of Mexico Foundation.

The breakwaters will be placed in water that is approximately three feet deep. Approximately one foot of the breakwaters will be exposed above water. I understand your concerns to be that the breakwaters may entice people to climb on them, dive off, and injure themselves; and that boats might hit and be damaged by the breakwaters.

As I see it, your question breaks down into two distinct legal questions. First, what is the potential liability of the landowner? Second, what is the potential liability of the entity or entities that build the project?

This letter contains the results of my research. As you know, the Sea Grant Legal Program and MASGC do not have an attorney-client relationship, so this letter should not be considered formal legal advice.

1. Landowner liability

There seems to be some uncertainty about whether the project site is owned by the Alabama Department of Conservation and Natural Resources (DCNR) or the City of Dauphin Island (City), so I will discuss both scenarios. To set the stage, I will briefly discuss the general rules of landowner liability in this type of situation. (In your situation the land is submerged land, but the same analysis applies.)

A landowner may be liable for negligence to an entrant on his land who is injured by a dangerous condition if the landowner breaches a duty of care to the entrant with respect to the dangerous condition. The duty of care depends on the entrant's status as trespasser, licensee, or invitee. A boater or bather at the project site would most likely be considered a licensee; that is, one who has permission to use the landowner's property for his own purposes (rather than to benefit the landowner). The duty of care of one who owns or possesses land towards a licensee is "to abstain from inflicting intentional, willful or wanton injuries [and] to refrain from exposing such licensee to new hidden dangers, such as

traps, pitfalls or obstructions which arise through his active negligence."[1] With respect to potentially dangerous conditions, like the breakwaters, the landowner owes "no duty to warn a licensee of a potentially dangerous condition unless he does some positive act which creates a new hidden danger, pitfall or trap, which is a condition that a person could not avoid by the use of reasonable care and skill."[2]

DCNR liability

The State of Alabama, by its constitution, is immune to suit by its citizens.[3] This immunity applies to state agencies as well.[4] DCNR cannot be sued for negligence; therefore, it has no potential liability.

City liability

The state's immunity does not apply to municipalities; in general, cities may be sued for negligence.[5] However, Alabama's "recreational use" statute should shield the City from liability in this situation, as it has for other cities in similar situations.[6]

For landowners who allow the public to use their property for non-commercial recreational purposes, Alabama's recreational use statute, Ala. Code §§ 35-15-1 through –28, virtually eliminates the usual duty of care towards entrants that I described above. The statute furthers the state's declared public policy, favoring maximum outdoor recreational opportunities for the public at minimal state expense, by encouraging landowners to allow the public to use their land for recreational purposes.[7] In addition to protecting private landowners, the statute protects public landowners like the City. The statute provides:

> Except as specifically recognized by or provided in this article, an owner of outdoor recreational land who permits non-commercial public recreational use of such land owes no duty of care to inspect or keep such land safe for entry or use by any person for any recreational purpose, or to give warning of a dangerous condition, use, structure, or activity on such land to persons entering for such purposes.[8]
>
> Except as expressly provided in this article, an owner of outdoor recreational land who either invites or permits non-commercial public recreational use of such land does not by invitation or permission thereby: (1) [e]xtend any assurance that the outdoor recreational land is safe for any purpose; (2) [a]ssume responsibility for or incur legal liability for any injury to the person or property owned or controlled by a person as a result of the entry on or use of such

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[1] *Wright v. Ala. Power Co.*, 355 So.2d 322, 325 (Ala. 1978) (quoting *W.S. Fowler Rental Equip. Co. v. Skipper*, 165 So.2d 375 (Ala. 1963)).
[2] *Id*.
[3] Ala. Const. § 14.
[4] *City of Foley v. Terry*, 175 So.2d 461, 465 (Ala. 1965).
[5] *City of Foley v. Terry*, 175 So.2d at 464-65.
[6] *E.g*, *Poole v. City of Gadsden*, 541 So.2d 510 (Ala. 1989) (statute shielded city from liability for drowning of child who struck submerged object after diving from boardwalk in city-owned park); *Glover v. City of Mobile*, 417 So.2d 175 (Ala. 1982) (statute and common law shielded city from liability for drowning of child in whirlpool at city-owned pavilion).
[7] Ala. Code § 35-15-20.
[8] *Id*. § 35-15-22.

> land by such person for any recreational purpose; or (3) [c]onfer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.[9]

The term "owner" includes municipal owners like the City.[10] "Outdoor recreational land" includes "water, as well as…structures,…and other such appurtenances used for or susceptible of recreational use."[11] "Recreational use" includes, but is not limited to, "water sports,…vehicular riding,…and any related activity."[12] In my opinion, the project site qualifies as "outdoor recreational land" and swimming, bathing, and boating qualify as "recreational uses." Therefore, the City should enjoy the statute's protections.

As you probably guessed from the "except as specifically recognized…" and "except as expressly provided…" language quoted above, the recreational use statute has an exception. A landowner who would otherwise be protected by the statute may be liable if he or she has actual knowledge "(1) [t]hat the outdoor recreational land is being used for non-commercial recreational purposes; (2) [t]hat a condition, use, structure, or activity exists which involves an unreasonable risk of death or serious bodily harm; (3) [t]hat the condition, use, structure, or activity is not apparent to the person or persons using the outdoor recreational land; and (4) [t]hat having this knowledge, the owner chooses not to guard or warn, in disregard of the possible consequences."[13] Note that all four of these elements must be present for the landowner to be liable. From my understanding of the project, it is unlikely that any of these elements besides the first will be present: nothing indicates that the breakwaters will present an unreasonable risk of death or serious bodily harm; the breakwaters, which will not be fully submerged, should be apparent to persons using the water; and Jeff Jordan mentioned in his August 2 email to you that signage is being discussed. All things considered, I think the City has very little risk of falling into the exception to the recreational use statute.

Because the recreational use statute severely limits the City's duty of care to recreational users of the project site, and because the City should not fall into the exception to the recreational use statute, I believe it is highly unlikely that the project will expose the City to liability.

2. Builder liability

As is always the case in a construction project, the project's builder may be liable if the project is executed negligently. To avoid liability the builder must exercise reasonable care under the circumstances. If harm is reasonably foreseeable, the builder has a duty to take reasonable steps to avoid or prevent the harm.[14]

As you have no doubt gathered, the key word is "reasonable." The builder does not have a duty to avoid *every possible imaginable* harm, no matter how improbable; the duty extends only to those harms that are reasonably foreseeable. Likewise, the builder does not have to take *extreme* care, but only reasonable care in light of all the circumstances.

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[9] *Id.* § 35-15-23.
[10] *City of Geneva v. Yarbrough*, 707 So.2d 626 (Ala. 1997).
[11] *Id.* § 35-15-21.
[12] *Id.*
[13] *Id.* § 35-15-24(a).
[14] *See, e.g.*, *Howe v. Bishop*, 446 So.2d 11, 13 (Ala. 1984) (builder-owner, architect, and engineer of apartment complex did not owe duty of care to subsequent purchasers because it was not reasonably foreseeable that anyone other than builder-owner would ever own the apartments).

Defenses to liability: assumption of risk and contributory negligence

Common sense demands that an entrant must bear some responsibility for his or her actions. It would be extremely unfair if a landowner or builder could be held liable whenever someone is injured on their land or structure, no matter the circumstances. The law reflects this common sense idea. For example, as the background law on landowner liability that I gave you above indicates, landowners are not liable for injuries resulting from obvious dangers or dangers that the entrant should observe with the exercise of reasonable care.[15]

The law also provides defenses to landowners who are sued for injuries on their land when the entrant is at least partially at fault: assumption of risk and contributory negligence. These two defenses are very similar. Contributory negligence applies if the plaintiff (1) has knowledge of the dangerous condition, (2) appreciates the danger, and (3) fails to exercise reasonable care by placing himself in the way of the danger.[16] Assumption of risk applies if the plaintiff (1) has knowledge of the dangerous condition and the risk it presents, and (2) voluntarily consents to bear that risk.[17] A plaintiff who is negligent or assumes the risk cannot recover even if the defendant was negligent, unless the defendant has acted wantonly.[18] Either or both of these defenses would likely be applicable if, for example, a bather climbs on a breakwater, dives off, and injures himself.

Conclusion

In my opinion the Alonzo Landing Salt Marsh Habitat Restoration poses little risk of liability. DCNR is immune from suit, and the City is shielded by Alabama's recreational use statute. The builder of the project subjects itself to liability only if it fails to act with reasonable care. Finally, the defenses of contributory negligence and/or assumption of the risk would probably be applicable if someone sues for an injury that they brought upon themselves. Of course, someone could still sue; it is just highly unlikely they could win.

I hope this letter answers your question adequately, LaDon. If not, or if you would like me to research any other aspect of this situation, please let me know. I always appreciate the opportunity to be of service to you and the MASGC's constituents.

Sincerely,

Josh Clemons
Research Counsel
Mississippi-Alabama Sea Grant Legal Program

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[15] *See, e.g.*, *Ex parte Mountain Top Indoor Flea Market, Inc.*, 699 So.2d 158 (Ala. 1997) (flea market not liable when customer fell while walking on graveled area, the dangers of which the customer was aware).
[16] *Gulf Shores Marine Indus. v. Eastburn*, 719 So.2d 238, 240 (Ala. Civ. App. 1998).
[17] *Id*.
[18] *Mitchell v. Torrence Cablevision USA, Inc.*, 806 So.2d 1254, 1259 (Ala. Civ. App. 2000). "Wantonness" is "the conscious doing of some act, or the omission of some duty, under knowledge of existing conditions and while conscious that from the doing of such act or omission of such duty injury will likely or probably result." *Id*. For a party to be guilty of wanton conduct, it must be shown that "with reckless indifference to the consequences, he consciously and intentionally did some wrongful act or omitted some known duty that produced the injury." *Id*.