WATER LOG

A Legal Reporter of the
Mississippi-Alabama Sea Grant Consortium

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WATER LOG

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Alabama Coastal Takings

by Neil C. Johnston

INTRODUCTION

Property, including coastal property, wetlands, beaches, hardwood bottomlands, ponds, sloughs, swamps and marshes, when in private ownership, is protected from being taken for public use unless payment in a "just" amount is made to the owner.

The protection is found in the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Thus, the Fifth Amendment to the United States Constitution prohibits the Government from taking private property for public use without just compensation. The right to hold possession of private property and exclude or restrict the public's access to private property has been cited as one of the most valued property rights protected by the Constitution. The U.S. Constitution only provides that the taking of private property be for a public use. The framers of the Constitution did not elaborate on the type, amount, or time of taking involved. All those questions have been addressed in the various courts. The taking can be accomplished by physical occupation or by the effect of a regulation. For purposes of this discussion, we will focus on regulatory takings.

Several recent United States Supreme Court cases have addressed regulatory takings in the environmental land use context. The analyses of regulatory taking, the extent, if any, of injury, and the proper remedies have been reviewed on a case-by-case basis.

Two basic questions seem to be common among recent takings cases:

(1) Does the governmental regulation substantially advance a legitimate government (public) interest?

(2) Does the regulation deny the owner economically and viable use of the property? *Dolan v. City of Tigard*, 512 U.S. ____, 129 L.Ed. 2d 304, 114 S.Ct. _____ (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. _____, 120 L.Ed. 2d 798, 112 S.Ct. 2886 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed. 2d 677, 107 S.Ct. 3141 (1987); *Agins v. Tiburon*, 447 U.S. 255, 65 L.Ed. 2d 106, 100 S.Ct. 2138 (1980).

Takings cases have generally suggested that three particular issues must be examined to find a compensable regulatory taking: (1) the character of the governmental action; (2) the economic impact of the regulation on the landowner; and (3) the impact of the regulation on the landowner's investment backed expectations, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 57 L.Ed 2d 631 (1978).

Variations of these three elements are discussed in many cases, illustrating the difficulty in recognizing a clear takings event. We see that "there really does not exist yet a precise formula for determining if an owner of private property has been deprived of economically viable use of his property." *Formanek v. U.S.*, 26 Cl.Ct. 332, 335 (1992). Some courts have recited that in order to make such a determination, each case and set of facts must be examined individually. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 89 L.Ed.2d 166, 106 S.Ct. 1018 (1986).

In the cases below, we will see that each court has struggled with the notion of protecting private property while recognizing changing public interests. We will see that recent cases do not provide the answer or fill the need to find that certain formula which can be used to predict when compensation is due and how much is given. There is the distinct implication that land use regulation will be the subject of close judicial scrutiny, however.

ESSENTIAL NEXUS TEST

In *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed. 2d 677, 107 S.Ct. 3141 (1987), the owners of property applied for a permit to reconstruct a beach-front residence in California. The California Coastal Commission conditioned the building permit on the owners granting a public access easement across their private beach-front property. The Commission failed to show that a substantial and legitimate public purpose would be served by the condition. The U.S. Supreme Court found that there was no essential nexus between a legitimate state interest in protecting the public's view of the beach or reducing public beach congestion and the permit condition demanding the

conveyance by the property owner of a public easement across the beach-front. The Court explained that a legitimate state interest in the takings context did not include exacting an easement for public purpose without just compensation. Since the Court first found no nexus or connection between the demand for an easement and the public use or interest to be protected, the Court did not need to address the question regarding the effect on the owner's economic use.

In *Dolan v. Tigard*, 512 U.S. _____, 129 L.Ed. 2d 304, 114 S.Ct. _____ (1994), the U.S. Supreme Court found that the City Planning Commission went too far by conditioning approval of a building permit on Dolan's dedication of certain private property. Dolan owns and operates a business in the City of Tigard, Oregon. Dolan applied for a building permit to enlarge the building and parking lot. The City Planning Commission agreed to issue the permit so long as Dolan dedicated private property to the City along a flood plain for flood protection, as a public greenway and as a bike path. Dolan's application for a variance from the conditions was denied and he appealed to the appropriate review board and state courts. According to the City, the property would provide further flood control and relieve traffic congestion associated with Dolan's business and enlarged building. Although the Court found that a legitimate public purpose existed, and there was a *Nollan* nexus between the legitimate state's interest of flood and traffic control and permit conditions, the restrictions nonetheless were a taking of private property. The restrictions were not reasonably necessary or related to the impact of the proposed project. The court referred to the reasonable relationship as the "rough proportionality" test, but failed to provide a precise and specific method of determining the boundaries of "rough proportionality." The economic interests of *Dolan* were not addressed.

REGULATION CAUSES TOTAL LOSS OF USE AND VALUE

In *Lucas v. South Carolina Coastal Council*, 505 U.S. _____, 120 L.Ed. 2d 798, 112 S.Ct. 2886 (1992), the United States Supreme Court found that Lucas, an owner of two private beach-front lots, had plans to develop his private property which were subsequently eroded by the South Carolina legislature through enactment of the Beachfront Management Act as a coastal zoning law. The law set forth a coastal construction line restricting Lucas' private property in such a manner that he no longer could construct single family residences on the lots. Although he had the ability to construct uninhabitable structures, the primary purpose of the property was taken away. Lucas filed suit claiming that the law placed unreasonable restrictions on construction and deprived him of all economically viable use of the property. He did not attack the law's validity. The Court found that Lucas was not previously restricted from constructing houses on his two lots at the time he purchased the property, and there was no state nuisance or property law which would have otherwise prevented him from constructing residences on the property. The coastal zoning restriction did subsequently affect all economic expectations of Lucas.

Thus, although it initially appeared that the court was going to resolve all takings issues, once again we were given a separate and narrow category of takings, that is, where *all* economically viable use of the property is taken by the impact of the regulation, a Fifth Amendment takings occurs and the owner is thereby entitled to just compensation. The Court did not address the situation in which less than all of the value or economic viable use of the property is taken.

TAKINGS CASES IN THE ELEVENTH CIRCUIT COURT OF APPEALS

The Eleventh Circuit Court of Appeals found that an ordinance passed by the City of Pleasant Grove, Alabama was invalid and caused damage to the property owners. The ordinance prohibited the construction of new apartments on property of Wheeler, directly affecting the use of the property. The ordinance repealed a pre-existing ordinance which had allowed apartment construction. The property owners had obtained a permit to build an apartment complex from the city and had begun the initial preparations.

When news of the apartment construction reached the community, a referendum was held. The city passed a new ordinance forbidding construction of the new apartments. The district court found that the ordinance was arbitrary, capricious, and had no substantial relationship to legitimate concerns for health, safety, welfare, or the general well-being of the community. The ordiance was confiscatory in nature and violated Fourteenth Amendment rights of due process. The district court found that the ordinance did constitute a regulatory taking, but would not award damages. Following *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 96 L.Ed.2d 250, 102 St.Ct. 2378 (1987) decided during the pendency of the Wheeler appeals, the Eleventh Circuit emphasized that a temporary regulatory taking was indeed a compensable event. The Eleventh Circuit stated in Wheeler IV, 896 F.2d at 1351:

> The unconstitutional taking which this Court found compensable was not a denial of all use of the Pleasant Grove property, as the district court's computation of damages would imply.

The City was enjoined from enforcing the ordinance and the owners were awarded damages for the period of temporary takings.

The case bounced between the Eleventh Circuit and the district court several times until the Eleventh Circuit finally resolved the issue of temporary takings and awarded the owners damages for the time of delay in construction due to the unconstitutional ordinance.

Wheeler Cases (Alabama): (Wheeler I) *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), aff'd in part, reversed in part; (Wheeler II) 746 F.2d 1437, (11th Cir. 1984), aff'd in part, vacated in part and remanded; (Wheeler III), 833 F.2d 267 (11th Cir. 1987), reversed and remanded as to damages; (Wheeler IV), 896 F.2d 1347 (11th Cir. 1990).

In *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), cert. denied, 498 U.S. 1120, 112 L.Ed. 2d 1179, 111 S.Ct. 1073 (1991), the property owner complained that a county comprehensive zoning plan was unconstitutional as it applied to his private property. The district court denied the county's defense that the claim was not ripe for a constitutional challenge since no final decision concerning the property had been made. The court enjoined the county's use of the plan ordinance, zoning code, or any regulation to deny property owner commercial zoning. The court stated that in order to establish a violation of the Fifth Amendment, the landowner must demonstrate that the property was taken or the regulation goes too far and makes no provision to award just compensation. The court recited that the remedy is money damages calculated by the value of the property rights taken and the duration of the taking. The landowner had $850,000.00 in damages.

The Eleventh Circuit reversed the district court finding that the case was not yet ripe for adjudication since the property owner did not file a plan or request commercial zoning for his property. The property owner had argued that to do so would be futile under the existing laws. Concurring separately, one of the judges noted that the district court did conclude that adoption of the sector plan was the same as an adverse zoning decision and that the Eleventh Circuit did not give enough weight to the district court's findings of fact in determining further applications by the landowner would be futile. The Eleventh Circuit remanded the case back to the district court for further proceedings.

In *Reahard v. Lee County*, 968 F.2d 1131 (Eleventh Circuit 1992), opin. suppl'd 978 F.2d 1212 (1992), the long term landowner, Reahard, challenged the Lee County, Florida comprehensive land use plan which reclassified Reahard's property. It was changed to a natural resource protection area, designated for limited development, and restricted to one residence per 40 acres or use as a recreational area, a open space, or for conservation. Reahard filed an action stating that although the plan may be a valid exercise of the county's police power, it constituted a taking for which compensation was due under the Florida Constitution and the Fifth and Fourteenth Amendments of the U. S. Constitution. The evidence showed that the property, which had been in the Reahard family since 1944, was part of a larger tract that had a history of subdivision sales and development. The United States Magistrate entered an order finding that the land use plan did result in an unconstitutional taking of the property under the Fifth and Fourteenth Amendments.

On appeal, the Eleventh Circuit reversed the Magistrate's decision, citing *Nollan*. The Eleventh Circuit stated that there are two tests used in analyzing taking claims. The first is whether a particular regulation substantially advances a legitimate state interest. If it does not, the regulation can be declared invalid. The second is whether the regulation denies an owner economically viable use of his property. The Eleventh Circuit stated that the Lee County plan did advance a legitimate government interest so that the validity of the regulation was not at issue. The court found that in order to resolve the question of whether the landowner has been denied all or substantially all economically viable use of his property, the economic impact of the regulation on the claimant and the extent to which the regulation had interfered with the investment backed expectations must be examined. The court then recited eight categories of questions which must be analyzed in order to determine whether a substantial deprivation of value has occurred:

(1) History of the Property:
What is the history of the property; when was it purchased?
How much land was purchased?
Where was the land located?
What was the nature of title?
What was the composition of the land and how was it initially used?

(2) History of Development:
What was built on the property and by whom?
How was it subdivided and to whom was it sold?
What plats were filed?

What roads were dedicated?

(3) The History of Zoning and Regulations:
How and when was the land classified?
How was use proscribed?
What changes and classifications occurred?

(4) How did development change when Title Passed?

(5) What is the present nature and extent of the property?

(6) What were the reasonable expectations of the landowner under state common law?

(7) What were the reasonable expectations of the neighboring landowners under state common law?

(8) What was the diminution in investment backed expectations of the landowner, if any, after passage of the regulation?

The Court waited for the *Lucas v. South Carolina Coastal Commission* opinion to be issued before proceeding. The Court, in a footnote, noted that the *Lucas* opinion left open how the categorical takings rule would apply in situations where only a part of the landowner's property was rendered unusable by the regulations. The Eleventh Circuit thus implied that it would allow compensation if less than substantially all economic viable use of the property were adversely affected.

On September 2, 1994, the Eleventh Circuit found that the federal courts had no jurisdiction over the landowner's damage claim, and the landowner must first proceed with an inverse condemnation action in state court.

In a recent Georgia case, the U.S. District Judge found that a regulatory taking had occurred. *Bickerstaff Clay Products, Inc. v. Harris County, Georgia*, Case No. 94-3-COL, (M.D. Ga., Sept. 30, 1994). The landowner, Bickerstaff Clay Products, Inc., sought to use property it owned since 1960 as a clay mine to support its ongoing brick business. The Harris County Commission passed a zoning ordinance restricting the property initially to agricultural use then to residential use only. Bickerstaff's petition to rezone the property for manufacturing use was denied. The county zoning ordinance that was enacted to prevent industrial use of private property was held invalid and unrelated to any valid public health, safety, or welfare consideration by the County Commission. The District Court examined the facts and relied upon recent U.S. Supreme Court cases in support of its conclusions.

WETLANDS TAKINGS

One of the recent rulings of the Federal Circuit Court of Appeals is *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171 (Fed. Cir. 1994). The property in dispute concerned a 12.5 acre parcel of historic wetlands with one acre of filled land. This 12.5 acre parcel was part of 51 acres owned by Loveladies. Loveladies sought to develop the 51 acre parcel of wetlands and negotiated with the New Jersey Department of Environmental Protection to protect 38.5 acres in exchange for a state permit to fill 12.5 acres. Loveladies thereafter filed a Clean Water Act § 404 individual permit with the Corps of Engineers which was denied. After several other procedural attacks, the United States Court of Federal Claims found an unconstitutional taking of property and awarded compensation to Loveladies Harbor, Unit D, Inc. *Loveladies Harbor, Unit D, Inc. v. U.S.*, 21 Cl.Ct. 153 (1990). The award was appealed by the government, but the Federal Circuit affirmed the award and the finding of takings.

Though the Loveladies Harbor property had once encompassed 250 acres, 199 acres had been developed leaving 51 undeveloped acres. Though there were many arguments concerning the facts and whether or not this should be a question of a partial or total taking, the Court found that the main focus should be the property left for development which involved only 12.5 acres. The Court found that Loveladies established a regulatory taking and proved that all economically viable use of the property as a result of the regulatory restrictions had been denied. The history of the property development illustrated Loveladies' distinct investment backed expectation, and without the regulatory restriction state common law principles of nuisance did not apply. While the government argued that this was a partial takings case, the Federal Circuit found that the property in question fell into the *Lucas* category.

Some commentators have suggested, like the government in its argument before the Federal Circuit, that this decision will encourage developers to sell off the upland acres before applying for a § 404 permit for development of any remaining acreage consisting of wetlands.

In *Florida Rock Industries, Inc. v. The United States*, 38 ERC 1297 (F.Cir. Mar. 10, 1994) (Florida Rock IV), the Federal Circuit for the second time has remanded the case to the U.S. Court of Federal Claims to determine if indeed an unconstitutional taking of property occurred, and to review the degree and the extent of the reduction in value of the property affected by the permit denial. The Court focused on the question of whether or not the Corps of Engineers' denial of the § 404 permit of Florida Rock to mine limestone which lay beneath a tract of wetlands had such an impact on the economic use and value of property

to constitute an unconstitutional taking under the Fifth Amendment.

In 1972, before the enactment of the Clean Water Act, Florida Rock purchased 1,560 acres of wetlands in Florida. The purpose of the purchase was to extract the underlying limestone. After 1977, Florida Rock began mining operations on the parcel without a §404 permit as the new Corps of Engineers regulations required. The Corps issued a cease and desist order and Florida Rock began negotiating with the Corps of Engineers for a permit. Initially, Florida Rock sought a permit for the entire 1,560 acres, but reduced the size of the area in response to a Corps request that parcels of a size to allow three years of mining be considered, i.e. 98 acres. Florida Rock agreed with the Corps demand and applied for a permit covering a 98 acre parcel which remains at issue. In 1980 the application was denied. Florida Rock did not challenge the validity of the Corps action, but did allege in the Federal Claims Court that the permit denial constituted an unconstitutional regulatory takings of property. *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 22 ERC 1943, (1985) (Florida Rock I). In Florida Rock I, the Federal Claims Court found that the value before the taking was $10,500.00 per acre and the value after the taking was negligible because rock mining was the only viable economic use of the property. On appeal, the Federal Circuit vacated the judgment, stating that the Claims Court should not focus on the use of the property but on the determination of its fair market value. *Florida Rock Industries v. U.S.*, 791 F.2d 893 (F.Cir. 1986), cert. denied, 479 U.S. 1053 (1987) (Florida Rock II). On remand, the Court of Federal Claims found that the permit denial destroyed all value of the land and reinstated the damage award. *Florida Rock Industries, Inc. v. United States*, 21 Cl. Ct. 161, 31 ERC 1835 (1990) (Florida Rock III).

On appeal in Florida Rock IV, the Federal Circuit focused upon the amount of economic use remaining after the permit denial. The court remanded the case to the Claims Court to determine the residual economic use of the property by examining fair market value of the property after the permit denial. The case raises the question of a partial taking and raises the question "to what extent, if at all, does a regulation which has an effect on a part, but not all of the property, constitute a compensable takings?"

The Florida Rock IV court noted that the Fifth Amendment does not confine itself to a taking of all property. The court attempted to answer the question of when a partial loss of economic use of property is more than a noncompensable mere diminution in value and thereby becomes a compensable partial taking. The majority criticized the dissenting opinion which suggested that a Fifth Amendment taking was an "all or nothing" proposition. Florida Rock has petitioned for a rehearing *en banc*.

In another 1994 wetlands taking case, *Bowles v. U.S.*, 28 ERC 1607 (Ct. Fed. Cl. March 24, 1994), the owner of a lot in a subdivision was surprised to learn that after his purchase, he needed to apply to the Corps of Engineers for a permit to fill wetlands on which he wished to construct a residence. The property owner argued that he did not have notice of the Corps of Engineers' regulations and that other lots and activity in the subdivision suggested that no permit was necessary. The subdivision restrictions required that Bowles improve his lot by controlling weeds around and under the house, provide fill for a septic tank system, and conform the property to the rest of the neighborhood by planting sod to control mosquitos.

The Corps of Engineers suggested that an alternative was available to Bowles in that he could build his house on pilings and instead of a septic tank utilize an above-ground storage tank. The Corps also argued that any prudent person would have known a Corps of Engineers permit was necessary and that there were no assurances a permit would be granted. The court disagreed and awarded Bowles the value of the lot as of the time of taking plus interest.

In *Formanek v. United States*, 26 Cl. Ct. 332, 35 ERC 1406 (May 14, 1992), the Claims Court found that a Clean Water Act permit application which had been denied by the Corps of Engineers resulted in a taking for which the Formaneks were entitled compensation. The property, subject to the application, included 99 acres of wetlands of which 45 acres contained a rare plant community. The Formaneks purchased over 120 acres (12 acres of uplands and the balance subject to the Corps permit application) with the expectation of developing the property for industrial use. The Court found that the expectations were valid in that the Formaneks did not purchase the property for a nature preserve, and they had no notice of the existence of wetlands or a rare plant species at the time of purchase. In awarding the owners $933,921, the Court found that the substantial reduction in value of all the property and the government's interference with the Formanek's investment backed expectations constituted a taking.

ADEM REGULATIONS

Recently the Alabama Department of Environmental Management (ADEM), amended its coastal program regulations. (ADEM Admin. Code Reg. 335-8, et seq.). Although several regulations in particular have been added, revised or repealed one has been highlighted by ADEM:

> 335-8-1-.02(ii)
>
> (ii) "fill" means any solids, dredged material, sludge, or other material the placement of which has the effect or purpose of raising the elevation of wetlands or lands underlying coastal waters. Fill does not normally include the vertical placement of pilings or pile supported structures unless the Department determines such placement has or would have the effect of fill, e.g. the pilings are so closely spaced that sedimentation rates would be significantly increased; the pilings themselves effectively replace the bottom of the water body or wetland; the pilings would significantly impact the flow or circulation of coastal waters; the pilings would otherwise result in a significant impact to the functional value of a wetland.

The regulations further provide for additional review and variance procedures designed to alleviate regulatory takings challenges.

If the regulation is found to "go too far", it will be an unconstitutional taking of private property for a public benefit. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Bowles v. U.S.*, 38 ERC 1612 (Fed.Cl.Ct. 1994).❑

CONCLUSION

Property rights is an issue that is receiving a great deal of attention in Congress, in state legislatures, and in the courts. As the most recent cases demonstrates, there is currently no formular for balancing the protection of private property rights with the need to protect public interest It will be interesting to see how this important area of property law develops.❑

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A Commentary — Dockside Gaming: Coastal Mississippi's Newest Industry

by Dave Burrage and Benedict Posadas

INTRODUCTION

The Mississippi Gulf Coast is in the midst of an unprecedented period of growth and development as a result of the legalization of dockside casino gambling. When the state's first casino boat opened in Biloxi in the summer of 1992, few would have guessed the extent of change the coastal region would undergo in such a short period of time.

The "boats" themselves have changed dramatically from replicas of Mississippi River paddlewheelers to what are essentially floating buildings constructed on barges. Dockside casinos are located on the Mississippi River and along the Gulf Coast in Hancock and Harrison counties, two of Mississippi's three coastal counties. Regardless of where they are located, the impacts are substantial.

The industry is touted as a major source of employment and revenue and has certainly lived up to those expectations. The dockside gaming industry is now the number one employer on the Mississippi Gulf Coast, providing jobs for over 15,000 individuals. While some of these jobs have undoubtedly been taken by people relocating to the coast, the regional unemployment rate has dropped significantly from 7.7 percent in 1992 to 5.7 percent in 1993. Thirty-three casinos have opened with 14 in operation on the Gulf Coast. Five to eight more were scheduled to open in Mississippi as of August 23, 1994. In 1993, total revenues from gaming in coastal Mississippi totaled about $426 million, generating $52 million in taxes to state and local governments. Average monthly tax receipts are currently around $5 million, one-fourth of which goes to county and municipal governments where the casinos are located. Residents in Hancock County have seen an 85 percent decrease in property taxes as a result of gaming revenues. In other coastal communities the funds have been needed just to keep up with increased demands on public safety and improvements in highway and traffic controls brought about by casino development.

As word gets out about the new industry, the casinos are also helping coast tourism. Tourism inquiries in Harrison county in May 1994 totaled 35,871, up substantially from 9,480 a year ago. Convention business is up about 16 percent—a figure officials say could increase when new hotels are constructed. Conversely, hotel shortages and room price increases have caused some groups to meet elsewhere.

NEON, LASERS AND GLITZ

Gaming development has also altered the appearance of the coastline, particularly in Biloxi where multistory parking garages and hotels now stand where shrimp boat docks and seafood factories once existed. Some coast residents feel that the new facilities are a vast improvement over what was considered a dilapidated section of waterfront. Others feel that the neon, lasers, and glitz have erased the city's true character. One thing is certain; many waterfront dependent industries have experienced dislocation as a result of dockside gaming development. Zoning changes instituted to accommodate and encourage casinos have resulted in increased land values for what was once commercial and light industrial waterfront property. One of the hardest hit groups was the commercial fishing fleet in Biloxi. Support structures for fishing operations, such as ice and fuel docks as well as unloading and berthing facilities, were either lost outright or moved to less accessible locations. On the other hand, food service facilities at the casinos have created a new market for local products, particularly seafood.

The existing highways and sewage treatment facilities have proven woefully inadequate to meet the demands of the influx of new residents and visitors. The casinos have shared a substantial portion of the costs of road-widening, parking and drainage projects. However, Harrison County property owners will pick up a large portion of the tab if a proposed $37 million bond issue to upgrade municipal sewage treatment plants is passed. Many casinos have received fines from the state Department of Environmental Quality because their wastewater effluent did not meet pretreatment guidelines, further taxing the already overburdened treatment plants.

There is also considerable dredging and wetland alteration associated with the construction phase of dockside gaming facilities. Some of the waterfront locations proposed for casino development have been deemed too environmentally sensitive, causing monumental clashes between developers, land speculators and regulatory agencies. Non-point Source pollution is another environmental concern associated with the

casinos due to their huge parking lots and other non-permeable surfaces which contribute to polluted stormwater runoff and exacerbate drainage problems. Demand for housing is up dramatically along the coast due largely to new residents taking jobs in the gaming industry. Residential real estate prices increased nearly 20 percent in Harrison County in 1993.

HURRICANE WARNINGS AHEAD

An important issue which has yet to be resolved is what action will be taken when a hurricane bears down on the Mississippi Gulf Coast. The first three casinos to open on the coast had to submit an evacuation plan as part of their permitting process. These particular boats were comparatively small and built to resemble paddlewheel riverboats so they could be moved to safe harbor relatively easily. Some of the later casinos look more like buildings than boats, but are built on barges and were supposedly subject to the same evacuation requirements. The Coast Guard has expressed concerns regarding windage, bridge and powerline clearance and suggested the casinos not be relocated during winds of 30 miles per hour or more. This concern was amplified recently when one of the casinos struck a bridge located over the Back Bay of Biloxi on a calm day while being towed to its spot on "casino row."

The bridge was damaged and the channel obstructed. Civil defense officials have voiced concerns that a casino vessel could damage highway bridges during evacuation and prevent vehicular traffic from leaving the coast. Mississippi Governor Kirk Fordice has said that he wanted the State Gaming Commission to prohibit casinos from evacuating during hurricanes and instead to build storm moorings at their permanent berths. Casinos have battled the mooring idea because they want to evacuate as required by insurance policies and because the moorings will be expensive.

On June 30, 1994, the Gaming Commission proposed regulations which would require the casinos to build moorings capable of withstanding 155 mile per hour winds and 15-foot tidal surges. Two of the casinos have already constructed these on-site moorings. All of the proposed options for dealing with the casinos during a hurricane threat are expensive and potentially dangerous.

WHAT WILL THE FUTURE BRING?

The law which allows dockside gaming sets no limits on the number of casinos which can operate in Mississippi. Legislators chose instead to let market forces dictate how many facilities can operate profitably. Some analysts have speculated that the saturation point is rapidly approaching, particularly on the coast where so many casinos exist in a relatively small geographic area. Casinos have responded by offering charter packages designed to bring in gamblers from outside of the region. Charter aircraft boardings for the month of May at the Gulfport-Biloxi regional airport totaled 10,910, up substantially from 2,651 in May 1993. In "Legalized Gambling As A Strategy For Economic Development," Robert Goodman outlines studies which document what has happened in other areas as legalized gambling has reached market saturation.

Consequently there has been a tendency towards more lax government regulation of the gambling industry and subsidies to help competing private gambling operations survive. There are likely to be serious economic and social costs to communities as the result of boom and bust type of development.

Another interesting point raised by these studies is what percentage of gaming revenues is actually new money from outside the region as opposed to shifts in expenditures of discretionary (and sometimes nondiscretionary) income by local residents. Some economists assume that about 8 percent of consumer dollars will be lost to gambling from existing entertainment activities. For example, casinos will often have a negative economic impact on nearby restaurants and bars. As a way of enticing players to stay on the premises, casinos generally have a variety of food services and restaurants within the complexes. Food prices are often subsidized or "comped"—that is, given free to the more avid gamblers. In Atlantic City, N.J., during the 10-year period following legalized gaming there were 40 percent fewer restaurants competing for 10 percent fewer dollars.

Whether you view the dockside gaming industry in Mississippi as the "goose that lays the golden egg" or the proverbial "800—pound gorilla," one thing is certain—things will never be the same. Many activities such as boating, fishing, shipping, and beach recreation are water-dependent by necessity. Dockside gaming is only water-dependent by legislation. Many Mississippi coastal residents have expressed the view that these "buildings on barges" might as well have been located on land away from the coastline, thus

allowing for a broader-based mix of waterfront development using industries which require water access such as boatbuilding, marinas, and shipyards. Considering the environmental and pollution factors, the hurricane safety issue, the shifting of dollars away from other businesses and industries, and the narrowing diversity of coastal economic development, the jury is still out on whether dockside gaming will be in the best long-term interest for coastal Mississippi.

GAMING IN ALABAMA

Proponents of gaming in Alabama are proposing seven land-based casinos statewide, four of which would be based at the state's four dog tracks, according to Al St. Clair, director of governmental and legislative affairs for Mobile.

"Some people feel that money is lost for Mobile and Alabama as a whole when individuals, groups, families, and organizations come to Mobile for conventions and vacations and then board buses and go to Mississippi for gaming. Some feel if there were casinos in Alabama the revenue from gaming would stay in Alabama," St. Clair said.

The earliest possible vote on a referendum would be 1995. Michael Anderson, executive director of the Mobile Baptist Association, said that opposition from business and religious denominations is on moral, social and economic grounds. His position: "Gambling takes out more than it puts in."

FOR FURTHER READING

Anyone with an interest in gambling as a revenue generating tool should read *Legalized Gambling as a Strategy for Economic Development, by Dave Burrage of the Mississippi Sea Grant Advisory Service.* Published in March as a result of the United States Gambling Study, the volume gives a thorough overview of the gaming controversy. The study was directed by Robert Goodman and funded by private foundations.

According to Burrage, the purpose of the study was to assess the economic, social and legal consequences that occur when governments try to use gambling as a way to improve their economies." "It is an objective examination, and highlights problems that are infrequently brought to public attention. It is an excellent resource with an extensive bibliography, interviews, hard data, case histories, and anecdotal information.

The 222-page report can be ordered from United States Gambling Study, 245 Main Street, North Hampton, MA 01600 or call Broadside Books, 413-586-4235. Cost is $28 plus $5 shipping and handling.❑

Dave Burrage and Benedict Posadas are marine resource specialists with the Mississippi Sea Grant Advisory Service. Burrage is especially interested in the regions living resources and how environmental, political and economic choices affect those resources and the people who harvest them for fun or profit. Posadas is an economist with a knowledge of firsthand marine-related enterprise in the northern Gulf. In accord with Sea Grant's mandate to provide facts—not advocacy—Burrage and Posadas have provided the preceeding retrospective of the 24-month old gaming industry on the Mississippi Gulf Coast.

The Impact of Legalized Dockside Gaming on Mississippi Coastal Management Agencies

Richard J. McLaughlin and Lonnie T. Cooper

INTRODUCTION

When Mississippi enacted legislation allowing dockside casino gaming a little more than three years ago, few observers could have foreseen how quickly the industry would grow. By the end of 1994, over thirty casinos were operating in state waters. It is predicted that the state will have forty dockside casinos by the end of 1995.

The authors have examined how the explosive growth in dockside casinos has affected the state's ability to manage its coastal resources. After a brief look at the historical development of gaming legislation, consideration is given to the legal regime governing Mississippi's coastal area and the potential impact of casino gaming on the ability of state resource agencies to carry out their regulatory responsibilities.

The rapid growth of casino gaming in coastal counties has had a disparate impact on government agencies. Some local planning agencies have significantly benefited from dockside gaming as a result of increased local tax revenue from casinos and associated industries. In contrast, state coastal management agencies have been negatively affected as additional staff time and resources are expended on casino siting responsibilities at the expense of other environmental regulatory responsiblities.

HISTORICAL BACKGROUND OF DOCKSIDE GAMING IN MISSISSIPPI

In 1989, Mississippi became the first state to enact legislation that allowed gambling aboard cruise ships in state waters as long as they were in transit to or from international waters. The following year the state repealed the 1989 statute and passed much more comprehensive legislation that created a state gaming commission and legalized gambling aboard approved vessels of a minimum size while underway or docked in state waters. The new legislation authorized two existing cruise ships, the *LA Cruise* based in Biloxi, and the *Europa Jet* berthed in Gulfport, to continue gambling operations without a privilege license. Except for the two "grandfathered" vessels, county residents were given the authority by a majority vote to halt gambling in state waters on vessels that operate from county ports or are docked there. According to the law, dockside gaming was limited to the three counties adjacent to the Gulf of Mexico and the counties along the Mississippi River.

Originally, casino gaming in Mississippi was envisioned as confined to riverboats navigating the Mississippi River and on board Gulf Coast cruise vessels. However, the legislation that ultimately passed allowed gambling on "any cruise vessel or vessel" with a minimum overall length of one hundred and fifty feet. Vessels did not have to be in transit or even have an engine that would enable them to leave the dock as long as they were floating on one of the qualified bodies of waters.

The statute is worded so that dockside gaming is legal in all the qualified counties unless the voters of a county take affirmative steps to block it. Mississippi's three coastal counties were quick to respond. As required by statute, coastal residents obtained enough signatures to force a referendum vote regarding cruise ship and dockside gaming. On December 4, 1990, 51 percent of Harrison County voters and 61 percent of Jackson County voters rejected floating casino style gambling, while 51 percent of Hancock County voters approved it. If opponents failed to block dockside gambling by not forcing a referendum or losing any referendum vote they had no further recourse. However, if dockside gambling was defeated it could be brought back up for later votes. Harrison County citizens voted again in 1992 and approved dockside and cruise ship gambling for Gulfport and Biloxi.

During this inital period when individual counties were exercising their local options on gaming, public debate was narrowly focused on the benefits of economic growth versus the perceived social and moral decay brought about by legalized gambling. Conspicously absent from this mainstream debate were any considerations regarding the environmental impact casino development might have on the sensitive region of the Gulf Coast and counties along the Mississippi River.

By early 1992 thirteen gaming operators had filed applications with the newly created Mississippi Gaming Commission. Although the voters of Harrison County did not legalize gambling in their Gulf Coast area until the issue was put to a second referendum vote in early 1992, the first three dockside casinos to open in August of that year were all located in Biloxi on the Gulf Coast. By year's end one more casino had opened on the coast and one opened in Tunica County on the Mississippi river thirty miles south of Memphis, Tennessee.

Dockside gaming activity exploded in 1993 on both the Gulf Coast and the counties along the Mississippi river.

Between August 1992 and December 1993 twelve casinos opened their doors. Over a hundred other license applications by operators, manufacturers, and distributors were filed at the Mississippi Gaming Commission.

By 1993, the rapid proliferation of operating and proposed dockside casinos brought about a shift in the public's attitude toward new casino development. The debate began to change from one dominated almost exclusively by economic and religious considerations to one that included quality of life and environmental issues.

As of February 1995, 32 casinos were in operation. Of those, 14 are locate along the Gulf Coast, 9 in Tunica, 4 in Vicksburg, 2 in Greenville, 1 in Natchez, 1 in Philadelphia, and 1 in Lula. Since August 1992, total gambling proceeds have topped a billion dollars. State tax revenues from that same year came to over eighty million dollars.

In 1994, total gambling proceeds reached 1.5 billion dollars. State tax revenues from that same year came to over seventy million dollars.

IMPACT OF DOCKSIDE GAMING ON COASTAL ENVIRONMENTAL REGULATORY RESPONSIBILITIES OF STATE AGENCIES

Overview of Regulatory Scheme in Mississippi Coastal Area

The Mississippi Coastal Wetlands Protection Law (Miss. Code §49-27-1 et seq.) provides the new statutory basis for Mississippi's coastal management plan. This bill expresses the public policy regarding the management and use of the state's coastal areas. The policy requires that coastal wetlands be preserved, except in those instances where the alteration will serve a higher public interest. The Mississippi Commission on Marine Resources has been designated the lead agency to carry out this policy and administer the coastal program's permitting and compliance review procedure. Final permitting decisions are made by the Commission with the advice of its regulatory arm, the Department of Marine Resources.

The Marine Commission works with the U.S. Army Corps of Engineers to coordinate all federal wetland permitting requirements. Through a memorandum of understanding between affected state and federal agencies, a one-stop permitting process has been established with the Department of Marine Resources serving as the information and permitting clearinghouse.

In theory, any activity that affects coastal wetlands in Mississippi's three coastal counties is a regulated activity and subject to the Commission's permit process. In reality, however, not all activities affecting coastal wetlands are subject to permitting procedures. Essentially, only five types of activities are specifically regulated: (1) dredging, excavating or removing of any materials from the wetlands; (2) direct or indirect filling of the wetlands; (3) killing or materially damaging any plant or animal in a wetland area; (4) erecting structures on wetlands which materially affect the ebb and flow of the tide; and (5) erecting structures on suitable sites for water-dependent industry. (Miss. Code §49-27-5).

Moreover, the law includes nineteen exemptions that do not require a formal permit. (Miss. Code §49-27-7). These exemptions were enacted to protect a variety of political interests and do not warrant detailed discussion here. However, it should be noted that exempted activities must conform to the public policy requirements provided in the Wetlands Protection Law and that the Department of Marine Resources must be informed of all exempted activities.

The Mississippi Coastal Program contains a wetlands use plan that serves as the basis for permitting. The Department of Marine Resources may not issue a permit for a regulated activity unless it conforms to a use allowed in the coastal wetlands use plan. Even exempted activities must conform to the use plan (Miss. Coastal Program VIII-32 (Oct. 1988)).

In addition to Department of Marine Resources, which is the primary administrator of the program, two other state agencies -- the Department of Environmental Quality and the Department of Archives and History -- have been assigned responsibilities to review and comment on decisions that affect the coastal area and to ensure that such decisions comply with coastal program goals.

Independent of the Coastal Program, the Department of Environmental Quality's Office of Pollution Control is charged with carrying out the mandates of the federal Clean Water Act and is also responsible for implementing state water quality legislation. This includes the permitting and monitoring of gaming vessels.

Impact of Casinos on Coastal Areas

The introduction of dockside gaming facilities in Mississippi has brought unparalleled economic growth. It has also profoundly altered the natural and cultural environment in the state's coastal region. In addition to the obvious aesthetic changes to waterfront areas, the casinos and related tourist facilities have stimulated a large increase in permanent residents and temporary visitors to the three coastal counties. This rapid influx of people has caused

congestion of area roads and other transportation facilities, a shortage of affordable housing, and a strain on existing sewage systems and landfill areas. Some traditional industries such as commercial fishing and seafood processing have been displaced to a great extent by tourist-related development. There has also been concern that the floating casinos may endanger coastal residents should a hurricane strike the coast.

To date, the ecological consequences of the new coastal casinos have been relatively minor because most have been located in existing industrial areas rather than in undeveloped wetlands or residential areas. This can be contrasted with casino development along the Mississippi river where a number of casinos have engaged in a significant amount of dredge and fill activity in undeveloped wetland areas.

Ecological and land-use planning concerns are especially apparent along the Mississippi river thirty miles south of Memphis in Tunica County, where casino development has become concentrated. Tunica County, which was once the second poorest county in the nation, is projected to experience between $2 billion and $3 billion in casino-related development. The population of the county nearly doubled within one year. Concerns over sewer and water systems, depletion of landfill space and power-generating capacity, and other infrastructure needs quality arose.

The casinos are bearing much of the cost of the rapid expansion of public utilities and services. However, local governmental oversight has lagged behind the pace of development. For example, the county's first two casinos generated as much as 13 tons of garbage a day. That amounted to 42 percent of the solid waste dumped at the county landfill. Tunica County now has 9 casinos with possibly more on the way.

In the three counties adjoining the Gulf of Mexico, the somewhat benign view of the environmental impact of casinos began to change in 1993 as new operators sought sites in more economically advantageous areas. Several casinos have requested permits to locate in undeveloped areas closer to the interstate highway or in areas designated as non-industrial in the Mississippi Coastal Program. Requests by casino operators to change the Coastal Program Use Plan to accomodate proposed sites in areas designated as non-commercial has become an explosive political issue.

The proliferation of casino permit applications in sensitive areas and the recognition that the growth of the casino industry may produce cumulative environmental effects has caused local environmental organizations and coastal residents to exert political pressure on local and state coastal management agencies to closely scrutinize new applicants. Illustrative is an action taken recently by the Gulfport City Council which restricted casinos to the waterfront adjacent to Mississippi Sound because proposed inland casinos would cause too much congestion and disruption in nearby residential areas.

Impact of Casinos on Coastal Management Agencies

The authors conducted an informal survey of state and local agencies with land use management or environmental regulatory responsibilities to determine what impact, if any, casino gaming has had on their ability to carry out their mandated tasks. The survey disclosed that gaming had a disparate impact depending on the individual agency. Several local planning agencies reported that gaming favorably impacted their regulatory efforts by providing additional funds in the form of increased local tax revenue.

In stark contrast, some state agencies reported that they have experienced significantly increased regulatory burdens as a direct result of casino gaming with no comparable increase in state funding. Especially hard hit are the three agencies that have primary responsibility to implement the Coastal Program. The Departmeny of Marine Resources, the Department of Environmental Quality, and the Department of Archives and History all expressed the view that gaming has negatively affected their ability to properly carry out existing coastal management responsiblities. Each noted that additional staff time allocated to gaming issues has resulted in a backlog or time delay in carrying out other regulatory responsibilities. For example, DEQ indicated that gaming tasks have caused a backlog in water quality certifications for projects involving dredge and fill activities required under Section 401 of the Federal Clean Water Act. The Department of Archives and History reported that 390 project reviews directly related to gaming were standing as of December 1993. This represents a 25 percent increase in total project reviews over the past two years. In order to give applicants the attention they deserve, all of the Coastal Program agencies have requested additional staff to deal with the increased work load.

Changes in State Coastal Management Policy

Management of Mississippi's marine and coastal resources is currently in a state of change. For many years, a group of legislators from the three coastal counties complained that the former Department of Wildlife, Fisheries, and Parks in general and the former Department of Marine Resources in particular were unresponsive to the needs of

the commercial fishing and seafood processing industries. To remedy these concerns Senate Bill 3079 was enacted in 1994 to create the autonomous Mississippi Commission on Marine Resources with complete authority to regulate the state's marine resources and to administer the Coastal Wetlands Protection Law. In contrast to the past Commission on Wildlife, Fisheries, and Parks, which included representatives from all parts of the State, the new Commission is made up of members drawn only from residents of the three coastal counties.

Given the changing political atmosphere in coastal Mississippi, it is not clear whether the newly-created Mississippi Commission on Marine Resources will aggressively seek to remedy the deficiencies in staff and funding brought about by rapid influx of casino related development. There are preliminary indications that the Commission in cooperation with the staff of the Department of Marine Resources are taking efforts to rectify existing problems. In the absence of such reforms, it is possible that the federal government may intervene and seek to take over some of the environmental regulatory duties delegated under Clean Water Act or decertify the state's coastal management program under the Coastal Zone Management Act.

CONCLUSION

In the end, it is the citizens of Mississippi who must determine how to deal with the changes brought about by casino gaming in the coastal region. The economic growth and increased employment brought by the dockside gaming industry have benefited coastal residents and the state as a whole. However, along with these benefits come significant costs. Let us hope that the citizens of Mississippi find a reasonable balance.❑

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This article was adopted from remarks Mr. McLaughlin made at the The Coastal Society's 14th Biennial Conference, Charleston, S.C., April 17-21, 1994.

Dolan v. City of Tigard

1994 U.S. Lexis 4826

by Danny L. Collier

INTRODUCTION

The petitioner, Florence Dolan, who owned a plumbing and electric supply store, sought a permit from the city of Tigard to redevelop and expand the business site. When the city conditioned approval of the permit on the dedication of a portion of the property for purposes of flood control and traffic management, Dolan claimed that the conditions resulted in an uncompensated taking of property in violation of the Fifth Amendment of the Constitution.

The Fifth Amendment, which is made applicable to the States through the Fourteenth Amendment, states in part that private property may not be taken for public use unless the owner of that property is fairly compensated. On the other hand, state and local governments have the authority to establish land use regulations, and to do so free of constitutional challenges. Under any other circumstances, had the city required the petitioner to dedicate any of her property to the city, a taking would have occurred and the city would be required to compensate Dolan for the property taken. The obvious question in the instant case is whether the result should be different when a permit to redevelop property is conditioned upon a dedication of part of that property.

FACTS

The city required property owners within the business district to comply with certain land use regulations. First, business owners had to meet a 15% open space requirement. This meant that an owner had to limit site coverage, which included buildings and paved surfaces, to 85% of the total space available on the property. Second, to facilitate the transportation system in the area and limit the amount of vehicles on the road, the city planned to build pedestrian/bicycle pathways with land dedicated from new developments. Finally, areas within the city's 100-year floodplain had to remain free from structures and be preserved as greenways to minimize flood damage to structures. Part of the petitioner's property came within this regulated floodplain.

Dolan planned to build a new store that would be nearly twice the size of the old one. Other plans included paving the parking lot, razing the old building, and eventually building another structure with more parking space for

other businesses. The city's permit that would allow Dolan to carry out her plans had several conditions. First, Dolan had to dedicate to the city the property within the floodplain. The city proposed to maintain a storm drainage system and a greenway to minimize flood damage in the area. Second, the permit conditions required Dolan to dedicate to the city a 15 foot strip of land that ran along the floodplain. The city proposed to use this part of the property for a pathway. The total dedication was about 10% of Dolan's property. The city was willing to take that amount and use it to satisfy that much of the 15% open space requirement.

The city determined that the permit conditions requiring dedication were reasonably related to the project's supposed impacts. These impacts were an increase in storm water run-off due to an increase in the amount of impervious surfaces and an increase in traffic congestion due to an increase in the amount of traffic in the area. Dolan objected to the city's decision and took her grievance to the Land Use Board of Appeals. The Board assumed the city's findings were supported by substantial evidence and affirmed the city's decision. After unsuccessful appeals to the Oregon Court of Appeals and the Oregon Supreme Court, Dolan took her case to the United States Supreme Court.

DISCUSSION

The High Court found several peculiarities in this case. Dolan's appeal was special because the underlying controversy did not involve a legislative decision that might affect an entire part of a city. This case involved a city's decision to condition a single property owner's permit to redevelop on the dedication of part of that property. In addition, the permit conditions did not merely limit Dolan's use of her own property. The conditions required Dolan to deed sections of her property over to the city. The Court referred to "the well-settled doctrine of 'unconstitutional conditions,'" which states that "the government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit."

To determine whether the instant case involved an improper exercise of eminent domain power or an appropriate exercise of police power, the Court asked two questions. First, was there an essential nexus between a legitimate state interest and the permit conditions of dedication? Second, if the answer to the first question is "yes," what would be the required degree of connection between the city's exactions upon Dolan and the projected impact of the proposed development?

In the first instance, the Court found that the city had a legitimate interest in the prevention of flood damage and in the reduction of traffic congestion. There was an obvious nexus between flood prevention and the requirement that the 100-year floodplain remain undeveloped. The increase in the size of the store and the paved parking lot would create an increased amount of storm water run-off as a result of the greater amount of impervious surfaces. In addition, the Court affirmed that pathways would be useful in providing for alternative methods of transportation. That would result in fewer vehicles on the road, less congestion, and a smoother system of transportation. Thus, the Court answered the first question in the affirmative.

The Court then turned to the question of "whether the deqree of the exactions demanded by the city's permit conditions [bore] the required relationship to the projected impact of [Dolan's] proposed development." The Court recognized that courts generally agree that dedication must be "reasonably related" to the necessities that arise from the development's impacts. However, the Court instead articulated a "rough proportionality" standard to satisfy the demands of the Fifth Amendment. Without requiring a "precise mathematical calculation" the Court required the city to make an "individual determination that the required dedication is related both in nature and extent to the impact of the proposed development."

With that in mind, the Court turned to the specific dedications of the case. Keeping the floodplain undeveloped would be necessary in flood prevention. However, the Court found several problems with the city's plan. The city went too far when it tried to obtain the property within the floodplain for itself. The city wanted to build a greenway system to prevent flooding. The Court found there was no reason why a public greenway system would prevent floods better than a privately owned greenway system. In other words, the city could accomplish the same thing by allowing Dolan to retain ownership. In addition, the dedication would result in the loss of one of Dolan's important property rights--the right to exclude others from the property. Had the city acquired the property it desired, Dolan would have lost her right to regulate when members of the public could come onto the greenway. The city's findings did not "show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building."

Concerning the pathway, the Court could envision a larger store attracting more customers and causing more traffic congestion. However, the city had insufficient evidence in the record to show that there would be an increased number of vehicles and bicycles due to the new

development that would justify the dedication for a pathway. The findings on the record were that a pathway "could" offset some of the traffic demand and thereby result in less traffic congestion. Such findings were insufficient to satisfy Dolan's constitutional challenge. The Court required the city to make an effort to quantify the findings upon which it based its decision to impose such harsh dedication conditions on Dolan.

CONCLUSION

The Court closed by noting that cities' land planning efforts are to be commended. In this case, the land planning regulations involved flood prevention and traffic management. Despite the unquestionable necessity that a city must do something about the very real problems of flooding and traffic, this case shows that the city can go only so far. In this case, improving the public condition involved a Fifth Amendment requirement that the city compensate the land owner. The city of Tigard could not get around the Constitution by an improper use of its permit power.❑

Danny J. Collier, Jr. is a graduate of the University of Mississippi School of Law.

The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.

Overview of the Mississippi Commission on Marine Resources

by William C. Harrison

INTRODUCTION

In April of 1994 the Mississippi legislature passed Senate Bill No. 3079 in an effort to gather all of its marine conservation and regulation efforts under one controlling body. The bill, which took effect on July 1 of 1994, created the Mississippi Commission on Marine Resources (MCMR). The MCMR connects the various departments dealing with marine resources as well as providing guidance for Mississippi's marine policy.

To carry out its mission Senate Bill No. 3079 provides for a board of seven representatives from the marine field. Of these Governor appointed MCMR members, two are selected from each of the following counties: Jackson, Harrison, and Hancock. The seventh representative is the Fifth District Congressional appointee to the Department of Wildlife, Fisheries, and Parks.

Of the six county appointees, each is required to represent a different interest. Douglas Horn from Pascagoula represents commercial seafood processors. Oliver A. Sahuque of Lakeshore, Mississippi represents commercial fishermen. Sherman Muths, Jr. of Gulfport represents recreational sports fishermen and serves as the chairman of the commission. Also from Gulfport, Henry W. Boardman represents charter boat operators. The Sierra Club's Vernon Asper of Diamondhead, Mississippi represents nonprofit environmental organizations. William Mitchell of Ocean Springs represents the non-seafood industry and is the vice-chairman of the commission.

The MCMR has many resources to further its programs such as the Gulf Coast Research Lab in Ocean Springs. Funds for the commission are provided through state appropriation and collection of fees from licenses, permits, taxes, and fines. All money collected through the MCMR is deposited in the Seafood Fund that is administered by the commission.

The commission's work is carried out with the support of several agencies, including the Department of Marine Resources and the Department of Wildlife, Fisheries and Parks. The latter provides law enforcement for the commission and other departments. Legal counsel is provided for through the state Attorney General's office.

The Department of Marine Resources is the principle agent of the MCMR, carrying out most of the practical functions required to maintain Mississippi's marine environment. It is composed of four divisions: Wetlands Protection, Coastal Programs, Fisheries, and Support Services. The department has a new executive director, Glade Woods of Picayune.

The Department of Marine Resources issued a statement regarding the overall goal of the department: "The mission . . . is to enhance marine interests of the state, including finfish, oysters, shrimp and other shellfish, by managing public trust wetlands subject to the ebb and flow of the tide, certain uplands, and waterfront access areas to provide for commercial, recreational, educational and economic uses of these marine resources."

Duties of this department include administration of the Coastal Wetlands Protection Law and the Public Trust Tidelands Act. The Department is also responsible for setting saltwater access and licensing fees, conserving and managing the coastal wetlands, establishing fines for violations of the marine laws, and promoting public education about the scientific and economic effects of Mississippi's marine resources. The Department of Marine Resources additionally provides maps and surveys of the Mississippi coast and surrounding wetlands.

Working together under the direction of the Mississippi Commission on Marine Resources, the various organizations that make up Mississippi's marine task force will be much more efficient. With everyone's effort and the guidance of the MCMR, Mississippi's goals of environmental nourishment will grow far into the 21st century.❑

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The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.

LAGNIAPPE

A Little Something Extra

On January 24, 1995, after weeks of heated debate and public hearing concerning the use of gill and trammel nets along Mississippi's Gulf Coast, the Mississippi Commission on Marine Reources adopted new regulations regarding the use of such nets. The Commission's 4-3 vote to adopt the new rules ended a heated controversy between commercial and sport fishermen in coastal Mississippi. Sport fishermen, represented by the Gulf Coast Conservation Association (GCCA), called for a total ban on gill and trammel nets, arguing that the use no evidence that any species of fish was endangered, and that a total ban on the use of gill nets would result in the eventual end of commercial fishing.

Although the new regulations, which took effect on February 24, 1995, do not completely ban the use of gill and trammel nets, they do restrict the use of such nets within a certain distance from the shore, between certain hours of the day, and on weekends from holidays. In addition, the new regulations require that all gill nets be constructed of "an approved biodegradable material.

Neither the commercial fishermen nor the GCCA were satisfied with the new restrictions. The commercial fishermen assert that there was no scientific evidence to support the restrictions imposed by the Commission, and the GCCA asserts that the restrictions are not adequate to protect the fish popultation in the Gulf.