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WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

In This Issue . . .

Republican Senators Halt President Bush's Plan for Marine Sanctuaries in Gulf

Timothy M. Mulvaney, J.D.

An official of the National Oceanic and Atmospheric Administration ("NOAA") recently announced that Republican senators have halted President George W. Bush's proposal to create multiple marine sanctuaries in the Gulf of Mexico.

Background

In July of 2006, President Bush signed a proclamation protecting over 140,000 square miles of the Northwestern Hawaiian Islands and the surrounding waters. Environmentalists hoped that President Bush's initiative in protecting the waters off Hawaii could serve as a model for increased marine conservation programs. A plan for a similar sanctuary in Gulf waters would restrict fishing and oil drilling in certain deep-water reefs and coral banks that scientific research shows are essential to the sustenance of the Gulf's marine ecosystem.

The proposal is known as "Islands in the Stream," in light of the biological links between submerged hard bottom features, or "islands," that serve as bastions for marine life but currently are managed in isolation. The islands are connected by the natural looping movement of water, or "the stream," in the Gulf. Certain links in the island chain lie off the coasts of Mexico and Belize, suggesting that international partnerships could strengthen the preservation of any established sanctuary.

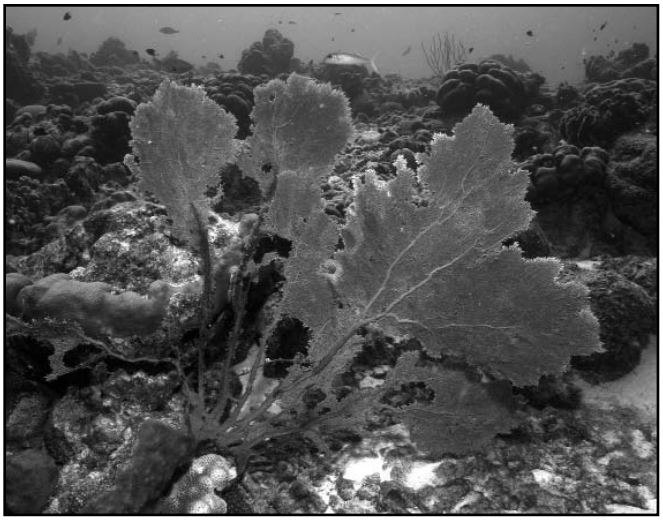
Opposition Prevails for the Present Time

On November 7, 2008, William Causey, a southeast regional director for the National Marine Sanctuary Program organized under NOAA, announced that progress on the proposal had come to a standstill.[1] Causey noted the intense opposition from the fishing industry and GOP senators representing Gulf states.

For example, in April, Alabama's Republican senators, Richard Shelby and Jeffrey Sessions, as well as Sen. David Vitter, R-La., advised the executive branch that they strongly objected to the sanctuary proposal, in light of potential effects on both fishing and the drilling industry.[2] Opponents of the sanctuary suggest that preserved areas could hold valuable oil and natural gas

reserves. Sen. Vitter has asserted that he would oppose any similar sanctuary proposal by any future administration.

Photograph of coral reef courtesy of (c) Wolcott Henry 2005/Marine Photobank.



Causey stressed that the protected areas would be small and the measures would result in little or no change in existing fishing and extraction practices, particularly in light of some prohibitions already in place.[3]

It remains to be seen whether the administration of President-Elect Barack Obama will renew a marine sanctuary proposal in an effort to preserve the ecology of the Gulf amidst strong opposition from commercial industries.

Endnotes:

1. *See* Cain Burdeau, "GOP Senators Ice Bush's Marine Sanctuaries in Gulf," A.P., found in, e.g., San Francisco Chronicle, A4, November 8, 2008.
2. *Id.*
3. *Id.*

Introducing Tim Mulvaney, the new editor of WATER LOG

As the new editor of *Water Log*, I am honored to assist in producing this publication that has been serving the Gulf Coast and beyond for twenty-eight years. This edition, we welcome several law student authors, including Juliane Morris and Jonathan Proctor of the University of Mississippi School of Law and Moses Dewitt of Florida State University School of Law.

In 2009, we plan to launch "The Water Log Blog," with a variety of interactive features. To take advantage of these new features, please send your email address to our Web Specialist, Waurene Roberson, at waurene@olemiss.edu.

Further, if you have content or format suggestions, or know of law students interested in writing for *Water Log* over the winter recess, please contact me at tmulvane@olemiss.edu. I look forward to hearing from you.

Best,

Louisiana Court Denies Takings Claim Based on Background Principles of Local Zoning Law

East First Street, L.L.C. v. Bd. of Adjustments, 2008 WL 2567080 (La. App., June 6, 2008).

Timothy M. Mulvaney, J.D.
(with research assistance from Moses Dewitt, 2010 J.D. Candidate, Florida State University College of Law)

In an unpublished opinion, a Louisiana appellate court upheld a trial court ruling rejecting a constitutional takings claim based on a city's refusal to rezone property from residential to commercial use, holding that the zoning in place at the time Plaintiff acquired the property represented a "background principle" of state property law that barred the claim.

Background
In 1979, the City Council of Thibodaux, Louisiana ("City") rezoned the relevant five adjoining tracts of land for residential use. However, a grandfather clause in the zoning ordinance allowed the landowner to continue utilizing the property for commercial purposes. Plaintiff, East First Street, LLC, purchased the property after 1979.

Plaintiff petitioned the City to rezone the area above the existing commercial establishments on these tracts from residential to commercial use. The City agreed with the recommendation of its planning board in denying Plaintiff's petition to rezone.

The property owner challenged the City's decision in district court, alleging that the City acted arbitrarily and capriciously in refusing to rezone the property as requested. In the alternative, Plaintiff alleged that the regulation, or zoning scheme, constituted an inverse, or regulatory taking, of its property by substantially reducing its value.

District Court Affirms City's Decision
At trial, the City presented witnesses who testified as to their reasons for voting against the rezoning request, which included the character of the surrounding area, compliance with the zoning master plan, avoidance of spot zoning, the potential for more-conforming commercial uses, and the precedent of other rezoning requests. Plaintiff alleged that the decision bore no relation to health, safety or welfare, and that the City rejected the rezoning proposal merely based upon nearby residents' speculation.

Generally affording deference to local zoning entities, Louisiana's judiciary has defined "arbitrary and capricious" as acting in a "willful and unreasoning manner, absent consideration and in disregard of facts and circumstances of the case."[1] The courts have held, "[W]hen there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached."[2]

The district court held that Plaintiff did not meet its burden of proving by a preponderance of the evidence that the City acted arbitrarily and capriciously in its zoning decision.[3] The court also rejected Plaintiff's allegation that it should be compensated for damages to the value of its property, in light of the fact that Plaintiff purchased the property after the 1979 rezoning. Plaintiff appealed these rulings.

Ruling Affirmed on Appeal
The appellate court upheld the district court's decision with respect to the rezoning decision. The court held that the City acted in good faith and that the district court did not err in concluding that the Plaintiff failed to meet its burden of proof.

The court spent considerably more time addressing Plaintiff's claim of an unconstitutional taking. In accord with the United States Supreme Court's decision in *Palazzolo v. Rhode Island,*[4] the court stated that acquisition of title after the effective date of the regulation does not bar, in and of itself, a takings claim. In *Palazzolo*, the nation's high court explained that post-enactment transfer of title does not absolve the State from defending its land use regulations. To

hold otherwise, the court asserted, a newly regulated landowner could not transfer the interest she recently purchased, which includes the right to challenge unreasonable restrictions on land without the provision of just compensation.

Here, Plaintiff presumed that the residential use restriction was not applicable to the property at the time of purchase because commercial activities had continued on the land for thirty-five years since the adoption of the zoning ordinance. When the City advised Plaintiff that it would be enforcing the residential use restriction, the court held that the Plaintiff had the right to challenge the regulation as applied to his property. Therefore, the court found the takings issue ripe for review.

The appellate court went on to explain that, under Louisiana law, private property "shall not be taken *or damaged* by the state or its political subdivisions except for public purposes and with just compensation paid."[5] However, the United States Supreme Court has indicated that this right to just compensation is not absolute. This court acknowledged that in *Lucas v. South Carolina Coastal Council,*[6] the nation's high court held that regulation cannot prohibit all economically beneficial use of land without compensation, *unless* the restrictions were never part of the landowner's title to begin with in light of background principles of state property law.[7]

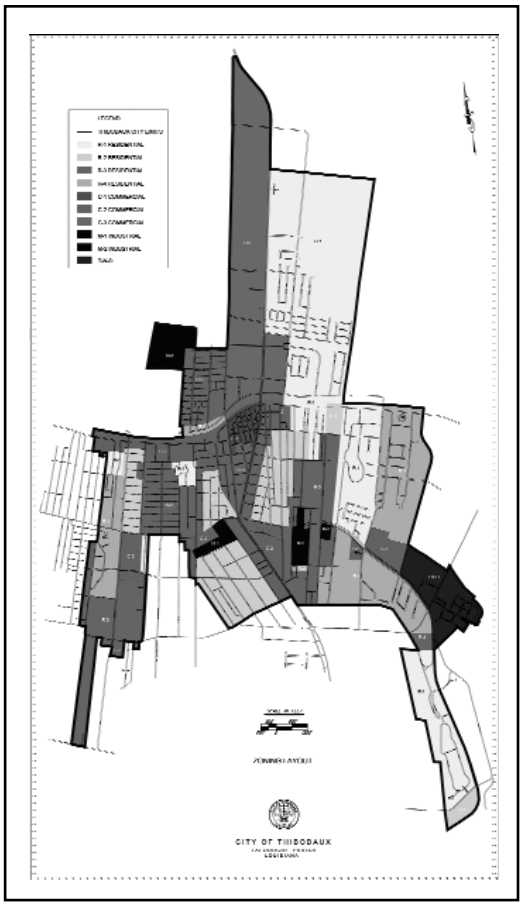
The Louisiana Supreme Court has found that valid zoning and land use regulations properly enacted under the state's police power may constitute "background principles" of Louisiana law.[8] Therefore, the appellate court ruled that the valid zoning scheme in place since 1979 constituted a "background principle" that is a defense to Plaintiff's damage claims under Louisiana's takings law.

Among other peculiarities in the decision, the court did not explain its application of *Lucas* in light of the fact that some commercial activity continued on the property, whereby the denial of the rezoning request surely did not prohibit all economic beneficial use of the land. When there remains some value in the land after regulation, takings jurisprudence ordinarily has relied upon the balancing test set forth in the United States Supreme Court's decision in *Penn Central Transportation, Co., et al., v. New York City, et al.*[9] to determine whether the government action unreasonably interferes with a landowner's use and enjoyment of property.

Endnotes:

1. *See East First Street, L.L.C. v. Bd. of Adjustments,* 2008 WL 2567080, *1 (La. App., June 6, 2008) (quoting Four States Realty Co., Inc. v. City of Baton Rouge, 309 So.2d 659, 664 (La. 1974)).
2. *Id.*
3. *Id.*
4. 533 U.S. 606, 632 (2001).
5. *East First Street, L.L.C.,* 2008 WL 2567080, at *4 (citing La. Const. Art. I, § 4 (emphasis added)).
6. 505 U.S. 1003 (1992).
7. *See id.* at 1029.
8. *East First Street, L.L.C.,* 2008 WL 2567080, at *4 (citing Avenal v. State, 886 So.2d 1085, 1107 n. 28 (2004)).
9. 438 U.S. 104 (1978).

Thibodaux zoning map courtesy of the City of Thibodaux.



Offshore Aquaculture in the Gulf of Mexico's Federal Waters

Jonathan Proctor, 2010 J.D. Candidate, University of Mississippi School of Law

On October 27, 2008, the Gulf of Mexico Fishery Management Council ("Gulf Council") held its final public hearing concerning a proposal for the issuance of permits for offshore fishery aquaculture in the federal waters of the Gulf of Mexico. As this article went to press, a final decision from the Council on the proposal appeared imminent.

Background

Aquaculture is a controlled means of cultivating fish, often through the use of nets and cages.[1] The National Oceanic and Atmospheric Administration ("NOAA") has been involved in controlled seafood stocks since the late 1800s.[2] However, NOAA's involvement with aquaculture generally has been limited to shellfish, algae cultures, and feeds.[3] The need to mitigate the nation's dependence on seafood imports has been a driving factor in NOAA's decision to establish offshore aquaculture for additional fish species.

Almost 80 percent of seafood sold in the U.S. is imported[4] and 40 percent of those imports are farmed.[5] Additionally, the average American's yearly seafood consumption rose from 12.5 lbs to 16.5 lbs from 1980 to 2005.[6] Projections regarding future demand and population growth in the U.S. estimate that the "seafood gap," or the difference between domestic production and imports, will be between two and four million tons in 2025.[7]

Overseen by NOAA, the Gulf Council is one of eight regional fishery management councils authorized to make recommendations regarding the regulation of fisheries in the Gulf of Mexico in accord with the Magnuson-Stevens Fishery Conservation Management Act ("Magnuson Act").[8] By enacting the Magnuson Act, Congress sought to establish a federal program to "realize the full potential of the Nation's fishery resources."[9]

The Gulf Council proposed a Fishery Management Plan ("FMP") to establish a permitting process to accommodate commercial offshore aquaculture.[10] Currently there are five offshore aquaculture operations in the U.S. and Puerto Rico. However, none of these operations are located in federal waters.[11] In creating the FMP, the Council seeks to maximize the sustainable and optimum yields of fish by supplementing the wild harvest with controlled populations in the Gulf of Mexico.[12]

The Offshore Aquaculture Fishery Management Plan

The proposal calls for the commercial rearing and harvesting of fish in federally managed waters in the Gulf of Mexico, beginning where state jurisdiction ends and extending up to 200 miles offshore, an area known as the Exclusive Economic Zone ("EEZ").[13] By proposing requiring NOAA permits to participate in aquaculture offshore only after public comment periods, the Council hopes to minimize interference with other fishing operations and recreational boating.[14]

Increasing the optimum yield ("OY") of fish from the aquaculture is of vital importance to the FMP. The OY must take several factors into account, such as potential overfishing, recreational opportunities, and protecting ecosystems surrounding the aquacultures.[15] The OY must not exceed the maximum sustainable yield ("MSY"), or "the fishery's ability to replace removals through natural growth or replenishment."[16] By balancing these yields, the domestic harvest can increase while maintaining a sustainable aquaculture population.

Environmental Impact

Under the proposal, all permits must identify, among other information, the species and expected harvest amounts in the FMP.[17] The Council contends that the increased water currents well offshore will mitigate the environmental impact of permitted aquaculture.[18]

Aquaculture, from page 5

In its Environmental Impact Statement ("EIS"), NOAA detailed many environmental concerns raised by interested parties, and addressed possible solutions for ensuring that the FMP will not have an adverse effect on the ecosystems surrounding proposed aquaculture operations.

Despite the EIS, however, there are environmental concerns associated with such a relatively large population of fish limited to a confined space. Fish waste, large amounts of uneaten food, and any pesticides or biologics could contaminate the seafloor and the surrounding ecosystem.[19] Furthermore, with an elevated population density, the risk that the fish within the aquaculture pens could spread disease and parasites to wild species increases.[20] To address these concerns, the Council's proposal would require aquaculture operators to report findings of pathogens, instances of major escapes, and interactions with endangered species.[21]
Another environmental concern involves the risk that aquaculture fish, though contained by cages or nets, could escape and mix with the wild population where they may mate and compete for food. Further, due to their limited breeding stock, the aquaculture fish may produce genetically inferior offspring, affecting both the health of the wild species and the amount/quality available to commercial and recreational fishermen in the event of an escape.[22] In order to minimize this risk, the EIS suggests using fish that are genetically similar to the wild populations, possibly by using eggs or juveniles from the wild broodstock.[23]

Economic Impact

By moving forward with offshore aquaculture, the U.S. may be able to reduce its dependence on imported seafood, which is evidenced by the nation's seafood trade deficit of $9.1 billion.[24] Considering that aquaculture is the fastest growing method of food production in the world, NOAA asserts there is a need for the nation to have an aquaculture program to prevent falling further behind in seafood trade.[25]

A precise assessment of the FMP's economic impact on Gulf Coast communities is difficult to compute, due to the fact that the large-scale aquaculture companies that could develop as a result of the FMP currently are not in operation.[26] However, the potential for a reduction in the nation's dependence on seafood imports is predicted to benefit consumers through a reduction in prices.

The seemingly apparent economic value of aquacultures is not without potential difficulties. In several

Photograph of Gulf aquadome courtesy of NMFS/NOAA.

instances, the commercial harvesting of fish via aquaculture in other countries has decreased net profits, and caused many local fishing fleets to go out of business.[27]

Despite the negative local economic impacts of aquaculture abroad, a Mississippi State University study concluded that such offshore harvesting in the Gulf would be economically beneficial to fishing communities, as the proposal may result in job growth, higher revenues, and increased supply.[28] The study shows an expected increase in labor income of $2.17 million and a projected overall economic gain of $6.84 million.[29]

Conclusion

By expanding the means and scope of domestic fish production, NOAA envisions a more self-sufficient U.S. seafood supply. However, the proposal raises questions about aquaculture's impacts on offshore ecosystems and the local and national economy.

The EIS provides measures designed to mitigate a number of environmental concerns, but close monitoring of such large-scale operations will be necessary to ensure compliance. Through proper implementation, the Council suggests that aquaculture can provide numerous economic benefits to consumers and businesses alike without causing undue environmental harm.

Endnotes:

1. *See* Gulf of Mexico Fishery Management Council, "Fishery Management Plan for Managing Offshore Aquaculture: Frequently Asked Questions" (hereafter "FAQ"), Gulf Fishery News 2, August-September 2008.
2. *See* U.S. Department of Commerce, NOAA, National Marine Fisheries Service, "NOAA 10-Year Plan for Marine Aquaculture," October 2007, at 8, *available at* http://aquaculture.noaa.gov/pdf/finalnoaa10yrrweb.pdf.
3. *Id.*
4. *See* Gulf of Mexico Fishery Management Council, "Fishery Management Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico" (hereafter "FMP"), September 2008, at 12.
5. *See* NOAA Aquaculture Program, "Quick Stats on Aquaculture," March 12, 2007, *available at* http://aquaculture.noaa.gov/pdf/15_aq_statistics.pdf.
6. National Marine Fisheries Service Office of Science and Technology, "Fisheries of the United States, 2006," Elizabeth S. Pritchard, ed., July 2007 at 74, *available* at http://www.st.nmfs.-noaa.gov/st1/fus/fus06/fus_2006.pdf.
7. NOAA Aquaculture Program, "Quick Stats on Aquaculture," *supra* note 5.
8. 16 U.S.C. § 1852(a)(1)(E) (2007).
9. *Id.* § 1801(a)(6).
10. *See* Gulf of Mexico Fishery Management Council, FAQ, *supra* note 1, at 2.
11. *See* Gulf of Mexico Fishery Management Council, FMP, *supra* note 4, at 17.
12. *Id.* at 9.
13. *Id.*
14. *Id.*
15. *Id.* at 20.
16. *Id.*
17. 50 C.F.R. 600.745.
18. *See* Gulf of Mexico Fishery Management Council, FAQ, *supra* note 1, at 9-10.
19. Food & Water Watch, "Offshore Aquaculture: Bad News for the Gulf," Press Release, October 24, 2007, *available at* http://www.foodandwaterwatch.org/press/releases/offshore-aquaculture-in-the-gulf-article10242007.
20. *Id.*
21. *See* Gulf of Mexico Fishery Management Council, FAQ, *supra* note 1, at 10.
22. *See* Food & Water Watch, "Offshore Aquaculture: Bad News for the Gulf," *supra* note 19.
23. *See* Gulf of Mexico Fishery Management Council, FMP, *supra* note 4, at 183.
25. *See* Gulf of Mexico Fishery Management Council, FAQ, *supra* note 1, at 2.
26. *See* Gulf of Mexico Fishery Management Council, FMP, *supra* note 4, at 324.
27. Food & Water Watch, "Offshore Aquaculture: Bad News for the Gulf," *supra* note 22.
28. Benedict C. Posadas, "Potential Economic Impact of Commercial Offshore Aquaculture in the Gulf of Mexico," Mississippi State University – Coastal Research & Extension Center, Mississippi Sea Grant Extension Program 2, 2005.
29. *Id.* at 6.

Texas Court Declares Categorical Taking: Ordinance Deprived Landowner of All Economic Use

City of Sherman v. Wayne, 2008 Tex. App. LEXIS 6267 (August 18, 2008).

Timothy M. Mulvaney, J.D.

The Texas Court of Appeals affirmed a trial court ruling that found the city's action limiting the use of property to residential use deprived the landowner of all economically viable use in violation of the constitutional takings clause.

Background

In 1964, the City of Sherman adopted an ordinance restricting use of the relevant property to residential development. Nonetheless, until 1999, the Texas National Guard operated an armory and vehicle storage unit on the property, though the majority remainder of the property lay undeveloped.[1] In 2001, James Wayne purchased the ten-acre property by bid for approximately $126,000 under the assumption that he could continue to use the existing buildings for commercial purposes in light of the continued use of the property for those purposes for the prior thirty-five years.[2] Wayne unsuccessfully sought rezoning and a special use permit, and thereafter filed suit claiming the ordinance prohibited all economically viable uses of the property without the provision of just compensation, in violation of the takings clause of the Constitution.[3]

At trial, Wayne alleged under oath that he bought the property for commercial purposes, in light of the fact that the buildings were constructed prior to the enactment of the ordinance, were used for commercial purposes for more than three decades after the ordinance had passed, and the property appeared unsuitable for any use other than industrial or commercial. Further, Wayne presented two appraisal experts, who testified that it would cost more to develop the property as a residential subdivision than the lots would be worth.

The City asserted that Wayne's takings allegations were not ripe for review because Wayne did not exhaust all administrative efforts to develop the property before filing the claim. Further, the City relied upon two restricted appraisal reports showing that the property retained value with enforcement of the zoning ordinance (one alleged the property was worth $250,000, the other $65,000). The City even pointed to the testimony of one of Wayne's appraisal experts, who asserted that the property likely could sell for $10,000 with enforcement of the zoning ordinance. Still further, the City relied upon the other bids for the property at the 2001 auction and the current tax assessments in claiming that the property retained some value.

A jury found the market value of the property to be zero with enforcement of the residential zoning requirement, and $250,000 without enforcement.[4] Wayne moved for an immediate judgment on the verdict.

The trial court held that the owner's regulatory takings claims were ripe for review because further efforts to change the zoning would have been futile. Further, the court ruled that the evidence supported the finding that the property had no market value as residential property. Therefore, the court required the City to pay just compensation of $250,000, plus interest, for the lost value of Wayne's use of the land.[5] Also, the court ruled that Wayne could retain the property in its undeveloped state. The City filed this appeal.

Ruling Affirmed on Appeal

The appellate court first addressed whether the takings claim was ripe for review before addressing the merits of the claim.

Ripeness

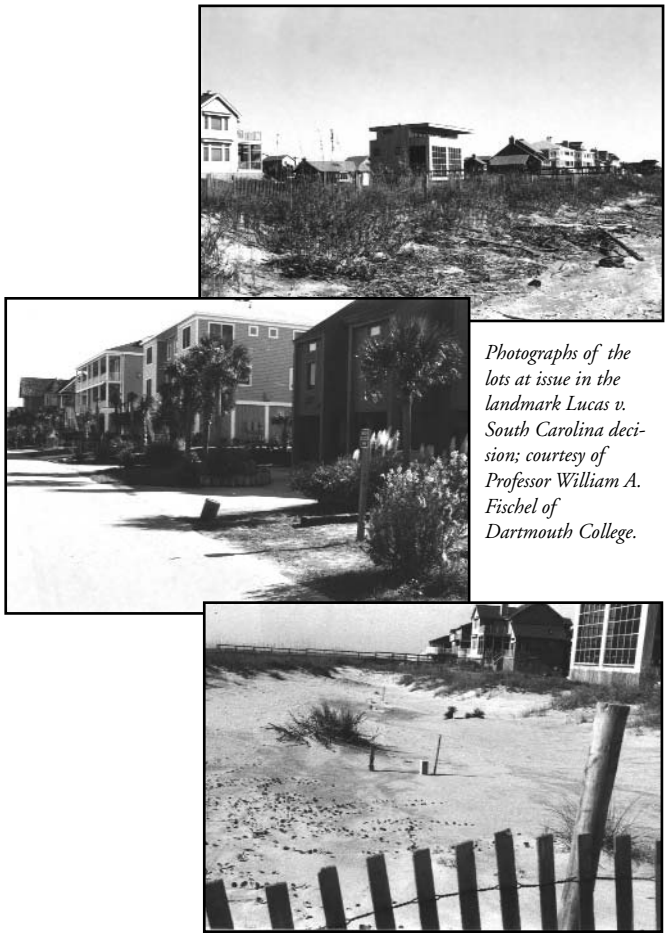
In *Palazzolo v. Rhode Island,*[6] the United States Supreme Court explained that a takings challenge to a land use regulation is not ripe for review unless the entity charged with implementing the regulation has reached a final decision regarding the application of that regulation to the relevant property. Once a final decision is issued, whereby it is clear that the permitted uses on the property are known to a reasonable certainty, a takings claim is ripe.

In *Palazzolo*, the high court found that the denial of an application to fill wetlands constituted a final decision, and the property owner need not file additional applications to fill substantially lesser surface areas when it was evident that the agency interpreted its regulations to bar the applicant from engaging in any filling of the wetlands at issue.

Here, the appellate court found that the takings claim was ripe for review. The court relied on *Palazzolo* in holding that Wayne was not required to apply to the City numerous times for a variety of rezoning requests or special use exceptions where such efforts would be futile, in light of the evidence that the City would approve only residential uses.[9]

Regulatory Taking

In *Lucas v. South Carolina Coastal Council,*[9] the United States Supreme Court held categorically that regulations prohibiting all economically beneficial use of land exact an unconstitutional taking without compensation, unless the restrictions were never part of the landowner's title to begin with in light of background principles of state property law.[9] In Texas, determining whether or not all economically viable use of a particular piece of property has been denied "entails a relatively simple analysis of whether value remains in the property after governmental action."[10] The City claimed that the application of the zoning ordinance did not constitute a categorical regulatory taking because it did not deprive Wayne of all economically viable uses of his property.



Photographs of the lots at issue in the landmark Lucas v. South Carolina decision; courtesy of Professor William A. Fischel of Dartmouth College.

The court expressed disregard for the City's attempt at evaluating property based upon tax appraisals, in light of the infrequent relationship between taxes paid and actual value. The court also found that the two appraisals predominantly relied upon by the City amounted to mere speculation.

Instead, the court focused on the testimony of Wayne's experts. These experts asserted that converting the land to residential use would cost more money than Wayne could ultimately sell the residential units for, in light of the high cost in removing the existing buildings, which contained asbestos and lead in dangerous quantities and thus could require expensive environmental remediation upon demolition.

Therefore, the appellate court did not disturb the jury's finding that the residential use restriction prohibited all economically beneficial use of the land and upheld the trial court's decision with respect to the regulatory taking.[11] However, the court overruled the trial court decision to the extent it ruled that Wayne could retain the property upon the provision of just compensation. Instead, upon fulfillment of the judgment, the City would acquire full title and interest in the property.

The court acknowledged that the United States Supreme Court has explained that *Lucas* regulatory takings are limited to the "extraordinary circumstance" when no economically viable use is permitted.[12] Nonetheless, despite evidence in the record indicating at least some remaining value in the land with enforcement of the ordinance, the court did not address in its written opinion both United States Supreme Court and lower court opinions finding that government action that causes a substantial

See Sherman, page 15

Appellate Court Finds Operators of Sunken Vessels Fully Liable for Removal Costs

S. Scrap Material Co. LLC v. ABC Ins. Co. (In re S. Scrap Material Co. LLC), 541 F.3d 584 (5th Cir. 2008).

Moses R. DeWitt, 2010 J.D. Candidate, Florida State University School of Law

The United States Court of Appeals for the Fifth Circuit recently held that the Wreck Act supersedes the Limitation of Vessel Owner's Liability Act ("Limitation Act"), whereby the owner of a sunken vessel is subject to liability with respect to removal costs even if the vessel sank without the owner's fault or neglect.

Background

Southern Scrap Material Co. ("Southern Scrap") operated a buoyant dry-dock located on the Inner Harbor Navigational Canal in New Orleans, Louisiana. Hurricane Katrina's storm surge damaged the dry-dock, sinking it into the Canal on August 29, 2005. The United States Army Corps of Engineers ("the Corps") determined that the sunken dry-dock needed to be removed because it was a hazard to others navigating the channel.

The Corps contacted Southern Scrap to advise them to remove the hazard, but Southern Scrap did not have the resources to remove it in a timely manner. The Corps then hired an independent construction company to remove the dry-dock at a cost of $8,000,000.

The United States sought to recover the full cost of removal from Southern Scrap. However, Southern Scrap alleged that the Limitation Act restricts its liability to the post-accident value of the dry-dock, which Southern Scrap claims is $316,131.64.

The Limitation and Wreck Acts

Enacted in 1851, the Limitation Act "was designed to encourage investment and protect vessel owners from unlimited exposure to liability" by limiting their liability to the cost of the vessel and its freight, provided that the circumstances giving rise to the damage occurred without the owner's knowledge or privity.[1]

Congress enacted the Wreck Act in 1899 to "prevent obstructions in the Nation's waterways."

Congress enacted the Wreck Act in 1899 to "prevent obstructions in the Nation's waterways."[2] It provided that the "owner…of a vessel sunken in a navigable channel shall commence the immediate removal of the vessel and prosecute the removal diligently, or else be considered as having abandoned the vessel, subjecting it to removal by the United States."[3] Congress amended the Wreck Act in 1986 to allow recovery of removal costs when the owner of the sunken vessel fails to diligently remove the obstruction, regardless of fault for the sinking.

Litigation

Southern Scrap filed a petition to limit its liability to the post-accident value of the dry dock pursuant to the Limitation Act. The district court issued an order restricting prosecution against Southern Scrap outside of the Limitation Act.

The United States filed a motion requesting that the district court lift the order so that the United States could pursue its claim for the full cost of the removal in accordance with the Wreck Act. The district court granted the United States' motion, allowing it to bring a claim against Southern Scrap for the actual removal costs outside the restraints of the Limitation Act. Southern Scrap appealed the district court's holding.

The Appellate Court's Ruling

The United States Court of Appeals for the Fifth Circuit found the Limitation and Wreck Acts are in direct conflict with respect to removal costs. The court affirmed the district court's holding allowing the United States to bring a claim against Southern Scrap for the actual cost of the wreck removal, declaring that "when two statutes irreconcilably conflict, the more recent statute controls."[4]

The court looked to the intent of the 1986 amendment to the Wreck Act ("Wreck Amendment"). The Wreck Amendment "permit[s] the United States to hold a non-negligent vessel owner personally liable for the total amount of the governmental removal costs when it fails to remove its sunken vessel."[5]

Under the Wreck Amendment, the removal costs can be offset by the salvage value of the wreck, but this is usually significantly less than the cost of removal.[6] The court reasoned that allowing Southern Scrap to invoke the Limitation Act would nullify the Wreck Amendment, thereby "violat[ing] the canon of statutory construction that discourages courts from adopting a reading of a statute that renders any part of the statute mere surplusage."[7]

Impact of the Decision

This decision will encourage owners to remove sunken vessels in a timely and efficient manner to avoid disrupting navigation. Otherwise, when the owners of sunken vessels fail to promptly remove their vessels, the United States will be able to recover the full cost of removal.

However, the marine industry suggests the decision may discourage investment in buoyant dry-docks and other vessels, especially in those waters more vulnerable to hurricanes and other natural disasters. Nonetheless, environmentalists and those government officials entrusted with disaster mitigation efforts likely will welcome this result.

Endnotes:

1. *See* 46 U.S.C. § 181 et seq. *See also* ROBERT FORCE el al., ADMIRALTY AND MARITIME LAW 699-700 (abridged ed. 2006).
2. S. Scrap Material Co. LLC v. ABC Ins. Co. (In re S. Scrap Material Co. LLC), 541 F.3d 588 (5th Cir. 2008).
3. *Id.*
4. *Id.* at 593.
5. *Id.* at 594.
6. *Id.* at 593.
7. *Id.* at 594 (citing Bailey v. United States, 516 U.S. 137, 146 (1995)).

Photograph of sunken wreckage courtesy of NOAA.

Federal Appellate Court Rejects Hurricane Katrina Insurance Claim

Northrop Grumman v. Factory Mutual Ins. Co., 2008 U.S. App. LEXIS 17270 (9th Cir. Aug. 14, 2008).

Juliane D. Morris, 2008 J.D. Candidate, University of Mississippi School of Law
Timothy M. Mulvaney, J.D.

A federal appellate court found that a flood damage exclusion provision in the excess layer of a dual-layered insurance policy is unambiguous in excluding damage caused to Northrop Grumman's shipyard in Pascagoula, Mississippi as a result of the storm surge associated with Hurricane Katrina.

Background

Northrop Grumman Corporation ("Corporation"), a global defense contractor employing approximately 120,000 employees worldwide, operates a Mississippi subsidiary, Northrop Grumman Ship Systems ("Northrop Grumman"), located in Pascagoula, Mississippi.[1] Northrop Grumman purchased dual-layered property insurance from Factory Mutual Insurance Company ("Factory Mutual"). The primary policy covered fifteen percent of "all risk including…[f]lood," unless otherwise excluded, up to the first $100 million.[2] The excess policy covered additional losses above $500 million up to the $19.8 billion total value of Northrop Grumman's property for "all risks" but for various specified occurrences such as floods (the "Flood Exclusion").[3]

As a result of Hurricane Katrina in 2005, the Northrop Grumman plant in Mississippi sustained significant water damage, with six to ten feet of water covering some parts of the property.[4] The Corporation estimated its losses as a result of the hurricane at $1,257,100,000, due in part to the damage at the Pascagoula shipyard.[5] Northrop Grumman timely notified its insurers of the losses, and Factory Mutual paid $15 million under the primary policy.[6] With respect to the excess policy, Factory Mutual informed Northrop Grumman that it would analyze the sustained damages in two separate categories: damage caused by wind, under which there is no limit under the policy, and damage caused by flooding, under which there is no coverage due to the Flood Exclusion.

Litigation Ensues

On November 4, 2005, Northrop Grumman filed suit against Factory Mutual in a California state court, as opposed to a Mississippi court, apparently in light of a venue agreement in the insurance contract. In its complaint, Northrop Grumman demanded coverage under the excess policy for the water damage it sustained.[7] Factory Mutual removed the case to federal court in the Central District of California, where both parties filed summary judgment motions asking the court to determine whether or not the Flood Exclusion in the excess policy barred coverage for the water damage from Hurricane Katrina.[8] Summary judgment is appropriate in cases where there is no genuine issue of material fact in dispute.

The district court held in favor of Northrop Grumman, ruling that the Flood Exclusion language was ambiguous because it did not "plainly and clearly reference hurricanes or damage caused by wind."[9] Therefore, the court agreed with Northrop Grumman's interpretation of the Flood Exclusion, stating that the excess policy covered only those floods not caused by wind.[10] Factory Mutual appealed.

The Court of Appeals' Decision

On appeal, Northrop Grumman argued that the contractual language was ambiguous, in reliance upon the fact that the primary policy used the phrase "whether wind driven or not" to define "flood," but the excess policy did not.[11] In alleging that the primary and excess policies should be read together, Northrop Grumman contended that the absence of the phrase "whether wind driven or not" in the excess

policy reflected an intent on Factory Mutual's part to expand coverage.[12] It alleged that Mutual could and should have included this phrase in the definition of "Flood" in the excess policy if it wanted to limit coverage.[13] Further, Northrop Grumman insisted that inclusion of the phrase "whether wind driven or not" in flood exclusion provisions is industry custom, and Factory Mutual contravened this custom by creating a narrower exclusion for flood-related damages.[14]

Under California law, applicable because Factory Mutual did not contend that Mississippi law, or that of any other state, applied, ambiguous terms are generally construed in favor of the insured.[15] However, a policy provision is only considered ambiguous if "it is susceptible to two or more constructions despite the plain meaning of its terms within the context of the policy as a whole."[16]

The Ninth Circuit found that the absence of the language "whether wind driven or not" in the excess policy did not render ambiguous the definition of "Flood" in that policy.[17] The court noted that the excess policy's definition of the term "Flood" included "flood, surface waters, rising waters," etc. The court relied upon lay and legal dictionaries for determining the plain meaning of "flood," and the related terms utilized in the definition, as encompassing the inundation of water over normally dry property, which occurred here.

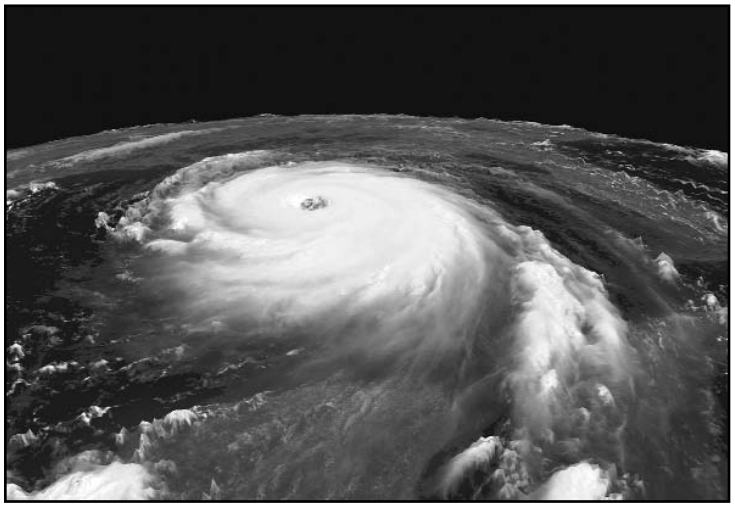
The Ninth Circuit stated that the lack of the phrase "whether wind driven or not" was not an admission of the insurer's intent to "conspicuous(ly) omi(t)" the phrase, but rather "indicative of a lack of specificity."[18] Therefore, the court refused to read the two policies together.[19] Further, the court rejected Northrop Grumman's claim of custom for lack of proof that Factory Mutual was on notice to include the qualifying language in light of prior narrow interpretations of flood exclusion provisions.[20]

Accordingly, the Ninth Circuit reversed the lower court's grant of partial summary judgment for Northrop Grumman, holding that the Flood Exclusion in the excess policy is unambiguous in excluding the damage caused to Northrop Grumman's shipyard as a result of the storm surge associated with Hurricane Katrina. The court remanded the matter to the lower court for consideration of Northrop Grumman's allegation that California's efficient proximate cause doctrine demands coverage of the water damage notwithstanding the language of the contract.[21]

Endnotes:

1. Northrop Grumman Corp. v. Factory Mut. Ins. Co., 2008 U.S. App. LEXIS 17270, *2 (9th Cir. Aug. 14, 2008).
2. *Id.* at *2-3.
3. *Id.* at *4-5.
4. *Id.* at *6.
5. *Id.*
6. *Id.* at *6-7.
7. *Id.* at *7.
8. *Id.*
9. *Id.*
10. *Id.* at *7-8.
11. *Id.* *15.
12. *Id.*
13. *Id.* at *15-16.
14. *Id.* at *16.
15. *Id.* at *8-9.
16. *Id.* at *9 (quoting Palmer v. Truck Ins. Exch., 988 P.2d 568, 573 (1999)).
17. *Northrop Grumman Corp.*, 2008 U.S. App. Lexis 17270 at *16.
18. *Id.* at *16-17.
19. *Id.* at *13-17.
20. *Id.* at *18.
21. *Id.*

Photograph of Hurricane Katrina courtesy of NOAA.



Florida Voters Pass Working Waterfront Tax Measure

Timothy M. Mulvaney, J.D.

On November 4, 2008, 70.5 percent of Floridian voters approved Amendment 6, which will require assessments of working waterfronts based upon their current use, as opposed to their "highest and best" economic use as condominiums or hotels.

The marine industry favored passage of the amendment as protective of the state's marine sector against property assessments that increased significantly throughout the recent escalation of the real estate market. Some marine-related businesses from Miami to Fort Myers had seen their taxes more than double in a two-year period in light of prospective residential waterfront development.[1]

Photograph of working waterfront courtesy of © Nova Development Corp.

Proponents suggest Amendment 6 will provide incentive for landowners to maintain their properties as working waterfronts and provide public access to the state's waterways. They cite to statistics asserting that Florida's marine businesses contribute more than $18 billion annually to the state's economy and provide over 200,000 jobs, while also playing an important role in the state's leading industry of tourism.[2]

However, some marine groups remain concerned that the amendment is ambiguous as to whether shipping facilities receive the same protections as marinas and boat repair facilities.

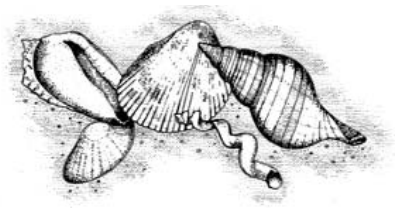
Further, while there was little evidence of organized opposition to the amendment prior to the election, local governments and school districts now are concerned about the considerable resultant revenue shortfalls.[3] Providing tax relief to undeveloped waterfront property could deprive some municipalities of a significant portion of their tax base, leading to program and service cuts.

Stay tuned to *Water Log* for important developments as the state legislature promulgates rules for the implementation of Amendment 6.˅

Endnotes:

1. *See* Bill Frogameni, "Maritime Industry Lauds Passage of Amendment 6," South Florida Business Journal, November 5, 2008; Evan Williams, "Ken Stead Works to Preserve Public Docks and Marinas," Fort Myers Florida Weekly, November 12, 2008.
2. *See generally* Save Our Waterfronts, "Allow Working Waterfronts to Survive – Vote 'YES' on Amendment 6," *available at* www.saveourwaterfronts.org/materials.html.
3. *See, e.g.,* Alexi Howk & Eric Pfahler, "Amendment 6 Could Cost Fort Pierce $150,000 in Taxes," TC Palm, *available at* www.tcpalm.com/news.

Interesting Items



Around the Gulf…

• As this edition went to press, the U.S. Court of Appeals for the Fifth Circuit held in *Omega Protein v. Samson Contour Energy*, No. 07-30725 (5th Cir., November 10, 2008), that failure to properly train a master on how to use electronic obstruction warning equipment did not make the vessel owner fully liable for the collision with another ship. Further, the decision found that the vessel owner is not prevented from limiting its liability where there is insufficient evidence that the failure to train the master caused the collision.

• Iowa's Conservation Reserve Enhancement Program is making strides in preventing nutrients used in farming from not only traversing the state's waterways but also from having an impact hundreds of miles down stream in the Gulf of Mexico. On October 29, 2008, the Gulf of Mexico Program Partnership presented three Iowa environmental entities with a third-place Gulf Guardian Award for their work in partnering with Gulf agencies in these efforts.

• A Mexican company, Petroleos Mexicanos, could triple the amount of its exploratory offshore drilling in the Gulf of Mexico as the result of new contracting arrangements approved under a revised Mexican law. The new legislation - Regulating Article 27 of the Constitution - empowers the country's exploration and production agency to award contracts directly under certain conditions, such as when safety and protection of the environment are involved or in the case of risk or emergency, while all other contracts will be awarded under the traditional arrangement of competitive bidding.

Sherman from page 9

diminution in a property's market value may not amount to a taking.[13]

Endnotes:

1. *See* City of Sherman v. Wayne, 2008 Tex. App. LEXIS 6267, *1 (Aug. 18, 2008).
2. *Id.*
3. *Id.* at *2.
4. *Id.*
5. *Id.*
6. 533 U.S. 606, 632 (2001).
7. *See City of Sherman*, 2008 Tex. App. LEXIS 6267, at *4.
8. 505 U.S. 1003 (1992) (holding that when a property owner is "called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking").
9. *See id.* at 1029.
10. *See City of Sherman*, 2008 Tex. App. LEXIS 6267, at *6.
11. *See id.* at *5-10.
12. *Id.* at *12-13 (citing Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 935 (Tex. 1998)).
13. *See, e.g.,* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (holding that zoning ban that reduced property value by 90% not a taking); Haas v. City & County of San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (finding 95% reduction in property value not a taking). *But see, e.g.,* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) (asserting that 62% reduction in property value may be a taking). When there remains some value in the land, takings jurisprudence ordinarily has relied upon the balancing test set forth in the United States Supreme Court's decision in *Penn Central Transportation, Co., et al., v. New York City, et al.* to determine whether the government action unreasonably interferes with a landowner's use and enjoyment of property. *See* 438 U.S. 104 (1978).

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