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WATER LOG

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Florida Municipality Subject to Takings Claim for Permit Denial after Applicant Refuses Conditions

St. Johns River Management District v. Koontz, 2009 Fla. App. LEXIS 91 (Fla. Dist. Ct. App. 5th Dist. Jan. 9, 2009).

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

Timothy M. Mulvaney, J.D.

In a matter apparently headed to the Florida Supreme Court,[1] a divided Florida Court of Appeals panel held that a water district is subject to a takings claim under the U.S. Supreme Court's decisions in *Nollan* and *Dolan*. In this case set in Monroe County, FL, a landowner refused to accept off-site mitigation conditions of a wetlands development permit and the water district therefore denied the permit application in total.

Background

Coy Koontz's property is comprised predominantly of wetlands, which lie within a "Riparian Habitat Protection Zone" of the Econlockhatchee River Hydrological Basin. Riparian Habitat Protection Zones are areas of high biodiversity that are important for soil conservation and play a significant role in the functioning of aquatic ecosystems. In light of this environmental significance, the Zones are subject to the jurisdiction of the St. Johns River Water Management District ("St. Johns").

Koontz requested a permit from St. Johns to dredge a greater portion of the wetlands on his property than allowed by the existing environmental regulations in order to create a commercial development. St. Johns agreed to approve Koontz's development application if Koontz would offset the impacts of the development by deed restricting the remaining portion of his property for conservation purposes and performing offsite mitigation by either replacing culverts four and one-half miles southeast of his property or plugging certain drainage canals on other property some seven miles away.[2] Alternatively, St. Johns proposed that Koontz reduce his development to one acre and convert the remaining acreage into a conservation area, with no off-site mitigation requirements.

Photograph of the Econlockhatchee River courtesy of Dominika Durtan, with copyright permission as stated at http://creativecommons.org/licenses/by-sa/3.0/ .

Koontz agreed to deed restrict any remaining portion of his property for conservation purposes after construction of his proposed commercial development, but refused to reduce the size of his development or to perform, or pay for, any offsite mitigation costs.[3] Consequently, St. Johns denied Koontz's permit request. Thereafter, Koontz filed suit, alleging that St. Johns had affected a taking of his property.

Trial Court

The trial court ruled in favor of Koontz, holding that St. Johns had affected a taking of his property.[4] In reaching this ruling, the trial court applied the constitutional standards set forth in the United States Supreme Court's landmark decisions in *Nollan v. California Coastal Commission*[5] and *Dolan v. City of Tigard*.[6]

In *Nollan*, the Supreme Court held that the government could condition the issuance of a permit if there exists an "essential nexus" between the condition imposed and the purpose of the regulatory restrictions on the property. In *Dolan* seven years later, the Court added the requirement that there also must be "rough proportionality" between the extent of the condition and the impact of the proposed development.

In implicitly asserting that a condition requiring Koontz to deed restrict the remaining portion of his property after construction of his proposed commercial development was enough to offset the environmental impacts of that development, the trial court found "that the off-site mitigation imposed by [St. Johns] had no essential nexus to the development restrictions already in place on the Koontz property and was not roughly proportional to the relief requested by Mr. Koontz."[7]

Without contesting the evidentiary foundation for the trial court's findings that the proposed conditions did not meet the *Nollan* and *Dolan* tests, St. Johns appealed the trial court's decision. St. Johns contended that the lower court never had subject matter jurisdiction to review Koontz's takings claim because his allegation was a challenge to the merits of a permit denial, which is the subject of administrative not judicial review, as nothing was exacted from Koontz that could constitute a taking.

Appellate Decision

The appellate division asserted that St. Johns' argument, "although couched in terms of jurisdiction," actually addresses whether an exaction claim is cognizable when the land owner refuses to agree to an improper request from the government resulting in the denial of the permit. In citing U.S. Supreme Court Justice Antonin Scalia's dissent from the denial of certiorari in *Lambert v. City & County of San Francisco*,[8] the appellate court found that "[t]here is no apparent reason why the phrasing of an extortion demand as a condition precedent rather than as a condition subsequent should make a difference."[9] Reliant upon Justice Scalia's rationale, the Florida appellate court upheld the trial court's decision, asserting that any condition precedent that does not comply with *Nollan* and *Dolan* amounts to an unconstitutional exaction rising to a taking and is thus proper for a circuit court to address under Florida Statutes §373.617(2).

In a lengthy dissent, Judge Griffin contended that the *Nollan* and *Dolan* tests are applicable only where conditions are actually imposed, not where the development application is denied based on the owner's refusal to accept the conditions, in accord with the U.S. Supreme Court's recent opinion in *Lingle v. Chevron, USA, Inc.*[10] In *Lingle*, the court declared that challenges that government actions do not substantially advance a state purpose do not sound in takings law, but rather substantive due process, under which Koontz did not contest St. Johns' condition demand. Under the dissent's rationale, once the government denied his application, Koontz had the same development rights that he had before he began the permitting process, and thus lost nothing that could be taken.

Judge Griffin contended that the majority's conclusion will result in discouraging governments, which are generally risk averse, from proposing impact offsets from developers that could improve societal welfare in lieu of outright denials, in light of the significant financial exposure if a court concludes after-the-fact that the government has asked for too much under the *Nollan* and *Dolan* tests. Rather, governments are more likely to deny the permit and defend it against a challenge under the traditional regulatory takings balancing approach set forth in the U.S. Supreme Court's 1978 opinion in *Penn Central Transp. Co. v. New York City*.[11]

In granting St. Johns' Motion for Certification, the Florida Court of Appeals certified the following question to the Florida Supreme Court: "Where a landowner concedes that permit denial did not deprive him of all or substantially all economically viable use of the property, does Article X, Section 6(a) of the Florida Constitution recognize an exaction taking under the holdings of *Nollan* and *Dolan* where, instead of a compelled dedication of real property to public use, the exaction is a condition for permit approval that the circuit court finds unreasonable?" Stay tuned to

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Mississippi Court of Appeals Denies Easement Requests

Evanna Plantation, Inc., v. Thomas, 999 So. 2d 442 (Miss. Ct. App. 2009).

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

The Mississippi Court of Appeals affirmed a trial court ruling denying Plaintiffs' requests for various easements over either of Defendants' two private roads. Finding no clear error in the trial court's decision that the Plaintiffs failed to provide satisfactory evidence necessary to obtain an express easement, an easement by necessity, or a prescriptive easement, the Court of Appeals affirmed.

Background

Evanna Plantation, Inc., and the David Klaus Trust, for which David Klaus served as president and trustee, respectively, jointly owned a 100-acre parcel of land in Sharkey County, MS. Klaus sought an easement over either Ernest or Camille Thomas' private roads, arguing these roads constitute the only practical ways to traverse over the naturally moving water body known as "Coon Bayou" to access his 100-acre property.[1] The Bayou creates a natural barrier to Klaus' property, which is bordered to the east by Ernest Thomas' property and to the south by that of Camille Thomas.

Photographs of a central Mississippi bayou courtesy of the USDA Natural Resources Conservation Service, photographer Lynn Betts.

Specifically, Evanna Plantation, Inc. claimed a prescriptive easement over a private road on Ernest Thomas' property, in addition to an easement by necessity and/or a prescriptive easement over a private road on Camille Thomas' property. Concurrently, the David Klaus Trust claimed a prescriptive easement over Camille Thomas' road and an express easement, easement by necessity, and prescriptive easement across Ernest Thomas' road. Additionally, a lessor, Sabill Farms, sought compensatory damages, including $21,000 for alleged lost rental opportunities.[2]

The Sharkey County Chancery Court denied all easement claims, rejected all requests for damages, and declined to grant an injunction that would prevent either Thomas from blocking access. Arguing that the trial court erred in its judgment, Evanna Plantation, Inc., and the David Klaus Trust appealed.

Appellate Court Upholds Denial of Easement Requests

Unless the ruling "was manifestly wrong, clearly erroneous, or applied the wrong legal standard," the judgment must stand.[3] Though Evanna Plantation, Inc., and the David Klaus Trust brought separate easement claims, the court declined to review each claim as if brought by individual parties since all claims arose from David Klaus' involvement. Focusing on the types of easements sought, the Court of Appeals looked for clear error in the trial court's ruling.

Express Easement

An express easement typically is created by recording proof of an easement at the appropriate county land records office.

However, Appellants offered no evidence of a recorded easement for either property. Furthermore, Appellants' express easement claim incorrectly relied on a prescriptive easement case, *Dieck v. Landry*.[4] In light of Appellants' failure to cite any authority supporting the express easement contention, the appellate court decided that the claim was procedurally barred and the trial court therefore correctly denied this claim.

Easement by Necessity

When a portion of land cannot be accessed except by crossing another's property, an owner may seek an easement by necessity. The appellate court stated that the determining factor is "whether an alternative would involve disproportionate expense and inconvenience."[5] According to the court, for the purposes of an easement by necessity, a "disproportionate expense" would occur when the alternative's cost would exceed the value of the property.[6] Though Appellants discussed the merits of bridges and culverts, they offered no evidence as to the prospective costs of these alternatives. Additionally, Appellants did not present estimates of the value of the 100-acre parcel. Without this information, the trial court declared that it found itself unable to determine whether these alternatives would cause a "disproportionate expense." The Court of Appeals found no clear error in that judgment.

Prescriptive Easement

A party claiming a prescriptive easement must satisfy the same burden as that required for proving adverse possession. Among other factors, the claiming party's use of the property must be hostile and exclusive.[7] Klaus used the private roads with the permission of both Ernest and Camille Thomas, as well as that of the previous owners. The Court restated the rather obvious principle that permissive use cannot constitute hostility.

Furthermore, Klaus failed to meet the exclusive use requirement for obtaining a prescriptive easement. According to the court, Klaus did not present any evidence to suggest that Evanna Plantation, Inc., and the David Klaus Trust ever intended to "use the land as [their] own to the exclusion of all others."[8] Based on this failure to meet the requirements of a prescriptive easement, the Court of Appeals could find no clear error in the trial court's ruling.

Conclusion

In light of the insufficient evidence in support of the easement allegations of Evanna Plantation, Inc., and the David Klaus Trust, the Court of Appeals found no clear error in the trial court's judgment. Therefore, the Thomas's retained the right to refuse access across their land to the property in question.

[for] an easement by necessity . . . the determining factor is "whether an alternative would involve disproportionate expense and inconvenience."

Endnotes:

1. *Evanna Plantation, Inc., v. Thomas*, 999 So. 2d 442 (Miss. Ct. App. 2009).
2. *Id.* at 445.
3. *Id.* (citing *Biddix v. McConnell*, 911 So. 2d 468, 474 (Miss. 2005)).
4. 796 So. 2d 1004 (Miss. 2001).
5. *Evanna Plantation, Inc.*, 999 So. 2d at 446 (citing *Swan v. Hill*, 855 So. 2d 459, 464 (Miss. Ct. App. 2003)).
6. *Evanna Plantation, Inc.,* 999 So. 2d at 446
7. *Id.* at 447 (citing *Biddix*, 911 So. 2d at 475) ("To acquire [a]...prescriptive easement the claimant must show that the possession was: (1) open, notorious, and visible; (2) hostile; (3) under claim of ownership; (4) exclusive; (5) peaceful; and (6) continuous and uninterrupted for ten years.").
8. *Evanna Plantation, Inc.*, 999 So. 2d at 447(citing *Biddix*, 911 So. 2d at 476).

Recommended citation: Jonathan Proctor, *Mississippi Court of Appeals Denies Easement Requests*, 29:1 WATER LOG 4 (2009).

Mississippi Supreme Court Finds for Hancock County in Zoning Decision

Childs v. Hancock County Bd. of Supervisors, 1 So. 3d 855 (Miss. 2009).

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

The Mississippi Supreme Court recently reversed a Court of Appeals ruling regarding the Hancock County Board of Supervisors' decision to rezone waterfront coastal property for commercial purposes. The Supreme Court held that there existed substantial evidence to support the Board's decision, that the Board justifiably considered its familiarity with the area, and that the Board may rely upon its planning commission's recommendations. The state's high court found that the Court of Appeals incorrectly substituted its judgment for that of the Board, instead of extending the appropriate deference to the municipality on land use control matters.

Background

The area in question included approximately 1,000 acres of waterfront coastal property that the County zoned for highway commercial, medium density residential, and general agricultural uses. In an effort to bolster the local economy, the Hancock County Board of Supervisors ("Board") in 2005 sought to determine the viability of rezoning the area to allow for the construction of condominiums, hotels, and general tourist attractions.

When deciding whether to reclassify an area for zoning purposes, the Board relies on a Planning Commission to review the relevant issues and submit its recommendations to the Board, as is typical of most municipal government land use hierarchies. Here, the Planning Commission examined studies of the area, reviewed zoning regulations from other jurisdictions, and evaluated a report on the rehabilitation of obsolete subdivisions.[1] Subsequently, the Planning Commission held a public hearing and proposed the creation of a new zoning classification, "C-4," which would allow for commercial resorts, condominiums, apartments, hotels, and motels.

In order to re-zone a property, as discussed in more detail below, the original classification must be in error or the character of the property must have changed since that original classification. The Planning Commission found that the anticipated construction of the new Bayou Caddy Casino in the immediate vicinity of the subject property constituted a sufficient change in character. After public debate, the Planning Commission unanimously resolved to adopt the new C-4 classification and to designate the property in question as such in an effort to complement the Bayou Caddy Casino.[2]

The Planning Commission's resolution came before the Board, which voted to adopt the recommendation. Additionally, the Board adopted the Planning Commission's "findings and public hearings . . . and all documents reviewed and relied upon by the [Planning Commission]."[3] Relying upon the Planning Commission's evidence and recommendation, the Board approved the reclassification of the property in question to C-4 and opened the area for resort development.

Childs, along with other owners of land adjacent to the re-zoned property, challenged the Board's decision in the Hancock County Circuit Court. The Circuit Court, or trial court, found that the Board's decision was based upon substantial evidence and therefore was not arbitrary and capricious. On appeal, the Court of Appeals reversed the Circuit Court's decision, finding that the Board failed to present evidence of a change in character of the property sought to be rezoned. The Board petitioned the Mississippi Supreme Court to review the decision, and the State's highest court granted review.

Mississippi Supreme Court Finds for Board

When reviewing zoning disputes, courts may only set aside a decision if it is clearly "arbitrary, capricious,

discriminatory, . . . illegal, or without a substantial evidential basis."[4] Zoning decisions are presumed to be in the public's interest. Therefore, when the Board establishes a local land use regulation, that action is presumed to be valid, and the burden of proving otherwise rests with the challenger. If the question at issue is fairly debatable, the court may not impose its own judgment.

A different burden applies when an individual challenges a re-zoning of property.[5] In that instance, a party must prove that either "(1) there was a mistake in the original zoning, or (2) the character of the neighborhood has changed to such an extent as to justify rezoning and that a public need exists for rezoning."[6] In reviewing and researching the issue, the Planning Commission found that present conditions differed from the time when the Board originally zoned the property in 1997, and that reclassifying the property for commercial resorts would benefit the public.

The Court of Appeals found fault with the Board for adopting the findings and documents relied upon by the Commission without conducting its own research. However, the Supreme Court stated that the Board is entitled to incorporate the Commission's research as its own. Furthermore, with respect to any change in character of the area, the Board may use its common knowledge and familiarity with the area when making its decision.

Conclusion

The Mississippi Supreme Court clearly and unequivocally rejected the Court of Appeals' decision. The high court asserted that the appellate court substituted its own judgment for that of the Board by focusing not on whether there was substantial evidence to support the Board's decision but rather on the merits of the proposal. Because the issue of whether to reclassify the area was fairly debatable, the Supreme Court held that the Board's decision is presumed valid and given great deference.[7]

Endnotes:

1. *Childs v. Hancock County Bd. of Supervisors*, 1 So. 3d 855, 857 (Miss. 2009).
2. *Id*. at 858.
3. *Id*.
4. *Id*. at 859.
5. *Id*. at 860.
6. *Id*. (citing *Bridge v. Mayor and Bd. of Aldermen of Oxford*, 995 So. 2d 81 (Miss. 2008)).
7. *Childs,* 1 So. 3d at 861 (citing *Perez v. Garden Isle Cmty. Ass'n*, 882 So. 2d 217, 220 (Miss. 2004)).

Recommended citation: Jonathan Proctor, *Mississippi Supreme Court Finds for Hancock County in Zoning Decision*, 29:1 WATER LOG 6 (2009).

Photograph of Bayou Caddy Casino building site from http://www.coast-writer.blogspot.com, courtesy of Ellis Anderson, photographer Joe Tomasovsky.

Florida Court Reverses Dismissal of Takings Claims on Statute of Limitations Grounds

Collins v. Monroe County, 999 So. 2d 709 (Fla. Dist. Ct. App. 3d Dist. 2008)

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

The Third District Court of Appeal of Florida held that a takings claim was not a categorical challenge and, therefore, the statute of limitations did not begin to run until the land use authority made a determination as to what type of use is permitted, if any, on the landowners' properties.

Background

In 1985, the Florida Legislature enacted a State Comprehensive Plan that Monroe County adopted in 1986. The Comprehensive Plan altered the zoning classification for much of the County, which includes the Florida Keys, from "General Use" to "Conservation-Offshore Island" in an effort to protect areas of sensitive environmental character. In 1996, Monroe County adopted its Year 2010 Comprehensive Plan ("2010 Comprehensive Plan").

Collins and several other plaintiffs (together, "Landowners") owned real property in Monroe County.[1] In 1997, the Landowners filed Beneficial Use Determination (BUD) petitions under the 2010 Comprehensive Plan, which permits property owners whose properties have been deprived of all economic use to secure relief through an efficient, non-judicial proceeding.[2] In 2002, the Monroe County Board of County Commissioners reviewed the BUD recommendations of a Special Master, found that each Landowner had been deprived of "all economic use," and approved the Special Master's recommendations that the County purchase the properties.[3]

In 2004 the Landowners brought suit alleging that their property had been taken without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, for the County never offered nor paid the Landowners just compensation.

In declaring that the adoption of the 2010 Comprehensive Plan deprived the Landowners of all economic value in their properties, the trial court found that this government action constituted a categorical taking. However, the Florida statute of limitations requires landowners to file inverse condemnation suits within four years of the government action that allegedly caused the taking. Therefore, the trial court agreed with the State's defense that the causes of action were barred because the four-year statute of limitations had elapsed, for the County and the City had adopted the 2010 Comprehensive Plan in 1996.

Photograph of lagoon in Monroe County, FL courtesy of the National Biological Information Infrastructure, photographer Vicky Quick.

Categorical vs. As-Applied Takings Claims

The United States Supreme Court established a categorical regulatory takings test in *Lucas v. South Carolina Coastal Council*, declaring that a regulation that deprives a landowner of all economic use of her property constitutes a *per se* taking, unless the regulation simply restates a preexisting limitation on title under state common law.[4] However, only in rare circumstances does property possess absolutely no economically beneficial use, and indeed several Justices questioned the valueless finding in *Lucas* itself.[5]

The Florida appellate court here described an as-applied challenge as a claim that raises the question of whether there has been a substantial deprivation of economic use through the application of a regulation that amounts to a taking, in accordance with the applicable balancing test under the U.S. Supreme Court's opinion in *Penn Central Transp. Co v. City of New York*.[6] A *Penn Central* analysis involves assessing the "economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action."[7]

The Appellate Court's Determination

The appellate court found that while the adoption of the 2010 Comprehensive Plan in the cases at hand restricted the development of the properties, it did not deprive the landowners of all economically beneficial use. To the contrary, some received post-BUD building permits or sold their properties. Thus, the mere enactment of the plan at issue did not eliminate all economically beneficial use of the property, contrary to the finding of the Special Master.

The Appellate Court ruled that the trial courts erred in determining that the adoption of the 2010 Comprehensive Plan constituted a categorical *Lucas* taking because the property retained economic value. Instead, the court asserted that the landowners' takings claims were "as-applied" challenges to the application of the Monroe County land use regulations to specific properties.[8]

Takings jurisprudence states that a landowner cannot be expected to bring a takings cause of action when she does not know the allowable uses of her property, nor should a governmental land use authority face takings challenges before having an opportunity to make a final determination on the permitted uses, if any, for the property. Thus, an as-applied challenge is not ripe for judicial review until the government has made that final determination.[8] Therefore, the statute of limitations cannot begin to run until the land use authority has notified the landowner of that determination, as well as had an opportunity to determine whether to grant any variances or waivers that are allowed by law. The court declared that the 2002 BUD determination constituted a final decision on the uses of the properties. Thus, the 2004 filing fell well within the four year statute of limitations.

. . . a landowner cannot be expected to bring a takings cause of action when she does not know the allowable uses of her property . . .

Endnotes:

1. *Collins v. Monroe County,* 999 So. 2d 709 (Fla. Dist. Ct. App. 3d Dist. 2008).
2. *Id.* at 711.
3. *Id.* at 711-12.
4. 505 U.S. 1003, 1017 (1992).
5. *See, e.g., id. at 1076* (Souter, J., dissenting) (stating that he would dismiss the writ of certiorari as improvidently granted in light of the "highly questionable" trial court conclusion that Lucas was deprived of his "entire economic interest.").
6. 438 U.S. 104 (1978).
7. *Id.*
8. *Collins*, 999 So. 2 at 715-16.
9. *Id.* at 715.

Recommended citation: Moses R. DeWitt, *Florida Court Reverses Dismissal of Takings Claims on Statute of Limitations Grounds*, 29:1 WATER LOG 8 (2009).

As MRGO Nears Closure, Takings Suit Proceeds

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

After a June 5, 2008 Congressional de-authorization, the United States Army Corps of Engineers has begun depositing over 433,000 tons of stone near Bayou La Loutre in an effort to block the Mississippi River-Gulf Outlet and allow natural wetlands to return to the area.[1] Meanwhile, a takings suit on behalf of a large class of private property owners proceeds on the theory that the outlet caused portions of their lands to become submerged.

Background

The Mississippi River-Gulf Coast Outlet ("MRGO") is a seventy-six mile long,[2] man-made shipping channel lying between Lake Borgne and marshland, constructed by the United States Army Corps of Engineers ("Army Corps") in 1968.[3] By dredging shallow bays, coastal marshes, and cypress swamps, the Army Corps created this shipping thoroughfare.[4] Though the project was intended to shorten the travel time between the Port of New Orleans and the Gulf of Mexico, many blamed the channel for contributing to the flooding of St. Bernard Parish, Louisiana, in the aftermath of Hurricane Katrina.[5] Without the MRGO, some allege that the hurricane would have traveled over the wetlands dredged in constructing the MRGO en route to New Orleans, possibly weakening its overall strength and lessening the sheer volume of water that led to devastating floods.

Even prior to Hurricane Katrina, the channel was the subject of criticism from environmental groups, who contended that it destroyed thousands of acres of wetlands and marshes that served as a vital shore protection buffer during hurricanes and other coastal storms.[6] The environmentalists asserted that, in addition to their functioning as protection features for lands upriver from the full force of hurricanes, the wetlands of Louisiana also support a unique and diverse ecosystem. They contended that the MRGO gradually eroded the wetlands' shores, disturbing the natural landscape and decimating many species' habitats. With the MRGO's closing, these groups suggest that the surrounding areas may be able to support the return of marshes and wetlands.

Due in part to the MRGO's potential negative effects during hurricanes, the Corps hopes to complete the outlet closing in time for the 2009 tropical storm season.[7] Though the completed dam may offer some protection from storm surges immediately, shelter from major hurricanes may not be feasible until wetlands are re-established in the area.[8]

. . . environmental groups . . . contended that [the MRGO] destroyed thousands of acres of wetlands . . . that served as a vital shore protection buffer during hurricanes . . .

Not all in the region favor closing the MRGO. Local fishermen worry that the longer routes required to reach fishing grounds and additional boat traffic in narrow bayous ultimately will increase their costs and accident rates.[9] Previously reliant on the MRGO for fast and easy access to the Gulf of Mexico, the fishermen are currently seeking adjustments to the Corps' plans, though with construction underway, they may be too late.[10]

MRGO Litigation

Some residents affected by the MRGO's alleged contributions to the flooding of their homes, including television news anchor Norman Robinson, filed suit in the U.S. District Court for the Eastern District of Louisiana, claiming that the Corps is responsible for the failure of the 17th Avenue and London Avenue Canal Levees and acted negligently in constructing and maintaining the MRGO.[11] The court dismissed

the class action suit against the Army Corps that alleged failure of drainage canal levees, in light of the government's immunity from liability for damage caused by its flood-protection projects.[12] However, the same court commenced trial on April 20, 2009 for those claims asserting that the Corps ignored environmental and other laws in maintaining the MRGO, a federal navigation, not a flood control, project.

In the only other remaining federal lawsuit against the Army Corps on behalf of Katrina flood victims, the St. Bernard Parish government and residents of St. Bernard Parish and the Lower 9th Ward of the City of New Orleans alleged that the construction and maintenance of the MRGO directly led to the destruction of their homes during Hurricane Katrina. On October 17, 2005 they filed suit seeking compensation under a constitutional takings theory.[13]

Originally, Plaintiffs argued that, without the MRGO, their properties would not have been subjected to the destruction and devastation of Hurricane Katrina.[14] However, at least according to the federal government, the complaint now seeks to recover damages based only on the alleged exposure of their properties to an increased risk of flooding that is alleged to be attributable to the creation, operation, dredging and maintenance of the MRGO.[15] The United States contends that the potential increases in flood exposure are caused not by the MRGO, but by subsidence and sea level rise.

Plaintiffs contend that the dismissal of the class action lawsuit in the Robinson case will have no bearing on these claims. After multiple amendments to the complaint over the past three years, the matter is proceeding in the United States Court of Federal Claims in Washington, DC, a specialized court that hears claims against the United States government based on the "Constitution, federal statutes, executive regulations, or contracts, express or implied-in-fact."[16] A hearing on the United States' motion for dismissal is scheduled for May 6, 2009 in New Orleans. In its motion, the United States alleges that the claims are time-barred by the applicable statute of limitations and that plaintiffs seek damages only for future flooding, which are speculative. Stay

Aerial photograph of New Orleans just below the junction of the MRGO Canal, courtesy of the USGS (1997).

tuned to future editions of Water Log for updates on the status of this lawsuit.

Endnotes:

1. US Army Corps of Engineers, *MRGO Closure Structure Progress as of 11 April 2009*, http://mrgo.usace.army.mil/MRGO/Progress/MRGO%20Progress%204-11-09.pdf (last visited April 13, 2009).
2. *Tommaseo, et al. v. United States*, 80 Fed. Cl 366, 367 (Fed. Cl. 2008).
3. *Id.* at 368.
4. *Id.*
5. Bob Warren, *Goodbye MR-GO: Work begins to close shortcut to Gulf of Mexico*, THE TIMES-PICAYUNE, Jan. 31, 2009, *available at* http://www.nola.com/news/t-p/frontpage/index.ssf?/base/news-12/123338321850000.xml.&coll=1.
6. *Id.*
7. Mark Schleifstein, *Plans for Closing MR-GO Advance*, THE TIMES-PICAYUNE, Feb. 11, 2008, http://www.nola.com/news/index.ssf/2008/02/plans_for_closing_mrgo_advance.html (last visited April 13, 2009).
8. Maya Rodriguez, *Emotions Run High as St. Bernard Residents Mark Close of MR-GO*, WWLTV, March 28, 2009, http://www.wwltv.com/topstories/stories/wwl032809mlmrgo.7e683cd7.html (last visited on April 13, 2009).
9. Rob Masson, *MRGO Closing Affects Fishing Industry*, FOX 8 WVUE New Orleans, April 10, 2009, http://www.fox8live.com/news/local/story/MRGO-closing-affects-fishing-industry/v1lSlQV7XEGoYRp-oB9BSg.cspx (last visited April 12, 2009).
10. *Id.*
11. *Robinson v. United States*, Civil Action No. 06-2268, United States District Court, Eastern District of Louisiana.
12. *See* Susan Finch, *St. Bernard wetlands changed dramatically after MRGO was built, geologist testifies*, THE TIMES-PICAYUNE, April 20, 2009, *available at* http://www.nola.com/news/index.ssf/2009/04/st_bernard_wetlands_changed_dr.html.
13. *Tommaseo*, 80 Fed. Cl. 366.
14. Defendant's Motion for Summary Judgment and Incorporated Memorandum of Law in support thereof, filed Nov. 7, 2008 (on file with Editor).
15. *Tommaseo, et al.*, 80 Fed. Cl. at 367.
16. U.S. Court of Federal Claims, *About the Court*, http://www.uscfc.uscourts.gov/about-court (last visited April 19, 2009).

Recommended citation: Jonathan Proctor, *As MRGO Nears Closure, Takings Suit Proceeds*, 29:1 WATER LOG 10 (2009).

Photograph of the MRGO at Bayou Beinvenue courtesy of the U.S. Army Corps of Engineers, Photographer Michael Maples.

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future editions of Water Log for updates on the Florida high court's review.

Endnotes:

1. *See* St. Johns River Water Mgmt. Dist. v. Koontz, 2009 Fla. App. LEXIS 2267 (Fla. Dist. Ct. App. 5th Dist. Mar. 20, 2009) (granting Motion of Certification to Florida Supreme Court).
2. *See* St. Johns River Water Mgmt. Dist. v. Koontz, 2009 Fla. App. LEXIS 91, *5 (Fla. Dist. Ct. App. 5th Dist. Jan. 9, 2009).
3. *Id.* at *2.
4. *Id. at *5.*
5. 483 U.S. 825 (1987).
6. 512 U.S. 374 (1994).
7. *St. Johns*, 2009 Fla. App. LEXIS 91 at *6.
8. 529 U.S. 1045 (2000) (J. Scalia, dissenting denial of certiorari).
9. *St. Johns*, 2009 Fla. App. LEXIS 91 at *9, n. 3.
10. 544 U.S. 528 (2005).
11. 438 U.S. 104 (1978).

Recommended citation: Moses R. DeWitt and Timothy M. Mulvaney, *Florida Municipality Subject to Takings Claim for Permit Denial after Applicant Refuses Conditions*, 29:1 WATER LOG 2 (2009).

Eleventh Circuit Affirms Dismissal where Claimant Failed to Exhaust State Remedies

Busse v. Lee County, 2009 U.S. App. LEXIS 5055 (11th Cir. Fla. Mar. 5, 2009).

Timothy M. Mulvaney, J.D.

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of Plaintiff's claim that Lee County, Florida had taken his coastal property without just compensation, as the claimant failed to seek compensation in state court prior to filing the inverse condemnation claim in federal court.

. . . a claimant must pursue . . . takings claims in state court prior to . . . federal court, even if the state remedy became available after the . . . [alleged] taking.

Background

In 1969, the Board of Commissioners of Lee County, Florida ("Board") adopted a resolution claiming certain lands in the Cayo Costa subdivision as public lands ("the Resolution").[1] In the Resolution, which referenced the Cayo Costa subdivision map, the Board laid claim to all non-designated parcels on the map, as well as to any accretions to those parcels.[2] The Plaintiff, Jorg Busse, alleged that he owns one of the parcels, with all accretions thereto, to which the Board laid claim.[3]

Busse filed suit in federal district court challenging the Resolution as violative of his private property rights under a variety of both federal and state laws. The United States District Court for the Middle District of Florida, on the government's motion, found that Busse had stated a valid takings claim but dismissed it in light of the fact that he had failed to exhaust all available state remedies. Lacking subject matter jurisdiction over Busse's federal takings claim and declaring that he had stated no other valid federal claims under the equal protection or due process clauses, the court also declined to exact supplemental jurisdiction over the state claims.[4]

Appellate Court Affirms District Court's Dismissal for Lack of Subject Matter Jurisdiction

The Court of Appeals for the Eleventh Circuit explained that a claimant can only recover on a takings theory if she can prove she did not receive just compensation for the taking of her property.[5] Therefore, a takings claim is ripe for federal review only upon demonstration that the claimant unsuccessfully sought compensation through all available state procedures.[6] Though Florida law has permitted inverse condemnation suits since at least 1990, Busse asserted that those procedures were not available when the Board adopted the Resolution in 1969. However, the appellate court cited circuit precedent in holding that a claimant must pursue such takings claims in state court prior to filing in federal court, even if the state remedy only became available after the date of the government action that allegedly constitutes the taking.[7]

The court also upheld the district court's dismissal of Busse's other federal allegations for failure to state a claim. The court asserted that Busse's procedural due process claim is invalid because (1) he possessed a state remedy in inverse condemnation to counter any alleged procedural violations in the Board's adoption of the Resolution and made no claim that that remedy was insufficient,[8] and (2) even if the state takings remedy was insufficient, the Board's act was "legislative in nature" in that it affected a large swath of persons rather than specifically targeting Busse or his

immediate neighbors, wherefore a procedural due process claim is unavailable.[9]

The appellate court also dismissed Busse's substantive due process claim as plead, for private property rights are not a "fundamental right" created by the federal Constitution but rather are defined by state law.[10] The court did not interpret Busse's pleading to challenge the validity of the Board's adoption of the Resolution as arbitrary and capricious government action under the substantive due process clause, so the court did not address whether Plaintiff had a valid claim under such a theory.[11]

Further, the Eleventh Circuit upheld the dismissal of Busse's equal protection claim, for Busse had only plead that the Board had treated privately-owned and publicly-owned property differently in its exercise of the taking power, and not that he had been treated differently than similarly-situated private landowners. Since publicly-owned lands are not subject to the power of eminent domain but privately-owned lands are, the court ruled that Busse, as a private property owner, could not be similarly situated to a public landowner, whereby his equal protection claim was invalid.[12]

Finally, the Court of Appeals held that the district court was within its discretion in refusing to exercise supplemental jurisdiction over all of Busse's pending state claims where it has dismissed all claims over which it has original jurisdiction.[13]

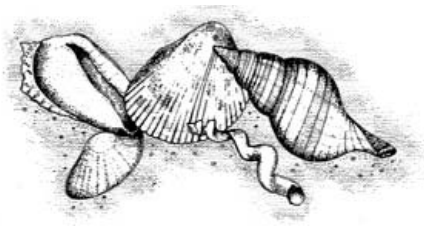
Endnotes:

1. *See* Busse v. Lee County, 2009 U.S. App. LEXIS 5055, *2 (11th Cir. Fla. Mar. 5, 2009).
2. *Id.*
3. *Id.* at *2-3.
4. *Id.* at *5.
5. *Id.* (citing Eide v. Sarasota County, 908 F.2d 716, 720 (11th Cir. 1990)).
6. *See Busse*, 2009 U.S. App. LEXIS 5055 at *8.
7. *Id.* at *8 (citing Reahard v. Lee County, 30 F.3d 1412, 1417 (11th Cir. 1994)).
8. *See Busse*, 2009 U.S. App. LEXIS 5055 at *9.
9. *Id.* (citing 75 Acres, LLC v. Miami-Dade County, Fla., 338 F.3d 1288, 1294 (11th Cir. 2003)).
10. *See Busse*, 2009 U.S. App. LEXIS 5055 at *11.
11. *Id.* at *12-13, n.4.
12. *Id.* at *11.
13. *Id.* at *13-14.

Recommended citation: Timothy M. Mulvaney, *Eleventh Circuit Affirms Dismissal where Claimant Failed to Exhaust State Remedies*, 29:1 WATER LOG 13 (2009).

Photograph of Florida coastal wetlands courtesy of NOAA.

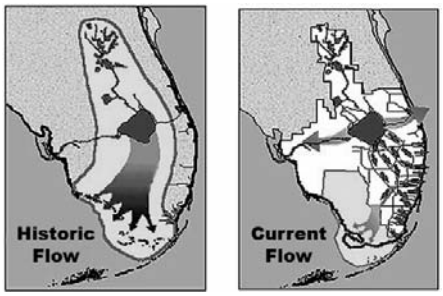
Interesting Items



Around the Gulf…

Economic Crisis Impacts Proposal to Preserve Florida's Everglades

In early April, Florida Governor Charlie Crist announced that a prior proposal to purchase 180,000 acres from the United States Sugar Corporation for $1.75 billion in an effort to preserve the Everglades has been reduce to 72,500 acres in light of economic constraints. The revision, which would cost the state $530 million via a bond issue, is subject to the approval of the South Florida Water Management District and the corporate board of United States Sugar. Many predicted that the original plan would renew the flow of water between Lake Okeechobee and the Everglades, though the water supply and environmental benefits of the reduced proposal have drawn only tacit praise. According to the proposal, United States Sugar would continue to farm 40,500 acres for at least seven years at a lease rate of $150/acre per year. The remaining 32,000 would be available to the state for water treatment and storage. The State would retain a ten-year option to match any purchase offer for United States Sugar's additional 107,500 acres.



Water flow graphic courtesy of NASA.

Louisiana Seeks to Funnel Sediment from Mississippi River to Restore Coastal Wetlands

Louisiana has lost approximately 2,000 square miles of coastal wetlands in the past 80 years. On April 13th, Louisiana Governor Bobby Jindal announced a plan to counter wetlands loss associated with coastal storms, sea level rise, saltwater intrusion, and the blockage of some flowing sediment by the levee system on the Mississippi River. Jindal favors replacing the Army Corps of Engineers' annual navigation facilitation practice of dredging a sizable portion of that blocked sediment and discharging it into the Gulf with an innovative $28 million project. In a pilot venture known as the Mississippi River Sediment Delivery System at Bayou Dupont, which is scheduled for completion this summer, the state will transport mud dredged from the bed of the Mississippi River via pipeline into diked coastal areas in the Upper Barataria Basin in Plaquemines and Jefferson Parishes to restore eroding coastal wetlands and marshes. The environmental impacts of this proposal have not yet been fully reported to date.

Photograph of pipeline depositing sediment courtesy of the Coastal Protection and Restoration Authority of Louisiana.

NOAA Announces Upcoming Evaluation of Mississippi's Coastal Management Program

The National Oceanic and Atmospheric Administration's Office of Ocean and Coastal Resource Management announced its intent to evaluate the performance of the Mississippi Coastal Management Program, in accord with the Coastal Zone Management Act of 1972, which requires the continuing review of state coastal program implementation. The evaluation will inquire as to the extent to which Mississippi has met national objectives, adhered to its Coastal Management Program approved by the Secretary of Commerce, and adhered to the financial assistance funding under the Act. Evaluations ordinarily include site visits, consideration of public comments, and consultations with federal, state, and local agencies. NOAA conducted a site visit the week of March 16-20, which included a public meeting on March 16 at the Department of Marine Resources in Biloxi, MS. Stay tuned to Water Log for any important findings resulting from the evaluation process.

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Editor: Timothy M. Mulvaney, J.D.

Publication Design: Waurene Roberson

Contributors:

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

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

For information about the Legal Program's research on ocean and coastal law, or for past issues of WATER LOG, visit our homepage at

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Mississippi-Alabama Sea Grant Legal Program
Kinard Hall, Wing E, Room 258
P.O. Box 1848
University, MS 38677-1848

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