

# WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

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## “Barging In”:

### Mississippi High Court to Review Grand Casino Case

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*Also,*

Oil Spill Litigation Update

Sea Grant Continues Flood Insurance Outreach with Support from EPA Gulf of Mexico Program

The Governor’s Oyster Council for Restoration and Resiliency

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*Cover photograph of the Grand Casino in Biloxi; courtesy of Morgan Harrison.*

*Contents photograph of a sunset over the Gulf of Mexico; courtesy of Kim Seng.*

## • UPCOMING EVENTS •

### **2nd Annual Mid-South Agricultural & Environmental Law Conference**

April 17, 2015  
Memphis, TN

<http://nationalaglawcenter.org/midsouthcle2015>

### **Gulf of Mexico Alliance 2015 All Hands Meeting**

June 16–18, 2015  
Biloxi, MS

<http://bit.ly/goma2015>

### **24th Annual Southeastern Environmental Law and Regulation Conference**

June 19, 2015

Sandestin Beach & Golf Resort  
West Miramar Beach, FL

<http://bit.ly/alstatebar24>

# “Barging In”: Mississippi High Court to Review Grand Casino Case

Marc Fialkoff



Part of Grand Casino on Highway 90 in Biloxi, MS;  
courtesy of Jim McDyer.

**Last month, the Mississippi Supreme Court agreed to** hear the appeal of Cheri Porter in her case against Grand Casino of Mississippi, State Farm Fire and Casualty, and Max Mullins. The primary issue in the case is whether Ms. Porter’s insurance policy covers the damages that were caused by the Grand Casino’s barge

when it allided with her beach home during Hurricane Katrina and whether the lower court applied the proper standard established in *Eli Investments, LLC v. Silver Slipper Casino Venutire, LLC*.<sup>1</sup>

The decision of the Mississippi Supreme Court to take this case signals that lower courts are conflicted about the

two cases pertaining to barge litigation; *Bay Point High & Dry LLC v. New Palace Casino* and *Eli Investments*. Where *Bay Point High & Dry* solely focuses on the adequacy of the moorings in resolving whether the barge owner was negligent, *Eli Investment* focuses on the locale of the barge in addition to the adequacy of the moorings to restrain the vessel during hurricane conditions.

#### **Hurricane Katrina, the *Biloxi*, and Ms. Porter's Beach Home**

Hurricane Katrina hit the Gulf Coast in 2005, leaving mass destruction and flooding in her wake. In the case of Ms. Porter, her beach home was damaged when the Grand Casino's barge, *Biloxi*, came loose from her moorings, travelled 3,000 feet and allided<sup>2</sup> with Ms. Porter's beach home located on East Beach Boulevard. After the storm, Ms. Porter filed a claim with State Farm Fire and Casualty Company under her "all risk" homeowner's insurance policy. State Farm denied Ms. Porter's claim because her policy excluded loss caused by wind and water as well as "loss [that] would not have occurred in the absence of [an] excluded event."<sup>3</sup> Ms. Porter sued State Farm for bad-faith denial of coverage and negligence in issuing her the policy. In addition to suing State Farm and their agent, Max Mullins, Ms. Porter also brought a claim against Grand Casino for negligence; specifically alleging that the mooring design for the *Biloxi* was substandard.

In 2009, the lower court dismissed the claims against State Farm and Mullins, having determined that Porter did not have any evidence to establish that the barge was moved by anything other than the water.<sup>4</sup> Since the policy excluded loss due to water or loss due to water as a causal force, State Farm was entitled to judgment. Likewise, the lower court determined that Mullins made no statements contrary to the policy language and was therefore also entitled to judgment in his favor. In 2012, Grand Casino was also granted summary judgment after the lower court applied the precedent in *Bay Point High & Dry LLC* and determined that Ms. Porter could not establish that Grand Casino failed in its duty to secure the barge in light of Hurricane Katrina.<sup>5</sup>

#### ***Eli Investments* and the Mississippi Court of Appeals**

After the circuit court's decision, the Mississippi Supreme Court decided *Eli Investments*, which clarified the standard for whether barge litigation questions could reach the jury.<sup>6</sup> In *Eli Investment*, the Supreme Court determined that when the plaintiff and defendant submit expert affidavits which set up a "battle of the experts" on whether the casino breached a duty to neighboring property owners, the question should be resolved by a jury. In *Eli Investment*, the plaintiff was able to establish the "battle of the experts" scenario and have the matter reach the jury for a decision. In contrast, the *Bay Point High & Dry* decision does not require this "battle of the experts;" rather the decision only requires a showing that the barge owner took reasonable precautions to moor the vessel. On appeal to the Mississippi Court of Appeals, the attorney for Ms. Porter argued that the *Eli Investment* ruling was not available at the time the lower court was reviewing whether Ms. Porter's case merited trial and the *Bay Point High & Dry* case was inapplicable to her case.

On appeal to the Mississippi Court of Appeals, the court upheld the decision of the lower court. As to the questions relating to the policy and the insurance agent, the appeals court quickly determined that the policy language was unambiguous to the exclusion of loss due to water or to loss resulting from water as the causal event.<sup>7</sup> The court explained that allision damage signifies that the barge hit the home as a result of water moving the barge towards the beach home. Because water was the true force that caused the barge's displacement and subsequent allision with the beach home, the loss was properly excluded from the homeowner's policy.

Arriving at the question as to whether Ms. Porter's case aligns with the *Eli Investment* decision, the court determined that the affidavits submitted by Ms. Porter at trial were insufficient to create the "battle of the experts" situation which the court in *Eli Investment* determined was necessary to reach the jury. Instead, the affidavit submitted by Ms. Porter's expert never

contradicted the affidavit submitted by Grand Casino, but rather opined that heavy storm surge was a deviation from customary use of the mooring system. The affidavit did not explicitly state that there was a defect in the mooring system or that the unmooring was caused by the storm surge that caused the damage to Porter's property. The court concluded that the fact that the barge broke free was not *in and of itself* evidence that Grand Casino was negligent and that the expert put forward by Ms. Porter did not establish the battle of the experts required by *Eli Investment*. Rather, the case aligned itself with *Bay Point High & Dry* where the defendant put forward evidence to show he took reasonable care to ensure the system was sufficient to keep the barge restrained during a hurricane.<sup>8</sup>

### Appeal to the Mississippi Supreme Court

On appeal, Ms. Porter's attorney focused his argument on the split in case law with respect to barge litigation resulting from Hurricane Katrina, arguing that the decisions in *Bay Point High & Dry* and *Eli Investment* are polar opposites that create confusion amongst the lower courts as to which standard to apply. In particular, the *Eli Investment* decision changed the analysis from solely the adequacy of the moorings to the inclusion locale of the barge at time of the incident.<sup>9</sup> Additionally, Ms. Porter argues that the affidavit submitted by her expert showed there was no inspection of the moorings and therefore created a rebuttal argument that should have been submitted as a question for the jury.

Although the primary argument focuses on which case, (*Bay Point High & Dry* or *Eli Investment*) is the primary case to be applied in Ms. Porter's case, the appellant also argues that Ms. Porter's home was not damaged by the wind or water from Hurricane Katrina, but rather by the barge when it became a vehicle which is a covered peril under the policy.<sup>10</sup> Under their interpretation of the policy, the debris from the storm was not delineated in the policy and this omission/ambiguity should be submitted to the jury as

a question of contract interpretation. They distinguish water/wind damage by asserting the fact that it was the debris caused by the storm and debris is not delineated as excluded under the policy.

From a public policy perspective, the appellant argued that the resolution as to which standard applies to barge litigation is of "public importance" to the citizenry of Mississippi and should therefore be reviewed by the Mississippi Supreme Court to resolve the controversy between the dueling standards. In their estimation, the appellant's case falls squarely into the *Eli Investment* realm; in which case, the judge should submit the question as to the liability of Grand Casino and State Farm to the jury to resolve.

### Conclusion

By taking this case, the court may seek to clarify the two opinions as to which controls in such situations as well as delineate a clear standard for circuit courts to apply. 🦋

*Marc Fialkoff holds a J.D. from Roger Williams University School of Law and is currently pursuing his Ph.D. in Planning, Governance, & Globalization at Virginia Tech.*

### Endnotes

1. Porter v. Grand Casino of Mississippi, Inc.-Biloxi, 138 So.3d 952 (Miss. Ct. App. 2014), *cert granted*, 2010-CT-00307-SC (Miss. Jan. 22, 2015).
2. *Allision* is the incidence when a vessel collides with a stationary object. *See infra* 7.
3. Porter v. Grand Casino of Mississippi, Inc.-Biloxi, 138 So.3d 952, 954 (Miss. Ct. App. 2014).
4. *Id.* at 955.
5. *Id.*
6. *Id.* at 959 (citing *Eli Investments, LLC v. Silver Slipper Casino Venutire, LLC.*, 118 So.3d 151, 154-56 (Miss. 2013)).
7. *Id.* at 957. The Court of Appeals explained that "allide" is a nautical term used to describe the situation when a moving object traversing across water hits a stationary object. *Id.* Thus boats and barges allide whereas trains and planes collide. *Id.*
8. *Id.* at 961.
9. Brief for Petitioner-Appellant at 3. Porter v. Grand Casino of Mississippi, Inc., 2010-CT-00307-SC (Miss. 2014).

# Oil Spill Litigation Update

Terra Bowling, J.D.

**Over the past few months, there have been several** developments in the litigation following the *Deepwater Horizon* oil spill. Most recently, courts have ruled on BP and Anadarko's liability for Clean Water Act fines, the amount of oil spilled by BP, and the maximum fine allowed by the Clean Water Act. Below are brief summaries of these rulings.

## Fifth Circuit Denies Rehearing

On January 9th, the U.S. Court of Appeals for the Fifth Circuit denied BP and Anadarko's motion to rehear a decision regarding the companies' liability under the Clean Water Act (CWA) for discharges related to the *Deepwater Horizon* disaster. Last June, a panel of the Fifth Circuit had ruled that the companies were strictly liable for fines under § 311 of the CWA for the oil spill.<sup>1</sup>

The CWA imposes penalties on owners of facilities "from which oil or a hazardous substance is discharged."<sup>2</sup> The panel affirmed the district court's finding that "discharge is the point where 'uncontrolled movement' begins."<sup>3</sup> The panel agreed with the district court's finding that oil flowing from the well through the *Deepwater Horizon's* riser was the point at which uncontrolled movement began, which made the owners of the well liable. In November, the panel issued a supplemental decision in response to the companies' rehearing petitions upholding its decision.

In a response to the Fifth Circuit's vote denying a rehearing, the dissenting judges felt that the panel had improperly used "loss of controlled confinement" test as a definition of discharge. The dissent noted that the CWA defines discharge as "spilling, leaking, pumping, pouring, emitting, emptying or dumping."<sup>4</sup> The dissenting judges

stated that "[t]he panel opinion's 'controlled confinement' test does not follow from the text of the CWA. Compounding this, the panel's supplementary opinion conflicts with the panel opinion. These problems, coupled with the exceptional importance of the underlying issue, necessitated a rehearing."<sup>5</sup>

## Phase Two Findings Issued

In January, U.S. District Court Judge Carl J. Barbier issued a ruling in Phase Two of the BP oil spill multidistrict litigation.<sup>6</sup> In this phase of the litigation, Judge Barbier issued findings regarding the amount of oil BP spilled into the Gulf of Mexico during the *Deepwater Horizon* disaster, as well as the effects of the company's clean up response. Judge Barbier ultimately ruled that BP is responsible for a net discharge of 3.19 million barrels of oil.

As expected, BP and the federal government had widely varying estimates of oil spilled and collection efforts. BP had estimated 3.26 million had been released, with a net total of 2.45 million considering collection efforts. The government had estimated 5 million barrels, with a net total of 4.19 million after collection.

The Judge's decision found a middle ground between the federal government and BP's estimates of the amount spilled. The Judge considered evidence from both sides and noted, "There is no way to know with precision how much oil discharged into the Gulf of Mexico. There was no meter counting off each barrel of oil as it exited the well. The experts used a variety of methods to estimate the cumulative discharge. None of these were perfect. Because data from the well is limited, every expert had to make some assumptions while performing his calculations."<sup>7</sup> Judge Barbier ultimately



Photograph of the Deepwater Horizon drill site; courtesy of EPI2oh Media.

determined that the company was responsible for 4 million barrels of oil spilled, but estimated the company collected around 800,000 barrels and ruled that the company would be responsible for a net discharge of 3.19 million. In February, BP filed notice of appeal of the ruling.

### Maximum CWA Penalty

On February 19th, Judge Barbier ruled that the maximum civil penalty under the CWA is \$4,300 per barrel of oil discharged.<sup>8</sup> BP had requested the cap be set at \$3,000.

When the CWA was enacted in 1990, the maximum amount of the civil penalty was set at \$3,000. Pursuant to the Adjustment Inflation Act, however, agencies may issue regulations raising statutory penalties to adjust for inflation. Since 1997, both the Environmental Protection Agency (EPA) and the U.S. Coast Guard have issued regulations raising the maximum amount of civil penalties under the CWA. At the time of the *Deepwater Horizon* disaster, the EPA had set the maximum civil penalty at \$4,300, while the Coast Guard set the amount at \$4,000.

In Phase One of the MDL litigation, the court found that the discharge resulted from BP's gross negligence and willful misconduct and, therefore, BP is subject to the maximum civil penalty. Since the court ruled that BP is responsible for 3.19 million barrel of oil spilled, BP could pay up to \$13.7 billion in CWA fines. The exact amount will be determined in Phase Three of the litigation, which began January 20th and ended February 2nd. A ruling on Phase Three could be issued at any time. [↗](#)

*Terra Bowling is Sr. Research Counsel for the National Sea Grant Law Center.*

### Endnotes

1. *In re Deepwater Horizon*, 775 F.3d 741 (5th Cir. 2015).
2. 33 U.S.C. § 1321(b)(7)(A).
3. *In re Deepwater Horizon*, 753 F.3d 570, 571 (5th Cir.) *adhered to*, 772 F.3d 350 (5th Cir. 2014).
4. 33 U.S.C. § 1321(a)(2).
5. *In re Deepwater Horizon*, 775 F.3d 741, 742 (5th Cir. 2015).
6. *In re Deepwater Horizon*, 2015 WL 225421 (E.D. La. Jan. 15, 2015).
7. *Id.* at \*20.
8. *In re Deepwater Horizon*, 2015 WL 729701 (E.D. La. Feb. 19, 2015).

# Sea Grant Continues Flood Insurance Outreach with Support from EPA Gulf of Mexico Program

Niki L. Pace

The National Flood Insurance Program (NFIP) plays a critical role in the overall resilience of coastal communities by providing federally backed flood insurance in exchange for communities adopting minimum floodplain management requirements. Most coastal residents are all too aware of the NFIP but they may know less about the Community Rating System (CRS). Through CRS, communities participate in a variety of floodplain management actions that qualify their residents to receive discounts on flood insurance premiums. Most coastal communities in Mississippi participate in CRS and many Alabama communities are involved as well.

The CRS awards a community points for each supplemental activity it implements, as identified in the CRS manual. A community's CRS Class (1-10) depends on the number of points a community receives. For each CRS Class, a community receives a 5% reduction on flood insurance premiums in the Special Flood Hazard Area (SFHA). For example, a Class 1 community receives a 45% premium reduction on SFHA properties and a 10% premium reduction on non-SFHA properties, while a Class 9 community receives a 5% premium discount on premiums for both SFHA and non-SFHA properties.

In the last few years, the NFIP and CRS have undergone several changes, including the adoption of the 2013 CRS Coordinator's Manual. This manual is



Photograph from the January 2015 CRS PPI Workshop.

important because it determines how participating communities are scored under the CRS program (and what corresponding flood insurance discounts they qualify for!).

The 2013 Manual contains new activities for communities to consider, including the Program for Public Information (PPI). A PPI is a committee-based localized approach to community outreach on flood hazards and flood insurance under the CRS. The objective of the PPI is to provide communities with additional points for outreach that is: (1) designed to meet local needs and (2) monitored, evaluated, and revised to improve effectiveness. In other words, outreach activities coordinated through a PPI gain more CRS points than standalone outreach activities.

Through funding from the EPA Gulf of Mexico Program, Mississippi-Alabama Sea Grant and partners are working with coastal communities to provide technical guidance on forming a PPI. The team held its first training workshop on January 21, 2015 in LaCombe, Louisiana. The successful daylong workshop was led by CRS expert French Wetmore and attended by 17 communities across Mississippi, Louisiana, and Alabama.

The project team includes Mississippi-Alabama Sea Grant, Louisiana Sea Grant, Grand Bay NERR, and BlueUrchin working with local partners Mississippi Gulf Coast Coastal Hazard Outreach Strategy Team (C-HOST) and the Louisiana Southwest Informational Floodplain Team (SWIFT) to strategically develop materials that best address the needs of communities participating in the CRS. In Mississippi, C-HOST is a regional outreach team comprised of building officials, certified floodplain managers, NFIP CRS coordinators, and planning officials that serve the CRS communities along the Mississippi Gulf Coast. In Louisiana, SWIFT consists of floodplain managers and planners from three parishes (Vermillion, Cameron, and Calcasieu) and three municipalities (the cities of Sulphur, Lake Charles, and Iowa).

Following the PPI workshop in January, the project team is working individually with targeted Mississippi and Louisiana communities to develop successful PPIs. Materials developed through this project will serve as models for other coastal communities throughout the Gulf. For more information about the project, visit us at: <http://masglp.olemiss.edu/projects/crspipi>. 

Hosted by the Agricultural & Food Law Consortium

## SECOND ANNUAL MID-SOUTH AGRICULTURAL & ENVIRONMENTAL LAW CONFERENCE

UNIVERSITY OF MEMPHIS SCHOOL OF LAW  
MEMPHIS, TN

**April 17, 2015**  
**8:15am – 4:00pm**

### LOCATION:

University of Memphis  
Cecil C. Humphreys School of Law  
1 North Front Street, Memphis, TN 38103

### COST:

\$150 - Attorneys seeking continuing education credit  
\$100 - Other attendees, not seeking professional credit  
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### CONTINUING LEGAL EDUCATION:

The program has been approved in Arkansas, Mississippi & Tennessee for 5 hours of general continuing legal education credit and one hour of ethics credit.

### REGISTRATION:

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For more information, go to:  
<http://nationalaglawcenter.org/midsouthcle2015>

# The Governor's Oyster Council for Restoration and Resiliency

Amber Wilson

Over the past decade, Mississippi water resources have endured the effects of Hurricane Katrina, the Deepwater Horizon oil spill, and the Bonnet Carré Spillway opening. These incidents have caused stress and severe depletion of the Mississippi oyster reefs. For instance, before Hurricane Katrina in 2005, there were over 400,000 oyster sacks harvested in Mississippi waters. With just 70,000 oyster sacks harvested in the 2014-15 season, this has been one of the lowest production years on record in Mississippi and throughout the Gulf. Marine science experts have projected that the current season will experience more downward trend and produce just 20,000 sacks of oysters. In an effort to protect and restore the state's oyster reefs, Governor Phil Bryant created an Oyster Restoration and Resiliency Council (the Governor's Oyster Council) by Executive Order on February 2, 2015.

The role of the Governor's Oyster Council is to develop a long-term resource creation and management plan that provides prioritized recommendations for Mississippi, regional, and national leaders when implementing policies that increase, enhance, and promote oyster resources and current best practices for production and conservation. The Governor's Oyster Council will meet periodically to discuss and analyze environmental and economic factors related to oyster resources, and the role that aquaculture and emerging technologies will play in growing the industry. The Council also encourages public involvement during the process with the overall goal of combining local expertise and

experiences with definitive research on the national oyster industry. Public involvement will also provide an opportunity for the community at large to broaden its understanding of the restoration and resiliency of the oyster industry along the Gulf Coast.

The Governor's Oyster Council is governed by an Executive Committee, which is composed of the Oyster Council Chairman, four additional members appointed by the Governor, and nine additional advisory members. The Oyster Council has three Topic Area Committees chaired by members appointed by the Governor: the Oyster in the Environment Committee, chaired by Allan Sudduth; the Oyster in the Economy Committee, chaired by Tish Williams; and the Aquaculture and Emerging Technologies Committee, chaired by Clay Wagner. Each committee possesses a different scope; however, all committees hold the responsibility to explore and evaluate the best practices in the regulatory sector of the industry in order to develop an attainable plan to grow Mississippi's oyster population.

A written Oyster Restoration and Resiliency Plan incorporating all mandates of the Council, made accessible to policy-makers and citizens, will be provided to the Governor by June 2, 2015. By creating the Plan, the State hopes to reach the goals of increasing oyster harvest in an effort to create new jobs and business opportunities while improving the economy through species recovery, habitat recreation and improved water quality. 

*Amber Wilson is an undergraduate student assistant at the Mississippi-Alabama Sea Grant Legal Program.*

# The Low Road Taken: An Examination of Architecture's Disposable Goods

Stephen Deal



Airstream mobile units in Pensacola, FL become a fully functioning food court, a notable example of Low Road planning in action.

**One of the great tensions in city planning is striking** the right balance between safe, uniform design and devising neighborhood plans that promote the social spontaneity indicative of truly great places. There are a lot of questions and issues one could run through while trying to strike the right balance, but one simple question

we could start asking more is this: are you a high road or a low road building culture? Stewart Brand, author of the book *How Buildings Learn*, described low road buildings as such: “Low Road Buildings are low-visibility, low-rent, no-style, high turnover.”<sup>1</sup> In other words, Low Road buildings derive their value less from the quality of design,

but from the numerous opportunities for adaptable design they provide. The State of Mississippi is full of places that were built simply and have gone through frequent revision during the course of their lifetime. Jook joints, sharecropper shacks and, even to some extent, working waterfronts exhibit a rustic informality indicative of a low road building culture.

This is in contrast to High Road buildings, which are generally built with high intent and are built to endure.<sup>2</sup> Historically, planning has taken the high road, opting for master planned developments or different certifications to establish that a building meets some desired performance standard. Since the 2009 recession occurred though, many urban projects have flourished on their ability to be cheap, flexible, temporary and able to be plugged into a number of different urban settings. Container architecture, tiny houses and pop up parks are just a few examples of urban projects with a Low Road sensibility and style.<sup>3</sup> Mississippi and the greater Gulf Coast are no strangers to these evolving urban trends. Highlighted below are just a few examples of this philosophy in action.

#### **Clarksdale: Low Road Revitalization in Action**

In the Mississippi Delta community of Clarksdale, the principles of Low Road design have been embraced in two notable projects: The Ground Zero Club and The Shack Up Inn. Conceived in 2001 as a joint venture between local attorney Bill Lockett and actor Morgan Freeman, the Ground Zero Blues Club has become a regional fixture.<sup>4</sup> The chief design attribute of the club is its feeling of endless malleability. The club's exterior seating is essentially a haphazard collection of old sofas and chairs. The club also has a tradition of letting people adorn the walls with individual markers and graffiti.<sup>5</sup> Both these design features transform a fairly new club into a community icon because one gets the sense that the club grows and changes with the community. Indeed a number of clubs and bars essentially start, and continue to operate, as low road operations. Along Alabama's Gulf Coast, the Flora-Bama has celebrated 50 years in business and is a coastal fixture, but you would not exactly gather that by looking at the building itself, which can best



Ground Zero Blues Club in Clarksdale, MS; courtesy of John Cathey-Roberts.



The Shack Up Inn in Clarksdale, MS; courtesy of Social Stratification Media.

be described as an oversized sea shack.<sup>6</sup> For a lot of community institutions though, the lack of maintenance and the ability to see all the ad-hoc changes is what makes a place, such as a bar or other social gathering place, feel like an old friend. In both cases, the faded architectural character is emblematic of the community's character and that's something people want to be a part of.

Elsewhere in Clarksdale, The Shack Up Inn provides an economical, but whimsical, way for visitors to experience a night in the Mississippi Delta. The property is a combination of relocated sharecropper shacks and new cabins done up to embrace the shabby chic of the rest of the property. If the Ground Zero and Flora-Bama have a Low Road aesthetic, then the Shack Up Inn is the philosophy of low road planning in action. The modest startup costs associated with the project gave them the time to test the idea and see if it could work and the subsequent success made it easy to aggressively expand the idea and sell it to potential investors.<sup>7</sup> The Shack Up Inn is not elegant in the traditional sense, and it certainly does not display all the hallmarks of sound design, but it will endure for the simple fact that people want it to endure. Both the Shack Up Inn and the Ground Zero Club demonstrate that otherwise nondescript properties can be put to good use when they embrace people's desire to leave their mark on a place, and that short term fixes crafted with love and care can be just as enduring as many professionally built buildings.

### Crafting a Regulatory Response

As mentioned earlier, planning has always displayed a preference for the High Road building, the structure that has the financial or institutional security behind it to be built right at the beginning of the process. Given that history, it makes sense that local regulations are not always the best at articulating a low road response to a fundamental planning problem.

In Pensacola, Florida a group of local entrepreneurs came up with the idea of converting old Airstream mobile units into small restaurants with outdoor seating. While the city did have regulations pertaining to food trucks, it did not have a regulatory mechanism for what they were proposing, essentially a dedicated mobile food vending location. In response, the city amended its land development code to allow for the creation of mobile restaurants, provided that they are: (1) approved as an accessory use to an existing restaurant, (2) are anchored to the ground, and (3) provide outdoor seating.<sup>8</sup> The back and forth process shown here, where a small scale intervention hints at a better way of improving regulatory practice, may hint at a new paradigm of undergoing regulation where cities hold small design projects to better understand the efficacy of their regulations.<sup>9</sup>

Sometimes cities themselves find they are in need of a Low Road solution. Consider this Ocean Springs example. When the city discovered that its current bait

shop was not in compliance with elevation requirements it had to come up with a quick solution. The solution came in the form of a refurbished Katrina cottage donated by the Mississippi Emergency Management Agency (MEMA).<sup>10</sup> Because it is mobile, the cottage is not subject to elevation requirements, and if the small craft harbor gets expanded in the future it can be easily replaced or moved elsewhere, to be reused again in conjunction with some other civic amenity. Does this type of solution work for everybody? The answer is probably no, but it is a workaround solution and these type of solutions help keep the process of urban renewal going when permanent solutions simply lack the financing to get off the ground.

### How Does this Achieve Resiliency?

Low Road buildings have inherent value because of their potential for continued adaptation and reinvention. For example, aging suburban enterprises such as shopping malls typically lose out because they are, in some sense, overdesigned and unable to cope with a sudden decline in popularity. Individual homeowners and small businesses can lose out as well because success in these scenarios is contingent upon a neighborhood price point being right or an anchor store being able to find its customer base. A small, independent operation though can be scaled up or down accordingly, which is where the Low Road Planning philosophy enters into the picture. For small startups and aspiring homeowners the low road taken is quite often the best option. If a food truck business flounders, then the amount of lost capital is minimal and if one of these simple structures is lost to a flood or other kind of disaster then the structure can be reproduced with a minimum of effort. In the case of a tiny house or a small residential unit the building can be added on to or structurally reinforced.

Over time its possible for a temporary solution to become a permanent fixture with the accrual of additional capital by the owners. This building paradigm also may have some interesting implications in how we approach the topic of resiliency. A low road approach to coastal resiliency might be homes and small businesses that can

be built with a minimum effort and can be easily replaced following a storm event or it could be the structurally reinforced shell of a building with a kind of plug and play component to it, where residents are free to make interior changes and subdivide the property as they intend to.<sup>11</sup> Also, by laying claim to a portion of the development process, homeowners can become more engaged with the maintenance of the building. Even if a building is built with the best structural materials available, it may all be for naught if the building owners lack the tools and knowledge to maintain the structure properly.

Now should every building be a Low Road building? Of course not. The Low Road is part of a bigger urban arrangement, one that needs a rich mixture of unique uses and buildings to thrive. However, for every urban life cycle there is a beginning condition as well as an end condition, and for many, the path to establishing one's city footprint begins on the Low Road. 🏠

*Stephen Deal is the Extension Specialist in Land Use Planning for the Mississippi-Alabama Sea Grant Legal Program.*

### Endnotes

1. Stewart Brand, *HOW BUILDINGS LEARN: WHAT HAPPENS AFTER THEY'RE BUILT* (pp. 24), Penguin Books 1994.
2. *Id.* at 35.
3. Street Plans Collaborative, *Tactical Urbanism: Volume 2*, March 2, 2012.
4. Ground Zero Blues Club Official Website (last visited March 3, 2015), <http://www.groundzerbluesclub.com>.
5. Liana Thompson, *The Construction of Blues Authenticity: The Case of Ground Zero Blues Club*, July 31, 2008. Paper presented at the American Sociological Association Annual Meeting.
6. Will Isern, *Flora-Bama celebrates 50 years*, PENSACOLA NEWS JOURNAL (Aug. 1, 2014).
7. Patrick Sauer, *Shack Up Inn: The Coolest Hotel in America?*, THE HUFFINGTON POST/AOL SMALL BUSINESS, (Aug. 1, 2011).
8. The City of Pensacola Agenda Center, Feb. 14, 2012, Planning Board Meeting Agenda.
9. David Lepeska, *The Rise of the Temporary City*, ATLANTIC CITYLAB. 1 (May 2012).
10. Warren Kulo, *Katrina cottage to replace Ocean Springs harbor bait shop*, GULFLIVE (Oct. 16, 2012).
11. Rory Stott, *ELEMENTAL's "Half-Finished" Housing Typology: A Success in All Circumstances*, ARCHDAILY, 22 (Nov. 2013).

# WATER LOG

## IMPORTANT ANNOUNCEMENT

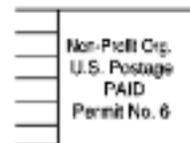
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