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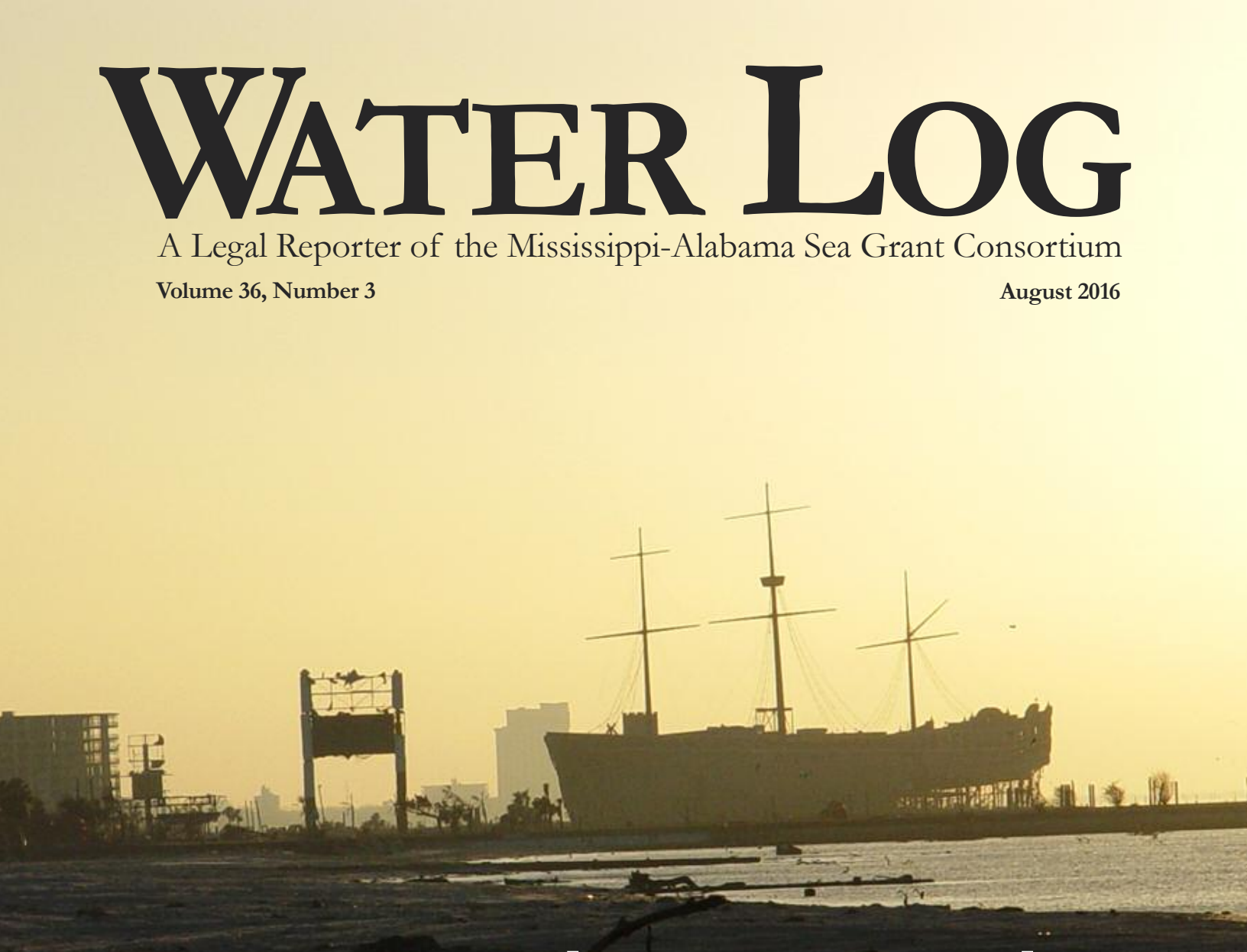

Court Considers Yet Another Casino Barge Case in the Wake of Katrina

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Cover photograph of the Biloxi Beach post-Hurricane Katrina; courtesy of Jimmy Smith.

Contents photograph of a pier in Biloxi, MS; courtesy of Rendal Ladner.

• UPCOMING EVENTS •

MS & AL Chapters of American Planning Association 2016 Annual Conference

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Biloxi, MS

http://bit.ly/2016msal

American Bar Association: Section of Environment, Energy, and Resources 24th Fall Conference

October 5-8, 2016
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December 10-15, 2016
New Orleans, LA

https://www.estuaries.org/Summit

Court Considers Yet Another Casino Barge Case in the Wake of Katrina

Nathan Morgan

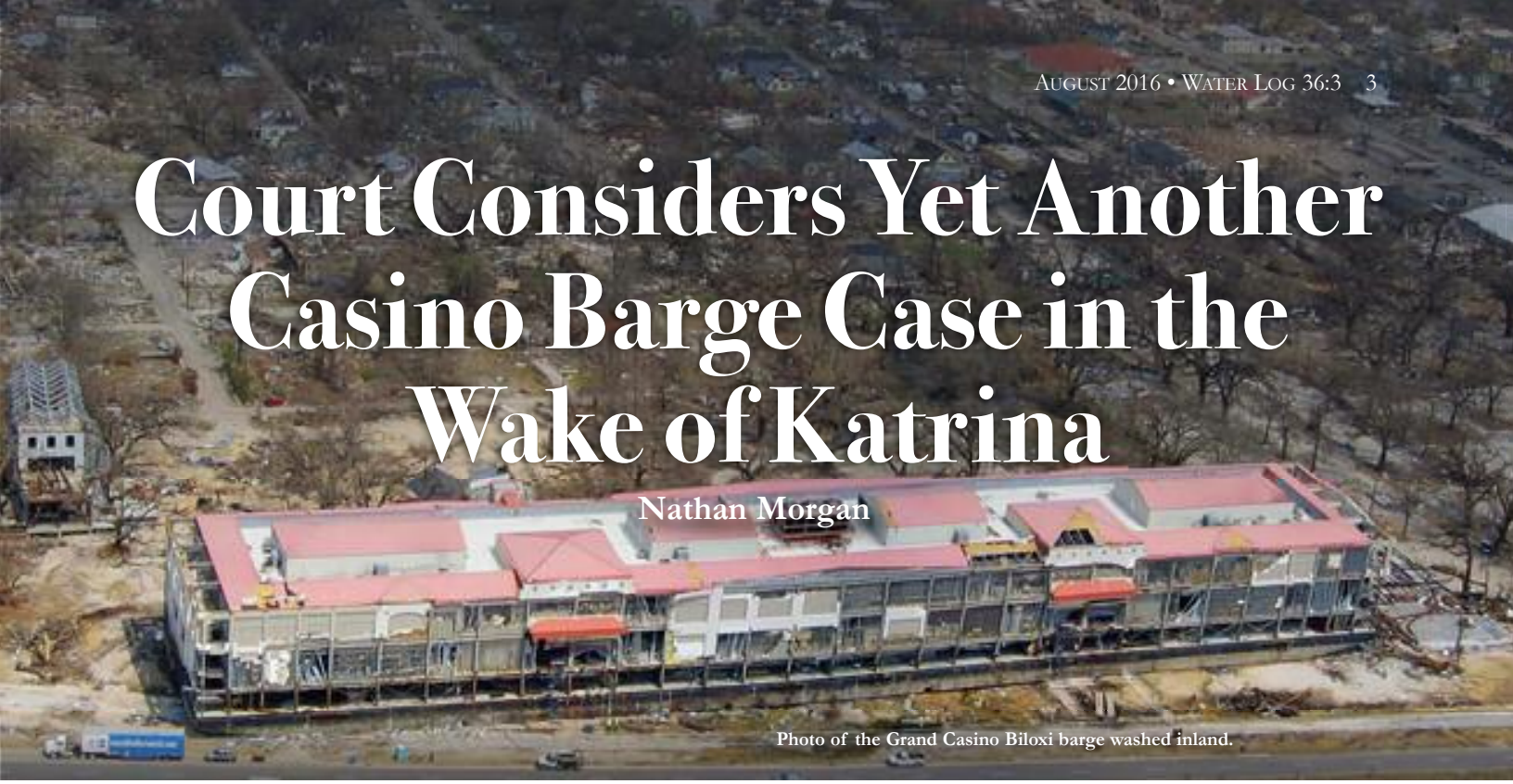

Photo of the Grand Casino Biloxi barge washed inland.

Eleven years later, Mississippi courts continue to wrangle with the legal fallout of Hurricane Katrina. In March, the Mississippi Supreme Court considered yet another lawsuit against Grand Casino of Mississippi, Incorporated Biloxi (Grand Casino), this time for damage to a construction project on Biloxi's Schooner Pier. This case is one of a series of lawsuits that claims damages resulting from loose casino barges during the hurricane.

Background

In 2005, just off the Mississippi Gulf Coast in Biloxi Bay, Grand Casino operated two large casino barges. The first of the two barges, the Grand Casino, opened for business in 1994. To open, Grand Casino received licensing from the Mississippi Gaming Commission. As required by the Commission's regulations, the Grand Casino barge could not be self-propelled and had to have the capacity to withstand a Category 4 hurricane, up to a fifteen-foot storm surge, and 155 mile per hour winds. In 1999, Grand Casino expanded its presence in Biloxi Bay with a second casino barge, the Lady Luck. The Lady Luck was not separately licensed and was moored to the original Grand Casino barge when it was set in the bay. The two barges remained together until 2005, when Hurricane Katrina barreled down on the Gulf Coast.

At the time, Borries Construction was working on Biloxi's Schooner Pier and had nearly finished the work when Hurricane Katrina made its way to the coast.[1] Schooner Pier was located in close proximity to the Grand Casino and the Lady Luck Casino. During the storm, both casinos were torn from their moorings. Eventually, the Grand and the Lady Luck casino barges were separated. At some point, one or both of the two casino barges allegedly struck the Schooner Pier where Borries construction work was taking place.[2]

In the wake of Katrina's damage, Borries sued Grand Casino for negligence, claiming that the casino's mooring system was inadequate. Borries sought over $1.5 million in damages to compensate for lost investments in the pier, cleanup following Hurricane Katrina, and loss of business while having to reconstruct the pier following the hurricane, none of which fell under Borries' insurance coverage.

At the trial court, both parties submitted competing sworn statements. Borries argued that, in light of Hurricane Camille, which hit the Mississippi Gulf Coast in 1969 with storm surges up to thirty feet, a reasonable party would have set the safety mechanisms to withstand surges similar to Hurricane Camille. Grand Casino argued that the barges complied with safety regulations, which shows that they took proper precautions. Ultimately, the trial court rejected Borries' claims and granted judgment in favor of Grand Casino. Borries then appealed to the Mississippi Supreme Court.

Negligence Action

Upon appeal, the Mississippi Supreme Court reviewed Borries' negligence claim against Grand Casino. To succeed on his negligence claim, Borries had to prove four elements: (1) Grand Casino owed him a duty of care, which a reasonable person would have provided; (2) Grand Casino breached its duty to Borries; (3) Grand Casino's breach of duty caused the damage sustained by Borries; (4) Borries did in fact sustain some damage. In this case, the outcome hinged on whether or not Grand Casino had breached its duty to Borries. The court compared the situation to an almost identical case, which also took place in the wake of Hurricane Katrina.

Photo of the Biloxi Schooner Pier Complex; courtesy of Visit Mississippi.

In *Eli Inv, LLC v. Silver Slipper Casino Venture, LLC*, the court agreed that Hurricane Katrina's storm surge was foreseeable since three previous hurricanes had created storm surges over the fifteen-foot regulatory minimum.[3] Silver Slipper, the casino barge owners in that case, had met the Commission's mooring requirements but still had its barge break free of the mooring during Hurricane Katrina, destroying a nearby hotel. The *Eli* court stated that Silver Slipper had failed to consider what would happen if storm surges exceeded the fifteen-foot requirement, thereby breaching its duty of care. Further, it recognized that although Silver Slipper complied with the safety regulations, compliance did not shield the company from liability for the damage.[4]

The Mississippi Supreme Court agreed with the analysis in *Eli* in several respects. The court stated that Grand Casino's compliance with regulations does not by itself show that Grand Casino fulfilled its duty to prevent foreseeable harm.

Act of God Defense

Grand Casino also argued that it was protected from lawsuit under the "Act of God" defense. The "Act of God" defense applies to natural occurrences that are "so extraordinary that the history of climatic variations and other conditions … affords no reasonable warning of them."[5] An "Act of God" defense only applies to damage entirely due to natural causes without human intervention, which could not have been prevented by any reasonable care or foresight.[6] The court reasoned that since Borries presented evidence that Grand Casino could have foreseen the storm surges from Hurricane Katrina, a jury may agree that Grand Casino could have prevented the damage. If that happens, the court stated that the "Act of God" defense would not apply. In other words, this was a question of fact for a jury to decide.

Conclusion

While the court entertained some inconsistencies in the testimony, it accepted that each side brought forth enough competing testimony for a jury to determine whether Grand Casino could have prevented the damage. The Mississippi Supreme Court reversed the decision of the trial court. The case will return to Harrison County Circuit Court where a jury will review the facts and determine whether Grand Casino breached its duty of care to Borries.

Nathan Morgan is a 2017 J.D. Candidate at Vermont Law School and a summer research associate with the Mississippi-Alabama Sea Grant Legal Program.

Endnotes

1. Justin Mitchell, *Grand Casino loses Katrina appeal over schooner pier damage*, The Sun Herald, (March 31, 2016).
2. K.R. Borries v. Grand Casino of Mississippi, Inc. Biloxi, 187 So.3d 1042 (2016).
3. *Grand Casino*, 187 So.3d 1042, 1046 (citing *Eli Inv., LLC v. Silver Slipper Casino Venture, LLC*, 118 So.2d 151 (Miss.2013)).
4. *Id.*
5. *Id.* at 1050.
6. *Id.*

Court Dismisses State Law Claims in Mississippi River Flooding Dispute

Niki L. Pace

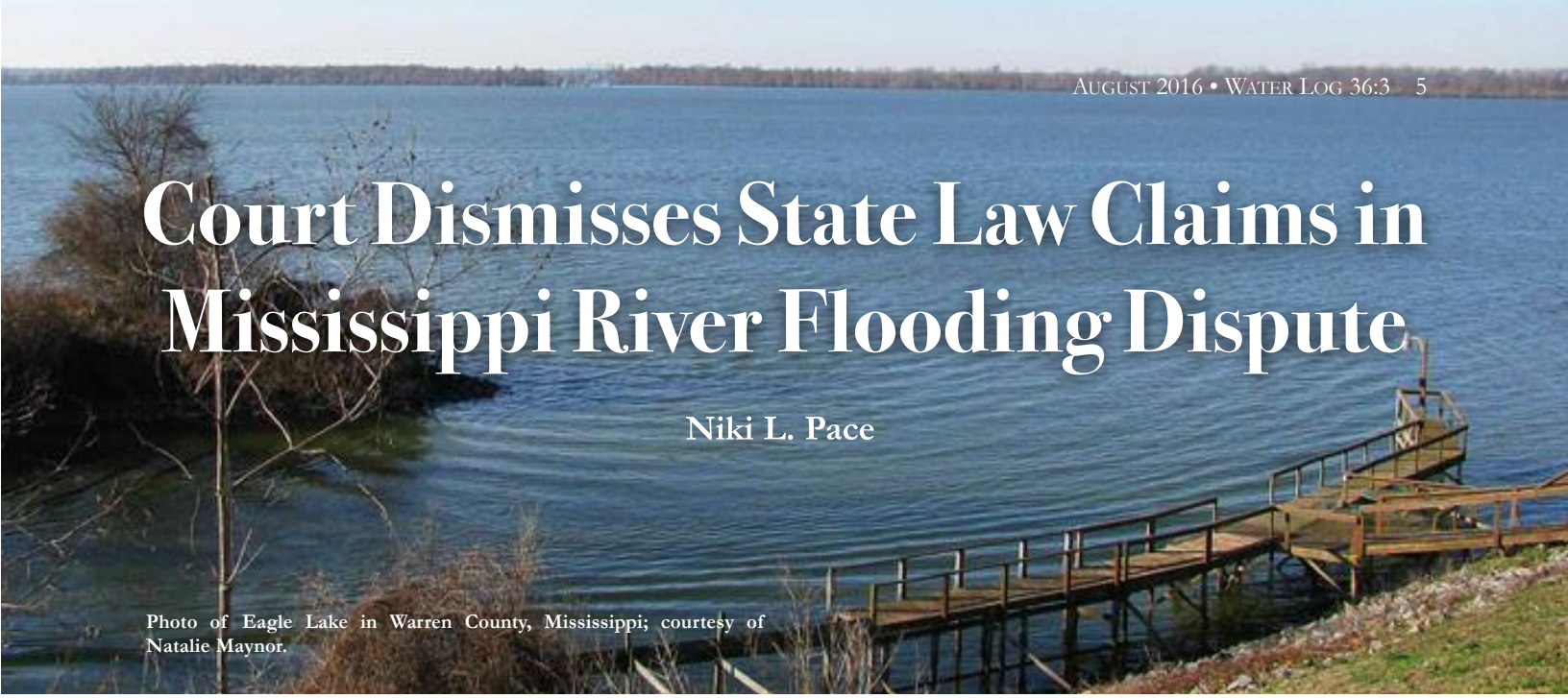

Photo of Eagle Lake in Warren County, Mississippi; courtesy of Natalie Maynor.

Numerous residents of the Eagle Lake Community in Warren County, Mississippi sued the U.S. Army Corps of Engineers (Corps) following flooding experienced in 2011. The Eagle Lake Community is a relatively flat area near the Mississippi River that would naturally flood during high river stages, except for a man-made system of levees and floodways designed to control the floodwaters. Congress authorized construction of the system in the Flood Control Act of 1928, following the Mississippi River Flood of 1927.

In response, the Corps constructed a series of flood control structures in the area, including the Mainline Mississippi River Levee and the Muddy Bayou Control Structure. The Muddy Bayou Control Structure manages waters entering and leaving Eagle Lake. The Corps manages it in conjunction with the Mississippi Department of Wildlife, Fisheries, and Parks pursuant to the Eagle Lake Water Level Management Agreement (Eagle Lake Agreement).

In 2011, the Mississippi River swelled to record stages following several large storms in March and April. The high flood stages threatened to breach the Mainline Mississippi levee. According to the Corps, this would endanger approximately 3,000 homes, 1,000 other structures, and 925,000 acres. To avoid this flooding, the Corps issued an emergency proposal to reduce pressure on the Mississippi River levee by opening the Muddy Bayou Structure.[1] The Corps acknowledged that the action would raise Eagle Lake water levels above those authorized under the Eagle Lake Agreement and would inundate fishing piers along the lake. The action was authorized on April 28, 2011. Following the event, residents of Eagle Lake Community alleged that substantial damages were caused to homes, businesses, and other property in the community.

In 2014, a group of residents (collectively Alford) filed suit against the Corps alleging: (1) violations of Fifth Amendment takings (federal law), (2) violations of Mississippi state takings law, (3) other violations of Mississippi state law, and (4) violations of their rights under the Eagle Lake Agreement. The residents filed suit in the United States Court of Federal Claims.

In a recent decision, the court granted the Corps' motion to dismiss Claims 2 and 3 – those claims based on Mississippi state law. Specifically, the federal claims court can only adjudicate matters that involve federal law or federal contract. As those two matters are dependent on state law, the court does not have the power to resolve them. In dismissing the two state law claims, the court also ordered the parties to file a status report on how the two remaining federal claims should proceed. If the case moves forward, the court will assess whether or not the Corps is liable under federal law to the residents of Eagle Lake for the flooding that occurred in 2011.

Niki L. Pace is senior research counsel for the Mississippi-Alabama Sea Grant Legal Program at the University of Mississippi School of Law.

Endnotes

1. Alford v. United States, 125 Fed. Ct. 4 (2016).

Court Upholds Florida Couple's $2.2M Private Beach Verdict

Ashley Stilson

The early morning sun illuminates the serene landscape leading from the cool sands of the Chmielewskis' backyard to the soft waves of the Gulf of Mexico. Within hours, this tranquility vanishes as the sounds of flip-flops and laughter fill the air as beachgoers follow the City of St. Pete Beach's (City) beach access map along the Chmielewskis' sidewalk abutting their home and down the beach path on their adjoining beach parcel to sunbathe, attend weddings, participate in sporting events, and celebrate national holidays on the beach's sun-filled sands.[1] After many years of protesting their unwanted backyard visitors, the Chmielewskis' sought relief in court.

Background

When the Chmielewskis purchased their residential property in 1972, they never envisioned it being used for public beach access. The Chmielewskis' residential property is located adjacent to a large beachfront lot (Block M) owned by the subdivision homeowner's association. The Chmielewskis subsequently acquired title to a section of Block M that extends their residential property's lot lines across Block M and to the mean high water mark of the Gulf of Mexico. This strip of land, known as the Chmielewskis' beach parcel, remained a part of Block M.

For years, the City encouraged the public to access St. Pete Beach via the Chmielewskis' sidewalk and beach path and to use Block M for various activities. Irritated by the public's increasing presence in their backyard, the Chmielewskis filed a lawsuit against the City to confirm their right to exclude the public from their beach parcel. The lawsuit was settled with both parties agreeing the public could not use Block M. Following the settlement, the City continued to encourage the public to use Block M, and as a result, the Chmielewskis' continued to have unwanted visitors on their back doorstep.

Further aggravated with the City's actions, the Chmielewskis sued the City again. The Chmielewskis' claimed the City had in effect unlawfully seized a portion of their residential property and their beach parcel for public use without paying them any financial compensation. At trial, the jury agreed with the Chmielewskis and awarded them over $2.2 million in damages - $725,00 for unlawful seizure of property and $1,489,700 for taking the property. Disgruntled with the jury's award, the City challenged the matter and asked the court to order a new trial in hopes of escaping the beach parcel's nearly $1.5 million price tag.

Unreasonable Seizure of Property

The Chmielewskis claimed the City violated their Fourth Amendment right against unreasonable seizure by authorizing the public to regularly traverse the sidewalk abutting their residential property and their entire beach parcel to access and use Block M and St. Pete Beach. An unreasonable seizure occurs when there is a "meaningful interference" with an owner's property interest.[2] The public's constant physical occupation on a property can constitute an unreasonable seizure, and such may be attributed to the government where it participated in or had knowledge of the public's actions.[3]

At trial, the Chmielewskis introduced substantial evidence demonstrating the City contributed to the public's use of Block M after the 2006 settlement. The Chmielewskis claimed the City cleared their sidewalk to allow public access, permitted weddings, Fourth of July celebrations, and other public events to be held on Block M, threatened to arrest Mr. Chmielewski for

protesting a wiffle ball tournament held on Block M, and, most notably, declared the public was authorized to use Block M at City Council meetings.[4] Although the City posted private property signs on Block M, the court determined a reasonable jury could find, balanced against the City's other actions, that the City authorized public use of the sidewalk abutting the Chmielewskis' residential property and their beach parcel.[5]

Florida Taking of Property

In addition to their seizure claim, the Chmielewskis argued the City's actions constituted a taking of their beach parcel for which they were entitled just compensation.[6] One example of a taking occurs when the government's actions result in giving individuals "a permanent and continuous right to pass" on private property.[7] In addition to published beach access maps which displayed a "beach access" path along the Chmielewskis' sidewalk and across their beach parcel, the City placed signs with the City's logo at the juncture of the Chmielewskis' sidewalk and their beach parcel path designating it as public "Beach Access."

The court held a reasonable jury could find that the City "authorized, if not encouraged" the public to use the Chmielewskis' beach parcel to access Block M and St. Pete Beach and therefore, created a public right to pass on the Chmielewskis' beach parcel.[8] While the City argued the beach parcel's value was arbitrary, the Court concluded the property appraisals supported the jury's $1,489,700 award.

Conclusion

Although the Chmielewskis' won their case against the city, they lost their serene backyard landscape to the people of St. Pete Beach. The Chmielewskis' now live next to a beach access path lawfully owned by the City and must tolerate their unwanted backyard visitors.

Ashley Stilson is a 2017 J.D. Candidate at the Elisabeth Haub School of Law at Pace University and a summer research associate at the National Sea Grant Law Center.

Endnotes

1. Chmielewski v. City of St. Pete Beach, No. 8:13-cv-3170-T-27MAP, 2016 WL 761032 (M.D. Fla. Feb. 26, 2016).
2. *Id.* at *2 (citing Soldal v. Cook Cty., Ill., 506 U.S. 56, 61 (1992)).
3. *Id.* (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)).
4. *Id.*
5. *Id.* at *5.
6. *Id.* (The Chmielewskis' brought an inverse condemnation claim.); *Condemnation*, Black's Law Dictionary (10th ed. 2014) (Inverse condemnation is "an action brought by a property owner for compensation from a governmental entity that has taken the owner's property without formal condemnation proceedings." Condemnation is "the determination and declaration that certain property…is assigned to public use, subject to reasonable compensation.").
7. *Chmielewski*, 2016 WL 761032, at *5 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982)) (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831-32 (1987)).
8. *Id.*

Eleventh Circuit Considers Ownership of Wisteria Island

Nathan Morgan

Less than a mile off the coast of Key West, Florida, sits a thirty-nine acre patch of land known as Wisteria Island. Locals of Key West also call this island "Christmas Tree Island" due to the growth of invasive Australian pine trees.[1] The island attracts both residents and visitors to the Florida Keys who moor boats near its shores and build makeshift shelters on its sands.[2] However, the island did not occur naturally. Rather, it and several other islands grew from the dredging and depositing of material by the U.S. Navy as it deepened the ship channels in Key West Harbor.[3] The dredging first occurred in the early nineteenth century, and again in 1943. Wisteria Island is one among many islands created from dredged soils known as "spoil islands."[4] Wisteria Island has been the subject of a unique dispute since 1951, and remains so today.

History of Wisteria Island

In 1951, Florida put Wisteria Island up for sale, under the impression that it held title. The United States quickly objected to Florida's notice to sell, arguing that the federal government owned the island. The United States traced its ownership back to an 1819 treaty with Spain that granted the federal government ownership to the submerged lands on which the island now sits. Florida's attorney general recognized the claim but questioned its validity, calling the claim "shrouded in antiquity." He advised the state to go forward with the sale of the island and notify the buyer of the United States' competing claim to ownership. Florida would thereby remove itself from any dispute with the federal government on the issue.

Florida completed the sale of the island to a private party in 1952. In doing so, Florida was careful to sell the property without any warranties regarding the title.[5] In this way, the private buyer could not bring a legal action against Florida for selling the property while the United States maintained a competing claim of ownership. In other words, the private buyer was taking a gamble that Florida lawfully had the right to sell the island.

The United States made no further effort to stop Florida's sale of Wisteria Island. The island transferred to private ownership and has been resold several times to private buyers. Finally, in 1967, F.E.B. Corporation (F.E.B.) purchased the island with the intent to develop it. F.E.B. is the current owner of the property.

The United States did not initially reassert ownership over the island. To the contrary, the Chief of the Bureau of Yards and Docks wrote a letter in 1957 stating that the Navy would have a difficult time stating that the island was built for federal use. The Bureau also suggested condemning the island, and the Navy's District of Public Works later requested an appraisal for the island during the same year. A nearby island was officially condemned in 1961, which may have been built up during the same dredging operation that created Wisteria Island. The Navy even entered into agreements with F.E.B. to use the island for training from 2004 through 2006.

All that changed in 2011 when the United States again asserted its ownership of the island. Following the United States' claim to ownership, F.E.B. filed a claim under the Quiet Title Act, asserting that F.E.B. rightfully owned the island according to the Submerged

Photo of Sunset Key and Wisteria Island; courtesy of GizmoDoc Media.

Lands Act and Florida state law. The trial court reviewed F.E.B.'s claims but dismissed the action for lack of jurisdiction, since the court determined that the statute of limitations under the Quiet Title Act (QTA) had lapsed.[6] F.E.B. later appealed the action to the U. S. Court of Appeals for the Eleventh Circuit.

Quiet Title Act

The QTA allows individuals to sue the United States when a private party and the federal government claim competing interest in real property. A lawsuit under the QTA is designed to resolve the property disputes by determining who actually owns the property.[7] However, QTA claims must be brought within twelve years of the private property owner (or his predecessor) learning of the United States' claim.[8] If the current or previous owner should have known of the United States' claim, the twelve-year clock begins to countdown from that date, regardless of whether the current owner has actual knowledge of the claim.

The United States made Florida aware of its claim of ownership over Wisteria Island in 1951 through its letter objecting to Florida's plan to sell the island. In that letter, the United States laid out its claim of ownership, tracing it back to the 1819 treaty with Spain. The court referred to the letter as "an explicit and unambiguous" claim of title that began the twelve-year countdown to file suit under the QTA.[9] The court also pointed to both the Florida attorney

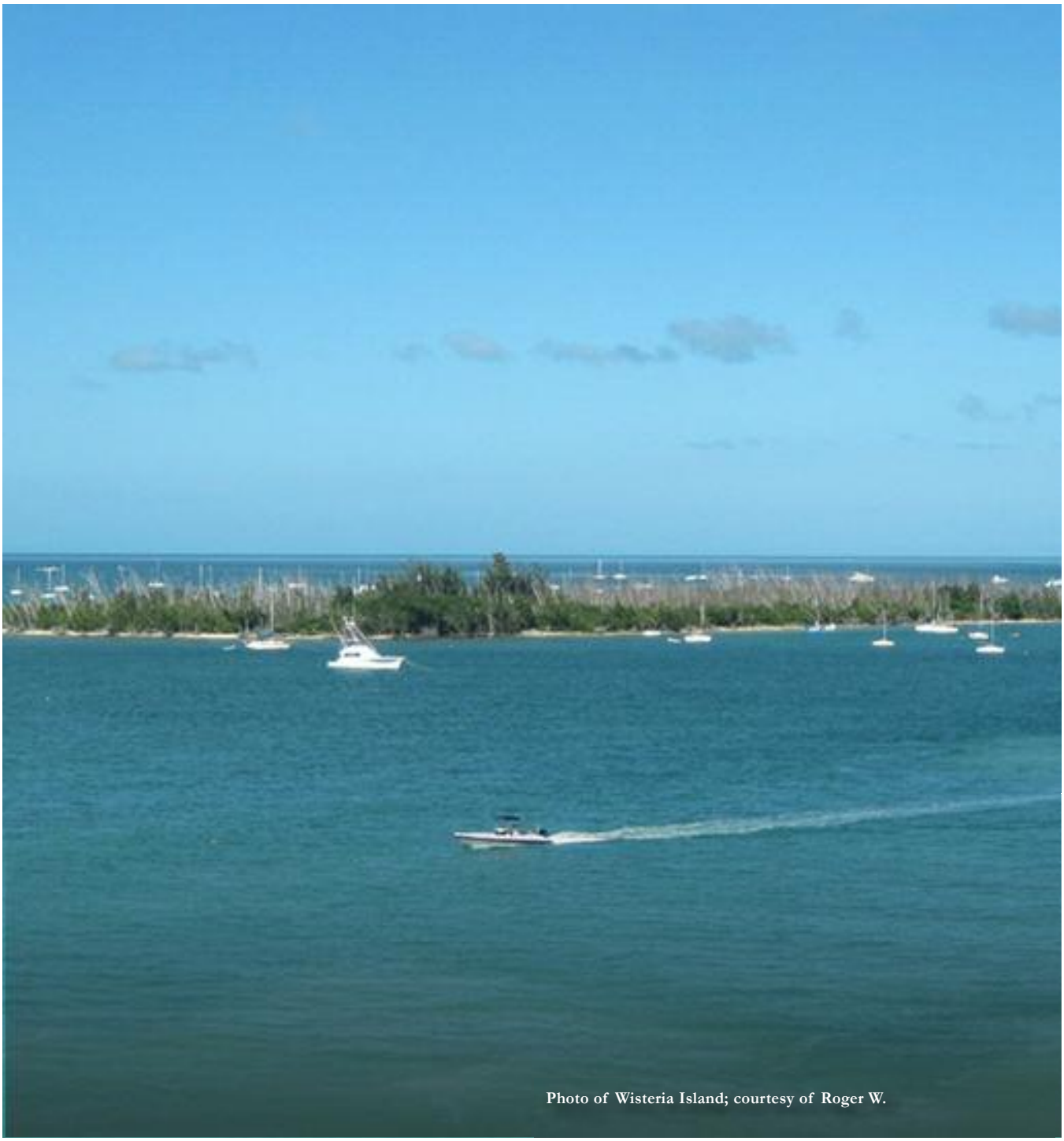

Photo of Wisteria Island; courtesy of Roger W.

general's letter discussing the validity of United States' claim and the nature of the deed Florida used to sell the island as further evidence that Florida knew of the United States' claim to the island.[10] This means that if any supposed owner of Wisteria Island other than the United States were to file an effective action to settle ownership under the QTA, they would have needed to do so by 1963.

Submerged Lands Act

F.E.B., in an attempt to side step the twelve-year limitation under the QTA, asserted that the Submerged Lands Act (SLA), passed in 1953, intervened and gave proper ownership of Wisteria Island to the State of Florida. F.E.B. suggested that the SLA broke any claim the United States government had over the island, leaving proper title with F.E.B.[11]

The SLA generally grants coastal states ownership to submerged lands under navigable waters, extending three miles seaward from their coastline.[12] For Florida, the state's jurisdiction extends further into the Gulf of Mexico, to approximately ten miles, reaching the edge of the Continental Shelf.[13] However, this grant is subject to certain exceptions, including the exception of "all lands filled in, built up, or otherwise reclaimed by the United States for its own use."[14]

While the SLA did grant certain submerged lands to Florida, the court reasoned that the United States creation of the island via dredge spoil was artificial and for the government's own use. The court stated that such circumstances brought the island under the exception of the SLA, thereby preserving the United States' proper claim over the island.

While the SLA did grant certain submerged lands to Florida, the court reasoned that the United States creation of the island via dredge spoil was artificial and for the government's own use.

Relinquished Property Interest

Further, according to the QTA, for the United States to completely relinquish a property interest it once had in a parcel, the government must take a concrete action authorized by Congress. For the United States to abandon its claim, it must (1) "clearly and unequivocally" abandon its interest, and (2) the abandonment must be proven by sufficient formal documentation "from a government official with authority" to make such a decision.[15] By this, the court reasoned that memoranda and statements by agency officials, such as the Chief of the Bureau of Yards and Docks, cannot relinquish government possession of land without Congress's affirmative approval, since the Chief does not, on his own, have authority to do so.[16] Nor does inaction relinquish the United States' ownership of its property claim under the QTA. The court emphasized that the United States did not have to take action against any of the previous owners to come under the QTA, as F.E.B. suggested. Instead, the time for the private or state owner to file a suit still begins to run when that party knew or should have known about the United States' claim against them.[17]

Conclusion

Ultimately, the case did not officially decide who was the true owner of Wisteria Island, although the court's ruling does recognize the United States' legitimate claim of ownership to the island. Rather, the court did not have jurisdiction to hear the case since the statute of limitations for F.E.B. to file suit had tolled in 1963. Therefore, the court affirmed the lower court's dismissal of the action.[18] This means that F.E.B. will not be able to pursue a quiet title action again through the courts.

Nathan Morgan is a 2017 J.D. Candidate at Vermont Law School and a summer research associate with the Mississippi-Alabama Sea Grant Legal Program.

Endnotes

1. Emily Yehle, *Mystery of Fla. island ownership still unresolved as court date looms*, E&E PUBLISHING, LLC., (July 16, 2013).
2. *Id.*
3. F.E.B. Corp. v. United States, 818 F.3d 681, 684 (2016).
4. *Enjoy The Islands!*, Florida Department of Environmental Protection, (last visited June 16, 2016).
5. *F.E.B. Corp.,* 818 F.3d at 684.
6. *Id.* at 686-687.
7. 28 U.S.C. § 2409a(a).
8. *Id.* § 2409a(g).
9. *F.E.B. Corp.*, 818 F. 3d at 686.
10. *Id.* at 686-687.
11. *Id.* at 687.
12. 43 U.S.C. §§ 1311-1312.
13. United States v. States of Louisiana, Texas, Mississippi, Alabama, and Florida, 364 U.S. 502 (1960).
14. 43 U.S.C. § 1313(a).
15. *F.E.B. Corp.*, 818 F.3d at 688.
16. *Id.* at 690.
17. *Id.* at 691-692.
18. *Id.* at 693-694.

Riding the Wave: Coastal Communities Tackle the Short-Term Rental Craze

Stephen Deal

Communities that want to implement additional short-term rental oversight, but don't want to explicitly discourage the practice, could look to Gulf Shores as a good example to follow.

Coastal towns may be some of the most popular places to vacation and retire, but the influx of tourism dollars and resort properties can create strains on the existing social dynamic and community character. The highly seasonal nature of beach traffic, coupled with the potential for disasters like hurricanes, can make reliance on beach appeal something of a feast or famine proposition. Tensions between seasonal visitors and permanent residents are a common occurrence and cities must constantly evaluate the benefits of additional tourism dollars against the potential impact to community character, social cohesion and environmental sustainability. This has been especially true in the debates surrounding short-term rentals, which often pit coastal residents against the perceived impacts of tourists, who are using sites like AirBnb and VBRO, to obtain vacation rooms from local homeowners. That is why it is so essential that beach communities have the right set of regulatory policies and solutions in place to best capture the economic value of the ocean's scenic splendor, while keeping the interests of full-time residents in mind.

Short-Term Rentals: A New Challenge with A Familiar Flavor

The debate over short-term rentals in coastal communities has gained increasing attention of late. Online platforms and apps, such as AirBnb and VBRO, have enticed people to rent spare rooms, accessory dwellings, and vacation homes for extra income.

The range of responses to this issue is wide. Some cities have chosen to regulate heavily, treating the rental as a traditional hotel establishment. Others have banned the rentals altogether. Still others have embraced the model and crafted ordinances that manage this new type of land use.

Though the technology that supports the short-term rental market is cutting edge, the idea is not without historical precedent. Throughout the 19th century, boardinghouses were created to accommodate in-town visitors and individuals who otherwise did not have the funds or resources for their own apartment or residence.[1] These arrangements were common in big cities, but coastal resorts also had their own unique examples of boardinghouse living. For instance, the O'Keefe-Clarke Boarding House in Ocean Springs, Mississippi was originally built as a single-family home in the 1850's. In 1874, it was converted to a boardinghouse.[2] The house, which still stands on Government Street, continued as a boardinghouse until shortly after 1910. The price range for boardinghouses varied widely, as did the individuals and groups who frequented them. An 1869 tourist guide for New York City noted that boardinghouses could cost from as little as $2.50 a week to as much as $40 a week.

Considerations

There are a host of issues to consider before entering the short-term rental market, and confusion over these rules is often a primary source of neighborhood conflict and consternation. For instance, many homeowners' insurance policies do not cover homes that are perceived as running a commercial business. Likewise, lease arrangements and neighborhood associations may have rules that prohibit a property from being rented out periodically by others.[3] Where cities allow short-term rentals, city offered resources and guides can encourage homeowners to engage in due diligence before renting out a unit. City maintained Checklists and FAQs can do a lot to provide insight into steps neighbors should take before renting out rooms, such as checking neighborhood covenants or obtaining commercial insurance. For example, the City of Portland, Oregon operates a fairly comprehensive FAQ page for potential short-term rental applicants. A lot of the questions discuss the city's zoning process for short-term rentals, but several questions delve into basic steps, such as how to best notify your neighbors and what are the most common complaints associated with short-term rental properties.[4] Though additional information can be useful in avoiding future conflicts, there is still one issue that remains front and center in every city office: what regulations should cities craft for short-term rentals?

Developing a Regulatory Response for Short-Term Rentals

Perhaps the most fundamental level of short-term rental management begins with timely and efficient enforcement of a city's nuisance ordinances. An example of this comes from Cape Elizabeth, Maine. As part of its short-term rental ordinance, the town instituted a "three strike system", which allows the town to revoke permits for up to a year if there have been three complaints lodged against the property during a three-year period.[5]

Another component of regular enforcement that can be useful are routine inspections by city staff, which provide short-term rental users with assurances that the properties are structurally fit and able to accommodate local visitors. The City of Gulf Shores, in 2013, passed an ordinance that made a routine safety inspection a precondition of renting a dwelling out to vacation goers.[6] The inspections do not address whether a building meets current building codes but instead focuses on "life-safety aspects" that would make a property unfit for use as a vacation rental.[7]

These basic levels of regulatory oversight can go a long way in providing reassurance to residents as well, who may be wary of vacation rentals due to their lack of consistent regulations and standards. A key advantage of these types of arrangements is that they effectively tie short-term rentals to the day-to-day enforcement of city nuisance laws. This type of enforcement situation effectively gives the city another leg to stand on as affected properties will be judged more on whether they are detriments to the community's character and not so much on their status as a short-term rental property.

Shotgun houses, such as the ones pictured, have been a prominent feature in New Orleans' debate over short-term rentals, because of their popularity with vacation rental users.

Other cities have banned the practice altogether. The challenge to this approach is that any such ban is dependent on enforcement by citizen complaints, as cities lack the staff capacity to do a comprehensive check on all short-term rental properties. For example, when the City of New Orleans was examining its existing short-term rental regulations, it conducted an informal survey on the number of properties in the city. In that survey, the City estimated that there are between 2,400 and 4,000 entries spread across various listing services. The City has publicly acknowledged that it lacks the resources to enforce tougher short-term rental regulations.[8]

Cities can also opt to allow or restrict short-term rentals in certain zoning districts or create new zoning classifications specifically for short-term rentals, but that too can be problematic. In Ocean City, Maryland, officials have a created a R1A zone that single-family neighborhoods can petition to be included into, which would ban short-term rentals that have terms of less than a year.[9] This development has short-term renters in the city worried about political favoritism and whether politically connected neighbors will more easily be able to shut down short-term rentals altogether.

Another option, one that is currently being looked at by the City of New Orleans, would divide short-term rentals among several different categories. A task force, led by Mayor Mitch Landrieu, has recommended creating four unique categories, each of which attempts to address a specific facet of the short-term rental market: (1) accessory short-term rentals, (2) temporary short-term rentals, (3) principal, and (4) commercial.[10] Under this model, both accessory short-term rentals and temporary short-term rentals refer to properties that continue to operate as primary residence. These categories are subject to the lowest levels of city scrutiny. On the other hand, a principal residential rental property essentially transforms a long-term rental property or owner-occupied house into a vacation home. This rental category is subject to the highest levels of scrutiny, with explicit density limitation placed on the rentals.[11]

Across all categories, operators are required to have liability insurance and display a short-term rental license on the street, visible to the public. The new regulations also reflect the varying circumstances and situations that are emblematic of the short-term rental market. Short-term renters, who are engaged in the activity only periodically, are not subject to the same level of regulation as those who are attempting to create permanent short-term rental properties. Likewise, the Bed and Breakfast industry, whose business model shares a lot in common with short-term rentals, are less likely to be adversely affected by new regulations on short-term rentals. Though New Orleans has by no means solved the short-term rental conundrum, the approach of breaking down an emerging market into discrete categories is a positive step forward. It shifts the debate away from the pros and cons of the short-term rental market as a whole and instead subjects major trouble spots within the market to increased scrutiny.

Conclusion

The dilemma over short-term rentals is the latest example of the tension that can exist between permanent residents and seasonal visitors. Coastal communities are accustomed to dealing with these types of conflicts, but short-term rental properties often blur the boundaries between private residences and coastal accommodations in ways that confound existing local ordinances. However, through new regulations and enforcement practices, there are ways in which cities can better position themselves to accommodate the needs of both permanent residents and visitors. In the case of short-term rentals, cities can diligently enforce existing nuisance laws and provide information that will assist short-term renters in making sure that their property conforms to community expectations and standards. The examples provided show that it is possible to craft new districts and standards that effectively address some of the concerns in a discrete and thorough manner. While the coast remains a popular travel destination, the influx of tourists and rentals does not have to overwhelm a coastal community's year-round character and environmental health. With appropriate regulations and community responses, coastal communities can, in effect, wear many hats, serving as a center for tourism in the summer and a quiet recreational port and fishing village in the winter.

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