

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 1677

AVOCA, INC.

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF NATURAL RESOURCES

Judgment Rendered: SEP 15 2017

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APPEALED FROM THE 16TH JUDICIAL DISTRICT COURT
ST. MARY PARISH, LOUISIANA
DOCKET NUMBER 129,068

HONORABLE PAUL J. deMAHY, JUDGE

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BEFORE: WHIPPLE, C.J., McDONALD, and CHUTZ, JJ.

McDONALD, J.

In this appeal, a landowner challenges a judgment affirming a state department's issuance of a coastal use permit to a parish levee district. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2013, St. Mary Levee District (the Levee District) submitted an application for a coastal use permit to the Louisiana Department of Natural Resources/Office of Coastal Management (DNR) to install a permanent flood control structure across Bayou Chene, Avoca Island, and along Tabor Canal, southeast of Morgan City, Louisiana (the Project). The Project's purpose is to provide protection against backwater flooding in St. Mary, Terrebonne, St. Martin, Assumption, and Iberville Parishes during an extreme flood event. The Project includes the installation of a floodgate in Bayou Chene near Avoca Island; removal of a pre-existing temporary flood control structure; installation and replacement of weir structures; elevation of nearby roads and levees; and, excavation of native material. The Levee District distributed a copy of the application to potentially affected landowners, including Avoca, LLC¹, which owns part of Avoca Island, an approximate 16,000-acre island near the Project.

In addition to applying for a coastal use permit, the Levee District also applied to the United States Army Department/Corps of Engineers (COE) for a Section 404 Clean Water Act permit, and to the Louisiana Department of Environmental Quality (DEQ) for a water quality certification. DNR, COE, and DEQ issued a joint public notice of the Project, and DNR designated a public comment period. Over several months, numerous federal and state entities and Avoca commented on the Project. In response to concerns raised, the Levee District and/or its consultants provided DNR with additional information on several occasions, including a December 2013 study assessing the hydrodynamic changes in Bayou Chene and nearby region due to the proposed Project; updated versions of the 2013 Study completed in March and June 2014 (the 2013/2014 Studies); as well as numerous other responses to DNR's requests for information. During these months, Avoca also submitted comments and modeling analyses to DNR

¹ In its petition for judicial review, Avoca, LLC, identified itself as Avoca, Inc. Apparently, Avoca, Inc. converted to Avoca, LLC, on December 15, 2016.

regarding the Project's impact on Avoca Island. Specifically, Avoca's consultant, Dr. Andrew Nyman, responded to each version of the 2013/2014 Studies, contending they insufficiently addressed the Project's impact on Avoca Island. Avoca met with DNR staff and Levee District officials several times to discuss the Project, and DNR and the Levee District responded to many of Avoca's concerns.

In response to comments, the Levee District also provided additional information to COE about the Project on several occasions. Relevant here, in May 2014, the United States Fish and Wildlife Service (FWS) expressed concern to COE about the Project's impact on freshwater flow downstream when the proposed floodgate was to be closed. In response, the Levee District's consultant, CBI, proposed the addition of four 8-foot pass-through culverts to the floodgate to allow freshwater flow when the floodgate was closed. At COE's request, in June 2014, the Levee District submitted a revised permit application to COE, which included the pass-through culverts. In January 2015, COE asked the Levee District to address additional concerns relevant to its permitting process. In June 2015, Avoca requested that DNR, DEQ, and COE develop additional hydrologic modeling of the Project. In July 2015, Avoca submitted its own impact assessment study, contending the Project would have additional adverse impacts to Avoca Island that DNR had not adequately analyzed.

In September 2015, after considering all evidence before it, a DNR administrator issued a 25-page Basis of Decision containing DNR's analysis of the Project, the Project's compliance with applicable guidelines, and the administrator's recommendation that DNR issue a permit for the Project. DNR then issued Coastal Use Permit No. P20130808 (the Permit) to the Levee District. The Permit contained numerous conditions and indicated that it did not eliminate the need to get a COE permit or any other federal, state, or local approval. Avoca filed a petition for reconsideration, which the Secretary of DNR denied with reasons. Avoca then filed a petition for judicial review in the district court. DNR answered the petition and filed the administrative record into the district court record. The Levee District, the Terrebonne Levee and Conservation District, and St. Mary Parish Government (Intervenors) each intervened in the suit, uniting with DNR in opposition to Avoca's petition. Avoca

motioned to reopen the administrative record to submit flood impact data collected during a 2016 flood event in Bayou Chene, which the district court denied. Over the course of about eight months, the parties filed numerous answers, memoranda, and briefs supporting their respective positions. The trial court held a hearing on the matter, and on July 21, 2016, signed a judgment affirming DNR's issuance of the Permit to the Levee District. Avoca appeals from the adverse judgment.

APPLICABLE LAW AND STANDARD OF REVIEW

Under the State and Local Coastal Resources Management Act of 1978, LSA-R.S. 49:214.21 et seq. (SLCRMA), the Secretary of DNR administers an overall state coastal management program, which includes the issuance of coastal use permits. LSA-R.S. 49:214.26(A)(1) & (C) and 49:214.27(A) & (B)(2). Under the SLCRMA, DNR promulgated Coastal Use Guidelines, LAC 43:I:701 et seq., to implement the SLCRMA. LSA-R.S. 49:214.30(B) & (C). DNR may only issue a coastal use permit if the proposed use conforms to the Coastal Use Guidelines and after an appropriate balancing of social, environmental, and economic factors. LSA-R.S. 49:214.30(C)(3); LAC 43:I:723(A), (C)(8)(a). To show its full and fair consideration of all information before it, DNR is required to issue a statement explaining the basis for its decision on a permit application, including its conclusions on the proposed use's conformity with the Coastal Use Guidelines. LAC 43:I:723(C)(8)(a). The Secretary of DNR or his designee makes the final decision as to whether to grant or deny a coastal use permit application. LSA-R.S. 49:214.26(C) and 49:214.30(C)(2)(b).

Any aggrieved person or other person adversely affected by a DNR coastal use permit decision may appeal the decision by filing a petition in the district court of the parish in which the proposed use is to be situated. LSA-R.S. 49:214.30(D); 49:214.35(D) & (E). The Louisiana Administrative Procedure Act, LSA-R.S. 49:950 et seq. (APA), governs judicial review of a DNR permit decision. LSA-R.S. 49:214.35(F). A district court's review is confined to the record as developed in the administrative proceeding. LSA-R.S. 49:964(F). In conducting its review, the district court functions as an appellate court. *AAA Safety, Inc. v. Dept. of Public Safety and Corrections*, 13-2171 (La. App. 1 Cir. 7/11/14), 146 So.3d 709, 712. The district court may affirm the

agency decision or remand the case for further proceedings. LSA-R.S. 49:964(G). The court may also reverse or modify the agency decision, if substantial rights of the appellant are prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error or law; (5) arbitrary, capricious, an abuse of discretion, or a clearly unwarranted exercise of discretion; or (6) not supported by a preponderance of evidence. LSA-R.S. 49:964(G). In the application of this rule, the district court shall make its own determination and conclusions of fact by a preponderance of the evidence based on its own evaluation of the entire record. *Id.*

Once the district court renders a final judgment, an aggrieved party may appeal the judgment to the appropriate appellate court. LSA-R.S. 49:965. The appellate court owes no deference to the district court's factual findings or legal conclusions; rather, on appeal of an agency decision, the appellate court reviews the agency's findings and conclusions under the standards set forth in LSA-R.S. 49:964(G). *Doc's Clinic, APMC v. State ex rel. DHH*, 07-0480 (La. App. 1 Cir. 11/2/07), 984 So.2d 711, 719, *writ denied*, 07-2302 (La. 2/15/08), 974 So.2d 264; *Metcalfe & Sons Investments, Inc. v. State ex rel. Dept. of Natural Resources*, 10-2120 (La. App. 1 Cir. 12/14/11), 2011 WL 6288044, *writ denied*, 12-0143 (La. 3/23/12), 85 So.3d 94. Under LSA-R.S. 49:964(G)(6), the appellate court makes its own factual determinations and conclusions by a preponderance of the evidence based on the entire record. And, under LSA-R.S. 49:964(G)(5), the appellate court uses the arbitrary and capricious test to review the agency's conclusions and exercises of discretion. *See Ford v. State, DHH*, 14-1262 (La. App. 1 Cir. 3/6/15), 166 So.3d 332, 336, *writ denied*, 15-0774 (La. 6/1/15), 171 So.3d 264. An action is arbitrary and capricious if it is taken without reason. *Id.* at 337.

In its review under LSA-R.S. 49:964(G), a reviewing court should afford considerable weight to an agency's construction and interpretation of its rules and regulations adopted under a statutory scheme the agency is entrusted to administer. *Id.* at 337; *Oakville Community Action Group v. La. Dept. of Env. Quality*, 05-1365 (La. App. 1 Cir. 5/5/06), 935 So.2d 175, 186; *Calcasieu League for Env. Action Now v.*

Thompson, 93-1978 (La. App. 1 Cir. 7/14/95), 661 So.2d 143, 149, *writ denied*, 95-2495 (La. 12/15/95), 664 So.2d 459. An agency is owed this deference in interpreting its rules because the agency typically is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the most reasonable interpretation of the rule given the agency's purpose in issuing it. See *Women's and Children's Hosp. v. State, Dept. of Health and Hosp.*, 08-946 (La. 1/21/09), 2 So.3d 397, 402-03; *Ford*, 166 So.3d at 337.

AVOCA'S APPEAL

On appeal, Avoca contends that this court must reverse the Permit because (1) DNR failed to evaluate the effect of the pass-through culverts on the Project, and (2) DNR abused its discretion by reaching conclusions that are unsupported by the record – namely, conclusions regarding the Project's economic value, the impact of maintenance closures of the floodgate, and a borrow pit's exemption from the Coastal Use Guidelines analysis.

Pass-Through Culverts

The record indicates that DNR had ample evidence to determine that the Project would not significantly impede water and sediment volume and flow unless the floodgate was closed; that the floodgate would be closed only in an extreme flooding event; that the river stage at which the floodgate would be closed has occurred only eight times since 1905; and, since the floodgate would remain open except during extreme flooding, the reduction of sediment, nutrients, and freshwater flow would be minimal. Although not explicitly stated in its Basis of Decision, DNR also had ample evidence to conclude that the addition of pass-through culverts to the floodgate would not change the above conclusions. Rather, the record clearly shows that DNR was aware of the pass-through culverts before issuing the Permit; and, contrary to Avoca's claim that the culverts constitute a "significant design change," the record indicates that, in its discretion, DNR decided that the pass-through culverts would not change its Coastal Use Guidelines analysis of the Project, notwithstanding what effect such would have on COE's permit decision. Notably, COE's permit decision is not at issue in this appeal.

Mindful of our role as a reviewing court, we find DNR reasonably considered the evidence before it. DNR's decision is supported by a preponderance of the evidence and shows no abuse of discretion. *See Ford*, 166 So.3d at 337, 339; *Calcasieu League for Env. Action Now*, 661 So.2d at 149.

**Conclusions Regarding Economic Value,
Maintenance Closures, Borrow Pit**

As earlier noted, DNR may only issue a coastal use permit if the proposed use conforms to the Coastal Use Guidelines and after an appropriate balancing of social, environmental, and economic factors. LSA-R.S. 49:214.30(C)(3); LAC 43:I:723(A), (C)(8)(a). As noted in DNR's Basis of Decision, in general, the greater the adverse impacts to coastal resources, the greater the need for analysis of the required justification and alternatives to ensure that the project's benefits outweigh the adverse impacts.

The Coastal Use Guidelines required DNR to evaluate the Project's economic need and local economic impact. In its Basis of Decision, DNR estimated the Project would provide flood protection to local/regional residential and commercial developments in five parishes at a net value of tens of billions of dollars. DNR's estimate was partly based on the proven success of the 2011 temporary flood control structure, which indisputably reduced the level of flooding during the 2011 flood event in these same parishes by about two feet. DNR's estimate is also reasonably based on the Project's inclusion in the 2012 Louisiana Comprehensive Master Plan for a Sustainable Coast, as a project inherently justified as in the public interest in terms of future management of Louisiana's coastal zone. *See* LSA-R.S. 49:214.1 et seq. Further, we note that Avoca points to no evidence to refute DNR's "tens of billions of dollars" estimate. Absent any such evidence, and given the record as a whole, we do not find DNR acted "without reason" in reaching this conclusion. *See Ford*, 166 So.3d at 337.

We similarly reject Avoca's arguments that DNR abused its discretion in assessing the impact of the floodgate's maintenance closures and in excluding the borrow pit from its Coastal Use Guidelines analysis. We reasonably discern from the

record that DNR weighed the adverse effect of routine maintenance closures against the benefit of installing the floodgate and found that the former did not outweigh the latter. And, given the considerable weight we afford DNR's construction of its rules, we find no abuse of DNR's discretion in determining the borrow pit, at more than five feet above sea level, would not have a direct impact on coastal waters, and need not be included in its evaluation of the Project.

In sum, we have thoroughly reviewed DNR's detailed Basis of Decision, its weighing of the Coastal Use Guideline factors, as well as the extensive evidence to which it cites and upon which it is based. The Basis of Decision demonstrates that DNR gave full and fair consideration of all information before it. Under the standards set forth in LSA-R.S. 49:964(G), and given the deference we owe DNR in its construction and application of the Coastal Use Guidelines, we find no reason to reverse or modify its decision – particularly, we find DNR's factual findings are supported by a preponderance of the evidence, and DNR did not abuse its discretion in applying the Coastal Use Guidelines to determine that issuance of the Permit was warranted.

CONCLUSION

The district court's July 21, 2016 judgment, affirming the Louisiana Department of Natural Resources/Office of Coastal Management's issuance of Coastal Use Permit No. P20130808 to the St. Mary Levee District, is affirmed. We issue this memorandum opinion in compliance with Uniform Rules – Courts of Appeal, Rule 2-16.1(B). Costs of this appeal are assessed to Avoca, LLC.

AFFIRMED.