NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 0664

EAST FIRST STREET, L.L. C. AND
M & B RENTALS OF AMERICA, L.L.C.

VERSUS

BOARD OF ADJUSTMENTS AND CITY OF THIBODAUX

Judgment rendered: JUN - 6 2008

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On Appeal from the 17th Judicial District Court
Parish of Lafourche, State of Louisiana
Civil Number 101760, Division "C"
The Honorable Walter I. Lanier, III, Judge Presiding

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BEFORE: CARTER, C.J., KUHN, AND DOWNING, JJ.

DOWNING, J.

M & B Rentals of America, LLC, East First Street, LLC, and Cornel and Cynthia Graham Martin ("the Applicants") appeal a judgment denying their petition for writ of mandamus and damages, effectively denying their requests to rezone five contiguous tracts of batture, approximately 2.8 acres, lying between East First Street and Bayou Lafourche in Thibodaux, Louisiana. The Thibodaux Planning and Zoning Board did not recommend the rezoning, and the Thibodaux City Council ("City Council") denied the rezoning requests. The district court affirmed the decisions of the City Council. For the following reasons, we affirm the judgment of the district court.

PERTINENT FACTS AND PROCEDURAL HISTORY

The Applicants sought to rezone certain property from R-1, residential only, to C-1, commercial, or C-1 with restrictions. The property had been rezoned R-1, residential only, in 1979. Prior to that, the property was zoned commercial. After the 1979 rezoning, the property was allowed to continue as commercial property because the zoning ordinance's "grandfather clause" allowed the property to continue its non-conforming uses. The five tracts bore two addresses, 711 East First Street and 629 East First Street. 711 East First Street was allowed to operate as a traditional filling station. 629 East First Street was allowed to continue in various commercial activities.

After the Planning and Zoning Board failed to recommend the Applicants' rezoning, and after the City Council voted to deny the rezoning requests, the applicants filed a petition for writ of certiorari, for writ of mandamus, and for damages in the district court.[1] After a trial over three

[1] In a related matter, this court has previously considered East First Street, LLC's appeal of the denial of its request for variances. *See* **East First Street, L.L.C. v. Board of Adjustments**, 06-0067 (La.App. 1 Cir. 2/9/07) (unpublished), 949 So.2d 675 (table), *writ denied*, 07-1047 (La. 8/31/07), 962 So.2d 440.

days, the district court denied the petition for mandamus and for damages at the Applicants' cost.

The Applicants now appeal, raising two assignments of error:

1. The district court erred in finding that the City Council was not arbitrary and capricious in refusing to rezone a residential-only zone over long-established commercial buildings to an appropriate commercial designation; and

2. The district court failed to even address [the Applicants'] claim that the City of Thibodaux's arbitrary enforcement of its zoning regulations constitutes a "taking" of [the Applicants'] property.

DISCUSSION

Denial of Rezoning Application

In their first assignment of error, the Applicants assert that the district court erred in failing to find that the City Council acted arbitrarily and capriciously in refusing to rezone the subject property as requested. We disagree.

A challenge to a zoning decision is a *de novo* action in which the issue is whether the result of the legislation, or lack thereof, is arbitrary and capricious. *See* **King v. Caddo Parish Com'n**, 97-1873, p. 15 (La. 10/20/98), 719 So.2d 410, 419. The Applicants have the burden of establishing by a preponderance of the evidence that the rezoning decision has no substantial relationship to public health, safety, morals or general welfare of the municipality. **Id.**, 97-1873 at p. 16, 719 So.2d at 419. Quoting **Four States Realty Co., Inc. v. City of Baton Rouge**, 309 So.2d 659, 664 (La.1974), the **King** court explained the terms "arbitrary and capricious" as follows:

> The terms 'arbitrary and capricious action' when used in a manner like the instant one, must mean willful and unreasoning action, absent consideration and in disregard of the facts and circumstances of the case. On the other hand, when there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due

> consideration, even though it may be believed that an erroneous conclusion has been reached.

King, 97-1873 at p. 14, 719 So.2d at 418. A court of appeal does not consider whether the district court manifestly erred in its findings, but whether the zoning decision was arbitrary, capricious, or confected with any calculated or prejudicial lack of discretion. **Id.**, 97-1873 at pp. 14-15, 719 So.2d at 418. Even where no competent evidence to support a zoning decision supports a governing body's decision, the resulting legislation, or lack thereof, will be upheld if the result is supported by evidence adduced at trial. *See* **Palermo Land Co., Inc. v. Planning Com'n of Calcasieu Parish**, 561 So.2d 482, 491-92 (La. 1990).

Based on the record before us, we conclude that the district court did not err in concluding that the Applicants failed to prove by a preponderance of evidence that the City Council acted arbitrarily and capriciously, that is, in a willful and unreasoning manner without consideration of or in disregard for the facts and circumstances of the case. Five members of the City Council and the chairman of the Planning and Zoning Board testified as to their reasons for voting against the rezoning. These reasons included, among others, the character of the surrounding area, the good of the neighborhood and the city, compliance with the zoning master plan, spot zoning, the potential for more-conforming, rather than less-conforming, commercial uses, respect for the work of the Planning and Zoning Board, the precedent for other rezoning requests in changing residential property to commercial property, maintaining the integrity of commercial and residential zones, giving special treatment to the two tracts at issue, other permitted uses on the batture, and the appropriateness of the zoning. They

also considered the Applicants' testimony that the sale of alcohol was anticipated.

The Applicants argue that the proposed rezoning did not meet the legal definition of spot zoning. Even if true, we cannot say it is improper for the City Council to consider how two owners' applications for rezoning would be singled out for different treatment. The Applicants further argue that the R-1 zone is unreasonable and that the Chairman of the Planning and Zoning Board's reasons for denying the rezoning bore no reasonable relation to health, safety or welfare. They argue that the City Council based its decision on residents' baseless speculation. They further argue that a rezoning is the only way to satisfy the fundamental tenets of zoning law.

We recognize that the City Council may have considered some matters that were inappropriate. But, as explained above, our inquiry is not whether the district court erred, but whether the City Council's decisions were arbitrary, capricious, or confected with any calculated or prejudicial lack of discretion. **King**, 97-1873 at pp. 14-15, 719 So.2d at 418.

Our review of the record shows that the City Council acted in good faith in considering the rezoning of the subject property. It is apparent that people could reasonably differ on whether the subject property should be rezoned. Accordingly, we conclude that the district court did not err in concluding that the Applicants failed to show by a preponderance of the evidence that City Council's actions were arbitrary and capricious. The district court did not err in concluding that the Applicants failed to prove by a preponderance of the evidence that the denial of their rezoning request bore no substantial relationship to the public health, safety, morals or general welfare.

The Applicants' first assignment of error is without merit.

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Damages for Taking

The Applicants argue that they are entitled to damages because the City has destroyed the value of their land, resulting in a constructive taking, since the district court found that "the properties in question [were] destined to fail" and that the Applicants "would suffer financial loss to conform their property to fit the R-1 setting." Nonetheless, on the record before us, we disagree that the Applicants are entitled to damages.[2]

The Applicants point to **Palazzolo v. Rhode Island**, 533 U.S. 606, 632, 121 S.Ct. 2448, 2465, 150 L.Ed.2d 592 (2001), where the Supreme Court held that a state supreme court erred in ruling that "acquisition of title after the effective date of the regulations barred [a] takings [claim]." And pursuant to **Palazzolo**, we conclude that the district court erred to the extent it found that the Applicants created for themselves the hardship caused by the zoning restriction.

The **Palazzolo** court explained that the central question in resolving the issue of whether a takings claim is ripe for decision "is whether petitioner obtained a final decision from the Council determining the permitted use for the land." **Id.**, 533 U.S. at 618, 121 S.Ct. at 2458. The court futher explained:

> [There exists an] important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been

[2] The Applicants argue that the district court did not rule on their claim for damages arising from a taking. However, the judgment plainly denies their petition for damages.

> established. Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision. (Citations omitted.)

Id., 533 U.S. at 620-21, 121 S.Ct. at 2459. The court stated that "[a] challenge to the application of land-use regulation ... does not mature until ripeness requirements have been satisfied." **Id.**, 533 U.S. at 628, 121 S.Ct. at 2463. We note that neither the district court nor the City Council address the ripeness issue, probably due to their erroneous belief, as discussed above, that the Applicants' takings claims were barred by their acquisition of the subject properties after enactment of the zoning regulations.

Even so, we note differences between federal and state takings that might affect when a claim ripens. In **Avenal v. State**, 03-3521 (La. 10/19/04), 886 So.2d 1085, *cert. denied,* 544 U.S. 1049, 125 S.Ct. 2305, 161 L.Ed.2d 1090 (1995),[3] the Louisiana supreme court discussed the concept of taking under Louisiana Const. Art. I, § 4. This provision provides in pertinent part as follows:

> (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. **This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.**
>
> (B)(1) Property shall not be **taken or damaged** by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity. (Emphasis added.)

As Justice Weimer explained in his concurring opinion in **Avenal,** 04-2185, concurring opinion p. 7, 886 So.2d at 1113, "La. Const. art. I, § 4, using both words, 'taken' and 'damaged,' encompasses damage claims that

[3] *See also*, Costonis, **Avenal v. State: A Road Map for Takings and Damagings Claims under the Louisiana and Federal Constitutions, 52 La. B.J. 358 (Feb./Mar. 2005).**

would not necessarily qualify as a taking under the Fifth Amendment. Under Louisiana law, a damage claim is compensable although it is not a taking." Justice Weimer further explained:

> In sum, because the Louisiana Constitution provides for compensation for property "taken" or "damaged," what is considered "taken" is a narrower concept in Louisiana when contrasted with federal law. Under federal law, interpretation of the term "taken" is broader. Under Louisiana law, the right to compensation is broad, but the interpretation of "taken" is narrower than in the federal sense.

Id.

Nonetheless, in **Lucas v. South Carolina Coastal Council**, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 2900, 120 L.Ed.2d 798 (1992), the Supreme Court observed that a landowner's ability to recover for governmental economic deprivation is not absolute. The court explained, "We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." In **Palazzolo,** 533 U.S. at 627, 121 S.Ct. at 2462, the Supreme Court stated that "[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions." Further, there is widespread agreement among the members of the Supreme Court that "some valid zoning and land use regulations are background principles that bar any takings claim." Blum and Ritchie, **Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses**, 29 Harv. Envtl. L. Rev. 321, 356 (2005).

The Louisiana supreme court has expressed views in accordance with this view. In **Avenal**, 03-3521 at p. 32 n.28, 886 So.2d at 1107 n.28, the

court, citing **Lucas**, noted, "if [the coastal diversion project] did entirely deprive [the leaseholders] of all economically beneficial and productive use of their property rights, the plaintiffs are still not entitled to compensation as [the coastal diversion project] was a valid exercise of the state's police power under federal law." It further explained, "compensation is not owed if the state action is in accordance with a 'background principle' of the state's property law that already prohibit the landowner from the use he claims was taken, or is undertaken in the exercise of the state's police power." **Id.**

"[Z]oning is a legislative function, the authority for which flows from the police power of governmental bodies." **King**, 97-1873 at p. 14, 719 So.2d at 418. Here, the zoning at issue has been in place since 1979. Nothing in the record suggests that the zoning is somehow invalid or that it was done for a malicious or improper purpose. As such, it is a background principle that is a defense to recovery of damages under Louisiana's takings law.

We therefore find no merit in the Applicants' second assignment of error.

DECREE

We affirm the judgment of the district court. Costs of this appeal are assessed against M & B Rentals of America, LLC, East First Street, LLC, and Cornel and Cynthia Graham Martin.

AFFIRMED