IN THE SUPREME COURT OF MISSISSIPPI
APPEAL NO. 2007-CA-01027

JAMES LLOYD PRESLEY, SR.
MAE PRESLEY VEAZEY
MARTHA PRESLEY HOUSTON **APPELLANTS**

VS.

CITY OF SENATOBIA, MISSISSIPPI **APPELLEE-CROSS APPELLANT**

I. CERTIFICATE OF INTERESTED PERSONS.

The undersigned counsel of record certifies that the following listed persons/entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Senior Circuit Court Judge Andrew C. Baker, Tate County Circuit Court, Senatobia, Mississippi

2. City of Senatobia, Mississippi.

3. Mayor Alan Callicott, Mayor of Senatobia, Mississippi.

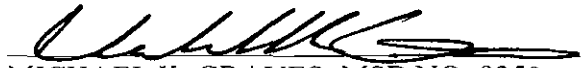
4. Board of Aldermen of Senatobia, Mississippi: (i) Lana Nail, (ii) Mike Putt; (iii) Michael Cathey; (iv) Buford Givens; and, (v) Penny Hawks Frazier.

5. Jim Johnson, Esq., City Attorney for Senatobia, Mississippi.

6. All persons/entities identified in Appellant's Certificate of Interested Persons.

7. Myers Graves, PLLC, 2446 Caffey Street, Suite 200, Hernando, MS.

DATED this the 23rd day of January, 2008.



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A. THE NATURE OF THE CASE.

On September 20, 2005, Appellants James Lloyd Presley, Sr., Mae Presley Veazey, and Martha Presley Houston (referred to collectively herein as "the Presleys") filed a Complaint against Appellee City of Senatobia, Mississippi (hereinafter "the City"). The Presleys' Complaint alleged that the City's denial of the Presleys' "Application For Rezoning" filed by the Presleys in 2001 seeking to rezone the Presleys' property from "R-2" (residential) to "M-1" (light industrial) for the alleged purpose of mining gravel constituted a "regulatory taking" of the Presleys' property by the City in violation of Article 3, section 17 of the Mississippi Constitution. (R.5-10)

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

On August 30, 2001, the Presleys filed an "Application For Rezoning" with the City requesting that the Presleys' property be rezoned from R-2 (residential) to M-1 (light manufacturing). (R.62-64) The Presleys' Application was denied by the City at its regularly scheduled meeting of the City's Mayor and Board of Aldermen on November 6, 2001. (R.65-71)

On November 16, 2001, the Presleys appealed the City's denial of the Application to the Circuit Court of Tate County, Mississippi, by filing a "Bill Of Exceptions And Notice Of Appeal" pursuant to the appeal procedure provided in Miss. Code Ann. § 11-51-75 (Rev. 2002). (R.92-102) The decision of the City to deny the Presleys' rezoning request was subsequently affirmed by the Tate County Circuit Court on September 24, 2002. (R.103-104)

The Presleys did not appeal the September 24, 2002, Order of the Tate County Circuit Court. Instead, nearly four (4) full years following the City's denial of the Presleys' Application—and without pursuing further state court appellate remedies allowed by law---the Presleys filed the instant lawsuit on September 20, 2005, claiming that the City owed the Presleys monetary damages for "inverse condemnation" because, as alleged by the Presleys, the City's refusal to rezone their property constituted a "regulatory taking" of the Presleys' property in violation of Article 3, section 17 of the Mississippi Constitution. (R.5-10)

On November 18, 2005, the City filed a Motion To Dismiss With Prejudice Pursuant To M.R.C.P. 12(b)(6) seeking to have the Presleys' lawsuit dismissed with prejudice on the basis of numerous legal defenses asserted by the City. (R.32-104) On May 30, 2007, the Circuit Court of Tate County entered an Order granting the City's Motion To Dismiss With Prejudice. (R.165-166)

On June 14, 2007, the Presleys filed a Notice Of Appeal. (R.167-168) On June 22, 2007, the City filed a Notice Of Cross-Appeal asserting that numerous additional legal defenses raised by the

City in its Motion To Dismiss but not specifically addressed or relied upon by the Circuit Court in its Order dismissing the Presleys lawsuit nevertheless provided further legal grounds warranting dismissal of the Presleys' lawsuit in addition to those relied on by the Circuit Court.[1] (R.170-171)

C. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.

In 1997, the City annexed property surrounding the City and located in Tate County, Mississippi. The Presleys' property subject of this matter was included within the property annexed by the City. On March 17, 1998, the City adopted, enacted, and passed comprehensive zoning regulations ("Zoning Ordinance: City of Senatobia, Mississippi (Ordinance No. 298)) which included zoning of the Presleys' property. The properties annexed by the City were zoned either "R-2" (residential), "B-2" (business), or "M-1" (light industrial). The Presleys' property was zoned R-2 consistent with the City's comprehensive plan for development. (R.58-59 at ¶ 3)

On August 30, 2001, the Presleys filed an "Application For Rezoning" with the City requesting that the property be rezoned from R-2 to M-1 for the stated intended use of "washing, crushing of aggregates". (R.62-64) The Presleys allegedly had entered into a contract with Memphis Stone and Gravel "to mine the gravel over a period of 15 years, contingent upon both parties being able to obtain a change in the plaintiffs' property's zoning classification from R-2 to M-1, as well as other required permits". (R.5-10 at ¶ 15)

On November 6, 2001, a public hearing was held before the Mayor and Board of Aldermen of the City on the Application filed by the Presleys. Following a full hearing on the Application with

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[1]The City filed a Notice Of Cross-Appeal as to the legal defenses raised by the City in its Motion To Dismiss which were not specifically relied upon or addressed in the Circuit Court's Order dismissing the Presleys' Complaint. (R.170-171) The City's Motion To Dismiss relied on the defenses of "lack of jurisdiction and/or failure to exhaust administrative remedies", "statute of limitations", collateral estoppel and/or *res judicata*", "valid exercise of police power", "sovereign immunity", "waiver", and "no 'taking' by the City's action". (R.32-104)

evidence presented both in support of and in opposition to the Application, the City denied the Application. (R.65-71)

The Presleys then appealed the denial of the Application by the City to the Circuit Court of Tate County, Mississippi, on November 16, 2001. (R.92-102)

The decision of the City denying the Application was affirmed by the Tate County Circuit Court on September 24, 2002. (R.103-104)

The Presleys did not further appeal the Order of the Tate County Circuit Court through available state court appellate remedies. (R.5-10 at ¶ 21)

On September 20, 2005, nearly four (4) full years following the decision of the City to deny the Application—and without exhausting state court appellate remedies allowed by law—the Presleys filed the instant lawsuit for monetary damages alleging "inverse condemnation" claiming that the City's denial of the Presleys' Application for rezoning constituted a "regulatory taking" of the Presleys' property in violation of Article 3, section 17 of the Mississippi Constitution. (R.5-10)

On November 18, 2005, the City filed a Motion To Dismiss With Prejudice Pursuant To M.R.C.P. 12(b)(6) seeking to have the Presleys' lawsuit dismissed with prejudice on the basis of numerous legal defenses asserted by the City. (R.32-104) On May 30, 2007, the Circuit Court of Tate County entered an Order granting the City's Motion To Dismiss With Prejudice, specifically finding and ruling as follows, in relevant part:

> This Court is of the opinion and rules that the Plaintiffs' claim of unconstitutional "taking" of their property in the present lawsuit was waived or given up by not following through with their administrative remedy, that being an appeal of the September 24, 2002, Order to the Mississippi Supreme Court and, therefore, the Circuit Court of Tate County does not have jurisdiction to hear plaintiff "taking" separate from the original appeal of the rezoning appeal since it was determined that the denial of Plaintiffs' request was not arbitrary, capricious, discriminatory or beyond the Board's

> legal authority. Therefore, this Court has already determined by its prior order of September 24, 2002, that the rezoning was not confiscatory.
>
> This Court is without jurisdiction to grant relief to the Plaintiffs. This lawsuit is therefore dismissed with prejudice pursuant to M.R.C.P. 12(b)(6).

May 30, 2007, Order of the Circuit court of Tate County, Mississippi. (R.165-166)

On June 14, 2007, the Presleys filed a Notice Of Appeal to appeal the May 30, 2007, Order of the Tate County Circuit Court dismissing the Presleys' lawsuit with prejudice. (R.167-168) On June 22, 2007, the City filed a Notice Of Cross-Appeal asserting that numerous additional legal defenses raised by the City in its Motion to Dismiss but not specifically addressed or relied upon by the Circuit Court in its Order dismissing the Presleys lawsuit nevertheless provided further legal grounds warranting dismissal of the Presleys' lawsuit. (R.170-171)

VI. SUMMARY OF THE ARGUMENT.

The Presleys' lawsuit for "inverse condemnation" is wholly predicated on their dissatisfaction with the City's refusal to rezone their property from R-2 to M-1 on November 6, 2001. Although the Presleys filed an appeal of the City's decision with the Circuit Court of Tate County, which affirmed the City's decision, the Presleys took no further appeal or other action to challenge the City's decision until the filing of the instant lawsuit on September 20, 2005. Consequently, the Circuit Court properly dismissed the Presleys' Complaint for lack of jurisdiction because the Presleys failed to exhaust administrative remedies.

Additionally, or alternatively, although not addressed by the Circuit Court's decision dismissing the Presleys' claim, the Presleys' claim is barred by the applicable statute of limitations because it was not filed within three (3) years of the date of the initial decision by the City which was the body charged with implementing the zoning regulation and deciding the rezoning request by the

Presleys.

Additionally, or alternatively, the Presleys' claim is barred by the preclusive doctrines of collateral estoppel and/or *res judicata*. Crucial and absolutely necessary to the Presleys' claim of inverse condemnation is that there must be a finding that the City's decision in refusing to rezone the Presleys' property was "arbitrary and capricious". That issue was previously, specifically decided in favor of the City in the earlier Circuit Court appeal of the City's denial. Therefore, the Presley's claim is barred by collateral estoppel, or "issue preclusion". Furthermore, the Presleys' claim is barred by *res judicata* both because the earlier Circuit Court decision already determined that the City's action was not confiscatory, and, the Presleys could have asserted any alleged "constitutional" grounds for reversing the City's decision in the previous action.

Additionally, or alternatively, the Presleys' claim is based on a valid exercise of the City's police power in zoning and rezoning matters, and are therefore not compensable. Mississippi law is clear that restrictions placed on the use of property through the lawful exercise of the State's police power do not require compensation. The actions of the City in refusing to rezone the Presleys' property were lawful exercises of that power, and the Circuit Court already determined that the City's actions were lawful.

Additionally, or alternatively, the Presleys' claim is barred by sovereign immunity. The actions of the City complained of by the Presleys are specifically protected from liability under Mississippi's sovereign immunity.

Additionally, or alternatively, the Presleys waived any "takings" claim by failing to further pursue the judicial, appellate processes available to attempt to obtain reversal of the City's initial rezoning decision.

Additionally, or alternatively, the Presleys have not, and cannot, establish the necessary predicate that there has been a "taking" of their property. The City's decision did not deprive the Presleys of economically viable use of their property, and, in fact, did not even deprive the Presleys' of all benefit of the "minerals" in or on their property as alleged by the Presleys. The City's only action was to refuse to rezone the Presleys' property in a manner which would be inconsistent with the current and planned zoning of the Presleys' property and out of character with the City's comprehensive planning.

VII. ARGUMENT.

A. STANDARD OF REVIEW.

This matter came before the Tate County Circuit Court on the City's Motion To Dismiss With Prejudice Pursuant To M.R.C.P. 12(b)(6). Attached to and made a part of the City's Motion were Exhibits "1"-"5" including materials[2] which were both unobjected to by the Presleys and referred to by both parties both in the proceeding before the trial court and to date on this appeal.

Mississippi Rule of Civil Procedure 12(b)(6) expressly provides,"[i]f, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56". See Jones v. Jackson Public Schools,

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[2] The specific materials "outside the pleadings" which were attached to and made a part of the City's Motion To Dismiss were:

Exhibit "1":	Affidavit of Mayor Alan Callicott
Exhibit "2":	Application For Rezoning (with attached exhibits)
Exhibit "3":	Minutes of the November 6, 2001, meeting of the Mayor and Board of Aldermen of the City of Senatobia, Mississippi (with attached exhibits)
Exhibit "4":	Bill Of Exceptions And Notice Of Appeal
Exhibit "5":	September 24, 2002, Order of the Circuit Court of Tate County, Mississippi

760 So.2d 730, 731 (Miss. 2000) (motion to dismiss was converted into a motion for summary judgment when judge viewed a video tape outside of the pleadings). In Gray v. Baker, 485 So.2d 306, 307 (Miss. 1986), the Mississippi Supreme Court summarily disposed of an argument that there was a motion to dismiss before the Court for review rather than a summary judgment, ruling as follows:

> At the outset we are met with the complaint of Baker and the other Appellees that the summary judgment is not before the Court. To be sure, Gray's assignment of error is singular and is directed toward the trial court's granting of the motion to dismiss under Rule 12(b)(6). Appellees forget, however, that motions to dismiss and motions for summary judgment are by rule declared interchangeable. . . . .

The standard of review of the grant of summary judgment is familiar and oft-repeated under Mississippi law:

> The standard for reviewing the granting or the denying of summary judgment is the same standard as is employed by the trial court under M.R.C.P. 56(c). This Court conducts de novo review of orders granting or denying summary judgment and examines all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exits is on the moving party. That is, the non-movant would be given the benefit of the doubt.

See Titus v. Williams, 844 So.2d 459, 464 (Miss. 2003)(citing McCullough v. Cook, 679 So.2d 627, 630 (Miss.1996)).

Alternatively, the standard of review on the grant of a motion to dismiss with prejudice is abuse of discretion. See Hood v. Perry County, 821 So.2d 900, 902 (Miss.Ct.App. 2002).

Under either/both standard of review, the dismissal of the Presleys' claim by the Circuit Court of Tate County was proper and should be affirmed.

B. THE CIRCUIT COURT PROPERLY DISMISSED THE PRESLEYS' CLAIM FOR LACK OF JURISDICTION BECAUSE THE PRESLEYS FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES.

1. The Circuit Court Lacked Jurisdiction.

The Tate County Circuit Court affirmed the denial of the Presleys' rezoning Application by the City on September 24, 2002, and an Order was entered by the Tate County Circuit Court consistent with that decision.[3] (R.103-104) The Presleys admittedly did not further appeal that Order. (R.5-10) Instead, nearly four (4) full years following the City's denial of the Presleys' rezoning request, the Presleys filed the instant lawsuit claiming that the City's decision denying their rezoning request constituted a "regulatory taking" under Article 3, section 17 of the Mississippi Constitution, and the City therefore owed the Presleys in excess of one million dollars[4] for alleged "inverse condemnation" of their property. (R.5-10)

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[3] In its September 24, 2002, Order, the Tate County Circuit Court specifically ruled as follows, in pertinent part:

> This Court cannot find that the decision of the Board of Aldermen was arbitrary, capricious, discriminatory or beyond legal authority as to the claim of the Appellants that the character of the neighborhood has changed to such an extent as to justify rezoning and there is a public need for rezoning. If the issue is fairly debatable, then the Board did not act arbitrarily.
>
> . . . .
>
> For the reasons stated above, this Court affirms the decision of the Board of Aldermen of November 6, 2001, and dismisses the Appellants' appeal because the Circuit Court finds no error in said decision of the Senatobia Board of Aldermen.
>
> (R.103-104)

[4] The Presleys' *ad damnum* of their Complaint demands monetary damages against the City for "a minimum amount of one million one hundred two thousand five hundred dollars ($1,102,500.00), together with reasonable interest from the date of the taking, together with other damages to be shown upon trial". (R.9)

The City filed a Motion To Dismiss With Prejudice Pursuant To M.R.C.P. 12(b)(6) in response to the Presleys' "inverse condemnation" Complaint. On May 30, 2007, the Circuit Court of Tate County entered an Order granting the City's Motion To Dismiss With Prejudice, specifically finding and ruling as follows, in relevant part:

> This Court is of the opinion and rules that the Plaintiffs' claim of unconstitutional "taking" of their property in the present lawsuit was waived or given up by not following through with their administrative remedy, that being an appeal of the September 24, 2002, Order to the Mississippi Supreme Court and, therefore, the Circuit Court of Tate County does not have jurisdiction to hear plaintiff "taking" separate from the original appeal of the rezoning appeal since it was determined that the denial of Plaintiffs' request was not arbitrary, capricious, discriminatory or beyond the Board's legal authority. Therefore, this Court has already determined by its prior order of September 24, 2002, that the rezoning was not confiscatory.
>
> This Court is without jurisdiction to grant relief to the Plaintiffs. This lawsuit is therefore dismissed with prejudice pursuant to M.R.C.P. 12(b)(6).

May 30, 2007, Order of the Circuit court of Tate County, Mississippi. (R.165-166)

The Tate County Circuit Court was eminently correct in its holding.

Mississippi Rule of Appellate Procedure 3(a) provides that "[a]n appeal permitted by law as of right from a trial court to the Supreme Court shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4". "[T]he notice of appeal shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from". M.R.A.P. 4(a). The timely filing of a notice of appeal is both mandatory and jurisdictional. See Comment to M.R.A.P. 3 ("timely filing of the notice of appeal" is "absolutely necessary"). See Fisher v. Crowe, 289 So.2d 921, 924 (Miss. 1974) ("It is well settled in this State that the perfection of an appeal to the Supreme Court within the time allowed by statute is jurisdictional."); Gulf, Mobile & Ohio R.R. Co. v. Forbes, 87 So.2d 488, 489 (Miss. 1956) ("The proper perfection of an

appeal to the Supreme Court within the time allowed by statute is jurisdictional.").

The Presleys admittedly never made any attempt whatsoever to appeal the May 30, 2007, Order of the Tate County Circuit Court. (R.5-10) Therefore, it is both clear and undisputed that there was not, and never has been, an attempt by the Presleys to appeal the May 30, 2007, Order by the Presleys. (R.5-10)

Mississippi law provides a clear procedure for persons aggrieved of the "administrative, legislative determination" of a rezoning decision of a governing body such as the City's Board of Aldermen—i.e., an appeal to the circuit court within ten (10) days of the board's decision by filing a bill of exceptions,[5] and, further, by appealing the decision of the circuit court to the Mississippi Supreme Court. See City of Jackson v. Holliday, 149 So.2d 525, 527 (Miss. 1963) (holding that *res judicata* barred subsequent rezoning attempt by city "because the administrative, legislative determination [by the city council] of the [initial attempted] rezoning was reviewed by the circuit court in 1961, reversed, and set aside, **and no appeal was taken from that judgment**") (emphasis added).

This procedure for appeal is neither new nor novel to Mississippi practice. The Presleys simply failed to or chose not to exhaust the available state law process provided for review of the decision of the City's Board of Aldermen and the subsequent Order of the Tate County Circuit Court denying the Presleys' rezoning Application. The Circuit Court therefore lacked jurisdiction to entertain a subsequent "inverse condemnation" lawsuit for monetary damages—filed four (4) years later—alleging the same wrongful action by the City which the Presleys, four (4) years earlier, failed or chose not to appeal.

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[5] Miss. Code Ann. § 11-51-75 (Rev. 2002).

This same type of "end-run" around Mississippi's proper appeal and judicial processes following a board of supervisors' decision was unsuccessfully attempted by the plaintiff in Hood v. Perry County, 821 So.2d 900, (Miss.Ct.App. 2002). In Hood, plaintiff Hood filed a declaratory judgment action against the county seeking a declaration from the chancery court that the county had abandoned a road on Hood's property as a result of prior action of the board of supervisors in the adoption of an official road map. Hood, 821 So.2d at 901-02. The chancery court subsequently granted the county's motion to dismiss because Hood "did not elect the appropriate and exclusive remedy available" to contest the board's action by filing an appeal under Miss. Code Ann. § 11-51-75 which would have placed exclusive jurisdiction with the circuit court under section 11-51-75, and Hood therefore did not follow the "judicial processes of the State". Id. at 902.

> The Hoods properly had a single exclusive avenue to appeal the Board's decision: they could, within ten days, appeal to the circuit court. Miss. Code Ann. § 11-51-75 (Rev. 2000). The Hoods, knowing full well that the chancellor had acted specifically to allow them proper notice by issuing the temporary injunction [to prevent the county from taking action against Hood until Hood could file a proper appeal within the ten-day window provided by section 11-51-75], ignored their exclusive remedy in an attempt to make an end-run around the **judicial processes** of the State of Mississippi. It is their great misfortune that similar issues have come before the courts of Mississippi in the past.
>
> Proceeding in opposition to a lawful decision of the Board outside of the exclusive remedies available constitutes a collateral attack that will not be maintained. Applying this rule to the extant case, we find that the Hoods did not elect the appropriate and exclusive remedy available to them. Further, the initial dismissal of the action for declaratory relief was proper precisely because it is outside the statutory scheme for appeal. The statutory scheme has been held to afford "a plain, adequate, speedy, and complete remedy for a **judicial** determination" of right. Examining these authorities, the chancellor properly dismissed the case. The Hoods' actions amounted to a failure to state a claim upon which relief can be granted, because the circuit court had exclusive jurisdiction over any appeal of the Board's actions.

Hood, 821 So.2d at 902 (citations omitted) (emphasis added). The Court of Appeals therefore made clear that a person aggrieved of a board's decision must file an appeal under section 11-51-75, and must then follow the "judicial processes" provided by the State for appellate review which "afford 'a plain, adequate, speedy, and complete remedy for judicial determination' of right". See id. The Presleys failed or chose not to comply with this process to obtain a "judicial determination of right" as to the City's decision denying their rezoning request, and the Tate County Circuit Court was therefore correct in ruling that it lacked jurisdiction to entertain the Presleys' subsequent "end-run" action seeking monetary damages for alleged "inverse condemnation".

In a Mississippi Supreme Court decision also arising out of an earlier administrative decision, the Court found the circuit court lacked jurisdiction in Smith v. The University of Mississippi, 797 So.2d 956, 962 (Miss. 2001) (emphasis added):

> Because [plaintiff] Smith did not exhaust his administrative remedies, by following statutory appeal procedures, the circuit court lacked jurisdiction to review the University's employment decision. . . . . As the University correctly points out, Smith failed to submit a petition supported by an affidavit and post a bond, with security, within six months of the decision of the PARB per the requirements of § 11-51-95. Smith's failure to perfect his appeal under § 11-51-95 **deprived the circuit court of jurisdiction** to review the University's decision to terminate Smith . . . .

Similarly, in Zimmerman v. Three Rivers Planning and Dev. Distr., 747 So.2d 853, 861 (Miss.Ct.App. 1999), the Mississippi Court of Appeals found, "To the extent that Zimmerman's appeal is, in essence, a challenge to the [Permit Board's] grant of the [landfill] permit, he failed to exhaust administrative remedies" by failing to appeal that decision within the time allowed to appeal.

In Pratt v. City of Greenville, 918 So.2d 81, 82 (Miss.Ct.App. 2006), plaintiff Pratt filed a lawsuit against the city alleging that he was wrongfully terminated from his position as a firefighter. During the course of the lawsuit, Pratt stipulated that he did not follow the city's grievance

procedures for employees prior to filing the lawsuit. Pratt, 918 So.2d at 83. The trial court granted summary judgment in favor of the city, and the Court of Appeals affirmed the trial court's decision on the basis that Pratt's admitted failure to follow the city's grievance procedure denied the circuit court of jurisdiction:

> As Pratt failed to exhaust his administrative remedies pursuant to Mississippi Code Annotated section 11-51-75 (Rev. 2002), the circuit court was without subject matter jurisdiction to hear the case. *Hood v. Perry County*, 821 So.2d 900, 902 (Miss.Ct.App. 2002). In *Hood*, this Court held that "[p]roceeding in opposition to a lawful decision of the board outside of the exclusive remedies available constitutes a collateral attack that will not be maintained." *Id.*

Pratt, 918 So.2d at 83.

In a closely analogous federal court case, Houck v. Tate County, Mississippi, 1999 WL 33537173 at *1 (N.D. Miss. 1999) (not reported in F.Supp.2d), the Tate County Board of Supervisors refused to allow plaintiff Houck to include single-wide mobile homes in two subdivisions being developed by Houck. In response, and without filing an appeal of that decision under state law procedures, Houck filed an action in federal court under 42 U.S.C. § 1983 alleging that the county's refusal to allow single-wide mobile homes amounted to a taking of his property without just compensation under the Fifth Amendment. Id. In granting the county's motion to dismiss, the district court found that the federal claim was not "ripe" because Houck did not pursue available "state law judicial remedies":

> A Fifth Amendments takings claim is not ripe until the owner of the property has pursued state law judicial remedies and been denied just compensation. . . . .
>
> Miss. Code Ann. § 11-51-75 provides that any person aggrieved by a decision of the board of supervisors may appeal such decision to the Circuit Court by filing a Bill of Exceptions. To date, the plaintiff has failed to pursue an appeal of any decision of the Board of Supervisors. Accordingly, since the plaintiff's Fifth Amendment

> takings claim is not ripe until the owner of the property has pursued state law judicial remedies and been denied just compensation, the court finds that the plaintiff's takings claim should be dismissed.

Houck at *2 (citations omitted) (emphasis added).

The Tate County Circuit Court's Order dismissing the Presleys' Complaint for lack of jurisdiction should be affirmed.

2. Appellant Presleys' Mischaracterization Of The Lawsuit And Citation To Inapplicable Legal Authorities.

In a desperate attempt to manufacture a viable claim where none exists (or to resuscitate a barred claim), the Presleys wholly mischaracterize the nature of their lawsuit and this appeal. The Presleys disingenuously claim that "[t]he purpose of this lawsuit is to seek compensation, not to dispute affirmance by the court of the earlier zoning decision, i.e., not to dispute that the Presley's (sic) mineral estate has been taken". See Brief Of Appellants at p.8. As innocently innocuous as this statement may appear, upon careful consideration it is the touchstone of the Presleys' misstatement and mischaracterization of the nature of their claim and, concomitantly, the fallacious basis upon which the Presleys' attempt to dodge the Circuit Court's dismissal.

The Presleys' (mis)characterization of the nature of the lawsuit purposefully ignores several key issues in the litigation and on appeal absolutely crucial to any chance of success on their claim. The Presleys' admitted—albeit curious—assertion that their lawsuit is "not to dispute" that there has been a "taking" by the City does not, as the Presleys suggest, support their claim.[6] First and

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[6] The Presleys' curious, self-serving "stipulation" that there has been a constitutional "taking" perhaps explains why the Presleys spend considerable time in their Brief discussing the "self-executing" nature of Article 3, section 17 of the Mississippi Constitution—i.e., it appears that the Presleys' contention is that "self-executing" automatically renders any restriction on the use of private property a constitutional "taking" without the necessity of any proof and without being subject to any legal defenses. See Brief Of Appellants at 2. However, there is clearly no legal authority to support such a proposition. See § IV. G. infra. Furthermore, the City is not aware of **any** alleged "constitutional" claim which is, by its very nature, automatically immune

foremost, the Presleys would have the burden to **prove** that there was a compensable, constitutional "taking" of their property. See MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 2565-66 (1986) ("The regulatory takings claim advanced by appellant has two components. First, appellant must establish that the regulation has in substance 'taken' his property .... Second, appellant must demonstrate that any proffered compensation is not 'just'.") (citations omitted). Also see § IV. G. infra.

Mississippi law is clear, however, that zoning regulations which restrict the use of property do not present a predicate for constitutional "takings" claims. See, e.g., Mississippi State Hwy. Comm'n v. Roberts Enterprises, Inc., 304 So.2d 637, 639 (Miss. 1974) (holding that Outdoor Advertising Act regulating billboard placement on highways was "in essence a zoning of property adjacent to highways" pursuant to the police power of the State and, therefore, not violative of section 17 of the Mississippi Constitution); Dear v. Madison County, 649 So.2d 1260, 1261 (Miss. 1995) (stating that notwithstanding constitutional provisions, the Court "has never held compensable every diminution of value. Zoning laws and the authority to place public projects are familiar sources."); Saunders v. City of Jackson, 511 So.2d 902, 906 (Miss. 1987) (finding that denial of rezoning request did not amount to a confiscatory taking); Jackson Municipal Airport Authority v. Evans, 191 So.2d 126, 133 (Miss. 1966) (distinguishing between "zoning regulations which merely restrict the enjoyment and use of property through a lawful exercise of the police power, and a taking of property for public use, for which compensation must be paid"); Walters v. City of Greenville, 751 So.2d 1206, 1208 (Miss.Ct.App. 1999) ("Zoning does not constitute a 'taking'.").

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from any and all potentially available legal defenses including, but not limited to, jurisdictional defenses, limitations defenses, sovereign immunity defenses, ripeness, etc.

Nevertheless, controlling Mississippi law thrown to the winds, the Presleys bemusingly frame this issue as though they are "stipulating" that the City's zoning decision **was** a taking without acknowledging the need that they "prove" anything. The Presleys' perversion of the nature of their lawsuit is akin to a car wreck plaintiff attempting to "stipulate" that the wreck was the defendant's fault, and plaintiff only seeks a jury verdict to determine the amount of damages plaintiff is allegedly owed. Convenient for the Presleys, but clearly misguided.

Second, following on the heels of the Presley's self-serving perversion of the parameters of their claim, the Presleys "stipulate" themselves out of court by stating that they "do not dispute the decision of the City"[7] which, again, the Presleys self-servingly assert, by *ipse dixit* proclamation, constituted a "taking". The Presleys' mischaracterization of their claim notwithstanding, there can be no mistake—this lawsuit **is** a challenge to the decision of the City denying the Presleys' request for rezoning of their property. See Zimmerman v. Three Rivers Planning and Dev. Distr., 747 So.2d 853, 861 (Miss.Ct.App. 1999) ("To the extent that Zimmerman's appeal is, in essence, a challenge to the grant of the permit, he failed to exhaust administrative remedies [by failing to appeal the agency's decision within the time allowed for appeal]."). Indeed, for the Presleys to have any chance of success on their claim—even ignoring the City's legal defenses—the Presleys must prove that the City's action was "arbitrary, capricious, or unreasonable, or whether it was fairly debatable". See Burdine v. City of Greenville, 755 So.2d 1154, 1158 (Miss.Ct.App. 1999) ("The Mississippi Supreme Court has held that 'the issue of confiscatory takings by zoning restrictions [is] intertwined with it review of whether the zoning decision is arbitrary, capricious, or unreasonable, or whether it was fairly debatable,'"). Therefore, even if none of the legal defenses raised by the City in its

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[7] See Brief Of Appellant at 5.

Motion To Dismiss and on this appeal were meritorious, the Presleys have nevertheless **judicially admitted** that they have no basis for a "takings" claim against the City under Mississippi law.

Additionally, the legal authorities cited and relied on by the Presleys also provide no refuge. Initially, the authorities relied on by the Presleys for the bald proposition that "filing of this inverse condemnation suit was the proper procedure for Plaintiffs to seek a monetary remedy for the taking of their property"[8] do not support the Presleys' position that they can eschew the statutory appeal process initiated under Miss. Code Ann. § 11-51-75 with subsequent available judicial review, and, instead, simply file this lawsuit for monetary damages. Neither Gilich v. Mississippi State Hwy. Comm'n, 574 So.2d 8, 10-11 (Miss. 1990) nor City of Gulfport v. Anderson, 554 So.2d 873, 875 (Miss. 1989) relied on by the Presleys involved "zoning" decisions which carry with them the mandatory, statutory appeal process initiated by the filing of a bill of exceptions under section 11-51-75. See Miss. Code Ann. § 11-51-75 (Rev. 2002). See also Tilghman v. City Of Louisville, 874 So.2d 1025, 1026 (Miss. Ct. App. 2004) (holding that neither the circuit court, nor the Court of Appeals, had jurisdiction to consider property owner's appeal because property owner failed to appeal zoning decision within ten days from the date of adjournment of board meeting as required by Mississippi Code Annotated § 11-51-75). Finally, while Herrington v. City of Pearl, 908 F.Supp. 418, 422-23 (S.D. Miss. 1995) did involve a "zoning" matter, it is difficult to believe that the Presleys would rely on this case as supporting authority since the plaintiff's inverse condemnation claim in Herrington was in fact dismissed on a motion for summary judgment as not being "ripe" for federal court review because the plaintiff had not yet exhausted all available state law remedies, specifically including the state appeal process provided by initiating an appeal of the local board's

[8] See Brief Of Appellant at 8.

decision pursuant to section 11-51-75. See Herrington, 908 F.Supp. at 424.

The primary case relied on by the Presleys throughout their Brief, Dunston v. Mississippi Dep't of Marine Resources, 892 So.2d 837 (Miss.Ct.App. 2005), in fact further evidences why the Presleys' claim was properly dismissed by the Circuit Court. In Dunston, the Court clearly stated that "since the Dunstons have not exhausted **all** administrative remedies available to them this Court does not have jurisdiction to hear this claim [for taking of their property in violation of Mississippi Constitution § 17] as it is unripe for judicial review". Dunston, 892 So.2d at 843 (emphasis added). Although the Court's opinion also later stated that the claim might be brought at a later time in a separate action in circuit court, id., the Court's opinion makes clear that the "takings" claim would only be appropriate **after** the Dunstons were denied a permit to develop the property **and** exhausted **all** administrative remedies, stating: "The Dunstons never filed for, and subsequently were never denied, a permit to develop their property. Since the Dunstons have not exhausted **all** administrative remedies available to them this Court does not have jurisdiction to hear this claim . . . .". Id. (emphasis added).

There are two important aspects of the Dunston decision and the Presleys' unfounded reliance on Dunston which warrant response. In their Brief, the Presleys contend that, "[u]nlike the Dunstons, the Presleys ***were denied the right to recover their mineral resources***".[9] The Dunstons alleged as part of their taking claim that the state agency's actions were "stonewalling **any** possible development to the property", but the Dunstons apparently never applied for a permit—and consequently were never denied a permit---to develop their property. Dunston, 892 So.2d at 843 (emphasis added).

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[9] Brief Of Appellants at 8-9 (emphasis in original).

Therefore, reason the Presleys, because the City denied their rezoning Application purportedly sought in order to allow the Presleys to mine gravel on their property (R.5-10), "[u]nlike the Dunstons", their claim is catapulted to a legal posture not attained by the Dunstons.

First, the Presleys fail to inform the Court that their admitted, ultimate plan for this property was to develop the property as a "nicer residential subdivision". (R.58-61 at ¶ 11) The Presleys remain entitled to develop the property as "residential" consistent with the current R-2 zoning and the City's Zoning Ordinance and Comprehensive Plan. (R.58-61) However, **"just like" the Dunstons**, the Presleys have not applied for (and, consequently, have not been denied) any permit to develop the property in a manner consistent with the City's zoning laws. The Presleys nowhere even allege that such a request would be denied by the City. (R.5-10) The Presleys' attempt to distinguish their claim from the Dunstons is unavailing. The simple fact remains that the Presleys have **never** sought—or been denied---any type of permit or permission from the City to develop this property consistent with its zoning.

In Herrington, 908 F.Supp. at 425 (citations omitted), the court summarily disposed of a landowners' similar assertion that he suffered a constitutional "taking" simply because the city's zoning restricted a desired use of his property not compatible with the zoning:

> [T]he plaintiff was restricted only from placing mobile home sales establishments on the two parcels in question. Otherwise, argues the City, he had a whole "bundle" of rights available to him and, "[w]here an owner possesses a full 'bundle' of rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."

Similarly, in MacDonald, 106 S.Ct. at 2567-68, the United States Supreme Court affirmed the dismissal of plaintiff's complaint for inverse condemnation finding that "the holdings of both courts below leave open the possibility that some development will be permitted, and thus again leave us

in doubt regarding the antecedent question whether appellant's property has been taken". Likewise, in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 101 S.Ct. 1287, 1293-94 and n.12 (1981), the Court dismissed plaintiff's inverse condemnation claim because the city's rezoning and open space plan did not deprive plaintiff of all beneficial use of the property. Quite simply, the Presleys are **"just like"** the Dunstons because they have never applied for—and have never been denied—a permit or permission to use their property in a manner consistent with the current zoning of the City.

Secondly, as concerns the Presleys' misplaced reliance on Dunston, the Presleys' reliance must again be predicated on the Presleys' *ipse dixit* assumption that they have in fact, "unlike the Dunstons", exhausted all available and necessary administrative remedies prior to filing this action. Without repeating at length the City's discussion *supra*, the Court is simply reminded that the Presleys have **never** applied for—or been denied—permission to use their property in any manner consistent with the City's zoning; therefore, as the above authorities make clear, the Presleys, "just like the Dunstons", have **not** exhausted all available and necessary administrative remedies precedent to filing this action.

Further in this regard, the Presleys also claim, without supporting legal authority,[10] that their appeal of the Board's decision denying their rezoning request to the Circuit Court constituted an exhaustion of all available and necessary administrative remedies prior to filing this action. In their Brief, the Presleys posit that, "An inverse condemnation suit did not become ripe for adjudication in state court until the judgment in the rezoning case was final. Once the circuit court judgment

[10] See Brief Of Appellants at 9 ("Undersigned counsel has not found any Mississippi authority requiring the Presleys to exhaust all judicial remedies in the prior suit in order to have exhausted their administrative remedies.").

became final, the issue of compensation arose." Brief Of Appellants at 9. That proposition is certainly nowhere supported by Mississippi law (as admitted by the Presleys' counsel in Appellants' Brief). Apparently the Presleys' position is that a disgruntled landowner can pick-and-choose which available appeal procedures are necessary for the required exhaustion of administrative remedies[11]—i.e., if an appeal to and final judgment of the Circuit Court was necessary for exhaustion as a predicate to this action as posited by the Presleys, why would that not also extend to further appeal of the Circuit Court's decision to the Mississippi Supreme Court—i.e., the obvious, ultimate "exhaustion"? Perhaps only because the Presleys did not do that four (4) years ago when it should have been done? In short, there is simply no (admitted)[12] legal or rational justification for the Presleys' assertion, and to hold otherwise would undermine the entire judicial and appellate processes of the State. The Presleys simply continue to mischaracterize the facts and procedure to suit their needs.

As curious as the Presleys' misplaced reliance on Dunston is their reliance on Herrington v. City of Pearl, 908 F.Supp. 418 (S.D. Miss. 1995). In Herrington, the court dismissed plaintiff's "taking" claim arising from a moratorium against the establishment of new mobile home businesses finding that plaintiff had not exhausted available administrative remedies—including state court appellate review—prior to filing a separate lawsuit for monetary damages. Id. at 424:

> The decision of the Mayor and Board of Aldermen was reviewable by the Rankin County Circuit Court pursuant to Miss. Code Ann. § 11-51-75. Herrington did not pursue this route of appeal prior to bringing this § 1983 cause of action.

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[11] See Brief Of Appellants at 7 n.2 ("Appellants submit that an unappealed municipal decision is a final decision, but an appealed municipal decision is not final until it is affirmed on appeal and no further appeal is taken.").

[12] See note 10 supra.

Of course, this "route of appeal" would also logically and legally include a possible subsequent appeal of the circuit court's decision to the Mississippi Supreme Court. See Little v. Collier, 759 So.2d 454, 458 (Miss. Ct. App. 2000) (recognizing that parties have a right to appeal an unfavorable judgment from circuit court pursuant to Miss. Code Ann. § 11-51-3)[13]. See generally M.R.A.P. 4.

The Fifth Circuit Court of Appeals' decision in Lange v. City of Batesville, 160 Fed. Appx. 348, 354 (5th Cir. 2005) (unpublished opinion), likewise does not stand for the Presleys' asserted proposition that an inverse condemnation suit "must follow" on the heels of a circuit court's affirmance of an administrative body's order. Initially, again to point out an important distinction which the Presleys continue to ignore, Lange did **not** involve a "zoning" decision. In Lange, the Fifth Circuit held that a federal court lawsuit for an alleged "taking" resulting from a municipality's alleged breach of contract was barred by ***issue preclusion*** based upon the state circuit court's affirmance of the municipality's order. Id. at 351. As concerns the "prerequisites" for filing a "takings" claim under **state** law as posited in the Presley's Brief, Lange simply holds that, in the context of a **federal** takings claim in federal court, that claim is not "ripe" until there has been a final decision by the governmental entity as to what will be done with the property, **and**, the plaintiff has already sought ***compensation*** through available, adequate state court procedures. Id. at 354. In other words, the decision in no way addresses what procedures or "route of appeal" must be followed or exhausted by plaintiff under state law and procedure prior to filing a state law claim for "compensation" under Article 3, section 17 of the Mississippi Constitution as is the case and issue under consideration *sub judice*.

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[13] Miss. Code Ann. § 11-51-3 states that "[a]n appeal may be taken to the Supreme Court from any final judgment of a circuit or chancery court in a civil case, not being a judgment by default, by any of the parties or legal representatives of such parties; and in no case shall such appeal be held to vacate the judgment or decree."

Finally, as suggested by the Presleys' unfounded reliance on the above decisions, the Presleys' further reliance on Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006), evidences that the Presleys are confusing the concepts of "ripeness", "finality", and "exhaustion".[14] Just as in Lange *supra*, Urban Developers involved an issue of "ripeness" for instituting "takings" claims in **federal** court as opposed to "exhaustion of administrative remedies" through state court law and procedure precedent to instituting a **state** court takings claim as in the case *sub judice*. Indeed, the only statement by the Fifth Circuit in Urban Developers concerning state law and procedural requirements precedent to a **state** law takings claim in state court is the following lone sentence: "The Mississippi Takings Clause, like its federal counterpart, has also been interpreted to require finality." Urban Developers, 468 F.3d at 294 (citations omitted). That is hardly a ringing endorsement for the Presleys' position. To the contrary, Urban Developers focused on "ripeness" necessary for federal court adjudication:

> Urban Developers' regulatory takings claim, that the City erroneously applied an otherwise valid flood plain ordinance, is unripe . . . . When Urban Developers was notified that the Mod Rehab contracts wouldn't be renewed, it suspended its plans to rehabilitate Town Creek and abandoned all avenues of review that were available to it. . . . . Urban Developers submitted two building plans for approval by the City, both of which were rejected because they did not comply with the City's flood-zone ordinance. After this rejection, although represented by counsel, Urban Developers neither applied for a floodplain-development permit, nor pursued mandamus against the City's community development officer, nor availed itself of the appeal process set forth in the City of Jackson municipal code, which provided any person affected by an order issued by a housing official with an appeal to the circuit court of the First Judicial District of Hinds County [consistent with section 11-51-75]. . . . . Accordingly, we dismiss as unripe Urban Developers' regulatory takings claims against the City of Jackson.

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[14] The legal difference in these concepts is very important in considering the City's defenses of both "exhaustion of administrative remedies" **and** that the Presleys' claim is barred by the applicable statute of limitations. See § IV. C. infra.

Id. at 293-94. See also Houck, 1999 WL 33537173 at 2 ("A Fifth Amendment takings claim is not ripe until the owner of the property has pursued state law judicial remedies and been denied just compensation.") (citations omitted).

"Ripeness" for federal court jurisprudence is also conceptually distinct from "exhaustion of administrative remedies" and "finality", all concepts which the Presleys have erroneously, interchangeably championed as evidenced by their reliance on the above-cited decisions for the self-same proposition—i.e., the Presleys' contention that they have "exhausted administrative remedies", and the Circuit Court therefore had jurisdiction of their inverse condemnation claim:

> Herrington views the matter of bringing an inverse condemnation lawsuit or appealing the decision of the Mayor and Board of Aldermen to Rankin County Circuit Court as an exhaustion requirement and contends that administrative claims need not be exhausted prior to bringing a § 1983 action in federal court. However, the question before this court is one of finality, not exhaustion. As noted in *Williamson County Regional Planning v. Hamilton Bank*, distinguishing *Patsy*, the question whether administrative remedies must be exhausted is conceptually distinct from the question whether an administrative action must be final before it is judicially reviewable. Hence, while the policies underlying these concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual concrete injury. The exhaustion requirement generally refers to administrative **and judicial procedures** by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful.

Herrington, 908 F.Supp. at 423 (citations omitted) (emphasis added).

In summary, although the Presleys' counsel admittedly "has not found" any applicable Mississippi authority supporting the Presleys' position, there is an abundance of Mississippi authority supporting this defense of the City and the Order of the Circuit Court dismissing the Presleys' claim for lack of jurisdiction because of the Presleys' failure to exhaust administrative

remedies. See § IV.B.1. supra.

The Presleys did not exhaust their available administrative remedies as concerns the City's decision denying their rezoning request. Then, four (4) years after the City's decision, **and after failing or choosing not to further appeal that decision**, the Presleys attempt to resuscitate their claim by seeking monetary damages against the City. The Tate County Circuit Court's decision dismissing the Presleys' inverse condemnation claim for lack of jurisdiction should be affirmed.

C. THE PRESLEYS' CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

The statute of limitations for the Presleys' claim is three (3) years from the date that the Presleys knew or should have known that their property was allegedly "condemned" by the City. See Taylor v. County of Copiah, 937 F.Supp. 573, 577 (S.D. Miss. 1994) (statute of limitations for alleged "takings" claim is three years under Mississippi's residual statute of limitations found in Miss. Code Ann. § 15-1-49) (holding that limitations period began to run at the time landowner knew or should have known that county was claiming public right adverse to landowner's rights). See also Henritzy v. Harrison County, 178 So. 322, 326 (Miss. 1938) (statute of limitations begins to run against landowner at time of condemnation of property).

Assuming *arguendo* there was any "taking" by the City as alleged,[15] the limitations period began to run when the City denied the Presleys' Application to rezone their property from R-2 to M-1 on **November 6, 2001**[16]. Decisions involving takings claims have made clear that the relevant action establishing "injury" for accrual of the limitations period is when there has been definitive action by the government entity implementing the regulation as to the application of the regulation

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[15] But see § IV.G. infra.

[16] The Presleys' Complaint was not filed until **September 20, 2005**. (R.5-10)

to the property at issue—in this case, the City's decision to deny the Presleys' rezoning request on November 6, 2001. In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 3117 (1985) (emphasis added), although in the context of a "ripeness" inquiry, the United States Supreme Court held that a "**final decision**" necessary for a federal takings claim to be ripe occurs when "**the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue**". Consistent with this principle of "finality" attendant with the decision of "the government entity charged with implementing the regulations", the Fifth Circuit in Urban Developers, 468 F.3d at 294 (emphasis added), recognized:

> The **City** has not made a **final decision** on whether to condemn the property, and has done nothing more than state its intent to proceed with condemnation. . . . . Here, we have only a threat to use the City's legal powers, and a mere threat does not constitute a taking . . . .

The court in Herrington, 908 F.Supp. at 423 (emphasis added), also made clear that an administrative action "**must be final before it is judicially reviewable**", and, "the finality requirement is concerned with whether **the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual concrete injury**". In the present case, the Presleys filed a Bill Of Exceptions seeking judicial review of the City's denial under section 11-51-75.[17] (R.92-102) Additionally, the "initial decision-maker"—the City—through its Minutes of November 6, 2001 (R.65-71), took a "definitive position on the issue" which the Presleys in this suit contend inflicted "an actual concrete injury" (R.5-10). Therefore, the City's denial of the Presleys'

[17]Although, as previously discussed (and acknowledged by the Presleys), the Presleys did not exhaust this "route of appeal", the Presleys clearly initiated the appeal process and had available to them subsequent appeals of the Circuit Court's decision which they simply failed or chose not to pursue. See § IV.B. supra.

Application, as clearly evidenced by the Presleys' own actions, was both "judicially reviewable" and "a definitive position [by the City] on the issue". The City's decision of November 6, 2001, was unquestionably "final" for purposes of the accrual of the statute of limitations.[18]

The Mississippi Supreme Court and Court of Appeals have both also addressed the "finality" of a local governing board's decision. In Mississippi Waste of Hancock County, Inc. v. Board of Supervisors of Hancock County, 818 So.2d 326 (Miss. 2001), the Court held that a final, appealable judgment is rendered by a board of supervisors where the board's decision adjudicates all issues as to all parties.

> Miss. Code Ann. § 11-51-75 (Supp. 2000) provides that an appeal to the circuit court from a decision of the county board of supervisors is proper only when brought by a person "aggrieved by a **judgment** or **decision** of the board." Likewise, this Court has jurisdiction over a matter only when a final judgment has been entered. A final judgment has been defined by this Court as a judgment adjudicating the merits of the controversy which settles all the issues as to all the parties.

Id. at 330 (citations omitted) (emphasis added). Consistent with this principle, the Court in Sanford v. Board of Supervisors, Covington County, 421 So.2d 488, 490 (Miss. 1982), held that an order of the board, acting in its judicial capacity, to appoint a committee to recommend action to the board was not a "final disposition" of the matter, and, therefore, was not an appealable order from the board as no judgment or decision as to the final resolution of the issue had been made by the board.

Similarly, in Hood v. Perry County, 821 So.2d 900, 902 (Miss. 2002) (citation omitted), the Court of Appeals rejected an argument that the board's decision did not constitute an appealable judgment or decision:

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[18] As previously discussed, there is a very important distinction between "finality" for purposes of accrual and "exhaustion of administrative remedies". See § IV. B. and n.14 and accompanying text supra.

> There is no merit in the Hoods' assertion that the Board's actions do not constitute a judgment or decision that may be appealed to the circuit court. "We are of the opinion that any act of a county or municipality leaving a party aggrieved is appealable under § 11-51-75 where, as in the present case, all issues of the controversy are finally disposed of by order of the [Board of Supervisors]."

The three (3) year statute of limitations began to run at the time the Presleys knew or should have known that the City—the initial decision-maker charged with implementing the regulation (zoning ordinance)—made a decision allegedly adverse to their rights. This occurred when the City took a definitive position and made a "final" decision on the Presleys' rezoning request on **November 6, 2001**. (R.65-71) The Presleys' instant action was not filed until **September 20, 2005** (R.5-10), long after the three (3) year limitations period had expired. The Presleys' claim is barred by the statute of limitations.

D. THE PRESLEYS' CLAIM IS BARRED BY THE PRECLUSIVE DOCTRINES OF COLLATERAL ESTOPPEL AND/OR *RES JUDICATA*.

In its May 30, 2007, order dismissing the Presley's Complaint, the Circuit Court specifically ruled that "this Court has already determined by its prior Order of September 24, 2002, that the rezoning was not confiscatory." (R.166 (emphasis added)).

> At some point, litigation must come to an end. Following final judgment, the rights of the parties *inter se* must become fixed. Successful plaintiffs in civil litigation are at some point entitled to satisfaction. Likewise, successful defendants are at some point entitled to repose. Relitigation of matters already decided between the same parties serves no useful purpose . . . .

J.Jackson, Encyclopedia of Mississippi Law, "Collateral Estoppel And Res Judicata" § 14:1 (2004).

To ensure finality of litigation, Mississippi courts have long-recognized the preclusive doctrines of collateral estoppel ("issue preclusion") and *res judicata* ("claim preclusion"). In order for either doctrine to apply in a particular case, four identities must be present between the first

action and the second action: (1) subject matter; (2) cause of action; (3) parties; and, (4) the quality or character of the person against whom the claim is made. Id. at § 14:3. See, e.g., Black v. City of Tupelo, 853 So.2d 1221 (Miss. 2003).

In the instant case, each of the four required "identities" is present for application of these doctrines of preclusion from the decision of the City in denying the Presleys' rezoning request and the previous Order of the Tate County Circuit Court affirming that decision:

(1) **Subject matter:** Both cases involve the zoning, and requested rezoning, of the Presleys' property by the City.

(2) **Cause of action:** In both actions—i.e., the appeal of the City's decision to the Circuit Court and this lawsuit for "inverse condemnation"—claim that the City wrongfully denied the Presleys' rezoning request. See Black, 853 So.2d at 1225 ("The identity of a cause of action is the identity of the underlying facts and circumstances upon which a claim has been brought.") (citations omitted).

(3) **Parties:** The Presleys and the City are the parties to both actions.

(4) **Character of the person against whom the claim is made:** The Presleys sought relief against the City in both actions.

In addition to these four identities, the first action must have been terminated with a "final judgment" being entered. Id. "A final judgment of the circuit court is a judgment adjudicating the merits of the controversy." Bank of Courtland v. Long Creek Drainage Distr. No. 3, 97 So. 881 (Miss. 1923).

It is clear that the September 24, 2002, Order of the Tate County Circuit Court entered in the previous action between these parties (R.103-104) is a "final judgment" entitled to preclusive effect. See Marshall County v. Rivers, 40 So. 1007, 1009 (Miss. 1906) (decision by circuit court on appeal from board of supervisors is a "final judgment" for purposes of appeal to Supreme Court).

1. Collateral Estoppel.

"Collateral estoppel . . . is a doctrine of preclusion. . . . . [C]ollateral estoppel precludes parties from relitigating in a second action *issues* actually decided in the first action." J.Jackson, Encyclopedia of Mississippi Law, "Collateral Estoppel And Res Judicata" § 14:7 (footnote omitted) (emphasis in original).

> The doctrine of collateral estoppel was recently discussed by the supreme court. The high court stated:
>
> Under the doctrine of collateral estoppel, "[an] appellant is precluded from relitigating in the present suit specific questions actually litigated and determined by and essential to the judgment in the prior suit, even though a different cause of action is the subject of the present suit."

Lange v. City of Batesville, 2008 WL 73289 at *10 (Miss.Ct.App. 2008) (citations omitted). See also Howard v. Howard, 968 So.2d 961, 973 (Miss.Ct.App. 2007).

Significant for purposes of the present appeal, it has been specifically held that collateral estoppel applies to issues raised by and judicially determined by Mississippi's process of proceeding with appeal through a bill of exceptions. See Lange v. City of Batesville, 160 Fed.Appx. 348, 352-53 (5th Cir. 2005) (unpublished opinion). See also San Remo Hotel, L.P. v. City and County of San Francisco, California, 545 U.S. 323, 125 S.Ct. 2491, 2503-04 (2005) (holding that collateral estoppel bars further federal court action where an issue of fact or law necessary to the action has already been determined by a valid state court judgment).

In the first action between the parties—i.e., the circuit court appeal of the City's denial of the Presleys' Application—the Tate County Circuit Court specifically found and ruled as follows:

> **This Court cannot find that the decision of the Board of Aldermen was arbitrary, capricious, discriminatory or beyond legal authority as to the claim of the [Presleys] that the character of the neighborhood has changed to such an extent as to justify rezoning and there is a public need for rezoning. If the issue is fairly debatable, then the Board did not act arbitrarily.**

September 24, 2002, Order of Tate County Circuit Court (emphasis added). (R.103-104) It is therefore clear that the **issue** of whether the City's action in denying the Presleys' Application was "arbitrary or capricious", or, instead, "fairly debatable", was actually litigated and determined in the earlier circuit court proceeding, and that ruling was essential to the judgment of the Circuit Court in the first action. See, e.g., Burdine v. City of Greenville, 755 So.2d 1154, 1157 (Miss.Ct.App. 1999) (holding that on appeal of a zoning or rezoning issue, "'the order of the governing body may not be set aside unless it is clearly shown to be arbitrary, capricious, discriminatory, or is illegal, or is without a substantial evidentiary basis.'") (citation omitted).

In the instant (second) action, the Presleys claim that the City's denial of the Presleys' Application to rezone their property from R-2 to M-1 constituted a "taking" of the Presleys' property by "inverse condemnation". (R.5-10) Significantly, however, the necessary predicate of the Presleys' takings claim has already been decided against the Presleys in the first action—i.e., that the City's action was not "arbitrary or capricious" and, instead, was "fairly debatable".[19] In fact, in its subsequent Order of May 30, 2007, the Circuit Court stated that "this Court has already determined by its prior order of September 24, 2002, that **the rezoning was not confiscatory**". (R.165-166 (emphasis added)) See Burdine, 755 So.2d at 1158 (citations omitted):

> Burdine contends that [the city's refusal to rezone his property from residential to commercial in order that Burdine could open a medical facility] is a denial of due process of law and amounts to a confiscatory taking without payment of due compensation which is contrary to Miss. Const. Art. 3 § 17 (1890) and the U.S. Const. amends. V & XIV. The Mississippi Supreme Court has held that "the issue of confiscatory takings by zoning restrictions [is] intertwined

[19] The Court should be reminded that the Presleys chose not to appeal this prior ruling of the Circuit Court. See § IV. B. supra. See Zimmerman v. Three Rivers Planning and Dev. Distr., 747 So.2d 853, 861 (Miss.Ct.App. 1999) ("Once an agency decision is made and the decision remains unappealed beyond the time to appeal, it is barred by administrative *res judicata* or collateral estoppel.") (citation omitted).

> with its review of whether the zoning decision is arbitrary, capricious, or unreasonable, or whether it was "fairly debatable." In *Saunders*, the Mississippi Supreme Court found the decision to be "fairly debatable" and accordingly found that denying the rezoning request did not amount to a confiscatory taking.

As stated in Burdine, "'the issue of confiscatory takings by zoning restrictions [is] intertwined with its review of whether the zoning decision is arbitrary, capricious, or unreasonable, or whether it was fairly debatable.'" Id. The Tate County Circuit Court has already made this determination in its ruling and Order of September 24, 2002 (R.103-104), and no appeal was taken from this Order. Therefore, this issue has already been litigated between these parties, has been decided by the Circuit Court, was essential to the Circuit Court's judgment in the prior action which was unappealed, and the judgment is entitled to preclusive effect under the doctrine of collateral estoppel.

2. Res Judicata.

> *Res judicata* has two functions. Under the principle known as "bar", *res judicata* precludes parties from litigating in a second action all claims litigated in an earlier action. Under the principle known as "merger", *res judicata* prevents subsequent litigation of any claim that should have been litigated (but was not litigated) in the original action. As such, *res judicata* is a mandatory joinder device, requiring plaintiffs to bring all transactionally related claims in a single action or be barred from ever litigating those claims.

J.Jackson, Encyclopedia of Mississippi Law, "Collateral Estoppel And Res Judicata" § 14:6. See Howard, 968 So.2d at 973 ("Res judicata precludes a party from litigating claims that were raised or could have been raised [in a prior action].") (citation omitted).

(i) *Res Judicata* as "bar".

In City of Jackson v. Holliday, 149 So.2d 525, 526 (Miss. 1963), the City of Jackson adopted an ordinance rezoning a lot from "commercial" to "residential" over the objection of the landowner. The landowner appealed the rezoning to the Hinds County Circuit Court which ruled on May 9, 1961, that the rezoning was "an unreasonable and arbitrary act", and reversed the city council's

rezoning order. Id. at 526-27. No appeal was taken from the judgment of the circuit court. Id. at 527-28. Seventeen days after entry of the circuit court's judgment, objecting adjacent landowners filed a Petition for Correction of Zoning Map "designed in part to re-determine and re-try exactly the same issues in the earlier proceedings", again asking the city council to rezone the subject property from "commercial" to "residential". Id. at 527. On this subsequent petition, the city council again ordered rezoning of the subject property from "commercial" to "residential". Id. The landowners again appealed this order to the circuit court which again reversed the city council's order holding that the court's prior judgment of May 9, 1961, **which was never appealed**, was *res judicata* as to the zoning of the subject property. Id. An appeal to the Mississippi Supreme Court followed.

The Mississippi Supreme Court affirmed the judgment of the Circuit Court based on *res judicata*. Finding that all of the necessary "identities" required for application of *res judicata* were present, the Court ruled:

> Administrative law presents special problems resulting from the differences in judicial and administrative processes. However, difficulty does not attach in the instant case, because the administrative, legislative determination of the rezoning was reviewed by the circuit court in 1961, reversed, and set aside, **and no appeal was taken from that judgment**.

2 AmJur.2d, Administrative Law, Sec. 499 summarizes the rule in this way:

> "Where an administrative determination has been reviewed by the courts, the res judicata effect, if any, attaches to the court's judgment rather than to the administrative decision, and it is frequently recognized that the rule of res judicata applies when an order or decision of an administrative agency in the exercise of quasi-judicial or adjudicatory power has been affirmed by a reviewing court; the same is true in the case of a reversal by the court or where review has been denied. Furthermore, even though an administrative determination itself, because legislative or administrative in its nature, or for other reasons, may not be capable of being res judicata,

> a court's judgment rendered in its judicial capacity, with respect to such a determination, operates as res judicata in the same manner as its other judgments."

City of Jackson, 149 So.2d at 527-28 (emphasis added). See also Zimmerman, 747 So.2d at 861 ("Once an agency decision is made and the decision remains unappealed beyond the time to appeal, it is barred by administrative *res judicata* or collateral estoppel."); Walton v. Bourgeois, 512 So.2d 698 (Miss. 1987) (where same facts and legal issues are presented but under a different legal theory, subsequent action is barred by *res judicata*).

Just as in City of Jackson, the Tate County Circuit Court reviewed and affirmed the City's decision to deny the Presleys' rezoning request, specifically finding that the City's decision was not "arbitrary, capricious, discriminatory, or beyond legal authority", but, instead, "fairly debatable". (R.103-104) **The Presleys did not appeal this judgment of the Tate County Circuit Court**. (R.5-10 at ¶ 21) That Order is now *res judicata* as to the Presleys' instant lawsuit which is premised on the allegation that the City wrongfully refused to rezone the Presleys' property.[20] (R.5-10)

(ii) *Res Judicata* principle of "merger".

In addition to the Presleys' claim being barred by the principle of "bar" under the preclusive doctrine of *res judicata*, the Presleys' claim is also barred by "merger". "Under the principle known as 'merger', *res judicata* prevents subsequent litigation of any **claim** that should have been litigated (but was not litigated) in the original action." J.Jackson, Encyclopedia of Mississippi Law, "Collateral Estoppel And Res Judicata" § 14:6 (emphasis added).

In the present case, the Presleys allege that the City's action in denying the Presleys' rezoning request was "unconstitutional" as a "regulatory taking" of the Presleys' property. (R.5-10) The Presleys clearly could have raised the alleged "unconstitutional" nature of the City's denial before

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[20] See Burdine, 755 So.2d at 1158 ("The Mississippi Supreme Court has held that 'the issue of confiscatory takings by zoning restrictions [is] intertwined with its review of whether the zoning decision is arbitrary, capricious, or unreasonable, or whether it was fairly debatable'.").

the Tate County Circuit Court on the previous appeal.

Initially, zoning ordinances—and rezoning decisions—are presumed constitutionally valid, and this presumption must be overcome by the person seeking to change the ordinance:

> It is a basic rule in the law of zoning that where a board of city or county officials, under authority conferred by the Legislature, has enacted a zoning ordinance, judicial review of action taken by the board is restricted and narrow in scope. An attack upon a zoning ordinance, to be successful, must show affirmatively and clearly that it is arbitrary, capricious, discriminatory, or illegal. **The presumption of reasonableness and constitutional validity applies to rezoning as well as to original zoning.**

Martinson v. City of Jackson, 215 So.2d 414, 417 (Miss. 1968) (emphasis added) (citation omitted). See, e.g., Moore v. Madison County Bd. of Supervisors, 227 So.2d 862, 863 (Miss. 1969) ("The presumption of reasonableness and constitutional validity applies to rezoning as well as to original zoning.").

Furthermore, in reviewing a (re)zoning order, the appellate court is expressly charged that, "[o]n appeal, 'the order of the governing body may not be set aside unless it is clearly shown to be arbitrary, capricious, discriminatory, **or is illegal**, or without a substantial evidentiary basis'". See, e.g., Burdine, 755 So.2d at 1156-57 (citation omitted) (emphasis added). See also Red Roofs, Inc. v. City of Ridgeland, 797 So.2d 898,900 (Miss. 2001) (to be reversed, zoning order must be shown to be arbitrary, capricious, discriminatory, unsupported by substantial evidence, or **"beyond the legal authority** of the [governing body]") (emphasis added).

In Hinds County Bd. of Supervisors v. Covington, 285 So.2d 143, 144 (Miss. 1973), the landowner sought to have his property rezoned from residential to commercial in order to operate a "dry-cleaning and laundry establishment" claiming that this was the "highest and best use" of the property. The Hinds County Board of Supervisors denied the rezoning application, and the circuit court then reversed the decision of the Board, ordering that the Board rezone the property to commercial. Id. at 144. The Board appealed the decision to the Mississippi Supreme Court, id.,

which reversed the circuit court finding that the landowner had not met the burden for changing a presumptively valid and constitutional zoning ordinance, id. at 144-45:

> Nor was it shown by any evidence capable of being characterized as clear or convincing that the original classification, **or the Board's action in declining to change it**, was unreasonable, arbitrary, discriminatory, **or confiscatory** or imposed unnecessary or unreasonable hardship upon [the landowner]. We are forced to conclude that [the landowner] failed to meet the burden which rested upon him to produce proof sufficient to require the Board to reclassify the property.

Hinds County, 285 So.2d at 145 (emphasis added). See also Robinson Indus. v. City of Pearl, 335 So.2d 892, 895 (Miss. 1976) (citation omitted) (emphasis added):

> It is only when their acts under their police power become arbitrary, capricious, **confiscatory** or fraudulent, that this Court will interfere with the ordinary performance of their duties so as to set aside a municipal ordinance.

It is therefore abundantly clear that the Presleys' **"could have"** asserted their constitutional attack on the City's denial of their rezoning request before the Tate County Circuit Court. Whether the City's denial was "unconstitutional", "confiscatory", "illegal", or otherwise "beyond the legal authority of" the City were clearly issues which could have been addressed on appeal by the Tate County Circuit Court had those issues been pursued on appeal by the Presleys. See, e.g., Burdine, 755 So.2d at 1156-57; Red Roofs, 797 So.2d at 900; Hinds County, 285 So.2d at 145; and, City of Pearl, 335 So.2d at 895 (all discussed supra).

The Presleys chose not to attack the alleged "unconstitutionality" of the City's denial of their rezoning request before the Tate County Circuit Court although that Court clearly had the authority within its limited scope of review to address any such allegation. The Presleys "could have" brought this issue forward at that time, but failed or chose not to do so. The Presleys' claim is now barred

from assertion by *res judicata*.[21]

E. THE PRESLEYS' CLAIM IS BASED UPON A VALID EXERCISE OF THE CITY'S POLICE POWER AND THEREFORE NOT COMPENSABLE.

The Presleys' property has not been physically taken or damaged by the City, and there is no such allegation by the Presleys. (R.5-10) Rather, this is an alleged "regulatory takings" case in that the Presleys allege that the City's denial of their rezoning request has "taken" their property in violation of Article 3, section 17 of the Mississippi Constitution.[22] (R.5-10)

In Mississippi, the principle has been long-recognized that "[r]estrictions imposed upon the use of property through the lawful exercise of the police power of the state do not require compensation." Mississippi State Hwy. Comm'n v. Roberts Enterprises, Inc., 304 So.2d 637, 639 (Miss. 1974) (holding that Outdoor Advertising Act regulating billboard placement on highways in State was "in essence a zoning of property adjacent to highways" pursuant to the exercise of the police power of the State and, therefore, not violative of section 17 of the Constitution). See also Dear v. Madison County, 649 So.2d 1260, 1261 (Miss. 1995) (stating that notwithstanding constitutional provisions, the Court "has never held compensable every diminution of value. Zoning laws and the authority to place public project are familiar sources."); Gilich, 574 So.2d 8 (Miss. 1990) ("not all governmental actions adversely affecting value require compensation").

In Jackson Municipal Airport Authority v. Evans, 191 So.2d 126, 133 (Miss. 1966), the Mississippi Supreme drew a distinction between "zoning regulations which merely restrict the

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[21] Additionally, the Mississippi Supreme Court has long held that "constitutional" issues not raised in the lower court are waived on appeal. See, e.g., Southern v. Mississippi State Hosp., 853 So.2d 1212, 1214 (Miss. 2003).

[22] Although addressed separately in the City's Brief at § IV. H. infra ("There Has Been No Taking" Of The Presleys' Property"), since the City's action was a valid exercise of its police powers as discussed herein, there simply was no constitutionally cognizable "taking" of the Presleys' property.

enjoyment and use of property through a lawful exercise of the police power, and a taking of property for a public use, for which compensation must be paid." The Court stated, "In the former instance, where the owner of property is merely restricted in the use and enjoyment of his property, he is not entitled to compensation." Id. at 132-33. The Court concluded that "mere regulation under the police power which can be modified at the discretion of regulating authority is wholly different from the taking or appropriating of private property by the government for a specific public use." Id.

The Mississippi Supreme Court in Red Roof Inns, Inc. v. City of Ridgeland, 797 So. 2d 898, 902 (Miss. 2001), affirmed a city's adoption of an ordinance requiring the removal of non-conforming signs pursuant to an exercise of police power. The Court quoted from Evans, *supra*, and drew a distinction between the exercise of a regulation under the police power and a taking that requires compensation. The Court explained the rationale for its holding:

> Implicit in the theory of the police power, as differentiated from the power of eminent domain, is the principle that incidental injury to an individual will not prevent its operation, once it is shown to be exercised for proper purposes of public health, safety, morals, and general welfare, and there is no arbitrary and unreasonable application in the particular case.

Id. at 902 (quoting Grant v. Mayor & City Council of Baltimore, 129 A. 2d 363, 366 (Md. 1957)).

In Walters v. City of Greenville, 751 So. 2d 1206, 1208 (Miss. Ct. App. 1999), a property owner alleged he suffered a substantial loss in the character, use and value of his real property, ultimately arguing that a change in a zoning ordinance constituted a taking of his property. The Court of Appeals held in favor of the city's zoning ordinance and, quoting from the United States Supreme Court decision in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 47 (1978), stated:

> Zoning does not constitute a 'taking.' While zoning at times reduces individual property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefitted by another.

Id. at 1211.

In a case directly on point, Burdine v. City of Greenville, 755 So.2d 1154, 1156 (Miss.Ct.App. 1999), the property owner applied to the city council for a request to rezone his property from a classification of R-2 (residential) to C-2 (light commercial). The city council denied his request, and the property owner appealed to the circuit court which subsequently affirmed the decision of the city council. Id. at 1155. The Court of Appeals began by stating, "This Court has no authority to disturb the decision of the zoning board if the controversy is 'fairly debatable.'" Id. (*quoting* Saunders v. City of Jackson, 511 So.2d 902, 906 (Miss. 1987), where the Mississippi Supreme Court found the decision of the zoning board to be "fairly debatable" and denying the rezoning request did not amount to a confiscatory taking). The Burdine Court found that, when there is substantial evidence supporting both sides of a rezoning application, the decision must be said to be "fairly debatable." Id. at 1157 (citation omitted). See generally Mayor and Board of Aldermen, City of Ridgeland v. Estate of M. A. Lewis, 963 So.2d 1210, 1214 (Miss.Ct.App. 2007) ("The meaning of the term 'fairly debatable' is 'the antithesis of arbitrary and capricious.'").

In Mathis v. City of Greenville, 724 So.2d 1109, 1114 (Miss.Ct.App. 1998), plaintiff Mathis claimed that the city's decision to remove a "No Thru Trucks" restriction in his residential neighborhood resulted in "an unconstitutional taking of property rights and a diminution of property values". The Court's opinion provides authoritative reasoning as to why exercise of the state's police powers—even where there results in a diminution in the economical use of the property---does not result in a compensable "taking":

. . . Mathis argues that "[d]iminution in property value, standing alone, can establish a 'taking,'" and directs us to *Village of Euclind, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed.2d 303 (1926) and *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) as authority. We have conducted a review of *Euclid* and *Penn Central* and will assume that Mathis has misread the holdings of these cases in conducting his research.

In *Penn Central*, the appellants filed suit against the city of New York following the refusal of the New York City Landmarks Preservation Commission to grant approval of plans for the construction of a 50-story office building over Grand Central Terminal, which had been designated a "landmark". Penn Central Transportation Co. argued that the application of the preservation law constituted a "taking" of the property without just compensation and that as a result were denied their property rights without due process. Penn Central argued that as a result of the restriction, they were limited economically in their use of the property thereby constituting a diminution in the property's value. The United States Supreme Court rejected this argument and held that mere diminution in property value, standing alone, cannot establish a "taking".

The Court went further in stating that the "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." This is precisely the issue in the case before us today. The Council enacted a "general law" removing a restriction on commercial traffic.

The *Penn Central* Court cited to *Village of Euclid, Ohio* in reaching its conclusion. In *Village of Euclid, Ohio*, the Court reversed a lower court's ruling which declared a municipality's zoning restriction unconstitutional. The Court held that if the legislative action in the classification for zoning purposes is "fairly debatable", then the legislative judgment must not be disturbed. The zoning ordinance in *Village of Euclid, Ohio* constituted a 75% diminution in value.

We are additionally persuaded by the Mississippi Supreme Court's holding in *Dear v. Madison County By and Through Madison County Bd. of Sup'rs*, 649 So.2d 1260 (Miss. 1995). In *Dear*, condemnation proceedings were begun and the landowner sought to introduce evidence regarding the impact of special assessment upon the value of his land. In deciding against Dear, the court held that the present value of the special assessment was not an element of due

compensation. The court went further and stated that:

> Certainly, constitutional history does not force the conclusion that the governing authority is obligated to compensate citizens for the economic impact of every action it takes; on the contrary, government has powers that do not carry with them the duty to compensate, as is attendant to eminent domain, which extend beyond the zoning authority mentioned in *Potters II*.[23] These include the authority to relocate roads and highways, and the exercise of its police powers through the regulation of traffic control and designation of access . . . .
>
> Therefore, under these holdings, we cannot conclude that the residents of the Tampa Drive neighborhood have been denied their due process of law or have suffered an unconstitutional taking of property rights and diminution of property values as a result of the exercise of a governmental body's policy power in establishing the "general law" for the good of the community as a whole.

Mathis, 724 So.2d at 1114-15 (footnote added) (citations omitted).

Finally, in Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138 (1980), *overruled on other grounds by* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), the plaintiffs sought damages against the city for inverse condemnation alleging that density restrictions in the city's (re)zoning ordinance "'forever prevented [its] development for residential use . . . .", and "[the rezoning] had 'completely destroyed the value of [appellants'] property for any purpose or use whatsoever'". Agins, 100 S.Ct. at 2140. In affirming dismissal of the plaintiffs' action, the Court adopted the California appellate courts' finding which rejected plaintiffs' "contention that the ordinances prevented all use of the land". Id. at 2141 n.6.

> The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban

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[23] In Potters II v. State Hwy. Comm'n of Mississippi, 608 So.2d 1227, 1230 (Miss. 1992), the Mississippi Supreme Court held that zoning decisions resulting in diminution of value are not compensable ("[W]e have never held compensable every diminution of value. Zoning laws and the authority to place public projects are familiar sources.").

> property in the State, and that the best possible use of the land is residential. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments.

Id. at 2142. As in Agins, the Presleys admit that they have always planned to use their property to develop a "nicer residential subdivision" (R.58-61 at ¶ 11), and there is absolutely nothing about the City's decision or related zoning that deprives the Presleys of the right to develop the land as a residential subdivision. In fact, to the contrary, the City's zoning ensures their right to do so.

The City's zoning and subsequent denial of the Presleys' rezoning request were valid exercises of the City's police power, and, to the extent that these actions resulted in any diminution in value to the Presleys' property, there is nevertheless no compensable, constitutional "taking".

F. THE PRESLEYS' CLAIM IS BARRED BY SOVEREIGN IMMUNITY.

Sovereign immunity cloaks all governmental functions a city performs. See Westbrook v. City of Jackson, 665 So.2d 833, 836 (Miss. 1995). The Mississippi Supreme Court has defined governmental functions as those which the city is required to undertake. Id.

Mississippi Code Annotated § 11-46-3 codified the State's historical recognition and preservation of sovereign immunity for the State and its political subdivisions. Within that statutory scheme, Mississippi Code Annotated § 11-46-9 provides in pertinent part:

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;
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> ****

(h) Arising out of the issuance, denial, . . . or the failure or refusal to issue, deny, . . . any permit, license, . . . or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, . . . unless such issuance, denial, . . . or failure or refusal thereof, is of a malicious or arbitrary and capricious nature.

The immunity provided to the City under the State's sovereign immunity statute is to be strictly construed in favor of limiting liability for the City's actions:

> "Waiver of a state's sovereign immunity, like waiver of any constitutional right, is strictly construed in favor of the holder of the right . . . . [T]he MTCA's exemptions to Mississippi's waiver should be liberally construed in favor of limiting liability." "The basis for the immunity given to government officials is in the inherent need to promote efficient and timely decision-making without fear of liability. This . . . works to encourage free participation and hinder fear that goes with risk-taking situations and the exercise of sound judgment."

Urban Developers, 468 F.3d at 306 (citations omitted).

As is evident from the plain language of § 11-46-9(1)(a) and (h), sovereign immunity protects the City from liability in exercising its judgment in zoning and rezoning decisions unless the City's action was "of a malicious or arbitrary and capricious nature". The Tate County Circuit Court has already determined and expressly ruled in its September 24, 2002, Order that the action of the City in denying the Presleys' rezoning request was not "arbitrary, capricious, discriminatory or beyond legal authority" (R.103-104). See Dunston, 892 So.2d at 842 ("If the agencies had denied the Dunstons a permit to develop their property they . . . would be immune from suit pursuant to Mississippi Code Annotated Section 11-46-9(h) (Rev. 2002).").

The City's action in denying the Presleys' request to rezone their property is immune from liability under the cloak of Mississippi's sovereign immunity.

G. THE PRESLEYS WAIVED ANY "TAKINGS" CLAIM.

As ruled by the Tate County Circuit Court, "the Plaintiffs' claim of unconstitutional 'taking' of their property in the present lawsuit was waived or given up by not following through with their administrative remedy, that being an appeal of the September 24, 2002, Order to the Mississippi Supreme Court . . . ." See May 30, 2007, Order of the Tate County Circuit Court (R.165-166).

"Waiver is voluntary surrender or relinquishment of some known right, benefit or advantage . . . ." Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp., 743 So.2d 954, 964 (Miss. 1999). By failing to appeal the Tate County Circuit Court's previous Order, the Presleys surrendered or relinquished any right which they might have had to attack the constitutionality of the City's decision and its alleged unconstitutional taking of their property. See, e.g., Rosenbaum v. City of Meridian, 246 So.2d 539, 542 (Miss. 1971) (holding that rezoning order denying rezoning is properly reviewed as to whether decision was "confiscatory").

The fact that the Presleys' claim involves alleged "constitutional" issues is of no moment:

> There is no doubt that an individual may waive the personal protections and privileges provided by the United States Constitution. He may, of course, also waive the personal protections and privileges afforded by the Mississippi Constitution (1890). Waiver may be accomplished by a specific written agreement or by a course of conduct which indicates an intention to forego the privilege.

Morgan v. United States Fidelity & Guar. Co., 222 So.2d 820, 829 (Miss. 1969) (citations omitted). See also Robinson v. State of Mississippi, 345 So.2d 1044, 1045 (Miss. 1977) (doctrine of waiver applies to "rights secured by the Mississippi Constitution").

The Circuit Court of Tate County was correct in finding that the Presleys have "waived or given up" their "taking" claim by failing to prosecute further appeals of the City's decision.

H. THERE HAS BEEN NO "TAKING" OF THE PRESLEYS' PROPERTY.

As previously discussed, despite the Presleys' self-serving perversion of the nature of their lawsuit as one "stipulating" that the City has taken their property and only to determine the amount of compensation owed,[24] it is clear that the Presleys have the burden to **prove** that there was a compensable, constitutional "taking" of their property. See MacDonald, 106 S.Ct. at 2565-66 ("The regulatory takings claim advanced by appellant has two components. First, appellant must establish that the regulation has in substance 'taken' his property. . . . Second, appellant must demonstrate that any proffered compensation is not 'just'.") (citations omitted).

In this regard, the Presleys have stated that their intention is that their property be developed as a "nicer residential subdivision". (R.58-61 at ¶ 11) The Presleys are still entitled to develop the property as "residential" consistent with the City's Zoning Ordinance. However, the Presleys have not applied for—or been denied—use of their property in a manner consistent with the Zoning Ordinance, and there is no allegation in the Presleys' Complaint even suggesting that such a request would be denied by the City. Quite simply, the Presleys have not shown—**or even alleged**—that there has been a "taking" of their property by the City. See MacDonald, 106 S.Ct. at 2568 n.8:

> [T]he Court of Appeal relied on the decisions in *Agins* to illustrate that the property owners there—as here—had not "attempt[ed] to obtain approval to . . . develop the land" in accordance with applicable zoning regulations and for this reason had "failed to allege facts which would establish an unconstitutional taking of private property."

See also Madison River R.V. LTD v. Town of Ennis, 994 P.2d 1098, 1104 (Mont. 2000) (citations omitted):

> [Plaintiff] has not alleged facts from which this Court could find it has suffered a taking at the hands of the Ennis Town

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[24] See § IV.B.2. supra.

> Commission. The Montana Supreme Court has stated that "a regulatory taking of property by a municipality is allowed even if the value of that property and its usefulness is diminished." The Court went on to say, "It is only when then owner of the real property has been called upon to sacrifice all economically beneficial use of that property in the name of the common good that a constitutionally-protected taking has occurred." There is nothing in the record to suggest, nor has [plaintiff] alleged, that the effect of the Commission's denial of its application for an RV park is to deny all economically beneficial use of the property in question. Therefore with regard to inverse condemnation [plaintiff] has not stated a claim for which relief can be granted.

Although the Presleys in their Brief attempt to mask the obvious fact that their property can still be developed as "residential" by claiming only that "the Presleys' mineral estate has been taken"[25]—i.e., strategically attempting to frame the alleged "taking" only as to "minerals" as opposed to their surface estate and any and all other uses which they may benefit from the property—this type of argument has been previously, roundly rejected.

In Herrington, 908 F.Supp. at 425 (citations omitted), the court summarily disposed of any such "strategy":

> [T]he plaintiff was restricted only from placing mobile home sales establishments on the two parcels in question. Otherwise, argues the City, he had a whole "bundle" of rights available to him and, "[w]here an owners possesses a full 'bundle' of rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."

Similarly, in MacDonald, 106 S.Ct. at 2567-68, the United States Supreme Court affirmed the dismissal of the plaintiff's complaint for inverse condemnation finding that "the holdings of both courts below leave open the possibility that some development will be permitted, and thus again leave us in doubt regarding the antecedent question whether appellant's property has been taken".

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[25] See Brief of Appellants at 8.

Likewise, in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 101 S.Ct. 1287, 1293-94 and n.12 (1981), the Court dismissed the plaintiff's inverse condemnation claim because the city's rezoning and open space plan did not deprive plaintiff of all beneficial use of the property.

Furthermore, there is no showing or even allegation that the City's decision has denied the Presleys access to all of their mineral rights in their property. The only issue which has been brought before the City by the Presleys and decided by the City was whether to "rezone" the Presleys' property from R-2 to M-1. There has been no decision by the City on any application by the Presleys or otherwise as to what the Presleys may do with any "minerals" which may exist in or on the Presleys' property, if any, only that rezoning of their property is not appropriate.

It is abundantly clear that the Presleys have not suffered a constitutionally cognizable "taking" by the action of the City in denying their rezoning request.

VIII. CONCLUSION.

As found by the previous decisions of the Circuit Court, the City's decision to refuse to rezone the Presleys' property in a manner which would be wholly inconsistent with the City's Zoning Ordinance and comprehensive plan for development just so the Presleys could purportedly engage in an "industrial" enterprise for self-profit was not "arbitrary and capricious" and was not "confiscatory". Nevertheless, after nearly four (4) full years of inaction by the Presleys to further object to the City's decision declining to rezone their property, the Presleys then subject the City to this costly litigation to defend a demand for over one million dollars in alleged damages. The Presleys' attempted end-run around the State's judicial and appellate processes is, however, fruitless. There has been no "taking" by the City of the Presleys' property. Furthermore, any one, and all, of the legal defenses to the Presleys' claim asserted by the City and discussed above serves as an absolute bar to the Presleys' claim. The Circuit Court's dismissal with prejudice of the Presleys'

claim should be affirmed.

RESPECTFULLY SUBMITTED this the 23rd day of January, 2008.

CITY OF SENATOBIA, MISSISSIPPI

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CERTIFICATE OF SERVICE

I, Michael K. Graves, one of the attorneys for Appellee/Cross-Appellant City of Senatobia, Mississippi, do hereby certify that I have this day provided a true and correct copy of the above Brief of Appellee/Cross-Appellant, via First Class Mail, postage prepaid, to the following:

Betty Sephton, Clerk
MS Supreme Court
P. O. Box 249
Jackson, MS 39205-0249

Honorable Senior Circuit Court Judge Andrew C. Baker
Tate County Circuit Court
202 French's Alley
Senatobia, MS 38668

Ronald W. Lewis, Esq.
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This the 23rd day of January, 2008.

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