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

ON APPEAL FROM THE CIRCUIT COURT OF
TATE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

ORAL ARGUMENT REQUESTED

MICHAEL K. GRAVES, MSB NO. [redacted]
JAMIE MONSOUR HALL, MSB NO. [redacted]
MYERS GRAVES, PLLC
2446 CAFFEY STREET, SUITE 200
P. O. BOX 876
HERNANDO, MS 38632
662-429-1994

ATTORNEYS FOR APPELLEE/CROSS-APPELLANT

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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 9th day of May, 2008.

MICHAEL K. GRAVES, MSB NO. 9359
JAMIE MONSOUR HALL, MSB NO. 102360
Myers Graves, PLLC
2446 Caffey Street, Suite 200
P. O. Box 876
Hernando, MS 38632
662-429-1994
Attorneys For Appellee/Cross-Appellant

II. TABLE OF CONTENTS.

III. TABLE OF CASES AND AUTHORITIES.

CASES

IV. STATEMENT OF ISSUES.

I. WHETHER THE CIRCUIT COURT LACKED JURISDICTION.

II. WHETHER THE PRESLEYS' CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

III. WHETHER THE PRESLEYS' CLAIM IS BARRED BY COLLATERAL ESTOPPEL AND/OR *RES JUDICATA*.

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

V. WHETHER THE PRESLEYS' CLAIM IS BARRED BY SOVEREIGN IMMUNITY.

VI. WHETHER THE PRESLEYS WAIVED ANY "TAKINGS" CLAIM.

VII. WHETHER THERE HAS BEEN A "TAKING" OF THE PRESLEYS' PROPERTY.

V. ARGUMENT.

A. THE CIRCUIT COURT LACKED JURISDICTION.[1]

Despite the Presleys' continued attempts to merely obfuscate the salient issues on this appeal, and their continued, self-serving mischaracterization of the nature of this lawsuit and appeal[2], in the context of the present case "failure to exhaust administrative remedies" and "failure to exhaust available judicial process" (as asserted by the Presleys) is an attempted distinction without a difference.

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[1] Also see pp. 9-26 of "Brief of Appellee/Cross-Appellant".

[2] In the Presleys' "Reply Brief" at p.7, the Presleys continue to ignore critical aspects of their claim, erroneously stating, "All that is required for the bringing of an inverse condemnation action is a prior final decision amounting to a taking." Again, at no time has it been established that there has been a compensable, constitutional "taking" by the City. Despite that, the Presleys bemusingly insist on contending that their action is simply one for "compensation". See Presleys' "Reply Brief" at p.15 ("[I]n the instant case the Presleys do not challenge the taking, which is acknowledged [by the Presleys (only)], but simply seek just compensation for that taking." The outright folly of the Presleys' position has been previously addressed and discussed in "Brief of Appellee/Cross-Appellant" at § VII.B.2 (hereinafter referred to as "the City's Brief"). Also see § V.G. infra.

The judicial appeal of a legislative, administrative decision by a zoning board pursuant to Miss. Code Ann. § 11-51-75 **is** the exclusive legal remedy/appeal of that decision. See Tilghman v. City of Louisville, 874 So.2d 1025 (Miss. Ct. App. 2004); Newell v. Jones County, 731 So.2d 580, 582 (Miss. 1999) (statute's ten day time limit to appeal decision of board is both mandatory and jurisdictional). The circuit court's decision is then appealable "as of right" to the Mississippi Supreme Court. See Little v. Collier, 759 So.2d 454, 458 (Miss. Ct. App. 2000). It is an elementary principle of law that an unappealed decision thereby becomes "final" and not subject to further attack. See, e.g., Hood v. Perry County, 821 So.2d 900, 901-02 (Miss. Ct. App. 2002).

Therefore, whether framed as "failure to exhaust administrative remedies" or "failure to exhaust judicial process", the fact remains that the Tate County Circuit Court properly ruled that it **lacked jurisdiction** over the Presleys' claim because the Presleys' failed to exhaust the **exclusive** remedy of judicial appeal of the City's decision. See May 30, 2007, Order of the Circuit Court of Tate County, Mississippi. (R.165-166) In Herrington v. City of Pearl, 908 F.Supp. 418, 422-24 (S.D. Miss. 1995), the plaintiff's inverse condemnation claim was dismissed on a motion for summary judgment 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 decision pursuant to section 11-51-75. In Powe v. Forrest County Election Comm'n, 163 So.2d 656, 660 (Miss. 1964) (emphasis added), the Mississippi Supreme Court made clear that the Presleys' argument is a distinction without a difference:

> A petitioner has the right to appeal from the decision of the [Election] Commission under the authority of the Code Section in Notes (see end of opinion), particularly § 3229, Miss. Code 1942, Rec., which requires the Commission to '* * * return the bill of exceptions and the appeal bond into the circuit court of the county within five days after the filing of the same with them * * *'.

> It is said in 2 AmJur.2d 434, § 599, Administrative Law, that 'Because the doctrine of exhaustion of administrative remedies is one of **judicial administration**, it is applicable to proceedings at law, as well as suits in equity, and applies in mandamus, certiorari, and declaratory judgment proceedings.'

Indeed, what "makes no sense", as posited by the Presleys, is that the Presleys could forego their rights of appeal of the City's decision to only then return to the courts over four (4) years later demanding a judgment in excess of a million dollars from the City. The taxpayers of the City of Senatobia should not be burdened with defending such claims.

The Circuit Court properly dismissed the Presleys' claim for lack of jurisdiction.

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

Preliminarily, the City is concerned that the Presleys perhaps conveniently overlooked several pages of the City's Brief. The Presleys state that the City has only cited two (2) cases in support of the City's statute of limitations defense, when in fact the City cited to and discussed eight (8) cases in its Brief, including decisions from the Mississippi Supreme Court, the United States Supreme Court, the United States Court of Appeals for the Fifth Circuit, and the Federal District Court for the Southern District of Mississippi. See the City's Brief at pp.26-29. Nevertheless, of the eight (8) cases relied on by the City, the only two (2) decisions which the Presleys choose to address are Taylor and Henritzy.

The Presleys baldly assert that Taylor "cannot be considered a persuasive precedent on accrual of the cause of action issue in an inverse condemnation case under state law". See Presleys' "Reply Brief" at p.15. Unbelievably, the **only** purported justification which the Presleys provide for this bald assertion is that, "[u]nlike plaintiff Taylor, who filed a federal lawsuit under the Takings Clause of the Fifth Amendment **to challenge the taking, the Presleys do not challenge the taking,**

which is acknowledged [by the Presleys (only)], but simply seek just compensation for that taking." See Presleys' "Reply Brief" at p.15 (emphasis added). Therefore, because the Presleys believe that they can "skip" the legal prerequisite of proving that the City's decision constituted a compensable, constitutional taking[3], the Presleys eschew all applicable legal precedent founded upon claims in which the plaintiff actually attempted to **prove** that there had been a compensable, constitutional taking. The Presleys' position has no legal rationality or support whatsoever.[4]

The Presleys attempt to disregard Henritzy by simply asserting that it has no precedential value because Henritzy involved a condemnation proceeding initiated by the governmental entity rather than an inverse condemnation claim. Again, this is simply an attempt by the Presleys to obfuscate applicable legal precedent by making wholly irrelevant distinctions. The salient point of Henritzy is that the limitations period accrued at the time of the decision **of the governmental entity** which allegedly "condemned" the property. That is precisely the issue which is addressed by the numerous decisions which were cited and discussed in the City's Brief but were apparently overlooked or simply ignored by the Presleys.

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[3]It should be noted that the plaintiff in Taylor did not make such an ill-fated assumption.

[4]The Presleys erroneously contend that their claim that the City's application of its Zoning Ordinance to the Presleys' property constituted a "taking" could not have been raised until the affirmance by the Circuit Court of Tate County. See Presleys' "Reply Brief" at p.18. Numerous Mississippi decisions make clear that the Presleys' assertion is without merit. In Walters v. City of Greenville, 751 So.2d 1206, 1208 (Miss. Ct. App. 1999) (cited by Presleys), the aggrieved property owner filed a bill of exceptions with the Circuit Court of Washington County arguing that the city's rezoning of his property caused a substantial loss in the value of his property and thus constituted a "taking" of his property. This Court affirmed the lower court's ruling on the statutory appeal by bill of exceptions that the city's action did not constitute a "taking" of the property. Similarly, in another decision of this Court heavily relied on by the Presleys, Tippitt v. City of Hernando, 909 So.2d 1190, 1192 (Miss. Ct. App. 2005), the disgruntled landowners filed a bill of exceptions with the Desoto County Circuit Court claiming that the city's rezoning of neighboring property "constitutes a **taking** by violating a fundamental right of ownership". Id. at 1194 (emphasis added).

For example, in Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 3117 (1985) (cited in the City's Brief at p.27) (emphasis added), the United States Supreme Court held that a "final decision" necessary for a federal takings claim occurs when "the **governmental 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 decision, the United States Fifth Circuit Court of Appeals held as follows in Urban Developers LLC v. City of Jackson, 468 F.3d 281, 294 (5th Cir. 1006) (cited in the City's Brief at p.27) (emphasis added):

> 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 . . . .

Additionally, in Herrington v. City of Pearl, 908 F.Supp. 418, 423 (S.D. Miss. 1995) (cited in the City's Brief at p.27) (emphasis added), the federal district court made clear that "the finality requirement [for judicial review of the governmental entity's decision] is concerned with whether the **initial decision-maker** has arrived at a definitive position on the issue that inflicts an actual concrete injury".

As discussed and supported in the City's Brief, the three (3) year statute of limitations accrued at the time that the City—the "initial decision-maker" **and** "the governmental entity charged with implementing the regulation"—made a final decision which allegedly inflicted injury on the Presleys.[5] The City's final decision denying the Presleys' rezoning request was made on November

[5] This also points out the fallacy of the Presleys' attempted analogy to a UM claim. See Presleys' "Reply Brief" at p.17 n.5. In the context of a UM claim, the **initial** decision denying a UM claim is made by a **private** insurance company and has no force of law. However, in a zoning matter, as is involved in the present case, the initial—"final"—decision is made by the **governmental entity charged (by law) with**

6, 2001, and the Presleys' inverse condemnation claim was not filed until September 20, 2005, nearly a full four (4) years later.

In Hobson v. City of Vicksburg, 874 So.2d 1026, 1027-28 (Miss. Ct. App. 2004), the City of Vicksburg passed an ordinance closing a deteriorated bridge on February 10, 1995. On January 11, 2002, plaintiffs filed an eminent domain action against the City. This Court affirmed the decision of the Warren County Special Court of Eminent Domain dismissing the case as barred by the three (3) year statute of limitations.

The Presleys' claim is similarly barred by the statute of limitations.

C. THE PRESLEYS' CLAIM IS BARRED BY COLLATERAL ESTOPPEL AND/OR *RES JUDICATA.*

1. Collateral Estoppel.

The Presleys claim that the preclusive doctrine of collateral estoppel does not apply because "[t]he issue in the prior case was rezoning. The issue here is whether the Presleys are entitled to just compensation for a taking." See Presleys' "Reply Brief" at p.8. The Presleys choose to simply ignore controlling Mississippi law which holds that "'the issue of confiscatory takings by zoning restrictions [is] intertwined with . . . whether the zoning decision is arbitrary, capricious, or unreasonable, or whether it was fairly debatable.'" See, e.g., Burdine v. City of Greenville, 755 So.2d 1154, 1158 (Miss. Ct. App. 1999) (citations omitted). According to the Presleys, this is simply "flawed" law and should be disregarded.

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implementing the regulation. The Presleys' attempted analogy is misguided.

While the Presleys contend that they "do not ask this court to revisit the rezoning decision"[6], see Presleys' "Reply Brief" at p.9, controlling Mississippi law makes clear that the issue of whether there has been a compensable, constitutional taking is wholly predicated upon whether the decision of the zoning authority was arbitrary, capricious, or unreasonable. See, e.g., Burdine, 755 So.2d at 1158. Also see additional authorities previously cited and discussed in the City's Brief at pp. 31-33. Therefore, while the Presleys understandably want to draw attention away from the City's zoning decision, that is clearly the legal predicate upon which the Presleys' claim must be based. Frankly, the Presleys even acknowledge that their complaint is with the City's **application** of the Zoning Ordinance to their property. See Presleys' "Reply Brief" at 5 ("Here, the City's designation of the Presleys' formerly agricultural land as residential extinguished their right of access to the mineral resources under their property . . . ."). It is grossly disingenuous for the Presleys to attempt to persuade this Court that they are not challenging the City's **application** of the Zoning Ordinance to their property. Instead, with just a hop, skip, and a jump right to the "issue of compensation", the Presleys expect a huge payday without having to prove anything.

To attempt to avoid the death-knell of controlling precedent, the Presleys contend that the controlling authorities of both the Mississippi Supreme Court and the Mississippi Court of Appeals on this issue "should be rejected as precedent because the reasoning is flawed". See Presleys' "Reply Brief" at p.9.

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[6] While the Presleys are not challenging the **validity** of the **zoning ordinance**, it is clear that the Presleys **are** challenging the application of the particular ordinance to their property—i.e., that the City wrongfully refused to rezone their property from R-2 to M-1. Indeed, it would be very difficult for the Presleys to challenge the "validity" of the zoning ordinance when no one on behalf of the Presleys asserted any type of objection to the adoption of the ordinance which originally zoned their property R-2.

In attempting to discard the Mississippi Supreme Court's decision and precedential law in Saunders v. City of Jackson, 511 So.2d 902 (Miss. 1987), the Presleys' claim that "[t]he issue before this court is compensation, not rezoning"[7], again wholly ignoring their own burden to **prove** that the City's decision resulted in a compensable, constitutional taking. The Presleys conclude by boldly suggesting that "[t]he *Saunders* case lacks the thorough analysis and reasoning required to determine whether compensation is due". See Presleys' "Reply Brief" at p.10. One can only suspect that the Mississippi Supreme Court believed its analysis and reasoning to be "thorough" and sufficient.

The Presleys then move on to criticize the Mississippi Court of Appeals' ruling in Burdine v. City of Greenville, 755 So.2d 1154 (Miss. Ct. App. 1999), as "unsupported" and "represent[ing] a second line of poorly reasoned cases". See Presleys' "Reply Brief" at p.11. The Burdine decision and an analysis of that decision and its holding have already been fully discussed in the City's Brief,[8] and no further elucidation is worthwhile at this point. Suffice it to say that the Presleys' disenchantment with Burdine is based on no more than a dislike of its clear application to the facts of the instant appeal.

Similarly, the Presleys attempt to jettison the authorities cited by the courts in Saunders and Burdine by elementary factual distinctions and further cries that the reasoning in these decisions is flawed. See Presleys' "Reply Brief" at pp.11-14. As fully briefed and discussed in the City's Brief,[9] these decisions represent well-established law in Mississippi, and, the Presleys' consternation notwithstanding, the decisions fully dispose of the Presleys' claim.

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[7] See Presleys' "Reply Brief" at p.10.

[8] See the City's Brief at pp.31-37.

[9] See the City's Brief at pp.31-33.

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 in refusing to rezone the Presleys' property was not "arbitrary or capricious" and, instead, was "fairly debatable". In its subsequent Order of May 30, 2007, the Circuit Court expressly 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).

Therefore, the touchstone issue of any alleged takings claim by the Presleys 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.

The Presleys do not even attempt to address the legal principles and authorities cited in the City's Brief concerning the application of the preclusive doctrine of *res judicata* to the Presleys' claim and instant appeal. Again solely relying on their mischaracterization of the nature of their claim and this appeal—i.e., that it is not a challenge to the zoning decision of the City, simply to determine damages—the Presleys claim that the identities of "subject matter" and "cause of action" are not present. See Presleys' "Reply Brief" at pp.7-8. Whether the Presleys vigorously pursued a "takings" claim in the prior action is of no moment; it is irrefutably clear that they could have (and should have if they intended to assert such a claim).[10]

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[10] See note 4 supra. Also, the Presleys roundly criticize the plaintiff in Saunders for presumably failing to seek compensation as part of the appeal of the city's zoning decision, and only alleging that the rezoning decision was confiscatory. See Presleys' "Reply Brief" at p.10. ("[Saunders] apparently did not make a claim for compensation in *Saunders*, but simply alleged that the denial of the requested reclassification amounted to a confiscatory taking in violation of due process of law."). The Presleys

As has been previously fully discussed and briefed in the City's Brief[11] and supra[12], the underlying predicate which the Presleys' must **prove**[13] in order to have a valid (regulatory) takings claim has already been brought before the Circuit Court, addressed by both parties, and decided by the Circuit Court adverse to the Presleys. Significantly, the Presleys did not appeal this decision.

As fully discussed in the City's Brief, the Presleys' claim is now barred by *res judicata* under the principles of both "bar" and/or "merger". See the City's Brief at pp.33-37.

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

The Presleys' reply wholly misses the mark on this legal defense. The pertinent issue here is whether the governmental restriction actually took property for a specific public purpose as opposed to simply restricting the use of the property for the public good and in the public interest.[14]

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therefore apparently believe, despite their protestations to the contrary, that Ms. Saunders mistakenly did not seek compensation as part of her challenge to the City of Jackson's zoning decision, but nevertheless now claim that they could not have done so.

[11] See the City's Brief at pp.33-37.

[12] See § C.1. supra.

[13] In MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 2565-66 (1986) (citations omitted), the United States Supreme Court discussed the plaintiff's burden to **prove** that there had been a compensable, constitutional taking: "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'."

[14] See Great South Fair v. City of Petal, 548 So.2d 1289, 1291 (Miss. 1989) (holding that "the police power is conferred upon or reserved to the states, and delegated to local governments, through the Tenth Amendment of the U.S. Constitution. The police power is the right of a government to promote the public health, safety, morals and general welfare, peace and order, and public comfort and convenience. Such concepts are entirely consistent with the purposes of zoning law."); Ridgewood Land Company v. Simmons, 137 So.2d 532, 536 (Miss. 1962) (board of supervisors is required to consider "not only objectors' interest and the landowner's right to use his land in making zoning decisions, but the common good of the community and the general welfare of all of the citizens")

As previously discussed in the City's Brief,[15] in a case heralded by the Presleys in their Reply Brief, the Mississippi Supreme Court in Jackson Municipal Airport Authority v. Evans, 191 So.2d 126, 133 (Miss. 1966), recognized a distinction 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 a public use, for which compensation must be paid." The Court acknowledged, "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 decision observed that "mere regulation under the police power which can be modified at the discretion of the regulating authority is wholly different from the taking or appropriating of private property by the government for a specific public use." Id.

The remaining decisions of the Mississippi Supreme Court, the Mississippi Court of Appeals, and the United States Supreme Court cited and discussed in the City's Brief provide undaunting support for this proposition, but repetition of those decisions here would be merely superfluous. See the City's Brief at pp.38-43.

The Presleys' property has not been "taken" by the City, and the Presleys are still wholly capable of full use of their property for any activity or investment permitted under the City's validly enacted zoning ordinance. The zoning regulations merely restrict the activities which may be conducted on the Presleys' property—just as with any other landowner in the City of Senatobia—specifically including the use of the Presleys' property for an extensive gravel pit/mining operation.

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[15] See the City's Brief at pp.38-39.

The City's refusal to rezone this property was a valid exercise of the City's police power acting in the public interest and for the public good for which no compensation is owed to the Presleys.

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

As an initial point, the Presleys cite no authority for their *ipse dixit* proclamation that Mississippi's sovereign immunity statute is inapplicable to this case. The Presleys' "Reply Brief" is devoid of any substance on this issue, and proffers only the Presleys' counsel's argument. This Court should not consider any argument on appeal not supported by cited legal authority. See Dampier v. State, 973 So.2d 221, 228 (Miss. 2008) ("the failure to cite authority in support of an argument eliminates our obligation to review the issue").

Beyond that point, the Presleys fail to even address why the provisions of section 11-46-9 (1) (a) and (h) are not applicable to the City's administrative, legislative act[16] of denying the Presleys' request to rezone their property. The simple fact is that the Presleys have no way to "argue around" the clear, express language of these provisions of Mississippi's sovereign immunity statute. See the City's Brief at § VII.F.

The only "red herring" in this case is the Presleys' continued mischaracterization of the nature of this claim as **not** being "an attack on the City's denial of their application for rezoning". See the City's Brief at §§ VII.B.2., VII.H., and discussion herein exposing the Presleys' disingenuous contention that "[t]he purpose of this lawsuit is to seek compensation, not to dispute affirmance by the court of the earlier zoning decision". The odor of that red herring permeates **every** argument

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[16] See City of Jackson v. Ridgway, 261 So.2d 458, 460 (Miss. 1972) (zoning is essentially a legislative function); Board of Aldermen, City of Clinton v. Conerly, 509 So.2d 877, 855 (Miss. 1987) (all matters by the local governing board pertaining to zoning are legislative in nature)

posited by the Presleys.

The Presleys' claim is barred by sovereign immunity.

F. THE PRESLEYS WAIVED ANY "TAKINGS" CLAIM.

The City not only relies on the authorities cited in its Brief[17], but the City also relies on the express finding of the Tate County Circuit Court 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 . . . ." See May 30, 2007, Order of the Tate County Circuit Court. (R.165-166)

While the Presleys continue to attempt to "declassify" this as a rezoning case, the fact remains that the Presleys' "taking" claim can only exist if the Presleys prove that the City's decision was "arbitrary and capricious". See, e.g., Burdine, 755 So.2d at 1158. Also see § V. C.1. supra. As previously discussed, that specific issue has been previously litigated between the parties and expressly decided by the Tate County Circuit Court against the Presleys (who chose not to appeal that decision). See § V. C. supra and the City's Brief previously filed.

Also conveniently overlooked by the Presleys is that any rezoning decision—including that of the City of Senatobia---may be properly reviewed as to whether that decision was "confiscatory". 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"). In fact, the Presleys have roundly criticized the plaintiff in Saunders v. City of Jackson, 511 So.2d 902 (Miss. 1987), for purportedly failing to seek compensation and only alleging that the rezoning decision was

[17] See the City's Brief at § VII.G.

confiscatory.[18] See Presleys' "Reply Brief" at p.10 ("[Saunders] apparently did not make a claim for compensation in *Saunders*, but simply alleged that the denial of the requested reclassification amounted to a confiscatory taking in violation of due process of law."). The Presleys therefore apparently believe that Ms. Saunders mistakenly did not seek compensation as part of her challenge to the City of Jackson's zoning decision, but nevertheless now claim that they could not have done so despite the fact that Mississippi law is clear that any rezoning decision may be reviewed to determine whether that decision is "confiscatory".

The Tate County Circuit Court was eminently correct in finding that the Presleys waived any alleged takings claim.

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

Nearly three (3) full pages of the City's Brief clearly evidences more than a "passing suggestion" on the issue of whether there has been any "taking" of the Presleys' property as curiously suggested by the Presleys. Of course this is not unexpected from the Presleys who continue to ignore that it is they who must **prove** that there was a compensable, constitutional taking of their property. See, e.g., MacDonald, 106 S.Ct. at 2565-66 (discussed supra).

The Presleys' lone argument is that the City's refusal to rezone their property from R-2 to M-1 has deprived the Presleys of their (entire) "mineral estate", and this action by the City therefore constitutes a "taking".[19] The Presleys' argument is wrong factually and legally.

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[18] The Presleys provide no evidence in their Brief as to where, if at all, they obtained information concerning the parameters of and specific claims made (or not made) in the Saunders decision other than what is contained in the Supreme Court's written decision. One can then only surmise that the Presleys expect this Court to accept their unsupported suppositions at face value.

[19] The City again points out that, the Presleys' contention to the contrary, the Presleys' claim is altogether a challenge of the City's **application** of the Zoning Ordinance to the Presleys' property.

First, factually, the City's decision has not denied the Presleys access to their "mineral estate". There are **many** minerals typically existing in a parcel of property (besides gravel)[20] which comprise the "mineral estate", and the City has not made any decision which does anything more than not allow the Presleys' property to be rezoned to M-1.[21] The fact that this may prevent the Presleys from entering into a contract with a third party to conduct extensive mining operations for gravel for commercial purposes does not mean that the City's decision has denied the Presleys "access" to **all** minerals on the property which comprise the Presleys' entire "mineral estate" as claimed by the Presleys.[22] Any issue relating to any other mineral which may exist on the Presleys'

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[20] See Black's Law Dictionary (5th Ed. 1979) (citations omitted), defining "mineral" as follows:

> Any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil.
>
> Any natural constituent of the crust of the earth, inorganic or fossil, homogeneous in structure, having a definite chemical composition and known crystallization. The term includes all fossil bodies or matters dug out of mines or quarries, whence anything may be dug, such as beds of stone which may be quarried.
>
> The word is not a definite term and is susceptible of limitations or extensions according to intention with which it is used. Standing alone it might by itself embrace the soil, hence include sand and gravel, or, under a strict definition, it might be limited to metallic substances. The term "mineral" as it is used in the public land laws is more restricted than it is when used in some other respects. Its definition has presented many difficulties. It has been hld that for purposes of mining laws, a mineral is whatever is recognized as mineral by the standard authorities on the subject.

[21] Notably, if the property were allowed to be rezoned to M-1, many uses other than "mining" would be allowed on the property as permitted uses pursuant to the City of Senatobia's Zoning Ordinance, many, if not all, of which would be wholly incompatible with the residential character of the neighborhood in which the Presleys' property is located.

[22] Significantly, to the extent that the Presleys' claim is predicated upon a contention that the City's decision has denied them access to their **entire** "mineral estate", the Presleys would clearly have the burden to prove the existence of all minerals purportedly existing on the property, and that the City's action has denied the Presleys use of **all** of these minerals. The Presleys have at no time alleged this as part of their claim, and the record is wholly devoid of any evidence which would support such a contention. Furthermore, as previously discussed and further addressed herein, even if the Presleys could establish that their (entire)

property and/or "access" to any other mineral which may exist on the Presleys' property has never been addressed to the City by the Presleys. Furthermore, there are many other beneficial uses of the property which **are** expressly allowed under the current R-2 zoning designation,[23] and there is no indication that the City would in any way interfere with the Presleys' use of the property in any permitted manner.

Also, significantly, to the extent that the Presleys' claim is predicated upon a contention that the City's decision has denied them access to their **entire** "mineral estate", the Presleys would clearly have the burden to prove the existence of all minerals purportedly existing on the property, and that the City's action has denied the Presleys use of **all** of these minerals. The Presleys have at no time alleged this as part of their claim, and the record is wholly devoid of any evidence which would support such a contention. Furthermore, as previously discussed and further addressed herein, even if the Presleys could establish that their (entire) "mineral estate" had been "taken" by the City, the minerals which exist on the property are only one "strand" of a "bundle" of rights available to the Presleys as property owners, and, "the **destruction** of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety". See Herrington v. City of Pearl, 908 F.Supp. 418, 425 (S.D. Miss. 1995) (emphasis added).

Legally, the Presleys must **prove** that there has been a compensable, constitutional "taking" rather than the hop-skip-jump to "the issue of compensation" which they are attempting. See, e.g.,

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"mineral estate" had been "taken" by the City, the minerals which exist on the property are only one "strand" of a "bundle" of rights available to the Presleys as property owners, and, "the **destruction** of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety". See Herrington v. City of Pearl, 908 F.Supp. 418, 425 (S.D. Miss. 1995) (emphasis added).

[23] The Court is here reminded of the Presleys' acknowledged intention to develop this property as a "nicer residential subdivision". See the City's Brief at § VII.H.

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 . . . ."). Also see the City's Brief at § VII.H. The Presleys have wholly failed to even make an attempt to establish that an alleged taking has occurred, instead admittedly catapulting their case simply "to the issue of compensation".

On the substantive issue of "taking", the City has previously fully briefed the fact that there has been no compensable, constitutional taking by the City's action, and in the interest of judicial economy will not here further restate the applicable authorities supporting this position. See the City's Brief at § VII.H.. Briefly, however, the City reemphasizes a very important issue addressed in the City's Brief which the Presleys expectantly "overlook" and do not even bother to address.

Even assuming *arguendo* that the Presleys' **entire** "mineral estate" was "taken" by the City's application of the Zoning Ordinance, the Presleys "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." See Herrington, 908 F.Supp. at 425 (citations omitted) (emphasis added). See also San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 101 S.Ct. 1287, 1293-94 and n.12 (1981) (dismissing inverse condemnation claim because the city's rezoning and open space plan did not deprive plaintiff of all beneficial use of the property). Therefore, even if the City's application of the Zoning Ordinance **destroyed** the Presleys' **entire** "mineral estate" (of which there is certainly no proof), the Presleys would still enjoy the use and benefit of this residential property located in a residential neighborhood, and there is therefore no compensable, constitutional "taking" by the City's application of its Zoning Ordinance.

This principle is displayed in other decisions of the Mississippi Supreme Court which make clear that an alleged "regulatory taking" does not occur simply because the application of a zoning ordinance restricts the use of the property or makes its use less profitable. See Westminster Presbyterian Church v. City of Jackson, 176 So.2d 267, 271-72 (Miss. 1965) (emphasis added):

> Appellant urges also that the circuit court was in error in finding that the action of the City Council was neither arbitrary nor confiscatory. We have already pointed out that the action of the Council was not arbitrary. As to whether the action of the Council was confiscatory, the burden of proof was upon appellant to show that there had been a change of conditions since the previous orders of the Council that would make the action of the Council in denying its petition confiscatory. The only change of conditions shown is that, since the May 1961 order of the Council, appellant has made diligent efforts to sell its property for purposes other than a filling station site, and has been unable to do so. The proof on behalf of appellant shows that the value of the property for a filling station site is $45,000. In fact, Humble Oil Company has agreed to purchase it for this price if the Church can get it rezoned for a filling station site. The proof shows that for residential purposes the value of the property is about $11,000. The Council found that the evidence of values of the property was the same at all hearings, and that there was no change in circumstances. The circuit judge found, and we are in agreement with his fining, that the order of the city was not confiscatory. The general rule found in 62 C.J.S. Municipal Corporations § 227(15)c (1949), as follows:
>
> A variance to construct and operate a service station or garage should not be granted merely because such use of the property will be more convenient or profitable to the owner, or because he will suffer some financial disadvantage or hardship if denied such use; it is essential that applicant should suffer some unusual hardship from the literal enforcement of the regulation different from, and greater than, that suffered by other property owners in the district. The variance or exception should not be granted unless the proposed use of the property is within the spirit of the zoning regulations.
>
> We are also in agreement with the statement of the circuit judge, wherein he said: 'I sympathize with the position of the appellant, but **the City Council had the right and the duty to review the whole situation and protect the residential property owners** to the east of appellant's property. As I understand the record, **this whole block is residential property.** The Courts should not constitute themselves as a Zoning Board for a municipality.'

Also see Rosenbaum v. City of Meridian, 246 So.2d 539, 542 (Miss. 1971):

> . . . . Appellant's property is, according to all the witnesses, located in a prime single family residential zone, containing no commercial enterprises of any kind. It is located in the logical area for a single family neighborhood already established in that area. Appellant made no objection to his property being A-0 when the comprehensive ordinance for the zoning of the city was enacted in 1967. It is true that the proof shows that there is a need in the City of Meridian for multi-family dwellings. There has been no change in the character of the neighborhood since the adoption of the ordinance. The record also discloses that there is ample property in the city zoned A-3 to take care of the present need for multi-family dwellings.
>
> After a careful study of the record in this case we find, as did the circuit court, that the order of the city council denying the petition of appellant to rezone his property is not arbitrary, discriminatory, confiscatory, capricious, or unreasonable and that it is based upon substantial evidence.

Similarly, in Walters v. City of Greenville, 751 So.2d 1206, 1210-11 (Miss. Ct. App. 1999) (citations omitted), a decision curiously cited and relied on by the Presleys, this Court affirmed the lower court's dismissal of Walters' claim that the city's rezoning of his property constituted a "taking" because the rezoning placed his businesses in a conditional use area rather than a permitted use area thereby allegedly reducing the value of his property. In rejecting Walters' claim that a taking was effected by the city's application of its zoning ordinance, this Court stated:

> [A] taking has not occurred in the present case. Walters in no way has been deprived of the use and enjoyment of his property, nor has he been denied economic benefits of his land. He still is able, just as he was before, to operate his businesses on the property. A mere speculation as to difficulty in selling or renting the property in the future in no way amounts to a taking.

Finally, the primary case relied upon by the Presleys, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922), is a 1922 decision of the United States Supreme Court which was predicated upon the principle of "conceptual severance" relating to various rights incident to property ownership. Consistent with the decisions previously cited and discussed by the City,[24] "conceptual

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[24]See San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 101 S.Ct. 1287 (1981); Herrington v. City of Pearl, 908 F.Supp. 418 (S.D. Miss. 1995); and, Westminster Presbyterian Church v.

severance" is no longer controlling in federal takings claims with the relevant inquiry instead focusing on the effect of the regulatory decision on the **entire** parcel of property:

> "Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" [FN13] In other words, for purposes of determining whether a "taking" of the plaintiffs' property has occurred, the proper inquiry is what constitutes the relevant "property"? Is it the fee interest that must be "taken," or is it some lesser unit of property? Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs' argument is that we should conceptually sever each plaintiff's fee interest into discrete segments in at least one of these dimensions–the temporal one–and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments.
>
> > FN13. The problem of defining the relevant property interest at stake is commonly referred to as either the "denominator problem" or the problem of "conceptual severance."
>
> While Supreme Court precedent has not over the years been entirely uniform in its treatment of the conceptual severance question, *compare Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed.322 (1922) (employing conceptual severance) *with Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (rejecting conceptual severance in the identical context), most modern case law rejects the invitation of property holders to engage in conceptual severance, except in cases of physical invasion or occupation. Several cases illustrate the Court's refusal to employ this concept in other types of circumstances. In [the United States Supreme Court decision in] *Penn Central Transportation Company v. City of New York*, the Penn Central Transportation Company entered into a contract for the construction and lease of an office building above its Grand Central Terminal in New York City. When the City denied two alternate building plans on the ground that they would destroy the architectural appeal of the historic landmark, Penn Central filed suit, claiming that the rejection of the building plans constituted a taking. In affirming the denial of its takings claim, the Court explicitly rejected Penn Central's proposal to consider the airspace above

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City of Jackson, 176 So.2d 267 (Miss. 1965).

the Terminal as a property interest separate from the rest of the Terminal site. The Court explained:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in *the parcel as a whole*-here, the city tax block designated as the "landmark site."

The Court also refused to employ conceptual severance in *Keystone Bituminous Coal Association v. DeBenedictis*, which considered the effect of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act on the property rights of mining companies. As implemented, the Act generally required 50% of the coal beneath certain protected structures to be kept in place as a means of providing surface support. The petitioners, who had purchased both mining rights and waivers for any surface damage caused by mining, argued that the Act constituted a taking. In particular, the petitioners argued that the Act appropriated the portion of coal that they were required to leave in the ground. They also argued that the Act entirely destroyed the value of each petitioner's "support estate," which is recognized under Pennsylvania law as a separate interest in land. In essence, the petitioners argued that there had been a categorical taking of these two distinct property interests.

In holding that the regulation of the petitioners' mining rights did not amount to a taking, the Supreme Court refused to consider the coal that the Act required the petitioners to leave in place as a separate property interest; rather, the Court emphasized, takings jurisprudence must consider the "parcel as a whole."

The Court's general rule against conceptual severance is not limited to the spatial dimension of property rights. In *Andrus v. Allard*, the Court applied its general rule in a more functional dimension, to the "bundle" of rights that make up what we think of as "property."

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764, 774-75 (9th Cir. 2000) (citations omitted).

Just as in Penn Central, 438 U.S. 104 (1978), and Keystone, 480 U.S. 470 (1987), the City of Senatobia's lawful application of its Zoning Ordinance has not interfered with the Presleys' rights in the "parcel as a whole".[25] Indeed, following the City of Senatobia's lawful application of its

[25] As previously discussed, the City's decision did not even deprive the Presleys of their **entire** "mineral estate". See notes 19-23 and accompanying text supra.

Zoning Ordinance, the Presleys still enjoy a "bundle" of rights in their property. There has simply been no "taking" of the Presleys' property.

VI. CONCLUSION.

The Circuit Court of Tate County was eminently correct in dismissing the Presleys' claim. Even assuming *arguendo* that the City's application of its Zoning Ordinance to the Presleys' property effected a "taking", same being vigorously denied, the Presleys' "taking" claim is barred by any one of the numerous legal defenses relied on by the City. The decision of the Tate County Circuit Court should be affirmed.

RESPECTFULLY SUBMITTED this the 9th day of May, 2008.

CITY OF SENATOBIA, MISSISSIPPI

BY: Jamie Hall

MICHAEL K. GRAVES, MSB NO.
JAMIE MONSOUR HALL, MSB NO.
Myers Graves, PLLC
2446 Caffey Street, Suite 200
P. O. Box 876
Hernando, MS 38632
662-429-1994
Attorneys For Appellee/Cross-Appellant

VII. CERTIFICATE OF SERVICE.

I, Jamie Monsour Hall, 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 Reply 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.
2621 West Oxford Loop
Oxford, MS 39655

This the 9th day of May, 2008.

Jamie Hall
JAMIE MONSOUR HALL, MSB NO. [redacted]