RT & CROSS-APPELLEE'S BRIEF

IN THE SUPREME COURT OF MISSISSIPPI

CV-[redacted] 2007-CA-1027-COA

JAMES LLOYD PRESLEY, SR.; MAE PRESLEY VEAZEY

MARTHA PRESLEY HOUSTON — APPELLANTS

vs — CAUSE NO. CV-2005-273-BT

CITY OF SENATOBIA, MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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

APPELLANTS

JAMES LLOYD PRESLEY, SR. MAE PRESLEY VEAZEY and MARTHA PRESLEY HOUSTON

ATTORNEY FOR APPELLANTS
Ronald W. Lewis

APPELLEE
CITY OF SENATOBIA, MISSISSIPPI

ATTORNEY FOR APPELLEE
Michael K. Graves
Myers, Graves & Parker, PLLC

RONALD W. LEWIS, MSB[redacted]
(Lead Attorney of Record for Appellant)
2621 West Oxford Loop, Suite C
Oxford, Mississippi 38655
(662)234-0766

TABLE OF CONTENTS

TABLE OF AUTHORITIES **Page**

CONSTITUTIONAL PROVISIONS

CASES:

I.
INTRODUCTION (STATEMENT OF ISSUES)

The parties have fully set out the issues, nature of the case, procedural history and facts in their original briefs. The appellants/cross-appellees now reply to the appellees/cross-appellants' brief with regard to the issue of exhaustion of administrative remedies and further present their original brief in response to the appellees/cross-appellants' brief relating to other alleged affirmative defenses raised by them at the trial court level, but not relied upon in the trial court's order of dismissal of the Complaint, despite listing of those grounds in the order.

II.
STATEMENT OF THE CASE

Each party has provided a Statement of the Case in their original briefs. Therefore, to avoid unnecessary repetition and prolixity, the Presleys respectfully refer the court to those briefs.

III.
SUMMARY OF THE ARGUMENT

The Presleys first submit their brief in reply to the appellees' brief on the issue of exhaustion of administrative remedies. The Presleys then submit their original brief in opposition to the appellees' cross-appeal on the issues of res judicata, collateral estoppel, statute of limitations, exercise of the police power, sovereign immunity, waiver, and alleged failure to establish a taking.

IV.
ARGUMENT

a. THE PRESLEYS' HAVE STATED A VALID CAUSE OF ACTION:

The case of *Jackson Municipal Airport Authority v Evans*, 191 So.2d 126 (Miss. 1966),

cited by defendant City at Page 16, 38 and 39 of its brief, actually supports the Presleys' claim that an otherwise valid zoning decision may constitute a taking. The Supreme Court forty years ago found that the City of Jackson and the airport authority,

> . . . under the guise of perhaps an otherwise valid zoning order have so interfered with and restricted the use and enjoyment of Defendant - Appellees' private property as to constitute a taking or damaging thereof for public use without due compensation being first made as required in Section 17 of the Constitution of the State of Mississippi.

Evans, 191 So.2d at 133.

In *Evans* the Supreme Court found that an airport zoning statute regulating tree height within the Jackson airport's zoned flight path amounted to a compensable taking of private airspace. The case involved 15 trees.

The Mississippi Supreme Court over thirty years later affirmed a Court of Appeals decision in which the lower appeals court recognized that a landowner may seek just compensation in an action for inverse condemnation for a deprivation caused by a municipal zoning ordinance. *Citizens for Equal Property Rights v. Board of Supervisors of Lowdnes County, Mississippi*, 730 So.2d 1141, 1143, P. 5 (Miss. 1999). The court confirmed, "The Court specifically noted in *Evans* that the validity of the zoning ordinance in question was not at issue." 730 So.2d at 1145, P. 17. The Supreme Court in *Citizens for Equal Property Rights* remanded to the circuit court for a hearing on the merits of the takings claim. See, also, the unreported decision of the Court of Appeals at 1998 Miss. App. Lexis 172; No. 96-CA-0019 COA.

The Court of Appeals in the same year explained further in *Walters v City of Greenville*, 751 So.2d 1206 (Miss. App. 1999),

> Mississippi case law gives no distinct definition of a "taking" of

> property; therefore, we turn to federal case law which has given such definition. 'There is a taking of property when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property.' *Brothers v. U.S.*, 594 F.2d 740, 741-42 (5th Cir. 1979). ***'A taking is effected if the application of a zoning law denies a property owner of economically viable use of his land. This can consist of preventing the best use of the land or extinguishing a fundamental attribute of ownership.'*** *Vari-Build, Inc. v City of Reno*, 596 F.Supp 673, 679 (1984).

Walters, 751 So.2d at 1210, P.19. (Emphasis added.)[1]

See, also, *King v. Miss. State Highway Comm'n,* 609 So.2d 1251, 1254, n.2 (Miss. 1992) ("This state is also held to the Fifth Amendment's just compensation standard." (Citations omitted.)); and *Tippitt v. City of Hernando, Miss.*, 909 So.2d 1190, 1193 - 1194, P.14 (Miss. App. 2005), in which the Court of Appeals, citing *Walters*, recently reconfirmed that a zoning decision may result in a taking. Although the record in that case was devoid of evidence demonstrating that the Tippitts had either been deprived of the use and enjoyment of their property or denied any economic benefits derived from their land as a result of a city's decision to rezone their property, the principle that a zoning decision may result in a taking remains the law in this state.

The Mississippi view that a zoning statute or ordinance may result in a taking mirrors federal Fifth Amendment Takings Clause jurisprudence. The landmark decision by the United

---

[1] Although in *Walters* the appeals court affirmed the trial court's judgment against the landowner, the court found that no taking had occurred because Walters had not been deprived of the use and enjoyment of his property, nor had he been denied any economic benefits of his land. On the other hand, the complaint and exhibits in the instant case detail the severe deprivation to the plaintiffs and document the contract with Memphis Stone and Gravel, which takes the damages claim well beyond the realm of speculation. The City has extinguished a fundamental attribute of the Presley's ownership of their property - their mineral rights.

States Supreme Court in *Pennsylvania Coal Co. v Mahon,* 260 U.S. 393; 43 S.Ct. 158; 67 L.Ed. 322 (1922) is instructive with regard to the present case. In that case the Supreme Court voided a Pennsylvania statute which prevented holders of mineral rights from mining coal if the mining would cause subsidence of residential structures belonging to the surface owners.[2] Justice Holmes framed the fundamental issue as follows:

> 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. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. ***But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.*** The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

Mahon, 260 U.S. at 413. (Emphasis added.)

Quoting from an earlier Pennsylvania case, Justice Holmes further observed,

"For practical purposes, the right to coal consists in the right to mine it." Id., at 414. (Citing, *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328, 331). Holmes added, "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Mahon*, 260 U.S. at 414.

---

[2] The surface owners previously had contracted in their surface deeds from the coal company to allow mining. *Mahon*, 260 U.S. at 412.

The loss to the Presleys is no less burdensome to them than the loss to the coal company in *Mahon*. To prevent the extraction of their sand and gravel is tantamount to appropriating that valuable resource, a fundamental attribute of their ownership - certainly a much more valuable attribute than the trees (or more accurately that portion of the trees extending above fifty feet) at issue in *Evans*, supra. Although the zoning restriction here may be a reasonable exercise of municipal power, the effect on the Presleys is so extreme as to require just compensation for their loss. Recently, the United States Supreme Court cited *Mahon* and reaffirmed its holding that "government regulation of private property may be so onerous that its effect is tantamount to a direct appropriation or ouster - and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle v. Chevron USA, Inc.* 544 U.S. 528, 537; 125 S.Ct. 2074; 161 L.Ed.2d 876 (2005). The Presleys, owners of mineral rights under their surface land, have been deprived of all economic benefit of that valuable mineral resource.

It is not necessary for the Presleys to allege a direct interference with their property rights. *Gilich v. Mississippi State Highway Comm'n*, 574 So.2d 8, 10 -11 (Miss. 1990) (... "an actual *taking or physical invasion* is not the only basis for compensation.") (Emphasis added.) In *Gilich* the Mississippi Supreme Court reversed summary judgment for the defendant city and remanded for trial on the issue of compensation because Gillich's view of the Gulf of Mexico had been obstructed by construction of the I-110 Loop in Biloxi, resulting in devaluation of his property. Valuable resources under the surface are no less important than air space above. 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, thereby completely destroying the value of their mineral rights. As owners of the mineral rights they are entitled to compensation.

See, also, *City of Gulfport v. Anderson*, 554 So.2d 873, 875 (Miss. 1989). ("[O]ur question is whether there be a rule of the positive law precluding Gulfport's interference with the value of Anderson's property and thus conferring a right to compensation... *an actual physical invasion of landowner's property is not required.* This view is a function of our constitution which requires due compensation when property is 'taken or damaged for public use'.") (Citing, Miss. Const. Art. 3, §17 (1890)). (Emphasis added.) The Presleys have stated a valid cause of action.

b. THE PRESLEYS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

The City misconstrues the doctrine of exhaustion of administrative remedies. Exhaustion of administrative remedies does not extend to exhaustion of judicial remedies. Undersigned counsel has been unable to find **any** decision of a Mississippi court which extends the doctrine of administrative remedies to include a mandate requiring pursuit of the case through all available judicial appeals. For example in *Everitt v. Lovitt*, 192 So.2d 422, 426 (Miss. 1966), the Court noted that the doctrine of administrative remedies embodies the principal of "the necessity of exhausting all administrative remedies before turning to the courts for relief." In the case of *Powe v. Forrest County Election Com.*, 249 Miss. 757, 163 So.2d 656, 660 (Miss. 1964), this court held, "The doctrine of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act." In *Roberts v. Mississippi Dept. Of Pub. Safety*, 852 So.2d 631, 634 (C.A. Miss. 2003) a court of appeals noted that, "[A] state civil-service employee who has been dismissed from employment must exhaust his or her administrative remedies before seeking judicial review." Numerous other court decisions of this state refer to the exhaustion of administrative remedies as a **precondition** to judicial review. Undersigned counsel has found no Mississippi

case in which judicial review was included within the doctrine. Indeed, if that were so, then in every case requiring exhaustion of administrative remedies, appeal to the highest court of the state would be required. This, of course, would make no sense and would certainly overwhelm the courts for no good purpose. All that is required for the bringing of an inverse condemnation action is a prior final decision amounting to a taking. That final decision in this case was the decision by the Circuit Court of Tate County in Presley I.

c. THE PRESLEYS' CAUSE OF ACTION IS NOT BARRED BY THE DOCTRINE OF RES JUDICATA:

The City also asserts that res judicata bars the Presley's claims.

"Generally, four identities must be present before the doctrine of res judicata will be applicable: (1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity of the quality or character of a person against whom the claim is made . . . " *Dunaway v. Hopper and Associates, Inc.*, 422 So.2d 749, (Miss. 1982) (cited, in *Norman v. Bucklew*, 684 So.2d 1246, 1253 (Miss. 1996).

Only two of the four identities required for application of res judicata are present in this case, factors three and four. The first factor, identity of the subject matter, is not met. In the previous action, the plaintiffs sought unsuccessfully to obtain rezoning of their property. They now seek compensation for the loss of their property's value as noted above, Section IV a. Just compensation cannot be sought until a taking is final and must be sought in a separate inverse condemnation suit. The instant case involves an entirely different cause of action from that advanced in Presley I. The cause of action here is for just compensation for a taking which was not complete until the Circuit Court affirmed the City's refusal to rezone. No effort is made here

to overturn the City's zoning decision. Therefore, there also is no identity of cause of action, factor number two. Presley I was a zoning case. This is an inverse condemnation case for damages.

d. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT BAR THE PRESLEYS' CLAIM OF A TAKING OR CLAIM FOR COMPENSATION:

The Supreme Court has defined collateral estoppel as requiring four elements in the case of *Stutts v. Stutts,* 529 So.2d 177, 179 (Miss. 1988) and in *Dunaway, supra,* as follows: (1) a party must be seeking to re-litigate a specific issue; (2) that issue already had been litigated in a prior lawsuit; (3) that issue actually was determined in the prior law suit; and (4) that determination of the issue was essential to the judgment in the prior lawsuit. See, also, *Norman, supra,* 684 So.2d at 153. None of the four factors is present in the instant case.

In *Marcum v. Miss. Valley Gas Company*, 672 So.2d 730, 732 -733 (Miss. 1996), citing *Dunaway, supra,* the Supreme Court emphasized that "collateral estoppel, unlike the broader doctrine of res judicata, applies only to questions actually litigated in a prior suit, and not to questions which might have been litigated." For that reason, alone, collateral estoppel does not apply here. The issue in the prior case was rezoning. The issue here is whether the Presleys are entitled to just compensation for a taking. Not only was that issue not before the Court, it could not have been raised in Presley I. See, Defendant's Exhibit "5", Circuit Court Order. R. 103 - 104. The issue of compensation could not be triggered until a final decision was reached prohibiting recovery of the mineral resources.

Defendant City cites *Zimmerman v. Three Rivers Planning and Development Dist.*, 747 So.2d 853 (Miss. App. 1999) for the proposition that an unappealed agency decision bars a later

lawsuit under the doctrine of res judicata and collateral estoppel. The Presleys' do not disagree with the law as set out in *Zimmerman*. However, the law of *Zimmerman* does not apply in this case. The denial of the Presleys' request for rezoning was indeed appealed to the Tate County Circuit Court. *Zimmerman* is easily distinguishable. Furthermore, contrary to the City's assertion, the Presleys do not ask this court to revisit the rezoning decision.

The defendant City cites language in *Saunders v. City of Jackson*, 511 So. 2d 902 (Miss. 1987) and in *Burdine v. City of Greenville*, 755 So.2d 1154 (Miss. App. 1999) in support of its assertion that if the ultimate decision of the governing body is "fairly debatable", and therefore not "arbitrary and capricious", it necessarily follows that the zoning decision does not result in a taking. In response to Saunders' claim that the denial of a requested reclassification amounted to a confiscatory taking in violation of due process of law, the *Saunders*, court stated:

> This court has identified the issue of confiscatory takings by zoning restrictions as intertwined with its review of whether the zoning decision is arbitrary, capricious or unreasonable, or whether it was fairly debatable. See, *Thrash v. Mayor and Com'rs of City of Jackson*, 498 So.2d 801, 805-807 (Miss. 1986); *Bridges v. City of Jackson*, 443 So. 2d 1187, 1189 (Miss. 1983). As such, what was said under point one leads us to find no reversible error here."[3]

Saunders, 511 So. 2d at 907.

The ruling in *Saunders* appears to be at odds with *Evans*, supra, and its progeny, and should be rejected as precedent because the reasoning is flawed, or at least inapposite, due mainly to the way the issues were framed in that case. A close review of the *Saunders* case reveals that it is a rezoning case in which the landowner also raised the taking issue on due

---

[3] Under point one the court found that denial of requested rezoning was not arbitrary or capricious because it was fairly debatable.

process grounds in the same appeal. That is, the landowner attempted to combine her zoning case with her takings case, but did not cite to Mississippi Constitution Article 3, Section 17, but rather based her claim on due process, and failed to raise the holding of *Evans*. The *Saunders* decision is inconsistent with the Supreme Court's holdings in the cases cited in Section IV a. above for the principle that an otherwise valid zoning regulation may constitute a taking. The *Saunders* court undertook no analysis, whatsoever, of those decisions. Also, the landowner 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 case is all about zoning and due process, not compensation. Clearly, the issues presented to the Mississippi Supreme Court by Ms Saunders were remote from the issue to be decided by this court. The issue before this court is compensation, not rezoning. Furthermore, Saunders did not bring an inverse condemnation suit, as required by the Court's other precedents cited herein. The *Saunders* case lacks the thorough analysis and reasoning required to determine whether compensation is due and may be reconciled with the precedents cited by the Presleys, if at all, only by viewing it as a due process case about zoning.

The Circuit Court of Tate County in Presley I did not have before it, nor decide the issue of a taking or of compensation; nor could those issues have been appropriately raised in the context of the rezoning appeal. Thus, neither res judicata nor collateral estoppel can apply here.

In *Burdine,* also relied upon by the City, the Court of Appeals also stated 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." 755 So.2d at 1158, P. 7. Citing *Saunders, supra, Thrash v. Mayor and Commissioners of Jackson,*

498 So. 2d 801, 805 - 807 (Miss. 1986) and *Bridges v. City of Jackson*, 443 So.2d 1187, 1189 (Miss. 1983). The Court of Appeals found that since the zoning decision was "fairly debatable" it followed that denying the rezoning request did not amount to a confiscatory taking. *Burdine*, 755 So. 2d at 1158. *Burdine's* holding is also unsupported and contrary to the Supreme Court decisions cited by the Presleys above.

Saunders, *Burdine* and the cases cited by each in support of the position that a zoning decision which is not arbitrary and capricious - that is, which is "fairly debatable", cannot constitute a confiscatory taking appear to represent a second line of poorly reasoned cases which do not square with the precedents cited by the Presleys in Section IV a. of this brief. Plaintiffs cite *Jackson Municipal Airport Authority v. Evans*, 191 So.2d 126 (Miss. 1966), *Citizens for Equal Property Rights v. Board of Supervisors of Lowdnes County,* 730 So.2d 1141 (Miss. 1999), *Walters v. City of Greenville*, 751 So.2d 1206 (Miss. App. 1999), *Tippitt v. City of Hernando, Miss.*, 909 So.2d 1190, 1193 - 1994, P.P. 13 - 15, (Miss. App. 2005), as well as federal court decisions, for the proposition that an otherwise valid zoning decision may nonetheless constitute a compensable taking. None of these decisions has been overruled.

Even though the issue of a confiscatory taking may be intertwined with the issue of whether the zoning decision is arbitrary, capricious or unreasonable, the Mississippi Supreme Court decisions, except for *Saunders,* stop short of suggesting that this mandates the conclusion that there can be no taking if the zoning ordinance is not arbitrary and capricious. On the contrary, the Supreme Court has said an otherwise valid zoning regulation may result in a taking.

Analyzing the precedents cited by the Mississippi Supreme Court in *Saunders*, the first precedent cited is *Thrash v. City of Jackson*, 498 So.2d 801 (Miss. 1986. The holding in *Thrash*

is totally irrelevant to the issues before the present court. In *Thrash* adjoining landowners challenged rezoning of a large tract of land for a soccer complex in northeast Jackson, Mississippi. There was no issue of a taking, or of a request for compensation. Indeed, the landowner initiated the request for rezoning. The Supreme Court found that, "We have no authority to disturb the legislative action of the municipal zoning authorities where the point in controversary is fairly debatable." *Thrash*, 498 So.2d at 805. The *Thrash* court was referring to a zoning decision. The issue of inverse condemnation did not arise in *Thrash.* The Supreme Court noted the complaint of nearby homeowners that the value of their properties would be diminished by development of the proposed soccer complex, noting that the changes in the law which do not adversely affect the value of someone's property are few and far between. Paraphrasing Justice Holmes, the court noted, "This petty larceny of its police power is one of the inevitabilities of organized society. The trick is to avoid governmental action effecting grand larceny, legal bulwarks against which, of course, are the takings and just compensation clauses of the federal and state constitutions." *Thrash*, 498 So.2d at 806. (Citations omitted. Footnote omitted.) The adjoining landowners in *Thrash* suffered "petty larceny". The Presleys, owners of a valuable mineral estate which is now inaccessible, suffered "grand larceny". While the "fairly debatable/arbitrary and capricious standard of review" applies in the context of rezoning, it does not apply in the context of an inverse condemnation suit in which the zoning decision, itself, is not challenged, but rather is accepted as a given fact, but one which may trigger a right to just compensation for "grand larceny".

The second decision relied upon by the *Saunders* court is *Bridges.* The only reference to a taking in *Bridges* is dictum. Since the landowner in that case succeeded in obtaining rezoning

of his property, there was no taking. As a general rule of law, the *Bridges* court noted that ". . . the appellate court must examine the record to determine whether the order of the Jackson City Council is arbitrary, capricious and confiscatory and whether it is supported by substantial evidence." 443 So.2d at 1189. No further discussion of takings, or compensation appears in the decision. A review of the cases cited in *Bridges* for the proposition that the appellant court must examine the record to determine whether the order of the governmental body was arbitrary, capricious and confiscatory" reveals the following: *City of Jackson v. Ridgeway*, 261 So.2d 458 (Miss. 1972) is a "spot zoning" case. This case contains no discussion of a taking, nor does it refer to the standard of review referenced by the *Bridges* court. *Westminister Presbyterian Church v. City of Jackson*, 253 Miss. 495, 176 So.2d 267 (1965) involved a second petition for rezoning less than two years after the landowner church filed a first petition for rezoning. The church alleged that material changes had occurred since the original petition was denied. The Circuit Court applied the doctrine of res judicata and the Supreme Court affirmed, holding that the church failed to meet its burden of proving that there was a material change of circumstances. No appeal had been taken from the order of the city council denying the first petition to rezone the property. On appeal the church asserted that denial of the second petition for rezoning amounted to a confiscatory taking. The court noted, "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." 253 Miss. At 505. This case clearly was decided on the issue of res judicata because the first petition for rezoning had not been appealed - that is, the church did not exhaust

its administrative remedies. ***More importantly, the court did not conclude that the rejection of the arbitrary and capricious argument necessitated rejection of the claim that the Council's action was confiscatory.*** Rather, the court found that the appellant church simply failed to submit adequate proof that it was confiscatory. *Ridgewood Land Co. v. Simmons*, 23 Miss. 236, 137 So. 2d 532 (1962) also does not involve the taking issue although the court did refer to the general rule that the appeals court "reviews acts of governing authorities to determine whether such acts are reasonable, arbitrary, discriminatory, confiscatory, or an abuse of discretion." The case was brought by adjoining landowners who complained about rezoning of their neighbor's land. The landowner did not claim that the rezoning decision resulted in a taking of his property. On the contrary the decision was favorable to the landowner. Thus, any reference to confiscation or taking is dictum. The only issue was whether the zoning decision constituted "spot zoning." *Holcomb v. City of Clarksdale*, 217 Miss. 892, 65 So.2d 281 (1953) is also is a "spot zoning" case. The court cites the general rule that on appeal of a zoning decision the court must determine whether the municipality's action was reasonable, arbitrary, discriminatory, confiscatory, or an abuse of discretion. 217 Miss. at 900. However, the case did not involve an allegation that the zoning question resulted in a taking and did not involve the issue of compensation for a taking. Thus, *Holcomb* lends no support to the assertion that a valid zoning decision per se cannot be confiscatory.

Plaintiffs submit that this court should follow the more cogent reasoning of *Evans* and its progeny and reject the flawed, or at least inapposite, decisions in *Saunders* and *Burdine*. Collateral estoppel does not apply.

e. THE PRESLEYS' CAUSE OF ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS:

Defendant City supports its statute of limitations defense with two cases, a federal district court case and a Mississippi case. Neither case is apposite. The first, *Taylor v. County of Copiah*, 937 F.Supp. 573 (S.D. Miss. 1994), aff'd without op., *Taylor v. Copiah County*, 51 F.3d 1042 (5th Cir. 1995), is not an inverse condemnation case at all, but rather is a case brought under 42 U.S.C. §1983 for federal constitutional violations. That case correctly holds only that the residual statute of limitations in Miss. Code Ann. §15-1-49 applies in a federal Section 1983 (civil rights) suit and that generally the statute begins to run in such a case at the time of the federal constitutional violation, but the federal court's analysis does not take into account the Mississippi court decisions cited herein with regard to establishing the time of accrual of an inverse condemnation cause of action. [4] *Taylor* cannot be considered a persuasive precedent on accrual of the cause of action issue in an inverse condemnation case under state law.

Unlike plaintiff Taylor, who filed a federal lawsuit under the Takings Clause of the Fifth Amendment to challenge the taking, in the instant case the Presleys do not challenge the taking, which is acknowledged, but simply seek just compensation for that taking. Furthermore, Taylor had not filed an inverse condemnation suit in state court and, therefore, had not pursued his state remedy, and his federal case therefore was not ripe for adjudication. See, e.g., *Herrington v. City of Pearl*, 908 F. Supp. 418 (S.D. Miss. 1995). (The federal court held that the issues were not ripe because the plaintiff failed to avail himself of *either* an inverse condemnation lawsuit or an

---

[4] Consistent with the *Herrington* federal decision, supra, the federal constitutional violation nonetheless would occur upon denial of compensation. *Walters, supra*, P. 4, *King, supra, P.4,* and *Herrington, supra*, P. 9 and P. 12.

appeal of the City's decision as required by state law.)

The second case relied upon by defendant, *Henritzy v. Harrison Co.,* 178 So. 322 (Miss. 1938), correctly holds that **in a condemnation proceeding initiated by the governmental entity,** the time of condemnation of the property by the governmental entity triggers the statute of limitations. However, as noted below, **in the *absence of formal condemnation* by the governmental body the rule of *Henritzy* does not apply.**

Defendant City asserts that the three-year prescriptive period provided by Mississippi's residual statute of limitations, Miss. Code Ann. §15-1-49, is the applicable limitations period for filing of this suit. The Presleys agree. See, *Hobson v. City of Vicksburg*, 1026, 1028, P.11 (Miss. App. 2004). The crucial question, though, is when the cause of action accrued. This suit was filed less than three years after judgment in the Tate County Circuit Court on the rezoning suit, (Presley I). Unlike a garden variety eminent domain case, in which the date of condemnation of property is clear, in an inverse condemnation suit the date of condemnation occurs when the landowner reasonably is able to determine the date of his injury. *Jackson Mun. Airport Authority v. Wright*, 232 So.2d 709, 714 (Miss. 1978). (Inverse condemnation suit remanded for determination of amount of compensation, calculated as of the date of taking, which the court held was the date the inverse condemnation suit was filed.) Here, this occurred not at the time of the Board of Aldermen's denial of the request for rezoning, as asserted by the City, but at the earliest when that decision was affirmed by the unappealed final judgment of the Circuit Court and at the latest, according to *Wright,* on the date suit herein was filed.

As the Mississippi Supreme Court held in *Foreman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So.2d 344 (1943):

> Citation from neither judicial decision nor lexicon is needed to support the view that a cause of action "accrues" when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested.

Foreman, 195 Miss. at 104.

In the case sub judice the earliest point at which the right to request compensation was triggered was when the Circuit Court of Tate County denied the plaintiffs' appeal of the City's refusal to rezone. When the Presleys decided to forego further appeal of their rezoning issue, the circuit court's decision as to the rezoning request became final. The date of the Court's judgment was September 24, 2002. The complaint in this case was filed on September 20, 2005, prior to the expiration of the three-year limitation period. The date that the plaintiffs knew or should have known that the subject property had been "condemned" was, at the earliest, the date when the Circuit Court denied their appeal.[5]

---

[5] By analogy the limitations period for filing of a lawsuit for uninsured motorist proceeds does not begin at the time of the automobile accident, but rather when there is a final determination that the other driver was uninsured. The Mississippi Supreme Court in *Vaughn v. State Farm Mut. Auto Ins. Co.*, 445 So.2d 224 (1984) held,

> "The decision that disposes of [the statute of limitations question] is that Creely was not finally adjudged to be in an uninsured motorist until this Court affirmed the lower court's decision on May 31, 1978. Until that time, there was merely an appealable decision of the Circuit Court agreeing with State Farm that the policy of insurance admittedly in force on the McGarrah car did not cover Creely. Creely was not uninsured until this court said so on May 21, 1978. The cause of action with which we presently are concerned, could not accrue as long as the uninsured motorist

In the instant case the Presleys assert the limitations period began to run no sooner than when the decision of the circuit court became final. The Presleys did not have a right to demand payment until the circuit court affirmed the refusal of the City to rezone their property. That is when the deprivation of access to the Presleys' minerals became final. This suit was filed within the statute of limitations.

f. THE PRESLEYS' CLAIM IS NOT INVALIDATED BY EXERCISE OF THE CITY'S POLICE POWER:

The City claims that the zoning of the Presleys' property as residential, thereby denying them access to their mineral resources, was a valid exercise of the City's police power, and that, therefore, the Presleys' claim should be dismissed. The Presleys reply with the terms adopted by Justice Holmes at pages 4 and 5 of this brief - that is, that the municipality's police power clearly extends to "petty larceny" necessary for the public good, but when the municipality commits a "grand larceny", the takings clause is triggered. While the governmental body is entitled to do what in its legislative capacity it considers to be in the public interest, the landowner nonetheless is entitled to just compensation if the impact of that legislative decision is such that it denies the landowner access to his property, whether it be the surface, the airspace, or the mineral

---

question had not been decided."
445 So.2d at 226.

Similarly, the cause of action herein did not accrue until the Circuit Court of Tate County ruled on appeal against the plaintiffs on the zoning issue and the Presleys chose to forego further appeal. It was then that the question finally had been decided. Had the Presleys' cause of action been appealed to the Mississippi Supreme Court, the cause of action would have accrued upon ruling by the Supreme Court. However, since there was no appeal from the Circuit Court's decision, the Circuit Court's decision was final. There was no obligation to appeal the case to the Supreme Court. The defendant has not cited any law to the contrary.

underlying.the surface. *Mahon, supra*, pp.5 - 6; *Thrash, supra.*

The zoning decision of the City of Senatobia at issue here does not "merely restrict the enjoyment and use of property through a lawful exercise of the police power", *Evans, at 133,* but is "a taking of property for public use, for which compensation must be paid." Id. The remaining cases cited by the City in its brief on this issue involved facts and circumstances which are distinguishable from those in the instant case, or are in conflict with the Mississippi Supreme Court precedents relied upon by the Presleys and discussed at length throughout this brief. None of the City's authorities cited in support of their position involved confiscation of a fundamental attribute of ownership.

g. THE PRESLEYS' CAUSE OF ACTION IS NOT BARRED BY SOVEREIGN IMMUNITY:

The Mississippi Constitution, Article 3, Section 17 (see footnote 1 for the full text) expressly provides for just compensation arising from a taking of private property by a governmental body. This principle is embedded in Mississippi jurisprudence, as well as the jurisprudence of all other states and the federal government. The constitutional right supersedes any and all legislative enactments to the contrary, including that one proposed by the City, Mississippi Code Ann. §11-46-1, et seq.. Defendant City is incorrect in characterizing plaintiffs' claim as an attack on the City's denial of their application for rezoning. On the contrary, as explained throughout this brief, the plaintiffs accept the rezoning regulation, but claim that they are entitled to just compensation for its effect upon a fundamental attribute of their private property - their mineral estate. Sovereign immunity is a "red herring" in this case. The Supreme Court routinely recognizes the constitutional right to bring an inverse condemnation suit against governmental bodies, notwithstanding statutes referenced by the City.

h. THE PRESLEYS HAVE NOT WAIVED THEIR "TAKINGS" CLAIM:

Subsection G of the City's brief at page 45 is a re-argument of the City's claim that since the plaintiffs did not take a further appeal of the circuit court's denial of their rezoning requests, they are barred from proceeding with a takings claim. The principal case cited by the City as an example of waiver of a constitutional right by voluntary surrender or relinquishment of a Constitutional or other right is *Rosenbaum v. City of Meridian*, 246 So. 2d 539, 542 (Miss. 1971). However, a review of the short opinion in *Rosenbaum* will disclose that the issue of waiver of the right to seek compensation as the result of a regulatory (zoning) taking is not mentioned. *Rosenbaum* is a zoning case. The landowner failed to object to annexation and subsequent zoning and could not thereafter successfully challenge the zoning classification. *Rosenbaum* is relevant to this court's prior decision in Presley I, but is irrelevant to the current suit. In that case a landowner appealed a circuit court's decision affirming a city's denial of a petition to rezone a parcel of land. The case is devoid of discussion of takings and just compensation issues. In this case, as noted above, the Presleys' cause of action for inverse condemnation accrued no earlier than entry of the circuit court's order affirming denial of their rezoning petition. Prior to that date the Presleys did not have a reasonable basis for claiming compensation. The Presleys have filed their lawsuit within the acknowledged statute of limitations and, therefore, cannot be said to have waived their right to proceed with this case pursuant to the Mississippi Constitution, Article 3, Section 17 and the three-year statute of limitations.

j. TAKING REVISITED:

The City concludes its brief with a passing suggestion that the Presleys have not asserted sufficient facts to establish a taking. The Presleys have discussed the taking issue extensively in Section IV. a. of this brief, reference to which is made here. It is undisputed that the Presley's have been denied the right to develop their mineral estate - a fundamental attribute of ownership. The City has committed "grand larceny" against the Presleys. See, discussion, supra at page 11.

The City's defense that there has been no taking of the Presleys' property because of statements by them that the subject property would be developed as a "nicer residential subdivision", (see affidavit of Mayor Callicott, Defendant's Exhibit 1) (R. Vol. 1, P.58) is substantially rebutted by the affidavit of Jim Presley, Plaintiffs' Exhibit "1", R. P. 113, in Response to the Motion for Summary Judgment, in which he asserts under oath that the intention was to reclaim the property only after the gravel and sand had been removed. Furthermore, the Presleys do not claim here that they have been deprived of their surface estate in the property, but that their mineral estate is no longer accessible to them. This issue has been discussed at length in Section IV a. of this brief and in the interest of judicial economy, will not be discussed further here.

IV.
CONCLUSION

The Presleys do not attempt to reverse the zoning decision or to mine their mineral resources. They do not attempt to change the neighborhood, or to interfere with the City's plans and projects for the area. They simply seek damages due to the loss of their mineral estate. The changes which the City asserts have occurred would not be affected by an award of damages.

The affirmative defenses raised by the City are without merit. This case should be reversed and remanded to the Circuit Court of Tate County for trial.

RESPECTFULLY SUBMITTED,

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

BY: _____

RONALD W. LEWIS, MSB [redacted]
2621 WEST OXFORD LOOP, SUITE C
OXFORD, MS 38655
662-234-0766

CERTIFICATE OF SERVICE

I, Ronald W. Lewis, attorney for plaintiffs, do hereby certify that I have mailed, First Class Mail, postage prepaid, a true and correct copy of the above foregoing **APPELLANTS' REPLY BRIEF AND CROSS-APPELLEES' BRIEF** to the following:

Michael K. Graves
Myers, Graves & Parker, PLLC
140 West Center Street
Hernando, MS 38632

Senior Circuit Judge Andrew Baker
P.O. Drawer 368
Charleston, MS 38921-0368

Betty Sephton, Clerk of Court
P.O. Box 249
Jackson, MS 39205 0249
(Original and three copies w/electronic disc)

This the 25th Day of March, 2008.

RONALD W. LEWIS