

IN THE SUPREME COURT OF MISSISSIPPI

THE CARL RONNIE DARICEK LIVING TRUST

APPELLANT

VS.

2009-IA-01513-SCT

HANCOCK COUNTY, MISSISSIPPI, ET AL

APPELLEES

CONSOLIDATED WITH

LISA K. FITCH, SANDRA K. GOODWIN
AND ANN K. ENGLEHORN

APPELLANTS

VS.

2009-IA-01514-SCT

HANCOCK COUNTY, MISSISSIPPI, ET AL

APPELLEES

CONSOLIDATED WITH

ERNEST BECKEMEYER, III

APPELLANT

VS.

2009-IA-01515-SCT

HANCOCK COUNTY, MISSISSIPPI, ET AL

APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF
HANCOCK COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLEES ON INTERLOCUTORY APPEAL

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies pursuant to Mississippi Supreme Court Rule 28(a)(1) that the following persons have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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Trial Judge

SO CERTIFIED, this the 10 day of December, 2009.

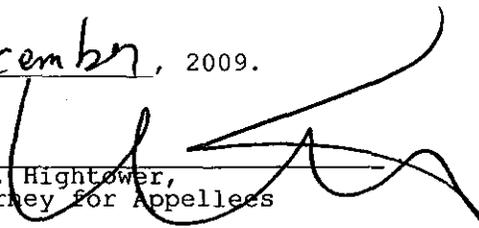

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STATEMENT OF THE ISSUES

I.

Whether the condemnation procedure set forth by Miss. Code Ann. §65-33-31 is constitutional.

II.

Whether Hancock County, Mississippi and the Hancock County Road Protection Commission properly condemned the parcels of real property at issue in each of the three cases comprising this consolidated interlocutory appeal.

STATEMENT OF THE CASE

As a result of Hurricane Katrina, the Seawall, along with Beach Boulevard, in Hancock County was practically destroyed. All that remained was intermittent, battered segments in various locations along the beach. Recognizing the obvious need for a Seawall at the aforementioned location, the United States Corps of Engineers offered to replace the destroyed Seawall at its expense. The estimated cost of the construction exceeds Thirty-three Million Dollars (\$33,000,000.00). However, the United States Corps of Engineers stated at the project's inception, that it would not handle property acquisition that required litigation. Fortunately, very little property needed to be acquired prior to construction as the Seawall itself will be erected on land situated between the Gulf and the old Seawall. Stated another way, the Seawall will be placed on public trust tidelands. However, the project has required the acquisition of permanent and temporary construction easements along the entire length of the wall at various locations for purposes such as access, drainage, and other maintenance related activities. All necessary property has been acquired with the exception of the three parcels at issue in this litigation, which are, all three, temporary construction easements. When the owners of these parcels refused to convey a temporary construction easement to

the County for purposes of construction of the Seawall, the decision was made to condemn the easements using the procedure set forth in Mississippi Code Annotated § 65-33-1, et seq., related to sea walls and other road protection devices. The Board followed those procedures, and condemned each of the three easements. The Appellants, feeling aggrieved by the actions of the Board, appealed to the Circuit Court of Hancock County, Mississippi. That circuit court determined the actions of Hancock County to be proper in all respects. The Appellants, unhappy with the Circuit Court's decision, pursued the present interlocutory appeal.

SUMMARY OF THE ARGUMENT

After the landowners in each of these three cases refused to convey Hancock County, Mississippi a temporary construction easement for purposes of constructing a seawall, Hancock County, Mississippi acting by and through its Board of Supervisors and on the advice of the Hancock County Road Protection Commission found it necessary to condemn each of the three temporary construction easements at issue in this litigation. As a seawall is a road protection device, Mississippi Code Annotated § 65-33-1, et seq., was the appropriate statutory scheme to be used by Hancock County, Mississippi in implementing a road protection device such as a seawall, and the aforementioned set of statutes set forth the proper procedure to be followed when a County determines that it is necessary to acquire property by way of condemnation which is to be used in conjunction with implementation of a road protection device such as a seawall. Furthermore, the procedure set forth in Mississippi Code Annotated § 65-33-1, et seq. is to be used to the exclusion of the procedures set forth in Mississippi Code Annotated § 11-27-1, et seq. by the express language of Mississippi Code Annotated § 11-27-1, and Mississippi Code Annotated § 65-33-31. Additionally, the procedure set forth in Mississippi Code Annotated § 65-33-31, contrary to the assertions of the Appellants, does not violate Article 3, Section 17 of the Mississippi Constitution. As such, Hancock County,

Mississippi in properly carrying out the aforementioned statutory procedure, lawfully condemned each of the three parcels at issue in this litigation, and those parcels are now in the hands of Hancock County, Mississippi and may be used during the construction of the seawall, with the sole issue in each of the three cases being the amount of compensation to be paid to each of the landowners after a trial on damages in the Circuit Court of Hancock County, Mississippi.

Argument

I. The condemnation procedure employed by the Hancock County Board of Supervisors was the proper procedure to follow, and does not violate the Fifth Amendment to the United States Constitution, or Article 3, Section 17 of the Mississippi Constitution.

Background

The focus of this consolidated appeal deals with the propriety of the actions of Hancock County, Mississippi, acting by and through its Board of Supervisors, and the Hancock County Road Protection Commission (collectively known hereinafter as "the Board") in implementing a sea wall along Beach Boulevard in Bay St. Louis, Mississippi pursuant to Mississippi Code Annotated § 65-33-1 et seq. (hereinafter known as the "Seawall Act"). The Hancock County Road Protection Commission is an advisory body to the Board of Supervisors created under the Seawall Act, and was properly appointed in each of these cases. The Mississippi Code devotes an entire chapter to sea walls, and refers to the creation, or construction of the same as a "program". See, Miss. Code Ann. § 65-33-5. The chapter creates a comprehensive method for counties, acting through their respective Boards of Supervisors, to finance, acquire property for, and ultimately construct a sea wall when they deem it necessary. The first few sections of the chapter relate to the preliminary steps of a sea wall program. A significant portion of the chapter deals with

the financing of a sea wall which, in this case, was not necessary as the cost of the sea wall is being paid by a grant from the United States Corp of Engineers. Another portion deals with the creation of plans, designs, and specifications for the sea wall by the county. These activities were also not necessary as the plans and specifications were prepared by the United States Corp of Engineers. The remainder of the chapter deals with the acquisition of property to be used for purposes of construction of a sea wall. Fortunately, and as previously mentioned, the sea wall itself will sit on public trust tidelands. However, the project calls for the acquisition of various other property interest for varying purposes. Most, if not all, of the property interests which have been acquired, are easements. Some of the easements are permanent, and will be used for various purposes such as drainage. Many, if not most, of the easements are temporary, and will only be used during the construction of the sea wall for purposes such as access, and storage of materials. At the end of their term, the temporary easements will revert to the landowners. The three parcels forming the basis of this consolidated appeal, are all temporary easements, and the parcels' owners (the appellants, hereinafter known as "landowners") have refused to convey the parcels to the county. Presumably, the legislature anticipated such a scenario when it created the Seawall Act, and addressed the problem by

conferring upon the counties of this state, the right to exercise the power of eminent domain to acquire land for a sea wall. See, Miss. Code Ann. § 65-33-23. The legislature then determined how that power, procedurally speaking, would be exercised, and it did so in Miss. Code Ann. § 65-33-31. It is strongly believed by the Board that the landowners do not seriously question compliance with the statutory procedures set forth in Miss. Code Ann. § 65-33-1 et seq. or the Board's *right* to exercise the power of eminent domain to acquire their property in any of these cases, rather the landowners' bone of contention, at least in all of their previous filings, seems to be related to the constitutionality of the *procedure* set forth by the legislature in Miss. Code Ann. § 65-33-31 which creates the condemnation procedure to be used when exercising the power of eminent domain in the context of sea wall implementation.

Exercising the Power of Eminent Domain

Substantive Right.

Generally speaking, there are two considerations that must be addressed in deciding whether or not the action of the Board, in acquiring the property of the landowners via eminent domain, was proper. First, is whether or not the Board possesses the *right* to exercise the power of eminent domain to acquire an interest in real property for the purpose of erecting a road protection device such as a seawall. , In these cases, the short

answer is yes, and that right is conveyed to the Board by Miss. Code Ann. § 65-33-23, which reads as follows:

"For the purpose of this chapter the several boards of supervisors are hereby clothed with the power and authority, and it is made their duty, to exercise the right of eminent domain in order to procure the right of way for such roads, streets, highways, sea walls, breakwaters, bulkheads, sloping beach, and such other devices as may be adopted for the protection of such highways. They shall have the power to pass all necessary ordinances for the preservation and protection of any such road, sea wall, sloping beach, or other device constructed hereunder, and the violation of such ordinances shall constitute, and be punished as, a misdemeanor."

It is not believed that the county's *right* to exercise the power of eminent domain is seriously questioned by the landowners as it is clear that the legislature intended to confer such a right upon the Board of Supervisors to be used for projects such as a the erection of a sea wall.

Procedural Requirements.

The second consideration, which appears to be the real issue in these cases, relates to what *procedure* should be employed when a county Board of Supervisors chooses to exercise the rights granted by Miss. Code Ann. § 65-33-23. The Board believes that question is clearly answered by reviewing Miss. Code Ann. § 11-27-1 together with Miss. Code Ann. § 65-33-31. Miss. Code Ann. § 11-27-1 reads as follows:

Any person or corporation having the right to condemn private property for public use shall exercise that right as provided for in

this chapter, **except as elsewhere specifically provided under the laws of the State of Mississippi.** (emphasis added.)

Miss. Code Ann. § 65-33-31 reads as follows:

"Whenever it shall become necessary to construct, widen, or protect any highway under the provisions hereof, the road protection commission shall make publication for thirty days in some newspaper published in the county wherein such improvements are made, setting forth the commencement and termination, with a general outline of the nature and extent thereof. When any owner of land or other person shall claim compensation for land taken for such purpose, or for damage sustained by the construction, widening, improvement, or protection of such road or highway, he shall petition the board of supervisors in writing within thirty days after the expiration of the time provided for such publication, setting forth the nature and character of the damages claimed. Thereupon the board shall, on five days' notice to petitioner, go on the premises and assess the damages sustained by him. The finding of the board shall be in writing, signed by the members agreeing to it, and must be entered on the minutes at the next meeting; but if the damages sustained and claimed be less than the cost of assessing, the board may allow the same without inquiry."

It appears to be the position of the landowners, based on previous filings, that while the Board has the *right* to exercise the power of eminent domain to acquire real property for the purpose of construction a sea wall, that in exercising that power, the Board should use the *procedure* set forth in Miss. Code Ann. § 11-27-1, rather than the procedure set forth Miss. Code Ann. § 65-33-31, as the former statute provides greater procedural safeguards for landowners, and/or the Seawall Act procedure violates the United States Constitution and the Mississippi Constitution.

Choice of Law.

The landowners have argued that the Board should have employed the condemnation procedure set forth in Miss. Code Ann. § 11-27-1 et seq., instead of the procedure set forth in Miss. Code Ann. § 65-33-31. This assertion is simply incorrect as 1) the statutes involved clearly mandate use of the Seawall Act in these cases, and 2) this Honorable Court has recognized that where the legislature has provided for a condemnation procedure to be used for a specific purpose, that such procedure is to be employed to the exclusion of Miss. Code Ann. § 11-27-1 et seq. See, *Branaman v. Long Beach Water Management District*, 730 So.2d 1146, 1149 (Miss. 1999). In that case, the City of Longbeach sought to condemn property for use as drainage easements, and they used a procedure enacted by legislature specifically for condemning property for drainage easements. *Branaman* at 1146. The landowners in that case made the same argument being advanced in these cases by claiming that Miss. Code Ann. § 11-27-1 et seq. provided more procedural safeguards than the statute created specifically for drainage easements (Miss. Code Ann. § 51-29-39), and therefore the City of Longbeach should have used Miss. Code Ann. § 11-27-1 et seq. This court rejected that argument by simply referring to the plain language of each statute and determining that each one, by its own terms, required utilization of Miss. Code Ann. § 51-29-39 when a condemnor seeks to condemn property to

be used as a drainage easement. *Id.* at 1149. This Court is faced with the same situation today. Specifically, Miss. Code Ann. § 11-27-1 requires condemnors to use the procedure set forth in Title 11, Chapter 27 "except as elsewhere specifically provided under the laws of the State of Mississippi". The Seawall Act specifically provides its own procedure for condemnation. As such, it is that procedure which is properly employed by a condemnor seeking to condemn property for a seawall.

Constitutionality of the Seawall Act Procedure

It is a worthwhile endeavor to consider several holdings of this court in *Branaman v. Long Beach Water Management District*, 730 So.2d 1146 (Miss. 1999) as the factual scenario in that case is very similar to the cases presently before the court. In *Branaman*, this court held, "the ultimate goal of eminent domain is to insure [sic] that landowners receive due process and just compensation" *Id.* at 1149. Moreover, "The power of eminent domain must be exercised in satisfaction of due process, including adequate notice and the opportunity to be heard.", *Id.*

General Considerations.

Importantly, the Seawall Act is a lawful, and valid enactment of the Mississippi legislature, and has not been repealed by that body, nor held to be unconstitutional by this Honorable Court. It is a well accepted principle of law that statutory enactments of

our legislature are presumptively constitutional. This Court held in *City of Belmont v. Mississippi Tax Com'n*, 860 So.2d 289 (Miss. 2003), "Legislative acts are cloaked with a presumption of constitutionality, and unconstitutionality must appear beyond reasonable doubt." Furthermore, the Seawall Act has been reviewed on at least two separate occasions, and has been found to be constitutional by the Supreme Court of Mississippi. The first case was *Ladner v. Road Protection Commission*, 116 So. 602 (Miss. 1928), and the second case was *Henritzky v. Harrison County*, 178 So. 322 (Miss. 1938). Admittedly, those cases dealt with the constitutionality of the statutes based on other questions, but contained within those cases was a discussion of the procedure that was followed by the Board in these cases, and the High Court took no issue with that procedure in each of its opinions. As such, the Supreme Court of this State has, at least implicitly, recognized the constitutionality of the procedure which was followed by the Board.

Specific Considerations.

Adequate Notice.

The condemnation procedure set forth in Miss. Code Ann. § 65-33-31 provides that "the road protection commission shall make publication for thirty days in some newspaper published in the county wherein such improvements are made, setting forth the commencement and termination, with a general outline of the nature

and extent thereof." *Id.* Additionally, Miss. Code Ann. § 65-33-5 requires the plans and specifications for the sea wall to be filed with Chancery Clerk of the County. In these cases, the Board published the statutory notice in the local newspaper for the requisite period of time. The published notice referred to the owners of these parcels specifically, and referenced that the plans and specifications were available for review in the Office of the Chancery Clerk of Hancock County, Mississippi. The notice was admitted into evidence during the consolidated hearing before the circuit judge. (Trans. P. 36, L. 4; Ex. 3) Unlike *Branaman*, the landowners in this case were afforded a full thirty day notice period, and while the Mississippi Rules of Civil Procedure do not apply to the proceedings before the Board of Supervisors, the fact that the statutory notice period is the same as M.R.C.P., Rule 4 related to notice by publication, strongly suggest that such a period is reasonable. It should also be noted that as these matters deal with proceedings *in rem*, notice by publication is appropriate. This legal procedure was initiated by the Board when it published its notice. The statute provides that at the termination of the thirty day notice period, any affected landowner shall file his claim for compensation with the Board of Supervisors, and shall have thirty days from the last day of the notice period to make such filing. Each of the landowners filed a timely claim with the Board. Clearly, the statute provides

sufficient notice, and in these cases, the landowners filed timely claims indicating that they actually received the notice.

Opportunity to Be Heard.

After an affected landowner files his timely claim with the Board of Supervisors, the Board shall, upon five days notice, enter upon the property of the claimant to assess the same for damages. In each of these cases actual notice was sent to counsel for each of the landowners, setting the date and time when the Board would enter upon his or her property. On June 8, 2009, a member of the Hancock County Board of Supervisors along with the Hancock County Tax Assessor/Collector, the Hancock County Chancery Clerk, the Board Attorney for Hancock County, an appraiser with the United States Corp of Engineers, the project manager with the United States Corp of Engineer, the land acquisition agent who had been dealing with the landowners prior to the commencement of the condemnation proceedings, as well as an engineer with the United States Corp of Engineers all traveled as a group to each of the three parcels at issue in this appeal. None of the affected landowners chose to attend. Nevertheless, the landowners in all three of these cases not only were heard through the filing of their complaints, but had an additional opportunity to be heard, on site, at their property. As such, the Seawall Act plainly affords any affected landowner the opportunity to be heard.

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Following the inspection by the aforementioned individuals, it was determined that the specific benefit conferred upon each individual parcel caused an increase in the value of the parcel, and thus just compensation was determined to be zero dollars. In other words, it was determined that the temporary taking had actually increased the value of the property, rather than decreased the value of the property, thus, no sum was due. The Board then determined and resolved on its minutes that the landowners' property had been properly condemned, and placed in the hands of the county (Trans. P. 26, L. 15; Ex.1). As discussed in greater detail below, the Seawall Act, provides for additional due process by allowing for judicial review by the circuit court of the county. Therefore, as the procedure set forth by the Seawall Act provides adequate notice, and ample opportunity to be heard, it satisfies due process concerns, and thus the landowners have failed to demonstrate that the statute employed by the Board is unconstitutional beyond a reasonable doubt, or stated another way, have failed to overcome the strong presumption of validity afforded statutory enactments of our legislature.

Just Compensation

The landowners assert that they have not received just compensation. However, their assertions are premature as they have not yet tried the issue of damages to a jury as contemplated by Miss. Code Ann. § 65-33-31 (1972). The statute allows for a

jury trial on damages. While the Board takes the position that just compensation in this matter is \$0, the landowners have every right to challenge that position both legally and factually, but it will require them to comply with the statute. The Board asserts that Miss. Code Ann. § 65-33-1, et seq. (1972) is the established law of this State. It is clear that the landowners would like the established law in these matters to be that procedure set forth in Miss. Code Ann. § 11-27-1, et seq., but as previously discussed, that is simply not the case, and even if it was, the Board does not believe that a determination of \$0 for just compensation is legally precluded by the laws of our State. In support of that position, the Board would compare Miss. Code Ann. § 11-27-21 (1972) which states:

In determining damages, if any, to the remainder if less than the whole of the Defendant's interest in property is taken, nothing shall be deducted there from on account of the supposed benefits incident to the public use for which the Petitioner seeks to acquire the property.

with Miss. Code Ann. § 65-33-1 et seq. Importantly, Miss. Code Ann. § 65-33-1 et seq. contains no such prohibition.

Additionally, the Board is not deducting from any amount that would otherwise be due the landowners in this case due to supposed benefits incident to the public use, but has in fact determined that the erection of the Seawall and all of the work and material that will be done in and on each specific parcel, will confer a

Mississippi jurisprudence would have constituted a jurisdictional defect requiring the court to simply dismiss the appeals for lack of subject matter jurisdiction. Nonetheless, and based on current case law, the filing of a Notice of Appeal appears to be jurisdictionally sound. Subsequent to the landowners initiating their circuit court actions, counsel for the Board filed a motion to expedite the hearing of the matters, and on August 24, 2009, the circuit court conducted a consolidated hearing on all three cases. Then, on August 31, 2009, the circuit court entered the Order from which the landowners' appeal arises. The order speaks for itself, but the gist of it is that the court found that the county had complied with the Real Property Policies Acquisition Act, and had also complied with the Seawall Act, and "the factual findings of a trial judge sitting without a jury are accorded the safe deference as a chancellor's findings of fact". *City of Jackson v. Powell*, 917 So.2d 59 (Miss. 2005). The court further found that the temporary easements had been properly condemned, and were available for use by the county. The court then ordered that each matter would be set for a jury trial on damages at the request of the landowners. Unhappy with the circuit court's decision, the landowners filed the present appeal.

Conclusion

As discussed throughout the Board's brief, and its' previous filings, the *right* to exercise the power of eminent domain in

these matters is not at issue. It is merely the procedure that was employed by the Hancock County Board of Supervisors that the landowners take issue with, by generally asserting that it violates notions of due process. However, the pertinent sections of the Code at issue provide for notice to potentially affected landowners, and allow for an opportunity to be heard.

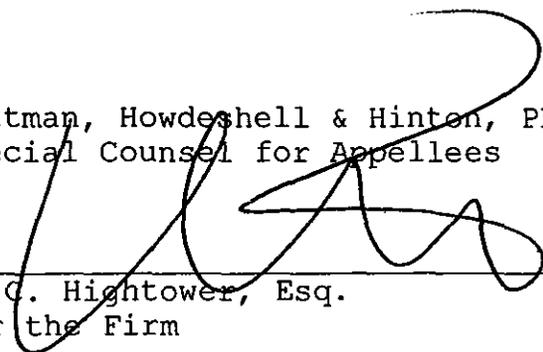
Additionally, within the existing statutory framework, landowners may seek judicial review in the Circuit Court. As such, the Board believes that Mississippi Code Annotated § 65-33-1, et seq.

(1972) satisfies notions of, both substantive, and procedural due process. Thus, for this, and all the other aforementioned reasons, the Seawall Act, is constitutional and controlling in this matter, and the property at issue has been properly condemned and may be used for the construction of the sea wall along Beach Boulevard in Bay St. Louis, Mississippi. The Board asserts that all the actions of the Board in this matter, as well as the decisions of the Circuit Court of Hancock County, Mississippi should be affirmed, and this case should be remanded to the circuit court for a trial on damages.

Respectfully submitted, this the 10th day of December, 2009.

**HANCOCK COUNTY, MISSISSIPPI, ACTING
BY AND THROUGH ITS BOARD OF
SUPERVISORS
AND THE HANCOCK COUNTY ROAD
PROTECTION
COMMISSION**

By: Pittman, Howdeshell & Hinton, PLLC
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CERTIFICATE OF SERVICE

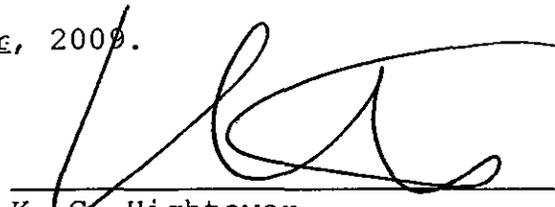
I, K. C. Hightower, Special Counsel for Appellees, do hereby certify that I have this date delivered via U.S. postal mail, a true and correct copy of the above and foregoing, Brief of Appelles to:

Judge Lawrence P. Bourgeois, Jr.
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This, the 10th day of December, 2009.

BY:


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