

IN THE MISSISSIPPI SUPREME COURT

THE CARL RONNIE DARICEK LIVING TRUST

APPELLANT

VS.

NO. 2009-IA-01513-SCT

HANCOCK COUNTY, MISSISSIPPI, ET AL

APPELLEES

CONSOLIDATED WITH

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

APPELLANTS

VS.

NO. 2009-IA-01514-SCT

HANCOCK COUNTY, MISSISSIPPI, ET AL

APPELLEES

CONSOLIDATED WITH

ERNEST BECKEMEYER, III

APPELLANT

VS.

NO. 2009-IA-01515-SCT


HANCOCK COUNTY, MISSISSIPPI, ET AL

APPELLEES

**APPEAL FROM THE CIRCUIT COURT
OF HANCOCK COUNTY, MISSISSIPPI**

BRIEF OF APPELLANTS ON INTERLOCUTORY APPEAL

(ORAL ARGUMENT REQUESTED)

VIRGIL G. GILLESPIE
MSBN 
The Gillespie Law Firm
2213 15th Street
P.O. Box 850
Gulfport, MS 39502
Ph: (228) 864-4520
Fax: (228) 864-8464

CERTIFICATE OF INTERESTED PERSONS

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 may evaluate possible disqualification or recusal:

APPELLANTS:

ERNEST BECKEMEYER, III
LISA K. FITCH
SANDRA K. GOODWIN
ANN K. ENGLEHORN
CARL RONNIE DARICEK

APPELLEES:

HANCOCK COUNTY BOARD OF SUPERVISORS:
DAVID YARBOROUGH
RODRICK "ROCKY" PULLMAN
LISA COWAND
STEVE SEYMOUR
PATRICIA CUEVAS
HANCOCK COUNTY ROAD PROTECTION COMMISSION:
HAROLD OLSEN
JOHN BAXTER
LEE SEAL
CHET LABLANC
JAY CUEVAS
TERI WYLY
TIM A. KELLAR, CLERK OF THE BOARD OF SUPERVISORS AND CHANCERY CLERK

ATTORNEY FOR APPELLANTS:

Virgil G. Gillespie
The Gillespie Law Firm
P. O. Box 850
Gulfport, MS 39502
Ph: 228-864-4520

ATTORNEYS FOR APPELLEES:

K.C. Hightower
Pittman, Howdeshell & Hinton, PLLC
P.O. Drawer 17138
Hattiesburg, MS 39404-7138
Ph: 601-

Jack Pittman
Pittman, Howdeshell & Hinton, PLLC
P.O. Drawer 17138
Hattiesburg, MS 39404-7138
Ph: 601-

Ronnie Artigues
Gex & Artigues – Butler Snow
P.O. Box 47
Waveland, MS 39576
Ph: 228-467-5426

OTHER INTERESTED PARTIES:

Jim Hood, Attorney General

TABLE OF CONTENTS

	<u>Page(s):</u>
Certificate of Interested Persons.....	i
Table of Contents.....	iii
Tables of Cases, Laws & Constitution, and Other Authority.....	iv
Oral Argument Requested.....	viii
Statement of Issues.....	1
Statement of the Case.....	2
Summary of the Argument.....	6
Argument.....	8
Conclusion.....	20
Certificate of Service.....	22

TABLE OF CASES

	<u>Page(s):</u>
<u>Am. Fidelity Fire Ins. v. Athens Stove Works</u> , 481 So.2d 292, 295 (Miss 1985).....	12
<u>Board of County Comm'rs v. Auslaender</u> , 710 P.2d 1180 (Colorado, 1985).....	15
<u>City of Little Rock v. Raines</u> , 411 S.W.2d 486, 491 (Ark. 1967).....	12
<u>Ferguson v. Board of Supervisors</u> , 149 Miss. 627, 630 (1928).....	11
<u>Howell v. State Highway Comm'n</u> , 573 So. 2d 754 (1990).....	12
<u>Isom vs. Mississippi Central Railroad</u> , 36 Miss. 300 (1858).....	18
<u>King v. Vicksburg Ry. and Light Co.</u> , 88 Miss. 456, 42So.204 (1906).....	14
<u>Louisiana Power & Light v. Lasseigne</u> , 240 So.2d 707 (La. 1970).....	16
<u>Mississippi State Highway Commission vs. Hillman</u> , 189 Miss. 850, 180 So 565 (Miss. 1940).....	18
<u>Miss. Power and Light v. Conerly</u> , 460 So.2d 107, 111 (Colorado, 1984).....	12
<u>New York Telephone Co. v. Wood</u> , 259 N.Y.S. 365 (1931).....	15
<u>Potters v. State Highway Comm'n</u> , 608 So.2d 1227 (1992).....	12
<u>Roberts v. Miss. State Highway Comm'n</u> , 309 So.2d 156, 159 (Miss. 1975).....	12
<u>Sarphie v. Mississippi Highway Commission</u> , 275. So.2d 381 (Miss. 1973).....	14, 15
<u>State Highway Commission. v. Havard</u> , 508 So.2d 1099 (1987).....	12

<u>State Highway Commission v. Mason</u>	
192 Miss. 576, 4 So.2d 345, 6 So.2d 468 (1941).....	8, 20
<u>Williams v. Walley,</u>	
295 So.2d 286 (Miss. 1974).....	8, 19, 20
<u>Wise v. Yazoo City,</u>	
96 Miss. 507 (1910).....	11, 20

TABLE OF LAWS, RULES & CONSTITUTIONS

	<u>Page(s):</u>
Section 14, Mississippi Constitution.....	8, 10, 20
Section 17, Mississippi Constitution.....	8, 11, 14, 19, 20
Section 24, Mississippi Constitution.....	8
M.C.A.:	
11-27-1 et seq.....	2, 17, 18
11-27-37.....	7
11-27-21.....	16, 17
65-33-1 et seq. (Seawall Act).....	2, 3, 6, 8, 13, 17
65-33-31.....	3, 4, 5
43-37-1 et seq. (Real Property Acquisition Policies Act).....	7, 8, 20
43-37-3.....	5, 6, 9, 16
Rule 24, Mississippi Rules of Procedure.....	4
Rules 5.01 – 5.10, Uniform Rules of Circuit and County Court Prentice.....	4
United State Constitution, Amend V & XIV.....	13, 14

OTHER AUTHORITY:

Page(s):

26 AmJur 2d, Eminent Domain, Section 1, Page 638.....14

26 AmJur 2d, Eminent Domain, Section 250 (1966), Page 81l.....15

ORAL ARGUMENT REQUESTED

Pursuant to Rule 24(b), the Appellants respectfully submit that Oral Argument may be helpful to the Court in this matter. These cases presents Constitutional issues of great magnitude and the Appellants offer oral argument if the Court deems the same necessary or if the same would aid the Court.

IN THE MISSISSIPPI SUPREME COURT

THE CARL RONNIE DARICEK LIVING TRUST

APPELLANT

VS.

NO. 2009-IA-01513-SCT

HANCOCK COUNTY, MISSISSIPPI, ET AL

APPELLEES

CONSOLIDATED WITH

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

APPELLANTS

VS.

NO. 2009-IA-01514-SCT

HANCOCK COUNTY, MISSISSIPPI, ET AL

APPELLEES

CONSOLIDATED WITH

ERNEST BECKEMEYER, III

APPELLANT

VS.

NO. 2009-IA-01515-SCT

HANCOCK COUNTY, MISSISSIPPI, ET AL

APPELLEES

STATEMENT OF ISSUES

(1) Whether the Board of Supervisors can condemn an interest in a parcel of property in the manner in which Hancock County acted in its Resolution of June 24, 2009, without making a monetary offer, without payment of any compensation, by considering benefits and without any type of Court proceeding.

(2) Whether the Circuit Court erred in determining that there shall be a trial for jury or whether this matter should be remanded back to the Board of Supervisors with specific instructions to the Board of Supervisors that if they are going to condemn these properties they are going to have to start with a new Resolution and then file proceedings under Section 11-27-1 et seq. of the Mississippi Code and proceed with formal Eminent Domain proceedings as required by the Real Property Policies Acquisition Act.

(3) Whether the Seawall Act, Section 65-33-1 et seq. of the Mississippi Code has been superseded and repealed by the Real Properties Acquisition Policies Act and by the requirements of Section 17 of the Mississippi Constitution.

(4) Whether this Court should exercise the authority granted it by law and declare that the Appellants are entitled to Attorney's fees and expenses and establish a procedure to determine the same.

(5) Whether this Honorable Court should remand this matter back to Circuit Court with directions to the Circuit Judge not only to direct the Board of Supervisors to begin a new proceeding for Eminent Domain under Section 11-27-1 et seq. of the Mississippi Code, but also to require the Circuit Court Judge to assess cost and Attorney's fees in favor of the Appellants pursuant to applicable Code Sections.

(6) Whether this Court should declare the Seawall Act unconstitutional.

STATEMENT OF THE CASE

The Appellants are the owners of certain beach front property lying and being situated on the East side (water side) of Beach Boulevard in downtown area of Bay St. Louis, MS. Bay St. Louis is located in Hancock County, MS. The Beckemeyer property is waterfront property on which Mr. Beckemeyer operated a business prior to its destruction by Hurricane Katrina in 2005. The Beckemeyer property fronts Beach Boulevard and runs back to the existing Seawall, after which one would cross the beach and then be at the shore of the Bay of St. Louis. The Daricek property is waterfront property on which Mr. Daricek maintained his residence prior to its destruction by Hurricane Katrina in 2005. The Daricek property fronts Beach Boulevard and runs back to the existing Seawall, after which one would cross the beach and then be at the shore of the Bay of St. Louis. The Daricek and Beckemeyer properties are both zoned commercial. The Fitch property is zoned residential and is on the seaward side of Beach Boulevard.

After Hurricane Katrina the United States Corps of Engineers proposed to rebuild the Seawall slightly seaward from its present location. In order to do this it was necessary to have a construction easement over all three properties for a period of three years.

The Appellees, Hancock County and the Hancock County Road Protection Commission, without making any type of monetary offer, without due process of law, without the payment of any compensation and without any type of Court proceeding summarily condemned the property belong to the Appellants in a Resolution of the Board of Supervisors dated June 24, 2009, a copy of which is found under Tab 2 of the Appellants' Record Excerpts.

The Board of Supervisors, in adopting this Resolution, was apparently following the procedures set forth in the Seawall Act which is contained in the Mississippi Code in Sections 65-33-1 through 65-33-71. This act of the Legislature was initially adopted in 1924.

Section 65-33-31 of the Seawall Act provides that there shall be a publication in the newspaper to the property owner, after which the property owner must file a claim with the Board of Supervisors and Road Protection Commission. This publication was made and all three Appellants filed such a claim. Although it is believed that such claim was unnecessary due to the passage of the Real Property Acquisition Policies Act, nevertheless in order to protect their rights all three Appellants filed such a claim. One member of the Board of Supervisors then went to the properties and determined that the claims were unjustified and without further involvement of the Appellants the Board enacted the Resolution mentioned above. The Resolution was not signed as required by law. See Section 65-33-31.

Section 65-33-31 provides that "the Board" shall go to the premises and "assess the damages sustained" by the property owner. This Section does not provide for any safeguards of constitutionally or of due process of law, but merely says that the Board shall "assess the damages sustained by him".

Section 65-33-31 provides that the Board shall go to the premises, however, the Resolution (Tab 2) shows that only one member of the Board went to the property. This Section

of the Code then provides that the "findings of the Board shall be in writing, signed by the members agreeing to it..." A reading of the Resolution will show that none of the Board of Supervisors signed the Resolution. The Resolution merely states that "no payment is due to the landowner" and then states that the property is "hereby taken, dedicated and condemned for use as a road and/or Road Protection Device as provided by law". The Board didn't even fully comply with Section 65-33-31 of the Code.

In order to protect their rights the Appellants filed Appeals within the time allowed by law. Due to the serious Constitutional issue, the Attorney General was notified pursuant the Rule 24 of the Rules of Civil Procedure. See Tab 3 of Appellants' Record Excerpts. The Appellees filed a Motion to expedite this matter and have the Appeal heard without a Bill of Exceptions and without the normal Briefing schedule called for in the Uniform Rules of Circuit and County Court practice, Rules 5.01 through 5.10.

The Appellants are not complaining that a formal Bill of Exceptions was not compiled and a briefing schedule was not allowed, for it is believed that the only thing really needed for this Appeal and the determination of this matter is the Resolution of the Board of Supervisors, which shows that this matter was handled in a manner contrary to the Requirement of Section 17 of the Mississippi Constitution and contrary to the mandatory requirements of the Real Property Acquisition Policies Act.

This expedited Appeal was heard before Judge Lawrence P. Bourgeois, Jr. on August 24, 2009, and he entered his ruling of August 31, 2009, from which this Appeal is taken. Copies of Judge Bourgeois' Orders are found under Tab 2 of the Appellants' Record Excerpts.

At this point the Appellant's will summarize the events that occurred prior to the Resolution of the Board of Supervisors condemning their property.

The first letters received by the property owners were dated August 8, 2008, and were from the Department of the Army, Corps of Engineers. This first letter informed the property owners that a three year construction easement would be required and enclosed an easement

conveying the property to the United States of America. This letter informed the property owners that an appraisal had been made, but that the seawall improvements offset the value of the easements. No copy of the appraisal or any breakdown of the appraisal was included. The property owners were never invited to offer any input into the appraisal.

The next letters were dated February 19, 2009, and they were from the Department of the Army, Corps of Engineers. They enclosed a revised easement, but no information regarding the appraisal.

The next time the landowners knew anything about what was going on is when a "Public Notice" came out in the Sea Coast Echo, a local Bay St. Louis newspaper. This notice was not addressed to any single land owner, but did mention the three land owners and the size of each temporary easement. No other details were contained therein except that the notice designated a 30 day period from March 21, 2009 to April 20, 2009 and gave the property owners 30 days after the expiration of this notice period to petition the Board of Supervisors setting forth the nature and character of the damages claimed. Although current Mississippi Law does not place the responsibility of making such a claim on the land owner (this is prohibited by Section 43-37-3(h)), nevertheless all three landowners filed a claim with the Board of Supervisors and Road Protection Commission of Hancock County, Mississippi, on May 15, 2009.

The next time the landowners heard from the Board of Supervisors was a notice dated May 26, 2009 and mailed May 27, 2009 telling them that the Board of Supervisors would go to the property on June 8, 2009 at 1:30 p.m. to assess damages.

The court will notice that the Resolution of the Board of Supervisors shows that only one Supervisor (Steve Seymour) went to the property. This is contrary to Section 65-33-31 which requires that the Board shall go to the premises and assess the damages sustained by the property owner. It should also be noted, as has been pointed out before, that the members agreeing to this Resolution did not sign as required by Section 65-33-31.

Therefore not only did the Board of Supervisors fail to follow the Seawall Act in the action it took, the Seawall Act itself is set up so that the land owner does not receive due process of law, and receives none of the guarantees set forth in the current version of Section of 43-37-3 of the Mississippi Code entitled Acquisition of Real Property and Publicly Funded Projects.

Section 43-37-3 of the Code starts off by stating that any agency or other entity acquiring real property shall comply with certain policies. Hancock County never made any effort to negotiate with the property owner. The property owners were never given opportunity to accompany the appraiser during his inspection of the property. No monetary offer was ever made. How could this possibly comply with the Mississippi Constitution that requires payment of due compensation? The owner was never provided a written statement or summary of the basis of the appraisal. The owner was expected to surrender possession of the property without the agreed purchase price being paid or deposited. It is sincerely suggested that the methodology used by Hancock County was coercive action to compel an agreement. Formal condemnation proceedings were never instituted. The property owner was intentionally made to institute legal proceedings to protect his property rights. How many ways can the property owners rights and constitutional promises be trampled upon and ignored?

SUMMARY OF THE ARGUMENT

In summary, the Seawall Act which is found under Section 65-33-1 et seq. of the Mississippi Code should be declared unconstitutional. The procedures set forth therein make it impossible for a landowner to receive due process of law or to receive just compensation as required by the Constitution.

As is pointed out herein, the matter of due compensation to be awarded pursuant to the Constitution is a Judicial question, not a Legislative question. How can this Court allow a statute to remain on the books that provides for notice by publication, which contains no provision for Judicial determination of due compensation and allows a star chamber proceeding

to occur similar to the one that occurred in this case. The Court needs to declare these Sections of the Code unconstitutional and we need to start over in this matter.

The States' Boards of Supervisors are given very limited Eminent Domain authority. The only time the Board of Supervisors can exercise this right is where it is specifically statutorily granted. Appellants will concede that it is specifically granted to them in the Seawall Act, however, the remainder of the Seawall Act allows them to act in the manner in which they acted in this case in a constitutionally unacceptable manner. It is therefore suggested that the entire procedure be declared unconstitutional and that the Board of Supervisors to be required to request the Legislature to enact new legislation if needed.

Therefore, this entire matter needs to be thrown out and no further proceedings had due to the lack of due process and/or constitutional protection being afforded in the Seawall Act.

This Court cannot constitutionally remand this back to the Circuit Court for a trial since due process was not afforded to the land owner in the first instance. Therefore this matter needs to start all over again. As will be mentioned, the Real Properties Policies Acquisition Act (Section 43-37-1 et seq. of the Mississippi Code) sets forth a specific set of rules before a landowner's property can be taken. It starts off with saying they must negotiate. They didn't negotiate. There must be an appraisal ever given or summarized to the Landowner. There was no appraisal. And so on and so on.

Furthermore, this Court, of its own Motion should remand this back to the Circuit Court for only one reason, other than to tell the Board of Supervisors that they must proceed in a constitutionally and statutorily approved manner, and that is to have a hearing to award the property owners, their Attorney's fees and expenses as provided by law. The Court's attention in that regard is invited to Section 11-27-37 of the Mississippi Code.

Therefore, in summary it is submitted that the Seawall Act should be declared unconstitutional and the Board of Supervisors should be admonished to proceed in this matter only as authorize by law and by the Constitution. Of course the landowners must be

compensated for this obvious violation of their constitutional and due process rights, under the self executing authority of the Constitution.

ARGUMENT

This matter involves some of the most fundamental rights known to our system of justice and which are protected not only by Sections 14 and 17 of our State Constitution, but also by many, many decisions of this Court and by the Real Property Acquisition Policies Act (Section 43-37-1 et seq. of the Mississippi Code). It is abundantly clear that the Seawall Act as applied by the Board of Supervisors does not comply with the Real Properties Acquisition Policies Act, nor did it come even near meeting the requirements of the Constitution.

At this point the Court is reminded that Section 17 of the Constitution is self executing in a situation where private property is concerned. See *Williams V. Walley* 295 So. 2d 286 (Miss 1974). In *Williams vs. Walley* p.288, the Court stated:

Section 17, Mississippi Constitution of 1890, provides that private property shall not be taken or damaged without first paying due compensation therefor. This section is self-executing, and the courts of the state are always open to provide a remedy for the expropriation of private property by the sovereign or any of its subdivisions. *State Highway Commission v. Mason*, 192 Miss. 576, 4 So.2d 345, 6 So.2d 468 (1941).

* * *

As already stated, when private property is taken without payment therefor, the courts are open to provide a remedy against the sovereign or any of its subdivisions. Otherwise section 17 of the Mississippi Constitution of 1890 would be meaningless. Section 17 guarantees the right, and section 24, of the Constitution assures that the courts are open to provide the remedy.

The Sections of the Code relied upon by Hancock County were initially enacted by the Mississippi Legislature in the year 1924. The Courts attention is invited to the laws of 1924, Chapter 319.

In 1972 the Mississippi Legislature enacted the Real Properties Acquisition Policies Act. See Sections 43-37-1 et seq. of the Mississippi Code. When this Act was first enacted in 1972 it

referred only to the use of Federal Funds. A number of years ago the Act was amended to referred to any public funds. In this case it would apply whether we are talking about regular Public Funds (County or State) or Federal Funds, since the Appellees admit that they are using Federal Funds in this case. Therefore, it is established that Public Funds are being used.

Section 43-37-3 of the Mississippi Code is entitled "Acquisition of Real Property in Publicly Funded Projects". This Section of the Code was amended in 2009, effective April 14, 2009.

Section 43-37-3 (as amended in 2009) starts off stating: "Any person, agency or other entity acquiring real property for any project or program in which public funds are used shall comply with the following policies: "(emphasis added). As the Court can see Section 43-37-3 is mandatory and Hancock County must follow each and every sub-Section thereof when condemning any part of a parcel of privately owned property.

In the Court below Hancock County emphasized that all that is involved are small tracts for a three year temporary easement. It appears that the County may be trying to impress upon the Court that there is not much of an interest in property being taken. Nevertheless it is an interest in property and it is protected by the Section 17 of our Constitution and by Section 43-37-3. Subsection (h) of 43-37-3 states "if an interest in real property is to be acquired by exercise of power of Eminent Domain, formal condemnation proceedings shall be instituted" (emphasis again added). It even goes further to say that the acquiring authority shall not intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his Real Property. It seems that's all we need to cite to the Court for a reversal, but the Act goes further.

Section 43-37-3 makes the following things mandatory for the County before it can acquire an interest in the Appellant's property. These things are as follows:

- (1) The County must negotiate with the owner.

- (2) The property must be appraised. The owner must be given an opportunity to accompany the appraiser to the property.
- (3) The price paid must be no less than the negotiated price or the approved appraisal.
- (4) The owner of the property shall be submitted a written statement and a summary of the basis of the appraisal.
- (5) A property owner shall not be required to surrender possession of Real Property before the agreed price is paid or deposited.
- (6) In no event shall the time of condemnation be advanced or any other coercive action be taken to compel an agreement regarding the property.
- (7) No property can be condemned except upon the exercise of formal condemnation proceedings.
- (8) The acquiring authority shall not intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

All of these things are made mandatory. There is no choice given to the County.

Please note that these proceedings must be carried out by Hancock County, not by the property owner. The procedure used by Hancock County violates almost every Section of this Act of the Mississippi Legislature. This, in and of itself, should stop this matter cold right now. The property owner should not be forced to file a claim for his Constitutional rights in view of the above mentioned Section of the Code.

With the possible exception of the right to liberty and the constitutional guarantees afforded those charged with a crime, no rights of citizens are more jealously protected than the right of individuals to own and enjoy their property.

Section 14 of the Mississippi Constitution provides as follows:

No person shall be deprived of life, liberty, or property except by due process of law.

Section 17 of the Mississippi Constitution provides as follows:

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

The awesome power of eminent domain is an attribute of sovereignty and is in derogation of the common law. Any Code Section conferring such right must be strictly construed. In Wise v. Yazoo City, 96 Miss. 507 (1910), the Mississippi Supreme Court stated as follows:

No power conferred on any corporation, either private or municipal, is to be more strictly construed than the power of eminent domain.

* * *

In these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and when the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own.

* * *

Eminent domain rights are attributes of sovereignty, to be exercised by the state with great caution and only in cases of public necessity. It is a power which sleeps in the bosom of the state until aroused into activity by an act of the legislature. This high power is never to be presumed to be confided to any public or private body or corporation, however, great may be the necessity for it to have and exercise such power. When it is asserted by any person or corporation, the state's assent must be clearly given in legislative acts, and the subjects for which it may be exercised specifically named. (Emphasis added)

Further, in this regard, the Supreme Court in Ferguson v. Board of Supervisors, 149 Miss. 624, 630 (1928), stated as follows:

The power of eminent domain is in derogation of common right. Therefore the statutes conferring the right of eminent domain are to be strictly construed. They are not to be extended beyond their plain provisions. The right to exercise this power is strictly limited to the purposes expressed in the statutes conferring the power. Where there is any doubt of the right to exercise the power, the landowner is entitled to the benefit of such doubt. (Emphasis added)

This rule of strict construction is one of universal application and is not restricted to the State of Mississippi. The Arkansas Supreme Court in City of Little Rock v. Raines, 411 S.W.2d 486, 491 (Ark. 1967) expressed the proposition as follows:

Statutes relating to the exercise of the right of eminent domain, especially where there is an alleged delegation of the power, should be strictly construed in favor of the landowner and against the condemnor, largely because they are in derogation of the common right. . .

Any fair, reasonable, and substantial doubt about the existence of a power in a municipal corporation must be resolved against it.

In Roberts v. Miss. State Highway Comm'n, 309 So.2d 156, 159 (Miss. 1975), the Court stated:

It is a general rule of statutory construction that where there is a doubt of the right to exercise the power of eminent domain, the statutes will be strictly construed most favorably to the landowner.

It seems that this Court has sent a clear message that where there is doubt as to the right to exercise the power of eminent domain, the statutes will be strictly construed most favorably to the landowner. See Miss. Power and Light v. Conerly, 460 So.2d 107, 111 (Miss. 1984)

To allow the County to proceed under §65-33-1, et seq. and disregard the rest of the Code is an insult to our system of justice.

Due compensation has been defined as meaning the same as market value. See Potters v. State Highway Comm'n, 608 So.2d 1227 (1992); Howell v. State Highway Comm'n, 573 So.2d 754 (1990); and State Highway Commission. v. Havard, 508 So.2d 1099 (1987); wherein the Court stated:

First, due compensation has two familiar components: the fair market value of the property taken and the damage if any to the remainder. Put another way when a part of a larger tract is taken the property owner is due compensation equal to the difference between the fair market value of the whole tract immediately prior to the taking and the fair market value of the remaining tract immediately after the taking.

Due process means notice reasonably calculated to afford parties the time to prepare for their opportunity to be heard. Am. Fidelity Fire Ins. v. Athens Stove Works, 481 So.2d 292, 295

(Miss. 1985). In this case notice was a farce -- publication in the newspaper. We must not lose sight of the big picture. Every time we allow the government to run over a private citizen it makes it easier for the same thing to happen to the next person.

The County wants to take property from private citizens. The right to own private property is one of our most valuable rights. Our country was founded because of the desire of our ancestors to have the freedom to own property that would not be arbitrarily taken by the sovereign. Well, that is exactly what has happened to the Appellant landowners -- the taking in this manner amounts to nothing more than a Star Chamber proceeding. We must not let this abuse continue.

The County contends they have followed the 'law.' But, the law they profess to follow is vague, unclear and has allowed the County to run rough-shod over private citizens. The County contends that they can publish a notice in the newspaper requiring citizens to file a claim and the Board of Supervisors can then go to the property, evaluate that claim, and then find that no value is to be awarded, and then take ownership of the three-year construction easement with no more proceedings and for no consideration. That is an outrage and an affront to our system (and sense) of justice. We do not live in a country where our citizens are abused by the law. We, as American citizens, have the right of due process of law -- no person shall 'be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.' US Const., Amend. V & XIV (emphasis added) To allow a branch of the sovereign to swoop in on private citizens and take their property without affording due process to assure that the process is being handled properly is nothing more than the despotism of an absolute monarchy.

Sections 65-33-1 et seq of the Mississippi Code is devoid of adequate due process protections for the landowner. These Sections do not provide for the simple safeguards that ensure a landowner receives due process and just compensation. The landowner herein simply wanted to ensure himself that he is getting what was guaranteed to him -- just compensation for the land taken from him. A chance to be heard. Their day in Court.

In evaluating the Constitutional right that the landowner has to just compensation for the property taken and diminution in value as a result of this taking, the landowners refer to the case of Sarphie v. Mississippi Highway Commission, 275 So.2d 381 (Miss. 1973).

In Sarphie, the Supreme Court emphasized that the condemnor is under a heavy and non-delegable duty and responsibility to pay the landowner the full and fair market value of the property to be taken. They emphasized the use of the word 'full', along with 'just', 'due', and 'adequate'. The pertinent parts of Sarphie are quoted as follows:

This was a hard-fought and well-tried case. There were no substantial errors made in the admission or exclusion of oral and documentary evidence. However, an eminent domain suit is a peculiar type of action where the condemnor is under a heavy and non-delegable duty and responsibility to pay the defendant landowner the full fair market value of her property.

26 Am. Jur. 2d, Eminent Domain, § 1 (1966) at page 638 gives this definition:

'Eminent domain is generally defined as the power of the nation or a sovereign state to take, or to authorize the taking of, private property for a public use without the owner's consent, *conditioned upon the payment of just compensation*.' (Emphasis added).

U. S. Constitution Amend. V provides in part:

[N]or shall private property be taken for public use, without just compensation.' (Emphasis added.)

Mississippi Constitution of 1890, Section 17, states in part:

'Private property shall not be taken or damaged for public use except on *due compensation* being first made to the owner or owners thereof, in a manner to be prescribed by law;' (Emphasis added).

In addition to 'just compensation' and 'due compensation', this Court saw fit to further define the compensation to be paid in King v. Vicksburg Ry. and Light Co., 88 Miss. 456, 42 So. 204 (1906), wherein this Court said:

'Constitution §17, makes the right of the owner of private property superior to that of the public, reversing the former rule that the individual might be made to suffer loss for the public. He may still be compelled to part with his property for public use, but only *on full payment for it* or any right in relation to it. . . .

The decisions of this court since the Constitution of 1890 give full effect to the just rule established by its seventeenth section, by maintaining the right of the owner to be *fully compensated* for any loss of value sustained from any physical injury to his property or disturbance of any right in relation to it, whereby its market value is diminished.

' . . . *Due compensation is what ought to be made*, i.e., what will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of its cognizable by the senses, or by interference with some right in relation to property whereby its market value is lessened as the direct result of the public use.' (Emphasis added).

Still another description of the compensation to be made is contained in 26 Am.Jur .2d, Eminent Domain, § 250 (1966), at page 811:

'It is, moreover, the settled rule that property cannot be taken for public use *without adequate compensation*,' (Emphasis added).

Four different descriptive words have thus been used to describe the compensation due the landowner for the taking of his property without his consent for public use: 'just', 'due', 'full', and 'adequate'.

All of the above is quoted from Sarphie, pages 383-384.

It would be difficult, if not impossible, to secure due process and due compensation where an adequate offer is not made.

In the Colorado case of Board of County Comm'rs v. Auslaender, 710 P.2d 1180 (Colorado, 1985), a similar situation was discussed where the offer letter was only mailed five days prior to condemnation. The Court stated:

However, here, a condemnation action was initiated only a few days after an offer was mailed and only five days after the County stated its intent to initiate good faith negotiations. Thus, the County's assertion concerning the futility of negotiations is not factually sustainable since no reasonable time for negotiations was provided.

In the New York case of New York Telephone Co. v. Wood, 259 N.Y.S. 365 (1931), the Supreme Court of New York stated that a perfunctory offer for the property, or one not genuine, or one made upon conditions that are oppressive, is not sufficient.

Our sister state of Louisiana requires that the condemnor must conduct good faith, bona fide negotiations before resort may be had to expropriation. See Louisiana Power & Light v. Lasseigne, 240 So.2d 707 (La. 1970).

It does not take much exercise of common sense to come to the conclusion that a condemning authority would be acting abusively if it did not make a good faith, bona fide and fair effort to negotiate with property owners. The law [Section 43-37-3(a)] requires it.

Why the Board of Supervisors of Hancock County chose to totally ignore the established law of the State of Mississippi and the procedures established by the Legislature is beyond understanding. They apparently felt that all this free government money was more important than the Constitutional and Statutory rights of the citizens and property owners of their County. The above mentioned Resolution addressed the property of each landowner in these three Appeals. For each landowner the Board found as follows:

The benefit conferred upon the property owner by erection of the Seawall exceeds, in terms of value, any damage that may be incurred by Ernest Beckemeyer, III, and therefore, the property owned by Ernest Beckemeyer, III, will have an enhanced value as a result of the erection of the Seawall. As such, the Board finds that just compensation for this claim is \$0.00. The Board further finds, that it is entitled to offset damages incurred by the landowner with the value of the enhancement conferred upon the landowner by completion of the Project, as the prohibition against using enhancement as an offset is found in Mississippi Code Annotated § 11-27-21 (1972), and the procedure being employed by the Board by this instance is set forth in Mississippi Code Annotated § 65-33-1, et seq., wherein no such prohibition is found.

The above finding is the absolute height of arrogance and abuse of power.

Section 11-27-21 found under the heading "Civil Practice and Procedure - Eminent Domain" which is the Chapter of the Code that governs the procedure in condemning property, the Code provides:

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

For the Board of Supervisors to say that it can ignore 11-27-21 because 65-33-1 et seq. contains no such prohibition is the most glaring example of abuse of power that can be imagined. The Seawall Act does not give the Board of Supervisors the authority to ignore the Code.

Up until this point the Appellants, Beckemeyer, Daricek and Fitch have not found it necessary to request that the Court declare the Seawall Act unconstitutional, however, it may be necessary for the Court to consider such action since the Seawall Act, as written, cannot be applied without violating the Constitution of the State of Mississippi and, for that matter, the Constitution of the United States of America. The process of condemning private property is a judicial function rather than a legislative function and the Seawall Act does not recognize this separation of powers and its implementation cannot be carried out without violating the Constitutional mandate and without violating due process of law. Therefore although it may be unnecessary procedurally, nevertheless, the Court should consider declaring these Sections of the Code unconstitutional since they can only be applied in a manner that violates the Constitution and in a manner that deprives the property owner of due process of law.

The real issue in this case, however, is whether the Board of Supervisors, or whoever is exercising the power of Eminent Domain, should have proceeded with a formal Eminent Domain proceeding as set forth in Sections 11-27-1 et seq. of the Mississippi Code. The Courts attention is invited these Sections of the Mississippi Code which more than adequately provide for the protection of property owners and their constitutional and due process rights.

It is respectfully submitted that the Legislature knew what it was doing when, in 11-27-1 et seq. of the Mississippi Code it provided for the establishment of the Special Court of Eminent Domain. It is submitted that the Special Court of Eminent Domain is the only Court that can constitutionally and legally preside over the taking of private property for the public use. Otherwise wouldn't it be just a sham to have established this Special Court and then say that the Circuit Court can adjudicate the same things on appeal from an obviously unconstitutional statute. It is respectfully submitted that this matter cannot be submitted back to the Circuit

Court for determination for damages since the Circuit Court, as constituted by the Seawall Act, does not have the jurisdiction to preside over this matter. This matter must be resubmitted all the way back to the Board of Supervisors. The Board must begin all over again and start with the appraisal, the invitation to the landowner to accompany the appraiser, the offer, etc. If negotiations are not successful then the process must then find its way to the Special Court of Eminent Domain by use of Sections 11-27-1 et seq. of the Mississippi Code.

The notification of the land owners by newspaper; the requirement that they pursue their own claim; the absence of anything that resembled a Court action; and the taking of property without compensation in the manner that the Board of Supervisors of Hancock County and the Road Protection Commission of Hancock County acted is an unconstitutional deprivation of the Appellant's right to own and enjoy their property and, at the very least this Court should remand this matter back to the Board of Supervisors directing them exactly how they are to proceed and mandating that they cannot proceed under the Seawall Act or any other manner except pursuant to formal Court proceedings under applicable Mississippi Law (11-27-1 et seq.).

As was set forth by Meridian Attorney, Thomas R. Jones, in his law journal article entitled "Just Compensation via Fair Market Value, may not include the kitchen sink – it could be non compensable", the Supreme Court recognized, as early as 1858, that "due compensation", as required by the State Constitution is a judicial, not a legislative question. See Isom vs. Mississippi Central Railroad 36 Miss. 300 (1858) and Mississippi State Highway Commission vs. Hillman 189 Miss. 850, 180 So 565 (Miss. 1940). Mr. Jones pointed out that judicial power is a limitation upon the power of the legislature to prescribe the Rules of Damages through which an owner will obtain the due compensation which is constitutionally guaranteed.

An understanding that due compensation is a judicial function rather than a legislative function can only lend itself to an interpretation that the Seawall Act, as written, is unconstitutional. To vest finding of due compensation in a legislative body without of any type

of Judicial proceeding cannot possibly comply with the Constitution. In a Judicial proceeding there is a Summons to Court. These parties were not Summons before the Board of Supervisors. They had a closed door session to which the Appellants were not invited. Where is the Judicial function of cross examination. Where is the Judicial process of submitting witnesses. This procedure was a sham and the Court should not waste any time declaring it a sham. We need to be aware that the Laws of this State should not be influenced by the expediency of Hancock County getting some Federal money at the risk of property owner's rights no matter how small they may claim these rights are. We are dealing with a sacred principle and one that the Court needs, in the strongest terms, to stop in the future. These Appellants cannot imagine that as Americans their right to own property could be treated in the manner that it has been treated in this case.

Procedurally, if this matter is thrown out and the action of the Board of Supervisors declared improper or unconstitutional the Appellants may seek their Attorney's fees and expenses under the provisions of applicable law in a separate suit filed therefore. Why should this Court make these Appellants wait for that application of law. It is Respectfully Submitted that this Court should find that the Appellee's should be reimbursed for their Attorney's Fees and expenses in even having to do anything in this matter much less take this Appeal to the highest Court of this State. Why should the Appellants have been required to file their claim. That is not how the Law works.

Again the Court is reminded that Section 17 of the Constitution is self executing and when there is not a remedy the Court will provide one. This should be equally true for the awarding of Attorney's fees and expenses. The quote from Williams vs. Walley, p. 288, is again cited as follows:

Section 17, Mississippi Constitution of 1890, provides that private property shall not be taken or damaged without first paying due compensation therefor. This section is self-executing, and the courts of the state are always open to provide a remedy for the expropriation of private property by the sovereign or any of its subdivisions. State

Highway Commission v. Mason, 192 Miss. 576, 4 So.2d 345, 6 So.2d 468 (1941).

* * *

As already stated, when private property is taken without payment therefor, the courts are open to provide a remedy against the sovereign or any of its subdivisions. Otherwise section 17 of the Mississippi Constitution of 1890 would be meaningless. Section 17 guarantees the right, and section 24, of the Constitution assures that the courts are open to provide the remedy.

In conclusion of this Argument the Appellants would repeat and reiterate all of their arguments made in their original Petition and would again call the Courts attention to the wisdom this Court set forth almost 100 years ago in *Wise vs. Yazoo City* where it's stated:

No power conferred on any corporation, either private or municipal, is to be more strictly construed than the power of eminent domain.

* * *

In these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and when the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own.

* * *

Eminent domain rights are attributes of sovereignty, to be exercised by the state with great caution and only in cases of public necessity. It is a power which sleeps in the bosom of the state until aroused into activity by an act of the legislature. This high power is never to be presumed to be confided to any public or private body or corporation, however, great may be the necessity for it to have and exercise such power. When it is asserted by any person or corporation, the state's assent must be clearly given in legislative acts, and the subjects for which it may be exercised specifically named.

CONCLUSION

It is respectfully submitted that this Court should conclude that the Seawall Act, as written, is unconstitutional and does not provide protection to the property owner to guarantee that the property owner receives due compensation and due process as guaranteed by Sections 14 and 17 of the Mississippi Constitution.

In the event the Court determines that it is not willing to rule that this act is unconstitutional, nonetheless the Court should rule that it has been superseded and overruled by

not only applicable cases of this Court, but by the provisions of the Real Property Acquisition Policies Act.

It is respectfully submitted that the mandate of this Court should require the Hancock County Board of Supervisors to being anew in this matter or, at the very minimum, directing the Hancock County Board of Supervisors to proceed in this matter as authorized by Law.

It is recognized that if the Court declares the Seawall Act unconstitutional, or otherwise declares that it is unavailable for use in view of more recent acts of the Mississippi Legislature, then Hancock County may not be clothed with the authority to condemn in this matter. The Court is well aware that Counties do not possess the right of Eminent Domain unless specifically granted such right by the legislature.

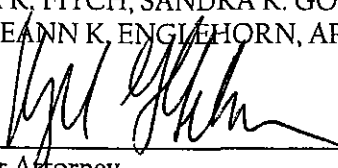
The fact that we have a public project that has already been funded by the United States Government, does not mean that we need to be blinded by the expediency of the situation, but rather we must be guided by the Constitution and the Laws of this State which, clearly provide that the Seawall Act is not available for use by Hancock County, Mississippi.

It is also respectfully submitted that the Court does have the authority to resubmit this back to the Circuit Court for the sole purpose of determining Attorneys fees and expenses to be due to the landowners for their fees and expenses that were made necessary by the acts of Hancock County in proceeding in this unconstitutional manner.

RESPECTFULLY SUBMITTED this the 9th day of December, 2009.

ERNEST BECKEMEYER, III,
THE CARL RONNIE DARICEK LIVING TRUST,
LISA K. FITCH, SANDRA K. GOODWIN AND
ROSEANN K. ENGLEHORN, APPELLANTS

By:



Their Attorney

CERTIFICATE OF SERVICE

I, Virgil G. Gillespie, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief to the following:

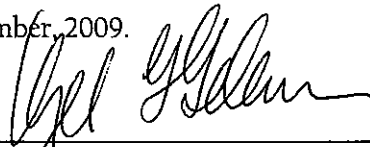
Judge Lawrence P. Bourgeois, Jr.
P.O. Drawer 1461
Gulfport, MS 39502

K. C. Hightower
Pittman, Howdeshell & Hinton, PLLC
P.O. Drawer 17138
Hattiesburg, MS 39404-7138

Ronald Artigues, Jr.
Gex & Artigues - Butler Snow
P.O. Box 47
Waveland, MS 39576

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205

So certified this the 9th day of December, 2009.



Virgil G. Gillespie

Virgil G. Gillespie, MBN [REDACTED]
THE GILLESPIE LAW FIRM
2213 15th Street
Post Office Box 850
Gulfport, MS 39502
Telephone (228) 864-4520
Facsimile (228) 864-8464