IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00132

CHARLES BENSON
AS HEIR TO THE ESTATE OF JOHN S. BENSON

Appellant

V.

NESHOBA COUNTY SCHOOL DISTRICT
AND DELBERT HOSEMANN, SECRETARY OF STATE
FOR THE STATE OF MISSISSIPPI

Appellees

On Appeal from the Chancery Court for the Sixth Judicial District of Neshoba County, Mississippi

BRIEF OF THE APPELLEES

ORAL ARGUMENT NOT REQUESTED

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2. Whether the chancery has the power to exercise the duties statutorily given to the Secretary of State and the School Boards, in contravention of the principle of separation of powers, to originally set the classification of sixteenth section trust land, to order an appraisal of sixteenth section trust land prior to classification, and to hold a hearing to determine fair market rental value of sixteenth section trust property.

3. Whether the State properly classified the subject trust land as "forest land" when the land is nearly half forested, is land which is proven for growing timber in the past, and is determined to be land which can grow timber in the future, when the classification statute, Miss. Code Ann. § 29-3-33(a), requires "forest land" to be "land which will produce a maximum of revenue by utilization to produce timber or other forest products."

4. Whether the Secretary of State and the Neshoba County School Board's failure to reclassify Sixteenth Section trust property before a lessee's lease expires prevents the State from reclassifying the subject property after the lease's expiration; specifically, when the law requires the State to reclassify the property because its current classification is no longer statutorily valid, and failure to reclassify would greatly diminish the revenue received by the subject property, which is held in trust for the benefit of the school children of Neshoba County.

STATEMENT OF THE CASE

I. Procedural History

This appeal arises out of a failed lease renewal negotiation between the Appellees, Neshoba County School Board and the Secretary of State, (Appellees are hereinafter "the School Board", "the Secretary", and collectively "the State") and the previous leaseholders, the heirs of John S. Benson (represented by the Appellant, Charles Benson, hereinafter, "Benson"). The negotiations failed due to disagreement over the State's reclassification of the land leased by Benson to "forest land" and a substantial disagreement in price. Subsequently, appellant filed an *Objection to Reclassification of Sixteenth Section Land and for Determination of Lease* in the Chancery Court of Neshoba County on April 6, 2010. [R. at p.1-4].[1] In that pleading, Charles Benson made the following objections and requested the following relief:

[Benson's objections to classification]

> VII.
>
> The Petitioner objects to the Respondents' proposed reclassification because [the State] did not seek reclassification within one (1) year prior to the expiration date of the subject lease as required by Miss. Code Ann. § 29-3-39.
>
> VIII.
>
> The Petitioner objects to [the State's] reclassification because the subject land does not meet the definition of "forest land" under Miss. Code Ann. § 29-3-39.

[Benson's requests for relief]

> WHEREFORE the Petitioner prays that, after a hearing on this objection, [the chancery court] will reject the classification that has been proposed by [the State]. The Petitioner further prays that **(1)** [the chancery

[1] Citations to the Record are cited as "R." followed by the page in the record, i.e. R. at p.1. Citations to the transcript are cited as "Tr." followed by the page and line numbers (p.#:[line #]), i.e. Tr. at p.5:10.

> court] will require the Neshoba County School District to hire an independent appraiser for the determination of the fair market rental value of the subject land and that subsequent to such appraisal **(2)** [the chancery court] will hold a hearing to determine the classification of the subject land and **(3)** the fair market rental value of the subject land.

[R. at p. 3-4 (numbering added)].

The following month, the State filed *Motions to Dismiss* and accompanying *Memoranda in Support* of the motions.[R. at p.8 (Neshoba County School District's Motion to Dismiss); R. at p.11 (Secretary of State's Motion to Dismiss); R. at p.14 (Secretary of State's Memorandum in Support of Motion to Dismiss)]. On June 11, 2010, Benson filed a *Response to Motion to Dismiss* [R. at p.36-40], and within the same month the Secretary filed a *Rebuttal* to the Response. [R. at p.41-46].

On December 8, 2010, the Honorable Edward C. Fenwick presided over a hearing in Neshoba County Chancery Court on the *Motion to Dismiss*, and afterward granted without prejudice the *Motion to Dismiss* in favor of the State. [R. at p.47 (Agreed Order Setting Hearing); Tr. at p.1-52 (Transcript); R. at p.49-50 (Court's Order of dismissal)]. The Chancellor found the Court lacked jurisdiction to hear Benson's objection to reclassification of land, finding "any objection to reclassification may only seek to show the final classification determined by Neshoba County School Board is not the highest and best use of the land that would maximize value received by the school children of Neshoba County." [R. at 49-50]. Instead, Benson sought a classification which would substantially diminish the revenue received by the school children of that district. [Tr. at p. 47:20-29]. The Chancellor also found that he was without the power to grant Bensons remaining relief: which were to (1) hire an independent appraiser to appraise the property, (2) hold a hearing to determine classification, or (3) make a finding of fair market value. [Tr. at

p.45:13-29, p.46:1-16]. The Chancellor further found these requests for relief were premature, pending classification of the property. [R. at p.49; Tr. at p.46:12-16, 29, p.47:1-10]

Benson, aggrieved, now appeals that finding to this Court.

II. Sixteenth Section Lands

Since statehood, Sixteenth Section Public School Trust Land has been owned by the State and held in trust for the benefit of the school children of the townships in which the land is located. The School Boards are the governing bodies of the Trust Lands located within each respective school district. In particular, the School Boards manage and are responsible for the property at dispute here. The Secretary of State is the supervisory trustee of the Sixteenth Section Lands and is responsible for overseeing the management of Sixteenth Section Public School Trust Lands in Mississippi covered by the Choctaw Indian Treaties, pursuant to Miss Code Ann. § 29-3-1 *et seq.*.

Chapter 303, Laws of 1958, was enacted to improve the management of sixteenth section lands. The provisions of that Act, insofar as the classification and reclassification and the purposes thereof are concerned, are codified as Mississippi Code Annotated Sections 29-3-31 *et seq*. The further purpose of the statutes as represented by the Code and the Mississippi Supreme Court is to ensure that the State receives from the trust land the maximum amount of revenue for the school children of each respective county, all the while respecting the contracting interest of those who enter into Sixteenth Section leases.

III. Factual Background

On March 4, 1985, the Neshoba County School District leased approximately 71 acres of Sixteenth Section land ("the subject property") to Appellant John S. Benson for the

annual payment of $5.00 per acre per year and a term of twenty-five years. [R. at p.2]. On March 4, 2009, Benson's lease to the Sixteenth Section land in question expired.[2] [Id.]. Appellant Charles Benson's claim to the subject lease is by way of his position as an heir to the estate of his recently deceased father, John S. Benson. [Id.]. The original lease did not state the classification of the property, but according to records submitted to the Neshoba County School District, the land was classified as "farm residential." [R. at p.15].

Following the expiration of the lease in 2009, the parties participated in good faith negotiations to renew the lease. [R. at p.2-3]. As was required by Miss. Code Ann. § 29-3-31 (1992), the Neshoba County School Board began the process of reclassifying the land from its former status as "farm residential" because no persons lived on the subject property. [R. at p.16; Tr. at p.23: 13-17]. After meeting with the Secretary of State, Benson indicated that $15.00 (fifteen dollars) per acre per year was what he believed to be fair market price. [R. at p.16].[3] Benson also indicated that $15.00 per acre per year was the highest value he or any of the heirs with right of first refusal would pay for a new lease. [Id.]. The negotiations then stalled because local comparative rates per acre were in the $75.00 (seventy-five dollars) range per year for land classified as "forest land", plus an

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[2] The lease in question is located at Section 16, Township 11 North, Range 11 East, Neshoba County, Mississippi.

[3] This citation is from the Memorandum of the Secretary of State. The fact that fifteen ($15) dollars is the highest and only amount that Benson would pay per acre per year for the subject property is not affirmatively stated by Benson in the record. However, despite being cited in the Secretary of State's memorandum in support of its *Motion to Dismiss*, its *Rebuttal*, and again numerous times by the State at the hearing, where Benson was present and testified, Benson has yet to dispute the recollection of the Secretary of State that fifteen ($15) dollars is the most his family would agree to release the subject property for. *See i.e.* [R. at p.16; R. at p.43; Tr. p.10:10-13; Tr. at p.17:22-29; Tr. at p.31:8; Tr. at p.41:1-2, 23-25; Tr. at p.42:23-25; Tr. at p.44:10-12, 28-29].

additional average of $10.00 (ten dollars) an acre per year as a hunting and fishing lease. [Id. (citing Affidavit of Jim Loome)[4]].

Benson's final offer was $15.00 per acre per year. [Id.]. Thus, the negotiations failed and the School Board set out to properly classify the property to comply with the Sixteenth Section statutes, and eventually release the property for its maximum value. [Id.].

[4] The Affidavit of Secretary of State Forestry Advisor Jim Loome is found in the record at page 34-35.

SUMMARY OF THE ARGUMENT

The Sixteenth Section statutes of the Mississippi code require that Sixteenth Section land classified as "farm residential" be reclassified when the land ceases to be used as a residence. Neither Appellant Benson nor any other person claims the subject property, classified as "farm residential", as a residence. Thus, Miss Code Ann. § 29-3-31 (1992) requires that the property be re-classified. When reclassifying Sixteenth Section Land, the new classification must reflect the highest and best use of the land, which would realize the maximum possible revenue for that property.

The School Board determined that the highest and best use of the subject property was as "forest lands", which comparative properties in the same district can fetch upwards of $75.00 per acre per year (plus the revenue produced by making additional hunting and fishing leases on the same property). Benson is only willing to pay $15.00 per acre per year. Therefore, this proceeding, while in the posture as a challenge to the reclassification of a parcel of Sixteenth Section Public School Trust Land, is really a dispute over the proposed rent assigned to the subject property. Because of the disagreement over price, Benson wishes to reclassify the property to a classification which could be leased at no more than $15.00 – his final offer. However, the Mississippi Supreme Court has found that objections to classification can only be entertained by the chancery when the objection is to a new classification that does ***not*** maximize revenue. Benson would have the Neshoba County schools receive some $60.00 per acre per year less than under the State's new classification. Clearly, Benson's objection does not seek to maximize revenue; consequently, his objections are without jurisdiction. The Chancellor was also correct in dismissing Benson's requests for relief, which would have required the Chancellor to

interfere with ongoing agency determinations as violating separation of powers and premature.

Even so, Benson's classification objection and procedure objection would also fail as matters of law. Initially, the land was properly classified as "forest lands". Additionally, Benson argues on the one hand that the land cannot be reclassified because it was not done so within a statutory window; but, on the other hand, Benson does not object that the subject property must be reclassified because its "farm residential" classification is no longer valid. In fact, Benson has confessed the land must be reclassified and has requested the land be reclassified as "recreational land". While the property was not reclassified during the one year leading up to the expiration of Benson's lease, the State has a further, affirmative statutory duty to reclassify "farm residential" property when it is determined to no longer be used as a residence. In this case, the apparently conflicting statutes (one requiring reclassification and one seemingly prohibiting it) must therefore be read *in pari materia.* In that case, it is logical that the statutory window does not apply because the State is not reclassifying an "existing" lease, as stated in Miss. Code Ann. § 29-3-39 (1978).

Accordingly, the finding of the Chancellor below, that Benson's objections and requests for relief were without jurisdiction under Section 29-3-37, were premature, and were a violation of separation of powers, should all be affirmed.

STANDARD OF REVIEW

Appellate courts apply a limited standard of review on appeals from chancery court. Reddell v. Reddell, 696 So.2d 287, 288 (Miss. 1997). It should not interfere with the chancellor's findings of fact unless they were "manifestly wrong, clearly erroneous or an erroneous legal standard was applied." Bell v. Parker, 563 So.2d 594, 596–97 (Miss. 1990). However, the chancery court's interpretation and application of the law is reviewed under a *de novo* standard. In re Carney, 758 So.2d 1017, 1019 (Miss. 2000).

DETERMINATIONS BEING REVIEWED

The Chancellor heard testimony that the subject property could collect $75 or more per acre per year, if the land in question is classified as "forest lands". [Tr. at p.10; Tr. at p.5:24-29 (directing Court to affidavit of Forestry Consultant, which establishes the $75 price cited by counsel throughout hearing)]. Benson never testified that he could establish another classification which would best the $75 price cited by the State. Moreover, Benson never offered anything other than a long term, $15 per acre per year price for the property, whatever the classification.

Consequently, this Court should find that the Chancellor was correct in his legal finding that "any objection to reclassification may only seek to show the final classification determined by Neshoba County School Board is not the highest and best use of the land that would maximize value received by the school children of Neshoba County." [R. at 49-50]; *see also* Talley v. Carter, 318 So.2d 835, 839 (Miss. 1975) (holding the same); *and* Frierson, July 18, 1997, Miss. A.G. Op. #97-0431 ("the board of education has a duty to reclassify the land on its highest and best use...for producing a maximum of revenue.").

Further, this Court should find that the Chancellor was correct in finding Benson's additional relief requiring the Chancellor to insert himself into ongoing agency proceedings was also beyond the power of the chancery. [Tr. at p.46:12-16, 29, p.47:1-10]; *See* State Oil & Gas Board v. McGowan, 542 So.2d 244, 249 (Miss. 1989) ("[T]he Chancery Court has ***no jurisdiction*** to participate in the administrative process and it was error to do so when the effect amounted to an intervention in the pending proceeding.").

ARGUMENT

After a hearing on the State's Motions to Dismiss, the Chancellor correctly found that his court was (1) without jurisdiction to entertain Benson's objections to the classification of the trust land, or (2) the authority to award any of Benson's requested relief. The only decision a chancellor can make under Miss. Code Ann. § 29-3-37 (1983) is to confirm or modify a sixteenth section land classification as the circumstances demand; yet, even that jurisdiction is limited to modifications which will maximize revenues received by the trust land. Such jurisdiction does not permit the chancery to classify sixteenth section land in the first place, order an appraisal, or determine the fair market rental of the property.

The Chancellor, therefore, correctly dismissed all of Benson's objections and claims. First, because Benson's objection to the State's reclassification would diminish the revenue received, not maximize it, the chancery court was without jurisdiction to review his objections under the Sixteenth Section jurisdictional statute, Miss. Code Ann. § 29-3-37. Second, the Court correctly found it was without jurisdiction to provide any of Benson's remaining relief (outside his objection to the classification) because Benson's requests

were premature and would be a violation of separation of powers. Third and finally, even if Benson could challenge the State's classification of his property, despite not challenging to maximize value, his objections to both the classification chosen and the timing of the classification are without merit. Consequently, this Court should affirm both of the Chancellor's findings of lack of jurisdiction.

I. Benson's objection to the State's reclassification of the subject property would diminish the revenue received and therefore it is without jurisdiction before the chancery court.

The Supreme Court and the Sixteenth Section statutes are clear: the issue to be addressed in a reclassification challenge is whether there is a change in condition of the subject property which would justify a change to a more suitable classification in order to produce a maximum of revenue. Miss. Code Ann. § 29-3-39 (1978) (imposing a duty to reclassify because of changes in conditions); *and see* Miss. Code Ann. § 29-3-1 (1978) (imposing a duty to assure adequate compensation is received for trust lands). Indeed, the Supreme Court has affirmatively stated, "[r]eading the several sections of the Act together, it is clear that any changes of conditions which would justify a reclassification must be changes that would require a reclassification to a more suitable use in order to produce a maximum of revenue." Talley, 318 So.2d 835, 839.

The Supreme Court in Talley further expressed the limited role the courts play in reclassification hearings:

> The judicial review of the action of the Land Commissioner[5] in reclassifying 16th section lands ***is limited to*** a determination of whether or not the reclassification is required in order to produce a maximum of revenue.

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[5] The Secretary of State replaced the Land Commissioner as the entity with the ultimate authority over public lands and the general supervisory powers originally vested in the State Land Commissioner as to Sixteenth Section Land has likewise been transferred to the Secretary of State. *See generally* Turney v. Marion Co. Bd. of Education, 481 So. 2d 770, 776-77 (Miss. 1985).

Id. (emphasis and footnote added). Benson is only willing to pay $15.00 per acre per year on a renewed lease of the subject property. Thus, Benson is seeking to reclassify the subject property to a classification which would diminish the revenue received by the property, not maximize the revenues received. Such an objection is not within the jurisdiction of an *Objection to Classification* pursuant to Section 29-3-37, according to Mississippi Supreme Court's precedent.

In an attempt to have the courts create a meeting of the minds between himself and the State on a renegotiation of his expired lease, Benson brought this underlying action as an *Objection to Classification* pursuant to Miss. Code Ann. § 29-3-37. However, Benson's attempt to reclassify the subject property as some other classification cannot find jurisdiction under Miss. Code Ann. § 29-3-37. Benson's objection does not find jurisdiction under Section 29-3-37 because his objection does not seek to maximize the value realized by the subject trust property, but rather to diminish the revenue that would be collected by the trust land.

The Chancellor, therefore, properly found the Court lacked jurisdiction to hear Benson's *Objection to Reclassification of Land*, finding "any objection to reclassification may only seek to show the final classification determined by Neshoba County School Board is not the highest and best use of the land that would maximize value received by the school children of Neshoba County." [R. at 49-50]. In other words, until Benson, or any other person, offers another proper classification which would collect ***more revenue*** than the proposed "forest land" classification, that person cannot challenge the State's determination of that property's classification as "forest land".

Accordingly, this Court should uphold the Chancellor's finding that Benson's objection to the "forest land" classification is without jurisdiction and the objection was correctly dismissed.

II. Benson's requests for the Court to reclassify the land, hire an independent appraiser, and make fair market value determinations would violate separation of powers and are premature.

As stated in the beginning, Benson's sole objective is for the courts to create a meeting of the minds between the State and himself on a lease contract regarding the subject property.[6] The only catch is that Benson will not pay more than $15.00 per acre per year. Benson continually harps on his "rights in the property", however, the only right Benson has is the right of first refusal. He has no right to dictate the price for which the State leases its own property. The Benson's right to release is codified at Miss. Code Ann. § 29-3-63(1) (1978): "[t]he holder of a lease of sixteenth section or lieu land, at the expiration thereof, shall have a prior right, exclusive of all other persons, to re-lease or to extend an existing lease ***as may be agreed upon*** between the holder of the lease and board of education ***subject to the classification of said land.***" (emphasis added).

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[6] The Secretary in his *Motion to Dismiss* before the Chancery Court argued that the Court could not force a meeting of the minds between two parties seeking to contract. [R. at p.26-28]. Below, Benson was seeking relief which would force a meeting of the minds between the State and Benson to release the subject property. The Secretary argued that while Benson had the right to release the property, the right still required that the lease "be agreed upon between the holder of the lease and the board of education," Miss. Code Ann. § 29-3-63(1) – meaning the right of first refusal still requires all the traditional elements of a contract. [Id.]. The Mississippi courts have held that when the courts are asked to fashion the formation of contract, the petitioner has failed to state a claim upon which relief can be granted: "This relief is legally impermissible" and "[a] Court, as a matter of law, cannot fashion such a remedy because the formation of a contract requires mutual assent, often referred to as a 'meeting of the minds.'" Wiggins v. Perry, 989 So.2d 419, 429 (Miss.App. 2008) (*citing* Rotenberry v. Hooker, 864 So.2d 266, 270 (Miss. 2003). Thus, the Chancellor could have dismissed on failure to state a claim grounds as well as the failure to find jurisdiction grounds, which he cited.

The Court correctly stated that it did not have the statutory authority to order an appraisal, to hold a hearing to determine the classification of the property in the first place, or to determine the fair market value of the property. The Court further correctly found that it is only after classification that Benson may agree with the State's requested lease price and have a chance at first refusal:

> [The Court]: Well, I don't want to do what the law says I can't do. ...
>
> One, that [Benson's] asking me to do some things that under the statute I cannot do. And, specifically, that I'm being asked to reject the classification proposed by the school board. Two, require the Neshoba County School Board to hire an independent appraiser for the determination of the fair market rental value of the subject land.
>
> Three, to hold a hearing to determine the classification of the subject land. And, four, to hold a hearing to determine the fair market value of the subject land.
>
> I think that the position of the secretary of state and the school board is correct that at least as to those last three things, I cannot do that. I don't think I have the legal authority to do it.
>
> * * * *
>
> I think we are in kind of a circular argument here. We've got to get the land reclassified in order to go forward with any appraisal process that's done.
>
> * * * *
>
> [The Court]: Okay. All right. Based on that, I sustain the motion to dismiss ..., but authorize the school board to do its reclassification.
>
> At that point, they'll have to see if Mr. Benson - - or Mr. Benson and his family will have to do a little soul searching to see if they are able to come to an agreement with [the State].

[Tr. at p.46:12-16, 29, p.47:1-10 (spacing added)]. Accordingly, the Chancellor in his opinion ordered the State to continue the process of reclassification so as the State could then appraise the land for a value under the "forest land" classification and then lease the property, whether to the Benson's or someone else. [R. at p.49].

A. Benson's requests would violate separation of powers.

To begin with, Miss. Code Ann. § 29-3-37 limits jurisdiction to objections to classifications, it does not give the Court jurisdiction to assist in the determination of the fair market rental value of the subject property. The duty to determine the fair market value for leases is solely that of the School Boards, who have "the final authority, duty, and responsibility to determine the reasonable annual rental amount to be assessed on sixteenth section lands." Barber v. Turney, 423 So.2d 133, 135 (Miss. 1982); *see also* Miss. Code Ann. § 29-3-1 ("It shall be the duty of the board of education to manage the school trust lands and all funds arising therefrom as trust property."); *and* Miss. Code Ann. § 29-3-65 (1992) ("The board shall then determine whether [an appraiser's recommendation] be a reasonable amount."). The court's role in judicial review under Section 29-3-37 is to determine if the school board's classification or reclassification is reasonable to maximize revenue from sixteenth section lands – not to determine the fair market rental values for the land.

Likewise, the chancery court has no more jurisdiction to hold a hearing to determine the classification of the subject land than it does to determine the fair market value. That duty again is the sole "duty of the board of education, using the services of all appropriate public agencies." Miss. Code Ann. § 29-3-31. The role of the chancery court is to review a classification to determine whether that classification maximizes revenues from that particular trust property. Miss. Code Ann. § 29-3-37. The chancery courts are not given original jurisdiction authorizing them to determine the proper classifications of sixteenth section lands. Such specific powers are given to the secretary of state and the board of

education. In fact, the Supreme Court has expressly prohibited such interference as violating separation of powers.

It is a bedrock principle of Mississippi law that courts cannot interject themselves into ongoing administrative agency processes. In State Oil & Gas Board v. McGowan, 542 So.2d 244 (Miss. 1989), the Supreme Court held that courts may only exercise appellate review of agency decisions and have no authority to intervene in administrative proceedings. Id. at 249. In McGowan, the plaintiff was involved in a proceeding before the State Oil & Gas Board and had his request for discovery denied by the Board. Id. at 245. Before the scheduled hearing took place before the Board, the plaintiff filed suit in chancery court, asking the court to order the Board to disclose all of the information he had previously sought. Id. The Board filed a motion to dismiss for lack of jurisdiction, which the court denied. Id. at 246. The Board then appealed that denial to the Supreme Court. Id. The Supreme Court held that the chancery court did not have jurisdiction over the plaintiff's claims:

> Judicial review may be had of any final rule, regulation or order of the Board. Prior to an appeal from a final rule, regulation, or order, as contemplated by the statute, the Chancery Court has ***no jurisdiction*** to participate in the administrative process and it was error to do so when the effect amounted to an intervention in the pending proceeding.

Id. at 249 (emphasis added). It further stated that because "the matter substantively at issue ha[d] by law been committed to the authority and jurisdiction of the Board," the chancery court's "authority as to that matter [wa]s limited to judicial review." Id.; *see also* Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC., 864 So.2d 939, 946-947 (Miss. 2004).

In Mississippi State Tax Commission v. Mississippi-Alabama State Fair, 222 So.2d 664, 665 (Miss. 1969), the Court also stated as follows:

> Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. The appeal is a limited one, however, since the courts cannot enter the field of the administrative agency.

Here, the State has only attempted to reclassify the property from "farm residential" to "forest land" so the fair market value for that particular piece of property can be determined. Benson seeks to impermissibly interject the chancery court into a determination statutorily granted to an agency, by asking the chancery court to make classification determinations, order appraisals, and set fair market value. All of which are duties granted to the school boards and the Secretary of State by statute. Granting any of this relief would directly interfere with the pending administrative determination and would be a violation of separation of powers. Accordingly, this Court should uphold the Chancellor's decision to dismiss Benson's request to set the property's classification, order appraisal, and set its fair market value.

B. Benson's requests are premature.

Benson's right to release is "subject to the classification" of the land. Miss. Code Ann. 29-3-62(1). The land has not been reclassified because Benson has tied the reclassification up with this present litigation. Thus, Benson's request that a "fair" and "reasonable" rental value be determined by an appraiser at this juncture is premature. The Chancellor was correct in ordering that the State continue its process of reclassifying the subject property from "farm residential" to "forest land" then to be followed by an appraisal under that classification. It will be at that point that Benson may "have the final right to extend its lease for the term advertised at the annual rental equal to [the] highest offer received by

the Board of Education." Appellant's Br. at p.11 (*citing* Tucker v. Prisock, 791 So.2d 190, 193 (Miss. 2001)). Indeed, any other action by the Chancellor, other than making a determination that the new "forest land" classification is not the highest and best use of the property that will maximize value, is premature.

III. Even if the chancery court could review Benson's objections, his objections have no merit and would have to overcome the strong presumption that the State's interpretations of its own governing statutes were completely impermissible.

As an initial matter, it is important to note that through his objections Benson is challenging the Secretary of State and School Board's interpretation of their own governing statutes. In doing so, Benson faces a heavy burden. Because Sixteenth Section laws are entrusted to those entities to administer, their interpretation of Sixteenth Section law is entitled to "considerable weight." *C.f.*, Rayner v. Barbour, 47 So.3d 128, 131 (Miss. 2010); Barbour v. State ex rel. Hood, 974 So.2d 232, 240-41 (Miss. 2008): *See also* Turney v. Marion Co. Bd. of Education, 481 So.2d 770, 776-77 (Miss. 1985) (Secretary of State is entrusted with the ultimate authority over public lands and the general supervisory powers as to Sixteenth Section Land); *see also* Miss. Code Ann. § 29-3-1 ("It shall be the duty of the board of education to manage the school trust lands and all funds arising therefrom as trust property.").

This judicial "duty of deference" is derived from the Supreme Court's acknowledgment that the agency's "everyday experience" in the administration of state statutes provides them with a "familiarity with the particularities and nuances of the problems committed to [their] care which no court can hope to replicate." Gill v. Mississippi Dept. of Wildlife Conservation, 574 So.2d 586, 593 (Miss. 1990) (citations omitted). Importantly, a court need not conclude that the Secretary's "construction was the

only one [they] permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Mississippi Gaming Comm'n v. Imperial Palace of Mississippi, Inc., 751 So.2d 1025, 1029 (Miss. 1999). In other words, to conclude that the Secretary has selected one of multiple permissible interpretations of Sixteenth Section law is to, in fact, conclude that the Secretary's interpretation must be upheld.

A. Benson confesses that Miss. Code Ann. § 29-3-31 requires that the subject property be reclassified.

It is curious what Benson is seeking to accomplish through his argument that the State failed to reclassify the subject property within the one year period leading to the expiration of his lease as outlined by Miss. Code Ann. § 29-3-39. Indeed, Benson makes this argument the foremost point of his appellate brief, stating the "failure to [reclassify during the last year of the lease] and other statutory duties resulted in the present litigation." Appellee Br. at p.7. However, regardless of whether the State performed its statutory duty in Miss. Code Ann. § 29-3-39 (and this argument will be addressed herein), the subject property must be reclassified.

Mississippi Code Annotated Section 29-3-31 states, "all lands being used as 'residential land' or 'farm-residential land' shall continue to be classified as 'residential land' or 'farm-residential land' ***until such land ceases to be used as a residence.***" (emphasis added); *see also* Miss. Code Ann. § 29-3-33(f) (1995) (defining "farm residential land" as "any tract of land upon which a leaseholder resides[.]"). The Attorney General of Mississippi has opined on this requirement stating, "Sixteenth section lands are not validly classified as 'farm residential land' if the lease holder does not reside on the property ... and the board of education has a duty to reclassify the land on its 'highest and best use...for

producing a maximum of revenue." Frierson, July 18, 1997, Miss. A.G. Op. #97-0431. No person resides on the subject property. Therefore, the plain language of the Mississippi Sixteenth Section lands require the land to be reclassified, and Benson has continually confessed as much.

Since the Benson family has held a lease on the subject property, the property has been classified as "farm residential" pursuant to Miss. Code Ann. § 29-3-33 (1995). At some point in the renegotiation process, the State learned that the subject property was no longer being used as a residence. Benson testified at the *Motion to Dismiss* hearing that no one has lived on the property since at least 2001, if not earlier, and that the land must be reclassified:

> [The Court] Okay. How long has it been since anybody has lived on the place?
>
> [Benson] Well, my mother lived on it probably about five years after my father died. She died in '01. My father died in '91. So we've just been keeping it up and enjoying it since then.
>
> [The Court] But nobody's occupied it since your mother's death?
>
> [Benson] That's correct.
>
> [The Court] I take it you're saying you agree that the current status of it requires that the land be reclassified now, or do you disagree with that?
>
> [Benson] We disagree with reclassifying it into forestry. We wouldn't object to reclassifying it into recreational.
>
> [The Court] But you do agree it could not be reclassified as farm residential? It doesn't meet the legal requirements for that?
>
> [Benson] ***That's correct. Because no one lives on it.***

[Tr. at p.23:29, 24:1-17 (emphasis added)].

Therefore, statutory procedures notwithstanding, the subject property is required to be reclassified because it is no longer being used as a residence and the State has an affirmative duty to reclassify the land. Further, in his appellate brief, Benson has again confessed that because the subject property is no longer being used as a residence, the property must be reclassified: "Charles Benson admits that there are no permanent residents on the Benson property and, therefore, conditions have changed requiring a change in classification." Appellant Br. at p.9. Accordingly, the question is not whether the State reclassified the property when it was not supposed to, but rather, whether the property has had a change in conditions where it is required to be reclassified, and it has.

As Benson confesses, the subject property is no longer being used as a residence. Sixteenth Section law requires that the property be reclassified to its highest and best use for producing the maximum of revenue. In the end, Benson's complaint is not that the subject property was reclassified at a wrong time, but rather his complaint centers around the classification that was eventually chosen: "forest land."

B. The Subject Property is properly classified as "forest land" pursuant to Miss. Code Ann. § 29-3-33.

The Sixteenth Section statutes at Miss. Code Ann. § 29-3-33 lists the many classifications in which Sixteenth Section lands must be classified before being leased. In addition to the definitions outlined in Section 29-3-33, the State has an obligation to reclassify the property as one of the classifications that would "produce a maximum of revenue." Talley v. Carter, 318 So.2d 835 (Miss. 1975); *see also* Frierson, July 18, 1997, Miss. A.G. Op. #97-0431 ("the board of education has a duty to reclassify the land on its highest and best use...for producing a maximum of revenue."). Therefore, when it became clear to the State that the subject property was no longer validly classified as "farm

residential", the State sought to reclassify the land to another classification which would produce the maximum of revenue.

The State determined that the highest and best use of the land that would maximize revenue would be "forest lands". The Sixteenth Section statutes define "forest land":

> (a) "Forest land" shall mean all land at least ninety percent (90%) of the total area of which is at present forest or wasteland, ***or land which will produce a maximum of revenue by utilization to produce timber or other forest products,*** shall be classified as forest land. The unit of measurement to be used in arriving at the classification of forest land shall be the smallest division of the government survey covering said lands in counties where such government survey has been made, and in other counties shall be forty (40) acres.

Miss. Code Ann. § 29-3-33(a) (emphasis added).

Benson argues that the State's position is that the classifications in "Miss. Code Ann. § 29-3-33 can be routinely ignored as long as a classification maximizes revenue." Appellant's Br. at p.9. This is not the case at all. Mississippi Code Annotated Section 29-3-33 presents a whole number of classification options to choose from, any of which may apply to any one piece of property at any given time – i.e., a large tract of forested land on the edge of a metropolitan area could possibly be properly classified as "forest land", "industrial land", "commercial land", etc. Once the property in question is examined to determine which definitional categories it fits into, as those definitions are "controlling", the State must then determine in which of those categories the land will maximize revenue – i.e., what classification will potential lessee's pay the most money for per acre per year.

It was within this duty, to properly and most efficiently classify trust property, that the State set out to reclassify the subject property. The State classified the property as "forest lands" and that classification's value projections were confirmed by a forestry

consultant.[7] Timber Consultant Jim Loome testified by affidavit that the subject property "is land which will produce a maximum of revenue by utilization to produce timber or other forest products." The Consultant further stated:

> 5. Based upon my review of the 2008 Forest Management Plan for this Section prepared by the Mississippi Forest Commission, the Neshoba County School District will be averaging $52 per acre, per year for timber (natural mixed pine/hardwood) sold from immediately adjacent land classified as forest land.
>
> 6. Based upon my analysis, $75 per acre per year is achievable by the Neshoba County School District for land classified as forest land by planting and growing managed pine plantations on a 35 year rotation.
>
> 7. From my review of information in the Secretary of State's Office the Neshoba County School District is averaging $6.82 per acre, per year for lands it leases for hunting and fishing. The average for the 16th Section Lands in the State of Mississippi is $10.68 per acre, per year.

[R. at p.34-35]. As Benson himself testified to: "I think the appraisals said it's about 50 percent pasture and about 50 percent forestry." [Tr. at p.20:20-21]. Clearly, and according to the affidavits attached to the State's *Motion to Dismiss*, the subject property was good timber growing land which could be leased at $75 per acre per year.

In addition to the $75 per acre per year, those lands which are classified as "forest lands" may further be offered (in addition to the lease for growing trees) as hunting and fishing leases. Miss. Code Ann. § 29-3-41 (1993). The evidence offered by the State's motion showed that hunting and fishing leases in the Neshoba County area could add an additional $10.59 average to the $75 per acre per year received from the timber leases –

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[7] Benson now challenges the legitimacy of the surveys and expert affidavits presented at the hearing for the first time on appeal. Challenging the legitimacy of this evidence for the first time on appeal is barred when the challenging party did not file a motion to strike the affidavits before the trial court. *See* Bd. of Educ. of Calhoun County v. Warner, 853 So.2d 1159, 1163(¶ 16) (Miss.2003) (citation omitted); *and* Brown v. Credit Center, Inc., 444 So.2d 358, 365 (Miss.1983) (Failure to file the motion to strike constitutes waiver of any objection to the affidavit).

meaning the subject property could be leased upwards of $85 per acre per year. [R. at p.34-35 (Affidavit of Jim Loom at p.2)]. Whether it is only the $75 or the supplemented $85 per acre per year, the "forest land" classification's capacity for producing revenue far outpaces Benson's suggestion that the land be reclassified from "farm residential" to "recreational land" (a classification under which Benson made a final offer of $15 per acre per year).[8]

The State has determined that the subject property would maximize revenue by being classified as "forest land"; or, in other words, the land will be best suited for producing timber or other forest products, now and in the future, and leasing the same land for hunting and fishing. That determination, like any other agency determination, should be given great deference by the courts, especially since Benson has yet to offer an alternative that would maximize the value for the trust.[9]

C. Benson's argument that the State did not reclassify the subject property before his lease expired is of no consequence.

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[8] Benson has indicated that he will pay no more than $15.00 per acre per year. *See* note 4, *supra*. The ***current*** comparative prices of forest land (at the time of the survey) in the area surrounding the subject land is around $52.00 per acre per year for forest products and an additional average of $6.82 per acre per year for hunting and fishing leases. [R. at p.34-35 (Affidavit of Jim Loom at p.2)]. In order to properly have jurisdiction in this case, Benson, at the minimum, would be required to demonstrate a classification option that exceeds the $58.82 per acre per year demanded by "forest land". Any classification that is lower than at least $58.82 per acre per year, especially if it were in the $15.00 range, would not find jurisdiction pursuant to Miss. Code Ann. § 29-3-37 (jurisdiction question is discussed *infra*). Moreover, the discussed $75.00 per acre per year and $10.59 averages discussed here are values achievable through a forest land classification. [Id.]. Thus, it is completely conceivable that any classification option that would not receive upwards of $85.59 would not find jurisdiction under Section 29-3-37.

[9] Again, the Chancellor was not reviewing a final decision of the agency, but if he had his review would have been limited to "whether the action of the Board was (1) supported by substantial evidence; (2) arbitrary or capricious; (3) beyond the agency's scope or powers; or (4) in violation of some constitutional or statutory rights of the complaining party." Tucker v. Priscock, 791 So.2d 190, 192 (Miss. 2001) (*citing* Board of Trustees v. Acker, 326 So.2d 799, 801 (Miss.1976)). Here, there is ample evidence to prove that the land is properly classified as forest land and would receive a maximum amount of revenue. Thus, the Chancellor would have been correct in upholding the determination of the school board in re-classifying the subject property as "forest lands".

The State's failure to reclassify the subject Sixteenth Section property before Benson's lease expired is equally of no consequence on the outcome of this action. As stated previously, Benson's argument is merely rhetorical – he confesses the land must be reclassified. Regardless, even if Benson did not agree that the trust property must be reclassified under Section 29-3-31, the State still did not violate the statutory window for reclassification.

1. Apparently conflicting statutes must be read *in pari materia.*

Section 29-3-39's one year statutory window is not meant to apply in this instance. That section states, "It shall be the duty of the board of education to survey periodically the classification of all sixteenth section land under its jurisdiction and to reclassify said land as it may deem advisable because of changes of conditions.... ***[p]rovided, however, that all sixteenth section land shall be classified, or reclassified as is necessary, within one (1) year prior to the expiration date of any existing lease.***" Miss. Code Ann. § 29-3-39 (emphasis added). This section only serves as a protection to lease holders, preventing the State from forcing them to reclassify their lease in the middle of a long-term lease (a protection that Benson claims he does not have[10]). Otherwise, under any other reading, Section 29-3-39 would obviously and irreconcilably clash with Section 29-3-31 (which requires reclassification when a property ceases being a residence). When two statutes in

[10] In his Appellate Brief, Benson bemoans: "[u]nder a maximization of revenue standard like the one handed down by the trial judge, School Boards could reclassify and renegotiate valid leases whenever a better offer came along." Appellant Br. at p.9. Obviously, Benson forgets that the main statute he uses in attacking the State with indeed prevents the state from applying the "maximization of revenue standard" in such a strong-armed manner. It was for this exact purpose, the protection of leaseholders from renegotiation in the middle of a multi-year lease, that the Legislature likely enacted the one year statutory window for reclassification of trust lands. Thus, his fears under the maximization of revenue standard can be allayed.

a statutory scheme apparently and irreconcilably conflict, the courts will read those statutes *in pari material* so as they no longer clash and so the statutes are read as to give effect to each. Sanders v. State, 63 So.3d 497, 507-08 (Miss. 2011). Such a reading is both permissible and reasonable as the statutory window only applies to the reclassification of an "existing lease", not to an expired one.

2. The State is not reclassifying an *existing* lease.

Here, the one year statutory window can be read to no longer apply in this instance because the State is not attempting to reclassify an "existing" lease. Instead, Miss. Code Ann. § 29-3-39 requires the State to "reclassif[y] as is necessary, within one (1) year prior to the expiration date of any ***existing*** lease." (emphasis added). In fact, Benson's lease expired in March of 2009. [R. at p.2]. Therefore, this provision does not apply because there is no "existing" lease. The land on the other hand is statutorily required to be reclassified before it is re-leased pursuant to Section 29-3-39, because the land can no longer be classified as "farm residential" pursuant to Section 29-3-31. In that case, the State is no longer classifying an "existing" lease, but is instead reclassifying land which is no longer subject to any lease. Under this scenario, both Sections 29-3-31 and 29-3-39 are given their effect – (1) by preventing the State from reclassifying Sixteenth Section land in the middle of a lessee's long-term lease as prohibited by Section 29-3-39, and (2) by allowing the State to reclassify trust property as required by Section 29-3-31.

Such a reading is not only reasonable, it gives effect to both statutes. Therefore, the State's reading of the statute should be upheld as a permissible construction by the agencies charged to implementing the sixteenth section statutes.

CONCLUSION

The Chancellor was correct in his finding that Appellee Benson did not have jurisdiction to object to the State's reclassification of the land to which he holds an expired lease. A party may only object to a classification of Sixteenth Section land if the objection is because the State is not maximizing the value received from the property. The objection statute is a watchdog statute which protects against state officials leasing land for dirt cheap prices in violation of their duty to collect as much revenue as possible from each piece of trust property for the school children of Mississippi. Additionally, the State's failure to reclassify within the year leading up to the expiration of Benson's lease is of no consequence; even Benson confesses the land must be reclassified. Even more, the Court should read Sections 29-3-31 and 29-3-39 to give effect to both. In doing so, it is obvious that the State is still legally allowed to reclassify the property as the current classification is not valid, because either, there is no lease to which the statutory window applies, or Benson is still within the last year of his lease, which allows the State to legally reclassify at this point. For all those reasons, the Chancellor's dismissal of Benson's action should be affirmed.

RESPECTFULLY SUBMITTED, this the 11th day of October, 2011.

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CERTIFICATE OF SERVICE

I, L. Christopher Lomax, Special Assistant Attorney General of the State of Mississippi, do hereby certify that on October 11, 2011, caused to be delivered to the following a true and exact copy of the foregoing ***Brief of the Appellees*** by United States mail, postage prepaid, addressed as follows:

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