

NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

JULY 2019

2018-2019 REAL PROPERTY SECTION OFFICERS

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SECTION ADOPTS TITLE EXAMINATION STANDARDS

In 2018, the Executive Committee of the Real Property Section approved the formation of a committee to study the formulation and development of title examination standards. This committee, which became the Title Standards Board, was composed of over thirty experienced Mississippi real estate attorneys. After a great deal of study, vigorous debate and multiple drafts, the Title Standards Board proposed a set of standards. These standards were submitted to the Real Property Section for a vote by email. The members of the Section overwhelmingly approved adoption of the new Title Examination Standards. The Standards become effective on August 1, 2019 and will be posted on the Section's page on the Mississippi Bar's website.

NEW LEGISLATION

HB 807-extends the automatic repealer in Miss. Code Ann. Section 29-1-75 to July 1, 2022. This is the statute that limits the ability of corporations and non-resident aliens to purchase public lands. This bill became effective on July 1, 2019.

HB 869-regulates private project construction bonds. This bill adds a new Section 85-7-432 that gives subcontractors, sub-subcontractors, materialmen to the subcontractors and sub-contractors, and laborers who have worked on the project, and who have not been paid within ninety days, a right of action on a payment bond. It also amends Section 85-7-431 to provide that a contractor can bond over liens of subcontractors and materialmen with a private project construction bond, as provided in new Section 85-7-432. This bill became effective on July 1, 2019.

HB 962-amends Miss. Code Ann. Section 89-1-69, which prohibits transfer fees in subdivision covenants, to narrow some of the exceptions to application of the statute. In other words, this statute makes it more likely that transfer fees in subdivision covenants will not be enforceable. This bill became effective on July 1, 2019.

HB 1307-amends Section 27-45-27 to provide that neither the purchaser of land at a tax sale nor any holder of title under him by descent or purchase shall have the right to challenge the validity of the tax sale. This bill became effective on July 1, 2019.

HB 1375-makes a number of changes to Chapter 91 of the Mississippi Code dealing with administration of wills and estates. This bill was the product of a study group organized by the Secretary of State's office. This bill became effective on July 1, 2019.

HB 1612-authorizes municipalities to create local improvement assessment districts. Taxpayers within the district can vote to impose an assessment to pay for public improvements within the district. This bill became effective on July 1, 2019.

SB 2828-Mississippi Guardianship and Conservatorship Act or GAP ("Guard and Protect") Act. The Gap Act replaces most of the existing statutes on guardians and conservators. It was the product of a study group appointed by the Mississippi Supreme Court. Of particular interest to real estate attorneys is that under the Act only a conservator has authority over the property of a person. The Gap Act will become effective on January 1, 2020. For more information about the Gap Act, see Ken Farmer's article in the June 2019 edition of the newsletter of the Land Title Association of Mississippi: <https://ltams.org/gap-act-mississippi-guardianship-and-conservatorship-act/>.

SB 2716-makes landlord-friendly changes to the tenant eviction process. Among other changes, the bill provides that when the eviction is based on non-payment of rent, the judge must immediately issue a warrant for removal, unless the judge determines that a stay not to exceed three days "would best serve the interests of justice and equity." An amendment was offered to SB 2716 that would have made the three-day stay of removal automatic, but this amendment was defeated. This legislation by its terms became effective upon passage.

SB 2901-Landowners Protection Act-This Act limits the liability of owners to invitees for acts of third parties. It adds a new section to the Code that provides that no person who owns or manages commercial or other real property shall be liable to an invitee who is injured by a third party unless the injured person proves that the conduct of the owner or manager, "with a degree of conscious decision-making, impelled the conduct of said third party, ..." The Act also amends Section 85-5-7, the statute defining "fault" for purposes of joint and several liability, to provide that in a premises-liability action alleging tortious conduct of a third party, "fault" includes any tort that results from an act or omission committed with a specific wrongful intent. The Landowner Protection Act became effective on July 1, 2019.

Bills that did not make it out of the legislature this year, and that likely will be introduced again in the 2020 Legislature, include HB 777, the Revised Mississippi Law on Notarial Acts; SB 2856, which authorizes counties and municipalities to establish land banks; HB 554, amendments to increase the amount of historic tax credits; and HB 1425, the Uniform Real Property Transfer on Death Act.

FEDERAL TAKINGS CLAIMS AND GRAVEYARD EASEMENTS

In *Knick v. Township of Scott*, 138 S. Ct. 1262 (2019), the United Supreme Court overruled one of its cases from 1985 and held that Fifth Amendment takings cases by property owners can be brought directly in federal court without the necessity of bringing an action in state court first. In *Knick*, the Township of Scott, Pennsylvania, passed an ordinance requiring that all cemeteries be kept open and accessible to the public during daylight hours. Rose Knick owns a ninety-acre rural property in Scott on which was located a small family graveyard. Officials from the Township informed her that she was violating the ordinance

by not allowing the public to have access across her property to the graves. Knick filed an action in federal district court asserting that the ordinance constituted a taking under the Fifth Amendment to the United States Constitution. The Fifth Amendment provides in part that the government cannot take property from private citizens without due process of law. Knick claimed that the ordinance constituted a taking under the Fifth Amendment, and filed an action against the Township in the United States District Court under 42 U.S.C. Section 1983. The District Court dismissed her claim under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), which held that property owners must seek compensation under state law in state court before bringing a federal takings claim under §1983. The Third Circuit affirmed. The United States Supreme Court overruled *Williamson County's* state litigation requirement, vacated the Third Circuit's opinion, and remanded the case for further proceedings.

Advocates for the rights of property owners have been working for years on reversing *Williamson County*. For more on this aspect, see the website of the Pacific Legal Foundation, which represented Knick: <https://pacificlegal.org/case/knick-v-scott-township-pennsylvania/>

Knick will undoubtedly make taking (aka inverse condemnation) cases easier to bring and win, since the property owner can now bring an action directly to federal court without having to run the gamut in state court first. The knee-jerk reaction will be to bring a takings action in federal court, but the Mississippi Supreme Court generally has been receptive to takings cases. *See State v. Murphy*, 202 So. 3d 1243 (Miss. 2016)(affirming jury verdict against state for taking land to build harbor); *Jackson Municipal Airport Authority v. Wright*, 232 So. 2d 709 (Miss. 1970)(affirming that navigation easement had been taken). Recent legislation and cases, and the 2011 referendum limiting the state's eminent domain powers, show that Mississippi is a stronghold of the rights of property owners.

One interesting twist on the *Knick* case is how it might apply to a bill that was introduced in the 2019 Mississippi legislature. Recall that the ordinance passed by the Township of Scott, which gave rise to Ms. Knick's taking claim, required landowners to give the public access to graveyards on their property. HB 1004 provided that a person who desired to enter someone else's property for the purpose of visiting a grave, and who was unable to obtain the permission of the owner of the property to enter the property, could file a petition with the chancery court of the county in which the grave is believed to be located to allow the petitioner to enter the property and discover, restore, maintain or visit the grave. Service of process must be made on the owner and all lienholders of record. The court can issue an order allowing the petitioner to enter the property if there are reasonable grounds to believe that a grave is located on the property and that it is reasonably necessary to enter or cross the owner's land to reach the grave; that the petitioner is a descendant of the deceased or has a special interest in the grave; and that entry on the property will not reasonably interfere with the owner's enjoyment of the property. The court's order may, but is not required to, specify the days and times that the petitioner can enter the property, give the petitioner the right to enter the property periodically, specify a reasonable route for the petitioner to take to cross the property, and require the petitioner to post a bond to protect the owner from damages. The court also may, but is not required to, direct the petitioner to pay the owner reasonable damages and costs of the proceeding. Assuming that the court did not require the petitioner to pay compensation to the owner, would the court-ordered access contemplated by HB 1004 be a taking? HB 1004 died in committee in the 2019 legislative session, but could be introduced again in the 2020 session.

NOTICE OF RESIDENTIAL FORECLOSURE REQUIRED

The Mississippi S.A.F.E. Mortgage Act, Miss. Code Ann. Section 81-18-1 to -55, applies to residential mortgage loans, which are defined as "any loan primarily for personal, family or household use

that is secured by a mortgage, deed of trust or other equivalent consensual security interest on a dwelling (as defined in Section 103(v) of the Truth in Lending Act) or residential real estate upon which is constructed or intended to be constructed a dwelling (as so defined).” Miss. Code Ann. Section 81-19-3(jj). Depository institutions and subsidiaries are exempt from the Act. *Id.* Section 81-18-5(e). If the Act applies, then it is unlawful for a mortgage lender to fail to mail a notice to the borrower, at least forty-five days before the foreclosure sale. The notice must contain an itemization of the past-due amounts due and other charges that must be paid to bring the loan current, the contact information for the mortgage lender who is authorized to work with the borrower to avoid foreclosure, the contact information for one or more HUD-approved counseling agencies, and the contact information for the consumer complaint section of the Mississippi Department of Banking and Consumer Finance. Miss. Code Ann. Section 81-18-55(f).

CASES

Amendments to Text of Zoning Ordinance Constituted Zoning and Spot Zoning

Beard v. City of Ridgeland, 245 So. 3d 380 (Miss. 2018)(*en banc*). In 2014 the City of Ridgeland completed a new comprehensive zoning ordinance and map. In 2015, the City adopted an amendment to the zoning ordinance that permitted a new use in the General Commercial C-2 district for a Large Master Planned Commercial Development. One aspect of the amendment was that it permitted a fuel center (aka service station) in a C-2 District. Service stations otherwise were not permitted in the C-2 District. At the time that the 2015 amendments were adopted, the Mayor and Board of Aldermen knew that Costco was interested in developing a store in a C-2 district in Mississippi, and that Costco wanted a fuel center as part of its development. Owners of residential properties near the site brought an action in the Circuit Court of Madison County alleging that the amendment constituted a *de facto* rezoning that required the City to prove change in the neighborhood and a public need for the rezoning; and that the amendment was intended solely to benefit the Costco development and therefore constituted illegal spot zoning. The Circuit Court affirmed the zoning amendments. On appeal, the Mississippi Supreme Court, in a unanimous *en banc* decision by Justice King, reversed the Circuit Court and rendered judgment for the neighbors. The Supreme Court found that the amendment of the text of the zoning ordinance constituted rezoning, and that the city failed to meet the requirement of showing clear and convincing evidence of substantial change and public need for the zoning change. The Supreme Court also found the zoning amendment was specifically intended to benefit the Costco development, and thus constituted illegal spot zoning.

Note 1: In order to appreciate this case, one must know that generally when an owner seeks to rezone property, the owner is seeking to amend the zoning map to change the zoning classification of a particular property, usually from a less intense use to a more intense use. To be entitled to have the property rezoned, the owner must prove by clear and convincing evidence that substantial change has occurred since the adoption of the zoning ordinance, and public need for the more intense use. In this case, the City of Ridgeland amended the text of the zoning ordinance itself to allow a use that would not be allowed under the existing zoning ordinance. The Supreme Court found that this amendment of the text of the zoning ordinance constituted a *de facto* rezoning, that the City failed to prove change or need, and thus the zoning was illegal. One difference between a rezoning of a property and a text amendment is that a rezoning requires actual notice of the proposed rezoning to owners of neighboring properties, and a text amendment does not require actual notice to anyone.

Note 2: “Spot zoning” occurs when a municipality rezones one lot to favor a particular developer. It is deemed to be arbitrary and capricious and illegal. In this case, the Supreme Court relied on emails between the city and the developer in finding that the amendments were intended to permit the Costco development

with a fuel center. Of course, one does not get to the question of spot zoning until it is determined that the text amendments constituted a rezoning.

Note 3: This is not the first case in which the Mississippi Supreme Court found that an amendment to the text of the zoning ordinance constituted a *de facto* rezoning. In *Modak-Truran v. Johnson*, 18 So. 3d 106 (Miss. 2009), the City of Jackson made amendments to its zoning ordinance to permit bed and breakfast inns to serve meals to the public. The Mississippi Supreme Court held that the text amendment were intended to benefit one bed and breakfast inn, the Fairview Inn, and that the amendments effectively rezoned this property from residential to commercial property and were an attempt to “circumvent the stringent procedural requirements for rezoning.” The Court also found that the amendments constituted illegal spot zoning because the City did not dispute that the amendments only applied to the Fairview Inn. In contrast, in the Costco case, the City asserted that the amendments applied to seventeen different properties.

Note 4: It is all well and good to talk about the sanctity of comprehensive plans, whether change has occurred and need exists, and the evils of illegal spot zoning. This is the classic Euclidean zoning analysis. But in the real world, what does a municipality or county do when an extraordinary economic development opportunity arises? The United States Supreme Court, in a different context, has stated, “Promoting economic development is a traditional and long-accepted function of government.” *Kelo v. City of New London*, 545 U.S. 469 (2005). Every municipality in Mississippi would love to have a new Costco store within its boundaries, and would do whatever it could to make such a development happen. In this case, the Mississippi Supreme Court’s decision does not suggest that the Mayor and Board of Aldermen of Ridgeland were motivated by anything other than a desire to capture an extraordinary economic opportunity for the City.

Note 5: The development of the Costco store has continued. According to news reports, the store is expected to open in the fall of 2019. The location of the fuel center was moved across the street from the main development. Owners of nearby residential properties have challenged the new location of the fuel center, and the environmental permits granted for the development.

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