

**NEWSLETTER OF THE REAL PROPERTY SECTION
OF THE MISSISSIPPI BAR**

September 2022

2022-2023 Officers

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MESSAGE FROM THE CHAIR

I am honored to serve as this year's Chair of the Real Property Section of the Mississippi Bar. On behalf of the Real Property Section Executive Committee, thank you for choosing to be a member of the Real Property Section. There is strength in numbers, so please consider recommending Section membership to your colleagues who practice real property law.

Rod Clement – as he has done at least as long as I have been practicing law (2012) - continues to serve our Section by providing the latest real property legislative and case law updates. I know that each of you join me in thanking Rod for volunteering his time, experience and expertise for the benefit of the Section. Rod, your service is greatly appreciated.

We value your input with respect to all matters relating to Mississippi real property law, so please reach out to me if there are issues or topics that you would like to see addressed by the Section. I can be reached by e-mail at robert.bass@phelps.com or by telephone at 662-690-8141.

NEW LEGISLATION

HB 1163 amends Section 19-5-9 of the Mississippi Code to require counties to require building permits in unincorporated parts of the county. It also amends Section 21-19-25 to require municipalities to do the same within municipalities. Prior to this legislation many rural counties

did not require building permits, but most municipalities already require building permits. The legislation does not address the duration of the building permits or what penalties, if any, are imposed for failure to obtain a permit.

HB 1163 also makes amendments to Title 73 Chapter 59 regarding Residential Builders and Remodelers to require residential construction managers and residential solar contractors to obtain licenses from the State Board of Contractors.

HB 1163 became effective on July 1, 2022.

Note: The editor's understanding is that HB 1163 was targeted at contractors from out of state who collect payment for work on residences in advance and then leave without doing the work.

FANNIE MAE AND FREDDIE MAC TO REQUIRE 2021 ALTA FORMS

[Freddie Mac](#) is requiring use of the 2021 ALTA Loan policy for promissory notes dated on or after January 1, 2023, and [Fannie Mae](#) is requiring use of the 2021 ALTA Loan policy beginning January 1, 2024. The 2021 ALTA forms became effective on July 30, 2021. In the editor's experience, the 2021 forms have not been used extensively yet. The editor anticipates that these announcements by Fannie Mae and Freddie Mac will accelerate use of the 2021 forms for all real estate transactions.

[Fannie Mae](#) and [Freddie Mac](#) similarly gave a boost to the transition from the London Interbank Offering Rate (LIBOR) to the Secured Overnight Financing Rate (SOFR) as the benchmark for floating rate loan by announcing that they would require the use of SOFR. LIBOR had been the standard benchmark for variable interest rate for real estate loans for many years. When LIBOR began being phased out, great angst existed about what the replacement benchmark would be. Since Fannie Mae and Freddie Mac announced that they would require loans indexed to SOFR, SOFR appears to have become the leading benchmark for variable rate loans. Anyone who reviews commercial loan documents regularly has seen excruciatingly detailed provisions addressing the transition from LIBOR to SOFR.

CASES

Listing Home on Airbnb Did Not Violate Covenant Requiring Residential Uses

Lake Serene Property Owners Ass'n v. Esplin, 334 So. 3d 1139 (Miss. 2022)(*en banc*). Esplin owned a home in the Lake Serene subdivision in Lamar County, Mississippi. The subdivision protective covenants limited the use of the property to residential purposes. The covenants provided that they could be amended by the vote of seventy-five percent of the lot owners. The covenants also provided that the board of directors of the Lake Serene Property Owners Association could establish reasonable rules and regulations concerning the use of property in the subdivision. Esplin listed his property for rent on Airbnb. The Association sent Esplin letters

asserting that the rental violated the subdivision covenants. The Association's bylaws provided that the board of directors could amend the bylaws by a two-thirds vote of the directors. The board of directors of the Association amended the Association's bylaws to prohibit rentals of less than 180 days. The Association then filed an action in the Chancery Court of Lamar County to prevent Esplin from renting his property on Airbnb. The Chancery Court found that Esplin's use was residential and denied the Association's request for injunctive relief. The Chancery Court also found that the Board's attempt to amend the bylaws to prevent rentals of less than 180 days was invalid because a change in the rules regarding rentals required an amendment to the protective covenants by the lot owners, and that the amendment of the bylaws by the Board was not sufficient. On appeal by the Association, the Mississippi Supreme Court, in a 6-2 opinion (Justice Beam not participating), affirmed. Justice Chamberlin, writing for the majority, first determined that the use of Esplin's property by renters was "residential" in nature because the renters used the property for eating, sleeping, bathing and other such uses consistent with the use of the property as a "place of abode." The commercial activities of arranging and paying for the rentals took place online. Since the protective covenants did not prohibit short-term rentals, short-term rentals were permitted. Finally, the Court found that the amendment of bylaws by the Board to prohibit rentals of less than 180 days was not valid because the protective covenants reserved to the lot owners the right to amend the protective covenants, and that the amendment of the bylaws was an "end-around of the covenants." While the Board had the right to make rules regarding the use of the property, the Board could not make rules regarding matters that were reserved to the lot owners.

Note 1: The Court's holding that rentals of Esplin's property via Airbnb were "residential" in nature is a holding of first impression in Mississippi. There appear to be two distinct lines of cases on the issue of whether such short-term rentals arranged through Airbnb and similar online services are "residential." The Association cited cases from Pennsylvania, New Hampshire and the Court of Justice of the European Union (!) that have held that short-term rentals to transient customers are not residential uses. Esplin cited cases from Alabama, Florida and Texas in support of his position that short-term rentals can be residential in nature. The Mississippi Supreme Court followed the reasoning of the cases cited by Esplin. The editor sees this holding as being consistent with a long-term trend by the Mississippi courts to allow owners to use their land for any purpose unless specifically prohibited.

Note 2: Justice Ishee, joined by Justice Griffis, concurred in the majority's opinion that the rentals at issue in this case were residential in nature, but dissented as to the holding that Board's amendment of the bylaws was invalid and that any change to the rules regarding leasing required an amendment of the covenants. Justice Ishee wrote that the protective covenants did not give owners an unrestricted right to lease their property, but permitted the Board to establish rules and regulations, and that the Board's amendment of the bylaws should be considered to be a valid exercise of that rulemaking authority.

Note 3: The majority opinion in *Esplin* relied heavily on *Kephart v. Northbay Property Owners Ass'n*, 134 So. 3d 784 (Miss. Ct. App. 2014). In *Kephart* the subdivision covenants for the Northbay subdivision permitted owners to lease their homes provided that the term of the lease was at least six months and the lease "otherwise complies with the rules and regulations adopted and promulgated from time to time by the Board of Directors,..." The covenants also provided that the covenants could be amended by the owners of seventy-five percent of the lots. The bylaws

of the Northbay Property Owners Association provided that no amendment to the bylaws of a material nature could be made without the approval of fifty-one percent of the holders of a recorded first mortgage; and further provided that an amendment to change the “Leasing of Residence...” would be considered material. The board of directors of the homeowners’ association subsequently adopted a resolution prohibiting owners from leasing their properties, which resolution was recorded in the land records of Madison County. After the board adopted the resolution, the Kepharts bought a house in Northbay and rented it to a third party. The Northbay Property Owners Association brought an action in Madison County Chancery Court to enforce the prohibition against leasing. The Chancery Court held that the Board’s resolution prohibiting the leasing of residences was valid and enforceable, and ordered the Kepharts to terminate their lease with the third party. On appeal, the Mississippi Court of Appeals reversed and rendered judgment in favor of the Kepharts. The Court of Appeals acknowledged that the Board had the power to enact rules and regulations which did not involve rights reserved by the landowners. However, because the bylaws expressly provided that a change to the leasing of residences required an amendment to the bylaws, the Court held that the Board did not have the authority to enact the resolution. In *Esplin*, no such provision regarding consent of mortgagees was at issue. The Mississippi Supreme Court in *Esplin* wrote that this was “a distinction without significance”, and that it did not affect the “ultimate holding” of *Kephart* that “a resolution of the board of directors cannot be used to amend covenants that otherwise requires a vote of the landowners.”

Note 4: An important factor in the Supreme Court’s decision was that all of the commercial activities of contacting the owner, arranging the terms of the lease and paying the rent took place online and not at the property. If *Esplin* had delivered a lease and collected the rent from his tenants at the property, arguably the Supreme Court would not deem the use to be residential. Would the result be the same if the transaction was handled by mail? Some of *Esplin*’s rentals were for as short as one day. Is the right to use a house for one day really a lease, or is it a license, like “renting” a hotel room?

Note 5: The rental of houses in residential neighborhoods has become a hot topic nationally. According to an [article](#) in the *Wall Street Journal* on April 18, 2022 by Will Parker and Nicole Friedman, investors are purchasing homes in residential subdivisions for the sole purpose of renting the houses on Airbnb and similar online services, and homeowners’ associations are trying to stop this practice. Another [article](#) by Parker and Friedman in the August 28 issue of the *Journal* addressed online services that allow out of state individual investors (“laptop landlords”) to purchase houses in Mississippi and other states sight unseen with the intent of renting the house to third parties. The online services also connect the laptop landlords with local property managers, so that the laptop landlords never have to visit the property. According to the article, laptop landlords are outbidding traditional home buyers for properties and exacerbating the housing shortage. Also according to the article, Mississippi is a favorite location for laptop landlords because of our relatively lax laws protecting tenants.

Note 6: Given the number of recent cases regarding homeowners’ associations and 2021 and 2022 amendments to the statutes regulating how homeowners’ associations manage money (discussed in the July 2022 Real Property Section Newsletter), the editor thinks that representing a homeowners’ association is no longer for amateurs. The potential issues are multiplied if the subdivision includes a lake. Homeowners’ associations also seem to be proliferating. These factors

may create an opportunity for attorneys who can prepare a comprehensive set of organizational documents and protective covenants for associations that reflect recent cases and statutes and can keep these documents updated as the law in this area changes, and who can provide the association's board with sound advice. The editor knows attorneys who caught this wave in Georgia and Florida and have built sophisticated practices in this area. On the other hand, homeowners' associations are often led by people who are not experienced in business and who do not appreciate the need for and value of quality legal advice. The editor also speculates that most homeowners' association in Mississippi are not going to have the resources to pay for the legal services that they need.

Note 7: Esplin won the battle, but the Association won the war. Shortly after this case was handed down, the Association obtained the consent of 75% of its lot owners to an amendment of its protective covenants. The amendment prohibited rentals of less than six months and rentals through Airbnb. The amendment also provided that an owner may delegate use of the subdivision's common areas only to members of his family who permanently reside with the owner. The amendment was filed in the office of the Chancery Clerk of Lamar County on June 10, 2022 and is recorded in Book 30A at Page 9.

No More Deference to Interpretations by Local Officials of Zoning Ordinances

Wheelan v. City of Gautier, 332 So. 3d 851 (Miss. 2022)(*en banc*). Vindich owned land in the City of Gautier. He sought a building permit from the City to build a garage and workshop on his land. The City's zoning ordinance provided that the maximum lot coverage for this land was "Twenty-Five (25) percent for the principal structure and accessory structures. Accessory structures shall not exceed twenty (20) percent of the rear area or fifty (50) percent of the main building area, whichever is less." The ordinance did not define the terms "rear area" and "main building area." The City's Building Department denied the application on the basis that the proposed construction would violate the ordinance. Vindich appealed the Building Department's decision to the Planning Commission, which voted to recommend approval of the permit to the City Council. The City Council voted to accept the Planning Commission's recommendation. The City granted the building permit to Vindich and Vindich started construction. Vindich's neighbor, Wheelan, filed a lawsuit in the Chancery Court of Jackson County challenging the grant of the permit. Wheelan asserted that Vindich's proposed improvements violated the maximum lot coverage ordinance, that the City's interpretation of the ordinance was arbitrary and capricious, that Vindich needed a variance from the City to build his improvement which required a public hearing, and that Wheelan's due process rights were violated because no public hearing was held. The Chancery Court found that the City's interpretation of the ordinance was not manifestly unreasonable and dismissed Wheelan's lawsuit. On appeal by Wheelan, the Mississippi Court of Appeals affirmed. The Court of Appeals relied in part on the traditional standard of review of zoning appeals followed by the Mississippi Supreme Court in *Hatfield v. Board of Supervisors of Madison County*, 235 So. 3d 18 (Miss. 2017), in which the Supreme Court stated that "[I]n construing a zoning ordinance, unless manifestly unreasonable, great weight should be given to the construction placed upon the words by the local authorities." The *Hatfield* court also restated another venerable rule regarding construction of zoning ordinances: "And if the ordinance's application is "fairly debatable", the decision of the Board of Supervisors must be affirmed." The Court of Appeals found that the City of Gautier's interpretation of the maximum lot coverage ordinance was fairly debatable and not

manifestly unreasonable. Justice Wilson, in a separate opinion concurring in part and dissenting in part, discussed ambiguities and internal conflicts in the ordinance, and wrote that the City's interpretation was manifestly unreasonable. On a writ of certiorari, the Mississippi Supreme Court, in an opinion by Justin Coleman, reversed and remanded the case back to the Chancery Court. Justice Coleman first stated that the Supreme Court was taking the opportunity of this case to overrule the rule stated in *Hatfield* that courts will be deferential to the interpretation by local officials of their zoning ordinances. The interpretation of zoning ordinances is a question of law and the authority to interpret the law rests solely with the judicial branch. In 2018, the Mississippi Supreme Court had stated that it would no longer give deference to executive branch interpretations of statutes. *King v. Mississippi Military Department*, 245 So 3d 404 (Miss. 2018). More recently the Mississippi Supreme Court had stated in another zoning case that it might apply the same rationale to interpretations by local officials of local zoning ordinances. *Board of Supervisors of Hancock County v. Razz Halili Trust*, 320 So. 3d 490 (Miss. 2021)(discussed in the January 2022 Real Property Section Newsletter). Going forward, courts will review zoning decisions *de novo*.

Addressing the merits of this case, the majority opinion quoted from and followed Justice Wilson's rationale in his separate opinion in the Court of Appeals. Because the ordinance did not define "main building area" or "rear area", these terms could have different meanings. Therefore, the ordinance was ambiguous. The Planning Commission and City Council had determined that "main building area" meant the entire lot, but this interpretation made the second part of the ordinance meaningless. The Supreme Court reversed the judgment of the Court of Appeals and the Chancery Court and remanded the case back to the Chancery Court for further proceedings consistent with its opinion.

Note 1: This is a significant change in zoning law. Scores of zoning decisions by the Mississippi Supreme Court and the Court of Appeals have relied on deference to local authorities in the interpretation of their zoning ordinances. As a result of not giving deference to interpretations by local authorities of zoning ordinances, more challenges to zoning decisions by local authorities will be successful.

Note 2: Justices Randolph, Kitchens, King, Ishee and Griffis concurred in Justice Coleman's opinion. Justice Chamberlin, joined by Justices Maxwell and Beam, concurred in the result only in a separate opinion. Justice Chamberlin wrote that zoning issues have to be enforced by local authorities, and that in order to enforce the zoning ordinances, local authorities have to interpret the ordinances. Justice Chamberlin also pointed out the distinction between a state administrative agency interpreting a statute passed by the state legislature, as was the circumstance in the *King* case, and local authorities interpreting an ordinance that the local authorities had enacted, which was the circumstance in this case, and argued that the majority's reliance on *King* was misplaced.

Note 3: While the *Wheelan* court only addressed zoning, it seems to the editor that the same rationale could be applied to an appeal of any decision by a municipality or county, not just zoning cases. The "fairly debatable" rule is not unique to zoning but is a part of the general standard of review on appeal of administrative decisions.

Note 4: As a practical matter, this decision means that proponents of rezonings will need to conduct their own independent interpretation of applicable zoning ordinances and not rely solely on interpretations by local officials, since the interpretations of local officials may get second-guessed by the courts.

Note 5: In this case, the City's Building Department opposed the granting of the building permit to Vindich at the Planning Board and at the City Council, and their arguments were in the record. At the Court of Appeals, Justice Wilson in his separate opinion gave a well-reasoned explanation of why the City's interpretation of its ordinance did not work. The Supreme Court therefore had two road maps for reversing this opinion. In most cases, the rationale for reversal is not going to be as clear.

Vested Rights Doctrine Prohibits Retroactive Application of Statute

Anderson v. S & S Properties, LLC, 334 So. 3d 172 (Miss. Ct. App. 2022). S & S Properties, LLC ("S & S") purchased land in Tunica County at a tax sale in August 2015. In January 2019, S & S filed a complaint in the Chancery Court of Tunica County against Tunica County. S & S asserted that the county failed to serve notice of the tax sale on the property owners and the tax sale therefore was void. S & S asked the court to order the County to refund to S & S the purchaser price. The Chancery Court granted summary judgment to S & S. The judgment was entered on December 9, 2020. Effective July 1, 2019, Section 27-45-27(2) of the Mississippi Code became effective. This statute provides, "No purchaser of land at any tax sale, nor holder of the legal title under him by descent or distribution, shall have any right of action to challenge the validity of the tax sale." On appeal by the County, the Mississippi Court of Appeals, in an opinion by Justice Smith, affirmed the Chancery Court. The County argued that Section 27-45-27(2) applied since it became effective before the Chancery Court's order was entered, and S & S therefore had no standing to challenge the validity of the tax sale. Justice Smith quoted from prior Mississippi cases: "[E]very right or remedy created solely by the repealed or modified statute disappears or falls with the repealed or modified statute, ..., save that no such repeal or modification shall be permitted to impair the obligations of a contract or to abrogate a vested right." Justice Smith also quoted from a decision of the United States Supreme Court: "The federal and state courts have held, with practical unanimity, that any substantial alteration by subsequent legislation of the rights of a purchaser at tax sale, accruing to him under laws in force at the time of his purchase, is void as impairing the obligation of contract." In two recent prior cases, the Court of Appeals had found that the purchaser at a tax sale had a vested right in the property purchased. Following these and other precedents, the Court of Appeals found that Section 27-45-27(2) did not apply to S & S's cause of action.

Note 1: While this case provides an exception to the application of Section 27-45-27(2), this exception to the application of Section 27-45-27(2) will only apply to tax sales that took place prior to July 1, 2019.

Note 2: The Court of Appeals has held in two cases that a tax sale purchaser has vested rights in property purchased at tax sales. *Durrant Inc. v. Lee County*, Miss. Court of Appeals No. 2019-CA-01826-COA, 2021 WL 5896268 (Dec. 14, 2021) at 5; *Bennett Tax Co. Inc. v. Newton County*, 298 So. 3d 440, 445 (Miss. Ct. App. 2020).

Note 3: This case has significance beyond its particular context because it adds to Mississippi's jurisprudence regarding vested rights in property. The source of the law protecting vested rights is the Contracts Clause in Article I, Section 10 of the United States Constitution, which provides in relevant part that "No State shall...pass any...Law impairing the Obligation of Contracts,..." While the doctrine of vested rights in property has been developed in other states, the doctrine has not received much attention in reported Mississippi cases. The Mississippi Supreme Court has addressed vested rights in cases involving permits issued by local authorities but has found in those cases that the doctrine did not apply. *Robinson Industries v. City of Pearl*, 335 So.2d 892 (Miss. 1976); *City of Jackson v. Kirkland*, 276 So. 2d 654 (Miss. 1973); *Delta Construction Co. v. City of Pascagoula*, 278 So. 2d 436 (Miss. 1973). So any case in Mississippi that finds that the vested rights doctrine applies is a win for owners of real property.

Judgement Creditor Not Entitled to Notice of Tax Sale

HL&C Marion, LLC v. DIMA Homes, Inc., Miss. Supreme Ct. No. 2020-CT-00750-SCT, 2022 WL 3131521 (August 4, 2022) (*en banc*). DIMA obtained a judgment against the Kennedys in the Circuit Court of Marion County, Mississippi, which judgment was enrolled in the Circuit Clerk's records and therefore created a judgment lien against land owned by the Kennedys in Marion County. The Kennedys did not pay the ad valorem taxes on the land, and the land was sold for taxes. The Chancery Clerk did not give notice of the tax sale to DIMA, despite the fact that the Chancery Clerk's records contained a note about DIMA's judgment. After the two-year redemption period expired, the purchaser at the tax sale obtained a deed from the Chancery Clerk and conveyed the land to HL&C Marion, LLC ("HL&C"). HL&C filed suit to quiet title to the land and named DIMA as a defendant. DIMA challenged the validity of the tax sale on the grounds that DIMA was not given notice of the tax sale. The chancellor set aside the tax sale because DIMA was not given notice and extended the redemption period to allow DIMA to redeem. On appeal by HL&C, the Court of Appeals affirmed. The Court of Appeals wrote in part,

It would be inconsistent with equity and the intent of our tax sale statutes to hold that DIMA Homes, which had a statutory lien on the property as a judgment creditor and had a right to redeem, did not have a remedy when it could not execute on that right to redeem because it received no notice. Equity is not that harsh. Instead, equity seeks to do that which is right. Here, the chancellor fashioned an equitable remedy for DIMA Homes by setting aside the tax sale and extending DIMA Homes' redemption period."

HL&C Marion, LLC v. DIMA Homes, Inc., Miss. Court of Appeals No. 2020-CA-00750-COA, 2021 WL 50700556 (Nov. 2, 2021) at 5. On writ of certiorari, the Mississippi Supreme Court, in an opinion by Justice Coleman, reversed the Chancery Court and the Court of Appeals and rendered judgment for HL&C. Section 27-43-5 of the Mississippi Code provides that chancery clerk shall search the records of deeds, mortgages and deeds of trust in his office and ascertain the names of all mortgagees, beneficiaries and holders of vendors liens for purposes of giving notice. No requirement exists that notice be given to judgment creditors. Moreover, the chancery clerk is only required to search the records in his office and is not required to search the records of judgments in the circuit clerk's office. DIMA argued that under Section 27-45-3 of the Mississippi

Code, a judgment creditor has the right to redeem the property from the tax sale by paying the past due taxes, and that the right to redeem lacks value if the judgment creditor does not receive notice of the sale. Justice Coleman wrote that DIMA could have protected itself by checking the tax records to make sure that the ad valorem taxes were paid. Justice Coleman wrote, “Here, DIMA held the responsibility as an interested party to check public records to ensure its rights remained protected. It did not.” In regard to the right of courts to extend the two-year redemption period, the Mississippi Constitution establishes the two-year redemption period. The courts do not have the authority to change the two-year period. “Courts of equity cannot ignore or change unambiguous legal principles when the law forbids it.”

Note 1: This opinion has not been released for publication yet.

Note 2: The Supreme Court in *HL&C* referenced two cases in which Mississippi courts have found that equity allows for an extension of the two-year redemption period. *Levy v. McCay*, 445 So. 2d 546 (Miss. 1984)(taxpayer was told by public official that someone else had paid taxes); *Marathon Asset Management, LLC v. Otto*, 977 So. 2d 1241 (Miss. 2008)(deed to owners not filed until after redemption period expired). The Court of Appeals relied heavily on the *Marathon Asset Management* case, an opinion written by Justice Ishee when he was on the Court of Appeals, in affirming the chancellor’s holding. The Supreme Court in *HL&C* did not expressly overrule these two cases, but given the Supreme Court’s holding that the two-year redemption period cannot not be extended for equitable reasons, the continued validity of these two cases is doubtful as to this point.

DISCLAIMER

This Newsletter is a publication of the Real Property Section of The Mississippi Bar for the benefit of the Section’s members. Members are welcomed and encouraged to send their corrections, comments, news, articles or ideas for articles to the editor, Rod Clement at rclement@bradley.com. Although an earnest effort has been made to ensure the accuracy of the matters contained in this Newsletter, no representation or warranty is made that the contents are comprehensive and without error. Summaries of cases and statutes are intended only to bring current issues to the attention of the Section’s members for their further study and independent review and should not be relied upon by readers for their own or their clients’ legal matters; rather, readers should study the cases and statutes and draw their own conclusions. All commentary reflects only the personal opinions of the editor, which are subject to change, and does not reflect a position of The Mississippi Bar, the Real Property Section, or the editor’s law firm.