

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

July 2022

2021-2022 OFFICERS

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NEW LEGISLATION

Homeowners' Associations-In 2021 the Legislature enacted Miss. Code Ann. §§79-11-751 to -759, entitled Regulation of Homeowners Associations Management Agents and the Management of Association Assets. This legislation was enacted in response to alleged embezzlement of money from multiple homeowners' associations by an association management company. Among other things, the legislation imposed additional requirements on boards of directors of homeowners' associations to review and approve bank statements and transfers of funds. Many homeowners' associations complained that that the limitations were too restrictive and interfered with their ability to conduct routine business. In HB 933, the Legislature made changes to the 2021 statutes to delete the requirement that approval of transfers of funds by boards be in writing, require boards to review only the most recent reconciliations of its operating and reserve accounts, allow a board to get insurance rather than a fidelity bond, and allow a board rather than the members of the association to vote not to require a fidelity bond.

Carbon sequestration-HB 1214 makes changes to the Mississippi Geologic Sequestration of Carbon Dioxide Act, Miss. Code Ann. §§ 53-11-1 to -33 to promote carbon sequestration in Mississippi. Among other changes, HB 1214 permits the entry by the Mississippi Oil and Gas Board of a preliminary technical order even if a majority of the ownership interests of an underground storage facility have not consented as long as the operator (aka developer) has made a good-faith effort to obtain consent of a majority of the surface and mineral owners, and the operator obtains majority consent within twenty-four months from the date of the preliminary technical order. The operator would have to compensate non-consenting surface and mineral owners.

Note: The Mississippi Geological Sequestration of Carbon Dioxide Act was enacted by the Legislature in 2011 to allow the construction of a carbon dioxide pipeline. The pipeline was originally intended to use carbon dioxide for enhanced oil recovery, e.g., fracking. That pipeline currently connects underground storage in a geological formation known as the Jackson Dome to pipelines running southeast to the southeasterly and southwesterly corners of the state. A tax credit for carbon sequestration, known as [45Q](#), was enhanced by Congress in 2018. 45Q provides an incentive for industries to store carbon dioxide rather than emit the carbon dioxide into the atmosphere. According to an article by Alex Rozier in the June 13, 2022 online edition of *Mississippi Today*, the owner of the pipeline is considering using the pipeline and storage facility for carbon capture and storage rather than or in addition to enhanced oil recovery. The Legislature enacted HB 1214, according to the article, in the hope that this existing pipeline and storage facility, and the favorable geology in Mississippi for underground storage generally, might provide an incentive for industries that can use the 45Q tax credit to locate in Mississippi.

Affidavit of scrivener's error- HB 1351 amends Section 89-5-8 of the Mississippi to provide that an affidavit of scrivener's error must recite the Mississippi bar number of the affiant attorney and include a statement that the affiant is in good standing with the Mississippi Bar, is licensed to practice law in the State of Mississippi, and that the attorney's license is active at the time of making the affidavit. If an affidavit of scrivener's error is recorded that does not meet these requirements, the affidavit is void.

Eminent domain-In HB 1769 the Legislature enacted by statute the wording of the eminent domain initiative that was approved by the voters in an initiative in 2011. The 2011 initiative amended the Mississippi Constitution to provide that no property acquired by eminent domain shall for ten years be transferred to a private party, with some exceptions. However, the rationale of the Mississippi Supreme Court's decision striking the cannabis initiative in May 2021 put the validity of the 2011 eminent domain initiative into question. HB 1769 was signed by the Governor on April 19, 2022 and became effective on passage.

Letters of Administration-Prior to July 1, 2022, Section 91-7-63 provided that letters of administration shall be granted by the chancery court of the county in which the intestate had, at the time of his residence, a fixed place of residence, but if the intestate did not have a fixed place of residence, then by the chancery court of the county in which the intestate died, or in which his personal property or some part of it may be. The Legislature, in SB 2034, deleted the reference to personal property. After July 1, 2022, Section 91-7-63 provides that if the deceased did not have a fixed place of residence, then chancery court of the county in which the intestate owned land can issue letters testamentary. If the intestate does not have a fixed place of residence, then the chancery court in which the intestate dies can issue letters testamentary.

Cannabis-The new Mississippi Medical Cannabis Act, SB 2095, raises some interesting zoning issues. First, the Act describes where cannabis facilities can be located by reference to areas of municipalities and counties zoned commercial, industrial and agricultural. There are no statewide zoning or other definitions of these terms; each municipality and county that has adopted zoning

has its own code and its own definitions. There are uses defined as commercial in some of the rural county codes that would not be allowed in commercial districts in municipalities with very restrictive zoning ordinances. Uses permitted in a commercial zone in Tunica County may not be permitted in a commercial zone in the City of Madison. This may cause municipalities with more restrictive ordinances to opt out of the Act. According to a Mississippi Department of Revenue map¹ dated July 1, 2022, 86 cities and 19 counties in Mississippi had opted out of having cannabis dispensaries. Second, some municipalities and many counties in Mississippi have not adopted any zoning restrictions. The Act may encourage those municipalities and counties to adopt zoning ordinances to try to control the location of cannabis facilities. Third, the Act permits a municipality or county to grant a variance to permit cannabis uses in commercial zones. A variance traditionally is for exceptions to dimensional restrictions, like setbacks or height restrictions, while a use permit allows a use that otherwise would not be allowed in that district. Allowing cannabis facilities in commercial areas arguably is more like a use permit than a variance. The practical significance of this distinction is that many zoning ordinances make it easier to get a variance than a use permit in terms of notices, hearings and which bodies need to approve the action. For example, a local planning board may be able to give final approval for a variance, but the mayor and board of aldermen may need to approve a use permit. It will be interesting to see how these issues affect implementation of the Act. The Act was signed by the Governor on February 2, 2022 and became effective on passage.

Note: Development of cannabis facilities is raising many issues for real estate lawyers. For example, title insurance generally is not available for cannabis facilities. The lack of access to the banking system raises challenges for closings. Also, leases for cannabis facilities require need special provisions regarding compliance with laws, landlord access and permitting, among other issues.

Evictions-In *Conner v. Alltin, LLC* 2021 WL 5588731 (Nov. 30, 2021), the United States District Court for the Northern District of Mississippi held that certain Mississippi statutes regarding eviction were unconstitutional. Apparently in response to this case, the Legislature in SB 2461 made changes to evictions for both residential and non-residential leases. Changes applicable to all leases include allowing the tenant additional time to remove its personal property after a judgment of eviction is issued and permitting the landlord to give notice of default by email or text if the tenant has agreed to this in writing. This bill was signed by the Governor on April 21, 2022 and became effective on passage.

Legislation not enacted

Garbage liens-No legislation was enacted to address the problem of unrecorded garbage liens imposed by Section 19-5-22 (counties) and Section 21-19-2 (municipalities). Numerous bills were drafted to address this problem, but none were enacted. One problem is that the municipal records of owners of property normally do not contain the information that is needed for liens to be recorded and indexed in the land records (e.g., quarter section, township and range), only street addresses. The editor has started seeing garbage liens listed as exceptions on some title insurance commitments.

¹ <https://www.dor.ms.gov/dispensary-opt-out-map>, viewed July 5, 2022.

DISCLAIMER

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