

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

FEBRUARY 2012

2011 – 2012 REAL PROPERTY SECTION OFFICERS

Chair	Julie W. Brown
Vice-Chair	David M. Allen
Secretary/Treasurer	William C. Smith III
Past Chair	Don Ogden
Executive Committee	Thomas Ross, Jr. Larry S. Pickle Kenneth D. Farmer

MESSAGE FROM THE CHAIR

Our January Lunch and Learn CLE, “Kinwood: Off-Record Land Mine or One-Off Quirk?” broke a record for telephonic attendance, with over 110 participants!! A **big** thanks to Rod Clement for planning the program, lining up speakers, and preparing written materials, and to the panelists, Joyce Hall of Watkins & Eager, Bridgforth Rutledge of Phelps Dunbar, and Matt Grenfell of Butler, Snow, O’Mara, Stevens & Cannada.

Please be sure to sign up for the upcoming Lunch and Learn CLE offered by our Section (free to members) on March 8th from 11:45 to 1:00. We are pairing up with SONREEL (thanks to Susan F. King, of Brunini, Grantham, Grower & Hewes) to learn about environmental issues in land purchases. Our speakers will be Michael D. Caples, of Butler, Snow, O’Mara, Stevens & Cannada, and Troy F. Odom of Blair & Bondurant.

Plans are in the works for one more CLE with the Trusts and Estates Section in April or May. The topic will be real estate and the use of deeds and trusts in estate planning. Be sure to take advantage of these great learning sessions and free credits!

Help!! Our section currently has \$16,320.00 in our account! We need ideas on how to best utilize this golden egg. We will be awarding scholarships to law students at MC and Ole Miss, but that will still leave money in the account. Please contact me if you would like to serve on a committee to adopt charitable and promote *pro bono* project(s) that are real estate related – ie, Habitat for Humanity, homes through the Wounded Warrior foundation, Ronald McDonald House, etc.

Please email me directly at juliewbrown@msn.com to volunteer or present ideas! I thank you in advance for your consideration!

Julie W. Brown, Chair

LOSING HOMESTEAD EXEMPTION FOR NOT PAYING TAXES

A particularly interesting discussion took place on the Real Property Section listserve on February 8-9, 2012, about how a homeowner could lose his homestead exemption by failing to pay his state income taxes, and how the Department of Revenue and some counties were vigorously pursuing the collection of back taxes.

The source of the homestead exemption is the Homestead Exemption Act of 1946, Miss. Code Ann. § 27-33-1 *et seq.* The basic grant of the exemption is in Section 27-33-3, which provides in relevant part:

In order to recognize and give effect to the principle of tax-free homes as a public policy in Mississippi, to encourage home building and ownership, and to give additional security to family groups, it is hereby declared that homes legally assessed on the land roll, owned and actually occupied as a home by bona fide residents of this state, who are heads of families, shall be exempt from the ad valorem taxes herein enumerated...

Section 27-33-63(2) provides that the homestead exemption can be lost if the owner or the owner's spouse has not paid his or her state income taxes or the road and bridge privilege tax laws (aka license tag fees).

The Mississippi Department of Revenue is sending to the counties lists of taxpayers who are delinquent in paying state income taxes. The counties then seeks to collect the amount of the homestead exemption for prior years by filing a notice of reassessment in the land records and by mailing a notice of delinquent taxes to the taxpayer.

What happens when one purchases residential property before any notice of a reassessment is filed in the land records, and then after the purchase the county files a notice of reassessment for prior years? Provided that the notice was not filed at the time of the sale, Section 27-33-37(1) should protect the purchaser. This section provides in relevant part:

such reassessment shall not take effect or become a lien on the property of bona fide purchasers or encumbrancers for value without notice thereof, unless there shall have been filed prior to their attaining such status a notice of rejection in the chancery clerk's office in the county in which the property is located, which notice shall be recorded and indexed as are deeds; but the applicant shall in all cases remain personally liable for such reassessment.

What about the circumstance in which A conveys to B, then a notice is filed in the land records of a reassessment of the property because A was delinquent in paying his state taxes, and then B conveys to C? The argument would be that, while B did not have notice of the homestead at the time that B took title, C does have constructive notice of the homestead reassessment at the time the C purchases, and therefore C is not a BFP. The practical effect of making C liable for the payment is that C would require B to pay the reassessed taxes at closing of the sale from B to C. So in effect B would end up paying the additional taxes when B sold the property, even though B was protected by Section 27-33-37(1) when B purchased the property. In an opinion to Kenneth Harmon dated September 29, 2006, Opinion No. 2006-480, 2006 WL 3146996, the Attorney

General opined that B's protection under Section 27-33-37(1) would extend to all subsequent purchasers of the property. C therefore would not be liable to pay the reassessed taxes, even though C had constructive notice of the reassessment at the time that C took title.

EVANS BANKRUPTCY CASE

The bankruptcy court's decision in the first phase of the Evans bankruptcy case has been published at 460 B.R. 848 (Bankr. S. D. Miss. 2011). The case addresses a number of issues regarding the duties of title insurance companies and interpretation of title insurance policies under Mississippi law. The case probably will be appealed, but the bankruptcy court's opinion is still worthwhile reading for attorneys who deal with title insurance regularly.

NEW MISSISSIPPI CASES

Standards for Obtaining Variances Tightened

Harrison v. City of Batesville, 73 So. 3d 1145 (Miss. 2011). Memphis Stone sought a zoning variance to mine property in Batesville zoned for residential use. The zoning ordinance allowed the Board of Aldermen to grant a variance due to "practical difficulties or unnecessary hardships." This language is from the Standard Zoning Act, prepared by the Department of Commerce in the 1920's, and is common in zoning ordinances. The City's Board of Aldermen found that the variance was necessary to avoid "practical difficulties or unnecessary hardship" of the land proposed to be mined by Memphis Stone and approved the variance. Owners of land near the proposed mining site appealed to the Circuit Court of Panola County and argued that Memphis Stone had not submitted any evidence of hardship. The Circuit Court affirmed the City's grant of the variance. On appeal the Mississippi Court of Appeals affirmed. On writ of certiorari from the Court of Appeals, the Mississippi Supreme Court, in an *en banc* decision by Justice Lamar, vacated the Court of Appeals' decision, reversed the Circuit Court's decision, and remanded the case to the Board of Aldermen for further proceedings. The Supreme Court, relying on New York law, distinguished between the terms "practical difficulty", which applies to a nonuse or area (a/k/a dimensional) variance, and "unnecessary hardship," which applies to a use variance. An applicant for a use variance has a higher burden than an applicant for a non-use variance. The Supreme Court adopted the following standard from an Ohio case for proving the existence of an "unnecessary hardship":

The record must show that (1) the land in question cannot yield a reasonable return if used only for the purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances [of the land for which the variance is sought] and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

In a footnote, and citing a Missouri case, the Supreme Court stated that the owner could prove an inability to yield a reasonable return "by submitting evidence that 'he or she will be deprived of all beneficial use of the property under any of the permitted uses' and this requires "actual proof, often in the form of dollars and cents evidence." [citations omitted]. The Court also stated that

whether the hardship is self-created is relevant to determine whether to deny a use variance. The Court directed the Board to consider whether Memphis Stone leased the land at issue with actual or constructive knowledge that the land was zoned for residential uses. The Court stated that it found no evidence of “unnecessary hardship” in the record of this case, but that since this was a case of first impression, the Court was remanding the case to the Board of Alderman so that the parties would have an opportunity to present evidence in compliance with this opinion.

Note 1: This case will make it more difficult for owners to get a variance, especially a variance based on use. Seeking a variance from the use requirements has sometimes been used by owners as an end run around the more onerous, in terms of notice and public hearings, requirements of applying to change the zoning classification.

Note 2: Especially interesting is the statement that limits on use may not be deemed a “hardship” if the owner had “constructive knowledge” of how the property was zoned when the owner bought the property. Presumably the Court contemplates that a purchaser of land has constructive knowledge of how the land that is being purchased is zoned. Assuming that this is correct, under what circumstances would a purchaser not have constructive knowledge of the limits on use that the zoning ordinances impose on the property? The only circumstances that the editor can think of are if a county or city adopts zoning after the purchase of land, or if land in the county is annexed into a city, and the zoning classification is changed as a result of the annexation.

Note 3: The standard of proof for showing that no “reasonable return” can be derived from the property under the current use restrictions also seems very high. Under this case, the owner must show that it will be deprived of “all beneficial use of the property under any of the permitted uses.” Another way to state this is that if any beneficial use can be made of the property under the current restrictions on use, then a “reasonable return” exists, and the owner is not entitled to a variance. This standard sounds similar to the high standard for proving a regulatory taking under the Fifth Amendment of the U.S. Constitution. A regulatory taking occurs under the Fifth Amendment when land use regulation denies an owner economically viable use of his land. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-20 (1992).

Landlord Waived Strict Compliance of Requirements for Renewal

Kazery v. Wilkinson, 52 So. 3d 1270 (Miss. Ct. App. 2011). In 1966 Mary Kazery Eyd leased commercial property in Jackson to Courtesy Inns. The lease provided for a primary term of one year, and a series of renewal options that, if exercised, would extend the term of the lease through 2017. The lease required that the tenant’s notice of an election to exercise the right to renew must be given to the landlord. In 1985 Courtesy Inns assigned its interest as tenant to Wilkinson. In 1986 the Chancery Court of Hinds County ordered Mary’s conservator to transfer the property to Mary’s son Arnold Kazery or his designees. The property was conveyed to Arnold’s designees, his sons George Kazery and Sam Kazery. George conveyed his interest in the property to Sam in 1987, making Sam the sole owner of the property. But Wilkinson paid the rents to Sam’s father Arnold for twenty years, provided proof of payment of insurance to Arnold, and named Arnold as the named insured on the liability insurance policy required by the lease, without any objection from Sam or Arnold. Wilkinson gave timely notices of his intent to extend

the term for an additional ten years to Arnold in 1987, 1997, and for the term beginning 2007. In early 2007, a developer contacted Sam about purchasing the property. On April 20, 2007, twenty days after the deadline to exercise the option, Sam wrote Wilkinson and demanded that all future rents be sent to Sam, asking for proof of insurance, and informed Wilkinson that Sam was the sole owner of the property. Sam's letter also inquired whether Wilkinson was interested in joining Sam in hiring joint counsel regarding a sale to the developer, if Wilkinson wanted to "keep the lease." On May 1, 2007, Wilkinson sent Sam the May rent check, stated in the letter that he would have Sam added as an additional insured on the insurance policy, and declined Sam's offer to hire joint counsel. On July 12, 2007, Sam sent Wilkinson a letter stating that Wilkinson had not exercised his option to renew, and that the lease therefore would expire on July 31. Wilkinson wrote back that he had renewed the lease by giving notice to Arnold. Sam did not reply. Wilkinson continued to occupy the property, paid rent to Sam, and otherwise complied with the lease. In February 2008 Sam filed an action in the Chancery Court of Hinds County asking the court to find that the lease had not been properly renewed and therefore was terminated because Wilkinson did not properly renew. The Chancery Court's order denied Sam's claim for declaratory judgment. The Chancery Court found that Sam had never given Wilkinson notice of the 1987 deed conveying the full interest in the property to Sam. Sam let Wilkinson pay the rent to Arnold for twenty years, and did not assert his ownership in the property until the developer had approached him about buying the property. Only after the deadline to give notice to renew had passed did Sam inform Wilkinson that Sam owned the property and demanded that Wilkinson pay the rent to him rather than Arnold. While Wilkinson did not comply with the lease because he gave notice of renewal to Arnold and not Sam, the chancellor found that Sam had waived any improper notice of renewal by asking Wilkinson in 2007 to share the cost of selling their joint interests in the property. The chancellor also determined that, under these "compelling circumstances," Wilkinson was entitled to an equitable exception to the strict compliance with the requirements to renew. Sam appealed, and the Mississippi Court of Appeals, in an opinion by Justice Griffis, affirmed. The Court of Appeals wrote that Wilkinson established that he properly extended the term when he sent the notice to the person he believed to be the owner and the person to whom he had paid the rent for twenty years. The Court of Appeals noted that if Sam had given Wilkinson notice that Sam was the sole owner of the property earlier, then Sam would have been the only person entitled to receive the notice.

Note 1: This is a fact-heavy case, but the editor thinks that it has significance because it is the only exception in Mississippi that the editor has found to the general rule that the tenant must strictly comply with the terms of a renewal clause. In the case from which the chancellor distilled the equitable exception for "compelling circumstances", *Koch v. H&S Development Co.*, 163 So. 2d 710 (Miss. 1964), for example, the Mississippi Supreme Court held for the landlord and followed the rule that the tenant must comply strictly with the terms of a renewal clause.

Note 2: The courts have distinguished between the waiver by the landlord of its right to terminate a lease because of the tenant's defaults, and the landlord's waiver of the tenant's failure to comply with the requirements to renew the lease. While the courts have held that a landlord may be deemed to have waived its right to terminate the lease by failing to object timely to past defaults, the landlord will not be deemed to have waived strict compliance with the future rights to renew by allowing the tenant to exercise one renewal in a non-complying manner. See *Taranto Amusement Co. v. Mitchell Associates, Inc.*, 820 So. 2d 726 (Miss. Ct. App. 2002).

Note 3: Both the Chancery Court and the Court of Appeals found that, under the *Taranto* case, Sam's waiver of the tenant's noncompliance with the terms of the renewal right in 1987 and 1997 was not a waiver of Sam's right to insist on strict compliance with the lease requirements in 2007. But there is a subtle difference in how the Chancery Court and the Court of Appeals reached the conclusion that the lease was renewed. The Chancery Court found that Sam waived the tenant's non-compliance when Sam asked the tenant to share the cost of hiring an attorney to sell their joint interests to the developer. The Court of Appeals reasoned that Sam had opportunities to inform the tenant that Sam was the landlord rather than Arnold, and therefore the only person to whom the notice should be given. Sam did not do so, "so he cannot now complain." In other words, the Chancery Court found a waiver by Sam of the tenant's failure to give the notice, based on the contemporaneous correspondence between Sam and the tenant, and the Court of Appeals found that Sam was estopped from asserting a non-compliance because of Sam's failure to inform the tenant that Sam was the owner of the land.

Note 4: This difference between a waiver and an estoppel is important in this context because the estoppel protects the tenant from losing its right to renew if the landlord assigns the lease without the knowledge of the tenant. In most cases the new landlord will want to inform the tenant of the assignment as soon as possible so that the tenant will send the rents to the new landlord. Customarily this is accomplished by a letter signed by the original landlord and the new landlord at closing. This case is an anomaly because, for whatever reason, the new landlord (Sam) was content to let the rents go to his father Arnold for twenty years.

Note 5: The opinion does not address the fact that Sam continued to accept rent payments from the tenant even after Sam had asserted that the tenant had not properly renewed the lease. Shouldn't the acceptance of rent by the landlord be deemed a waiver and dispositive of the landlord's claim that the tenant failed to renew properly?

Full Credit Bid Bars Deficiency Even When Lender Subsequently Sells for Less Than Bid

LOL Finance Co. v. Easy Money Catfish Co, 2012 WL 310869 (N.D. Miss. , February 2, 2012). LOL Finance Company loaned money to Easy Money Catfish Company. The loan was secured by deeds of trust on real property in Humphreys County and a security interest in the borrower's personal property. On December 12, 2008, the lender foreclosed on the real property. At the sale the lender bid in the full amount of the outstanding indebtedness, \$2,404,711, and was the only bidder. After the sale, the lender obtained an appraisal showing that the property was only worth \$803,865. The lender subsequently sold the property to a third party for \$667,793. The lender filed an action for a deficiency in the United States District Court for the Northern District of Mississippi. The borrower argued that the lender's full credit bid satisfied and extinguished the indebtedness, and that the lender therefore was not entitled to a deficiency. The lender argued that in the absence of any Mississippi authority, and in light of the substantial deficiency, the court should decide the case based on equitable considerations and allow the deficiency. The district court, in an opinion by Judge Mills, granted the borrower's motion for summary judgment. The court found persuasive that the lender had consulted with counsel about the amount of the bid, and recent cases from other states that followed the "full credit bid rule," which is that when a lender bids the full amount of his debt at a foreclosure sale, the lender is

deemed to have been paid in full, and no deficiency is allowed. The district court wrote: “The court finds that the “full credit bid” rule to be such a clear and consistent rule, and it makes an *Erie*-guess that the Mississippi Supreme Court would adopt it in a appropriate case.”

Note 1: This case is not yet reported and could be appealed. The editor nevertheless thought that the issue was significant enough to mention. There are several Mississippi cases that hold that when the beneficiary purchases the property at a foreclosure sale and subsequently sells the property for more than the purchase price, the beneficiary’s deficiency is based on the sale to the third party rather than the bid price at the foreclosure sale. But there are no cases that address the situation in which the beneficiary subsequently sells to a third party for less than the bid price. In this circumstance, is the beneficiary entitled to a deficiency based on the subsequent lower sale, or is the beneficiary stuck with its bid price? Given the drop in property values since 2007, the Mississippi courts are bound to face this issue soon.

Note 2: The district court quoted a California court’s opinion about the justification for the “full credit bid” rule: “The full credit bid rule has various justifications, including that “[t]he lender, perhaps more than a third party purchaser with fewer resources with which to gain insight into the property’s value, generally bears the burden and risk of making an informed bid. [citations omitted] Further, “[t]o allow the [lender], after effectively cutting off or discouraging lower bidders, to take the property-and then establish that it was worth less than the bid-encourages fraud, creates uncertainty as to the [borrower]’s rights, and most unfairly deprives the sale of whatever leaven comes from other bidders.”

Note 3: In *Hartman v. McInnis*, 996 So. 2d 704 (Miss. 2008), the Mississippi Supreme Court held that the foreclosing lender was not entitled to a deficiency because the lender did not prove the fair market value of the property, and strongly suggested the fair market value had to be determined by an appraisal contemporaneous with the foreclosure. The lender in the *LOL Finance* case had an appraisal done after the foreclosure. The district court’s opinion does not reference the *Hartman* case. So arguably under this case, a court will not get to the *Hartman* analysis if the lender makes a full credit bid.

Note 4: If the lender bid in the full amount of its debt at the foreclosure sale of the land, what happens to the lender’s security interest in the personal property? Under *Estate of Walters v. Freeman*, 904 So. 2d 1140 (Miss. Ct. App. 2004), the lender’s security interest in the personal property is extinguished when the full amount of the secured indebtedness is bid at the foreclosure sale of the real property, and the lender cannot foreclose on the personal property.

CASES OF INTEREST FROM OTHER STATES

In *Bloomfield State Bank v. United States*, 644 F.3d 521 (7th Cir. 2011), the court held that an assignment of rents clause in a mortgage had priority over a federal tax lien filed after the mortgage was recorded. This appears to be a case of first impression. Wilson Freyermuth of the University of Missouri School of Law wrote an article about this case that is published in the September/October 2011 edition of *Probate & Property* magazine.

GENERAL

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, articles or news to the editor, Rod Clement, by mail to 188 East Capitol Street, Suite 400, Jackson, Mississippi 39201, or by email to rclement@bab.com. Although an earnest effort has been made to ensure the accuracy of the matters contained herein, no representation or warranty is made that the contents are comprehensive or without error. Summaries of cases or statutes are intended only to bring current issues to the attention of the Section's members for their further study and are not intended to and should not be relied upon by readers as authority for their own or their client's legal matters; rather, readers should review the full text of the cases or statutes referred to herein before relying on these cases or statutes in their own matters or in advising clients. All commentary reflects only the personal opinion of the editor and does not represent a position of the Real Property Section, The Mississippi Bar or the editor's law firm.