

**NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR**  
**MAY 2020**

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**MORATORIA ON EVICTIONS AND FORECLOSURES**

Governor Reeves issued Executive Order No. 1477 on April 24, 2020, that imposed a moratorium on evictions of residential properties, Executive Order No 1484, issued on May 14, 2020, provides that the moratorium on evictions will expire on June 1, 2020. There has not been a moratorium on eviction of commercial tenants.

There is no moratorium on foreclosures under Mississippi law.

The federal CARES Act imposed a moratorium on residential evictions by borrowers with certain federally backed loans. This moratorium only applies to evictions resulting from non-payment of rent, and not to other defaults. Guidance from HUD about the moratorium on evictions is available at <https://www.hud.gov/sites/dfiles/PIH/documents/PIH-HCV-Mod-Rehab-Eviction-QA.pdf>.

HUD also has imposed a moratorium on foreclosures of FHA-insured mortgages, and evictions of persons from properties securing FHA-insured mortgages, through June 20, 2020. The moratorium does not apply to vacant or abandoned properties. A copy of the letter from HUD to mortgagees is available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/2020-13hsngml.pdf>.

Executive Order No. 1477 of the Governor of Mississippi states in relevant part, “Nothing in this Executive Order shall limit or alter the authority of any local or county authority from adopting orders, rules, regulations, resolutions and actions that are more strict than those established herein,....” Can municipalities and counties in Mississippi enact restrictions on evictions and foreclosure? Local governments in other states have enacted local ordinances to protect tenants and mortgagors. For example, the City of Seattle, Washington has enacted ordinances that create a defense to eviction for failure to pay rent during or within six months after the declared emergency if the tenant declares a financial hardship; allow tenants who miss

rent payments during or within the six-month period following the emergency to repay in installments with no interest or penalty; and prohibit landlords from evaluating a prospective tenant by considering an eviction that occurred during or within six-months after the declared emergency, and creates a rebuttable presumption against a landlord with knowledge of an eviction during that period who decides not to rent to the tenant. Could a municipality in Mississippi adopt similar ordinances?

## RECENT CASES

### Statutory Obligation to Reappraise Sixteenth-Section Land Prevails Over Lease Terms

*Oak Grove Marketplace, LLC v. Lamar County School District*, 287 So. 3d 924 (Miss. 2020). Section 29-3-69 of the Mississippi Code requires that the rent in a sixteenth-section lease be adjusted every ten years. Oak Grove Marketplace, LLC (the “Lessee”) and the Lamar County Board of Education (the “Board”) entered into a lease of sixteenth-section land on August 5, 2002. The lease was on a form provided by the Secretary of State’s office. The lease was for forty years, with an annual rent payment due on August 5 of each year. The initial rent payment was \$8,450. The lease provided that the Board had the right to reappraise the property during the sixty-day period before the tenth, twentieth and thirtieth anniversaries of the lease, being August 5, 2012, August 5, 2022, and August 5, 2032. The Board did not reappraise the property on August 5, 2012. The Board reappraised the property as of April 11, 2017. Based on the appraisal, the Board informed the Lessee that the rent would be increased to \$32,250 beginning August 5, 2017. The Lessee objected, asserting that under the terms of the lease, the Board had missed its opportunity to reappraise property and adjust the rent on August 5, 2017, and that the rent could not be adjusted again until August 5, 2022. The Board argued that Section 29-3-69 required it to reappraise the property and adjust the rent regardless of what the lease said. The Lessee paid \$8,450 and filed an action in the Chancery Court of Lamar County. The Lessee asked for a declaratory judgment that the lease did not permit a reappraisal until August 22, 2022. The chancery court held that although the Board missed the sixty-day window to reappraise under the lease, Board’s statutory obligation under Section 29-3-69 required it to reappraise and adjust the rent every ten years, and therefore denied the Lessee’s motion for declaratory judgment. On interlocutory appeal, the Mississippi Supreme Court, in an opinion by Justice Maxwell, affirmed. The Lessee argued that the lease must comply with sixteenth-section law because the Secretary of State’s office promulgated the form of lease, and the Secretary of State is the state official with the responsibility for sixteenth-section lands. The Supreme Court wrote that the courts, not state agencies, interpret the law, and that to the extent that the lease permitted the Board to go more than ten years between reappraisals and readjustments of rent, the lease was void. The Lessee argued that the lease was binding because when a state entity like the Board enters into a lease or other contract with a private party, the state entity had to abide by the terms of the contract. While a state entity can waive some rights, such as immunity, the trust duties of a school board cannot be waived. The Supreme Court affirmed the chancery court’s decision to allow the school board to adjust the rent outside the terms of the lease and remanded the case to the chancery court to consider the remaining issues.

Note 1: The Secretary of State’s forms of sixteenth-section lease can be downloaded from the Secretary of State’s website. There are probably hundreds of sixteenth-section leases in effect

that use the Secretary of State's form and that contain the language that the Supreme Court has found to be inconsistent with the statute.

Note 2: The Supreme Court, as it should, only answered the narrow question before it of whether the school board's duty of to reappraise the property and adjust the rent every ten years could be limited by the terms of the lease. That still leaves open the question of what happens when a school board fails to do this. The possibilities are myriad. In this case, the Board took the position that the adjusted rent was due on the next date that the annual rent was due, August 17, 2017, and that the next appraisal and adjustment of rent would be ten years later, in 2027, rather than the next adjustment date in the lease of 2022. Does the Board have the right under the lease to reappraise and readjust the rent in 2022 rather than 2027? And what about the rent from 2012, the date that the Board should have reappraised and adjusted the rent, until 2017? Does the Board have any obligation to try to recover any additional rent to which it would have been entitled if it had reappraised the property in 2012 as contemplated by the lease? Is it even possible to get an appraisal today of what land was worth in 2012? The parties and the chancery court will have to work through these issues on remand. If this case involved a private lease, the landlord and tenant probably would negotiate a mutually agreeable number. The fact that this case involves a sixteenth-section lease limits the range of options to compromise.

Note 3: The Secretary of State's Office has prepared and posted online a Policies & Procedures Manual that is a great source of information about sixteenth section leases and management. [https://www.sos.ms.gov/content/documents/lands/Lands%20Handbook\\_2020.pdf](https://www.sos.ms.gov/content/documents/lands/Lands%20Handbook_2020.pdf) This Manual addresses late adjustments and provides on page 767 that when the rent has not been adjusted, the board of education should get a new appraisal and adjust the rent, and then "should resume with the rental adjustment schedule found within the terms of the lease, and not otherwise alter the schedule. For instance, if the ten-year rent adjustment occurs during year thirteen (13) of the lease, the next rental adjustment should still occur during year twenty (20)." In this case the Board argued that by adjusting the rent outside the terms of the lease, it was attempting to comply with the Secretary of State's policy. Under the facts of this case, wouldn't the policy quoted above require that the property be reappraised and the rent adjusted in 2022?

Note 4: If the rent adjustment clause in a sixteenth-section lease is not enforceable, is there an argument that the entire lease is void? The Supreme Court addressed this question in footnote 6. The Supreme Court followed general contract law and, quoting from a 2002 case, wrote that "if a court strikes a portion of the agreement as void, the remainder of the contract is binding."

Note 5: Drafting rent adjustment clauses in long-term ground leases that attempt to capture changes in the value of the land is notoriously tricky. Superimposing the body of sixteenth-section law on top of this makes this task even more challenging.

#### County Cannot Rescind Abandonment of Road Without Notice and Opportunity to be Heard

*Tippah County v. Leroses*, 283 So. 3d 149 (Miss. 2019). A county road ran through land owned by the Leroses. The Tippah County Board of Supervisors scheduled a public hearing to address abandoning the road. Notice of the hearing was published in the local newspaper. The Board held the hearing on February 27, 2015 and issued an order to abandon the road. [Although the case does not expressly state this, the Leroses, as owners of the land on both side of the county

road, would have gotten title to the land adjacent to their land over which the road ran.] On August 15, 2016, the Board, at a regular meeting, entered an order rescinding the order abandoning the road. The Board found that the abandonment had been “illegal due to the lack of proper due process to the proper landowners,” though what was lacking in the notice and hearing was not identified. The Board gave no notice of this reconsideration other than the notice given for regular board meetings. The Leroses did not file an appeal from the Board’s decision within ten days as provided in Section 11-51-75, which provides for appeals from decisions of boards of supervisors. The Leroses filed a complaint in the Circuit Court of Tippah County and asked for a declaratory judgment that the August 15, 2016 order was void and that they were entitled to damages for the Board’s unconstitutional taking of their property without compensation. The county argued that the public has constructive notice of regular meetings of the Board of Supervisors, and that no additional notice was necessary. The Circuit Court granted partial summary judgment to the Leroses, holding that the county’s interest in the land had terminated when the Board’s February 2015 order became effective. The county filed an interlocutory appeal. The Mississippi Court of Appeals, in a unanimous decision by Justice Ishee, affirmed that the Board’s order of August 15, 2016 rescinding its previous action was void. No statute explicitly requires notice of a hearing to reconsider a prior decision of a board of supervisors. But even in the absence of a statutory provision, notice and a hearing often may be necessary to comply with the constitutional requirement of due process. The Leroses had a vested property right in the land at the time of the Board’s reconsideration. The county’s position that constructive notice was adequate was not tenable. Although the Leroses did not file an appeal within ten days after the Board’s order as provided in Section 11-51-75, a direct appeal is not the exclusive remedy when the owner did not receive notice if notice was required.

Note 1: This decision leaves the editor with more questions than answers. For example, does the county have a right to reconsider its prior decision to abandon the road? The Court of Appeals’ decision does not state that the Board of Supervisors could not reconsider its prior decision, only that the notice was inadequate. The decision does not identify the reason why the Board in August 2016 found that the notice of the February 2015 hearing was inadequate. Section 65-7-121 of the Mississippi Code provides that in order to abandon a county road, “the board of supervisors shall hold a public hearing on the question of such abandonment and shall publish notice of such hearing at least two (2) times, not less than two (2) weeks prior to the date of the hearing, in a newspaper having general circulation in the county.” If the notice of the February 2015 hearing did not meet these statutory requirements, then isn’t the Board within its rights to rescind the order abandoning the road? But if the notice of the February 2015 hearing did meet the statutory requirements, then it seems to the editor that the Board does not have the right to rescind its prior decision; rather, the Board would have to go through the process of eminent domain to re-acquire the land. Presumably the Circuit Court of Tippah County addressed the adequacy of the February 2015 notice before it granted summary judgment to the LeRoses.

Note 2: The opinion of the Court of Appeals states that a county (and presumably a municipality, administrative agency or any governmental entity) may have to give notice and opportunity to be heard in some circumstances when no statute requires notice. What sort of notice does the county have to give? Personal service, notice by mail, publication in the local newspaper for one week, publication in the local newspaper for two weeks? Quoting from a 1999 case by the Mississippi Supreme Court, the Court of Appeals wrote, “the Mississippi Rules of Civil Procedure will

control the amount of notice that a landowner should be given after a complaint is filed.” What about cases like this one, when notice of a hearing is required, and no complaint is involved? As noted above, Section 65-7-121 only requires notice by publication, while personal service of process is required in an eminent domain action to take land.

Note 3: The plaintiffs asked for damages for the county’s unconstitutional taking of their land. Since the Court of Appeals has affirmed that the Board of Supervisors’ ordering rescinding the abandonment of the road is void, are the plaintiffs entitled to any damages?

Note 4: This opinion does not identify the source of the requirement of due process. There is a right to due process under the Fifth and Fourteenth Amendments of the United States Constitution as condition of a taking of property, of course, but Section 14 of the Mississippi Constitution also provides that “No person shall be deprived of life, liberty or property except by due process of law.” Presumably the outcome in this case would be the same under the state and federal constitutional provisions. The significance of prevailing under a federal due process claim as opposed to a state due process claim is that in some circumstances the plaintiff who prevails on a federal due process claim is entitled to an award of attorneys’ fees, although the editor has not researched whether an award of attorneys’ fees would be appropriate under the facts of this case.

Note 5: It would be interesting to know more facts about the road abandonment. In the editor’s experience, most road abandonments are initiated by adjacent landowners rather than the local government. Did the Leroses request the Board to abandon the road? Were the Leroses the only landowners affected by the abandonment of the road? If so, the failure to give actual notice rather than constructive notice seems more egregious and arguably may support a substantive due process claim in addition to the procedural due process claim.

#### Easement By Necessity Extinguished When Other Means of Access Acquired

*Sullivan v. Maddox*, 283 So. 3d 222 (Miss. Ct. App. 2019)(*en banc*). The Court of Appeals held that an easement by necessity was extinguished when the owner of the benefitted parcel acquired other means of access to the property..

#### Former Owner of Land Who Did Not Redeem Does Not Have Standing to Challenge Tax Sale

*Burns v. Sonador REI LLC*, 283 So. 3d 246 (Miss. Ct. App. 2019). Burns failed to pay the ad valorem taxes assessed to his property in 2012. The property was sold to the State of Mississippi at the tax sale. Burns did not redeem the land during the two-year redemption period. In 2016 the State granted a patent to the land to Sonador REI LLC. Sonador REI filed an action in the Chancery Court of Hinds County to confirm the tax title, which was confirmed. Burns filed a motion set the judgment aside. The Chancery Court denied Burns’ motion because Burns failed to challenge the validity of the tax sale. On appeal by Burns, the Mississippi Court of Appeals, in a unanimous opinion by Justice Lawrence, affirmed on the basis that Burns had no standing to challenge the tax sale. Section 29-1-21 of the Mississippi Code provides in relevant part that

“courts shall not recognize claims by the original owners, his heirs or assigns after unredeemed lands are sold to the state for taxes...” Since Burns did not provide any proof that he paid the taxes, did not try to redeem the land, and did not challenge the validity of the tax sale or the Secretary of State’s handling of the sale of the patent, Burns had no standing to challenge the judgment confirming the tax title.

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