

No. _____

In The
Supreme Court of the United States

BAY POINT PROPERTIES, INC.
f/k/a BP Properties, Inc.,

Petitioner,
v.

MISSISSIPPI TRANSPORTATION COMMISSION and
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,

Respondents.

**On Petition for a Writ of Certiorari
to the Supreme Court of Mississippi**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An inverse condemnation jury determined the Mississippi Transportation Commission (MTC) ceased using a highway-purpose easement granted to it in 1952 by Petitioner's predecessor-in-title for a specific bridge, "Toll Project No. 1," the U.S. Highway 90 crossing of Bay St. Louis. In 2005, Hurricane Katrina destroyed the bridge. MTC removed Toll Project No. 1 and built an entirely new bridge in a different location, and converted the majority of Petitioner's land into a public recreational park. This discontinued the specific use authorized by the easement, and Petitioner should have immediately recovered unencumbered possession. The jury determined MTC's new uses were not highway purposes within the 1952 easement, and MTC had taken Petitioner's property. The court, however, instructed the jury to calculate compensation as if Petitioner's land was still encumbered by the 1952 highway-purpose easement. A Mississippi statute gives MTC the absolute discretion to formally abandon highway-purpose easements. Because MTC had not done so, the jury only awarded a nominal \$500, and not \$16 million—the value of the unencumbered land. The Mississippi Supreme Court affirmed, conflicting with the Federal Circuit and the Court of Federal Claims.

This petition presents two questions:

1. Does the Just Compensation Clause prohibit a legislature from limiting how just compensation for a taking is calculated?
2. Does the Just Compensation Clause allow the jury to value the fee interest taken as if it were still encumbered by the discontinued highway easement?

PARTIES TO THE PROCEEDING

Bay Point Properties, Inc., formerly known as BP Properties, Inc., petitioner on review, was the plaintiff-appellant below.

The Mississippi Transportation Commission and the Mississippi Department of Transportation were the defendants-appellees below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Bay Point Properties, Inc. states that it is a privately-held Mississippi corporation. It has no parent corporation. All of the stock of Bay Point Properties, Inc. is privately held by individuals, and no public entity holds 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Bay Point Properties, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS BELOW

The majority opinion of the Mississippi Supreme Court (App. 1-21), and the two-Justice dissent (App. 21-30) are reported at 201 So. 3d 1046. The Final Judgment of the Circuit Court of Harrison County (App. 31-32) is not reported.

JURISDICTION

The Mississippi Supreme Court entered judgment on July 21, 2016. The court denied rehearing (App. 37-38) on November 3, 2016. On December 7, 2016, Justice Thomas extended the time to file this petition up to and including March 3, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Just Compensation Clause of the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Section 65-1-123 of the Mississippi Code provides:

(5) All easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes, and when released, they

shall be filed by the department in the office of the chancery clerk in the county where the property is located.

(6) In no instance shall any part of any property acquired by the commission, or any interest acquired in such property, including, but not limited to, easements, be construed as abandoned by nonuse, nor shall any encroachment on such property for any length of time constitute estoppel or adverse possession against the state's interests.

(7) It is the intent of the Legislature that the Transportation Commission shall declare property it has acquired and which is no longer needed for public purposes as excess and to sell and/or dispose of such excess property in accordance with the provisions of this section as soon as practicable after such property becomes excess in fact. Unnecessary or excess property or property interests shall be disposed of only upon order of the Transportation Commission on its minutes as provided in this section.

Miss. Code. Ann. § 65-1-123(5)-(7) (Rev. 2012). The entirety of this statute is reproduced at App. 39-44.

INTRODUCTION

A Mississippi statute compelled an inverse condemnation jury to value Bay Point's land as if it continued to be burdened by an easement the jury had determined the Mississippi Transportation Commission (MTC) no longer used for its original highway purpose. The jury was instructed to award a nominal \$500, not the \$16 million the property was worth.

The statute deems a highway-purpose easement to continue in perpetuity unless formally released by MTC, even when—as the jury determined here—it no longer used the easement for highway purposes. The court instructed the jury to calculate compensation as if Bay Point's land was subject to a highway-purpose easement in both its "before" and "after" condition, even though MTC converted the land into a public park and a different highway project. Over a two-Justice dissent, the Mississippi Supreme Court affirmed. The statute, not the Just Compensation Clause, controlled the amount Bay Point received for the permanent physical occupation of its land.

This end-run around the Fifth Amendment directly conflicts with decisions of this Court that the self-executing nature of the Fifth Amendment means it cannot be impaired or limited by the legislature. It also conflicts with this Court's rulings that full and perfect compensation is required when an easement is abandoned or terminated by nonuse, or by being put to a use different than that granted. The Mississippi ruling also directly conflicts with two courts with nationwide jurisdiction over takings claims against the federal government, the Federal Circuit and the Court of Federal Claims. These courts require that land which should be free of encumbrance

as a result of an easement holder abandoning it or putting it to a different use, cannot be valued as if still burdened by the discontinued easement. Finally, Mississippi also conflicts with other lower courts which conclude that a legislature cannot limit the right to Just Compensation, either by affirmative action, or by inaction.

It has been more than three decades since this Court last provided guidance on the Just Compensation Clause. *See United States v. 50 Acres of Land*, 469 U.S. 24 (1984). The lack of attention is not because the law governing compensation is settled, uniformly applied, and truly “just,” as the decision below makes painfully clear. To the contrary, this Court’s long absence has permitted the lower courts to wander in the jurisprudential wilderness, employing compensation rules starkly divergent from the standards established by this Court, with bizarre and inequitable results.

STATEMENT

I. FACTS

A. The 1952 Toll Project No. 1 Highway Easement

Bay Point owns a 14.34-acre parcel in Harrison County, Mississippi, which it purchased in 1993 from the estate of Wallace C. Walker. The beachfront parcel is on Henderson Point, the eastern side of the mouth of the Bay St. Louis.

In 1952, the Mississippi State Highway Commission (MSHC) sought to take Walker’s land by eminent domain, and declared it was in the public inter-

est to use it for highway purposes, specifically Toll Project No. 1, the U.S. Highway 90 bridge spanning the entrance to the Bay. The resulting condemnation order allowed the building and operation of U.S. Highway 90 on Walker's property incorporating the specific "plans and specifications" of Toll Project No. 1. App. 53.¹ To settle the eminent domain suit, Walker agreed to grant a highway-purpose easement to MSHC (now MTC), for Toll Project No. 1. App. 3. The state built the bridge, using Walker's property for the eastern ramp.

B. Hurricane Katrina Destroyed Toll Project No. 1

For more than fifty years, MTC operated the Toll Project No. 1 bridge, until Hurricane Katrina struck the Gulf Coast on August 29, 2005. The bridge, along with a lot of other property in Mississippi and Louisiana, was destroyed. See DeNeen L. Brown, *On Mississippi's Gulf Coast, what was lost and gained from Katrina's fury*, The Washington Post (Aug. 25, 2016), https://www.washingtonpost.com/local/on-mississippi-gulf-coast-what-was-lost-and-gained-from-katrina-fury/2015/08/26/2c00956a-4313-11e5-846d-02792f854297_story.html. ("Highway 90, the Mississippi coast's main artery, was broken. The storm buckled bridges like dominoes. . . .").

¹ Minutes of the Meeting of Highway Commission (Jan. 22, 1952) ("[I]t is necessary to take for public use the following described property . . . of Wallace C. Walker, along U.S. Highway No. 90, being described as a strip of land . . . known as Federal Aid Project No. Toll Project No. 1, as more particularly shown by the plans and specifications for said project . . . which plans and specifications are made a part hereof . . .").

Rather than repair the Toll Project No. 1 bridge, MTC elected to redesign and relocate it on a different road bed for the approach of new U.S. Highway 90, which required the acquisition of additional property for the right-of-way. As a result, MTC discontinued and physically removed the remnants of Toll Project No. 1 from Bay Point's land.

C. MTC Converted Bay Point's Land Into A Public Community Park And A Different Bridge

After the new U.S. Highway 90 was relocated and open to the public, MTC also began construction of Henderson Point Community Park, a public recreational park on the remaining portion of Bay Point's land previously occupied by Toll Project No. 1's road bed. Henderson Point Community Park provides public rest, recreation, and parking areas, and includes a perimeter pedestrian track, a concert lawn, two pavilions, and small buildings to house sanitary facilities. *See Henderson Point Community Park, <http://www.harrisoncountyparks.us/henderson-point-community-park>.* A map of the site is reprinted at App. 56 (footprint of Toll Project No. 1 is in red; Bay Point's 14.34 acre tract is in green; and the new Highway 90 is in magenta).

When Bay Point learned of MTC's intentions, it objected to the changes in use and insisted that MTC stop construction, asserting that the park and the new bridge were outside the scope of the Toll Project No. 1 easement. Initially, MTC agreed to purchase Bay Point's land to be used for the park. It agreed to survey the property and to commission two appraisals. It also agreed that once the appraisals were complete, it would make a good faith and reasonable offer

to purchase the land from Bay Point. In return, Bay Point agreed not to seek to enjoin the park's construction. The Director of the Mississippi Department of Transportation's Right-of-Way Section acknowledged that it would need to purchase some of Bay Point's land: "[MDOT] has already let a project to build a roadside park & we learned that we don't own fee title, only an easement. . . . This could turn into an inverse condemnation lawsuit if we don't make progress."

MDOT surveyed and appraised the land as agreed, which resulted in a value of \$8,788,650 for a portion of Bay Point's land which was being used for the park. MDOT's senior appraiser acknowledged that MDOT's "offer of what is believed to be just compensation for the acquisition of the real property rights specified." But after MTC completed building the park, it informed Bay Point that the Toll Project No. 1 highway-purpose easement continued, and that MTC was authorized to build the park on it. Despite its previous agreement, MTC informed Bay Point it would not be purchasing the land.

Since that time, the park has been operated by Harrison County, and is being used by the public.

II. PROCEEDINGS BELOW

A. Bay Point's Inverse Condemnation Lawsuit

Discontinuance of MTC's use of the land for Toll Project No. 1 should have resulted in Bay Point having exclusive, unencumbered use of its property as

the fee owner.² MTC’s use as a park and new U.S. Highway 90—both uses beyond the scope of the 1952 Toll Project No. 1 easement—allowed the public to physically occupy Bay Point’s land, permanently. Because MTC refused to pay any compensation, Bay Point brought an inverse condemnation lawsuit in Harrison County under both the Fifth Amendment and the Mississippi Constitution.

B. Jury Instructions

The case was tried before a jury in 2013. It was instructed of its obligation to award compensation under both the Just Compensation Clause and the Mississippi Constitution. App. 52 (Instruction P-2A). It determined that MTC and MDOT were not using Bay Point’s land for highway purposes, and found in favor of Bay Point on the inverse condemnation claim. Over Bay Point’s objection, however, the trial court also instructed the jury it could not conclude that discontinuance of the original purpose of the easement resulted in abandonment:

Finally, in no instance shall any part of any property acquired by the commission, or any interest acquired in such property, including,

² See *Mississippi Highway Comm’n v. McClure*, 536 So. 2d 895, 896 (Miss. 1988) (“The right-of-way easement granted to the MSHC by the Edmonson and Expose deeds was for a specific public right-of-way of a certain highway, U.S. Highway 49. When the MSHC determined that a portion of that easement was no longer needed by the public, the easement ceased to exist. Since the public acquired a mere easement, the fee title remaining in the landowner was no longer burdened by the easement.”).

but not limited to, easements, be construed as abandoned by nonuse.

App. 51 (Instruction D3-A). *See also* App. 48 (Instruction D2-A) (“The court further instructs the jury that an easement encumbers, or is still over and upon the land unless it has been abandoned by [MTC].”). Instead, the court instructed the jury, “in order to prevail on the issue of abandonment,” Bay Point must have proven that MTC formally abandoned the highway easement pursuant to section 65-1-123, an action which the agency concededly had not undertaken. App. 51. The court also instructed the jury that formal abandonment on the minutes under the statute was the only way that MTC’s highway easement could have been abandoned. *Id.*

The court instructed the jury how it must calculate compensation, and gave it three options:

First, if MTC’s current uses of Bay Point’s land were highway purposes, the jury would award no damages. App. 45 (Instruction No. D-7A).

Second, if Bay Point’s land was not being currently used by MTC for a highway purpose, but MTC had not formally abandoned the 1952 easement on its minutes, the jury was instructed to award a nominal amount, between \$100 and \$500 for the taking. *Id.*

Third, if MTC’s current uses of Bay Point’s land were not highway purposes, and MTC had expressly abandoned the 1952 easement on its minutes under section 65-1-123, the jury was instructed, “you may award the plaintiff just compensation for any such taking, just compensation being what you determine to be the difference between the fair market value of

the property taken after proper application of the before and after rule.” *Id.* at 46.

C. Jury Verdict

Because the jury concluded that MTC’s present uses of Bay Point’s land are not within the scope of the 1952 easement, but also that MTC had not formally abandoned the easement on its minutes pursuant to section 65-1-123, it could only take the second option. It concluded that there was a taking of all of Bay Point’s property, but that it was only entitled to a nominal sum of \$500; the jury could not award just compensation under option 3.

D. Mississippi Supreme Court

The Mississippi Supreme Court affirmed over a two-Justice dissent. The majority concluded that section 65-1-123 prohibited MTC from abandoning the 1952 easement by nonuse or a change in use, and that the only way it could abandon was under the statute’s formal procedures. App. 6-7 (“Per the statute, the easement could not have been abandoned by *nonuse*. Release (*i.e.*, termination or abandonment) requires a determination on the minutes. Therefore, any evidence of abandonment other than minute entries is irrelevant and inadmissible.”) (emphasis in original). The majority rejected the argument that calculation of just compensation is for the judiciary, and not the legislature or an executive agency. *Id.* at 7 (“The dissent’s separation-of-powers argument is misplaced. The Legislature has decreed that it is the Transportation Department’s prerogative whether to release a highway easement. MTC is the entity charged with transportation-related policy decisions, not this Court.”) (citations and footnote omitted).

Moreover, the majority rejected Bay Point’s argument that the Just Compensation Clause required valuation of the land unencumbered by MTC’s easement, regardless of section 65-1-123’s formal requirements. *Id.* at 11-12 (“However, the compensation owed would be the value of the property, subject to the easement, and could not exceed a sum evidenced by the proof offered.”). The majority also concluded the trial court properly rejected Bay Point’s proposed jury instruction which would have based compensation on the unencumbered value of its land if the jury concluded that MTC’s “current uses of the Property . . . are outside the limited and specific scope of the Easement granted.” *Id.* at 13.

Two Justices dissented, reasoning that “a state statute cannot be applied in a manner that thwarts a landowner’s state and federal constitutional rights to just compensation for a governmental taking of private property.” *Id.* at 22. Relying on the Federal Circuit’s opinion in *Preseault v. United States*, 100 F.3d 1525, 1551-52 (Fed. Cir. 1996), the dissenting Justices “would reverse and remand for a determination of just compensation owed to Bay Point for the taking of its property unburdened by the easement.” App. 22.

The majority affirms a verdict that violated Bay Point’s federal and state constitutional rights to just compensation for the taking of its property for public use. This Court errs by interpreting Sections 65-1-123(5) and (6) in a manner that violates Bay Point’s right to just compensation. Because the jury found that the MTC’s easement no longer was being used for highway purposes, Bay Point was entitled to just compensation for the value of the property

unencumbered by the easement. I would reverse the judgment and remand this case to the trial court for a determination of just compensation for the unencumbered value of the property.

App. 30. Bay Point sought rehearing, which the court denied over the same two-Justice dissent. App. 37-38.

REASONS FOR GRANTING THE PETITION

I. MISSISSIPPI DECIDED AN IMPORTANT FEDERAL QUESTION IN SHARP CONFLICT WITH DECISIONS OF THIS COURT

A. Just Compensation Is Self-Executing And Cannot Be Impaired By Statute

More than a century ago, this Court expressed the separation-of-powers rule that the legislature has no power to dictate how much compensation is paid for a taking. The requirement of Just Compensation springs from the Constitution itself, and the power to determine it is reserved for the courts. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1892) (Although a “legislature may determine what private property is needed for public purposes . . . the question of compensation is judicial.”).

In *Monongahela*, Congress authorized the acquisition of a privately-owned lock. The owner also had the authority to collect tolls from river traffic. Congress appropriated money for compensation, but directed that whatever amount was paid for the taking, it could not include the value of the tolls. The owner appraised the value of the lock and the value of the right to collect tolls at \$450,000. After trial, the court awarded the owner \$209,000, which in accordance

with the statute was the value of the taken lock alone, “not considering or estimating . . . the franchise of this company to collect tolls.” *Id.* at 319.

This Court rejected that approach, concluding that calculation of just compensation is a judicial function, and that a legislature can neither establish the amount to be paid in compensation for a taking, nor dictate the method used to calculate it. *Id.* at 327 (“By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question.”). The Just Compensation Clause requires payment of “the full and perfect equivalent for the property taken.” *Id.* at 326. The Court noted a Mississippi decision which held that permitting the legislature to set or determine the amount of compensation paid would allow it to “constitute itself the judge in its own case.” *Id.* (quoting *Isom v. Mississippi Cent. R.R.*, 36 Miss. 300, 315 (1858)).

But in the case at bar, the Mississippi Supreme Court overlooked both this Court’s decisions and its own *Isom* case. It allowed the legislature’s delegation of discretion to MTC (an executive branch agency) to decide whether to formally abandon a highway easement to determine how Bay Point’s land could be valued by the jury. The court accepted the jury’s judgment the state was no longer using Bay Point’s land for highway purposes. App. 2, 4, 11-12, 19, 22. But applying Mississippi’s roadbanking statute, the majority concluded that “easements for highway purposes can be released only when MTC determines on its minutes that it no longer needs the property for highway purposes.” App. 17. As a consequence, the jury was prohibited from awarding just compensation based on the taking of the unencumbered property,

and could only value it as if it remained burdened by the Toll Project No. 1 easement, even though that use had in fact ceased forever. Instead of valuing Bay Point's property as fee simple absolute, the jury was instructed to treat it as permanently physically occupied by the public.

That conclusion is contrary to this Court's rulings, which hold that the Fifth Amendment has a "self-executing character . . . with respect to compensation." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987). This recognition began with Justice Brennan's recognition that "[a]s soon as private property has been taken . . . the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting on other grounds) (internal citations and quotations omitted).

Six years later, Justice Brennan's dissent was adopted by the Court's majority, which held that just compensation must be provided once a taking has occurred. *First English*, 482 U.S. at 315. That case involved a temporary regulatory taking by a municipality, but the principle is equally applicable when the state continued to treat Bay Point's property as if it were still encumbered by a specific highway-project easement, even after it converted it into a public park and an entirely new bridge project. *Id.* at 315 ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation[.]'"). As Justice Brennan noted, "[t]his Court has consistently recog-

nized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a ‘taking,’ compensation must be awarded.” *San Diego Gas & Electric Co.*, 450 U.S. at 654 (Brennan, J., dissenting) (citing *Jacobs v. United States*, 290 U.S. 13 (1933)); *see also First English*, 482 U.S. at 316 n.9 (“[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking”).

A state statute cannot thwart or limit that self-executing right. *Jacobs*, 290 U.S. at 17 (the “right to just compensation could not be taken away by statute or be qualified”). In other words, the right to recover just compensation for property taken for public use cannot be burdened by state law limitations, particularly legislatively-created limitations on how an easement is formally abandoned. This is true whether the legislature directly limits the amount of compensation (as in *Monongahela*), or indirectly limits it (as here by superseding the common law regarding how easements are abandoned by nonuse or conversion to a different use). The very nature of constitutional rights is that they cannot be interfered with by a legislature, a principle which extends back to at least *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) (“It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.”).

The Just Compensation Clause embodies that principle, because as a self-executing right, compensation flows as the natural consequence of a taking, and cannot be limited or restricted. The Just Compensation Clause is designed “to bar Government from forcing some people alone to bear public burdens

which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Mississippi cannot use Bay Point’s land for a public park and a different bridge in perpetuity and not pay for it, when all Walker allowed the state to use his land for was Toll Project No. 1. The jury determined MTC no longer uses that land for that purpose. MTC cannot avoid the requirements of the Constitution simply because the Mississippi legislature decreed how an easement is formally abandoned under state law.

B. The Right To Compensation Does Not Turn Upon A State Statute

1. *Preseault*: Abandoned Easements Converted To Public Parks Trigger Compensation

“An easement,” as this Court noted recently in *Marvin M. Brandt Rev. Tr. v. United States*, 134 S. Ct. 1257 (2014), “is a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement. Unlike most possessory estates, easements may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude. In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.” *Id.* at 1258.³ In *Brandt*, this Court held that

³ This is hardly a new or novel rule. See, e.g., *Harris v. Elliott*, 35 U.S. (10 Pet.) 25, 55 (1836) (“upon the discontinuance of the highway, the soil and freehold revert to the owner of the land” and the easement is extinguished). It is also the common law of (footnote continued on next page)

railroad rights-of-way are common law easements granted for the specific purpose of operating a railroad, and terminate when no longer used for that original purpose. *Brandt*, 134 S. Ct. at 1265-66. The Court thwarted an attempt to rewrite the rules to avoid the right to compensation, and emphatically reaffirmed the principle that using an easement in a way different than the use granted triggers that right.

That principle had its genesis in *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990) (*Preseault I*), where the Court held that converting abandoned railway easements to recreational trails

gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations.

Id. Three Justices of this Court concurred, emphasizing that “[a] sovereign, ‘by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.” *Id.* at 23 (quoting *Webb's Fabu-*

Mississippi. See *Campbell v. Covington Cnty.*, 137 So. 111, 112 (Miss. 1931). Termination may be accomplished by formal release agreement or by acts *in pais*. *Columbus & Greenville Ry. Co. v. Dunn*, 185 So. 583 (Miss. 1939).

lous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)).

In *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (*Preseault II*), the Federal Circuit confirmed that when an abandoned rail easement is converted into a public park, the issuance of a Notice of Interim Trail Use (NITU) under the Trails Act, 16 U.S.C. § 1241 *et seq.*, prevents the usual abandonment, but that just compensation still must be paid. Railbanking interferes with the operation of state property law by preventing owners of land subject to abandoned rail easements from exercising their unencumbered rights. Compensation turns on the scope of the easement and the present use, not whether an easement has been formally “abandoned.” *Id.* at 1555.⁴ What *Preseault I* and subsequent cases require is that even if the legislature rearranges common law easement rules, it cannot avoid the self-executing Just Compensation Clause.

The factual situation and legal rules in rails-to-trails cases and this case are remarkably similar, and the Mississippi Supreme Court’s ruling squarely conflicts with these decisions. In both, when an easement terminates by nonuse or a change in use, the owner’s

⁴ See also *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) (“It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action destroys state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement.”); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004) (“[i]t is elementary law that if the Government uses (or authorizes the use of . . .) an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner’s property for the new use.”).

fee estate should be free of encumbrances, and the owner should have the exclusive right to use and possess the land. *See Brandt*, 134 S. Ct. at 1266 n.4; *Preseault II*, 100 F.3d at 1533. In rails cases, the Trails Act thwarts the fee estate owner's ability to use her land freely, while in the case at bar, section 65-1-123 has the same effect. Putting the land to a different public use is a taking, resulting in the obligation to pay the full and perfect equivalent—the difference between the land in its “before” condition (unencumbered by the discontinued highway easement) and its “after” condition (use for non-highway purposes). We are not challenging the Mississippi legislature's power to supersede common law rules. Bay Point merely seeks the remedy which the Just Compensation Clause imposes as the constitutional consequence flowing from MTC's actual change in use of Bay Point's land.

2. Statutory Abandonment Is Irrelevant To Compensation

The Mississippi court tried to avoid *Preseault I* and its Federal Circuit progeny by concluding that section 65-1-123 cut off Bay Point's right to just compensation by requiring the jury to value its fee simple interest as if it remained encumbered by the Toll Project No. 1 easement. But Just Compensation is not governed by requirements established by state legislatures about whether an easement is formally “released” or “abandoned.” *Geneva Rock Prods., Inc. v. United States*, 107 Fed. Cl. 166, 172 (2012) (“the existence of rail-banking, even if it may be sufficient to rescue the easement from abandonment through operation of state law, is not enough to insulate the government from a takings claim”). Rather, the actu-

al use being made of the land triggers the right to compensation is. *James v. United States*, Nos. 14-6L, 14-38L, slip op. at 23-24 (Fed. Cl. Feb. 28, 2017) (“[T]he [state] statute is not dispositive to determine whether the scope of the railroad’s easements was exceeded. In other words, the South Carolina statute may allow railbanking and block abandonment in these cases, but railbanking may still exceed the scope of the railroad’s easements for railroad purposes”). Walker granted an easement to use his land for Toll Project No. 1 and not for another highway bridge; and emphatically not for a public park. The only thing preventing the jury here from awarding Bay Point the full and perfect equivalent of the property taken—measured by the difference in the value of the land in its “before” condition (unencumbered by the discontinued Toll Project No. 1 easement), and its “after” condition (used as a public park and new U.S. Highway 90)—was the court’s instruction pursuant to section 65-1-123.

Applied here, Mississippi could not by *ipse dixit* transform a limited right to use property for a specific highway (Toll Project No. 1) into a grant of fee simple title whereby MTC can use the land for non-highway purposes in perpetuity simply by not formally abandoning the easement on its minutes, an action within MTC’s sole discretion. The Mississippi court validated a regime in which a rational agency would never abandon an easement on its minutes under the statute, for by abstaining from doing so, it could use highway easements for any purpose whatsoever and forever avoid the need to pay just compensation.

The right to just compensation cannot be burdened by legislative hurdles or condemning agency

procedures. It is no answer to assert that highway easements cannot be abandoned under Mississippi's statute by nonuse, only when they are determined on the minutes as no longer needed. But the amount of compensation owed is not contingent on MTC's formal act of release, particularly when doing so resulted in Bay Point's unencumbered fee interest being subject permanently to a public physical invasion without just compensation. The relevant inquiry should have been whether MTC's use of Bay Point's land as a public park or a new highway bridge was inside or outside the scope of the original 1952 easement, not whether MTC formally abandoned the easement on the minutes under section 65-1-123. The jury determined MTC's use to be outside the 1952 easement, which was a taking. But it was prohibited from awarding full compensation, because the court required that an additional element be met: whether MTC had formally abandoned the easement on its minutes. This effectively empowered MTC to control whether just compensation would be paid, by giving it the discretion to decide whether to formally release the easement. The Just Compensation Clause does not allow a state agency to control the amount of compensation paid, or to create an additional requirement to its receipt.

As the dissenting Justices below noted, the Mississippi statute cannot be applied to Bay Point consistent with the Just Compensation Clause: Bay Point's predecessor Walker had settled expectations—backed by Mississippi common law—that if MTC ever ceased using the 1952 easement for Toll Project No. 1, the fee owner would regain its full rights to its land, unencumbered by any easement or other uses. This principle is at its zenith in cases

such as this, in which Walker voluntarily conveyed an easement which allowed the state to use his land for a specific highway purpose—Toll Project No. 1—with the understanding that if the specific use which it permitted ever ceased, full use of the land would be restored to the owners, unencumbered by any easement. At the time of the grant of this highway-purpose easement, Mississippi's common law of easements confirmed their expectation that if the MTC ceased using the easement for Toll Project No. 1, the fee interest would no longer be so encumbered. *See, e.g., Columbus & Greenville Ry. Co. v. Dunn*, 185 So. 583, 586 (Miss. 1939) (an easement may be considered abandoned by “full and clear” evidence of nonuse for the granted purpose). The Mississippi rule was, of course, entirely consistent with the general law of easements. *See* Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 10:18 (2016); Restatement (Third) of Prop.: Servitudes §§ 7.2, 7.4 (2000).

Here, we have a very specific easement which was for the limited purpose of building U.S. Highway 90 according to the plans and specifications of Toll Project No. 1, which was subsequently discontinued. The owners certainly could not have foreseen more than fifty years later that their land would be impressed into public service as a new, different highway project with completely different plans and specifications than Toll Project No. 1, or for a public recreational park. This Court has observed, there is a “special need for certainty and predictability where land titles are concerned [and this Court is] unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.” *Leo Sheep Co. v. United States*, 440

U.S. 668, 687-88 (1979). The Mississippi court undermined that bedrock principle when it concluded that a statute adopted in 1988, over three decades after Walker conveyed the limited easement to the state, destroyed Bay Point’s right to just compensation when MTC no longer used the easement for highway purposes. The Just Compensation Clause cannot tolerate MTC converting a highway easement for a specific project into a public recreational park and a new highway project, and then, by virtue of its inaction under a statute *ex post facto*, shifting the entire economic burden of that public good to Bay Point.

3. Mississippi Cannot Insulate Itself From Just Compensation By Enacting A Statute

Two decisions in an Indiana rails-to-trails case illustrate how the Mississippi court went wrong, and how it conflicts with this Court’s decisions that just compensation is required, regardless of how state property law treats abandonment.

The first is *Howard v. United States*, 964 N.E.2d 779 (Ind. 2012), a case in which the Indiana Supreme Court answered certified questions of Indiana law posed to it by the Court of Federal Claims. The court there was faced with a statute similar to Mississippi’s, and concluded that the Indiana legislature had similarly limited how railroad easements could be abandoned. The statute there determined that the use of a railroad easement as a recreational trail was deemed not to be an abandonment of the railroad easement. *Id.* at 781 (citing Ind. Code § 32-23-11-7 (“A right-of-way is not considered abandoned if the Interstate Commerce Commission or the Surface

Transportation Board imposes on the right-of-way a trail use condition under 16 U.S.C. § 1247(d).”).⁵ Similarly here, the Mississippi legislature determined the only way MTC could abandon highway easements (“released,” as the statute describes it), is after a “determin[ation] on the minutes of the commission” that the easement is no longer needed for a highway purpose. Miss. Code. Ann. § 65-1-123(5) (Rev. 2012). In *Howard*, the Indiana Supreme Court concluded the statute “superseded” the common law of easements. *Howard*, 964 N.E.2d at 781 (citing *Consol. Rail Corp., Inc. v. Lewellen*, 682 N.E.2d 779, 783 (Ind. 1997)). Here, the Mississippi statute abrogated the common law rule of abandonment by nonuse and the common law rule that an easement terminates when used for a purpose outside the scope of the easement or *in pais*. Miss. Code. Ann. § 65-1-123(6) (Rev. 2012) (“In no instance shall any part of any property acquired by the commission, or any interest acquired in such property, including, but not limited to, easements, be construed as abandoned by nonuse . . .”). The Indiana court, however, did not reach the question of whether the alteration of the common law required payment of just compensation. *Howard*, 964 N.E.2d at 784.

That issue was resolved by the CFC when the case returned there. In *Howard v. United States*, 106 Fed.

⁵ In addition to Indiana and Mississippi three other states, Montana, South Carolina, and West Virginia, have similar statutes which “preserve the property rights in trust or simply hold that the conversion to interim trail use is not a cessation of a railroad use.” Michael A. Wolf, 11 Powell on Real Property § 78A.11[4] n.26 (2010).

Cl. 343 (2012), the court determined that the property owners deprived of their “reversionary” interest were entitled to just compensation. It rejected the government’s argument that the Indiana legislature’s alteration of the law of easement abandonment cut off the owners’ right to compensation. Thus, the argument went, when the property subject to the easement had been put to a different use, the easement hadn’t been abandoned. *Id.* at 367. In other words, the same situation presented here. The court held that the property owner was—in spite of the statute’s alteration of the rules of abandonment—nonetheless entitled to just compensation because the recreational use being made was outside the scope of the originally-granted railroad easement. *Id.* (“[U]nder Indiana statutory law, the plaintiffs’ railroad easements could not be considered abandoned. As the Indiana Supreme Court indicated, the Indiana statutes supersede Indiana common law and the highest state court has so indicated.”). But that wasn’t the end of the analysis because the Just Compensation requirement is immune from a state’s ability to limit it. The CFC concluded:

State law, while determining the technical property interests, however, does not control the determination of the valuation of property parcels for the purposes of determining the amount of federal money to be distributed to plaintiffs once a taking has been established pursuant to the Fifth Amendment to the United States Constitution. The question of how to distribute federal funds is for the federal sector, including the federal courts to determine, and in this case it is for this court to establish the proper measure of just compensation due

to plaintiffs. In this case, trail use has been determined as beyond the scope of the easements, resulting in a taking.

Id. The court recognized the inherent illogic of the argument that property must be valued as if it was still being used for a use that has admittedly ceased: “The government seeks to have the best of all worlds, effect the conversion of the plaintiffs’ property to trail use by the issuance of a NITU [Notice of Interim Trail Use], and avoid having to pay just compensation for the taking and conversion of the plaintiffs’ property.” *Id.* Citing the Federal Circuit’s opinion in *Preseault II*, the CFC concluded, “[o]bviously the State could not simply by enactment of a statute immunize itself from the salutary provision of the Fifth Amendment.” *Id.* at 367 (quoting *Preseault II*, 100 F.3d at 1551). The CFC also held:

Once it is established that federal action occasioned a taking of plaintiffs’ state law property interests, it is for the federal courts, not state legislatures, to determine what qualifies as “just compensation” due from the federal treasury.

Howard, 106 Fed. Cl. at 369. Similarly, in *Schmitt v. United States*, 2003 WL 21057368 (S.D. Ind. 2003), the district court held, “the fact that the railroad right-of-way has not been legally abandoned does not absolve the Government of liability. In fact, whether or not the easements at issue were legally abandoned is irrelevant to the takings issue; instead, the relevant issue is whether the Government’s use of the recreational trail is outside the scope of the original easement.” *Id.* at *7. See also *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009)

(“It is the law-created right to own private property, recognized and enforced by the Constitution, legislation, and common law, that gives the owner an historically rooted expectation of compensation.”); *James*, Nos. 14-6L, 14-38L, slip op. at 18 (“[T]he South Carolina statute precludes a finding of abandonment. . . . however that is not dispositive. . . . Although the court may not consider the railroad’s easements abandoned. . . . the court still may find that the NITU effected a temporary taking if the NITU authorized uses of the railroad easement that went beyond the scope of the easement.”).

II. MISSISSIPPI CONFLICTS WITH OTHER LOWER COURTS

A. Property Cannot Be Valued As If Still Burdened By An Abandoned Easement

As noted earlier, rails-to-trails inverse condemnation cases present issues similar to those here. Yet the federal courts considering how to value the land in those cases have undertaken an approach completely at odds with the Mississippi Supreme Court.

In a series of rails-to-trails cases in the CFC, the court with nationwide jurisdiction over Just Compensation claims against the federal government, the government made the same argument as MTC here, asserting compensation must be calculated as if the land continued to be encumbered by an abandoned easement. That argument was soundly rejected numerous times by the CFC, which concluded that land formerly subject to rail easements which are converted to recreational trails must be valued in their unencumbered state:

1. *Ingram v. United States*, 105 Fed. Cl. 518, 530 (2012) (In a case from South Carolina, “[t]he measure

of just compensation to the plaintiffs for the takings of plaintiffs' property should capture the value of the reversionary interests in their 'before taken' condition, unencumbered by the easements.").

2. *Ybanez v. United States*, 102 Fed. Cl. 82, 88 (2011) (In a case from Texas, "[t]he measure of just compensation is the difference between the value of plaintiffs' land unencumbered by a railroad easement, and the value of plaintiffs' land encumbered by a perpetual easement for recreational trail use.").

3. *Rogers v. United States*, 101 Fed. Cl. 287, 294 (2011) (In a case from Florida, the measure of compensation is the difference between the land unencumbered by a railroad easement, and the land encumbered by an easement for recreational trail use).

4. *Raulerson v. United States*, 99 Fed. Cl. 9, 12 (2011) (same rule in a case from South Carolina).

5. *Macy Elevator, Inc. v. United States*, 105 Fed. Cl. 195, 201 (2012) (In a case from Indiana, "[b]y operation of law, the Trails Act blocks plaintiffs' state law reversionary interests when the NITU is issued and the taking occurs. What was 'taken' from plaintiffs were these reversionary interests. If state law defines these reversionary interests as a right to unencumbered land, and if these interests would have been triggered absent the issuance of the NITU, then the 'before' condition of plaintiffs' properties should be those properties unencumbered by any easement.").

6. *Toscano v. United States*, 107 Fed. Cl. 179, 188 (2012) (In a case from Utah, the court noted, "[p]laintiffs counter that we must calculate damages based on a methodology which determines the difference between the value of plaintiffs' lands unencum-

bered by any right-of-way and the value of the land encumbered by the new easement for a recreational trail.”) (citing *Macy Elevator, Inc.*, 105 Fed. Cl. at 199; *Ybanez*, 102 Fed. Cl. at 87) (“The before value must reflect the value of the land without an easement of any kind because, but for the federal action, plaintiffs would have recovered the full use of their property as a result of the termination of the easement by contrary trail use.”).

7. *Whispell Foreign Cars, Inc. v. United States*, 106 Fed. Cl. 635, 642-43 (2012) (In a case from Florida, “[a]ccordingly, just compensation in this context is compensation for the reversionary interest that was taken—that is, the difference between the value of Mr. Alton’s property in fee simple, unencumbered by a railway easement, and the value of his property subject to the perpetual trail/railbanking easement imposed by operation of the Trails Act and the Trails Act amendments.”).

8. *Howard*, 106 Fed. Cl. at 369 (In a case from Indiana, “[t]he proper measure of damages is as plaintiffs have argued, the difference between the value of plaintiffs’ property unencumbered by the railroad easement and the value of plaintiffs’ property encumbered by a trail use easement subject to possible reactivation as a railroad easement.”).

9. *Anna F. Nordhus Family Trust v. United States*, 106 Fed. Cl. 289, 294 (2012) (In a case from Kansas, the court ordered the appraisers “to measure the just compensation owed to Plaintiffs as the difference between the fair market value of their properties held in fee simple and the fair market value of the same properties burdened with the current Trails Act easement”).

B. Legislative Action Or Inaction Cannot Limit The Right To Just Compensation

Mississippi also conflicts with other lower courts. For example, many courts conclude that once a taking has been found, the requirement to pay just compensation is self-executing and cannot be limited or impaired “by legislation or ordinance.” *People ex rel. Wanless v. Chicago*, 38 N.E.2d 743, 746 (Ill. 1941). A court cannot read a statute to deprive the landowner of compensation for a taking. *See San Antonio v. Astoria*, 67 S.W.2d 321, 322 (Tex. Ct. App. 1933) (legislature may provide the method of securing payment of compensation but may not prescribe any procedure which would lessen the absolute obligation of the taker to compensate the owner, “in money,” for the property taken”). *See also Tucson Airport Auth. v. Freilich*, 665 P.2d 1007, 1011 (Ariz. App. 1982) (“The determination of the proper rate of interest, being a part of just compensation, is necessarily a judicial function which the legislature may not usurp.”); *Re-development Agency of City of Burbank v. Gilmore*, 198 Cal. Rptr. 304 (Cal. App. 1984) (since a constitutional right is involved, the interest rate to be allowed may exceed that specified by statute); *Gov’t of Guam v. 162.40 Square Meters of Land*, No. CVA14-011 (Guam Mar. 17, 2016) (statutory interest rate of 6% on condemnation awards does not limit the right under the Just Compensation Clause of the owner to prove that she is entitled to a greater rate of interest); *Ill. State Toll Highway Auth. v. Am. Nat’l Bank & Trust Co.*, 642 N.E.2d 1249, 1253 (Ill. 1994) (“Although that statute purports to set an interest rate at

6% per year [on compensation awards]. . . the 6% rate is not binding.”); *Booras v. Iowa State Highway Comm’n*, 207 N.W.2d 566, 569-70 (Iowa 1973) (remititur not available in eminent domain to reduce jury’s compensation verdict); *State ex rel. Humphrey v. Baillon Co.*, 480 N.W.2d 673, 676 (Minn. App. 1992) (calculation of interest on compensation is judicial function, and courts are not bound by statutory interest rates); *Manning v. Mining & Minerals Div. of the Energy, Minerals & Nat. Res. Dep’t*, 144 P.3d 87, 91-92 (N.M. 2006) (rejecting agency’s claim it was not liable for regulatory taking because the agency lacked eminent domain power, the court noted, “legislation cannot insulate the state from providing just compensation for takings . . . When a taking occurs, just compensation is required by the Constitution, regardless of state statute”); *Red Springs City Bd. of Educ. v. McMillan*, 108 S.E.2d 895, 900 (N.C. 1959) (Parker, J., concurring) (“[T]he constitutional prohibition against taking private property for public use without the payment of just compensation is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation.”); *Mitchell v. White Plains*, 16 N.Y.S. 828, 829 (N.Y. Sup. Ct. 1891) (“A remedy for compensation contingent upon the realization of funds from taxation for benefit within a limited assessment district does not meet the constitutional requirement.”); *Comm’w of the N. Marianas Islands v. Lot No. 281-5 R/W*, No. 2013-SCC-0006 (C.N.M.I. Dec. 28, 2016) (Commonwealth not protected by sovereign immunity when it fails to pay a condemnation judgment; self-executing Just Compensation Clause prohibits legislature from refusing to appropriate money to pay the judgment after it has taken property).

III. THIS CASE IS A GOOD VEHICLE TO ADDRESS THIS IMPORTANT ISSUE

A. Just Compensation Law Needs Clarity

In recent years, this Court has addressed all but one of the “critical terms” in the Fifth Amendment’s Taking Clause. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (“The critical terms are ‘property,’ ‘taken’ and ‘just compensation.’”). The Court has clarified in what circumstances a valuable interest qualifies as “property,”⁶ when a regulation “goes too far” and qualifies as a “taking,”⁷ and established standards for when an exercise of eminent domain is “for public use.”⁸

But guidance regarding the last—and perhaps most important part of the takings calculus—just compensation, the subject of the overwhelming majority of takings cases—has been absent. When this Court began selectively applying the Bill of Rights to the states under the Fourteenth Amendment, it started with the Just Compensation Clause. *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 235 (1897). But the last time this Court accepted a compensation case was more than thirty years ago.

⁶ *See, e.g., Babbitt v. Youpee*, 519 U.S. 234 (1977) (the ability to transfer property by descent or devise is property).

⁷ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (clarifying standards for regulatory takings).

⁸ *Kelo v. City of New London*, 545 U.S. 469 (2005) (judicial review of public use supporting taking is limited).

United States v. 50 Acres of Land, 469 U.S. 24 (1984). The Just Compensation Clause deserves this Court's attention yet again, to emphasize the constraints the Fifth Amendment places on the power of a state to limit just compensation when it takes property.

The Court's long absence from the field has permitted decisions like Mississippi's to have free rein, untethered from just compensation law's foundational principles. *See, e.g., City of Milwaukee Post No. 2874 v. Redevelopment Auth. of City of Milwaukee*, 768 N.W.2d 749 (Wis. 2009) (applying undivided fee rule to deny compensation for admittedly valuable long-term leasehold interest), *cert. denied*, 561 U.S. 1006 (2010); *In re John Jay College of Criminal Justice of City Univ. of N.Y.*, 905 N.Y.S.2d 18 (N.Y. App. Div. 2010) (prohibiting owner from testifying about value of his property, and excluding evidence of deliberate government actions to depress the value of the taken property), *rev. denied*, 948 N.E.2d 925 (N.Y. 2011), *cert. denied sub nom. River Ctr. LLC v. Dormitory Auth. of State of N.Y.*, 566 U.S. 982 (2012).⁹

⁹ The issue has not escaped the Court's attention entirely. In two oral arguments, just compensation appeared to be of interest, even where the question was not actually presented by either petition. During the arguments in *Kelo v. City of New London*, 545 U.S. 469 (2005), a case involving the Public Use Clause, Justices Kennedy and Breyer raised the compensation issue. *See Transcript, Kelo v. City of New London*, No. 04-108, at 21-23 (Feb. 23, 2005). *See also id.* at 48. More recently, in the arguments in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 560 U.S. 702 (2010), a case about regulatory and judicial takings, Justice Kennedy also inquired about valuation. *See Transcript, Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Protection*, No. 08-11, at 18 (Dec. 2, 2009).

(footnote continued on next page)

Further percolation in the lower courts will not frame the issue better, and waiting for a future case will only allow the harm which Bay Point has suffered to fester and be experienced by other property owners. For example, although the CFC has consistently rejected the government's repeated attempts to make this same argument, the government keeps making it. Even if the owners may eventually prevail, there is a concrete harm in being forced to repeatedly respond to it. *See, e.g., Cal. Fed. Bank v. United States*, 39 Fed. Cl. 753, 754-55 (1997) (even if plaintiffs may recover attorneys' fees, they should not be forced to litigate "issues that have already been resolved by this court, the Federal Circuit or the Supreme Court"); Cecelia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 Ecology L.Q. 673, 675-76 (2011) (Despite "unequivocal" *Preseault II*, government continued to press the same arguments, and in "an apparent coordinated litigation strategy . . . routinely raises arguments . . . previously rejected."). Until this Court firmly closes that door, property owners must continue to expend time and fees pushing back.

B. This Case Is An Ideal Vehicle To Reaffirm That Legislatures Cannot Redefine Just Compensation

Six years ago, in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 560 U.S. 702 (2010), this Court was unable to reach a consensus on how much latitude state courts and legislatures have under the Fifth Amendment to define (and redefine)

property. *Id.* at 715 (“If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”) (plurality). This case is an ideal vehicle to bring more clarity to that issue, by reaffirming *Monongahela*’s rule that states cannot avoid the just compensation requirement simply by redefining property law.

First, all fact issues have been fully resolved. The jury conclusively determined MTC had actually discontinued using Bay Point’s land for Toll Project No. 1, and then took the land for different uses outside the scope of the 1952 easement. The Mississippi Supreme Court affirmed the jury’s findings. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1011 (1992) (bench trial determined regulations deprived owner of any reasonable economic use of his land).

Second, Bay Point squarely presented and preserved the question. The jury instructions which it submitted, instructed the jury to value the land under the Just Compensation Clause without regard to formal abandonment under section 65-1-123. App. 52, 49-50.

Third, but for the trial court’s instructing the jury that it was prohibited from determining MTC had abandoned the 1952 easement, it would have awarded Bay Point the value of the land unencumbered by an easement, \$16 million. As the court below concluded, “[t]he jury was presented with only two values: an encumbered value between \$100 and \$500, and an unencumbered value of \$26 per square foot.” App. 15.

CONCLUSION

The Court should grant certiorari to review the judgment of the Mississippi Supreme Court.

Respectfully submitted.

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Counsel for Petitioner

MARCH 2017.

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IN THE SUPREME COURT OF MISSISSIPPI
NO. 2014-CA-01684-SCT

BAY POINT PROPERTIES, INC.
f/k/a BP PROPERTIES, INC.

v.

***MISSISSIPPI TRANSPORTATION
COMMISSION AND MISSISSIPPI
DEPARTMENT OF TRANSPORTATION***

DATE OF JUDGMENT: 01/03/2014

TRIAL JUDGE: HON. JOHN C. GARGIULO
COURT FROM

WHICH APPEALED: HARRISON COUNTY
CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

WILLIAM ALEX BRADY, II
CHARLES STERLING LAMBERT, JR.

ATTORNEYS FOR APPELLEES:

CHRISTOPHER M. HOWDESHELL
JACK HOMER PITTMAN

NATURE OF THE CASE: CIVIL – EMINENT DOMAIN

DISPOSITION: AFFIRMED IN PART,
REVERSED IN PART, AND
REMANDED – 07/21/2016

MOTION FOR

REHEARING FILED:

MANDATE ISSUED:

EN BANC.

RANDOLPH, PRESIDING JUSTICE, FOR THE COURT:

¶1. Bay Point Properties Inc. filed inverse condemnation proceedings against the Mississippi Transportation Commission,¹ claiming the easement MTC had across Bay Point's property had terminated and that MTC was required to pay Bay Point the unencumbered value of the property. The issue was put to the jury, which determined the easement – for which the Commission had paid \$50,000 – continued to encumber the property, but that the use by MTC was not a highway purpose. The jury awarded Bay Point the encumbered value of \$500, as testified to by two witnesses.² Bay Point appealed. We affirm in part the judgment of the Circuit Court for the First Judicial District of Harrison County. However, the trial court failed to follow Section 43-37-9's mandate to "determine and award or allow . . . such sum as will, in the opinion of the court[,] . . . reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding." Thus, we reverse the judgment of the Harrison County Circuit Court in part and remand the case with instructions to the trial court to hold a hearing in compliance with Section 43-37-9.

¹ For purposes of this opinion, we refer collectively to the Transportation Commission and the Department of Transportation as MTC.

² Bay Point's expert refused to give an encumbered value. As a result, the only encumbered-value testimony before the jury was between \$100 and \$500.

FACTS AND PROCEDURAL HISTORY

¶2. In 1952, the Mississippi State Highway Commission, MTC’s predecessor, acquired an easement over certain property of Wallace Walker for “all highway purposes” by an agreed judgment.³ The property was used to reconstruct a bridge spanning the Bay of St. Louis, between Pass Christian and Bay St. Louis, after the bridge had burned in 1948.⁴ After Hurricane Katrina destroyed the bridge in 2005, MTC constructed a newly designed bridge across the bay.⁵ MTC subsequently [sic] entered an agreement with Harrison County, which provided that (1) MTC would build a park, (2) Harrison County would maintain the park, (3) Harrison County would provide MTC any additional property required to build the park, and (4) MTC would maintain its property interest (its easement) in the park. MTC then built a park, with a parking lot, on the old road bed, with stairs connecting to the new bridge, which included a walking and biking path for the public.

³ Pursuant to an agreed judgment, the Commission paid Walker \$50,000 and Walker reserved a five-foot buffer along Bayou Boisdore to prohibit the general public from using bayou frontage.

⁴ The bridge suffered substantial damage following Hurricane Camille in 1969, but MTC was able to repair the bridge in place.

⁵ The new design required that the eastern foot of the new bridge be moved south and west to flatten out or straighten the curve approaching the now-elevated bridge.

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¶3. Bay Point, Walker's successor in interest, filed inverse condemnation proceedings, claiming the easement terminated on the *whole* property when the new bridge was constructed following Katrina. Alternatively, Bay Point argued that the easement terminated on that *portion* of the easement used to build the park when the park was constructed. Bay Point asserted MTC's subsequent use constituted a taking for which it was entitled to just compensation of the unencumbered value of the property. MTC argued that it was using the property for highway purposes. Alternatively, MTC argued that, even if its use was not a highway purpose, the easement continued to burden the property because it had not been released on MTC's minutes as required by Section 65-1-123. *See* Miss. Code Ann. § 65-1-123 (Rev. 2012). Therefore, any compensation owed to Bay Point would be the value of the property, encumbered by the easement.

¶4. The jury viewed the property and heard five days of testimony before returning a verdict for Bay Point. The circuit court denied Bay Point's motion for attorneys' fees, costs, and expenses, as well as its post-trial motions for additur, new trial on the issue of damages, and/or judgment notwithstanding the verdict (JNOV). Bay Point appealed.

ISSUES

¶5. Bay Point raises the following issues, which we restate and reorder for clarity:

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- I. Whether the trial court erred in granting MTC's motion in limine regarding release of the easement.
- II. Whether the trial court erred in denying Bay Point's supplemental motion in limine regarding testimony of a nominal sum.
- III. Whether the trial court erred in excluding testimony of an appraisal of the five-foot buffer.
- IV. Whether the trial court erred in giving jury instructions D-2A, D-3A, and D-7A.
- V. Whether the trial court erred in refusing jury instruction P-4.
- VI. Whether the trial court erred in not instructing the jury that MTC must acquire property in fee to use as rest and recreation areas under Section 65-1-51.
- VII. Whether the jury verdict was supported by substantial evidence.
- VIII. Whether the trial court erred in denying Bay Point's motion for attorneys' fees and costs.
- IX. Whether the trial court erred in denying Bay Point's post-trial motions.

ANALYSIS

I. Whether the trial court erred in granting MTC's motion in limine regarding release of the easement.

¶6. Bay Point argues the trial court erred in granting MTC's motion in limine, limiting evidence of abandonment of the easement to the minutes of the Commission. We review evidentiary matters for an abuse of discretion. *Ware v. Entergy Miss., Inc.*, 887 So. 2d 763, 766 (Miss. 2004). There is no abuse of discretion in granting a motion in limine “if the court determines that (1) the material or evidence in question will be inadmissible at trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury.” *Id.*

¶7. The Legislature has provided by statute the process by which an easement for highway purposes terminates: “All easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes[.]” Miss. Code Ann. § 65-1-123(5). The section further provides that “[i]n no instance shall any part of any property acquired by the commission, or any interest acquired in such property, including, but not limited to, easements, be construed as abandoned by nonuse[.]” Miss. Code Ann. § 65-1-123(6). Per the statute, the easement could not have been abandoned *by nonuse*. Release (*i.e.*, termination or abandonment) requires a determination on the minutes.

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¶8. Therefore, any evidence of abandonment other than minute entries is irrelevant and inadmissible. *See* M.R.E. 401 (“‘Relevant Evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”); M.R.E. 402 (“Evidence which is not relevant is not admissible.”). As the statute itself provides the sole process by which an easement for highway purposes terminates, the trial court did not err in limiting evidence of abandonment to what the statute requires – Commission minute entries.

¶9. The dissent’s separation-of-powers argument is misplaced. *See* Dis. Op. at ¶¶ 42-43. The Legislature has decreed that it is the Transportation Department’s prerogative whether to release a highway easement. MTC is the entity charged with transportation-related policy decisions, not this Court.⁶

II. Whether the trial court erred in denying Bay Point’s supplemental motion in limine regarding testimony of a nominal sum.

¶10. Bay Point argues on appeal that it filed a supplemental motion in limine to strike any testimony

⁶ The dissent contends this Court’s “interpretation of the law permits the MTC unilaterally to determine when an easement has terminated.” Dis. Op. at ¶ 43. To be clear, whether the easement had been abandoned was a determination to be made by the appropriate factfinder – in this case, the jury. *See* Jury Instruction D-7A, ¶ 16, *infra*. As in all cases, a jury’s decision is subject to judicial review.

that its property was worth a nominal sum. However, Bay Point mischaracterizes its own motion. Bay Point's supplemental motion in limine requested only that the trial court "bar the expert testimony of John 'Jeb' Stewart[.]" The motion asserted that "Mr. Stewart should not be allowed to offer his opinion. . . . Mr. Stewart should not be allowed to offer any testimony. . . . Mr. Stewart should not be allowed to sit in front of the jury. . . ." Finally, Bay Point requested the court "bar the expert testimony of John 'Jeb' Stewart."

¶11. While the trial court denied the motion, Stewart did not testify. We fail to see how Bay Point was prejudiced by the trial court's refusal to bar Stewart from testifying when Stewart in fact did not testify.⁷ See

⁷ Bay Point argues in its supplemental motion in limine that Brian Moore and Tommy Madison should not have been allowed to testify regarding a nominal value for the same reasons it asserted Stewart should not have been allowed to testify to a nominal value. However, the motion sought only to exclude Stewart's testimony. At trial, Bay Point failed to object that Moore's or Madison's opinions were improper expert testimony. If no contemporaneous objection is made, an error is waived. *InTowne Lessee Assocs., LLC v. Howard*, 67 So. 3d 711, 719 (Miss. 2011). See also M.R.E. 103(a)(1). Nevertheless, Madison testified that, according to "the appraisal methodology and treatises," an underlying fee encumbered by an easement for all highway purposes has a nominal value of around \$100-\$500. Moore testified that "the appraisal industry" places a nominal value of around \$500 on property encumbered by an easement for all highway purposes. Opinions supported by methodologies recognized in the appraisal industry are admissible. See *Miss. Gulf Props., LLC v. Eagle Mech., Inc.*, 98 So. 3d 1097, 1103-04 (Miss. Ct. App. 2012) (citing *Gulf S. Pipeline Co. v. Pitre*, 35 So. 3d 494 (Miss. 2010)).

M.R.E. 103(a) (Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]”).

III. Whether the trial court erred in excluding testimony of an appraisal of the five-foot buffer.

¶12. At some point, MTC appraised the value of the five-foot buffer around Bayou Boisdore reserved to Walker in the agreed judgment. Bay Point argues the trial court erred in excluding evidence of that appraisal. In *Coleman v. Mississippi Transportation Commission*, 159 So. 3d 546, 548 (Miss. 2015), this Court held a trial court in error for excluding a second appraisal of the same property. As the appraisal was of the same property, it was “relevant and admissible” as to the value of that property. *Id.* at 551-52. However, the appraisals here are of two different parcels of property. The five-foot buffer was reserved to Walker, and thus he retained rights in that property that he did not retain in the property subject to MTC’s easement. The trial court found the evidence would be irrelevant and would serve only to confuse the jury, as the value of the buffer was not related to the value of the property, whether encumbered or not. Moreover, neither the park nor the highway sits on the buffer. The trial court did not abuse its discretion in excluding this evidence.

IV. Whether the trial court erred in giving jury instructions D-2A, D-3A, and D-7A.

¶13. “The main query we make when reviewing jury instructions is whether (1) the jury instruction contains a correct statement of the law and (2) whether the instruction is warranted by the evidence.” *N. Bi-loxi Dev. Co., LLC v. Miss. Transp. Comm’n*, 912 So. 2d 1118, 1123 (Miss. 2005). In reviewing jury instructions, the instructions must be read as a whole. *Id.*

¶14. Instruction D-2A instructed the jury “that an easement encumbers, or is still over and upon the land unless it has been abandoned by [MTC].” Instruction D-3A instructed the jury that, in order to prevail on the issue of abandonment, Bay Point had to prove by full and clear evidence that MTC had abandoned the easement. The instruction then quoted Section 65-1-123, which provides that abandonment of an easement requires a release on the minutes of the Commission, rather than mere nonuse.

¶15. Bay Point argues the full and clear evidence standard was erroneous. However, “[e]vidence of abandonment must be ‘full and clear.’” *Stone v. Lee Brant Family Invs.*, 998 So. 2d 448, 456 (Miss. Ct. App. 2008) (quoting *Columbus & Greenville Ry. Co. v. Dunn*, 184 Miss. 706, 185 So. 583, 586 (1939)). Bay Point further argues the easement could have terminated in ways other than a minute entry of release by MTC, but D-3A quoted the statute directly. As discussed in Issue I *supra*, this issue is without merit.

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¶16. Finally, D-7A presented the jury with three alternative findings:

If you find (1) that [MTC]’s easement has not been abandoned, and (2) that the use being made of the property in this case is a highway purpose, then your verdict shall be in favor of [MTC], and no sum of money shall be awarded to [Bay Point]. Or,

Alternatively, if you find (1) that [MTC]’s easement has not been abandoned, but (2) that the use being made of the property in this case is not a highway purpose, then your verdict shall be in favor of [Bay Point], and you may award it a sum of money, but said sum may not exceed a nominal sum that has been evidenced by the proof in the case. Or,

Alternatively, if, and only if, you find by full and clear evidence that [MTC]’s easement has been abandoned, and that the property of [Bay Point] has been taken by [MTC], you may award [Bay Point] just compensation for any such taking, just compensation being what you determine to be the difference between the fair market value of the property taken after proper application of the before and after rule.

¶17. The jury essentially had to resolve two issues: whether the easement was abandoned, and whether the use being made was a highway purpose. If the easement remained in existence and MTC was using it for a highway purpose, there was no taking. If the easement remained in existence, but MTC was using the

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property for a purpose other than a highway purpose, then MTC took Bay Point's property. However, the compensation owed would be the value of the property, subject to the easement, and could not exceed a sum evidenced by the proof offered. The only encumbered value placed before the jury was a nominal one (between \$100 and \$500).⁸ Alternatively, if the easement had been abandoned, and MTC was using the property for a purpose other than a highway purpose, then MTC took Bay Point's property, for which Bay Point was owed the value of the property, unencumbered by the easement. This instruction contains a correct statement of the law that was warranted by the evidence, given the testimony offered of the necessity to repair and/or replace the Highway 90 bridge that spans the Bay of St. Louis. *See ¶ 2 supra.*

¶18. The dissent raises arguments not presented to the trial court. (See Dis. Op. at ¶¶ 41-42). However, we do not consider arguments raised for the first time on appeal. *See Anderson v. LaVere*, 136 So. 3d 404, 410 (Miss. 2014). We do not hold trial courts in error on issues not presented to them for consideration. *See Ridgway Lane & Assocs. v. Watson*, 189 So. 3d 626, 630 n.4 (Miss. 2016) (quoting *InTown Lessee Assocs., LLC v. Howard*, 67 So. 3d 711, 718 (Miss. 2011)); *Ronk v. State*, 172 So. 3d 1112, 1139 (Miss. 2015)

⁸ Had greater values been testified to, the argument that a "nominal sum" was incorrect would have more validity. However, the only encumbered value evidenced by proof in this case was a nominal one. Therefore, the instruction correctly instructed the jury as to how the law applied to the facts in this case.

(citing ***Moawad v. State***, 531 So. 2d 632, 634 (Miss. 1988)). Furthermore, Bay Point did not object to the instruction based on the arguments introduced anew by the author of the dissent. If a proper contemporaneous objection is not made, an error is waived. *See InTowne*, 67 So. 3d at 719.

V. Whether the trial court erred in refusing jury instruction P-4.

¶19. P-4 is a long and convoluted instruction. Among other things, it gives the jury a summary of Bay Point's position along with a summary of MTC's position. It then presents the jury with the following:

If you find that:

1. The underlying property burdened by the easement granted by Wallace C. Walker in 1952 is owned in fee by [Bay Point]; and
2. That [MTC] only possessed an easement for the limited purpose granted in the 1952 Judgment and Verdict; and
3. [MTC]'s current uses of the Property of Bay Point are outside the limited and specific scope of the Easement granted to [MTC], then you must find in favor of [Bay Point] and award just compensation. If you find that the current uses of [Bay Point]'s property are within the scope of the Easement granted in the 1952

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Judgment and Verdict, then you must find in favor of [MTC].

¶20. As discussed in Issue IV *supra* regarding instruction D-7A, the jury had to determine whether the easement still burdened the property and whether MTC's use was a highway purpose. Instruction P-4 is premised on Bay Point's position that the easement terminated when MTC used the property for a non-highway purpose, which fails to consider Section 65-1-123's requirement that easements be declared as no longer necessary on Commission minutes before they are released. "An instruction that incorrectly states the law, is covered fairly in another instruction or is without foundation in the evidence need not be given." *N. Biloxi*, 912 So. 2d at 1123. We find the trial court did not err in refusing to give jury instruction P-4.

VI. Whether the trial court erred in not instructing the jury that MTC must acquire property in fee to use as rest and recreation areas under Section 65-1-51.

¶21. Section 65-1-51 reads, in pertinent part, "[t]he commission may acquire and have the Transportation Department develop publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the highway right-of-way reasonably necessary to accommodate the traveling public." Miss. Code Ann. § 65-1-51 (Rev. 2012). Bay Point argues this section requires MTC to buy property used for rest and recreation areas in fee, and that the trial court erred in not instructing the jury to that

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effect. MTC counters by arguing it can build rest and recreation areas on publicly owned easements for such purposes.

¶22. However, we decline to address whether MTC can build rest and recreation areas on easements.

To warrant reversal, two elements must be shown: error, and injury to the party appealing. Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the final outcome of the case; it is prejudicial, and ground for reversal, only when it affects the final result of the case and works adversely to a substantial right of the party assigning it.

Catholic Diocese of Natchez-Jackson v. Jaquith, 224 So. 2d 216, 221 (Miss. 1969). *See also Gray v. State*, 799 So. 2d 53, 61 (Miss. 2001).

¶23. Even if MTC was required to acquire the property used for the park in fee, the value of the property depended on the existence, *vel non*, of the easement. If the easement continued to exist, compensation due to Bay Point would be the value of the property, subject to the easement. If the easement no longer existed, compensation due to Bay Point would be the value of the property, unencumbered by the easement. The jury was presented with only two values: an encumbered value of between \$100 and \$500, and an unencumbered value of \$26 per square foot. The jury determined the easement continued to exist and awarded Bay Point \$500. That being the case, instructing the

jury that MTC was required to acquire land used for rest and recreation areas in fee would not have affected the final result of the case, and therefore did not prejudice Bay Point. *See Jaquith*, 224 So. 2d at 221. Assuming the trial court erred by not instructing the jury that MTC must acquire land used for rest and recreation areas in fee, that error was harmless.

VII. Whether the jury verdict was supported by substantial evidence.

¶24. “This Court has a long-standing history of not disturbing jury verdicts in eminent domain proceedings, especially when the jury has viewed the property being taken and the evidence in the record supports the jury’s findings.” *Trowbridge Partners, L.P. v. Miss. Transp. Comm’n*, 954 So. 2d 935, 943 (Miss. 2007) (citing *Miss. Highway Comm’n v. Havard*, 508 So. 2d 1099, 1105 (Miss. 1987)). Courts are “loathe to disturb a jury’s eminent domain award where, as here, the jury has personally viewed the premises.” *Crocker v. Miss. State Highway Comm’n*, 534 So. 2d 549, 554 (Miss. 1988). In fact, “where the jury has viewed the property being taken, any substantial evidence in the record supporting the jury’s damage assessment will preclude reversal.” *Id.*

¶25. The jury’s verdict of \$500 was supported by substantial evidence. The jury viewed the property. The appraiser-witnesses agreed that the unencumbered value of the property was \$26 per square foot. Bay Point’s appraiser refused to give an encumbered value.

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MTC's appraisers testified that, according to appraisal methodology and procedures, along with their personal knowledge of practice, the encumbered value of the property would be a nominal sum of around \$100-\$500.⁹ This was the only encumbered value presented to the jury.

¶26. Bay Point consistently argues that the easement terminated on the whole property when MTC built the new bridge, or that it at least terminated on the property used for the park when the park was built. As discussed in Issue I, *supra*, easements for highway purposes can be released only when MTC determines on its minutes that it no longer needs the property for highway purposes.¹⁰ While MTC's agreement with Harrison County was executed on the minutes, the

⁹ Though the easement for all highway purposes rendered the land practically worthless, this value was based on the maxim that because land holds the world together, it cannot be devoid of value.

¹⁰ Bay Point relies on ***Hattiesburg Realty*** for its contention that highway easements can terminate other than by a declaration on commission minutes. This reliance is misplaced. ***Hattiesburg Realty*** provides "If and when the Commission decides to abandon its right-of-way easement over all or any portion of the Tuttle lots, or declares all or any portion of the Tuttle lots surplus under applicable law, the disposition . . . would be governed and controlled by applicable Mississippi law." ***Hattiesburg Realty Co. v. Miss. State Highway Comm'n***, 406 So. 2d 329, 332 (Miss. 1981). See also ***Miss. State Highway Comm'n v. McClure***, 536 So. 2d 895, 896 (Miss. 1988) ("When the MSHC determined that a portion of that easement was no longer needed by the public, the easement ceased to exist."). These cases are consistent with the statutory provision, as the Commission makes decisions or declarations only through its minutes.

agreement provided that the county would provide, “at no cost to the Commission, any right or interest in any property owned by the [c]ounty which may be necessary to complete construction of the [p]ark.” The agreement further provided that MTC retained its interest in the property, and that if the county determined it would no longer operate the park, the county would inform MTC, “which will have the option of closing the [p]ark and removing all improvements.” The jury heard this evidence but determined it insufficient to constitute a release.

VIII. Whether the trial court erred in denying Bay Point’s motion for attorneys’ fees and costs.

¶27. “[A] trial court’s decision regarding attorneys’ fees will not be disturbed by an appellate court unless it is manifestly wrong.” *Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So. 2d 495, 521 (Miss. 2007) (citing *Mabus v. Mabus*, 910 So. 2d 486, 488 (Miss. 2005)).

¶28. Pursuant to Mississippi Code Section 43-37-9,

[w]here an inverse condemnation proceeding is instituted by the owner of any right, title or interest in real property because of use of his property in any program or project in which federal and/or federal-aid funds are used, the court, rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property, or the state’s attorney effecting a settlement of any such

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proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or the state's attorney, reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding.

¶29. MTC used federal funds to finance construction of the park. Bay Point was the plaintiff in this inverse-condemnation proceeding. The jury rendered a verdict for the plaintiff in the amount of \$500. Based on the jury verdict, the trial court rendered a judgment for the plaintiff in the amount of \$500. Accordingly, all the requirements of the statute were met for an award of "reasonable costs, disbursements and expenses, including reasonable attorney,¹¹ appraisal and engineering

¹¹ Rule 1.5 of the Mississippi Rules of Professional Conduct sets out several factors which the trial court should consider in determining the reasonableness of the amount of attorneys' fees:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Miss. R. Prof'l Conduct 1.5(a).

fees, actually incurred because of such proceeding.” Section 43-37-9’s mandatory language – *shall* determine and award – leaves no room for judicial discretion, except as to a reimbursement amount that was “reasonable.” We conclude it was within the trial court’s discretion not to grant Bay Point’s request for \$680,000 in full. Yet we reject the trial court’s failure to award *any* reimbursement at all. Such a result is in direct violation of the statute and therefore manifestly wrong.

IX. Whether the trial court erred in denying Bay Point’s post-trial motions.

¶30. Bay Point’s entire argument is that “the jury award of \$500 was in error and the lower [c]ourt’s refusal to grant Plaintiff’s Motion for Additur was a clear error of law, an abuse of discretion, manifestly wrong and contrary to the substantial weight of the evidence, and reversal is proper.”

¶31. An additur can be granted where (1) the damages are inadequate because the jury was influenced by bias, prejudice, or passion; or (2) the damages awarded were contrary to the overwhelming weight of the evidence. Miss. Code Ann. § 11-1-55 (Rev. 2014). The evidence must be viewed in the light most favorable to the party in whose favor the jury decided. *Lewis v. Hiatt*, 683 So. 2d 937, 941 (Miss. 1996). As discussed in Issue VII *supra*, the jury award of \$500 was supported by substantial evidence. Ergo, the trial court’s refusal to grant additur was not in error.

CONCLUSION

¶32. For the reasons stated, the judgment of the Circuit Court for the First Judicial District of Harrison County is affirmed in part. Because the trial court rendered judgment in Bay Point's favor and awarded it compensation, all of the requirements of the statute were met for an award of reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of such proceeding. The trial court's failure to follow the statute's clear mandate is reversible error. We therefore affirm the judgment in part, reverse the judgment in part, and remand the case to the Harrison County Circuit Court with instructions to the trial court to hold a hearing in compliance with Section 43-37-9.

**¶33. AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.**

**WALLER, C.J., DICKINSON, P.J., LAMAR,
COLEMAN, MAXWELL AND BEAM, JJ., CON-
CUR. KITCHENS, J., DISSENTS WITH SEPA-
RATE WRITTEN OPINION JOINED BY KING, J.**

KITCHENS, JUSTICE, DISSENTING:

¶34. The majority affirms the trial court's grant of a jury instruction that allowed the jury to find that a taking had occurred because the Mississippi Transportation Commission (MTC) no longer was using the

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easement for highway purposes, but that just compensation could not be awarded because the MTC had not released the easement on its minutes. Indeed, Mississippi Code Section 65-1-123(5) provides that “[a]ll easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes. . . .” Miss. Code Ann. § 65-1-123(5) (Rev. 2012). But a state statute cannot be applied in a manner that thwarts a landowner’s state and federal constitutional rights to just compensation for a governmental taking of private property. U.S. Const. amend. V; U.S. Const. amend. XIV; Miss. Const. art. 3, §17; *Presault v. U.S.*, 100 F.3d 1525, 1551-52 (Fed. Cir. 1996). Therefore, I respectfully dissent. I would reverse and remand for a determination of just compensation owed to Bay Point for the taking of its property unburdened by the easement.

¶35. The facts of this case may be stated succinctly. In 1952, the MTC¹² acquired an easement over the property of Wallace Walker for highway purposes. Walker’s successor, Bay Point Properties Inc., sued for inverse condemnation after the MTC commenced construction of a public park on the easement and asserted that the use of the land for a public park was within the scope of the easement. The jury found that, because the MTC’s use of the land was not for highway purposes, and thus outside the scope of the easement, a taking had occurred. But because the MTC had not

¹² Then the Mississippi State Highway Commission.

released the easement on its minutes by entering a determination that the easement was no longer needed for highway purposes, the jury did not award just compensation for the taking. Instead, the jury awarded nominal damages of \$500, an amount representing the value of the Bay Point's property encumbered by the easement.

¶36. On appeal, Bay Point renews its argument from the trial that, because the jury found that the MTC's use of the easement exceeded its scope, the easement was terminated, and the MTC owes just compensation for the property unencumbered by the easement. The MTC argues that the easement did not terminate because Section 65-1-123(6) states that the MTC's easements cannot be construed as abandoned by nonuse, and Section 65-1-123(5) states that easements for highway purposes "shall be released when they are determined on the minutes of the commission as no longer needed for such purposes." Miss. Code Ann. §§ 65-1-123(5); 65-1-123(6) (Rev. 2012).

¶37. Under the Fifth Amendment to the United States Constitution, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Article 3, Section 17, of the Mississippi Constitution provides,

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public,

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the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

Miss. Const. art 3, § 17. This Court has held that the state constitutional right “provides broader protection of private property rights by the guarantee that ‘[p]rivate property shall not be taken or damaged for public use, except on due compensation. . . .’” *Gilich v. Miss. State Highway Comm’n*, 574 So. 2d 8, 11 (Miss. 1990) (quoting Miss. Const. art. 3, § 17). These provisions establish absolute federal and state constitutional rights to just compensation when private property is taken for public use.

¶38. The MTC is authorized by statute to take by eminent domain any rights, title, and interests in property that are necessary for its authorized purposes. *Roberts v. State Highway Comm’n*, 309 So. 2d 156, 161 (Miss. 1975); Miss. Code Ann. § 65-1-47 (Rev. 2012). Here, the MTC took an easement for highway purposes. An easement is “[a]n interest in land owned by another person, consisting in the right to use or control the land . . . for a specific limited purpose.” *Easement*, Black’s Law Dictionary 527 (7th ed. 1999). The dominant tenement holds the easement, and the obligation is imposed upon the servient tenement. *Browder v. Graham*, 204 Miss. 773, 38 So. 2d 188 (1948). Easements may be created by express grant, implication, or prescription. *Miss. State Highway Comm’n v. Wood*, 487 So. 2d 798, 804 (Miss. 1986). When an easement is created by express grant for a particular purpose, the

terms of the grant govern the extent of the permissible usage. **Presault**, 100 F.3d at 1542 (quoting Jon. W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land* ¶8.02[1], at 8-3 (Rev. ed. 1995)). If the holder of the dominant estate uses the land in a way inconsistent with the purpose for which the easement was granted, the easement reverts to the holder of the servient estate free of the easement. **Presault**, 100 F.3d at 1542 (quoting **Lawson v. State**, 730 P.2d 1308, 1312 (Wash. 1986)).

¶39. Bay Point argued that the easement had reverted to Bay Point when the MTC used the easement to build a park, a use which Bay Point argued exceeded the grant of the easement for highway purposes. The jury agreed and found that the MTC no longer was using the easement for highway purposes; thus, a taking had occurred. However, the trial court instructed the jury that, unless it also found that the MTC had released the easement on its minutes, the MTC retained the easement and the jury could not award just compensation. The trial court granted this jury instruction after finding that Section 65-1-123(5) does not permit the termination of an easement for highway purposes in any manner other than by a release on the minutes.

¶40. I would hold that the trial court erroneously applied Section 65-1-123(5) and Section 65-1-123(6) in a manner that violated Bay Point's state and federal constitutional rights to just compensation for the taking. I would hold that the jury's finding that the easement was no longer used for highway purposes triggered Bay Point's constitutional rights to just compensation for

the value of the property unencumbered by the easement. As stated, the MTC had title to an easement for highway purposes. As found by the jury, when the MTC built the park, it put the property to a new use, outside the grant of an easement for highway purposes. In other words, according to the jury's finding, the MTC's use of the easement exceeded the terms of the grant, causing the easement to revert to Bay Point and entitling Bay Point to just compensation for the MTC's taking of the easement for use as a park. The MTC presented no evidence or argument that the easement had not terminated due to some need for future highway use. This Court errs by speculating that the easement may be needed for future repair or replacement of the Highway 90 bridge.

¶41. Moreover, the MTC acquired the easement in 1952, before the enactment of Section 65-1-123(5) and Section 65-1-123(6). These provisions were added to the statute by amendment in 1988. 1988 Miss. Laws, ch. 597, §1. Yet the trial court construed Sections 65-1-123(5) and Section 65-1-123(6) to require that Bay Point could show that the easement had terminated only if the MTC had released the easement on its minutes. This interpretation prevented any termination of the easement that otherwise would have occurred under the common law. It has been held that, because interests in land are fixed at the time of their creation, application of a "later statute[] . . . to divest those interests would constitute a separate ground for finding a governmental taking." *Presault*, 100 F. 3d at 1540 n.13 (citing *Lawson*, 730 P. 2d 1308). When the

easement was created in 1952, termination of an easement did not require a determination on the MTC's minutes. Therefore, constitutionally, Section 65-1-123(5) cannot be applied to divest the interests of Bay Point by supplanting the common law and requiring a determination on the minutes before an easement can terminate.

¶42. Additionally, the trial court's interpretation of Section 65-1-123(5) implicated the doctrine of separation of powers. Although the majority points out that Bay Point never presented a separation of powers argument to the trial court, this Court may address a separation of powers violation *sua sponte*. ***Wimley v. Reid***, 991 So. 2d 135, 136 (Miss. 2008). Article 1, Section 1 of the Mississippi Constitution provides,

The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Miss. Const. art. 1, § 1. Article 1, Section 2, addresses encroachment of power and provides, in part, that,

No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others.

Miss. Const. art. 1, § 2.

¶43. The jury instruction granted by the trial court and approved by the majority in this case plainly allowed the MTC, an executive agency, to exercise power properly belonging to the judiciary. The majority's interpretation of the law permits the MTC unilaterally to determine when an easement has terminated. As shown by this case, even if the facts support the legal conclusion that an easement has terminated by its own language, under the majority's interpretation, the MTC may hold the easement indefinitely by refusing to release it on the minutes no matter how far the MTC may stray from the public purpose for which the property was taken from its private owner. And under the majority's interpretation, if a lawsuit ensues, the jury's role is limited to deciding whether the MTC has, in fact, released the easement on its minutes. This Court errs by construing Section 65-1-123 to allow the MTC to retain terminated easements until such time, if ever, as it deigns to release them on its minutes.

¶44. Finally, I would hold that Section 65-1-123(5) and Section 65-1-123(6) are no bar to Bay Point's recovery of just compensation equal to the value of its property unencumbered by the easement. Section 65-1-123(6) states that no property interest acquired by the MTC "shall . . . be construed as abandoned by non-use." Under the common law, a presumption of abandonment arises from protracted nonuse of an easement over an extended period of time, and the presumption is strengthened if there is proof of intent to abandon. *R & S Dev., Inc. v. Wilson*, 534 So. 2d 1008, 1010 (Miss. 1988). Bay Point does not claim abandonment

by nonuse, and the jury did not find the easement to have been abandoned. Indeed, the MTC's use of the easement to build a public park hardly can be considered abandonment. Instead, Bay Point argued and the jury found that a taking had occurred because the MTC was using the easement, but not for highway purposes. Thus, Section 65-1-123(6) did not bar Bay Point's recovery of just compensation for the unencumbered value of the property.

¶45. Neither does Section 65-1-123(5) bar Bay Point's recovery of just compensation for the value of the property unencumbered by the easement. Section 65-1-123(5) states that the MTC "shall" release an easement for highway purposes when it is determined on the minutes to no longer be needed for such purposes. Thus, the statute places an affirmative duty upon the MTC to determine if and when an easement is no longer needed for highway purposes, and then to release that easement on the minutes. Here, the MTC did not formally release the easement on its minutes. However, the jury has entered a verdict to the effect that the easement no longer is being used for highway purposes. "Equity regards as done that which ought to be done." *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201, 208 (Miss. 1984). A jury finding that the easement no longer was being used for highway purposes eliminated the need for a formal entry of that fact on the minutes. Therefore, the jury should have been instructed to award just compensation for the unencumbered value in the event it determined the easement no longer was being used for highway purposes.

¶46. The majority affirms a verdict that violated Bay Point's federal and state constitutional rights to just compensation for the taking of its property for public use. This Court errs by interpreting Sections 65-1-123(5) and (6) in a manner that violates Bay Point's right to just compensation. Because the jury found that the MTC's easement no longer was being used for highway purposes, Bay Point was entitled to just compensation for the value of the property unencumbered by the easement. I would reverse the judgment and remand this case to the trial court for a determination of just compensation for the unencumbered value of the property.

KING, J., JOINS THIS OPINION.

**IN THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BP PROPERTIES, INC.	PLAINTIFF
VERSUS	CAUSE NO.
MISSISSIPPI DEPARTMENT OF TRANSPORTATION AND MISSISSIPPI TRANSPORTA- TION COMMISSION	A2401-2011-00115
	DEFENDANTS

FINAL JUDGMENT

In this cause, the claim by the Plaintiff, BP Properties, Inc. (now known as Bay Point Properties, Inc.), that all of its interest in certain lands described in Exhibit "A" attached hereto and incorporated herein (being the same legal description included in the Judgment and Verdict recorded at Deed Book 358, Pages 202-205 on August 29, 1952, in the Land Records of Harrison County, Mississippi, First Judicial District), was taken by the Defendants, Mississippi Department of Transportation and Mississippi Transportation Commission, and appropriated to the public use without payment of just compensation, was submitted to a jury composed of Kathy Vogel and eleven other qualified persons. On August 13, 2013, said jury returned the following verdict:

We the jury, find for the Plaintiff, BP Properties, Inc., against the Defendant Mississippi Department of Transportation and Mississippi Transportation Commission and assess its damages in the amount of \$500.00.

It is, therefore, ORDERED AND ADJUDGED that the verdict of the jury, finding for the Plaintiff against the Defendants, and assessing damages in the amount of Five Hundred and no/100 Dollars (\$500.00), is hereby entered as the Judgment of this Court.

It is further ORDERED AND ADJUDGED that the Mississippi Transportation Commission shall tender to the Clerk of this Court the sum of Five Hundred and no/100 Dollars (\$500.00) on behalf of itself and the Mississippi Department of Transportation; that Plaintiffs Motion for Attorney's Fees, Costs and Expenses under Mississippi Code Annotated Section 43-37-9 is denied, as set forth under separate order of this Court; that said \$500.00 payment shall satisfy any and all of the Defendants' obligations to the Plaintiff in this civil action; that the Clerk of this Court, without further order from the Court, shall disburse said \$500.00 sum to the Plaintiff upon receipt; and that a copy of this Final Judgment shall be certified and filed in the Land Deed Records of the Chancery Clerk's office of the First Judicial District of Harrison County, Mississippi.

SO ORDERED AND ADJUDGED, this the 3rd day of January, 2014.

/s/ John C. Gargiulo
JOHN C. GARGIULO
CIRCUIT COURT JUDGE

EXHIBIT A

Commencing at a point in the center of 4th Avenue in Henderson Point, Harrison County, Mississippi, which said point is 198.5 feet Southerly from the North line of Bayview Street, measured along the center line of 4th Avenue, which said point is the point of beginning of the land herein described; thence run North $5^{\circ} 13' 35''$ East along the center line of a proposed highway project, known and designated as Toll Project #1, 46.3 feet; thence continue to run along said center line in a northwesterly direction on the circumference of a circle to the left with a radius of 1637.28, 152.3 feet to a point on the North line of Bayview street; thence ran North $84^{\circ} 56' 30''$ West along the North line of Bayview Street 115.4 feet; thence run in a Northwesterly direction, parallel to and 115 feet from said center line, on the circumference of a circle to the left, with a radius of 1522.28 feet, 338.0 feet; thence run North $13^{\circ} 12' 10''$ West parallel to and 115 feet from said center line, 382.1 feet to a point where the South line of 9th Street extended intersects the center line of Ponce de Leon Boulevard; thence run North $84^{\circ} 56' 30''$ West along the South line of 9th Street extended, 40.3 feet to the Northeast corner of Lot 1, Block 1 of Pass Christian Isles; thence North $5^{\circ} 3' 30''$ East, 114 feet; thence run in a Northwesterly direction, on the circumference of a circle to the left, with a radius of 802.35 feet, parallel with and 115 feet from said center line, 300 feet, more or less; thence North $84^{\circ} 56' 30''$ West, 98 feet, more or less, to a point on the West side of Sandy Hook Drive; thence in a Northwesterly direction along the West

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side of Sandy Hook Drive, 104.7 feet; thence in a Northwesterly direction on the circumference of a circle to the left, with a radius of 802.35 feet, parallel to and 115 feet from said center line, 485 feet, more or less, thence North $83^{\circ} 51' 10''$ West, parallel to and 115 feet from said center line, 73 feet, more or less, to the shore line of the Bay of St. Louis; thence in a Northwesterly direction along the shore line of the Bay of St. Louis, 124.4 feet to said center line; thence continue in a Northwesterly direction along the shore line of the Bay of St. Louis, 131.8 feet to a point that is 115 feet from said center line, measured at right angles thereto; thence South $83^{\circ} 51' 10''$ East, 305 feet, more or less, to a point on the West margin of Sandy Hook Drive, which point is 89.6 feet from the Northeast corner of Lot 3, of Block 7 of said Pass Christian Isles, measured along the West line of Sandy Hook Drive; thence in a Northeasterly direction, 50.1 feet to a point on the East margin of Sandy Hook Drive, which point is 104.1 feet from the Southwest corner of Lot 7, Block 4 of said Pass Christian Isles, measured along the East margin of Sandy Hook Drive; thence Southeasterly along the East margin of Sandy Hook Drive and the West line of Lot 7, Block 4, 104.1 feet to the Southwest corner of said Lot 7, Block 4; thence in a Northeasterly direction along the North margin of Front Street and along a Southern line of Lot 7, Block 4, 116.6 feet to the Southeast corner of said Lot 7, Block 4; thence North $25^{\circ} 11' 30''$ West along the East line of said Lot 7, Block 4, 7.7 feet; thence South $83^{\circ} 51' 10''$ East, 15 feet, more or less, to the North margin of Front Street and the South line of Lot 6, Block 4; thence North $64^{\circ} 23' 30''$ East

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along the North margin of Front Street, 212.2 feet to the Southwest corner of Lot 15, of Block 5, which said point is on the East margin of Ponce de Leon Boulevard; thence South $25^{\circ} 11' 30''$ East along the East margin of Ponce de Leon Boulevard, 182.2 feet; thence South $83^{\circ} 51' 10''$ East, 130 feet, more or less, to the shore line of Bayou Boisdore; thence in a Southeasterly direction along the shore line of Bayou Boisdore, 720 feet, more or less; thence in a Southeasterly direction on the circumference of a circle to the right, with a radius of 1032.35 feet, parallel to and 115 feet from said center line, 20.4 feet; thence South $13^{\circ} 12' 10''$ East, parallel to and 115 feet from said center line, 452.7 feet; thence in a Southeasterly direction, on the circumference of a circle to the right with a radius of 1752.28 feet, 529.0 feet to a point on the South margin of Bayview Street; thence South $44^{\circ} 41' 30''$ West, 101.9 feet to a point on the East margin of 4th Avenue; thence North $84^{\circ} 56' 30''$ West, 50 feet to the center line of 4th Avenue and the point of beginning, and containing 11.26 acres, more or less, exclusive of present street and highway right of way, and being a part of Lots 3, 4 and 5, Block 7, Section B, and part of Lot 2, Block 7, Section A, and a part of Lots 1, 2 and 3, Block 3, Section A, and all of Lots 1, 2, 3, 4, 5, 11, 12, 13 and 14, and part of Lots 6, 7, 9 and 10, Block 2, Section A, and all of Lots 6, 7, 8, 9, 10, 11, and 12, and part of Lots 13, 14, 5, 4, 3, 2 and 1, Block 5, and that parcel of land between Lots 5 and 6, Block 5, designated as "Park" on said Subdivision map, and also a part of that Parcel of land South of Lot 1, Block 5, designated as "Park", of the

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Survey and Subdivision of Pass Christian Isles, Harrison County, and a part of Block 105 of the Survey and Subdivision of Henderson Point Heights, Harrison County, Mississippi.

**Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk**

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November 3, 2016

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 3rd day of November, 2016.

Supreme Court Case # 2014-CA-01684-SCT
Trial Court Case # A2401-11-115

Bay Point Properties, Inc. f/k/a BP Properties, Inc. v.
Mississippi Transportation Commission and Mississippi Department of Transportation

The Motion for Rehearing filed by Appellant is denied.
Kitchens and King, JJ., would grant.

* NOTICE TO CHANCERY/CIRCUIT/
COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found at www.courts.ms.gov under the Quick Links/Supreme Court/Decision for the date of the decision or the Quick Links/Court of Appeals/Decision for the date of the decision.

SEC. 65-1-123. Sale or disposal of unnecessary property.

(1) Except as otherwise provided in subsection (10) of this section, whenever any personal property has been acquired in any manner by the Mississippi Transportation Commission for public use and in the opinion of the commission, all or any part of the property becomes unnecessary for public use, the commission is authorized to dispose of such property for a fair and reasonable cash market price. Any such sale shall be a sale upon the receipt of sealed bids after reasonable advertisement for bids in such manner and at such time and place as the commission may deem proper and advisable, except that the commission may sell at private sale any such personal property not necessary for public purposes the cash market value of which is less than Five Hundred Dollars (\$500.00); however, if the personal property is timber, the commission may sell at private sale any such timber not necessary for public purposes the cash market value of which is less than Five Thousand Dollars (\$5,000.00), except that whenever persons, groups or agencies are permitted to remove a quantity of timber from highway rights-of-way, and the cash market value of the timber is estimated by the commission to be less than One Thousand Dollars (\$1,000.00), it shall not be necessary to have the timber cruised or appraised and the commission may sell the timber at private sale. The commission shall have the right to reject any and all bids in its discretion

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and to sell the property theretofore advertised at private sale for not less than the highest of the rejected bids, or to readvertise.

(2) Except as otherwise provided in subsections (3) and (4) of this section, whenever real property, with the exception of easements for highway purposes, has been acquired by the Mississippi Transportation Commission, in any manner, for public use and in the opinion of the commission all or any part thereof becomes unnecessary for public use, the same shall be declared on the minutes of the commission as excess property and shall be sold at private sale at market value. If the excess property was a total take from the original owner, then the commission shall offer to such owner, in writing, the first right of refusal to purchase such excess property; however, if after due diligence the original owner cannot be located, then the commission shall offer the first right of refusal to purchase the property to the adjoining property owner or owners. If the excess property was a partial take from the current owner of the parcel of real property from which the excess property was originally taken, then the commission shall be required to offer in writing the first right of refusal to purchase such excess property to such owner. If within forty-five (45) days any owner to whom the commission has offered the first right of refusal under the provisions of this subsection fails to accept the offer to purchase, the property shall then be offered to the adjoining property owner or owners. If within forty-five (45) days an adjoining property owner fails to accept the offer to purchase, then the excess property shall be

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sold to the highest bidder upon the receipt by the commission of sealed bids after reasonable advertisement for bids in such manner and at such time and place as the commission deems proper and advisable; however, the commission shall have the right to reject any and all bids in its discretion and to sell the property theretofore advertised at private sale for not less than the highest of the rejected bids, or to readvertise. Upon payment of the purchase price, the executive director of the department, upon due authorization by the commission entered on its minutes, may execute a quit-claim deed conveying such property to the purchaser.

(3) Whenever the commission acquires by fee simple interest any property determined to be an uneconomic remnant outside the right-of-way, then the commission may sell the property to the adjoining property owner or owners for an amount not less than the market value established by the county tax assessor or a state licensed or certified appraiser.

(4) Whenever the commission desires to sell any real property used as maintenance lots, the property shall be sold to the highest bidder upon the receipt by the commission of sealed bids and after reasonable advertisement for bids in such manner and at such time and place as the commission deems proper and advisable; however, the commission, in its discretion, may reject any and all bids and sell the property advertised at private sale for not less than the highest of the rejected bids, or may readvertise. Upon payment of the purchase price, the executive director of the department, upon authorization by the commission entered on its

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minutes, may execute a quitclaim deed conveying the property to the purchaser.

(5) All easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes, and when released, they shall be filed by the department in the office of the chancery clerk in the county where the property is located.

(6) In no instance shall any part of any property acquired by the commission, or any interest acquired in such property, including, but not limited to, easements, be construed as abandoned by nonuse, nor shall any encroachment on such property for any length of time constitute estoppel or adverse possession against the state's interests.

(7) It is the intent of the Legislature that the Transportation Commission shall declare property it has acquired and which is no longer needed for public purposes as excess and to sell and/or dispose of such excess property in accordance with the provisions of this section as soon as practicable after such property becomes excess in fact. Unnecessary or excess property or property interests shall be disposed of only upon order of the Transportation Commission on its minutes as provided in this section.

(8) Whenever any real property has been acquired by the Transportation Commission and in the opinion of the commission all or any part of the property will not be utilized in the near future, the property shall be so declared by the Transportation Commission on its

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minutes and the commission may lease or rent the property for its market value.

(9) This section shall not apply to any sale, donation, exchange or other conveyance of real property when the Legislature otherwise expressly authorizes or directs the commission to sell, donate, exchange or otherwise convey specifically described real property.

(10)(a) As an alternative to the sale of timber under subsection (1) of this section, the Mississippi Transportation Commission may enter into an agreement with the State Forestry Commission for the general supervision and management of timber on selected portions of the rights-of-way of the interstate highway system and those completed segments of four-lane highways in the state. Such an agreement may prescribe the details of, and authority and control over, the full range of forestry management practices. Seventy-five percent (75%) of any money collected from the sale of timber on rights-of-way, less any expenses associated therewith, shall be deposited into the Education Enhancement Fund created in Section 37-61-33, and the remainder shall be deposited into the State Highway Fund to be expended solely for the repair, maintenance, construction or reconstruction of highways.

(b) Subject to the provisions of paragraph (a) of this subsection, the Mississippi Transportation Commission may, after consultation with the State Forestry Commission, adopt such rules and regulations with regard to the management, sale or disposal of timber on

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highway rights-of-way as it considers appropriate; provided, however, such rules and regulations shall be uniform throughout the state and shall be designed to maximize the value of such timber or minimize the cost of removing such timber.

SOURCES: Codes, 1942, Sec. 8059; Laws, 1940, ch. 162; 1948, ch. 332, Sec. 32; 1983, ch. 324; 1988, ch. 597, Sec. 1; 1991, ch. 569, Sec. 1. Laws, 1993, ch. 606, Sec. 1; 1994, ch. 410, Sec. 1, eff from and after July 1, 1994; Laws, 1998, Ch. 434, § 1, HB 1171; Laws, 2002, ch. 437, § 2, HB 1267; Laws, 2003, ch. 470, § 1, SB 2102, eff from and after July 1, 2003.

IN THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BP PROPERTIES, INC. PLAINTIFF
VERSUS CIVIL ACTION NO. A2401-11-115
MISSISSIPPI TRANSPORTATION
COMMISSION, ET AL DEFENDANTS

Jury Instruction No.: ____
(Filed Aug. 13, 2013)

If you find 1) that the Mississippi Transportation Commission's easement has not been abandoned, and 2) that the use being made of the property in this case is a highway purpose, then your verdict shall be in favor of the defendants, the Mississippi Transportation Commission and the Mississippi Department of Transportation, and no sum of money shall be awarded to the plaintiff. Or,

Alternatively, if you find 1) that the Mississippi Transportation Commission's easement has not been abandoned, but 2) that the use being made of the property in this case is not a highway purpose, then your verdict shall be in favor of the plaintiff, and you may award it a sum of money, but said sum may not exceed a nominal sum that has been evidenced by the proof in this case. Or,

Alternatively, if, and only if, you find by full and clear evidence that the Mississippi Transportation Commission's easement has been abandoned, and that

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the property of BP Properties, Inc. has been taken by the Mississippi Transportation Commission, you may award the plaintiff just compensation for any such taking, just compensation being what you determine to be the difference between the fair market value of the property taken after proper application of the before and after rule.

**IN THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BP PROPERTIES, INC. **PLAINTIFF**
VS. **CAUSE NO.: A2401-11-115**
MISSISSIPPI DEPARTMENT
OF TRANSPORTATION and
MISSISSIPPI TRANSPORTATION
COMMISSION **DEFENDANTS**

JURY INSTRUCTION NO: ____

(Filed Aug. 13, 2013)

Just Compensation is defined as the fair market value of property rights taken for public use. The definition of fair market value is the price that a willing buyer will pay and a willing seller will accept for this property as of the date of acquisition; both being informed of the highest and best use of the property; neither being under duress or under any compulsion to either buy or sell; and allowing a reasonable time for exposure on the open market, each having knowledge of the material facts concerning the property.

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IN THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BP PROPERTIES, INC. PLAINTIFF
VERSUS CIVIL ACTION NO. A2401-11-115
MISSISSIPPI TRANSPORTATION
COMMISSION, ET AL DEFENDANTS

Jury Instruction No.: ____
(Filed Aug. 13, 2013)

The Court instructs the jury that the Mississippi Transportation Commission obtained an easement for all highway purposes in 1952. The court further instructs the jury that an easement encumbers, or is still over and upon the land unless it has been abandoned by the Mississippi Transportation Commission.

**IN THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BP PROPERTIES, INC. **PLAINTIFF**
V. **CAUSE NO.: A2401-11-115**
MISSISSIPPI DEPARTMENT
OF TRANSPORTATION and
MISSISSIPPI TRANSPORTATION
COMMISSION **DEFENDANTS**

JURY INSTRUCTION NO: ____

(Filed Aug. 9, 2013)

Inverse condemnation is a remedy available to one whose land has been taken for public use. Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner, rather than the condemnor, and has been deemed to be available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings. Inverse condemnation is a legal process by which an owner brings suit against the government to prove that the government has taken compensable property rights for public use without payment of just compensation.

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If you find that the Defendants have taken compensable property rights of Plaintiff Bay Point Properties, Inc., for a public use without payment of just compensation, you must render a Judgment for the Plaintiff in this inverse condemnation proceeding and award just compensation to Plaintiff for the taking of its property rights for public use.

IN THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BP PROPERTIES, INC. PLAINTIFF
VERSUS CIVIL ACTION NO. A2401-11-115
MISSISSIPPI TRANSPORTATION
COMMISSION, ET AL DEFENDANTS

Jury Instruction No.: ____
(Filed Aug. 13, 2013)

The Court instructs the jury that in order to prevail on the issue of abandonment, the plaintiff must prove by full and clear evidence that the Mississippi Transportation Commission's easement has been abandoned in the manner provided by law. The Court instructs the jury that all easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes, and when released, they shall be filed by the department in the office of the chancery clerk in the county where the property is located. Furthermore, unnecessary or excess property or property interests shall be disposed of only upon order of the Mississippi Transportation Commission on its minutes. Finally, in no instance shall any part of any property acquired by the commission, or any interest acquired in such property, including, but not limited to, easements, be construed as abandoned by nonuse.

**IN THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BP PROPERTIES, INC. **PLAINTIFF**
VS. **CAUSE NO.: A2401-11-115**
MISSISSIPPI DEPARTMENT
OF TRANSPORTATION and
MISSISSIPPI TRANSPORTATION
COMMISSION **DEFENDANTS**

JURY INSTRUCTION NO: ____

(Filed Aug. 13, 2013)

The Fifth Amendment of the United States Constitution provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The Mississippi Constitution provides that “private property shall not be taken or damaged for public use except upon due compensation to its owner.”

If you find that the Defendants have taken private property rights of Plaintiff Bay Point Properties, Inc., for public use without the payment of just compensation, you must render a Judgment for the Plaintiff and award just compensation.

MISSISSIPPI STATE HIGHWAY DEPARTMENT
MINUTES OF MEETING OF
HIGHWAY COMMISSION
HELD AT JACKSON, MISSISSIPPI ON
22ND DAY OF JANUARY 1952.

The question of the necessity for the taking for public use of the property hereinafter described having been duly considered and the Commission being of the opinion that it is necessary to take for public use the following described property, it is hereby ordered that the property of Wallace C. Walker, along U. S. Highway No. 90, being described as a strip of land of irregular width running through Harrison County, known as Federal Aid Project No. Toll Project No. 1, as more particularly shown by the plans and specifications for said project on file in these offices, which plans and specifications are made a part hereof by reference, is hereby declared to be necessary for the construction of a part of a public highway, to-wit: U. S. Highway No. 90, between Bay St. Louis and Henderson Point, and the Attorney General of Mississippi is hereby authorized and requested to institute any and all condemnation proceedings necessary to acquire the above described property for the Public use mentioned, the owners and other parties interested in such lands being unable to agree with this Commission on a fair price to be paid therefor.

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And the Engineer is directed to proceed immediately with his inspection of the premises to be condemned and to prepare evidence for the use of and under the direction of the Attorney General.

MOVED, SECONDED AND ORDERED, this the 22nd day of January, 1952, by the following vote:

Commissioners voting aye:

John D. Smith, Chairman

Roy C. Adams, W. F. Dearman

The question of the necessity for the taking for public use of the property hereinafter described having been duly considered and the Commission being of the opinion that it is necessary to take for public use the following described property, it is hereby ordered that the property of J. Harold Golden, along U. S. Highway No. 90, being described as a strip of land of irregular width running through Harrison County, known as Federal Aid Project No. Toll Project No. 1, as more particularly shown by the plans and specifications for said project on file in these offices, which plans and specifications are made a part hereof by reference, is hereby declared to be necessary for the construction of a part of a public highway, to-wit: U. S. Highway No. 90, between Bay St. Louis and Henderson Point, and the Attorney General of Mississippi is hereby authorized and requested to institute any and all condemnation proceedings necessary to acquire the above described property for the public use mentioned, the owners and other parties interested in such lands being unable to agree with the Commission on a fair price to be paid therefor.

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And the Engineer is directed to proceed immediately with his inspection of the premises to be condemned and to prepare evidence for the use of and under the direction of the Attorney General.

MOVED, SECONDED AND ORDERED, this the 22nd day of January, 1952, by the following vote:

Commissioners voting aye;
John D. Smith, Chairman
Roy G. Adams. W. F. Dearman

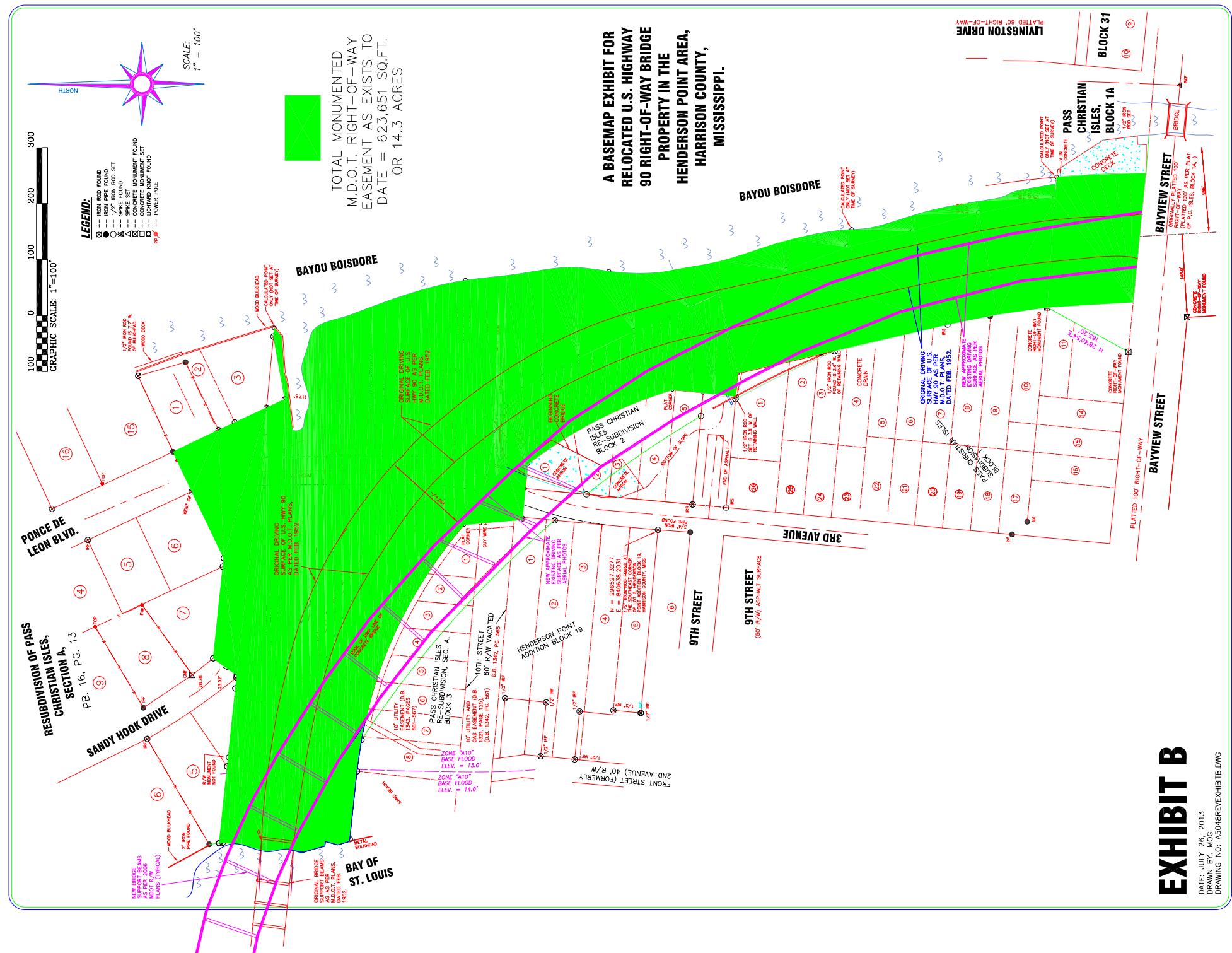


EXHIBIT B

DATE: JULY 26, 2013
DRAWN BY: MOG
DRAWING NO: A5048REVEXHIBITB.DWG