Rel: 09/27/2013

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2013

1110439

Town of Gurley

v.

M & N Materials, Inc.

1110507

M & N Materials, Inc.

v.

Stan Simpson, individually and as mayor of the Town of Gurley, and Town of Gurley

Appeals from Madison Circuit Court
(CV-05-731)

On Applications for Rehearing

PARKER, Justice.

1110439 -- APPLICATION OVERRULED; OPINION OF DECEMBER 21, 2012, MODIFIED [BY SUBSTITUTION OF PAGES 26 THROUGH 36 FOR PAGES 26 THROUGH 35 OF THE ORIGINAL OPINION TO ADD FOOTNOTE 6 AND TO RENUMBER THE REMAINING FOOTNOTES ACCORDINGLY].

Smith, Special Justice,* concurs.

Moore, C.J., and Stuart, Parker, and Shaw, JJ., concur specially.

Bolin, Wise, and Bryan, JJ., concur in the result.

Murdock, J., concurs in the result, withdraws his special writing issued on original submission on December 21, 2012, and substitutes a new writing.

Main, J., recuses himself.

1110507 -- APPLICATION OVERRULED; OPINION OF DECEMBER 21, 2012, MODIFIED [BY SUBSTITUTION OF PAGES 26 THROUGH 36 FOR PAGES 26 THROUGH 35 OF THE ORIGINAL OPINION TO ADD FOOTNOTE 6 AND TO RENUMBER THE REMAINING FOOTNOTES ACCORDINGLY].

Smith, Special Justice,* concurs.

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*Retired Associate Justice Patti Smith was appointed on August 23, 2013, to serve as a Special Justice in regard to these appeals.

Moore, C.J., and Stuart, Parker, and Shaw, JJ., concur specially.

Bolin, Wise, and Bryan, JJ., dissent.

Murdock, J., dissents, withdraws his special writing issued on original submission on December 21, 2012, and substitutes a new writing.

Main, J., recuses himself.

University of North Alabama, 826 So. 2d 118 (Ala. 2002), § 23 was not applicable to the Town's actions.

Section 23, entitled "Eminent domain," provides:

> "That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association."[6]

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[6]We note that the plain language of § 23 prevents the State, not municipalities, from taking property without just compensation. See Art. I, § 36, Ala. Const. 1901 ("[W]e declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate.")(emphasis added). In this case, the legislature enacted Act No. 2004-19, which annexed the at-issue property. Therefore, § 23 is applicable because of the legislature's involvement with the Town's annexation of the at-issue property.

Further, this Court set forth the following concerning the power of eminent domain and its limitations in Gober v. Stubbs, 682 So. 2d 430, 433-34 (Ala. 1996):

> "The power of eminent domain does not originate in Article I, § 23. Instead, it is a power inherent in every sovereign state. Section 23 merely places certain limits on the exercise of the power of eminent domain. This Court stated in Steele v. County Commissioners, 83 Ala. 304, 305, 3 So. 761, 762 (1887):
>
> > "'The right of eminent domain antedates constitutions, and is an incident of sovereignty, inherent in, and belonging to every sovereign State. The only qualification of the [inherent] right is, that the use for which private property may be taken shall be public.... The constitution [of our State] did not assume to confer the power of eminent domain, but, recognizing its existence, [further] limited its exercise by requiring that just compensation shall be made.'
>
> "In order for an exercise of eminent domain to be valid under § 23, two requirements must be met. See Johnston v. Alabama Public Service Commission, 287 Ala. 417, 419, 252 So. 2d 75, 76 (1971). First, the property must be taken for a public use and, with one exception inapplicable here, it cannot be taken for the private use of individuals or corporations. This first restriction is no more than a restatement of a requirement inherent in a sovereign's very right to exercise eminent domain. See Steele, 83 Ala. at 305, 3 So. at 762. Second, 'just compensation [must be paid] for any private property taken.' Johnston, 287 Ala. at 419, 252 So. 2d at 76."

(Footnotes omitted.)

In Willis, a property owner owned property across the street from a parking lot owned by the University of North Alabama ("UNA"). UNA built a multilevel parking deck on its parking lot; it was assumed that the construction of the parking deck reduced the value of the property owner's property. As a result, the property owner "filed an inverse-condemnation action against UNA, based on the allegation that UNA 'took' his property without 'just compensation,' in violation of § 23 ...." 826 So. 2d at 119. This Court held that even though the property owner's property was injured, "since no portion of Willis's property was 'taken,' or applied to public use by UNA, UNA was not required to compensate Willis under § 23." 826 So. 2d at 121. Also significant to the holding in Willis was the overruling of certain holdings in Foreman v. State, 676 So. 2d 303 (Ala. 1995), as follows:

> "Foreman v. State, 676 So. 2d 303 (Ala. 1995), involved an inverse-condemnation action in which compensation was sought under § 23 of the Constitution of Alabama of 1901. In Foreman, this Court held that in '"inverse condemnation actions, a governmental authority need only occupy or injure the property in question."' 676 So. 2d at 305 (quoting Jefferson County v. Southern Natural Gas Co., 621 So. 2d 1282, 1287 (Ala. 1993)) (emphasis added in Foreman). However, in Jefferson County, the

> Court was applying § 235 of the Alabama Constitution, not § 23. As we have already noted, § 235 does not apply to the State. Finnell v. Pitts, 222 Ala. 290, 132 So. 2 (1930). To the extent that Foreman (and Barber v. State, 703 So. 2d 314 (Ala. 1997), which relied on Foreman), held that under § 23 '"a governmental authority need only occupy or injure the property in question,"' those holdings are incorrect and are hereby overruled."

Therefore, it is clear, under the plain language of § 23 and under Willis, that the trial court properly held that § 23 does not apply in this case. It is undisputed that there was not an actual taking in this case and that M & N has complained only of administrative and/or regulatory actions taken by the Town. Willis makes clear that § 23 applies when a physical taking of the property in question has occurred.[7]

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[7]The dissent discusses Alabama Department of Transportation v. Land Energy, Ltd., 886 So. 2d 787 (Ala. 2004), which was based upon the "law of the case" doctrine, not upon an interpretation by this Court of § 23 allowing for the recovery of a regulatory "taking." See, e.g., id. at 796 ("Under the governing 'law of the case,' ...), 802 ("Given the particular procedural and evidentiary posture of this case, and given the 'law of the case' established by the jury instructions, we conclude that the jury was entitled to find that LE possessed an identifiable property-use interest before the condemnation. In that regard, one feature of the law of the case, binding on the jury, was the instruction that if it found to its reasonable satisfaction that ADOT [the Alabama Department of Transportation] 'by acquiring the surface above the mineral estate of [LE] improperly foreclosed the possibility that [LE] could recover its minerals,' it would be the duty of the jury to determine damages"), and 803 ("Although there was testimony offered by ADOT contrary to

In the present case, M & N does not allege that there was a physical taking of the property in question. We affirm the trial court's judgment granting the Town's motion for a JML as to M & N's § 23 claim.[8]

Next, M & N argues that the trial court "erred in granting judgment as a matter of law on M & N's negligence claims." Although M & N cites general authority setting forth the elements of a negligence claim, M & N cites no authority establishing that the Town or Simpson owed M & N a duty. Instead, without citing any authority, M & N generally alleges that the Town and its employees

> "had a duty to ensure that its mayor was qualified to hold office ... and to properly process and issue a business license to M & N and to Vulcan, to prevent the adoption of arbitrary and capricious moratoria targeting the property, to properly assign zoning to the property (including overseeing a

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some of the testimony recited above, under the applicable standard of review we must construe the record in favor of LE and look to see only if there is substantial evidence in the record supporting the jury's finding that a taking, as defined by the jury instructions, occurred.") (some emphasis added).

[8]We note that M & N also cites Blankenship v. City of Decatur, 269 Ala. 670, 115 So. 2d 459 (1959), and Opinion of the Justices No. 119, 254 Ala. 343, 48 So. 2d 757 (1950), in support of its argument regarding § 23. However, those cases are distinguishable in that both of those cases involved a physical taking of property, unlike the present case.

> proper land use study), and to properly apply its existing zoning ordinances."

Then, without citing any facts, M & N generally alleges that the Town "breached those duties, which proximately caused damages to M & N." M & N also generally argues, without citing any facts, that it "presented substantial evidence from which the jury could have determined that [the Town] acted negligently...."

As set forth in our standard-of-review section above, a motion for a JML is properly denied when the nonmoving party has produced substantial evidence to support each element of the party's claim. See Cheshire, supra. M & N, the nonmoving party below and the cross-appellant here, has the burden of demonstrating that it produced substantial evidence to support every element of its negligence claims. M & N has failed to cite any authority to support its assertion that the Town owed M & N a duty and has failed to indicate which facts in the record constitute substantial evidence supporting the elements of its negligence claims. This Court held as follows in University of South Alabama v. Progressive Insurance Co., 904 So. 2d 1242, 1247-48 (Ala. 2004):

"Rule 28(a)(10), Ala. R. App. P., requires that arguments in an appellant's (or cross-appellant's) brief contain 'citations to the cases, statutes, other authorities, and parts of the record relied on.' The effect of a failure to comply with Rule 28(a)(10) is well established:

> "'It is settled that a failure to comply with the requirements of Rule 28(a)([10]) requiring citation of authority for arguments provides the Court with a basis for disregarding those arguments:
>
> > "'"When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research. Rule 28(a)([10]); Spradlin v. Birmingham Airport Authority, 613 So. 2d 347 (Ala. 1993)."
>
> "'City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998). See also McLemore v. Fleming, 604 So. 2d 353 (Ala. 1992); Stover v. Alabama Farm Bureau Ins. Co., 467 So. 2d 251 (Ala. 1985); and Ex parte Riley, 464 So. 2d 92 (Ala. 1985).'

"Ex parte Showers, 812 So. 2d 277, 281 (Ala. 2001). '[W]e cannot create legal arguments for a party based on undelineated general propositions unsupported by authority or argument.' Spradlin v. Spradlin, 601 So. 2d 76, 79 (Ala. 1992)."

[substituted p. 32]

Based on its failure to cite any legal authority or facts demonstrating that the trial court's JML on M & N's negligence claims was in error, we need not consider M & N's argument.

Next, M & N argues that the "trial court erred in dismissing M & N's claims for negligent hiring, retention, and supervision." M & N generally argues that "the trial court erroneously granted [the Town's] motion to dismiss M & N's negligent hiring, retention, and supervision claims," but M & N does not provide this Court with any authority demonstrating that the trial court's judgment was in error. Instead, M & N argues that "a negligent hiring and supervision claim may lie against a municipality" and that the Town "incorrectly argued that it could have no vicarious liability for the negligence of its employees because of discretionary function immunity." However, M & N does not provide this Court with any argument or authority demonstrating that the trial court's judgment was in error. Therefore, we need not consider this argument. See Rule 28(a)(10), Ala. R. App. P., and Progressive Insurance, supra.

Next, M & N argues that the "trial court erred in excluding evidence of Simpson's prior convictions." In City

of Birmingham v. Moore, 631 So. 2d 972, 974 (Ala. 1994), this Court held that "[t]he decision to admit or to exclude evidence is within the discretion of the trial judge, and we will not reverse such a decision absent an abuse of discretion." This Court also held in Moore that

> "the mere showing of error is not sufficient to warrant a reversal; it must appear that the appellant was prejudiced by that error. Rule 45, [Ala.] R. App. P. Industrial Risk Insurers v. Garlock Equip. Co., 576 So. 2d 652, 658 (Ala. 1991); Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165, 167 (Ala. 1991)."

631 So. 2d at 973-74. In the present case, M & N has argued only that the trial court erred by excluding Simpson's prior convictions, not that the trial court exceeded its discretion in doing so. M & N generally alleges that it was prejudiced by the exclusion of the evidence of Simpson's prior convictions, but it offers no explanation as to how it was prejudiced. M & N has failed to demonstrate that the trial court exceeded its discretion in excluding the evidence and, thus, has failed to demonstrate reversible error on the part of the trial court.

Lastly, M & N argues that the "trial court erred in granting judgment as a matter of law on M & N's wantonness

claims against Simpson" and that the "trial court erred in charging the jury on the affirmative defense of justification on M & N's intentional interference claim." However, M & N fails to cite authority supporting these arguments. M & N does make general allegations concerning the facts to support its argument that the trial court's JML for Simpson on its wantonness claim was in error; however, it does not direct this Court's attention to specific facts supporting its argument. Therefore, we need not consider these arguments. See Rule 28(a)(10), Ala. R. App. P., and Progressive Insurance, supra.[9]

Conclusion

Based on the foregoing, in case no. 1110439, we hold that § 235 does not support M & N's inverse-condemnation claim that is based upon administrative and/or regulatory actions taken by the Town; thus, we reverse the trial court's judgment in favor of M & N on its inverse-condemnation claim and render a

[9]We note that the Town and Simpson argued that M & N was not the real party in interest under Rule 17, Ala. R. Civ. P. However, that issue is inconsequential because, assuming that M & N is the real party in interest for either some or all the claims, the Town and Simpson have prevailed.

judgment in favor of the Town. In case no. 1110507, we affirm the trial court's judgment.

1110439 -- REVERSED AND JUDGMENT RENDERED.

Malone, C.J., and Woodall, Stuart, Bolin, Shaw, and Wise, JJ., concur.

Murdock, J., concurs in the result.

1110507 -- AFFIRMED.

Malone, C.J., and Woodall, Stuart, Bolin, Shaw, and Wise, JJ., concur.

Murdock, J., dissents.

[substituted p. 36]

MURDOCK, Justice (concurring in the result in case no. 1110439 and dissenting in case no. 1110507, as substituted on denial of applications for rehearing on September 27, 2013).

I concur in the result in case no. 1110439; I dissent in case no. 1110507. I write in reference to the latter case.

There are two issues in case no. 1110507: (1) the substantive meaning of the "takings clause" in § 23 of our State Constitution, specifically whether it prohibits "regulatory takings" without just compensation, and, (2) if it does, whether the takings clause in § 23 limits the power of municipalities. I will address both issues in the order stated.

I. The Substantive Meaning of § 23

The claim of inverse condemnation asserted by M & N Materials, Inc., under § 23 of the Alabama Constitution of 1901 was based not on a physical taking of the property at issue, but upon a so-called "regulatory taking" by the Town of Gurley ("the Town"). In case no. 1110507, the main opinion rejects this claim on the ground that

> "it is clear, under the plain language of § 23 [Alabama Const. 1901] and under [this Court's holding in] Willis [v. University of North Alabama, 826 So. 2d 118 (Ala. 2002)], that the trial court properly held that § 23 does not apply in this case. ... Willis makes clear that § 23 applies when a

> physical taking of the property in question has occurred."

___ So. 3d at ___. As discussed below, although Willis may hold that § 23 does apply when there has been a physical taking, it should not be read as holding that this is the only circumstance in which § 23 applies. In any event, the present case is distinguishable from Willis. Further, as also discussed below, I do not agree that the plain language of § 23 forecloses compensation for a so-called "regulatory taking" of property by the government.

A. Distinguishing Willis

I agree that the Court in Willis did rely upon the lack of a physical taking as a basis for ruling against the landowner in that particular case. 826 So. 2d at 121. That was the only rationale offered to the Court by the government in that case, however. Id. Moreover, the Court's reliance upon this rationale to decide the particular case before it must be considered in light of the juxtaposed rationales offered to the Court by the parties in that case. The alternative position offered to the Court by the landowner was that governmental action that resulted in a mere "injury" to property, as opposed to an outright physical taking of it, was

sufficient to sustain a claim of inverse condemnation under § 23. Id. The Court's opinion, therefore, understandably rejects the landowner's argument and embraces the position that mere "injury" to property does not violate the right expressed in § 23. Importantly for our purposes here, no issue was presented in Willis as to whether a "regulatory taking" would be prohibited by § 23.

Willis involved the construction of a parking deck by the government on property adjacent to the plaintiff's. The plaintiff complained that the presence of this structure resulted in a reduction in the market value of the plaintiff's property and, thus, that his property had been "injured" for purposes of § 23. 826 So. 2d at 120. Willis did not involve, as does the present case, a regulatory action by which the government directly and formally imposed restrictions upon the use of the plaintiff's property. Nor did the plaintiff argue that the government's actions had deprived his property of all reasonable uses.[10] Accordingly, I cannot find Willis to be

[10]I do not address the issue whether a regulatory taking necessarily occurs only when property is deprived of all reasonable uses, only the fact that that is what occurred in this case. See discussion, infra, of Alabama Department of Transportation v. Land Energy, Ltd., 886 So. 2d 787 (Ala.

dispositive of the issue of the potential application of § 23 in the present case.[11]

2004), noting with apparent approval United States Supreme Court jurisprudence recognizing the possibility of a regulatory "partial taking."

[11]In his separate writing, Justice Parker expresses the view that this writing "does not address the significant holding in Willis overruling in part Foreman v. State, 676 So. 2d 303 (Ala. 1995)." ___ So. 3d at ___ (Parker, J., concurring specially). I disagree. I believe I have adequately explained the limited nature of the Willis holding.

Specifically, however, Justice Parker focuses on the overruling in Willis of the holding in Foreman that "'a governmental authority need only occupy or injure the property in question.'" ___ So. 3d at ___ (quoting Foreman, 676 So. 2d at 305 (emphasis by Justice Parker)). He suggests thereby that Willis stands for the proposition that a mere "injury" is not enough to constitute a "taking" under § 23.

I stand by the factual distinctions between the present case and Willis, as described in the preceding text, as well as by my explanation of the limited nature of the Willis holding given the context of those facts and the competing positions offered to the Court by the parties in that case. The Willis Court said that a physical occupation of the property was compensable; it did not say, as Justice Parker suggests, that "anything other than physical invasion is not compensable." ___ So. 3d at ___. In short, the issue of a "regulatory taking" simply was not presented to or addressed by the Court in Willis.

As I explain in the text immediately following this footnote, what is going on in this case is more than a mere "injury" to property of the nature rejected in Willis (the construction of a parking deck next to the landowner's property). Instead, there is a regulatory taking that deprives the property of all reasonable uses, including particularly the "reasonable investment-backed expectations"

B. Comparing the "Takings Clause" of § 23 of the Alabama Constitution and the "Takings Clause" of the Fifth Amendment to the United States Constitution

The applicable "takings clause" of § 23 reads as follows: "[P]rivate property shall not be taken for, or applied to public use, unless just compensation be first made therefor ...." The "Takings Clause" of the Fifth Amendment to the United States Constitution states that private property shall not "be taken for public use, without just compensation." I see no material difference in the wording of these two provisions.

As this Court has recognized:

> "[W]hen the United States Supreme Court construes the Federal Constitution and its application to a given situation, it is controlling on us insofar as that constitution is concerned. When we construe similar features of the State Constitution as applicable to the same situation the decision of the United States court, though not controlling on us[,] should be persuasive. A different conclusion would produce much confusion and instability in legislative effectiveness."

Pickett v. Matthews, 238 Ala. 542, 547, 192 So. 261, 265-66 (1939). This Court often looks to federal constitutional

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of its owner. See Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978).

cases when considering the meaning of a particular word in a constitutional context. See, e.g., Cole v. Riley, 989 So. 2d 1001, 1009-10 (Ala. 2007) (See, J., concurring specially); Jefferson Cnty. v. Southern Natural Gas Co., 621 So. 2d 1282, 1287 (Ala. 1993) (looking to United States Supreme Court cases to draw a distinction between inverse condemnation and eminent domain).

The United States Supreme Court has held that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster -- and that such 'regulatory takings' may be compensable under the Fifth Amendment." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005). As Justice Holmes explained in his watershed decision in Pennsylvania Coal Co. v Mahon, 260 U.S. 393, 415 (1922): "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Furthermore, insofar as a taking for "public use" is required, there is no dispute that the zoning of the land at issue here in order to prevent its use as a quarry was done for the purported benefit of the Town and the public at large.

Takings jurisprudence in both the federal and the state courts emphasizes the need 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); City Council of Montgomery v. Maddox, 89 Ala. 181, 188-89, 7 So. 433, 436 (1890). "Whatever is beneficially employed for the community is of public use and a distinction [between this and 'public benefit'] cannot be tolerated." Aldridge v. Tuscumbia, C. & D.R. Co., 2 Stew. & P. 199 (Ala. 1832).

This is not the first case in which this Court has had the opportunity to discuss federal "regulatory taking" jurisprudence in the context of a claim under § 23 of the Alabama Constitution. In Alabama Department of Transportation v. Land Energy, Ltd., 886 So. 2d 787 (Ala. 2004), the Court affirmed an inverse-condemnation award under § 23 of the Alabama Constitution based on a "taking" of surface-mineable coal. In so doing, the Court relied upon the doctrine of law of the case in relation to a failure of the State (specifically, the Alabama Department of Transportation ("ADOT")) to object at trial to a jury instruction that the

plaintiff was entitled to recover for a "taking" if the jury found that the actions of the State had prevented the plaintiff from mining the coal from its property. Indeed, ADOT committed itself in that case to a position that a "taking" could occur for purposes of § 23 by a so-called "regulatory taking." 886 So. 2d at 799. Accordingly, this Court provided the following explanation of ADOT's position in that case, helpful to the present case because of its instructive discussion of federal "regulatory taking" jurisprudence:

> "ADOT ... state[s] that
>
> > "'there are two distinct kinds of taking: physical takings and regulatory takings. A physical taking requires a physical invasion or occupation of the property or that the owner be otherwise dispossessed of the property. A regulatory taking occurs where the owner retains the property, but its use is now regulated to such a degree that it is the legal equivalent of a taking. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).'
>
> "ADOT further asserts that the 'takings jurisprudence of the U.S. Supreme Court has recognized two types of compensable regulatory takings: Categorical and partial.' It contends that a categorical taking is one in which all economically viable use, meaning all economic value, has been absorbed by the regulatory imposition. By process of elimination, it concludes that the

> alleged taking in this case must be analyzed as a 'partial' taking that is 'regulatory in nature' because LE's claim, which relates only to 'a portion of the mineral estate, i.e., the surface mineable coal, prevents any conclusion that a categorical taking of the 120-acre mineral estate occurred.' Thus, in accordance with the legal position ADOT has staked out, this Court must consider whether there was substantial evidence from which the jury could reasonably have concluded that either a full or a partial taking occurred. Citing Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 130-31, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), ADOT argues that '[t]he point at which regulation becomes a partial taking does not present a bright line test, but rather an ad hoc balancing test focused on (1) distinct investment backed expectations, (2) the nature of the government action, and (3) the economic impact on the property owner.'"

Land Energy, 886 So. 2d at 797. The Court also noted that, "'[w]ith respect to 'regulatory takings,' ADOT referred in its trial brief to 'a growing body of federal law involving the issue,' citing six decisions of the United States Supreme Court, including Penn Central, supra; Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed. 2d 798 (1992); and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed. 2d 517 (2002)." 886 So. 2d at 798. Further, citing Lucas, ADOT took the position that "'[a] regulatory taking occurs where the owner retains the property, but its use is

now regulated to such a degree that it is the legal equivalent of a taking.'" Id.

The Court's opinion in Land Energy went on to explain as follows:

> "In Penn Central, supra, the United States Supreme Court acknowledged that it had theretofore been unable to develop any set formula for determining when compensation for a regulatory taking was due from the government, explaining that the cases on point had engaged in 'essentially ad hoc, factual inquiries.' Among the factors prior caselaw had identified as having particular significance in the analysis was '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' 438 U.S. at 124, 98 S.Ct. 2646. In Lucas, the Court acknowledged that its caselaw had produced some 'inconsistent pronouncements.' 505 U.S. at 1016 n. 7, 112 S.Ct. 2886. The Court pointed out that it had said on numerous occasions '[that] the Fifth Amendment is violated when land-use regulation ... "denies an owner economically viable use of his land."' 505 U.S. at 1016, 112 S.Ct. 2886 (quoting Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980)) (emphasis added in Lucas). ...
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> "In Tahoe-Sierra Preservation Council, supra, the Court explained that '[t]he Penn Central analysis involves "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."' 535 U.S. at 315 n. 10, 122 S.Ct. 1465 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 616, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001)). The phrase actually used in

> Penn Central was 'distinct investment-backed expectations.' Penn Central cited Goldblatt v. Town of Hempstead, 369 U.S. 590, 594, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), as the source of this factor, but no phrasing similar to it is used at the page cited or anywhere else in the Goldblatt opinion. The relevant statements that appear on the page cited from Goldblatt are simply that '[t]here is no set formula to determine where regulation ends and taking begins'; that a 'comparison of values before and after is relevant,' but 'by no means conclusive'; and that '[h]ow far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question' (footnote omitted).[3]
>
> "_____
>
> "[3]Penn Central commented that '[i]t is, of course, implicit in Goldblatt that a use restriction on real property may constitute a "taking" ... perhaps if it has an unduly harsh impact upon the owner's use of the property.' 438 U.S. at 127, 98 S.Ct. 2646."

Land Energy, 886 So. 2d at 798.

The Court ended its analysis of the issue with an extensive review of the trial testimony relevant to the landowner's "reasonable expectation of a return on investment." 866 So. 2d at 799-803. Based on this evidence, it concluded that the landowner had been deprived of an "identifiable property-use interest" within the context of the

regulatory-taking jurisprudence applicable to that case. 866 So. 2d at 802-03.

Although we are not bound by the federal regulatory jurisprudence relied upon by the Court in Land Energy, I am persuaded that we should apply some form of it to § 23 claims, given the virtually identical language of that section of our State constitution and of the Fifth Amendment to the United States Constitution. In this case, there is ample evidence from which the jury could have concluded that the property was suited primarily for mining the stone beneath its surface and not for the agricultural purpose for which it was zoned and that, as a result, there has been an "unduly harsh impact upon the owner's use of the property." 866 So. 2d at 798. More specifically, the owner in this case has been deprived of any and all reasonable uses of its property and, concomitantly, of a distinct and "reasonable investment-backed expectation." I therefore find the Town's actions to have been a regulatory taking that is prohibited by § 23 in the absence of adequate compensation.

II. The Takings Clause of § 23 Does Limit Municipalities (And § 235 Does Not Dictate Otherwise)

Two provisions of the Alabama Constitution of 1901 are germane to the issue before us, §§ 235 and 23. To the extent that the Town argues that § 23 does not apply to takings by municipal corporations because § 235 instead applies, I do not follow the Town's logic. It is true that § 235 does apply to municipal corporations. This does not mean, however, that § 23 does not also apply to them. For the reasons discussed in more detail in Part II.B., below, § 23 prevents a municipal corporation from taking private property without compensating the landowner therefor. Before turning to § 23 per se, however, I will first address the provisions of § 235.

A. Section 235 Does Not Empower Municipalities to Take Property for Reasons Other than Constructing "Public Works" Without Compensating the Landowner

The first critical point to be made concerning § 235 is that § 235 is not the source of municipalities' power to take property. That is, § 235 is not the provision that creates or defines the nature of that power in municipalities. The first sentence of § 235 simply begins with the following reference: "Municipal ... corporations ... invested with the privilege of taking property for public use...." This language presumes

that power to take property of some nature already has been "invested" in a municipality apart from § 235 itself. (The source of the power in municipalities is discussed below.)

Accordingly, and this second point is closely tied to the first, the fact that § 235 then continues by expressing limitations or conditions (the payment of compensation) on certain uses of that power (the "construction or enlargement of [the municipal corporation's] works, highways, or improvements") is no basis for concluding that the referenced uses are the only possible uses of the power of eminent domain by a municipality. It means only that these are the uses of the power of eminent domain as to which the drafters of § 235 chose to reiterate a limitation on municipalities in that section, probably because the more general limitations imposed by § 23 (as discussed below) were also in place and the uses referenced in § 235 were the most commonly used purposes of eminent domain by municipalities at that time. See note 13, infra.[12]

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[12]Of course, if this Court considers the purposes specified in § 235 as the only purposes for which a municipality is permitted to take property, then the Town is in no better position as a result. If in fact, as discussed in Part I of this writing, the Town's actions did in fact

In other words, if, consistent with the discussion in Part I of this writing, we accept the general notion that "taking" of private property can entail more than just the physical taking of property (i.e., a taking for "the construction or enlargement" of public works as addressed in § 235), then it is important to recognize what § 235 does and does not say regarding those types of taking that it does address. What § 235 does say is that there is an affirmative obligation on the part of a municipal corporation to pay compensation whenever it does take or destroy property for the construction or enlargement of a public-works project. What § 235 does not say is that a municipal corporation can take or destroy private property only for the construction or enlargement of public-works projects or, more importantly, that if in fact a municipality does take or destroy private property for some purpose other than for the construction or enlargement of a public-works project, it need not worry about compensating the landowner for that taking.

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constitute a "taking," the purpose for which that taking occurred in this case was not one of the purposes that the Court will have found to be authorized by § 235.

In his discussion of the relationship of §§ 235 and 23, however, Justice Parker contends that an understanding of § 23 as limiting the authority of municipalities would be contrary to the principle that §§ 23 and 235 should be read in pari materia. ___ So. 3d at ___ (Parker, J., concurring specially). I find the converse to be true. The limitations on municipal action expressed in § 235 are entirely consistent with the understanding that § 23 recognizes the rights of private landowners and a corresponding right to just compensation when their property is "taken" by force of governmental action. As discussed above, § 235 simply makes clear that there is in fact a right to receive compensation when the taking is by a municipality for a public-works project, this more than likely being the purpose for which it was anticipated in 1901 that a municipality would take a citizen's property.[13] A reading of this affirmative language

[13]As Justice Parker notes, municipal zoning ordinances did not come into vogue until the early 1900s. Therefore, "[i]n 1901 ... the threat of regulatory 'takings' of property through a municipality's authority to pass zoning regulations wan not an obvious threat to an individual's property rights," ___ So. 3d at ___, as was the threat of a physical taking for use in a public-works project. The threat of the latter would explain the decision of the drafters of the Constitution to provide the additional, specific layer of protection articulated in § 235. Understandably, as well, the specific

as somehow negating the right to receive compensation in any circumstance not described therein would be the reading that would conflict with the plain language of § 23 and that would run counter to the principle of reading the two provisions in pari materia. The specific provisions of § 235 do not negate the more general protection afforded by § 23 to the citizens of this State against the "general power of government" to take their property without compensation.

Section 23 is part of Article I of the Alabama Constitution, an Article entitled "Declaration of Rights." A reading of § 235 that blocks the application of § 23 to takings by municipal corporations also runs counter to the assurance in another provision of that "Declaration of Rights," specifically § 36, that the rights recognized by that Declaration will be held "inviolate" against "the general power of government":

> "[T]he enumeration of certain rights [in Article I] shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted

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matters addressed in § 235 were not appropriate to the more general "declaration of [individual] rights" and corresponding limitation on governmental power to take property as expressed in § 23.

> out of the general power of government, and shall forever remain inviolate."

(Emphasis added.)

I therefore must conclude that what we have in § 235 is simply a more specific assurance of the right to compensation from a municipality when it acts in certain ways or, as Justice Parker puts it, "a further limitation upon the eminent-domain power" that is "specifically applicable to corporations, including municipal corporations." ___ So. 3d at ___.

In an effort to support the view that § 235 applies to municipal corporations to the exclusion of § 23, however, Justice Parker relies upon the 1911 case of Duy v. Alabama Western R.R., 175 Ala. 162, 57 So. 724 (1911). Specifically, he infers from the analysis in Duy that § 23 applies only to the State. I do not read Duy as so holding.

The only question under consideration in the portion of Duy quoted by Justice Parker was what limitations on taking are imposed by the Constitution against the State:

> "As to the state itself, the sole restraint in the particular now important is Const. § 23, wherein it is provided that 'private property shall not be taken for, or applied to, public use, unless just compensation be first made therefor.' Section 235 is

> addressed to the restraint of 'municipal and other corporations and individuals invested with the privilege of taking property for public use.' This latter section [235] does not apply to the state itself in the exercise of its sovereign power in restraint of which, in so far as we are now concerned, Const. § 23, alone operates."

175 Ala. at 173-75, 57 So. at 727-28. The quoted passage correctly notes that, as between §§ 23 and 235, the only passage that applies to the State is § 23. The fact that § 235 does not apply to the State, however, does not mean that § 23 does not apply to municipalities, and the passage quoted from Duy certainly does not say that it does.

In short, there is nothing in the language of § 235 that deprives landowners of the fundamental right guaranteed by § 23 of the Constitution merely because the governmental entity doing the "taking" is a municipal corporation. Moreover, for the various reasons discussed below, the rights expressed in § 23 and the limitations on governmental power that inherently correspond to those rights clearly do apply to "takings" by municipal corporations.

B. Section 23 Limits Municipal Corporations

1. The Intrinsically Limited Nature of the Power

Section 23 of the Alabama Constitution, in its entirety, reads:

> "That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association."

(Emphasis added.)

It is contended that § 23 does not apply to municipalities because of the two references to "the legislature" in the first and fourth clauses of § 23. It is clear, however, that these references do not mean that the

power to take property, when exercised by a municipality, is somehow less subject to the limitations expressed in the above-emphasized "takings clause" than when that power is exercised by the legislature itself. Specifically, it is clear that the limitations of § 23 are intended, in the words of § 36 discussed above, as limitations on "the general powers of government." That is, the term "legislature" must be treated as a reference to the State itself (much like the word "Congress" in the First Amendment to the United States Constitution[14] is treated as a reference to the federal government generally[15]).

Moreover, the use of a reference to "the legislature" in reference to restrictions on the power of the State to take private property is particularly appropriate because of the intrinsically legislative nature of that power. Although that power to take private property does belong to the State as a

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[14]"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[15]Justice Parker agrees that "the Declaration of Rights set forth in Article I, including the limitations on the power of eminent domain in § 23, applies to the State generally, not only to the legislature." ___ So. 3d at ___.

sovereign entity, the specific repository of that power within the State is in fact "the legislature." The legislature may vest some other agency of the government or some political subdivision with the power, but when it does so it is a portion of the legislature's power that is being vested. Excluding the federal government, there is no other power to take property. The power that is held by the legislature is the whole of it.

> "The power of eminent domain belongs exclusively to the legislative branch. The mode and manner of the exercise of the power of eminent domain is exclusively vested in the judgment and discretion of the legislature, exercised through entities or individuals authorized by statute. The executive branch of the government cannot, without the authority of some statute, proceed to condemn property for its own uses. Likewise, the judiciary can not exercise eminent domain, although it may rearrange property rights in accordance with the law without it being a taking of property."

26 Am. Jur. 2d Eminent Domain § 5 (footnotes omitted). See also, e.g., Green St. Ass'n v. Daley, 373 F.2d 1, 6 (7th Cir. 1967) ("The power of eminent domain is legislative in character.").

Section 23 defines a limitation on this power of eminent domain held by the State through its legislature. This Court set forth the following concerning the power of eminent domain

and its limitations in Gober v. Stubbs, 682 So. 2d 430, 433-34 (Ala. 1996):

> "The power of eminent domain does not originate in Article I, § 23. Instead, it is a power inherent in every sovereign state. Section 23 merely places certain limits on the exercise of the power of eminent domain. This Court stated in Steele v. County Commissioners, 83 Ala. 304, 305, 3 So. 761, 762 (1887):
>
> > "'The right of eminent domain antedates constitutions, and is an incident of sovereignty, inherent in, and belonging to every sovereign State. The only qualification of the [inherent] right is, that the use for which private property may be taken shall be public.... The constitution [of our State] did not assume to confer the power of eminent domain, but, recognizing its existence, [further] limited its exercise by requiring that just compensation shall be made.'"

(Emphasis added.)

Accordingly, if the power of eminent domain held by the State and reposited in the legislature is characterized by some limitation, then, by definition, some portion of that power given by the legislature to another entity is characterized by that same limitation. Again, the power held

in the first instance by the legislature is the whole of the power of eminent domain in the State of Alabama. There is no other. The power given to a political subdivision, including as in this case a municipal corporation, is but a portion of the same power that resides in the legislature. See generally, e.g., Peak v. City of Tuscaloosa, 73 So. 3d 5, 16 (Ala. Crim. App. 2011) ("Municipal corporations both possess and exercise two kinds of functions and powers, one governmental and the other proprietary or business. ... The one is a part of the sovereign power of the state, delegated by the Legislature." (emphasis added)); Cooper v. Town of Valley Head, 212 Ala. 125, 126, 101 So. 874, 875 (1924) (explaining that, "in the exercise of the police powers conferred thereon, [a municipal corporation] is essentially a public agency, a local unit of government, invested with a portion of the sovereign power of the state, for the benefit of its inhabitants." (emphasis added)).[16] If that power is

[16]This principle is so fundamental as to predate our existing Constitution:

> "'There is, nevertheless, one clearly-defined exception to the rule that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the

limited in the hands of the State, then so it is in the hands of a municipality.

2. The Limited Nature of Municipalities

All of this may also be viewed from the slightly different perspective that a municipality is a creature of the State (and specifically of the legislature) that has no inherent power of its own, but only that power the legislature gives it.[17] The State of Alabama (or our legislature, if one

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> general features of our political system, and it rests upon an implication of popular assent which is conclusive. The exception relates to the case of municipal corporations. Such corporations being considered parts of the machinery of the government, governmental agencies necessary and most effective to manage the local affairs of the people residing in the designated locality, by custom immemorial a portion of the political powers of the state has been delegated to them, to be exercised in local administrations; and the authority to delegate, if not expressly incorporated in the constitution, may be regarded as clearly implied.'"

Schultes v. Eberly, 82 Ala. 242, 244-45, 2 So. 345, 347 (1887) (quoting with approval Cooley on Tax. 63) (emphasis added).

[17] "'A municipal corporation is but a creature of the State, existing under and by virtue of authority and power granted by the State.' Hurvich v. City of Birmingham, 35 Ala. App. 341, 343, 46 So. 2d 577, 579 (1950). A municipality 'derives all of its power from the state, and no municipality can legislate beyond what the state has either expressly or impliedly authorized.' Arrington v. Associated

prefers) therefore cannot confer upon a municipality, as a political subdivision of its creation, some authority or ability to act in relation to the State's citizens that the State, the creating entity, itself does not possess.

> "[C]ities are political subdivisions of the state, each created by the sovereign power of the state, in accordance with the sovereign will, and each exercising such power, and only such power, as is conferred upon it by law....
>
> "... 'Every power which is possessed by a municipality is a power which is delegated to it by the state....'"

Yeilding v. State ex rel. Wilkinson, 232 Ala. 292, 295, 167 So. 580, 582 (1936) (quoting State ex rel. Wilkinson v. Lane,

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> Gen. Contractors of America, 403 So. 2d 893, 902 (Ala. 1981). Put another way, '[m]unicipal corporations may exercise only such powers as are expressly granted to them by the Legislature or necessarily implied in or incident to the powers expressly conferred, and those indispensably necessary to the accomplishment of the objects of the municipality.' Phenix City v. Putnam, 268 Ala. 661, 664, 109 So. 2d 836, 838 (1959)."

Peak v. City of Tuscaloosa, 73 So. 3d 5, 12 (Ala. Crim. App. 2011). Thus, "[a] municipal corporation has no inherent power of eminent domain, and can exercise it only when expressly authorized by the legislature ...." City of Birmingham v. Brown, 231 Ala. 203, 207, 2 So. 2d 305, 308 (1941) (emphasis added).

181 Ala. 646, 62 So. 31, 34 (1913)). Moreover, as the Court in Yeilding continued:

> "This statement of the law by this court in [Wilkinson v.] Lane[, 181 Ala. 646, 62 So. 31 (1913)], finds direct and full support in the following statement of the rule found in 43 Corpus Juris, p. 76, § 15: 'A municipal corporation can have no other source than the sovereign power; its creation is an attribute of sovereignty. [A municipal corporation] is a political creature, and the creature cannot be greater than its creator. Certain sovereign powers, such as legislative power, and the power of eminent domain, are conferred on a municipal corporation, and nothing less than sovereign power can confer the supreme faculties upon any creature; nor can he who has no sovereign power confer any.'"

Yeilding, 232 Ala. at 295-96, 167 So. at 582 (emphasis added). See also id., 232 Ala. at 297, 167 So. at 584 (referring to the power of the legislature to delegate non-legislative powers "which it may itself rightfully exercise."[18]

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[18]See also Johnston v. Alabama Pub. Serv. Comm'n, 287 Ala. 417, 420, 252 So. 2d 75, 77-78 (1971):

> "[I]n exercising the power, [the legislature] can select such agencies as it pleases, and confer upon them the right to take private property subject only to the limitations contained in the Constitution. Accordingly it has been held that the right may be conferred upon corporations, public or private, upon individuals, upon foreign corporations, or a consolidated company composed in part of a foreign corporation, and upon the federal government. Such has been the common practice since the Revolution,

> "A legislature may delegate part of its power over local matters to local governments. The delegation of legislative power with respect to the control of municipalities is subject to the usual conditions and limitations, including that a municipality may not be vested with powers that the legislature itself does not possess, and local legislation that conflicts with the general law of the state is void."

56 Am Jur. 2d Mun. Corp. § 90 (2013) (emphasis added).

The legislature of Alabama has conferred upon the Town a portion of the State's power to zone property[19] and a portion of the State's power to take private property for public purposes.[20] As discussed in Part I, neither of these powers in the hands of the State could be used to accomplish an

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> and the right to do so has never been a matter of serious question; and it may be regarded as settled law that, in the absence of special constitutional restriction, it is solely for the Legislature to judge what persons, corporations or other agencies may properly be clothed with this power."

(Emphasis added.) (Elsewhere, the Court in Johnston posited that the term "confer," rather than "delegate," was appropriate, given the Court's concern that the notion of "delegating" power connoted a "divesting" of power by a sovereign, something a sovereign cannot do. 287 Ala. at 420-21, 252 So. 2d at 77-78. It appears that the authorities that use the term "delegate" do so without intending to suggest anything more than a sharing by the delegating authority of some power it possesses.)

[19]See § 11-52-70, Ala. Code 1975.

[20]See § 11-47-170, Ala. Code 1975.

uncompensated "regulatory taking" of M & N's property. Neither can they be so used by the Town.

3. Our Cases Apply § 23 to Municipalities

Consistent with all the foregoing, in a case relied upon by the Town in its brief to this Court and characterized by the Town itself as a § 23 case, the Alabama Court of Civil Appeals recognized that "Article I, § 23, Ala. Const. (1901), requires that before a municipality may take private property for public use, it must pay just compensation to the property owner." Parrish v. City of Bayou La Batre, 581 So. 2d 1101, 1102 (Ala. Civ. App. 1990) (relying on § 23 to uphold a municipality's exercise of its power of eminent domain). See also Opinion of the Justices No. 155, 264 Ala. 452, 88 So. 2d 778 (1956) (providing advisory opinion to the Governor of the State of Alabama in a manner that contemplated the applicability of § 23 of the Alabama Constitution to municipalities); Chichester v. Kroman, 221 Ala. 203, 128 So. 166 (1930) (discussing § 23 and making no distinction between the restraint it places on the State and the restraint it places on municipal corporations). See also City of Dothan v. Wilkes, 269 Ala. 444, 114 So. 2d 237 (1959) (citing both §§ 23

and 235 as "constitutional ... provisions relating to eminent domain [that] comprehend compensation for damage to property" taken by a municipality for purposes of constructing a public roadway); Blankenship v. City of Decatur, 269 Ala. 670, 115 So. 2d 459 (1959) (treating § 23 as the applicable provision governing the legality of an alleged taking by a municipality of private property); Jones v. City of Huntsville, 47 Ala. App. 595, 259 So. 2d 277 (Ala. Civ. App. 1971) (measuring sewer assessment imposed by the City of Huntsville against the restrictions of imposed by § 23).

III. Conclusion

Under § 23, the State cannot do indirectly by regulation what it cannot do directly by a physical taking. If, notwithstanding the purported protection of the rights of landowners and the corresponding limitation on State action as expressed in § 23, the State can create a political subdivision with the power to act free of those limitations, then the purported recognition of those rights and the purported assurance in § 36 that those rights will be held "inviolate" against "the general powers of government" are hollow.

For the reasons discussed above, I respectfully dissent.

MOORE, Chief Justice (concurring specially).

I agree with the main opinion on original submission that a "regulatory takings" jurisprudence does not comport with Art. I, § 23, Ala. Const. 1901. The underlying issues in this case are an unconstitutional use of both zoning and annexation. M & N Materials, Inc. ("M & N"), brought claims for declaratory relief on those issues.[1] The injury done to M & N was done through zoning and annexation of land, not through eminent domain under § 23. Thus, recognizing regulatory takings based on § 23 does not address the underlying root causes that have impelled many state courts to adopt Justice Oliver Wendell Holmes's "regulatory takings" framework. Courts have no such creative powers, for the Constitution gives the judiciary no legislative powers to say what the law shall be for future applications.

Although the Court lacks the legislative power to create new remedies, the Court has power to strike down

[1]M & N sought a judgment declaring that "the annexation of the subject property and/or the zoning restrictions placed on the property as well as the other actions described herein, void, invalid, and/or unconstitutional." M & N's claims for declaratory relief were dismissed without prejudice after the jury returned its verdict and thus may be reinstated following the Town of Gurley's appeal.

unconstitutional acts of legislative bodies. "[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." The Federalist No. 78 (Alexander Hamilton), at 467 (Clinton Rossiter ed., 1999). "The constitution of the State ... is the paramount, supreme law, of primary obligation. All legislative enactments are subservient to it, and if they conflict with it, are without validity." City of Mobile v. Stonewall Ins. Co., 53 Ala. 570, 575 (1875). Because

> "[w]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

The Federalist No. 78, at 466.

I believe that taking and zoning are two separate issues. Courts have adopted regulatory takings without addressing the underlying problem of unconstitutional state and local regulations. Thus, the fundamental issue is whether the Town of Gurley's actions are constitutional under zoning and annexation law, not whether the Town's actions may be somehow

converted into compensable injuries through a takings construct. In this special writing, I will address Alabama's laws governing zoning and annexation and explain why the text of § 23 of the Constitution may not be applied to create regulatory takings.

I. Zoning and Annexation

A. Zoning

Our general rule is that "[a]n arbitrary and capricious ordinance should be set aside whether there is, or is not, a comprehensive zoning plan." COME v. Chancy, 289 Ala. 555, 565, 269 So. 2d 88, 97 (1972). A zoning ordinance may be set aside if it "'passes the bounds of reason and assumes the character of a merely arbitrary fiat.'" Leary v. Adams, 226 Ala. 472, 476, 147 So. 391, 394 (1933). The ultimate test "is whether the ordinance creates zones ... that ... are consistent with the land use pattern of the area, and bear a substantial relationship to the public health, safety, morals, and general welfare." Chancy, 289 Ala. at 565, 269 So. 2d at 97.

Zoning may be "arbitrary and capricious" in several ways. First, zoning that is inconsistent with a comprehensive plan is arbitrary and capricious. Zoning must be done "in

accordance with a comprehensive plan." § 11-52-72, Ala. Code 1975. "There must be a comprehensive plan. ... [T]he owner of property may use it as he sees fit, provided it is not a nuisance ... nor within the prohibition of zoning ordinances." Davis v. City of Mobile, 245 Ala. 80, 82-83, 16 So. 2d 1, 3 (1943) (emphasis added).

Second, zoning that leaves the exercise of property rights to the whims of special groups is arbitrary and capricious. "Nor can the exercise of property rights be left to the caprice, whim or aesthetic sense of a special group of individuals who may object to the use by a property owner of the rights fixed by such ordinance or left unrestricted thereby." Johnson v. City of Huntsville, 249 Ala. 36, 40, 29 So. 2d 342, 345 (1947). See City Council of Montgomery v. West, 149 Ala. 311, 314, 42 So. 1000, 1000 (1907) ("'Ordinances which invest a city council ... with a discretion which is purely arbitrary, and ... exercised in the interest of a favored few, are ... invalid.'" (quoting Smith on the Modern Law of Municipal Corporations § 530)).

Third, zoning that lacks a substantial relation to the public health, safety, morals, and general welfare is

arbitrary and unconstitutional. Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395 (1926). The police powers may not be used to impose unreasonable and unnecessary zoning ordinances "upon the use of private property.... [G]overnmental interference by zoning ordinances with such use, is not unlimited, and ... should bear some substantial relation to the public health, safety, morals, or general welfare." Leary v. Adams, 226 Ala. at 474, 147 So. at 392.

This Court has said that constitutional rights "cannot be abridged or destroyed under the guise of police regulations." First Avenue Coal & Lumber Co. v. Johnston, 171 Ala. 470, 473, 54 So. 598, 599 (1911). See Panhandle E. Pipe Line Co. v. State Highway Comm'n of Kansas, 294 U.S. 613, 622 (1935). ("The police power of a state ... is subordinate to constitutional limitations."). Police powers are an aspect of legislative power or the general power of government, or both. See Art. IV, § 44 ("The legislative power of this state shall be vested in a legislature ...." (emphasis added)), and Art. I, § 36 ("[E]verything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate." (emphasis added)).

However, the Constitution also protects the rights of private property and confines the government to the sole object of protecting the citizen's property. See Art. I, § 13, Ala. Const. 1901 ("[E]very person, for any injury done him, in his lands ... shall have a remedy by due process of law...."); Art. I, § 35, Ala. Const. 1901 ("That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property....").

Thus, whether viewed as an aspect of general powers of government referenced in Art. I, § 36, or the legislative powers referenced in Art. I, § 44, a local government's use of the police powers to enact zoning ordinances may not "abridge or destroy" Alabama's constitutional protections of private property contained in Art. I, §§ 13 and 35. Johnston, 171 Ala. at 473, 54 So. at 599.

Fourth, spot zoning is arbitrary and capricious. Spot zoning occurs when municipal officials attempt to partially zone a municipality or zone by "piecemeal." Johnson v. City of Huntsville, 249 Ala. 36, 29 So. 2d 342 (1947). As stated above, "[a]n arbitrary and capricious ordinance [will] be set aside [and] ... any theory of 'spot zoning' would have to give

way to the larger principle." Chancy, 289 Ala. at 565, 269 So. 2d at 97. Alabama's rule limits spot zoning to cases where no comprehensive plan exists. Shell Oil Co. v. Edwards, 263 Ala. 4, 9, 81 So. 2d 535, 540 (1955); Haas v. City of Mobile, 289 Ala. 16, 21, 265 So. 2d 564, 568 (1972).[2]

B. Annexation

The Town of Gurley's annexation of the quarry property is another fundamental issue underlying this case. "Alabama's statutory methods of annexation require that property owners consent to the annexation before an annexation of their property can occur. See Ala. Code 1975, §[§] 11-42-1 through 11-42-88." City of Fultondale v. City of Birmingham, 507 So. 2d 489, 491 (Ala. 1987) (plurality opinion) (emphasis added) (noting that unanimous consent is not required under all methods of annexation). "'[A]n unreasonable annexation is invalid or void.'" City of Birmingham v. Community Fire Dist., 336 So. 2d 502, 504 (Ala. 1976) (quoting 2 McQuillin, Municipal Corporations § 7.23 (Rev. ed., 1966)). "'[A]

[2]Alabama follows the minority rule on spot zoning. The majority rule is that "rezoning of a small tract of land out of harmony and in conflict with a comprehensive plan may constitute 'spot zoning.'" Haas, 289 Ala. at 21, 265 So. 2d at 568.

municipal corporation may not extend its boundaries by the annexation of territory ... where it would be unreasonable to do so.'" Id.

II. Eminent Domain

The ultimate question, however, is whether there is an additional ground for relief under the eminent-domain provision of the Alabama Constitution. Section 23, Ala. Const. 1901, states, in relevant part: "[P]rivate property shall not be taken for, or applied to public use, unless just compensation be first made therefor." Since so-called "regulatory takings" were not recognized in 1901 when our current Constitution was adopted, we have no direct evidence as to whether the people intended for § 23 to apply to this kind of case. Consequently, an exposition of § 23 is needed to determine whether "regulatory takings" are prohibited by the letter and the spirit of § 23.

The Dutch jurist Hugo Grotius first coined the term "eminent domain" in his work De Jure Belli ac Pacis Libri Tres ("On the Law of War and Peace in Three Books"). Alberto B. Lopez, Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo, 41 Wake Forest L. Rev. 237, 245

(2006). Grotius said the state had the power of eminent domain "over its citizens and over the property of citizens for public use." 2 Hugo Grotius, De Jure Belli ac Pacis Libri Tres 102 (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1625). According to Grotius, the proper exercise of eminent domain had two requisites: "the first requisite is public advantage; then, that compensation from the public funds be made, if possible, to the one who lost his right." Id. at 385. However, Grotius reasoned that the state had the power of eminent domain because "full private ownership [of property] was first acquired in common for the state or its head; and that then a distribution was made individually to private persons, in such a way, nevertheless, that their ownership was dependent on that earlier ownership." Id. at 219. Thus, Grotius reasoned that private property ultimately "belongs to the state under the right of eminent domain." Id. at 807. This rationale gave rise to Grotius's rule:

> "[T]he state, or he who represents the state, can use the property of subjects, or even destroy it or alienate it, not only in case of direct need ... but also for the sake of public advantage; and to the public advantage those very persons who formed the body politic should be considered as desiring that private advantage should yield."

Id. Thus, Grotius believed that the state could take private property for public use so long as just compensation was given, but his reasoning suggests a liberal interpretation of that rule: the state could use or exercise dominion over private property so long as the state or the public considered it desirable to the public advantage.

The common law also recognized the legislature's right to take private property for public use upon just compensation, but under a rationale quite different from Grotius's, and one that provided more protection to private-property owners. Blackstone wrote:

> "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.... In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights .... In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an

> individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform."

1 William Blackstone, Commentaries *139. Thus, unlike Grotius, the common law held private-property rights in such a high regard that the common good alone was not a sufficient justification for violating them. This is because private property is a gift of Almighty God, not the state:

> "[W]e are informed by holy writ, the all-bountiful Creator gave to man 'dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.' This is the only true and solid foundation of man's dominion over external things .... The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator."

2 William Blackstone, Commentaries *208. Grotius viewed the power of eminent domain as the right of the state or the public to exercise dominion over what was already theirs for the sake of the public good. In contrast, the common law viewed the power of eminent domain as the public acting "as an individual, treating with an individual for an exchange." Id.

The Fifth Amendment of the United States Constitution, which was ratified in 1791, provides: "[N]or shall private property be taken for public use, without just compensation." Justice Thomas interprets the Fifth Amendment as follows:

> "The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever. At the time of the founding, dictionaries primarily defined the noun 'use' as 'the act of employing any thing to any purpose.' 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773).... The term 'use,' moreover, 'is from the Latin utor, which means "to use, make use of, avail one's self of, employ, apply, enjoy, etc."' J. Lewis, Law of Eminent Domain § 165, p. 224, n. 4 (1888). When the government takes property ... and the public has no right to use the property, it strains language to say that the public is 'employing' the property, regardless of the incidental benefits that might accrue to the public from the private use. The term 'public use,' then, means that either the government or its citizens as a whole must actually 'employ' the taken property. See id., at 223 (reviewing founding-era dictionaries)."

Kelo v. City of New London, 545 U.S. 469, 508-09 (2005) (Thomas, J., dissenting). Consequently, reading the natural language of the Federal Constitution along with the historical and philosophical backdrop of the common law, it appears that the Founders understood the right of eminent domain to be the right of the government to take private property only if the

government or public would actually use it. This view comports with Blackstone's view of eminent domain as an exchange rather than Grotius's view of eminent domain as the state's exercise of dominion over private property for the public good.

Alabama's original eminent-domain provision in the 1819 Constitution was nearly identical to the eminent-domain provision of the Federal Constitution: "[N]or shall any person's property be taken or applied to public use, unless just compensation be made therefor." § 13, Ala. Const. 1819. Despite the fact that other parts of our current eminent-domain provision are different from the Alabama Constitution of 1819, the operative language at issue in this case is essentially the same: "[P]rivate property shall not be taken for, or applied to public use, unless just compensation be first made therefor." § 23, Ala. Const. 1901.

Thus, reading § 23 in light of Alabama's original eminent-domain provision, the similar federal constitutional provision, and the common law, the conclusion is that a "taking" under § 23 requires an exchange between the State and the private-property owner by which the State provides just compensation for property that the State or the public will

actually employ. Consequently, the Town of Gurley's zoning ordinance is not a "taking" under § 23. There has been no exchange between the Town and M & N Materials, Inc., and neither the public nor the State are going to use or employ the property in question. On the contrary, instead of taking the property so that the State or public can use it, the Town has left the property with its owners but has restricted how the private owner may use it. While this appears to be a case of spot zoning, or at least arbitrary and capricious zoning, it is not a taking under § 23.

III. Conclusion

This case is about zoning, not takings. Every act of zoning is a "taking" in a sense, because the state takes some rights of use away from the owner. Nevertheless, the type of taking contemplated by § 23, Ala. Const. 1901, is a taking where property is exchanged from the private-property owner to the state for the state or public's employment. Because the Town of Gurley has not taken property in that manner in this case, M & N's injuries are not redressable through § 23, Ala. Const. 1901. M & N still has a remedy available through declaratory and injunctive relief, as do all private-property

owners who are subjected to spot zoning or arbitrary and capricious zoning ordinances. Thus, although I encourage M & N to reinstate its claim for declaratory and injunctive relief, I cannot grant M & N the relief it seeks by stretching § 23, Ala. Const. 1901, beyond what it says and means. Therefore, I concur in overruling the applications for rehearing.

PARKER, Justice (concurring specially).

I concur in the decision overruling the applications for rehearing; I write specially to note the tension between this Court's strong support for an individual's fundamental right to property and this Court's exercise of judicial restraint in interpreting the Alabama Constitution of 1901. I also write to note that M & N Materials, Inc. ("M & N"), is not without a remedy. M & N appropriately challenged the constitutionality of the exercise of the police power by the Town of Gurley ("the Town") in passing the at-issue zoning ordinance; M & N's constitutional challenge was dismissed without prejudice, and M & N intends to refile it. Lastly, I write to respond to Justice Murdock's substituted dissent.

First, an individual has a fundamental right to property. William Blackstone defined an individual's property rights at common law as including "the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 William Blackstone, Commentaries *134. Consistent with Blackstone's view of an individual's private-property rights as fundamental, in Smith v. Smith, 254 Ala. 404, 409, 48 So. 2d 546, 549 (1950), this

Court stated that "it should never be forgotten that the right to control one's property is a sacred right which should not be taken away without urgent reason." Indeed, property rights have historically been provided strong protection in this Country and have been the cornerstone in the development of this nation. See Page Carroccia Dringman, Regulatory Takings: The Search for a Definitive Standard, 55 Mont. L. Rev. 245, 248 n. 16 (1994) ("'Next to the right of liberty, the right of property is the most important individual right guaranteed by the [federal] Constitution and the one which, united with that of personal liberty, has contributed more to the growth of civilization than any other institution established by the human race.' [Senator Steve Symms, The Private Property Rights Act (1991),] at 11 (citing William H. Taft, 27th President of the United States (1906)). ... 'The moment the idea is admitted into society that property is not as sacred as the laws of God, and there is not force of law and public justice to protect it, anarchy and tyranny commence.' Id. at 11 (citing John Adams, 2d President of the United States (1821)).").

In 1901, the year the current Alabama Constitution was ratified, the threat of regulatory "takings" of property through a municipality's authority to pass zoning regulations was not an obvious threat to an individual's property rights.[3] In 1926, the Supreme Court of the United States recognized the inconspicuous threat zoning laws posed to property rights in

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[3]Although our current Constitution was ratified in 1901, the antecedent to § 235 is Art. XIV, § 7, Ala. Const. 1875, which states:

> "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction. The general assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers, or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to law."

Article XII, § 235, Ala. Const. 1901, set forth infra, was not an entirely novel constitutional provision, but was derived from Art. XIV, § 7, Ala. Const. 1875. See Opinion of the Justices No. 133, 259 Ala. 524, 526-27, 67 So. 2d 417, 419-20 (1953) (noting that Art. XII, § 235, Ala. Const. 1901, used language identical to that used in Art. XIV, § 7, Ala. Const. 1875, and added additional language). Therefore, § 235 was essentially drafted prior to or in 1875.

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 386 (1926), its landmark decision concerning zoning laws: "Building zone laws are of modern origin. They began in this country about 25 years ago." In fact, it was not until 1909 that Los Angeles, California, became the first major American city to enact a zoning ordinance. Michael Lewyn, New Urbanist Zoning for Dummies, 58 Ala. L. Rev. 257, 262 (2006). New York City followed suit in 1916, and municipalities' use of zoning laws then spread rapidly throughout America. Id. By 1920, 904 cities had zoning ordinances, and, later in the 1920s, recognizing the growing use of local zoning ordinances, the Federal Department of Commerce drafted a model Standard State Zoning Enabling Act. Id. I include this brief history of zoning ordinances in America to demonstrate that zoning ordinances passed by local municipalities were nonexistent and unforeseeable in Alabama when the current Alabama Constitution was ratified in 1901.

The applicable provision of our Constitution is Article XII, § 235, Ala. Const. 1901, which states:

> "Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided

> by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction. The legislature is hereby prohibited from denying the right of appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise, but such appeal shall not deprive those who have obtained the judgment of condemnation from a right of entry, provided the amount of damages assessed shall have been paid into court in money, and a bond shall have been given in not less than double the amount of the damages assessed, with good and sufficient sureties, to pay such damages as the property owner may sustain; and the amount of damages in all cases of appeals shall on demand of either party, be determined by a jury according to law."

Section 235 plainly states that compensation is due a property owner when his land has been "taken, injured, or destroyed by the construction or enlargement of [a municipality's] works, highways, or improvements ...." (Emphasis added.) In other words, under § 235, compensation is due when property is taken by a municipality for public works. When compensation is mandated in a for-public-works situation, it precludes regulatory "takings" through zoning.

In my dissent to Chism v. Jefferson County, 954 So. 2d 1058 (Ala. 2006), I stated the following concerning constitutional interpretation:

> "Constitutions, in order to effectively protect the rights of the people, must be accessible to them, or at least to the average educated citizen. Consistent with this purpose, '[a] constitution, properly conceived, deals with basic principles and policies, and omits specific applications,' Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 498, 86 So. 56, 58 (1920).
>
> "Thus, proper interpretation of a constitutional text must begin with the ordinary usage of the words of the text, which we call its 'plain meaning.' As this Court has explained with respect to statutory interpretation:
>
> > "'"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."'
>
> "Blue Cross & Blue Shield v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998) (quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)). Furthermore, Courts are 'not at liberty to disregard or restrict the plain meaning of the provisions of the Constitution.' McGee v. Borom, 341 So. 2d 141, 143 (Ala. 1976)."

954 So. 2d at 1099 (Parker, J., dissenting). Further, in Ex parte James, 836 So. 2d 813, 834-35 (Ala. 2002), this Court set forth the following caution concerning its duty to interpret the Constitution:

> "And like the United States Supreme Court's duty with regard to the federal constitution, our status as final arbiter imputes to us a particularly important duty with regard to the Alabama Constitution, because while our interpretations of statutes can be, in a sense, 'overruled' by subsequent legislative enactment, our interpretations of the Alabama Constitution are beyond legislative alteration. See Marsh v. Green, 782 So. 2d 223, 232 (Ala. 2000) (noting that, in cases involving constitutional adjudication, the doctrine of stare decisis plays little role 'because, in such cases, "'"correction through legislative action is practically impossible."'"' (quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 63, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996))); see also Agostini v. Felton, 521 U.S. 203, 235, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (noting that the policy which undergirds the principle of stare decisis -- that sometimes 'it is more important that the applicable rule of law be settled than that it be settled right' -- 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions' (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815 (1932) (Brandeis, J., dissenting))); City of Boerne v. Flores, 521 U.S. 507, 535-36, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) (discussing Congress's inability to change the Court's interpretation of the United States Constitution); Napue v. Illinois, 360 U.S. 264, 271, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) (noting that the Supreme Court has a 'solemn responsibility for maintaining the Constitution inviolate') (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 4 L. Ed. 97 (1816); and Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958))."

In his article Interpreting the Alabama Constitution, 71 Ala. Law. 286 (July 2010), Marc James Ayers, discussing Ex parte Melof, 735 So. 2d 1172 (Ala. 1999), set forth a cautionary tale concerning this Court's role as final arbiter of the Alabama Constitution:

> "In [Ex parte] Melof, [735 So. 2d 1172 (Ala. 1999),] the [C]ourt corrected an erroneous line of decisions that had actually created and relied upon a constitutional provision -- an 'equal protection provision' -- where none existed in the Alabama Constitution of 1901. It was undisputed that such a provision existed in earlier Alabama constitutions but that it had been intentionally removed in the 1901 Constitutional Convention in an overall effort to hinder black Alabamians. However, in 1977 the court ruled (based on a scrivener's error, as it turns out) that various other constitutional provisions somehow combined to form the essence of an 'equal protection provision' similar to, but not necessarily identical to, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This 'provision' had no specific text (and therefore no history to be examined), but was merely the 'spirit' behind several different provisions.
>
> "Like the federal Constitution's Equal Protection Clause, an equal protection provision in the Alabama Constitution would carry with it certain substantive limitations on the state, and could be interpreted as providing much greater limitations than those provided under the Equal Protection Clause. And as this 'provision' was allegedly part of the Alabama Constitution, any ruling by the Alabama Supreme Court under that provision would not be reviewable by the United States Supreme Court. The 'phantom equal protection provision' was used in

striking down as unconstitutional tort reform legislation and in attempting to judicially restructure the funding of Alabama's educational system.

"The phantom equal protection provision finally met its end in Melof. In that decision, the [C]ourt stressed that it could not simply create constitutional provisions under the guise of 'interpretation,' and that, even though several decisions had relied on the phantom provision, the principle of stare decisis could not ... apply to uphold a wholly unfounded constitutional interpretation. Although several of the justices made it clear that they personally desired that the Alabama Constitution contain an equal protection provision -- Justice Houston even included in his special writing a letter to members of all three branches of Alabama's government expressing this desire -- they also made it clear that a strong desire to see the constitution written differently does not provide grounds for the judiciary to simply declare it to be so.

"Three justices dissented, led by Justice Cook. Although admitting that the Alabama Constitution of 1901 did not have an express 'equal protection provision,' the dissenting justices argued that the essence of such a provision is found in and among other constitutional provisions. Justice Cook accurately described how the actions of the Constitutional Convention of 1901 were explicitly undergirded with racist motivations, including the Convention's elimination of the equal protection provision. Justice Cook's eloquent opinion provided much support for the general concept of equal protection under the law and for the inclusion of an equal protection clause in Alabama's Constitution. He also argued that some other states do not have an explicit 'equal protection provision' but have nonetheless construed their state constitutions to include one.

"Although he wrote the majority opinion, Justice Houston also filed a special concurrence in which he responded to Justice Cook's impassioned defense of an implicit equal protection provision. Justice Houston felt the force of Justice Cook's arguments (especially Justice Cook's accurate description of the racist motivations behind the framing of the Alabama Constitution of 1901), but explained how the framers' abuse of power only served as more reason to show judicial restraint, even when it hurts in the short term:

> "'Among Supreme Court Justices, the notion of truth should be paramount. As demonstrated by Justice Cook's well-documented account of the racially biased forces that were present at the Constitutional Convention of 1901, we have all seen how much damage can be done by the State when truth is overlooked in favor of expedience and power. If I have done anything by consistently pointing out what is unfortunately but unmistakably true -- that Alabama's Constitution currently has no equal-protection clause -- I have attempted to keep the Court from corrupting not only the Constitution, but itself as well. We pour corruption on both sacred entities by failing to resist the urge to drink from the chalice of illegitimate, but available, power. With that understood, I want to underscore one unavoidable truth: that the power to amend the Constitution rests with the people of the State of Alabama, not with the members of this Court.
>
> "'....
>
> "'We must recognize that we cannot change our history, no matter how egregious

> or embarrassing our history might be. It is precisely because individuals who govern can do some egregious things with the power that has been given them that we have the concept of the constitution -- a legal document meant to achieve two primary goals. First, a constitution establishes a particular form of government. Second, a constitution, as the solidifying agent of the rights recognized by the government, protects the individual against the whim of those in power.
>
> "'As a legal document, a constitution does not change on its own. The very purpose of protecting individuals would be undermined if those in charge of interpreting the constitution were to add or delete provisions to reflect 'changes in society.' Why? Because both the question of who selects the interpreter and the question of what counts as a 'change in society' will be decided by those in power at any particular time. No, as a legal document, a constitution can change only if the parties who gave effect to the document -- the people -- call for change. This recognition of the exclusive right of the people to change their own constitution is inherent in the amendment procedure.
>
> "'....
>
> "'Such is the danger of sitting on the highest court of any sovereign when that court is interpreting the sovereign's own constitution. With no threat of being overruled, we can wield our words in any way that we like, knowing that they will be given the full effect of law. In this way, the nature of being Supreme Court Justices creates a dangerous dynamic. As we are

> sworn in, we are handed -- by the people -- a powerful sword: our ability to state what the law is. At the same time, we are placed inside a paper boundary -- a written constitution -- and told by the people 'this far you may go, and no further.' The problem is that the sword can easily sever the boundary and we can escape its limits, perhaps with the notion of 'doing justice.' Once the boundary is severed, however, it is not easily repaired; and the next judge, now not bound, is free to do either justice or evil. As judges, then, we are entrusted by the people to use that sword wisely and with restraint; to stay within the boundary no matter how strongly we think it too small to meet the people's needs. The people made the boundary; it is for the people to enlarge it.
>
> "'It is true, as Justice Cook points out, that racist motives were behind the action of the 1901 Constitutional Convention eliminating the equal-protection clause from our Constitution. The fact that we still do not have an equal-protection clause in our Constitution is certainly troubling. It is just this kind of situation that sparks in all of us such an emotional indignation that we want to correct this wrong as fast as possible, in any way possible .... To be sure, a judicial declaration [creating an 'equal protection provision'] would be much faster and easier than a constitutional amendment. Also, I am sure that the general population would overwhelmingly support such a declaration. There would be very little resistance or grumbling among the citizens of Alabama, so why not?

> "'The problem, of course, as I have illustrated above, is that while such a popular declaration may be all right today, we must ask: What about tomorrow's judge and tomorrow's issue? If we are not restrained to the text of the Constitution; if we current Justices can amend it today by judicial declaration to include a provision that the people have not put there, will the next 'declaration' be so favorable? As Justice Cook has made clear in his dissent, those with power can do some horrible things for some horrible reasons. It is naive to think that something like that could not happen again. As the saying goes, those who do not pay attention to history are doomed to repeat it.
>
> "'Might does not make right. We should not, simply because we can, shift the power to amend the Constitution from the hands of the people into the hands of nine Supreme Court Justices. I wholeheartedly believe that the Alabama Constitution should have an equal-protection clause, but I do not believe in obtaining it by a method that would turn this Court into an autonomous super-legislature. ...'
>
> "The Alabama Supreme Court has continued to hold fast to this interpretive philosophy of judicial restraint. And, as it must be, this philosophy is at the heart of the various rules and methods of constitutional interpretation that have been adopted by the Alabama appellate courts."

71 Ala. Law. at 289-90.

As fervently as I desire to protect the fundamental property rights of Alabamians, §§ 23 and 235 of the Alabama

Constitution simply do not make a regulatory "taking" compensable. It would be unwise to throw to the wind the caution set forth by this Court in James and declare that §§ 23 and 235 of our Constitution makes regulatory "takings" compensable. Such an "interpretation" of the Alabama Constitution would not be based on the text of the Constitution, but upon what I believe the law ought to be. As set forth by Justice Houston in his special writing in Melof, supra, set forth at length in Ayers's article quoted above, the people of Alabama, by ratifying the Alabama Constitution, have established a paper boundary -- the Constitution -- that this Court must not cavalierly breach based on what it personally desires. Declaring a constitutional right where one does not exist, no matter how much I desire it, would violate my principles of judicial restraint, and turning a blind eye to the express for-public-works limitation in our pre-zoning 1901 constitutional provision would violate my principles of strict constructionism.

Next, I also write to express that this Court's decision in Town of Gurley v. M & N Materials, Inc., [Ms. 1110439, 1110507, December 21, 2012] ___ So. 3d ___ (Ala. 2012), does

not bar M & N from seeking relief from the Town's zoning regulations under alternate legal theories available to M & N. First, M & N could have maintained its claim that it initially filed under the Fifth Amendment to the United States Constitution. M & N voluntarily dismissed its Fifth Amendment claim and proceeded only under the Alabama Constitution, thereby forgoing any protections afforded M & N under the federal Constitution. In fact, M & N must seek compensation through any procedures a State may have provided for doing so before its Fifth Amendment claim is ripe for adjudication; in other words, M & N must be denied just compensation before it has a Fifth Amendment claim. See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-95 (1985) ("A ... reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. ... Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure

and been denied just compensation."); and San Remo Hotel, L.P. v. City & County of San Francisco, California, 545 U.S. 323, 346 (2005) ("The requirement that aggrieved property owners must seek 'compensation through the procedures the State has provided for doing so,' [Williamson County,] 473 U.S., at 194, does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution."); see also Kenneth B. Bley, Use of the Civil Rights Act to Recover Damages in Land Use Cases, SM040 ALI-ABA 207 (American Law Institute 2007)(also published in Inverse Condemnation and Related Government Liability: The Response from State and Federal Courts, Legislatures, and Initiatives, and How It Affects Your Client Today (American Law Institute 2007)).

Second, M & N may refile its claims for a declaratory judgment and injunctive relief that were dismissed without prejudice by the trial court. In an amended complaint filed by M & N in the trial court, M & N requested a declaratory judgment and injunctive relief on the basis that the zoning

ordinance at issue in this case was "void, invalid, and/or unconstitutional." M & N's claim challenged as unconstitutional the Town's use of its police power, not its use of its conferred power of eminent domain.

In Haas v. City of Mobile, 289 Ala. 16, 20, 265 So. 2d 564, 567 (1972), this Court stated: "It is well established in our jurisdiction that zoning is a legislative act, Ball v. Jones, 272 Ala. 305, 132 So. 2d 120 [(1961)], which rests on the exercise of police powers of a municipality, Fleetwood Development Corp. v. City of Vestavia Hills, 282 Ala. 439, 212 So. 2d 693 [(1968)]." See also Leary v. Adams, 226 Ala. 472, 474, 147 So. 391, 392 (1933) ("The authority for zoning laws is found within the bounds of the police power ...."); Ziegler, Rathkopf's The Law of Zoning & Planning § 1:2 ("Police power in the land-use control context encompasses zoning and all other government regulations which restrict private owners in their development and use of land.").

This Court has distinguished between an exercise of a municipal corporation's police power and the exercise of its conferred power of eminent domain and the remedies available to a property owner in relation to a municipal corporation's

exercise of those powers. In City of Mobile v. McClure, 221 Ala. 51, 127 So. 832 (1930), the City of Mobile cut down a tree situated on property the City of Mobile did not own but that was adjacent to a street it did own; the owner of the property upon which the tree was situated sought damages. In discussing the difference between a municipality's police power and its conferred power of eminent domain, this Court stated:

> "The fundamental questions of law which are involved have been settled in this state, and need no further discussion. Briefly stated, they are: (1) That if the tree was cut by the city while engaged in the construction or enlargement of the works, highways, or improvements of the city, and the property of the lot owner is thereby injured or destroyed, the city is liable in damages to the extent of an amount which would award just compensation therefor. Const. § 235; McEachin v. Tuscaloosa, 164 Ala. 263, 51 So. 153 [(1909)]; Birmingham v. Graves, 200 Ala. 463, 76 So. 395 [(1917)]. (2) That if the tree is cut in the exercise of the police power of the city, in caring for the health, comfort, and general welfare of the inhabitants thereof, and was not an arbitrary, corrupt, or a manifest abuse of the right of such police power, and not rendered in an improper or negligent manner, the city is not liable in damages for doing so. Birmingham v. Graves, supra; Southern Bell v. Francis, 109 Ala. 224, 19 So. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930 [(1896)]; 4 McQuillin, Municipal Corporations (2d Ed.) § 1431; 38 Cyc. 528."

221 Ala. at 52, 127 So. at 833. This Court later recognized the same principle in Jefferson County v. Southern Natural Gas Co., 621 So. 2d 1282, 1287-88 (Ala. 1993):

> "Although there is no Alabama case directly on point, we note that there is a distinction between the 'taking' of or 'injury' to property pursuant to police powers and a 'taking' of or 'injury' to property that is compensable under § 235. For example, when the property taken is itself a nuisance, so that the authority must act, then that taking would be within the exercise of the police power and would not be compensable if it was not achieved in an arbitrary or corrupt manner and did not amount to an abuse of the police power. See, e.g., City of Mobile v. McClure, 221 Ala. 51, 127 So. 832 (1930); City of Birmingham v. Graves, 200 Ala. 463, 76 So. 395 (1917). However, if the authority is enlarging or improving something, e.g., a highway or a creek, and in achieving that enlargement or improvement it must 'take' or 'injure' property that is not itself a nuisance or is not the reason for the project, then that 'taking' of or 'injury' to the property would be constitutionally compensable. See City Council of Montgomery[v. Maddox, 89 Ala. 181, 7 So. 433 (1890)]; see, also, McEachin v. Mayor of City of Tuscaloosa, 164 Ala. 263, 51 So. 153 (1909); Town of Avondale v. McFarland, 101 Ala. 381, 13 So. 504 (1893); Panhandle Eastern Pipe Line Co.[v. State Highway Comm'n of Kansas, 294 U.S. 613, 622, 55 S. Ct. 563, 567, 79 L. Ed. 1090 (1935)]."

Based on the above cases, a property owner may challenge a municipal corporation's actions that the owner alleges are an abuse of its police power. Such a challenge would not be an inverse-condemnation action unless the municipal corporation

has taken property, under its conferred power of eminent domain, "by the construction or enlargement of its works, highways, or improvements." However, in the present case, the Town did not exercise its conferred power of eminent domain by the construction or enlargement of its works, highways, or improvements; instead, the Town exercised its police power in enacting the at-issue zoning ordinance. See Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1517-19 (11th Cir. 1987)(recognizing a distinction in Florida law between a municipal corporation's police power and its conferred power of eminent domain).

It is well established under Alabama law that a property owner may challenge the constitutionality of a zoning ordinance passed pursuant to a municipal corporation's police power. See Budget Inn of Daphne, Inc. v. City of Daphne, 789 So. 2d 154, 159 (Ala. 2000)(determining that certain provisions of a zoning ordinance passed by a municipality were arbitrary and capricious and striking down those provisions). In fact, M & N indicated in its brief filed on original submission that its constitutional challenge of the at-issue zoning ordinance was an alternative claim to its inverse-

condemnation claim and that its constitutional challenge could be reinstated if the trial court's judgment in favor of M & N on M & N's inverse-condemnation claim was reversed. The trial court's judgment in favor of M & N on M & N's inverse-condemnation claim has been reversed; thus, M & N is free to refile its constitutional challenge to the at-issue zoning ordinance. M & N would be afforded the relief it seeks if it were to prevail on its constitutional challenge of the at-issue zoning ordinance.

Lastly, I write to respond to Justice Murdock's substituted dissent. Initially, I note that Justice Murdock's dissent is entirely dependant upon distinguishing Willis v. University of North Alabama, 826 So. 2d 118 (Ala. 2002), in which this Court held that "§ 23 applies when a physical taking of the property in question has occurred." ___ So. 3d at ___ (interpreting Willis).[4] Ignoring Willis, Justice

[4]I note that this Court has not been asked to overrule Willis either in the parties' briefs or at oral argument; in fact, counsel for M & N stated at oral argument that M & N was not requesting that Willis be overruled. In Clay Kilgore Construction, Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 898 (Ala. 2006), this Court stated:

> "[W]e are not inclined to abandon precedent without a specific invitation to do so. 'Stare decisis

Murdock concludes that the plain language of § 23 makes compensable a regulatory "taking." Justice Murdock's erroneous conclusion that § 23 makes compensable regulatory takings leads him to the misguided conclusion that § 23 applies to municipal corporations.

First, I will address Justice Murdock's position that Willis does not apply in this case because it is factually distinguishable. On original submission in Town of Gurley, a majority of this Court affirmed this Court's interpretation of § 23 in Willis that § 23 does not make compensable regulatory "takings." In Town of Gurley, a majority of this Court rejected Justice Murdock's attempt to distinguish Willis from the present case and held as follows:

> "In Willis, a property owner owned property across the street from a parking lot owned by the University of North Alabama ('UNA'). UNA built a multilevel parking deck on its parking lot; it was assumed that the construction of the parking deck reduced the value of the property owner's property. As a result, the property owner 'filed an inverse-condemnation action against UNA, based on the allegation that UNA "took" his property without

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> commands, at a minimum, a degree of respect from this Court that makes it disinclined to overrule controlling precedent when it is not invited to do so.' Moore[v. Prudential Residential Servs. Ltd. P'ship], 849 So. 2d [914,] 926 [(Ala. 2002)]."

"just compensation," in violation of § 23 ....' 826 So. 2d at 119. This Court held that even though the property owner's property was injured, 'since no portion of Willis's property was "taken," or applied to public use by UNA, UNA was not required to compensate Willis under § 23.'[5] 826 So. 2d at 121. Also significant to the holding in Willis was the overruling of certain holdings in Foreman v. State, 676 So. 2d 303 (Ala. 1995), as follows:

> "'Foreman v. State, 676 So. 2d 303 (Ala. 1995), involved an inverse-condemnation action in which compensation was sought under § 23 of the Constitution of Alabama of 1901. In Foreman, this Court held that in "'inverse condemnation actions, a governmental

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[5]Section 23 states, in pertinent part:

"That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected ...."

(Emphasis added.) Section 235 states, in pertinent part:

"Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction."

(Emphasis added.)

> authority need only occupy or injure the property in question.'" 676 So. 2d at 305 (quoting Jefferson County v. Southern Natural Gas Co., 621 So. 2d 1282, 1287 (Ala. 1993)) (emphasis added in Foreman). However, in Jefferson County, the Court was applying § 235 of the Alabama Constitution, not § 23. As we have already noted, § 235 does not apply to the State. Finnell v. Pitts, 222 Ala. 290, 132 So. 2 (1930). To the extent that Foreman (and Barber v. State, 703 So. 2d 314 (Ala. 1997), which relied on Foreman), held that under § 23 "'a governmental authority need only occupy or injure the property in question,'" those holdings are incorrect and are hereby overruled.'
>
> "Therefore, it is clear, under the plain language of § 23 and under Willis, that the trial court properly held that § 23 does not apply in this case. It is undisputed that there was not an actual taking in this case and that M & N has complained only of administrative and/or regulatory actions taken by the Town. Willis makes clear that § 23 applies when a physical taking of the property in question has occurred. In the present case, M & N does not allege that there was a physical taking of the property in question."

___ So. 3d at ___ (footnote omitted). Justice Murdock's dissent does not address the significant holding in Willis overruling in part Foreman v. State, 676 So. 2d 303 (Ala. 1995). We held in Willis, by overruling Foreman in part, that under § 23 a state governmental authority must occupy property in order to constitute a taking; injury to the property caused

by anything other than physical invasion is not compensable under the language of § 23. Whether the facts of Willis are distinguishable from the present case is inconsequential; the holdings of Willis apply, and no effort to address the significance of those holdings in that case has been made.

Justice Murdock's reliance upon the unestablished proposition that Willis does not apply to the present case and, thus, that § 23 makes compensable regulatory "takings" appears to lead him to struggle with the unfounded notion that § 235 provides less of a limitation upon the power of eminent domain than does § 23. This unfounded notion is a consequence of the refusal to apply the interpretation of § 23 set forth in Willis. In other words, if Justice Murdock's view that Willis does not apply is accepted and regulatory "takings" are compensable under § 23 (a position that was rejected on original submission by this Court), then § 23 would make compensable regulatory "takings," whereas § 235 does not make compensable regulatory "takings." Based on that unestablished legal position, the argument then follows that the legislature could not have intended to put less of a limitation upon the power of eminent domain when wielded by a municipal

corporation than when wielded by the State. However, as stated above, this argument is premised upon refusing to accept the clear ruling in Willis, which a majority of this Court recognized in Town of Gurley. Therefore, giving Willis its proper weight as binding precedent, the foundation of Justice Murdock's dissent crumbles.

Moreover, Justice Murdock's dissent would render meaningless § 235; such an interpretation of our Constitution is prohibited by our rules of constitutional interpretation. As this Court noted in Town of Gurley:

> "[T]his Court set forth the following concerning the power of eminent domain and its limitations in Gober v. Stubbs, 682 So. 2d 430, 433-34 (Ala. 1996):
>
> > "'The power of eminent domain does not originate in Article I, § 23. Instead, it is a power inherent in every sovereign state. Section 23 merely places certain limits on the exercise of the power of eminent domain. This Court stated in Steele v. County Commissioners, 83 Ala. 304, 305, 3 So. 761, 762 (1887):
> >
> > > "'"The right of eminent domain antedates constitutions, and is an incident of sovereignty, inherent in, and belonging to every sovereign State. The only qualification of the [inherent] right is, that the use for which private property may be taken shall be public....

> The constitution [of our State] did not assume to confer the power of eminent domain, but, recognizing its existence, [further] limited its exercise by requiring that just compensation shall be made."
>
> "'In order for an exercise of eminent domain to be valid under § 23, two requirements must be met. See Johnston v. Alabama Public Service Commission, 287 Ala. 417, 419, 252 So. 2d 75, 76 (1971). First, the property must be taken for a public use and, with one exception inapplicable here, it cannot be taken for the private use of individuals or corporations. This first restriction is no more than a restatement of a requirement inherent in a sovereign's very right to exercise eminent domain. See Steele, 83 Ala. at 305, 3 So. at 762. Second, "just compensation [must be paid] for any private property taken." Johnston, 287 Ala. at 419, 252 So. 2d at 76.'
>
> "(Footnotes omitted.)"

___ So. 3d at ___ (emphasis added). As set forth in Town of Gurley, quoting Gober v. Stubbs, 682 So. 2d 430, 433-34 (Ala. 1996), the power of eminent domain is an inherent power of the State, and the Constitution limits the State's exercise of that power.

The State may confer its inherent power of eminent domain upon a municipal corporation. In fact, in City of Birmingham

v. Brown, 241 Ala. 203, 207, 2 So. 2d 305, 308 (1941), this Court held:

> "A municipal corporation has no inherent power of eminent domain, and can exercise it only when expressly authorized by the legislature, and statutes conferring the right must be strictly construed in favor of the landowner. New & Old Decatur Belt, etc., R. R. Co. v. Karcher, 112 Ala. 676, 21 So. 825 [(1896)]; Sloss-Sheffield S. & I. Co. v. O'Rear, 200 Ala. 291, 76 So. 57 [(1917)]; Denson v. Alabama P. I., [220 Ala. 433, 126 So. 133 (1930)]; 10 R.C.L. page 197."

Therefore, the only manner in which a municipal corporation may exercise the power of eminent domain is if the State has conferred upon it the power to do so. The State has, under numerous statutes, invested municipal corporations with the privilege of taking property for public works; that privilege is limited by § 235.

Justice Murdock's dissent concludes that because the State conferred the power to zone upon the Town, M & N's inverse-condemnation action for the alleged regulatory "taking" may be brought under § 23. Justice Murdock does not explain how granting a municipal corporation the power to zone is the equivalent of conferring upon a municipal corporation the power of eminent domain. A taking by the power of eminent domain involves a change in ownership of the property taken,

whereas there is no change in ownership when a property is subject to a zoning ordinance. Regardless, Justice Murdock's dissent ignores the structure of the Alabama Constitution and would render useless § 235.

In Hornsby v. Sessions, 703 So. 2d 932, 939 (Ala. 1997), this Court held:

> "'A constitutional provision, as far as possible, should be construed as a whole and in the light of [the] entire instrument and to harmonize with other provisions, [so] that every expression in such a solemn pronouncement of the people is given the important meaning that was intended in such context and such part thereof.' State Docks Commission v. State ex rel. Cummings, 227 Ala. 414, 417, 150 So. 345, 346 (1933)."

Further, this Court has also held that "[e]ach section of the Constitution must necessarily be considered in pari materia with all other sections. Opinion of the Justices, 333 So. 2d 125 (Ala. 1976)." Jefferson Cnty. v. Braswell, 407 So. 2d 115, 119 (Ala. 1981); see also House v. Cullman Cnty., 593 So. 2d. 69, 72 (Ala. 1992) ("This rule applies with particular force in the construction of provisions of the Constitution ....").

In order to ensure that we do not violate the above principles, we must consider the structure of the

Constitution. Section 23 falls under Article I of the Constitution, which is entitled "Declaration of Rights"; § 23 states:

> "That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association."

(Emphasis added.) Section 36, Ala. Const. 1901, the last section in Article I, states:

> "That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate."

(Emphasis added.) As made plain in the language of § 36, the Declaration of Rights set forth in Article I, including the limitations on the power of eminent domain in § 23, applies to the State generally, not only to the legislature. Section 235 falls under Article XII, which is entitled "Corporations"; § 235 states:

> "Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction."

Section 235 is a further limitation upon the eminent-domain power specifically applicable to corporations, including municipal corporations.

When the structure of the Constitution is considered and all parts are read in harmony, § 235 clearly provides the avenue by which to bring an inverse-condemnation action against a municipal corporation "invested with the privilege of taking property for public use," such as the Town. The position that § 23 applies to the State and § 235 applies to municipal corporations was stated in Duy v. Alabama Western

R.R., 175 Ala. 162, 57 So. 724 (1911), in which this Court held:

> "As to the state itself, the sole restraint in the particular now important is Const. § 23, wherein it is provided that 'private property shall not be taken for, or applied to, public use, unless just compensation be first made therefor.' Section 235 is addressed to the restraint of 'municipal and other corporations and individuals invested with the privilege of taking property for public use.' This latter section does not apply to the state itself in the exercise of its sovereign power in restraint of which, in so far as we are now concerned, Const. § 23, alone operates. It was ruled in Jackson v. Birmingham F. & M. Co., [154 Ala. 464, 45 So. 660 (1908)], that a property owner whose lot abutted on a street had a special, private property right in the street, which could not be taken, by a vacation of the street, without compensation, if such vacation, by the state, operated to deprive the property of a reasonably convenient means of access thereto. In the Jackson Appeal, as appears, consideration was alone given the validity vel non of the legislative act as affected by Const. 1875, art. 1, § 24; Const. 1901, § 23. No account was or could be taken of section 235, or of its predecessor in the Constitution of 1875, for, as stated, that section of the Constitution did not restrict the state itself in the exercise of its power in the premises."

175 Ala. at 173-75, 57 So. at 727-28. See also Markstein v. City of Birmingham, 286 Ala. 551, 554, 243 So. 2d 661, 662 (1971)("We note that section 235, which begins 'Municipal and other corporations and individuals invested with the privilege of taking property for public use, ...' does not apply to

eminent domain proceedings initiated by the State. State v. Barnhill, 280 Ala. 574, 196 So. 2d 691 [(1967)]; Finnell v. Pitts, 222 Ala. 290, 132 So. 2 [(1930)].").

Justice Murdock's dissent violates the above principles by rendering meaningless § 235. Parties bringing an inverse-condemnation action against a municipal corporation would be free to disregard § 235 entirely in favor of § 23. Sections 23 and 235 are not alternate avenues by which to receive just compensation but must be read in harmony, and each must be given effect. Reading §§ 23 and 235 in pari materia, one must conclude that any inverse-condemnation action against the municipal corporation using its conferred power of eminent domain must be brought pursuant to § 235, which does not make compensable regulatory "takings."

I sympathize with the notion that our principles of judicial restraint and strict constructionism have produced an undesirable result in this case. However, we must not abandon our principles to obtain a desired result in this one instant. Let us heed the following warning set forth in George Washington's Farewell Address of 1796:

> "If, in the opinion of the people, the distribution or modification of the constitutional powers be in

> any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit, which the use can at any time yield."

SHAW, Justice (concurring specially).

It is incorrect to say that M & N Materials, Inc. ("M & N"), cannot receive compensation for any taking of its property in this case: according to M & N, it can seek compensation for a violation of its 5th and 14th Amendment rights, and it could have sought to challenge the zoning regulations in this case as arbitrary and capricious. See ___ So. 3d at ___ (Moore, C.J., concurring specially). Notwithstanding my personal opposition to the notion of an uncompensated regulatory taking, I cannot change the Alabama Constitution to provide a remedy that has not existed in 138 years. Thus, I concur to overrule the applications for rehearing, as they do not convince me that our original opinion in this case "overlooked or misapprehended" the facts or law. Rule 40(b), Ala. R. App. P.

As framed by the arguments on appeal, this case purportedly involves, among other things, the proper interpretation of two "eminent-domain" provisions of our Constitution of 1901: art. I, § 23, and art. XII, § 235. These constitutional provisions require that governmental

entities acting to "take" private property for public use provide "just compensation" to the private-property owner.[6]

Section 235 governs the "taking" of property by municipalities and corporations that have been "invested with th[is] privilege." As the numerous authorities in our opinion on original submission note, § 235 does not make compensable "regulatory takings"; instead, "the taking, injury, or destruction of property must be through a physical invasion or disturbance of the property ... not merely through administrative or regulatory acts." Town of Gurley v. M & N Materials, Inc., [Ms. 1110439, Dec. 21, 2012] ___ So. 3d ___, ___ (Ala. 2012).

[6]When governmental entities wish to acquire property for public use, they may pursue what is known as a "condemnation" action. See Ala. Code 1975, §§ 18-1A-20 through -32. If there is a "taking of private property for public use without formal condemnation proceedings and without just compensation being paid by a governmental agency or entity which has the right or power of condemnation," then the property owner brings what is known as an "inverse condemnation" action seeking such compensation. McClendon v. City of Boaz, 395 So. 2d 21, 24 (Ala. 1981). The Town of Gurley did not institute a condemnation action in this case; instead, M & N argues that the result of the Town's zoning ordinance is that it has been denied a property interest and is thus entitled to "just compensation."

Section 23 broadly references the exercise of the power of eminent domain. As noted in our opinion on original submission in the instant case, Willis v. University of North Alabama, 826 So. 2d 118 (Ala. 2002), indicates that § 23 also applies to the "physical" taking of property and not a "regulatory" taking.[7] Thus, § 23 and § 235 are in harmony: they both require just compensation for a "physical" taking of property.

The 5th and 14th Amendments to the Constitution of the United States also address the exercise of eminent-domain powers but have been interpreted differently than § 23 and § 235. Specifically, the Supreme Court has held that the 5th and 14th Amendments can require (in some cases) that just compensation be paid for a "regulatory" taking of property.

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[7]We stated:

> "Therefore, it is clear, under the plain language of § 23 and under Willis, that the trial court properly held that § 23 does not apply in this case. It is undisputed that there was not an actual taking in this case and that M & N has complained only of administrative and/or regulatory actions taken by the Town. Willis makes clear that § 23 applies when a physical taking of the property in question has occurred."

___ So. 3d at ___.

See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). M & N acknowledges in its brief on rehearing that a claim under federal law for a purported regulatory taking by the Town of Gurley is available to it; however, M & N has instead, among other things, elected to pursue an inverse-condemnation action alleging that the Town of Gurley's zoning ordinances amounted to a regulatory taking under § 23. Specifically, M & N asks this Court to, for the first time in nearly 138 years,[8] interpret § 23 as embracing the federal regulatory-taking principles, the very principles M & N has not pursued.

To accomplish such an interpretation and apply it in this case, this Court must distinguish Willis or overrule it (which we have not been asked to do). Then, the definition of a "taking" in § 23 must be expanded to something less than an actual physical taking. This would create disharmony with § 235: both regulatory and physical takings would be covered by § 23, but § 235, which explicitly covers takings by municipalities, would, as our caselaw states, require

[8]Section 24 of the 1875 Alabama Constitution appears essentially identical to § 23.

compensation for only physical takings. Section 23 would provide a greater restriction on eminent domain, while municipalities have a freer hand under the more limited definition of a taking under § 235.

Recognizing the inequity this new definition would create between § 23 and § 235, it is suggested that § 23 should be interpreted as essentially trumping § 235 and also regulating all municipal takings. Such an interpretation essentially renders § 235 meaningless: applying an expanded definition of "taking" under § 23 to municipalities would mean that the narrower definition under § 235 would no longer have any practical field of application. In other words, the more expanded definition of a "taking" under § 23 would swallow the limited definition of "taking" under § 235. Again, notwithstanding my opposition to the notion of an uncompensated regulatory taking, to change the interpretation of one section of the Alabama Constitution (§ 23) at the cost of rendering another section (§ 235) irrelevant (all for the purpose of extending a remedy that already exists under federal law) seems to me unnecessary and contrary to my understanding of the concept of judicial restraint.

Stuart, J., concurs.

BOLIN, Justice (concurring in the result in case no. 1110439 and dissenting in case no. 1110507).

As a former probate judge, I presided over numerous condemnation cases, both direct and inverse. I readily admit that I misapprehended the law with regard to Alabama's general eminent-domain provision, § 23, Ala. Const. 1901, and the state-law claim of M & N Materials, Inc., that the Town of Gurley's actions amounted to a regulatory taking.[9] I must respectfully dissent from the denial of rehearing in case no. 1110507, because I would grant rehearing; I also join Justice Bryan's special writing.

The factual scenario that led to the instant proceeding has been well laid out in this Court's opinion on original submission. It begins with and could be captioned by the colloquial acronym "NIMBY," an abbreviation for "Not In My Backyard," which is often the reaction when there is a conflict between private-property rights and needs for public

[9]This Court grants applications for rehearing in a narrow range of cases. Rule 40(b), Ala. R. App. P., provides that "[t]he application for rehearing must state with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended." M & N Materials did so in its application, and I believe it has demonstrated a manifest error of law.

use, as those needs are determined by governmental entities. Here, the needs of the public were set and obtained by what can only be explained as governmental arrogance, exhibited in raw fashion by the municipality when it decided it did not want a property owner outside its municipal boundaries to operate a quarry. This governmental entity embarked on a road to "lasso" the property in question into its corporate limits through a legislative annexation, issued a moratorium on a business license for the property owner, and finally enacted a zoning ordinance to prohibit the operation of the proposed quarry business -- without paying any compensation whatsoever for so doing, much less just compensation.

Rare would be the person who would want a quarry built and operated near his or her property -- equally rare, however, would be a person who would not want roads and highways constructed from minerals and rocks extracted from the earth for the very construction of such roads and highways. I am now convinced that the Town had a lawful means to "take" the subsurface rights from the municipally conscripted property owner through eminent domain, but chose instead a course that allowed it to bypass paying just

compensation therefor. Put another way, it chose to unlawfully take for free by regulation what it chose not to take by paying proper compensation through its conferred power of condemnation.

The State of Alabama is imbued as a sovereign with the right of eminent domain.

> "[T]his Court set forth the following concerning the power of eminent domain and its limitations in Gober v. Stubbs, 682 So. 2d 430, 433-34 (Ala. 1996):
>
> > "'The power of eminent domain does not originate in Article I, § 23. Instead, it is a power inherent in every sovereign state. Section 23 merely places certain limits on the exercise of the power of eminent domain. This Court stated in Steele v. County Commissioners, 83 Ala. 304, 305, 3 So. 761, 762 (1887):
> >
> > > "'"The right of eminent domain antedates constitutions, and is an incident of sovereignty, inherent in, and belonging to every sovereign State. The only qualification of the [inherent] right is, that the use for which private property may be taken shall be public.... The constitution [of our State] did not assume to confer the power of eminent domain, but, recognizing its existence, [further] limited its exercise by requiring that just compensation shall be made."

> "'In order for an exercise of eminent domain to be valid under § 23, two requirements must be met. See Johnston v. Alabama Public Service Commission, 287 Ala. 417, 419, 252 So. 2d 75, 76 (1971). First, the property must be taken for a public use and, with one exception inapplicable here, it cannot be taken for the private use of individuals or corporations. This first restriction is no more than a restatement of a requirement inherent in a sovereign's very right to exercise eminent domain. See Steele, 83 Ala. at 305, 3 So. at 762. Second, "just compensation [must be paid] for any private property taken." Johnston, 287 Ala. at 419, 252 So. 2d at 76.'"

"(Footnotes omitted.)"

Town of Gurley v. M & N Materials, Inc., [Ms. 1110439, December 21, 2012] ___ So. 3d ___, ___ (Ala. 2012).

Article I of the Constitution of Alabama, the article that defines and sets out our Declaration of Rights, provides in § 23 that private property shall not be taken without just compensation to the property owner first being provided. Therefore, the State may condemn property for lawful purposes, but must, as a limitation upon its inherent power, pay just compensation to the property owner for doing so. The State is further empowered to "confer" this right of a sovereign regarding eminent domain upon a municipal corporation. In Sloss-Sheffield Steel & Iron Co. v. O'Rear, 200 Ala. 291, 292,

76 So. 57, 58 (1917), this Court, quoting Lewis on Em. Dom., at § 374, stated:

> "'Strictly speaking, the Legislature cannot delegate the power of eminent domain. It cannot divest itself of sovereign powers. But, in exercising the power, it can select such agencies as it pleases, and confer upon them the right to take private property subject only to the limitations contained in the Constitution. Accordingly it has been held that the right may be conferred upon corporations, public or private, upon individuals, upon foreign corporations, or a consolidated company composed in part of a foreign corporation, and upon the federal government. Such has been the common practice since the Revolution, and the right to do so has never been a matter of serious question; and it may be regarded as settled law that, in the absence of special constitutional restriction, it is solely for the Legislature to judge what persons, corporations or other agencies may properly be clothed with this power.'"

(Emphasis added.)

The State therefore has the power to lawfully "confer" the power of eminent domain upon municipalities, which it has done in statutes such as § 11-47-170, Ala. Code 1975, applicable to municipal corporations only, and § 11-80-1(a), Ala. Code 1975, applicable to both counties and municipal corporations. Section 11-47-170 reads, in pertinent part:

> "(a) Except as otherwise provided in subsection (b), whenever in the judgment of the council, commission, or other governing body of a city or town it may be necessary or expedient for the carrying out and full exercise of any power granted by the applicable provisions of this title or any other applicable provision of law, the town or city shall have full power and authority to acquire by purchase the necessary lands or rights, easements, or interests therein, thereunder, or thereover or, for the purposes for which private property may be acquired by condemnation, may proceed to condemn the same in the manner provided by this article, or by the general laws of this state governing the taking of lands or the acquiring of interests therein for the uses for which private property may be taken, and such proceedings shall be governed in every respect by the general laws of this state pertaining thereto or by the provisions on the subject contained in this article when the same are followed."

(Emphasis added.)

Further, § 11-80-1 states, in pertinent part:

> "(a) Counties and municipal corporations may condemn lands for public building sites or additions thereto, or for enlargements of sites already owned, or for public roads or streets or alleys, or for material for the construction of public roads or streets or for any other public use."

Therein lies the irony of not declaring this case to be what it really is -- a hardball regulatory "taking" (by annexation and zoning ordinance) by government of a private-property interest. This allows what has been determined to be for the "public use" and public good to be accomplished by a

municipality upon the unrecompensed shoulders of the property owner. The ultimate irony of it all is this: the State has given to or "conferred" on the Town of Gurley the lawful right to have condemned this property, if it had so needed, "for material for the construction of public roads or streets or for any other public use," including "the necessary lands or rights, easements or interests... thereunder," and the Town can still do so in the future. However, the property owner is now prevented and precluded, without any state-law remedy, from ever extracting the same material from its own property to mine and sell for use in the construction of public roads or streets by the heavy-handed power of government.

Inverse condemnation is the taking of private property for public use without formal condemnation proceedings and without just compensation being paid by the governmental agency or entity that has the power of condemnation. Foreman v. State, 676 So. 2d 303, 305 (Ala. 1995), overruled on the ground that § 23 requires a physical taking of property, Willis v. University of North Alabama, 826 So. 2d 118 (Ala. 2002); for the reasons set out in Justice Bryan's special writing, I agree that Willis was wrongly decided and should be

overruled. As such, it is in the nature of a derivative action available to a property owner when a condemnor defaults on its obligation to commence a condemnation proceeding. Section 18-1A-32, Ala. Code 1975, wisely provides a property owner with a remedy when such abuses occur:

> "(a) If property is to be acquired through the exercise of its power of eminent domain, the condemnor shall commence a condemnation action for that purpose. A condemnor shall not intentionally make it necessary for an owner of property to commence an action in inverse condemnation, to prove the fact of the taking of his property.
>
> "(b) The judgment and any settlement in an inverse condemnation action awarding or allowing compensation to the plaintiff for the taking or damaging of property by a condemnor shall include the plaintiff's litigation expenses."

(Emphasis added.)

The property owner, M & N Materials, had its property involuntarily annexed into the Town of Gurley, was delayed and its property subsequently rezoned into a classification that did not allow for the mining of its subsurface mineral rights, and hence was a classic victim of a regulatory "taking" or "damaging." From the beginning it would have been difficult to argue that the opinion on original submission was an unjust result based on the facts. The office of a rehearing

application is to allow for a review and recalculation of the law involved. Now, based upon a review of, and a second look at, the law involved, it is my judgment that M & N properly availed itself of the state-law remedy provided by § 18-1A-32 in its complaint, and it is my considered opinion that the application for rehearing should have been granted in case no. 1110507.

One of the premier Alabama lawyers who ever practiced eminent-domain law was Maurice F. Bishop. He was well over 50 years ahead of his time when wrote the following:

> "There is no phase of the law that has seen a wider expansion during the last few years than the law of eminent domain, and with the [then] new, tremendous interstate highway and local urban redevelopment programs now in full swing throughout Alabama, I feel that we can confidently predict that this phase of the law will become one of the most important and remunerative parts of our work. It will continue to increase in magnitude as the programs of the state, federal and local governments make mandatory the condemnation of lands for public purposes. Therefore, continuing legal education in this field is of increasing importance."

The Alabama Lawyer, Vol. 22, No. 4 (October 1961).

Little did Bishop realize how prescient he was, especially given the present-day and future litigation that will inevitably develop from the battle between the rights of

private-property owners against public takings by governmental regulatory action.

Wise, J., concurs.

BRYAN, Justice (concurring in the result in case no. 1110439 and dissenting in case no. 1110507).

The Takings Clause of the Fifth Amendment to the United States Constitution, which applies to both the federal government and the states, see Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897), provides that private property shall not "be taken for public use, without just compensation." Alabama's general eminent-domain provision, § 23, Ala. Const. 1901, mirrors the Takings Clause. Section 23 provides, in part: "[P]rivate property shall not be taken for, or applied to public use, unless just compensation be first made therefor ...." The Takings Clause, as well as our § 23, "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987). That is, it "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." First English, 482 U.S. at 315 (emphasis omitted). "One of the principal purposes of the Takings Clause is '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.'" Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

The classic example of a taking involves a direct appropriation of property or physical intrusion onto property. Before 1922, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) (citations omitted). However, in that year the United States Supreme Court stated that "if regulation goes too far it will be recognized as a taking" under the Takings Clause. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). "Beginning with Mahon, ... the [Supreme] Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster -- and that such 'regulatory takings' may be compensable under the Fifth Amendment." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005).

The main opinion on original submission concludes that a government's regulatory conduct cannot effect a taking under § 23, which is our State's parallel provision to the Takings Clause. That view places Alabama landowners, like M & N Materials, Inc., the plaintiff in this case, in the position of potentially having to "'bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Dolan, 512 U.S. at 384 (quoting Armstrong, 364 U.S. at 49). Thus, I must respectfully dissent in case no. 1110507.

First, I note that I agree with much of Justice Murdock's substituted special writing. Justice Murdock aptly explains why § 23 applies to the Town of Gurley's regulatory conduct in this case. However, whereas Justice Murdock distinguishes this case from Willis v. University of North Alabama, 826 So. 2d 118 (Ala. 2002), a case relied on by the main opinion, I would simply overrule Willis.

In my opinion, Willis requires that there be a physical intrusion onto property for there to be taking of that property under § 23. In Willis, this Court stated, in a straightforward manner:

> "UNA [University of North Alabama] argues that § 23 does not apply to this case because UNA did not physically take Willis's property or apply Willis's property to public use during the construction of the parking deck. We agree."

826 So. 2d at 121 (emphasis added). Thus, Willis precludes a "regulatory taking" -- the type of taking allowed under the Takings Clause after Mahon -- under § 23. Although the term "regulatory taking" may be given different meanings, see, e.g., John Martinez, Government Takings §§ 2:9-20 (2007), in the context of the present case the term describes a taking in which the government does not physically invade or disturb the property. For the following reasons, I believe we should overrule Willis.

Initially, I recognize that we have not been asked to overrule Willis and that "[s]tare decisis commands, at a minimum, a degree of respect from this Court that makes it disinclined to overrule controlling precedent when it is not invited to do so." Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 926 (Ala. 2002). However, this is that rare case in which we should overrule precedent on our motion.

As noted, more than 90 years ago, in 1922, the United States Supreme Court stated that "if regulation goes too far it will be recognized as a taking" under the Takings Clause of the Fifth Amendment. Mahon, 260 U.S. at 415. Since Mahon, the Supreme Court has developed extensive caselaw regarding regulatory takings under the Takings Clause; the concept of a regulatory taking under that provision is well established. See Martinez, supra, §§ 2:9-20. As noted, the applicable part of Alabama's general eminent-domain provision, § 23, mirrors the Takings Clause. The United States Supreme Court's construction of federal constitutional provisions is persuasive when we construe similar provisions of the Alabama Constitution. Pickett v. Matthews, 238 Ala. 542, 547, 192 So. 261, 265-66 (1939). To conclude otherwise would "produce much confusion and instability in legislative effectiveness." Id. By interpreting § 23 to preclude a regulatory taking, Willis is out of line with well established Supreme Court precedent construing a provision materially the same as our provision in § 23.

Moreover, Willis is out of line with the vast majority of states, which recognize the concept of a regulatory taking

under state constitutions and often borrow heavily from federal law on that subject. See Cannone v. Noey, 867 P. 2d 797 (Alaska 1994); Mutschler v. City of Phoenix, 212 Ariz. 160, 129 P.3d 71 (Ariz. Ct. App. 2006); Forest Glade Mgmt., LLC v. City of Hot Springs, (No. CA 08-200, November 12, 2008) (Ark. Ct. App. 2008) (not reported in S.W.3d); Twain Harte Assocs., Ltd. v. County of Tuolumne, 217 Cal. App. 3d 71, 265 Cal. Rptr. 737 (1990); G & A Land, LLC v. City of Brighton, 233 P.3d 701 (Colo. Ct. App. 2010); Cumberland Farms, Inc. v. Town of Groton, 262 Conn. 45, 808 A.2d 1107 (2002); Gradous v. Board of Comm'rs of Richmond Cnty., 256 Ga. 469, 349 S.E.2d 707 (1986); Covington v. Jefferson Cnty., 137 Idaho 777, 53 P.3d 828 (2002); State v. Kimco of Evansville, Inc., 902 N.E.2d 206 (Ind. 2009); Molo Oil Co. v. City of Dubuque, 692 N.W.2d 686 (Iowa 2005); Lone Star Indus., Inc. v. Secretary of Kansas Dep't of Transp., 234 Kan. 121, 671 P.2d 511 (1983), superseded by statute as recognized in Estate of Kirkpatrick v. City of Olathe, 289 Kan. 554, 215 P.3d 561 (2009); Annison v. Hoover, 517 So. 2d 420 (La. Ct. App. 1987); Seven Islands Land Co. v. Maine Land Use Regulation Comm'n, 450 A.2d 475 (Me. 1982); Maryland-National Capital Park & Planning Comm'n

v. Chadwick, 286 Md. 1, 405 A.2d 241 (1979); Blair v. Department of Conservation & Recreation, 457 Mass. 634, 932 N.E.2d 267 (2010); Poirier v. Grand Blanc Twp., 167 Mich App. 770, 423 N.W.2d 351 (1988); DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299 (Minn. 2011); Jackson Mun. Airport Auth. v. Evans, 191 So. 2d 126 (Miss. 1966); Clay Cnty. ex rel. Cnty. Comm'n of Clay Cnty. v. Harley and Susie Boque, Inc., 988 S.W.2d 102 (Mo. Ct. App. 1999); Buhmann v. State, 348 Mont. 205, 201 P.3d 70 (2008); Scofield v. Nebraska Dep't of Natural Res., 276 Neb. 215, 753 N.W.2d 345 (2008); McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Mansoldo v. State of New Jersey, 187 N.J. 50, 898 A.2d 1018 (2006); Estate & Heirs of Sanchez v. County of Bernalillo, 120 N.M. 395, 902 P.2d 550 (1995); Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381 (1976); Beroth Oil Co. v. North Carolina Dep't of Transp., 725 S.E.2d 651 (N.C. Ct. App. 2012); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983); State ex rel. Shemo v. City of Mayfield Heights, 95 Ohio St. 3d 59, 765 N.E.2d 345 (2002); Calhoun v. City of Durant, 970 P.2d 608 (Okla. Civ. App.

1997); Hall v. State ex rel. Oregon Dep't of Transp., 252 Or. App. 649, 288 P.3d 574 (2012); Cleaver v. Board of Adjustment, 414 Pa. 367, 200 A.2d 408 (1964); Annicelli v. Town of S. Kingstown, 463 A.2d 133 (R.I. 1983); Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005); US West Commc'ns, Inc. v. Public Util. Comm'n of South Dakota, 505 N.W.2d 115 (S.D. 1993); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998); Diamond B-Y Ranches v. Tooele Cnty., 91 P.3d 841 (2004); Killington, Ltd. v. State, 164 Vt. 253, 668 A.2d 1278 (1995); City of Virginia Beach v. Bell, 255 Va. 395, 498 S.E.2d 414 (1998); Presbytery of Seattle v. King Cnty., 114 Wash. 2d 320, 787 P.2d 907 (1990); McFillan v. Berkeley Cnty. Planning Comm'n, 190 W. Va. 458, 438 S.E.2d 801 (1993); Eberle v. Dane Cnty. Bd. of Adjustment, 227 Wis. 2d 609, 595 N.W.2d 730 (1999); and Cheyenne Airport Bd. v. Rogers, 707 P.2d 717 (Wyo. 1985).

"[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man." Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dal.) 304, 310 (Cir. Ct. Pa. 1795). Our nation's founders sought to protect the fundamental right of private

property; unfortunately, Willis erodes that right. James Madison stated: "'Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.'" In re Certified Question from U.S. Bankruptcy Court for the E. Dist. of Mich., 477 Mich. 1210, 1212-13, 722 N.W. 2d 423, 425 (2006) (Young, J., concurring) (emphasis omitted) (quoting "Property," National Gazette, March 29, 1792, Writings of James Madison (New York, Putnam, Hunt ed. 1906), vol VI, p. 102). Madison also stated that "'[i]f the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights ....'" Taylor v. Armco Steel Corp., 373 F. Supp. 885, 887 (S.D. Tex. 1973) (quoting National Gazette, March 29, 1792). Alexander Hamilton wrote that one of the benefits of the proposed Constitution was "[t]he additional security which its adoption will afford to the preservation of [republican] government, to liberty, and to property." Federalist No. 1

(Alexander Hamilton) (George W. Carey & James McLellan eds. 2001). Hamilton also wrote that state government, "in the administration of criminal and civil justice," is "the immediate and visible guardian of life and property." Federalist No. 17 (Alexander Hamilton) (George W. Carey & James McLellan eds. 2001). Arthur Lee, a delegate to the Continental Congress, opined that "'the right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.'" Resource Inv., Inc. v. United States, 85 Fed. Cl. 447, 470 n.31 (2009) (quoting James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 26 (2d ed. 1998)). William Blackstone, who held great influence among the Founders, wrote: "'So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.'" Kelo v. City of New London, 545 U.S. 469, 510 (2005) (Thomas, J., dissenting) (quoting 1 William Blackstone, Commentaries on the Laws of England *135). By failing to recognize the concept of a regulatory taking under

§ 23, Willis falls short of national precedent and, in my opinion, undermines our fundamental right to private property.

Furthermore, I note that Willis itself overruled Foreman v. State, 676 So. 2d 303 (Ala. 1995), and Barber v. State, 703 So. 2d 314 (Ala. 1997), which relied on Foreman. A review of the briefs submitted in Willis indicates that no party or amicus curiae in that case asked this Court to overrule those cases.[10] In that case, the University of North Alabama and amici curiae did argue, on application for rehearing only, and in the alternative, that Foreman and Barber were "flawed" and that they "misapplied" the law, but they did not ask this Court to overrule those cases. On original submission in Willis, no party or amici argued that those cases were wrongly decided.

In short, Foreman and Barber, the cases Willis overruled, allowed for the possibility of compensation under § 23 for injuries to property that were not physical injuries, but Willis precluded that possibility. In my view, by overruling Willis, we would simply be returning the law to a position

[10]Because there was no oral argument in Willis, the only arguments before this Court were those submitted in briefs.

similar to the position in which it was before this Court changed the law on its own motion. In doing so, we would align our State with the overwhelming majority of jurisdictions. The landowners of this State deserve the same basic protections under well settled eminent-domain law afforded by other jurisdictions. For us to accomplish this, we must overrule Willis's physical-intrusion rule and thereby allow for regulatory takings under § 23.

Having overruled Willis, I would then remand this case for the trial court to consider whether a regulatory taking under § 23 actually occurred, given the facts here. This raises the question of which standard or standards would be applied to determine whether a regulatory taking occurred. Considering the plethora of cases that have applied the well established regulatory-taking standards adopted by the Supreme Court, I would apply those standards to cases involving alleged regulatory takings under § 23.

As noted, although the term "regulatory taking" may be given different meanings, see, e.g., Martinez, supra, §§ 2:9-20, in the present case the term merely describes a taking in which the government does not physically invade or disturb the

property. Therefore, it would appear that one of two standards could be used to determine whether there was in fact a regulatory taking in this case. Id. Applying the standard established in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992), a government regulation goes "too far" if it "denies all economically beneficial or productive use of [the] land." In that situation, a compensable taking occurs unless "background principles of the State's law of property and nuisance" would restrict the owner's intended use of the property. 505 U.S. at 1029. A Lucas taking is sometimes referred to as a "total regulatory taking," 505 U.S. at 1026, or a "categorical regulatory taking," Bair v. United States, 515 F.3d 1323, 1326 (Fed. Cir. 2008).

Any regulatory action causing less than the denial of all economically beneficial or productive use of the property would require an analysis under Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). In Penn Central, the Supreme Court identified these factors for determining whether a regulatory taking has occurred: (1) "the character of the governmental action"; (2)

"[t]he economic impact of the [action] on the claimant"; and (3) "the extent to which the [action] has interfered with distinct investment-backed expectations." Id. at 124. The Penn Central standard involves "essentially ad hoc, factual inquiries." Id. A Penn Central taking is sometimes referred to as a "partial regulatory taking." See Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); and Bair, 515 F.3d at 1326.

In conclusion, I concur in the result in case no. 1110439, but I must respectfully dissent in case no. 1110507. Regarding the latter case, I would grant rehearing, overrule Willis, look to federal caselaw regarding regulatory takings under § 23, and remand the case for the trial court to consider whether a regulatory taking occurred under either Lucas or Penn Central.

Bolin and Wise, JJ., concur.