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"Regulatory Takings"

Claims under the Alabama Constitution Following *Town of Gurley v. M&N Materials, Inc.*

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Prior to December 21, 2012, the Alabama Supreme Court had never addressed the issue of whether a regulatory taking–i.e., governmental action which operates by executive or legislative action to restrict the use of property–can constitute the basis for a cognizable claim of inverse condemnation under the *Alabama Constitution of 1901*. In the case of *Town of Gurley v. M&N Materials, Inc.*, 143 So. 3d 1 (Ala. 2012) (as modified on denial of rehearing), the Alabama Supreme Court addressed for the first time the question of whether such a right of action exists. The authors of this article served as appellate counsel for the Town of Gurley in the *M&N* case.[1] This article will address the background of inverse condemnation in Alabama, the *M&N* opinion and the current status of regulatory takings claims under the Alabama Constitution.

Inverse Condemnation Under Alabama Law

Generally, the exercise of the power of eminent domain is accomplished through the statutorily regulated process of condemnation. See, e.g., *State Dep't of Transp. v. McLelland,* 639 So. 2d 1370 (Ala. 1994). However, "inverse condemnation is the 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." *McClendon v. City of Boaz*, 395 So. 2d 21, 24 (1981). *In Ex parte Carter*, 395 So. 2d 65, 67 (Ala. 1980), the Supreme Court of Alabama observed that "an action claiming inverse condemnation is very limited and [ ] all elements must be present."

The difference between formal condemnation proceedings and "inverse condemnation" was explained by the Alabama Supreme Court in *Jefferson County v. Southern Natural Gas Co.,* 621 So. 2d 1282 (Ala. 1993), by reference to a United States Supreme Court decision on the subject, as follows:

> In *United States v. Clarke,* 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980), the United States Supreme Court explained the difference between formal condemnation proceedings and inverse condemnation proceedings. A formal condemnation proceeding is a legal action brought by a condemning authority, such as the Government, in the exercise of its power of eminent domain. "Inverse condemnation" refers to a legal action against a governmental authority to recover the value of property that has been taken by that governmental authority without exercising its power of eminent domain–it is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when the taking authority has not initiated condemnation proceedings. Condemnation proceedings require affirmative "taking" action on the part of the condemning authority; the particular action required depends on the particular statute applicable. However, in inverse condemnation actions, a governmental authority need only occupy or injure the property in question; when that occurs and the property owner discovers the encroachment, the property owner has the burden of taking affirmative action to recover just compensation.

621 So. 2d at 1287.

The right of action for inverse condemnation is not found in the *Alabama Code*. Although inverse condemnation claimants frequently cite the *Alabama Eminent Domain Code*, *Ala. Code* § 18-1A-1, *et seq*. (AEDC), as the source of the right to maintain an inverse condemnation action, it does not appear that the AEDC provides a basis for an inverse condemnation claim. The AEDC specifically states that it "does not confer the power of eminent domain" and, instead, provides only "standards for the acquisition of property by condemnors" and "supplements the law of this state relating to the acquisition of property and to the exercise of the power of eminent domain." *Id.* At § 18-1A-2. The commentary to Section 18-1A-2 of the AEDC specifically provides that the AEDC does not purport to regulate inverse condemnation actions in Alabama except to provide for the recovery of attorneys' fees for successful inverse condemnation claimants.

> Subsection (a) establishes that this *Code* is conceived primarily as a procedural statute. . . .
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> Subsection (b) makes it clear that this Alabama Eminent Domain Code (hereinafter referred to as "AEDC" or "this Code") is intended to supplement and not displace other provisions of law dealing with the substantive powers of land acquisition and eminent domain. . . .
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> *This AEDC does not purport to supply rules for inverse condemnation actions* (except as provided in section § 18-1A-32).[2] The extent to which its provisions may be applicable in inverse condemnation actions is intended to be determined by judicial construction in the light of other applicable state law.

(emphasis added). There are no appellate decisions in Alabama that have held that the AEDC provides a statutory basis of a claim for inverse condemnation.[3]

Most of the reported cases involving inverse condemnation claims against municipalities have been brought under § 235 of the *Alabama Constitution of 1901*, which provides in pertinent part as follows:

> 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).

Section 235 thus has two principal clauses which materially restrict its scope of operation. In order for a governmental action to be compensable under § 235, two separate and distinct elements must both be present. The property must have been: (1) "taken, injured, [or] destroyed," and (2) the taking, injury or destruction must have been related to the governmental entity's "construction or enlargement of its works, highways, or improvements." Section 235 has also been restricted by judicial interpretation. For example, the supreme court has stated that a property owner "does not bring himself within the protection of § 235 of the *Constitution of Alabama 1901,* unless he shows that he is an 'abutting owner'" to the improvements under construction. *Markstein v. City of*

The property must have been: (1) "taken, injured, [or] destroyed," and (2) the taking, injury or destruction must have been related to the governmental entity's "construction or enlargement of its works, highways, or improvements."

Birmingham, 243 So. 2d 661, 662 (Ala. 1971) (quoting *Hall v. Atlanta, B.&A.R.R. Co.,* 158 Ala. 271, 48 So. 365 (Ala. 1908)). The supreme court has further said that under § 235, "damages to be recoverable, must be to property, and *not* for a mere personal inconvenience *or injury to business*." *Thompson v. City of Mobile,* 199 So. 862, 865 (Ala. 1941) (emphasis supplied).

The supreme court has further made it clear that § 235 applies only to property taken or injured in connection with the "construction or enlargement" of a municipality's physical "public works, highways or improvements." On this point, the supreme court has stated:

> The right of recovery of compensation by the property owner, under the provisions of Section 235 of the Constitution, is confined of course, *to where the municipality is engaged in the construction or enlargements of the works, highways, or improvements of the City*.

(emphasis supplied). *City of Birmingham v. Graves,* 76 So. 395, 395 (Ala. 1917) (emphasis supplied). The supreme court has noted this requirement in the context of the damages recoverable in an inverse condemnation action brought under § 235. See, e.g., *City of Tuscaloosa v. Patterson,* 534 So. 2d 283, 286 (Ala. 1988) (holding that in an inverse condemnation action under § 235, "[t]he burden is on the property owner to prove the existence and extent of the damage to his property, and the measure of damages is the difference between the value of the property *before the work was done* and the value afterwards.") (emphasis supplied); *Mahan v. Holifield,* 361 So. 2d 1076, 1079 (Ala. 1978) ("Damages recoverable under section 235 of our Constitution, however, *are only those capable of being ascertained at the time the city's works are being constructed or enlarged*.") (emphasis supplied).

The second constitutional basis for inverse condemnation claims in Alabama is contained in Article I, § 23, *Alabama Constitution of 1901*. Section 23 provides, in relevant part, that "private property shall not be taken for, or applied to, public use, unless just compensation be first made therefor." Prior to the Alabama Supreme Court's decision in *Willis v. University of North Alabama*, 826 So. 2d 118 (Ala. 2002), the supreme court had held on several occasions that in inverse condemnation actions under § 23, "a governmental authority need only occupy *or injure* the property in question." *Foreman v. State,* 676 So. 2d 303, 305 (Ala. 1995) (emphasis added). See also *Barber v. State,* 703 So. 2d 314 (Ala. 1997) (same, citing *Foreman*). Injury could simply be, under those cases, a diminution in value. In *Willis,* however, the supreme court specifically overruled *Foreman* and *Barber* on that point and held that a claim solely of diminution in value is not sufficient to sustain an inverse condemnation action under § 23. Rather, to have a maintainable claim under Section 23 a property owner is required to show that the owner's property was "*physical*[*ly*] take[n] . . . or . . . appl[ied] to public use." 826 So. 2d at 121. (emphasis added).

In *Willis,* the plaintiff alleged that the construction by the University of North Alabama of a parking deck across the street from the plaintiff's property had resulted in a decrease in the value of his property. The plaintiff filed an inverse condemnation action alleging a violation of § 23 contending that the devaluation of his property constituted an "injury" to his property which was compensable in an inverse condemnation under § 23. The trial court granted summary judgment. In its consideration of the summary judgment motion, "the trial court assumed that Willis's property was *injured* ('the size, location, and eventual operation of the parking deck [did] substantially reduce the value of [Willis's] property.')." 826 So. 2d at 121. (emphasis in original). However, in granting the summary judgment, the trial court held that "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 of the Constitution." *Id.* The supreme court affirmed the summary judgment on the basis granted by the trial court, and in so holding, specifically overruled the prior line of cases that had held that "injury" as that term was utilized in § 23 included simply diminution in value without an actual physical taking of the land. *Id.*

Supreme Court's Decision in *M&N Materials, Inc. v. Town of Gurley*

Facts Applicable to M&N's Claims

M&N Materials, Inc. was formed in 2003. At that time, it acquired 160 acres of mountain property adjacent to the

town limits of Gurley, Alabama to be used as a rock quarry. By June 2004, it had acquired an additional 109 adjoining acres for use in connection with the quarry. M&N's proposed quarrying operations generated a great deal of controversy in the area and local citizens contacted their legislative representatives voicing opposition to the proposed quarry. On February 26, 2004, the legislature passed Act No. 2004-19 directing the town to hold a referendum on the issue of whether it should annex M&N's property. A referendum accordingly was conducted on April 13, 2004 and the annexation proposal passed by a majority vote.

Following the annexation, M&N applied for a business license, and its application was denied. Additionally, because the land lacked a zoning classification after the annexation, the town imposed a moratorium on development pending selection of a zoning classification. In the course of these events, M&N ended up reaching an agreement with Vulcan Lands, Inc. under which Vulcan acquired an option to purchase the property for $3.75 million. Ultimately, Vulcan Lands let the option expire but paid M&N $1 million for the property; Vulcan Construction Materials, LP then applied for a business license but that application was denied as well.

Following this, M&N sued the Town of Gurley, claiming that the town's actions constituted a "regulatory taking" of its land. M&N's original lawsuit asserted regulatory takings claims under the Fifth Amendment to the United States Constitution and §§ 23 and 235 of the *Alabama Constitution of 1901*. M&N claimed the following actions, together or separately, constituted a regulatory taking:

(1) The initial annexation of the property on April 16, 2004;

(2) The failure to issue a business license in response to M&N's April 21, 2004 application;

(3) The moratoria placed on the issuances of business licenses thereafter on May 4, 2004 and August 4, 2004;

(4) The denial of a business license to Vulcan on January 18, 2005; and

(5) The zoning of the property for agricultural use on January 18, 2005.

M&N's federal claims were ultimately dismissed and the state constitutional regulatory takings claims were tried to a jury in Madison County Circuit Court. The circuit court granted judgment as a matter of law at the close of the case as to the inverse condemnation claim under § 23. The dismissal of the § 23 claims was based upon the holding of *Willis* that such claims are only cognizable where there has been a physical injury to property. The case was submitted to the jury against the town as an inverse condemnation case under § 235.

On February 22, 2011, the jury rendered a verdict in favor of M&N and against the town in the amount of $2,750,000. On August 5, 2007, the circuit court entered a judgment pursuant to the jury verdict against the town in the amount of $2,750,000. In addition, the circuit court awarded pre-judgment interest in the amount of $966,493.15, and litigation expenses of $1,200,169.20, for a total judgment amount of $4,916.662.30.

The Appeal

The town filed an appeal to the supreme court. M&N cross-appealed the trial court's order dismissing the § 23 claim. The circuit court stayed the judgment pending the appeal. On December 21, 2012, the supreme court reversed and rendered the judgment entered by the circuit court on the § 235 claim and affirmed the dismissal of the § 23 claim on M&N's cross-appeal.

THE SECTION 235 CLAIM

On appeal, as it had done in the circuit court, M&N argued that a regulatory takings claim was cognizable under § 235. M&N "encourage[ed] [the Supreme Court] to look to federal case law concerning regulatory 'takings' under the final clause of the Fifth Amendment to the United States Constitution, often referred to as the 'Just Compensation Clause' in interpreting § 235." *M&N*, 143 So. 3d at 13. As it had also done in the circuit court, "[t]he Town argue[d] that, under the plain language of § 235) that the property must be 'taken, injured, or destroyed *by the construction or enlargements of its works, highways or improvements . . .*') an inverse condemnation claim based upon a municipal corporation's regulatory 'taking' of property is not sustainable." *Id.* at 12 (emphasis in original). The supreme court noted the town's argument "that under § 235 there are essentially two requirements that must be met in order to maintain an inverse-condemnation claim: the party alleging that its property has been taken pursuant to inverse condemnation must prove, first, that the property has been

'taken, injured or destroyed' and, second, that the property has been *physically* disturbed." *Id.* (emphasis in original).

In reversing and rendering the trial court judgment which had been rendered in favor of M&N, the supreme court stated that it found "the Town's argument persuasive." *Id.* at 13. The court in *M&N* squarely held that administrative or regulatory action of a municipality which restricts land use cannot be the basis for a "regulatory taking" claim under § 235. The court stated:

> As set forth in our long-standing precedent, *the taking, injury, or destruction of property must be through a physical invasion or disturbance of the property, specifically "by the construction or enlargement of [a municipal or other corporations'] works, highways, or improvements,"* not merely through administrative or regulatory acts.

Id. (emphasis added).

In holding that § 235 could not support a regulatory takings claim, the supreme court rejected M&N's argument that federal case law construing the Fifth Amendment should be looked to by the supreme court in interpreting § 235. In so doing, the court stated: "The language used in the Just Compensation Clause is not similar to the language in § 235. The Just Compensation Clause provides that 'private property [shall not] be taken for public use without just compensation.' Therefore, the precedent interpreting the Just Compensation Clause should not aid our interpretation of the substantially different § 235." 143 So. 3d at 13.

The supreme court's decision in *M&N* had been presaged by its decision two weeks before in *Housing Auth. of Birmingham Dist. v. Logan Properties, Inc.*, 127 So.3d 1169 (Ala. 2012). In *Logan Properties,* a landowner had argued that it had suffered an injury compensable under § 235 "because its property was identified for acquisition and/or condemnation by [the Housing Authority] and because that fact made it more difficult to renovate, lease, or otherwise use the property, thus decreasing its market value." 127 So. 3d at 1176. No physical injury to the plaintiff's property was alleged. The supreme court rejected the plaintiff's contention that it had suffered an injury compensable under § 235 without a direct, tangible physical to the property. The court stated:

> The requirement that the taking or injury result from the "construction or enlargement of . . . works, highways, or improvements"–projects that themselves have a tangible physical effect on property–suggests that any injury or taking must also be of a physical nature. Logan Properties' assertion that it has suffered a taking or injury merely because its property was identified for acquisition and/or condemnation by [the Housing Authority] and because that fact made it more difficult to renovate, lease, or otherwise use the property, thus decreasing its market value, therefore fails in the absence of any evidence of a physical injury to that property.
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> *It is undisputed that [the Housing Authority] caused no "direct physical disturbance" to property owned by Logan Properties; accordingly, the trial court erred by failing to grant [the Housing Authority's] motions for a judgment as a matter of law.*

Id. at 1176-1177 (emphasis added).[4]

The supreme court's decision in *M&N* that a claim of a regulatory taking is not compensable under § 235 was rendered by a unanimous 8-0 vote of the court.[5]

…only "injury" to property in the form of diminution in value was sufficient to maintain a successful claim under § 23.

THE SECTION 23 CLAIM

As noted above, M&N also asserted a claim under § 23 of the Constitution. This claim was dismissed by the trial court prior to submission of the case to the jury on the basis of *Willis v. University of North Alabama*, 826 So. 2d 118 (Ala. 2002). M&N cross-appealed from the dismissal of its § 23 claim.

The supreme court affirmed the circuit court's dismissal of the § 23 claim. The court reviewed its decision in *Willis* and noted that it was "significant to the holding in *Willis*" that the court in that case overruled the previous decisions of *Foreman v. State,* 676 So. 2d 303 (Ala. 1995) and *Barber v. State,* 703 So. 2d 314 (Ala. 1997) which had held that only "injury" to property in the form of diminution in value was sufficient to maintain a successful claim under § 23. 143 So. 3d at 15. The court in *M&N* stated that "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." *Id.* The court held that § 23 was inapplicable because "M&N has complained only of administrative and/or regulatory actions taken by the Town." *Id.* The court stated that "*Willis* makes clear that § 23 applies when a physical taking of the property in question has occurred" and that "M&N does not allege that there was a physical taking of the property in question." *Id.* at 15-16.

The decision in *M&N* regarding whether a regulatory takings claim was maintainable under § 23 was a 7-1 decision. Justice Murdock dissented and felt that *Willis* was distinguishable. 143 So. 3d at 18-19. Justice Murdock stated that the only issue before the court in *Willis* was whether "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 to inverse condemnation under § 23." *Id.* at 19. He noted that "no issue was presented in *Willis* as to whether a 'regulatory taking' would be prohibited by § 23." *Id.* Justice Murdock was of the view that § 23, because of the similarity of its wording to the Fifth Amendment to the

United States Constitution, should provide a remedy to a landowner who has been the subject of a regulatory taking by a local governmental entity. *Id.* at 19-22. Because Justice Murdock concluded that "*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," he could not conclude that "*Willis* [was] dispositive of the issue of the potential application of § 23 in the present case." *Id.* at 19.

THE DECISION IN *M&N V. TOWN OF GURLEY* ON REHEARING

Following the December 21, 2012 decision by the supreme court, M&N filed an application for rehearing. M&N was joined by many business and lobbying groups as *amici* on its application for rehearing. The court scheduled and heard oral arguments on the rehearing application on May 8, 2013. On September 27, 2013, the supreme court ruled on the application for rehearing. The court, as it had done in its opinion on original deliverance, denied the application for rehearing insofar as the town's appeal on the § 235 claim was concerned on an 8-0 vote. However, the court splintered badly on its decision on rehearing with regard to M&N's cross-appeal from the dismissal of its § 23 claim. More than 100 pages of concurring and dissenting opinions were issued by the justices in connection with the denial of rehearing on the § 23 issue.

Prior to the release of the decision of the court on rehearing, the chief justice appointed former Justice Patti Smith to participate in the decision of the court. When the court's decision on rehearing on the cross-appeal of M&N on the § 23 claim was rendered, it was apparent that there had been a 4-4 split on whether to grant rehearing on that issue. (Justice Main, as he had done on original submission, also recused himself on rehearing). Justice Smith sided with the four justices who were in favor of denying rehearing. Rehearing on the § 23 issue was denied by a 5-4 vote with Chief Justice Moore and Justices Parker, Shaw, Stuart and former Justice Smith voting to deny rehearing. Justices Murdock, Bolin, Wise and Bryan dissented from the denial of rehearing.

We note that the plain language of § 23 prevents the State, not municipalities from taking property without just compensation.

A total of six concurring and dissenting opinions were written in connection with the denial of rehearing on the § 23 claim. Chief Justice Moore, along with Justice Parker and Justice Shaw, authored concurring opinions. Justice Stuart concurred in Justice Shaw's concurring opinion. Justices Bolin and Bryan authored dissenting opinions. Justice Wise concurred in Justice Bolin's opinion. Justices Bolin and Wise concurred in Justice Bryan's dissenting opinion. Justice Murdock modified his original dissenting opinion on the § 23 claim so as to address some of the arguments made in the concurring opinions on rehearing.

The majority opinion authored by Justice Parker on original deliverance was also modified on rehearing. The modification consisted of a significant addition to the opinion, which came by means of the addition of footnote 6 to the court's majority opinion. Footnote 6 dealt with the applicability of § 23 to municipalities. In his concurring opinion on rehearing, Justice Parker made clear his view that § 23 only applied to the state and not to municipalities. 143 So. 3d at 46-48. The majority opinion was modified on rehearing to reflect Justice Parker's view that § 23 was applicable only to the state. The majority opinion, as modified, contained the following language in newly added footnote 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.")

Id. at 14 n.6. (first emphasis added; second emphasis in original).[6] Modification of the original opinion on rehearing by the addition of footnote 6 was approved by Justices Moore, Parker, Shaw, Stuart and Smith. However, in their dissenting opinions, Justices Murdock, Bolin, Wise and Bryan all indicated their view that § 23 did apply to municipalities. Since Justice Smith was appointed specially only for this case and Justice Main did not participate, it is uncertain whether the statement contained in footnote number 6 of the majority opinion that "the plain language of § 23 prevents the State, not municipalities from taking property without just compensation," will continue to be the law in future cases.

The justices also were equally divided on the issue of whether the physical injury requirement of *Willis* should continue to control cases brought under § 23. A majority of the court, by voting to deny rehearing, voted to affirm the original holding in *M&N* that because there was no physical taking of the property in question, *Willis* precluded the regulatory taking claim of *M&N* under § 23. However, although Justices Bolin and Wise had voted with the majority on original deliverance that *Willis* controlled and precluded a § 23 regulatory takings claim, they changed their position on rehearing. Justice Bolin, in an opinion in which Justice Wise joined, stated that the holding in *Willis* that § 23 required a physical taking of property was "wrongly decided and should be overruled." 143 So. 3d at 53. Justice Bryan also agreed in a separate dissenting opinion that *Willis* should be overruled. Justice Bryan stated that he disagreed with Justice Murdock that *Willis* was distinguishable from this case. Instead, Justice Bryan stated that he "would simply overrule Willis." *Id.* at 55. Justices Bolin and Wise joined in Justice Bryan's opinion.[7] As a consequence, there

are currently four votes on the court (Justices Murdock, Bolin, Bryan and Wise) who would hold that § 23 permits a regulatory taking claim. Justices Moore, Parker, Shaw and Stuart, based upon their positions on rehearing in *M&N,* would hold that it does not. Justice Main's views on the issue are unknown because he did not participate in the court's decision.

Summary

In summary, the following can be said as a result of the court's decision in *M&N:* That § 235 cannot support a regulatory takings claim is now clearly established. A unanimous 8-0 vote of the court, both on original deliverance and rehearing in *M&N,* has established that to be the law. However, the applicability of § 23 to regulatory takings claims involving municipalities is uncertain for future cases. First, the court is evenly divided on the issue of whether § 23 applies to municipalities in the first instance. Justices Moore, Parker, Shaw and Stuart are of the view that it does not. Justices Murdock, Bolin, Wise and Bryan are of the opposite view and would hold that § 23 can be used as the basis of a regulatory takings claim against municipalities. Justice Main's opinion on this point is unknown. Second, the court appears to be evenly divided on the issue of whether a physical taking under *Willis* is required in a § 23 claim. Four justices appear to believe that *Willis* continues to be good law and requires a physical taking before a § 23 claim can be made out. Three justices recognize the applicability of *Willis* and would overrule it on this issue, while one believes that § 23 can, consistently with *Willis,* be utilized as the basis of a regulatory takings claim. Again, because Justice Main did not participate in the court's decision in *M&N,* his view on these issues is unknown. Whether the court will honor the rule of *stare decisis* and follow the majority opinion in *M&N* that § 23 is inapplicable to municipalities and requires a physical injury to property, or whether, in future cases in which Justice Main participates, the court will depart from the holding of *M&N,* is uncertain. | AL

Endnotes

1. Birmingham attorney Angela Shields also served as appellate counsel for the town on this appeal.
2. Section Ala. Code 18-1A-32 provides in pertinent part: 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.
3. Although there has been no Alabama appellate opinion holding that the AEDC provides a right of action for inverse condemnation, Justice Bolin in his dissent from the denial of rehearing in Town of Gurley v. M&N Materials, Inc., 143 So.3d 1, 46 (Ala. 2012), appears to believe that such a right of action exists under the AEDC. Justice Bolin stated in his dissenting opinion that he was of the view that Ala. Code § 18-1A-32 provides a property owner with a remedy for inverse condemnation when a governmental entity with the power of eminent domain "defaults on its obligation to commence a condemnation proceeding." Justice Bolin stated his view that the remedy "is in the nature of a derivative action available to a property owner." Justice Bolin stated that "Section 18-1A-32 Ala. Code 1975, wisely provides a property owner with a remedy when such abuses occur." Justice Bolin stated that it was his "judgment" that M&N "properly availed itself of the state-law remedy provided by § 18-1A-32 in its complaint." Justice Bolin was joined by Justice Wise in his dissenting opinion in M&N.
4. The supreme court in Logan Properties did note one additional claim that would be maintainable under § 235 which might technically not involve direct physical injury to property. The Court stated that: "[W]e have noted that § 235 is applicable in cases where an authorized entity engaged in 'the construction or enlargement of its works, highways or improvements' interferes with a nearby property owner's right to access to his or her property." 127 So.3d at 1175.
5. Justice Main recused and did not participate in the court's decision.
6. The majority opinion stated in footnote 6 that although § 23 operated only as a limitation on the state from taking property without just compensation, § 23 was held to be applicable in this case because the property owned by M&N had been annexed by legislative action. The court stated: "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." 143 So. 3d at 10 n. 6.
7. Most recently, in Ex Parte Alabama Department of Transportation, 143 So. 3d 730, 741-42 (Ala. 2013), Justices Bolin, Wise and Bryan have reiterated their view in concurring opinions in that case that Willis was wrongly decided and should be overruled. Id.