IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-02040

PHYLLIS W. NIEDFELDT, TRUSTEE FOR THE PHYLLIS W. NIEDFELDT LIVING TRUST — **APPELLANT-PLAINTIFF**

VS.

GRAND OAKS COMMUNITIES, LLC, and GRAND OAKS, INC. — **APPELLEES- DEFENDANTS**

APPEAL FROM THE CHANCERY COURT OF LAFAYETTE COUNTY, MISSISSIPPI HON. GLENN ALDERSON

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel of record certify that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

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Ms. Joyce Freeland
Freeland & Freeland, Lawyers
Oxford, Mississippi

Grand Oaks Communities, LLC, a Mississippi limited liability company
Mr. Tripp Wilson, Memphis Tennessee
Mr. Matthew Wilson, Memphis Tennessee
Mr. Bernard Johnson, Oxford, Mississippi

Golden Eagle Investments, an affiliate of Grand Oaks Communities, LLC
Mr. Brad DeYoung, Frisco, Texas
Ms. Kaylynn Weyand, Frisco, Texas

Grand Oaks, Inc., a Mississippi corporation
James W. Rayner, M.D., Oxford, Mississippi

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Joshua J. Wiener
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STATEMENT OF THE ISSUES ON APPEAL

(1) Whether the Chancellor erred in holding that Plaintiff was under a duty to investigate and object to Grand Oaks' proposed amended subdivision plat at the time of the 1995 Chancery Court proceeding, and that she is bound by her execution of the "Waiver of Process and Entry of Appearance" by which she consented to the recording of the amended plat.

(2) Whether Plaintiff's claims that the amended plat breached Grand Oaks' protective covenants are time barred by Mississippi's three year statute of limitations, Miss. Code Ann. § 15-1-49, insofar as this alleged breach of the covenants occurred in 1995.

(3) Whether Plaintiff's suit should have been dismissed based upon her failure to appeal the pertinent 1995 and 2004 City of Oxford zoning decisions to the Circuit Court pursuant to Miss. Code Ann. § 11-51-75.

(4) Whether Plaintiff's suit is barred by the doctrine of laches and the maxim that "equity aids the vigilant and not those who slumber on their rights."

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiff sought a judicial declaration in Chancery that Grand Oaks' subdivision plat was not lawfully amended in a prior Chancery proceeding so as to include a 47 foot strip of land between lots 142 and 143 for use as a limited access road, and that such an amendment violates the subdivision's protective covenants. Plaintiff sought an injunction prohibiting Grand Oaks from constructing a road on this strip of land.

Plaintiff's Complaint was filed January 26, 2006. 1 R. 1.[1] Defendants answered (1 R. 67) and subsequently moved to dismiss contending that Plaintiff's sole and exclusive remedy for challenging the zoning decisions referenced in her Complaint was by appeal to the Circuit Court. 1 R. 98.

A preliminary injunction hearing was conducted in the Chancery Court of Lafayette County on August 13, 2006, Hon. Glenn Alderson presiding. Tr. 1-117. The Chancellor heard live witnesses and received documents into evidence. At the conclusion of the hearing, the Chancellor issued a bench ruling in favor of Appellee on the merits, and entered a Final Judgment ordering that Plaintiff's Complaint be dismissed. Tr. 115-117; R. Vol. II., 174.

Following the hearing, an Order was entered reflecting the Chancellor's bench ruling and confirming the parties' agreement that the August 13, 2006 hearing was deemed consolidated with a final hearing on the merits, without prejudice to Plaintiff's right to file a Rule 59 motion and/or appeal. 2 R. 174.

Plaintiff filed a post-hearing "Motion for New Trial," (2 R. 176) which was denied. Tr. 117-125; 2 R. 187. This appeal followed.

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[1] Throughout this Brief, citations to the record are listed as "___ R. ___", to the hearing transcript as "Tr. ___," to exhibits as "Ex. ___," and to the Record Excerpts as "R.E. ___."

STATEMENT OF THE FACTS

"Grand Oaks" is a residential subdivision located adjacent to Mississippi Highway 7 South, within the City of Oxford. The subdivision was originally situated on 400+ acres purchased in 1993 by a group of businessman who formed a corporation, Grand Oaks, Inc., to transact business. Tr. 61-62. Among the shareholders and officers was James W. Rayner, M.D., of Oxford. Rayner testified at the hearing in this matter and recounted the pertinent history of the subdivision. Tr. 61-89.

Grand Oaks, Inc. followed the requirements of Mississippi law pertaining to the establishment of subdivisions by creating and recording a subdivision plat, as well as adopting and recording "Protective Covenants" governing various aspects of land usage. Exs. 1, 2. The original subdivision plat, dated February 1, 1994, was prepared by Ryland Sneed, a surveyor with the Oxford engineering firm Precision Engineering Corporation. Ex. 19. The original subdivision plat laid out 147 single family residential lots surrounding an eighteen hole golf course.

Phyllis Niedfeldt purchased lot no. 94 in April 1995.[2] She was a member of Grand Oaks' Homeowners' Association for a brief period, but has not belonged to the Association for a number of years. Tr. 34-35.

In July 1995, Grand Oaks, Inc. purchased an additional five acres adjacent to the southern portion of the subdivision. Tr. 64-65. Grand Oaks once again engaged its surveyor, Ryland Sneed, to prepare an amended plat incorporating this newly acquired acreage. Sneed prepared an amended plat, dated October 5, 1995. R.E. 001.

[2] Ms. Niedfeldt established a "living trust." Thus, the conveyance was from Grand Oaks, Inc. to "Phyllis W. Niedfeldt, Trustee, The Phyllis W. Niedfeldt Living Trust." Ex. 35.

The amended plat added three new lots, nos. 148, 149 and 150. Tr. 66 -67. Several of the original lots on the south end were reconfigured and enlarged. *Id.* Anticipating that Grand Oaks might wish to purchase some or all of the 400+ additional adjacent acreage, Grand Oaks' surveyor platted a strip of land approximately 47 feet wide between reconfigured lots 142 and 143 for possible future use as a road connecting the original part of the subdivision with this possible future addition. *Id.*

The amended plat indicated the width of the strip between lots 142 and 143 as 47.11 at the south end. Later plats continued to show this 47.11 foot width at the south end, but also indicated that the strip was 45 feet wide toward the north end. (*E.g.*, Ex. 27) Throughout her Brief, Plaintiff refers to the strip as 45 feet wide. Because the strip is not of uniform width, it is appropriate for purposes of this appeal to refer to it as approximately 45 or 47 feet wide.

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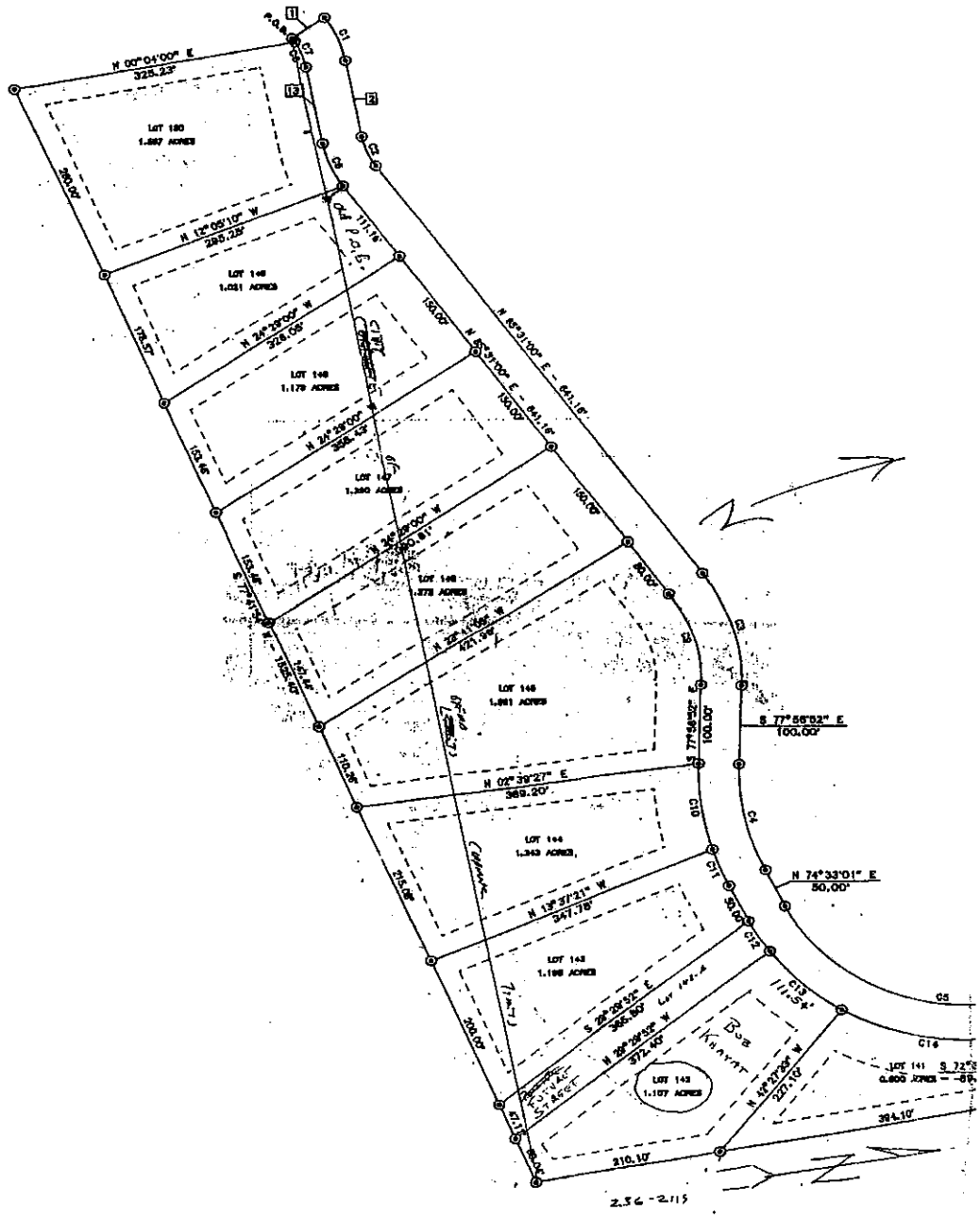
The pertinent portion of the amended plat is copied below[3]:



[3] Rayner confirmed that the handwriting on the plat "future street" and "Bob Khayat" (first owner of lot 142) was added at a later time and was not on the plat presented to the City and Chancery Court. Tr. 88-89.

Grand Oaks, Inc. sought legal approval of the amended plat in two separate proceedings: 1) a zoning proceeding before the City of Oxford Planning Commission and Board of Alderman (R.E. 002; R.E. 004); and 2) a Chancery Court proceeding. Petition, R.E. 006; Order, R.E. 017.[4]

Municipal approval

The City of Oxford Planning Commission approved the amended plat at its October 1995 public hearing. Tr. 68. R.E. 003.

Neither Ms. Niedfeldt nor any other individual appeared at the Planning Commission hearing to speak in opposition to the proposed amended plat. Tr. 71.

Grand Oaks' amended plat came before the City of Oxford Board of Aldermen a week later. R.E. 004. The Aldermen voted unanimously to approve the amended plat. *Id.*

As with the Planning Commission hearing, there is no record that Ms. Niedfeldt or anyone else appeared before the Board of Aldermen to speak regarding the proposed amended plat. Tr. 71. No party filed an appeal from the Aldermen's decision.

Chancery Court approval

Grand Oaks, Inc. retained Oxford attorney Carolyn Kessinger, who filed a "Petition To Alter And Amend Original Map And Plat Of Grand Oaks Subdivision By Enlarging And Renumbering Certain Lots." R.E. 006. All of the owners of subdivision lots, including Plaintiff, were named individually as defendants, along with other interested parties. R.E. 006. Notice of the Petition was published in the Oxford Eagle pursuant to Miss. Code Ann. § 19-27-31. Ex. 36.

Attorney Kessinger sought waivers of process and joinders in the Petition from each Grand Oaks lot owner. Ex. 72. She prepared a pleading entitled "Waiver of Process and Entry of Appearance" by which a lot owner would acknowledge receipt of the Petition, enter an appearance for all purposes, and consent to entry of a decree granting the Petition.

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[4] The amended plat was approved internally by Grand Oaks' Architectural Control Committee, of which Rayner was a member at the time. Tr. 70-71.

Attorney Kessinger carried a copy of the amended plat as she made her rounds, explained matters to each lot owner, and asked each to sign the Waiver. Tr. 72. Plaintiff admitted signing the Waiver but did not recall any details concerning her meeting with attorney Kessinger. R.E. 015; Tr. 37-39.

In addition to Grand Oaks' attorney bringing the amended plat around to each lot owner, the amended plat was also available for inspection by any lot owner or other interested party at Grand Oaks' office. Tr. 74.

The original court file contains a thick stack of signed Waivers identical to the one signed by Plaintiff, and it appears that these were all of the Grand Oaks lot owners named in the Petition.[5] Tr. 9-10. The court file does not reflect that any lot owner or other named party filed an objection, motion or answer. Tr. 74.

On February 23, 1996, the Chancery Court entered an "Order To Alter And Amend Original Map and Plat of Grand Oaks Subdivision By Enlarging and Renumbering Certain Lots." R.E. 017.[6] Plaintiff's Brief at 12 quotes a portion of the relief granted by the Chancery Court's Order. The Court also ordered:

> 2.(e) That the Clerk and proper lawful authorities of the City of Oxford, Mississippi be authorized to accept and file and record the altered and amended Maps and Plat of Grand Oaks subdivision, or any supplemental map or plat that may be necessary to comply with this Decree, in the Plat survey records in the office of the Chancery Clerk of Lafayette County, Mississippi and in the office of the Clerk of the City of Oxford, Mississippi.

Grand Oaks' attorney did not place a full sized copy of the amended plat in the 1995 court file. Rather, a chopped off copy of the southern portion of the amended plat was made on 8" X 11" paper and placed in the file. Tr. 73–74. Rayner testified without contradiction,

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[5] Copies of the other lot owners' waivers were not introduced into the record below. Tr. 9-10. Only Plaintiff's signed Waiver was marked as an exhibit. R.E. 015.

[6] Plaintiff's Brief at 11 inadvertently recites that the Order was entered February 23, **2006,** rather than 1996.

however, that Exhibit 21, "the big thing," was presented to the Chancery Court. Tr. 73, 88.[7]

Inexplicably, Grand Oaks' attorney did not immediately record the amended plat in the land records of Lafayette County. An amended plat by Ryland Sneed dated January 17, 2000 was recorded in 2000. Ex. 27. Plaintiff's counsel has spotted an immaterial difference between Sneed's October 5, 1995 and January 17, 2000 plats, insofar as one of the curve table numbers near lot 144 was changed from C-4 to C-10. (Plaintiff's Brief at 14-15) Both plats are identical, however, in depicting the substantive changes brought about by the 1995 expansion, and both show the same configuration and dimensions for the strip of land between lots 142 and 143.

At the time the City and Chancery Court approved the amended plat, the property encompassed by lots 142 and 143 was owned by Grand Oaks, Inc. Tr. 69. When Grand Oaks first conveyed lot 142 to an individual lot owner in 1997, Grand Oaks granted the new lot owners an easement on 20 feet "along that roadway which lies on the Southwesterly side of the lot owned by the Grantees herein..." Ex. 8. The instrument recites further, "It is understood that at some point in the future the developers of Grand Oaks Development, their successors or assignees, may open a roadway along this easement..." Ex. 8. A drawing attached to the instrument makes it clear that the Grantees' easement is situated on the strip of land platted between lots 142 and 143. Ex. 8, final page.

The amended plat and other drawings depicting the strip of land between lots 142 and 143 as an access road have been exhibited in a number of public zoning proceedings since 1995. Ex. 18 – collective exhibit containing plats from Oxford zoning cases #1166, 1204 and 1245. A survey done in 1997 by another firm in Oxford showed the strip of land between lots 142 and 143. Ex. 26 (plat drawn by Southern States Engineering for prospective purchaser).

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[7] The copy of the amended plat pasted into Plaintiff's Brief at p. 13 has been reduced in size to the extent that it is nearly illegible. The copy in the court file (R.E. 026) is chopped off on the sides, but that which is shown is legible.

The access road between lots 142 and 143 is depicted on the Official Zoning Map of The City of Oxford. Ex. 18. The original color map hangs on the wall in the zoning department's public offices in City Hall. Tr. 15-16, 97-98.

In May 2004, Rayner and other of the original investors in Grand Oaks, Inc. sold substantially all of their interest to a new group of investors, doing business as Grand Oaks Communities, LLC ["GOC"][8] Tr. 81-82. The new investors performed "due diligence," including studying the recorded subdivision plat as well as the Official Zoning Map of the City of Oxford. These depicted the strip of land between lots 142 and 143 which provided access to the land south. Tr. 83, 203. GOC would not have purchased the property without that potential access road. Tr. 83.

After completing this due diligence, GOC went forward with the purchase from the original investors, and subsequently proceeded to purchase the additional acreage to the south as originally contemplated. GOC through an affiliate, Golden Eagle Investments, ultimately invested over $8 million in reconstructing the golf course, which is now the location for the Country Club of Oxford. Tr. 103, Ex. 18 – CASE #1245, Data Summary, 10-10-05.[9] GOC has invested approximately another $10 million in the development of Grand Oaks. Tr. 103.

As GOC has developed additional phases of Grand Oaks, it has come back to the City of Oxford Planning Commission on several occasions seeking approval of various development plans. In virtually every one of these zoning proceedings, GOC has presented plats which show utilization of the strip between lots 142 and 143 as a road providing access to its property to the south. *See* plats and conceptual renderings contained in Ex. 18 – collective exhibit of Oxford zoning cases. Tr. 106-107.

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[8] One of the original investors was Sam Wilson. Tr. 62. His sons Tripp and Matt Wilson succeeded to his interest and were part of the group that "bought out" Dr. Rayner and others. Tr. 82.

[9] Plaintiff's home is situated adjacent to one of the fairways on the course. Tr. 24 - 25

Of particular note here is zoning case #1166. GOC sought approval from the City of a PUD Plat Amendment, which included the plan for redesigning the golf course and joining additional land outside the city limits. Tr. 99-100, *See* Ex. 18 – CASE #1166, Data Summary, 12-6-04. The "Master Plan" drawing dated 12/1/04 depicted the strip of land between lots 142 and 143 as an access road to the property to the south. (Tr. 100, Ex. 18; Plaintiff's Brief at 15)

The Planning Commission's minutes of the December 2004 hearing reflect that, "Phyllis Niedfeldt, Grand Oaks resident, brought forth two concerns: 1) she did not want to see the proposed access road become a thoroughfare and 2) she was concerned about the bond lapsing." R.E. 028. The minutes indicate also that the President of the Grand Oaks' Homeowners' Association expressed the Association's overwhelming support for GOC's proposed PUD Amendment. R.E. 027. The Planning Commission voted unanimously to approve Grand Oaks' plans. R.E. 027.

Later that month, the Mayor and Board of Alderman of the City of Oxford likewise unanimously approved Grand Oaks' PUD Amendment. R.E. 030. Plaintiff did not appear before the Alderman and there is no indication that any opposition was voiced. *Id.* No one appealed the City's approval of the PUD Amendment to the Circuit Court.

Plaintiff acknowledges that she appeared twice more before the Planning Commission during October 2005 "to raise her concerns about a cut-through or access road being shown on maps that the new Grand Oaks developer had submitted to the City of Oxford." (Tr. 29-31; Plaintiff's Brief at 15-16)

GOC's manager of development, Bernard Johnson of Oxford, testified below, as he has at City zoning hearings, that Grand Oaks primarily needs a road between lots 142 and 143 in order to provide a secondary access route for emergency vehicles. Tr. 103-04. In zoning case #1166

cited above and all other zoning proceedings, GOC agreed to make this a "limited access" road. Tr. 104-05.

In early Fall 2005, Plaintiff observed that some excavation work had been done on the strip between lots 142 and 143. Tr. 29. Although she knew of Grand Oaks' plan to use this land as a road long before this excavation work commenced, seeing the work in progress apparently prompted her to take photographs (*e.g.* Ex. 14) and to file this action.

Upon being served with Plaintiff's Complaint, GOC immediately halted further construction work and continues to suspend work pending a final ruling by Mississippi's courts.

SUMMARY OF THE ARGUMENT

The Chancellor decided this case correctly. He found as he should that Grand Oaks' platting of the strip of land between lots 142 and 143 for a potential access road did not violate the subdivision covenants. The Chancellor also properly held that Plaintiff was under a duty to investigate and object in 1995, when she was given actual notice of Grand Oaks' Chancery Petition seeking authority to record the amended plat, and not eleven years later. The Chancellor's decision should be affirmed by this Court. Moreover, additional grounds not cited by the Chancellor support a decision in favor of Appellee.

Mississippi's appellate courts employ a limited standard of review of Chancellors' decisions. The Courts will not disturb a Chancellor's findings unless the court's actions were manifestly wrong, the court abused its discretion, or if it applied an erroneous legal standard. When, as here, the Chancellor does not make separate findings of fact and conclusions of law, the appellate court will assume that the Chancellor resolved all factual disputes in favor of the appellee.

Appellant's various arguments on appeal are based upon two alleged defects in Grand Oaks' 1995 Petition, namely: 1) the Petition did not make specific reference to the platting of the strip of land between lots 142 and 143; and 2) the Petition recited that "the existing easements and streets as shown on the original Maps and Plats of the Grand Oaks Subdivision shall remain unchanged." These arguments fail for the simple reason that Plaintiff could and should have raised all these same arguments and objections back in 1995. Grand Oaks' attorney's hand delivery of the court Petition announcing the acquisition of new property, expansion of the subdivision, and adoption of an amended plat, gave Plaintiff's knowledge of such facts as to "excite her attention and incite her to inquiry."

Plaintiff contends that the Chancery Court lacked jurisdiction to authorize plat changes other than those specifically referenced in the Petition. The cases cited by Plaintiff do not support this "jurisdictional" argument. The Chancery Court clearly had jurisdiction. Plaintiff was a named party to the proceeding and had the opportunity to oppose entry of the proposed Order and/or to seek its modification.

The Chancellor properly rejected Plaintiff's equitable estoppel arguments which are based on the recitation in the Petition that "the existing easements and streets shall remain unchanged." The recitation was literally accurate because the existing easements and streets were not changed. Moreover, Plaintiff offered no testimony that she read and relied on this particular portion of the Petition.

Similarly, the Chancellor correctly found that the platting of an access road between lots 142 and 143 did not violate par. 11 of Grand Oaks' protective covenants, which provides that, "No lot shall be sold for street purposes, or used as a street or easement to adjoining property or lots..." Pursuant to the Mississippi Supreme Court's decision in *Lake Serene*, the issue of whether lots 142 or 143 have been sold or used for street purposes must be determined by reference to the 1995 amended plat, not the 1994 original plat. No portion of reconfigured lots 142 and 143 was sold or used as a street or easement.

This Court should not entertain Plaintiff's argument on appeal that the construction of an access road of 45 – 47 feet in width will violate the City of Oxford's Land Development Code. Plaintiff offered no testimony or exhibits on this issue at the hearing below. Moreover, the question of whether the planned road meets City code is for the City's building department to decide, not the Chancery Court.

The Chancellor's ruling was soundly based on the notice given to Plaintiff in 1995 and her execution of the Waiver instrument. Nevertheless, additional grounds support dismissal of Plaintiff's action, as follows:

1. Plaintiff's claim that Grand Oaks breached the subdivision covenants with the adoption of the amended plat accrued in 1995 and is barred by Mississippi's three year statute of limitations for actions on contracts, Miss. Code Ann. § 15-1-49.

2. The amended plat was approved in a 1995 City of Oxford zoning proceeding. A PUD Amendment containing the subject access road was approved over Plaintiff's stated opposition in a 2004 zoning case. Pursuant to Miss. Code Ann. § 11-51-75, the sole remedy for an appeal of a municipality's zoning decision is an appeal to the Circuit Court by way of a Bill of Exceptions. Thus, the Chancellor could have properly granted GOC's Motion to Dismiss Plaintiff's Complaint below on grounds that the Complaint is an impermissible "collateral attack" on the City's 1995 and 2004 zoning actions.

3) Plaintiff's suit is barred by laches. Plaintiff did not act with "reasonable promptitude" when she waited more than 10 years after the plat amendment to file suit. In that intervening decade, GOC invested literally millions of dollars in the development of Grand Oaks based upon the lawful adoption of the 1995 amended plat, the City's approval of Grand Oaks' master plan over Plaintiff's objection in the 1995 and 2004 zoning cases, and the depiction of the access road on the City of Oxford Official Zoning Map. The Chancellor's finding that Plaintiff was under a duty to investigate and object in 1995 comports with the maxim that "Equity aids the vigilant and not those who slumber on their rights."

For the foregoing reasons, GOC asks this Court to affirm the Chancellor's decision below.

ARGUMENT

I. The standard of review

The Mississippi Supreme Court employs a limited standard of review of Chancellors' decisions. *E.g.*, *Samples v. Davis*, 904 So. 2d 1061, 1064 (Miss. 2004); *Watson v. Watson*, 882 So. 2d 95, 98 (Miss. 2004). "When reviewing decisions rendered by our chancery courts we must remember that our '[c]hancellors are vested with broad discretion, and this Court will not disturb the chancellor's findings unless the court's actions were manifestly wrong, the court abused its discretion, or the court applied an erroneous legal standard.'" *Lupo v. State Dep't of Transp.*, 771 So. 2d 358, 360-61 (Miss. 2000); *Dobbins v. Coleman*, 930 So. 2d 1246 (Miss. 2006); *Thoms v. Thoms*, 928 So. 2d 852 (Miss. 2006).

Plaintiff's appeal hinges on the determination of whether Grand Oaks' 1995 Petition and Waiver instrument were sufficient to put a reasonably prudent person on notice of facts which reasonably diligent inquiry would have disclosed. Whether someone has acted reasonably is generally a question of fact, not law. *T.T.W. v. C.C.*, 839 So. 2d 501, 506 & n.2 (Miss. 2003)

In rendering his bench opinion, the Chancellor in this case did not make separate findings of fact and conclusions of law. When a Chancellor does not make specific findings of fact, the Supreme Court will assume that he/she resolved all factual disputes in favor of the appellee. *E.g.*, *McNeil v. Hester*, 753 So. 2d 1057, 1072 (Miss. 2000); *In re Estate of Law*, 869 So. 2d 1027, 1029 (Miss. 2004).

II. The Chancellor correctly held that Plaintiff was under a duty to investigate and object in 1995.

The central issue in this case is whether, as Plaintiff argues, the Chancellor got things "backward" (Plaintiff's Brief at 30) by charging Plaintiff with the duty to investigate and object in 1995. For the reasons discussed below, we respectfully submit that the Chancellor put matters in proper order when he held that the delivery of Grand Oaks' Petition to Plaintiff, together with

the accompanying Waiver, put Plaintiff "under a duty to investigate and object at that time." Tr. 117.

Two alleged defects in Grand Oaks' 1995 Chancery Petition and the published legal notice form the predicate for nearly all of Plaintiff's arguments on appeal:

1) The Petition and newspaper notice made reference to enlarging lots 143 through 147 and adding lots 148 through 150 but did not make specific reference to the platting of the strip of land between lots 142 and 143.

2) The Petition recited that "the existing easements and streets as shown on the original Maps and Plats of the Grand Oaks Subdivision shall remain unchanged."

Based on these alleged defects, Plaintiff argues that the Chancery Court was "jurisdictionally limited to plat changes prayed for in the Petition," that Grand Oaks should be limited by its "representations" in the Petition, and that Plaintiff's execution of the Waiver should be disregarded because the Petition "assured" her that no streets were being changed. *See generally* Plaintiff's Brief, p. ii, 1-2.

The Chancellor correctly characterized this dispute as a "very simple case" and rejected these same arguments. Tr. 115. Regardless of which legal theory Plaintiff chooses to frame her argument, her attack on the 1995 Chancery proceeding fails for the simple reason that Plaintiff could and should have raised all these same arguments and objections back in 1995. The Chancellor pulled no punches in describing the handling of the 1995 Chancery proceeding as "sloppy, sloppy, sloppy, sloppy." Tr. 92. But he also made the right ruling in finding that given the information which was presented to Plaintiff and which was otherwise available, Plaintiff received sufficient notice to put her under a duty to investigate.

Plaintiff's counsel asks rhetorically, "What amended plat is she bound by?" (Plaintiff's Brief at 24) The answer is: Exhibit 21, the amended plat dated October 5, 1995 that Grand Oaks'

attorney carried with her when she brought the Petition and Waiver around for Plaintiff's signature. Tr. 72. It is the same amended plat that Grand Oaks presented to the Chancery Court and which the Court authorized to be recorded in the land records, Tr. 73.; the same amended plat which Grand Oaks presented for approval by the City of Oxford Planning Commission and Board of Aldermen in 1995, R.E. 002; the same amended plat which was available for inspection in Grand Oaks' office. Tr. 74.

The Mississippi Court of Appeals, citing long standing precedent from the Mississippi Supreme Court, held recently that:

> Notice is charged when: in respect to a matter in which he has a material interest, a person has knowledge of such facts as to excite the attention of a reasonably prudent man and to put him upon guard and thus to incite him to inquiry, he is chargeable with notice, equivalent in law to knowledge, of all those further relevant facts which such inquiry, if pursued with reasonable diligence, would have disclosed.

In re Estate of Charles Wheeler v. Fikes et al., no. 2005-CA-01614-COA, ¶ 26, (Miss. 2007), quoting *Crawford v. Brown*, 215 Miss. 489, 503, 61 So. 2d 344, 350 (1952). Grand Oaks' attorney's hand delivery of a court Petition announcing the acquisition of new property, expansion of the subdivision, and adoption of an amended plat, gave Plaintiff's knowledge of such facts as to excite her attention and incite her to inquiry.

Trying to avoid the consequences of her lack of diligence, Plaintiff argues that the Chancery Court lacked jurisdiction in 1995 to approve a plat which contained changes other than those described in the Petition and newspaper publication, and that her "waiver" was ineffective to bestow jurisdiction on the court. (Plaintiff's Brief at 21, 31) Plaintiff bases this purported jurisdictional argument on an inaccurate reading and characterization of *Reinecke v. Reinecke*, 105 Miss. 798, 63 So. 215 (1913) (Plaintiff's Brief at 21, 31) She states that "the prayer in the Petition jurisdictionally limits the scope of the amendment the chancellor may allow. **Reineke**, 63 So. at 216." (Plaintiff's Brief at 31)

Reinecke contains no such "jurisdictional limit" holding. The Court does not mention "jurisdiction" anywhere in the opinion. Moreover, *Reinecke* is not a "plat amendment case" involving a subdivision. Rather, it involved a series of deeds of family land executed by a mother to her children containing conflicting and/or uncertain property descriptions, which became the subject of two Chancery actions. The Supreme Court declined to give effect to a default decree obtained by the mother against one of her children in the first Chancery action because the mother "failed to give the names of the persons interested and to make such persons parties, and, in short, failed to comply with the provisions of the statute." *Id.*

Unlike Mrs. Reineke, Grand Oaks followed the statutory procedure in 1995 for giving all interested parties notice of the Chancery action and proposed amended subdivision plat. Plaintiff concedes this. (Plaintiff's Brief at 5)

Plaintiff makes the same error citing *Barrett v. Ballard*, 483 So. 2d 304 (Miss. 1985), claiming that it "explicitly holds that the advertising process is a jurisdictional limit on the court's power." (Plaintiff's Brief at 22) In *Barrett*, the Mississippi Supreme Court refused to give effect to a prior Chancery decree obtained by a subdivision developer which vacated the developer's original subdivision plat. The Court noted that, "The record nowhere indicates that the petitioners published a summons in a county newspaper of general circulation, as required by statute." *Id.* at 305. "Ballard and Hudspeth have not contested the appellants' allegation that no publication was made of the proposal to vacate the plat of Hillcrest subdivision, nor is there any indication of publication in the record." *Id.* at 306. The Court held as follows:

> The required publication was not made in this case, which invalidates the judgment subsequently entered....Because publication was not made, and because neither the Barretts nor the forty-nine would-be intervenors were otherwise given legally adequate or timely notice of the proceedings commenced by Ballard and Hudspeth, the chancellor erred in dismissing this case on March 30, 1984.

Id. at 306-07.

Barrett does not discuss the notion of limiting the court's jurisdiction to those matters described in the published notice. Rather, it invalidated the prior decree *in toto* because the developer published no notice at all. Grand Oaks' situation is opposite from *Barrett* because Grand Oaks published notice of the filing of its Petition. Moreover, Grand Oaks' attorney personally delivered a copy of the Petition to Plaintiff and all the named Grand Oaks lot owners.

Plaintiff's "jurisdictional" argument simply lacks merit. The Chancery Court clearly had subject matter jurisdiction over Grand Oaks' plat amendment proceeding pursuant to Miss. Code Ann. § 19-27-31. By virtue of her execution of the Waiver, Plaintiff became a party to that proceeding. She had the opportunity to oppose entry of the Court's Order and/or to try to modify its terms.

Plaintiff inaccurately claims that *Reinecke* "holds that the *res judicata* impact of the decree in the prior plat amendment case is defined and limited by the relief sought in the petition." (Plaintiff's Brief at 21) Such a holding is nowhere to be found in the opinion. To the contrary, Mississippi cases applying the doctrine of *res judicata* bar a party from re-litigating not only those issues which were actually decided in a previous case, but also those issues which might have been litigated. *Little v. V & G Welding Supply, Inc.*, 704 So.2d 1336, 1337 (Miss. 1997); *Estate of Anderson v. Deposit Guar. Nat'l Bank*, 674 So.2d 1254, 1256 (Miss. 1996); *Jenkins v. Terry Investments*, LLC, 947 So. 2d 972, 977 (Miss. Ct. App. 2006). *See also Brown v. Felsen*, 442 U.S. 127, 131 (1979). The courts look to see which claims and issues might have been litigated "with the use of diligence." *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). Had she been reasonably diligent, Plaintiff could have inspected the amended plat, asked questions, filed objections, and/or otherwise opposed Grand Oaks' Petition and proposed Order approving the amended plat and authorizing its recording.

The Chancellor also properly rejected Plaintiff's arguments that her signed Waiver has no effect because of the recitation in the Petition that "the existing easements and streets shall remain unchanged." The Chancellor correctly observed that this recitation was literally accurate – the amended plat did not change any of the existing easements and streets; rather, it added a potential new access road between re-drawn lots 142 and 143. Tr. 116. That's not to say that the Petition was well drawn or that it wouldn't have been the better practice to make specific reference to the newly platted 47 foot strip. But ultimately, the precise language of the Petition is irrelevant to Plaintiff's action. Despite her repeated assertions that the Petition gave "assurances that there were no street changes" (*e.g.* Plaintiff's Brief at ii, 24, 26, 30), Plaintiff did not testify that she read the Petition, much less that this particular portion of the Petition "assured" her.

Relying on *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201 (Miss. 1984) and *White Cypress Lakes Development Corp. v. Hertz*, 541 So. 2d 1031 (Miss. 1989), Plaintiff argues that Grand Oaks should be "equitably estopped" by the so-called "representations" in the 1995 Petition. (Plaintiff's Brief at 26-27) Neither decision supports a conclusion that Grand Oaks should be equitably estopped under the facts of this case. *PMZ Oil* is particularly instructive. It involved a subdivision in which the developer adopted written covenants providing that each lot would be restricted to one single family home, and the developer made similar verbal representations to all of the lot purchasers. *Id.* at 204, 207. Later, the developer had a "change of attitude" and gave notice of his plans to construct six townhouse condominiums on one of the lots. *Id.* at 207. The Supreme Court characterized this as a "clear violation of the covenants." *Id.* at 202. The Court also noted the Chancellor's implicit factual finding that several lot owners had changed their position in reliance upon the covenants and the developer's representation. *Id.* at 205, 208. Thus, it held that the developer, "having represented that the covenants applied to the whole

unrecorded subdivision, and having followed that general scheme halfway, is now estopped to deny that the lots remaining are subject to the same restrictions for the benefit of those who dealt with defendant in reliance on those representations." *Id.* at 205. The Supreme Court observed that "An equitable estoppel may be enforced in those cases in which it would be substantially unfair to allow a party to deny what he has previously induced another to believe and take action on." *Id.* at 207.

The case at bar is readily distinguishable from *PMZ Oil*. Plaintiff failed to establish in the first instance that Grand Oaks' proposed amended plat violated the protective covenants. Plaintiff also offered no proof that she relied upon the "representations" in Grand Oaks' Petition and/or that the criticized language in the Petition "induced" her to change her position.

If anything, the principles of equitable estoppel go the other way in this case – the present owners of Grand Oaks changed their position in reliance upon the lawful adoption of the 1995 amended plat by both the Chancery Court and City of Oxford, and the unchallenged recording in the Lafayette County land records of a plat depicting the access road between lots 142 and 143.

III. The amended subdivision plat does not violate Grand Oaks Protective Covenants.

Plaintiff contends that irrespective of whether the amended plat was properly adopted in 1995 as a matter of procedure, the platting of an access road between lots 142 and 143 violated par. 11 of Grand Oaks' protective covenants, which provides that, "No lot shall be sold for street purposes, or used as a street or easement to adjoining property or lots without written consent of the Architectural Control Committee." (Plaintiff's Brief at 32) The Chancellor correctly rejected this argument after examining the original (Ex. 19) and amended subdivision plat (R.E. 001) and hearing Rayner's uncontroverted testimony confirming that no part of re-drawn lots 142 and 143 have been used or sold for a street or easement. Tr. 84-85.

Plaintiff acknowledged that the Protective Covenants did not prohibit adoption of an amended plat and/or an expansion of the subdivision. Tr. 41-42. As such, this issue is controlled by *Andrews v. Lake Serene Prop. Owners Ass'n,* 434 So. 2d 1328 (Miss. 1983), where in a similar setting the Mississippi Supreme Court observed that "the draftsmen of the original protective covenants had the power to word those covenants so that 'lot' continued, then and forever, to refer to the original plat. This they did not do in the protective covenants under consideration here." 434 So. 2d at 1332. Pursuant to the holding in *Lake Serene*, the issue of whether lots 142 or 143 have been sold or used for street purposes must be determined by reference to the lots depicted in the amended subdivision plat, not the original plat.

IV. The Court should not entertain Plaintiff's claim that the 47 foot strip violates Oxford Land Development Code

In her final assignment of error, Plaintiff contends that Grand Oaks' construction of a road with a width of only 45 - 47 feet will violate the City of Oxford's Land Development Code, which Plaintiff claims requires a 48 foot width and 68 foot right of way. (Plaintiff's Brief at 35) This assignment fails for two reasons. First, Plaintiff offered no testimony or exhibits on this issue at the hearing below. Her attachment of a portion of a partial, unauthenticated portion of Oxford's Land Development Code to her Brief is improper and should be stricken. Second, the question of whether the planned road meets City code is for the City's building and zoning departments to decide, not the Chancery Court. If Plaintiff is aggrieved by the City's issuance of a building permit to Grand Oaks, she must resort to the procedures set forth in Mississippi law for challenging municipal actions.

Plaintiff's Brief cites cases involving proceedings to dedicate public streets. (Plaintiff's Brief at 23, 25), citing *Mitchell v. McLarty*, 230 So. 2d 215 (Miss. 1970); *Nettleton Church of Christ v. Conwill*, 707 So. 2d 1075 (Miss. 1997). This discussion is inapposite because the 1995

Chancery and zoning proceedings were not public street dedication proceedings. Rather, Grand Oaks re-platted its privately owned land and created space for a possible future road.

Based on the foregoing, GOC respectfully submits that this Court should affirm the Chancellor's ruling that Plaintiff was under a duty to investigate and object to the amended plat in 1995, that she is bound by her Waiver, and that the amended plat did not violate Grand Oaks' protective covenants.

V. Other grounds supported dismissal of Plaintiff's action

The fact that Plaintiff was given notice of the proposed amended plat in 1995 but waited until 2006 to file her Complaint provided other grounds for a dismissal of the Complaint. *See Miller v. R.B. Wall Oil Co., Inc.*, 2005-CA-01966-COA, ¶ 21 (Miss. 2006), citing *Puckett v. Stuckey*, 633 So. 2d 978, 980 (Miss. 1993)(when trial court has reached the right result, appellate court may affirm employing a different basis than the one upon which the trial court relied).

A. Three year statute of limitations – Miss. Code Ann. § 15-1-49.

Plaintiff contends that the platting of the access road in 1995 breached Grand Oaks' protective covenants. A breach of subdivision covenants is in the nature of a breach of contract, and a claim asserting such a breach is subject to the applicable statute of limitations for actions on contracts. *E.g., Russell v. Williams*, 964 P. 2d 231, 234 (Okla. Civ. App. 1998) (*See also*, Plaintiff's Brief at 19, "A restrictive covenant is a contract...").

"A cause of action for the breach of a covenant accrues immediately upon its breach, and suit may be brought during the ownership of the assignee. On the other hand, actions for the breach of a covenant are subject to the defense of the statute of limitations, so that after the statute has run, suit may not be maintained to enforce the covenant." *White v. Mississippi Power & Light Co.*, 196 So. 2d 343, 348 (Miss. 1967).

Assuming *arguendo* that the platting of a road between lots 142 and 143 breached Grand Oaks' covenants, the cause of action for that breach accrued in October, 1995. Accordingly, this Court should hold that Plaintiff's suit more than ten years later is time barred.

B. Failure to appeal zoning decisions pursuant to Miss. Code Ann. § 11-51-75

The amended plat was approved in October, 1995 in public hearings before the Oxford Planning Commission and Board of Aldermen. Plaintiff was a Grand Oaks lot owner when these proceedings took place. Pursuant to Miss. Code Ann. § 11-51-75, the sole remedy for an appeal of a municipality's zoning decision is an appeal to the Circuit Court by way of a Bill of Exceptions. *E.g.*, *Highland Village Land Co. v. City of Jackson*, 137 So. 2d 549, 552 (Miss. 1962)(sustaining demurrer to a Chancery Court suit relating to a municipal zoning matter, based on the predecessor statute, Section 1195, Code of 1942). Plaintiff did not file such an appeal in 1995.

A PUD Amendment depicting an access road between lots 142 and 143 was presented in zoning case #1166 in 2004. Plaintiff came to the podium and spoke in opposition. Having spoken at the zoning hearing, and being a resident of Grand Oaks, Plaintiff unquestionably had standing to appeal the City's approval of the PUD Amendment in case #1166. She did not.

Plaintiff continues to argue to this Court that these zoning cases did not follow the statutory requirements for approval of a subdivision plat. (Plaintiff's Brief at 29) Even assuming that assertion is correct, Plaintiff's exclusive remedy for challenging improper zoning decisions was an appeal to the Circuit Court by means of a Bill of Exceptions filed pursuant to Miss. Code Ann. § 11-51-75. The Chancellor could have correctly granted GOC's Motion to Dismiss Plaintiff's Complaint on grounds that the Complaint is an impermissible "collateral attack" on the City's 1995 and 2004 zoning actions. *Hood v. Perry County*, 821 So. 2d 900, 902

(Miss.Ct.App. 2002) citing *Biloxi-Pascagoula Real Estate Bd. v. Mississippi Reg'l Hous. Auth. No. VIII*, 94 So. 2d 793, 796-97 (Miss. 1957).

C. Equitable principles

GOC asked the Chancellor to dismiss Plaintiff's suit on several grounds, including the doctrine of laches. Tr. 57 – 58; 114. Although the Chancellor expressed a different basis for his ruling in favor of GOC, this Court can and should apply the doctrine.

In *Stepanek v. Roth*, 418 So. 2d 74 (Miss. 1982), the Mississippi Supreme Court applied the doctrine of laches to defeat a subdivision lot owner's claims for breach of the subdivision's covenants prohibiting trailers. 418 So. 2d at 74. Plaintiff knew for at least three years that another lot owner had trailers on his lot but did nothing. The Chancellor granted an injunction ordering the defendants to remove the trailers, but the Mississippi Supreme Court reversed.

The Court cited its earlier decision in *Twin States Realty Company v. Kilpatrick*, 26 So. 2d 356 (Miss. 1946) holding that a party seeking equitable relief in enforcing a deed restriction or limitation on use of property must act with "reasonable promptitude." 418 So. 2d at 76. Specifically, the Court observed:

> There is no hard and fast rule as to what constitutes laches. If there has been unreasonable delay in asserting claims or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked.

418 So. 2d at 76.

Here, Plaintiff did not act with "reasonable promptitude" or "seasonably avail herself of means at hand for enforcement" when she waited more than 10 years after the plat amendment to file suit. In that intervening decade, GOC invested literally millions of dollars in the development of Grand Oaks based upon the lawful adoption of the 1995 amended plat, to which

Plaintiff consented, the City's approval of Grand Oaks' master plan over Plaintiff's objection in zoning case #1166, and the depiction of the access road on the City of Oxford Official Zoning Map.

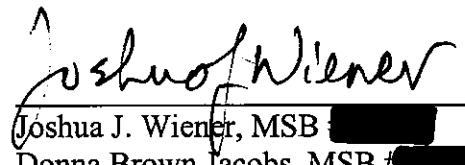
The *Stepanek* court held that "Diligence is an essential prerequisite to equitable relief of this nature...[W]e think it was too late, after waiting more than six years and until appellee had invested her money in the purchase of the property, for appellant to complain, so far as any relief in equity is concerned." 418 So. 2d at 76. This Court, too, should hold that Plaintiff's suit is barred by laches.

A similar, well known maxim of equity implicitly underlies his finding that Plaintiff was "under a duty to investigate and object at that time" (Tr. 117) "Equity aids the vigilant and not those who slumber on their rights." Griffith, *Mississippi Chancery Court Practice*, § 41.

CONCLUSION

Appellee asks this Court to affirm the Chancellor's decision below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I mailed a true and correct copy of the above and foregoing Brief of Appellee upon the following:

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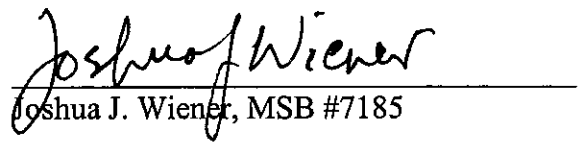
This the 10th day of September, 2007.

Joshua J. Wiener, MSB #[redacted]

CERTIFICATE OF FILING

I certify that I have hand-delivered the original and three copies of the Brief of Appellee Grand Oaks Communities, LLC and an electronic diskette containing the Brief on September 10, 2007, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

This the 10th day of September.



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