IN THE
SUPREME COURT OF MISSISSIPPI

No.: 2006-CA-02040

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

v.

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

APPEAL FROM THE CHANCERY COURT OF LAFAYETTE COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT IS REQUESTED (Miss.R.App.Pro. 34(b))

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STATEMENT CONCERNING ORAL ARGUMENT

This case involves complex interaction between the record in a prior action (the 1995 Chancery proceeding), principles of *res judicata* and the jurisdiction of the chancery court, and this state's plat amendment statutes. Because of the complexities of these issues, oral argument would be of great assistance to this court in the resolution of this case.

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REPLY BRIEF OF APPELLANT

I. Introduction

Grand Oaks' argument is based on a series of purposeful category mistakes. Grand Oaks attempts to equate plat approvals under a city land development code with plat amendments under the statutory procedures for plat amendment. Further, Grand Oaks pretends that a plat change creating a narrow strip of land (which it admits was a part of a change that could not have altered the streets in the subdivision) had the effect of approving a road there, a pretense not based on logic but just on saying it is so. These are category mistakes, that is, both improperly treat two dissimilar things as the same just because they are described with similar words.[1]

The Mississippi Supreme Court has explicitly recognized that there are more than one category of limitations on land use recognized by the law—that there are publicly created limits created by zoning laws and the like, on the one hand, and that there are privately created limits created by instruments such as easements, licenses, and protective covenants on the other hand:

> Over the years our law has come to recognize the need, when properly called upon, to enforce certain types of limitations upon land use. Broadly speaking, these limitations fall into two categories by reference to their source and nature. First, there are those limitations created by the public law emanating from an identifiable sovereign, limitations such as zoning laws, building codes and fire codes. Second, private lawmaking, in accordance with the empowering and enabling rules of the sovereign, has given rise to such useful devices as licenses, easements, defeasible estates and protective covenants.

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[1]The concept of a category mistake originates with the analytic philosopher Gilbert Ryle. Ryle, ***The Concept of Mind*** at 15-22 (1949). The concept has been used in legal writing to describe "an inappropriate linking of disparate concepts spawned by grammatical similarities in representation." Joel R. Cornwell, ***Legal Writing as a Kind of Philosophy,*** 48 MERCER L.REV. 1091, 1117 (1997). Grand Oaks is asking this court to fall into a form of illogic that has been called "the lawyer's treasured trope." ***Id.*** (explaining the concept)***; see Planned Parenthood of Idaho, Inc. v. Wasden,*** 376 F.3d 908, 929 (9th Cir. 2004) (explaining the concept); ***State v. Norman,*** 145 Wash.2d 578, 40 P.3d 1161, 1174 (2002) (same).

Andrews v. Lake Serene Property Owners Assoc., Inc. 434 So.2d 1328, 1332 (Miss. 1983). The creation and filing of a plat is one such private lawmaking tool; once it is created, it is binding on those involved, and can be modified only by following one of two statutory procedures, which are legal procedures designed to protect the private rights created by the filing of the plat. As will be seen, the central premise of Grand Oaks' argument is based on the category mistake of pretending that resolution of a zoning or land development code issue (a public law limitation) is a plat amendment. A zoning decision quite simply is not a plat amendment decision, and, as recognized in ***Lake Serene***, does not deal with the rights protected through the private lawmaking functions of the filing of a plat and the procedures in the plat amendment statutes.

II. The Mississippi Supreme Court Has Held That the Requirements Of the Plat Amendment Statute Are Jurisdictional

The elements of the plat amendment statute are jurisdictional in that it is compliance with those elements that gives the chancery court the power to amend a plat. Grand Oaks attempts to evade this point by arguing that the cases under the plat amendment statute do not support such a conclusion. Grand Oaks states that one of the cases relied on for this point in the Brief of Appellant, ***Reinecke v. Reinecke***, 105 Miss. 798, 63 So. 215, 216 (1913), "contains no such 'jurisdictional limit' holding." Brief of Appellee at 18. Grand Oaks also states that there is no holding concerning *res judicata* in ***Reinecke.*** Brief of Appellee at 19. The problem with these arguments is that the Mississippi Supreme Court has subsequently read and explained ***Reinecke*** as precisely containing a holding about jurisdiction and precisely containing a holding about *res judicata* as demonstrated by this quote citing the case:

> the judgment of the court in that case cannot be res judicata here of the question of the appellant's removal vel non from this state for "it is of course obvious that issues outside of the jurisdiction of the court to determine, cannot

> become res judicata by virtue of its judgment." 2 Freeman on Judgments (5th Ed.) § 699; 34 C. J. 935; ***Scully v. Lowenstein***, 56 Miss. 652; ***Lake v. Perry***, 95 Miss. 550, 49 So. 569; ***Reinecke v. Reinecke***, 105 Miss. 798, 63 So. 215.

Weisinger v. McGehee, 160 Miss. 424, 134 So. 148, 149 (1931). Even more oddly, Grand Oaks seems to take the position that ***Reinecke*** is not a plat amendment case. *See* Brief of Appellee at 18 ("***Reinecke*** is not a plat amendment case..."). This is a startling misreading of *Reinecke*, which states:

> The chief purpose of the bill in the case numbered 1,976 was to vacate a recorded map. Provision is made in section 4969, Code of 1906, for proceedings when an owner of land shall desire to alter or vacate a map showing an addition to a city, to wn, or village. Under this statute it is necessary for such owner to set forth particularly the circumstances of the case, give an accurate description of the property and the names of the persons to be affected thereby or interested therein, the parties so named to be made defendants to such proceeding, and publication of summons to be made for all persons who may feel disposed to object, which publication shall clearly state the objects and purposes of the petition in the proceeding.

Reinecke, 160 Miss. at ____, 134 So. at 216. Section 4969 of the Code of 1906 is, of course, the predecessor of the plat amendment statute at issue in this case, Miss. Code Ann. § 19-27-31, which contains the requirements discussed in the quote above to this day. As set forth in the quoted language, the purpose of the original suit in Reinecke was to vacate a recorded plat. The suit was under the predecessor statute to the statute involved here, under which (as here), "it is necessary for such owner to set forth particularly the circumstances of the case, ... and publication [that] shall clearly state the objections and purposes of the proceeding."[2] A party who had failed to answer or respond to that suit later filed a chancery action contesting the results of the chancery proceeding. The petitioner in the original proceeding asserted *res judicata*.

Because the original petitioner had failed to comply with the provisions of the statute, the original proceeding was not given *res judicata* effect. The holding (as recognized in ***Weisinger***) was that *res judicata* did not apply to issues outside the court's jurisdiction, and that the elements of the plat amendment statute established the court's power to act, that is, its jurisdiction.

Grand Oaks similarly states that ***Barrett v. Ballard,*** 483 So.2d 304 (Miss. 1985) does not hold that the statutory elements are jurisdictional. ***See*** Brief of Appellee at 18 ("Plaintiff makes the same error citing ***Barrett***"). Yet it is unequivocally clear that the Mississippi Supreme Court held in ***Barrett v. Ballard,*** 483 So.2d 304, 307 (Miss. 1985) that the statutory elements are jurisdictional:

> In ***City of Wiggins v. Breazeale,*** 422 So.2d 270 (Miss.1982), we held that "the chancery court has authority under Section 19-27-31 to alter and vacate maps or plats, or any part thereof, *under facts and circumstances coming within the statute....*" *Id.* at 272 [emphasis added].

The statute was not complied with because of lack of publication. The court therefore held that the trial court lacked the power to render the judgment it had rendered—"the want of power in the court to render the judgment... appears upon the face of the record." ***Id.*** (quoting ***Road Material & Equipment Co. v. McGowan,*** 229 Miss. 611, 91 So.2d 554 (1956). This is the language of jurisdiction—that, without compliance with the statute, the court lacked "power" or "authority" to render a judgment. Further, the court makes it clear that the chancery court's authority proceeds from compliance with the statute generally, not merely the publication requirement—the court stated (as just quoted) that "the chancery court has authority... under

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[2]The quoted language from ***Reinecke***, 105 Miss. at ____, 63 So. at 216, is a very close paraphrase of the plat amendment statute, both at the time of ***Reinecke*** and in its present form, Miss. Code Ann. § 19-27-31.

the facts and circumstances coming within the statute" ***Barrett,*** 483 So.2d at 307, that is, the circumstances within the statute generally, and not just the publication requirement.

The Grand Oaks reading of ***Barrett*** is narrow and completely at odds with the actual language of the case. Grand Oaks states that the Brief of Appellant is mistaken in claiming that ***Barrett*** "holds that the advertising process is a jurisdictional limit on the court's power." Brief of Appellee at 18, citing Brief of Appellant at 22. Yet that is exactly what ***Barrett*** explicitly holds; in fact, ***Barrett*** goes one step further, holding that the chancery court's authority proceeds from meeting the statutory requisites. That is, to have the benefit of the statute, Grand Oaks must have come within it. The statutory requirements are explicit as to what the petitioner must do. The petitioner must "set[ ] forth the particular circumstances of the case" and the publication notice "shall clearly state the objects and purposes of the petition." Miss. Code Ann. § 19-27-31. These are the "facts and circumstances... coming within the statute" that, according to ***Barrett,*** give the chancery court the authority to act. To read ***Barrett*** more narrowly, as appellee attempts to do, is to simply ignore the explicit language of ***Barrett*** itself.

Grand Oaks's misreading of both ***Barrett*** and ***Reinecke*** is absolutely central to its attempt to sustain the judgment below. If the statutory elements are jurisdictional, then the 1995 plat amendment proceeding was limited to what the petition set out and to the purposes set forth in the published advertisement.

Turning to the actual 1995 proceeding and what Grand Oaks "set[ ] forth [as] the particular circumstances of the case" and its publication notice that "shall clearly state the objects and purposes of the petition,"[3] it is clear that the 1995 proceeding did not authorize any change in the roads of Grand Oaks subdivision. The petition stated that "the existing easements

and streets as shown on the original Maps and Plats of the Grand Oaks Subdivision shall remain unchanged." Petition in the Chancery Court of Lafayette County at 7. Chancery Court Cause No. 95-471 Petition to Alter and Amend Original Map and Plat of Grand Oaks By Enlarging and Renumbering Certain Lots, Exhibit 11 (hereinafter "1995 Petition, Exhibit 11"). Further, the petition describes the purpose of the amendments: "that lots number 143, 144, 146, and 147 may be enlarged to accommodate houses of a size and in conformity with others already constructed in Grand Oaks Subdivision"; and "That lots 148, 149, and 150 should be added to the subdivision plat." 1995 Petition, Exhibit 11, at unnumbered pages 6-7. Thus, the petition's statement of the "particular circumstances" both explicitly contradicts the opening of a new road in the subdivision and states a purpose that does not include the opening of a road in its aims. The prayer of the petition asks that the map and plat be altered to reflect larger lot sizes for 143, 144, 145, and 147, and that lots 148, 149, and 150 be added, and that the lots be renumbered. *Id.* at unnumbered page 7.

The statutorily required "clear[ ] state[ment of] the objects and purposes of the petition" in the required advertisement just as clearly contradicts the opening of a new road. The notice states the object and purpose as "in order to enlarge lots 143, 144, 145, and 147 and to add lots 148, 149, and 150." Proof of Publication, Exhibit 36. No reference was made to any changes in the roads or to any lot being changed or made smaller so that a new road could be added.

Grand Oak's statement of objects and purposes in the 1995 publication did not suggest anything about a new road opening. The particular circumstances and prayer of the 1995 petition do not suggest anything about a new road opening and in fact explicitly state there would be no change in roads. The statutory language and the holding of ***Barrett*** (that the

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[3] This is the statutory language, Miss. Code Ann. §19-27-31

Court's authority proceeds from "facts and circumstances coming within the statute" as does the court's "power ... to render a judgment") make clear that the Chancery Court in the 1995 proceeding would have had no power to change the roads of Grand Oaks. Having no power to change the roads means also that the Chancery Court had no power to add a road.

And in fact, the decree in response to the petition did not change the roads. It explicitly declined to do so, stating: "That the existing easements and streets as shown on the original Maps and Plats of the Grand Oaks subdivision shall remain unchanged." 1995 Order, Exhibit 13 at unnumbered page 7, R.E. Tab 5.

The 1995 proceeding is limited exactly as Phyllis Niedfeldt and the other residents who signed waivers understood it to be limited. It is important to recall what the petition said: "the existing easements and streets as shown on the original Maps and Plats of the Grand Oaks Subdivision shall remain unchanged." Petition in the Chancery Court of Lafayette County at 7. This is explicit: That there will not be a change to the streets as shown on the original plat. There is no other honest reading of this sworn representation. Grand Oaks swore it did not intend to change the roads, and then obtained a decree that provided it did not change the roads. Mrs. Niedfeldt had no argument with the stated purposes of that proceeding. Yet a central premise of the Grand Oaks brief is that Mrs. Niedfeldt's claim is barred for failing to "contest" the 1995 proceeding. Grand Oaks argues that Mrs. Neidfeldt's claims "fail for the simple reason that Plaintiff could and should have raised all these same arguments and objections back in 1995." Brief of Appellee at 12. What could this possibly mean? That Phyllis Niedfeldt should have argued that Grand Oaks was misleading the court with assurances it was not going to change the streets? What possible information in the filing or even the plat which appears in the 1995 chancery court file or elsewhere in 1995 would suggest that these representations were not true?

Beyond misreading the Mississippi Supreme Court's cases about chancery court power and the plat amendment statute, Grand Oaks attempts to pretend away the explicit requirements of that statute, by ignoring the statutory requirements to advertise the purpose of the amendment and to state the facts and circumstances of the amendment. Its argument requires both pretending away the jurisdictional impact of ***Barrett*** and ***Reinecke*** and writing the explicit requirements of the statute out of the statute. Beyond denying the import of these cases, Grand Oaks cites no authority for its argument that the elements of the plat amendment statute do not establish and limit the authority of the chancery court. ***See*** Brief of Appellee at 15-21 (section containing this argument). Grand Oaks does cite some cases for the proposition that the principle of *res judicata* bars issues that could have been litigated. Brief of Appellee at 19. Those cases note that where the four identities for *res judicata* are present, issues that could have been litigated are barred. ***See Little v. V&G Welding Supply, Inc.,*** 704 So.2d 1336, 1337 (Miss. 1997)(cited in Brief of Appellee at 19).

The simplest answer to this argument is that ***Reinecke*** holds that that the statutory procedure establishes the scope of the chancery decree and therefore places a limit on the *res judicata* effect of a plat amendment decree. ***See supra*** at 2 (discussing this holding). This, of course, proceeds from the requisites for *res judicata.* One of the required " identities" for *res judicata* is that the claims asserted in the present case be identical to those asserted in the prior case. ***Little,*** 704 So.2d at 1337. Here, the claim asserted by Mrs. Niedfeldt—that Grand Oaks had no authority to file an amended plat with an additional road—was not identical to that in the 1995 litigation. The 1995 litigation explicitly excluded the issue Grand Oaks seeks to hold applied—the alteration of the streets of Grand Oaks. There being no "identity of causes of action," *res judicata* cannot apply.

Given its representations in its sworn petition, a particularly strained argument made by Grand Oaks is about the relative equities. In the Brief of Appellant, Mrs. Niedfeldt argued that Grand Oaks should be equitably estopped from denying its sworn representations in the 1995 Petition, citing ***PMZ Oil Co. v. Lucroy***, 449 So.2d 201 (Miss. 1984). In attempting to distinguish ***PMZ Oil***, Grand Oaks argues that equitable estoppel should not bind it to the allegations in the 1995 petition and the decree it obtained. Brief of Appellee at 21. Recall that Grand Oaks obtained chancery court approval of a plat amendment in 1995 based on pleadings and a decree that contained no reference to a new road and explicitly stated that the roads on the Grand Oaks plat would be unchanged by the plat amendment in question. Grand Oaks is now arguing that, in spite of its sworn representation to the court, the 1995 proceeding somehow approved an additional road. From this leap, it argues that equity flows in its favor, not Mrs. Niedfeldt's favor. Obviously, equity would demand holding a party to its sworn allegations in a chancery court petition and to the decree it obtained from that petition. ***PMZ Oil*** was cited by Mrs. Niedfeldt in Brief of Appellant at 27 for a simple proposition: That a developer is equitably estopped by its representations. That being so, Grand Oaks is estopped from asserting the 1995 proceeding changed the roads in Grand Oaks.[4]

III. Mrs. Niedfeldt Did Not Waive a Challenge to a New Road in Grand Oaks in a Proceeding that Did Not Seek to Change the Existing Roads

A related argument is that Mrs. Neidfeldt waived her claims in this suit because the 1995 action was somehow "sufficient to put a reasonably prudent person on notice of facts which reasonably diligent inquiry would have disclosed." Brief of Appellee at 15. Grand Oaks refers to a number of cases about notice, Brief of Appellee at 16-17.

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[4] This issue of relative equities is developed further in the discussion of laches, ***infra*** at 18-18.

The question of notice and inquiry must be resolved based on the actual facts before Mrs. Neidfeldt when she signed the waiver: That the petition stating what Grand Oaks intended to do both explicitly stated that the streets as platted were to remain unchanged, and described what the amendment did without mentioning any change in the streets of Grand Oaks. She was told two different ways that this amendment was not about adding a new street.

The abstract principles relating to notice cited by Grand Oaks entirely beg the actual question here of whether there were facts that would put a reasonable person on inquiry. It is that law that "notice is charged when... a person has knowledge of such facts as to excite the attention of a reasonable man and put him upon guard and thus incite him to inquiry"[5] but the question here is: Was there something in the 1995 proceeding that should lead a reasonable person to inquire whether the roads of Grand Oaks were to be changed? It cannot be said that a sworn petition reciting there will be no changes in the streets somehow puts one on notice that there might be a change in the streets. Grand Oaks describes the "facts" that purportedly required Mrs. Neidfeldt to inquire: "[H]and delivery of a court Petition announcing the acquisition of new property, expansion of the subdivision, and adoption of an amended plat, [which] gave Plaintiff's knowledge of such facts as to excite her attention and incite her to inquiry." Brief of Appellee at 17. The additional land was five acres, and the addition to the subdivision was a few new lots. Grand Oak's argument for inquiry notice fails due to the explicit sworn recital in the sworn petition that there would not be changes to the roads.

In two distinct contexts, Grand Oaks argues that Mrs. Neidfedlt is too late. Both of these arguments are waiver arguments. First, Grand Oaks argues that Mrs. Neidfeldt "could and should have raised all these same arguments and objections [about the 1995 petition] back in

1995." Brief of Appellee at 12. Second, Grand Oaks argues that Mrs. Neidfeldt should have appealed from decisions by the City of Oxford that amended the plat. Brief of Appellee at 24-25.[6] The central flaw in these arguments is that neither the city (in the plat approval) nor the chancery court (in the plat amendment) had the power to amend the plat as Grand Oaks pretends they did. The chancery court's jurisdiction was statutorily limited to the purposes advertised and to the circumstances described in the petition: No roads were to be changed. As will be shown below, ***infra*** at 13, the actions before the city were not plat amendment proceedings at all.

IV. The New Street Did Not Appear On A Plat Before 2004

On both the 1995 plat and the later 2000 plat (Exhibit 27), what is now the disputed road is shown as a strip of land. As is clear in the image Grand Oaks includes in its brief (Brief of Appellee at 5) and that was included in Mrs. Neidfeldt's major brief (Brief of Appellant at 14), this is merely land and not a road. In spite of the fact that neither the 1995 plat nor the 2000 plat show it as a road, Grand Oaks states: "The amended plat and other drawings depicting the strip of land... as an access road have been exhibited in a number of public zoning proceedings since 1995." Brief of Appellee at 8. Grand Oaks cites Exhibit 18, a compilation of City of Oxford zoning documents, for this statement. The problem with that citation is that everything in Exhibit 18 dates from 2004 and thereafter. The first is a proceeding from December, 2004 along with some maps and letters relating to that proceeding. The second is a proceeding from June of 2005 with similar documents. The third is from October of 2005. Not one document in

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[5]Brief of Appellee at 17, quoting ***In re Estate of Charles Wheeler v. Fikes,*** 958 So.2d 1266 (Miss. App. 2007).

[6] It is an undisputable fact that the proceedings before the City of Oxford did not amend the plat, because, first, they actually do not even purport to amend the plat, and, second, they

that collection predates December 2004; it cannot stand for the proposition that anything from 1995 suggests there was a road. In fact, neither the chancery proceeding (discussed, ***supra*** at 5) nor the 1995 proceeding before the city (discussed, ***infra*** at 13) contain a hint that this strip of land might become a road. This is an important point, because the basis for the GrandOaks statute of limitations argument is the pretence that the 1995 proceedings established that there would be a road on the strip of land.

V. There Has Been No Plat Amendment Proceeding Before The City Of Oxford

Grand Oaks argues in its brief that certain actions by the city constitute an amendment of the Grand Oaks plat. Brief of Appellee at 6, 10, 24. In those parts of the brief, Grand Oaks consistently refers to matters before the city as plat amendment proceedings when they are not. Grand Oaks' argument intentionally confuses the distinction between approval of a plat under the city Land Development Code and approval of a plat amendment under the statutes.[7] The plat amendment process is designed to protect the rights of land owners who have purchased in reliance on the plat and therefore requires they all be joined. The plat approval process under a land development code is designed to assure compliance with the code requirements such as street width and has no requirement to join all parties. As noted in Brief of Appellant at 27-29, Mississippi has two plat amendment methods, Miss. Code Ann. § 19-27-31, the chancery court procedure discussed, ***supra*** at 3-5, and Miss. Code Ann. Miss. Code Ann. §17-1-23, a procedure for plat amendment before a municipality or board of supervisors. Both of these procedures have similar requirements. Both require joinder of all interested parties. The procedure for municipalities also requires consent of all interested parties.

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do not follow the procedure or requirements for a plat amendment by a municipality. ***See infra*** at 12.

[7]This is one of the category mistakes discussed in the introduction.

Grand Oaks attempts to create the illusion that there has been a plat amendment by referring to proceedings before the city that involved plat approval, not plat amendment. Grand Oaks in its brief utterly ignores Miss. Code Ann. §17-1-23, failing even to cite it, even though the statute establishes what must be done to obtain a plat amendment before a city government. This statute requires that all interested parties be named, and

> made aware of the action and must agree in writing to the vacation or alteration. Failure to gain approval from the parties named shall prohibit the board of supervisors or governing authorities from altering or vacating the map or plat, or any part thereof.

Miss. Code Ann. §17-1-23. The statute also requires the filing of a petition with the governing authorities of the municipality setting forth the particular circumstances with an accurate description of the plat to be altered. ***Id.***

The plat approval proceedings cited by Grand Oaks before the city quite simply do not involve a statutory plat amendment; they involve preliminary approvals of plats under the requirements of the City of Oxford's land development code. Grand Oaks places great reliance on a 1995 proceeding contemporaneous with the 1995 Chancery Court petition. Here is what happened in 1995, according to the minutes of the planning commission:

> There came on for discussion Grand Oaks preliminary subdivision plat and site plan approval for Grand Ridge Villas. Mr. Paige Cothren passed out copies of the floor plans and specifications for the villas. ... Mr. Cothren also brought up for discussion approval to amend the original Grand Oaks Phase V plat to include 5 acres that Grand Oaks has bought. He explained that the property is located to the south of Grand Oaks and borders the Industrial Park. Motion was made by Commissioner Cousely, seconded by Commissioner Sharpe to approve the amended plat. All members present voting aye, motion carried.

Exhibit 18 at unnumbered page 2. Note that no reference is made to a change in the roads, and there is no evidence here or elsewhere of a change in the roads at the time of this action by the city. About this proceeding, Grand Oaks argues that "[t]he amended plat was approved in

October, 1995 public hearings.... 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...." Brief of Appellee at 24. There are several distinct problems with this argument

First, the minute entries of the City of Oxford for October 1995 contain no suggestion of a proceeding under Miss. Code Ann. §17-1-23—there is no hint of a petition, no hint of the required consent by those within the plat. Without that required consent, the city "shall [be] prohibit[ed] ...from altering ... the map or plat...." The record contains no support whatever for Grand Oaks' characterization of this proceeding.

Grand Oaks attempts to turn the statutory requirement that those affected must consent on its head, arguing throughout its brief that Mrs. Neidfeldt defaulted by failing to appear before the city at these purported plat amendment proceedings and objecting. *See* Brief of Appellee at 24-25 (so arguing). From this, Grand Oaks pretends that this action is a collateral attack on the city's planning commission actions. The problem with this is that not one of those actions purported to be an amendment of the Grand Oaks plat. It is not that Mrs. Niedfeldt is collaterally attacking those decisions; it is that she is accurately pointing out to the court that those decisions did not do what Grand Oaks wishes to pretend they did, that is, accomplish an effective amendment of the Grand Oaks plat.

The Brief of Appellee states that the plat and drawings "depicting the strip of land...as an access road have been exhibited in a number of public zoning proceedings since 1995." Brief of Appellee at 8 (citing Exhibit 18). As shown above, none of the 1995 proceedings refer to the strip of land as a road. In fact, the strip of land was not shown as a road in any of these filings until 2004 (the earliest date of any of the proceedings before the city in Exhibit 18). The other three zoning matters cited by Grand Oaks are discussed in detail in Brief of Appellant at 28-29. Just as with the 1995 proceeding, they contain no hint that they are proceedings under Miss.

Code Ann. §17-1-23, and no mention of consent by the effected parties. They, also, are proceedings under Oxford's Land Development Code.

The oddest thing about this argument is the switch made between this argument (where Grand Oaks argues, in effect, "what we did was put in a road in 1995 and got it approved") and the argument about the 1995 Chancery proceeding (where Grand Oaks argues, in effect, "we did not change the roads, we just added a undesignated strip of land"). *See* Brief of Appellee at 23 (reference to "the platting of the access road in 1995") and Brief of Appellee at 20 (it was "literally accurate [that] the recitation ...the amended plat did not change any of the existing easements and streets..."). What actually happened is shown by the record: In 1995 Grand Oaks swore it was not changing the roads, and obtained a plat amendment that did not change the roads.

The actual amended plat which was part of the record in the 1995 chancery proceeding contains no street. It is exhibited in this brief, full size, after the certificate of service.

V. The Covenants Prohibit Using The Strip Of Land As A Street

Grand Oaks covenants contain a prohibition against resubdivision of lots without architectural control committee approval, which did not occur here,[8] and a prohibition of the use of lots for street purposes: Exhibit 1 at ¶11. An alternate ground for the relief Mrs. Neidfeldt sought was that placement of the road on the strip of land violates the explicit prohibition against use of lots for street purposes. Grand Oaks builds its entire argument about compliance with the Grand Oaks protective covenants on one case that is entirely distinguishable because the covenants in that case had no prohibition against resubdivision. The

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[8]That there was no written architectural control committee approval is demonstrated in the discussion in the Brief of Appellant at 34. Grand Oaks makes no contention in its brief that such approval occurred. *See* Brief of Appellee at 21-22 (discussing this issue).

case is *Andrews v. Lake Serene Property Owners Assoc., Inc.* 434 So.2d 1328, 1332 (Miss. 1983), cited in Brief of Appellee at 22.

In *Lake Serene,* two large lots were subdivided into smaller lots. The case was a challenge to the resubdivision. The challenge failed because there was no prohibition in the Lake Serene covenants against resubdivision: "The protective covenants contained no prohibition against resuddivision." *Lake Serene*, 434 So.2d at 1332. Further, in *Lake Serene* there was a legally effective amended plat that carried out the resubdivision being contested. *Id.* at 1331-32.

If there had been a prohibition against resubdivision in *Lake Serene*, the result would have changed and the covenants would have prohibited what the developer did. In this case, there are both prohibitions against resubdivision and against the use of a lot for a street. These provisions prevent Grand Oaks from building the connector road on the strip of land.

VI. The Alternative Grounds For Affirmance Cited By Grand Oaks Have No Merit

a. Mrs. Niedfeldt's Claim Is Not Time Barred Because It Did Not Accrue Until She Knew A Road Was To Be Added

Grand Oaks cites alternate grounds for affirmance in its brief. One, that there was somehow a plat amendment proceeding before the City of Oxford that Mrs. Niedfeldt failed to appeal, has already been discussed, ***supra*** at 12. The other two are the related defenses of limitations and laches.

Grand Oaks argues that Mrs. Neidfeldt's claim accrued in 1995. Brief of Appellee at 23-24. The fact that the 1995 proceeding did nothing to add a street to Grand Oaks is a fatal flaw in Grand Oaks's statute of limitations argument. The basis for its suggestion that the cause of action accrued more than three years before suit was filed is the 1995 plat amendment proceeding. Grand Oaks creates this argument with sleight of hand: "Plaintiff contends that the

platting of the access road in 1995 breached Grand Oaks' protective covenants." Brief of Appellee at 23. The sleight of hand occurs in the subordinate clause in the middle: "...the platting of the access road in 1995..." There was no platting of an access road in 1995. There is no suggestion in the record of a road in any of the documents from the 1995 chancery proceeding or the action before the municipality. This is yet another place where Grand Oaks attempts a contradictory argument, having elsewhere argued that the 1995 proceedings had nothing to do with changes in the road. ***Compare*** Brief of Appellee at 23 (reference to "the platting of the access road in 1995") ***with*** Brief of Appellee at 20 (the recitation the streets shall remain unchanged "was literally accurate—the amended plat did not change any of of the existing easements and streets....").

Grand Oaks's limitations argument fails because nothing in 1995 put Mrs. Niedfeldt on notice that Grand Oaks was going to attempt to add a new road. As will be seen below in the discussion below about laches, the first notice Mrs. Niedfeldt had of such a road was in December, 2004, about 13 months before she filed suit and well within the three year statute of limitations.

b. A Party Who Has Filed A Misleading Chancery Proceeding Can Not Be Held To Invoke It To Assert Equitable Principles Such As Laches

Grand Oaks invokes "equitable principles," specifically laches, as another alternate ground of affirmance. Brief of Appellee at 26-27. The laches argument is premised once again on the notion that the 1995 plat amendment proceeding somehow gave Mrs. Neidfeldt some sort of notice that the streets were being changed in Grand Oaks. The Grand Oaks laches argument is driven by two cases. In one, a neighbor stood by as property was improved and time passed for six years before objecting to mobile homes placed on a lot in violation of protective covenants. ***Stephanek v. Roth***, 418 So.2d 74 (Miss. 1982). In the other case, the

complaining neighbor sat silently while a tea room was established, run for more than six years, then sold. ***Twin States Realty Co. v. Kilpatrick,*** 199 Miss. 545, 26 So.2d 356 (1946).

What happened in this case bears no comparison to this case. The clock did not begin to run against Mrs. Neidfeldt in 1995 because there was no plat with a road on it at that time. In December of 2004, Grand Oaks began to exhibit plats before the City of Oxford that contained a road there. ***See supra*** at 11-12 (establishing that the road was not referred to before 2004). As Grand Oaks admits in its brief, Mrs. Niedfeldt appeared in December of 2004 and objected to the addition of the road. Brief of Appellant at 10 (so admitting). She objected at several proceedings before the city, and then in January of 2006 filed suit. R. 1 She did not sit quietly by as the complaining parties in ***Stephanek*** and ***Twin States*** had done.

Further, it is important to consider relative equities. As the chancellor noted, Grand Oaks's 1995 plat amendment proceeding was "sloppy, sloppy, sloppy, sloppy." Tr. 92. The due diligence of the new investor, appellee Grand Oaks Communities—which it cites in its Brief of Appellant at 9—was also lacking. Any investigation would have disclosed the plat amendment proceeding and the sworn petition that is a major basis for Mrs. Niedfeldt's claim. Any review of the plat amendment proceeding, the decree, and the existing plat would have shown that no new road had been approved, and that the plat amendment proceeding had explicitly stated that roads were not changed (and therefore not added).

The equities here weigh heavily in favor of Mrs. Niedfeldt—she should be allowed to rely upon the sworn representations in the 1995 petition, and Grand Oaks must be charged with the representations of its predecessor in title, of which it must have learned in conducting their due diligence. Given the relative equities, that Mrs. Niedfeldt's stated objection is almost simultaneous with the first appearance of a road in the record, and the speed with which she filed suit, laches can have no application here.

CONCLUSION

For the reasons stated in this brief and the Brief of Appellant, this case should be reversed and remanded so that a decree can be entered enjoining Grand Oaks and Grand Oaks Communities from using the strip of land as a road.

Respectfully submitted, this 2nd day of November, 2007.

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CERTIFICATE OF SERVICE

I, T.H. Freeland, IV certify that I have this day, by United States mail, first class, postage prepaid, mailed a copy of the foregoing REPLY BRIEF OF APPELLANT to the following:

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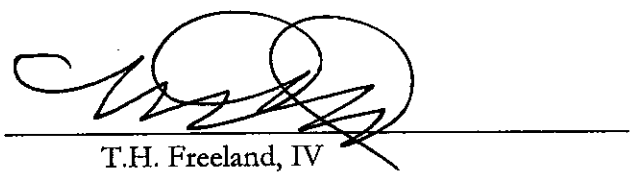
This the 27th of November, 2007.



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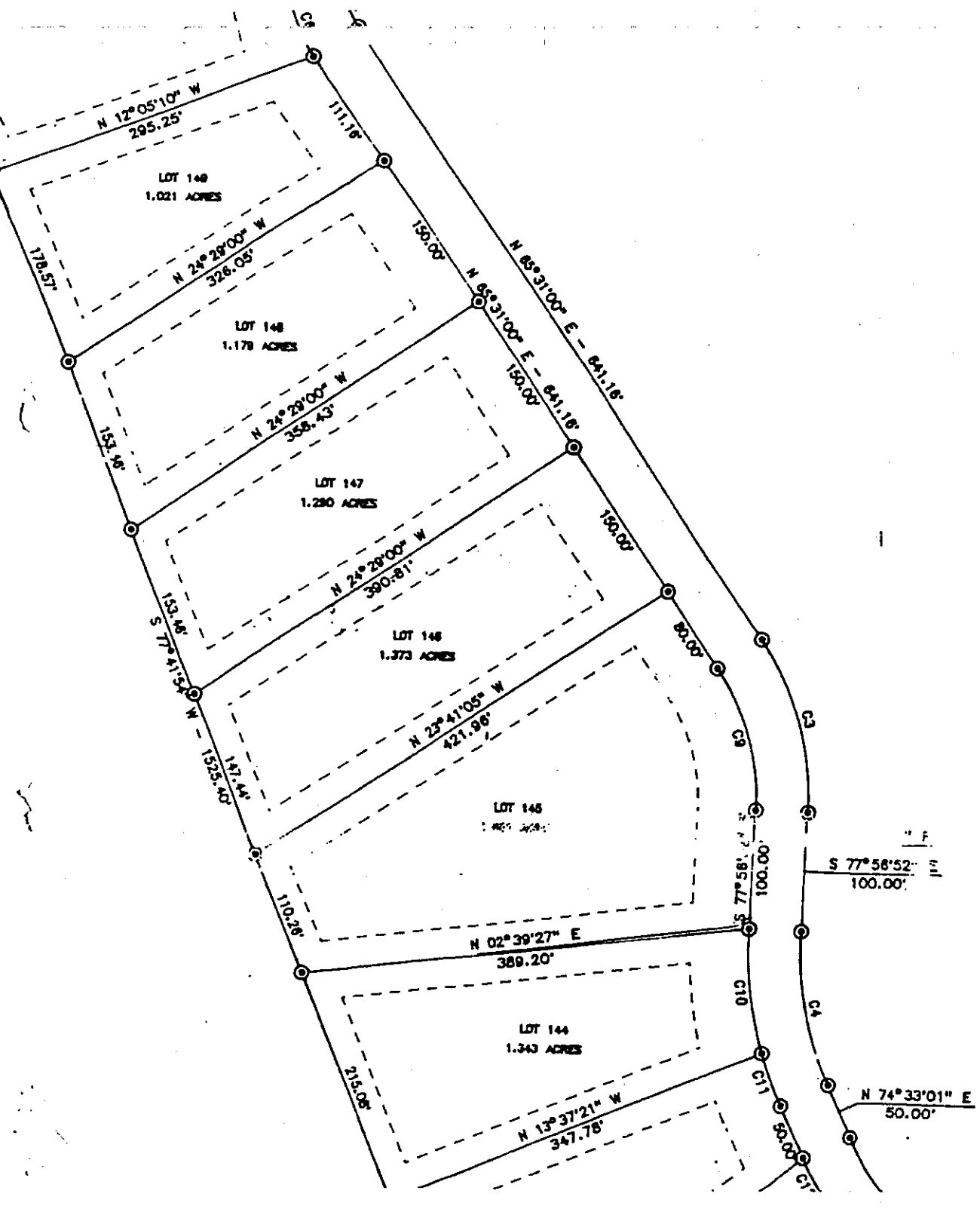
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