

COPY
IN THE SUPREME COURT AND COURT OF APPEALS OF MISSISSIPPI

NO.: 2006-CA-02040

PHYLLIS W. NIEDFELDT, TRUSTEE FOR THE
PHYLLIS W. NIEDFELDT LIVING TRUST

VERSUS

GRAND OAKS COMMUNITIES, LLC, and GRAND
OAKS, INC.

FILED

JUN 20 2007

APPELLANT

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPELLEES

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Phyllis W. Niedfeldt, Trustee vs. Grand Oaks Communities, L.L.C.,

Cause No. 2006-CA-02040.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Circuit Judge may evaluate possible disqualification or recusal:

Phyllis W. Niedfeldt

The Phyllis W. Niedfeldt Living Trust

Grand Oaks Communities, L.L.C.

Grand Oaks, Inc.



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the Phyllis W. Niedfeldt Living Trust

TABLE OF CONTENTS

	PAGE
<u>CERTIFICATE OF INTERESTED PERSONS</u>	i
<u>TABLE OF CONTENTS</u>	ii
<u>TABLE OF AUTHORITIES</u>	iv
<u>BRIEF OF APPELLANT</u>	1
ISSUES.....	1
INTRODUCTION.....	2
I. COURSE OF PROCEEDINGS BELOW	3
II. STATEMENT OF FACTS.....	7
SUMMARY OF ARGUMENT	16
<u>ARGUMENT</u>	18
I. THE ISSUES PRESENTED BY THIS APPEAL, INCLUDING THE EFFECT OF A SIGNED WAIVER AND A PREVIOUS COURT DECREE, ARE QUESTIONS OF LAW TO BE GIVEN DE NOVO REVIEW.....	18
II. GRAND OAKS' PLAT HAS NEVER BEEN EFFECTIVELY AMENDED TO AUTHORIZE A NEW ROAD ON OR BETWEEN LOTS 142 AND 143.....	19
A. A Chancery Court Plat Amendment Is Jurisdictionally Limited To Plat Changes Prayed For In The Petition To Amend.....	19
B. The Chancery Court Procedure Requires That the "Objects and Purposes" of the Petition Be "Clearly Stated" in a Published Legal Notice	21
C. Acting On a Plat Amendment Petition That States "streets... shall remain unchanged...", A Chancellor Has No Jurisdiction To Change The Streets.....	22
D. Grand Oaks' Plans To Change The Streets Are Inconsistent With Its Legal Plats And Therefore Improper	23
E. In its 1995 Chancery Court Petition for a Plat Amendment, the Grand Oaks Developer Bound Itself to Make No Changes in the Existing Easements and Streets of Grand Oaks	26
F. None of the Proceedings Before the City of Oxford Purported in Any Way To Comply with the Statutory Procedure for Altering a Subdivision Plat.....	27
III. MRS. NIEDFELDT DID NOT WAIVE HER RIGHT TO OBJECT TO A NEW ROAD ON OR BETWEEN LOTS 142 AND 143	30
A. Mrs. Niedfeldt Cannot Be Said to Have "Knowingly" Waived Her Right to Object to a New Road at Lots 142 and 143 in a Proceeding Where She Was Expressly Assured No Roads in Grand Oaks Were Being Changed	30

B. Jurisdictional Matters (Limits on a Chancery Court's Authority to Amend Subdivision Plats) Cannot Be Waived.....	31
C. The Waiver of Service Signed by Mrs. Niedfeldt in the 1995 Chancery Court Proceeding Cannot Deprive Her of Vested Property Rights Without Violating Constitutional Due Process Principles.....	31
IV. USE OF THE 45-FOOT STRIP AS AN ACCESS ROAD WOULD VIOLATE THE PROTECTIVE COVENANTS OF GRAND OAKS PHASE V.....	32
V. USE OF THE 45-FOOT STRIP AS A ROAD PROVIDING ACCESS TO MORE THAN 2000 HOMES WOULD VIOLATE THE STREET-WIDTH AND RIGHT-OF-WAY REQUIREMENTS IN THE CITY OF OXFORD'S LAND DEVELOPMENT CODE.....	35
CONCLUSION.....	35
CERTIFICATE OF SERVICE	37

TABLE OF AUTHORITIES

	Page
Cases	
<i>Andrews v. Lake Serene Property Owners Assoc., Inc.</i> 434 So.2d 1328 (Miss. 1983)	33
<i>Barrett v. Ballard</i> , 483 So.2d 304 (Miss. 1985).....	19, 21, 22, 32
<i>City of Wiggins v. Breazeale</i> , 422 So.2d 270 (Miss. 1982)	21
<i>Erickson v. Smith</i> , 909 So.2d 1173 (Miss. App. 2005)	19
<i>Ethredge v. Yawn</i> , 605 So.2d 761 (Miss. 1992).....	18, 31
<i>Ewing v. Adams</i> , 573 So.2d 1364 (Miss. 1990).....	30
<i>Gast v. Ederer</i> , 600 So.2d 204 (Miss. 1992)	32
<i>Gillum v. Gillum</i> , 230 Miss. 246, 92 So.2d 665 (1957)	19
<i>Goode v. Woodgreen Homeowners Ass’n</i> , 662 So.2d 1064 (Miss. 1995)	33
<i>Harry v. Harry</i> , 856 So.2d 748 (Miss. App. 2003)	31
<i>Marshall v. State</i> , 662 So.2d 566 (Miss. 1995).....	31
<i>Mitchell v. McLarty</i> , 230 So.2d 215 (Miss. 1970).....	23
<i>Mullane v. Central Hanover Bank</i> , 339 U.S. 306 (1950).....	32
<i>Nettleton Church of Christ v. Conwill</i> , 707 So.2d 1075 (Miss. 1997)	25
<i>PMZ Oil Co. v. Lucroy</i> , 449 So.2d 201 (Miss. 1984)	27
<i>Reinecke v. Reinecke</i> , 105 Miss. 798, 63 So. 215 (1913).....	21, 22, 26, 31
<i>Sullivan v. Kolb</i> , 742 So.2d 771 (Miss. App. 1999).....	32, 33
<i>White Cypress Lakes Development Corp. v. Hertz</i> , 541 So.2d 1031 (Miss. 1989).....	26
<i>Wray v. Wray</i> , 394 So.2d 1341 (Miss. 1981).....	19
Statutes	
Miss. Code Ann. § 17-1-23(4)	27, 29
Miss. Code Ann. § 19-27-31.....	1, 20, 26
Miss. Code Ann. §21-19-63	25
Other Authorities	
Miss. Atty. Gen. Opinion No. 2001-0041 (Feb. 9, 2001)	28
Miss. Laws 1997, Ch. 459	20
Rules	
Miss.R.Civ.Pro. 65. R. 14-15	5

BRIEF OF APPELLANT

ISSUES

1. Whether the subdivision plat recorded in 1994 for Phase V of Grand Oaks has ever been amended under Miss. Code Ann. §19-27-31 to add a road on or between Lots 142 and 143 of the subdivision, where:
 - a. The Developer represented in its petition to amend the plat and the court found in its decree that “the existing easements and streets shall... remain unchanged” and there was no road on or between Lots 142 and 143 in the original plat; and
 - b. The Developer’s stated purpose for the amendment, as stated in its petition and the required public advertisement for the amendment, was to enlarge lots 143, 144, 146, and 147, and to add lots 148, 149, and 150, and the stated purposes make no reference to the addition of a road.
2. Whether a petitioner for a plat amendment is bound by the terms and findings of the decree on his petition and is bound by the stated purposes and representations in the petition and in the required public advertisement for the plat amendment.
3. Whether the scope of a plat amendment decree is jurisdictionally limited to the plat amendments prayed for in the petition and the purposes described in the required public advertisement for the amendment.
4. Whether a party who signs a waiver of process and consent to a plat amendment petition is: (a) entitled to rely on the stated purposes and representations in the petition as limiting what is to be sought in the proceeding; and (b) can be said to have waived jurisdictional limits on the court’s power.
5. Whether use of a 45-foot strip of an original platted lot of Phase V of the Grand Oaks Subdivision as a road would violate the Grand Oaks protective covenants.

6. Whether use of a 45-foot strip as a road would violate the requirements of the City of Oxford Land Development Code, for example, the requirement that a road used by 2000 or more homes as a collector road in a multi-unit residential area be at least 48-feet wide and have a 68-foot right-of-way.

INTRODUCTION

This is an appeal in a case involving the rights of the plaintiff, Phyllis W. Niedfeldt, as the Trustee of the Phyllis W. Niedfeldt Living Trust, which owns a lot and home on Majestic Oaks Drive in Phase V of the Grand Oaks subdivision in Oxford, Mississippi. The part of the Grand Oaks subdivision in which Phyllis Niedfeldt lives has 198 homes surrounding a golf course. Tr.110-11¹

Mrs. Niedfeldt sued the current and past developer of Grand Oaks, after learning in public presentations to the Oxford Planning Commission that there were plans to open a road that would allow residents of a new 2000-unit development, including 1137 multi-family “four-plex” units,² to use Majestic Oaks Drive to access Highway 7. Mrs. Niedfeldt’s complaint pointed out that the developer’s plans to provide access through the existing Grand Oaks subdivision were being discussed publicly (a) without complying with the provisions of Grand Oaks’ protective covenants for adding a new road; (b) without following the statutory requirements to amend the subdivision plat recorded in 1994 to authorize such a new road; and (c) without complying with the City of Oxford Land Development Code requirements for the new road.

¹Citations to the clerk’s record are in the form R. _____. Citations to the transcript of the trial and post-trial hearing below are in the form Tr. _____. Citations to the Record Excerpts are to their tab numbers and in the form R.E. Tab _____.

² Based on PUD II Site Data submitted by the present Grand Oaks developer to the Oxford Planning Department as of September 1, 2005. See Exhibit 18, unnumbered page 17.

In denying the relief requested in her Complaint, the Chancellor ruled that a Chancery Court proceeding filed by the original developer in 1995 (hereinafter, the “1995 Chancery Court Proceeding”) authorized an amendment of the subdivision plat to allow the new road, even though the Petition and Decree that authorized the plat amendment in the 1995 Chancery Court Proceeding each explicitly provided “[t]hat the existing easements and streets as shown on the original Maps and Plats of the Grand Oaks subdivision shall remain unchanged.” *See* Exhibit 13 at unnumbered page 7, R.E. Tab 5, Order to Alter and Amend Original Map and Plat of Grand Oaks Subdivision by Enlarging and Renumbering Certain Lots.

The Chancellor further ruled that, by waiving process and filing an appearance in the 1995 plat amendment case, Mrs. Niedfeldt waived a right to challenge whatever happened in that case, *see* Tr. 115-117, R.E. Tab 2—although the record in that case establishes that nothing happened to authorize a new road or right-of-way in Grand Oaks subdivision. *See discussion infra* at 19-29.

A central issue on this appeal is whether, in waiving her right to service of process and consenting to judgment in 1995, Mrs. Niedfeldt is protected by the representations and limits expressed in the pleadings of the party benefiting from the waiver.

Another central issue on this appeal is whether the past or current developer has ever followed either of the two statutory alternatives available in Mississippi to alter Grand Oaks’ subdivision plat to add the road in question.

I. COURSE OF PROCEEDINGS BELOW

Phyllis Niedfeldt, a property owner in Grand Oaks subdivision, filed this action in the Chancery Court of Lafayette County against the prior and current developer of the Grand Oaks subdivision. Mrs. Niedfeldt lives on Majestic Oaks Drive in Grand Oaks. The current developer had publicly announced plans that would have used existing lots on Majestic Oaks

Drive as connector roads to large new additional development. Mrs. Niedfeldt's complaint sought an injunction prohibiting the construction of any road on Lots 109,³ 142, or 143 in Grand Oaks. R. 1-16. The Complaint requested such relief, because (a) construction of such a road would violate the protective covenants for Grand Oaks; (b) the statutory procedures for amending the recorded plat had not been followed to authorize the road; and (c) the road would not comply with the requirements of the Land Development Code of the City of Oxford. R. 1-16.

In response to Mrs. Niedfeldt's Complaint, Grand Oaks Communities, L.L.C., the present developer, and Grand Oaks, Inc., the prior developer, answered separately. *See* R. 67 (Grand Oaks Communities' Answer); R. 82 (Grand Oaks, Inc.'s Answer). Grand Oaks Communities later filed a motion to dismiss asserting that this action was an impermissible appeal or collateral attack on zoning decisions made by the City of Oxford. R. 98. As a basis for this motion, Grand Oaks Communities asserted that the City of Oxford had "approved amended subdivision plats which depict the subject easements," that the Complaint sought review of the City's zoning decisions, and that the only way to seek such review was by filing a Bill of Exceptions appealing the matter to Circuit Court. R. 101.

Years previously, Grand Oaks, Inc. had followed one of the statutory procedures for amending a subdivision plat by filing a Petition in the Chancery Court of Lafayette County. 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"). That Petition contained the statement: "the existing easements and streets as

³ The question concerning a road on Lot 109 became moot, because the defendants presented testimony at trial that they had agreed with the Grand Oaks homeowners' association not to build a road on Lot 109. *See* Tr. 33-34.

shown on the original Maps and Plats of the Grand Oaks Subdivision shall remain unchanged.” It also stated that the existing Protective Covenants “will remain unchanged and in full force and effect.” *Id.* At 7. The petition followed the statutory procedure by naming all property owners, including Phyllis Niedfeldt, who signed a waiver of process and entry of appearance. Waiver of Process and Entry of Appearance in Cause No. 95-471 Waiver of Process and Entry of Appearance in Cause No. 95-471, Exhibit 12; *see* Tr. 9 (admitting Exhibit 12). The chancery court entered a decree in that cause that provided “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; *see* Tr. 9 (admitting Exhibit 13). Attached to this decree was a part of a plat of Grand Oaks. This plat showed a part of the lots that were being altered and to which land was added.

The decision by the chancellor in the court below turned on the scope and meaning of this 1995 decree. Mrs. Niedfeldt’s complaint contained a request for a preliminary injunction and asked as a part of the relief sought that the complaint be treated as a motion for a preliminary injunction under Miss.R.Civ.Pro. 65. R. 14-15. A hearing for a motion for a preliminary injunction relief was held on August 22, 2006. At the conclusion of the hearing, the chancellor rendered a bench opinion, ruling for the defendants. The chancellor ruled:

There was a petition filed in Chancery Court Cause No. 95-471, “Grand Oaks Development Ins. vs. All Of The Owners Of Lots In Grand Oaks,” asking the Court to adopt and to ratify the changed plat or amended plat of Grand Oaks Subdivision. Mrs. Niedfeldt signed a waiver to that action, and she did not file any type of responsive pleadings to the action. There was a decree entered by the Court on the 23rd day of February, 1996, which said, That the clerk and proper lawful authorities of the City of Oxford, and of the Chancery Clerk of Lafayette County, Mississippi directed to accept and file and regard the altered and amended Maps and Plats of Grand Oaks Subdivision, which they did. The amended plat that was approved by the Court is Exhibit No. 5, Exhibit No. 4 is the old plat.

In the petition and in the Order it is stated in Paragraph 8 of the Order, That the existing easements and streets that are shown on the original Maps and Plats of Grand Oaks Subdivision shall remain unchanged.

The Court in examining Exhibit 4 and Exhibit 5 finds that the streets and easements remain the same. They have not been altered. Three lots have been added in the amended plat, and some of the lots—existing lots of Grand Oaks was made larger and some were made smaller. The two lots in question, Lot No. 143 in the old plat consisted of 1.072 acres. In the new plat—it has 1.20 acres. Lot 142 in the old plat has 1.295 acres. In the new plat it has 1.11 acres. The plat that was approved by the Court has a 45 foot width strip of land between the two lots of 143 and 142. There's nothing in here that designates what it is, so it is not a lot.

So based upon this, the Court is going to deny your—your Complaint and your Motion for Preliminary Injunction. I think when the plaintiff filed—when she signed her waiver it was her duty then to know what she had signed her waiver on. And thus by not objecting at the time she approved the amended plat, and I think she is bound by it.

Tr. 115-117, R.E. Tab 2. Thereafter, a judgment was entered based upon this bench ruling consolidating trial of the merits with the preliminary injunction and dismissing the case. R. 174, R.E. Tab 3.

Phyllis Niedfeldt filed a timely motion for a new trial, which noted that both the Petition and Decree in Chancery Court Cause 95-471 explicitly stated that “the existing easements and streets as shown on the original Maps and Plats of the Grand Oaks subdivision shall remain unchanged.” R. 176. The motion pointed out that the trial court's ruling from the bench contradicts explicit assurances and findings in the 1995 Chancery Court Proceeding:

This Court's ruling that the plaintiff should have further investigated the nature of the changes sought in cause number 95-471 runs counter to the explicit assurance in the petition and finding of the court in cause number 95-471. The petition informed the plaintiff at the time of her entry of appearance, and anyone who read it, that there would be no changes in the existing streets or easements. The court's finding to that effect is binding upon the developer.

R. 177. This motion for a new trial was brought on for hearing on October 13, 2007, and overruled by an order entered October 30, 2006. Tr. 117; R. 187, R.E. Tab 4. A timely Notice of Appeal was filed on November 28, 2006, R. 188, and this appeal followed.

II. STATEMENT OF FACTS

The plaintiff Phyllis W. Niedfeldt lives at 3884 Majestic Oaks Drive on Lot 94 in Grand Oaks subdivision. Grand Oaks was originally developed by defendant Grand Oaks, Inc. Tr. 61-62.

This litigation involves two lots farther down Majestic Oaks Drive from Mrs. Niedfeldt's house, Lots 142 and 143. In 2005, Bernard Johnson, as the representative of the current developer of Grand Oaks, Grand Oaks Communities, L.L.C., filed publicly available documents and made public presentations to the Oxford Planning Commission and the Oxford Board of Aldermen that indicated that the current developer planned to build an access road on those lots to a large new development. Tr. 98-100, 106-07. About a year before the litigation began, the current developer began work on a road bed entering Majestic Oaks Drive at lots 142 and 143. Tr. 27.

Majestic Oaks Drive makes a U-shaped loop around the golf course in Grand Oaks. Majestic Oaks Drive as it exists now is a winding, quiet and narrow street in a residential area with houses relatively high in value along it. Tr. 24-25, 27. Mrs. Niedfeldt selected Grand Oaks to live in because it "was a wonder[ful] encapsulated subdivision that would provide tranquility and safety for me" and chose Lot 94, because "it was a beautiful lot situated on a golf course." Tr. 24. Mrs. Niedfeldt's home is the first home on the left on Majestic Oaks Drive as one enters the subdivision. Any access from the main entrance of Grand Oaks to a new road at lots 142 and 143 would necessarily pass her house. Tr. 25, 51-53.

The proposed road at Lots 142 and 143 would be the most direct access from the main entrance of Grand Oaks and the existing subdivision to a planned new golf course club facility. Tr. 52. It will also connect through to 462.43 acres that the current developer has purchased south of Grand Oaks for additional development. Tr. 96, 106-08; Minutes of Oxford Planning Commission, Exhibit 33.⁴

Grand Oaks Communities has announced that it plans to develop up to 2212 units⁵ (including approximately 1000 multi-family "four-plex" units) on roughly 600 acres to the south of Majestic Oaks Drive. Tr. 111. This land to the south will only be accessible from the existing parts of Grand Oaks through the connector road on Lots 142 and 143. While Grand Oaks Communities' representative stated that he had made a commitment that the road would be "limited in access," Tr. 102-105, the developer did not establish any formally defined limit on access whatsoever. There was no evidence that he was bound to limit access in any meaningful way.

If the connector road is allowed, the potential users of Majestic Oaks Drive will increase from residents of 198 units (at present) to residents of several thousand units in the 600-acre development to the south.

When she purchased her lot in 1995, Mrs. Niedfeldt reviewed the protective covenants for Grand Oaks. She knew that her lot and the other lots in the subdivision would be subject to those covenants. Tr. 28. The restrictive covenants provide:

⁴The 462.43 acres is the Furr tract. Tr. 96. Another tract (referred to by the Grand Oaks representative as the Bowles property) is also part of the additional development south of Grand Oaks. Tr. 106. The planning commission minutes refer to the entire area as 600 acres.

⁵ This number will vary by topography but is certainly over a thousand. Tr. 111. The site plan data submitted by current developer to the City of Oxford as of September 1, 2005 states plans to develop 2112 units. *See* unnumbered page 17 of Exhibit 18.

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.

Corrective Protective Covenants, Exhibit 2 at 5 (§11); *see* Tr. 6 (admitting exhibit); Tr. 32 (quoting passage).⁶

There was no evidence at trial of written approval by the Architectural Control Committee of Grand Oaks of any new road. While Dr. Rayner, who was the president of Grand Oaks, Inc. and a member of the Architectural Control Committee at one time, testified that the committee authorized an engineer to make an amended plat and that this approval was written down, Tr. 70-71, 87, any such writing was not filed. Tr. 91-93. When Dr. Rayner testified that the Architectural Control Committee approved the amended plat, he was clearly referring to the plat that he contends was approved in the 1995 chancery matter. Dr. Rayner signed the sworn Petition that initiated the 1995 chancery court proceeding. That Petition explicitly provides that the existing easements and streets on the original plats and maps of Grand Oaks would remain unchanged under the plat amendment being sought. Tr. 87-88.

Dr. Rayner testified that at no time did the Architectural Control Committee approve "any right-of-way on a lot" nor "a road on a lot." Tr. 90-91. The record is devoid of any written consent of the Architectural Control Committee for any portion of Lot 142 or Lot 143 as shown on the plat recorded in 1994 to be used as a road.

The original plat for Grand Oaks included only 147 lots. In July of 1995, the initial developer, Grand Oaks, Inc., purchased 5.6 additional acres from Dr. Furr south of Lots 142-147. Tr. 64-65. The 5.6 acre tract was purchased because the lots in Grand Oaks adjoining it

⁶This identical language occurred in both the original and the corrective protective covenants for Grand Oaks. *Compare* Original Protective Covenants, Exhibit 1 at 5 (§11) *with* Corrective Protective Covenants, Exhibit 2 at 5 (§11).

were unbuildable because of setback requirements. Tr. 64 -65. According to Dr. Rayner, President of Grand Oaks, Inc., the 1995 purchase deepened more than one existing lot, added three new lots, and “added a right-of-way for access to the property south of us,” because Dr. Rayner had learned that another 400 acres owned by Dr. Furr south of Grand Oaks “would be up for sale at some point.” Tr. 65. Dr. Rayner testified that “we re-platted everything” and “we put the right-of-way between one—the new plat of 142 and 143.” Tr. 67. He testified that he believed that the “amended plat” with the right-of-way between Lots 142 and 143 was approved by both the Oxford Planning Commission and the Chancery Court. Tr. 68, 75.

Dr. Rayner’s testimony about his intent and belief at the time about re-platting and approval of the right-of-way does not match what was actually filed in the 1995 Chancery Court Proceeding. The Petition signed and sworn to by Dr. Rayner and filed to initiate that chancery court matter is Exhibit 11. It describes the purpose of the plat amendment being sought as follows:

VI.

That the plaintiff purchased additional property from the adjacent landowners in order 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.

VI. [sic]

That lots 148, 149, and 150 should be added to the subdivision plat.

...
...

VIII.

That the existing Protective Covenants of Grand Oaks Subdivision . . . will remain unchanged and in full force and effect.

VIII. [sic]

That the existing easements and streets as shown on the original Maps and Plats of the Grand Oaks subdivision shall remain unchanged.

1995 Petition, Exhibit 11, at unnumbered pages 6-7. 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. It asks that the maps and plats filed with the chancery clerk and the city be changed to reflect these changes, and that the existing covenants remain unchanged and in full force and effect. *Id.* at unnumbered page 8.

Nowhere in the Petition is a suggestion that a road is to be added at Lots 142 and 143. Nowhere is there a suggestion that *any* lot is being made smaller to accommodate a right-of-way or road or to create a strip with any “undesigned” use. Furthermore, the petition specifically recites: “existing easements and streets as shown on the original Maps and Plats of the Grand Oaks subdivision shall remain unchanged.”

As a part of the plat amendment, Grand Oaks placed an advertisement in the local newspaper noticing a hearing on a plat amendment proposed “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.

Mrs. Niedfeldt signed a waiver of process and consented to entry of a final decree in response to this petition,⁷ as did other property owners. On February 23, 2006, the Chancery Court entered the Decree, which tracks the averments in the Petition. The Decree, as a result, includes the following findings:

⁷ Waiver of Process and Entry of Appearance, Exhibit 12.

VI.

That said plats shall be altered and amended to reflect the larger sizes of lot number 143, 144, 146, and 147, and to show the addition of new lot numbers 148, 149, and 150.

VII.

That the existing Protective Covenants of Grand Oaks Subdivision . . shall remain unchanged and in full force and effect.

VIII.

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 findings are followed by a description of the matters being adjudged and decreed, by entry of the order. This section of the Decree begins as follows:

THEREFORE, IT BE ORDERED AND ADJUDGED AND DECREED:

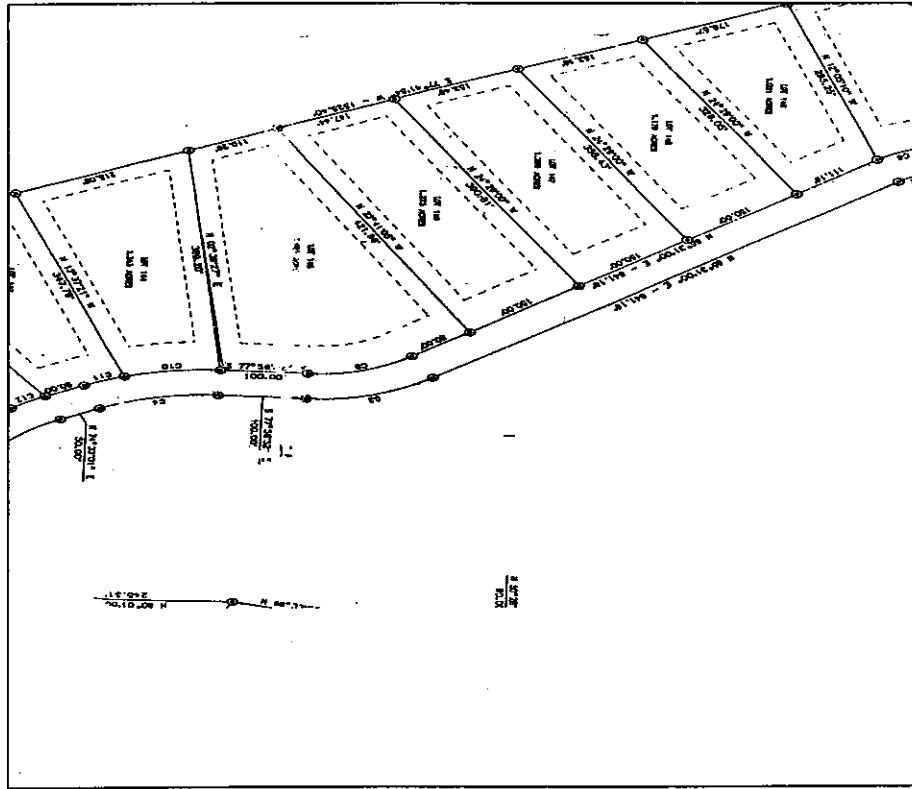
(a.) That the original Maps and Plats of Grand Oaks Subdivision be altered and amended to reflect the larger sizes of lots 143, 144, 146, and 147, and to allow the addition of new lot numbers 148, 149, and 150 as shown on Exhibit A.

(b) That the Maps and Plats of Grand Oaks Subdivision be altered and amended to allow a renumbering of said lots.

(c) That the Protective Covenants of the Grand Oaks Subdivision . . . will remain unchanged and in full force and effect.

1995 Order, Exhibit 13 at unnumbered pages 7-8, R.E. Tab 5. Attached in the court file after the last page of the decree is a part of a plat of Grand Oaks. *See* Exhibit 13, unnumbered page 10, R.E. Tab 5.. It shows a part of Lots 142 and 143 at the left edge, all of Lots 145, 146, 147, and 149, and a part of Lot 150 — all of the lots that were being enlarged or added in the 1995 proceeding. It does not show any suggestion of a road or easement or right-of-way on or

between Lots 142 and 143. *Id.* This is the amended plat from the Chancery Court file for the 1995 proceeding:



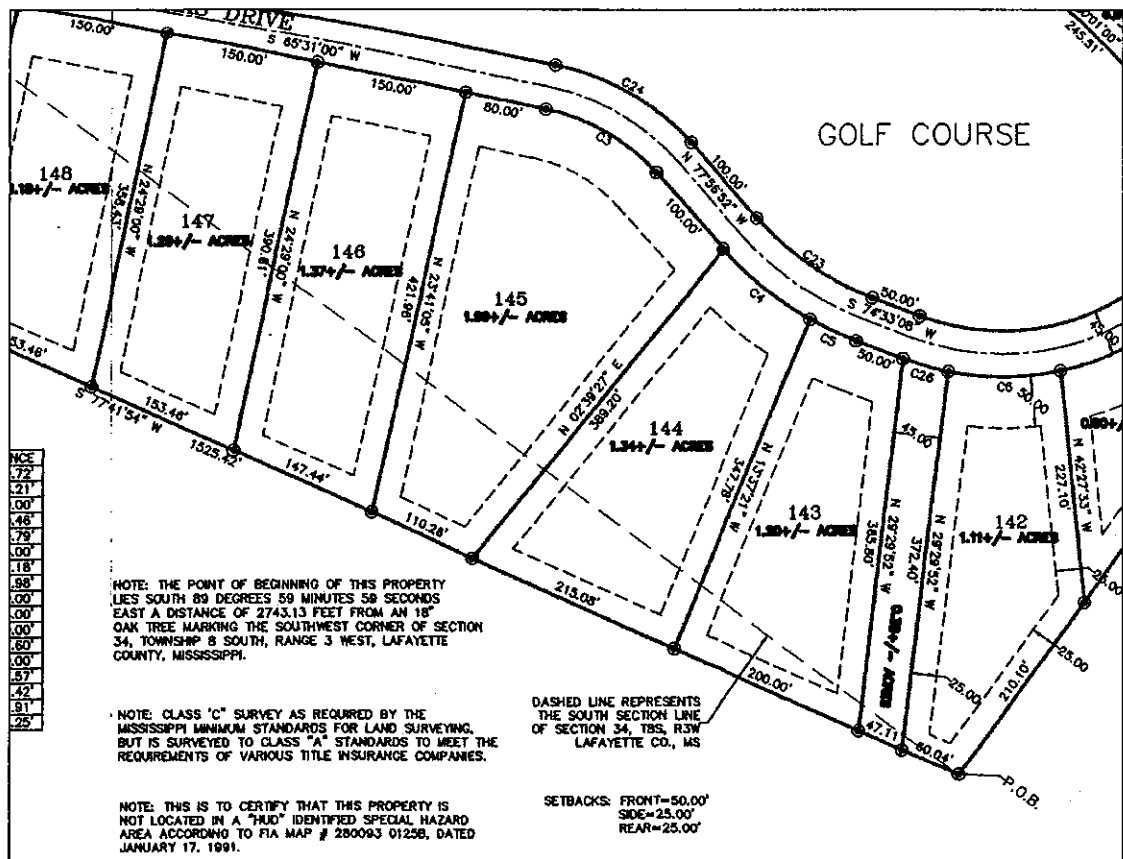
These pleadings from the 1995 plat amendment procedure establish that Rayner’s testimony about what he remembers hoping to accomplish in amending the plat in 1995—a new right-of-way—does not match in any way the petition he actually signed or the decree he obtained. His recollection contradicts the assurance in the petition and the finding in the decree that “existing easements and streets . . . shall remain unchanged.”

The amended plat from the 1995 chancery proceeding was not filed for record immediately after the decree was entered. Tr. 91-92.

At about the time of the plat amendment proceeding in chancery court, a request to amend Grand Oaks’ subdivision plat came before the City of Oxford Planning Commission on October 9, 1995, for approval under the City’s Land Development Code. The representative of Grand Oaks, Inc. sought approval to amend the Grand Oaks plat to include the five acres that

Grand Oaks had bought. Minutes of the Oxford Planning Commission dated 10/9/95, Exhibit 22. There was no reference to an addition of a road.

An amended plat for Grand Oaks was not filed in the Lafayette County land records, until a plat dated January 17, 2000, prepared by Ryland Sneed, was filed almost 5 years after entry of the Decree. See Exhibit 5. The Chancellor in the court below described the delay in filing an amended plat as "sloppy."⁸ See Tr. 91-92. The relevant detail from the 2000 plat can be compared to the plat in the 1995 court file, already reproduced above:



⁸ This characterization of the 1995 proceeding by the Chancellor appears in the following statements from the bench: "Sloppy, sloppy, sloppy, sloppy, here you go. Why couldn't the decree just say that the amended plat is being recorded rather than the clerk will make notations." Tr. 92.

A comparison of the detail of the amended plat as it appears in the court file for the 1995 Chancery Court Proceeding to the plat filed by Grand Oaks in 2000 (Exhibit 5, discussed and shown, *infra* at 12) shows they are not the same. For example, on the copy in the court file, the reference to the curve where lot 144 meets the road is "C10". This is a reference to a curve on a curve table on the plat. The reference to the curve on the exact same place on the 2000 plat is to curve "C4". Obviously, they are different plats with different curve tables.

In May of 2004, Grand Oaks, Inc. sold the development to Grand Oaks Communities, L.L.C. Tr. 81-82, 94.

On December 13, 2004, Grand Oaks came before the City of Oxford for a PUD ("Planned United Development") plat amendment based on a redesign of the golf course and a plan to request annexation of land outside the city limits. The connector road on Lots 142 and 143 is depicted on the master plan that was submitted at this time by Grand Oaks Communities. Tr. 100; *see* Master Plan for Grand Oaks prepared by Michael Redd dated 12/1/04, Exhibit 29 (depicting the road). Mrs. Niedfeldt appeared at this meeting and raised two concerns: that "she did not want to see the proposed access road become a thoroughfare; and . . . she was concerned about the bond lapsing." Minutes of the Planning Commission, December 13, 2004, Exhibit 30, at 2; Tr. 42-43. Mrs. Niedfeldt's concern about the road included increased traffic and

[t]he loss of tranquility, the loss of safety, the Majestic Oak Roads are very narrow, people park on the roads, and further congestions. And I want to live and have what I was entitled to when I bought the lot and when I built my home there.

R. 44. She was also concerned about potential decreased value of her home. Tr. 45.

Mrs. Niedfeldt also appeared twice before the Planning Commission of the City of Oxford in roughly October of 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.

At that time, she stated that she did not want a “cut-through or any access road coming into Majestic Oaks” because of the potential for increased traffic. At that time, there had been some dirt moved on what appeared to be a roadbed near Lots 142 and 143. This road work was recent. Tr. 29. She spoke again at a later meeting. Tr. 29-30.

In June of 2005, another plat was presented to the city, in this instance seeking annexation of a part of the proposed development and city water, sewer, and other services. This plat also showed the proposed road. Tr. 106-07; Minutes of Oxford Planning Commission, Exhibit 33. There is no reference in these minutes to a connector road across Lots 142 and 143. The current City of Oxford zoning map does depict the connector road on Lots 142 and 143. Tr. 97-98.

SUMMARY OF ARGUMENT

The lower court held that a prior chancery court plat amendment procedure had amended the Grand Oaks subdivision plat to allow the developer to place a road on a strip of land where there had been a lot on the original plat. The chancellor so found even though he also found that “There’s nothing in [the plat amendment procedure] that designates what [the strip of land] is....” Tr. 116, R.E. Tab 2. He held that the roads of Grand Oaks were changed even though the petition and decree in the plat amendment procedure described changes that had nothing to do with adding a new street and stated that “existing easements and streets . . . shall remain unchanged...”

Under Mississippi’s Chancery Court procedure for amending a plat established by Miss. Code Ann. §19-27-31, (1) a sworn petition must be filed which describes “the particular circumstances of the case”; (2) a legal notice must be published with the “objects and purposes” of the petition “clearly stated”; (3) all persons who would be “adversely affected” or have a “direct interest” must be named as parties and given notice; and (4) the decree must be

“recorded as a deed” and “a memorandum thereof noted on the record of the map or plat.” Each of these requirements is jurisdictional in nature.

The stated purpose of the plat amendment relied on by the court below was to expand several lots and add several lots. Nothing in the stated purpose in the sworn petition or as advertised referred to the addition of a road. The petition and decree stated that roads would not be changed. Miss. Code Ann. §19-27-31 establishes that the plat amendment procedure was limited to the stated purposes (expanding some lots and adding a few others) and jurisdictionally prohibited from accomplishing anything else. Further, the decree itself in the prior plat amendment procedure by its explicit provisions did not change the streets of Grand Oaks. The 1995 decree cannot as a matter of law have had the effect ascribed to it by the court below.

In addition, the Chancellor held that by signing a waiver of process in the 1995 proceeding, Mrs. Niedfeldt waived her right to object to a 45-foot strip of land being shown on an amended version of the plat recorded in 2000 and also waived her right to object later to use of that strip as a street or road in violation of Grand Oaks’ protective covenants. This stands the concept of waiver on its head, since Mrs. Niedfeldt and 107 other lot owners were assured in writing before giving their consent to the 1995 proceeding that no streets or easements on the 1994 plat would be changed. The ruling below runs counter to the axiomatic concepts that (1) waivers to be legally effective must be entered into “knowingly”; (2) jurisdictional matters cannot be waived; and (3) a judicial proceeding which takes away vested property rights, without notice, violates constitutional requirements of due process.

In explaining his ruling concerning amendment of the subdivision plat and waiver, the Chancellor adopted a strained interpretation of clear and unambiguous language in the protective covenants rather than reading and applying the covenants “in their ordinary sense” as

required under Mississippi law. The Chancellor's interpretation would allow the developer to circumvent and evade the purpose and intent of the covenants.

The Chancellor failed to reach the issue of whether use of the 45-foot strip would violate the requirements of Oxford's Land Development Code for a road as heavily-used as the one proposed here.

For each of these reasons, use of this 45-foot strip as a street or road is improper. For each of these reasons, the appellant, Mrs. Niedfeldt, should have prevailed at the trial level and use of the strip in question to allow access to Majestic Oaks Drive should be enjoined.

ARGUMENT

I. THE ISSUES PRESENTED BY THIS APPEAL, INCLUDING THE EFFECT OF A SIGNED WAIVER AND A PREVIOUS COURT DECREE, ARE QUESTIONS OF LAW TO BE GIVEN DE NOVO REVIEW.

The trial court ruled that Mrs. Niedfeldt's waiver and consent to a judgment in the 1995 chancery case amending the plat to Grand Oaks barred her in this case from challenging the addition of a road at Grand Oaks. This raises two issues on this appeal, either of which fully resolve the case if decided for the appellant: (1) Did Mrs. Niedfeldt's waiver in the prior chancery matter give such a broad consent to changes given the limited relief sought in the petition and granted by the decree entered in the prior chancery matter? (2) Did the prior chancery matter in fact amend the plat to add the disputed road? The question of the relation of the waiver to the relief sought in the petition is a purely legal one, as is the question of the effect of the prior chancery decree. The effect to be given her waiver of process is a legal issue to be given *de novo* review by this Court. *See Ethredge v. Yawn*, 605 So.2d 761, 764-65 (Miss. 1992) (giving *de novo* review of the scope and effect of a waiver of process and consent). The Mississippi Supreme Court has given *de novo* review to questions concerning compliance with the requirements of the statutes governing amendments to plats. *See Barrett v. Ballard*, 483 So.2d

304, 306 (Miss. 1985)(reversing a chancellor's refusal to vacate a decree amending a plat where the statutory requirement for publication of legal notice had not been followed). Similarly, the question of the legal effect of the prior chancery decree is a question of law to be given *de novo* review. *See Wray v. Wray*, 394 So.2d 1341, 1345-46 (Miss. 1981) (reversing in giving *de novo* review to questions of interpretation of a divorce decree); *Gillum v. Gillum*, 230 Miss. 246, 92 So.2d 665, 669 (1957) (same).

There is an additional issue involving construction of the Grand Oaks protective covenants and determining whether use of the 45-foot strip, still shown as part of a lot on the only legally effective amendments to the Grand Oaks subdivision plat, would violate those covenants. This is purely a question of law and, therefore, also involves a question of law given *de novo* review by this court. A restrictive covenant is a contract, and questions of contract construction are questions of law. *Erickson v. Smith*, 909 So.2d 1173 (Miss. App. 2005).

The application of the City of Oxford's Land Development Code to the facts in this case is also a question of law given *de novo* review.

II. GRAND OAKS' PLAT HAS NEVER BEEN EFFECTIVELY AMENDED TO AUTHORIZE A NEW ROAD ON OR BETWEEN LOTS 142 AND 143

A. A Chancery Court Plat Amendment Is Jurisdictionally Limited To Plat Changes Prayed For In The Petition To Amend

There are two statutory procedures in Mississippi for amending a plat—by filing a petition with the Chancery Court pursuant to Miss. Code Ann. §19-27-31 or by filing a petition with the governing authorities of the applicable municipality under Miss. Code Ann. §17-1-23(4). This later provision has only been available since 1998.⁹ As discussed below, *infra* at 27, the statutory procedure for petitioning the City of Oxford's Board of Aldermen has never been used

for Grand Oaks. The Chancery Court procedure has been used once in Grand Oaks, for the 1995 amendment of the plat.

The statutory procedure for amendment of a previously recorded subdivision plat through a Chancery Court proceeding sets forth strict requirements for notifying and obtaining the consent of those affected by the amendment:

If the owner of any land which shall have been laid off, mapped, or platted as a city, town or village, or addition thereto, or subdivision thereof, or other platted area, whether inside or outside a municipality, shall be desirous of altering or vacating such map or plat, or any part thereof, he may, under oath, petition the chancery court for relief in the premises, setting forth the particular circumstances of the case and giving an accurate description of the property, the map or plat of which is to be vacated, or altered, and the names of the persons to be adversely affected thereby, or directly interested therein. The parties so named shall be made defendants thereto, and publication of summons shall be made one time in a newspaper published, or having a general circulation, in the county where the land is situated, and which publication shall clearly state the objects and purposes of the petition.

At any time after the expiration of five days from said publication and the service of process upon the named defendants, the cause or proceeding shall be triable, and the court in term time or the chancellor in vacation may hear the petition and all objections from any person thereto, and may decree according to the merits of the case. However, where all adversely affected or directly interested persons join in said petition, the same may be finally heard and determined by the court or chancellor at any time. If the decree vacate, in whole or in part, or alter the map or plat, it shall be recorded as a deed, and a memorandum thereof noted on the record of the map or plat.

Miss. Code Ann. § 19-27-31.

In order to comply with these statutory requirements, the Petition must set "forth the particular circumstances of the case" and name those "adversely affected thereby, or directly interested therein."

⁹ The provision allowing amendment by petitioning the governing authority was added to the code by Miss. Laws 1997, Ch. 459.

The Grand Oaks defendants cannot argue for an application of the 1995 decree that goes beyond the purposes stated in the 1995 Petition. The Mississippi Supreme Court has long recognized that a decree entered in a plat amendment proceeding can only amend the plat to make changes prayed for in the petition. *Reinecke v. Reinecke*, 105 Miss. 798, 63 So. 215, 216 (1913); see *City of Wiggins v. Breazeale*, 422 So.2d 270, 271 (Miss. 1982)(citing and explaining *Reinecke*). *Reinecke* holds that the chancery court's jurisdiction is limited to the purposes stated in the petition seeking to amend the plat. *Reinecke* also 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. The logic of *Reinecke*—that the statutory requirements are jurisdictional—has been confirmed in *Barrett v. Ballard*, 483 So.2d 304, 306-07 (Miss. 1985), which held that the statutory provisions requiring advertising were also jurisdictional.

The petition in the 1995 plat amendment proceeding listed two purposes: to enlarge four lots and to add three new lots. It expressly stated that “existing easements and streets... shall remain unchanged.” 1995 Petition, Exhibit 11, at unnumbered pages 6-7; see *supra* at 10 (quoting and discussing petition). These stated purposes, which were reiterated in the decree that followed,¹⁰ jurisdictionally limited the court to expanding some lots and adding others and nothing more. The court could not have changed the streets because of this limit on its power.

B. The Chancery Court Procedure Requires That the “Objects and Purposes” of the Petition Be “Clearly Stated” in a Published Legal Notice

The Mississippi statute creating the Chancery Court procedure for amending a plat requires publication of a legal notice and summons in the local newspaper, “which publication shall clearly state the objects and purposes of the petition.”

¹⁰1995 Order, Exhibit 13 at unnumbered page 7; see *supra* at 12 (quoting and discussing decree).

The requirement that a legal notice be published is mandatory; a decree obtained in violation of the notice requirements of this statute is invalid and subject to being set aside. *Barrett*, 483 So.2d at 306. In *Barrett*, the party seeking a plat amendment did not comply with the statutory requirements for publication of notice. The Supreme Court therefore reversed the chancery court's refusal to set aside the decree. *Id.* at 307. As the court recognized, this requirement proceeds from requirements of due process, a "principle of hornbook constitutional law... implemented in" plat amendment procedure. *Id.* The legal advertisement, like the purposes stated in the petition, confines any plat amendment to the purpose stated in the advertisement. *Barrett* explicitly holds that the advertising process is a jurisdictional limit on the court's power. As with the Petition, the legal advertisement published in connection with the 1995 petition states that the plat amendment is being requested "in order to enlarge lots 143, 144, 145, and 147 and to add lots 148, 149, and 150." Proof of Publication, Exhibit 36.

The description in the legal notice published in 1995 is entirely consistent with the purposes of the plat amendment as stated in the Petition. The legal notice provides no suggestion that there are to be any changes in the roads or that any lot was being reduced in size or being changed so that a new road could be added. There is no suggestion in the legal notice that the developer intended to carve a 45-foot strip out of Lot 142 or 143. In fact, the legal advertisement states that Lot 142 and 143 is being enlarged.

C. Acting On a Plat Amendment Petition That States "streets... shall remain unchanged...", A Chancellor Has No Jurisdiction To Change The Streets

As discussed, *supra* at 21, the Mississippi Supreme Court has previously made it clear that the Chancery Court's jurisdiction is limited to the purposes stated in the petition seeking to amend the plat. *Reinecke*, 63 So. at 216.

The Petition in the 1995 Chancery Court Proceeding affirmatively stated that the plat amendment being sought (1) would not alter roads on the previous plat; and (2) would enlarge

(rather than reduce) the size of Lot 143. The Court in the 1995 proceeding, accordingly, had no jurisdiction to add a road or carve a 45-foot strip out of Lot 142 or 143.

D. Grand Oaks' Plans To Change The Streets Are Inconsistent With Its Legal Plats And Therefore Improper

The original Grand Oaks plat showed no street between lots 142 and 143 or on any part of those lots. To place a street there would "change the street" and change the plat. The 1995 plat amendment proceeding is the only plat amendment proceeding that has occurred in Grand Oaks. It did not and could not have authorized connecting a new street to Majestic Oaks because through that amendment "streets...remain[ed] unchanged...."

It is important to note that neither the portion of a plat in the court file behind the 1995 Decree (an image of which is found, *supra* at 12 and found as the last page of Exhibit 13 and at R.E. Tab 5) nor that filed in 2000 (an image of which is found, *supra*, at 14 and is Exhibit 5) contain any legend or other indication that might suggest that a portion of Lots 142 or 143 is to be used as a road. The chancellor below remarked upon this in his bench opinion, stating: "There is nothing here that designates what it is...." Tr. 116, R.E. Tab 2. The Mississippi Supreme Court has looked for such a designation to determine whether a plat established that a strip of land on the plat was dedicated as a public road. In *Mitchell v. McLarty*, 230 So.2d 215 (Miss. 1970), the question was whether there had been a dedication of public roads as described in a subdivision plat; a seventy foot strip had been used for a narrower road and part of the dam for a lake. Arguing that the plat established the dedication of that strip as a road, a neighboring property owner attempted to connect to the road. In holding there had been no dedication, the Mississippi Supreme Court referred specifically to the lack of designation of the strip as a street: "The seventy foot strip in question bore no designation as a street on the plat." *Id.* at 216.

Without a plat amendment to change the streets, they are necessarily the same as on the original 1994 plat. The lower court so found, holding that under the plats "the streets and

easements remain the same. The have not been altered.” Tr. 116, R.E. Tab 2. But the lower court failed to reach the obvious conclusion required by this finding: No connector road is therefore authorized by any plat.

The lower court attempted to avoid this result by two holdings, both in error. First, the court held that because the new plat places the 45 foot strip outside lots 143 and 142, that strip is “not a lot.” Tr. 115-117, R.E. Tab 2. This reasoning, apparently designed to avoid the requirements of a Grand Oaks covenant prohibition against placing a road on a lot,¹¹ does not support a conclusion that any plat amendment had authorized a connector road at lots 143 and 142.

Second, the lower court held that when Mrs. Niedfeldt signed a waiver in the plat amendment procedure

it was her duty then to know what she had signed her waiver on. And thus by not objecting at the time she approved the amended plat, and I think she is bound by it.

Tr. 117, R.E. Tab 2. This conclusion about waiver, an issue developed more fully below, quite literally begs the question: What “amended plat” is she bound by? What exactly was accomplished by the amendment? The answer is established by the petition and decree and their assurances that there were no street changes. Therefore, the plat amendment could not have authorized a connector road at Lots 143 and 142.

The error of the lower court’s ruling that Mrs. Niedfeldt had waived her objection to a road is highlighted by the lower court’s acknowledgement that nothing on the 2000 plat suggests that the 45 foot strip might be a road, that “[t]here’s nothing here that designates what it is...”

¹¹ *See infra* at 34.

Tr. 116, R.E. Tab 2. The 45 foot strip is nothing more than a patch of earth defined by metes and bounds; it is not defined—or dedicated—as anything.

There are two established methods for dedicating public streets. By one “well-settled” method, the land sold according to a plat “will dedicate the streets, alleys, squares, and other public ways marked on the map or plat to the public for public use.” *Nettleton Church of Christ v. Conwill*, 707 So.2d 1075, 1076 (Miss. 1997). Thus, that part of the plat marked as for public use is dedicated as such. Interestingly, in *Nettleton*, the developer had dedicated a strip of land for public use but not defined the particular use. The Mississippi Supreme Court held that the marking on the plat for public use effectively conveyed title to the public. Here, as the chancellor below stated, “nothing... designates what it is...” There is no dedication on the plat.

It is clear that Grand Oaks understood how to use this method of dedication of a street, as this is the method used in dedicating Majestic Oaks Drive as a public street in the first place.

Nettleton also describes the other method for dedication to public use, established by Miss. Code Ann. §21-19-63, which requires submission of a plat of the subdivision to the municipality for its approval, followed by the filing of the plat establishing the dedication in the land records of the county. *Nettleton*, 707 So.2d at 1076. That has not occurred here. That there has been no procedure before the municipality leading to the establishment of a new plat with newly dedicated roads is demonstrated by the fact that there is no such plat filed in the land records of Lafayette County; the only two plats were the original plat (in which there is no 45 foot strip) and the 2000 plat (in which there is no designation that might be taken to dedicated that strip to public use of any type—road, park, or otherwise).

Yet Grand Oaks has announced an unauthorized connector road on the strip at Lots 143 and 142. Such a road is clearly inconsistent with the legally authorized plats of Grand Oaks. The chancellor was in error to refuse to enjoin this unauthorized connector road.

E. In its 1995 Chancery Court Petition for a Plat Amendment, the Grand Oaks Developer Bound Itself to Make No Changes in the Existing Easements and Streets of Grand Oaks

The language in the Petition setting forth the particular circumstances and the legal notice published in a local newspaper “which... clearly state[s] the objects and purposes of the petition” amending the plat show—and limit—what was done in the 1995 plat amendment procedure. *See* Miss. Code Ann. § 19-27-31 (containing quoted language). Grand Oaks’s 1995 Petition states that the developer intends to enlarge lots 143, 144, 146, and 147 “to accommodate houses of a size and in conformity with others already constructed in Grand Oaks Subdivision.” 1995 Petition, Exhibit 11, at unnumbered pages 6. The Petition also states an intent “[t]hat lots 148, 149, and 150 should be added to the subdivision plat.” *Id.* at 6-7. Those are the only purposes stated; there is no mention of adding or changing streets, or that a street or right-of-way or any other strip of land might have been carved out of one of the lots. In fact, the possible purposes of a road or right-of-way is specifically negated by the Petition sworn by Dr. Rayner, which states: “the existing easements and streets as shown on the original Maps and Plats of the Grand Oaks subdivision shall remain unchanged.” *Id.* at 7. Additionally, the Petition contains an assurance that the Grand Oaks covenants are to remain unchanged. *Id.* These assurances were ratified in the decree, which contained the exact same assurances. 1995 Order, Exhibit 13 at unnumbered page 7, R.E. Tab 5.

The developer is bound through res judicata by the decree the developer obtained in a plat amendment procedure. *See Reinecke*, 63 So. at 216 (applying res judicata to limit scope of plat amendment decree).

Additionally, Grand Oaks, Inc. and its successor are estopped by the representations in the 1995 Petition. *White Cypress Lakes Development Corp. v. Hertz*, 541 So.2d 1031, 1035 (Miss. 1989) makes clear that both the initial developer and its successors are equitably estopped

under Mississippi law from using lands in the subdivision in a manner that is inconsistent with the general representations that the initial developer made in marketing lots, including the terms of the restrictive covenants which the Plaintiff seeks to enforce. Developers should also be equitably estopped from denying the representations they made in seeking a plat amendment. Similarly, in *PMZ Oil Co. v. Lucroy*, 449 So.2d 201 (Miss. 1984) a developer was equitably estopped to deny or abrogate a covenant which was communicated to purchasers before sale, referenced in their deeds, but not recorded, where lots owners had made substantial investment in building their home.

F. None of the Proceedings Before the City of Oxford Purported in Any Way To Comply with the Statutory Procedure for Altering a Subdivision Plat

In 1998, the following alternative statutory procedure for amendment of a recorded subdivision plat was adopted in Mississippi:

If the owner of any land which shall have been laid off, mapped, or platted as a city, town or village, or addition thereto, or subdivision thereof, or other platted area, whether inside or outside a municipality, desires to alter or vacate such map or plat, or any part thereof, he may petition the board of supervisors of the county or the governing authorities of the municipality for relief in the premises, setting forth the particular circumstances of the case and giving an accurate description of the property, the map or plat of which is to be vacated or altered, and the names of the persons to be adversely affected thereby, or directly interested therein. However, before taking such action the parties named shall be 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. Any alterations of a plat or map must be recorded in the appropriate location and a note shall be placed on the original plat denoting the altered or revised plat. No land shall be subdivided nor shall the map or plat of any land be altered or vacated in violation of any duly recorded covenant running with the land.

Miss. Code Ann. § 17-1-23(4)(Emphasis added). This statute gives a developer the alternative of petitioning the “governing authorities” of a municipality, which in the case of Grand Oaks would be the Board of Aldermen of the City of Oxford.

The 1998 statute is very similar to the statute authorizing the Chancery Court procedure to amend recorded plats, including many of the requirements discussed above. For example, it requires a formal petition "setting forth the particular circumstances of the case" and notice to all persons "adversely affected" or "directly interested" in the proposed plat amendment.

The 1998 statute has two significant differences from the statute creating the Chancery Court procedure.

First, this alternative requires agreement in writing in advance of all "adversely affected" or "directly interested" parties. This procedure for a plat amendment could only be used by the Grand Oaks developers if they had "obtained the written agreement of all affected parties." Miss. Atty. Gen. Opinion No. 2001-0041 (Feb. 9, 2001). The statute by its terms makes this requirement jurisdictional. The Board of Aldermen are prohibited from acting to alter a plat, if the developer does not have the written agreement of all affected parties. Second, the 1998 statute expressly provides that no land shall be subdivided and no map or plat of any land altered in violation of any duly recorded covenant running with the land. None of the zoning actions by the city officials meet these statutory requirements for an effective plat amendment.

Copies of three zoning cases relating to the Grand Oaks development were submitted in evidence at trial in response to a subpoena duces tecum to Tim Akers, City Planner for the City of Oxford, Mississippi, as custodian of those zoning records. Tr. 14-15 (admitting Exhibit 18). The three zoning matters were:

1. Case #1166 filed by the present developer to seek approval by the Oxford Planning Commission of an "overall PUD Amendment" on December 13, 2004;
2. Case #1204 filed by the present developer, giving the city notice of its intention to seek annexation in the future for the acreage included in the PUD amendment, which was heard on May 31, 2005; and

3. Case #1245 filed to obtain preliminary site plan approval by the Oxford Planning Commission in October 2005.

None of these zoning cases purports to follow the statutory requirements for approval of a subdivision plat amendment by the “governing authority” of a Mississippi municipality. First, none of these cases involve submission of a plat with setbacks, boundary lines, rights-of-way, etc., indicated in the way they appear on the subdivision plats prepared for Grand Oaks by an engineer in 1994, 1995, and 2000.

Instead, the plats submitted to the city in 2004 and 2005 are highly conceptualized, artistic presentations of the current developer’s “Master Plan” to show compliance with the green space and density requirements for Planned Unit Developments or PUDs. *See, e.g.*, all plats and PUD documents in Exhibit 18, in particular, unnumbered pages 5, 6, 9, 13, and 18. Of these three zoning matters, only Case 1166 went beyond consideration by the Planning Commission to consideration by the City of Oxford’s Board of Aldermen. Finally, the type of formal petition, disclosures, and notice required under Miss. Code Ann. §17-1-23(4) for amendment of a plat was not provided by the applicant in any of these zoning matters.

As demonstrated by Mrs. Niedfeldt’s appearance and objection on the record at the Planning Commission meetings, the applicant did *not* have the written agreement in advance of all “adversely affected” or “directly interested” parties for a formal plat amendment as required under Miss. Code Ann. §17-1-23(4).

Finally, approval of a plat amendment by the “governing authorities” of this municipality would not be possible, if the amendment included use of a lot as a road in violation of Grand Oaks’ existing covenants. *See* Miss. Code Ann. §17-1-23(4)(final sentence).

III. MRS. NIEDFELDT DID NOT WAIVE HER RIGHT TO OBJECT TO A NEW ROAD ON OR BETWEEN LOTS 142 AND 143

A. Mrs. Niedfeldt Cannot Be Said to Have “Knowingly” Waived Her Right to Object to a New Road at Lots 142 and 143 in a Proceeding Where She Was Expressly Assured No Roads in Grand Oaks Were Being Changed

Mrs. Niedfeldt responded to the 1995 Petition with a waiver of process and entry of appearance, that “consent[ed] and agree[d] that this court may hear said cause and enter a final decree....” Waiver of Process and Entry of Appearance, Exhibit 12. She consented to relief under a petition that gave her the express assurance that “existing easements and streets as shown on the original Maps and Plats of the Grand Oaks subdivision shall remain unchanged.” Yet, in dismissing her case, the court below based its ruling on a finding that Mrs. Niedfeldt had a duty to go behind the sworn assurances in the Grand Oaks petition:

I think when the plaintiff filed—when she signed her waiver it was her duty then to know what she had signed her waiver on. And thus by not objecting at the time she approved the amended plat, and I think she is bound by it.

Tr. 117, R.E. Tab 2. This holding is exactly backward—when Grand Oaks filed its sworn petition, it was its duty to know that it was limited by the representations made in that petition, and, by providing an assurance that it had no purpose to change a road, it is bound by that sworn petition.

Mrs. Niedfeldt cannot be said to have waived her right to challenge an amendment of the plat to authorize the opening of a new road, because:

Waiver presupposes full knowledge of a right existing, and an intentional surrender or relinquishment of that right. It contemplates something done designedly or knowingly, which modifies or changes existing rights or varies or changes the terms and conditions of a contract. It is the voluntary surrender of a right. To establish waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived.

Ewing v. Adams, 573 So.2d 1364, 1369 (Miss. 1990).

The question of the scope or extent of a waiver of process is evaluated in terms similar to other waivers. In *Ethredge*, 605 So.2d at 765-66, the chancellor had held that a waiver of process to consent to a guardianship waived a father's parental rights. The Mississippi Supreme Court reversed, holding that the chancellor had erred by viewing a waiver of a father's rights relating to a guardianship as extending to waiving parental rights altogether.

Here, the waiver is even more clearly limited: There was a specific representation by Grand Oaks that the proposed plat amendment was not going to change the roads or easements in Grand Oaks. The chancellor erred in finding that Mrs. Niedfeldt's waiver effectively waived her right to challenge the opening of and addition of a road into Majestic Oaks Drive. Not only did the 1995 petition fail to provide her with "full knowledge" concerning the road, it explicitly assured her no such road was to occur.

B. Jurisdictional Matters (Limits on a Chancery Court's Authority to Amend Subdivision Plats) Cannot Be Waived

Another limitation on the effect of Mrs. Niedfeldt's waiver is that she could not waive jurisdictional issues. "Jurisdiction over the subject matter of a proceeding cannot be conferred by consent or waiver." *Harry v. Harry*, 856 So.2d 748, 752 (Miss. App. 2003)(citing *Marshall v. State*, 662 So.2d 566, 576 (Miss. 1995)). Mrs. Niedfeldt cannot be said to have waived plat changes that went beyond the changes prayed for and sought in the 1995 Petition, because the prayer in the Petition jurisdictionally limits the scope of the amendment the chancellor may allow. *Reinecke*, 63 So. at 216; *see supra* at 21 (discussing *Reinecke* and the jurisdictional limit on the court's power).

C. The Waiver of Service Signed by Mrs. Niedfeldt in the 1995 Chancery Court Proceeding Cannot Deprive Her of Vested Property Rights Without Violating Constitutional Due Process Principles

This Court has previously held that the legislative enactment which gives the Chancery Courts authority to hear and adjudicate a proceeding to alter or vacate a subdivision plat

incorporates basic principles of “hornbook constitutional law.” *Barrett v. Ballard*, 483 So.2d at 305. *Barrett* held that it is “axiomatic that before one may be judicially deprived of a right” there must be (a) reasonable advance notice and (b) a meaningful opportunity to assert and defend that right. *Id.* The Court cited the leading case in which the United States Supreme Court established the due process requirements for notice, *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950). In *Mullane*, the United States Supreme Court established that a minimum requirement of due process is notice of exactly what is at stake: “The notice must be of such nature as reasonably to convey the required information....” *Mullane*, 339 U.S. at 314. The notices that were provided to residents of Grand Oaks such as Mrs. Niedfeldt provided no warning to of the changes now claimed by the developer to have occurred.

IV. USE OF THE 45-FOOT STRIP AS AN ACCESS ROAD WOULD VIOLATE THE PROTECTIVE COVENANTS OF GRAND OAKS PHASE V

The protective covenants of Grand Oaks provide:

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.

Corrective Protective Covenants, Exhibit 2 (¶11); *see* Tr. 6 (admitting exhibit); Tr. 32 (quoting passage). This provision unambiguously prohibits use of land within lots for street purposes unless there has been Architectural Control Committee approval.

If the intent to prohibit or restrict the use of land is expressed in “clear and unambiguous wording” in a restrictive covenant, it is well-established that enforcement is available in Mississippi courts. *See Sullivan v. Kolb*, 742 So.2d 771, 777 (Miss. App. 1999)(so holding); *Gast v. Ederer*, 600 So.2d 204, 206-07 (Miss. 1992). In construing covenants, “[o]ur touchstone remains the covenants themselves. For it is established in our law that clearly worded covenants, if lawfully made, are indeed enforceable as written.” *Andrews v. Lake*

Serene Property Owners Assoc., Inc. 434 So.2d 1328, 1332 (Miss. 1983). Mississippi courts read a protective covenant in “its ordinary sense” and interpret it based on the “plain meaning of the words in issue.” *Sullivan v. Kolb*, 742 So.2d at 776-77.

The “plain meaning” of the words used in the Restrictive Covenants prohibit both the use of a lot “as a street or easement” and prohibits the sale of a lot for street purposes without written consent of the Architectural Control Committee.

The Mississippi Supreme Court in *Goode v. Woodgreen Homeowners Ass’n*, 662 So.2d 1064 (Miss. 1995), made clear that it will uphold enforcement of restrictive covenant provisions requiring the approval of architectural control committees. In *Goode*, the chancellor permanently enjoined the construction of a house commenced without architectural committee approval of the plans. The protective covenants required committee approval. Goode’s arguments that such a requirement was unenforceable or unreasonable were rejected.

In the court below, Grand Oaks Communities argued that the plat amendment placed the forty-five foot strip outside the boundaries of Lot 143 and therefore it cannot be said that a road is being placed on a lot. Tr. 54-55. Grand Oaks cited *Andrews v. Lake Serene*, 434 So.2d 1328 (Miss. 1983) for the proposition that, once a plat has been amended, the restrictive covenants are to be read as if they were subject to the amended plat. Grand Oaks then argued that, because the forty-five foot strip was effectively removed from Lot 143 by the plat amendment, the provision of the protective covenants that prohibit use of a lot for a street no longer applies. For the rule in *Lake Serene* to have any application, Grand Oaks must first establish that there has been an effective plat amendment to accomplish its goals—to remove part of the land within Lot 143, and to change the roads within the subdivision. As argued, *supra* at 19-29, that did not occur.

The court below did not make a finding on Mrs. Niedfeldt's claim that the road violates the restrictive covenants; the chancellor took the apparent view that its finding that Mrs. Niedfeldt's waiver to the 1995 amendment was not just effective to waive rights under the plat amendment procedure but also waived Mrs. Niedfeldt's rights under the protective covenants. Such a reading cannot be. Her rights under the protective covenants are contractual in nature, proceeding from the covenants, and are necessarily independent of her due process and other rights under the plat amendment statute.

There was no evidence at trial of written approval by the Architectural Control Committee of Grand Oaks of any new road. While Dr. Rayner, who was the president of Grand Oaks, Inc. and a member of the Architectural Control Committee at one time, testified that the committee authorized an engineer to make the plat, and that this approval was written down, Tr. 70-71, 87, no such writing was entered into evidence at trial. When Dr. Rayner stated that the Architectural Control Committee approved the amended plat, he referred to the plat approved in the chancery matter through the petition Dr. Rayner had signed; that petition explicitly provides that the existing easements and streets on the original plats and maps of Grand Oaks are to remain unchanged. Tr. 87-88. At no time did the Architectural Control Committee approve the use of any lot for a street or easement. Tr. 90. More importantly, Rayner's testimony about what he remembers hoping to accomplish in amending the plat—a new right-of-way—does not match in any way the petition he actually signed. His recollection contradicts the assurance in the petition and the finding in the decree that “existing easements and streets...shall remain unchanged.” The record below cannot support a finding that there has been Architectural Control Committee approval of the use of a portion of the subdivision lots as a road or street.

V. USE OF THE 45-FOOT STRIP AS A ROAD PROVIDING ACCESS TO MORE THAN 2000 HOMES WOULD VIOLATE THE STREET-WIDTH AND RIGHT-OF-WAY REQUIREMENTS IN THE CITY OF OXFORD'S LAND DEVELOPMENT CODE.

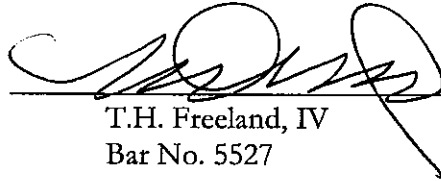
Use of a 45-foot right-of-way for a road with the type of traffic contemplated under the present Developer's Master Plan and the recently approved Site Plan for Phase II would not comply with the City of Oxford's Land Development Code and zoning requirements. For example, under Section 162.04 of the Land Development Code of the City of Oxford, a road with traffic from 2112 units, with more than half of that number being multifamily units, would require a minimum 48-foot street width and a 68-foot right-of-way. *See* page 105 of the City of Oxford's Land Development Code attached hereto as Exhibit A.

The Chancellor failed to reach this issue, although it constitutes a separate ground for enjoining use of the 45-foot strip as a road in the context of this development. Obtaining the right to use any other portion of Lots 142 or 143 to widen the right-of-way would violate the Grand Oaks covenants and dedicating any additional land for the road bed or required right-of-way would require another amendment of the recorded subdivision plat.


CONCLUSION

There has been no plat amendment that allows the use of any part of the original Lots 142 and 143 of Grand Oaks as a road. The Petition and Decree in the 1995 plat amendment proceeding both explicitly provide that the street of Grand Oaks will remain unchanged. Finally, even if the 1995 plat amendment had the effect of removing a forty-five foot undesignated strip from Lot 142 or 143, that still would not justify Grand Oaks' use of that strip as a road. The lower court was in error in refusing to enjoin this unauthorized change to the legally established Grand Oaks plat.

Respectfully submitted, this the 20th day of June, 2007.



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CERTIFICATE OF SERVICE

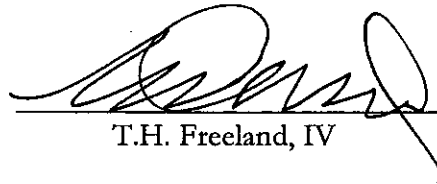
I, T.H. Freeland, IV certify that I have this day, by United States mail, first class, postage prepaid, mailed a copy of the foregoing BRIEF OF APPELLANT to the following:

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Hon. Glen Alderson
246 Chancery Bldg.
300 N. Lamar Ave.
Oxford, MS 38655

This the 20th day of June, 2007.



T.H. Freeland, IV

7. Lots not served by Public Sewer and Water
 - a. Unsewered Lots. Any such lot developed or occupied after July 1, 1992, shall require Mississippi State Department of Health approval of any individual on-site wastewater disposal system planned on any residential lot. Whenever the applicant submits a preliminary plan containing more than thirty-four (34) lots, a feasibility study on wastewater disposal shall be sent to the Mississippi Department of Environmental Quality and a copy of their response shall be submitted with the preliminary plan application to the Planning Commission. All lots must be of sufficient size to allow the installation of an individual wastewater disposal system.
8. Building Lines.
 - a. Building setback lines shall be shown on all lots intended for residential use and on commercial and industrial lots adjacent to residential areas. Such setback lines shall not be less than the requirements of the official Zoning Ordinance.
 - b. In the absence of zoning regulations, building setback lines shall not be less than twenty (20) feet from the right-of-way of the street or highway upon which the lot fronts.
 - c. Restrictions requiring buildings to be set back to such building setback lines shall either be shown on the plat or shall be contained in a separate recorded document and referred to on the plat.
9. Lot Numbering. All lots established for building and common area shall be designated by numbers listed consecutively within a block. Lot numbering may be cumulative throughout the subdivision if the numbering system continues from block to block in a uniform manner.
10. Blocks.
 - a. The lengths, widths, and shapes of blocks shall be determined with due regard to:
 - 1) Provision of adequate building sites suitable to the special needs of the type of use contemplated.
 - 2) Zoning requirements as to lot sizes and dimensions.
 - 3) Needs for convenient access, circulation, control and safety of street traffic.
 - b. Block lengths shall not exceed twelve hundred (1,200) feet, or be less than four hundred (400) feet.
 - c. Block widths shall not be less than two hundred (200) feet.
 - d. Pedestrian crosswalks, not less than six (6) feet wide, shall be required where deemed essential to provide safety as required by the Planning Commission and the Manual on Uniform Traffic Control Devices (MUTCD) Standards.

162.04 Streets

1. General Arrangement and Layout. The street pattern shall be based upon the following general design criteria;

- a. Provide for adequate vehicular access to all properties within the development.
- b. Provide street or road connections to adjacent properties to ensure adequate traffic circulation within the general area.
- c. Provide a local residential street system which discourages through traffic and provides adequate access for fire, police and other emergency vehicles.
- d. Provide a sufficient number of collector roads adequately sized to accommodate the present and future traffic demands of an area.
- e. Provide streets and roads in accordance with the Future Transportation and Circulation Plan of the Comprehensive Plan.

2. Classification of Public Streets or Roads

- a. Arterials. Streets, roads or highways having the primary purpose of carrying through traffic and the secondary purpose of providing access to abutting properties.
- b. Collector. A minor amount of through traffic may be carried on collector streets, but the system primarily provides service access and carries local traffic movements within residential neighborhoods, or commercial and industrial areas.
- c. Locals. Residential streets or rural roads not classified in a higher system, primarily providing direct access to abutting land and to collector streets. They offer the lowest level of mobility and usually carry very little truck traffic. Service for through traffic is deliberately discouraged.
- d. Marginal Access. A frontage road parallel to a limited access roadway providing direct access to abutting land and collector streets.

3. General Access and Circulation Requirements

- a. Number of Access Points. Residential developments with more than two hundred (200) lots or dwelling units shall have at least two (2) separate points of public road access.
- b. Non-Residential developments shall provide sufficient public road access to accommodate the ultimate traffic volume anticipated, and to enable safe and convenient service by police, fire, and other emergency vehicles.
- c. Marginal Access Roads. Where a subdivision borders on or contains a limited access right-of-way, the planning Commission may require a street approximately parallel to and on each side of such right-of-way at a distance suitable for the purposes in residential zones, or for commercial or industrial purposes in appropriate zones. Such distances shall also be determined with due regard for the requirements of approach grades and future grade separations.
- d. Adjacent Properties. Street stubs into adjacent properties may be required to provide greater interconnectivity and ensure adequate future circulation.
- e. Reserve Strips. Strips of land preventing access to the right-of-way at the terminus of, or adjacent to, existing or proposed roads shall not be permitted unless approved by the Planning Commission.

4. Right-of-Way Width

- a. Design Standard. The minimum widths of street and road rights-of-way and pavement widths, measured perpendicularly from lot line to lot line, shall be as shown on such plan and not be less than the following:

Type of Public Street	Right-of-Way (in feet)	Street Width (in feet)
Major or Arterial	100	64
Collector in commercial, industrial, and multi-unit residential areas	68	48
Collector in one- and Two-Unit residential areas	60	40
Minor	50	28
Marginal Access in non-residential areas	46	36
Marginal Access in residential areas	36	26

- b. Variation in Right-of-Way. Any variation in right-of-way or street width requirements shall be requested in writing.

5. Right-of-Way Dedication

- a. Arterial Roads. Those roads designated in the Comprehensive Plan shall either be dedicated, or a permanent reservation shall be provided, and front building setbacks shall be shown on the final plat as measured from the proposed right-of-way.
- b. Dedication for collector streets shall be made in accordance with the standards set forth in Section 162.4, paragraph D of these regulations. A dedication variance may be granted for developments with frontage on existing collector streets if it is determined that a variance would not adversely affect current or future traffic movement and either:
- 1) The collector road is existing and fully developed on both sides of the road such that additional dedication and widening is not feasible and, the collector road dedication is not at an intersection with a minor or principal arterial, or another collector road which may require additional right-of-way for turn lanes or other traffic control measures;
 - 2) The collector street is not likely, in the foreseeable future, to serve enough traffic volume to justify requiring additional dedication.
- c. Local Streets. Dedication for local streets shall be in accordance with Section 162.4. Additional dedication for existing local streets may be granted a variance under the criteria outlined above in Section 162.4.
- d. Partial Street Dedications. Partial dedications may be permitted only in those instances where it is necessary for the proper development of the property and is in the public interest to locate a public street on a common property line. Sufficient right-of-way shall be provided for at least twenty-four (24) feet of pavement, in addition to curb, gutter and sidewalk when required by the provisions of these regulations.

6. Access Limitations

- a. Access shall be provided to all lots from dedicated public streets unless otherwise prohibited or modified below.
- b. Minor and Principal Arterial Roads.
 - 1) Access Limitation – Where a subdivision abuts an existing or proposed arterial, double frontage lots with no access to the arterial, lots with rear service drives, common access drives, or other treatment may be required;
 - 2) Residential Driveways – Driveways should not be permitted on arterials. Where this requirement cannot be met, shared or common driveways may be required. All driveways shall be designed to provide egress in a forward motion and must be constructed of concrete or bituminous material.
- c. Ingress-Egress Easements. Ingress/egress easements shall be shown graphically on the preliminary plan, and on the final plat accompanied by a statement describing the responsibility for maintenance.
- d. Restricted Access. All access shall be graphically indicated on the preliminary plan and final plat.

7. Driveways / Curb Cuts

- a. General Design. Curb cuts shall be located and designed to provide safe and convenient ingress and egress to the site, and shall be designed in accordance with City of Oxford policies and standards. No curb cut shall be closer than twenty (20) feet from the point of curvature of a corner radius.
- b. Number. Multiple commercial and industrial curb cuts for driveways within a subdivision on an arterial street are discouraged, and shared curb cuts and internal access between lots and uses are encouraged.
 - 1) Whenever possible curb cuts shall be located directly across from one another or offset from curb cuts or intersections on the opposite side of the street by at least one hundred fifty (150) feet.
 - 2) Curb cuts, other than shared curb cuts, shall be located at least ten (10) feet from any property line.
 - 3) Where uses abut the major arterials, curb cuts for driveways shall be spaced at three hundred (300) feet.
 - 4) Variations from the standards shall be permitted at the discretion of the Planning Commission where the effect would be to enhance the safety, efficiency of travel and operation of the roadway. Examples can include the use of joint driveways, cross easements, service drives and alignment of median openings with existing access connections.

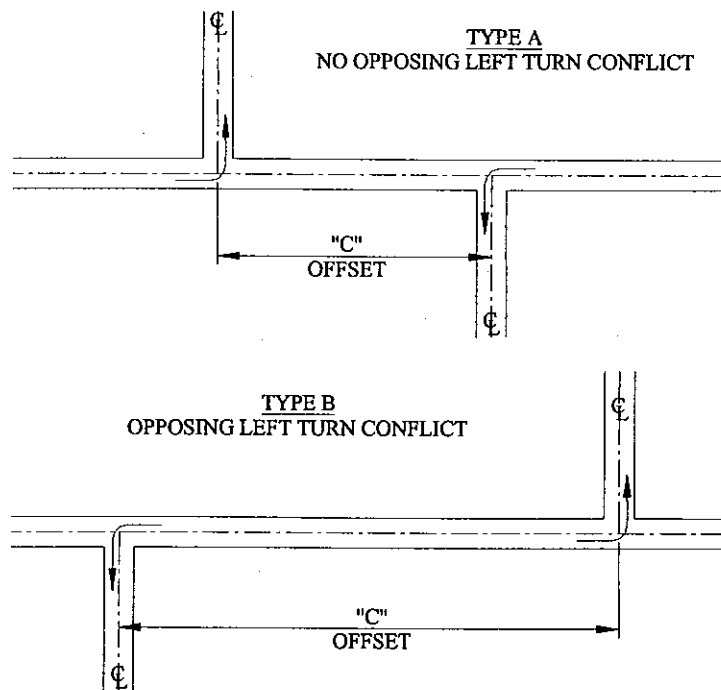
8. Intersections

- a. Spacing. Intersections on the same side of a street shall be spaced a minimum of three hundred (300) feet apart for arterial and collector streets, and one hundred fifty (150) feet for minor streets, measured from centerline to centerline.

- b. Angle. Streets shall be laid out so as to intersect as nearly as possible at right angles. A proposed intersection of two (2) new streets at an angle of less than seventy-five (75) degrees shall not be acceptable. Not more than two (2) streets shall intersect at any one point unless specifically approved by the Planning Commission.
- c. Centerlines. The centerlines of two (2) streets intersecting the same road on opposite sides shall be offset as shown and illustrated in Figure 1. Offset dimension "C" between intersections is categorized by the type of streets involved. If the two legs creating the offset are different types of streets, the shorter of the offset dimensions "C" shall apply.

Type of Street	Type A (in feet)	Type B (in feet)
Arterial	300 feet	400 feet
Collector	200 feet	250 feet
Minor	150 feet	150 feet

FIGURE 1



- d. Radii. Minimum radii of intersections of property lines at arterial and major street intersections shall be rounded with a radius of twenty-five (25) feet. An increased radius shall be required when the angle of intersection is less than ninety (90) degrees or when the intersection involves an arterial or major street. Property line radii at street intersections involving arterial or collector streets shall be not less than thirty-five (35) feet. The City Engineer shall determine the appropriate corner radii and make recommendation to the Planning Commission.

9. Curves

- a. Horizontal. The minimum centerline radius permitted for each street classification is shown below:

Type of Street	Minimum Radius (in feet)
Arterial	825
Collector	400
Minor	100

- b. Vertical. Every change in street grade shall be connected by a vertical curve designed to afford a minimum sight distance of two hundred (200) feet as measured from a driver's eyes, which are assumed to be four and one-half (4 1/2) feet above the pavement surface, to an object four (4) inches high on the pavement. Vertical curves shall be of standard parabolic design.

10. Turnarounds (Cul-de-Sac)

The minimum radii for all public streets and roads on the turnaround end of the cul-de-sac shall be fifty (50) feet for right-of-way and forty (40) feet for the paving surface.

11. Sight Distance

The minimum sight distance for the various street and road types are shown below:

- a. Stopping Sight Distance. Measured in feet on a vertical curve between point, three and three-quarters (3.75) feet, and one-half (0.5) foot above the centerline of the finished grade.

Type of Street	Minimum Distance (in feet)
Arterial	350
Collector	275
Minor	200

12. Grades

Grades on arterial and collector streets shall not exceed seven (7) percent. Grades on all other streets shall not exceed ten (10) percent. The minimum grade for street construction shall not be less than one-half of one percent (0.5%).

13. Tangents and Center Radii

- a. Minimum centerline tangents. Permitted minimums on approach to intersections are shown below:

Type of Intersection	Tangent Length (in feet)
Arterial with Arterial	200
Arterial with Collector	200
Collector with Arterial or Collector	100
Collector with Minor	75
Minor with Minor or Other	50

- b. Tangents Between Curves. Between curves there shall be a centerline tangent not less than three hundred (300) feet in length on arterials, and one hundred (100) feet on all collector streets. No tangent is required on minor, loop, or cul-de-sac streets.

14. Length of Dead End Street or Road

Dead-end streets designed to be so permanently shall not be longer than eight hundred (800) feet in length and shall be provided at the closed end with a turnaround having an outside roadway diameter of at least eighty (80) feet, and a street property line diameter of at least one hundred (100) feet.

162.05 Easements.

1. Easements across lots or centered on rear or side lot lines shall be provided for utilities where necessary and shall be at least five (5) feet wide for side lot lines and fifteen (15) feet wide for rear lot lines.
2. Whenever any stream or important surface drainage course is located in an area which is being subdivided, the sub-divider shall provide an adequate easement area along each side of the stream for the purpose of widening, deepening, sloping, improving, or protecting the stream or drainage course. the adequacy of the easement shall be determined by the City Engineer.

162.06 Public Sites and Open Spaces.

1. Where a proposed park, playground, school or other public use facility is located in whole or in part in a proposed subdivision, the Planning Commission may require the sub-divider to offer the city an option to purchase such areas on reasonable terms.
2. Where deemed essential by the Planning Commission, upon consideration of the particular type of development proposed in the subdivision, and especially in large-scale neighborhood unit developments, the Planning Commission may require that the city be offered an option to buy such other areas or sites of a character, extent, and location suitable to the needs created by such development for schools, parks, and other neighborhood purposes.

(Ord. of 8-30-66, 5 I(G))

162.07 Substandard Land.

Land subject to flooding and land deemed to be uninhabitable because of poor drainage or other reasons shall not be platted for any use which may increase danger to health, life, or property, or aggravate flood or other hazards. Such land within the plat shall be set aside for such uses as shall not be endangered by periodic or occasional inundation or shall not produce unsatisfactory conditions. However, this shall not be construed as precluding subdivisions of a given plot of ground, providing the owner agrees to install storm sewers or other drainage structures adequate to remedy the situation, as prescribed by the City Engineer.

(Ord. of 8-30-66, § 3(H))

162.08 Digital Records.

The subdivision developer shall provide to the city, at the time of acceptance of the subdivision improvements, a digital representation of the final subdivision plat and all improvements to be accepted by the city. Digital record drawings shall consist of one (1) file for each sheet of "as built" plans and one (1) file for each sheet of the final plat. All digital files shall be in a format as required by the City Engineer.