IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NUMBER 2008-CA-00066

JOHN T. WHITLEY APPELLANT

VS.

CITY OF BRANDON, MISSISSIPPI APPELLEE

APPELLANT'S BRIEF

On Appeal from the Judgment of the Chancery Court of Rankin County, Mississippi.

HONORABLE DAN FAIRLEY-CHANCELLOR

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CERTIFICATE OF INTERESTED PERSONS

NO: 2008-CA-00066

John T. Whitley vs. City of Brandon, Mississippi

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 Justice of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

John T. Whitley	Appellant Herein
City of Brandon, Miss.	Appellee Herein
Hon. Mark C. Baker	Attorney for the Appellee
Hon. Harry J. Rosenthal	Attorney for the Appellant
Hon. Dan Fairley	Rankin County Chancery Ct. Judge

All members of the Board of
Alderman City of Brandon, Miss,

Mayor City of Brandon, Miss

HARRY J. ROSENTHAL- ATTORNEY
FOR THE APPELLANT-JOHN WHITLEY

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STATEMENT OF THE CASE

THIS CASE involves an appeal of the Chancellor's ruling which was adverse to the Appellant, and contrary to a constitutional right guaranteed to property owners by common law in the State of Mississippi for a continuation use of noneonforming use which was lawfully and in use prior to the annexation of the Appellant's property into the City of Brandon, Mississippi.

Historical Background

The Appellant, John T. Whitley, and his father and grandfather before him has maintained a ninety (90) acrea farming operation in Rankin County, Mississippi at or near Highway 471 for a period of time in excess of one hundred (100) years raising growing crops, hogs, cattle, horses, with the Appellant, John T. Whitley, still in the same farming operation having at this time and prior to the City of Brandon's annexation more than fifty (50) horses and cows and other livestock located on the subject ninety (90) acre farm. The "farm" has various associated and farm related equipment situated on the subject property, consisting of various trucks, trailer, fork lift, tractors and a number of automobiles which had been stored on the appellant's property many years prior to the City of Brandon's annexation of the Appellant's property, and of which many of the trailers and

automobiles were used by the Appellant for storage of his farming equipment, feed and as shelter for his farm animals.

The Appellant, Whitley, maintains, that it has been the laws of the State of Mississippi for many years that the right of property owners to a continuation of a nonconforming use is a right that is one of many rights guaranteed to property owners in the State of Mississippi and that his farming operation and the use of the various equipment located on his property prior to the annexation by the City of Brandon should be a continuing right of the property owner.

Secondly, the Appellant contends that his storage of the various motor vehicles located on his property prior to the City of Brandon, Mississippi's annexation should be a continuing right of nonconforming use of the Appellant due to the fact that he had these vehicles stored on his property for period of time in excess of three (3) years or more prior to the City's annexation; that the same was lawfully stored under the ordinance of the County of Rankin, Mississippi and that over the many years of operation and storage the Appellant or his mother and father prior to their death never had a complaint or any objection from the Rankin County Board of Supervisor regarding his farm and storage of his vehicles and equipment.

In May 29, 2007 the Chancery Court of Rankin County, Mississippi entered a Final Judgment Approving the Enlargement and Extension of the Boundaries of the City of Brandon, Mississippi.

Approximately one month afterward on or about June 6, 2007 an office of the City of Brandon Zoning Enforcement Office sent a certified letter to the Appellant notifying him, that he was in violation of the zoning ordinances of the City of Brandon, Mississippi.as follows: (see exhibit "o")

> "IPMC 302.8 (Motor vehicles) Except as provided for in other regulations, no inoperable or unlicensed motor vehicle shall be parked, kept or stored on any premises, and no vehicle shall at any time be in a state of major disassembly, disrepair, or in the process of being stripped or dismantled."
>
> "Section 415 (Parking and storage of vehicles requiring licenses and state inspection stickers) Vehicles or trailers of any kind or type which require licenses or state inspection stickers, but are without current license plates or do not have current state inspection stickers affixed to the vehicle or trailer, shall not be parked or stored on any residentially zoned property other than in completely enclosed buildings."
>
> Section 1901.3.A (Parking) No parking shall be provided or allowed in the minimum yards of any residential district except in the driveways of single-family and two-family dwellings. "All driveways must be paved."

The City of Brandon Division of Zoning Enforcement gave the Appellant thirty (30)Day to correct the alleged zoning violations.

Thereafter on or about August 29, 2007 the Appellant, John T. Whitley, was issued three (3) City of Brandon's Ordinance

Violation Ticket on the aforesaid three (3) ordinances.

Thereafter on or about September 5, 2007 the Appellant, John T. Whitley appeared before the Brandon Municipal Court and was found guilty of violation of each of the ordinances and was finds One Thousand Five Hundred ($1,500.00) plus cost of court ($288.00) for a total of $1,788.00. The Appellant, John T. Whitley thereafter immediately filed a notice of an appeal of his conviction to the County Court of Rankin County, Mississippi.

On or about September 20, 2007, the City of Brandon, Mississippi filed their Complaint For Injunction and Other Relief against the Appellant (Exhibits page 6) to require the Appellant to:

> "to remove all vehicles from the present location which are in violation of cited ordinances, and prohibit the Defendant from locating the vehicles in any fashion on the subject property that violate the Municipal Ordinances or any other statutes, Ordinances and/or regulations of the State of Mississippi, Rankin County."

The City of Brandon, Mississippi filed their Complaint in the County Court of Rankin County, Mississippi and the Appellant, Whitley objected to the jurisdiction of the County Court Section 9-9-23 of the Mississippi Code, 1972 as amended; and after a hearing was held before the County Court Judge; Judge McDaniel ruled that he does not have original jurisdiction to

issue injunction, and he entered an Order transferring the cause to the Chancery Court of Rankin County, Mississippi and requiring the Appellant, Whitley, to pay the required fee transfer fee to the court.

On December 12, 2007 a trial was held before the Chancery Court of Rankin County, Mississippi in cause number 62607 on the City of Brandon's Complaint For Injunctive Relief. After a trial of this cause, the Chancellor found that he had jurisdiction of the parties and of the subject matter under the case of Johnson vs. Hinds County, Mississippi (1988) 524 So.2d 947 and Brooks vs. City of Jackson, a (1951) Supreme Court decision which gave the Chancery Court the power and the authority to enjoin parties for violation of zoning ordinances and to the enforcement of other ordinances enacted by a municipality.

The Chancellor ordered the Appellant, Whitley, to remove from his property located at Highway 471, Brandon, Mississippi (the farm) each and every pickup and passenger cars located on the property including the 18 wheeler, a dump truck, blue tractor.

The Chancellor's Order gave the Appellant, John T. Whitley, until January 31, 2008 at 5:00 o'clock P.M. to remove the vehicles. Further, the Appellant was enjoined from locating

any other vehicles in violation of the city ordinance on the appellant's property.

On January 4, 2008 the Appellant filed a Motion For New Trial or Reconsideration of the Judgment entered in this cause on December 14, 2007, and filed a Notice of Appeal of the Chancellor's Ruling to the Supreme Court of the State of Mississippi (Exhibit P-108)

On January 10, 2008 the Chancellor entered an Order denying the Appellant's Motion for New Trial and Reconsideration.

The Appellant fileda Designation of Record with the Clerk of the Chancery Court on January 4, 2008 posted a surerty bond in the amount of $775.00 to the clerk to prepare the record $1,258.00 (Exhibit page 113) Certificate of Compliance M.R.A.P. 11(B). Rules of Mississippi Supreme Court State of Mississippi.

Notwithstanding the Appellant's pending appeal to the Supreme Court State of Mississippi, the City of Brandon filed their Motion For Contempt, Permission To Enter Property and Execute on Judgment and Related Relief. (Exhibit pahe 116)

The Appellant fileda Motion to Set Supersedeas, and the Chancellor held a hearing on February 19th , 2008 on the City of Brandon's Motion For Contempt.

The Court entered a Judgment (Ex. 122) wherein the Appellant, John T. Whitley, was found to be in contumacious contempt for failing to abide by the court's prior Judgment, and thereafter on February 21, 2008 entered a Supplemental Order (Ex. 124) setting a superedeas bond in the amount of $1,250.00 which was afterward posted by the City of Brandon, Mississippi and denying the Appellant's right to post a superedeas bond for a stay pending an appeal of his case to the supreme court.with his appeal having been Notice to the Mississippi Supreme Court in January 4, 2008.

Thereafter on March 11, 2008 the Chancellor signed an order (Ex. 134), which authorized the Sheriff of Rankin County, Mississippi to arrest the appellant and to incarcerate him in the Rankin County Jail at Brandon, Mississippi until he purged himself of contempt by the removal of all of the vehicles and equipment and related parts which had not been in compliance with the Judgment of the Court entered on December 12, 2007.

The Appellant, John Whitley, was immediately arrested and placed in the Rankin County Jail at Brandon, Mississippi and remained in the custody of the Sheriff for a period on eight (8) days and was released by the Sheriff at his request for the same due to the age of the Appellant and his medical condition. (Ex. 147). The majority of the Appellant's vehicles and farm equipment were removed from his property during the time that the Appellant was incarcerated by the City's contractor.

ERROR NUMBER ONE

THE CHANCELLOR ERRED AS A MATTER OF LAW IN HIS FAILURE TO RECOGNIZE THE APPELLANT'S CONTINUED NONCONFORMING USE OF HIS PROPERTY AFTER THE ANNEXATION BY THE CITY OF BRANDON

The evidence clearly reflected that the Appellant, John T. Whitley and his father and mother and grand father before him for more than one hundred (100) years had used the subject property on Highway 471 for a farming operation wherein they raised horses, cows, chickens, pigs, sheep and grew various crops on the subject property.

The evidence further reflected that the subject farming property was situated in Rankin County, Mississippi and prior to the City of Brandon, Mississippi Annexation, that the property was under the jurisdiction of the Rankin County Board of Supervisors; that over a lengthly period of time prior to the City's Annexation, the appellant and his family members utilized a portion of the property for the storage of various truck, trailers and farm equipments, which in many cases served as a place for the appellant to store his feed and various tools and equipment used in his farming operation due to the fact that he did not have a barn on his property for the storage of his feed and equipment, automobile parts of every description, wood and lumber, and bales of hay.

The testimony of several witnesses at the trial of this cause each testified that there had never been any complaint filed against the Appellant or his family members for any

violation of the zoning ordinance of Rankin County, Mississippi. In addition, the witness each testified that there had been no complaint filed by any individual citizen of Rankin County, Mississippi with regards to the appellant having and maintaining his trucks and cars and other equipment stored on the Appellant's property.

The first and only complaint was filed by the City of Brandon, Mississippi on or about June 26, 2007 approximately one month after the City of Brandon, Mississippi annexed the subject property into the City of Brandon, Mississippi.

The Supreme Court of the State of Mississippi had long ago recognized the right of property owners, that a "continuation use of a nonconforming use is a right that is one of the many rights guaranteed to property owners in the State of Mississippi by common law. Heroman vs. McDonald 885 So2d 67 (Miss. 2004).

Further, the Mississippi Supreme Court in 1949 in the case of Jones vs. City of Hattiesburg 42 So2d 717; Justice Hall in his opinion stated, "

> "We are of the opinion that in the case at bar Section 8 of the zoning ordinance clearly authorizes the continued use of the property in question for commercial purposes ..... and that the action of the city authorties in denying such use of the property is an unreasonable and arbitary interpretation of the zoning ordinance which tends to deprive the company of its property and the use thereof, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 14 and 17 of the Mississippi Constitution of 1890." (emphasis added)

The Mississippi Supreme Court in 1989 had the case of Richard Barrett vs. Hinds County, Mississippi, 545 So2d 734, wherein Justice Prather writing for the Court stated:

> "The nature of the right to a non-conforming use is a property right. It has been held that the right to continue a non-conforming use, once established and not abandoned, runs with the land."

Appeal of Indianhead, Inc. 414 Pa. 46, 198 A.2d 522 (1964) and Eilner vs. Kretiz Corp. 404 Pa. 406; 172 A.2d 320 (1961) Faircloth vs. Lyles, 592 So2d 941.

In the Barrett case, the issue was somewhat similiar to the issue now before the cour t in the Whitley case; in the Barrett case, Richard Barrett contended "that it was error for the trial court to allow the zoning ordinances in question to be applied retroactively against him in violation of his constitutional rights. He maintained as well as the Appellant, Whitley, now maintains, that his use of his property pre-existed the adoption of the zoning ordinances and in the case of Whitley was in existence prior to the annexation of his property into the City of Brandon, Mississippi, and was therefore, a pre-existing non-conforming use exempt from the City of Brandon zoning ordinance provisions.

The Appellant, Whitley maintains that the Chancellor totally failed to recognize the pre-existence of the storage of his vehicle and equipment on his subject property and was clearly in error for the enforcement of the zoning ordinances prohibiting the same.

The Constitution of the United States of America as well as the Constitution of the State of Mississippi in the Fifth and Fourteenth Amendments and Section 14 and 17 of the State Constitution clearly prohibit the making and enforcement of "ex post facto laws", the same being prohibited. A statute or law (in this case the adoption of the vague zoning ordinances and the ultimate annexation of the Appellant's property into the City of Brandon, Mississippi and then the enforcement of their ordinance retroactively through both civil and criminal means was clearly an abuse of power and a prohibited act to enforce a "ex post factor" law ignoring the Appellant's right to the continuation of a nonconforming use of his property which existed prior to the city's annexation; having done so, the city's abuse of power as was shown here, both civil and criminal with relation to the offense , the punishment of being incarcerated in jail were clearly to the disvantage of the Appellant and contrary to fair play under the rules of our judicial system and the same should not now be allowed by this Court. 11 Am Jur 1176; "after the thing is done; after the fact or the situation existed." Calder vs. Bull, 1 Led (U.S. 648).

The evidence is no disputed that the Appellant's farming operation and storage of his vehicles and equopment existed many years prior to the City's Annexation and even prior to the Adoption of the City of Brandon's Zoning Ordinances. The evidence presented at the trial of this cause did not support the Chancellor' findings.

ERROR NUMBER TWO

THE CHANCELLOR ERRED IN FAILING TO RECOGNIZE THE APPELLANT'S PROTECTIVE RIGHTS UNDER THE MISSISSIPPI RIGHT TO FARM STATUTE 49-17-29 MISSISSIPPI CODE ANNOTATED , AND FAILED TO PRECLUDE ANY CLAIM FOR NUISANCE ACTIONS

The facts are undisputed that the Appellant, John Whitley, had his farming operation and storage yard in existance for many years prior to the annexation by the City of Brandon, Mississippi in May 29, 2007.

Further, it is undisputed that the Appellant stored his farming equipment and various vehicles on the subject property many years prior to the annexation.

In the case now before the Court, the City of Brandon in their attempts to enforce their ordinance regardless of the continued non-conformity rights of the Appellant, sought to circumvent the rights of the Appellant for a continued non-conformity use of his property as existed prior to the city's annexation thereof. In their effort to do so, the City of Brandon's action sought to have the Appellant's prior use of the land for farming and storage of automobiles declared to be a public nuisance in violation of the zoning ordinances of the City of Brandon, Mississippi.

The Appellant, John Whitley, maintains, that he is first protect against the enforcement of the City of Brandon's Zoning Ordinance because of his rights to a continued use of a non-conforming use, and secondly, that the City of Brandon's

Zoning Ordinance were unconstitutional vague, ambigiguous and otherwise unenforceable.

The City of Brandon's action against the Appellant, alleged that the Appellant's storage of vehicle ~~as were~~ on his property before the City's Annexation was a "public Nuisance" and should be removed.

The Mississippi Supreme Court has held that generally a public nuisance is an injury or invasion which affects an interest common to the general public. John C. Parker, Mississippi Law of Damages, 385 (1990). The United States Fifth Circuit Court of Appeals in the case of Berry vs. Armstrong Rubber Company 989 F.2d 822 (citing Phillips vs. Davis Timber Co. Inc, 468 So2d 72, 79 (Miss 1985) "determined that a "plaintiff must present evidence of an invasion in order to proceed." In 1988 the Mississippi Supreme Court in the case of Delta, Inc. vs. Pate Stevedore Co. of Pascagoula, Inc. 521 So2d 857, 861, set a standard which the Plaintiff must establish. In that case the Court required a "proof of a public nuisance" requiring a showing of:

1. An unreasonable interference with a right common to the general public; and

2. Circumstances supporting an unreasonable interference with a public right such as:

1. Conduct involving a signfast interference with the public heath, the public safety, the public peace, the public confort or the public convenience;

2. Conduct which is prescribed by a statute, ordinance or administrative regulation; or

3. Conduct of a continuing nature or which has produced a permanent or long lasting affect and that the actor knows or has reason to know the significant effect upon the public right.

In the Delta Case the Court did not discuss the aspect of prior existing non-conforming use and the right of the citizen to a continuation of such use.

The Appellant contended that the City of Brandon's Ordinances regarding what constitutes "nuisance" were overly broad and vague as to their meaning. None of the five (5) witness who testified for the City had the same meaning or interpretation and each expressed their individual opinion which was different from each other's opinion. To show these different opinion the following is submitted:

Mr. Robbie Power Zoning Enforcement Officer:

Q. And particularly, would you advise the Court as to what particulars within the ordinances in your opinion constitutes a violation by the location of the vehicles that we talked about today on the subject property?

A. A nuisance.... you've got something that injures or endangers the comfort, repose, or health; section 3, something that's offensive to the senses; and section 6, something that essentially interferes with the comfortable enjoyment of life or tends to depreciate another's property. (Record Transcript Page 26)

Q. And particularly, we're talking about vehicles here today. Is that right?

A. That's correct.

Further the witness, Powers testified that "nusinance that we're in court today ?

Question: Particularly with regards to Section 34-22, Illustrative Enumeration, where it has particular items that are enumerated. Particularly, which of these enumerated items, if any, in your opinion constitute the nuisance that we're here about today?

Answer: You've got four. Item i under that section would be noxious weeds and other vegation; item 2 would be accumulation of rubbish, trash, refuge, junk, and other abandoned materials; item 3, any condition that could harbor rats, snakes, or other vermin; and item 10, which is an accumulation of stagnant water permitted or maintained.

On Cross Examination, Mr. Robbie Powers was asked the following: (Transcript page 33)

Question: When did you first come to Rankin County?

Answer: 2003 is when I moved here.

Question And you're familiar with that area. Yo've seen this property before?

Answer: Nodded head affirmatively.

Question: And what was the condition of the property prior to you comming to work for the City of Brandon?

Answer: The current state it is now.

Question: And it's your testimony that the condition of the property even today is somewhat similiar to what it was prior to May or June 2007? (emphasis eadded)

Answer: That's correct. (Transcript 35)

Q: Is it your position that he has a nuisance there or he got a junkyard there?

A. I'm not sure what--- he's got a bunch of junk vehicles and that constitutes a nuisance. (emphasis added) (R 37)

Mr. Robbie Powers further testified, that under Section 34-21 of the ordinance- I believe that's the one called nuisance?

A. Uh-huh.

Q. Says it's offensive to the senses.

A. Uh-huh/ (R-46)

Question: Tell me what that means.

Answer: Offensive to the senses. If I'm not mistaken, sight is a sense. Something that is an eyesore can be considered offensive to the senses. Forty-six junk vehicles in my opinion is offensive to the senses. (R-47).

The zoning enforcement office testified, that a nuisance to me couldn't be grandfathered in. (R-48) You've got to take care of a nuisance whenever it occurs. In this case it's something that was there before the City annexed the property. However, when the City takes control and the city ordinances zoning regulations go into place, then we have to take action at the annexation time or thereafter. Of course, we couldn't do anything beforehand, but we could do something after. (R.48) (emphasis added). (R.48)

Another witness was called by the City of Brandon, who was Mrs. Amanda Tolsted, who stated that she was employed by the City of Brandon as the Community Development and Planning Director .

Mrs. Totsted stated that Mr. Whitley had stored vehicles on the property a number of years prior to the City annexation. (R-125).

Mrs. Tolsted stated that it was illegal and an eyesore to the people that lived in the vicinity of that area. (R-127)

The Appellant, John T. Whitley, would show unto the Court, that the Zoning Ordinance of the City of Brandon, Mississippi were unconstitutional vague, ambiguous and should have been uneforceable.

Section 34-21 of the City Ordinances proposed to describe a Definition to the general public as to what the meaning of "nuisance" woulf be; the Appellant contents tat this definition is overly broad and is subject to the interpretation of the individual having no common meaning. As in the case now before the Court, Mr. Robbie Powers testified that the "nuisance" was the fact of the junk vehicles (R-37) Mrs. Tolsted stated that nuisance was the "eyesore" of the various vehicles stored on the Appellant's property that constituted the nuisance among other things.

The Mississippi Supreme Court (2004) in the case of Mayor & Board of Alderman City of Clinton, Mississippi vs. Scott and Mary Welch 888 So2d 416, addressed this very issue concerning a "vague" ordinance; and stated in the Court ruling;

> "A governmental enactment is impermissibly vague where it fails to provide persons of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited"

The United States Supreme Court in one of the leadings land cases on matters concerning vaguness of ordinances, stated in the case of Connally vs. General Construction 269 U.S. 385, 46 S.Ct. 126, 70 L.ed 322- Justice Sutherland wrote in his opinion:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rule of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessaryily guess at its meanings and differ as to its application violates the first essential of due process of law."

In another case of similiar importanct to mention here was the case of Nichols vs. City of Gulfport 589 So2d 1280 (Miss. 1991) this case conzerned the violation of a noise ordinance which was established by the City of Gulfport's ordinances. The Supreme Court therein struck down the ordinance the ordinance as being vague in it's meaning and as such violates the First Amendment due to it's vagueness. The citizens and general public cannot necessarily guess at it's meaning.(Nichols ID).

In the case of Mayor and Board of Alderman, City of Clinton, Mississippi vs. Scott Welch & Mary Welch (June 2005) 888 So2d 416, at page 417, in the wisdom of the Court, Justice Dickinson, writing for the Court stated:

"We offer this preface to our decision today, only to assure the City, the Welches, the Clarion Ledger, and those members of the public who are interested in this case has not been decided by popular opinion, but rather by applying the law to the facts presented to us. When (as here) the law requires us to invalidate set aside, or otherwise prevent the enforcement of a law or ordinance, we are presuaded that, to do otherwise, would undermine the Constitution and our oath of office."

In the Court's analysis of the Welch case, the Court addresses vagueness and its concept, holding that the State and Federal Government, and their political subsidiaries are trusted with immense powers over the citizens living within their respective jurisdictions. Among the greates of these is the power to regulate and control a citizen's use of private property. When a governmental entity presumes to prohibit otherwise legal activity on a citizen's private property, the Constitution requires that there be a legitimate governmental purpose. City of Jackson vs. McPhearson (1932) 162 Miss. 164, 138 So 604; Village of Euclid vs. Ambler Realty Co. 272 U.S. 365. 47 S.Ct. 114, 71 L.Ed 303 (1926) . In these cases each stated that the restriction must be reasonably clear, enabling a citizen and the general public as to a clear meaning as to what is allowed and what is prohibited.

The Appellant, John T. Whitley, does not challenge the right of the City of Brandon, Mississippi to make and adopt it's ordinance. That is not the question and point of law brought before this Court now for review.

The Appellant does however challenge the City's Ordinance which adopted and sought to be enforced retroactive against him as being unconstitutional due to the fact that they did not provide the Appellant and other similiar citizens in the newly annexed area of the city with any protection for nonconforming use which is a right guarantted by the U.S. Constitution Fifth and Fourteenth Amendment as well as Sectien 14 and 17 of the Constitution of the State of Mississippi.

From the evidence and testimony of the various witnesses who testified at the trial of this cause, there is no dispute, that the Appellant for many years prior to the annexation by the City of Brandon, operated a farming operation and had numerous farming equipment and many automobiles, trucks, trailers some in operation and some no-operational stored on his farm nd or private property.

The Code enforcement officer, Robbie Powers stated in his testimony that his opinion was that a "nuisance" was junk cars or automobiles which were stored on the Appellant's private property. (T-48) and that they could not be "grandfathered" in because they were a nuisance. He stated that prior to the annexation of the Appellant's property, that the City of Brandon couldn't do anything or take any action regarding the cars, however, once the City of Brandon annexed the property that they could have the cars removed by declaring them as junk cars and declaring the same as being a nuisance and violation of the zoning ordinances. (T-48).

Not only was the Appellant, John Whitley, faced with the enforcement of the new ordinances without showing the protection of a nonconforming use of a prior existing use of his land; so were approximately fifty (50) other similiar individuals in the newly annexed area was faced with the same delimina regarding their respective nonconforming prior use of their property.

The Appellant contents that the continued storage of his vehicles and equipment on his private property did not constitute a nuisance per se even though one of the witnesses for the City testified that the vehicles constituted an "eyesore" (Tolested R-37)

A case which is taught in various law schools for many years, People vs. Miller (304 N.Y. 105, 106 N.E. 2d 34); held that the neighbors whose sensibilities are offended would find difficulty in abating it (even if it were a nuisance) for the reason that they "came to the nuisance"in the time honored phrase, by purchasing and moving into the neighborhood while appellant's storage of his vehicles and his farming operation was in operation prior to the annexation by the City of Brandon, Mississippi; and even the same applied to the City of Brandon; they had knowledge before hand that the Appellant was in fact storing his various cars and equipment on the subject annexed property and his farming operation many years prior to their annexation.

Mr. David Wade was called as a witness for the City of Brandon, Mississippi; he stated that he worked for the Central Mississippi Planning and Development District and that he assisted in the preparation of the current Zoning Ordinances of the City of Brandon, Mississippi (R-89);

Mr. Wade's testimony confirmed the fact that the City of Brandon's Ordinances contained in Section 401, which the witness testified read as follows: (R.98)

> "Nonconformities shall consist of any land, lot, building, structure, or part thereof, or the various uses to which those items are or were put and which lawfully existed prior to the enactment of this ordinance of June 3rd,1986 but which subsequently do not comply with the provisions of this ordinance and the requirements of the district wherein located. The regulation pertain to such nonconformities are established in the district wherein located."

Mr. Wade stated that he had written the Rankin County Zoning Ordinances (R.101), he further testified as follows:

Question: Was the storage of the vehicles on Mr. Whitley's property a lawful use under Rankin County zoning ordinances?

Answer: Yes. Your Honor. Rankin County chose not to address the storage of abandoned vehicles." (R-101).

Mrs. Tolsted testified that the reason that it was illegal for the Appellant to have his vehicles stored on his on property under the non-conforming provisions.

"Because it's a nuisance to the people that lived in the vicinity of that area. It's an eyesore." (R-127)

Question: what is the nuisance?

Answer: The nuisance is the breeding ground for the vermin. It's the pollutants that leak into the ground. It's the --- it poses a risk for anyone who comes onto that property because the --- glass and the engine parts..." (R-127)

Q. Have you made any test to see if the vehicle out there leaks?

A. No.

Q. Have you made any survey or did any survey to see if any body got hurt out there was trespassing?

A. No.

Q. Have you went to check to see if there were rats out there?

A. No.

Q. He doesn't drive these vehicles on the state highways, does he?

A. No. (-128)

Another Witness for the City of Brandon, Mississippi, Mr. Robert R. Morrow, stated that he was a licensed certified general real estate appraiser. (R-52) He was offered as an expert real estate appraiser and then testified as follows;

He testified that individuals in the surrounding area near the Whitley' property many years prior to the City of Brandon's annexation had elected to build their houses with the knowledge that the Appellant had a farming and storage of vehicles on his property. (R-58)

Q. "Do you know of any tract of land which has, based on an appraisal, depreciated in value as a result of the storage of these cars on Mr. Whitley's property?

A. "I'm not aware of anything, no. (R-60).

Q. "Are you aware of any parcel, for example, an individual ... or rather I ment to say a lot which has been appraised at a lower value because of the storage of the cars on Mr. Whitley's property."

A. I'm not aware of anything, no. (R-60)

Mr. George "Pat" Guest, testified that he was a professional civil engineer since 1968 and among many things testified as follows:

Q. Specifically with regards to inoperable vehicles located on property, what are smoe of the concerns that you have in relation to the ordinances that you've just described?

A. Well, you have fuel, oil, antifreeze, sometimes there asbestos in the brakes, mercury in the light switches, hydraulic fluids, those type items. (R-67)

The witness testified as follows:

Q. You made no examination, no test whatsoever to determine that those factors have occurred on Mr. Whitley's property.

A. That's correct. (R-82).

The Chancellor's findings that the Appellant's preexisting nonconforming use of the property constituted a nuisance was unsubstantiated by any supporting evidence.

The Court was bound by the facts which were presented at the trial and the evidence of the witnesses who were called to testify. The Chancellor did not have authority to deviate from the evidence and facts introduced at the trial of this cause.

The Chancellor was duty bound to protect the rights of the appellant's Constitutional rights of nonconforming use of his private property, and was an abuse of his authority to fail to protect the Appellant's rights.

ERROR NUMBER THREE

THE CHANCELLOR ERRED IN DENYING THE APPELLANT'S RIGHT TO POST A SUPERSEDES BOND STAYING THE ENFORCEMENT OF THE COURT JUDGMENT OF DECEMBER 12, 2007 WHILE THE APPELLANT'S CASE WAS ON AN APPEAL TO THE MISSISSIPPI SUPREME COURT

The Appellant would show unto the Court, that a trial of the City of Brandon's Complaint For Injunctive Relief was held on December 12, 2007.and a Final Judgment was entered, the Appellant within the time prescribed by statute gave a Notice of Appeal on January 4, 2008. (Exh 108).

Accordingly under Rule 48 the Appellant filed his Motion For New Trial and or For Reconsideration with the Clerkm and the Chancellor entered an Order on January 10, 2008 without a hearing denying the Appellant's Motion For New Trial and or Reconsideration. (Ex. 112).

The Appellant filed a Designation of Record with the Clerk of the Chancery Court of Rankin County, Mississippi on January 4, 2008 (E-113) and the Clerk of the Miss. Supreme Court gave Notice to the Trial Court of the pending appeal and assigned a Supreme Court Case Number 2008-TS-00066 to the appeal. (Ex 115).

The City of Brandon, filed a Motion For Contempt, Permission to Enter Property and Execute on the Judgment on January 24, 2008 (R-116) And the Appellant filed his Motion To Set A Supersedes Bond with the Clerk to prevent the City of Brandon

from proceeding furher while the Appellant's appeal was pending in the Supreme Court of the State of Mississippi.

The Mississippi Supreme Court has long held that a party has the right to an appeal from any final decree of the Chancery Court when the party requesting the appeal from a final decree in writing to the clerk of the court where the decree was rendered, Thompson vs. Wilson, 172 Miss 766, 775, 160 So 388; Railroad Co. vs. James, 108 Miss. 656, 67 So 152. This Court has held, that if a decree be a final one, no leave of the court is necessary to an appeal. (Id. Thompson).

The Appellant's appeal bond was set by the Clerk and once the bond was posted, jurisdiction is then vested in the Mississippi Supreme Court. Patterson vs. Holly Springs, 127 Miss. 433, Perkins vs. State, 129 Miss. 438, 91 So. 704.

The record reflected that the Appellant tendered to the Clerk of the Chancery Court the sum of $775.00 on January 8, 2008 (R-112) and filed a Certificate of Compliance Rule 11(B)1 on January 14, 2008, and on noticed tendered an additional sum of $1,258.00 on January 14, 2008. (R-113)

The Appellant was denied the right to have a stay of his case by the Chancellor's denial of his rights and his efforts

was in vain; the Appellant was denied his right to an appeal with supersedeas which had the effect of preventing the enforcement of the Judgment of the Court entered on December 12, 2007. Land Co. vs. Robertson, 125 Miss. 338, 87 So 669. Rule 62 M.R.C.P empowered the Clerk of the court in which the decree was rendered to determine the value of the amount in controversy.

This Court has long held that pending an appeal is to maintain the statud quo pending the appeal. Lamb vs. Rowan 81 Miss. 369, 33 So 4. Further, the Court stated in other Cases which had long ago been established as the appellant's right on appeal, "that the decree appealed from is not vacated by the appeal, nor are any of its liens impaired; the enforcement of the right declared by the decree are merely suspended until the appeal shall be determined. Early vs. Board of Supervisors, 182 Miss, 636, 181, So. 132, Kilpatrick vs. Dye, 12 Miss. 289, Planters Bank vs. Calvit, 11 Miss. 143; Wade vs. Society, 12 Miss. 670, Railroad vs. Adams, 78 Miss 984, 30 So 44, Grayson vs. Harris, 102 Miss. 68, 58 So 775, 59 So. 1. Land Co. vs. Robertson, 125 Miss 338, 87 So 669.

The Chancellor instead of allowing the Appellant his right to a supersedeas bond to stay the enforcement of the prior injunction, the Chancellor instead, allowed the City of Brandon

to post a supersedeas bond allowed the City of Brandon, Mississippi to proceed with the enforcement of the Court's prior Order.

The Appellant, John T. Whitley, maintained that the City of Brandon, Mississippi would suffer no injury whatsoever should the court's Order be suspended or held in abeyance.

Nevertheless, the Chancellor permitted the City of Brandon to proceed on the enforcement of the Court's prior Judgment, and was Ordered to be placed in the Rankin County Jail for his failure to move his vehicles as previously ordered by the Court's prior Judgment. The Judgment of incarceration was entered in the lower Court on March 11, 2008 (R-138) at a time when the Appellant's case was on appeal to the Supreme Court of the State of Mississippi.

The Appellant, John T. Whitley, remained incarcerated in the Rankin County Jail at Brandon, Mississippi from March 11th, 2008 until March 19, 2008 at which time the Sheriff of Rankin County, Mississippi requested the Chancellor to release the Appellant, John T. Whitley, because of health reasons. (R-147). During the time the Appellant was in jail, the City of Brandon, Mississippi proceeded to move the appellant's cars and various farm equipment from the appellant's private farm and storage area. (R 147).

The Appellant maintains that the Chancellor's actions

in permitting the City of Brandon, Mississippi to proceed on the removal of the subject vehicles under a nonconformity right guaranteed by the Constitution was a violation of his rights to due process under the fourth and fifth Amendment of the U.S. Constitution. He was not protected even though he appealed the lower court's decision in a timely and a reasonable manner. The Chancellor in denying the stay of enforcement by the Appellant's Appeal, in essence deprived the appellant of his constitutional right to a continuation of a non-conforming use of his property contrary to the fifth and Fourteenth Amendments to the Constitution of the United States and Section 14 and 17 of the Mississippi Constitution of 1890. Heroman vs. McDonald 885 So2d 67 (Miss. 2004) Jones vs. City of Hattiesburg (1949) 42 So2d 717, Richard Barrett vs. Hinds County, Mississippi (1989) 545 So2d 734.

The denial of the Appellant's rights to post the supersedeas bond, in effect made the appeal of the Appellant's case to this Court became moot, due to the fact that the City of Brandon proceeded to remove the Appellants. vehicles and equipment regardless of the ruling of the Court of Appeal. For which the Appellant contends that the Chancellor action constituted manifest error and further the Chancellor applied an erroneous legal standard of law to the Appellant's case and should be reversed. Ferguson vs. Ferguson 639 So2d 930. Newsom vs. Newsom 577 So. 2d 511, (Miss 1990), Bell vs. Parker 563 So2d 586.

CONCLUSION

Based on the evidence submitted and the testimony of the witnesses, the Chancellor clearly manifestly erred and abused his discretion in not protecting the Appellant's constitutional rights to continuation of the use of his private property for nonconforming use as was in existance well before the City of Brandon, Mississippi annexed the Appellant's property into the City of Brandon.

The Chancellor's findings were not based on supporting evidence of the witnesses and their testimony at the trial of the case in the lower court, in view especially as to the interpretation and various different opinion as to exactly what the meaning of the Ordinances sought to be enforced was and the meaning which clearly could be understood by the general public who the City sought to enforce the ordinance against, and due to their vagueness as was shown by the evidence introduced in the trial of this cause the same should have been ruled unconstitutional and unenforceable.

The evidence clearly shown that the City of Brandon provided no evidence whatsoever, that they had any irremediable injury and as such the Appellant's request for Superseadeas should have been granted and the enforcement of the Court Judgment of December 12, 2007 held in abeyance.

CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that a true and correct copy of the Appellant's Opening Brief has been either delivered or mailed by United States Mail, Postage prepaid to the following parties which have an interest in this case:

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So certified on this 3 day of July, 2008.

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