IN THE MISSISSIPPI SUPREME COURT

NO. 2009-CA-00710

RIVERSIDE TRAFFIC SYSTEMS, INC., BOOKER FARR, AND LEHMAN-ROBERTS COMPANY
APPELLANTS

VS.

ROBIN BOSTWICK, ERIC FROHN, ALLEN MAXWELL,
HERBERT G. ROGERS, AND RAY TATE
APPELLEES

Appeal From The Circuit Court of Union County, Mississippi

REPLY BRIEF OF APPELLANT LEHMAN-ROBERTS COMPANY

ORAL ARGUMENT REQUESTED

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I. PROLOGUE

The Appellee Brief[1] repeats verbatim the assertions which were filed in the unsuccessful Appellee Motion to Dismiss. The Lehman-Roberts Company ("Lehman-Roberts") Motion to Strike those assertions, and the Response are attached as an exhibit to this Reply. Included in the Appellees' ("Bostwick's") assertions are efforts to add to the record in this case (after the Appellant Briefs were filed) matters which arose after the August 29, 2008 hearing before the City of New Albany ("City") and matters which were not considered by either the City or the Circuit Court. *E.g.*, Appellee Brief at 2, 6, 7, 8, 13, 14, 15, 17. Those were the bases for the unsuccessful Bostwick Motion to Dismiss. If the Court allows matters outside the appeal record to be considered in this appeal, Lehman-Roberts moves the Court to allow it to supplement this Reply.

II. SUMMARY OF THE ARGUMENT

This is a zoning case. The City denied the Bostwick Petition to rezone the Subject Farr Property to A-1 Agricultural. The City found that Bostwick failed to prove the rezoning prerequisites or that there had been a mistake in the zoning. The City further found that the Subject Farr Property had been zoned I-1 Industrial prior to 1997 on the City's Official Zoning Map, that the Official Zoning Map had been used as the Future Land Use Map for the 1997-2025 Comprehensive Plan, that the City, the public, Farr and Lehman-Roberts had relied on the I-1 Industrial zoning of the Subject Farr Property for a period of years and rezoning was not in the public interest.

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[1] The Appellee Brief is rife with misstatements, *see e.g.* p. 8, f.n. 2, which should be both stricken and disregarded. Rather than clogging the substance of this Reply in a tit-for-tat response which detracts from the issue on this appeal, Lehman-Roberts moves the Court to disregard any assertion which has no citation to the record or to a Lehman-Roberts or Riverside Traffic Systems or Booker Farr ("Farr") Brief.

Under this Court's decisions, zoning is a legislative action. Even if this Court would not have made the same decision, if there is substantial evidence to support the City's decision, then it must be upheld. Overwhelming record evidence supports the City's decision.

The Circuit Court made both unsupported factual findings and a legal error when it reversed the City's refusal to rezone the Subject Farr Property to A-1 Agricultural. That decision must be reversed and the City's zoning decision upheld.

III. ARGUMENT

Bostwick petitioned the City to find that the I-1 Industrial zoning of the Booker Farr Property ("Subject Farr Property") was a mistake or alternatively to rezone the Subject Farr Property from its current zoning of I-1 Industrial to the A-1 Agricultural zoning that it had forty years earlier when it was annexed into the City. (Vol. 1 Bill of Exceptions at ¶13). No Appellee had any interest in the Subject Farr Property for which it sought rezoning.

A review of the Bostwick Appellee Brief reveals a fundamental misunderstanding of this Court's zoning law and the roles of the Petitioner seeking to have property rezoned.

In order to prevail in a zoning case the *Petitioner, not the City or the Respondent,* must prove by *clear and convincing evidence* that there was (1) a [clerical] mistake in the original zoning or that (2) the character of the neighborhood has changed to such an extent as to justify rezoning and that public need exists for rezoning. *See Modak-Truran v. Johnson, 18 So. 3d 206,* 209 (Miss.2009)("There is a presumption of validity of a governing body's enactment or amendment of a zoning ordinance and the burden of proof is on the party asserting its invalidity.")(citations omitted); *Edwards v. Harrison County Bd. of Supervisors*, 22 So. 3d 268, 274 (Miss. 2009)("To reclassify property, there must be proof, by clear and convincing evidence, that either: (1) a mistake in the original zoning occurred; or (2) a change occurred in the character of the neighborhood to justify rezoning and a public need.").

The City refused to rezone the Subject Farr Property to A-1 Agricultural and found that

> Plaintiffs have failed to show a mistake in the rezoning of the subject property which was not cured by the 2001 public hearing. Further, there was no proof of a change in the character of the neighborhood which would justify a rezoning of the property from industrial to agricultural. Lastly, there was no proof that it would be in the best interest of the public for the property to be rezoned from industrial to agricultural.

(Vol. 2, CP at 163, ¶16)(R.E. 6). That is the decision that is being appealed.

Under this Court's zoning cases, the one "assailing the validity" of the zoning decision has the burden of proof. *See Edwards,* 22 So. 3d at 274, 279. Bostwick, however, attempts to shift the burden of proof to the City:

> The decision of the Circuit Court was not based on its own determination and judgment *but on the failure of the City to demonstrate in the record that it had complied with its own ordinances and state statutes.* Therefore, the lower court judge acted completely within his discretion and within the limited scope of review and his ruling is not reversible.

Appellee Brief at 40 (emphasis added). Bostwick moreover misstates the rationale of the City in denying their zoning petition:

> On September 15, 2008, the Board of Aldermen ... voted in a 3 to 2 vote that the property was appropriately zoned as industrial because the zoning map showed it that way. (R.E. 1, Finding of Fact at 161-163).

Appellee Brief at 5-6. The City denied the rezoning petition because Bostwick had the burden of proving the rezoning prerequisites with clear and convincing evidence, and Bostwick failed to prove with clear and convincing evidence that there was a clerical mistake in the zoning or that there was a change in the area and a public need for additional agricultural zoning. (Vol. 2 CP at 164)(R.E. 6).

Bostwick presented *no* evidence on the prerequisites required for rezoning (that there was a change in the area and a public need for additional agricultural zoning). Consequently, the legal issue is whether Bostwick presented clear and convincing evidence that there was some clerical mistake in the I-1 Industrial zoning of the Subject Farr Property as shown on the City's pre-1997

and 2001 Official Zoning Maps.[2]

This Court has found that the appellate court cannot substitute its own judgement as to the wisdom or soundness of the municipality's judgement. See *Perez v. Garden Isle Community Association*, 882 So. 2d 217, 219 (Miss. 2004). "If the Board's decision is founded upon substantial evidence, then it is binding upon an appellate court, i.e., the Circuit Court, the Court of Appeals and this Court.'" *Edwards*, 22 So. 3d at 279.

A review of the record before the City proves that there was no record evidence proffered to show mistake and that there was substantial evidence to support the City's Findings and refusal to rezone the Subject Farr Property to A-1 Agricultural. Under this Court's decision, the City's rezoning decision must be upheld.

A. The Evidence Proffered for "Mistake"

Lehman-Roberts has searched the Appellee Brief to determine what record evidence Bostwick claims shows by clear and convincing evidence that there was a mistake in the zoning of the Subject Farr Property I-1 Industrial. The results of that search are quoted below:

> Mr. Rutledge contended that the land had always been agricultural since being brought into the city; that it had never been rezoned; and that it remained agricultural through the date of the hearing. (Id.). The undersigned cited numerous legal precedents in support of his clients' position. (Id.). Mr. Rutledge made the point that the land in question was clearly annexed into the City as agricultural in 1968. Citing case law in support, the undersigned outlined the proof which must be established before a rezoning can take place. This is: (1) that there was a mistake in the original zoning; (2) the character of the neighborhood has changed to such an extent as to justify the reclassification; and (3) there is a public need for the rezoning. Requirements for this proof are that it must be shown through clear and convincing evidence. (Id.).
>
> Booker Farr testified that he bought the subject property in 1999 and did not know the status of its zoning until sometime around 2002 or 2003 when he was advised by a city official that the subject property was zoned industrial. He checked on the zoning because he wanted to sell the land. (R.E. 2, Booker Farr Deposition at 22:9-18).

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[2] "a mistake within the meaning of the law is not a mistake of judgment, but, rather, a clerical or administrative mistake." *City of New Albany v. Howard Lee Ray*, 417 So. 2d 550, 552 (Miss. 1982).

Appellee Brief 5.

> Clearly, in the case at hand, a mistake was made. That mistake was most certainly a clerical or administrative mistake that placed the subject property on the zoning map incorrectly. It certainly was not a mistake of judgment as no one even knows or remembers how it occurred. No decision was made to change the zoning of he subject property. No procedural steps were taken to do this. No judgment was used.

Appellee Brief at 28.

Lehman-Roberts asserts that "no one even knows how [the zoning] occurred" is not proof by clear and convincing evidence of a mistake in zoning. The presumption, moreover, that the City could not rezone property without a petitioner requesting the rezoning is false both as a matter of statute, and as a matter of the City's Zoning Ordinance. *See infra* pages 17-18.

B. The Circuit Court's Reversal of the City's Zoning Decision

The Circuit Court nonetheless found that the City was arbitrary and capricious by failing to rezone the Subject Farr Property to A-1 Agricultural. (Vol. 3 CP at 314)(R.E. 5). The Circuit Court factually found[3] that the Subject Farr Property was shown to be zoned *A-1 Agricultural* at the time the City adopted its 1997-2025 Comprehensive Plan in April 1997[4], and that the notice provided by the City for the July 21, 2001 hearing that resulted in the 2001 Official Zoning map showing the Subject Property to be I-1 Industrial was not legally sufficient. (Vol. 3 CP at 311, 313)(R.E. 5).

To paraphrase the Circuit Court's conclusions: the Subject Farr Property was zoned A-1 Agricultural at the time the City adopted the 2001 Official Zoning Map; the Notice for the 2001 hearing was legally defective; therefore the City could not have rezoned the Subject Farr Property

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[3] Lehman-Roberts respectfully suggests that the role of a circuit court sitting as an appellate court is not to find facts, but to determine whether the "trial court" – the City in this instance - had evidence to find the facts and make the decisions that it did. *See, e.g., Edwards*, 22 So. 3d at 279.

[4] "The City adopted a Comprehensive Zoning Plan in 1997 which designated the Farr tract as being classified as agricultural land (A-I). According to the Comprehensive Zoning Plan the Farr tract could not be used to contain an asphalt batch plant." Opinion and Order, Vol. 3 CP at 311 (R.E. 5).

to I-1 Industrial in 2001; and the Subject Farr Property should have been rezoned to A-1 Agricultural. (Vol. 3 CP at 310-314)(R.E. 5).

1. The Pre-1997 Industrial Zoning of the Subject Farr Property

The City made a finding that the Subject Property was shown to be zoned I-1 Industrial on the City's Official Zoning Map at the time the City adopted its 1997-2025 Comprehensive Plan on April 21, 1997 and that the then-Official Zoning Map was used as the future land use component in the Plan. *See* Vol. 2 CP at 162 (R.E. 6)("3. The subject property was shown as being industrial on both of the current zoning map, adopted in 2001, and the zoning map immediately preceding the current one.")

The Official Zoning Map at the time the City adopted its 1997-2025 Comprehensive Plan is in evidence, and it shows the Subject Property to be zoned I-1 Industrial. *See* Exhibit 16, first map. (Vol. 2, Ex. 16).

Chris Watson, the professional urban planner who drew the 2001 Official Zoning Map, testified that there was no question that the Official Zoning Map in use prior to the 2001 Map showed the Subject Property to be zoned I-1 Industrial.

> MR. MAYOR: Are you saying that property was zoned industrial before Munsford Drive?
>
> MR. WATSON: I'm not sure when Munsford Drive was constructed, Mayor. *What I do know is that the zoning map, which preceded the 2001 map, showed the property industrial.*

(Vol. 1, Ex. K at 146)(R.E. 11)(Emphasis added). There was *no* contradictory testimony.[5] Even Bostwick agrees that the Subject Property was zoned I-1 Industrial on the Official Zoning Map in use prior to the City's adoption of the 2001 Zoning Map. *See* Appellee Brief at 4 ("at some time unknown for certain by anyone, it was erroneously shown as being zoned industrial, instead of agricultural, on the City's zoning map.")

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[5] Under this Court's decisions and the rules of evidence, argument of counsel and briefs do not constitute record evidence. *See, e.g., Tentoni v. Slayden*, 968 So. 2d 431, 442 (Miss. 2007).

The record evidence overwhelmingly supports the City's finding that the Subject Property was zoned I-1 Industrial prior to 1997. The Circuit Court, however, found that the City adopted a Comprehensive Zoning Plan in 1997 which designated the Farr tract as being classified as agricultural land (A-I). See Vol. 3 CP at 311 (R.E. 5). There is *no* evidence to support the Circuit Court's finding that the Subject Property was shown as zoned A-1 Agricultural on the Official Zoning Map in use at the time the 1997-2025 Comprehensive Plan was adopted.

2. There Was No Drafting Error in the 2001 Official Zoning Map

The Circuit Court further found that the Subject Property was zoned I- Industrial for the first time on the new 2001 Map "through a combination of survey and map drafting errors." Vol. 3 CP at 311 (R.E. 5).

> There was annexations to the City in 1999 and 2000 and the City directed a new City map be prepared. When the official zoning map was redrawn the Farr tract was shown to be industrial through a combination of survey and map drafting errors.

Vol. 3 CP at 311 (R.E. 5).

There is *no* record evidence to support the Circuit Court's finding, and Chris Watson testified that there was in fact *no* drafting error on the 2001 Map.

> Now, I've also looked to see whether or not we could have simply just made a mistake in the computer system in drawing this. In other words, do we have one shaded color on top of another one and that type of thing; did we accumulate parcels to achieve this shape? You know, was there a way that we physically, in the technical side of it, make a mistake? And I've looked and I've concluded that no, there's not a way that that could have occurred. Because when we drew these shape in our GIS system, they're drawn as solid polygons. They're not an accumulation of properties, they're drawn as solid polygons. So then I've also looked at the relationship of the industrial boundaries as shown on this 2001 map. I have by hand, and I don't have it up here, but by hand I've plotted the boundaries of the subject property, the Booker Farr property. Coincidentally, it matches up nearly perfectly with what is shown to be industrial here (indicating). That's not by accident. Okay. So we can attribute it to the prior zoning map, and we can attribute it to a more precise zoning map having been drawn in 2001. *None of those factors indicate error.*

(Vol. 1, Ex. K at 139-140)(R.E. 11)(Emphasis added).

3. The Circuit Court's Decision Must Be Reversed

The Circuit Court reversed the City's refusal to rezone the Subject Farr Property in part

because it found, without record support, that the zoning of the Subject Farr Property was A-1 Agricultural on the Official Zoning Map in use prior to adoption of the 2001 Map. He then found that the 2001 hearing was not validly noticed. (Vol. 3 CP at 311)(R.E. 5). With overwhelming contrary record testimony, the Circuit Court further found that the Subject Property came to be zoned I-1 Industrial for the first time with the adoption of the 2001 Official Zoning Map, "through a combination of survey and map drafting errors." (Vol. 3 CP at 311)(R.E. 5). Therefore, since he had concluded that the 2001 Official Zoning Map was not validly noticed and adopted, the City had to rezone the Subject Farr Property to A-1 Agricultural. (Vol. 3 CP at 310-314)(R.E. 5).

The role of the Circuit Court, and of this Court, was and is to determine whether the City's Findings and zoning decision were based on record evidence, and if they were, then they are to be upheld. As an appellate court, this Court's task

> is to determine whether the circuit court erred in its judicial review of whether the Board's decision to rezone was arbitrary and capricious and unsupported by substantial evidence. Our role is to verify the existence of substantial evidence, not reweigh the evidence. Furthermore, 'If the Board's decision is founded upon substantial evidence, then it is binding upon an appellate court, i.e., the Circuit Court, the Court of Appeals and this Court.'

Edwards, 22 So. 3d at 279.

Thus, this Court is called on to "verify" the existence of record evidence to support the City's findings that the Subject Farr Property was zoned I-1 Industrial on the City's Official Zoning Map prior to the time the City adopted the 2001 Official Zoning Map. The City outlined the evidence that was presented to it at the hearing (Vol. 2 CP at 153-162)(R.E. 6), and there is substantial record evidence in support of that finding. That evidence is detailed in the Lehman-Roberts Appellant Brief, in this Reply Brief, and in the Farr Reply Brief which Lehman-Roberts joins and adopts as its own.

The record indisputably proves that the Subject Farr Property was shown to be zoned I-1 Industrial on the Official Zoning Map in use at the time the City adopted the new 2001 Zoning

Map. Pursuant to the City's Zoning ordinance the Official Zoning Map "shall be the final authority to the current zoning of land within the city." (Vol. 1, Ex. Q at 1707). Consequently pursuant to the City's Zoning Ordinance, the Subject Farr Property was zoned I-1 Industrial prior to the adoption of the 1997-2025 Comprehensive Plan, at least twelve years prior to the Bostwick challenge to the zoning, and that zoning had been confirmed in the pre-2001 Official Zoning Map, the 1997-2025 Comprehensive Plan and the 2001 Official Zoning Map.

There was no challenge to the Official Zoning Map in effect prior to the challenged 2001 Zoning Map. That 1996 Official Zoning Map, which showed the Subject Farr Property to be zoned I-1 Industrial, was incorporated and relied upon as the Land Use Plan for the 1997-2025 Comprehensive Plan.[6] Chris Watson testified unequivocally that there was no drafting mistake in the 2001 Map and that the prior Official Zoning Map had shown the Subject Farr Property to be zoned I-1 Industrial.

Bostwick's "no one knows how the zoning occurred" is not clear and convincing evidence of mistake. The record evidence supports the City's decision that Bostwick failed to prove that there was a mistake in the I-1 Industrial Zoning of the Subject Farr Property which had been on the City's Official Zoning Maps for at least twelve years at the time of the hearing. It is this Court's role to verify whether there is substantial evidence to support the City's findings, not to agree with the decision. As this Court stated in *Edwards v. Harrison County Bd. of Supervisors*, 22 So. 3d 268, 274 (Miss. 2009)(citing *Saunders v. City of Jackson,* 511 So. 2d 902, 906-907 (Miss. 1987),

> [Z]oning issues are legislative in function. Where, as here, there is substantial evidence supporting both sides of a rezoning application, it is hard to see how the ultimate decision could be anything but 'fairly debatable,' not 'arbitrary and capricious,' and therefore beyond our authority to overturn."

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[6] (Vol. 2, Ex. 15 at 51-52)("On the basis of the policies outlined earlier in this section the current zoning map will provide guidance for future land use until a study is made and a future land use plan is prepared for New Albany.").

While Lehman-Roberts disagrees that there is substantial record evidence to support Bostwick's position or that any evidence was presented that would show by clear and convincing evidence that there was a mistake in the I-Industrial zoning of the Subject Farr Property, nonetheless, there has been substantial argument made to that effect. If there is record evidence on both side of a zoning issue, this Court has held that fact to make the decision fairly debatable "and beyond [its] authority to overturn."

The City's decision that Bostwick failed to prove mistake and the prerequisites for rezoning is supported by substantial record evidence. Therefore the City's refusal to rezone the Subject Farr Property from I-1 Industrial to A-1 Agricultural should be upheld and the Circuit Court's refusal to do so reversed.

C. Notice

The Circuit Court found that the City's refusal to rezone the Subject Farr Property was arbitrary and capricious because its attempt to adopt the 2001 Official Zoning Map showing the I-1 Industrial zoning did not have a legally sufficient notice. Since the Subject Farr Property was already zoned I-1 Industrial prior to 1997, the issues surrounding the 2001 actions should be moot. Nonetheless since the Circuit Court based its reversal on those issues, they are assessed here.

The Circuit Court erroneously held that the Subject Farr Property was zoned A-1 Agricultural on the City's previous Official Zoning Map. The Circuit Court further found that the City's action in adopting the 2001 Official Zoning Map which he held zoned the Farr Property I-1 Industrial through a "combination of survey and map drafting errors" was illegal because there was insufficient notice. (Vol. 3 CP at 314)(R.E. 5).

The Circuit Court erroneously found that the Notice was not sufficient because

- the newspaper article failed to include the year of the hearing;

- the newspaper story said that property *inside* the City would not be rezoned and
- he had found without record support and contrary to all of the record evidence that the Subject Farr Property was not zoned I-1 industrial prior to adoption of the 2001 Official Zoning Map.
- Since the notice said that property inside the City would not be rezoned, it did not constitute notice that the Subject Farr Property, which was inside the City, could be rezoned.

See Opinion at Vol. 3 CP at 313-314 (R.E. 5).

> This "Notice" does not meet the requirements of Notice to the public. It contradicts the results claimed by the City in that it states "Zoning has not been changed in the part of the city not annexed ..." It is without question that the Farr property was within the city limits at this time. In addition, the "Notice" states that a hearing would be held on Thursday, July 26 at 6 p.m. but fails to give the year of the hearing. In order to suffice as Notice, the language must be simple, concise, clear, unambiguous and not subject to interpretation. The newspaper article relied upon by the City as legal notice fails to meet these requirements.

(Vol. 3 CP at 313-314)(R.E. 5).

Lehman-Roberts detailed the reasons in its Appellant Brief that notice should be considered sufficient, if this Court determines that adoption of the 2001 Official Zoning Map is required to confirm the I-1 Industrial zoning of the Subject Farr Property.

Lehman-Roberts reiterates that Mississippi law specifies how public notice must be given for changes in a municipality's zoning regulations. Miss. Code Ann. §17-1-17[7] specifies that fifteen (15) days notice of a hearing on such change must be given in an official paper or a paper of general circulation in such municipality or county specifying a time and place for the hearing. These constitute all of the statutory requirements for a notice of public hearing on a zoning

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[7] Miss. Code Ann. § 17-1-17 provides in pertinent part:

> Zoning regulations, restrictions and boundaries may, from time to time, be amended, supplemented, changed, modified or repealed upon at least fifteen (15) days' notice of a hearing on such amendment, supplement, change, modification or repeal, said notice to be given in an official paper or a paper of general circulation in such municipality or county specifying a time and place for said hearing.

change. There is *no* requirement that the notice be run in the legal notices section of the newspaper.[8]

The July 26, 2001 Minutes recite that legal notice was published as required by law:

> WHEREAS, the Mayor and Board of Aldermen met on Tuesday, July 3, 2001 and set a public hearing on the proposed zoning map to be held on Thursday, July 26, 2001 beginning at 6:00 p.m. in City Hall; and
>
> WHEREAS, notice of such meeting was published in the New Albany Gazette, posted throughout the newly annexed territory, all as required by law and otherwise generally made known 'to all of the citizens of the City of 'New Albany, Mississippi affected thereby;

(Vol. 1, Ex. U).

The City in 2008 found that it provided sufficient notice.

> 9. The article on the front page of the *New Albany Gazette* set forth the City of New Albany's intent, the date, time, and place of the hearing and thereby reported all information required by state statute.
>
> 10. The article appearing on the front page of the *New Albany Gazette* constituted sufficient legal notice of the public hearing on the proposed zoning map."

(Vol. 2 CP at 163)(R.E. 6). There was substantial record evidence to support the City's findings that the City provided sufficient statutory notice of the July 21, 2001 hearing at which it adopted a new Official Zoning Map. The question is thus whether Bostwick proved with clear and convincing evidence that it did not.

This Court has held that the governing body can determine whether it has met its *ordinance* requirements as long as it meets *statutory* notice requirements (15 days notice of the

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[8] Miss. Code Ann. § 17-1-15 provides in pertinent part:

> The governing authority of each municipality and county shall provide for the manner in which the comprehensive plan, zoning ordinance (including the official zoning map) subdivision regulations and capital improvements program shall be determined, established and enforced, and from time to time, amended, supplemented or changed. However, no such plan, ordinance (including zoning boundaries), regulations or program shall become effective until after a public hearing, in relation thereto, at which parties in interest, and citizens, shall have an opportunity to be heard. At least fifteen (15) days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality or county.

hearing in a paper of general circulation in the area). *See Thrash v. Mayor & Comm'rs of Jackson*, 498 So. 2d 801, 807 (Miss. 1986)("The procedural rules and regulations found in the City's Zoning Ordinance are in aid of the City's performance of its legislative zoning function, ..[and] it is the City which is vested with the final authority for determining whether its procedural requisites have been met or, if it pleases, waiving them.").

Bostwick claims that the City did not meet the *Thrash* requirements (Appellee Brief at 34) because *Thrash* does not allow a governing body to waive "some important limitation or procedure imposed by state law, and ... where the procedural deficiencies may have said to contravened a citizen's due process rights."

The statute requires the City to give fifteen days notice of the hearing in a newspaper of general circulation. One quarter of the front page of the July 6, 2001, *New Albany Gazette* on the top half of the newspaper featured the color coded proposed zoning map with the caption "**This is the proposed new zoning map for New Albany. It includes the newly annexed areas.**" (Vol. 1, Ex. R). A blow up of the map is shown in Exhibit 16 to the August 29, 2008 hearing. (Vol. 2, Ex. 16, next to last map). Below the map is the headline "What goes on in New Albany's zoning districts" with a description of the districts. At the top of the newspaper is a headline that announces, "Aldermen discuss zoning for new area" with the information that "a larger version of the map which appears in this story can be inspected at City Hall and the hearing will be Thursday, July 26 at 6 p.m. in City Hall." (Vol. 1, Ex. R).

Bostwick and Circuit Court make much of the "fact" that the Subject Farr Property was not in the newly annexed areas and was thus excluded from the hearing because the story indicated that property within the City was not being rezoned. (Appellee Brief at 12; Vol. 3 CP at 313-314)(R.E. 5). That "fact' is unsupported and completely contradicted by irrefutable evidence that the Subject Farr Property was already zoned I-1 Industrial at the time the 2001 Official Zoning

Map was adopted.

Bostwick claims that the City violated its due process rights, without enumerating what rights they are. (Appellee Brief at 22). The City, however, found that it had given sufficient legal notice. (Vol. 2 CP at 163)(R.E. 6). There is substantial evidence that the City met the statutory notice requirements in Miss. Code Ann. §§ 17-1-15 and 17-1-17. If the statutory notice requirement was met, then there was no denial of due process. Due process requires a notice of hearing and an opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865, 873 (1950). Adherence to Miss. Code Ann. §§ 17-1-15 and 17-1-17 statutory notice requirements, which provide notice and a hearing, meets that requirement.

The City's finding that it provided sufficient legal notice of the July 2001 hearing is supported by substantial evidence. Lehman-Roberts would argue that the Circuit Court should be reversed because the Subject Farr Property was zoned I-1 Industrial prior to the City's adoption of the 2001 Official Zoning Map and the City's refusal to rezone it was neither arbitrary nor capricious. Nonetheless, the Circuit Court should also be reversed because the Circuit Court's decision was both factually unsupported and legally in error.

D. Reliance

Under the rubric of reliance is the idea that once a City and the public have relied on an ordinance for a long time, the ordinance cannot be invalidated for defects and irregularities in the enactment of the ordinance. *See McKenzie v. City of Ocean Springs*, 758 So. 2d 1028, 1032 (Miss. Ct. App. 2000)("once an ordinance, though non-compliant with statutory dictates in its publication, has been recognized and relied upon by the community and given effect by the local government for many years, it will not be struck down due to technical failings."); *Benequit v. Borough of Monmouth Beach*, 125 N. J. L. 65, 13 A. 2d 847 (N.J. Sup. Ct. 1940)("Property owner

cannot attack validity of zoning ordinance because of noncompliance with formal requirements in manner of its enactment, where it has been recognized by him and has been in effect for more than nine years at time objections are asserted.") *cited by Walker v. City of Biloxi*, 92 So. 2d at 229; *Ballard v. Smith*, 234 Miss. 531, 107 So. 2d 580; 583 (Miss. 1958)("Although there is a procedural defect in the proceedings of the board enacting the ordinance, we do not think it has the effect of invalidating it.")(citing *Hawkins v. City of West Point*, 200 Miss. 616, 27 So. 2d 549 (1946); *Walker v. City of Biloxi*, 92 So. 2d 227 (Miss. 1957)).

In this case the City *met* the notice requirements of Miss. Code Ann.§§17-1-15 and 17-1-17. There was a publication on the front page of a newspaper of general circulation in the area, more than fifteen days prior to the hearing, giving the time, date and place of a hearing to be held on the color-coded Proposed Zoning Map, also published on the front page of the page.[9] Consequently, if under this Court's holdings an ordinance which *does not* meet *statutory* notice requirements can be upheld after recognition by the city and the public, clearly an ordinance which *does* meet the statutory notice requirements should be.

The City found that it had given legally sufficient notice. The notice complied with the statutory notice requirements of Miss. Code Ann.§17-1-15 and 17-1-17. Thus the issue is whether the adoption of the 2001 Official Zoning Map[10] ordinance can be invalidated because the City failed to publish notice of the hearing in the legal section of the New Albany Gazette pursuant to its own zoning ordinance.

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[9] The argument is that the City did not comply with its zoning ordinance notice by publishing in the legal notices portion of the paper. See Appellee Brief at 4-5 (No notice of the hearing was published in the "legal notices" section of *The New Albany Gazette,* nor was a formal legal notice in the form required by New Albany ordinances ever published at any time.")

[10] The City's Zoning Ordinance equates the adoption of the Zoning Map to the adoption of an ordinance. See 114.01. Declaration of policy. "as here used the term ordinance, shall be deemed to include the official zoning map,.." (Vol. 1 CP at 32).

Bostwick claims that there cannot be reliance because neither the City nor any of the current or previous owners of the Subject Farr Property have ever "taken statutory steps or the steps set out in the City's own ordinances to rezone Farr's land from Agricultural to Industrial." (Appellee Brief at 4).

Mississippi statute provides that a municipality "shall provide" for the manner in which its zoning ordinance and official zoning map are to be "amended, supplemented or amended."

> The governing authority of each municipality and county shall provide for the manner in which the comprehensive plan, zoning ordinance (including the official zoning map) subdivision regulations and capital improvements program shall be determined, established and enforced, and from time to time, amended, supplemented or changed.

Miss. Code Ann. § 17-1-15. By Ordinance, the City provided that the City on its own motion could rezone property. *See* Section 114.01 of the Ordinance ("an amendment to this ordinance may be initiated by the mayor and board of alderman, the planning and zoning commission, or by any person, firm or corporation filing application therefor.") (Vol. 1 CP at 32.)[11] *See also Town of Florence v. Sea Lands, Ltd.*, 759 So. 2d 1221, 1224 (Miss. 2000) ("Miss. Code Ann. § 17-1-15 (1995) clearly states that the governing authority of a municipality may amend, supplement, or change zoning ordinances provided that there is a properly noticed hearing.")

Chris Watson, the urban planner with fourteen years professional experience who drafted the 2001 Official Zoning Map, likewise testified that the "City could initiate zoning through the adoption

---

[11] 114.01. Declaration of policy.

For the purpose of establishing and maintaining sound, stable, and desirable development within the territorial limits of the municipality, this ordinance, and as here used the term ordinance, shall be deemed to include the official zoning map, shall not be amended except to correct a manifest error in the ordinance, or, because of changed or changing conditions in a particular area or in the municipality generally. Amendments shall be limited strictly to those necessary to the promotion of public health, safety, or general welfare. Subject to the above limitations, an amendment to this ordinance may be initiated by the mayor and board of aldermen, the Planning and zoning commission or by any person, firm; or corporation filing application therefor.
Vol 1 CP at 32.

of a new official zoning map and this was how a significant portion of the property lying on either side of Munsford Drive between US 78 and Hwy. 30 West came to be zoned commercial." (Vol. 2 CP at 160)(R.E. 6). *See also* Watson, Vol. 1, Ex. K at 135)(R.E. 11).

The uncontradicted record evidence proves that the Subject Farr Property was zoned I-1 Industrial prior to the date on which the City adopted its 1997-2025 Comprehensive Plan in April 1997, and that the Official Zoning Map with that zoning was incorporated as the Future Land Use Plan for the City when the Comprehensive Plan was adopted.

Booker Farr took the steps that any responsible owner would take when he began to market his property. He contacted the City and asked what the zoning of the property was. He was told that the Property was Zoned I-1 Industrial.

> MR. FARR: My name is Booker Farr, and I own the property in question. I don't have much to say. As you know, I brought this property in '99. The first time I checked on the zoning was somewhere around 2002 or 2003. The City represented it to me as industrial. That didn't surprise me because I own eight-and-a-half acres north of this property, it's industrial. This property joins an existing asphalt plant, it's industrial. So I wasn't surprised to find it industrial and really didn't care what it was zoned because, at that time, I didn't know what I was going to do with it. But after I realized I wasn't going to need it and put it on the market, I went back to the zoning office, it's industrial. Now, how it got that way, I have no idea. But I have marketed this property for the last three or four or five years as industrial. And I respectfully submit to you that after seven years, it's not fair to go back and change the zoning on this property. I don't understand all this stuff, but they's been a lot said about me not coming before the zoning board. They are hundreds of pieces of property where the people didn't come and ask for a zoning classification. It had a zoning classification, but they didn't ask for it. I asked Dr. Bostwick, you said some of your property was agricultural. Some of it's commercial. Did you ask for commercial?
>
> MR. BOSTWICK: (Shakes head 4 back and forth.)
>
> MR. FARR: So there you go. Just because it was changed don't make it illegal. So I respectfully ask you to uphold the zoning on this property. Thank you.

(Vol. 1, Ex. K at 87-88)(R.E. 8).

Before Lehman-Roberts contracted to purchase the Subject Farr Property, Lehman-Roberts took the steps that any responsible business would take when it entered a contract to purchase property and to expend hundreds of thousands of dollars to build a new plant. David Greene, Lehman-Roberts's Vice President, asked the City what the zoning was of the Subject

Property and he was told that the Subject Farr Property was zoned Industrial. Greene testified at the August 29, 2008 hearing as follows.

> We went to Mr. Mike Armstrong's office to inquire about the zoning of this property and to verify Mr. Farr's understanding that his property was zoned industrial. Mr. Armstrong showed us the official zoning map of the City of New Albany. And the map showed that this parcel of land is indeed zoned industrial. We then asked Mr. Armstrong if this piece of property was zoned properly so that an asphalt plant could be placed on it. Mr. Armstrong said that it is zoned properly and that one of the property usage of this industrially zoned site is an asphalt plant.

Vol. 1, Ex. K at 109-110 (R.E. 10).

Lehman-Roberts applied for an environmental permit from the Mississippi Department of Environmental Quality ("MDEQ") for an asphalt plant. MDEQ took the steps that any responsible agency would take when considering an application for a permit. It contacted the City and asked what the zoning of the Subject Farr Property was. The City provided MDEQ with an opinion letter stating that the Subject Farr Property was zoned Industrial. The December 19, 2007, letter was addressed not only to MDEQ but also to the State's Attorney General. The letter reads in pertinent part:

> It is my understanding you have requested the City to give its official opinion as to whether this property is zoned industrial. This request came after counsel for Allen Maxwell, et al (a citizens group opposing Lehman-Roberts) raised the question in the public meeting held here in New Albany.
>
> One additional piece of information has come to light since the public hearing. It appears that in 2001, following an annexation, the City Planning Firm assisting the City of New Albany took the existing zoning map and, with their superior capabilities in this area, duplicated the same but made it much more precise. Before doing this, notice was run in the New Albany Gazette along with a color coded zoning map appearing on the front page of said paper. A public bearing was held and four citizens appeared requesting changes in the zoning of their property. 'The Board of Aldermen agreed to these changes and the official map was modified accordingly. My client is not commenting on the legal weight of this additional evidence, but is simply making it available to all parties.
>
> Having said all of that, *it is the position of the City that the Booker Farr tract which Lehman-Roberts proposes to purchase is zoned industrial on the official zoning map of the city. It was shown as such prior to the 2001 annexation and it remains so.*

(Vol. 1, Ex. 13 at 14-15)(Emphasis added).

These were responsible actions. Each of the persons and entities involved in the

purchase, sale and provision of a permit inquired as to the zoning of the Subject Farr Property. Over a period of five years, they each consulted the City's Official Zoning Map, which under the City's Zoning Ordinance is "the final authority to the current of land within the city." (Vol. 1, Ex. Q at 1707). They each consulted with the City official in charge of zoning, and they were each told that the Subject Farr Property was zoned Industrial.

Unlike Appellee Robin Bostwick who testified that he did not know that his own property fronting on Munsford Drive had been rezoned to Commercial by the adoption of the 2001 Official Zoning Map without a request from him because he had never looked at the zoning map until "this asphalt thing came up," (Vol. 1, Ex. See Bostwick Deposition Testimony at 13-14, 18), Farr and MDEQ and Lehman-Roberts all undertook the due diligence steps that responsible business people undertake. *See* Farr Reply Brief at 17-22 for more detailed information on the widespread reliance on the City's 2001 Official Zoning Map.

Bostwick claims that the waiver and estoppel cases referenced by Lehman-Roberts are not apposite and that the Court should rely on the case of *City of Petal v. Dixie Peanut Co.*, 994 So. 2d 835 (Miss. Ct. App. 2008). (Appellee Brief at 10-11.)[12]

The *Dixie Peanut* case involved a city's action against a property owner – someone who has a substantive due process property claim,[13] unlike Bostwick who has *no* property interest in the Subject Farr Property. The action undertaken by the City of Petal was not allowed by its zoning ordinance,[14] unlike here where the City's Zoning Ordinance specifically provides for the

---

[12] "The case presently before this Court is actually much more akin to the situation discussed in *City of Petal* v. *Dixie Peanut Co.*, where an application for a zoning variance was before the Board of Aldermen at a meeting for which no notice was given. 994 So.2d 835 (Miss. Ct. App. 2008)." Appellee Brief at 11.

[13] Dixie Peanut, 994 So. 2d at 837.

[14] Dixie Peanut, 994 So. 2d at 837.

City to initiate rezoning. (§114.01 Vol. 1, Ex. Q at 1704). The City of Petal also violated statutory notice requirements because there was *no* notice given,[15] unlike here where the City's notice of the hearing on the new Official Zoning Map met statutory requirements. The City of Petal's action involved the taking of a property interest,[16] unlike here where the Subject Farr Property was already zoned I-1 Industrial prior to the hearing, the hearing merely confirmed that zoning, and no complainant has any property interest in the Subject Farr Property.

E. Standing

As it did for the first time in its March 12, 2010 Motion to Dismiss, Bostwick challenges Lehman-Roberts' standing to make claims, even after Lehman-Roberts participated fully in both the hearing before the City and formally as an intervenor in the Bostwick appeal of the City's decision to the Circuit Court of Union County:

> Appellant Lehman Roberts has no standing to make any claims in this matter. If the Court does find the Appellants to have valid appeal issues, the only issue that should be considered in this appeal is that of notice as this is the sole issue that was addressed by the Circuit Court.

Appellee Brief at 7.

Bostwick expends three pages arguing that Lehman-Roberts has no standing to intervene in this case or to appeal the Circuit Court's decision. Appellee Brief at 16-19. Lehman-Roberts has already addressed the issue of its standing and ability to appeal as an intervenor of right in the Reply to Response to Motion to Strike in which Bostwick sought to dismiss this appeal, attached hereto as an exhibit. In summary Lehman-Roberts was granted the right to intervene as of right in the Bostwick appeal of the City's decision to the Circuit Court pursuant to Miss. R. Civ. P. 24(a)(2). (Vol. 1 CP 90).

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[15] *Dixie Peanut*, 994 So. 2d at 837.

[16] *Dixie Peanut*, 994 So. 2d at 840.

The three pages of argument about how Lehman-Robert would have no damages if it had simply heeded Bostwick's warnings that it was proceeding at its own peril (Appellee Brief at 16-17) have no relation to the issue of standing. If every business could be bullied into dropping plans for economic development by the threats of residents, there would be no jobs and no development of any kind within this State.

In Mississippi, parties have standing to sue when they assert a colorable interest in the subject matter of the litigation or experience an adverse affect from a defendant's conduct. *Miss. Manufactured Housing Assn v. Bd. of Aldermen*, 870 So. 2d 1189, 1192 (Miss. 2004). Lehman Roberts was given the right to intervene in the appeal (Vol. 1 CP at 90) after participating fully in the zoning hearing before the City because it had a substantial interest in the outcome of the case, which interest was not protected by the other parties to the appeal.

Lehman-Roberts has a contract to purchase the Subject Farr Property on which it intends to construct an asphalt plant. That contract does not expire unless and until there is a final decision that the Subject Farr Property cannot be used for that plant. (Vol. 1, Ex. G at ¶18-19). Lehman-Robert has a permit from the MDEQ to operate that asphalt plant. (Vol. 2, Ex. 13 at 18-19). Lehman-Roberts has a building permit from the City to construct that asphalt plant. (Vol. 2, Ex. 13 at 25-27). Lehman-Roberts has expended substantial funds in preparation to construct the asphalt plant. (Vol. 1, Ex. K at 110-111)(R.E. 10). If the Circuit Court's decision is not reversed and the City's zoning decision upheld, Lehman-Roberts will be the most adversely affected of any of the parties to this appeal. That meets the requirement for standing under this Court's standing decisions.

The Appellees on the other hand do not live near the Subject Farr Property. They are separated from the Subject Farr Property by 2500 to 3500 feet of dense trees. (Vol. 2, Ex. 16, Maps 4-5). They are lead by a man, Robin Bostwick, whose own property along Munsford Drive

was rezoned from Agricultural to Commercial, without his requesting or petitioning the City, by the City's adoption of the 2001 Official Zoning Map. (Vol. 1, Ex. K at 88)(R.E. 8); (Vol. 2 CP at 160)(R.E. 6). Appellee Bostwick rarely reads the paper, and he could not remember as far back as 2001 regarding the colored zoning map on the front page of the New Albany Gazette. He did not know that his own property had been rezoned, because he had never looked at the City's Official Zoning Map until 2008 "when that asphalt thing" came up." (Vol. 1, Ex. B at 13-14, 18).

F. Minutes

Lehman-Roberts has addressed the signing of the Minutes related to the 2001 adoption of the City's 2001 Official Zoning Map. *See* Appellant Brief at 37-38 (The minutes were signed according to law.). Bostwick now claims that since the City did not state the reasons for the rezoning of the property (other than the area from the annexed areas), that the adoption of the Map is invalid. Appellee Brief at 12, 30-32.

To reiterate, the Subject Farr Property was rezoned I-1 Industrial prior to 1997, not through the adoption of the 2001 Official Zoning Map. (*e.g.,* Vol. 2 CP at 162)(R.E. 6). Therefore, if the adoption of the 2001 Zoning Map is invalidated, that merely invalidates the Commercial rezoning of the property along Munsford Drive, including Appellee Bostwick's property. It does not change the zoning of the Subject Farr Property, nor does it affect the zoning of the annexed property. *See Gatlin v. City of Laurel*, 312 So. 2d 435, 440 (Miss. 1975)(Adopting zoning classifications for newly annexed land does not require need to show material change in surroundings or prior mistake in order to reclassify land.).

Moreover, where a timely challenge to the 2001 ordinance might have had merit on the basis of the content of the minutes, where the City' 2001 Official Zoning Map has been in effect and relied upon by the City, the property owners whose property was rezoned thereunder and by Farr, Lehman-Roberts, and the public, the validity of the zoning ordinance cannot be challenged

"because of noncompliance with formal requirements in the manner of its enactment." *Walker v. Biloxi*, 229 Miss. 890, 896, 92 So. 2d 227, 229 (Miss. 1957).

G. Miscellaneous

Bostwick makes several other arguments in Response to the Lehman Roberts and Farr Appellant Briefs. One is that Lehman-Roberts should not label Bostwick's efforts as an attempt to appeal the City's July 26, 2001 adoption of the 2001 Official Zoning Map.

> The Appellee property owners bill of exceptions was not a direct appeal of the 2001 Ordinance and Map as stated multiple times by Lehman Roberts in this appeal.' It was in fact an appeal of the September 15, 2008 determination of the Board of Aldermen refusing to correct a previous mistake on the part of the City of New Albany that resulted in the Zoning Map's being incorrect. Therefore, any and all information and evidence presented to the board in previous meetings and hearings leading up to its vote was appropriately considered on appeal.

Appellee Brief at 8.

Had this been merely an effort to prove that there had been a mistake in the zoning of the Subject Farr Property, there would not have been the need to challenge the City's July 21, 2001 adoption of the Official Zoning Map or the April 27, 1997 adoption of the 1997-2025 Comprehensive Plan. The Subject Farr Property was already zoned I-1 Industrial at the time of those two actions by the City. The type of challenge allowed in this appeal is exactly what should have been brought in May 1997 and July 2001 – allegations that there were procedural deficiencies in the City's actions of those dates. Here there is not even a challenge to the ordinance that zoned the Subject Farr Property I-1 Industrial, but a challenge to the City's actions in 1997 and 2001 which confirmed the I-1 Industrial zoning.

Bostwick's claim that this was an appeal of the City's refusal to change the actions that it undertook prior to the adoption of the 1997-2025 Comprehensive Plan is similar to arguing that appealing a trial court's ruling eleven years after the ruling is in fact an appeal of the trial court's refusal to change that earlier ruling. Since the "trial court" was the City, this Court has refused to invalidate ordinances years after their adoption.

Bostwick also claims that the City put into evidence matters outside the record.

> The City of New Albany also introduced evidence that the property owners found to be outside the scope of the Circuit Court's consideration. This information was also allowed and is, in fact, even included in part in Lehman-Roberts' brief. None of the information about businesses using Munsford Drive, including mention of Martintown Industrial Park or Vuteq was mentioned until the City introduced its 12 page "Findings" after the Bill of Exceptions was filed. None of this information was properly before the Circuit Court and should not have been included in this appeal.

Appellee Brief at 38.

This Court has held, however, that it is appropriate for a governmental entity to consider both information provided at the hearing and "its own common knowledge and familiarity with the affected area." *See Edwards*, 22 So. 3d at 276.

In explaining the allowance of what in a court setting might be considered "judicial notice" this Court held

> In addition, the Board may rely on its own knowledge and familiarity with the affected land. This Court has stated:
>
> We emphasize that whenever zoning authorities act on the basis of their general knowledge of their community or on the basis of any other information obtained other than "from the parties," they should clearly so state. In order that we might effectively perform our judicial review responsibilities, it is vital that we be [reliably] informed of all bases of the decision of the zoning authorities.

Edwards, 22 So. 3d at 278.

The City filed eleven pages of specific findings, including matters within its own common knowledge and labeled it as such. See Vol. 2 CP at 153-164)(R.E. 6). Under this Court's rulings, the City's reliance on its own common knowledge of the City in addition to the hearing evidence was appropriate.

IV. CONCLUSION

Bostwick failed to present clear and convincing evidence to prove that there should be a rezoning of the Subject Farr Property from I-1 Industrial to A-1 Agricultural. Bostwick was required to provide clear and convincing evidence that there was a clerical mistake in the City's

Official Zoning Map or that that there was a change in the neighborhood and a public need for additional Agricultural zoned property. Bostwick failed to meet its burden, and the City's refusal to grant its rezoning petition should be upheld.

The record evidence was overwhelming that there was no clerical mistake in the City's Official Zoning Map. Bostwick presented *no* evidence that there was a change in the neighborhood and a public need for additional Agricultural zoned property, a statutory prerequisite for rezoning in Mississippi. The City's decision denying Bostwick's request to rezone the Subject Property from Industrial to Agricultural was not arbitrary or capricious, and was supported by substantial evidence.

Since the City's decision was clearly founded upon substantial evidence it is therefore binding upon this Court. Its decision must be reinstated.

This the 10th day of May, 2010.

Respectfully submitted,

LEHMAN-ROBERTS COMPANY, APPELLANT

By Its Attorneys,
WATKINS LUDLAM WINTER & STENNIS, P.A.

By: _____
Kathryn H. Hester

E. Patrick Lancaster, MS Bar No. 100919
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EXHIBIT

APPELLEES' MOTION TO DISMISS

LEHMAN-ROBERTS MOTION TO STRIKE

APPELLEES' RESPONSE TO MOTION TO STRIKE

LEHMAN-ROBERTS REPLY TO RESPONSE TO MOTION TO STRIKE

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DATE March 12, 2010

CAUSE NO: 2009-CA-00710
RE: Riverside, et al
vs.
Bostwick, et al

TO: E. Patrick Lancaster
WATKINS LUDLAM WINTER & STENNIS
Post Office Box 1516
Olive Branch, MS 38654

(ONLY CHECKED BOXES RELATE TO YOU)

✓ Enclosed please find documents listed for your information and records: Motion to Dismiss & Brief.

___ Please sign where indicated and return to us.

___ Please sign and forward documents to _____.

___ Please call this office immediately.

___ Please contact this office and schedule an appointment.

___ Please notice the date an action must be taken or a hearing is scheduled.

___ Check No. _____, in the amount of $ _____ is enclosed.

___ Please file the enclosed documents in your usual manner and send a copy of the first page marked "filed" back to us in the stamped, self-addressed envelope.

___ Please issue the summons and return to our office.

___ Please issue the summons and forward to the Sheriff's Office for service.

___ Please serve the summons and return original with process server's return back to us.

___ Other: _____

_____

_____

_____

If you have any questions, please contact our office. Thank you.

Sincerely,

RUTLEDGE, DAVIS AND HARRIS, P.L.L.C.

By: Valerie D. Hancock

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March 10, 2010

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
Post Office Box 249
Jackson, Mississippi 39205

RE: *Riverside Traffic Systems, Inc., Booker Farr, and Lehman-Roberts Company vs. Robin Bostwick, Eric Frohn, Allen Maxwell, Herbert G. Rogers, Ray Tate, and City of New Albany, Mississippi*
No. 2009-CA-00710

Dear Ms. Gillis:

Please find for filing the enclosed Motion to Dismiss Appeal or In the Alternative to Stay Appeal and/or Consolidate Cases and the supporting Memorandum Brief. 4 copies of each have also been enclosed and a copy has been forwarded to each counsel of record.

Should you have any questions, please do not hesitate to contact me. Thank you in advance for your assistance in this matter.

Sincerely,

Valarie B. Hancock
RUTLEDGE, DAVIS & HARRIS

Enclosure

cc: E. Patrick Lancaster, Esq.
A. Rhett Wise, Esq.
Phillip L. Tutor, Esq.

IN THE MISSISSIPPI SUPREME COURT

RIVERSIDE TRAFFIC SYSTEMS, INC.,
BOOKER FARR, AND LEHMAN-ROBERTS COMPANY — APPELLANTS

VS. — NO. 2009-CA-00710

ROBIN BOSTWICK, ERIC FROHN,
ALLEN MAXWELL, HERBERT G. ROGERS,
RAY TATE, AND CITY OF NEW ALBANY,
MISSISSIPPI — APPELLEES

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO STAY OR ABSTAIN FROM HEARING APPEAL

COME NOW, Appellees, pursuant to M.R.A.P. 27(a) and M.R.C.P. 42(a), and respectfully submit this motion to dismiss the appeal of Riverside Traffic Systems, Inc., Booker Farr, and Lehman-Roberts Company or in the alternative to stay their appeal or to abstain from hearing this appeal until the matter currently before the Circuit Court of Union County, Mississippi can be heard, and in support thereof would show as follows:

1.

On June 10, 2008, the Appellee property owners filed a Petition to Correct Zoning Map or to Rezone Property concerning a piece of property belonging to Appellant Booker Farr and/or Riverside Traffic Systems, Inc. when it was discovered that a mistake had been made on the zoning map which showed the Farr property to be zoned Industrial rather than Agricultural as it actually was.

2.

After much discussion and litigation between all parties, a hearing was finally had before the Board of Aldermen on August 29, 2008, and the matter was taken under advisement by the Board.

3.

On September 15, 2008, the Board of Aldermen met and voted on the Appellee property owners' petition and held by a 3 to 2 vote that the Farr property was zoned Industrial.

4.

On September 25, 208, the property owners, and Appellees herein, filed a Notice of Appeal and a Bill of Exceptions with the Union County Circuit Court.

5.

Lehman-Roberts and Booker Farr filed a motion to intervene to "protect their interests" which was granted in October, 2008.

6.

A hearing was held before Circuit Court Judge Henry Lackey on March 24, 2009, and the matter was taken under advisement by Judge Lackey.

7.

On March 31, 2009, Judge Lackey entered an Order finding the City of New Albany had acted in an arbitrary and capricious manner and held the property to be zoned Agricultural. (Please See Order, Attached as Exhibit "A").

8.

After receiving the Circuit Court Order, Appellant Booker Farr chose, as his remedy, to file an Application with the City of New Albany to rezone the same property from Agricultural to Industrial on or about April 15, 2009. (Please See Application, Attached as Exhibit "B"). In that

application, Farr states clearly over his signature that the property at issue is properly zoned as Agricultural.

9.

On April 24, 2009, Booker Farr and Lehman-Roberts filed a Notice of Appeal from Judge Lackey's decision with this Court arguing that the property was properly zoned Industrial. This is the very same property which Farr had, nine days previously, petitioned the City to rezone from its agricultural classification.

10.

Farr chose his remedy by filing the Petition to Rezone with the City rather than protecting his appeal. (Exhibit "B"). He cannot have it both ways and pursue two separate remedies in two separate courts.

11.

While waiting on the record to be prepared and submitted and briefs to be filed in this matter, a second public hearing was held on Farr's Petition to Rezone before the Board of Aldermen of the City of New Albany on June 15, 2009.

12.

At that hearing, all parties were present, including their witnesses and experts, and a new record was made before the Board of Aldermen.

13.

At the end of that hearing, the Board of Aldermen voted, and found the property to be zoned Agricultural by a 3 to 2 vote.

14.

Riverside Traffic, Booker Farr and Lehman Roberts then filed a Bill of Exceptions with the Union County Circuit Court on June 25, 2009, appealing the Board's decision on Farr's application to rezone, but no briefs or other pleadings have been filed at this time. This, in effect, gave Farr and Lehman-Roberts two active appeals at the same time regarding the same property.

15.

There are no grounds for this appeal and it should be immediately dismissed for the following reasons.

FARR'S APPEAL SHOULD BE DISMISSED BASED ON JUDICIAL ESTOPPEL AND THE DOCTRINE OF ELECTION OF REMEDIES

16.

By filing a new application with the City of New Albany, requesting the property be re-zoned from Agricultural to Industrial, Farr made a party admission and elected his remedy. He admitted the property is, in fact, zoned as Agricultural and verified this with his signature in his application to rezone. Farr cannot continue to argue in this appeal that the property is zoned industrial. He must be held to his admission. Farr made the decision to request rezoning of the property from agricultural to industrial before filing this appeal. The two remedies were in direct contradiction with each other. In the Petition to Rezone, Farr states the property is currently Agricultural and that he wishes it to be rezoned as Industrial. His signature was added to this document. He is not allowed to reverse that statement in an appeal to this Court, stating the property is now Industrial.

THE COURT SHOULD STAY OR ABSTAIN FROM HEARING THIS APPEAL PENDING A DETERMINATION BY THE CIRCUIT COURT OF UNION COUNTY, MISSISSIPPI

17.

Should this Court determine that there is jurisdiction to hear these claims and that all parties are properly before the Court, any decision in this matter should be stayed until the Circuit Court rules on the matter before it as both cases are essentially identical, involving a common nexis of facts, parties, and subject matter.

18.

Lehman-Roberts was merely an intervenor in the matter on appeal to this Court. Its rights, if any, do not supercede those of Booker Farr who owns the property at issue. Should Booker Farr and/or Riverside's Appeal be dismissed, Lehman-Roberts will be unable to proceed with an appeal and should also be dismissed.

19.

These issues are being raised for the first time before this Court due to the fact that judicial estoppel and the doctrine of election of remedies necessarily only came into play in this case after the Circuit Court ruling had been entered. This is the first opportunity for these issues to be raised or heard and this is the appropriate forum for them to be presented.

THEREFORE, the Appellees request that this Court dismiss with prejudice the Appeal in this matter as to all parties and all issues identified above due to the reasons stated herein.

The Appellees further request that this Court extend the deadline for the Appellees to file their Appeal Brief until this Motion can be ruled upon.

RESPECTFULLY SUBMITTED, this the 12 day of March, 2010.

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Attorneys for the Appellees

CERTIFICATE OF SERVICE

I, William O. Rutledge, III, counsel for the Appellees, do hereby certify that I have on this date, served a true and correct copy of the above and foregoing Motion to Dismiss Appeal upon the following persons at their usual business addresses as follow:

Honorable Henry Lackey
Union County Circuit Court Judge
Post Office Box T
Calhoun City, MS 38916

Rhett Wise
Priest & Wise
301 W. Main Street
Tupelo, MS 38802

Phillip Lynn Tutor
50 Liberty Street
Pontotoc, MS 38863

E. Patrick Lancaster
WATKINS, LUDLAM WINTER & STENNIS, P.A.
Post Office Box 1456
Olive Branch, MS 38654

Roger H. McMillin, Jr.
401 E. Bankhead Street
New Albany, MS 38652

SO CERTIFIED, this the 12 day of March, 2010.

WILLIAM O. RUTLEDGE, III

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March 24, 2010

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
Post Office Box 249
Jackson, Mississippi 39205

RE: *Riverside Traffic Systems, Inc., Booker Farr, and Lehman-Roberts Company vs. Robin Bostwick, Eric Frohn, Allen Maxwell, Herbert G. Rogers, Ray Tate, and City of New Albany, Mississippi*
No. 2009-CA-00710

Dear Ms. Gillis:

Please find for filing the enclosed Response to Lehman-Roberts Company's Motion to Strike Appellees' Motion to dismiss. Four copies have also been enclosed and a copy has been forwarded to each counsel of record.

Should you have any questions, please do not hesitate to contact me. Thank you in advance for your assistance in this matter.

Sincerely,

Valarie B. Hancock
RUTLEDGE, DAVIS & HARRIS

Enclosures

cc: E. Patrick Lancaster, Esq.
Kathryn H. Hester, Esq.
A. Rhett Wise, Esq.
Phillip L. Tutor, Esq.
Roger H. McMillin, Jr., Esq.

IN THE MISSISSIPPI SUPREME COURT

RIVERSIDE TRAFFIC SYSTEMS, INC.,
BOOKER FARR, AND LEHMAN-ROBERTS COMPANY — APPELLANTS

VS. — NO. 2009-CA-00710

ROBIN BOSTWICK, ERIC FROHN,
ALLEN MAXWELL, HERBERT G. ROGERS,
RAY TATE, AND CITY OF NEW ALBANY,
MISSISSIPPI — APPELLEES

RESPONSE TO LEHMAN-ROBERTS COMPANY'S MOTION TO STRIKE APPELLEES' MOTION TO DISMISS

COME NOW, Appellees, Robin Bostwick, Eric Frohn, Allen Maxwell, Herbert G. Rogers, and Ray Tate (hereinafter "Bostwick Appellees"), by and through counsel, and file this Response to Lehman-Roberts Company's Motion to Strike Appellees' Motion to Dismiss, and in support thereof would show as follows:

1.

The Bostwick Appellees filed their Motion to Dismiss Appeal based purely on the following point:

Booker Farr elected the remedy of petitioning the City of New Albany to rezone the property located at 1355 Munsford Drive, New Albany, Mississippi. Because of that, Farr and his company, Riverside Traffic Systems, Inc., are hereinafter barred from filing an appeal with this Court in an attempt to pursue the same matter in two separate courts at the same time through the well established doctrine of election of remedies. (*O'Briant v. Hull*, 208 So.2d 784 (Miss. 1968)(Citing *Clark v. Ripley Savings Bank & Trust Company*, 181 S.W.2d 386; *Grizzard v. Fite*, 191 S.W. 969)).

2.

That being said, Circuit Court Intervenor, Lehman-Roberts Company has no actual interest in the outcome of this case and has no standing of their own. Their appeal is purely dependant upon that of the other Appellants. Booker Farr and Riverside Traffic Systems, Inc., who are estopped from pursuing an appeal in this Court. Therefore, Lehman-Roberts Company is, necessarily, without grounds to proceed in this appeal as well.

3.

At this point, to the best knowledge of the Bostwick Appellees, only Intervening Appellant, Lehman-Roberts Company has filed a Response to the Motion to Dismiss. Neither Appellant Riverside Traffic Systems, Inc. nor Appellant Booker Farr have filed any Response to the Motion.

4.

The acts that allow for dismissal occurred on April 15, 2009, between March 31, 2009, the time when Circuit Court Judge Henry Lackey ruled on the Bill of Exceptions and April 24, 2009 when the Notice of Appeal was filed. This is the first Court where the issue of election of remedies could be raised. This is not a question on the merits of the Circuit Court's ruling on the Bill of Exceptions. This is a procedural and jurisdictional issue that must be addressed before the Court should contemplate hearing the case on the merits.

5.

Appellant Lehman-Roberts Company apparently knows this as they have refused to even address the issues that were set forth in the Appellees' Motion to Dismiss. Instead, Lehman-Roberts has filed a Motion to Strike on an issue that is irrelevant and completely unrelated to the Appellees' Motion to Dismiss, while the other Appellants have not responded at all.

6.

Lehman-Roberts Company states that the Bostwick Appellees only filed their Motion to Dismiss as a means to delay this matter listing two requests for extensions of time and a request for an increase in the number of pages for their brief.

First, a request for an increase in page number is not a delay to this proceeding and was necessary in order to address Lehman-Roberts Company's brief which was fully 49 pages in length and addressed multiple points that must have a response from the Appellees, leaving Appellees no further room to address their own points in the 25 pages they were initially allowed.

Second, the Appellees second motion for time was requested in order to file the Motion to Dismiss. It was only after consulting the Mississippi Supreme Court Clerk's office as to whether it would be necessary to file a motion for time along with the motion to dismiss, that the Appellees went ahead and filed for the second extension of time in order to allow the clerk to receive the motion to dismiss. At that time, Appellees were informed that their Brief would not be due until the Motion to Dismiss was ruled upon.

7.

Lehman-Roberts Company has conspicuously failed to mention that the Appellants have each asked for extensions of time in this matter. The Appellants have not filed any objection with this Court concerning the Appellees' requests for time or their request to increase page number. This is simply an example of the pot calling the kettle black.

8.

Appellees have no objection to Lehman-Roberts Company filing a response to the Motion to Dismiss. However, any such response should be limited strictly to the only issue concerning Lehman-Roberts. Due to the fact that Lehman-Roberts' appeal is totally dependent on Farr and

Riverside for its appeal, Lehman-Roberts' appeal cannot stand on its own if Farr and Riverside are dismissed. This is the only issue in the Motion to Dismiss that concerns Lehman-Roberts and it is the only issue in the Motion to Dismiss to which Lehman-Roberts is entitled to respond.

9.

Lehman-Roberts Company's Motion to Strike should be denied.

RESPECTFULLY SUBMITTED, this the 23 day of March, 2010.

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Attorneys for the Appellees

CERTIFICATE OF SERVICE

I, William O. Rutledge, III, counsel for the Appellees, do hereby certify that I have on this date, served a true and correct copy of the above and foregoing Motion to Dismiss Appeal upon the following persons at their usual business addresses as follow:

Honorable Henry Lackey
Union County Circuit Court Judge
Post Office Box T
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Rhett Wise
Priest & Wise
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Phillip Lynn Tutor
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Roger H. McMillin, Jr.
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New Albany, MS 38652

SO CERTIFIED, this the 23 day of March, 2010.

WILLIAM O. RUTLEDGE, III

COPY

IN THE MISSISSIPPI SUPREME COURT

NO. 2009-CA-00710

RIVERSIDE TRAFFIC SYSTEMS, INC., BOOKER FARR, AND LEHMAN-ROBERTS COMPANY

APPELLANTS

FILED
MAR 29 2010
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

VS.

ROBIN BOSTWICK, ERIC FROHN, ALLEN MAXWELL, HERBERT G. ROGERS, RAY TATE AND CITY OF NEW ALBANY, MISSISSIPPI

APPELLEES

Appeal From The Circuit Court of Union County, Mississippi

LEHMAN-ROBERTS COMPANY'S REPLY TO APPELLEES' RESPONSE TO MOTION TO STRIKE

Lehman-Roberts Company ("Lehman-Roberts") replies to the Response to the Motion to Strike of the Appellees Bostwick, Frohn, Maxwell, Rogers and Tate ("Bostwick"), as follows.

1. In responding to Lehman-Roberts' Motion to Strike, a motion in which Appellants Riverside Traffic Systems and Farr joined, the Bostwick Appellees claim that Lehman Roberts has no interest in the outcome of the case and therefore has no standing to appeal on its own and/or to file its Motion to Strike.

2. To the contrary, Lehman Roberts is clearly entitled to appeal in its own right and to Move to Strike the Appellees' effort to add to the record in this appeal from the City of New Albany's September 15, 2008 zoning decision.

3. Lehman-Roberts participated fully in the hearing before the City of New Albany at which the Bostwick Appellees challenged the zoning classification of the Farr Property. See City Findings, Vol. 2 CP at 153 ("Intervenor, Lehman Roberts Asphalt Company, Inc. was represented by E. Patrick Lancaster, Esquire.").

4. Lehman-Roberts moved to intervene as of right in the Bostwick appeal to the Union County Circuit Court pursuant to Miss. R. Civ. P. 24(a)(2) because it had a substantial interest in the outcome of the case, which interest was not protected by the other parties to the appeal.

5. Lehman-Roberts has expended substantial sums at the Farr Property where it has begun construction of an asphalt plant pursuant to a valid building permit, and in reliance on the assurances of the City that the Property was zoned Industrial, and it was so situated that its interest would be severely impaired or impeded by the disposition of the appeal. See Motion to Intervene, Vol. 1 CP at 64-66.

6. Lehman-Roberts was granted the right to intervene as of right to protect its interest pursuant to MRCP 24(a)(2). See Order Granting Motion for Leave to Intervene, Vol. 1 CP at 112. There was no opposition from the Bostwick Appellees to Lehman-Roberts' intervention.

7. This Court has held that the circuit court sitting as an appellate court may grant intervention to additional parties who then participate in the proceedings before the circuit court. See *Cooper v. Picayune*, 511 So.2d 922, 923 (Miss. 1987)(Any court sitting as an appellate court has authority to allow additional parties to participate in the appeal upon timely application or upon the court's own invitation).

8. As an intervenor of right, Lehman-Roberts was, and is, given the right to participate in all aspects of the Circuit Court and Supreme Court appeals. See *Cooper v. Picayune*, 511 So, 2d 922, 923-924 (Once intervention is allowed, intervening parties are subject to the full jurisdiction of the court).

9. Mississippi follows Federal Rule 24 with regard to intervention. In *Guaranty National Ins. v. Pittman*, 501 So. 2d 377, this Court followed federal practice and applied four prerequisites to Rule 24(a)(2) - Intervention of Right - in finding that

> We think there is much to be said for an overall attitude which gives the benefit of the doubt to the one seeking intervention, particularly where intervention of right under Rule 24(a)(2) is claimed.

See *Guaranty National Ins*, 501 So. 2d at 385, citing cases from both the federal Fifth Circuit and the federal Eighth Circuit.

10. Under Federal Rule 24, absent restrictions imposed by the court on the intervenor, the intervenor is treated as if he were an original party and has equal standing with the original parties. See *Alvarado v. JC Penney Co.*, 997 F.2d 803, 805 (10th Cir 1993)(When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party).

11. Moreover, an intervenor can obtain effective review of its claims on appeal. See *Stringfellow v. Concerned Neighbors in Action,* 107 S. Ct. 1177, 480 U.S. 370, 376, 94 L. Ed. 2d 389 (U.S. 1987)(An intervenor may appeal from "all interlocutory and final orders that affect him . . . whether the right under which he intervened was originally absolute or discretionary" citing 3B J. Moore & J. Kennedy, *Moore's Federal Practice*).

12. Lehman-Roberts, as an intervenor as of right, has the independent right to appeal the decision of the Union County Circuit Court, and to file its Motion to Strike the Bostwick Appellees' Motion to Dismiss.

13. The belated contrary assertion by the Bostwick Appellees should be disregarded out of hand.

For the reasons stated here and in its Motion to Strike, Lehman-Roberts Company moves the Court to strike the Motion of Appellees to Dismiss. If the Court determines to allow matters outside the record and the Bill of Exceptions to be considered in this appeal of the City's 2008 zoning decision by denying Lehman-Roberts Company's Motion to Strike and by considering the Motion to Dismiss, Lehman-Roberts requests the right to respond to the substance of the new matters that the Bostwick Appellees seek to interject through its Motion to Dismiss.

This the 29th day of March, 2010.

Respectfully submitted

LEHMAN-ROBERTS COMPANY
APPELLANT

By Its Attorneys

WATKINS LUDLAM, WINTER & STENNIS, P.A.

By: Kathryn H. Hester
Kathryn H. Hester

E. Patrick Lancaster, MS Bar No. [redacted]
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ATTORNEYS FOR APPELLANT
LEHMAN-ROBERTS COMPANY

CERTIFICATE OF SERICE

I certify that I have this day had mailed, United States postage prepaid, the Lehman-Roberts Company Reply to the Response of the Appellees to the Lehman-Roberts Motion to Strike to:

William O. Rutledge, III
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Attorney For Appellees

Anthony Rhett Wise
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Phillip Lynn Tutor
Attorney At Law
P.O. Box 487
Pontotoc, MS 38863-0487

This the 29th day of March, 2010.

Kathryn H. Hester

CERTIFICATE OF SERVICE

I, Kathryn H. Hester, attorney for Appellant Lehman-Roberts Company, do hereby certify that I have this day filed the Reply Brief of Appellant Lehman-Roberts Company with the clerk of this Court and have mailed, via United States mail, postage prepaid, a true and correct copy of the Brief of Appellant Lehman-Roberts Company to the following:

William O. Rutledge, III
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Attorney For Appellees

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Priest & Wise
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Honorable Henry L. Lackey
Union County Circuit Court Judge
P. O. Box T
Calhoun City, MS 38916

This the 10th day of May, 2010.

Kathryn H. Hester