IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ACKBAR F. BRINSMADE — APPELLANT

v. — NO. 2009-CA-1906

THE CITY OF BILOXI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
CIVIL ACTION NO. A2402-2008-280

BRIEF OF APPELLEE

SUBMITTED BY:

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ORAL ARGUMENT IS NOT REQUESTED

TABLE OF CONTENTS

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THE CITY OF BILOXI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee The City of Biloxi, certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or judges of the Mississippi Court of Appeals, may evaluate possible disqualifications or recusal:

1. Appellant, Ackbar F. Brinsmade;

2. Appellee, The City of Biloxi, Mississippi;

3. Malcolm F. Jones, P.O. Box 908, Gulfport, MS 39502; Attorney for Appellant, Ackbar F. Brinsmade;

4. Les W. Smith, Page, Mannino, Peresich & McDermott, PLLC, P.O. Drawer 289, Biloxi, MS, 39533; Attorney for Appellee, The City of Biloxi; and

5. Lauren Reeder McCrory, Page, Mannino, Peresich & McDermott, PLLC, P.O. Drawer 289, Biloxi, MS 39533; Attorney for Appellee, The City of Biloxi.

THIS, the 30th day of November, 2010.

Lauren Reeder McCrory

LAUREN REEDER MCCRORY

TABLE OF AUTHORITIES

CASES **Page No.**

STATUTES AND OTHER AUTHORITIES **Page No.**

STATEMENT OF THE ISSUES

The City of Biloxi, Mississippi ("Appellee" or "the City") submits that this appeal presents the following issues:

1) Whether the lower court erred in holding City of Biloxi was not required to gain the Appellant's assent or give the Appellant notice before vacating an unimproved, unopened road access easement because Miss Code Ann. §17-1-23 and/or Miss Code Ann. §19-27-31 were inapplicable.

2) Whether the lower court erred in holding that it could not be said the City failed to consider public safety or that its actions in this regard were arbitrary and capricious.

3) Whether the lower court erred in not considering the issue of whether the City violated its rules and ordinances in regards to the vacating of the easement which potentially created streets longer in length than permitted by its own ordinances.

STATEMENT OF THE CASE

The Appellant Akbar F. Brinsmade (hereinafter "Brinsmade") is aggrieved of the decision of the City to vacate an access road easement. (Resolution No. 630-08; R. 40-44) On October 7, 2008, the City vacated an easement located in the Edgewater Cove Subdivision (hereinafter "the Easement"). *Id.* Equal halves of the Easement were to be quitclaimed to the two (2) adjoining property owners. *Id.* The vacating of the Easement is contained in Resolution No. 630-08, which reflects that the Biloxi Planning Commission (hereinafter "the Commission") held a public hearing on July 17, 2008, concerning the City's request to vacate the Easement. *Id.* The Commission recommended the vacating of the Easement, finding that the unimproved Easement was not necessary to provide for the needs of the City at that time or in the foreseeable future. *Id.* The City adopted the report and findings of the Commission and found that the unimproved access road Easement should be vacated. *Id.*

Brinsmade lives in an adjoining subdivision know as the Channel Mark Subdivision. (R. 64). He, along with others, appeared at the public hearing held by the Commission. (R.64-69). Brinsmade objected to the fact that the Easement had existed for thirty (30) years and had not been developed and maintained by the City. *Id* at 64. Brinsmade was also of the opinion that the blockage of the Easement should not continue as it would prevent the evacuation in that direction in the event of a storm. *Id* at 65.

The area at issue in Edgewater Cove Subdivision is Cove Drive, which street ends in a cul-de-sac and currently has no cross streets once Cove Drive is entered. (Channel Mark Subdivision Proposed Easement Vacation; R. 50). The Easement is between Lots 8 and 9. (Request to Vacate an Unimproved Access Road Easement; R. 45). The Easement has never been developed, paved or improved. *Id.* At the boundary between the Edgewater Cove Subdivision and Channel Mark

Subdivision, the Easement abuts a paved roadway. *Id.* The driveways of lots 7 and 8 in the Channel Mark Subdivision enter this roadway. *Id.* This roadway in named Channel Way. Only Lots 7 and 8 abut Channel Way. *Id.* Brinsmade lives at Lot 9 in the Channel Mark Subdivision. *Id.* His lot does not abut Channel Way or the Easement, nor is he even in the same subdivision of the Easement. *Id.* The owners of the lots in Edgewater Cove burdened by the Easement, Bernice Magee and Michael Rewis, consented to the vacation, as did the owners of lots in the Channel Mark Subdivision whose corners touched upon the Easement, Pete Mistown and Dr. John Liberto. [*Compare* Consent Sheet; R. 61 with Channel Mark Subdivision Proposed Easement Vacation; R. 50].

Aggrieved by the City's decision, Brinsmade filed a Notice of Appeal and Intent to File Bill of Exceptions to the Circuit Court of Harrison County, Mississippi, Second Judicial District on October 17, 2008. (R.5). After both parties fully briefed the matter, the Circuit Court entered a Judgment on Appeal dismissing the appeal and affirming the action of the City. (R. 122). Brinsmade now seeks to appeal the lower court's decision in the matter to this Court. (R. 133).

SUMMARY OF THE ARGUMENT

Neither Miss. Code Ann. §17-1-23(4) nor Miss. Code Ann.§19-27-31 has any applicability to the City's decision to vacate an unopened, unimproved access road easement. As the lower court correctly held, Miss. Code Ann. § 21-37-7, the applicable statute, does not require that a municipality seeking to vacate an easement to obtain written consent from all affected persons prior to vacating the easement. Even if Miss. Code Ann. §17-1-23 or Miss. Code Ann.§19-27-31 were applicable, which they clearly are not, Brinsmade does not fall into the category of "persons to be adversely affected thereby or directly interested therein" which is required in order to proceed under either statute. Furthermore, pursuant to the record in this appeal, it cannot be said that the City failed to consider public safety or that its actions in this regard were arbitrary and capricious. Finally, the

lower court did not err in not considering the issue of whether the City violated its rules and ordinances because the relevant ordinances were not included in the record before the circuit court. Since the Court cannot take judicial notice of these ordinances, and because the Bill of Exceptions constitutes the record on appeal, the Circuit Court could not have considered matters that were not a part of the record.

ARGUMENT

I. Standard of Review

"The party challenging the governing body bears the burden of proof showing that the decision rendered is arbitrary, capricious, discriminatory, or beyond the legal authority of the city board, or unsupported by substantial evidence." *McWaters v. City of Biloxi*, 591 So.2d 824, 827 (Miss. 1991). A decision of a governing board of authorities should not be disturbed unless it is "unsupported by substantial evidence; was arbitrary or capricious; was beyond the agency's scope or powers; or violated the constitutional or statutory rights of the aggrieved party." *Robinson v. Lincoln County Board of Supervisors*, 973 So.2d 288, 289-290 (Miss. Ct. App. 2008).

II. Miss. Code Ann. § 17-1-23(4) has no applicability to the City's determination of the vacation of the Easement.

Brinsmade continues to assert as a basis of error that Miss. Code Ann. § 17-1-23(4) prohibits the City's vacation of the Easement without his written approval. (Appellant's Brief, pg. 11). Miss. Code Ann. § 17-1-23(4) provides:

> *If the **owner** of any land* which shall have been laid off, mapped or platted...or subdivision...desires to alter or vacate such map or plat, or any part thereof, he may petition the board of supervisors of the county or the governing authorities of the municipality for relief...setting forth...the persons to be adversely affected thereby or directly interested therein. However, before taking such action, the parties named...must agree in writing to the vacation or alteration...

Miss. Code Ann. § 17-1-23(4)(emphasis added). By its own terms, Miss. Code Ann. § 17-1-23(4)

applies to *landowners* seeking vacation of any portion of a platted subdivision. It has no applicability whatsoever to a *municipality's* authority to vacate public ways, such as the Easement. In fact, the lower court pointed out that elsewhere *in the very same code section* specific reference is made to "governing authorities" and "municipality" rather than to owners such that it is apparent that Miss. Code Ann. § 17-1-23(4) is not intended to apply to governing authorities, but to owners of the land involved, in its requirement for obtaining written consent from other landowners. (R. 126). "The use of the differing terms is apparent in §17-1-23(3) which states:

> The governing authorities of a municipality may provide that any person desiring to subdivide a tract of land within the corporate limits shall submit a map and a plat of such subdivision.... In all cases where a map or plat of the subdivision is submitted to the governing authorities of a municipality, and is by them approved, all streets, roads, alleys and other public ways set forth and shown on said map or plat shall be thereby dedicated to the public use, and shall not be used otherwise unless and until said map or plat is vacated in the manner provided by law, notwithstanding that said streets, roads, alleys, and other public ways have not been actually opened for use of the public. Any dedication pursuant to the provisions of this section, regardless of the date if the dedication, shall constitute an easement interest to the municipality in such streets, roads, alleys and other public ways, including the right to maintain such easement, and shall not constitute a conveyance of the underlying fee title. Subject to the easement interest dedicated to the municipality, abutting landowners shall hold fee title to the centerline of the said street, road or public way."

Id. Clearly, Miss. Code Ann. § 17-1-23(4) does not apply when a municipality seeks to vacate a road access easement. Rather, Miss. Code Ann. § 21-37-7 gives a municipality explicit authority to vacate the Easement:

> The governing authorities of municipalities shall have the power to close and vacate any street, or alley or any portion thereof. No street or alley or any portion thereof shall be closed or vacated, however, except upon *due compensation being first made to the abutting land owners* upon such street or alley for all damages sustained thereby.

Miss. Code Ann. § 21-37-7 (emphasis added). Notably, Miss. Code Ann. § 21-37-7 does not contain language concerning "interested persons or persons adversely affected," which is the language

Brinsmade relies on in §17-1-23(4). Because the City of Biloxi, a municipality, vacated the Easement as opposed to an actual landowner, there was no need for Brinsmade to assent to anything before the Easement could be vacated. Brinsmade was simply not an abutting landowner. In fact, Brinsmade's property is not even in the same subdivision of the Easement. In explaining the predecessor to Miss. Code Ann. § 21-37-7, the Mississippi Supreme Court has provided:

> "Where full power is granted to the authorities of a municipality to vacate streets, they may act upon their own motion, *and a petition of the property owners as a basis for the proceeding is not necessary in the absence of a statute requiring it.* 44 C.J., p.902, Municipal Corporations, par.3641; 64 C.J.S., Municipal Corporations, § 1671; *Curtiss v. Charlevoix Golf Ass'n*, 178 Mich. 50, 144 N.W. 818. In those jurisdictions where the statutes require that notice of the intention of the governing authorities of the municipality to vacate a street be given to interested parties, the courts have held that only abutting property owners or persons having a legal right to compensation are entitled to notice. 44 C.J., p. 902. And the general rules is that only those who sustain some special or peculiar injury, differing in kind and not merely in degree from that sustained by the general public are entitled to complain of a vacation. 25 Am.Jur., p. 420, Highways, par. 123."

Puyper v. Pure Oil Co., 60 So.2d 569, 574 (Miss. 1952)(emphasis added). Brinsmade now attempts to argue that *Puyper* is not applicable in this circumstance because there has since been another statute enacted, namely §17-1-23(4), which requires notice and consent from "adversely affected and diversely interested" parties. (Appellant's Brief, pg. 16). This notion is inaccurate. Once again, §17-1-23(4) applies to landowners, while Miss. Code Ann. § 21-37-7 expressly gives municipalities authority to vacate a road access easement. If municipalities were required to proceed under §17-1-23(4) as a landowner, then there would be no need for Miss. Code Ann. § 21-37-7.

Brinsmade further asserts that Miss. Code Ann. § 21-37-7 applies only to "non-subdivision" streets, yet he cites absolutely no relevant authority for this assertion. In fact, the interplay between §17-1-23(3) concerning the closing of roads within subdivisions and the authority provided municipalities by Miss. Code Ann. § 21-37-7 was addressed in a 1999 Mississippi Attorney

General's Opinion. *See* MS AG Op., Stark (October 15, 1999). The Stark Opinion recognizes that the applicability of Miss. Code Ann. § 21-37-7 is not affected by the fact that the street is located in a platted subdivision. *Id. See also* MS AG Op., Hewes (September 4, 1979). The Attorney General's Office went on to opine that "Section 21-37-7 contains no requirement that notice of any kind be provided to *abutting* landowners... ." Obviously, if *notice* is not required to be given, *even to landowners who have a statutorily defined interest in the closure of a road*, then the City of Biloxi is not required to gain assent of a non-abutting landowner such as Mr. Brinsmade before taking action.

Here, the action complained of was taken by a municipality, not a landowner. All abutting property owners consented to the vacation. (R. 50, 61). Accordingly, §17-1-23(4), which has no applicability to the City's vacation of the Easement, cannot provide a basis for error.

III. Miss. Code Ann. § 19-27-31 has no applicability to the City's determination of the vacation of the Easement.

Brinsmade also argues, in the alternative, that if the City was not required to proceed under §17-1-23(4), then it was required to proceed under Miss. Code Ann. § 19-27-31 which provides:

> If the owner of any land which shall have been laid off, mapped, or platted as a city, town or village, or addition thereto, or subdivision thereof, or other platted area, ..., shall be desirous of altering or vacating such map or plat, or any part thereof, he may, under oath, petition the chancery court for relief in the premises, setting forth...the names of the persons to be adversely affected thereby, or directly interested therein. The parties so named shall be made defendants thereto, and publication of summons shall be made..

Brinsmade argues that the only other manner through which the City would be able to vacate the Easement would be through Miss. Code Ann. § 19-27-31 which allows the *landowner* to petition the chancery court for vacation of an easement within a subdivision. Much like §17-1-23(4), Miss. Code Ann. § 19-27-31 has no applicability whatsoever to a *municipality's* authority to vacate public ways,

such as the Easement. Rather, Miss. Code Ann. § 21-37-7 gives a municipality explicit authority to vacate the Easement. In his Brief, Brinsmade cites cases, namely *COR Developments, LLC v. College Hill Heights Homeowners*, LLC, 973 So.2d 273 (Miss. App. 2008); *Barrett v. Ballard*, 483 So.2d 304 (Miss. 1985); and *Niefeldt v. Grand Oaks Communities, LLC*, 987 So.2d 1043 (Miss. App. 2008) in which a *landowner or developer* sought to vacate or alter part of a subdivision plat under Miss. Code Ann. § 19-27-31. (Appellant's Brief, pgs. 12-14). A cursory review of these cases show that Brinsmade's authority is easily distinguishable. Brinsmade fails to cite any authority whatsoever for the proposition that a *municipality* must proceed under Miss. Code Ann. § 19-27-31.

Brinsmade also cites *City of Wiggins v. Breaseale*, 422 So.2d 270 (Miss. 1982) as authority for his position although it is unclear why. In *City of Wiggins*, the Mississippi Supreme Court considered a case in which a landowner sought to vacate parts of a street. *Id.* The landowner filed suit in Chancery Court against the municipality. *Id.* The Mississippi Supreme Court simply held that a municipality does not have *exclusive* jurisdiction to vacate an easement. *Id.* In other words, the Chancery Court also has jurisdiction to vacate an easement pursuant to Miss. Code Ann. § 19-27-31. *Id.* Thus, a municipality has *concurrent* jurisdiction with a chancery court for the purpose of closing an vacating streets and alleys. *Id.* The City does not maintain that it had exclusive jurisdiction in this instance. The City simply exercised its authority pursuant to Miss. Code Ann. § 21-37-7, which *City of Wiggins* clearly allows it to do.

IV. Even if the City was required to proceed under §17-1-23(4) or § 19-27-31, which it clearly is not, Brinsmade is not a person adversely affected or directly interested in the vacation of the Easement.

Brinsmade has not nor can he provide any authority for the definition of "persons to be adversely affected thereby or directly interested therein." There are cases which while considering closing or vacating streets and addressing abutting landowners, do expand the category of owners

invloved to others who might be adversely affected or damaged. In *City of Jackson v. Welch*, 101 So. 361 (Miss. 1924), the Mississippi Supreme Court provided:

> In order for a landowner to have a just complaint against the abandonment or closing of an abutting street, he must have a special easement in the use of a street in connection with his property for access purposes; that is, he must be specifically damaged in connection with an outlet and inlet to his property, otherwise, he has no more interest in the street than that enjoyed by the general public for travel, and cannot prevent its closing by the owners or public authorities.

Id. at 362. *See also Puyper* at 574. There is nothing in the record to indicate in any way that Brinsmade would be adversely affected by or directly interested in vacating the Easement. His property does not abut the Easement. The Easement is not used as an ingress or egress for his property. There is no claim that the value of his property has been or will be affected. He cannot establish any special injury different from that of the general public. Instead, he argues that he was adversely affected and/or directly interested because his property was "in close proximity to" the Easement, and that he was concerned how the road closure would affect his property because of lack of adequate evacuation routes. (Appellant's Brief, pg. 18). Even if §17-1-23(4) or § 19-27-31 were applicable, which they clearly are not, Brinsmade has not and cannot show that he was adversely affected or directly interested in the vacation of the Easement.

Brinsmade cites *Fleming v. Miss. State Hwy. Comm.*, 135 So.2d 821 (Miss. 1962) and *Hamilton v. Miss. State Hwy. Comm.*, 70 So.2d 856 (Miss. 1954) to show that "non-abutting" landowners can recover special damages in certain situations, however *Fleming* only shows that an *abutting* landowner may recover damages. (Appellant's Brief, pg. 17). Hamilton is also distinguishable because Brinsmade has made no showing that he has an interest in the vacation of the Easement separate from that of the general public.

In addition, Brinsmade asserts that because the City did not object to his status as adversely affected or interested person in the Chancery Court proceedings in 2008, then the City should be collaterally estopped from challenging his status on appeal. No matter how Brinsmade seeks to stretch his position, the fact of the matter is that the Bill of Exceptions constitutes the record on appeal and the circuit court cannot consider matters not a part of that record. *See Wilkinson County Bd. Of Supervisors v. Quality Farms, Inc.*, 767 So.2d 1007 (Miss. 2000); *Stewart v. City of Pascagoula*, 206 So.2d 325 (Miss. 1968). The extent that the Circuit Court may review evidence is limited to such evidence that has been included in the bill of exceptions. *See Van Meter v. Greenwood*, 724 So.2d 925 (Miss. 1998)(holding the circuit court can only consider the case as made by the bill of exceptions); *Beasley v. Neely*, 911 So.2d 603, 607 (Miss. App. 2005)(providing that "Mississippi's long-standing law declares that the bill of exceptions serves as the record on appeal"). Because the chancery court proceedings were not included in the Bill of Exceptions, it cannot be considered on appeal.

V. The lower court did not err in holding that it could not be said the City failed to consider public safety or that its actions in this regard were arbitrary and capricious.

Brinsmade also argues that the lower court erred as a matter of law by holding that it could not be said the City failed to consider public safety or that its actions were arbitrary and capricious. Although the City still maintains that this issue should not be considered because it was not raised in the original Notice of Appeal or Bill of Exceptions, the lower court found that Brinsmade raised the issue at the Commission Hearing, the transcript of which is part of the Bill of Exceptions. (R. at 130). At the hearing, Brinsmade voiced concern that the Easement would provide another means for evacuation from his neighborhood in the event of a hurricane. (R.65). Brinsmade, however, has not and cannot provide any authority whatsoever that would require the City to specifically state that

it had considered public safety in reaching its decision, or that the City was required to obtain traffic studies or reports regarding safety in this regard. As the lower court points out in its opinion, the Resolution reflects that the City was made aware of the particulars of the case and that its action was taken "upon careful reflection of the particulars of this case." (R. at 42). While the Resolution does not specifically address public safety, it does make clear that it considered all information which would have included Brinsmade's public safety concerns. Thus, it cannot be found that the lower court erred in holding the City's actions in this regard were not arbitrary or capricious.

VI. The lower court did not err in not considering the issue of whether the City violated its rules and ordinances.

The lower court did not err in not considering the issue of whether the City violated its rules and ordinances in reference to the vacating of the Easement which created streets which were longer in length than permitted by its own ordinances. Brinsmade's original Notice of Appeal and Bill of Exceptions does not raise this issue. Where an issue is not asserted in a bill of exceptions, the issue is barred from review. *Falco Lime v. Mayor of Vicksburg*, 836 So.2d 711, 727 (Miss. 2002)("[n]either the original nor corrected bill of exceptions filed in this case raises any issue regarding constitutionality...the issue is procedurally barred").

Even if the issue had been raised in the Bill of Exceptions, which it was not, the Appellant relies upon a City of Biloxi Land Development Ordinance which was not included in the Bill of Exceptions. "It has long been settled in this State that the courts do not and cannot take judicial knowledge on municipal contracts and ordinances." *Stewart v. City of Pascagoula*, 206 So.2d 325, 327 (Miss. 1968). Because the Ordinance may not be considered, Brinsmade's assertion, even it were not procedurally barred, would be a moot point. Even if the Court were to consider Brinsmade's argument, Brinsmade argues that because an unopened easement in a subdivision

within which he does not reside could *possibly* be opened in the future, the preclusion of that possibly violates a City ordinance concerning length of cul de sacs. It is hard to imagine how this would apply to an unopened easement created in a 1978 subdivision established 25 years prior to the adoption of the Land Development Ordinance.

CONCLUSION

There is nothing in the record whatsoever to indicate that the City's decision to vacate the Easement was arbitrary or capricious. The City legally vacated the Easement within its authority pursuant to Miss. Code Ann. § 21-37-7. As a non-abutting landowner, Brinsmade's assent was immaterial. Even if Brinsmade's assent was material, which it was not, Brinsmade was not adversely affected by or directly interested in the vacation of the Easement. Furthermore, pursuant to the record in this appeal, it cannot be said that the City failed to consider public safety or that its actions in this regard were arbitrary and capricious. Finally, the lower court did not err in not considering the issue of whether the City violated its rules and ordinances because the relevant ordinances were not included on the record, nor did Brinsmade include them in his initial Circuit Court Brief. Since the Court cannot take judicial notice of these ordinances, and because the Bill of Exceptions constitutes the record on appeal, the Circuit Court could not have considered matters that were not a part of the record. Thus, the lower court's decision must be affirmed.

Respectfully submitted,

CITY OF BILOXI, MISSISSIPPI

BY: PAGE, MANNINO, PERESICH & MCDERMOTT, P.L.L.C

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CERTIFICATE OF SERVICE

I, LAUREN REEDER MCCRORY, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing **CITY OF BILOXI'S BRIEF OF APPELLEE** to:

Malcolm F. Jones
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This the 30th day of November, 2010.

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