IN THE SUPREME COURT OF MISSISSIPPI

AKBAR BRINSMADE — APPELLANT

VERSUSNO. 2009-CA-1906

CITY OF BILOXI, MS — APPELLEE

BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

HONORABLE LISA DODSON, CIRCUIT COURT JUDGE

ORAL ARGUMENT IS NOT REQUESTED

ATTORNEY FOR APPELLANT:

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CERTIFICATE OF INTERESTED PERSONS

1. Akbar BrinsmadeAppellant

2. City of Biloxi, MS - Mayor A. J. Holloway Appellee

3. Malcolm F. Jones - Attorney for Appellant
P. O. 908, Gulfport, MS 39502

4. Les Smith - Attorney for Appellee
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5. Circuit Court Judge Lisa Dodson
P. O. Box 1461, Gulfport, MS 39502

6. Jamie Morgan – Court Reporter

7. Pat Sheehan – Trial Attorney for Appellant
429 Porter Ave., Biloxi, Ms 39564

Respectfully submitted this the 27th day of Sept., 2010.

MALCOLM F. JONES
ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

Appellant, Akbar Brinsmade, is the record owner of the home and lot situated at 486 Channel Mark Drive, Biloxi, MS. This is also Lot 9 on the recorded plat of the Channel Mark Subdivision. Channel Mark Subdivision adjoins Edgewater Cove Subdivision. At consideration is the review of the decision of the governing authorities of the City of Biloxi, MS, upon the recommendation of their Planning Commission to vacate and alter a portion of the Edgewater Cove subdivision plat to close an unimproved thoroughfare between Lots 8 and 9 of the same subdivision.

The southeast corner of the the lot immediately adjacent and south of Mr. Brinsmade's lot in the Channel Mark Subdivision touches the northwest corner of the vacated access road easement at issue in the Edgewater Cove subdivision. Although his property does not abut the subject access road easement, the northwest corner of Mr. Brinsmade's lot is about one hundred feet (100 feet) from the vacated easement. There is no dispute that the road easement as shown on the plat for Channel Way was improved with curbs, gutters, and asphalt and in use by the public, but the adjoining road easement of the same width (which has now been vacated) was cleared when the subdivision was developed, but has not been improved by the City or used as a road easement since its inception.

When this matter came before the City Planning Commission upon a request by the City staff to vacate and close the road access easement the owners abutting the easement on Lots 8 and 9 of the Edgewater Cove Subdivision joined in and consented to the City's petition. Also, a substantial number of the residents in the surrounding neighborhood area also filed a petition in favor of the petition to vacate the road easement. In fact, Mr. Brinsmade was the only homeowner in the immediate area that was sent a notice of the proceedings by the City that strenuously objected to the proposed vacation of the road easement at the hearing before the Planning Commission.

At the conclusion of the hearing, on July 17, 2008, the Planning Commmission approved the request of the City staff and recommended to the governing authorities of the City of Biloxi, MS, that the road easement be vacated. On September 14, 2008, Mr. Brinsmade filed a Declaratory Judgment action against the City of Biloxi, MS, and certain adjoining landowners of the road easement in the Chancery Court of Harrison County, MS, 2nd JD, In his Complaint Mr. Brinsmade requested the Court to adjudicate the subject road access easement had not been vacated and was still dedicated to the public for use. The Defendants filed responsive pleadings and counterclaims requesting a partial vacation of the the subject easement. The Defendants later withdrew their Answers and dismissed their counterclaims. The Chancery Court entered an Agreed Declaratory Judgment on September 16, 2008 and adjudicated the road easment still existed, was available for public use, and could not be used other than as a road easement until the subdivision plat was vacated in the manner provided by law.

Thereafter, on October 7, 2008, over the continued objection of Mr. Brinsmade the Biloxi City Council adopted a Resolution to vacate the subject road easement. Aggrieved by this decision the Appellant, Akbar Brinsmade, filed a Notice of Appeal and Bill of Exceptions to the Circuit Court of Harrison County, MS, 2nd JD on October 17, 2008. Upon a submission of briefs (and without further argument or hearing by agreement of all counsel) the Circuit Court entered a Judgment on Appeal dismissing the appeal and affirming the action of the City of Biloxi, MS in this regard. From this decision the Appellant has filed his appeal to this Court.

STATEMENT OF THE FACTS

Akbar Brinsmade and his wife are the owners of a single-family home in an upscale established neighborhood in Biloxi, MS, in a platted subdivision known as "Channel Mark Subdivision'. Their home is situated on Lot 9 of the subdivision and fronts on an improved and paved street, Channel Mark Drive. (See RE 37). Their back lot line and the platted drainage easement on the rear of their lot which also traverses the adjoining lot to the South, are approximately one hundred feet from the western margin of the unimproved "Road Access Easement" between Lots 8 and 9 in the adjoining Edgewater Cove Subdivision. Their property line is also 100 feet from the curb drainage in the improved street in their subdivision, known as Channel Way Road. (See copy of Subdivisions maps and tax map attached, RE 17-18). The Channel Way road easement in the Channel Mark Subdivision is improved and paved, as is the main intersecting street of the subdivision, Channel Mark Drive. (RE 37).

The "Road Access Easement" between Lots 8 and 9 in the Edgewater Cove Subdivision, which was clearly designated as a public road on the subdivision plat originally filed in about 1978, abuts the improved Channel Way Street and is the same width as that thoroughfare. (See RE 19, 60 and Subdivision Plat, RE 17). It is undisputed that the vacated "Road Access Easement" had not been improved or paved by the City. (See RE 20). However, at the Planning Commission hearing Dean Wilson, a former surveyor working for the original developer of the subdivision, stated that the "Road Access Easement" proposed to be vacated was created as a "emergency" or "fire access" for the adjoining lot apparently formerly owned by "Leonard Collins". Mr. Wilson went on to state at the hearing that the subject easement was never intended to be opened as a public right-of-way, however, the recorded subdivision plat has no such disclaimer. (See RE 21). In fact, according to the Planning

Commission's application as outlined in the Resolution of the City of Biloxi the property was an "Access Road Easement". (See RE 2).

Mr. Brinsmade objected to the vacation of the the subject road easement at the Planning Commission hearing for "public safety" reasons based upon the impact he believed the proposed action would have upon him and his property personally, as well as other lot owners in his subvision. He clearly articulated to the Commissioners that his subdivision was a "dead end" street fronting on a water body and he was concerned with his ability to evacuate during the threat of a hurricane. (See RE 19 - 20). The area suffered flooding in their home during Hurricane Katrina in 2005 and Mr. Brinsmade wanted the City to consider opening and improving the nearby "Road Acess Easement" in the adjoining subdivision to allow him and others to have another way to evacuate from the subdivision in the event of a future evacuation order for a storm. He further stated that the single road from his subdivision, Channel Mark Drive, and also from Cove Drive leads to Ruunymede Drive (formerly East Debuys Road) thus creating a traffic "bottleneck" for the approximately 94 owners (47 owners from each subdvision) to evacuate under threat of a storm. (See RE 20). Mr. Brinsmade also outlined his concerns for "public safety" about flooding caused by past hurricanes and his issues with drainage. (See RE 20). Also, Dean Wilson stated that the "Road Access Easement" served as a "narrow drainage ditch" in the past. (See RE 21).

Other than receiving "no objection" letters from the City engineer and the water, sewer, and drainage utility departments and other public utility companies, as demonstrated in the record, the Planning Commission received no input from any City department or other public agency in the form of a traffic study, analysis or comments that considered the impact the vacation of the "Road Access Easement" would have on future traffic flow or access for public safety or emergency vehicles. (See RE 5, 7-15). There are no reports or letters from the City Police or Fire Departments or Emergency

Management Director regarding these issues. The City Council stated in their Resolution the reasons they were vacating the road easement was based upon the following: 1) the road was unimproved, 2) there were no utilities in the easement, 3) the City no longer needed the property, and 4) it was not necessary for vehicular or pedestrian needs now or in the foreseeable future. (See RE 26-29).

Because Mr. Brinsmade's property was situated within 500 feet of the proposed easement to be vacated, pursuant to the City's Land Development Ordinance, Section 23-8-1(g)(2) (See RE 49), he received notice of the proceedings to vacate the unimproved road. Based upon his articulated concerns Mr. Brinsmade voiced his objection to the road closure at the hearing of the Planning Commission and in separate proceedings he filed in the Chancery Court in his jurisdiction. (See RE 19 -20 and RE 74-76).

Notwithstanding his strenuous objection, the City of Biloxi proceeded foreward to adopt a Resolution to alter the subdivision plat of Edgewater Cove. Mr. Brinsmade contended before the appellate court below (Circuit Court) that the City of Biloxi erred in vacating the Road Access Easemensit because (1) after he filed his objection the City did not have authority on its own to close the road easement and would have been required by law to file a petition with the Chancery Court to obtain a Judgment to do so; (2) the City's decision was not supported by substantial evidence and/or was arbitrary and capricious in that the City failed to consider his objection based upon "public safety" concerns; and (3) the City failed to follow its own subdivision ordinance by vacating the road easement thus creating a cul-de-sac with a subdivision road longer than the length permitted by its own standards. (See RE 55 et seq.)

The lower appellate court basically ignored the applicable statutes concerning the alteration or vacation of a subdivision plat and the easements therein and found that since Mr. Brinsmade was not an "abutting" landowner on the easement to be vacated he did not have the right to object to the closure of the thoroughfare. As requested, the Circuit Court failed to recognize the Appellant's recognized status

and the rulings of judge in the previous Chancery Court proceedings. The lower court further ruled that the City's decision was supported by substantial evidence and not arbitrary or capricious. The Court refused to consider the provisions of the City's zoning ordinance in considering whether or not the City failed to abide by the terms of its own ordinance in vacating the road easement. (See Circuit Court and Chancery Court Judgments. See RE 36-46 and 74-76).

SUMMARY OF THE ARGUMENT

Akbar Brinsmade contends that the lower appellate court (Circuit Court) erred as a matter of law in failing to conclude that upon recommendation of the Planning Commission the City Council for the City of Biloxi unilaterally and unlawfully vacated a portion of the Edgewater Cove Subdivision plat by closing the platted but unimproved Access Road Easement without first obtaining the written consent of Mr. Brinsmade. Mr. Brinsmade submits that he was a "named party" to the Commission's proceedings and "adversely affected or directly interested" all as provided in MCA Section 17-1-23(3) and 17-1-23(4). Lacking Mr. Brinsmade's statutory written consent, the City of Biloxi was required to file an action in the Chancery Court, name the Brinsmades as party Defendants, and obtain a judgment over his objections to vacate and close the subject road easement. See MCA Section 19-27-31, as amended. This the City of Biloxi did not do and as such, the road easement has not been lawfully vacated.

Mr. Brinsmade contends the lower court erred in finding he did not have a statutory right to object because he was not an abutting owner as provided in MCA Section 21-37-7, as amended. The lower court also held that based upon the authority granted in the aforementioned statute the City of Biloxi was not required to proceed under MCA Section 17-1-23(4). The Court erred by holding the City (and not an adjacent owner) had filed the application to close the road easement and as such, this subdivision statute did not apply. Alternatively, the circuit court judge held Mr. Brinsmade was not "adversely affected or directly interested" in the action because the road easement was not improved and in use by the public and Mr. Brinsmade's property was situated in the adjacent subdivision and he was not an "abutting owner". Mr. Brinsmade claimed the case law interpreting these statutes has made it clear that Mr. Brinsmade property does not have to abut on the road to be vacated and closed for him to be considered an "adversely affected or directly interested" party under the controlling statutes,

MCA Section 17-1-23 and Section 19-27-31. Mr. Brinsmade contends that earlier cases that were decided prior to the amendments to MCA Section 17-1-23, which now provide mandatory notice and consent of certain persons before the City can act unilaterally, are no longer controlling or can be distinquished.

Mr. Brinsmade submits that he has proper "standing" to object to the City's attempt to close this platted road easement because his property was in close proximity to the easement; would be adversely impacted for "public safety" reasons; the City's own applicable ordinance required him to receive notice of the proceedings; and the City had failed to object to his standing in certain Chancery Court proceedings between the same parties involving the same issues.

Mr. Brinsmade also alleges the circuit court below failed to take judicial notice of the law, i.e. the City's zoning ordinances and mandatory judicial notice of the adjudicative facts, i.e. the Chancery Court decision. If the lower court found that it could not consider the ordinances or the Chancery Court decision it had a duty to remand the case back to the City for the record on appeal to be properly supplemented.

Mr. Brinsmade contends the lower court erred by failing to conclude the City of Biloxi's decision was not supported by substantial evidence and/or was "arbitrary and capricous". Mr. Brinsmade supports his argument by submitting 1) the City failed to follow the terms of their own ordinance and did not make findings or receiving evidence to support the ruling the road easement would not be of benefit to the Mr. Brinsmade in the future; and 2) the City failed to consider his "public safety" argument that the closure of the road easement would cause his property to be situated on a dead-end street and his access and drainage would be impaired in the future due to flooding and evacuation for hurricanes and storms.

Finally, Mr. Brinsmade contended the City authorized the closure of the access road easement in violation of its own subdivision regulations by causing the remaining subdivision streets in both

subdivisions to terminate in cul-de-sacs with a length in excess of 500 feet all contrary to the terms of the City's own ordinance. The City did this without obtaining a variance as required by law. The City directly circumvented the provisions of their own ordinances, which require publicly advertised hearings and more exacting standards for variances. A clear violation of statutory provisions providing statutory notice and certain other protections is a basis for reversal of the decision of the lower appellate court.

ARGUMENT

ISSUE ONE: Did the lower court err in affirming the decision of the City of Biloxi to unilaterally vacate and alter the plat for the Edgewater Cove Subdivision without Chancery Court approval and in violation of the applicable statutes setting forth certain procedures for such proceedings, particularly given Mr. Brinsmade's objection to the closure of the Road Access Easement?

There is no dispute that Mr. Brinsmade made a timely objection to the closure of the Road Access Easement in the adjoining subdivision at the hearing before the City Planning Commission. It is likewise clear that he did not "agree in writing to the vacation or alteration" of the platted Road Access Easement as provided in MCA Section 17-1-23(4). The City claimed (and the lower court agreed) that 1) this paragraph of the Statute did not apply because it was intended for situations where an owner other than a municipality was seeking an alteration or vacation of a subdivision plat; and 2) alternatively, if the Statute did apply, Mr. Brinsmade consent was not required because he was not "adversely affected thereby or directly interested therein" as provided by statute. The lower court adjudicated that since Mr. Brinsmade was not an abutting owner he did not have a legal right to oppose the vacation and closure of the road easement, and even if he was not an abutting owner he did not suffer any "special injury not suffered by the general public" granting him the right to object.

The Appellant would show that the Appellate Courts of this State have not been so restrictive in their interpretation of the the applicable statutes. On the contrary, these Courts have clearly held that when municipal authorities are faced with objections of adversely affected landowners they are required to file proceedings in the Chancery Court to close a platted subdivision thoroughfare to ensure the Chancery Court Judge will consider and decide all relevant objections.

In the case of **COR Developments, LLC v. College Hill Heights Homeowners, LLC**, 973 So.2d 273 (Miss. Ct. App. 2008) a developer attempted to file a condominium plat and construct a condominium development over a portion of the subdivision plat, which would "obliterate" several interior lot lines, affect common utility easements, and cross over a part of Adams Lane which ended in a cul-de-sac. Adams Lane was platted (but unimproved) and did not intersect with the other subdivision street, College Hill Drive, which formed a loop and only intersected with College Hill Road. Although the developer owned five of the lots fronting on Adams Lane and the objecting homeowners owned properties on a nearby non-intersecting street in the same subdivision they were apparently recognized to be "adversely affected or directly interested" as provided in MCA Section 17-1-23(4). The Court held that since these objecting landowners in the same subdivision did not receive notice and consent to the proceedings before the County Planning Commission or the Board of Supervisors to approve the condominium plat the developer could not "alter or vacate" the portion of the subdivision plat without obtaining a judgment from the Chancery Court allowing them do so. Again, the Court of Appeals did not require the objecting landowners to abut Adams Lane or the areas of the plat to be vacated.

The appellate court in the above case also held that the developer was required to follow the statutory procedures to vacate the plat, even if the platted easement, Adams Lane, has not been improved and had been alleged to be "abandoned". The Court cited MCA Section 17-1-23(3) as authority that the developer could not use the road easement, even if unopened, for purposes other provided on the plat until the plat had been vacated in the manner provided by law.

In the aforementioned decision the appellate court cited the case of **Barrett v. Ballard**, 483 So.2d 304 (Miss. 1985) as authority for mandatory compliance of the statutory procedures to alter or vacate subdivision plat. In that case the developer unlawfully attempted to alter and vacate a subdivision plat by constructing improvements over utilities that had already been installed and over streets that were

platted, but had not been constructed. This was attempted in Chancery Court proceedings without proper notice to "adversely affected" persons. The objectors, the Barretts, owned property west of the subdivision and alleged that the proposed closing of the subdivision streets would affect their property values and limit their access to a street south of the subdivision. The Barretts were also joined by 49 "other citizens" who objected to the road closure. The Mississippi Supreme Court stated that the Barretts and the "other citizens" may have rights subject to adjudication and "could be adversely affected by the proceedings". Id. at p. 305. The facts of this case are very similar to the present case in that the Brinsmades live in an adjacent subdivision and claim the vacation of the unimproved road easement limited their potential access to a nearby intersecting thoroughfare.

In **Niedfeldt v. Grand Oaks Communities, LLC,** 987 So.2d 1043 (Miss. App. 2008), the owner of Lot 94 on the subdivision street objected to the developer attempting to alter the subdivision plat by opening a connector road between Lots 142 and 143 on a cul-de-sac in the subdivision. The Court of Appeals held the non-abutting owner had a right of notice as an "adversely affected" party to chancery court proceedings to alter the subdivision plat. The Court held that because the developer failed to refer to the creation of the connector road in its publication of notice the chancery judgment was not effective against the objecting property owner.

In **City of Wiggins v. Breaseale**, 422 So.2d 270 (Miss. 1982) a developer that owned property abutting both sides of a platted but unopened subdivision street filed chancery court proceedings against the City to vacate the street pursuant to MCA Section 19-27-31. The City responded that it had exclusive authority to vacate the street pursuant to MCA Section 21-37-7. The Mississippi Supreme Court held that the City was required to be joined in the action as a party "adversely affected or directly interested", but that the City did not have exclusive jurisdiction to close streets.

As the Court was required to do, it read the the two aforementioned statutes together and did not try to apply a strained interpretation to one statute by ignoring the clear lanquage of the other statute. In the present case, the circuit court on appeal held that the City of Biloxi was not an "owner" under MCA Section 17-1-23(4) and as such, the City could close a street without complying with its mandatory notice and consent provisions. The lower court in the present case also held that even with an objection from a landowner the City could close the street without complying with MCA Section 19-27-31. This interpretation of the statutes by the lower court is not supported by the decisions of the aforementioned superior appellate courts of this State. If the City was not required to comply with these statutes its governing authorities could have taken action to alter or vacate the plat to close a road easement in each of those proceedings without notice and the consent of adversely affected owners. The appellate courts have not allowed the governing authorities of cities and counties such unilateral authority.

In **COR Developments, LLC v. College Hill Heights Homeowners, LLC**, 973 So.2d 273 (Miss. . App. 2008) the Board of Supervisors attempted to authorize a developer to alter or vacate a plat when the developer neither petitioned to do so under either of the applicable statutes. The Court of Appeals made it clear the the owners had to proceed under the chancery court statute if they they did not have the consent of the adversely affected landowners. The appellate court recently reiterated this requirement of mandatory compliance with these procedural statutes in the case of **City of Gulfport, Miss. v. McHugh, No. 2009-CA**-00244-COA (Decided June 29, 2010). In that case, the objecting landowners, were abutting the portion of the plat to be vacated and "other residents of the subdivision". The Court of Appeals stated the City's Planning Commission should have determined whether or not these parties were "adversely affected or directly interested" landowners whose consent must have been obtained. Had the non-abutting landowners in the subdivision clearly not been in this category the Court would have so held.

MCA Section 17-1-23(3) provides the easements on a subdivision plat, whether opened or not, must be used as provided in the plat until the plat is vacated or altered "in the manner prvided by law. " For subdivisions, the manner for vacating and altering a plat is provided in MCA Section 17-1-23(4) if the adversely affected and directly interested landowners consent and pursuant to MCA Section 19-27-31 if the affected or interested parties do not consent in writing. No other alternative has been discussed in these cases.

A fair interpretation of MCA Section 21-37-7 would be that it applies to the vacation of non-subdivision streets and alleys and it also requires a municipality to first pay compensation but only to abutting owners before the vacation of both subdivision and non-subdivision streets and alleys. Therefore, even though under the aforementioned statute a non-abutting landowner would not be entitled to due compensation, except possibly in exceptional circumstances where an owner could show a "special injury", an "adversely affected or directly interested" owner would be entitled to notice and the right to "veto" a subdivision road closure when the City was attempting to vacate the road easement under MCA Section 17-1-23(4). Due compensation and the right to notice and to voice consent to a road closure are two separate and distinct issues.

In the present case the City owned and controlled the road by way of the dedication under the recorded subdivision plat and also by operation of law. See MCA Section 17-1-23(3). The City's executive department acting as the "owner" filed the Petition to vacate and close the subdivision road easement. The City Council acted in a "quasi-judicial" capacity to adjudicate the proceedings under the procedures set forth in the City's ordinance and the applicable statute cited above. The City was required to comply with the notice and consent provisions of this statute or file proceedings in the chancery court if they could not obtain consent of all adversely affected and interested parties. It is consistent with the interpretations of the aforementioned court decisions to require the City executive staff to follow the statute. Of course, in proper circumstances the City Council could refuse

to grant the relief requested by its executive staff, even if all of the affected or interested landowners expressly consented to the petition for road closure.

The lower court also cited the caes of **Puyper v. Pure Oil Co.**, 215 Miss. 121, 60 So.2d 569 (1952) and **City of Jackson v. Welch**, 136 Miss. 223, 101 So. 361 (1924) for authority that non-abutting property owners have no special right to complain of the vacation of a street. None of these cases and the authorities cited therein appear to specifically apply to the vacation of a street in a subdivision.

In that case the Court was faced with a situation where a municipality sought to vacate a street. The Court reviewed the authority provided to municipalities to close streets in the predecessor statute to MCA Section 21-37-7. The Court stated: "When full power is granted to the authorities of a municipality to vacate streets, they may act upon their own motion, and a petition of property owners as a basis for the proceeding is not nrecessary **in the absence of a statute requiring it**." (Special Emphasis Supplied).

Appellant's counsel would show that the predecessor statutes for MCA Section 17-1-23(3) and (4) as found in the Mississippi 1942 Code Annotated, Sections 3374-123 and 3591 do not appear to provide the requirements of notice and consent to vacate or alter a platted subdivision street easement. Therefore, the lower court in the present case erred in ruling because the circuit court failed to recognize that new statutory procedures that had been enacted subsequent to the **Puyper** case, supra. The statutory provisions for notice and consent of "adversely affected and directly interested" parties were not added to MCA Section 17-1-23 until 1997. It should be noted the Legislature specifically chose to not limit these provisions to abutting owners of a street.

It may be that the **Puyper** line of cases may still continue to apply to the vacation of non-subdivision streets. However, in certain cases decided since that decision the Supreme Court in certain circumstances has acknowledged that non-abutting owners of a street to be closed who can show

special damages may object and recover damages. In the case of **Fleming v. Miss. State Hwy. Comm.**, 135 So.2d 821 (Miss. 1962), after remand 157 So.2d 792 (Miss. 1963), the Supreme Court held a non-abutting landowner that was left on a "dead-end" street (like the Brinsmades) after a road closure could complain and recover special damages. Also See **Hamilton v. Miss. State Hwy. Comm.**, 70 So.2d 856 (Miss. 1954), where another non-abutting owner was entitled to damages. In the present case, Brinsmade clearly pointed out that the closring of the Road Access Easement would cause his property to be left on a dead-end street or cul-de-sac on Channel Mark Drive. This case would at least provide Mr. Brinsmade with the status of a potentially "adversely affected" person entitled to notice and the right to "veto" the proposed road closure at least at the level of the City proceedings.

Although not exactly on point, cases regarding "standing" in zoning and the appeal of other municipal decisions may provide guidance as to which property owners may be considered "adversely affected". "Aggrieved" parties seeking appellate review of muncipal decisions must also prove they have suffered special damages different from other members of the public. See **Hall v. The City of Ridgeland**, 2008-CA- 01763 – SCT (Decided June 10, 2010). In the **Hall** case the proponents for the rezoning argued the protestants lacked standing because they did not live within 160 feet of the development as provided in MCA Section 17-1-17. The Court held the objectors had standing to seek appellate review becuase they lived in close proximity to the development and had alleged the land use decision would adversely affect their property. Also see **Ball v. Mayor and Board of Aldermen of the City of Natchez,** 983 So.2d 295 (Miss. 2008) and **White Cypress Lakes Development Corp. v. Hertz**, 541 So.2d 1031 (Miss. 1989).

In **Luter v. Oakhurst Assoc., Ltd.**, 529 So.2d 889 (Miss. 1988), the Court acknowledged the standing of the objector, Beckner, who owned property 211 feet from the subject property at its nearest point, and that of adjacent Whispering Pines subdivision homeowners, which was 530 feet from

the property. Both objectors voiced concerns that the value of their property would be affected by the zoning decision. In **Mayor and Board of Aldermen of City of Pontotoc v. White**, 230 Miss. 698, 93 So.2d 852 (1957) the Court appeared to acknowledge the rights of "property owners of the area" in reviewing the zoning decision. Also See **Bellhaven Impr. Assoc., Inc.v. City of Jackson**, 507 So.2d 41 (Miss. 1987).

Mr. Brinsmade contends he was "adversely affected or directly interested" in the City's proceedings seeking to close the Access Road Easement because 1) his property was in close proximity, i.e. about 100 feet from the road to be closed; and 2) he voiced concerns at the Biloxi Planning Commission that the proposed road closure would affect his property due to flooding from storms and his lack of adequate evacuation routes. He also complained the road closure may cause drainage issues down the common subdivision drainage easements in the rear of his property.

Mr. Brinsmade also claimed he was"adversely affected or directly interested" by the proceedings because the City's provided him individual notice by letter of the hearing before the Planning Commission. See the City's Land Development Ordinance, Section 23-8-1(g)(2), which required that notice be issued to the "record owner of each property abutting any public right-of-way within 500 feet of any part of the portion of the public right-of-way proposed for vacation." (RE 49). Mr. Brinsmade acknowledges the City provided him with adequate notice of the proceedings. He does claim that because the City adopted the ordinance providing for his individualized notice and he did appear at the City hearings and voice his opposition he should have been recognized as a person "adversely affected or directly interested". See generally **Jefferson Landfill Comm. v. Marion Co.**, 686 P.2d 310, 313-314 (Or. 1984), where the appellate court declared it would be appropriate to recognize that a person would be "interested" in the land use proceedings if the governing authorities adopted an ordinance or otherwise granting them such status. The Court went on to state that if the governing authorities did not specifically so provide the Court would assume "that when a peson

appears before the local body and asserts a position on the matter, the person has a recognized interest in the outcome." Id. at p. 313.

The City argued successfully in the circuit court below that the lower appellate court could not consider the provisions of the City's Land Development Ordinance because Brinsmade's counsel did not submit the ordinance as part of the the record on appeal. Brinsmade's former counsel may not have formally placed a copy of the ordinance in the appeal record, but he did recite the specific relevant provisions of the City's Land Development Ordinance in his arguments in his Brief. (See RE 63, 68). The City's counsel offered a portion of the ordinance on appeal in the lower appellate court in his Appendix to his Brief (See RE 31-35) and thus "opened the door" for the consideration of the other relevant portions of the City's ordinance.

Since the parties submitted the matter to the circuit court on the briefs and the appeal record the Appellant's former counsel was not made aware until the lower appellate court entered its Final Judgment the Court would not consider the provisions of the City's ordinance.

In **Triplett v. Mayor and Board of Aldermen of the City of Vicksburg**, 758 So.2d 399 (Miss. 2000) the Supreme Court held it was error for the lower appellate court to not offer Mr. Brinsmade's former counsel an opportunity to amend the Bill of Exceptions. In the case the Court distinguished the case of **Stewart v. City of Pascagoula**, 206 So.2d 325 (Miss. 1968) [cited by the lower appellate court as controlling authority] by stating the appellant had not been directed by the City or the lower appellate court to amend its Bill of Exceptions or suffer the penalty for failing to do so. The Court also held that the City officials had an "implied duty" to advise the appealing party of these obvious deficiencies in a timely manner to allow that party an opportunity to amend the Bill of Exceptions to complete the record. There is no indication in the record below that any City Official or their counsel ever complied with this duty.

In **Weathersby v. City of Jackson**, 226 So.2d 739 (Miss. 1969) the Court held that it was an immaterial matter of "form" and not substance that the appellant in that case failed to inlcude the rezoning ordinance in the appeal record. In the present case, counsel for the City in his reply brief did not dispute the appellant's counsel's recitation of the applicable provisions of the City's Ordinance. Furthermore, since the City's counsel offered a portion of the ordinance with his record excerpts and argued the City complied with its provisions of the ordinance in his brief MRE Rule 106 required that the remainder of the document should have been considered in the lower court record on appeal. It is the purpose of the rule to require that all relevant matters should be presented to the trial court to show a proper context. See **Palmer v. Volkswagen of America, Inc.**, 905 So.2d 564 (Miss. App. 2003).

Mr. Brinsmade also submits that the City's Land Development Ordinance was not a matter of evidence that required proof in the appeal record below. It is the modern trend of authority for courts to consider local municipal ordinances as authority when there is no dispute as to their enactment and their terms and provisions, so long as the parties provide the reviewing court with "readily verifiable" information. See **City of Aztec v. Gurule**, 147 N. M. 693, 228 P.3d 477 (2010). As the New Mexico court pointed out in this age of technology municipal ordinances are "readily accessible" and easily verified.

Since the ordinance should be considered the same as possibly a state statute or regulation it was unnecesssary for the appellant to submit a copy of same as evidence. Likewise, since the ordinance does not involve "adjudicative facts" it can also be argued that Mr. Brinsmade's former counsel requested the Court to take judicial notice of "law". See MRE Rule 201 and Comment which only provides for judicial notice of "adjudicative facts". The appellant submits the lower court erred as a matter of law in failing to consider or take "judicial notice" of this local "law". See **City of Aztec v. Gurule,** 147 N. M. 693, 228 P.3d 477 (2010).

Mr. Brinsmade's trial counsel also requested the Court to take judicial notice of the agreed Declaratory Judgment between the appellant and the City of Biloxi, as well as other adjacent landowners. (See RE 69). On September 14, 2008, Mr. Brinsmade filed a Declaratory Judgment action against the City of Biloxi, MS, and certain adjoining landowners of the road easement in the Chancery Court of Harrison County, MS, 2 JD, In his Complaint Mr. Brinsmade requested the Court to adjudicate the subject road access easement had not been vacated and was still dedicated to the public for use. The Defendants filed responsive pleadings and counterclaims requesting a partial vacation of the the subject easement. The Defendants later withdrew their Answers and dismissed their counterclaims. (See RE 74-76).

The Chancery Court entered an Agreed Declaratory Judgment on September 16, 2008 and adjudicated as follows:

"Section 17-1-23 of the Mississippi Code at subsection 3 mandates that all streets, roads, alleys, and other public ways set forth on an approved plat shall be thereby dedicated to the public and shall not be used otherwise unless and until said map or plat is vacated **in the manner provided by law."**

The Chancery Court concluded and ordered as follows:

"The 'Access Road Easements' shown on the plat for Edgewater Cove Subdivision, Part One, at Plat Book 7, Page 17, as affecting Lots 8 and 9, have not heretofore been vacated and remain dedicated to the public pursuant to Section 17-1-23 of the Mississippi Code."

The Court further ordered: "This Judgment is limited to the status of the aforesaid easements on the date hereof and in no way impairs the rights of the parties, or others, to initiate proceedings or continue proceedings heretofore initiated, to alter or vacate said "Access Road Easements" in any manner provided by law." (Seem copy of Judgment attached as Exhibit "A", RE 74-76).

In his appellant's brief (p. 15) before the circuit court (See RE 69) Brinsmade requested the lower appellate court to take judicial notice of the aforementioned chancery court judgment that had been entered **after** the Planning Commission hearing but before the City Council hearing. It was his stated intention to have the Court acknowledge that the City had not challenged his status or standing as an "adversely affected or directly interested" party in these separate proceedings. Although according to

the circuit court Appellant's counsel did not provide the lower appellate court with a copy of the judgment or any pleadings from these chancery court proceedings on appeal, the Appellant's former counsel did provide the Court with the cause number of the case, the location of the court, and the date of the judgment. Appellant submits that this was sufficient information for the lower appellate court to ascertain the aforementioned findings of fact and conclusions of law as determined by the Chancery Court were "not subject to reasonable dispute" because they were "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." See MRE Rule 201(b) and Comment.

There is no dispute that a copy of the Declaratory Judgment from the Chancery Court from the same jurisdiction as the Circuit Court was readily available from appellant's former counsel or from the chancery court clerks to the judge upon request. The City's counsel did not object to the appellant's request for the Court to take judicial notice of this matter, nor did counsel opposite dispute the entry of the Judgment nor any of the terms and provisions of same. It is true that pursuant to MRE 201(d) the lower appellate court was not required to take judicial notice, even though requested to do so, if the requesting party failed to provide the Court with the "necessary information". Nevertheless, Appellant submits that he did provide the Court with the "necessary information", although minimally so, and it was mandatory for the court to take judicial notice of the judgment. However, if he did not, as was stated in the case of **Triplett v. Mayor and Board of Aldermen of the City of Vicksburg**, 758 So.2d 399 (Miss. 2000) it appears the Court should have told Appellant's that she required further information or documents in this regard and requested the Appellant's counsel to provide same before she finally decided the case or remanded the case to allow supplementation of the record.

Although the lower appellate court cited pre-rules cases prohibiting it from taking judicial notice of the chancery court proceedings, the Mississippi Supreme Court had held that the lower court could take judicial notice of a court's order from other proceedings. See **In Re: McMillan**, 642 So.2d 1336

(Miss. 1994). Also see **Ditto v. Hinds County, Ms**, 665 So.2d 878 (Miss. 1995). MRE Rule 201(f) clearly provided a court can take judicial notice at any stage of the proceedings and even on final appeal. See **Cook v. State**, 483 So.2d 371 (Miss. 1986).

Even though the lower appellate court may not have been able to taken judicial notice of the findings from the chancery court proceedings, the chancery decision should have been considered by the lower appellate court to prove that the City of Biloxi acknowledged Mr. Brinsmade's status as an "adversely affected or directly interested" person in the court proceedings to close the road easement. At the very least, the lower appellate court should have considered the chancery court judgment and found that the City was collaterally estopped from re-litigating the issues actually decided by agreement in those proceedings. **Mayor and Board of Aldermen, City of Ocean Springs v. Homebuilders Assoc. of Miss.**, 932 So.2d 44, 59 - 64 (Miss. 2006).

In conclusion, Mr. Brinsmade submits the City of Biloxi failed to recognize and acknowledge that he was a person "adversely affected or directly interested" as provided in MCA Section 17-1-23(4) for the following reasons:

a. His property was located in close proximity to the Access Road Easement;

b. Assuming the platted easement had been later improved by the City, opened for public use for his access, and not closed by the City, his property would not be left on a "dead-end" street with a cul-de-sac.

c. Mr. Brinsmade stated the use and enjoyment of his property would be impaired by the road closure due to potential flooding and the lack of adequate exits required in the event of evacuation orders;

d. Brinsmade stated that the drainage of the rear of his property southward across the common drainage easement for the subdivision to the natural drainage running down the Road Access Easement would be impaired by the vacation of the easement.

e. The City's own Land Development Ordinance provided Mr. Brinsmade was entitled to notice of the road closure proceedings before the Planning Commission and the City did issue the notice to him to participate at the hearing.

f. Mr. Brinsmade attended the hearing and voiced his opposition to the road closure.

g. The City did not object to Mr. Brinsmade's status or standing as an adversely affected or interested person in the proceedings in the Chancery Court action.
As such, the City the City should be collaterally estopped from challenging his status or standing on appeal.

Since Mr. Brinsmade was within the aforementioned category; was a "named party" of the City's proceedings as provided in MCA Section 17-1-23(4); and did not provide written consent to the City for its road closure proceedings, the City was required by law to go back to the Chancery Court to attempt to obtain a Judgment allowing the road easement to be vacated and the subdivision plat altered. Failing to do so, the City unilaterally and unlawfully vacated the road easement and it continues to exist through this date.

ISSUE TWO: Did the lower court err as a matter of law by affirming the decision of the City of Biloxi authorizing the alteration and vacation of the subdivision plat and closure of the road easement when the decision was not supported by substantial evidence and/or it was arbitrary and capricious?

At the hearing before the Planning Commission Mr. Brinsmade objected to the vacation and closure of the Access Road Easement because he believed that it would reduce the possible number of exits from his subdivision to be used for emergency vehicles and for his family in the event of an evacuation order during a threat of storms or hurricanes. Mr. Brinsmade pointed out that his residential lot is currently on a street, Channel Mark Drive, which ends in a cul-de-sac and his subdivision and the adjoining subdivision are bounded on the North and East by water on the Back Bay of Biloxi with a low lying area to the West. (See RE 17, 19-20). In fact, all of the streets in both subdivisions end in cul-de-sacs and the two main subdivision streets, Channel Mark Drive and Cove Drive, both lead into Runnymede Drive (formerly East Debuys Road) on the South. (See maps, RE 17-18). Mr. Brinsmade stated that about 94 lot owners (47 lots in each development) in both

subdivisions had to use the common connecting road, Runnymede Drive, to evacuate the area or to obtain access to the common road system. Mr. Brinsmade stated that to allow the closure of the Road Access Easement that was the only connection between the two subdivisions would create a "bottleneck" at Runnymede Drive when both subdivisions were evacuating. (See RE 19-20).

Mr. Brinsmade also stated at the hearing that he and his wife remained in their home during Hurricane Katrina in 2005 and his home flooded. He also advised that his home was 18 feet above sea level. (See RE20). Clearly his home is in a Special Flood Hazard Area according to FEMA flood maps. Dean Wilson, a surveyor for the developer of the Edgewater Cove Subdivision informed the Planning Commission that the original purpose of the Road Access Easement was for an "emergency access" for Mr. Collins that lived near the easement for drainage along the West side of that subdivision. (See RE 21). This drainage actually runs from the Road Access Easement North down along the platted utility easement to the rear of Mr. Brinsmade's home. (See subdivision plat, RE 17).

Many of the neighbors in both subdivisions testified at the hearing before the Planning Commission in support of tthe City's application to vacate and close the road easement, but no one offered any real evidence to rebut Mr. Brinsmade's "public safety" arguments. None of the Planning Commissioners addressed his concerns at the hearing. Although the City received numerous forms from the City engineer, various city departments, and other utility companies, which basically confirmed there were no utilities in the road easement and they had "no objection" to the road closure (See RE 5, 7-14), they received no input from the Fire and Police departments or from the Emergency Management Director or a traffic study or report concerning these "public safety" issues. In the Resolution of the Biloxi City Council the City did not specifically address Mr. Brinsmade's objection or his concerns, but they did make findings that 1) the City's Development Review Committee (DRC) "had determined that said unimproved access road easement is no longer needed by the City of Biloxi, and as such, should be vacated" and the City Council concluded "the said access road easement is not

necessary to provide for the vehicular and pedestrian needs of the City of Biloxi, now or in the foreseeable future." (See RE 28). The City's Land Development Ordinance, Section 23-8-1, (See RE 48) specifically provides the following criteria for the City to follow in the "Easement Abandonment Process":

> The City Council shall grant the application for easement abandonment, or a portion thereof, **only** if it finds that the portion of the easement is not now, or foreseeably, of any benefit to the City **or its inhabitants.**

The City made no finding that the road easement was no longer of foreseeable benefit to its inhabitants. (See RE 26-29).

An evacuation order due to storm threats is serious business. The Appellant would request this Court to take judicial notice of the well developed public policy of local, State and National governments regarding the necessity and high importance of well designed and managed evacuation routes during hurricane seasons. Since the lessons learned from Hurricane Katrina in 2005 the City of Biloxi has provided specific guidance on its website regarding preparation for storms and use of evacuation routes. The Governors's Office, the Mississippi Emergency Management Agency (MEMA), and the Miss. Department of Transportation (MDOT) on their respective websites working with local governments, including the City of Biloxi and Harrision County, have also developed evacuation zones for each coastal community, protocols for evacuation procedures, and evacuation routes from each City to encourage or order its residents to remove themselves from their homes in the event of a hurricane threat. The Federal Government acting through the Department of Homeland Security – FEMA has also expended millions of dollars with coastal communities on the Mississippi Gulf Coast and throughout the nation to assist cities in developing evacuation plans and routes. As public policy, Brinsmade requests this Court to take judicial notice of these declarations. See MRE Rulew 201

Mr. Brinsmade submits the decision of the Bilox City Council is not supported by substantial evidence as found in the record and/or is arbitrary and capricious. See URCCC Rule 5.03. Although

ISSUE THREE: Did the lower court err in failing to conclude the City acted unlawfully when it closed the road easement and failed to onsider the provisions of the City's Land Development Ordinance which required that no street with a dead end or cul-de-sac shall be longer than 500 feet?

Reference to Mr. Brinsmade testimony before the Planning Commission and a review of the subdivision plat for his subdivision clearly indicated the closure of the platted connecting Road Access Easement in the adjoining subdivision would cause a clear violation of the City's ordinance. (See RE 17 and 19-20). Section 23-14-6(c)(13) specifically prohibits subdivision dead end streets with cul-de-sacs from being more than 500 feet in length. [The Appellant will not repeat the argument he has previously made regarding the proper consideration and "judicial notice" of the ordinance as set forth in the argument in Issue One.] No variance of the subdivision regulations was sought or granted by the City in separate proceedings before the Zoning Board with a public hearing. The City may not ignore this provision of its ordinance. Different standards apply to granting variances. See **Noble v. Scheffer,** 529 So.2d 902 (Miss. 1988) and **Caver v. Jackson County Board of Supervisors** , 947 So.2d 351 (Miss. App. 2007).

The failure of the City staff to seek a variance of the aforementioned subdivision street length requirement from the Zoning Board after a published public hearing as required by the City's ordinance and more particularly State Law, i.e. MCA Section 17-1-17, as amended, prohibited the City from granting the road closure. The City could not circumvent the law by attempting to classify its action as another type of proceedings to avoid the more stringent requirements to obtain a variance. See **Duckett v. Mayor and Board of Aldermen of City of Ocean Springs**, 24 So.3d 405 (Miss. App. 2009) and **Modak-Turan v. Johnson**, 18 So.3d 286 (Miss. 2009).

Mr. Brinsmade submits the lower appellate court erred in failing to conclude the City violated its own ordinance by failing to obtain a variance.

CONCLUSION

The lower appellate court erred in concluding the City of Biloxi followed the proper statutory procedures to vacate the access road easement, even though Mr. Brinsmade objected to the proceedings and did not provide his written consent. The lower court erred in concluding that the City's decision in this regard was supported by substantial evidence. The decision was "arbitrary and capricious" since the City failed to make appropriate findings or consider adequate evidence in the record to support its conclusion that unopened acess road easement was of no future benefit to Mr. Brinsmade and his neighbors. The City did not properly consider his "public safety" arguments of how the road closure would adversely affect his property during flooding and hurricane evacuations. The lower court erred in finding the City properly complied with its own zoning and subdivision ordinances and applicable state laws for granting variances from same.

Based upon the foregoing, Mr. Brinsmade requests this Court to reverse the decision of the lower appellate court and adjudicate the City did not properly alter and vacate the subdivision plat of the Edgewater Cove Subivision to close the Access Road Easement. In the alternative, he would request this Court to remand this case back to the lower court and/or the City with proper instructions and guidelines to properly supplement the record for this appeal to include the City's Land Development Ordinance and the Chancery Court decision; to make appropriate findings as to whether or not Mr. Brinsmade was "adversely affected or directly interested" in the matter; and if he were deemed to fit in this category, to instruct the City that if they decide to proceed further that they should file a Petition in the Chancery Court for resolution of the matter pursuant to MCA Section 19-27-31, as amended. Your Appellant requests such other relief that he would be properly entitled to under the premises.

CERTIFICATE OF FILING AND SERVICE

I, Malcolm F. Jones, counsel for Appellant, do hereby certify that I have this date mailed by first-class postage prepaid or hand delivered a true and correct copy of the Brief for Appellant and Record Excerpts to the following:

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This the 27th day of September, 2010.

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