

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO.: 20010-TS-00495**

PEARSON'S FIREWORKS, INC.

APPELLANT

VERSUS

CITY OF HATTIESBURG

APPELLEE

BRIEF OF THE APPELLEE

**APPEAL FROM A JUDGMENT OF
THE CIRCUIT COURT OF LAMAR COUNTY**

ORAL ARGUMENT IS NOT REQUESTED

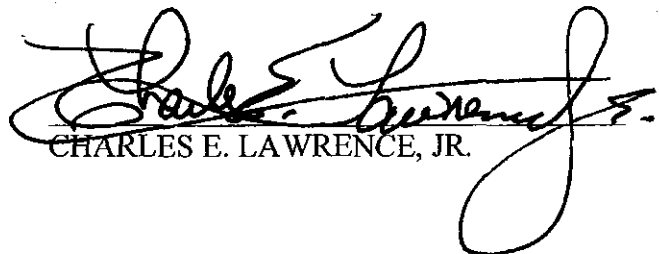
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CERTIFICATE OF INTERESTED PARTIES

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

1. Pearson's Fireworks, Inc., a Louisiana Corporation, Appellant;
2. Edwin Pearson, 64 Long Lake Drive, Carrier, MS 39426, sole shareholder of Pearson's Fireworks, Inc.
3. Gary Mack Grubbs, d/b/a MGM Partnership, 199 West Canebrake, Hattiesburg, MS 39402
4. Joe Montgomery, Esq., MB #3419, Williams, Williams & Montgomery, Post Office Box 113, Poplarville, MS 39470, Attorney for Appellant;
5. Lawrence C. Gunn, Jr., MB #5075, Post Office Box 1588, Hattiesburg, MS 39403-1588, Attorney for Appellant;
6. City of Hattiesburg, a municipal corporation, Appellee
7. Hattiesburg City Council members Kim Bradley, Deborah Denard Delgado, Carter Carroll, Dave Ware and Henry E. Naylor, Post Office Box 1898, Hattiesburg, MS 39403-1898; and
8. Charles E. Lawrence, Jr., MB #1105, Post Office Box 1624, Hattiesburg, MS 39403-1624, Attorney for Appellee.



CHARLES E. LAWRENCE, JR.

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STATEMENT OF ORAL ARGUMENT

City of Hattiesburg does not request oral argument as it believes that the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. The facts presented are straightforward and there are no complex issues of law.

STATEMENT OF THE ISSUES

City of Hattiesburg accepts the statement of the issues as presented by the Appellant, Pearson. However, it would restate the issue as presented in issue number three to read,

Whether existing general ordinances of a municipality applies to newly annexed areas of the municipality when there was no previous ordinance having application in the annexed area or the existing ordinance in the annexed area was in conflict with that of the municipality.

STATEMENT OF THE CASE

Statement of Facts

Pearson's filed its Complaint for Declaratory Judgment, Damages and Injunction against the City of Hattiesburg on December 11, 2008. Process was issued on that day and the City Clerk was served with the Summons and Complaint on December 12, 2008. (R. pages 4-17, 19-22). Pearson's seeks to continue to operate its fireworks stand on property leased from Gary Mack Grubbs, (R. page 135-136) identified in Appellant's Brief as MGM Partnership. (Appellant's Brief page 4). The return of the process was filed on December 15, 2008 (R. page 21). Also, on December 15, Pearson's filed a Motion for Preliminary Injunction and filed a Notice (R. page 25) dated December 11, 2008, addressed to the City Clerk and City Attorney notifying them that the Motion for Preliminary Injunction would be presented for hearing on that day at 10:30 a.m.

An Agreed Order was entered agreeing for Pearson's to remain open during the Christmas 2008 holiday season through New Year's Day 2009. (R. page 26-27).

In addition to allowing Pearson's to continue to operate through the Christmas season and New Year's Day, the Agreed Order implemented a briefing schedule that required Pearson's to submit its brief to the court by January 30, 2009, in support of its claim for declaratory relief and the City was required to file its responsive brief by February 28, 2009. (R. page 26).

The specific relief being sought by Pearson's as set forth in its complaint was as follows;

- "A. A judgment of this court (Lamar County Circuit Court), declaring that Pearson (sic) has the right to continue to conduct its fireworks business at its location on Highway 98 West in the City of Hattiesburg in spite of the provision of Section 19-8¹ of the Code of Ordinances;
- B. Alternatively, a judgment of this Court awarding Pearson just compensation for the taking of its business in a sum to be determined by the Court or the jury; and,
- C. Pending final judgment in this case, an injunction of this Court enjoining the City of Hattiesburg from enforcing Section 19-8 of the Code of Ordinances and from otherwise interfering in any way with Pearson's business."

Pearson's filed a formal motion for declaratory judgment that contained its legal argument and authorities in support of the motion on March 3, 2009. (R. pages 33-52) City of Hattiesburg filed its response to Pearson's motion for declaratory judgment on April 8, 2009 that contained its legal argument and supporting authorities. (R. pages 56-84).

¹ "Sec. 19-8. Fireworks—Possession and sale prohibited. Except as expressly authorized in Sec. 19-10, it shall be unlawful for any person to possess, store, handle, deal in, sell, offer for sale, shoot, discharge, fire, explode, or otherwise use any fireworks as defined in Sec. 19-7 within the city limits of Hattiesburg. (Ord. 2331, codification, 12-19-89)" From the Hattiesburg Code of Ordinances.

SUMMARY OF THE ARGUMENT

- I. The circuit court did not commit error in granting summary judgment upholding the city's authority to close Pearson's fireworks business when the court inquired in an informal conference whether the parties would allow the court to treat the declaratory judgment motion of Pearson's as a summary judgment motion and to treat the response of the city as a countering request for motion of summary judgment.
- II. The circuit court did not commit error by granting final summary judgment to the city without addressing Pearson's claim for damages as there was no regulatory taking of Pearson's property.
- III. The fireworks ordinance of the City of Hattiesburg declares the sale of fireworks within the city to be illegal, a criminal activity, and therefore the sale of fireworks in the city can never be a non-conforming use because a non-conforming use is a legal use, a use that is allowed, that is occurring in a zone where said use is not allowed.

ARGUMENT

- I. The circuit court did not commit error in granting summary judgment upholding the city's authority to close Pearson's fireworks business when the court inquired in an informal conference whether the parties would allow the court to treat the declaratory judgment motion of Pearson's as a summary judgment motion and to treat the response of the city as a countering request for motion of summary judgment.

The City concedes that it never filed a written motion for summary judgment. It argues that the ore tenus motion was made in response to the inquiry of the court of whether the motion for declaratory judgment of Pearson's and the response of the City should be treated as competing summary judgment motions. In response to the inquiry of the court, the attorney for the City responded in the affirmative and requested that Pearson's pending motion for declaratory judgment and the responsive pleading of the City be treated as such. There were no objections made by Pearson's either orally or in writing. The inquiry of the court was followed up with a letter dated December 10, 2009 by the City's attorney to the court. This letter reduced to writing the request for the pending matters to be treated as motions for summary judgment on behalf of each of the parties. (R. page 107). A copy of the letter of December 10, was forwarded to Pearson's counsel by fax and mail. No objection was lodged on behalf of Pearson's to contest the treatment of the pending matters as summary judgment motions.

Pearson's argues in its brief that the City attorney made the unsupported statement in the letter of December 10, that the owner of the property, Mack Grubbs, had requested the city to annex his property. (Appellant's Brief page 11). Pearson's did not object to the statement and did not attempt to refute the statement by affidavit or otherwise even though Mr. Grubbs was readily available to him as demonstrated by his attendance at a court conference with Pearson's and his subsequent signing of an affidavit on behalf of Pearson's on January 6, 2010. (R. page 135-136).

Pearson's contends that because no written motion was filed by the City identified as a "motion for summary judgment" that it is reversible error per se committed by the circuit court and the judgment of the court must automatically be reversed. In support of this argument Pearson's relies upon the ruling in *Sullivan v. Tullos*, 19 So.3d 1271 (Miss. 2009) wherein the court held that a 12(b)(6) motion to dismiss that is converted into a motion for summary

judgment by the court requires the granting of ten days notice to the non-moving party returnable to a date certain for the hearing. The court reversed the summary judgment decision in *Sullivan v. Tullos* and remanded the case. The reversal in *Sullivan* was clearly based upon the lack of ten days notice as required by M.R.C.P. Rule 56, and the fact that the court determined that the plaintiffs in *Sullivan* did not waive the ten-day requirement. Pearson's was given notice of the request by the City to treat the pending motion for declaratory relief and the response thereto as competing summary judgment motions on December 10. Pearson took no action until after the court entered a judgment on January 4. The inaction of Pearson's to respond or object is, in effect, a waiver of the ten day requirement. The Court of Appeals in *Lopez v. McClelland*, 2008-CA-01857-COA (Miss. App. 4-27-2010) holds that if counsel fails to object to the error and apparently consents to the trial court's action then any objection to the error is waived. In *Lopez* the court on a *sua sponte* motion granted summary judgment. There was no such *sua sponte* motion in this case.

In the case of *Robinson v. Enterprise Leasing Co.*, 2009-CA-00383-COA, (Miss. App. 7-20-2010), a 12(b)(6) motion to dismiss was converted to a Rule 56 motion for summary judgment and no additional ten days notice was given. The court in reaching its conclusion to affirm the decision of the lower court to grant a summary judgment considered the pleadings that had been filed by the parties, particularly, the fact that exhibits outside of the pleadings were considered. The court found that the original motion which was a 12(b)(6) motion was filed March 3, 2008 and a response was filed on March 14 and a reply was filed on March 24. A notice of hearing was filed on March 31 setting the motion for hearing on July 1, 2008. The Court of Appeals determined that the parties treated the motion as if it was a summary judgment

motion and that notice of the nature of the motion and an opportunity to respond was not an issue.

The court did not commit error in treating the motion before the court as a summary judgment motion as Pearson's had sufficient notice of the nature of the motion and an opportunity to respond.

II. No error was committed by the court in granting final summary judgment in favor of the city without addressing Pearson's claim for damages because no regulatory taking of its leasehold interest occurred.

Pearson's filed its complaint seeking declaratory relief as allowed by M.R.C.P. 57 and specifically requested affirmative relief by asking the court to determine that it had a right to continue its fireworks business in the newly annexed area of Hattiesburg even though the sale of fireworks was prohibited within Hattiesburg by virtue of an ordinance enacted in 1989 and codified at 19-8 of its Code of Ordinances. Rule 57(a) of the M.R.C.P. specifically reads

“(a) Procedure. Courts or record within their respective jurisdiction may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed. The court may refuse to render or enter a declaratory judgment where such judgment, if entered, would not terminate the uncertainty or controversy giving rise to the proceeding.”

The city derived its authority to regulate the sale of fireworks within the city from § 21-19-15 of the Mississippi Code, Annotated 1972. Chapter 19 of Title 21 of the Mississippi Code is titled “Health, Safety, and Welfare” and subsection 15 grants authority to municipalities for “enacting police regulations” and states,

“(1) The governing authorities of municipalities shall have power to make all needful police regulations necessary for the preservation of good order and peace of the municipality and to

prevent injury to, destruction of, or interference with public or private property....

(3) The governing authority of a municipality shall have the power to prohibit or regulate the sale or use of firecrackers, roman candles, torpedoes, sky rockets, and any and all explosives commonly known and referred to as fireworks; the term "fireworks" shall not include toy pistols, toy canes, toy guns, other devices in which paper caps manufactured in accordance with United States Interstate Commerce Commission regulations for packing and shipping of toy paper caps are used, or toy pistol paper caps manufactured as provided herein, the sale and use of which shall be permitted at all times...."

The state legislature recognized that the regulation of the sale of fireworks was not just a matter of zoning to determining where fireworks may be sold but rather a matter of police regulations of determining whether or not to allow the sale of fireworks because of the health, safety, and welfare issue "necessary for the preservation of good order and peace of the municipality and to prevent injury to, destruction of, or interference with public or private property."

The authority of a municipality to zone the use of property is conferred upon the municipality in Title 17, Chapter 1 of the Mississippi Code. § 17-1-5 grants each county and each municipality in the county the authority to act independently from each other or the authority to act jointly in adopting zoning regulations for property located within their respective boundaries. The property annexed by the City of Hattiesburg upon which Pearson's has its firework business is zoned for commercial use where retail sales are allowed. The physical street address is 6507 U.S. Highway 98, Hattiesburg, MS 39402 which is also the physical street address for Mack Grubbs Hyundai.

Pearson's argues that the ordinance of the City prohibiting the sale of fireworks within its boundaries constitutes a regulatory taking of its leasehold interest. Most recently the United

States Supreme Court in the case of *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005), 124 S. Ct. 2074 held that the “substantially advances” formula is not a valid takings test and that a party making a claim that a government regulation has resulted in an uncompensated taking of private property should proceed by alleging a “physical taking”, a “total regulatory taking” or a land-use exaction violating the standards set forth in *Dolan v. City of Tigard*, 512 U.S. 374 and *Nolan v. California Coastal Commission*, 483 U.S. 825., *Lingle supra* at 548. A “total regulatory taking” as described in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1004; 112 S. Ct. 2886 (1992) occurs when the regulatory authority adopts regulations that renders the property valueless and denies the owner of all economically beneficial or productive use of the land. *Lucas supra* at 1015. Pearson’s would have the court to believe that the City’s fireworks ordinance has deprived him of all economically beneficial or productive use of the land. That is simply not true. The property is zoned for commercial use and a portion of it is being utilized for retail sales for a Hyundai dealership by the owner of the property, Gary Mack Grubbs. Pearson’s right to utilize the property for commercial purposes has not been terminated it merely does not have the right to sell fireworks just as no other entity has the right to sell fireworks within the corporate limits of the City of Hattiesburg. Pearson’s has not suffered a total deprivation of beneficial use as described in *Lucas, id.* See also, *Briarwood, Inc. v. City of Clarksdale*, 766 So.2d 73 at 82, 83 (Miss. App. 2000).

Since the property leased by Pearson’s continues to have a beneficial economical use there was no regulatory taking that would entitle Pearson’s to damages therefore the summary judgment granted by the Circuit Court on the issue of damages was proper.

III. The fireworks ordinance of the City of Hattiesburg declares the sale of fireworks within the city to be illegal, a criminal activity, and therefore the sale of fireworks in

the city can never be a non-conforming use because a non-conforming use is a legal use, a use that is allowed, that is occurring in a zone where said use is not allowed.

Pearson's has advanced the argument that it has the right to sell fireworks inside the City of Hattiesburg despite the fact that the City has an ordinance which prohibits and makes illegal the sale of fireworks in the city. Pearson's contends that its right to continue to sell fireworks should be viewed as a non-conforming use of the property he has under lease and should be grandfathered in to allow the business continued existence.

A non-conforming use of property may be defined as a use that is legal but is not being conducted in the proper planning zone. *See, Barrett v. Hinds County*, 545 So.2d 734, (Miss. 1989) where *Barrett* began to use his home as his law office prior to Hinds County adopting its zoning ordinance and the use as a law office was deemed as non-conforming use because it was in a residential zone. Law offices were a legal activity but not allowed in a residential zone. *See also, Heroman v. McDonald*, 885 So.2d 67, (Miss. 2004). In *Heroman, id.*, the property was zoned residential historic district by the zoning ordinance but was being utilized and had always been utilized in a commercial manner. The commercial activities for which the building had been used were legal but were classified as a non-conforming use after the adopting of the city's zoning ordinance. In each of these cases the activities that were classified as non-conforming were legal and permitted activities but not for the zone in which the activities were occurring. The difference between activities engaged in by *Barrett, id.*, and in *Heroman id.*, and the activities engaged in by Pearson's is Pearson's activity of selling fireworks is prohibited and classified as a misdemeanor criminal offense. Pearson's activity is therefore an illegal activity and is an activity that is not allowed in any zone. Pearson's complains that the Land Code

Administrator would not issue him a permit and further that he was denied an appeal of that decision. It was legally impossible for the Land Code Administrator to issue a permit to Pearson's authorizing it to engage in an activity that the City prohibited as illegal. Further, no appeal could be taken for the same reason as the remedy sought by Pearson's was not possible without repealing the fireworks ordinance.

Pearson's now argues and request of this court that it hold the City's fireworks ordinance inapplicable to Pearson's because it was a legal activity allowed by the county and should continue to be legal after the City annexed the property. There has only been one case where a court in the State of Mississippi has rendered an opinion on this exact same issue. The case of *Meramec Specialty Co. v. Southaven*, 2:98cv171-EMB, (N.D. Miss. 200) is squarely on point with the present case. In *Meramec, id.*, the plaintiff leased land that was utilized for the purpose of selling fireworks. During the term of the lease the property was annexed by the City of Southaven. At the time of the annexation, Southaven had an ordinance which prohibited the sale of fireworks within its corporate limits, except by special permit. *Meramec* likewise argued that it was entitled to the right to continue to sell fireworks under the doctrine of uninterrupted use or non-conforming use. The Court in arriving at its decision considered § 21-19-15 of the Mississippi Code Annotated which grants municipalities the authority to regulate fireworks and determined that Southaven had an ordinance since 1981 which prohibited the sale of fireworks within its limits and there were no issues regarding the city's authority to enact the ordinance or the constitutionality of the ordinance. Just as Southaven the City of Hattiesburg has exercised its authority to adopt an ordinance prohibiting the sale of fireworks within its boundaries and said ordinance has been in existence since 1989 and there is not issue regarding the City's authority to adopt such an ordinance or the constitutionality of the ordinance.

The court in *Meramec* cited as binding authority upon the court a Mississippi case decided by the 5th Circuit Court of Appeals in *Davidson v. City of Clinton*, 826 F.2d 1430 (5th Cir.1987). The *Davidson, id.*, case involves annexation and the applicability of an existing ordinance to the newly annexed area. In *Davidson* the plaintiff owned and operated a nightclub in an area outside the city limits of Clinton. In 1960 the City of Clinton adopted an ordinance that prohibited the sale of beer or any alcohol beverage within 3,000 feet of a church or public school. In 1982 the City began its annexation effort that encompassed the area where the plaintiff nightclub was located and the annexation was finalized in 1984. The plaintiff had sold beer at his nightclub since 1969. After the annexation the plaintiff was prohibited from selling beer because his nightclub was within 475 feet from a public school. The court noted that the plaintiff did not dispute the legitimacy of the annexation or the power of the city to exercise jurisdiction over the newly annexed area. Further, it noted that the plaintiff did not challenge the legality of the ordinance prohibiting the sale of beer or regulating the sale within a certain radius of a school. The plaintiff did argue that under the doctrine of non-conforming use he should be entitled to the uninterrupted enjoyment of his property including the selling of beer because that right existed prior to the passage of the annexation ordinance. The City of Clinton defended the claim by responding that its action was authorized by the police power. *Id.*, at 1432.

The court in *Davidson, id.*, cited the law as the following:

“Once an area is annexed, in the absence of special provisions to the contrary, all ordinances and contracts of a general character are simultaneously extended over and become operative in the added territory so that such territory becomes entitled to the same privileges and subject to the same burdens as that within the original limits. 56 Am Jur 2d, Municipal Corporations, § 56; see, *Bridges v. City of Biloxi*, 253 Miss. 812, 178 So.2d 683 (1965). Stated otherwise, a municipal ordinance designed for the city at large operates throughout its boundaries whatever their change.

Louder v. Texas Liquor Control Board, 214 S.W. 2d 336, (Tex. Civ. App. 1948)..."

The *Davidson* court also held that "any territory which was zoned under the authority of one zoning authority retains that zoning when it becomes subject to the jurisdiction of the new zoning authority, subject to change by the new authority. Citing *City of Jackson v. Holliday*, 246 Miss. 412, 149 So.2d 549 (1962). This is so because the jurisdiction of the new zoning authority attaches and that of the former zoning authority ceases when the territory is annexed."

Davidson determined that there was no vested property in a license to sell beer, because the license is a revocable permit or an alienable privilege. Pearson's do not have a vested property right in a license to sell fireworks. The City must maintain its ability to exercise its police power to assure the public health, safety and welfare of its residents. Non-conforming use is an appropriate doctrine for allowing the continuation of a legal use in an inappropriate zone based upon a zoning issue but it has no place in allowing a prohibited and illegal use to continue and thus limit the police powers of a municipality. Pearson's should not be allowed to continue to operate because it is engaging in a prohibited and therefore illegal activity.

CONCLUSION

The fireworks ordinance of the City of Hattiesburg is an ordinance that was adopted pursuant to its police powers that prohibits the sale of fireworks in any zone and is not a zoning ordinance that regulates where the activity may be conducted. The decision of the Circuit Court should be affirmed.

However, if the court should find that the decision should be reverse then it should also remand the decision with instructions to the court to enter a declaratory judgment making a determination that Pearson's does not have a right to continue to operate its business because the fireworks ordinance of the City applies throughout the city, including the newly annexed areas

and further that the application of the fireworks ordinance does not constitute a regulatory taking giving rise to a claim for compensation.

Respectfully submitted this the 8th day of November, A.D., 2010.

CITY OF HATTIESBURG, Appellee

A handwritten signature in black ink, appearing to read "Charles E. Lawrence, Jr.", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, CHARLES E. LAWRENCE, JR., Attorney for Appellee, do hereby certify that I have this day mailed by U.S. mail, postage prepaid the original and three copies of the Brief of the Appellee, together with an electronic disk by mailing the same to:

Ms. Kathy Gillis, Clerk
Mississippi Supreme Court
Post Office Box 249
Jackson, MS 39205-0249

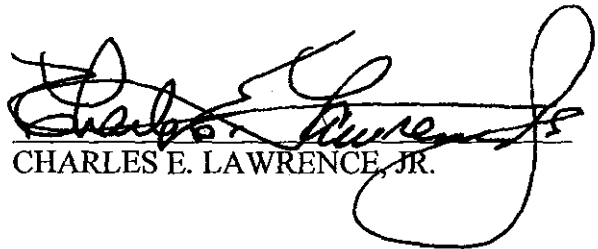
Further, that I have caused a true and correct copy to be mailed by U.S. mail, postage prepaid to:

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THIS the 8th day of November, A.D., 2010.


CHARLES E. LAWRENCE, JR.