SUPREME COURT OF MISSISSIPPI
CASE NO.: 2010-TS-00495

PEARSON'S FIREWORKS, INC. **APPELLANT**

VS.

CITY OF HATTIESBURG **APPELLEE**

BRIEF OF THE APPELLANT

APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT OF LAMAR COUNTY

ORAL ARGUMENT 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 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, Carriere, MS 39426, sole shareholder of Pearson's Fireworks, Inc.;

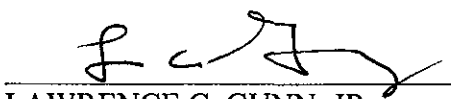
3. Joe Montgomery, Esq., MSB #3419, Williams, Williams & Montgomery, Post Office Box 113, Poplarville, MS 39470, Attorney for Appellant;

4. Lawrence C. Gunn, Jr. MS Bar #5075, Post Office Box 1588, Hattiesburg, MS 39403-1588, Attorney for Appellant;

5. City of Hattiesburg, a municipal corporation, Appellee;

6. Kim Bradley, Deborah Denard Delgado, Carter Carroll, Dave Ware, and Henry E. Naylor, Hattiesburg City Council, Post Office Box 1898, Hattiesburg, MS 39403-1898;

7. Charles E. Lawrence, Jr., P.O. Box 1624, Hattiesburg, MS 39403-1624, Attorney for Appellee.



LAWRENCE C. GUNN, JR

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE NO.**

STATUTE AND RULES

STATEMENT OF ORAL ARGUMENT

Pearson's respectfully requests oral argument in this case and will, after filing of the Appellee's brief, file a request for oral argument pursuant to Rule 34(b) setting forth additional reasons why oral argument should be granted. The undersigned counsel for Pearson's feels that oral argument is appropriate in every case important enough to be filed in the appellate courts of this state, without exception.

STATEMENT OF THE ISSUES

I. Was it proper for the circuit court to grant summary judgment to the City closing the plaintiff's fireworks business when the City never filed a motion for summary judgment?

II. Should the circuit court have granted final summary judgment in favor of the City without first addressing plaintiff's claims for compensation for the regulatory taking of its leasehold?

III. Did the circuit court properly rule that Hattiesburg's fireworks ordinance overrides the "grandfather" provision of Hattiesburg's Zoning Code and the pre-existing use doctrine in newly-annexed areas of the City?

STATEMENT OF JURISDICTION

The judgment appealed from was entered by the circuit court on January 4, 2010 (RE 2; R 111-114). However, two days later, on January 6, the circuit court entered an order staying the effect of the judgment pending an additional motion and briefing to the court (R. 115). This post-judgment motion was denied by the court in an order entered on March 4, 2010 (R. 154). This appeal was filed March 23 (R. 157), within the thirty-day time limit for filing appeals specified in M.R.A.P.(4)(a).

STATEMENT OF THE CASE

A. Course of Proceedings in the Court Below.

This case began with the filing of a complaint on December 11, 2008, by Pearson's Fireworks, Inc. against City of Hattiesburg (R. 4). Pearson's had operated a fireworks business on leased property in western Hattiesburg for a number of years, but the City annexed the lot where the fireworks business had operated, and then City officials decreed that the fireworks business must close, because Hattiesburg, prior to the annexation, had adopted an ordinance prohibiting the sale of fireworks within the City. Pearson's complaint sought three separate types of relief:

- A declaratory judgment that the business could continue operating due to a "grandfather" provision of the Hattiesburg Zoning Code and the doctrine of pre-existing or non-conforming use set forth in decisions of this court such as *Heroman v. McDonald*, 885 So. 2d 67 (Miss. 2004).
- Damages for the taking of Pearson's business, contended to be a regulatory taking that is compensable under the principle enunciated by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992).
- An injunction preventing the City from interfering with plaintiff's business pending a decision on Counts I and II of the complaint.

Shortly after plaintiff's complaint was filed, the parties entered into an agreed order, approved by the court December 19, 2008 (R. 26). This agreed order accomplished several things. First, it allowed Pearson's to continue operating pending a decision by the court. Second, it provided that the court would initially determine plaintiff's entitlement to a declaratory judgment and decide if Pearson's could remain open in spite of the fireworks

ordinance. Third, it provided that, if the court should deny the plaintiff's request for declaratory judgment, the court would then consider Pearson's claim for regulatory taking damages (RE 2; R. 111-115).

However, as it turned out, this bifurcated procedure was not followed.

By its judgment of January 4, 2010, the court denied plaintiff's request for declaratory judgment, but went further and actually granted summary judgment in favor of the City of Hattiesburg on all aspects of the case, both the claim for declaratory relief and the claim for damages.

This ruling is erroneous in three ways. First, City of Hattiesburg never filed a motion for summary judgment, so the circuit court had no legal basis to grant judgment to the City. Second, entering the judgment is contrary to the agreed order of December 19, 2009, where the court indicated that plaintiff's regulatory takings claims would be decided if the court should deny plaintiff's request for declaratory judgment. The circuit court's judgment instead grants total judgment to the City without even having a hearing or trial on Count II of the complaint, the damages claim. Finally, the circuit court failed to recognize the doctrine of non-conforming use.

B. Statement of the Facts.

Pearson's Fireworks, Inc. is a Louisiana corporation which operates several retail fireworks businesses in southern Mississippi and Louisiana. The owner of the business, Edwin Pearson, moved to Picayune, Mississippi, several years ago and is a Mississippi citizen. His business has operated uneventfully and profitably for many years. The fireworks business is seasonal, open a few days around the Fourth of July each year and then for a two or three week period before Christmas and continuing through New Year's Day.

For years Pearson's has had a successful business location on Highway 98 west of Hattiesburg. In 2003, Mr. Pearson leased a vacant lot owned by MGM Partnership and operated his business in that location continuously pursuant to a lawful business license issued by the Lamar County Board of Supervisors. MGM's property at the time was outside the incorporated area of Hattiesburg. Pearson's lease was for an initial term of ten years, ending in 2013, but his lease has renewal options for fifteen more years.*

Pearson's lease of this vacant lot is for operation of a firework's business only. No other type of business is permitted. Occupancy is allowed only for the two fireworks selling seasons. The location is a prime location, because it is situated between the commercialized area of Hattiesburg and the populated residential areas to the west, most of which are outside the incorporation limits of the City.

In 2007, Hattiesburg annexed the lot where Pearson's was located. Pearson's knew nothing about the pending annexation proceedings and was surprised to learn one day, when visited by the Hattiesburg fire inspector, that his business is now in the city limits of Hattiesburg. He was told he must shut down because Hattiesburg has an ordinance prohibiting the sale of fireworks within the city.

The legal basis for the controversy in this case can be found in two Hattiesburg ordinances, both re-enacted by the City Council on the same day. The first, §19-8 of Ordinance 2331 of the Code of Ordinances (RE 4, p. 1), makes it illegal to sell fireworks in the city limits of Hattiesburg.

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* Pearson's lease from MGM and Pearson's retail license are not in the record, because as explained in Part II of this brief, the case was dismissed without an opportunity for Pearson's to present evidence. The description of the lease terms here is for background informational purposes. We do not anticipate the City will contest Pearson's description.

A second ordinance, §2330 of the Code of Ordinances, comprises the Hattiesburg Land Development Code. The Land Development Code has a "grandfather" clause or non-conforming use provision at §12.03:

> The lawful use of "land" existing at the time of the passage of this Code, although such does not conform to the provisions herein, may be continued . . . ." (RE 4, p. 3).

The Land Development Code also contains a prohibition against sales of fireworks, providing in §77.01(1), "Retail sale of fireworks is not permitted in any district" (RE 4, p. 7).

Another provision of the Land Development Code, §12.06 (RE 4, p. 4) provides that a business can apply to continue a non-conforming use by securing a certificate from Hattiesburg's Land Development Code official. Pearson's made application for such a certificate, but was surprised to learn from the building official that the City of Hattiesburg did not consider the Land Development Code to govern use of land where fireworks businesses operate and that fireworks stands were regulated, not by the zoning code, but by the separate fireworks ordinance. When Pearson's sought to appeal this decision of the land code official, Pearson's was informed by the city clerk that the Board did not allow for appeals from decisions of the Land Code Administrator, even though such is clearly provided for in §43.01 of the Land Development Code. Because the building official was simply "a city official carrying out his job responsibilities," according to the city clerk, Pearson's would simply have to accept his decision without any further rights of appeal (R. 11-17).

Unable to secure any relief administratively through the Hattiesburg government, Pearson's resorted to this suit in the Circuit Court of Lamar County, with equally unavailing results.

SUMMARY OF THE ARGUMENT

I. **It was error for the circuit court to grant summary judgment to the city closing the plaintiff's firework business when the city never filed a motion for summary judgment.**

No motion for summary judgment was filed in the record of this case as required by M.R.C.P. 56.

Further, there was no notice of the hearing of any motion as required by M.R.C.P. 6(d) and 56(c).

It was error for the court to thus grant summary judgment in favor of the City based upon informal or *ore tenus* comments made in off-the-record conferences before the court.

Parties are entitled to at least ten days written notice of motions for summary judgment; see *Sullivan v. Tullos*, 19 So. 3d 1271 (Miss. 2009).

II. **The Circuit Court erred in granting final summary judgment in favor of the city without addressing plaintiff's claims for damages for the regulatory taking of its leasehold interest.**

Under the rule announced in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), an otherwise valid regulation or ordinance passed by local government may under the right circumstances constitute a regulatory taking that requires the payment of compensation under the takings clause of the Fifth Amendment to the United States Constitution. *Lucas,* at 505 U.S. 1019, 112 S.Ct. 2895.

The Hattiesburg fireworks ordinance, if valid and if literally enforced against Pearson's, will effectively take Pearson's business, because its long term leasehold interest in the property

where it operates is limited to the operation of a fireworks business during the fireworks selling seasons.

Pearson's must present numerous facts to the court to establish a regulatory takings case, such as economic impact of the fireworks ordinance on Pearson's, the character of the action the city has taken, the extent to which the ordinance affects Pearson's expectation from its investment, and whether the common good the City seeks to advance does more than simply adjust the benefits and burdens of economic life. See *Lingle v. Chevron USA*, 544 U.S. 528, 538-9, 125 S. Ct. 2074, 2081-2 (2005). See Also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002), and *Briarwood, Inc. v. City of Clarksville*, 766 So. 2d 73, 82 (Miss. App. 2000).

The circuit court's grant of summary judgment against Pearson's was done without a hearing or trial or any opportunity for Pearson's to present evidence. The circuit court never considered any of the various factors that go into Pearson's regulatory takings claim. This ruling was contrary to the court's prior order (R. 26) which ruled, by agreement of both sides, that Pearson's would be able to present such a claim after the court ruled on the declaratory judgment aspect of the case. The court's judgment dismissing Pearson's case completely without consideration of Pearson's regulatory takings claim is contrary to the agreed order.

III. The Circuit Court erred in ruling that Hattiesburg's fireworks ordinance overrides the grandfather provision of Hattiesburg's Zoning Code and the pre-existing use doctrine in newly annexed areas of the City.

The common law of Mississippi recognizes the principle that lawful use of land may continue in the face of later conflicting land use regulations. This is the doctrine of non-

conforming use. See *Heroman v. McDonald*, 885 So. 2d 67 (Miss. 2004), *Barrett v. Hinds County*, 545 So. 2d 734 (Miss. 1989), and *Faircloth v. Lyle*, 592 So. 2d 941 (Miss. 1991).

Hattiesburg's Zoning Ordinance has a similar "grandfather clause" provision which allows legal businesses, once established, to continue to operate even after subsequently enacted land use provisions. The circuit court's judgment fails to give effect to the doctrine of non-conforming use.

ARGUMENT

I. It was error for the circuit court to grant summary judgment to the city closing the plaintiff's firework business when the city never filed a motion for summary judgment.

The city was granted summary judgment, even though there was no motion on file that the court could rule on to grant such a judgment. The question is whether the Rules of Civil Procedure allow a motion for summary judgment to be made informally, not in writing.

Motions in a circuit court case are governed by M.R.C.P. 7(d)(1):

> An application to the court for an order shall be by motion which, unless made during a hearing or trial, *shall be made in writing*, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. [Emphasis added].

Rule 7 makes it plain that motions "shall be made in writing," the only exception being those instances where the motion "is made during a hearing or trial," when by implication oral motions will suffice. This exception to the general rule makes sense, because there are undoubtedly trial motions, such as motions for directed verdict, that only can be made at trial, and in the case of such a motion there can be no controversy concerning the content of the motion, because a full record is made by the court reporter. Here, however, there has never been a hearing or a trial where any oral motion was made such as the one the circuit court granted,

much less a motion complying with the requirement of 7(d)(1) that motions must "state with particularity the grounds therefore. . . ." Therefore any motion in this case is governed by the general rule: it "shall be made in writing."

The written requirement of motions and notice of motions is also addressed in Rule 5, which states in relevant part: "[E]very written motion other than one which may be heard ex parte, and every written notice . . . shall be served upon each of the parties." And Rule 6(d) further provides, " [A] written motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than five days before the time fixed for the hearing . . . ."

In other words, with the limited exception of motions made at "hearing or trial," motions in a court case have to be in writing, and there also has to be notice of hearing of motions, a second written document, a notice, which also must be served on the opposing party.

Motions for summary judgment are even more formal than other types of written motions. Rule 56(c) states, "The motion shall be served at least ten days before the time fixed for the hearing." This rule, read in conjunction with Rules 5 and 6, makes it plain that motions for summary judgment must be in writing, must be accompanied by a notice of hearing, and must provide at least ten days notice, rather than the usual five, before they can be heard.

In this particular case the only motion before the court was the motion of the plaintiff, Pearson's, for a declaratory judgment. This motion was fully briefed by the parties pursuant to the court's agreed order of December 19, 2008 (R. 26). This motion of Pearson's is the only motion in the record of this case upon which the court had any authority to rule.

There is no similar motion or notice in this case on behalf of the city. The city attorney, in a letter to the judge dated December 10, 2009, stated, "On behalf of the City of Hattiesburg, I

am requesting that the court treat the pleadings and filings in this cause as mutual motions for summary judgment, because there are no genuine issues of material facts only issues of law. [Sic]" (RE 3; R. 107)

The trial court in its judgment mentioned that various telephonic and settlement conferences had been held with the parties, and then stated:

> During the last telephonic conference held, *ore tenus* motion was made by the defendant to treat the declaratory action as one for summary judgment under Rule 56 of Miss. Rule Civ. Proc., which the court will allow (RE 2, p. 1; R. 111).

However, the record does not contain any such motion as referred to in the city attorney's letter, nor do the Rules of Civil Procedure allow "ore tenus" motions for summary judgment. Rule 56(c) would prevent what happened here. If a litigant wants judgment in a case, there must be a written motion supported with any appropriate affidavit or other material that the movant deems necessary, and, more importantly, a statement of the grounds for the motion. There must also be a written notice of the motion at least ten days before the hearing. Letters and *ore tenus* comments in telephone conferences are not written motions meeting the requirements of the Rules of Civil Procedure.

Pearson's never had any notice that it was defending a motion for summary judgment in this case. Admittedly, the city attorney had written the letter of December 10, 2009 (RE 3; R. 107), asking the court to treat the pleadings as a motion for summary judgment. There is no rule, however, that would allow "the pleadings and filings" in this case to be treated as a motion for summary judgment. Further, the court in its judgment referred to a "*ore tenus*" request made in a telephonic conference call where the city attorney apparently stated such a verbal request. However, there categorically has never been a written motion filed in this case alerting Pearson's what it must defend against, nor any notice of such a motion as required by Rule 56(c).

In this December 10 letter, the city attorney made the unsupported statement that, "Mack Grubbs as owner of the property requested that the city annex his property." (RE 3, R. 1; R 107). (Mr. Grubbs is the principal of MGM Partnership, lessor to Pearson's.) The circuit judge thought this was an important "fact," commenting in the judgment, "The City's assertion in this instance – that the landowner did not challenge or contest the City's annexing of the subject property – was uncontested." (RE 2, p. 4, R. 114). However, there is no documented evidence of such a written request by Mr. Grubbs in the record of this case nor anything by way of a motion for summary judgment for plaintiff to contest. Pearson's knows emphatically that it did not consent to the annexation of its leasehold interest and would never have done anything to have impaired its long term leasehold interest in the lot where its business had operated legally and properly for years. Whether Mr. Grubbs consented is unknown on this record. The important point, however, is that, regardless of what the city attorney might have requested in his letter or in an "*ore tenus*" telephonic conference, there was in fact no motion for summary judgment ever filed and therefore no opportunity for Pearson's to challenge the factual assertions made by the city attorney.

Closely analogous is *Sullivan v. Tullos*, 19 So. 3d 1271 (Miss. 2009), where this court held that a Rule 12(b)(6) motion to dismiss for failure to state a claim may not be converted into a Rule 56(c) motion for summary judgment without at least ten days notice prior to the hearing. In this case, Pearson's had even less notice than the losing party in *Sullivan v. Tullos*. There at least the losing party, before he was ruled against, had defended against a written 12(b)(6) motion which was similar to what was later asserted in the motion for summary judgment. Nonetheless, this court held that the ten day notice requirement under Rule 56(c) is mandatory and a motion for summary judgment cannot be granted unless there is at least ten days notice of

such a motion. Here Pearson's was given no notice that it must defend against a motion by the City. There is not even a motion in the record.

The Court of Appeals in *Lopez v. McClelland*, 2010 WL 1664937 (Miss. App. 2010) likewise recognized that motions for summary judgments may not be granted by a court on its own motion due to the ten day notice requirement. In *Lopez*, the court, while recognizing the rule, found there was a waiver of the ten day notice requirement. Here there is no such waiver by Pearson's. There is no motion for summary judgment on file at all, so Pearson's had nothing it could waive notice of in the first place. The judgment of January 4, 2010, was decided by the court on briefs without a hearing, and there is nothing in those briefs constituting a motion by the City, notice of such a motion, or waiver of notice by Pearson's. (See motion and response at R. 33 f, R. 56 f)

The Federal Rules of Civil Procedure are similar to our state rules, and federal courts hold that summary judgment may not be granted unless a written motion is filed, supported by a ten day written notice. See, e.g., *Hanson v. Polk County Land, Inc.*, 608 F. 2d 129 (5th Cir. 1979).

Hattiesburg never filed a motion for summary judgment. It was therefore error for the court to grant final judgment on all issues in favor of the city.

II. The Circuit Court erred in granting final summary judgment in favor of the city without addressing plaintiff's claims for damages for the regulatory taking of its leasehold interest.

Pearson's complaint sought in part a declaration that its business was grandfathered by a provision of Hattiesburg's Land Development Code and that the City could not shut down its

business simply by annexing the lot where Pearson's had operated for years. The court has ruled against Pearson's on this point, and Pearson's addresses that issue in Part III of this brief.

However, Pearson's complaint seeks additional relief. Count II of the complaint seeks damages for the regulatory taking of plaintiff's leasehold interest, and this claim has been summarily dismissed without any motion, briefing, hearing, or trial. (See Complaint at R. 4-17).

Property can be taken by government in the traditional way of eminent domain, but decisions of the United States Supreme Court recognize that a property interest can also be taken by the government through regulatory action. For instance, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), the United States Supreme Court stated the principle that regulations that deprive a property owner of all economically viable use of his land constitute a type of regulatory "taking" that requires compensation under the Takings Clause of the Fifth Amendment:

> When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good that is, to leave his property economically idle, he has suffered a taking. *Lucas*, 505 U.S. at 1019, 112 S. Ct. at 2895.

This principle is appropriate here. The Hattiesburg Fireworks Ordinance, if valid and enforced against Pearson's, will shut down Pearson's business. Pearson's leasehold interest from MGM Partnership is for the sole and specific purpose of conducting its retail fireworks business. It cannot use the property for any other purpose. Prohibiting the sale of its products effectively takes Pearson's property.

The U.S. Supreme Court recognized the doctrine that the takings clause of the Fifth Amendment restricts government regulation in subsequent cases such as *Lingle v. Chevron USA*, 544 U.S. 528, 125 S. Ct. 2074 (2005), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002). While there has not been a

celebrated case in this court over the "regulatory takings" issue, the doctrine has been recognized in *Briarwood, Inc. v. City of Clarksville*, 766 So. 2d 73, 82 (Miss. App. 2000), where the Court of Appeals observed:

> [T]here is a taking of property when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property. *Briarwood, Inc. v. City of Clarksville*, 766 So. 2d at 82, *Brothers v. U.S.*, 594 F. 2d 740, 741 (9th Cir. 1979).

It is not Pearson's purpose in this appeal to establish that it is entitled to damages from the City of Hattiesburg. A trial must first be held on that issue. A regulatory takings case involves consideration of numerous factors and involves case-specific inquiries into the facts. As the U.S. Supreme Court noted in *Lingle,* factors to consider in evaluating a regulatory takings claim are the economic impact of the regulation on the plaintiff, the character of the governmental action, the extent to which the regulation interferes with distinct investment-backed expectations, and whether the governmental regulation does more than simply adjust the benefits and burdens of economic life to promote the common good. *Lingle,* 544 U.S. at 538-9, 125 S. Ct. at 2081-2. These factors were never considered by the trial court. Pearson's never had a chance to introduce any evidence on these issues. Indeed, the summary judgment was granted in favor of the City of Hattiesburg without even recognizing the claim stated in Count II of Pearson's complaint.

This is surprising in view of the fact that the court earlier ordered, based on the parties' agreement, that if Pearson's suit for declaratory judgment was unsuccessful, then Pearson's would have an opportunity to present a "regulatory takings" case for damages. This procedure was expressly described in the order of December 19, 2008:

> 6. If the court should determine that plaintiff is not entitled to prevail on its claim for declaratory relief, then the plaintiff shall

> not be allowed to continue its business within the city limits of Hattiesburg. *However, the plaintiff may at that time elect to pursue its claims for damages for what it contends is an unlawful taking of its property.* [Emphasis added]. (R. 026-7).

In other words, the circuit court first recognized, and both sides agreed, that if the declaratory judgment action was decided adversely to Pearson's, then Pearson's could present its regulatory takings claim for damages. However, Pearson's has now been denied that opportunity. Because the trial court granted complete final judgment in favor of the City of Hattiesburg, Pearson's has "lost" its regulatory takings claims without ever having a hearing, without being able to argue any of the *Lucas* factors to the circuit court, or without in any way being allowed to present its case for damages pled in Count II of the Complaint.

Because there has never been any presentation of the Count II aspect of Pearson's complaint, this court should set aside the circuit court's judgment and remand this case for determination of whether Pearson's has a valid regulatory takings claim under the Fifth Amendment and, if so, the amount of damages Hattiesburg must pay Pearson's.

III. The Circuit Court erred in ruling that Hattiesburg's fireworks ordinance overrides the grandfather provision of Hattiesburg's Zoning Code and the pre-existing use doctrine in newly annexed areas of the City.

If this court agrees with the arguments advanced by Pearson's in this section of its brief, then the procedural shortcomings described above in Parts I and II will become moot and will not need to be decided.

The court's judgment enforces §19-8 of Ordinance 2331 of the City of Hattiesburg, codified on December 19, 1989. That section reads:

> Except as expressly authorized in §19-10, it shall be unlawful for any person to possess, store, handle, deal in, sell, offer for sell,

> shoot, discharge, fire, explode, or otherwise use any fireworks as defined in §19-7 within the city limits of Hattiesburg (RE 4, p. 1).

The same day this ordinance was re-adopted by the Hattiesburg City Council, it also passed Hattiesburg's Land Development Code, Ordinance 2330, the official zoning code for the City of Hattiesburg. One section of the zoning code provides:

> 12.03. The lawful use of "land" existing at the time of the passage of this Code, although such does not conform to the provisions herein, may be continued, . . . (RE 4, p. 3).

The zoning code also contains this provision:

> 77.01. Provisions in this section shall govern the sales of fireworks and related articles:
>
> 1. Retail sale of fireworks is not permitted in any district. (RE 4, p. 7)

Another significant provision of the zoning code is §14.01:

> From and after the date of adoption, the Land Development Code shall govern all development, land development, zoning, land uses, and land subdivision of land located within the corporate limits of the City of Hattiesburg, Mississippi. [Emphasis added]. (RE 4, p. 5).

Against the background of these ordinances are this Court's decisions in *Heroman v. McDonald*, 885 So. 2d 67 (Miss. 2004), *Barrett v. Hinds County*, 545 So. 2d 734 (Miss. 1989), and *Faircloth v. Lyle*, 592 So. 2d 941 (Miss. 1991), all of which recognize the doctrine of "non-conforming use" as a principle of the common law of Mississippi.

Heroman v. McDonald involved a V.F.W. hall that was being used for receptions, wedding parties, and other similar types of activities. These activities had been legal in the past until the City of Pass Christian decided that the V.F.W. hall would have to cease operating as it had done in the past. This Court held that the doctrine of non-conforming use is a right that runs with the land and that a legal activity could not be made illegal by subsequent city legislation.

Barrett v. Hinds County was about a law office that had been operated for years by an attorney in his residence in rural Hinds County. Later the county passed the zoning ordinance classifying the attorney's property as residential and prohibiting him from using any part of it for a professional office. This Court ruled that Hinds County Zoning Ordinance could not be applied retroactively, as a non-conforming use may be allowed to continue if it was lawfully established at the time a contrary ordinance became effective.

Faircloth v. Lyle was a controversy over a sand and gravel pit that had operated legally for years until it ran afoul of a new ordinance passed by Hinds County that prohibited sand and gravel mining. This Court recognized that the later enacted county ordinance could not stop what had always been a legal use, because the right to a non-conforming use runs with the land and may even be transferred from one owner to another.

Section 12.03 of the Hattiesburg Zoning Code (RE 4, p. 3) recognizes the common law doctrine of non-conforming use. That section provides that a legal use may continue even when the provision of the zoning code later conflicts with it, if the use was legal before the code became effective. In this case, the code did not become effective as to Pearson's location until Pearson's leased lot was annexed into the city limits in 2007. At that time Pearson's had been operating for several years and for at least four years under its current lease with MGM Partnership.

The circuit court's judgment does not recognize that Hattiesburg's zoning code has any effect, even though §14.01 states that it is the Land Development Code, not some other ordinance of the City of Hattiesburg, that "shall govern all . . . land uses . . . within the corporate limits of the City of Hattiesburg, Mississippi." (RE 4, p. 5)

The grandfather clause or non-conforming use provision of the Hattiesburg Zoning Ordinance should be applied in such a way to allow Pearson's to continue its business which legally operated before its leased lot was annexed into the city limits.

The circuit court in its judgment cited *Meramac Specialty Co. v. Southaven*, Case No. 2:98cv17-EMB(N.D. Miss. 2000) and *Davidson v. City of Clinton*, 826 F. 2d 1420 (5th Cir. 1987).

Meramac Specialty, a non-reported decision by Magistrate Judge Eugene Bogan of the Northern District of Mississippi, is simply wrong. Judge Bogan assumes that "there is a presumption that an ordinance is valid, and the party asserting that it is arbitrary or unreasonable as it applies to its property must prove this by clear and convincing evidence." *Meramac* at headnote 4. However, the reasoning of this opinion stops there and fails to recognize the non-conforming use doctrine of *Heroman v. McDonald* and *Barrett v. Hinds County. Meramac Specialty* is not persuasive; Judge Bogan's opinion is conclusory only, not analytical at all.

Davidson v. City of Clinton deals with liquor regulation. Liquor regulation is different from other forms of government regulation. States are given the right to regulate liquor distribution and sales by the Twenty-First Amendment to the United States Constitution, which provides, "The transportation or importation into any state territorial possession in the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited." Federal courts, including the U.S. Supreme Court, have long recognized that local governments enjoy special powers to regulate intoxicating beverages. *California Retail Liquor Dealers Association v. Mid Cal Aluminum, Inc.*, 445 U.S. 97 100 S. Ct. 937 (1980). The Fifth Circuit in *Davidson* referred to these regulatory powers as "the heightened powers of the state to regulate the sale and distribution of intoxicating liquor." See *Davidson* at 1433.

Fireworks are not dealt with in the United States Constitution as is liquor. The states and local government such as the City of Hattiesburg have no constitutionally endowed right or authority to regulate fireworks as they do liquor sales. *City of Clinton* is not authoritative in this case.

Since Hattiesburg's zoning code recognizes the doctrine of non-conforming use, a recognized doctrine of the common law of this state, the circuit court's judgment should be reversed and Pearson's should be allowed to continue its fireworks business as it has legally done in the past.

CONCLUSION

First, Pearson's feels that, for the reasons stated in part III of this brief, the circuit court's judgment should be reversed and rendered, and Pearson's should be allowed to continue operating its fireworks business in its present location as it has in past years.

If the court does not reverse and render as requested part III of this brief, then Pearson's asks that this court affirm and remand, that is, affirm the circuit court's ruling that Pearson's must close down its business, but remand the case to the circuit court for consideration of Pearson's regulatory takings claim set forth in Count II of its complaint. Remand is necessary for those reasons advanced above in Parts I and II of this brief.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have this day forwarded via United States Mail, postage prepaid, the original and three copies of the Brief of Appellant, along with an electronic disk of same for filing to:

Ms. Kathy Gillis, Clerk
Mississippi Supreme Court
P.O. Box 249
Jackson, MS 39205

I have caused to be mailed by Unites States Mail, postage prepaid, a copy of the above referenced Brief of Appellant to:

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Honorable Prentiss G. Harrell
Lamar County Circuit Court Judge
P.O. Box 488
Purvis, MS 39475

This the 3rd day of August, 2010.

LAWRENCE C. GUNN, JR