

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2013-CA-00955

CONCERNED CITIZENS OF RAVEN  
WOOD SUBDIVISION

APPELLANTS

VERSUS

PEARL RIVER COUNTY, MISSISSIPPI

APPELLEE

---

**BRIEF OF APPELLEE,  
PEARL RIVER COUNTY,  
MISSISSIPPI**

---

APPEAL FROM A JUDGMENT OF THE  
CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

JOE H. MONTGOMERY  
MS BAR NO. 3419  
WILLIAMS, WILLIAMS & MONTGOMERY, P.A.  
P.O. BOX 113  
POPLARVILLE, MS 39470  
TELEPHONE: (601) 795-4572  
FACSIMILE: (601) 795-8382  
EMAIL: [joemontgomery@wwmlawfirm.net](mailto:joemontgomery@wwmlawfirm.net)

## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certified 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 judges of the Court of Appeals may evaluate possible disqualifications or recusal.

APPELLEE: Pearl River County, Mississippi

Joe H. Montgomery (MSB #3419)  
Williams, Williams & Montgomery, P.A.  
P. O. Box 113  
Poplarville, MS 39470  
Telephone: (601) 795-4572  
Facsimile: (601) 795-8382  
Email: [joemontgomery@wwmlawfirm.net](mailto:joemontgomery@wwmlawfirm.net)  
ATTORNEY FOR APPELLEE

APPELLANTS:

Benjie Pettiette and Ashley Pettiette  
Twanna Carter  
Milton Jacobs and Kimberly M. Jacobs  
Mark Rody and Brenda Rody  
Ronald Cousin and Natasha Cousin  
David Taporco and Karen Taporco  
Nicholas Sciambra and Mary Sciambra  
Jeffrey Chad Palmer and Cheryl Palmer  
Rufus L. Stallings and Liz Stallings  
Albert P. Butler and Barbara Butler  
Donald Juan and Jennifer Juan  
COLLECTIVELY, CONCERNED CITIZENS OF RAVEN WOOD SUBDIVISION

Lewie G. Negrotto, IV (MSB #10060)  
Todd G. Crawford (MSB #102620)  
John S. Garner (MSB #102470)  
Michael J. Thompson, Jr. (MSB #103772)  
FOWLER RODRIGUEZ  
2505 14<sup>th</sup> Street, Suite 500  
Gulfport, MS 39501  
Telephone: (228) 822-9340  
Facsimile: (228) 822-9343

snegrotto@frfirm.com  
tcrawford@frfirm.com  
jgarner@frfirm.com  
mthompson@frfirm.com  
ATTORNEYS FOR APPELLANTS

s/ Joe H. Montgomery  
JOE H. MONTGOMERY  
ATTORNEY OF RECORD FOR APPELLEE

## TABLE OF CONTENTS

Certificate of Interested Persons .....	i
Table of Contents .....	iii
Table of Authorities .....	v
Statement of Oral Argument .....	1
Statement of the Issues .....	1
Statement of the Case .....	1
Procedural History .....	1
Statement of Facts .....	3
Summary of the Argument .....	10
Argument .....	11
Summary Judgment Standard .....	11
I.    The Appellant Raven Wood's request for a writ of mandamus has no basis in law or fact .....	12
A.    The Appellee, Pearl River County, has fully complied with the Restrictive Covenant placed on County 5.44 .....	14
Priority of the Easement to Restrictive Covenant .....	14
Size and Scope of the Easement in Controversy .....	18
Standing to Enforce Restrictive Covenant .....	23
B.    The Appellee, Pearl River County, has fully complied with the Flood Prevention Ordinance .....	24
Dirt and Rock Piles .....	25
Proposed Railroad Spur .....	26
C.    The Appellee, Pearl River County, has complied with the Hazard Mitigation and Flood Damage Prevention Plan .....	30



D.	The Appellant, Raven Wood's objection to exhibits offered by the Appellee, Pearl River County, is without merit . . . . .	30
	No Rise Certificate . . . . .	33
E.	The Appellant, Raven Wood, has failed to demonstrate they have an interest separate and apart from the general public . . .	35
F.	Any grant of mandamus in this matter will adversely affect the public interest . . . . .	36
G.	The trial court correctly denied the introduction of proffered documents by Appellant Raven Wood on the day of the summary judgment hearing . . . . .	37
II.	The Appellant, Raven Wood's continued insistence on a Temporary Restraining Order/Preliminary Injunction (TRO/PI) is unwarranted and should be denied . . . . .	38
Conclusion	. . . . .	39
Certificate of Service	. . . . .	41

## TABLE OF AUTHORITIES

<u>Case Law:</u>	<u>Page No.</u>
<i>PPG Architectural Finishes, Inc. v. Lowery</i> , 909 So.2d 47 (Miss. 2005) . . . . .	11
<i>Hurdle v. Holloway</i> , 848 So.2d 183 (Miss. 2003) . . . . .	11
<i>Erby v. North Miss. Med. Ctr.</i> , 654 So.2d 495 (Miss. 1995) . . . . .	11, 12
<i>Magee v. Transcontinental Gas Pipe Line Corp.</i> , 551 So.2d 182 (Miss. 1989) . . . . .	11
<i>McHenry v. State</i> , 44 So. 831 (Miss. 1907) . . . . .	12
<i>Bennett v. Bd. of Supervisors of Pearl River County, Miss.</i> , 987 So.2d 984 (Miss. 2008) . . . . .	12
<i>Wood v. State</i> , 142 So. 747 (Miss. 1931) . . . . .	12
<i>Am. Book Co. v. Vandiver</i> , 178 So. 598 (Miss. 1938) . . . . .	14
<i>Hobson v. City of Vicksburg, Miss.</i> , 848 So.2d 199 (Miss. Ct. App. 2003) . . . . .	14
<i>Carter v. Pace</i> , 86 So.2d 360 (Miss. 1956) . . . . .	15
<i>Journey v. Berry</i> , 953 So.2d 1145 (2007) . . . . .	16
<i>Clement v. R. L. Burns Corp.</i> , 373 So.2d 790 (Miss. 1979) . . . . .	16
<i>Sanders v. Advanced Neuromodulation Systems, Inc.</i> , 44 So.3d 960 (Miss. 2010) . . . . .	17
<i>Fortenberry</i> , 71 So.3d 1196 (Miss. 2011) . . . . .	17
<i>Bivens v. Mobley</i> , 724 So.2d 458 (Miss. Ct. App. 1998) . . . . .	19, 20
<i>Bourne v. Estate of T. L. Carraway</i> , 118 So.3d 571 (Miss. 2013) . . . . .	20
<i>Gulf, M. &amp; O. R. Co. v. Tallahatchie Drainage Dist. of Union County</i> , 67 So.2d 528 (1953) . . . . .	20
<i>Lanier v. Booth</i> , 50 Miss. 410 (1874) . . . . .	20
<i>Rubenstein v. State</i> , 941 So.2d 735 (Miss. 2006) . . . . .	21, 22
<i>Tate v. State</i> , 912 So.2d 919 (Miss. 2005) . . . . .	21

<i>Wilcher v. State</i> , 479 So.2d 710 (Miss. 1985) .....	21
<i>Chantey Music Publ'g Inc. v. Malaco, Inc.</i> , 915 So.2d 1052 (Miss. 2005) .....	21
<i>Garraway v. State</i> , 184 So. 628 (Miss. 1938) .....	25
<i>Marbury v. Madison</i> , 5 U.S 137 (1803) .....	25
<i>State ex rel. Horton v. Lawrence</i> , 83 So. 532 (Miss. 1919) .....	26
<i>United States v. St. Bernard Parish</i> , 756 F.2d 1116 (5 <sup>th</sup> Cir. 1985) .....	30
<i>Stewart v. Southeast Foods</i> , 688 So.2d 733 (Miss. 1996) .....	32, 33
<i>Thomas v. State</i> , 14 So.3d 812 (Miss. Ct. App. 2008) .....	34
<i>Seeling v. State</i> , 844 So.2d 439 (P17) (Miss. 2003) .....	34
<i>Travis v. Steward</i> , 680 So.2d 214 (Miss. 1996) .....	34
<i>Alexander v. State</i> , 759 So.2d 411 (Miss. 2000) .....	35
<i>Partin v. N. Miss. Med. Ctr., Inc.</i> , 929 So.2d 924 (Miss. Ct. App. 2005) .....	37
<i>Hobgood v. Koch Pipeline Southeast Inc.</i> , 769 So.2d 838 (Miss. Ct. App. 2000) ...	38
<u>Statutes:</u>	
Miss. Code Ann. §11-41-1 (1972) .....	12
Miss. Code Ann. §89-5-5 (1972) .....	16
42 USC 5170c .....	17
Miss. Code Ann §17-1-15 (1972) .....	24
<u>Rules:</u>	
Rule 4.04 Uniform Rules of Circuit and County Court Practice .....	2
Rule 56 Mississippi Rules of Civil Procedure .....	11
Rule 201 Mississippi Rules of Evidence .....	19
Rule 801(c) Mississippi Rules of Evidence .....	32

Rule 803 Mississippi Rules of Evidence .....	33, 34
--	--------

Other Authorities:

Pearl River County, Mississippi Flood Damage Prevention Ordinance .....	1, 2, 10, 13, 24
--	------------------

Pearl River County, Mississippi Hazard Mitigation and Flood Protection Plan .....	13, 14, 25, 30, 31, 35
--	------------------------

44 CFR 206.434 .....	17
----------------------	----

## **STATEMENT OF ORAL ARGUMENT**

The Appellee, Pearl River County, 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**

Whether the Circuit Court of Pearl River County, Mississippi committed reversible error in denying the Motion for Summary Judgment of the Appellant, Concerned Citizens of Raven Wood Subdivision and granting the Cross-Motion for Summary Judgment of the Appellee, Pearl River County, Mississippi?

## **STATEMENT OF THE CASE**

### Procedural History

The Appellants, Concerned Citizens of Raven Wood Subdivision (hereinafter Raven Wood”), initiated this lawsuit by filing a Petition for Temporary Restraining Order, Preliminary Injunction and Writ of Mandamus on May 3, 2012, alleging the following:

- (1) “Violation of a hazard mitigation restriction of perpetual open space property”;
- (2) “Violation of the PRC Hazard Mitigation Flood Protection Plan”; and
- (3) “Violation of the PRC Flood Damage Prevention Ordinance.” (PRC- R.E. 1)

The Appellee, Pearl River County, Mississippi (hereinafter “Pearl River County”), responded on May 14, 2012 and filed its Affirmative Defenses, Responsive Pleading, Answer, Motion to Dismiss and Other Motions denying these allegations. (PRC - R.E. 14) The trial court conducted a hearing on May 14, 2012, and entered an Order denying Raven Wood’s

requested preliminary injunction and set the case for trial on the merits on November 15, 2012. (PRC - R.E. 4-12)

On September 23, 2012, at the request of both parties, the trial date of November 15, 2012 was continued and the case was reset for trial on the merits on February 21, 2013. (PRC - R.E. 13) Raven Wood, chose not to conduct any discovery in this matter, propounded no interrogatories, requests for admission or production of documents, and took no depositions. (PRC - R.E. 14-16) In spite of its assertion on appeal that the trial court instigated the notion that this case be decided only on summary judgment, it was actually counsel for Raven Wood who suggested this procedure in the conference with the Court, because of "the simplicity of the issues before the Court," to which the Court simply agreed. (PRC- R.E. 18)

On December 21, 2012, Pearl River County, having not received Raven Wood's promised Motion for Summary Judgment and realizing Raven Wood had not taken any action whatsoever to prepare the case for decision or trial, did timely file its Defendant's Designation of Expert Witnesses, sixty-two (62) days prior to trial as required by Rule 4.04 of the Uniform Rules of Circuit and County Court Practice, knowing failure to designate experts sixty (60) days in advance of trial would bar their testimony should Raven Wood, choose to proceed to trial. (PRC - R.E. 22-39) Among the experts designated by Pearl River County were County Engineers H. Les Dungan, III, P.E., P.L.S. and Brooks R. Wallace, P.E., along with Billy Colson, a professional engineer, surveyor and hydrologist who performed the no rise certification attached to the Designation of Expert Witnesses in conformance with the Flood Damage Prevention Ordinance. (PRC - R.E. 22-39 & 181)

Raven Wood, took no action whatsoever until January 18, 2013, when it filed its Motion for Summary Judgment and Motion to Strike Expert Witnesses, or alternatively, Leave for Time to Designate Experts. (PRC - R.E. 14-16) Pearl River County, also recognized the case was proper for disposition on summary judgment rather than trial, and filed a Cross-Motion for Summary Judgment on February 11, 2013, supported with brief and evidentiary submissions (PRC -R.E. 40-274).

All parties noticed their respective Motions for Summary Judgment for hearing on the trial date of February 21, 2013, which had been set September 23rd of the preceding year. (PRC - R.E. 13) The trial court correctly determined there to be no genuine issue of material fact and denied Raven Wood's motion and granted the motion of Pearl River County. (PRC - R.E. 321-325) The Appellants, Raven Wood, having first asserted there to be no genuine issues of material fact and that this was a case ripe to be decided without trial and on summary judgment, now assert the opposite on appeal. (PRC - R.E. 1)

#### Statement of Facts

The lawsuit before the Court involves the interaction of four (4) distinct property interests:

- (1) A sixty (60) foot wide easement (hereinafter "easement") paralleling the Norfolk Southern Railroad, providing access to properties located in the Picayune Industrial Park, granted on November 2, 2001 (PRC -R.E. 112-113);
- (2) An approximate 5.44 acre tract of property purchased on March 24, 2004 by Pearl River County (hereinafter "County 5.44") burdened by the easement (PRC - R.E. 128-135);
- (3) A approximate 35.38 acre tract (25.38 + 10.00 acres) of property located in the Picayune Industrial Park leased by Alliance Consulting Group, LLC (hereinafter "Alliance property") from AHG Solutions, L.L.C., the owner of the easement and the property upon which Alliance has constructed a multi-

million dollar manufacturing facility (PRC - R.E. 212-215); and

(4) The Raven Wood Subdivision (PRC -R.E. 98-108).

Topographically, Raven Wood Subdivision, County 5.44 and the Alliance property share common boundaries as depicted in the tax map (PRC - R.E. 52, 51) and are traversed by a narrow stream called Alligator Branch depicted as blue in the aerial map (PRC - R.E. 50, 49).<sup>1</sup> A deraignment of aforementioned property interests can be found in the Chronology of Events, Documents and Exhibits Relevant to Cross-Motions for Summary Judgment (PRC - R.E. 43-48).

The developers of Raven Wood, Dorothy M. Baker and/or her family, and related family corporate entities and/or trusts (hereinafter also referred to as the "Bakers") originally owned both County 5.44 and Raven Wood Subdivision. (PRC - R.E. 98-108 & 128-135) During that time, the Bakers operated the Satellite Trailer Park on what is now Raven Wood Subdivision and the Shady Acres Trailer Park on what is now County 5.44. (PRC - R.E. 250-251)

The Bakers began converting the Satellite Trailer Park into Raven Wood Subdivision prior to 1998. (PRC - R.E. 69-72) According to the preliminary plats of the subdivision, Alligator Branch crossed what would become Lots 11-16. (PRC - R.E. 71) In order to make these lots marketable, the developers diverted the flow of the Branch out of the subdivision and starting filling the lots. (PRC - R.E.73-76) When the Pearl River County, discovered

---

<sup>1</sup> A true and correct color copy of two maps from Exhibit 1 of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment is attached as PRC - R.E. 50 & 52. The copies depicted on pages 426 and 427 of the appeal record are in black and white and have been partially cut-off through reproduction. The originals in the trial court's file are in color and are a fair and accurate representation of the location of the parcels and stream in question.



the diversion, it notified the Corps of Engineers. (PRC - R.E. 73-80) Ultimately the Corps of Engineers determined this diversion and filling constituted both civil and criminal violations, but decided in the exercise of its discretion not to prosecute and permitted the Baker family to relocate the bed of Alligator Branch into a large ditch on the north and east sides of the subdivision where it is currently located. (PRC - R.E. 78-80 & 87-88) The final plat of Raven Wood Subdivision was approved on May 5, 1999. (PRC - R.E. 98-108)

On November 2, 2001, Dorothy M. Baker sold and conveyed a perpetual non-exclusive easement and right-of-way across the east sixty (60) feet of what is now County 5.44, along with "***the right to construct, gravel, improve, maintain, and use same . . .***" to Bryan Douglas Dearman (hereinafter also referred to as "Dearman"). (PRC - R.E. 112-113) (emphasis added) This easement was obtained through the backing of Mark Gibson who assumed Dearman's property of 25.38 acres (now Alliance property) six (6) months later on May 16, 2002, through his company Great Southern Industries, Inc in order to provide industrial access along the Norfolk Southern Railroad to the property which is located in the Picayune Industrial Park. (PRC - R.E. 258; 117-120; & 67-68)<sup>2</sup>

On November 7, 2001, Dearman petitioned Pearl River County to establish the easement as a new access for a parcel. (PRC - R.E. 114-116) The Board approved the request to establish the easement to provide access to property held by Dearman located in the Industrial Park on November 19, 2001, based on the recommendation of the Director

---

2

A true and correct copy of Exhibit 2 of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Pending Cross-Motions for Summary Judgment is attached as PRC - R.E. 68. The copy depicted on page 442 of the appeal record has been partially cut-off through reproduction. The original in the trial court's file is a fair and accurate representation of the location of the approximate 25.38 and 10.00 acre parcels leased by Alliance in the Picayune Industrial Park.

of Planning of the Pearl River County Planning and Development Department. (PRC - R.E. 67-68; 117-120 & 114-116) This action vested protected property rights that are now held by Alliance. On November 27, 2001, the easement was recorded in the Land Deed Records of Pearl River County. (PRC - R.E. 112-113)

On May 16, 2002, Dearman executed a Warranty Deed conveying the easement and 25.38 acres unto Great Southern Industries (a Mark Gibson company) which was recorded on May 28, 2002. (PRC - R.E. 117-120) The property was then conveyed by Great Southern Industries to C & C Sales, L.L.C. (another Mark Gibson company) via Quitclaim Deed on April 10, 2003 and recorded on April 24, 2003. (PRC - R.E. 121-123) Later, C & C Sales, L.L.C., by Mrs. Mark Gibson acting an officer, executes a Warranty Deed conveying the property to Philip J. Kahn, a Mark Gibson partner<sup>3</sup>, on December 19, 2003, recorded December 22, 2003. (PRC - R.E. 125-127)

Shortly thereafter, federal funds became available to Pearl River County through Hazard Mitigation Program Grant (HMPG) administered by the Federal Emergency Management Administration (FEMA) to purchase high flood risk properties. Among the properties that were targeted for purchase were the Satellite and Shady Acres Trailer Parks. Although Pearl River County, originally attempted to buy both Satellite and Shady Acres Trailer Parks, the Bakers would not sell Satellite because they had created Raven Wood Subdivision there more than four (4) years before. (PRC - R.E. 250-251 & 98-108)

On March 24, 2004, Pearl River County purchased Shady Acres Trailer Park, now County 5.44, from the Bakers who conveyed the property, ***“subject to any and all mineral***

---

<sup>3</sup> Philip J. Kahn is a member of C & C Sales, L.L.C. (PRC - R.E. 127)

***reservations, conveyances, rights of way, easements, and /or restrictive covenants as may be shown by the land Deed Records on files in the Office of the Chancery Clerk of Pearl River County, Mississippi”***. (PRC - R.E. 128-135) (emphasis added) On June 28, 2004, Pearl River County, placed a Restrictive Covenant on County 5.44, contracting itself to maintain the property as perpetual open space subject to the encumbrances emphasized above and shown in the deed of Dorothy Baker to Pearl River County, as Attachment B to the recorded Restrictive Covenant. (PRC - R.E. 136-150).

On May 29, 2009, Philip J. Kahn, using Mark Gibson’ home address<sup>4</sup>, executes an Assumption Warranty Deed conveying the 25.38 acres and the easement to Haybren Land & Cattle Company, L.L.C. (a Mark Gibson company). ( PRC - R.E. 118 & 151-153) On April 15, 2011, Haybren Land & Cattle Company, L.L.C. purchases an additional 10.00 acres from the City of Picayune that abutted the 25.38 acres to the north. (PRC - R.E. 154-156 & 67–68) Haybren Land & Cattle Company, L.L.C. then sells the 25.38 and 10.00 acre tracts and the easement to AHG Solutions, LLC (hereinafter “AHG”) on November 28, 2011. (PRC - R.E. 169-171) Finally, on May 9, 2012, AHG leased the premises to Alliance who has constructed a multi-million dollar Sand Frac Plant which produces sand utilized in the oil and gas industry. (PRC - R.E. 212-215)

Although Raven Wood argues this case is about Pearl River County’s alleged failure to enforce certain obligations, it is really a case of their opposition to the Sand Frac Plant and their repeated demands for a “buy out” from Alliance or Pearl River County. (PRC -

---

4

Compare Mark Gibson’s address 70 Magnolia Ridge Lane, Carriere, MS 39426 (PRC - R.E. 118) with Philip J. Kahn (PRC - R.E. 153) and Mark Gibson’s address P.O. Box 60, Picayune, MS 39466 (PRC - R.E. 123; 155; & 170) with Philip J. Kahn, Grantee (PRC - R.E. 123).

R.E. 276 & 254) In February 2012, the City of Picayune sought to annex portions of the Alliance property and County 5.44 in Pearl River County Chancery Cause No. 12-0105-GN-B. (PRC - R.E. 279) The Appellant, Raven Wood, opposed the annexation and filed a motion to join Pearl River County as a defendant, but the issue was settled before the motion was heard. (PRC - R.E. 279) The residents of Raven Wood opposing the annexation agreed to withdraw their objections to most of the annexed areas if the city abandoned annexation of the County 5.44 and a few acres in the Picayune Industrial Park outside the city limits of Picayune. As a direct result of Raven Wood's actions, County 5.44 and some of the Picayune Industrial Park remain outside the city limits of Picayune with no zoning protections, as Pearl River County has no zoning ordinances.

Raven Wood then initiated this lawsuit against Pearl River County in an attempt manufacture a cause of action to further their opposition to operations taking place in the Picayune Industrial Park. (PRC - R.E.14) It was during this period of time that Alliance finalized its lease with AHG and obtained the necessary permits from the City of Picayune to construct its multi-million dollar Sand Frac Plant on its premises in the city limits, north of County 5.44. (PRC - R.E.212-215; 187-210 & 67-68) As construction of the plant began, Pearl River County, received multiple demands from Raven Wood, that Pearl River County purchase their homes due to the construction activities in the Picayune Industrial Park and the movement of trucks, materials, and dirt across County 5.44. (PRC - R.E.211; 222; 225-249; 254 & 276) The issue was investigated by Pearl River County and the Mississippi Emergency Management Agency (MEMA) and it was determined that Alliance had temporarily located dirt on County 5.44 near its easement to facilitate their construction activities taking place in the Industrial Park. (PRC - R.E. 211; 222; 225-249 ) In addition,

Alliance had also placed piles of rock material on the premises to be used in ditch checks to reduce sediment from entering ditches in the area. (PRC - R.E. 211; 222; 225-249) However, all of these materials were later removed. (PRC - R.E. 226)

The Court conducted a hearing on Raven Wood's Petition on May 14, 2012 and denied their request for a temporary restraining order and/or preliminary injunction and tentatively set the matter for trial on November 15, 2012, later reset to February 21, 2013. (PRC - R.E. 4-13) It is important to note that the trial court reserved all matters raised in Raven Wood's Petition and Pearl River County's Response to be heard at trial. (PRC - R.E. 11-12) The issue of Raven Wood's standing in this matter was not addressed until the summary judgment hearing of which the trial court found in Pearl River County's favor and any assertion by Raven Wood to the contrary is in clear contradiction to the record before this Court.

As construction of the Sand Frac Plant progressed, Alliance sought a permit from Pearl River County to locate a railroad spur on portions of their easement burdening County 5.44 in order to facilitate access to the Sand Frac Plant. (PRC - R.E. 219-221) Pearl River County, determined that since Alliance held an easement that was unencumbered by the Restrictive Covenant and the fact that the improvement did not contravene the County Flood Plan or Flood Ordinance, it could not unreasonably prohibit the placement of a railroad spur on County 5.44, provided it was located within the dedicated easement and that Alliance obtain any necessary permits as required by the Flood Ordinance. Pearl River County, consulted the services of professional engineers Les Dungan, Brooks Wallace, and Billy Colson to determine the effect, if any, the proposed railroad spur would have on the floodplain of Alligator Branch to ensure compliance with

the Flood Damage Prevention Ordinance. (PRC - R.E. 22-39; 223; 225-249; & 259-274) Billy Colson, in conjunction with County Engineers, Brooks Wallace and Les Dungan performed the calculations based on FEMA guidelines resulting in a No Rise Certificate for the proposed project. (PRC - R.E. 22-39; 223; 225-249; 259-274) Although construction activities were still pending at trial, Pearl River County has issued all permits required under the law. (PRC - R.E.221- 222; 225-249 & 207-210)

### **SUMMARY OF THE ARGUMENT**

This Court should affirm the Judgment of the Circuit Court in all particulars. There is no genuine issue of material fact in this case and the lower court correctly ruled in favor of Pearl River County. There is sufficient admissible evidence in the record submitted by Pearl River County to support the decision in favor of the County as a matter of law. Pearl River County has not violated, breached, or failed to enforce any duty under the law, ministerial or otherwise. The trial court correctly denied the introduction of proffered documents and testimony by Raven Wood on the day of the summary judgment hearing. Having neither the facts nor the law to support their contentions, Raven Wood has chosen to attack the integrity of the public officials and counsel of Pearl River County by alleging a conspiracy to conceal activities that in fact never occurred. Pearl River county will not dignify these mis-characterizations, misstatements, and outright falsehoods with a response. The officials of Pearl River County have done nothing but try to protect the interests of all parties concerned and the general public. Raven Wood simply did not get the decision it wanted, so it has now has once again completely changed approaches and argued inadmissible, irrelevant and scandalous matters to attempt to avoid a just result in this case.

## ARGUMENT

### Summary Judgment Standard

This Court's review of the order granting Pearl River County's *Cross-Motion for Summary Judgment* is *de novo*. PPG Architectural Finishes, Inc. v. Lowery, 909 So.2d 47, 49 (Miss. 2005) (citing Hurdle v. Holloway, 848 So.2d 183, 185 (Miss. 2003)). Rule 56 of the Mississippi Rules of Civil Procedure permits summary judgment on claims where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Erby v. North Miss. Med. Ctr., 654 So. 2d 495, 499 (Miss. 1995). The rule provides, *inter alia*, that summary judgment shall be entered by a trial judge "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.*

The presence of fact issues in the record does not per se entitle a party to avoid summary judgment. *Id.* The party opposing the motion must rebut, if he is to avoid entry of an adverse judgment, by bringing forth probative evidence legally sufficient to make apparent the existence of triable fact issues and "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided by the rule, must set forth specific facts showing that there is a genuine issue for trial." Miss. R. Civ. P. 56(e). ***A party opposing summary judgment may not create issue of fact by arguments and assertions in briefs or legal memoranda.*** Magee v. Transcontinental Gas Pipe Line Corp. 551 So.2d 182, 186 (Miss. 1989). (emphasis added) "The court must be convinced that the factual issue is a material one, one that matters in an outcome

determinative sense” and “***the existence of a hundred contested issues of fact will not thwart summary judgment where there is no material issues of fact***” . Erby, 654 So. 2d at 499. (emphasis added)

**I. The Appellant, Raven Wood’s request for a writ of mandamus has no basis in law or fact.**

Mandamus is an ***extraordinary*** writ, and not to be resorted to where the purpose can otherwise reasonably be accomplished. McHenry v. State, 44 So. 831, 832 (Miss. 1907). (emphasis added) The purpose of the writ is to compel an entity or person “to do or not do an act the performance or omission of which the law specifically enjoins as a duty resulting from an office, trust, or station, ***where there is not a plain, adequate, and speedy remedy in the ordinary course of law.***” Miss. Code Ann. § 11-41-1 (1972), as amended (emphasis added). In order to have standing to seek the remedy of mandamus, five (5) essential elements must co-exist before the writ may issue:

*“(1) the petitioner must be authorized to bring the suit, (2) there must be a clear right in petitioner to the relief sought, (3) there must exist a legal duty on the part of the defendant to do the thing which petitioner seeks to compel, (4) there must be no other adequate remedy at law, and (5) the petitioners must show that they have an interest “separate from or in excess of that of the general public”. Bennett v. Bd. of Supervisors of Pearl River County, Miss. 987 So. 2d 984, 986 (Miss. 2008).*

Raven Wood’s request for a writ of mandamus is inappropriate and inapplicable to the matter before the Court. In order for a writ of mandamus to issue there must be an actual default in performance of duty. Wood v. State, 142 So. 747, 748 (Miss. 1931). Raven Wood alleges as the basis for said writ, the failure of Pearl River County to enforce:

- (1) a Restrictive Covenant on County 5.44 (hereinafter “ Restrictive Covenant”);



- (2) the County Flood Damage Prevention Ordinance (hereinafter "Flood Ordinance"); and
- (3) the County Hazard Mitigation and Flood Protection Plan (hereinafter "Flood Plan"). (PRC - R.E.1)

Pearl River County, would show that it has performed all necessary duties related to County 5.44 required by law and would offer the following exhibits in support and demonstration thereof:

- (a.) Affidavit of Dr. Ed Pinero, Pearl River County Director of Planning and Development, Floodplain Ordinance Administrator, and Mayor of the City of Picayune (PRC - R.E.222 & 225-249);
- (b.) Flood Plain Permit - Approving Alliance Consulting Group, LLC's development of Sand Frac Plant (PRC - R.E. 205);
- (c.) Sand Frac Plant permits (PRC - R.E.187-210 & 216-218);
- (d.) Flood Plain Permit - 12/13/2012 - Denying Alliance Consulting Group, LLC's development of rail spur on HMGP Property outside deeded easement (PRC - R.E. 219-220);
- (e.) Flood Plain Permit - 12/14/2012 - Approving Alliance Consulting Group, LLC's development of rail spur within deeded easement (PRC - R.E. 221)
- (f.) Affidavit of Patrick Lee, President of Pearl River County Board of Supervisors (PRC - R.E.254-256);
- (g.) Affidavit of Brooks Wallace, Pearl River County Engineer (PRC - R.E.223-224);
- (h.) Affidavit of Mike Mitchell, Pearl River County Road Manger (PRC - R.E. 250-251);
- (i.) Affidavit of Danny Manley, Pearl River County Director of Emergency Management and Fire Coordinator (PRC - R.E.252-253);
- (j.) Affidavit of Bobby Robbins, Fire Chief, Nicholson Volunteer Fire Department (PRC - R.E.257);
- (k.) Affidavit of Mark Gibson (PRC - R.E.258);

- (l.) Affidavit of H. Les Dungan, III, Pearl River County Engineer (PRC - R.E.259-260); and
- (m.) Affidavit of Bill Colson, Aqua Engineering Services, LTD with attached no rise certificate (PRC - R.E.261-274).

It is universally recognized that mandamus only lies to enforce a ministerial act or duty. Am. Book Co. v. Vandiver, 178 So. 598 (Miss. 1938). A ministerial duty is some duty imposed expressly by law which is to be performed with such precision and certainty as to leave no exercise of discretion. Id. As a result, private citizens may only result to the remedy of mandamus to compel public officials and bodies to act as to non-discretionary duties plainly required by law. Hobson v. City of Vicksburg, Miss., 848 So. 2d 199, 202 (Miss. Ct. App. 2003). Although the Appellee, Pearl River County maintains the alleged deficiencies complained of by the Appellants, Raven Wood, in the Restrictive Covenant, the Flood Ordinance, and the Flood Plan are non-ministerial, it would show that it has complied with the spirit and purpose of each.

**A. The Appellee, Pearl River County, has fully complied with the Restrictive Covenant placed on County 5.44.**

Priority of the Easement to Restrictive Covenant

The easement in controversy clearly primes the Restrictive Covenant. As previously stated, AHG leased the property located north of County 5.44 in the Picayune Industrial Park to Alliance, which contains within it a sixty (60) foot wide easement across County 5.44 paralleling the Norfolk Southern Railroad. (PRC - R.E.112-116; 67-68; & 212-215) The easement was granted on November 2, 2001 by Pearl River County's predecessor in title, Dorothy M. Baker, to Bryan Douglas Dearman who obtained the easement in association with Mark Gibson, who assumed Dearman's easement and

property (6) months later. (PRC - R.E.112-113; 128-135; 258; & 117-120) Dearman then presented the easement to the Pearl River County Board of Supervisors for approval as an easement of access for a parcel which was approved on November 19, 2001, and recorded in the Land Deed Records of the Pearl River County on November 27, 2001. (PRC - R.E.114-116)

County 5.44 which was owned by Dorothy M. Baker, was later purchased by Pearl River County, on March 24, 2004, using an HMPG grant from FEMA. (PRC - R.E.128-135) As a condition of that transaction, Pearl River County placed a Restrictive Covenant on County 5.44 obligating it contractually to maintain said what had been deeded as perpetual open space. (PRC - R.E.136-150) Later, the land previously owned by Dearman and Gibson was consolidated into approximately 35.38 acres and leased to Alliance who began constructing a Sand Frac Plant on the property. (PRC - R.E.169-171 & 212-15) In order to facilitate access to the Plant, Alliance sought to construct a rail spur on the sixty (60) foot wide easement serving their property in the Picayune Industrial Park. (PRC - R.E. 219-221)

The rules governing the construction of covenants imposing restrictions on the use of realty are the same as those applicable to any contract, as a restrictive covenant in a deed represents an agreement and contract by the **grantor and grantee** of what the property would be used for. Carter v. Pace, 86 So. 2d 360, 362 (Miss. 1956) (emphasis added). According to Mississippi law, in order for a covenant to run with the land the following criteria must be met: (1) the covenanting parties must intend to create such covenant; (2) **privity of estate must exist between the person claiming the right to enforce the covenant and the person upon whom the burden of the covenant is to**

**be imposed**; and (3) the covenant must 'touch and concern' the land in question. Journey v. Berry, 953 So. 2d 1145, 1154 (2007). (emphasis added) Privity implies succession as he who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his titles, and thus takes it charged with the burden attending it. Clement v. R.L. Burns Corp., 373 So. 2d 790, 794 (Miss. 1979). As one can plainly see, there exists no privity of estate between Pearl River County, the creator of the covenant, and Alliance. Pearl River County has no authority impose the Restrictive Covenant on the easement rights of Alliance which were established almost three (3) years prior to the Covenant.

Pursuant to Miss. Code Ann. § 89-5-5 (1972), as amended, priority of all land instruments shall be as follows:

*Every conveyance, covenant, agreement, bond, mortgage, and deed of trust shall take effect, as to all creditors and subsequent purchasers for valuable consideration without notice, only from the time when delivered to the clerk to be recorded; and **no conveyance, covenant, agreement, bond, mortgage, or deed of trust which is unrecorded** or has not been filed for record, **shall take precedence over any similar instrument affecting the same property which may be of record, to the end that with reference to all instruments which may be filed for record under this section, the priority thereof shall be governed by the priority in time of the filing of the several instruments, in the absence of actual notice.*** Miss. Code Ann. § 89-5-5 (1972), as amended. (emphasis added)

The foregoing principle is commonly referred to as "race notice" meaning that he who records their instrument first shall take precedence over all subsequent instruments affecting the same property. As a result, one who purchases land with notice that it is burdened with an existing easement takes the estate subject to the easement and has no greater estate than his grantor to prevent or obstruct the use of the easement D.L. Fair Lumber Co. V. Weems, 16 So. 2d 770 (Miss. 1944).

Although Pearl River County, was obligated to place a Restrictive Covenant on County 5.44 as perpetual open space pursuant to federal regulation provided by the Hazard Mitigation Grant Program (HMGP), there is no evidence that Congress intended to preempt the laws of Mississippi regarding real property rights. Preemption is only proper: (1) where Congress explicitly preempts state law; (2) where preemption is implied because Congress has occupied the entire field; or (3) where preemption is implied cause there is an actual conflict between federal and state law. Sanders v. Advanced Neuromodulation Systems, Inc., 44 So. 3d 960, 964 (Miss. 2010). Based on a plain reading of the Hazard Mitigation Grant Program, as codified in 44 CFR 206.434, and enabled in 42 USC 5170c, there is no evidence that Congress explicitly or implicitly preempted or occupied the entire field of laws of Mississippi with regard to title to real property. Furthermore, there is no evidence of any conflict between federal and state law or an intent that the Hazard Mitigation Grant Program be enforced as a ministerial function. Fortenberry, 71 So. 3d 1196, 1202-03 (Miss. 2011) (holding federal law does not cause city's operation of sewage system to be ministerial). The intent of the agreement between Pearl River County and FEMA was to "restrict the use of land to open space in perpetuity in order to protect and preserve natural floodplain values" ***"subject to any and all mineral reservations, conveyances, rights of way, easements, and /or restrictive covenants as may be shown by the land Deed Records on files in the Office of the Chancery Clerk of Pearl River County, Mississippi"*** as shown in deed of Dorothy Baker to Pearl

River County, incorporated as Attachment B to the recorded Restrictive Covenant. (PRC -R.E. 136-150) (emphasis added).

The trial court, having made unannounced visits to the properties in question on two separate occasions and having considered the aforementioned actual and constructive notice provisions of Mississippi law as to real property, correctly determined that the easement prioritizes the Restrictive Covenant and that Raven Wood was on notice of such priority and the drainage issues surrounding their properties by virtue of public record and obvious visual inspection. (PRC - R.E. 308-317) Had Pearl River County made any attempt to enforce the Restrictive Covenant on the easement, then the County would have been exposed to claims of unlawful taking, inverse condemnation, and/or slander of title from Alliance, whom Raven Wood never made a party to this action.

#### Size and Scope of the Easement in Controversy.

Raven Wood, having first contended and lost in their argument that the easement was invalid and/or inferior to the Restrictive Covenant, changes its position on appeal asserting that the easement does not permit industrial use. Raven Wood, now alleges that the character and scope of the easement must be strictly construed as being created for an access road only. Although Raven Wood, has never had legal standing to question the use or interpretation of the easement at issue, they persist in their contentions that any operations thereon are outside the intended use warranting the issuance of a writ of mandamus.

However, much like the physical size of the easement, the wording of the same is very broad and grants unto the dominant estate the “**right to construct, gravel, improve, maintain, and use same.**” (PRC - R.E. 112-113) (emphasis added) As a general rule, the beneficiary of an easement is authorized to make use of the servient estate that is reasonably necessary for the convenient enjoyment of the servitude for its intended purpose so long as it does not cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment. Bivens v. Mobley, 724 So. 2d 458, 464 (Miss. Ct. App. 1998). Raven Wood is not a part of the servient or dominant estates in this matter. The trial court took judicial notice, as permitted by Rule 201 of the Mississippi Rules of Evidence, that the easement which parallels the Norfolk Southern Railroad and provides access directly to lands located in the Picayune Industrial Park is of a size is common for industrial use, being sixty (60) feet in width and over six-hundred (600) feet long. (PRC - R.E. 309; 112-116; 169-171 & 67-68)

Any contention by Raven Wood that because the word “industrial” is absent from the language of the easement, that industrial use is prohibited is without merit. Raven Wood acknowledges in its own Response to Pearl River County’s Cross-Motion for Summary Judgment that the term “industrial easement” is not a common term of jurisprudence used in legal instruments (R. 1003), but is instead, as the trial court recognized, a permitted use within the easement. (PRC - R.E.309 & 311) The easement in question clearly grants “a perpetual non-exclusive easement and right of way through, upon, over and across the lands of the Grantor, in Pearl River County, Mississippi, along with the right to construct, gravel, improve, maintain, and use same...”. (PRC - R.E. 112-113)

Raven Wood ignores the above referenced wording in favor of a narrow interpretation to serve their purpose, and expose Pearl River County to potential litigation from Alliance who owns the easement and these rights. (PRC - R.E. 212-215) According to Mississippi law, “an easement may be created by implied grant when its existence is necessary to the enjoyment of that which is expressly granted or reserved, upon the principle that where one grants any thing to another he thereby grants him the means of enjoying it whether expressed or not.” Bourne v. Estate of T.L. Carraway, 118 So. 3d 571, 590 (Miss. 2013) (citing Gulf, M. & O.R. Co. v. Tallahatchie Drainage Dist. Of Union County, 67 So. 2d 528, 533 (1953) (quoting Lanier v. Booth, 50 Miss. 410 (1874))). Aside from the broad wording that allows the holder of the easement “to construct, gravel, improve, maintain and use same,” (PRC - R.E. 112-113) the holder of the easement is also granted the means of enjoying it whether expressed or not. Such narrow interpretation suggested by Raven Wood has already been attempted and failed before this Court who addressed a similar argument in Bivens v. Mobley, 724 So. 2d 458 (Miss. Ct. App. 1998).

In Bivens, the owner of the servient estate sued to enjoin the dominate estate holder from adding utility lines along his easement to his property, alleging the easement in question was solely for ingress and egress. Id. at 459-60. The Court in Bivens found in favor of the dominant estate holder stating that

*“when evidence of intent is non-existent, a negotiated easement – not a statutory one as in Rowell – for ingress in egress to a tract on which a home is to be built means more than a surface roadway on which people and vehicles travel. Ingress and egress for other necessities, whether carried in vehicles or continuously conveyed underground, is included in the grant.” Id. at 465.*



The Court in reaching this conclusion utilized an illustrative example from the Restatement of Law of Property, the logic of which clearly disposes of narrow interpretation of the easement in controversy proposed by Raven Wood.

*“O, the owner of Blackacre, granted an easement to Able, the owner of Whiteacre, for “ingress and egress” from Whiteacre to the public street abutting Blackacre. The deed did not specify whether utility lines could be placed in the easement. Unless the facts or circumstances suggest that the parties intended otherwise, it would be proper to define the purpose of the easement generally to include **access for anything that could conveniently be transported through the easement corridor and that would normally be used in connection with property situated like Whiteacre, including utility services.**”* *Id.* at 464-65. (emphasis added)

In the case at hand, County 5.44 would be Blackacre and the property owned by Alliance in the Picayune Industrial Park would be Whiteacre whose easement includes access for anything that could conveniently be transported through the easement corridor and that would normally be used in connection with a property situated in an industrial park, including a rail spur.

Raven Wood also for the first time on appeal attempts to raise the argument that the intended use of the easement in controversy was not for industrial use, but for that of a residential subdivision. It is an established principle of appellate review that “issues not brought before the trial court are deemed waived and may not be raised for the first time on appeal.” Rubenstein v. State, 941 So. 2d 735, 761 (Miss. 2006) (quoting Tate v. State, 912 So. 2d 919, 928 (Miss. 2005) (citing Wilcher v. State, 479 So. 2d 710,712 (Miss. 1985)) see also Chantey Music Publ’g Inc. V. Malaco, Inc., 915 So. 2d 1052, 1069 (Miss. 2005) (holding that this Court does “not entertain arguments made for the first time on appeal as the case must be decided on the facts contained in the record and not on assertions in the brief”). This argument is likewise without merit.

Following the grant of the easement from Baker to Dearman, but before it was recorded, Dearman petitioned the Pearl River County Board of Supervisors to approve Dearman's easement of access for a parcel. (PRC - R.E. 114 -116) It is clear from this application that Dearman intended the easement to provide access to his property located in the Picayune Industrial Park. (PRC - R.E. 114 - 116; 67-68; & 51-52) Any contention by Raven Wood that Dearman was planning to develop a residential subdivision within the confines of the Picayune Industrial Park and adjacent to the mainline of the Norfolk Southern Railroad is simply not logical. This argument was also not raised at the summary judgment hearing, but instead on the Motion to Reconsider/Rehearing in attempt by Raven Wood to introduce for the first time the argument and subdivision regulations of Pearl River County. Although, Raven Wood is barred from raising this argument or submitting the Pearl River County subdivision regulations for the first time on appeal based on the principle set forth in Rubenstein, Pearl River County, would state that compliance with the subdivision regulations merely provides additional property rights to the landowner and in no way limits the scope any existing easement.

Raven Wood also takes great issue with the affidavit of Mark Gibson. Whether or not the trial court mis-spoke regarding Gibson as grantor of the easement is irrelevant. (PRC - R.E. 311) The trial Court sustained Raven Wood's objection to that affidavit and did not utilize it in its ruling. (PRC - R.E. 311) Regardless, Pearl River County would state the affidavit of Mark Gibson is admissible and relevant as set forth herein because of his personal involvement in acquiring the easement and his ownership and familiarity with the properties subject to this litigation from 2001 to 2012. (PRC - R.E. 112-123; 125-127; 151-

156; & 169-171) The trial judge being an experienced real estate attorney would have concluded Mark Gibson was intimately involved by only examining the conveyances.

#### Standing to Enforce Restrictive Covenant

Pearl River County would further show that even if there were a violation, the Restrictive Covenant provides very specific terms for enforcement of which Raven Wood has no standing.

4. *Enforcement. If the subject property is not maintained according to the terms of the grant, **the Grantee, the State of Mississippi, Mississippi Emergency Management Agency, and FEMA, its representatives, and assigns are responsible for taking measures to bring the property back into compliance.** (emphasis added)*
  - a. *The State will notify the Grantee in writing and advise the Grantee that it has 60 days to correct the violation.*
  - b. *If the Grantee fails to demonstrate a good faith effort to come into compliance with the terms of the grant within the 60-day period, the State shall enforce the terms of the grant by taking any measures it deems appropriate, including but not limited to bringing an action at law or in equity in a court of competent jurisdiction.*
  - c. *FEMA, its representative and assigns may enforce the terms of the grant by taking any measures it deems appropriate, including but not limited to the following:*
    - i. *Requiring transfer of title in accordance with Paragraph 1(d). The Grantee shall bear the costs of bringing the property back into compliance with the terms of the grant, or*
    - ii. *Brining an action at law or in equity in a court of competent jurisdiction against the State or the Grantee.*

The aforementioned clause places enforcement of the Restrictive Covenant solely in the hands of **“the Grantee, the State of Mississippi, Mississippi Emergency Management Agency, and FEMA, its representatives, and assigns.”** (emphasis added) (PRC - R.E. 137-138) Nowhere in the document are private citizens vested with authority to enforce the covenant. Raven Wood, therefore lacks standing to enforce the Restrictive

Covenant based on the plain wording of the document. Moreover, even if Pearl River County had refused to enforce alleged violations, which it has not, the responsibility for enforcement would fall on the State of Mississippi, Mississippi Emergency Management Agency (MEMA), and FEMA, its representatives, and assigns, not Raven Wood. These alternatives also represent a plain, adequate, and speedy remedy in the ordinary course of the law for any alleged violation. Furthermore, as stated previously, FEMA, MEMA, the State of Mississippi and Pearl River County would all lack standing to enforce said Covenant against Alliance, because it is not bound by the Restrictive Covenant.

**B. The Appellee, Pearl River County, has fully complied with the Flood Prevention Ordinance.**

Miss. Code Ann. § 17-1-15 (1972), as amended, provides that:

*The governing authority of each municipality and county shall provide for the manner in which the comprehensive plan, zoning ordinance (including the official zoning map) subdivision regulations and capital improvements program shall be determined, established and enforced, and from time to time, amended, supplemented or changed...* Miss. Code Ann. § 17-1-5 (1972), as amended.

Pursuant to this authority, Pearl River County adopted the Flood Damage Prevention Ordinance and authorized and directed the Floodplain Ordinance Administrator and/or staff to enforce the provisions of the ordinance and **render interpretations** of the ordinance which are consistent with its spirit and purpose. (emphasis added) (PRC - R.E.173) Based on the wording of the ordinance, it is the Administrator who investigates any alleged violation of the ordinance, interprets whether a violation has occurred, and enforces any noncompliance. (PRC - R.E. 147-175) Although Raven Wood, claims enforcement of the Flood Ordinance is ministerial because its performance is authorized by law, they ignore the fact that the Administrator is vested with substantial judgment and discretion of how the

provisions of the Flood Ordinance are discharged based on his authority to render interpretations. (PRC - R.E.173) Moreover, the Flood Ordinance contains within it a procedure to grant variances from the requirements contained therein. (PRC - R.E.176-178) According to federal and state law, any act involving the exercise of judgment or discretion on the part of the officer renders the performance therefore non-ministerial. Garraway v. State, 184 So. 628, 630 (Miss. 1938) (citing Marbury v. Madison, 5 U.S. 137 (1803)). As a result, mandamus will not lie to control the discretion of public officers, boards, or municipalities Id. at 628.

The current Administrator is the Pearl River County Director of Planning and Development Dr. Ed Pinero. (PRC - R.E. 222 & 225-249) Dr. Ed Pinero actively investigated and monitored the conditions of County 5.44 and found no violations of the Restrictive Covenant, Flood Ordinance, or Flood Plan. (PRC - R.E. 222 & 225-249)

#### Dirt and Rock Piles

During early 2012, Dr. Pinero, acting as Administrator, received complaints regarding piles of dirt that were allegedly placed on or about County 5.44. (PRC - R.E. 222; 211& 225-249) Upon investigation, it was discovered that some dirt piles had been temporary located on County 5.44. (PRC - R.E. 222; 211& 225-249) According to Dr. Pinero's affidavit, Alliance had been utilizing the easement they possessed on County 5.44 to haul construction materials to their property located to the north and had temporarily placed dirt near the easement as a staging area. (PRC - R.E. 222 ; 211& 225-249) Dr. Pinero determined, as was in his discretion, that due to the fact the materials were related to construction on AHG property leased by Alliance and not County 5.44, adverse action against Alliance was unwarranted as the materials were in the process of being moved.

(PRC - R.E. 225-249) Later, rock piles belonging Alliance were placed on County 5.44 as staging for ditch checks in the area to prevent sediment distribution, but said piles were also moved remedying any violation that may or may not have existed. (PRC - R.E. 225-249) Therefore, any request for a writ of mandamus by Raven Wood with regard to these activities should be denied as issue has been rendered moot as stated in State ex rel. Horton v. Lawrence, 83 So. 532 (Miss. 1919) (holding mandamus properly dismissed on question becoming moot), and great weight should be accorded to the trial court who viewed the premises on two separate occasions at the request of both parties.

#### Proposed Railroad Spur

The activities taking place on County 5.44 subsequent to the removal of the staging dirt or rocks have complied with the Flood Ordinance. In addition to receiving all the necessary permits for construction of the Sand Frac Plant located in the Picayune Industrial Park and city limits, (PRC - R.E. 187-210 & 216-218) Alliance also sought to locate a railroad spur on its easement and portions of County 5.44. (PRC - R.E.219) Alliance applied for a Floodplain Development Permit, but the Administrator denied it because portions of the railroad spur would be located outside the designated easement. (PRC - R.E. 219) As a result, Alliance revised its request wherein the railroad spur would only be located within its defined easement. (PRC - R.E.221) The Administrator having determined the revised request to be acceptable, granted Alliance a Floodplain Development Permit for the railroad spur to be located within the defined easement only. (PRC - R.E.221) Among the relevant provisions of the ordinance considered by the Administrator was Article III, Section E which states as follows:

*This ordinance is not intended to repeal, abrogate, or impair any existing easements, covenants, or deed restrictions. However, where this ordinance and another conflict or overlap, whichever imposes the more stringent restrictions shall prevail. (PRC - R.E. 179-180)*

The Administrator, determined because there was no conflict between the ordinance and the easement, the grant of a Floodplain Development Permit would be consistent with the spirit and purpose of the ordinance. (PRC - R.E.225-249) Although Raven Wood, also cites the fact that use of fill is discouraged by the ordinance, Pearl River County would show that all requirements regarding fill have been met.

*(6) Fill. Fill is discouraged because storage capacity is removed from floodplains. Elevating **buildings** by other means must be considered. An applicant must demonstrate that fill is the only alternative to raising the **building** to at least one foot above the base flood elevation, and that amount of fill use will not affect the flood storage capacity or cause drainage problems on neighboring properties. If any fill material is used, the following provisions shall apply: (emphasis added)*

- a.) Certification is required by a **registered professional engineer demonstrating through hydrologic and hydraulic analyses preformed in accordance with standard engineering practice that the proposed encroachment shall not result in any increase in flood levels during the occurrence of the base flood discharge.** Such certification and technical data shall be presented to the floodplain administrator before permit is issued.*
- b.) Fill may not be placed in wetlands without the required State and Federal Permits.*
- c.) Fill must consist of soil and rock materials only. Landfills, rubble fills, dumps, and sanitary fills are not permitted*
- d.) Fill used to support structures must comply with ASTM Standard D-698, and its suitability to support structures certified by a registered professional engineer.*
- e.) Fill slopes shall be no grater than two horizontal to one vertical. Flatter slopes may be required where velocities may result in erosion.*  
*(PRC - R.E. 181-182) (emphasis added)*

Although the construction of the railroad spur does not include buildings, Billy E. Colson, a registered professional engineer, performed a hydrologic and hydraulic analyses



of the use of fill in conjunction proposed railroad spur project. (PRC -R.E.22-39 & 261-274)

According to Mr. Colson's report:

*"the construction of the proposed railroad spur line along edge of floodplain of Alligator Branch, Picayune, Pearl River County, Mississippi will not increase the 100-year flood elevation on Alligator Branch, City of Picayune, Pearl River County, Mississippi and will not adversely impact the 100-year flood elevations, floodway elevations and floodway widths on Alligator Branch at published and unpublished cross-sections in the vicinity of the development."* (PRC - R.E.27 & 265)

Pearl River County would further show that no State or Federal wetland permits were required regarding the use of fill. Although County 5.44 is designated as perpetual open space for the purposes of the HMPG grant, it is not a designated wetland under State or Federal law. (PRC - R.E. 222 & 225-249) Furthermore, the railroad spur project meets the slope and material requirements set forth above and does not involve the support of any structures. (PRC - R.E. 222) According to the definition's section of the Flood Ordinance, a structure is "any walled and roofed building that is principally above ground, as well as a mobile or manufactured home, a gas or liquid storage tank or other man-made facilities." (PRC - R.E. 183) The construction of the proposed railroad spur on the Alliance easement meets none of these categories.

In addition, a Large or Small Construction General Permit from the Mississippi Department of Environmental Quality is not required because the total ground disturbance from the rail spur project is less than one acre. (PRC - R.E.184) The size of the spur will occupy less than one acre. (PRC - R.E.53) Also, permits from the Corps of Engineers are only required if the applicant were conducting activities such as "excavation within or discharge of dredged or fill material into the Water of the United States," or "obstruction or alternation of navigable waters of the United States." (PRC - R.E. 185) The construction



of the subject rail spur involves none of these activities thus making the necessity of a permit inapplicable.

Furthermore, in terms of the Standards for Erosion, Sediment, and Stormwater as set forth in the Flood Ordinance the Appellee, Pearl River County would state that Alliance has complied with all applicable provisions therein and obtained a Large Construction Storm Water General NPDES Permit on March 15, 2012. (PRC - R.E.187) A copy of the permit and Drainage Calculations for Sand Frac Plant are located in Pearl River County's record excerpts and includes areas of County 5.44 where the railroad spur is to be located. (PRC - R.E.187-203)

Finally, in regard to the Provisions for Flood Hazard Reduction of the Ordinance, Pearl River County would state that all requirements have either been satisfied or are inapplicable. (PRC - R.E.225-249) As it is clear from the permits and "No Rise Certificate" set forth above, the addition of the railroad spur and Sand Frac Plant will provide for the maintenance of all drainage mechanisms and will not adversely affect any floodway or riverine habitats, as none exist in the immediate area. (PRC - R.E.27 & 265) Moreover, Pearl River County has interpreted that compliance with the Federal Water Pollution Control Acts , Title IV-Permits and Licences Certification, and Section 404 Permits for Dredge or Fill Material in Wetlands and Floodplain Management Regulations have been satisfied or are inapplicable to the activities of Alliance because there has been no suggestion that the facility will be discharging fill or pollutants into the navigable waters of the United States. ( PRC - R.E.225-249)

**C. The Appellee, Pearl River County, has complied with the Hazard Mitigation and Flood Damage Prevention Plan (“Flood Plan”).**

The Flood Plan, much like the Restrictive Covenant, is nothing more than a voluntary agreement with FEMA for participation in the National Flood Insurance Program (NFIP) and does not provide for a private right of action for the violation of its terms. United States v. St. Bernard Parish, 756 F.2d 1116, 1123 (5<sup>th</sup> Cir. 1985). Based on the foregoing it is clear that the Flood Plan does nothing more than provide guidance and a suggested planning process with regard to the Hazard Mitigation Grant Program and any standards imposed therefrom are discretionary, not ministerial. (PRC - R.E. 165) Regardless, Pearl River County has reviewed and complied with all terms and conditions of the Flood Plan in order to keep Pearl River County residents eligible for flood insurance. (PRC - R.E. 223-249)

**D. The Appellant, Raven Wood’s objection to exhibits offered by the Appellee, Pearl River County is without merit.**

Significantly, Raven Wood did not move to strike any of Pearl River County’s exhibits at the summary judgment hearing, but instead chose to make a brief proffer and later a blanket objection in its Motion to Reconsider/Rehearing to every single exhibit offered by Pearl River County despite utilizing a number of same exhibits in its own motions, proffer, and in this appeal summarized as follows:<sup>5</sup>

- (1) Map of properties in question attached as Exhibit 8 to Raven Wood’s Motion to Reconsider/Rehearing (R.1138) and submitted as Tab 13 of its Record Excerpts to this Court is Exhibit 1 of Pearl River County’s Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment (R. 426);

---

<sup>5</sup>

Pearl River County does not waive its objection to Raven Wood’s proffered documents, but merely makes note of the contradiction in Raven Wood’s argument regarding admissibility of Pearl River County’s exhibits.

- (2) Flood Plan attached as Exhibit G to Raven Wood's Petition for Temporary Restraining Order, Preliminary Injunction and Writ of Mandamus (R. 70-135) is a previous version of the updated Flood Plan attached as Exhibits 23-25 of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment (R. 531-835);
- (3) Flood Ordinance attached as Exhibit H to Raven Wood's Petition for Temporary Restraining Order, Preliminary Injunction and Writ of Mandamus (R.136-176) is Exhibit 27 of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment (R. 839-880);
- (4) Recorded easement in controversy attached as Exhibit 13 of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment (R. 488-490) Raven Wood cites as Tab 11 of its Record Excerpts;
- (5) Application for New Access Easement attached as Exhibit 14 of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment (R. 486-487) Raven Wood cites as Tab 13 of its Record Excerpts;
- (6) Flood Plain Development Permit attached as Exhibit 3 page 11-12 of Raven Wood's proffer is identical to Exhibit 39 of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment (R. 914-915);
- (7) Flood Plain Development Permit attached as Exhibit 3 page 13 of Raven Wood's proffer is Exhibit 40 of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment (R. 916);
- (8) Restrictive Covenant, Warranty Deed of Baker to Pearl River County, and Easement from Baker to Dearman as Exhibit 3 pages 22-29 of Raven Wood's proffer is Exhibits 20 (R. 510-524), Exhibit 13 (R. 486-487) and Exhibit 19 (R. 501-509) of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment;
- (9) No Rise Certificate attached as Exhibit 3 pages 30-36 of Raven Wood's proffer is Exhibit 50 (R. 957-967) of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment;
- (10) Warranty Deed from Baker to Pearl River County for County 5.44 attached as Exhibit A (R.19-20) to Raven Wood's Petition for Temporary Restraining Order, Preliminary Injunction and Writ of Mandamus is Exhibit 19 (R. 501-09) of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment;

- (11) Restrictive Covenant attached as an Exhibit to Raven Wood's Motion to Strike Expert Witnesses or in the Alternative Leave for Time to Designate Experts (R. 360-374) is Exhibit 20 (R. 510-524) of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment;
- (12) Affidavit of Ed Pinero dated May 11, 2012, (R. 319) as an Exhibit to Raven Wood's Motion to Strike Expert Witnesses or in the Alternative Leave for Time to Designate Experts (R. 377) is Exhibit 41 (R. 917) of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment;
- (13) Affidavit of Brooks Wallace dated May 11, 2012, (R. 320-321) as an Exhibit to Raven Wood's Motion to Strike Expert Witnesses or in the Alternative Leave for Time to Designate Experts (R. 378-379) is Exhibit 42 (R. 918-919) of Pearl River County's Memorandum Brief Regarding Pending Cross-Motions for Summary Judgment.

Regardless, Raven Wood's objection to any exhibit or affidavit offered by Pearl River County is without merit. The Mississippi Supreme Court in Stewart v. Southeast Foods, 688 So. 2d 733, 734-35 (Miss. 1996) has clearly addressed this issue stating that

*"most, if not all, affidavits are hearsay, but they are nevertheless properly considered on summary judgment motions as long as they are based on personal knowledge and set forth facts such as would be admissible in evidence. M.R.C.P. 56(e). The hearsay objection would be valid if there were hearsay statements within the affidavit itself, but the affidavit in question contains no "out of court statements offered to prove the truth of the matter asserted." Stewart, 688 So. 2d at 735.*

"If an affiant's personal observations and recollections in an affidavit were considered to be inadmissible, then no affidavits could be used by judges in summary judgment ruling."  
Id.

The exhibits offered by Pearl River County, are simply not hearsay or fall within an exception to the hearsay rule. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Miss. R. Evid. 801(c). The majority of the exhibits offered by Pearl

River County merely provide background history regarding the property interests involved in the litigation and are not offered to prove the truth of the matter asserted. (PRC - R.E. 43-247) Other exhibits are a matter of public record and/or business records carried out in accordance with Pearl River County's government functions, and are excepted from the hearsay rule as provided in Miss. R. Evid. 803 (6) (8) (15) (20) (24). (PRC - R.E. 43-247) Lastly, any affidavits offered by Pearl River County, are clearly admissible as pronounced by the Court in Stewart and are based on the individual's own personal observations and recollections. (PRC - R.E. 43-247)

#### No Rise Certificate

In addition, Raven Wood, while demanding strict interpretation and adherence to the Flood Ordinance, strangely object to the admissibility of public documents and/or business records carried out in compliance therewith, namely, the No Rise Certificate of Billy Colson. Raven Wood, having failed to depose Billy Colson or present evidence to the contrary, now object to the admissibility aforementioned No Rise Certificate despite having proffered a copy of the same at the summary judgment hearing. (PRC - R.E. 14-16 & 280-320) It is also unclear exactly to what extent Raven Wood, bases their admissibility objections. While Raven Wood, following the County's Designation of Expert Witnesses did file a Motion to Strike Expert Witnesses or Alternatively for Time to Designate Experts, the ground for the Motion was based on the relevancy of the experts reports and testimony with regard to the Court's ability "to interpret County Ordinances and Plans and real property restrictive covenants." (PRC - R.E. 19) Raven Wood's objection to the same based on relevance or hearsay is clearly irrational as they themselves have demanded

strict compliance with the ordinance and would surely take issue if the No Rise Certificate had never been performed or presented.

Further, at the summary judgment hearing, Raven Wood at no time identified or raised a specific objection to the No Rise Certificate, report or any other exhibit offered by Pearl River County. (PRC - R.E. 280-320) Raven Wood only made general objections at the hearing regarding authentication and hearsay to the County's exhibits, but never made a specific identification to the same. The Mississippi Supreme Court has stated many times that objections must be made with specificity in order to be preserved for appeal and that "general objections will not suffice." Thomas v. State, 14 So. 3d 812, 822 (Miss. Ct. App. 2008) (quoting Seeling v. State, 844 So. 2d 439, 445 (P17) (Miss. 2003).

In addition, the Mississippi Supreme Court has long held that

*"where the party against whom a motion for summary judgment is made wishes to attack one or more of the affidavits upon which the motion is based, he must file in the trial court a motion to strike the affidavit. Failure to file the motion to strike constitutes a waiver of any objection to the affidavit. (Any insufficiency in pretrial discovery is clearly and manifestly waived when party opposite fails to object). An objection to use of an affidavit may not be raised for the first time on appeal. Travis v. Steward, 680 So. 2d 214, 217-18 (Miss. 1996) (internal citations omitted).*

Regardless, even if Raven Wood, had specifically identified the affidavits or the No Rise Certificate and raised a specific objection or filed a motion to strike, the same would have still been admissible before the Court. As stated previously, the No Rise Certificate was performed in compliance with the Flood Ordinance and constitutes a valid public document and/or business record. (PRC - R.E. 181) Pursuant to Miss. R. Evid. 803 (6), (7) and (8) public documents and business records fall within the exception of the hearsay rule and

are admissible. Further, any hearsay within hearsay argument by Raven Wood is likewise without merit. Rule 703 of the Mississippi Rules of Evidence states:

*“The facts of data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by the experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Furthermore, the Comment to Rule 703 expressly states that an expert witness may use data that is presented to the expert “outside of court and other than by his personal observation.” Rule 703 allows an expert to base his opinion on the opinions of others which are not in evidence so long as experts in the field ordinarily rely on such opinions in forming their own opinions. For example, a psychiatric expert may rely on the reports of a patient’s psychiatric history in arriving at his diagnosis. In such circumstances, the opinion of the non-testifying expert would serve simply as a premise supporting the testifying expert’s opinion on a broader issue.” Alexander v. State, 759 So. 2d 411, 420 (Miss. 2000) (internal citations omitted)*

In the case at hand, Billy Colson utilized the data provided him by fellow expert engineers Brooks Wallace and Les Dungan to perform his calculations and is clearly admissible before the Court. (PRC - R.E. 22-39 & 261-274) Furthermore, the No Rise Certificate is further supported by the affidavit of Billy Colson which is also admissible for the reasons regarding the use of affidavits in summary judgment proceeding previously stated herein. (PRC - R.E. 261-274)

**E. The Appellant, Raven Wood, has failed to demonstrate they have an interest separate and apart from the general public.**

Based on the foregoing and due to the fact all requirements of the Restrictive Covenant, Flood Ordinance, and Flood Plan have been met, there exists no breached or omitted ministerial duty on behalf of the Appellee, Pearl River County to enforce. While, Pearl River County is sympathetic to Raven Wood, they have failed to demonstrate they have an interest that is separate from and in excess to that of the general public. The



Court may take judicial notice that the whole of South Mississippi has experienced a hurricane and significantly above average rainfall during the pendency of this litigation and appeal. Issues with flooding have touched citizens living in both high and low-lying areas, not just Raven Wood. Raven Wood has suffered no damage and Pearl River County has not had to perform any rescue functions in Raven Wood Subdivision as it did in other parts of the County. (PRC - R.E. 252-253; 254; & 257) Lastly, any grant of mandamus by the Court based on these considerations would be prospective in nature which is not a ground for the extraordinary writ to issue. Wood, 142 So. at 750.

**F. Any grant of mandamus in this matter will adversely affect the public interest.**

The Court may also take judicial notice of the fact that unemployment in Pearl River County is it at approximately ten percent (10%) and is well above the national average. (PRC - R.E. 186) Alliance's multi-million dollar investment of the Sand Frac Plant in the community will ease the people of Pearl River County's dire need for employment and provide much needed tax dollars to provide for the general welfare. As a result , the Court should further deny Raven Wood's request based on the following:

*Mandamus is a discretionary writ, and even in cases where an abstract legal right is shown, the writ will be withheld whenever the public interest would be adversely affected. This is the law where private property rights, and other private judicial rights, are involved, but even stronger is the rule when, as is the case here, no private right is asserted, but only the public political rights of those for whom the petition is filed, in which latter case the writ will not issue to enforce a public right when in fact it will operate to the detriment rather than to the benefit of the general public. Wood, 142 So. at 753.*

Although Pearl River County maintains there has been no violation of any duty to warrant a writ of mandamus, any issuance thereof by the Court would operate to the detriment, rather than the benefit of the general public of Pearl River County and would create an



unfortunate precedent wherein the Courts are interposed to micro-manage the workings of local governments.

**G. The trial court correctly denied the introduction of proffered documents by Appellant Raven Wood on the day of the summary judgment hearing.**

The trial court correctly denied the introduction of proffered documents by Raven Wood, on the day of the summary judgment hearing. Raven Wood, having realized their Motion for Summary Judgment had failed to demonstrate entitlement to judgment as a matter of law in their favor, attempted to introduce supplementary and inadmissible documents in support thereof on the day of hearing. (PRC - R.E. 280-320) Pearl River County timely and continually objected to the introduction of this evidence as improper as these documents were not a part of any pleading submitted by Raven Wood, nor provided to Pearl River County in advance thereof. The Court correctly sustained Pearl River County's objection, stating "If it wasn't in the record, it should have been. We've had plenty of time to do it. We've been arguing this matter for a long time." (PRC - R.E. 295) It is important to note that Raven Wood, brought forth its Petition for Temporary Restraining Order, Preliminary Injunction and Writ of Mandamus on May 3, 2012, failed to conduct any discovery on the matter, and then proceeded with its summary judgment motion despite acknowledging that it possessed its proffered documents in advance thereof. (Appellant's Brief p. 4)

This Court has addressed a situation similar to this in Partin v. N. Miss. Med. Ctr., Inc., 929 So. 2d 924, 938-39 (Miss. Ct. App. 2005) that dealt with the issue of timely discovery in relation to a motion for summary judgment. In Partin, the Plaintiff failed to conduct discovery and in a last minute attempt to avoid summary judgment requested he

be allowed to conduct the same. The Court, utilizing the analysis of a similar case in Hobgood v. Koch Pipeline Southeast Inc., 769 So. 2d 838 (Miss. Ct. App. 2000) stated that:

*“A party may defend against summary judgment by presenting affidavits that prove “that he cannot for reasons stated present by affidavit facts essential to justify his opposition”; the result of such proof is that the trial court should continue the case to allow discovery to develop further. M.R.C.P. 56(f). The record shows that Hobgood propounded no discovery during the three months between the filing of the complaint and the hearing on summary judgment. The need for additional time as allowed under this rule is not proven merely through allegation: However, the party resisting summary judgment must present specific facts why he cannot oppose the motion and must specifically demonstrate “how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant’s showing of the absence of a genuine issue of fact. This exception in Rule 56 may not be used to avoid diligence in pursuing formal discovery; “ normally the party invoking Rule 56(f) must show what steps have been taken to obtain access to the information allegedly within the exclusive possession of the other party.” No such showing was even attempted, much less made. In Marx, five months passed without the defendant’s attempting any discovery. In this case, Hobgood never sought any discovery, not after filing his answer nor after being served with the summary judgment motion.”*

Raven Wood did not bring forth any evidence in opposition of Pearl River County’s summary judgment motion, and did not request a continuance or plead unfair surprise. Instead, it is clear from the record that Raven Wood waived their right to introduce proffered documents in this matter and that the trial court correctly excluded the same. Further, any claim by Raven Wood that it was prejudiced by not allowing examination of witnesses at the summary judgment hearing is without merit and immaterial.

**II. The Appellant, Raven Wood’s continued insistence on a Temporary Restraining Order/Preliminary Injunction (TRO/PI) is unwarranted and should be denied.**

The trial court correctly denied Raven Wood’s, request for a Temporary Restraining Order/Preliminary Injunction. Raven Wood has failed to demonstrate any threat of

immediate and irreparable harm related to the activities taking place on County 5.44. To the contrary, Raven Wood has suffered no harm or loss of property or life despite one of the rainiest seasons on record. According to the submitted Affidavits of Pearl River County, no flooding losses or rescue efforts have ever occurred in the Raven Wood Subdivision. (PRC - R.E. 252-253; 254; & 257)

### **CONCLUSION**

There is no reason for the Concerned Citizens of Raven Wood to be concerned. Pearl River County has protected the rights of all interested parties by monitoring this situation, enforcing all applicable laws, ordinances and regulations, and engaging independent competent engineers to perform the engineering services necessary to calculate whether or not the railroad spur would adversely impact Raven Wood. The no rise certificate clearly indicates that there should be no drainage impact resulting from this small railroad spur being constructed in a place where Alliance clearly has the legal right to construct it.

In spite of what Raven Wood argues, County 5.44 is still barren tundra. Raven Wood is still a beautiful subdivision just off the Nicholson exit on I-59 where the houses are mostly on elevated pads above the base flood elevation. It is still by far the closest, most attractive and desirable subdivision to New Orleans, Slidell, Covington and NASA. In fact, it is the only nice subdivision South of Picayune, only a couple of miles from Louisiana.

As shown by the No Rise Certificate and the lower court's two views of the property, nothing has really changed drainage wise to increase any risk to the residents of Raven Wood.

The officials of Pearl River County have done nothing but try to protect the interests of all parties concerned and the general public. (PRC-R.E. 278)

Pearl River County submits that as a matter of law that the lower court's judgment should be affirmed in all particulars.

Respectfully submitted,

PEARL RIVER COUNTY, MISSISSIPPI

BY: s/ Joe H. Montgomery  
Joe H. Montgomery [MSB #3419]  
Williams, Williams & Montgomery, P.A.  
P.O. Box 113  
Poplarville, MS 39470  
Telephone: (601) 795-4572  
Facsimile: (601) 795-8382  
Email: [joemontgomery@wwmlawfirm.net](mailto:joemontgomery@wwmlawfirm.net)  
**ATTORNEY FOR THE APPELLEE,**  
**PEARL RIVER COUNTY, MISSISSIPPI**

**CERTIFICATE OF SERVICE**

I, JOE H. MONTGOMERY, attorney for Pearl River County, Mississippi, certify that on this day I electronically filed the foregoing document with the Clerk of the Court using MEC system which sent notification of such filing to the following counsel of record:

Lewie G. Negrotto, IV  
Todd G. Crawford  
John S. Garner  
Michael Thompson, Jr.  
FOWLER RODRIGUEZ  
2505 14<sup>th</sup> Street, Suite 500  
Gulfport, MS 39501  
Telephone: (228) 822-9340  
Facsimile: (228) 822-9343  
[snegrotto@frfirm.com](mailto:snegrotto@frfirm.com)  
[tcrawford@frfirm.com](mailto:tcrawford@frfirm.com)  
[jgarner@frfirm.com](mailto:jgarner@frfirm.com)  
[mthompson@frfirm.com](mailto:mthompson@frfirm.com)

Further, I hereby certify that on this day I have mailed the foregoing document by United States Mail, postage prepaid to the following:

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

THIS the 24<sup>th</sup> day of March, A.D., 2014.

s/ Joe H. Montgomery  
JOE H. MONTGOMERY