IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TINSELTOWN CINEMA, LLC	APPELLANT
VS.	CAUSE NO. 2013- -TS-2014
CITY OF OLIVE BRANCH	APPELLEE

Appeal from Decision of the DeSoto County Circuit Court

REPLY BRIEF OF APPELLANT TINSELTOWN CINEMA, LLC

ORAL ARGUMENT REQUESTED

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Other Authorities

Comes now Appellant, TinselTown Cinema, LLC ("TinselTown"), and respectfully submits the following as its Reply to the Response of Appellee, City of Olive Branch ("Olive Branch" or the "City"), to the Initial Brief of TinselTown filed herein:

TINSELTOWN'S REPLY TO OLIVE BRANCH STATEMENTS OF FACTS

Introduction

Through its mischaracterization of the underlying facts – in particular, its allegations as to TinselTown's motives and actions in pursuit of approval by Olive Branch of its Project Text and Preliminary Development Plan (the "Plan" or the "TinselTown Project") for the development of TinselTown's proposed Planned Commercial Development, Olive Branch has attempted to fit the "square peg" of the appeal *sub judice* and its very unique facts into the "round hole" of the decisions in cases involving usual and ordinary appeals from decisions of Mississippi governmental authorities. It is TinselTown's position that these unique facts merit this Court's reversal of the denial of approval by the Olive Branch Board of Aldermen of the same TinselTown Project to which it had granted final approval just 35 days earlier.

1. **The "multiple theater-related planning applications" and "flurry of applications" - as described by the City [Olive Branch Response Brief, p. 3] - submitted by TinselTown's Principal, Ambarish Keshani, arose because of competitive pressures in the theater business, uncertainty early on in the approval process on the part of Mr. Keshani as to the best location for his planned theater, and were in large part caused by the City's "discovery" of the "error" in the City's Official City Zoning Map. In addition, and in any event, there is no legal impediment to simultaneous submission of alternate locations by a developer for a proposed development and is simply irrelevant to the issues before this Court on appeal.**

Olive Branch seeks to characterize the business and investment decisions by TinselTown's principal, Mr. Keshani, as some nefarious plot to subvert the Olive Branch

development approval process. First of all, there is nothing in the Record nor the Mississippi Code nor Olive Branch ordinances or planning and development rules prohibiting simultaneous submission of alternate locations by a developer for a proposed development.[1] Given the herculean efforts by the Board to reverse its previously granted final approval of the TinselTown Project, if there was some such restriction in existence it surely would have been raised by now. Secondly, Mr. Keshani consistently requested and was granted delays in consideration of the alternate location of his proposed theater for Olive Branch, the Cedar Hills Properties Planned Commercial Development or the "Pooja Cinema" Project ("Pooja Cinema"), in favor of consideration by Olive Branch of the TinselTown Project, such that consideration by the Board of both proposals at the same time would not occur. [See File 1, Board Minutes, December 18, 2012, p. 209 (TinselTown Public Hearing set for January 15, 2013; Public Hearing on Pooja Cinema tabled until February 19, 2013}, Reply Record Excerpts ("RRE" p. 390) ; File 3, Board Minutes, February 19, 2013, p. 352, 367-368 {Date of Board's TinselTown Public Hearing; Public Hearing on Pooja Cinema tabled until March 19, 2013}, RRE p.396] Finally, there was **one comprehensive "application"**[2] for TinselTown, consisting of several parts (plus Exhibits), all submitted pursuant to Olive Branch requirements for approval – initially, a Development Plan Application [R.E. 138] and

[1] The Court should take judicial notice of the "elephant in the room" in this situation – and the subject of vague references throughout consideration of the TinselTown Project by the Olive Branch Planning Staff, Board of Aldermen and speakers at their meetings– Mr. Keshani's longtime competitor and nemesis in the movie theater business in the Mid-South, Malco Theaters, Inc., which was also in the process of constructing a theater in Olive Branch on Goodman Road in direct competition with Mr. Keshani regardless of which of his two applications he chose to pursue; the Malco theater in Olive Branch is now open. *See MRE 201; Ayers v Pastime Amusement Co.,* 283 F. Supp. 773, 784 (D.S.C. 1968) [judicial notice taken of existence of competing movie theaters] [Reply Addendum ("Reply Add.") 19]; File 1, Board of Aldermen Minutes, Jan. 15, 2013, p. 293-294, 296, RE 220-221, 223; [File 1, Planning Commission Meeting Minutes, February 12, 2013, p. 14, 16-17 [RE 302, 304-305]; File 3, Transcript, Board of Aldermen Meeting, Feb. 19, 2013, p. 91-96, 106 [Reply Record Excerpts ("RRE") 399].

[2] **Bolded,** underlined or *italicized* text in this Brief indicates emphasis added by TinselTown's counsel.

a Subdivision Application [RRE 393]; and then a Zoning Amendment Application [RRE 394] **required by Olive Branch** after its "discovery" of the City's Official Zoning Map "error" to be filed by TinselTown.[3] **Thus, the criticism of Olive Branch of the TinselTown "multiple applications" – caused by its own rules and its own discovery of its own "zoning error" - is disingenuous, at best. The only application relevant for consideration of this Court is the TinselTown application that was denied by the Olive Branch Board of Aldermen on February 19, 2013.**

2. There was no "hiding of the ball" by TinselTown as to its proposed use of Lot 2 of the development for a movie theater.

Olive Branch alleges that the intended use of Lot 2 of the TinselTown development was somehow "hidden" by TinselTown until it was "revealed" at the January 15, 2013 Board meeting. [Olive Branch Response Brief, p. 6] This is simply incorrect.

First of all, the name of the development from the outset – the initial filing of the Development Plan Application on November 19, 2012 - was "TinselTown Plaza". "TinselTown" is defined by the Oxford Advanced American Dictionary as a noun meaning "a way of referring to Hollywood, the center of the U.S. movie industry".[4] "TinselTown Plaza" - on its face – obviously would put anyone on notice of at least the possibility of use of the property as a movie theater. Secondly, if there had been a sudden "revelation" of its intended use as a movie theater at the January 15, 2013 Board meeting as alleged by Olive

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[3] The bottom of the TinselTown Zoning Amendment Applications carries the handwritten note: "This Application being a renewal and continuation of the original application dated 11-19-12, a copy of same being attached hereto".

[4] Oaadonline.oxfordlearnersdictionaries.com/dictionary/tinseltown. *See also* www.merriam-webster.com/dictionary/tinseltown ["Tinseltown - adjective - Hollywood"].

Branch, the "revelation" was irrelevant as – despite this supposed "revelation" – the Board approved the Plan for the sole use as a movie theater at that meeting by a vote of 5-2.

Similarly, Olive Branch's exhaustive discussion of the Plan's classification of "movie theater" as a "permitted use" versus a "conditional use" [Olive Branch Response Brief, p. 3] [classification as a "permitted use" omitting a third, redundant review of the Project by the Board of Adjustment required for a "conditional use" after reviews by the Planning Commission and the Board of Aldermen; see File 8, Zoning Ordinance, Article X, Sec. 10.07(C), "Conditional Use Permits", p.10-5 – 10-10 (RRE 406)] is simply another "red herring". The Record is replete with abundant references **prior to the January 15, 2013 Board meeting** to the use of Lot 2 of the Development as a movie theater, as apparently inadvertently admitted by Olive Branch in its discussion of the issue. ["movie theater" use discussions references at Olive Branch Brief, p. 4 (Planning Commission staffer Thymes discussion and statement by TinselTown attorney Armistead at December 11, 2012 Planning Commission meeting; *see also* File 1, Planning Commission Staff Report, December 5, 2012;"Concept" including discussion of "Movie Theaters" [R.E. p. 142]; File 1, Minutes, Planning Commission Meeting, December 11, 2012, p. 4-6 [RE p. 180-182].[5] The Olive Branch argument that there was a "revelation", "a belatedly revealed switch in plans" or some sort of "deception" by TinselTown prior to or at the January 15, 2013 Board meeting is simply at odds with the Record.[6]

[5] In addition, comments by opponents of the TinselTown Project at the January 15, 2013 Board meeting conclusively establish that the general public, the Staff and the Board had prior knowledge of the intended use of Lot 2 of the TinselTown property as a movie theater. [File 1, Board Minutes, January 15, 2013, p. 294-295 (RE 221-222)].

[6] As previously stated, **C-4 districts allow all uses listed in Districts C-1, C-2, and C-3, which in turn allow movie theaters.** See TinselTown Initial Brief, p. 18, fn. 11 and accompanying text.

3. **Olive Branch indicated to TinselTown that – notwithstanding the necessity of rezoning the TinselTown Property to C-4 and the alleged necessity of reconsideration of the TinselTown Plan – that such were mere formalities in light of the Board's prior approval of the Project.**

In the Planning Commission Staff Report of February 4, 2013, the Staff "Comments" provided as follows:

> COMMENTS: If the case had not resulted in a rescinded action the [Project] text as presented is that which was approved by the Board of Aldermen on 1/15/13 with a vote of 5/2. (Minutes Attached) The changes [in the Plan approved by the Board] would have been submitted to Staff for implementation of the approved Plan. **Therefore this submission simply requires a re-approval before Staff can implement it subject to the approval of an action to rezone.** [File 1, Planning Commission Staff Report, "Zoning Amendment AR to C-4 - TinselTown Plaza Project Text Approval", February 4, 2013 (RE p. 265)]

These Comments were repeated by the Staff at the February 12, 2013 Planning Commission Meeting [File 1, Planning Commission Meeting Minutes, February 12, 2013, p. 7 [RE p. 295]; and similar comments were contained in the Staff Report to the Board of Aldermen [File 1, Planning Commission Staff Report to Board, February 14, 2013 (RE p. 307)]

4. **The TinselTown Project presented to the Board on February 19, 2013 was identical in all material respects to that presented to and approved by that same Board just 35 days earlier on January 15, 2013; the only changes arising from the Project's reconsideration were to the benefit of adjacent, objecting landowners.**

As previously set forth in TinselTown's Initial Brief (p.23),

> **There is no evidence in the record that the Plan rejected on February 19, 2013, was materially different from the Plan approved on January 15, 2013. The only difference was an increase in buffering as the property was now thought to abut property that was ostensibly**

> **zoned A-R. The proposed use of the TinselTown property remained the same as did the actual use of all of the surrounding properties. [TinselTown's INITIAL BRIEF, p. 23]**

The only other difference – and the **only reason** for Olive Branch's rescission of its January 15, 2013 approval of the TinselTown Project: the "error"[7] on the Official Zoning Map – had been resolved by the Board with a "supermajority" vote in favor of the rezoning of the TinselTown Property to C-4 just prior to its reconsideration of the TinselTown Project on February 19, 2013.

The foregoing discussion establishes that Olive Branch has been relegated to "grasping at straws" in its efforts to justify its denial of the TinselTown Project on February 19, 2013, after approving the same Project 35 days earlier; in words often used by Mississippi appellate courts, Olive Branch's attempts at distinguishing the underlying facts between its approval and its later denial are merely **"distinction[s] without a difference"** and therefore are of no legal consequence. *See, e.g., Bellsouth Telcomms. v. Miss. PSC*, 18 So.3d 199, 205, P. 27, *rehrg. den.*, 2009 Miss. LEXIS 495 (Miss. 2009); *Edwards House Co. v. Jackson,* 91 Miss. 429, 45 So. 14, 1907 Miss. LEXIS 169 (at p. 42) (Miss. 1907); *Turner v. Turner*, 73 So. 3d 576, 579. fn. 1, Par. 2 (Miss. App. 2011).

[7] Contrary to the position of the City, the City has merely set forth the alleged **existence** of the "error" in the Official City Zoning Map which had "misled" everyone prior to the Board's initial approval of the TinselTown Project; the Record is devoid of any evidence as to **how** the "error" occurred, allegedly affecting the zoning of the TinselTown Property and eight other adjoining or nearby properties.

TINSELTOWN'S REPLY TO OLIVE BRANCH ARGUMENT

Introduction

Just as it did with its Statements of the Facts, Olive Branch has chosen to focus on irrelevant issues and inapposite authorities in its effort to divert attention from the improper denial of approval by the Board of Aldermen of the same TinselTown Project to which it had granted final approval just 35 days earlier.

1. Olive Branch's argument as to an alleged "failure" by TinselTown to appeal the January 15, 2013 approval of the TinselTown project and the January 28, 2013 rescission of the Project is irrelevant as this reputed "dispute" was resolved by Consent Order in this matter entered on April 22. 2013.

In its Bill of Exceptions filed in this matter on March 20, 2013, TinselTown stated:

> COMES NOW Appellant, TinselTown Cinema, LLC, by and through counsel, Myers Law Group, PLLC, and presents this Bill of Exceptions pursuant to Mississippi Code Annotated (1972) as amended §11-51-75 and states an exception to the decision of the Board of Aldermen for the City of Olive Branch rendered on 19th day of February, 2013, **whereby the application for project text and Preliminary Development Plan approval of TinselTown Cinema, LLC, was denied and the decision of the Board of Aldermen for the City of Olive Branch rendered on the 28th day of January, 2013, whereby the prior approval of the project text and Preliminary Development Plan was rescinded**...

Contrary to the initial Olive Branch argument at page 17 of its Response Brief, TinselTown has never appealed any decision of the Board except that of the Board's February 19, 2013 denial of approval of the TinselTown Project. Even a brief review of the above-referenced introductory paragraph to its Bill of Exceptions shows that the only purpose of the mention of the Board's January 28, 2013 rescission of its prior approval of the Project on January 15, 2013, was to provide background for TinselTown's appeal of the Board's February

19, 2013 denial of approval of the Project. Notwithstanding the foregoing, Olive Branch saw fit to file a Motion to Dismiss March 27, 2013, either based upon its misapprehension of the purpose of TinselTown's reference to the rescission, or in an effort to convince the Court that TinselTown was ignoring the clear 10-day deadline for appeals set forth in MISS. CODE ANN. §11-51-75 (1972 as amended). This required TinselTown to file on April 3, 2013, a Response setting forth the sole purpose of the reference to the rescission as background for its appeal, as stated above. Olive Branch then saw fit to file a Rebuttal Memorandum on April 8, 2013, ignoring both the language of the TinselTown Bill of Exceptions and the explanation provided in TinselTown's Reply Brief. In order to resolve the matter as to which there was not (and never really had been an issue), TinselTown's counsel initiated discussions with Olive Branch counsel for entry of a Consent Order resolving the Motion, which was entered by the Court on April 22, 2013. Inexplicably, Olive Branch has sought to resurrect this "non-issue" which was previously resolved by the Consent Order. In short, the City's assertions in this regard are irrelevant to the disposition of TinselTown's appeal.

2. This Court clearly has jurisdiction to reverse the Board's February 19, 2013 denial of approval of the project and to "render such judgment as the board or municipal authorities ought to have rendered" pursuant to MISS. CODE ANN. §11-51-75 (1972 as amended).

Olive Branch asserts at page 18 of its Response Brief that a reversal of the Board's denial of approval of the TinselTown project on February 19, 2013, "would seem to strain the limits of the Court's jurisdiction." This is simply an incorrect statement of Mississippi law.

First of all, as the Court is well aware, MISS. CODE ANN. §11-51-75 (1972 as amended) provides in pertinent part, "If the [appealed] judgment be reversed, **the circuit court shall render such judgment as the board or municipal authorities ought to have rendered,**

and certify the same to the board of supervisors or municipal authorities..." From this it is clear that whether the appeal is from a positive action or a negative action by the municipal authorities is irrelevant from a jurisdictional standpoint. While it is true that many of the reported cases applying this code section deal with appeals from "positive" grants rather than "negative" governmental body denials, there is no authority limiting the court's jurisdiction to the former. *See, e.g., Mayor &Board of Aldermen, City of Clinton, Mississippi v. Welch,* 888 So.2d 416 (Miss. 2004) [municipality's denial of permit reversed by trial court; Supreme Court affirmed trial court]; *Jackson v. May,* 193 So.2d 555 (Miss. 1967) [municipality's denial of rezoning reversed by trial court; Supreme Court affirmed trial court]; *Lee County Drys v. Anderson,* 95 So.2d 224 (Miss. 1957) [trial court reversed Board of Aldermen's dismissal of petition requiring referendum on beer sale, but erred in not entering a judgment directing Board to call said election].

3. The record does not contain substantial evidence to support the Project denial.

Olive Branch lists on p. 20 and 21 of its brief the evidence that Olive Branch believes supports its decision to deny the very same application it approved 35 days earlier. A close analysis of that evidence clearly reveals that it falls far short of arising to the level of even a "scintilla", much less "substantial" evidence as required by law.

Mayor Rickard's February 19, 2013, memo to the Board merely points out his review of the two sites for which Keshani/TinselTown had selected for a theater. The memo contains no evidence to suggest that either of the sites being considered by the Board was inappropriate for the location of a theater.

The zoning issue was resolved by a supermajority vote of the Board in favor of the rezoning of the TinselTown Property to C-4 prior to consideration of the Project Text. The revelation that other properties were also shown on the Olive Branch zoning maps to be zoned C-4 when they ostensibly remained agricultural residential has no bearing on the TinselTown Project as the actual uses of those properties was well known. The only relevance is in whether the TinselTown project text provided for appropriate buffering for the adjoining use. The fact that the TinselTown Plan complied with the buffering requirement for a C-4 project lying next to an A-R property is not in dispute.

The written and verbal presentations of the City Planning Director, B. J. Page and Associate City Planner, Laurette Thymes and the representative of TinselTown, Hugh Armstead, were simply that the Plan either met or exceeded the existing ordinance requirements. There is nothing in the staff report that could be interpreted as substantial evidence to support a denial.

The buffering along the TinselTown property that bordered the Butler property was clearly shown to exceed the ordinance requirements, just not the extraordinary demands of Mr. Butler. There was no suggestion by anyone in the meeting, much less any evidence offered, that the buffering between TinselTown and Butler was in any way inadequate. The Board's obvious reliance on Mr. Butler's rejection of the proposed buffering of his property – far in excess of that required by Olive Branch, but agreed to by TinselTown in an effort to appease him - amounted to the Board's delegation of its decision to him, equivalent to giving "veto power" over the TinselTown Project to an unelected citizen.

The comments of Alderwoman Hamilton were based solely on speculation with no reference to any basis for them. Alderwoman Hamilton was concerned with traffic but offered no evidence to support that concern. Her comment regarding "piecemeal" development was

derived from the Mayor Rikard memo but it also had no basis in fact. The term was not defined or distinguished from any other single use development in the immediate vicinity. The Mayor, the Board and the City have placed their "eggs" of justification of the denial of the TinselTown Project on February 19, 2013, after approving the Project just 35 days earlier, in one basket – that of "piecemeal development". **That is, the TinselTown Project was rejected because of the City's ostensible desire that all of the property in the vicinity of the intersection of Goodman Road and Pleasant Hill – whether currently zoned C-4 or possibly zoned A-R – should be developed contemporaneously.** While this is a commendable wish on the part of the City, if not every governing body, **it is obviously not practical as no governmental body can simply wave a magic wand over a large area of undeveloped land - under fragmented ownership of differing financial abilities, development plans, and desired uses – and have the entire area approved for coordinated development and constructed all at the same time.** This would be tantamount to holding that a landowner would be denied the highest and best use of his property until all other development projects in the area not owned or controlled by him reached his land so that it would not be a stand-alone project. *See J.D. Partnership v. Berlin Township*, 2002 Ohio 2539, P. 111-117 (Ohio App. 2002) [Add. 33] ["piecemeal development" rejected as basis for denial of rezoning].

In a case with facts and governing law remarkably similar to those in the case at bar, *Highway Oil, Inc. v. City of Lenexa,* 547 P.2d 330 (Kan. 1976) [R. Add. 42] , the property owner applied for permission to build a gas station on land zoned C-P (commercial) in which a gas station was a permitted use; in fact, there were four other gas stations in the immediate vicinity. The Planning Commission recommended approval; but when the matter went to the City Council, the present zoning was questioned for the first time. The incumbent city attorney opined

it was in fact zoned C-P (Planned Business District), but he was replaced by a second city attorney who opined it was in fact zoned R-1 (Residential). The owner then filed a petition to rezone the property to C-2 (general business district), a district which also permitted gas stations. The Planning Commission then, *sua sponte*, proposed a rezoning of the property to C-1 (Restricted Business District) which would **not** permit a gas station, ostensibly in order "to halt piecemeal development". The Planning Commission ultimately recommended denial of the owner's rezoning petition, which recommendation and denial were subsequently adopted by the City Council. The owner appealed the denial to the local Kansas district court, a court of general jurisdiction equivalent to Mississippi's Circuit Courts. Using a standard of review almost totally identical to that in the instant case, the Kansas Supreme Court reiterated the findings of the trial court as follows, presenting a scenario quite familiar to TinselTown:

> The record is not clear as to the exact reasons for the city's refusal to grant [owner's] applications. **There are indications it was because the governing body desired to halt piecemeal development in planned areas** and because the narrowness of appellee's lot prohibited the setbacks which would be necessary. **It appears the concern over piecemeal development occurred only after [owner] made application to build what would be a cut-rate filling station and opposition developed from nearby major oil company station operators. That opposition was clearly shown in several of the proceedings and the trial court made a specific finding there was "considerable evidence tending to prove that the denials were based upon political considerations, a desire to restrict competition, and sham screening and set-back complaints".**
>
> **It does appear appellee's property was singled out for special treatment once it made its applications rather than merely being dealt with as a part of an overall program.** The Clark Oil Company tract immediately adjacent had been unanimously approved for a filling station by a planning commission and council which had included some members who opposed similar action on [owner's]. Three other stations were within a stone's throw. **The essential character of the entire area surrounding appellee's tract was either already commercial or being held**

> **for that purpose and was not out of harmony with another filling station...**547 P.2d at 334

The Kansas Supreme Court held that **"The record amply justifies the trial court's conclusion that the city acted arbitrarily and unreasonably in denying [owner's] applications and its judgment is affirmed."** 547 P.2d at 335. An identical result should be reached by this Court with respect to the TinselTown Project.

Olive Branch suggests further that the Board relied on its own common knowledge. If so, then they each kept it to themselves as no single Board member articulated what common knowledge they relied on to suggest that a movie theater was an inappropriate use at the TinselTown location. There is no doubt that each of the Board members was familiar with the tremendous commercial growth that existed in the area of the proposed theater. Common knowledge should have suggested that a movie theater was a splendid use for this highly developed commercial district on one of the busiest roads in the state of Mississippi. There certainly was no evidence, "substantial" or otherwise, to the contrary articulated by any Board member from their common knowledge at the public hearing and no articulation of such in the minutes of the February 19, 2013 meeting.

The suggestion that the findings of fact contained in the minutes of the meeting supports denial of the TinselTown Plan was fully addressed in the Motion to Strike and in TinselTown's Initial Brief. The Court is encouraged to simply review the transcript of the meeting to understand clearly that there were no such "findings of fact" made in the public hearing.

In an effort to refute the argument of TinselTown that Olive Branch denied a plan for a use permitted in a C-4 zone, Olive Branch states on p. 22 of its Brief that "[t]he only zone in Olive Branch where theaters are a permitted use is the 'C-3' General Commercial District, which incorporates as a permitted use all listed conditional uses of the 'C-1' district." Without

debating whether a movie theater would be permitted in any one or more of the available commercial zones prescribed by the Olive Branch ordinance, the Court need only review Article V, ¶ 11, the "C-4" Planned Commercial District portion of the Olive Branch Zoning Ordinance, as it is that provision that applies to the use sought by TinselTown in this case. [File 8 Zoning Ordinance, Art.V. §11, p. 5-50. R.E. p. 359] The last paragraph on p. 5-50 states clearly that the **"uses of land which may be proposed within a preliminary development plan, are those uses listed as permitted or conditional uses within the "O", "C-1", "C-2", and "C-3" districts."** There is no dispute that a movie theater is a use within that definition.

4. The City's view of the underlying facts of the City's consideration of the TinselTown Project as they impact the application of the doctrine of equitable estoppel is much too limited in scope.

The City's contention that equitable estoppel is inapplicable to the case at bar erroneously focuses on actions taken by TinselTown solely after the rescission vote of January 28, 2013. As previously noted (TinselTown Initial Brief, p. 24), the application of the doctrine requires:

(1) Belief and reliance on some representation;

(2) Change of position, as a result thereof;

(3) Detriment or prejudice caused by the change of position.

In the case at bar, from the outset – TinselTown's consultation with City Planning Staff prior to the initial filing of its application on **November 19, 2012** - there is no doubt that TinselTown had a belief that the zoning of its property was C-4 – requiring no rezoning – based on those consultations and the City's Official Zoning Map. There is likewise no doubt that TinselTown materially changed its position in the most dramatic and significant of ways based on that belief: deciding to proceed with the approval process for the TinselTown Development;

retention and payment of lawyers, design and engineering firms to assist in the presentation and pursuit of the approval of the Plan; followed by its arranging financing of acquisition of the Property, its closing on the acquisition of the Property, and clearing of the Property, the latter taking place in accord with the approval of the City. After approval of the Project was received, it was revoked and approval ultimately denied by the City, resulting in severe detriment and prejudice arising from TinselTown's change in position. Coupled with the ultimate correction by the Board of the undocumented zoning "error" – conforming the zoning of the TinselTown Property to that as originally represented by the City - it is difficult to imagine a situation which more clearly calls for the application of the doctrine of equitable estoppel to the City of Olive Branch.

5. There was no "material change" in the TinselTown Project - alleged by the City to bar the application of *res judicata* - approved by the Board on January 15, 2013 and rejected by the Board on February 19, 2013.

In addition to the buffering issue raised by Mr. Butler, the Property's neighbor to the southwest [*infra,* p. 10], the City's oft-stated underlying (and only other) justification for its denial of approval of the TinselTown Project just 35 days after it had approved it was the undocumented "discovery" of error on the Official Zoning Map showing the TinselTown Property and contiguous or adjacent properties near the intersection of Goodman Road and Pleasant Hill to be zoned as C-4 instead of A-R. But what the City chooses to ignore is the fact that the Comprehensive Plan shows the ultimate planned zoning of all of these properties as being "C-4", regardless of their current use. [TinselTown Initial Brief at p. 20]. In addition, significant and substantial commercial development – including Target and neighboring strip centers - was already existing in the area. The TinselTown Project was approved on January 15,

2013 for a commercial use – a movie theater – **which is specifically allowed in all Olive Branch commercial districts, including C-4.** There was no "material change" in the TinselTown property during that 35 day period – and even if the map "error" could even be considered a "change" at all, the issue was addressed and resolved by the Board's supermajority approval of the rezoning and its "correction" of the Official Rezoning Map" of the TinselTown Property from A-R to C-4, just minutes before its denial of approval of the Project on February 19, 2013.

The City also contends that application of *res judicata* would not result in the approval of the TinselTown Project (Olive Branch Response Brief, page 20), but its subsequent argument against the application of the doctrine of equitable estoppel (Olive Branch Response Brief, page 21-22) undercuts that contention. The City contends that the January 15, 2013 approval was superseded and of no effect by the rescission vote of January 28, 2013 because the rescission fell within the statutory 30-day waiting period before the effective date of the January 15, 2013 ordinance approving the Project. MISS. CODE ANN. §21-13-11 (1972, as amended). Applying that same principle to the January 28, 2013 rescission vote, the rescission never became effective because the rezoning approval vote – curing the zoning "error"- occurred on February 19, 2013, within the same statutory 30-day waiting period before the effective date of the rescission vote by the Board.

CONCLUSION

For the foregoing reasons, TinselTown respectfully requests the Court to reverse the Board's denial of approval of its Project Text and Preliminary Development Plan and render judgment in favor of TinselTown, allowing its Plan to go forward.

This the 10th day of June, 2014.

Respectfully submitted,

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ADDENDUM

1 of 1 DOCUMENT

Lawrence H. Ayers , Plaintiff, v. Pastime Amusement Co., Albert Sottile, Consolidated Theatres, Inc., Paramount Film Distributing Corp., Loew's, Inc., Twentieth Century-Fox Film Corp., Warner Bros. Pictures Distributing Corp., RKO Teleradio Pictures, Inc., United Artists Corp., Universal Film Exchanges, Inc., Columbia Pictures Corp. Defendants, Lawrence H. Ayers and Ruth T. Ayers, Plaintiffs v. Pastime Amusement Co., Albert Sottile, Consolidated Theatres, Inc., Paramount Film Distributing Corp., Loew's, Inc., Twentieth Century-Fox Film Corp., Warner Bros. Pictures Distributing Corp., RKO Teleradio Pictures, Inc., United Artists Corp., Universal Film Exchanges, Inc., Columbia Pictures Corp., Defendants.

Civil Action Nos. 6481, 6482

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

283 F. Supp. 773; 1968 U.S. Dist. LEXIS 12180; 1968 Trade Cas. (CCH) P72,468

April 16, 1968

JUDGES: [**1] Simons, D.J.

OPINION BY: SIMONS

OPINION

[*776] ORDER

SIMONS, D.J..

Civil Action No. 6481 was commenced by the filing of a complaint on October 9, 1957, by plaintiff Lawrence H. Ayers, operator of the Summerville Theatre, Summerville, South Carolina, and the Holly Hill Drive-In Theatre, Holly Hill, South Carolina, against defendants seeking treble damages for alleged violation by defendants of the anti-trust laws of the United States, namely, the Sherman Anti-Trust Act, Title *15 U.S.C.A. Sections 1, 2* and *7*, and the Clayton Act, Title *15 U.S.C.A. Sections 12, 15, 16* and *22*. Jurisdiction of this court is provided for in these acts and is not in dispute.

[*777] Civil Action No. 6482, a companion action, was also commenced on October 9, 1957 by plaintiffs Lawrence H. Ayers and Ruth T. Ayers, operators of the Four Mile Drive-In Theatre, Charleston, South Carolina, against defendants, alleging violation of the Sherman and Clayton Anti-Trust Acts, supra, and seeking treble damages.

After his death the individual defendant Albert Sottile was voluntarily dismissed from both actions. In 1964 the eight national distributor defendants entered into a compromise settlement with plaintiffs [**2] in both actions whereby they collectively paid to plaintiffs a total of $42,500.00 on the basis of covenants not to sue, and were in due course dismissed with prejudice from both actions. In the covenants plaintiffs specifically reserved all claims and causes of action which they had against the remaining defendants in each action.

In January 1968 defendant Consolidated Theatres, Inc., entered into a compromise settlement with plaintiffs on the basis of a covenant not to sue whereby it paid to plaintiffs the sum of $7,000.00 and were dismissed from both actions with prejudice.

Presently the sole remaining defendant is Pastime Amusement Company, and the two actions are now before the court on this defendant's motion to dismiss each action against it upon the ground that the complaints fail to state claims upon which relief can be granted. The motion is supported by affidavits, various exhibits, the depositions in the record, and the pleadings. Upon the hearing of the motion it was stipulated and agreed by counsel for the parties that defendant's motion should be

treated as a motion for summary judgment under *Rule 56 of the Federal Rules of Civil Procedure.*

The first count of the [**3] complaint in each action alleges a conspiracy of national significance to monopolize and restrain interstate commerce and trade in the distribution of motion pictures. At oral argument upon the motion plaintiffs' counsel stated that inasmuch as the eight national distributors had been eliminated as party-defendants, plaintiffs no longer seek to recover under count one of their complaints. It is therefore proper that Pastime's motion for summary judgment be granted as to count one in each complaint without further ado.

In Civil Action No. 6481 plaintiff Lawrence H. Ayers alleged a conspiracy involving defendant Pastime and the dismissed defendants as co-conspirators, which injured plaintiff in the operation of his drive-in theatres in Summerville and Holly Hill, South Carolina. The pertinent portions of count two of his complaint are as follows:

> "2. (a) Prior to 1947 the defendants and various other persons and corporations entered into an unlawful combination and conspiracy, other than and different from the national conspiracy alleged in the first count of this complaint, to restrain and to monopolize interstate trade and commerce in motion picture films, particularly the [**4] right of the plaintiff and various independent exhibitors operating theatres in and near cities where theatres of the defendant exhibitors were located, to contract for and to exhibit said films within a reasonable time after national release date or territorial release date, without unreasonable or unlawful restrictions against them in favor of the theatres of the defendant exhibitors and in other ways and by other means unlawfully to discriminate against the said independent exhibitors, including the plaintiff, in favor of the defendant exhibitors.
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> "(b) The purpose and intent of said combination and conspiracy were and are to minimize, suppress and destroy competition in contracting for and exhibiting films in and near the said city of Charleston, and in the said towns of Summerville and Holly Hill and in other cities where theatres of the defendant exhibitors were located; to establish and maintain a uniform structure [*778] of runs, clearance and admission prices in and near the said cities; to induce the public to attend the exhibition of films at the theatres of the defendant exhibitors, and to prevent them from attending the theatres of the plaintiff and other independent [**5] exhibitors; to cause the theatres of the plaintiff to be operated at a financial loss, and ultimately to force independent exhibitors, including the plaintiff, to retire from business; and to establish and maintain a monopoly in the said defendant exhibitors of the prior right to contract for and to exhibit motion picture films in and near the said cities.
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> " (3) By reason of the aforesaid combination and conspiracy of the defendants, and of their acts and practices in pursuance of it, and of the monopoly and restraint of trade created thereby, the plaintiff has been grievously injured and damaged in his business and property. At all times he has been ready, able and willing to contract in the usual course of interstate commerce for licenses to exhibit motion picture films of the defendant distributors on or shortly after national release date or territorial release date, without unreasonable or unlawful restrictions against him, but the defendant distributors have refused to enter into contracts with him or to permit him to exhibit their films, except upon the condition that they should not be exhibited until the lapse of long periods of time after their exhibition in the theatres [**6] of the defendant exhibitors and in other theatres in the said city of Charleston and in the said towns of Summerville and Holly Hill. He has been compelled to pay excessive and unreasonable prices for films of the defendant distributors exhibited by him. He has lost the patronage of the public to a considerable degree and has suffered serious and permanent damage to the goodwill of his business. By reason thereof the plaintiff was unable to continue the operation of said theatres and was compelled to cease operation at the times stated in paragraph 21 of count 1 of this complaint. Since that time he has incurred necessary expenses in connection with the maintenance and ownership of said theatres; and he has lost profits and sustained losses he would not have lost or sustained except for the aforesaid unlawful combination and conspiracy."

Plaintiff demands judgment against defendant in count two of this complaint for one million dollars ($1,000,000) damages, attorneys' fees and costs.

In Civil Action No. 6482 plaintiffs Lawrence H. Ayers and Ruth T. Ayers allege in Count two of their complaint a conspiracy of defendant Pastime and the dismissed defendants as co-conspirators, [**7] which injured plaintiffs in the operation of their Four Mile Drive-In Theatre located approximately one and one-half miles from the city of Charleston. The allegations of Count two of plaintiffs' complaint in this action are substantially the same as those quoted hereinabove from Count two of the complaint in Civil Action No. 6481. Plaintiffs seek judgment against defendants for Three Hundred Fifty Thousand Dollars damages, attorneys' fees and costs.

Defendant Pastime duly answered the complaints in each action denying all of the material allegations thereof.

During the ten-year period of the pendency of these actions numerous depositions, exhibits, and affidavits have been filed by the parties, which indeed constitute a voluminous record. Included among depositions on file are the following: Lawrence H. Ayers and Ruth T. Ayers, plaintiffs; H. J. Meyers, vice president and general manager of defendant Pastime; Frank H. Bedenfield, executive vice-president of former defendant Consolidated Theatres, Inc.; Ulmer Eaddy, film buyer of Consolidated Theatres, Inc.; branch managers of the former defendant distributors Paramount Film Distributing Corporation, Warner Bros. Pictures Distributing [**8] Corporation, Columbia Pictures Corporation and [*779] Loew's, Incorporated. Also on file are affidavits of H. G. Meyer and Frank Bedenfield in support of defendant Pastime's motion for summary judgment. Plaintiffs have also filed counter-affidavits of plaintiff Ruth T. Ayers in opposition to defendant's motion for summary judgment. Also all of Pastime's contracts with distributors in reference to the booking of their film at its theatres have been made available and inspected by plaintiffs' counsel. Plaintiffs' counsel have also inspected such other of Pastime's records as they desired, including the correspondence between Pastime and the distributors and their representatives.

Furthermore, numerous motions have been made and considered by the court, and orders entered which deal with varied aspects of the litigation. Subsequent to the dismissal of the eight national distributor defendants which left only Pastime and Consolidated Theatres, Inc. as party-defendants the case was tentatively set for jury trial during January 1967. Prior to the trial date District Judge Larkins of the Eastern District of North Carolina, on December 29, 1966, granted summary judgment in favor [**9] of the defendants in the case of James Seago v. North Carolina Theatres, Inc., et al., by order reported in *42 F.R.D. 627*. Many of the defendants in that case were also defendants in these cases, and W. Brantley Ryan of Boston, Massachusetts, of counsel for plaintiffs in *Seago*, is also the lead counsel for plaintiffs herein. Immediately after learning of the district court decision in *Seago*, counsel for Pastime and Consolidated Theatres, Inc., moved to dismiss these actions against their clients. Thereupon counsel for plaintiffs, and Pastime and Consolidated urged the court to delay a hearing on these motions and the trial until after the decision of the Fourth Circuit Court of Appeals in the appeal which plaintiff took from Judge Larkins' order in *Seago*. On September 25, 1967 the Fourth Circuit in a *per curiam* order sustained Judge Larkins stating "The judgment is affirmed on the district Court's opinion in *42 F.R.D. 627 (E.D.N.C. 1967)*." [388] F.2d [987]. Thereafter plaintiff in *Seago* petitioned the Supreme Court of the United States for a writ of certiorari which was denied on March 4, 1968. *390 U.S. 959, 88 S. Ct. 1039, 19 L. Ed. 2d 1153 (1968)*.

Oral [**10] arguments on Pastime's motion for summary judgment were heard on February 29, 1968. At that time Pastime also moved to dismiss both actions on the further ground that they could no longer be maintained, inasmuch as all other defendants except it had been dismissed with prejudice and that it could not have conspired with itself. The court overruled this motion, and took under advisement defendant Pastime's motion for summary judgment, [1] which is now for determination pursuant to *Rule 56 of the Federal Rules of Civil Procedure*.

1 The court has been advised by plaintiffs' and Pastime's counsel that they are now ready to proceed with the jury trial as to count two of the complaints should defendant's motion for summary judgment be refused. Their varying estimates of trial time range from a minimum of three to a maximum of six weeks.

FINDINGS OF FACT

Defendant Pastime Amusement Company hereinafter referred to as "Pastime" is a corporation duly organized by law having its usual place of business in the City [**11] of Charleston, South Carolina. It is a locally owned, independent theatre company which has in no way been connected with or controlled by any of the former defendant distributors. The latter have never owned stock in, nor had any control over the management and operation of Pastime. For a period of more than forty years Pastime has been engaged in the opera-

tion of motion picture theatres of the conventional type known as "brick and mortar theatres" in the city of Charleston. In this litigation the court is specifically concerned with the years from 1953 through 1957 when Pastime operated the Gloria, the Riviera, the Garden, the American, and the Arcade Theatres in the downtown area of [*780] Charleston, and the Ashley Theatre in the area known as St. Andrews Parish in Charleston County, located just across the Ashley River west of the city.

The Gloria Theatre located at 327-29 King Street in downtown Charleston was constructed in 1928 and is owned by Theatre Realty Company. It has a seating capacity of 1400, is air conditioned and during all times in question in this litigation had the highest quality in projection and sound equipment, luxurious lounges and restroom facilities, [**12] together with a modern snack bar and concession stand. This theatre located in the heart of the downtown business section was leased to Pastime at a rental of $2500 per month during the year 1953 and 1954 and $2,000 per month during 1955 and 1956.

The Riviera Theatre built in 1938 is located at 227 King Street about five blocks from the Gloria Theatre. With a seating capacity of 1180 it is also owned by Theatre Realty Company and was leased to Pastime at a monthly rental of $2,000 during 1953 and 1954 and $1250 per month for the years 1955 and 1956. It too is a modern, up-to-date theatre having excellent projection and sound equipment and luxurious accommodations.

The Arcade Theatre built in 1951 with a seating capacity of 272 is located at No. 1-3 Liberty Street in downtown Charleston about one block from the Gloria Theatre. It is also owned by Theatre Realty Company, and was leased to Pastime at a monthly rental of $500 for the years 1953 and 1954 and $250 per month for the years 1955 and 1956. Although small this theatre has very fine accommodations and appointments.

The Garden Theatre is located on King Street in downtown Charleston about one block north of the Gloria Theatre [**13] with a seating capacity of 900. It was also modern in every respect and was leased to Pastime for a rental of $1500 a month for the years 1953 and 1954 and $1000 per month for the years 1955 and 1956.

The American Theatre built in the early 1940s is located about six blocks north of the Gloria Theatre and has a seating capacity of 830. It was also a modern and luxurious theatre which was leased to Pastime at a monthly rental of $1500.

The Ashley Theatre built in 1952 is located in Avondale, St. Andrews Parish. It has a seating capacity of 300 and was leased during the period in question to Pastime for a monthly rental of $250. It is the type known in trade as a "neighborhood theatre."

The former defendant Consolidated Theatres, Inc., hereinafter referred to as "Consolidated" is a corporation duly organized and has its usual place of business in the County of Charleston, South Carolina. For many years it has operated the Flamingo Drive-In, the North Fifty-two Drive-In, and the Magnolia Drive-In Theatres near the city of Charleston in Charleston County, South Carolina. It also operates about twenty-five other theatres in other parts of South Carolina and in North Carolina.

[**14] The former defendant distributors Paramount Film Distributing Corporation, Loew's, Incorporated, Twentieth Century-Fox Film Corporation, Warner Bros. Pictures Distributing Corporation, RKO Teleradio Pictures, Inc., United Artists Corporation, Universal Film Exchanges, Inc., and Columbia Pictures Corporation are corporations duly organized by law and have their principal places of business in New York City and transact business in the District of South Carolina. They were all national distributors of motion picture films during the period from 1950 through 1957 inclusive and for many years before. These former defendant corporations will hereafter be referred to as "distributors".

Each of the distributors had a branch office in Charlotte, North Carolina which generally served North and South Carolina in connection with the distribution of the distributors' films.

[*781] In the trade a "run" is an exhibition of a film in a given area, the first run being the first exhibition in the area, the second exhibition being the next, and so on. A "clearance" is a period of time usually specified in license contracts between a distributor and an exhibitor which must elapse between [**15] runs of the same feature within a particular area or within specified theatres. A motion picture is not sold by a distributor to an exhibitor, but is merely licensed for exhibition at a theatre for a certain period of time. "Booking" in the trade is the arrangement between distributor and the exhibitor of a particular date for exhibition of a picture already licensed to be exhibited.

Consolidated's North 52 Drive-In and Flamingo Drive-In Theatres are both located on Highway 52 north of the city limits of Charleston, approximately nine miles from Pastime's downtown theatres. Consolidated also operates the Magnolia Drive-In Theatre, located on Highway 17 about five miles south of Pastime's downtown theatres.

Plaintiffs Mr. and Mrs. Ayers operated the Four Mile Drive-In Theatre in North Charleston, South Carolina from about April 1950 to November 1957. This

theatre was located approximately four miles from Pastime's downtown Charleston theatres, seven miles from Pastime's Ashley Theatre, eleven miles from Consolidated's Magnolia Drive-In Theatre and five miles from Consolidated's North 52 and Flamingo Drive-In Theatres. Plaintiff Lawrence H. Ayers operated the Holly Hill Drive-In [**16] Theatre in Holly Hill, South Carolina from about July 1947 to July 1955. It was approximately fifty-seven miles from Pastime's theatres and from forty-eight to fifty-seven miles from Consolidated's Magnolia Drive-In, North 52 and Flamingo Drive-In Theatres. Mr. Ayers also operated the Summerville Drive-In Theatre at Summerville, South Carolina from March 1948 to June 1956 which was approximately twenty-six miles from Pastime's downtown Charleston theatres and seventeen miles from Consolidated's North 52 and Flamingo Drive-In Theatres. He also operated the St. Andrews Drive-In Theatre in St. Andrews Parish from about June 1949 to October 1953. However, his operation of this latter theatre ceased prior to the four year damage period involved in this litigation and his claims in reference to this theatre, if any, are barred by the applicable statute of limitations.

Prior to the commencement of the operation of the foregoing named theatres neither Mr. nor Mrs. Ayers had ever had any prior experience in the motion picture business. All of their theatres were of the drive-in type, which represented by comparison to Pastime's theatres a very small investment on their part. None of [**17] them could be considered first class theatres, which could be expected to command first run pictures from any of the leading distributors. The Holly Hill Drive-In which represented a total investment of $9,000 had very meager facilities, including a small concession stand, and no restroom facilities (the only restrooms available to the patrons were located at a service station across the street). Further, the theatre was equipped with a blast-type speaker instead of individual speakers for each car. At his Summerville Drive-In Mr. Ayers had an investment of approximately $13,000 including land and equipment; and in his St. Andrews Drive-In Theatre his investment was $15,000, and he paid an annual rental of $300. Plaintiffs had a total investment in their Four Mile Drive-In Theatre in North Charleston of $18,000.

Based on sound business principles, the pictures of each of the distributors were generally exhibited on a first-run basis in the city of Charleston, which was recognized in the trade as a "key city," at one of Pastime's downtown theatres with "clearance" over all other theatres, including those of Consolidated, plaintiffs and other exhibitors in the area. Frequently [**18] Pastime also exhibited the films of the distributors on a second run basis in Charleston generally at its Ashley, Arcade and American Theatres. It also [*782] sometimes exhibited pictures of the distributors on a so-called "move over" run, which means that a picture was moved from one of its theatres to another after the contract time at the first theatre had ended. This was done because the public reception of the movie at the first theatre had been so good that it was moved over to the other theatre so as to be able to continue the run of the picture. Whenever a "move-over" occurred Pastime charged the same admission price as was charged at the first showing theatre.

Generally speaking Pastime in its licensing agreements with the distributors at its first run theatres were granted clearances over plaintiffs', Consolidated's, and other exhibitors' theatres in the Charleston area of from twenty-eight to forty-two days for the first run pictures at its downtown theatres; and such pictures were not licensed by the distributors for exhibition at plaintiffs' and other exhibitors' theatres until after the clearance periods granted by the distributors to Pastime. The record reflects [**19] that in the event the distributors violated their clearance agreement with Pastime as to these first-run pictures, the latter's president, Mr. Sottile, or its manager, Mr. Meyer, protested vigorously on such occasions to the distributors.

There is no competent evidence in the record to support plaintiffs' contention that Pastime requested or received any clearance over plaintiffs' Holly Hill Drive-In Theatre for any films, nor that it demanded or received any clearance or priority for second or subsequent run pictures over any of plaintiffs' theatres. Neither is there any competent evidence to support plaintiffs' contention that Pastime was in any way responsible for the distributors' refusal to make available any of their pictures to plaintiff at his Holly Hill Theatre at earlier dates, or that it had anything to do with the delays experienced by plaintiffs in obtaining second or subsequent run films at any of their theatres. In this connection it is noted that in her deposition and affidavit Mrs. Ayers stated that when she attempted to get earlier exhibition dates for pictures at Holly Hill some of distributors' salesmen told her that this could not be done because of Pastime's [**20] objection. There is no showing that such salesmen were authorized by the distributors to make any such statements to Mrs. Ayers. Even if such evidence were relevant and admissible against the distributors themselves, such would not be competent as to Pastime since no representative of Pastime was present when such statements were allegedly made, and plaintiffs have failed to first establish by independent and competent evidence that a conspiracy between Pastime and the distributors then existed so that any statement made by an alleged "conspirator" would be admissible against Pastime as a "co-conspirator".

The record supports the conclusion that there was no substantial competition between defendant Pastime's

Charleston Theatres and plaintiffs' Holly Hill Drive-In Theatre. Furthermore, there is no competent evidence sufficient to form the basis for a reasonable inference that, if the Holly Hill Drive-In Theatre did not obtain film on a "day and date" basis with the theatres of defendant Pastime and former defendant Consolidated, such failure was due to or caused in any manner by a plan, scheme, design or conspiracy on the part of Pastime to discriminate against plaintiff. There [**21] is no showing that Pastime ever requested, demanded, or sought any clearance over the Holly Hill Drive-In Theatre, nor is there any competent evidence to show that it in any manner ever attempted to influence any of the distributors in their making pictures available to plaintiffs at the Holly Hill Drive-In. Neither is there any evidence that Pastime had knowledge of or sought to influence in any manner the film rentals charged to plaintiffs at their Holly Hill Drive-In Theatre, or at any other of their theatres.

[*783] Plaintiff Mrs. Ruth T. Ayers generally handled the management, supervision and operation of all of plaintiffs' drive-in theatres involved in these two actions. She also conducted negotiations and made arrangements with representatives of the distributors for the booking and exhibition of the distributors' pictures in plaintiffs' drive-in theatres. It further appears that Mr. Ayers took very little part in the management, supervision and operation of these theatres but relied almost totally upon Mrs. Ayers.

In the motion picture industry it is a common, acceptable, and reasonable practice for first class "brick and mortar" theatres, particularly in key areas [**22] such as Charleston, to be given a reasonable and first run clearance or priority in showing pictures over second class "brick and mortar" theatres and run-of-the-mill drive-in theatres, such as those of plaintiff's drive-ins. Good business management dictates such a policy on the part of distributors as well as first run exhibitors, since a conventional theatre normally operates from 1:00 p.m. through 11:00 p.m., exhibiting about five shows per day; while at the drive-in theatres especially in the summer time, the season when they are most attractive to patrons, it is hardly possible to show more than one full length feature film after dark and before a reasonable bedtime. One must also realize that only a limited amount of film is available, and the distributors are interested in making as much profit as possible while the movie is still new and at its "peak" in terms of advertising. Accordingly it is only sound judgment that a distributor prefer a first class theatre like those of Pastime that can produce more income per day than could plaintiffs' drive-ins or any other inferior type theatres. In fact Mrs. Ayers in her deposition testimony acknowledged that Pastime's downtown [**23] theatres should have preference of clearance over plaintiffs' drive-in theatres. [2]

2 In vol. 3, pages 452-3 of Mrs. Ayers' deposition she testified as follows:

> A. I thought at Four Mile Mr. Sottile should have had one run downtown and Fifty-Two being near Four Mile it would have been well enough for them to have first run and then have it to be available for Four Mile, but not wait for North Fifty-Two, Magnolia and sometimes Flamingo.
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> Q. Your complaint, as I understand from your complaint and the statement there, your complaint is having to wait on the other drive-ins before you could show pictures?
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> A. That is correct in most all cases.
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> Q. You recognize that in the industry that what we refer to as brick and mortar theatres or four-wall theatres usually get first run?
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> A. Usually when they are in a key city or a city as large as Charleston.

Charleston is one of the oldest cities in the United States. It is primarily built on a peninsula situate at the confluence of the Cooper and Ashley [**24] Rivers, with the Cooper River located on its eastern side and the Ashley River on its western side. The older downtown section of Charleston is in the southernmost portion of the peninsula. Because of limited space for expansion and development in the downtown area, in the last half century and particularly since World War II, the metropolitan area of Charleston has grown by leaps and bounds in a northerly direction toward Summerville, South Carolina. In the north area there are located many private industries and defense installations such as the Charleston Naval Base, Mine Force Atlantic Fleet, Headquarters for the Submarine Destroyer Flotilla Six, Naval Supply Center, Naval Hospital, Atlantic Fleet Polaris Facility, Naval Weapons Station, Marine Barracks and Charleston Air Force Base. During this period many extensive residential housing developments have been built in a northerly direction for many miles. Most

of the area between the Town of Summerville and Charleston has become so heavily and densely populated that it is actually difficult to determine where the city limits of Charleston begin and end. Summerville, North Charleston and [*784] the areas in between are [**25] definitely part of the greater Charleston Metropolitan Area. Many people who actually reside in Summerville commute daily and work in the Charleston-North Charleston area. Mr. and Mrs. Ayers acknowledge that their drive-in theatres in the Charleston and Summerville areas were patronized by a substantial number of residents of the Charleston-North Charleston areas; and that they regularly advertised the pictures showing at their theatres in the Charleston News and Courtier and the Charleston Evening Post, the two daily newspapers published in Charleston. Furthermore, plaintiffs' own exhibits in opposition to Pastime's motion for summary judgment consisting of correspondence between defendant Pastime and the former defendant distributors establish fully that Pastime considered that its theatres were in substantial competition with plaintiffs' drive-in theatres in the Charleston-Summerville Area. The court must take judicial notice of the fact that the city of Charleston has excellent shopping facilities, fine restaurants, excellent entertainment, clubs, motion picture theatres, and is quite a tourist center. It has several beautiful gardens and historical points of interest. It [**26] also has several fine hospitals serving not only the lower part of South Carolina but the entire state. Therefore the conclusion is inescapable that residents living far beyond the town of Summerville and the area in which all of plaintiffs' drive-in theatres are located, with the exception of the Holly Hill Drive-In Theatre, regularly come to Charleston to shop, to visit a doctor or a hospital, to enjoy a dinner at one of the fine eating establishments located here, and to attend a first run motion picture at one of its luxurious theatres.

Not of minor significance is the fact that television came to Charleston in a big way in the early 1950s which naturally resulted in a substantial curtailment of the public's attendance of motion pictures, causing many theatres to go out of business completely and others to operate on a marginal or a greatly reduced income basis.

ISSUES

In passing upon defendant's motion for summary judgment as to each of these actions the court must decide whether on the record as a whole considering the evidence most favorably to plaintiffs they have raised any issues of material fact which should be resolved by the jury.

In its consideration of the present [**27] motion, the court has studied the record including the depositions, exhibits, and affidavits on file, and has been influenced by the reasoning and principles enumerated in the *Seago* case, supra, especially in view of the similarity of the issues in the cases. Judge Larkins in *Seago* very aptly stated the cardinal legal principles which must govern the court in its consideration of Pastime's motion for summary judgment as follows:

> "If the evidence construed most favorably in behalf of the plaintiff would justify or require a directed verdict against him, the Court should enter summary judgment for the defendants. *Dulansky v. Iowa- Illinois Gas and Electric Co., 10 F.R.D. 566* (S.D. Iowa, 1950), *Dewey v. Clark, 86 U.S.App.D.C. 137, 180 F.2d 766 (1950)*. A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried. *Sartor v. Arkansas National Gas Corporation, 321 U.S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (1944)*. The theory underlying a motion for summary judgment is substantially the same as that underlying a motion for a directed verdict. The essence of both motions is that there is [**28] no genuine issue of material fact to be resolved by the trier of facts. In accordance with the theory of a directed verdict, a court should not grant summary judgment where it could not properly direct a verdict although it might properly set aside a verdict as being against the weight of [*785] the evidence, and summary judgment should not be granted on the ground that if a verdict were rendered for the adverse party the court would set it aside. *Fuqua v. Deapo, 34 F.R.D. 111 (W.D. Ark. 1964)*. It is important to note, however, that facts sufficient to preclude granting of summary judgment cannot be based on sheer speculation rather than the drawing of logical inferences. *Fiumara v. Texaco, Inc., 204 F. Supp. 544 (E.D. Pa. 1962)*, affirmed in *310 F.2d 737 (3rd Cir. 1962)*. As the Court said in the Viking Theatre case, supra, *320 F.2d 285 at 296*:
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> > 'Because of the unsubstantial nature of the comparison technique employed and the equivocal results obtained by the application of that technique,

> we are of the opinion that it would be impermissible to allow a jury to draw the inference that the rejection of the plaintiff's bids resulted from an intent to discriminate. A jury is [**29] permitted to draw only those inferences of which the evidence is reasonably susceptible, and may not be permitted to resort to speculation. Therefore, we held that the evidence was insufficient to support the claim that the distributors rejected superior bids of the plaintiff in furtherance of a common plan.'

A mere scintilla of evidence is not enough to create an issue; there must be evidence on which a jury might rely. *McVay v. American Radiator & Standard S. Corporation, 1 F.R.D. 677 (D.C. Pa. 1941)*, affirmed *119 F.2d 593 (3rd Cir. 1941)*. A party may not escape summary judgment on the mere hope that something will turn up at the trial." *42 F.R.D. 627, 639-40.*

Plaintiff is now required, based upon personal knowledge, to set forth such facts as would be admissible in evidence and show that he is competent to testify with respect to such matters. *Rule 56(e) of the Federal Rules of Civil Procedure* was amended to take care of a too rigid standard on motions for summary judgment and to enable the Court, after extensive pre-trial discovery proceedings, to dispose of litigation without the necessity for a protracted trial. This is plainly set forth in the Advisory Committee's [**30] Notes with respect to the last two sentences in *Rule 56(e)*, which constitute the amendment to that section of the rule in 1963. Those notes read, in part, as follows:

> 'The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation the Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well pleaded" and not suppositions, conclusory, or ultimate.'
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> 'The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits [**31] the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purposes of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron and Holtzoff, supra, § 1234.
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> 'It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment." *42 F.R.D. 627, 633-34.*

[*786] In opposition to Pastime's motion and in support of their claim of conspiracy plaintiffs now assert that: (1) The evidence establishes that defendant Pastime agreed, in fact insisted, with each distributor that the latter grant clearances over plaintiffs' Summerville and Four Mile Drive-In Theatres in favor of Pastime's first run theatres in Charleston and that Pastime's second run theatres in Charleston be granted priorities over plaintiffs' theatres; (2) The facts establish that there was no substantial competition between plaintiffs' Summerville Drive-In and Four Mile Drive-In Theatres and the first run and second run theatres of Pastime in Charleston which were granted clearances and priority over plaintiffs' said theatres; and (3) The Supreme Court and other courts have [**32] clearly established that it is unreasonable to grant clearances between theatres not in substantial competition and that therefore the vertical agreements by Pastime with each distributor to impose an unreasonable clearance is sufficient evidence of conspiracy and in fact constitutes an agreement to unreasonably restrain trade tantamount to a *per se* violation of *Section 1* of the Sherman Act.

If the record reveals that there is an issue of fact as to whether or not there was such substantial competition between plaintiffs' Summerville and Four Mile Drive-In Theatres and Pastime's Theatres, or if there is an issue of fact based on competent evidence that Pastime entered into an unlawful conspiracy with the former defendants, or any one else, with intent to injure plaintiffs, or which resulted in damage or harm to them, then in either of such events Pastime's motions for summary judgment must be refused. If, however, the only reasonable inference to be drawn from the record is that there was in fact substantial competition between plaintiffs' Summerville Drive-In and Four Mile Drive-In Theatres and Pastime's theatres, then the question before the court is whether such clearances [**33] as were granted by distributors to Pastime were reasonable; *United States v. Paramount Pictures, Inc., 334 U.S. 131, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*, and whether Pastime was a party to any unlawful conspiracy, as alleged by plaintiffs.

CONCLUSIONS OF LAW

There is nothing illegal *per se* about a clearance granted one theatre over another when they are in substantial competition with each other so long as such clearance is reasonable. Plaintiffs cannot establish a conspiracy by the fact that clearances were in effect in the Charleston area among theatres in substantial competition with each other. They must go further and show that such clearances were in fact unreasonable, *and* that they were used pursuant to a common plan, design, or conspiracy to discriminate against plaintiffs. *Seago*, supra.

The deposition testimony of plaintiffs and others, and the conclusory opinions contained in Mrs. Ayers' affidavit in opposition to Pastime's motion for summary judgment that plaintiffs' Summerville Drive-In and their Four Mile Drive-In Theatres were not in substantial competition with the theatres of defendant Pastime are not only inconsistent and contradictory with the other [**34] competent testimony in the record, but were only expressions of personal opinions totally unsupported by their recitation of any facts which would support such opinions. As was stated by the court in *Naumkeag Theatres, Inc. v. New England Theatres, Inc., 345 F.2d 910, 913 (1st Cir. 1965)*, cert. denied *382 U.S. 906, 15 L. Ed. 2d 158, 86 S. Ct. 241*, "an ultimate conclusion not only unsupported by, but contradictory to the subsidiary facts cannot stand, whether reached by a jury or expressed by a witness".

From a consideration of the entire record and all of the circumstances found to exist, it must be concluded that the only reasonable inference which a jury could properly draw is that plaintiffs' Summerville Drive-In and its Four Mile Drive-In Theatres and all of Pastime's theatres were in substantial competition with each other.

[*787] In view of such conclusion, in order to recover in either case plaintiffs must establish that the clearances granted Pastime by distributors were in fact unreasonable and that they were granted to Pastime pursuant to a common plan, design or conspiracy between Pastime and one or more of the distributors to discriminate against plaintiffs. [**35] *Seago*, supra.

The record discloses that the clearances agreed upon and granted to Pastime by distributors range from a minimum of twenty-eight days to a maximum of forty-five days. These clearances were in harmony with the clearances in *Seago* ranging from a minimum of thirty days to a maximum of forty-five days depending upon the particular distributor, all of which were determined in that case to be reasonable and proper under the circumstances.

Considering the types of theatres involved, the investments of the parties, the types and costs of the operations and all other relevant facts and circumstances, the only reasonable inferences to be deduced therefrom is that the clearances granted Pastime by various distributors were reasonable and proper.

Even if there were a sufficient basis in the record to warrant a reasonable inference that such clearances were unreasonable when imposed against either the Summer-

ville Drive-In Theatre, or the Four Mile Drive-In Theatre of plaintiffs, still in order to defeat Pastime's motion for summary judgment plaintiffs must establish by competent evidence that a conspiracy, plan or design existed between Pastime and the former defendants, [**36] whose purpose was to hurt, injure and damage plaintiffs.

Plaintiffs have failed to produce any direct or circumstantial evidence sufficient to give rise to a reasonable inference that Pastime was in any way a party to any unlawful conspiracy with the former defendants or with any other person, firm or corporation which brought about plaintiffs' problems in its operations of the Summerville Drive-In and Four Mile Drive-In Theatres.

Neither is there any evidence in the record to establish or even intimate that the agreements between Pastime and the distributors with reference to clearances at Pastime's Theatres did not have as their sole purpose the furthering of the business interests of Pastime and the distributors, completely disassociated from any intent to hurt, injure or damage plaintiffs in the operation of their theatres. Distributors of motion picture films are not required to license their products to every exhibitor who requires or requests them. An exhibitor does not have the absolute right to compel distributors to furnish him films or to give him the privilege of exhibiting them on the basis of any specified run. The Fifth Circuit Court of Appeals in *Paramount Film* [**37] *Distributing Corp. v. Applebaum, 217 F.2d 101, 124-25 (5th Cir. 1954)*, cert. denied *349 U.S. 961, 99 L. Ed. 1284, 75 S. Ct. 892*, held as follows:

> "Despite the multitude of decisions against film distributors, it is still the law that ordinarily a distributor has the right to license or refuse to license his film to any exhibitor, pursuant to his own reasoning, so long as he acts independently. The antitrust laws qualify that right only to the extent that they prohibit contracts, combinations and conspiracies, with another party, which have the purpose or effect of monopolizing or restraining trade in motion picture films. . . . Any illegality consists not in the refusal of any one distributor to license an exhibitor but in his conspiring with one or more other persons to refuse such license. . . . The question here is not whether there was a duty on the part of the distributors to license their films to appellees, but whether their refusal to do so was the result of an illegal conspiracy."

As to plaintiffs' contention #1 set forth above, it is undisputed that defendant Pastime agreed with each distributor [*788] that it grant its theatres clearances over plaintiffs' [**38] theatres, and in fact insisted upon such clearances which were in fact granted. As to plaintiffs' contention #2 above the court cannot agree that there was no substantial competition between plaintiffs' and Pastime's theatres, but to the contrary has concluded that the only reasonable inference to be drawn from the competent testimony and record before the court is that there was substantial competition between plaintiffs' and defendant Pastime's theatres, and that such clearances and priorities were fair, reasonable and proper. During the period of time involved in this litigation defendant Pastime only operated conventional first class theatres in the Charleston Area, and provisions for clearances were made in its contracts with former defendant distributors which generally varied with each distributor. For example, in most of the contracts with Columbia a clearance period of thirty days after first run was provided for; with Metro-Goldwyn-Mayer generally a clearance of twenty-eight days was granted. There is no evidence that the clearance provided for by agreement with any distributor exceeded forty-five days. Reference to plaintiffs' depositions clearly show that they recognized [**39] and accepted the fact that Pastime was entitled to clearances over their theatres and that there was nothing improper in the granting of such clearances. Apparently up to the time of the *Seago* decision plaintiffs' primary complaint was that, although Pastime was entitled to clearances, such clearances granted by distributors to Pastime were unreasonable and that there was too much delay in the availability of pictures for plaintiffs' theatres. There is no competent evidence to substantiate plaintiffs' contention that such clearances granted to Pastime by distributors were improper or unreasonable. To the contrary all of the evidence points overwhelmingly to the conclusion that such clearances were reasonable.

As hereinabove stated the record substantiates the fact that there was no substantial competition between plaintiffs' Holly Hill Drive-In Theatre and Pastime's theatres in Charleston which were approximately fifty-seven miles apart. Therefore, there should have been no clearance between this theatre and those of Pastime. *United States v. Paramount Pictures, Inc., 334 U.S. 131, at pages 145-146, 92 L. Ed. 1260, 68 S. Ct. 915 (1948).* Therefore, if there were any competent [**40] evidence that the availability of distributors' pictures to plaintiffs' Holly Hill Drive-In Theatre was held back after Pastime's theatres in Charleston with which it was not in substantial competition, as a result of any agreement express or implied between Pastime and any or all of the distributors, then such would constitute sufficient evidence of conspiracy to make an issue for jury determina-

tion and defendant's motion for summary judgment should be denied.

Pastime has vehemently denied that it had anything whatever to do with the holding back of the Holly Hill Drive-In's availability of motion pictures by distributors. Mrs. Ayers' deposition and affidavit constitute the only evidence in the record tending to establish that the Holly Hill Drive-In Theatre was not allowed to show pictures of the distributors until after their exhibitions at Pastime's Charleston theatres. Such evidence of Mrs. Ayers is based upon certain alleged statements made by specified representatives of the distributors explaining in response to her requests for an earlier availability for the Holly Hill Drive-In Theatre that they had to hold back such availability because of Pastime's theatres in Charleston. [**41] As before stated such evidence is not competent as to Pastime since none of its representatives were present when such alleged statements were reported to have been made, and there is no competent evidence to warrant a reasonable inference that a conspiracy existed between Pastime and any of the distributors at the time such statements were reportedly made by the latter's sales representatives to Mrs. Ayers. Thus the court concludes that there is no competent direct or circumstantial evidence of a conspiracy between defendant Pastime [*789] and any of the former defendant distributors in connection with plaintiffs' Holly Hill Drive-In Theatre sufficient to give rise to any jury issue in connection with plaintiffs' contentions and reference thereto.

After the decision in *Seago* and in an apparent attempt to distinguish that case from these cases, plaintiffs in their brief assert:

> " Plaintiffs' claim in Ayers rely heavily on the absence of substantial competition . . . . In the Ayers cases, plaintiffs are not urging that Pastime should have had even one first run picture taken away from it. Plaintiffs in Ayers were perfectly content that Pastime play whatever first [**42] run pictures they did, but plaintiffs are saying that because of the absence of substantial competition their theatres should have had the opportunity to play the same pictures on a territorial release or open booking availability without any restrictions in favor of the Pastime theatres (and Consolidated theatres) with which plaintiffs' theatres were not in substantial competition."

Having concluded that the only reasonable inference to be drawn from the evidence is that plaintiffs' Summerville Drive-In Theatre and Four Mile Drive-In Theatre were in fact in substantial competition with Pastime's theatres, Pastime was entitled under the circumstances to reasonable clearances from distributors over plaintiffs' said theatres, and consequently plaintiffs were not entitled to receive a territorial release or open booking availability without any restrictions in favor of Pastime's theatres.

Plaintiffs also allege that the fact that the former defendant distributors granted move-over runs to Pastime is evidence of an illegal conspiracy. Such claim is made without any evidentiary support that such move-over runs as were granted Pastime were made with the intent and for the purpose [**43] of discriminating against plaintiffs in any manner. The evidence is uncontradicted that Pastime charged the same admission price for the films when it was granted move-over privileges. The law is clear that there is nothing unlawful or improper in the granting of move-over runs if the motion picture is moved from one theatre to another as a continuation of the first run, and the same admission price is charged at the move-over theatre. *Robbinsdale Amusement Corp. v. Warner Bros. Pictures Distributing Corporation, 141 F. Supp. 134 (D. Minn. 1955)*, affirmed *235 F.2d 782 (8th Cir. 1956)*.

Plaintiffs further allege as evidence of an illegal conspiracy that the former defendant distributors discriminated against plaintiffs in favor of defendant Pastime in the film rentals which they charged plaintiffs. They also assert that distributors granted Pastime rental adjustments which were not afforded plaintiffs. Proof of such contentions is offered in certain tabulated charts attached as exhibits to the second affidavit of Mrs. Ayers in opposition to defendant's motion for summary judgment. The apparent purpose of such charts is to show that in connection with certain motion pictures plaintiffs [**44] paid more percentage-wise for film rentals than did Pastime. A study of such charts substantiates that in some instances this was true. However, generally plaintiffs paid substantially less rental than did Pastime. [3] The court cannot accept these facts as any evidence of an illegal conspiracy against plaintiffs [*790] participated in by Pastime. The record reflects that plaintiffs' negotiations with distributors in connection with film rentals and film rental adjustments, if any, were conducted solely between them and the distributors with Pastime having no interest, control, participation in, or influence over such rentals. Whatever rentals were agreed upon by plaintiffs and distributors were their own voluntary acts. The Third Circuit Court of Appeals in *Viking Theatre Corp. v. Paramount Film Distributing Corp., 320 F.2d 285 (3d Cir. 1963)*, which was affirmed by the United States Supreme Court, *378 U.S. 123, 84 S. Ct. 1657, 12 L. Ed. 2d 743 (1964)*, held that the evidence failed to

present a jury question as to whether defendant distributors and defendant exhibitors were guilty of discriminatory conduct from which it could be inferred that a conspiracy existed in connection [**45] with film rentals or film rental adjustments. The court stated:

"FILM RENTALS

"It is charged that in furtherance of the conspiracy, the defendant distributors 'required' the plaintiff to pay 'excessive' film rentals. The term 'excessive' implies an amount too great to be fair and reasonable. To support the charge, the plaintiff attempted a comparison of the film rental it paid with that paid by the defendant exhibitors. . . .

"We have some difficulty in determining what inference could be drawn from either the evidence in the record or that offered by the plaintiff. The calculations are based upon a hindsight determination of the earning power of films exhibited, while licensing takes place before earning power, as reflected by gross receipts, can be determined. Therefore, the figures do not tend to reflect the rental terms which the parties to the license might foresee as being fair and reasonable. Moreover, the calculations provide no criteria determinative of 'excessiveness.'

"We entertain serious doubt as to the probative value of the comparisons. The plaintiff's computation of gross film rental paid by it includes the total of six guarantees, each of which was considerably [**46] higher than the earned film rental. The reference is to the guarantees paid on pictures licensed by Viking in the second year of its operations. Absent these guarantees, the comparisons are of little or no significance.

"Whatever the comparisons are intended to show, there is no evidence from which it can be inferred that the plaintiff was 'required' to offer excessive rental terms. There is likewise no evidence which would warrant a conclusion that the plaintiff was under any compulsion to offer guarantees which later proved to be excessive. The record is devoid of proof from which it can be inferred that any distributor was aware that the film rentals offered were deemed by the plaintiff to be unreasonable. The rental terms were voluntarily proposed by the plaintiff; the acceptance of those terms by the distributors would not permit an inference that plaintiff was required to offer them.

"The above deficiencies in the evidence aside, there is no proof, direct or circumstantial, that there was a common understanding among distributors with respect to film rentals. There is no evidence from which it can be inferred that any distributor had knowledge of the film rentals charged [**47] by any other distributor. There is nothing in the evidence as a whole from which a jury could reasonably conclude that the [*791] distributors conspired to exact excessive film rentals from the plaintiff." *320 F.2d 285, 298-99.*

3 The affidavit of Wilbert Stevens Fox, a CPA employed by Pastime which was filed February 23, 1968 contains an analysis and comparison of the gross receipts shown on Exhibits "A" and "B" of Mrs. Ayers' second affidavit between the theatres operated by Pastime and the theatres operated by plaintiffs. His analysis is as follows: Exhibit "A" shows that out of the total fifty-six pictures for which gross receipts are listed which were shown at plaintiffs' theatres the total film rental paid to Distributors was $2,251.79 which represented 29.24 percent of their gross receipts; whereas out of the total fifty-two pictures for which gross receipts are listed which were shown at Pastime's theatres a total rental of $62,919.16 was paid which represented 38.68 percent of Pastime's gross receipts from such pictures. Exhibit "B" shows that out of the total of 109 pictures for which gross receipts are listed which were shown at plaintiffs' theatres a total film rental paid to Distributors by plaintiffs was $4,529.70 which represents 27.47 percent of their gross receipts; whereas out of a total of 106 pictures for which gross receipts are listed which were displayed at Pastime's theatres it paid a total film rental to Distributors of $70,948.18 which represents 31.01 percent of its gross receipts for said pictures.

[**48] The factual situation in *Viking* appears quite analogous to the situation here. There is no inti-

mation that plaintiffs were pressured in any manner to pay higher prices for their film rentals. Neither is there any indication that plaintiffs ever protested to distributors as to any "excessive" rentals charged them; nor that plaintiffs sought from the distributors any adjustments in the rentals they were charged. On the other hand Pastime's management repeatedly demanded rental adjustments from the distributors, some of which were granted. Even if the record contained sufficient evidence, which it does not, to support a finding that there was a "parallel conspiracy" between distributors to charge plaintiffs excessive rentals and their failure to grant proper film rental adjustments, there is not a scintilla of evidence that Pastime, a competitive exhibitor, knew, participated in, or had any connection with any of the distributors' film rental charges to plaintiffs.

Plaintiffs further assert that their drive-in theatres were held back after the theatres in Charleston with which they were alleged not to be in substantial competition gives rise to an inference of a so-called "vertical [**49] conspiracy". Since the court has concluded that the only reasonable inference to be deducted from the evidence is that plaintiffs' theatres were in substantial competition with the theatres of Pastime and former defendant Consolidated, such theatres were entitled to a reasonable clearance over plaintiffs' theatres. Up to the point in this litigation when Consolidated was dismissed as a party defendant plaintiffs apparently never seriously urged that the clearances granted Pastime ranging from twenty-eight to forty-five days were unreasonable or excessive. Their primary complaint appears to have been that the distributors were favoring Consolidated's drive-in theatres by requiring plaintiffs to wait until after pictures had had their runs in Consolidated's theatres before they were made available to plaintiffs. Surely Pastime should not be held responsible for any delays in plaintiffs' availability to films beyond the clearances provided for in its contracts with distributors, when there is no evidence that it ever sought or received more from the distributors. Actually plaintiffs seek to invoke the doctrine known as "conscious parallel action" by contending that an unlawful conspiracy [**50] should be inferred from the fact that the distributors did not make film available to them until after Pastime's and Consolidated's theatres had had their runs. The record substantiates that plaintiffs' delay in receiving films for exhibition until after they were shown in Pastime's downtown theatres and Consolidated's drive-in theatres resulted in sound business judgment, and such circumstances standing alone without any other evidence of conspiracy between distributors and exhibitors Pastime and Consolidated are not sufficient to infer a conspiracy based on parallel action. In *Brown v. Western Massachusetts Theatres, Inc., 288 F.2d 302 (1st Cir. 1961)*, the court held that the evidence, including that of parallel action by motion picture distributors, was insufficient to take to the jury the question whether distributors and others, who did not engage in competitive bidding, had conspired to monopolize and restrain trade in pictures in areas of plaintiff's theatres. In that case the court stated: "Plaintiffs make the customary attempt to rely on the theory of consciously parallel action. But, as the Supreme Court has said, '"[Conscious] parallelism" has not yet read conspiracy [**51] out of the Sherman Act entirely.' *Theatre Enterprises, Inc., v. Paramount Film Distributing Corp., 1954, 346 U.S. 537, 541, 74 S. Ct. 257, 260, 98 L. Ed. 273.* And in any event, something more than occasional similarity of conduct is required." Our own Fourth Circuit in *Windsor Theatre Co. v. Walbrook Amusement Co., 189 F.2d 797 (4th Cir. 1951)* had occasion to pass upon the sufficiency of evidence allegedly in support of a so-called "horizontal conspiracy". [*792] At pages 798 and 799 the court stated:

> "A careful examination of the record fails to show any horizontal conspiracy among the distributors in selling to the larger and longer-established Walbrook Theatre in preference to the newly-established Windsor Theatre. It seems to this court quite natural that the distributors would not be prone to substitute an unknown customer for a proven one. This Court cannot see how the preference of one exhibitor over another is, per se, a combination in restraint of trade. Indeed, every 'exclusive' contract has that effect. As the District Court concluded: 'There is no evidence tending to show any conspiracy or concerted action by distributors; that is, there is no "horizontal" [**52] conspiracy in these cases. To some extent it may be said that some of the distributors have much of the time acted similarly with respect to Rosen and Goldberg; but similarity of action under substantially like circumstances affecting each distributor is not proof of conspiracy.'"

Another significant circumstance in this case is the almost total failure of Mrs. Ayers, who concededly was in complete charge of managing and operating plaintiffs' theatres including the securing of pictures for them, to take positive and affirmative action to obtain films earlier from proper representatives of the distributors. The evidence reveals that she merely wrote two letters, one to Loew's and another to Universal in an attempt to secure pictures for the Summerville Drive-In. The only other

evidence of any activity on her part in this connection was her statement that on several occasions she discussed the matter with the distributors' salesmen who advised her that nothing could be done about it. She was apparently content to accept their statements and do no more about this matter. In the case of Royster Drive-In *Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d* [**53] *246, 251*, (2d Cir. 1959), cert. denied, *361 U.S. 885, 80 S. Ct. 156, 4 L. Ed. 2d 121 (1959)*, which involved a similar factual situation, the Court of Appeals for the Second Circuit held:

> "Finally appellant complains that its failure to make a demand to the distributors should not be considered fatal to its claim. It presents two reasons for this position: (1) the making of demands would not have had any effect . . . . As we have previously held and recently reiterated: '[Plaintiffs] cannot recover damages on account of any failure to obtain feature pictures for first-run exhibition unless they made demand for that of which they now claim they were deprived by the conspiracy.'"

See also 608 *Hamilton Street Corporation v. Columbia Pictures Corporation, et al., 244 F. Supp. 193 (E.D. Pa. 1965)*, where the court granted summary judgment for defendant distributors on the basis that the record did not fulfill the requirements of affirmative evidence of clear request or demand by theatre operators for availability of films, and that plaintiffs could not recover in absence of such a demand.

During the extended period of this litigation the parties have made full use of the discovery [**54] procedures granted under the Federal Rules. Depositions of most available witnesses have been taken, and countless exhibits and affidavits have been filed. Nevertheless, plaintiffs have failed in their efforts to make out a *prima facie* case against Pastime. Applying the guidelines established by Amended *Rule 56 of the Federal Rules of Civil Procedure*, it is concluded that plaintiffs have failed to raise a genuine issue of material fact sufficient to defeat Pastime's motion for summary judgment. The evidence construed most favorably in behalf of plaintiffs would require a directed verdict against them, and accordingly the Court should enter summary judgment for defendant in each action. *Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 88 L. Ed. 967, 64 S. Ct. 724 (1944). Dulansky v. Iowa-Illinois Gas & Electric Co., 10 F.R.D. 566 (S.D. Iowa 1950). Dewey v. Clark, 86 U.S. App. D.C. 137,* [*793] *180 F.2d 766 (1950).* A jury is permitted to draw only those inferences of which the evidence is reasonably susceptible, and may not be permitted to resort to speculation. A mere scintilla of evidence is not enough to create an issue. There must be evidence upon which a jury may [**55] reasonably rely; and a party may not escape summary judgment on the mere hope that something will turn up at the trial. The plaintiffs have not offered sufficient evidence, either direct or circumstantial, of a common plan, scheme, design or conspiracy among Pastime and any of the former defendants to these actions; neither have plaintiffs raised any issue of material fact as to the lack of substantial competition between its Charleston and Summerville area drive-in theatres and those of Pastime. Nor has it raised a sufficient issue as to the reasonableness and propriety of the clearances granted Pastime by distributors; nor that such clearances were used pursuant to any common plan, scheme, design or conspiracy to discriminate against plaintiffs. It is, therefore,

Ordered that Pastime's motion for summary judgment in each case be, and the same hereby is, granted.

71 of 101 DOCUMENTS

J.D. PARTNERSHIP, ET AL., Plaintiffs-Appellants -vs- BERLIN TOWNSHIP BOARD OF TRUSTEES, ET AL., Defendants-Appellees

Case No. 01 CEA 06-018, 01 CEA 10-057

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, DELAWARE COUNTY

2002 Ohio 2539; 2002 Ohio App. LEXIS 2529

May 22, 2002, Date of Judgment Entry

PRIOR HISTORY: [**1] CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Delaware County. Case No. 99CVF-07-274.
J.D. Pshp. v. Berlin Twp. Bd. of Trustees, 2000 Ohio App. LEXIS 3459 (Ohio Ct. App., Delaware County, Aug. 2, 2000)

DISPOSITION: Reversed and remanded.

COUNSEL: For Plaintiffs-Appellants: J.D. Partnership, BENJAMIN S. ZACKS, JAMES R. BILLINGS, Columbus, Ohio.

For Plaintiffs-Appellants: T&R Properties, Inc., LARRY H. JAMES, Columbus, Ohio.

For Defendants-Appellees: W. DUNCAN WHITNEY, MARIANNE T. HEMMETER, Delaware, Ohio.

JUDGES: Hon. William B. Hoffman, P.J., Hon. Sheila G. Farmer, J., Hon. John F. Boggins, J. Boggins, J., Hoffman, P.J. and Farmer, J. concur.

OPINION BY: John F. Boggins

OPINION

Boggins, J.

[*P1] These are appeals from the Delaware County Court of Common Pleas.

APPELLATE PROCEDURE

[*P2] This is the third appeal in this cause. Initially, the trial court concluded that it lacked jurisdiction due to the action of the township in denying the amended zone change application as being legislative rather than administrative. This Court reversed such conclusion and remanded for further proceedings. (Case No. 00CAH01002).

[*P3] The trial court then heard evidence, with the decision being adverse to appellants. An appeal was taken in Case No. 01 CEA 06-018. As appellants filed a motion to vacate the decision, this Court [**2] granted a stay until such motion was decided. Again, the decision was not in favor of appellants and an appeal has been taken, being Case No. 01 CEA 10057. The stayed appeal and the last referenced appeal are now consolidated.

FACTS OF THE CASE

[*P4] J.D. Partnership and T&R Partnership, as owners, in their amended application requested a zone change of 40.611 acres on the east side of Africa Road, Berlin Township, Delaware County from FR-1 (Farm Residential District) to PRD (Planned Residential Zoning District).

[*P5] The amended application was referred to the Delaware County Regional Planning Commission (DCRPC) which held a public hearing and denied the amended application.

[*P6] Next, the Berlin Township Zoning Commission (BZC) addressed the amended application, held a public hearing and denied the zone change.

[*P7] The Berlin Township trustees then considered the application at a public hearing and also denied the requested zone change.

[*P8] Appellants then filed an administrative appeal to the Delaware County Common Pleas Court along with prayers in declaratory judgment, injunctive relief and damages.

[*P9] The trial court conducted a *de novo* evidentiary hearing and affirmed the decision of the [**3] trustees and as stated heretofore denied additional relief.

ASSIGNMENTS OF ERROR

CASE NO. 01 CEA 06-018

I.

[*P10] THE COURT OF COMMON PLEAS COMMITTED REVERSIBLE ERROR BY FAILING TO HOLD THAT THE DECISION OF THE BOARD WAS ILLEGAL UNREASONABLE AND/OR CONTRARY TO THE TOWNSHIP ZONING RESOLUTION.

II.

[*P11] THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT THE 1989 RESOLUTION FOREVER LIMITS THE APPELLANT'S LAND TO BE DEVELOPED AT ONE UNIT PER ACRE.

III.

[*P12] THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO RENDER FINDINGS OF FACT AND CONCLUSIONS OF LAW IN COMPLIANCE WITH OHIO LAW.

IV.

[*P13] THE COURT OF COMMON PLEAS COMMITTED REVERSIBLE ERROR IN EXCLUDING PORTIONS OF THE EXPERT TESTIMONY OF WITNESSES, DAVID HARTT AND DAVID SHADE, ESQ.

ASSIGNMENTS OF ERROR

CASE NO. 01 CEA 10057

I.

[*P14] THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT AND FOR ATTORNEYS FEES.

II.

[*P15] THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO CONSIDER ALL OF THE EVIDENCE BEFORE THE COURT BEFORE DETERMINING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT AND FOR ATTORNEY'S FEES.

[*P16] In considering the various Assignments of Error [4] we must first determine the jurisdiction of the trial court.**

[*P17] Revised Code § 2506.03 requires that the Common Pleas Court hearing is confined to the transcript of the hearing conducted by the trustees and that additional evidence may be received to correct deficiencies in the transcript. In *Grant v. Washington Township* (1963), 1 Ohio App. 2d 84, 203 N.E.2d 859, the Court of Appeals for the Second District determined that no jurisdiction rested with the Common Pleas Court without a transcript. Also, in *Wickliffe Firefighters Association Local 1536 v. Wickliffe* (1990), 66 Ohio App. 3d 681, 586 N.E.2d 133, the court also found a lack of jurisdiction to proceed with a trial *de novo without a transcript in an administrative proceeding.*

[*P18] *However, in Crist v. Battle Run Fire District Board of Trustees* (1996), 115 Ohio App. 3d 191, 684 N.E.2d 1296, the court ruled that a trial *de novo* was required in the absence of a transcript. See also *Powell v. Meigs Local School District No. 502,* (Sept. 8,1993), 1993 Ohio App. LEXIS 4582, Meigs App. No. 502, unreported, *Ray v. Ohio Unemployment Board of Rev.* (1993), 85 Ohio App. 3d 103, 619 N.E.2d 106. [**5]

[*P19] In this case, as evidenced by the receipt of joint Exhibit 2, no sufficient transcript of the trustees' hearing exists.

[*P20] We therefore determine that under R.C. § 2506.03(A)(1) and (5), the court appropriately conducted a *de novo* hearing and was possessed of statutory authority to receive such evidence.

[*P21] We find further that the trial court was not limited to a consideration of the trustees' decision but also upon evidence received in the trial *de novo* to determine if such decision was unreasonable, arbitrary and not supported by a preponderance of reliable, probative and substantial evidence. R.C. § 2506.01 et. seq, 2506.04.

[*P22] In *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St. 3d 570, 589 N.E.2d 1303, the Supreme Court, while discussing R.C. § 119.12

rather than R.C. § 2506.01 et seq., provided guidelines as to these terms when it stated:

[*P23] **(1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.**

[*P24] **(2) 'Probative' evidence** [**6] **is evidence that tends to prove the issue in question; it must be relevant in determining the issue.**

[*P25] **(3) 'Substantial' evidence with some weight; it must have importance and value.**

[*P26] **The court, in considering the evidence before it, reviewed the deficiencies in the amended application found by the Regional Planning Commission, which was relied upon by the zoning board, and the trustees. Applicable portions from such recommendations are:**

[*P27] **1.) "If the proposed development is consistent in all respects with the purpose, intent and general standards of this zoning resolution."**

[*P28] A final development plan must be submitted which meets all the criteria for approval under the zoning resolution at the time of zoning amendment. The revised development plan is still incomplete:

[*P29] a.) The landscaping plan in the text provides for buffers and trees in the yards, but there are no calculations for the amount of landscaping needed in relation to vehicular use areas.

[*P30] b.) No renderings of landscape cross sections or entrance features are included.

[*P31] c.) No sign plan is included.

[*P32] d.) The architectural design criteria do not include structural renderings.

[*P33] e.) The County Sanitary Engineer has [**7] not approved the concept of an additional force main and lift station, therefore, engineering feasibility is not shown for the plan as submitted. If the sewer can be made to gravity flow to the 24" main, there is adequate capacity in the 24" sewer to service the development without affecting commercial capacity in the 12" force main. The developer's engineer has agreed to make improvements to the lift stations at Cheshire and Peachblow Roads. *(corrected by fax 4/21/99).*

[*P34] f.) The relationship of the development to the existing and probable uses is not fully demonstrated, especially in light of the applicant's 123 acres of adjacent future development lands.

[*P35] g.) The County Engineer has indicated that a left turn lane will have to be constructed in Africa Road at the entrance of this development. No turn lane is shown on the development plan. *(corrected by fax 4/21/99).*

[*P36] h.) No traffic study has been submitted. The township may wish to see how this parcel relates to the applicant's additional 123 adjacent acres of future development.

[*P37] i.) 50' rights of way are shown where 60' is required. *(corrected by fax 4/21/99).*

[*P38] j.) Lot 2 destroys an existing tree line. This is a natural [**8] feature, to be retained via PRD (Art. 11.01 and 23.03D) *(lot 2 eliminated by fax 4/21/99).*

[*P39] k.) The high-pressure gas main easement touches the building envelope on lots 6, 7, 67, and 68. These lots seem imprudent in case of a rupture. *(adjusted, see fax 4/21/99).*

[*P40] **2.) "If the proposed development is in conformity with the comprehensive plan or portion thereof as it may apply."**

[*P41] a.) The original Berlin Township Land Use Plan (3/10/88) recommends this area for residential use at one unit per acre. The request is for 1.69 per acre.

[*P42] b.) Because sanitary sewer service was subsequently provided to this area the township should re-evaluate its comprehensive plan recommendations. The township has begun this process.

[*P43] c.) The Delaware County 1993 Regional Land Use Plan for this area shows the land to contain areas that are suitable for development, areas which are unsuitable for development, and areas which are critical resource management areas, but does not recommend uses or densities. It states several policies:

[*P44] 1.) *"It shall be the policy of the Central Planning Area to discourage piecemeal development of unrelated, isolated single use developments stand alone structures.* [**9] *" (Page 1, Central Area Master Plan DCRPC 1993 Master Plan)."* This application may be categorized as a piecemeal development, which needs to be studied in its larger context.

[*P45] 2.) *Inside sewer service districts, suburban pattern development will predominate, but alternatives to this pattern should be initiated.*

[*P46] *a.) Existing settlements should be, expanded to become villages.* (Cheshire) Not applicable to this request.

[*P47] *b.) All developments should be planned developments, permitting townships to participate with the*

county Engineer and the DCRPC to review, through zoning requirements and development standards, proposed areas, subdivision plans, and to have opportunity to achieve thoroughfare planning objectives, appropriate land use mix, and clustering to preserve critical resources, historical resources, and special features of sites." Partially added by this request.

[*P48] *c.) For proposed land uses deemed appropriate according to the Central Planning Area's balanced land development pattern and development suitability, it shall be the policy of the central Planning area to consider the compatibility of proposed land uses with existing land uses."* Partially achieved by this [**10] request.

[*P49] **3.) "If the proposed development advances the general welfare of the township and the immediate vicinity."**

[*P50] a.) At this time, the development plan proposed does not advance the general welfare of the township and the immediate vicinity for the reasons and deficiencies stated above.

[*P51] Such deficiency findings are considered in the court's opinion at pages 4 and 5 and are as follows:

[*P52] 15. Those reported deficiencies included:

[*P53] (a) "The revised development plan is incomplete" or inappropriate in eleven respects;

[*P54]. (b) The proposed development is not in conformity with the Berlin Township Comprehensive Plan, because

[*P55] (i) The Berlin Township plan calls for residential use at no more than one unit per acre, and this application requests 1.69 units per acre; and

[*P56] (ii) The equally applicable Delaware County Regional Land Use Plan discourages piecemeal development with stand-alone or isolated single use developments like this proposal; and

[*P57] (iii) "The development plan proposed does not advance the general welfare of the township and the immediate vicinity for the reasons and deficiencies" which the report recites.

[*P58] In 1998 the township adopted a comprehensive plan [**11] (a land use plan) under R.C. Chapter 519. Following this, on January 1, 1989, it established zoning districts for the township, effectively classifying all undeveloped land as F-1 but taking into consideration a low or high density map legend as a guide to the future of the township.

[*P59] Section 7.03(A) (FR-1) limited density to one single family dwelling per one acre parcel, tract or lot.

[*P60] Appellants' land was classified as FR-1.

[*P61] However, the Zoning Code was modified to provide for Planned Residential Districts (PRD) in Article XI pursuant to R.C. § 519.021. By this action, the Comprehensive Plan and potential density was significantly altered as were the initial overall zoning concepts.

[*P62] This is the classification for which appellants applied.

[*P63] Section 11.02 of Article XI states:

[*P64] **Section 11.02 - APPLICATION:** The provisions of this article of the Zoning Resolution shall apply to all lands of the township, regardless of the size. The owner of any parcel may elect to submit an application for a change in the zoning under the provisions of this article provided that the planned densities or size of the tract do not exceed the permitted densities or acreage [**12] set forth in Articles VII, VIII, and IX of this resolution. Central water and sewer systems are a requirement of this district.

[*P65] Articles VII, VIII, and IX in section 7.03 (A) each state "single family dwellings (limited to one (1) single family dwelling per one (1) acre parcel, tract or lot.)"

[*P66] Article 7.06 (A) states:

[*P67] **A. Lot Area** - No parcel of land in this district shall be used for residential purpose which has an area of less than one (1) net acre forty-three thousand five-hundred sixty (43,560 square feet), excluding all road right-of -ways. All other uses in this district shall have such lot area prescribed by the article permitting the use or as prescribed by the Board of Zoning Appeals as a condition of said use.

[*P68] Article 8.06 (A) provides:

[*P69] **A. Lot Area** - Residential lots which are served with an approved central water and sewer system serving all lots may be developed for such use if they have a lot net area of not less than twenty-thousand (20,000) square feet, excluding all road easements. All other parcels, not so serviced, shall contain the lot areas prescribed by the provisions of Article VII of this Zoning Resolution.

[*P70] Article 9.07 (A) also [**13] states:

[*P71] **A. Lot Area** - A minimum of twenty-thousand (20,000) net square feet, excluding all road right-of ways, per dwelling unit shall be required. All other uses in this district shall have such lot area pre-

scribed by the article permitting the use or as prescribed by the Board of Zoning Appeals as a condition of said use.

[*P72] Section 11.07 (A) of the PRD Districts recites:

[*P73] **A. Intensity of Use** - The maximum density shall be two (2) dwelling units per gross acre within the area to be developed, unless the physical boundaries of land or existing developments adjacent thereto on adjoining lands establish an atmosphere inconsistent with the above maximum density of two (2) dwelling units per gross acre. Increased densities may be approved by the Berlin Township Zoning Commission and Township Trustees if it is determined that any of the following conditions exist:

[*P74] 1. The property is directly adjacent and easily accessible to major thoroughfares.

[*P75] 2. The developer provides parks or public open space as part of the design of the development.

[*P76] 3. Pedestrian or bike trails are provided as part of the design of the development.

[*P77] 4. Natural or historic areas are retained [**14] and protected.

[*P78] The Zoning Commission and Township Trustees may grant zoning incentives of up to one-half (1/2) unit per gross acre for each of the above standards of quality found to exist; however, the total density for the entire area of the development shall not exceed four (4) units per gross acre.

[*P79] For purpose of development within the Planned Residential District in Berlin Township, the maximum density for development shall be as follows:

[*P80]

TYPE OF DWELLING	Maximum Dwelling Units on Any Single Acre
Single Family	2 (plus incentive units)
Two Family Units	6
Two-story Apartments	6
Multi-family Units	6

[*P81] The trial court, after the *de novo* evidence and consideration of the Comprehensive Plan, land use map, zoning classifications of 1989 as modified effective 1994 and 1995, the Regional Planning denial reasons, as affirmed by the Zoning Board and the trustees, along with the applicants' amended application and drew the following conclusions:

[*P82] 1. Pursuant to Sections 7.03 and 7.06 of the Berlin Township Zoning Resolution, the FR-I Zoning District requires a minimum one acre lot for any residential unit, and permits only one residential unit per acre [**15] for any development parcel. Pursuant to Sections 11.02 and 11.07 of the Berlin Township Zoning Resolution, a PRD Zoning District may permit two or more residential units per acre for a development parcel, "provided that the planned densities or size of the tract do not exceed the permitted densities or acreage set forth" for the applicable Zoning Resolution District.

[*P83] 2. By its terms, Sections 11.02 precludes rezoning from FR- I to PRD, if the proposed PRD provides greater residential density than one residential unit per acre in an area where the township's zoning map designates a maximum residence density of no more than one residence unit per acre. Any contrary reading of Section 11.02 would permit the trustees to approve a PRD without regard for the surrounding area or the township's general land use plan.

[*P84] 3. By its terms, Section 11.06(C)(2) precludes rezoning from FR-I to PRD if the proposed PRD fails to comply with the township's "comprehensive plan." The township's zoning map and its notations are part of that comprehensive plan. The map's notations expressly limit the residential unit density for the area where plaintiffs propose their PRD to no more than one residential [**16] unit per acre.

[*P85] 4. Though the Trustees expressly considered and affirmatively denied the plaintiff's amended application, the Trustees lacked authority to approve the plaintiffs amended application BZC-098-009 without violating Section 11.02 and/or Section 11.06(C)(2).

[*P86] 5. If the Trustees had authority to approve the plaintiffs' amended application, as they apparently believed they could, they had sufficient grounds to deny that application for one or more of the reasons that the DCRPC staff recommended its disapproval, and because the BZC and the DCRPC recommended its rejection.

[*P87] 6. The Trustees' decision to deny the plaintiffs' amended application was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported

by the preponderance of substantial, reliable, and probative evidence.

I., II.

[*P88] With this background we shall now consider Assignments of Error one and two simultaneously as each address the primary issue as to the presence or absence of a density limitation of one residence per acre as the Regional Planning, Zoning Board, Trustees and the Common Pleas Court determined.

[*P89] Each of these decisions is predicated upon the initial land use plan of 1989 and [**17] the zoning code which followed thereafter.

[*P90] There is no question that such documents speak in these terms with the Zoning Resolution having been submitted to and approved by the voters.

[*P91] The trial court specifically determined that the comprehensive plan (paragraph 3) precludes a zone change from FR-1 to PRD if the density exceeds such one residence per acre.

[*P92] However, the trustees and voters in approving the Zoning Resolution which created the PRD classification, specifically state that it shall apply to all lands in the township regardless of size. (Sec. 11.02) and provides for densities exceeding one unit per acre. Therefore, if a PRD application is approved, this density limitation becomes inapplicable and, as stated in R.C. § 519.021:

[*P93] "...within that development property is subject to the planned-unit development regulations and not to any other zoning regulations."

[*P94] Section 11.07 A then provides for a density of two dwelling units per gross acre with increased densities as approved by the Zoning Commission if any one of the four listed conditions applied (see p. 11 hereof). In addition, such Article provides incentives which can increase the density [**18] up to four units per acre.

[*P95] Section 11.02 does recite that:

[*P96] ["the planned densities or size of the tract do not exceed the permitted densities or acreage set forth in Articles VII, VIII and IX of this resolution."]

[*P97] But in examining such referenced sections VII, VIII and IX, we find that each provides in varying language that all other uses shall have such lot area prescribed by the Article permitting such use, which Article in the *sub judice* is 11.02

[*P98] This Court must consider the Zoning Resolution as amended by the adoption of the PRD as a whole as the trustees and voters have selected and approved the specific language contained therein. The trial court, by limiting the density to one residence per acre in reliance upon the initial Comprehensive Plan and the Zoning Resolution to the exclusion of the PRD sections has eliminated the latter from the approved amended Zoning Resolution at least to the extent of the permitted density.

[*P99] The trustees, and the court are prohibited from now choosing to change the language which, as stated, has been approved by such Board and the voters, even though the Planning Commission, Zoning Board and Trustees may have second thoughts as to [**19] the future development of the township lands.

[*P100] This Court did not choose such language, nor are we altering the content thereof.

[*P101] We are guided by the Ohio Supreme Court in *Saunders, et. al. v. Clark County Zoning Department* (1981), 66 Ohio St. 2d 259, 20 Ohio Op. 3d 244, 421 N.E.2d 152 which stated:

[*P102] "...restrictions on use of real property by ordinance, resolution or statute must be strictly construed and that scope of the restrictions cannot be extended to include limitations not clearly prescribed."

[*P103] In referencing such language we are mindful that it was a split decision. The differences, however, were based on other considerations. Judge Brown also stated the following:

[*P104] (1) All zoning decisions, whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. In re University Circle Inc. (1978), 56 Ohio St. 2d 180, 184, 10 Ohio Op. 3d 346, 383 N.E.2d 139; Pepper Pike v. Landskroner (1977), 53 Ohio App. 2d 63, 76, 7 Ohio Op. 3d 44, 371 N.E.2d 579; [**20] 3 Anderson, American Law of Zoning (2d Ed.) 4, Section 16.02. Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed. Davis v. Miller (1955), 163 Ohio St. 91, 95, 56 Ohio Op. 163, 126 N.E.2d 49 (Taft, J., concurring); State, ex rel. Ice & Fuel Co., v. Kreuzweiser (1929), 120 Ohio St. 352, 7 Ohio Law Abs. 256, 166 N.E. 228; State, ex rel. Moore Oil, v. Dauben (1919), 99 Ohio St. 406, 124 N.E. 232, 17 Ohio L. Rep. 22, paragraph one of the syllabus.

[*P105] As this Court held in *Vasu Communications, Inc. v. Planning Commission of City of Mansfield* (Oct. 26, 1999), 1999 Ohio App. LEXIS 5009, Richland App. No. 99CA4, unreported:

[*P106] Our standard for reviewing a decision of a trial court in an administrative appeal pursuant to R.C. Chapter 2506 is to review the record and the legal determinations of the common pleas court to determine whether as a matter of law the trial court's decision is supported by a preponderance of substantial, reliable and probative evidence. *Dudukovich v. Housing Authority* (1979), 58 Ohio St. 2d 202, 207, 12 Ohio Op. 3d 198, 389 N.E.2d 1113. Under R.C. 2506.04 [**21] , we review the judgment of the trial court only on questions of law which does not include the same extensive power to weigh the preponderance of the substantial, reliable and probative evidence as is granted to the trial court. *Kisil v. Sandusky* (1984), 12 Ohio St. 3d 30, 34, 12 Ohio B. 26, 465 N.E.2d 848. Therefore, pursuant to R.C. 2506.04, we must affirm the judgment entered by the trial court unless we find the judgment is, as a matter of law, not supported by a preponderance of reliable, probative and substantial evidence. *Id.* This determination is tantamount to evaluating whether a court below abused its discretion. *Id.*, 12 Ohio St. 3d at 34 at n. 4. An abuse of discretion connotes more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219 5 Ohio B. 481, 450 N.E.2d 1140.

[*P107] We find that the trial court and the trustees, as to permitted density in a PRD district, did not follow the language of Sec. 11.07 and therefore such decisions were not supported, as a matter of law, by a preponderance of reliable, probative and substantial evidence.

[*P108] We determine that [**22] appellants 40.66 acres are not bound by the density of one residence per acre but that the 1.69 units per acre are well within the PRD specifications and appellants are not disqualified by such density.

[*P109] Further, the trial court stated that the amended application violated the eleven objections of the Regional Planning Commission.

[*P110] However, the testimony of Mr. Laurien, Director (T. at p. 262), stated that five of these had been corrected.

[*P111] The objection raised that piecemeal development or stand-alone or isolated single use developments such as this one also does not conform to Sec. 11.07 as such section specifically applies to all FR-1 parcels. By following this reasoning, an owner would be denied the highest and best use of its property until other development projects reached its land so that it would not be a stand-alone project. This contradicts Sec. 11.07.

[*P112] The evidence presented indicated that adequate sewer facilities existed with an agreed lift station.

[*P113] A landscaping plan with signage was provided. (Plaintiff's Ex. 2).

[*P114] Article 11.06 (B) (2) does not require structural renderings.

[*P115] No traffic study was required. (See O.D.O.T. letter)

[*P116] Also, since the PRD classification applied, [**23] by its language, to all township land, the Township Planning Commission, Zoning Board and trustees retained the authority to review any application in the future and could not therefore, as a basis of denial, include or require that appellants provide data on other lands owned or controlled by them.

[*P117] We therefore sustain the first and second Assignments of Error and determine that appellants amended application conformed to the requirements of a P.R.D. district as defined.

[*P118] It therefore is unnecessary to rule upon the third or fourth Assignments of Error in Case No. CEA 06-018 nor the first Assignment of Error in Case No. 01 CEA 10057.

II

[*P119] The second Assignment of Error in Case No. 01 CEA 10057 concerns two separate aspects, to wit: non-consideration by the trial court as to all of the evidence and the request for attorney fees.

[*P120] As to the first portion, no ruling is necessary due to this Court's findings with respect to the first and second Assignments of Error in Case No. 01 CEA 06-018.

[*P121] In the trial court's decision of October 15, 2001 the court stated:

[*P122] Plaintiff failed to file a motion for R.C. 2323.51 sanctions within the statutorily allowable 21 days [**24] after the judgment See R.C. 2323.51(B)(1). Moreover, the Plaintiff fails to describe any defense conduct in either case which satisfies the statutory definition for "frivolous conduct" in R.C.2323.51(A)(2). The defendants positions in each case were "warranted under existing law" or they could "be supported by a good faith argument for an extension, modification, or reversal of existing law."

[*P123] On its face, this Court's order regarding costs in case no. 99CVH06196 relates solely to case no. 99CVH06196. Indeed, this court's. converse order in no. 99 CVF07274 allowed the defendants to recover their costs from the plaintiffs there. (see-page 14, P D of that

judgment). Further, the order that defendant may recover "the costs of this action" in case no. 99CVH06196. refers to traditional court costs recoverable under Civ. R. 54(D), which do not include attorney fees. *Williamson v. Ameritech Corp*, 81 Ohio St. 3d 342, 691 N.E.2d 288, 81 Ohio St. 3d 342, 691 N.E.2d 288 (1998); *Muze V. Mayfield*, 61 Ohio St. 3d 173, 573 N.E.2d 1078 (1991); *Sturm v. Sturm*, 63 Ohio St. 3d 671, 590 N.E.2d 1214 (1992).

[*P124] We find no abuse of discretion [**25] in making these findings and therefore reject this portion of the second Assignment of Error as to attorney fees in Case No. 01 CEA 10057.

[*P125] This cause is reversed and remanded for proceedings consistent herewith.

By: Boggins, J.

Hoffman, P.J. and

Farmer, J. concur

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the decision of the Delaware County Common Pleas Court is reversed and remanded. Costs to appellee.

Highway Oil, Inc., Appellee, v. City of Lenexa, Kansas, Appellant

No. 47,861

Supreme Court of Kansas

219 Kan. 129; 547 P.2d 330; 1976 Kan. LEXIS 343

March 6, 1976, Opinion Filed

PRIOR HISTORY: [***1] Appeal from Johnson District Court, division No. 4; Harold R. Riggs, Judge.

DISPOSITION: Affirmed.

SYLLABUS

SYLLABUS BY THE COURT

1. Zoning -- *Rules for Judicial Review Stated.* Rules for judicial review of municipal zoning ordinances and determinations are stated.

2. Zoning -- *Refusal to Rezone and Grant Building Permit -- City Acted Arbitrarily and Unreasonably.* In an action brought by a landowner to test the reasonableness of a city's refusal to rezone a tract and grant a building permit for a filling station, it is *held:* The trial court properly concluded that the city acted arbitrarily and unreasonably in its denial actions.

COUNSEL: *Timothy J. Turner*, of Prairie Village, argued the cause and was on the brief for the appellant.

Peter A. Martin, of Breyfogle, Gardner, Martin, Davis and Kreamer, of Olathe, argued the cause and was on the brief for the appellee.

JUDGES: The opinion of the court was delivered by Harman, C.

OPINION BY: HARMAN

OPINION

[*129] [**331] This is a zoning controversy. Challenged here is the propriety of a district court order finding that the refusal of the city of Lenexa to rezone a tract of land and grant a building permit for a filling [***2] station was unreasonable and arbitrary and directing the rezoning and permit applied for.

Certain facts were stipulated to by the parties in the district court. In addition the stipulation authorized the applications for rezoning and the pertinent minutes and records of the city, as well as certain photographs, surveys and plats, to be considered in evidence.

Appellee Highway Oil, Inc., is the owner of the tract in question. The property is located in the northeast part of the intersection at 95th street and Noland Road in Lenexa and is part of a block bounded on the other sides by Gillette and 94th streets. The portion facing 95th street is 366 feet in length while that along Noland Road is 119.66 feet.

In 1966, before appellee obtained any interest in the property in question, the city zoned it as C-P (planned business district). The C-P classification was designed for a commercial tract of land at least three acres in size under common ownership and control where there was a possibility of a unified plan of development. [*130] However, a history of the nine C-P zones in the city showed that requirements of common ownership and unified development were not enforced after [***3] the original C-P classification was made. The city had routinely approved zoning applications on behalf of owners of individual tracts within the C-P area in order that they could develop the land on a lot by lot basis. The property directly across the street south from appellee's, also zoned C-P, had been developed in this piecemeal manner.

In the early spring of 1971 appellee made application to the city planning commission for approval of its

plans to construct a gasoline filling station on the tract in question. Owners of land with C-P classification were required to submit plans for any new construction in the area. This application was for a building permit, not for a change in zoning. A gasoline station was a permissible use with the C-P zoning and there were four other existing filling stations in the immediate vicinity of appellee's land. On May 11, 1971, the planning commission, on a 3-2 vote, recommended to the city council that the city approve the plans.

The matter came on for hearing before the city council on June 3, 1971. A question [**332] was raised as to whether the original C-P classification for the tract was validly enacted and whether it remained [***4] in effect by reason of the fact construction upon it had not commenced within one year from the initial time of the zoning. The C-P zoning had never been questioned by any party until this time. In the opinion of the city attorney who was acting as such until June 3, 1971, the C-P classification was legal and still in effect. However, at the city council meeting on June 3, 1971, the council appointed a new city attorney, who suggested the matter be tabled so he could research the question. This suggestion was followed and the new city attorney subsequently ruled the C-P zoning for the tract was void and had reverted to R-1 (residential). Not wanting to be caught in the cross-fire of conflicting legal opinions appellee tacitly accepted the new city attorney's opinion and filed an application for rezoning with the planning commission on July 9, 1971. The application requested rezoning from C-P or R-1, depending on which city attorney was correct, to C-2 (general business district), a classification which also permitted filling stations.

In September of 1971 the mayor of Lenexa increased the number of members on the planning commission by appointment. An attempt was made to remove [***5] the existing chairman and elect another [*131] in his place. For several weeks it was uncertain who was presiding and it was impossible to transact business before the commission. The matter of appellee's requested rezoning was continued from meeting to meeting while, according to the parties' stipulation of facts, "the internal affairs of the City precluded the transaction of normal business".

The next step to be noticed is the planning commission's eventual decision to hold a public hearing, on its own proposal, to rezone appellee's property from that of C-P to C-1 (restricted business district), a classification which would not permit a filling station. The planning commission held this hearing December 7, 1971, as a result of which it recommended rezoning to C-1. Its minutes stated it desired to halt piecemeal development on planned areas and C-1 zoning would allow the highest and best use of the property. The proposed change was heard by the city council on January 20, 1972. The ordinance to rezone the land was tabled at that meeting to allow further study and the recommendation remained in that status indefinitely.

After these repeated delays by the city appellee's [***6] application for rezoning was finally heard by the planning commission on April 3, 1972. The commission recommended denial. The minutes of the meeting do not clearly state the reason for the decision. They indicate concern with the highest and best use of the land and that "The narrowness of the lot prohibits too great a setback from 95th street. However, it was decided that this decision would be discussed at the time a building permit was applied for". This recommendation was adopted by a majority vote of the city council at a meeting held April 20, 1972. At this meeting the planning commission chairman stated that setback requirements had been a factor in the commission's recommendation. Appellee made it clear at that meeting and throughout that it was willing to meet any reasonable setback and screening requirements made by the city. Shortly thereafter the planning committee was dissolved and not recreated for a brief interval.

On May 12, 1972, appellee commenced this action in district court pursuant to K. S. A. 12-712 to test the city's refusal to rezone the property. After some further delay for various reasons the case was tried to the court March 1, 1974.

In addition [***7] to the stipulated facts and exhibits the court had before it the testimony of appellee's vice-president, Albert Hadley, who had handled appellee's applications and of Alan Uhl, a city [*132] councilman who had previously served on the planning commission. The court made extensive findings of fact and concluded that the denials [**333] of appellee's requests for a building permit and for subsequent rezoning were unreasonable, arbitrary and inconsistent with the practice of the city in the past and with the character of the neighborhood; further they were without any legitimate bearing on the public health, safety, comfort, morals or welfare; also that there was considerable evidence the denials were based on political considerations, a desire to restrict competition and sham screening and setback complaints. The court ruled the city's actions were void and directed approval of plaintiff's application for construction of a gasoline station and issuance of the requisite permits.

The city has brought the matter here for review.

The rules for judicial review of municipal zoning ordinances and determinations are well established. "It must be understood that the governing body [***8] has the right to prescribe zoning, the right to change zoning and the right to refuse to change zoning" (*Arkenberg v.*

City of Topeka, 197 Kan. 731, 734-735, 421 P. 2d 213). The power of the district court, in reviewing zoning determinations, is limited to determining (1) the lawfulness of the action taken, that is, whether procedures in conformity with law were employed, and (2) the reasonableness of such action. In making the second determination, the court may not substitute its judgment for that of the governing body and should not declare the action of the governing body unreasonable unless clearly compelled to do so by the evidence (*Arkenberg v. City of Topeka,* supra; *Keeney v. City of Overland Park,* 203 Kan. 389, 454 P. 2d 456; *Paul v. City of Manhattan,* 212 Kan. 381, 511 P. 2d 244). "There is a presumption that the governing body acted reasonably and it is incumbent upon those attacking its action to show the unreasonableness thereof", by a preponderance of the evidence (*Arkenberg v. City of Topeka,* supra, p. 735; *Creten v. Board of County Commissioners,* 204 Kan. 782, 466 P. 2d 263). The mark of unreasonable action by zoning authorities is ". . . when [***9] the action is so arbitrary it can be said it was taken without regard to the benefit or harm involved to the community at large including all interested parties and was so wide of the mark its unreasonableness lies outside the realm of fair debate" (*Gaslight Villa, Inc. v. City of Lansing,* 213 Kan. 862, Syl. para. 3, 518 P. 2d 410).

Before measuring the city's action by the foregoing standards we should examine further the character of the neighborhood involved [*133] and other evidence before the trial court. As already indicated, appellee's property is at the northeast quadrant of the intersection at 95th and Noland Road. Immediately adjoining it on the east and in the same block is a Clark Oil filling station. Continuing on east, across Gillette street, are two adjoining filling stations, Standard Oil and Texaco (formerly Sinclair). Cornering diagonally on the northeast point of appellee's property and in the same block is a tract of land zoned C-P. Directly across Gillette street from this latter tract is a tract zoned R-1, use not shown. Directly north of appellee's property and in the same block, are two tracts, comparable in size to that of appellee, which are [***10] zoned R-1 and on each of which is located one rental house. West of this property across Noland Road is a tract upon which a house has been converted to a preschool operation. Directly west of appellee's property across Noland Road is a tract zoned "special use" containing an office building. Diagonally across the 95th -- Noland Road intersection from appellee's property is a tract zoned R-1 upon which a baby-sitting operation is conducted. Directly across 95th street south of appellee's property is a large tract zoned C-P which contains a D-X filling station, a bank, office building, liquor store and a pizza parlor (exact order along 95th street not shown). 95th street is an exit from Interstate 35 and a main arterial street leading into Lenexa.

[**334] The record is not clear as to the exact reasons for the city's refusal to grant appellee's applications. There are indications it was because the governing body desired to halt piecemeal development in planned areas and because the narrowness of appellee's lot prohibited the setbacks which would be necessary. It appears the concern over piecemeal development occurred only after appellee made application to build what would [***11] be a cut-rate filling station and opposition developed from nearby major oil company station operators. That opposition was clearly shown in several of the proceedings and the trial court made a specific finding there was "considerable evidence tending to prove that the denials were based upon political considerations, a desire to restrict competition, and sham screening and set-back complaints". Counsel for appellant as well as one of the councilmen admitted that appellee's applications had become embroiled in "politics". The "politics" included frequent replacement of city attorneys with the result five different ones have participated in this proceeding. All that was entailed in this continuing controversy is not shown. In common parlance the term [*134] "politics" has come all too often to mean the activities between competing interest groups by whatever means, rather than the objective operation of government in the best interests of all concerned.

It does appear appellee's property was singled out for special treatment once it made its applications rather than merely being dealt with as a part of an overall program. The Clark Oil Company tract immediately adjacent [***12] had been unanimously approved for a filling station by a planning commission and council which had included some members who opposed similar action on appellee's. Three other stations were within a stone's throw. The essential character of the entire area surrounding appellee's tract was either already commercial or being held for that purpose and was not out of harmony with another filling station. The owner of the tract immediately north of that of appellee expressed opposition to appellee's requests but at the same time it appears he sought access to 95th street over appellee's land so that his R-1 property might be more attractive for commercial purposes. Such access was not granted by appellee. This landowner offered to withdraw his objections if appellee would buy him out. Also it appears that at the time of the hearing in district court this landowner had secured a favorable recommendation for commercial zoning of his own property. That appellee's property was being singled out for unique treatment is also demonstrated in the fact appellee had meanwhile contracted to sell a tract off the east side to a third party for the construction of a 7-11 store, sale contingent [***13] on the city's approval of requested rezoning by the third party -- the city refused to rezone that portion of appellee's land, thus voiding the sale contract, despite the fact the city's

proposed rezoning would have permitted construction of the 7-11 store. The trial court found that this independent denial bolstered its conclusion of arbitrary actions in zoning decisions respecting appellee's land. Councilman Uhl, who had formerly served on the planning commission, testified in district court that approval of appellee's applications would have been consistent with former actions by the city.

The second purported reason for the city's refusal seems to have been appellee's inability to meet setback requirements because of the narrowness of its tract. The trial court branded this and any screening complaints as sham. The record bears this out. Throughout the entire proceedings appellee offered to meet any reasonable setback and screening requirements. More importantly paragraph [*135] 10 of the parties' agreed stipulation of facts, with reference to the council's final action on April 3, 1972, stated:

". . . The property to be screened would be other commercially zoned property [***14] and the *plat plan for the gasoline station showed that it met the legal setback* [**335] *requirements.* Plaintiff further offered to construct all improvements beyond the ultimate right of way needs for the uncertain future improvements of 95th Street." (Our emphasis.)

The record amply justifies the trial court's conclusion that the city acted arbitrarily and unreasonably in denying appellee's applications and its judgment is affirmed.

Approved by the court.

CERTIFICATE OF SERVICE

I, William P. Myers, attorney for Appellant, do hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Bryan E. Dye, Esq.
City of Olive Branch
9200 Pigeon Roost
Olive Branch, MS 38654

Further, I hereby certify that I have mailed by hand-delivery service the document to the following none-MEC participants:

Hon. Robert P. Chamberlin
P.O. Box 280
Hernando, MS 38632

DeSoto County Circuit Clerk
2535 Highway 51 South
Hernando, MS 38632

This the 10th day of June, 2014.

/s/ William P. Myers
WILLIAM P. MYERS, MB NO. 3716