

**IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT  
OF HARRISON COUNTY, MISSISSIPPI**

**IN THE MATTER OF THE ENLARGING,  
EXTENDING AND DEFINING THE CORPORATE  
LIMITS AND BOUNDARIES OF THE CITY  
OF BILOXI, HARRISON COUNTY, MISSISSIPPI**

**F I L E D**  
SEP 6 2011  
JOHN McADAMS, CHANCERY CLERK  
BY: *B. McAdams*

**CITY OF BILOXI, MISSISSIPPI**

**PLAINTIFF**

**VS.**

**CAUSE NO. 10-02780-4**

**CITY OF GULFPORT, MISSISSIPPI, and  
CITY OF D'IBERVILLE, MISSISSIPPI**

**DEFENDANTS**

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**JUDGMENT**

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**THIS MATTER** having come on to be heard on the Motion to Dismiss filed by the Northeast Harrison Water and Sewer District, the Court, after giving careful consideration of the briefs of the parties, as well as evidentiary exhibits and oral argument of counsel at the motion hearing conducted on August 26, 2011, and, after receiving and considering the proposed findings of fact and conclusions of law submitted on behalf of the City of Biloxi and Northeast Harrison Water and Sewer District, finds as follows:

**BACKGROUND**

The City of Biloxi seeks to enlarge its boundaries by annexing approximately 7.6 square miles in this matter. The area Biloxi seeks to annex is adjacent to and north of Biloxi, the only direction Biloxi can seek to expand<sup>1</sup>. The proposed annexation extends into an unincorporated part of Harrison County that lies within the boundaries of the Northeast Harrison Water and

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<sup>1</sup> Biloxi is bounded on the south by the Mississippi Sound, on the east by D'Iberville, on the west by Gulfport.

Sewer District (NHWSO). NHWSO comprises 163.2 square miles and adjoins the entire northern boundary of Biloxi.

On July 28, 2011, NHWSO filed its Objection and Motion to Dismiss the City of Biloxi's Amended Annexation Complaint. The City of Biloxi filed its Response to the District's Motion or, in the Alternative, Complaint for Declaratory Judgment in which Biloxi asserted various legal challenges to the validity of the creation of the NHWSO. Biloxi has either abandoned or otherwise failed to bring on for hearing its request for declaratory relief and therefore the court limits its ruling to Biloxi's Motion to Dismiss.

### **FACTS**

The facts pertinent to NHWSO's Motion to Dismiss are as follows and are essentially undisputed by the parties:

The NHWSO is a 163.2 square mile local utility district created by the Harrison County Board of Supervisors in 2008 pursuant to House Bill 1340, as amended. (Exhibits NE-6, NE-7).

On August 11, 2008 the Board of Supervisors of Harrison County, Mississippi received Petitions for the Creation of the NHWSO. Thereafter, all of the legal requirements for notice of the creation of NHWSO were complied with. Neither Biloxi, nor any other party hereto, appeared, objected to, nor opposed the creation of NHWSO; likewise, none of those entities appealed the creation of NHWSO.

It appears, essentially without dispute, NHWSO presently serves no customers, owns and operates no water lines, sewer lines, or other water or sewer infrastructure, has no money, has no bank accounts, owns no buildings or other real property, has no debt, has no outstanding bonds, and has no employees. (Exhibits B-2, pp. 15-17, 25, 61; B-3, pp. 16-19, 56-57). It further appears

NHWSO has no definite plans for the extension of services at any point in the foreseeable future. (Exhibits B-2, pp. 19-21, 45; B-3, pp. 57-59).

Section 6 of House Bill 1340, as amended, states in pertinent part as follows: "None of the territory lying within any such district shall be subject to annexation by any city, town or village unless all of the territory of such district be so annexed..." It is undisputed that Biloxi's annexation complaint only seeks to annex 7.6 square miles, which is obviously less than "all of the territory of such district..."

### **OPINION AND RULING OF THE COURT**

Clearly, on the face of the matter (seeking to annex less than the entire district), the Motion to Dismiss is well taken. In the absence of a legally sufficient basis to deny the same, NHWSO's Motion must be granted.

Biloxi contends that Section 6, of the act, the so called "poison pill" provision, is unconstitutional. NHWSO counters that such a provision has been upheld on two or three occasions and there is no basis to deny its Motion to Dismiss. The precedent NHWSO relies upon dealt with the issue of a facial constitutional attack. Biloxi claims that it does not attack the entire legislation but rather limits its attack to only a small portion of the legislation, as applied. Biloxi seems to be saying "we are happy with the legislation, we just want to take out a word or two.", e.g. the part we find offensive. The initial chord Biloxi's argument struck with the court was akin to Biloxi saying the Ten Commandments are fine, we just want to do away with "not". More particularly Biloxi is saying we want to do away with: 'Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his manservant, nor his

maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's.'<sup>2</sup>. Biloxi says we want to change, instead of "Thou shalt not annex less than the whole..." we want to change it to "Thou shalt annex whatever you want..." just a minor change according to Biloxi. In essence "The Ten Commandments, are fine except we seek to delete one small three letter word: 'NOT'. We are fine with the whole local and private thing as long as we can do away with the word 'not'." While that whole "let's take the 'not' out of the Ten Commandments" thing doesn't appear to be working well for the world in general, here Biloxi seeks to distinguish and limit its attack to one of "unconstitutional as applied".

"Unconstitutional as applied" seems to be enjoying a high profile in recent times. In the Cato Institute's Center for Constitutional Studies, eighth volume of the *Cato Supreme Court Review*, and particularly in the *Foreword* by Roger Pylon, it is well documented that constitutional law, as it is unfolding from the Roberts Court, is significantly infiltrated by constitutional challenges of the "as applied" variety (versus facial constitutional attacks).

So, what traction does Biloxi gain with its unconstitutional "as applied" argument here? Section 6, the so called "poison pill" provision, was and is a part of House Bill 1340, as much as any other provision of the legislation that gave birth to NHWSD. NHWSD argues that Biloxi has waived its complaint by failing to object to the creation of the district as it had a right and opportunity to do. However, under the authority of *In re Validation of \$7,800,000 Combined Utility System Revenue Bond, Gautier Utility District*, 465 So. 2d 1003 (Miss. 1985), Biloxi's right to attack the district, as applied, is not waived or otherwise lost.

The unconstitutional as applied attack Biloxi pursues is this:

- The enabling local and private legislation must, to pass constitutional muster, serve the purposes of the general act [*Mississippi Code Annotated* § 19-5-151, *et seq*] and any

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<sup>2</sup> Exodus, Chapter 20:17 King James Version of the Holy Bible.

differences between the two must be primarily procedural and minor. *Oxford Asset Partners, LLC v. City of Oxford*, 970 So. 2d 116, 122-23 (Miss. 2007);

- Biloxi then contends the poison pill provision of House Bill 134 is different; it is neither procedural nor minor as applied here where the district consists of 163.2 square miles.

Initially, it appeared to the court that Biloxi's "as applied" attack on the constitutionality of the NHWSD's enabling legislation must fail because of Biloxi's failure to define or delineate where the legislation, "as applied" by NHWSD, crosses the line. In other words, in the absence of a clear standard, legislatively created, Biloxi's argument seems to create as many potential problems as it proposes to resolve. Specifically, where exactly does House Bill 1340, as applied by NHWSD, cross the line of constitutionality, "as applied"? Would 50 square miles be too large a district to require Biloxi or any other municipal entity to annex all or "none at all." Thus the court was confronted with the inability to define where the line falls. Biloxi offers nothing by way of guidance to the court from or by which one may ascertain just where the line is [number of square miles], across which the NHWSD would be "unconstitutional as applied".

Yet, the court here feels that while it may have no idea what constitutes a minimum size district that would cross the line, there is, nevertheless, a clear sense here of the line having been crossed. I think the court's sense is, in reverse, somewhat like Justice Potter Stewart must have felt in trying to define what constituted hard-core pornography when he stated:

"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

I don't know that I can define unconstitutional as applied here, but I know it when I see it and requiring Biloxi to annex 163.2 square miles or none at all is clearly unconstitutional as applied.

The court finds that the differences between House Bill 1340, as amended, particularly the so called "poison pill" provision "as applied" (requiring Biloxi to annex 163.2 square miles or nothing) and *Mississippi Code Annotated* § 19-5-151, *et seq*, are substantive and major.

Therefore, under the authority of *Oxford Asset Partners, LLC v. City of Oxford*, above, the court finds that the poison pill provision of Section 6 of the House Bill 1340, as amended, is clearly unconstitutional as applied in this specific set of circumstances.

**IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED** that Northeast Harrison Water Supply District's Motion to Dismiss is not well founded and the same is hereby denied.

ORDERED, ADJUDGED AND DECREED ON THIS THE 6th DAY OF SEPTEMBER, 2011.



Special Judge, Hollis McGehee