

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EARL CHILDS, LORI GORDON,
AMELIA KILLEEN, DAVID WHEELER
AND MARIA BEARD

APPELLANTS

VERSUS

CASE # 2006-^{CA}~~TS~~-00608

HANCOCK COUNTY BOARD OF SUPERVISORS

APPELLEES

CERTIFICATE OF INTERESTED PARTIES

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

Earl Childs, Appellant,
Lori Gordon, Appellant,
Amelia Kileen, Appellant,
David Wheeler, Appellant,
Maria Beard, Appellant,
Hancock County Board of Supervisors, Appellee,
Paradise Properties Group, L.L.C., Intervenor Below,
Kudo Developers of Mississippi, L.L.C., Intervenor Below,
Ronald J. Artigues, Jr., Attorney for Appellee,
Joseph R. Meadows, Attorney for Kudo Developers of Mississippi, L.L.C., Intervenor Below,
Donald Rafferty, Attorney for Paradise Properties Group, L.L.C., Intervenor Below,
Robert B. Wiygul, Attorney for Appellants, and
Honorable Stephen B. Simpson, Circuit Court Judge.

Respectfully submitted this the 14TH day of March, 2007.

HANCOCK COUNTY BOARD OF
SUPERVISORS

BY: 

Ronald J. Artigues, Jr.
Its Attorney

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STATEMENT OF SOLE ISSUE ON APPEAL

Whether the Hancock County Board of Supervisors' adoption of amendments to the Hancock County Zoning Ordinance placing certain land in a "Commercial Resort Zone" was arbitrary and capricious, or whether such governmental action was supported by evidence from a record developed by the Hancock County Planning and Zoning Commission through research and a public hearing showing increasing rural blight and crime coupled with spiking development pressures in the affected area as well as the public need for zoning reforms to assure wise stewardship of economic growth in the area.

STATEMENT OF THE CASE

A. Course of the Proceedings Below:

The Appellants began this civil action by filing a Bill of Exceptions (R.E., pp. 2-6) from a zoning action taken by the Board of Supervisors of Hancock County, Mississippi (hereinafter referred to as "the Board of Supervisors" or "the Board"). In their Bill of Exceptions, the Appellants sought to overturn a duly adopted resolution of the Board of Supervisors approving revisions to the Hancock Zoning Ordinance that would create a C-4 Commercial Resort District on certain property bordering the Mississippi Sound and Bayou Caddy in the unincorporated Lakeshore area of Southwestern Hancock County, Mississippi. The Appellants claimed that they were "aggrieved" by the Board of Supervisors' decision and they appealed the Board's action to the Circuit Court of Hancock County pursuant to MCA § 11-51-75.

The County's zoning amendment process at issue in this proceeding had its origins in comprehensive studies performed by the Hancock County Planning and Zoning Commission (hereinafter referred to as "the Planning Commission"). These studies showed that reform of the

County's Zoning Ordinance was required to improve increasingly blighted conditions in the area and the growing and changing needs of the resort tourism industry. The Planning Commission's studies also concluded that certain areas in the Clermont Harbor - Lakeshore area should be re-zoned as Resort Districts to carefully shepherd redevelopment in the area anticipated and planned in conjunction the approved expansion of gaming infrastructure in the area.

After compiling data from its studies, the Planning Commission held a public hearing on April 14, 2005, in which it accepted additional evidence from the public in the form of documents and oral statements both for and against the proposed zoning reforms. The Planning Commission duly adopted a resolution recommending adoption of the zoning amendment. (R.E., pp. 13-19). On May 2, 2005, after full public review of the record prepared by the Planning Commission, the Board of Supervisors passed a resolution approving the amendments to the zoning ordinance recommended by the Planning Commission. (R.E., p. 20).

On May 11, 2005, the Appellants submitted their Bill of Exceptions to the Board of Supervisors and, after execution by the President of the Board of Supervisors, the Board forwarded the Bill of Exceptions to the Hancock County Circuit Clerk for docketing. Two private companies, Paradise Properties, Group, L.L.C. and Kudo Developers of Mississippi, L.L.C., who had expressed an interest in developing parcels in the area intervened into the Circuit Court action.¹

The Circuit Court heard oral arguments of all parties, reviewed the record, briefs and analyzed all applicable law. On March 13, 2006, the Circuit Court issued its Opinion finding that the Board of Supervisors' adoption of the zoning ordinance amendment was supported by substantial

¹ In August 2005, Hurricane Katrina wrought immense destruction on the Clermont Harbor - Lakeshore communities and on Hancock County in general.

evidence, that there were sufficient changes in conditions to support creating the new Resort District, the adoption of the Resort District was supported by a majority of the residents of the area and that the Board of Supervisors considered the public need and determined that the public need supported creation of the Resort District. The Circuit Court further found that “the amendment is consistent with the stated goals of the comprehensive zoning plan including economic and tourism development while providing control over development in the area.” The Circuit Court concluded that the Board of Supervisors’ adoption of the zoning ordinance amendments was a valid legal function of the Board and was not arbitrary and capricious and was supported by substantial evidence. Accordingly, the Court issued its Order affirming the Board of Supervisors’ May 2, 2005, resolution approving the amendment to the Zoning Ordinance. (R.E., pp. 7-10). On April 10, 2006, the Appellants filed their Notice of Appeal of the Circuit Court’s Opinion. (R.E., pp. 11-12).

B. Statement of Facts

1. Geography of the Subject Area.

The Board of Supervisors voted to create a new Commercial Resort District in the unincorporated area of Southwestern Hancock County. The Resort District is bordered by the Mississippi Sound on the East and Southeast, by Poinset Avenue on the East and Northeast, by the railroad right of way on the Northwest and by Turkey Bayou and Bayou Caddy on the West and South. Hereinafter, this area of land will be called, “the Resort District” or “the Subject Area”. *See* map setting forth the boundaries of the new Resort District. (R.E., p. 67).

The Resort District is accessible from the beachfront sections of the Cities of Bay Saint Louis and Waveland via Beach Boulevard. Traveling West and Southwest, one would pass Buccaneer State Park and traverse the Clermont Harbor Community to enter the Resort District. Beach

Boulevard terminates at the mouth of Bayou Caddy at the current Silver Slipper Casino site. From the North, the Resort District is assessable from Highway 90 via Lakeshore Road. *See* large fold out land use map attached to Record Exhibit #1.

2. History and Demographics of the Subject Area.

Documents in the record and oral testimony to the Planning Commission show the Clermont Harbor-Lakshore area developed approximately 100 years ago along with a railroad built along the Coast. The area was originally known as a vacation area for families from Southeastern Louisiana and Southern Mississippi who built modest weekend retreats and fishing camps. It was considered a beautiful area for weekend visits or for families to spend portions of the summer away from the city. Clermont Harbor boasted a general store and a tourist hotel. The area also supported a small fishing industry with a commercial dock servicing fishing vessels at the mouth of Bayou Caddy. (R.E., pp. 73 and 139).

In 1990, the State of Mississippi enacted laws regulating legal dockside gaming via local option along the Mississippi River and the Mississippi Sound. Hancock County was the first coastal county to approve regulated gaming along the Mississippi Sound.

Although Hancock County was experiencing explosive population growth prior to the advent of regulated gaming, County leaders recognized that gaming would bring even more growth.

Hancock County's population grew by twenty-four percent (24%) between 1960 and 1970. Between 1970 and 1980, the population in Hancock County grew about forty percent (40%). Population growth between 1980 and 1990 maintained this growth momentum. Between 1980 and 1990, the population in Hancock County grew by thirty percent (30%).

See, p. 9 Comprehensive Plan. (R.E., p. 72). Significantly, by the 1980s, growth was occurring more rapidly in the unincorporated sections of Hancock County and by 1990, for the first time since

1940 a greater percentage of the population lived in unincorporated areas than in the two municipalities, Bay St. Louis and Waveland. *Id.*

3. 1991 Comprehensive Plan and Original Zoning Ordinance.

In 1991, Recognizing the need to manage this growth in an orderly fashion, the Hancock County Board of Supervisors commissioned the Southern Mississippi Planning and Development District to work with a Citizens Advisory Committee to develop a master plan for the County's economic development. From this effort, the Comprehensive Plan and Land Use Map ("Comprehensive Plan") referenced above was developed and adopted by the Board of Supervisors. Prior to this time, Hancock County had no zoning ordinance or a master plan for development. In the Background Statement, the plan's authors said that the Plan acts as a "Policy Statement" drafted to "guide the County into the 21st Century. (R.E., p. 68).

The Citizens Advisory Committee took inventories of the assets and liabilities of the County and from these lists formulated goals and objectives "to ensure social, economic and land use development that protects and enhances the quality of life enjoyed by citizens and visitors." *Id.* The drafters identified Preservation, Control and Diversification as the three most important issues to arise from their studies. With respect to Preservation, the Comprehensive Plan recommends that historical resources be documented and utilized. On the issue of Control, the Comprehensive Plan acknowledges "a strong pro-growth sentiment within the county", but recognizes that the growth must be controlled in the short term to prevent long term problems. Finally, on the issue of Diversification, the Comprehensive Plan defines the need to "diversify the local economy away from over-reliance on government employment." (R.E., pp. 68-71).

In keeping with these themes, the Comprehensive Plan lists Economic Development as a primary Goal and Objective for the County. The Comprehensive Plan's first economic development recommendation is to develop "tourism as an industry, and consider dockside gaming, heritage tourism and recreational tourism as facets of that industry." The Comprehensive Plan also recommends establishing "zones for new commercial and industrial development." (R.E. 70-71).

The authors of the 1991 Comprehensive Plan recognized that dockside gaming would impact the County but the full potential of that impact was clearly not understood at the time. The Comprehensive Plan predicted that the impact of gaming would depend on the type of amenities offered. The Comprehensive Plan anticipated that two types of gaming facilities would emerge: self-contained resorts with restaurants and overnight accommodations and facilities catering to day bus trips from the New Orleans area. The authors of the Comprehensive Plan predicted that visitors to these casinos would be unlikely to patronize local businesses but that new markets would emerge for local businesses to "service contracts of the gaming resorts." The Comprehensive Plan anticipated that the Bayou Caddy site would host a casino catering to the package bus tour market from New Orleans. (R.E., pp. 79 and 81).

With the Comprehensive Plan in place, on January 6, 1997, the Board of Supervisors adopted the Hancock County Zoning Ordinance, ("the Zoning Ordinance") See Record Exhibit # 24. The Board of Supervisors adopted the Comprehensive Plan and the Zoning Ordinance and map to ensure stability and harmony for the orderly development and growth of Hancock County. With respect to the Subject Area, the 1997 Zoning Ordinance classified the strip along Beach Boulevard as C-2 (Highway Commercial), the area along Poinset Avenue as R-2 (Medium Density Residential), and the remainder of the area as A-1 (General Agricultural). *Id.*

4. Planning Commission Studies.

The arrival of the new millennium saw Hancock County continuing to experience rapid population growth and increased interest in the development of gaming and other resort type properties. With respect to the Subject Area, the Planning Commission and the Board of Supervisors were aware of approval of plans to locate a new casino resort development at the mouth of Bayou Caddy and increased interest in redevelopment of the surrounding area into commercial report properties servicing patrons of the Casino and higher end vacationers. (R.E., pp. 100, 115, 116). Coupled with increasing citizen complaints about blighted properties in the area and community concerns about crime and the nature of businesses that may open in the area in the wake of Casino development under existing C-2 zoning classifications, the Planning Commission and the Board of Supervisors began a study of new zoning regulations to promote smart up scale redevelopment of the Subject Area.

In their study, the Planning Commission considered zoning regulations from jurisdictions, a report on rehabilitation of obsolete subdivisions, a Mississippi Department of Transportation policy statement on removal of automobile junkyards, a policy paper on reducing sewer effluents from septic tanks and proposals for limiting outdoor billboard signs.² The Planning Commission also considered development proposals for the Subject Area and Clermont Harbor. (R.E., pp. 115-116). From these studies, the Planning Commission developed a proposal to amend the Zoning Ordinance by adding new two new zoning classifications and by changing the zoning classification of the Subject Area from A-1 (General Agricultural) and C-2 (Highway Commercial) to the new

² Copies of Zoning Ordinances from other jurisdictions and other documents considered in the Planning Commission's studies are found in Record Exhibits 18, 19, 20, 23, 40, 41, 42, 43, 45, 53 and 55.

zoning classification, C-4 (Commercial Resort District). The Planning Commission also proposed changing the zoning classification of a strip along the beach front in Clermont Harbor from C-1 (Neighborhood Commercial) to C-3 (Commercial Resort District) (R.E., p. 117).

The Planning Commission announced that the proposed amendments were under review pursuant to Section 907.01.02 of the Zoning Ordinance which refers to a “change in condition” within the area designated for change. The Planning Commission also announced that the basis for the changes was in accordance with the Comprehensive Plan and would be enacted to promote the general welfare of the citizens of Hancock County. (R.E., p. 118).

5. Public Hearing - Development of the Record.

The Planning Commission published Notification of a Public Hearing to be held on April 14, 2005, to consider the amendments to the Zoning Ordinance specifically referencing the proposal to change the zoning classification of the Subject Area. (R.E., p. 119). The Notice was published in the Sea Coast Echo, the weekly newspaper for Hancock County. *Id.*

The Notice of Public Hearing invited interested persons to visit the Zoning Office to obtain more information and announced that copies of the proposed amendments were available at the Hancock County Libraries and at the Hancock County Courthouse. *Id.* The Agenda for the Public Hearing outlined the proposed amendments to the Zoning Ordinance, included the text of the proposed amendments and included a map of the proposed Resort Districts with the proposed zoning classification changes written thereupon. (R.E., pp. 21-67).

The Planning Commission convened the Public Hearing on the proposed amendments on April 14, 2005, as advertised. Almost 100 persons attended the Public Hearing as evidenced by the

Attendance Sheet. (R.E., pp. 120-126). Most of those in attendance listed their home addresses as within the Lakeshore-Clermont Harbor area of Hancock County. *Id.*

The Planning Commission established the format of the Public Hearing so that it was conducive to full expression of data and opinions by those in attendance via written documents and/or oral statements. The attendees offered several documents into the record which provided the Planning Commission with substantial evidence with which to determine that the Subject Area had experienced and was experiencing changed conditions.

Mr. Jim Maness, a self-described “concerned citizen” residing at 5370 S. Beach Blvd., submitted a “Quality of Life?” brochure he assembled highlighting many blighted properties and other problems with the Subject Area that could be alleviated through careful high-end development. (R.E., pp. 127-139). Mr. Maness wrote that he is a long time resident of the Lakeshore-Clermont Harbor community who had personally witnessed the area decline. Mr. Maness said the area was once a “beautiful place to visit” for “weekend travelers” who loved the Coast. The Mr. Maness observed that in recent years, to the detriment of the community, many of the weekend camps had become occupied by permanent residents who located in the unincorporated area to more freely engage in illegal activities such as drug trafficking, domestic violence, public drunkenness and the like. Mr. Maness extolled the Planning Commission take note of this evidence of community decline and take steps to clean-up the area “to ensure safe utilities, jobs an (sic) recreation for our children.” Mr. Maness also included in his brochure a number of photographs with captions graphically illustrating many of the aforementioned symptoms of his community in decline. *Id.*

Ms. Millie Usher submitted to the Planning Commission’s public hearing a document she titled “Visions for Improvements in Clermont Harbor.” (R.E., pp. 140-144). Ms. Usher’s visions

document describes badly needed infrastructure improvements such as mosquito breeding clogged ditches, too narrow or unpaved roads, lack of sidewalks, junk vehicles in yards, dilapidated houses, littered properties and the like. Ms. Usher also noted the rise of petty crime such as littering and disturbing the peace. She pointed out the need for recreation facilities to occupy area youth who were out on the streets at all hours. Ms. Usher expressed a vision of Clermont Harbor with a "park-like" appearance on the beach front featuring a new seawall, a bike path, restrooms, street lights with underground wiring and subtropical landscaping. Ms. Usher also expressed the need to quickly implement plans to clean and rebuild the sand beach along Clermont Harbor. *Id.*

The Planning Commission also accepted a "Rezoning" petition that was signed by 64 persons. (R.E., pp. 145-148). Mr. George Ladner presented the Petition and represented to the Planning Commission that it was executed by "the majority of the landowners" in and near the proposed Resort District. (R.E., pp.87 and 145-148). The Petitioners expressed their support for creation of the Resort District in Lakeshore as well as the proposal to create a smaller Resort District along the beachfront in Clermont Harbor. *Id.*

The Planning Commission added to the Public Hearing record 14 form "Memoranda" filled out by persons opposed to both the proposed Resort District in the Subject Area and the proposed smaller Resort District along the beachfront in Clermont Harbor. (R.E. 149-162). Likewise, the Planning Commission accepted form Memoranda from 31 individuals who supported the Resort District in the subject area but opposed reclassification of the beachfront strip in Clermont Harbor. (R.E. 163-193).

The Planning Commission also heard oral statements for and against the proposed Resort Districts. According to one count, 13 persons spoke in favor of creating the Resort Districts and 14

persons spoke against them. (R.E., pp. 194-195). Individuals in favor of the reform spoke of the need to support business development in the area. (R.E., p. 87). Others favoring reform spoke of the need for economic development so children growing up in the area would not have to leave the area upon graduation. Others yearned for nicer amenities closer to their homes so that they would not have to drive all the way to Gulfport or Slidell, Louisiana, for shopping, dining and entertainment activities. (R.E., pp. 90 and 96). One individual argued that condominium tower developments have less environmental impact since they house a greater number of people on a smaller geographic footprint than the same number of people living in single family homes in typical suburban sprawl. (R.E., pp. 88-90). This person also pointed to the need for better fire protection to reduce insurance rates and argued that increased development would support more fire fighters which in turn would reduce insurance rates. *Id.*

Many of those listed as speaking against the proposed changes actually limited their opposition to the other smaller Resort District proposed for the Clermont Harbor beachfront but were not opposed to creation of a Resort District in the Subject Area. For example, Ms. Linda Allen opposed placing condominiums in residential sections of Clermont Harbor but she did not seem to oppose development of Subject Area in Lakeshore. (R.E., p. 90). Others spoke of the need for the County to impose building codes to assure that new development was constructed in a livable manner. Others seemed to oppose the proposed reforms for sentimental or family history reasons lamenting a bygone era they recalled with nostalgia. (R.E., pp. 91-94).

The Planning Commission also heard evidence of changes in the Subject Area from the development of a new Casino called the "Silver Slipper" at the mouth of Bayou Caddy. (R.E., pp. 99-100). Ms. Patty Packard expressed her concern that the current zoning classification, C-2

(Highway Commercial), would allow undesirable “spin-off” development in the area as a result of the Silver Slipper resort. Specifically, she expressed her fear that the C-2 (Highway Commercial) designation would not prevent the location of sexually oriented businesses such as “gentlemen’s clubs” from “popping up” in the area. (R.E., p. 100). A planning commissioner explained to Ms. Packard that sexually oriented businesses of that ilk would not be permitted in the areas classified as Resort Districts. (R.E., pp. 100-101).

By the time of the April 2005 Public Hearing, the Planning Commission and the Board of Supervisors had the benefit of almost 15 years of experience studying the economic impact of regulated gaming and associated resort properties on the Mississippi Gulf Coast. Without the benefit of this hindsight, the authors of the 1990 Comprehensive Plan could not anticipate the extent to which resorts with regulated gaming would increase the volume and change the nature of the Coast’s tourism industry. For example, the 1990 Comprehensive Plan predicted that out-of- town Casino guests would be unlikely to patronize local business establishments and that any Casinos at Bayou Caddy would not attract overnight visitors but would rather cater to the “package bus tour market” from the New Orleans area. (R.E., pp. 79-81).

The Board of Supervisors and the Planning Commission knew well the potential of high-end resort developments to offer a broad entertainment package attracting family vacationers as well as business conventioners from throughout the Southeastern United States. They were also aware of the “spill over” business multiplier available for enterprising local hotels, restaurants, golf courses, fishing charters, art galleries, gift shops, water parks and other amenities. This recognition of the need to promote smart development of tourism infrastructure collateral to the Silver Slipper Casino at Bayou Caddy that was under development at the time of the April 2005 Public Hearing is clearly

reflected in the transcripts of these hearings. (R.E., p. 100). Of course, this type of tourism infrastructure development perfectly jibes with the vision of the Comprehensive Plan to diversify the Hancock County economy with a wide variety of expanded tourism opportunities to grow this sector of the economy.

6. Planning Commission Resolution.

After hearing evidence in the form of written documents and oral statements, the planning commission entertained a motion for a resolution to approve amending the zoning map to reclassify the Subject Area as C-4 (Commercial Resort). A commissioner seconded the motion and the Planning Commission unanimously approved the motion by voice vote. (R.E., pp. 13-19 and 107-108).³ In its resolution approving the zoning reform, the Planning Commission made the following findings of fact from the evidence it had considered in its studies and collected at the Public Hearing:

1. Conditions had changed in and around the Subject Area making a change in the zoning classification necessary, desirable and in the public interest;
2. The proposed change was consistent with the goals and objectives of the Comprehensive Plan;
3. Existing uses of the property within the Subject Area were compatible with commercial resort uses;
4. The Subject Area is currently zoned C-2 (Highway Commercial), R-2 (medium density residential), and A-1 (general agricultural) but was planned

³ The Planning Commission tabled for further study the proposal to reclassify the beachfront section of Clermont Harbor as R-3 (Commercial Resort District). (R.E., pp. 17).

for commercial resort uses to complement and support the new Bayou Caddy Casino which is scheduled to begin operation later this year (in late 2005);

5. The Subject Area was better suited for uses allowed in a C-4 (Commercial Resort) district than for commercial, residential and agricultural uses; and
6. The trend of development in the vicinity of the Subject Area called for more commercial resort uses to support the commercial and recreational uses which would develop in conjunction with the Bayou Caddy Casino and the new sand beach adjacent thereto. (R.E., 18-19).

7. Board of Supervisors Decision.

Following the Public Hearing and the Planning Commission's approval of the proposed Resort District, the Board of Supervisors considered the issue including the entire record created by the Planning Commission. On May 2, 2005, the Board of Supervisors passed a resolution adopting the plan to enhance resort development opportunities by re-zoning the Subject Area as a C-4 Resort District. In the same resolution, the Board of Supervisors required that before any development of construction project could be approved within the Subject Area, that the developer and the Board of Supervisors must enter into a written development agreement addressing requirements for development including but not limited to infrastructure costs. The Board of Supervisors' resolution incorporates by reference the entire record developed by the Planning Commission. (R.E., p. 20).

SUMMARY OF THE ARGUMENT

The Appellant filed this appeal seeking reversal of the Board of Supervisors' decision to create a Resort District to guide the proper development of the Subject Area. To reverse the Circuit Court's Order affirming the Board of Supervisors' zoning decision, the Appellants must clearly show

the Board's decision was "arbitrary and capricious" or without a substantial evidentiary basis. If the issue is "fairly debatable" based on the evidence in the record, the decision must be affirmed.

The Board of Supervisors based its zoning decision on evidence in the record showing that the character of the Subject Area had changed and that the public need required a zoning change to create a Commercial Resort District to foster additional resort development in the Subject Area along with the recently approved Silver Slipper Resort. In reaching this decision, the Board of Supervisors noted substantial evidence indicating that increasing blight and criminal activity had changed the character of the neighborhood requiring modification of the zoning classification of the Subject Area. The Board of Supervisors also reviewed substantial evidence showing that increasing development pressures had changed the character of the Subject Area.

Finally, the Board of Supervisors considered substantial evidence in the record of their constituents' public need for creation of a Resort District in the Subject Area to foster desirable economic development in accordance with the County's Comprehensive Plan. The record shows the Planning Commission and the Board of Supervisors used their own knowledge and familiarity with Southwestern Hancock County to assist in making their determination that substantial changes in the neighborhood coupled with the public need for redevelopment required creation of a tightly controlled Resort District to assure economic revitalization of the Subject Area.

ARGUMENT

I. Standard of Review

The Mississippi Supreme Court has consistently held that "classification of property for zoning purposes is a legislative rather than a judicial matter." *Faircloth v. Lyles*, 592 So.2d 941, 943

(Miss. 1991), citing, *W.L. Holcomb, Inc. v. City of Clarksdale*, 217 Miss. 892, 900, 65 So.2d 281, 284 (1953). Thus, the order of a governing body such as the Hancock County Board of Supervisors must be upheld upon judicial review unless the opponent can **clearly show** that the order was “arbitrary, capricious, discriminatory, or is illegal, or without a substantial evidentiary basis.” *Id.*, citing, *Barnes v. Board of Supervisors, DeSoto County*, 553 So.2d 508, 510 (Miss.1989).

The action of the Board of Supervisors in enacting or amending an ordinance, or its action of rezoning, carries a presumption of validity, casting the burden of proof upon the individual or other entity asserting its invalidity. *Ridgewood Land Co. v. Moore*, 222 So.2d 378, 379 (Miss.1969). On appeal we cannot substitute our judgment as to the wisdom or soundness of the Board's action. *Currie v. Ryan*, 243 So.2d 48, 52 (Miss.1970); *Moore v. Madison County Bd. of Supervisors*, 227 So.2d 862, 864 (Miss.1969).

*Id.*⁴

Put another way, the Supreme Court has explained that the Board of Supervisors' decisions are not “arbitrary and capricious” and should be upheld if the issue in controversy is “fairly debatable”. *Id.* In other words, if the Board of Supervisors' zoning decision is supported by some evidence in the record, the courts have no authority to overturn Board's zoning decision. *Id.* citing, *Saunders v. City of Jackson*, 511 So.2d 902, 906 (Miss.1987) and *Broadacres, Inc. v. City of Hattiesburg*, 489 So.2d 501, 505 (Miss.1986).⁵

⁴ Our Court of Appeals concurs, “zoning is a legislative matter, the validity of which is presumed; therefore, we must not interfere or substitute our judgment for the wisdom or soundness of the local governing body.” *Tippitt v. City of Hernando*, 909 So.2d 1190, ¶ 5 (Miss. App. 2005).

⁵ Again, the Court of Appeals concurs with this standard, “[A] zoning decision by a local governing body, the validity of which appears to be “fairly debatable,” must not be disturbed on appeal, and can only be set aside if the decision clearly appears to be arbitrary, capricious, discriminatory, illegal, or not supported by substantial evidence. *Hilbert*, 597 So.2d at 1280. The Mississippi Supreme Court has described the ““fairly debatable”” standard as the antithesis of arbitrary and capricious, meaning that if a decision could be considered ““fairly debatable,”” then it could not be considered arbitrary or capricious.” *Tippitt v. City of Hernando*, 909 So.2d 1190, ¶ 6 (Miss. App. 2005).

Accordingly, the Board of Supervisors' zoning decision in this case should be upheld unless the Appellants **clearly show** that the Board's decision was arbitrary and capricious. In this case, the Appellants argue that the Board of Supervisors' zoning decision was arbitrary and capricious because it is not supported by "substantial evidence." The Court defines "substantial evidence" as "more than a mere scintilla of evidence" or "something less than a preponderance of the evidence but more than a scintilla or glimmer." *Mississippi Dept. of Environmental Quality v. Weems*, 653 So.2d 266, 280-81 (Miss. 1995).

In the case *sub judice*, the Board of Supervisors' zoning decision is supported by **substantial evidence** in the record. Accordingly, the Board's zoning decision was "fairly debatable" and therefore not "arbitrary and capricious" as a matter of law.

II. Administrative and Judicial Standards for Amending Zoning Statutes

Before reclassifying property from one use or another, a governing body must find that either "(1) that a mistake was made in the original zoning or, (2) that a change in the character of the neighborhood has occurred to such an extent as to justify rezoning and that a public need exists for such action." *Faircloth v. Lyles*, 592 So.2d 941, 945 (Miss. 1991), citations omitted. In this case, the Planning Commission and the Board of Supervisors based their zoning decision on the changes in the Subject Area and the public need for the zoning change.

In addition, the Zoning Ordinance sets forth a procedure for amendments and changes to the zoning ordinance. Consistent with the *Faircloth* decision, the Hancock County Zoning Ordinance specifically provides that:

Change in Condition. Changed or changing conditions in a particular area, or in the county generally, make an amendment to the ordinance necessary and desirable.

Record Exhibit 24, p. 45.

A. Evidence in the Record Shows a Change in the Character of the Neighborhood of the Subject Area.

The Planning Commission's first finding states that conditions in and around the Subject Area had changed making a new zoning classification necessary, desirable and in the public interest. (R.E., p. 18). The record in this case is replete with substantial evidence of changes in the character of the Clermont Harbor - Lakeshore section of Southwestern Hancock County. Thus, a change in the zoning classification of the Subject Property to create a Resort District would be necessary and desirable under the Zoning Ordinance and in accordance with Mississippi jurisprudence.

1. The Board of Supervisors correctly recognized that increasing blight and criminal activity was substantial evidence of changes in the character of the neighborhood requiring modification of the Subject Area's zoning classification.

Our Court of Appeals has recognized that deterioration of a neighborhood or increased crime are evidence of a change in the character of a neighborhood justifying a zoning reclassification. *See*, for example, *Walters v. City of Greenville*, 751 So.2d 1206 (Miss. App. 1999)(oral statement at planning commission was substantial evidence that crime was a serious problem in the neighborhood). The Planning Commission collected substantial and compelling evidence in the form of written documents and oral statements clearly and convincingly showing that the character of Clermont Harbor - Lakeshore section of Hancock County had declined.

Prior to 2005, neighborhood was described as an idyllic rural resort area consisting of fishing camps and cottages that hosted family gatherings during the weekends and summer vacations. By the time of the April 2005 Public Hearing, property owners bemoaned the fact that too many of the properties in the area were "improved" with dilapidated mobile homes, junk cars, derelict vessels

in waterways, and abandoned and decaying houses. (R.E., pp. 127-144). The Planning Commission also received evidence of declines in the public infrastructure in the area in the form of weed clogged ditches with mosquito breeding standing water, narrow unpaved roads incapable of allowing two cars to pass, a lack of sidewalks, uncontrolled litter and beach erosion. The public demanded action from the Planning Commission and the Board of Supervisors to improve living conditions through redevelopment of the Subject Area.

Even more disturbing than the decay of the housing stock and public infrastructure, the Planning Commission's record evidences increasing crime in the area. *Id.* The Court of Appeals, has recognized, that oral statements regarding increased criminal activity in the surrounding neighborhood is substantial evidence of a change in the character of the neighborhood justifying a decision to change the zoning classification. *Briarwood, Inc. v. City of Clarksdale*, 766 So.2d 73, ¶ 34 (Miss. App. 2000). This substantial and compelling evidence of property neglect and increasing crime in the area is certainly one factor that caused the Planning Commission and the Board of Supervisors to conclude that the character of the neighborhood had changed and that the remedy for this blight would be to create a modern Resort District with tight zoning rules to foster specifically targeted upscale resort development.

- 2. The Board of Supervisors correctly determined that increasing development pressures were substantial evidence of a change in the character of the Subject Area and the surrounding neighborhoods justifying a zoning reclassification to assure prudent redevelopment.**

Mississippi Courts also recognize that increasing development pressures may constitute substantial change in the character of a neighborhood so as to justify a change in the zoning designation of an area. For example, in *Briarwood, Inc. v. City of Clarksdale*, 766 So.2d 73, (Miss.

App. 2000), the municipality received substantial evidence that increasing development of multifamily subsidized housing units was over-taxing the public infrastructure of the area. Accordingly, the Court concluded that this increasing development was substantial evidence of a changed condition supporting reclassification of the area from multifamily residential to single and two family residential and thus the municipality's re-zoning order was affirmed since it was not arbitrary and capricious and was fairly debatable. *Id.*, at ¶¶ 27, 28, 29, 36, 37 and 39.

In the case *sub judice*, substantial evidence in the record shows that, at the time of the April 14, 2005 Public Hearing and the May 2, 2005 Board of Supervisors Meeting, the Planning Commission and the Board of Supervisors were aware that the Silver Slipper Resort and Casino was approved for development. (R.E., pp. 99-101). The record further reflects that the Planning Commission and the Board of Supervisors were aware of the multiplier effect that higher end resort development can have on the economy of adjacent neighborhoods and the corollary need to manage this development in a sustainable fashion. *Id.*⁶ Recognizing that future development was inevitable and that new zoning regulation was needed to foster higher end development as opposed to undesirable and potential sleazy development, the Board of Supervisors' decision to create a Resort District in the Subject Area was obviously "fairly debatable" since it was based on the substantial evidence of development pressures spread throughout the record.⁷

⁶ Although delayed by Hurricane Katrina, the Silver Slipper opened in November 2006 and proposes to break ground on a hotel in 2008.

⁷ The record shows that the Planning Commission and the Board of Supervisors were approached by various companies requesting assistance with proposals for real estate development in the Subject Area. (R.E., pp. 115-116).

3. The record clearly shows a public need for creating a Resort District in the Subject Area to properly channel economic development in accordance with the County's Comprehensive Plan.

To rezone based on changes in the neighborhood, the applicant must prove not only substantial change in the character of the area but also a public need for rezoning. *Kuluz v. City of D'Iberville*, 890 So.2d 938, 940 (Miss. Ct. App.2004). In *Kuluz*, the Court found an adequate showing of public need where testimony supported municipality's finding that a proposed RV park furthered the City's recreational and public safety needs. *Id.* at ¶ 10.

In the case at bar, the Planning Commission received substantial evidence supporting its finding that creating the Resort District in the Subject Area served the public interest. The Planning Commission received oral statements and documentary evidence that the Subject Area and its surrounding area were in decline and needed the economic revitalization that resort properties can bring. As noted earlier, the Planning Commission's record documented substantial decline in the condition of private property and the need for public infrastructure improvements in the subject area. (R.E., pp. 127-144).

Also as discussed earlier, neighborhood citizens placed statements in the record complaining about the lack of shopping opportunities, restaurants and entertainment venues in the neighborhood and spoke in favor of this type of commerce for the Clermont Harbor - Lakeshore section of Hancock County. (R.E., pp. 87 and 96). Others spoke of the need for increased recreational and employment opportunities for the young people of Hancock County. (R.E., p. 96). Others were concerned that the current zoning classification, C-2 (Highway Commercial), would allow development of undesirable sexually oriented establishments in the area such as "gentlemen's clubs". (R.E., pp. 100-102).

The record also shows that the Board of Supervisors considered the public need for infrastructure improvements in the Subject Area as a part of its decision to create the Resort District. The Board of Supervisors resolution clearly states that before any development or construction project can be approved in the new Resort District, the developer shall execute a written development agreement setting forth all development requirements, "including but not limited to the infrastructure costs" of any planned development. (R.E. p. 20). This language is substantial evidence of the Board of Supervisors' prudent anticipation of the public need for infrastructure improvements and the need to finance these public works projects in conjunctio

All of this is **substantial evidence** of the **public need** that convinced the Board of Supervisors that creation of a Resort District in the Subject Area was in the best interest of their constituents, the people of Hancock County, Mississippi.

4. **The Planning Commission and the Board of Supervisors properly considered their own knowledge and familiarity with Southwestern Hancock County and found that substantial changes in the neighborhood coupled with the public need for redevelopment demanded revitalization through creation of a tightly controlled Resort District.**

"In determining the factual issues in rezoning, the Board could consider not only the information obtained at the hearing but also their own common knowledge and the familiarity with the ordinance area." *Faircloth v. Lyles*, 592 So.2d 941, 943 (Miss. 1991), citing, *Board of Aldermen of Town of Bay Springs v. Jenkins*, 423 So.2d 1323, 1327 (Miss.1982). Both the Hancock County Planning Commission and the Board of Supervisors were aware of the urgent need for redevelopment occasioned by the documented decline in the private property and public infrastructure in the environs of the Subject Area. (R.E., pp. 127-144). They were also fully aware

of the highly positive potential impact that high end commercial resort development can have on surrounding neighborhoods when proper zoning regulations are in place. Armed with this knowledge and familiarity with the changing conditions in the Subject Area and the public needs of their constituents, the Planning Commission and the Board of Supervisors made the correct decision and established a highly structured Commercial Resort District to assure proper redevelopment of the Subject Area.

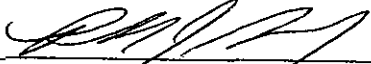
CONCLUSION

The Board of Supervisors' decision to create a Resort District is supported by substantial evidence in the record showing that the Subject Area and its surroundings had experienced changes in their character wrought by private property and public infrastructure decline, increasing crime and development pressures occasioned by approval and development of a casino resort within the Subject Area. The Board of Supervisors' re-zoning decision was consistent with public need since the designation of the Subject Area as a Commercial Resort District would spur economic development and assure that such development was conducted in a way compatible with an upscale resort district. The Planning Commission and the Board of Supervisors legitimately relied upon their own knowledge and over 15 years of experience with regulated gaming to determine that the proposed re-zoning was required by changes in the character of the neighborhood and would satisfy the public need for additional shopping and entertainment amenities and public infrastructure improvements. Accordingly, the Appellee Board of Supervisors requests that this Court affirm the March 13, 2006 Order of the Circuit Court of Hancock County affirming the decision of the Board of Supervisors

to Amend the Zoning Ordinance of Hancock County to reclassify the Subject Area as a Commercial Resort District.

Respectfully submitted this the 14th day of March, 2007

HANCOCK COUNTY

By: 
Ronald J. Artigues, Jr.
Its Attorney

CERTIFICATE OF SERVICE

I, Ronald J. Artigues, Jr., attorney for the Appellee, Board of Supervisors for Hancock County, Mississippi, certify that I have this day sent by overnight delivery for filing the original and three copies of this Brief to the Supreme Court Clerk of Mississippi and mailed postage prepaid, one copy of the foregoing Appellee Brief to the Honorable Stephen B. Simpson, P.O. Box 1570, Gulfport, MS 39502, the Honorable Robert B. Wiygul, 1025 Division St., Suite C, Biloxi, MS 39530, the Honorable Donald J. Rafferty, 2118 18th St., Gulfport, MS 39502-4252 and the Honorable Joseph Meadows, P.O. Box 1076, Gulfport, MS 39502-1076.

THIS, the 15th day of March, 2007.



Ronald J. Artigues, Jr.