IN THE COURT OF APPEALS
STATE OF MISSISSIPPI
NO. 2007-CA-00601

MICHAEL L. BRIDGE **APPELLANT**

VS.

MAYOR AND BOARD OF ALDERMEN
CITY OF OXFORD, MISSISSIPPI, ET AL. **APPELLEES**

Appeal from the Circuit Court of Lafayette County, Mississippi
Cause No. L05-428

BRIEF OF THE APPELLANT MICHAEL L. BRIDGE

Oral Argument Requested

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CERTIFICATE OF INTERESTED PERSONS

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 Court may evaluate possible disqualification or recusal.

PARTIES:

Appellant: Michael L. Bridge

Appellees: Mayor and Board of Aldermen
City of Oxford, Mississippi

Richard Howorth, Mayor
William Baker, Alderman
E. O. Oliver, Alderman
Pat Patterson, Alderman
Ulysses Howell, Alderman
Janice Antonow, Alderwoman
Jon Fisher, Alderman
Preston E. Taylor, Alderman

Ralph Coleman

Lucy Lynn Robinson
Mary Sue Robinson

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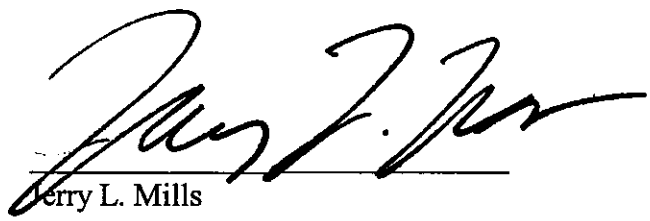
This the 19th day of October, 2007.



Jerry L. Mills

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF THE ISSUES

Did the Circuit Court err in affirming the decision of the Mayor and Board of Aldermen to rezone certain property based upon the following findings:

1. That there was a change in the character of the neighborhood.

2. That the rezoning was justified based upon a mistake in the original zoning.

3. That the rezoning is consistent with Oxford's Comprehensive Plan.

As a result of these findings the following specific issues arise in this appeal.

4. Does the lack of change over a thirty-year period constitute a change in the character of the neighborhood to justify rezoning?

5. Is ignorance of the provisions of a zoning ordinance the type of mistake which justifies rezoning?

6. Is the procedure proposed by Oxford - amend the zoning ordinance and then amend the Comprehensive Plan to comply with the zoning ordinance – compatible with the requirement that zoning regulations shall be in accordance with the comprehensive plan?

II. STATEMENT OF THE CASE

On May 23, 2005 a group of individuals applied for an amendment to the zoning map of the City of Oxford seeking to rezone certain property owned by the Appellant. (R-596) The Petitioners had no ownership interest in the property sought to be rezoned. (R-596)

The initial public hearing on the Petition was held before the Oxford Planning Commission. A motion to rezone died there for the lack of a second before the planning commission. (R-596). The matter was then appealed to the Mayor and Board of Aldermen.

At the meeting of the Mayor and Board of Aldermen held on October 4, 2005, an ordinance was adopted rezoning the property from RB[1] to R1A[2]. (R-166, 167) The Ordinance was approved based on a motion containing the following findings: "I am basing this motion on substantial public need, changes in the community character and mistakes that were made during the comprehensive planning process regarding this area." (R-184).

Being aggrieved by the rezoning, the property owner appealed to the Circuit Court. The matter was heard by the Court. The Court correctly set forth the following facts in his opinion:

1. In 2004, the City adopted its comprehensive plan. Under the plan the north side of Price Street was zoned RB. In May, 2005, Lucy Robinson and others filed a petition with the Oxford Planning Commission requesting a zoning amendment to have a portion of Price Street rezoned from RB (multi-family residential) to RIA (single family residential). The thrust of the petition was that Price Street had remained a traditional single-family residential neighborhood and an error had been made by designating the area RB (multi-family residential) rather than RIA (single-family residential). The matter was heard before the Planning Commission in July, 2005 and died for lack of a motion. R- 1071, RE-8-9.

2. The rezoning of Price Street was then presented to the City and was considered at the September 6, 2005, September 20, 2005, and the October 4,2005 meetings. Public comments were received at the September 6 and October 4 meetings. After a third reading, a motion was made to rezone Price Street from its current zoning of RB (multi-family residential) to RIA (single- family residential). The motion was based upon evidence presented at the previous meetings on substantial public need, changes in community character, and mistakes that were made during the comprehensive planning process regarding the Price Street area. The motion was duly seconded and all aldermen present voted for the passage thereof. Alderman Patterson had recused himself and was absent during the vote. Appellant Bridge appealed the decision of the Board of Aldermen to this Court. R-1071. RE-10.

[1] A two-unit residential use
[2] A single family residential use

III. SUMMARY OF THE ARGUMENT

Mississippi follows a modified version of the Maryland Rule in rezoning matters. In order to meet the requirements of that rule as applied in Mississippi the applicant bears the burden of establishing:

1. That there was a mistake in the original ordinance or

2. That there has been a substantial change in the character of the neighborhood and

3. That there is a public need for the rezoning.

Appellant submits that the Circuit Court erred in finding that this burden was met. The alleged mistake found to exist was that the aldermen simply made a mistake in adopting a comprehensive plan calling for the subject property to be RB[3] and in adopting a zoning ordinance that called for the subject property to remain zoned as it has been since 1971 – RB. The Appellant respectfully submits that the mistake, if any, was one of judgment and not a mere clerical or administrative mistake.[4]

Appellant urges that the Circuit Court erred when it found that there had been a substantial change in the character of the neighborhood. The evidence reflects that the only change over the last third of a century was the construction of one or more duplexes as permitted under the RB zoning classification in place during that time.

Finally, both the courts and legislature of this state require that zoning ordinances be in conformity with a city's comprehensive plan. In October of 2004 the City of

[3] RB is defined in Oxford's comprehensive plan as two-unit residential.

[4] See *Town of Florence v. Sea Lands, Ltd.* 759 So.2d 1221, 1225 (Miss.,2000)This Court has held that "a mistake within the meaning of the law is not a mistake of judgment, but, rather, a clerical or administrative mistake." *City of New Albany v. Ray,* 417 So.2d 550, 552 (Miss.1982).

Oxford adopted a new comprehensive plan. This comprehensive plan followed the dictates of Section 17-1-1 by including a future land use map which graphically depicted the "general distribution and extent of land uses" in the City of Oxford. That map clearly shows the subject property as RB. As of the date this record closed it had not been amended to reflect the zoning action taken in this case.[5] Appellants respectfully submit that the zoning change is incompatible with the future land use portion of the City of Oxford's newly adopted comprehensive plan.

IV. ARGUMENT

A. THE LOWER COURT ERRED IN FINDING THAT THE RE-ZONING WAS IN COMPLIANCE WITH THE COMPREHENSIVE PLAN

The Supreme Court has long held that zoning ordinances must be in compliance with a municipality's comprehensive plan. The undisputed evidence is that the zoning amendment now before the Court does not comply with the comprehensive plan. While our Supreme Court has always required that planning be done in accordance with a comprehensive plan, it was not until 1988 that the term "Comprehensive Plan" was defined. In that year the legislature defined Comprehensive plan as follows:

> (c) "Comprehensive plan" means a statement of public policy for the physical development of the entire municipality or county adopted by resolution of the governing body, consisting of the following elements at a minimum:
> (i) Goals and objectives for the long-range (twenty (20) to twenty-five (25) years) development of the county or municipality. Required goals and objectives shall address, at a minimum, residential, commercial and industrial development; parks, open space and recreation; street or road improvements; public schools and community facilities.
> (ii) **A land use plan which designates in map or policy form the proposed general distribution and extent of the uses of land for residences, commerce, industry, recreation and open space,**

[5] The future land use map is contained in the record before the Court. However the map is color-coded. The maps in the record are copied in black and white. A color copy is attached hereto as Exhibit "A". The subject property is circled and noted on Exhibit "A".

> **public/quasi-public facilities and lands.** Background information shall be provided concerning the specific meaning of land use categories depicted in the plan in terms of the following: residential densities; intensity of commercial uses; industrial and public/quasi-public uses; and any other information needed to adequately define the meaning of such land use codes. Projections of population and economic growth for the area encompassed by the plan may be the basis for quantitative recommendations for each land use category.
> (iii) A transportation plan depicting in map form the proposed functional classifications for all existing and proposed streets, roads and highways for the area encompassed by the land use plan and for the same time period as that covered by the land use plan. Functional classifications shall consist of arterial, collector and local streets, roads and highways, and these classifications shall be defined on the plan as to minimum right-of-way and surface width requirements; these requirements shall be based upon traffic projections. All other forms of transportation pertinent to the local jurisdiction shall be addressed as appropriate. The transportation plan shall be a basis for a capital improvements program.
> (iv) A community facilities plan as a basis for a capital improvements program including, but not limited to, the following: housing; schools; parks and recreation; public buildings and facilities; and utilities and drainage. [Emphasis Added] Miss. Code Ann. § 17-1-1.

The element which provides the clearest guidance as to how the comprehensive plan contemplated future development for the subject property is the future land use map. An examination of the future land use map leaves no room for dispute on the issue of whether this zoning change complied with the comprehensive plan. The comprehensive plan contemplates that the land use codified into the zoning ordinances since 1971 would continue.

At the oral argument before the Circuit Court counsel for the City of Oxford had to concede that the comprehensive plan was never amended to comply with the zoning change. Counsel for the City anticipated that if this zoning change is upheld the city would move forward with an amendment to the comprehensive plan to bring it into compliance with the zoning ordinance. (T-16-17). With all due respect Oxford has it backwards. The zoning ordinance is supposed to be in compliance with the

comprehensive plan at the time the zoning ordinance is passed. As of the date the record in this matter closed, Oxford had never amended its comprehensive plan to correct the alleged mistake. Oxford has placed the cart before the horse.

It is important to note that the City of Oxford adopted its comprehensive plan just a year before this rezoning occurred. That comprehensive plan showed the subject property as being expected to develop as RB. To date that comprehensive plan has never been changed. The Supreme Court recently note in reversing a rezoning that "There is a strong presumption, therefore, that a municipality carefully considered its current and future needs when adopting its plan for development. **The decision to change such a plan a mere two years after its adoption is suspect.**" *Town of Florence v. Sea Lands,* Ltd. 759 So.2d 1221, 1225 (Miss.,2000). Here, the evidence suggests that Oxford simply changed its mind a year after it adopted its comprehensive plan. A year after it adopted a zoning ordinance carrying forward a zoning classification that had been in existence since 1971.

B. THE LOWER COURT ERRED IN FINDING THAT REZONING WAS JUSTIFIED ON THE GROUNDS OF MISTAKE.

The Court below erred in finding that rezoning the Appellant's property was justified on the grounds of a mistake in the original zoning. The Court found:

> Since the early 1970's, the record indicates that both the north and south sides of Price Street were zoned RB (multi-family residential). When the comprehensive plan was adopted, a majority of the lots on the south side of Price Street were zoned RIA (single family residential) but the north side of Price Street remained RB. The lots on the north and south sides of Price Street are similar, single family houses on small lots. The record is clear that there were similar mistakes in the comprehensive plan where neighborhoods had been incorrectly zoned and these mistakes were subsequently corrected.

> It is entirely understandable that in the development of a comprehensive plan of this magnitude mistakes would be made which would require corrections. The Court realizes that in order to reclassify property on the criteria of a mistake in the original zoning that the mistake must not be a mistake of judgment, but rather a clerical or administrative mistake. *Town of Florence Vs. Sea Lands, LTD*, 759 So. 2d 1221 (Miss. 2000).
>
> The Court is of the opinion that the record clearly reflects that the error in failing to rezone the Price Street property as RIA (single family residential) was not a mistake of judgment but one of omission or oversight. The issue of mistake is fairly debatable.

The Appellant respectfully disagrees. It should be noted that in order for the mistake relied on to have occurred, it would have to be repeated, first in the Comprehensive Plan and then again in the Zoning Ordinance. Essentially, this line of reasoning would justify a new basis for rezoning. Henceforth an alderman would be able to assert that he or she was ignorant of the terms of a zoning ordinance and claim they made a mistake in their original vote. The Supreme Court has refused to alter legislation based on a claim of ignorance. In *Dugger v. Board of Sup'rs of Panola County* 104 So. 459, 464 (Miss. 1925) the Court said: "For it must be presumed that the Legislature has declared its entire will, otherwise there must be imputed to them gross carelessness or ignorance. Sedgwick on Statutes, 429."

The argument of the proponents of the rezoning succinctly states a critical issue in this case. They claim *"IGNORANCE OF WHAT YOU ARE VOTING ON IS NOT A MISTAKE OF JUDGMENT"*[6] If indeed this becomes the law an important principle of zoning law in this state will be abrogated. In *Mayor and Com'rs of City of Jackson v. Wheatley Place, Inc.* 468 So.2d 81, 83 (Miss.,1985) the Supreme Court said:

> In the absence of agreement between all interested parties, an amendment to a zoning ordinance is not meant to be easy. Otherwise, it would be a meaningless scrap of paper.

[6] Argument of counsel for the petitioners for the rezoning. T- 21-22.

See also: *Town of Florence v. Sea Lands, Ltd.*,759 So. 2d 1221, 1229 (Miss.2000).

In *City of New Albany v. Ray* 417 So.2d 550, 552 (Miss.,1982) the Supreme Court rejected essentially the same argument as is being made here by the City of Oxford. The Court said:

> Appellee originally requested that the property be zoned A-1, and **some members of the Zoning and Planning Commission may not have realized the full import of the zoning classification**. One such representative testified that it was a mistake to zone the property A-1. *However, a mistake within the meaning of the law is not a mistake of judgment, but, rather, a clerical or administrative mistake.*

The City's argument, we suggest, is directly counter to the presumption of correctness that zoning ordinances enjoy. In this case the record reflects the following statement of Alderman Antonow regarding a claim of mistake:

> We changed the zoning of the property directly across the street. It was RB, and we changed it to RN. So we upgraded the zoning in all the property adjacent to this property that's up for rezoning, and yet we overlooked that strip of houses on Price Street.
>
> And I apologize. I feel that – like some of the rest of us do, that we dropped the ball. If I had seen this, I would have never have allowed an RB zoning to be sandwiched between RA an RE. It doesn't even make any sense. R-55

The argument and proof presented in support of the claim of a mistake is precisely the same the Supreme Court has previously rejected. In *Martinson v. City of Jackson* 215 So.2d 414, 416 (Miss. 1968) the Supreme Court said:

> Proponents of the change testified that when the general zoning ordinance was adopted in 1950 the area involved was similar to surrounding or adjacent areas classified A-1 and concluded therefrom that there was 'manifestly' an error or mistake in zoning the subject property as A-2.

> There was no proof that such an error or mistake was made in the original zoning but proponents rested on the conclusion that it must have been a mistake.
>
> We cannot know the reason for such zoning but since the area is in the immediate vicinity of Belhaven College can surmise as to the reason. **However, the officials so zoning cannot be presumed to have made a mistake; the presumption is to the contrary.** The aforesaid evidence would not overcome this presumption of correctness, and, as stated, was merely a conclusion.

The lower court in this case incorrectly concluded that a mistake had been made based in large part by examination of nearby zoning. This is exactly what is prohibited in *Martinson*, supra.

It is clear that if a mistake was made by members of the Board of Aldermen it was either:

1. The didn't know what they were voting for, or
2. The changed their minds about how they should have voted.

Neither is a mistake which would justify a rezoning. If this Court adopts as law the proposition that ignorance of what an alderman is voting for is a mistake justifying rezoning, it will indeed become easy to rezone. *Town of Florence v. Sea Lands, Ltd.*,759 So. 2d 1221, 1229 (Miss.2000). Zoning ordinances will become a meaningless scrap of paper. Little more than elected officials not doing their jobs will have to be shown.

C. THE EVIDENCE DOES NOT SUPPORT A FINDING OF CHANGE IN THE CHARACTER OF THE NEIGHBORHOOD

The lower court found:

> Since 1971 until the adoption of the comprehensive plan in 2004, the north and south sides of Price Street had been zoned RB (multi family residential). Price Street did not evolve into a multi-family development as contemplated by the RB zoning designation in 1971. It should be noted, however, that the RB and RIA zoning designations have the same density, i.e., RIA - 7500 square feet for one

> single family dwelling; RB - 15,000 square feet for a two family dwelling. The Appellant Bridge submits that Price Street is a collector street designed to use and move vehicular traffic between North Lamar and Molly Barr Street. The street provides direct access to the city's activity center, tennis courts, and ball fields, as well as the Middle School, Stone Park and swimming pool. It is also the position of the Appellant that it is customary in land use design for higher density land uses to adjoin higher capacity transportation routes, while lower density land uses should be more remotely located to the transportation routes. Nevertheless, Price Street has continued as a moderate single-family residential neighborhood with small houses located on small lots.
>
> The Court is of the opinion that the record presents clear and convincing evidence that there has been a change in the Price Street neighborhood since the original zoning ordinance of 1971 and the issue of change is fairly debatable.

Appellant respectfully suggests that this finding is error both factually and legally. First, the Court utilized the wrong point in time against which change should be measured. In *Coleman v. Southwood Realty Co.* 271 So.2d 742, 743 (Miss. 1973) the Mississippi Supreme Court provide direct guidance as to the time to be considered in dealing with the issue of change in the character of the neighborhood. The Court said:

> In order to justify a rezoning order, Coleman was required either to show that there was a mistake in the original ordinance or that the area has changed sufficiently since the last comprehensive amendment to the zoning ordinance to warrant the reclassification. *City of Jackson v. Sheppard Inv. Co.*, 185 So.2d 675 (Miss.1966); *Currie v. Ryan*, 243 So.2d 48 (Miss.1971).

Second, the evidence does not support a finding of change in the character of the neighborhood. There is no better description of the lack of change in the character of the neighborhood than is contained in the City's brief to the Circuit Court. The City of Oxford correctly stated:

> The Price Street neighborhood was originally zoned RB in 1971. Apparently, despite the single-family use then in place, the City fathers felt that the neighborhood's use would be changed to a use where multi-family dwellings would be present and desirable. Instead, despite the RB zoning to allow a more dense use, the Price Street neighborhood continued to consist entirely of single-family houses for over thirty years.

Simply put there has been no change in the character of the neighborhood. While arguably the property could have been rezoned in 2004 without showing a change in the character of the neighborhood, it is undisputed that it was not rezoned at that time. In 2004 the City of Oxford adopted a comprehensive plan. The future land use map shows no recommended changes in the subject property. Thereafter in 2004, the City of Oxford adopted a new zoning ordinance classifying the subject property as RB. To this date the only change in the neighborhood was a new duplex (an RB use) constructed on the property of one of Oxford's aldermen.[7] The only changes in the neighborhood were totally consistent with the City's zoning ordinance. As the Supreme Court told Oxford once before:

> It is also well established that the use of property in accordance with an original zoning plan is not a material change of conditions which authorizes rezoning. *Jitney Jungle, Inc. v. City of Brookhaven*, 311 So.2d 652 (Miss.1975); *Martinson v. City of Jackson,* 215 So.2d 414 (Miss.1968). (Emphasis added). *City of Oxford v. Inman* 405 So.2d 111, 113 (Miss., 1981)

V. CONCLUSION

The facts of this case are simple. Since 1971 the subject property had been zoned RB. The City of Oxford hired consultants to assist with updating its comprehensive plan and zoning ordinance. The consultants prepared a future land use map as required by statute. The future land use map showed no change with regard to the uses of the subject property. The Mayor and Board of Aldermen adopted the comprehensive plan after public hearings. The comprehensive plan has never been amended.

[7] Alderman Patterson recused himself from these proceedings.

The Mayor and Board of Aldermen adopted a new zoning ordinance that conformed to the adopted comprehensive plan. Less than a year later a group of property owners requested that the Aldermen change the zoning.

The only mistake that is alleged is that the Aldermen really didn't know what they were voting for. The only change in the character of the area alleged is that no change has occurred over the last thirty years.

These facts are not fairly debatable. There is no evidence to the contrary. As a result the rezoning of Appellant's property is clearly arbitrary and capricious and should be reversed.

Respectfully submitted this the 19th day of October, 2007.

MICHAEL L. BRIDGE
APPELLANT

By: _____
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CERTIFICATE OF SERVICE

I, Jerry L. Mills, attorney for the Appellant, Michael L. Bridge, certify that I have this day served a copy of the forgoing Brief of Appellant by United States mail with postage prepaid on the following:

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Dated this the 19th day of October, 2007.

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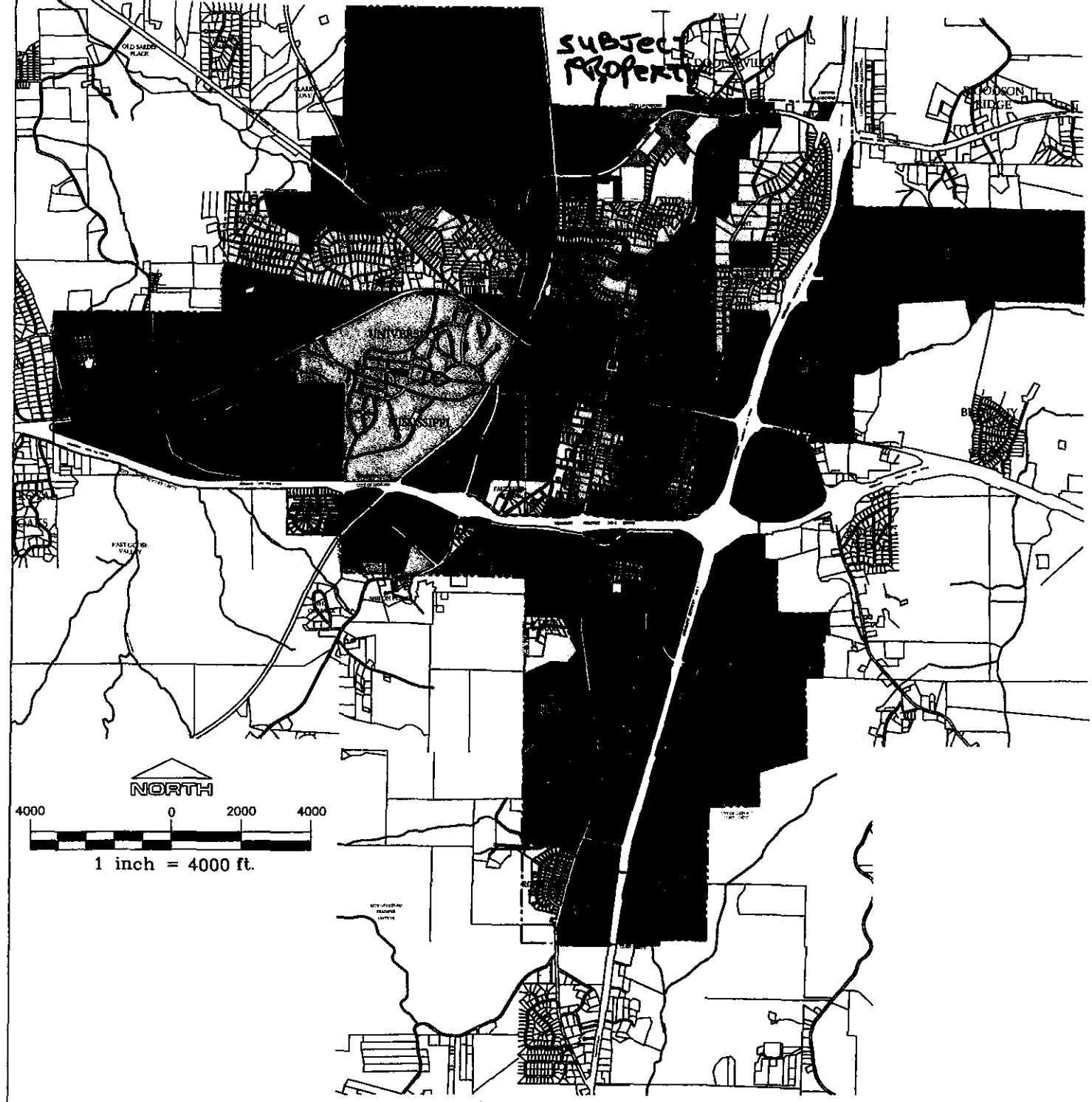
SUBJECT PROPERTY
NORTH
4000 0 2000 4000
1 inch = 4000 ft.
POL PUBLIC / OPEN LAND
A AGRICULTURAL
CE COUNTRY ESTATE RESIDENTIAL
RE RESIDENTIAL ESTATE
RA SINGLE FAMILY RESIDENTIAL
R1A SINGLE FAMILY RESIDENTIAL
RB TWO-UNIT RESIDENTIAL
RC MULTI-UNIT RESIDENTIAL
PUD PLANNED UNIT DEVELOPMENT
DB DOWNTOWN BUSINESS
GB GENERAL BUSINESS
NB NEIGHBORHOOD BUSINESS
SC SHOPPING CENTER BUSINESS
PB PROFESSIONAL BUSINESS
I INDUSTRIAL
OD OPPORTUNITY DISTRICT
UNIVERSITY OF MISSISSIPPI
POTENTIAL SCHOOL SITE
S
PROPERTY (LOT) LINES
SECTION LINES
STREAMS/CREEKS/ETC.
MUNICIPAL BOUNDARIES
"SUBURBAN OXFORD" DEVELOPMENT BOUNDARY
NEIGHBORHOOD CONSERVATION ZONE