IN THE SUPREME COURT OF MISSISSIPPI

LAKE CAROLINE, INC., ET AL. — APPELLANTS

V. — CAUSE NO. 2007-CA-00640

A&F PROPERTIES, LLC — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY
Civil Action No. CI-2006-0331

BRIEF OF APPELLEE A&F PROPERTIES, LLC

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 justices of the Supreme Court may evaluate possible disqualification or recusal:

1. A&F Properties, LLC, whose sole member is Craig Foshee;

2. G. Todd Burwell, W. Jeffrey Collier and Latham & Burwell, PLLC, counsel for A&F Properties, LLC;

3. Madison County Board of Supervisors

4. Ed L. Brunini, Jr., Richard Cirilli and Brunini, Grantham, Grower & Hewes, counsel for Madison County Board of Supervisors

5. Lake Caroline, Inc., whose principals are Mark S. Jordan, R. Wayne Parker and John M. Louis;

6. Thomas A. Cook, Glen Gates Taylor, D. James Blackwood, Jr., and Copeland, Cook, Taylor & Bush, P.A., counsel for Lake Caroline, Inc.;

7. Lake Caroline Owners Association, whose members are residents and lot owners of the purported Lake Caroline Planned Unit Development;

8. Steven H. Smith and DunbarMonroe, PLLC, counsel for Lake Caroline Owners Association

9. Hon. Samac S. Richardson, Circuit Court Judge, Madison County, Mississippi

So certified, this the 30th day of January, 2008.

G. Todd Burwell

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I.

SUMMARY OF ARGUMENT

The lower court did not err in dismissing the complaint of Plaintiffs, Lake Caroline Owner's Association ("LCOA") and Lake Caroline, Inc. ("LCI"). The lower court found that it lacked jurisdiction in this mater and/or that the Complaint filed by the Plaintiffs failed to state a ground upon which relief could be granted. In their Complaint the Plaintiffs requested that the lower court rule upon what they claimed were certain legal issues of a planning matter which were going to be brought before the Madison County Board of Supervisors (the "MCBS"). However, the lower court lacked jurisdiction to consider the claims presented by Plaintiffs and properly dismissed the same.

The focus of Plaintiffs' argument on appeal is misplaced. The case was dismissed because the lower court did not have original jurisdiction over the issues before it. Planning matters originate with the administrative body which in this case is the MCBS and only come within the jurisdiction of the circuit court on appeal. *See Wilkinson County Bd. of Supervisors v. Quality Farms, Inc.*, 767 So. 2d 1007, 1010 (Miss. 2000); *Jackson v. Wheatley Place, Inc.*, 468 So. 2d 81, 83 (Miss. 1985); *Ballard v. Smith*, 234 Miss. 531, 546, 107 So. 2d 580, 586 (1958). The issues presented by Plaintiffs for consideration in their Complaint were factual and legal issues within the original jurisdiction of the MCBS, and could only come before the circuit court on appeal from the MCBS.

II.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal of the Madison County Circuit Court's granting of A&F

Properties, LLC's ("A&F") Motion to Dismiss. LCI and LCOA sought declaratory relief concerning what they claimed were legal issues in a planning matter which were going to be brought before the MCBS and over which the lower court did not have jurisdiction. Accordingly, the Circuit Court dismissed the Complaint.

B. **Statement of Facts, Course of Proceedings, and Disposition of Case**

On or about July 14, 1989 a Petition for Rezoning was filed by LCI for consideration by the MCBS. The Petition requested rezoning of certain property from A-1 (Agricultural) classification to P-1 (Planned Unit Development or PUD) classification. On or about August 7, 1989, after notice and public hearing as required by the Ordinance, the MCBS rezoned the property from A-1 to P-1 (R.E. Tab 4, 000005). In connection with this rezoning, a Master Development Plan for the PUD known as Caroline dated June 26, 1989 was approved by the MCBS ("1989 Master Plan"). The Ordinance in effect at that time required approval of a Master Development Plan or Site Plan in connection with the rezoning of property to P-1.

The 1989 Master Plan was lost and/or could not be found in the Madison County records. (R.E. Tab 4, 000006; 000039-49). Despite this fact, there can be no dispute that the 1989 Master Plan, was the original Master Plan provided to and/or approved by the MCBS in connection with the rezoning of the property.

On or about September 27, 1995, LCI agreed to sell 154 acres in the PUD to A&F. (R.E. Tab 4, 000005-6; 000020-38) The Contract between LCI and A&F required A&F to develop and construct a golf course on the property and to maintain the property as a golf course until December 31, 2006. Thereafter, there was no limitation on A&F's use of the property. The property was transferred and conveyed by LCI to A&F on or about

November 3, 1995 by way of Warranty Deed. (R.E. Tab 4, 000006-7; 000039-49) The Warranty Deed contained a deed restriction requiring that the subject property be used and maintained as a golf course for 10 years from December 31, 1996 with no limitation after that as to A&F's use of the property. In 1996, the property was developed by A&F as a golf course as required in the Contract and Warranty Deed.

On or about February 25, 1998, after the 1989 Master Plan had been lost and/or could not be found, the MCBS, at the request of LCI, approved another Master Plan for the PUD dated February 19, 1998 ("1998 Master Plan"). (R.E. Tab 4, 000007) The 1998 Master Plan showed a golf course on A&F's property where residential lots formerly appeared on the 1989 Master Plan. The Order from the Board of Supervisors approving the 1998 Master Plan stated that all future actions affecting the development would be in keeping with this Master Plan. (R.E. Tab 4, 000008; 000050-51) The action taken by the MCBS, at the request of LCI, substantially changed the boundary of the PUD and the use and classification of A&F's property as well as other property within the PUD. The 1998 Master Plan was approved by the MCBS without notice, including specific notice to A&F as the owner of 154 acres within the PUD being affected, and without public hearing. A&F was not given an opportunity to advise the MCBS of its contract and deed rights to change the use of its property after December 31, 2006. Notwithstanding the above, the 1998 Master Plan, as had the 1989 Master Plan, provided that the developer has the right, in its sole discretion, to alter or amend the uses and locations illustrated on the Master Plan. (R.E. Tab 4, 000062)

Since 1998, there have been other substantial amendments to the Master Plan for this PUD. In February of 2001, the MCBS approved an amendment to the 1998

Master Plan. The amendments to this Master Plan were achieved by the MCBS stamping a Master Plan dated February 22, 2001 (the "2001 Master Plan"). There is no Order in the county records from MCBS approving the amendment and no notice was given or public hearing held concerning the amendment. (R.E. Tab 4, 000062) The difference between the 1998 Master Plan and 2001 Master Plan is the addition of 217 residential lots. In January of 2003, the MCBS approved an amendment to the 2001 Master Plan. The amendments to the 2001 Master Plan were achieved by the MCBS stamping a Master Plan dated January 8, 2003 (the "2003 Master Plan"). There is no Order in the county records from MCBS approving the amendment and no notice was given or public hearing held concerning the amendment. (R.E. Tab 4, 000062) The difference between the 2001 Master Plan and 2003 Master Plan includes the addition of six (6) commercial lots along Catlett Road when commercial use had not previously been indicated.

On or about September 1, 2003, A&F advised the MCBS of its intention to develop its property into a residential subdivision. A&F was advised by members of the MCBS and their Zoning Administrator that development within the PUD must adhere to the Master Plan approved by the MCBS and any change thereto must be approved by the MCBS through an amendment to the Master Plan and such amendment may be implemented by the owner at his pleasure. Prior to this time, A&F was not aware of any Master Plans for this PUD other than the 1989 Master Plan which had been shown to it by LCI during the negotiation of the Contract.

On or about November 7, 2003, A&F filed a request that the MCBS hear its proposal to amend the Master Plan to allow the use of A&F's property to be changed

from a golf course to a residential subdivision. Subsequently, public notice was given and a public hearing was held on December 12, 2003. At the public hearing, the MCBS tabled A&F's request until after November of 2006 finding that the request was premature until that time. (R.E. Tab 4, 000008)

On or about March 26, 2004, A&F filed another request requesting that it be allowed to change the use of its property from a golf course to a residential subdivision. Subsequently, public notice was given and a public hearing was held on April 23, 2004. At the April 23, 2004 public hearing, the Zoning Administrator testified that A&F's request was a request for an amendment to the Master Plan which according to the practice of the MCBS did not require a public hearing. (R.E. Tab 4, 000063) Ultimately, the MCBS voted unanimously to deny A&F's request. (R.E. Tab 4, 000008-9)

On May 3, 2004, A&F filed its Notice of Appeal and Bill of Exceptions to the MCBS' denial of its request. Subsequently, all parties filed their briefs and the Circuit Court held a hearing and heard arguments of counsel. On October 25, 2004, the Circuit Court entered its Opinion and Order affirming the MCBS' denial of A&F's request. The Circuit Court gave several reasons in support of its affirmance of the MCBS' denial of A&F's request. (R.E. Tab 4, 000052-58) On November 8, 2004, the Circuit Court entered its Final Judgment. On November 15, 2004, A&F filed its Notice of Appeal as to the Circuit Court's Final Judgment. Subsequently, the parties filed their briefs and the Mississippi Supreme Court heard oral arguments. On June 29, 2006, the Mississippi Supreme Court issued its Opinion affirming the Circuit Court's affirmation of the MCBS' denial of A&F's request, but only because A&F's request was contractually

premature and barred by virtue of the MCBS' initial ruling on December 12, 2003. The Mississippi Supreme Court did not affirm any of the other reasons offered by the Circuit Court in support of its affirmance of the MCBS' denial of A&F's request. The Supreme Court held that "only after December 31, 2006, when A&F's contractual obligation to maintain the golf course expires, is A&F free to petition the Board regarding other uses for the subject property." (R.E. Tab 4, 000060-70)

Prior to the filing of the Complaint herein, the Plaintiffs were advised by A&F that it intended to file another request with the MCBS to amend the Master Plan to change the use of its property from a golf course to residential development. (R.E. Tab 4, 000010) [1]

Contemporaneous with A&F's filing of its request to amend the Master Plan, Plaintiffs sought to bypass the administrative procedures for the request by filing its Complaint with the lower court. (R.E. Tab 1, 000001; Tab 4, 000003-75) In addition, LCOA filed an Application for Preliminary Injunction requesting that the lower court enjoin the MCBS from acting upon the request by A&F to amend the Master Plan. (R.E. Tab 1, 000001; A.R.E. Tab 1, 000078-87). In response to the Complaint, A&F filed its

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A&F subsequently filed such request with the MCBS. Following proper notice, hearings were held before the Planning and Zoning Commission (the "P&Z") and the MCBS. The P&Z voted 3-1 with one member abstaining to approve A&F's request to amend the Caroline PUD. Plaintiffs appealed that decision to the MCBS. The MCBS failed to approve A&F's request to amend the Caroline PUD by way of tie vote resulting in a denial of the same. The denial of its request for amendment was appealed by A&F to the Circuit Court of Madison County, Mississippi. The Circuit Court subsequently affirmed the denial by the MCBS without having a hearing on the same. On January 9, 2008, A&F perfected its appeal to this Court in the matter styled *A&F Properties, LLC v. Madison County Board of Supervisors*, Case No. 2008-TS-00073. The issues presented in Case No. 2008-TS-00073 go to the core of the dispute between the parties: does A&F have standing to request an amendment to the PUD and, if so, should the amendment be granted or denied by the MCBS. Given that pending appeal, this matter is nothing more than excessive, unnecessary litigation which, in the end, will not serve to resolve the ongoing dispute, nor declare the rights of the parties.

Motion to Dismiss the Complaint on January 16, 2007. (A.R.E. Tab 2, 000090-99).[2]

Following a hearing by the lower court on A&F's Motion to Dismiss, the court found that it lacked jurisdiction to entertain the action for declaratory judgment filed by Plaintiffs. The Court found that it lacked jurisdiction and/or that Plaintiffs had failed to state a claim upon which the court could grant relief. (R.E. Tab 3, pages 000047-53).

III.

ARGUMENT

A. STANDARD OF REVIEW & LEGAL STANDARD

The standard of review for a motion to dismiss is *de novo* and not abuse of discretion. *See Ralph Walker, Inc. v. Gallagher*, 926 So. 2d 890, 893 (Miss. 2006).

In deciding a motion to dismiss, the court accepts as true the allegations of the complaint and should not grant the motion unless in appears beyond a doubt that the Plaintiff will be unable to prove any set of facts which support its claim. *Lowe v. Lowndes County Building Inspection Department*, 760 So. 2d 711, 713 (Miss. 2000).

To survive a motion to dismiss, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Graves v. Tubb*, 281 F. Supp. 2d 886, 890 (N.D. Miss. 2003) (quoting *Campbell v. City of San Antonio*, 43 F.3d 972, 975 (5th Cir. 1995)). "[A] claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir.

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[2]The MCBS did not file a Joinder in A&F's Motion to Dismiss but did at the hearing on the Motion to Dismiss join in A&F's arguments that the Court lacked jurisdiction to hear the matter. (A.R.E. Tab 3, pages 35-37)

1995).

B. THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR IN DISMISSING APPELLANT'S COMPLAINT FOR DECLARATORY JUDGMENT

In this appeal, Plaintiffs argue that the lower court, the Circuit Court of Madison County, erred in granting A&F's Motion to Dismiss. However, Plaintiffs did not directly or correctly address the basis of the court's dismissal in their brief. Rather, they argue that the lower court dismissed their complaint without basis.

As stated in its bench opinion (R.E. Tab 3, p. 47-48), the lower court dismissed the action because it did not have original jurisdiction to hear and decide the issues presented in the Complaint. In their brief, Plaintiffs argue that any one of the issues presented in their Complaint was proper for consideration in a declaratory action. In their Complaint, Plaintiffs requested declaratory relief on five (5) legal issues:

1. "AFP [A&F] Has No Legal Right or Standing to Amend the Lake Caroline PUD Master Plan" (R.E. Tab 4, 000012);

2. "AFP is Collaterally and Equitably Estopped from Attacking the Validity of or Amending the Master Plan" (R.E. Tab 4, 000013);

3. "AFP Waived any Right to Object to the Zoning Designation of the Golf Course Lands as a Special-Use" (R.E. Tab 4, 000015);

4. "The Board of Supervisors of Madison County, Mississippi, Has No Legal Authority to Permit AFP to Amend the Master Plan" (R.E. Tab 4, 000016); and

5. "The Board Is Collaterally and Equitably Estopped from Amending the Master Plan to Allow the Golf Course Lands to be Residentially Developed" (R.E. Tab 4, 000017).

A&F based its Motion to Dismiss on the following: (1) the court lacked original jurisdiction over the issues presented in the Complaint; (2) the issues presented in the Complaint were not ripe for adjudication by the lower court; (3) Plaintiffs failed to exhaust the administrative remedies available to them; and/or (4) this action was barred by the statute of limitations.

In its brief to this Court, Plaintiffs specifically focus on whether the issues raised by them were proper subjects for a declaratory judgment action. (Appellant's Brief, pp. 12-15). Neither their brief nor argument before the lower court addressed the issue of jurisdiction. Plaintiffs are focused upon whether the issues raised in the Complaint are proper subjects for a declaratory action. Taken in vacuum, they might be. But this matter cannot be considered in a vacuum as there are specific laws concerning the jurisdiction of planning issues. That issue is directly addressed by the lower court in its opinion.

However, the appropriateness of the declaratory action was not the basis upon which the lower court dismissed Plaintiff's Complaint. The lower court in its bench opinion discussed the procedural history of the underlying dispute, the prior opinion of this court concerning these parties and this dispute, questions which have not yet been answered, and its authority and role in planning and zoning matters.

Following the court's discussion of the right to amend a PUD, it stated "I can find very little guidance in our body of law as to who can and who can't [amend a PUD] .... Those issues are not before this court at this time. In my opinion, none of it is." (R.E. Tab 3, p. 51, lines 4-5, 18-19).

After its analysis of this issues, the lower court stated: "Now, we talked a lot about

the jurisdiction of this court, as to original jurisdiction.... In zoning matters, the Circuit Court sits merely as an appellate court.... You're pretty well limited in reviewing zoning matters there as you are in reviewing actions of administrative remedies.... Now, I think it would go without saying, but I'm going to go ahead and say it, that before this court can take any action and make any rulings, there has to be some action taken by a board somewhere, or an administrative agency, to get it here in the first place.... Now, I think it's well settled that this court cannot rule on zoning issues, and – and to that extent what I mean is I can't zone or rezone anything. I can only look at what the proper authority has done with those issues" (R.E. Tab 3, p. 47, line 27 through p. 49, line 9). Based upon that reasoning, the court dismissed the Plaintiffs' complaint.

A proper reading of the bench opinion demonstrates that the lower court granted A&F's Motion to Dismiss as it lacked original jurisdiction over the planning and zoning issues raised by Plaintiffs in their Complaint. There had been no hearing, consideration or decision by the MCBS, the local governing body or administrative agency granted the authority to make planning decisions. In that there had been no decision by the MCBS, there had been no appeal in connection therewith. Accordingly, the matter was not properly before the lower court. Therefore, Plaintiffs' Complaint failed to present any issues upon which the lower court could have granted relief.

The lower court's reasoning is well supported by both statute and case law.

1. Lower Court Lacked Original Jurisdiction

"The circuit shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law." Miss. Const. Art. 6 § 156. Jurisdiction is a question of

law. *See Neshoba County Dept. of Human Services v. Hodge*, 919 So. 2d 1157, 1160 (Miss. Ct. App. 2006); *Entergy Miss. Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1204-05 (Miss. 1998).

Through their Complaint, Plaintiffs requested that the lower court make factual findings on matters which might be presented to the MCBS on A&F's request for an amendment to the PUD. Furthermore, Plaintiffs sought legal adjudications which would otherwise be made by the MCBS following a hearing on A&F's request to amend the Master Plan to change the use of its property.

Zoning, comprehensive planning and the regulation of subdivisions are matters which have been delegated to the governing authority of the municipality or county. Miss. Code Ann. § 17-1-15 (1972) states as follows:

> The governing authority for each municipality and county shall provide for the manner in which the comprehensive planning, zoning ordinance (including the official zoning map), subdivision regulations and capital improvements program shall be determined, established and enforced, and from time to time, amended, supplemented or changed. However, no such plan, ordinance (including zoning boundaries), regulations or program shall become effective until after a public hearing, in relation thereto, at which parties-in-interest, and citizens, shall have the opportunity to be heard.

The Mississippi Code specifically sets forth the manner in which an aggrieved party may appeal a judgment or decision of the board of supervisors. "Any person aggrieved by a judgment or decision of the Board of Supervisors . . . may appeal within ten (10) days from the date of adjournment at which session the Board of Supervisors . . . render such judgment or decision . . . . The clerk thereof shall transmit the bill of exceptions to the circuit court at once. . . ." Miss. Code Ann. § 11-51-75 (1972).

The Mississippi legislature has created original jurisdiction for the establishment, enforcement and amendment of such planning, ordinances and regulations with the local governing body (i.e. the Board of Supervisors) and appellate jurisdiction with the circuit court. Accordingly, these issues can only become a matter for the circuit court on appeal. At that time, the circuit court can determine whether or not the decision of the governing body was unsupported by substantial evidence, arbitrary or capricious, beyond the agency or board's powers, or violated constitutional or statutory rights of the aggrieved party. *See Wilkinson County Bd. of Supervisors v. Quality Farms, Inc.*, 767 So. 2d 1007, 1010 (Miss. 2000); *Jackson v. Wheatley Place, Inc.*, 468 So. 2d 81, 83 (Miss. 1985); *Ballard v. Smith*, 234 Miss. 531, 546, 107 So. 2d 580, 586 (1958).

In planning or zoning matters, the circuit court "is not sitting as the initial fact-finder, but rather as an intermediate appellate court." *Hemba v. Miss. Dept. of Corrections*, 848 So. 2d 909, 915 (Miss. 2003).

In the case of *Mississippi State Tax Comm'n v. Mississippi-Ala. State Fair*, 222 So. 2d 664 (Miss. 1969), this Court previously stated:

> Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal.

Id., at 665.

The MCBS is treated like an administrative agency under Mississippi law. See *Ladner v. Harrison County Board of Supervisors*, 793 So.2d 637, 638 (Miss. 2001) (The standard of review of an order of a board of supervisors is the same standard which

applies in appeals from the decisions of administrative agencies.) "Where an administrative agency regulates certain activity, an aggrieved party must first seek relief from the administrative agency before seeking relief from the trial courts." *Chevron Oil Co. v. Smith*, 844 So. 2d 1145, 1148 (Miss. 2002).

It is anticipated that Plaintiffs will cite several cases (as they did in their briefs to the lower court) where a circuit court considered and ruled upon actions involving either a request for declaratory relief and/or a claim by or against a governmental body. However, none of the cases which Plaintiffs may cite concern a set of facts or request for relief similar to the ones at issue in this case. Specifically, none of those cases involve a circuit or chancery court entering a declaratory judgment concerning planning and zoning matters which are pending before a governmental body such as a board of supervisors or city council. Likewise, none of those cases involve a circuit or chancery court enjoining a board of supervisors or city council from considering or taking action on a planning or zoning matter pending before such body. See *Christian Methodist Episcopal Church v. S&S Const. Co., Inc.*, 615 So. 2d 568 (Miss. 1993) (suit over money owed under a construction contract; suit did not involve a request for declaratory judgment or matters pending before a governmental body such as a board of supervisors or city council); *McCorkle v. Loumiss Timber Co., Inc.*, 760 So. 2d 845 (Miss. Ct. App. 2000) (suit by individuals to recover damages for timber cut on property on which the individuals held an option to purchase; suit did not involve a request for declaratory relief or matters pending before a governmental body such as a board of supervisors or city council); *Scott Addison Const. Inc. v. Lauderdale County School System*, 789 So. 2d 771 (Miss. 2001) (suit over construction contract between construction company and

county school system; suit did not involve a request for declaratory relief or matters pending before a governmental body such as a board of supervisors or city council); *McDonald's Corporation v. Robinson Industries, Inc.*, 592 So. 2d 927 (Miss. 1992) (suit in chancery court by landowners to enjoin special court of eminent domain from proceeding with a retrial of matters pending before the special court of eminent domain; the chancery court dismissed the suit and the Mississippi Supreme Court affirmed the dismissal; the suite did not involve a request for declaratory relief or matters pending before a governmental body such as a board of supervisors or city council); *Norman v. Bucklew*, 684 So. 2d 1246 (Miss. 1996) (suit by city councilman against Mayor and City for malicious prosecution and other claims as a result of criminal affidavits being sworn out against councilman because he allegedly signed city checks without authority; the suit did not involve a request for declaratory judgment or matters pending before a governmental body such as a board of supervisors or city council); *State v. Madison Co. Bd. Supervisors*, 873 So. 2d 86 (Miss. 2004) (suit by county against appraiser to determine validity of contract between them; suit did involve a request for declaratory relief in that the county wanted a declaration that the contract entered into without advertising for bids was valid; the suit did not involve any matter pending before the board of supervisors); and *Dye v. State of Mississippi*, 507 So. 2d 332 (Miss. 1987), (suit by senators against lieutenant governor to determine legality of powers exercised by Lieutenant Governor; suit did involve a request for declaratory relief, but did not involve matters pending before a governmental body such as a board of supervisors or city council).

Through their Complaint, Plaintiffs requested the lower court to make factual findings and legal conclusions on issues which were or would be pending before the MCBS for consideration and ruling. Each of the issues presented by Plaintiffs were matters exclusively delegated to the local governing body for determination. As stated in M.C.A. § 17-1-15, it is the local governing body which is granted the authority to make such determinations. The lower court lacked original jurisdiction over the issues presented in the Complaint. Therefore, the Plaintiffs' Complaint was properly dismissed by the lower court.

If Plaintiffs' *Complaint* was not dismissed, the lower court would effectively become the board of supervisors. This deprives the MCBS from being involved in the planning and zoning process which is in large part a policy decision process. The MCBS not only considers the facts and law in deciding planning and zoning matters, but it also decides as a matter of policy the direction of development within its county and on behalf of its constituents, the general public. That is why this Court has held that courts should not consider themselves zoning boards. See *Jackson v. Wheatley Place, Inc.*, 468 So.2d 81, 83 (Miss. 1985).

2. Issues Were Not Ripe for Adjudication by the Lower Court

As stated above, all planning matters, whether it be the establishment, enforcement or amendment, begin with the local governing authority (e.g. the Board of Supervisors).

Without a decision from the MCBS, the Plaintiffs had nothing to present to the lower court which was ripe for adjudication. Only after a properly noticed hearing at which the MCBS ruled upon A&F's request to amend the Master Plan and a timely

appeal of that decision to the circuit court, would consideration and adjudication of those issues by the lower court be proper.[3] The Plaintiffs did not seek relief from the MCBS. Rather, Plaintiffs attempted to circumvent the established procedure for consideration and appeal of planning matters through its Complaint.

It is anticipated that Plaintiffs may argue (as they did in their brief to the lower court) that the MCBS does not have the power or authority to make legal decisions. That is incorrect. This Court has long recognized that the board of supervisors is a body which exercises judicial, legislative and executive powers." *Tally v. Board of Supervisors of Smith County*, 307 So. 2d 553, 556 (Miss. 1975). The exercise of judicial power is a determination of what the law is and the interpretation of such law. *See Natchez & S.R. Co. v. Crawford*, 99 Miss. 697, 55 So. 596 (1911); *Illinois C.R. Co. v. Dodd*, 105 Miss. 23, 61 So. 743 (1913).

In the case of *Covington County v. Collins*, 92 Miss. 330, 45 So. 854 (1908), this Court acknowledged that although a decision to be made by the board of supervisors was a question of law, it was a decision that the board could make having been "vested with full jurisdiction in all matters" pertaining to the subject matter of that decision. *Id.*, 92 Miss. at 337, 45 So. at 855. The Court went on to state that the decision of the board was very persuasive given the fact that it had been vested with full jurisdiction in the subject matter. *Id.* The subject matter at issue in that case was the use of public county highways by traction engines. *Id.*, 92 Miss. at 330 and 45 So. at 854.

Plaintiffs have argued that MCBS has no legal authority or power to adjudicate

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[3] As noted in footnote 1 *supra* this has occurred in the proper course and manner.

the legal issues contained in Plaintiffs' *Complaint*. This is untrue and ignores the longstanding Mississippi law discussed above. Clearly, the MCBS has the authority under Mississippi law to adjudicate the legal issues contained in Plaintiffs' *Complaint* which are nothing more than Plaintiffs' defenses and/or objections to A&F's request to amend the Master Plan. The MCBS regularly makes judicial decisions on planning and zoning matters. The MCBS holds hearings on planning and zoning matters pending before it. It is presented with facts through witnesses, exhibits and public comments. It then takes those facts, applies them to the controlling law and renders a decision. If any party disagrees with a decision by the MCBS, it may appeal the same to the circuit court in accordance with Miss. Code Ann. §11-51-75.

None of the issues presented in the Complaint were ripe for consideration by the lower court and, therefore, not within the jurisdiction of the lower court. Accordingly, Plaintiffs' Complaint was properly dismissed.

3. Administrative Remedies Were Not Exhausted

At the time this matter was pending in the lower court, the MCBS had not yet ruled upon the request of A&F to amend the Master Plan. Miss. Code Ann. §§ 17-1-15 and 11-51-75, as well as the Zoning Ordinances of Madison County, Mississippi, prescribe the procedures for such an amendment and any appeal thereof. Such administrative procedures must be followed before any appeal may be taken to the circuit court.

It is a prerequisite to judicial action relating to an administrative agency, that the remedy available from that agency be exhausted prior to judicial intervention. *Powe v. Forrest County Election Commission*, 249 Miss. 757, 768, 163 So. 2d 656, 660 (1969).

See also Davis v. Barr, 250 Miss. 54, 157 So. 2d 505 (1963) (administrative remedies must be exhausted before resorting to the courts); *Davis v. Attorney General of the State of Mississippi*, 935 So. 2d 856 (Miss. 2006) (failure to exhaust administrative remedies is a bar to further litigation of the issues); *Davis v. AIG Life Ins.*, 945 F.Supp. 961, 967 (S.D. Miss. 1995) (claim dismissed due to Plaintiff's failure to exhaust administrative remedies.)

The doctrine of exhaustion of administrative remedies required that the Plaintiffs exhaust those remedies created by statute and ordinance, which required a hearing before and ruling by the MCBS. Then, and only then, would the Plaintiffs have been permitted to bring those issues before the circuit court.

It is "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Powe v. Forrest County Election Commission*, 249 Miss. 757, 768, 163 So. 2d 656, 660 (Miss. 1964). Despite such long standing law, Plaintiffs sought judicial review or relief for something which had not yet occurred, while ignoring the administrative remedy available to them.

Due to the failure of the Plaintiffs to exhaust their administrative remedies as required by Mississippi law and the controlling ordinance, their Complaint was properly dismissed.

4. Rule 57 Declaratory Action Does Not Replace Jurisdictional Requirements

Plaintiffs argue that the lower court's dismissal was error as the Plaintiffs had presented issues in their Complaint which were susceptible to authoritative resolution.

However, Plaintiffs fail to acknowledge that the original jurisdiction for such matters was with the MCBS. Plaintiffs rely upon a rule of procedure in an attempt to create jurisdiction in the circuit court when it did not yet have jurisdiction.

In *Bowling v. Madison County Board of Supervisors*, 724 So. 2d 431 (Miss. Ct. App. 1998), the Court of Appeals was faced with a case wherein Bowling substituted a declaratory judgment action for an appeal of the board's decision pursuant to Miss. Code Ann. § 11-51-75 (1972). Although the court found that that particular Rule 57 declaratory action could stand as an appeal of the board's decision, the court made valuable remarks applicable to the matter before this Court. It stated:

> The rules of procedure, both for trial and appellate courts, do not replace the jurisdictional statutes. The right to appeal is governed by statute. The supreme court has continued to apply [Section 11-51-75] for appeals from municipal and county governing authorities. Thus, Bowling must comply with the statute to the extent that it is applicable.

Bowling, at 433.

In further discussion of the application of Rule 57, the *Bowling* court stated: "A Rule 57 declaration is also an alternative to injunctive relief. **What it has never been held to be is an alternative to an appeal from a lower tribunal's actions**. To hold that it may be, permits de novo trial under Rule 57 instead of deferential review of the record." *Id.*, at 435. (emphasis added).

Even if Plaintiffs raised issues proper for a declaratory action, which A&F denies, the appellate courts of Mississippi have clearly stated that such issues must first be decided by the board of supervisors and then, and only then, may such issues proceed to the circuit court by way of appeal.

The Plaintiffs are asking the circuit court to consider what Plaintiffs claim to be

pure legal issues in a vacuum. The issues presented in their *Complaint* are part of a much larger picture. It is a picture which includes A&F's request, responses by interested parties, testimony of witnesses, public comment, and consideration by the MCBS. This controversy is much broader than just Plaintiffs' arguments supporting their position.

Plaintiffs are effectively asking the circuit court by way of their *Complaint* to take jurisdiction and authority from the MCBS over matters which by law, must first be presented to and considered by the MCBS. The Plaintiffs are asking the circuit court to make a declaratory ruling which would effectively decide certain issues for the MCBS. Plaintiffs want the circuit court to place its own reasoning and judgment in the place of a local governing body or an administrative body created by law and given the responsibility to make planning and zoning decisions. Under Mississippi law, the circuit court cannot do that. The circuit court must not reweigh the facts of a case or insert its judgment for that of an administrative agency. See *Hemba v. Miss. Dept. of Corrections*, 848 So. 2d 909, 914 (Miss. App. 2003); *Red Roof Inns, Inc. v. City of Ridgeland*, 797 So.2d 898 (Miss. 2001).

Plaintiffs' *Complaint* in this case is analogous to a litigant filing an interlocutory appeal on an issue before the lower court ever considered and ruled upon such issue. Plaintiffs cannot first ask the appellate court (i.e. the circuit court) to determine an issue or direct the lower court (i.e. the MCBS) how to rule. The Plaintiffs must follow the legal process as set forth in Miss. Code Ann. §11-51-75 (1972).

Accordingly, Plaintiffs attempt to create original jurisdiction in the circuit court must fail. As discussed before, original jurisdiction for such planning issues lies with

the MCBS. The declaratory action filed by Plaintiffs does not replace the original jurisdiction of the MCBS or the appellate jurisdiction of the circuit court as created by the Mississippi Constitution and statutes.

The lower court properly dismissed the Complaint of Plaintiffs as it failed to present any claims upon which the court could have granted relief.

IV.

CONCLUSION

Plaintiffs filed their Complaint for Declaratory Judgment with the intent to circumvent the proper procedures for the determination of planning matters. Rather than present their issues to the MCBS as required by law, Plaintiffs requested that the lower court rule on such issues which must have been considered and decided by the MCBS. The lower court is not a court of original jurisdiction for such matters. It sits only as an appellate court. Therefore, the lower court lacked original jurisdiction over the issues and Plaintiffs' Complaint was properly dismissed. Furthermore, Plaintiffs could not create jurisdiction in the circuit court through the use of a procedural rule and the declaratory action. As such, Plaintiffs' Complaint failed to state a claim upon which the lower court could grant relief and was properly dismissed.

RESPECTFULLY SUBMITTED, on this 30th day of January, 2008.

A&F PROPERTIES, LLC

By: _____
G. Todd Burwell

OF COUNSEL:

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CERTIFICATE OF SERVICE

I, G. Todd Burwell, attorney for Defendant A&F Properties, LLC, do hereby certify that I have this day served a true and correct copy of the above and foregoing document by United States mail, postage prepaid, to the following:

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THIS, the 30th day of January, 2008.

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