IN THE SUPREME COURT OF MISSISSIPPI

MARK C. MODAK-TRURAN AND
ANITA K. MODAK-TRURAN — **APPELLANTS**

VS. — **CASE NO. 2008-CA-00104**

MAYOR HARVEY JOHNSON, IN HIS OFFICIAL CAPACITY ONLY, AND THE CITY COUNCIL OF JACKSON, MISSISSIPPI, CAROL N. SIMMONS, AND WILLIAM J. SIMMONS, DECEASED D/B/A THE FAIRVIEW INN — **APPELLEES**

CONSOLIDATED WITH

DANIEL M. BAKER, AND
KATHERINE S. BAKER — **APPELLANTS**

VS. — **CASE NO. 2008-CA-00105**

MAYOR HARVEY JOHNSON, IN HIS OFFICIAL CAPACITY ONLY, AND THE CITY COUNCIL OF JACKSON, MISSISSIPPI, CAROL N. SIMMONS, AND WILLIAM J. SIMMONS, DECEASED D/B/A THE FAIRVIEW INN — **APPELLEES**

On Appeal from Hinds County Circuit Court Judge Bobby B. DeLaughter's Memorandum Opinion and Order (Dated December 4, 2007)

REPLY BRIEF OF APPELLANTS MARK AND ANITA MODAK-TRURAN

ORAL ARGUMENT REQUESTED

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Appellants Mark and Anita Modak-Truran (collectively, "the Modak-Trurans" or "Appellants") reassert their earlier request for oral argument. The Appellees (collectively, "the City") have not opposed this request in their three response briefs.[1] Oral argument may be helpful to the Court, particularly (1) when the Statement of Facts in the City's Response to the Modak-Trurans' Brief ignores the factual record, which is demonstrated by the City's repeated failure to cite to the record (Resp. to Modak-Truran Brief at 3-10), (2) when the City has misconstrued the applicable law and facts in an attempt to legitimize spot zoning and its arbitrary and capricious actions, and (3) when the City's actions have violated the Modak-Trurans' rights under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 (1996) ("§ 1983").[2]

SUMMARY OF REPLY ARGUMENT

Irrespective of the name,[3] the zoning amendments at issue "***specifically affect and uniquely affect*** Fairview Inn, because ***Fairview Inn is the only Class B Bed and Breakfast***" in Jackson. (10 R. 377) (quoting Fairview Inn counsel, who drafted the amendments) (Emphasis added). The new amendments create an entirely new classification called a "Class B Bed and Breakfast Inn with Restaurant." (1 R. 30-31). While other bed and breakfast establishments

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[1]Instead of drafting one cohesive brief, the City filed a Response to Brief of Appellants Daniel and Kathy Baker ("Resp. to Baker Brief"), Response to Brief of Appellants Mark and Anita Modak-Truran ("Resp. to Modak-Truran Brief"), and Supplemental Response to Brief of Appellants Mark and Anita Modak-Truran ("Supp. Resp."). All three briefs are collectively referred herein as "Response".

[2]Contrary to the City's bald assertion (Supp. Resp. at 22), the Modak-Trurans' Bill of Exception and Complaint for Other Relief explicitly raises their claims for procedural due process (Count II), substantive due process (Count III) and vagueness (Count IV) under § 1983, requests relief for the § 1983 claims and seeks attorneys fees under 42 U.S.C. § 1988 (2000) (1 C.P. 25-29, 48-49).

[3]The City claims that the term "Fairview Inn Amendments" is "pejorative." (Resp. to Modak-Truran Brief at 3). There is nothing pejorative about the term, which truthfully and without malice refers to the two amendments to the ZONING ORDINANCE OF JACKSON, MISSISSIPPI ("Zoning Ordinance") enacted by the City Council on April 7, 2004 for the benefit of one business, the Fairview Inn. These amendments are codified in §§ 202.17(a) and 602.02.03 of the Zoning Ordinance. (1 R.E. 155-156).

having restaurants in Jackson (such as the Old Capitol Inn) are "commercially zoned" (10 R. 377), the Fairview Inn Amendments sanction the operation of a full-service restaurant able to sell alcohol with meals all days of the week, anytime of the day, in an R-2 Residential District.[4] (1 R.E. 155-156; 1 R. 30-31; 1 C.P. 22).

Based on a proper exercise of its police power, the City of Jackson's Zoning Ordinance prohibits commercial uses from residential districts to prevent problems caused by the proverbial "pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1923). It is well-established that reserving land for family residences preserves the character of neighborhoods, securing "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995) (*quoting Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974)).

Ignoring the complete lack of precedent supporting the operation of a full-scale restaurant in a residential neighborhood (4 R.E. *passim*, 1 C.P. 22, 86-123, 2 C.P. 125-244, 1 R. 62), the City claims that the Fairview Inn Amendments comport with the City of Jackson's Land Use Plan enacted on March 2, 2004 ("Land Use Plan" or "Plan"). (Resp. to Modak-Truran Brief, *passim*). Quite telling, ***not once*** in the 77 pages the City cobbles together for its Response does the City ever cite to the Plan.

Not only are the Fairview Inn Amendments out of harmony with the City's Zoning Ordinance, but they contravene the purpose, intent and express language in the City's Land Use Plan. While providing for mixed uses in certain designated areas, the Plan ***does not*** provide for

[4]Judge Bobby DeLaughter's opinion appears to be built on an assumption that the new restaurant would only serve 50 patrons a night and not be open for lunch. (1 C.P. 294, 300, 7 R. 227). However, the Fairview Inn holds itself out as providing "fine dining" and "entertainment" for "two to two thousand people" (13 R.465), and nothing in the Fairview Inn Amendments restricts the size and capacity of the restaurant or the hours of operation. (1 R.E. 155-156). Nor are the City's off-street parking requirements an impediment to a large scale restaurant operation when the Fairview Inn uses buses, vans and trolleys to bring in diners. (4 R. 206-209, 13 R. 481-483).

commercial uses south of Riverside Drive and east of State Street in the Belhaven neighborhood, which is where Fairview Street is located. (2 C.P. 153, 160). This area is deemed low density residential under the Plan. (2 C.P. 160). Indeed, the City's Response ***concedes*** that "the comprehensive land use plan for the city calls for the Belhaven neighborhood ... to be residential." (Resp. to Baker Brief at 9, incorporated by reference to Resp. to Modak-Truran Brief at 3).

Nor are the Fairview Inn Amendments a legitimate exercise of the City's police power. Instead of promoting the public health, safety, welfare and morals, the amendments boost the profitability of one property owner with "a new source of revenue" to maintain an aesthetically appealing residential compound used for a bed and breakfast by allowing the unfettered operation of a full-service restaurant on a residential street. (Resp. to Baker Brief at 9, incorporated by reference into Resp. to Modak-Truran Brief at 3). Palpably absent from the record, however, is substantial evidence of a material change in the character of the neighborhood to justify the amendments and public need.

The City's Response falls back on a manta of legislative prerogative to justify its actions. (Resp. to Modak-Truran Brief, *passim*). The City, however, does not have the legislative prerogative to promote private gain to one property owner through illegal spot zoning running afoul of its Zoning Ordinance and Land Use Plan. Nor does the City have the legislative prerogative to enact legislation that is not grounded in its police power.

Under the guise of a "Text Amendment," the Fairview Inn Amendments effectively rezone and reclassify for the benefit of one property owner an R-2 Residential District into a C-3 General Commercial District. As set forth in our opening brief and discussed below, the Fairview Inn Amendments: (a) contravene the City's Zoning Ordinance and Land Use Plan; (b) bear no substantial relationship to the public health, safety, morals or general welfare of the City

of Jackson, and therefore, are plainly arbitrary and capricious, (c) violate the Modak-Trurans' substantive and procedural due process rights guaranteed under the United States Constitution; and (d) are unconstitutionally vague.[5] Accordingly, this Court should reverse Judge Bobby DeLaughter's opinion, vacate the Fairview Inn Amendments, and restore the *status quo* lawfully existing before the enactment of the amendments.

REPLY ARGUMENT

I. THE CITY MISCHARACTERIZES THE STANDARD OF REVIEW.

While recognizing that "'[t]he burden is upon the party seeking to set aside the decision to show that it was arbitrary, capricious, discriminatory, illegal, not supported by substantial evidence, and not fairly debatable,'" the City mischaracterizes crucial aspects of the standard of review. (Resp. to Baker Brief at 21-26, incorporated by reference in Resp. to Modak-Truran Brief at 15). The City suggests that the presumption of legislative reasonableness is an impenetrable shield. (*Id.*). The Mississippi Supreme Court's opinion in *Town of Florence, Miss. v. Sea Lands, Ltd.*, 759 So. 2d 1221 (Miss. 2000), belies this contention.

In *Sea Lands*, the Court observed:

> All presumptions must be indulged in favor of the validity of a zoning ordinance if it is within the legislative power of the city. Such an ordinance is presumed to be reasonable and for the public good. The presumption of reasonableness must be applied to the facts of the particular case, and it applies to re-zoning as well as to the original zoning regular zoning regulation, ***but not with the same weight, the presumption being that the zones are well planned and arranged to be more or less permanent, subject to change only to meet a genuine change in conditions.***

Sea Lands, 759 So. 2d at 1227 (Emphasis in original), citing *Board of Alderman, City of Clinton v. Conerly*, 509 So. 2d 877, 883 (Miss. 1987), and *W.L. Holcomb, Inc. v. City of Clarksdale,* 65 So. 2d 281, 284 (1953). The reason for this weaker presumption stems from the fact that zoning

[5]Under *Falco Lime Inc. v. Mayor and Alderman of the City of Vicksburg*, 836 So. 2d 711 (Miss. 2003), the Court first reviews the administrative appeal under Miss. Code § 11-51-75 (2004) and then proceeds to the other claims raised by Appellants. *Id.* at 720.

amendments, like the Fairview Inn Amendments, are often inconsistent with the zones established by a comprehensive zoning scheme. *See, e.g., Sea Lands,* 759 So. 2d at 1227; *Conerly,* 509 So.2d at 883; *Lewis v. City of Jackson,* 184 So. 2d 384, 388 (Miss. 1966).

Before a property may be reclassified through a text or map amendment, "'an applicant seeking rezoning must prove clear and convincing evidence either that (1) there was a mistake in the original zoning, or (2) the character of the neighborhood has changed to such an extent as to justify rezoning and that a public need exists for rezoning.'" *Childs v. Hancock County Board of Supervisors*, __ So. 2d __, 2009 WL 262462 at *4 (Miss. Feb. 5, 2009) (*quoting Bridge v. Mayor and Board of Aldermen of Oxford*, 995 So. 2d 81, 83 (Miss. 2008)). This means that "the burden of proof was first on the Board to prove clear and convincing evidence that the area needed to be rezoned." *Childs*, 2009 WL 262462 at *5. On appeal, "[a] finding of no sufficient proof will lead this Court to conclude that the ... decision was arbitrary and capricious." *Sea Lands,* 759 So. 2d at 1227, citing *Conerly*, 509 So. 2d at 883-86; *see also Perez v. Garden Isle Community Ass'n*, 882 So. 2d 217, 219 (Miss. 2004); *Cockrell v. Panola County Board of Supervisors*, 950 So. 2d 1086, 1091 (Miss. App. 2007); *Kuluz v. City of D'Iberville*, 890 So. 2d 938, 940 (Miss. App. 2004).

Here, unlike in *Childs*, *supra*, where the City's Planning Board "specifically found conditions had changed in and around the area sought to be rezoned" (*Childs*, 2009 WL 262462 at **4-6), the record shows that the City of Jackson Planning Board did not find any legitimate reason supporting a restaurant on Fairview Street and voted ***against*** the amendments. (10 R. 443). Nor did the City Council make any findings. (1 R. 142). In the absence of such findings or comparable evidence in the record, the Fairview Inn Amendments are arbitrary, capricious, illegal and without a substantial evidentiary basis.

II. THE FAIRVIEW INN AMENDMENTS CONSTITUTE SPOT ZONING

The City argues that the Fairview Inn Amendments are consistent with the City's "comprehensive land use plan [adopted] on March 2, 2004, only one month before the April 7, 2004 hearing before the action by the City Council, which fundamentally changed the land use planning focus of the City ... to a more New Urban mixed use planning focus, particularly for central city neighborhoods like Belhaven (with its North State Street Corridor plan and Fortification Street overlay district) ...." (Resp. to Modak-Truran Brief at 16). The City, however, ***never cites*** to the Land Use Plan itself, which is part of the record. (1 C.P. 86-124, 2 C.P 125-244). The reason for the City's flagrant omission is transparent; the Plan does not support the City's position.

The City of Jackson developed the Land Use Plan because of the decline in population (*i.e.*, people moving out of Jackson). (1 C.P. 97, 98, 106). The purpose of the Plan is to make Jackson ***"a great place to live in the future."*** (*Id.*) Key components of the plan include creating strong neighborhoods, promoting existing ones and enhancing the quality of life for residents. (2 C.P. 127-130, 147-149). The Plan affirmatively provides that the "residential neighborhood is the basic physical structure for the City's land use and development framework. It is the goal of FABRIC ["For A Better Revitalized Inclusive Community"] ***to create and sustain strong neighborhoods.***" (2 C.P. 147) (Emphasis added).

The Land Use Plan allows mixed uses in designated parts of the city. However, it makes ***no*** provision for commercial uses to encroach in existing residential districts. (2 C.P. 147-149). Contrary to the City's position, which cites no law, the Plan retains the residential character of Fairview Street. Under the Plan, the portion of Belhaven that is east of North State Street and South of Riverside Drive, which would include Fairview Street, ***"should remain as low impact institutional and low density residential."*** (*Id.* at 160) (Emphasis added).

Under the Land Use Plan, commercial development, such as dine-in restaurants and hotels (which is the combo use allowed by the new classification of a "Class B Bed and Breakfast with Restaurant") will continue to be focused along the major arterials, highways and interstates[.]" (2 C.P. 135; *see also id.* at 151-152). Fairview Street, however, is not a major arterial, highway or interstate. (*Id.*).

The Land Use Plan allows dine-in restaurants and hotels in designated community centers, which must have the "infrastructure to support heavy traffic volumes and water and sewage usage" and be located along major arterial, highway or interstates (2 C.P. 151), and designated regional mixed use centers. (*Id.* at 154-157). Fairview Street, however, is not a designated community center; nor is it a designated regional mixed use center. (*Id.* at 153-157).

The Land Use Plan designates six regional mixed use centers within Jackson: (1) Downtown; (2) I-55 North and County Line Road District, (3) Jackson International Airport, (4) Jackson Medical Mall District; (5) Medical/Fondren District[6]; and (6) the Metro Center District. (2 R. 155-169). The Belhaven neighborhood ***does not*** fall within these districts. (*Id.*). Belhaven is located south of the Medical/Fondren District. (*Id.* at 159).

The Land Use Plan also provides for "design overlays." (2 C.P. 208). The design overlays "ensure that infill buildings and development ***does not compromise*** the integrity of the neighborhood." (*Id.*) (Emphasis added). Part of the City's aggressive design strategy is the Fortification Street Overlay Plan. (*Id.*) But this plan finds that Fortification Street, which is a main thoroughfare, can not support anymore restaurants. (1 R. 67). If Fortification Street cannot, then Fairview Street, which has never been anything but the quintessential, tree-lined residential street, cannot.

[6]The Medical/Fondren District includes University of Mississippi Medical Center, the Sonny V. Montgomery Department of Veterans Affair, St. Dominic's Hospital, and the Mississippi Methodist Rehabilitation Center. (2 R. 158-161). The district ***does not*** include Mississippi Baptist Medical Center. (*Id.*)

As found by the Special Master, the Fairview Inn Amendments "are diametrically opposed to other uses permitted under R-2 [zone] ... and out of harmony" with the City's Zoning Ordinance. (2 R.E. 21; 3 C.P. 303). Rather than allow mixed uses, the Zoning Ordinance and the Land Use Plan protect Fairview Street by requiring that portion east of State Street and south of Riverside Drive to remain low density residential and low impact institutional. (2 R. 160). Nor is there any public need for a restaurant at the Fairview Inn when there are countless restaurants in Jackson offering fine-dining opportunities, such as Schimmels and Walkers. located north of Millsaps College on North State Street. Accordingly, the Fairview Inn Amendments should be struck down as illegal spot zoning.

In its Response, the City suggests that it can dictate to the Court what counts as spot zoning by labeling something a "text amendment" instead of a "map amendment." Without citing any case law, the City states that

> Text Amendment 5 is a "text amendment" meeting the requirements of the "Procedure for Text Amendments" provided for by the City of Jackson's zoning ordinance (at Section 1704-A). The Ordinance allows the City to adopt a "text amendment" to its zoning ordinances following the publication of notice and a public hearing. *Id.* By contrast to a "text amendment", a "map amendment" under the City's zoning ordinance is "rezoning" for which there is an application requirement that includes a showing in the application of sufficient evidence to meet the "change and need" criteria. Ordinance Section 1703.02.1-A. No such "change and need" criteria for "rezoning" appear as a condition to a "text amendment" under the text amendment ordinance, Section 1704-A (ore even for a new use permit under Section 1701.02-A). The only conditions required for a "text amendment" are publication of notice and a public hearing, "before the City Planning Board and/or City Council". Section 1704.02-A.

(Resp. to Baker Brief at 27, incorporated by reference to Resp. to Modak-Truran Brief at 15). In other words, the City maintains that the City Council can unilaterally classify a zoning change as a "text amendment" and effectively preclude review of its rezoning by Mississippi courts.

The City's contention seems to boil down to the claim that through statutory definitions, the City Council has the discretion to preclude judicial review of its actions regarding whether a

"text amendment" is just a disguised form of illegal spot zoning. If this argument had any legal validity, there would be a long line of property owners asking the City for "text amendments" to avoid showing that there has been a substantial change in the character of neighborhoods in question and that there is a public need for rezoning.

What makes the City's position even more fanciful is the utter ***absence of case law*** to support the City's claim that the Zoning Ordinance's distinction between a "text amendment" and a "map Amendment" has legal significance for the issue of spot zoning. Legal scholars long ago rejected the idea that the law is a collection of "magic words" or "solving names" which can be mechanically applied to resolve disputes.[7] The City should not be allowed to resurrect this flawed understanding of the law by making legally-unsubstantiated and casuistic distinctions between "text amendments" and "map amendments" to avoid judicial review.

The City's Response cites a Mississippi Court of Appeals case, *Mayor and Board. of Alderman of Clinton v. Hudson*, 744 So. 2d 448, 453 (Miss. App. 2000), for the claim that "[a] permit for a conditional use variance does not necessarily infer or create the notion that spot-zoning has or is occurring." (Resp. to Baker Brief at 32, incorporated by reference to Resp. to Modak-Truran Brief at 15). The court's opinion in *Hudson* and the City's Response suggest that "conditional use variances" are not "rezoning" so they do not constitute spot zoning. Like the City's distinction between "text amendment" and "map amendment," the court in *Hudson* cites no legal authority for this suggested proposition. *Id.*

To the contrary, five years after *Hudson*, the Mississippi Supreme Court in *Drews v. City of Hattiesburg*, 904 So. 2d 138 (Miss. 2005), held that "the proposed *variances constituted a* ***rezoning in fact***, *the effect of which* ***is spot zoning***." *Id.* at 142. (Emphasis added). The Court

[7]*See e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 820 (1935)("So too are *title, contract, conspiracy, malice, proximate cause*, and all the rest of the magic 'solving words' of traditional jurisprudence.").

further stressed "that the City of Hattiesburg has attempted to *bypass the safeguards provided by the rezoning process* in that the need for *a variance* must be proven by only a preponderance of the evidence while the need for rezoning must be proven *by clear and convincing evidence*." *Id.* (Emphasis added). Finding that the zoning variances effectively rezoned one parcel of property from a B-1 Professional Business District to a B-3 District, the Court found that the zoning variances were not in harmony with the zoning scheme, and thus, invalid. *Id.* at 140-142.

The *Drews* Court did not limit the legal doctrine of spot zoning to "a change in zoning classification" but applied the doctrine to "a reclassification of uses allowed in a zoning district" through variances. *Drews*, 904 So. 2d at 142. To do otherwise would encourage the kind of sophistry suggested by the City's distinction between a "text amendment" (not "rezoning") and a "map amendment" ("rezoning").

The City attempts to distinguish *Drews, supra,* as "extreme circumstances." (Resp. to Baker Brief at 42, which is incorporated by reference in Resp. to Modak-Truran Brief at 16). The Fairview Inn Amendments, however, constitute an even more flagrant departure from the City's Zoning Ordinance than the zoning variances struck down in *Drews*, because they effectively rezone one parcel of property from an R-2 Residential District to a C-3 General Commercial District, which is an arbitrary and significant departure from the scope and intent of the R-2 classification. *See* Zoning Ordinance § 602.05 at 35. Absent a material change in conditions (such as blight and property deterioration), however, the courts have been diligent in keeping commercial uses out of residential neighborhoods. *See, e.g., Village of Euclid v. Ambler Reality Company*, 272 U.S. 365 (1926); *Burdine v. City of Greenville*, 755 So. 2d 1154 (Miss. 1999); *Underwood v. City of Jackson*, 300 So. 2d 442 (Miss. 1974).

Instead of deferring to municipalities' characterizations of zoning amendments as "variances" or "text amendments," Mississippi courts focus on the substance of the land use

change rather than its form, *Drews*, 904 So. 2d at 142, which is consistent with scholarly opinion that "there appears to be **no distinction** made between **a change in zoning classification** and a **reclassification of uses allowed in a zoning district**. The latter may constitute spot zoning." 2 E.C. Yokley, ZONING LAW AND PRACTICE § 13-2 n.3 (4th ed. 2000) (Emphasis added).

The New Mexico Supreme Court in *Albuquerque Commons v. City of Albuquerque*, 184 P.3d 411 (N.M. 2008), has squarely rejected the argument the City forwards here. In that case, the Court held that "a bright-line rule that distinguishes between text amendments and map amendments such that the former can never constitute a rezoning would be a classic elevation of form over substance." *Id.* at 426. While the holding in *Albuquerque Commons* is not binding, the analysis is instructive and consistent with this Court's reasoning in *Drews v. City of Hattiesburg*, 904 So. 2d 138.

Under the analysis set forth in *Albuquerque Commons*, *supra*, and *Drews*, *supra*, the Fairview Inn Amendments result in reclassifying the use at 734 Fairview Street as a combo "general restaurant" and "hotel" and effectively rezone this property from an R-2 Residential District into C-3 General Commercial District, all for the benefit of **only one property owner** in the entire City of Jackson. As defined by the Mississippi Supreme Court, the Fairview Inn Amendments provide a textbook example of illegal spot zoning. The term "spot zoning" applies "where a zoning ordinance is amended reclassifying one or more tracts or lots for a use prohibited by the original zoning ordinance and out of harmony therewith." *Drews,* 904 So. 2d at 141. "Whether such an amendment will be held void depends upon the circumstances of each case. The one constant in the cases, as stated by the textwriter, where zoning ordinances have been invalidated due to 'spot zoning' is that they were designed **'to favor' someone**." *Id.* (*quoting* 1 E.C. Yokley ZONING LAW AND PRACTICE §§ 8-1 to 8-3 (3rd ed. 1965)) (Emphasis added).

Here, the Fairview Inn Amendments were designed to favor the ***Fairview Inn***. As stated in the record, the proposed amendments create "an entirely new type of bed and break inn with a restaurant." (1 R. 31; *see also* 10 R. 377). Under the amendments, a "bed and breakfast inn, Class B with restaurant, may engage in the preparation and retail sale of food and beverages, including sale of alcoholic beverages." (1 R. 39). "***There is only one Class B bed and breakfast in the City of Jackson, and that is the Fairview Inn***." (*Id.* at 7; *see also* 10 R. 377) (Emphasis added).

In addition to the testimony from City officials and Fairview Inn counsel at the hearing, the City Council Agenda dated April 7, 2004, reiterates the flagrant nature of the spot zoning: The proposed amendments "create a third type of Bed and Breakfast Inn -- one that will be permitted to have a Restaurant that serves the general public on the premises. The only existing Class B Bed and Breakfast Inn (The Fairview Inn on Fairview Street, Belhaven neighborhood) will be permitted to open a Restaurant 30 days after the publication of this Ordinance and after giving notice to the Planning Department."[8] (4 R.E. 14, 1 C.P. 29).

The Fairview Inn Amendments allow only one business, ***the Fairview Inn***, to operate a full-service restaurant selling alcohol with meals in a residential neighborhood and exempt only one business, ***the Fairview Inn***, from the provisions of Section 1703.02.4-A of the Zoning Ordinance which requires non-conforming uses to apply for a use permit. The City has expressly granted ***the Fairview Inn***, and no one else, the right circumvent all of the traditional zoning requirements for use permits set forth in Section 1703.02.4-A of the Zoning Ordinance. Because the Fairview Inn Amendments are "diametrically opposed" to the City's Zoning Ordinance Land Use Plan, they constitute impermissible spot zoning and must be vacated.

[8]The City Council Agenda was inadvertently excluded from the record on appeal, but its contents are alleged in ¶ 68 of the Modak-Trurans' Bill of Exception and Complaint for Other Relief, which is part of the record.

III. THE FAIRVIEW INN AMENDMENTS ARE ARBITRARY, CAPRICIOUS AND WITHOUT A SUBSTANTIAL EVIDENTIARY BASIS.

In an attempt to legitimize the Fairview Inn Amendments, the City devotes scores of pages quoting long passages from Fairview Inn counsel and amendment proponents at the hearings before the City Council. (Resp. to Baker Brief, *passim*, incorporated by reference in Resp. to Modak-Truran Brief, *passim*). As discussed below, none of the lay opinions and other testimony the City culls out of the administrative record constitutes substantial evidence of a material change in the character of Fairview Street or a public need for a full-service restaurant selling alcohol with meals on a residential street when numerous restaurants are readily available in the existing commercial corridors on North State Street.

A. No Material Change in the Neighborhood Warranted Amendments.

The record lacks ***any***, much less substantial, evidence of a material change in the neighborhood justifying the enactment of the Fairview Inn Amendments. The City's Planning Department found no change in the character of Fairview Street and found no public need for these changes, and thus, gave a negative recommendation on the Fairview Inn Amendments. (10 R. 443-444). The City Council made no finding that there was a change in the character of Fairview Street or that there was a public need for these changes. (1 R. 140). The administrative record affirmatively shows no change in the character in the neighborhood to justify a commercial use or public need. (1 R. 18-140; 3 R 160-168, R. 169-213, 10 R. 358-446, 11 R. 446-450, 13 R. 452-503). Indeed, since the operation of the Fairview Inn in 1993, Fairview Street has "remain[ed] residential and "retain[ed] its residential character." (1 R. 57) Nothing in the City's Response points to the contrary.

In its Response, the City repeats its arguments that the need to show a material change in conditions in the area affected by the proposed amendments "are required prerequisites for a rezoning/map amendment but not prerequisites for a zoning ordinance text amendment." Resp.

to Modak-Truran Brief at 9. As previously discussed, the City grossly misconstrues the law. *See supra* at 8-11.

In the absence of a material change in the residential character of the neighborhood to justify the Fairview Inn Amendments, the City pulls out a crystal ball and predicts that the operation of a full-scale restaurant able to sell alcohol with meals every day of the week, any of the day, will not change the residential character of the neighborhood. This prediction, however, assumes that the Fairview Inn was able to maintain a restaurant prior to the enactment of the Fairview Inn Amendments. That assumption is patently false.[9]

First, the record affirmatively establishes that the Fairview Inn was ***never*** "permitted to serve dinner on a nightly basis." (4 R. 213). Such a use was limited to "restaurants properly designated and operating within the City." (*Id.*) At best, the Fairview Inn could host wedding receptions, birthday parties and other group activities when planned in advance. (*Id.*; 7 R. 244) As the record demonstrates, the Fairview Inn only had a few sporadic events, rather than 365 days a year of special events. (7 R. 227-228).

Contrary to the City's assertion, the Zoning Administrator did not retract the substance of her directive dated on September 22, 2003 (4 R. 212-213). The September 22 correspondence expressly stated that "[i]t has come to my attention that the Fairview Inn ***intends*** to commence serving dinners to the general public beginning today, September 22, 2003." (*Id.*) (Emphasis added). Two days later, the Zoning Administrator wrote that social gatherings, such as "wedding receptions, birthday parties, Christmas parties and other such group events" would not constitute a restaurant operation if scheduled prior to the date of the event. (7 R. 244). However, the Zoning Administrator reiterated that "[a]ny departure from the current practice of booking

[9]This is not a case about grandfathering in an existing use. Accordingly, the City's reliance on *Mississippi Manufactured Housing Association v. Board of Supervisors of Tate County*, 878 So. 2d 180 (Miss. App. 2004), is misplaced.

social gatherings or receptions should be not considered without contacting the City of Jackson." *Id.*

Second, the Fairview Inn Amendments changed the *status quo* by "create[ing] ***an entirely new*** type of bed and breakfast with a restaurant." (1 R. 30-31) (Emphasis added). This new use allows for the unrestricted operations of a full-service restaurant able to sell alcohol with meals every day of the week, any time of the day, on a residential street. (1 R.E. 155-56). In addition, the amendments allow advertising for the solicitation of business in all formats except billboards. (*Id.*).

Third, while the City attempts to portray the Fairview Inn restaurant as a small operation, the record unequivocally shows that the Inn can accommodate the "dining" and "entertainment needs" for "two or two thousand people." (13 R. 465). The Fairview Inn Amendments provide no restriction on the size or capacity of the restaurant except designated off-site parking. (1 R.E. 155-156). At the time of the hearing, the Inn had parking for 150 vehicles through leased parking at a near-by institutional site during the evenings and weekends and no off-site parking during the week days. (10 R. 379). Nothing in the amendments restricts the Inn's ability to enter into additional parking leases, such as with First Presbyterian or Belhaven College. Nothing in the amendment prohibits tour buses and trolleys to drop off restaurant patrons. Nothing in the amendments require the Fairview Inn owners to honor the representations made at the City Council hearing.

In its Response, the City mocks the Modak-Trurans for complaining that the amendments allow the Fairview Inn to be "open for lunch." (Resp. to Baker Brief at 17). "A wrong assumption indeed," says the City. "Because the adjacent 1600 medical building parking lot is not available during the week days, the Fairview Inn restaurant serves lunch only at Sunday Brunch." (*Id.* at 17 n 3). The Fairview inn Amendments, however, place ***no restriction*** on

whether the Fairview Inn can serve lunch, and a lack of off-street parking has never stopped the Fairview Inn from being inventive.[10] (1 R.E. 155-156).

Moreover, unless there is security, Fairview Inn patrons routinely park on the street in front of the homes of the Modak-Trurans and Bakers, and even security cannot eliminate traffic and parking problems. (13 R. 477-483). Nothing in the Fairview Inn Amendments or any other ordinance requires security at the Inn. Nothing in any City ordinance precludes Fairview Inn patrons from parking on the street. There is no residential permit parking system in Belhaven and weekday lunch crowds routinely exceed the legally mandated off-street parking requirement. (4 R. 198, 200-01, 13 R. 467-68, 480).

Fourth, the City attempts to bootstrap the Fairview Inn's illegal advertising of a restaurant and ongoing violations of the City's off-street parking and loading restrictions as a valid reason why nothing changed before and after the enactment of the Fairview Inn Amendments. (Resp. to Baker Brief at 37-40, incorporated by reference in Resp. to Modak-Truran Brief at 16). Neither the City nor Judge Bobby DeLaughter, who adopted this position, rely on any case law for such a proposition. Nor are the Appellants aware of any.

Although it was prohibited from doing so, the Fairview Inn began holding itself out as a restaurant in 2003. (13 R. 470). Shortly after beginning its advertising campaign, the amount of parking problems, traffic congestion, loading issues and safety concerns dramatically increased on Fairview Street. (4 R. 191-211, 13 R. 477-483). When Appellants complained, the Zoning Administrator conducted an investigation, which led to a written directive that the owners of the Fairview Inn were not allowed under their use permit to operate a restaurant, nor were they

[10]While the Fairview Inn represented to the City Council that they would not serve lunch (7 R. 227), the Fairview Inn's new owners ***are serving lunch***. "Sophia's restaurant at the Fairview is now serving lunch, Monday-Friday from 11:00 a.m. until 2:00 p.m., in addition to dinner and their Sunday Brunch buffet. Parking is available on the Fairview's property, and they have hired a parking attendant to assist. In addition, the Fondren Trolley will drop off and pick up at Fairview as part of their regular route." *See* BIA Neighborhood Report dated February 20, 2009.

allowed to advertise. (4 R. 212-213). The Zoning Administrator then issued a statement that social gatherings planned in advance would not violate the Zoning Ordinance. (7 R. 244). When Appellants continued to push the City to enforce the Zoning Ordinance against the Fairview Inn's illegal off-street parking, illegal unloading, illegal advertising, and illegal restaurant (13 R. 471-503), the result was the Fairview Inn Amendments, which removed these restrictions and allowed the Fairview Inn to operate a full-service restaurant in an R-2 District and to advertise in all formats but billboards. (1 R.E. 155-156). The City should be estopped from making any argument premised on the Fairview Inn's illegal activities.

Fifth, politicians and friends of the Fairview Inn claimed that the restaurant would alter the *status quo* by changing the tax base and increasing the number of jobs citywide. (Resp. to Baker Brief, *passim*, incorporated by reference to Resp. to Modak-Truran Brief, *passim*. To have any measurable impact on the economic well-being of the city, however, such a business would be "anything but" small and unobtrusive. By increasing business activity generated by the daily operation of a restaurant selling alcohol with meals, by increasing patronage generated from advertising in all format but billboards, by increasing sales taxes collected from the sale of food and alcohol, and by increasing number of jobs to service the increased demands created by the restaurant, the Fairview Inn is not promoting a residential use, but an intrusive commercial one, involving increased vehicular traffic, increased service deliveries of produce, meats and other necessities for restaurant operation, increased opportunities for children to be hurt and increased opportunities for disorderly disruptions. This new use is incompatible with R-2 Residential Districts generally and Fairview Street specifically. See *Euclid*, 272 U.S. at 391.

Finally, the most egregious argument made by the City, which was adopted by Judge Bobby DeLaughter, was that there was no substantial change in the character of Fairview Street because the problems raised by Appellants "were all problems encountered ***before*** passage of the

amendments." (Resp. to Baker Brief at 39, incorporated by reference in Modak-Truran Brief at 16) (Emphasis in original). Neither the City nor Judge DeLaughter provide legal citation for this proposition. Basic logic dictates that evidence of ***post***-amendment problems cannot exist until ***after*** the amendments are passed. But the record for administrative appeal is that which was before the City Council, not what happened afterwards.[11] *See* Miss Code § 11-51-75.

The Mississippi Supreme Court has not hesitated to reverse municipal action regarding rezoning or reclassification when substantial evidence of change in the character of the area is not met. *See Wright v. Mayor and Comm'rs of City of Jackson*, 421 So. 2d 1219, 1223 (Miss. 1982); *City of Oxford v. Inman*, 405 So. 2d 111, 112 (Miss.1981); *Hughes v. Mayor and Comm'rs of City of Jackson*, 296 So. 2d 689, 691 (Miss. 1974). The issue comes down to "whether the changes [in the area] justify rezoning" or reclassification. *Cockrell,* 950 So. 2d at 1092, citing *Woodland Hills Conservation Assoc., Inc. v. City of Jackson*, 443 So. 2d 1173, 1182 (Miss. 1983); *see also Sea Lands,* 759 So. 2d at 1227 (holding zoning amendment was arbitrary and capricious because of the lack of substantial evidence of a material change in the character of the area); *City of Jackson v. Bridges*, 139 So. 2d 660, 658 (Miss. 1962) (same).

In *Sea Lands,* the Mississippi Supreme Court emphasized that:

> To support on appeal a reclassification of zones, the record **at a minimum** should contain **a map showing the circumstance of the area,** the **changes in the neighborhood, statistics showing a public need,** and such further matter of proof so that a rational, informed judgment may be formed as to what the governing board considered. **Where there is no such proof in the record we must conclude there was neither change nor public need.**

[11]If the City is allowed to maintain this unfair argument, then Appellants request the opportunity to augment the record with post-amendment problems. The operation of a full-time restaurant at 734 Fairview Street has resulted in a significant increase in traffic and parking congestion from the luncheon crowd (which is not supposed to exist during the week), an increased number of delivery trucks and semi-vans blocking the street and creating traffic and safety concerns with children riding on bikes and ripsticks, an escalation of rats, increased problems with patrons parking in front of the Modak-Truran home in the evenings, and an increased number of disorderly events.

Sea Lands, 759 So.2d at 1227 (¶ 22) (*quoting Conerly*, 509 So.2d at 886) (emphasis added). The Court found that expert testimony offered in favor of the zoning amendments at the municipal board hearing of a "need for affordable multi-family housing, as contemplated by the recently adopted Comprehensive Plan" was legally insufficient. *Sea Lands,* 759 So.2d at 1227. The Court accentuated that "there was no substantial evidence showing that areas surrounding the subject property had been recently rezoned or that there were statistics or mapped circumstances of a growing change in the neighborhood." *Id.* Consequently, the Court concluded that the Town of "Florence's decision to rezone based on a material change in the character of the neighborhood and a public need was arbitrary and capricious as it was not based on substantial evidence." *Id.* at 1228.

Similarly, the Mississippi Court of Appeals recently reversed a decision to rezone property because "there were no previous rezonings, statistics or mapped circumstances of growing change and no quantification of any increase" but "only vague references" by the attorney for the applicants that the decision was not based on substantial evidence. *Cockrell v. Panola County Bd. of Supervisors*, 950 So.2d 1086, 1094 (Miss. App. 2007). Moreover, in *Kuluz*, the Mississippi Court of Appeals found substantial evidence supported rezoning because "twenty zoning changes ... allowing commercial development by re-zoning land to either C-2 (commercial) or ID-D (interstate)" had occurred since 1996, "two pieces of property had already been zoned commercial" in a "rural, residential, housing" area, and "the City was in the process of adopting a future land use plan" prepared by a hired consultant which "foresaw a continuous strip of commercially-zoned property" in the relevant area. *Kuluz,* 890 So. 2d at 940-41.

Even this brief look at Mississippi law makes it clear that the record lacks substantial evidence of a material change in the character of Fairview Street or the surrounding neighborhood. The City provided no evidence that any residential property on or near Fairview

Street has been rezoned for use as a general restaurant. The City did not provide any expert testimony supporting a land use plan for fostering mixed-use in Belhaven or mapping growing change in Belhaven from residential to commercial uses. No quantifiable evidence was offered showing rezoning or other change on Fairview or in Belhaven. The City offered no future land use plan to demonstrate a plan to develop mixed-use or commercial zones or uses on Fairview or in Belhaven. Even the City's Planning Department found no change in the character of Fairview Street and found no public need for these changes, and thus, gave a negative recommendation on the Fairview Inn Amendments. (10 R. 443). Thus, this Court should vacate the Fairview Inn Amendments.

B. No Public Need Warranted Amendments.

Not only does the record lack substantial evidence of a material change in the neighborhood justifying the amendments, but the record lacks substantial evidence of a public need for the operation of a full-scale restaurant selling alcohol with meals seven days a week on a residential street. (1 R.E. 155-156). In its Response, the City obliquely states that the Land Use Plan allows for "mixed uses." (Resp. to Modak-Truran, *passim*). As previously discussed, there is ***not one single provision*** in the City's Land Use Plan allowing a restaurant or any other intrusive commercial use on Fairview Street, which lies in that part of Belhaven that is south of Riverside Drive and east of North State Street. (2 C.P. 147-149, 160). Under the City's Land Use Plan, these areas, including Fairview Street, are to remain low density residential and low impact institutional. (*Id.* at 160).

The City attempts to bootstrap "a public need" for the restaurant in an R-2 Residential District based on testimony of "increased tax revenues",[12] a possibility of more jobs and

[12]Receipt of tax revenues alone is insufficient for finding a public need for rezoning. *See Fondren N. Renaissance v. Mayor of Jackson*, 749 So. 2d 974, 979 (Miss. 1999).

maintaining a tourist attraction.[13] (Resp. to Baker Brief at 34, incorporated by reference to Response to Modak-Truran Brief at 16). Mississippi courts, however, require something much more concrete than vague, self-serving statements from the property owner benefiting from the zoning change, their friends and politicians. *See, e.g., Wright*, 421 So. 2d at 1222-1223; *Mayor and Board of Alderman v. Estate of M.A. Lewis*, 963 So. 2d 1210 (Miss. App. 2007). In *Estate of M.A. Lewis*, the court held that the testimony by the applicant's "urban planning consultant regarding the area's traffic conditions, changing demographics, and surrounding commercial properties" was insufficient in part because there was "'ample land within the current city limits and study areas to satisfy [future] commercial needs, much of which is already zoned for these purposes.'" *Id.* at 1215.

With respect to the Fairview Inn Amendments, the City offered no future use plan showing a need for a restaurant on a residential street like Fairview Street in Belhaven. The City did not even hire an urban land use planer to provide testimony on the "area's traffic conditions, changing demographics, and surrounding commercial properties" which was not even sufficient in *Kuluz*. Furthermore, no showing was made that there is an absence of commercially zoned land suitable for restaurants which is unlikely given that all the other restaurants in Jackson are on commercially zoned land. (1 R. 62; 10 R. 377). Indeed rather than being "fairly debatable," the record is ***devoid*** of a public need for a restaurant on a residential street when there are already numerous restaurants, including "fine-dining" establishments, like Schimmels and Walkers, in commercial areas within a short drive or trolley ride from the Fairview Inn and when the City's Land Use Plan allows plenty of areas for combo restaurants and hotels in designated community

[13]The City's reliance upon *Adams v. Mayor and Board of Alderman of the City of Natchez*, 964 So. 2d 629 (Miss. App. 2007), is misplaced. *Adams* upheld a re-zoning of a parcel of property from an open land zone to a B-2 general business use for the restaurant operation of Fat Mama's Tamales. *Id.* at 634-637. Unlike here, the record showed that the owner of Fat Mama's Tamales could not find land to relocate his business and that the rezoned parcel did not conflict with existing ordinances. *Id.* at 635-636. Further, nothing in *Adams* supports the position that there is a public need for a restaurant in a ***residential district***. *Id.* To the contrary, *Adams* provides further support that restaurants -- whether they attract tourists or not -- must be in ***commercial districts***. *Id.*

and regional mixed use centers. Because the record does not demonstrate substantial evidence of public need and substantial evidence of change in the character of the area warranting new zoning, the Fairview Inn Amendments fail to withstand judicial scrutiny and must be vacated.

IV. THE FAIRVIEW INN AMENDMENTS VIOLATE THE MODAK-TRURANS' CONSTITUTIONAL RIGHTS.[14]

A. Procedural Due Process

Nothing in the City's Response undermines the Modak-Trurans' procedural due process claim. The City's Response is premised on the notice and hearing requirements for a text amendment. (Supp. Resp. at 24-25). However, as previously discussed, the Fairview Inn Amendments, like the variances struck down in *Drews v. City of Hattiesburg*, 904 So. 2d 138 (Miss. 2005), "constituted a rezoning in fact ...." *Id.* at 142. As observed by this Court, "serious questions arise" when a zoning amendment "permit[s] a use otherwise prohibited the by ordinance; *e.g.*, a service station or quick-stop grocery in a residential district. The most obvious danger is that the variance will be utilized to by-pass procedural safeguards required for valid amendment." *Drews*, 904 So. 2d at 141. That is precisely what the City did here. The City violated the Modak-Trurans' procedural due process by shifting the burden of proof through a contrived "text amendment" onto the shoulders of the objectors of the amendments, which effectively by-passed the procedures set forth in the Zoning Ordinance for a valid rezoning and reclassification, and denied the Modak-Trurans' meaningful process. *See* ZONING ORDINANCE §§ 1703:02 to 1703:03A, pp. 104-06; *see also Carpenter v. City of Petal*, 699 So. 2d 928 (Miss. 1997) (by-passing procedural safeguards constituted procedural due process violation).

[14] The standard of review for the Modak-Trurans' constitutional claims is *de novo*. *See, e.g., Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006); *Duncan v. Duncan*, 774 So. 2d 418, 419 (Miss. 2000).

B. Substantive Due Process

On its face and its application, the Fairview Amendments fail to withstand constitutional scrutiny under a substantive due process analysis. Contrary to City's assertion, the Modak-Trurans prevail on their substantive due process claim for two reasons. First, the Modak-Trurans have a constitutional protected right to the quiet enjoyment and use of their home. *See Boraas*, 416 U.S. at 4-5; *Euclid*, 272 U.S. at 394; *Mikeska*, 451 F.3d at 370. Second, the Fairview Inn Amendments are not rationally related to a legitimate government interest.

"Whether a particular zoning action has the requisite rational relationship to a legitimate government interest is a question of law." *Mikeska*, 451 F.3d at 379. In its Response, the City never actually identifies a government purpose. (Supp. Resp. at 22-24). Instead, it makes a general assertion that "mixed uses" are "in line with the City's changes to city-wide development planning." (*Id.* at 23). However, as previously discussed, the City's Land Use Plan makes ***no*** provision for commercial uses to encroach in existing residential districts. (2 C.P. 147-149). Indeed, the Plan retains the residential character of Fairview Street. (*Id.* at 160) (the portion of Belhaven that is east of North State Street and South of Riverside Drive, which would include Fairview Street, "***should remain as low impact institutional and low density residential.***"). (Emphasis added). Consistent with the Zoning Ordinance, the Plan restricts restaurants and hotels (which together equal the combo classification provided by the "Class B Bed and Breakfast with Restaurant") to major arterials, highways, interstates, designated community centers and designated regional mixed use centers. (2 C.P. 135, 151-169).

Further, the Fairview Inn Amendments contravene the purpose of the City's Land Use Plan. (2 C.P. 147). As set forth in the Plan, the "residential neighborhood is the basic physical structure for the City's land use and development framework" and the purpose is ***to create and sustain strong neighborhoods***." (*Id.*) (Emphasis added).

In addition, the rational basis test requires not only a legitimate state interest, which the City does not have, but also that "the government action is rationally related to furthering that interest." *Mikeska*, 451 F.3d at 381; accord *Carpenter*, 699 So. at 932. While the City dismisses the Modak-Trurans' substantive due process challenge as "frivolous" (Supp. Resp. at 24), the City is unable to provide ***any*** reason to distinguish the operation of a "Class B Bed and Breakfast with Restaurant" from general restaurants, neighborhood restaurants, bars and hotels. All of these uses involve high density impact from delivery needs for food and drink, the sale of alcohol, dine-in guests, parking issues, traffic problems, rodent issues from food waste, and large amounts of raw trash disposal, yet the Fairview Inn (the only Class B Bed and Breakfast in town) can operate its restaurant in an R-2 Residential District, and the others uses doing the same types of activities as the Fairview Inn cannot.

Moreover, the City fails to provide ***any*** rational reason why allowing the operation of a full-service restaurant selling alcohol with meals any day of the week on a residential street furthers the purpose of an R-2 District, which is to provide areas for "low and medium density residential uses and structures." Zoning Ordinance § 602.05 at 35. Because the Fairview Inn Amendments are not rationally related to furthering the purpose of an R-2 Residential District (indeed, they are contrary to the stated purposes of the Zoning Ordinance and Land Use Plan to promote residential neighborhoods), they violate the Modak-Trurans' substantive due process rights.

C. Unconstitutional Vagueness

The Fairview Inn Amendments are also unconstitutionally vague. Contrary to the City's argument (Resp. to Modak-Truran Brief at 20), the amendments "appeal to the unfettered discretion of a City official who, on an ad hoc basis, must decide" what is a bed and breakfast with restaurant versus general restaurant, neighborhood restaurant, or hotel, which in turn leads

to the arbitrary enforcement of the City's Zoning Ordinance. If a general restaurant, neighborhood restaurant, bar or hotel opened for business in any designated residential district, the Zoning Ordinance requires the City to take immediate enforcement action to stop the illegal use. However, if the Fairview Inn operates the same use -- that is, at the very least a general restaurant and hotel under the reclassified use of a "Class B Bed and Breakfast Class with Restaurant" -- the City gives the Fairview Inn a pass. This is precisely what the United States Constitution does not allow. *See, generally, Mayor & Board of Alderman of City of Clinton v. Welch*, 888 So. 2d 416, 421-428 (Miss. 2004) (striking down zoning ordinance that was unconstitutionally vague). The Fairview Inn Amendments on their face and in their application lead, at the very least, to arbitrary enforcement. Accordingly, this Court should invalidate the Fairview Inn Amendments as impermissibly vague.

CONCLUSION

We ask this Court to do what the City Council and Judge Bobby DeLaughter failed to do and protect the integrity of our residential neighborhood. For all the forgoing reasons and those set forth in our Opening Brief, this Court should reverse the lower court's decision, vacate the Fairview Inn Amendments and reinstate the *status quo* which legally existed before the enactment of the Fairview Inn Amendments.

DATED this the 23rd day of February, 2009.

Respectfully submitted,

By: _____
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By: _____ (Sent w/ permission)
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CERTIFICATE OF SERVICE

I, Anita Modak-Truran, do hereby certify that I have this day has mailed, by First Class mail with proper postage prepaid, a true and correct copy of Appellants' Reply Brief to the following persons:

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