

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

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THE FAIRVIEW INN**

APPELLEES

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

BRIEF OF APPELLANTS MARK AND ANITA MODAK-TRURAN

ORAL ARGUMENT REQUESTED

ANITA K. MODAK-TRURAN, ESQ., *PRO SE*
MARK C. MODAK-TRURAN, ESQ., *PRO SE*
735 Fairview Street
Jackson, Mississippi 39302
(601) 969-1055

APPELLANTS

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Miss. R. App. P. 28(a)(1), Appellants Mark and Anita Modak-Truran certify that the following persons have an interest in the outcome of this lawsuit:

APPELLANTS

Mark Modak-Truran, Esq., *Pro Se*
Anita Modak-Truran, Esq., *Pro Se*
Daniel Baker, Esq., *Pro Se*
Katherine Baker, Esq., *Pro Se*

APPELLEES

City of Jackson, MS
Mayor of Jackson in his official capacity only

ATTORNEYS FOR APPELLEES

Sarah O'Reilly Evans, Esq.
Peter Teeuwissen, Esq.
City Attorneys Office for Jackson, MS
455 East Capitol Street
Jackson, Mississippi 39201

HINDS COUNTY CIRCUIT COURT

Honorable Bobby B. DeLaughter
Hinds County Courthouse
P.O. Box 27
Raymond, MS 39154

Special Master Lee Turner
P.O. Box 488
Purvis, MS 39475

INTERVENORS

William Simmons
Carol Simmons
William and Carol Simmons, formerly d/b/a The Fairview Inn

ATTORNEYS FOR INTERVENORS

Crane Kipp, Esq.
Wise Carter Child & Caraway
401 East Capitol Street, Suite 600
Jackson, Mississippi 39205

Robert P. Wise, Esq.
Sharpe & Wise
120 N. Congress St., Suite 902
Jackson, MS 39201

OTHER INTERESTED PARTIES

Sharp Hospitality, LLC
Peter Sharp
Tamara Sharp

Respectfully submitted,

Anita K. Modak-Truran (not
at permission)

Anita K. Modak-Truran

Mark C. Modak-Truran

Mark C. Modak-Truran

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STATEMENT REGARDING ORAL ARGUMENT

The Appellants request oral argument. Resolution of this case depends upon a complete understanding of the record contained with the Bill of Exceptions, the matters presented at the City Council Meeting and before the Circuit Court, and the relevant Mississippi case law. Oral argument also may be helpful to the Court concerning any questions regarding these matters.

STATEMENT OF THE ISSUES

1. Do the Fairview Inn Amendments constitute illegal spot zoning when these amendments were enacted for the sole benefit of the Fairview Inn and operate to exempt the Fairview Inn's use of a general restaurant and hotel in a residential neighborhood from the comprehensive zoning scheme that applies throughout the City of Jackson?

2. Are the Fairview Inn Amendments supported by substantial evidence of a change in the residential character of Fairview Street to warrant reclassification of a "general restaurant" and "hotel," which are uses restricted to a C-3 General Commercial District under the Zoning Ordinance into a new classification called a "Bed and Breakfast Inn Class B with Restaurant", which is allowed to be operated without a use permit by one business only on a quiet residential street located in one of the oldest neighborhoods in the City of Jackson?

3. Are the Fairview Inn Amendments unconstitutionally vague when read against the comprehensive zoning scheme of the City of Jackson that prohibits general restaurants and hotels from operating in residential districts because of the incompatibility of these uses in residential areas?

4. Do the Fairview Inn Amendments violate the Modak-Trurans' substantive due process rights?

5. Did the City's actions in enacting the Fairview Inn Amendments without following the process set forth in the Zoning Ordinance violate the Modak-Truran's procedural due process rights?

STATEMENT OF THE CASE

Appellants Mark and Anita Modak-Truran (collectively, "the Modak-Trurans") appeal Hinds County Circuit Court Judge Bobby DeLaughter's Memorandum Opinion and Order (dated December 4, 2007) affirming two amendments to the Zoning Ordinance of Jackson, Mississippi ("Zoning Ordinance"). (2 R.E. 8-21; 3 C.P. 290-303).¹ These amendments—codified in §§ 202.17(a) and 602.02.03 of the Zoning Ordinance (collectively, "the Fairview Inn Amendments")—were enacted by the City Council of Jackson and the Mayor (collectively, "City of Jackson" or "City") on April 7, 2004, for the benefit of one business, the Fairview Inn. (3 R.E. 29-30; 6 R.E. 49; *accord* 1 R. 117, 119-120, 2 R. 155-156, 10 R. 477). On October 3, 2007, Special Master Lee Turner issued his Report and Recommendation finding that the Fairview Inn Amendments "amounted to illegal spot zoning" and that "the City of Jackson sanctioned impermissible 'spot zoning'." (5 R.E. 37, 41; 1 C.P. 63, 67). He also explicitly rejected the City of Jackson's claim that this "zoning change is merely a text amendment" and found that the Fairview Inn Amendments "are diametrically opposed to other uses permitted under R-2 use permits (churches, school, Historic Bed and Breakfast Inn's), and out of harmony with the original ordinance." (5 R.E. 42; 1 C.P. 68). On December 4, 2007, Judge DeLaughter rejected the Special Master's Report and Recommendation and affirmed "the actions of the City Council in adopting the subject amendments to the ordinances of the City of Jackson." (2 R.E. 21; 3 C.P. 303).

¹ The citations to the Record Excerpts included in APPELLANTS' RECORD EXERPTS FOR BRIEF OF APPELLANTS MARK AND ANITA MODAK-TRURAN (dated August 13, 2008) will be cited by tab and page number as "(__ R.E. __)". Similarly, citations to the Clerk Papers will be cited by volume and page number as "(__ C.P. __)", and citations to the administrative record (black three-ringed binder) that was considered by Judge Bobby DeLaughter and Special Master Lee Turner below is cited by tab and page number as "(__ R. __)".

Cognizant with the Special Master's Report and Recommendation, the Fairview Inn Amendments grant the Fairview Inn owners and any subsequent owners of 734 Fairview Street in Jackson, Mississippi, the unfettered right to engage in a general restaurant operation with extensive bar service and hotel-sized accommodations every day of the week, any hour of the day, in the interior of the historic Belhaven neighborhood. Under the guise of a "Text Amendment," the Fairview Inn Amendments effectively rezone and reclassify an R-2 Single-Family and Two-Family Residential District into a C-3 General Commercial District for the benefit of the Fairview Inn. These Amendments run afoul of the City's comprehensive zoning scheme, bear no substantial relationship to the public health, safety, morals or general public welfare of the City of Jackson, and therefore, are plainly arbitrary and capricious, and violate the Modak-Trurans' substantive and procedural due process right guaranteed under the United States Constitution. Accordingly, this Court should reverse Judge DeLaughter's decision, vacate the Fairview Inn Amendments, and remand the constitutional claims raised in the Modak-Trurans' Bill of Exception and Complaint for Other Relief pursuant to 42 U.S.C. § 1983 (1996). (8 R.E. 86-120).²

STATEMENT OF FACTS

I. THE CITY OF JACKSON ZONING ORDINANCE

On May 29, 1974, the City of Jackson adopted an ordinance establishing a comprehensive zoning plan for regulating and restricting the location of industries, trades, businesses, apartment houses, two-family houses, single family houses and so on for real property located within the city limits. ZONING ORDINANCE, *passim*. The Jackson City Council defined the general purpose and intent of the Zoning Ordinance as "the attainment of the goals

² On remand, the Circuit Court should proceed to the constitutional claims asserted by the Modak-Trurans in their Bill of Exception and Complaint for Other Relief. See *Falco Lime, Inc. v. Mayor and Alderman of the City of Vicksburg*, 836 So. 2d 711, 720 (Miss. 2003). All of the Modak-Trurans' constitutional claims can be decided on the administrative record and the pleadings in the court file.

and objectives of the PEOPLE OF THE CITY OF JACKSON, MISSISSIPPI, expressed in the Comprehensive Plan of the City, through provisions of this Ordinance" *Id.* at § 102, p. 2.³

One important facet of the Zoning Ordinance, which is equally true for all zoning ordinances throughout the United States, is the protection of residential properties from encroachment by commercial and industrial land uses. ZONING ORDINANCE, *passim*. See generally, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). "Industrial and commercial districts are not good places to bring up families[.]" 2 E.C. Yokley, ZONING LAW AND PRACTICE § 7-4(b) (4th ed. 1979).

The United Supreme Court in the seminal case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), held that the exclusion of business, trade and commerce from "residential districts bears a rational relation to the health and safety of the community." *Id.* at 391. "[T]he segregation of residential, business and industrial" uses "will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children...." *Euclid*, 272 U.S. at 394; see also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4-5 (1974). Allowing commercial uses in these areas decreases safety and deprives "children of the privilege of quiet and open spaces for play." *Euclid*, 272 U.S. at 394. If left to encroachment by commercial uses, the residential character of neighborhoods will be destroyed. *Id.*

Under the Zoning Ordinance, the Jackson City Council "divided the City into Zoning Districts in conformance with the City's Comprehensive Plan" and "prepared regulations pertaining to such districts," having "*given reasonable consideration, among other things, to the character of the districts and their particular suitability for particular uses....*" *Id.* at

³ While the citations in the brief will only refer to the zoning sections and page numbers in the Jackson Zoning Ordinance, the specific provisions cited can be found at 7 R.E. 50-85.

Preamble, p. 1 (emphasis added). The entire area of the City of Jackson is divided into 20 zoning districts. ZONING ORDINANCE § 301, p. 26. There are ten residential districts, four commercial districts, two industrial districts and four special zoning districts. *Id.*

Commercial uses, such as general restaurants, hotels and motels, bars and nightclubs, are prohibited in residential districts. ZONING ORDINANCE § 602.05.1, p. 35-36. Through a valid exercise of the City's police power and consistent with the holding of *Euclid, supra*, and its progeny, the Zoning Ordinance segregates commercial uses from residential districts and ensures that residential districts are located in areas of Jackson where the environment is conducive to this type of use and that serve to promote "residential areas as a means to ensure their continuance." Zoning Ordinance § 602.02, p. 31, § 602.05, p. 35, § 602.07, p. 37.

II. FAIRVIEW STREET

A. Three Properties on Fairview Street

This case concerns the fundamental rights of families to live and raise children in residential neighborhoods without the intrusion of commercial business. (3 R. 160-166; 13 R. 452-458, 473-503). The properties at issue are located on Fairview Street in Jackson, Mississippi and lie in the Belhaven neighborhood. (*Id.*) Belhaven is a designated local historic district and one of the City of Jackson's oldest established residential neighborhoods. (13 R. 462-464).

1. The Modak-Truran Home

Mark and Anita Modak-Truran reside at 735 Fairview Street with their now fourteen-year old son Michael. (1 R. 126; 7 R. 331-332; 13 R. 474). The Modak-Trurans have owned and continuously lived at this property since July 1998, having moved to Jackson from Chicago for a better quality of life. (1 R. 123-124; 10 R. 416-417).

2. The Baker Home

Living next door to the Modak-Trurans are Daniel and Katherine Baker and their four children, Morgan, Elizabeth, Olivia and Eleanor (collectively, "the Bakers"). (1 R. 61; 3 R. 160-168). The Bakers resides at 729 Fairview Street and have lived at this residence since 1994. (*Id.*; 7 R. 335-336).

3. The Fairview Inn

The Fairview Inn, a bed and breakfast inn formerly owned by William and Carol Simmons (collectively, "the Simmons"),⁴ lies directly across the street from the single family homes of the Modak-Trurans and Bakers. (1 R. 128; 10 R. 37). It is located at 734 Fairview Street. (3 R. 160-166; 13 R. 452-458, 473-503). Before the enactment of the Fairview Inn Amendments, the Fairview Inn was a residential bed and breakfast, hosting sporadically few weddings, birthday parties and corporate dinners. (*Id.*) Indeed, the Fairview Inn admits that it has hosted very few weddings and large party events the past few years. (1 R. 55; 10 R. 23).

B. The Fairview Street Properties Are Zoned Residential.

The Fairview Street properties are located in an "R-2 Single-Family and Two-Family Residential District" ("R-2 district"). The purpose of an R-2 district is "to provide areas for the development of low and medium density *residential uses and structures*." ZONING ORDINANCE § 602.05, p. 35 (emphasis added). The Zoning Ordinance further provides that "[i]t is the intent of this Ordinance that these districts be located in areas of the City where a *protected environment suitable for moderate density residential use can be provided*, as well as in established moderate density *residential areas as a means to ensure their continuance*." *Id.* (emphasis added).

Commercial uses are not permitted in an R-2 district. ZONING ORDINANCE § 602.05, pp. 35-36. Rather, this district confines property uses to single family homes, duplexes, or group

⁴ In 2006, the Simmons transferred by warranty deed the Fairview Inn property to Sharp Hospitality, LLC.

homes for the handicapped with or fewer residents. *Id.* The Zoning Ordinance allows for a limited number of other uses under a stringent licensing scheme for a "use permit." *Id.* at § 602.02.3, pp. 32-33, § 1703.02.04, p. 106. Uses which may be permitted under "use permits" in an R-2 district are churches, schools, group homes for the handicapped with 7 to 12 residents and bed and breakfast inns Classes A and B. *Id.*

The distinction between a Class A and Class B bed and breakfast inn is that a Class B inn may offer meals to "lodgers or guests of receptions and other social gatherings." *Compare* ZONING ORDINANCE § 202.16, p. 5 *with id.* at § 202.17, p. 5. The Fairview Inn is the only Class B bed and breakfast in the entire City of Jackson. (10 R. 377; 6 R.E. 49). While the Fairview Inn may hold wedding receptions, birthday parties, and corporate events on sporadic occasions, its classification as a Class B bed and breakfast inn does not allow it to operate a restaurant, nightclub or bar or to function as a hotel or motel. *Compare* ZONING ORDINANCE §§ 601.01-602.02.03, pp. 31-33 *with id.* at §§ 702.05.01, pp. 53-54.

Under the Zoning Ordinance, a use allowed by use permit is permitted only after being submitted to governmental scrutiny in each case to insure compliance with standards designed to protecting neighboring properties and the public. ZONING ORDINANCE § 1703.02.4, p. 106. For a use permit to issue, the applicant must prove, among other things, that the proposed use conforms to the City's comprehensive zoning scheme. *Id.*

III. THE FAIRVIEW INN: AN EVOLUTION FROM FAMILY HOME TO COMMERCIAL INTERLOPER

A. The 1993 Use Permit For a Class B Bed and Breakfast Inn

Prior to 1993, the Fairview Inn was the family home of William J. Simmons. (7 R. 323). In 1993, the City carved out a narrow exception and granted the Simmons a use permit for the limited operation of a "manor-sized" bed and breakfast inn at 734 Fairview Street. (3 R. 161). Initially, the owners of the Fairview Inn sought a rezoning of 734 Fairview Street to a

commercial classification. (*Id.*). When it was apparent that the City would not grant the rezoning application, the Fairview Inn owners submitted a proposal for a new classification of use, called a "Bed and Breakfast Inn, Class B." (*Id.*).

In support of the original application for use permit for a "Bed and Breakfast Inn, Class B", the Fairview Inn owners represented that this limited use would allow their property to buffer the surrounding residences from the C-2 Limited Commercial District of professional offices on State Street, while providing a source of income to defray the expense of maintaining the historic structure. (8 R.E. 93). They also represented that no children were living in close proximity to the property and that the number of events hosted at the inn would range between two to no more than nine per month. (*Id.*).

As further inducement for the City to grant their use application, the Fairview Inn owners assured the City and adjacent neighbors they would not advertise. (8 R.E. 93). "Since Fairview is a private home and its facilities are not offered to the general public, there is *no advertising*, not even a listing the in the telephone business directory. All inquiries about social events at FAIRVIEW result from personal word-or-mouth referrals from previous guests." (*Id.*) (emphasis added).

Based on a finding that the limited innkeeping activities proposed by the owners of the Fairview Inn would do no harm to the residential character of Fairview Street, the City granted the owners of the Fairview Inn a use permit to operate a "Bed and Breakfast Inn, Class B" at 734 Fairview Street on July 7, 1993. (7 R. 338-341; 8 R.E. 94). The Zoning Ordinance defines a "Bed and Breakfast Inn, Class B" as:

An Owner occupied dwelling which is the primary residence of the owner and where a portion of the dwelling is available for short-term lodging and where receptions or other social gatherings may be held. Meals may only be served to lodgers or guests of receptions and other social gatherings.

B. The 1999 Expansion of The Lodging Rooms

In 1999, the Simmons petitioned the City to add eight additional rooms to their property at 734 Fairview Street. (8 R.E. 94). In support of their petition, they represented that the additional rooms would allow the inn to “buffer” surrounding residences from the full commercial activity of professional offices and that these additions would reduce local traffic. (*Id.*) The petition alleged that no children were living *in* the Fairview Inn. (*Id.*) The petition never mentioned the fact that seven children lived directly across the street from the Fairview Inn. (*Id.*) Based on the Simmons' representations, the City approved the request, ostensibly because a few extra lodgers for the eight additional rooms would cause little or no intrusion on residential life. (7 R. 342).

C. The 2003 Request to Expand into from a Residential Bed and Breakfast into a General Restaurant and Hotel.

In 2003, the Fairview Inn sought to expand its residential bed and breakfast into a more commercially intrusive general restaurant and hotel. The Simmons began advertising in newspapers and elsewhere a restaurant with gourmet meals available to the general public. (3 R. 210, 211-213; 13 R. 465, 469, 479). One such advertisement read: “Beginning Monday, September 22nd Whether it's a special dinner for two or a corporate affair for 10 or 200, Chef Todd McClellan as a sumptuous culinary experience available for every taste. Each Monday through Saturday evening at the Fairview Inn you'll have select signature dinners for your gatherings.” (4 R. 210). As part of getting folks to spend money at the inn, the Fairview Inn also advertised to the general public what is colloquially referred to as “Happy Hours,” where paying patrons could kick back, relax and “[h]ave a bourbon on the veranda of this huge beautiful classical southern mansion, then a good steak dinner.” (1 R. 125-126; 13 R. 470).

On September 22, 2003, the City Zoning Administrator notified the Fairview Inn that its *advertised restaurant operation* at 734 Fairview Street would constitute a violation of the

Zoning Ordinance. (4 R. 212-13). Among other things, the Simmons were advised "that your understanding of the City's interpretation of its Zoning regarding the Bed & Breakfast Inn 'Class B' *is incorrect.*" (*Id.* at 212) (emphasis added). The City had previously advised counsel for the Fairview Inn of this very fact: as a consequence of subsequent discussions between the Planning Department and Attorneys Kipp, the City "made clear that The Fairview Inn could not serve regular evening dinners as you [the Simmons] have described, under the current ordinance. Additionally, being aware that the City's restrictive interpretation of this Ordinance does not allow meals to be served in this fashion, Attorney Kipp recommended and submitted a proposed ordinance that would allow the very activity you now advertise." (*Id.* at 212).

The City warned the Simmons "as has been done on previous occasions, that *it has never been the City's intent that a Bed and Breakfast "Class B" be permitted to serve dinner on a nightly basis. This proposed service that you have announced is contrary to the Use Permit that was issued for your establishment.*" (4 R. 213) (emphasis added). The Zoning Administrator advised the Simmons that under her interpretation of Section 202.17 of the Zoning Ordinance (which is controlling under Zoning Ordinance § 1403-A), "that 'social gatherings' include[d] events such as wedding receptions, birthday parties, Christmas parties and other such group activities that are based on a common theme, to be held on a periodic basis, as opposed to a nightly occurrence." (4 R. 213). Only "restaurants properly designated and operating within the City" were allowed to sell regular dinners to the public. (*Id.*).

Warned in writing by the City Zoning Administrator that any proposed restaurant operation at 734 Fairview Street constituted a zoning violation and caught in an advertising campaign designed to increase restaurant revenues from the sale of alcoholic beverages in a residential neighborhood, the Fairview Inn owners lobbied the City for a zoning reclassification. (13 R. 471-472). The Simmons sought to increase commercial activities from a sporadic few

times a month to a hard core commercial operation involving a restaurant, the sale of alcoholic beverages, irrespective of alcohol content (which is what distinguishes a "neighborhood restaurant" from a "general restaurant") and 18 lodging rooms that could be opened to the public, at the owners' sole discretion, every day of the month, any time of the day. (*Id.*)

The Simmons' request to transform a residential bed and breakfast inn with no right to advertising into a "general restaurant-full service bar-hotel" with advertising and Happy Hour specials such as "bourbons on the veranda" on a quiet residential street brought out objectors. (3 R. 160-164; 4 R. 169-189; 11 R. 446-450; 13 R. 452-458). Twenty-seven property owners who owned property falling within 160 feet of the Fairview Inn signed statements objecting to any amendment to the Zoning Ordinance which would result in an increase in the commercial use of the Fairview Inn. (*Id.*; 1 R. 63-64). The objecting owners constituted 31 percent of the total land falling within 160 feet of the Fairview Inn and 61 percent of the owner occupied residences. (*Id.*). As of January 2004, twenty-five children lived within 160 feet of the Fairview Inn. (3 R. 162).

IV. THE RECLASSIFICATION AND REZONING OF THE FAIRVIEW INN PROPERTY

A. Hearing Before The Jackson City Planning Board

On January 28, 2004, the City Council, at the request of the Fairview Inn, brought two proposed amendments to the Zoning Ordinance before the Jackson City Planning Board, which serves as an "Advisory Committee to the City Council on zoning matters."⁵ ZONING ORDINANCE § 202.17, p. 5; (10 R. 358-445). The first suggested amendment proposed a new classification for a use called a "Bed and Breakfast Inn Class B." ZONING ORDINANCE § 202.17(a). The second amendment proposed allowing this new use in an R-2 Single-Family and Two-Family Residential District." *Id.* at § 602.02.03. These amendments, collectively referred to as the

⁵ Article XV-A of the Zoning Ordinance sets forth the role of the City Planning Board and the manner in which Planning Board hearings are to be conducted.

Fairview Inn Amendments, came with no recommendation from the City of Jackson's Planning Department. (10 R. 358-445).

1. **A New Use: "Bed and Breakfast Inn Class B With Restaurant"**

The first proposed amendment sought to classify a new use called a "Bed and Breakfast Inn, Class B with Restaurant." ZONING ORDINANCE § 202.17(a). This amendment provides:

Section 202.17(a) Bed and Breakfast Inn, Class B with Restaurant: An owner occupied dwelling, which is the primary residence of the owner and where a portion of the dwelling is available for short-term lodging and where receptions or other similar private functions may be held. Meals may be served to lodgers, guests of receptions and other private functions *and the general public* as follows: *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.* Customers are served their food, or beverages by a restaurant employee at the same table at which said items are consumed. Advertising on local billboards is prohibited. The prohibition will not preclude, however, mailings or advertisements in newspapers and in national, regional, state or local travel and tourism periodicals. (See Section 602-02-3).

(7 R. 235; 10 R. 362-364) (emphasis added).

2. **A New Zone: One Business To Operate the New Use in Residential Zoning District**

The second proposed amendment sought to allow the new use to operate under a "use permit" in an "R-2 Single-Family and Two-Family Residential District." ZONING ORDINANCE § 602.02.03. However, the amendment exempted the Fairview Inn, the only "Class B Bed and Breakfast Inn" in the entire City of Jackson, from complying with the stringent requirements for a "use permit." (10 R. 377). This amendment provides:

Section: 602.02.03: Uses Which May be Permitted as Use Permits:

Class B Bed and Breakfast Inn with Restaurant. It is expressly understood that a separate Use Permit is required to operate a restaurant in a Class B Bed and Breakfast Inn. *Any existing Class B Bed and Breakfast Inns who determine that they wish to operate a restaurant in conjunction with their Class B Bed and Breakfast Inn is permitted to do so by right subject to receipt of a statement indicating this election.*

(7 R. 235-237; 10 R. 364-368) (emphasis added).

3. The City Planning Board Votes "No" To The Fairview Inn Amendments

At the Planning Board hearing on the Fairview Inn Amendments, the City's Planning Department offered no evidence in support of the Fairview Amendments. (10 R. 361-370). The City's Zoning Administrator noted that Fairview Street was residential in character and that there has been no change in the character of the neighborhood. (*Id.* at 434-435). The City's Zoning Administrator was unable to identify a change in the neighborhood warranting a restaurant operation in a residential district. (*Id.*)

The Fairview Inn's position at the Planning Board hearing was two-fold. (10 R. 21-23). *First*, counsel for the Fairview Inn argued that "a Class B Bed and Breakfast with Restaurant" was not really a "new" use because the Fairview Inn offered dinners to the public under reservations. (*Id.*). *Second*, that a restaurant was "vital to the economic welfare of the Fairview Inn." (*Id.* at 23).

The Fairview Inn, however, presented no evidence that it had been operating a restaurant since 1993 (indeed, that was the whole reason why the Fairview Inn sought the Fairview Inn Amendments so that it *could* operate a general restaurant and a position directly rejected by the Zoning Administrator), and presented no evidence of any financial problems. Indeed, the record shows that the Fairview Inn was financially successful. (10 R. 396, 398-399, 402-403). However, and more importantly, the Fairview Inn's financial condition or other personal conveniences are not relevant and cannot form the basis of a zoning change. *See Carver v. Jackson County Board of Supervisors*, 947 So. 2d 351, 354 (Miss. App. 2007).

In opposition to the Fairview Inn Amendments, Daniel Baker presented evidence on behalf of 27 objecting home owners including the Modak-Trurans. (10 R. 408-416). The objectors' evidence demonstrated that: (1) Fairview Street was a residential street; (2) families lived on Fairview Street; (3) 25 children lived within 160 feet of the Fairview Inn; and (4) these

children played in their front yards, rode their bicycles in the streets, and enjoyed the peace and quiet of a residential neighborhood. (10 R. 408-433). The objectors presented further evidence that even under the Fairview Inn's limited operations of a sporadic few weddings, birthday parties and corporate events, this limited activity created traffic congestion, parking problems, delivery truck problems, vibrations from large tour buses idling in front of the Modak-Truran home, disorderly conduct incidents from drunken patrons, excessive noise, and safety issues. (*Id.*; accord 4 R. 169-213; 13 R. 452-503).

After a full hearing, the Planning Board gave a "***negative recommendation***" to the Fairview Inn Amendments, and for good reason. (10 R. 443-444). There was no evidence of a substantial change in the neighborhood or a public need for rezoning a commercial use into a residential district. As the Chairman of the Planning Board said for an article printed in *The Clarion-Ledger* the day after the hearing, "'We have to protect the integrity of our neighborhoods.'" (1 R. 68).

B. The Appeal Before City Council of Jackson

Having lost before the City's Planning Board, the Fairview Inn owners appealed to the Jackson City Council. The Jackson City Council held a public hearing on April 7, 2004, on the Fairview Inn Amendments. (1 R. 1-147). The City Council agenda distributed on that day reminded council members that these amendments were expressly and directly for the benefit of the Fairview Inn:

Note from Staff: This proposed Ordinance will 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.***

New Bed and Breakfast Inns will be required to apply for a Use Permit and will be required to meet the standards cited by Section 1703.02.4-A., regarding notification of nearby property owners, submission of a site plan, and demonstration that the granting of

a Use Permit will not adversely effect the surrounding properties nor otherwise be detrimental to the public welfare.

(6 R.E. 49; *accord* 1 R. 117, 119-120, 10 R. 477). Five council members were present; Dr. Leslie Burl McLemore (President of the Jackson City Council), Margaret Barrett-Simon, Bettye Dagner-Cook, Bo Brown and Ben Allen. (3 R.E. 155-159).

The Simmons argued and submitted testimonials from well thought of people in the community that Mr. and Mrs. William J. Simmons were "good people" and that the Fairview Inn's bed and breakfast was well regarded in the hospitality industry. (1 R. 51-60, 71-115; 7 R. 227-344). They offered no evidence addressing the already existing problems of the Fairview Inn with congestion, loading and unloading of deliveries from the sparse wedding receptions and other functions at the Fairview Inn, and thus, offered nothing to alleviate residential concerns of harm to the neighborhood from the operation of a much more intrusive nature of the proposed restaurant, where meals and alcoholic beverages could be sold seven days a week. (*Id.*). In addition, the Fairview Inn did not offer any evidence that the character of Fairview Street had substantially changed from a residential neighborhood to justify reclassification of the Inn or that there was a public need for rezoning. (*Id.*) Indeed, the Fairview Inn conceded at the City Council hearing that had been ***no change*** in the residential character of the neighborhood. (1 R. 60).

The evidence introduced by the objectors demonstrated that Fairview Street was residential in character and that twenty-five children lived within 160 feet of the Fairview Inn. (1 R. 61-70, 115-129; 3 R. 160-168; 4 R. 169-213; 11 R. 446-450; 12 R. 452; 13 R. 452-503). The objector's evidence showed that ***no*** public need was served by a commercial intrusion of operating a full scale restaurant-bar service-hotel on a quiet and narrow residential street where children rode their bikes and played. (*Id.*)

The following testimony from Vaughn McRae, a Belhaven property owner residing with his family and 4 children within 160 feet of the Fairview Inn, illustrates some of the problems with the Fairview Inn Amendments:

I love the Fairview.... It's a great place. It's a great thing in our city.. But that's not really the point. The point is does having a hotel in a residential area make long-term planning sense for the historic neighborhoods of our city?

First of all, your planning board considered all of the relevant facts heard from all of these people, looked at the City land use and voted against a change in the ordinance....

Number 2, over 60% of the homeowners most affected by this change – that's the people who live in and occupy the houses closes to Fairview, including these families who live right across the street, have to wait outside every morning and look at Fairview, oppose allowing a full-service hotel in their neighborhood

Number 3, Fairview's argued for the change because of their difficult financial situation, yet they've not presented any evidence of this: Tax returns, net worth statements, income statements. And even if they did, is that really a legitimate reason for our city rewrite it's zoning laws to accommodate somebody's financial situation?

And Number 4, I ask you, please, to look at the history of Jackson, think up and down every major street in Jackson: State Street, Ellis Avenue, West Capital, and consider the negative consequences of allowing businesses to move from the main traffic corridors and penetrate residential neighbors. I cannot think of one example where allowing commercial encroachment into a residential neighborhood in the City of Jackson has enhanced the neighborhood.

(1 R. 121-123).

At the close of argument and public comment, only four council members remained: Dr. McLemore, Ms. Barrett-Simon, Ms. Dagner-Cook and Mr. Allen. (1 R. 138-146). The four members evacuated into a private executive session to discuss "prospective litigation." (*Id.*). They returned with an extra member; Councilman Brown suddenly appeared to vote. (*Id.*).

The City Council unanimously voted 5-0 to adopt the Zoning Amendments. (2 R. 155-159). While each member made general comments about the Fairview Inn Amendments, the City Council made no findings that the character of Fairview Street had changed to justify the Fairview Inn Amendments or that there was a public need for these amendments. (1 R. 138-

146). Subject to the submission of a site plan, the Fairview Inn Amendments automatically allowed the Fairview Inn to operate a restaurant with the sale of alcoholic beverages seven days a week, 24 hours a day, in a residential neighborhood. (3 R.E. 29-33; 2 R. 155-159). In this respect, the “Note to the Staff” on the Jackson City Council Agenda stated that “[t]he 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.” (6 R.E. 49; *accord* 1 R. 117, 119-120, 10 R. 477). All other persons, however, seeking to operate a Bed and Breakfast Restaurant must go through the stringent requirements of Section 1703.02.4-A of the Zoning Ordinance, regarding notification of nearby property owners, submission of a site plan, and demonstration that the granting of a Use Permit will not adversely effect the surrounding properties nor otherwise be detrimental to the public welfare. (*Id.*) Aggrieved by the Fairview Inn Amendments, the Modak-Trurans filed this appeal. (8 R.E. *passim*).

STANDARD OF REVIEW

“The standard of review in zoning cases is whether” the City’s action “was arbitrary or capricious and whether it was supported by substantial evidence.” *Drews v. City of Hattiesburg*, 904 So. 2d 138, 140 (Miss. 2005). *See, also Perez v. Garden Isle Community Ass’n*, 882 So. 2d 217, 219 (Miss. 2004); *Board of Alderman, City of Clinton v. Conerly*, 509 So. 2d 877, 883 (Miss. 1987); *Kuluz v. City of D’Iberville*, 890 So. 2d 938, 940 (Miss. App. 2004); *Cockrell v. Panola County Bd. of Supervisors*, 950 So. 2d 1086, 1091 (Miss. App. 2007). The standard of review for questions of law, such as the Modak-Trurans’ constitutional claims, is *de novo*. *See, e.g., Duncan v. Duncan*, 774 So. 2d 418, 419 (Miss. 2000).

Mississippi courts have traditionally recognized a strong presumption that comprehensive zoning ordinances are reasonable, well planned, and meant to be permanent. *See, e.g., Town of*

Florence, Miss. v. Sea Lands, Ltd., 759 So. 2d 1221, 1224 (Miss. 2000); *Wright v. Mayor and Comm'rs of City of Jackson*, 421 So. 2d 1219, 1222 (Miss. 1982); *Cloverleaf Mall Ltd. v. Conerly*, 387 So. 2d 736, 740 (Miss. 1980). A presumption of reasonableness applies to rezoning as well as the original 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, Ltd.*, 759 So. 2d at 1227 (quoting *Conerly*, 509 So.2d at 883 (quoting *W.L. Holcomb, Inc. v. City of Clarksdale*, 217 Miss. 892, 65 So. 2d 281, 284 (1953)) (emphasis in original). In *Sea Lands*, the Mississippi Supreme Court stressed that it "has traditionally placed *a clear and convincing burden of proof on a party seeking rezoning*. A finding of no sufficient proof will lead this Court to conclude that the Board's decision was arbitrary and capricious." *Id.* (citing *Conerly*, 509 So.2d at 883-86) (emphasis added). In other words, the presumption of reasonableness does not eliminate the party seeking rezoning from the burden of showing by clear and convincing evidence either a mistake in the original zoning or a substantial change in the character of the neighborhood together with a public need for rezoning. If the party seeking rezoning fails to meet this burden, the rezoning is invalid.

The Mississippi Supreme Court's comments in *Sea Lands* clarify that the stronger presumption **applies to the zones** adopted through a comprehensive zoning scheme but **does not apply to zoning changes or amendments** to those zones. As will be discussed below, the reason for this weaker presumption stems from the fact that zoning amendments, like the Fairview Inn Amendments, are often inconsistent with the zones established by a comprehensive zoning scheme. In upholding the circuit court's conclusion that the Town of Florence should be equitably estopped from rezoning the property in question, the Court underscored the circuit court's statement that

'an amendment to a zoning ordinance is not meant to be easy. Otherwise, it would be a meaningless scrap of paper.' Thus, the circuit court found that 'this remark underscores the Court's appreciation of the municipal obligation to create and maintain an atmosphere of stability in which a person acting in reliance on an existing Ordinance may do so with confidence that the rules will not be changed in the middle of the game.'

Sea Lands, Ltd., 759 So. 2d at 1228-1229) (emphasis added). Thus, from the Mississippi Supreme Court's opinion in *See Lands* and other cases, it is clear that the burden of proof rests on the party wanting to rezone the property or reclassify the use; that party must prove by clear and convincing evidence either mistake in the original zoning or substantial change in the character of the area together with public need for rezoning. *See, e.g., Cockrell*, 950 So. 2d at 1091; *Kuluz*, 890 So. 2d at 940; *Gillis v. City of McComb*, 860 So. 2d 883, 835 (Miss. App. 2003) (citing *City of Madison v. Shanks*, 793 So. 2d 576, 578 (Miss. 2000)).

In the present case, the requested change in zoning was initiated by the Fairview Inn owners through counsel. (13 R. 472, 462-464). The City did not require the Fairview Inn owners to submit an application. Instead, the City presented the text amendments on behalf of the Fairview Inn. (13 R. 472). For the reasons set forth below, the Fairview Inn Amendments do not withstand judicial scrutiny because the City (even with the help of the Fairview Inn's attorneys) failed to show by clear and convincing evidence either that there was a mistake in the original zoning of the Fairview Inn or that there was a substantial change in the character of Fairview Street and a public need for rezoning the Fairview Inn.

SUMMARY OF ARGUMENT

The Fairview Inn Amendments are arbitrary, capricious and illegal for at least five separate and independent reasons. *First*, the amendments constitute illegal spot zoning. *Second*, the amendments are not supported by substantial evidence to warrant zoning reclassification *and* a public need for reclassification of a commercial use in a residential neighborhood. *Third*, the amendments are unconstitutionally vague; indeed, they run afoul of the Zoning Ordinance.

Fourth, these amendments violate the Modak-Truran' substantive due process rights. *Fifth*, the City's actions in enacting the Fairview Inn Amendments without the process afforded in the Zoning Ordinance violates the Modak-Trurans' procedural due process rights.

LEGAL ARGUMENT

I. THE FAIRVIEW INN AMENDMENTS CONSTITUTE ILLEGAL SPOT ZONING.

The Fairview Inn Amendments effectively reclassify the use at 734 Fairview Street as a combo "general restaurant" and "hotel" and effectively rezones this property from an R-2 Single Family and Two Family Residential District into C-3 General Commercial District, all for the benefit of only one property owner in the entire City of Jackson. These amendments constitute illegal spot zoning.

Conversely, Judge DeLaughter's Memorandum and Opinion suggests that the City of Jackson can avoid the consequences of illegal spot zoning by labeling something a "text amendment." Without citing any case law, Judge DeLaughter states that

Moreover, the Court agrees with the City in its position that the Council's action does not constitute re-zoning. The text amendments do not make any changes to the City's zoning map. As previously stated herein, Belhaven will maintain its R-2 zoning classification and, as pointed out by Carol Simmons, Fairview will continue to be an owner-occupied Bed-and-Breakfast Inn within a historic mansion listed on the National Register of Historic Places (R. 228). The amendments simply modify a "use" definition unique to Bed-and-Breakfast Inns that are required to be: (1) listed on the National Register of Historic Places; or (2) designated as a historic landmark by the Mississippi Department of Archives and History and/or the Jackson Historic Preservation Commission; or (3) deemed eligible for such historic status. [Fn 41 cites Jackson zoning ordinance 602.02.3 (R. 154)]. Thus, the amendments do not open the proverbial floodgates unleashing commercial development that would be inconsistent with the Belhaven Historic Preservation District.

(2 R.E. 19-20; 3 C.P. 301-02). The reasoning of Judge DeLaughter's opinion, which is inconsistent with Mississippi case law on spot zoning, implies that the City Council can simply classify a zoning change as a "text amendment" and effectively eliminate judicial review of spot zoning. In effect, the City Council becomes the sole judge of the validity of its own actions.

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 in those neighborhoods. What makes this argument even more difficult to fathom is the utter *absence of case law* to support the 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.⁶ The City of Jackson 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.

Not surprisingly, in *Drews v. City of Hattiesburg*, the Mississippi Supreme Court rejected the City of Hattiesburg’s classification of a rezoning as a number of variances in order to avoid the clear and convincing evidence standard applicable to rezoning. 904 So. 2d at 142. The Court affirmed the Mississippi Court of Appeals holding that “the proposed *variances constituted a rezoning in fact, the effect of which is spot zoning.*” *Id.* (emphasis added). The Court 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). The Mississippi Supreme Court’s statements in *Drews* clarify that spot zoning is a legal doctrine that the courts have used to differentiate between legal form and legal substance. Mississippi courts do not merely defer to

⁶ 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.”).

municipalities' characterizations of zoning amendments as "variances" or "text amendments" as a basis for avoiding a showing that there is clear and convincing evidence of a substantial change in the character of the neighborhood and clear and convincing evidence of a public need for rezoning. The Mississippi Supreme Court's focus on the substance of the land use change rather than its form is consistent with the 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). Contrary to Judge DeLaughter's Opinion, the Mississippi Supreme Court has not limited the legal doctrine of spot zoning to "changes to the City's zoning map" or a change in zoning classification but has also applied the doctrine to "a reclassification of uses allowed in a zoning district" such as the variances in *Drews*. To do so, would encourage the kind of sophistry suggested by the City's magical distinction between a "text amendment" (not "rezoning") and a "map amendment" ("rezoning"), which is simply based on the definitions adopted in the City's Zoning Ordinance.

Similarly, in *Albuquerque Commons v. City of Albuquerque*, 144 N.M. 99, 184 P.3d 411 (N.M. 2008), the New Mexico Supreme Court recently rejected the City of Albuquerque's casuistic distinction between "text amendments" and "map amendments." Like Mississippi, the New Mexico Supreme Court has required zoning changes to "be justified by either a change in the surrounding community or a mistake in the original zoning." *Id.* at 414. The Court further emphasized that the "enhanced procedures that are required to accompany proposed zoning changes . . . constitute the primary protection for the landowner" and that "the real question here is whether the City's adoption of the . . . amendments was fair overall, affording . . . adequate due process of law." *Id.* at 420, 421. The City of Albuquerque tried to avoid these enhanced procedures and the required showing of a change in the community or a zoning mistake by

labeling a rezoning (a downzoning) a text amendment. The New Mexico Supreme Court found 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, and held that “[t]he effect of the City’s action on the property owner—whether it constitutes a downzoning or not—determines the degree of process due, not the label the City employs.” *Id.* at 418. Moreover, the Court overturned the Court of Appeals upholding of the text amendment because of “the City’s failure to afford the proper procedural protections or to comply with the standards” requiring a demonstration of a change in the surrounding community or a mistake in the zoning. *Id.* at 426.

Like *Drews* and *Albuquerque Commons*, the Fairview Inn Amendments clearly result in reclassifying the use at 734 Fairview Street as a combination "general restaurant" and "hotel" and effectively rezone this property from an R-2 Single Family and Two Family Residential District into C-3 General Commercial District, all for the benefit of **only one property owner** in the entire City of Jackson. Labeling the Fairview Inn Amendments “text amendments” does not shield them from judicial review. Rather, 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 (reversing zoning decision as illegal spot zoning). "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*. They allow only one business, *the Fairview Inn*, to operate a full service restaurant and bar 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 to circumvent all of the traditional zoning requirements for use permits set forth in Section 1703.02.4-A of the Zoning Ordinance.

Indeed, the City Council agenda for April 7, 2004, expressly stated that 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." (6 R.E. 49) (emphasis added). All other Bed and Breakfast Inns are "required to apply for a Use Permit and required to meet the standards cited by Section 1703.02.4-A regarding notification of nearby property owners, submission of a site plan, and demonstration that the granting of a Use Permit will not adversely affect the surrounding properties nor otherwise be detrimental to the public welfare." *Id.*; accord ZONING ORDINANCE § 1703.02.4-A, pp. 104-05.

In this case, the Fairview Inn owners cannot meet the requirements for a use permit. Instead, the Fairview Inn Amendments, crafted by counsel for the Fairview Inn and rejected by the City's Planning Board, take away all obstacles for a full scale commercial operation on a residential street and allow the Fairview Inn owners to reap financial benefits from "a peaceful, quiet setting" and "a quiet residential street." Because the Fairview Inn Amendments benefit the private interests of the owners of the Fairview Inn rather than furthering the general welfare of

the neighborhood as part of a comprehensive zoning scheme, they constitute an impermissible spot zoning and must be vacated.

II. THE FAIRVIEW INN AMENDMENTS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE TO WARRANT A ZONING RECLASSIFICATION OF A "GENERAL RESTAURANT" AND "HOTEL" AS A "BED AND BREAKFAST INN RESTAURANT" OR PUBLIC NEED FOR REZONING THIS COMMERCIAL USE IN A RESIDENTIAL ZONING DISTRICT.

A. No Change In The Residential Character Of Fairview Street

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*, 421 So. 2d at 1223; *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). It plainly falls within this Court's judicial discretion to reverse a rezoning ordinance which was adopted based on insufficient proof. *Inman*, 405 So. 2d at 114. 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)).

In the present case, the Fairview Inn Amendments create a new use called a "Bed and Breakfast Inn with Restaurant," but this use is nothing more than a combination of general restaurant and hotel. Before these amendments were enacted, general restaurants and hotels were permitted only in C-3 General Commercial Districts. Now, in contravention of the Zoning Ordinance, the City allows one business -- the Fairview Inn -- to operate a full scale restaurant-bar service-hotel every day of the week, any time of the day in a residential neighborhood.

The City Council offered *no justification* for allowing a full scale restaurant-bar service-hotel operation for the benefit of one business in an R-2 zone at the April 7, 2004 hearing. The record is devoid of evidence establishing that there has been any change in the character of the neighborhood or that there is a public need for these zoning changes. 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. The City's Planning Board found no change in the character of Fairview Street and found no need for these public changes, and thus, gave a negative recommendation on the Fairview Inn Amendments.

Nor did the Simmons present any evidence before the City Planning Board or the City Council to justify reclassifying their use at 734 Fairview Street to allow a restaurant-bar service-hotel operation in a residential neighborhood. At best, the Simmons submitted testimonials from well thought of people in the community that Mr. and Mrs. William J. Simmons were "good people" and that the Fairview Inn's bed and breakfast was well-regarded in the hospitality industry. (1 R. 51-60, 71-115; 7 R. 227-344). Judge DeLaughter's Opinion similarly suggests that representations to the City Council that the Fairview Inn is "an internationally known 'jewel' within the industry" and approval of the Fairview Inn Amendments by "a state senator, the President of Belhaven College, representative from the Jackson Convention and Visitors Bureau, the Belhaven Improvement Association, and Baptist Health Systems" provide sufficient justification for rezoning the Fairview Inn. (2 R.E. 16; 3 C.P. 298). From a legal standpoint, however, neither the Simmons', Judge DeLaughter's, nor the whole City of Jackson's affection for the Fairview Inn justify rezoning the Fairview Inn or demonstrate a public need for rezoning. They merely indicate that the Fairview Inn has a good commercial reputation and has cultivated relationships with influential politicians, business persons, and citizens. Popularity does not justify the legality of the rezoning of the Fairview Inn.

More appropriately, the Mississippi Supreme Court in *Sea Lands* 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.

Sea Lands, Ltd., 759 So.2d at 1227 (§ 22) (quoting *Conerly*, 509 So.2d at 886) (emphasis added). The Town of Florence offered expert testimony at the municipal board hearing of a “need for affordable multi-family housing, as contemplated by the recently adopted Comprehensive Plan.” *Sea Lands, Ltd.*, 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 “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 (§ 26).⁷

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 (§ 18)(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 City has failed to provide clear and convincing evidence of a substantial change in the character of Fairview Street or the

⁷ Cf. *McWaters v. City of Biloxi*, 591 So.2d 824, 827 (Miss. 1991)(upholding the decision of the city council to rezone because of “[e]vidence that nearby property has been rezoned supports a finding by the city council there has been a material or substantial change in the neighborhood”)

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. The City's Planning Board even found no change in the character of Fairview Street and found no need for these public changes, and thus, gave a negative recommendation on the Fairview Inn Amendments. With respect to this evidentiary question, Judge DeLaughter asked "what evidence appears in the record upon which it could determine that changes in the neighborhood justified changes in the zoning amendments." (2 R.E. 18; 3 C.P. 300). He concluded that, "[t]his will not occupy us, for there is no such evidence whatever." (2 R.E. 18; 3 C.P. 300). Thus, the City did not come anywhere near the standard of showing clear and convincing evidence of a substantial change in the character of Fairview Street or the surrounding Belhaven neighborhood.

Furthermore, as a matter of law, the commercial operation of a general restaurant-full service bar-hotel is incompatible with the residential character of Fairview Street. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). A restaurant with full service bar dramatically increases the congestion in the neighborhood from car traffic and truck deliveries, would substantially increase the noise in the neighborhood, would seriously worsen safety risks to the numerous neighborhood children especially with respect to drunken driving, and would seriously depreciate the property values of residential property owners surrounding it. *See, e.g., Boraas*, 416 U.S. at 4-5; *Euclid*, 272 U.S. at 394. Accordingly, under well established precedent, the Fairview Inn Amendments infringe

on the quiet use and enjoyment of the property of the Modak-Trurans and Bakers for the financial benefit of the Fairview Inn.

Indeed, the record shows that Fairview Street is a quintessential residential neighborhood, lined-up with families raising children. (1 R. 61-70, 115-129; 3 R. 160-168; 4 R. 169-213; 11 R. 446-450; 12 R. 452; 13 R. 452-503). As of January 2004, *twenty-five children* lived within 160 feet of the Fairview Inn. (*Id.*).

For similar reasons, the Mississippi Supreme Court has reversed amendments reclassifying or rezoning property in three analogous cases. In *Hughes v. Mayor and Comm'rs of City of Jackson*, 296 So. 2d 689 (Miss. 1974), a church attempted to rezone its property to commercial, relying on the fact that part of the surrounding property was zoned commercial. *Id.* at 690. The Mississippi Supreme Court reversed the circuit court and the city council's decision to rezone the property because "[t]he record in this case is devoid of any evidence reflecting any mistake in the original zoning ... or showing that conditions in the area of the subject property have changed *so substantially* as to warrant a rezoning." *Id.* (emphasis added).

In *City of Oxford v. Inman*, 405 So. 2d 111 (Miss. 1981), the circuit court reversed the municipality's rezoning of land from agricultural to multi-family residential for lack of sufficient evidence of change. *Id.* at 112. The city argued that development of low-rent housing and a recreational facility was clear and convincing evidence of a change in the area. *Id.* at 113-14. The Mississippi Supreme Court rejected this argument and upheld the circuit court's reversal, finding that these developments, which were not in accordance with the original zoning plan, were not evidence of a material change in conditions which warranted rezoning. *Id.*

In *Wright v. Mayor and Comm'rs of City of Jackson*, 421 So. 2d 1219 (Miss. 1982), the subject of the appeal was the City of Jackson's decision to rezone a 44.5 acre trace from an R-2 Single Family and Two-Family Residential District to a C-3 Commercial District, C-1

Commercial Restricted District and an R-3 Residential-Townhouse and Zero Lot Line District. *Id.* at 1220-21. The Court reversed Jackson City Council zoning legislation on two separate grounds. *Id.* at 1222-1223. First, the Court held that the appellees failed to establish a substantial change in the subject property's neighborhood. *Id.* Second, appellees failed to establish a public need for rezoning. *Id.*

Likewise, in this case, there is *no* evidence in the record to warrant the enactment of the Fairview Inn Amendments on the basis of a substantial change in the character of the neighborhood. The record is devoid of any change in the residential character of Fairview Street. Indeed, the Fairview Inn owners conceded this issue at the City Council hearing on April 7, 2004 (1 R. 60). Nor could they hardly contend otherwise when all of the Fairview Inn print advertisements tout the location of the inn as a "quiet" and "peaceful" residential area. (3 R. 202-203; 13 R. 459-461).

B. No Public Need For A Restaurant-Hotel On Fairview Street

A zoning reclassification, like the Fairview Amendments, must not only be supported by clear and convincing evidence of a substantial change in the character of the area, but there must also be a public need for rezoning. *See, e.g., Wright*, 421 So. 2d at 1222-1223; *Kuluz*, 890 So. 2d at 940. In *Kuluz*, the court emphasized that "[a] future land use plan that is consistent with a proposed zoning change is evidence of public need." By contrast, in the *Mayor & Board of Aldermen of Ridgeland v. Estate of M.A. Lewis*, 963 So. 2d 1210 (Miss. App. 2007), 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, ¶ 12. The court further emphasized the Mississippi Supreme Court's decision in *Mayor &*

Commissioners of Jackson v. Wheatley Place, Inc., 468 So.2d 81, 83 (Miss.1985) with respect to what weight should be given to the testimony of citizens. *Id.* at 1216, ¶ 13. In *Wheatley Place*, the Mississippi Supreme Court “held that substantial weight could be given to the concerns of its citizenry in determining whether a public need exists for rezoning” because citizens “invest a substantial portion of their entire lifetime earnings, relying upon a zoning ordinance. Without the assurance of the zoning ordinance, such investments would not be made. On this small area they build their homes, where they expect to spend the most peaceful, restful and enjoyable hours of the day.” *Id.* at 1216, ¶ 13 (quoting *Wheatley Place*, 486 So. 2d at 83).

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 planner 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. Moreover, contrary to the City’s focus on the public comments in favor of the Fairview Amendments, the Mississippi Supreme Court gives substantial weight to residential property owners objecting to the rezoning of residentially zoned land. The Court gives great emphasis to the importance of not discouraging investment of citizens in residential property. Given the increasing violence and disorder in the City of Jackson, the Mississippi Supreme Court’s insights on this matter should be given extra weight.

The lack of substantial change in the character of Fairview Street and the lack of a public need for a restaurant on a residential street when numerous restaurants are readily available in the existing commercial zones of the Belhaven neighborhood further help explain the City’s magical and legally-unsubstantiated distinction between “text amendments” and “map

amendments". The Fairview Inn Amendments were likely characterized as "text amendments" to try to avoid judicial scrutiny and to attempt to eliminate the procedural protections for other property owners to reclassify the Fairview Inn a C-3 General Commercial District or to seek a new special use permit. However, despite the City's obscure analysis, we expect that the Court will see that the Fairview Inn Amendments clearly result in reclassifying the use at 734 Fairview Street as a combo "general restaurant" and "hotel" and effectively rezones this property from an R-2 Single Family and Two Family Residential District into C-3 General Commercial District, all for the benefit of only one property owner in the entire City of Jackson.

III. THE FAIRVIEW INN AMENDMENTS ARE UNCONSTITUTIONALLY VAGUE

The Fairview Inn Amendments are also unconstitutionally vague under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The Modak-Trurans' claim for unconstitutional vagueness is enforceable as a private right of action through 42 U.S.C. § 1983 (1996), which provides in pertinent part, that "[e]very person, who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory ... subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress" *Id.*

A. The Standard for Vagueness

The standard for a constitutional vagueness claim is well established. A governmental enactment may be impermissibly vague for two separate reasons. First, a governmental enactment is impermissibly vague where it fails to provide persons of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited and what conduct is allowed. *E.g., Hill v. Colorado*, 530 U.S. 703, 732 (2000); *City of Chicago v. Morales*, 527 U.S. 41, 56-57

(1999); *Mayor & Board of Alderman, City of Clinton v. Welch*, 888 So. 2d 416 (Miss. 2004). Second, an enactment is impermissibly vague if it authorizes arbitrary and discriminatory law enforcement. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *United States v. Escalante*, 239 F.3d 678, 680 (5th Cir. 2001). As the United States Supreme Court observed, "[v]ague laws may trap the innocent by not providing fair warning" and that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108.

B. A "Bed and Breakfast Inn Class B With Restaurant" Is Impermissibly Vague.

The City's new classification of a "Bed and Breakfast Inn Class B With Restaurant" is impermissibly vague when read in the context of the Zoning Ordinance as a whole and will lead to preferential treatment of the Fairview Inn and arbitrary and discriminatory enforcement of other bed and breakfast inns, general restaurants, neighborhood restaurants, nightclubs, bars, and hotels. Indeed, the Fairview Inn Amendments turn topsy-turvy the entire zoning scheme for the City of Jackson -- all for the sole benefit of one business, *the Fairview Inn*.

Under the Zoning Ordinance, general restaurants, bars, nightclubs, and hotels are uses permitted in a C-3 General Commercial District. ZONING ORDINANCE § 702.05.01. The purpose of a C-3 General Commercial District is to provide "for the preservation and perpetuation of retail and commercial enterprise," which are high density uses. *Id.*

A general restaurant, bar, nightclub or hotel *cannot even operate in a C-2 Limited Commercial District* without having satisfied the stringent requirements of obtaining a "use permit." Zoning Ordinance § 702.04-01, p. 51. These commercial uses are completely off limits in residential districts. *Id.* at §§ 601-602.11.3, pp. 30-47.

Then there is a “neighborhood restaurant”, which the Zoning Ordinance defines as an “establishment engaged in the preparation and retail sale of food and beverages, including alcoholic beverages containing not more than four percent (4%) alcohol by weight.” Zoning Ordinance § 202.144, p. 18. A neighborhood restaurant is a permitted use in a C-2 Limited Commercial District or C-3 General Commercial District. *Id.* at §§ 704.04.01, p. 51, 702.05.01, p. 53. Like a general restaurant, bar, nightclub, and hotel, a neighborhood restaurant is prohibited in all residential districts in the City of Jackson. *Id.* at §§ 601-602.11.3, pp. 30-47.

And then comes the special legislation for the Fairview Inn. The Fairview Inn Amendments tack together a series of commercial uses, which individually are not allowed in a residential district and collectively serve to destroy the residential character of Fairview Street. For instance, the Fairview Inn’s current activities allowed the Fairview Inn Amendments meet the definition of a “general restaurant,” which the Zoning Code defines as “[a]n establishment ***engaged in the preparation and retail sale of food and beverages, including sale of alcoholic beverages.***” ZONING ORDINANCE § 202.143, p. 17 (Emphasis added). The Fairview Inn’s current activities meet the definition of a hotel, which the Zoning Ordinance defines as a “building where for compensation, lodging is provided or lodging, food, and various, personal services are provided ***for more than twelve (12) persons.***” Zoning Ordinance § 202.77, p. 12 (Emphasis added).

In addition, the Fairview Inn’s activities may currently meet or in the future satisfy the definition of “a bar,” which is defined as an “establishment serving alcoholic beverages in which the principal business is the sale of such beverages at retail for consumption on the premises,” (*id.* at § 202.15, p. 5) or even a “nightclub”, which is defined as a “bar or similar establishment where a dance floor or live entertainment is provided” (*id.* at § 202.106, p. 14). Here, it is foreseeable that if the sale of alcoholic beverages exceed food sales (such as from campaigns to

promote alcohol consumption which ran rampant at the Fairview Inn in 2003), it would meet the definition of a bar, and with a dance floor or live entertainment satisfy the requirements of a "nightclub."

What becomes patently arbitrary is the enforcement of these sections and the preferential treatment afforded the Fairview Inn. The following example illustrates. If a general restaurant or hotel opened in a ***C-1 Restricted Commercial District***, the City would shut down the operation as an impermissible use. ZONING ORDINANCE § 702.02.1 If a neighborhood restaurant opened in a C-1 Restricted Commercial District, it would likewise be shut down. *Id.* If a general restaurant, neighborhood restaurant, bar, nightclub or hotel opened for business in a R-7 Mobile Home Park Residential District, R-6 Mobile Home Subdivision Residential District, R-5 Multi-Family Residential District, R-4 Limited Multi-Family Residential District, R-3 Townhouse and Zero Lot Line Residential District, R-2A Single-Family Residential District, and R-2 Single-Family and Two Family Residential District, R-1E Single-Family Estate Residential District, R-1 or R-1A Single Family Residential District, the City would take immediate enforcement action to bring the illegal use to a halt. 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 "Bed and Breakfast Class B 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, 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.

IV. THE FAIRVIEW INN AMENDMENTS VIOLATE THE MODAK-TRURANS' SUBSTANTIVE DUE PROCESS RIGHTS.

Likewise, the Fairview Inn Amendments deprive the Modak-Trurans of their substantive due process rights. The Fifth and Fourteenth Amendments to the United States Constitution provide that "No State . . . shall deprive any person of life, liberty or property without due process of law." U.S. CONST. AMENDS. V and XIV. The United States Supreme Court has recognized that the due process guaranteed in the United States Constitution is "more than fair process," *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997), and covers a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The core of a substantive due process violation is governmental arbitrariness. Substantive due process violations are actionable under 42 U.S.C. § 1983.

Changing the use at 734 Fairview Street to a C-3 General Commercial District use is arbitrary and unreasonable and bears no relationship to the City's police powers. Indeed, the Fairview Inn Amendments violate the principles established in *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), which prohibited a change in zoning use that arbitrary and unreasonable and bears no relationship to the public health, safety morals or general welfare.

Among other things, the implementation of the Fairview Inn Amendments results in: (a) a change in the character of Fairview Street from a quiet and peaceful neighborhood to a commercial zone; (b) an increase in parking congestion and traffic hazards from the influx of daily patrons, from the loading and unloading of supply trucks, and from the motor coaches that idle in the street and cause vibrations to the home of the Modak-Trurans; (c) the interference with the Modak-Trurans' enjoyment of their residential property; (d) an interference with the right of the children to live and play in the sanctity of a residential neighborhood; (e) the increase in the likelihood of criminal activities and untoward events on and around Fairview Street from

the operations of a general restaurant-full service bar-hotel in a residential neighborhood; and (f) a diminution in the value of the residential property of the Modak-Trurans from the encroaching commercial use. (1 R. 61-70, 115-129; 3 R. 160-168; 4 R. 169-213; 11 R. 446-450; 12 R. 452; 13 R. 452-503). *Accord, Boraas*, 416 U.S. at 4-5; *Euclid*, 272 U.S. at 394. Because the Fairview Inn Amendments violate the substantive due process rights of the Modak-Trurans, this Court should vacate the amendments.

V. THE CITY'S ACTIONS IN ENACTING THE FAIRVIEW INN AMENDMENTS WITHOUT THE PROCESS AFFORDED IN THE ZONING ORDINANCE VIOLATED THE MODAK-TRURAN'S DUE PROCESS RIGHTS

Moreover, the manner in which the City Council enacted the Fairview Inn Amendments violates the Modak-Truran's procedural due process rights. The basic rights of procedural due process are reasonable notice of a hearing and a reasonable opportunity to be heard. *Matthews v. Eldridge*, 424 U.S. 319 (1976). Due process of law requires that procedures for the exercise of municipal power "be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government" and that "a municipality protects individual against the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government." *McGautha v. California*, 402 U.S. 183 (1971).

Applying these principles here, the Zoning Ordinance structures the nature and scope of hearing afforded various changes in uses. See ZONING ORDINANCE §§ 1703:02 to 1703:03A at 104-06. These provisions are based on constitutional requirements of due process, and to circumvent these provisions constitutes not only a violation of the Zoning Ordinance, but a procedural due process violation under the Fifth and Fourteenth Amendments.

Under the Zoning Ordinance, the City Council was required to provide the Modak-Trurans, the Bakers, and all other property owners within 160 feet of the property with

procedural safeguards for the rezoning and reclassification of property, which is the effect of the Zoning Amendments at issue. See ZONING ORDINANCE §§ 1703:02 to 1703:03A, pp. 104-06. Instead, through a sham "text change," the City Council limited the Residential Property Owners' ability to have their case heard. The City Council impermissibly shifted the burden to the Modak-Trurans and Bakers to show how they would be harmed by the proposed Zoning Amendment. It is the owners of the Fairview Inn, however, who bear the burden to establish by clear and convincing evidence, among other things, that their commercial use was justified and that such commercial use did not adversely affect the residential character of Fairview Street. *Id.* at §§ 1703.02A and 1703.02.1-A, p. 104.

Among other things, the City gave more deference to the unsworn statements of persons not directly affected by the zoning change than to decision of the City's Department of Planning, which denied the amendments and to the testimony that of the adjoining property owners, who are directly affected by the Fairview Inn Amendments.

The City unlawful circumvention of the process required for a rezoning amendment through a sham "text change" and the City's failure to provide adequate process to the Residential Property Owners constitutes a violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitutions. Because the City violated the procedural due process rights of the Modak-Trurans and Bakers, the Fairview Inn Amendments must be invalidated.


CONCLUSION

The Modak-Trurans respectfully request that this Court do what the City and the Circuit Court did not: give credence to the Zoning Ordinance and protect the residential character of Fairview Street. For all the forgoing reasons, this Court should reverse Circuit Court Judge DeLaughter's decision, vacate the Fairview Inn Amendments, and remand the constitutional claims raised in Appellants' Bill of Exception and Complaint for Other Relief pursuant to 42 U.S.C. § 1983 (1996). (8 R.E. 86-120).⁸

DATED this the 13th day of August, 2008.

Respectfully submitted,

By:  (M m - T by permission)
ANITA K. MODAK-TRURAN, ESQ., PRO SE
735 Fairview Street
Jackson, Mississippi 39202
601.969.1055

By: 
DR. MARK C. MODAK-TRURAN, ESQ., PRO SE
735 Fairview Street
Jackson, Mississippi 39202
601.969.1055

⁸ On remand, the Circuit Court should proceed to the constitutional claims asserted by the Modak-Trurans in their Bill of Exception and Complaint for Other Relief. See *Falco Lime, Inc. v. Mayor and Alderman of the City of Vicksburg*, 836 So. 2d 711, 720 (Miss. 2003). All of the Modak-Trurans' constitutional claims can be decided on the administrative record and the pleadings in the court file.

CERTIFICATE OF SERVICE

I, Mark 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' Brief and Appellants' Record Excerpts for Appellants' Brief to the following persons:

Sarah O'Reilly Evans, Esq.
Peter Teeuwissen, Esq.
City Attorneys Office for Jackson, MS
P.O. Box 17
Jackson, Mississippi 39205-0017

ATTORNEYS FOR CITY OF JACKSON

Dan M. Baker, Esq.
Kathy Baker, Esq.
729 Fairview Street
Jackson, Mississippi 39202

Honorable Bobby B. DeLaughter
Hinds County Courthouse
P.O. Box 27
Raymond, MS 39154

Special Master Lee Turner
P.O. Box 488
Purvis, MS 39475

HINDS COUNTY CIR. COURT

ADJACENT PROPERTY OWNERS & APPELLANTS, PRO SE

Crane Kipp, Esq.
Wise Carter Child & Caraway
P.O. Box 651
Jackson, Mississippi 39205-0651

Robert P. Wise, Esq.
Sharpe & Wise
120 N. Congress St., Suite 902
Jackson, Mississippi 39201

ATTORNEYS FOR INTERVENORS WILLIAM AND CAROL SIMMONS, FORMERLY D/B/A THE FAIRVIEW INN

Peter Sharp
Tamara Sharp
734 Fairview Street
Jackson, Mississippi 39202

OWNERS OF THE FAIRVIEW INN

DATED, this the 13th day of August, 2008.


MARK MODAK-TRURAN