IN THE SUPREME COURT OF MISSISSIPPI

DANIEL M. BAKER AND
KATHERINE S. BAKER
APPELLANTS

V. CASE NO. 2008-CA-00105

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

CONSOLIDATED WITH

MARK C. MODAK-TRURAN AND
ANITA MODAK-TRURAN
APPELLANTS

V. CASE NO. 2008-CA-00104

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CAPACITY ONLY, AND THE CITY COUNCIL OF JACKSON,
MISSISSIPPI AND CAROL AND WILLIAM 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 DANIEL M. BAKER AND KATHERINE S. BAKER

ORAL ARGUMENT REQUESTED

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ORAL ARGUMENT REQUESTED

Appellants, Daniel M. and Katherine S. Baker respectfully request oral argument in this appeal. Oral argument would benefit the Court as this case involves multiple interrelated amendments to the Zoning Ordinance for the City of Jackson that were purposely designed to effectively re-zone property without necessary proof and to deprive the surrounding landowners of a full opportunity to be heard or confront the ostensible "evidence" presented by the Simmons. Because of the chicanery of the Appellees this appeal involves a complicated set of facts. Further, the Appellees' brief filed in this cause confuses the facts and issues by inaccurate characterizations of the facts and inaccurate statements regarding the Zoning Ordinance. The Court may find questioning the parties helpful to more clearly understand what may not be apparent viewing only the documents.

REPLY ARGUMENT

The contorted legal arguments and erroneous factual statements contained in the Response Brief of the City of Jackson and Carol Simmons illustrate the City's willingness to bend over backwards to ignore laws and run rough-shod over it's own citizens to grant a favor for William and Carol Simmons. The Appellees do not dispute that the Fairview Amendments were created by counsel for the Simmons; benefit only the Fairview Inn; were voted down by the Planning Board; came before the Council, not on recommendation of the Zoning Department as is usual, but instead, "at the request of a City Council member" (Appellees' Brief in response to Bakers' Brief, hereinafter "Appellees' Brief" P.7); and waive, exclusively for the Fairview Inn, all of the notice, hearing and evidentiary requirements under the Zoning Ordinance for granting a use permit. The City's position in a nutshell is that as long as it casts its actions as "text amendments" it enjoys "full discretion" to modify land use for individual citizens without following the law.

I. STANDARD OF REVIEW

In their Response, the Appellees devote a substantial amount of space restating what the Bakers have already acknowledged: that they bear the burden of showing to this Court that the April 7, 2004 decision of the Jackson City Council amending the Zoning Ordinance to allow a full-scale restaurant on the Simmons' residential property was arbitrary, capricious, discriminatory, illegal or unsupported by substantial evidence. McWaters v. City of Biloxi, 591 So.2d 824, 827 (Miss. 1991).

The amount of proof necessary to qualify as "substantial evidence" is "something less than a preponderance of the evidence but more than a mere scintilla or glimmer." Mississippi Dept. of Environmental Quality v. Weems, 653 So.2d 266, 280-81 (Miss. 1995). It may be said that it "means such **relevant** evidence as **reasonable minds** might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a **substantial basis of fact** from which the fact in issue can be **reasonably** inferred." City of Olive Branch Bd of Aldermen v. Bunker, 733 So.2d 842 (Miss.Ct.App. 1998)(citing Delta CMI v. Speck, 586 So.2d 768, 773 (Miss. 1991)(emphasis added).

A necessary component of a reasonable mind, charged with the responsibility of enacting laws for the general welfare of the citizenry, would include at least a cursory review of the evidence presented by Appellants prior to making a decision. No such review occurred.

Further the law is well settled, as Appellees concur (Appellees' Brief p. 23), that a decision to grant or deny a use permit is adjudicative in nature and "the burden in on the applicants to prove by a preponderance of the evidence that they have met the elements/factors essential in obtaining the conditional use permit." Perez v. Garden Isle Community Ass'n, 882 So.2d 217, 220 (¶7)(Miss. 2004). On appeal, "the reviewing courts must determine whether the applicant proved by a

preponderance of the evidence that all conditions required for the requested conditional use were satisfied." Beasley v. Neelly, 911 So.2d 603, 606 (¶ 8)(Miss.Ct.App. 2005).

It is at this juncture in the analysis that the Appellees offer their first novel theory of law. Appellees assert the applicable standard of review on the decision to grant a use permit *would be* a preponderance of the evidence *if* the Fairview Inn had filed an application for a use permit, but since the amendments exempted the Simmons from the need for an application, they were correspondingly relieved of any additional burden of proof. (Appellees' Brief P.22). However, in Town of Florence v. Sea Lands, Ltd.,759 So.2d 1221 (Miss. 200) where the mayor and board of aldermen re-zoned property on their own initiative without a formal petition, this Court stated, "[t]he Court has never considered a case such as this where a zoning change was taken up without the filing of a petition or application. However, the clear and convincing evidence burden of proof in support of the change in zoning is still required." Id. at 1224(¶12). This rule was restated by this Court very recently in Childs v. Hancock County Bd. of Supervisors, --- So.2d ----, 2009 WL 262462 (Miss., Feb. 5, 2009)[1] where the Hancock County Board of Supervisors re-zoned property on their own initiative without a petition and this court stated , "the burden of proof was first on the Board to prove by clear and convincing evidence that the area needed to be re-zoned." Id.at ¶21.

The amendment at Section 602.02.03 states that "It is expressly understood that a separate Use Permit is required to operate a restaurant in a Class B Bed and Breakfast Inn" before it proceeds to exempt the only such inn from complying with every requirement of the Zoning Ordinance to

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Appellants recognize that this opinion is unpublished; however, the time for filing a motion for rehearing of the opinion has expired and the mandate is expected to issue in the very near future, at which time the opinion will likely be released for publication. Because this opinion is authoritative on the issue(s) in the appeal sub judice and because Appellants' reply brief due date will run before the mandate issues, Appellants seek leave to cite to this unpublished opinion.

procure a use permit. While Appellees prefer to define their automatic use permit for the Fairview Inn as "legislation of a procedure to add an additional use" (Appellees' Brief P.22), they still are subject to the preponderance of evidence standard for the issuance of a use permit under Mississippi law.

While germane to due process issues, but contained in the Appellees' discussion of the standard of review, Appellees also claim the city did not need to go through another hearing because all parties were present to "debate" the issues. A total of ten minutes to make a statement and introduce evidence which the Appellees describe as "multiple witnesses, three memoranda with numerous exhibits attached totaling 108 pages of memoranda and exhibits (R.1-147, 160-213, 446-450, 452-503). ...the 87 page transcript of the hearing before the Planning Board" (Appellees' Brief P.47) accompanied by no opportunity to ask questions of those being touted as "witnesses" does not under any stretch of the imagination amount to a "debate" or a full and fair hearing. Nor do Appellees explain, other than their "no application-no burden" theory of law, how a council member can propose the Fairview Amendments and then sit as an adjudicator of facts as to whether the Fairview Inn has satisfied the requirements of the law necessary for the issuance of a use permit.

Strangely, Appellees' suggest that after perfection of this appeal, the Bakers' should have also appealed any subsequent findings of the the Site Plan Review Committee. Such illogic is either a picture of the City's ignorance of its own laws and procedures or the City's willingness to make silly arguments to muddy the water. Under the Zoning Ordinance, a Site Plan Review Committee considers an application for a use permit *before* the application can proceed to the Planning Board for consideration. The Planning Board and the City Council need the information provided by the Committee in order to make an informed decision. See, JACKSON, MISS., ZONING ORDINANCE §§1201-A- 1204.03(A), 1703.02.4-A, 1703.04-A, 1703.06-A (1974 with amendments).

In the present case, the "clear site plan review from City Staff" requirement which, in addition to rendering the grammatically challenged amendment nonsensical, was hastily thrown onto the tail of the amendment by Councilwoman Barrett-Simon just prior to voting. (R.140). While ordinarily the recommendation of the Site Plan Review Committee is a necessary antecedent to an informed decision by the Planning Board and the City Council, in the present case, the "clear site plan review by City Staff" language represents a decision to grant a use permit knowing the required information was lacking, hoping to redeem the decision with meaningless language after the fact.

The presumption that zoning ordinances are well thought out and designed to be permanent reflects the principle that changes in zoning ordinances are to be viewed skeptically and must be based on a true change in circumstances, and not merely as a result of a change in the wishes of an individual. Blacklidge v. City of Gulfport, 233 So.2d 530 (Miss. 1969), W.L. Holcomb v. City of Clarksdale, 65 So.2d 281 (Miss. 1953). "A presumption of reasonableness applies to re-zoning as well as to 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.'" Cockrell v. Panola County Bd. of Sup'rs, 950 So.2d 1086 (Miss.App.,2007) (quoting Sea Lands, Ltd., 759 So.2d at 1227 (¶ 23).

Further, Appellees point out that just one month prior to enacting the Fairview Amendments the City adopted a new comprehensive plan, which left the residential status of Fairview Street completely intact. "There is a strong presumption, therefore, that a municipality carefully considered its current and future needs when adopting its plan for development. The decision to change such a plan a mere two years after its adoption is suspect." Sea Lands, Ltd., 759 So.2d at 1225 (¶16).

While not pertaining to the standard of review, the Appellees next brandish Thrash v. Mayor and Commissioners of the City of Jackson, 498 So.2d 801 (Miss. 1986) to justify the City's wholesale disregard of the law and every single provision of the Zoning Ordinance pertaining to use permits stating, "the City was entitled to discretion in, 'determining whether its procedural requisites have been met or , **if it pleases, waiving them..**'" (Appellees' Brief P.24). While Thrash does hold that legislative actions that have been thoughtfully and thoroughly explored will not be struck down for procedural irregularities as long as all affected receive a full and fair hearing, it does not stand for stand for the high-handed position of the City that it enjoys full discretion to ignore all procedures and manipulate the Zoning Ordinance to deprive citizens of due process. However, Thrash is properly relegated to the Appellants' argument on due process and will be discussed more thoroughly therein.

II. The Fairview Amendments Result in Both a Defacto Rezoning and Spot Zoning.

A. The Fairview Amendments result in an illegal Defacto Rezoning

The next theory put forth by Appellees is that the Fairview Amendments are *per se* valid because "[t]he only conditions required for a 'text amendment' are publication of notice and a public hearing." (Appellees' Brief P.27). Appellees take the position that no proper substantive rationale is necessary for the City Council to amend its Zoning Ordinance. Therefore, when a zoning change cannot be obtained by legitimate procedures, i.e. an application for re-zoning, or a use permit, individuals with enough influence can simply persuade a council member to introduce a "text amendment" to circumvent the requirements of the law. Again, the presumption that zoning ordinances are well thought out and designed to be permanent reflects the principle that changes in zoning ordinances are to be viewed skeptically and must be based on a true change in circumstances,

and not merely as a result of a change in the wishes of an individual. Blacklidge, 233 So.2d 530 (Miss. 1969), W.L. Holcomb, 65 So.2d 281 (Miss. 1953).

While Appellees correctly state the notice requirement for a text amendment, it does not necessarily follow that simply following the notice procedure can change an illegitimate re-zoning in fact into a valid text amendment. A text amendment is not property specific because it applies to the zoning scheme as a whole. By contrast, the Fairview Amendments apply to only one parcel of property. And while claiming that the Fairview Amendments apply to the city as a whole, the amendment to Section 602.02.03 strips a previously available Bed and Breakfast use permit from every other property in Jackson, unless the property happens to be an owner occupied dwelling with either landmark status or a listing on the National Register of Historic Places. (R. 35-36). Within such a minuscule universe of possibility should such a property exist at some point in the future, that hypothetical property, unlike the Simmons, would have to obtain two separate use permits and prove by a preponderance of the evidence that a full scale restaurant is in keeping with residential property and life on a residential street. Since such would be an impossible task, the City is assured that the Fairview Inn is the only beneficiary of their fiction.

There was no evidence regarding any property other than the Fairview Inn. Not one question was asked about the city as a whole. No one wondered whether any other properties even exist in the city that are owner occupied dwellings with landmark status or a listing on the National Register of Historic Places. The amendments were not about a vision for the city, but a restaurant for the Simmons.

Further, the fact that council for the Fairview Inn personally mailed notice in compliance with the notice requirements for a re-zoning or use permit is an admission by the Appellees that the amendments effectively re-zone the property. Surely this Court finds it odd that the City of Jackson

would have the Simmons, through counsel, mail notice to only the owners of property within 160 feet of the Fairview Inn for a hearing on a city-wide text amendment. Instead the individual notice, unnecessary for a true text amendment, is another example of an attempt to redeem the City's illegitimate action.

Next, the Appellees claim that this "new use" of a full scale restaurant on residential property is readily distinguishable from a general restaurant because the language of the Fairview Amendments require that alcoholic beverages "are to be consumed strictly at the same table where meals are served". Appellees keep repeating this nonsense despite the plain language of the Zoning Ordinance. This supposed "restriction" to which Appellees refer was lifted verbatim from the definition of a general restaurant found at Section 202.143 of the Zoning Ordinance.

Under the Zoning Ordinance, a general restaurant, which includes dance halls, discotheques, lounges, and pool halls, is defined as follows:

> 202.143 Restaurant, General: An establishment engaged **in the preparation and retail sale of food and beverages, including sale of alcoholic beverages. Customers are served their foods**, frozen desserts, **or beverages by a restaurant employee at the same table** or counter **at which said items are consumed**.

Compare, the relevant portion of the Fairview Amendments which supposedly strictly requires that alcohol only be served at a table and in conjunction a meal:

> Section 202.17(a) Bed and Breakfast Inn with Restaurant: .... 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.**

Upon even a cursory reading of the types of restaurants defined by the Zoning Ordinance, it is readily apparent that the language regarding service "by a restaurant employee at the same table at which said items are consumed" simply distinguishes a fast food restaurant from a restaurant with what

is commonly known as table service. See Jackson, Miss., Zoning Ordinance §§ 202.142 through 202.145(a)(1974 with amendments). If the language of the Fairview Amendments strictly prohibits a bar, then, likewise, bars are strictly prohibited in every single restaurant permitted to sell alcohol in the City of Jackson, as each separate definition contains the exact language claimed by Appellees to prohibit a bar at the Fairview Inn.

The City and the Fairview Inn ludicrously attempt to distinguish the activity permitted by the Fairview Amendments from an general restaurant by arguing that the ordinance imposes "strict requirements and tight controls" which contrast the liberties enjoyed by all other types of restaurants. (Appellees' Brief P.28). For instance, while all other restaurants are free to be located in a high density commercial districts, only the Fairview Inn has the "strict general requirement" that it must confine its commercial operation to a low density residential area and must be located in an "owner-occupied residential dwelling". Next Appellees actually state that restaurants located in high density commercial districts are not required to direct lighting away from the adjacent homes. Appellees also claim that no other restaurant must obtain site plan approval, a use permit, or provide off-street parking.

The foregoing arguments are just silly at best, but they also are inaccurate and further illustrate the City's ignorance of its own laws. All restaurants are subject to site plan review under Section 1203-A(8) of the Zoning Ordinance. Section 702.041(a)(2) requires fast food restaurants, *which may not serve alcohol*, on *C-2 property* adjacent to residential property to obtain a use permit and to direct all lighting away from residential property. Further, Section 702.02(1)(a)(9) even requires a use permit for a general restaurant to operate on property zoned *C-2 which is not adjacent to residential property*. Finally, Section 1108-A(23) requires every single restaurant in Jackson to provide off-street parking.

The truth is, the only characteristic distinguishing the restaurant authorized by the Fairview Amendments from all other general restaurants is that the Fairview Inn's restaurant is the only one in the entire city of Jackson permitted on residential property, or even restricted commercial property for that matter. According to Appellees, such is the strict burden under which the Fairview Inn's restaurant operates.

Drews v. City of Hattiesburg, 904 So.2d 138 (Miss. 2005) plainly held that zoning procedures may not be manipulated to produce a result that is forbidden by the Zoning Ordinance. Restaurants are not permitted on residential property in the city of Jackson. Restaurants are not permitted by use permit on residential property in the city of Jackson. A re-zoning is the only way a restaurant can legitimately be located at 734 Fairview Street. The Simmons would like nothing better than a re-zoning. They even tried and failed in the past, but there has been no change in the neighborhood from its solidly residential status. Therefore, their lawyers and an obliging councilperson created the fiction of a "text amendment" to allow the Simmons to use their property in a way consistent with a C-3 zoning classification regardless of the R-2 classification of 734 Fairview Street and every other property on Fairview Street. The amendments amount to nothing more than an illegal defacto re-zoning.

Appellees also argue that the amendments did not re-zone the property because "the addition of a Restaurant to the existing Inn created no change to the Inn visible from the exterior of the Inn." (Appellees' Brief P.30). Since when does the facade of a building determine its zoning? Appellees point out quite rightly that the Simmons did not seek a re-zoning, but they got a re-zoning, in fact. In the words of the Appellees, the Simmons got "an added use under an existing use permit" without a showing of change. (Appellees' Brief P.30). The very essence of zoning is land use, and when an ordinance is modified at the request of a citizen to permit a C-3 commercial use of his residential

property, then the use has been changed and the zoning has been changed, regardless of what semantic games the Appellees want to play. Surely this Court will not let such dishonesty stand.

B. The Fairview Amendments result in Spot Zoning

Appellees argue that since no one physically changed the map from an R-2 designation for 734 Fairview Street, it necessarily follows that the new C-3 restaurant on residential property is in harmony with the comprehensive plan for the city of Jackson. Applying Appellees' logic, a use permit to operate a hog farm would leave the residential status of the Fairview Inn intact and in harmony with the comprehensive plan as long as the view from the street remains the same and nobody marks on the map.

It is not the appearance of 734 Fairview Street, but the commercial operation of a full scale general restaurant on 734 Fairview Street that is out of harmony with the comprehensive plan. "[T]here 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." 2Yokely, Zoning Law and Practice § 13-2 n.3 (4th ed. 2000). The purpose of a use permit is to allow "certain uses which are generally compatible with the land uses permitted in a zoning district, but due to their unique characteristics, require individual review to ensure the appropriateness and compatibility of the use on any particular site." JACKSON, MISS., ZONING ORDINANCE § 1701.01-A (1974 with amendments).

Nothing in the comprehensive plan for the City of Jackson suggests that restaurants are compatible with residential property, but simply need to be reviewed on a cases by case basis. To the contrary, the zoning ordinance clearly shows that restaurants are highly incompatible with residential property, as they are relegated to areas of "high density development of commercial

businesses in certain areas adjacent to major transportation arteries and thoroughfares within the City." JACKSON, MISS. ZONING ORDINANCE § 702.05 (1974 with amendments).

Appellees also argue that since a Class B Bed and Breakfast Inn is compatible with a residential area, a C-3 restaurant *in* a Class B Bed and Breakfast Inn is also compatible with residential property. They argue that because the Simmons have been hosting lodgers and occasional social receptions for eleven years, a full scale restaurant open to the general public operating and serving alcohol every day of the week would only represent a "minor, incremental change." Despite the repeated assertion of proponents of the the Fairview Amendments, the amendments contain no limitation of 50 diners per night, or on the service of alcohol. If the City Council thinks that there is no difference in the hosting of social functions and the operation of a general restaurant, then why do the amendments require all future hypothetical Class B Bed and Breakfast Inns to get a separate use permit? The Simmons were more than willing to violate the terms of their use permit, hence the amendment clarifying the definition of a social function, and then use their violations to argue that the amendments are no change from their present illegal operations.

Appellees argue that Drews, 904 So.2d 138, is inapplicable to the present case because it involved variances and the Fairview Amendments do no authorize a change in the physical appearance of the Fairview Inn. Appellees miss the point of the case, which is that "serious questions arise when a variance is granted to permit a use otherwise prohibited by the ordinance.... The most obvious danger is that the variance will be utilized to be-pass procedural safeguards required for a valid amendment." Id. at 141 (¶ 9). The record is clear that the Fairview Amendments were specifically crafted to by-pass the need for a re-zoning to operate a restaurant on residential property.

Appellees cite to Mayor and Bd. of Aldermen v. Hudson, 774 So.2d 448, 452 (Miss. Ct. App.2000) to support the proposition that a use permit or variance does not necessarily infer that

spot-zoning has occurred. True, the granting of a use permit upon adequate proof does not necessarily infer spot-zoning has occurred. But the Simmons did not simply seek a use permit under the provisions of Zoning Ordinance. In fact, they have gone to great lengths to declare that the Simmons did not seek a new use permit since they fear the evidentiary standard that accompanies a use permit (Appellees' Brief Pp.22-3). Instead, the Simmons oversaw the crafting of the Fairview Amendments which, in one swift action, modified the zoning ordinance to allow a full scale general restaurant on only one parcel of residential property in Jackson by "use permit", which "use permit" was then bestowed "by right" upon the Simmons. JACKSON, MISS. ZONING ORDINANCE § 602.02.03 (1974 with amendments).

C. There was no evidence of Public Need

Appellees seek to justify the Fairview Amendments by claiming substantial evidence of a public need for a restaurant at the Fairview Inn. Appellees cite to Adams v. Mayor and Bd. of Aldermen of City of Natchez, 964 So.2d 629 (Miss. Ct. App.2007) to support their proposition that public need can include "'receipt of tax revenue' from and 'reputation and importance' of a restaurant 'as a tourist attraction'"(Appellees' Brief P.33 *citing* Adams at 635 So.2d ¶19). While the court in Adams did find public need, the facts and proof in that case are completely different. What the court actually said was, "[w]hile the receipt of tax revenue may not be the sole reason for a finding of public need," it is a factor to be considered. Id.

Adam, a re-zoning case, came about when Fat Mama's tamales' property was appropriated by the Department of the Interior. Finding no suitably zoned replacement, the owner sought and obtained a re-zoning on a new parcel. The evidence supporting a decision to re-zone included the owner's plan to invest a large sum of money for a new restaurant, the number of people employed by the restaurant, the amount of tax revenue generated by his restaurant, a copy of the zoning map, and a discussion by the city planner regarding the nature of the area.

In the present case there was no evidence, only opinions. There was no map, or discussion by city planners. There was no financial information of any sort, despite claims of financial hardship. The Simmons did get a state senator to say that a restaurant would generate tax revenue, but there were no projections, which should have been easy enough to produce. Ironically, had the Appellants produced projections of increased revenues they would have undercut their argument that a restaurant did not really amount to an increase in activity. There was plenty of talk about the Fairview Inn being a jewel, and recognition as the most outstanding inn in North America, **which it achieved without a restaurant**. There was no evidence showing that the Fairview Inn was going to go out of business, only a bunch of people who obviously had been told such. There was no evidence of a shortage of restaurants in Jackson. Judge Delaughter even characterized the evidence "general in nature, with no supporting statistics or projections". (R.299).

"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) (Miss. 2000) (quoting Bd. of Aldermen, City of Clinton v. Conerly, 509 So.2d 877, 885 (Miss. 1987).

Appellees point to Councilwoman Barrett-Simon's use of a Main Street Association report to justify her support for a restaurant at the Fairview Inn. Ms. Barrett-Simon, without a doubt, is aware that the Main Street Program has nothing whatsoever to do with Fairview Street. The Main Street program seeks to revitalize commercial areas, and applies to the commercial area surrounding the intersection of Fortification and State Streets. The Fairview Inn is located at the opposite end of the Belhaven neighborhood on an exclusively residential street. Attempting to connect Fairview

Street to the Main Street Program was a smoke and mirrors tactic to justify a political favor. Further, the concept of mixed- use zoning does not involve placing a restaurant in the middle of a low density street, as she is well aware.

Apparently Councilwoman Barrett-Simon thought the issue was about civil rights, not about public need:

> And I will remind the Council today that the only decision that has to be made is whether the Fairview can be treated like a private club, which everybody seemed to have been comfortable with, or can anyone now walk in and have dinner. And that is the issue. ... It was fine when it was treated as a private club; it's no longer fine. And so that's the issue.

(R.133-134).

The Fairview Amendments are not in harmony with the comprehensive plan for the City of Jackson, which by the Appellees' own admission is residential . The benefit enjoyed by the Fairview Inn is not incidental to the adoption of the Fairview Amendments, but instead the sole reason for the design and creation of the amendments. They were adopted as a favor to Bill and Carol Simmons at the expense of and to the detriment of the Appellants and the other objecting homeowners. The Fairview Amendments result in spot zoning and should be set aside.

D. Appellants' land use is not the issue.

Appellants are at a loss to understand how Mississippi Manufactured Housing Ass'n v. Bd. of Supervisors of Tate County, 878 So.2d 180 (Miss. Ct. App. 2004) has anything to do with the present case or how Appellants' residential property use proves anything. The court explained that the change or mistake rule typically applies to decisions regarding individual properties (like the Fairview Amendments) and not comprehensive revisions to the Zoning Ordinance.

Appellees next argue some more that the new general restaurant use is not a change from the Bed and Breakfast Inn use, claiming that a restaurant will draw many fewer people than receptions (while somehow generating more revenue). They represent that the restaurant operates only on

nights and weekend, which is untrue. Lunch is served Monday through Friday despite no adequate off street parking, as the professional building lot is in use at that time. Their absurd statement that the City took "every precaution to see that the proposed Text Amendment 5 would not pose any impact on the Belhaven neighborhood" (Appellees' Brief P.41) is utterly baseless.

III. The Appellants' Due Process Rights were Violated By Denial of a Full and Fair Hearing

Though Appellees discuss whether Appellants received actual notice, Appellants acknowledge actual notice. Instead, Appellants assert that the Fairview Amendments were crafted as text amendments to intentionally deny the Appellants the right to a full and fair hearing, which, in addition to a reasonable amount of time to present evidence and make arguments, includes the right to confront witnesses. The Simmons did not wish to be subject to the scrutiny of a re-zoning or a use permit hearing because they lacked relevant proof.

The City and the Fairview Inn rely solely on Thrash, 498 So.2d 801 (Miss. 1986) to support their assertion that the City Council enjoys absolute discretion to ignore and waive any and all requirements of the Zoning Ordinance. First, Appellees misconstrue the language contained in Thrash to support the proposition that the City Council can do whatever it pleases. The procedural irregularities involved in Thrash were minor, and included failure to set out particular wording in the application for re-zoning, an improper site plan, less than a quorum at a zoning committee meeting, and procedural problems with the appeal to the City Council. Id. at 807. The Court stated that the City Council may not waive its own procedures where the question involves a limitation or procedure imposed by state law, or "where the procedural deficiencies may be said to have contravened a citizen's due process rights." Id. at 808. The essence of due process rights includes reasonable advance notice and an opportunity to be heard at all critical stages of the process. Id. Finding the Objectors were then "given full opportunity to present any and all matters they wished" the court held that the minor irregularities did not amount to a denial of due process.

In the present case, the irregularities were not minor, but all encompassing at every level and done for the purpose of accomplishing an illegitimate legislative act. The Simmons filed *no* application for a use permit. They submitted *no* site plan for review *prior* to a recommendation by the planning director as required by the Zoning Ordinance. There was *no* recommendation by the planning director to the Planning Board. There was *no* appeal from the Planning Boards' vote of a negative recommendation. There was *no* recommendation from the planning director to the City Council or mention of the Planning Board's negative action. There was *no* consideration of the factors specifically enumerated in the Zoning Ordinance for the issuance of a use permit. Appellants and the 28 other homeowners objecting to the Fairview Amendments were allotted merely ten minutes to present both argument and evidence in opposition to the amendments. There were *no* findings made by the City Council in adopting the Fairview Amendments, although findings were made in every other land use action that day (R.148-159). Appellees claim the hearing before the Planning Board was part of Appellants' full and fair hearing, but Appellants **won** before the Planning Board, and the Board's decision was utterly ignored. Not one mention was made of the proceeding.

Contrast Thrash with a the later case of Noble v. Scheffler, 529 So.2d 902, 907 (Miss. 1988) wherein the Mississippi Supreme Court clearly stated: "Suffice it to say that local zoning authorities may not ignore but must abide by the restrictions of all applicable zoning ordinances. See, Robinson v. Indianola Municipal Separate School District, 467 So.2d, 911, 917 (Miss. 1985); Kynerd v. City of Meridian, 366 So.2d 1088 (Miss. 1979)." Id. at 907. Caver v. Jackson County Board of Supervisors, 947 So.2d 351, 353 (¶7) (Miss. Ct.. App. 2007).

Appellees do not contend that the City complied with the requirements of the Zoning Ordinance, only that the City enjoys unfettered discretion to ignore the ordinance. Further the City and the Fairview Inn contend that the utter absence of any compliance with the Zoning Ordinance did not impact the Appellants' due process rights to a full and fair hearing.

Appellants extensively prepared and submitted written legal memorandum, documentary evidence of zoning violations, of children affected by the Fairview Amendments, and a map showing the opposition of the majority of property owners affected by the amendments. However, the fact that the materials were physically placed into evidence does not mean that Appellants were heard. The evidence remained undisturbed on the clerk's desk through the entire proceeding. The Council did not even pretend to consider or even glance at the documentary evidence provided by Appellants prior to rendering a decision. While Appellants spent untold hours and substantial financial resources to prepare the evidence provided to the City Council, the Council refused to consider any of it.

Further by relegating any "witnesses" to public comment, Appellants were denied the opportunity to ask questions of the "witnesses" such as:

- Why do you think that the Simmons signed an agreement not to put in bar? (R. 80).
- Why do you think the amendment limits patrons to no more than 50 a night? (R. 80,113).
- Why do you believe that the Fairview Inn is about to go out of business? (R.78, 270, 274, 383, R.E. 69).
- Were you recently invited to the Fairview Inn and provided food and drink without charge? (R.E. Pp.76-77).
- Were you promised a discount on food and drink in exchange for your appearance today?
- (R. 80-81).
- Do you consider a public advertisement for pre-event cocktails and post-event champagne and desert to be consistent with the Simmons' assurance that alcohol would only be served in conjunction with the service of a meal? (R.E. p.71).
- Do you consider an advertisement to "come have a bourbon on the veranda" to be consistent with the Simmons' assurance that alcohol would only be served in conjunction with the service of a meal? (R. 470).

Despite the Appellees' assertions of a complete and robust debate, the record is clear no such opportunity was afforded Appellants. Had the City Council desired to be informed on the issue it would have continued the matter to consider the evidence and arguments prepared by the Appellants.

Appellants would have been provided an opportunity to ask questions Instead, a vote was hastily taken despite the lack of relevant evidence presented by the Fairview Inn, the complete absence of evidence presented by the City, and the evidence and argument of Appellants and all other parties in opposition to the Fairview Amendments.

Appellees also claim that Appellants' due process rights were not violated because the Bed and Breakfast Inn use permit together with present Inn operations were sufficient proof of the compatibility of a general restaurant on a residential street. However, neither the hearing for the 1993 use permit to operate as a Class B Bed and Breakfast Inn nor the amendments allowing construction of additional rooms considered the appropriateness of a restaurant on the property.

Neither the Zoning Ordinance nor the amendments support the position of the Appellees that the activities of a Bed and Breakfast Inn and a general restaurant are so similar as to make a separate evaluation under the Zoning Ordinance unnecessary. The very wording of the Fairview Amendments states "It is expressly understood that a separate Use Permit is required to operate a restaurant in a Class B Bed and Breakfast Inn." JACKSON, MISS., ZONING ORDINANCE § 602.02.03(4)(1974 with amendments). If the City Council really thought that Inn activities are so similar in nature to general restaurant activities as to make a separate evaluation "an unnecessary waste", then the Fairview Amendment would not have"expressly" required a separate use permit evaluation for anyone other than the Fairview Inn.

The lodging and social function activities permitted at an Inn are not similar in nature to a general restaurant, and the City Council was well aware of that fact. First, while the Zoning Ordinance allows Bed and Breakfast Inns to locate on residential property, general restaurants are relegated to properties designated C-3, or general commercial, which are found adjacent to major transportation arteries or thoroughfares. JACKSON, MISS., ZONING ORDINANCE § 702.05 (1974 with

amendments). While a Bed and Breakfast Inn, Class B only needs one parking space for every 250 square feet of area used for receptions, a general restaurant must have one parking space for every 75 feet of gross floor area, contemplating activity that is more than triple the intensity of reception activities at an Inn . JACKSON, MISS., ZONING ORDINANCE § 1108-A (1974 with amendments). Further, the amendment to the Zoning Ordinance clarifying that an Inn *may not* serve meals to the general public is further evidence that the social activities permitted at an Inn and the commercial activities of a restaurant are not same. As explained in Appellants' principal brief, the clarifying amendment was necessary because the Fairview Inn's advertisements for dinner service were beyond the scope of and in violation of the Simmons' use permit. (R.212).

IV. The City Council's adoption of the Fairview Amendments was Unsupported by Substantial Evidence, and, therefore, Arbitrary and Capricious.

The Appellees argue that since the Appellants, along with the other objectors, submitted to the Council evidence and extensive legal memoranda,. the substantial evidence requirement for adopting an amendment to the zoning ordinance is met. (Appellees' Brief Pp.46-7). Once again, Appellees misunderstand the law. The justification for the City Council's decision *must have been based on substantial relevant evidence* supporting the decision. Appellants did not somehow satisfy the City's burden to act prudently by supplying the Council with material showing the inappropriateness of the Fairview Amendments. Even in the absence of any evidence in opposition to the Fairview Amendments, the decision still must be based on substantial evidence of a sound basis for the City to exercise its delegated police power.

Appellees attach some significance to the fact that all four of the Appellants hold law degrees, stating that "the very breadth of their participation in the debate demonstrates that the City Council's decision was supported by the Council's consideration of substantial evidence..."

(Appellees' brief before Circuit Court Pp.47-8 and Response Brief P. 26). This statement is absurd. The only significance that can be attached to the fact that the Appellants are lawyers, is that Appellants would be unable to defend their homes against a deep-pocketed citizen with a team of paid lawyers if they were not able to perform their own legal work. Appellees wish to both utterly ignore the outcome of the Planning Board hearing, but embrace Appellants' participation therein as "substantial evidence" for the Fairview Amendments.

Appellants set out in great detail the evidence before the City Council, and will not repeat the facts again here. "It is well established that the use of property in accordance with an original zoning plan is not a material change of conditions with authorizes rezoning." Cloverleaf Mall, Ltd. V. Conerly, 387 So.2d 736, 740 (Miss. 1980)(citing Jitney Jungle, Inc. V. City of Brookhaven, 311 So2d. 652 (Miss. 1975); Martinson v. City of Jackson, 215 So.2d 414 (Miss. 1968); Cockrell v. Panola County Bd. of Supervisors, 950 So.2d 1086 (Ct. App. 2007). Proof that the Fairview Inn is a much admired inn with many awards is not proof that a full scale restaurant on residential property on a residential street is in furtherance of the safety and public good required for an amendment to the Zoning Ordinance. The fact that the Simmons have had a use permit for eleven years to operate a bed and breakfast inn is not proof that a full scale restaurant on residential property is in an harmony with Jackson's Comprehensive Plan for the City of Jackson. Neither is the fact that the Simmons have been willing to operate beyond the scope of their use permit; holding functions in excess of their parking capacity, advertising for public dining, violating the Zoning Ordinance regarding loading and unloading in the street, proof that a full scale restaurant on a residential street with a large population of children will not pose a hazard to the residents of Fairview Street. The assertion that the Fairview Inn has had authority to serve reservation only fine

dining for eleven years is blatantly dishonest. (Pp. 4-8 Appellants' principal brief, R. 212, 462, 466, 212-13.)

Citing Mayor and Comm'rs v. Wheatly Place, Inc., 468 So.2d 81 (Miss. 1985), the Mississippi Supreme Court stated:

> It should be borne in mind, however, that while a duly enacted comprehensive zoning ordinance is not a true protective covenants agreement, it bears some analogy. Purchasers of small tract of land invest a substantial portion of their entire lifetime earning, relying upon a zoning ordinance. Without the assurance of the zoning ordinance, such investments would not be made. ....
>
> ....
>
> It is precisely this reason that, while this Court accords profound deference to actions of governing boards pertaining to local affairs, we have nevertheless carefully delineated rules for them to follow before amending their duly adopted and established zoning ordinances. **The amendment of a zoning ordinance will never by simply a matter of local politics as long as this Court sits.**

Bd. of Aldermen, City of Clinton v. Conerly, 509 So.2d 877, 885 (Miss. 1987).

The unsubstantiated opinions of a few misled people, and photographs depicting the Fairview Inn's current facility was the only evidence presented to the Council, none of which could be called substantial. There was *no evidence* from the City Planning Department, there was no reference, other than by Appellants, to the City Planning Board's negative recommendation, there were no documents showing a lack of restaurant facilities in the area, there were no projections as to additional tax revenues, only assertions which were at odds with the contention that the change would be unnoticeable. The City and the Fairview Inn point to the endorsement of the neighborhood association (BIA) as evidence that the Fairview Amendments were for the public good and necessary to salvage the Inn from ruin. However, the explicit conditions upon which the BIA based its endorsement *were never drafted into the Fairview Amendments*. The BIA was also a victim of the Simmons' unwritten assurances coupled with a lack of diligence.

"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." Town of Florence v. Sea Lands, Ltd., 759 So.2d 1219, 1227 (¶ 22) (Miss. 2000) (quoting Bd. of Aldermen, City of Clinton v. Conerly, 509 So.2d 877, 885 (Miss. 1987).

Likewise, upholding a decision to re-zone in McWaters v. City of Biloxi, 591 So.2d 824 , 826 (Miss. 1991), the Mississippi Supreme Court found:

> In addition to the oral testimony taken during the public hearing the City Council received for its consideration (1) the report of the Zoning Test and Map Committee; (2) the legal opinion of the City Attorney which recommended rezoning; (3) the legal opinion of the attorney for the Planning Commission which, likewise, recommended rezoning; (4) the minutes of the June 16, 1988 Planning Commission hearing; (5) the amended site plan ...; (6) the Comprehensive Zoning Map of the city of Biloxi, and (7) the entire Planning Commission file for Case No. 88-21.

McWaters v. City of Biloxi, 591 So.2d 824 , 826 (Miss. 1991).

Finding a lack of substantial evidence in reversing a decision to re-zone, the Court of Appeals held that where there were no statistics, mapped circumstances or charts, and no real quantification of the change, but "only vague references" by the attorney for the applicants that the decision was not based on substantial evidence, stating, "This Court fails to understand how Hanson Industries could have expanded to such an extent so as to change the character of the surrounding neighborhood without violating the Ordinance's prohibition on expansion of nonconforming uses." Cockrell v. Panola County Bd. of Supervisors, 950 So.2d 1086, 1093-1094 (¶ 17, 18)(Ct. App. 2007). Likewise, the Fairview Inn cannot show that a full scale restaurant is no different from current operations unless the current operations are in violation of the Zoning Ordinance.

In the present case, there was no quantification of evidence, because all quantifiable evidence showed that the City Council's decision was arbitrary and capricious. The Comprehensive Plan shows that the area is resoundingly residential, the Planning Commission voted against the change, the City Planning Department had no support for the change, the affected homeowners overwhelmingly opposed the change, there are plenty of restaurants in the area, and it would be impossible to show an increase in tax revenues while maintaining that the Fairview Amendments would not increase commercial activity on a residential street.

There also were no findings whatsoever by the City Council though all other decisions regarding land use were accompanied by findings (R. 148 -159). Standing alone, a lack of findings does not show the action of the City Council were arbitrary and capricious, but as in City of Petal v. Dixie Peanut Co., 994 So.2d 835 (Miss. Ct. App. 2008), "[t]he failure of the City to articulate these reasons was just a further indication of the City's manner of dealing the issue in a manner contrary to case and statutory law." Id. at ¶26.

In sum, the City Council's decision to permit a full scale restaurant on residential property on a historic residential street was unsupported by substantial relevant evidence that the safety and welfare of the citizens of Jackson, and particularly Fairview Street will be enhanced by a full scale commercial operation juxtaposed with residential activity. The City Council's responsibility to make Zoning decisions to advance the welfare of its citizens is not a meaningless concept subject to political whims. Their decision to sacrifice the safety and quality of life of families and children to the dangers inherent in commercial activity was without substantial evidence of relevant proof that the amendments were in furtherance of the public good and was arbitrary and capricious.

CONCLUSION

The Appellants, Daniel M. and Katherine S. Baker, have met their burden showing to this Court that the City of Jackson's April 7, 2004 decision amending the Zoning Ordinance by adoption of Sections 202.17(a) and 602.02.03 was arbitrary, capricious, and illegal and unsupported by substantial evidence. Further, the actions of the Council violated the due process rights of Appellants, as Appellants were not afforded even close to a reasonable amount of time to be heard and were denied the right to confront what the Appellees characterize as "evidence." Simply allowing Appellants to place evidence into the record, which was not even read, does not amount to being heard.

The City and the Simmons do not deny that this entire fiasco was solely for the benefit of the Fairview Inn. Rather, the City takes the position that it is free to manipulate the Zoning Ordinance to produce whatever outcome it wants under Thrash. There was no relevant proof of a legitimate nature to support the changes, and plenty of proof, which the council did not even bother to review, showing that the Amendments should be rejected.

This Court has stated repeatedly that zoning will never be a matter of local politics as long as this Court sits. The Fairview Amendments are quintessentially local politics in action. Appellants respectfully ask this Court to do what Judge Delaughter was unwilling to do; find that in adopting the Fairview Amendments, the Jackson City Council acted in an illegal, arbitrary and capricious manner which violated Appellants' due process rights.

Upon a finding that the Fairview Amendments, embodied as Sections 202.17(a) and 602.02.03 of the Zoning Ordinance, are both illegal and arbitrary and capricious , Appellants, Daniel and Katherine Baker respectfully ask this Court to enter an order setting the amendments aside.

Daniel M. Baker and Katherine S. Baker /DMB/

DANIEL M. BAKER (MSB N[redacted] AND KATHERINE S. BAKER, PRO SE, APPELLANTS

CERTIFICATE OF SERVICE

I, Daniel M. Baker, Pro Se Appellant, do hereby certify that I have this day served via United States mail, a true and correct copy of the above and foregoing Reply Brief of Daniel M. Baker and Katherine S. Baker, Appellants, to:

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So dated this the 23rd day of Feb., 2009.

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