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**NO. 2008-CA-105  
CONSOLIDATED WITH NO. 2008-CA-104**

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**IN THE SUPREME COURT OF  
MISSISSIPPI**

**DANIEL M. BAKER AND KATHERINE S. BAKER**

**APPELLANTS**

**V.**

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

**APPELLEES**

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**APPEAL FROM ORDER OF THE  
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY,  
MISSISSIPPI**

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**BRIEF FOR APPELLANTS  
DANIEL M. BAKER AND KATHERINE S. BAKER**

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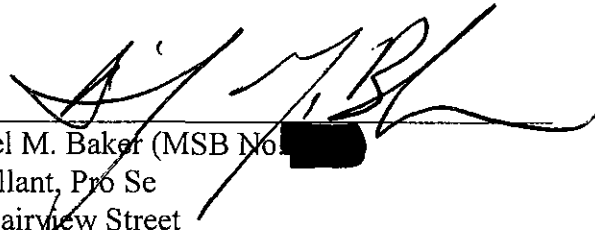
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PRO SE

### CERTIFICATE OF INTERESTED PERSONS

The undersigned pro se party certifies that the following listed persons or organizations have an interest in the outcome of this case. These representations are made in order that the Supreme Court may evaluate possible disqualifications or recusal.

1. Daniel M. Baker and Katherine S. Baker, Pro Se Appellants;
2. Mark C. Modak-Truran, PhD., Esq. and Anita Modak-Truran, Esq., Pro Se Appellants;
3. William J. Simmon, Deceased, and Carol Simmons, previous owners of 734 Fairview Street;
4. The City Council of Jackson, Mississippi;
5. Mayor Harvey Johnson, In His Official Capacity only (previous Mayor of Jackson);
6. Mayor Frank Melton, In His Official Capacity only, (current Mayor of Jackson);
7. Sharp Hospitality, LLC, the current owner of the 734 Fairview Street.
8. Peter and Tamar Sharp, Current Residents of 734 Fairview Street;
9. Pieter Teeuwissen, Esq., Special Assistant to The City Attorney, Jackson, Mississippi;
10. Sarah O'Reilly Evans, City Attorney, Office of The City Attorney, Jackson, Mississippi;
11. Crane D. Kipp, Esq., Attorney for Intervenor-Appellees, Carol and William Simmons, Deceased d/b/a The Fairview Inn, Wise Carter Child & Caraway Professional Association; and
12. Robert P. Wise, Esq., Attorney for Intervenor-Appellees, Carol and William Simmons, Deceased, d/b/a The Fairview Inn, Sharpe & Wise, PLLC.
13. Honorable Bobby B. DeLaughter, Circuit Court Judge
14. Special Master Lee Turner

This the 14<sup>th</sup> day of July, 2008.

  
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\*(Amended section, no objection from Bakers)

\*\*(New section, subject of this appeal)

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### **STATEMENT OF THE ISSUES**

- I. THE CITY COUNCIL'S DECISION AMENDING THE ZONING ORDINANCE BY ADDING SECTIONS 202.17(a) AND 602.02.03 TO PERMIT A RESTAURANT ON RESIDENTIAL PROPERTY ILLEGALLY REZONED 734 FAIRVIEW STREET FROM AN R-2 CLASSIFICATION TO A C-3 CLASSIFICATION
- II. THE CITY COUNCIL'S DECISION AMENDING THE ZONING ORDINANCE BY ADDING SECTIONS 202.17(a) AND 602.02.03 TO ALLOW A RESTAURANT ON RESIDENTIAL PROPERTY AT 734 FAIRVIEW STREET RESULTED IN ILLEGAL SPOT ZONING
- III. THE CITY COUNCIL'S DECISION AMENDING THE ZONING ORDINANCE BY ADDING SECTIONS 202.17(a) AND 602.02.03 TO ALLOW A RESTAURANT ON RESIDENTIAL PROPERTY VIOLATED SECTIONS 1701.02-A THROUGH 1703.08-A OF THE ZONING ORDINANCE THEREBY DEPRIVING THE APPELLANTS OF THE OPPORTUNITY FOR A FULL AND FAIR HEARING
- IV. THE CITY COUNCIL'S DECISION AMENDING THE ZONING ORDINANCE BY ADDING SECTIONS 202.17(a) AND 602.02.03 TO ALLOW THE SIMMONS TO OPERATE A RESTAURANT ON RESIDENTIAL PROPERTY WAS ARBITRARY AND CAPRICIOUS

## **STATEMENT OF THE CASE**

### **I. INTRODUCTION**

This case is before the Court on appeal from the Hinds County Circuit Court. It involves the April 7, 2004 decision of the City Council of Jackson, Mississippi amending the Zoning Ordinance of Jackson, Mississippi ("Zoning Ordinance" or "the Ordinance") by inserting two new provisions into the Ordinance, the effect of which, was to grant to William J. Simmons and his wife Carol Simmons permission to operate a general restaurant on their residential property. (R.E. 31-32, R. 157-8.) Appellants, Daniel and Katherine Baker, filed a Bill of Exceptions appealing the matter to the Circuit Court. (C.P. 3:321.) After ruling on several motions, including a motion to dismiss the Bill of Exceptions for the failure of the Appellants to file the Bill on a Sunday, Judge Delaughter referred the matter to a special master. (R.E. 34, C.P. 1:56-9.) On October 3, 2007, the special master issued his report and recommendation on the matter, finding that the actions of the City Council amounted to spot zoning and should be set aside. (R.E. 37, C.P. 1:63-9.) On December 4, 2007 Judge Delaughter issued an opinion and order rejecting in whole the findings of the special master and upholding the actions of the City Council. (R.E. 8, C.P. 3:290.) For reasons unknown, the order was not entered until April 10, 2008.

At the time of the City Council's action, the Simmons were doing business as the Fairview Inn on their residential property at 734 Fairview Street, Jackson, Mississippi. The Inn is operated as a Bed and Breakfast Inn, Class B pursuant to a use permit, and is the sole Bed and Breakfast Inn, Class B in Jackson (R.7.) (Citations to "R" are contained in the black three-ring binder.). The amendments which are the subject of this appeal originated from the Simmons' desire to open a general restaurant on Fairview Street, and their vigorous political efforts to obtain a contrived

solution that would allow them to do what is prohibited by the Zoning Ordinance. These efforts resulted in the creation of four amendments to the Ordinance.

The first amendment revised existing language in Section 202.17 of the Ordinance to clarify the long-standing limitation that a Bed and Breakfast Inn, Class B *may not* serve food to the general public, except in the context of an organized social event. (R.E. 32, R. 158.)

The second amendment modified Section 602.02.3 of the Ordinance, restricting future use permits to operate a bed and breakfast inn to only those homes that are either a Jackson Landmark or listed on the National Register of Historic Places. Prior to the amendment a use permit was available generally to structures located within a locally designated historic district. (R.E.28-29, R. 154-5.)

The third amendment, inserted as Section 202.17(a) of the Ordinance, purports to create a new use for residential property by use permit; a restaurant operating in conjunction with a Bed and Breakfast Inn, Class B. (R.E. 31, R. 157.) Again, the Fairview Inn is the only such establishment in Jackson.

Finally, the fourth amendment, inserted as Section 602.02.03 of the Ordinance, expressly requires a separate use permit for any future Bed and Breakfast Inn, Class B to operate a restaurant under Section 202.17(a), but grants, as of right, the necessary use permit to the Simmons, thereby exempting the Simmons from the explicit requirements of Sections 1701.02-A through 1703.08-A of the Zoning Ordinance regarding the issuance of a use permits. (R.E. 31-32, R. 157-8.)

The Bakers do not oppose the use of 734 Fairview Street as a bed and breakfast inn. Nor do they appeal the adoption of the first two amendments, modifying Sections 202.17 and 602.02.3 of the Ordinance. However, the context in which the first two amendments were created helps illuminate the invalid nature of the two amendments granting the Simmons the restaurant they

desired. The first amendment clarifying permissible activities arose from the Fairview Inn's violation of its use permit, and the second amendment, limiting future bed and breakfast inns, was created to preclude the possibility of any additional restaurants on residential property within the city.

## **II. THE BIRTH OF THE FAIRVIEW "TEXT AMENDMENTS"**

The Zoning Ordinance provides for two types of bed and breakfast inns: a Bed and Breakfast Inn, Class A, which may only serve meals to lodgers, and a Bed and Breakfast Inn, Class B, which may also host "receptions and other social gatherings" and may serve meals to the "guests of receptions and other social gatherings." JACKSON, MISS., ZONING ORDINANCE §§ 202.16, 202.17 (1974 with amendments)(All sections of the Zoning Ordinance cited herein are contained in Addendum 2 for ease of reference.)

In July of 1993, Mr. And Mrs. Simmons, the then owners of the Fairview Inn<sup>1</sup>, obtained a special use permit to operate as a Bed and Breakfast Inn, Class B. (R. 339-41.)

In June of 1994, Daniel and Katherine Baker, Appellants, purchased their home at 729 Fairview Street, directly across the street from the Fairview Inn, where they live with their four children. (R. 61.)

In October of 1999, the City Council amended the Simmons' use permit, allowing the construction of eight additional lodging rooms (R. 342.) The order was subsequently amended in 2001 to remove the condition limiting new construction to only eight rooms. (R. 343.)

Next, the Simmons decided they would also like to operate a restaurant on their property. At the time, both Mrs. Simmons' daughter and her daughter's husband, who is a chef, were employed at the inn. (R. 211.) In November of 2002, the Simmons' attorney, Crane Kipp, contacted the city planning department, inquiring as to the Simmons' authority to operate a restaurant. (R.

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<sup>1</sup>In 2006, the Simmons transferred 734 Fairview Street to Sharp Hospitality, LLC by warranty deed.

212.) At that time they were informed that they could not serve regular evening meals under the current ordinance. (R. 212.)

Mr. Kipp, then contacted the zoning department to request a change in the zoning ordinance to allow the Simmons to serve meals to the public on a nightly basis. (R. 472.) The Simmons also contacted City Council Member Margaret Barrett-Simon and the Belhaven Improvement Association (BIA) seeking accommodation of their wish for a general restaurant on their residential property. (R. 462.) As a result, the BIA held open meetings to discuss the desirability of a restaurant within the residential interior of Belhaven. (R. 462-4.) Upon conclusion of the meetings, the BIA issued a letter dated April 22, 2003 to Margaret Barrett-Simon stating, "It is our understanding that the Simmonses wish to operate a restaurant open to the public at the Fairview, and in order to do so have requested that the current ordinance be amended." (R. 462.) In the letter, the Board voiced its concern that the legal expansion of permissible uses "would permit further commercial encroachment" into Belhaven. (R. 462.)

During this time, the Simmons represented that the full extent of their ambitions was to serve dinner by "reservation only", but in order to do so they needed an amendment to the Zoning Ordinance. On April 3, 2003, Crane Kipp sent an e-mail to Mark Modak-Truran wherein he stated, "In addition, you need to know that the Simmons' intentions would be to conduct any restaurant operations as they do their other lines of business today - on a 'reservation only' basis." (R. 466.) This assurance of the Simmons' limited ambitions is further reflected by the April 22, 2003 comments of the BIA, "Although the Board does not support the particular language as presented, the ordinance could be amended in such a manner to address many of the issues of concern to the neighborhood while still allowing the Fairview to serve meals at night on a reservations only basis."

(R. 462.) The BIA next appointed a committee to address the matter, resulting in a decision by the BIA not to support an amendment to the zoning ordinance. (R. 93, 372, 414, 427.)

Prior to the 1993 creation of the new use of “Bed and Breakfast Inn, Class B”, no zoning provision existed allowing rented out parties on residential property. The Simmons had previously filed a petition to rezone and withdrew that request (R. 62) when it became clear that they could not meet the requisite proof, whereupon the “new use” of a Bed and Breakfast Inn, Class B was created and their present use permit was obtained pursuant to the requirements of the zoning ordinance.

Now, as in 1993, the Zoning Ordinance would prove to be a roadblock to the Simmons’ ambition. Once again an unobtainable rezoning was the only route available to the Simmons. Not to be deterred, Counselors for the Simmons crafted their own “text amendments” to the zoning ordinance that would allow them to rezone their property without any sort of relevant proof. (R. 212.) The first amendment, like the 1993 amendment, would simply create a “new use” permissible by use permit only for Class B Inns on residential property. However, this time the Simmons did not wish to follow the procedural and proof requirements required by the Ordinance to obtain a valid use permit, particularly in light of the opposition of neighbors. Hence, the amendment granting an automatic use permit to the Simmons was born, alleviating the need to meet the proof and procedures required by the Ordinance and substantive law.

Further, in order to assure that there will be no other restaurants on residential property, any future applicant would have to obtain a separate and distinct use permit by proving the impossible to the City Council - that a general restaurant on residential property on a residential street is an activity compatible with and in furtherance of the general welfare of those people living in close proximity. Finally, the amendment modifying Section 602.02.3 curtailed the possibility for almost all residential properties in the city to operate as a Bed and Breakfast Inn, even without a restaurant.

But rather than wait for the city to act on their proposed "text amendments", the Simmons proceeded to operate a restaurant in defiance of the Zoning Ordinance, advertising that a "social gathering" under Section 202.17 means two or more people coming together for "fine food and drink for the purpose of friendly relations". (R.E. 66, R. 210.) They circulated letters advertising their restaurant, explaining, "we are in the process of requesting an addition to a section of the B&B ordinance (Class B) *to clarify Fairview Inn's ability to advertise fine dining to the general public without advance booking.*" (R.E. 67, R. 211, R.E. 69, Exh. F., Bakers' Stmt. To Planning Bd.) Though the Simmons had represented to the BIA and neighbors that an amendment was necessary to allow dinner service on a "reservations only" basis (R. 462, 466), they now touted their ability to do so under the existing ordinance (R.210-11, 469), inviting patrons to "have a bourbon on the veranda." (R.E. 68, R. 470).

On September 22, 2003 Corrinne Fox, the acting Zoning Administrator, issued a letter to the Simmons stating:

It has come to my attention that The Fairview Inn intends to commence serving dinners to the general public beginning today, September 22, 2003.

...  
You should be advised that your understanding of the City's interpretation of the Zoning Ordinance regarding the Bed and Breakfast Inn 'Class B' is incorrect. In fact, Attorney Crane Kipp contacted our office through correspondence dated November 25, 2002 regarding the City's interpretation of Section 202.17 of the Zoning Ordinance. .... As a consequence of subsequent discussions between the Planning Department and Attorney Kipp, it was made clear that The Fairview Inn could not serve regular evening meals as you have described, under the current ordinance. Additionally, being aware that the City's restrictive interpretation of the 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.

You are hereby advised, as has been done on previous occasions, that it has never been the City's intent that a Bed and Breakfast Inn '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. .... It is my interpretation of Section 202.17 that 'social gatherings' include 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.

(R.E. 73-74, R. 212-13.)

Interestingly, upon meeting with the Simmons regarding her September 22, 2003 letter, Ms Fox issued a letter dated September 24, 2003 stating:

As stated in that letter my interpretation of Section 202.17 of the City's Zoning Ordinance indicates that "social gatherings" include events such as weddings receptions, birthday parties, Christmas parties and other such group activities. What I did not indicate was that the intent of a 'social gathering' could also include other social events whereby the host or hostess schedule an event prior to the actual date and make arrangement with the Inn for service to be provided. In my interpretation ... there is no limitation on the frequency of special events that can be held, nor on the number of events held at one time.

(R. 244.)

In October of 2003, Ms. Fox informed Mr. Baker by telephone that the Planning Department had looked at the issue and no amendment is planned. (P. 6, Bakers' Stmt. to Planning Bd.)

### **III. THE JANUARY 28, 2004 HEARING BEFORE THE PLANNING BOARD**

On January 15, 2004, the Simmons' counsel, Crane Kipp, mailed notice to all property owners within 160 feet of the Fairview Inn, informing them of a hearing before the Jackson Planning Board on certain "text amendments". (R. 345-349.) The Zoning Ordinance does not require individual notification of property owners for the enactment of a text amendment; only two advertisements in a paper of general circulation. JACKSON, MISS., ZONING ORDINANCE §1702-A (1974 with amendments). However, the Ordinance *does* require individual notice to property owners within 160 feet of the property where a re-zoning or use permit is sought. *Id.* at Sections 1703.02.1-A, 1703.02.4-A .

On January 28, 2004 the Fairview Amendments came before the Jackson City Planning Board for consideration. (R. 358.) Other than explaining the nature of the amendments, the Planning



Department offered no evidence in support of the Fairview amendments. ( R. 361-70.) In response to a board member's question, "how is the property shown on the future land use map, and has there been a change in the need, other than the Fairview Inn's desire?", the Zoning Administrator indicated that the property was still shown as residential on the future land use map. (R. 434-5.) The Zoning Administrator did explain that the amendment to 602.02.3 should allay concerns about any additional inns being able to operate on residential property in Jackson.<sup>2</sup> (R. 368.)

The Board then heard the positions of parties both for and against the amendments. (R. 360-361.) Mr. Kipp began by presenting the president of the BIA (R. 371), who stated that based on "a presentation" to the BIA Board a couple of days prior, the BIA Board was reversing its previous position opposing the amendments<sup>3</sup>, contingent upon certain modifications to the amendments addressing their concerns about alcohol and parking. (R. 371-4.) These promised changes were, in fact, never made.

Next, contrary to prior assertions (R. 466) and the September 22, 2003 letter from Ms. Fox, Mr. Kipp represented to the Planning Board that under its current use permit, the Fairview Inn has been serving fine-dining meals in the evening and the proposed amendments simply remove the need for reservations. (R. 378.) "Fairview has been operating under that existing authority for 11 years. Nothing will really change..." (R. 380). Mr. Kipp speculated that a restaurant is "vital to the economic welfare of Fairview Inn" (R. 380), but *no* evidence was presented regarding the financial state of the Fairview Inn.

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<sup>2</sup>Responding to a question regarding the amendment to Section 602.02.3, Ms. Fox explained, "that's to eliminate the right of any person who is within a district - a historic district, a locally-designated historic district - from applying for a bed and breakfast classification." (R. 368.)

<sup>3</sup>At the Planning Board hearing Dan Baker testified, "the BIA came to tell you how they support this text amendment, but what they didn't tell you is that they did it at the 11<sup>th</sup> and a half hour, actually, last night. In fact, I have not even seen the final product. Those most affected by their ruling were not even involved. And last year, the BIA addressed this. They allowed for public comments, as we are today. They investigated it, and they said, 'No. We can't support it'." (R. 414.)

Fifteen people then gave public comment in favor of the Fairview Amendments, only two of which actually lived within 160 feet of the Fairview Inn. (R. 382-406.) The comments all related solely to the Fairview Inn; describing the beauty and quality of the inn along with the graciousness of Mr. And Mrs. Simmons. At one point, the Chairman of the Planning Board interjected, "let me make one comment ... , and I think it's important that all we all remember it. The textual changes are not just about the Fairview Inn. It's about any Bed and Breakfast Class B within a residential area, just so you're aware of that, and just so we're not isolated on one institution." (R. 395.) At least eight of the fifteen commenting were apparently traveling under the unsubstantiated belief that the Fairview Inn was about to close and become a derelict property.<sup>4</sup> Again, there was no evidence of the Fairview Inn's financial situation. To the contrary ample evidence was presented of the great successes achieved by the Fairview Inn *without* a restaurant. (R.E. 75-78, R. 323-4; 384-402; Exh's L, M, N, Bakers' Stmt. To Planning Bd.)

In opposition to the amendments, Dan Baker spoke on behalf of 27 objecting homeowners, all residing within 160 feet of the Fairview Inn. He also entered into evidence their signed objections, stating opposition to any increase in commercial activities at the Fairview Inn. (R. 408.)

Mr. Baker testified that when the 1993 use permit to operate as an inn was issued there were

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"It is a world class property, and that is something we don't want to lose." Pat Weir (R. 383).

"We want to keep in place the meticulous care that the Simmons give to their property..." Richard Freis (R. 385).

"...[T]he Fairview Inn does not stand out, but it is outstanding, and we need to keep it." John Horhn (R. 388).

"It is a treasure. It couldn't be replaced." Roger Parrott. (R. 393).

"It is important for me ... that Fairview continues, because one would hesitate time to think about what would happen to this property ... it if were not in the proper stewardship of people like the Simmons." Shirley Vanderpool (R. 398).

"We need to make sure that Fairview, in my opinion has this added authority ... so that they can be a viable property..." Bud Robinson (R. 402).

"My desire is to see that the Fairview Inn is able to continue to thrive ..." John Lewis (R. 403).

"[i]n order for this to be a financially viable business, it has to be able to provide fine dining ..." Dorothy Christ (R. 404).

no children living within 160 feet of the Fairview Inn, but now there were 25 children living within 160 feet of the Fairview Inn. (R. 413.) Mr. Baker spoke of safety concerns for the 25 children playing in the midst of a C-3 activity. He also argued that the increase in delivery trucks necessary to sustain a nightly restaurant operation, the increase in refuse, noise would all contribute to a decrease in the value of the historic homes surrounding the Fairview Inn. (R. 414-15.)

Also opposing the amendments, Dr. Modak-Truran introduced evidence of present ongoing zoning violations. He spoke of safety concerns regarding the children playing in proximity to this activity, and the resulting depreciation of the homes' value. (R. 419-20.)

Next, Heather Wagner voiced her opinion regarding the legal insufficiency of a supposed "text amendment" enacted for the benefit of one property over the objections of those surrounding properties (R. 420-24.)

Vaughan McRae reminded the Board of their hard work on the future land use plan, asking the Board not to abandon it by approving the amendments. (R. 426.)

Finally, Rebecca Wiggs pointed out that the Zoning Ordinance does not even permit new restaurants in the Fortification Street Overlay; arguing that if Fortification Street is insufficient for a restaurant, then a residential street within the interior of Belhaven is not an appropriate location for a restaurant. (R. 429.)

At the close of public comment, the Planning Board voted to issue a negative recommendation regarding the amendments. (R. 443-44.)

#### **IV. THE APRIL 7, 2004 HEARING BEFORE THE CITY COUNCIL**

Though no appeal was taken from the decision of the Planning Board pursuant to Section 1902.02-A of the Zoning Ordinance, the Fairview Amendments came before the City Council on April 7, 2004. Present at the meeting were 5 of the 7 members of the Council. (R. 148.)

### **A. The City's Evidence in Support of the Text Amendments**

As before the Planning Board, the Planning Department made *no* recommendation to the City Council regarding the Fairview Amendments (R. 40.), though recommendations were made on the other zoning matter before the Council that day. (R.E. 22-24. R. 148-150)

Likewise, the Zoning Administrator, made *no* mention of the January 28, 2004 Planning Board's issuance of a negative recommendation. (R. 40.) In fact, no council member inquired as to the disposition before the Planning Board.

*No* evidence was presented by the Planning Department regarding the city wide "text amendments".

The council allotted ten minutes to counsel for the Simmons to speak in favor of the amendments, and ten minutes to one member of the entire group opposing the amendments to speak, followed by public comment. (R. 40-41.)

Mr. Baker next made a motion to invoke Mississippi Code Ann. §17-1-17 (1972), requiring a two-thirds vote of the entire council where the owners of more than twenty percent of the land falling within 160 feet of the subject property object to the proposed amendment.<sup>5</sup> (R. 41-43.)

### **B. The Fairview Inn's Evidence in Support of the "Text Amendments"**

First, Mr. Kipp spoke in favor of the amendments. (R. 51-60.) Not surprisingly, no mention was made of the Planning Board's negative recommendation. The arguments and evidence were essentially the same as those presented to the Planning Board.

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<sup>5</sup>A two-thirds majority vote would require an affirmative vote of all 5 members present. Mr. Baker submitted the signed objections of 28 property owners, and a certified map showing that the area of the 28 objecting property owners comprised 31 percent of the total property falling within 160 feet of the Fairview Inn. (R. 168, 451.) The Council did not vote on the motion.

Mr. Kipp read a letter to the editor from a tourist extolling the beauty of the Fairview Inn. (R.52, 291.) He explained that the Fairview Inn is a member of the hospitality community and is a “treasure”, and that old homes are expensive to maintain. (R. 53.)

He next argued *against* the amendment to Section 202.17 clarifying that meals may not be served to the general public, stating, “We’re not particularly in favor of changing the definition from ‘social gatherings’ to ‘private functions’ ... because we have a definition. ... Social gatherings are fairly simple. Social gatherings are where two or more are gathered. That’s what it is. Food and drink may be involved. Sometimes its just conversation. That’s clear. We know what that is. We all know what that is.” (R. 54.)

Further, Mr. Kipp argued that the proposed amendments allowing a restaurant would not pose in intrusion into the neighborhood because “Fairview has had a use permit to do exactly this since 1993 ... That’s what was contemplated when the ordinance was amended and the permit was issued by this council.” (R. 54-55.)( But see, R.E. 73, R. 212-3.)

Mr. Kipp also stated that “[B]ecause of the economy, because of changes in economic circumstances of the public, it needs to look at other ways to deal with supporting the property.” (R. 55.) Again, there was no documentary evidence to prove the claim of impending disaster. (Contrast, R.E. 75-78, Exh.s L,M,N Bakers’Stmt. to Planning Bd..)

He again submitted evidence that, while not required for a text amendment, he personally had given notice to the homeowners residing within 160 feet of the inn (R. 56.)

Mr. Kipp asserted that the amendments are not spot zoning, stating:

The comprehensive land use plan for this city calls for the Belhaven neighborhood to be R- -- to be residential. This is residential. That zoning is not changing. This is R2 property with a special use – with a use permit, a permanent use permit, which allows it to remain residential ... and therefore, there is no zoning change.

(R. 57-58.)

Finally, Mr. Kipp summed up his argument as follows:

The Fairview Inn is operating now under the permanent use permit and is allowed to have social gatherings, which they do. Since September of last year, that have had advanced reservation only social gatherings. They were willing to make it available that if you call in advance and arrange to have a party, inviting whomever you want, make arrangements for a menu or a couple of menus if that's what you want to have, so people have choices, because some people like vegetables only and some people like fish and some people like red meat and some people don't.

(R.59-60.)

The Simmons also presented the following documentary evidence to support their "city wide text amendments":

1. A January 26, 2004 letter regarding the BIA's conditional assent to the amendments, contingent upon certain changes, that were, in fact, never made. (R. 234-41);
2. The September 24, 2003 Letter from Corrinne Fox (which followed her September 22, 2003 letter) upon which the Simmons apparently base their contention that they have had authority since 1993 to serve meals to the general public. (R. 212-13, 244);
3. Photos of the inn and adjacent C-1 professional building parking lot on State Street (R. 247-51) along with a copy of the parking lease the Simmons must maintain to operate as an inn (R. 258-64);
4. A letter from Mr. Simmons to Baptist Health Systems proposing a gate between the two properties (R. 254-5);

5. 22 written expressions<sup>6</sup>, both letters and e-mails, submitted as evidence to support the Fairview amendments<sup>7</sup> (R. 266-290);
6. Undated ambiguous petitions for “an amendment to the City of Jackson Zoning Ordinance regarding ‘food service’, as more fully explained in the attached memorandum”<sup>8</sup> (R. 294);
7. An article citing the Fairview Inn’s award as Most Outstanding Inn in North America (R. 323-325);
8. Newspaper notice of City Council meeting (R. 328);
9. The Modak-Trurans’ deed to their home (R. 331-2); the Bakers’ deed to their home (R. 335-6); and
10. The Simmons’ 1993 use permit to operate as a Bed and Breakfast Inn, Class B (R. 339-44).

### **C. The Evidence in Opposition to the Amendments**

Mr. Dan Baker next spoke in his own capacity *and* as the representative of the 28 objecting homeowners living within 160 feet of the Fairview Inn. (R. 169-189.)

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<sup>6</sup>The 22 “letters in support” include 2 letters apiece for two individuals (R. 268, 269, 278, 279), 9 letters written by the same people who also gave public comment before the Planning Board, the City Council, or both (267, 270-74, 276-80, 282-83), 1 thank you note for a “magnificent lunch” signed by the staff of the convention and visitor’s bureau (R. 284), and a thank you letter that has nothing whatsoever to do with the amendments (R.289). In sum, these “Letters of Support” contain the opinions of 8 individuals who did not also speak before the Planning Board, the City Council, or both. Only 1 of the 8 non-duplicative letters/ e-mails in support was written by a person who lived or owned property within 160 feet of the Fairview Inn (R.266).

<sup>7</sup>Again, It appears the writers were under varying impressions:

“The thought of it being bought by someone and turning it in to a half-way house with an iron fence or closed down like former hotels is frightening.” Pat Weir (R. 270).

“And if the building were bought, for example, and divided into apartment complexes ...” Richard Freis (R. 274).

“They have signed an agreement not to put in a bar.” Marion Barnwell (R. 268).

“The parking and traffic issues have been addressed with proposed valet parking ...” Amy Turner (R. 286).

“... I can imagine the profit margins are thin.” Warren Speed (R. 288).

<sup>8</sup>Which *unattached* memorandum deceptively states that the change “represents no change in the nature of established operations.” Further, the supposed signatures of those in support include people from as far away as Las Vegas (R. 320) and also people living within 160 feet of the Fairview Inn, who also later signed and dated their specific objection to an increase in commercial operations. (R. 295, 313 314.)

During his ten minutes, Mr Baker began by pointing out the Planning Board's negative recommendation on the "text amendments" (R. 61.), placing into evidence the transcript from the Planning Board hearing. (R. 61.) He then argued that notice mailed by the Simmons' counsel, unnecessary for a true text amendment, was further evidence that the amendments were nothing but a "clever way to re-zone". "They knew they were hedging their bet by sending that notice." (R. 62.)

Responding to Mr. Kipp's assertion that the amendments are not spot zoning, Mr. Baker asked, "I want to know where else in our comprehensive plan we allow a full-service general restaurant called by another name on a residential street." (R. 62.)

Mr. Baker pointed out that he had introduced into evidence the signed objections of 28 homeowners. Those objectors constitute 61 percent of the actual owner-occupied dwellings located within 160 feet of the inn (R. 63.), and comprise 31 percent of the land lying within 160 feet of the Fairview Inn. (R. 169-89; R.E. 44-64, R. 452.)

Mr. Baker further argued that the Fairview Amendments, styled as "text amendments", exist solely to allow the Simmons to use their property in an illegal manner, explaining that the amendments were intentionally crafted to effectively re-zone their property without the necessity of following the law. (R. 65.)

Mr. Baker introduced into evidence photographs of children playing on Fairview Street. "That's not a photo the Fairview is going to issue to you. That's another view of Fairview Street, children playing in the yard. That's what Fairview Street is about. Restaurant patrons are not in the habit of watching out for small children when they leave after having a few." (R. 66.) Further, "The Simmons can't show that a restaurant on a residential property is in harmony with your comprehensive plan, and they can't show that their patrons, the vibrating delivery trucks, and increased dumpsters would not pose a nuisance to the surrounding property. Those are the things



that come along with a restaurant.” (R. 67.) “It’s very important to understand our zoning code in the City of Jackson. Why do you put restaurants in C3? Because it classifies it as a high-traffic generating use. In fact, in the Fortification Street Overlay, they said it cannot support any more restaurants. Fortification Street. But yet how can they expect Fairview Street to handle one?” (R. 67.)

Mr. Baker also presented evidence of current Ordinance violations( R. 67, 191-209). The evidence included pictures of cars parked up and down the street in violation of the zoning ordinance (R. 199-201), trucks illegally parked and unloading in the street (R. 190-98), advertisements for functions in excess of off-street parking capacity (R. 202-4), and advertisements stating the presence of on-site motor coach parking, along with pictures of buses parked on the street (R. 205-9).

Further, Mr. Baker testified that while there were no children living near the Fairview Inn when the 1993 use permit to operate simply as an inn was issued, 26 children now reside within 160 feet of the Fairview Inn.(R. 69.) He also cited recent successful opposition to a law firm attempting to locate in a home on *State Street* around the corner from the Fairview Inn. (R. 69.)

The documentary evidence submitted to the council in opposition to the amendments included:

1. The transcript of the January 28, 2004 hearing before the Planning Board resulting in a negative recommendation for the amendments (R. 358-445);
2. Pictures of children playing on Fairview Street (R. 165-6);
3. The signatures of 28 homeowners residing within 160 feet (18 properties) in opposition to a restaurant on Fairview Street (R. 169-89);
4. A certified map showing that land held by the objecting homeowners comprises 31 percent of the property lying within 160 feet of the Fairview Inn (R. 168);
5. Photographs of trucks illegally loading and unloading in the street in violation Section 1109-A of the Zoning Ordinance (R. 190-98);

6. Photographs of cars parked on the street in violation Section 602.02.3(3)(b) of the Zoning Ordinance (R. 199-201, 467-8);
7. Advertisements for events in excess of required parking capacity, 850 and 2,000 people (R. 202-4);
8. Advertisement falsely indicating motorcoach parking onsite and pictures of buses parked on street in violation of Section 602.02.3(3)(b) of the Zoning Ordinance (R. 205-9);

At the conclusion of Mr. Baker's ten minutes, the council meeting proceeded to public comment.

#### **D. Public Comment in Favor of the Amendments**

Nineteen people spoke in favor of the Fairview Amendments. Again, only one actually lived within 160 feet of the Fairview Inn. As before the Planning Board, the comments all related solely to the Fairview Inn, except that in recognizing that Belhaven is "one of Jackson's most stable neighborhoods," John Horhn assured the Council that "you have unanimously passed a measure that will ensure that there won't be the proliferation of this kind of facility in the Belhaven area with the passage of Item No. 4. ..." (R. 73.)

As before, of the nineteen people, apparently ten of them based their support on the Simmons' vague and unsupported assertions of financial need.<sup>9</sup> Others were impressed by non-existent agreements and non-existent textual restriction on the number of cars and the service of alcohol.<sup>10</sup>

Mr. Mike Farrell spoke on behalf of the BIA, whose support was predicated on restrictions (R. 371-4.) which, in fact, were never incorporated into the amendments. (R. 158-9).

Regarding commercial traffic generated by a restaurant, Pat Weir, who owns a rental house on Fairview Street stated, "And most children should be playing in a fenced area, not just be able

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<sup>9</sup>"I know it is difficult on the neighbors... without the diversity of income ... they would be worried about weeds and closed up buildings." Roger Parrott (R. 77).

"This is a treasure that the city needs to keep. Once you lose it, then its gone." Joe Haynes (R. 78).

"I respectfully ask this council to help develop these treasures than essentially put them out of business and creating a negative impact on the neighborhood in that way." Don Kettner (R. 81).

"I sincerely hope that the Simmons are allowed to expand their services ... thereby maintaining a jewel..." Wanda Wilson (R. 86).

"And if the building were bought, for example, and divided into apartment complexes ..." (R. 274). Richard Freis, the sole speaker living within 160 feet of the Fairview Inn..

"I add our support in the efforts to retain the importance of the bed and breakfast and world-class dining facility that we have become dependent on." Toni Turner (R. 103).

"You only have to look at the Iron Horse Grill to see what the loss of a particular establishment can do to an area. I know that area is coming back down there because of the train station, but when the Iron Horse left, that area tanked." Chris Klotz (R. 106)

"I'm just a minister for the Kingdom of God. And I was privileged to come to the Fairview Inn. .... And I was opportunited [sic.] to be the host for the first lady and the pastor and the king of Malawi. And when we went there, I looked at it, and I named it 'The Palace,' because the king and queen of Spain stayed there; Jim Barksdale, which is a close friend of mine, stayed there. And I have been invited to the White House with George Bush. And I hope the Fairview will be here." Minister Sheila Davis (R. 108).

"... I think to disallow the potential of a thriving business of this kind to go on and succeed would be a detriment." Shirley Vanderpool (R. 115).

"The thought of it being bought by someone and turning it in to a half-way house with an iron fence or closed down like former hotels is frightening." Pat Weir (R. 270).

<sup>10</sup>"And the restrictions they have been willing to implement, such as not having a free-standing bar on the premises, as well as not serving alcohol anywhere except at the table during time which food is served, they have also agreed to not have more than 50 diners at any one time." Don Kettner (R. 80).

"Limited to 50 people, drinks served only at the table." Jim Kopernak, who plays the piano at the Fairview Inn. (R. 112-113).

"I'm here to say that the Fairview Inn is not a members-only club and shouldn't only be for private parties. .... We're talking about a maximum of 30 cars for restaurant goers." Dorothy Triplett (R.82).

to run all around near the street. Because there are trucks ... I mean, they're all over the neighborhood. You can't stop that. That's business." (R. 98.)

Additional support from people who do not live in close proximity of the inn, was full of sentiment but devoid of substance or relevant fact<sup>11</sup>.

### **E. Public Comment in Opposition to the Fairview Amendments**

Lastly, those in opposition who were still able to remain at the lengthy hearing had an opportunity to offer public comment.

Heather Wagner, who resides with her husband on State Street within 160 feet of the inn, submitted a written statement into evidence (R. 446-450) setting forth the basis of her objection to the proposed amendments, stating:

The City of Jackson has already given in to similar requests by the owners of the Fairview Inn. In 1993, allegations of financial difficulties were used as justification for the adoption of the definition of bed and breakfast permitting social gatherings and receptions. And, much like the present, the property was already being used for social gatherings prior to the property being granted a permit authorizing such uses. The owners of the Fairview Inn have a history of using threats of financial ruin to leverage the City into permitting them to do what they want. This should not be permitted to continue.

(R. 450.)

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<sup>11</sup>Jo Ann Morris added, "The truth of the matter is, that Fairview has never done in the past anything but good for our community. It is not logical to assume that they're going to do anything but good for our community in the future." (R. 97.)

Carl Reddix stated: "And the Simmons have always been just immaculate and gentlemanly and ladylike, perfect host and hostesses. And my friends only want to stay there when they come back." (R. 100.)

Kathryn McCraney declared "And you know, then I thought looking ahead, I was, like, wow what a great opportunity for me to walk with my husband's hand to dinner one night and walk home." (R. 104.)

Bill Osborne stated "My initial reaction one year ago when I first heard of this ... was, wow, a great restaurant in our neighborhood. I've reflected on this for over a year, for that whole period of time. I still think wow, a great restaurant for our neighborhood." (R. 109.)

She also made four points. First, that a full-scale restaurant operating in a residential neighborhood, though not technically re-zoned, could serve as evidence of change in character for future re-zoning applicants. (R. 118.) Second, “adoption of measures designed strictly for the benefit of one property owner places the City Council in a precarious position. ... a lot of the proponents in favor of this have called this the Fairview’s text amendment. I thought this was a city text amendment.” (R.. 118.) Third, “when an individual requests a change ... the grant or denial of that request must be based on sound land use principles and whether such change is compatible with those municipality’s ordinances, the comprehensive land use plan, and state statutes. ... Zoning and land use decisions are not popularity contests.” (R. 119-120.) Fourth, how will the city council justify not amending the zoning ordinance the next time another property owner desires to put his property to a use which is not permitted in that zoning district. (R. 120).

Next, Vaughn McRae, who has lived on State Street with his wife and four children for 16 years (R. 121), voiced his opposition to the amendments, explaining, “we’ve improved our property a lot, and we have encouraged others to buy and renovate the historic homes in the area. (R. 121.)

He then presented the following to the council:

... I love Fairview. As the King of Spain loves Fairview, those people from San Angelo. It’s a great place. It’s a great thing in our city. But that’s not really the point. ... I’m going to ask you to consider four points.

First of all, your planning board considered all of the relevant facts heard from all these people, looked at the City’s land use and voted against a change in the ordinance. If you’re going to circumvent the planning board, why do you even have a planning board?

Number 2, over 60 percent of the homeowners most affected by this change – that’s the people who live in and occupy the houses closest to Fairview, including these families who live right across the street ... oppose allowing a full-service hotel in their neighborhood ... If our neighbors are against it, why would you even consider it?

Number 3, **Fairview’s argued for 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 to rewrite its 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 Capitol, and consider the negative consequences of allowing businesses to move from major traffic corridors and penetrate neighborhoods. I cannot think of one example where allowing commercial encroachment into a residential neighborhood has enhanced that neighborhood. So I would please ask you to vote against these changes."

(R.121-123.)

Next, Anita Modak-Truran, who lives directly across the street from the inn with her husband and young son, stated "Now, we were assured that there would be some sort of measure to keep liquor in check here. Since that time, there's been advertising about 'Come join us, have bourbons on the veranda.' (R. 470.) There was an e-mail that went around, 'Have drinks, then go to the New Stage Theater and join us.' (R.E. 71, Exh. K , Bakers' Stmt to Planning Bd. ) The problem with the liquor is that it increases the chance of drunk drivers and I simply cannot have my child to be a victim of a crime or of a congestion problem when we live in a residential area." (R. 125-6.)

Finally, Mark Modak -Truran placed the Modak-Trurans' Statement in Opposition to the Amendments along with exhibits into the record. (R.126.) Dr. Modak-Truran spoke of current zoning violations regarding parking (R. 126-7, 467-8), illegal loading and unloading of trucks in the street (R. 127, 477-80), and motor coaches illegally parked in the street along with the attendant nuisance (R. 127, 481-3), arguing, "Those things I'm talking about are already violations of the ordinances .... The restaurant would only add to these problems" (R. 127-8). "All of these thing, in general, demonstrate that a C3 use in an R2 residential district is inconsistent with normal, rational Euclidian zoning scheme. ...So in the end, this is not about liking the Fairview, people supporting it. It's about what the law requires."(R. 128.)

## **F. The Decision of the City Council**

At the conclusion of public comment, only four members of the City Council remained, as Councilman Brown had left the meeting. Four members only would have been insufficient for a super-majority vote. Citing the need for legal advice, the remaining council members voted to go into executive session.(R. 129-130, 156.)

But before leaving, Councilwoman, Margaret Barrett-Simon made the following impassioned plea:

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's not about liquor, it's not about whiskey, it's not about - what are those other things? - wedding parties. They already do. They have a thousand people for wedding parties.

It's not about wedding parties. It's not about – let me think. I mean, it's just all these things I heard. It is simply one question to be answered, and that is can they serve dinner to 50 people or fewer a night without a reservation. It was fine when it was treated as a private club; it's no longer fine. And so that's the issue.

(R. 133-4.)

Upon returning from executive session, Councilman Brown had rejoined the group (R. 158.), and the number of council members necessary to achieve a super-majority vote were again present. Council President McLemore stated, "We are formally out of executive session. No formal action was taken. We didn't vote on anything in particular. Didn't vote on anything at all, in fact." (R. 140.)

Councilwoman Barrett-Simon moved to amend the amendment "that this will go before site plan". (R. 143.) The motion passed. (R. 146.) Without even glancing at the documentary evidence or written statements, a vote was taken, and the five present members of the City Council unanimously voted to adopt the amendments. (R 146.)

Unlike all other zoning decisions made that day, the City Council made no findings with regard to their decision adopting these amendments to the Zoning Ordinance. (RE 22-33, R. 148-59.)

Pursuant to Miss. Code Ann. § 11-51-75 (1972), on April 19, 2004 the Bakers filed a Bill of Exceptions, seeking review of the City Council's decision amending the zoning ordinance to add Sections 202.17(a) and 602.02.03 in order to permit a general restaurant on residential property at 734 Fairview Street. (C.P. 3:321.)

### **SUMMARY OF ARGUMENT**

*The amendment of a zoning ordinance will never be simply a matter of local politics as long as this Court sits.”* City of Clinton v. Conerly, 509 So.2d 877, 885 (Miss. 1987).

This appeal is brought by two families to protect the residential character of Fairview Street, where, for the last fourteen years, the Appellants have made and improved their homes and raised their families. It is an effort by the Bakers and Modak-Trurans to defend themselves and their children from the unwarranted commercial aggression of a prominent citizen who used his financial and political resources to obtain an illegal exemption from the limitations of the Zoning Ordinance. It is a necessary appeal to protect Appellants' children and homes from the dangers inherent in allowing heavy commercial activities, including the daily service of alcohol, to take place on a residential street where families live and children play. In addition to these two families, numerous other families and homeowners living in close proximity to the subject property, likewise opposed any increased commercial activity on Fairview Street.

In adopting the Fairview Inn's "text amendments", the City Council acted in an illegal and arbitrary and capricious manner for the purpose of bestowing a favor upon two of Jackson's well-known citizens, William J. Simmons and Carol N. Simmons, the owners of 734 Fairview Street, a residential property being operated as the Fairview Inn pursuant to a use permit. Specifically, this



appeal is a result of the Jackson City Council's April 7, 2004 decision adopting Sections 202.17(a) and 602.02.03, the "Fairview Amendments", for the express purpose of allowing the Simmons to operate a full-scale, general restaurant on their residential property directly across the street from the Appellants.

The Fairview Amendments resulted in an illegal rezoning, in fact of 734 Fairview Street. The amendments permit a drastic change in the use of the property from low density residential use to high density commercial use without the need for a rezoning. They allow, on only one residential property, a general restaurant; something prohibited by the Zoning Ordinance in all but the most intense commercial areas of the city. The amendments were treated as "text amendments" in order to circumvent the necessity of proof required for a valid rezoning.

The Fairview Amendments also result in illegal spot zoning. The Zoning Ordinance relegates general restaurants to properties having a C-3 or C-4 classification. Both 734 Fairview Street and all surrounding properties are zoned R-2, with the exception of the adjacent low intensity, professional office building on State Street. The amendments allowing a C-3 activity on R-2 property are grossly out of harmony with the Comprehensive Plan for Jackson, which calls for Fairview Street to be residential. The amendments were designed solely to accommodate one property in the entire city. As such, they result in illegal spot zoning and should be set aside.

Also, the Fairview Amendments were cast as "text amendments" in order to stifle the rights of the surrounding homeowners to real notice as to the impact of the zoning change, and also the opportunity for a legitimate hearing, to which the Appellants are entitled under the provisions of the Zoning Ordinance and the laws of the State of Mississippi. The amendments violated every single provision of the Zoning Ordinance as it pertains rezonings and use permits. Further, by treating the

amendments as text amendments, the Simmons were excused from presenting any of the relevant proof necessary to obtain either a rezoning or a use permit.

Finally, the amendments were adopted without any relevant proof of circumstances justifying an amendment to the City's Zoning Ordinance. The law is clear that a validly enacted Zoning Ordinance may only be amended in furtherance of sound land use principles designed to promote the welfare of the citizenry. Amendments that bestow a favor on one property owner to the detriment of others without requisite proof are by nature arbitrary and capricious and must be set aside as an invalid exercise of the City's authority to enact zoning laws.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

In zoning matters, the standard of review applied by the appellate court is the same limited review applied by the circuit court. Broadacres, Inc. v. Hattiesburg, 489 So.2d 501, 503 (Miss. 1986); Adams v. Mayor and Bd. Of Aldermen of City of Natchez, 964 So.2d 629 (¶9)(Miss. Ct. App. 2007). In order for the decision of a legislative body to be set aside, appellants must show that the action was arbitrary, capricious, discriminatory, illegal or unsupported by substantial evidence. McWaters v. City of Biloxi, 591, So.2d 824, 827 (Miss, 1991). Appellants acknowledge that the burden is on the party seeking to have the City Council's action set aside. Mathis v. City of Greenville, 724 So.2d 1109, 1112 (¶ 7)(Miss.Ct.App. 1998).

Additionally, the law in Mississippi is equally clear that a decision to grant or deny a use permit is an adjudicative act and the "burden is upon 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); Barnes v.

Desoto County Board of Supervisors, 553 So.2d 508, 510 (Miss.1989). “Zoning issues that concern whether to grant or deny a request for a conditional use, or special exception, are adjudicative, as opposed to legislative, in nature; therefore, 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 So2d 603, 606 (¶ 8) (Miss.Ct.App. 2005).

Therefore, the Court should make a two part inquiry as to whether: 1) the enactment of the Fairview “text-amendments” was arbitrary and capricious, discriminatory, illegal or unsupported by substantial evidence, and also 2) whether in granting a use permit to operate a general restaurant on a residential street, the evidence before the City Council proved by a preponderance of the evidence each of the specific findings required prior to the issuance of a permit and enumerated in Sections 1701.02-A. through 1703.08.-A of the Zoning Ordinance of Jackson, Mississippi.

**II. THE CITY COUNCIL’S DECISION AMENDING THE ZONING ORDINANCE FOR THE SOLE PURPOSE OF ALLOWING WILLIAM AND CAROL SIMMONS TO OPERATE A GENERAL RESTAURANT ON RESIDENTIAL PROPERTY ILLEGALLY REZONED 734 FAIRVIEW STREET FROM AN R-2 CLASSIFICATION TO A C-3 CLASSIFICATION.**

The Baker’s first assignment of error is based on the obvious. The City Council’s decision inserting “text amendments” Section 202.17(a) and Section 602.02.03 into the Zoning Ordinance, for the admitted sole purpose of allowing the Simmons to operate a restaurant on their residential property, was a contrivance designed to excuse the Simmons from the necessity of rezoning and to permit a use which is restricted to property having the two most intense commercial classifications under the city’s Ordinance, C-3, General Commercial and C-4, Central Business District. JACKSON, MISS., ZONING ORDINANCE §§ 702.05.01(19), 702.06.1(18) (1974 with amendments). The “text amendments” were created by counsel for the Simmons because no legal basis existed for a rezoning of 734 Fairview Street. The “text amendments” were adopted by the Council because of the

political, financial and social status of William J. Simmons. There was no pretense that these “text amendments” apply to more than one property in the entire city. In fact, a state senator was brought in to reassure the council that Belhaven is “one of Jackson’s most stable neighborhoods,” and “you have unanimously passed a measure that will ensure that there won’t be the proliferation of this kind of facility in the Belhaven area with the passage of Item No. 4. ...” (R. 73.)

While Mississippi Code §§ 17-1-15, (Rev. 1988) 17-1-17 (Rev. 2004) and Section 1701-A of the Zoning Ordinance undoubtedly provide authority for the City Council to amend the text of its ordinance when the need arises, it does not necessarily follow that the Council may use this power to amend for illegitimate purposes. A basic and fundamental proposition of zoning law is that arbitrary provisions inserted in ordinances will not hold up under the acid test of reasonableness.”

1 Yokley, Zoning Law and Practice, § 3-13 (4<sup>th</sup> ed. 2000).

Although a city has wide discretion to enact zoning ordinances, it has no authority to place restrictions on one property and by mere favor remove restrictions from another. There must be a reasonable basis for the distinction to make it valid. The police power must be exercised to promote the general welfare of the public at large and not for the interest of any private group.

Id. at §3-21.

Further, the comprehensive Zoning Ordinance for the City of Jackson is presumed to be well thought out and designed to be permanent. It is subject to change only to meet a genuine change in conditions. See Town of Florence, Miss. v. Sea Lands, Ltd., 759 So.2d 1219, 1224 (¶ 11) (Miss. 2000), McWaters v. City of Biloxi, 591 So.2d 824, 827 (Miss 1991). City of Clinton v. Conerly, 509 So.2d 877, 882 (Miss. 1987)(citing W.L. Holcomb v. City of Clarksdale, 65 So.2d 281 (Miss. 1953)).

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

509 So.2d at 885. The Supreme has clearly stated, “while this Court accords profound deference to actions of governing boards pertaining to their 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 be simply a matter of local politics as long as this Court sits.*” Id. At 885 (emphasis added).

The comprehensive zoning scheme in Jackson provides for general restaurants to be located in areas with a C-3, General Commercial classification or a C-4, Central Business District classification. JACKSON, MISS., ZONING ORDINANCE §§ 702.05.01(19), 702.06.1(18) (1974 with amendments). In so doing, the Ordinance states the purpose of a general commercial district is “to provide areas for the development of retail type and personal service type commercial, community, and regional shopping centers of integrated design and high density development of commercial businesses in certain areas adjacent to major transportation arteries or thoroughfares within the City.” Id. at Section 702.05. <sup>12</sup>

By contrast, 734 Fairview Street, the location of the Fairview Inn, is zoned R-2, which purpose is stated as follows: “It is the intent of the 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. at Section 602.05 (emphasis added).

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<sup>12</sup>Also, the Zoning Ordinance allows a general restaurant to operate on property zoned C-2, Limited Commercial, with a use permit. Id. at Section 702.04.1(a). The purpose of the C-2, classification is to provide for “medium density office buildings and neighborhood type stores, services and commercial centers.” Id. at Section 702.04. Such use permit is obtained by compliance with the specific enumerated requirements of the Zoning Ordinance set forth in Sections 1701.02-A through 1703.08-A, thus ensuring that any general restaurant located on C-2 property will be in harmony with surrounding properties and the comprehensive plan.

Prior to the Fairview Amendments, the zoning ordinance had no mechanism by which any type of restaurant could be operated on residential property.

The Zoning Ordinance defines a General Restaurant as:

**An establishment engaged in the preparation and retail sale of food and beverages, including the sale of alcoholic beverages. Customers are served their foods, frozen deserts, or beverages by a restaurant employee at the same table at which said items are consumed,** however, food may be prepared for carry-out sale to walk-in customers. A general restaurant may include live entertainment. Typical uses include restaurants, dance halls, discotheques, lounges, and other businesses that combine both a food and beverage operation with entertainment (i.e. dance floor or pool table).

Id. at Section 202.143 (emphasis added).

The Ordinance also provides for other types of less commercially intense restaurants; fast food restaurants, neighborhood restaurants, neighborhood shopping center restaurants, and overlay district restaurants, none of which may be operated on residential property.<sup>13</sup>

The “text amendment”, inserted at Section 202.17(a) of the Zoning Ordinance, creates a “new” type of restaurant which unlike all other restaurants, is allowed to locate on residential property with a use permit; for a “Bed and Breakfast Inn, Class B with Restaurant”. The amendment defines a “Bed and Breakfast Inn Class B with Restaurant” in pertinent part 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 foods or beverages by a restaurant employee at the same table at which said items are consumed.**

( R. 158)(emphasis added).

The language inserted as the new Section 202.17(a) repeats verbatim the commercial activity defined as a general restaurant by Section 202.143 of the Zoning Ordinance. The amendment simply lacks

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<sup>13</sup> Id. at Sections 202.142; 202.144; 202.145; 202.145(a).

the examples of the what sort of establishments can operate under the above described commercial activity.

That the “text amendment” inserted as Section 202.17(a) purports to create a new type of restaurant, identical to a general restaurant, which can only be located on one piece of residential property in the entire city, is objectionable enough on its own. However, the fact that the other “text amendment” inserted as 602.02.03 grants the “required” use permit, as of right, to the Fairview Inn without even the necessity of an application is really quite brazen.

When a proper rezoning is sought, the applicant must prove by clear and convincing evidence either a mistake in the original zoning, or “that the character of the neighborhood has changed to such an extent as to justify reclassification, and there was a public need for rezoning.” Madison v. Shanks, 793 So.2d 576, 578 (¶ 7) (Miss. 2000), Broadacres, Inc. v. City of Hattiesburg, 489 So.2d 501, 503 (Miss.1986), City of Jackson v. Aldridge, 487 So.2d 1345, 1346 (Miss.1986).

Further when a proper application for use permit comes before the planning board and city council, the applicants must show by a preponderance of the evidence that the proposed use, in this case a general restaurant: a) is compatible with the character of development in the vicinity relative to density, bulk and intensity of structures, parking and other uses; b) will not be detrimental to the continued use, value or development of properties in the vicinity; c) will not adversely affect vehicular or pedestrian traffic in the vicinity; d) can be accommodated by existing public services; e) is in harmony with the Comprehensive Plan; and f) will not be hazardous, detrimental, or disturbing to present surrounding land uses. JACKSON, MISS., ZONING ORDINANCE § 1701.02-A (1974 with amendments); Perez v. Garden Isle Community Ass’n, 882 So.2d 217, 220 (¶ 7) (Miss. 2004); Barnes v. Desoto County Board of Supervisors, 553 So.2d 508, 510 (Miss.1989).

If the Simmons could prove the elements necessary to obtain a rezoning the creative “text amendments” would not have been necessary. Likewise, if the Simmons could even prove the elements necessary to obtain a use permit under this “new use” of a Bed and Breakfast Inn, Class B with restaurant, the automatic use permit would have been unnecessary. Appellants cannot even characterize the City’s actions as thinly veiled, because there was no attempt to remotely veil the purpose of the “text amendments”. The City Council’s decision was the result of an all-out effort to make an exception for William and Carol Simmons. (R. 133-4.) The city’s actions excusing the Simmons from the necessity of rezoning their property as a condition precedent to operating a C-3 activity on their property was illegal. To rename an existing C-3 activity as a “new” type of use available exclusively to the Fairview Inn, and then to bestow the “required” use permit automatically upon the Simmons, without any sort of relevant proof was nothing more than an illegal rezoning. The surrounding property owners were deprived of the opportunity for a full and fair hearing as required by the zoning ordinance on a petition for a rezoning. It relieved the Simmons of the necessity of showing by clear and convincing evidence a change in the character of the surrounding area, and a public need for another restaurant.

In Drews v. City of Hattiesburg, 904, So2d. 138 (Miss. 2005), the Mississippi Supreme Court found that where six variances were granted for property zoned B-1 professional business district to allow the construction of a 60,000 square foot medical office building, the proposed variances constituted a rezoning in fact. Id. at 142 (¶ 12). In so holding, the court stated, “[w]hile variances are allowable, the question is whether Hattiesburg, because of the number and nature of the variances requested, was actually attempting something more drastic, such as rezoning, or something impermissible, such as spot zoning.” Id. at 141 (¶ 8). The court went on to state, “[S]erious 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 by-pass procedural safeguards required for valid amendment.” Id. at 141 (§ 9).

Finding that the proposed variances constituted a rezoning in fact, the court further stated, “It is clear 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. at 142 (§ 11).

While the Drews case involved variances, the court showed its willingness to look beyond the technical classification of the city’s action to find that the impact on the property in question amounted to a rezoning without compliance with the law as it relates to rezonings.

Further, in holding that the variances amounted to an illegal rezoning in the Drews case, the Mississippi Supreme Court stated that the city’s actions impermissibly lowered the burden on the applicants from clear and convincing to a preponderance of the evidence. In the present case, the Fairview Amendments are an attempt to impermissibly lower the Simmons’ burden of proof from the most stringent standard, clear and convincing, to the most deferential standard, arbitrary and capricious, while simultaneously denying the Appellants the opportunity to fully present evidence and confront witnesses.

And while the Fairview Inn’s “text amendments” were crafted to circumvent the high level of proof required for a rezoning under the Zoning Ordinance and applicable law, the lack of even basic relevant evidence further illustrates the “text amendments” are mere artifice . There was *no* evidence before the City Council showing that the amendments serve any purpose other than to allow the Fairview Inn to operate a general restaurant on residential property within a residential district. The City Planning Department produced *no* evidence to support a city-wide text amendment and

voiced *no* opinion on the city-wide text amendment. The Council made *no* inquiry as to the disposition before the Planning Board or what effect the supposed city-wide text amendment would have on anything other than the Fairview Inn. There was only a carnival-like parade of misinformed people beseeching the council not to put the Fairview Inn out of business.

The Simmons classify their amendments as “text amendments” which by nature apply to the city wide zoning scheme as a whole. It is hard to imagine how a text amendment could be in furtherance of a city wide zoning scheme and yet not be presented to the City Council by the city’s planners, supported by any experts, or even commented upon by those in charge of developing land use regulations. It is impossible to understand why counsel for the Simmons would bear the responsibility of giving notice for city wide text amendments.

The Bakers’ respectfully urge the Court to find that decision of the City Council in adopting Section 202.17(a) and Section 602.02.03 to allow a restaurant on residential property amounts to an illegal rezoning of the property, and therefore an invalid exercise of the City’s police power as conferred by Miss. Code Ann. § 17-1-3 (Rev. 2006).

### **III. THE CITY COUNCIL’S DECISION AMENDING THE ZONING ORDINANCE FOR THE SOLE PURPOSE OF ALLOWING WILLIAM AND CAROL SIMMONS TO OPERATE A RESTAURANT ON RESIDENTIAL PROPERTY RESULTED IN ILLEGAL SPOT ZONING.**

When amendments are made to a zoning ordinance, there must be substantial evidence before the governing body that the amendments are in harmony with the comprehensive plan. When an amendment is not in accordance with the comprehensive plan, it will be set aside as spot zoning.

Jitney Jungle, Inc. v. City of Brookhaven, 311 So.2d 652, 654 (Miss.1975); McKibben v. City of Jackson, 193 So.2d 741, 744 (Miss.1967); Ridgewood Land Company v. Simmons, 137 So.2d 532,

The Mississippi Supreme Court has defined spot zoning as follows:

There is a clear cut distinction between a validly enacted amendatory zoning ordinance and a 'spot zoning' ordinance. Not all amendments which change or alter the character of a use district fall within the category of 'spot zoning' as we generally understand the term. The term 'spot zoning' is ordinarily used 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.....The one constant, as stated by the textwriter, where zoning ordinances have been invalidated due to 'spot zoning' is that they were designed 'to favor' someone.

McKibben v. City of Jackson, 193 So.2d 741, 744 (Miss.1967) (citing 1 Yokley, Zoning Law and Practice §§ 8-1 to 8-3 (4th ed. 2000)); see also, Kuluz v. City Of D'Iberville, 890 So.2d 938, 943-4 (¶ 11) (Miss.Ct.App. 2004).

To support the ""text amendments"" admittedly designed to allow only one property in the city to operate a C-3 restaurant on residential property without any sort of relevant proof, counsel for the Simmons assured the Council that the commercial activity being approved did not represent spot zoning, stating, " The comprehensive land use plan for this city calls for the Belhaven neighborhood to be R- -- to be residential. This is residential. That zoning is not changing. This is R2 property with a special use -- with a use permit, a permanent use permit, which allows it to remain residential ... and therefore, there is no zoning change." (R.57-58).

Essentially, the Simmons' contend that a zoning decision permitting heavy commercial activity on only one residential property will be in harmony with the Comprehensive Plan so long no one physically marks the map and the property technically remains listed as residential. In other words, as long as a legal fiction remains in place, no harm is done to the Comprehensive Plan, regardless of the activity permitted.

"Constitutional uniformity and equality require that a classification be founded on real and not feigned differences having to do with the purposes for which the classes are formed." 1 Yokley,

Zoning Law and Practice §3-10 (4th ed. 2000). “A restaurant is a business and as such is properly excluded from residential zones. It may even be prohibited in restricted office or business districts.” Id. at § 38-11.

Appellants note that while the general view is that special exceptions, use permits and variances do not result in spot zoning, See 2 Yokley Zoning Law and Practice §13-2 (4<sup>th</sup> ed. 2000). “This rule is based on the distinction that “[s]pot-zoning is always concerned with the validity of the ordinance and not ... with whether or not action has been properly taken in accordance with the ordinance.” Glidden v. Town of Nottingham, 244 A.2d 430, 431 (N.H. 1968). Stated another way, use permits issued pursuant to a comprehensive plan embodied by a *valid* ordinance necessarily contemplate nonconforming uses. Instead the question is whether the applicants met the necessary burden of proof required by both the ordinance and applicable law.

The present case, however, does not involve an ordinary use permit issued pursuant to both the city’s Comprehensive Plan and a valid existing ordinance. This case involves “text amendments” created by a private citizen and brought before the Council at the request of Councilmembers (R. 361.), not the Planning Department. The Planning Department officials offered nothing to support the amendments, nor were they asked. Council for the Simmons alone orchestrated the support, offering only conclusory statements about the Comprehensive Plan. The Zoning Map was not introduced into evidence, no experts opined on the compatibility of the amendments and no visual evidence of the surrounding area was presented other than a picture of the inn and it’s leased part-time parking area. The failure of counsel for the Simmons to introduce the map or seek the testimony of planning officials or other experts was not an oversight, but a calculated decision.

“[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.” 2

Yokley, Zoning Law and Practice §13-2 n. 3 (citing Ballenger v. Door County, 388 N.W. 2d 624, 627(Wiss. App. 1986)) (4<sup>th</sup> ed. 2000).

In Drews v. City of Hattiesburg, 904, So2d. 138 (Miss. 2005), the Mississippi Supreme Court clearly showed its willingness to find illegal spot-zoning even though the city's action involved variances, and not a request to rezone. "[S]erious questions arise when a variance is granted to permit a use otherwise prohibited by the ordinance; e.g., a service station or quick-stop grocery in a residential district. ....The differences between B-1 and B-3 are so extreme that if the variances are granted, spot-zoning would occur." Id. At 141 (¶ 9-10). If a change from B-1 to B-3 is considered by the Mississippi Supreme Court to be an extreme change resulting in spot zoning, then surely the city's decision permitting C-3 activity on residential property on a fully residential street amounts to spot zoning.

Counsel for the Simmons and various proponents assured the Council that this "new use" is limited in scope, and does not amount to a departure from the lodging and social activities permitted under the Simmons' current use permit. This argument is disingenuous, and appears to rely on the Simmons' willingness to violate the Zoning Ordinance (R.E. 80-96, R. 67, 126-7, 191-209, 467-8, 477-83.) The September 22, 2003 letter from the Zoning Administrator (R.212-3.) along with the Planning Department's amendment clarifying Section 202.17 of the Zoning Ordinance, prohibiting meals service except in the context of an organized social function, plainly shows that the Simmons' escalation of commercial activities was beyond the scope of their use permit (R. 2-6.) Further, the Simmons' opposition to the clarification shows that in the event the Fairview Inn's "text amendments" are found invalid, they wish to continue ignoring the limits of their use permit. If the amendments do not allow an increase in permissible commercial activities, then the vast amount of

time, effort and expense put forth by the Simmons in getting their amendments before the City Council was a completely unnecessary waste.

Further, the contention, even repeated by Councilwoman Barret-Simon, that the amendment only allows 50 or fewer people per night (R. 134.) does not make it so. As shown by Appellants, infra at pp. 30-31, the amendment inserted at 202.17(a) embodies the identical language defining a general restaurant under the Zoning Ordinance. Section 202.143 Zoning Ordinance of Jackson, Miss. (1974 with amendments). The amendments contain no limitation on the number of people, the hours of operation, or the terms under which alcohol may be served. (R. 158-9.) The amendments permit a full scale general restaurant on residential property. Assurances made to the City Council that contradict the plain wording of the amendments are irrelevant and prove nothing. To give any weight to such incorrect assurances would be to absolve the Council members of their duty to actually read amendments before voting on them.

Counsel for the Simmons also argued that a restaurant on residential property is in harmony with the Comprehensive Plan because 734 Fairview Street is adjacent to a professional office building located on State Street. (R.58-59.) Under the Zoning Ordinance, a professional office building may be located on property zoned C-1, the city's least intense commercial classification. Section 702.02 Zoning Ordinance of Jackson, Miss. (1974 with amendments). However, applying the Drews case, supra, a decision permitting a restaurant *on* the adjacent C-1 property would amount to an extreme change resulting in spot zoning. Appellants are at a loss to understand the logic of the argument that permitting a C-3 activity on R-2 property is in harmony with the Comprehensive Plan simply because the R-2 property is adjacent to C-1 property where a restaurant also is not permitted.

Clearly, the Fairview Inn's "text amendments" were designed to favor the Simmons. After all, their attorney, not the Planning Department, drafted them and presented all argument in favor

of them. They were crafted to apply to only one property in order to appease opposition to commercial encroachment in residential areas. The activity permitted, regardless of its name and regardless of proponents' assertions, is a high intensity, full scale general restaurant. It is impossible to show that such commercial activity is compatible with low density residential use. Likewise, it is impossible to show that such activity is in harmony with the Comprehensive Plan, which relegates general restaurants to areas with a C-3 or C-4 classification. See JACKSON, MISS., ZONING ORDINANCE §§ 702.05.01(19), 702.06.1(18) (1974 with amendments). Hence, the complete lack of *any* substantive proof on the matter.

For the foregoing reasons, Appellants ask this Court to find that the Fairview Inn's "text amendments" resulted in illegal spot zoning, and therefore, are invalid.

**IV. THE CITY COUNCIL'S DECISION AMENDING THE ZONING ORDINANCE FOR THE SOLE PURPOSE OF ALLOWING WILLIAM AND CAROL SIMMONS TO OPERATE A RESTAURANT ON RESIDENTIAL PROPERTY VIOLATED SECTIONS 1701.02-A THROUGH 1703.08-A OF THE ZONING ORDINANCE, THEREBY DEPRIVING THE APPELLANTS OF THE OPPORTUNITY FOR A FULL AND FAIR HEARING.**

The law in Mississippi is well established that "local zoning authorities may not ignore but must abide by the restrictions of all applicable zoning ordinances." Noble v. Scheffler, 529 So.2d 902, 907 (Miss. 1988); Robinson v. Indianola Municipal Separate School District, 467 So.2d 911, 917 (Miss.1985); Caver v. Jackson County Board of Supervisors, 947 So.2d 351, 354 (¶ 11) (Miss.Ct. App. 2007).

Mississippi's recognition of this principle is in keeping with the broadly recognized rule that "amendments to zoning ordinances must be adopted consistent with statutory requirements as well as charter and ordinance provisions respecting notice and public hearings." 1 Yokley, Zoning Law and Practice, § 3-12 (4<sup>th</sup> ed. 2004).

And while the Mississippi Supreme Court has stated that not all procedural deficiencies will render a zoning decision invalid, where a procedural deficiency may be said to have contravened a citizen's due process rights, the decision will be found to be invalid. Thrash v. City of Jackson, 498 So2d. 801, 808 (Miss. 1986). In Thrash, the Court stated, "Without attempting to be all inclusive, we consider it beyond debate that the essence of the due process rights ... is reasonable advance notice of the substance of the rezoning proposal together with the opportunity to be heard at all critical stages of the process. Id. at 808.

In refusing to find a violation of the appellants' due process rights in the Thrash case, the Mississippi Supreme Court found that the appellants "were given the opportunity to present any and all matters they wished. ... Objectors were given full and fair opportunity to present their views." Id. at 808.

By contrast, the entire group of 28 homeowners objecting to the Fairview Inn's "text amendments" was afforded just ten minutes to present evidence and argument in opposition to the amendments. (R. 40-41.) Further, no opportunity was provided to confront evidence or examine "witnesses" who gave opinion via public comment

The Zoning Ordinance sets forth detailed requirements for the granting of a special use permit. Section 1703-A provides that no use permit "shall be passed by the City Council *unless and until* the following conditions have been met." Section 1703.02-A requires that a written application be filed with the Zoning Administrator. Next, Sections 1703.02.4-A through 1708-A set forth the items to be included in the application; the necessity of a certification from the Planning Director as to the proposed changes' conformity with the Comprehensive Plan; the necessity of a hearing before the Planning Board; the necessity of written findings by the Planning Board to be submitted to the City Council, and mailed to parties who appeared at the hearing; notice of a hearing before the



City Council; and the actual hearing before the City Council where the Council shall approve or deny the recommendation of the Planning Board. Further, in deciding whether to approve or deny the recommendation of the Planning Board, the City Council must consider the specific factors set out in Section 1701.02-A, and find that each was proved by a preponderance of the evidence.

In the present case, *none* of the requirements for granting a use permit were followed. The City Council simply bestowed a use permit automatically upon the Simmons simultaneously with the creation of the purported “new use”. The City did not even require an application to be filed. Appellants would also note that Section 1703.02-A expressly provides “under no circumstances shall an application [*for a special use permit* ] filed hereunder be processed while any litigation is pending concerning the zoning of the subject property.”

The Mississippi Supreme Court stated in Town of Florence v. Sea Lands, Ltd., 759 So.2d, 1221, (Miss. 2000), “The Court has never considered a case such as this where a zoning change was taken up without a the filing of a petition or application. However, ... the burden of proof in support of the change in zoning is still required.” Id. at 1224 (§ 12). Likewise, finding the action of a municipal authority taken in violation of the zoning ordinance to be unlawful, the Mississippi Supreme Court stated, “To be sure, the Zoning Ordinance empowers the Jackson County Zoning authorities to grant special exceptions from the strictures of the ordinance. That procedure requires not only the same advance notice and hearing requirement as is the case with the use permit generally but also requires that the Planning Commission make certain findings which heretofore have not been made. Noble v. Scheffler, supra at 907 (citations omitted).

In this case, not only did the City Council violate *every* provision of the Zoning Ordinance regarding the issuance of use permit, it also refused to allow the Appellants a meaningful opportunity to present evidence in support of their opposition to a restaurant of their residential street. The ten

minutes afforded the entire group of people in opposition to the amendments could hardly be construed as an opportunity for a full and fair hearing. In Town of Prentiss v. Jefferson Davis County, 874 So.2d 962, (Miss. 2004), where the city allotted only ten minutes for the Petitioner to make its presentation of evidence and argument to the town, and the Mississippi Supreme Court clearly viewed this as a “refusal to allow any reasonable time to make its case” Id. at 966.

The City’s wholesale disregard for the requirements of its own Zoning Ordinance along with its refusal to grant a meaningful opportunity to be heard to the Appellants, and others who opposed a general restaurant proximate to their homes, resulted in an illegal violation of the Appellants’ due process rights. Therefore, upon finding the City Council’s decision to grant the use permit was not based on a preponderance of the evidence and resulted in a violation of the Appellants due process rights, the amendments should be set aside as illegal.

**V. THE CITY COUNCIL’S AMENDMENT OF THE ZONING ORDINANCE FOR THE SOLE PURPOSE OF ALLOWING WILLIAM AND CAROL SIMMONS TO OPERATE A RESTAURANT ON RESIDENTIAL PROPERTY WAS ARBITRARY AND CAPRICIOUS.**

Miss. Code Ann §17-1-3 (Rev. 2006) confers upon municipalities the police power necessary to enact valid legislation regarding the use of land for the purpose of “promoting health, safety, morals, or the general welfare of the community.” However, the power to adopt zoning regulations is not unfettered. Further, Miss. Code Ann §17-1-9 (1972) requires:

Zoning regulations shall be made in accordance with a comprehensive plan, and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; .... Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view toward conserving the value of buildings, and encouraging the most appropriate use of land throughout such municipality.... Id. Zoning ordinances “must be reasonable and fair in their application and must bear a substantial relation to the public health, safety and morals.”

See also, 1 Yokely, Zoning Law and Practice, §3-10 (4<sup>th</sup> ed. 2000).

Further, the comprehensive Zoning Ordinance for the City of Jackson is presumed to be well thought out and designed to be permanent. It is subject to change only to meet a genuine change in conditions. See Town of Florence, Miss. v. Sea Lands, Ltd., 759 So.2d 1219, 1224 (§ 11) (Miss. 2000), McWaters v. City of Biloxi, 591 So.2d 824, 827 (Miss 1991). City of Clinton v. Conerly, 509 So.2d 877, 882 (Miss. 1987)(citing W.L. Holcomb v. City of Clarksdale, 65 So.2d 281 (Miss. 1953)).

After the city has adopted a comprehensive zoning ordinance, an amendment to such an ordinance depends primarily upon a reevaluation of changes affecting the general welfare of the municipality as a whole. The Mississippi Supreme Court stated in W. L. Holcomb, Inc. v. City of Clarksdale, 217 Miss. 892, 65 So.2d 281 (1953), that a change in zoning involving a very few properties would only be made where new or additional facts materially affecting the merits intervene since the adoption of the original regulations, and whether to permit such change depends on whether it is reasonably related to the public welfare. Blacklidge v. City of Gulfport, 223 So.2d 530(Miss. 1969). “Property owners have the right to rely on the rule of law that the classifications of property will not be changed unless the change is required for the public good.” 4 Yokley, Zoning Law and Practice § 25-1 (4<sup>th</sup> ed. 2003). “Accordingly, the legal standard for amendment of a zoning plan is fairly stringent.” Adams v. Mayor and Bd. of Aldermen of City of Natchez, 964 So.2d 629 (§11)(Miss. Ct. App. 2007).

The City Council’s decision to adopt Fairview “text amendments” solely to excuse the Simmons from the necessity of following the law clearly amounted to an arbitrary and capricious action by the Council.

This Court recently reiterated guidelines set forth by the Mississippi Supreme Court for determining whether an action is arbitrary and capricious, stating:

“Arbitrary” means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending on the will alone, absolute in power, tyrannical, despotic, non-rational, implying either a lack of understanding of or a disregard for the fundamental nature of things.

“Capricious” means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles ...

City of Petal v. Dixie Peanut Co., 2008 WL 2098031, ¶ 8 (Miss. Ct. App. 2008) (mot. for reh’g pending) ((citing Harrison County Bd. v. Carlo Corp., 833 So.2d 582, 583 (¶ 6)(Miss. 2002)(quoting McGowan v. Miss. State Oil & Gas Bd., 604 So.2d 312, 322 (Miss. 1992).).

In deciding whether an amendment to a zoning ordinance is arbitrary and capricious, the court will examine the record to see if the issue was fairly debatable. If the issue was fairly debatable, then the action could not have been arbitrary capricious. McWaters, 591 So2d at 827.

In determining whether the issue before the City Council was fairly debatable, the court must first define *the issue* or *issues*.

To begin, *the issue* is not whether the Simmons and approximately 35 other people wanted a full service general restaurant at the Fairview Inn - clearly they did, although this support apparently was based in large part on unsubstantiated fears regarding the future of the inn.

Further, *the issue* is not whether the Fairview Inn has been a benefit to the community, thereby entitling the Simmons to do whatever their ambitions dictate. There is no question that Fairview Inn has been a exceedingly successful Bed and Breakfast Inn *without* a restaurant, achieving the status of Most Outstanding Inn in North America. There is also no question that people think Carol Simmons’ son-in-law is a talented chef. If these were the controlling issues, then land use decisions would be based on how well-liked a particular individual or entity is at any given moment. The expert testimony of city planners and traffic engineers would be replaced by the

opinions of interior designers and food critics. Zoning decisions would be dictated not be established principles, but by mob rule.

Also, *the issue* is not whether the Simmons needed the amendments for their financial well-being. Amendments to a zoning ordinance in order to further the pecuniary interests of the owners of one piece of property are not a proper exercise of the Council's legislative authority. McKibben v. City of Jackson, 193 So.2d 741 (Miss. 1967). Further, any conclusion that the amendments were necessary to keep this historic property from being used "as a half-way house" (R. 270.) is utterly unsubstantiated by a single bit of proof. There were no financial statements, there was no direct testimony, there was no evidence whatsoever to establish a dire financial crisis or even a mild financial disappointment. In fact, the evidence of the lavish appointments of the inn point to the exact opposite conclusion. It does not necessarily follow that the Fairview Inn will be prevented from doing what it has done so successfully in the past if the Simmons are not allowed to continually expand the scope of commercial activities on their residential property.

Contrary to the stated belief of Councilwoman Barrett-Simon, *the issue* before the Council is not whether the residential property belonging to William J. Simmons can continue to be treated like a private club. (R. 133-134.) There was no suggestion that the Fairview Inn has ever been anything other than a home and a bed and breakfast inn. Nor do Appellants think that the Honorable Councilwoman actually believed that Mr. Simmons' Fairview Inn is a private club. Such statements were made to play on certain sensibilities of those present and are further indication of the arbitrary, political nature of the meeting.

Instead, *the issues* which must have been "fairly debatable" based on the evidence before the Council, is whether a restaurant on Fairview Street is necessary to promote the health, safety, morals or the general welfare of the entire community." in accordance with Miss. Code Ann Section 17-1-9

(1972), from which the necessary police power to enact zoning ordinances for the forgoing purposes derives. Further, was it fairly debatable based on the evidence before the Council that a restaurant on Fairview Street is "in accordance with the comprehensive plan? Was there evidence that a restaurant will lessen congestion on Fairview Street? Was there evidence ensuring the safety of the 25 children forced to live proximate to an intense commercial activity. Was it fairly debatable that a restaurant on Fairview Street would make the residents of Fairview Street more secure from the dangers inherent in commercial activity? Was the decision to allow a restaurant on Fairview Street made with a view to conserving the value of the homes on Fairview Street? See Miss. Code Ann § 17-1-9 (1972), JACKSON, MISS., ZONING ORDINANCE §§ 1701.02-A - 1703.08-A (1974 with amendments.) These were the issues which should have been the subject of the council's decision, instead not one bit of evidence on these issues was presented which would support the Fairview Amendments.

The Planning Board heard the evidence, and voted to issue a negative recommendation. Although required by Section 1506-A of the Zoning Ordinance, the Planning Department made no recommendation to the city council regarding the amendments. In fact, the Planning Department offered no evidence whatsoever regarding the amendments. Further, there was no evidence of the potential zoning impact on the city as a whole.

The Future Land Use Map shows the property as residential; (R. 434-435).

Twenty six children live and play within 160 feet of the Fairview Inn. (R69, 165-66.).

Twenty eight property owners, representing sixty percent of all homeowners falling within 160 feet of the Fairview Inn (R.169-189.)

There was ample evidence of ongoing zoning violations. (R.190-209, 467-468.)

By contrast, there was not one single piece of substantive relevant evidence to support the Council's decision to adopt the amendments. There was evidence that the Fairview Inn is a "treasure" and has achieved many great successes. Also, the consensus was clear that William and Carol Simmons are delightful people, and the food they prepare is delicious.

There was no evidence in the form of testimony or documents reflecting the number of cars expected per day, only a copy of a parking lot lease the Simmons were required to maintain in the operation of their inn.

There was no evidence of the Fairview Inn's financial state, although simple enough to prepare and present. In contrast, there was evidence of the Simmons' extravagant gestures of generosity to the community and efforts to purchase additional real estate during the same year that "financial need" was alleged.

There was no evidence of tax revenues generated or projections regarding the future revenues, only vague assertions that a restaurant would be good for the City's coffers. Although, Appellants are not certain how the amendments can generate an increase in tax revenue if the amendments do not represent a change in the present use of the property ( R. 54-55.)

There was no evidence of the modifications to the amendments upon which the BIA based its conditional endorsement, because they were never made.

There were no reports or projections; there was no expert testimony or input from the planning department. There simply was no proof that a valid reason based on sound land use principles existed for the amendments to the zoning ordinance to permit a general restaurant on residential property in a residential neighborhood. The Baker's suppose that perhaps Counselors for the Simmons were trying to show a public need for either another place to eat, or to save this

wonderful private enterprise, but there simply was no proof. Instead, there was a popularity contest, decided by people whose property is unaffected by the amendments.

And while Council for the Simmons was adept at trying to inflate opinion and conjecture to the level of evidence, the evidence in support of the Fairview Amendments boils down to the following: the Simmons wanted a restaurant, and a total of 35 people, most of whom were misinformed, were willing to either write some type of letter or e-mail, or appear before the City Council, or both, to state that they thought it was a good idea.

Substantial evidence is “more than a mere scintilla of evidence” or “something less than a preponderance of the evidence but more than a scintilla or glimmer.” Mississippi Dept. of Env'tl. 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. 1988) (citing Delta CMI v. Speck, 586 So.2d 768, 773 (Miss.1991).

Further, Section 1701.02-A of the Zoning Ordinance requires that the City Council shall consider certain enumerated factors prior to granting a use permit. The City Council made no findings whatsoever regarding their decision to adopt the Fairview Amendments (R. 158-159). While municipal authorities should detail their findings in making zoning decisions, where there are no findings, the court must look to the record for a factual basis to support the decision. Beasley v. Neelly, 911 So.2d 603, 607 (¶ 14)(Miss.App. Ct. 2005). The Mississippi Supreme Court has clearly stated that where there is no record “showing sufficient evidence to support the findings, it is inevitable that reversal will follow.” Faircloth v. Lyles, 592 So.2d 941, 945 (Miss. 1991). The



factual basis for the decision must be discernable from the record. Id. at 945, Adams v. Mayor and Bd. of Aldermen of the City of Natchez, 964 So.2d at (¶14).

But, where a lack of findings was viewed along with other factors, including the fact that the city only allotted ten minutes for the petitioner to make his case, the Mississippi Supreme Court stated, that the city's "...refusal to allow any reasonable time to make its case, and its decision to deny the County's petition without evidence or explanation proves that the Town's decision was arbitrary and capricious and not based upon substantial evidence." Town of Prentiss v. Jefferson Davis County, 874 So.2d 962, 966 (¶ 13)(Miss. 2004). Likewise, the Jackson City Council permitted ten minutes for all parties in opposition to the Fairview Amendments to provide the Council with evidence and arguments before deciding to grant an automatic use permit. Appellants were denied any chance to examine "witnesses" who gave opinion in the form of public comment.

In this case there simply was no substantial evidence to support the City Council's decision to adopt the "text amendments" allowing the Simmons to operate a restaurant on residential property or to show that the amendments were a proper exercise of the city's police powers. The utter lack of relevant proof, the refusal of the council to allow any reasonable amount of time to be heard, the erroneous statements of Council member Barret-Simon regarding the issues to be considered (R. 133-134), the Council's refusal to even view the submissions of those in opposition along with a complete absence of any findings regarding the Fairview Amendments clearly show that the actions of the City Council in adopting the amendments were arbitrary and capricious and without substantial evidence.

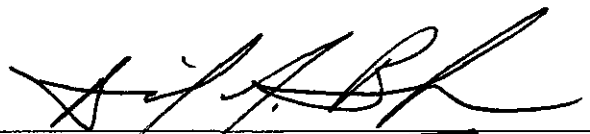
Appellants respectfully request that the amendments be set aside as an arbitrary and capricious exercise of the city's police power as conferred by the State of Mississippi.

## CONCLUSION


The actions of the Jackson City Council adopting the Fairview Amendments in order to exempt William and Carol Simmons from the restrictions of the Zoning Ordinance was an improper exercise of the police powers conferred on the City of Jackson by the State of Mississippi. The amendments illegally permit an intense commercial use of residential property; something prohibited by the Zoning Ordinance. They amount to an illegal rezoning, in fact. Also, the Fairview Amendments, effectively rezoning 734 Fairview Street in an illegal manner, amount to illegal spot zoning, as they were specifically designed to allow Mr. and Mrs. Simmons a use of their residential property that is inconsistent with the City's Comprehensive Plan to the detriment of surrounding property owners. Further, the amendments were both intentionally crafted and adopted in a manner which illegally deprived the Appellants of any meaningful opportunity to be heard. Finally, the amendments were adopted without the relevant evidentiary basis necessary for a valid amendment to the Zoning Ordinance or the issuance of a valid use permit, and therefore, amount to an arbitrary and capricious decision by the City Council.

For the foregoing reasons, the Bakers respectfully request that upon finding the City Council's decision adopting the Fairview Amendments was either arbitrary and capricious or illegal, or both, this Court will set aside Section 202.17(a) and Section 602.02.03 of the Zoning Ordinance of Jackson, Miss. (1974 with amendments)(amendments adopted April 7, 2004.)

In the alternative, if the Court finds the creation of the new use set forth in Section 202.17(a) of the Zoning Ordinance to be *both* legal and founded on substantial evidence, Appellants ask the Court to declare invalid the automatic use permit provided by Section 602.02.03 upon a finding that the decision of the City Council to grant said use permit was not founded upon a preponderance of the evidence as required by both the Zoning Ordinance and well settled state law.

  
DANIEL M. BAKER (MSB No. [REDACTED]), Appellant

AND

  
KATHERINE S. BAKER, (MSB No. [REDACTED] Inactive),  
Appellant  
729 Fairview Street  
Jackson, Mississippi 39202  
(601) 944-0904  
PRO SE

**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 Brief of Daniel M. Baker and Katherine S. Baker, Appellants, to:

Sarah O'Reilly-Evans, Esquire  
Pieter Teeuwissen, Esquire  
P.O. Box 17  
Jackson, Mississippi 39201  
ATTORNEYS FOR THE CITY OF JACKSON

Mark C. Modak-Truran, Esquire  
Anita Modak-Truran, Esquire  
735 Fairview Street  
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APPELLANTS, PRO SE

Crane D. Kipp, Esquire  
Wise, Carter, Child & Caraway, P.A.  
P. O. Box 651  
Jackson, MS 39205

Honorable Judge Bobby B. Delaughter  
Hinds County Circuit Court  
P. O. Box 27  
Raymond, MS 39154

and  
Robert Wise, Esq.  
Sharpe & Wise, PLLC  
120 N. Congress Street, Suite 902  
Jackson, MS 39201  
ATTORNEYS FOR INTERVENORS  
WILLIAM SIMMONS AND CAROL SIMMONS  
D/B/A THE FAIRVIEW INN

So dated this the 14<sup>th</sup> day of July, 2008.

  
DANIEL M. BAKER

**PERTINENT AMENDMENTS TO THE ZONING ORDINANCE OF JACKSON, MISS.**

- § 202.17 (amended, not on appeal by Baker)
- § 602.02.3 (amended, not on appeal by Baker)
- § 202.17(a) (new section, subject of appeal)
- § 602.02.03 (new section, subject of appeal)

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ORDINANCE AMENDING THE ZONING ORDINANCE OF JACKSON,  
MISSISSIPPI, AS ADOPTED MAY 29, 1974, AND SUBSEQUENTLY  
AMENDED, AMENDING THE DEFINITION FOR A BED AND  
BREAKFAST INNS, CLASS B

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF  
JACKSON, MISSISSIPPI:

SECTION 1. That Section 202.17 is hereby amended to read as follows:

202.17 Bed and Breakfast Inn Class B: 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 and other similar private functions may be held. Meals may only be served to lodgers, and guests of receptions and other private functions. For purposes of this definition a private function means a pre-planned, organized social event for which one host or hostess is responsible. It has defined beginning and ending times and is a celebration of a specific event such as a wedding, high school or college graduation, corporate event or a reception honoring a special person.

SECTION 2. This Ordinance shall be in force and effective thirty (30) days after its passage.

Council Member Barrett-Simon moved adoption; Council Member Dagner-Cook seconded.

Yeas - Allen, Barrett-Simon, Brown, Dagner-Cook, and McLemore.

Nays - None.

Absent - Crisler, and Stokes.

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ORDINANCE AMENDING THE ZONING ORDINANCE OF JACKSON,  
MISSISSIPPI, AS ADOPTED MAY 29, 1974, AND SUBSEQUENTLY  
AMENDED, RE-DEFINING WHERE BED AND BREAKFAST INNS  
CLASS A AND B MAY BE LOCATED.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF JACKSON,  
MISSISSIPPI:

SECTION 1. That Section 602.02.3 is hereby amended to read as follows:

602.02.3 Uses Which May be Permitted As Use Permits:

The following uses are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

3. Bed and Breakfast Inn Class A and B:

a. Applicant shall submit to the Zoning Division proof of one of the following:

1. Structure is listed on the National Register of Historic Places, or
2. Structure is designated as a Jackson Landmark by the Jackson Historic Preservation Commission, and/or a Mississippi Landmark by the Department of Archives and History; or
3. Structure is deemed eligible for designation as a Jackson Landmark by the Jackson Historic Preservation Commission or as a Mississippi Landmark by the Mississippi Department of Archives and History and

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is granted designation within one year from the date of eligibility determination.

- b. Adequate parking shall be provided. Off-site parking must be within a reasonable walking distance of the bed and breakfast, and proof of such parking (lease agreement, etc.) must be provided annually to the Zoning Division and whenever the contractual rights of the bed and breakfast inn owner in such off-site parking facilities are modified in any way.
- c. All exterior lighting shall be directed away from adjacent residential property.
- d. Signage shall comply with the City of Jackson Sign Ordinance.

SECTION 2: This Ordinance shall be in force and effect thirty (30) days after its passage.

Council Member Barrett-Simon moved adoption; Council Member Allen seconded.

Yeas - Allen, Barrett-Simon, Brown, Dagner-Cook, and McLemore.

Nays - None.

Absent - Crisler, and Stokes.

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FIFTH PROPOSED TEXT CHANGE TO THE CITY OF JACKSON ZONING ORDINANCE. The following persons spoke in opposition to the change: Anita Modak-Truran, Mark Modak-Truran, Dan Baker, Heather Wagner, and Vaughan McRae.

The following persons spoke in support of the change: Roger Curry, Joe Haines, Don Kefner, Dorothy Triplett, Wanda Wilson, Rose Snow, Sidney Alexander, Dr. Richard Freis, Mike Farrow, JoAnn Morris, Pat Weir, Dr. Carl Reddix, Toni Turner, Kathryn McRaney, Chris Klotz, Sheila Davis, Cynthia Ayers Elliott, Jim Kopernak, Shirley Vanderpool, Senator John Horhn, and Attorneys Robert Wise and Crane Kip.

ORDINANCE AMENDING THE ZONING ORDINANCE OF JACKSON, MISSISSIPPI, AS ADOPTED MAY 29, 1974, AND SUBSEQUENTLY AMENDED, CREATING A BED AND BREAKFAST INN CLASS B RESTAURANT DEFINITION AND ALLOWING A BED AND BREAKFAST INN WITH RESTAURANT TO BE LOCATED IN A R-1 SINGLE-FAMILY RESIDENTIAL DISTRICT.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF JACKSON, MISSISSIPPI:

SECTION 1. That Section 202.17 is hereby amended to read as follows:

Section 202.17(a) Bed and Breakfast Inn 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 foods, or beverages by a restaurant employee at the same table at which said items are consumed. Advertising on local billboards is prohibited. This prohibition will not preclude, however, mailings or advertisements in newspapers and in national, regional, state or local travel and tourism periodicals. (See Section 602-03-3.)

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SECTION 2: That Section 602.02.3 Uses Which May Be Permitted As Use Permits is changed to read as follows:

602.02.03 Uses Which May be Permitted As Use Permits:

The following uses are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

Bed and Breakfast Inn Class A and B: The following uses are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

3. Bed and Breakfast Inn Class A and B:

4. 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.

SECTION 3: This Ordinance shall be in force and effect thirty (30) days after its passage.

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President McLemore, presiding, recognized City Attorney Terry Wallace who suggested the need for an Executive Session to discuss potential litigation. Council Member Allen, moved seconded by Council Member Dagner-Cook, that Council go into a closed session to determine whether the Council should go into Executive Session, and the motion prevailed by the following vote:

Yeas - Allen, Barrett-Simon, Dagner-Cook, and McLemore.  
Nays - None.  
Absent - Brown, Crisler, and Stokes

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The meeting was closed, and after discussion solely on the need for an Executive Session, and the Council being advised by City Attorney Terry Wallace, Council Member Dagner-Cook, seconded by Council Member Barrett-Simon, moved that the Council go into Executive Session; and the motion prevailed by the following vote:

Yeas - Allen, Barrett-Simon, Dagner-Cook, and McLemore.  
Nays - None.  
Absent - Brown, Crisler, and Stokes.

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An announcement was made to the public that the Council voted to go into Executive Session to discuss ORDINANCE AMENDING THE ZONING ORDINANCE OF JACKSON, MISSISSIPPI, AS ADOPTED MAY 29, 1974, AND SUBSEQUENTLY AMENDED, CREATING A BED AND BREAKFAST INN CLASS B RESTAURANT DEFINITION AND ALLOWING A BED AND BREAKFAST INN WITH RESTAURANT TO BE LOCATED IN A R-1 SINGLE-FAMILY RESIDENTIAL DISTRICT.

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Council Member Barrett-Simon, seconded by Council Member Brown, moved that the Council come out of Executive Session. The motion prevailed by the following vote:

Yeas - Allen, Barrett-Simon, Brown, Dagner-Cook, and McLemore.

Nays - None.

Absent - Crisler and Stokes.

At 6:00 P.M., the Council came out of the Executive Session. An announcement was made that the Council voted to come out of Executive Session and that no official action transpired. President McLemore announced in open session the business that had transpired. No action was taken during the Executive Session.

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Therefore President McLemore put forth the following Ordinance:

ORDINANCE AMENDING THE ZONING ORDINANCE OF JACKSON, MISSISSIPPI, AS ADOPTED MAY 29, 1974, AND SUBSEQUENTLY AMENDED, CREATING A BED AND BREAKFAST INN CLASS B RESTAURANT DEFINITION AND ALLOWING A BED AND BREAKFAST INN WITH RESTAURANT TO BE LOCATED IN A R-1 SINGLE-FAMILY RESIDENTIAL DISTRICT.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF JACKSON, MISSISSIPPI:

SECTION 1. That Section 202.17 is hereby amended to read as follows:

Section 202.17(a) Bed and Breakfast Inn 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 foods, or beverages by a restaurant employee at the same table at which said items are consumed. Advertising on local billboards is prohibited. This 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)

SECTION 2: That Section 602.02.3 Uses Which May Be Permitted As Use Permits is changed to read as follows:

602.02.03 Uses Which May be Permitted As Use Permits:

The following uses are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

Bed and Breakfast Inn Class A and B: The following uses are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

3. Bed and Breakfast Inn Class A and B:

4. 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.



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SECTION 3: This Ordinance shall be in force and effect thirty (30) days after its passage.

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Council Member Barrett-Simon moved to amend the Ordinance seconded by Council Member Dagner-Cook to include a requirement that a Bed & Breakfast Inns with Restaurant clear site plan. The motion prevailed by the following vote:

Yeas - Allen, Barrett-Simon, Brown, Dagner-Cook, and McLemore.  
Nays - None.  
Absent - Crisler and Stokes.

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Therefore President McLemore put forth the following Ordinance as amended:

**ORDINANCE AMENDING THE ZONING ORDINANCE OF JACKSON, MISSISSIPPI, AS ADOPTED MAY 29, 1974, AND SUBSEQUENTLY AMENDED, CREATING A BED AND BREAKFAST INN CLASS B RESTAURANT DEFINITION AND ALLOWING A BED AND BREAKFAST INN WITH RESTAURANT TO BE LOCATED IN A R-1 SINGLE-FAMILY RESIDENTIAL DISTRICT.**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF JACKSON, MISSISSIPPI:**

SECTION 1. That Section 202.17 is hereby amended to read as follows:

Section 202.17(a) Bed and Breakfast Inn 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 foods, or beverages by a restaurant employee at the same table at which said items are consumed. Advertising on local billboards is prohibited. This prohibition will not preclude, however, mailings or advertisements in newspapers and in national, regional, state or local travel and tourism periodicals. (See Section 602-03—3.)

SECTION 2: That Section 602.02.3 Uses Which May Be Permitted As Use Permits is changed to read as follows:

602.02.03 Uses Which May be Permitted As Use Permits:

The following uses are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

Bed and Breakfast Inn Class A and B: The following uses are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

3. Bed and Breakfast Inn Class A and B:

4. 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 to include a requirement that a Bed & Breakfast Inns with Restaurant clear site plan review from City Staff.

SECTION 3: This Ordinance shall be in force and effect thirty (30) days after its passage.

REGULAR ZONING MEETING OF THE CITY COUNCIL  
TUESDAY, APRIL 7, 2004, 2:30 P.M.

175

Council Member Barrett-Simon moved adoption; Council Member Dagner-Cook seconded.

Yeas - Allen, Barrett-Simon, Brown, Dagner-Cook, and McLemore  
Nays - None.  
Absent - Crisler and Stokes.

\*\*\*\*\*

There being no further business to come before the City Council, it was unanimously voted to adjourn until the next regular meeting to be held at 10:00 A.M., on Tuesday, April 13, 2004, and at 6:15 P.M., the Council stood adjourned.

ATTEST:

APPROVED:

Mary F. Belinson  
CITY CLERK

[Signature] 4/21/04  
MAYOR DATE

\*\*\*\*\*

**EXCERPTS FROM**

JACKSON, MISS., ZONING ORDINANCE (1974 WITH AMENDMENTS)

202.15 Bar (See also Nightclub): An establishment serving alcoholic beverages in which the principal business is the sale of such beverages at retail for consumption on the premises. This includes establishments with three (3) or more pool tables where alcoholic beverages are served.

202.16 Bed and Breakfast Inn Class A: 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 only lodgers are served meals.

202.17 Bed and Breakfast Inn Class B: 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.

202.18 Bedroom: Any room used principally for sleeping purposes, provided that no room having less than eighty (80) square feet of floor area shall be considered a bedroom.

202.19 Boarding House (Also see Rooming House): Any building, or part thereof, containing two (2) or more guest rooms, other than a hotel, motel, or bed and breakfast establishment, that is kept as, used as, maintained as, advertised as, or held out to be a place where, for any type of compensation, sleeping accommodations are furnished for periods of one (1) week or more. A Boarding House may provide meals.

202.19(a) Body Piercing Business: Any business which predominantly specializes in the piercing of body parts and the retail sale of body jewelry.

202.20 Borrow Pit: A place or premises where dirt, soil, sand, gravel, or other material is removed by excavation.

202.21 Buffer Area: A landscaped area so planned and which acts as a separation area between two (2) or more uses or structures which are not compatible due to design, function, use, or operation.

202.22 Buildable Area: That portion of a lot remaining after required yards have been provided.

202.23 Building (See Principal Building):

202.24 Building Height: The vertical distance measured from the base point of measurement to the highest point of the parapet or coping of a flat roof, or the deck line of a mansard roof, or one-half the distance between the eave and the ridge line of the highest gable of a pitch or hip roof. When the building is within fifty (50) feet of a street right-of-way, base point of measurement shall be defined as the average elevation of the street crown on that section of street occurring between the end lines of the building when projected perpendicular to the street right-of-way. When the building is more than fifty (50) feet from a street right-of-way, base point shall be defined as the average elevation of grade or paving surrounding the building. (See illustrations, page 24)

202.25 Building Official: The administrative official responsible for enforcement of the City Building Codes and issuance of building permits.

202.26 Car Wash: An area of land and/or a structure with machine or hand-operated facilities used principally for the cleaning, washing, polishing, or waxing of motor vehicles.

202.26(a) Catering Service: An establishment which is housed in an existing structure, that serves and supplies food to be consumed off premises, all in accordance with County Health Department standards.

202.27 Cemetery: Dedicated open space land used or intended to be used for the burial of the dead; this includes columbariums, crematories, mausoleums, and mortuaries when operated in conjunction with and within the boundaries of such cemetery.

202.28 Central Business District: The area generally described as being that portion of the City of Jackson bounded on the east by Jefferson Street between George Street and South Street; on the south by South Street between Jefferson Street and South State Street, South State Street between South Street and Silas Brown Street, Silas Brown Street between South State Street and South West Street, South West Street between Silas Brown Street and South Street, and South Street between South West Street and the Illinois Central Railroad; on the west by the Illinois Central Railroad between South Street and Pascagoula Street, Pascagoula Street between the Illinois Central Railroad and Gallatin Street, Gallatin Street between Pascagoula Street and Amite Street, Amite Street between Gallatin Street and the Illinois Central Railroad, and the Illinois Central Railroad between Amite Street and a westerly extension of Hamilton Street; and on the north by Hamilton Street and a westerly extension thereof between the Illinois Central Railroad and Bloom Street, Bloom Street between Hamilton Street and Oakley Street, Oakley Street between Bloom Street and High Street, High Street between Oakley Street and George Street, and George Street between High Street and Jefferson Street.

202.29 Child Care Center/Residential: An occupied residence in which shelter and personal care are regularly provided for six (6) to ten (10) children who are not related within the third degree computed according to the civil law to the operator and who are under the age of twelve (12) years and receive care for at least four (4) but less than twenty-four (24) hours of the twenty-four (24) hour day.

202.30 Child Care Center/Commercial: A facility (not a residence) in which shelter and personal care are regularly provided for six (6) or more children who are not related within the third degree computed according to civil law to the operator and who are under the age of twelve (12) years and receive care for at least four (4) but less than twenty-four (24) hours of the twenty-four (24) hour day.

202.31 Church: A facility regularly used to hold religious services, meetings, and similar activities. The term "church" shall not carry a secular connotation and shall include buildings in which the religious services of any denomination are held. The term "church" does not apply to detached accessory uses or church related uses, such as schools, residences, coffee houses, day care centers, bingo parlors, and fellowship halls.

202.32 City Council: The seven (7) elected members of the City Council of the City of Jackson.

202.33 City Planning Board: The duly constituted Jackson City Planning Board herewith cited as being the Advisory Committee to the City Council on zoning matters.

202.34 Clinic: A facility for diagnosis and treatment of medical, chiropractic, dental or psychological out-patients, provided that patients are not kept overnight, and which may be used by one (1) or a group of such practitioners.

202.35 Club, Country: A private facility providing recreational and related services to members and their guests only, characterized by substantial land and improvements committed to such facilities as golf courses, tennis courts, swimming pools, clubhouses, and the like.

202.36 Club, Private: A facility not open to the general public, providing recreational or food and beverage services to members and their guests only.

202.36(a) Co-Location: The practice of placing communication attachments to any existing tower, building or structure that currently accommodates other communication attachments.

202.36(b) Communication Attachment: Any and all devices intended for transmitting and receiving telephone, television, radio or similar communication, but shall exclude attachments used for Studio to Transmitter Links (STLs).

202.37 Commercial Communication Tower: A freestanding structure that is intended for transmitting or receiving television, radio, telephone, or similar communications, excluding STL's (Studio to Transmitter Link) transmitting devices which have the following characteristics: (a) line of sight transmission, (b) a height no greater than the minimum height above a tree line for a transmission to a taller tower, (c) transmission that is limited to radio or television broadcast purposes, and (d) the STL is located on property zoned commercial, Industrial, Special Use, Technical Industrial Park (TIP) Districts or Planned Unit Development (PUD), and excluding attachments, which are separately regulated by 1104.B of this Zoning Ordinance.

202.38 Comprehensive Plan and Planning Process: The officially adopted plan and comprehensive planning process that contains the elements that provide long range development policies for the City of Jackson and the area subject to urbanization in and around Jackson, Mississippi.

202.39 Convenience Type Grocery Store: A store of not more than 3,000 square feet of retail sales area, not counting storage, which deals in grocery items of a convenience nature. Also, commonly referred to as a "drive-in" grocery store with self-service gasoline pumps and may include an automated drive-through car wash.

202.40 Convalescent Home (Rest Home or Nursing Home): A licensed facility where persons are housed and furnished with meals and full-time nursing services for a fee.

202.135 Public Utility Facilities: Electric substations, distribution facilities, pumps, lift stations, power generating plants, telephone exchanges, sewage treatment plants, wells, storage tanks and related installations which are necessary to the provision of utility service.

202.136 Rear Yard (See Yard, Rear):

202.137 Recreational Vehicle (RV): See "Transient Trailer" or "Travel Trailer"

202.138 Recycling Center: A facility that is not a junkyard and in which recoverable resources, such as newspapers, plastic, glassware, and metal cans are collected, stored, flattened, crushed, or bundled, essentially by hand. The term "recycling" as used herein shall not include the speculative accumulation of materials in anticipation of recycling opportunities and shall not include the recovery of materials unless the materials recovered have a commercial value.

202.139 Recycling Collection Point: An incidental use that serves as a neighborhood drop-off point for temporary storage of recoverable resources. No processing of such items is allowed. This facility generally is located in a shopping center parking lot or in other public/quasi-public areas, such as at churches and schools.

202.140 Recycling Plant: A facility that is not a junkyard and in which recoverable resources, such as newspapers, magazines, books, and other paper products; glass; metal cans; and other products, are recycled, reprocessed, and treated to return such products to a condition in which they may again be used.

202.141 Residential Care Facility: A facility of four (4) or more persons for the provision of residential, social, and personal care for children, the aged, and special categories of persons with some limits on ability for self care, but where medical care is not a major element.

202.142 Restaurant, Fast Food: An establishment whose principle business is the sale of foods, frozen desserts, or beverages in edible containers or in paper, plastic, or other disposable containers for consumption either on or off the premises. The foods, frozen desserts, or beverages may be served directly to the customer in the restaurant building or in a motor vehicle either by a carhop or by other means which eliminate the need for the customer to exit the motor vehicle.

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, however, food may be prepared for carry-out sale to walk-in customers. A general restaurant may include live entertainment. Typical uses include restaurants, dance halls, discotheques, lounges, and other businesses that combine both a food and beverage operation with entertainment (i.e. dance floor or pool table).

202.144 Restaurant, Neighborhood: 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. 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, however, food may be prepared for carry-out sale to walk-in customers. Typical uses include restaurants, delicatessens, donut and coffee shops, and other establishments that sell food but do not provide entertainment in any form.

202.145 Restaurant, Neighborhood Shopping Center: An establishment which is part of a neighborhood shopping center and is engaged in the preparation and retail sale of food and beverages, including 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, however, food may be prepared for carry-out sale to walk-in customers. Typical uses include restaurants, delicatessens, donut and coffee shops, cafeteria-type operations and other establishments that sell food.

202.145(a) Restaurant, Overlay District: An establishment located in an adopted overlay district, which is housed in an existing structure, engaged in the preparation and retail sale of food and beverages, including sale of alcoholic beverages. Customers are served their foods, beverages, and desserts by a restaurant employee at the same table or counter at which said items are consumed; however, food may be prepared for carry-out sale to walk-in customers. Drive through service is prohibited. Typical uses include restaurants, delicatessens, donut and coffee shops, and other establishments that sell food. Live entertainment, on a limited basis, may be performed solely within the building; however, dance halls, discotheques, and pool halls are specifically prohibited.

202.146 Rooming House (See Boarding House): Meals may not be provided.

202.147 Satellite Dish Antenna: A device incorporating a reflective surface of any configuration. Such device shall be used to transmit and/or receive radio or electromagnetic waves between terrestrially and/or orbitally based transmitters. This definition is meant to include but not be limited to what are commonly referred to as satellite earth stations, TVROs (television reception only satellite dish antennas), and satellite microwave antennas.

202.148 School: A facility, whether public or private, that provides a curriculum of elementary, secondary, and post secondary academic instruction, including kindergartens, day care centers, elementary schools, junior high schools, high schools, and accredited two and four-year degree granting institutions of higher learning. For purposes of this Ordinance, the term "school" shall include accessory student athletic facilities when located on the same or adjacent parcels. The term "school" shall not include business, trade or vocational schools or beauty colleges.

202.149 Screening: This term refers to landscaping and/or architectural barriers which block vision.



202.150 Secondhand Store: An establishment primarily engaged in the sale or receipt of used or previously owned tangible personal property, except motor vehicles, books, rare coins and antiques.

202.151 Service Station (See Also Garage, Mechanical): Any building, structure, or land used primarily for the dispensing, sale, or offering for sale at retail of any automotive fuels, oils, accessories, or other sundry items normally sold at service stations for the traveling public, but not including major repair work such as motor overhaul, body and fender repairs, or spray painting.

202.152 Setback: The minimum horizontal distance between the lot or property line and the nearest front, side or rear line of the building as measured to the outside face at the enclosing wall or in structures lacking walls (as in the case of a carport) to the face of the supporting columns and beams. Setback does not include roof overhangs, except that they shall not encroach on more than fifty percent (50%) of the required setback. (See illustration, Page 25)

202.153 Short-Term Lodging: Lodging in which guests may stay no more than fourteen (14) consecutive nights and may stay no more than twelve (12) stays per year.

202.154 Side Yard (See Yard, Side):

202.155 Single Room Occupancy Hotel (SRO): An establishment occupied by more than six (6) persons, where, for compensation, private furnished rooms are offered for either long or short periods of time and where residents may share common kitchen and/or bath facilities. A resident manager shall be required.

202.156 Site Plan: A plan prepared to scale showing accurately and with complete dimensions, the boundaries of a site and the location of all buildings, structures, uses, and principal site development features, including topography and infrastructure, proposed for a specific parcel of land.

202.157 Site Plan Review Committee: That Committee appointed by the City Council, which shall have the duty to review certain site plans, all as hereinafter provided for in this Ordinance.

202.158 Slope (See Grade):

202.159 Special Exception: A non-retail use which is not permitted in the Zoning District where the property is located under the provisions of this Ordinance but which in the specific case would, in the judgment of the Zoning Hearing Committee, Planning Board, or City Council, promote the public health, safety, morals, or the general welfare of the community and the granting of which would not adversely affect adjacent properties. A permit granted as a Special Exception will not change the general zoning of the property; will not permit off-street parking within the required front yard setback; nor allow any change in integrity and appearance of the property or the

202.175 Use Permit: A use which is not permitted by right but which is allowed in certain zoning districts, usually subject to conditions, and with the approval of a site plan, as regulated by the provisions of this Ordinance.

202.176 Variance: A variance is a relaxation of the terms of the Zoning Ordinance where such variance will not be contrary to the public interest and where, owing to conditions peculiar to the property, a literal enforcement of the Ordinance would result in unnecessary, undue hardship. As used in this Ordinance, a variance is authorized only for height, area and size of structure, or size of yards, separation of uses, open spaces, and off-street parking spaces; establishment or expansion of a use not permitted shall not be allowed by variance.

202.177 Vehicular Use Area: That area of development subject to vehicular traffic, which is required to be a hard surface, all weather area, including access ways, loading and service areas, areas used for the parking, storage or display of vehicles, boats, or portable construction equipment, and all land which vehicles cross over as a function of primary use.

202.178 Veterinary Clinic/Hospital: A commercial facility where sick or injured animals are given medical care, including temporary boarding, and where animals may be housed overnight, fed, and provided related services.

202.179 Yard: Any open space located on the same lot with a building, unoccupied and unobstructed from the ground up, except for accessory buildings, or such projections as are expressly permitted in these regulations. The minimum depth or width of a yard shall consist of the horizontal distance between the lot line and the nearest point of the foundation wall of the main building.

202.180 Yard, Front: A yard extending along the full width of a front lot line between side lot lines and from the front lot line to the front building line in depth. (See illustration, page 23)

202.181 Yard, Rear: A yard extending across the full width of the lot and lying between the rear lot line and the nearest line of the building. Rear-yard depth shall be measured at right angles to the rear line of the lot. (See illustration, page 23)

202.182 Yard, Side: A yard lying between the side line of the lot and the nearest line of the building and extending from the front yard to the rear yard, or in the absence of either of such front or rear yards, to the front or rear lot lines. Side-yard width shall be measured at right angles to side lines of the lot. (See illustration, page 23)

202.183 Zoning Administrator: The City Official responsible for administration and enforcement of the City Zoning Ordinance.

202.184 Zoning Map: The Official Zoning Map or maps which are a part of the Zoning Ordinance and delineate the boundaries of the zoning districts.

4. Boundaries indicated as following railroad lines shall be construed to be midway between the main tracks.
5. Boundaries indicated as following shorelines shall be construed to follow such shorelines, and in the event of change in the shoreline shall be construed as moving with the actual shoreline.
6. Boundaries indicated as following the center lines of streams, rivers, canals, or other bodies of water shall be construed to follow such center lines.
7. Boundaries indicated as parallel to or extensions of features indicated in subsections 1 through 6 above shall be so construed.
8. Distances not specifically indicated on the Official Zoning Map shall be determined by the scale of the map.
9. Where physical or cultural features existing on the ground are at variance with those shown on the Official Zoning Map, or in other circumstances not covered by subsections 1 through 8, the City Planning Board shall recommend and the City Council shall interpret the district boundaries.
10. Where a district boundary line divides a lot which was in single ownership at the time of passage of this Ordinance, the City Planning Board may recommend and the City Council may permit the extension of the regulations for either portion of the lot into the remaining portion of the lot.

## ARTICLE V      ZONING DISTRICT REGULATIONS

### Section 501      Compliance with Regulations

The Regulations set forth by this Ordinance within each district shall be minimum regulations and shall apply uniformly to each class and kind of structure or land, except as hereinafter provided:

1. No building, structure, or land shall hereafter be used or occupied, and no building or structure or part thereof shall hereafter be erected, constructed, reconstructed, moved, or structurally altered except in conformity with all of the regulations herein specified for the district in which it is located.
2. No building or other structure shall hereafter be erected or altered to exceed the height or bulk; to accommodate or house a greater number of families or to occupy a greater percentage of lot area than that specified for the district in which it is located.

3. No building or other structure shall have narrower or smaller rear yards, front yards, side yards, or other open spaces than herein required; however, in any residential district, where at least sixty-six percent (66%) of all lots on both sides of the same street block as the subject lot have been developed, the front and side yard setbacks of the subject lot shall conform to the average established front and side yard setbacks.
4. No part of a yard, other open space, off-street parking or loading space required about or in connection with any building for the purpose of complying with this Ordinance shall be included as a part of a yard, open space, off-street parking or loading space similarly required for any other building.
5. Minimum building setback for lots fronting on an arterial street shown on the City's "Major Streets and Routes Concept Plan" shall be sixty (60) feet from centerline of such street. Where two or more provisions of this Ordinance apply to the front building setback, the greater requirement shall be used.
6. Yards or lots created after the effective date of this Ordinance shall meet at least the minimum requirements established by this Ordinance. No yard or lot existing at the time of passage of this Ordinance shall be reduced in dimension or area below the minimum requirements set forth herein. Established lots of record which do not meet the minimum requirements of lot width and area after the effective date of this Ordinance shall be exempt, provided minimum required yards and open space are provided. However, the creation of flag lots is not permitted.
7. The zoning map and regulation of all territory annexed by the City shall remain in effect subject to a subsequent change by the City after appropriate notice and hearing.
8. All use separation requirements shall be defined as the distance from property line to property line, including right-of-ways.
9. Unless otherwise stated, all uses permitted by Use Permits shall meet the minimum requirement of the district in which the use is permitted.

602.02.3 Uses Which May Be Permitted As Use Permits:

The following uses are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

1. Accessory automobile parking and principal access when used to serve a Special Use District, residential, commercial, or industrial use when the land proposed for such accessory parking or access is either immediately adjacent to or across the street from the use which it serves. Accessory parking may also be across the street from the use which it serves. All parking shall be located at least five (5) feet from any public street or any adjoining property line. Only access across this setback area with sidewalks, bikeways, trails, and drives will be permitted.
2. Churches and schools, (including public, private, and parochial) on sites of less than one (1) acre but greater than ten thousand (10,000) square feet. Regulations for alterations of existing structures or for new construction of churches and schools shall be the same as for the Special Use District.

3. Bed and Breakfast Inn Class A and B:

- a. Applicant shall submit to the Zoning Division proof of one of the following:
  1. structure is listed on the National Register of Historic Places; or
  2. structure is designated as a Jackson Landmark by the Historic Preservation Commission; or
  3. structure is deemed eligible for designation as a Jackson Landmark by the Historic Preservation Commission and is granted designation within one year from the date of eligibility determination; or
  4. structure is located within a locally designated historic district and is deemed contributing to that district by the Historic Preservation Commission.
- b. Adequate parking shall be provided. Off-site parking must be within a reasonable walking distance of the bed and breakfast, and proof of such parking (lease agreement, etc.) must be provided annually to the Zoning Division and whenever the contractual rights of the bed and breakfast inn owner in such off-site parking facilities are modified in any way.
- c. All exterior lighting shall be directed away from adjacent residential property.

4. Group Homes for the handicapped and personal care facilities housing between seven (7) and twelve (12) residents, excluding staff. In considering applications hereunder, the City shall comply with the provisions of 42 U.S.C. Section 3604(f) (3) (B).
5. Accessory structures used as living quarters for family members, temporary guests, or domestic help subordinate to the principal residence on the same lot.
  - A. Applicant shall provide a restrictive covenant agreement which runs with the land that the accessory structure will never be made available for lease or rental.
  - B. Electrical service will be connected to and master metered from the principal residence.
6. Accessory church related uses such as adult and child care centers, schools, gymnasiums, and fellowship halls.
7. Ground Sign (Monument Sign), as defined by the City of Jackson Sign Ordinance, for an adjacent commercial business where both properties are under the same ownership. Regulations shall be the same as the adjacent commercial business, based on its underlying zoning, as regulated by the City of Jackson Sign Ordinance.

602.02.4 Regulations:

1. Minimum lot area - 7,500 square feet.
2. Minimum lot width - sixty (60) feet measured at the front building setback line, except that corner lots shall be a minimum of eighty (80) feet wide.
3. Minimum front yard depth - twenty-five (25) feet from street right-of-way line.
4. Minimum side yard depth - five (5) feet, except on a corner lot the minimum side yard depth on the street side shall be twenty-five (25) feet.
5. Minimum rear yard depth - twenty-five (25) feet; however, a one (1) story extension may be projected into the rear yard but no closer than five (5) feet from the rear lot line, provided that such is approved through the following procedure:

Application is filed with the Zoning Administrator who shall place a sign according to his standard posting procedure for a period of not less than fifteen (15) days. The petitioner/property owner shall secure the written approval or acquiescence of

602.04.2(a) Uses Which May be Permitted as Use Permits:

1. Any and all Use Permits as listed in the R-1 Residential District.

602.04.3 Regulations:

1. Minimum lot area - one (1) acre.
2. Minimum lot width - one hundred (100) feet measured at front building setback line, except that corner lots shall be a minimum of one hundred-twenty (120) feet wide.
3. Minimum front yard depth - fifty (50) feet from street right-of-way line.
4. Minimum side yard depth - twenty-five (25) feet, except on a corner lot the minimum side yard depth on the street side shall be fifty (50) feet.
5. Minimum rear yard depth - fifty (50) feet.
6. Maximum height - thirty-five (35) feet.
7. Maximum lot coverage - fifteen percent (15%) for Single-Family dwellings including accessory structures.
8. Accessory structures - accessory structures of a type compatible with the surroundings shall be permitted, and when detached from the main building, shall be set back a minimum of eighty (80) feet from the front lot line, five (5) feet from the side lot line, and five (5) feet from the rear lot line. On corner lots, the accessory structure must be erected on the opposite corner of the lot from the street line. No accessory structure may be used as living quarters.

602.05 R-2 Single-Family and Two-Family Residential District: The purpose of this district is to provide areas for the development of low to medium density residential uses and structures. It 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.

602.05.1 Uses Permitted:

1. Single-Family and Two-Family residential dwellings and accessory structures.
2. Group Homes for the handicapped and personal care facilities housing six (6) or fewer residents, excluding staff.

602.05.2 Uses Which May be Permitted as Special Exceptions:

1. Special Exceptions as listed in the R-1E Residential District.

602.05.3 Uses Which May be Permitted as Use Permits: The following uses are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

1. Any and all Use Permits permitted in the R-1A Residential District.

602.05.4 Regulations:

1. Minimum lot area - 7,500 square feet.
2. Minimum lot width - sixty (60) feet measured at front building setback line, except that corner lots shall be a minimum of eighty (80) feet wide.
3. Minimum front yard depth - twenty-five (25) feet from street right-of-way line. Required off-street parking is prohibited in this area or between the street right-of-way and the principal building, with the exception of single-family dwellings.
4. Minimum side yard depth - five (5) feet, except on a corner lot, the minimum side yard on the street side shall be twenty (20) feet. However, no two-family dwelling shall be built closer than twenty-five (25) feet to the side lot line of a lot which is zoned R-1E, R-1A, R-1, or R-2A Residential or in any R zone which presently has a detached single-family dwelling located on it.
5. Minimum rear yard depth - twenty (20) feet, such space can be used for parking purposes and open carports.
6. Maximum height - thirty-five (35) feet.
7. Maximum lot coverage - fifty percent (50 %)
8. Accessory structures - accessory structures of a type compatible with the surroundings shall be permitted, and when detached from the main building shall be set back a minimum of fifty (50) feet from the front lot line, five (5) feet from the side lot line, and five (5) feet from the rear lot line. On corner lots, the accessory structure must be erected on the opposite corner of the lot from the street line. No accessory structure may be used as living quarters.
9. Regulations for detached single-family dwellings shall be the same as in the R-1 Residential District.



## ARTICLE VII      COMMERCIAL DISTRICT

### Section 701      General Provisions

The uses permitted in all commercial districts are as follows:

1. Commercial, as hereinafter regulated;
2. Public parks, open spaces, and recreational areas including playgrounds;
3. Libraries;
4. Schools, including public, private, and parochial, all on sites of not less than ten thousand (10,000) square feet;
5. Churches; provided all requirements contained herein for off-street parking are complied with;
6. Public utility facilities and structures required to provide essential public services. (See Section 1203-A)
7. Public facilities and uses necessary for conducting the business of operating the City, County, State, and/or Federal Government.
8. Off street surface parking.
9. Residential uses in non-residential structures which meet the requirements of and qualify for the municipal ad valorem tax exemption of the City of Jackson, enacted on January 22, 2002, and recorded in Minute Book "5-F" at Page 462.

### Section 702      Commercial District Subdivision

The "C" Commercial District is hereby further subdivided into five (5) subordinate districts which are known as:

1. C-1 Restricted Commercial District
2. C-1A Restricted Commercial District
3. C-2 Limited Commercial District
4. C-3 General Commercial District
5. C-4 Central Business District

702.01 Continuance: In Commercial Districts minimum lot area and lot width measurements set forth by this Ordinance shall not be applicable upon existing and developed commercial lots at the date of adoption of this Ordinance which do not meet such regulations as set forth herein. However, all other commercial properties shall comply with provisions of this Ordinance.

**702.02 C-1 Restricted Commercial District:** The purpose of this district is to provide relatively quiet, attractive and spacious areas for the development of office and limited retail uses. This district is intended to encourage high quality attractive office park development in protected environments.

**702.02.1 Uses Permitted:**

1. Any type of professional occupation as defined in this Ordinance and any other office type activity in which there is kept no stock in trade or merchandise for sale and which offers only a service to the general public.
2. Hospitals, research institutes, convalescent homes, and assisted living facilities on sites of not less than three (3) acres.
3. Auxiliary and related retail uses located entirely within buildings where the predominant use is office, hospital, research institute and/or convalescent home.
4. Personal care facilities and group homes for the handicapped which exceed thirteen (13) residents on sites of not less than three (3) acres.

**702.02.2 Regulations:**

1. Minimum lot area - 5,000 square feet.
2. Minimum lot width - fifty (50) feet.
3. Minimum front yard depth - twenty-five (25) feet from street right-of-way line.
4. Minimum side yard width - five (5) feet, except where it adjoins residentially zoned property, the side yard requirement shall be increased to twenty-five (25) feet. On a corner lot, the minimum side yard depth on the street side shall be twenty-five (25) feet.
5. Minimum rear yard depth - fifteen (15) feet, except where it adjoins residentially zoned property, the rear yard requirement shall be increased to twenty-five (25) feet.
6. Maximum height - thirty-five (35) feet.
7. Maximum lot coverage - fifty percent (50%), including accessory structures.
8. No exterior storage shall be permitted.

**702.03 C-1A Restricted Commercial District:** The purpose of this district is to provide relatively quiet and attractive areas for the development of office activities with some limited retail use. Such uses are to be located entirely within structures that are developed with site coverage consistent with that typically found in adjacent residential areas. This district is intended to permit residential and office development and allow for the conversion and maintenance of existing residential structures for limited retail uses which will not significantly alter the residential facade of the structure or the general physical character of the neighborhood.

**702.03.1 Uses Permitted:**

1. Any type of professional occupation as defined in this Ordinance and any other office type activity which offers only a service to the general public.
2. Bed and breakfast inn.
3. Art gallery, museum, studio, antique, and/or specialty retail shop.
4. All uses permitted in the R-2 Single-Family and Two-Family Residential District.

**702.03.2 Uses Which May be Permitted as Use Permits:** The following Use Permits are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

1. Commercial banks, saving institutions, and credit unions.
2. Adult and child care centers/Commercial.

**702.03.3 Regulations:**

1. All regulations of the C-1 (Restricted) Commercial District shall be applied.

**702.04 C-2 Limited Commercial District:** The purpose of this district is to provide attractive areas for the medium density development of office buildings and neighborhood type stores, services, and commercial centers that address the daily needs of the surrounding residential community.

**702.04.1 Uses Permitted:**

1. Any and all uses, except residential, permitted in C-1 and C-1A Restricted Commercial Districts.
2. Neighborhood shopping centers, retail convenience stores, and personal services. No single tenant shall occupy more than 40,000 square feet.

3. Restaurants, Neighborhood.
4. Convenience type grocery stores.
5. Coin laundry and dry cleaning establishments.
6. Adult and child care centers.
7. Restaurant, Neighborhood Shopping Center, where part of a neighborhood shopping center.
8. Restaurant, Fast-Food, where part of a neighborhood shopping center.

702.04.1(a) Uses Which May be Permitted as Use Permits: The following Use Permits are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

1. Any and all Use Permits provided in the C-1 and C-1A Restricted Commercial Districts.
2. Restaurant, Fast-Food.
  - A. When the restaurant adjoins residentially zoned property, all exterior lighting shall be directed away from adjacent residential properties;
  - B. The location for the point of taking food orders shall be buffered from and so located so as to minimize the intrusion upon adjacent properties.
3. Veterinarian clinic when no storage pens or runs are located outdoors.
4. Automotive service and repair establishments, but excluding major repair work such as motor overhaul, body and fender repairs, spray painting, tire retreading, or other activities which may generate excessive noise or odors which may be incompatible with the character of the district when:
  - A. Conducted within a completely enclosed building;
  - B. There is no outdoor storage of automobiles, discarded parts, tires or similar materials.

5. Re-cycling collection point when:
  - A. The collection point occupies no more than five hundred (500) square feet;
  - B. has no processing equipment;
  - C. recycling containers are made of durable material and are covered and secured from unauthorized entry;
  - D. located two-hundred fifty (250) feet from any residentially zoned property;
6. Nightclubs and bars.
7. Service stations.
8. Car wash.
9. Restaurant, General.
10. Liquor Stores, where part of a neighborhood shopping center.

702.04.2 Regulations:

1. Minimum lot area - not regulated.
2. Minimum lot width - not regulated.
3. Minimum front yard depth - twenty-five (25) feet from street right-of-way line.
4. Minimum side yard width - None, except where it adjoins residentially zoned property; the side yard requirement shall be increased to twenty-five (25) feet, provided further, that the side yard shall be increased by one (1) foot for each five (5) feet of building height over forty-five (45) feet. On a corner lot, the minimum side yard depth on the street side shall be twenty-five (25) feet.
5. Minimum rear yard depth - fifteen (15) feet except where it adjoins residentially zoned property, the rear yard requirement shall be increased to twenty-five (25) feet; provided further, that the rear yard shall be increased by one (1) foot for each five (5) feet of building height over forty-five (45) feet.
6. Maximum height - seventy-five (75) feet.
7. Maximum lot coverage - not regulated.

8. No exterior storage shall be permitted.
9. The leading edge of canopies shall be a minimum of five (5) feet from any street right-of-way line.
10. Petroleum dispensing facilities shall be a minimum of twenty (20) feet from any street right-of-way line.

**702.05 C-3 General Commercial District:** The purpose of this district is to provide for the preservation and perpetuation of retail and commercial enterprise, to provide areas for the development of retail type and personal service type commercial, community, and regional shopping centers of integrated design and high density development of commercial businesses in certain areas adjacent to major transportation arteries or thoroughfares within the City.

**702.05.01 Uses Permitted:**

1. All uses permitted in the C-2 Limited Commercial District
2. Amusement Arcades
3. Amusement rides
4. Apartments, when located in renovated, non-residential structures, which exceed 5,000 square feet, in accordance with Section 701 (9.) of the Zoning Ordinance.
5. Automotive service and repair establishments
6. Auto and truck sales
7. Boarding houses
8. Bowling centers
9. Car Wash
10. Gun Shops
11. Health Club/Fitness Center
12. Hotels and motels
13. Ice and roller skating rinks

14. Liquor Stores
15. Nightclubs and bars
16. Parking Garages
17. Recycling Collection Point
18. Drive-in and fast food restaurants
19. Restaurants, General
20. Secondhand Stores
21. Service stations
22. Veterinarian clinics and kennels
23. Mini-warehouses
24. Wholesale outlet stores
25. Check cashing business
26. Tattoo parlor
27. Body Piercing Business
28. Microbrewery pubs
29. Transient Vendors, when located completely indoors, as in shopping centers, hotels, or motels. Outdoor display of merchandise is prohibited.
30. Automobile and Truck Rental Business
31. Nurseries / Yard and Garden Centers
32. Produce Stands

702.05.1(a) Uses Which May be Permitted as Use Permits: The following Use Permits are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

1. Any and all Use Permits provided in the C-2 (Limited) Commercial District.
2. Recycling Center
3. Commercial Communication Towers
4. Amusement parks
5. Bingo parlors
6. Emergency shelter/mission
7. Golf driving ranges and pitch-n-putt
8. Mobile/manufactured home sales
9. Pawn shops
10. Single-room occupancy hotels (SRO)
11. Title Pledge Office - Any such uses lawfully operating prior to March 11, 1998, shall be treated as non-conforming uses under this Ordinance, and shall be subject to the requirements of Article XIII-A of this Ordinance, entitled "Non-conforming Use of Lands and/or Structures."
12. Billboards
13. Bail Bonding business
14. Apartments (new construction)
15. Automobile and truck wrecker and recovery businesses, when all vehicles are stored in a completely enclosed building.

702.05.01 (b) Existing Uses and Structures: On June 1, 2002, any land or structures being used as apartments within a C-3 District will be a legally conforming use for all purposes of this Ordinance. Further, this provision applies to all plans, construction or designated use of any building or land which, before June 1, 2002 either (1) the Zoning Administrator has issued a zoning verification letter stating that apartments are a permitted use; (2) the Owner or other entity with a legal interest in the property has applied to construct or improve apartments in a C-3 District; or (3) the owner or an entity with a legal interest in the property has lawfully begun construction of apartments.



702.05.02 Regulations:

1. Minimum lot area - none.
2. Minimum lot width - none.
3. Minimum front yard depth - fifteen (15) feet from street right-of-way line.
4. Minimum side yard width - none, except where it adjoins residentially zoned property, the side yard requirement shall be increased to twenty-five (25) feet; and provided further, that the side yard shall be increased by one (1) foot for each five (5) feet of building height over forty-five (45) feet. On corner lots, the minimum side yard depth on the street side shall be fifteen (15) feet.
5. Minimum rear yard depth - none, except where it adjoins residentially zoned property, the rear yard requirement shall be increased to twenty-five (25) feet; and provided further, that the rear yard shall be increased by one (1) foot for each five (5) feet of building height over forty-five (45) feet.
6. Maximum height - one hundred-fifty (150) feet.
7. Maximum lot coverage - not regulated.
8. Exterior storage - Exterior storage by a retail establishment is permitted only for items which by their nature are typically used outdoors in an unprotected environment. To protect the integrity of adjacent properties, the Zoning Administrator may require that exterior storage areas be completely screened from the street and from adjacent properties by a six (6) foot high wood or masonry fence or by natural plants or trees of equal minimum height so planted as to provide maximum opacity.
9. No bingo parlor, pawnshop, title pledge office, or secondhand store shall be located within two hundred fifty (250) feet of any other such use, or located within five hundred (500) feet of any residentially zoned property, church, school, park, playground or public library.
10. No pawnshop or secondhand store shall be constructed or altered to permit business to be transacted via a drive-through or a walk-up window.
11. The leading edge of canopies shall be a minimum of ten (10) feet from any street right-of-way line.

12. Petroleum dispensing facilities shall be a minimum of twenty (20) feet from any street right-of-way line.

**702.06 C-4 Central Business District:** The purpose of this district is to preserve and perpetuate an intensive and cohesive downtown urban core characterized as the center for employment and as the focus of commercial, governmental, and cultural activities. The intent of this district is to develop a strong sense of place by extending the duration of downtown's activities by improving the pedestrian environment and creating mutually supportive land uses such as cultural arts, education, entertainment, housing, business, other commerce and government. The Central Business District is to be located in the vicinity of the City Hall and State Capitol and close to peak traffic and pedestrian flows where residential, commercial, governmental and cultural activities can be conveniently accommodated and made easily accessible to adequate parking, transit, and regional transportation services for clientele and employee groups residing, patronizing, or working in the Central Business District.

**702.06.1 Uses Permitted:**

1. Arts, entertainment, and cultural facilities
2. Adult and Child Care/Commercial
3. General commercial and professional offices
4. Mixed service and retail commercial
5. Mixed office, retail commercial, and residential
6. Conference/Convention center
7. Finance, insurance and professional offices
8. Gaming Casinos
9. Governmental Administration offices
10. Health/Fitness Club
11. Hotels
12. Nightclubs, Bars
13. Mixed office and retail commercial

12. Petroleum dispensing facilities shall be a minimum of twenty (20) feet from any street right-of-way line.

**702.06 C-4 Central Business District:** The purpose of this district is to preserve and perpetuate an intensive and cohesive downtown urban core characterized as the center for employment and as the focus of commercial, governmental, and cultural activities. The intent of this district is to develop a strong sense of place by extending the duration of downtown's activities by improving the pedestrian environment and creating mutually supportive land uses such as cultural arts, education, entertainment, housing, business, other commerce and government. The Central Business District is to be located in the vicinity of the City Hall and State Capitol and close to peak traffic and pedestrian flows where residential, commercial, governmental and cultural activities can be conveniently accommodated and made easily accessible to adequate parking, transit, and regional transportation services for clientele and employee groups residing, patronizing, or working in the Central Business District.

**702.06.1 Uses Permitted:**

1. Arts, entertainment, and cultural facilities
2. Adult and Child Care/Commercial
3. General commercial and professional offices
4. Mixed service and retail commercial
5. Mixed office, retail commercial, and residential
6. Conference/Convention center
7. Finance, insurance and professional offices
8. Gaming Casinos
9. Governmental Administration offices
10. Health/Fitness Club
11. Hotels
12. Nightclubs, Bars
13. Mixed office and retail commercial

14. Parking Garages
15. Personal services
16. Residential
17. Restaurant, Fast-Food
18. Restaurants, General
19. Multi-modal transportation facilities
20. Wholesale and retail commercial
21. Microbrewery pubs

702.06.1(a) Uses Which May be Permitted as Use Permits: The following Use Permits are permitted provided they are established in accordance with the procedures and provisions of this Ordinance:

1. Adult arcades, adult bookstores, adult cabarets, adult entertainment establishments, adult motels and adult motion picture theaters.
2. Commercial Communication Towers

702.06.2 Regulations:

1. Minimum lot area - not regulated.
2. Minimum lot width - not regulated.
3. Minimum front yard depth B not regulated.
4. Minimum side yard width - not regulated.
5. Minimum rear yard depth - not regulated.
6. Maximum height - one hundred-fifty (150) feet.
7. Maximum lot coverage - not regulated.
8. No exterior storage, including vehicle storage associated with a retail establishment, shall be permitted.

ARTICLE XVI      ADMINISTRATION AND ENFORCEMENT  
(RE-NUMBERED: IS NOW "ARTICLE XIV-A")

ARTICLE XVI-A    SCHEDULE OF FEES, CHARGES AND EXPENSES

Section 1601-A    Schedule Established

The City Council may establish a schedule of fees, charges, and expenses and a collection procedure for certificates of zoning compliance, appeals, and other matters pertaining to this Ordinance.

Section 1602-A    Collection Office

The schedule of fees, charges and expenses shall be posted in the office of the Zoning Administrator, who shall be responsible for their collection. The schedule may be altered or amended only by the City Council. Until all applicable fees, charges, and expenses have been paid in full, no action will be taken on any application or appeal.

ARTICLE XVII      CITY PLANNING BOARD RESPONSIBILITIES  
(RE-NUMBERED: IS NOW "ARTICLE XV-A")

ARTICLE XVII-A   REZONING (MAP AMENDMENTS), TEXT AMENDMENTS,  
SPECIAL EXCEPTIONS, VARIANCES AND USE PERMITS

Section 1701-A    General Provisions

The regulations, provisions, restrictions and district boundaries set forth in this Ordinance may from time to time be amended, supplemented, changed or repealed. Also from time to time, the public health, safety or general welfare of the community may require that Special Exceptions, Variances, and Use Permits be granted in specific cases as set forth in the Ordinance.

1701.01-A Purpose of Use Permits: The development and execution of this Ordinance is based upon the division of the community into districts, within which districts the use of land and building and the bulk and location of buildings and structures in relation to the land are substantially uniform. It is recognized, however, that there are 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. Use Permits may therefore be granted by the City Council for those uses enumerated in each of the zoning districts established in Article III, Section 301, of this Ordinance in accordance with the standards and procedures of this Article and the standards enumerated for each Use Permit in the district regulations.

1701.02-A Application of Use Permits: When considering application for Use Permits, the City Council shall consider the extent to which:

1. the proposed use is compatible with the character of development in the vicinity relative to density, bulk and intensity of structures, parking, and other uses;
2. the proposed use will not be detrimental to the continued use, value, or development of properties in the vicinity;
3. the proposed use will not adversely affect vehicular or pedestrian traffic in the vicinity;
4. the proposed use can be accommodated by existing or proposed public services and facilities including, but not limited to, water, sanitary sewer, streets, drainage, police and fire protection, and schools;
5. the proposed use is in harmony with the Comprehensive Plan;
6. the proposed use will not be hazardous, detrimental, or disturbing to present surrounding land uses due to noises, glare, smoke, dust, odor, fumes, water pollution, vibration, electrical interference, or other nuisances.

1701.03-A Authority For Conditions: A Use Permit may be issued subject to such conditions as are necessary to carry out the purpose of this Ordinance and to prevent or minimize adverse effects upon other property in the neighborhood, including, but not limited to, limitations on size and location, requirements for landscaping, lighting, the provisions of adequate ingress and egress, duration of the permit which may be permanent or may be limited to a specific period of time and hours of operation. Such conditions may include a requirement for a second stage approval process under the provisions of Section 1703.06-A.

#### **Section 1702-A      Public Hearing Required**

No action shall be taken concerning Rezoning, ~~Text~~ Amendments, Special Exceptions, Variances, or Use Permits until after a public hearing in relation thereto, at which parties in interest and the general citizenry ~~(shall have an opportunity to be heard)~~ Before the City Planning Board or City Council holds such a hearing, there shall be two (2) advertisements of the hearing, which advertisements set forth the time and place of the hearing, describe the nature of the proposed request or text amendment, and if property is involved, the existing zoning and purported changes and modifications therein. Such publication shall be made in a newspaper of general circulation within the City of Jackson, Mississippi, the first publication to be at least fifteen (15) days before such hearing.

Section 1703-A      Procedure for Rezoning, Special Exceptions, Variances, and Use Permits

No Rezoning, Special Exception, Variance, and/or Use Permit shall be passed by the City Council unless and until the following conditions have been met:

1703.01-A Signs Required: In the case of Rezoning, Special Exceptions, Variances, and/or Use Permits, Zoning Notice signs shall be erected facing the street or streets and visible and readable from the street of any lot involved for a period of at least fifteen (15) days prior to the hearing. The Zoning Notice sign shall indicate the case number.

1703.02-A Application Requirements: A written application for a Rezoning, Special Exception, Variance, and/or Use Permit shall be filed with the Zoning Administrator. Rezoning of a property shall not be granted unless the applicant can prove by clear and convincing evidence either, (1) that there was a mistake in the original zoning, or (2) the character of the surrounding area has changed to such an extent as to justify rezoning and there is a public need for additional property to be zoned in accordance with the request in said application. If an application for rezoning is denied by the City Council or if said application is withdrawn after the Planning Board has recommended denial of the application, then such property may not be the subject of an application for rezoning for a period of one year from the earliest date of such denial or withdrawal. Anything stated to the contrary notwithstanding, under no circumstances shall an application filed hereunder be processed while any litigation is pending concerning the zoning of the subject property.

1703.02.1-A Application for Rezoning: This application shall include a legal description, plot plan, and location map of the property, the exact nature of the proposed change, a detailed listing of documents included in the application setting forth the grounds upon which said application is made, the change in land use conditions affecting the property since any previous City Council action, a listing of the owners of all property within one hundred-sixty (160) feet and all neighborhood organizations registered with the Department of Planning and Development with geographic boundaries within one thousand (1,000) feet in all directions therefrom the property lines of the lot or parcel of land for which the application is being submitted, excluding width of streets, and any such other information as may be required by the Zoning Administrator to determine the merits of the application. In order to obtain a change in the zoning classification of real property in the City of Jackson, Mississippi, applicant must prove by clear and convincing evidence either (1) that there was a mistake in the original zoning, or (2) substantial change in the land use character of the surrounding area which justifies rezoning the property and a public need for additional property that area zoned in accordance with the request in said application since any previous City Council action. The petitioner shall show proof of notification to all of the listed property owners and organizations by submitting certified mail receipts and a copy of the letter sent to the listed in property owners and organizations. Such letter shall include the date, time, location, and purpose of the stated public hearing. In the alternative applicant may present a petition bearing the signatures of the listed property owners and organizations as proof of notification.

1703.02.2-A Application for Special Exception: This application shall include a legal description of the property, a plot plan of the property, and the non-retail type use to which the property and/or structure is contemplated. The justification statement shall state the grounds upon which the request is based, and shall further demonstrate that the granting of such Special Exception will not adversely affect the surrounding properties nor otherwise be detrimental to the public welfare. The petition shall contain a listing of names of the owners of all the property within one hundred-sixty (160) feet and all neighborhood organizations registered with the department of Planning and development with geographic boundaries within one thousand (1,000) feet in all directions from the lot or parcel of land for which the application is being submitted, excluding width of streets, and any such other information as may be required by the Zoning Administrator to determine the merits of the application. The petition shall show proof of notification to all of the listed property owners by (1) submitting certified mail receipts and a copy of the letter sent to the listed property owners. Such letter shall include the date, time, location, and purpose of stated public hearing; or (2) a petition bearing the signature of the listed property owners; or (3) a combination of Items (1) and (2).

1703.02.3-A Application for Variance: This application shall include a legal description, location map, plot plan, the exact nature of the requested Variance, the grounds upon which it is requested, any City Council action involving rezoning or any variance, or such other information as may be required by the Zoning Administrator to determine the merits of the application. The variance application shall demonstrate the following:

1. That special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other lands, structures or buildings in the same district.
2. That literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the provisions of this Ordinance.
3. That the special conditions and circumstances do not result from actions of the applicant.
4. That granting the Variance requested will not confer upon the applicant any special privilege that is denied by this Ordinance to other similar lands, structures or buildings in the same district.

The petition shall contain a listing of names of the owners of all the property within one hundred-sixty (160) feet and all neighborhood organizations registered with the Department of Planning and Development with geographic boundaries within one thousand (1,000) feet in all directions from the lot or parcel of land for which the application is being submitted, excluding width of streets, and any such other information as may be required by the Zoning Administrator to determine the merits of the application. The petition shall show proof of notification to all of the listed property owners by (1) submitting certified mail receipts and a



copy of the letter sent to the listed property owners. Such letter shall include the date, time, location, and purpose of stated public hearing; or (2) a petition bearing the signatures of the listed property owners; or (3) a combination of Items (1) and (2).

1703.02.4-A Application for Use Permit: This application shall include a legal description of the property, a site plan of the property, and the specific use to which the property and/or structure is contemplated. The justification statement shall state the grounds upon which the request is based, and shall further demonstrate that the granting of such Use Permit will not adversely affect the surrounding properties nor otherwise be detrimental to the public welfare. The petition shall contain a listing of names of the owners of all the property within one hundred-sixty (160) feet and all neighborhood organizations registered with the Department of Planning and Development with geographic boundaries within one thousand (1,000) feet in all directions from the lot or parcel of land for which the application is being submitted, excluding width of streets, and any such other information as may be required by the Zoning Administrator to determine the merits of the application. The petition shall show proof of notification to all of the listed property owners by (1) submitting certified mail receipts and a copy of the letter sent to the listed property owners. Such letter shall include the date, time, location, and purpose of stated public hearing; or (2) a petition bearing the signature of the listed property owners; or (3) a combination of Items (1) and (2). Application for a Use Permit shall be accompanied by a site plan drawn at a scale to allow adequate review. Site plans shall include the following:

1. property boundary lines and dimensions, available utilities, location of easements, roadways, rail lines and public right-of-way crossing adjacent to the subject property;
2. the proposed height, dimensions and arrangements of buildings and uses on the site;
3. the type and location of landscaping proposed for the site;
4. the locations of points of ingress and egress from the site;
5. the location of driveways, parking lots and loading areas on the site;
6. the location of any proposed substantial regrading on the site and any significant topographical or physical feature, including water courses.

1703.03-A Public Hearing Held: After public notice has been published as aforementioned, a public hearing on the Rezoning, Special Exception, Variance or Use Permit shall be held before the City Planning Board at its Zoning Meeting. At said hearing, any individual may appear in person or by agent.

1703.04-A Application Reviewed by Planning Director: At least fifteen (15) days prior to the public hearing to be conducted at the City Planning Board's Zoning Meeting, the Zoning Administrator shall submit the application for Rezoning, Special Exception, Variance, or Use Permit to the Planning Director for determination as to whether or not the requested changes are in conformance with the officially adopted overall Comprehensive Plan for City Development. The Planning Director, within ten (10) days, shall certify in writing to the Zoning Administrator his finding that the proposed Rezoning, Special Exception, Variance, or Use Permit does or does not conform to the Comprehensive Plan for City Development. The Zoning Administrator shall then transmit this certification of the finding to the City Planning Board. If a written statement is not received from the Planning Director within the ten (10) day period, the Zoning Administrator shall so advise the City Planning Board and continue the due processing of the application.

1703.05-A Public Hearing Procedures: Proceedings of the hearing at the City Planning Board's Zoning Meeting shall be taken down in shorthand and/or by mechanical or tape recording, which cannot be altered, and all witnesses before said City Planning Board's Zoning Meeting shall be sworn in by an officer qualified to administer oaths under the laws of the State of Mississippi. The hearing at the zoning meeting may proceed informally without strict compliance with rules of evidence. The Chair of the City Planning Board's Zoning Meeting shall act as moderator.

1703.06-A City Planning Board's Zoning Meeting Determination: Within fifteen (15) calendar days from the conclusion of such hearings, the Zoning Administrator shall prepare and submit in writing the findings from the City Planning Board. The City Planning Board shall, within fifteen (15) days, give its recommendations in writing to the Zoning Administrator, and which shall become a recommendation to the City Council. After the City Planning Board has acted upon a proposed Use Permit application and required site plans, at the zoning meeting, the applicant shall submit a modified site plan to the Zoning Administrator, if necessary, reflecting conditions recommended by the City Planning Board prior to forwarding the request to the City Council.

1703.07-A Notification by Zoning Administrator: The Zoning Administrator shall, within five (5) working days of such decision and recommendations, mail a copy of same to all parties in interest who appeared at said hearing.

1703.08-A City Council Notified: After fifteen (15) days from the date of the City Planning Board decision or recommendation, the Zoning Administrator shall forward to the City Council such recommendation, along with all documents and exhibits pertaining to the case. If no appeal is filed by a party of record or authorized representative, defined herein as a party present and speaking at the City Planning Board public hearing, with the Zoning Administrator within fifteen (15) days from the date of the City Planning Board recommendation, it will not be necessary for stenographic notes to be transcribed or publication to be made, however, if such an appeal is taken, it will be necessary for stenographic notes to be transcribed and for the City Clerk to place two (2) advertisements of the pending consideration by the City Council. Such publication shall be in the usual form and shall be made in a newspaper of general circulation within the City of

Jackson, Mississippi, at least fifteen (15) days before such hearing before the Jackson City Council. Within sixty (60) calendar days after the date set in the case advertisement, the City Council shall approve or deny, in whole or in part, the recommendation of the City Planning Board, or where there is need for additional information, may remand the case to the City Planning Board for further consideration, and this shall be done by the City Council on the record of the case.

**Section 1704-A      Procedure for Text Amendments**

No text amendment shall be passed by the City Council unless and until the following conditions have been met:

1704.01-A Public Hearing Held: After public notice has been published as aforementioned (Section 1702-A), a public hearing on the proposed text amendment shall be held separately and/or jointly before the City Planning Board and/or the City Council. At said hearing, any individual may appear in person or by agent.

1704.02-A Public Hearing Procedures: Proceedings of the hearing before the City Planning Board and/or City Council shall be taken down in shorthand and/or mechanical or tape recording, which cannot be altered. The City Planning Board and/or the City Council may proceed informally without strict compliance with rules of evidence. The Chairperson of the City Planning Board shall act as moderator unless the hearing is held jointly or separately by the City Council, then the President of the City Council shall act as moderator.

**ARTICLE XVIII      SCHEDULE OF FEES, CHARGES AND EXPENSES**  
**(RE-NUMBERED: IS NOW "ARTICLE XVI-A")**

**ARTICLE XVIII-A      AREA-WIDE REZONING (MAP AMENDMENTS)**

**Section 1801-A      Purpose and Intent**

The purpose of this Article is to permit the re-zoning of established neighborhoods to more accurately reflect existing land use patterns in the area and to preserve the distinctive physical character of the neighborhood. This Article is also intended to provide a mechanism by which established neighborhoods may amend zoning regulations to improve the area's quality of life, strengthen the tax base, and insure adequate infrastructure, transportation and public facilities.

**Section 1802-A      Procedure**

(a) A neighborhood rezoning may be initiated by:

- (1) The owners of at least seventy-five (75) percent of the property described in the application; or

- (2) A two-thirds (2/3) vote of the City Council; or
- (3) A two-thirds (2/3) vote of the Planning Board.
- (b) This section shall only be applicable when at least fifty (50) contiguous parcels or at least fifteen (15) acres of contiguous land (excluding rights of way) are the subject of the re-zoning application.
- (c) Any proposed rezoning under this section shall be studied by the Planning Department to determine:
  - (1) The need for additional land in the City having the same classification as that requested; and
  - (2) A substantial change of the land use character of the surrounding area that justifies the change in zoning.
- (d) Additionally, the Planning Department may report findings concerning the following:
  - (1) The effect of the change on the particular property and on surrounding properties;
  - (2) The impact, if any, on the existing infrastructure, transportation, tax base, and surrounding land uses;
  - (3) The relationship of the proposed amendment to the City's Comprehensive Plan and other relevant local and regional plans, with appropriate consideration as to whether the proposed changes will further the purpose of this section and related plans; and
  - (4) Any other relevant considerations regarding re-zoning of the subject parcels.
- (e) The Planning Department shall submit the re-zoning request to the Planning Board for consideration along with a staff report stating the Staff's findings under subsections (c) and (d) above.
- (f) The Planning Board shall hold a public hearing on the re-zoning request. Public notice of the hearing shall be given at least fifteen (15) days in advance of the hearing by publication in a newspaper of regular and general circulation in the City, and a notice shall be posted at City Hall. The Planning Board shall forward their recommendations in writing to the City Council for final consideration. The City Council shall hold a public hearing following adequate public notice within sixty (60) days of the Planning Board's recommendations.

- (g) When the City proposes to rezone any property within its jurisdiction, it shall be the duty of the City to give notice by first class mail to each property owner whose zoning classification is proposed to be changed or affected. Such notice shall be mailed to the owner's current address of record, as maintained by the assessor of taxes and shall be postmarked no later than ten (10) days prior to the first scheduled hearing concerning the proposed change. The notice shall contain a description and map of the affected property, showing the existing and the proposed zoning, and the time and place of any scheduled hearing concerning the proposed rezoning. Prior to the effective date of any area-wide rezoning, the City shall cause an affidavit to be filed with the City Clerk certifying that the City has complied with this section. The filing of the affidavit shall be prima facie proof of compliance with this section. A failure to give notice shall not affect the validity of rezoning, except as to the property of the complaining owner. Notice shall not be invalid or ineffective if sent according to the ownership records of the Tax Assessor, regardless of the accuracy of the tax records. It is the owner's responsibility to insure the accuracy of tax records pertaining to his property.

## **ARTICLE XVIII-B**

## **ESTABLISHMENT OF OVERLAY DISTRICTS**

### **Section 1801-B**

#### **Purpose and Intent**

The purpose of an overlay district is to protect the special, public interest and benefit in an area that is not already adequately protected by mapped traditional zones. An overlay district establishes regulations beyond those in the underlying zone and may cover parts of several zoning districts or only a portion of the underlying district. Generally, the underlying zone determines the permitted land uses, while the overlay district may regulate such things as the design and setbacks. Overlay districts may also set in place any other regulations that meet the district's purpose.

### **Section 1802-B**

#### **Procedure**

- (a) An overlay district may be initiated by the Planning Board, upon recommendation of the Planning Department.
- (b) Any proposed overlay district under consideration shall be studied by the Planning Department to determine:
  - (1) The purpose and intent of the overlay district under consideration;
  - (2) The existing character of the area;
  - (3) Development goals for the area;

postmarked no later than ten (10) days prior to the first scheduled hearing concerning the proposed change. The notice shall contain a description and map of the affected property, the proposed historic zoning district regulations, the time and place of any scheduled hearing. Prior to the effective date of the establishment of an historic zoning district, the City shall cause an affidavit to be filed with the City Clerk certifying that the City has complied with this section. The filing of the affidavit shall be prima facie proof of compliance with this section. A failure to give notice shall not affect the validity of the historic zoning district regulations, except as to the property of the complaining owner. Notice shall not be invalid or ineffective if sent according to the ownership records of the Tax Assessor, regardless of the accuracy of the tax records. It is the owner's responsibility to ensure the accuracy of tax records pertaining to his property.

**ARTICLE XIX      AMENDMENTS, SPECIAL EXCEPTIONS, VARIANCES AND USE PERMITS**  
**(RE-NUMBERED AND RE-NAMED: IS NOW "ARTICLE XVII-A REZONING (MAP AMENDMENTS), TEXT AMENDMENTS, SPECIAL EXCEPTIONS, VARIANCES AND USE PERMITS")**

**ARTICLE XIX-A    APPEALS**

**Section 1901-A    General Provisions**

The regulations, provisions, restrictions, and district boundaries set forth by this Ordinance may from time to time be amended, supplemented, changed or repealed. Also, from time to time the public health, safety, or general welfare of the community may require that Special Exceptions, Variances, and Use Permits be granted in specific cases. Appeals from written decisions of the Zoning Administrator in the administration and enforcement of the provisions of this Ordinance shall be submitted to the City Planning Board for review and recommendation. Except for Article XVIII Area-Wide Rezoning (Map Amendments), Establishment of Overlay Zone Districts, and Historic Zoning Districts, appeals from recommendations of the City Planning Board relating to any of its functions shall be submitted to the City Council for final determination.

**Section 1902-A    Appeal of Zoning Administrator Decisions and City Planning Board Recommendations**

No appeal of a decision of the Zoning Administrator or of a recommendation of the City Planning Board shall be ruled upon by the City Council until the following conditions have been met:

1902.01-A Written Notice of Appeal Required: A written Notice of Appeal from a decision of the Zoning Administrator or recommendation of the City Planning Board shall be filed with the Zoning Administrator. The written Notice of Appeal shall state the order, determination, interpretation, requirement, recommendation or decision from which an appeal is desired.

1902.02-A Appeal to Stay Proceedings: An appeal from a decision of the Zoning Administrator stays all proceedings in furtherance of the action appealed from, unless the Zoning Administrator, from whom the appeal is taken, certifies to the City Planning Board, after the Notice of Appeal is filed with him, that by reason of the facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life and property. In such case, proceedings shall not be stayed by the City Council, or by a court of record on application, on notice to the Zoning Administrator from whom the appeal is taken and on the due case shown.

1902.03-A Appeal of City Planning Board Recommendation: Any party of record, as defined herein, who is aggrieved by a recommendation of the City Planning Board shall be entitled to any appeal from such recommendation to the City Council, provided the procedures herein stated are followed:

1. A written notice of appeal shall be given to the Zoning Administrator within fifteen (15) days from the date of such recommendations by the City Planning Board, and that the party appealing shall also mail a copy of such notice to all parties entering an appearance in such cause, such appearance being mandatory for the receipt of said notice.
2. When such Notice of Appeal is filed, the Zoning Administrator shall immediately notify the Recording Secretary of the City Planning Board's Zoning Meeting, and the Recording Secretary shall have a period of sixty (60) days from the date of delivery of the Notice of Appeal to the Zoning Administrator in which to transcribe and file the notes with the Zoning Administrator. If the City Planning Board, at its discretion, finds the aforesaid sixty (60) day period is insufficient, it may, upon request of the Recording Secretary, grant an additional period of time up to sixty (60) days in which to prepare the record.
3. Upon receipt of the transcribed notes, the Zoning Administrator shall immediately forward to the City Council recommendations of the City Planning Board, the transcribed notes, and all documents and exhibits in the case; and shall have published two (2) advertisements of such hearing setting forth the time and place of the hearing, description of the property involved, the existing zoning and purported changes and modifications therein. Such publication shall be made in a newspaper of general circulation within the City of Jackson, Mississippi, the first publication to be at least fifteen (15) days before such hearing.



1902.04-A Action of the City Council: Unless there is an appeal by a party of record, as defined herein, the Council may immediately act to approve or deny the zoning application. In cases involving an appeal by a party of record, as defined herein, within sixty (60) days after the date set in the case advertisement and receipt of the transcript and documented case record, including the recommendation of the City Planning Board, the City Council shall either approve or deny, in whole or in part, the decision and recommendations of the City Planning Board on the record of the case or where there is need for additional information, may remand the case to the City Planning Board for further consideration, all in accordance with the provisions of the Mississippi Code Annotated, Section 17-1-17 (1972).

1902.05-A Two-Thirds Council Vote Needed: In case of a protest against a Rezoning, Special Exception, Variance, or Use Permit signed by twenty percent (20%) or more of the owners of lots within a distance of one hundred-sixty (160) feet from the property involved, widths of all streets excluded, such Rezoning, Special Exception, Variance or Use Permit shall not become effective except by the favorable vote of two-thirds (2/3) of all members of the City Council.

1902.06-A Appeal to Court of Law: An appeal from the decision of the City Council may be made as provided by law for appeals from any order of the governing authorities of a municipality.

**ARTICLE XX      APPEALS**  
**(RE-NUMBERED: IS NOW "ARTICLE XIX-A")**

**ARTICLE XX-A      PROVISIONS DECLARED TO BE MINIMUM REQUIREMENTS**

**Section 2001-A      Declaration**

In their interpretation and application, the provisions of this Ordinance are hereby declared to be the minimum requirements, adopted for the promotion of the public health, safety, morals, and general welfare for the City of Jackson, Mississippi. Wherever the requirements of any other lawfully adopted rules, regulations, ordinances, and deed restrictions, or covenants filed of record are not in conflict with the intent and purposes of this Ordinance, but impose more restrictive or higher standards, the more restrictive or higher standards shall govern.

**ARTICLE XXI      PROVISIONS DECLARED TO BE MINIMUM REQUIREMENTS**  
**(RE-NUMBERED: IS NOW "ARTICLE XX-A")**

**ARTICLE XXI-A      COMPLAINTS REGARDING VIOLATIONS**