

**IN THE SUPREME COURT OF MISSISSIPPI**

**VINEYARD INVESTMENTS, LLC d/b/a  
THE WINE PEDDLER**

**APPELLANT**

**VS.**

**NO. 2008-CA-00325**

**CITY OF MADISON, MISSISSIPPI**

**APPELLEE**

**BRIEF OF APPELLEE,  
THE CITY OF MADISON, MISSISSIPPI**

**ORAL ARGUMENT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

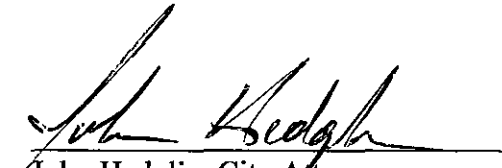
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Circuit Judge may evaluate possible disqualification or recusal.

Mayor Mary Hawkins Butler and  
The Board of Aldermen of the City of Madison, Mississippi

John Hedglin, Esq.  
Counsel for the Appellee

William P. Featherston, Jr., Esq.  
Counsel for Appellant

Vineyard Investments, LLC  
Appellant

  
John Hedglin, City Attorney

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## **STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT**

Pursuant to MRAP 34(b), the City of Madison would request oral argument in this matter, and support of such request would submit that, although the various propositions of law involved in this matter are settled, the issue has never been submitted to the Court directly, and it would be beneficial to the Court and to the parties to have the opportunity to explore the issue in the context of oral argument.

### **I. STATEMENT OF THE ISSUE**

Did the City of Madison act beyond the scope of its powers in denying a building permit, when the applicant did not have the legal authority to conduct the activity which he proposed to conduct in the site which was the subject of the permit application?

### **II. STATEMENT OF THE CASE**

The City of Madison accepts the recitation of “Course of Proceedings and Disposition in the Court Below” in Appellant’s Statement of the Case, although not the premise of the Appellant’s argument.

### **III. STATEMENT OF THE FACTS**

The City accepts paragraphs one through six of the Appellant's "Summary of Facts." Also, the City would note that the pages which constitute the minutes of the November 20, 2007, meeting of the Board of Aldermen from R.11 through R.14 appear to be in reverse order, although all the pages are included. The record does not support the Appellant's claim that the application complied with the ordinances of the City of Madison, and as the City will demonstrate hereafter, the application was submitted in furtherance of activity which was not legal at the time of the decision by the governing authorities of the City. Paragraph seven of the Appellant Summary is denied. The City can only speak through its minutes, so the language in the minutes found on R.12 controls, although certainly the underlying issue is whether the City is obligated to issue a building permit for a use which is not lawful at the time of the application or decision. Paragraph eight is denied, since there was no evidence that Vineyard was in compliance. Paragraph nine is denied, since there is no evidence regarding the issuance of the prior building permit. Paragraph ten is admitted.

### **IV. SUMMARY OF ARGUMENT**

Vineyard's entire argument is based upon the assumption that their proposed use of the structure did not violate any ordinances of the City of Madison at the time of the application or at the time of the Madison Board's decision. As a matter of law, this is not true, and Vineyard's basic premise is flawed.

At the time of the Board's decision regarding denial of the building permit, it is uncontested that Vineyard Investments did not hold a valid package retailer's permit.

Vineyard Investments acknowledged, at the meeting of the Mayor and Board of Aldermen, that the stated purpose of the structure for which the building permit was sought was the sale of alcoholic beverages.

Sale of alcoholic beverages by the appellant, Vineyard Investments, without a valid retailer's permit would have constituted a misdemeanor under state law.

Any misdemeanor under state law is automatically a "criminal offense against the municipality in whose corporate limits the offenses may have been committed to the same effect as though such offenses were made offenses against the municipality by separate ordinance in each case."

Where a building or structure is proposed to be used in violation of the zoning law "or of any ordinance or other regulation," the city has a statutory right to "prevent the unlawful erection, construction . . . or use, . . . to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business, or use in or about such premises." Miss. Code Section 17-1-19.

Therefore, the proposed use of the structure would have constituted a "criminal offense against the municipality," and under all prior decisions of this Court regarding the issue, the City was under no obligation to issue the building permit in furtherance of an admittedly illegal activity.

## **V. STANDARD OF REVIEW**

The City accepts the standard of review as set out in the Appellant's brief.

## **VI. ARGUMENT**

Vineyard Investments bases its entire argument upon the premise that the issuance of the building permit in this instance was a ministerial rather than legislative or quasi-

judicial act. As set forth below, this premise, and all argument flowing from it, is completely contrary to state law and established precedent.

Vineyard Investments (hereafter "Vineyard") argues that the City should have the obligation to issue a building permit despite the fact that (a) Vineyard admitted at the meeting of the Mayor and Board of Aldermen that the purpose of the structure for which the permit was sought was the sale of alcoholic beverages (R.12), (b) Vineyard did not have the legal right to sell alcoholic beverages at the proposed site at the time the City acted on the building permit, and (c) it would have been a violation of state law and, by operation of statute, a criminal offense against the municipality to sell alcoholic beverages without a valid permit.

This is not the law, and never has been.

Miss. Code Section 67-1-9 provides that it shall be unlawful for any person to sell any alcoholic beverage except as authorized in that chapter, and goes on to establish that a first or second violation of that section is a *misdemeanor under state law*. Section 67-1-51 provides that a "package retailer's permit" is necessary to operate a store for the sale at retail of alcoholic beverages. This is exactly the activity which Vineyard admitted to the Mayor and Board that it proposed to conduct (R.3,12).

It is uncontested that on November 20, 2007, the date of the decision/action of the City of Madison, Mississippi, which is presently under review, that the appellant Vineyard did not hold such a package retailer's permit for the location for which the building permit was requested (R.3,12).

Mississippi Code Section 21-13-19 provides that "All offenses under the penal laws of this state which are misdemeanors, together with the penalty provide for violation



thereof, are hereby made, without further action of the municipal authorities, criminal offenses against the municipality in whose corporate limits the offense may have been committed to the same effect as though such offense were made offense against the municipality by separate ordinance in each case.”

Therefore, as of November 20, 2007, the date of the City’s decision/action, it would have been a misdemeanor under state law and, by action of law, a criminal offense against the municipality for Vineyard Investments to conduct the business which they proposed to conduct in the structure for which the building permit was sought.

Since the City had actual knowledge of the purpose for which the structure was to be used, and that use was admittedly unlawful at the time of the City’s action, it defies logic to suggest that the City had a legal obligation to issue a building permit in furtherance of a business venture which, at the time of the City’s action, was unlawful.

Section 17-1-19 of the Mississippi Code supports the City’s position. That section states, in part, that “In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted or maintained, or any building, structure, or land, is used in violation of the zoning law *or of any ordinance or other regulation* made under authority conferred hereby, the proper local authorities of any county or municipality, in addition to other remedies, may institute any appropriate action or proceedings, *to prevent such unlawful erection*, construction reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct, or abate such violation, *to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business, or use in or about such premises.*”(Emphasis added).

The minutes of the November 20 Board of Alderman meeting reflect that Vineyard was in the process of applying for a package retailer's permit and that a hearing was pending, but the permit had not been issued as of November 20 (R.12).

The Mississippi courts have never given any indication that a municipality is required to issue a building permit for a structure which is to be used for an unlawful or unauthorized activity.

In Mayor and Board of Aldermen of the City of Pontotoc v. White, 93 So.2d 852, 856 (Miss. 1957), the Supreme Court held that the City of Pontotoc did not have the authority to grant a building permit which was violative of the city's zoning ordinance: "[T]he record from the Mayor and Board of Aldermen of the City showed that, on its face, the granting of the permit was violative of the zoning ordinance. Hence the court reached the right result in declaring the permit void and in ordering its denial."

In Delta Const. Co. of Jackson v. City of Pascagoula, 278 So.2d 436 (Miss. 1973), the court held that the City properly revoked a building permit mistakenly issued for a structure to be used in violation of the city's zoning ordinance.

Even the cases cited by the appellant acknowledge that there is no obligation to issue a building permit in violation of city ordinances. In Thompson v. Mayfield, 204 So.2d 878 (Miss. 1967), the court held that the city should have issued the building permit *because* there was no violation of codes or ordinances. In Berry v. Embry, 120 So.2d 165 (Miss. 1960), the court also found that denial of a building permit was inappropriate *because there was no violation of codes or ordinances in the proposed use or construction*.

Contrary to the appellant's argument, that is clearly not the case here. As noted above, the proposed use of the site as a liquor store was unlawful at the time the Board acted upon the building permit, and that is the only point in time which is relevant to disposition of this appeal.

If the appellant Vineyard wants to file a new application for a building permit based upon changed circumstances since the City's decision of November 20, it is free to do so and the City will be required to make a decision based upon all of the circumstances which may have changed in the interim period.

However, the standard which this Court must utilize in reaching a decision on the present appeal is whether the City's action of November 20, 2007, was "unsupported by substantial evidence; arbitrary or capricious; beyond the municipality's scope or powers; or violated the constitutional or statutory rights of the aggrieved party" based on the facts as they existed on November 20, 2007. Vineyard makes reference on Page 16 of the Appellant's brief about a ruling of the Mississippi State Tax Commission dated December 18, 2007. That comment should not be considered since (a) there is no evidence of that ruling in the record, and (b) the date of the ruling was subsequent to the date of the Madison board's decision, and therefore should not be considered in determining whether the action of the Madison Board was appropriate. Falco Lime, Inc. v. the Mayor and Aldermen of the City of Vicksburg, 836 So.2d 711, 716 (Miss.2002) ("Because the action is an appeal, the circuit court sits only as an appellate court, and may consider no evidence presented outside the bill of exceptions . . . this rule has been in place for over 150 years . . ."); Moore v. White, 137 So. 99 (Miss.1931) ("The Supreme Court has no original jurisdiction upon appeal, and has

therefore no power to consider upon the merits any material fact or facts not brought before the trial court. . . .”).

Clearly, based on statutory law and judicial precedent as cited above, the City was within its rights to deny a building permit to the appellant based upon the fact that, as of November 20, 2006, the proposed use would have violated state law and, by operation of statute, constituted a criminal offense against the municipality.

Could the City have considered other options, such as issuing the building permit subject to the condition that the appellant obtain the necessary permit before a certificate of occupancy was issued? Possibly, but it is not the function of this Court to second guess the City as to which of the options permitted by law the City *might* have followed. As long as the governing body’s decision is “fairly debatable,” an appellate court is without authority to supplant the municipality’s legislative decisions. Fondren North Renaissance v. Mayor and City Council of City of Jackson, 749 So.2d 974 (Miss. 1999).

The City of Madison, Mississippi, was not legally obligated to issue a building permit for a use that, at the time of the Board’s action, would have been a violation of state law and a criminal offense against the municipality. Consequently, the Court should not rule that the City’s action of November 20, 2007, must be reversed under the standard of review which governs this Court’s decisions.

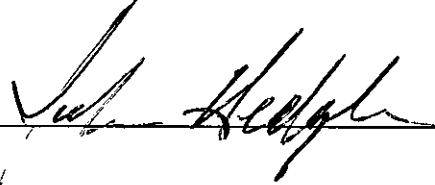
## VII. CONCLUSION

For the reasons set forth above, the City respectfully requests that the Court affirm the decision of the Mayor and Board of Aldermen of the City of Madison in their denial

of the application for a building permit by the appellant, Vineyard Investments, LLC, on November 20, 2007.

THE CITY OF MADISON, MISSISSIPPI

by:



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CERTIFICATE OF SERVICE

I certify that this pleading was mailed to William Feathersen, Jr., Esq. on April 9, 2008 at P.O. Box 1105, Ridgeland, Mississippi 39158-1105 and to Madison County Circuit Judge William E. Chapman, III, P.O. Box 1626, Canton, Mississippi 39046.

