

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**CITY OF HATTIESBURG, MISSISSIPPI**

**APPELLANT**

**VERSUS**

**NO. 2008-CA-1134**

**J.W. McARTHUR and KENNEY  
PROPERTIES, INC.**

**APPELLEES**


**APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY**

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**BRIEF OF APPELLEES**

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**ORAL ARGUMENT REQUESTED**

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## **CERTIFICATE OF INTERESTED PARTIES**

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 Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. J.W. McArthur, 1000 Beverly Hills Road, Hattiesburg, MS, owner of the tract of land that is the subject of this zoning appeal;
2. Kenney Properties, Inc., 701 Exposition Place, Suite 101, Raleigh, NC, proposed purchaser and developer of the land in question;
3. City of Hattiesburg, a municipal corporation;
4. Charles Holt, 914 Beverly Hills Road, Hattiesburg, MS , one of the appellants to the Hattiesburg City Council;
5. Robert Walters, 3608 Rosewood Drive, Hattiesburg, MS, one of the appellants to the Hattiesburg City Council;
6. Hilda Perrott, address unknown, one of the appellants to the Hattiesburg City Council.



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Lawrence C. Gunn, Jr.

### **STATEMENT REGARDING ORAL ARGUMENT**

City of Hattiesburg has already indicated it does not desire oral argument, and the appellees agree that the issue involved in this case is a very simple and straightforward issue that may not require oral argument. However, the appellees also recognize that it is a rare case where some question does not present itself that is not adequately covered in the briefs, and thus oral argument can be helpful to the Court in most cases. For this reason the appellees respectfully request oral argument.

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES .....	-ii-
STATEMENT REGARDING ORAL ARGUMENT .....	-iii-
TABLE OF CONTENTS .....	-iv-
TABLE OF AUTHORITIES .....	-v-
STATEMENT OF THE ISSUE .....	-1-
STATEMENT OF THE CASE .....	-1-
SUMMARY OF THE ARGUMENT .....	-8-
ARGUMENT .....	
<b>A. Rationale for the Circuit Court’s Ruling</b> .....	-9-
<b>B. The “trial <i>de novo</i>” Argument</b> .....	-11-
<b>C. The “spot zoning” Argument</b> .....	-14-
<b>D. City of Hattiesburg’s Argument Concerning Changes and Public Need</b> .....	-15-
CONCLUSION .....	-17-
CERTIFICATE OF SERVICE .....	-18-
APPENDIX (Opinion of Circuit Court) .....	-A1-

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Broadacres, Inc. v. City of Hattiesburg</i> , 489 So.2d 501 (Miss. 1986) .....	-7-
<i>City of Biloxi v. Hilbert</i> , 597 So.2d 1276 (Miss. 1992) .....	-10-
<i>City of Clinton v. Conerly</i> , 509 So.2d 877 (Miss. 1987) .....	-11-
<i>City of Madison v. Shank</i> , 793 So.2d 576 (Miss. 2000) .....	-10-
<i>Fondren North Renaissance v. Mayor and City Council of City of Jackson</i> , 749 So.2d 974 (Miss. 1999) .....	-9-, -10-
<i>Foundation Development v. City of Hattiesburg</i> , Cause No. CI05-0052, Forrest County Circuit Court .....	-4-, -5-, -6-, -8-, -10-, -11-, -15-, -16-
<i>Kuluz v. City of D'Iberville</i> , 890 So.2d 938 (Miss. 2004) .....	-14-
<i>Minor v. City of Indianola</i> , 909 So.2d 146 (Miss. App. 2005) .....	-16-
<i>Perez v. Garden Isle Community Ass'n</i> , 882 So.2d 217 (Miss. 2004) .....	-9-, -10-, -17-

### **STATUTES AND RULES**

M.R.A.P. 28(a)(4) .....	-2-
M.R.A.P. 28(a)(6) .....	-16-

## **STATEMENT OF THE ISSUE**

The Hattiesburg City Council denied the appellees' zoning request, and the Circuit court of Forrest County reversed the City Council and ordered the property re-zoned to multifamily. In doing so, the circuit court acknowledged the "fairly debatable" standard of review of municipal bodies' decisions, but found that the lack of evidence to support the City Council's decision rendered the Council's decision arbitrary and capricious. There is only one issue on this appeal, and that is whether the circuit court was correct in ruling that there was no evidence to support the City Council's denial of the zoning petition in question.

## **STATEMENT OF THE CASE**

### **A. Proceedings Before the City and in the Circuit Court**

This zoning appeal began with the filing of a petition under the Hattiesburg Land Development Code to re-zone the property from R1B, single family residential, to R4, multifamily residential. (R. I, pp.16 - R. II, p.209) The zoning petition was filed with the Hattiesburg Planning Department on May 16, 2007, and was considered at a public hearing by the Planning Commission on June 6 (R. II, p.213-214) and again at a recessed hearing on July 5, 2007. (R. II, p.241)

After the Planning Commission recommended the zoning petition be granted, three individuals appealed that decision to the City Council, (R. II, pp.284-7) and the Hattiesburg City Council held a public hearing on August 6. After this public hearing the City Council reversed the Planning Commission's decision and reinstated the zoning to R1B. (R. III, p.391)

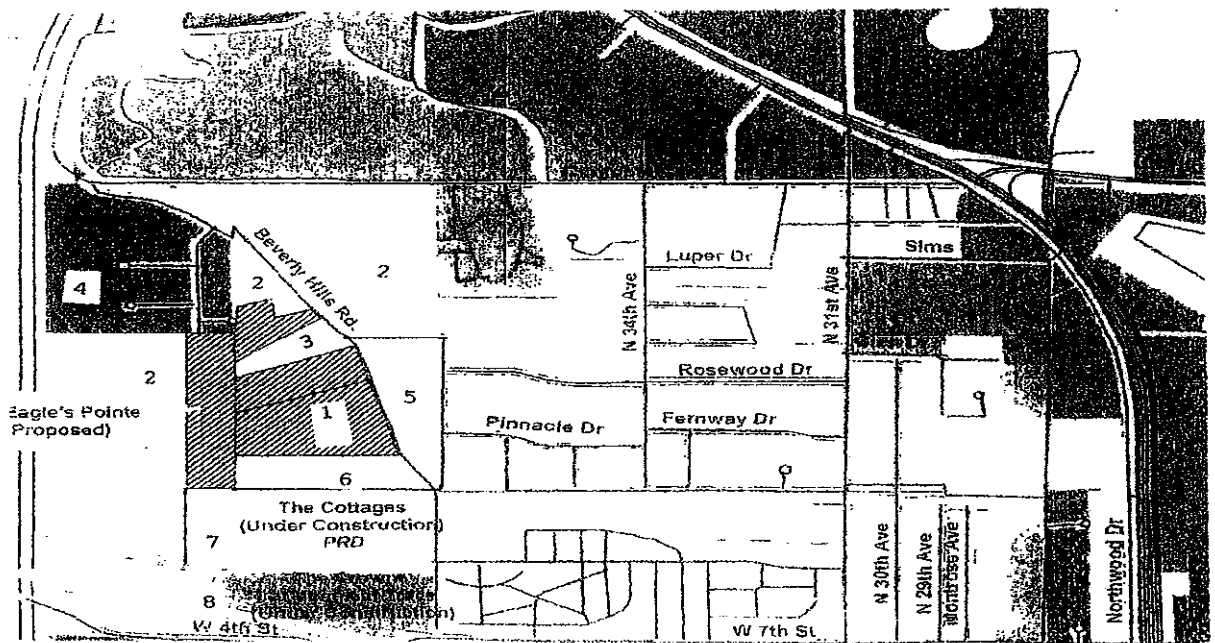
The appellees appealed the City Council's decision to the Circuit Court of Forrest County. After the elected Forrest County Circuit Judge, Robert Helfrich, recused himself, (R. III,

p.397) this Court appointed Honorable Roger T. Clark to preside over this appeal. (R. III, p.398) Judge Clark heard oral argument (he did not conduct a trial, as asserted by the appellants) and on June 11, 2008, rendered his decision ordering the property be re-zoned to R4, ruling that the Hattiesburg City Council decision was arbitrary and capricious. (R. IV, pp.468-472)

### **B. Statement of the Facts**

The statement of facts contained at pages 9-14 of the City's brief is a somewhat unorthodox mode of compliance with M.R.A.P. 28(a)(4), and the appellees take the liberty of summarizing the relevant facts for the Court.

The land that is the subject of this zoning appeal is a 30 acre tract located on the west side of Beverly Hills Road in Hattiesburg. This map, derived from the map in the record at R. I, p.34, shows the land and its relationship to surrounding properties:



1. McArthur property;
2. Property owned by landowners consenting to re-zoning;
3. Perrott property;
4. Plantation Place Apartments;
5. City park;
6. Holt property;
7. The Cottages
8. Foundation Development property

Two parcels of land border Mr. McArthur's land on the north. Plantation Apartments abuts the property at the northwest corner. This tract is zoned R4 multifamily. At the northeast corner of the McArthur property between Plantation Apartments and Beverly Hills Road, and across Beverly Hills Road from the northeastern portion of the property lie tracts of land owned by various landowners who all consented to the re-zoning. Signed consents by these landowners appear in the Record at R. II, pp.216-218.

The R1B (single family residential) zoned land to the west of Mr. McArthur's property is owned by the Clark Estate, which has also consented to the re-zoning. (See R. III, p.394)

Immediately to the south of the property in question is an 8 acre tract owned by Charles Holt, one of the opponents to the re-zoning request. South of the Holt property is The Cottages, a planned residential development currently under construction. The Cottages land is technically zoned R1B, but in reality it is non-traditional single family zoning, i.e., zero lot line or patio homes used for student housing. A portion of The Cottages property also touches the McArthur property at the southwest corner.

Just south of The Cottages is the Foundation Development property which the Forrest County Circuit Court previously ordered to be re-zoned to R3 multifamily in an earlier case. (R. I, pp.134-145)

A pie-shaped piece of property owned by Hulene Perrott protrudes into the McArthur property near the northeast corner. Mrs. Perrott signed a real estate contract with Kenney Properties agreeing to sell her land (R. II, pp. 220-226), and Kenney Properties initially intended to include it within the overall project. Mrs. Perrott, however, had a change of heart and asked to be relieved from her contract. Kenney Properties agreed to cancel the contract, and Mrs. Perrott agreed not to oppose the zoning request.



Other opponents to the re-zoning were the same group of opponents who opposed the *Foundation Development* re-zoning case, residents of the Highlands neighborhood. Their residences do not border the McArthur property. The Highlands neighborhood begins a block or so to the east of Beverly Hills Road and is separated from the property in question by a city park and by the parcels of land owned by other owners who have consented to the re-zoning. It is questionable whether most of the residents of the Highlands neighborhood can even see the McArthur property from their homes due to this separation between the neighborhood and Mr. McArthur's property on the other side of Beverly Hills Road.

The University of Southern Mississippi campus is approximately ½ mile to the southeast of the property in question. The Hattiesburg Convention Center and numerous motels and other business establishments are less than a mile to the north. Apartments, service stations, restaurants, and other business establishments are located along West 4<sup>th</sup> Street, approximately 1/4 mile to the south of the property in question. Interstate 59 is less than 1/4 mile to the west of the property. (R. I, p.35)

This case is not the first time a developer has taken City of Hattiesburg to court over zoning issues on Beverly Hills Road. In 2005, in *Foundation Development v. City of Hattiesburg*, Cause No. CI05-0052, Forrest County Circuit Court, Judge Clark, also sitting in that case by designation, ruled that City of Hattiesburg had acted arbitrarily and capriciously in denying a requested zoning change at the corner of Beverly Hills Road and West 7<sup>th</sup> Street, a few hundred feet south of the McArthur property. (See Judge Clark's opinion at R. I, pp.134-145) In *Foundation Development* the circuit court found that the character of the neighborhood had changed from single family to multifamily and that there was a public need for additional student housing in the area in question. There are numerous similarities between *Foundation*

*Development* and this case. The land is on the same street. It is in the same general neighborhood. The opponents of the requested zoning change were the same in each instance. The evidence presented by the landowners in *Foundation Development*, which was ignored by the City Council in that case, is evidence of the same sort and character as the evidence Mr. McArthur and Kenney Properties presented in this case.

Consistent with the requirements of Hattiesburg's land development code, Mr. McArthur and Kenney Properties filed a petition for re-zoning of the property from its current zoning of R1B, Single Family Residential, to R4, Multifamily Residential. (R. I, p.15-31) The petition was filed with the Hattiesburg Planning Department on May 16, 2007, and was scheduled for public hearing before the Hattiesburg Planning Commission on June 6. (R. II, p.241)

In the interim the project was reviewed by the Site Plan Review Committee of the City, consisting of various public officials from the police department, the fire department, city engineer's office, building code enforcement, etc. The Site Plan Review Committee approved the site plan and offered extensive comments and suggestions to assist Kenney Properties in its compliance with various city requirements. (R. III, pp.306-308).

The city engineer, Bennie Sellers, participated in the site plan review process and gave his department's approval to the proposed project and the re-zoning. He was a proponent of the appellees' zoning petition at the Planning Commission meeting. (R. II, p.213)

The staff of Hattiesburg's Planning Department studied the application for re-zoning carefully and ultimately gave its recommendation that the rezoning request be granted.<sup>1</sup> (R. III, p.305)

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<sup>1</sup>The City disputes this fact. The controversy surrounding the Planning Department position is discussed later in this brief.

On June 6 the Hattiesburg Planning Commission met to consider the request for re-zoning. No decision was made by the Planning Commission at the June 6 hearing, because the staff of the Planning Department had failed to deliver copies of the application and supporting material to the individual members of the Planning Commission before the meeting, and several of the members wanted more time to read all the information before voting. Therefore, the request was tabled to the next hearing.

At the next month's hearing, July 5, the Planning Commission found that there was a public need for the type of apartments being proposed by the appellants and that there had been a change in the character of the neighborhood, two findings that coincide with the previous ruling of the court in *Foundation Development*. (R. II, p.241)

Evidence presented by Kenney Properties at both the June 6 and July 5 hearings was substantial. This evidence included:

- The petition and various attachments; (R. I, pp.16-30)
- The current official zoning map of the area of the city in question; (R. I, p.34)
- A land use map showing land usage on the West 4<sup>th</sup> Street corridor; (R. I, p.35)
- An informational packet by Kenney Properties showing the types of projects Kenney has built in other college towns in the Southeast; (R. I, pp. 36-134)
- A copy of this Court's opinion from *Foundation Development*; (R. I, p.134-145)
- A letter of need by the President and Marketing Director of Kenney Real Estate Services summarizing their marketing research and the need for additional student housing in Hattiesburg; (R. I, p.146 - R. II, p.161)
- A Hattiesburg area apartment survey that was conducted by the City Council in connection with the *Foundation Development* case two years earlier; (R. II, pp.162-

3); the entire document is on a CD on file at the office of the city clerk)

- Excerpts from various news articles and other public information concerning the growth of University of Southern Mississippi and the need for additional housing in Hattiesburg and across the nation both now and into the next decade; (R. II, pp.164-181)
- A traffic impact analysis done by Neel-Schaffer Engineers, showing that Kenney Properties' project, with planned changes to the layout of Beverly Hills Road and the intersection at West 4<sup>th</sup> Street, would not adversely impact traffic flow and would actually improve traffic conditions in some areas; (R. II, pp.182-209)
- A report from Patricia Brantley, a land use planner at Neel-Schaffer, describing that the zoning change was consistent with the overall comprehensive land use plan of the city and the general pattern of growth in the area. (R. II, pp.248-257)

Kenney Properties' evidence was not challenged in any real factual sense. Various persons in the neighborhood spoke and expressed their disapproval to the zoning request, but offered no real evidence against the petition.

The Planning Commission voted 4-1 in favor of the requested re-zoning, based in part on the recommendation of the Hattiesburg Planning Department staff. The Planning Commission found that (1) there was a public need for additional multifamily housing in the area, and (2) that there has been a material change in the neighborhood and the area surrounding the property in question. (R. II, p.241) These two findings are prerequisite to a zoning change, *Broadacres, Inc. v. City of Hattiesburg*, 489 So.2d 501 (Miss. 1986).

Recommendations of the Hattiesburg Planning Commission can be appealed to the City Council by aggrieved persons, and three persons filed such an appeal. Charles Holt, owner of the

property to the south of the affected property, was one of the appellants, (R. II, p.286) and a second appellant was Robert Walters, (R. II, p.287) a resident of the Highlands neighborhood, the same group of people who opposed the *Foundation Development* case in 2005 in the same circuit court. A third appellant was Hilda Perrott, the daughter of the landowner who had initially agreed to sell her property to Kenney Properties to be included in the apartment project. (R. II, p.285)

The matter was heard publicly by the Hattiesburg City Council on August 6. All of the evidence from the Planning Commission proceedings was reintroduced before the City Council, and Kenney additionally submitted a letter from the Neel-Schaffer engineer who had conducted the traffic impact analysis (R. III, p.392), clarifying questions that some of the council members apparently had about the level of traffic service if the proposed project were constructed.

Minutes of the City Council meeting show that City Council members were for the most part unconcerned with the evidence that had been introduced at the Planning Commission level. Rather, council members seemed more interested in pacifying members of the Highlands neighborhood who packed the hearing room, who made speeches, and who applauded when the City Council overruled the planning commission recommendation and denied the zoning request in issue. (See Minutes of R II, pp.289-300 and R. III, pp. 390-391)

### **SUMMARY OF THE ARGUMENT**

**The Circuit Court Correctly Ruled that there was a Lack of Evidence to Support the City's Denial of the Zoning Petition in Question, and the City Council Decision was thus Arbitrary and Capricious as a Matter of Law.**

Ordinarily a reviewing court should give deference to decisions of municipal governing bodies such as that of the Hattiesburg City Council in this case.

However, an important qualification of the general rule is that a court should reverse a city council decision when that decision is not based upon any competent or credible evidence.

Lack of an evidentiary basis for a city council decision renders that decision arbitrary and capricious as a matter of law. See *Perez v. Garden Isle Community Ass'n*, 882 So.2d 217, 219 (Miss. 2004) and *Fondren North Renaissance v. Mayor and City Council of City of Jackson*, 749 So.2d 974, 977 (Miss. 1999)

Evidence presented by the appellees before the Planning Commission and the City Council included land use data, a report by an expert urban planner attesting to change in the character of the neighborhood, evidence that had been offered in connection with an earlier zoning case on a nearby parcel of property, an engineering traffic analysis, and an in-house marketing survey together with related information showing a public need for high-end student apartments in the area near University of Southern Mississippi.

All of the evidence offered by the appellees was unchallenged and unrefuted. The sole opposition offered by opponents to the zoning request was in the form of speeches and political influence. The opponents offered no evidence and in their brief to this Court simply try to argue against the persuasive nature of the appellees' evidence. None of their arguments, however, contradict the volume of evidence presented to the Planning Commission and the City Council by the appellees, and the ruling of the circuit court should be affirmed and the property ordered rezoned to R4 Multifamily.

### **ARGUMENT**

**The Circuit Court Correctly Ruled that there was a Lack of Evidence to Support the City's Denial of the Zoning Petition in Question, and the City Council Decision was thus Arbitrary and Capricious as a Matter of Law.**

#### **A. Rationale for the Circuit Court's Ruling**

The circuit court correctly stated the appropriate standard of review. The standard of review in zoning appeals is whether a decision of the local governing authority "was arbitrary or

capricious or whether it was supported by substantial evidence,” citing *Perez v. Garden Isle Community Ass’n*, 882 So.2d 217, 219 (Miss. 2004).

The circuit court also correctly noted that applicants for rezoning, such as the appellees, carry the burden of establishing that either there is a mistake in the original zoning or that the character of the neighborhood has changed to such an extent as to justify rezoning and that a public need supports the request for rezoning, citing *City of Madison v. Shank*, 793 So.2d 576, 578 (Miss. 2000), *Fondren North Renaissance v. Mayor and City Council of City of Jackson*, 749 So.2d 974, 977 (Miss. 1999), and *City of Biloxi v. Hilbert*, 597 So.2d 1276, 1280 (Miss. 1992).

The circuit court’s opinion in this case carefully analyzes the evidence that was presented before the City Council. Judge Clark was aware of and cited the legal authorities mentioned above. He was keenly aware of his earlier decision in the *Foundation Development* case, which involved property near to that owned by Mr. McArthur. He recognized that the protestors in that case are the same people who are protesting in this case. He knew that the same city council, governed by the same political considerations, had denied multifamily rezoning in that case, that he had ruled that the City Council decision there was arbitrary and capricious, and he knew that the City Council had not appealed his earlier decision. (See opinion at App. 1-5 of this brief; also R. IV, pp.468-472)

The evidence in this case included evidence similar to that in *Foundation Development* and two additional significant facts. First, since *Foundation Development* was decided, the property involved in that case has actually been developed into multifamily apartments catering to USM students. Second, a tract of land between *Foundation Development* and the McArthur property now contains a zero lot line, patio home planned residential development likewise

catering to USM students. In other words, the area in question has changed to multifamily usage even more now than was the case in *Foundation Development*.

In addition to what had been before the court in *Foundation Development*, the appellees here presented a large volume of evidence all supporting the petition for rezoning. (R. I, p.16- R. II, p.257) None of the appellees' evidence was seriously challenged. The City Council hearing was very little more than a group of politicians playing to the crowd of protestors who packed the city hall and who presented a petition signed by 228 potentially hostile voters. (R. III, pp.373-389) Judge Clark recognized all of these considerations in his opinion, recognized that on occasion courts of law have to correct politically motivated decisions by municipal governing bodies, and he made the right decision. His opinion itself stands as a persuasive argument for the position of the appellees in this appeal.

The law respecting review of zoning appeals is well settled. Ordinarily great deference is given by a reviewing court to decisions of municipal bodies. However, in those instances, such as this one, where the City Council decision is wholly unsupported by any credible evidence, the lack of evidentiary foundation renders the zoning body's decision arbitrary and capricious, and in such a case it is the duty of a reviewing court to reverse the decision of the City Council. *City of Clinton v. Conerly*, 509 So.2d 877, 884 (Miss. 1987)

The City's brief tacitly recognizes that the record contains no evidence at all refuting that offered by Kenney Properties and Mr. McArthur, so the City in this Court is left to simply criticize the quality of the appellees' evidence. First, though, the City's brief makes two curious arguments.

#### **B. The "trial *de novo*" Argument**

At pages 16-22 of its brief the City takes Judge Clark to task



for ostensibly “conducting a trial *de novo*,” and considering extra evidence. The truth is there was no trial. Judge Clark held oral argument. He also conducted a hearing on the appellees’ motion to correct the record. But there was no trial and no new evidence. (See Transcript, pp.1-70)

At the Planning Commission meetings the professional urban planning staff of the City made a recommendation that the zoning petition be granted. The fact of this positive recommendation, however, does not appear in the minutes of the Planning Commission, nor does it appear in the minutes of the City Council, and the appellees thought the fact of the positive recommendation was significant enough that it should be part of the record. They thus filed a motion to supplement the record to include the fact of the planning department’s positive recommendation. (See motion at R. III, p.424, pp.428-435)

The motion was, to our surprise, strenuously opposed by the City. Members of the City Council were subpoenaed, placed under oath, questioned, and to a man denied that the city planner had made any such recommendation. The city planner herself, Lisa Reid, obviously under fire and at odds with members of the City Council at this point, likewise denied that she made a recommendation in this case, and she even went so far as to deny that her department routinely recommends zoning petitions be accepted or denied. (Tr. 23-28)

The appellees’ attorney learned at this hearing that there was a tape recording of a part of the City Council meeting, and was able to have a portion of the City Council dialog transcribed after the hearing. The transcript proves that the city planner in fact made a positive recommendation and even that recommendations are made in every case, contrary to what she testified to at the hearing and contrary to the testimony of the Hattiesburg city officials.

Mrs. Reid’s testimony at the hearing of the motion to correct the record was this:

**Q.** And do you recall at that planning commission meeting in June of last year that Blake Lewis asked you what's the staff recommendation?

**A.** I really do not. We don't typically give recommendations, and I honestly do not remember that. Could have, I just don't remember it. (Tr. 26)

The tape recording of the City Council meeting shows something different in a dialog between members of the council and Ms .Reid:

**MR. NAYLOR:** Is that something we're doing now, we're recommending approval for certain items that come before us—

**MS. REID:** For all items the staff makes a recommendation.

**MR. NAYLOR:** Mayor, are you aware we're doing that now, as well?

**MAYOR:** I believe the staff have always done that.

**MR. NAYLOR:** I was not aware that we're actually recommending approval of an item—

**MAYOR:** I think they just make a recommendation as to—

**MS. REID:** Lay out the pros and cons, either way, or if the — have been— (can't hear)

**MS. DELGADO:** Pros and cons are different from recommendations. You have pros and you have—

**MS. REID:** We address the criteria, the pros and cons of the criteria, and then make a recommendation. (See attachment to Motion to Reconsider at R. IV, pp.462-7)

Judge Clark entered his opinion reversing the City Council action without addressing the appellees' supplemental motion to correct the record, and the entire flap would be moot now if the City had not devoted 6 pages of its brief to this Court arguing that this motion hearing was a "trial *de novo*." It should be apparent from the recording of the statements made by Ms. Reid at

the City Council meeting (R. IV, pp.466-7) and from the text of the staff recommendation itself (R. III, p.305) that the planning department certainly made a recommendation that Kenney Properties and Mr. McArthur's petition be granted.

We would be remiss if we did not point out to the Court that the recommendation of the planning department is not outcome-determinative of this appeal. The decision that is being reviewed is that of the governing authority of Hattiesburg, the City Council, not that of the planning department. Had not the City of Hattiesburg made such a big issue over this point, we would not even mention it. But we think it is significant that the only professional city planner in the administration of the City of Hattiesburg initially supported appellees' petition for rezoning, and the elected politicians went the other way and then went so far as to deny under oath that the city planner had made her positive recommendation.

This point demonstrates the City Council's attitude and lack of appreciation of zoning laws. (See Tr. 12, lines 24-27; Tr. 21, lines 6-9, where two members of the City Council confessed to not knowing the legal standard for considering a zoning change.) The fact that a motion hearing was held on the motion to correct the record does not constitute reversible error and does not mean that Judge Clark conducted a "trial *de novo*."

### **C. The "spot zoning" Argument**

The "spot zoning [sic]" argument made by City of Hattiesburg at pages 25-29 of its brief is strange. The appellees agree with the general proposition that it is impermissible to "spot zone" a piece of land, that is to amend the zoning ordinance to reclassify a tract out of harmony with the surrounding pieces of property. See *Kuluz v. City of D'Iberville*, 890 So.2d 938, 944-5 (Miss. 2004)

The rezoning of the McArthur property is manifestly not “spot zoning.” Indeed, there are apartments to the north of the McArthur property and apartments to the south. Virtually the entire west side of Beverly Hills Road is multifamily zoning. An argument can be made that to leave the McArthur property zoned single family would more nearly constitute “spot zoning” than granting the change to multifamily, as the circuit court did in this case.

The more important analysis, however, recognized by the circuit judge in his opinion, is that the legal standard for rezoning has been met. The volume of evidence presented by McArthur and Kenney Properties establishes that the character of the neighborhood has changed substantially from the time the property was first zoned single family many years ago. Numerous apartment projects and other commercial and business establishments have been developed in recent years, not only on Beverly Hills Road, but in the nearby West 7<sup>th</sup> and West 4<sup>th</sup> Street corridors as well. The extensive evidence presented by Kenney Properties in this case establishes the changed character of the neighborhood. Spot zoning is not an issue.

#### **D. City of Hattiesburg’s Argument Concerning Change and Public Need**

Beginning on page 29 of its brief the City of Hattiesburg attempts to show why the evidence presented by Mr. McArthur and Kenney Properties is not strong enough to support the requested zoning change. It must be borne in mind that City of Hattiesburg and the three opponents presented no evidence at all opposing the zoning change, and this entire section of the City’s brief is simply an effort to try to reinterpret the evidence presented by the appellees.

Change in character of the neighborhood, we think, has been overwhelmingly established. First there was the report of Mr. Lustek and the other evidence that was presented in connection with the *Foundation Development* case. This evidence was expanded upon and amplified to account for more recent rezonings in the area in the report of Patty Brantley, a Certified Urban

Planner, employed by Neel-Schaffer Engineers. (R. II, pp.248-257) Her report speaks for itself and identifies eight more zoning changes supporting her opinion that this area of the City can no longer be considered a single family residential area. The multifamily development as a result of the *Foundation Development* case makes the present case even more compelling than before *Foundation Development* was decided. Judge Clark carefully analyzed all this evidence and recognized that the appellees met the burden of establishing this element of a *prima facie* case of rezoning.

In attempting to belittle the appellees' evidence concerning the issue of public need, the City makes repeated reference to a set of publications known as "Fact Books." These "Fact Books" are referred to in footnotes at pages 34-37 of the City's brief, but no such publications appear in the record of this case. Because those documents do not appear in the record of this case, we suggest that it would be improper for the Court to give any credence to this part of the City's brief at pages 34-37. Matters not contained within the record on appeal should not be considered. M.R.A.P. 28(a)(6); *Minor v. City of Indianola*, 909 So.2d 146 (Miss. App. 2005)

Included in the record are portions of USM's website and other news media excerpts (R. II, pp.164-181) which reflect that it is USM's strategic plan to increase its enrollment to 20,000 students. There are only 4,000 dorm rooms on the USM campus. Sixteen thousand USM college students must be housed somewhere in Hattiesburg. William Carey University also has students in Hattiesburg, and there are several nearby community colleges. While we acknowledge that a significant percentage of these students already live in the area and commute to class, nonetheless, they must be housed somewhere, and the evidence presented by Kenney Properties and Mr. McArthur firmly establishes the need for additional student housing in the Hattiesburg area and, in particular, the area of the city near USM. Judge Clark carefully analyzed

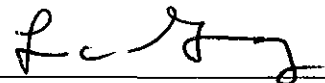
the evidence and came to this conclusion, and his opinion should be affirmed, since there is no evidence contradicting it.

Lastly, the City contends that the traffic engineering study commissioned by Kenney Properties (R. II, pp.182-209), instead of supporting Kenney Properties and McArthur's side of the case, somehow supports the City's side. It is curious why the City contends this. Because there was some question about interpretation of the Neel-Schaffer Engineering traffic study, the author of that study, Michael Essary, drafted a letter clarifying and summarizing the report. That letter is in the record at R. III, p.392. Mr. Essary makes clear that his report proves that increased traffic will not be an undue burden and that, in fact, with the planned improvements and widening of Beverly Hills Road, made possible in part due to Kenney Properties' offer to donate a sufficient amount of land that the road can be widened, the level of traffic service on the road will actually be better than in its present state. How the City can contend this traffic report proves the opposite of what it actually shows, is something of a mystery.

In summary, all of the evidence offered by the appellees firmly establishes the standard announced by this Court in *Perez v. Garden Isle* and other decisions, that a city council decision that is unsupported by evidence is arbitrary and capricious as a matter of law and must be reversed.

### CONCLUSION

For the reasons set forth above, the appellees request that this Court affirm the decision of the Circuit Court of Forrest County, which ruled that the City Council denial of the appellees' zoning request was arbitrary and capricious.



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Lawrence C. Gunn, Jr.  
Attorney for Appellees

**CERTIFICATE OF SERVICE**

I certify that I have caused to be mailed via United States Postal Service, first-class, postage prepaid, the original and three copies of BRIEF OF APPELLEES, along with an electronic disk of same for filing to:

Ms. Betty Sephton, Clerk  
Mississippi Supreme Court  
Mississippi Supreme Court Building  
450 High Street  
Jackson, Mississippi 39201

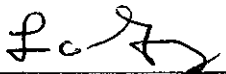
I have caused to be mailed by United States Mail, postage prepaid, a copy of above referenced Brief of Appellees to:

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Honorable Roger T. Clark  
Circuit Court Judge  
P.O. Box 1461  
Gulfport, MS 39502

THIS 8 day of May, 2009.

  
\_\_\_\_\_  
Lawrence C. Gunn, Jr.