

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF CASES, STATUTES AND OTHER RELATED AUTHORITIES	2
REPLY TO ARGUMENTS	3
Whether Circuit Court Judge Erred in Applying Trial <i>de novo</i> ?	3
Whether Zoning Request was Fairly Debatable?	5
Whether A Substantial Change in the Character of the Neighborhood Had Occurred?	5
Whether Public Need was Proven for the Zoning Change?	5
Whether Rezoning of Subject Property was Spot Zoning?	12
General Observations	13
CONCLUSION	16

## **TABLE OF CASES, STATUTES AND OTHER CITED AUTHORITIES**

### **Cases Cited:**

<i>Childs v. Hancock County Board of Supervisors</i> , 1 So.3d 855 (Miss. 2009)	6
<i>Town of Florence v. Sea Lands, Ltd.</i> , 759 So.2d 1221 (Miss. 2000)	6

## REPLY TO ARGUMENTS

### **I. Whether the Circuit Court Judge erred in applying the wrong standard of review by conducting a trial *de novo* and rendering a decision which improperly substituted its opinion for the proper legislative decision of the Hattiesburg City Council?**

This “flap” was not presented by the City of Hattiesburg to obfuscate other issues nor as a subterfuge. The reason for raising this issue are as follows:

1. Counsel for McArthur attempted to amend the record with a motion for a hearing when this issue could have been argued, purely, on the content of the record without the need of an evidentiary hearing. The so-called “recommendation” of the planning staff is part of the part of the record. (R. 305)
2. Counsel for McArthur referenced that he had “the clerk of the Council to burn a CD with regard to that proceeding . . . .” (Tr. 7) The “proceeding” in question is the public hearing of the McArthur request before the City Council of Hattiesburg.
3. The written “recommendation” is in the record, but somehow the CD which McArthur acquired from the City of Hattiesburg is not. It would appear that this CD and a transcription of it should have been part of the record on appeal to the Forrest County Circuit Court. Had the lower appellate court record been proper and complete, there would have been no need for a motion to elicit additional evidence which would not have been presented before the City Council at its public hearing.
4. It appears the matter may be moot because the lower court overruled the motion, but the additional evidence was still presented when it should not have been.
5. McArthur properly notes that any “recommendation” of the planning staff “is not outcome-determinative of this appeal.” In fact, neither the City of Hattiesburg

Planning Commission nor the City Council of Hattiesburg is bound by a “recommendation” of the planning staff, if, indeed, one was ever given.

6. For not wanting to “even mention it, “ counsel for McArthur, in its brief, uses the evidence presented at that hearing to castigate “the City Council’s attitude and lack of appreciation of zoning laws. (. . . where two members of the City Council confessed to not knowing the legal standard for considering zoning change.)” It would be admirable if every elected official knew every “legal standard” with which he or she would be faced during their tenures in office, but that expectation is unreasonable if not absurd. That is why state, county and municipal bodies hire legal counsel to assist their elected officials.
7. There is no way to know whether any harm may have come from this hearing, but the record in this proceeding, the transcript of the motion hearing and even McArthur’s brief in this appeal are replete with references by McArthur that the Hattiesburg Planning Department “gave its recommendation that the rezoning request be granted.” It appears that these protestations are based, in part, on this hearing.

It may be well to say this much ado about nothing, but it is difficult to believe this when so much of the efforts of McArthur in this appeal were devoted to this position. These are the reasons why such hearings as this should not occur beyond the time when the public hearings before legislative bodies were held.

**II. Whether the decision of the City Council of Hattiesburg, Mississippi was fairly debatable with respect to denying the zoning request of the Appellees?**

**III. Whether McArthur/Kenney met their burden of proof in showing a substantial change in the character of the neighborhood surrounding the subject property had occurred, and that it was supported by substantial evidence sufficient to negate the rezoning issue being fairly debatable?**

**IV. Whether public need was proven by McArthur/Kenney by clear and convincing evidence sufficient to negate the rezoning issue being fairly debatable?**

**V. Whether rezoning the subject property was spot zoning thereby invalidating the zoning change made by the circuit court?**

**A. Fairly Debatable.**

There is little doubt, after examining the record in this case and reviewing McArthur's brief, that the most substantive issue of this case is whether (1) substantial change in the character of the neighborhood and (2) existence of public need as presented before the City of Council of Hattiesburg were "fairly debatable." Simply stating the various parts of this legal principle in a court opinion or a brief does not attain to the level proof required if the evidence and facts of the case do not support them. The same could be said for those who simply say there has been a change in the character of the neighborhood and there is public need for one more zoning change. Stating the legal standard does not, in and of itself, make those statements true if the evidence and facts do not support them. This is especially true if these underlying issues are "fairly debatable" when presented to the legislative body responsible for making the ultimate decision.

The lower appellate court in this case concluded that the decision of the City Council of Hattiesburg was "arbitrary or capricious," and therefore proceeded to state the evidence of change and public need that supported the McArthur appeal. (R . 460-472) The lower court concluded, somewhat summarily, at the end of its opinion that these issues before the City Council of Hattiesburg were "not fairly debatable." If these matters are "fairly debatable," then they cannot be

arbitrary and capricious. “‘Fairly debatable’ is the antithesis of arbitrary and capricious.” *Town of Florence v. Sea Lands, Ltd.*, 759 So.2d 1221, 1223 (Miss. 2000) The Mississippi Supreme Court has noted that it is not the responsibility of our state courts to substitute their judgment over that of the wisdom and sound judgment of the local legislative bodies. *Childs v. Hancock Count Board of Supervisors*, 1 So.3d 855, 859 (Miss. 2009)

The lower appellate court noted the following evidence supporting “changes” in the neighborhood:

1. The report submitted by Ms. Patricia Brantley which “piggy-backed” on the report of Mr. Joseph Lustek in the *Foundation Development* case decided by this same court in 2005. (R. 470) The City of Hattiesburg pointed out in its earlier brief some of the analytical problems of these two reports. The fact that there were 16 zoning changes in 15-year period over an area covering hundreds of, if not more than a thousand, acres and a linear distance east and west along West 4<sup>th</sup> street of nearly 1.75 miles is hardly persuasive. Also, the fact that 9 of these 16 zoning changes presently exist or are under construction as apartment developments (4), single-family developments (2) and vacant land (3) does little to demonstrate substantial change and even less to remove the issue from being one that is “fairly debatable” before the Hattiesburg City Council.
2. The lower court mentioned that *Foundation Development* project was completed and the single-family development south of the McArthur property was completed or nearing completion. (R. 470) The latter project is closer to the McArthur property than the former. Again, this hardly demonstrates substantial change in the character of the neighborhood which is generally zoned for single-family development..

3. The lower court relied on the traffic analysis presented by Neel-Schaffer, Inc., in which the report (R. 182-209) and the follow-up letter from their engineer (R. 392) both assert that there will be a considerable increase in traffic in the area and, especially, two intersections on West 4<sup>th</sup> Street and West 7<sup>th</sup> Street as a result of the proposed development and the other proposed developments in the area already approved for the development of apartments. Of course, the engineers noted that this increase in traffic might be mitigated with the help of the City of Hattiesburg in signalization and street changes. In the public hearing before the City Council, the issue, among others, of traffic congestion was raised. Based upon the engineering report, this would appear to be a very valid concern for the City Council of Hattiesburg. Finally, it must be noted that this engineering report only dealt with traffic flows they existed at the time of the study with the addition of traffic from apartment projects already approved in the area when they are completed. This seems to ignore, rather significantly, the ever-increasing traffic flows and congestion generated by movement patterns of travelers through the area whose points of origin and destination are outside the area in question.

Much has been stated and written by McArthur and referenced by the lower court that this evidence was not refuted by the City of Hattiesburg or other objectors to the original request. These issues were raised by the objectors at the public hearing and by the City Council of Hattiesburg at the public hearing. One might question what refutation is required by the City of Hattiesburg when your special land use reports show no substantial change over an extended period of time and an immense area of land and many of the changes are nowhere in proximity to the property of McArthur; the fact that an apartment project and a single-family development is under construction

or completed within 400-800 feet of the subject property and thereby are satisfying, in large part, any public need which might have existed in 2005; and a traffic analysis report which states there will definitely be an increase in traffic as a result of the proposed apartment development on the McArthur property. The Hattiesburg City Council's knowledge of its city, its sub-areas and its current development problems is extremely important when it considers problems associated with zoning request.

This evidence of change simply reinforces the City of Hattiesburg's concerns for this area with respect to increased traffic congestion, density of development, whether public need is already being filled by the apartment projects and single-family projects being developed in the area. McArthur's "evidence" appears to do a sufficiently good job of demonstrating that the issue of substantial change in the character of the neighborhood was a fairly debatable issue before the City Council of Hattiesburg. In a similar, but yet opposite, respect, the lower appellate court never mentioned the complaints of the objectors to this zoning request. The 228 citizens and residents of Hattiesburg in this area deserve the right to have their concerns regarding this development heard and considered. Their opinions and observations are every bit as valuable, if not more so, than the purported "evidence" presented by McArthur. Because they may not be able to employ expensive consultants to do studies for them does not diminish the value of the opinions, objections and testimony of local citizens residing in the area of the subject property.

With respect to the existence of public need, the lower appellate court found that the following items presented by McArthur established clear and convincing evidence of public need thereby removing this issue from being fairly debatable:

1. The lower court noted McArthur presented a "marketing study" referencing "a high occupancy rate for student housing and that the need for student housing will increase



over the next few years.” (R. 471) There was no “marketing study” presented by McArthur that was in the record. However, a “Letter of Need” was presented by Kenney Properties on behalf of the McArthur request. (R. 146-161) This document hardly suffices as a “marketing study.” It is a self-serving document in which one paragraph references a “recent market survey.” (R. 146) There are no citations as to the author of the “survey,” when it was specifically completed, what its parameters were or, for that matter, anything else of substance about the “survey.” The vast majority of the content of this “Letter of Need” is promotional information for the developer of this apartment complex and highly generalized, unsubstantiated statements about such items as tax base, storm water runoff and the City of Hattiesburg being able to help with the anticipated traffic increase from the proposed development. The incredible lack of substance in this document renders it of little, if any, persuasive value on the issue of public need. Certainly, no refutation of this piece of “evidence” is required due to its generality, vacuousness, and promotional tenor.

2. The lower appellate court also found that McArthur presented the Hattiesburg Area Apartment Survey, “commissioned by the City Council in connection with *Foundation Development* case” as showing the need for more student housing in the Hattiesburg area. (R. 471) Unfortunately, this observation of the lower court is not accurate. The only item from that study presented by McArthur was its cover page and a one-page summary of the study’s analysis. (R. 162-163) As pointed out in Hattiesburg’s initial brief, the faulty research assumptions and analysis of the study make the overall study suspect. Further, given the rapid changes in the Hattiesburg

apartment market and the likelihood of the market becoming saturated due to apartment projects under construction and approved for construction, it is quite likely that result of the 2005 apartment study had changed by 2007. Certainly, McArthur could have updated the study to ascertain if there were changes in the apartment market over that 2-year period. They did not do this. The City Council of Hattiesburg and the City's planning staff had great misgivings about this 2005 study and the need to update it. The important concern with this study is that it was not updated to see if its 2005 estimates and projections were still applicable in 2007.

3. The lower appellate court found that a hodge podge of excerpts from newspaper articles and newspaper articles covering a wide variety of nonspecific subjects generally relating to student housing in the Hattiesburg area was clear and convincing evidence of public need for the McArthur apartment project. (R. 164-181) There was nothing of substance in these articles and excerpts, with one exception, which presented substantive data supporting the issue of public need for the McArthur request. However, one of the articles presented by McArthur presented clear and convincing evidence that additional high density apartment projects like that proposed for the McArthur property is definitely not needed at this time for Hattiesburg and especially for the area along West 4<sup>th</sup> Street and West 7<sup>th</sup> Street. (R. 174-176) This article entitled, "Apartment market booming," discusses how five housing projects presently ( June 2006) under construction would add an additional 1,200 apartment units to the market. The data relied upon in this article identifies each housing development and the number of units in each development. When one contemplates the absorption rate of 168 apartment units per year as identified in the

2005 Hattiesburg Area Apartment Survey (R. 163), and compares that to 1,200 units under construction in June 2006, it is incredibly easy to see there was no public need for the apartment project proposed for the McArthur property. At that absorption rate, it would take the City of Hattiesburg until the year 2014 to absorb the units then under construction if no other units were constructed during that time.

4. Finally, the lower appellate court noted as clear and convincing evidence of public need the portion of “USM’s Strategic Plan” presented by McArthur. (R. 178-179) Presumably, this was supposed to be important because the University of Southern Mississippi asserted a goal of increasing enrollment by 5 percent per year. This was merely a goal or estimate, not a fact. In Hattiesburg’s initial brief, it was shown that the university was not even close to maintaining these optimistic projections for all the campuses of USM, much less just for the Hattiesburg campus which typically has several thousand less students than the total student enrollment of the university. The lower court decided it could substitute its judgment for the Hattiesburg City Council on this issue of public need by saying the City Council was concerned about “the entire City of Hattiesburg” instead of the McArthur property. The reality of zoning land for development of apartments requires the Hattiesburg City Council to examine the apartment market for the entire City, and not just the McArthur property. Given the mobility of college students and other residents of the City of Hattiesburg who might desire to rent an apartment, it is ludicrous to assume that public need is only based upon the area around the McArthur property. Several of the items of “evidence” presented by the Kenney Properties referred to the possible desire of the

students from William Carey University renting their units. William Carey University is approximately three to four miles from the McArthur property.

McArthur failed to present clear and convincing evidence of public need for their zoning request for an apartment project. The City of Hattiesburg voiced legitimate concerns about a saturated apartment market, and the lower appellate court peremptorily dismissed it. The lack of clear and convincing evidence of a public need for this zoning request is even more compelling than the lack of clear and convincing evidence of a substantial change in the character of the neighborhood. It is obvious that the lower court chose to substitute its judgment on both issues for that of the Hattiesburg City Council. The facts of this case are not the same as those for the *Foundation Development* case. It is improper to attempt to piggy-back this case on the decision made in the *Foundation Development* case. Even though McArthur would deem them to be same, they are not and never will be.

The City Council of Hattiesburg made a careful and thoughtful decision based upon whether substantial change had occurred and whether a public need for the zoning change existed. They concluded neither had happened.

**B. Spot Zoning.**

The issue of spot zoning was raised because the McArthur zoning request is predicated solely for the benefit of the landowner and the developer, and not based upon what is best for the City of Hattiesburg. Even though counsel for McArthur has decided this zoning request is “manifestly not ‘spot zoning,’” one has to question the reasoning put forth by McArthur. The existence of apartments to north of the proposed development and approximately 800 feet to the south, does not negate the fact that the McArthur property is in the middle of nearly 300 acres of land mostly zoned for single-family development. Further, the lower appellate court’s findings that the

issues of substantial change and public need were not “fairly debatable” does not make such a statement or finding necessarily true. Consequently, if either or both of these issues are fairly debatable, then it could be equally plausible that the issue of spot is a reality.

**C. General Observations.**

**1. *Foundation Development* case is not the same as the McArthur request.**

McArthur is so intent on riding the coattails the *Foundation Development* case that they allege the two cases are almost identical. The problem with this rationale is that the two cases are not the “same” or identical. First, there is a difference of two years in the cases, which time difference certainly could and did affect the apartment market in Hattiesburg. The *Foundation Development* case sought multi-family zoning (R-3) and the McArthur request seeks high density multi-family zoning (R-4). The number of beds proposed for the McArthur project is far greater than that proposed in the *Foundation Development* case. Traffic increase and congestion is not the same. The location of the McArthur property puts it in or near the center of the single-family uses and not at the edge of the area, as may have been true in the *Foundation Development* case. The size of the parcel of land in the McArthur request is considerably larger than that in the *Foundation Development* case. The deleterious impact of the *Foundation Development* case on the neighborhood is much less than that of the McArthur request. Finally, the *Foundation Development* case property is located adjacent to West 4<sup>th</sup> Street, a minor arterial, as well as Beverly Hills Drive, but the McArthur property is over a quarter of a mile north of West 4<sup>th</sup> Street.

**2. Site plan review committee did not approve McArthur’s zoning request.**

McArthur, in its brief, states that the Hattiesburg Site Plan Review Committee “approved their site plan.” (Pg. 5 of McArthur Brief) The report of the Site Plan Review Committee does not in any way state that this committee approved the McArthur plans and zoning request. (R. 306-307)

In fact, the report at the top states "Resubmit." Further, a careful reading of the thirty-three observations and requirements identified by the Site Plan Review Committee in no way suggests the committee approved McArthur's plans. The committee is obviously offering comments and suggestions to the developer needed to procure approval from the Site Plan Review Committee as it would do with any developer on any other project.

**3. City engineer gave approval to McArthur's plans?**

McArthur states that the city engineer gave his department's approval to McArthur's plan of development. Apparently, the city engineer spoke favorably of the request at the Planning Commission Hearing. (R. 213) However, nothing in the record specifically identifies any issue about which the city engineer spoke. Further, the thoughts and opinions of the city engineer are not binding on the Hattiesburg City Council in making its legislative decision.

**4. Recommendation of planning staff.**

McArthur has stated repeatedly that the Hattiesburg planning staff recommended approval of the McArthur zoning request. One need only look at the planning staff's report under the heading "Staff Recommendation" to see what, if anything, they recommended in the way of approval of the McArthur zoning request. (R. 305) Obviously, a quick reading of this section shows that the planning staff made no recommendation whatsoever. The staff did observe that in the general area of the subject property there has been a "trend for request for apartments in the area." The staff also noted that "[s]everal parcels have been rezoned from single family to multi-family . . . ." These observations and opinions speak as much to the fact there is no public need for additional apartments in the area as they do to a substantial change in the character of the neighborhood.

**5. “Volumes of evidence”?**

Of the one hundred and ninety-two pages of “evidence” presented by McArthur, at least one hundred and thirty-two pages are promotional literature for the developer, thirteen pages comprise the petition for a zoning change and twelve pages are the *Foundation Development* case opinion. The remaining 37 pages of “evidence have been identified for their mistakes in analysis and faulty assumptions. Obviously, this “voluminous evidence” is not so clear and convincing as to make the issues of substantial change and public need not “fairly debatable.”

**6. Mischaracterization of motives of Hattiesburg City Council and objectors.**

The minutes of the Hattiesburg City Council public hearing on the McArthur zoning request show that more than 200 residents and citizens opposed this request because of traffic congestion, deleterious impacts on the neighborhood, decreased property values and increased negative environmental factors such as noise and safety. During the public hearing, the City Council allowed parties on both sides of this issue to speak and introduce evidence. McArthur characterizes the City Council of Hattiesburg as being “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 planning commission recommendation . . . .” (Pg. 8 of McArthur Brief.) The City Council of Hattiesburg was further disparaged when McArthur noted “[t]he 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.” (Pg. 11 of McArthur Brief) It is easy to take liberty with those things which happen in a public hearing when there is no transcript of said hearing. In this case, the City Council of Hattiesburg allowed the proponents and supporters of the McArthur zoning petition to give “speeches” just as it did those who might oppose the request. The City Council treated all parties to this dispute fairly and equitably.

In its opinion, the lower appellate court did not find a need “. . . to correct politically motivated decisions by municipal governing bodies. . . .” (Pg. 11 of McArthur Brief) There is nothing in the record, except for the McArthur’s protestations, to indicate that the Hattiesburg City Council made a “politically motivated decision” in this case.

**7. Mississippi “Fact Books.”**

McArthur complains that the references by the City of Hattiesburg to Mississippi “Fact Books” is improper. Mr. Joseph Lustek used these “Fact Books” in his report on the *Foundation Development* case. Further, Hilda Perrott used these “Fact Books in her report opposing the McArthur request.

**8. Right to criticize the quality and substance of McArthur’s “evidence.”**

Finally, counsel for McArthur talks of its “voluminous evidence” and decries the City of Hattiesburg’s criticism of the quality and substance of this so-called “evidence.” It seems logical that counsel for the City of Hattiesburg should have as much right to criticize the “evidence” of McArthur as McArthur has to mischaracterize the motives of the Hattiesburg City Council and the testimony and opinions of the residents and citizens of Hattiesburg who oppose the McArthur zoning request.

**CONCLUSION**

The City of Hattiesburg asserts that this case, as considered before its City Council, was fairly debatable. Therefore, the City Council concluded that there was not a substantial change in the character of the neighborhood and there was not a public need for the proposed zoning change sufficient to make these issues not fairly debatable. Its decision was not arbitrary and capricious. The City of Hattiesburg also asserts the circuit court of Forrest County, Mississippi held an improper evidentiary hearing which attributed to this court conducting a trial *de novo* of the issues. The facts

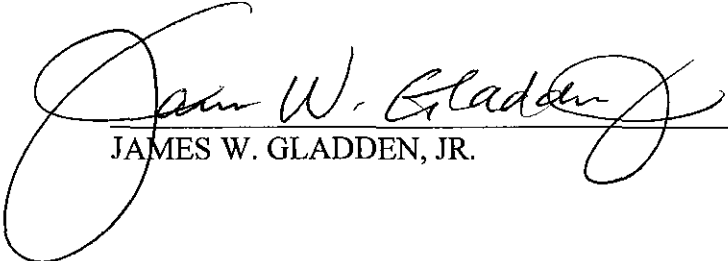


of this case bear out a plausible assertion that granting the McArthur/Kenney rezoning request would be an impermissible spot zoning. The City of Hattiesburg requests that the decision of the Forrest County Circuit Court be reversed and the decision of the Hattiesburg City Council reinstated.

**CERTIFICATE OF SERVICE**

I, **JAMES W. GLADDEN, JR.**, attorney for appellant in this action, hereby certify that a true and correct copy of the foregoing Reply Brief for Appellant has been mailed, postage prepaid, to the Honorable Roger T. Clark, Circuit Court Judge, at the usual post office address of said judge at the Post Office Box 1461, Gulfport, Mississippi 39502-1461, and to Mr. Lawrence C. Gunn, Jr the attorney of record for the appellees in this action, at the usual post office address of said opposing attorney at 607 Corinne Street, Suite 81, Hattiesburg, Mississippi 39401.

**GIVEN** on this 25<sup>th</sup> day of June 2009.

  
JAMES W. GLADDEN, JR.