CITY OF HATTIESBURG, MISSISSIPPI **APPELLANT**

COA

versus **No. 2008-CA-01134**

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

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 justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. City of Hattiesburg, Mississippi, the appellant, has an interest in this matter which relates to the judgment of the Special Forrest County Circuit Court Judge overruling the legislative decision of the City Council of Hattiesburg with respect to the zoning petition filed by the appellees at the municipal level.

2. J. W. McArthur, one of the appellees and the owner of the property which is the subject of the original zoning petition, has an interest in this matter which relates to a favorable zoning decision being rendered by the Special Forrest County Circuit Court Judge, reversing the legislative decision of the City Council of Hattiesburg with respect to the zoning petition filed by the appellees with the City of Hattiesburg.

3. Kenney Properties, Inc., one of the appellees and the developer of the apartment project on the subject property, has an interest in this matter which relates to a favorable zoning decision being rendered by the Special Forrest County Circuit Court Judge,

reversing the legislative decision of the City Council of Hattiesburg with respect to the zoning petition filed by the appellees with the City of Hattiesburg.

4. Terry Hopkins, Jena Hopkins, Nelda Saliba and Ray Riley, residents in the area of the subject property who filed notes of support for the rezoning change filed by the appellees.

5. Mrs. Hughlene Perrott, an owner of property adjacent to the subject property, who withdrew from a sales contract with Kenney Properties, Inc. to sell her real property to the developer.

6. Hilda D. Perrott, a resident of the area, who filed at least two reports with the City of Hattiesburg opposing the zoning change to the subject property.

7. Robert Walters and Charlie Holt, owners of properties adjacent to or near the subject property and who opposed the rezoning change filed by the appellees.

8. Approximately 288 residents and property owners who signed petitions opposing the zoning change filed by McArthur/Kenney, and who live in the neighborhood area around the subject property.

by _____
JAMES W. GLADDEN, JR., Attorney of record for the City of Hattiesburg, Appellant

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V. Whether rezoning the subject property was spot zoning, thereby invalidating the zoning change made by the Forrest County Circuit Court.?

STATEMENT OF THE CASE

McArthur/Kenney filed an Application Request for Re-Zoning with the City of Hattiesburg on May 16, 2007 requesting that a 29.63-acre parcel of land on the west side of Beverly Hills Road in Hattiesburg, Mississippi be rezoned from R-1B, single-family residential, to R-4, high density residential. The project to be constructed on the subject property is "a luxury student housing project." As a matter of course for such projects, it was reviewed by the Site Review Committee of the Hattiesburg Planning Department. Subsequent to this review, the application for rezoning was set for public hearing before the Hattiesburg Planning Commission on June 06, 2007. At that hearing, the application was tabled until July 05, 2007, at which time it was reconsidered. The planning commission recommended, by a 4-1 vote, that the rezoning request be approved.

Certain opponents to the McArthur/Kenney application, being aggrieved with the recommendation of the planning commission, filed an appeal of the matter with the City of Hattiesburg. The appeal was set for public hearing before the City Council of Hattiesburg on August 07, 2007. At that time, after hearing the presentation of evidence from the proponents and opponents, the city council denied the McArthur/Kenney application for rezoning by a vote of 4-0.

On August 13, 2007, McArthur/Kenney appealed the decision of the Hattiesburg City Council to the Forrest County Circuit Court. They filed at the same time their Bill of Exceptions. Forrest County Circuit Judge Robert B. Helfrich filed an Order of Recusal for

himself on August 28, 2007, requesting the Chief Justice of the Mississippi Supreme Court appoint a Special Judge to hear this appeal. Chief Justice James W. Smith filed an Order on August 29, 2007 appointing the Honorable Roger T. Clark as Special Judge to hear this appeal. McArthur/Kenney filed their brief on the lower court appeal on November 13, 2007. Seven days later, McArthur/Kenney filed a Motion to Correct or Supplement Record comprising three requests–the first two requests were innocuous enough to have, simply, been corrected at that time by agreement in writing between counsel for McArthur/Kenney and counsel for the City of Hattiesburg. The third request was more substantive and intrusive in the sense that it attempted to change the underlying record upon which this appeal is based. The importance of the latter request to change the record is magnified by a filing on December 21, 2007 of a "Supplement to Motion to Correct Record." This pleading's entire focus is on changing the underlying record of this appeal by virtue of two letters and four affidavits attached as exhibits. The City of Hattiesburg filed its brief in the lower court appeal on January 02, 2008, and McArthur/Kenney filed their reply brief on January 24, 2008..

An evidentiary hearing was held by the Forrest County Circuit Court on February 26, 2008 on the McArthur/Kenney motion and supplement to motion. The lower court denied the motion. The balance of the hearing on that date was purportedly for the purpose of "oral argument" of the parties. On April 02, 2008, McArthur/Kenney filed a Motion to Reconsider Ruling Concerning Supplementation of Record. Evidently, no ruling was made on this motion. The lower court rendered its opinion and decision on this case on June 04, 2008 by

reversing and rendering the decision of the Hattiesburg City Council thereby permitting the rezoning of the subject property to R-4, high density residential. The City of Hattiesburg filed its notice of appeal of the Forrest County Circuit Court's decision on June 25, 2008.

STATEMENT OF FACTS

The following facts are relevant to issues presented for review of this court:

1. An Application Request for Re-Zoning with accompanying exhibits was filed by McArthur/Kenney on May 16, 2007 requesting the City Council of Hattiesburg to rezone a 29.63-acre parcel of land on the west side of Beverly Hills Road from R-1B, single family residential, to R-4, high density residential. (R. 16-210)
2. The McArthur/Kenney application request identifies the zoning classifications of properties adjoining or near the subject property as R-4 and R-1B to the north; R-1B, R-3 and R-1B to the south; R-1B to the east; and R-1B and R-4 to the west. (R. 018)
3. A summary of evidence to be presented by McArthur/Kenney. (R. 032)
4. A zoning map of the area around the subject property. (R. 034)
5. Promotional literature on Kenney Properties, Inc., which have no bearing on a substantial change in the character of the neighborhood nor on the public need for the project in ths area of the subject property. (R. 038-099)

6. Letters of reference for the Kenney Companies which have no bearing on a substantial change in the character of the neighborhood nor on the public need for the project in ths area of the subject property. (R. 100-108)

7. News articles on Kenney Properties which have no bearing on a substantial change in the character of the neighborhood nor on the public need for the project in ths area of the subject property. (R. 110-133)

8. Special Judge Roger C. Clark's Memorandum Opinion and Order in the case of *Foundation Development, LLC v. City of Hattiesburg, Mississippi*, Civil Action No. CI05-0052, in the Circuit Court of Forrest County, Mississippi. This document is objected to for the following reasons: (1) it appears to be included it in this record for the sole purpose of trying to show that the above case is similar to, if not precisely like, the pending case on appeal; (2) it lends itself to references about expert opinions regarding substantial change in the character of the neighborhood and public need when, in fact, the providers of such opinions have not rendered opinions in the existing case; (3) it permits the drawing of purported facts from the earlier case and applying them to this case when, in reality, there are consequential differences in the facts of the two cases; and (4) it facilitates the drawing of the wrong legal conclusions about the facts in the existing case because, in fact, the wrong legal conclusions may have been drawn about the facts in the earlier case. (R. 134-145)

subject area, which desires the City of Hattiesburg to expend its funds to make street and road and lighting improvements to help ameliorate the traffic problem and, further, acknowledges that with the additional traffic generated by the proposed apartments and certain traffic improvements made there will still be streets and roads with low levels of service. (R. 182-209)

14. Minutes of the June 06, 2007 meeting of the Hattiesburg Planing Commission where the McArthur/Kenney zoning request was tabled. (R. 213-214)

15. Building inspection report for May 2007 for the City of Hattiesburg, Mississippi. (R. 212)

16. Petitions filed in support of the McArthur/Kenney zoning request. (R. 216-219)

17. Petitions filed before the Hattiesburg Planing Commission opposing the McArthur/Kenney zoning request. (R. 227-228)

18. A letter from Hilda D. Perrott opposing the zoning request of McArthur/Kenney. (R. 229-238)

19. Minutes of the July 05, 2007 meeting of the Hattiesburg Planning Commission where the McArthur/Kenney zoning request was recommended for approval (R. 239-241)

20. "Land Use and Zoning Trends for Properties Located in the Beverly Hills Road Area, Hattiesburg, Mississippi." (R. 248-254)

21. Exhibit 2 and Exhibit 3 of the report in No. 20 above. (R. 253-254)

22. "Beverly Hills Road, The Facts," by Hilda D. Perrott, Ph.D. (R. 255-280)

23. Discussion of student housing at USM and reasons why projected growth of on-campus student enrollment in McArthur/Kenney evidence is wrong. (R. 258-261)

24. Discussion of public need relative to on-campus student enrollment. (R. 261-263)

25. Opposition to the findings of the Neel-Schaffer's "Traffic Impact Analysis." (R. 271-272)

26. Minutes of the public hearing before the Hattiesburg City Council. (R. 289-302)

27. Hattiesburg Planning Department "Staff Summary" on the McArthur/Kenney zoning request. (R. 304-305)

28. Observations of the Hattiesburg Site Plan Review Committee on the McArthur/Kenney apartment project. (R. 306-307)

29. Petitions filed before the Hattiesburg City Council objecting to the McArthur/Kenney zoning request. (R. 334-335, 373-389)

30. Minutes of the Hattiesburg City Council denying zoning request of McArthur/Kenney. (R. 390-391)

31. Petition supporting McArthur/Kenney zoning request. (R. 394)

32. Order of Recusal for Judge Robert B. Helfrich. (R. 397)

33. Order of Supreme Court Chief Justice appointing the Honorable Roger T. Clark, Special Judge, to hear this appeal. (R. 398)

34. Brief of McArthur/Kenney submitted to Forrest County Circuit Court. (R. 404-423)

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37. Brief of City of Hattiesburg (R. 436-451)

38. Reply Brief of Appellants. (R. 454-461)

39. Opinion of Special Judge for the Forrest County Circuit Court (R. 468-472)

40. Notice of Appeal. (R. 474-475)

SUMMARY OF THE ARGUMENT

The lower court erred in reversing and remanding the decision of the City Council of Hattiesburg, Mississippi to deny the rezoning request of McArthur/Kenney. The Circuit Court of Forest County, Mississippi substituted its opinion and decision for that of the legislative body that rendered its decision on issues that were fairly debatable. The evidence for the rezoning request was not sufficient to override the City Council's decision finding (1) there had not been a substantial change in the character of the neighborhood where the subject property is located, and (2) there was no public need for additional apartments in the City of Hattiesburg at that time.

Secondly, the City of Hattiesburg contends that the lower court conducted a trial *de novo* of the issues when it held an evidentiary hearing to modify and/or supplement the appeal record. This resulted in new evidence, both testimony and documentary, being introduced into the record.

Finally, the City of Hattiesburg contends that by granting the McArthur/Kenney rezoning request, the lower court allowed an impermissible spot zoning. The evidence clearly shows by virtue of the location of the property relative to the single-family residential zoning surrounding it, the lack of a public need at this time when 1,200 additional apartment units were under construction or approved for construction, and that the request was for the primary benefit of the zoning applicants, McArthur/Kennney.

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?

The scope of review on the appeal of a zoning decision by a local zoning board, including that of the local legislative body is often restricted to whether the local board or governing body's decision "was arbitrary, unreasonable or illegal."[1] There are certain states which allow appellate courts to conduct a *de novo* review of zoning decisions, allowing those courts to arrive at decisions independently of the actions of the local legislative boards. Many of these states place limitations on the *de novo* review by the appellate courts.[2] Some courts, as is true in Mississippi, note that the judicial inquiry should only relate to whether the city council's decision was arbitrary and capricious. *City of Jackson v. Aldridge*, 487 So.2d 1345 (Miss. 1986).

'In zoning cases on appeal the cause is not tried *de novo*, the circuit court acts as an appellate court only." *Aldridge*, at 1347, citing *Board of Supervisors of Washington County v. Abide Bros. Inc.*, 231 So.2d 483 (Miss. 1970). It was further noted that "[u]nder this

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[1]Patricia E. Salkin, *American Law of Zoning*, § 42.19, at page 42-176 (4th ed. 2008).

[2]*Tyrer v. Ryan*, 2003 WI 22962455 (Ark.Ct.App. 2003) (The court noted that Arkansas law does not permit a trial *de novo* from a city's legislative decision but does allow a *de novo* hearing from other city planning decisions.); *SMC, Inc. v. Laudi*, 44 OhioApp.2d 325, 338 N.E.2d 547 (8th Dist. 1975) (Judicial review of local zoning decisions normally does not permit *de novo* review, but on the issue of constitutionality of the zoning decisions, a *de novo* review is to be tried in the Court of Common Pleas.); *Olley Valley Estates, Inc. v. Fussell*, 232 Ga. 779, 208 S.E.2d 601 (1974) (Where the issue of bias and self-interest was alleged as to one of zoning commissioner's, it was proper additional court inquiry into the surrounding circumstances of the propriety of the actions of the zoning commissioner.)

limited scope of judicial review the appellate court must look at the record to determine whether the order of the city council denying the application is arbitrary, capricious and confiscatory and whether it is supported by substantial evidence." *Aldridge,* at 1347. The appellate court is not to substitute it judgment for the "wisdom and soundness of the municipality's action." *Id.* The order of the legislative body should not be set aside if its validity is fairly debatable. *Killegrew v. City of Gulfport,* 293 So.2d 21 (Miss. 1974). Courts "should not constitute themselves [as] zoning boards." *Broadacres, Inc. v. City of Hattiesburg,* 489 So.2d 501, 504 (Miss. 1986). The court in *Broadacres* noted that "the classification of property for zoning purposes is essentially a legislative rather than a judicial responsibility of the city board . . . ." *Id.*

On February 26, 2008 the circuit court judge held an evidentiary hearing on McArthur/Kenney's Motion to Correct or Supplement Record (filed November 20, 2007), a motion, which on its face, clearly indicates a desire and/or proposal to introduce new evidence in the record which would not have been part of the record examined by the Hattiesburg City Council. (TR. 1; R. 424-425) To further compound this issue, McArthur/Kenney filed on December 21, 2007 a Supplement to Motion to Correct Record, containing six exhibits. (R. 428-429)

Even a casual review of the initial motion shows that its first two requests are so inconsequential that a mere letter from the counsels of record agreeing to the changes would have solved these requests.. (R. 424) However, the third request in the motion is a blatant attempt to introduce into the record of this proceeding testimony from city council persons

Rule 5.01 of the Uniform Rules of Circuit and County Court Practice makes it clear that ". . . all cases appealed to circuit court shall be on the record and not a trial de novo." Mississippi case law points out the state's long-standing law noting that the bill of exceptions serves as the record on appeal. *Beasley v. Neelly,* 911 So.2d 603, 607 (Miss.App. 2005). It is stated further in *Falco Lime, Inc., v. Mayor and Aldermen of City of Vicksburg,* 836 So.2d 711, 717 (Miss. 2002), that "[b]ecause the action is an appeal, the circuit court sits only as an appellate court, and may consider no evidence outside the bill of exceptions." Our court has said that a circuit court, in its appellate role should permit "no discovery or testimony outside the bill of exceptions . . . on the Board's decision . . . ." *Id.* It was error on the part of the circuit judge to allow a hearing on the two McArthur/Kenney pleadings because they were clear attempts to introduce into the appeal record additional testimony and documentation not originally presented before the Hattiesburg City Council at its public hearing on the matter.

An examination of the transcript of the evidentiary hearing including "oral argument," and the circuit court's opinion in this case, indicates that the lower court placed great weight upon the documents, testimony and argument of counsel of McArthur/Kenney in its opinion and order to reverse the Hattiesburg City Council's decision (R. 468-472). Further, it discounted or gave no weight to (1) the large amount of opposition to the zoning request; (2) the petitions and evidence presented by said opposition showing weaknesses and errors in the expert studies presented by McArthur/Kenney; (3) the discourse in the public hearing before the Hattiesburg City Council; (4) the knowledge of the local area of the council

Hattiesburg "just flatly objected to it and stated to the contrary . . . ." (TR. 4) It would appear that the issue in question was properly considered by the Hattiesburg City Council, thereby making it fairly debatable. Yet the lower court ignored this and held an evidentiary hearing on the matter.

During the course of this evidentiary hearing it was stated that it was important to amend the record to assist the lower court in deciding whether the zoning request should be "approved or not." (TR. 5) This hearing digressed into an unabashed attempt to modify the record upon which the circuit court was to render its decision. The lower court stated "[w]ell, as an appellate court that's what I need, what was actually said, not what was meant to be said." (TR. 7) Respectfully disagreeing with lower court, it has been noted that "[a] circuit court sitting as an appellate court reviewing a zoning matter is limited in its judicial review and may not perform a *de novo* review." *Mayor and Board of Aldermen v. Estate of M. A. Lewis,* 963 So.2d 1210, 1214 (Miss.Ct.App. 2007). As long as the issue is fairly debatable, the court is to give "deference to the zoning decision of the local governing board, as the decision is presumed to be valid. *Id.* By its own admission, McArthur/Kenney was attempting to amend or add to the record put before the planning commission and not the Hattiesburg City Council. (TR. 7) Clearly, this evidentiary hearing was held as an attempt to amend a record after it had already been considered by the Hattiesburg City Council, and any approval of these pleadings would result in adding to the record and bypassing the Hattiesburg City Council.

The circuit court drew upon its opinion the case of *Foundation Development, LLC v. City of Hattiesburg,* decided by it in November 2005. However, this case's fact pattern had considerable differences from the existing appeal. Maybe most notable among the distinctions is the fact the earlier case involved a rezoning to R-3, multifamily residential as compared to the existing case which seeks rezoning to R-4, high density multifamily residential. The lower court lauded some of the expert testimony given in the earlier case, but those same experts had not submitted evidence in the existing case. Instead, the court gave great weight to experts in the existing case who "piggy-backed" on the reports of the experts in the earlier case. It should not be presumed by an expert that a previous expert's report is correct in its assumptions, data compilations and analyses. Faults, disparities and contradictions in the experts' reports in this case and, by implication, some of those in the earlier case are discussed later in this brief. The lower court in praising the evidence of McArthur/Kenney, disposes of the evidence of the City of Hattiesburg and opponents to the zoning request with phrases such as "[t]he City has presented no evidence to refute such uncontradicted evidence of change in the record of the Appellants, " and "the public need for rezoning is clear and no evidence presented by the City refutes the evidence submitted by Appellants." (R. 471-472)

The lower court substituted its opinion for that of the City of Hattiesburg's legislative body and became the zoning authority for Hattiesburg. It decided this appeal, in part, on the basis of a *de novo* proceeding, and, therefore, its opinion and decision should be reversed and the decision of the City of Hattiesburg reinstated.

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.

Courts have said "that the burden of proving the arbitrary or unreasonable character of a zoning ordinance is not sustained if the evidence does no more than to demonstrate that the issue is fairly debatable.: Kenneth H. Jones, *Anderson's American Law of Zoning,* § 3.20, at pae 130 (4th ed. 1996). The Mississippi Supreme Court has noted that "[b]oth zoning and rezoning are legislative functions. As such, the judicial department of the government of this state has no authority to interdict either zoning or rezoning decisions which may be said 'fairly debatable.'" *Luter v. Hammon,* 529 So.2d 625, 628 (Miss. 1988). The zoning decision of a local legislative body that appears fairly debatable "will not be disturbed on appeal, and will be set aside only if it clearly appears the decision is arbitrary, capricious, discriminatory, illegal, or is not supported by substantial evidence. *City of Biloxi v. Hilbert,* 597 So.2d 1276, 1280 (Miss. 1992)

Courts which usually require a contesting party to show the invalidity of a zoning ordinance "so clearly as to take the issue beyond the reach of reasonable debate assert that

zoning is a legislative function committed to municipal legislative bodies, not to the courts." *Anderson's American Law of Zoning,* § 3.20, at page 132. In its application of this function, the local legislative body has a wide range of discretion which may not be limited or reduced by the courts. *Id.* The validity of a zoning decision is fairly debatable if for any reason it is " open to dispute or controversy on grounds that make sense or point to a logical deduction . . .," and validity of a zoning decision is fairly debatable "where reasonable minds may differ," or where the evidence establishes a basis "for a fair difference of opinion as to the . . . [ordinance's] application to particular property." *Id.,* at 133. See also, *Covington v. APB Whiting, Inc.*, 234 Va. 155, 360 S.E.2d 206 (1987); *Everett v. City of Tallahassee,* 840 F.Supp. 1528 (N.D.Fla. 1993); *City Council of City of Salem v. Wendy's of Western Virginia, Inc.*, 252 Va. 12, 471 S.E.2d 469 (1996).

Quite a few courts require the litigant challenging the zoning decision to prove by clear and convincing evidence that the ordinance is arbitrary, capricious, unreasonable, or otherwise invalid. *Anderson's American Law of Zoning*, § 3.21, at page 136. "One who attacks a zoning ordinance has the burden of proof, and must affirmatively and clearly show that the ordinance is arbitrary, capricious, discriminatory or illegal." *Killegrew v. City of Gulfport,* 293 So.2d 21, 22 (Miss. 1974). The burden is upon the party attempting to set aside the zoning decision to prove by clear and convincing evidence that "it is arbitrary, capricious, discriminatory, illegal, not supported by substantial evidence, and not fairly debatable." *Gillis v. City of McComb,* 860 So.2d 833, 835(¶ 6) (Miss.Ct.App. 2003).

The circuit court in this case decided rather peremptorily that the issues in question relating substantial change in the character of the neighborhood and public need of the proposed project were not fairly debatable. (R. 472), The lower court noted "[t]he City Council's decision of August 7, 2007 denying Appellants'" (McArthur/Kenney in this appeal) request for rezoning was not fairly debatable but instead arbitrary and capricious and not supported by the evidence in the record." (R. 472) It further noted that the evidence presented by McArthur/Kenney was unrefuted and uncontradicted by the City of Hattiesburg and the other opponents to the zoning change request. (R. 471-472)

It is well-settled in Mississippi that a change in zoning of real property can only occur when there "has been (1) a mistake in the original zoning, or (2) a substantial change in the character of the neighborhood and a public need for rezoning." *Mayor and Board of Aldermen v. Estate of M. A. Lewis,* 963 So.2d 1210, 1214(¶ 10) (Miss.Ct.App. 2007) Therefore, it is necessary to focus on whether the issues of (1) substantial change in the character of the neighborhood and (2) public need for the proposed zoning are fairly debatable and supported by substantial evidence. Each of these issues will be examined I light of whether each is fairly debatable.

B. Spot Zoing.

The circuit court below has noted that "the City has presented no evidence to refute such uncontradicted evidence of change in the record by the Appellants." (R. 471) It is safe to say that the record reveals that several opponents to the rezoning request contradicted the

evidence presented by McArthur/Kenney and that on, certain key points, the City unequivocally refuted the positions of McArthur/Kenney.

The record is replete with observations by McArthur/Kenney as to the quantum of its evidence in this hearing and the absolute paucity of evidence by the City of Hattiesburg and other opponents to the McArthur/Kenney zoning request. As the issues of whether a substantial change in the character of the neighborhood and public need for the proposed project are discussed, a careful examination of the allegedly voluminous "mountain of evidence" presented by McArthur/Kenney will be made to determine what substance exists, if any, from expert studies with bad assumptions, worse data and faulty if not inaccurate conclusions; from promotional publications; from innocuous newspaper articles with no or vague conclusions on housing needs; from expert reports which are not even, effectively, part of this case since the expert in question did not testify nor present a report in this case; and, otherwise, from the fluff.

Accompanying the Application Request for Re-Zoning filed by McArthur/Kenney is a "Summary of Evidence Supporting Application for Re-zoning." (R. 32-33) Reviewing McArthur/Kenney's evidence as defined by this summary may be the most expeditious way to determine the substance of their evidence and whether it is so overwhelming, qualitatively and quantitatively, that it precludes the evidence presented by the City of Hattiesburg and other opponents to the zoning request, thereby making the issues of substantial change in the character of the neighborhood and public need not fairly debatable.

McArthur/Kenney placed into evidence a "Zoning Map" prepared Neel-Schaffer as representing the location of the subject property within its liberally-defined neighborhood area. (R. 34, 249) This neighborhood or study area is defined by Interstate 59 on the west, U. S. Highway 49 on the north and east, and Hardy Street on the south. (R. 249) No rationale is given for defining such a large area as the "subject area" for studying "the changing land use and zoning patterns along Beverly Hills Road." (R. 249) A cursory examination of the map and a basic understanding of what a quarter section is in land measurement suggests that the selected "study area" is approximately 1,500 acres in size. Presumably, such a large area, including the University of South Mississippi ("USM") and major arterials with commercial development adjacent to them, tends to draw away from defining the neighborhood affected by the proposed development to a more circumscribed and rational area defined by West 4th Street to the south, North 31st Avenue to the east and Campbell Drive to the north (an area comprising approximately 480 acres). This latter area shows more clearly the impact of the proposed development on Beverly Hills Road and the lands to the east and west of it. It also shows that the overwhelmingly predominant zoning classification is single-family residential. Except for the fact that the subject property is adjacent to Plantation Apartments to the north, an area which had been zoned for apartments at the time of the adoption of the present Land Development Code of the City of Hattiesburg, the McArthur/Kenney zoning proposal is comparable to spot zoning on a larger than normal scale.

It is quite obvious in looking at this zoning map that the land east and west of Beverly Hills Road is presently zoned consistently with Hattiesburg's land use and zoning maps

adopted in 1990. Therefore, the zoning change would be inconsistent and incompatible with Hattiesburg's present land use and zoning map and its comprehensive plan. In the case of *Adams v. Mayor and Bd. Of Aldermen of City of Natchez,* 964 So. 629, 636(¶¶ 9, 10) (Miss.Ct.App. 2007), the court noted that "Spot zoning is defined as 'a zoning amendment which is not in harmony with the comprehensive plan or well-considered land use plan of a municipality." The term "spot zoning" is normally 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. Whether such an amendment will be held void depends upon the circumstances of each case. The one constant in the cases, as stated by the textwriter, where zoning ordinances have been invalidated due to "spot zoning" is that they were designed "to favor" someone. *Id.,* at 636. *See,* 1 Yokley, *Zoning Law and Practice* §§ 8-1 to 8-3 (3rd ed. 1965).

The proposed zoning change of McArthur/Kenney is clearly not in harmony with zoning map, land use map and comprehensive plan of Hattiesburg, adopted during the period 1988-1990. The City Council of Hattiesburg found there was no public need for the proposed zoning change by denying the request. (R. 390-391). As discussed below, McArthur/Kenney's attempts to establish public need are suspect due to false assumptions regarding the growth of the University of Southern Mississippi and the present and future number of apartment units based upon apartment complexes under construction and/or approved for construction. Therefore, the proposed rezoning request is spot zoning because

it is designed to favor McArthur/Kenney and not the community at large, or, even the Beverly Hills Road neighborhood.

If the issue is fairly debatable and there is no substantial evidence of public need, then it is reasonable to consider the proposed zoning request as one that favors someone. *Cockrell v. Panola County Bd. of Supervisors,* 950 So.2d 1086, 1097(¶28) (Miss.Ct.App. 2007) (In this case, a 124-acre tract of land was under consideration.). In *Fondren North Renaissance v. Mayor and City Council of City of Jackson,* 749 So.2d 970 (Miss. 1999), a 6.1-acre tract of land was not considered spot zoning because the rezoning was permitted in and compatible with the community's comprehensive plan. In another case, the rezoning of an 18.72-acre tract of land was not considered spot zoning because the request was for a change from R-4 to R-2 zoning. The court said R-2 zoning is consistent with R-4 zoning because R-2 uses are permissible within the R-4 zoning classification. *Briarwood, Inc. v. City of Clarksdale,* 766 So.2d 73 (Miss.Ct.App. 2000)

When the circuit court judge reversed and remanded the decision of the City Council of Hattiesburg on the McArthur/Kenney rezoning petition, he then created the condition of a spot zoning with respect to the subject property. Therefore, the opinion and order of the circuit court judge **should be reversed and the decision of the City of Hattiesburg reinstated denying the zoning request because otherwise it is impermissible spot zoning.**

C. Substantial Change in the Character of the Neighborhood and Public Need.

The second map put into evidence by McArthur/Kenney is the West 4th Street Corridor Land Use Map. (R. 035) This map is interesting for several different reasons, all of which

revolve around the core issues of substantial change in the character of the neighborhood and public need. First, with respect to need, the map shows Plantation Apartments to the north of the subject property, a development which has been in place a long time and is consistent with zoning of the property under the Hattiesburg's Land Development Code. South of West 4th Street, more than a quarter of a mile from the subject property, several apartment projects were constructed or were being constructed (as is evidenced on the underlying aerial photograph showing cleared, but undeveloped, land associated with some of the projects.). Second, along West 4th Street there are a large number of single-family residential properties, both east and west North 38th Avenue. Third, closer to the McArthur/Kenney property, it is easy to see the large amount of undeveloped land around the subject property, and the subject property itself is largely undeveloped. Finally, the underlying aerial photograph makes the proximity of the surrounding single-family residential neighborhoods to the subject property very apparent.

If anything, this corridor map demonstrates on its face a large number of existing apartments (and some apparently under construction) which indicates present availability of apartments without the need of disturbing the tranquil setting along Beverly Hills Road. The main intrusion on Beverly Hills Road which is incompatible with the general neighborhood is the Foundation Development project, and the rezoning on this property was denied by the City of Hattiesburg. Their decision was reversed and remanded by the circuit court judge handling the appeal of the rezoning applicant. The subject property is also buffered by a

planned residential development of single-family residential and other single-family residential zoning for which most of the land is unused.

Other parts of the "voluminous" McArthur/Kenney evidence is merely self-serving promotional literature or guides regarding Kenney Properties' developments. (R. 036-133) None of these materials lend any substance to the issues of whether there is a material change in the character of the neighborhood and a public need for the proposed project. All of the materials relate to Kenney Properties' projects in other locations than Hattiesburg, Mississippi.

McArthur/Kenney also placed into evidence the Memorandum Opinion and Order of the Forrest County Circuit Court in the *Foundation Development, LLC v. City of Hattiesburg, Mississippi,* Case No. CI05-0052. There seem to be, at least, three reasons for placing this order into evidence in this case. First, McArthur/Kenney presume the earlier case to be a precedent for granting the zoning change on the latter case. Secondly, there are implications by McArthur/Kenney that the earlier case and it final opinion offer the possibility of extrapolating expert testimony and reports from it to the existing case without the need of having these experts testify or submit reports McArthur/Kenney hearing. Thirdly, there is an effort by McArthur/Kenney to use the earlier case, its findings, maybe even some of its evidence, and piggy-backing its findings of facts and conclusions of law onto the existing case.

Even though Foundation Development is about 900 feet south of the subject property along Beverly Hills Road, the facts, testimony and documentary evidence are not applicable

by mere extrapolation to the existing case. If nothing else, the passage of two years of time and the location of one project at a major intersection and the other located midway on a two-lane local road affect and alter the facts of the two cases. The *Foundation Development* case cannot be considered as some automatic precedent requiring the City of Hattiesburg to rezone the McArthur/Kenney property. The City of Hattiesburg denied the Foundation Development request for rezoning that property. The court in that case noted, "the case involved lengthy and complex proceedings before the City of Hattiesburg." (R. 136) This certainly speaks to the fact that the Hattiesburg planning staff, planning commission and the city council weighed the facts of that case carefully. In its opinion, the court also noted that detailed evidence was presented by Foundation Development, and the residents of the Highlands neighborhood spoke in opposition to the request, "but presented no expert testimony on such issues as neighborhood change and public need." (R. 137) It is apparent the court in the *Foundation Development* case was more enamored with expert testimony and reports, which, of course, are usually prepared and presented "hired guns" paid to produce results favorable for the rezoning applicant. The testimony of and evidence presented by residents of affected neighborhoods should not be devalued because they did not have the foresight and/or financial resources to hire professionals to present "expert testimony." The neighborhood residents most assuredly spoke against the existence of a substantial change having occurred in the neighborhood and the absence of a public need for the rezoning since the proceedings were so "lengthy and complex." The residents of the neighborhoods in question were certainly aware of any zoning changes which might affect them, as was the

City Council in performing its duties to evaluate all zoning requests in light of whether a substantial change in the character of the neighborhood had occurred and whether a public need was evident.

The court noted in its opinion that the City of Hattiesburg discussed the issue of whether there was a public need for the Foundation Development project, tabled the request pending the completion of an apartment study, later removed the rezoning application from the table and denied it even though the apartment study found some additional need of apartments. However, since the study seemed to affect the lower court's decision in the Foundation Development case (and by implication its decision in the McArthur/Kenney case), it may be prudent to examine some its assumptions, data, analyses and conclusions.

Before examining the Hattiesburg Area Apartment Survey, it must be noted that McArthur/Kenney chose only to enter into the record a one-page "Summary of Research Findings" (R. 163) This study was available to the City Council of Hattiesburg in the Foundation Development hearing as well as those participating in the McArthur/Kenney hearing. This study, after stating is summary of findings on its sixth page,[3] reports the existing apartment market by apartment type over its next 20 pages. The study, in its next five pages, discusses demographic analysis of the Hattiesburg market area based upon the Hattiesburg Metropolitan Statistical Area. This area comprises all of Forrest and Lamar Counties. It is common knowledge that Lamar County is one of the fastest growing counties in the State of Mississippi, whereas Forrest County's growth, in terms of percentage increase

[3]The pages in the Hattiesburg Area Apartment Survey are unnumbered.

of population, is more modest. Yet, this study, in its demographic analysis, does not distinguish between Hattiesburg and the greater metropolitan area, most of which is rural.

There are several disturbing aspects of the apartment study is its analysis of the student population of the University of Southern Mississippi ("USM"). The report states "growth of the University was calculated using the 2000 and 2003 enrollment figures of 12,818 and 13,696, respectively." The actual on-Hattiesburg campus enrollment figures for USM for the Fall semester of those two years was 12,818 and 13,345.[4] It seems somewhat incredulous that the researchers for this study used only 2 years (one of which overstated the on-campus enrollment of USM) to do a straight line projection of on-campus student population. There analysis produced projected student populations for the following years:[5]

Year	**# of Students**
2004	13,696[6]
2005	13,998
2006	14,308
2007	14,624
2008	14,947
2009	15,277
2010	15,614
2011	15,959

This analysis shows a projected on-campus student population by 2011 of 15,959, an increase of 2,263 students. The problems with these numbers are (1) they are predicated on a straight-

[4]Mississippi State Board of Trustees of Institutions of Higher Learning, "2000 Fall Factbook" and "2003 Fall Factbook."

[5]Hattiesburg Area Apartment Survey, Figure 24, 28th page.

[6]This is the same number of students for 2003 that they used to calculate these projections.

line projection, (2) part of the starting numbers for the calculation are overstated (of particular note is the overstated number is for the most recent year thereby inflating the increase in on-campus student population by 40 percent from 2000 to 2003); and (3) on-campus student enrollment is readily available each Fall through the Fall Factbooks for each year, but yet the researchers did not use these data. Instead, they "cherry-picked" two recent years and then inflated the number of students for the controlling year–2003. If you were to reduce their estimated apartment need to compensate for their error, then only 101 apartment units are needed each year, if there are no other weaknesses in their study. However, the failure to use official on-campus student enrollment for a longer period of time and choosing the years 2000 and 2003 (error in their date) results in a greater than 40 percent error in their calculations. The researchers conducted their study from "August to October 2004." The Fall 2004 on-campus student enrollment for USM was available to the researchers and was 13,477,[7] 249 students less than projected in the study. To show the highly inflated results of this study and its spurious analyses, one need only look at the actual on-campus student population for USM for those year related to the McArthur/Kenney zoning request:[8]

Year	**# of Students**
2004	13,477
2005	13,331
2006	13,093
2007	12,940

[7] *Id.*, "Fall 2004 Factbook," Figure 5.

[8] *Id.*, Fall 2204, 2005, 2006 and 2007 Factbooks.

Actual on-campus student enrollment for 2007 is actually 1,684 students less than projected in the Hattiesburg Area Apartment Survey. Among the other student enrollment data available and readily accessible to the researchers of this study is that overall student enrollment for USM grew from 14,033 students in 1996 to 14,592 students in 2007.[9]

Finally, this apartment survey did not acknowledge and account for commuting students to USM in its analyses. Had this been done, their projections for apartment need would have been further reduced. The questionable analysis of apartment need was raised by Hilda Perrott in her opposition to the McArthur/Kenney request. (R. 264-266)

Another item of evidence presented by McArthur/Kenney is the "Eagle's Pointe Letter of Need." (R. 146-150) It is a highly generalized list of purported reasons that support the public of this project. First, it mentions "high occupancy rate of existing residential" referring to a "recent market survey." (R. 146) The market survey is nowhere to be found in the record. Therefore, there is no way to substantiate the methodology used and the conclusions drawn by Kenney Properties. The second issue raised by them is the "anticipated continual increase in need for student housing." (R. 146) They discuss the projected growth of USM by stating the current enrollment of the university is 16,428. Since their report was dated May 01, 2007, the Fall 2006-2007 student enrollment for USM was 14,777 (the Hattiesburg on-campus enrollment was 13.093).[10] They further asserted that USM was projected to increase to over 20,000 students in five years. This projection was so "good"

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[9] *Id.*, "Fall 2005 Factbook" and "Fall 2007 Factbook."

[10] *Id.*, "Fall 2006 Factbook."

that the overall student enrollment for Fall 2007-2008 decreased to 14,592 (the Hattiesburg on-campus enrollment decreased to 12,940).[11] They also discuss William Carey University ("WCU") student body as providing renters for Eagle's Pointe. The fact that WCU is on the opposite end of Hattiesburg from the Beverly Hills Road should not diminish overzealous expectations on the part of McArthur/Kenney, except to the extent of enlarging the "neigbhorhood" to city size. Further, if it is expanded to include WCU, why not consider all of the many apartment complexes which exist between WCU and Beverly Hills Road. Using WCU to support a public need is disingenuous when you ignore the several, relatively large apartment complexes around and in the vicinity of WCU. The lower court, in its opinion, must have overlooked this item supporting public need presented by Kenney Properties because, in its minimization of the importance of "1,200 apartments under construction in Hattiesburg," it stated the "[a]ppellants' evidence of public need is not based upon the need for multifamily housing throughout the entire City of Hattiesburg." (R. 471) Interestingly enough, on June 2007 Planning Commission meeting in which the McArthur/Kenney soning request was first considered, the May 2007 building inspection permit report was included. (R. 212). For apartments it showed $14,505,060.00 dollars worth of building permits issued in May 2007 to construct new apartments (these permits represent an estimated 222 new apartment units.). It appears Kenney Properties sees the drawing power for its apartment project extending well beyond the USM campus and its students.

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[11] *Id.*, "Fall 2007 Factbook."

The next five items on Kenney Properties' "Letter of Need" encompass items that are promotional and related to the on-site operations of their apartment projects. None of these have anything to do with a substantial change in the character of the neighborhood or public need. The remainder of the items in the "Letter of Need" deal with issues that have little or nothing to do with public need. For example, the increase in tax base is certainly something the Hattiesburg City Council probably had considered and found it wanting in light of the attendant problems associated with a high density apartment development versus a single-family residential development.

Another block of supposed "evidence" presented by McArthur/Kenney was its "Guide to Successful Living at Eagle's Pointe Apartments." (R. 151-161) This document has absolutely no bearing on the issues of substantial change in the character of neighborhood and public need. Of course, this is another 11 pages of the "overwhelming evidence" that precludes the above two issues in dispute of being considered fairly debatable.

Another group of items of "overwhelming evidence" presented by McArthur/Kenney are excerpts of newspaper articles and press releases purportedly supporting the issue of public need (many of them are duplicates of one another). (R. 164-181) On their face, there is little or nothing which shows positive, affirmative support for the public need of the McArthur/Kenney project. Further, most of the commentators and writers have little knowledge or understanding that the City of Hattiesburg had 1,200 apartment units under construction at the time of the hearing on this case..

McArthur/Kenney hired Neel-Schaffer, an engineering firm, to do a "Traffic Impact Analysis for Eagle's Pointe Apartments" in anticipation of "heading off" criticism of the project for the increase traffic congestion it would cause if the project is approved and built. (R. 182-209) A few observations are in order about this report. First, it is not "expert testimony" that demonstrates there has been a substantial change in the character of the neighborhood or that there is a public need for the McArthur/Kenney project. Traffic concerns for a rezoning requests are only one index to be considered by the local legislative body in granting or denying a request. In some respects, it may have little relevance to the evaluation of a rezoning request. However, it is easy to mischaracterize the findings of these types of studies. Counsel for McArthur/Kenney stated that "we all know if you put several hundred more residents on the street with cars, traffic will be increased." (TR. 39) The facts are that the engineers doing the traffic impact analysis calculated trip generation using ITE methodology, and found the McArthur/Kenney project coupled with the other apartment projects under construction in the area of Beverly Hills Road would generate an additional 5,696 trips per day. (R. 196-197) Therefore, care must be used in interpreting the results of these studies, and the opinions of the residents in the area should not easily be dismissed as to how they view traffic congestion in the area. (TR. 38-39)

Secondly, it is often hard to decipher the arcane nature of numbers and equations, but if one is careful in one's reviews of the numbers and equations, sometimes one can find faulty assumptions, poor data construction and analysis, and improperly-based conclusions. The possibility of faulty assumptions and improper conclusions immediately jump out at you

Apparently, the rationale for this is to make this traffic flow analysis static (predicated on May 2007 actual and assigned data), thereby not having to deal with or project the normal increase in traffic in the area until 2010 or much later. Such projection of general traffic flow in the area are probably more difficult to control than the four or five apartment projects considered for traffic flow assignment Whereas, McArthur/Kenney may not consider general traffic flow increases in the area important, the City of Hattiesburg certainly does. It is the City of Hattiesburg that has to "pick up the tab" for that future traffic congestion and its associated problems. Focusing on the present and discussing changes which can be made today is presumptuously concluding that the traffic problems created by these apartment projects 3-4 years from the traffic study date will not change. Such an assumption is specious at best and a significant disservice to the City of Hattiesburg at its worst.

The level of service (LOS) identified for the affected intersections leaves a lot to be desired. However, Neel-Schaffer, once again, suggests that the City can make changes in it traffic lights to improve LOS. How can the numbers be accurate for 2010 when the numbers used by the engineers appear to have excluded the projected normal traffic increases from 2007 until 2010. It is easy to see why the Hattiesburg City Council viewed this issue with concern. They were doing their jobs–watching over the interests of their citizens, trying to control traffic congestion and insuring stability for the neighborhoods in and around Beverly Hills Road area. Given the LOS figures for the intersections affected by the increased traffic from the Eagle's Pointe apartments, the City's concerns were and are valid. An examination of Table 2, "Existing Traffic Level-of-Service," and Table 3, "Projected Traffic Level-of-

Service,." reveals that the existing and projected levels of service for affected intersections are poor, if not dismal. (R. 201, 202)

A review of the "K-LOS Interpretation (HCM 2000 Methodology" for analyzing traffic levels of service[12] describes how level of service letter designations (A-F) correlate with delay in seconds "for each approach to the intersection."[13] For example, an "F" LOS for an "all-way stop controlled intersection (unsignalized and all-way stop controlled) is greater than 50 seconds. For a signalized intersection a "C" LOS is 20.1 to 35.0 seconds and "F" LOS is greater than or equal to 80 seconds.[14] Looking at Table 3, for example, it would appear that the LOS for "PM Pk" (123.4 seconds) might better be characterized as an "F" LOS rather than an "E" LOS. (R. 202) Also, one has to wonder whether the LOS designations might change to lower levels of service if the data had been based on projected traffic to 2010 (the build-out time for Eagle's Pointe) instead of using 2007 real and assigned data. Certainly traffic in the area will increase (dramatically, if we are to believe McArthur/Kenney's proof of the overwhelming change occurring in the area) by 2010, and that increase should logically, adversely affect the traffic impact in the subject area. Those adverse impacts will be the responsibility of the City of Hattiesburg, not McArthur/Kenney.

Another study by experts presented as "evidence" by McArthur/Kenney is the "Land Use and Zoning Trends for Properties Located in the Beverly Hills Road Area, Hattiesburg,

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[12] *2000 Highway Capacity Manual,* Transportation Research Board, Washington D.C., 2000, Chapters 16 and 17.

[13] *Id.*

[14] *Id.*

Mississippi." (R. 248-254) This study was also prepared by Neel-Schaffer, Inc. It is this study, in combination with a study done in the *Foundation Development* case, that raises concerns as to just how substantial and accurate is the "evidence" represented by this study. With respect to substantial change in the character of the neighborhood, the circuit court stated that "[t]he City has presented no evidence to refute [the] uncontradicted evidence of change in the record by [McArthur/Kenney]." (R. 471) The lower court relies heavily on a study done by Patricia Brantley who is employed by Neel-Schaffer, Inc. (R. 470) It further applauds Ms. Brantley's study because it incorporated part of Joseph Lustek's study presented two years earlier in the *Foundation Development, Inc. v. City of Hattiesburg* case. Neither of these two studies, whether individually or in combination demonstrates that there has been a substantial change in the character of the neighborhood or the existence of a public need for the apartment complexes under consideration.

The circuit court was incorrect in saying that this body of evidence was not refuted and contradicted. In attempting to analyze this item of "evidence," one becomes wary of a court opinion and order in another case as providing "evidence" of substantial change and public need in a later case, given a difference in time, location and other factors. By reviewing the circuit court judge's "Memorandum Opinion and Order" in the *Foundation Development* case and Ms. Brantley's study in the existing case, it is possible to examine some of the assumptions, data analysis and conclusions of the Lustek report as they affect the important issues of whether there has been a substantial change in the character of the

neighborhood and whether there is a public need in the *Foundation Development* case, but more importantly in the existing case.

Of course, one must keep in mind that the *Foundation Development* case involved the construction of 208 dwelling units, and the present case anticipates the construction of an additional 444 dwelling units. Lustek studied zoning changes "in the general area of the subject property" from 1990 to 1999. (R. 139) The lower court noted that Lustek found 8 zoning changes over the ten year period, with one tract being zoned to B-1, 2 tracts being zoned to B-2, 3 tracts being zoned to B-3 and 2 tracts being zoned to R-4. (R. 139-1404) In analyzing these data, the "devil is in the details." The B-1 (Professional) rezoning was from R-4 (High Density Residential) thereby resulting in a much less intensive and intrusive zoning classification. The B-2 (Neighborhood Business) rezonings were from R-3 (Muli-family Residential) resulting in the uses of a real estate office and a fast food restaurant instead of apartment complexes. The B-3 (Community Business) rezonings were from B-2 (Neighborhood Business) and R-4 (High Density Residential), the former allowing an existing business use to sell alcoholic beverages with food to the public (not permitted in a B-2 classification) and a 4.6-acre mixed use commercial use area and another area which was vacant then and still is today. The R-4 (High Density Residential) rezonings were from B-3 (Community Business) and B-5 (Regional Business) to develop two apartment complexes located south of West 4th Street. The perplexing aspects of Lustek's analysis and its extrapolation into Brantley's study are (1) at least four of the eight zoning changes went from classifications of higher intensity to lesser intensity; (2) one change stayed a business

classification, but changed only to sell alcoholic beverages with its food sales; (3) one change has remained vacant over the nine years and (4) two changes developed as apartments south of West 4th Street, an east-west arterial functioning as a plausible barrier between intensive land use to its south versus much less intensive uses and large expanses of vacant land to the north.

The lower court stated that two of these zoning changes "were in close proximity to the subject property" (Foundation Development property). (R. 140) It should be noted that only one of these changes (change for allowing the sale of alcoholic beverages on-site) is north of West 4th Street. It is even more important to note that all of the 8 changes mentioned in Lustek's report are greater than a quarter mile from the McArthur/Kenney property.

Other items of purported change were the completion of Interstate 59, addition of the Long Leaf Bicycle Trail and the addition of a right turn lane on Beverly Hills Road. The first item has no impact on substantial change in the character of the neighborhood–I-59 has been approved for decades and has been in existence well before 2004. The second item is a low intensity recreational facility that certainly does not suggest the need for intensive development adjacent to it–in fact, intensive development adjacent to this recreational facility may very well have an adverse impact on it. The latter change is an obvious attempt by the City of Hattiesburg to address increased traffic problems.

The court also suggested that Lustek studied USM on-campus enrollment and population growth of the Hattiesburg SMA. The Lustek report showed from 1994-2003 the growth in student population by 1,758 students or 176 students per year. This is hardly

substantial growth of USM. Further, if you examine the figures for 2001 (13,480), 2002 (13.493) and 2003 (13,345), you find that the student population decreased by 148 students. With respect to the McArthur/Kenney project, the USM on-campus enrollment had decreased to 12,940 by 2007. So, projections or speculations on the increase in student enrollment at USM are substantially inflated or are contradictory to the facts. The population growth of the Hattiesburg SMA is discussed elsewhere in this brief.

The court also noted that Lustek suggested the change in percentages of owner-occupied residences versus renter-occupied residences had changed from 1970 to 2000. (R. 141) This would not be unusual for a small city in an essentially rural setting. Percentage changes are often less import than the actual number changes, which were not discussed or else omitted. Also, the court noted that Lustek suggested a public need for apartments in 2004, especially given the mobilization of Camp Shelby. Now that the City of Hattiesburg has 1,200 apartment units under construction or approved for construction, how can anyone reasonably assert there is a public need for apartments with a virtual static situation in the growth of on-campus student population at USM (12,357 for 1998 and 12,940 for 2007) and a de-emphasis on the mobilization effort related to the war in the Middle East.

The lower court also stated that Lustek had studied the Hattiesburg Comprehensive Plan adopted in 1988 and "concluded that the proposed rezoning was consistent with numerous objectives of the Comprehensive Plan, including 11 separate demographic,

economic, housing and development goals."[15] (R. 143) Since there are only twelve objectives of the Comprehensive Plan which fall in these four categories, it begs the question, "Which one was omitted?". (R. 143) It could be one of the four reference in footnote 15. The facts are the planning objectives are highly generalized and, given which side of the dispute one is on, it is relatively easy to rationalize that a specific development somehow comports with a certain group of objectives.

The faults with analysis contained in the Lustek report (which in reality should have not have been made part of the existing case due to the fact Lustek did not provide expert testimony in it) are compounded by the fact that the lower court reflected favorably on the Lustek report as being similar to the Brantley report, and "Brantley incorporated some of the same information in her report that was previously presented in the Lustek report." (R. 470)

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[15]There are fifty-six objectives in the Hattiesburg Comprehensive Plan (1988), of which twelve relate to demography, economy, housing and private development. The "specific nature of objectives reveals the potential for conflict between desirable but sometimes mutually exclusive objectives. . . . They reflect, ideally, consideration of a combination of community issues and facts blended with community values." (Page 8 of the Comprehensive Plan). There are twelve objectives in the four categories referred to above. To illustrate the nature of the objectives and their highly generalized view of issues, and to be fair, the first objective in each of the four categories are as follows:

Demography:	"Provide for needs of all projected population."
Economy:	"Encourage equal opportunities for all segments of the population."
Housing:	"Improve the efficiency of the development process to minimize house costs while maintaining standards of quality."
Private Development:	"Consider the relationship of existing and propose regulations to the private business sector."

(Pages 8-11, Comprehensive Plan (1988)).

This seems to put the City of Hattiesburg in the position of arguing against Lustek's report, which the lower court obviously favored, instead of just Brantley's report.

Brantley's report leaves much to be desired in terms of substance and tends to show there is little in the way of substantial change in the character of the neighborhood where the subject property is actually located. The report notes that the subject property is located at 1000 Beverly Hills Road. (R. 249) According to Brantley's "Zoning Map" for the neighborhood (R. 034), except for the Foundation Development apartment project (denied by the City of Hattiesburg) and the planned residential development consisting of single-family residents adjacent to the Foundation Development to its north, all of the zoning changes pointed out by Brantley and Lustek as demonstrating a substantial change in the character of neighborhood are located at least a quarter mile to as much as three quarters of mile from the subject property and, except for another planned residential development on Campbell Drive, they are all south of West 4th Street. Also, it must be kept in mind that Brantley/Lustek identified sixteen zoning changes over a nearly 17-year period–less than one change per year. Finally, Brantley's chart of zoning changes shows four zoning changes to multifamily residential and two to planned residential development. If nothing else, the fact that four of these six changes occurred after May 2005 should indicate clearly that there is housing, especially multifamily housing, under construction in general area of the subject project. In addition there is another nearly 1000 dwelling units of apartments being constructed in the City of Hattiesburg, which shows there can be no justified need for additional apartments at this time. The City of Hattiesburg is compelled to determine public

need for zoning changes in the overall context of the city and not just the narrow view espoused by a landowner or developer desirous of furthering their economic interests at the expense of the city.

Brantley also seems to suggest that Beverly Hills Road acts as a "buffer" to the future development on the western side of the road. This is incredulous in that Beverly Hills Road is winding, 2-lane local road (R. 250) Further, as justification for granting the zoning change on the McArthur/Kenney property we are told in her report that "[i[f or when new development moves to the east of Beverly Hills Road, then the planned residential development classification can be used to provide more buffer for the Highlands Neighborhood (R. 250) This is hardly a reassuring or persuasive justification for a zoning change that is going to have numerous adverse effects on the nearby neighborhoods. This report is the epitome of a self-serving statement supporting the client which hired you. There is no compelling reason for the Hattiesburg City Council to give special credibility to the report's conclusions when the first-hand knowledge of these city officials about their own city, its citizens and neighborhoods contradicts the report's conclusions.

We are told by McArthur/Kenney that the City of Hattiesburg and other opponents to their request to change the zoning of the subject property are faced with voluminous evidence in favor of the McArthur/Kenney position that they proved there was a substantial change in the character of the neighborhood and a public need for their proposed apartment project. Further, it is the mantra of McArthur/Kenney that City and other opponents have not produced any evidence contradicting the proponents' "mountain of evidence." (TR. 46) The

faults, discrepancies and erroneous conclusions of that evidence are discussed earlier in this brief. A careful reading of the transcript of the evidentiary hearing held by the court in this matter and the appeal record suggests that McArthur/Kenney rely as much upon the opinion and order of the court in the *Foundation Development* case for evidence as any other document they submitted in this proceeding. (TR. 405, 407, 414-417, 420)

It is plain wrong to denigrate the testimony and proceedings of citizens and council persons who are legitimately and properly concerned about a zoning change that will, in their opinions, adversely affect their neighborhoods and their city. (TR. 41-42, 46-47, 49-50, 51-52) There was purportedly a "mountain of evidence" presented by McArthur/Kenney, hearings held by the City Council of Hattiesburg, "speeches" and a "petition with 288 voters" signed on it, and some citizens of Hattiesburg who made individual objections to the rezoning request. The record shows clearly that the City Council considered thoughtfully several issues raised in this proceeding. They discussed the traffic situation and their concerns for exacerbating traffic congestion in the subject area, they discussed the needs of protecting residential neighborhoods in Hattiesburg, they made known their feelings about the issue of public need when the City had approximately 1,200 apartment units under construction and approved for construction, and they acknowledged their constitutional and statutory authority to govern their city as its elected officials. These are valid concerns stated by citizens of Hattiesburg who live in the affected area and by their duly elected officials who, as the sitting legislative body of the City, have a responsibility to all citizens of Hattiesburg, both in and outside the affected area, to make decisions that are for the good of

Hattiesburg and not just for a specific developer. It is this decision making responsibility and the consideration the data and various issues raised in this case which make the action before the Hattiesburg City Council fairly debatable.

CONCLUSION

"It is understood that property owners may feel unfairly dealt with when they are unable to use or dispose of their property for a purpose such as involved here [construction of a shopping center on a 13.5-acre tract of land]." *Bell v. City of Canton,* 412 So.2d 1179, 1181 (Miss. 1982). The Court noted further that there are other people (the public) who need to be considered also. They have a "right to enjoy their property without being offended or disturbed by the use of their neighbor's property." *Id.* It is clear that the Hattiesburg City Council "[was] authorized to consider the statements expressed by all the landowners at the hearing, as well as to call upon their own common knowledge and experience in their town." *City of Jackson v. Aldridge,* 487 So.2d 1345, 1348 (Miss. 1986). See also, *Childs, et al. v. Hancock County Board of Supervisors, et al.,* 2006-CT-00608-SCT (Miss. 2009); *Luter v. Hammon,* 529 So.2d 625, 629 (Miss. 1988) Our Supreme Court has "held that substantial weight could be given to the concerns of its citizenry in determining whether a public need exists for resoning." *Mayor and Board of Aldermen v. Estate of M. A. Lewis,* 963 So.2d 1210, 1216 (Miss.Ct.App. 2007)

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 was not a public need sufficient to make

these issues not fairly debatable. 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 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. of the law firm Gunn & Hicks, PLLC, the attorneys of record for the appellees in this action, at the usual post office address of said opposing attorneys at Post Office 1588, Hattiesburg, Mississippi 39403-1588.

GIVEN on this 11th day of March 2009.

JAMES W. GLADDEN, JR.