IN THE SUPREME COURT OF MISSISSIPPI

NO: 2008-CA-01271-SCT

MICHAEL EDWARDS, PIERCE BREWER, INDIVIDUALLY AND IN THEIR REPRESENTATIVE CAPACITIES AS ORGANIZERS AND MEMBERS OF CONCERNED CITIZENS OF SAUCIER, APPELLANT

V.

HARRISON COUNTY BOARD OF SUPERVISORS, APPELLEE

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REBUTTAL BRIEF OF THE APPELLANTS

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ORAL ARGUMENT REQUESTED

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I. REBUTTAL ARGUMENT

A. General Rebuttal.

First, in the Appellees "Summary of the Argument" section, page 8 of their brief, and later on as will be discussed below, the Board of Supervisors states that "the Development Commission entered into a Real Estate Purchase Agreement with the Owner of the land, which is the subject of the rezoning controversy now before the Court..." They fail to acknowledge that there was a third party to that contract, which is a real bone of contention here. That is, the Board of Supervisors was a party to the Contract, actually approving it with the signature of the President of the Board.

At page 10 of its brief, the Board acknowledges that it took into account matters not presented at the initial hearing before the Planning Commission. Specifically, the Appellees brief acknowledges that "...the Board's decision was based upon:

- The evidence presented to the Planning Commission
- The arguments presented to the Board
- ***The Board's knowledge of the area*** (emphasis supplied)
- ***The Board's knowledge of the needs of Harrison County*** (emphasis supplied)
- ***The change in the character of the area sought to be rezoned.*** (emphasis supplied)

Thus, on the one hand the Board admits that it considered various matters not discussed in detail at the hearing before the Planning Commission. On the other hand, the Board wants to tell this Court, as it did the Circuit Court, that even though it considered things not presented to the Planning Commission, as set out above, that the

Citizens Group could not offer from the public records belonging to the Board, or under the control of the Board, facts which disputed the claims such as the rezoning rested upon. This position makes no sense and is in fact so inconsistent as to be logically incoherent.

Under the general heading of its brief captioned "Argument," in section 2 at page 14 of the brief, "Applying the Standard Review," the Board, citing case law correctly, states that, "The courts presume that comprehensive zoning ordinances adopted by municipal authorities are well planned and designed to be permanent...". Unincorporated Harrison County had no zoning at all until its zoning ordinance and comprehensive zoning map was adopted on August 28, 2000, as appears from the ordinance itself. At that time, all the property now in dispute was zoned agricultural, A-1, or light residential E-1R.

At page 15 of its brief, paragraph B, "Change in Character of Neighborhood," the Board now asserts that, "The Planning Commission and the Supervisors found that the character of the area (to be rezoned) had changed to such an extent to justify the rezoning classification." There is absolutely no evidence anywhere in the record, either before the Planning Commission or elsewhere, that the character of the neighborhood had changed. Indeed, quite the opposite is true. The Development Commission at the hearing before the Planning Commission was clear in its position that there had been no mistake in zoning or change in the neighborhood to justify the rezoning; rather, when the Development Commission presented the case for rezoning, the clearly articulated reason for the request was, "...a needs request. It's a need for additional industrial

land." Transcript, page 5, page 8, R-614. "I wanted to talk about the need for this park because that's what the whole basis of this application is based on is need."

B. Specific Rebuttal

1. The Concerned Citizens of Saucier were denied their right to due process under the Fourteenth Amendment to the United States Constitution and Article 3, Section 14 of the Mississippi State Constitution, which also guarantees citizens of this State due process of law, when the decision-maker on the zoning issue was a party to the contract and had a preexisting contractual duty to change the zoning. Because the Board of Supervisors had a vested interest, it could not fairly decide the issue.

The Appellee never comes to grip with the notion that the Board of Supervisors cannot approve a contract in advance contingent upon a change of zoning being approved; demonstrate its support of the contract by authorizing a multi-million dollars bond issue to finance the sale; and still be impartial.

This case law on the point is clear: it is the ***Spradlin*** standard, adopting the U.S. Supreme Court ruling in ***Withrow v. Larkin***, 421 U.S. 35 (1975). See ***Spradlin v. Board of Trustees of Pascagoula Municipal Separate School District***, 515 So.2d 893 (Miss. 1987).

The case law, upon a close reading, makes a careful distinction between "a personal or financial stake in the decision." As a practical matter the disqualifying interest in a matter might be frequently financial in nature. No one is trying to say that the Board of Supervisors itself, as an institutional body, or that any Member of the Board profits individually from this dubious sale of land to Cotton Fore where the land price without explanation went from $6,000.00 to $12,000.00 literally over night, doubling the price over what the Appraiser reported in the initial round. Rather, this is

an example of the Board as an institutional body having a personal stake in the subject matter.

It is not a case where the Board had some knowledge of the transaction before hand, as in ***Spradlin***, where the Board had knowledge of investigative facts prior to voting on the matter before it.

Here the Board, by approving the contract, had agreed in advance with the proposition that it would use its best efforts to change the zoning, as required of the Development Commission, and it demonstrated its prejudgment by actually authorizing the bond float at that time.

Imagine what any rational person's response would be if he were going in front of the Board of Supervisors trying to get the zoning changed and it came to his attention that, before he had his day in front of the Planning Commission or subsequently the Board of Supervisors, the Board had agreed that "...it would use its best efforts to defeat any request for zoning." How much confidence would that engender in someone seeking a change that the Board would be receptive to arguments supporting a change? That's exactly what the Board is asking the Citizen's Group to do, that is, to go like Candide, all smiles and belief in the goodness of his fellow man, into the lion's den thinking he's going to be treated fairly, in the face of language in the contract committing the Board to affirming the zoning change, and the attendant act of floating the bond issue in advance of the hearing before it.

Because the Board clearly had a personal interest in the outcome, it could not have been fair and objective.

The alternative is not what the Appellee would have the Court believe. That is, no one takes issue with the notion that the Development Commission should not agree to buy the land not knowing what the zoning would be. What should have happened, moreover, is that the landowner, Cotton Fore, independent of the Development Commission, should have made application to have the zoning changed. That would have taken the Board of Supervisors out of it, and would not have put them where they are now, in a hopelessly conflicted situation.

The way they did it, however, took all the risk out of the transaction for Mr. Fore. He was holding a pat hand from the start, being able to be a land speculator on the one hand, and knowing that the act necessary to make the land appreciate wildly overnight was going to come about because the outcome was predetermined. So what happens here, ultimately, is that the people of Harrison County must yield to the land speculator in a process which cannot bear public scrutiny and survive.

2. Mississippi law requires either an error in the initial zoning; a change in the character of the use of the land; or some compelling need before existing zoning may be changed. None of these circumstances apply; thus, the Board of Supervisors did not have a fairly debatable reason in changing the zoning as it did, making the decision arbitrary and capricious.

At page 24 of its brief, the Appellee states, "The proof presented to the Planning Commission, which was considered by the Supervisors, coupled with their personal knowledge of changes in the area and the needs of the County, justified the zoning change." At that same time, they took issue with the Citizen's Group attempt to bring to light facts culled from the County's own land records as to the ownership of large tracts

of property already zoned industrial, which directly contradicted the assertions made to the Planning Commission.

Surely the Board in developing "their personal knowledge and the needs of the County" knew about the four largest parcels in Bayou Bernard already owned by the County ranging from about 30 acres up to 90 acres already zoned industrial and available for sale or lease? R-535. And outside Bayou Bernard Industrial Park, there were five additional sites of acreage from 55 acres up to a 148 acres, exhibit O, R-535. This wasn't presented to the Planning Commission. It was before the Board of Supervisors, however, because they used their personal knowledge of what was out there in the County, which certainly would include their own record system.

As a matter for consideration, how exactly would the Citizen's Group know that the Development Commission would not present this information regarding the availability of all these tracts already properly zoned to the Planning Commission? The obvious reason that the Board doesn't want this Court or, indeed, the public at large to know what is buried deeply in the land records of the County, is that it makes their argument that there is a public need for the rezoning untenable. They don't try to justify the doubling of the price overnight in face of their own appraisal, and they don't want anybody to talk about a relatively long list of sites over 35 acres in size already available without need of a zoning change.

3. The Fore contract could not legally go forward, since by its own terms the agreement forbade the County from closing on the contract if there existed any pending or threatened litigation affecting the property; the Mississippi Department of Transportation had already announced that the Highway 601 connector road would be running squarely through the property, in effect telling Mr. Fore

and the County that there would be an eminent domain proceeding affecting the land. Hence, since the decision to rezone rested upon public need, as did the contract itself, the rezoning was arbitrary and capricious, and illegal in view of the contract requirements.

The Board of Supervisors continues to object to this contract between it and Cotton Fore being made a matter of record in this proceeding. The contract was already before the Board and is certainly part of the general knowledge of the Board as an institutional body and of the individual members. At page 25 of its brief, the Board protests that the contract had no relevance at all to anything the Planning Commission was doing, and that they didn't need to know about the contract.

What was before the Planning Commission was a discussion of two parcels of land totaling over 600 acres owned by a private citizen who was about to make a killing in a sale to the County. The Planning Commission had to give its imprimatur to the project before it could continue. How could it possibly be said that a Mississippi State Department of Transportation road project, the 601 connector, which was going to take a substantial portion of the land being considered by the Planning Commission and would make it unuseable for the very purpose that the zoning change was sought, might not be relevant?

Once again, on the one hand the Board of Supervisors want to say that the County needs industrial development sites and the Fore property was large enough to accommodate that need; but on the other hand, they know, but don't want to acknowledge evidence, that the property isn't in fact a 600 acre parcel - - it's much less depending on what ultimately happens with the connector route and the wetlands issue.

The fact that a large transfer of public monies was involved here in and of itself should be enough to give any public body a duty, a legal, moral, and ethical duty, to not let themselves be used to advance a private agenda involving the transfer of that public money. Fore, who was in jeopardy of being forced to sell his property at eminent domain prices, for undiscernible reasons received double the appraised value and the public never got a chance to ask why this purchase purportedly operates to their benefit.

This Court can take notice of what's happening in the country at large in no small part because the money men were left to their own devises and permitted to advance whatever their agendas might be without due consideration being given to the detrimental impact on the public. That's the argument being implicitly offered to this Court here, that no one ought to really take a hard look at these public transfers, and that's why they don't want things like the very contract at issue in the transaction to be before the public body, the Planning Commission, being asked to facilitate the transfer of the public money.

The contract between Fore and the County wasn't public knowledge. No one in the community knew about it. At the hearing, the Development Commission didn't tell the Planning Commission that the Board had already signed on to the contract.

4. Since the contract between the County and Fore required that at least 72% of the Fore property be available for development, a precondition for the rezoning, the decision to re-zone for the purpose of buying the 627 acres was arbitrary and capricious in that the Board knew or should have known that wetlands and the MDOT requirements for the 601 connector would take up to half the purchased land, thus thwarting the putative purpose of the re-zoning, i.e., to significantly increase industrial zoning in the county.

The Appellant adopts remarks made in the preceding assignment in rebuttal. In addition, for the Board of Supervisors to talk about the wetlands and 601 connector matters to be "speculative" is hardly credible. They admit that significant parts of the Fore property are made up of wetlands; indeed, at the Planning Commission hearing, the HCDC representative stated to the Planning Commission that "in looking at the initial 500 acre tract of the Fore property, approximately 100 acres of it look like wetlands." R-630.

Why wouldn't the Planning Commission want to know, indeed, need to know that the Fore contract with the County had a provision that spoke to the need for the land to "be conveyed free and clear from any and all restriction with regard to coastal wetlands, promulgated by the United States Army Corp of Engineer..."? It's part of their public trust to make informed decisions based on relevant facts. Nothing could have been more relevant as the terms of that contract, which was withheld from the Planning Commission, and, incredibly, at the hearing before the Board of Supervisors, the Board itself resisted any discussion of the contract at the public meeting.

5. The Board denied the Objectors a fair hearing when it refused to admit and consider clearly relevant information and documents which addressed concerns raised initially at the Planning Commission meeting, and the Circuit Court should have taken judicial notice of the exhibits offered by the Objectors at the hearing before the Board of Supervisors.

The Appellants would respectfully suggest that the Circuit Court erred in not permitting those exhibits offered by the Citizens Group to the Board of Supervisors. The items offered, almost to the last page, come from public records of the County, already under the control of the Board of Supervisors. If the Board of Supervisors can

take notice of conditions in the county - - as they admitted doing as a basis for their decision - - why can the Citizens not show to the Board and to the public that what the Board thinks it knows about conditions in the county is not supported by its own records? If the Citizens are charged with notice of a public hearing, for example, placed in a newspaper in fine print, why exactly is it that the Board can't be charge with notice of things in its own minutes, like the bond issue and the contract and the many, many large already zoned industrial properties existing in the County?

The Board unfortunately takes the position that "what's mine is mine, what's yours is negotiable."

These public documents, along with the internal emails obtained by the Open Records Act from the County's records as well, particularly those showing something odd happening in the price doubling overnight from $6,000.00 an acre as initially approved to $12,000.00 per acre, and coupled with the fact that the appraisal was withheld from the public record of the zoning proceeding, calls this entire transaction into great question.

CONCLUSION

The Concerned Citizens of Saucier respectfully ask this Court to take a long, hard look at this record. There is something very wrong that happened in Harrison County in the zoning change of the property owned by Cotton Fore and sought to be transferred to the public for a hefty $7 million plus dollars price tag. These are all valid points raised by the Appellants in their arguments. The legal standards have not been met, in that there has been no mistake in the original zoning; there has been no change

in the character of the neighborhood to be rezoned; and there is no demonstrable public need.

For reasons which remain unclear, what we are seeing here is a transfer of $7 million dollars of public money to private hands under significantly questionable circumstances. This Court is in a position to do something about it, as part of its duty to apply the law, and Appellants ask the court to reverse the finding of the Circuit Court, and to strike down this land sale and rezoning as being improper, in substance and in form.

Respectfully submitted this the 5th day of March, 2009.

MICHAEL EDWARDS and PIERCE BREWER,
Individually and on behalf of the
CONCERNED CITIZENS OF SAUCIER,
Appellants

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CERTIFICATE OF SERVICE

I, CHESTER D. NICHOLSON, do hereby certify that I have mailed, by first class postage, a true and correct copy of the above and foregoing ***Rebuttal Brief of the Appellants*** to Joseph Meadows, Attorney for the Board of Supervisors, at his mailing address of P. O. Box 1076, Gulfport, Mississippi 39502; and Honorable Roger T. Clark, Harrison County Circuit Court Judge at his mailing address of P. O. Box 1461, Gulfport, Mississippi 39502.

This the 5th day of March, 2009.

Chester D. Nicholson

CHESTER D. NICHOLSON