IN THE SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO: 2008-CA-01271

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

**********

# BRIEF OF THE APPELLANTS

**********

ORAL ARGUMENT REQUESTED

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**MICHAEL EDWARDS and**
**PIERCE BREWER, Individually and**
**in their representative capacities**
**as organizers and members of**
**CONCERNED CITIZENS OF SAUCIER** **APPELLANTS**

**vs.** **NO: 2008-CA-01271**

**HARRISON COUNTY**
**BOARD OF SUPERVISORS** **APPELLEES**

## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Parties:

Michael Edwards, Pierce Brewer
and Concerned Citizens of Saucier..... Appellants

Harrison County Board of Supervisors..... Appellees

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Respectfully submitted this the 7th day of November, 2008.

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

By: _____
CHESTER D. NICHOLSON

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## STATEMENT OF THE JURISDICTION

This is an appeal from a final decision of the Circuit Court of Harrison County upholding a decision of the Board of Supervisors changing the zoning in Saucier, an unincorporated part of Harrison County, from its classification under the 2000 Zoning Ordinance of A-1/E-1, agricultural and very light residential, to I-2, general industrial zoning. The Court has jurisdiction to review the decision of the Circuit Court pursuant to Article 6, §146 of the Mississippi State Constitution; Miss. Code Ann. §9-3-9 and §11-51-3; and Rule 3 of the Miss. Rules of Appellate Procedure.

## STATEMENT OF THE ISSUES

The Citizens present six issues for review:

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.

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.

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.

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.

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.

## STATEMENT OF THE CASE

### A. Nature of the case; course of proceeding and disposition below.

This is a zoning case. The Harrison County Development Commission and the Harrison County Board of Supervisors wanted to buy land from Cotton Fore, a local land speculator and businessman for the purpose of developing an industrial park in Saucier, an unincorporated residential community in northern Harrison County. The County, meaning both the Development Commission and the Board of Supervisors, after negotiations finalized a contract with Mr. Fore on August 14, 2006. Mr. Fore had signed off on a version of the contract on July 24, 2006; the Development Commission signed off on the following day, July 25, 2006 and again on apparently another version on August 4, 2006 ; and the Board of Supervisors came on board on August 14, 2006, agreeing contractually at that time to use their best efforts to change the zoning so as to

satisfy a condition precedent to closing on the land deal. On the same day the Supervisors signed off on the deal with Mr. Fore, they passed a resolution authorizing a seven and one-half million dollar bond offering to finance the land purchase.

After the deal was thus in place, the Development Commission, acting as Mr. Fore's agent, petitioned the Harrison County Planning Commission to change the zoning. On September 21, 2006, the Planning Commission held a "hearing," ostensibly so that the Development Commission could make the case for the zoning change, and the people of Saucier, those directly affected by the zoning change, could be heard in opposition. By letter of September 25, 2006, the Planning Commission announced that it had approved the zoning change.

The following day, Wednesday, September 27, 2006, Michael Edwards, a resident of the Saucier community and a party to this appeal, issued his notice of appeal from the zoning change. A hearing was held before the Harrison County Board of Supervisors on November 8, 2006, at which time the Board of Supervisors upheld the decision of the Planning Commission. The Citizens thereafter filed a notice of appeal and a bill of exceptions, placing the matter before the Circuit Court of Harrison County, sitting as an appellate court. After briefing and oral argument, the Circuit Court issued its opinion of June 30, 2008, upholding the decision of the Supervisors. This appeal follows.

**B. Facts**

The Saucier community lies in northern Harrison County contiguous to the county's northern border with Stone County. Most of the community is west of U.S.

Highway 49, and that is where all of the approximately 627 acres at dispute in this zoning matter may be found.

For almost all of its history, Saucier was without zoning. Then, on August 28, 2000, the county adopted a comprehensive zoning map and ordinance that applied to Saucier. All of the property now in dispute was at that time zoned agricultural, A-1, or light residential, E-1R. Indeed, the community is made up of farms, smaller "farmsteads," single family dwellings on large lots, and small commercial enterprises that service the residential population. The residents who appeared at the two hearings on this matter overwhelmingly oppose the industrial park; and it's fair to say that the overwhelming majority of Saucier residents oppose the change in zoning as well. When given the chance to speak, they emphasized the quiet, bucolic character of their community which they feel will be altered by the construction of a 600 acre industrial park in the heart of their living environs. See Transcript of Planning and Zoning Commission hearing of 9-21-2006, R-607, 642 ff.

There was apparently an earlier effort on the part of the Harrison County Development Commission and Cotton Fore, the owner of the property, to change the zoning. In 2004, Mr. Fore wanted to sell his land to the Development Commission, which wanted to buy it, subject to the change in zoning to I-2. The sale of the property was put on hold at that time after the Harrison County Board of Supervisors failed to approve the zoning change. Transcript of Board of Supervisors hearing of November 8, 2008, R-87 ff. The initial turn down of the zoning change request was not on the merits; rather, an internal dispute caused the negative vote.

Then, in the Spring of 2006, the project came to life once again as negotiations between the Development Commission and Mr. Fore recommenced. Harrison County Development Commission records obtained via Mississippi's Open Records Act indicate that on March 14, 2006, Bill Hessell, the Director of Operations and Property of the Development Commission, authored an email stating that he had talked to Jason (Garner), (an appraiser with Global Valuation Services, Inc.) who reported that "if the selling price is in the $6,000.00 per acre " range, the purchase would be feasible. R-243 A little over six weeks later on May 2, 2006, Development Commission attorney Jim Simpson wrote a letter to Misters Hessell and Barnett (Executive Director HCDC) transmitting a draft of the Fore contract. A revised contract was again sent from Simpson to Barnett and Hessell two days later on May 4, 2006, and yet another revised contract on June 16, 2006. See open records documents, R-244, 245; R-248.

As of the June 16th note from Simpson to Hessell and Barnett, changes included the purchase price, the time to close, and a paragraph was deleted regarding the exercise of an option. On June 27th, 2006, Simpson again emailed Barnett and Hessell, saying that "I need to know generally I how long we need to close with Cotton (Fore)." R-249. Then on July 5, 2006, Simpson transmitted via email to Hessell and Barnett what he called the final version of the Fore contract. R-252. On July 12, 2006, Simpson wrote a letter to Cotton Fore sending him the final version of the contract, although that apparently was for 546 acres at $12,000.00 per acre, and the purchase ended up being for 627 acres, since Mr. Fore had acquired a second tract which he wanted to sell to the County. R-290. On July 25th, 2006, the Harrison County Development Commission approved a final version of the contract, which included a nearly two-fold increase in the

cost of the land from three and a half million dollars to more than seven million.

Mr. Fore had signed off on the contract the previous day on July 24, 2007. R-366 The Harrison County Development Commission, through Larry S. Barnett, the Executive Director, signed the contract on August 4, 2006, and Connie Rocko, acting as the President of the Harrison County Board of Supervisors, signed off on the contract on August 14, 2006.

From the Saucier Citizen Group's point of view, two provisions in the contract are of particular interest: under paragraph 11, Conditions to Purchasers Obligation to Close, subparagraph E requires that before the contract can be closed, the Development Commission "shall have determined that it shall be able to utilize and develop a total of seventy-two percent of the acreage to be conveyed, free from any wetlands restrictions or from "any other applicable local, state or federal ordinance, law or regulation." In other words, seventy-two percent of the acreage has to be buildable for industrial park purposes.

And in Paragraph F, the deal couldn't go through unless the zoning were changed to I-2, general industrial. In signing on to the contract and approving it on August 14, 2006, the Board of Supervisors, the ultimate zoning authority in the county, in effect agreed to change the zoning: "if any portion of the property must be rezoned to comply with this provision, seller, with any assistance buyer (the Board of Supervisors) is able to provide, shall pursue such rezoning as expeditiously as possible, and conclude same prior to closing." Naturally, the zoning authority in the County is able to provide substantial assistance; indeed, when what is sought is a zoning change to permit the county to buy the property, who could provide more?

In any event, after Mr. Fore, the Development Commission, and the Board of Supervisors entered into the contract, on August 14, 2006, the same day it approved the land purchase contract, the Board of Supervisors adopted a resolution declaring its intention to issue taxable general obligation industrial development bonds in the amount of $7,750,000.00, to buy the land from Mr. Fore and establish the industrial park. See Open Records documents.

On August 18, 2006, four days after the Board of Supervisors became a party to the contract and authorized the issuance of bonds to finance the deal, a general application to change the zoning was jointly submitted by the Harrison County Development Commission acting as Mr. Fore's agent, to the Harrison County Zoning Administration. R-355.

A meeting was held on Thursday, September 21, 2006, by the Harrison County Planning Commission to consider the zoning change. The Development Commission appeared on behalf of Mr. Fore and presented the request for rezoning, and a large number of citizens from the community appeared to oppose it, both in person and by virtue of petitions which were submitted. Four days later, a letter dated September 25, 2006, R-760, notified Mr. Fore and other interested parties that the zoning had been changed for the 627 acre parcel of land from A-1 (general agriculture) and E-1 (very low density residential) to I-2 (general industrial).

The following day, Wednesday, September 27, 2006, Michael Edwards, a resident of the Saucier community and a party to this appeal, issued his notice of appeal from the zoning change.

A hearing was held before the Harrison County Board of Supervisors on November 8, 2006, at which time the Board of Supervisors upheld the decision of the Planning Commission, and the objectors timely filed their notice of appeal and bill of exceptions to the Circuit Court. After briefing and oral argument on February 28, 2008, the Circuit Court affirmed the zoning change made by the Board of Supervisors and denied the Objectors motions to supplement the record and to remand the matter back to Planning and Zoning for additional hearings. R-598. From those June 30, 2008 rulings, the Objectors took their appeal, filing their notice to this Court on July 22, 2008. R-900.

## SUMMARY OF THE ARGUMENT

The gist of the Citizen Group's argument is simple: the rezoning process has failed to comply with constitutional and legislative requirements. The Harrison County Board of Supervisors and the Development Commission decided that they wanted to buy Cotton Fore's land from him. They took a look at the procedural requirements and laid out a plan to try to satisfy the letter of the law, at least on its face, while concealing key documents and the actual process from the citizens of Saucier. They entered into the contract to buy the Fore land in late July and early August, 2006 after a long period of negotiation in which the price on the land doubled in a matter of weeks from $6,000.00 an acre to $12,000.00 an acre according to an internal email obtained through an open records act request; and only after the Board of Supervisors signed on to the land purchase, agreed to use their best efforts to change the zoning, and concurrently with their execution of the contract issued a resolution authorizing the

issuance of a $7,500,000.00 bond offering to finance the deal - - only then did the "rezoning" process began. Because the tribunal in which the zoning authority in the County is vested, the Board of Supervisors, was a party to the contract prior to any action being taken to change the zoning, the process is not legitimate, and regardless of how many hearings the Board of Supervisors holds it could never legitimize such a creation as is now before the Court.

The Development Commission appeared before the Planning and Zoning Commission as Mr. Fore's agent, going so far as to sign off on the application to change the zoning. At the Planning Commission hearing, however, the fact that there was already a contract was concealed from the Citizens and the Planning Commission, something they only learned later, and a copy of which contract was only obtained after this litigation actually began.

Within that context, the Citizens advance five assignments of error.

First, the Citizens living in the immediate vicinity of the Fore property were denied their due process rights under the Fourteenth Amendment and Article 3, Section 14 of the Mississippi State Constitution. The Legislature gave them a property right in the zoning process, which was denied to them when the Board of Supervisors agreed in advance to change the zoning. It can not be said that the Board of Supervisors was capable of dispassionate review, since it had a contractual obligation to use its best efforts to change the zoning.

Second, the factual basis asserted by the Board of Supervisors and the Development Commission to change the zoning - - public need created by a shortage of available industrial sites - - may not be demonstrated. Indeed, a survey of the county

land records reveals the availability of existing land already zoned industrial far exceeds what was represented by the Development Commission before the Planning Commission.

Third, the Fore contract with the Board of Supervisors and the Development Commission was not presented to the Planning Commission, which would make the initial decision on the zoning. The failure to present the contract, effectively concealing it, made any kind of meaningful decision by the Planning Commission impossible, since certain provisions of the contract were so intertwined with the zoning determination that for the Board not to be apprized of those provisions - - specifically the fact that the 601 connector road and its eminent domain proceeding which was forthcoming - - created a situation where the contract couldn't close, and since the whole purpose of the contract was to get land rezoned industrial, and the rezoning would thus be thwarted if the provisions of the contract itself had been followed. Because the Planning Commission didn't know the details about the 601 connector road - - it was not presented to them, even though the two corridors then under consideration cut directly through the Fore land - - it could not make an informed decision on the suitability of the Fore property for rezoning.

Fourth, and related to the preceding issue, the contract provided that unless 72% of the Fore property could be available for industrial development, the sale could not go through. A combination of wetlands and lands which would be lost to the 601 connector road likely pushed the land actually being sold to the county well below 72%. Instead of buying 627 acres for industrial use, the County is probably buying three to four hundred acres of useable land. Had the Planning Commission, assuming they

were acting in good faith, been apprized of that fact, the zoning could not have been approved under the facts represented by the Development Commission, i.e., that they required a 627 acre parcel, and that the smaller parcels elsewhere in the County would not do for rezoning to industrial purposes.

Fifth, when the hearing was held before the Board of Supervisors, the Board refused to consider various documents assembled by the Citizen's Group after it hired counsel and the Citizens understood that the hearing before the Planning Commission had been orchestrated so as to conceal or withhold from the Planning Commission the Fore contract and all its implications. Related to that, the Planning Commission never got to see the appraisal, which itself was infirm in that it made no mention whatsoever of the 601 connector situation. Virtually all the documents sought to be presented to the Board of Supervisors were those already present in the County record system, under the Board's control, directly or indirectly, and as such clearly should have been heard, since they did no more than rebut the incorrect assertions made by the Development Commission before the Planning Commission. The Circuit Court erred in not taking judicial notice of public documents found in the Court official records systems under the control of the Board of Supervisors.

## ARGUMENT

### A. Relevant Law

The law here is well settled. Before the zoning can be changed, the party seeking the change must prove by clear and convincing evidence either that:

1. There was a mistake in the original zoning;

2. There has been a change in the character or use of the land;

3. There is some compelling public need.

***Yates Gillis v. City of McComb***, 860 So.2d 833 (Miss. App. 2003); ***Tippitt v. City of Hernando***, 909 So.2d 1190 (Miss. App. 2005); ***Kuluz v. City of D'Iberville***, 890 So.2d 938 (Miss. App. 2004). Zoning decisions will not be set aside unless clearly shown to arbitrary, capricious, discriminatory, illegal or without substantial evidentiary basis. ***Drews v. City of Hattiesburg***, 904 So.2d 138 (Miss. 2005); ***Perez v. Garden Isle Community Assoc.***, 882 So.2d 217 (Miss. 2004); ***Beasley v. Neelly***, 911 So.2d 603 (Miss. App. 2005). A zoning decision of a local governing body which appears to be fairly debatable will not be disturbed on appeal, and will be set aside only if it clearly appears that the decision is arbitrary, capricious, discriminatory, illegal or not supported by substantial evidence. ***Gentry v. City of Baldwyn***, 821 So.2d 870 (Miss. App. 2002).

The Circuit Court's role in reviewing the decision of the zoning authority is not as a trier of fact, but as an appellate court. ***Mayor and Board of Aldermen for the City of Clinton v. Welch***, 888 So.2d 416 (Miss. 2004). The appellate court sitting in review of the decision to grant or deny a zoning variance affords deference to administrative factual findings, and if the decision can be viewed as fairly debatable, it will not be disturbed on appeal. ***Beasley v. Neelly***, 911 So.2d 603 (Miss. App. 2005).

Those possessing a property right or liberty interest granted by state law may not be denied that right without due process of law, and citizens are entitled to a hearing in front of a fair and impartial decision maker. ***Withrow v. Larkin***, 421 U.S. 35 (1975); ***In re: Murchison***, 349 U.S. 133, 136 (1955); ***Spradlin v. Board of Trustees of***

***Pascagoula Municipal Separate School District***, 515 So.2d 893 (Miss. 1987).

**B. Argument**

**ASSIGNMENTS OF ERROR**

**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.**

Any citizen aggrieved by a zoning determination made by the Planning Commission has a right of appeal to the Board of Supervisors pursuant to §903 of the Harrison County Zoning Ordinance and Miss. Code Ann. §17-1-17. Hence, the right to have the decision of the Planning Commission reviewed by the governing body of the county, the Board of Supervisors, is one which is established by state statute and local ordinance. The right to such review thus rises to the level of constitutional proportion, since affected citizens have a property interest in the zoning process and its review.

The problem here is that there could be no meaningful review of the Planning Commission action, since the Board of Supervisors was a party to the contract for the purchase of land, giving the Board a vested interest in the matter before it the Board became a party to the contract to purchase the land from Cotton Fore, contingent upon Fore and the Development Commission obtaining a change in the zoning of the property, and, of course, it is the Board which ultimately is the arbiter of the zoning changes. The Board had a contractual duty to use its best efforts to effect the zoning change. Paragraph 11F provides that "the real property shall be zoned in a manner

which will enable HCDC to ...develop the property as an industrial park...if any portion of the property must be rezoned to comply with this provision, Seller, with any assistance (the Board of Supervisors/HCDC) is able to provide, shall pursue such rezoning as expeditiously as possible, and conclude same prior to closing." Since the Board determines the zoning in the first instance, its best efforts are thus foolproof, absent effective judicial review.

Because the citizens have a protected property interest in Board of Supervisor's review of the zoning determination of the Planning Commission, they have a right to a decision by a fair and an impartial board. In the United States Supreme Court case of ***Withrow v. Larkin***, 421 U.S. 35 (1975), the high court stated that "...a fair trial in a fair tribunal is a basic requirement of due process." Citing ***In re: Murchison***, 349 U.S. 133, 136 (1955). The rule applies to administrative agencies which adjudicate as well as to courts. ***Gibson v. Berryhill***, 411 U.S. 564, 579 (1973). Not only is a biased decision maker constitutionally unacceptable, but "our system of law has always endeavored to prevent even the probability of unfairness." ***In re: Murchison***, supra, at 136; cf. ***Tumey v. Ohio***, 273 U.S. 510, 532 (1927). Again quoting from ***Withrow***:

> ...in pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the Judge or decision maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him. The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication held a much more difficult burden of persuasion to carry. It must overcome a presumption of honest and integrity in those serving as

> adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weaknesses, conferring investigative and adjudicative powers on the same individuals pose such a risk of actual bias or prejudgment that the practice may be forbidden if the guarantee of due process is to be adequately implemented.

These rules have been adopted by the states, of course. In Mississippi, the seminal case is ***Spradlin v. Board of Trustees of Pascagoula Municipal Separate School District***, 515 So.2d 893 (Miss. 1987). ***Spradlin*** adopted ***Withrow v. Larkin*** and spelled out that there is a presumption of honesty and integrity in those serving as adjudicators. In order to rebut the presumption, the objector must show that the Board had a personal or financial stake in the decision, or that there was some personal animosity toward the objector. The mere fact that the Board was involved in the events preceding the action complained of is not enough, absent a showing of either personal interest, personal stake or financial stake in the decision, to overcome the presumption of honest and integrity in conducting a hearing and rendering a fair decision.

Here, the Board has more than a passing interest in the matter before it: indeed, the Board is an actual party to the contract of sale, and prior to even publishing to the public its intention to consider a zoning change, the Board agreed contractually to do what it could - - using its best efforts is the phrasing of the contract - - to effect the zoning change. Under such a "best-efforts" scenario, where the Board is a party to the very contract which required a zoning change in order for the contract to go through, it unduly taxes credulity to believe anything other than the Board was mindful of its contractual responsibility to get the zoning change passed. The Board prejudged the deal when it became party to the contract.

In order to preserve its ability to fairly adjudicate the zoning change, no action should have been taken on the contract prior to Mr. Fore and the Development Commission petitioning the Planning Board for the zoning change. Had they done that before presenting the contract to the Board of Supervisors, the citizens could not have complained about the Board being directly, contractually interested in the outcome, as its signature on the contract signaled.

There is more.

Not only did the Board agree to use its best efforts to cause the zoning change to come about, it passed a resolution to float a $7,500,000.00 bond issue as soon as the zoning change was in place.

For anybody to say that this Board was disinterested and that these citizens got a fair shake in front of it is to ignore the realities of what happened here. If ever there is a case where this Court has an opportunity to preserve even a meager shred of confidence that the citizens of the Saucier area have in government, this is it. The zoning change should be set aside, and the matter left for another day, with the contract thus being abnegated and the previous zoning map restored.

**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 was incorrect in changing the zoning as it did, making the decision arbitrary and capricious.**

Before there could be a change to a zoning map, the party seeking the change must prove by clear and convincing evidence either that:

(1) there was a mistake in the original zoning;

(2) there has been a change in the character or use of the land;

(3) there is some compelling public need for the change.

***Yates Gillis v. City of McComb***, 860 So.2d 833 (Miss. App. 2003); ***Tippitt v. City of Hernando***, 909 So.2d 1190 (Miss. App. 2005); ***Kuluz v. City of D'Iberville***, 890 So.2d 938 (Miss. App. 2004).

The Development Commission spoke for Mr. Fore at the Planning Commission meeting held September 21, 2006. The zoning officer for the County noted at the outset of the meeting that Mr. Fore had been in front of the Planning Commission "a couple of years ago," and although the Planning Commission approved Fore's request to change the zoning, it was "denied by the Board of Supervisors." Transcript at page 2, R- 608. When the Development Commission presented the case for the rezoning, the succinct reason for the request "...is a need request. It's a need for additional industrial land." Transcript, page 5, page 8 ("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." ) R-614. The Development Commission noted that industrial parks exist in Harrison County in Pass Christian, Long Beach, Gulfport, and Bayou Benard, and two more in the City of Biloxi. Transcript, page 9. R-615. The presenter stated that "...there is 3,300 acres in all of these parks. The County is down to 266 acres total acreage left out of 3,300 acres that started out."

In speaking to the total amount of acreage left outside the existing industrial parks, the Commission represented that there were only about 1,000 acres left in the entire county that might be available for industrial development. Transcript, page 11.

R-617. And in response to a direct question by one of the Planning Commissioners, the HCDC representative stated that the largest site in any of the existing parks available for development is 35 acres. Transcript, page 18. R - 624.

The representations to the Planning Commission by the Development Commission were simply not correct. In addition, the Development Commission, perhaps not surprisingly, wholly failed to disclose to the Planning Commission that a contract had already been signed with Mr. Fore for the purchase of the land by both the Development Commission and the Board of Supervisors, and that Board of Supervisors had in effect already passed a resolution to float a bond issue to the buy the land. The omission was serious, in that certain terms of the contract would have been vital to a proper understanding of the request, and the fact that the Development Commission concealed the existence of the contract from the Planning Commission raises serious questions in the mind of any fair-minded analyst.

Here are some of the immediate problems that make the needs presentation so flawed as to cause any decision to be made upon it to be arbitrary and capricious within the contemplation of the law, and therefore infirm.

Members of the citizen's group opposing sewage treatment plants, concrete plants, slaughter houses, anything that might be brought in under an I-2 zoning or request for a one level variance, did a quick survey of the public records and toured Bayou Bernard looking for sites posted for sale or lease. Their observations contradict the representations of the Development Commission.

A physical inspection of Bayou Bernard, an approximately twenty-five hundred acre park, disclosed, twenty-eight of its parcels marked or posted for sale or lease or

otherwise available for development - - that is, they are unoccupied. The four largest parcels, listed by owner and acreage, and parcel numbers are:

| | | | |
|---|---|---|---|
| 1. | Harrison County | 93.8 acres | 1009K-01-001.000 |
| 2. | Harrison County | 72.3 acres | 0909B-02-001.000 |
| 3. | Harrison County | 30.25 acres | 0909G-01-001.000 |
| 4. | Harrison County | 29.2 acres | 0809A-010009.000. |

As the Court will note, the four largest range from 93.8 acres to 30 acres, with there being a 72 acre site in there as well. R-535.

In any event, the Development Commission flatly told the Planning Commission that there was virtually no industrial land left in the County. However, a quick survey of the land rolls discloses 703 separate, unimproved parcels already zoned for industrial use. Of those 703 parcels, the County already owns at least 106 of them. The public records online are incomplete, and 47 of the parcels do not reflect the identity of the owner or the size of the parcel. The average size of the 700 parcels is 10 to 12 acres. At the September 21st hearing, the HCDC representative asserted that they weren't interested in developing small 4 to 5 acre sites, implying that larger sites aren't available. As mentioned, the average size is twice that, 10 to 12 acres, and many much larger sites are vacant and available for development.

The five largest sites are already zoned for industrial use along with their owner, which happens to be Harrison County, include acreages of 148, 119, 93, 72, and 55. See exhibit "O", R-535.

It simply cannot be said that the decision of the Planning Commission is fairly debatable, given the existing availability of industrial land, which far exceeds that which was represented to the Planning Commission.

**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 announcing to 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.**

As pointed out above, the Development Commission and the Board of Supervisors withheld from the Planning Commission the contract between Fore and the County, to include both the Development Commission and the Board of Supervisors, effectively concealing key terms which, had they been disclosed to the Planning Commission, would likely have caused the public needs zoning decision to have been different. That is, there could be no closing on the contract if there were litigation of any sort, either existing or threatened in writing, or any governmental proceeding. The specific language of the Board of Supervisors/HCDC agreement with Fore reads thus:

**11. <u>CONDITIONS TO PURCHASER'S OBLIGATION TO CLOSE</u>:**

B. There shall not exist any pending litigation, or litigation which has been threatened in writing, *or any governmental proceeding*, affecting the property.

Exhibit L to the Concerned Citizens Supplemental Exhibits, R-452.

The Development Commission actually did mention the 601 connector, although not by name, at the hearing in front of the Planning Commission. Here's what they said:

> . . . this park was selected on Highway 49 (the Fore property) because of the rail access, because of the highway access, and with ***the future potential for a northern road up Canal Road, the new road that the Highway Department is talking about . . .***

Transcript, page 5, R-611.

What the Development Commission representative did not tell the Planning Commission was that the Mississippi State Department of Transportation had narrowed down the routes for the 601 connector roadway to two corridors, proposed route number 2 and proposed route 3B. The omission could not have been accidental. Exhibit "M" to the supplemental exhibits provided to the Board of Supervisors by the Saucier Concerned Citizens Group contains a map showing the two routes, 2 and 3B, and it may be seen that both cut squarely through the proposed acquisition from Mr. Fore. R -461.

The Department of Transportation has announced the project, funded it, and is well on the way to actually beginning construction. It will, absent a voluntary sale of the necessary land needed to build the roadway, exercise its power of eminent domain in order to acquire the property. The State Department of Transportation has authority pursuant to Miss. Code Ann. §65-1-47 to take by eminent domain any land that it needs to construct, improve, widen, or lay out a new public highway. Thus, if Mr. Fore owns the land at the time the route selection is made and it's time to begin construction, he will be forced to sell his property pursuant to litigation, an eminent domain proceeding,

to the State Department of Transportation. It's questionable, moreover, whether MDOT would pay $12,000.00 an acre for the land. This, too, becomes relevant for a zoning connected economic reason, since if the Development Commission owns the land when its time for the highway to be constructed, the land gets taken from it, either voluntarily by sale, or by eminent domain thereby reducing the amount of the tract available for development. The State Department may take land by eminent domain against public entities as well as private ones. ***Harrison County School Board v. State Highway Commission***, 284 So.2d 50 (Miss. 1973); ***Board of Supervisors of Covington County v. State Highway Comm.***, 188 Miss. 274, 194 So.743 (Miss. 1940).

Thus, it is clear that under the terms of the contract there does exist "litigation, or litigation which has been threatened in writing, or any governmental proceeding, affecting the property," within the contemplation of paragraph 11, subsection B of the County's contract with Fore.

This matter should clearly have been disclosed to the Planning Commission, as it was relevant to a zoning determination. The County admitted that there had been no change in the character of the land; nor had there been any mistake in the original zoning, which is only six years old. Coupled with the wetlands issue, to be discussed below, how could it conceivably be said that it is in the public interest to pay an astronomical sum of money for land, a significant amount of which is not useable, and a good portion of which is about to be lost to the State for highway purposes in the near future? In other words, if instead of saying to the Planning Commission, "we have a 627 acre plot of ground which we want to pay $7,500,000.00 for, and we want you to

rezone it so we can do the deal," the Development Commission had said "we have a three to four hundred acre plot of ground" - - which is apparently the effect of the wetlands/highway connector deductions - - "which we want to pay $7,500,000.00 for if we can get the zoning changed to I-2", would there have been approval? Would at least one member of the Planning Commission have so much as raised a question? Would even a single member of the Board of Supervisors have asked a question? Clearly there could have not been approval consistent with the contract, because of the plain terms of paragraph 11B, which forbids closing because of the pending litigation/governmental proceeding connected to the eminent domain shortly to commence. Surely someone in local government cares about that. Hence, the action of the Planning Commission is arbitrary and capricious, and therefore an improper zoning determination.

**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 much of the purchased land, thus thwarting the putative purpose of the re-zoning, i.e., to significantly increase industrial zoning in the county.**

Under the terms of the Fore contract with the County, unless 72% of the land were available for development, the contract failed of its own terms. Specifically:

**11. <u>CONDITIONS TO PURCHASER'S OBLIGATION TO CLOSE</u>:**

E. HDCD shall have determined that it shall be able to utilize and develop a total of 72 percent of the acreage to be conveyed free and clear from any

> and all restriction with regard to coastal wetlands, promulgated by the United States Army Corps of Engineers or any other applicable local, state or federal ordinance, law or regulation.

When this contractual provision is considered, the Planning Commission decision was arbitrary and capricious for yet another reason. The Development Commission wholly fail to describe the impact of the 601 connector road running through the Fore land, as pointed out above, and the Planning Commission thus failed to consider the impact of the connector road. Bear in mind that the sole reason for the rezoning was an alleged public need, so that if the land could not be used in accordance with the contract, there existed no basis for the rezoning as to that particular piece of property. The failure of the HCDC to talk about the 601 connector, coupled with the concealment of the contract and its relevant provisions as to the viability of the parcel for the claimed public need, further concealed from the Planning Commission that a substantial portion of the total acreage ***could not "be conveyed free and clear from any and all restriction with regard to coastal wetlands, promulgated by the United States Army Corp of Engineers, or (free from) any other applicable local, state or federal ordinance, law or regulation." Exhibit "L" Board of Supervisors contract with Cotton Fore, paragraph 11, subparagraph E. (Emphasis supplied)*** R - 769.

At page 7 of the transcript, R-613, the HCDC represented that wetlands on the 627 acre plot were "minimal." At page 15, the HCDC stated that "we have a wetlands delineation that has already been done, and we would like to submit that." Planning Commission transcript, page 15, R - 621.

At page 24 of the Planning Commission transcript, the reason for the Board of Supervisors and the Development Commission, partners to the contract with Mr. Fore, to conceal from the Planning Commission the existence of the contract and its terms becomes clear. At page 24, an HCDC representative stated to the Planning Commission:

> ...(We) provided a copy of a letter from the U.S. Army Corp. of Engineers that was dated May 18th of 2004, confirming that the Corp. agreed with the wetland delinination that we prepared for the site (Cotton Fore's land). In that wetland delinination, ***we found approximately 100 acres of the 550 acre main parcel looked like wetlands***. ..." (emphasis suppled) Planning Commission transcript at page 24, R - 630.

Thus, we know that 100 acres of Cotton Fore's original 500 acre site was wetlands, meaning that the percentage of that main parcel was about twenty percent wetlands. However, Mr. Fore added a second parcel to up the acreage, and we do not know with precision what the wetlands percentage is when the second parcel is added in.

The contract by its own terms entered into by the Board of Supervisors and the Development Commission on its face says that the contract can't go forward unless 72% of the land is available for industrial park development. See exhibit "L", Contract to Purchase Property, paragraph 11, subparagraph "E". R-769.

Hence, the decision of the Planning Commission is clearly arbitrary and capricious in the face of the contract itself. Evidence that 100 of the original 500 acre tract is unusable because of wetlands; and a substantial additional portion of the land will be lost to the connector road. And all within the context of the price of the land

doubling virtually overnight from $6,000.00 per acre to $12,000.00 per acre. Without the benefit of the contract, which was withheld from the Planning Commission; and without the eminent domain issue, presented by the Development Commission; and being without an updated wetlands figure on the second tract, any decision made by the Planning Commission would necessarily be arbitrary and capricious.

**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 at the Planning Commission hearing and the Circuit Court erred in failing to take judicial notice of the documents.**

At the hearing in front of the Board of Supervisors to review the Planning Commission decision, the Board of Supervisors refused to consider the supplemental exhibits, A through O, R-194 ff, offered by the citizens which were proffered. This decision was improper and served to deny the objectors a fair hearing, since the evidence offered was clearly relevant and for the most part was made up of documents from the public records system which addressed concerns which were raised at the Planning Commission hearing.

Miss. Code Ann. §11-51-75 establishes jurisdiction in this Court to review the actions of the Board of Supervisors. Although Rule 5.01 of the Uniform Circuit and County Court Rules provides that except for appeals from Justice or Municipal Court, "all cases appealed to Circuit Court shall be on the record and not a trial de novo," the rules really do not speak to the question of what additional documents may be presented to the Board of Supervisors, particularly if they come from their own record

system, when the Board reviews the actions of a statutorily created inferior body acting as a zoning authority.

***Ditto v. Hinds County***, 665 So.2d 878 (Miss. 1995) stands for the proposition that a trial judge may sua sponte take judicial notice of the minutes of the Board of Supervisors, saying that such public records are "capable of accurate and ready determination by resort to sources whose accuracy can not reasonably be questioned," and therefore, are admissible pursuant to Rule 201, judicial notice of adjudicative facts.

Looking at the exhibits bound and offered by the Concerned Citizens, it may be seen that exhibit "A", R - 710, the incorporation papers from the Mississippi Secretary of State, is a public record maintained by a government agency of the State of the Mississippi; exhibits "B" through "E", R-716 through 747, are all records maintained by the Harrison County Board of Supervisors or the County Tax Assessors Office, and therefore clearly within the contemplation of Rule 201; exhibits "J" through "L"; R - 760 ff, and exhibit "0", R- 822 ff are taken directly from the public records of the County and are technically before the Board of Supervisors at all times anyway. These documents are all susceptible to judicial notice, there was no surprise to the County, and in some instances the documents should, in fairness, have been presented by the County through its agent, the Development Commission, to the Zoning Commission.

Information regarding the Highway 601 connector file as well as relevant emails were obtained by virtue of an Open Records request made by counsel after being hired by the citizens (the zoning hearing had already taken place) and the records obtained from the Development Commission, again, are public records, highly relevant to any

determination by this Court as to the efficacy of the zoning determination, and are such as to permit judicial notice.

In particular, the email (R-242) regarding the value of the land as being only $6,000.00 in March, when four months later it's suddenly $12,000.00 an acre, doubling in price; the resolution of the Harrison County Board of Supervisors passing a bond issue to fund the land purchase, prior to the hearing on the zoning taking place; the public contract between Cotton Fore and the County, with signators being the Development Commission and the Board of Supervisors, being critical, since it was withheld from the Planning Commission and not available to the citizens at the time the Planning Commission hearing was held.

Indeed, how could there be meaningful review by the Planning Commission or any other reviewing authority without access to the contract with Cotton Fore? It contains relevant provisions which should stop the County from going forward: specifically, paragraph 11B which says they can't close on the land deal if there is any kind of litigation or public action threatened, i.e., the Highway 601 connector action, which was concealed effectively from the Planning Commission; and 11E, the 72 % rule, which affects directly whether the land should be rezoned or not. The argument made by the Development Commission was that they needed this large parcel of land because they didn't have large parcels available elsewhere, and without the 600 acres, development could not properly be nurtured. It was simply wrong for the Development Commission and the Board of Supervisors to hide these documents from the Planning Commission (and we will assume that the Planning Commission members did not know about the contract and the agreement of the Board of Supervisors to change the zoning

in order to make the contract go through). The public interest is not served by clouding things and making matters opaque. Everyone should have been forthright about what was happening here. Instead, they hid the contract with Cotton Fore before the Planning Commission, they didn't present any evidence of the 601 connector issue, they didn't discuss the contractual provision as to 72% of the land being useable before the sale could be made within the context of eminent domain/wetlands issue, and no evidence was put on of the number of acres in wetlands in the second parcel of the Fore property.

In effect, the HCDC and the Board of Supervisors made the entire review process highly questionable when they well knew that the Board of Supervisors had signed on in advance, that the Supervisors had already agreed to use their "best efforts" to change the zoning, and the contract containing relevant facts was concealed from the Planning Commission.

This Court should take judicial notice of all the records and things offered by the citizens.

## V.

## CONCLUSION

This is a case of arbitrary and capricious action by the zoning authority. The Harrison County Board of Supervisors signed on as a party to a contract, taking on a contractual obligation to use its best efforts to change the zoning to general industrial. Because it's the zoning authority, the Board's "best efforts" are very good indeed. The citizens of this county have not been well served here. The price of the land went from $6,000.00 an acre in March to $12,000.00 an acre in July, when the appraisal report

doubles the price of land four months later and makes absolutely no mention of the connector road issue. Review of the internal emails disclose that the appraiser called for a copy of the contract before he issued the report evaluating the land. Why did he do that?

The Court is the last line of defense here. If the Court doesn't intervene, a grave injustice will have been done to the citizens of Harrison County in general, and to the Saucier Concerned Citizens in particular. This entire transaction needs badly to be debated in the public forum so everyone can get a close look at how local government functions for all of us who live here, and all the facts surrounding an overnight doubling in value from six to twelve thousand dollars an acre on an occluded sale of private land to a public body need to be aired in the light of full public scrutiny.

Respectfully submitted this the 7th day of November, 2008.

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

By: _____
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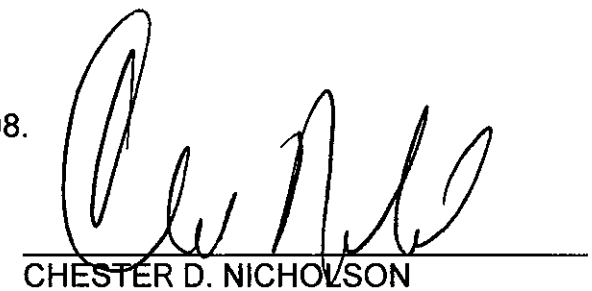
## CERTIFICATE OF SERVICE

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 ***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 to the offices of the President of the Harrison Board of Supervisors at their mailing address of P. O,. Drawer CC, Gulfport, Mississippi 39502.

This the 7th day of November, 2008.



CHESTER D. NICHOLSON