IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01329

ALBERT DUCKETT AND ALICE DUCKETT — APPELLANTS

VERSUS

MAYOR AND BOARD OF ALDERMEN OF
THE CITY OF OCEAN SPRINGS, MISSISSIPPI — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
NO. 2007-00,130(3)

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE:**

CITY OF OCEAN SPRINGS ORDINANCES:

BRIEF OF APPELLEE, MAYOR AND BOARD OF ALDERMEN OF THE CITY OF OCEAN SPRINGS, MISSISSIPPI

COMES NOW, the Appellee, Mayor and Board of Aldermen of the City of Ocean Springs, Mississippi, in the above styled and numbered cause by and through its attorneys of record, and files this its Appellee Brief, to show as follows:

I. STATEMENT OF THE ISSUE

The Circuit Court of Jackson County did not err by applying the "substantial evidence" standard of review to a governing authority's interpretation of its zoning ordinance and affirming the decision of the Mayor and Board of Aldermen of the City of Ocean Springs, which determined that the proposed deli was a permitted use in the C-4B Commercial Limited Marina district.

II. STATEMENT OF THE CASE

The Mayor and Board of Aldermen of the City of Ocean Springs (hereinafter referred to as "Board" or "City") interpreted the language of Section 409 C4-B (Commercial Limited Marina) of the Ocean Springs Zoning Ordinance and determined that a proposed deli was a permitted use in the harbor. The Circuit Court of Jackson County (hereinafter referred to as "trial court") affirmed the City's decision and this appeal is a result thereof.

Initially, the Harris' (hereinafter referred to as "Applicant" or "Harbor Landing") filed an application with the City of Ocean Springs' Planning Commission (hereinafter referred to as "Commission") for a special use permit to provide food services in the harbor as they were advised to do by an Ocean Springs building official. (*See* Application, Appellants' R.E. 26-27 and Letter, Appellants' R.E. 19.) The Commission conducted a public hearing on said request on March 13, 2007. After some discussion, the Commission voted to table the request in order to obtain more information on parking and other issues. (*See* Minutes of March 13, 2007 Commission meeting,

Appellants' R.E. 074-077.) At the April 10, 2007 meeting, the Commission heard additional information on the request and made a recommendation to the Mayor and Board of Aldermen that the request for a special use permit be denied.

The Harris' appealed the Planning Commission's decision to deny their request for a special use permit. This issue was placed on the Board's April 17, 2007 agenda, but was taken off after the Harris' requested a clarification of the zoning ordinance. *See* Minutes of April 17, 2007 Board meeting, Appellants' R.E. 114.) After the City Attorney reviewed the zoning ordinance and provided a memorandum on the requested clarification, the Board heard the request on May 1, 2007. (*See* Memorandum, Appellants' R.E. 195-208.) Based on the Attorney's research, the Board informed the Applicants that a special use permit is not allowed under the ordinance in question. The Board further held that under the language of the ordinance in question a deli as proposed by the Harris' is a permitted use *and allowed by the language in the ordinance* . (*See* Minutes of May 1, 2007 Board meeting, Appellants' R.E. 177-178.)

Appellants filed a Notice of Appeal on or about June 1, 2007 in the Jackson County Circuit Court. On or about September 20, 2007, Appellants filed a Bill of Exceptions. On or about October 31, 2007, Appellants filed their Appellate Brief. The City filed a Corrected Bill of Exceptions on or about November 2, 2007 and its Brief on or about December 3, 2007. The trial court heard oral arguments on February 29, 2008. On or about July 2, 2008, the court issued its Decision and Order affirming the Board's decision. Finally, the Appellants filed their Notice of Appeal to this Court on August 1, 2008.

III. SUMMARY OF THE ARGUMENT

The trial court did not err in applying the "substantial evidence" standard and affirming the decision of the Mayor and Board of Aldermen of the City of Ocean Springs. The Board interpreted

the language of Section 409 C4-B (Commercial Limited Marina) of the Ocean Springs Zoning Ordinance and determined that a proposed deli was a permitted use thereunder. The court held there was sufficient evidence to support the Board's findings of fact and that said findings were "not unreasonable, arbitrary, capricious or beyond the authority of the Board to make." (*See* Decision and Order Affirming Decision of the Mayor and Board of Alderman of the City of Ocean Springs, Mississippi, Appellants' R.E. 240-246.)

Despite Appellants' assertions, the Board did not provide the Harris' with a special exception. The Board did not allow a restaurant and bar use in the harbor nor did it grant a variance or engage in spot zoning. The Board simply looked to the language of its ordinance and determined that the Harris' request to operate a deli was within the permissible uses under the applicable ordinance.

IV. ARGUMENT

A. Standard of Review

1. The City's Interpretation of Its Zoning Ordinance is Presumed Valid and Will Not Be Disturbed Unless it is Clearly Shown to be Arbitrary, Capricious, Discriminatory, or is Illegal, or Without a Substantial Evidentiary Basis

In this instance, the City interpreted the language of its city zoning ordinance, Section 409 C4-B (Commercial Limited Marina), to determine whether the operation of a deli as presented by Harbor Landing was allowed under said ordinance.

It is well settled law that "[t]he cardinal rule in construction of zoning ordinances is to give effect to the intent of the lawmaking body." *Columbus & Greenville Railway Co. vs. Scales*, 578 So. 2d 275, 279 (Miss. 1991.) Furthermore, "[i]n construing a zoning ordinance, unless manifestly unreasonable, great weight should be given to the construction placed upon the words by the local authorities." *Id.* In *Faircloth versus Lyles*, this Court opined "the best interpretations of what the

wording in the ordinance means is the manner in which it is interpreted and applied by the enacting and enforcement authorities." 592 So. 2d 941, 945 (citing *Scales*, 578 So. 2d at 279 (Miss. 1991)). The interpretation of the governing authority will not be disturbed "unless it is clearly shown to be arbitrary, capricious, discriminatory, or is illegal, or without a substantial evidentiary basis." *Id.* at 943. A governing authority's decision that is "fairly debatable" cannot be considered arbitrary or capricious, because "fairly debatable is the antithesis of arbitrary and capricious." *City of Biloxi vs. Hilbert*, 597 So. 2d 1276, 1280-81 (Miss. 1992). Thus, the trial court did not err by applying the arbitrary and capricious/substantial evidence standard of review wherein the City interpreted its own zoning ordinance.

2. Section 409 C4-B (Commercial Limited Marina District) of the Ocean Springs Zoning Ordinance

The C-4B Commercial Limited Marina district ordinance provides the following:

> In the marina zone the use of buildings, other structures, and the land is restricted to the following: Yacht clubs, sale or service and supplies including beverages and food for boats and water craft which use the small craft harbor. Specifically prohibited are: All types of commercial marine ways, repair shops or any type of industrial activity.

The Board interpreted the words "for the sale or service and supplies including beverages and food for the boats and water craft which use the small craft harbor" and made a fact-based decision that the Harbor Landing deli as proposed was a permitted use under the language of the ordinance.

3. History of Section 409 of the Ocean Springs Zoning Ordinance

Before making a decision on this issue, the City considered the history of Section 409 of the Ocean Springs Zoning Ordinance provided by its City Attorney. (*See* Memorandum from City Attorney, Appellants' R.E. 195-208.) First, the City Attorney explained that Section 409 does not

provide for a special exception or special use.[1] Therefore, the question before the Board became whether the proposed deli was an allowable use in the C4-B district (i.e., whether the Harris' "proposal ha[d] a primary intended use as 'sale or service and supplies including beverages and food for boats and watercraft which use the Small Craft Harbor'"). Because these words are not specifically defined within the ordinance, the Board as the governing authority interpreted their meaning.

The original version of this ordinance, No. 4-1949, provided specifically for "two boat ways, one gasoline filling station for boats, restroom in connection therewith, ice crushers and necessary housing to take care of said items, to be located at the Small Craft Harbor all for the use and convenience of boats using said harbor." In 1957, the City created "the commercial limited-boating and marine" district via Ordinance No. 1-1957. This ordinance allowed businesses or commercial enterprises that "related to the sale of services and supplies for boats and watercraft which use the Small Craft Harbor." It expressly restricted against the building, repair and upkeep of boats on land or the scraping and painting of the same. Further, it specifically prohibited the sale of beer or alcoholic beverages. The ordinance was amended in 1959 to include the following language, "the marina zone may be used for residential purposes, subject to the regulations for residential "A" zone." In 1967, the Mayor and Board amended the 1959 ordinance to allow for the sale of beer, but prohibited its consumption on the premises.

In 1972, the ordinance was amended to read as follows: "In the marina zone the use of buildings, other structures, and the land is restricted to the following: sale or service of supplies for boats and watercraft which use the Small Craft Harbor. Specifically prohibited are: all types of

[1] The Harris' application originally came before the Planning Commission and the Mayor and Board as a request for a special use or special exception as directed by the Building Department.

commercial marine ways, repair shops or any type of industrial activity. Beer may be sold for off premises consumption." Notably, the language referring to residential purposes was deleted as well as the specific language restricting against the repair and upkeep of boats on land or the scraping and painting of same or the doing of any kind of building or repair for boats.

Finally, in 1976, the language of the ordinance was amended to mirror that of today's ordinance, which provides in pertinent part: "In the marina zone the use of buildings, other structures, and the land is restricted to the following: Yacht clubs, sale or service and supplies *including beverages and food* for boats and water craft which use the small craft harbor." The Board removed the clause "[b]eer may be sold for off premises consumption" and included the words "beverages and food" in the sale or service and supplies category. Importantly, it does not limit the consumption of the food and beverages to off site premises, as it did beer in the prior ordinance nor does it limit the preparation of the food to off site premises.

The City interpreted the language of this ordinance in 1982 when the construction of an ice house was proposed by the prior owner of this property, Earl H. Fayard, Jr. The City requested an opinion from the then City Attorney, Oscar R. Jordan, whom stated that whether or not the ice house would be considered an allowable use was a factual decision and depended on whether the Board found it to be a "sale of service and supplies, including beverages and food for boats and watercraft which use the Small Craft Harbor." (*See* minutes of Recess Meeting of October 19, 1982, Appellants' R.E. 207-208.) He further stated, if Mr. Fayard planned to sell ice to all boats and watercraft (rather than just commercial), the proposed ice house would serve *primarily* the boats and watercraft which use the Small Craft Harbor. (*Id.*) (emphasis added). By a unanimous vote, the City found the ice house to be a permitted use under the language of the ordinance. (*Id.*) Note, the ice house sales were not restricted *exclusively* to boats and watercraft which use the harbor.

4. The City's Interpretation of Section 409 of the Ocean Springs Ordinance Was Not Arbitrary and Capricious

The minutes of the May 1, 2007 Board meeting clearly provide that the Board considered the language of the ordinance and concluded that the proposed deli was a permitted use based on substantial evidence. (*See* Minutes, Appellants' R.E. 177-178.) The Board made several findings of fact as follows:

1. That the testimony represented that the deli will provide food and beverages primarily to the boating public.

   Representations by the Harris':
   - A. That the Marina users requested food service.
   - B. That the Harris' stated it is their plan to serve food primarily to their boating customers.
   - C. That the hours of operation of the deli are from sunup to sundown, which mirror the hours of the Marina.
   - D. That the food menu lends itself to take-out.
   - E. That the Harris'/Harbor Landing are providing only ten (10) tables for dine-in customers as a convenience and incidental to the serving of beverages and food to harbor boaters.
   - F. That the Harris' submitted business plan documents.

2. That traffic congestion exists.
3. That the neighborhood surrounding the harbor could be adversely affected by loud noise, rowdy behavior and late night hours of operation.
4. That the Harris' submitted certain documents which contained representations by them that would be enforced as a condition of occupancy.

(*See* Appellants' R.E. 187.) Moreover, the Board imposed certain conditions upon the Harbor Landing deli requiring it to provide adequate parking, provide security at designated times throughout the year, operate from sun-up to sun down and follow all noise ordinances. In requiring the deli to operate from sun-up to sun down, the City acknowledged that in order to primarily serve the harbor users as required by the ordinance, the hours of the deli need to be limited to when the harbor is active, as opposed to closing at one o'clock in the morning.

Finally, the Board expressly stated that the finding that the deli was a permitted use under

the language of the ordinance was made "within the particular facts, statements, and representations presented," and if the facts change or were misrepresented, the deli's permits could be revoked and it would become a non-conforming use. (*Id.*) Thereby, making it clear that the City will ensure the zoning ordinance is complied with and will take appropriate action if it is not.

a. The Harris'/Harbor Landing's Intention

The Appellants assert that the Harris' true intention is to serve the general public as opposed to the boats and watercraft of the harbor and therefore the proposed deli does not fall within the language of the ordinance. (Appellant Br. 32-36.) The City readily admits that the Applicants first applied for a special use permit to provide food services in the harbor as they were advised to do by the Ocean Springs Building Official, Terry Agar. (*See* Appellants' R.E. 026-027; Appellants' R.E. 019.) It was later brought to the attention of the Applicants, as well as the City, after an examination of the ordinance in question, a special use permit is not allowed under said ordinance. (*See* Appellants' R.E. 195-208.) Thus, the City was left to examine the language of its ordinance and decide whether the proposed deli was allowable under the zoning ordinance as written. After hearing arguments for both sides, the Board concluded the deli was a conforming use.

Appellants argue that there is no substantial evidence or even a "mere scintilla" of evidence to support the finding that the Harris' intend to limit their services to the boats and watercraft using the harbor because the Harris' changed their position at the last minute, therefore, their final statement of intention is unbelievable. (Appellant Br. 36.) Appellants further state, "[o]bviously, Harbor Landing changed its position after reading the City Attorney's memo and realized that a 'special use permit' is not legal in the Limited Marina District." (Appellant Br. 35.) The City strongly disagrees with Appellants suggestion that the Harris' are dishonest solely because they altered their position on an issue. This is especially true in the instant case where the course of the

proceedings changed in the middle of the process (i.e., from a request for a special use permit to the interpretation of an ordinance). In any event, the Harris' did not change their position on this issue, they ultimately altered their plans to comport with the language of the zoning ordinance. This certainly does not make their proposal to the Board untruthful.

Mrs. Harris spoke at the May 1, 2007 Board Meeting and stated the following in pertinent part:

> [W]e are a dry marina. We store boats, but then we service the customers where those boats are storing. Tr. 2:14-2:15. When we opened the business, we listened to what our customers wanted. The request of those customers were things like ice, fuel, bait, drinks, and we responded to all of those. Food was also a very large request by those customers, and not just a Coke and a bag of chips, they wanted prepared food that they could take out on the boat with them or have there while they were waiting for their boat at the harbor. We want to make it clear that we have a business plan that is one goal and one goal only, and that this full-service customer business marina, which includes a deli to provide food to the boaters – and we anticipate that 100 percent of our customer base is our boating community at the Ocean Springs harbor. As you're well aware, there have been many statements regarding this idea of opening a deli. While many statements have no merit, whatsoever, we have taken the valid concerns of our neighbors into account and we certainly want to show the willingness to bridge the gap between what is best for the people at the harbor and for the neighboring citizens who have voiced concerns.... Tr.2:24- 3:25. [W]e read Mr. Edwards' document on the clarification that we asked for two weeks ago, and we're here tonight to show that we have met our requirements for the C-4B ordinance and that our proposed deli is in complete compliance with our existing ordinance. Tr. 4:12-4:18.

(*See* Transcript of May 1, 2007 Board Meeting, Appellants' R.E. 139-173.) These statements to the Board evidence the Harris' intent to serve primarily the boats and watercraft using the harbor. The Harris' first and foremost run a marina and wish to further service their customers by responding to their request for food. Finally, Mrs. Harris stated that they sought clarification of the zoning ordinance and were there to present a proposed deli that would be in complete compliance with the City's ordinance.

With that being said, the most important point is the Board found that a deli with the primary intent to provide food and beverages to the boats and watercraft using the harbor, not the sole intent, was a permitted use, and the Harris' own personal "heart of hearts" intent does not alter this determination. Whether or not the Harris' changed their minds or their plans is irrelevant. Certainly, the Harris' are well aware of the fact that if the deli fails to comply with the findings and conditions imposed by the Board, it will become a non-conforming use and the City may proceed as necessary to ensure compliance with the ordinance; therefore, they would gain nothing by agreeing to abide by defined parameters of "sale of service and supplies, including beverages and food for boats and watercraft which use the Small Craft Harbor" if they did not follow them. (*See* Appellants' R.E. 187.)

As such, there is substantial evidence in the record to support the City's interpretation of its ordinance and its findings of fact in this case. "Substantial evidence has been defined as 'such relevant evidence as reasonable minds might accept as adequate to support a conclusion' or to put it simply, more than a 'mere scintilla' of evidence." *Hooks vs. George County*, 748 So. 2d 678, 680 (Miss. 1999). The information presented to the Board provided more than a "mere scintilla" of evidence upon which the Board could determine that "reasonable minds might accept" the primary purpose of the proposed deli was to provide food and beverages to boats and watercraft using the harbor. As the governing authority of the City, the Board's decision is not to be disturbed, "unless it is clearly shown to be arbitrary, capricious, discriminatory, or is illegal, or without a substantial evidentiary basis." *Faircloth vs. Lyles*, 592 So. 2d at 943.

It is apparent from the record, that the City considered both sides of this issue and its decision is at a minimum "fairly debatable." *City of Biloxi vs. Hilbert*, 597 So. 2d at 1280-81. The Board heard from citizens for and against the proposed deli, which it did not have to do because the Ocean

Springs Zoning Ordinances contain no provision for a public hearing involving the interpretation of words. It looked to the history of the ordinance and showed deference to the precedent set in 1982 by following the analysis for the ice house. The Board made several findings of fact and imposed several conditions upon the Applicants in order to ensure the proposed deli was in compliance with the language of the ordinance requiring the services to be provided to the harbor users. The City made a well-thought out decision based on substantial evidence in determining that a business proposing to sell food and beverages to harbor boaters is a permitted use under an ordinance that specifically allows for the sale of food and beverages to harbor boaters. Therefore, the trial court was correct in holding that the decision was based on substantial evidence, and it was not arbitrary, capricious, discriminatory or illegal.

B. The City Did Not Provide the Harris' a Special Exception or Conditional Use

Admittedly, the trial court termed this issue as the appeal of a request for a special exception or conditional use even though the City's zoning ordinances do not provide for such requests; however, this is harmless error because the court ultimately reviewed the Board's interpretation of the ordinance and applied the proper standard of review. (*See* Decision and Order, Appellants' R.E. 240-246.)

The trial court quoted the familiar standard that a governing authority's decision will not be disturbed if it is considered "fairly debatable" and will be set aside only if it clearly appears the decision is arbitrary, capricious, discriminatory, illegal or is not supported by substantial evidence. (*Id.* at 244.) It then looked to the ordinance in question and noted that there is one specifically permitted use (yacht club) and a description of uses that are specifically prohibited, and "[i]n between, there are uses that essentially require an analysis by the permitting authorities to determine its compatibility." (*Id.* at 245.) An analysis to determine compatibility is an interpretation of the

ordinance to determine compatibility (i.e., determine whether the proposed use is a compatible and therefore permitted under the ordinance).

The court went on to state that both sides agree the ordinance does not provide for a special exception, but "any proposed use other than that specifically permitted - a yacht club- would have to be one compatible with the requirements of the ordinance and the district. In essence, then, to allow any use other than a yacht club would be tantamount to allowing a special exception or a conditional use." (*Id.*) The court is correct in the fact that the use would have to be compatible with the requirements of the ordinance and the City found that the proposed use was compatible with the ordinance. However, this is not the same thing as allowing a special exception or conditional use.

In the instant case, the City simply interpreted the language of its zoning ordinance and nothing more. Despite the fact the trial court termed the issue as an appeal of a special exception, it correctly reviewed the appeal as an interpretation of a zoning ordinance. This is evidenced by the fact the court quoted the law that "the best interpretation of a zoning ordinance is the manner in which it is interpreted and applied by the enacting authorities." (*Id.* at 246.) Furthermore, it stated, "[h]ere, the City made a factual determination from the evidence and information before it that the intended use was compatible with the objectives and regulations of the ordinance...." *(Id.)* This is essentially saying the City interpreted the language of its ordinance to determine whether the proposed deli was a permitted use under the ordinance, which is what occurred, and the court reviewed this interpretation using the proper substantial evidence standard; therefore, the fact the court labeled it as a special exception is harmless error.

1. The Trial Court Did Not Err by Not Applying a De Novo Review

Appellants argue that the trial court erred by failing to undertake a de novo review of this case because the central issue is a question of statutory interpretation. (Appellant Br. 24-25.)

However, the central issue in this case is the interpretation of a zoning ordinance, not a statute, which is a significant difference because it requires a different standard of review. Appellants cite *32 Pit Bulldogs and Other Property versus County of Prentiss* in support of the statement that "an appeal of an interpretation of a statute *or ordinance* is in the nature of a question of law for review de novo by appellate courts." (Appellant Br. 25.) However, the Court in *32 Pit Bulldogs* only addressed the review of a state statute —not the review of a city zoning ordinance. 808 So. 2d 971 (Miss. 2002).

As provided *supra*, this Court has stated, "[i]n construing a zoning ordinance, unless manifestly unreasonable, great weight should be given to the construction placed upon the words by the local authorities." *Columbus & Greenville Railway Co. vs. Scales*, 578 So. 2d at 279. Moreover, "the best interpretations of what the wording in the ordinance means is the manner in which it is interpreted and applied by the enacting and enforcement authorities." *Faircloth vs. Lyles,* 592 So. 2d at 945. In the instant case, the Ocean Springs Mayor and Board of Aldermen, as the enacting authority, interpreted the wording in its zoning ordinance and that decision was correctly given great weight by the trial court. Clearly, the trial court did not err by refusing to apply a de novo standard of review to the interpretation of this ordinance.

2. The City's Interpretation of its Ordinance is a Fact-based Decision and Not a Question of Law

Even if reviewed as a request for a special exception, the correct standard of review remains substantial evidence. The City agrees with the law cited by Appellants that special exceptions are considered adjudicative in nature and that when appealing an adjudicative issue, fact-based decisions are reviewed based on substantial evidence and questions of law are reviewed de novo. (Appellant Br. 26.) However, the City strongly disagrees with the proposition that the fact based interpretation and application of a city zoning ordinance is a question of law and therefore should be reviewed de

novo.

Appellants cite *Drews versus City of Hattiesburg* to support their assertion that the interpretation of a zoning ordinance should be reviewed de novo. (Appellant Br. 25.) The only statement the *Drews* Court makes about the standard of review for questions of law is "[t]he standard of review for questions of law is de novo," after it states "[t]he standard of review in zoning cases is whether the action of the board or commission was arbitrary or capricious and whether it was supported by substantial evidence." 904 So. 2d 138, 140 (Miss. 2005). It went on to state "zoning decisions will not be set aside unless clearly shown to be arbitrary, capricious, discriminatory, illegal or without substantial evidentiary basis." *Id.* (citations omitted). The *Drews* Court concluded the request for a variance in that case constituted "spot zoning" which is illegal; therefore, the Court reversed the city's decision to allow the requested variances. *Id.* at 142. This decision falls squarely within the Court's standard of review that a zoning decision will not be set aside unless clearly shown to be "illegal." To make this decision, the Court had to look to the ordinance itself and the city's interpretation thereof in order to decide whether it was based on substantial evidence as it does in every case.

Appellants also cite *Hearne versus City of Brookhaven* and *ABC Manufacturing Corporation versus Doyle* in support of their de novo review argument, both of which are easily distinguishable from the instant case. (Appellant Br. 26.) In *Hearne*, the court provided a de novo review to the legal question of whether proper notice was provided. 822 So. 2d 999 (Miss. App. 2002). In *ABC*, this Court reviewed a statute of limitations issue de novo as it was a question of law. 749 So. 2d 43 (Miss. 1999). However, the instant case is clearly a fact based decision, which would be reviewed using the substantial evidence standard as opposed to the de novo standard.

3. The City's Decision Was Not Illegal

Appellants assert that the City's decision permitted the Harris' to operate a lounge on the subject property, apparently because the Harris' intend to serve alcohol for on premises consumption. (Appellant Br. 31.) This is nonsensical since the zoning ordinance specifically allows for food and *beverages* to be served. Moreover, it is certain the City considered alcoholic beverages because the 1972 version of the ordinance specifically stated "beer may be sold for off premises consumption," and the 1976 version deleted that language and included the wording that allows for food and beverages. *(See* Appellants' R.E. 195-208.)

Appellants also propose that the City's decision was illegal because a restaurant is not a legal use in this area. (Appellant Br. 31.) The City's decision found that a proposed deli was a permitted use, not a restaurant. The deli will serve food and beverages, which again is specifically allowed for in the language of the ordinance.

Moreover, Appellants assert that the Harris' requested a permit for a restaurant and bar use which "can only be analyzed as a request for a zoning variance." (Appellant Br. 37.) They further stated that the request did not meet the requirements for a variance. Lastly, Appellants argue that the City engaged in "spot zoning" by essentially re-zoning the property because it allowed the Harris' to operate a restaurant and bar use in the harbor. (Appellant Br. 40.) However, both of these arguments must fail for the reasons previously stated, the Harris' did not request a permit for a restaurant or bar nor did the City allow a restaurant or bar. The City simply concluded that the deli, as proposed, is a permitted use under the ordinance in question, which specifically allows for the service of food and beverages in the harbor.

V. CONCLUSION

The Ocean Springs Mayor and Board of Aldermen examined the language of Section 409 C-

4B (Commercial Limited Marina District) of the Ocean Springs City Zoning Ordinance and determined that a deli as proposed by the Harris' fell within the confounds of the ordinance. The Board did not grant a special exception. It did not grant a variance. It did not engage in spot zoning. It simply held that its ordinance allows the use as requested by the Harris'. This fact-based decision was based on substantial evidence and is supported by the Board's findings of fact. The trial court gave deference to the Board's decision as the law requires and correctly affirmed its decision. As such, the City requests this Honorable Court affirm the trial court's decision.

Respectfully submitted,

MAYOR AND BOARD OF ALDERMEN OF THE CITY OF OCEAN SPRINGS, MISSISSIPPI

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CERTIFICATE OF SERVICE

I, Kendall K. Stockman, hereby certify that I have mailed, via United States First Class Mail, the original and three copies of BRIEF OF APPELLEE to the Clerk of the Court of Appeals of the State of Mississippi, Betty Sephton, Post Office Box 249, Jackson, MS 39205-0249, for filing in the record. I have also served the following, by the method so indicated:

John Paul Barber (Via U.S. First Class Mail)
COPELAND, COOK, TAYLOR & BUSH, P.A.
Post Office Box 10
Gulfport, MS 39502

Honorable Dale Harkey (via hand delivery)
Circuit Court Judge
3104 South Magnolia Street
Pascagoula, MS 39567

This the 4th day of March, 2009.

Kendall K. Stockman
KENDALL K. STOCKMAN

AUTHORITY

Addendum

Supreme Court of Mississippi.
ABC MANUFACTURING CORPORATION and Continental Casualty Company (CNA Insurance Company)
v.
Martha Jane DOYLE.
No. 97-CT-01376-SCT.

Sept. 2, 1999.

Claimant appealed from order of the Workers' Compensation Commission, affirming administrative law judge's finding that claim was barred by one-year limitations period. The Circuit Court, Benton County, Henry L. Lackey, J., reversed, and employer and its insurer appealed. The Court of Appeals, 1998 WL 906428, --- So.2d ---- (Miss.App.), reversed and rendered, and claimant sought writ of certiorari. After granting writ, the Supreme Court, Waller, J., held that petition for entry of appearance with its attached material, which referred to controversy between parties as to nature and extend to claimant's injuries, was sufficient to toll one-year statute of limitations.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Supreme Court uses a de novo standard of review when passing on questions of law including statute of limitations issues.

[2] Administrative Law and Procedure 15A ⚿796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law Questions in General. Most Cited Cases
Generally, an administrative agency is accorded deference, but when the agency has misapprehended a controlling legal principle, no deference is due, and appellate court's review is de novo.

[3] Workers' Compensation 413 ⚿2016

413 Workers' Compensation
413XVII Increase, Diminution, Termination, Reinstatement, or Additional Award of Disability Compensation
413XVII(A) Awards Generally
413XVII(A)1 Adjustment or Termination of Compensation
413k2015 Time for Application and Limitations
413k2016 k. In General. Most Cited Cases
Petition for entry of appearance with its attached material that recited that there was controversy between parties as to nature and extend to claimant's injuries, filed by workers' compensation claimant's attorney within one-year after employer filed form informing claimant that it considered its obligations ended, was sufficient to toll one-year statute of limitations to challenge employer's assertion that it had satisfied its payment obligation to claimant. West's A.M.C. § 71-3-53.

[4] Workers' Compensation 413 ⚿1164

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(A) In General
413k1164 k. Nature and Form in General.

Most Cited Cases
Informal proceedings are encouraged in workers' compensation cases and are so designed that the commission can best ascertain the rights of the parties and prevent unnecessary delays, costly appeals, and rehearings.

[5] Workers' Compensation 413 ⇐51

413 Workers' Compensation
413I Nature and Grounds of Employer's Liability
413k44 Construction and Operation of Statutes in General
413k51 k. Liberal or Strict Construction in General. Most Cited Cases
Supreme Court construes the workers' compensation statutes liberally in favor of injured workers.

[6] Workers' Compensation 413 ⇐2016

413 Workers' Compensation
413XVII Increase, Diminution, Termination, Reinstatement, or Additional Award of Disability Compensation
413XVII(A) Awards Generally
413XVII(A)1 Adjustment or Termination of Compensation
413k2015 Time for Application and Limitations
413k2016 k. In General. Most Cited Cases
An informal "request" for payment or a formal "enforcement" of payment, i.e., a filing of a Notice of Controversy, is sufficient to toll one-year statute of limitations to challenge employer's assertion that it has satisfied its payment of obligations to workers' compensation claimant. West's A.M.C. § 71-3-53.
***44** Dennis W. Voge, Tupelo, Attorney for Appellants.

B. Sean Akins, Ripley, Attorney for Appellee.

EN BANC.

ON WRIT OF CERTIORARI

WALLER, Justice, for the Court:

STATEMENT OF THE CASE

¶ 1. Appellee Martha Jane Doyle sought workers' compensation benefits for injuries she allegedly sustained while on the job at ABC Manufacturing Corporation. The administrative law judge found that her claim was barred by the one-year statute of limitation, and the Workers' Compensation Commission dismissed the claim. The Circuit Court of Benton County reversed and reinstated Doyle's claim.

¶ 2. ABC and its insurer, Continental Casualty Company, appealed. The Court of Appeals reversed and rendered, finding that Doyle's claim was barred by the one-year statute of limitations. Doyle's petition for certiorari was granted by this Court.

FACTS

¶ 3. The relevant facts in this matter are essentially undisputed. On February 2, 1993, Doyle suffered a back injury arising out of and in the course of her employment as a sewing machine operator at ABC Manufacturing Corporation ("ABC") in Ashland, Mississippi. Doyle received medical treatment from doctors supplied by her employer. Doyle also received temporary total disability benefits through June 4, 1993, when the treating doctor released her to return to work. Despite the doctor's finding that she was able to work, ***45** Doyle continued to claim that she was in pain. Doyle attempted to return to work but, according to her, was physically unable to perform her duties.

¶ 4. On August 18, 1993, ABC filed with the Workers' Compensation Commission a "Notice of Controversy" and thereby sought a determination of the compensability of Doyle's injuries and her purported inability to work. No hearing was held on the Notice of Controversy, and the Commission did not

issue a ruling.

¶ 5. On October 20, 1993, ABC filed a Form B-31 Final Report. Doyle acknowledged receipt of her copy of the Form B-31 which was mailed to her by certified mail. The Form B-31 notified the Commission and Doyle that a final payment of compensation in the amount of $2,494.99 had been made to Doyle. Form B-31 includes a warning to the claimant that "the closing of this file may become final one year after the proper filing of this form," and that, "[i]f you have additional loss of work due to your injury or medical expense within the next year, you should immediately contact your employer, insurance carrier, or the Mississippi Workmen's Compensation Commission, Jackson, MS, for further guidance."

¶ 6. Doyle sought medical treatment for her back injury after ABC filed the Form B-31. She saw Dr. John Huffman on approximately seven occasions between November of 1993 and November of 1994. She also saw Dr. James Nakashaima once. She admits that she did not submit these medical bills to her employer, the employer's insurance carrier, or the Commission. There is no proof that ABC authorized her to see these doctors.

¶ 7. Doyle had no contact with ABC, its workers' compensation carrier or the Commission until June 4, 1994, when Doyle's newly retained attorneys filed an entry of appearance with the Commission. The entry of appearance stated that Doyle's new attorneys had been retained "to represent the claimant and institute any necessary proceedings in her interest before the Workers' Compensation Commission." The entry of appearance also referenced and included as an attachment the notice of controversy which stated that Doyle "alleges that she sustained accidental injuries arising out of and in the course of her employment," that Doyle "alleges that she is due medical and indemnity benefits", and that Doyle "continues to allege that she is unable to return to work and is temporarily disabled and that such is related to her employment."

¶ 8. Several more months passed without any action being taken. On April 12, 1995, Doyle's attorney filed a Form B-5, 11 Petition to Controvert. On May 3, 1995, ABC and its carrier answered, claiming that Doyle's claim was barred by the one-year statute of limitations. The administrative judge agreed that the claim was time-barred, as did the Workers' Compensation Commission. Doyle appealed to the Circuit Court of Benton County, which reversed and reinstated Doyle's claim.

¶ 9. ABC appealed and asserted that Doyle's claim was barred by the statute of limitations. The Court of Appeals rendered a decision for ABC. Doyle filed a petition for a writ of certiorari which was granted by this Court.

STANDARD OF REVIEW

[1][2] ¶ 10.This Court uses a de novo standard of review when passing on questions of law including statute of limitations issues. *Ellis v. Anderson Tully Co.*, 727 So.2d 716, 718 (Miss.1998). Generally, an administrative agency is accorded deference, but when the agency has misapprehended a controlling legal principle, no deference is due, and our review is de novo. *Smith v. Jackson Constr. Co.*, 607 So.2d 1119, 1125 (Miss.1992).

ANALYSIS

[3] ¶ 11.ABC filed its Form B-31 on October 20, 1993, thereby placing Doyle on notice that it considered that its obligations had ended and that Doyle's future ***46** rights could be terminated if she took no action for one year. The one year statute of limitations is derived from Miss.Code Ann. § 71-3-53 (1995), which states in pertinent part that, upon the application of any party in interest,

> the commission may, at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensa-

> tion case, issue a new compensation order which may ... reinstate ... such compensation, or award compensation.

Section 71-3-53 operates in conjunction with Miss.Code Ann. § 71-3-37(7) (1995), which allows a case to be closed only after the employer has given notice to the employee by a form prescribed by the Commission. That form is Form B-31.

¶ 12.Procedural Rule 2 of the Mississippi Workers' Compensation Commission states that "[a] cause will be controverted by the employee's filing with the Mississippi Workers' Compensation Commission a properly executed workers' compensation form B-5, 11." However, a plain reading of § 71-3-53 sets out a broad range of review by the Commission, and not just in response to a Petition to Controvert. Doyle claims that filing the entry of appearance by her new attorneys tolled the running of the statute of limitations and that the Court of Appeals erred in ruling to the contrary.

¶ 13.Within the one-year period, Doyle's new attorneys filed a petition for acceptance of representation and entry of appearance in which they noted their intention to represent Doyle in the proceedings before the Commission seeking redress for Doyle's workplace injury. The petition included as an exhibit a copy of the notice of controversy previously filed by ABC on which the Commission had never held a hearing. The attachment to the notice recited generally that there was a controversy between the parties as to the nature and extent of Doyle's injuries.

¶ 14.This Court has held that in order to prevent a claim from becoming time-barred, the injured worker may request and enforce payment of medical benefits within the one year period. *Barr v. Conoco Chems., Inc.*, 412 So.2d 1193, 1196 (Miss.1982). Doyle claims that her attorneys' petition for an entry of appearance was such a request and enforcement of payment which sufficiently placed ABC on notice that the claim was still disputed and had not been finally resolved to the satisfaction of Doyle.

¶ 15.The matter at hand is similar in some respects to a recent case considered by this Court. In *Harper v. North Miss. Med. Ctr.*, 601 So.2d 395 (Miss.1992), an unrepresented employee sent a letter to the Commission in which she stated that she was still having back problems and that she needed help in resolving the problem. She continued to receive medical attention, and her physician ultimately filed a preliminary medical report (a form B-9). Her employer attempted to deny her claim for medical benefits by claiming that more than a year had passed since the filing of its Form B-31. This Court held that a formal petition to controvert was not required. Harper's letter sufficiently articulated the nature of her claim and clearly expressed her intent to pursue remedies through the workers' compensation system. Harper's claim was not barred because "[t]he filing of the Preliminary Medical Report together with Harper's ... letter are a sufficient request and enforcement of payment so as to serve as a substitute for a formal petition to reopen." *Id.* at 398.

[4] ¶ 16.We note that "[i]nformal proceedings are encouraged in workmen's compensation cases and are so designed that the commission can best ascertain the rights of the parties and prevent unnecessary delays, costly appeals, rehearings, etc." *47*Day Detectives, Inc. v. Savell*, 291 So.2d 716, 721 (Miss.1974). Additionally, workers' compensation procedure

> takes its tone from the beneficent and remedial character of the legislation. Procedure is generally summary and informal. The initial handling of claims, and perhaps the first reviews, are administrative in all but a few states. The whole idea is to get away from cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route.

7 *Larson's Workmen's Compensation Law*, § 77A.10 at 15-1 to 15-3 (1999) (footnotes omitted).

Finally, Miss.Code Ann. § 71-3-55(1) provides that the Commission shall not be bound by "technical or formal rules or procedure, except as provided by this chapter."

[5][6] ¶ 17.Due to the beneficent purposes of the Mississippi Workers' Compensation Act, we construe the statutes liberally in favor of injured workers. *Metal Trims Indus., Inc. v. Stovall,* 562 So.2d 1293, 1297 (Miss.1990); *Big "2" Engine Rebuilders v. Freeman,* 379 So.2d 888, 889 (Miss.1980). We therefore find that the entry of appearance with its attached material was a sufficient request for payment. The attachment to Doyle's filing contained allegations that Doyle had suffered a workplace injury and that she continues to allege that she is due medical benefits and disability payments from her former employer. Even though the *Barr* case seems to state that a workers' compensation claimant must "request" *and* "enforce" payment to toll the statute of limitations, we find, again in light of the Act's beneficent purposes, that an informal "request" for payment *or* a formal "enforcement" of payment, i.e., a filing of a Notice of Controversy, is sufficient to toll the statute of limitations.

CONCLUSION

¶ 18.We make no comment on the compensability of Doyle's injury other than that it is not time-barred. The petition for entry of appearance, filed by Doyle's attorneys within the one-year period after ABC filed its Form B-31, was sufficient to toll the statute of limitations. For that reason the judgment of the Mississippi Court of Appeals is reversed, and this case is remanded to the Mississippi Workers' Compensation Commission for further proceedings consistent with this opinion.

¶ 19.**REVERSED AND REMANDED.**

PRATHER, C.J., PITTMAN, P.J., BANKS, McRAE, SMITH, MILLS AND COBB, JJ., CONCUR. SULLIVAN, P.J., NOT PARTICIPATING.
Miss.,1999.

ABC Mfg. Corp. v. Doyle
749 So.2d 43

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Supreme Court of Mississippi.
CITY OF BILOXI, Mississippi
v.
M.C. HILBERT.
No. 90-CA-0151.

April 8, 1992.

City council approved rezoning application. Neighboring property owners appealed. The Circuit Court, Harrison County, Second Judicial District, James E. Thomas, J., after remand to city council for further proceedings, reversed and set aside decision. City appealed. The Supreme Court, McRae, J., held that: (1) circuit court, sitting as appellate court, had authority to remand case to city council for record supplementation or factual determination while retaining jurisdiction over both parties as well as subject matter; (2) objecting landowners had duty to affirmatively show that they were within statutory class who could validly object to rezoning so as to make applicable enhanced voting requirements of zoning statutes; and (3) decision of city granting rezoning request was fairly debatable and, thus, could not be overturned on appeal.

Reversed; order of city council reinstated.

West Headnotes

[1] Municipal Corporations 268 ⚿726

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k726 k. Duties Imposed with Consent or for Benefit of Municipality. Most Cited Cases
Circuit court, sitting as appellate court, had authority to remand rezoning case to city council for record supplementation or factual determination while at same time retaining jurisdiction over both parties as well as subject matter. Code 1972, §§ 11-51-75, 17-1-17.

[2] Zoning and Planning 414 ⚿198

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k198 k. Number of Votes Required. Most Cited Cases

Zoning and Planning 414 ⚿726

414 Zoning and Planning
414X Judicial Review or Relief
414X(D) Determination
414k726 k. Remand. Most Cited Cases
Protesting landowners failed to affirmatively show that they were within statutory class who could validly object to zoning change so as to require application of enhanced voting requirements of zoning statute, and thus, remand by circuit court to city council for purposes of application of enhanced voting requirements of statute was unwarranted. Code 1972, § 17-1-17.

[3] Zoning and Planning 414 ⚿154

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k154 k. Circumstances Affecting Validity of Amendment in General. Most Cited Cases

Zoning and Planning 414 ⚿158

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k158 k. Necessity of Changed Conditions. Most Cited Cases

Zoning and Planning 414 ⚿194.1

414 Zoning and Planning

414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k194 Notice and Hearing
414k194.1 k. In General. Most Cited Cases
(Formerly 414k194)
Before property is reclassified, applicant seeking rezoning must prove by clear and convincing evidence either that there was mistake in original zoning, or that character of neighborhood had changed to such extent as to justify rezoning and that public need existed for rezoning.

[4] Zoning and Planning 414 ⚖605

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k605 k. Decisions of Boards or Officers in General. Most Cited Cases
Appellate court examining zoning order by city council proceeds with restricted scope of judicial review; zoning decision of 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 decision is arbitrary, capricious, discriminatory, illegal, or is not supported by substantial evidence.

[5] Zoning and Planning 414 ⚖604

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k604 k. Amendment or Rezoning. Most Cited Cases
Decision of city council that there was mistake in original zoning and that substantial change in character of neighborhood together with public need justified change in zoning was fairly debatable, and thus, decision would not be disturbed on appeal.
***1276** Kimberly G. Starks, Raymond D. Carter, Compton Crowell & Hewitt, Biloxi, for appellant.

Robert E. Farish, Jr., Biloxi, for appellee.

Before DAN M. LEE, P.J., and ROBERTSON and McRAE, JJ.

McRAE, Justice, for the Court:

The City of Biloxi appeals from an order entered on January 10, 1990, by the Circuit Court of Harrison County, Second Judicial District, reversing and setting aside a decision by the Biloxi City Council approving the zoning application of Bill E. Shinn. The issues presented in this appeal deal with the jurisdiction of the circuit court following its remand to the City Council, the applicability of the enhanced voting provisions found in Miss.Code Ann § 17-1-17 (Supp.1991), and whether the rezoning ***1277** decision made by the Biloxi City Council was "fairly debatable," or arbitrary, capricious, discriminatory, and unlawful. We reverse and reinstate the decision of the Biloxi City Council.

I.

On December 5, 1986, the applicant for a zoning change, Bill E. Shinn, purchased approximately 2.9 acres of unimproved land from the City of Biloxi. This property is bounded on the west by Rosalie Marie Drive, on the north by the single family residential properties of Quave, Mock, and Hilbert, on the east by the single family residential properties of Skupien and Schena, and on the south by the West Biloxi Wastewater Treatment Plant. The property to the north includes a newly developed subdivision, Acadian Court, owned by the appellee, M.C. Hilbert. The original warranty deed from the City of Biloxi to Bill Shinn contained no restrictions or reservations save for the reservation unto the city of all oil, gas, and mineral rights.

On the date of Shinn's purchase, the 2.9 acres was zoned R-1A, single family residential, and was surrounded by other property zoned R-1A except for certain property owned by Shinn located west of

Rosalie Marie Drive which was zoned M-S, Medical Services. Shinn owns and operates a nursing home at this location.

The West Biloxi Wastewater Treatment Plant was constructed in the fall of 1973 and was placed into service in the latter part of 1974. The comprehensive zoning ordinance presently in effect in the City of Biloxi was adopted in March of 1973. The City of Biloxi authorized the construction and operation of the treatment plant as a conditional use exception within the R-1A zoning district.

On April 30, 1987, Shinn made application to the City of Biloxi for a zoning change of the 2.9 acres from R-1A to M-S. On August 10, 1987, the City Council, following a public hearing conducted on July 27, 1987, adopted Resolution 323-87 which denied the zoning change in the wake of a finding "that the applicant's request fail[ed] to establish by clear and convincing evidence either a mistake in the original zoning, or a substantial change in the character of the neighborhood and an identifiable public need for the requested zoning change ..."

A related event surfaced approximately two weeks later on August 26, 1987, when the Mayor of Biloxi received a letter from the attorney representing the Harrison County Wastewater Management District informing the mayor that the scheduled expansion of the West Biloxi Water Treatment Plant in 1989 would "require either a 150 foot buffer zone around the plant property or, if such a buffer zone is not available, a waiver of the buffer zone requirement by adjacent landowners."

The attorney noted in this letter he had been advised by Shinn's lawyer that Shinn would grant such a perpetual waiver voluntarily if he were allowed by the city to construct a parking lot for his nearby nursing home on the property conveyed to him by the city. Shinn's attorney explained, however, that Shinn would decline to execute the waiver in the present state of things since the city had denied him a zoning variance for the parking lot. The city was asked to reconsider its posture concerning the Shinn zoning application since it could be costly if the District had to condemn an easement for a buffer zone from Shinn to accommodate the expected plant expansion.

Subsequently, on September 28, 1987, the City Council, meeting in executive session, reconsidered Shinn's application, and by a majority vote of 4 to 2 with one abstention, reversed its earlier position and approved the rezoning of Shinn's property from R-1A, single family residential, to M-S, Medical Service.

In reversing itself and adopting Ordinance 1503, the City Council concluded "[i]t ha[d] been proven clearly and convincingly that there was both a mistake in the original zoning of the property of Bill Shinn considered in Case No. 87-26, and that there has been a material change in character of the neighborhood as well as a public need for a transitional use or buffer area ***1278** warranting a change in the zoning of said parcel;...."

On October 15, 1987, two weeks following reversal by the City Council of its original position, Shinn executed a waiver of the buffer zone requirements for wastewater treatment facilities and entered into a covenant "that now and hereafter the property above described of the undersigned shall constitute the necessary 150 foot buffer zone for all purposes, this covenant to run with the land in favor of the West Biloxi Treatment Plant property."

On October 8, 1987, a week prior to Shinn's execution of the waiver, M.C. Hilbert, one of several landowners protesting the change in classification from R-1A to M-S, filed a timely appeal to the circuit court of Harrison County. In his bill of exceptions Hilbert contended, *inter alia:* (1) that the action of the City Council was arbitrary, capricious, unreasonable, confiscatory, and constituted an abuse of discretion; and (2) the final vote on the zoning amendment was made over the protest of 20% or more of the property owners authorized by statute to object, and that, therefore, a favorable vote of two-thirds (2/3) was required to implement the

change.

On November 28, 1988, the circuit judge remanded the matter to the city counsel for a factual determination of the applicability of the enhanced voting requirement of Miss.Code Ann. § 17-1-17 (Supp.1991). On March 6, 1989, the City Council adopted Resolution 95-89 concluding that the enhanced voting requirement of § 17-1-17 was not applicable.

The circuit judge, sitting as an appellate court, entered final judgment on January 10, 1990. The court found the rezoning of the property from R1-A to M-S to be improper under the existing standard for rezoning and held the action of the City Council was "arbitrary, capricious and discriminatory." It further held the zoning amendment was adopted over the protest of 20% or more of the property owners who were authorized to object within the meaning and purview of § 17-1-17, thereby invoking the requirement of a two-thirds (2/3) majority vote of the City Council. Feeling aggrieved, the City of Biloxi perfected this appeal.

II.

[1] The City of Biloxi contends the circuit court did not have jurisdiction over this matter because Hilbert, following remand, failed to file a second bill of exceptions appealing the findings made by the City Council in Resolution 95-89 which addressed the enhanced voting requirement. However, in his original bill of exceptions filed on October 8, 1987, Hilbert had claimed, *inter alia,* "the final vote on the said zoning amendment was made over the protest of twenty percent or more property owners who were authorized to object within the meaning of Section 17-1-17 and said vote did not constitute a favorable vote of two-thirds of all members of the legislative body." In its addendum to Hilbert's bill of exceptions, the City of Biloxi responded to and denied the allegations thus generating a bona fide question on the issue.

Moreover, the circuit court retained continuing jurisdiction over the matter. On November 28, 1988, the circuit judge remanded this cause to the Biloxi City Council after concluding the applicability of the enhanced voting requirement found in Miss.Code Ann. § 17-1-17 (Supp.1991) could be outcome determinative. Specifically, he remanded the case "to the City Council for a determination of the number and percentage of eligible property owners who protested the subject zoning change of Bill E. Shinn and [ordered] that a report of its findings and conclusions be filed with the Clerk of the Court to become part of the record of this cause."

On March 6, 1989, the City Council adopted Resolution 95-89 which stated that the council had again reviewed the matter and was of the opinion that an insufficient number of objectors filed written objections to the zoning change in order to invoke the two-thirds voting majority required by § 17-1-17. This finding was filed with the circuit clerk on March 10, 1989.

On October 3, 1989, the circuit court found it had "continuing jurisdiction" of ***1279** the matter when it sustained a second suggestion of record diminution filed by Hilbert, and denied a motion to dismiss filed by the City of Biloxi. On January 10, 1990, after examining the record and finding it complete, the court pronounced final judgment.

It is clear to us the order issued on November 28th remanding the cause to the City Council was not intended to constitute a final judgment contemplated by Miss.Code Ann. § 11-51-75 (1972); rather, the circuit court, sitting as an appellate court, retained jurisdiction pending record expansion and supplementation.

Our own rules of appellate procedure embody this concept. Miss.Sup.Ct.R. 14(b) gives this Court the authority to remand a case on appeal to the trial court for further development and determination of issues of fact.

(b) Finding of Fact by the Trial Court. In the event

this Court so directs, the trial court may determine all issues of fact which may arise out of any appeal submitted to the trial court for a determination, and which may be necessary for the disposition of cases on appeal to this Court.

Although we ultimately hold the remand in this case was unwarranted, such a procedure raises no jurisdictional barriers. A circuit court, sitting as an appellate court, enjoys the same authority to remand a case to an inferior body for record supplementation or a factual determination while at the same time retaining jurisdiction over both the parties as well as the subject matter.

III.

The circuit court also held that the two-thirds (2/3) majority voting requirement of Miss.Code Ann. § 17-1-17 (Supp.1991) was applicable, and because the rezoning decision did not receive two-thirds approval of the council, a reversal of that decision was warranted. The relevant part of § 17-1-17 provides as follows:

In case of a protest against such change signed by the owners of twenty percent (20%) or more, either of the area of the lots included in such proposed change, or of those immediately adjacent to the rear thereof, extending one hundred sixty (160) feet therefrom or of those directly opposite thereto, extending one hundred sixty (160) feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of two-thirds (2/3) of all the members of the legislative body of such municipality or county.

The council concluded that the enhanced voting requirements of § 17-1-17 did not apply because:

1. [T]he written objections filed do not state that they are filed by a property owner, nor do they state the distances from the front or rear of the applicant's property in which said property owners allegedly reside;

2. Insufficient evidence was presented by the objectors from which a determination could be made that the owners of twenty percent (20%) or more of the area of lots immediately adjacent to the rear of applicant's property and extending one hundred sixty (160) feet therefrom objected in writing;

3. [E]ven if all of the objectors were, in fact, property owners, the evidence submitted shows that less that [sic] twenty percent (20%) of those situated to the front or rear of the applicant's property as defined by § 17-1-17, objected in writing.

In the face of the council's holding, the circuit court concluded as follows:

The Court ... finds that of two properties located immediately adjacent rear of the subject property, the Skupien property has 64.5 feet of common boundary with the subject property and the Schena property has 164.5 feet of common boundary. Both properties extend Easterly 130 feet to Greenwood Drive. The Court concludes that the Skupien property represents 28.2 percent of the area to the rear of the subject property within the meaning of Section 17-1-17, thereby invoking the requirement of a two-third vote approval of the City Council to amend the zoning.

[2] ***1280** In interpreting this part of section 17-1-17, we have declared that the burden rests upon the party relying on this provision to affirmatively prove that twenty percent (20%) or more of the protesting landowners fit within the class of landowners outlined in the statute; and this showing must be made before the local governing body and not for the first time on appeal. *Tindall v. City of Louisville,* 338 So.2d 998, 999 (Miss.1976); *Board of Super. of Washington Co. v. Abide Bros., Inc.,* 231 So.2d 483, 485 (Miss.1970). It seems clear that the first and second reasons of the City Council, set forth above, are premised on this requirement.

Nothing in the record indicates that any of the protestors timely sought to invoke the requirements of section 17-1-17. The applicability of section

17-1-17 was not raised until the appeal was taken to circuit court. In its order remanding to the council on this point, the circuit court notes that "the record contains only a brief mention of the landowner protest." When this matter was originally before the City Council for decision, there was no affirmative showing even remotely suggesting that the enhanced voting requirements of section 17-1-17 might be applicable. Failing this, a majority vote of the City Council was sufficient. *Tindall,* 338 So.2d at 999.

The circuit court erroneously placed upon the council the burden of satisfying the requirements of section 17-1-17. The circuit court held that remand was necessary because there was "no action by the City Council to classify and count the protestors according to statutory criteria." With due respect to the circuit court, this is a burden which the law does not place upon the council. It was up to the protesting landowners to "affirmatively show that they were within the statutory class who could validly object." *Abide Bros.,* 231 So.2d at 485. They failed to make any showing in this regard, much less an affirmative one, and thus a remand to the council, which gave the protestors a second bite, was unwarranted.

Holding as we do that a remand to the council on this point was unwarranted, we do not address the wisdom of the council's alternative holding that, in fact, less than the required percentage of landowners objected.

IV.

Finally, there is the matter of whether the council's rezoning decision must be set aside. Initially, we reject Hilbert's contention that the original decision of the City Council on August 10, 1987, denying the zoning application of the applicant should have been conclusive. In Anderson, *American Law of Zoning 3d* § 4.29 (1986), we find the following:

The power of a municipal legislative body to amend the zoning regulations is legislative in character. Therefore, it is not exhausted when it has been used once. Rather, a legislative body can reconsider its passage or rejection of a proposed amendment.

A.

[3] Before property is reclassified, an applicant seeking rezoning must prove by clear and convincing evidence either that (1) there was a mistake in the original zoning, or (2) the character of the neighborhood has changed to such an extent as to justify rezoning and that a public need exists for rezoning. *Saunders v. City of Jackson,* 511 So.2d 902, 906 (Miss.1987); *Wright v. Mayor and Comm'rs of City of Jackson,* 421 So.2d 1219 (Miss.1982).

[4] Any appellate court examining a zoning order by a City Council proceeds with a restricted scope of judicial review. The 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 the decision is arbitrary, capricious, discriminatory, illegal, or is not supported by substantial evidence. *Barnes v. Board of Supervisors, DeSoto County,* 553 So.2d 508 (Miss.1989); *Luter v. Hammon,* 529 So.2d 625, 628 (Miss.1988); *Ridgewood Land Co. v. Moore,* 222 So.2d 378, 379 (Miss.1969). " 'Fairly debatable' is the antithesis***1281** of arbitrary and capricious. If a decision is one which could be considered 'fairly debatable,' then it could not be considered arbitrary or capricious ..." *Saunders v. City of Jackson,* 511 So.2d at 906.

B.

[5] The City of Biloxi contends the circuit judge conducted a *de novo* review of the evidence and erroneously concluded the action of the City Council was "arbitrary, capricious and discriminatory." It suggests the lower court ignored the "fairly debatable" standard of review.

In Resolution 323-87 the City Council denied Shinn's application. It initially concluded the applicant had failed to prove by clear and convincing evidence there was a mistake in the original zoning or a substantial change in the character of the neighborhood together with a public need for the change in zoning. In Ordinance 1503 adopted forty nine (49) days later, the City Council concluded the applicant had shown by clear and convincing evidence not only a mistake in the original zoning of the property but a substantial change in the character of the neighborhood, as well as public need.

The conclusion reached by the City Council that the character of the neighborhood had changed substantially, and that a public need existed to justify rezoning, is fairly debatable. We therefore omit any discussion of the City Council's finding of mistake, except to say that we view this decision to be fairly debatable as well, and thus beyond the limited power of an appellate court to disturb.

The council received evidence of a proposed expansion of the wastewater treatment plant in the area. It considered the fact that the sewage treatment plant had undergone previous expansion to provide service to parts of Keesler Air Force Base and the city of Gulfport, and that construction, operation and expansion of this plant all occurred subsequent to the enactment of the comprehensive zoning ordinance in March, 1973.

It likewise considered the need for a transition, or buffer, zone between the wastewater treatment plant to the south and the residential areas to the north and east in order that the sewage treatment plant expansion would not unduly infringe upon the residential properties. There was testimony from a real estate appraiser suggesting that the highest and best use of the subject property would be for medical services and not single family residential use, and that medical services use would be in harmony with the remainder of the neighborhood.

The Zoning Text and Map Committee which considered Shinn's application and recommended approval to the council noted their agreement with Shinn that the change represented a logical extension of the medical services zoning. The Committee report also noted that Shinn's parcel has a greater affinity to the sewage treatment plant and access road than it does to any of the adjoining residential property, and therefore, the construction, operation and subsequent expansion of the sewage treatment plant brought about a change in the character of the neighborhood affecting Shinn's parcel of land.

Finally, the council noted that because of the unique location of Shinn's property in relation to the sewage treatment plant, rezoning the Shinn property "would not constitute a basis for the rezoning of other properties, and would not be precedent setting in nature."

C.

Neither this Court nor the circuit court should sit as a super-zoning commission. We hold the decision of the City Council of the City of Biloxi in this case was fairly debatable. Thus, the circuit court erred in overturning the decision of the City Council, and accordingly, the decision of the circuit judge reversing the decision of the Biloxi City Council and ordering that the subject property shall revert to its original zoning classification, R1-A, single family residential, is reversed, and the decision of the City Council reinstated.

REVERSED AND ORDER OF BILOXI CITY COUNCIL REINSTATED.

***1282** ROY NOBLE LEE, C.J., HAWKINS and DAN M. LEE, P.J., and PRATHER, ROBERTSON, SULLIVAN, PITTMAN and BANKS, JJ., concur.
Miss.,1992.
City of Biloxi v. Hilbert
597 So.2d 1276

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C

Supreme Court of Mississippi.
COLUMBUS & GREENVILLE RAILWAY COMPANY
v.
Susan M. SCALES, Gerald J. Montgomery, Jr., Susan Montgomery, Tom R. Pitts, Joan T. Pitts, and Dexter Walcott.
No. 90-IA-0423.

April 10, 1991.

Property owners sued alleging that railroad's construction of switching tracks within its right-of-way in area zoned agricultural violated the zoning ordinance. The Chancery Court, Leflore County, Harvey T. Ross, Chancellor, overruled motion to dismiss and appeal was taken. The Supreme Court, Hawkins, P.J., held that while board of supervisors had statutory authority to enact zoning ordinance affecting the railroad in that county, court would not decide whether the ordinance did in fact apply to the railroad in absence of any attempt to have local officials enforce the ordinance.

Reversed and remanded.

West Headnotes

[1] Zoning and Planning 414 ⇐236.1

414 Zoning and Planning
414V Construction, Operation and Effect
414V(A) In General
414k236 Application to Persons or Places
414k236.1 k. In General. Most Cited Cases
(Formerly 414k236)
In a very limited way a common carrier railroad may be subject to local zoning regulations.

[2] Zoning and Planning 414 ⇐5.1

414 Zoning and Planning
414I In General
414k5 Source and Scope of Power
414k5.1 k. In General. Most Cited Cases
(Formerly 414k5)
When county in 1982 adopted a countywide zoning ordinance covering all land in the county outside corporate limits, county had statutory authority to make provisions affecting use of railroad property subject to reasonableness test that recognizes railroad is common carrier. Code 1972, §§ 17-1-3, 17-1-15.

[3] Carriers 70 ⇐10

70 Carriers
70I Control and Regulation of Common Carriers
70I(A) In General
70k10 k. Supervision by Public Officers in General. Most Cited Cases

Municipal Corporations 268 ⇐592(1)

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k592 Concurrent and Conflicting Exercise of Power by State and Municipality
268k592(1) k. In General. Most Cited Cases

Railroads 320 ⇐5

320 Railroads
320I Control and Regulation in General
320k5 k. Power to Control and Regulate. Most Cited Cases
Public service commission has general jurisdiction over common carrier railroads with an official responsibility to the public to see that railroads are operated safely, efficiently and for the public's benefit; this responsibility cannot be frustrated by any local ordinance or order, whether by a city or county. Code 1972, §§ 77-1-23, 77-1-49, 77-9-1 to 77-9-41, 77-9-141 to 77-9-193, 77-9-257, 77-9-265.

[4] Zoning and Planning 414 ⚖602

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k602 k. Regulations in General. Most Cited Cases
Zoning ordinances are essentially legislative functions with limited judicial review.

[5] Zoning and Planning 414 ⚖231

414 Zoning and Planning
414V Construction, Operation and Effect
414V(A) In General
414k231 k. Construction of Regulations in General. Most Cited Cases
Cardinal rule in construction of zoning ordinances is to give effect to the intent of the lawmaking body; great weight should be given to the construction placed upon the words by the local authorities.

[6] Zoning and Planning 414 ⚖778

414 Zoning and Planning
414XI Enforcement of Regulations
414XI(B) Injunction Against Violation
414k778 k. Conditions Precedent. Most Cited Cases
Question whether county ordinance applied to railroad that sought to add switching track within its right-of-way in area zoned agricultural would not be decided in suit by property owners where no attempt had been made to have local commission or board of supervisors interpret and enforce the ordinance.

[7] Zoning and Planning 414 ⚖783

414 Zoning and Planning
414XI Enforcement of Regulations
414XI(B) Injunction Against Violation
414k783 k. Parties. Most Cited Cases
The county board of supervisors was an indispensible party to action by property owners who alleged that railroad's construction of switching tracks within its right-of-way in area zoned agricultural violated the zoning ordinance. Rules Civ.Proc., Rule 19.

***275** Arnold F. Gwin, Greenwood, for appellants.

James Y. Dale, Whittington, Brock, Swayze & Dale, Greenwood, for appellee.

Before HAWKINS, P.J., and PITTMAN and BANKS, JJ.

HAWKINS, Presiding Justice, for the Court:

This appeal involves the effect, if any, a zoning ordinance of Leflore County has upon a railroad.

We hold on the first of the two questions presented by this appeal that the board of supervisors of the county had the statutory ***276** authority to enact a zoning ordinance affecting the Columbus and Greenville Railway Company's railroad in that county, subject to a reasonableness test that recognizes a railroad is a common carrier.

For the reasons stated, we decline to address the second issue, whether or not the county ordinance did in fact apply to the railroad.

FACTS

On March 3, 1982, the Leflore County board of supervisors adopted a county-wide zoning ordinance covering all land in the county outside corporate limits.

On October 10, 1989, Susan M. Scales and over twenty other plaintiffs filed an amended complaint in the chancery court of Leflore County against the Columbus & Greenville Railway Company (C & G). Plaintiffs live just West of the corporate limits of Greenwood on River Road Extended which runs along the south banks of the Yazoo River.

The defendant C & G operates a railroad across the state from Columbus to Greenville and is entirely

intra-state. Just west of the corporate limits of Greenwood, and running westerly, the railroad takes a sharp left turn and runs for a short distance in a southwest direction. Just into this southwest turn, after being awarded a federal grant for the purpose, the defendant in 1989 commenced enlarging its single track to include two additional tracks to be used for switching cars. The railroad is on a one-hundred-foot-wide right-of-way, and the additional tracks would be constructed within this right-of-way. None of the plaintiffs' lots abut the railroad right-of-way. This portion of the railroad is separated from their residences by a half-mile of open cotton fields. Plaintiffs' property is North of the railroad.

The complaint alleges the land through which the railroad travels is zoned agricultural, and that the defendant was in violation of the zoning ordinance in adding the switching tracks, and that no permit had been granted by the county board to construct them.

The complaint alleges that construction of the tracks also violated federal and state environmental standards, and funding for it violated due process. Further, that the switching yard would create a public and private nuisance, an "attractive nuisance" to children in the area, hazardous waste storage, and would bring in "undesirables into the area as result of overnight parking of trains in the area immediately south of plaintiffs' homes, and in other respects to be shown."

In its answer filed December 1, C & G's first defense was that the complaint failed to state a cause of action, and moved to dismiss.

We must surmise there was a further motion filed to dismiss that portion of the complaint alleging a zoning ordinance violation, because on April 7, 1990, the special chancellor entered an order overruling this motion, and it is this order upon which this appeal is based.

The order first recites that this motion is dismissed "on the ground that the Court is of the opinion that the Leflore County zoning ordinance does apply to the defendant in this case." The order further recites that the chancellor was of the opinion that a substantial basis for a difference of opinion existed on the "question of law as to whether or not the Leflore County zoning ordinance does apply to the railroad," and that "appellate resolution of this issue at law may materially advance the termination of the litigation in this case." He accordingly granted an interlocutory appeal, recommending that it be expedited.

On May 22, 1990, this Court, with two Justices dissenting, granted the petition for interlocutory appeal, and expedited briefing schedule.

The motion to dismiss upon which the chancellor ruled was only that portion seeking relief predicated upon a violation of the zoning ordinance. Whether or not the remaining portion of the complaint stated a cause of action was not addressed by the chancellor nor do we.

The appellant C & G's brief raises two issues, the first being whether or not the board of supervisors had the statutory authority*277 to adopt a zoning ordinance restricting use by a railroad of property owned by it when the ordinance was adopted. Does a board of supervisors have the legal authority to make a zoning ordinance apply to a common carrier railroad? The second issue is whether this particular zoning ordinance applies to the C & G railroad.

[1] We hold that in a very limited way a common carrier railroad may be subject to local zoning regulations. For the reasons set forth, we decline on this appeal to address the second issue.

I. STATUTORY AUTHORITY

[2] A common carrier railroad is an enterprise on which many municipalities and counties depend. Its successful, efficient operation has an economic impact throughout the state, and most especially on communities through which it runs.[FN1]

FN1. Transportation by railroad is clearly the most *energy* efficient transportation on wheels. It may some day be recognized that the wholesale abandonment of railroad lines, which this State has witnessed in the past two decades, was an economic catastrophe.

Jones v. City of Hattiesburg, 207 Miss. 491, 42 So.2d 717 (1949), answers the question of the county's authority to pass a zoning ordinance affecting a railroad right-of-way. This Court held, in interpreting §§ 3590-3597 of the Mississippi Code of 1942, that the city of Hattiesburg had the statutory authority to pass a zoning ordinance affecting railroad property. *Id.* Miss.Code Ann. § 17-1-3 (1972) gives the same authority to a county board of supervisors that § 3590 of the 1942 code granted municipalities. *Also,*Miss.Code Ann. § 17-1-15 (1972). We accordingly hold that when the zoning ordinance was adopted by the board of supervisors of Leflore County the county had statutory authority to make provisions affecting use of railroad property.

Jones is also authority for the principle that "a railroad company may use its right-of-way not merely for its track but for any other building or structure which reasonably tends to facilitate its business." 207 Miss. at 498, 42 So.2d at 719. And, we struck as unreasonable and arbitrary a refusal by the city to grant the railroad and its lessee a building permit to construct a warehouse on the railroad right-of-way in a residentially zoned area. *Jones,* 207 Miss. at 550, 42 So.2d at 499. For the reasons hereinafter noted, we do not address whether the zoning ordinance itself applies to railroads. At the same time, from the record before us, we are constrained to observe, in fairness to all parties, that on remand if it is contended in the chancery court that the zoning ordinance does apply, then under our holding in *Jones* the county zoning authorities will be hard pressed to deny a permit for the construction of these additional tracks. The switching tracks do not appear to cross any highway, and are in a countryside of open farmland a half mile from the nearest residence.

Some states by statute vest exclusive authority in public service commissions or their equivalent to regulate railroads. Thus, in *Commonwealth v. Delaware & Hudson Railway Co.,* 19 Pa.Commw. 59, 339 A.2d 155 (1975), a case in which a railway company had been convicted of violating a local zoning ordinance because it had constructed an additional railroad track without obtaining a building permit, the Pennsylvania Commonwealth Court held:

The clear intent of *Duquesne* [*Light Co. v. Upper St. Clair,* 377 Pa. 323, 105 A.2d 287 (1954)] *supra,* and the many cases cited therein is to uphold the proposition that public utilities are to be regulated exclusively by an agency of the Commonwealth with state-wide jurisdiction rather than by a myriad of local governments with different regulations.

"If each county were to pronounce its own regulation and control over electric wires, pipe lines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state. It is for that reason that the Legislature has vested in the Public Utility Commission exclusive authority over the complex and technical service and engineering questions arising in the location, construction and maintenance***278** of all public utilities facilities. ..." (Citations omitted.) *Chester County v. Philadelphia Electric Company,* 420 Pa. 422, 425-26, 218 A.2d 331, 333 (1966). (Parenthesis original)

This reasoning is equally applicable to railroads. Therefore, to the extent that Section 619 of the Pennsylvania Municipalities Planning Code gives any authority to local governments to regulate public utilities, that authority must be strictly limited to the express statutory language. The Pennsylvania Municipalities Planning Code itself states in Section 1202, 53 P.S. § 11202 that it "shall not repeal or modify any of the provisions of the 'Public Util-

ity Law'...."

We hold that the word "building" in Section 619 of the Pennsylvania Municipalities Planning Code does not include railroad tracks as it does not include transmission lines of power companies....

Commonwealth, 339 A.2d at 157. The Pennsylvania court also noted that the public utility law of that state gave the municipality a forum to voice its objection to any such construction before that state's commission. *Id. See also, Burlington Out Now v. Burlington Northern, Inc.,* 532 P.2d 936, 938 (Idaho 1975).

Massachusetts and New Jersey give their departments of public utilities authority to exempt a railroad from the provisions of a local zoning ordinance. *Town of Westborough v. Department of Public Utilities,* 358 Mass. 716, 267 N.E.2d 110 (1971); *New York Central R. Co. v. Department of Public Utilities,* 347 Mass. 586, 199 N.E.2d 319 (1964); *N.Y. Central v. Ridgefield,* 84 N.J.Super. 85, 201 A.2d 67 (1964).

Miss.Code Ann. §§ 77-9-1 -41; 77-1-23 and 77-1-49; 77-9-257; and 77-9-265 of the 1972 Code vest in the public service commission of this state authority to supervise and regulate common carrier railroads. We find no specific statutory language vesting authority in the commission as to whether construction of a switching yard in the open countryside requires its approval. Miss.Code Ann. § 77-9-265 gives the commission jurisdiction where a switching yard affects traffic on a public street or highway.

We likewise note that Miss.Code Ann. §§ 77-9-141 -193 (1972) grant railroad corporations broad powers, including construction of one or more tracks, Miss.Code Ann. § 77-9-147, and of eminent domain, Miss.Code Ann. § 77-9-169.

[3] While the line of authority between the local authorities and the public service commission's regulation of railroads is not specifically defined by statute, at least as to the construction of an addition to railroad tracks, we have no difficulty in gleaning a legislative intent that our public service commission has general jurisdiction over common carrier railroads with an official responsibility to the public to see that railroads are operated safely, efficiently and for the public's benefit. This responsibility which the commission has to the entire state manifestly cannot be frustrated by any local ordinance or order, whether by a city or county. Hence we underscore what is at least tacitly clear from *Jones v. Hattiesburg:* any reasonableness test of a zoning ordinance which applies to a railroad must take into account the obligation of the company to serve efficiently and economically all sections of the state dependent on it for services.

II. THE ZONING ORDINANCE

What purports to be a copy of the official zoning ordinance of Leflore County adopted March 3, 1982, is in the record. We do not know if it is the complete ordinance or not. The ordinance never mentions the word "railroad," or "common carrier." Section 400 of the ordinance provides:

SECTION 400. USES PERMITTED IN ALL DISTRICTS

1. Any use or facility necessary for the operation of any political subdivision of local, state or Federal Government, including public and private utilities. Locations for electrical transformers, gas regulator stations, sewage treatment facilities and similar uses shall be approved by the Planning ***279** Commission and the Board of Supervisors prior to installation.

2. Public and Semi-Public uses are permitted in all district[s]; provided however, that the locations for such facilities are approved by the Planning Commission prior to construction. Such facilities shall include, but not be limited to, public and private schools, churches, public parks and playgrounds.

3. Agricultural uses.

C & G argues that this section authorizes it to construct the extra tracks unaffected by the ordinances. The plaintiffs argue that the railroad is not a public or private utility, and therefore does not come under the provisions of the section. Both make plausible arguments supporting their own interpretation.

[4] From this record it appears that neither the local zoning commission (if one exists) nor the board of supervisors of Leflore County has taken any official position regarding these additional tracks. Zoning ordinances are essentially legislative functions with limited judicial review. *Luter v. Hammon,* 529 So.2d 625, 628 (Miss.1988); *Robinson Industries v. City of Pearl,* 335 So.2d 892, 895 (Miss.1976); *City of Jackson v. Ridgway,* 261 So.2d 458, 460 (Miss.1972).

[5] This is not a case where the meaning, intent and purpose of the zoning ordinance is clear and unequivocal. *Robinson v. Indianola Mun. Separate Sch. Dist.,* 467 So.2d 911, 914 (Miss.1985); *Ullrich v. State,* 186 Md. 353, 358, 46 A.2d 637, 640, or its violation beyond dispute. To the contrary, credible arguments can be made for either side's position. Yet no official position has ever been taken by the local zoning authority. The cardinal rule in construction of zoning ordinances is to give effect to the intent of the lawmaking body. *Hutchinson v. Board of Zoning Appeals of Stratford,* 100 A.2d 839, 841 (Conn.1953); *City of Rome v. Shadyside Memorial Gardens, Inc.,* 93 Ga.App. 759, 92 S.E.2d 734, 736 (1956); *City of Buffalo v. Roadway Transit Co.,* 303 N.Y. 453, 104 N.E.2d 96, 98 (1952). In construing a zoning ordinance, unless manifestly unreasonable, great weight should be given to the construction placed upon the words by the local authorities. *Drennen v. Mason,* 133 So. 689, 691 (Ala.1931); *Kordick Plumbing and Heating Co. v. Sarcone,* 190 N.W.2d 115, 118 (Iowa 1971). *Daniel D. Rappa, Inc. v. Engelhardt,* 256 A.2d 744, 746 (Del.1969).

[6] Insofar as this record shows, the board of supervisors of Leflore County has never been called upon to interpret this zoning ordinance and officially declare whether or not it applies to railroads. There is enough uncertainty and ambiguity about this ordinance that if the board of supervisors by resolution declared it never intended it to affect railroads any court would be hard put indeed to disregard that interpretation as unreasonable. In *Napa Valley Electric Co. v. Calistoga Electric Co.,* 38 Cal.App. 477, 176 P. 699, 700 (1918), that court held:

A court of equity will never assume jurisdiction to prepare a decree dependent for its efficacy on the approval or rejection of some other co-ordinate or inferior board or tribunal, but only when the court can enforce its decree.

[7] Since the plaintiffs contended the C & G had violated the zoning ordinance, they should first have called upon the local commission or board of supervisors, or both, to enforce it. The county is under a duty to enforce its own ordinance. 101 C.J.S. *Zoning and Land Planning,* § 334. Failing in that, they could have sought by mandamus to force the county to enforce the ordinance. 101A C.J.S., § 335. And, at the very least the board of supervisors of Leflore County is an indispensable party to resolution of this action in chancery court. Rule 19, M.R.C.P.

Any attempt to interpret and then enforce this zoning ordinance in the absence of any official positions by the board of supervisors of Leflore County is putting ***280** the cart before the horse. We therefore eschew this endeavor as should the chancery court. Upon remand the board of supervisors should be made a party to this action.

REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

ROY NOBLE LEE, C.J., DAN M. LEE, P.J., and ROBERTSON, SULLIVAN, PITTMAN, BANKS and McRAE, JJ., concur.
PRATHER, J., not participating.
Miss.,1991.
Columbus & Greenville Ry. Co. v. Scales
578 So.2d 275

578 So.2d 275

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Supreme Court of Mississippi.
Fred H. DREWS, III, and Bonnie Drews
v.
CITY OF HATTIESBURG on Writ of Certiorari.
No. 2003-CT-00823-SCT.

March 31, 2005.

Background: Doctor and wife brought action to contest city council's decision to grant six variances to developer which wished to construct large medical office building. The Circuit Court, Forrest County, Billy Joe Landrum, J., affirmed. Doctor and wife appealed. The Court of Appeals, 905 So.2d 719, 2004 WL 2093727 reversed and rendered. Certiorari was granted.

Holding: The Supreme Court, Waller, P.J., held that the variances rezoned the property and would result in spot zoning.

Affirmed.

West Headnotes

[1] Zoning and Planning 414 ⇐610

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k608 Arbitrary, Capricious, or Unreasonable Action
414k610 k. Decisions of Boards or Officers. Most Cited Cases

Zoning and Planning 414 ⇐703

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k703 k. Substantial Evidence. Most Cited Cases
The standard of review in zoning cases is whether the action of the board or commission was arbitrary or capricious and whether it was supported by substantial evidence.

[2] Zoning and Planning 414 ⇐608.1

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k608 Arbitrary, Capricious, or Unreasonable Action
414k608.1 k. In General. Most Cited Cases

Zoning and Planning 414 ⇐612

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k612 k. Illegality. Most Cited Cases

Zoning and Planning 414 ⇐703

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k703 k. Substantial Evidence. Most Cited Cases
Zoning decisions will not be set aside unless clearly shown to be arbitrary, capricious, discriminatory, illegal or without substantial evidentiary basis.

[3] Zoning and Planning 414 ⇐672

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k672 k. Validity of Regulations in

General. Most Cited Cases

Zoning and Planning 414 ⚿681

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k680 Burden of Showing Grounds for Review
414k681 k. Regulations in General. Most Cited Cases

There is a presumption of validity of a governing body's enactment or amendment of a zoning ordinance, and the burden of proof is on the party asserting its invalidity.

[4] Zoning and Planning 414 ⚿601

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k601 k. In General. Most Cited Cases

Where the point at issue is fairly debatable, the Supreme Court will not disturb the zoning authority's action.

[5] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

The standard of review for questions of law is de novo.

[6] Zoning and Planning 414 ⚿162

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k162 k. Spot Zoning. Most Cited Cases

"Spot zoning" describes a zoning amendment which is not in harmony with the comprehensive or well-considered land use plan of a municipality.

[7] Zoning and Planning 414 ⚿490

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k490 k. Public Interest and Welfare, and Harmony With, or Impairment Of, Regulation. Most Cited Cases

Variances which are incompatible with the terms of an ordinance should not be granted.

[8] Zoning and Planning 414 ⚿503

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k503 k. Architectural or Structural Designs in General. Most Cited Cases

Zoning and Planning 414 ⚿504

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k504 k. Building or Set-Back Lines. Most Cited Cases

Zoning and Planning 414 ⚿509

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k509 k. Garages and Parking Lots. Most Cited Cases

Variances allowing construction of 60,000 square feet medical office building in B-1 professional business district constituted a rezoning to B-3, would result in spot zoning, and were improper; the

largest permissible building in B-1 was 10,000 square feet, the other variances increased the maximum building height by ten feet from thirty-five to forty-five feet, reduced the number of parking places from 360 to 169, increased the allowed percentage of impervious surface by 13% from 60% to 73%, reduced the minimum front set back from twenty-five feet to ten feet, and allowed parking in the front set back area, and these were not minor departures from scope and intent of B-1 classification.

***139** Lawrence C. Gunn, Jr., Hattiesburg, attorney for appellants.

Charles E. Lawrence, Jr., attorney for appellee.

EN BANC.

ON WRIT OF CERTIORARI

WALLER, Presiding Justice, for the Court.

¶ 1. Lee Medical Development, LLC, applied for six zoning variances with the City of Hattiesburg concerning a proposed medical office project. Two of the requested variances were subsequently withdrawn. The Board of Adjustments granted four and denied two. Lee Medical and Fred and Bonnie Drews, residents of the area in question who opposed the variances, both appealed. On appeal, the Hattiesburg City Council approved all six variances. The Forrest County Circuit Court affirmed. The Drewses' appeal was assigned to the Court of Appeals, which reversed***140** and rendered. *See Drews v. City of Hattiesburg,* 905 So.2d 719, 2004 WL 2093727 (Miss.Ct.App.2004). The Court of Appeals found that "while the variance[s] could arguably benefit the community, the city's decision is directly contrary to the uses permitted by the city's zoning ordinance for [the] property ... and constitutes spot zoning." *Id.* at *1, at 720.

¶ 2. We granted the City of Hattiesburg's petition for writ of certiorari, *Drews v. City of Hattiesburg,* 892 So.2d 824 (Miss.2005), and now affirm the Court of Appeals' judgment and reverse and render the circuit court's judgment.

FACTS[FN1]

FN1. The facts are largely taken from the Court of Appeals' decision.

¶ 3. Lee Medical Development purchased six lots of land that were originally developed for residential housing adjacent to the hospital in Hattiesburg, Mississippi. These lots were zoned B-1, professional business district, at the time of the purchase. Lee Medical requested six variances to the city's zoning ordinance in order to build a 60,000 square foot medical office building, of which the Hospital intended to lease a major portion.

¶ 4. The Hattiesburg Board of Adjustments held a public hearing to consider the requests. The board granted four of the variances, which reduced the required "setback" and lessened requirements for numbers of parking spaces specified in the zoning ordinance for medical office buildings. The board denied two of the variances, which would have allowed an increase in building height from 35 to 45 feet and increased the size of a building under one roof from 10,000 to 60,000 square feet. Both the Drews and Lee Medical sought review by the Hattiesburg City Council. The city council voted to grant all six variances. The Forrest County Circuit Court affirmed the city council.

STANDARD OF REVIEW

[1][2][3][4] ¶ 5. The standard of review in zoning cases is whether the action of the board or commission was arbitrary or capricious and whether it was supported by substantial evidence. *Perez v. Garden Isle Community Ass'n,* 882 So.2d 217, 219 (Miss.2004) (citing *Broadacres, Inc. v. City of Hattiesburg,* 489 So.2d 501, 503 (Miss.1986)). Thus, zoning decisions will not be set aside unless clearly

shown to be arbitrary, capricious, discriminatory, illegal or without substantial evidentiary basis. *Perez,* 882 So.2d at 219; *Carpenter v. City of Petal,* 699 So.2d 928, 932 (Miss.1997). There is a presumption of validity of a governing body's enactment or amendment of a zoning ordinance and the burden of proof is on the party asserting its invalidity. *Perez,* 882 So.2d at 219; *Carpenter,* 699 So.2d at 932. Where the point at issue is "fairly debatable," we will not disturb the zoning authority's action. *Perez,* 882 So.2d at 219; *Carpenter,* 699 So.2d at 932.

[5] ¶ 6. The standard of review for questions of law is de novo. *Duncan v. Duncan,* 774 So.2d 418, 419 (Miss.2000).

DISCUSSION

WHETHER THE VARIANCE REQUESTS AMOUNTED TO AN IMPERMISSIBLE USE OF THE PROPERTY UNDER THE ZONING ORDINANCES.

¶ 7. Hattiesburg's City's Land Development Code defines "variance" as

> a modification of the literal provisions of this Code which the Board of Adjustment and/or the City Council is permitted to grant when strict enforcement of ***141** said provisions would cause undue hardship (such hardship cannot be self created or of an economic nature) owing to circumstances unique to the individual property on which the variance is sought.

[6] ¶ 8. While variances are allowable, the question is whether Hattiesburg, because of the number and nature of the variances requested, was actually attempting something more drastic, such as rezoning, or something impermissible, such as spot zoning.[FN2] The Court of Appeals determined that an adoption of the variances constituted spot zoning.

FN2. In *McWaters v. City of Biloxi,* 591 So.2d 824, 828 (Miss.1991), we discussed "spot zoning":

> The term "spot zoning" is used by the courts to describe a zoning amendment which is not in harmony with the comprehensive or well-considered land use plan of a municipality. In *McKibben v. City of Jackson,* 193 So.2d 741, 744 (Miss.1967), we stated:
>
> There is a clear cut distinction between a validly enacted amendatory zoning ordinance and a "spot zoning" ordinance. Not all amendments which change or alter the character of a use district fall within the category of "spot zoning" as we generally understand the term. The term "spot zoning" is ordinarily 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. *See* 1 Yokley Zoning Law and Practice §§ 8-1 to 8-3 (3rd ed.1965).

[7] ¶ 9. Variances which are incompatible with the terms of an ordinance should not be granted:

> Variances were conceived initially as a means for granting relief from height, bulk, and location restrictions in the ordinances which rendered use of the property impossible or impractical. No conceptual problems arise when the variance is granted to authorize minor departures from the terms of the ordinance; e.g. to permit a landowner to place the structure on his lot nearer the lot line than is permitted by the set-back or side-yard requirements. Such relief does not authorize a use inconsistent

with the ordinance and, consequently, does not constitute rezoning under the guise of a variance.... Bulk variances afford relief to the landowner who proves unnecessary and unique hardship, but does not request relief which offends the spirit of the ordinance.

On the other hand, serious questions arise when a variance is granted to permit a use otherwise prohibited by the ordinance; e.g., a service station or quick-stop grocery in a residential district. The most obvious danger is that the variance will be utilized to by-pass procedural safeguards required for valid amendment.

Robert C. Khayat & David L. Reynolds, *Zoning Law in Mississippi,* 45 Miss. L.J. 365, 383 (1974) (footnotes omitted).

[8] ¶ 10. We have never limited the number of variances which can be requested at a given time, and we will not do so in this opinion. However, the changes proposed in the six variances are so dramatic that they constitute a rezoning to B-3, two levels beyond the B-1 (professional business district) lots in question. The differences between B-1 and B-3 are so extreme that if the variances are granted, spot zoning would occur. The largest building that could be built in B-1 was 10,000 square feet. One of the granted variances would allow a single building on ***142** all the lots at a size of 60,000 square feet. The other variances included increasing the maximum allowed building height by 10 feet from 35 to 45 feet; reducing the number of parking places from 360 to 169; increasing the allowed percentage of "impervious surface" by 13% from 60% to 73%; reducing the minimum front "set back" from 25 feet to 10 feet; and allowing parking places in the front "set back" area.

¶ 11. It is clear that the City of Hattiesburg has attempted to bypass the safeguards provided by the rezoning process in that the need for a variance must be proven by only a preponderance of the evidence while the need for rezoning must be proven by clear and convincing evidence. *See Barnes v. Bd. of Supervisors,* 553 So.2d 508, 510, 511 (Miss.1989); *Broadacres, Inc. v. City of Hattiesburg,* 489 So.2d at 503. Hattiesburg's proposed variances are not minor departures from the scope and intent of the B-1 classification. Lee Medical and Hattiesburg failed to present any evidence that the current zoning provisions present an undue hardship or that unique circumstances are present. *See* Khayat & Reynolds, 45 Miss. L.J. at 383.

CONCLUSION

¶ 12. Finding that the proposed variances constituted a rezoning in fact, the effect of which is spot zoning, we affirm the Court of Appeals' judgment, reverse the circuit court's judgment, and render judgment here denying the six zoning variances requested by Lee Medical Development, LLC.

¶ 13. THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED, AND THE JUDGMENT OF THE FORREST COUNTY CIRCUIT COURT IS REVERSED AND RENDERED.

SMITH, C.J., COBB, P.J., EASLEY, CARLSON, GRAVES AND DICKINSON, JJ., CONCUR. DIAZ AND RANDOLPH, JJ., NOT PARTICIPATING.
Miss.,2005.
Drews v. City of Hattiesburg
904 So.2d 138

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Supreme Court of Mississippi.
Darrell FAIRCLOTH
v.
James LYLES, Donna Lyles, Dr. Edward J. Valente, Dr. James Burnside, Dr. Lucy Burnside, E.C. Rochester, Jane Rochester, Marion L. O'Neals, Frank W. Lyles, Jimmy R. Lung, Norma Lung, William Moore, Terri Moore, Dr. John Murphy, Estelle Murphy, Milton Bayse, Colleen Bayse, Henry Marsalis, Willene Marsalis, William Elton Taylor & Hinds County Board of Supervisors.
No. 89-CA-0703.

Oct. 16, 1991.

Appeal was taken from order of the Circuit Court, First Judicial District, Hinds County, Fred L. Banks, Jr., J., vacating county board of supervisors' order rezoning certain property used for sand mining operation from commercial and residential to agricultural. The Supreme Court, Roy Noble Lee, C.J., held that: (1) substantial evidence supported board's determination that classification mistake was made in original zoning ordinance; (2) agricultural classification as interpreted included commercial extraction of sand; and (3) provision of ordinance prohibiting transfer of nonconforming use was arbitrary, unreasonable, and unlawful exercise of police power and was therefore invalid.

Reversed and rendered.

West Headnotes

[1] Zoning and Planning 414 ⇐603

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k603 k. Classification of Property; Size and Boundaries of Zones. Most Cited Cases
Classification of property for zoning purposes is legislative rather than judicial matter.

[2] Zoning and Planning 414 ⇐608.1

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k608 Arbitrary, Capricious, or Unreasonable Action
414k608.1 k. In General. Most Cited Cases
(Formerly 414k608)

Zoning and Planning 414 ⇐612

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k612 k. Illegality. Most Cited Cases

Zoning and Planning 414 ⇐703

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k703 k. Substantial Evidence. Most Cited Cases
Order of governing body in zoning matter may not be set aside unless it is clearly shown to be arbitrary, capricious, discriminatory, illegal, or without substantial evidentiary basis.

[3] Zoning and Planning 414 ⇐672

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k672 k. Validity of Regulations in General. Most Cited Cases

Zoning and Planning 414 ⚿675

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k675 k. Modification or Amendment; Rezoning. Most Cited Cases

Zoning and Planning 414 ⚿681

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k680 Burden of Showing Grounds for Review
414k681 k. Regulations in General. Most Cited Cases

Zoning and Planning 414 ⚿684

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k680 Burden of Showing Grounds for Review
414k684 k. Amendment or Rezoning. Most Cited Cases

Action of board of supervisors in enacting or amending ordinance, or its action of rezoning, carries presumption of validity casting burden of proof upon individual or other entity asserting its invalidity.

[4] Zoning and Planning 414 ⚿614.1

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k614 Wisdom, Judgment or Opinion
414k614.1 k. In General. Most Cited Cases
(Formerly 414k614)

On appeal of zoning matter, Supreme Court cannot substitute its judgment as to wisdom or soundness of board of supervisor's action.

[5] Zoning and Planning 414 ⚿154

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k154 k. Circumstances Affecting Validity of Amendment in General. Most Cited Cases

Zoning and Planning 414 ⚿158

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k158 k. Necessity of Changed Conditions. Most Cited Cases

Zoning and Planning 414 ⚿194.1

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k194 Notice and Hearing
414k194.1 k. In General. Most Cited Cases
(Formerly 414k194)

Prerequisite to property reclassification from one use to another is proof by clear and convincing evidence either that mistake was made in original zoning or that change in character of neighborhood has occurred to such an extent as to justify rezoning and that public need exists for such action.

[6] Zoning and Planning 414 ⚿194.1

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k194 Notice and Hearing
414k194.1 k. In General. Most Cited Cases
(Formerly 414k194)

In determining factual issues in rezoning, board of

supervisors could consider not only information obtained at hearing but also their own common knowledge and familiarity with ordinance area.

[7] Zoning and Planning 414 ⚷194.1

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k194 Notice and Hearing
414k194.1 k. In General. Most Cited Cases
(Formerly 414k194)

Hearsay evidence could be admitted and considered by board of supervisors in making its decision as to whether to reclassify property for zoning purposes.

[8] Zoning and Planning 414 ⚷167.1

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k167 Particular Uses or Restrictions
414k167.1 k. In General. Most Cited Cases
(Formerly 414k167)

Zoning and Planning 414 ⚷194.1

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k194 Notice and Hearing
414k194.1 k. In General. Most Cited Cases
(Formerly 414k194)

Evidence supported finding of county board of supervisors that classification mistake was made in original zoning ordinance, and board's decision to rezone property used as sand mining operation prior to ordinance's enactment from commercial and residential to agricultural was not arbitrary or capricious.

[9] Zoning and Planning 414 ⚷321

414 Zoning and Planning
414VI Nonconforming Uses
414k321 k. In General. Most Cited Cases

Any prohibition in zoning ordinance on transfer of nonconforming uses with land was invalid; right to continue nonconforming use was not a personal right but one that ran with land and could not be terminated or destroyed by change of ownership of property.

[10] Zoning and Planning 414 ⚷199

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k199 k. Filing, Publication, and Posting; Minutes and Records. Most Cited Cases

County board of supervisors was not required to specifically state in its rezoning order whether its action rested on one or both grounds asserted in petition to rezone, as facts supporting action were adequately reflected in record of proceedings.

***942** William C. Smith, Jr., J. Gary Massey, Taylor Covington Smith Lambert & Bailey, Jackson, for appellant.

Robert L. Spell, Edmonson Biggs & Jelliffe, Jackson, Barry W. Gilmer, Gilmer Law Firm, Jackson, for appellee.

Before ROY NOBLE LEE, C.J., and PRATHER and PITTMAN, JJ.

ROY NOBLE LEE, Chief Justice, for the Court:

This is an appeal from an order of the Circuit Court of the First Judicial District of Hinds County, vacating an order of the Board of Supervisors of Hinds County rezoning certain property owned by Darrell Faircloth. We reverse and render.

I.

Darrell Faircloth owns approximately 32 acres of land in the Northwest Quarter of Section 8, Township 5 North, Range 1 West, Hinds County, Missis-

sippi. A sand mining operation has been conducted on the property for many years, including prior to the 1970 enactment of a county zoning ordinance. The 1970 ordinance was supplanted in 1974 by the zoning ordinance currently used.

The property sought to be rezoned by Faircloth was classified for commercial and residential use in the 1974 ordinance. At the time the ordinance was established as law, sand mining was not specifically excepted as a nonconforming use, although Article X of the ordinance recognized that nonconforming uses existed. Property zoned commercial and residential did not permit sand extraction. However, property zoned agricultural provided for uses as follows:

ARTICLE IV

"A" AGRICULTURAL DISTRICT

(A) Uses Permitted. Uses and structures permitted in this area include but are not limited to agricultural, horticultural, floricultural and other similar uses of a noncommercial nature which require few, if any, of the regular services or commodities required by uses in other districts in this ordinances. Uses permitted are summarized as follows:

* * * * * *

15. Extraction of minerals, including sand and gravel.

In 1986, Faircloth was advised that strict enforcement of the uses permitted under the classifications assigned his property ***943** prohibited sand extraction. He sought rezoning to "A" Agricultural Use under the advice and belief that sand extraction was permissible under this classification. The Hinds County Planning Commission considered Faircloth's petition to rezone and recommended that it be approved with certain protective covenants and a 200 foot buffer zone as an improved condition. Faircloth does not complain of the imposed covenants and conditions.

The Hinds County Board of Supervisors conducted an administrative hearing on October 13, 1986. Faircloth and objectors to the zoning petition appeared and formally presented their positions. The Board approved the rezoning petition subject to the conditions recommended by the Planning Commission.

The objectors appealed the Board's decision to the Circuit Court of the First Judicial District of Hinds County. On May 15, 1989, the circuit court, finding the Board's decision was not supported by substantial evidence, vacated the order of the Board.[FN1] Faircloth appeals contending that the circuit court erred in reversing the action of the Hinds County Board of Supervisors in rezoning his property.

FN1. At approximately the same time Faircloth filed his rezoning request, Donald Johnson, owner of an adjacent 10 acre tract of land, filed a similar request for the purpose of continuing his sand mining operation. Although the requests were similar, the Faircloth and Johnson cases were heard separately and given separate numbers by the county. The two cases were heard by the Board of Supervisors on the same day, one following the other. Following similar results at the county level, both cases were appealed to the Circuit Court where they were consolidated by consent of all parties. The Circuit Court's ruling reversing the Board of Supervisor's decision to rezone was embraced in one order. The appeal in this case is from the Circuit Court's single order reversing both the Johnson and Faircloth cases. However, an appeal was taken only by Faircloth.

II.

[1][2][3][4] The classification of property for zon-

ing purposes is a legislative rather than a judicial matter. *W.L. Holcomb, Inc. v. City of Clarksdale,* 217 Miss. 892, 900, 65 So.2d 281, 284 (1953). The order of the governing body may not be set aside unless it is clearly shown to be arbitrary, capricious, discriminatory, or is illegal, or without a substantial evidentiary basis. *Barnes v. Board of Supervisors, DeSoto County,* 553 So.2d 508, 510 (Miss.1989); *Hinds County Board of Supervisors v. Covington,* 285 So.2d 143, 144 (Miss.1973). The action of the Board of Supervisors in enacting or amending an ordinance, or its action of rezoning, carries a presumption of validity, casting the burden of proof upon the individual or other entity asserting its invalidity. *Ridgewood Land Co. v. Moore,* 222 So.2d 378, 379 (Miss.1969). On appeal we cannot substitute our judgment as to the wisdom or soundness of the Board's action. *Currie v. Ryan,* 243 So.2d 48, 52 (Miss.1970); *Moore v. Madison County Bd. of Supervisors,* 227 So.2d 862, 864 (Miss.1969). We have stated that where the point in controversy is "fairly debatable," we have no authority to disturb the action of the zoning authority. *Saunders v. City of Jackson,* 511 So.2d 902, 906 (Miss.1987); *Broadacres, Inc. v. City of Hattiesburg,* 489 So.2d 501, 505 (Miss.1986).

[5][6][7] Prerequisite to property reclassification from one use to another is proof by clear and convincing evidence either (1) that a mistake was made in the original zoning or, (2) that a change in the character of the neighborhood has occurred to such an extent as to justify rezoning and that a public need exists for such action. *Woodland Hills Conservation Assn. v. City of Jackson,* 443 So.2d 1173, 1181 (Miss.1983); *Cloverleaf Mall, Ltd. v. Conerly,* 387 So.2d 736, 740 (Miss.1980). In determining the factual issues in rezoning, the Board could consider not only the information obtained at the hearing but also their own common knowledge and the familiarity with the ordinance area. *Board of Aldermen of Town of Bay Springs v. Jenkins,* 423 So.2d 1323, 1327 (Miss.1982). Furthermore, hearsay evidence may be admitted and considered by the Board in making its decision. ***944***Tauber v. County Bd. of Appeals for Montgomery County,* 257 Md. 202, 262 A.2d 513, 518 (1970); *Eger v. Stone,* 253 Md. 533, 253 A.2d 372, 377 (1969).

A.

[8] In this case, Joseph Lusteck, president of a real estate planning consultant firm, qualifying as an expert, testified and gave affidavit on behalf of Faircloth stating:

(a) Two properties in the vicinity of the Faircloth parcel had recently been rezoned from commercial to industrial. One tract was used for a large warehouse and the other for mobile homes;

(b) In the vicinity of the Faircloth property are seven commercial operations and three sand mining operations;

(c) Commercial extraction of sand from Faircloth's property and other properties in the vicinity predates the Hinds County zoning ordinance many years, with no abandonment of operations;

(d) The Faircloth property is unimproved, vacant land and historically was used as a sand source;

(e) Strict enforcement of the zoning ordinance without recognition of pre-existing use status prohibits sand extraction in commercial and residential districts;

(f) In light of the long established use prior to ordinance enactment, inclusion of Faircloth's property in a zoning district that prohibits the property's prior and existing use should be recognized as a mistake;

(g) Commercial sand extraction is the highest and best use for the property;

(h) The property is not in an approximate location for presently permitted residential use;

(i) Continued sand extraction from the property will neither adversely affect surrounding properties nor

be detrimental to public interest;

(j) The rezoning will help to correct a mistake that resulted in an established pre-existing use being zoned out of existence; and

(k) The rezoning will not adversely affect adjacent properties nor otherwise be detrimental to the public welfare.

The clerk of the Hinds County Planning Commission stated that the zoning ordinance had, prior to the hearing on Faircloth's petition, been interpreted to include commercial extraction of sand as a permitted use of property classified as "agricultural."

When asked by a Board member if he knew that sand mining was not permissible on property zoned commercial under the ordinance, the Planning Commission clerk stated that he was unaware of the prohibition until it was called to his attention earlier in 1986.

Faircloth asserts that the Board's action of rezoning may be affirmed on the basis of a mistake made in the original zoning ordinance which classified the property as commercial and residential instead of agricultural. Neither commercial nor residential classification permit commercial extraction of sand although, admittedly, this use was in effect prior to and at the time of the ordinance enactment.

In this case, strict application of the zoning ordinance to the classifications originally assigned Faircloth's property would prohibit the only use made of the property. Moreover, the evidence showed that the property is not in an appropriate location for presently permitted residential use. The Faircloth property, and other properties in the vicinity, when originally classified, consisted of unimproved, vacant land devoted primarily to sand mining. The original classification at the time of the ordinance enactment failed to bear a reasonable relation to its actual use. While the mere fact that vacant, unimproved land is adaptable to better uses would not prevent the governing authorities from zoning it residential, the classification must rest upon some reasonable link to its actual or adaptable use. *See Forbes v. Hubbard,* 348 Ill. 166, 180 N.E. 767 (1932).

We hold that the evidence more than supported a finding that a mistake was made in the original zoning ordinance, and the Board's decision to rezone Faircloth's ***945** property was not arbitrary or capricious. The circuit court erred in reversing the decision of the Board.

B.

[9] Objectors maintain that sand mining subsequent to enactment of the zoning ordinance was simply a nonconforming use which, pursuant to Article X, § 1000(1) of the ordinance, is not transferable from one owner to another. With this foundation, objectors point to the uncontradicted evidence that Faircloth purchased the property subsequent to the zoning enactment. This sounds plausible until we remind ourselves that the right to continue a nonconforming use is not a personal right but one that runs with the land. It follows, as night follows day, that such right may not be terminated or destroyed by a change of ownership of the property. Anderson, *American Law of Zoning,* Vol. 1, § 6.40 (3d ed.1986); *Barrett v. Hinds County,* 545 So.2d 734, 737 (Miss.1989). Nonconforming uses fix themselves to the land, not to the owner of the land. Thus, any prohibition in the ordinance on the transfer of non-conforming uses with the land is invalid.

C.

Objectors insist that the zoning ordinance does not permit commercial removal of sand in "A Agricultural" districts, and that rezoning Faircloth's property will not achieve the desired result. This argument is unsupported by the language of the zoning ordinance itself. Moreover, the best interpretation of what the wording in the ordinance means is the manner in which it is interpreted and applied by the enacting and enforcement authorities. *Columbus &*

Greenville Railway Co. v. Scales, 578 So.2d 275, 279 (Miss.1991). During the hearing, the Planning Commission clerk stated unequivocally that the wording of the agricultural classification was interpreted to include commercial extraction of sand and gravel.

D.

[10] Objectors next contend that the record fails to contain a specific affirmative finding by the Board that Faircloth met the necessary criteria for establishing that a mistake was made in the original zoning or that the rezoning is justified by changes which have occurred since the original enactment, relying on *Board of Aldermen, City of Clinton v. Conerly,* 509 So.2d 877, 884 (Miss.1987).

In *City of Clinton* we simply emphasized the necessity of a record showing the factual basis for the findings of the governing body. Absent a record showing sufficient evidence to support the findings, it is inevitable that reversal will follow. On the other hand, while recognizing the desirability of specific findings by the zoning authority on each considered issue, we will not reverse for a lack of such specificity where a factual basis for the action is disclosed.

In this case, the record is replete with factual bases for the Board's findings and its action. The matter was considered on a petition to rezone because of a mistake made in the original zoning or, alternatively, because of changes which occurred since the enactment. The Board was not required to specifically state in its order whether its action rested on one or both of the asserted grounds because the facts supporting the action are adequately reflected in the record of proceedings.

III.

We conclude that (a) there is substantial evidence to support the Board's action in determining that a classification mistake was made in the 1974 zoning ordinance, (b) the agricultural classification as interpreted includes commercial extraction of sand, and (c) the provisions of the ordinance which prohibit transfer of a nonconforming use is an arbitrary, unreasonable, and unlawful exercise of the police power, and therefore invalid.

REVERSED AND RENDERED

HAWKINS and DAN M. LEE, P.JJ., and PRATHER, ROBERTSON, SULLIVAN, PITTMAN and McRAE, JJ., concur.
BANKS, J., not participating.
Miss.,1991.
Faircloth v. Lyles
592 So.2d 941

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Court of Appeals of Mississippi.
Allan K. HEARNE, Appellant,
v.
CITY OF BROOKHAVEN, Mississippi, Appellee.
No. 2000-CA-01869-COA.

March 12, 2002.
Rehearing Denied May 21, 2002.
Certiorari Denied Aug. 29, 2002.

Property owner sought judicial review of decision of city board to deny petition to practice psychology in building in neighborhood zoned solely for residential purposes under home occupation exception. The Circuit Court, Lincoln County, Mike Smith, J., affirmed. Property owner appealed. The Court of Appeals, Brantley, J., held that: (1) trial court properly applied de novo standard of review to board's denial of petition; (2) discrepancy in published notice of hearing did not render notice defective as matter of law; (3) property owner's appearance at hearing waived objections to notice; (4) board did not improperly consider whether change in neighborhood had occurred prior to denial of petition; and (5) sufficient evidence supported board's denial of property owner's application for home occupation exception.

Affirmed.

West Headnotes

[1] Zoning and Planning 414 ⚿607

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k607 k. Variances or Exceptions, Decisions Relating To. Most Cited Cases
Unlike decisions to zone or re-zone, which are legislative in nature, decisions on requests for special exceptions are adjudicative, and a reviewing court thus subjects such decisions to the same standard as is applied to administrative agency adjudicative decisions.

[2] Administrative Law and Procedure 15A ⚿741

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak741 k. In General. Most Cited Cases
Decision of an administrative agency is not to be disturbed unless the agency order was unsupported by substantial evidence, was arbitrary or capricious, was beyond the agency's scope or powers, or violated the constitutional or statutory rights of the aggrieved party.

[3] Administrative Law and Procedure 15A ⚿791

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak791 k. Substantial Evidence. Most Cited Cases
"Substantial evidence," which would support an administrative decision, is such relevant evidence as reasonable minds might accept as adequate to support a conclusion or to put it simply, more than a mere scintilla of evidence.

[4] Administrative Law and Procedure 15A ⚿796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law Questions in General. Most Cited Cases
While factually-based decisions are not reversed

unless the decision is not founded on substantial evidence or is arbitrary or capricious, legal errors are readily reversible and subject to a de novo review.

[5] Zoning and Planning 414 ⚖642

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)2 Additional Proofs and Trial De Novo
414k642 k. Trial De Novo in General. Most Cited Cases

Trial court properly applied de novo standard of review to city board's denial of property owner's petition for home occupation exception to residential zoning to allow him to conduct psychology practice out of house in residential neighborhood, even though trial judge did not articulate that standard of review, where trial judge acknowledged duty to reverse for legal errors, after reviewing facts, evidence, and documentation in record, trial judge addressed why discrepancy in notice did not render it defective and explained that incorrect legal standard was not board's basis for denial of petition, and after finding that no legal errors had occurred, trial judge reviewed board's decision and concluded that decision was supported by substantial evidence and that it was not arbitrary or capricious.

[6] Zoning and Planning 414 ⚖534

414 Zoning and Planning
414IX Variances or Exceptions
414IX(B) Proceedings and Determination
414k534 k. Notice. Most Cited Cases

Discrepancy in published notice of hearing, which incorrectly identified subject matter of hearing as petition to rezone property from residential to commercial use, instead of describing petition as seeking home occupation exception to residential zoning, did not render notice defective as matter of law, given that notice was properly published 15 days in advance stating date, time, and place of hearing, notice adequately advised community at large that there was pending change contemplated to zoning ordinance on subject property, record reflected that all interested parties were well represented at hearing and that property owner, community, landowners surrounding property knew purpose of hearing, and purpose of hearing was clarified by board as special use exception without comment by property owner. West's A.M.C. § 17-1-17.

[7] Zoning and Planning 414 ⚖534

414 Zoning and Planning
414IX Variances or Exceptions
414IX(B) Proceedings and Determination
414k534 k. Notice. Most Cited Cases

Property owner's appearance at hearing on petition as seeking home occupation exception to residential zoning waived any objections he might have had to form of notice, which incorrectly identified subject matter of hearing as petition to rezone property from residential to commercial use. West's A.M.C. § 17-1-17.

[8] Zoning and Planning 414 ⚖306

414 Zoning and Planning
414V Construction, Operation and Effect
414V(C) Uses and Use Districts
414V(C)2 Accessory Uses and Buildings
414k304 Residence, Accessory Uses
414k306 k. Home Occupations. Most Cited Cases

City board did not improperly consider whether change in neighborhood had occurred prior to denial of property owner's request for home occupation exception to residential zoning to allow him to practice psychology out of house, where adopted letter of alderman and board's decision specifically stated that petition was denied because it did not comply with requirements of home owner's occupation exception because owner did not live on premises, owner used more than one room for business purposes, and non-family members participated in business, official records indicated that property owner had been less than candid and mis-

leading as to location of office, home, and contradictory character of subject property as home or office, and board considered whether effects of exception would be inconsistent or adverse to master plan of neighborhood and public's interest, not to determine whether neighborhood's character had changed, but rather to see if there was any other possibility that would allow exception to be granted, and board was concerned that allowing changes would be adverse to public's interest and may ultimately change neighborhood.

[9] Zoning and Planning 414 ⚿306

414 Zoning and Planning
414V Construction, Operation and Effect
414V(C) Uses and Use Districts
414V(C)2 Accessory Uses and Buildings
414k304 Residence, Accessory Uses
414k306 k. Home Occupations. Most Cited Cases

Zoning and Planning 414 ⚿539

414 Zoning and Planning
414IX Variances or Exceptions
414IX(B) Proceedings and Determination
414k537 Weight and Sufficiency of Evidence
414k539 k. Particular Uses. Most Cited Cases

Sufficient evidence supported city board's denial of property owner's application for home occupation exception to residential zoning of building, which he sought to use for psychology practice, where evidence indicated that property owner did not use property as residence as required by exception, two unrelated individuals worked at residence, including secretary, who had no relation to property owner either by blood or marriage, which was prohibited by exception, and in violation of exception, property owner testified that he used three rooms for conducting business, rather than just one, including porch for receptionist, another room for office, and dining room to store files, and building inspector testified that one room had desk and coffee pot, second room contained office, and third room contained nine plastic white chairs, and there was indications that building in back was being used for Alcoholic Anonymous (AA) meetings.

[10] Zoning and Planning 414 ⚿610

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k608 Arbitrary, Capricious, or Unreasonable Action
414k610 k. Decisions of Boards or Officers. Most Cited Cases

Zoning and Planning 414 ⚿703

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k703 k. Substantial Evidence. Most Cited Cases

If the city board's decision on a zoning matter is founded on substantial evidence, and is not arbitrary or capricious, it is binding on courts.

[11] Municipal Corporations 268 ⚿625

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k625 k. Reasonableness of Regulations. Most Cited Cases

Municipal ordinances and regulations must be reasonable, otherwise they will be void and unenforceable, and the question of their reasonableness is a judicial question.

[12] Zoning and Planning 414 ⚿306

414 Zoning and Planning
414V Construction, Operation and Effect
414V(C) Uses and Use Districts
414V(C)2 Accessory Uses and Buildings

414k304 Residence, Accessory Uses
414k306 k. Home Occupations.
Most Cited Cases
Reasonable interpretation of the purpose of the exception to the zoning ordinance to allow use of residential property for home occupations is that a home owner applies for the exception to work at his home where he resides.

***1001** Dale F. Schwindaman, Jr., Jackson, attorney for appellant.

Joseph A. Fernald, Jr., Brookhaven, attorney for appellee.

Before KING, P.J., THOMAS, MYERS, and BRANTLEY, JJ.

BRANTLEY, J., for the court.

¶ 1. The Circuit Court of Lincoln County affirmed the City of Brookhaven's decision to deny Dr. Allen Hearne's petition to practice psychology in a neighborhood zoned solely for residential purposes. Aggrieved, Hearne appeals. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2. Dr. Allen Hearne maintains a practice as a psychologist in the city of Brookhaven. In January of 1997, Hearne purchased a residence at 1001 North Jackson Street in Brookhaven in an area zoned "R-1" (single family residence).

¶ 3. From January 1997, until June 1999, Hearne had used this location as an office in violation of the R-1 zoning restriction. During this time, the City was unaware of Hearne's commercial use of the property. While Hearne alleged that he purchased the property for an office, documents filed with the municipality indicated that the property was intended to be used as a single family residence. Hearne had filed for privilege licenses that indicated he maintained his practice at two other locations within commercial zones. According to documents in the record, Hearne also listed two additional addresses as his place of residence during this time. In May of 1998, a fire substantially damaged the subject property. In documents filed with the City for a building permit, Hearne stated that the subject property would be used as a single-family residence, not a business. He also listed a different address as his home on the permit application. In June 1999, the City of Brookhaven became aware of his office in the residential neighborhood and promptly informed him that he could not practice at that residence in violation of the zoning ordinance for the district.

¶ 4. In October 1999, Hearne petitioned Brookhaven's Board of Adjustment for a special exception to the R-1 zoning restriction based on his allegation that he was entitled to such exception for a "home occupation" as defined in the Brookhaven Zoning Ordinance Section 1301.53. After a hearing on November 23, 1999, the board of adjustment denied his petition. Dr. Hearne appealed this decision to the mayor and the board of aldermen (City Board).

¶ 5. Notice of the appeal hearing was given fifteen days prior to the hearing stating the date, time, and place as set forth in Miss.Code Ann. § 17-1-17 (Rev.1979). The published notice incorrectly identified the subject matter of the hearing as a petition to rezone Hearne's property "from R-1 to C-1" instead of describing ***1002** his petition as a "home occupation exception" to the R-1 zone.

¶ 6. On April 12, 2000, the appeal was heard "*de novo* " before the City Board. All interested parties were represented at the hearing. The Board clarified that the purpose of the hearing was to decide if the property could be designated as a home occupation exception to the R-1 zone, not to rezone the subject property from R-1 to C-1. Hearne never questioned the content of the notice and proceeded with the hearing. After testimony by Hearne, the adjacent land owners, and other interested parties, the City Board voted unanimously to deny Hearne's request.

¶ 7. On April 25, 2000, Hearne filed his bill of exception with the circuit court alleging that the City Board's decision was contrary to the weight of the evidence, was not supported by substantial evidence, and should be voided because of procedural deficiencies. A hearing was conducted on September 5, 2000, and the court issued its letter opinion and order on October 11, 2000, affirming the City Board's decision to deny Hearne's request because the court found that the record provided not only substantial evidence to support the City Board's decision, but the greater weight of the evidence showed Hearne did not comply with the zoning ordinance.

ISSUES PRESENTED

I. WHETHER THE CIRCUIT COURT EMPLOYED AN IMPROPER STANDARD OF APPELLATE REVIEW.

II. WHETHER NOTICE WAS DEFICIENT.

III. WHETHER THE BOARD APPLIED AN INCORRECT LEGAL STANDARD.

IV. WHETHER THE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY IN ITS RULING.

ANALYSIS

I. WHETHER THE CIRCUIT COURT EMPLOYED AN IMPROPER STANDARD OF APPELLATE REVIEW.

¶ 8. Hearne contends that the circuit court did not follow the proper standard of review because it failed to mention its duty to reverse and remand for legal errors. Hearne contends that two legal deficiencies existed which required the circuit court to reverse and remand. First, Hearne contends that the discrepancy in the notice renders the City Board's decision void as a matter of law. Second, Hearne contends that the City Board applied an incorrect legal standard to its decision.

[1][2][3] ¶ 9. Unlike decisions to zone or re-zone, which are legislative in nature, decisions on requests for special exceptions are adjudicative, and a reviewing court thus subjects such decisions to the same standard as is applied to administrative agency adjudicative decisions. *Bowling v. Madison County Board of Supervisors,* 724 So.2d 431, 436 (¶ 22) (Miss.App.Ct.1998). The proper standard of review is set forth in *Hooks v. George County:*

The decision of an administrative agency is not to be disturbed unless the agency order was unsupported by substantial evidence; was arbitrary or capricious; was beyond the agency's scope or powers; or violated the constitutional or statutory rights of the aggrieved party. *Board of Law Enforcement Officers Standards & Training v. Butler,* 672 So.2d 1196, 1199 (Miss.1996). Substantial evidence has been defined as "such relevant evidence as reasonable minds ***1003** might accept as adequate to support a conclusion" or to put it simply, more than a "mere scintilla" of evidence. *Johnson v. Ferguson,* 435 So.2d 1191, 1195 (Miss.1983).

[4] *Hooks v. George County,* 748 So.2d 678, 680 (¶ 10) (Miss.1999). While factually-based decisions are not reversed unless the decision is not founded on substantial evidence or is arbitrary or capricious, legal errors are readily reversible and subject to a *de novo* review. *ABC Mfg. Corp. v. Doyle,* 749 So.2d 43, 45 (¶ 10) (Miss.1999).

[5] ¶ 10. The circuit court properly applied this standard of review to the decision of the City Board. Although the trial judge did not articulate in his standard of review his duty to reverse for legal errors, his letter of opinion provides evidence that the circuit court reviewed Hearne's claims of legal deficiency *de novo.*After reviewing the facts, evidence, and documentation in the record, the trial judge addressed why the discrepancy in the notice did not render it defective and explained that an incorrect legal standard was not the City Board's basis for its denial of Hearne's petition. After finding no legal errors had occurred, the trial judge reviewed the City Board's decision and concluded

that their decision was supported by substantial evidence and that it was not arbitrary or capricious. *Hooks*, 748 So.2d at 680 (¶ 10). Therefore, this assignment of error is without merit.

II. WHETHER NOTICE WAS DEFICIENT.

[6] ¶ 11. The published notice incorrectly identified the subject matter of the hearing as a petition to rezone Hearne's property "from R-1 to C-1", instead of describing his petition as a "home occupation exception" to the R-1 zone. The discrepancy in the notice did not render the notice defective as a matter of law. Sufficient notice was given to confer upon the City Board jurisdiction over the parties' interests. The notice was properly published fifteen days in advance stating the date, time, and place of the hearing. Miss.Code Ann. § 17-1-17 (Rev.1979). The notice adequately advised the community at large that there was a pending change contemplated to the zoning ordinance on the subject property. The record reflects that all interested parties were well represented at the hearing and that Hearne, the community, and the landowners surrounding the property knew the purpose of the hearing. The purpose of the hearing was clarified by the Board as a special use exception without comment by Hearne.

[7] ¶ 12. Hearne argued at the circuit court level that this discrepancy in the legal description rendered the notice defective. Hearne made no attempt to raise the issue of defective notice during the April 12, 2000 appeal hearing before the City Board. Hearne's appearance at the hearing waived any objections he might have had to the form of notice. *Ridgewood Land Co. v. Simmons*, 243 Miss. 236, 137 So.2d 532, 538 (1962). This assignment of error is procedurally barred from review by this Court.

III. WHETHER THE BOARD APPLIED AN INCORRECT LEGAL STANDARD.

¶ 13. Hearne asserts that the Board, in making its decision, applied an additional legal requirement not specified in the home occupation exception factors in Brookhaven Zoning Ordinance Section 1301.53. Hearne asserts that this alleged illegal consideration was whether a "change in the neighborhood's character" had occurred.

¶ 14. The Brookhaven Zoning Ordinances that govern special use exceptions are found at § 1301.99, which defines the exceptions, § 1301.53 which defines the elements***1004** of the home use exception and § 901.01 and § 901.02, which set out the procedural requirements. Section 901.01 of the zoning ordinance authorizes the Board to grant special exceptions and decide whether or not granting the exception will adversely affect the public interest. Section 901.02 requires general compatibility with adjacent properties and other property in the district so as not to be detrimental to uses allowed by right in the district.

¶ 15. Section 1301.99 defines a "special exception" as a use that would generally not be appropriate throughout a zoning district but, if permitted, would promote, the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or general welfare. The specific rules governing the home occupation exception are set forth in § 1301.53 [FN1] of the Brookhaven Zoning Ordinance. Section 1301.53 provides that in order to qualify, a home occupation must not involve ten different conditions which are all inclusive. Failure to comply with one, all or any combination of the ten conditions constitutes a bar to the home occupation special exception.

> FN1. A home occupation is a commercial enterprise conducted in a dwelling unit, WHICH DOES NOT INVOLVE (1) *employment of help other than members of the resident family,* (2) sales of products or services not produced or provided on the premises, (3) generation of pedestrian or vehicular traffic beyond that usual in and reasonable to the district in which the dwelling unit is located, (4) use of commercial vehicles for delivery of material to or from the premises, (5) outdoor storage

> of materials and/or supplies, (6) use of signs other than those permitted in the district of which the dwelling is a part, (7) *use of any building or space outside the main dwelling unit building,* (8) *use of more than one room in the dwelling,* (9) any visible or audible evidence on the outside of the dwelling unit of the conduct of a home occupation with or that the structure is used otherwise than exclusively for residential purposes (either by color, materials or construction, lighting, signs, sound of noises, or vibrations), or (10) use of utilities or community facilities beyond those reasonable and customary for property used exclusively for residential purposes. The operation of beauty culture schools, beauty parlors or barber shops shall not be considered a home occupation. (emphasis added).

[8] ¶ 16. The Board applied the proper legal standard in making its decision to deny Hearne's request. The adopted letter of Alderman Buddy Allen was a clear statement of Dr. Hearne's failure to meet the test set forth in sections 1301.99, 1301.53, 901.01, and 901.02 of the zoning ordinances. The Board's decision specifically stated that Hearne's petition should have been denied because it did not comply with the requirements of the home owner's occupation exception of § 1301.53 for the following three reasons: he does not live on the premises, he is using more than one room, and non-family members are required to run this business.

¶ 17. Further, the City Board considered the official records of the municipality when Hearne had been less than candid and misleading as to the location of his office, home and the contradictory character of the "subject property" as a home or office.

¶ 18. Following sections 901.01 and 901.02, the Board also discussed whether the effects of the exception would be inconsistent or adverse to the master plan of the neighborhood and the public's interest. The Board did not deny his request on the basis of whether the neighborhood's character had changed. Hearne's contention is misplaced. The Board considered the neighborhood's character to see if there was any other possibility that would allow the exception to be granted. They also were concerned that allowing changes would be adverse to the public's interest ***1005** and may ultimately change the neighborhood.

¶ 19. The Board found that Dr. Hearne failed to comply with the occupation exception. It also found that Dr. Hearne was misleading in his testimony and found no other possibility to allow the exception to be granted. Therefore, this assignment has no merit.

IV. WHETHER THE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY IN ITS RULING.

[9] ¶ 20. The City Board stated the following three specific findings of fact which violated the home occupation exception of section 1301.53 of the Brookhaven Zoning Ordinance: 1) Hearne does not live there; 2) non-family members will be required to operate the business; and 3) his practice will use more than one room.

¶ 21. Hearne contends that the Board's decision of his noncompliance was not supported by substantial evidence. Hearne argues that there is no expressed requirement in § 1301.53 that he reside there. He also states that he is in compliance with the Board's second asserted violation because he does not employ help other than the resident family. Finally, he claims that he only uses one room for his practice. He also contends that the overwhelming weight of the evidence demonstrates that he satisfied all ten requirements of Section 1301.53 because he testified that he was ready and willing to comply with all conditions set forth under Section 1301.53 to attain his home occupation special use exception.

[10] ¶ 22. "If the Board's decision is founded on substantial evidence, and is not arbitrary or capricious, it is binding on [this] [C]ourt." *Bowling v. Madison County Bd. of Supervisors,* 724 So.2d 431,

436 (¶ 22) (Miss.Ct.App.1998). Hearne needs only to fail one requirement of section 1301.53 in order to not comply with the home owner exception.

a) Owner must reside there

¶ 23. This requirement is not expressly stated in section 1301.53. Hearne argues that had Brookhaven wanted to require the owner of the subject parcel to also reside there in order to qualify for the "home occupation" special use exception, it should have specified this condition in its ordinance, and cannot now do so by implication.

[11] ¶ 24. Municipal ordinances and regulations must be reasonable, otherwise they will be void and unenforceable, and the question of their reasonableness is a judicial question. *Jones v. City of Hattiesburg*, 207 Miss. 491, 42 So.2d 717 (1949). The title of the exception, "home occupation" establishes the owner as the resident. Black's Law Dictionary defines "home" as: "[o]ne's own dwelling place; the house in which one lives, especially the house in which one lives with his family. That place in which one in fact resides with the intention of residence...."BLACK'S LAW DICTIONARY 733 (6th ed.1990).

[12] ¶ 25. Therefore, a reasonable interpretation of the purpose of the ordinance is that a home owner applies for the exception to work at his home where he resides. Concluding that the owner does not have to live at his residence would frustrate the very purpose of the home owner's exception.

¶ 26. The record indicated that the property at 1001 N. Jackson does not serve as his residence. He testified that he did not reside there and exhibits entered into evidence such as the license application and his own check indicated that he resided at different locations other than the subject property.

***1006** *b) Employment of help other than members of the resident family is prohibited*

¶ 27. Hearne argues that he does not violate this requirement because his employee will be the resident. A strict interpretation places no restriction on the relation of the employer. It expresses employees must be related to the resident family.

¶ 28. The City Board based their decision on the reasonable interpretation that Hearne was required to be the resident; therefore, two unrelated individuals worked at the residence in violation of the ordinance. The proof is uncontradicted that his employee, his secretary, has no relation to him either by blood or marriage.

c) Use of more than one room is prohibited

¶ 29. Hearne argues that he will comply with this requirement. The fact is at the time of the Board's decision, he did not. Hearne's own testimony was that he used three rooms: a porch for his receptionist, a room for his office at the north end of the first floor, and a dining room to store files in. Furthermore, the City building inspector testified that the big room at the front door had a desk and a large coffee pot and that there was an office to the north end. He also testified that another room contained nine plastic white chairs. These three areas were separate rooms. Also, there were indications that the building in the back was being used for alcoholic anonymous meetings. Advertisements appeared in the newspaper posting that address as a location for the meetings and there was a sign at the back building that said "alcoholic beverages not allowed." There is substantial evidence to support the City Board's decision and this assignment of error has no merit.

¶ 30. THE JUDGMENT OF THE LINCOLN COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, THOMAS, LEE, IRVING, MYERS AND CHANDLER, JJ., CONCUR.

Miss.App.,2002.
Hearne v. City of Brookhaven
822 So.2d 999

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Supreme Court of Mississippi.
Mary Jane HOOKS
v.
GEORGE COUNTY, Mississippi.
No. 98-SA-00571-SCT.

Sept. 16, 1999.

Plaintiff landowner filed bill of exceptions after county board of supervisors approved private right of way across her land in favor of defendant landowners. The Chancery Court, George County, Glenn Barlow, J., affirmed in part. Plaintiff appealed. The Supreme Court, Smith, J., held that: (1) defendant landowners were not required to make formal offer to purchase right of way after litigation had begun, but (2) defendants failed to show that right of way was reasonably necessary in light of unresolved factual issues regarding two possible alternative rights of way.

Reversed and remanded.

West Headnotes

[1] Administrative Law and Procedure 15A ⇐ 741

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak741 k. In General. Most Cited Cases
Decision of an administrative agency is not to be disturbed unless the agency order was unsupported by substantial evidence; was arbitrary or capricious; was beyond the agency's scope or powers; or violated the constitutional or statutory rights of the aggrieved party.

[2] Private Roads 311 ⇐ 2(1)

311 Private Roads
311k2 Establishment
311k2(1) k. In General. Most Cited Cases
Under statutory scheme for acquiring access by private right of way, the plaintiff must compensate the landowner over whose land he is given a right of way by paying the landowner the fair value of any land taken and any damage that might accrue to the remainder of the landowner's property; in addition, the plaintiff must pay for all the costs and expenses incurred in proceedings before the board of supervisors. West's A.M.C. § 65-7-201.

[3] Private Roads 311 ⇐ 2(1)

311 Private Roads
311k2 Establishment
311k2(1) k. In General. Most Cited Cases
After dispute regarding grant of right of way had been resolved by chancery court and was on appeal to Supreme Court, in order to have standing to bring petition for private right of way before county board of supervisors, landowners were not required to make formal offer to adjoining landowner to purchase right of way; such a requirement after judicial system had become involved in case would have been imprudent and ignorant of the realities. West's A.M.C. § 65-7-201.

[4] Private Roads 311 ⇐ 2(1)

311 Private Roads
311k2 Establishment
311k2(1) k. In General. Most Cited Cases
There must be a real necessity at stake, not just mere convenience, before private right of way may be granted. West's A.M.C. § 65-7-201.

[5] Private Roads 311 ⇐ 2(1)

311 Private Roads
311k2 Establishment
311k2(1) k. In General. Most Cited Cases
County board of supervisors acted prematurely in granting private right of way across land, where unresolved questions existed regarding two possible

alternative rights of way to the land. West's A.M.C. § 65-7-201.

***678** Mark H. Watts, Pascagoula, Attorney for Appellant.

Sidney Amon Barnett, Darryl A. Hurt, Jr., Gerald Alan Dickerson, Lucedale, Attorneys for Appellee.

BEFORE PITTMAN, P.J., McRAE AND SMITH, JJ.

SMITH, Justice, for the Court:

¶ 1. This appeal comes to this Court following the granting of a private right of way, by the George County Board of Supervisors (hereinafter "the Board"), across the property of Mary Jane Hooks for the sole benefit of Doug Welford and wife, Juanita Welford, (the "Welfords") and the partial affirmance of that decision by the Chancery Court of George County. We, therefore, find that the chancellor was correct regarding the Welfords' standing to bring a petition before the Board of Supervisors.***679** The Welford's should have offered proof that they had first sought to purchase the right of way from Hooks, prior to filing with the Board of Supervisors. To now require that the Welfords make a formal offer to purchase is rather impotent in view of the fact that our judicial system is now involved.

¶ 2. However, the Board failed to make a determination that the right of way was reasonably necessary in view of the fact that the Welfords had two other easements of access to their property. The chancellor erred regarding this issue and we reverse thereon.

FACTS

¶ 3. On August 8, 1978, Casper and Ruby Mergenschroer, Hooks's parents, purchased forty acres from Sarah Miller, north of Basin Refuge road, described as the Northwest 1/4 of the Southeast 1/4 Section 36, Township 2 South, Range 7 West, in George County, Mississippi. Included in this conveyance was a right of way across Patricia Horn's property which allowed ingress and egress from the property to the road. The Mergenschroers then conveyed approximately three acres to their daughter, Hooks. On May 22, 1979, the Mergenschroers conveyed a perpetual easement or road right of way to Hooks and her former husband to allow for ingress and egress from Basin Refuge Road.

¶ 4. On August 22, 1997, Doug and Juanita Welford purchased a tract of land adjacent to the north side of Hooks's parents' property from Ruth Deakle along with a right of way to the property across Deakle's property. On August 23, 1997, the Welfords purchased from the Deakles a strip of land thirty feet by one thousand three hundred twenty feet.

¶ 5. This narrow strip is the very same land to which Hooks claims she was granted the previously mentioned easement. On September 4, 1997, Hooks returned home from work to find a new locked gate preventing her egress and ingress to her house. On September 5, 1997, Hooks was granted a temporary injunction to have the gate removed.

¶ 6. On October 31, 1997, George County Chancellor William H. Myers dissolved the injunction and granted leave for the parties to seek such relief for a private right of way before the George County Board of Supervisors. The Welfords filed their request for a private way on November 17, 1997, with the Board. On December 1, 1997, the Board ordered to approve a private way for Welford across the property of Hooks and to appraise the property for damages payable to Hooks. On December 5, 1997, Hooks filed a Bill of Exceptions with the Circuit Court of George County to appeal the Board's order.

¶ 7. Meanwhile, the Mergenschroers filed a petition for an injunction with the George County Chancery Court involving the same strip of land and gate against the Welfords, the Deakles, and another ad-

joining landowner, Robert E. Eubanks. The chancellor granted that petition for temporary injunction on November 6, 1997. On December 11, 1997, the Welfords filed a motion to contest jurisdiction and dissolve the injunction. On December 12, 1997, Chancellor Myers recused himself by order from the Mergenschroers's case.

¶ 8. Being made aware of the Mergenschroers' action in chancery court, on January 26, 1998, and finding that judicial economy would be best served by a transfer the Circuit Court of George County, *sua sponte,* transferred the appeal of Hooks from the Board's order to the Chancery Court of George County. Chancellor Glenn Barlow considered the record and rendered an opinion on March 10, 1998, affirming in part and remanding one issue to the Board. Specifically, the chancellor reversed and remanded the case to the Board for a ruling consistent with the petition and request in that the private way should be equally shared between the Scotts and the Hooks.

***680** ¶ 9. Aggrieved, Hooks timely appealed on March 23, 1998, raising the following issues:

I. THE COURT ERRED IN AFFIRMING THE BOARD OF SUPERVISORS' ORDER WHERE THE WELFORDS FAILED TO MAKE THE REQUIRED SHOWING THAT THEY WERE UNABLE TO OBTAIN A REASONABLE RIGHT OF WAY FROM ALL THE SURROUNDING PROPERTY OWNERS.

II. THE COURT ERRED IN AFFIRMING THE ORDER OF THE BOARD OF SUPERVISORS WHERE THE WELFORDS FAILED TO ESTABLISH THAT THE PRIVATE WAY WAS REASONABLY NECESSARY FOR INGRESS AND EGRESS.

STANDARD OF REVIEW

[1] ¶ 10.The standard of review for this case is substantial evidence, the same standard which applies in appeals from decisions of administrative agencies and boards. *Barnes v. Board of Supervisors,* 553 So.2d 508, 511 (Miss.1989). "The decision of an administrative agency is not to be disturbed unless the agency order was unsupported by substantial evidence; was arbitrary or capricious; was beyond the agency's scope or powers; or violated the constitutional or statutory rights of the aggrieved party." *Board of Law Enforcement Officers Standards & Training v. Butler,* 672 So.2d 1196, 1199 (Miss.1996). Substantial evidence has been defined as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion" or to put it simply, more than a "mere scintilla" of evidence. *Johnson v. Ferguson,* 435 So.2d 1191, 1195 (Miss.1983).

¶ 11.In an appeal from the decision of a municipal authority, Miss.Code Ann. § 11-51-75 (1972) states that the person aggrieved may "embody the facts, judgment and decision in a bill of exceptions" which will be transmitted to the circuit court acting as an appellate court. Miss.Code Ann. § 11-51-75 (1972). The bill of exceptions serves as the record on appeal, and we have held that "[t]he circuit court can only consider the case as made by the bill of exceptions. This is the only record before the circuit court, as an appellate court." *Stewart v. City of Pascagoula,* 206 So.2d 325, 328 (Miss.1968).

LEGAL ANALYSIS

I. THE COURT ERRED IN AFFIRMING THE BOARD OF SUPERVISORS' ORDER WHERE THE WELFORDS FAILED TO MAKE THE REQUIRED SHOWING THAT THEY WERE UNABLE TO OBTAIN A REASONABLE RIGHT OF WAY FROM ALL THE SURROUNDING PROPERTY OWNERS.

¶ 12.Article 3, Section 14 of the Mississippi Constitution of 1890 provides that "(n)o person shall be deprived of life, liberty, or property except by due process of law."

¶ 13.Article 4, Section 110 of the Mississippi Con-

stitution of 1890 provides as follows:

The legislature may provide, by general law, for condemning rights of way for private roads, where necessary for ingress and egress by the party applying, on due compensation being first made to the owner of the property; but such rights of way shall not be provided for in incorporated cities and towns.

Pursuant to Section 110, the Legislature enacted Miss.Code Ann. § 65-7-201 (1991) which provides as follows:
When any person shall desire to have a private road laid out through the land of another, when necessary for ingress and egress, he shall apply by petition, stating the facts and reasons, to the board of supervisors of the county, which shall, the owner of the land being notified at least five days before, determine***681** the reasonableness of the application. If the petition be granted, the same proceedings shall be had thereon as in the case of a public road; but the damages assessed shall be paid by the person applying for the private road, and he shall pay all the costs and expenses incurred in the proceedings.

[2] ¶ 14.As early as 1905, this Court recognized that the proper manner for seeking a private way across neighboring land was by petitioning the county board of supervisors. *Wills v. Reid,* 86 Miss. 446, 453, 38 So. 793, 795 (1905). Under this statutory scheme for acquiring access, the plaintiff must compensate the landowner over whose land he is given a right of way by paying the landowner the fair value of any land taken and any damage that might accrue to the remainder of the landowner's property. *Alpaugh v. Moore,* 568 So.2d 291, 295 (Miss.1990); *Quinn v. Holly,* 244 Miss. 808, 812, 146 So.2d 357, 358 (1962). In addition, the plaintiff must pay for all the costs and expenses incurred in proceedings before the board of supervisors. *Broadhead v. Terpening,* 611 So.2d 949, 955 (Miss.1992).

¶ 15.This Court has further addressed the requirements and procedures necessary for the granting of a private way on several occasions. This Court has consistently held that the right to control and use of one's property is a sacred right not to be lightly invaded or disturbed. *Whitefort v. Homochitto Lumber Co.,* 130 Miss. 14, 26, 93 So. 437, 439 (1922). In *Whitefort,* this Court held that one seeking to establish a private way of ingress and egress must bring his case within the statute by showing necessity and not mere convenience, and that he has been unable to acquire such right by contract, and that there is no other practical way that it may be acquired by contract or grant, and that he has no way over his own lands, in order that the board of supervisors may acquire jurisdiction. 130 Miss. at 25-26, 93 So. at 439.

[3] ¶ 16.Later, in *Rotenberry v. Renfro,* 214 So.2d 275 (Miss.1968), this Court reaffirmed that before one may acquire a private roadway over the lands of another before the Board of Supervisors "the landlocked landowner must allege and show that he has been unable to obtain a reasonable right-of-way from all of the surrounding property owners." *Id.* at 278. Hooks asserts that the Welfords have failed to meet these requirements. Hooks contends that not only did their petition fail to contain allegations concerning the inability to obtain a right of way from the surrounding property owners, but they also failed to present any proof at the Board hearing that they had attempted to acquire by contract or purchase an easement or private roadway through Hooks's property.

¶ 17.To buttress her argument, Hooks offers the statement of chancellor who said as follows:

The Bill of Exceptions assigns as error, first, that the Board of Supervisors was without authority to act in that Mr. Welford failed to show that he contacted the adjoining landowners and was refused access and had no other way that what was given by the Board of Supervisors. This aspect is true in the real sense of the word since there has been no record to show that he had gone upon the property or contacted Mrs. Hooks and asked her straight out if

she would sell him the land.

Thus, Hooks contends that the Welfords had no standing to request the Board to grant a private way through Hooks property, and the chancellor committed reversible error in affirming the Board's order.

¶ 18.The Board responds that the petition offered by the Welfords alleged as follows:

The Petitioner would show that they have approached the said Respondents and have been denied a reasonable private way to reach their property and they have no recourse except as set forth in Section 65-7-201 of the Mississippi Code of 1972 and Section 110 of ***682** the Constitution of the State of Mississippi for the granting of a way to reach their property.

Based upon these allegations, the Board appointed a committee of two to view the property and make a recommendation. The Board cites *Renfro* for the proposition that whether the petitioner made the requisite showing that negotiation for the property has proven fruitless is a question of fact for the Board to determine. 214 So.2d at 278.

¶ 19.The Board also refers this Court to the chancellor's opinion in which it is stated as follows:

Although the exact words set forth in the statute were not used, nevertheless, the record clearly indicates that Mr. Welford through his efforts to go to court and to the Board of Supervisors demonstrates that he is unable to find passage. Therefore, the Court cannot say that the Board of Supervisors erred in regard to this element of proof. To say that Mr. Welford has not formerly or officially offered Mrs. Hooks money for the property would be futile in view of the ongoing dispute that has obviously continued for some time.

The Board ultimately determined, and the chancellor approved, that the Welfords should pay not only damages, but also the costs of a surveyor and an appraiser. The chancellor reversed the Board only on one issue-"the Board gave no reason for assessing the full thirty (30) feet against Mrs. Hooks." The chancellor reversed and remanded the case to the Board for a ruling consistent with the petition in that the private way should be equally shared between the Scotts and the Hooks.

¶ 20.For this Court to now require the Welfords to make a formal offer to purchase (as Hooks seems to suggest) would be imprudent and ignorant of the realities. The chancellor was correct in determining that the Welfords should not have to now make an offer to Hooks in order to have standing to bring a petition before the Board. However, it should be noted that the Welfords' tactics in attempting to find passage are not condoned. Rather than building a locked gate and starting a legal war, the prudent course of action would have been to approach Hooks first and discuss the problem. Regardless, it is now true that the judicial system is involved and the Board has made a ruling that is fair to both parties in regard to the Welfords' right to bring a petition. Thus, Hooks's contention of error is without merit.

II. THE COURT ERRED IN AFFIRMING THE ORDER OF THE BOARD OF SUPERVISORS WHERE THE WELFORDS FAILED TO ESTABLISH THAT THE PRIVATE WAY WAS REASONABLY NECESSARY FOR INGRESS AND EGRESS.

[4][5] ¶ 21.In *Quinn v. Holly,* 244 Miss. 808, 146 So.2d 357 (1962), this Court stated as follows:

We have concluded that the requirement ... that the private road be "necessary for ingress and egress" only means that the same should be **reasonably necessary** and practical and not absolutely necessary; and that to construe the statute otherwise would defeat the wholesome purpose for which the same was enacted.

244 Miss. at 813, 146 So.2d at 359. However, there must be a real necessity not just mere convenience at stake before private property can be taken. *Ren-*

fro, 214 So.2d at 278; *Roberts v. Prassenos,* 219 Miss. 486, 69 So.2d 215 (1954). Hooks asserts that the Welfords have two other access routes to their property and that the private way across her property is not a necessity but a mere convenience.

¶ 22.Furthermore, Hooks offers *Alpaugh* in which this Court determined that the petitioners had met their burden of proof based on the fact that they were bound by water on three sides and the Alpaughs on the fourth. 568 So.2d at 294. There, this Court held that the burden of ***683** building a bridge over the water to access the property was unreasonable and the only reasonable access was across the Alpaughs' property. *Id.* at 295. Hooks contends that here the facts are clearly distinguishable from *Alpaugh.*

¶ 23.Hooks asserts that the Welfords also purchased a fifty by thirty foot right of way on the south side of their property across the Deakles' property. It is inconvenient because it is wooded and not yet cleared. Hooks asserts that it would not be cost prohibitive to have this right of way cleared for the Welfords' access route.

¶ 24.Hooks also contends that the Welfords have additional access to their property from Sally Parker Road, a county maintained public road. It is approximately 3/4 of a mile to the north of the Welfords' property and is joined thereto by a gravel road traversing Scott Paper Company land. The Welfords alleged at the Board hearing that they had already acquired an easement or right of way from Scott Paper Company. Hooks, by counsel, argued at the hearing that the Welfords are not landlocked and can get to their property by the easement they bought from the Deakles. Hooks contends that the Board and the chancellor, on appeal, ignored these facts.

¶ 25.This Court agrees, because the Board did not make a finding of fact that the Welfords are in fact landlocked and in reasonable need of access across Hooks. Supervisor Larry Havard at the hearing stated as follows:

I don't think we are going to benefit a thing in the world putting all the different things off. There is a lot of legal questions. You've got four different lawyers. You're going to have four different opinions. I think we've got a decision to make.

Obviously, the Board acted prematurely in granting the right of way to the Welfords in light of the unresolved issue of ownership of the original easement. Prudence would suggest that the Board should wait for a determination from the chancery court involving all the claims over exactly who owns which easement. The hearing transcripts reveal that Board was aware of all the unresolved legal issues and acted anyway.

¶ 26.The Board does not refute Hooks's claims. Rather, the Board stresses the standard of review and the discretion to be afforded the chancellor. However, the Board does recognize that the chancery court record is "very busy" and that most of those proceedings are "not within its province."

¶ 27.It seems from the record that the Board was acting in manner to determine at least in some part the outcome of the legal issues of the parties rather than simply determining whether a private way was in fact a reasonable necessity. Hooks presented evidence to the Board that the Welfords had two alternative rights of way to their property. The Board did not even respond. A finding of fact in this regard is mandatory when determining whether the Welfords met their burden of proof, especially where the Welfords did not provide any evidence to the Board that the right of way across Hooks's property is any more reasonable than the other two easements the Welfords already have. *Renfro,* 214 So.2d at 278 (petitioner has burden of proof to show right of way is "reasonably necessary"); *accord Alpaugh,* 568 So.2d at 295. Regardless, there are unresolved issues in the other case currently pending (the Mergenschroers' case) before the chancery court that are relevant to a determination of whether a right of way for the Welfords across Hooks's property is a reasonable necessity.

¶ 28.Therefore, the order of the Board is arbitrary and capricious and violative of the statutory and constitutional rights of Hooks. The Welfords have not met their burden of proof and have not complied with Section 65-7-201 by showing the Board that they are in reasonable need of a right of way across Hooks. The Board must wait on the chancery court to make a ***684** ruling on the status of the easements and rights of way in dispute before it can determine whether the right of way across Hooks is "reasonably necessary."

CONCLUSION

¶ 29.Although the Welfords' tactics are not condoned, the chancellor was correct in determining that the Welfords should not have to now make an offer to Hooks in order to have standing to bring a petition before the Board. Rather than building a locked gate and starting a legal war, the prudent course of action would have been to approach Hooks first and discuss the problem. Regardless, it is now true that the judicial system is involved, and the Board has made a ruling that is fair in regard to the Welfords' standing to bring a petition.

¶ 30.However, the George County Board of Supervisors has acted in an arbitrary and capricious manner by granting the Welfords' petition for a right of way across Hooks's property. The Board failed to make a determination that the right of way was in fact "reasonably necessary" in light of the Welfords allegedly having two other easements of access. The Board should not rule on the petition until the status of the easements is determined in chancery court, because the status of the easements will have a direct bearing on the reasonable necessity of a private way. Hence, the judgment of the George County Chancery Court is reversed and remanded for proceedings consistent with this opinion.

¶ 31.REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

PRATHER, C.J., SULLIVAN AND PITTMAN, P.JJ., BANKS, McRAE, MILLS, WALLER AND COBB, JJ., CONCUR.
Miss.,1999.
Hooks v. George County
748 So.2d 678

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Supreme Court of Mississippi.
32 PIT BULLDOGS AND OTHER PROPERTY
and Wilson Dalton Watkins
v.
COUNTY OF PRENTISS and Prentiss County Sheriff's Department.
No. 2000-CA-01482-SCT.

Feb. 28, 2002.

While a criminal trial regarding alleged dog-fighting was pending, the Circuit Court, Prentiss County, Thomas J. Gardner, III, J., ordered the humane euthanization of 18 of 34 seized pit bulldogs. The alleged dog owner appealed. The Supreme Court, Cobb, J., held that allegations the dogs had been trained to fight, could not be rehabilitated as pets, and posed serious threat to other animals and people, related to the "physical condition" of the dogs, as statutory basis for humane euthanization.

Affirmed.

McRae, P.J., and Easley, J., concurred in result only.

West Headnotes

[1] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Supreme Court's review of a trial court's interpretation of a statute presents a question of law, which is reviewed de novo.

[2] Animals 28 ⇐73

28 Animals
28k66 Personal Injuries
28k73 k. Killing Vicious Animals. Most Cited Cases
Opinions of licensed veterinarian and officer of animal humane society that 18 of 34 pit bulldogs seized from suspected dog-fight operation had been trained to fight, could not be rehabilitated as pets, and posed serious threat to other animals and people, especially children, related to "physical condition" of the 18 pit bulldogs, within meaning of statute prohibiting dog fights and also providing for humane euthanization of a seized dog upon certification by licensed veterinarian or officer of animal humane society that the seized dog should be humanely euthanized because of the physical condition of the dog. West's A.M.C. § 97-41-19(3).

[3] Statutes 361 ⇐208

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and Related Clauses. Most Cited Cases
In interpreting any part of a statute, the court will first look to the statute as a whole, to ensure its meaning is not taken out of context.
***971** Tommy Dexter Cadle, Booneville, Attorneys for appellants.

***972** Kenneth E. Floyd, II,John A. Ferrell, Booneville, Attorney for appellees.

Before SMITH, P.J., WALLER and COBB, JJ.

COBB, J., for the Court.

¶ 1. Wilson Dalton Watkins (Watkins) was arrested in August of 2000 and charged with the crime of "dog fights and related violations of § 97-41-19 of

the Mississippi Code of 1972." As a result of the arrest, thirty-two of Watkins's pit bulldogs were seized along with other personal property related to the charge.[FN1] Approximately two weeks later, August 23, 2000, while the criminal trial was pending, a hearing was held in the Prentiss County Circuit Court to determine the disposition of the animals and property seized pursuant to the statute. The judge ordered that eighteen of the thirty-two pit bulldogs be "humanely euthanized because of their physical condition, including their dangerous vicious nature as a result of their prior training and their natural tendency toward violence and dangerous conduct toward other animals and people," citing Miss.Code Ann. § 97-41-19(3) (2000).[FN2] Watkins appeals that ruling claiming three similar assignments of error, which have been reduced to one issue for review.

FN1. This property included, inter alia, items indicative of dog fighting, such as an automobile tire found suspended from the ceiling of a barn, a section of plastic pipe with a plastic jug attached to one end, a treadmill, 2 sets of weighing scales, various dietary supplements and medications, and 3 wooden "break" sticks.

FN2. The remaining dogs did not need to be euthanized because they did not appear aggressive; or they were young, not showing any aggression towards people or other animals, and not having had any fight training. Three of the dogs that were seized had died before the hearing.

DID THE CIRCUIT COURT ERR IN DETERMINING THAT THE VICIOUS AND AGGRESSIVE NATURE OF THESE PIT BULLDOGS WAS A "PHYSICAL CONDITION" WHICH PERMITTED EUTHANIZATION, PURSUANT TO MISS. CODE ANN. § 97-41-19(3)?

¶ 2. Concluding that Watkins's assignments of error are not well taken, we affirm.

FACTS

¶ 3. Prior to the hearing on this matter, Tommy G. Timmons, President of the Tupelo Lee County Humane Society, and the Society's Staff Veterinarian, Donald B. Rowan, both certified that eighteen of the thirty-two dogs should be humanely euthanized due to their physical condition. At the hearing, both Timmons and Rowan testified.

¶ 4. Timmons testified that the dogs were exceedingly aggressive and could not be housed at the humane shelter for any period of time because they would kill every other animal on site.[FN3] Timmons's testimony included the history of pit bulldogs, which can be traced back to ancient Rome where they fought in the Circus Maximus as bloodsport dogs. They were later brought to England by the Phoenicians, then subsequently to the United States around the time of the Civil War for bloodsport fighting. The pit bulldog was bred for "gameness," which is the ability of an animal to fight to the death.

FN3. While the dogs were housed at the humane shelter, one of the dogs chewed through a cage to attack another dog resulting in the death of both dogs.

¶ 5. Finally, Timmons testified that these particular eighteen dogs should be euthanized because they had been trained to fight and could not be rehabilitated as ***973** pets. He based his conclusion that these dogs had been so trained on the presence of a treadmill that was used to build the dogs' strength, the flick pole that was used to train them to attack, the blood-stained pit where the dogs fought, and the fighting scars and markings on the dogs.

¶ 6. Rowans similarly testified, based on what he observed, that these dogs were trained to fight. They were very aggressive towards each other and even when they were being loaded they were trying to fight, and had to be separated. Rowans was concerned that if these dogs were released or adopted later, they could present a serious danger, espe-

cially to children. Rowan further testified that he too had observed the blood-stained carpets, the arenas used for fighting, and the training tools such as plastic jugs, which pit bulldogs are taught to attack.

¶ 7. Timmons and Rowan both recommended that the dogs be humanely euthanized. To reach this conclusion, they took into consideration the aggressive nature of the animals, their having been trained to fight, the evidence of fighting, their intent on killing other animals, their being a hazard to humans, and the unlikelihood that they could be rehabilitated as pets. Although Watkins's attorney cross-examined Timmons and Rowan, and offered a brief rebuttal argument, Watkins himself offered no witnesses at the hearing, nor did he testify himself.

STANDARD OF REVIEW

[1] ¶ 8. This Court's review of a trial court's interpretation of a statute presents a question of law; we review questions of law de novo. *Carrington v. Methodist Med. Ctr., Inc.*, 740 So.2d 827, 829 (Miss.1999).

DISCUSSION

¶ 9. Watkins argues that the statute is plain and unambiguous. He states that it means the dog should be put to sleep if it is suffering from ailments or injuries to the extent that it would be better off dead. He further argues that it is all about what is in the best interest of the dog's well being.

¶ 10. The same "plain and unambiguous" argument is made by the State, though not surprisingly, its interpretation is totally contrary to Watkins's interpretation. We conclude that both are incorrect; the statute is neither plain nor unambiguous. In fact, it is that ambiguity that is at the heart of this appeal. Concerning statutory interpretation, this Court has said:

> When the language used by the legislature is plain and unambiguous, ... and where the statute conveys a clear and definite meaning, ... the Court will have no occasion to resort to the rules of statutory interpretation. The courts cannot restrict or enlarge the meaning of an unambiguous statute.
>
> ...
>
> Courts have a duty to give statutes a practical application consistent with their wording, unless such application is inconsistent with the obvious intent of the legislature.

Marx v. Broom, 632 So.2d 1315, 1318 (Miss.1994) (citations omitted). Further, in *Clark v. State ex rel. Miss. State Med. Ass'n*, 381 So.2d 1046, (Miss.1980) we stated:

> The primary rule of construction is to ascertain the intent of the legislature from the statute as a whole and from the language used therein. Where the statute is plain and unambiguous there is no room for construction, but where it is ambiguous the court, in determining the legislative intent, may look not only to the language used but also to its historical***974** background, its subject matter, and the purposes and objects to be accomplished.

Clark, 381 So.2d at 1048. In *Allred v. Webb*, 641 So.2d 1218, 1221 (Miss.1994), we stated: "Statutes must be read and considered in conjunction with the legislative intent, and then be liberally construed with the object in view of effecting such intent."

[2] ¶ 11. At issue here is the interpretation of the first sentence in the second paragraph of subsection (3) of the criminal dog fighting statute, which reads:

> Upon the certification of a licensed veterinarian or officer of the humane society or animal welfare agency that, in his professional judgment, a dog which has been seized is not likely to survive the final disposition of the charges or that, **by reason of the physical condition of the dog, it should be humanely euthanized** before such time, the court

may order the dog humanely euthanized....

Miss.Code Ann. § 97-41-19(3) (2000) (emphasis added).

¶ 12. In its order, the trial court adopted a broad interpretation of the phrase "physical condition" stating:

[I]n reading the statute, the language of that statute says that by reason of physical condition of the dog, it should be humanely euthanized before disposition of the case. I interpret that to mean not only how many scars and injuries it might have but its physical condition with reference to vicious or aggressive behavior, its propensity to fight or to inflict serious injury or death on other animals, including humans. And I think this is a proper interpretation of the statute.

In contrast, Watkins asserts a narrow interpretation. He argues that euthanization is only permissible if the dog is severely injured or impaired.

[3] ¶ 13. In interpreting any part of a statute this Court will first look to the statute as a whole to ensure its meaning is not taken out of context. Subsection (1) of the statute makes it a felony for any person to "sponsor, promote, stage or conduct a fight or fighting match between dogs, or ... wager or bet, promote or encourage the wagering or betting ... upon any such fight or ... own a dog with the intent to wilfully enter it or to participate in any such fight, or ... train or transport a dog for the purposes of participation in any such fight...." Subsection (2) makes it a misdemeanor for any person to be present as a spectator at a dog fight. Subsection (3) gives law enforcement officers the authority to make arrests for violations of subsection (1) and to take possession of all dogs and paraphernalia, equipment, or other property used in violation of that subsection. Miss.Code Ann. § 97-41-19 (2000).

¶ 14. Clearly the purpose and objective of this statute is to prosecute individuals who engage in the business of dog fighting, bet on dog fights, or even attend dog fights. The statute makes provisions not only for what constitutes the crime, but for the seizure and disposition of those things utilized in the perpetration of the crime, including the dogs themselves. The Legislature has provided two different scenarios under which a dog seized pursuant to this criminal statute may be humanely euthanized before the final disposition of the criminal case. First, if the dog is not likely to survive until the final disposition of the criminal charges against the owner or violator. Second, if by reason of the physical condition of the dog, the dog should be humanely euthanized. Under Watkins's narrow interpretation, the first clause, (the dog is not likely to survive) ***975** would seem to be superfluous, since it would establish essentially the same criteria for euthanization as the second clause. Under Watkins's narrow interpretation, the only reason the dog could be euthanized pursuant to the statute would be because of severe injury or impairment. It would not encompass a situation, such as here, where the dog should be euthanized because it has been trained to fight, cannot be rehabilitated as a pet, and poses a serious threat to other animals and people, especially children.

¶ 15. We conclude that the circuit court's broader interpretation is in keeping with the obvious legislative intent in enacting the criminal dogfight statute. Considering this Court's directive to liberally construe a statute with the object of effecting legislative intent, *see Allred,* 641 So.2d at 1221, clearly the circuit court's broader interpretation is correct.

CONCLUSION

¶ 16. Pursuant to § 97-41-19, if a licensed veterinarian, or officer of the humane society or animal welfare agency certifies that, "in his professional judgment, a dog which has been seized ... [and] by reason of the physical condition of the dog, it should be humanely euthanized ... the court may order the dog humanely euthanized." Miss.Code Ann. § 97-41-19(3) (2000). In the case sub judice, both a licensed veterinarian and an officer of a humane so-

ciety have certified and testified that such is their professional judgment. The trial court acted within its statutory authority, and its judgment is affirmed.

¶ 17. **AFFIRMED.**

PITTMAN, C.J., SMITH, P.J., WALLER, DIAZ, CARLSON AND GRAVES, JJ., CONCUR. McRAE, P.J., AND EASLEY, J., CONCUR IN RESULT ONLY.
Miss.,2002.
32 Pit Bulldogs and Other Property v. County of Prentiss
808 So.2d 971

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