IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALBERT DUCKETT AND ALICE DUCKETT **APPELLANTS**

VERSUS **NO. 2008-CA-01329**

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

CERTIFICATE OF INTERESTED PARTIES

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

Albert Duckett, Appellant,
Alice Duckett, Appellant,
John Paul Barber, Attorney for Appellants,
Mayor and Board of Aldermen of Ocean Springs, Mississippi, Appellee,
  Connie Moran, Mayor
John Edwards, Attorney for Appellee,
Kendall K. Stockman, Attorney for Appellee, and
Harbor Landing, LLC, Potential Intervenor.
  Wanda Melba Harris, Member
  Jay Kemball Harris, Member
  Isaac David Harris, III, Member

Respectfully submitted this the 31st day of December, 2008.

ALBERT DUCKETT AND ALICE DUCKETT,
APPELLANTS

BY: John Paul Barber
John Paul Barber
Their Attorney

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STATEMENT OF ISSUES ON APPEAL

1. The Circuit Court of Jackson County, Mississippi (the "Trial Court") erred by failing to apply the *de novo* standard of review to the issue of statutory interpretation presented and by failing to conclude that the City of Ocean Springs (the "City") misinterpreted the C-4B zoning ordinance to allow Harbor Landing, LLC ("Harbor Landing") to operate a restaurant and bar that serves the general public in the Limited Marina District.

2. The Trial Court erred by failing to hold that the City's decision to allow Harbor Landing to operate a restaurant and bar that serves the general public in the Limited Marina District was an illegal "special use exception" specifically prohibited in the Limited Marina District by the Ocean Springs Zoning Ordinance.

3. Alternatively, applying the arbitrary and capricious standard, the Trial Court erred by failing to conclude that the City acted arbitrarily and capriciously in "interpreting" the Ocean Springs C-4B zoning ordinance to allow Harbor Landing to operate a restaurant and bar that serves the general public in the Limited Marina District.

4. The Trial Court erred by failing to conclude that the City's decision to allow Harbor Landing to operate a restaurant and bar that serves the general public in the Limited Marina District was illegal spot zoning.

5. The Trial Court erred by failing to conclude that the City's decision to allow Harbor Landing to operate a restaurant and bar that serves the general public in the Limited Marina District was an illegal variance.

STATEMENT OF THE CASE

This case is an appeal of a decision by the Trial Court to affirm a decision by the City to allow Harbor Landing to offer food and beverage services to the general public in violation of a City zoning ordinance which limits commercial activity in the City's Limited Marina District to the provision of boats and water-craft that ply the City's inner harbor.

I. Course of the Proceedings Below:

This appeal arises from requested changes to a building permit the City Building Department issued to Harbor Landing for real property located at 1709 Harbor Road, Ocean Springs, MS, (hereinafter referred to as the "Subject Property"). The Subject Property is located within the C-4B District (Commercial Limited Marina) of the City of Ocean Springs (hereinafter, the C-4B District shall be referred to as the "Limited Marina District"). Harbor Landing owns the subject property.

A. Proceedings before the Building Department.

The City issued a building permit to Harbor Landing after Hurricane Katrina authorizing construction of a ship's store and office space Harbor Landing's boat storage enterprise business. (R. 197; R.E.016). At the time the building permit was issued, Harbor Landing did not disclose plans for a restaurant use. (R. 267 and 670; R.E. 062 and 230). Instead, Harbor Landing represented its food services would be limited to pre-made sandwiches and other packaged snacks offered for sale to boat traffic with no food preparation on-site. (R. 269; R.E.064).

Later, city building officials learned that Harbor Landing intended to open a restaurant and bar on the subject property. City officials advised Harbor Landing that such a use was not permitted in the Limited Marina District and that the City could only allow such a non-conforming use if a "special use permit" were approved by the Mayor and Board of Aldermen. (R. 200; R.E. 019).

B. Proceedings before the Planning Commission.

On January 29, 2007, Harbor Landing filed a request for a "Special Exception" to operate a "full service marina", "yacht club" and to provide food services in the Limited Marina District. (R. 226-227; R.E. 026-027). The Planning Commission posted a Public Notice advertising that the application would be the subject of a public hearing to be heard on March 13, 2007. (R.301; R.E. 072).

The Planning Commission conducted a Public Hearing on the Special Use Application on March 13, 2007. After hearing from proponents and opponents of the application, the Planning Commission approved a Motion to Table the application until the next meeting to obtain more information on parking and other issues. (R. 333; R.E. 074).

The Planning Commission considered the special use application and a draft "Conditional Use Permit" at its April 10, 2007 meeting. (R. 353; R.E. 083). After hearing more evidence on the issues, the Commission considered and approved a Motion to recommend to the Mayor and Board of Aldermen that the special use application be denied based, in part, on their conclusion that parking is not sufficient in the Limited Marina District. (R. 398 and 409-411; R.E. and 103 and 106-108). The Commission also approved a second motion recommending that the Mayor and Board of Aldermen prepare an agreement with Harbor Landing specifically defining and limiting the scope of its food services to food and beverages prepared off-site for consumption off-site. (R. 399 and 409-411; R.E. 104 and 106-108).

C. Proceedings Before the Mayor and Board of Aldermen.

Harbor Landing appealed the Planning Commission's recommended denial of its Application for special use permit. The Mayor and Board of Aldermen placed the issue on its April 17, 2007 agenda as follows: "[a]ppeal denial of Planning Commission for special use permit to sell food – David Harris". The minutes of the Mayor and Board of Aldermen's April 17, 2007 meeting shows that the mayor removed Harbor Landing's appeal from the agenda of the April 17, 2007 meeting. Harbor Landing requested a two week continuance to appeal the Planning Commission's denial of its application for a Special Use Permit and requested a clarification in writing of the "C4-B Ordinance food and beverage issue." Alderman McDonnell asked the City Attorney for a listing of what can be regulated in C4-B. (R. 460; R.E. 114).

The Agenda of the May 1, 2007 Regular Meeting of the Mayor and Board of Aldermen lists "Harbor Landing Project Appeal" as "Old Business" agenda item "5(a)". (R. 536; R.E. 177). Rather than taking the matter up as an appeal of the Planning Commission's denial of the application for special use exception, the Board of Aldermen passed a resolution with findings of fact interpreting the zoning ordinance to allow Harbor Landing to sell food and beverages to the general public in the Limited Marina District. (R. 527-531, 539, 540 and 568; R.E. 168-172, 180, 181 and 187). The Mayor and Board of Aldermen finally adjourned their May 1, 2007 Regular Meeting at their May 29, 2007 Recess Meeting. (R. 621-623; R.E. 192-194).

D. Appeal to Circuit Court of Jackson County, Mississippi.

On June 1, 2007, the Appellants, Albert Duckett and Alice Duckett (the "Ducketts"), filed their Notice of Appeal of the City's resolution with the Trial Court together with a motion requesting additional time to prepare and file a Bill of Exceptions. (R. 2; R.E. 002). The Ducketts filed a Bill of Exceptions on September 20, 2007. (R. 38-41; R.E. 010-013). In accordance with the Trial Court's Scheduling Order, the Ducketts filed their Appellate Brief on October 31, 2007. The City filed a "Corrected Bill of Exceptions" on November 2, 2007 and its Response Brief on December 3, 2007. The Ducketts filed their Reply Brief on January 14, 2008. (R.2, R.E. 002).

The Trial Court heard oral argument on February 29, 2008. On July 2, 2008, the Trial Court issued its Decision and Order affirming the City's resolution. (R. 691-697, R.E.240-246). The Ducketts filed their Notice of Appeal on August 1, 2008 together with other pleadings needed to perfect this appeal. (R. 698, R.E. 247).

II. Statement of Facts

A. Geography of the Limited Marina District.

The Subject Property at issue in this appeal is located in the Limited Marina District (C-4B Zone) of the City of Ocean Springs. The Limited Marina District is bounded on all sides by Single Family Residential (R-1) zones except a small R-1A zone bounding the Southwest section of the District and the Public Beach just South of the District. The most prominent geographic feature of the Limited Marina District is a dredged inlet of Biloxi Bay known as the "Ocean Springs Inner Harbor" or as the "Small Craft Harbor". A map depicting the Limited Marina District can be found at (R 215; R.E. 023).

B. Comprehensive Plan for the Limited Marina District describing acceptable uses in the Limited Marina District.

The City adopted the Ocean Springs Comprehensive Plan on June 19, 2001 intending it to be the community's vision of its own future and a guide to achieve that vision through the year 2020. With respect to the Limited Marina District, the Comprehensive Plan states:

> The **Inner Harbor District** is another unique area of the city. The District plays a critical role for Ocean Springs because it is characteristic of the community's image, exemplifying the type and mix of desired and appropriate uses. Located between Front Beach and East Beach, the Inner Harbor District is a small craft harbor located among traditional single-

family detached dwellings. The District provides small craft storage slips for personal vessels, yet also permits single family residential units and limited marine-related commercial activities, which include the sale or service and supplies for those who use the harbor. The protection and preservation of the harbor and the surrounding neighborhoods is an important task for the City. The continuance and further development of permitted uses should be encouraged. Uses, whether marina-based or not, which should be prohibited include moderate- and high-density residential, moderate- and high-intensity commercial uses, repair shops and industrial activities because they are not conductive to the character and environment surrounding the harbor."

(R. 77; R.E. 015). The 20 year Comprehensive plan for protecting the Limited Marina District is entirely consistent with the City's zoning ordinance applicable to the District.

C. History of Zoning in the Limited Marina District.

Currently, the City of Ocean Springs zoning ordinance for the Limited Marina District reads as follows:

> "C-4-B commercial limited marina. 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."

Section 409.2 of the Ocean Springs Zoning Ordinance. (R. 662-663; R.E. 222-223).

This very restricted zoning stems, in part, from a promise made in 1938 by the Supervisors of Jackson County through A.P. Moran, the district's representative. Supervisor Moran was seeking property donations from adjacent landowners for a right-of-way so the County could dredge Mill Dam Bayou to create the Inner Harbor. His intent was to give "the poor fisher class and owners of boats in Ocean Springs...a safe harbor to store their boats in time of storm." Supervisor Moran continues in his September 14, 1938 letter to Mrs. G. W. Anderson to promise that in exchange for the easement, the Town of Ocean Springs would "zone the whole area, so that there will be no business enterprises whatever around the harbor." (R 202; R.E.021).

By 1949, the City of Ocean Springs had passed an ordinance regulating the inner harbor area. Ordinance 4-1949 provided that harbor facilities could include a gasoline filling station for boats, restrooms, ice crushers and the buildings needed to house this infrastructure. However, the City was careful to limit the use of these facilities to "boats using the said harbor." (R. 635-638; R.E. 195-199).

In 1957, the City created the Limited Marina District. Again, through Ordinance No. 1-1957, the City limited commercial activity in the area to those enterprises "that are related to the sale of services and supplies for boats and watercraft which use the Small Craft Harbor". The 1957 Ordinance prohibited marine ways, repair shops, or any type of industrial activity. The repair and upkeep of boats on land was specifically prohibited as was the sale of beer and alcoholic beverages. (R. 635-637 and 639-640; R.E. 195-197 and 199-200). In 1967, the ordinance was amended to allow the sale of beer to be consumed only outside the Limited Marina District. (R. 636; R.E.196).

In 1972, the Ordinance was amended to restrict uses in the Limited Marina District to the "sale or service of supplies for boats and watercraft which use the Small Craft Harbor. Specifically prohibited were all types of commercial marine ways, repair shops or any type of industrial activity. Beer may be sold for off premises consumption." (R. 636 ; R.E. 196).

In 1976, the City passed Ordinance 13-1976 which has language that mirrors the current ordinance: "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 watercraft which use the Small Craft Harbor Specifically prohibited are: all types of commercial marine ways, repair shops or any type of industrial activity." (R. 636-637 and 645-646; R.E. and 196-197).

Two common themes emerge from this review of the City's zoning laws regulating the

Limited Marina District. First, all commercial activity in the District **is limited to sales of services and supplies to boats and watercraft which use the Small Craft Harbor**. Second, marine ways, repair shops and any type of industrial activity are specifically prohibited.

D. Past Application of Zoning Ordinance to the Subject Property - Provision of ice to fishing boats and pleasure craft that use the Inner Harbor is an example of a permitted use in the Limited Marina District.

Before Harbor Landing acquired the subject property, Earl H. Fayard, Jr. owned the parcel. In 1982, Mr. Fayard proposed constructing an Ice House on the subject property. The City was asked to determine if this was a permitted use in the Limited Marina District. Then City Attorney Oscar R. Jordan opined that the issue turned on whether the facility would provide "sale of service and supplies, including beverages and food for boats and watercraft which use the Small Craft Harbor." Mr. Jordan advised that the issue would turn on whether Mr. Fayard intended to sell ice to boats and watercraft as opposed to general commercial sales. Finding that Mr. Fayard's ice house would sell ice to the shrimp boats and pleasure watercraft which use the Small Craft Harbor, the Mayor and Board of Aldermen approved a Motion to adjudicate that the ice house was a permitted use. (R. 647-648; R.E. 207-208).

E. Evidence Collected by Building Department - Post Katrina Building Permit and Discovery of Harbor Landing's Intent to Operate a Restaurant and Bar.

On August 29, 2005, Hurricane Katrina rampaged through the Harbor District heavily damaging the home of Appellants along with most of the residences near or on the water. Very few homes were undamaged. The residents, undaunted, began rebuilding their homes. Harbor Landing also began rebuilding its boat storage businesses.

In January 2007, City Building Official Greg Wilson (hereinafter referred to as "Greg

Wilson") discovered that Harbor Landing's rebuilding plans included a restaurant and bar use when his department received a telephone call from a company seeking to identify the right-of-way for a gas line to the subject property. Greg Wilson asked the builder what was the purpose of the gas line and he was told it was for a restaurant. Harbor Landing had not previously disclosed plans for a restaurant and bar in its applications submitted to the City's building department. See, testimony of Greg Wilson before the March 13, 2007 meeting of the Ocean Springs Planning Commission. (R. 267; R.E. 062).

Two or three days later, City Building Official Terry Agar read a January 11, 2007 article in the Sun Herald newspaper stating that Harbor Landing intended to place a restaurant in the Limited Marina District. (R. 267 and 664; R.E. 062 and 224).[1] At this point, Terry Agar sent a letter to Harbor Landing stating that a restaurant in the Limited Marina District was a non-conforming use and suggesting that a "special use permit" would be required to operate a restaurant on the premises. (R. 200; R.E.019). Noting that the Ocean Springs Zoning Ordinances allow restaurants in all commercial zones except the Limited Marina District, Assistant City Planner Angela Mohar also advised Harbor Landing to apply for a "special use permit" to request permission to operate the restaurant in violation of the City's zoning ordinance and to provide new plans. (R. 201; R.E. 020). Harbor Landing finally disclosed its plans for the non-conforming Restaurant and Bar use when it submitted a new floor plan for a 58 seat restaurant and another floor plan depicting a bar-type seating arrangement with 39 bar stools and 21 table seats. (R. 198-199; R.E. 017-018). Newspaper articles

[1] The Sun Herald quotes David Harris, Sr. describing Harbor Landing as a "full-service" marina offering "wash-down services, fuel, ice, tackle, snacks and **engine maintenance**." Mr. Harris promoted the restaurant as a place where "**everyone** can come and watch the boats come in and enjoy Ocean Springs." (Emphasis added). (R. 664; R.E. 224).

also show that Harbor Landing provided drawings outlining locations for grease traps and "dumpsters" for restaurant waste. (R. 670; R.E. 230). Angela Mohar advised Harbor Landing that its proposal for a non-conforming restaurant and bar use would have to be considered by the Planning Commission and the Mayor and Board of Aldermen. (R. 670; R.E.230).

F. Evidence Presented to Planning Commission during Consideration of Application for Special Use Permit to Operate Restaurant and Bar in Limited Marina District.

On January 29, 2007, Harbor Landing requested a special use permit in the form of an Application for a Public Hearing with the Planning Commission signed by David Harris. Harbor Landing's Application says it intended to use the subject property as a "full service marina - to accommodate (sic) the City of Ocean Springs plans to rebuild and be in accord with "smart growth". Under the section on present uses of the property, Mr. Harris listed "Food - waiting on ships store to be rebuilt after Katrina." At the bottom of the application the following handwritten sentence appears, "David said it was going to be a deli like Mohlers - serving poboys - sandwiches". (R. 226-227; R.E. 026-027).

After reviewing Harbor Landing's January 29, 2007 Public Hearing Application, the City's Building and Planning Departments sent a February 22, 2007 letter to Harbor Landing requesting a detailed site plan to evaluate their request for a "special use" permit for the subject property. (R. 201; R.E. 020).

The Department of Community Planning prepared a Planning Commission Report in advance of the March 13, 2007 Public Hearing. The report determined that based on the seating arrangement, type of equipment to be installed and description of food items to be prepared, the proposed restaurant would be classified as a "short order (fast food) type FB restaurant as defined by the FDA" and the Mississippi Department of Health. (R. 338-340; R.E. 080-082).

a. Evidence Presented at March 13, 2007 Public Hearing.

On March 13, 2007, the Planning Commission conducted a Public Hearing on Harbor Landing's application for a special use permit to open a restaurant and bar in the Limited Marina District. Almost 60 people signed the "Sign-in-Sheet". (R. 336-337; R.E. 078-079).

Mr. David Harris spoke first on behalf of Harbor Landing. Disclosing plans to serve the general public, Mr. Harris said Harbor Landing planned to open a restaurant or a deli "where people can come and eat." (R. 235-236; R.E. 030-031).

David Harris, III also spoke on behalf of Harbor Landing. He said he stopped in front of several restaurants and bars in downtown Ocean Springs to check their noise levels. Comparing Harbor Landing's proposed restaurant and bar to other bars and restaurants that operate in other sections of Ocean Springs, Mr. Harris opined that these other bars and restaurants were not "overly offensive". (R. 236-237; R.E. 031-032).

Ms. Jody Harris testified that the proposed restaurant was a "family place" and not intended to be a "bar". Ms. Harris represented to the planning commission that the restaurant did not have a liquor license. (R. 237-238; R.E. 032-033).

Many citizens of the surrounding residential neighborhoods spoke in opposition to the special use request. Appellant Bruce Duckett, a resident of the adjacent R-1 neighborhood district since 1964 who had previously served on the Planning Commission, pointed out that the C-4-B zoning prohibited certain activities and did not permit a restaurant, which was allowed in C-1, C-2 and C-3 districts. He also mentioned the existing traffic problems at the harbor and cited the requirements of a yacht club pursuant to the ordinance, and testified that he lived directly downwind from the building and did not want to smell the kitchen odors. (R. 239-243; R.E. 034-038).

Mr. Dale Clossen, a member of the Ocean Springs Harbor Commission, which is the governing entity for the county public harbor, stated that the Harbor Commission does not have space at the harbor to support more commercial activity. He stated that the businesses already there were encroaching on the county parking lot, which was intended for boat trailers parking. Mr. Clossen predicted that the proposed expansion of Harbor Landing's business would encroach on parking for shrimp boats and their customers. He also predicted that overflow parking problems would infringe on the slip leaseholder's access to their boats. (R. 246-248; R.E. 041-043).

Mrs. Amanda Kennerly, a resident directly across from the Harbor Landing building testified that she and all of her neighbors, with a very few exceptions, had rebuilt their homes after Katrina and that the single-family residential use of the harbor area had been strongly reaffirmed. She felt that Harbor Landing had to prove by a preponderance of the evidence that they had a need for this special use in their residential neighborhood. She said she relied on the zoning when she bought and rebuilt her house to protect her investment from the nuisances of restaurants and bars. She also stated that she saw no public need for another restaurant, but plenty of need for more residences. She also argued that the Harbor Landing was bypassing the procedural safeguards of a zoning change by requesting a private club or a full service marina or a restaurant via a special use request. (R. 251-256; R.E. 046-051).

Mr. David Harris then stood and retracted Harbor Landing's application for a yacht club and a full-service marina. (R. 262-263; R.E. 057-058). Mr. Wilson then indicated that he knew a restaurant would require parking of one space per every 100 gross square feet, but he was unsure as to how many spaces were required for the high and dry storage, which houses 163 boats. (R. 265;

R.E. 060).

David Harris testified again further divulging his plans for a restaurant and bar catering to the general public as opposed to limiting service to boats and watercraft that use the harbor.

> I had in mind having people being able to come by, based on Mayor Moran's charrettes, but we had already had that vision, but this just tied in, of people being able to come down to the harbor, get a cup of gumbo, relax, watch the boats. Ms. Lena, Eleanor Lena, who is, what 94 years old now, she said, David, I've never been downtown in Ocean Springs where I haven't passed by the harbor. People love the harbor. They love to come by there. And what we are talking about doing is not abusing anything but simply to enhance the atmosphere at the harbor.

Mr. Harris also denied doing any repairs on boats. (R. 270; R.E. 065).

The commissioners were aware of the parking problems in the Limited Marina District. One Commissioner testified that every time he had gone out on a boat from Harbor Landing's storage facility, he had been forced to park in public parking since there was not adequate space for parking on the Harbor Landing lot. (R. 278; R.E. 066).

A consensus emerged with the commissioners that the parking design and requirements were too vague. They needed a lot more information. They were also concerned about the sale of alcoholic beverages. Harbor Landing's request, now reduced to a special use permit for a restaurant, was tabled until the Planning Commission's April 10, 2007 meeting. See, transcript of the March 13 meeting of the Ocean Springs Planning Commission. (R. 295-298; R.E. 068-071).

b. Evidence Presented at April 10, 2007 Ocean Springs Planning Commission Meeting.

On Tuesday, April 10, 2007, the Ocean Springs Planning Commission continued the public hearing on Harbor Landing's request for a special use permit to operate a restaurant and bar in the Limited Marina District. Mr. David Harris stated that he wanted to sell hot food in a little deli and that he had developed an extensive landscaping plan. No other testimony was offered. (R. 356-358; R.E. 085-087). The commissioners were very concerned about the parking requirements and whether adequate parking existed for Harbor Landing's proposed restaurant and bar use in addition to its boat storage business. The commissioners recognized that a **special use** must not create fire or traffic hazards or over-tax public utilities. (R. 366-368; R.E. 092-094).

A motion was made, and seconded, to deny Harbor Landings special use request since the requested restaurant bar use is not permissible in the Limited Marina District. The Planning Commission voted to pass the motion recommending denial of Harbor Landing's request for a special use exemption. (R. 369; R.E. 095).

Next, the Planning Commission considered a second motion to recommend that the Mayor and Board of Aldermen prepare an agreement with Harbor Landing specifically delineating the scope of business operations on the subject property to limit the sale of food and beverages to items prepared and packaged outside the Limited Marina District and limiting consumption on the premises to Harbor Landing employees. The commissioner sponsoring the motion provided the following statement:

> This is on the original special use request that was granted a couple of years ago. And I preface my motion with several comments, and I'll read this because I don't want to miss any words. First of all, it has come to the planning commission's attention last month that the applicant desired and wanted, in fact, to build a use that was not allowed in the C-4-B zone. For that reason he was compelled to request a special use for his building and attached deck. The method of the applicant's approach for that work gave us the appearance that the applicant was making a new vital decision as to what was allowed for a C-4-B district and moving forward with construction incorporating the use of that building.
>
> Some time ago, the applicant was given a special use to operate an embroidery shop within the ship store. At that time, the applicant stated that it was desired to sell typical items to boaters they can use while boating. The applicant also stated that he was planning to sell sandwiches that boaters could take with them when they go out. No indication was given

to consume food or beverages on site.

After what has transpired over the past month or so, I think it behooves the City to have an agreement with the applicant to specifically define the extent what's being sold at the ship store and other facilities on the applicant's property. Having made these comments, I move that we recommend to the Mayor and Board of Aldermen that the City prepare an agreement with the applicant specifically designing the scope of operations of this business. The agreement should be specific with respect to the sale and consumption of food and beverages to be sole, or any other way bartered, must be prepared and packaged outside the C-4-B zoning, that no consumption of food or beverages other than employees' meals will be allowed on the applicant's property. The agreement developed should be reviewed by the planning commission before execution."

(R. 370-372; R.E. 096-098).

G. Evidence Presented to the Mayor and Board of Aldermen

Harbor Landing then appealed their request for a special use exemption to the Mayor and Board of Aldermen. The Board set the appeal for hearing at its April 17, 2007 recess meeting.

a. Recess Meeting of April 17, 2007.

On April 17, 2007, Harbor Landing requested a two week continuance to appeal the Planning Commission's recommendation for denial of its request for a special use permit to operate a Restaurant and Bar in the Limited Marina District. Harbor Landing also requested clarification in writing of the C-4-B Ordinance food and beverage issue. Alderman McDonnell asked the City Attorney for a listing of what can be regulated in C-4-B. Mayor Moran removed the appeal from the agenda. See Minutes of the Mayor and Board of Aldermen, Recess Meeting April 17, 2007. (R. 460; R.E. 114). After limited public comment, the Mayor and Board accepted the following documents into the record of Harbor Landing's appeal:

(1) A memorandum dated April 11, 2007 from Angela Mohar to the Mayor and Board, reporting on the Planning Commission's public hearings. (R. 409-410; R.E. 106-107);

(2) The written motion passed by the Planning Commission. (R. 464; R.E. 115);

(3) The Planning Commission Reports of its Tuesday, March 13, 2007 and Tuesday April 10, 2007 meetings. (R. 465-470; R.E. 116-121);

(4) All the testimony and exhibits presented to the Planning Commission;

(5) The Conditional Use Permit conditions, unsigned, showing the conditions of the special use of the land for a delicatessen. (R. 471; R.E. 122);

(6) A list of conditions for "Harris Project for Harbor Landing LLC-Harbor Deli and Ships Store", also unsigned. (R. 472; R.E. 123);

(7) A "Harbor Landing Business Plan", also unsigned. (R. 473-474; R.E. 124-125);

(8) A list provided by Harbor Landing purporting to show how many vessels they launched in a 15 day period in March and April. (R. 475; R.E. 126);

(9) A survey, a site plan, four different parking plans, a rough sketch of the three story building and the 800 sq. ft. deck, a very crude drawing of the inside of the two top stories of the restaurant building, a seating chart, and a simple drawing showing the use of three stories and the deck. (R. 476-485; R.E. 127-136);

(10) A portion of the parking regulations of the City of Ocean Springs. (R. 486; R.E. 137); and

(11) A letter from Alice Martin to the Mayor and Board, dated April 4, 2007, confirming that she is leasing a piece of land to David Harris for the purpose of providing temporary extra parking for Harbor Landing, and stating that the leased land can not be used to satisfy parking requirements for the boat storage or any other business on the Harbor Landing property. (R. 487; R.E. 138).

b. Regular Meeting of Mayor and Board of Aldermen - May 1, 2007.

On May 1, 2007 the Mayor and Board heard Harbor Landing's appeal of the denial of their special use request to operate a restaurant by the Planning Commission. Ms. Jody Harris spoke for Harbor Landing. Although Ms. Harris was allocated unlimited time to speak, all opponents were limited to five minutes of speech each by Mayor Moran.

Ms. Harris stated that Harbor Landing stores boats and services its customers. She denied that Harbor Landing repairs or paints boats. She said that Harbor Landing's customers wanted food to go and that they anticipated that "100% of their customer base" would be the boating community in the Ocean Springs Harbor, despite the earlier statements in the press and before the Planning Commission that the purpose of the restaurant was to bring the public to the harbor to watch the boats and eat gumbo and po'boys. (R. 490; R.E. 141).

Ms. Harris submitted as an exhibit yet a fourth parking diagram and insisted that it complied with all Ocean Springs parking regulations. (R. 562-563; R.E. 185-186). She claimed Harbor Landing exceeded all parking requirements while acknowledging that parking at the harbor remains an issue. She said Harbor Landing requested no special treatment, no special exemption and no special use permit. (R. 491; R.E. 142).

Mrs. Harris said that the proof of Harbor Landing's intent to serve either the general public or primarily to the boats and water craft which use the harbor is as follows: (1) the type of food that they are selling is deli-oriented; (2) if it was not part of a marina they would have absolutely no intention of selling food to the general public and (3) the hours of operation are the same as the marina. (R. 493-494 R.E. 144-145).

Mrs. Harris spent some minutes reading a letter from Mrs. Beth Riley, who formerly lived at the harbor but chose not to rebuild her home. Ms. Riley predicted the restaurant and bar would attract the general public since she and her husband seek out such waterfront venues when they travel to other coastal areas. (R. 495; R.E.146).

Mr. Bruce Duckett, Appellant, spoke against the deli being open to the public and not just boaters. He pointed out that the ordinance does not permit a restaurant in C-4-B and if Harbor Landing's restaurant proposal is supported by the City, then the ordinance must be changed. He noted that, except for the Rileys, who do not live in the harbor, almost everybody else who owns land in the harbor area is opposed to a restaurant in their neighborhood. (R. 510-511; R.E. 151-152).

Dale Closson speaking on behalf of the Jackson County Harbor commission cautioned that the Harbor area did not have sufficient parking and that Harbor Landing needed to police its parking to assure that its customers did not park on County property. (R. 511-513; R.E. 152-154).

Mrs. Ann Burke noted that restaurants are prohibited in the C-4-B zone. She also stated that the zoning specifically prohibits use of all types of marine ways, which is defined by the county as any service that takes a boat out of the water and puts it back. Mrs. Burke was repeatedly interrupted by cat-calls from the proponents and admonishments from the Mayor. (R. 517-518; R.E. 158-159).

Mr. Don Abrams, who owns property on the harbor, stated that the business plan of selling only to the boats and watercraft customers is not enforceable. He thought that if the board made the assumption that the general public would not constitute most of the customers, shame on them. (R. 519-520; R.E. 160-161).

Mr. Jim Botts, a boater, said that Harbor Landing would never be able to restrict its proposed restaurant to boaters. He predicted that the general public would come to the restaurant. (R. 521; R.E. 162).

Mrs. Amanda Kennerly asked that the Board enter as exhibits an email she sent to the Mayor and Board and a drawing of the proposed restaurant showing 58 seats excluding the 800 square foot deck she had copied from the Planning Commission exhibits. She said she lives on the harbor and adjacent to the Limited Marina District and keeps a sailboat in the harbor. She stated she had a right to quiet enjoyment at her premises. She testified that she and 22 other families rebuilt after Katrina, and the R-1A condominiums and families around the corner from the boat shed had also rebuilt. She expected that the zoning of her residential neighborhood would protect her from noises, traffic, industrial activity such as engine noises and other nuisances. She stated that the very limited commercial marine related activities and the residents had lived together peaceably since the 1950's due to the well planned zoning. She noted that all the businesses on the harbor excepting Harbor Landing were aimed directly at vessels using and leaving the harbor. She stated that the present parking was so inadequate that persons using the public ramps were parking in her yard, and that Harbor Landing was adding to the parking problem, not alleviating it as they claimed. She stated she has lived on the harbor for 25 years and was not disturbed by anything until the marina bull woke her up at 5:50 AM. She opined that the permits for the marine way, the giant metal shed, and for the restaurant did not follow the zoning and thus caused all this trouble. She gave a brief history of all the special attention, variances, hearings, attempted code violations, and moratoriums the City has given Harbor Landing, and that a 58 seat sit-down restaurant was not allowable according to the present zoning. (R. 522-540; R.E. 163-181).

The Board of Aldermen, by motion, made a series of "findings of fact" as follows: (1) That Harbor Landing will provide food and beverage to the boating public that use the harbor; (2) That traffic congestion exists in the Limited Marina District and that Harbor Landing should be required to designate and mark their parking spaces and provide security from May 1st through September 15th for traffic, parking control for the designated parking during Saturdays, Sundays, and holidays, along with designated signage indicating parking is allowed for their guests on their property;

(3) That the neighborhood surrounding the harbor could be adversely affected by the loud noise, rowdy behavior and late-night hours of operation; therefore the City require that Harbor Landing operate from sunup to sundown and follow all noise ordinances established by the City of Ocean Springs.

(4) That certain documents submitted by Harbor Landing will be included as part of a specific agreement that will be adhered to and enforced as a condition of occupancy.

(5) That if Harbor Landing's use changed and that food and beverages sold not primarily to the boating public and the other specified agreed-upon stipulations are not met, that the City of Ocean Springs can revoke their permit. The motion was amended to include the parking plan Harbor Landing provided the Board in the record. The motion carried. (R. 527-529; R.E. 168-170).

At the May 1, 2007 meeting, the Mayor and Board of Aldermen accepted into the record a Memorandum written by John B. Edwards, II, Esq., City Attorney, reviewing Section 409 of the City of Ocean Springs Zoning Ordinance, finding no language where a special exception or special use could be provided. Mr. Edwards concluded that the Board had to make a finding of fact based on the evidence presented by Harbor Landing that its proposal has a primary intended use as "sale or service and supplies including beverages and food for boats and watercraft which use the Small Craft Harbor". Mr. Edwards researched the history of the zoning of the harbor, with attached minutes, and asked that the Board consider the elements of adequate parking, potential for congestion of streets, hours of operation, and other evidence that indicates the purpose of the enterprise as 1) primarily to the boats and watercraft that use the Small Craft Harbor or 2) merely to the general public. He noted that it was incumbent on Harbor Landing to provide the Board such relevant evidence that reasonable minds might accept as satisfactory to support the conclusion that the primary purpose of the deli is to provide food service to boats and watercraft that use the Small Craft Harbor. He also recommended that because there is no provision for a special exception in the C-4-B district, that the Board should waive the usual procedure of taking the matter through the building department and then to the Board of Zoning and Adjustment due to the absence of a City Planner, and consider the matter itself. (R. 635-648; R.E. 195-208). The Board did not waive any such procedure prior to taking up Harbor Landing's request and treated it as an appeal from the Planning Commission instead.

The Mayor and Board of Aldermen also accepted the following documents into the record:

(1) A document labeled, "Harbor Landing Addressing Issues", provided by Harbor Landing. Nowhere in this document did Harbor Landing address how it planned to limit its food and beverage services to boats and water craft that use the Inner Harbor. (R. 569-570; R.E.188-189).

(2) A parking plan submitted by Harbor Landing titled "New Parking and Landscape Plan" and "Old Parking Plan. (R. 562-563; R.E. 185-186).

(3) An untitled document setting down in writing the findings of the Board and containing certain "representations" by Harbor Landing. (R. 658-675; R.E. 218-235).

(4) An untitled parking plan labeled "Exhibit B". (R. 571; R.E. 190).

(5) The Position Statement submitted by counsel for the Friends of the Ocean Springs Harbor, dated May 1, 2007, with attached exhibits showing that Mr. Harris has made statements both to the press and to the Planning Commission clearly showing his primary intent is to serve the general public at a 50 to 58 seat restaurant. (R. 658-675; R.E. 218-235).

(6) An email from Mrs. Amanda Kennerly supporting the denial of the Planning Commission of the proposed restaurant, pointing out that the building in which the restaurant is to be is a three story building in violation of the C-4-B zoning, which only allows two stories, and so is tall enough to broadcast noise all over the neighborhood, which she has heard when the builders decided to work all night. She also noted that Harbor Landing had been using a marine way since 2005 in violation of the specific prohibition in the ordinance, and thus the restaurant would be an expansion of an illegal use. She also stated that she had personally observed the congested parking at Harbor Landing boat shed and that Harbor Landing customers already encroach on the available public parking and a restaurant will make it worse for everyone. She stated the three story building is visible from her house. (R. 676-678; R.E. 236-237).

(7) A drawing of a 58 seat sit-down restaurant, excluding the deck seating, submitted by Harbor Landing to the Planning Commission and submitted to the Mayor and Board by Mrs. Kennerly in support of her position that Harbor Landing in fact intended to serve the general public. (R. 572; R.E.191).

The Board voted 4-1 to approve the Harbor Landing's request for a special use to operate a restaurant and bar in the Limited Marina District. Aggrieved by this action, the Friends and many other persons determined that an appeal to Circuit Court was the only way to enforce the C-4-B zoning. Due to Trial Court rules limiting the number appellants, Bruce and Alice Duckett courageously volunteered to act as Appellants in this matter. The fate of the Ocean Springs Harbor, with its unique character, remains of strong interest to the community group known as the Friends of the Ocean Springs Harbor.

Appellants, Bruce and Alice Duckett, have lived on the Ocean Springs Harbor for more than

35 years. They own three improved lots in the R-1 Residential District immediately adjacent to the Commercial Limited Marina District, and one lot abutting the lot owned by the Harbor Landing and zoned C-4-B. The Ducketts are boaters and sailors and keep a sailboat in the harbor. The Ducketts are within seeing, hearing and smelling distance of the restaurant and bar, which is brightly and obnoxiously lit up at night, with a glaring spotlight and running lights lit up all along the surrounding balconies. The three story building broadcasts sound and noise all over the harbor. The Ducketts purchased their properties with the expectation that the Limited Commercial Marina district would remain an unobtrusive small craft harbor, and consider the commercial use as a restaurant permitted by the City in violation of the zoning as an unlawful taking of their property rights in violation of due process. Hence, this appeal.

SUMMARY OF THE ARGUMENT

The Trial Court erred by failing to apply the de novo standard of review to the question of law presented in the form of statutory interpretation presented and then by failing to determine that the City of Ocean Springs misinterpreted the C-4B zoning ordinance to allow Harbor Landing to operate a restaurant and bar that serves the general public in the Limited Marina District. The Trial Court erroneously applied the "substantial evidence" standard to this appeal of the City's flawed interpretation of its zoning ordinance. Clearly, the Trial Court was duty bound to apply the *de novo* standard to this question of law.

The Trial Court also erred by affirming the City's illegal decision to approve Harbor Landing's "special" or "conditional use" request to offer food and beverage services to the general public in the Limited Marina District since the Ocean Springs Zoning Ordinance does not permit "special" or "conditional" uses in the Limited Marina District.

Alternatively, the Trial Court erred by affirming the City's decision allow Harbor Landing's restaurant and bar use since there is no substantial evidentiary basis in the record to support the City's "finding" that Harbor Landing intended to limit its food and beverage sales to boats and watercraft that use the Inner Harbor. In fact, the City acknowledged that the evidence before the Board of Aldermen clearly showed that Harbor Landing intended to offer its food and beverage services to the general public.

Finally, the Trial Court erred in affirming the City's decision since the City could only permit the non-conforming restaurant and bar use in Limited Marina District through the variance procedure and the record is devoid of evidence that would support a variance for the mere economic convenience of Harbor Landing.

ARGUMENT

I. Standard of Review

The central issue in this appeal is a question of statutory interpretation; i.e. whether the Ocean Springs zoning ordinance allows a restaurant and bar use that caters to the general public in the Limited Marina District. In the case *sub judice*, the City interpreted the Ocean Springs zoning ordinance and then ordered that Harbor Landing be permitted to operate a restaurant and bar in the Limited Marina District.

In Section III of its Decision, the Trial Court cites, *City of Biloxi v. Hilbert*, 597 So.2d 1276, 1280 (Miss. 1992) for the familiar standard in re-zoning cases that a municipality's decision "which appears to be 'fairly debatable' will not be disturbed on appeal, and will be set aside only if it appears that the decision is arbitrary, capricious, discriminatory, illegal or is not supported by substantial evidence." (R. 694; R.E. 243). The Trial Court then went on to analyze the case as an appeal of a "conditional use permit" or "special use" and applied the "substantial evidence" standard of review, "[A]s the issuance of conditional use permits or special exceptions are adjudicative in nature the burden of proof necessary to support such a finding is 'substantial evidence'". (R. 695, R.E. 244).

The City's decision in this case was based on its illegal interpretation of Section 409.2 of the Ocean Springs Zoning Ordinance to allow a restaurant and bar use catering to the general public in the Limited Marina District. (R. 662-663; R.E. 222-224). The Trial Court's application of the "substantial evidence" standard was in error since an appeal of an interpretation of a statute or an ordinance is in the nature of a question of law for review *de novo* by appellate courts. *32 Pit Bulldogs & Other Property v. County of Prentiss*, 808 So.2d 971, 973 (Miss. 2002).

This is true even in appeals of a municipality's interpretation of its zoning ordinance. For example, in *Drews v. City of Hattiesburg*, 904 So.2d 138 (Miss. 2005) the Court reversed Hattiesburg's decision to grant variances since to do so would essentially abrogate the applicable zoning ordinance. To reach this decision, the municipality and the reviewing court were required to interpret the zoning ordinance and this question of law was subject to *de novo* appellate review. *Id.* at p. 140. In *Drews*, the Mississippi Supreme Court ultimately held that Hattiesburg's interpretation of its zoning ordinance was unsustainable and reversed that city's decision to issue a number of variances that would obliterate the original intent of the ordinance. *Id.* A governing body's zoning decision will be set aside "if it clearly appears that the decision is arbitrary, capricious, discriminatory, ***illegal*** or is not supported by substantial evidence". *City of Biloxi v. Hilbert*, 597 So.2d at 1280 ***(emphasis added)***. Thus, a municipality's zoning decision must be reversed if it is "illegal" in the sense that the decision is contrary to the city's own zoning laws.

While the Circuit Court is correct in citing the standard of review for zoning cases, the issue here is whether the City interpreted the C-4B ordinance correctly in finding the intended use as a restaurant was, in fact, a permitted use. This administrative decision entailing a question of law is reviewed de novo. *Drews v. City of Hattiesburg,* 905 So.2d 719 (Miss. App. 2004).

"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. 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." *Hearne v. City of Brookhaven*, 822 So.2d 999, ¶ 9. (Miss. App. 2002)(internal citations omitted).

Appellate courts use "a de novo standard of review when passing on questions of law including statute of limitations issues. 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. *ABC Mfg. Corp. v. Doyle*, 749 So.2d 43, ¶ 10 (Miss. 1999)(Internal citations omitted). 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. *Id.* at p. 45.

The Trial Court applied the wrong standard of review to this appeal since the City represented that it was interpreting an ordinance and not hearing an appeal of the denial of a special use permit. The case must therefore be reversed since the Trial Court failed to apply a de novo review to the City's decision under the plain meaning of the ordinance.

II. The City's decision to permit a restaurant and bar use in the Limited Marina District was illegal and must be reversed and rendered as a matter of law.

The City acted in contravention to its own zoning ordinance by approving a restaurant and bar use in the Limited Marina District since the City knew the facility would serve the general public as opposed to restricting its services to the boaters who ply the inner harbor.

A. The City's decision to grant a special use exception to Harbor Landing to offer food and beverage services to the general public in the Limited Marina District is illegal and should be reversed since the Ocean Springs Zoning Ordinance prohibits special use exceptions in the Limited Marina District.

Zoning codes often set forth special or conditional uses for particular districts set forth in the zoning plan. If a particular zoning district allows special or conditional uses, an applicant may petition for approval to carrying on a special use on the subject property. For example, Article IV, Section 401 of the Ocean Springs Zoning Ordinance provides the regulations for the R-1 single-family residential district. Section 401.2 sets forth the uses that are permitted in the R-1 district. Section 401.3 sets forth the special or conditional uses that are permitted in the R-1 district only after public notice, public hearing and recommendation by the planning commission and approval by the mayor and board of aldermen. *See*, Exhibit "A" (Cited Sections of the Ocean Springs Zoning Ordinance). However, if the zoning ordinance at issue does not provide for "special" or "conditional" uses, none are allowed.[2]

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[2] The following discussion of "special uses" and "conditional uses" is found in *Walters v. City of Greenville*, 751 So.2d 1206 (Miss.App. 1999). "In 83 Am.Jur. *Zoning and Planning* § 213 (1992) the author describes permitted uses: "Some zoning ordinances contain a general provision or cumulative provisions permitting kinds of buildings and uses thereof in less restricted zones that are expressly permitted in the more restricted zones."" *Id.* at ¶ 12.

In 83 Am.Jur.2d *Zoning and Planning* § 218 (1992) conditional zoning is described: "Conditional zoning is a device employed to bring some flexibility of use to an otherwise rigid system of control. It is generally used to describe a zoning change granted to an owner subject to condition as generally not applicable to land similarly zoned. 'Conditional zoning' involves

Article IV, Section 409 of the Ocean Springs Zoning Ordinance does not provide for "special" or "conditional" uses in the C-4-B commercial limited marina district. Section 409.2 clearly delineates the permitted uses in the limited marina district. The ordinance provides no exceptions to the listed permitted and restricted uses. Article IV, Section 409 of the Ocean Springs Zoning Ordinance does not include a subsection allowing for special or conditional uses in the commercial limited marina district. *See* Exhibit "A". Accordingly, Harbor Landings' application for a "special exception" to operate a restaurant in the commercial limited marina district is not cognizable under Ocean Springs zoning procedure and was properly rejected by the Planning Commission.[3][4]

As set forth in detail above, this case began in the City's Planning Commission pursuant to Harbor Landing's request for a "special use permit" to provide food services to the general public. *See,* April 10, 2007 Agenda of Planning Commission. (R. 302; R.E. 073). The Planning Commission recommended denial of the special use permit and Harbor Landing appealed to the Mayor and Board of Aldermen. The City placed the issue on the agenda of the April 17, 2007 meeting of the Mayor and Board of Aldermen as an "appeal of the denial of the Planning

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ordinances which provide either that rezoning becomes effective immediately with an automatic repealer if the specified conditions are not met, or that the zoning becomes effective only upon conditions' being met within a certain time." *Id.* at ¶ 13.

[3] The City's attorney, John B. Edwards, II, arrived at the same conclusion in his April 27, 2007 memorandum to the Mayor and Board of Aldermen, "[u]pon review of Section 409 of the City of Ocean Springs Zoning Ordinance, I could find no language where a special exception or a special use could be provided." (R. 635; R.E. 195).

[4] Indeed, the Trial Court stated that "[T]he Ducketts and City both agree that the subject ordinance does not specifically provide for any similar, special or conditional uses." (R. 695; R.E. 244). Curiously, the Trial Court proceeded to analyze the appeal as a "special" or "conditional use" appeal.

Commission for a special use permit to sell food". (R. 460; R.E. 114). Only at the May 1, 2007 meeting, after the City Attorney opined that special use permits were not legal in the Limited Marina District, did Harbor Landing suddenly claim it was not requesting a special use permit.

Despite Harbor Landing's attempt at the May 1, 2007 meeting to recast this case as an interpretation of permitted uses in the Limited Marina District pursuant to Article IV, Section 409 of the Ocean Springs Zoning Ordinance, the Board of Aldermen continued to treat this matter as a "special use" case. By the time of the May 1, 2007 meeting, Harbor Landing had introduced so much evidence into the record of its intent to offer food and beverage services to the general public, it was impossible for the City to accept Mrs. Harris's preposterously inconsistent statement that Harbor Landing anticipated that "100 percent" of its customer base for the restaurant and bar operation would be the "boating community at the Ocean Springs harbor." (R. 490; R.E. 141).

Apparently, the Board of Aldermen did not believe that 100 percent of the restaurant and bar's customers would be those that use the marina way facility since the City required **automobile parking** for the restaurant and bar operation. Also, when the Board of Aldermen introduced its Motion to approve the non-conforming restaurant and bar use, the sponsoring alderman acknowledged that Harbor Landing intended to offer food and beverage services in part to the general public by using the following language: "[t]he Board of Aldermen hereby finds that Harbor Landing deli will **primarily** provide food and beverage to the boating public that use the harbor." (R. 679; R.E. 239). By using the "primarily" in its finding, the Board explicitly recognized that Harbor Landing planned to offer food and beverage services to the general public.

This "finding" indisputably shows that the Board's decision to approve the Harbor Landing restaurant and bar use was a "special use exemption" since food and beverage sales in the Limited

Marina District are restricted to "boats and water craft that use the small craft harbor." *See,* Article IV, Section 409.2 of the Ocean Springs Zoning Ordinance.

The language of a statute is controlling, and that language should be attributed a usual and ordinary meaning. *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n,* 654 So.2d 892, 894 (Miss.1995). There is no ambiguity in this ordinance and thus resort to rules of statutory interpretation is not indicated. *Ladner v. Necaise*, 771 So.2d 353 ¶ 4 (Miss. 2000)("If a statute is not ambiguous, the court should apply the plain meaning of the statute.").

Ordinance Section 409.2 simply does not permit food and beverage sales to the general public in the Limited Marina District! By passing a motion that allows Harbor Landing to sell food and beverages to customers who are not using "boats and water craft that use the small craft harbor", the City has approved a "special use" in a district for which no special uses are permitted. The special use permit is illegal and must be reversed.[5]

The Trial Court also recognized that the City essentially approved a "special" or "conditional use" appeal in permitting Harbor Landing to serve food and drinks to the general public in the Limited Marina District in contravention of the plain language of the ordinance. (R. 696; R.E. 245). However, the Trial Court erred by failing to recognize that the City's decision to issue a "special" or "conditional use" in the Limited Marina District was inherently ***illegal.*** Accordingly, the Trial Court should have reversed the City's illegal decision and the Trial Court committed manifest error by failing to do so.

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[5] Significantly, the sponsoring Alderman acknowledges that the findings are actually a "special use" permit in his last proposed "finding" when he stated that if Harbor Landing did not live up to its "agreed upon stipulations", "the City of Ocean Springs can revoke their **permit.**" (R. 529; R.E. 170 emphasis added).

a. The City's decision was also illegal since a lounge use is not legal on the Subject Property.

The Harbor Landing Premises is situated in the Limited Marina District on a parcel that abuts single family parcels zoned R-1. (R. 241; R.E. 036). The record shows that Harbor Landing intended to serve alcohol for on premises consumption. (R. 296 and 671; R.E. 069 and 231).

Ocean Springs Zoning Ordinance Article V, Section 509(3) provides that lounge uses are only allowed in the C-2 and C-3 districts. Harbor Landing is located in the C-4B Limited Marina District where lounges are not permitted.

Moreover, Ocean Springs Zoning Ordinance Article V, Section 509(3)(a) provides that Lounges are never allowed on parcels that abut a single family residential district as does the Subject Property upon which Harbor Landing is situated. Accordingly, the City acted illegally by permitting Harbor Landing to operate a lounge use in the Limited Marina District on a parcel that abuts R-1 parcels since such a use on the Subject Property is prohibited by the Ocean Springs Zoning Ordinance.

b. The City's decision was also illegal since a Restaurant use is not legal on the Subject Property.

The record is replete with evidence showing that Harbor Landing intended to operate a sit-down restaurant on the Subject Property. In the City of Ocean Springs, restaurant uses are specifically permitted in commercial zones C-1, C-2 and C-3. *See*, Ocean Springs Zoning Ordinance Article VI, Sections 406.2(10), 407.2(1) and 408.2(1). Restaurant uses are not specifically permitted in the C-4B Limited Marina District. *See*, Ocean Springs Zoning Ordinance Article VI. Section 409.2. Reading the entire zoning ordinance in concert, it is clear that since the drafters specified that a restaurant use is permitted in zones C-1, C-2, and C-3 but did not specify that a restaurant use is permitted in zone C-4B, the legislative intent that restaurant uses are not allowed in the Limited Marina District clearly emanates from the ordinances.[6]

III. The City's "findings of fact" that Harbor Landing's proposed restaurant and bar operation in the Limited Marina District comported with the Ocean Springs Zoning Ordinance is arbitrary and capricious and should be reversed since there was no substantial evidence in the record before the Board of Aldermen to support a finding that Harbor Landing intended to limit its food and beverage services primarily to boats and watercraft that use the Small Craft Harbor and because there is no substantial evidence in the record to support Harbor Landing's compliance with the City's parking regulations.

Although the Trial Court committed reversible error by applying the substantial evidence standard of review rather than the *de novo* standard to an issue of statutory construction, even applying the substantial evidence standard, there is no support in the record for a finding that Harbor would try to limit their food and beverage services to boats and watercraft that ply the inner harbor. By the time Harbor Landing sought to reverse tack and abandon its request for an illegal special use exemption in the Limited Marina district at the May 1, 2007 meeting of the Board of Aldermen, the record was already replete with evidence of Harbor Landing's intent to offer food and beverage services to the general public in violation of the Article IV, Section 409.2 of the Ocean Springs Zoning Ordinance. *See* Exhibit "A". As early as March 2005, Harbor Landing agent David Harris, Sr, had written that restaurants and seafood markets "should not be restricted" in the Limited Marina District. (R. 224-225; R.E. 024-025).

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[6] *Hollandale Ice Co. v. Board of Sup'rs, Washington County*, 171 Miss. 515, 157 So. 689 (Miss. 1934) (In construing statutes, court looks to entire legislation on subject, and determines policy of Legislature from consideration of all statutes together.) *City of Ocean City v. Somerville*, 958 A.2d 465 (N.J. Super. App. 2008)(A statute must be construed as a whole with reference to the system of which it is a part.)

A January 11, 2007 article appearing in the Biloxi Sun Herald quotes David Harris, Sr. as follows:

> We wanted to build a place where **everyone** can come and watch the boats come in and enjoy Ocean Springs.

(R. 664; R.E. 224 emphasis added). Other evidence of Harbor Landing's intent to engage in non-permitted uses in the harbor district is the following quote from that article:

> The dry-dock across the street from the new ship store and deli, holds more than 163 boats and offers wash-down services, fuel, ice, tackle, snacks and **engine maintenance**.

(R. 664; R.E.224 emphasis added). Again, "repair shops" and service of food and beverages to the general public are specifically prohibited in the Limited Marina District. Article IV, Section 409.2 of the Ocean Springs Zoning Ordinance. *See* Exhibit "A".

An internet advertisement posted prior to May 2007, promoted the restaurant as follows: "*Harbor Landing Deli* specializes in Po-boys, Gumbo and much more! Check back for more. Opening May 2007." The ad gave a street address obviously targeting the advertising message to the general public arriving by automobile. (R. 665; R.E. 225).

Harbor Landing's detailed parking plans also reveal its intent that its patrons be members of the driving public as opposed to "boaters that use the Small Craft Harbor." See examples of Harbor Landings' parking plans. (R. 652-653; R.E.212-213).

In their statements at Planning Commission hearings, Harbor Landing's proprietors disclosed their true intent to market the restaurant and bar to the general public. David Harris, Sr. told the Commissioners that he envisioned a drive-up place where people can come and eat. (R. 235; R.E. 030). Mr. Harris expounded on the plan explaining that it was consistent with "Mayor Moran's charrettes", to have a place where people could "come down to the harbor, get a cup of gumbo, relax, watch the boats." (R. 270; R.E. 065). Mr. Harris then described his target customers by alluding to Elenor Lena, whom he described as a 94 year old lady who loves to ride through the harbor after visiting downtown Ocean Springs. (R. 490; R.E. 141). Obviously, 94 year old Ms. Elenor Lena is not among "the boating public", from whom Harbor Landing later represented it would draw "100 percent" of its customer base. (R. 490; R.E. 141).

David Harris, III candidly admitted to the planning commissioners that he intended to operate the Harbor Landing bar and grill just like any other night spot in downtown Ocean Springs. David Harris, III explained that after he leaves the harbor at night, he drives downtown and stops in front of various bars and restaurants to gauge the noise levels. In his view, none of these establishments were offensive and he offered his opinion that complaints about a similar establishment in the Limited Marina District were unfounded. (R. 236; R.E 031).

Harbor Landing's proprietors reiterated their intent to market food and beverage services to the general public in their subsequent statements to the media. The March 8, 2007 Ocean Springs Record attributes the following quote to Mr. David Harris, Sr.: "[W]e're getting people coming by every day saying they like the way it looks and they can't wait to get down there and have a po-boy and sit on the deck and watch the boats come in or maybe watch a sunrise or a sunset." In the same March 8, 2007 report, Harris indicated he would sell beer by the drink for on premises consumption and left the option open for operating a bar selling mixed drinks in the future. (R. 670-671; R.E. 230-231). Obviously, a hard liquor bar is inconsistent with the ordinance's prescription that food and beverage sales may only be made to the boats and watercraft that use the small craft harbor.

From this evidence, it is clear that Harbor Landing intends to market to and serve the general public and has no plans to limit its food and beverage services to boats that ply the inner harbor. As one citizen testified, to twist the law and ignore this reality is "shameful".

The only indication in the record that Harbor Landing intended to limit its food and beverage services to the boating public is Mrs. Harris's May 1, 2007 statement to the Mayor and Board of Aldermen that "we anticipate that 100 percent of our customer base is our boating community at the Ocean Springs harbor." (R. 490; R.E.141). The credibility of this wholly inconsistent statement is severely undermined by the fact that Harbor Landing only took this position after receiving City Attorney John Edwards's memo indicating approval of their restaurant and bar proposal would hinge on whether Harbor landing intended to offer food and beverage services to the general public or limit these services to boats that use the small craft harbor. (R. 493; R.E. 144). Obviously, 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.[7]

In cases where appeal courts are asked to rule on the reasonableness of a municipality's interpretation and application of zoning ordinances, each case must be determined in view of the particular facts shown. *Jones v. City of Hattiesburg*, 207 Miss. 491, 42 So.2d 717 (Miss. 1949). If a municipality's fact finding conducted in conjunction with interpretation and application of

[7] The evidence of a concocted effort to salvage Harbor Landing's proposed restaurant and bar proposal for the Limited Marina District is stark. Knowing that Harbor Landing's application for a special use permit was illegal, the doomed appeal was pulled from the Board's April 17, 2007 agenda. The City Attorney was asked to research permitted uses in the district. (R. 460; R.E. 141). The City attorney advised the Board that it could only approve the restaurant and bar if Harbor Landing provided satisfactory relevant evidence that it intended to "provide food service to "boats and watercraft that use the inner harbor." (R. 635-648; R.E. 195-208). The City Attorney's memo was furnished to Harbor Landing in time for Harbor landing to change its tack and claim that its customer base would somehow come "100 percent" from the boaters who use the inner harbor as opposed to all its previous statements and advertising targeting the restaurant and bar to the general public. (R. 490; R.E. 141).

zoning ordinances is not supported by substantial evidence, the decision is considered to be arbitrary and capricious and must be reversed. *Hooks v. George County*, 748 So.2d 678, 680 (¶ 10) (Miss.1999). The Court defines "substantial evidence" as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion". *Johnson v. Ferguson*, 435 So.2d 1191, 1195 (Miss.1983). To withstand scrutiny, there must be more than a "mere scintilla" of evidence. *Id.*

On this factual record, it is crystal clear case there is no credible evidence to support the City's finding that Harbor Landing intended to limit its food and beverage services to the boats and watercraft that use the inner harbor. Harbor Landing's deathbed conversion to the position that it will somehow limit its food and beverage sales to boaters is simply not believable and does not even rise to the level of a "mere scintilla" of evidence. The issue is not even "fairly debatable' and is therefore "arbitrary and capricious" as a matter of law.[8] Accordingly, the City's "fact finding" Order approving Harbor Landing's Restaurant and Bar operation in the Limited Marina District must be reversed.

IV. There is no evidence in the record to support a variance in this case.

Since the Ocean Springs Zoning Ordinance does not allow for "special use exceptions" in the Limited Marina District and there is no substantial evidence in the record to support the Board's "findings of fact" that Harbor Landing somehow intended to limit its food and beverage sales to boats that use the Small Craft Harbor, Harbor Landing's request to engage in a non-permitted

[8] The "fairly debatable" standard is the antithesis of arbitrary and capricious. Thus, if the evidence, as in this case, shows the municipality's decision is not even "fairly debatable," then it is considered "arbitrary or capricious". *Tippitt v. City of Hernando*, 909 So.2d 1190, ¶ 6 (Miss. App. 2005).

restaurant and bar use in the Limited Marina District can only be analyzed as a request for a zoning variance. City Attorney John B. Edwards, II supports this view in his April 27, 2007 memo to the Mayor and Board of Aldermen. In the last paragraph of his memo, the following language appears:

> Finally, because there is no provision for a special exception in the C-4B district, the course this matter would usually take before coming to the board would be through the building department for a requested permit, if denied, then to the Board of Zoning and Adjustment.

(R. 637; R.E.).

In *Caver v. Jackson County Bd. of Supervisors*, 947 So.2d 351 (Miss. App. 2007) our court of appeals considered a very similar case also arising out of Jackson County. In that case, the property owner sought a variance from the residential set back requirements. The County Board of Supervisors granted the variance and the adjacent landowners appealed to the Courts. The Court of Appeals considered Article I, Section 2, of the Jackson County zoning ordinance which provides that a "variance" is a:

> modification of the literal provisions of this ordinance which the Planning Commission is permitted to grant when strict enforcement of 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.

Holding that the Board of Supervisors "may not ignore but must abide by the restrictions of all applicable zoning ordinances." The Appellate Court denied the variance holding that there was no evidence in the record that there was an undue hardship affecting the property.

Article II, Section 202 of the Ocean Springs Zoning Ordinance defines a "Variance" as "[A] modification from the provisions of this ordinance by the zoning board of adjustment in cases when enforcement of its provisions would result in unnecessary hardship." Article VIII, Section 803 of the Ordinance provides for a variance procedure whereby the Zoning and Adjustment Board considers appeals from the City Inspector and the City Planner and formulates recommendations on these issues to the Mayor and Board of Aldermen. Article VIII, Section 805 provides that the Zoning and Adjustment Board may recommend a variance in limited situations where the shape or topography of a piece of property would make application of the zoning regulations cause exceptional and undue hardship on the property owner. *See* Exhibit "A". Such is not the case here since Harbor Landing was requesting permission to engage in an additional prohibited use rather than a variance to allow it to place a building on their lot in violation of a set back requirement or the like.

In these cases, the zoning ordinances establish a standard for a variance. A variance merely for the economic convenience of a landowner is not sufficient. To prevail, Harbor Landing would have to show that some undue hardship will result if the variance is not granted. Harbor Landing requests a variance for its own convenience and economic interests. Indeed, the record in the planning commission shows that to allow the variance would be a burden on the community at large in the form of an undue stain on the infrastructure and natural environment of a sensitive area. Accordingly, the City cannot justify its Order allowing the non-permitted use based on variance.

CONCLUSION

The Appellents Albert Duckett and Alice Duckett have lived in the inner harbor neighborhood of Ocean Springs for over thirty five years. They have purchased several properties in the area with the reasonable expectation that their City would enforce the protective zoning ordinances on the books.

As Justice Hawkins eloquently stated:

> Purchasers of small tracts of land invest a substantial portion of their entire lifetime earnings, relying upon a zoning ordinance. Without the assurance of the zoning ordinance, such

investments would not be made. On this small area they build their homes, where they expect to spend the most peaceful, restful and enjoyable hours of the day.
Zoning ordinances curb the exodus of city workers to a lot in the distant countryside. Indeed, the protection of zoning ordinances in municipalities, as opposed to no zoning in most county areas, encourage the choice of a city lot rather than a country lot for a home in the first instance. Zoning ordinances make city property more attractive to the prudent investor.
In the absence of agreement between all interested parties, an amendment to a zoning ordinance is not meant to be easy. Otherwise, it would be a meaningless scrap of paper.
It is for precisely this reason that, while this Court accords profound deference to actions of governing boards pertaining to their local affairs, we have nevertheless carefully delineated rules for them to follow before amending their duly adopted and established zoning ordinances. The amendment of a zoning ordinance will never be simply a matter of local politics as long as this Court sits.

Childs v. Hancock County Bd. of Sup'rs, 2007 WL 3257014 ¶ 29 (Miss. App. 2007) quoting, *Board of Aldermem, City of Clinton v. Conerly,* 509 So.2d at 877 (Miss. 1987) and *Mayor and Comm'rs v. Wheatley Place,* 468 So.2d 81, 82 (Miss.1985)).

Instead of protecting the harmonious blend of residential and maritime uses that have co-existed in the area for decades, the City attempts to shoehorn in an incompatible nuisance commercial activity and force change on this stable neighborhood. If the City wants to change the character of the Limited Marina District to a restaurant and bar district, it should have engaged in the re-zoning process.

With respect to the interplay between the required *de novo* standard of review for interpretations of zoning ordinances and the substantial evidence standard applicable to fact finding to support variances, the *Drews v. City of Hattiesburg* case is particularly illustrative to the case at bar. In *Drews,* the Mississippi Supreme Court affirmed the decision of the Court of Appeals, and found that the six zoning variances granted to Lee Medical Development, LLC, by the Hattiesburg City Council, constituted a re-zoning in fact, the effect of which was "spot zoning" since the Hattiesburg Council essentially obliterated the zoning ordinance by approving such substantial variances to the original intent of the ordinance. Of course, *de novo* review of the city's statutory interpretation of the zoning ordinance was essential to reaching this result. *Drews v. City of Hattiesburg*, 904 So. 2d 138 (Miss. 2005).

In the case *sub judice*, the City of Ocean Springs ignored the plain meaning of the zoning ordinance that prohibits commercial activities that are not provided to the boats and watercraft that ply the inner harbor. By engaging in a tortured interpretation of the zoning ordinance that allowed Harbor Landing to operate a restaurant and bar use in the Limited Marina District, the City essentially re-zoned the Limited Marina District without complying with the statutory protections attendant to a re-zoning action.[9] Consistent with *Drews*, the decision of the Trial Court should be reversed and City's decision rendered a nullity.

The Trial Court's decision should also be reversed since the City's decision to permit Harbor Landing to operate a restaurant and bar in the Limited Marina District that caters to the general public in violation of the Ocean Springs Zoning Ordinance is an illegal special exception permit that is not authorized by the Ocean Springs Zoning Ordinance. Moreover, the City's decision should be reversed since it is based on the City's arbitrary findings of fact that are not supported by substantial evidence. Finally, the City's decision should be reversed since there is no substantial evidence in the record to justify a variance from the Ocean Springs Zoning Ordinance.

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[9] *See*, for example, Miss. Code Ann. § 17-1-17 and other statutory guidelines for the re-zoning process.

Respectfully submitted this the 31st day of December, 2008

ALBERT DUCKETT AND ALICE DUCKETT

By: John Paul Barber
JOHN PAUL BARBER
THEIR ATTORNEY

CERTIFICATE OF SERVICE

I, John Paul Barber, attorney for the Appellants, Albert Duckett and Alice Duckett, certify that I have this day filed by U.S. Postal Service the original and three copies of this Appellant's Brief to the Supreme Court Clerk and served one copy via U.S. Postal Service of the foregoing Appellant's Brief to the Honorable John B. Edwards, II, and the Honorable Kendall K. Stockman, P.O. Box 1618, Pascagoula, MS 39568-1618

THIS, the 31st day of December, 2008.

John Paul Barber
JOHN PAUL BARBER

ARTICLE II. DEFINITIONS AND WORDS

Section 201. Rules for words and phrases.

For the purpose of this ordinance certain terms and words are herewith defined as follows:

Words used in the present tense include the future; words in the singular number include the plural, and words in the plural number include the singular; the word "building" included the word "structure"; the word "shall" is mandatory, and not directory.

Section 202. Definitions.

Accessory building or use: A subordinate building on the same lot, or a portion of the main building, the use of which is clearly incidental to that of the main building; or a use customarily incidental to the main use of the property.

Advertising sign or structure: Any sign, device, or structure of any character whatsoever, including statuary, placed for outdoor advertising purposes on the premises. The area of an advertising structure or sign shall be determined as the area of the largest cross-section of such structure or sign.

All weather surface: Any surface which will support the type of vehicular traffic intended for its use and properly drained to prevent ponding.

Alley: A minor right-of-way dedicated to public use which gives a secondary means of vehicular access to the back or side of properties otherwise abutting a street, and which may be used for public utility purposes.

Apartment house or *multiple family dwelling:* Any single detached dwelling unit designed for and occupied by three (3) or more families living independently of each other as separate housekeeping units, including apartment houses, apartment hotels and flats, but not including auto or trailer courts or camps, hotels, motels, or resort-type hotels. It is intended that apartment units be occupied as permanent dwelling units (minimum of thirty (30) days' duration) as opposed to hotel or motel facilities which are intended as temporary abiding place of transients. Apartments and multiple-family dwelling complexes shall be rental units under single ownership. It will be unlawful to rent apartments as a temporary abiding place to transients.

Automobile junk area or graveyard: An open area other than a street or alley or place used for the dismantling or wrecking of used automobiles or the storage, sale or dumping of dismantled or wrecked automobiles or their parts.

Basement: A story below the first story as hereinafter defined. See "story."

Billboard: An outdoor advertising structure which advertises a use, product, or service not necessarily found on the premises.

Block: A piece or parcel of land entirely surrounded by public highways or streets, other than alleys. In cases where the platting is incomplete or disconnected, the city engineer, or such other persons as may be designated shall determine the outline of the block.

Board: The Ocean Springs Zoning and Adjustment Board.

Boarding house or *lodging house:* A building other than a hotel, occupied as a single housekeeping unit, where lodging or meals are provided for five (5) or more persons for compensation, pursuant to previous arrangements, but not for the public or transients.

Buffer area: An area which acts as a separation area between two (2) or more noncompatible

EXHIBIT

"A"

districts.

Building official: A person designated by the mayor and board of aldermen who is responsible for issuing building permits, certificates of occupancy, and inspections pursuant thereto.

Buildable width: Width of the building site left after the required yards have been provided.

Building: Any structure intended for shelter, housing or enclosure of persons, animals or chattel.

Building, alteration of: Any change or rearrangement in the supporting members (such as bearing walls, beams, columns or girders) of a building, any addition to a building or movement of a building from one location to another.

Building, front line of: A line being along the foremost portion of a building and parallel and/or concentric to the street line.

Building height : The vertical measurement from the average existing ground level elevation within the footprint of the proposed structure, exclusive of fill, to the highest point of a flat roof or to the midpoint of the highest gable of a pitched, shed, gambrel, gabled, or hipped roof. However, in no case shall the highest part of a gable, gambrel, hip, shed, or similarly pitched roof extend more than five (5) feet above the specified maximum building height. *See figure below.*

GRAPHIC LINK: Click here

Cemetery: A place for the burial of the human dead; usually a large park-like enclosure, laid out and kept for the purpose of interment.

Concealing fence: A fence, wall, live shrubbery, or other material approved by the planning commission which visually prevents, on a perpetually maintained basis, an area so enclosed from being viewed from without by a maximum of twenty (20) per cent visibility. Any fence, wall or other material, except live shrubbery, shall be painted or colored a uniformly solid color, pastel in nature, or otherwise aesthetically pleasing, which contains no advertising sign or symbol. Any live shrubbery used shall be a hearty species to the area and permanently maintained in a manner which will not create a nuisance. Any lack of maintenance of such concealing fence shall be deemed a violation of this ordinance and shall be prosecuted as prescribed herein.

Condominium: A condominium shall be similar to apartments in structural design and layout. However, it is intended that condominiums shall be purchased on an individual unit basis rather than being rented or leased.

Conforming use: Any lawful use of a building or lot which complies with the provisions of this ordinance.

Country club or *yacht club:* A facility providing recreational and related services to members and their guests only, characterized by substantial land and improvement commitment to such facilities as golf courses, tennis courts, swimming pools, club-houses or the like.

Coverage: The percentage of the lot area covered by the building area.

Day care center: A place where six (6) or more children are left for care a part of the twenty-four (24) hours of the day, for which remuneration is received.

District: Any zoning district established by this ordinance.

Dwelling: Any building, or portion thereof, which is designed or used as living quarters for one or more families.

Dwelling, single-family: A dwelling designed to be exclusively occupied by one family.

Dwelling, two-family: A dwelling designed to be occupied by two (2) families living independently of each other.

Dwelling, multiple-family: A dwelling designed for occupancy for three (3) or more families living independently of each other.

Dwelling unit: A room or group of rooms occupied or intended to be occupied as separate living quarters.

Easement: A grant by the property owner to the public, a corporation, or persons, of the use of a strip of land for specific purposes.

Engineer--City engineer: A person registered as a professional engineer in the State of Mississippi and who is authorized to approve construction of public works such as streets, roads, bridges, etc.

Family: One or more persons related by blood or marriage, including adopted children, occupying premises and living as a single nonprofit housekeeping unit.

Fill (landfill for development purposes): Fills shall be constructed with suitable materials capable of being compacted to provide a solid foundation for any structure to be placed on it. Unsuitable materials or perishable materials such as rubbish, sod, brush, roots, stumps, logs, heavy vegetation, etc., shall not be incorporated or buried in said fill.

Floor area: The square feet of floor space within the outside line of walls and including the total of all space on all floors of a building used for dwelling purposes.

Garage apartment: A dwelling unit attached to a private garage.

Garage, private: An accessory building or a part of a main building used for storage purposes for one or more automobiles.

Garage, public: Any building other than a private garage, available to the public for the care, servicing, repair, or equipping of automobiles or where such vehicles are parked or stored for remuneration, hire or sale.

Garage, storage: A building or portion thereof, other than a private garage, used exclusively for parking or storage of self-propelled vehicles, but with no other services provided except facilities for washing.

Gasoline, service or filling station: Any area of land, including structures thereon, that is used for the retail sale of gasoline or oil fuels, and installation of other minor automobile accessories, and which may or may not include facilities of lubricating, washing, or cleaning.

Governing authority: The mayor and board of aldermen of Ocean Springs, Mississippi.

Group housing project: A group of one-family, two-family, or multiple dwellings, arranged on land not subdivided into customary streets and lots.

Hobby: An accessory use carried on by the occupant of the premises in a shop, studio or other work room, purely for personal enjoyment, amusement or recreation, provided that the articles produced or constructed in said shop, studio or work room are not sold either on or off the premises, and provided such use will not permit the storage of materials outdoors and will not be obnoxious or offensive by reason of vibration, noise, odor, dust, smoke or fumes.

Home occupation: Any occupation which is customarily incident to the main use of the premises as a dwelling place, and is conducted by a member of a family residing in the dwelling, and in connection with which there is kept no stock in trade nor commodity to be sold upon the premises, provided that no person is employed other than a member of the immediate family residing on the premises; providing, further that no mechanical equipment shall be used which will be obnoxious or offensive by reason of vibration, noise, odor,dust, smoke, fumes and/or excessive traffic. None of the materials required in the home occupation shall be permitted to be stored outside the home or garage. The operation of beauty culture schools, beauty parlors, or barbershops shall not be considered home occupations.

Hotel or *motel:* A building containing sleeping rooms occupied, intended or designed to be occupied as the more or less temporary abiding place of persons who are lodged with or without meals for compensation.

Junk: The term "junk" is defined to mean and shall include scrap iron, scrap tin, scrap brass, scrap copper, scrap lead or scrap zinc and all other scrap metals and their alloys, and bones, rags, used cloth, used rubber, used rope, used tinfoil, used bottles, old cotton or used machinery, used tools, used appliances, used fixtures, used utensils, used boxes or crates, used pipe or pipe fittings, inoperable automobiles or airplanes or their parts, and other manufactured goods that are so worn, deteriorated or obsolete as to make them unusable in their existing conditions; subject to being dismantled for junk.

Kennel: Any building, lot, or premises on, or in, which four (4) or more dogs, cats, or similar pets (at least eight (8) weeks of age) are kept. Any building, lot or premises where dogs, cats, or similar pets are housed or accepted for boarding, for which remuneration is received.

Lot: A plot of land of not less than the minimum dimensions established by this ordinance, occupied or capable of being occupied by a single building for any use as defined in this ordinance.

Lot, area: The total area included within the front, side and rear lot lines.

Lot, corner: A plot of land located at the intersection of and abutting on two (2) or more streets.

Lot depth: The average horizontal distance between the front lot line and the rear lot line.

Lot, double frontage: A lot, other than a corner lot, which has frontage on more than one street.

Lot, frontage: That dimension of a lot or portion of a lot abutting on a street.

Lot, interior: A lot other than a corner lot.

Lot lines: The lines bounding a lot as defined herein.

Lot of record: A lot, the plat of which has been recorded in the office of the chancery clerk of Jackson County.

Lot width: The width of a lot at the front building line.

Medical and dental facilities:

(a) *Convalescent, rest, or nursing home:* A health facility where persons are housed and furnished with medical and/or nursing care.

(b) *Medical or paramedical offices:* A facility for the examination and treatment of human patients.

(c) *Hospital:* An institution providing comprehensive health services.

(d) *Public health center:* A facility primarily utilized by a health unit for the provisions of public health services.

Mobile home: A mobile home is a portable unit designed and built to be towed on its own chassis, comprised of frame and wheels, connected to utilities, and designed without a permanent foundation for year-round living. The removal of wheels, towbars, or other appurtenances and placing it on a permanent or semi-permanent foundation does not alter the fact that it is a mobile home, so designed and built.

Mobile home park: A contiguous parcel of land which has been planned and improved for the placement of mobile homes for nontransient use. A mobile home park is an area in which spaces are provided on a rental basis or lease basis only for owner-occupied mobile homes or in which both the space and the mobile home are offered to the public on a rental or lease basis only.

Mobile home stand or pad: The area for locating a single mobile home unit.

Mobile home subdivision: A mobile home subdivision is a tract of land in which spaces or lots for mobile homes are for sale and in which the purchaser receives fee simple title to the space or lot.

Nonconforming use, building or yard: A use, building or yard existing legally at the time of the passage of this ordinance which does not by reason of design, use or dimensions conform to the regulations of the district in which it is situated. A use, building or yard established after the passage of this ordinance which does not conform to regulations of the district in which it is situated shall be considered an illegal nonconforming use.

Overhang: That portion of a roof or other structural appendage which projects out past the main building wall of the structure.

Parking space: A space located on private or public property sufficient in size to store one standard size automobile.

Parking area, public: An open area other than a street, alley or place, used for the temporary parking of more than four (4) self-propelled vehicles and available for public use whether free, for compensation or as an accommodation for clients or customers.

Parking area, semipublic: An open area other than a street, alley or place, used for the temporary parking of more than four (4) self-propelled vehicles as an accessory use to semipublic institutions, schools, churches, hospitals and noncommercial clubs.

Planning commission: The Ocean Springs Planning Commission.

Premises: Land with or without structure or structures occupying it.

Shell house: A structure which is composed of foundation outside walls and roof with no interior walls or fixtures, or incomplete interiors and which is transferred to another party for completion of the interior.

Stable, private: An accessory building for the keeping of horses or mules owned by the occupants of the premises and not kept for remuneration, hire or sale.

Stable, public: A stable other than a private or riding stable.

Stable, riding: A structure in which horses or mules used for pleasure riding or driving are housed, boarded or kept for hire, including a riding track.

Story: That part of a building included between the surface of one floor and the surface of the floor next above, or, if there be no floor above, that part of the building which is above the surface of the highest floor thereof. A top story attic is a half story when the main line of the eaves is not above the middle of the interior height of such story. The first story is the highest story having its interior floor surface not more than four (4) feet above the curb level, or the average elevation of the finishedgrade along the front of the building were it set back from the street.

Story, half : A space under a sloping roof that has the line of intersection of the roof and the exterior wall face not more than three (3) feet above the floor level and in which space the possible floor area with headroom of five (5) feet or less occupies at least forty (40) percent of the total floor area of the story directly beneath. *See figure below* .

GRAPHIC LINK:**Click here**

Street: A right-of-way other than an alley dedicated or otherwise legally established for public use, usually affording the principal means of access to abutting property.

Street line: Public right-of-way line of a street.

Structure: Anything constructed or erected, which requires location on the ground, or attached to something having a location on the ground, including, but not limited to, advertising signs, billboards, and poster panels; but exclusive of customary fences or boundary or retaining walls, sidewalks and curbs.

Structural alterations: Any change in the supporting members of a building, such as bearing walls, columns, beams or girders, or any substantial change in the roof or in the exterior walls.

Subdivision: The division of land into two (2) or more tracts, lots, sites or parcels, any part of which subdivided shall contain less than ten (10) acres in area.

Swimming pool: A swimming pool shall be considered as a structure, the same as an accessory building, and subject to the same setback requirements but not as to area.

Unobstructed open space: An area of land upon which no structure may be erected from the ground upward.

Used automobile junk area: See "automobile junk area or graveyard."

Variance: A modification from the provisions of this ordinance by the zoning board of adjustment in cases when enforcement of its provisions would result in unnecessary hardship.

Wetlands-tidal marsh: Any area which is under water or so saturated with moisture that normal activity is prohibited for at least six (6) months out of every year. In these areas the soil material is composed principally of brown, partly decomposed marsh grass over mineral soil material. Variations occur in the degree of decomposition and in depth to and in character of the mineral material. This land type is not considered suitable for development of any kind. Where areas of this land type exist, the Ocean Springs Planning Commission shall make the final determination as to delineation.

Yard: A space on the same lot with a principal building open, unoccupied and unobstructed by building or structures from ground to sky except where encroachments and accessory buildings are expressly permitted.

Yard, front: A space across the full width of a lot extending from the front line of the main building to the front street line of the lot.

Yard, rear: A space extending across the rear of a lot measured between inner side yard lines and being the minimum distance between the rear lot line and the rear of the main building. No accessory structure shall be built closer than five (5) feet to the rear lot or side yard lines and shall not occupy more than five (5) per cent of the lot area. On both corner lots and interior lots, the rear yard shall in all cases be at the opposite end of the lot from the front yard.

Yard, side: A space between the building and the side line of the lot unoccupied and unobstructed by any portion of a structure from the ground upward and extending from the front building line to the rear lot line.

(Ord. No. 5-2006, §§ 1, 2, 1-12-06)

ARTICLE IV. SPECIFIC DISTRICT REGULATIONS

Section 401. R-1 single-family residential district.

401.1 General description.

This is the most restrictive residential district. The principal use of land is for single-family dwellings and with special permission related recreational, religious and educational facilities normally required to provide the basic elements of a balanced and attractive residential area. These areas are intended to be defined and protected from the encroachment of uses not performing a function appropriate to the residential environment. Internal stability, attractiveness, order and efficiency are encouraged by providing for adequate light, air and open space for dwellings and related facilities and through consideration of the proper functional relationships of each element.

401.2 Uses permitted.

In the R-1 single-family district, no building or land shall be used and no building shall be hereafter erected, reconstructed, altered or enlarged, unless otherwise provided in this ordinance, except for one or more of the following uses:

(1) Detached single dwellings, but not including mobile homes or shell houses.

(2) Detached accessory buildings, not exceeding one and one-half (1 1/2) stories in height, including one private garage or servants' quarters when located not less than sixty (60) feet from the front lot line, nor less than the distance required for the main building from any side or rear lot line. However, where property in this district is bounded by the Bay of Biloxi, a river, creek or bayou, a pier and/or boathouse may be permitted if the plans and specifications are approved by the mayor and board of aldermen.

(3) Cemetery.

(4) Churches and related accessory buildings, provided they are located on a minimum three-acre lot fronting a major artery or connecting route with required off-street parking spaces separated from property lines by a five-foot concealing fence.

(5) Public parks, public beaches, and playgrounds.

(6) Uses customarily incident to any of the above uses when situated in the same dwelling, when not involving the conduct of a business or industry, but including home occupation, as heretofore defined. The furnishing of board or lodging for not more than four (4) persons in a dwelling occupied as a private residence shall be considered an accessory use, provided no window or other display or sign is used to advertise such use.

(7) One nonilluminated sign advertising the sale or rent of the land or buildings upon which it is located. Such sign shall not exceed six (6) square feet in area and shall be located at a point not less than one-half the front yard depth from the street line. The sign may remain in place until no longer needed provided it is kept in a nondeteriorating condition.

(8) Customary signs in conjunction with residential usage, such as mailbox signs, names of residents and house numbers. These shall be nonilluminated and shall not exceed one square foot in area.

(9) A gazebo, under however, the following limitations:

Not to exceed fifteen (15) feet in height nor one hundred forty-four (144) square feet, or, if circular, not more than twelve (12) feet across. All gazebos shall be nonutilitarian and open (but may be screened) and shall be subject to minimum setback requirements of forty (40) feet from the front or rear property lines and ten (10) feet from the side property lines.

401.3 Uses permitted after public notice and hearing and recommendation by the planning commission and approval by the mayor and board of aldermen.

(1) Golf course, and/or country club, not including commercial miniature courses or driving range.

(2) Art gallery or museum (public).

(3) Telephone exchange, but not to include administrative office, shop or garage.

(4) School, public or private, offering general educational courses.

(5) College or university, not to include business or commercial college.

(6) Library (public).

(7) Public use, including utilities.

(8) Bed and breakfast type enterprises, including the furnishing of board or lodging, not to exceed four (4) rentable rooms, provided that the facility is in accordance with all applicable fire and health codes as would apply if such facility was located within a commercial zone and designated as a commercial venture therein; provided that off-street parking is available to accommodate one (1) vehicle per room of the facility including resident manager(s) and provided that the owner of the facility resides uponthe property. Meals furnished to guests only and shall be continental breakfasts.

401.4 Area, height and setback regulations.

In the R-1 single-family district, the height of buildings, the minimum dimension of lots and yards, and the minimum lot area per family shall be as follows (for additional district provisions see Article V):

401.4.1 *Front yard:* There shall be a front yard of not less than twenty-five (25) feet.

401.4.2 *Side yard:* There shall be a side yard on each side of the lot of not less than ten (10) feet; however, any existing structure may be added onto with the existing setback, provided it is not closer than five (5) feet to the property line. On corner lots the side yard regulation shall be the same as for interior lots except in the case of reversed frontage where the corner lot abuts on the side of a lot facing the other intersecting street, in which case, there shall be a side yard on the corner lot of not less than fifty (50) per cent of the front yard required on the lot abutting the rear of the corner lot or separated only by an alley, provided that this regulation shall not be so interpreted as to reduce the buildable width, after providing the required minimum side yard, of a corner lot of record and in separate ownership at the time of the passage of this ordinance to less than twenty-eight (28) feet. No accessory buildings on a said corner lot shall project beyond the front yard line of the lots in the rear, nor shall a building be erected, reconstructed, altered or enlarged closer than ten (10) feet to the line of the abutting lot to the rear.

401.4.3 *Rear yard:* There shall be a rear yard having a depth of not less than twenty-five (25) feet; however, any existing structure may be added onto with the existing setback provided it is not closer than five (5) feet to the property line.

401.4.4 *Height:* No building hereafter erected, reconstructed, altered or enlarged shall exceed two and one-half (2 1/2) stories nor shall it exceed thirty-five (35) feet with the exception of buildings located in a floodplain whereas such buildings may be measured from the elevation requirements of the adopted floodplain management maps. Additional provisions are located in section 503, Height.

401.4.5*Width of lot:* The minimum width of a lot at the building line shall be one hundred (100) feet, provided that where a lot of record and in separate ownership at the time of the passage of this ordinance has less width than herein required, this regulation shall not prohibit the erection of a single-family dwelling. Lots fronting on culs-de-sac shall be at least thirty-five (35) feet in width at street frontage and shall have a width of at least fifty (50) feet at the front building line. There shall not be more than six(6) lots facing on one cul-de-sac.

401.4.6*Lot area per family:* In the R-1 single-family district every building hereafter erected, reconstructed, altered or enlarged shall provided a lot area of not less than thirteen thousand five hundred (13,500) square feet per family; provided, however, that where a lot has less area than herein required and was of record and in separate ownership on the effective date of this ordinance, said lot may be occupied by not more than one family.

(Ord. No. 2-1985, § 1, 1-2-85; Ord. No. 6-1994, § 3, 6-7-94; Ord. No. 1-2006, § 1, 1-12-06)

Section 401A. R-1-A special apartment use district.

401A.1 General description.

This is the most restrictive apartment district to provide for luxury townhouse or apartment development in selected areas of Ocean Springs.

401A.2 Uses permitted.

In the R-1-A apartment district, no building or land shall be used and no building shall be hereafter erected, reconstructed, altered or enlarged, unless otherwise provided in this ordinance, except for one or more of the following uses:

(1) Any use allowed in R-1 but subject to the provisions thereof.

(2) Townhouse and/or apartment units.

401A.3 Area, height and setback regulations.

In the R-1-A special apartment use district, the height of buildings, the minimum dimension of lots and yards, and the minimum lot area per family shall be as follows (for additional district provisions see Article V):

401A.3.1*Front yard:* Same as R-1.

401A.3.2*Side yard* : Same as R-1; however, any multifamily building above thirty-five (35) feet in height shall have a minimum side yard on each side equal to fifty (50) percent of the building height.

401A.4.3*Rear yard:* Same as R-1.

401A.4.4*Height:* No building hereafter erected, reconstructed, altered or enlarged shall exceed four (4) stories nor shall it exceed fifty (50) feet with the exception of buildings located in a floodplain whereas such buildings may be measured from the elevation requirements of the adopted floodplain management maps. Additional provisions are located in section 503, Height.

401A.4.5*Width of lot:* The minimum width of a lot at the building line shall be one hundred (100) feet, provided that where a lot of record and in separate ownership at the time of the passage of this ordinance has less width than herein required, this regulation shall not prohibit the erection of a single-family dwelling. Lots fronting on culs-de-sac shall be at least thirty-five (35) feet in width at street frontage and shall have a width of at least fifty (50) feet at the front building line. There shall not be more than six(6) lots facing on one cul-de-sac.

401A.4.6*Lot area per family:* In the R-1-A special apartment use district every building hereafter erected, reconstructed, altered or enlarged shall provide a lot area of not less than thirteen thousand five hundred (13,500) square feet for single-family dwellings; and every multifamily dwelling or apartment complex hereafter erected, reconstructed, altered or enlarged shall provide minimum lot areas exclusive of wetlands or tidal marsh based on the following schedule:

Thirteen thousand five hundred (13,500) square feet for the first unit;

Sixteen thousand (16,000) square feet for the first two (2) units;

Eighteen thousand five hundred (18,500) square feet for the first three (3) units;

Twenty-one thousand (21,000) square feet for the first four (4) units;

plus an additional two thousand (2,000) square feet per unit for all units thereafter in a single building.

A maximum of twelve (12) units shall be allowed in each structure. When an end unit of a structure does not side on a street, an open space or court at least twenty (20) feet in width shall be provided between it and the adjacent structure and this open space shall be divided between the two (2) immediately adjacent structures as to property or lot lines.

Where apartment units are designed to face upon an open space or common access court rather than upon a street, this open court shall be a minimum of forty (40) feet in width and said court shall not include vehicular drives or parking areas.

Every multifamily dwelling or apartment complex hereafter erected, reconstructed, altered or enlarged, having a total of twenty-four (24) family units or less, shall provide the required lot area in the above schedule.

Every multifamily dwelling or apartment complex hereafter erected, reconstructed, altered or enlarged, having a total in excess of twenty-four (24) family units, shall provide minimum lot areas for each building in accordance with the minimum lot areas in the above schedule. In addition each apartment project shall provide a minimum of five (5) per cent open space. Private streets, drives, or parking areas will not count as this unobstructed open space requirement.

(Ord. of 9-7-83, § 1; Ord. No. 6-2006, §§ 1, 2, 1-12-06)

Section 402. R-2 single-family residential district.

402.1 General description.

Same as R-1.

402.2 Uses permitted.

Same as R-1.

402.3 Uses permitted after public notice and hearing and recommendation by the planning commission and approval by the mayor and board of aldermen.

Same as R-1.

402.4 Area, height and setback regulations.

In the R-2 single-family district, the height of buildings, the minimum dimension of lots and yards, and the minimum lot area per family shall be as follows:

minimum of five thousand (5,000) square feet. Mobile home subdivisions shall contain a minimum of ten (10) lots.

405.3 Special provisions for mobile home parks.

(1) Mobile home parks shall not exceed a density of eight (8) mobile home units per gross acre within the mobile home park.

(2) Each mobile home stand shall have an identifiable staked lot of not less than three thousand five hundred (3,500) square feet. No mobile home shall be placed closer than ten (10) feet to any lot line.

(3) Mobile home parks shall be surrounded by a buffer strip at least fifteen (15) feet in depth on all sides and rear from an R-1, R-2, R-3, and R-4 district.

(4) Buffers shall be unoccupied except for landscaping, utility facilities, signs, or entrance ornamentation.

(5) A minimum of five (5) per cent of the gross land area of the mobile home park shall be required for recreation area separate and apart from individual yard or buffer requirement.

(6) All mobile home lots shall abut upon a paved driveway of not less than twenty (20) feet in width, which shall have unobstructed access to a public street.

(7) All streets, roadways, and driveways within the park shall meet the minimum construction standards recommended by the consulting engineer of the planning commission. They shall be appropriately lighted at night.

(8) Mobile home park design shall be approved by the planning commission.

(9) No mobile home park shall contain less than ten (10) stands.

(10) Each mobile home stand shall be provided with permanent concrete runners, patio, parking area and utilities as recommended by the Mobile Home Manufacturers Association and approved and recommended by the city engineer.

(11) Every mobile home stand shall provide a storage structure of at least two hundred (200) cubic feet. However, such structure shall not exceed three hundred (300) cubic feet.

405.4 Special provisions for mobile home subdivisions.

(1) Mobile home lots shall be a minimum of five thousand (5,000) square feet in area. Only one mobile home will be permitted per lot.

(2) Each mobile home shall have a minimum front yard of twenty-five (25) feet and minimum side and rear yards of ten (10) feet each.

(3) Mobile home subdivisions shall be surrounded by a buffer strip at least fifteen (15) feet in depth on all sides and rear from an R-1, R-2, R-3, and R-4 district.

(4) Buffers shall be unoccupied except for landscaping, utility facilities, signs, or entrance ornamentation.

(5) All mobile home lots shall abut upon a paved street of not less than twenty-seven (27) feet in width.

(6) All streets within the subdivision shall meet the subdivision regulations of the City of Ocean Springs.

(7) No mobile home subdivision shall contain less than ten (10) lots.

Section 406. C-1 neighborhood commercial district.

406.1 General description .

The purpose of this commercial district is to provide retail stores and personal services for the convenience of the people in adjacent residential areas.

406.2 Uses permitted .

The following uses of property, buildings, or structures are permitted provided there is no outside storage:

(1) Bakery employing not more than five (5) people and limited to retail sales only.

(2) Banks and similar financial institutions.

(3) Barbershop, beauty parlor, tanning salons, and nail salons.

(4) Bicycle sales and repair.

(5) Drug stores.

(6) Grocery stores.

(7) Liquor stores and tobacco shops. (Subject to site plan review.)

(8) Coin-operated laundry and dry cleaning pickup stations.

(9) Offices:

(a) Medical or paramedical practice or clinics licensed by the State of Mississippi for human care.

(b) Legal, engineering, real estate, insurance, etc.

(c) Professional offices and studios including executive, administrative writing, clerical, stenographic and drafting uses.

(10) Restaurants. (Drive-in and drive-through restaurants are not permitted.)

(11) Custom dressmaking, millinery, tailoring, shoe repairing, repairing of household utility articles or similar trade.

(12) Specialty shop for the conduct of retail business as limited herein, such as furniture, fabric, appliances, apparel, jewelry, etc.

(13) Photographer's studio.

(14) Shop for the repair and sale of electrical and radio equipment, other appliances and similar commodities.

(15) Accessory buildings and uses customarily incident to the above uses, including signs or bulletin boards not exceeding twenty-four (24) square feet and lighted by floodlight only.

(16) Mortuary (funeral home). (Subject to site plan review.)

(17) Daycare center.

(18) Telephone exchange.

(19) Single-family residential use.

(20) Pet grooming. (Subject to site plan review.)

(21) Convenience stores. (Gas pumps are subject to site plan review.)

(22) Shop for the sale and repair of plumbing.

406.3 Uses permitted after public notice and hearing and recommendation by the *planning commission and approval by the mayor and board of aldermen* ,

Any use not specifically permitted by section 406.2 entitled "Uses permitted" shall not be allowed until such time as the planning commission has determined that the use requested is similar to or not in conflict with those uses specifically permitted.

406.4 Area, height and setback regulations .

406.4.1*Front yard* : A minimum of twenty-five (25) feet; however, a fifteen-foot front yard setback may be allowed when all parking is located within the rear yard.

406.4.2*Side yard* : Side yards of ten (10) feet are required except in instances where a commercial use abuts a residential district, in which case a minimum side yard of twenty-five (25) feet shall be provided, as measured from the side lot line to the nearest building or structure on the side adjacent to the residential district. Such space shall be screened from the abutting residential district by a concealing fence not less than six (6) feet in height. On corner lots, the side yard abutting a street shall be a minimum of fifteen (15) feet.

406.4.3*Rear yard* : No rear yard shall be required except in instances where a commercial use abuts a residential district, in which case a rear yard of not less than thirty-five (35) feet shall be provided. Such space shall be screened from the abutting residential district by a concealing fence not less than six (6) feet in height.

406.4.4*Height:* No building hereafter erected, reconstructed, altered or enlarged shall exceed two and one-half (2 1/2) stories nor shall it exceed thirty-five (35) feet with the exception of buildings located in a floodplain whereas such buildings may be measured from the elevation requirements of the adopted floodplain management maps. Additional provisions are located in section 503, Height.

406.4.5*Width of lot* : A minimum of one hundred (100) feet.

406.4.6*Lot area* : No minimum required, however, main and accessory buildings or structures shall not exceed thirty (30) percent of lot area.

(Ord. of 4-17-79; Ord. No. 6-1994, § 2, 6-7-94; Ord. No. 2-2005, § 1A, 1-4-05; Ord. No. 4-2006, § 1, 1-12-06; Ord. No. 23-2006, § 1, 7-18-06)

Section 407. C-2 community commercial district (central business district).

407.1 General description .

This commercial district is intended for the conduct of personal and business services and retail business of the community. Traffic generated by these uses will be primarily passenger vehicles and only those trucks and commercial vehicles required for stocking and delivery of retail goods.

407.2 Uses permitted .

The following uses of property, buildings, or structures are permitted provided there is not outside storage:

(1) Any commercial use permitted in the C-1 neighborhood commercial district.

(2) Dry or steam cleaning shop or plant employing not more than five (5) people.

(3) Shop for the repair of plumbing, radio and electric equipment, shoes, furniture and similar personal or household commodities.

(4) Department store.

(5) Retail stores, businesses or shops for sale of books, music (instruments, audio equipment, CD and DVD, tapes, records, etc., clothing, music and DVD rentals, jewelry, small household appliances, etc.

(6) Printing shop, including sale of office supplies and equipment.

(7) Newspaper publication.

(8) Sign painting shop.

(9) Blueprinting shop.

(10) Interior decorating shop.

(11) Catering establishments.

(12) Train stations, bus depots and travel agencies.

(13) Theaters, auditoriums.

(14) Recreational or amusement classification when conducted wholly inside an enclosed building.

(15) Hardware or appliance stores.

(16) Variety stores including discount stores.

(17) Paint and hobby store, including sale of carpets, wall covering and similar household items.

(18) Florists, provided no greenhouses are maintained on premises.

(19) Hotels. No room shall have exterior access.

(20) Automotive parts and equipment sales.

(21) Mail order stores.

(22) Stamp redemption centers.

(23) Personal care facility--A personal care facility is a facility designed to accommodate elderly people by providing for their personal needs such as care, feeding and grooming. The definition does not include medical facilities or treatment of any type such as are normally found in a nursing home.

(24) Lounges. (Subject to site review.)

(25) Parking garage, parking lots. (Subject to site plan review.)

(26) Bookstores.

(27) Residential, provided it is not on the ground floor. It must be above a commercial use.

(28) Pottery making.

407.3 Uses permitted after public notice and hearing and recommendation by the planning commission and approval by the mayor and board of aldermen.

Any use not specifically permitted by section 407.3 entitled "Uses permitted" shall not be allowed until such time as the planning commission has determined that the use requested is similar to or not in conflict with those uses specifically permitted.

407.4 Area, height and setback regulations.

407.4.1 *Front yard* : No front yard shall be required except where the frontage on one (1) side of a street between two (2) intersecting streets is partly in the C-2 commercial district and partly in a residential district, the front yard regulations of the residential district shall apply.

407.4.2*Side yard* : No side yard shall be required except in instances where a commercial use abuts a residential district, in which case a minimum side yard of fifteen (15) shall be provided, as measured from the side lot line to the nearest building or structure on the side adjacent to the residential district.

407.4.3*Rear yard* : No rear yard shall be required except in instances where a commercial use abuts a residential district, in which case a rear yard of not less than twenty-five (25) feet shall be provided. Such space shall be screened from the abutting residential district by a concealing fence not less than five (5) feet in height.

407.4.4*Height:* No building hereafter erected, reconstructed, altered or enlarged shall exceed four (4) stories or fifty (50) feet with the exception of buildings located in a floodplain whereas such buildings may be measured from the elevation requirements of the adopted floodplain management maps. Additional provisions are located in section 503, Height. Buildings of three (3) floors or greater, inclusive of first floor garages, shall require a fire suppression system for each floor.

407.4.5*Width of lot* : No minimum required.

407.4.6*Lot area* : No minimum required, however, impervious surface (green space) of ten (10) percent of the total lot area is required. This area shall be located adjacent to right-of-way.

(Ord. of 4-17-79, § 2; Ord. of 11-10-81, § 1; Ord. of 12-21-82, § 1; Ord. of 9-7-83, § 1; Ord. No. 2-2005, § 1B, 1-4-05; Ord. No. 4-2006, § 2, 1-12-06)

Section 408. C-3 highway commercial district.

408.1 General description.

This commercial district is intended for the conduct of personal and business services for the motoring public.

408.2 Uses permitted.

The following uses of property, buildings or structures are permitted:

(1) Any uses permitted in C-2 community commercial district.

(2) Laboratory, dental and medical.

(3) Restaurants including drive-in and drive-through.

(4) Veterinary services and pet stores. (Subject to site plan review.)

(5) New and used machinery sales and service.

(6) Public garages. (Subject to site plan review.)

(7) New and used car dealership.

(8) Marble and granite works sales.

(9) Yard and garden center including nursery and greenhouses.

(10) Establishments for the sales, servicing and repair of automobiles, boats, recreational vehicles and trailers including utility trailers. Storage area for servicing of vehicles or equipment must be located within the confines of an enclosed fence at the

rear of property.

(11) Storage yards for commercial vehicles and trucks and truck terminals provided that the storage yards are enclosed by a concealing fence not less than six (6) feet in height.

(12) Upholstery repair.

(13) Food storage locker and ice manufacturing plant.

(14) Wholesale establishments and storage.

(15) Lumber and building supplies sales and carpenter shop.

(16) Commercial kennels, when enclosed.

(17) Service yard for public utilities.

(18) Riding academy.

(19) Open-air sports.

(20) Drive-in theaters, restaurants and places of amusement. Circuses and carnivals may be permitted subject to approval of the mayor and board of aldermen.

(21) Tent sales, truck load sales, etc., subject to tenant merchant law of the State of Mississippi.

(22) Paint and body shops provided vehicle storage is located in rear of property in concealing fence.

(23) Pawn shops. (Subject to site plan review.)

(24) Tattoo parlors.

(25) Service station. (Gas pumps are subject to site plan review.)

408.3 Uses permitted after public notice and hearing and recommendation by the planning commission and approval by the mayor and board of aldermen.

Any uses not specifically permitted by section 408.2 entitled "Uses permitted" shall not be allowed until such time as the planning commission has determined that the use requested is similar to or not in conflict with those uses specifically permitted.

408.4 Area, height and setback regulations.

408.4.1 *Front yard* : Same as C-1 neighborhood commercial district.

408.4.2 *Side yard* : Same as C-1 neighborhood commercial district.

408.4.3 *Rear yard* : Same as C-1 neighborhood commercial district.

408.4.4 *Height:* No building hereafter erected, reconstructed, altered or enlarged shall exceed six (6) stories nor shall it exceed seventy-five (75) feet with the exception of buildings located in a floodplain whereas such buildings may be measured from the elevation requirements of the adopted floodplain management maps. Additional provisions are located in section 503, Height.

408.4.5 *Width of lot* : No minimum required.

408.4.6 *Lot area* : No minimum required.

(Ord. of 4-17-79, §§ 3, 4; Ord. No. 2-2005, § 1C, 1-4-05; Ord. No. 4-2006, § 3, 1-12-06; Ord. No. 23-2006, § 2, 7-18-06)

Section 409. C-4 commercial limited district.

409.1 General description.

This commercial district is intended to provide for the very special commercial services closely related to the comprehensive plan and necessary to the best development of Ocean Springs.

409.2 Uses permitted.

C-4-A commercial limited hospital related businesses and services. In the hospital related businesses and services the use of buildings, other structures, and the land is restricted to the following:

Motels, restaurants, drug stores, medical offices and clinics, prosthetic supply sales, florist shops, gift shops, hobby shops, tourist homes, barber shops, beauty salons, book store, stationery store, convalescent home.

C-4-B commercial limited marina. 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.

409.3 Area, height and setback regulations.

(a) *Hospital related businesses and services:*

Front yard: Same as C-3 district.

Side yard: Same as C-3 district.

Rear yard: Same as C-3 district.

Height: No building hereafter erected, reconstructed, altered, or enlarged shall exceed three (3) stories nor shall it exceed forty-five (45) feet. Accessory buildings shall not exceed two (2) stories or thirty-five (35) feet.

Width of lot: No minimum required.

Accessory buildings may not exceed ten (10) per cent of lot area.

(b) *Marina:*

Front yard: None specified.

Side yard: None specified.

Rear yard: None specified.

Height: Same as hospital related businesses and services.

Width of lot: No minimum required.

Lot area: Main building shall not exceed sixty (60) per cent of the lot area; the accessory building shall not exceed ten (10) per cent of lot area.

Section 410. I-1 planned industrial park district.

410.1 Uses permitted.

The owner, or owners, or any contiguous and compact tract of land shall submit to the planning commission a petition for the rezoning and subsequent exclusive use and development of all such tract of land as a planned industrial park district. The petition submitted shall be referred to the planning commission for study, hearing and report as provided by law.

(e) Potential projects may include sidewalks and bike paths along primary corridors to the waterfronts, comfort stations, parking, and piers for public use; such projects will be implemented at an appropriate time.

(Ord. No. 3-1995, 3-21-95; Ord. No. 7-2006, §§ 1, 2, 1-12-06)

Editor's note: Ord. No. 3-1995, adopted Mar. 21, 1995, amended the Zoning Ordinance by the addition of provisions designated as § 507; however, as provisions in the Zoning Ordinance were already so designated, the new provisions have been redesignated as § 508 at the discretion of the city.

Section 509. Site plan standards.

The following uses have specific site plan standards and a site plan shall be submitted to the building department at application. Review by the planning department and building department is required to assure limiting any adverse impacts on surrounding or nearby uses:

(1) Funeral homes, mortuaries and crematoriums are permitted in C-1, C-2 and C-3, when:

a. Located on arterial street and with adequate ingress and egress to said arterial streets.

b. Be located at least one hundred (100) feet from any single-family residential district.

c. Have sufficient off-street automobile parking and assembly area provided for vehicles to be used in a funeral procession. The assembly area shall be provided in addition to required off-street parking.

d. Provide screening from all residential view for the loading and unloading area used by ambulances, hearses, or other such service vehicles.

(2) Automobile wrecking yards are allowed by special use in the I-2 district when:

a. Not located within two hundred fifty (250) feet of any street designated as a gateway, if not completely obscured from view of the street by landforms or building.

b. Located near a major collector or arterial or a local street in a heavy industrial zone by special use permit. They may be located near a railroad.

c. Comply with all state and federal environmental requirements.

d. Be reasonably compatible with surrounding land uses such as, vehicle repair shops, businesses that have outdoor storage, especially metal parts.

e. Have a minimum of three (3) acres of land.

f. Store all items within the fenced area, and ensure that no items be piled higher than the fence.

g. Provide for the storage and off-site disposal of oil and used tires.

h. It shall be unlawful for any person or property owner to store or to allow storage of any junked motor vehicle in the open area on any private property except motor vehicles awaiting repair at legally licensed auto repair garages or legally licensed junkyards.

(3) Lounges defined as established with more than fifty (50) percent of total revenues generated from the sale of alcoholic beverages are permitted in the C-2 and C-3 districts

when:

a. Not located on parcels that abut a single-family residential district.

b. Not located within two hundred fifty (250) feet of a church, school, park/playground, daycare center, or funeral home. Such distances shall be measured along a straight line between the nearest property lines of the lounge and the church, school, park/playground, daycare center, or funeral home. If such facility is part and parcel of a strip mall, shopping center or other parcel with common parking facilities, sidewalks and grounds then said distance shall be measured in a straight line from the point thatis closest to the lounge in question of the main structure of the church building, school, daycare or funeral home.

c. When located within two hundred fifty (250) feet of a single-family residential district, hours of operation may be limited and additional buffering and construction methods (sound proofing) may be required.

(4) Liquor stores and tobacco shops are permitted uses in the C-1, C-2 and C-3 when:

a. Not located within two hundred fifty (250) feet from a church, school, park/playground, daycare center or funeral home. Such distance shall be measured along a straight line between the nearest property line of the business and church, park/playground, daycare center or funeral home. If such facility is part and parcel of a strip mall, shopping center or other parcel with common parking facilities, sidewalks and grounds then said distance shall be measured in a straight line from the point that is closest to the liquor store and tobacco shop in question of the main structure of the church building, school, daycare or funeral home.

(5) Veterinary services, small animal clinics, kennels, pet stores, and pet grooming businesses are permitted when located in the appropriate district when:

a. Small animals, pet grooming are permitted in C-1 and C-2 districts when:

1. All animals are confined within the exterior walls of the building at all times.

2. Not located within one hundred (100) feet to a restaurant.

3. No overnight boarding of pets.

b. Veterinary services, small animal clinics, kennels and pet grooming businesses and pet stores are permitted in the C-3 and I-2 districts when:

1. The animals are confined primarily within the exterior walls of the building except for the use of runs for exercise.

2. Not be located closer than two hundred (200) feet to existing residence, restaurant, apartment, hotel, library, museum, clinic or hospital for humans, church or theater.

3. Be soundproofed from all adjacent property and uses.

(6) Gas pumps are permitted as accessory uses in the C-1, C-2 and C-3 districts when:

a. Not to be located within fifty (50) feet of the location of a church, school, hospital, rest home, nursing home, playground or residential dwelling(s).

b. Not allow pump islands closer than fifteen (15) feet of any property line and canopies no closer than ten (10) feet from any property line.

c. Erect masonry or wooden fences at least four (4) feet high around the station site and also plant shrubs and trees around the site if the station wishes to locate closer than two hundred (200) feet to the uses listed in item a. above. Hours of operation may also be designated as part of the special use permit in situations of close proximity to these same uses.

d. Provide access driveways no closer than thirty-five (35) feet from the point of intersection of the right-of-way lines of the adjoining street(s). Two (2) driveways on each street frontage may be permitted and shall be at least twenty-five (25) feet apart and no closer than five (5) feet to the side property line(s).

(7) Pawn shops are permitted in the C-3 and I-2 district when:

a. Not to be located within two hundred (200) feet of a school, playground or church.

b. With no exterior display.

c. With no exterior storage.

(Ord. No. 3-2005, § 1, 2-1-05)

Editor's note: Ord. No. 3-2005, adopted Feb. 1, 2005, amended the Zoning Ordinance by the addition of provisions designated as § 508; however, as provisions in the Zoning Ordinance were already so designated, the new provisions have been redesignated as § 509 at the discretion of the city.

ARTICLE VIII. ZONING AND ADJUSTMENT BOARD

Section 801. Board of zoning adjustment and methods of appeal.

There is hereby created for Ocean Springs a zoning and adjustment board with the powers and duties as hereinafter set forth.

Section 802. Membership.

The Ocean Springs Zoning and Adjustment Board shall consist of five (5) members appointed by the city council. Members shall review applications and give recommendation to the mayor and board aldermen for final approval. The appointive members shall be named for three-year terms, in such manner that memberships shall expire on succeeding years.

(Ord. No. 15-2004, § 1A, 12-21-04)

Section 803. Procedure.

The zoning and adjustment board is a recommending committee of the City of Ocean Springs. All recommendations of this committee will be forwarded to the mayor and board of aldermen for ratification and approval. The zoning and adjustment board shall elect a chairperson and a vice-chairperson. The city planner will serve as secretary for the board, which will include keeping of minutes, providing correspondence and arranging meetings as required. A quorum of three (3) members is necessary for any action.

The zoning and adjustment board shall have the following duties:

(a) To receive appeals from any decision of the building inspector or the city planner and hold a meeting promptly to discuss the matter.

(b) If it is a matter of interpretation of the terms of the ordinance, the board shall render a recommendation in writing to the mayor and board of aldermen for ratification and approval.

(Ord. No. 15-2004, § 1B, 12-21-04)

Section 804. Appeals.

Appeal may be made from any decision of the building inspector or city planner by presenting the case to the secretary of the zoning adjustment board.

Any decision of the zoning board may be appealed to the mayor and board of aldermen at the next scheduled city council meeting by giving written notice to the secretary.

Any person aggrieved by a judgment or decision of the mayor and board of aldermen shall have the right to appeal to higher legal authority in the manner provided for in Section 11-51-75 of the Mississippi Code of 1972, as amended.

(Ord. No. 15-2004, § 1C, 12-21-04)

Section 805. Powers.

The zoning and adjustment board shall have the following powers:

(1) Power to hear and decide appeals.

(2) Powers relative to variances: Where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, which condition is not generally prevalent in the area, the strict application of these regulations would result in peculiar and exceptional practical difficulties to or exceptionaland undue hardship upon the owner of such property, the full zoning adjustment board shall have the right by a majority vote to decrease any minimum requirement and to increase any maximum requirement by not more than twenty (20) percent, under the following conditions:

(a) The variation shall be allowed only for good and substantial reasons which shall be made part of the motion and entered into the minutes and reported to the city council.

(b) A quorum shall be required of not less than three (3) board members.

(3) Powers relative to exceptions: Upon appeal, the zoning and adjustment board is hereby empowered to permit the following exceptions:

(a) To permit the extension of a district not to exceed one hundred (100) feet where the boundary lines of a district divides a lot in single ownership as shown on record.

(b) To interpret the provisions of these regulations where the street layout actually on the ground varies from the street layout as shown on the map fixing the several districts which map is attached to and made a part of these regulations.

In exercising the abovementioned powers, the zoning and adjustment board may, in conformance with the provisions of these regulations, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken. In considering all appeals from rulings made under these regulations, the board shall,in making its findings on any specific case, determine the effect of the proposed change upon the supply of light and air to adjacent property, upon the congestion in the public streets, upon the public safety from fire and other hazards, upon the established property values within the surrounding area, and upon other factors relating to the public health, safety, comfort, morals and general welfare of the people of Ocean Springs, Mississippi. Every ruling made upon any appeal to the zoning and adjustment board shall be accompanied by a written finding of fact based upon the testimony received at the hearing afforded by the board and shall specify the reason for granting or denying the appeal.

(Ord. No. 15-2004, § 1D, 12-21-04)