IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DR. CHARLES HALL, ET AL	**APPELLANTS/CROSS-APPELLEES**
VS.	**NO. 2008-CA-01763**
THE CITY OF RIDGELAND, MISSISSIPPI	**APPELLEE**
- AND -	
MADISON COUNTY LAND COMPANY, LLC, SOUTHERN FARM BUREAU BROKERAGE COMPANY, INC., BAILEY-MADISON, LLC, 200 RENAISSANCE, LLC , RENAISSANCE AT COLONY PARK, LLC and 100 RENAISSANCE, LLC	**APPELLEES/CROSS-APPELLANTS**

REPLY BRIEF OF CROSS-APPELLANTS

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INTRODUCTION

The Bailey Companies submit this Reply Brief in support of their Cross-Appeal seeking reversal of the Circuit Court's denial of their Motion to Dismiss for Lack of Standing and their Motion to Dismiss the Class Action and Unincorporated Association Aspects of the Appeal. In reply to the Protestants' arguments on the Cross-Appeal, the Bailey Companies make three observations: (1) this case is not a spot zoning case as in the recent *Modak-Truran* case; (2) the cases cited by Protestants do not overturn the well-established rule requiring a specific harm different than that experienced by the general public in order to confer standing; and (3) there has been no change to Mississippi's law that would allow Protestants to pursue a zoning challenge on a class action basis, much less a class action appeal. The Bailey Companies discuss each of these observations in more detail in the following pages. As that discussion will demonstrate, the Court should reverse the Circuit Court's denial of their motions to dismiss.

ARGUMENT

A. *Modak-Truran* Does Not Support the Protestants' Argument on Spot Zoning

On August 13, 2009, some 16 days after the Bailey Companies filed the Brief of Appellees/Cross-Appellants, the Mississippi Supreme Court rendered an Opinion in *Modak-Truran v. Johnson*, 18 So.3d 206 (Miss. 2009). The Court held that the action of the Jackson City Council, in amending the Zoning Ordinance of the City of Jackson to permit the Fairview Inn to operate a restaurant, being a commercial business, in a

residential zone in the Belhaven Historic Preservation District, on land surrounded by mostly residential dwellings, constituted illegal spot zoning. The Protestants, in their Combined Reply Brief of Appellants/Brief of Cross-Appellees, cited *Modak-Truran* in support of their contention that the one special exception and the one variance granted by the City of Ridgeland for the construction of the 200 Renaissance Building constituted spot zoning. Having had no previous opportunity to comment upon the *Modak-Truran* decision, the Bailey Companies now deem it appropriate to do so.

Because the term "spot zoning" employs intriguing imagery, protestants often allege spot zoning in any type of zoning controversy.[1] Over a period of more than 40 years, the Mississippi Supreme Court and the Mississippi Court of Appeals have continually rejected attempts to brand various zoning actions with the opprobrious label of spot zoning. For example, *see McWaters v. City of Biloxi*, 591 So.2d 824, 828-29 (Miss. 1991), holding that rezoning property on the north side of Highway 90 (Beach Boulevard) and east of Edgewater Shopping Mall in the City of Biloxi from single-family residential and multi-family residential classifications to a residential office classification, where there were residential neighborhoods to the north and east, did not constitute spot

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[1] The use of the term "spot zoning" has been criticized as an "unnecessary" impediment to the adjudication of zoning disputes. 1 Salkin, *American Law of Zoning* §6.12, at 6-52 (5th ed. 2009). Professor Osborne M. Reynolds, Jr., of the University of Oklahoma Law Center has declared that the term is not useful, creates confusion, lacks precision, and clouds zoning decisions. According to Professor Osborne, the term "spot zoning" has become almost an anachronism in some states. "The concept of spot zoning, and the use of this terminology, are gradually losing favor in the law." Reynolds, *"Spot Zoning" - A Spot That Could Be Removed from the Law*, 48 Wash. U.J. Urb. & Contemp. L. 117, 134-137 (1995).

zoning; *Cowan v. Gulf City Fisheries, Inc.*, 381 So.2d 158, 163 (Miss. 1980), holding that rezoning the eastern 150 feet of a 736-foot tract in the City of Pascagoula from a residential to an industrial classification, where the other 586 feet of the tract had been zoned industrial for many years, did not constitute spot zoning; *Paine v. Underwood*, 203 So.2d 593, 597-98 (Miss. 1967), holding that the action of the Hinds County Board of Supervisors in rezoning land on the west side of Hanging Moss Road, north of the corporate limits of the City of Jackson, from a residential to a commercial classification did not constitute spot zoning, even where there was nearby residential property, when the rezoning was done in accordance with a comprehensive plan; *McKibben v. City of Jackson*, 193 So.2d 741, 744-45 (Miss. 1967), holding that the rezoning of property on the south side of Lakeland Drive, near its intersection with Ridgewood Road, from a residential to a commercial classification did not constitute spot zoning, even though there were residences nearby; *Ridgewood Land Co., Inc. v. Simmons*, 243 Miss. 236, 137 So.2d 532, 538 (1962), holding that the action of the Hinds County Board of Supervisors in rezoning property from a residential to a commercial classification for the construction of a shopping center separated from residential areas by a buffer strip did not constitute spot zoning; *Adams v. Mayor and Board of Aldermen of City of Natchez*, 964 So.2d 629, 636 (Miss. App. 2007), holding that the rezoning of a parcel of land at the corner of the Canal Street-Washington Street intersection in Natchez from an open land classification to a general business classification for the relocation of a restaurant did not

constitute spot zoning where most of the land on Canal Street was already zoned for general business purposes and where the entire area was one of mixed use; *Cockrell v. Panola County Board of Supervisors*, 950 So.2d 1086, 1096-97 (Miss. App. 2007), holding that rezoning of property from an agricultural to an industrial classification for the relocation of a metal scrap yard, while disapproved for lack of proof of substantial change in the character of the area, would not have constituted spot zoning where there was a public need for additional industrial property in Panola County; *Tippitt v. City of Hernando*, 909 So.2d 1190, 1193 (Miss. App. 2005), holding that the rezoning of a 0.34-acre parcel located between residential and commercial tracts from a residential to an office classification did not constitute spot zoning, where the City's comprehensive plan contemplated that small-scale office activities should function as a transitional buffer area between residential and non-residential uses; and *Kuluz v. City of D'Iberville*, 890 So.2d 938, 941-42 (Miss. App. 2004), holding that rezoning land in the City of D'Iberville from a residential to a commercial classification so that the local Veterans of Foreign Wars Post could build a recreational vehicle park for its members did not constitute spot zoning, where the general neighborhood had both residential and commercial uses.

In many of these cases, the Mississippi Supreme Court expressly rejected the argument of spot zoning made by the protestants because the rezoning was in accordance or in harmony with the local comprehensive plan. As the Mississippi Supreme Court said

in *Ridgewood Land Co., Inc. v. Simmons*, a rezoning action "is not spot zoning if it is enacted in accordance with a comprehensive zoning plan." 137 So.2d at 538. Similarly, in *McWaters v. City of Biloxi*, the Mississippi Supreme Court stated that the rezoning action taken by the Biloxi City Council was not spot zoning "inasmuch as the rezoning appears to be in harmony with the comprehensive zoning plan of the [C]ity of Biloxi with respect to the subject property." 591 So.2d at 829. In *Tippitt v. City of Hernando*, the Mississippi Court of Appeals found that, because the rezoning action was in accordance with the municipality's comprehensive plan, the approval of rezoning "cannot be deemed improper as spot zoning." 909 So.2d at 1194.

The action of the Mayor and Board of Aldermen of the City of Ridgeland in the present case in approving a special exception and variance for the construction of the 200 Renaissance Building to a height of 13 stories was in accordance with the Comprehensive Plan of the City of Ridgeland. That Comprehensive Plan is a part of the record. R-02240-02332. At the public hearing before the Zoning Board, the attorney for the Bailey Companies explained that the special exception and variance being sought were consistent with the policies set forth in the Comprehensive Plan of the City of Ridgeland. R-00096.

Those policies include Policy 54, which states that the City will employ flexible zoning administrative techniques, including variances, special use permits, and administrative permits, as well as flexible decision-making standards for these techniques.

R-02268.

Those policies also include both Policy 29.2, which states that the City will encourage the location of regional shopping centers along its highways, and Policy 29.4, which states that office uses are allowed in any of the commercial districts and that office parks or office districts are encouraged to locate along arterial streets or highways. R-02261.

Those policies further include Policy 29.5, which states that mixed-use districts, being large-scale developments containing a mixture of office, retail, and other space, are encouraged to locate along major arterial streets and interstate highways. R-02261.

Those policies additionally include Policy 33, which encourages a mixture of high-quality and retail office development along Highland Colony Parkway. R-02263.

Using the flexible zoning administrative techniques of variances and special uses to authorize a high-quality office building in the mixed-use, large-scale commercial development known as Renaissance at Colony Park, between Interstate Highway 55 and Highland Colony Parkway, implemented the aforesaid policies and was completely consistent with the Comprehensive Plan of the City of Ridgeland. For this reason, there was no spot zoning involved here.

The Court should also note that the granting of special exceptions and variances, as distinct from rezoning, ordinarily does not constitute spot zoning. As one leading authority has pointed out, courts making careful use of the term "spot zoning" have held

that "the issuance of special permits consistent with a provision in the zoning ordinance for such issuance does not constitute spot zoning nor does the granting of a variance constitute spot zoning." 1 Salkin, *American Law of Zoning* §6.12, at 6-57 through -58 (5th ed. 2009). For a similar statement that the granting of a variance or a special exception does not constitute spot zoning, see 3 Ziegler, *Rathkopf's The Law of Zoning and Planning* §41:1, at 41-3 n. 1 (2006). As the Texas Court of Civil Appeals has explained:

> The term 'spot zoning' is used by the court to describe an amendment to the zoning ordinance which is invalid because such amendment is not in accordance with the municipality's comprehensive plan. Although the courts may use different language in defining the term, common to all definitions is the assertion that 'spot zoning' involves amendments to existing zoning ordinances. The conclusion is inescapable that the action of a board of adjustment in granting variances or exceptions in the exercise of the power vested in such board by the zoning ordinance cannot result in invalid spot zoning. The critical distinction rests in the difference between the traditionally legislative process of amending the zoning ordinance and the administrative or, perhaps, 'quasi-judicial' act of granting a variance or exception as authorized by the ordinance.

Board of Adjustment of City of San Antonio v. Leon, 621 S.W.2d 431, 436 (Tex. Civ. App. - San Antonio 1981) (internal citations omitted).

The most widely accepted test for determining whether a zoning action constitutes spot zoning is whether (1) the action is in accordance with the comprehensive plan, (2) the action is compatible with the uses in the surrounding area, and (3) the action serves the public welfare. These criteria "are flexible and provide guidance for judicial balancing of interests." *Annot.*, 73 A.L.R. 5th 223, 258-59 (1999). The action in granting

a special exception and variance for the 200 Renaissance Building meets all of these determination tests.

The 200 Renaissance Building, constructed at a cost of $60 million, has brought to the City of Ridgeland an all-star list of tenants, including the regional headquarters of a major bank, the State's largest law firm, and the State's largest accounting firm. R-00089. It will support 1,006 employees and generate 623 indirect jobs. The annual payroll will be approximately $83 million. The building will generate substantial new tax revenues for the benefit of the City of Ridgeland, Madison County, and the Madison County School District, including more than $400,000 per year just for the School District. R-00903-04. *See* the economic impact report of financial expert Chris G. Gouras, Jr. R-01231-33. These factors alone unquestionably promote the public welfare.

The situation here is far different from that in the *Modak-Truran* case involving the Fairview Inn, on which the Protestants rely to support their contention of spot zoning. In *Modak-Truran*, the City of Jackson had grandfathered a restaurant use into a new zoning classification, without requiring the Fairview Inn to secure rezoning to that classification and thereby put that restaurant use into the middle of an established residential neighborhood, directly across the street from residential homes.

However, in the present case, the 200 Renaissance Building is not something being placed into the middle of an established residential neighborhood. As the zoning map and

artist's drawing in the record clearly show, the 200 Renaissance Building is located on land located along Interstate Highway 55 in a C-4 Highway Commercial District; the land across Interstate Highway 55 is also zoned C-4 Highway Commercial District. The remainder of Renaissance at Colony Park, the mixed-use lifestyle center of which the 200 Renaissance Building is a part, is zoned C-2 General Commercial District or C-3 Convenience Commercial District. Other lands along both sides of Highland Colony Parkway, including the development on the west side of Highland Colony Parkway known as the Township at Colony Park, are zoned C-2 General Commercial District. There is no adjacent or nearby residential property. The closest residential area to the west is separated from the 200 Renaissance Building by commercial property on the west side of Highland Colony Parkway, by Highland Colony Parkway itself, and by retail facilities and office buildings of Renaissance at Colony Park, including the eight-story Cellular South Building, all of which are in commercial classifications. R-00045; 00051.

The 200 Renaissance Building is at the interstate highway east edge of a large commercial area that includes other office buildings but no residential tracts. There is simply no spot zoning present here.

The continuing efforts of the Protestants to shoehorn the facts of this case into the completely different facts of *Modak-Truran* and of *Drews v. City of Hattiesburg*, 904 So.2d 138 (Miss. 2005), cited in *Modak-Truran*, are without merit. For an explanation of why the present case, in which one variance was granted, is so completely

distinguishable from *Drews*, in which six variances were granted so as effectively to rezone the subject property two commercial classifications higher, *see* the original Brief of Appellees/Cross-Appellants, at 33-35.

B. The Protestants Do Not Have Standing Under *Burgess*, Its Antecedents, or Its Progeny.

Turning now to the arguments made by the Protestants as Cross-Appellees, the Bailey Companies would first note that it is irrelevant that the City of Ridgeland did not file a separate Cross-Appeal in regard to the issue of standing and the other issues raised by the Bailey Companies in their Cross-Appeal. All that is necessary for the consideration of these issues by the Supreme Court is that the Bailey Companies, as Appellees on the direct appeal and as Cross-Appellants, raise these issues which they had properly brought before the Madison County Circuit Court. The Bailey Companies did so in their Cross-Appeal before the Supreme Court.

The Protestants incorrectly state that the Madison County Circuit Court "determined and adjudged that the Appellants had legal standing to maintain the appeal." As was carefully explained in the initial Brief of the Bailey Companies, Madison County Circuit Judge Samac S. Richardson denied the two Motions of the Bailey Companies on the standing question and on the class action/unincorporated association aspects of the appeal solely to avoid the possibility of multiple appeals. Judge Richardson did not discuss the substance of the Motions or the strong legal precedent supporting those Motions. He made no adjudication on the merits of those Motions. *See* Brief of

Appellees/Cross-Appellants, at 5-6.

The Protestants, the closest of whom lives across Highland Colony Parkway some 1,632 feet, or .31 miles, from the 200 Renaissance Building, illogically allege that they suffered harm exceeding that of the protestants in the recent *Modak-Truran* decision. The protestants in that case live directly across the street from the Fairview Inn that was the subject of that zoning appeal and are directly impacted by a restaurant operation there.

The Bailey Companies have pointed out that the five cases cited by the Protestants in support of their standing assertions did not, upon close examination, support those assertions. *See* Brief of Appellees/Cross-Appellants, at 46-48. The Protestants have not attempted to refute the argument of the Bailey Companies.

Nor have the Protestants taken issue with the point emphasized by the Bailey Companies that Section 11-51-75 of the Mississippi Code of 1972, under which the Protestants have appealed, "does not in any way confer standing" to appeal. *Burgess v. City of Gulfport*, 814 So.2d 149, 153 (Miss. 2002).

The issue of standing to appeal in zoning cases has not been recently analyzed by the Court. Because it may be helpful to the Court to review how appellate tribunals in other states have dealt with the issue of standing in zoning appeals, the Bailey Companies cited and discussed overwhelming case law from throughout the United States in support of their contention that the Protestants in the present case lack standing to appeal. The Bailey Companies also cited statements made by the leading treatise-writers confirming

507 So.2d 41, 47 (Miss. 1987). Likewise, the Protestants did not attempt to refute the subsequent statement by the Mississippi Supreme Court that a developer lacks standing to appeal a zoning decision when he had not demonstrated that the municipal action "had an adverse effect on the property in which he has an interest." *City of Madison v. Bryan*, 763 So.2d 162 (Miss. 2000). Further, the Protestants did not attempt to refute the later statement by the Mississippi Supreme Court that it had placed on the appealing party a "burden to demonstrate a specific impact or harm felt by him that was not suffered by the general public." *Burgess v. City of Gulfport*, 814 So.2d 149, 153 (Miss. 2002).

The Protestants also did not attempt to refute the statements made by the Mississippi Supreme Court in later cases that parties lacked standing to appeal a municipal decision where they had not demonstrated a specific impact or harm that was not suffered by the general public. *City of Jackson v. Greene*, 869 So.2d 1020, 1024 (Miss. 2004); *Aldridge v. West*, 929 So.2d 298, 301 (Miss. 2006). The Protestants did not attempt to refute the ruling made just last year of the Mississippi Supreme Court that parties attempting to appeal a decision of the Pearl River County Board of Supervisors lacked standing to appeal where they "failed to show that they have any interest in the subject matter separate or in excess of that of the general citizens of Pearl River County" and that they "have failed to show that they will suffer in any way that the general population of Pearl River County will not." *Bennett v. Board of Supervisors of Pearl River County*, 987 So.2d 984, 987 (Miss. 2008).

The Bailey Companies thus submit that Mississippi law, consistent with overwhelming precedent from throughout the United States, supports the contention of the Bailey Companies that the Protestants in the present case lack standing to appeal.

The Protestants anchored much of their argument on *Ball v. Mayor and Board of Aldermen of City of Natchez*, 983 So.2d 295 (Miss. 2008), in which the Mississippi Supreme Court declined to dismiss an appeal for lack of standing by the protestants. The Bailey Companies submit that the reliance by the Protestants upon *Ball* is misplaced.

In *Ball*, the Mississippi Supreme Court upheld the action of the City of Natchez in selling, over the objection of certain appealing residents, surplus land owned by the City and known as the Natchez Pecan Factory Site. The land, which was located on a bluff overlooking the Mississippi River, was sold so that condominiums could be constructed thereon as part of the development of the Natchez Waterfront Development District.

The City of Natchez, citing *Burgess*, filed a Cross-Appeal arguing that the residents lacked standing to appeal. The Mississippi Supreme Court found the circumstances of the Natchez controversy distinguishable from the circumstances of the Gulfport controversy giving rise to *Burgess*. Emphasizing that the appealing Natchez property owners owned properties "located near the Natchez Pecan Factory Site," and that those residents had submitted evidence that the development project proposed for the site "would adversely impact the properties," the Mississippi Supreme Court rejected the Cross-Appeal contention of the City of Natchez in regard to standing.

The ruling in *Ball* was by no means a reversal of the long standing jurisprudence articulated by the Mississippi Supreme Court in the aforementioned cases beginning with *Belhaven Improvement Association* and continuing through *Burgess*, *Greene*, *Aldridge*, and *Bennett*. First, the *Ball* case was ***not*** a zoning controversy. It was a challenge to the sale of surplus public land held in trust for the benefit of the citizens of Natchez brought by taxpayer citizens who were beneficiaries of the trust. Their status as beneficiaries was sufficient to confer standing. The present case concerning the 200 Renaissance Building in Renaissance at Colony Park involves privately owned land for which there are no public trust beneficiaries. The present case arises not under the statutes governing the sale of surplus public land, but rather under the Zoning Ordinance of the City of Ridgeland.

Second, the appellate record in *Ball*, which is on file in the office of the Clerk of the Mississippi Supreme Court, shows that Appellant Sarge Preston owned property directly adjacent to the Natchez Pecan Factory Site. None of the Appellants in the present case own property adjacent to the land on which the 200 Renaissance Building has been constructed, or indeed, anywhere near to that property. The lots owned by the Protestants in the present case range in distance from 1,632 feet, or 0.31 miles, to a distance of 10,987 feet, or 2.08 miles, from the 200 Renaissance Building. See the exhibit map after CP-339.

Third, in *Ball*, the Appellants had alleged that they engaged in recreational

activities on the Natchez Pecan Factory Site, including but not limited to walking and enjoying the scenic vista; that these activities were not engaged in by the general public; and that the sale of the Natchez Pecan Factory Site as surplus land would adversely impact their continuing use and enjoyment of the site. In the present case, the Protestants have not alleged that they have engaged in recreational or other activities on the 200 Renaissance property. The Protestants have not alleged or shown that their position is different from that of the general public. The Protestants have not alleged or shown that the construction of the 200 Renaissance Building will prevent them from engaging in recreational or, indeed, any other activities at the building site.

Fourth, the Appellants in *Ball* had alleged that their property values would be adversely affected. In the present case, while the Appellants have stated that they do not like tall buildings and that they object to the City's granting the Special Exception expressly permitted by the Zoning Ordinance, they have not alleged, and there is nothing in the record to show, that property values of the Protestants have been adversely affected by the construction of the 200 Renaissance Building. Indeed, the record demonstrates just the opposite. Expert witness Hugh Hogue, MAI, after having made a study supported by detailed real estate statistics, presented uncontradicted evidence that the 200 Renaissance Building would increase property values and extend the economic life of the surrounding residential area. R-00119-124. His report showed that property values in the high-quality Woodland Hills area of Jackson had increased while in close proximity to the 13-story

St. Dominic office tower. R-00344-00471.

All these circumstances distinguish the facts of *Ball* from those of the present appeal. But even if the *Ball* case were not distinguishable from the present matter, it would be an anomaly deviating from the rule originally announced in *Belhaven Improvement Association* in 1987 and reapplied in cases continuing down to *Bennett* in 2008.

The Protestants have attempted to couch the *Ball* case as an outright reversal of *Burgess*, its antecedents, and its progeny, and a retreat from a national trend requiring a demonstration of a threshold interest before engaging in litigation over zoning matters. A fair reading of the cases does not support that conclusion. The Court should maintain the requirement that a litigant possess a tangible, defined interest in the outcome of a case in order mount a legal challenge, a requirement that the Protestants in this case have not met.

C. The Protestants Do Not Possess A Colorable Interest in the Zoning for 200 Renaissance Building.

The Protestants also cited *State v. Quitman County*, 807 So.2d 401 (Miss. 2001), for the proposition that parties have standing to sue "when they assert a colorable interest in the subject matter of the litigation." *Id.*, at 405. That assertion begs the question: What is a "colorable interest"? While the Mississippi Supreme Court has used those words on more than one occasion, it has never really defined what constitutes a "colorable interest".

The Bailey Companies submit that a colorable interest is something more than

opposition based upon personal dislikes or specious and speculative claims lacking supportive evidence. For example, in *State v. Quitman County*, Quitman County had a definite monetary interest arising from the fact that it had to provide very expensive funding for indigent defense in a capital murder case under the system then in place, as mandated by the Legislature, that each county fund indigent criminal defense services in that county. Everyone would agree that Quitman County's financial stake in that case gave it a colorable interest to challenge the State system.

Other cases cited in *Quitman County*, in which the Mississippi Supreme Court had made reference to a colorable interest, include *Fordice v. Bryan*, 651 So.2d 998 (Miss. 1995), and *State ex rel. Moore v. Molpus*, 578 So.2d 624 (Miss. 1991). Both of those cases involve disputes between public officials over constitutional and statutory questions. In *Fordice*, legislators challenged the Governor's attempted exercise of partial veto power as being violative of the Mississippi Constitution of 1890. In *Molpus*, the Attorney General and legislators filed suit against the Secretary of State on the issue of whether an early twentieth century initiative and referendum amendment to Mississippi Constitution of 1890, held by the Mississippi Supreme Court in 1922 to be void, was actually in effect. In both *Fordice* and *Molpus,* the Mississippi Supreme Court ruled that the plaintiffs had a colorable interest in the litigation and thus had standing to sue. In both those cases, there were direct and real disputes between high public officials on important constitutional and statutory questions. The facts of *Quitman County*, *Fordice*,

and *Molpus* are far removed from the facts of the present case.

The word "colorable" seems to denote something real rather than speculative. For example, in a title dispute, a plaintiff, even though his deed might ultimately be found to be defective, would have color of title to bring suit as long as a deed purporting to convey title to him had been recorded. *See Cranford v. Hilbun*, 245 Miss. 269, 147 So.2d 309, 312 (1962); *Downing v. Starnes,* 35 So.2d 536, 537 (Miss. 1948). A duly elected Winston County Constable was acting under color of his office in attempting to make an arrest without authority to do so. *See Maryland Casualty Co. v. Eaves*, 188 Miss. 872, 196 So. 513, 515 (1940). In *Eaves*, the Constable was undoubtedly an elected law enforcement officer--a fact that was real, not speculative.

A federal civil rights statute provides for liability against every person who deprives a citizen of constitutionally protected rights, privileges, or immunities under color of state law. *See* 42 U.S.C. §1983. The color of law referred to in Section 1983 includes statutes and ordinances which are something real and definite, not conjectural.

An Internal Revenue Service agent acted under color of federal law when she attempted to use her federal employment status, with the ability to initiate investigations and tax audits, to thwart being arrested by New York City police detectives. *See United States v. Temple*, 447 F.3d 130, 137-39 (2nd Cir. 2005), *cert. denied*, 549 U.S. 987, 127 S.Ct. 495, 166 L.Ed.2d 273 (2006). There was no question of federal employment status.

A colorable interest must arise from something definite, like a deed giving color of title, a position giving color of office, or a statute giving color of law. A colorable interest does not arise from unfounded fears and claims. The Protestants in the present case have no colorable interest in the appeal.

Had the Protestants been able to show that they owned land adjacent to the subject property of the 200 Renaissance Building, or land within 160 feet[3] thereof, they might have had a colorable interest that would have given them standing on appeal. But they did not have such ownership.

The Protestants cited certain nuisance cases in an effort to say that the 200 Renaissance Building is a nuisance that adversely affects them and confers upon them a colorable interest giving rise to standing. For example, the Protestants cite *Biglane v. Under the Hill Corp.*, 949 So.2d 9 (Miss. 2007), in which loud music and noise coming from a saloon was found to constitute a nuisance to the residents of an apartment next door; *Alfred Jacobshagen Co. v. Dockery*, 243 Miss. 511, 139 So.2d 632 (1962), in which

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[3] The 160-foot distance first appeared in Mississippi law in 1924 and 1926, when the Mississippi Legislature adopted and revised the Standard State Zoning Enabling Act drafted by the United States Department of Commerce Advisory Committee on Zoning appointed by Secretary of Commerce (and later President) Herbert Hoover. *See* Miss. Gen. Laws of 1924, chap. 195, section 5; Miss. Gen. Laws of 1926, chap. 308, section 5. That 160-foot distance has remained unchanged for more than 85 years and is currently codified in Section 17-1-17 of the Mississippi Code of 1972, as amended. It is the only legislative expression of the distance in which nearby property owners in zoning disputes undoubtedly have an interest sufficient to allow them to challenge zoning decisions. That 160-foot distance appears in the notice provisions of the zoning ordinances of most Mississippi municipalities, including the City of Ridgeland. R-02508.

an animal rendering plant producing obnoxious, nauseous, sickening, and offensive odors was declared to be a nuisance; *Green v. State ex rel. Chatham*, 212 Miss. 846, 56 So.2d 12 (1952), in which a café and dance hall producing loud and boisterous music until the wee hours of the morning, with no proper sanitary facilities, was held to be a nuisance; and *Lambert v. Matthews*, 757 So.2d 1066 (Miss. App. 2000), in which a gamecock-breeding operation, with numerous roosters producing loud noises, was held to be a nuisance.

A nuisance is a wrong "arising from the unreasonable, unwarrantable, or unlawful use by a person of his own property, or from his own improper, indecent, or unlawful personal conduct working an obstruction or injury to a right of another or of the public producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage." *See Bosarge v. State ex rel. Price*, 666 So.2d 485, 489 (Miss. 1995) (holding that the Pines Club in north Gulfport was a nuisance where it continually sold alcohol to underage students and where 134 criminal cases had arisen between 1986 and 1992). The record is devoid of any nuisance in the present case.

The 200 Renaissance Building, a beautifully designed $60 million office structure, compatible with the Mediterranean design of surrounding structures in Renaissance at Colony Park, is occupied by a law firm, an accounting firm, and a bank. It is located in a highly praised mixed-use development that has become a mecca for shoppers and diners and that is the envy of every other municipality in Mississippi. It produces no noise, odor,

or other offensive elements. It is not an annoyance, inconvenience, or discomfort. By no stretch of the imagination can it be considered a nuisance. As is evident from the *amicus curiae* Brief filed by the Supporters of 200 Renaissance, the 200 Renaissance Building is supported by numerous landowners owning land within close proximity to the building and also by numerous residential homeowners. Nuisances do not attract such overwhelming support. The nuisance cases cited by the Protestants have no applicability to the present situation.

The Protestants argue that the 200 Renaissance Building causes light pollution. Of course, the building, like all buildings, produces light. But there are no searchlights or glaring beams directed at surrounding property owners. The 200 Renaissance Building is just one of many structures in Renaissance at Colony Park, in Township at Colony Park, and in other nearby areas producing light. Its contribution to the light produced in the City of Ridgeland or in the entire Jackson Metropolitan Area is infinitesimal. The fact that the top of the building can be seen from certain lots or subdivision to the west does not make the building a nuisance. Interestingly enough, the Protestants do not complain about the football field at St. Andrews Episcopal School, on the west side of Highland Colony Parkway adjacent to Canterbury Subdivision, where lights from the football field, band music, and noise from cheering crowds at football games have a far greater impact on residential neighborhoods than the distant 200 Renaissance Building.

The Protestants claim that the fact that there will be some increase in traffic on

Highland Colony Parkway and other streets gives them a colorable interest. It is fair to say that objectors in virtually every contested zoning case raise the specter of increased traffic. But here the traffic arguments made by the Protestants have no valid foundation. As the Mississippi Supreme Court pointed out in *Woodland Hills Conservation Association, Inc. v. City of Jackson*, 443 So.2d 1173 (Miss. 1983), in rejecting a traffic argument made by Woodland Hills residential owners objecting to commercial development on the north side of Lakeland Drive, the "proposed development does not connect in any way with residential streets in the Woodland Hills neighborhood" and it was unlikely that the proposed development would increase traffic flow within Woodland Hills. *Id.*, at 1177. In a similar vein, the 200 Renaissance Building does not connect in any way with the residential streets and subdivisions to the west and will not increase traffic flow within those subdivisions.

Moreover, and particularly significant, is the fact that the Bailey Companies submitted a detailed Traffic Impact Analysis as to the effect which the 200 Renaissance Building would have on traffic in the area, where streets have been carefully designed, where Highland Colony Parkway has been widened, where a new frontage road has been built, where traffic signals have been installed, and where other improvements have been made, or are being made, to expedite traffic flow. R-01234-01361. That detailed report concludes "that the existing road system in the vicinity of the Renaissance at Colony Park development will perform satisfactorily once ongoing improvements are completed and

with additional improvements recommended in this report." R-01238. Those findings are undisputed.

Notwithstanding the efforts of the Protestants to take certain figures in the analysis out of context, the Analysis shows peak hour levels of service on local roads and at signalized intersections to be at high-level A and B ratings. R-01262. At the time the Traffic Impact Analysis was prepared in 2007, many road improvements in the area were underway, and traffic signals had not yet been installed at several intersections. During the past two years, road improvements have been completed. Traffic signals have been installed. The 200 Renaissance Building has been completed and occupied. The traffic problems fantasized by the Protestants simply have not materialized.

The arguments of the Protestants about traffic problems have no foundation in fact and are based on speculation and unfounded fears. If the Protestants had competent evidence to support their imagined concerns, they should have introduced that evidence. They simply did not, and could not, do so. The Protestants produced no engineering or other expert studies to give validity to their speculation and unfounded fears. A colorable interest may not arise out of baseless fears.[4]

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[4] After the administrative record was made before the City of Ridgeland in 2007, the Mississippi Department of Transportation announced plans, and began acquiring right-of-way, for the widening of Interstate Highway 55 near the 200 Renaissance Building. That widening will include the construction of new northbound and southbound lanes, the construction of frontage roads on both sides of the interstate highway, and the construction of a new interchange where a new east-west thoroughfare to be known as Colony Boulevard running beneath the interstate highway will connect Highland Colony Parkway on the west with Highway 51 on the east. Because of the acquisition of new right-of-way for the widening, the replica of the Washington Monument which serves as a landmark for Colony Park was recently relocated to the northwest quadrant of the new Colony Boulevard interchange. Traffic

The Protestants similarly argue that their unsubstantiated claims about depreciation of property values gives them a colorable interest so as to confer standing. If the Protestants had some credible evidence to back their claims, perhaps they might have had a colorable interest. But the Protestants produced no such evidence. The only evidence in the record concerning property values is the detailed report provided by expert appraiser Hugh Hogue, MAI. That report, based on detailed statistical information, stated that residential property values in the area would be ***enhanced*** by the proximity of high-quality office buildings like the 200 Renaissance Building and by other high-quality commercial development. Mr. Hogue pointed out that residential values in Woodland Hills Subdivision, within sight of the 13-story St. Dominic tower, had experienced a 38.77% increase. R-00344-00471.

As a last resort, the Protestants raised the so-called "consumer surplus" argument, being an argument about excess of subjective value over market value. They cited three law review articles ranging from 15 to 36 years old in support of the "consumer surplus" argument. The "consumer surplus" theory is an attempt to reformulate nuisance law as an alternative to zoning. Neither the Mississippi Supreme Court nor any other appellate court has ever endorsed the "consumer surplus" argument, which is simply an academic theory. One of the law review articles even admits that market values "may in fact not be an unfair or inefficient standard." Ellickson, *Alternatives to Zoning: Covenants,*

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improvements continue to be made.

Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. Law Rev. 681, 736 (1973). No colorable interest arises from a purely academic theory that has never been endorsed by the courts and is not a part of the law of Mississippi or any other jurisdiction.

D. The Arguments the Protestants Fail to Address and Facts the Protestants Do Not Accurately State.

The Bailey Companies note that there were several arguments advanced in the initial briefing that the Protestants fail to address. While the Bailey Companies do not go so far as to suggest those arguments are confessed, the absence of a response by the Protestants suggests they do not have a meaningful response.

For example, the Bailey Companies argued in their Cross-Appeal that the Madison County Circuit Court erred in failing to dismiss the class action aspect of the appeal and to dismiss the unincorporated association aspect of the appeal. The Bailey Companies have pointed out that class actions and unincorporated association actions are foreign to Mississippi jurisprudence.

In response, the Protestants did not really contest the arguments of the Bailey Companies. Instead, they attempted to confuse the issue by pointing out that neighborhood associations have sometimes been appellants in zoning matters, including the case of *Woodland Hills Conservation Association, Inc. v. City of Jackson*, 443 So.2d 1173 (Miss. 1983).[5]

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[5] In contrast to the situation in the present case, lots in Woodland Hills Subdivision, some of whose owners were members of Woodland Hills Conservation Association, Inc., lay adjacent to, and within 160 feet of, the subject property of the commercial rezoning application.

In the present case, the *ad hoc* unincorporated association known as Z.O.N.E. (Zoning Ordinances Need Enforcement), in which the individual Appellants apparently claim membership, is not named as an appellant. Instead, the Protestants have named twenty or so individuals (a list that has decreased significantly over time) as Appellants "for and on behalf of those similarly situated persons comprising Z.O.N.E." The name "Z.O.N.E." is only a shorthand for other undisclosed, unidentified parties, just as in a class action. The fact that neighborhood associations may have been appellants in other cases is inapplicable to the present situation. The fact that neighborhood associations may have been appellants in previous cases does not permit the individual Protestants to file a class action appeal for and on behalf of similarly situated persons comprising Z.O.N.E..

The Bailey Companies also note that two *amicus* groups filed friends of the Court briefs, which argue that the 200 Renaissance Building will increase surrounding residential property values and enhance the economic and tax benefits and quality of life for the city. While the Protestants may have chosen to ignore *amici*, the fact that more than ***three times*** the number of Protestants signed on and agreed to go on record as ***supporters*** of the building is a matter that the Court should not ignore.

Finally, the Bailey Companies note that the Protestants insinuate that the Bailey Companies acted improperly because they "did not file an appeal of Ridgeland's Zoning

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See the map included as a part of the Opinion. 443 So.2d at 1186.

Board's unanimous denial of the C-6 Petition to Rezone." *See* Combined Reply Brief of Appellants/Brief of Cross-Appellees, at 23 (emphasis added). That argument is misleading in at least three respects.

First, the Bailey Companies' C-6 petition was a petition to rezone the entire 75.921 acre site for Renaissance at Colony Park. It was a petition that was presented as a possible land-use designation for the ***entire development***; it was ***not*** a zoning request unique to the 200 Renaissance Building or filed solely for the purpose of constructing the 200 Renaissance Building.

Second, the Protestants have mischaracterized the role of the Ridgeland Zoning Board. The record clearly reflects that the Zoning Board only made a recommendation and did not deny the C-6 Petition. R-01506. Indeed, the Zoning Board is not authorized or empowered to grant or deny zoning requests as the Protestants seem to imply. Rather, its role is to ***recommend*** a course of action by the Mayor and Board of Aldermen. Once the matter is ultimately considered by the Mayor and Board of Aldermen, and if the petition is denied, only then is the petitioner faced with the decision of whether to appeal the zoning decision or re-file its petition after a period of one year. *See, e.g., A&F Properties, LLC v. Madison County Bd. of Sup'rs.*, 933 So. 2d 296 (Miss. 2006) (holding applicant's failure to appeal prior denial of land-use application by board of supervisors and simply refiling application after county elections reversible error on grounds of administrative *res judicata*.); *see also* Ridgeland Zoning Ordinance § 600.10(I)

(prohibiting submission of petition prior to expiration of one year from denial of prior petition by Mayor and Board of Alderman.).

Third, in this case, the record clearly reflects that the Bailey Companies voluntarily withdrew their C-6 petition prior to its consideration by the Mayor and Board of Aldermen. R-01507-08. Because the Mayor and Board of Aldermen never considered the petition, there was no "denial of the C-6 Petition to Rezone" as the Protestants have (with emphasis) argued. Because there was no decision on the petition of any sort by the Mayor and Board of Aldermen, there was obviously nothing to appeal. There was no decision to which the doctrine of administrative *res judicata* would apply. Therefore, there is no merit to the Protestants' argument regarding the Bailey Companies' prior C-6 petition.

While the Court has said that Mississippi's standing jurisprudence is more liberal than that of federal courts, that does not mean that there are no standing requirements at all. As the Mississippi Supreme Court announced in *Belhaven Improvement Association* in 1987, and reiterated in *Burgess* in 2001, *Greene* in 2004, *Aldridge* in 2006, and most recently *Bennett* in 2008, there are standing requirements that appellants must meet. The Protestants in the present case simply do not meet those requirements. This Court should reject the invitation of the Protestants to confer appellate standing on those with only baseless, speculative, and nebulous claims or on those who have not demonstrated a specific impact beyond that experienced by the general public.

CONCLUSION

The Bailey Companies, as Cross-Appellants, respectfully request this Court to reverse the ruling of the Madison County Circuit Court denying both (1) their Motion to dismiss the appeal for lack of standing by the individual Protestants and (2) their Motion to dismiss the class action and unincorporated association aspects of the appeal. The Bailey Companies request this Court to dismiss the appeal on these grounds and/or to affirm on the principal appeal.

Respectfully submitted,

MADISON COUNTY LAND COMPANY LLC; SOUTHERN FARM BUREAU BROKERAGE COMPANY, INC.; BAILEY-MADISON, LLC; 200 RENAISSANCE, LLC; RENAISSANCE AT COLONY PARK, LLC; AND 100 RENAISSANCE, LLC, APPELLEES AND CROSS-APPELLANTS

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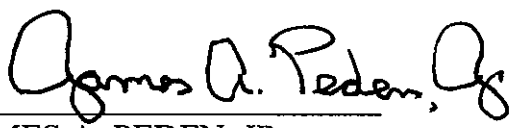
BY: 
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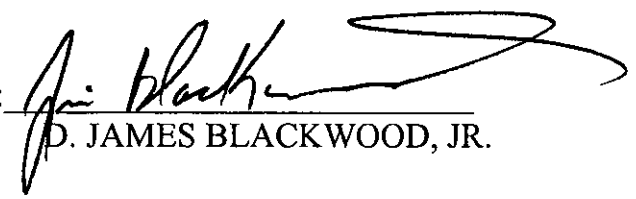
BY: 
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CERTIFICATE OF SERVICE

I, the undersigned, D. James Blackwood, Jr., of counsel for Madison County Land Company LLC, et al, Appellees/Cross-Appellants, do hereby certify that I have this day sent by United States mail, postage prepaid, a true and exact copy of the foregoing Reply Brief of Cross-Appellants to Steven H. Smith, 1855 Lakeland Drive, Suite R-309, Jackson, Mississippi 39216, attorney for the Appellants/Cross-Appellees; to Jerry L. Mills, 800 Avery Boulevard North, Suite 101, Ridgeland, Mississippi 39157, attorney for Appellee City of Ridgeland, Mississippi; to Lynn P. Ladner, Post Office Box 650, Jackson, Mississippi 39205, attorney for *amici curiae* Supporters of 200 Renaissance; to Thomas E. Williams, Post Office Box 22567, Jackson, Mississippi 39225-2567, attorney for *amici curiae* Horne LLP, Regions Bank, and Butler, Snow, O'Mara, Stevens & Cannada, PLLC; and to Samac S. Richardson, Circuit Judge of Madison County, Post Office Box 1662, Canton, Mississippi 39046..

IN WITNESS WHEREOF, I have affixed my signature on this, the 8th day of December, 2009.

D. JAMES BLACKWOOD, JR.