IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DR. CHARLES HALL, JANET H. CLARK, BEATRICE LANGSTON BERRY, KATE SHARP, BELINDA BOOZER, WILLIAM MURPHY, CAROL MURPHY, STEVE HANNEKE, MARY ELLEN MARTIN, MARY S. GODBOLD, BOBBY J. STOKES, KEVIN CAMP, GARY E. PAYNE, MARIA ROSA GUTIERREZ, DENISE MICHELLE WILSON, MARY BISHOFF, JOHN AUSTIN EVANS, MEL EVANS, TED FRENCH, ESTHER FRENCH,LARRY STOWE, PAIGE STOWE, and KIM H. LOPER Individually and as Landowners, Residents, Taxpayers, and Interested Citizens of the City of Ridgeland, Mississippi, and for and on behalf of those similarly situated persons comprising Z.O.N.E., (Zoning Ordinances Need Enforcement)	**APPELLANTS**
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	**INTERVENORS-APPELLEES**

BRIEF OF APPELLANTS

STEVEN H. SMITH
ATTORNEY FOR APPELLANTS (MSB[redacted]
1855 Lakeland Drive, Suite R-309
Jackson, MS 39216
Telephone (601) 987-4800
Facsimile (601) 420-6600

I. CERTIFICATE OF INTERESTED PERSONS

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

1. Dr. Charles Hall, Appellant
2. Janet H. Clark, Appellant
3. Beatrice Langston Berry, Appellant
4. Kate Sharp, Appellant
5. Belinda Boozer, Appellant
6. William Murphy, Appellant
7. Carol Murphy, Appellant
8. Steve Hanneke, Appellant
9. Mary Ellen Martin, Appellant
10. Mary S. Godbold, Appellant
11. Bobby J. Stokes, Appellant
12. Kevin Camp, Appellant
13. Gary E. Payne, Appellant
14. Maria Rosa Gutierrez, Appellant
15. Denise Michelle Wilson, Appellant
16. Mary Bishoff, Appellant
17. John Austin Evans, Appellant
18. Mel Evans, Appellant
19. Ted French, Appellant
20. Esther French, Appellant
21. Larry Stowe, Appellant
22. Paige Stowe, Appellant
23. Kim Loper, Appellant
24. Steven H. Smith, attorney for Appellants
25. James H. Gabriel, Pyle, Mills, Dye & Pittman, Attorney(s) for the City of Ridgeland, Mississippi, Appellee
26. James A. Peden, Jr., Stennett, Wilkinson & Peden, P.A., Attorney(s) for Intervenors-Appellees
27. Glenn G. Taylor, D. Jim Blackwood, Copeland, Cook, Taylor & Bush, Attorneys for Intervenors-Appellees
28. Hon Samac Richardson, Circuit Judge of Madison County
29. H.C. "Buster" Bailey, Jr. (Member/Manager of LLC Appellees)
31. Madison County Land Company, LLC, Intervenor-Appellee
32. Southern Farm Bureau Brokerage Company, LLC, Intervenor-Appellee
33. Bailey-Madison, LLC, Intervenor-Appellee
34. 200 Renaissance, LLC, Intervenor-Appellee
35. Renaissance At Colony Park, LLC, Intervenor-Appellee
36. 100 Renaissance, LLC, Intervenor-Appellee

THIS, the 5th day of May, 2009.

STEVEN H. SMITH

Steven H. Smith (MSB # 7610)
1855 Lakeland Drive, Suite R-309
Jackson, Mississippi 39216
Tel: (601) 987-4800
Fax: (601) 987-6600

ATTORNEY FOR APPELLANTS

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

CASES

STATUTES AND ORDINANCES

IV. STATEMENT REGARDING ORAL ARGUMENT

The Appellants hereby request oral argument in the instant matter pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure. The facts of this case are such that oral argument would assist in the presentation of the matter to the Court. The important public concerns raised by the issues on appeal merit oral argument.

V. STATEMENT OF THE ISSUES

VI. STATEMENT OF THE CASE

Appellants seek the reversal of the Circuit Court of Madison County, which erroneously affirmed the Decisions of the City of Ridgeland. Appellants seek the reversal of the adoption of the Ordinance here in question at the specially called Board of Aldermen meeting held on October 10, 2007. Appellants pray that pursuant to the provisions of Miss. Code Ann.§ 11-51-75, this Court will reverse the Circuit Court and adjudge that the 200 Renaissance Development here in question be limited in (1) its height and (2) its floor area dimensions, (3) maximum buildable area, (4) required number of parking spaces, and (5) setback requirements, so as to be in conformity with the existing Official Zoning Ordinances of the City of Ridgeland, specifically inclusive of Sections 440.04.E. (Maximum Floor Area Ratio), 440.04.D (Maximum Buildable Area), 440.F.1 (Setbacks), and 37.02.B (Parking). Clarified, this result would require that the Circuit Court and the underlying October 10, 2007 Ordinance be reversed such that (1) the subject 200 Renaissance Development structures, office building, and parking building be limited to a height of no more than 48 (forty-eight) feet and four stories or the height consistent with, in accordance with, and compatible with Ridgeland's Official Zoning Ordinances and Comprehensive Plan, and (2) containing not more than ***98,534 square feet of office space*** on the 4.5421 acre parcel of land, and that its parking area be in strict conformity with the requirements of Ridgeland's Official Zoning Ordinances.

This appeal finds its basis in, and arises from, the Order of the Circuit Court of Madison County, Mississippi, which was executed and filed of record on September 17, 2008, and also from the "Corrected Order" of the Circuit Court of Madison County dated September 22, 2008. The Circuit Court erroneously affirmed the actions, omissions, decisions, judgments, minutes and findings and vote(s) made/undertaken by the Mayor and Board of Aldermen of the City of Ridgeland,

Mississippi (hereafter "Ridgeland") on or before October 10, 2007 and October 11, 2007, as well as all underlying and related filings and proceedings, inclusive of those held and conducted before Ridgeland's Planning Commission and Zoning Board. All of the matters from which this appeal arises were taken to the detriment of Appellants and in favor of the Madison County Land Company, LLC, Southern Farm Bureau Brokerage Company, Inc., and Bailey-Madison, LLC (hereafter "Developers/Appellees").

All of the Appellants herein live/make their homes in residential areas and/or subdivisions which are located in close proximity (1/4 to 1 ½ miles) to the 4.5241 acre parcel in question and would necessarily, substantially and continually be adversely affected/impacted if the thirteen (13) story office building and parking structure is/are allowed to be constructed on the 4.5241 acre parcel, and/or as otherwise proposed and/or not disclosed in the "Petition and Application for Special Exception (Conditional Use Permit) and Variances ("hereafter "Petition") dated August 16, 2007, R. at 4-51,. an Amendment to the Petition, dated September 11, 2007, R. at 837-39, (hereafter "Amendment") and a Second Amendment to the Petition dated September 14, 2007, R. at 842-53, (hereafter "Second Amendment") which are found as part of the evidentiary Record herein. The original "Petition and Application for Special Exception (Conditional Use Permit) and Variances" (hereafter "Petition") which ultimately gives rise to this appeal was dated August 16, 2007 and was filed by the Madison County Land Company, LLC, Southern Farm Bureau Brokerage Company, Inc. and Bailey-Madison, LLC (hereafter "Developers" or "Developers/Appellees"). Appellants contend that they are persons aggrieved by the decisions of the City of Ridgeland made on October 10, 2007 (and October 11, 2007) and prosecute this Appeal. Appellants collectively are residents and homeowners in the residential subdivisions which include but are not limited to (1) Canterbury, (2) Windrush, (3) Dinsmor, (4) Rolling Meadows, (5) Olde Towne, (6) Cottonwood, and (7) Bridgewater

and also the non-subdivided areas to the east of the Site, east of Interstate 55, and toward the center of Ridgeland.

Appellants, their homes, and real property will be adversely affected by the Circuit Court's Order(s) affirming the zoning Decisions of the City of Ridgeland which are the subject of this appeal. Appellants have legal and equitable standing to maintain this appeal pursuant to applicable common law and statutory authority. *see Luter v. Oakhurst Associates, LTD,* 529 So.2d 889, 892 (Miss. 1988); *City of Clinton v. Smith*, 493 So.2d 331, 336-37 (Miss. 1986); *Cooper v. City of Picayune*, 511 So.2d 922 (Miss. 1987); *Barrett v. Ballard*, 483 So.2d 304, 305 (Miss. 1985); *Rosenblaum v. City of Meridian*, 246 So.2d 539, 541 (Miss. 1971).

This matter is an appeal based upon the filings and record of proceedings created below in the proceedings and hearings before the Circuit Court of Madison County and the City of Ridgeland, Mississippi, including all filings and a transcript of the record created before the Mayor and Board of Aldermen of the City of Ridgeland on or before October 10, 2007 and October 11, 2007, as well as all underlying and related filings and proceedings, inclusive of those before or with Ridgeland's Planning and Zoning Commission held on September 10, 2007 and Ridgeland's Architectural Review Board and the public hearing(s) relating thereto or held thereafter.

The actions and decisions and Order(s)of the Circuit Court and City of Ridgeland and its Mayor and Board of Alderman, from which this appeal arises, were taken in furtherance of a "Petition and Application for Special Exception (Conditional Use Permit) and Variances ("hereafter "Petition") dated August 16, 2007, an improperly filed Amendment to the Petition, dated September 11, 2007 (hereafter "Amendment") and a Second Amendment (also improperly filed) to the Petition dated September 14, 2007 (hereafter "Second Amendment") which are found as part of the evidentiary Record herein. The Circuit Court erroneously affirmed the actions of the City of Ridgeland and its

Mayor and Board of Alderman in the form of decision(s), judgment(s), and finding(s) (hereafter "Decisions") made/undertaken by Ridgeland on October 10 and/or 11, 2007, which purported to approve the construction of a thirteen (13) story office building and a separate seven (7) story building labeled as a parking garage (hereinafter collectively referred to as "200 Renaissance or the 200 Renaissance Development"), on a 4.5241 acre parcel of property. R. at 2189-97. The parcel of property here in issue is partially zoned "C-3" and partially "C-4," and contains three (3) times as many square feet of office building as is otherwise allowed under Ridgeland's Zoning Ordinances on the 4.5241 acre parcel; all of these actions were taken pursuant to requests by the Developers/Appellees for "variances" and/or "conditional uses/special exceptions" and without any request(s) for rezoning.

Initially, on September 10, 2007, a hearing was held before the Planning and Zoning Board of the City of Ridgeland. During the course of the public hearing before Ridgeland's Planning Board on September 10, 2007, the Developers/Appellees orally sought to amend their application to seek a "special exception"/"variance" so as to construct a 13-story office building as opposed to a 17-story office building. R. at 81-82. The Appellants submitted signed petitions to Ridgeland's Planning and Zoning Board at their September 10, 2007 meeting, which contained in excess of 750 signatures in opposition to the proposed 17-story/13-story office building. R at 1543-1726. Additionally, Appellants offered substantial evidence, in the form of photographs, documents and verbal statements, in opposition to the proposed Development. R. at 149-214; 473-828. At the hearing of September 10, 2007, the Planning and Zoning Board did not recommend the approval of the Petition and Application for Special Exception (Conditional Use Permit) and Variances" (hereafter "Petition"). R. at 1363-1371. All motions made at the Planning and Zoning Board for approval of the subject Development failed to pass. R.at 1363-71 On September 11, 2007, Petitioners/Appellees filed

a written "Amendment to Petition and Application for Special Exception (Conditional Use Permit) and Variances" (hereafter "First Amendment") memorializing its oral request to amend its application to the September 10, 2007 Planning Board Public Hearing so as to construct an office building to consist of 13 stories in height as opposed to 17 stories - - which request had not met with approval from the Planning and Zoning Board the day prior. R.at 837-39.

Although the Planning and Zoning Board did not approve the proposed Development, the Appellants (and *not* the Developers/Appellees) protected their procedural rights by submitting an appeal from the Planning and Zoning Board to the Mayor and Board of Aldermen and demanded a formal Public Hearing. in light of the wording in Section 600.17B of Ridgeland's Zoning Ordinances entitled "Appeals from Recommendation of the Zoning Board." R.at 834. The Appellants, being aggrieved with the lack of recommendation of the Planning and Zoning Board to *deny* the Development at its September 10, 2007 meeting, filed a written Notice of Appeal which entitled Appellants to a public hearing before the Mayor and Board of Aldermen. R.at 834. Upon the demand of Appellants, a hearing was held on October 10, 2007 before the Mayor and Board of Aldermen of the City of Ridgeland, Mississippi pursuant to the aforesaid "Petition and Application for Special Exception (Conditional Use Permit) and Variances" (hereafter "Petition"), along with the First and Second Amendments to the Petition filed by the Madison County Land Company, LLC, Southern Farm Bureau Brokerage Company, Inc. and Bailey-Madison, LLC, (hereafter "Developers" or "Developers/Appellees"), seeking a Special Exception (Conditional Use Permit) and a variance so as to be able to construct an office building not to exceed 17 stories in height, to include three (3) levels of parking space and up to 14 stories of office space. R.at 870-1220. Developers/Appellees further sought a variance from certain front yard set-back requirements for the parking structure situated at the northwest corner of the office building in question. R.at 842-53.

Pursuant to the Petitioners/Appellees' Petition, First Amendment and Second Amendment thereto, Ridgeland's Zoning Board and Mayor and Board of Aldermen were necessarily required to examine, interpret and apply numerous sections of its Zoning Ordinances dealing with "variances", "conditional uses," "special exceptions," "C-2", "C-3", and "C-4" zoning classifications, off-street parking, site plan requirements and numerous substantive and procedural aspects of Ridgeland's Zoning Ordinance. At the October 10, 2007 meeting (which, for clarity, lasted into the early morning hours of October 11, 2007), the Mayor and Board of Aldermen of the City of Ridgeland, Mississippi (hereafter "Ridgeland") adopted an "Ordinance of the Mayor and Board of Aldermen of the City of Ridgeland, Madison County, Mississippi Approving and Granting Special Exception and Conditional Use Permit and a Dimensional Variance for Property Located at the Renaissance at Colony Park, City of Ridgeland, Madison County, Mississippi" (*hereafter referenced as the "Ordinance"*). R. at 2189-2197. Specifically, the City of Ridgeland granted a Special Exception and Conditional Use Permit for the construction of a 13 story office building , R. at 2194. The City did grant one variance under Section 440.04.F.1 of the Ridgeland's Zoning Ordinance to reduce the required front yard [setback] from thirty (30) feet to no less than fifteen (15) feet at 200 Renaissance Building. R. at 2194. **The City was not asked to, and did not, grant any variance to the Developers under Sections 440.04A, D or E although such variances were mandatory before the Development in issue could be lawfully approved. The City of Ridgeland allowed the construction of the 13 story office building/200 Renaissance Development without granting the required variances as to the "Maximum Floor Area Ratio" of the Development under Section 440.04E of Ridgeland's Zoning Ordinance, and without specifically granting the required variance from the "Maximum Buildable Area", Section 440.04D of Ridgeland's Zoning Ordinance. R.at 2189-97. There was also no variance, special exception or conditional use granted under the ordinance**

to allow a required deviation from the required number of parking spaces. *Id.* The City ignored the four story or 48 foot height limitation imposed by Section 440.04A.

The Mayor and Board of Aldermen of Ridgeland adopted the Ordinance referenced immediately herein above, at a specially-called meeting held on Tuesday, October 10, 2007. R.at 2189-2197. The Appellants were present at Ridgeland's Tuesday, October 10, 2007 Board meeting, and represented by counsel. The Appellants' objections and opposition to the City of Ridgeland's adoption and implementation of the Ordinance was made known and was registered with the City of Ridgeland officials at the Board meeting. R.at 868; 952-1048; 1509-2170. The October 10, 2007 Ordinance which granted the Developers'/Appellees' variance(s) and special exception(s)/conditional use(s) passed by a vote of four (4) votes in favor of, and three (3) votes against, the Petition. R. at 01095; 2187; 2189-97. All of the Appellants herein being otherwise aggrieved by the judgment/decision of the City of Ridgeland to adopt and implement the Ordinance, did appeal the actions of the City of Ridgeland's Mayor and Board of Aldermen in adopting the Ordinance in question (dated October 10, 2007) in a timely manner and pursuant to § 11-51-75, Mississippi Code of 1972, to the Circuit Court of Madison County. The Order of the Circuit Court of Madison County, Mississippi, which was executed and filed of record on September 17, 2008, and also from the "Corrected Order" of the Circuit Court of Madison County dated September 22, 2008, erroneously affirmed the City's Decisions.

The original "Petition and Application for Special Exception (Conditional Use Permit) and Variances" (hereafter "Petition") which ultimately gives rise to this appeal was dated August 16, 2007 and was filed by the Madison County Land Company, LLC, Southern Farm Bureau Brokerage Company, Inc. and Bailey-Madison, LLC (hereafter "Developers" or "Developers/Appellees"). R.at 4-51. The Developers/Appellees' Petition originally sought certain variance/condition use(s)/special

exception(s) from the City of Ridgeland for construction of the ***17 story (subsequently amended to be a 13 story)*** office building and adjoining parking garage (hereafter referenced as either "200 Renaissance" or the 200 Renaissance Development) located at the "Renaissance at Colony Park", and to be situated on a 4.5241 acre parcel of property located in the southwest corner of the intersection of Interstate Highway 55 and Steed Road, in the City of Ridgeland, Madison, Mississippi. R.at 4-51. The subject property of the Development is located at the northeast corner of "Renaissance at Colony Park" ("Renaissance"), all located west of Interstate 55, east of the Highland Colony Parkway, north of Old Agency Road and south of Steed Road. *Id.*.

A portion of the 4.5241 acre parcel is zoned as C-4 with a smaller portion of the subject property being zoned as C-3. *Id.* The entire parcel of property in question (4.5241 acres) contains a total of 197,069.79 square feet of ground. R.at 1531; 2196. The Developers'/Appellees' Petition does not identify how much of the 4.5241 acres is zoned C-4 versus how much is zoned C-3, nor how much of the Development (13 story office building and 7 story parking garage) is located on that portion of the property (4.5241 acres) zoned C-3. R. At 4-51. The 13-story office building in issue, to be known as the 200 Renaissance Building, will have 25,000 square feet of office per floor for a total of 325,000 square feet of floor area. R.at 4-51; 848. The height of the 200 Renaissance building would not be limited to the 48 feet established under Ridgeland Official Zoning Ordinances, (see Section 440.04A) but instead, ***would range from 201 feet to 214.6 feet. R. at 00888.***

At the time of the City's actions and Decisions to approve the variance and conditional use(s) for the 200 Renaissance Development, there were 73 commercial, office buildings already located on or adjacent to the Highland Colony Parkway within the City of Ridgeland city limits. R.at 190-91; 1729-68. Of the 73 office buildings located on the Highland Colony Parkway, ***72 buildings were four stories or less***; with only the Cellular South building a/k/a 300 Renaissance (another H.C. Bailey-

related company development) being taller than four stories. ***Photographs of all 72 of these buildings are found in the Record at pages 01729-01768.*** The Cellular South building is 134 feet tall and its visibility from adjacent residential areas is depicted in the Record at pages 01777-1781; 01786-1790; 01797-1801. The Cellular South building, a/k/a 300 Renaissance, represents a June 22, 2005 exception from the City of Ridgeland to Highland Land Colony, LLC. R. at 15. The Warranty Deed by which Developer/Appellee Bailey-Madison LLC was signed by **Mr. H.C. Bailey, Jr.** as Manager of Highland Land Company, LLC. See. R. at 23. The Manager of Developer/Appellee Bailey-Madison, LLC is likewise the same person, **Mr. H.C. Bailey, Jr**. *Id.* The common factor in both the 300 Renaissance exception and the 200 Renaissance exception, obviously, is the same Manager and developer, **Mr. H.C. Bailey, Jr.**, the outspoken proponent for the Developers/Appellees herein. The Cellular South building a/k/a 300 Renaissance, however, is situated ***in the C-2 zoning district***, R.at 46, (i.e., a materially different zoning district than the proposed 200 Renaissance Development), and is *134 feet tall.* R. at 00892. ***The 200 Renaissance Building would be 80.6 feet taller than the Cellular South building a/k/a 300 Renaissance.*** R.at 892; 888. *The already stark contrast to the Ridgeland landscape presented by the Cellular South building/300 Renaissance, as visible from or near the residential neighborhoods occupied by Appellants may be found in the Record at 01777-1790.* The profound impact on the use and enjoyment of the residential neighborhoods caused by the existing Cellular South building/300 Renaissance (at a height 80.6 feet lower than 200 Renaissance) is shown clearly in the Record at page 01790). A map depicting the proximity of the neighborhoods occupied by Appellants in relation to the 200 Renaissance Development is found in the Record at 01802.

Prior to the initial public hearing regarding the Renaissance 200 Development, the Developers/Appellees tethered a red balloon at the proposed site of 200 Renaissance. Photographs

depicting the visibility *of this red balloon* (which is obviously minuscule in size to a 214.6 foot tall building with contained office space of 25,000 per floor) from or near the residential neighborhoods in issue are depicted in the Record at pages 01775-76; 01779-01789; and 01791-1801.

There were no special conditions or circumstances existing which were peculiar to the 4.5241 acre parcel of property in question. R.at 75-315; 870-1220. Indeed, the only special set of circumstances here as regards this 200 Renaissance Development, were created by the Developers'/Appellees *subjective desire to house three tenants, (1) Butler, Snow, O'Mara, Stevens and Cannada law firm, Horne CPA Group, and a portion of the offices of Regions Bank in the same building. The Developers'/Appellees' desire in this regard reportedly stemmed from those proposed tenants' subjective desire to be housed together in the same building and per the Developers/Appellees, accomplishing this economic feat would require a building of not less than 13 stories and an adjacent parking structure of seven stories.* R. at 82; 129; 132-33; 143-44; 877-78. There was and is nothing unique to the real property (or structure) in issue - - except for the subjective desires of the Developers and three tenants who wanted it *there*, and built *their* way - - irrespective of what the City of Ridgeland's zoning ordinances required. Mr. H.C. "Buster" Bailey, Jr., Manager of one of the Developers/Appellees and spokesman for all of them, admitted this motive as follows before the City:

> ***We reduced the height request to 13 floors because that is the number of floors at the floor plan size that is required to accommodate the fine tenant lineup that we have committed to this building.***

R. at 00877 (quote of H.C. Bailey, Jr. as made to the Mayor and Board of Aldermen at the October 10, 2007 public hearing.)

Mr. Bailey's comments, however, did not stop there, and continued later as follows:

> The initial tenant that committed to the building was the Butler, Snow law firm...The next tenant that committed to the building was the Horne CPA Group... and the third tenant that is committed to the building is the regional headquarters for a Fortune 500 company that I have never been authorized to release the name. I know everyone in the room knows the name of the Fortune 500 Company, but I have never been authorized to release the name so I'm going to continue to follow that path tonight. R. at 00877-00878.
>
> . . .
>
> ***We did not want to reduce the height of the building because the entire concept had been developed and committed to these tenants as a 16-story building with 25,000 square foot floor plans.***

R. at 00878

Mr. Bailey's foregoing comments echoed those made by him at the Planning Commission and Zoning Board hearing on September 10, 2007, where he stated as follows:

> ...[W]e have met ... with our tenants ... and we are going to propose that we reduce the height of the building to 13 floors. So we will be amending our application from 17 floors to 13 floors. ***This is the bare minimum number of floors that it takes to house these three tenants. We cannot reduce it any more and house those three tenants, meet their needs and desires and meet our obligations to them. So 13 floors is the bare minimum that we can reduce the height variance to.***
>
> . . .
>
> [An] eight story building will not accommodate the tenants we have committed - - that have committed to us and we have committed , ***and if there's not a 13 story building, there will be no building.***
>
> . . .
>
> This building goes away if it is not approved ***for these tenants.***
>
> . . .
>
> ...[A] 25,000 square foot floor plate is the optimum size floor plate. ***It's not accidental that that's the size of the floors.... That is an optimum size, and that is one of the basic requirements of these tenants.***
>
> ...

When asked what *hardship* (See Ordinance Section 600.08 below) would result if the building were not approved, Mr. H.C. Bailey, Jr. responded as follows:

> ***Well, I haven't thought of it in terms of hardship, but the three tenants have all made their decision to come to this building because they all want to be in the same building... We have explored the possibility of trying to relocate one of the tenants***

> ***in another building on another piece of property, and that's just simply not what they want.***

R. at 00082; 00129; 00132-133 (Quotes of H.C. "Buster" Bailey, Jr. made to the Planning Commission and Zoning Board at the September 10, 2007 public hearing.)

A proponent of the building and a member of [proposed tenant] Butler Snow law firm, confirmed to the Planning Commission and Zoning Board that:

> ***Our executive director and I met with Buster [Bailey] before -- we were at least five years out....[T]he firm decided in July of last year [2006]to come to the city of Ridgeland. We have always expressed our needs in terms of space per floor. The 25,000 square foot is the optimum space for a professional services firm.... So our space per - - square foot per floor was one of our requirements.... And we stated certain size limits -- size requirements for our building as well, so Buster [Bailey] accommodated those.***

R. at 00143-144 (Comments of Steve Rosenblatt made to the Planning Commission and Zoning Board at the September 10, 2007 public hearing.)

Premised upon the *subjective desires* (i.e., their expressed "requirements" and "wants") of three tenants *and without even so much as having* "... *thought of it in terms of hardship*..." the Developers/Appellees submitted their Petition as well as the First and Second Amendments for certain variance/conditional use(s)/special exception(s) from the City of Ridgeland for construction of the 17-story (now 13-story) office building and adjoining parking garage. Indeed, the matter at bar stems directly from the subjective wishes of three businesses simply to be housed as tenants *together* in the same office building, at the location they *want*, with the square footage per floor that they *want*, in the size building they *want*. R.at 82; 129; 132-33; 143-44; 877-78. Thus, this appeal directly pits the rule of law squarely at odds with, and in conflict with, the individual "wants" and desires of three tenants and the Developer(s) who seek to satisfy them. The rule of law must prevail.

Appellants respectfully seek the reversal of the Order of the Circuit Court of Madison County, Mississippi, which was executed and filed of record on September 17, 2008, and also the "Corrected Order" of the Circuit Court of Madison County dated September 22, 2008.

VII. SUMMARY OF THE ARGUMENT

Appellants seek the reversal of the Circuit Court Order(s) which erroneously affirmed the Decisions of the City of Ridgeland and seek the reversal of the adoption of the Ordinance here in question at the specially called Board of Aldermen meeting held on October 10, 2007. Appellants pray that this Court will reverse the Circuit Court and adjudge that the 200 Renaissance Development here in question be limited in (1) its height and (2) its floor area dimensions, (3) maximum buildable area, (4) required number of parking spaces, and (5) setback requirements, so as to be in conformity with the existing Official Zoning Ordinances of the City of Ridgeland, specifically inclusive of Sections 440.04.E. (Maximum Floor Area Ratio), 440.04A (height), 440.04.D (Maximum Buildable Area), 440.F.1 (Setbacks), and 37.02.B (Parking). Clarified, this result and prayer for relief would require that the Circuit Court's Order(s) be reversed and that the October 10, 2007 Ordinance likewise be reversed such that (1) the subject 200 Renaissance Development structures, office building, and parking building be constructed if at all, to a height of no more than 48 (forty-eight) feet and four stories or the height consistent with Ridgeland's Official Zoning Ordinances and Comprehensive Plan, and (2) containing not more than ***98,534 square feet of office space*** on the 4.5421 acre parcel of land, and that its parking area be in strict conformity with the requirements of Ridgeland's Official Zoning Ordinances.

The Order(s) of the Circuit Court, which affirmed the Decisions of the City of Ridgeland made upon the Petition of the Developers/Appellees, and which form the basis of this appeal, were not supported by substantial evidence, were arbitrary, capricious and/or unreasonable. The Circuit Court

erred in failing to determine that the Ordinance was beyond the power of Ridgeland to make, and/or illegal and in violation of statutory, common law and Ridgeland's own ordinances, and violated both statutory and substantive rights of the Appellants by the actions of the Board on October 10 and 11, 2007. Further, the Order(s) of the Circuit Court, affirming the Decisions of Ridgeland, allowed and constituted unlawful ***"spot zoning."*** Additionally, the Circuit Court erred in failing to determine that the Decisions of the City of Ridgeland were result-driven Decisions, performed without adherence to required and mandatory administrative procedures and substantive requirements/ criteria, and based upon inappropriate factors other than those required by statutory and/or common law to form the basis of the City's decision. The Circuit Court erroneously affirmed Decisions of the City of Ridgeland which represent the worst form of "local petty politics" which places the *subjective desires* of business entities above the *objective rights* of its citizenry and the homeowners of Ridgeland who placed their reliance in the City of Ridgeland to enforce its Official Zoning Ordinances - - long before the Developers/Appellees proposed to construct a thirteen (13) story, 214.6 foot high, office tower adjacent to their residential backyards.

VIII. ARGUMENT

As recognized in detail by the Mississippi Supreme Court in *Mayor and Comm'rs v. Wheatley Place, Inc.*, 468 So.2d 81, 83 (Miss. 1985):

> It should be borne in mind, however, that *while a duly enacted comprehensive zoning ordinance is not a true protective covenants agreement, it bears some analogy.*
>
> 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 precisely for this reason that, while this Court accords profound deference to the 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.***

Mayor and Comm'rs v. Wheatley Place, Inc., 468 So.2d 81, 83 (Miss. 1985)(emphasis supplied); *see also Noble v. Scheffler*, 529 So.2d 902, 905 (Miss. 1988)(recognizing that "...unbridled discretion in public officials is the *antithesis* of law.")(emphasis supplied)

A. Standard of Review

To reverse the Circuit Court's Order(s) affirming the Decisions of the City of Ridgeland, Appellants "bear the burden of proving that the decision appealed from and rendered was arbitrary, capricious, discriminatory, or beyond the legal authority of the city's board or unsupported by substantial evidence." *McWaters v. City of Biloxi,* 591 So.2d 824, 827 (Miss. 1991); *Board of Aldermen, City of Clinton v. Conerly*, 509 So.2d 877, 884 (Miss. 1987); *Walters v. City of Greenville*, 751 So.2d 1206, 1211 (Miss.App. 1999). The terms "arbitrary" and "capricious" were defined by the Mississippi Supreme Court in *Burks v. Amite County School Dist.,* 708 So.2d 1366, 1370 (Miss. 1998)(citing *McGowan v. Mississippi State Oil & Gas Bd.,* 604 So.2d 312, 322 (Miss. 1992). "***An act is arbitrary when it is not done according to reason or judgment, but depending on the will alone. "Capricious" is defined as any act done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.***" *Id.* In clarification, a zoning decision also may be set aside if it is illegal. *see Drews v. City of Hattiesburg*, 904 So.2d 138, 140 (Miss. 2005); *Carpenter v. City of Petal*, 699 So.2d 928, 932

(Miss. 1997). "...[L]ocal zoning authorities may not ignore, but must abide by, the restrictions of all applicable zoning ordinances." *Noble v. Scheffler*, 529 So.2d 902, 907 (Miss. 1988); *Robinson v. Indianola Municipal Separate School District*, 467 So.2d 911, 917 (Miss. 1985); *Kynerd v. City of Meridian*, 366 So.2d 1088 (Miss. 1979).

The request for, and grant of a "variance" or a "conditional use" permit[1] is distinguishable from other zoning decisions for purposes of appellate review because conditional use permits are ***adjudicative*** in nature. while zoning ordinances are ***legislative*** in nature. *Barnes v. Board of Supervisors of DeSoto County*, 553 So.2d 508, 510 (Miss. 1989); *City of Olive Branch Bd. Of Aldermen v. Bunker*, 733 So.2d 842 (Miss. Ct. App. 1998); *Vulcan Lands, inc. v. City of Olive Branch*, 912 So.2d 198, 201 (Miss. Ct. App. 2005). In such instances, *the burden is on the Developers/Appellees* in this matter at bar to have established that they have met by a preponderance of the evidence the elements/factors essential to obtaining the conditional use permit. *Id. at* 510.

B. In Granting a Zoning Variance to the Developers/Appellees, the City of Ridgeland Engaged in Illegal Spot Zoning. Restated, The City of Ridgeland's Decisions, In Violation of Law, Allowed Through "Variances" and "Exceptions" Relief Which May Only Be Sought or Allowed, If At All, Through the Formal Rezoning Process. The Circuit Court Erred In Failing to Reverse the Actions of the City.

The Mississippi Supreme Court has repeatedly made it clear that "[t]he Courts *presume that the original zoning is well planned and designed to be permanent.*" *Board of Alderman, City of Clinton v. Conerly,* 509 So.2d 877, 883 (Miss. 1987); *City of New Albany v. Ray*, 417 So.2d 550, 552 (Miss 1982); *City of Oxford v. Inman*, 405 So.2d 111, 113 (Miss. 1981); *Sullivan v. City of Bay St.*

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[1] Under Ridgeland's Official Zoning Ordinances, a "***conditional use***" permit is synonymous with a "***special exception***" and accordingly, the legal discussion which follows collectively addresses the relief sought by the Developers from Ridgeland, and the October 10, 2007 Ordinance and the Decisions of the City of Ridgeland under the collective categories of (1) a ***dimensional variance*** and (2) a ***conditional use/conditional use permit.***

Louis, 375 So.2d 1200, 1201 (Miss. 1979). "...**[L]ocal zoning authorities may not ignore, but *must* abide by, the restrictions of all applicable zoning ordinances.**" *Noble v. Scheffler*, 529 So.2d 902, 907 (Miss. 1988)(emphasis supplied); *Robinson v. Indianola Municipal Separate School District*, 467 So.2d 911, 917 (Miss. 1985); *Kynerd v. City of Meridian*, 366 So.2d 1088 (Miss. 1979). **"A variance [which is] merely for the convenience of a landowner is not [a] sufficient [basis]."** *Caver v. Jackson County Board of Supervisors*, 947 So.2d 351, 354 (Miss. Ct. App. 2007); *Westminster Presbyterian Church v. City of Jackson*, 176 So.2d 267, 272 (1965). When viewed against these applicable legal standards, the Petition(s) of the Developers/Appellees and the Decisions of the City of Ridgeland, and the Circuit Court's erroneous Order(s) affirming them, are rendered contrary to law and by legal axiom, are both thereby arbitrary, capricious and unreasonable.

Under the City of Ridgeland's Official Zoning Ordinances, Article II, Section 21, the term "***variance***" is defined as follows:

> "A relaxation of the terms of the *Zoning Ordinance* where such variance will ***not be contrary to the public interest*** and where, owing to ***conditions peculiar to the property and not the result of the actions of the applicant***, a literal enforcement of the ordinance would result in ***unnecessary and undue hardship***. However, ***financial hardship*** shall ***NOT*** be considered justification for granting a variance. The criteria for issuance of a variance are listed in Section 2507 of this Ordinance. As used in this Ordinance, a variance is authorized only for height area and size of structure or size of yards and open spaces. ***Establishment or expansion of a use not permitted shall not be allowed by variance nor shall a variance be granted because the presence of nonconformities in the Zoning District or uses in an adjoining district.***" (*Emphasis added.*)R. at 2359-2360.

In the landmark decision of ***Drews v. City of Hattiesburg***, 904 So.2d 138 (Miss. 2005), the Mississippi Supreme Court was faced with an appeal from a zoning decision of the City of Hattiesburg which bears striking similarity to the subject Decisions of the City of Ridgeland in the case at bar. In *Drews,* a developer petitioned the City of Hattiesburg for variances from the City's

zoning ordinance for the purpose of building only *one (1) 60,000 square foot medical office building.* The City's zoning board [Hattiesburg Board of Adjustments] granted four (4) of the six (6) requested variances to allow for (1) a reduction in the "setback" and (2) lesser requirements for the number of parking spaces for the medical office building than was otherwise required by the City's ordinance. Interestingly, the zoning board *denied* two of the developer's requests for variances (from the applicable zoning ordinance)to increase the proposed building height from 35 to 45 feet and to increase the size of the proposed building from 10,000 square feet (allowed by the ordinance) to 60,000 square feet. An appeal was taken to the Hattiesburg City Council which voted to grant all six variances (i.e., thereby allowing the variances (a) to increase the proposed building height from 35 to 45 feet (i.e., a height variance)and (b) to increase the size of the proposed building from 10,000 square feet (allowed by the ordinance) to 60,000 square feet (i.e., a dimensional floor area ratio or maximum buildable area variance.) Thereafter, a further appeal was taken from the City Council to the Forest County Circuit Court, which Court affirmed the City Council's grant of all six variances. On further appeal, the Mississippi Court of Appeals *reversed and rendered* the decision of the Circuit Court and ruled *inter alia* that the granting of the requested variances constituted illegal "***spot zoning***." Upon grant of further appeal by petition for writ of certiorari, the Mississippi Supreme Court affirmed the decision of the Mississippi Court of Appeals, specifically affirming that the actions of the City Council constituted unlawful "***spot zoning***."

An analysis of the Mississippi Supreme Court's decision in *Drews*, as applied to the matter *sub judice*, clearly renders the Circuit Court's Order(s) to be in error as the Decisions of the City of Ridgeland were unlawful, arbitrary, capricious and/or unreasonable conduct and/or illegal "spot zoning" in favor of the Developers/Appellees. In *Drews*, the Mississippi Supreme Court reviewed the definition of "variance" which is directly comparable to the definition of "variance" found in the

City of Ridgeland's Official Zoning Ordinances. Paraphrased, under Hattiesburg's ordinance a "variance" was permissible for (1) undue hardship (2)which hardship could not be created by the developer itself, (3) which hardship could not be of an economic nature, and (4) the hardship must be owing to circumstances "***unique to the individual property on which the variance is sought.***" *Drews,* 904 So.2d at 140-41. Notably, Ridgeland's ordinances defining "variance" contains each of these same definitional criteria as requirements.[2] The Ridgeland ordinances determinative of the circumstances under which a variance can be granted are likewise directly analogous and similarly restrictive. *See* Section 600.08, *infra.*

In *Drews*, the Mississippi Supreme Court's legal analysis centered upon whether or not the requested variances, despite their characterization as "variances," actually attempted "...something more drastic, such as ***rezoning***." *Id.* at 141(emphasis supplied). The Mississippi Supreme Court recognized a definition of "spot zoning" as being a "... zoning amendment which is not in harmony with the comprehensive or well-considered land use plan of the municipality." *Id.* In *Drews,* the Mississippi Supreme Court gave particular importance to the facts that (1) the requested variances would have allowed a square footage increase from 10,000 square feet to 60,000 square feet and (2) the requested variances would have allowed *a ten (10) foot increase* in the building height restriction (i.e., an increase to 45 feet from the 35 feet allowed by the existing ordinance.) *Id at 141-42.* The Court also considered (3) that the number of parking spaces would have been reduced below what was required by the ordinance, (4) that the "set back" for the building would have been reduced by

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[2] "**Variance**" is defined by the City of Ridgeland, in pertinent part, to be "A relaxation of the terms of the *Zoning Ordinance* where ... owing to ***conditions peculiar to the property and not the result of the actions of the applicant***, a literal enforcement of the ordinance would result in ***unnecessary and undue hardship***. However, ***financial hardship*** shall ***NOT*** be considered justification for granting a variance.(emphasis supplied) R.at 2359-2360.

15 feet, and (5) that the "impervious surface percentage (directly analogous to Ridgeland's "floor area ratio" ordinance requirement) would have been increased by 13% (from 60% to 73%). *Id* Given the nature of these requested variances, the Mississippi Supreme Court was emphatic in its pronouncement that such attempted "variances" represented an attempt by the City of Hattiesburg "... to bypass the safeguards provided by the rezoning process ... [and that] ... the proposed variances are not minor departures from the scope and intent of the B-1 [zoning] classification." *Id.* As stated by the Mississippi Supreme Court, "***Finding that the proposed variances constituted a rezoning in fact, the effect of which is spot zoning, we affirm the Court of Appeals' judgment, reverse the circuit court's judgment, and render judgment here denying the six zoning variances requested by ... [the developer.]***" *Id.* (emphasis added)

Just as in *Drews*, but upon an even more egregious attempt by the City of Ridgeland to grant by "variance" what would instead require formal rezoning by the statutory process, the Circuit Court erred in affirming the Decisions of the City of Ridgeland which constitute illegal "spot zoning" and should be reversed. In the case at bar, the City's interpretation and application of its zoning ordinances, resulting in the October 10, 2007 Ordinance as granted to the Developers, would **(1)** increase the number of otherwise allowable floors and feet of height from four (4) floors/48 feet, to thirteen (13) floors with no actual maximum height restriction being placed on the height of the building by the City of Ridgeland.[3] R.at 848; 2189-2197. The height of the 200 Renaissance Building, according to the Developers/Appellees, would not be limited to the 48 feet established under

[3]At a minimum the *de facto* or default height increase under the variance would be 9 floors at 12 feet per floor or a total of *108 feet* above the ordinance's maximum of 48 feet (*an increase of more than 225% beyond the height limitation allowed by ordinance.* In reality, the Development will have an even greater but unspecified height for the office building and at least 67 feet for the adjoining seven floor parking building. R.at 888; 2463; 2470.

Ridgeland Official Zoning Ordinances, but instead, ***would range from 201 feet to 214.6 feet.*** R. at 00888.[4] ***This height represents a building height for 200 Renaissance which is more than one-hundred and sixty-six (166.6) feet more than the height limitation allowed under the City of Ridgeland's Official Zoning Ordinances in either a C-3 or C-4 zoning district.*** R.at 2463; 2470. ***The total height of 200 Renaissance (214.6 feet), divided by the number of its floors (13) represents a more than 4.5 "feet per floor" increase over the de facto height-per-floor (12 feet per floor) contemplated by the City's ordinances. (see fn. 3 above)***

In the case at bar, the Circuit Court's Order(s) also erroneously would **(2)** grant a variance with regard to dimensional requirements under Section 440.04.F.1 of the Official Zoning Ordinances of the City of Ridgeland to reduce the required front yard [setback] for the Renaissance 200 Development from thirty (30) feet to no less than fifteen (15) feet. R. at 2194.[5] This change represents a 50% reduction in the required front yard [setback] of Section 440.04.F.1 of the Zoning Regulations Ordinance of the City of Ridgeland; this setback variance is the *same 15 foot dimensional variance deemed material* by the Mississippi Supreme Court in its "spot zoning" discussion in *Drews.*

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[4]The Mississippi Supreme Court in *Drews* found *a ten (10) foot increase* in the building height restriction (i.e., an increase to 45 feet from the 35 feet allowed by the existing ordinance.) to be material to its "spot zoning" determination. *Id at 141-42.* In the case at bar, *the height increase of the building is 166.6 feet above what was allowed under Ridgeland's existing ordinance.* R.at 2463; 2470.

[5]***It is readily apparent from the submissions that without obtaining the fifteen (15) foot setback, the Development could not be constructed and/or would otherwise further infringe upon or affect the portion of the property zoned C-3 in order to achieve the same dimensional requirements. The significance of this "setback" is thus underscored, becauseunder C-3 zoning, neither the thirteen (13) story office building or seven (7) story parking garage could be built. See Ridgeland Zoning Ordinance Section(s) 430 generally and also Sections 430.01-430.10. Under Sections Section(s) 430 generally and also Sections 430.01- 430.10 of Ridgeland's Zoning Ordinances, there is no "conditional use" provided for in a C-3 zoned area for any building over forty-eight (48) feet in height!*** R.at 2463; 2462-68.

The City of Ridgeland's actions would also **(3)** arbitrarily, capriciously and illegally increase the Floor Area Ratio of the 200 Renaissance Development allowed under Section 440.04E of Ridgeland's Zoning Ordinance *by more than 300%.* (E.g. 325,000 square feet in building ÷ 197,068 square feet of land area = 1.64 Floor Area Ratio ("FAR")). **Section 440.0E of Ridgeland' Official Zoning Ordinances establishes the "floor area ratio" in "C-4" zoned areas as ".5." R.at 2470. The October 10, 2007 Ordinance (for the 200 Renaissance Development) has approved a "floor area ratio" on the Development which is more than three (3) times greater than allowed under the Official Zoning Ordinances of the City of Ridgeland.** R.at 848; 1531; 2189-97; 2470.

Further, the Circuit Court erred in failing to recognize, and reverse on the grounds that, the City's October 10, 2007 Ordinance (for the 200 Renaissance Development) **(4)** would, per the Developers/Appellees' Petition, allow the 13-story building with a footprint of 27,707 square feet including the exterior (25,000 useable office space per floor) and adjacent parking garage/facility (which itself will have 51,900 square feet) to cover *at least **40% (forty percent)** of the total area of the 4.5241 acre Site of the Development, thereby exceeding by at least 15 % the Maximum Buildable Area (25%) allowed under the applicable ordinance.*[6] R.at 848; 1531; 2189-97.

Section 440.04.D of Ridgeland's Official Zoning Ordinances establishes a "maximum buildable area" on property zoned for "C-4" use of no more than twenty-five (25) percent (%). R.at 2470. Just as in *Drews*, the City's Ordinance would also **(5)** reduce the number of parking spaces for the Development from that required under the applicable formula under Ridgeland's Official Zoning Ordinances. *See Section 37.02B* Indeed, the Developers'/Appellees' Petition does not even purport

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[6]Again, the Mississippi Supreme Court in *Drews* found an increase of only 13% to be a material deviation from the applicable ordinance for purposes of spot zoning. The "in-excess-of- 40%" calculation would be achieved by using either the 25,000 per floor office space figure or the 27,707 exterior footprint figure.

to define the number of parking spaces to be provided in the Development in issue. R.at 4-51. **Developers/Appellees would need 1,083 parking spaces under Section 37.02B. of Zoning Ordinance to build an office building containing 325,000 square feet or some sort of exception or variance thereto. R.at 2375-76. No request with regard to the number of parking spaces required by an office building containing 325,000 square feet of office space was contained in Petitioners/Appellees' Petition or Amendments thereto, nor granted, or addressed in the Ordinance adopted by Ridgeland on October 10, 2007.** R.at 2189-97. Neither has the Circuit Court or Ridgeland or the Developers/Appellees identified any language which would make Section 37.02B. inapplicable to the 13-story office building here in question. Indeed, no parking garage information/representations/ calculations or total number of parking spaces to be contained in the parking garage were addressed or contained in Petitioners/Appellees' Petition, First Amendment or Second Amendment. However, in the Traffic Impact Analysis performed for the Developers/Appellees, and which was provided to the City of Ridgeland at the October 10, 2007 public hearing, the engineering firm of Neel-Schaffer confirms that the parking garage will have " ... a 1,000 car parking garage." R. at 01238. Accordingly, the Renaissance 200 Development *approaches a 10% deficiency* in the number of parking spaces required for this Development under Ridgeland Ordinance Section 37.02B, as shown by the Developers'/Appellees' own evidence. R.at 848; 1238; 2375-76.

Moreover, in contravention of the Mississippi Supreme Court's mandate and rationale in the *Drews v. City of Hattiesburg* decision, the totality of the variances or conditional use(s) allowed the Developers/Appellees by the City of Ridgeland would allow a 13-story office building containing 325,000 square feet of office space in the proposed 200 Renaissance building alone. When one applies the "Maximum Floor Area Ratio" ("FAR") (using a FAR of 0.5) to the total square footage

of the parcel of property in question (197,068) in relation to the total number of square feet proposed in the 13-story office building (325,000), ***the floor area ratio would exceed that allowed under Section 440.04E of Ridgeland's Zoning Ordinance by more than 300%.*** (e.g., 325,000 square feet in building ÷ 197,068 square feet of land area = 1.64 Floor Area Ratio.)[7] Under Section 440.04E of Ridgeland's Zoning Ordinance, when one applies the 0.5 FAR to the subject property (197,068 square feet), a building *containing only one-half (½) of the 197,068 square feet could be lawfully constructed, i.e., only a building containing* ***98,534*** *square feet of office space.*[8] R.at 2470. Neither the Circuit Court nor Ridgeland nor the Petitioners/Appellees have identified any wording in Ridgeland's Zoning Ordinance which exempts the application of Section 440.04E to Petitioners/Appellees' 13-story office building. *No variance has been sought from or granted by the City of Ridgeland from this otherwise governing limitation, thereby rendering the Development to be in direct violation of Ridgeland's existing ordinances and in direct violation of law.* R.at 2470.

The Mississippi Supreme Court's decision in *Drews* represents the most current and directly applicable decision by this State's highest appellate court. The application of the *Drews* factors to the Decisions by the City of Ridgeland mandates the inescapable legal conclusion that the City of Ridgeland, in favor of the Developers/Appellees, engaged in unlawful **"spot zoning"** in violation of

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[7]In *Drews*, The Mississippi Supreme Court found an increase of only 50,000 square feet to be a material deviation from the applicable ordinance for purposes of spot zoning. Here, the Appellants are faced with a *more than 225,000 square foot deviation from the ordinance.*

[8]***98,534 square feet of office space ÷ (divided by)12 feet per floor = only 8 stories of office space on the 4.5241 acre parcel with only 12,316.75 square feet of office space per floor or 98,534 square feet of office space ÷ (divided by) 25,000 quare feet of office space per floor =3.94 total floors/stories in the building.***

the ordinances of the City of Ridgeland.[9] Accordingly, the Circuit Court's Order(s) affirming the Decisions of the City of Ridgeland should be reversed because such Decisions constitute illegal "spot zoning" in violation of Mississippi law.[10]

Further underscoring the arbitrary, capricious and/or unreasonable nature of the actions and Decisions of the City of Ridgeland, and the error on the part of the Circuit Court in affirming them, is the fact that *the Developers/Appellees knew, even before submitting the subject Petition, that the City of Ridgeland could not lawfully grant by variance and conditional use(s) what the Developers/Appellees were seeking.* Prior to the filing of Developers'/Appellees' Petition herein, "Renaissance at Colony Park, LLC," a subsidiary and/or affiliate and/or predecessor to the Petitioners herein, filed a "***Petition to Rezone Real Property***" with Ridgeland dated June 21, 2007, roughly two months prior to the filing of its original Petition which is the subject of this Appeal. R.at 1372-1503. The "Petition to Rezone Real Property (hereafter "Petition to Rezone") sought "***to rezone*** and reclassify that certain property commonly referred to as "Renaissance at Colony Park," from a C-4,

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[9]The Ridgeland Ordinances recognize spot zoning as an improper practice and as a use incompatible with surrounding uses. R. at 1850. Accordingly, a finding that the City of Ridgeland has engaged in spot zoning equates to a legal finding under the ordinances that the uses sought by the Developers/Appellees are "incompatible with surrounding uses."

[10]Any attempt to justify this spot zoning as justified lawful "rezoning" not only runs afoul of the substantive and procedural aspects of due process and Mississippi law and Ridgeland's ordinances, but also was not among the relief requested by the Developers/Appellees before the zoning board or City. Further, the Record does not contain any showing by clear and convincing evidence of the requirements for rezoning such as proof that (1) there was a mistake in the original zoning, or (2) that the character of the neighborhood has changed to such an extent as to justify reclassification, *and* (3) that there was a public need for rezoning. *See, e.g. Board of Aldermen v. City of Clinton v. Conerly,* 509 So.2d 877, 883 (Miss. 1987).

Highway Commercial District; C-3, Convenience Commercial District and C-2, General Commercial District *to a zoning classification of* ***C-6, Regional Shopping Mall District.***[11] *Id.*

Ridgeland's Zoning Board and/or Planning Commission eventually took up and considered the Petition to Rezone and by unanimous vote, Ridgeland's Zoning Board denied the application to Rezone the 75.921 acre tract of property referred to in paragraph 4 of Petitioners/Appellees' Petition from its C-4, C-3 and C-2 zoning classifications to a C-6, Regional Shopping Mall District. R.at 1372-1503. The Petitioners who previously had filed the Petition to Rezone a portion of the Renaissance at Colony Park Development from its C-2, C-3 and C-4 zoning classification to a C-6, Regional Shopping Mall District, did not file an appeal of Ridgeland's Zoning Board's unanimous denial of the C-6 Petition to Rezone. R.at 1504-08. With the recognition that the subject property could not and would not pass the legal requirements for *rezoning*, the Developers/Appellees elected to request through *"**variances**"* and *"**special exceptions/conditional use(s)**"* the forms of relief which may only be sought or allowed through the formal ***rezoning*** process. R.at 4-51. In so doing, the Developers/Appellees necessarily sought action by the City of Ridgeland in their favor and in an obvious and concerted violation of Ridgeland's zoning ordinances, and thereby sought to achieve a *"**spot rezoning**"* of the 4.5241 acre site of the proposed 200 Renaissance Development. The Developers/Appellees succeeded in their efforts to convince the slimmest majority of the City of Ridgeland's elected officials to act in violation of its own ordinances, and to engage in arbitrary, capricious and unreasonable conduct in violation of law, and to *"**spot zone**"* the 200 Renaissance Development. It is this very type conduct which the

[11]The 4.52 acre parcel of property here in question lies within the "Renaissance at Colony Park" property and specifically at the very northeast corner of that property, which is also the southwest corner of the intersection of Interstate 55 with Steed Road in the City of Ridgeland, Mississippi. R.at 2194-96.

Mississippi Supreme Court expressly condemned in the *Drews* decision and which, respectfully, the Appellants ask this Court to reverse in accordance with law.

C. In Granting a Zoning Variance and Special Exception(s)/Conditional Use(s) to the Developers/Appellees, the City of Ridgeland Either Arbitrarily, Capriciously and/or Unreasonably and/or In Violation of Law Wrongfully Failed to Enforce Its Own Ordinances. The Circuit Court Erred In Failing to Reverse the Actions of the City.

In further showing and explanation of the unlawful, arbitrary, capricious and unreasonable and/or unlawful nature of the Decisions of the City of Ridgeland in favor of the Developers/Appellees, the Circuit Court's Orders erroneously failed to recognize that Ridgeland violated its own applicable ordinances with regard to (1) Maximum Building Height Limitations, (2) mandatory conditions and procedures for consideration of zoning variances and exceptions/conditional uses, (3) parking requirements, (4) dimensional variances generally, and more specifically with regard to (5) Floor Area Ratio, and (6) Maximum Buildable Area Dimensional Requirements. Each of these categories of unlawful deviations by the City of Ridgeland are discussed herein below in turn.

(1) The Violation of Ridgeland's Maximum Building Height Limitations: The City's Decision Deviates From *Seventy-Two* (72) Prior Zoning Enforcements Of Its Pertinent Zoning Ordinances, Including the Maximum Building Height Limitations, for Other Buildings on or Adjacent to Highland Colony Parkway. The Circuit Court Erred In Failing to Reverse the Actions of the City.

The 13-story office building was approved to contain 13 stories of 25,000 square feet of office space per floor, for a total of 325,000 square feet of floor area in the proposed 200 Renaissance Building. Appellants filed and presented their Memorandum addressed to Ridgeland's Planning and Zoning Commission in opposition to Petitioners/Appellees' Petition. R.at 473-828. Appellants offered into the record before Ridgeland's Planning Board photographs of all 73 commercial or office buildings located on or adjacent to the Highland Colony Parkway within the City of Ridgeland city

limits, ***of which 72 of the 73 buildings were four stories or less***, with only the Cellular South building being taller than four stories.[12] R.at 190-91; 1729-68. The *reason* that the office buildings and commercial buildings which either front upon or are adjacent to Highland Colony Parkway are four stories or less equates to factors of (1) lower density in commercial development, and because (2) the commercial buildings are not visible from any significant distance - -factors whose importance is made self-evident under the evidentiary Record for this appeal. R.at 1729-68; 1802.

Adjacent to Highland Colony Parkway and to its west, are numerous upscale residential subdivision developments comprised by hundreds of residential homes, which in turn are occupied by thousands of Ridgeland residents, inclusive of Appellants. These residential subdivisions include but are not limited to (1) Canterbury, (2) Windrush, (3) Dinsmor, (4) Rolling Meadows, (5) Olde Towne, (6) Cottonwood[13], and (7) Bridgewater. R.at 46; 1802. Also adjacent to or in close proximity to Highland Colony Parkway and the existing commercial developments are the non-subdivided areas to the east of the Site, east of Interstate 55, and toward the center of Ridgeland. R.at 1802. The height and floor area ratios of office and commercial buildings and structures adjacent to Highland Colony

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[12]The Cellular South building, a/k/a 300 Renaissance, represents a June 22, 2005 exception from the City of Ridgeland to Highland Land Colony, LLC. See R. at 15. The Warranty Deed by which Developer/Appellee Bailey-Madison LLC was signed by **Mr. H.C. Bailey, Jr.** as Manager of Highland Land Company, LLC. See. R. at 23. The Manager of Developer/Appellee Bailey-Madison, LLC is likewise the same person, **Mr. H.C. Bailey, Jr**. The common factor in both the 300 Renaissance exception and the 200 Renaissance exception, obviously, is the same Manager and developer, **Mr. H.C. Bailey, Jr.**, the outspoken proponent for the Developers/Appellees herein. The Cellular South building a/k/a 300 Renaissance, however, is situated in the C-2 zoning district (i.e., a materially different zoning district than the proposed 200 Renaissance Development), and is *134 feet tall.* R. at 00892. *The 200 Renaissance Building would be 80.6 feet taller than The Cellular South building a/k/a 300 Renaissance. The already stark contrast to the Ridgeland landscape, visible from the residential neighborhoods occupied by Appellants may be found in the Record at 01777-1790.*

[13]Cottonwood is located to the east of Interstate 55 but is nonetheless affected by the 200 Renaissance Development.

Parkway are essential components to the maintenance of the adjacent residents' privacy and the intended use and enjoyment of their homes. R. at 992-1047. When the City of Ridgeland approved the construction of these residential neighborhoods, its ordinances recognized the importance of placing **height limitations**, **floor area ratios** and **maximum buildable areas** for commercial buildings in certain zoning areas such as those here in issue (i.e., C-3 and C-4. R.at 2463; 2470. These limitations in turn allow for the harmonious construction and coexistence of residential developments and commercial developments in reasonably close proximity to one another. When these protective zoning ordinances, which were adopted to protect the public as a whole, are flagrantly disregarded for the *subjective* desires of the few, this harmony and coexistence are lost and the opposite result occurs. An elementary review of Ridgeland's applicable zoning ordinances supports the conclusion that the subject Decisions and October 10, 2007 Ordinance of the City of Ridgeland not only betrayed its residential residents, but also, constituted arbitrary, capricious and unreasonable actions in violation of the ordinances, statutory and common law. The Circuit Court erred as a matter of law in not reversing the Decisions of the City.

The Site for the proposed Development is 4.5241 acres situated within two zoning classifications, C-3 and C-4 - - a result achieved by the Developers/Appellees themselves in their design and construction of that separate development now known as "Renaissance at Colony Park."R. at 46. A portion of the 4.5241 acre Site is zoned C-3; the remaining portion is zoned C-4. R.at 46. Section 430 of Ridgeland's Official Zoning Ordinance is designated as "Convenience Commercial District C-3." R.at 2462. Unlike Section 410, "General Commercial District C-2,", R.at 2450-55, and Section 440, "Highway Commercial District C-4,", R.at 2466-71, Ridgeland's C-3 Zoning Classification *does not contain any provision that would allow for a building in excess of a maximum height of 48 feet or four stories under any circumstances*. **Section 430**, C-3 Zoning Classification,

does not allow as a "**conditional use**," "... buildings in excess of 48 feet or four stories." (Ridgeland Zoning Ordinance Section 430.01-430-10.) R. At 2462-64. Under Section 430.04, "Dimensional Requirements," dimensional requirements are more restricted in areas zoned C-3 than areas zoned C-2. "This is due to the traffic and noise-related characteristics of uses first permitted in C-3 districts." (Ridgeland Zoning Ordinance, Section 430.04.) R.at 2463. Under Section 440 of Ridgeland's Zoning Ordinance, "Highway Commercial District, C-4, Section 440.04, "DIMENSIONAL REQUIREMENTS" also contains the express restriction and limitations on maximum building height and floors, to-wit: "A. Maximum Building Height: 48 feet or four stories." R.at 2470.

In its enforcement of its zoning ordinances, including (1) the height limitations, (2) floor area ratios, (3) maximum buildable areas, and (4) required parking, the City of Ridgeland essentially ***"got it right"*** seventy-two (72) times when it allowed commercial development and office buildings in the zoned areas adjacent to Highland Colony Parkway. See R. at 1708-1822. However, as to the 200 Renaissance Development, Ridgeland contravened its own ordinances, acted arbitrarily, capriciously and/or unreasonably and/or contrary to law, and obviously ***"got it wrong."*** **The City, as to this Development, violated its floor and height restrictions, floor area ratios, maximum buildable areas, parking requirements and flatly disregarded the mandatory conditions set forth in its own ordinances for the granting of variances and conditional uses.** Indeed, the City allowed the subjective desire of the Developers/Appellees to override the objective, established protective zoning ordinances that had heretofore allowed commercial uses and residential uses to peacefully coexist. The City's actions were unlawful and they were arbitrary, capricious and unreasonable. These Decisions, and the Orders of the Circuit Court affirming them, should be reversed.

2. The City's Violation of Mandatory Conditions and Procedures For Consideration of Zoning Variances and Exceptions/Conditional Uses: The City Acted Without Prior Approval from the Planning and Zoning Board and Without Prior Recommendation from the City Zoning Administrator. The Circuit Court Erred In Failing to Reverse the Actions of the City.

All municipalities, with the City of Ridgeland being no exception, adopt and give the force of law to certain administrative procedures and conditions which must be satisfied as predicate acts to its lawful decisions. Under Ridgeland Ordinance Section 600.09B.1. "***All applications for special exceptions must first be*** *submitted to the Zoning Administrator*, who reviews them in light of all standards in Section 600.09-D and 600.10-E." R.at 2498-99. "***Afterwards,*** the Zoning Administrator forwards the application and ***his recommendations to the Planning Commission and the Zoning Board*** for their review, comments and recommendations."*Id.* Ridgeland's Zoning Administrator in the case at bar never presented *any* recommendation to the Planning Commission and Zoning Board prior to the September 10, 2007 Planning Comission and Zoning Board meeting. R. at 176-77.

Section 600.09B.4 further requires that "[a]fter completing a review, the Planning Commission and Zoning Board will then forward the application and their recommendation to the Mayor and Board of Aldermen." Here, *no recommendation was ever forwarded from the Planning Commission and/or the Zoning Board to Ridgeland's Mayor and Board of Aldermen regarding the Petitioners/Appellee's Petition and amendments thereto.* R. at 1363-1371. As a result, the Board of Aldermen of the City of Ridgeland adopted the October 10, 2007 Ordinance without benefit of *any* predicate factual findings or determinations - - much less any recommendations - - from the Ridgeland Planning Commission and Zoning Board or its Zoning Administrator. *Id.* The Planning Commission and Zoning Board had equally been deprived of any recommendation from Ridgeland's Zoning Administrator. R.at 176-77. As such, all decisions in this matter were those of the Mayor and Board of Aldermen of the City of Ridgeland alone and were made in the absence of any factual

findings, determinations, or recommendations- - a result which is contrary to the procedural and substantive requirements of Ridgeland's own ordinances. R.at 2498-99. There is no evidence in the transcript of the September 10, 2007 meeting of the Ridgeland Planning Commission and Zoning Board that any recommendation was made by Ridgeland's Zoning Administrator to the Planning Commission and Zoning Board. To the contrary, it is established that the Planning Commission and Zoning Board refused/declined to give any recommendation to Ridgeland's Mayor and Board of Aldermen. R.at 75-315; 224-26; 1363-71. The City of Ridgeland's subsequent Decision/Ordinance of October 10, 2007 is (1) jurisdictionally, procedurally and substantively flawed, (2) absent the required predicate findings and recommendations from the Zoning Administrator and Planning and Zoning Board as contained in Ridgeland's Zoning Ordinances, and in turn, (3) is unlawful. Accordingly, the Circuit Court erred in failing to recognize that the Decisions of the City of Ridgeland were taken in violation of its own ordinances and in the absence of the municipal board's jurisdiction under the procedural, factual and legal circumstances presented. The failure to obtain the required determinations of fact and recommendations, such as those from a subordinate board such as a Planning [and Zoning] Commission, in and of itself, has been recognized by the Mississippi Supreme Court as requiring reversal. *see, e.g. Barrett v. Hinds County*, 545 So.2d 734, 738 (Miss. 1989); *Noble v. Scheffler*, 529 So.2d 902, 907 (Miss. 1988). At a very minimum, and if all other relief be denied, this relief should be afforded to the Appellants herein. However, because of the egregious nature of the substantive violations of Ridgeland's own ordinances, a reversal upon additional substantive grounds is also warranted, as shown below.

3. <u>The City Violated and Failed to Adhere to the Requirements of its Own Ordinances for the Granting of Variances or Conditional Use/Special Exceptions. The Circuit Court Erred In Failing to Reverse the Actions of the City.</u>

It is axiomatic that when a municipal body, (here the City of Ridgeland), adopts mandatory requirements for the granting of variances and conditional uses/special exceptions, such requirements must be met and not simply ignored in violation of the law. "...[L]ocal zoning authorities may not ignore, but *must* abide by, the restrictions of all applicable zoning ordinances." *Noble v. Scheffler*, 529 So.2d 902, 907 (Miss. 1988)(emphasis supplied); *Robinson v. Indianola Municipal Separate School District*, 467 So.2d 911, 917 (Miss. 1985); *Kynerd v. City of Meridian*, 366 So.2d 1088 (Miss. 1979). ***For the City to turn a blind eye to these requirements epitomizes the definition of arbitrary, capricious and/or unreasonable conduct in violation of the law. Indeed, such failure to abide by the requirements of the ordinances characterizes the Decisions of the City as having been done without reason or judgment, but instead on its will alone and with either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles of law.***

Section 600.08 (and others), R.at 2493-97, address the circumstances which are applicable for consideration of requests for a variance by the City by in favor of the Developers/Appellees. Section 600.08 of Ridgeland's Zoning Ordinance entitled "Dimensional Variance" states as follows:

> "Where the strict application of this Ordinance would result in peculiar and exceptional practical difficulties to or exceptional hardship upon the owner of such property, the Mayor and Board of Aldermen is empowered to grant, upon an application relating to such property, a dimensional variance from such strict application so as to relieve such difficulties or hardships. Examples of such difficulties or hardships include exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of this Ordinance; or by reason of the location of trees, natural drainage course, lakes, or other desirable or attractive features, which condition is not generally prevalent in the neighborhood."

Section 600.08A of Ridgeland's Zoning Ordinance, R.at 2493-94, entitled "Requirements for Granting Variances" states "[a]ny person desiring a dimensional variance from the terms of this Ordinance shall submit a written application . . . demonstrating compliance with **all** of the following:

1. That *special conditions and circumstances exist* which are *peculiar to the land*, structure, or building involved and which are not applicable to other lands, structures, or buildings, in the same district.
2. That literal interpretation of the provisions of this Ordinance *would deprive the applicant of rights commonly enjoyed by other properties in the same district* under the terms of this Ordinance.
3. That the special conditions and circumstances ***do not result from the actions of the applicant.***
4. That granting the variance requested *will not confer on the applicant any special privilege* that is denied by this Ordinance to other lands, structures, or buildings in the same district.
5. That the variance granted is the *minimum variance* that will make possible the reasonable use of the land, building, or structure.
6. That the granting of the variance will be in harmony with the general intent and purpose of the Ordinance and that such variance *will not be injurious to the area involved or otherwise detrimental to the public interest.*
7. Traffic visibility on adjoining streets *will not be adversely affected.*
8. Draining from proposed buildings and structures will not adversely affect adjoining properties and public rights-of-way.

Additionally, Ridgeland Ordinance Section 600.08B, "DIMENSIONAL VARIANCES: Corollary Guidelines For Determining Hardships:", R.at 2494-95, places further restrictions upon granting dimensional variances under Ridgeland's Ordinances, as follow:

1. A variance is not the appropriate remedy for a general condition:

   (a) Such ***hardship is not shared generally by the other properties*** in the same vicinity.

   (b) The condition or situation of the property is not ***of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the Ordinance.***

2. ***Self-inflicted hardship is not grounds for a variance.***

3. ***Personal hardship is not grounds for a variance. The hardship must relate to the physical character of the property.***

   (a) The hardship is created by the physical character of the property, including dimensions, topography, or soil conditions,

or by other extraordinary situation or condition of such property.

(b) ***Personal hardship shall not be considered as grounds for a variance***, since the variance will continue to affect the character of the neighborhood after title to the property has passed to another owner.

4. ***Economic hardship in itself is not grounds for a variance.*** It may be considered as an element, but there must be other compelling considerations.

5. ***The hardship must be severe and unnecessary in achieving public purposes.***

6. ***The variance must not adversely affect adjacent property or the character of the district.*** This limitation is clear in item 600.08-A above of the standards governing variances ***unless the Zoning Board finds*** that the authorization of such variance will not be of substantial detriment to adjacent property, and that the character of the district will not be changed by the granting of the variance.

Section 600.08H, provides that "DIMENSIONAL VARIANCES: Required Findings" further restricts the granting of a variance, as follows:

> *No variance shall be issued* until the Mayor and Board of Aldermen have made a finding that the reasons set forth in the application justify the granting of a variance, and that the variance constitutes the ***minimum allowable deviation*** from the dimensional regulations of this Ordinance in order to make possible the responsible use of the land, building or structures. Furthermore, no variance shall be granted until the Mayor and Board of Aldermen have made a finding that the granting of the dimensional variance will be in harmony with the general purpose and intent of this Ordinance, and that the variance will not be injurious to the neighborhood or otherwise detrimental to the public welfare. (Emphasis added.)

Section 600.08J, "DIMENSIONAL VARIANCES: Granting of a "Use Variance Prohibited," R.at 2496, states "***Under no circumstances shall the Mayor and Board of Aldermen issue a variance to allow a use not permissible under the terms of this Ordinance in the District involved***, or any use expressly or by implication prohibited by the terms of this Ordinance in said district.

Applying the foregoing conditions and provisions of the City of Ridgeland's Official Zoning Ordinances to the matter presented to this Court on appeal, it was contrary to law for the Circuit Court to affirm the City's grant of any variance(s) to the Developers/Appellees for *ten (10) distinct* legal reasons. **First**, ***the hardship set forth as the basis for the requested variance was solely and exclusively the result of the actions of the applicant (i.e., Developers/Appellees) and was thereby legally "self-inflicted" pursuant to Section 600.08.B.2.; See also 600.08.A.3.*** The Record confirms that the 75.921 acres constituting Renaissance at Colony Park and the separate parcels therein "... ***are owned by various H.C. Bailey Company entities***..." R. at 00091. Accordingly, if the Developers/Appellees had wished not to run afoul of Ridgeland's zoning ordinances, they could have elected to save more land/acreage for the 200 Renaissance Development or chosen land owned by them with different zoning classification(s). However, *they* created and carved out the 4.5241 acre parcel upon which they now purport to construct the 200 Renaissance Development and their actions thereby solely and exclusively self-inflicted the harm for which the variance(s)/ special exception(s)/conditional use(s) were sought. If the Developers/Appellees had wanted to build this building, it was incumbent upon them either to build it elsewhere and/or to build it in accordance with existing ordinances, or to seek and obtain a ***rezoning under the formal procedures for, and meeting the requirements for, a rezoning.*** The Developers/Appellees should not be allowed to obtain, under the guise and subterfuge of either variance(s) and/or conditional use(s)/special exception(s) a result and use of real property ***only permissible through the formal rezoning process.*** *See Drews v. City of Hatttiesburg*, 904 So.2d 138 (Miss. 2005). From the outset, the Developers/Appellees knew they could not comply with existing ordinances and could not meet the legal requirements to obtain a

rezoning of the 4.5241 acre parcel of property.[14] R.at 1372-1508.Under the Ordinance, the requisite "hardship" must relate to the physical character of the property; here, it is the Developer (or its tenants) and not the property, that purports to have the hardship, in the form of lost potential income, if the Developers' (and their tenants') *personal demands* are not met. Such circumstances run directly afoul of Ridgeland's ordinances and Mississippi common law which govern whether or not a variance may even be allowed under the law. **Second**, a literal enforcement of the ordinance would not result in ***unnecessary, severe and undue hardship***, because any such hardship (if any indeed exists) would be solely economic or financial in nature, and pursuant to the City's Ordinances, ***financial hardship*** shall ***NOT*** be considered justification for granting a variance. **Third**, *the hardship to the Developers/Appellees is not severe or unnecessary in achieving public purposes.* The Developers/Appellees could easily either (1) construct 200 Renaissance in conformity with Ridgeland's existing zoning ordinances on its proposed 4.5241 acre Site, or alternatively, (2) could build multiple buildings in conformity with the existing Ordinances to achieve the same square footage of office space development by utilizing the subject Site and other land which the Developers/Appellees admittedly already own in the City of Ridgeland. **Fourth**, no *special conditions and circumstances exist* which were *peculiar to the 4,5241 acres of land which were not likewise applicable to all such land and all such structures proposed for construction on either C-3 or C-4 zoned property districts.* Indeed, the only special set of circumstances here, as regards this Development and this parcel of property were created by the Developers'/Appellees subjective desire to house three tenants, (1) Butler, Snow, O'Mara, Stevens and Cannada law firm, Horne CPA Group,

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[14]Indeed, the Developers/Appellees would have had to seek (and indeed previously sought and were denied) a C-6 zoning classification which was necessary to accomplish their desired results in accordance with applicable law.

and a portion of the offices of Regions Bank *in the same building. The Developers'/Appellees' desire in this regard stemmed from those proposed tenants' subjective desire to be housed together in the same building and as shown by the Record, accomplishing this economic feat (i.e., putting all three tenants in the same building) would require a building of not less than 13 stories and an adjacent parking structure of at least seven stories.* R.at 82; 129; 132-33; 143-44; and 877-78. There was and is nothing unique to the real property or structure in issue - - except for the subjective desires of the Developers and three tenants who wanted it *there*, and built *their* way - - irrespective of what the City of Ridgeland's zoning ordinances required. **Fifth**, nothing in the Record before this Court remotely suggest that without a variance the Developers/Appellees *would be deprived of rights commonly enjoyed by other properties in the same district*. ***To the contrary, the Record suggests that all other commercial developments in these same zoning districts were required to live by the ordinances as written; 72 of the 73 commercial buildings along or adjacent to Highland Colony Parkway were conforming uses, with conforming heights, with conforming numbers of floors, with conforming floor area ratios, and with conforming buildable areas.*** R.at 190-91; 1729-68. The only exception to this statement is embodied in the prior exception granted in 2005 to another Limited Liability Company whose Manager was H.C. "Buster"Bailey, Jr. - - just as is here presented as regards this Renaissance 200 Development. R.at 15. **Sixth**, and by the same token as the immediately preceding consideration, by granting the variance to the Developers/Appellees, the City *conferred on the Developers a special privilege* that is denied by the City's Ordinance to other lands, structures, or buildings in the same zoning districts. The rule of law should not yield just because three tenants want to be housed together in a building suited to their own specifications. **Seventh**, the granting of the variance was not in harmony with the general intent and purpose of the Ordinance (i.e., to relieve a hardship unique to the real property and not of the Developers' own making, and based upon

objective criteria); further, the effect of the variance *was and will be tremendously injurious to the areas involved.* The homeowners of seven (7) subdivisions previously allowed by the City of Ridgeland to be platted and occupied will be forced to suffer the traffic congestion and intrusion that comes with a 13 story building on Highland Colony Parkway - - a location which for some homeowners quite literally places this Renaissance 200 Development in their backyards. R. at 1786-1790. The remaining homeowners in these affected areas get the pleasure of staring at a building three times as tall as that allowed by existing law (See R. at 1773-1790), and enduring significantly increased traffic for the remainder of their days as residents in this area. To see how "public" and adverse the interest really is, one need only look at the more than 750 signatures affixed to the petitions filed in opposition to this Development. R. at 1543-1726. **Eighth**, the variance adversely affects the adjacent property in countless ways and if allowed to stand, will forever change the nature of the character of the C-4 zoning district inasmuch as precedent will be set for a conditional use deviation of immense proportions, and the residential quality of life will be forever adversely affected. **Ninth**, *no variance shall be issued* until the Mayor and Board of Aldermen have made a finding that the reasons set forth in the application justify the granting of a variance, and that the variance constitutes the *minimum allowable deviation* from the dimensional regulations of the Ordinance in order to make possible the responsible use of the land, building or structures. R.at 2496. Here, there was never any finding, as required by law, that the variance constitutes the *minimum allowable deviation* from the dimensional regulations of the Ordinance. R.at 2189-97. **Tenth**, under 600.08-A, *the Zoning Board has never found* that the authorization of the variance at issue will not be of substantial detriment to adjacent property, or that the character of the district will not be changed by the granting of the variance(s). R.at 224-26; 1363-71. Accordingly, the City's granting of the

Developers/Appellees' variance(s) was unlawful, arbitrary and capricious, its basis is not fairly debatable.

Furthermore, a review of the October 10, 2007 Ordinance, R.at 2189-97, unequivocally reveals that not only did the Planning Commission and Zoning Board make no factual findings to support the grant of a *variance or special exception/conditional use,* ***but also, the Board of Aldermen/City of Ridgeland made absolutely no findings of fact or adjudications to support the grant of any variance(s) to the Developers/Appellees.*** R. at 2189-02197. *Indeed, the City of Ridgeland did not even so much as purport to address any of the ten (10) matters set forth in the preceding paragraph, nor did the City make any factual findings whatsoever as to those nineteen (19) matters set forth in Sections 600.08 (including subsections A, B, H, and J) and which govern the circumstances under which a "variance" may be granted. The City also did not make any determination that its grant of variance(s) to the Developers/Appellees were supported by any, much less substantial, evidence. Id. Axiomatically, therefore, the actions of the City of Ridgeland are rendered contrary to law and are thereby arbitrary, capricious and unreasonable. Accordingly, there are no findings by the City of Ridgeland in the Record which support the grant of any of the mandatory variances in any form to the Developers/Appellees. Id.* The application of the factors allowing a variance mandates that to the extent that the Circuit Court expressly or implicitly allowed *any* such variance(s), the Orders and the underlying Decisions must be reversed as a matter of law.

4. The City Ignored the Floor Area Ratio, Maximum Building Height and Maximum Buildable Area Dimensional Requirements of Its Own Ordinances and The C-3/C-4 Hardship Created by the Developer Appellees Themselves. The Circuit Court Erred In Failing to Reverse the Actions of the City.

As previoulsy established, the Site for the proposed Development is situated within two zoning classifications. One portion of the 4.5241 acres is zoned C-3; the other portion is zoned C-4.

R.at 4-51; 46. The Developers/Appellees did not establish by satisfactory, proper or competent evidence that neither the thirteen (13) story high-rise building nor the seven (7) story parking building do not impact the C-3 zoned parcel. R.at 75-315; 842-53; 870-1220. The entire tract of property comprising the Site in question *is 4.5241 acres and thus contains a total of 197,069.79 square feet.* Developers/Appellees' Petition does not identify how much of the 4.5241 acres is zoned C-4 versus how much is zoned C-3. R.at 4-51. The Developers/Appellees did not present any survey or any affidavits establishing that no portion of the 200 Renaissance Development will not be physically located on the C-3 portion of the Site. R.at 75-315; 842-53; 870-1220. However, irrespective of whether the *actual building itself* physically sits on C-3 only or C-4 only or partially on both, the entire Site (both the C-3 and C-4 portions) has been subjected to unlawful "spot zoning" for the 200 Renaissance Development..[15] Developers/Appellees' Petition reflects the 13-story building and adjacent parking garage/facility to cover *at least **40% (forty percent)** of the total area of the 4.5241 acre parcel.* R.4-51; 837-39; 842-53.. Section 430 of Ridgeland's Official Zoning Ordinance is designated as "Convenience Commercial District C-3." Unlike Section 410, "General Commercial District C-2)," and Section 440, "Highway Commercial District C-4," ***Ridgeland's C-3 Zoning Classification does not contain any provision that would allow for a building in excess of a maximum height of 48 feet or four stories under any circumstances.***[16] Section 430, C-3 Zoning

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[15]In the controlling *Drews v. City of Hattiesburg* case, the Mississippi Supreme Court found the City's actions to constitute "spot [re-]zoning" (from zoning district B-1 to zoning district B-3) *of the entire parcel in issue although 27% of the contiguous property was not to be covered by "impervious surface" such as a building or parking lot/garage. Drews*, 904 So.2d at 141-42.

[16]Section 430 of Ridgeland's Zoning Ordinance, "Convenience Commercial District, **C-3**, Section 430.04 "DIMENSIONAL REQUIREMENTS" reads as follows:

> 430.04 DIMENSIONAL REQUIREMENTS: With the exception of minimum yards, dimensional requirements for uses first permitted

Classification, does not allow as a "conditional use," "Buildings in excess of 48 feet or four stories." ***In addition, the definition of "variance" specifically prohibits the granting of a variance where the establishment or the expansion of a use is not permitted in a particular zoning classification.*** (Ridgeland Zoning Ordinance, Section 21.)

Section 430 "Convenience Commercial District C-3" and Section 440.03H, "Highway Commercial District C-4" are the only sections of the City of Ridgeland's Zoning Ordinances referenced in Petitioners/Appellees' Petition. R.at 4-51; 837-39; 842-53. No request for a ***"dimensional variance"*** was contained in the Developers/Appellees' Petition whether referenced under Sections 430 or 440 of Ridgeland's Zoning Ordinances. ***While the Developers knew that additional variances were required under Sections 430 or 440 of Ridgeland's Zoning Ordinances (as shown by the fact that the Developers sought a set-back variance under the very same***

> in C-3 Convenience Commercial districts are more restrictive than regulations for uses permitted in the C-2 General Commercial districts. This is due to the traffic and noise-related characteristics of uses first permitted in C-3 districts.
>
> A. Maximum Building Height: 48 feet or four stories.
>
> . . .
>
> D. Maximum Buildable Area: The aggregate square footage of all buildings shall not exceed twenty-five percent (25%) of the gross lot area.
>
> E. Maximum Floor Area Ratio (FAR): .25 (Example: 20,000 square foot lot---100 feet x 200 feet---with a building, 5,000 square feet on one floor: 5,000 square feet divided by 20,000 square feet = .25 FAR).
>
> F. Minimum Yards: The minimum yard requirements FOR USES FIRST PERMITTED in a C-3 Convenience Commercial district shall be as follows:
>
> 1. Front yard: 30 feet from the right-of-way line of an existing or proposed street in accordance with the adopted ***Thoroughfares Plan.***
>
> . . . .

ordinance) no request was even made for a dimensional variance to the "maximum buildable area" or "maximum floor area ratio" (FAR) in Petitioners/Appellees' Petition either under Section 430 or Section 440[17] of Ridgeland's Zoning Ordinances. Id. The failure to obtain these two variances renders the subject construction/development *per se* unlawful. On September 14, 2007, the Petitioners/Appellees filed a "Second Amendment to Petition and Application for Special Exception (Conditional Use Permit) and Variances" (hereafter "Second Amendment"). R.at 842-53. The Second Amendment contained four parts and requested the following relief/action: Part I - Petitioners/Appellees request to *delete* their prior request in the Petition for a "height variance" on that portion of the subject property zoned as "C-3". Part II - Petitioners/Appellees seek to amend the original Petition to contain a clarification and/or other relief in relation to Section 440.04E as said Zoning Ordinance (Section 440.04E) would apply to and/or govern the Petitioners/ Appellees' original Petition. *Id.* The City of Ridgeland specifically adjudged and found for purposes

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[17] Under Section 440 of Ridgeland's Zoning Ordinance, "Highway Commercial District, C-4, Section 440.04, "DIMENSIONAL REQUIREMENTS" reads as follows:

440.04 DIMENSIONAL REQUIREMENTS:

A. Maximum Building Height: 48 feet or four stories.
B. Minimum Lot Area: 10,000 square feet.
C. Minimum Lot Width: 100 feet.
D. Maximum Buildable Area: The aggregate square footage of all buildings shall not exceed twenty-five percent (25%) of the gross lot area.
E. Maximum Floor Area Ratio (FAR): 0.5 (Example: 20,000 square foot lot---100 feet x 200 feet---with a building, 5,000 square feet on each of four floors: total square footage = 20,000 square feet divided by 20,000 square feet = 1.0 FAR).
F. Minimum Yards:
   1. Front yard: 30 feet from the right-of-way line of an existing or proposed street in accordance with the adopted *Thoroughfares Plan.*

of its October 10, 2007 Ordinance (which is the subject of this appeal), and in Section 9 thereof, that "The property affected by this Ordinance (the "property") is ... described as follows ... containing 197,068 square feet or 4.5241 acres, more or less." R. at 2194-2196. Accordingly, because the Decisions of the City of Ridgeland were based upon the determination that the Site in issue and affected by the City's actions consisted of 197,068 square feet or 4.5241 acres, the Developers/Appellees positions on appeal and the propriety or illegality of the Decisions of the City of Ridgeland are to be judged and reviewed upon that determination.[18] Any argument to the contrary would read into the Decisions of the City of Ridgeland factual matters which are directly in conflict with its own subject October 10, 2007 Ordinance. R.at 2194-96.

Under Section 440.04 "DIMENSIONAL REQUIREMENTS, C-4" Section D is entitled "Maximum Buildable Area," and states as follows: "*The aggregate square footage of all buildings shall not exceed twenty-five percent (25%) of the gross lot area.*" **The maximum buildable area, i.e., the aggregate square footage of all buildings proposed on the 4.5241 acres in question, *was not stated or contained* in the Petitioners/Appellees' Petition or First or Second Amendments thereto.** The Site Plan [19] for the development on the subject property (4.5241 acres), showing the footprint of the proposed 13-story office building and adjacent parking facility, clearly depicts that

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[18] Developers/Appellees themselves defined the subject Site; the City adopted the definition given by the Developers/Appellees. R. at 21-22.

[19] Section 600.08F, "DIMENSIONAL VARIANCES: Site Plan Required" states "Every applicant for a dimensional variance shall submit a site plan in accordance with Section 600.11 of this Ordinance. Section 600.11 of Ridgeland's Zoning Ordinance is entitled "Site Plan Development Review Procedures" and sets forth the substantive and procedural requirements for submission and approval of a site plan. Section 600.12 entitled "Specifications For All Required Site Plans" sets forth all of the ***substantive data required to be contained on a site plan.***

more than 25% of the gross lot area will be covered by the 200 Renaissance Building and adjacent/connected parking facility in violation of Ridgeland's Official Zoning Ordinances.

Developers'/Appellees' Petition clearly depicts that the Site in question contains 4.5241 acres, or 197,068 square feet. However, Petitioners/Appellees' Petition, and First and Second Amendments, contain no information, calculations, plats, charts, or other evidence or representation that the proposed 13-story office building and/or attached parking garage will occupy no more than 25% of the gross lot area of the 4.5241 acre parcel. However, it has been represented that the 13-story building will have a footprint of 27,707 square feet including its exterior (25,000 useable office space per floor) and adjacent parking garage/facility (which itself will have 51,900 square feet) to cover *at least **40% (forty percent)**of the total area of the 4.5241 acre Site of the Development, thereby exceeding by at least 100% the Maximum Buildable Area allowed under the applicable ordinance.* The 200 Renaissance Development will exceed the "maximum buildable area," contained in Section 440.04D of Ridgeland's Zoning Ordinance and has thereby been allowed in violation of law and in an arbitrary and capricious manner.

Developers'/Appellees' Petition, and First and Second Amendments, also contained no information, calculations, tables, charts or other evidence that would allow one to determine the "maximum floor area ratio (FAR)" of the proposed 200 Renaissance Building. R.at 4-51; 837-39; 842-53. In paragraph 14 of Petitioners/Appellees' Second Amendment, they state that "the 13-story office building to be known as the 200 Renaissance Building will have 25,000 square feet per floor, or a total of 325,000 square feet of floor area." R.at 848. The total square footage on which the 13-story office building is proposed to be constructed is 4.524141 acres, or 197,068 square feet of land area. The 13-story office building proposed by Developers/Appellees at Ridgeland's Planning Commission and Zoning Board public hearing and before Ridgeland's Mayor and Board of Aldermen

public hearing, held on September 10, 2007 and October 10, 2007, respectively, was to contain 13 stories of 25,000 square feet of office space per floor, for a total of 325,000 square feet of floor area in the proposed 200 Renaissance Building. R.at 1363-71; 2185-88. If one were to apply the "maximum floor area ratio" of 0.5 to the total square footage of the parcel of property in question (197,068) in relation to the total number of square feet proposed in the 13-story office building (325,000), the floor area ratio would exceed that allowed under Section 440.04E of Ridgeland's Zoning Ordinance *by more than 300%.* (E.g. 325,000 square feet in building ÷ 197,068 square feet of land area = 1.64 floor area ratio.)

Under Section 440.04E of Ridgeland's Zoning Ordinance, if one applied a 0.5 FAR to the subject property (197,068 square feet), a building containing only one-half (½) of the 197,068 square feet could be constructed, i.e., only a building containing 98,534 square feet of office space. **Neither Ridgeland or the Petitioners/Appellees have identified any wording in Ridgeland's Zoning Ordinance which exempts the application of Section 440.04E to Petitioners/Appellees' 13-story office building.**

Petitioners/Appellees' Petition, and First and Second Amendments thereto, did not contain a request for a "dimensional variance" from Sections 440.04D and/or E of Ridgeland's Zoning Ordinance which deal with "maximum buildable area" and "maximum floor area ratio." Neither did the Ordinance adopted by Ridgeland at its October 10, 2007 meeting contain any grant of or authority for a "dimensional variance" with respect to the "maximum buildable area" or the "maximum floor area ratio" for the property in question. The 200 Renaissance building and parking facility will exceed the "maximum floor area ratio," contained in Section 440.04D of Ridgeland's Zoning Ordinance and has thereby been allowed in violation of law and the Circuit Court's Order(s) allowing these actions should be reversed.

5. The Developers'/Appellee's Requests for Variances and Exceptions Did Not Meet Their Burden To Satisfy the Requisite Conditions for the Granting of Variance(s) or Special Exception(s)/Conditional Use(s). The Circuit Court Erred In Failing to Reverse the Actions of the City.

The Circuit Court erred in failing to determine that the Ridgeland's Zoning Board, as well as Ridgeland's Mayor and Board of Aldermen eventually, were also required by law *to examine, interpret and apply* its ordinances contained under Section 600.09 entitled "Special Exceptions (Conditional Uses)" in evaluating and acting on Petitioners/Appellees' Petition and Amendments thereto. Fifteen (15) criteria/written findings are required to be satisfied. Under Section 600.09D of Ridgeland's Zoning Ordinance, the Mayor and Board of Aldermen ***shall not*** grant any conditional use ***unless all fifteen (15)*** of the criteria are satisfied. The failure to satisfy ***even one*** of these criteria precludes the grant of a conditional use as a matter of law. One of the requirements under Section 600.09D is that ***"[t]he proposed conditional use will comply with all applicable regulations in the zoning district in which the property in question is located."*** Here, the conditional use permit for the Development was granted in a manner contrary to law inasmuch as the Development does *not* comply with all applicable regulations in either the C-4 (or C-3) zoning district in which it is located. The 200 Renaissance Development and parking building will exceed the "maximum buildable area," contained in Section 440.04D of Ridgeland's Zoning Ordinance and has thereby been allowed in violation of law. Second, it is not fairly debatable that a simple application of the "maximum floor area ratio" of 0.5 under Section 440.04E of Ridgeland's Zoning Ordinance to the total square footage of the parcel of property in question (197,068) in relation to the total number of square feet proposed in the 13-story office building (325,000), the floor area ratio would exceed that allowed under Section 440.04E of Ridgeland's Zoning Ordinance *by more than 300%.* (E.g. 325,000 square feet in building ÷ 197,068 square feet of land area = 1.64 floor area ratio.) Under Section 440.04E of

Ridgeland's Zoning Ordinance, if one applied a 0.5 FAR to the subject property (197,068 square feet), a building containing only one-half (½) of the 197,068 square feet could be constructed, i.e., only a building containing 98,534 square feet of office space. Thus the Development, with the conditional use permit, does not satisfy either Sections 440.04D and/or E of Ridgeland's Zoning Ordinance which deal with "maximum buildable area" and "maximum floor area ratio." The Ordinance adopted by Ridgeland at its October 10, 2007 meeting did not contain any grant of or authority for a "dimensional variance" with respect to the "maximum buildable area" or the "maximum floor area ratio" for the property in question. The 200 Renaissance building and parking facility will exceed the "maximum floor area ratio," contained in Section 440.04D of Ridgeland's Zoning Ordinance and has thereby been allowed in violation of law and should be reversed.

IX. Conclusion

The "Ordinance" and Decisions here in question adopted and dated October 10, 2007 were improper, unlawful, arbitrary, capricious, and unreasonable and constitutes unlawful "spot zoning" with respect to the 4.5241 acre parcel of property here in question. The Circuit Court erred in failing to reverse the unlawful actions of the City. Appellants seek the reversal of the Circuit Court's Order(s) which affirmed the Decisions of the City of Ridgeland and seek the reversal of the adoption of the Ordinance here in question at the specially called Board of Aldermen meeting held on October 10, 2007. Appellants pray that this Court will reverse and adjudge that the 200 Renaissance Development here in question must be limited and effectively reduced in (1) its height and (2) its floor area dimensions, (3) maximum buildable area, (4) required number of parking spaces, and (5) setback requirements, so as to be in conformity with the existing Official Zoning Ordinances of the City of Ridgeland, specifically inclusive of Sections 440.04.E. (Maximum Floor Area Ratio), 440.04.D (Maximum Buildable Area), 440.F.1 (Setbacks), and 37.02.B (Parking). Clarified, this

result would require that the Circuit Court's Order(s) and the City's October 10, 2007 Ordinance be reversed such that (1) the subject 200 Renaissance Development structures, office building, and parking building be constructed if at all, to a height of no more than 48 (forty-eight) feet and four stories or the height consistent with, in accordance with, and compatible with Ridgeland's Official Zoning Ordinances and Comprehensive Plan, and (2) containing not more than ***98,534 square feet of office space*** on the 4.5421 acre parcel of land, and that its parking area be in strict conformity with the requirements of Ridgeland's Official Zoning Ordinances.

Respectfully submitted,

DR. CHARLES HALL, JANET H. CLARK, BEATRICE, LANGSTON BERRY, KATE SHARP, BELINDA BOOZER, WILLIAM MURPHY, CAROL MURPHY, STEVE HANNEKE, MARY ELLEN MARTIN, MARY S. GODBOLD, BOBBY J. STOKES, KEVIN CAMP, GARY E. PAYNE, MARIA ROSA GUTIERREZ, DENISE MICHELLE WILSON, MARY BISHOFF, JOHN AUSTIN EVANS, MEL EVANS, TED FRENCH, ESTHER FRENCH, LARRY STOWE, PAIGE STOWE, and KIM H. LOPER Individually and as Landowners, Residents, Taxpayers, and Interested Citizens of the City of Ridge land, Mississippi, and for and on behalf of those similarly situated persons comprising Z.O.N.E. (Zoning Ordinances Need Enforcement)

Steven H. Smith, Attorney for Appellants

OF COUNSEL:

Steven H. Smith (MSB #[redacted]
1855 Lakeland Drive, Suite R-309
Jackson, MS 39216
Tel: (601) 987-4800
Fax: (601) 987-6600

X. CERTIFICATE OF SERVICE

I, Steven H. Smith, Attorney for Appellants, do hereby certify that a true and correct copy of the foregoing Memorandum Brief of Appellants has been hand delivered, to the following:

Lee Westbrook, Circuit Clerk
Madison County Circuit Court
Madison County Circuit Courthouse
P. O. Drawer 1626
Canton, Mississippi39046

and has been sent this day by U.S. Mail, First Class, postage prepaid to the following:

James H. Gabriel
Pyle, Mills, Dye & Pittman
800 Avery Boulevard North, Suite 101
Ridge land, Mississippi 39157

James A. Peden, Jr.
Stennett, Wilkinson & Peden, P.A.
P.O. Box 13308
Jackson, Mississippi 39236-3308

D. Jim Blackwood
Glenn G. Taylor
Copeland, Cook, Taylor & Bush
P.O. Box 6020
Ridgeland, Mississippi 39158

This the 6th day of May, 2009.

Steven H. Smith