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

JIMMY COLLINS AND FELICIA COLLINS **APPELLANTS**

VERSUS **NO: 2008-CA-1929**

MAYOR AND COUNCIL OF THE CITY OF GAUTIER, MISSISSIPPI **APPELLEES**

APPELLEE BRIEF OF APPELLEE'S MAYOR AND COUNCIL OF THE CITY OF GAUTIER, MISSISSIPPI

ROBERT G. RAMSAY
ATTORNEY AT LAW
P.O. BOX 1892
PASCAGOULA, MS 39568
228-497-9909
BAR ID [redacted]

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

JIMMY COLLINS AND FELICIA COLLINS **APPELLANTS**

VERSUS **CAUSE NO: 2009-CA-1929**

MAYOR AND COUNCIL OF THE CITY OF GAUTIER, MISSISSIPPI **APPELLEES**

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 Supreme Court and Court of Appeals Justices may evaluate possible disqualification or recusal.

Jimmy Collins and Felicia Collins, Appellants
John Paul Barber, Attorney for Appellants
Mayor and Council of the City of Gautier, Mississippi, Appellees
Robert G. Ramsay, Attorney for Appellee
Amy St. Pe', Previous Attorney for Appellee
Silver Girl, LLC (Cybil R. Sauls) Member, Potential Intervenor
Trinity Development Group of the Gulf States, LLC (Kathryn N. Bickford) Member, Potential Intervenor
Daryl Dryden, Attorney for Silver Girl LLC and Trinity Development Group of the Gulf States, LLC, Potential Intervenors,
Kathy Jackson, Trial Court Judge

Respectfuly submitted this the 26 day of August, 2009.

MAYOR AND COUNCIL OF THE CITY
OF GAUTIER, MISSISSIPPI
APPELLEES

BY: _____
ROBERT G. RAMSAY
Their Attorney

TABLE OF CONTENTS

Certificate of Interested Persons.....i.

Table of Contents.....ii

Table of Authorities.....iii, iv

Summary of Argument.....1

Argument:

Standard of Review.....2

The Decision of the Gautier City Council to Re-Zone
The Subject Property was Not Arbitrary and Capricious
And was Supported by Substantial Evidence.....2

The Decision of the Gautier City Council to Re-Zone
The Subject Property Does Not Constitute Spot Zoning.....6

The City's Zoning Ordinance was properly enacted and
Is a Valid Ordinance.....8

Conclusion.....8

Certificate of Service.....9

TABLE OF AUTHORITIES

Cases from the Supreme Court of Mississippi

Adams v. Mayor and Board of Alderman of City of Natchez
766 So. 2d 73 (Miss. Ct. App. 2000).....2, 3,5, 6

Board of Alderman v. Conerly
509 So. 2d 877, 885.....3

Briarwood v. City of Clarksdale
766 So. 2d 73 (Miss. Ct. App. 2000).....2

Childs v. Hancock County
1 So. 3rd 855 (Miss. 2009).....5

City of Biloxi v. M.C. Hilbert
579 So. 2d 1276 (Miss. 1992).....2

Coleman v. Southwood Realty Co.
271 So. 2d 742 (Miss. 1973).....2

Faircloth v. Lyles
592 So. 2d 941 (Miss. 1991).....3

Fondren North Renaissance, et. al. v. Mayor and City Council Of the City of Jackson
749 So. 2d 974 (Miss. 1999).....2

Kuluz v. City of D'Iberville
890 So. 2d 938 (Miss. Ct. App. 2004).....5, 7

Luter v. Hammon
529 So. 2d 625 (Miss. 1988).....5

Martinson v. City of Jackson
215 So. 2d 414 (Miss. 1968).....5

McWaters v. City of Biloxi
591 So. 2d 824 (Miss. 1991).....5,6

Saunders v. Jackson
511 So. 2d 902 (Miss. 1987).....2

Statutes:

Section 17-1-11, Mississippi Code Annotated.....1,8

Ordinances:

City of Gautier, Ordinance No. 4.....8

City of Gautier, Ordinance No. 26.....8

I. SUMMARY OF ARGUMENT

The Applicants presented substantial evidence before the Planning Commission and the City Council to support the Council's finding and the Circuit Court's approval that a change in the neighborhood has occurred and that there is a public need for the zoning change of the subject property from R-1, Single Family Residential to R-2 Multi-Family Residential. The Record of the Hearing before the City Council reflects that the City Council relied on all evidence presented, which included the file from the Planning Commission, opinion of the Community Service's Director, Zoning Map and Satellite Map showing the intermixed zoning in the area, testimony from the Developer, the Developer's architect and Developer's Attorney and comments from those neighboring property owners who opposed the change. As such, the City's decision to rezone the subject was not arbitrary and capricious and was fairly debatable.

The Zoning Map, made a part of the record, clearly demonstrates that the subject property is in an intermixed zoning area comprised of R-1, R-2 and C-2. The trend, as evident from recent developments, including a new apartment complex, approval for a conditional use for a new private school, approval for a zone change to a planned unit development zoning and the numerous other multi-family housing developments in the area are clear evidence that the decision to re-zone was not done for the sole purpose of benefiting one person but rather to make the subject property more consistent with the zoning in the area. As such, Appellant's argument that the re-zoning was "spot zoning" must fail.

Appellant's argument that the City's Zoning Ordinance was not properly enacted must fail. The Appellant did not raise this issue on appeal to the Circuit Court, and therefore did not give the Circuit Judge an opportunity to rule on it. The requirement of Section 17-1-11, MCA which requires a Zoning Ordinance to be adopted pursuant to a Comprehensive Plan became effective on July 1, 1988, the City of Gautier adopted it's present Zoning Ordinance on June 7,

1988. However, even though at the time of the enactment of the ordinance the City was not required to have a Comprehensive Plan, subsequent to the enactment of the ordinance the City has enacted all aspects of a Comprehensive Plan as required by statute.

II. ARGUMENT

A. Standard of Review

Judicial review of zoning matters is limited. *Briarwood v. City of Clarksdale,* 766 So. 2d 73 (Miss. Ct. App. 2000). Municipalities are vested with the authority to amend its zoning plan, and the decision to do so is a legislative function that is entitled to a presumption of validity. *Adams v. Mayor and Board of Aldermen of City of Natchez,* 964 So. 2d 629, 633 (Miss. Ct. App. 2007) Mississippi Courts have held that '[t]he zoning decision of a local governing body which appears to be fairly debatable will not be disturbed on appeal, and will be set aside only if it clearly appears the decision is arbitrary, capricious, discriminatory, illegal or is not supported by substantial evidence." *Id.* At 79 (*quoting City of Biloxi v. M.C. Hilbert,* 579 So. 2d 1276, 1280 (Miss. 1992), *Fondren North Renaissance, et al. v. Mayor and City Council of the City of Jackson,* 749 So. 2d 974, 977 (Miss. 1999).

In reviewing a re-zoning decision on appeal, the "fairly debatable" standard applies to the legislative question whether there has been a change in the character of the neighborhood and whether there is a public need for the re-zoning. If these two legislative questions may be said to be fairly debatable, there is not judicial authority to interfere and the action taken by the city zoning authorities, be it pro or con the proposed re-zoning, must be allowed to stand. *Briarwood,* So. 2d at 81 (*citing Saunders v. Jackson,* 511 So. 2d 902, 907-907 (Miss. 1987) and *Coleman v. Southwood Realty Co.,* 271 So. 2d 742, 743 (Miss. 1973)).

B. The Decision of the Gautier City Council to Re-Zone the Subject Property Was Not Arbitrary or Capricious and Was Supported by Substantial Evidence.

Appellants argue that the Developer of the subject property, and then ultimately the City Council, failed to demonstrate the following *Conerly* factors, that (1) the character of the neighborhood had changed to such an extent to justify re-zoning, and (2) that there was a public need to re-zone the subject property. *Board of Alderman v. Conerly,* 509 So. 2d 877, 885 (Miss. 1987). Appellants argue that the City failed to produce the type of specific evidence necessary to show a change in the character of the neighborhood that justifies the re-zoning or a public need for the re-zoning. Appellants do not describe the type of specific findings, which they believe should have been provided, but rather rest on the vague statement that the City failed to make "specific findings."

The specificity argument was fully discussed in *Faircloth v. Lyles,* 592 So. 2d 941, 945 (Miss. 1991), wherein, the Mississippi Supreme Court relaxed the strict requirements enumerated in *Conerly.* The Court cited *Conerly* as instructive but stated.

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

Id. (citing Adams, 964 So. 2d at 634.

As properly stated in Appellants' Brief, the minutes state that **"based on the evidence presented,** council finds that there has been substantial change in the neighborhood and further that there is a public need for multi-family establishments in the City." The evidence presented to Council to which Council based it's decision to re-zone the subject property included the following:

(1) Record from the hearing before the Planning Commissio, including but not limited to, the transcript from said hearing, which included discussion from the architect regarding need and change in the area (R 081-098), the letter from the Developer with the attached zoning map of the area designating the mixed zoning of the area surrounding the subject area (R 014-019), including a mixture of C-2 (Martin Bluff Elementary) and R-2 zoning, pictures of other multi-family dwellings in the surrounding area, including Faragout Lake Apartments (proposed development), Bayou Villa Apartments (under construction), Riverbend Condominiums (recently converted to condos, Glenmark Apartments and Sioux Bayou Arms.

(2) Recommendation of Community Service's Director, which although ultimately recommended denial, clearly stated that an argument could be made for either denial or approval. (R 008-010. RE 059-062) This is evidence that the Council's decision was, at a minimum, "fairly debatable."

(3) During the public hearing, Council heard comments from numerous residents in opposition to the zoning change. Many of these residents countered that there had not been a substantial change in the neighborhood and that there was no public need. (R 053-059 RE 015-021). They further argued that the re-zoning would create a burdensome and incompatible high density development in the middle of an R-1 waterfront neighborhood.

(4) The City Council heard comments from the Developer's Attorney, Daryl Dryden, regarding the changes in the area and the public need for multi-family housing. (R 045-048). Additionally Mr. Dryden handed each Council member, and made part of the record, seven changes in the area that support the rezoning. (R 075, RE 035)

(5) The Council members also took into consideration their personal knowledge and familiarity with the subject site and surrounding area. This was obvious by the in-depth,

reasoned statements made by each Council member regarding the subject area at the public hearing. (R 060-072, RE 022-034).

The Courts have found the above evidence sufficient in finding a zoning change was not arbitrary and capricious. In *McWaters v. City of Biloxi* 591 So. 2d 824, 828 (Miss. 1991), the Court stated that "[e]vidence that nearby property has been rezoned supports a finding by the city council there has been a material or substantial change in the neighborhood since the inception of the comprehensive zoning plan." *citing Martinson v. City of Jackson,* 215 So. 2d 414, 418 (Miss. 1968). The Court has also recognized that residents' opposition and concerns about the re-zoning of a parcel of land are evidence for the City Council to consider in making the determination. *Adams,* 964 So. 2d at 635. With regards to personal knowledge, the Court stated it is the duty of municipal zoning authorities, acting legislatively, to assess their needs by "looking out the window" and acting on the basis of what they see happening in their community. *McWaters,* 591 So. 2d at 828, *citing Luter v. Hammon,* 529 So. 2d 625, 629 (Miss. 1988). Further, the Court has stated that "[i]nformality attends rezoning proceedings, and governing board members may take into consideration their personal knowledge and familiarity with their community." *Childs,* 2007 WL 3257014*6.

The record before this Court demonstrates that the decision of the City Council to re-zone the subject property from R-1 to R-2 was based on clear and convincing evidence and was not arbitrary and capricious. The zoning map presented by the Developer (R 016) and considered by the Council in particular best demonstrates the nature of the subject property and the area surrounding the neighborhood. While Council considered Appellants argument that their "neighborhood" consisted solely of Roys Road, it chose not to accept this argument and found that the neighboring multi-family developments should be considered. The Court in *Kuluz v. City of D'Iberville,* 890 So.2d 938 (Miss. Ct. App. 2004), stated that when facts could support

finding for either side as to what area comprised the neighborhood then the court should find that the issue is "fairly debatable." As such, the Council properly relied on zoning data from the surrounding area when making the decision that a substantial change in the neighborhood had occurred.

While briefly discussed by the Developers (R 046, RE 014) and the Council, all coastal residents, particularly the governing bodies of coastal cities, are acutely and painfully aware of the need for affordable housing. The fact that the Developers are willing to invest a considerable sum of money in the project is evidence that they feel that there is a need for this type of housing. As stated by Counsel for the Developer, "it seems to be the consensus of every person from the Governor to FEMA management to pretty much everyone could agree that housing is one of our biggest problems post-hurricane for five years or so." (R 046, RE 014). The City Council's decision was supported by "reasoned conclusions," and as such if "fairly debatable," and therefore, the decision cannot be considered arbitrary and capricious.

C. The Decision of the Gautier City Council to Re-Zone The Subject Property Does Not Constitute Spot Zoning.

Spot Zoning is defined as "a zoning amendment which is not in harmony with the comprehensive or well-considered land use plan of a municipality." *McWaters v. Biloxi,* 591 So. 2d at 828. As the Mississippi Supreme Court explained in *McWaters:*

> There is a clear cut distinction between a validly enacted amendatory zoning ordinance and a "spot zoning" ordinance. Not all amendments which change or alter the character of a use district fall within the category of "spot zoning" as we generally understand the term. The term "spot zoning" is ordinarily used where a zoning ordinance is amended reclassifying one or more tracts or lots for a use prohibited by the original zoning ordinance and out of harmony therewith. Whether such an amendment will be held void depends upon the circumstances of each case. The one constant in the cases, as stated by the textwriter, where zoning ordinances have been invalidated due to "spot zoning" is that they were designed "to favor someone. See 1 Yokley Zoning Law and Practice Sections 8-1 to 8-3 (3rd ed. 1965).

Id. (*citing Adams,* 964 So.2d at 635)

Appellants argue that the subject property was within the R-1 zone when annexation occurred in 2002 and that it is completely surrounded by R-1 land. Appellants further argue that the decision to re-zone the property to R-2 changes the allowed use to multi-family residential, which is completely "out of harmony" with the rural park-like ambience of the Roy's Fish Camp neighborhood. Last Appellant's boldly state that the decision to re-zone was enacted solely for the benefit of the applicant and it's developer partner.

While Appellants argue that the "neighborhood" consists solely of their street, this was obviously not the finding of the Council. The zoning map presented by the Developer and considered by the Council in particular best demonstrates the nature of the subject area and the area surrounding the neighborhood. (R 016, RE 002). As evident from looking at the zoning map, the area is intermixed with multiple zoning, including primarily C-2 and R-2 along Martin Bluff Road. It is only when viewing the subject property along Roys Road that the issue of "spot zoning" can even be argued. The Council listened and considered the opposers' arguments regarding "their fish camp neighborhood" at the public hearing. In fact, members of the Council questioned the Community Services Director regarding what constituted the "neighborhood," (R 068, RE 030), but ultimately decided that the "neighborhood" consisted of a larger area than that proposed by the opponents and that a substantial changed had occurred in the neighborhood.

The Court in *Kuluz,* 890 So. 2d 938, stated when facts could support finding for either side as to what area comprised the neighborhood then the court should find that the issue is "fairly debatable." As such, the Council rightfully considered zoning data from the surrounding area when making their decision that there had been a substantial change in the neighborhood. Based on the mixed-use nature of the area surrounding the subject property, as well as the fact

that the re-zoning keeps the property residential, the Council's decision to re-zone this property does not constitute spot zoning and as such should not be overturned by this Court.

D. The City's Zoning Ordinance was properly enacted and is A valid Ordinance.

The allegation that the City of Gautier's Zoning Ordinance is invalid must fail on two counts. First, this issue was not raised on appeal to the Circuit Court and the Circuit Judge was not given an opportunity to rule on this claim.

Secondly, the requirement of Section 17-1-11, MCA, that a Zoning Ordinance be enacted as part of a Comprehensive Plan did not become effective until July 1, 1988. The City of Gautier enacted its' Zoning Ordinance being Ordinance No. 4 on July 1, 1986, which Ordinance was superseded by Ordinance No. 26, enacted on June 7, 1988, and therefore the City was not required to have a Comprehensive Plan before enacting the Zoning Ordinance..

III. CONCLUSION

The City's decision to re-zone the subject property from R-1 to R-2 was not arbitrary and capricious. The City found, based on all evidence presented at the hearing, that a substantial change in the neighborhood had occurred since the original zoning, and a public need existed for affordable housing which would be allowed under the R-2 zoning designation. The decision to rezone was not "spot zoning", but rather a way for the City to make the zoning in the area, which is comprised of R-2 and C-2 more consistent. The decision of the City Council, the legislative zoning authority for the City of Gautier, to re-zone is, at a minimum, "fairly debatable" and as such should be upheld by this Court. The claim that the City's Ordinance is invalid for not having been enacted pursuant to a Comprehensive Plan fails because the issue was not timely raised and the Ordinance was enacted prior to that requirement.

Respectfully submitted,

ROBERT G. RAMSAY
Attorney at Law
P.O. Box 1892
Pascagoula, MS 39568
Tel: 228-623-3251
BAR ID# 4618
ATTORNEY FOR APPELLEES
MAYOR AND CITY COUNCIL OF
CITY OF GAUTIER, MS.

CERTIFICATE OF SERVICE

I, Robert G.Ramsay, do hereby certify that I have served this day, via U.S. Mail, postage prepaid, a true and correct copy of the above **Brief of Appellees,** to Counsel for Appellants:

John Paul Barber
COPELAND, COOK, TAYLOR & BUSH, P.A.
P.O. BOX 10
GULFPORT, MS 30502

This the 25th day of August, 2009.

ROBERT G. RAMSAY
ATTORNEY AT LAW
P.O. BOX 1892
PASCAGOULA, MS 39568
BAR ID # 4618
Tel: 228-623-3251

§ 17-1-11. Official plan; local planning commission.

(1) (a) The governing authority of each municipality and county may provide for the preparation, adoption, amendment, extension and carrying out of a comprehensive plan for the purpose of bringing about coordinated physical development in accordance with present and future needs and may create, independently or jointly, a local planning commission with authority to prepare and propose (a) a comprehensive plan of physical development of the municipality or county; (b) a proposed zoning ordinance and map; (c) regulations governing subdivisions of land; (d) building or set back lines on streets, roads and highways; and (e) recommendations to the governing authorities of each municipality or county with regard to the enforcement of and amendments to the comprehensive plan, zoning ordinance, subdivision regulations and capital improvements program. The governing authority of each municipality and county may, in its discretion, pay to each member of a planning commission a per diem in an amount as determined by such governing authority for each day, or portion thereof, spent in the performance of his duties; however, no member of a planning commission may be paid more than One Hundred Twenty Dollars ($120.00) in the aggregate per month.

(b) The definition of "comprehensive plan" set forth in paragraph (c) of Section 17-1-1 shall not be construed to affect, or to require the amendment of, any plan adopted by a county or municipality prior to July 1, 1988, which plan does not specifically conform to the minimum elements of a comprehensive plan required in such definition.

(2) The governing authority of each municipality and county may adopt, amend and enforce the comprehensive plan, zoning ordinance, subdivision regulations and capital improvements program as recommended by the local planning commission after a public hearing thereon as provided by Section 17-1-15.

(3) In the performance of its duties, the local planning commission may cooperate with, contract with, or accept funds from federal, state or local agencies or private individuals or corporations and may expend such funds

and carry out such cooperative undertakings and contracts.

(4) Any comprehensive plan established under this section shall not contain any provision which conflicts with Article VII of the Chickasaw Trail Economic Development compact described in Section 57-36-1.

Sources: Codes, 1942, § 2890.5; Laws, 1956, ch. 197, §§ 1-6; Laws, 1960, ch. 402; Laws, 1981, ch. 434, § 1; Laws, 1988, ch. 443; Laws, 1988, ch. 483, § 2; Laws, 1990, ch. 311, § 1; Laws, 1998, ch. 489, § 1; Laws, 1998, ch. 553, § 6, eff from and after July 1, 1998.

APPENDIX A

ZONING*

Art. I.	General Provisions, § 1
Art. II.	Specific District Regulations, §§ 1—12
Art. III.	Additional District Provisions, §§ 1—22
Art. IV.	Off-Street Automobile and Vehicle Parking and loading, §§ 1—7
Art. V.	Nonconforming Buildings, Structures, Lots and Uses of Land, §§ 1, 2
Art. VI.	Organization, §§ 1—7
Art. VII.	Administration, §§ 1—12
Art. VIII.	Board of Adjustment, §§ 1—6
Art. IX.	Procedure For Appeals From the Planning Commission and the Board of Adjustments, §§ 1—8
Art. X.	Effective Date

ARTICLE I. GENERAL PROVISIONS

Section 1. Establishment of districts, provisions of official zoning map.

1.1. Official zoning map. The official zoning map inclusive of the Jackson County Flood Insurance Rate Maps and the Mississippi Bureau of Marine Resources Wetlands Map, together with all explanatory matter thereon, is hereby adopted by reference and declared to be a part of this ordinance.

***Editor's note**—Ord. No. 4, adopted July 1, 1986, enacted provisions pertaining to zoning and was subsequently superseded by Ord. No. 24, adopted June 7, 1988 which is set out herein as Appendix A. Absence of a history note following a section indicates that the content thereof is set out as enacted in Ord. No. 24; conversely, a history note enclosed in parentheses following the section indicates that the section has been amended by the ordinance included in such history note. Material in brackets has been added where necessary for purposes of clarification.

Cross references—Administration, Ch. 2; alcoholic beverages, Ch. 3; adult entertainment, Ch. 3.5; conditions under which livestock and fowl may be kept, § 4-36 et seq.; buildings and building regulations, Ch. 6; fire prevention and protection, Ch. 9; flood damage prevention and control, Ch. 10; motor vehicles and traffic, Ch. 14; subdivision regulations, Ch. 18.

State law reference—Authority to adopt a zoning ordinance, provide for its administration, enforcement and amendment, Miss. Code 1972, § 17-1-3.