

**IN THE 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**

**REPLY BRIEF OF APPELLANTS JIMMY COLLINS AND FELICIA COLLINS**

**ORAL ARGUMENT REQUESTED**

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## **I. Introduction**

Property owners Jimmy and Felicia Collins appeal a decision of the City of Gautier (the “City”) to enacted an ordinance to re-zone from R-1 to R-2 a 13.5 acre parcel of land located in the Roy’s Fish Camp neighborhood of the City of Gautier, (the “Subject Property”). The Roy’s Fish Camp neighborhood is an insular community of single family homes that Jackson County zoned R-1 prior to annexation by the City in February 2002. The City retained the R-1 zoning after annexation.

The Roy’s Fish Camp neighborhood is accessible by only one roadway, Roy’s Road. From Roy’s Road, residents have access to all of the other residential streets that make up the Roy’s Fish Camp neighborhood.<sup>1</sup> All of the Roy’s Road neighborhood is zoned R-1. The Subject Property is completely surrounded by R-1. *See*, R.E. 063 and 064, R. 107 and 108.

The City enacted an ordinance to re-zone the subject property in violation of law since there is no substantial evidence in the record of a change in the neighborhood and no substantial evidence of a need for more multifamily housing in the City of Gautier. Since the City re-zoned the Subject Property for the economic benefit of the owner and purported developer of the Subject Property, the re-zoning decision should be overturned as illegal spot zoning. Finally, the City’s re-zoning ordinance is illegal since the City of Gautier has no comprehensive land use plan as is required by the Mississippi Code. Jimmy and Felicia Collins offer this Reply Brief to further emphasize these issues on appeal set forth in their appellate brief and to rebut some of the inaccuracies and illogical arguments the City offers in its Appellee’s brief.

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<sup>1</sup> The City’s brief incorrectly states that the Roy’s Fish Camp neighborhood only consists of the houses along Roy’s Road. *See*, Page 5 of Appellee’s Brief. In fact, the Roy’s Fish Camp neighborhood also includes many small lanes that feed off of Roy’s Road and provide access to the entire neighborhood including lots with water frontage. *See*, R.E. 001-003, R. 15-17.

**II. The City acted arbitrarily and capriciously by passing an ordinance re-zoning the Subject Property since no substantial evidence exists in the record to show a change in the character of the neighborhood and that there is a public need for re-zoning.**

For a re-zoning application to be approved by a municipality, the applicant must prove to the municipality, by clear and convincing evidence, that either (1) there was a mistake in the original zoning; or (2) the character of the neighborhood has changed to such an extent as to justify rezoning and that a public need exists for such re-zoning.” *Tippitt v. City of Hernando*, 909 So.2d 1190, 1192, ¶ 5 (Miss. Ct. App.2005). In this case, the applicant did not argue that there was a mistake in the original zoning. Accordingly, the City is only justified in re-zoning the subject property if it can point to substantial evidence that shows (1) a change in the character of the neighborhood **and** (2) that there is a public need for the re-zoning.

**A. The City cited no substantial evidence in its brief indicating a change in the character of the neighborhood.**

In their brief, Appellant’s Jimmy and Felicia Collins argued that the record lacks evidence of neighborhood changes sufficient to warrant re-zoning the subject property from R-1 to R-2. In its brief, the City was only able to cite two purported examples of a “changes” in the character of the neighborhood from the zoning map: (1) Martin Bluff Elementary School and (2) certain multi-family structures on Martin Bluff Road. *See*, Appellee’s Brief, p. 4. None of these structures constitute change in the character of the neighborhood.

Martin Bluff Elementary School is not an example of **change** in the character of the neighborhood since this Jackson County school was built prior to annexation by the City in 2002.

Moreover, an elementary school is consistent with the **character** of a R-1 single family neighborhood and is a permitted use in R-1 neighborhoods.

The multi-family structures on Martin Bluff Road the City cites are also not examples of “change” in the neighborhood. The proposed development called Faragout Lake Apartments is miles from the Subject Property to the North of I-10 while the subject property is South of I-10 and has not even been constructed. Obviously, planned construction cannot be cited as a change in the character of the neighborhood since the proposed construction has not been, and may not ever be, actually built.

The City also mentions Riverbend, Glenmark and Sioux Bayou Arms, three long existing apartment buildings on Martin Bluff Road, to somehow support its argument that there has been a change in the character of the neighborhood. These multifamily structures have existed for many years and cannot be reasonably considered as a change in the character of the neighborhood. The only true recent change along Martin Bluff Road that the City can cite is the recent construction of Bayou Villa Apartments.

The development of these properties does not constitute change in the character of the neighborhood since they were all built according to the original zoning ordinances. Since well before the 2002 annexation, the property fronting Martin Bluff has been zoned for commercial and multifamily development. Construction of another apartment building along that road is consistent with the long standing zoning plans of first Jackson County and now the City of Gautier. Such development does not show a change to the character of the larger neighborhood.<sup>2</sup>

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<sup>2</sup> Jimmy and Felicia Collins maintain that their neighborhood consists of the Subject Property and the other residential lots served by the streets that feed off Roy’s Road. Even if the

**B. There is no substantial evidence in the record indicating a public need for more high density multifamily development in the City of Gautier.**

The only statement in the record supporting a public need for the re-zoning at issue was the following conclusory statement by the developer's attorney: "housing is one of our biggest problem (sic) post-hurricane" R.E. 014, R. 46. This conclusory statement is supported by no data whatsoever. This bald assertion is all the City can offer to show a public need for the re-zoning at issue.

The City's Appellee Brief cites no evidence whatsoever supporting a conclusion that there is a public need for the re-zoning at issue. Without evidence in the record, the City is left with nothing more than its unsupported argument that the developer's attorney made "comments" regarding "the public need for multifamily housing". Tellingly, the City does not explain in its brief how these unsupported "comments" amount to substantial evidence showing a public need for the re-zoning. *See*, Appellee's Brief p. 4-6. Just as zero plus zero equals zero, two wholly unsupported conclusory statements do not credible substantial evidence make. *Cauthen v. Public Employees' Retirement System*, 860 So.2d 829, 832-833 (Miss. Ct. App. 2003)(conclusory statement held to not rise to the level of substantial evidence). *See also*, *Tate v. Miles*, 503 A.2d 187 (Del. 1986)(conclusory statements insufficient to sustain county council's re-zoning decision).

The Trial Court's Order affirming the City's decision to enact the re-zoning ordinance does not even mention the requirement that the re-zoning decision be supported by substantial evidence

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"neighborhood" is expanded to include Martin Bluff Road, there is still no evidence of a change in the character of the larger area since development is consistent with the existing zoning scheme that the City of Gautier inherited from Jackson County.

of a public need for the re-zoning nor does it discuss any evidence of a public need for the re-zoning. RE pp. 074-076 and R. 197-199. The simple reason for this omission is that the record lacks any credible evidence of a public need for the re-zoning.

### **III. The City engaged in illegal spot zoning.**

Both the Appellants and the Appellee cite *McWaters v. City of Biloxi*, 591 So.2d 824, 828 (Miss.1991) for an explanation of the concept of “spot zoning.” While the Appellants Jimmy and Felicia Collins analyze the facts of this case to show why the City’s re-zoning decision at issue fits the definition of spot zoning, the City’s argument misses the mark. Rather than addressing the legal criteria of spot-zoning, the City’s brief diverts to an unrelated tangent regarding the definition of the neighborhood at issue. A re-examination of this issue is therefore appropriate.

In *McWaters v. City of Biloxi*, 591 So.2d 824 (Miss.1991), our Supreme Court again set forth the following language discussing the concept of “spot zoning”:

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

*Id.* at p. 828.

From this discussion, we learn that spot zoning occurs when a municipality seeks to re-zone property to allow a use that was prohibited by and out of harmony with the original zoning ordinance. Both are true in this case. First, the City's re-zoning ordinance would allow multifamily construction on land originally zoned for single family homes. Second, multifamily development is completely out of harmony with the original zoning law which reserved all land that is accessed by way of Roy's Road and its tributaries for single family housing. In its brief, the City's argument against a spot zoning conclusion utterly fails to address these two essential points of a spot zoning analysis. *See Appellee's Brief*, pp. 6-8.

Moreover, the City's brief also fails to address the fact that the City enacted the re-zoning ordinance solely for the benefit of the applicant and its developer partner. In their brief, Jimmy and Felicia Collins cited record excerpts showing that the only reason the developers wanted to re-zone the Subject Property was because they thought they could make more money if the property were re-zoned R-2. *See, Appellant's Brief* p. 19 citing R.E. 049-050, R. 90-91. Jimmy and Felicia Collins also cited a plethora of evidence establishing that the re-zoning proposal would be detrimental to the other property owners in the Roy's Fish Camp neighborhood in the form of increased traffic and pollution and to the tax payers of the City of Gautier since the City's road, water, sewer and fire protection infrastructure is insufficient to service the proposed development. *See, Appellant's Brief* pp. 19 - 20 citing R.E. 065-069, 75, R. 114, 117-120, 151. Other than trying to minimize Jimmy and Felicia Collins's argument by calling it a "bold statement", the City offers no evidence whatsoever that the re-zoning at issue would benefit anyone other than the owner of the Subject Property and its development partner. *See, Appellee's Brief* p. 7. Thus, the second indicia showing that this is a case of spot zoning stands undisputed.

The City's only response to the obvious spot zoning is to argue that the "neighborhood" at issue is larger than the Roy's Fish Camp neighborhood. While this argument may have some place when considering whether there has been substantial change in the neighborhood, this argument has no place in a spot zoning analysis.

**IV. The City failed to rebut the Appellant's argument that the re-zoning ordinance is illegal and must be overturned since it was not enacted in accordance with a comprehensive zoning plan.**

Jimmy and Felicia Collins argue that since the City has no comprehensive plan it is statutorily prohibited from enacting zoning regulations such as the re-zoning ordinance at issue. *See* Appellant's Brief pp. 20-21. The Mississippi Code provides that

Zoning regulations **shall** be made in accordance with a comprehensive plan designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings, and encouraging the most appropriate use of land throughout such municipality.

Section 17-1-9 M.C.A., **emphasis added**.

The City argues that the Appellants cannot raise this claim because they did not argue that the City had no comprehensive plan before the trial court. Of course, there is legal precedent for this argument. *See, Stephens v. Miller*, 970 So.2d 225, 227 (Miss. Ct. App. 2007)(Appellate Court

to consider premises liability claim that was never brought before the trial court) and *Byrd v. Board of Sup'rs of Jackson County*, 179 Miss. 880, 176 So. 386 (1937)(Supreme Court declined to consider issue not presented to lower court pursuant to bill of exceptions).

However, in this case, Jimmy and Felicia Collins did raise the fact that the City has no comprehensive plan in its argument to Circuit Court. *See* Exhibit "A" (p. 10 of Appellant's Circuit Court Reply Brief). Even though the Appellants did not cite Section 17-1-9 M.C.A. to the Circuit Court, the Appellants did raise the issue of the City's lack of a comprehensive plan to the Circuit Court and therefore the issue is properly raised in this appeal.

The City also argues that the requirement that zoning regulations must be made in accordance with a comprehensive plan did not become effective until July 1, 1988 and since the City's original zoning ordinance was enacted on July 1, 1986, this requirement is not applicable to the re-zoning at issue in this case. The City's argument on this count falls flat for two reasons: (1) the applicable statute, Miss. Code Ann. § 17-1-9 was one of the original statutes of the 1972 code, the City mistakenly cites Miss. Code Ann. § 17-1-11 which does have an effective date of July 1, 1986 but has no relevance to the requirement that re-zoning decisions be made in compliance with a comprehensive plan; and (2) the issue is not the City's original 1986 zoning ordinance but rather the City's November 3, 2008 ordinance to re-zone the Subject Property from R-1 to R-2. Because the City's November 3, 2008 re-zoning ordinance was not enacted in accordance with a comprehensive plan it is illegal and must be struck as a matter of law. *Childs v. Hancock County*, 1 So.3rd 855 ¶12 (Miss. 2009)(A municipality's zoning decision cannot withstand judicial scrutiny if the appeals court determines that the decision was illegal).

## **V. CONCLUSION**

The City has failed to meet the burden of proof required to justify re-zoning the subject property from R-1 to R-2. The record lacks substantial evidence of a change in the character of the neighborhood surrounding the Subject Property. Even if the “neighborhood” is defined more extensively as the City urges, none of the properties the City presents are true examples of change since these properties either existed prior to the City’s annexation of the area or the properties were developed entirely consistent with the original zoning scheme of the area.

There is also no substantial evidence to support a conclusion that there is a public need for more multifamily housing in the City of Gautier. The City presents nothing more than an unsubstantiated conclusory statement that more affordable housing is needed. Since the City has presented no substantial evidence of a change in the character of the neighborhood and since there is no evidence of a public need for the re-zoning, the City’s re-zoning ordinance must be struck as a matter of law.

The evidence clearly shows the City engaged in illegal spot-zoning when it passed an ordinance to re-zone the Subject Property to allow a high density multifamily development in an area reserved for single family residential development by the original zoning ordinance and by re-zoning the Subject Property to advance the economic interest of Silver Girl, LLC and its developer partner to the detriment of the residents of the surrounding neighborhood and the tax payers of the City of Gautier. The result of the City’s re-zoning decision would be to create a burdensome and incompatible high density development in the middle of an R-1 waterfront neighborhood. The City’s brief fails to address any of these spot zoning issues and accordingly the Appellant’s positions are

unchallenged. Accordingly, the City's re-zoning decision should be held illegal spot zoning and this Court should overrule the City's re-zoning decision as a matter of law.

Finally, the City's re-zoning ordinance must be set aside as an illegal act since it was not enacted in accordance with a comprehensive zoning plan as is required by the Mississippi Code. For all of these reasons, the City's decision to re-zone the Subject Property must be overturned.

**RESPECTFULLY SUBMITTED**, this the 12<sup>th</sup> day of October, 2009.

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**CERTIFICATE OF SERVICE**

I, John Paul Barber, attorney for the Appellants, Jimmy Collins and Felicia Collins, certify that I have this day sent by U.S. Postal Service for filing the original and three copies of this Reply Brief to the Mississippi Court of Appeals and mailed postage prepaid, one copy of the foregoing Appellant Brief to the Honorable Robert Ramsay, P. O. Box 1892, Pascagoula, MS 39568, attorney for the City of Gautier and one copy to the Circuit Court of Jackson County, Mississippi, P.O. Box 998, Pascagoula, MS 39568.

THIS, the 12<sup>th</sup> day of October, 2009.

  
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JOHN PAUL BARBER