

**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**

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

**ORAL ARGUMENT REQUESTED**

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**CERTIFICATE OF INTERESTED PARTIES**

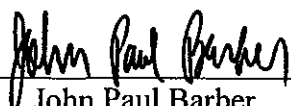
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Supreme Court and Court of Appeals Justices may evaluate possible disqualification or recusal.

Jimmy Collins and Felicia Collins, Appellants,  
John Paul Barber, Attorney for Appellants,  
Mayor and Council of the City of Gautier, Mississippi, Appellee,  
Amy St. Pe, 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 Intervenor, and  
Kathy Jackson, Trial Court Judge

Respectfully submitted this the 2<sup>nd</sup> day of June, 2009.

JIMMY COLLINS AND FELICIA  
COLLINS  
APPELLANTS

BY: \_\_\_\_\_

  
John Paul Barber  
Their Attorney

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### **STATEMENT OF ISSUES ON APPEAL**

1. The Mayor and Council of the City of Gautier, Mississippi, (the “City”) acted in an arbitrary and capricious manner by re-zoning from R-1 to R-2 a 13.5 acre parcel of land located on Roy’s Road in the City of Gautier, PID # 81807110.000 (the “Subject Property”) without substantial evidence in the record to show that the character of the neighborhood surrounding the Subject Property had changed to such an extent as to justify re-zoning.
2. The City acted in an arbitrary and capricious manner by re-zoning the Subject Property without finding substantial evidence in the record to show a public need existed for the re-zoning.
3. The City’s re-zoning decision constituted illegal spot zoning.
4. The City’s ordinance re-zoning the Subject Property is void *ab initio* since the City did not enact the ordinance in accordance with a comprehensive plan.

### **STATEMENT OF THE CASE**

This case is an appeal of the Trial Court’s November 3, 2008 Order affirming the City’s March 18, 2008 decision to re-zone the Subject Property in the Roy’s Fish Camp neighborhood from R-1 to R-2. The City passed an ordinance to re-zone the subject property for the benefit of the property owner and its development partner who desire to place an out-of-character high density multifamily development in a traditional single family semi-rural community that lacks the infrastructure for such development.

The Trial Court’s decision should be reversed since the City acted in an arbitrary and capricious manner by re-zoning the Subject Property without finding substantial evidence of a change in the character of the neighborhood. The Trial Court also erred by failing to find that the

record contained substantial evidence that there was a **public need for re-zoning**. Mississippi law provides that to justify a zoning change, the City must show, “either (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 there was a public need for re-zoning.” In this case, the Trial Court’s order did not assert that “there was a mistake in the original zoning”. Accordingly, the Trial Court could only affirm the re-zoning if it found the record contained substantial evidence that “the character of the neighborhood has changed to such an extent as to justify reclassification, **and** there was a public need for re-zoning”.

While the Trial Court stated without specificity that evidence in the record supported a finding that “the character of the neighborhood has changed to such an extent as to justify reclassification”, neither the City nor the Trial Court referred to any evidence in the record showing a public need for the proposed zoning change. The Trial Court’s opinion is devoid of any analysis of the public need requirement for a zoning amendment.

The Trial Court also erred by failing to reverse the City’s illegal spot zoning decision. The record clearly shows that the re-zoning decision at issue created a zoning change that would be completely out of harmony with the current zoning scheme of the area. Moreover, the City clearly enacted the flawed zoning amendment solely for the benefit of the applicant and its development partner to the detriment of the long term residents of the community. The Trial Court’s opinion failed to even address this illegal spot zoning issue.

Finally, the Trial Court erred by enacting a zoning ordinance that is not in accordance with a comprehensive plan. The City has failed to adopt a comprehensive plan. Accordingly, the City is statutorily prohibited from enacting the re-zoning ordinance at issue. For all of the above reasons,



this Court should reverse the opinion of the trial court and render the re-zoning ordinance void.

**I. Course of the Proceedings Below:**

This matter arises from a January 14, 2008 application by Silver Girl, LLC to re-zone the Subject Property from R-1, single family residential, to R-2, multifamily residential. The City's Planning Commission denied the re-zoning application following a February 7, 2008 public hearing. On February 13, 2008, Silver Girl, LLC appealed the Planning Commission's decision to the City Council.

During a March 18, 2008 public hearing, the City Council passed Ordinance Number 174-2008 re-zoning the Subject Property from R-1 to R-2. On March 28, 2008, the Appellants, Jimmy Collins and Felicia Collins filed their Notice of Appeal to the Trial Court. The Trial Court affirmed the City's re-zoning decision on November 3, 2008. *See*, R.E.077-079, R. 197-199.

**II. Statement of the Facts:**

The Subject Property in this case is a 13.5 acre parcel of land located in the Roy's Fish Camp Neighborhood. The Roy's Fish Camp Neighborhood is an insular community that Jackson County zoned R-1 prior to annexation by the City in February 2002. Consistent with the community's rural ambience characterized by single family homes surrounded by large lots, the City appropriately retained the R-1 zoning after annexation.

The entire neighborhood is accessible by only one roadway, Roy's Road. Roy's Road is a very narrow rural lane that intersects a larger road called Martin Bluff Road. Roy's Road provides access to other streets in the neighborhood. *See*, R.E. 001-003, R. 15-17.

Roy's Road and other streets in the neighborhood are so narrow that two cars have difficulty passing in opposite directions. *See*, photograph of Martin Bluff Road neighborhood street at R.E.

005, R. 19. Many lots in the back of the neighborhood have water frontage along the Pascagoula River and its bayou tributaries.

All of the Roy's Road neighborhood is zoned R-1. The Subject Property is completely surrounded by R-1. *See*, satellite map with zoning overlay at R.E. 063 and 064, R. 107 and 108. The headwaters of Lite Bayou lie in the Subject Property. *See*, R.E. 043, R. 84.

**The City of Gautier has no comprehensive zoning plan.** However, the City does have zoning ordinances. The City uses a familiar two-tiered process for changing its zoning ordinances. First, a planning commission reviews re-zoning requests and makes recommendations to the City Council. Afterwards, the City Council accepts or rejects the Planning Commission's recommendations.

On January 14, 2008, Silver Girl, LLC filed a Public Hearing Application seeking to re-zone the Subject Property from R-1 to R-2. *See*, R.E. 073, R. 147. Documents presumably submitted with the application show Silver Girl, LLC proposed to construct on the Subject Property a high density 120 unit development consisting of eight four story buildings with 309 parking spaces. *See*, R.E. 006-011, R. 21-26. Silver Girl, LLC lists Appellant Jimmy Collins as an owner of property located within 500 feet of the Subject Property *See*, R.E. 074, R. 148.

On January 17, 2008, the City Fire Marshal issued a Memorandum outlining his concerns with the proposed development. First, the Fire Marshall was concerned that the development plan had only one road for entrance and exit. The Fire Marshall recommended an additional fire department access road even though the property had only one access point to narrow Roy's Road. The Fire Marshall also listed other mandatory fire safety requirements that were missing from Silver Girl's development plans. *See*, Fire Marshall Memorandum, R.E. 066-067, R. 117-118, and satellite

photo showing the Subject property is only accessible via Roy's Road, R.E. 003, R. 17, sketch drawing showing single access to Roy's Road and theoretical "gravel surface emergency access drive" cutting across land owned outside the Subject Property, *See*, R.E. 075, R. 151.

On February 6, 2008, a City public works official sent an email outlining his concern that current infrastructure in the Roy's Fish Camp neighborhood was inadequate to service the proposed development. The public works official noted that the water lines, sanitary sewer lines and road ways in the neighborhood were all too small to service the proposed development. He also expressed concern about storm water runoff from the development. *See*, R.E. 068-069, R. 119-120.<sup>1</sup>

Concerned that the Planning Department had inadequate data to complete a site plan report and make a valid recommendation on Silver Girl, LLC's re-zoning request, the City's Community Services Director contacted Silver Girl, LLC on January 31, 2008 and suggested that the Planning Commission table its request for re-zoning until the March 2008 Planning Commission meeting. Silver Girl, LLC objected and demanded that the Planning Commission consider its re-zoning application at its February 7, 2008 meeting. *See*, R.E. 061, R. 102.

Prior to the Planning Commission's February 7, 2008 hearing, the Director of the City's Community Services Department issued a Fact Sheet and Recommendation regarding Silver Girl, LLC's re-zoning application. Although the Community Services Director recognized consideration of Silver Girl, LLC's arguments for re-zoning, the director recommended against the re-zoning since he considered the request a textbook example of illegal spot-zoning. In reaching this conclusion, the learned director noted that the Subject Property is an isolated parcel of land surrounded by a R-1

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<sup>1</sup> The record includes a February 7, 2008 traffic study report issued by Eco-Systems, Inc. but the record is silent as to the increased traffic that would be caused by the proposed development and whether the narrow lanes in the Roy's Fish Camp neighborhood could handle the additional traffic *See*, R.E.065, R-114.

zone and that re-zoning would be detrimental to or incompatible with the uses of the surrounding R-1 land and the re-zoning request would only favor the particular owner of the Subject Property. *See*, R.E. 059-062, R. 100-103.

On February 7, 2008, the Planning Commission conducted a public hearing on Silver Girl, LLC's re-zoning request. R.E. 040, R. 81. Architect Jeff Scott spoke first on behalf of Silver Girl, LLC's re-zoning application. Scott described the proposed development project but he offered no evidence showing a mistake in the original R-1 Zoning or of a change in the character of the neighborhood or of a public need for the development other than to offer a speculative and conclusory opinion that the Martin Bluff Road area was growing. *See*, R.E. 042-049, R. 83-90.

Noting a shortage of R-1 land available for development in the City, a planning commissioner asked why the developer did not plan R-1 development for the Subject Property. A Silver Girl, LLC representative responded stating that due to increasing construction costs and an over-supply of single-family homes in the area, the only economically feasible way Silver Girl, LLC could develop the Subject Property was to have it re-zoned R-2 and build multi-family housing. *See*, R.E. 049-050, R. 90-91.

Another planning commissioner objected to the development's detrimental effect on the surrounding community stating that the development would pollute Lite Bayou with run-off from its parking lots and landscaping. *See*, R.E. 053, R. 94. Other planning commissioners mentioned that the Subject Property is surrounded by R-1 and that it has remained unchanged since the original zoning by the County. *See*, R.E. 053-054, R. 94-95. Finally, the planning commissioners noted that Silver Girl, LLC objected to giving the City's planning department more time to study the re-zoning request. *See*, R.E. 055-056, R. 96-97. After concluding that the evidence presented did not show

a change in the character of the neighborhood to meet the criteria for a zoning change, the Planning Commission voted to deny Silver Girl, LLC's application. *See*, R.E. 056, 058 and 072, R. 97, 99, and 142.

On February 13, 2008, Silver Girl, LLC filed an appeal of the Planning Commission's decision to the City Council. *See*, R.E. 039, R. 80. On March 4, 2008, the City Council issued Order #088-2008 authorizing the council to conduct a March 18, 2008 public hearing on Silver Girl, LLC's appeal of the Planning Commission's decision *See*, R.E. 071, R. 122.

An attorney advocate argued as the first proponent for Silver Girl, LLC's re-zoning application at the March 18, 2008 public hearing before the City Council. The attorney offered no evidence of a mistake in the original zoning by the county. On the issue of public need, the attorney offered no specific evidence, but made a conclusory statement that a "housing is one of our biggest problem (sic) post-hurricane". *See*, R.E. 014, R. 46.

On the issue of change in the character of the neighborhood, the attorney offered a one page document generated by his law firm that listed seven (7) alleged examples of changes in the neighborhood (R-011, R-012 and R-040). Only two of the seven examples even related to the Roy's Fish Camp neighborhood, that being the loss of a business at the east end of Roy's Road to storm damage, and the construction of a neighborhood elementary school. The other examples described alleged changes occurring outside the Roy's Fish Camp neighborhood on lands already zoned for commercial use. *See*, R.E. 035, R. 75.

Several citizens offered evidence in opposition to the re-zoning proposal. Sandra McDaniel reported on her research regarding the lack of a public need for more condominiums in the City of Gautier. She offered evidence that condominiums for sale at Riverbend Condominiums and Hickory

Hill Condominiums had been on the market for more than half a year and still had not sold. She also noted the decline in the housing market in the last quarter of 2007 and the first quarter of 2008. Moreover, Ms. McDaniel stated that the only changes in the area around Roy's Road in the last ten years was the loss of a marina, the replacement of a water park with an RV park and the construction of an elementary school. *See*, R.E. 015-016, R. 53-54.

Ms. Vassey offered evidence that the neighborhood to be considered is the Roy's Fish Camp neighborhood which is a self contained neighborhood to itself off Roys Road. She distinguished the Roy's Fish Camp neighborhood from the commercial properties located some distance away off Martin Bluff Road. She also noted the glut of unsold condominiums on the Gautier housing market. *See*, R.E. 016-017, R. 54-55. The City's Community Services Director also offered evidence that the neighborhood in question in this case was the Roy's Fish Camp community as opposed to the commercial development on Martin Bluff Road. *See*, R.E. 029-030, R. 67-68.

Mr. Frank Feazell offered evidence impeaching the alleged seven changes in neighborhood offered by Silver Girl, LLC's attorney. First, Mr. Feazell pointed out that the alleged growth at Santa Maria RV park is temporary since the park is currently housing construction workers of the Chevron plant. With respect to the apartment complexes located on Martin Bluff Road, Mr. Feazell informed the Council that these units were lawfully developed on land zoned R-2. Finally, Mr. Feazell pointed out that the attorney's contention that Martin Bluff Road is "supposed" to be made four lanes is nothing more than mere speculation. *See*, R.E. 017-018, R. 55-56.

Three residents of the Roy's Fish Camp neighborhood offered testimony showing the adverse impact the proposed development would have on their surrounding property specifically citing drainage, pollution, destruction of wetlands and wildlife habitat and increased traffic problems as

problems that construction of the proposed development would inflict on their neighborhood. The citizens also offered evidence of the peaceful ambience of their fish camp community and how a high density multifamily development would be incompatible with this use. *See*, R.E. 018-020, R. 56-58. Additionally, 51 citizens signed a petition opposing the proposed development citing several examples of the detrimental effect the proposed high density development would impose on their properties including increased traffic, pollution, loss of privacy and reduction of property values. *See*, R.E. 036-037, R. 77-78.

The City Council then considered a motion to approve the zoning change. During their consideration, none of the Council members discussed a mistake in the original zoning. Two Council members mentioned in a conclusory fashion a change in the neighborhood, but they did not cite any evidence of a substantial change in the character of the neighborhood. No member of the City Council even mentioned a public need for the proposed re-zoning. Despite this lack of substantial evidence, the Council voted to approve the re-zoning request. *See*, R.E. 021-034, R. 59-72.

The minutes of the City Council's decision to approve the zoning change also do not include any real findings or conclusions other than summary type conclusory statements that there has been substantial change in the neighborhood and that there is a public need for multi-family establishments in the City. The City Council neglected to detail just *what* conditions had changed and failed to mention *how* those unnamed conditions had changed. Likewise, the City Council failed to detail what public need, if any, existed in the City of Gautier for more high density multifamily development. *See*, R.E. 070, R. 121.<sup>2</sup>

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<sup>2</sup> The City corrected its minutes on May 6, 2008 to show the council members who moved and seconded the motion to approve the zoning change. Again, the City Council failed to

## **SUMMARY OF THE ARGUMENT**

The City's decision to re-zoning of the Subject Property from R-1 to R-2 was arbitrary and capricious since the City did not support its "findings" of a substantial change in the character of the neighborhood and a public need for re-zoning with substantial evidence in the record. In fact, the City's ordinance contains no references to substantial evidence in the record. Moreover, the only substantial evidence in the record to support these so called "findings" are unsupported summary type conclusory statements of advocates paid by the developer to promote the re-zoning effort. These unsubstantiated statements are insufficient to provide the substantial evidence required to affirm the City's re-zoning decision.

The City's re-zoning ordinance must also be overturned since it constitutes illegal "spot zoning". The record clearly shows the City only re-zoned 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. This is a classic case of spot zoning that must not stand.

The City's re-zoning ordinance is also illegal because the City did not enact the ordinance in accordance with a comprehensive plan as is required by Mississippi Law. The City's re-zoning decision is therefore illegal and should be overturned as a matter of law.

## **ARGUMENT**

### **I. Standard of Review**

This Court has recently reaffirmed that "[T]he classification of property for zoning purposes is a legislative rather than a judicial matter. The order of the governing body may not be set aside

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specify what conditions had changes and how these unnamed conditions had changed. *See*, R.E. 076, R. 189.



unless it is clearly shown to be arbitrary, capricious, discriminatory, or is illegal, or without substantial evidentiary basis.” *Childs v. Hancock County*, 1 So.3rd 855 ¶12 (Miss. 2009). Appeals courts must give re-zoning decisions a presumption of validity and the burden of proof rests with the opponents of re-zoning. Additionally, “[A] court should not substitute its judgment for that of a municipality regarding the classification of property unless its decision is not supported by substantial evidence, arbitrary or capricious, beyond the scope of the municipality's powers, or violated the constitutional or statutory rights of the party.” *City of Petal v. Dixie Peanut Co.*, No. 998 So. 2d 1010 ¶ 7 (Miss. App. May 20, 2008) citing, *Wilkinson County Bd. of Supervisors v. Quality Farms, Inc.*, 767 So.2d 1007,1010 (¶ 8) (Miss.2000).

However, municipalities do not have *carte blanche* when it comes to re-zoning. Appeals Courts should not hesitate to overturn zoning decisions that are **illegal, arbitrary, capricious or without substantial evidentiary basis**. *Childs v. Hancock County*, 1 So.3rd 855 ¶12 (Miss. 2009).

“The guidelines for determining whether an action is arbitrary and capricious have been stated by the Mississippi Supreme Court as follows:

“Arbitrary” means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending on the will alone,-absolute in power, tyrannical, despotic, non-rational,-implying either a lack of understanding of or disregard for the fundamental nature of things. Capricious” means freakish, fickle, or arbitrary. An act is capricious when it is 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.* at ¶ 8, citing, *Harrison County Bd. v. Carlo Corp.*, 833 So.2d 582, 583 (¶ 6) (Miss.2002).

**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.**

Before reclassifying property from one use or another, a governing body must find that either “(1) that a mistake was made in the original zoning or, (2) that a change in the character of the neighborhood has occurred to such an extent as to justify re-zoning and that a public need exists for such action.” *Faircloth v. Lyles*, 592 So.2d 941, 945 (Miss. 1991).

In the case *sub judice*, the City has not alleged that there was a mistake in the original zoning. As such, the City attempts to travel on the concept that the character of the Subject Property changed to such an extent as to justify re-zoning **and** that there was a public need to re-zone the Subject Property from single family R-1 use to multifamily R-2 use.

In Mississippi, there is a strong presumption that comprehensive zoning ordinances adopted or amended by local governing authorities are well-planned and intended to be permanent. *Town of Florence v. Sea Lands, Ltd.*, 759 So.2d 1221, 1224 (¶ 11) (Miss. 2000).

In the context of re-zoning, proponents carry a heavy burden at the municipal level. The case at bar involves a question of re-zoning rather than 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 rezoning.” *Tippitt v. City of Hernando*, 909 So.2d 1190, 1192, ¶ 5 (Miss. Ct. App.2005).

A review of the record in this case shows that the City Council did not conclude there was substantial evidence of a change in the character of the neighborhood and a public need for the re-

zoning before voting to approve the application for a zoning change. The best evidence of this lack of a properly supported conclusion is the City's resolution itself.

The City's resolution approving the zoning change is sparse at best:

WHEREAS, a duly announced public hearing was conducted by the Gautier City Council on March 18, 2008 to receive public comments regarding a request for a zoning change that would re-zone 13-5 acre parcel of land on Roy's Road, specifically PID#81807110.000 and;

NOW THEREFORE, BE IT ORDAINED by the Mayor and Members of the Gautier City Council that based on evidence presented, council finds that there has been substantial change in the the neighborhood and further that there is a public need for multi-family establishments in the City therefore lot PID#81807110.000 is changed from R-1 Single Family Residential to R-2 Multi-Family Residential.

(R-086 and 154). This ordinance shows the City made no "specific findings" of a change in conditions and a public need nor did the City make conclusions "properly supported" by facts in the record. Such conclusory statements are insufficient to document the "clear and convincing" evidence that a municipality must receive before it enacts a change to its presumably well thought out zoning plan.<sup>3</sup>

As an appellate court, the Trial Court was bound to determine if substantial **evidence** supported the City's re-zoning decision. The record in this case is bereft of any specific evidence that would tend to show a change in the subject neighborhood or a public need for more multifamily housing units in the overbuilt Gautier market.

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<sup>3</sup> Of course, in this case, the City of Gautier has no comprehensive zoning plan.

The record shows the City Council did not consider any specific changes in the neighborhood or a public need for the re-zoning when it voted to approve the zoning change. During its discussion of the motion to approve the zoning change, none of the council members referred to any evidence of purported changes to the neighborhood or a public need for the proposed re-zoning. Councilwoman Lay merely commented on the developer's investigation of certain species found on the subject property, asked a few questions about wetlands destruction and inquired as to the economics of the proposed high density multifamily development. *See*, R.E. 021-024 , R. 59-62. Councilman Feathers merely discussed drainage issues and argued that some sort of development would occur on the subject property. *See*, R.E. 024-027 , R. 62-65. Councilman Hansford only asked for a legal definition of "spot-zoning". *See*, R.E. 027-028 , R. 65-66. Councilman Wilkinson also discussed the development potential of the subject property and spot-zoning. *See*, R.E. 027-029, R. 65-67. Councilman Paul inquired as to the definition of a neighborhood, requested information on drainage and discussed economics of the development for the benefit of the developer. *See*, R.E. 029-032, R. 67-70. Councilman Guillotte made a conclusory statement that the neighborhood had changed but most of his statement consisted of an argument that the proposed high density multifamily development was for some unspecified reason preferable to single family housing. *See*, R.E. 033-034, R. 71-72.

A careful review of the record shows that the City Council did not make a conclusion supported by specific findings that the Roy's Fish Camp neighborhood had changed. Moreover, there is no indication in the record that the City Council even considered whether a public need existed for additional multifamily housing units in Gautier.

- A. There is no substantial evidence in the record indicating a change in the character of the neighborhood.**

The Roy's Fish Camp neighborhood is a neighborhood that is easily defined as all of the properties accessed by Roy's Road and the streets that run off of Roy's Road. The neighborhood is zoned R-1 and consists of single family housing. The re-zoning proponents cite only two properties in the neighborhood to try to show a change. Their first example of a "change in the character of the neighborhood" is the construction of a Jackson County elementary school on Roy's Road near its intersection with Martin Bluff Road. This school is not an example of **change** in the character of the neighborhood since the Councilmen knew full well that this county school existed on this site prior to annexation by the City in 2002.<sup>4</sup> Most importantly, an elementary school is certainly in keeping with the character of a R-1 single family neighborhood and is a permitted use in R-1 neighborhoods. An elementary school is not an example of change in the character of a residential neighborhood.

The re-zoning proponents also cite the example of an old marina at the end of Roy's Road that is no longer in operation due to storm damage as evidence of a change in the neighborhood. While loss of tax base and blight may be evidence of change in character of a neighborhood, the loss of just one property cannot be said to be the type of "clear and convincing evidence" that municipalities must find exist to show a change in the character of a neighborhood sufficient to justify a zoning change.<sup>5</sup> In this case, no evidence was presented indicating the Roy's Fish Camp

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<sup>4</sup> In determining the factual issues in re-zoning, municipalities must consider not only the information obtained at the hearing but also their own common knowledge and the familiarity with the ordinance area. *Faircloth v. Lyles*, 592 So.2d 941, 943 (Miss. 1991), citing, *Board of Aldermen of Town of Bay Springs v. Jenkins*, 423 So.2d 1323, 1327 (Miss.1982).

<sup>5</sup> In limited circumstances deterioration of a neighborhood coupled with increased crime may be evidence of a character change in a neighborhood that justifies rezoning. *Briarwood, Inc. v. City of Clarksdale*, 766 So.2d 73, ¶ 34 (Miss. Ct. App. 2000).

Neighborhood is in any way blighted.

All of the other examples of “change” in the neighborhood were to properties off Martin Bluff Road that are not zoned R-1. For example, the City cites a proposed development called Faragout Lake Apartments. This proposed development is North of I-10 while the subject property is South of I-10. The City also lists various apartment developments built in commercial property along Martin’s Bluff Road. These apartment developments are not evidence of change in the character of the neighborhood since they are built on land zoned for such uses and are consistent with existing uses on Martin’s Bluff Road. The issue here is whether or not the R-1 Roy’s Fish Camp Neighborhood has changed. The record shows no evidence of a change that would warrant re-zoning the subject property to allow high density multifamily development in a peaceful semi-rural neighborhood of single family homes.

**B. There is no substantial evidence in the record indicating a public need for more high density multifamily development in 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-011). This statement is supported by no data or even rhetorical argument. By contrast, opponents of the re-zoning application offered evidence that condominiums previously constructed in the City of Gautier were languishing in a soft real estate market beset by fundamental problems such as an oversupply of housing, reduced population on the Mississippi Gulf Coast and reduced or unavailable credit opportunities for potential home buyers. The record cannot support a conclusion that there is a public need for more multifamily housing units in Gautier. The substantial evidence shows a glut of condominiums and other forms of high density multifamily housing in the contracting Gautier real estate market. On this record, the issue is not even “fairly

debatable”.

Simply because the substantial evidence standard of review is applicable, it does not follow that a municipality may re-zone property to the detriment of surrounding landowners on the sole basis of mere summary type conclusory statements. Mississippi Appellate Courts consistently hold that unsupported “conclusory statements” do not constitute the sort of “substantial evidence” required to support the decisions of governing bodies.<sup>6</sup> Appeals courts considering municipal zoning decisions in other jurisdictions are in accord.<sup>7</sup>

In this case, the City supports its re-zoning decision on no more than unsupported summary type conclusory statements of a paid advocate for the developer interests. No substantial evidence exists to support the City’s purported “finding” that a public need for high density multifamily housing existed in the City of Gautier. Accordingly, the City’s re-zoning decision was arbitrary and capricious and must be reversed as a matter of law.

**III. The City’s decision to re-zoning the subject property for the economic convenience of the developer to the detriment of the Appellants and the City of Gautier should be overturned as illegal spot zoning.**

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<sup>6</sup>See, for example, *Cauthen v. Public Employees' Retirement System*, 860 So.2d 829, 832-833 (Miss. Ct. App. 2003)(Reviewing official’s conclusory summary statement that there was not enough objective evidence of disability in the record held to be unhelpful to reviewing court’s effort to assess whether there was substantial evidence to support the PERS system’s determination of no disability especially in the face of claimant’s admissible medical evidence of disability). See, also, *Mississippi Sierra Club v. Mississippi Department of Environmental Quality*, 819 So.2d 515, 522-23 (Miss. 2002), citing *McGowan v. Mississippi State Oil and Gas Board*, 604 So.2d 312 (Miss. 1992)(Decision of governing bodies held arbitrary and capricious where orders did not include findings and explanations sufficient to show what substantial evidence existed in the record to support the order)

<sup>7</sup> *South Central Ass'n of Neighbors, Inc. v. Lindsey*, 21 Or.App. 578, 535 P.2d 1381 (Or. App. 1975)(Re-zoning proponent’s conclusory statement on public need held, in dicta, to be insufficient substantial evidence to support re-zoning decision). *Tate v. Miles*, 503 A.2d 187 (Del. 1986)(Conclusory statements insufficient to sustain county council’s re-zoning decision).

The Mississippi Supreme Court addressed the issue of illegal spot zoning in *Drews v. City of Hattiesburg*, 904 So.2d 138 (Miss. 2005) as follows:

In *McWaters v. City of Biloxi*, 591 So.2d 824, 828 (Miss.1991), we discussed “spot zoning”: The term “spot zoning” is used by the courts to describe a zoning amendment which is not in harmony with the comprehensive or well-considered land use plan of a municipality. In *McKibben v. City of Jackson*, 193 So.2d 741, 744 (Miss.1967), we stated: 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 FN. 2.

The City of Gautier has no Comprehensive Plan. Thus, the only evidence of a “well-considered land use plan” available to the City Council was its existing zoning ordinance. Prior to annexation, Jackson County wisely recognized the strong residential character of the Roy’s Fish Camp community and zoned the neighborhood R-1.

The Subject Property was within this R-1 zone when annexation occurred in 2002. The City continued the R-1 zoning designation for the subject property after annexation. The Subject Property is completely surrounded by R-1 land. The only point of ingress or egress to the Subject Property is via Roy’s Road. Accordingly, it is clear that the Subject Property is appropriately zoned R-1 along with all the other properties serviced by Roy’s Road in the Roy’s Fish Camp Community.

Clearly, to re-zone the subject property R-2 to allow a developer to cram a high density development consisting of 13 acres, eight mid-rise buildings holding 120 multifamily housing units and 309 parking spaces is completely out of character for an existing semi-rural single family



neighborhood. On this basis alone, this is a classic case of “spot zoning”.

Additionally, the record clearly shows that the re-zoning at issue was enacted solely for the benefit of the applicant and its developer partner. At the Planning Commission hearing, the developer was asked why the Subject Property could not be developed as R-1 single family housing. The developer responded by saying that due to construction costs, “[w]e cannot build on this property and actually make any money whatsoever and keep it R-1. R-2 is really the only solution . . .” R.E. 049-050 , R. 90-91. The undisputed record therefore shows that the decision to re-zone the property from R-1 to R-2 was enacted for the clear purpose of advancing the economic interests of the applicant Silver Girl, LLC and its development partner.

The record is replete with evidence that the proposed development would be detrimental to the adjacent residents of the Roy’s Fish Camp Community and the City of Gautier as a whole. At the public hearings, the residents of the Roy’s Fish Camp Community testified that the proposed dense development would adversely affect their life style and property values by increasing pollution, storm water run-off, flooding and traffic.

Moreover, the City Council had ample evidence that the infrastructure in the area was insufficient to accommodate the proposed development. The City public works official noted that the water lines, sanitary sewer lines and road ways in the neighborhood were all too small to service the proposed development. He also expressed concern about storm water runoff from the development. *See*, R.E. 068-069, R. 119-120.<sup>8</sup>

The City Council also had evidence that the proposed development was a fire hazard. The

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<sup>8</sup> The record includes a February 7, 2008 traffic study report issued by Eco-Systems, Inc. but the record is silent as to the increased traffic that would be caused by the proposed development and whether the narrow lanes in the Roy’s Fish Camp neighborhood could handle the additional traffic. R.E. 065 , R. 114.

City Fire Marshal expressed his concerns that the development plan had only one road for entrance and exit. The Fire Marshall recommended an additional fire department access road even though the property had only one access point to narrow Roy's Road. The Fire Marshall also listed other mandatory fire safety requirements that were missing from Silver Girl's development plans. *See*, Fire Marshall Memorandum. *See*, R.E.066-067 , R. 117-118. (R-082 and R-083), satellite photo showing the Subject property is only accessible via Roy's Road (R-074), sketch drawing showing single access to Roy's Road and theoretical "gravel surface emergency access drive" cutting across land owned outside the Subject Property. *See*, R.E. 075, R. 151 (R-116).

The record shows that the only beneficiary of the zoning change would be Silver Girl, LLC and its development partner. Those adversely impacted by the zoning change would be the residents of the Roy's Fish Camp Community who would suffer a compromised quality of life with attendant reductions in property values. Also adversely impacted would be each City of Gautier tax payer who would have to foot the costs of the infrastructure improvements that would be required to accommodate the high density development authorized by the short sighted decision of the City Council to favor a single development consortium.

**IV. The City's re-zoning ordinance is illegal and must be overturned since it was not enacted in accordance wit a comprehensive zoning plan.**

A municipality's zoning decision cannot withstand judicial scrutiny if the appeals court determines that the decision was illegal. *Childs v. Hancock County*, 1 So.3rd 855 ¶12 (Miss. 2009).

The statutory scheme granting municipalities the legal authority to enact zoning ordinances is found in Chapter One of Title 17 of the Mississippi Code. The statutes provide 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**.

Thus, to be valid, a zoning ordinance must be enacted in accordance with the comprehensive plan pertaining to use of land within the municipality. *Berry v. Embry*, 238 Miss. 819, 120 So2d 165 (1960). A land use ordinance must be held illegal and invalid if it is enacted not in accordance with a comprehensive plan. *Freelance Entertainment, L.L.C. v. Sanders*, 280 F.Supp. 533 (N.D. Miss.)(Lowndes County land use ordinance regulating adult entertainment held invalid since it was enacted without reference to a comprehensive plan).

In the case *sub judice*, the City of Gautier has no comprehensive plan. Accordingly, the City did not enact the re-zoning ordinance in accordance with a comprehensive plan. The Courts must therefore hold that the re-zoning ordinance enacted by the City of Gautier was illegal.

### **CONCLUSION**

The City’s decision to re-zone the Subject Property from R-1 to R-2 must be overturned since there is no substantial evidence in the record to show that a change in the character of the neighborhood has occurred to such an extent as to justify re-zoning and that a public need exists for such action. The City’s findings on these issues are supported by no more than summary type conclusory statements in the record offered by paid advocates for the developer interests.



Accordingly, the City acted in an arbitrary and capricious manner and its re-zoning decision must be reversed.

The evidence in the record clearly shows the City engaged in illegal spot-zoning by re-zoning the Subject Property to advance the economic interest of Silver Girl, LLC and its development 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 decision would be to create a burdensome and incompatible high density development in the middle of an R-1 waterfront neighborhood.

Finally, the City's re-zoning ordinance is illegal because the City did not enact the ordinance in accordance with a comprehensive plan as is required by Mississippi Law. For all of these reasons, the City's re-zoning decision is illegal and should be overturned as a matter of law.

RESPECTFULLY SUBMITTED, this the 2<sup>nd</sup> day of June, 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 Supreme Court Clerk and mailed postage prepaid, one copy of the foregoing Appellant Brief to the Honorable Amy St. Pe, P. O. Box 1618, Pascagoula, MS 39568-1618 and the Honorable Cathy Jackson,, Circuit Court Judge, c/o Joe W. Martin, Jr., P. O. Box 998, Pascagoula, SM 39568.

THIS, the 2<sup>nd</sup> day of June, 2009.

  
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JOHN PAUL BARBER