

IN THE SUPREME COURT OF MISSISSIPPI

HILLSIDE TERRACE, L.P., A MISSISSIPPI
LIMITED PARTNERSHIP, BY AND
THROUGH ITS GENERAL PARTNER,
HILLSIDE TERRACE I, LLC, A MISSISSIPPI
LIMITED LIABILITY COMPANY, HOSHALL
S. BARRETT, JR., FRANK A. LOVELL,
AND RAYMOND E. TIPTON

Appellants

VERSUS

CAUSE NO. 2008-SA-00350

CITY OF GULFPORT, MISSISSIPPI
MARTIN MIAZZA AND DOROTHY MIAZZA

Appellees

BRIEF OF CITY OF GULFPORT, MISSISSIPPI, APPELLEE

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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 judges of this court may evaluate possible disqualification or recusal.

1. Hillside Terrace, L.P., A Mississippi Limited Partnership – Appellant
2. Hillside Terrace I, LLC, A Mississippi Limited Liability Company – Appellant
3. Hoshall S. Barrett, Jr., - Appellant
4. Frank A. Lovell – Appellant
5. Raymond E. Tipton - Appellant
6. Paul Delcambre, Jr., Esq., of Balch & Bingham, LLP, - Counsel for Appellant
7. City of Gulfport, Mississippi – Appellee
8. Martin and Dorothy Miazza - Appellees
9. Margaret Murdock, Esq., of the City Attorney's Office of the City of Gulfport – Counsel for City of Gulfport, Appellee
10. David Crane – Counsel for the Miazza's, Appellees
11. Members of the City of Gulfport's Planning Commission
12. Members of the City of Gulfport's City Council

RESPECTFULLY SUBMITTED, this the 17 day of Nov, 2008.

CITY OF GULFPORT, MISSISSIPPI,
Appellee

BY:

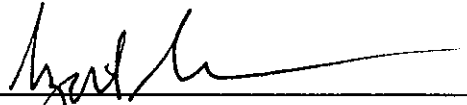

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TABLE OF CONTENTS

Table of Contents	iii
Table of Cases.....	iv
Statement of the Issues	1
Statement of the Case	2
Nature of the Case, Course of Proceedings and Disposition in Court Below	2
Statement of Facts	3
Summary of the Argument	6
Argument.....	7
STANDARD OF REVIEW	7
THE PLANNING COMMISSION AS AFFIRMED BY THE GULFPORT CITY COUNCIL ACTED WITHIN ITS POWER AND AUTHORITY IN DENYING HILLSIDE'S APPLICATION FOR MULTI-FAMILY DWELLING USE ON THE PROPOSED SITE ZONED B-2.....	6
DENIAL OF APPLICATION FOR PLANNING APPROVAL FOR THE MULTI-FAMILY PROJECT WAS NOT A VIOLATION OF HILLSIDE'S CONSTITUTIONAL OR STATUTORY RIGHT.....	12
DECISION BY CITY AUTHORITIES TO DENY THE APPLICATION FOR PLANNING APPROVAL FOR A MULTI-FAMILY HOUSING PROJECTIN A B-2 GENERAL BUSINESS DISTRICT WAS SUPPORTED BY THE SUBSTANTIAL EVIDENCE AS WAS NOT ARBITRARY OR CAPRICIOUS	13
THE DECISION IS NOT SHOWN TO BE IN VIOLATION OF THE FEDERAL FAIR HOUSING LAW	15
Conclusion	17
Certificate of Filing and Service	18

TABLE OF AUTHORITIES

CASE LAW

<u>Ballard v. Smith</u> , 107 So.2d 580 (1958)	10, 15
<u>Barnes v. Board of Supervisors, Desoto County</u> , 553 So.2d 508 (Miss. 1989)	8
<u>Beasley v. Neelly</u> , 911 So.2d 603 (Miss. 2005).....	10
<u>Board of Alderman of Town of Bay Springs v. Jenkins</u> , 423 So.2d 1323 (Miss. 1982)	14
<u>Broadacres, Inc. v. City of Hattiesburg</u> , 489 So.2d 501 (Miss. 1986).....	14, 15
<u>City of Biloxi v. M. C. Hilbert</u> , 597 So.2d 1276 (Miss. 1992).....	8
<u>Currie v. Ryan</u> , 243 So.2d 48 (Miss. 1970)	15
<u>Killegrew v. City of Gulfport</u> , 293 So.2d 21 (Miss. 1974)	15
<u>Ladner v. Harrison County Board of Supervisors</u> 793 So.2d 637 (Miss. 2001)	2
<u>Luter v. Hammon</u> , 529 So. 2d 625 (Miss. 1988).....	8
<u>Mathis v. City of Greenville</u> , 724 So.2d 1109 (Miss. App. 1998).....	15
<u>McIntosh v. Amacker</u> 592 So.2d 525 (Miss. 1991)	2
<u>Public Employees' Retirement System v. Howard</u> , 905 So.2d 1279 (Miss. 2005)	13, 14, 15
<u>Ridgewood Land Co. v. Moore</u> , 222 So.2d 378 (Miss.1969).....	8
<u>Saunders v. City of Jackson</u> , 511 So.2d 902 (Miss. 1987)	8, 15
<u>Walters v. City of Greenville</u> , 751 So.2d 1206 (Miss. 1999)	9

STATUTES

<u>Miss. Code Ann.</u> , §11-51-75.....	2
<u>Miss. Code Ann.</u> , § 17-1-7	9
<u>Miss. Code Ann.</u> , §17-1-9	9

OTHER AUTHORITIES

<u>Black's Law Dictionary</u> , 5 th Edition (1979).....	14
Rule 5.03, <u>Uniform Circuit Court Rules</u>	8
Rule 5.04, <u>Uniform Circuit Court Rules</u>	2

STATEMENT OF ISSUES

I. WHETHER OR NOT THE GULFPORT PLANNING COMMISSION, AND ON APPEAL, THE CITY COUNCIL WENT BEYOND THEIR POWERS IN DENYING HILLSIDE'S APPLICATION FOR MULTI-FAMILY DWELLING USE ON PROPOSED SITE ZONED B-2.

II. WHETHER OR NOT THE DENIAL OF APPLICATION FOR MULTI-FAMILY PROJECT VIOLATED A STATUTORY OR CONSTITUTIONAL RIGHT OF APPELLANT, HILLSIDE.

III. WHETHER OR NOT THE DENIAL OF APPLICATION WAS AN ARBITRARY AND CAPRICIOUS DECISION OR A DECISION BY THE CITY AUTHORITIES NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE.

IV. WHETHER OR NOT THE DECISION VIOLATED THE FEDERAL FAIR HOUSING LAW.

STATEMENT OF CASE

A. NATURE OF THE CASE:

This case is an appeal of a final municipal zoning decision of the Governing Authority of the City of Gulfport, Mississippi, vesting the Circuit Court of the First Judicial District of Harrison County, Mississippi with statutory jurisdiction under Miss. Code Ann., §11-51-75 (1972). This appeal was perfected by Appellant, Hillside Terrace, L.P., by its General Partner, Hillside Terrace I, LLC (herein "Hillside" or "Appellant") by filing its Notice of Appeal pursuant to Rule 5.04, Uniform Circuit Court Rules, and submitting its Bill of Exceptions to City of Gulfport authorities as required under said §11-51-75, which was duly signed by the President of the Gulfport City Council and filed herein.¹ The case before the Court herein is an appeal on the record as submitted and certified to by the City Clerk of the City of Gulfport (herein "City" or "Gulfport" or "Appellee") of proceedings from and before the City of Gulfport's authorities (Planning Commission and City Council) and the record is incorporated by the Bill of Exceptions.

B. SUMMARY OF THE PROCEEDINGS BELOW:

Stated as a chronology of pertinent proceedings:

(a) Dec. 5, 2006, Hillside filed with the Gulfport Planning Commission its Application for Planning Commission Approval to construct multi-family apartments on approximately 6.02 acres in a B-2 (General Business District) zone in the City. *See Record, p. 19*²

(b) Jan. 11, 2007 City of Gulfport Planning Commission held a Public Hearing on Hillside's Application and by vote of 6 to 2 against the approval, it denied approval of Hillside's proposed Multi-Family Housing Development, *See Record, p. 62*³, also *See Record, p. 92*;

¹ The bill of exceptions from appeal of a government decision serves as the record on appeal, and the circuit court must limit its review to the case made by the bill of exceptions. Ladner v. Harrison County Board of Supervisors 793 So. 2d 637 (Miss. 2001). Circuit Court's jurisdiction on appeal from a governing body's decision is dependent upon Appellant's obtaining and filing a bill of exceptions. *See McIntosh v. Amacker* 592 So.2d 525 (Miss. 1991).

² Reference to "Record" identify certain pages contained in the Record; reference to "Record Excerpts" indentify certain items contained in the Record Excerpts filed herein by the Appellant.

(c) Jan. 25, 2007 Submittal by Hillside of Appeal (to Mayor and City Council) of Planning Commission Denial⁴, *See Record*, p. 93;

(d) March 20, 2007 Hearing of Appeal and Decision of City Council affirming the Planning Commission and finally denying Hillside's Application for Multi-Family Dwelling use on proposed site zoned B-2, *See Record*, p. 117⁵;

(e) March 29, 2007 Hillside filing with the Circuit Court herein and served on the City's Attorney its of Notice of Appeal under Miss. Code (1972) Ann., §11-51-75;

(f) July 19, 2007 Gulfport City Clerk filed her Certificate and Transmittal of Official Record of Proceedings from Gulfport authorities;

(g) September 12, 2007, Bill of Exceptions filed;

(h) January 24, 2008, Judge Stephen B. Simpson entered an Order affirming the decision of the City Council, *See Record Excerpt No. 4*;

(i) February 22, 2008, Hillside filed a Notice of Appeal to this Court, *See Record Excerpt No. 2*.

C. STATEMENT OF FACTS:

Hillside Terrace, L.P., filed an Application for Planning Approval to be heard and ruled on by the Gulfport Planning Commission to construct multi-family apartments on a site on the North Side of Pass Road just East of the Pass Road, 29th Street intersection. This is a y-shaped intersection where Pass Road continues to run in a west-southwesterly direction and 29th Street

³ Use of land zoned B-2 for "Multi-Family Dwelling" requires Planning Approval by the Gulfport Planning Commission. *See Record*, pp. 158-59, *Record* pp. 160-161.

⁴ The Gulfport Planning Commission by City Ordinance is authorized to grant or deny an application for Planning Approval. Any person aggrieved by the decision of the Planning Commission may appeal that decision to the Mayor and City Council. The City Council shall hear the appeal on the "transcript of proceedings" from the planning commission. In absence of an appeal, the Planning Commission decision is final. If appealed as in the case *sub judice* to the City Council, the City Council decision is the final decision of the governing authorities of the city, that may be appealed to the Circuit Court. *See Record*, pp. 117-154.

⁵ This is the record of final decision of the Gulfport City Council by which the Planning Commission denial was affirmed by vote of 4 to 2 (Councilwoman Roland, recused herself). *See Exhibit 9*, pages 2 & 38.

begins at the intersection and runs west-Northwesterly (Record, P. 19). The Miazza's gift shop is located on 29th Street on the West side of the intersection. According to "Development Summary" (Record, p. 19) the development will consist of a 96 unit development of 4 three-story buildings and a large leasing office/clubhouse facility and a maintenance building on approximately 5.8 acres of the 6.02 acre site. The property is owned by Hoshall S. Barrett, Jr., Frank A. Lovell and Raymond E. Tipton (herein "Owners"), and Realtex Development Corporation, a Texas Corporation, has a contract to purchase the property with Hillside to develop, rent and manage the apartment complex. (Record, p. 19). The property is zoned B-2, and adjacent land use and zoning is, as follows:

North	R-2	Brickyard Bayou
South	B-2	Commercial
East:	B-2	Commercial
West	B-2	Apartments (also commercial by Miazza Gift Store)

See Record, p. 58 and Record, p. 89.

As stated in Footnote 4, Supra, the Gulfport Zoning Ordinance does not allow multi-family dwelling use of property in a B-2 (Business) zoning district except with "planning approval" by the Gulfport Planning Commission (herein "GPC"). A party aggrieved by GPC decision may appeal to the Mayor and City Council, who will render a final decision based upon the transcript from the GPC.

A public hearing was noticed and held by the Gulfport Planning Commission (See Transcript of Hearing, Record, p. 62) on Hillside's Application on January 11, 2007. The GPC had for consideration Hillside's Application with exhibits (Record, p. 19), the Gulfport's investigative "Staff Report" (Record, p. 58), and a letter of opposition from Attorney, David Crane, in behalf of Mr. and Mrs. Martin Miazza and their daughter, Kennedy White, owners of gift shop business immediately West of the subject site (Record, p. 89). At the hearing, the GPC heard (unsworn) testimony (Record, p. 62) by Ms. Doyle, a City of Gulfport Planner, explaining the project and finally giving the Planning Staff's recommendation. It heard testimony in behalf

of the Hillside project by its Attorney, Paul Delcambre, Hillside's Engineer (Record, pp. 69-72), whose name and credentials were not identified, and by John Boyd, V.P. of Realtex Development Corporation. In opposition to the project approval GPC heard testimony from Attorney David Crane. At the conclusion of the hearing a motion to approve the application and staff recommendation failed by vote of two (2) for and six (6) opposed (Record, p. 62).

The City staff gave notice of denial of the application to Hillside (Record, p. 92), and Hillside invoked its administrative right to appeal the GPC decision for a final decision by the Gulfport City Council (herein the "Council") and filed its documents stating its grounds for appeal (Record, p. 113).

The case was placed upon the March 20, 2007, Council Agenda, Item 4 under Policy Issues (Record, p. 114) for action, and was reviewed by the Council on the basis of the transcript and exhibits from the Planning Commission. After a motion was made by Councilwoman Ms. Holmes-Hines to uphold the Planning Commission recommendation (Record, p. 118)⁶, representatives were allowed to speak in behalf of the proponents and the opponents of the project, and many questions were asked by council-members, and a discussion among, council-members was held (Record, p. 118). The discussion was limited to matters in the Planning Commission Record.⁷ At the conclusion of the hearing a final decision was made by the City Council by vote of four to two in favor of the Motion that denied planning approval (Record, p. 154).

Some of the more pertinent facts that were evidenced by the testimony, documentary exhibits, question and answers, and noted in argument are here noted or shall be pointed out in more detail and emphasized in the City's legal argument herein. It is important to recognize

⁶ The Planning Commission in fact within their authority denied planning approval for the project. It was a decision-not a recommendation, before the Council on appeal. The Motion to uphold the recommendation was in fact a motion to affirm the GPC decision to deny the application for Multi-family dwelling use of the site.

⁷ Councilwoman Roland recused herself from the matter being heard, and therefore did not vote. Only 6 of the 7 Council Members considered and voted on the Motion to Deny.

that the proposed development shall have one (1) vehicular access only located on the north side of Pass Road just east of the "Y" intersection with 29th Street, and with businesses located on three (3) sides of the Pass Road access to the site. The businesses include the Gift Shop to the west that is raising serious objections to the development, a busy Grocery Super Market across the Street to the South, and a Rent-All center to the East. Further, a public elementary school is located to the South and East of the site on Pass Road, and the sole access to the site is within a regulated school zone along which children walk. The Staff Report (Record, p. 58) contains Fire and Police comments and concerns, and all of these things were certainly considerations on the issue of whether or not to approve increased person and vehicle density in an already busy and high traffic area that would evolve from a 96 unit dwelling facility. Further, the record indicates that on the West side of the site behind the Miazza gift shop that there is an existing Apartment project, Cypress Lane, that includes 100 units (Record, p. 56) with sole access on the West side of the Miazza's on 29th Street just West of the subject site.

SUMMARY OF ARGUMENT

The City of Gulfport Planning Commission was charged by City Ordinance with the duty of deciding whether to grant Planning Approval to Hillside Terrace, L.P., on its Application to develop ninety-six (96) multi-family apartments for rental dwelling use in a General Business (B-2) restricted zone. Multi-family dwelling use was not allowed in a B-2 zoning district, except by planning commission approval. Because it is a district designed for limited business purposes to supply commercial establishments to the local and surrounding community, the multi-family dwelling uses under City ordinance required approval as to location and site plan. The GPC acting within its authority and discretion denied the application and the denial, on appeal to the City Council was affirmed by the City Council based upon hearings before both boards and a very lengthy and documented record on file in this case.

The Appellants, Hillside (developer) joined by the current owners as intervenors appealed the decision, and using the shot-gun approach have set forth each element as an issue that the Court has jurisdiction to review, claiming the GPC went beyond its powers in making the decision, that its decision was confiscatory and in violation of Federal Fair Housing Laws, and that the decision was arbitrary or capricious and not based upon substantial evidence.

The City shall argue that based upon a very thorough record in this case, supported by the elements of the zoning ordinance required to be considered to approve this use, and within the purposes of a zoning ordinance as allowed by State statutory law, that the decision was one in which reasonable minds may agree upon, and was a decision that certainly must be decided by the Court to have been "fairly debatable." Being debatable, under case law, the Court cannot set it aside. Elements in the record that were considered and very strongly argued in behalf of next door gift shop business owners was the impact that such a development would have on transportation and access, fire and police protection, other public facilities such as the nearby school and city's drainage system, the undue traffic congestion and traffic hazard that would be caused by the development and the cars in this school district accessing the development to and from Pass Road in a busy area near an intersection. Also the record gives evidence that an additional residential development of this size next to an existing one would not be in harmony with the orderly and appropriate development of the business district. The record of problematic impact and of the need to protect the public interest is reason to uphold the decision.

ARGUMENT

A. Standard of Review:

Rule 5.03, Uniform Circuit Court Rules, adopts the limited criteria long established by Mississippi Supreme Court decisions for appeals from administrative agencies (which includes local government decisions), specifying the "scope of appeals", as follows:

"On appeals from administrative agencies, the Court will only entertain an appeal to determine if the order or judgment of the lower authority:

1. Was supported by substantial evidence; or
2. Was arbitrary or capricious; or
3. Was beyond the power of the lower authority to make; or
4. Violated some statutory or constitutional right of the complaining party."

The Mississippi Supreme Court stated succinctly the Circuit Court's limited review authority in a municipal zoning case in City of Biloxi v. M. C. Hilbert, 597 So.2d 1276, 1280, 1281 (Miss. 1992):

Any appellate court examining a zoning order by a City Council proceeds with a restricted scope of judicial review. The 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. Barnes v. Board of Supervisors, Desoto County, 553 So.2d 508 (Miss. 1989); Luter v. Hammon, 529 So. 2d 625, 628 (Miss. 1988); Ridgewood Land Co. v. Moore, 222 So.2d 378, 379 (Miss.1969). " 'Fairly debatable' is the antithesis of arbitrary and capricious. If a decision is one which could be considered 'fairly debatable,' then it could not be considered arbitrary or capricious..." Saunders v. City of Jackson, 511 So.2d at 906.

Because of the many concerns expressed to and recognized by the GPC and Council in refusing planning approval, it is not surprising that Hillside in its brief avails all four (4) "scope of review" criteria in an attempt to persuade the Court to overrule the decision of the Planning Commission as affirmed by the City Council. Gulfport avers that the decision of City government on each issue asserted in Hillside's appeal brief was no less than a fairly debatable decision, as will be hereinafter discussed.

B. City's Position on the Issues:

I. THE PLANNING COMMISSION AS AFFIRMED BY THE GULFPORT CITY COUNCIL ACTED WITHIN ITS POWER AND AUTHORITY IN DENYING HILLSIDE'S

APPLICATION FOR MULTI-FAMILY DWELLING USE ON THE PROPOSED SITE ZONED B-2.

It has already been stated herein that under City's zoning ordinance multi-family dwelling use is not allowed in a B-2 (General Business District) zoning district without planning commission approval (*Supra.*, Footnote 3). Certainly this requirement is not denied. The zoning code [*See Record*, p. 156, paragraph (2)] under the heading "*B-2 Districts: General business districts*" states: "The district regulations are designed to permit the development of the districts for their purpose in a spacious arrangement of uses and structures." (emphasis added) Municipal zoning ordinances are dependent upon statutory authority (§ 17-1-7, *Miss. Code (1972) Ann.*, as amended), and the Mississippi zoning statutes state purposes of zoning:

"Zoning regulations shall be made in accordance with a comprehensive plan, and 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." §17-1-9, *Miss. Code (1972) Ann.* (emphasis added).

Hillside erroneously implies a burden on Gulfport to prove its planning commission had authority under the circumstances to deny planning approval. City submits that to the contrary, Hillside had no right to use its B-2 property until it proves to the GPC that it is entitled to planning approval. Hillside had a burden to prove to the Planning Commission that the proposed multi-family development would not defeat the purposes of the zoning ordinance. Failing to meet this burden on the part of Hillside, GPC acted within its authority and discretion to deny planning approval. A Mississippi Court of Appeals case cited by Hillside, Walters v. Center of Greenville, 751 So.2d 1206 (Miss. 1999) from a procedural point of view is very similar to the case *sub judice* in that the Greenville Planning Commission was affirmed in its

recommendation that zoning be changed to require Planning Commission approval before a certain use could be maintained in a particular zoning classification. The Court *Supra* page 1212 identifies the burden on the owner: "The one assailing the validity has the burden of proof to establish that the ordinance is invalid or arbitrary or unreasonable as to his property, and this must be by clear and convincing evidence." *Ballard v. Smith*, 234 Miss. 531, 546, 107 So.2d 580, 586 (1958). Gulfport submits that Hillside had a burden to show by clear and convincing evidence why the zoning district purposes and elements needed for planning approval would not be defeated by the proposed project.

A very important element for consideration by the Planning Commission in its decision that City believes was substantiated by the record, deals with the density issue, the need to "to prevent the overcrowding of land", "to avoid undue concentration of population" and the consideration of "congestion in the streets" in this busy area. There is a need for GPC to assure that these very real zoning concerns expressed by statute are confirmed by application of the elements set forth in the zoning code under "(b) *Uses requiring planning approval.*" The considerations for the GPC to approve the location and site plan as being appropriate with regard to "transportation and access... fire and police protection, and other public facilities, as not causing undue traffic congestion or creating a traffic hazard"⁸ requires consideration of the impact by another 96 residential units with 150 plus cars in this parcel. The Police Department was unable to recommend approval, commenting: "There are concerns regarding access of traffic to Pass Road." (Record, p. 59).

Hillside's Attorney describes the property as being "adjacent to an existing apartment complex, and it also faces onto Pass Road. It's a general commercial district, so its not a residential area." (Record, p. 64). This admission at the beginning of the GPC hearing must have warned the GPC that density of population would be an issue by another 96 family

⁸ Record, p. 158, where zoning code specifies matters to be satisfied in order for Planning Approval.

dwelling and 150 plus vehicles with single access onto busy Pass Road in a commercial district adjacent to the Y intersection. This immediately raises a question related to traffic congestion, traffic hazard, and whether this use would "be in harmony with the orderly and appropriate development of the district".⁹ Mr. Crane in his testimony gives a very good explanation as to why the project would not be in harmony with the development of the district.

"Now, I will tell you that the fact that the apartments are there does not make them an existing use within the district¹⁰, but what it actually does is it converts their request almost to a request for a change in zoning because B-2 as it's defined by your code is a district composed of land structures occupied by or suitable for uses furnishing the wider range of retail goods and services required by residents or a group or a community. ... (W)hat you would, in fact, do is convert this neighborhood from a B-2 district, business retail district, and sandwich my clients¹¹ in between two huge multi-family residential complexes." (Record, pp. 81-82).

Nothing refutes this claim by the Miazza's. Is this not a concern over harmonious development of the district for consideration of location by the GPC? Also see Mr. Crane's statement in Record, p. 89, pointing out that "On the east side of the entrance is West Elementary School. Residents of the development exiting to the east will immediately be placed in an already overtaxed school zone." Could the GPC not have considered this to be a "police protection" problem or a development that will create "a traffic problem" or a problem for "public facilities," namely the elementary school?

Hillside bases its entire premise that the GPC and City Council abused its power on the assertion that its decision rested on drainage problems and drainage was not mentioned in the Ordinance's specification of conditions to be considered for planning approval. As stated above, there were many other recorded considerations without drainage that were presented to the

⁹ Whether the multi-family project would be in harmony with the development of this commercial district is a matter that the GPC is required by its ordinance, not just empowered, to consider (Exhibit "10", p. 1514.1).

¹⁰ The reference is to the adjacent apartment facility.

¹¹ His clients are the Miazza gift shop business being crowded between two (2) large residential complexes.

Planning Commission. The Mississippi Court of appeals stated the rule that the Court will not reverse a zoning decision where the record has ample evidence to support it.

"[W]hile recognizing the desirability of specific findings by a zoning authority on each considered issue, the courts will not reverse for a lack of such specificity where a factual basis for the action is supported by the record." Beasley v. Neelly, 911 So.2d 603, 609 (2005).

However, City agrees with the argument made by Mr. Crane to the City Council that drainage problems and a history of flooding along Brickyard Bayou is an issue for planning discussion. Attorney David Crane argued. "So I would suggest to you that drainage is certainly an issue that would task public facilities if, in the event that a plan was accomplished and built there, they caused drainage problems." (Record, p. 131). Location and site plan approval is required. Consideration of a history of flood problems is a legitimate question for the GPC to discuss. It is not the only reason in the record that supports the decision of the authorities, and if it was it would at least give rise to a debatable decision.

Gulfport sees no merit in an assertion that the Planning Commission lacked the power to deny planning approval based upon the record. That GPC had the power to deny this location for this multi-family development is not just debatable, but conclusive in the City's opinion.

II. DENIAL OF APPLICATION FOR PLANNING APPROVAL FOR THE MULTI-FAMILY PROJECT WAS NOT A VIOLATION OF HILLSIDE'S CONSTITUTIONAL OR STATUTORY RIGHT.

The conclusion that the GPC, by its refusal to approve this 96 unit project for multi-family use constituted a taking of Hillside's (or the present owners') property by the government is just not plausible. As shown above, the Planning Commission was empowered to make the decision. Hillside had no right to this development without planning approval. This is a B-2 (General Business District). There are many commercial uses for which the property is zoned. It is surrounded by commercial uses. It must be assumed that a business is the most appropriate and legitimate use for the site. The Gulfport Planning Commission has no authority

to act to prohibit the many uses for which the owners can develop and utilize the property by right, and its decision did not affect that right.

The City denies that this proper planning decision is shown by the record herein to deny any of the Appellants the use and enjoyment of their land, or loss of viable economic benefits that may be derived from the land. It is Gulfport's position that Appellants have no grounds to claim the decision violated their fundamental constitutional right of ownership where the Appellants under the B-2 zoning had no clear right to the proposed use. For the Appellants to have a claim that a zoning imposition is a constitutional taking in this instance, owners should have attacked the B-2 zoning application when it was ordained. Appellants did not attack the zoning classification or the zoning ordinance, and the decision of the GPC not to extend the district to multifamily use was a decision made for a valid public purpose and does not deprive the Appellants of any rights for which they were already vested. Their vested rights were for the B-2 listed purposes, not for multi-family residential purposes. This allegation of a constitutional taking is legally invalid on its face and certainly not substantiated by the record.

III. DECISION BY CITY AUTHORITIES TO DENY THE APPLICATION FOR PLANNING APPROVAL FOR A MULTI-FAMILY HOUSING PROJECT IN A B-2, GENERAL BUSINESS, DISTRICT WAS SUPPORTED BY THE SUBSTANTIAL EVIDENCE AND WAS NOT ARBITRARY OR CAPRICIOUS.

City believes its argument above for its Premise # II that GPC acted within its power based upon recorded evidence and planning principles spelled out by state statute and city ordinance clearly shows that there is **substantial evidence of record** to support the GPC decision. The decision based upon the record is not one that can be overturned by the Court herein. To rehash the evidence as addressed above would be a mere exercise of repetition.

Quoting the *Public Employees' Retirement System* decision¹², Hillside in its brief adopts the definition of "substantial evidence" as "something more than a 'mere scintilla' of suspicion," and that it is "such relevant evidence as reasonable minds might accept as adequate basis or

¹² Public Employees' Retirement System v. Howard, 905 So.2d 1279, 1285 (Miss. 2005).

fact from which the fact in issue can be reasonably inferred.” Certainly the evidence and resulting concerns of the GPC and Council due to impact on traffic, police protection, impact on public facilities such as drainage systems, the school system, and danger hazards to elementary school children and on the business community for which the district is designed go beyond that of a “scintilla of evidence,” and is evidence relevant to the elements for consideration. Scintilla of evidence is defined in Black’s Law Dictionary, 5th Edition (1979) as “[a] metaphorical expression to describe a very insignificant or trifling item or particle of evidence.” With a very thorough evidentiary hearing, replete with documentary evidence, and planning commissioners having knowledge of the area¹³, and a review and concurrence by the City Council, it cannot be said that the decision was not one that reasonable minds could not agree upon.

Where there is “substantial evidence” in the record to support a zoning decision by the municipal zoning authority it would seem logical that the decision is not “arbitrary or capricious.” Hillside again quoting *Public Employees’ Retirement, Id.* states that an “agency’s decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone.” Hillside in its brief infers that the entire decision was based either upon a drainage issue or a pretext for not wanting people of low to moderate income in the area. This is Hillside’s argument of a perceived motive, but the record supporting the decision is substantial and the decision as supported by the record is valid and the perception that it was based upon a will, a motive and not on reason and judgment cannot be implied in this case. There is a presumption of validity of the decision supported by the record and not overcome by one or two statements of one or two members of the GPC. “The decisions of municipality

¹³ By good authority, the government authorities are expected to “call upon their own common knowledge and experience” and their “familiarity” about the community. Broadacres, Inc. v. City of Hattiesburg, 489 So.2d 501, 504 (Miss. 1986), Board of Alderman of Town of Bay Springs v. Jenkins, 423 So.2d 1323, 1327-1328 (Miss. 1982).

zoning authorities, because they are legislative decisions, are presumed valid." *Supra*, *Broadacres v. Hattiesburg* at page 504.

Further, citing *Public Employees*, "[a]n action is capricious if done without reason, in a whimsical manner implying lack of understanding of or disregard for the surrounding facts and settled controlling principles." The decision cannot be ruled capricious. It was clear that the commissioners and council people were familiar with and had great regard for the area and the impact that the development would have on this business district if their application was approved.

I reiterate here the limited scope of review held time and time again by the Mississippi Courts, which when applied here would certainly not set aside the decision of the Gulfport Planning Commission affirmed by the Gulfport City Council. Again quoting the Court from *Broadacres v. Hattiesburg, Supra*, pages 504-505:

"We began by stating in *Ballard v. Smith*, 107 So.2d 580, 234 Miss. 531 (1958), that courts should not constitute themselves as zoning boards.

...Furthermore, this Court will not substitute its judgment as to the wisdom or soundness of the municipalities action. The scope of the reviewing court is limited. The order of the governing body of a municipality may not be set aside if its validity is fairly debatable, and such order may not be set aside by a reviewing court unless it is clearly shown to be arbitrary, capricious, discriminatory or is illegal or without substantial evidentiary basis. *City of Jackson, supra*; *Currie v. Ryan*, 243 So.2d 48 (Miss. 1970). Also see *Woodland Hills, supra* and *Killegrew v. City of Gulfport*, 293 So.2d 21 (Miss. 1974).

Also see *Mathis v. City of Greenville*, 724 So.2d 1109, 1112 (Miss. Ct. of Appeals) holding that "Fairly debatable" is the antithesis of arbitrary and capricious. If a decision is one which could be considered 'fairly debatable,' then it could not be considered arbitrary or capricious." At least the decision based upon the evidence was "fairly debatable" and supported by the "substantial evidence." The claim that it is arbitrary or capricious is without merit.

IV. THE DECISION IS NOT SHOWN TO BE IN VIOLATION OF THE FEDERAL FAIR HOUSING LAW.

Hillside's entire argument that the failure to give planning approval is in violation of fair housing laws infers that the reasoning for the decision was a pretext, and was really decided because Mississippi Regional Housing Authority, Section VIII, was associated with Hillside. Hillside tries to persuade the Court that failure to approve was to avoid having residents in the area that were of low to moderate income people. Nowhere in the record was there a discussion of MEHA VIII being a partner in the project. Realtex as a developer and manager was never according to the record considered to be an impediment to approval of the plan. Once again Hillside would have the Court find that its perception of the motive of a Planning Commissioner or a Council person is reason to overturn the decision. The record supporting the decision is the basis for the Court to rule, not a perceived motive argued by Hillside.

The City here was not taking action to block provisions for housing. The Appellants had no vested right. The City decision makers were looking at the impact on the public as to whether or not to grant a right that did not already exist. Gulfport did not make a decision involving disparate treatment against a certain class or for race restriction purposes. That cannot be implied from the record in this case. If such were the case a cause of action would be prosecuted in a forum separate from this appeal, and the claim would be solely based upon federal law and not as an appeal limited to a record devoid of any evidence of disparate treatment. Hillside cites two (2) Federal cases that Gulfport says are not applicable to the facts on this appeal. One is an attack on an ordinance (not a decision under an ordinance) by an association representing a class of racial minority and the other case is brought by the Civil Rights Division of the Justice Department to enforce an alleged violation of a civil rights statute. Here we have a developer and property owners appealing for their own economic benefits that would result if the City authorities overlooked the public impact and and permitted the extension of a large multi-family dwelling development into a business district. This zoning

appeal is not the proper forum, nor is it based upon the proper case record upon which to prosecute a contrived civil rights violation.

CONCLUSION

The City of Gulfport respectfully argues that it is entitled to a review of the Decision of the City of Gulfport Planning Commission that was concurred in and affirmed by the Gulfport City Council and Mayor and by the Circuit Court of Harrison County, Judge Stephen Simpson, according to evidentiary record and the limited scope of review imposed by its own rules and case decisions; and that City is entitled to a finding that the decision was not arbitrary or capricious, but was based upon substantial evidence, a decision that was "fairly debatable" according to the evidence of record, and that the decision was legal, was neither beyond the discretion or power of the Planning Commission to make, and that it does not take away or deny any property uses that the owners and developers had in said property and therefore, the zoning decision was well taken and did not deprive the Appellants of any constitutional property rights they may have had.

It is therefore requested that the Appeal be dismissed and the Decision of the municipal authorities be affirmed by order of the Court.

RESPECTFULLY SUBMITTED, this the 17 day of November, 2008.

CITY OF GULFPORT, MISSISSIPPI

BY:


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CERTIFICATE OF SERVICE

I, MARGARET MURDOCK, Assistant City Attorney for the City of Gulfport, do hereby certify that I have this day hand delivered the original and three (3) true and correct copies of the above and foregoing to:

Betty W. Sephton, Clerk
Supreme Court of Mississippi
Post Office Box 249
Jackson, MS 39205-0249

and a true and correct copy of the above and foregoing to:

Honorable Stephen B. Simpson
Circuit Court Judge
Post Office Drawer 1570
Gulfport, MS 39502

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This the 17 day of November, 2008.



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