

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

V.

**CAUSE NO. 2008-SA-00350
LOWER COURT CASE #2401-07-99**

**CITY OF GULFPORT, MISSISSIPPI,
MARTIN MIAZZA AND
DOROTHY MIAZZA**

APPELLEES

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

1. Hillside Terrace LP,
A Mississippi Limited Partnership
Through Hillside Terrace I, LLC its
General Partner
Appellant
2. City of Gulfport, Mississippi
2309 15th Street
Gulfport, MS 39501
Appellee
3. Mississippi Housing Authority No. VIII
Post Office Box 2347
Gulfport, MS 39505
Member, Hillside Terrace I, LLC
4. Dr. Hoshall Barrett
Dr. Allen Lovell
Dr. Raymond Tipton
Gulfport, Mississippi
Owners of the Subject Property
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TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT	9
ARGUMENT.....	10
CONCLUSION	20
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

Cases

<i>Beasley v. Neelly</i> , 911 So. 2d 603, 607 (Miss. App. 2005)	10
<i>Bowen v. Desoto County Board of Supervisors</i> , 852 So. 2d 21 (Miss. 2003)	2
<i>Broadacres, Inc. v. City of Hattiesburg</i> , 489 So. 2d 501, 505 (Miss. 1986)	10
<i>City of Jackson v. Freeman v. Howie, Inc.</i> 239 Miss. 84, 121 So. 2d 120, 123-124 (1960)	11
<i>Cutchens v. Bryant</i> , 449 So. 2d 231 (Miss. 1984)	10
<i>Hemphill Construction Co. v. City of Laurel</i> , 760 So. 2d 720, 723 (Miss. 2000)	11
<i>Tilgham v. City of Louisville</i> , 874 So. 2d 1025 (Miss. Ct. App. 2004)	2
<i>Wilkinson County Bd. of Supervisors v. Quality Farms, Inc.</i> , 767 So. 2d 1007, 1010 (Miss. 2000)	10

Other Authorities

Gulfport Code of Ordinances, Appendix A, Section III (J)(1)(b)	11
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STATEMENT OF ISSUES

- I. Did the Gulfport Planning Commission Exceed the Scope of its Delegated Power in Denying Hillside's Applications to Use its Property as a Multi-Family Residence Project?**
 - A. Consideration of Drainage Issues Was Beyond the Scope of the Planning Commission's Power.**
 - B. Consideration of Hillside's Relationship with MRHA VIII and the LIHTC Financing Exceeded the Scope of the Planning Commission's Authority.**
- II. Did the Gulfport Planning Commission's Denial Violate the Constitutional and Statutory Rights of Hillside?**
- III. Was the City's Decision Arbitrary and Capricious and Unsupported by Substantial Evidence?**

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a decision of the Council for the City of Gulfport, Mississippi in a land use matter. Jurisdiction is pursuant to Section 11-51-75, of the Mississippi Code of 1972, as amended, Rule 4 of the Mississippi Rules of Appellate Procedure, Rules 5.03 through 5.06 of the Uniform Rules of Circuit and County Court Practice and the Decisions of the Mississippi Court of Appeals and the Mississippi Supreme Court in *Tilgham v. City of Louisville*, 874 So. 2d 1025 (Miss. Ct. App. 2004) and *Bowen v. Desoto County Board of Supervisors*, 852 So. 2d 21 (Miss. 2003), respectively.

B. Summary of the Proceedings Below

On or about December 6, 2006, Hillside Terrace, LP, through its General Partner, Hillside Terrace I, LLC, (hereinafter "Hillside") filed an application with the City of Gulfport, Mississippi (hereinafter "the City" or "Gulfport") seeking Planning Commission Approval to allow them to construct a multi-family residential development utilizing Low Income Housing Tax Credits ("LIHTC") on 6.06 acres of land situated in a B-2 Zoning District on Pass Road in Gulfport. As required under the City's Comprehensive Zoning Ordinance, a public hearing was scheduled before the Gulfport Planning Commission (hereinafter "the Planning Commission") and was held on January 11, 2007. The City's Professional Planning Staff (hereinafter "the Planning Staff") recommended that the "use approval" be granted. However, after hearing the comments at the public hearing, the Planning Commission denied the request. Hillside timely filed a notice of appeal of the Planning Commission's decision to the City Council. At a regularly scheduled meeting of the City Council held May 26, 2007, the City heard public comments regarding the use of the site for apartments. After completion of the comments, the

City Council voted to uphold the decision of the Planning Commission and refused to grant to Hillside approval to construct apartments on the site. Being aggrieved of the decision and believing that it was without the support of substantial evidence; that the Planning Commission exceeded its grant of power, and, that the decision was arbitrary and capricious, Hillside appealed the decision to the Circuit Court for the First Judicial District of Harrison County. While the matter was pending before the Circuit Court, Martin and Dorothy Miazza, who had appeared before the Planning Commission to object to the approval, were allowed to intervene. After briefs were filed and arguments were heard by the Court, the decision of the City Council was affirmed. Being aggrieved of the decision, Notice of Appeal to this Court was filed on February 22, 2008.

C. Statement of Facts.

Hillside is a Mississippi Limited Partnership with Hillside Terrace I, LLC as its General partner. The City is a municipality organized under and existing pursuant to the laws of the State of Mississippi and is located within the First Judicial District of Harrison County, Mississippi. Prior to December 4, 2006, the City adopted an Ordinance establishing Comprehensive Zoning Regulations for the City of Gulfport, and providing for the administration, enforcement and amendment thereof (hereinafter "Zoning Ordinance"), pursuant to Section 17-1-1 et seq. of the Mississippi Code of 1972, as amended. The Zoning Ordinance or Ordinances included therein the designation of an area lying along the north side of Pass Road where it intersects with 28th Street to form a "Y". The area was identified as ad valorem tax parcel number 0818P-02-088.000 (hereinafter "the subject property"). The aforesaid property was zoned under the ordinance as lying in a B-2 District. (R. at 155-57; 194-98; 293-94).

Pursuant to the Zoning Ordinance, a multi-family residential development can be located within a B-2 District with Planning Commission approval. Under the Zoning Ordinance, a landowner seeking to construct a multi-family housing development in a B-2 District must file an application for approval of the Planning Commission to locate a multi-family structure in the B-2 District. The Planning Commission is charged with conducting a public hearing on the application, and notice of the hearing is given to adjacent landowners and surrounding landowners within a certain proximity to the site upon which the multi-family structure is proposed. After the hearing, the Planning Commission either approves or disapproves the application. If approved, the action of the Planning Commission is submitted to the City Council for adoption by resolution. If denied, the decision is final unless appealed. (R. at 299-302).

On or about December 5, 2006, Hillside filed an application with the City seeking approval to construct a multi-family development on the 6.06 acres of land that make up the subject property. (R. at 155-157). As noted, this property is located along Pass Road inside the city limits of Gulfport near where 28th Street crosses Pass Road to form a “Y” shaped intersection. All of the adjoining property is zoned B-2. After filing the application a hearing was scheduled before the Planning Commission and held on January 11, 2007. This hearing was for the limited purpose of Planning Commission approval and *was not* for approval of the final site plan. (R. at 194-97). Such technical engineering issues are to be addressed by the Planning Staff before a final site plan approval, before a building permit can be issued, or by the city official known as the Flood Plain Administrator.

Counsel for Hillside, the Engineer for Hillside and John Boyd, Vice-President of RealTex Development, one of the principals in Hillside, all appeared before the Planning Commission to present evidence in favor of the project. (R. at 199-213). The evidence established that the site is

bounded on the east by a commercial establishment, on the south by Pass Road, on the North by Brickyard Bayou and another commercial zone, and on the west by Miazza's Gifts (a business) and an existing apartment complex. The site is made up of 6.06 acres. It had access and was adjacent to a dedicated street. There was water and sewer service at the site provided by the City of Gulfport. There was police and fire protection from the City of Gulfport. Waste services were provided through the City by BFI. (R. at 155-157; 194-197; 199; 222-223).

The ordinances of the City of Gulfport permit densities of up to 25 multi-family units per acre. This development was planned at 16 units per acre, well below the maximum. (R. at 205). It was recognized that certain technical drainage issues, so that there would be no flooding, would be addressed with the technical and engineering members of the City's Planning Staff. (R. at 205-206; 211). Brochures of other similar developments detailing the amenities that would be available were introduced. (R. at 179-193). John Boyd testified that in order to satisfy the requirements of the LIHTC financing, the property would be subject to rent restrictions based upon income. While there was a minimum income below which a person did not qualify, there was also a maximum income as well. Mr. Boyd testified that Hillside would accept vouchers under the Department of Housing and Urban Development's Section 8 housing assistance program. The Chairman of the Planning Commission questioned Mr. Boyd about the types of income that would be allowed in the calculations and inquired whether they income from "welfare," "disability," and "social security" would be included to reach the minimum income allowable. (R. at 208-213).

Under the City's ordinances, the Planning Commission's scope of authority does not include technical issues such as engineering solutions. Nor does it include inquiry into the method of financing. (R. at 293-94). Regardless of the fact that consideration of technical issues

exceeded their authority and regardless of the fact that the Planning Staff's own recommendation stated that technical drainage issues were not to be addressed at the meeting (R. at 194-97), the Planning Commission continued to consider the drainage issue. (R. at 204; 207-208). Nevertheless, Hillside, through its engineer, assured the Planning Commission that their final plans would address drainage issues to the satisfaction of the engineering department or they would not be issued a building permit to construct the project. (R. at 205-206).

The principal objectors appearing at the Planning Commission hearing were the owners of an adjoining business, Miazza's gifts. They addressed the Planning Commission through Counsel and made a letter of opposition a part of the record. While they did mention drainage and traffic, the primary objection raised had its foundation in the nature of the project. They contended that since it was a LIHTC-financed property, then it would naturally be a haven for criminal activity. They contended that it would adversely affect property values and render their commercial neighborhood unsafe. In summary, their objection was based upon the stereotypical perception of the tenants in affordable housing without introduction of any facts to support it. (R. at 216-222; 225-227).

At the conclusion of the testimony, the staff made a recommendation that the project be approved conditioned upon compliance with certain technical issues. Specifically they stated:

"Staff recommends to approve the request with the following conditions.

1. A planned building group will be required for this development since there are going to be multiple buildings that are not connected.

2. There is an AE flood zone located on the northern portion of the proposed development. If this area is going to be used in the development, they will need to schedule a meeting with the floodplain administrator to discuss possibility of changes in the required base flood elevation. Also subject to Note Number 1." (R. at 194-197).

Nevertheless, the Planning Commission disregarded the recommendation of the staff and voted 6 to 2 to deny the approval (R. at 223). Notice of the decision was sent to Hillside by letter dated January 12, 2007. (R. at 228). Hillside then timely filed a notice of appeal to the City Council. (R. at 229).

The appeal was heard at a regularly scheduled meeting of the City Council held on March 20, 2007. Rick Deyoe, President of Realtex, Mr. Craig Carney, the engineer for Hillside, and Paul J. Delcambre, Jr., Counsel for Hillside, appeared and presented arguments in favor of the project.¹ (R. at 260-265; 286-89). Dr. Frank Lovell, representing the owners of the property, also appeared to support the project and denied the allegations made by members of the Planning Commission that the property had flooded on prior occasions. (R. at 280-286). Again, David Crane appeared on behalf of the Miazza Family to object to the project.² (R. at 265-271).

Only two members of the City Council made any comments regarding the project. Councilwoman Barbara Nally was one. While she professed to be opposed to it because of the drainage, she addressed what she perceived to be the inequitable distribution of LIHTC to properties proposed for development in Gulfport when compared to other cities on the coast. She admitted that her actions were motivated at least in part to limit the State controlled tax credit program that was part of the state and federal economic recovery act after Hurricane Katrina, commonly referred to as the GO Zone legislation. She complained that LIHTC properties would affect schools and taxes, and she complained that Mississippi Regional

¹ Under the Comprehensive Zoning Ordinance of the City of Gulfport, the appeal to the City Council is on the record. While people may appear and argue for or against the project, no additional "evidence" is received by the Council, a point that was demonstrated when the Owners of the property attempted to introduce a letter at the Council Meeting. While evidence is not taken, members of the Council may ask questions of the parties and may state their reasons for voting in favor or against the project. (R. at 275).

² Dr. Lovell, Dr. Ray Tipton and Dr. Hoshall Barrett are the owners of the property. They were not given notice by the City of Gulfport of the Planning Commission hearing, and so they did not have an opportunity to present any evidence before the Planning Commission. They later filed a joinder in the Appeal to the City Council.

Housing Authority No. VIII (hereinafter MRHA VIII) was involved in developing this project while disposing of other properties that it owns. (R. at 271-275).

Councilwoman Ella Holmes-Hines also inquired about the participation in the project by the local Regional Housing Authority. She asked why they would be involved in this project rather than repair other facilities in her ward. (R. at 278).

At the conclusion of the debate, the Council voted to affirm the action of the Planning Commission.

SUMMARY OF THE ARGUMENT

Hillside did not request a zoning change. The development proposed by Hillside can be constructed in a B-2 zone with the approval of the Planning Commission. While the Planning Commission can consider a number of factors, it is not authorized under the City's zoning laws to consider technical issues, such as drainage, nor is it authorized to consider the method of financing when determining whether to allow the applicant's requested use. Technical questions or issues are for the next stage of the process when the Planning Department reviews the final engineering drawing and issues the building permit. The method of financing the project, the amount of rents charged and the socio-economic level of the tenants is also irrelevant to the Planning Commission's function. The City Ordinance establishing the Planning Commission does not grant them the authority to entertain questions from its members or the public regarding those topics. By doing so, the action of the Planning Commission exceeded its authority.

While ostensibly it denied Hillside's request based upon the technical issue of drainage, no expert engineering testimony to support the denial was presented in opposition to the request. There was, however, engineering evidence in the record from the City's Planning Staff and the testimony of Mr. Craig, a licensed engineer, that the drainage issues would be addressed when the engineering drawings were submitted at the appropriate time in the planning process. Therefore, the engineering data in support of the project was unrebutted.

ARGUMENT

STANDARD OF REVIEW

This is an appeal from the affirmance by the Circuit Court of Harrison County of a decision of the Gulfport City Council. As such, it is treated as an appeal from an administrative agency. The duty of this Court is to examine the record to determine whether the decision was supported by substantial evidence or, was arbitrary or capricious; was beyond the agency's (in this case the Planning Commission) scope of powers; or, violated the aggrieved party's (Hillside's) constitutional or statutory rights. *Broadacres, Inc. v. City of Hattiesburg*, 489 So. 2d 501, 505 (Miss. 1986). *Cutchens v. Bryant*, 449 So. 2d 231 (Miss. 1984) (applying substantial evidence standard); *Beasley v. Neelly*, 911 So. 2d 603, 607 (Miss. App. 2005) citing *Wilkinson County Bd. of Supervisors v. Quality Farms, Inc.*, 767 So. 2d 1007, 1010 (Miss. 2000). It is Hillside's position that the Court will find that the decision of the City is not supported by substantial evidence, was arbitrary and capricious, and exceeded the scope of the powers granted to the Planning Commission and should have been reversed by the City Council and the Court below.

I. The Planning Commission Went Beyond the Scope of its Power in Denying Hillside's Application to Use its Property as a Multi-Family Residence Project.

Even a cursory review of the record reveals that the Planning Commission's denial of Hillside's request for approval to construct apartments in a B-2 zone, went beyond the scope of its power.

A. Consideration Of Drainage Issues Was Beyond the Scope of the Planning Commission's Power.

The decision was based mostly on expected drainage issues and was not based on the criteria called for in the City's Comprehensive Land Use Ordinances. Appendix A, Section III(J)(1)(b) of the zoning ordinance defines the conditions under which a use requiring planning approval is permitted. It states:

the uses listed below are permitted upon approval of location and the site plan thereof by the planning commission as being appropriate *with regard to* transportation and access, water supply, waste disposal, fire and police protection, and other public facilities, as not causing undue traffic congestion or creating a traffic hazard, and as being in harmony with the orderly and appropriate development of the district in which the use is located.³ [emphasis supplied]

Noticeably absent from the ordinance is any power granted to the Planning Commission to base its decision to deny the use of any property on technical engineering concerns such as drainage. Under any ordinary rules of construction, the "catch all" phrase of "in harmony with the orderly and appropriate development" must be read to modify the list of the criteria enumerated in the ordinance and should not be expanded to include drainage. To allow the Planning Commission to consider drainage issues would allow them to consider almost anything, essentially nullifying the specific intent to limit the criteria evidenced by the list of enumerated powers. Such a construction would violate the long standing rule of statutory construction laid down by the Mississippi Supreme Court that subdivisions of the state have only those powers expressly granted to them and are prohibited from exercising any others. *Hemphill Construction Co. v. City of Laurel*, 760 So. 2d 720, 723 (Miss. 2000); *City of Jackson v. Freeman v. Howie, Inc.* 239 Miss. 84, 121 So. 2d 120, 123-124 (1960).

The Planning Staff recognized this limitation in its report to the commission which stated:

³ Gulfport Code of Ordinances, Appendix A, Section III (J)(1)(b).

“Note: Even though a preliminary/general site plan is required to be submitted as part of this request, only the Planning Commission Approval request will be heard during this meeting. The final site plan layout and related details will be submitted for review and action at a later date. The above mentioned request is subject to all codes and regulations that may apply.”

By excluding drainage issues from consideration by the Planning Commission, the Ordinance recognizes that it is the Planning Staff and the members of the City’s Engineering Department who possess the technical training, experience, education and knowledge to address the issue. By acting without any technical data to challenge the recommendation of the Planning Department and Hillside’s engineer, the Planning Commission vote was a more visceral reaction to their individual personal perceptions, which clearly does not meet the standard of “substantial evidence”.

While Hillside acknowledges that during the hearing, both the Commission and opponents to the use mentioned traffic and access, the transcript of the hearing is clear that the Planning Commission’s decision to deny the project was almost entirely⁴ based upon the belief that that any project on this site could not effectively address the perceived drainage issues raised by members of the Planning Commission. The outright denial of Hillside’s application for *use*, not site plan or building permit approval, because of drainage concerns, clearly goes beyond the Planning Commission’s power to evaluate and approve such an application. Engineering and other technical issues such as drainage call for examination by people holding superior training, education and experience in the relevant disciplines.

B. Consideration of Hillside’s Relationship with MRHA VIII and the LIHTC Financing Exceeded the Scope of the Planning Commission’s Authority.

⁴ As noted *infra*, it is the position that the decision was also wrongfully influenced by the fact that this project was going to be financed by Low Income Housing Tax Credits. (LIHTC)

The Planning Commission was also improperly influenced by the LIHTC nature of Hillside's financing – nowhere in the code of ordinances are they charged with determining the financial viability of a project; exploring an applicant's methods of financing a project and the applicant's rental rate structure. Such an inquiry far exceeds the powers granted to them by law. Hillside is associated with Realtex Development Corporation, a leader in creating innovative affordable housing developments. Any concern about the quality to be expected of the proposed development because of its association with MRHA VIII has no basis in fact or law. While the subject development will be owned by a limited partnership of which a non-profit association controlled by MRHA VIII will be a member, it will be developed in association with Realtex Development Corporation.⁵ Realtex is a proven leader in creating innovative affordable housing developments in conjunction with local and regional housing authorities in other markets. With every project, Realtex carefully evaluates sites and embraces local agencies, civic leaders and neighboring residents to formulate the most precise plan for the area. Plans for each project are specifically developed to make sure the architecture, building materials, landscaping, and building placement complement the surrounding environment. Meticulous attention is paid to ensure that every finished property meets and exceeds design expectations. Additionally, every Realtex property is provided with extensive supportive services for its residents such as after school programs, health screening, job training, credit counseling, and computer training. As a result, Realtex consistently creates luxury apartment homes with high-end amenities, offering them at affordable rental rates. (R. at 178-193; 208-212). Accordingly, this project will be a high caliber development, offering luxury affordable housing to many residents in need of quality housing lost to Hurricane Katrina.

⁵ Brochures regarding other Realtex Developments are contained in the record.

As the following excerpts will show, the involvement of Realtex and Mississippi Regional Housing Authority VIII ("MRHA") and the LIHTC method of financing played a significant role in the Planning Commission's denial:

Mr. Allen: Okay. Let's deal on this hardworking family. The income restrictions. Is there a minimum and a maximum, or just a maximum?

Mr. Boyd: There is a maximum. On the minimum side, you must have an income of at least two and a half times the rent. There's a maximum by HUD, but there's an internal screening criteria that the family must have an income two and a half times the monthly rent.

Mr. Allen: So basically they can have an income of less than a thousand dollars a month.

Mr. Boyd: For the one bedroom, the lowest, the three hundred fifty-four, yes, two and a half times.

Mr. Allen: And I'm not speaking -- I'm just trying to get... When we say income, is that income from --

Mr. Boyd: Verifiable income from employment.

Mr. Allen: Are we talking Social Security, unemployment, welfare? What are we calling income? Because you used the term hardworking families, so let's clarify what we're describing as income.

Mr. Boyd: Verifiable income. I would suggest to you that a family on disability that can be shown as income. Section VIII vouchers don't show up as income, but the resident has to make up the gap between what the voucher is and the rent.

Mr. Allen: You consider verifiable income anything they have coming in; right?

Mr. Boyd: No gifts. Other than that, generally, yes.

Mr. Allen: Okay. Thank you. Anyone have any question of Mr. Boyd? No questions. Okay. Thank you, sir.

Mr. Boyd: Thank you.

Mr. Allen: Anyone else to speak for the request?

(R. at 212-213).

At the hearing Mr. Crane, on behalf of the Miazas stated:

"But then last but not least, fire and police protection. And this addresses the crime issue. And I know that they're telling you that this is not subsidized housing. Nonetheless, they're talking about voucher housing. And I can tell you that the voucher program is designed so that you can scatter that subsidized housing throughout the community rather than cluster it in high density living. The reason is when you live in a high density low income environment, unfortunately, it engenders an atmosphere for the cultivation of crime. Nobody want that, and that's nobody's intention when they go in. But if you look at the project in New Orleans, you look at the project we've had here, you see a high density of crime in those neighborhoods.

The reason is quite sociological. If you're an eight-year-old, and you see nothing but poverty around you and you see nothing but crime around you, you have no desire to go out and do something better for yourself.

If you take a voucher, and you go live across town, and you live with people who do have maybe a little different set of values than the people you're living next door to, you see an opportunity for growth and an opportunity of escape.

There will be no such opportunity in this complex. People are going to live, and they're going to see crime, and they're going to create crime. I think it's an unfortunate truth, but it is.

Right now, your community is very concerned about the Broadmoor neighborhood which I live in and that Kennedy White lives in. There have been two murders, and just this morning there was an article in the paper about the high incidence of crime in that neighborhood.

That community has influence of crime coming from Hewes Avenue which the court system has designated as a red zone, Soria City to the other side, and now they're talking about the possibility of sandwiching and giving us another influence of crime. (R. 220-222).

The impact of LIHTC was also demonstrated in Councilwoman Barbara Nally's comments at the hearing before the City Council:

However, what's happening under the GO Zone is something totally different than what happens under annual tax credits each year. It is like a feeding frenzy. Under the last round, 1,071 units were approved in Gulfport for 12 developments for a period ending February 15. On the current round ending March 9, 14 applications were applied for in the city of Gulfport for 1,954 units. Six applications on the city limit line in Ward 6 will affect our schools' infrastructure, burdens on our streets, 860 units.

Under this same application process ending 3/9/07, only four were applied for in Biloxi, three in Ocean Springs, five in Bay St. Louis, one in D'Iberville, four in Waveland, three in Pass Christian, one in Long Beach, one in Gautier, on in Moss Point.

My efforts are not to stop affordable housing or Section 8 housing. My efforts are to under this GO Zone to perhaps implement a better policy with the Home Corp under this next round of development.

And we were told in a meeting that we had yesterday why not just basically – and I'm paraphrasing – if we go ahead and approve these, then we as a council when it gets times like this or permitting, we will have that ability to say no. And my objection to this is obviously we haven't.

We have another development that was brought before the planning commission. They were denied for reasons of location. They were brought to us. It was denied for reasons of location being close to a creek bed, close to an interstate, close to a shopping mall that is projected to go in. And although it was denied both times, it's being brought back to planning again.

So I wonder if we have the ability to say no.

So we need 26 in the city of Gulfport? Is that saturation?

As I know that you're going to sit out there, gentlemen, and say we probably won't get all of these 14. We may not. But I ask the Home Corp, and they certainly are within their rights to approve them all should they choose to do so.

Saturation. It's going to affect our taxes. It's going to affect our schools. It's going to affect everything around us if we have this many. I'm not trying to stop them all.

I have concerns with this project in particular because of the location and because of the transcript. And I know where the location is. I am concerned about putting a housing unit there which is so close to where the buyout was.

People have talked to me. I've asked questions. I've driven by there. My concerns are not whether we appear in the paper tomorrow as being the first to award a tax credit development because I can tell you, I've got one on O'Neal Road called O'Neal Housing, which is very near where I live. And it is a good project. And it is an active project which wasn't damaged.

Do I have a problem with the federal government closing down some of our current housing projects which are fine buildings where people are in brick structures, there is space, they have yards to play in, to sell that property and relocate them to an apartment complex on a creek bed near the interstate? Yes, I have a problem with that.

So do we depend on our federal government to guide us? No, I don't think we do.

In a given year as a tax credit, the state of Mississippi receives \$5 million approximately, and gets 30 applications from across the state. Under GO Zone, that equates to about \$37 million a year over three years which is close to over \$120 million. That is excessive.

I would live to see it spread more evenly amongst the other cities. I am asking Home Corp to do that. (R. at 272-275).

At the same Council Meeting, Councilwoman Ella Holmes-Hines engaged in the following exchange with a citizen:

Ms. Santo: I'd like to know why, when we -- when other people in communities can take money and do developments with their Housing Authority and make the areas really nice and keep the people where they want to be, why are we moving them out of our area?

And, Ms. Hines, has anyone ever contacted you to sit down and discuss what the people in your community want to do and how they want to live and where they want to live? And do they want to move from their Section 8 housing or their whatever the L.C. Jones project and all that? Or would they rather these projects be put back in their neighborhood?

Ms. Holmes-Hines: We've had multiple meetings and hearings, and the original footprint is very important. (R. at 278).

The overwhelming discussion was not about drainage or any criteria addressed in the Ordinance but was about the people who were to be tenants.

II. The Planning Commission's Denial Violates the Constitutional and Statutory Rights of Hillside.

As noted in the preceding argument, the Planning Commission indicated that it would refuse to approve any use of the subject property based upon its prior experience with other projects proposed for this site. This blind refusal despite the uncontroverted statement of one of the owners that there had been no effort to develop the property for over eight years, which conclusively established that the Planning Commission was wrong in its findings, In *Tippitt v.*

City of Hernando, 909 So. 2d 1190, 1194 (Miss. App. 2005) citing *Walters v. City of Greenville*, 751 So. 2d 1206, 1210 (Miss. App. 1999) the court adopted the definition of a taking as follows:

“[T]here is a taking of property when government action directly interferes with or substantially disturbs the owner’s use and enjoyment of the property. [Citation omitted]. A taking is effected if the application of a zoning law denies a property owner of economically viable use of his land. This can consist of preventing the best use of the land or extinguishing a fundamental attribute of ownership. [Citation omitted]”

In this case, the Commission plainly denied Hillside’s application and sent a clear message that it would not approve any project for this site, multi-family dwellings, RV park⁶ or otherwise. Since this property is located in a commercial zone (B-2), the denial of approval to use this property for any project clearly constitutes a taking as it forecloses Hillside’s ability to this the land for its best use or *any* use for that matter. Therefore, the decision of the City Council in approving the Planning Commission’s action should be overturned and the application for approval to use the site for the construction of a multi-family facility should be granted.

III. The City’s Decision was Arbitrary and Capricious and Unsupported by Substantial Evidence.

In reaching its decision, the Planning Commission failed to consider the appropriate criteria when reaching its decision to deny Hillside’s application. As a result, its decision is arbitrary and capricious and unsupported by substantial evidence. In *Public Employees’ Retirement System v. Howard*, 905 So. 2d 1279, 1285 (Miss. 2005), the Supreme Court of Mississippi explicitly defined these terms. It stated:

⁶ The transcript reveals comments by Commission member(s) that it recently denied an application to use the site as an RV park to another potential developer. Those claims were denied by the owners when they appeared before the City Council. (R. at 284-286)

“We have defined substantial evidence as “something more than a ‘mere scintilla’ or suspicion.” It has also “been defined by this Court as ‘such relevant evidence as reasonable minds might accept as adequate basis or fact from which the fact in issue can be reasonably inferred.’” This Court has similarly defined arbitrary and capricious: “An administrative agency’s decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone.” “An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles.” [citations omitted] *Id.*

In this case, the Commission based its denial on its members’ personal understanding of past drainage issues without reviewing or offering any evidence to support its finding of infeasibility. (R. at 207-208; 215-216). The City’s own Planning Staff recommended the approval and advised the Planning Commission that drainage issues were not proper for consideration at that stage of the proceedings. (R. at 194-197; 222-223). No one opposed to the project presented any evidence that drainage, elevation, flood reports or applications to the Planning Commission had previously been presented, evaluated, approved or denied by the City with respect to the specific use proposed by Hillside. There was not a scintilla of technical evidence presented to refute the Planning Staff’s recommendation and to support the Planning Commission and City Council’s reason for denying the approval. By plainly basing its decision on a drainage issue⁷ the Commission, and the City Council by its affirmation of the Planning Commission decision, clearly relied on its will alone, disregarding the surrounding facts and controlling principles. Accordingly, the Planning Commission’s denial was arbitrary and capricious and unsupported by substantial evidence. Therefore, we respectfully request that you overturn the City’s denial of the approved use.

⁷ While Hillside admits that the reason proffered by the City and the Planning Commission was related to drainage, Hillside believes that this was a mere pretext for the real reason that the City did not want to approve a development constructed with LIHTC.

CONCLUSION

Hillside respectfully asks that the Court recognize the numerous benefits of a luxury affordable housing development of this caliber in this area and reverse the City's denial of the request for use approval of the subject property. Without a doubt the City's decision approved action of the Planning Commission that exceeded the powers conferred upon it, effectively constituted an unconstitutional taking of this property and was arbitrary and capricious and unsupported by substantial evidence. Consequently, the City's decision should be reversed and the approval should be granted subject to compliance by Hillside with the applicable building codes and other technical requirements.

RESPECTFULLY SUBMITTED, this the 14th day of August, 2008.

Hillside Terrace, LP
By and through its Attorneys of Record
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CERTIFICATE OF SERVICE

I, Paul J. Delcambre, Jr., do hereby certify that I have this date, August 14, 2008, forwarded via United States Mail, postage prepaid, a true and correct copy of the Brief of Appellant, Hillside Terrace LP.

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